PACIFIC RIM ADVISORY COUNCIL

Pacific Rim Advisory Council

March 2021 e-Bulletin

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CONFERENCES & EVENTS

PRAC - Let's Talk!

upcoming virtual meetings
March 22/23, 2021 | April 19/20, 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.

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

MEMBER DEALS MAKING NEWS

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►BAKER BOTTS | Represents Clearway Energy Operating LLC in Offering of $925 Million "Green Bond"
►CAREY |Assists Enel Américas in US$500 million loan
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PRAC TOOLS TO USE
COVID-19 SITE FOR ALL UPDATES

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BAKER BOTTS PROMOTES 19 LAWYERS TO SPECIAL COUNSEL

PALO ALTO, 02 March, 2021 – Baker Botts L.L.P., a leading international energy, technology and life sciences law firm, is pleased to announce that 19 lawyers have been promoted to special counsel, effective March 1.

“These lawyers consistently provide outstanding client service and regularly exhibit professional excellence as well as strong contributions to their clients, colleagues and the firm,” said John Martin, Managing Partner of Baker Botts.

The new special counsel comprise members of the Corporate, Global Projects, Intellectual Property, Litigation and Tax Departments. They are listed below with brief biographies that follow.

Eileen Boyce, Corporate, Houston
Luke Burns, Global Projects, Houston
Stephanie Cagniart, Litigation, Austin
Clint Culpepper, Corporate, Austin
Lee Davis, Corporate, Washington, D.C.
Adam Dawson, Litigation, Brussels
Lauren Dreyer, Intellectual Property, Washington, D.C.
Yi Dulkeith, Intellectual Property, New York
Michelle Eber, Intellectual Property, Houston
Matt Fusina, Global Projects, Washington, D.C.
John Gaustad, Intellectual Property, Palo Alto
Izabella Kharlamova, Litigation, Moscow
Allison Watkins Mallick, Litigation, Washington, D.C. & San Francisco
Laura Katherine Mann, Corporate, Houston
David Morris, Tax, Palo Alto
Leah Davis Patrick, Tax, Houston
Christine Ryu-Naya, Litigation, Washington, D.C.
Quentin Wiest III, Corporate, New York
Jennifer Wu, Corporate, Austin

For additional information visit www.bakerbotts.com

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.

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

BENNETT JONES WELCOMES NINE NEW PARTNERS

08 March, 2021: Bennett Jones is pleased to announce that nine lawyers have been admitted to the partnership. They serve clients from our offices throughout the firm and represent a cross section of our practice areas, including corporate, litigation and dispute resolution, regulatory, and tax.

Joey Blinick – Commercial Litigation
Melissa Dimilta – Intellectual Property Law
Sarah Harper – Corporate, Commercial and Securities Law
Jessica Horwitz – International Trade, Customs and Regulatory Law
Oliver Loxley – Capital Markets and Securities Law
Jared Mackey – Tax
Tim Myers – Energy Regulatory, Utilities and Rates, Environmental, Aboriginal, and Surface Rights Law
Michael Shakra – Insolvency and Restructuring Law
Sophie Virji – Tax Litigation and Dispute Resolution

Congratulations and welcome to the partnership.

For more information visit www.bennettjones.com

DAVIS WRIGHT TREMAINE ADDS FORMER NBC ENTERTAINMENT LAWYER

LOS ANGELES – 10 March, 2021 – Davis Wright Tremaine continues growing in California with the addition of Michelle Quijano to its Los Angeles office. Michelle joins the firm's entertainment practice as of counsel, bringing extensive in-house experience from NBC Entertainment where she most recently served as vice president of legal affairs.

"After working with Michelle for years as a client, we are thrilled to welcome her to DWT's entertainment team," said partner Alonzo Wickers. Adds Bob Wyman, co-head of entertainment transactions, "We have worked hard to build a dynamic mix of veteran entertainment lawyers as well as rising lawyers with a long future ahead of them, so Michelle is a perfect complement to the team."

Quijano served as the primary show lawyer for many NBCU scripted and unscripted television projects. Her practice focuses on the full spectrum of production issues, including above-the-line talent agreements, acquisition and rights agreements, day-to-day production agreements and trademark and other intellectual property issues. In addition to her experience at NBC Entertainment, she worked at NBCUniversal's Universal Studios Home Entertainment and ITV Studios, Inc., and served as vice president of legal affairs at NBCUniversal Cable Entertainment and production company, All3Media America, LLC.

"I have worked with Al and his team for years and watched them build a powerful presence in the entertainment industry," said Quijano. "I'm delighted to join this team and a firm, in DWT, that is well known for helping rising lawyers build successful practices."

Quijano received her B.A. in Law and Society from the University of California, Santa Barbara, and received her J.D. from Loyola Law School.

Davis Wright Tremaine recently reported that it had another strong year in 2020, its seventh consecutive year of record performance. Revenue increased by more than 7% and net income rose by nearly 12%. Chambers and Partners confirmed Davis Wright Tremaine's standing as the national leader in media and entertainment litigation, with more lawyers ranked than any other firm in 2020.

For more information visit www.dwt.com

HAN KUN EXPANDS CROSS-BORDER M&A CAPABILITIES

BEIJING - 01 March, 2021: Han Kun Law Offices is pleased to announce that Mr. Yuan Liming has recently joined the firm, further strengthening Han Kun's cross-border M&A capabilities. He will mainly be based in the firm's Shanghai office.

Mr. Yuan practiced law at Jones Day for more than 18 years before joining Han Kun Law Offices in 2021. Mr. Yuan's practice focuses on representing multinational companies in acquisitions and investments in China and China-based clients in acquisitions and investments overseas. He has in-depth experience advising clients in complex and sensitive transactions that have become difficult to resolve, with a particular emphasis on complex issues related to deal structuring, regulatory approvals, joint ventures, tax, employment, and compliance. He also has extensive experience in the area of life sciences and healthcare.

Mr. Yuan 's core services include representing multinational corporations and PE firms in sales of their entire greater China businesses, representing multinational companies in acquisitions of equity interests or assets of Chinese companies, establishment of Sino-foreign joint ventures in China, and Chinese companies' overseas asset and share acquisitions in the United States and Europe.

Mr. Yuan was recognized as one of the Client Choice Top 20 Lawyers in China by ALB in 2015.

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

For additional information visit www.hankunlaw.com

HOGAN LOVELLS ADDS TOP HEALTH CARE LOBBYIST

WASHINGTON, D.C., 26 February 2021: Global law firm Hogan Lovells has added Anna Weinstein as a Senior Director in its Government Relations and Public Affairs practice based in Washington, D.C. She is a seasoned health care strategist and recognized political adviser with 20 years of legislative and regulatory experience. Anna helps clients in the health and life sciences arenas navigate the process of developing and shaping complex federal legislation and regulatory policy. She also advises clients on formulating and implementing approaches to achieve objectives by building stakeholder coalitions and mobilizing grassroots efforts.

Before joining Chamber Hill Strategies, Anna was a principal at a boutique health care policy/advocacy firm. Before that, she headed the health care practice at the Podesta Group, a top government relations and public affairs firm. At both she represented a variety of pharmaceutical, post-acute care, health information technology, medical device companies and provider associations. Prior to that, she was the lead Democratic lobbyist for the Biotechnology Innovation Organization, a trade association representing over 1,100 members, where she focused on health care, intellectual property and biodefense issues. Anna also worked at another prominent international law firm as a senior health care adviser, where she focused on payment and regulatory policy affecting physicians, dialysis providers, biopharmaceutical and device manufacturers, ambulatory surgery centers and clinical laboratories.

At the corporate level, Anna has experience designing and executing federal and state advocacy agendas related to fiscal and regulatory policy for a leading U.S. provider of home oxygen and sleep therapy services, equipment and respiratory medications. She also directed federal policy and congressional relations on behalf of the major global producers of plasma-based and recombinant biological therapeutics at the Plasma Protein Therapeutics Association.

Anna began her career as a research assistant at the Harvard School of Public Health and Kennedy School of Government and following graduate school she was a special advisor to the CEO of AcademyHealth. She also worked in the Executive Office of the President within the Clinton administration, where she served as an aide to the deputy assistant to the president for health policy development.

Anna earned a Bachelor of Arts in history with a minor in Italian literature and culture from Middlebury College, as well as a Master of Public Policy with a concentration in health care economics from Georgetown University.

For additional information visit www.hoganlovells.com

NAUTADUTILH STRENGTHENS TECHNOLOGY GROUP

AMSTERDAM, 01 March, 2021: Joris Willems will join NautaDutilh as Partner and head of the Technology Group on 1 March. The arrival of Joris and his team, consisting of Cyril Christiaans (Of Counsel), Eva Reinders (Associate) and Tom De Smet (Associate), significantly strengthens the firm's Technology Group and IT/Data team.

"We are very pleased to have Joris and his team join NautaDutilh as of 1 March," says managing partner Petra Zijp. "Joris is an authority on IT law, with extensive experience in the technology sector. His arrival fits in perfectly with our ambition of offering our international and national clients, as a full-service firm, a wide range of services at the highest level. With their knowledge of and experience in IT law, commercial contracts and the digital transformation, Joris and his team will play an important role. The technology sector offers enormous potential for growth, with several IPOs and increased M&A activity on the horizon, and with the strengthening of our interdisciplinary Technology Group, we are excellently positioned to continue serving our clients in this sector."

Joris Willems: "The global digital transformation is at the core of my practice. This frequently involves legal challenges relating to new technologies, big data and cybersecurity. Transactions and contracts are often complex and cross-border. There is also a noticeable increase in IT litigation. I look forward to starting at NautaDutilh, a leading Benelux firm with a global network where, together with my team and other colleagues, I can offer clients the multidisciplinary, innovative and practical solutions these times call for."

Lieke van der Velden, Global Head of M&A at NautaDutilh: "Together with Cyril, Eva and Tom, Joris is a valuable reinforcement for our Corporate and Commercial Group in particular and of course for NautaDutilh as a whole. The firm enjoys a strong position in the field of regulated markets as well as in the technology sector. We look forward to working with Joris and his team on leading cases and continuing to make a difference for our clients."

For more information, please visit www.nautadutilh.com

SIMPSON GRIERSON SPECIALISTS PROMOTED TO SENIOR ASSOCIATE

AUCKLAND, 17 February, 2021: We're pleased to announce the promotion of Matthew Hill and Greg Mitchell to senior associate.

Matthew is part of our local government team and has a focus on local government funding and financing issues. He regularly advises councils across the country on a range of matters and also has experience working in-house for the Crown, advising on a range of public law matters.

Greg is a member of our corporate and commercial team, with a depth of expertise across a range of areas including: M&A, corporate governance, and overseas investment. He has acted on significant and complex transactions in New Zealand and Australia, advising both domestic and international clients, including major corporates, private equity firms and investment banks.

Both Matthew and Greg continue to deliver great results for clients, while providing valuable mentorship for our juniors, and are deserving of leadership roles within their teams.

We've also promoted ten team members to senior solicitor: Nicole Ashby, Matthew Brew, Richard Chiu, Edward Colenbrander, Sophie Hawksworth, Samuel Hider, Kitty Lin, Rachael Mortiaux, Viktoriya Pashorina-Nichols and Elsie Randow-Stone. Leslie Claydon was also promoted to legal executive - associate.

Congrats all on these well deserved promotions (effective from 1 Jan 2021).

For additional information visit www.simpsongrierson.com

SYCIP ADDS FOUR NEW PARTNERS

MANILA, 01 March, 2021: SyCip Salazar Hernandez & Gatmaitan (SyCipLaw) is pleased to announce the admission to the partnership of ***Easter Princess U. Castro-Ty, Joanna Marie O. Joson, Maria Viola B. Vista,*** *and* ***Maria Christina C. Ortua-Ang .***

Easter Princess U. Castro-Ty is a labor law specialist. She also has broad experience in handling commercial transactions. Ms. Castro-Ty regularly counsels clients on employment law issues such as those involving labor standards compliance, disciplinary actions and terminations, retirement issues, job contracting/labor-only contracting, occupational safety & health standards, and audits. She also advises clients on union issues and handles complex collective bargaining work. In addition, she specializes in expatriate employment and immigration work. She regularly provides professional advice and assistance to clients in the procurement and renewal of work visas and permits. Ms. Castro-Ty also has extensive experience in advising clients on the requirements for hiring of locals for overseas employment. She melds her expertise in employment law with commercial practice where she has M&A, and corporate restructuring and reorganization experience. Easter handles general corporate services, and acts as corporate secretary for several corporations. Ms. Castro-Ty obtained her undergraduate degree (*cum laude*) and her Juris Doctor degree (Dean's Medal for Academic Excellence) from the University of the Philippines College of Law. She is a member of the firm's Employment & Immigration Department and Special Projects group.

Joanna Marie O. Joson is an experienced commercial lawyer and a tax specialist. She specializes in acquisitions, investments, and restructuring. Her tax-related work includes rendering tax advice in connection with deals involving acquisitions, investments and divestments, and corporate reorganisations, as well as applications of foreign residents availing of preferential tax treatment under tax treaties. She also handles requests for confirmation of tax exemption, refund applications, responses to assessment notices and appeals against adverse rulings issued by the tax authority. Ms. Joson has handled key acquisition as well as divestment projects in a number of industries including food, advertising, manufacturing, logistics, real estate, and business process outsourcing. She also has labor law experience having worked on several labor-litigation cases involving illegal dismissal, certification election, and money claims. Ms. Joson obtained her undergraduate degree and Juris Doctor (second honors) from Ateneo de Manila University School of Law. She has a Master of Laws degree in taxation from New York University. She is a member of the firm's Special Projects group, Tax Department and Employment and Immigration Department.

Maria Viola B. Vista applies her expertise in tax and employment law in both litigation settings and commercial transactions, where she specially handles M&A and restructuring work. Ms. Vista's employment practice includes advisory work on various areas such as employment and contracting arrangements, hiring of expatriates, union issues, disciplinary proceedings, employee-related data privacy issues, and employment transfers or terminations in corporate transactions. In tax, Ms. Vista regularly advises clients on tax implications of corporate transactions and structures. She also handles tax assessments and refunds both at the administrative and court levels, representing companies from different sectors such as renewable energy and air transportation. The corporate projects she has led have been in a range of industries including those in the trading, pharmaceutical, advertising, information technology, financial technology, and airline industries. Ms. Vista obtained her undergraduate degree (*magna cum laude*) and finished her Juris Doctor degree (Dean's Medal for Academic Excellence) from the University of the Philippines College of Law. She is a member of the firm's Employment and Immigration, Tax and Special Projects practice groups.

Maria Christina C. Ortua-Ang is a tax, M&A, banking, and securities lawyer. She is also a certified public accountant in the Philippines. She is a tax specialist who also handles a broad range of corporate work and commercial transactions from structuring and regulatory advice to drafting and negotiation of transaction documentation. She handles financing projects as well. In tax, she regularly works on requests for rulings, refund claims and tax treaty relief applications, and appears before courts and revenue authorities in connection with tax assessments and other tax issues. Her recent significant projects include an approximately USD300 million investment in a storage and pipeline corporation, a USD 706 million investment in a local hospital business, and the acquisition of a thermal power business. Ms. Ortua-Ang obtained her Juris Doctor degree from the University of the Philippines College of Law (with honors) and obtained her Master of Laws (with distinction) from the Queen Mary University of London. She is with SyCipLaw's Special Projects, Taxation and Banking, Finance & Securities practice groups.

SyCipLaw is one of the largest law firms in the Philippines and it celebrated its 75th anniversary last year. With the admission of these four women as partners, more than 40% of the partnership is now comprised of women.

