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upcoming virtual meetings
June 28/29, 2021 | July 26/27, 2021

International Conference - New Delhi Hosted by KOCHHAR & Co. TBA
International Conference - New Zealand Hosted by Simpson Grierson 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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OIL & GAS VETERAN NAMED PARTNER AT BAKER BOTTS

HOUSTON, June 7, 2021 – Baker Botts L.L.P., a leading international energy, technology and life sciences law firm, announced today that Gerry Morton has been elected as a partner in the Energy Projects & Transactions Section of the Global Projects Department in the Houston office. Prior to joining the firm as a special counsel in 2020, Morton spent the previous 12 years as General Counsel and Vice President of Business Development of Carrizo Oil & Gas, Inc.

Morton has led numerous transactions in the oil and gas space over the last nearly 30 years. He also participated in Cabot Oil & Gas Corporation's recently announced $17 billion merger with Cimarex Energy Company. In addition to his transactional experience, he is leading the firm's "outside general counsel" program for oil and gas and midstream clients, utilizing his C-suite and board experience to provide legal counsel guided by practical business experience. Morton is also guiding upstream and midstream clients through the bankruptcy process.

"Gerry has incredible oil and gas experience spanning nearly 40 years in the industry, from the field to the board room," said Jason Bennett, Firmwide Chair of Baker Botts' Global Projects Department. "His experience and reputation throughout the upstream and midstream sectors will continue to strengthen the firm's leading position in this space. Gerry brings an experienced commercial and practical approach to assisting clients with their most important matters in this rapidly changing market."

Morton joined Carrizo in 2008 as General Counsel and Vice President of Business Development. During his 12 years with the company, he was involved in over $14.75 billion in capital markets, A&D, M&A and JV deals, including the first JV between a U.S. company and Indian state-owned enterprises, as well as one of the first JVs with a private Chinese company in the oil and gas sector. Carrizo merged with Callon Petroleum Co. in December 2019.

"I am delighted and honored to become a partner at such a renowned firm in the oil and gas industry," said Morton. "From my in-house years to my private practice years, Baker Botts has always been, and continues to be, the premier go-to firm in the oil & gas industry on which clients rely for their most critical opportunities and challenges.'

Morton began his oil industry career in 1982 after graduating from Brigham Young University with an Engineering Geology degree, spending six years with Texaco as a geophysicist. He received his MBA in Finance in 1985 and his J.D. in 1988. After working for a major New York law firm in oil and gas-related restructurings and mergers and acquisitions, Morton joined Pogo Producing Company in 1993, where he served as Vice President – Law and Corporate Secretary, in addition to taking on operational and new venture responsibilities in Asia/Pacific and Europe.

For more information, please visit www.bakerbotts.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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Visit us online for full coverage
http://www.prac.org/member_publications.php

BENNETT JONES WELCOMES TWO NEW PARTNERS TO FIRM

TORONTO - -10 June, 2021: Bennett Jones recently welcomed two new partners to the firm, ***Zirjan (Zee) Derwa*** *and* ***Peter Dunne.***

Peter Dunne

Zirjhan (Zee) Derwa

Peter Dunne has joined Bennett Jones as a partner in Toronto. He focuses on the Canadian investment industry, serving clients on securities regulatory matters, fund formation and capital raising. His combined experience in securities regulatory matters and fund formation enables him to assist many clients in anticipating and addressing their needs in launching, operating, acquiring or selling a business in the Canadian investment industry.

As a leader in securities regulatory law in Canada, Peter was one of the first lawyers in the country to focus his practice on the regulatory aspects of the investment industry. He acts for registered dealers, advisers and investment fund managers across the country and provides advice to international firms in connection with operating in Canada. Peter assists in the initial registration of firms and individuals under securities legislation, advises on the regulatory implications of operational matters and liaises with securities regulators on behalf of clients.

Through his past directorship and ongoing participation with the Private Capital Markets Association of Canada, Peter is involved in the formation of regulatory policy in this important aspect of the Canadian investment industry. He is a member of Canadian Securities Administrators' implementation committee for the Client-Focused Reforms, which propose sweeping changes to the national regulatory requirements for registrants under Canadian securities legislation.

Zirjan (Zee) Derwa has joined Bennett Jones as a partner in Toronto. His practice focuses on Canadian competition law and foreign investment matters, including national security.

Zee regularly advises clients on all aspects of Canadian competition law in connection with complex mergers, acquisitions, joint ventures and other strategic alliances. Zee also has extensive experience advising clients on potentially anti-competitive business practices, as well as compliance under the Competition Act. He regularly provides advice to clients on the misleading advertising provisions of the Competition Act.

In his foreign investment review practice, Zee advises clients across a broad range of industries on net benefit, national security and cultural sector reviews under the Investment Canada Act.

Who's Who Legal has named Zee as a Competition Future Leader, describing him as a "rising star of the Canadian bar." He is an active member of the Canadian Bar Association and the American Bar Association. He is a Vice Chair of the Mergers Committee, and former Chair of the Economics and Law Committee of the National Competition Law Section of the Canadian Bar Association.

For additional information visit www.bennettjones.com

DAVIS WRIGHT TREMAINE WELCOMES FORMER FTC ENFORCEMENT ATTORNEY

Former FTC Enforcement Attorney Thomas Kost Joins Firm's Expanding Banking and Financial Services Practice

SEATTLE – 26 May, 2021 – As banks, FinTech companies, and others providing financial services navigate a complex regulatory landscape, Davis Wright Tremaine has added a former Federal Trade Commission enforcement attorney to its enforcement & investigations practice within the banking and financial services group. ***Thomas Kost*** joins DWT's Seattle office as counsel, strengthening the firm's growing regulatory practice area.

"Thomas brings critical capabilities and expertise on both sides of complex investigations, enforcement actions, and litigation involving federal regulatory agencies, including the Federal Trade Commission, Consumer Financial Protection Bureau, and the Department of Justice," said Bradford Hardin, co-chair of the banking and financial services group. "His experience in fair lending and small business financing will help clients navigate regulatory trends and projected enforcement priorities for the FTC and CFPB."

Prior to joining the firm, Kost served as a staff attorney with the FTC's Bureau of Consumer Protection, where he played a leading role in handling all aspects of investigations and litigation to enforce the FTC Act's prohibition on deceptive or unfair conduct, as well as a range of other consumer financial laws. He also helped develop the agency's enforcement strategy relating to small business financing. Before joining the FTC, Kost practiced at Wilmer Cutler Pickering Hale and Dorr LLP, where he represented banks, card issuers, and non-bank financial services providers in high-stakes matters involving retail deposit products, overdraft services, mortgage lending and servicing, credit cards, and prepaid cards.

"DWT has a long history of providing up-and-coming lawyers with the space and support to grow their practices in a meaningful way," said Kost. "The firm's entrepreneurial spirit makes it a great place to build a practice, and its deep industry knowledge makes it a great place to serve clients. I feel confident that my knowledge of the consumer finance and small business enforcement regime, coupled with my perspective as a former regulator, can help solidify DWT's position as a leading one-stop shop for clients operating in highly regulated industries."

Kost began his career as a law clerk in the U.S. District Court for the Eastern District of Virginia and the U.S. Court of Appeals for the 6th Circuit. He received his B.A. in politics from Whitman College and his J.D. from Northwestern University's Pritzker School of Law.

For more information, visit www.dwt.com .

HOGAN LOVELLS WELCOMES BACK FORMER SENIOR DEPUTY GENERAL COUNSEL OF COMCAST

Former Senior Deputy GC of Comcast re-joins Hogan Lovells as litigation partner in Washington, D.C. office

WASHINGTON, D.C., 03 May 2021: Global law firm Hogan Lovells announced today that Shelita M. Stewart has re-joined the firm as a partner in the Litigation, Arbitration, and Employment practice group in Washington, D.C. Stewart joins from Comcast Corporation, where she was Senior Deputy General Counsel.

"We are thrilled to welcome Shelita back to the firm," said Des Hogan, Head of Hogan Lovells' global Litigation, Arbitration, and Employment practice group. "Shelita brings a skillset that will further several strategic goals: she will help build out our Investigations, White Collar and Fraud practice, and will work closely with our Crisis Leadership team and Government Relations and Public Affairs practice. Her broad experience responding to governmental investigations, and her ties to two key industries—media and telecoms—make her a wonderful addition to our practice."

While at Comcast, Stewart developed, implemented, and maintained its corporate compliance program, with a focus on government interactions and community partnerships. Stewart advised on Comcast's interactions with global and domestic government officials and entities. She also counseled Comcast's businesses on the investigation, defense, and remediation of alleged civil and criminal violations, potential internal misconduct, external crises, and other compliance related events. In addition, Stewart led legal diversity initiatives at Comcast and participated in pro bono programs focused on serving the company's diverse Philadelphia and Washington, D.C. communities.

"I am excited to be re-joining Hogan Lovells, where I began my legal career," Stewart said. "Having gained valuable experience from my years at one of the world's leading media and technology companies, I look forward to assisting clients with complex compliance challenges, which often bleed across jurisdictions and governmental authorities, and implicate different legal standards."

Key to the firm's global clients, Stewart has multi-agency experience with the U.S. Department of Justice, the U.S. Securities and Exchange Commission, several state Attorneys General, and has handled matters involving international enforcement agencies.

"Shelita will bring a unique perspective to our Washington practice because of her deep experience in compliance program development, anti-corruption work, and political law," said Hogan Lovells Washington, D.C. Office Managing Partner Michele Farquhar. "We are so happy she has returned."

Stewart will be part of the firm's Sports, Media & Entertainment, and Technology & Telecoms sectors.

Before joining Comcast, Stewart was a long-time associate at Hogan Lovells. She joined the firm (then Hogan & Hartson) as a summer associate after her first year of law school, returned the summer after her second year, and spent seven years at the firm before leaving to go in-house at Comcast. Stewart earned her J.D. from Columbia Law School and a B.A. from Yale University.

For additional information visit www.hoganlovells.com

NAUTADUTILH APPOINTS THREE SENIOR ASSOCIATES

LUXEMBOURG - 19 April, 2021: NautaDutilh Avocats Luxembourg is pleased to announce three promotions to senior associate.

Florence Remouchamps (Litigation & Arbitration): Florence represents a wide range of corporate clients and banks in commercial, corporate and insolvency-related arbitration and litigation.

David Al Mari (Corporate M&A): David advises clients on a wide range of corporate matters, including cross-border mergers and acquisitions, private equity, corporate governance and corporate finance. His practice also includes restructuring and insolvency.

Alexis Glavasevic (Employment and Litigation & Arbitration): Alexis focuses in particular on Luxembourg and European labour law and corporate employment matters. He also represents a wide range of corporate clients and banks in commercial and corporate litigation.

"We are very proud of our new senior associates", says Managing Partner Josée Weydert. "These promotions reflect the outstanding quality of their work and commitment to the firm and its clients. We wish them much success as they continue their careers with us."

For additional information visit www.nautadutilh.com

PACIFIC RIM ADVISORY COUNCIL

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June 28/29, 2021

Session Topic: "The Art and Science of Client Satisfaction"

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TOZZINIFREIRE ADDS ENERGY AND REGULATORY PARTNERS

SAO PALO -08 June 2021

TozziniFreire Advogados has appointed partners by hiring from Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados and Petrobras, adding firepower to its infrastructure, energy and regulatory departments.

Ana Carolina Katlauskas Calil Marcelo Zenkner

Former Mattos Filho associate Ana Carolina Katlauskas Calil, 31, and Petrobras lawyer Marcelo Zenkner, 49, joined on 24 May. TozziniFreire now has 84 partners.

Calil focuses on issues in the electricity sector, advising companies involved in generation, distribution and transmission. She advises on both regulatory and transactional matters. Calil spent the last seven years as an associate at Mattos Filho and prior to that was at Machado Meyer Advogados.

She has worked on several large transactions in the power sector, including the launch of a US$3 billion financial support scheme for Brazilian electricity companies affected by the pandemic. The deal was recently shortlisted in the banking and finance category of Latin Lawyer's Deal of the Year Awards.

Zenkner will co-lead TozziniFreire's regulatory practice alongside partners Shin Jae Kim and Marcelo Calliari. He was previously chief governance and compliance executive officer at state-controlled oil company Petrobras for two years. Prior to that, he was a public prosecutor in the eastern Brazilian state of Espírito Santo for more than 20 years. Zenkner specialises in public law, compliance and anti-corruption.

Like other partner hires over the past 12 months, the latest additions are part of the firm's strategic expansion plan, says TozziniFreire's managing partner, Fernando Serec. "We think these hires will make our performance even more recognised in the market, adding technical expertise to our practice groups," he says.

He says the firm will continue to invest in its multidisciplinary offering.

TozziniFreire, a Latin Lawyer Elite firm, boosted its M&A team in March by incorporating a Pinheiro Neto Advogados associate as partner. The month prior, it recruited a tax partner from Stocche Forbes Advogados and the former general counsel of logistics group Rumo. Those two joined after the firm hired another tax partner from São Paulo boutique Schneider Pugliese Advogados in October.

Partners have also left; a banking and finance lawyer departed for Lefosse Advogados back in December, for example.

TozziniFreire is frequently visible on large corporate and M&A transactions. It was an early adviser on innovative sustainable financings in Brazil; it helped Faro Energy issue the first Brazilian sustainable bonds in early 2020, for example. Earlier this year, it advised the underwriters in Klabin's US$500 million sustainability-linked note issuance. Other strong practice offerings include antitrust, private equity and labour, as well as tax.

