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INSIDE THIS ISSUE

Compiled and edited by Jorge A. Mestre and Amanda Fernandez of Rivero Mestre LLP https://www.riveromestre.com

Contributing firms: Prieto Abogados https://www.prieto.cl/en, Brigard & Urrutia Abogados S.A.S. https://bu.com.co/en, Ecija ecija.com, Ramos, Ripoll & Schuster https://www.rrs.com.mx/, Hughes & Hughes www.hughes.com.uy

CHILE

Chilean National Plan to Promote Projects for Energy Storage Systems on Public Land

Chile continues its energy transition process to achieve carbon neutrality with new regulation to face complications present in most countries regarding the lack of transmission lines and its dumping consequences.

It was in this context that during 2023, the Chilean Ministry of Energy launched the 'Initial Agenda for the Second Half of the Energy Transition', which includes a series of lines of work, with short, medium and long-term measures aimed at a structural transition towards a future electricity system that is mostly renewable, in accordance with the current National Energy Policy. Among these measures is the 'Promotion of Energy Storage' line of action, which includes a crucial measure consisting of the allocation of fiscal land for the development of energy storage projects.

It is important to note that storage plays an essential role in the energy transition to a more sustainable system because it offers an effective solution to address the dumping of renewable energy, variability in generation and is a source of continuous and constant renewable energy as it allow a greater placement of renewable energy at times when the primary energy is lower (sin it enables to collect surplus energy at times of high production, releasing it when generation is lower or non-existent). In addition, the implementation of this type of technology will allow to make up for the lack of transmission infrastructure in the short term.

Accordingly, on 4 May 2024, the Chilean Ministry of National Assets published Exempt Resolution Nº375, which Approves the National Plan to Promote Energy Storage Systems Projects on Fiscal Land ("**Plan**").

The Plan is an exceptional process for those interested in the development of storage system projects to apply for onerous concessions directly on public land available in the *Norte Grande* regions of Chile, to be connected to one of the specific substations of the National Electricity System, located in one of the aforementioned macro-areas[1].

With this measure, the Chilean Ministry of National Assets, together with the Chilean Ministry of Energy, intend to promote the allocation of public land for the development, construction and operation of stand-alone storage systems on public land, whose purpose is to connect to a substation of the National Electricity System located in the areas identified by the National Electricity Coordinator as those areas with energy storage needs as of 2026.

Contributors: Nicolas Yuraszeck and Emilia Valenzuela from Prieto Abogados. For further information, please send an e-mail

[1] https://www.bienesnacionales.cl/?p=46190

to nyuraszeck@prieto.cl or evalenzuela@prieto.cl.

COLOMBIA

First Step to Eliminate Hong Kong from the List of Tax Havens

• On May 31, 2024, the Colombian Tax Office ("DIAN"), through Resolution 96, issued the periodic report of those jurisdictions that, as of December 31, 2023, have signed an international treaty or agreement that allows the effective exchange of information with Colombia. Within the list of jurisdictions enunciated by the DIAN, Hong Kong is found.

• The purpose of Resolution 96 is for the National Government to have the necessary elements of judgment to review the list of tax havens, so as to determine whether to exclude any of the jurisdictions from the list.

• With this, all that remains is for the National Government to issue a Ruling removing Hong Kong from the list of Tax Havens.

• It is relevant to clarify that, although the National Government does not have a specific period to issue the aforementioned Ruling, it is evident that, in the past, the time that has elapsed between the DIAN Resolution and the National Government Ruling has been extremely short.

• To illustrate the above, we call to your attention, that when it was decided to remove Barbados, the United Arab Emirates, Monaco and Panama from the list of Tax Havens, the DIAN Resolution 8917 came out on the same day as Ruling 2095 of the National Government (October 21, 2024).

• With this in mind, it is expected that the Ruling excluding Hong Kong from the list of Tax Havens will be issued soon.

• This is positive news since, when the Ruling that excludes Hong Kong from the list of Tax Havens has been issued, transactions with this jurisdiction will not necessarily have to be subject to the transfer pricing regime, nor will the maximum withholding tax rate contemplated for payments made to those jurisdictions that are on the list of Tax Havens have to be applied.

• If you have any questions regarding the scope and application of the particular case, please do not hesitate to contact us.

Contributor: Daniel Duque from Brigard & Urrutia Abogados S.A.S. For further information, please send an e-mail to dduque@bu.com.com.

Control of Entities with Branches in Colombia

Recently, the press reported a historical sanction imposed by the Superintendence of Companies in relation to the non-registration of the control and corporate group situation, which is highly relevant

from a corporate law perspective, particularly for foreign companies with branches in Colombia.

For easy reference, the concept of "control situation" is derived from the existence of a corporate subordination, in which a company (the "Parent Company") holds the power of decision over another (the "Subordinate"), in the terms of Articles 260 and 261 of the Code of Commerce.