For more information, visit www.syciplaw.com

PRAC EVENTS

UPCOMING EVENTS

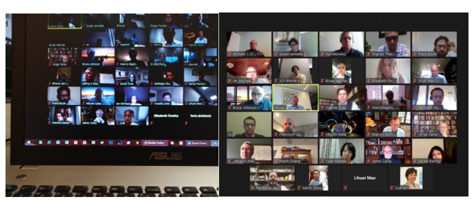
PACIFIC RIM ADVISORY COUNCIL

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

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

Together, we will see it through.

PRAC-Let's Talk!



Join us in 2021 for our monthly live one-hour virtual meetings

March 22/23 - "Law Firm Management – What Pandemic-Era Changes are Here to Stay?"
April 19/20 - PRAC @ India "micro-conference" hosted by Kochhar & Co.

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

ARIAS

ADVISES IDB INVEST ON US$75 MILLION FINANCING

GUATEMALA January, 2021: November 25, 2020 was the execution date of the loan and guarantee agreement among IDB Invest, a member of the Inter-American Development Bank Group, and Corporación Multi Inversiones (CMI Alimentos), in which Arias took part by providing our advice to IDB Invest, to provide a US$75 million financing to CMI Alimentos, with the aim of ensuring its liquidity in the medium term and supporting the continuity and reactivation of its operations. The transaction strengthens food security and revenue generation in Guatemala, El Salvador, and Honduras.

At Arias, we provided legal advice on the various stages of financing: due diligence; review and legal assistance for negotiation and preparation of the term sheet; review of the loan agreement and related documentation; negotiation and preparation of all documentation governed by local law; and closing and post-closing matters of the transaction.

Our lawyers who provided legal advice for this transaction were: **Roberta Gallardo (**Partner) with **Ernesto Sánchez** (Senior Associate) of our offices in El Salvador, acting as coordinator of the team in the region; **Jorge Luis Arenales** (Partner) with **Cindy Arrivillaga** (Associate) of our offices in Guatemala; and **Evangelina Lardizábal** (Partner) with **Antonio Montes** (Associate) of our offices in Honduras.

The transaction took place in El Salvador, Guatemala, and Honduras, and is governed by the laws of New York, United States of America.

Through this project IDB Invest plays a countercyclical role, providing long-term financing to alleviate food security challenges, a key aspect of the fight against COVID-19. CMI Alimentos will support the supply of food in local markets (animal protein, flours, and derived products) despite operational, logistical, and labor restrictions.

In addition, the operation supports the reactivation of income generation, through direct and indirect employment, in rural areas of Central America with vulnerable populations heavily affected by the health emergency and hurricanes.

It is an honor for Arias to participate in a transaction of this nature and to contribute, through this project, with the accomplishment of the Sustainable Development Goals of the United Nations: Decent Work and Economic Growth (SDG 8), Industry, Innovation, and Infrastructure (SDG 9) and Responsible Consumption and Production (SDG 12).

For additional information visit www.ariaslaw.com

BAKER BOTTS

REPRESENTS CLEARWAY ENERGY OPERATING LLC IN OFFERING OF $925 MILLION "GREEN BOND"

DALLAS, 09 March 2021 : Deal Description: On March 9, 2021, Clearway Energy Operating LLC ("Clearway Operating"), a subsidiary of Clearway Energy, Inc. (NYSE: CWEN, CWEN.A) ("Clearway Energy"), completed the sale of $925 million aggregate principal amount of its 3.750% Senior Notes due 2031 (the "New Notes").

Clearway Operating intends to allocate an amount equal to the net proceeds from the offering of the New Notes to finance or refinance, in part or in full, new and existing projects and assets meeting certain renewable energy generation eligibility criteria. Specifically, Clearway Operating used a portion of the proceeds from the offering to fund its tender offer (the "Tender Offer") for the $600 million outstanding aggregate principal amount of its 5.750% Senior Notes due 2025 (the "2025 Notes"), and intends to use the remaining portion to redeem the remaining amount of the 2025 Notes, to pay fees and expenses related to the offering and in connection with the repurchase of the 2025 Notes, to repay outstanding borrowings under its revolving credit facility and for general corporate purposes.

Morgan Stanley & Co. LLC, Goldman Sachs & Co. LLC, J.P. Morgan Securities LLC and MUFG Securities Americas Inc. acted as joint bookrunning managers for the offering. Baker Botts represented Clearway Operating in both the notes offering and the Tender Offer.

Clearway Energy is one of the largest renewable energy owners in the US with over 4,200 net MW of installed wind and solar generation projects. Clearway Energy also owns approximately 2,500 net MW of environmentally-sound, highly efficient natural gas generation facilities as well as a portfolio of district energy systems. Through this environmentally-sound diversified and primarily contracted portfolio, Clearway Energy endeavors to provide its investors with stable and growing dividend income. For more information, please see Clearway Energy's news release by clicking here: http://investor.clearwayenergy.com/news-releases/news-release-details/clearway-energy-operating-llc-subsidiary-clearway-energy-inc-9

For more information, please visit www.bakerbotts.com

CAREY

ASSISTS ENEL AMERICAS IN US $500 MILLION LOAN

SANTIAGO, 06 March, 2021: Chile's Carey helped Santiago-headquartered power company Enel Américas obtain a US$500 million loan from a syndicate of banks, BBVA, Scotiabank, Sumitomo, Bank of America and Citibank. An initial disbursement of US$113 million was made on 12 February. Enel Américas will use the money for general corporate purposes.

Local Counsel to Enel Américas led by Carey Partner Diego Peralta and associate Paluska Solar and Nadia Jara in Santiago.

For additional information visit www.carey.cl

DENTONS RODYK

SUCCESSFULLY STRUCK OUT CLAIMS BROUGHT BY THE OK TEDI FLY RIVER FOUNDATION LTD ("FOUNDATION") AND OTHERS ("PLAINTIFFS") AGAINST PNG SUSTAINABLE DEVELOPMENT PROGRAM LTD ("PNGSDP") IN THE HIGH COURT OF SINGAPORE

SINGAPORE, 01 February, 2021: The High Court (General Division) on 29 January 2021, struck out all the Plaintiffs' claims for control over PNGSDP's assets of approximately US$1.48 billion. The Plaintiffs brought their claims purportedly on behalf of some 147,000 residents of Papua New Guinea ("PNG"). The team from Dentons Rodyk representing PNGSDP, was led by Mark Seah.

The Court agreed with Mr Seah's submission that all of the heads of claim, which alleged breaches of fiduciary duty and unjust enrichment amongst others, failed to disclose any reasonable cause of action and/or were frivolous or vexatious.

PNGSDP was incorporated in Singapore in late 2001 by BHP Billiton Limited ("BHP") and the PNG government, in connection with BHP's exit from the Ok Tedi Mine in PNG's Western Province. PNGSDP's mission was and still is, to promote sustainable development in PNG. It forms part of the legacy of PNG's then Prime Minister, Sir Mekere Morauta KMCG PC, who passed away recently on 19 December 2020.

Dentons Rodyk also previously successfully resisted the State of PNG's claims for control, prevailing in the Singapore Court of Appeal in 2016, the Singapore High Court in 2019, and subsequently in the State's appeal to the Court of Appeal in 2020.

For additional information visit www.dentons.rodyk.com

GIDE

COUNSEL TO INSTITUTIONAL INVESTORS IN THE CONTEXT OF THE FORMATION OF CLIMATE FUNDS "FONDS OBJECTIF CLIMAT", FINANCING COMPANIES WHOSE ACTIVITIES CONTRIBUTE TO REACHING CARBON NEUTRALITY BY 2050

PARIS, 05 March 2021: A group of ten investors, including the French Caisse des Dépôts and institutional investors, has initiated the formation of three investment funds whose purpose is to support the development of advanced methods of financial management which take into account climate change.

Gide advised the investors as part of the selection process of the portfolio management companies for the climate funds and in the context of their formation.

The first two "Fonds Objectif Climat" will invest in listed equity securities, while the third one will invest in bonds markets.

The management of these climate funds has been awarded respectively to Amundi Asset Management and Sycomore Asset Management for the equity funds, and to HSBC Global Asset Management for the bonds fund.

The "Fonds Objectif Climat" are dedicated funds that raised approximately EUR 600 million at their time of launch, between December 2020 and January 2021.

Gide's team comprised partner Stéphane Puel, working with senior associate Clothilde Beau and associate Myriam Danicourt.

For additional information visit www.gide.com

HAN KUN

ADVISES QINGCLOUD TECH ON ITS SSE STAR MARKET IPO

BEIJING - 02 February, 2021: Beijing QingCloud Technology Co., Ltd. ("QingCloud Tech"), a PRC-based company primarily engaging in the business of providing cloud computing products and services, recently obtained registration consent from the China Securities Regulatory Commission for its initial public offering on the SSE STAR Market.

Han Kun is advising QingCloud Tech as its legal counsel for the initial public offering.

For additional information visit www.hankunlaw.com

HOGAN LOVELLS

SECURES FINAL VICTORY IN MAJOR PHILADELPHIA HEALTHCARE MERGER

WASHINGTON, D.C., and PHILADELPHIA - -2 March, 2021: Global law firm Hogan Lovells successfully represented Einstein Healthcare Network (Einstein) in a challenge by the Federal Trade Commission to its proposed merger with Thomas Jefferson University. Following the firm's representation of Einstein in a federal hearing and a favorable ruling from the Eastern District of Pennsylvania in December, the FTC has announced it will drop its appeal of the lower court's decision.

The FTC's announcement follows a major victory secured by Hogan Lovells in federal court in which Eastern District of Pennsylvania Judge Gerald J. Pappert denied the FTC's request for a preliminary injunction. In its ruling, the court stated the government "has not shown 'that there is a credible threat of harm to competition" from the merger.

Einstein Healthcare Network consists of an academic medical center with 1,000 licensed beds across three general acute care hospitals, a world-renowned inpatient rehabilitation facility, and skilled nursing and ambulatory care facilities in the greater Philadelphia area. Einstein employs 8,500 people from the communities it serves.

"We are pleased that the FTC has decided to drop its appeal of the district court's decision," said Hogan Lovells partner Leigh Oliver. "Einstein Healthcare Network has a long history of serving the most vulnerable communities of Philadelphia and it is encouraging to know that they will be able to continue with their mission for many years to come through their partnership with Thomas Jefferson University."

For additional information visit www.hoganlovells.com

MULLA & MULLA AND CRAIGIE BLUNT CAROE

SUCCESSFUL IN DELHI COURT GRANTING RELIEF TO FORD INDIA AND ITS DIRECTORS

NEW DELHI – 28 February, 2021: Kochhar & Co. represented Ford India, its Managing Director, and a US based Director in anticipatory bail applications before the Additional Sessions Judge, New Delhi. The Firm's Managing Partner Mr. Rohit Kochhar argued the matter and was successful in persuading the court to pass an order directing that no coercive action should be taken by the Economic Offenses Wing, Delhi Police against the applicants.

The matter has been widely covered by the Indian media and can be accessed from the following social media link: https://www.linkedin.com/feed/update/urn:li:activity:6772417372352593920

MUNIZ

ASSISTS CHINESE STATE OWNED POWER COMPANY CHINA THREE GORGES IN USD$ 569 MILLION BID IN LUZ DEL SUR

LIMA – 06 February, 2021: Muniz, Olaya, Meléndez, Castro, Ono & Herrera (Peru) has helped Chinese state-owned power company China Three Gorges launch a US$569 million bid to acquire an additional stake in the Andean country's largest electricity company, Luz del Sur.

The Chinese company made the bid through its local subsidiary, Peruvian Opportunity Company, which relied on Berninzon & Benavides. Luz del Sur was represented by Rodrigo, Elías & Medrano Abogados.

China Three Gorges launched the public bid on 22 January. It is expected to close on 19 February. If successful, the deal will hand the company a further 13.7% interest in Luz del Sur and increase its holding to 96.7%. China Three Gorges intends to buy 66,622,985 shares, paying US$8.5 each.

The hydropower-focused company completed its acquisition of 83% of the shares in Luz del Sur in April last year. The deal, which was made through its subsidiary, China Yangtze Power, was worth US$3.6 billion and was labelled one of the largest Chinese overseas investments when the deal was announced in 2019. Muñiz and Rodrigo Elías advised on those transactions.

Counsel to China Three Gorges—Muñiz, Olaya, Meléndez, Castro, Ono & Herrera Partners **Jorge Muñiz, Sergio Oquendo and Mercedes Fernandez,** and associates **Alesandra Azcárate, Rocío Izquierdo** and **Alessandro Heredia.**

For additional information visit www.munizlaw.com

NAUTADUTILH

ASSISTS AERCAP HOLDINGS N.V. WITH ACQUISITION OF GE CAPITAL AVIATION SERVICES (GECAS)

AMSTERDAM, 11 March, 2021: On March 10, 2021, AerCap Holdings N.V., the global leader in aircraft leasing, announced that it has entered into a definitive agreement with General Electric (GE), under which AerCap will acquire 100% of GE Capital Aviation Services.

The combined company will be an industry leader across all areas of aviation leasing, with over 2,000 owned and managed aircraft, over 900 owned and managed engines, over 300 owned helicopters and approximately 300 customers around the world.

Under the terms of the agreement, which has been unanimously approved by the boards of directors of AerCap and GE, GE will receive 111.5 million newly issued AerCap shares, $24 billion of cash and $1 billion of AerCap notes and/or cash. Upon completion of the transaction, GE is expected to own approximately 46% of the combined company and will be entitled to nominate two directors to the AerCap Board of Directors.

The transaction is subject to approval by AerCap shareholders, receipt of necessary regulatory approvals and satisfaction of other customary closing conditions. The transaction is expected to close in the fourth quarter of 2021.

NautaDutilh advised AerCap alongside Cravath, Swaine & Moore LLP. The NautaDutilh team is led by Paul van der Bijl and consists of Jaap Jan Trommel, Esther Schreiber, Sanne Meester (Corporate M&A), Sjuul Jentjens and Chris Warner (Tax).

For additional information visit www.nautadutilh.com

SKRINE

ADVISES TYSON INTERNATIONAL HOLDING COMPANY ON CONDITIONAL SALE AND PURCHASE AGREEMENT FOR 49% ACQUISITION OF DIDNING SUPREME SDN BHD

KUALA LUMPUR - 15 February 2021: Tyson International Holding Company ('Tyson') entered into a conditional sale and purchase agreement on 10 February 2021 ('SPA') to acquire 49% of Dindings Supreme Sdn Bhd ('DSSB') from Malaysian Flour Mills Berhad ('MFM') for a cash consideration of up to RM420 million. The proposed acquisition by Tyson is part of a proposed strategic partnership with MFM.

DSSB is presently a wholly owned subsidiary of MFM and holds the entire equity interests of Dindings Poultry Processing Sdn Bhd ('DPP') and Dindings Poultry Development Centre Sdn Bhd ('DPDC') (except for one ordinary share in DPDC which is held by Perak State Agricultural Development Corporation ('PPPNP'). DSSB, DPP and DPDC ('DSSB Group') collectively undertake vertical integrated poultry business comprising poultry farming, feed milling and poultry processing.

The SPA is conditional upon various approvals and consents being obtained, including the approval of the shareholders of MFM, PPPNP and the creditors or lenders of MFM and/or DPP and DPDC.

On the completion date of the SPA, Tyson, MFM, DSSB and certain parties related to the aforesaid parties will enter into five agreements to give effect to the strategic partnership between Tyson and MFM, including a shareholders agreement between Tyson and MFM to regulate the management and affairs of the DSSB Group.

The SPA and the strategic partnership agreements are expected to be completed in the second quarter of 2021.

Tyson's ultimate holding company is Tyson Foods, Inc., which is listed on the New York Stock Exchange, whilst MFM is listed on the Main Board of Bursa Malaysia.

Our Firm advised Tyson on the Malaysian aspects of the SPA and the strategic partnership agreements. The main lawyers involved in the transaction were Phua Pao Yii (Lead Partner), Jesy Ooi (Partner), Tan Wei Liang (Associate) and Ting Shi Jing (Associate).