For additional information visit www.tozzinifreire.com

BAKER BOTTS

REPRESENTS SUNNOVA ENERGY INTERNATIONAL INC. IN SECURITIZATION OF RESIDENTIAL SOLAR SYSTEMS

HOUSTON - 14 June 2021

Deal Description: Sunnova Energy International Inc. ("Sunnova") (NYSE: NOVA), today announced the pricing of its latest securitization of leases and power purchases agreements by a wholly owned subsidiary of $319.0 million in A- (sf) rated 2.58% notes with an Anticipated Repayment Date of April 30, 2031 and a final maturity of April 28, 2056.

The notes are backed by a diverse portfolio of over 20,000 solar rooftop systems distributed across 25 states, Guam, Puerto Rico, and Northern Mariana Islands. Sunnova intends to use the proceeds from the sale of the notes for the repayment of one or more currently existing financing arrangements of Sunnova's subsidiaries, including the voluntary prepayment of all outstanding Series 2017-1 solar asset-backed notes, the payment of expenses related to the offering of the notes, and for general corporate purposes. The transaction is expected to close by June 17, 2021, subject to customary closing conditions. The notes are secured by, and payable from the cash flow generated by, the membership interests in wholly owned, direct subsidiaries of the issuing entity and the sale of renewable energy credits. Each such subsidiary owns a managing member interest in a project company, one of which is a tax equity partnership.

Baker Botts L.L.P. represented Sunnova in the transaction.

Value: $319.0 million

For more information, please see Sunnova's news release by clicking here. https://www.businesswire.com/news/home/20210614005210/en/Sunnova-Prices-Securitization-of-Residential-Solar-and-Battery-Systems

For more information, please visit www.bakerbotts.com .

BENNETT JONES

ACTS FOR REDECAN IN $925 MILLION SALE TO REXO CORP

TORONTO – 28 May, 2021: Bennett Jones is acting for Redecan in its C$925-million sale to HEXO Corp. The combined company would hold number one market-share in Canadian recreational cannabis and hold number one positions in four of Canada's largest markets: Alberta, British Columbia, Québec and Ontario.

Redecan's lean production capabilities are expected to drive improved future financial performance and enhance potential to generate cash flow, and the deal will equip HEXO with one of the most robust brand portfolios in Canada. The transaction is expected to close in calendar Q3 2021.

The Bennett Jones M&A team included Curtis Cusinato, Andrew Bozzato, Celina Hong and Dominique Carli.

For additional information visit www.bennettjones.com

BRIGARD URRUTIA

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

BOGOTA – 01 June, 2021: Colombia firm Brigard Urrutia advised Colombia telecoms company Coltel with the acquisition of fixed internet business of the local branch of US satellite television service DirecTV. Garrigues (Colombia) advised DirectTV. 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.

Founded in 1997, DirecTV is owned by US telecoms giant AT&T, following a merger back in 2015.

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

ADVISED ASTERION IN ACQUISITION OF LATAM DATA CENTRES FROM TELEFONICA

SANTIAGO - 11 June 2021: Carey in Santiago and Clifford Chance (Madrid/LondonO have advised Spanish investment manager Asterion in its acquisition of four data centres in Chile and Spain from telecoms giant Telefónica, worth some US$120 million. The transaction was signed on 7 May. Uría Menéndez advised Madrid-headquartered Telefónica.

The deal hands Asterion four data centres – two in Chile and two in Spain – with a combined capacity of 10 megawatts. In exchange, Telefónica will get a 20% stake in Nabiax, a subsidiary of the investment manager that will hold the data centres.

While the deal gives Asterion the four data centres, it does not include Telefónica's servers in those centres, meaning the telecoms company will still own the services provided, as well as holding on to the customers using the services.

Founded in 1924, Telefónica owns several data centres around the world. Its sales of data centres in Latin America in recent years are part of the company's strategy to reduce its debt.

Counsel to Asterion and Nabiax: In-house counsel to Asterion -Manuela Gonzalez-Arias; In-house counsel to Nabiax - Carolina Toro and Gloria Norling; Clifford Chance LLP (Madrid/London)

Carey Partner Jorge Ugarte and associates Alejandra Daroch, Manuel José Barros, Tomás Varela, Pamela Morales, Beatriz Holmgren, Francisca Hernández, Domingo Russi, Daniela Soto and Alicia Corbo in Santiago.

For additional information visit www.carey.cl

DENTONS RODYK

ADVISING KEPPEL CORPORATION LIMITED, IN DIVESTMENT OF 100% STAKE IN ITS WHOLLY-OWNED SUBSIDIARY WHICH HOLDS KEPPEL BAY TOWER TO THE SINGAPORE EXCHANGE-LISTED KEPPEL REIT

SINGAPORE - 02 June, 2021: Dentons Rodyk is acting for Agathese Pte. Ltd. (as vendor) and Keppel Land (Singapore) Pte. Ltd. (as covenantor) (both wholly-owned subsidiaries of Keppel Corporation Limited), in the divestment of 100% stake in the entity which holds Keppel Bay Tower to the Singapore Exchange-listed Keppel REIT, based on an agreed property value of S$657.2 million.

Keppel Corporation Limited is one of Singapore's flagship multinational companies, and provides solutions for sustainable urbanisation. Keppel Bay Tower is a Grade A green commercial building comprising an 18-storey office tower with a 6-storey podium block, and is located in the Keppel Bay waterfront precinct in the prime Harbourfront area of Singapore (part of Singapore's Greater Southern Waterfront, which is envisioned to be a seamless extension of Singapore's Central Business District). It is the first commercial development in Singapore to be certified as a Green Mark Platinum (Zero Energy) building by the Building and Construction Authority of Singapore, and is also Singapore's first commercial development to be fully powered by renewable energy. Keppel Bay Tower has an aggregate net lettable area of 386,600 square feet (comprising 383,899 square feet of office space and 2,701 square feet of retail space), and the agreed property value of S$657.2 million takes into account up to S$3.2 million of rental support to be provided over an 18-month rental support period in relation to certain vacant units and expiring leases.

Dentons Rodyk is also acting for Keppel REIT Property Management Pte Ltd, which will provide certain property management services relating to Keppel Bay Tower after completion, in respect of the property management agreement to be entered into.

The team includes Senior Partners Melanie Lim and Li Chuan Hsu, Partner Lynette Khoo, Senior Associates Geena Liaw and Beverly Chong, and Associate Yvonne Lim.

For additional information visit www.dentons.rodyk.com

GIDE

ADVISING SOCIETE FONCIERE LYONNAISE ON A PROJECT INVOLVING A CHANGE TO SFL'S CAPITAL AND A VOLUNTARY CASH AND SHARE TENDER OFFER

PARIS - 10 June 2021: Gide has advised Société Foncière Lyonnaise (SFL) on a proposed transaction involving a simplified cash and share tender offer, initiated by Inmobiliaria Colonial, the majority shareholder of SFL, as well as a change to the existing partnership between SFL and Predica, shareholder of SFL.

The terms of the offer would be EUR 46.66 and 5 Inmobiliaria Colonial ordinary shares for one SFL share tendered into the offer.

This transaction aims in particular to simplify the shareholding structure of SFL.

Gide's team advising SFL was headed by partners ***Olivier Diaz, Didier Martin*** and ***Jean-François Louit***, working with associates ***Elise Bernard, Anaïs Roudel*** and ***François Bossé-Cohic*** on corporate / M&A aspects; partner ***Frédéric Nouel*** and counsel ***Cléopha Thomann*** on real estate aspects; partner ***Olivier Dauchez*** and counsel ***Alexandre Bochu*** on tax issues; partner ***Foulques de Rostolan*** on matters of employment law, and partner ***Emmanuel Reille*** on competition law aspects.

The ad hoc committee and the board of directors of SFL were advised by Bredin Prat.

Inmobiliaria Colonial and Predica were advised respectively by Darrois Villey Maillot Brochier and BDGS.

For additional information visit www.gide.com

HAN KUN

ADVISING TR CAPITAL IN ESTABLISHING A QFLP AND CO-LEADING A SIGNIFICANT INVESTMENT IN THE SECONDARY MARKET

BEIJING - 25 May, 2021: Han Kun recently represented TR Capital in establishing a QFLP, which then co-led a significant investment into Huagai Capital. As buyer's counsel, Han Kun advised on designing the QFLP structure and on all aspects of the investment. This transaction was highly innovative in its structuring as it introduced a new concept in the secondary market—QFLP participation in RMB-denominated continuation fund.

TR Capital is a leader in secondary private equity investments in the Asia-Pacific region and currently manages four funds with capital commitments of close to US$1 billion.

For additional information visit www.hankunlaw.com

HOGAN LOVELLS

ADVISES DBS, CREDIT SUISSE AND JP MORGAN IN US$334 MILLION SF REIT IPO

HONG KONG - 18 May 2021: Global law firm Hogan Lovells acted as Hong Kong and U.S. counsel to DBS as the sole listing agent, and DBS, Credit Suisse and J.P. Morgan as joint global coordinators, joint lead managers, joint bookrunners and underwriters in the US$334 million Initial Public Offering (IPO) of SF Real Estate Investment Trust (SF REIT) on the Main Board of the Hong Kong Stock Exchange.

SF REIT is the first logistics-focused REIT to be listed in Hong Kong. SF REIT is sponsored by S.F. Holding Co. Ltd. (順豐控股股份有限公司), the largest express delivery company in China.

Hong Kong Corporate partner Sammy Li led the Hogan Lovells team, with support from New York partner Sina Hekmat. They were assisted by senior associates Samson Suen and Tiffany Lam, registered foreign legal consultant Simei Huang, and associate Ada Chan in Hong Kong.

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

ADVISES RELIANCE PROPERTIES LTD. ON A JOINT VENTURE WITH INTERNATION DEVELOPER TO BUILD 32-STOREY VANCOUVER OFFICE TOWER

VANCOUVER – 12 May, 2021: Richards Buell Sutton LLP ("RBS") advised Reliance Properties Ltd. ("Reliance") on its joint venture with Hines, a privately owned global real estate investment, development and management firm based in Houston, TX. The joint venture is to build a world class AAA office tower at 1166 West Pender Street in Vancouver.

Reliance is a privately owned development company and has been contributing to Vancouver's architecture heritage for more than fifty years. Reliance is proud to be partnering with international developer, Hines on the new 361,000 square foot building. This will be Hines' first project in Vancouver and the most significant commercial real estate announcement since the start of the global pandemic. The new development will focus on tenant experience and consist of innovative indoor/outdoor space and incorporate new health, safety and wellness protocols.

RBS acted for Reliance on the original purchase of the property and subsequently assisted with the rezoning application. The development concept of the property was approved in 2018.

Aneez Devji, RBS partner, commented "we have worked with Reliance for a number of years and have assisted them in creating innovative developments throughout Greater Vancouver and Vancouver Island. It is a testament to the commitment of the parties that this transaction came together during the constantly evolving market conditions of a global pandemic. Through this proposed development, Reliance continues to demonstrate why they are known as a dynamic and leading real estate company in Vancouver."

RBS advised Reliance with a team led by Sharon White, Q.C. and Aneez Devji, and included Benjamin Hagen.

For additional information visit www.rbs.ca

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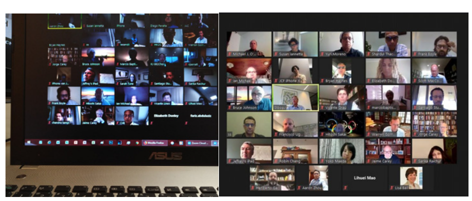

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PRAC LET'S TALK!

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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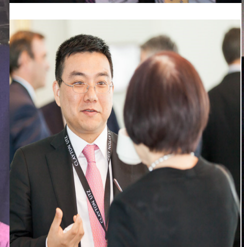
PRAC @ SAO PAULO


PRAC @ Taipei 2014

2020-21 monthly PRAC Let's Talk! online event


PRAC @ INTA


PRAC @ Vancouver

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Argentinean antitrust authority updates merger control thresholds and monetary penalties

On February 22, 2021, the Secretary of Domestic Trade -Argentina's current Antitrust Authority- published Resolution No. 151/2021 whereby the value of the administrative unit created as a reference by the Antitrust Law No. 27,442 (the "Antitrust Law"), was increased from 40.61 pesos to 55.29 pesos, thereby updating both the merger control notification thresholds and the monetary penalties set forth in the Antitrust Law.

Pursuant to the Antitrust Law, both the merger control notification thresholds and the monetary penalties are expressed in administrative units, unlike the previous antitrust regime where these were expressed in fixed local currency amounts and thus quickly became outdated as a consequence of inflation.

The administrative unit's value, according to the Antitrust Law, is to be updated on a yearly basis by the Antitrust Authority following the evolution of the official consumer price index.

The increase of the administrative unit's value has an impact in the merger control thresholds as well as in the monetary penalties provided in the Antitrust Law. The main resulting modifications are summarized below:

Merger control

Economic concentrations must be notified to the Antitrust Authority if the combined Argentine annual net sales of the acquiring group and the target group exceed AR$5,529 million during the preceding year (approx. US$61.9 million taking in consideration the exchange rate in force on December 30, 2020).