On the other hand, the concept of "corporate group situation" requires the existence of a subordination relationship (and, consequently, of a control situation), in which, additionally, there is unity of purpose and direction among the Parent Company and its Subordinate(s). These situations must be registered by the Parent Company in the commercial registry, in accordance with Article 30 of Law 222 of 1995.

Previously, in Colombia, there was a debate as to whether or not this registration obligation was also enforceable and/or applicable with respect to branches of foreign companies in Colombia.

The recently imposed sanction can be considered as a milestone, since it (i) settled the discussion regarding branches, due to the fact that the authority sanctioned the Parent Company for the lack of registration of the control and corporate group situation of various foreign companies with branches in Colombia, and, (ii) imposed to the Parent Company the maximum legal sanction allowed, equivalent to 200 SMLMV (COP$260.000.000 c. US$65.000), an amount of which we had no previous record.

On February 27, 2024, Brigard Urrutia will hold a forum event on this matter with expert speakers. More information coming soon through our media platforms.

Contributor: Raúl Vargas from Brigard & Urrutia Abogados S.A.S. For further information, please send an e-mail to rvargas@bu.com.co.

MEXICO

The Impact of Environmental Liabilities on M&A Transactions

This article aims to highlight the relevance of environmental conditions sought and found during a due diligence process in M&A transactions. We acknowledge that the main purposes of the due diligence process of an M&A transaction are **(i)** providing the client with an overview of the company or stocks to be acquired; **(ii)** analyze the feasibility of the transaction; **(iii)** highlight the contingencies encountered during the due diligence process; and **(iv)** try to evaluate these contingencies to help the client negotiate prices, indemnities and terms that will rule the transaction.

For these reasons, environmental conditions have gained increasing importance in M&A transactions, to identify better environmental conditions that can constitute "environmental liabilities". An environmental liability must be understood as a financial obligation of a person or

entity that consists of remediating environmental damage or alleviating breaches of environmental regulations. In this sense, environmental liabilities can go well beyond the boundaries of the property that will be the subject of the transaction.

For example, an environmental liability may also entail the emission of dust or particles that could damage the health of the neighboring community, or the contamination of underground water that could contaminate adjacent properties as it moves.

The main reason is that many liabilities are active processes, and the longer it takes to detect them, the greater their impact on the company's finances is likely to be.

Thus, there are tools and mechanisms available for the analysis, identification, remediation proposal, and implementation of environmental liabilities to eliminate them and increase the value of the transaction. Some of the best-known and most useful mechanisms are the "**Phase 1 ESA**" reports, which identify the problem, its cause, how to fix it, and a responsible party.

They can also protect buyers from assuming liability for pre-purchase environmental conditions. Here are the key benefits of Phase 1 ESA:

- **Risk Identification**: Identify potential environmental issues before acquisition.

- **Liability Protection**: Protect buyers from assuming liability for pre-purchase environmental conditions.

- **Negotiation Leverage**: Provide critical information to negotiate purchase prices, indemnities, and terms effectively.

Based on the findings of the Phase 1 assessment, lawyers will be able to take providences on the following:

- **Contractual Clauses**: Including specific clauses in the purchase agreement can help manage environmental risks.

- **Indemnities and Escrows**: Structuring indemnities and escrows to cover potential remediation costs.

- **Ongoing Compliance**: Ensuring ongoing compliance with environmental laws post-transaction to prevent future liabilities, with the assistance of both, the in-house and external teams.

Finally, it is important to remark on the role of Environmental Lawyers in M&A Transactions, which is reflected in allowing for an in-depth analysis of the factors that make up an environmental liability, the alternatives for its mitigation, repair, and remediation, as well as ensuring that such liabilities do not exist at the time of closing the transaction, thus increasing the value of the transaction.

By addressing these aspects, counselors can better navigate the complexities of environmental liabilities in M&A transactions and safeguard their clients' best interests.

Contributors: Carlos del Razo[2] and Frida Lopez Badillo[3] from Ecija. For further information, please send an e-mail to cdelrazo@ecija.com or flopez@ecija.com.

Technological Agents to Offer Digital Banking Services

Overview: On July 11, 2024, a resolution in the Mexican Official Gazette amended rules for Credit Institutions, allowing digital banking services via Technological Agents. These facilitate banking in underserved areas and enhance security via encryption and authentication standards. Technological Agents act solely digitally, differing from physically established agents. Effective from July 12, 2024, Credit Institutions have 18 months to adjust contracts.

Article: On July 11, 2024, a resolution was published in the Mexican Official Gazette amending the General Provisions applicable to Credit Institutions ("Banking Circular"), allowing the hiring of technological agents to offer digital banking services. This aims to expand the coverage of the financial system, especially in areas with less physical infrastructure. The modifications establish contractual and authentication responsibilities to mitigate identity theft and ensure secure communications between Credit Institutions and customers.