For additional information visit www.skrine.com

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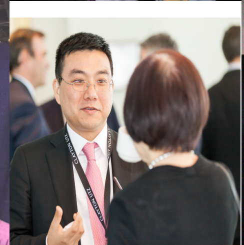


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Advocates, Solicitors and Notaries

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SKRINE

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TOZZINIFREIRE
ADVOGADOS

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

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

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

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

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

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

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

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

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

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

Practice Areas

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March 2, 2021

TOZZINIFREIRE
ADVOGADOS

New Rules Property Insurance: SUSEP Circular No. 621/2021

INTRO

- Simplifying and modernizing property Insurance (mass);
- Greater contractual freedom;
- Optional application for large risk (subject to a specific rule);
- Necessary compliance with the rules of good practice by insurance companies;
- Express liability of insurance companies for information and services provided by their intermediaries;
- 64 articles;
- 12 revoked rules;
- New products: immediate effect from March/2021;
- Products in commercialization: transition period of 180 days (end of August/2021)

CONTRACTUAL CONDITIONS

- Extinction of the mandatory structuring in general, special and particular conditions;
- Prior availability to the proponent;
- In the case of a proposal, the proponent, its legal representative or the insurance broker must **sign a statement**, which may be included the proposal itself, demonstrating that it is aware of the contractual conditions;
- The contractual conditions and their eventual alterations must be registered electronically at SUSEP prior to their commercialization;
- Any alteration in the policy in effect can only be made with the express agreement of the insured or his legal representative;
- The contractual conditions must be clear, objective and easy to understand;
- Highlight for the insured's obligations and/or rights restrictions.

Technical Note

SHOULD:

- Be technically structured and closely related to the contractual conditions;
- Be presented to SUSEP when requested or when provided in specific regulations.

Risk Assessment

- It is up to the insurance company to provide, in an objective way, all the necessary explanations for its correct filling out, as well as to specify all the implications, in case of inaccurate information properly proven.

MANDATORY MINIMUM ELEMENTS

- Purpose of the insurance, definitions, ways of contracting, geographical scope
- Coverage (possibility of offering all risks and combined coverages)
- Excluded risks: Acts performed by the insured in a state of mental insanity, intoxication or under the influence of intoxicating substances cannot be excluded, but may be considered as causes of aggravation of risk susceptible of leading to loss of coverage, upon demonstration of the causal link + exclusions referring to sanctions must be clear and objective, and cannot contain generic references.
- Acceptance, term and renewal
- Policy competition clause (free writing)
- Deductibles, obligatory participations by the insured and shortages
- Premium payment
- Indemnity, Communication, Regulation and Settling of the insured event (prohibition to include a clause that sets a maximum period for the communication of the insured event, settling continues to be in 30 days)
- Reinstatement, Loss of Rights, Cancelation and Termination of Contracts
- Dispute Resolution

Service Provisions

- Free choice of service providers by the insured and/or
- Indication of the network referenced by the insurance company, by means of a clear and prominent clause, in order to evidence its limitations as to the choice of the provider.

PROPOSAL

The proposal should include the following information:

- the acceptance of the insurance proposal is subject to risk analysis;
  - the registration of the product is automatic and does not represent approval or recommendation by SUSEP; and
    - the insured may consult the registration status of the insurance broker and the insurance company at the website www.susep.gov.br.

REVOKED RULES

SUSEP Circular No. 168/2001
Additional Clause in the Policy of Exclusion for Acts of Terrorism

SUSEP Circular No. 239/2003
Payment of premiums related to property insurance policies

SUSEP Circular No. 256/2004 and alterations
Contractual Conditions and Actuarial Technical Notes for Property Insurance Policies

SUSEP Circular No. 265/2004
Contractual conditions and respective tariff provisions and actuarial technical notes for standardized plans

SUSEP Circular No. 458/2012
Revoke of singular insurance

SUSEP Circular Letter/DETEC No. 5/2004
Competition clause

SUSEP Circular Letter/DETEC/GAB/No. 5/2008
Legal services

SUSEP Circular Letter/ DETEC/ GAB/ No. 7/2008
Coverage for Kidnapping and Extortion

Art. 7 to art. 14 of SUSEP Circular No. 535/2016
Codification of lines of Insurance (composed plans)

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Bennett Jones

BLOG

Important New Guidance from the Court of Appeal on TSX Majority Voting Rules, Reasonable Expectations in Oppression Claims and Contractual Set-Off

March 11, 2021

Written by Alan P. Gardner, Jonathan G. Bell, Justin Lambert and Joseph N. Blinick

Since 2014, the Toronto Stock Exchange (TSX) has required listed issuers without a majority shareholder to implement a majority voting policy requiring each of its directors to be elected by a majority of the votes cast (50 percent plus one vote) with respect to their election at uncontested shareholder meetings. The TSX's Majority Voting Requirement (the TSX Requirement) provides that, subject to exceptional circumstances, any director who fails to meet this threshold must immediately tender their resignation.

In *Baylin Technologies Inc. v Gelerman*, 2021 ONCA 45, the Ontario Court of Appeal provided helpful guidance on the application of the TSX Requirement, clarifying that in determining whether a director obtained a majority of votes, votes that are withheld are to be treated as votes against the director's election. Additionally, the Court of Appeal provided an important reminder that reasonable expectations in relation to an oppression claim are to be assessed objectively. Finally, the Court of Appeal also provided important guidance concerning the ability to use contractual set-off clauses in respect of non-monetary property such as share certificates.

Background Facts

Under the terms of an asset purchase agreement (APA) between Spacebridge Inc. and Baylin Technologies Inc. under which Baylin acquired Spacebridge, David Gelerman, the president and CEO of Spacebridge, was to be nominated for election to Baylin's board of directors at both the 2018 and 2019 annual general meetings (AGM) of Baylin's shareholders.

Gelerman was nominated and elected to Baylin's board at the 2018 AGM. However, prior to the 2019 AGM, Gelerman received a letter from a member of Baylin's board advising that while he would be nominated for re-election pursuant to the terms of the APA, Baylin's largest common shareholder did not intend to vote in his favour. Gelerman was encouraged in the letter to contact the shareholder to discuss the concerns relating to Gelerman’s presence on Baylin's board, but Gelerman did not respond. At the 2019 AGM, Gelerman only received 29.13 percent of votes in favour of his election whereas 70.87 percent of the votes were withheld. After the meeting, Gelerman's resignation was requested pursuant to Baylin's Majority Voting Policy (the Policy), which required that a director receive more "for" votes than "withheld" votes in their election. Gelerman refused to tender his resignation, and brought a claim seeking an order under the oppression remedy set out in section 248 of Ontario's *Business Corporations Act* allowing him to serve a second year as a director of Baylin.

In addition to the claims regarding Gelerman's directorship, Baylin asserted claims for indemnity against Spacebridge, and sought to exercise its rights under a contractual set-off clause in the APA, which allowed Baylin to set-off any indemnification amount to which it was entitled under the APA against amounts otherwise payable to Spacebridge. Baylin sought to set-off against instalments of share certificates payable to Spacebridge under a consulting agreement entered into in conjunction with the APA, which stipulated that a portion of the consulting fees were to be paid by instalments of Baylin share certificates held in trust until their release to Spacebridge.

Baylin's Majority Voting Policy

The lower court set Baylin's Policy aside finding that it did not comply with the TSX Requirement as it treated withheld votes as votes against a director's election, instead of recognizing them as votes not cast at all. This was held to be contrary to the TSX Requirement's reference to a director needing to receive a majority of votes cast with respect to their election.

Writing for the Ontario Court of Appeal, Nordheimer JA held that the purpose of the TSX Requirement was "to provide a meaningful way for security holders to hold directors accountable and remove underperforming or unqualified directors." To accomplish this purpose the TSX Requirement was designed to consider withheld votes as votes against a director's election. This ensured that no director could be elected with a single vote in their favour as is possible under Canadian corporate statutes where withheld votes are not counted in the tally of votes. Therefore, Baylin's Policy, which provided that a director had to receive more "for" votes than "withheld" votes, was declared to be compliant with the TSX Requirement and that it remains in force.

Additionally, the Court of Appeal noted that although the TSX has provided certain examples they believe constitute exceptional circumstances that would justify a company's refusal to accept a director's resignation in the absence of that director receiving majority of votes (e.g., if accepting a director's resignation would render the listed issuer non-compliant with corporate or securities law requirements, applicable regulations, or commercial agreements regarding the composition of the board), the TSX Requirement does not mandate that these exceptional circumstances be included in each policy, and a listed issuer is free to expressly stipulate within its own majority voting policy what it will consider an exceptional circumstance providing grounds to refuse a director's resignation.

Reasonable Expectations and the Oppression Remedy

While the lower court held that Gelerman had a reasonable expectation that he would be a director of Baylin for a two-year period based upon the terms of the APA, the Court of Appeal determined that while Gelerman may have held a subjective belief that he would be a director of Baylin for that period, this was not an objectively reasonable expectation for two reasons:

1. The APA only stated that Gelerman would be nominated for election. Gelerman did not obtain an undertaking that he would be given support in his election, and this was a protection that could have been bargained for as part of the terms of the APA. The Court of Appeal noted that this type of commitment was specifically requested by Gelerman in connection with the negotiation of the APA, but it was expressly rejected by Baylin.
2. Gelerman was warned in advance that he would not have sufficient support for his election at the 2019 AGM, and took no steps to seek the support of Baylin's largest shareholder prior to the 2019 AGM.

Accordingly, the Court of Appeal found that there was no oppressive conduct on the part of

Baylin.

Contractual Set-Off Clauses

The lower court determined that Baylin was not permitted to set-off its indemnification claims against the share certificates held in trust, as the set-off clause under the APA only allowed for set-off against amounts otherwise "payable" by Baylin to Spacebridge. The lower court found that under the consulting agreement, Baylin's fee was "paid" when the share certificates were delivered to its counsel, who acted as trustee, holding the certificates in trust until their release in quarterly instalments over the two-year period following the execution of the agreement.

However, the Court of Appeal disagreed, and ruled that the share certificates held in trust were still amounts that remained "payable" from Baylin to Spacebridge. In this regard, the structure of the consulting agreement provided that the amounts due to Spacebridge were to be paid out over a two-year period, and thus the Court of Appeal found that the share certificates were not truly "paid" until they were released by the trustee at the end of each quarter. Accordingly, the Court of Appeal held that the share certificates were within the scope of the APA's set-off clause.

The Court of Appeal also noted that there was a lack of jurisprudence analyzing whether share certificates could be subject to a set-off claim. It was acknowledged that the concept of legal set-off requires mutual debts, and that equitable set-off is only available in respect of claims for monetary sums. Therefore, a claim of set-off against share certificates would not be possible under either doctrine as shares do not constitute debt obligations owed to a shareholder, nor are they akin to a sum of money. However, the Court of Appeal stated that since Baylin sought to invoke a contractual right to set-off that was bargained for under the APA, the claim was not limited by the requirement of mutual debts and monetary sums, and thus Baylin was able to assert a claim to set-off the indemnification amount against the share certificates held in trust.

Takeaways

The Ontario Court of Appeal's decision in *Baylin Technologies* provides a number of important takeaways:

1. In determining that Baylin's Policy was compliant with the TSX's Majority Voting Requirement, the Court of Appeal clarified that withheld votes for the election of a director

are to be treated as votes against election, ensuring that the goals of shareholder democracy and director accountability as intended by the TSX are fulfilled.

2. In light of the Court of Appeal's decision, TSX-listed companies may consider reviewing their majority voting policies given the new judicial guidance that the TSX's guidelines are flexible in nature. Accordingly, while the guidelines must be followed, companies should have more latitude to draft majority voting policies that are tailored to their specific circumstances and objectives.

3. The decision in *Baylin Technologies* makes it clear that expectations will not be found to be reasonable in the context of an oppression claim where the expected result is beyond the scope of what a party had bargained for under a negotiated agreement.

4. The Court of Appeal's decision provides important guidance on contractual set-off clauses, highlighting that parties can contract for a right to set-off against non-monetary property such as share certificates held in trust, and in so doing, can override the stringent requirements of the doctrines of legal and equitable set-off which would typically preclude such a practice.

If you or your business have any questions, please contact a member of the Bennett Jones Securities Litigation group. *Special thanks to articling student Peter Douglas for his assistance with preparing this blog post.*

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Posted on: February 24, 2021

USING THE WRONG POLICY WORDING TO DENY COVERAGE DOES NOT EXTEND THE LIMITATION PERIOD

By: Nida Sohani

A recent ruling from the Alberta Queen's Bench confirmed a lower court's decision that an inadvertent mistake by an insurer in using the incorrect policy wording to deny coverage to its insured did not extend the running of the limitation period.

In *Condominium Corporation No 0427067 v Aviva Canada Inc,* 2021 ABQB 43 a condominium corporation commenced an action against six subscription policy insurers (the "Insurers") after the Insurers denied coverage for its $4.4 million claim for water damage causing construction deficiencies. The plaintiff unsuccessfully argued that the Insurers and their adjuster, unusually acting for both the plaintiff and the Insurers, had engaged in fraudulent concealment after the plaintiff realized years later that the denial letter issued in 2012 had been based on the wrong policy wording.

The Facts

On June 29, 2011, the plaintiff discovered water damage to the condominium building and on December 8, 2011, its property manager asked an adjuster (the "Adjuster") employed by a large adjusting firm to assess the damage and whether it was covered by the subject property insurance policy (the "Policy") coverage. At the time of the Adjuster's retainer by the plaintiff, the Adjuster's firm had already been contracted to provide adjusting services to one or more of the Insurers. Further to the second retainer the Adjuster advised the Insurers that coverage denial was possible and the next day, December 16, 2011, the Insurers authorized the denial on the basis that the damage being claimed was not the result of an insured peril.

In late January 2012, one of the subscribing insurers, contacted the Adjuster and requested a copy of the relevant policy wording. This Insurer raised the possibility that there may be coverage and that the lead Insurer may want to re-examine its position on denial.

The Adjuster responded by providing the subscribing Insurer with a copy of the Policy wording that became effective July 1, 2011. This wording was provided to the Adjuster by the plaintiff's own insurance broker. This wording was subsequent to a renewal of the Policy which was in effect at the time of the loss in June 2011. The subscribing Insurer had some concerns about the wording provided by the Adjuster as it was different than the wording it had, however the subscriber decided to follow the lead subscriber's determination of coverage and await the Adjuster's final report.

A formal denial letter was issued by the Adjuster on March 23, 2012. The letter cited wording, exclusions, and a different policy number than the Policy in place as of the June 29, 2011 date of loss.

A few years later, in the context of a concurrent construction deficiency action, the plaintiff realized that that the denial letter of March 2012 was based on the wrong policy wording. The plaintiff filed a Statement of Claim in 2017 to challenge the denial of coverage.

The coverage action was dismissed on a summary basis in September 2019 as being statute-barred. The plaintiff appealed on the grounds that the references to the wrong policy in the context of denial along with the Adjuster's conflicted position and failure to disclose the one subscribing Insurer's concern about the applicable Policy language amounted to a fraudulent concealment that would postpone the commencement of the limitation period.

The Ruling

In rejecting the plaintiff's arguments the court found that the evidence did not categorically confirm that the plaintiff was unaware that the Adjuster was also acting for the Insurers. On the contrary, the facts supported the conclusion that the plaintiff, effectively through its property manager agent, was aware that the Adjuster was acting on behalf of both itself and the various Insurers. The court also noted that the plaintiff was being assisted by sophisticated parties all of whom were well versed in the insurance and claims industry.

On the issue of whether the Insurers and Adjuster's actions were unconscionable, the court held that when viewed in context of the entirety of the circumstances, the Adjuster's failure to disclose the lone subscribing Insurer's concerns about Policy wording was not an unconscionable act. This was notwithstanding the special relationship between the Adjuster and the plaintiff as well as the plaintiff vis-à-vis the Insurers.