Additionally, the *de minimis* exemption was updated, and now otherwise mandatory economic concentrations are exempted from notification if both the amount of the Argentine portion of the transaction and the value of the assets to be transferred in Argentina are below AR$1,105.8 million (approx. US$11.76 million at the current exchange rate), unless where the acquiring group was involved in an economic concentration in the same market in Argentina valued in AR$1,105.8 million during the preceding 12 month period or AR$3,317.4 million (approx. US$35.29 million) during the preceding 36 month period.

Monetary penalties

Fines for anticompetitive conducts, when these cannot be calculated using the turnover or the illicit gain tests provided in the Antitrust Law, cannot exceed AR$11,058 million (approx. US$117.6 million at the current exchange rate).

Daily fines for breach of cease and desist orders, late filing and gun-jumping practices, when these cannot be calculated by means of using the turnover test set forth in the Antitrust Law, can now amount to AR$41.5 million (approx. US$441,000).

The new merger control thresholds and monetary penalties referred to above shall be in force as from February 22, 2021 until a new value for the administrative unit is adopted by the Antitrust Authority.

This briefing does not contain a full analysis of the law nor shall it be deemed as a legal or any other type of advice by Allende & Brea.

Practice Areas

Antitrust

Lawyer

Julián Peña
Federico Rossi

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

Carla do Couto Hellu Battilana

Marcela Waksman Ejnisman

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BLOG

What Is the Smart Renewables and Electrification Pathways Program?

June 11, 2021

Written by Thomas McInerney and Vivek Warrier

On June 2, 2021, Natural Resources Canada (NRCan) announced its Smart Renewables and Electrification Pathways Program (SREPs) in support of Canada's ongoing effort to reach net-zero emissions by 2050.

The $964-million commitment will reduce greenhouse gas emissions over four years by encouraging the replacement of fossil-fuel generated electricity with cleaner energy technologies, such as wind and hydro. To facilitate this transformation to Canada's electric grid, SREPs offers financial assistance to eligible projects during the construction phase. This investment in smart renewable energy and grid modernization projects will make clean, affordable electricity more accessible in communities across the country and improve the connectivity and efficiency of Canada's existing electrical infrastructure.

Projects must use market-ready technologies and will be expected to demonstrate a commitment to workplace equity, diversity and inclusion. SREPs is showing additional support for Indigenous communities by allotting a minimum percentage of total program funds to Indigenous-led projects, which may qualify for greater funding.

What Projects Are Eligible?

SREPs provides funding to projects under the following streams:

- established renewables (e.g., onshore wind, solar photovoltaic);
- emerging technologies (e.g., energy storage, geothermal, tidal);
- grid modernization (e.g., micro-grids, virtual power plants); and
- Strategic Dialogue Linked Projects (SDLPs).

Projects under established renewables and emerging technologies capable of supplying electricity must also provide grid services that synchronous generators (i.e., hydro, natural gas, coal, or nuclear) have ordinarily supplied in the jurisdiction where the project is located.

Grid modernization projects must contribute to a broader range of grid services and value streams, including asset utilization and efficiency, reliability and resiliency, system flexibility and enabling renewable integration.

SDLPs may fit under any of the other three project streams, and are described as being part of an ongoing dialogue between federal and provincial/territorial jurisdictions through a Memorandum of Understanding, or projects linked to negotiations between the federal and provincial/territorial governments.

What Is the Funding Limit for Each Project Stream?

Funding limits are based on a percentage of total project costs. This percentage varies according to project stream, with a $50-million cap on any single project. The maximum eligible percentage of total project costs for each stream is as follows: 10 percent of established renewables; 30 percent of emerging technologies; and 50 percent of grid modernization. Maximum eligible funding for SDLPs will follow that of the most fitting of the other three streams.

Where a project falls under multiple streams, the maximum funding percentage will be determined according to the proportion of eligible expenditures in each stream. Final project funding percentages will be assessed according to demonstrated need.

Applicants are encouraged to stack financial assistance from other funding sources. The maximum level of total Canadian government funding authorized under SREPs is 75 percent of total project costs when the applicant is a for-profit organization. Provincial, territorial and municipal governments, as well as Indigenous applicants and non-profit organizations, may receive up to 100 percent of total project costs from government funding sources.

What Expenses Are Eligible for Reimbursement?

SREPs will reimburse a portion of expenditures incurred for the execution of each project. These expenses include: (i) employee salaries and benefits; (ii) contracting services; (iii) travel, meals, and accommodation; (iv) GST, PST, or HST; (v) capital expenses; (vi) select overhead expenses; and (vii) miscellaneous expenses.

The total amount of program funding paid to a recipient will not exceed the eligible expenditures actually incurred by the recipient.

What Contribution Funds Are Repayable?

Funds distributed to for-profit organizations (intended to generate profits) will be repayable. These projects will be monitored for five years following their completion to determine the repayment amount. If a profit is generated within this period, the recipient must repay the funds based on profit multiplied by the proportion of the government's contribution towards total project costs, with a maximum repayment equal to SREPs' contribution.

The following recipients qualify for non-repayable contribution agreements: (i) Indigenous projects; (ii) provincial, territorial and municipal governments; (iii) projects that qualify for less than $100,000 in contribution funding; and (iv) non-profit organizations.

What Is the Application Process?

The process includes the following steps: (1) Project Registration; (2) Technical and Financial Project Application; and (3) Project Evaluation.

Project approval is based on the principle of "first in construction, first served," encouraging applicants to demonstrate project readiness. Where multiple projects submit planned start dates within the same period, priority will be given to projects in coal-generating provinces, followed by Indigenous-owned projects.

Additional information about SREPs can be found on the Government of Canada website.

To see if your business can benefit from SREPs, contact one of the authors or a member of our Power & Renewables group.

Authors

 Thomas W. McInerney, *Partner*

 Vivek T.A. Warrier, *Partner*

Posted on: June 10, 2021

PRIVATE BUSINESS TRANSITIONS: PART 1: FAMILY

By: David W. Harvey

Recently, RBS lawyers Silvana M. Facchin and David W. Harvey were part of a panel discussion for the Continuing Legal Education Society of British Columbia on succession and transition planning for privately owned businesses. David W. Harvey has broken-down and adapted this discussion into a series of articles that will be published in the coming months.

For many business owners, there is a strong desire to keep the business that they've worked so hard for over the years within the family. A transfer of the business within the family can be a great transition option, ensuring that the business will continue to provide for the family, perhaps for generations to come. However, for this to be a viable transition option, certain requirements must be met: (i) there must be family members *available* to take over the business; (ii) the family member successors must be *capable* of taking over the business; and (iii) the successors must *want* to take over the business.

There are a number of ways to structure a transition of the business within one's family. Often it will take the form of a gradual transition, where the ownership of the business is slowly transferred to the successors over a period of years. Even if ownership transfers all at once, the family succession plan will typically have been in motion for some time, with the successors having worked in the business for several years up to the transition point, perhaps even managing and running the business before becoming de facto owners.

A family business succession plan can also take the form of a transfer on death through the owner's will, or a transfer into a family trust for the benefit of the successors (and possibly other family members). Further, it is possible to split up the rights that are being transferred – perhaps a transfer of some ownership interest, but without any voting rights.

The family succession model allows for this flexibility to plan out an appropriate transition plan to suit the needs of the owners, their successors, and the family generally.

While there are many benefits to the family succession model, it is not without its problems. Often these problems have more to do with the family dynamic than the usual business or legal issues that one would face on a business transition. Sometimes successors are not capable of taking over the business, other times the owners are not capable of letting go. In some cases family members feel left out of the succession plan, and then in other cases the successors are annoyed that other less-deserving family members are also included in the succession plan. If there are pre-existing issues within the family, those issues are only going to be made worse when you toss in ownership interests in a business.

To help safeguard the family and the business from these issues, it is advisable to have a shareholders agreement in place. While it is not a perfect fix, a shareholders agreement can help the parties to anticipate issues before they arise and provide a framework for how those issues will be resolved when they do arise.

Given the myriad of options and issues involved in a business family succession plan, it is important to engage a lawyer experienced in navigating this process to ensure an appropriate and effective transition plan is implemented.

The business lawyers at Richards Buell Sutton LLP have a great deal of experience in handling business transitions, including transitions within families. If you have a business and would like to discuss your transition options with us, please contact David W. Harvey or one of our other business lawyers you are in contact with for assistance.

/Carey

News Alerts

Law No.21,347 establishes a labor permit to allow employees to get vaccinated

June 4, 2021

On June 3rd, 2021, Law No.21,347 was published in the Official Gazette (hereinafter, the "Law"), incorporating to the Labor Code new article 66 ter, which establishes a half-day labor permit to allow every employee, within the target population of public programs and campaigns of immunization to control and prevent transmissible diseases, to get vaccinated. The aforementioned permit must be supplemented with the required time for transportation to and from the place of vaccination.

To exercise this permit, the Law establishes that the employees must inform to the employer, with a two-day prior notice, the date in which they will use it. Likewise, the employees should submit to the employer, after the vaccination, the receipt that evidences it, including the corresponding date.

The time of this permit will be considered as worked for all legal effects.

This permit cannot be compensated in cash, not even during or at the termination of the employment relationship. All clauses on the contrary, will be understood as non-written.

If the employees are subject to a collective agreement which considers an analogous permit, the employer's obligation shall be understood as complied.

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

Oscar Aitken
Partner
+56 2 2928 2223
oaitken@carey.cl

Francisca Corti
Partner
+56 2 2928 2212
fcorti@carey.cl

Valentina Kuscevic
Associate
+56 2 2928 2212
vkuscevic@carey.cl

Paulina García
Associate
+56 2 2928 2212
pgarcia@carey.cl

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

Legal Commentary

May 27, 2021

Brief Comments on Draft Automobile Data Security Provisions

Authors: Kevin DUAN | Tina WANG | Kemeng CAI[1]

On May 12, the Cyberspace Administration of China ("**CAC**") issued for public comments the *Several Provisions on Administration of Automobile Data Security (Draft for Comment)* ("**Draft Provisions**"). The Draft Provisions would be the first departmental rules dedicated to addressing data compliance requirements in the automobile industry. Unlike previous draft standards[2] proposed for connected vehicles, the Draft Provisions would apply to vehicles of all types. The key take-aways of the Draft Provisions are as follows:

- Defines the scope of important data in the automobile industry. The processing of important data would be subject to a series data protection principles and requirements such as data minimization, vehicle-end processing, data localization and export security assessment, and government filing and annual reporting.
- Emphasis on ensuring data subjects' control of personal information ("**PI**") collection and deletion.
- Strengthening of obligations to report data processing activities to regulatory authorities.
- Potential changes to industry practices. The Draft Provisions would require significant changes to current vehicle data processing designs and practices due to their requirements with respect to data minimization, vehicle-end processing, data subject control, and data localization.

Below, we analyze the key requirements for PI and important data processing provided in the Draft Provisions and offer our insights accordingly.

Applicable scope

According to Articles 2 and 3, the Draft Provisions apply to the processing of PI and important data by operators in relation to the design, manufacture, sale, operation and maintenance, and management of vehicles within China. Operators under the Draft Provisions include vehicle manufacturers, suppliers of.

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1 Shimeng Cai also has contribution to this article.

2 E.g., *Draft Information Security Technology – Connected Vehicle – Security Requirements of Data* published by the National Information Security Standardization Technology Committee on April 28.

parts and software, distributors, maintenance workshops, online ride-hailing enterprises, insurance companies, and other enterprises and institutions in the areas of vehicle design, manufacture, and services In other words, almost all entities in the automobile industry could fall into the ambit of the Draft Provisions when they process important data and PI, including of vehicle owners, drivers and passengers, and pedestrians.

Yet, it is unclear whether the Draft Provisions would apply to internal data processing activities that are unrelated to automobile management, such as the processing of employee PI. In addition, the Draft Provisions do not yet specify whether and how they would apply to vehicles that are already in the market or currently in production.

Scope of important data

Article 3 of the Draft Provisions defines the scope of important data in the automobile industry, which would include:

- Crowd and traffic data in important and sensitive areas such as military administrative zones, areas in the vicinity of science, technology, and national defense agencies and other State secret-related agencies, and areas in the vicinity of Party and government agencies above the county level;
- Surveying and mapping data, the precision of which is above maps made public by the State;
- Data on the operation of vehicle charging networks;
- Data on vehicle types and road traffic;
- Outside-vehicle audio and video data including human faces, voices, vehicle license plates, etc.;
- Other types of data that might impact national security and public interests as designated by the State cyberspace administrations and departments of the State Council.

Detailed criteria are yet to be specified as to how to draw the scope of important data in practice, such as how to calculate crowd and traffic data, how to identify important and sensitive areas, etc. Despite this, it is certain that the State attaches great attention and importance to the surrounding data collected by vehicle cameras, radars, lidars, and other sensors and such data is to be processed with great care.

Data processing purposes and principles

According to Article 4 of the Draft Provisions, purposes of PI and important data processing are to be legitimate, specific, clear, and directly related to vehicle design, manufacture, and services. Article 6 would apply to the automobile industry the general principle of data minimization set forth in the Cybersecurity Law and the Personal Information Protection Law (Second Reading Draft) and encourage operators to abide by the following principles during data processing activities: (i) in-vehicle processing, (ii) data anonymization, (iii) minimum retention period, (iv) proper precision and scope, (v) no data collection by default.