1. What is an agent?

An agent, also known as a correspondent, is an entity that acts as an intermediary between a Credit Institution and its customers, performing certain functions on behalf of the bank. These functions can include receiving deposits, paying for services, delivering small loans, among other banking activities. Essentially, the agent or correspondent facilitates the extension of Credit Institution services to areas where there is no direct physical presence, thereby improving the accessibility of banking services for more people.

The Law of Credit Institutions and the Banking Circular already regulated the hiring of agents; however, the requirements and rules for hiring agents were focused on physical agents, that is, entities with physical establishments where the customers of the Credit Institutions can perform transactions that have been previously approved by the National Banking and Securities Commission ("CNBV").

[2] Carlos is a partner and head of the Sustainability Practice of ECIJA Mexico, Vice-president of the Mexican Association of Environmental Impact Assessment and President of the Environmental and Energy Law Commission of the International Association of Young Lawyers (AIJA). He also lectures the module titled "Soil protection and Waste Management" and "Environmental Impact Assessment", taught in the Environmental Law Diploma of the Mexican Supreme Court of Justice, and he frequently participates as Guest Lecturer on Environmental Law in Law Faculties, Universities and institutions

[3] Frida is a Mexican young lawyer who focus it practice on contractual, regulatory, ESG and human rights. She is also assistant professor of "Judicial Anthropology" at Escuela Libre de Derecho, and volunteer in a Mexican organization named "Derechos Humanos y Litigio Estratégico Mexicano" focused on anticorruption and transparency.

2. What were the modifications?

Key terms for performing digital operations such as encryption, asymmetric mathematical cryptography, and technological infrastructure were included. In Chapter XI of the Banking Circular regarding the Hiring of Third-Party Services or Agents, Article 318 was modified to establish detailed requirements for the operation and data management between Credit Institutions and technology-based agents ("Technological Agents"), including information security and the selection of third parties. Additionally, the modifications regulate the operations permitted to Technological Agents, excluding activities such as account opening, except for specific exceptions.

As part of the modifications, Chapter XI of Banking Circular was divided into three Sections: A, B, and C, to identify agents with permanent establishments, Technological Agents, and general provisions applicable to both types of agents.

3. Who is a Technological Agent? And what is the difference from the agents that were already regulated?

A Technological Agent, or as defined by the Banking Circular, "technology-based agent," is any entity that acts on behalf and representation of a Credit Institution, offering services and performing authorized operations with its customers through digital means.

Unlike the agents that were already regulated, Technological Agents only offer services or operations on behalf and representation of the Credit Institution through digital means, whereas the agents provided for in the existing regulation have physical and permanent establishments to carry out these operations.

4. What are the main requirements?

Among the additions related to Technological Agents, conditions are established under which Credit Institutions can contract with them to perform banking operations through digital platforms:

- **Permitted Operations:** Credit Institutions can contract Technological Agents to perform operations such as opening level 2 accounts, transferring funds, granting limited credits, paying for goods and services, and checking balances and transactions.

- **Security Requirements:** Strict security mechanisms are established, including customers authentication through category 2 and 3 authentication factors, and the use of encrypted technological infrastructures for the exchange of sensitive information.

- **Responsibilities and Obligations:** Credit Institutions must ensure that both they and the Technological Agents provide clear and sufficient information to customers about their responsibilities, the use of personal information, and authentication processes.

- **Data Protection:** Technological Agents are prohibited from

accessing, processing, or storing confidential information such as authentication factors. Additionally, the use and sharing of aggregated information derived from the contractual relationship are regulated.

- **Session Duration and Continuous Security:** Limits are established for the duration of active sessions and inactivity periods, ensuring the automatic revocation of access and permissions at the end of interactions.

- **Transparency and Regulatory Compliance:** Credit Institutions must publish and keep updated the certificates and public keys of the Technological Agents, in addition to complying with periodic reporting to the regulatory authority.

In general, Section C aims to regulate and make transparent the operations of Credit Institutions with their agents, ensuring compliance with regulations and protecting the interests of the customers.

Finally, Section C establishes the general requirements for obtaining authorization from the CNBV, such as business plans, the commercial agency contract model, and detailed information about the agents.

5. When does it take effect?

The Resolution will take effect the day after its publication in the Mexican Official Gazette, that is, from July 12, 2024. However, Credit Institutions will have a period of 18 months from its effective date to modify the contracts they have with third-party agents.

Contributors: Diego Ramos, Antonio Casas, Sofia Rojas, and Alejandra Sanchez from Ramos, Ripoll & Schuster. For further information, please send an e-mail to dramos@rrs.com.mx, acasas@rrs.com.ms, srojas@rrs.com.mx, or asanchez@rrs.com.mx.