Finally, the court noted that in order to suspend the limitation period on the basis of fraudulent concealment, an insured must prove it exercised reasonable or due diligence to discover the purported fraud. The court found that in the circumstances, it was reasonable to expect that the plaintiff and its team of advisors including its property manager, broker and counsel would have, through the exercise of due diligence, detected in a timely manner the references to the incorrect Policy wordings used by Insurers in their denial.

Practical Considerations for Insurance Professionals

0427 v Aviva demonstrates for all parties involved in assessing coverage the importance of both identifying the relevant date or dates of loss and the correct or applicable policy declarations, wordings, and endorsements for such date(s).

This is not only true for an insured who may lose the opportunity to commence an action against an insurer, notwithstanding that the denial was based on the insurer's mistake, but also for insurance brokers and legal counsel representing the insured. Both courts based their decisions in part on the fact that the plaintiff had access to legal counsel, an insurance broker, and a property management company to assist in advancing its coverage claim. A failure on the part of insurance professionals to conduct due diligence on behalf of their clients could open the door for negligence claims.

Finally, while the court found the plaintiff was likely aware of the Adjuster's dual role even though he did not explicitly advise of this fact, adjusters are well advised to clearly disclose any dual agency roles at the onset or altogether avoid such potential conflicts. This can avoid future allegations of bias or "abuse of a confidential position, some intentional imposition, or some deliberate concealment of fact".

Should you have any questions about this article, contact Insurance Lawyer, Nida Sohani here.

March, 2021

PUBLIC TENDERS OF TRAIN PROJECT IN CHILE IS ANNOUNCED

Chile's national railway, Grupo EFE, announced three tenders for a passenger train that will run 61 kilometers from Alameda to Melipilla in the Santiago Metropolitan Region. The project includes an **estimated investment of USD1.5 billion** to build a passenger transport service that will benefit eight communes.

With 11 stations and **connections to Metro lines 1 and 6**, it is estimated that the new route will have an approximate demand of **50 million passengers per year** in an area with more than 1.1 million inhabitants.

The construction process is expected to take place over a period of 5 years, and EFE hopes to put the new service into operation in 2025.

Tender 1: Construction of stations and platforms for Américo Vespucio, Tres Poniente, Ciudad Satellite and Melipilla.

Tender 2: Construction of the stage 1 confinement strip.

Tender 3: Construction of vehicular crossings for Lucas Pacheco and Anibal Pinto- Los Carrera

Sale of concession terms: **March 1-17, 2021**

Terms and other documents are available at: http://www.efe.cl/licitaciones

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

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COLOMBIA ISSUES TEMPORARY PROTECTION STATUTE FOR MIGRANTS

March 2, 2021

The President of the Republic issued the Temporary Statute for the protection of migrants from Venezuela, which includes a registry of migrants and a protection permit, which will be valid for 10 years.

The purpose of this regulation is to create the Temporary Protection Statute for Venezuelan Migrants Under the Temporary Protection Regime, defined as a legal mechanism for temporary protection focused on the Venezuelan migrant population. The objective of the statute is to create a registry of migrant population and to grant a temporary benefit of regularization.

The individuals who meet any of the following criteria are eligible for the permit:

1. Being in Colombian territory on a regular basis with one of the following permits: Entry and Permanence Permit (PIP), Temporary Permanence Permit (PTP) or Special Permanence Permit (PEP), the permit must be valid.
2. Being in Colombian territory on a permanent basis as holders of a Safe-pass of Permanence SC - 2 within the framework of the processing of an application for the recognition of the refugee status.
3. Being undocumented in Colombian territory on January 31st, 2021.
4. Enter Colombian territory through an Immigration Control Post, complying with the requirements established by the immigration regulations, during the first two (2) years of validity of this Statute.

The Single Registry of Venezuelan Migrants will serve as the basis for the development of public policies and the identification of migrants who meet the conditions that allow them access to this temporary protection. Inclusion in the registry does not imply modification of immigration status or recognition of refugee status.

The administration of this registry will correspond to Migración Colombia, entity that will issue the administrative act that puts it into operation.

Finally, the Temporary Protection Permit (PPT) will be created as a mechanism for migratory regularization and identification document, which will allow to remain in the national territory and to exercise any legal activity.

Arias

GUATEMALA

ENACTS THE LAW ON LEASING

Mar/2021

On 2 March 2021, the Law on Leasing, Decree 2-2021, (hereinafter, “the Law”) was published in the Official Gazette of Guatemala after being enacted and promulgated by the President. This law establishes the general legal framework to regulate leasing operations as well as the rights and obligations of the parties engaged in this type of operation in Guatemala.

Among the general regulation established on the Law, it is worth mentioning the following: it defines four types of leasing, namely, financial, property, operative, for housing and for social housing. Additionally, the Law obliges all entities whose main commercial activity is to conduct leasing operations to include to their company names any of the following terms: “leasing”, “lease”, “arrendadora financiera”, “arrendadora operativa”, and others derived from these terms. Nevertheless, banks, cooperatives, microfinance institutions and private financial corporations are excluded from this provision; therefore, all entities currently engaged on this activity, shall modify their company names in a term of 6 months after the entry into force of this law, in case they do not comply with the requirement set forth above. In the same term, for example, all lessors shall adapt their accounting system to International Accounting Standards (IAS). Regarding the party’s obligations, the Law, establishes, for example, that the lessee is obligated to obtain an insurance policy which must cover all risks derived from the nature and the use given to the leased assets; furthermore, it establishes that, except for vehicles used for commercial carriage of passengers or goods, only the lessee is liable for any damages caused to third parties as a consequence of the use of the leased assets. Regarding the contract form, the Law requires the execution of a written agreement; and, with regard to the contract’s term, it establishes that, unless otherwise agreed, it is a mandatory term.

The Law also regulates tax related issues and establishes the procedural rules to obtain the eviction of the leased assets, which may be conducted by extrajudicial procedures, leaving the judicial intervention only for the enforcement of decisions issued in the context of said proceedings.

According to its own provisions, the Law will enter into force 3 months from today.

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Production Linked Incentive Scheme to promote domestic manufacturing of telecom and networking products

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The Ministry of Communication (Department of Telecommunication) has notified the Product Linked Incentive Scheme ('PLIS') to promote manufacturing of telecom and networking products.

The Scheme aims to provide financial impetus to entities engaged in manufacturing of specified telecom and networking products.

Eligibility

I. Achievement of minimum threshold of cumulative incremental investment over a period of four years
II. Incremental sales of manufactured goods net of taxes over the base year i.e FY19-20
III. Entities can invest in single / multiple eligible products to meet the minimum incremental investment and sales threshold
IV. Inclusion of contract manufactures as per FDI policy
V. Minimum investment threshold for MSME shall be INR 10 crores and INR 100 crore for others excluding land and building
VI. Benefit under this Scheme for the product cannot be availed under any other PLIS of Central Government
VII. Total number of beneficiaries will be limited due to fixed budgets

Tenure of the Scheme

I. Scheme shall be effective form April 1, 2021
II. Investment will be permitted in 4 years , whereas the support shall be permitted for 5 years

Incentives

I. The incentive will be subject to annual investment targets been met.
II. The applicable incentive percentage shall be as follows:

Type of Industry	Year	Rate of incentive (%)
Micro Small and Medium Enterprise ('MSME')	**1st and 2nd year**	**7**
	3rd year	**6**
	4th year	**5**
	5th year	**4**
Other than MSME	**1st and 2nd year**	**6**
	3rd and 4th year	**5**
	5th	**4**

III. The incentive will be applicable on sales and manufactured finished goods net of taxes , discounts, commissions etc., (as distinct from traded goods) and the entity meeting the cumulative investment criteria.

IV. Total incentive shall be capped based on total investment committed at the time of application.

V. Each beneficiary will have to meet the minimum incremental sales criteria over the base year as prescribed in Annexure -2 to the notification

Eligible Products

S.no	Type	Description of goods
1	**Core transmission equipment**	Dense Wavelength Division Multiplexing (DWDM), Optical Transport Network (OTN), Multi Service Provisioning Platform (MSPP), Synchronous Digital Hierarchy (SDH), Packet Transport Network (PTN)/ Multi-Protocol Label Switching (MPLS), Gigabit Passive Optical Networks (GPON)/ Next Generation- Passive Optical Network (NGPON) Optical Line Terminal (OLT), Digital Microwave Radio
2	**4G / 5G, Nest Generation Radio Access Network and Wireless Equipment**	4G/ Long Term Evolution (LTE)Radio Access Network (RAN) Base Station & Core Equipment; 5G RAN Base Station & Core Equipment; Edge and Enterprise Equipment; Wireless Telecommunication Equipment in Access and Backhaul
3	**Access and Customer premises equipment (CPE), Internet of Things (IoT) Access Devices and other Wireless Equipment**	Unified Communications Platforms, IP Multimedia Subsystem, Soft Switch, GPON Optical Network Terminal (ONT), Wireless Fidelity (WiFi) Access Point and Controller, LTE CPE, 5G CPE, Short Range Devices and Associated Electronics in new technologies like 4G/5G/Fibre To The Home (FTTH) etc
4	**Enterprise Equipment ; Switches and Routers**	Switches , Routers, Internet Protocol (IP)and Packet Switching and Routing Apparatus.
5	**Any other product as declared by Empowered Group Of Secretaries (EGoS).**	

Kochhar & Co Comments

With the 'Atmanirbhar Campaign', Government of India (GOI) has taken all measures to notify the much awaited PLI scheme to position India as a global hub for manufacturing of telecom and networking products. The PLI Scheme shall definitely boost the MSME sector with higher incentive structure offered in a range between four and seven per cent in the initial three years. The provision for higher incentive to the MSME sector is likely to encourage the domestic telecom manufacturers to become part of the global supply chain.

We foresee that since the total cash outlay is budgeted, only limited applicants would be approved under the scheme by DOT. Eventhough, the detailed guidelines specifying the eligibility conditions and procedure for filing the application is awaited, the companies could decide to review their business strategies in light of the new announcement.

For a deeper understanding of the policy and any assistance in this regard, please feel free to connect with:

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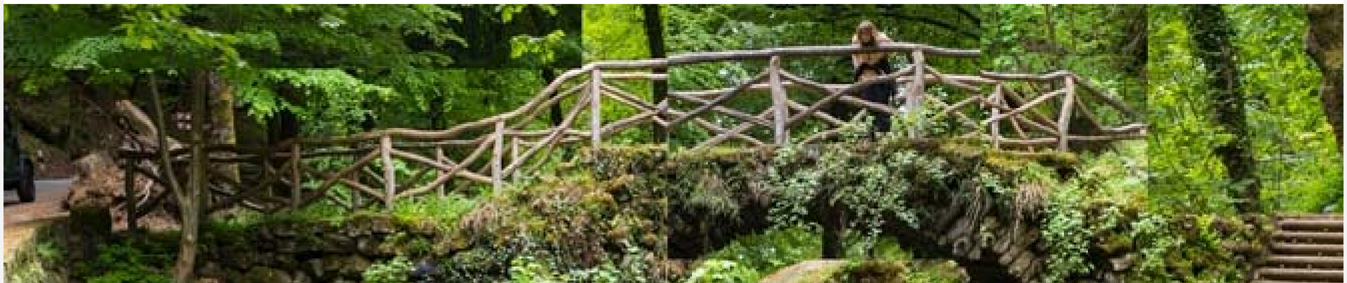
Investment Funds



Luxembourg

Joint ESA supervisory statement provides guidance on SFDR application timelines

Tuesday 2 March 2021

*On 25 February 2021, the European Supervisory Authorities ("**ESAs**") published a joint supervisory statement (the "**ESA Statement**") providing guidance on the application of Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector, as amended (the "Sustainable Finance Disclosure Regulation" or "**SFDR**").*

The main objective of the ESA Statement is to provide further guidance on and ensure consistent application of sustainability-related disclosures in the so-called interim period between 10 March 2021 and 1 January 2022.

Delayed Level 2 RTS application date

Most so-called Level 1 provisions on sustainability-related disclosures laid down in the SFDR apply from 10 March 2021 onwards. However, the proposed application date for the draft level 2 Regulatory Technical Standards ("**RTS**") has been delayed until 1 January 2022.

Compliance during the interim period

In their final report to the European Commission of 4 February 2021, the ESAs recommend that financial market participants and financial advisers apply the draft RTS, even though the RTS have yet to be finalised. The ESA Statement expressly refers to the draft RTS with respect to compliance with the following provisions of the SFDR:

- Article 2a - Principle of "do no significant harm" ("**DNSH**")
- Article 4 - Transparency of adverse sustainability impacts at entity level
- Article 8 - Transparency of the promotion of environmental or social characteristics in pre-contractual disclosures
- Article 9 - Transparency of sustainable investments in pre-contractual disclosures
- Article 10 - Transparency of the promotion of environmental or social characteristics and of sustainable investments on websites

The ESA Statement departs from the more principles-based approach endorsed by the European Commission in its letter announcing the interim period.

SFDR and Taxonomy Regulation application timelines

In an annex to the ESA Statement, the ESAs provide guidance on the timelines for application of specific provisions of the SFDR, Regulation (EU) 2020/852 (the "**Taxonomy Regulation**") and related RTS.

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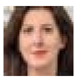

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SKRINE

Cape Town Convention: Malaysian Court Rules That Airasia X Restructuring Scheme Is an 'Insolvency Re | Skrine - Advocates & Solicitors

08 March 2021

Key Contacts: Sharon Chong Tze Ying; Janice Ooi Huey Peng

In the recent court decision in **AirAsia X Berhad v BOC Aviation Limited & 14 Ors (Originating Summons No.: WA-24NCC-467-10/2020)**, the Malaysian High Court held that a scheme of arrangement under section 366 of the Malaysian Companies Act 2016 is an "insolvency-related event" for the purposes of the Convention and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment ("**the Protocol**").

The Convention on International Interests in Mobile Equipment ("**the Convention**"), commonly referred to as the Cape Town Convention, is an international treaty intended to standardise transactions involving movable property. Malaysia acceded to the Convention and the Protocol on 2 November 2005. The Convention and the Protocol entered into force in Malaysia on 1 March 2006. The International Interests in Mobile Equipment (Aircraft) Act 2006 which was enacted to implement the Convention and the Protocol came into force on 19 October 2006.

The Convention creates international standards for registration of contracts of sale, security interests and leases and provides legal remedies for default in financing agreements, including repossession and the effect of bankruptcy/insolvency laws. The primary aim of the Convention is to resolve the problem of obtaining certain and opposable rights to high-value aviation assets, namely airframes, aircraft engines and helicopters which, by their nature, have no fixed location. This problem arises primarily from the fact that legal systems have different approaches to securities, title retention agreements and lease agreements, which create uncertainty for lending institutions regarding the efficacy of their rights. This hampers the provision of financing for such aviation assets and increases the borrowing cost.

Key points:

1. A scheme of arrangement falls within the definition of an 'insolvency-related event' under Article XI(10) of the Protocol (as defined under Article I(1)(m) of the Protocol).

2. The Convention applies to both rights *in rem* and rights *in personam*.

3. 'Security deposits' and 'maintenance reserves' paid by aircraft lessees to the lessors do not constitute 'security'. As such, aircraft lessors holding 'security deposits' and 'maintenance reserves' are not to be regarded as secured creditors.

Brief Facts:

Pursuant to an application under section 366 of the Companies Act 2016, AirAsia X Berhad ("**AAX**") applied for leave from the High Court to convene a creditors' meeting for the purpose of considering and approving a proposed scheme of arrangement ("**Proposed Scheme**")

(“**Leave Application**”). Under the Proposed Scheme, AAX’s current liabilities of RM64.15 billion will be written down to RM200 million to be shared *pari passu* with its scheme creditors, hence resulting in a ‘cram-down’ in the form of 99.7% hair-cut.