These principles are not provided as mandatory obligations. Yet, we reasonably foresee the regulatory authorities issuing future implementing rules that take these principles into account. Among other principles, operators would be encouraged to incorporate the principles of "in-vehicle processing"[3] and "no data collection by default"[4] into the technical planning at an earlier vehicle design and development stages.

Rules on PI processing

According to Article 9 of the Draft Provisions, operators shall obtain data subjects' consent unless laws and regulations otherwise stipulate. When processing PI, operators shall inform data subjects of the items enumerated under Article 7[5], such as the contact information of the person in charge of handling matters related to users' rights and interests, when the data collection will be initiated and how to stop it, and how to delete the collected data. Where it is not practically feasible to obtain data subjects' consent (e.g., when collecting PI outside of the vehicle), consent is not needed for anonymized or de-sensitized data, e.g., by deleting images that can be used to identify an individual or blurring the human faces in such images.

The Draft Provisions respond to the longstanding dilemma on how to lawfully handle pedestrians' PI. According to Article 9, data anonymization and de-sensitization relieve operators from the onerous and nearly impossible burden of obtaining pedestrians' consent. However, there are still two open points that require clarification: (i) whether the term "de-sensitization" has the same meaning as "anonymization" or instead refers to "de-identification"; (ii) whether only vehicle-end data anonymization and de-sensitization would serve to exempt the consent requirement or server-end anonymization and de-sensitization would also suffice. If only vehicle-end data anonymization and de-sensitization would serve to exempt the consent obligation, then operators would have to ensure strong in-vehicle processing capacities. Otherwise, operators would have to rely on legal bases other than authorization and consent for processing PI, which are to be established by the forthcoming Personal Information Protection Law.

Enhanced protection of sensitive PI

Article 8 of the Draft Provisions set forth enhanced requirements for the processing of sensitive PI. The Draft Provisions do not define sensitive PI in the automobile industry but only name three examples, which are vehicle location, audio and video of the drivers or passengers, and data that could be used to determine illegal driving behaviors. When processing sensitive PI, operators would also need to pay attention to the following requirements in addition to those mentioned above:

[3] Article 6.1 of the Draft Provisions: Principle of in-vehicle processing: there shall be no outward data transmission unless it is in fact necessary.

[4] Article 6.5 of the Draft Provisions: Principle of no data collection by default: unless it is indeed necessary, the default setting of each drive shall be no data collection. The consent by the driver to data collection shall only be valid to the specific drive.

[5] According to Article 7 of the Draft Provisions, items that shall be informed to the data subjects include: (i) contact information of the person in charge of handling matters related to users' rights and interests, (ii) types of the data being collected, (iii) when the data collection will be initiated and the way to stop it, (iv) the purpose and use case of each type of data, (v) the retention location and period of the data, or the rules on determining the same, (vi) how to delete the data stored within the vehicle and the data already transmitted outwards.

- **Purpose**: The purpose of processing sensitive PI shall be limited to direct services to **drivers or passengers**, e.g., improving driving safety, driving assistance, navigation, entertainment, etc.
- **Informed consent**: No sensitive PI is to be collected by default. **Each instance** of collection shall be subject to the **drivers'** consent and such consent shall **no longer be valid** at the end of each drive (e.g., when the driver leaves the driver's seat). Drivers and passengers shall be informed of the ongoing collection of sensitive PI via HMI or voice prompt.
- **Control by individuals**: **Drivers** shall be able to stop the collection at any time in a convenient manner. The **vehicle owners** shall be given access to the collected sensitive PI in a convenient and structured manner. Operators shall delete the data within two weeks upon the **drivers'** requests.

The requirements for sensitive PI processing provided in the Draft Provisions are stricter and more detailed than existing regulations, such as the shorter data deletion period. Some of the aforementioned requirements, such as obtaining consent for each drive, could significantly change existing vehicle settings as well as people's driving behavior. Furthermore, Article 8 could be interpreted such that consent is the only legal basis for processing sensitive PI. This may be problematic if the processing of vehicle locations is required to fulfil operators' legal obligations or to protect drivers' safety in emergencies.

Localization of PI and important data

Article 12 of the Draft Provisions provides that operators shall, **by following applicable laws**, store PI and important data within the territory of China and apply for government security assessment for outbound transfers of such data. This ambiguity on localization of PI could be interpreted in two ways. On one hand, the Draft Provision could *per se* mandate all types of automobile PI be stored within China, considering the high sensitivity of data in the automobile industry. On the other hand, it could also be interpreted that the Draft Provisions would not impose additional data localization obligations other than those proposed in the Personal Information Protection Law (Second Reading Draft), pursuant to which automobile operators would be obligated to store PI in China only if they are deemed operators of critical information infrastructure or PI handlers who process PI exceeding certain volume threshold. As for important data, it is more likely the Draft Provision would *per se* mandate local storage of all important data in the automobile industry, considering that the Data Security Law (Second Reading Draft) would empower CAC to stipulate localization rules for important data together with other State Council departments.

Data access and utilization by third parties

In the event that partners of scientific research and commercial operations need to access or utilize PI and important data stored with China, Article 16 would require operators to (i) take effective measures to ensure data security and prevent data leakage, and (ii) strictly restrict the access and utilization of important data and sensitive PI.

Based on textual interpretation, Article 16 would apply to the "access and utilization" of data by third parties rather than "cross-border transfers of data". Considering the common practice of remote data access and emerging technologies such as privacy computing, it is worth exploring whether the aforementioned requirements and restrictions would apply to cooperations between operators and both domestic and overseas partners.

Obligations to report data processing activities

The Draft Provisions would strengthen obligations for reporting data processing activities in the following situations:

- **Advance reporting of important data processing**: Article 11 would require that, prior to processing important data, operators report to the State cyberspace administrations at provincial levels and competent departments regarding the data types, volume, scope, retention location and period, use cases, and whether the same is to be provided to third parties. Unlike the filing requirement proposed under Article 15 of *Measures for Administration of Data Security (Draft for Comment)*[6], the Draft Provisions would require operators to predict important data processing activities and report the same in advance.

- **Display the types and scope of data in readable plaintext during random inspections**: According to Article 15 of the Draft Provisions, the State cyberspace administrations, along with relevant departments of the State Council, will conduct random inspections of cross-border transfers of PI and important data. Operators would be required to display the types, scope, and other information in readable plaintext.

- **Annual reporting on data security management**: Operators who process PI relating to **more than 100,000 data subjects** and/or important data would be required to report to the State cyberspace administrations at the provincial level and relevant departments by December 15 of each year regarding their data processing activities[7]. Should there be cross-border data transfers, the operators would also be required to report the circumstances surrounding cross-border data transfers[8], including, *inter alia*, data subjects' complaints and handling of the same.

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[6] Article 15 of the Measures for Administration of Data Security (Draft for Comment): A cyberspace operator shall file certain information with the local cyberspace administration with respect to the collection of important data or personal sensitive information for business, and the filing information shall include collection and use rules, purpose, scale, method, scope, type and duration, while excluding data content per se.

[7] According to Article 17 of the Draft Provisions, the following matters shall be included in the annual report: (i) name and contact information of the person in charge of data security and the person in charge of handling the person in charge of handling matters related to users' rights and interests, (ii) types, volume, purpose and necessity of the processed data, (iii) data security protection and management measures including data retention location and period, (iv) situations regarding data sharing with third-parties within China, (v) facts and handling of data security incidents, (vi) user complaints regarding PI and data, and handling of the same, (vii) other data security situations designated by the State cyberspace administrations.

[8] According to Article 18 of the Draft Provisions, the following matters on cross-border data transfer shall be included in the annual report: (i) name and contact information of the data recipient, (ii) types, volume and purposes of the transferred data, (iii) the data retention location abroad, scope and method of data use, (iv) data subjects' complaints concerning cross-border data transfer and handling of the same, (v) other situations concerning cross-border data transfer designated by the State cyberspace administrations.

Important Announcement

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

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

Kevin DUAN

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

Brigard Urrutia

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

www.bu.com.co

COSTA RICA

APPROVES THE DRAFT GENERAL LAW ON PUBLIC PROCUREMENT

May/2021

This Monday, May 17th, the Legislative Assembly unanimously approved in a second debate the draft General Law on Public Procurement, File No. 21,546. With this approval, the bill will now pass to the Executive Branch for its final signature. The new Law requires a regulation and will enter into force in 18 months, after its publication in the official journal "La Gaceta".

The Law modifies all legal norms concerning public procurement and repeals certain special regulations. Likewise, it unifies and regulates all legislation on contractual activity that makes total or partial use of public funds.

Among the main novelties of the Law is the use of ordinary public procurement procedures - as opposed to the tendency to use exceptional procedures, such as direct contracting. To this end, procedures were simplified, exceptions to ordinary procedures were reduced, and the requirements for their use were adjusted. The new ordinary regime contemplates the figures of higher tenders, minor tenders, and reduced tenders, depending on their amount.

The Law introduces other novel aspects, including:

The execution of all public procurement activities through the unified digital system, which currently corresponds to the SICOP virtual platform.

The creation of an electronic registry of suppliers and subcontractors, which will include affidavits, background information, qualifying markers, contractual history, etc.

The promotion of social, economic, environmental and innovation considerations in the specifications of the contracting procedures.

The introduction of innovative public procurement as a mechanism to improve the provision of public services, including public-private partnerships.

The possibility of using any contractual figure not expressly regulated in the Costa Rican legal system if a series of requirements are met.

The enforcement of fines for the presentation of reckless appeals.

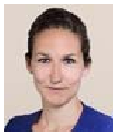
For any further questions concerning this new Law, its implication on current or future contracts, or for the request of legal counsel on matters regarding Public Law in Costa Rica, you may contact our experts Carlos Ubico and Luis Diego Obando, and/or call (+506) 4036 - 2800.

Carlos Ubico, Partner
carlos.ubico@ariaslaw.com

Luis Diego Obando, Associate
luis.obando@ariaslaw.com

Mónica Espinoza, Associate
monica.espinoza@ariaslaw.com


Anna Dias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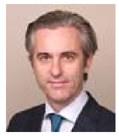

Laurent Godfroid


Stéphane Hautbourg


Benoit Le Bret


Olivier Prost


Romain Rard

European Commission Proposes New High-Potential Foreign Subsidies Control System

5 May 2021

Client Alert | European Commission | Foreign Subsidies

The European Commission is adopting today a proposal to investigate foreign subsidies that distort the internal market and to redress such distortions. This is an important step towards a true level playing field for companies in Europe, to ensure a healthy competitive environment benefitting consumers as well as European jobs. Today, an asymmetry exists as companies operating in the EU are subject to control when they benefit from subsidies from EU Member States, while control does not exist when such benefit comes from third countries. This new instrument is also innovative, as it combines well-established rules and practices from the World Trade Organisation (WTO) with principles stemming from EU State aid rules, public procurement regulation and merger control legislation.

The proposal is based on both Trade policy (Article 207) and Internal market policy (Article 114). It is comprehensive and covers three situations where foreign subsidies may distort the internal market: 1) subsidising the operations of a company operating in the EU, 2) subsidising the take-over of a EU company, and 3) subsidising a bidder in a public tender in the EU :

1. *Ex officio* review of foreign subsidies. A foreign subsidy to the operations of a company operating in the EU may be considered to distort the internal market when it improves its competitive position. That said, it is presumed that foreign subsidies for a total amount below EUR 5 million received over a period of 3 years are unlikely to distort the internal market. The definition of the foreign subsidies concerned is broad and inspired by an interesting combination of the relevant WTO and EU State aid definitions. When a distortion is identified, the Commission may accept commitments or impose measures, such as reducing capacity or market presence, refraining from certain investments, divestment of certain assets, or repayment of the foreign subsidy to the third country.
2. Concentrations. In the event of concentration, the requirement of a 'change of control' or a joint venture being established on a lasting basis applies, as considered under EU competition law. The notification thresholds consist in an EU turnover exceeding EUR 500 million over the past 3 years, and a foreign subsidy of more than EUR 50 million received over a 3-year period. The latter may be considered to distort the internal market when it improves the competitive position of the company concerned by the concentration. Where the relevant thresholds are met, the proposed regulation imposes an obligation to notify the merger *ex ante*. Following its investigation, the Commission can decide to either prohibit the concentration, accept commitments (as mentioned above), or state its absence of objections.
3. Public procurement. For procedures of an estimated value in excess of EUR 250 million, foreign subsidies that enable the submission of a tender that is unduly advantageous are targeted. The proposal requires all foreign subsidies received during the 3 years to be notified to the contracting authority, which will then alert the Commission. The Commission can then initiate a 60-day review, after which it may launch an in-depth investigation that can last up to 6 months. The result of this investigation may be to conclude that there is no distortion, to accept commitments as above, or prohibit the award of the contract to the company concerned.

It is also important to note that a common feature of the three modules described above (i.e. operations in the EU, concentrations, and public procurement) is that failure to provide information or refusal to submit to inspections in the Union, in the context of the relevant investigations may result in fines: up to 1% of the annual turnover of the company concerned; 5% of daily turnover per day of non-cooperation; while failure to implement commitment or measures imposed by the Commission may result in fines of up to 10% of its annual turnover and 5% of daily turnover per day of non-enforcement.

The proposed Regulation is not only welcome, it is a much-needed EU tool to address distortive behaviours affecting fair competition in the internal market. The latter, largely open to international competition, is subject to numerous interferences from third countries in key strategic sectors, which the other available instruments, including the screening of foreign direct investments, cannot fully address. In the course of the negotiation and implementation of this proposal, the following key factors are likely to determine the success or failure of this new instrument:

- ***Scope & applicable threshold:*** the Commission significantly raised some of the thresholds it had considered in its June 2020 White Paper. Question marks will remain regarding the appropriate thresholds; the Commission provided however for the possibility to amend them via Delegated Acts.
- ***Causality***: the proposal expects that a distortion on the internal market will be deemed to exist where a foreign subsidy is "*liable to improve the competitive position of the undertaking concerned in the internal market and where, in doing so, it actually or potentially negatively affects competition on the internal market*". It may be difficult to establish that the said subsidy result in an improvement of the operation of a foreign company in Europe, when it is indirect or granted as a general support to all activities of the company, whether domestic or export.
- ***Market/non-market economies***: in this respect, the proposal clearly targets the aggressive subsidisation by the third countries of key companies in selected sectors. However, the opacity and unreliability of accounting practices combined with the lack of transparency of state actors will be an important challenge in the deployment of the instrument. The recent experience of DG Trade in identifying foreign subsidies in the field of trade in goods (e.g. recent CVD glass fibre case) will be extremely useful.
- ***Control of direct foreign investment***: the EU introduced last year a new instrument that enables a better coordination of Member State measures to control foreign investment. There is an obvious link between this instrument and the takeover section of the foreign subsidy proposal: both will need to be well articulated, especially in terms of procedures, to minimise administrative burden for companies and authorities, all the while remaining effective.
- ***Complementary nature of the instrument***: the proposal complements the International Procurement Instrument proposal of the Commission, which aims to improve the access of European companies to public procurement markets outside the EU. It is also consistent with EU trade policy and complements existing trade instruments such as the EU anti-subsidy and, to a certain extent, the anti-dumping regulation that allows the EU to react to unfair competition where imported goods have been manufactured with the support of non-EU subsidies. When adopted, EU businesses will benefit from a range of legal tools they can draw on to counter distortions of competition caused by the behaviour of companies receiving foreign subsidies.
- ***Balance of interests***: The proposal states that the negative effects of a foreign subsidy should be balanced "*with positive effects on the development of the relevant economic activity*" where warranted. This provision is very broad, and somewhat unclear. It is reminiscent of the so-called "Union interest" examined by the Commission in anti-dumping proceedings before deciding to take measures. Special attention will be needed to avoid leaving excessive room for interpretation or discretion if not properly framed.
- ***Teams***: In practice, given the complexity of the investigations and analyses that will need to be carried out abroad, the new instrument would likely gain in efficiency if jointly operated by the Commission departments responsible for Competition and Trade. Officials from DG Trade are experienced in investigating non-market economies, and international public and private accounting practices, which will be crucial to the success of the new instrument, while officials from DG Competition have extensive practice in dealing with State aid and concentration issues.
- ***Transitional measures:*** the new instrument will not apply to concentrations realised prior to the date of application; however, transitional periods are provided for, whereby the Regulation could apply to other cases of foreign subsidies granted up to 10 years prior to the start of application of the Regulation.

To conclude, the Commission's proposal is very ambitiousand well-constructed. The change of attitude, of "philosophy", is striking. With the devil always being in the details, it remains to be seen what will come out of negotiations in the Council, and the lobbying of third countries. In any event,the initiative should be unquestionably welcomed as a positive sign that "naivety" is beginning to give way to a better understanding of the new world. The text of the proposal should be strongly supported by the EU Parliament and industry. While adoption and actual implementation will inevitably take some time, the clock is ticking: there is no time to lose, the challenges are already here and will not wait.

Hogan Lovells

Hong Kong – No hiding: mandatory registration of personal information for pre-paid SIM cards

10 June 2021

On 1 June 2021, the Hong Kong Government announced that it will enact the Telecommunications (Registration of SIM Cards) Regulation (Regulation) to implement the Real-name Registration Programme for subscriber identity module (SIM) Cards (Registration Programme). The Government is introducing the Registration Programme for the purpose of facilitating the prevention and detection of crime, specifically through more effective tracing of SIM card subscribers.

For context, Government figures report that there are approximately twelve million pre-paid SIM (**PPS**) cards and nine million SIM service plan (**SSP**) customers in Hong Kong.

Here is a summary of the key features of the Registration Programme:

- Telecommunications operators must not activate SIM cards unless users have registered their personal data including their full name in English and Chinese (as applicable), HKID number or other identity document number, a copy of their identity document and date of birth.
- A cap will be imposed on the number of PPS cards for which each user can register. After public consultation, the Government has relaxed the cap as follows:
    - For individual users, the cap has been lifted from three PPS cards, as originally proposed, to ten PPS cards for each user.
    - Each corporate user registered under the Business Registration Ordinance can register up to twenty five PPS cards
- The Registration Programme will be implemented in two phases, with the following transitional periods:
    - Phase 1 – with effect from 1 September 2021, telecommunications operators will have around 180 days (extended from 120 days as originally proposed) to put in place the registration system. After this period, all new PPS and SSP cards must be registered before activation.
    - Phase 2 - existing PPS card users will have 360 days (extended from 240 days as originally proposed) after 1 March 2022 to complete real-name registration with telecommunications operators. Any unregistered PPS cards

after this period will be deactivated or suspended. With regards to existing SSP customers, there is no need to "re-register" as relevant personal data has already been collected and retained by operators.

- Telecommunications operators are required to check and verify the information provided by subscribers and to deregister SIM cards when necessary. After deregistration of SIM cards, the information collected should be kept and stored for 12 months.
- Law enforcement agencies (**LEAs**) can request telecommunications operators to provide SIM cards registration records with a warrant. However, warrantless access is provided for if there is reasonable cause to suspect that a serious offence has been, is being, or is about to be committed or if it is necessary to access the data for the purpose of preventing loss of life or serious bodily harm to any person, in each case, if the delay involved in seeking a warrant would defeat the purpose of the access.

The Regulation was gazetted on 4 June and will be tabled at Legislative Council on 9 June for commencement on 1 September.

Key data protection implications

The new measures will apply to all mobile service operators/licensees providing SIM card services, including the larger mobile network operators and mobile virtual network operator and smaller operators under the Class Licence for Offer of Telecommunications Services.

While service operators will need to continue to comply with the requirements of the Personal Data (Privacy) Ordinance (Cap 486) (**PDPO**), under the Registration Programme, operators will be responsible for the collection and safekeeping of additional personal data of its users. This would possibly involve the setting up of additional infrastructure and back-end systems for registering and storing personal data of users, implementing procedures to address requests for access by LEAs and providing relevant staff with training.

Collection of copies of identity documents

While the PDPO does not expressly include any concept of "sensitive personal data" that is subject to stricter controls, the PDPO's Data Protection Principle 4 does require data users to consider the kinds of data they process and the harm that could result if there were any unauthorized access to it when they determine appropriate security controls. Copies of identity documents and identity card details are required to be handled in accordance with the Code of Practice on the Identity Card Number and other Personal Identifiers.

During the public consultation on the Registration Programme, the Office of the Privacy Commissioner for Personal Data (**PCPD**) proposed that SIM card users be given the choice to submit copies of their identity documents to service operators, depending on the mode of registration. For instance, the PCPD proposed that users that are registering online would have to provide a copy of the identity document for verification purposes, whereas users registering in person in physical stores could simply produce the original identity document for verification, without having to deposit a copy of the same.

Having considered the submissions received, the Government retained the requirement to submit a copy of the subscriber's identity document, regardless of the mode of registration.

Retention of personal data

The Registration Programme requires users' personal data to be kept for 12 months after the SIM cards are deregistered. Beyond this period, this general requirement under the PDPO still applies, i.e. personal data shall not be kept for a period longer than is necessary for the fulfilment of the purposes for which the data is to be used. Service operators may need to review and amend their current data privacy practices and policies.

Disclosure of personal data to LEAs

As mentioned, one of the features of the Registration Programme is that LEAs can request service operators to disclose SIM card registration records without a court warrant for dealing with urgent or emergency situations for the purpose of investigation or prevention of crimes. While the PDPO and other legislation already have similar provisions, the introduction of this new measure has led to personal privacy concerns, in particular whether the grounds for warrantless search are sufficiently clear. It remains to be seen whether the Communications Authority would issue further guidelines on this topic or whether one would need to wait for judicial cases to cast light on the scope.

Further guidelines

To facilitate the implementation, the Communications Authority is currently working on guidelines to explain and illustrate the requirements of the Registration Programme.

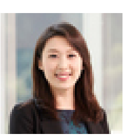
Our team at Hogan Lovells are following the changes closely. Watch this space for further updates.

Authored by Eugene Low, Mark Parsons, and Catharine Lau.

Contacts

Eugene Low
Partner
Hong Kong
eugene.low@hoganlovells.com

Mark Parsons
Partner
Hong Kong
mark.parsons@hoganlovells.com



Catharine Lau
Senior Associate
Hong Kong
catharine.lau@hoganlovells.com

Patent Waiver for Covid-19 Vaccines – Necessary or Reckless?

The world is in an upheaval now with the pandemic raging for over a year. The discussions and decisions that probably would never have been made a few years ago are being made today in the interest of the greater good and the public at large. When Bill Gates expressed his reservations against lifting IP protection on vaccine patents, it left the world reeling and his comments understandably criticised by experts and laymen alike. Several developing nations, including India, approached the World Trade Organisation (WTO) last year for approvals for the vaccine formula to be released to other manufacturers. A few days ago, we received further news that the United States supports a temporary lift on patents related to the Covid-19 vaccines and the Gates Foundation itself in an about face statement mentioned that they now support the opening of patents for the vaccine. All of this relates to the now growing concept of a Patent Waiver or an Open Patent.

We know that under intellectual property law, a patent is granted for a limited period for an idea or process that is novel, non-obvious and has value to the public. It allows the manufacturer to monetise this novel idea or process and prevent anyone else from making, using, or selling this invention for a limited period of time. An open patent or patent waiver removes this monopoly and permits anyone to make, use or sell this idea or process without fear of patent infringement. Tesla's popularity increased in 2014 with Musk's announcement that the company was going to open source their patents and would not sue anyone who wanted to use their technology, albeit with some restrictions on such use.

A patent waiver is a tremendous opportunity for other manufacturers. If granted, it aims to advance human growth and technology, enhances competitiveness, and increases sustainability. But does this utopian forward thinking process apply pan industries, in particular, can this be applied to the pharmaceutical industry in the same spirit. The world undoubtedly needs to ramp up its Covid-19 vaccine production. It is literally a matter of life and death. However, are we looking at this with coloured glasses hoping for a miracle, to end the waves of the devasting virus?

Patents while expected to provide detail, only cover a skeleton of the idea or process. Patent applications are expected to include enough information for someone in the same industry with the same amount of experience to copy the idea or process. However, do the vaccine patents cover the entire production process in microscopic detail? We know that the vaccines of the Messenger RNA (mRNA) type are a new variety of vaccines, never used on the market before, but tested on humans for other infectious diseases.

Which brings us to the real issues, how many of us have perfected a new dish with simply the recipe, minus the technique and skill…. and succeeded in our first attempt? Will providing the recipe for a Covid-19 vaccine to other manufacturers also provide the background knowledge, the technique, methodology and adequate skill required to manufacture this vaccine to perfection? Will there be additional government approvals, licenses and mandatory trials or will such manufacturers be permitted to release their vaccines for public consumption without the mentioned required elements? In our panic, are we jumping the gun, and could this decision possibly leave us with new problems of disastrous after-effects to contend with?

Gates had reasoned that “every manufacturing process needs to be looked at in a very careful way”. A patent waiver of the Covid-19 vaccines even if temporary must be accompanied with a transfer of background knowledge, training, production detail, trial, and regulatory approval. We must consider the practically of this. Is it even possible for these patent owners to facilitate this knowledge transfer to third parties amidst their own challenging responsibility to meet vaccine demand of the world?

Additionally, the cost of raw materials, skilled workforce and the required infrastructure needed to develop these vaccines would make it unlikely that manufacturers would simply jump on the vaccine production train without needing to make large investments of their own. People are forgetting that Moderna issued a patent waiver for its vaccine formula back in October 2020 and we have not heard of anyone who has taken up this opportunity. Another facet is that sadly we are also facing a raw material shortage, and if these materials are punted to manufacturers without the requisite expertise to develop these vaccines, we should consider that our existing vaccine producers could run out of the needed stock to meet even current supply requirements.

A patent waiver for the Covid-19 vaccine is welcome news when the world is searching for some form of respite from the harshness of the pandemic, but the practical reality and hard truth is that it isn’t going to make that much of a difference to the current epidemic. Even if other manufacturers choose to make use of the waiver to ramp up vaccine production, precautions need to be put in place to ensure safety remains the highest priority. We need to ensure that in our hurry to protect ourselves we don’t harm ourselves further.

"It's My Name!" – Federal Court Upholds Celebity's right to sue for passing off for use of his name

14 June 2021

In the case of ***Mohammad Hafiz bin Hamidun v Kamdar Sdn Bhd*** (Civil Appeal No. 02(f)-64-10/2020(W)), the Federal Court held that a person with established goodwill in his name has the standing to commence an action for passing off against another who is unauthorised to use his name. The bench at the apex court, led by the Chief Justice, shifted away from the Court of Appeal's reversal and reinstated the High Court's findings that a celebrity is entitled to claim for passing off over his name.