15 creditors filed and obtained leave from the High Court to intervene – among others, Malaysia Airports (Sepang) Sdn Bhd (the operator of the Kuala Lumpur International Airport), aircraft lessors and Airbus S.A.S..

The classification of Scheme Creditors changed three times since the filing of the Leave Application. The latest classes of Scheme Creditors at the hearing of AAX’s application were **Secured Class A** creditors (creditors of AAX having security over the assets of AAX) and **Unsecured Class B** creditors (creditors who have unsecured claims against AAX).

The aircraft lessors were treated by AAX as “*creditors of AAX having security over the assets of AAX*” and placed in Class A together with the secured lenders. It was argued on behalf of AAX that the aircraft lessors were considered as secured creditors by virtue of the ‘security deposits’ and ‘maintenance reserves’ held by the aircraft lessors.

Decision of the High Court

A scheme of arrangement is an “insolvency-related event” for the purpose of Article XI(10) of the Protocol

The Learned Judge agreed with the aircraft lessors that a scheme of arrangement under section 366 of the Companies Act 2016 would fall within the definition of an ‘insolvency-related event’[1] for the purpose of Article XI(10)[2] of the Protocol.

First, the Learned Judge noted that there had been two recent cases (the Irish High Court case of ***Re Nordic Aviation Capital Designated Activity Company***[3] and the English High Court case of ***Virgin Atlantic Airways Limited***[4]) where the courts had come close to determining the question whether a scheme of arrangement or a restructuring plan is an ‘insolvency-related event’ for the purposes of the Protocol. However, in the end, the question was not necessary for the court’s decision as the creditors had approved the scheme of arrangement and the restructuring plan.

The recent case of MAB Leasing Ltd is also not conclusive and not of guidance as the said case did not decide on the issue of the Convention as no objection was raised by any of the creditors.

Second, based on the principles relating to the interpretation of treaties, the issue of whether a scheme of arrangement is an insolvency proceeding is to be considered based on principles underlying the Convention and not on national law[5]. While the Official Commentary of the Cape Town Convention does not address the issue as to whether a scheme of arrangement is an “*insolvency proceedings*” under the Convention, the Annotation to the Official Commentary on the Cape Town Convention on 16 June 2020, endorsed by Professor Sir Roy Goode, the author of the definitive guide to the Cape Town Convention, confirms that schemes of arrangement fall within the definition of “insolvency proceedings” under the Convention where they are:

1. formulated in an insolvency context, or by reason of actual or anticipated financial difficulties of the debtor company; and

2. collective in that they are concluded on behalf of creditors generally or of classes of creditor that collectively represent a substantial part of the indebtedness.

The Annotation also confirms that a reorganisation arrangement, in which a court acts to facilitate a statutory process and where the court’s approval is required for its implementation, constitutes insolvency proceedings where the assets and affairs of the debtor are subject to control or supervision by a court for the purposes of reorganisation.

Third, the Learned Judge opined that Professor Payne's expert opinion on the Convention produced and relied on by AAX puts too restrictive a meaning to the words "*in which the assets and affairs of the debtor are subject to control or supervision by a court*" as provided for under Article 1(I) of the Convention. According to Professor Payne, three elements are required in order for a scheme of arrangement to be an 'insolvency proceedings' for the purpose of Article 1(l) of the Convention, namely (a) the proceeding must be a collective proceeding; (b) the debtor's assets and affairs must be subject to control or supervision by a court; and (c) the purpose must be the reorganisation of the debtor, or immediate liquidation. Professor Payne's view is that in a scheme of arrangement, the debtor's assets and affairs are not subject to control or supervision by the court because outside the terms of the scheme of arrangement, the directors can continue to manage the company without court's approval.

The Learned Judge was of the view that Article 1(l) does not state that the *entire* assets and affairs of the debtor must be covered under the scheme. Neither does it matter that outside the scheme, possession and management of the company remain with the management. All that is required is that the proceedings being a collective proceedings is such that it involves assets and affairs of the debtor being subject to the control or supervision of the court. The Learned Judge was also of the view that the fact that the Proposed Scheme must be sanctioned by the Court meets the requirement of "*control or supervision by a court*".

The Gibbs Rule[6]

The Learned Judge also considered the Gibbs Rule argued by some of the lessors. The Gibbs Rule is an English common law principle which provides that a debt governed by English law cannot be discharged or compromised by foreign insolvency proceedings.

The Learned Judge held that the Gibbs Rule does not operate to restrict the court from entertaining and if thought fit, approving a scheme of arrangement which involves the discharge or modification of any contractual rights between the scheme company and its creditors even where the contracts are governed by English laws or other foreign laws. This was the approach adopted by the Singapore High Court[7] and the Australia Supreme Court[8], where the Rule has been rejected.

The Cape Town Convention applies to both rights in rem and rights in personam

The Learned Judge disagreed with AAX's submission that the Convention was never intended to regulate rights *in personam* that a creditor might have against a debtor, for example, lease rentals and termination compensation.

Article XI(10) of the Protocol was found to be unambiguous and thus, the words "*obligations under the agreement*" in Article XI(10) of the Protocol must be given its literal, ordinary and natural meaning. In this regard, there can be no doubt that the words must include the obligation of the debtor to pay the rentals under the agreement. To restrict the meaning of the words "*obligations*" to only obligations relating to in rem matters is to read into the Article XI(10) of the Protocol, words which are simply not there. There is nothing to suggest that the Convention is to be viewed narrowly to only extend to rights *in rem*.

The word "obligations" also appears in Article XI(7)[9] of the Protocol where there is little doubt that the word must include the *in personam* obligation to pay rentals under the agreement. The Learned Judge was of the view that it would be "incongruous" that the same word in Article XI(10) of the Protocol bears a different and narrow meaning as suggested by AAX.

The prohibition under Article XI (10) to permit the debtor to modify the obligations under the agreement except with the consent of the creditor was found to be consistent with the purposes of the Convention – to promote and reduce the costs of asset-based financing for airline equipment.

AAX does not require the consent of the aircraft lessors in respect of the 'cram-down' provision under the Proposed Scheme

While the Learned Judge agreed with the lessors that the Convention applies to both *in rem* and *in personam* rights and that a scheme of arrangement under section 366 of the Companies Act 2016 falls under the definition of an "insolvency-related event" under the Protocol, the Learned Judge was nevertheless of the view that in the present case, AAX does not require the consent of the aircraft lessors in respect of the 'cram-down' provision under the Proposed Scheme.

Reading Article XI(7), (10) and (11) together, the Learned Judge was of the view that Alternative A of the Protocol only applies in events where the debtor chooses not to terminate the lease agreement when an insolvency-related event occurs or when the creditor does not exercise its right to repossess the aircraft. In such situations, the obligations under the lease agreement, including the obligation to pay the rentals cannot be modified by the debtor unless with the consent of the creditor.

Aircraft lessors are not secured creditors

The aircraft lessors of 27 aircraft leased to AAX's leasing subsidiaries were originally considered by AAX as 'unsecured creditors'. The status was subsequently changed to 'secured creditors' and the ground for holding this position was disclosed to be based on the 'security deposits' and 'maintenance reserves' that are paid over by AAX to the Lessors pursuant to their respective lease agreements.

The Learned Judge held that AAX cannot treat the Lessors who had paid the 'security deposits' and 'maintenance reserves' as secured creditors as they do not come within the definition of 'secured creditors' under section 2 of the Insolvency Act 1967, which defines a 'secured creditor' as a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor but shall not include a plaintiff in any action who has attached the property of the debtor before judgment.

Another factor which the Learned Judge opined militated against AAX's position is that AAX has no proprietary rights over these 'security deposits' and 'maintenance reserves' once they are paid to the lessors. It was noted that the lessors had in most cases commingled the cash payments with their own funds as is provided in a typical clause relating to 'security deposits' and 'maintenance reserves' in lease agreements. There is no issue of commingling of any *security interests* as the lessors never had any security interest in the 'security deposits' and 'maintenance reserves' to begin with. The Learned Judge agreed with the lessors that the right of disposal of the 'security deposits' and 'maintenance reserves' is no longer with AAX. All that AAX has is a contractual right upon the termination of the lease agreements is to be paid an equivalent sums or balance sum in the event that AAX had met all its obligations thereunder. The fact that the lease agreements provide that the 'security deposits' are "security for the performance of the agreement" does not assist AAX's position any further.

Conclusion

This is indeed an interesting case which will no doubt be instructive in many jurisdictions as the number of airline restructurings continue to rise due to the impact of COVID-19 on the aviation industry.

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[1] "Insolvency-related event" is defined in Article I(2)(m) of the Protocol to mean (a) the commencement of insolvency proceedings; or (b) the declared intention to suspend, or actual suspension of, payments by the debtor where the creditor's right to institute insolvency proceedings against the debtor or to exercise remedies under the Cape Town Convention is prevented or suspended by law or State action.

[2] No obligations of the debtor under the agreement may be modified without the consent of the creditor.

[3] [2020] IEHC 445; In this case, while arguments were put forward by the company that a

scheme of arrangement consists of restructuring of only certain parts of a debtor's assets does not constitute 'insolvency-related event' for the purposes of the Cape Town Convention, the Irish High Court took the view that it was unnecessary to consider or even make a ruling on the potential issues arising under the Cape Town Convention as the scheme in that case was ultimately approved by both classes of creditors unanimously.

[4] [2020] EWHC 2191 (Ch); In this case, the question of whether a cram down of non-consenting creditors pursuant to a restructuring plan would be contrary to the provisions of the Convention was again not decided as Virgin had secured the consent of all Convention creditors prior to the hearing.

[5] *VB Leaseco v Wells Fargo* 384 ALR 379, FCA.

[6] ***Anthony Gibbs and Sons v La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399 (CA)*; recently reinforced by the English Court of Appeal decision of Re OJSC International Bank of Azerbaijan* [2018] EWCA Civ 2802 (CA).**

[7] *Pacific Andes Resources Development Ltd* [2016] SGHC 210.

[8] *Bulong Nickel Pty Ltd* [2002] WASC 226.

[9] "*The insolvency administrator or the debtor, as applicable, may retain possession of the aircraft object where, by the time specified in paragraph 2, it has cured all defaults other than a default constituted by the opening of insolvency proceedings and has agreed to perform all future obligations under the agreement. A second waiting period shall not apply in respect of a default in the performance of such future obligations*"

March 2021

Amendment to the General Law of Negotiable Instruments and Credit Transactions

On February 15, 2021, the Joint Commissions of Finance and Public Credit and Legislative Studies of the Mexican Senate issued an opinion detailing the purpose, description, and considerations of certain legislative amendments to the General Law of Negotiable Instruments and Credit Transactions (the "Law").

The purpose of such amendments is to regulate payroll deduction loans as a subtype of the credit transactions provided for in the Law. The amendments set forth the rights and obligations of the parties to said credit transactions while limiting the creditor/lender status to Financial Institutions, referred to in the Law for the Transparency and Regulation of Financial Services.

These amendments seek to protect employees from abusive practices by non-regulated institutions without an applicable legal framework that protects the rights of financial services users, and to provide for legal certainty to payroll deduction loans, create effective mechanisms to counter such abusive practices and provide certainty to the relationship between creditors and employers and/or social security institutions, ensuring reasonable and effective collection of such loans.

Since payroll deduction loans involve specific regulation that incorporates a number of concepts, such as an order of payment and a payment compliance agreement, these credit transactions need to be regulated within a specific section avoiding confusion with other credit transactions covered by the Law (a new Third Section of Chapter IV of the Law).

Under payroll deduction loans, an employee may enter into a loan agreement with a Financial Institution, authorizing for payments to be made by his or her employer from one of the following sources of payment: (i) salary earned from the employment relationship, (ii) extraordinary benefits of a labor nature, (iii) retirement or annuity payments, and/or (iv) earned salary-assimilated payments.

Additionally, in order to duly enter into a payroll deduction loan, Financial Institutions and employers or social security institutions of the borrower, must enter into a payment compliance agreement. Such agreement may not provide for any consideration in favor of such employer or social security institution other than the right of restitution to the employer or institution of the actual, reasonable and documented transaction costs.

It is also important to note that payroll deduction loans must meet the following requirements: (i) an express reference to the source of payment, (ii) consider the payment capacity and total indebtedness of the borrower, (iii) that the loan and payment compliance agreements set forth conditions that ensure the uninterrupted and continuous amortization of the principal amount of the loan, (iv) that loans accrue interest as of the moment they are entered into, (v) that interest and fees to be accrued under a loan must be expressly provided for in the relevant agreement, and (vi) that Financial Institutions must verify, with the borrower's authorization, its credit history and report the borrower's credit score.

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Simpson Grierson

March 04, 2021 | 4 min read

New Zealand's overseas investment regime continues to evolve, with a number of recent developments:

- the new investor test takes effect from 22 March 2021;
- the emergency notification regime has been extended to 25 May 2021; and
- a review of application fees has been announced.

We provide details of these developments below, and offer some comment of our own about the new investor test, and the fee review. We also offer some final thoughts on our recent experiences with OIO processing times.

New "investor test" in force on 22 March 2021

The "investor test" holds a key place in New Zealand's overseas investment regime. In most cases, consent may not be granted (to allow a transaction captured by the regime to proceed) unless the investor test is met. A new "investor test" (introduced in 2020) will come into force on 22 March 2021.

The new test will replace the existing "investor test" criteria with a two-part test, focussing on "character" and "capability" factors.

- *Character* factors include: convictions resulting in imprisonment; corporate fines in New Zealand and overseas; and being ineligible to come to New Zealand.
- *Capability* factors include: prohibitions on being a director, promotor, or manager of a company; penalties for tax avoidance or evasion; and unpaid tax of $5 million or more.

The investor test is met for a consent application if (a) the "relevant overseas person" and any "individuals with control" answer 'no' to all factors; or (b) if a factor is present, the decision-maker is satisfied that the factor does not make an investor unsuitable to own or control a sensitive New Zealand asset.

The new investor test will apply if you lodge an application for consent before 22 March 2021 and have not yet entered into a transaction to buy the asset concerned, or if you apply for consent on or after 22 March 2021. More information is on the LINZ website **here (https://www.linz.govt.nz/overseas-investment/changes-overseas-investment-act/new-investor-test)**.

> *SG Comment*: We see the new test as a real improvement on the old one. It is significantly streamlined, with clearer 'bright-line' thresholds and a greater focus on material issues. This should help to simplify the process of preparing an application and reduce the number of requests for further information from the Overseas Investment Office (**OIO**). In particular, the removal of the requirement to make a full disclosure of all potentially relevant issues identified from Google searches (including, for example, mere allegations of a contravention of law) will be a relief - especially to large corporate entities in relation to which these disclosures can be extensive.

Emergency Notification regime extended

The Government has confirmed that the emergency notification regime will remain in place until 25 May 2021, when it will be reviewed again. This is the third time that the regime has been extended since its introduction in June 2020.

The emergency notification regime requires an overseas investor to notify the Government before it proceeds with an acquisition of NZ assets or a company having ownership or control of NZ assets, over relevant ownership thresholds, of any value. It only applies if consent under the regime is not already required, and empowers the Minister to take various actions in relation to a notified transaction, including prohibiting a transaction deemed not in the national interest. It was introduced to protect NZ assets from opportunistic foreign acquisition during the Covid-19 pandemic.

See our earlier **article (https://www.simpsongrierson.com/articles/2020/overseas-investment-compulsory-notification-regime-in-effect-16-june-2020)** or our **webinar (https://simpsongrierson.zoom.us/rec/play/6cZ7fuitqT03GN3DuQSDUPV7W9W6Lfqs0yEerPMIn0e3ByEEOlShYuQRNOfJaf92P61x-fT6W-Vf04Cu?startTime=1591761708000&_x_zm_rtaid=M2QXYH1tQOu0LEzThdFWvQ.1592339636908.ad1a85f529b59f04708f683bd73e99c8&_x_zm_rhtaid=66)** about for more information about the NZ overseas investment regime, and the June 2020 emergency notification requirement.

The emergency notification regime is expected to remain in force while the Covid-19 pandemic and its economic aftermath continues to have significant impact in NZ (which the Government has indicated may be for up to 2 years from when the pandemic first took hold). It will then be replaced by a call-in regime for transactions not otherwise requiring consent which relate to strategically important businesses.

Proposed changes to fee structure

The OIO is consulting on proposed changes to the OIO application fee structure. The review is being launched to ensure that the costs of providing OIO services are recovered in fees paid by the users of the services.

Under the current fee structure, a single fee is paid for applications for each investment pathway.

The alternative structure preferred by the OIO would charge three fees for each application:

- a lodgement fee (charged when an application is submitted);
- an application assessment fee (charged when an application is accepted), with different fee levels applicable to "standard" and "complex" applications; and
- a compliance monitoring fee (charged before consent is approved).

New fee levels are also proposed, depending on whether the application is "standard" or "complex". Proposed total fees for "complex" applications (significant business assets or sensitive land), would be nearly three times or more than current levels.

> *SG Comment*: In our view the proposed new fee structure will need to carefully balance the desire for a financially sustainable overseas investment regime with investors' perceptions of 'value for money'. Significantly increasing fees will also increase investor expectations that the regime will operate efficiently and provide certainty - including through practical consent pathways and criteria, clear fees and, importantly, improved timeframes for application processing. We think that recent reforms have had a positive impact on investor perceptions of the regime, but care will be needed to ensure significant fee increases do not unwind those gains.
>
> We believe that drawing a distinction between "standard" and "complex" applications is a step in the right direction, but see a benefit in also granting the OIO additional discretion where the fees would be disproportionate to the sensitivity of the assets which are the subject of a consent. If strictly applied the proposed fees could see, for example, an application for sensitive land where there is a "national interest" component (such as foreign Government interest above 10%) costing around $150,000, even where the transaction value itself might be relatively low.

Submissions must be made by 5pm Friday 19 March 2021. More information, including the consultation document and information about the submission process, is available on the LINZ website **here (https://www.linz.govt.nz/about-linz/what-were-doing/projects/third-party-funding-review/consultation-third-party-funding-for-overseas-investment-office-oio)**.

OIO Processing times - Recent experiences

Consent applications: We understand that the OIO received a large number of applications for consent towards the end of 2020. This reflects our experience that M&A activity is picking up again, following a lull in activity through mid-2020 when uncertainty from Covid-19 peaked. We expect this high workload will impact review timeframes - reinforcing the need for investors to consider OIO consent requirements and begin work on a consent application (if required) at an early stage of a proposed transaction.

This point is reinforced by the fact that the range of transactions requiring OIO input has increased significantly over the last few years (for example, through the introduction of residential land consent requirements, the national interest test and the emergency notification regime). It isn't clear that OIO resources have been increased to match this increased workload. Our hope is that the recent and upcoming reform of the regime will help both applicants and the OIO move through the OIO process efficiently.

Notifications: in our experience the OIO is processing notifications submitted under the emergency notification regime within the 10 working day target.

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PSE Issues Amendments to the Voluntary Delisting Rules

February 10, 2021

The Philippine Stock Exchange (PSE) issued *Memorandum CN-No. 2020-0104,*[1] dated December 21, 2020, on the amendments to its Voluntary Delisting Rules. These amendments tighten the approval requirements for delisting and seek to ensure the fairness of the tender offer price.

The following are some of the salient amendments introduced to the Voluntary Delisting Rules:

1. Petition for Delisting

The PSE will allow delisting upon filing of a petition by the listed company approved by (a) at least two-thirds of the entire membership of the board of directors, including the majority, but not less than two, of all of its independent directors; and (b) stockholders owning at least two-thirds of the total outstanding and listed shares of the listed company.[2] The previous Voluntary Delisting Rules only require approval by a majority of the listed company's incumbent directors. The number of votes cast against the delisting proposal should not be more than 10% of the total outstanding and listed shares of the listed company.[3]

All security holders must be notified of the meeting, in the manner and time provided under the by-laws of the listed company, at which meeting the proposed delisting will be submitted for approval by the stockholders.[4] If the stockholders' votes will be obtained via remote communication, voting in absentia, or by written assent, the listed company must give all stockholders at least two weeks to cast their votes.[5]

The petition for delisting must be filed with the PSE, together with the tender offer report, at least 60 days prior to the effective date of the delisting.[6]

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[1] Please see https://www.pse.com.ph/resource/rulesAndRegulations/Supplemental%20Rules/CN%20No.%202020-0104%20-%20Amended%20Voluntary%20Delisting%20Rules.pdf for reference.

[2] PSE *Memorandum CN-No. 2020-0104* dated December 21, 2020 (PSE Amended Voluntary Delisting Rules), Section 2(a), Annex A.

[3] PSE Amended Voluntary Delisting Rules, Section 2(a), Annex A.

[4] PSE Amended Voluntary Delisting Rules, Section 2(b), Annex A.

[5] PSE Amended Voluntary Delisting Rules, Section 2(b), Annex A.

[6] PSE Amended Voluntary Delisting Rules, Section 2(c), Annex A.

2. Tender Offer

The listed company must submit a fairness opinion or valuation report which states the fair value or range of fair values of the listed security based upon certain procedures followed and assumptions made.[7] Prior to the amendments, the listed company must submit a fairness opinion report or valuation report stating that from the financial point of view of the person making the opinion or report, and based upon certain procedures followed and assumptions made, the terms and conditions of the tender offer are fair.

In determining the valuation to be used in the tender offer, the PSE Amended Voluntary Delisting Rules now require that the minimum tender offer price is the higher of (a) the highest valuation based on the fairness opinion or valuation report prepared by an independent valuation provider in accordance with Rule 19.2.6 of the Implementing Rules and Regulations of the Securities Regulation Code[8], or (b) the volume weighted average price of the listed security for one year immediately preceding the date of posting of the disclosure of the approval by the board of directors of the applicant company delisting.[9]

The persons proposing the delisting must show to the PSE that they have obtained, through the tender offer, at least 95% of the issued and outstanding shares of the listed company.[10] If at the time the petition for delisting is filed, these persons already beneficially own at least 95% of the listed company's issued and outstanding shares, they must still make a tender offer to all other stockholders of record.[11]

3. Clearance from Delinquencies

The delisting company must not have any unpaid fees or penalties due to the PSE,[12] and must pay the voluntary delisting fee equivalent to its annual listing maintenance fee for the year when the petition for voluntary delisting is filed.[13]

A listed company may not apply for voluntary delisting if involuntary delisting procedures have already been initiated against it.[14]

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[7] PSE Amended Voluntary Delisting Rules, Section 2(d), Annex A.
[8] Securities Regulation Code (SRC) Rule 19.2.6 provides for the guidelines on the conduct of valuation and issuance of a fairness opinion. Only qualified independent firms may conduct valuation and issue fairness opinion to comply with SRC Rule 19. It lists down the requirements that must be observed in the conduct of the valuation and issuance of fairness opinion by an accredited firm. It also enumerates the information that must be provided in the firm's Fairness Opinion Report.
[9] PSE Amended Voluntary Delisting Rules, Section 2(d), Annex A. The tender offer price of a Listed Company that has been under suspension for one year or more as of the disclosure of the approval of the board of directors shall be the highest valuation based on the fairness opinion or valuation report prepared by an independent valuation provider.
[10] PSE Amended Voluntary Delisting Rules, Section 2(e), Annex A.
[11] PSE Amended Voluntary Delisting Rules, Section 2(e), Annex A.
[12] PSE Amended Voluntary Delisting Rules, Section 2(f), Annex A.
[13] PSE Amended Voluntary Delisting Rules, Section 2(g), Annex A.
[14] PSE Amended Voluntary Delisting Rules, Section 1, Annex A.

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The Banking, Finance and Securities Department of SyCip Salazar Hernandez & Gatmaitan advises a host of Philippine and international banks and financial institutions on different types of financing transactions and on regulatory matters. In the regulatory sphere, our services include reviewing bank forms and templates for compliance with legal requirements, advising on new financial products and services, responding to jurisdictional queries and providing periodic updates on new laws and regulations, and assisting with regulatory compliance and investigations.

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Harmonising of work pass policies: New changes to work pass requirements for Dependant's Pass holders

DENTONS RODYK

March 8, 2021

In a move to align the requirements with other foreigners working in Singapore, Dependant's Pass (DP) holders working in Singapore will soon have to secure a work pass if they want to work in Singapore. The change was announced by Minister for Manpower Mrs Josephine Teo on 3 March 2021 during the debate on the Ministry of Manpower's budget. It is set to become effective from 1 May 2021.

This is a step taken by the Government towards harmonising the employment of foreigners in Singapore.

Impact on Individuals

Currently, DP holders who are dependent on holders of an Employment Pass (EP), EntrePass or Personalised Employment Pass can work in Singapore without obtaining a separate work pass – they are permitted to work if they obtain a Letter of Consent (LOC).

With effect from 1 May 2021, DP holders relying on a LOC will need to hold a valid work pass such as an EP, S Pass or work permit instead of a LOC to be able to work in Singapore. If the DP holder is already working under the LOC, the DP holder will be allowed to continue working until the expiry of the LOC, with the application for the relevant work pass to be made once the LOC expires.

Impact on Employers

Employers currently hiring a DP holder working under a LOC will have to apply for a work pass applicable to the DP holder in order to keep employing such DP holder.

Employers should take note of the impact that this will have on the hiring process after the change takes effect. Companies hiring DP holders holding a LOC will have to comply with the conditions which are applicable when hiring foreigners under work passes, including the relevant qualifying salary, quotas and levies.

Impact on DP holders who are business owners

When the change is implemented, DP holders who are business owners can continue to work using a LOC, but with restrictions:

i. The DP holder should either be a sole partner, or company director, with at least a 30% shareholding in the business; and
ii. The DP holder's business should also hire at least one Singaporean or Singapore permanent resident who earns at least the "Local Qualifying Salary", which is currently set at S$1,400 per month, and receives contributions to the

Central Provident Fund for at least 3 months.

If the DP holder does not meet the required criteria, the DP holder can either run the business on the existing LOC until it expires or make an application for an extension of the LOC. However, the extension of the LOC will only be valid until April 2022 and such extension application can only be made once.

If the DP holder does not meet the abovementioned criteria, the DP holder will need to obtain a work pass.

Conclusion

The move aligns the requirements for foreigners working in Singapore with DP holders currently working under a LOC by requiring DP holders to meet the work pass requirements which are applicable to all other foreigners working in Singapore. From a business perspective, the changes mean that all employers will need to comply with the relevant qualifying salary, dependency ratio ceiling and levies payable for the employment of a foreigner as may be applicable to the corresponding work pass.

Further details on this change are expected to be released on 1 May 2021. Given the ongoing structural changes in the employment market, DP holders, employers and business owners should be aware of the updated restrictions when hiring foreigners to work in Singapore. Dentons has leveraged our global footprint to provide clients with an overview of their obligations as employers across multiple markets. We answer the typical questions you might have, and provide guidance around key employment concerns. If you have any questions about these new requirements and how they may apply to you, please call or e-mail us.

Dentons Rodyk thanks and acknowledges Associate Sarah Chan for her contributions to this article.

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Newsletter

Update and Observation on Transfer Pricing

02/26/2021

Dennis Yu/Daphne Chiu

On December 28, 2020, the Ministry of Finance promulgated the amended Regulations Governing Assessment of Profit-Seeking Enterprise Income Tax on Non-Arm's-Length Transfer Pricing (the "**Transfer Pricing Assessment Rules**"). This key changes under this round of amendment include an updated definition of "intangible asset" that expand the scope thereof beyond registered assets, new valuation methods and additional rules on profit allocation. The filing of the 2020 business income tax return will be subject to the amended Transfer Pricing Assessment Rules.

The purpose of this amendment is to align the Transfer Pricing Assessment Rules with the relevant international norms and practices. To this end, the amendments were made by referencing the recommendations and guidelines on intangible assets and the relevant transfer pricing published in 2015 by the Organization for Economic Cooperation and Development (OECD) in its Base Erosion and Profit Shifting (BEPS) Actions 8-10: Aligning Transfer Pricing Outcomes with Value Creation.

Looking ahead, we anticipate that the issue of transfer pricing will continue to be a hot topic in 2021 and the profit allocation and transactions of intangible assets within group companies will come under closer scrutiny in the future, thereby increasing the potential tax risks attached thereto. The key amendments are summarized and explained below.

Periodic Assessment on Whether the Allocation of Profits from Related Party Transactions is Consistent with the Substantive Economic Activities

If the allocation of profits is consistent with the local production value, local tax authorities generally do not take issue in terms of transfer pricing. However, if a multinational enterprise takes advantage of information opacity and taxation parity between different jurisdictions to allocate the profits to related parties in regions or countries with lower tax rates to circumvent the tax of its home country and the country of production, the enterprise will face increased tax risks in its home country as well as the country of production.

In the past, when performing risk analysis, profit-seeking enterprises and tax authorities tend to rely too heavily on written contracts or documents for guidance while ignoring the real-world risk exposures relating to the performance of the contracts by the parties to the transaction. Therefore, the amended Transfer Pricing Assessment Rules identifies the steps that must be taken when conducting a risk assessment on a specific transaction as well as the criteria for determining the risk bearing capacity and management capability of the parties to the transaction, and stipulates that the transfer pricing reports must include a risk analysis performed in accordance with such steps and criteria.

- Steps of Risk Assessment and Analysis: focusing on the substantive economic activities of the parties to a transaction and whether they have proper capacities for risk bearing and management.

- Criteria for Determining Risk Bearing Capacity and Management: When determining the risk bearing capacity of the parties to a transaction, it is necessary to consider whether they are apt to weather an unfavorable outcome from the risks in question and whether they have the financial capability to mitigate such risks. As for risk management capability, it is necessary to evaluate the parties' actual abilities to control and mitigate risks. If the assertions in written contracts and documents differ from the findings from the assessments conducted based on the foregoing principles in terms of the parties' actual ability and financial capabilities to assume the risks, such risk shall be reattributed to the party that actually has the financial capability to bear the risks, and transaction in question shall be repriced and the party concerned shall be reasonably compensated.

Update on the Definition of "Intangible Assets"

An intangible asset is defined as a right with property value, such as a business right or a copyright, that can be owned or controlled for use in business activities and for which the use or transfer of the asset between non-related parties would result in corresponding compensations.

The profit allocation of intangible assets must be analyzed in terms of the function, risk and use of assets for development, enhancement, maintenance, protection and utilization of the asset, and risk assessment and analysis must be conducted in accordance with the steps and criteria mentioned above, and the process and results of such assessment and analysis must be disclosed in the transfer pricing reports, and the appropriateness of the profit allocation between the group companies must be examined.

<u>"Income Approach" Included as Arm's Length Transaction Method</u>

The "income approach" identified in Guidance Note No. 7 Valuation of Intangible Assets published by the Accounting Research and Development Foundation has been included as one of the arm's length transaction methods.

<u>Conclusion</u>

Anti-avoidance of taxes has been the consensus of the international community, and transfer pricing audits have become the focus of governments in various jurisdictions. In recent years, the tax authorities in India, Malaysia, Thailand and Vietnam have all introduced the three-tier transfer pricing rules, targeting companies with losses and fluctuating surpluses in their transfer pricing schemes. Therefore, it is advisable for all multinational enterprises to examine whether their overall capabilities and allocations of risks are comparable to their profit outcomes in order to mitigate the relevant tax risks.