The salient facts

The Plaintiff is a celebrity Nasyid singer and song composer. Besides being an artiste, the Plaintiff is also in the business of selling Baju Melayu and Kurtas bearing his name, 'Hafiz Hamidun' **("Plaintiff's Name")**, through his company Mikraj Concept Sdn Bhd, that was later renamed Haje Sdn Bhd **("Plaintiff's Company")**.

The Defendant is a fabric retailer and has applied the Plaintiff's Name on the labels of certain products that it offers for sale **("Defendant's Products")**. This has prompted the Plaintiff to receive messages from his fans and followers on social media, enquiring if the Defendant's Products originated from the Plaintiff.

Upon receiving the cease and desist letter from the Plaintiff's solicitors, the Defendant replaced the Plaintiff's Name on the Defendant's Products with the label 'Afiz Amidun'. Subsequently, the Defendant ceased entirely the use of 'Afiz Amidun' after the Plaintiff commenced an action for passing off in the High Court.

Findings at the High Court

The issues before the High Court were whether the Plaintiff's Name had goodwill such that it could have been passed off, and whether the Plaintiff was clothed with the requisite standing to make the claim. After assessing the evidence, the learned trial Judge found that the Plaintiff satisfied all elements for passing off over the unauthorised use of the Plaintiff's Name as a business indicium by the Defendant.

In rejecting the Defendant's contentions on the non-joinder of the Plaintiff's Company, the High Court found that the Plaintiff has the locus to commence the claim of passing off for two reasons. First, the Plaintiff's Name was inextricably linked to the Plaintiff and he has personally established goodwill in it. Secondly, even if the goodwill in the Plaintiff's Name resided with the Plaintiff's Company and not the Plaintiff, the corporate veil ought to be lifted in the interest of justice to reveal the Plaintiff as the alter ego and effective owner of the Plaintiff's Company.

First reversal at the Court of Appeal

At the Court of Appeal, the bench decided solely on the issue and contentions on the non-joinder of the Plaintiff's Company, and held that the Plaintiff did not have the standing to claim against the Defendant for the passing off of his name.

In reversing the High Court's findings, the Court of Appeal found that the goodwill in the Plaintiff's Name was established in the Plaintiff's Company. Therefore, it was for the Plaintiff's Company to prosecute the claim for passing off against the Defendant and not the Plaintiff. It also found that in the absence of any evidence of fraudulent conduct, it is not appropriate to lift the corporate veil between the Plaintiff and the Plaintiff's Company in this case.

Final reversal at the Federal Court

Dissatisfied with the outcome at the Court of Appeal, the Plaintiff obtained leave to appeal to the Federal Court on two questions of law. The first question concerned the *locus standi* to commence an action in passing off where two entities may be entitled to claim goodwill. The second question concerned the distinction between lifting and piercing the corporate veil.

In deciding on the first question, the Federal Court found that goodwill is a flexible and malleable asset that can be manifested and generated in a myriad of ways depending on the nature of the trade or business. It also may not necessarily attach strictly to an individual or a group of persons. In doing so, the Federal Court referred to the case of **Bollinger and others v Costa Brava Wine Company Ltd** [1959] 3 All ER 800 where it was observed that any trader with sufficient nexus to the business with an established goodwill is eligible to sue for passing off.

On the subject of goodwill and passing off in the work or trade of famous individuals or celebrities, the Federal Court referred to cases from other jurisdictions such as **Irvine and another v Talksport Ltd** [2002] 2 All ER 414, **Henderson and another v Radio Corporation Pty Ltd** [1969] RPC 218 and **Fenty and others v Arcadia Group Brands Ltd (trading as Topshop) and another** [2015] 1 WLR 3291 involving the likes of formula one driver Edmund Irvine Jr, ballroom dancers Mr and Mrs Henderson, and R&B singer Rihanna. The apex court observed that in the context of celebrities, goodwill is generated by their personal achievements and fan base. From that, it is common for celebrities to venture into side businesses which rely on the goodwill from their name or stature.

The fact that celebrities might engage corporations to advance businesses which draw on their goodwill does not itself make the goodwill of those celebrities in those business any less their own. Consequently, any misappropriation and deceptive use of a celebrity's name or stature for commercial gain, such as by causing the public into believing that the celebrity had endorsed it, is consonant with the purpose for which the tort of passing off was developed to counter and remedy the misrepresentation and the deceit caused.

Accordingly, in answering the first question in the affirmative, the apex court departed from the Court of Appeal's decision and reinstated the High Court's findings that the Plaintiff has the *locus* to sue the Defendant for passing off over the Plaintiff's Name, and the goodwill in the Plaintiff's Name still belonged to the Plaintiff even though the Plaintiff's Company was used as a vehicle of trade.

The Federal Court also observed that there was an implied licence to use the Plaintiff's name by the Plaintiff's Company, and the non-joinder of the Plaintiff's Company in this action is not a defeating technicality. As there was evidence to show that the Plaintiff's fans and followers were wrongfully caused by the Defendant to believe that the Defendant's Products were associated with the Plaintiff or that he had endorsed them, the elements of passing off were satisfied.

As this appeal was successful on the first question, the Federal Court did not consider the second question on the facts of this case. However, the apex court observed in passing that there is a distinction between lifting and piercing of the corporate veil, pursuant to another recent decision before it, namely ***Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors*** [2021] 4 CLJ 821.

Conclusion

As the first reported case concerning a claim of passing off over one's name in Malaysia, this apex court decision is a welcoming development towards protecting the name and identity of famous individuals and celebrities from misappropriation and unauthorised commercial exploitation. It is also refreshing to see the Federal Court recognising that the tort of passing off is dynamic and in tandem with the development in business realities, and that the concept of goodwill is flexible and fluid which, depending on the nature and context of the claim, could cover a person's name.

By rejecting the arguments surrounding the non-joinder of the trade vehicle as a party to this case, the Federal Court clarified the position that the Courts are open to consider and allow a claim for passing off by a person or another entity with sufficient nexus to the goodwill asserted for protection. An implication from this decision would mean that one or more persons may be entitled to claim for passing off, just like the group of twelve wine producers from the Champagne district of France in the case of ***Bollinger***.

Case commentary by Joshua Teoh Beni Chris (Senior Associate) of the Intellectual Property Practice of Skrine.04 May 2021

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:

Mexico City Office:	**Mr. Andrés Rodríguez R., arodriguez@s-s.mx (Partner)** **Mr. Francisco Udave T., fudave@s-s.mx (Partner)** **Phone: (+52 55) 5279-5400**
Monterrey Office:	**Mr. Juan Carlos de la Vega G., jdelavega@s-s.mx (Partner)** **Phone: (+52 81) 8133-6000**
Queretaro Office:	**Mr. José Ramón Ayala A., jayala@s-s.mx (Partner)** **Phone: (+52 442) 290-0290**

Feltex class action finally at an end

The Supreme Court has put the final nail in the coffin of the Feltex class action, more than 13 years after it was first filed in the High Court.z

In a decision released yesterday, the Supreme Court dismissed an application by the representative investors for leave to appeal against an "unless order" made in the High Court which resulted in the proceeding being struck out.

The representative proceeding had been filed on behalf of more than 3,600 investors who had bought shares in Feltex Carpets Limited pursuant to a prospectus issued in an initial public offering in 2004. The company subsequently went into receivership and then liquidation in 2006. The plaintiffs claimed they had relied on statements in the prospectus that were misleading, and had suffered loss as a result.

At a stage one hearing to determine common liability issues, the Supreme Court ultimately found that the prospectus did contain an untrue statement for the purposes of the Securities Act 1978, and that the statement also amounted to misleading conduct under the Fair Trading Act 1986. The next step was then to consider issues of causation and loss at a stage two hearing, but the investors were ultimately unable to pull together the $1.65 million in security for costs required by the High Court for that hearing in time. As a result, their claim was struck out.

This long-running case underscores the need for a specific regime in New Zealand to manage and regulate class action proceedings and litigation funding in order to protect the interests of all concerned. The Law Commission is continuing with its work in this area and is due to make its final recommendations to the Minister of Justice in May 2022.

For more information visit www.simpsongrierson.com

Scammed or hacked? Overview of common fraud techniques and the corporate response playbook

DENTONS RODYK

May 21, 2021

Nobody is immune to scams and cyber-attacks. With the increase in scammers' levels of sophistication, their targets have also increased in scale. Scammers even routinely target multinational corporates and banks which have far more robust defences and highly trained personnel than the average SME.

Victims of scams and cyber-attacks face numerous consequences, including the difficulty of trying to unravel fraudulent transactions, exfiltration of sensitive financial or personal data, and disruption of key IT services. Some recent examples include the following:;

- In March 2021, a local furniture retailer was hacked, causing the phone numbers and physical addresses of its customers to be leaked online. The hacker group claimed that it had hacked into the company's database and stolen information related to more than 30,000 customers and nearly 600,000 transaction records.
- In May 2021, it was reported that an employee of a local bank allegedly fell prey to an impersonation scam that caused the leak of the names, identification and mobile numbers and account balances of over 1,100 customers of the bank. The employee had allegedly fallen victim to a Chinese police impersonation scam and was duped into disclosing the information of customers from China with Singapore-based accounts.

Apart from the direct consequences of cyber-attacks/scams, a whole range of questions that senior management and directors of affected companies must answer will swiftly arise such as how do we determine who is responsible and what went wrong? Or how the matter should be reported to the authorities and how should it be communicated to clients and/or shareholders? Is it be possible to retrieve the funds in the hands of the fraudsters? What should be done first?

This article seeks to set out a brief overview of common scam techniques and provides guidance on the consequences/potential liabilities that may arise, and more importantly, what should be done in the event of a scam being perpetrated on corporates.

Common Scam Techniques

i. Business Email Compromise (BEC) scams

In BEC scams, fraudsters approach employees of companies, passing themselves off as a known vendor or client of the company. Such fraudsters commonly hack/takeover the email accounts of the vendor, or impersonate the vendor by creating a similar looking email. Fraudsters may also attempt to pass off as CEOs or Senior Executives in order to request for sensitive data, often with a view to using such data in subsequent attacks such as to bypass security verification/authentication tools.

ii. Fake invoice scams

Another common scam is to utilise fake invoices, wherein fraudsters posing as known vendors generate fake/modified invoices using legitimate billing information or upcoming invoice, but with modified payment details that will route the payment to the fraudster's bank account instead.

iii. Ransomware

Getting users to click links in a phishing email, pop-up windows from a suspicious websites, and emails requesting one to download attachment are common ways of tricking employees into installing malicious software on their workplace computers. This may grant fraudsters the ability to steal the company's data and to remotely lock your files and prevent access unless a ransom is paid.

Potential repercussions of scams/cyber-attacks

The consequences for victims of scams/cyber-attacks are myriad and multifaceted. Anyone and everyone in the company's chain of command as well as clients and potential clients may be affected. Corporate entities who fail to secure the personal or financial data of their customers face not only reputational risks, but may also be found to be directly liable to the affected customers, not to mention potential breaches of regulations relating to, amongst others, cybersecurity and data privacy. Questions on breach of confidentiality obligations or fiduciary duties may also arise.

i. Direct consequences

Fraudulent transmittals of funds to scammers, and having to pay a ransom to regain control of critical IT systems/data would obviously cause losses and operational disruptions. The company may even to pay damages or fines. A company's intellectual property such as its know-how, technology, designs, and trade secrets could also be stolen and are vulnerable to cyber-attacks especially if stored on the cloud/third party servers.

Clients entrust personal information into the hands of the company on the basis that it is well stewarded and where their personal information has been leaked, a company has a duty to notify the authorities and/or the individuals affected (sections 26A − 26C of the Personal Data Protection Act (PDPA)). A person who suffers loss or damage directly as a result of data breaches may also have a right of action for relief in civil proceedings in court (section 48O, PDPA). On that note, although difficult to quantify, companies that fall victim to large cyber-attacks will invariably face reputational damage. Customers and suppliers may feel less confident in sharing their sensitive data/information with a company that has already been scammed or hacked once.

A notable example: in September 2017, a company (an American multinational) involved in consumer credit reporting business announced a data breach that exposed the personal information of 147 million people. The company subsequently agreed to a global settlement with the U.S. Federal Trade Commission, the Consumer Financial Protection Bureau, and 50 U.S. states and territories. The settlement included up to $425 million to help people affected by the data breach.

ii. Investigations, other indirect consequences and individual employee liability

The affected organisation may also face increased costs in having to hire experts to prevent repeats, to investigate the incident, and having to conduct additional security/compliance training for its personnel. Precious man-hours may also have to be spent on cooperating with the authorities for investigative purposes instead of being spent on the company's core functions.

Within the organisation itself, there would inevitably be a need to determine what went wrong, and whether any individuals are at fault, and if so whether any disciplinary sanctions are merited. It is not uncommon for there to be a breakdown in the relationship between employer and the individual employee found to be at fault. This can result in the employee leaving the company – either by agreement with a clean break. If the individual employee is found to be at fault, for example by failing to follow company protocols or policies, the employee may be terminated for cause as the employment contract may provide. The company should be careful to conduct a proper internal investigation (as elaborated on below) to avoid incurring any potential liability for wrongful termination. These would all result in increased costs for the company, whether in terms of investigative costs or in having to replace employees.