For multinationals that have already completed their transfer pricing reports, they may consider entering into an advance pricing agreement the National Taxation Bureau and negotiating the terms affecting the transaction, the pricing methods and other factors thereunder. An advance pricing agreement is valid for three to five years, and can be extended for another three to five years upon the expiration thereof. Therefore, corporations with an advance pricing assistance with the National Taxation Bureau can enjoy up to 10 years of freedom from transfer pricing audits and savings in compliance costs for the preparation of transfer pricing reports.

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CLIENT ALERT

COVID-19 | UK | UPDATE | UK QUARANTINE RULES 4 MARCH 2021

NEW RESTRICTIONS ON INTERNATIONAL TRAVEL DURING THE CORONAVIRUS PANDEMIC - UK QUARANTINE RULES

The UK Government has recently announced new quarantine rules. Since 15 February 2021, all travellers arriving in the UK have had to quarantine for 10 days and take COVID-tests on the 2nd and on, or after, the 8th day of quarantine[1]. Travellers from a newly-introduced 'red list' of countries face additional restrictions.

These requirements were imposed pursuant to the Health Protection (Coronavirus International Travel) (England) Regulations 2020 (SI 2020/578) (the "Travel Regulations") which came into force on 8th June 2020. The Secretary of State used his powers under the Public Health (Control of Diseases) Act 1984 to enact the Travel Regulations.

The powers and offences derived from the Travel Regulations are complementary to the powers created under the Coronavirus Act 2020.

Red List Countries

Travel from the red list of countries to the UK is banned[2] unless you are a British national, an Irish national, or anyone else with residence rights in the UK.

A person will be considered as having travelled from a red list country if they have transited through a red list country in the 10 days prior to their departure to the UK.

People arriving from red list countries will need to quarantine for 10 days (11 nights) in a Managed Quarantine Hotel at their own expense. The cost for one room for one adult is £1,750. This cost will increase by £650 for an additional person sharing the room and by £325 for a child aged five to 12 years old.

Red List Countries and Non-Red List Countries

Whether you arrive in England from a red list or non-red list country, you will need to self-isolate for 10 days on arrival[3] and provide the following documentation at border checkpoint:

- a Passenger Locator Form specifying:[4]
  - your passport details;
  - your travel details including times and dates;
  - the address where you will stay in the UK;

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[1] If you are travelling for professional reasons and that your job qualifies for travel exemptions, you may be exempt from one or more of the COVID-related travel restrictions; see Schedule 2 of the Health Protection (Coronavirus International Travel) (England) Regulations 2020.
[2] See Schedule B1 of the Travel Regulations.
[3] See Regulation 4 of the Travel Regulations. There are still some limited exceptions: people travelling to England to maintain essential supply chains, people working on critical national infrastructure and to contribute to the crisis response or other essential government work.
[4] See Regulation 3 of the Travel Regulations.

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    - a booking reference for the two coronavirus tests you must take after arriving in the UK;
    - a booking reference number confirming your quarantine hotel booking if you need one;

- proof of a negative COVID-19 test taken in the three days before the service on which you will arrive in England departs;[5] and
- proof of pre-booked COVID-tests on the 2nd and on or after the 8th day of quarantine.[6]

The requirement to take and provide proof of a negative test in the three days before departure to the UK came into effect on 15th January 2021 and the requirement to book COVID-tests packages subsequently came into effect on 15th February 2021.

The COVID-tests packages are provided by Corporate Travel Management ("CTM") at a cost of £210 for both tests.

Travelling from France to the UK

If you are travelling from France to the UK you will also need to provide a *Certificate of Travel from Metropolitan France to a Country outside the European Area* (EN version and FR version), as well as supporting documentation.

You cannot travel to the UK from France unless your travel is justified under one of the following grounds:

- compelling health reason;
- compelling family reason;
- compelling professional reason that cannot be postponed; or
- return to the country of residence or origin (with no guarantee of a return to France without a compelling reason).

The form provides a non-exhaustive list of the type of documentation which will need to be provided for any of these grounds to be successfully established.

Sanctions

There are strict penalties for providing false information on the Passenger Locator Form, for failing to complete COVID-tests prior and during the quarantine period, and for failing to abide by quarantine rules:

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[5] See Regulation 3A of the Travel Regulations. There are some limited exceptions including where your journey is from exempted countries (Ireland, Northern Ireland, Scotland, Wales…), children under 11 do not need to take a test, this is also the case if you are travelling for medical reasons or your job is exempted.
[6] Regulation 3B of the Travel Regulations.

False Information: A person providing false or deliberately misleading information on the Passenger Locator Form commits a criminal offence. Failing to provide accurate details about the countries you have visited in the 10 days prior to your departure to the UK is punishable by a fine or imprisonment for up to 10 years or both. Failure to declare on your Passenger Locator Form that you have transited through a red list country in the 10 days preceding your departure for the UK attracts a fine of £10,000.

COVID-19 Tests: Similarly, a person failing to provide proof of a negative test in the three days preceding the date of travel commits a criminal offence and may not be allowed to travel and/or enter the UK, and may be fined. Failure to book and undertake COVID-tests while in quarantine, can result in a £1,000 fine. A subsequent offence will carry a penalty of £2,000.[7]

Quarantine Rules: The sanctions resulting from a failure to self-isolate for a period of 10 days upon arrival in the UK depend on whether you are arriving from a red list or a non-red list country

If you fail to self-isolate upon arrival from a red list country, the following fines will be imposed:[8]

- first offence £5,000
- second offence £8,000
- third offence £10,000

If you fail to self-isolate upon arrival from a non-red list country, the following fines will be imposed:[9]

- first offence £1,000
- second offence £2,000
- third offence £4,000
- £10,000 each subsequent offence

We will endeavour to keep you informed of any developments related to this situation as they may arise.

[7] Regulation 7(6ZB) of the Travel Regulations.
[8] Regulation 7(5AA) of the Travel Regulations.
[9] Regulation 7(5A) of the Travel Regulations.

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Client Updates

Florida Water Treatment Facility Highlights Cybersecurity Risks for the Nation’s Critical Infrastructure | Thought Leadership | Baker Botts

24 February 2021

Issue in Brief: A recent cyberattack on a Florida water treatment facility highlights the growing threat of cyber-attacks on critical infrastructures, prompting an investigation from the EPA and FBI, and motivating lawmakers to make independent inquiries about the sufficiency of relevant cybersecurity standards and requirements for these facilities, including the 2015 critical infrastructure protection strategies overseen by the U.S. Department of Homeland Security.

Next Steps: Impacted businesses should take action to improve their cybersecurity practices using, among other things, the 2015 guidance and other industry best practices.

On the Horizon: As the increase of cyber-incidents for critical infrastructures continues, businesses are likely to see an increase in guidance and additional laws and regulations relating specifically to protecting the Nation’s critical infrastructures from cyber threats.

Critical Infrastructure Systems (CIS)—those essential to the functioning of society, such as sanitation, water treatment, energy production, etc.— have become a popular asset for cybercriminals. In 2020, cyberattacks on CIS facilities dramatically increased, with water and wastewater facilities seeing a large share of the increase. Experts seem unanimous in believing this uptick in attacks on CIS will continue to grow in the years to come.

In fact, this month, an unauthorized third-party infiltrated the Supervisory Control and Data Acquisition (SCADA) system—an electronic system used to monitor and control a plant or equipment in industries such as energy, water and waste control, and oil and gas refining—at a drinking water treatment facility in Oldsmar, Florida, in an apparent effort to poison the water supply. The third party was able to raise the concentration of lye (a chemical used in the treatment process) to potentially lethal levels. The Oldsmar facility serves a population of nearly 15,000 people—meaning that, had the attack been successful, all these individuals could have consumed deadly drinking water. Thankfully, attentive employees at the facility quickly noticed the change and corrected the issue, and, in the end, nobody was harmed. Federal officials have launched an investigation into the attack, and lawmakers are submitting follow-on inquiries about the facility’s compliance with certain Department of Homeland Security (DHS) guidelines and whether the DHS needs to update the guidelines.

The third-party is believed to have exploited the plant’s SCADA system due to poor password protections and the system’s use of antiquated versions of Microsoft Windows that no longer update with certain security protections. The third-party entered the SCADA system through a ubiquitous screenshare program called TeamViewer.

What to Expect

Because it is almost certain that attacks on CISs will increase in the future, all CIS operators should expect their systems to be targeted. Federal officials and industry experts have noted that CISs make attractive targets to cybercriminals due to the potential to harm (or threaten to harm) large amounts of people in a single hack. Accordingly, CIS operators should expect to focus more attention and resources on enhancing their cybersecurity.

Further, it is likely that laws and regulations may be enacted to require certain cybersecurity practices to reduce the likelihood that successful hacks will occur in the future. Recently, in part due to other cyberattacks, such as the highly publicized Solar Winds hack, federal lawmakers have stressed the importance of improving the Nation's cybersecurity laws and regulations. As such, it is fair to expect that compliance with various laws and regulations relating to cybersecurity will become a necessary component of running a business.

What to Do

For now, there is no singular set of rules governing a CIS facility's cybersecurity practices. However, a helpful place to start is with the DHS's 2015 Sector-Specific Plans for sixteen types of infrastructure industries, which were issued in response to Executive Orders issued by former President Obama. *See* 2015 Sector-Specific Plans, Cybersecurity & Infrastructure Security Agency (2015), available here. While issued by DHS, these plans were developed in conjunction with other agencies and private partners to focus on the unique conditions of each of the listed industries. After the issuance of the 2015 Sector-Specific Plans, former President Trump also took executive action to strengthen cybersecurity for CISs, which offers additional, useful information. See Executive Order on Strengthening the Cybersecurity of Federal Networks and Critical Infrastructure, Cybersecurity & Infrastructure Security Agency (May 11, 2017), available here.https://www.cisa.gov/executive-order-strengthening-cybersecurity-federal-networks-and-critical-infrastructure

Boiled down, there are various protective measures that a business can take harden its industrial control systems and reduce the exposure to cybercriminals. Such measures include, but are not limited to:

- Patch management: update software and patches regularly;
- System updates: avoid using outdated and unsupported operating systems;
- Technical safeguards: update firewalls and anti-virus software, and ensure that such software is working properly through regular testing;
- Administrative safeguards: use strong authentication measures, including strong and varied passwords changed regularly and implement two-factor authentication;
- Training: educate employees on the risks of cyberattacks, how to spot potential attacks, and how to protect against third parties if they do obtain unauthorized access to a given system;
- Response plan: develop and test an incident response plan specific to the compromise of an ICS system, and ensure that potential threats or suspicious activities are reported to federal relevant agencies, such as the FBI, CISA, NSA, and DHS;
- Best practices and guidance: stay abreast of evolving industry best practices and technology, and continuous monitor agency notices or alerts to respond nimbly to newly identified vulnerabilities; and
- Auditing / Testing: audit your ICS systems routinely to discover vulnerabilities and resolve potential weaknesses in a system or within the organization's cyber-preparedness and response procedures.

Cybersecurity practices will need to continue to improve and evolve as cyberattacks become more commonplace and cybercriminals become more sophisticated. There is no one-size-fits-all approach to cybersecurity, and all businesses will need to remain flexible and continuously improve their practices to mitigate the risk of third parties obtaining unauthorized access to their technology systems.

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Davis Wright Tremaine LLP

BLOG POST / EMPLOYMENT ADVISOR

Benefits and Executive Compensation

Washington State's New Long-Term Care Statute Is a Mess – Can ERISA Preemption Provide the Cleanup?

By Richard Birmingham

03.09.21

Washington state has passed the nation's first public-operated, long-term care insurance program—the Long Term Care (LTC) Act—which is paid for by employees through employer withholding as a payroll tax. The statute is a compliance nightmare for employers, employees, and the state.

An added complication is whether the Employee Retirement Income Security Act of 1974, as amended (ERISA), preempts the ability of the state to regulate this area.

Tax Rate, Effective Date, and Benefit Amounts

The LTC Act imposes a mandatory payroll tax for all employees on all compensation—including stock-based compensation—without a cap, at a rate of .0058 of the employee's wages. While the payroll tax is effective as of January 1, 2022, no benefits are payable until 2025. The benefits payable are a maximum rate of $100 per day to a lifetime maximum of $36,500.

The payroll tax is deposited in a trust, which currently can only be invested in U.S. Treasury investments that will not yield the projected 5 percent rate of return needed to support the benefits. As a result, the payroll tax should be at a rate of .0066 rather than .0058, as the funding at the current rate yields a projected net present value funding deficit of $15 billion.

Window Period to Apply for Limited Individual Exemption

Under a substitute bill that is likely to pass this legislative session, there is a limited individual exemption for employees who have long-term care insurance as of July of 2021 and who apply for an exemption during a window period of October 1, 2021, through December 31, 2022.

Once that window closes, no further exemptions will be granted.

Is Long-Term Care an ERISA Benefit?

Yes. Under Section 3 of ERISA, benefit plans are covered by ERISA if they include medical benefits and benefits in the event of sickness, accident, or disability. RCW 48.83.020(5) defines long-term care insurance as a policy, practice or program that provides coverage for one or more necessary or medically necessary diagnostic, preventive, therapeutic, rehabilitative, maintenance, or personal care services, provided in a setting other than an acute care unit of a hospital.

Given the statutory definition and the requirement under all qualified long-term care insurance policies that the insured be unable to perform certain basic activities of daily living, there seems little doubt that an employer-sponsored plan to provide qualified long-term care insurance would fall into one or more of the above-referenced categories as the statute specifically provides for reimbursement of professional services, nursing home services, assisted living services, and memory care. Thus, workplace long-term care benefits will be employee welfare benefit plans subject to ERISA unless the benefits are provided in a way that does not constitute an employer-established plan (see below).

The fact that long-term care insurance is considered a benefit that is excepted from some ERISA requirements if it is offered separately does not change this result. Its excepted benefit status does affect whether an employer's long-term care insurance plan is subject to ERISA or whether it is considered a group health plan, which would affect whether the plan must comply with the enhanced claims procedures and certain other changes made by health care reform.

For example, excepted benefits, including long-term care insurance benefits that are offered separately, should not be subject to the internal claims and appeals and external review requirements added by health care reform to the Public Health Services Act (PHSA) and incorporated by reference into ERISA Section 715. In one of the few litigated cases in this area, the court concluded that a long-term care insurance arrangement was subject to ERISA.[1]

Is Long-Term Care an Employer-Established Plan?

Yes. In its amicus brief concerning California state-mandated IRAs, the U.S. Department of Labor indicated that state-mandated IRAs were maintained by the employer. Although the Biden Administration is no longer actively supporting ERISA preemption of state-mandated IRAs (it is remaining neutral), the positon taken by its previously submitted amicus brief is legally sound.

ERISA-covered plans must be "established **or** maintained" by an employer.[2] An employer maintains a plan if it cares for a plan under an ongoing administrative scheme.[3] "Maintain" does not rise to the level of "administer."[4] Nor does the term "require[] an organization to have authority over the adoption, modification, termination, benefit commitments, or terms of a plan."[5]

The LTC Act undisputedly establishes an ongoing administrative program. The statute defines the employer's administrative responsibilities within that program. The statute requires that employers continually update their payroll deductions to reflect changes to their workforce of eligible employees, the contribution rate for each employee, and whether the employee is exempt from the LTC Act.

Where a plan requires an employer to make eligibility and benefits decisions on an individual case basis, the plan will satisfy the ongoing administrative scheme requirement sufficient to maintain the plan.[6] The fact that employers do not voluntarily create these ERISA plans does not alter the conclusion that they are still "employers" as defined by ERISA who "maintain" the plan.[7] In other words, the existence of the state mandate under the LTC Act does not mean that employers cannot "maintain" the withholding arrangements for ERISA coverage purposes.

Is Long-Term Care Exempt as a Payroll Practice?

No. The LTC Act cannot be exempt as a payroll practice because the ERISA exemption requires employee participation to be voluntary and coverage under the LTC Act is mandatory, with the exception of a very limited one-time individual exemption. A safe harbor regulation, 29 C.F.R. § 2510.3-2(a), provides that ERISA does not cover a payroll deduction arrangement so long as all of the following conditions are met:

> (1) The employer makes no contributions;
>
> (2) Employee participation is completely voluntary;
>
> (3) The employer does not endorse the program and acts as a mere facilitator of a relationship between the IRA vendor and employees; and
>
> (4) The employer receives no consideration except for its own expenses.

A failure of any condition establishes that the plan is an employee pension benefit plan for purposes of ERISA, assuming the plan was otherwise covered.[8] Because the LTC Act provisions are mandatory and not voluntary, long-term care cannot satisfy the safe harbor requirements. Thus, long-term care is an ERISA-covered plan.

Is Long-Term Care Saved as a Law Regulating Insurance?

No. Congress contemplated the types of benefit plans that states could require employers to have and chose to only exclude state laws mandating plans providing three types of benefits from ERISA preemption. ERISA section 4(b)(3), 29 U.S.C. § 1103(b)(3), excludes state-required workers' compensation, unemployment compensation, or disability insurance plans from ERISA coverage, and, thus, those laws are not preempted by ERISA.

Because of this, states are permitted to require separate non-ERISA plans covering only those kinds of benefits. Similarly, Congress amended ERISA section 514(b), 29 U.S.C. § 1144(b), to specifically save the Hawaii Prepaid Health Care Act from preemption after it was found to be preempted in *Standard Oil Co. v. Agsalud*.[9] Similar Congressional action would be required to save the LTC Act.

Nor is the LTC Act directed at the insurance industry to be saved as a law that regulates insurance. To be saved as a law that "**regulates insurance**" under § 1144(b)(2)(A), the law must satisfy two requirements. First, the state law must be specifically directed toward entities engaged in insurance. Second, the state law must substantially affect the risk pooling arrangement between the insurer and the insured.[10]

The Washington law is not directed at the insurance industry and therefore is not saved from preemption as a law that regulates insurance.

Summary

The LTC Act mandates a benefit that is arguably preempted by ERISA. As such, employers that desire to challenge the LTC Act should consider filing a declaratory action in federal court to challenge the statute on the grounds of ERISA preemption.

As the tax is not effective until January 1, 2022, there is still time for a court to render a decision before the effective date of the LTC Act, if employers act quickly.

FOOTNOTES

1 *See Schneider v. UNUM Life Ins. Co. of Am.*, 149 F. Supp. 2d 169, 26 EBC 1337 (E.D. Pa. 2001). (Holding union-sponsored long-term care insurance policy to be ERISA employee welfare benefit plan providing "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment.")

2 29 U.S.C. § 1002(2)(A) (emphasis added).

3 *See Medina v. Catholic Health Initiatives*, 877 F.3d 1213, 1225-26 (10th Cir. 2017); *Sanzone v. Mercy Health*, 954 F.3d 1031, 1041 (8th Cir. 2020).

4 *See Sanzone*, 954 F.3d at 1042 (noting that "administer . . . looks to tasks, while [maintain] considers continuity and longevity").

5 *Id.* at 1043; *accord Medina*, 877 F.3d at 1225.

6 *Edwards v. Lockheed Martin Corp.*, 954 F. Supp. 2d 1141, 1148 (E.D. Wash.); *Simas v. Quaker Fabric Corp.*, 6 F.3d 849, 852-53 (1st Cir. 1993). (A Massachusetts statute that required employers to make severance payments at varying times and amounts for terminated employees based on eligibility criteria required an "ongoing administrative program" and was preempted) (relying on *Bogue v. Ampex Corp.*, 976 F.2d 1319 (9th Cir. 1992)).

7 *In re Walter Energy, Inc.*, 911 F.3d 1121, 1144 (11th Cir. 2018) (rejecting distinction between state mandated employer "maintenance" of a plan versus an employer's voluntary maintenance of a plan under the Coal Act).

8 *Cline v. Indus. Maint. Eng'g & Contracting Co.*, 200 F.3d 1223, 1230 (9th Cir. 2000).

9 *Standard Oil Co. v. Agsalud*, 442 F. Supp. 695 (N.D. Cal. 1977), *aff'd*, 633 F.2d 760 (9th Cir. 1980), *aff'd*, 454 U.S. 801 (1981).

10 *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 123 S. Ct. 1471 (2003).

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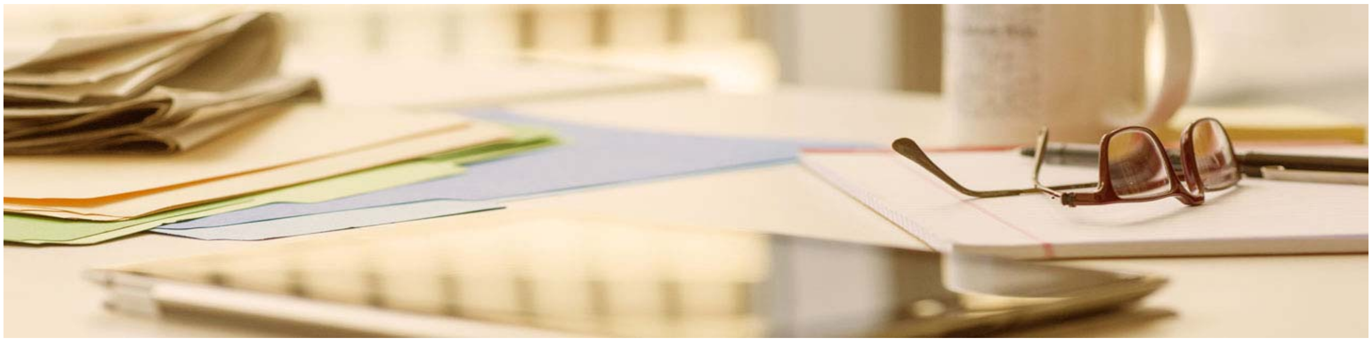

News & Knowledge

Publications

Supreme Court Clarifies That Mere Retention of Estate Property After a Bankruptcy Filing Does Not Violate 11 U.S.C. § 362(a)(3)

Feb 22, 2021

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On January 14, 2021, the U.S. Supreme Court clarified, in the case of City of Chicago, Illinois v. Fulton, 19-357 (January 14, 2021), that “mere retention of estate property after the filing of a bankruptcy petition does not violate §362(a)(3) of the Bankruptcy Code.” This decision is helpful to banks, lenders and other secured creditors who are often faced with demands to turnover collateral immediately after a bankruptcy filing.

Under the Bankruptcy Code, the filing of a bankruptcy petition has certain immediate consequences, including an “automatic stay” imposed by section 362(a). The automatic stay prohibits creditors from taking “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.” §362(a)(3) (emphasis added). This “exercise control” language of section 362(a)(3) is what was at issue in Fulton.

BACKGROUND FACTS

Fulton came about after the City of Chicago had impounded the Debtors’ vehicles for failure to pay fines for motor vehicle infractions. Id. at 2. After the debtors filed Chapter 13 bankruptcy petitions and requested that the City return their vehicles, and the City refused, a bankruptcy court in each case held that the City’s refusal violated the automatic stay. Id. at 2.

The Court of Appeals for the Seventh Circuit affirmed all of the judgments of the Bankruptcy Courts in a consolidated opinion. In re Fulton, 926 F. 3d 916 (CA7 2019). Id.

The Supreme Court granted certiorari to resolve a split among the Third, Seventh, Ninth and Tenth Circuits over whether an entity that retains possession of the property of a bankruptcy estate violates §362(a)(3). Id. at 3.

THE SUPREME COURT'S DECISION

The Supreme Court explained that the plain language used in Section 362(a)(3) of the Bankruptcy Code suggests that merely retaining possession of estate property does not violate the automatic stay. Id. at 3. "Under that provision," the Court explained, "the filing of a bankruptcy petition operates as a "stay" of "any act" to "exercise control" over the property of the estate." Id.

The Court explained that the most natural reading of these terms—"stay," "act," and "exercise control"— taken together, is that § 362(a)(3) prohibits affirmative acts that would disturb the status quo of estate property as of the time when the bankruptcy petition was filed. Id. at 3.

Aside from the plain language reading of the statute, the Court also looked at the legislative history of the Bankruptcy Code and found that it also confirms what its text and structure convey. Id. at 6.[1]

The Court explained that both §362(a)(3) and the turnover provision of §542(a) were included in the original Bankruptcy Code in 1978. Id. See Bankruptcy Reform Act of 1978, 92 Stat. 2570, 2595. At the time, §362(a)(3) applied the stay only to "any act to obtain possession of property of the estate or of property from the estate." Id.

The phrase "or to exercise control over property of the estate" was added in 1984. Id. See Bankruptcy Amendments and Federal Judgeship Act of 1984, 98 Stat. 371. The Court explained:

Had Congress wanted to make §362(a)(3) an enforcement arm of sorts for §542(a), the least one would expect would be a cross-reference to the latter provision, but Congress did not include such a cross- reference or provide any other indication that it was transforming §362(a)(3).

Id. at 6-7.The Supreme Court reasoned that, "the better account of the statutory history is that the 1984 amendment, by adding the phrase regarding the exercise of control, simply extended the stay to acts that would change the status quo with respect to intangible property and acts that would change the status quo with respect to tangible property without 'obtain[ing]' such property.'" Id. at 7.

Importantly, the Court clarified that it was not deciding how the turnover obligation in §542 operates, rather it was only holding that "that mere retention of estate property after the filing of a bankruptcy petition does not violate §362(a)(3) of the Bankruptcy Code." Id.

CONCLUSION

The Supreme Court's recent decision in Fulton is helpful to banks, lenders and other secured creditors who are often faced with demands of a debtor or trustee to turnover collateral immediately after a bankruptcy filing or face a lawsuit. Now it is clear that such threats are not actionable.

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[1] The debtors argued that §362(a)(3) should be read in reference to §542, which expressly governs the turnover of estate property, and provides as follows: "[A]n entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate." Id. at 4.

Hogan Lovells

Biden executive order kicks off government-wide review of supply chains

9 March 2021

On 24 February 2021, President Biden issued an Executive Order (EO) that launches an examination of America's supply chains. *See* EO No. 14017, 86 Fed. Reg. 11849 (Feb. 24, 2021). The Administration's ultimate goal is ambitious: to insulate supply chains from everything from geopolitics to extreme weather to pandemics—all while boosting manufacturing and research in America, including with respect to the aerospace and defense industry sector.

The EO is only an initial step toward this goal. It orders two reviews of America's supply chains. The reviews differ in scope and duration. The EO also asks federal agencies to propose policies to strengthen supply chains, as America's supply chain is an issue "of both concern for economic security as well as our national security."[1] Importantly, the EO directs agencies to consult with industry throughout the process. *See* EO Sec. 2. The EO does not, however, identify the forums for government-industry consultations. In the coming weeks, the aerospace and defense industry should watch for, and request, opportunities to engage with agencies as they address the EO.

The EO's main initiatives:

- **The EO orders a review of select supply chains in the next 100 days.** The EO taps four departments—Defense, Commerce, Health and Human Services (HHS), and Energy—to lead swift reviews of supply chains for, respectively, critical minerals, semiconductors, pharmaceuticals, and high-capacity batteries. In addition to pointing out vulnerabilities in the supply chains, the departments will recommend policy changes to address the vulnerabilities. *See* Sec. 3(b).
- **The EO sets a one-year deadline for more extensive assessments of supply chains for six major industries, including aerospace and defense.** The EO orders reviews of supply chains for the defense industrial base, the information and communications technology (ICT) industrial base, the energy sector industrial base, and the transportation industrial base, among others. Sec. 4(a)(i)–(vi). Specifically, the EO directs the Secretary of Defense to submit a report on supply chains for the defense industrial base, which should identify those areas where civilian supply chains are dependent upon other nations. Sec. 4(a)(ii). Commerce and the Department of Homeland Security are also directed to report on supply chains for critical sectors and subsectors of the ICT industrial base. Sec. 4(a)(iii).

[1] Remarks by President Biden at Signing of an Executive Order on Supply Chains, https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/02/24/remarks-by-president-biden-at-signing-of-an-executive-order-on-supply-chains/

Certain industry sectors, including aerospace and defense, should consider conferring with government agencies early in the review process to advocate regarding the appropriate scope of the agencies' reviews. Indeed, the EO alludes to the indistinct contours of its broad industry categories and gives the Assistant to the President for National Security Affairs (APNSA) and the Assistant to the President for Economic Policy (APEP) authority to modify the agencies' reviews to include additional goods and materials. *See* Sec. 4(b).

- **The EO requires agencies to submit comprehensive reports that identify risks to supply chains and outline policies to strengthen supply chains.** The EO prescribes a wide range of topics that agencies must assess in their reports. *See* Sec. 4. The APNSA and the APEP will consolidate the agencies' reports into a set of recommendations to shore up America's supply chains. These recommendations also will consider policy changes in the areas of trade, workforce development, and government contracting. *See* Sec. 5. Contractors should monitor agencies' reports over the next year for calls to amend federal acquisition regulations. *See* Sec. 5(i).

Supply chain issues have taken center stage over the last few years, as concerns have increased over domestic supply chain resiliency, the reliance on foreign nations, and the availability of supplies during the COVID-19 pandemic. As we have discussed previously, the government's focus on supply chain security is not new, but there has been increased focus on the issue and a call for it to be dealt with more aggressively.[2] Recent news, such as the SolarWinds attack, has spotlighted the real-world consequences that can arise if vulnerabilities in the supply chain are not addressed. Moreover, Senate Majority Leader Chuck Schumer has said recently that the Senate will act this spring on legislation that will include provisions to improve supply chains. Observers are also gauging Congress's and the Administration's interest in fully funding semiconductor legislation that was included in the FY2021 National Defense Authorization Act.

It is not clear how the actions set out in the EO will complement these and other executive and legislative policies. One unanswered question is how the recommendations that emerge from the EO will affect the Commerce Department's interim final rule on Information and Communications Technology and Services (ICTS) supply chains. *See* 86 Fed. Reg. 4909 (Jan. 19, 2021). This rule attempts to safeguard ICTS supply chains by empowering the Commerce Department to block certain ICTS transactions that it deems risky.[3] The Cyberspace Solarium Commission has also advocated for the creation of a national ICTS supply chain strategy that would coordinate efforts across different agencies and departments, which could potentially be addressed in these supply chain reviews.[4]

What is clear is that more federal action may be afoot. Aerospace and defense companies hoping to influence federal policy on supply chains should prepare to engage with the administration as agencies develop proposals to strengthen supply chains. The aerospace and defense industry should also prepare to sustain their advocacy throughout any subsequent rulemakings or legislative initiatives.

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[2] *See, e.g.*, U.S. Government's Increased Efforts in Supply Chain Integrity (Aug. 2018), *available at* https://www.hoganlovells.com/~/media/hogan-lovells/pdf/2018/2018_08_30_adg_insights_supply_chain_risks_in_adg_sector.pdf?la=en; Managing the ADG supply chain in the age of protectionism (Mar. 2019), *available at* https://www.hoganlovells.com/~/media/hogan-lovells/pdf/2019/2019_03_21_adg_insights_managing_the_adg_supply_chain_in_the_age_of_protectionism.pdf?la=en

[3] The rule, which was published in the final days of the Trump administration, was set to take effect in March, but may be delayed pending President Biden's freeze on Trump administration rulemakings.

[4] Cyberspace Solarium Commission, Report (July 2020), *available at* https://www.solarium.gov/report; Cyberspace Solarium Commission, Building a Trusted ICT Supply Chain (Oct. 2020), *available at* https://www.solarium.gov.

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