While it is settled law that employers are vicariously responsible for the harm caused by an employee in the performance of his duties (see section 53 of the PDPA which provides that any act done or conduct engaged in by a person in the course of his employment shall for the purposes of the PDPA by deemed to have been as done or engaged in by his employer whether or with the employer's knowledge/approval), there may arise a question of whether the employer can pursue a claim against the individual employee responsible for the data breach/fraudulent transmission. Deciding whether there are any merits and if it is worthwhile for the employer to pursue such a course of action is another issue that the affected company may have to consider.

Prevention is better than a cure

Employees may become the biggest weak spot in the ongoing battle against scammers and fraudsters. As compared to sophisticated cyber-attacks or hacking, it is more cost-efficient for fraudsters and often easier to try to utilise social-engineering techniques on employees into disclosing sensitive data or making fraudulent fund transfers. Therefore, it is important to ensure that employees are adequately trained to deal with situations involving scammers/common fraud techniques. This is key not only for employees involved in finance roles/data management, but for all employees of the firm. Refresher training should be conducted on a regular basis.

Whilst the employees are the 'software' and 'brains' of an organisation, the organisation must at the same time invest in its 'hardware' to keep itself secure from threats emanating from the cyberspace environment. It is vital that companies incorporate anti-virus/anti-malware software, and other digital authentication tools to mitigate risks such as customer fraud and identity theft. Security monitoring and web isolation are also useful tools.

Auditing the company's processes should also be part of consistent ongoing efforts. This can include conducting regular vulnerability assessments: (i) on IT systems to identify any security vulnerabilities to ensure gaps can be plugged in timely manner; (ii) drafting/reviewing of pre-determined plans or courses of action to implement upon the occurrence of certain pre-identified risks or incidents.

The quick response playbook

The most critical thing for the company to do is to establish a systematic plan from the outset. This will serve to identify the key issues to be dealt with, assist with budgeting, and help to avoid pitfalls which may prejudice the company's position further down the line.

While each incident and organisation will have its own specific concerns, the following steps serve as a basic framework.

1. Incident identification
2. Triage and assessment
3. Implementing the plan of action, including conducting internal investigations
4. Resolution & Remedial actions

1. Incident Identification

The very first step is to quickly identify what has happened by compiling the fundamental information pertaining to the incident:

a. Nature of the incident
b. Whether there is any basis to the allegations made
c. Personnel involved
d. Preliminary assessment of risks involved
e. Preliminary assessment of urgency/priority to be accorded
f. Informing key advisors in the Company (i.e. legal, PR etc) so that parties are aware of what is going on.

This is not meant to be a comprehensive fact-finding exercise, nor should this be treated as an opportunity to ascertain who is at fault at this stage. The purpose of the exercise is simply to gather enough information to enable the company's management/board to make an assessment of what to do next.

2. Triage and assessment

As the name suggests, the next step 'triage' is the process of determining the extent to which the company's resources ought to be brought to bear on the incident/allegation. It is to carry out an early assessment of any allegations, and to compel the decision makers to think through the correct investigative approach to be adopted.

Principle considerations would include:

a. Risk categorisation – high risk allegations such as misappropriation of company funds/corruption by senior management, or lower risk incidents such as breaches of internal protocol.
b. Significance or scale of the incident/allegation – one-off incident or whether there is a suggestion of recurring breaches
c. Whether the incident/allegation, if true, exposes the company to financial impact, legal liability and/or reputational risk
d. Seniority of personnel involved – whether senior management team is involved which may cause a crisis of confidence in the operation of the business

It is at this stage, where the board/management should decide what kind of resources are required. For example, if it is a low impact incident such as access to illicit sites, perhaps all that would be warranted would be a routine internal investigation. On the other hand, if the preliminary assessment reveals a high impact incident (leakage of customers' personal/financial data, theft of intellectual property, ransomware, unauthorised/fraudulent fund transfers), the management team should then consider bringing formally engaging external advisers such as legal counsel, investigative experts, forensic experts, public relations team etc.

It is also appropriate at this stage, depending on the seriousness of the incident, to consider bringing on board external advisers (such as lawyers, forensic investigators, technical experts, accountants)– not necessarily to immediately commence substantive works – but rather to provide the management team with an overview of the scope of work/issues that need to be addressed. Such an approach, would help keep investigative costs lower and help the company to make an informed decision on how to allocate its resources whilst working on mitigating any damage.

In short, the triage/assessment stage involves working toward preparing a specific and deliberate plan of action.

3. Implementing the plan of action, including conducting internal investigations

The plan formulated by the management team with the assistance of its advisers should cover all relevant issues, in particular the following key issues:

a. Immediate actions

i. Identifying root cause of scam, security breach / data loss, isolating comprised system to prevent spread of virus/malware, remedial actions to eradicate malware/ransomware
ii. Dealing with adverse publicity and writing press releases
iii. Disclosure/self-reporting obligations. For instance whether the incident triggers self-reporting obligations under anti-money laundering legislation such as the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act, or under mandatory notices issued by the Monetary Authority of Singapore. Companies Listed on the Singapore Exchange may have obligations under the Listing Manual to make certain disclosures.
iv. Consideration of whether to lodge a report with the authorities
v. Whether there are any immediate steps that need to be taken to try to recover monies paid out as a result of the scam or fraudulent transaction

b. Typical internal investigations involve conducting interviews with relevant employees, management/directors, collection and forensic review of records, as well as tracing the proceeds of fraud monies (possibly even applying to Court for injunctions or freezing of assets). Conducting such internal investigations necessarily involves consideration of a wide range of issues:

i. Protocol for investigation – consideration of scope of protection afforded by legal/litigation privilege to records created in the course of investigation is of paramount importance.
ii. Cross-border considerations – extent of legal protection/privilege of documents differs from jurisdiction to jurisdiction and it is critical to establish such differences at the outset. Other consideration could include what kind of material can be seized and relied on by authorities, whether there is a privilege against self-incrimination
iii. Restricting circulation of investigative records/materials to only specific stakeholders
iv. Scope of investigation – whether criminal, regulatory and/or civil litigation is anticipated
v. Evidence gathering and fact finding process – whether to be delegated to external counsel and/or conducted by in-house counsel
vi. Scope of investigative report – identifying cause of the incident, potential exposures, advice on next steps/remedial actions to be undertaken

c. Cooperation with authorities/regulators

i. Any plan of action should also take into account the possibility that the matter may be investigated by the authorities/regulators.
ii. Advice should be sought on whether to waive privilege and turn over material to the authorities, on the basis that voluntary cooperation would be favourably regarded or viewed as a mitigating factor
iii. In terms of enforcement proceedings, the organisation also ought to consider whether it will be held liable for its employee's conduct or whether it is entitled to disclaim responsibility

4. Resolution & Remedial actions

This stage largely involves preparing material for the purposes of regulatory reporting, insurance claims, civil litigation, disciplinary actions against employees concerned, and other issues such as customer notification and management of public relations issues. Needless to say, it is also important for management to implement the lessons learned to prevent a repeat of the situation and to improve defences.

Conclusion

Despite best efforts, it is not always possible to prevent falling prey to scams and cyber-attacks. However, preventive measures to reduce instances of such conduct can and should be implemented. More importantly, once an incident has occurred it is important to take all necessary measures to mitigate potential liabilities and to ensure that the least possible amount of damage is sustained.

Getting external counsel and advisers in at an early stage to advise on a concrete plan of action does not equate to ridiculous expenses or fees incurred. Fee agreements can be reached on a phased basis to first ascertain the necessary scope of work and to provide a preliminary assessment of the potential issues involved, before any decision is made on the substantive scope of work to be undertaken by the external advisers.

On the contrary, proceeding without any concrete plan of action may result in poor process management and unnecessary complications further down the line. For instance, many an organisation has proceeded to conduct its own internal investigations without adopting a considered approach to legal/litigation privilege, only to later find out to its chagrin that its internal records are not protected by privilege and have to be disclosed in civil proceedings and/or to the authorities.

We hope this article provides some guidance on responding to such events and our firm would be pleased to assist or discuss next steps on any such matters.

Dentons Rodyk acknowledges and thanks Intern Caleb Goh for his contributions to this article.

Your Key Contacts

Ajinderpal Singh
Senior Partner, Singapore
D +65 6885 3619
ajinderpal.singh@dentons.com

Sunil Rai
Partner, Singapore
D +65 6885 3624
sunil.rai@dentons.com

Jonathan Yao Jun Lim
Partner, Singapore
D +65 6885 3729
jonathan.lim@dentons.com

Newsletter

Recent Amendments to Taiwan Laws Pertaining to Investments and Technical Collaborations in the PRC – Summary and Analysis

04/30/2021

Susan Lo/ Derrick Yang/ Judy Lo

Under the tide of globalization where highly customized skillful works becomes more prevalent, there are increasingly diverse applications and frequent exchanges of proprietary technologies and intellectual property rights among enterprises from different countries. Against such backdrop, in a bid to protect the fruits of Taiwanese companies' R&D efforts, on December 30, 2020, the Investment Commission ("**IC**") under Taiwan's Ministry of Economic Affairs promulgated the amendments to Article 5 of the Regulations Governing the Approval of Investments or Technical Collaborations in the People's Republic of China (PRC) (the "**Approval Rules**") and Article 4 of the Regulations Governing the Review Criteria for Investments or Technical Collaborations in the PRC (the "**Review Criteria**") to further prevent any direct or indirect transfer or licensing of Taiwanese proprietary technologies or intellectual property rights to individuals or corporations of the PRC without prior approval. A summary and analysis of the amendments are as follows:

一、 Summary of the Amendments

（一）The types of technical collaborations in the PRC that are subject to regulatory approval now include those involving the transfer and/or licensing, either directly or indirectly through a third-area company, of Taiwanese technologies or intellectual property rights.

Before the amendment to Article 5 of the Approval Rules, "technical collaborations in the PRC" meant the **licensing** of proprietary technologies or intellectual property rights of and by individuals, corporations, groups or other organizations in Taiwan ("**Taiwan Nationals**") to individuals, corporations, groups or other organizations in the PRC ("**PRC Nationals**") in exchange for compensation other than equities (where equities were involved, the IC would usually consider it as an investment, instead of a technical collaboration in the PRC), while the **transfer** of such technologies or intellectual property rights to the PRC Nationals, and the transfer or licensing of such technologies or intellectual property rights **indirectly through a third-area company** were not covered or expressly regulated under the Approval Rules.

Under the newly amended Article 5 of the Approval Rules, all the events described above are defined as technical collaborations and are subject to regulatory approval, i.e., all future transfer and licensing of technologies or intellectual property rights by the Taiwan Nationals to the PRC Nationals, either directly or indirectly through a third-area company, will fall within the scope of technical collaborations that are covered by the Approval Rules and therefore subject to the IC's prior approval.

（二）Investments and technical collaborations in the PRC are now subject to different review procedures.

The IC's review procedures for investments and technical collaborations in the PRC by the Taiwan Nationals are set forth under the Review Criteria. Before the amendments, such investments and technical collaborations were subject to the same review procedure.

Given the fundamental differences between an investment and a technical collaboration, the amended Article 4 of the Review Criteria prescribes different review procedures for investments and technical collaborations in the PRC. That is, a Taiwan National who plans to invest in the PRC is required to either apply for prior approval or report the investment afterwards depending on the amount of investment, and such prior approval can be applied for through simplified or standard procedure. Meanwhile, a Taiwan National who plans to carry out a technical collaboration in the PRC must file for prior approval. When reviewing such applications, regardless of the value of the technologies/intellectual property rights at issue, the IC will always take into consideration factors such as the collaboration's impact on the core competitiveness of Taiwan companies, Taiwan's research and development roadmaps in the relevant industries, and any potential infringement on the intellectual property rights of any other entities in Taiwan. Such applications may also be further reviewed at the Commissioners' Meetings of the IC if special circumstances necessitate a closer scrutiny.

二、 Analysis and Potential Issues

While the Approval Rules and the Review Criteria were newly amended at the end of 2020, as the technical collaborations between the Taiwan Nationals and the PRC Nationals are being implemented in various forms, even after the amendments, the Approval Rules and the Review Criteria may not necessarily capture every possible type of such technical collaborations, thus leaving much room for interpretations by the competent authorities. If the competent authorities are to adopt an overly broad interpretation on the definition of **transfer** or **licensing**, the business operations of the Taiwan Nationals (especially those with subsidiaries in the PRC) might be affected.

The IC's overall position is that the Approval Rules and the Review Criteria were amended for the purpose of preventing substantial disclosure of technologies to the PRC Nationals, without interfering with the regular operation of Taiwan enterprises or the intra-group function allocation. Therefore, regarding the cross-strait transfer/licensing of proprietary technologies or intellectual property rights between parents and subsidiaries within the same group, if there is no substantial disclosure of technologies, such transfer or licensing will not be considered as a technical collaboration under the Approval Rules. For example, where a Taiwan parent company engages its PRC subsidiary to provide R&D services, consequently licenses certain technologies to the PRC subsidiary and owns the works thus created, the Taiwan parent company would not be required to apply with the IC for prior approval for the technical collaborations in the PRC; similarly, where a Taiwan parent company engages its PRC subsidiary to provide after-sale services to customers in the PRC and consequently licenses certain technologies to the PRC subsidiary which are required for the provision of such services, the Taiwan parent company would not be required to apply for prior approval, either.

In addition, for Taiwan enterprises that have subsidiaries in the PRC, the IC has already examined the technical aspects of their PRC investments when they applied for the establishment of a subsidiary in the PRC; hence these Taiwan enterprises do not need to apply for prior approval for technical collaborations in the PRC (unless such Taiwan parent company subsequently transfers or licenses other proprietary technologies or patent rights to the PRC subsidiary, in which event prior approval for technical collaborations in the PRC from the IC would be required).

In practice, the IC will determine on a case-by-case basis whether a specific transfer or licensing constitutes a technical collaboration under the amendments. Although the IC's objective is to prevent substantial disclosure of technologies without affecting the regular business arrangements between Taiwan enterprises and its PRC presence, whether certain transfer or licensing constitutes any substantial disclosure of technologies would still be subject to the review and determination of relevant competent authorities. While there are various types of transfers and licensing of proprietary technologies and intellectual property rights, how the competent authorities will view such transfers and licensing will become clearer only after they are presented with an actual case seeking their review. Therefore, to avoid any inadvertent violation of the laws, companies that plan to participate in any cross-strait or cross-border cooperation involving proprietary technologies or intellectual property rights should conduct a thorough assessment in determining whether or not to apply for the IC's prior approval.

Product Misclassification Results in Laser Manufacturer Settling with BIS for Apparent Export Controls Violations

08 June 2021
Client Updates

On May 28, the U.S. Department of Commerce's Bureau of Industry and Security ("BIS") announced the entry into a $350,000 settlement with Photonics Industries International, Inc. ("Photonics"), one of the world's largest solid state laser manufacturers based in Long Island, NY, for five apparent violations of the Export Administration Regulations ("EAR"), mainly caused by Photonics' misclassification of laser systems exported to China.[1]

According to BIS, in December 2014, Photonics exported 25 picosecond laser systems, classified under Export Control Classification Number ("ECCN") 6A005.b.6.b and controlled for National Security ("NS") and Anti-Terrorism ("AT") reasons, to China without obtaining the requisite BIS license. (Photonics also appears to have attempted to export an additional eight systems to China without a BIS license.) In transaction documents for these exports, Photonics mistakenly self-classified the items as EAR99 (meaning that the item is subject to the EAR, but not specifically listed on the EAR's Commerce Control List). Photonics did not request a commodity classification from BIS on the systems.

Additionally, BIS claimed that Photonics had its freight forwarder file Electronic Export Information ("EEI") in the U.S. Census Bureau's Automated Export System ("AES") for these exports that listed Hong Kong as the ultimate destination and a Hong Kong fright forwarder as the ultimate consignee, even though it knew that the ultimate destination and ultimate consignee were both located in China. Photonics apparently took this action at the direct request of its customer. (According to BIS, this type of request is a common "red flag" indicator that a potential EAR violation may occur with respect to the intended export.)[2]

As BIS was investigating the above transactions, Photonics was also alleged to have made an unlicensed export in May 2016 of a laser system (correctly designated as EAR99) to Sichuan University in China, which has been designated on the BIS Entity List since September 2012, thereby imposing a BIS license requirement to export any item subject to the EAR to it. According to BIS, Photonics did not maintain an export control compliance program that included screening foreign consignees or end-users against the U.S. Government Restricted Party Lists (including the BIS Entity List) and thus was unaware of the license requirement for this export.

Compliance Takeaways

The Photonics settlement demonstrates the importance of knowing the correct classification of products to be exported by determining whether your product has a specific ECCN on the EAR's Commerce Control List ("CCL").[3] While BIS permits companies to self-classify their products, they should have not only a technical understanding of the item to be classified in order to do so, but also deep familiarity with the structure and format of the CCL. Divided into ten categories, each of which is further subdivided into five product groups, the CCL contains thousands of items with a litany of different parameters. Companies must carefully review all the technical specifications of a given ECCN to determine the correct classification of their product and, quite often, consult several different ECCNs before making a final selection. If, after extensive review, classification of the product cannot be determined with a high degree of confidence, companies can obtain an official commodity classification determination from BIS by submitting a CCATS request through its online SNAP-R system.

The Photonics settlement also shows that determinations as to whether BIS authorization is required to export a particular product does not end after classification. In addition to the CCL-based controls, the EAR also contain a second set of controls based on the end-user and end-use of the item to be exported. These controls are commonly referred to as "catch-all" controls because they must be considered in connection with every export transaction, including those that do not require a license for classification-based reasons.

Broadly speaking, these controls prohibit the unlicensed export of items subject to the EAR, where the exporter knows or has reason to know that the item is destined for or may be diverted to a restricted end-user or end-use. These controls prohibit unlicensed exports to a foreign person that is identified on a U.S. Government Restricted Party List, such as the BIS Entity List, or that is likely to use the item in connection with proscribed proliferation activities. Thus, companies must ensure that, in addition to classifying products, all parties to be in possession of the product are screened prior to export (including consignees), even if the product itself does not require a BIS license to be sent to its destination.

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[1] https://efoia.bis.doc.gov/index.php/documents/export-violations/export-violations-2021/1314-e2667/file
[2] https://www.bis.doc.gov/index.php/all-articles/23-compliance-a-training/51-red-flag-indicators
[3] https://www.bis.doc.gov/index.php/licensing/commerce-control-list-classification

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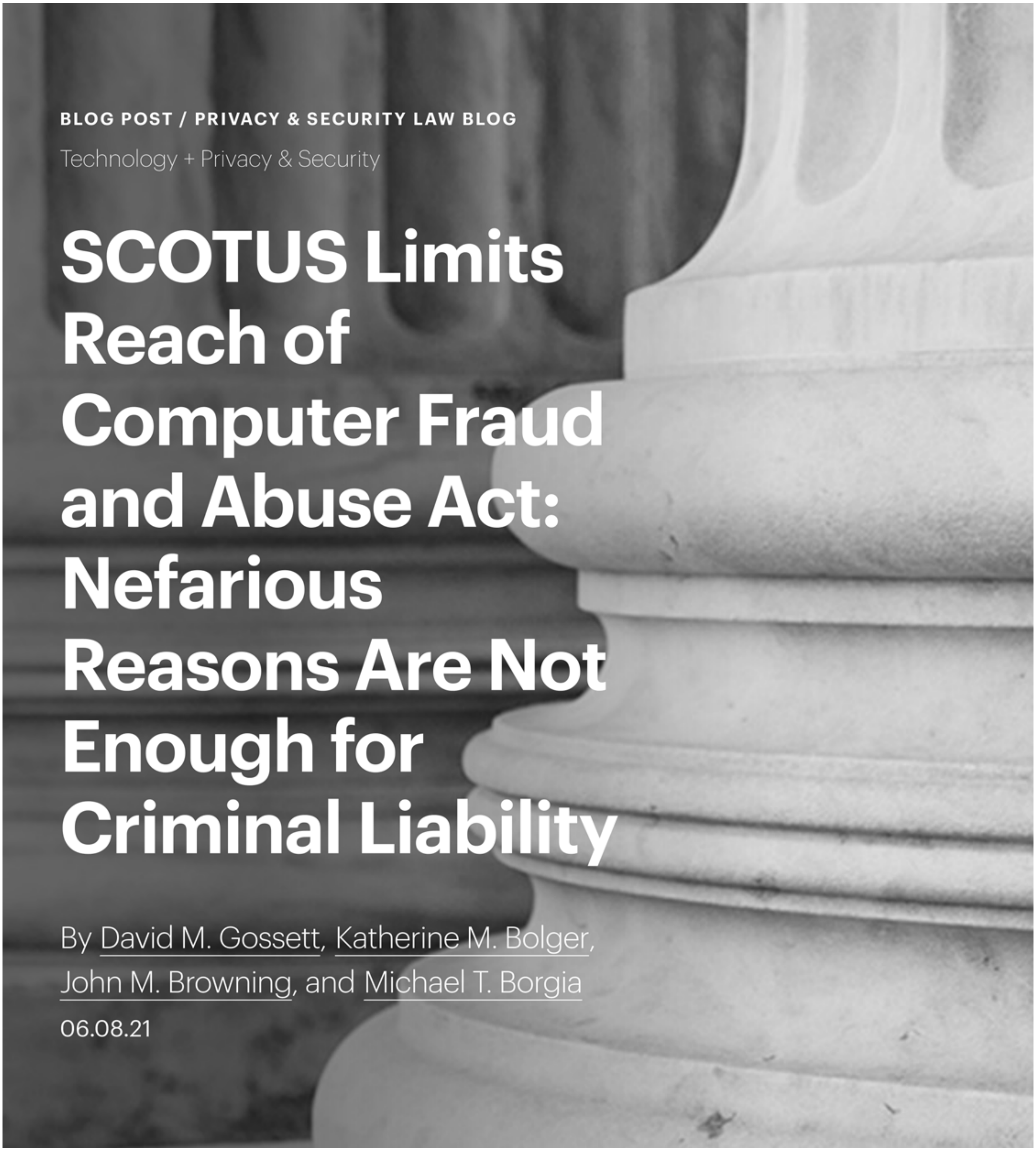

BLOG POST / PRIVACY & SECURITY LAW BLOG

Technology + Privacy & Security

SCOTUS Limits Reach of Computer Fraud and Abuse Act: Nefarious Reasons Are Not Enough for Criminal Liability

By David M. Gossett, Katherine M. Bolger, John M. Browning, and Michael T. Borgia

06.08.21

Last week, the U.S. Supreme Court resolved an important question about the meaning of provisions prohibiting "unauthorized access" or "exceeding authorized access" to computer systems and databases under the Computer Fraud and Abuse Act of 1986 (CFAA). The Court, in a 6-3 decision, sided with lower courts that found the CFAA does not prohibit accessing data for a purpose other than the purpose for which the user was permitted access in the first place. The decision will have far-reaching consequences for anyone who uses computers to access and retrieve information digitally.

The CFAA subjects to criminal and civil liability anyone who "intentionally accesses a computer without authorization or exceeds authorized access."[1] The term "exceeds authorized access" means "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter."[2]

Everyone agrees that these provisions of the CFAA prohibit traditional hacking done for a malicious purpose—for example, breaking into a computer system by using an illegally obtained password to steal data or encrypt files. They also cover "insider threats"—an employee who, for example, has access to a portion of a computer system but who accesses portions that she is not authorized to access (e.g., restricted systems containing business secrets).

For decades, courts have been divided whether the CFAA also prohibits accessing computer systems or files with permission, but for a forbidden reason. Does an employee "exceed[] authorized access" by, for example, downloading materials she is allowed to access for work, but with the intent of quitting and taking those materials to another employer?

The facts of *Van Buren* provide a stark example. A police officer, Nathan Van Buren, was offered $5,000 to check whether someone was an undercover police officer, using a license plate number. Van Buren searched for the number in a license plate database to which he had access, but only for legitimate law enforcement purposes.

In fact, the request was part of a sting operation, and Van Buren was arrested after carrying out the search and offering that he had information to share. Prosecutors charged Van Buren with several crimes, including violations of the CFAA. Van Buren argued that he was authorized to access that database, and the fact he accessed it for an unauthorized reason did not mean he had "exceed[ed] authorized access."

The U.S. Supreme Court agreed. To the majority, the case was simple. The Court relied primarily on the text of the statute, particularly the definition of "exceeds authorized access," to conclude that Van Buren was "entitled" to obtain the material he obtained, and in the manner that he obtained it. That he accessed the material for an improper purpose did not change the textual analysis.

The Court also concluded that this reading was more consistent with the overall structure of the CFAA, as it harmonized the analysis under the "without authorization" and "exceeds authorized access" prongs of the statute. Under the majority's reading, both prongs pose a straightforward "gates-up-or-down" inquiry—one either has permission to access a system or part of a system, or one does not.

The Court also concluded that the government's reading of the statute would mangle the CFAA's civil liability provisions, reasoning that the statute's civil remedies for "loss" and "damage" are best suited to address the consequences of traditional computer hacking (loss of data, inability to access systems, etc.)—not claims of data "misuse." In fact, the government conceded that the access provisions in the CFAA "prohibit[] only unlawful information 'access,' not downstream information 'misus[e].'"

Finally, the Court noted that "the Government's interpretation of the statute would attach criminal penalties to a breathtaking amount of commonplace computer activity." "If the 'exceeds authorized access' clause criminalizes every violation of a computer-use policy," the Court explained, "millions of otherwise law-abiding citizens are criminals." Any employee who is authorized to use an employer-supplied computer only for business purposes would, for example, violate the CFAA by sending a personal email.

Van Buren is critically important to a vast array of companies. The decision will limit the ability of some companies to use the CFAA to enforce terms of service that prohibit particular uses of their data, as well as the ability to punish employee misconduct.

And the decision is a welcome result for computational journalism: As DWT—and in particular, Kate Bolger, Jack Browning, and David Gossett—argued in an amicus brief, a different, broader reading would have infringed on established First Amendment protections for journalists—including amicus *The Markup*, a nonprofit news organization that conducts data-driven investigations into digital technology.

FOOTNOTES

1 18 U. S. C. § 1030(a)(2).

2 18 U. S. C. § 1030(e)(6).