URUGUAY

Perspectives and Challenges in the Outsourcing of Services in the Financial Sector

I. INTRODUCTION. CURRENT PANORAMA

For this presentation we have chosen the issue related to outsourcing in the financial sector, especially in relation to the current regulatory framework that we have at the level of the Central Bank of Uruguay ("CBU") on these issues, in reference to the contracting of services, and what challenges may arise in relation to financial institutions with the regulator. We will not delve into specific or particular regulatory aspects, but rather we will refer to the general parameters that are currently set out at the regulatory level, which, as seen in the daily advice to clients, are not always adjusted to the current reality in terms of contracting services specifically.

As we see daily, companies in the financial sector and all those regulated and in the

orbit of the CBU, require the contracting of certain services for their operation, associated, for example, with software-based tools. These services are primarily linked to data processing and information security.

A study of the current regulatory framework of outsourcing in the financial sector is proposed, with emphasis on the contracting of services and the challenges that this entails for financial institutions in their relationship with the regulator.

Currently, the regulatory framework establishes regulatory parameters that are not always adjusted to the current reality in terms of service contracting. The latter, marked by adhesion contracts with multinational companies, many of them conceived for another legal and cultural reality. This context entails a new regulatory adequacy challenge for the financial regulator and, consequently, for regulated entities. Let us remember that the outsourcing of services in the field of the financial system is regulated at the legal level, precisely by the new Banking Act No. 17,613, section 2, and regulated by the CBU.

A first point to address is related to the type of contracts that are signed in the field of outsourcing in the financial sector, especially those related to data and software processing, as well as for the safeguarding and security of information in general. Adhesion contracts are typical, which have their legal regulation in Uruguay, although limited since prerogatives are only established in the field of consumer law, but not in this type of case, such as that of the entities controlled by the CBU. As we know, this type of contract is characterized by containing, by default to its granting, the terms and conditions of the service to be provided, where appropriate, in the field of mass contracting in which this type of service provider companies operate.

The next thing we must take into account is what is related to the type of regulation that currently exists at the CBU level. In the first place, the regulations give different treatment to outsourcing provided from the country or from abroad, requiring some additional requirements for the latter case. An example of this is the outsourcing risk report, as well as an assessment of the financial and technical solvency of the contracted third parties. Here we already have a point on which situations of different kinds may arise, depending on the provider. Although it is a requirement for transparency in contracting and before the regulator, accurate information on this type of aspect is practically impossible to obtain when it comes to multinational companies, beyond the fact that due to their reputation it is public knowledge that their solvency is of significant magnitude. Although formally it is an "understandable and reasonable" requirement, formally it is very complex to comply with it in a substantial way, with the institutions requesting the authorization limiting themselves to referring to the fact that this financial and technical capacity is acceptable or adequate.

As for the Contracts themselves, a series of requirements are established by the Superintendence of Financial Services ("SFS") that they must contain in order to be authorized, including the basic ones contained in any type of Contract, to which are added some specific ones such as the

assumption of responsibility by the institution for the services provided by the provider, as well as commitments regarding confidentiality and personal data.

In this sense, we have seen some progress in recent times with the entry into force of Circulars 2419, 2420, 2421 and 2422 of December 30, 2022. Let's go over these aspects below.

II. REGULATORY ADVANCES. CBU CIRCULARS 2419, 2420, 2421 AND 2422.

One of the most notorious problems in this type of contracting is the control that the regulator must or should exercise during the execution of these Contracts, and it is for this reason that the regulations provided from the beginning some prerogatives in favor of the SFS that empower it to exercise this control. One of them is the right to carry out periodic audits or evaluations without any restriction by the SFS when it deems it appropriate, and the Contract must provide for unrestricted access to the data and all documentation and technical information related to the services provided, as well as the express provision of instructions for termination of the Contract by the SFS.

In this regard, these Circulars, which introduced changes to the CBU´s compilations of rules on the regulation and control of the financial system, the securities market, the control of provisional funds and insurance and reinsurance, allow the SFS to provide that, in relation to certain services, express authorization is not required for supervised entities to proceed with their contracting. even if the supplier is based abroad or if the services are provided totally or partially in or from abroad. These services are: email, instant messaging, office automation tools, file storage and safeguarding, electronic signature, collaborative tools and document management, and data processing services that do not include customers' personal data or have been dissociated.

To be included in this hypothesis and not require the express authorization of the SFS, the Contract must:

a) comply with the minimum requirements set for the provision of services by third parties based in the country, making the requirement to which we referred on the power of the SFS to audit or carry out periodic evaluations and that of unrestricted access to all data and documentation and information related to outsourced services, always if the Contract does not provide for it. If necessary, at least exclusive and unrestricted reading access to the externally processed data will be required, usable at all times from the offices of the institution, by the SFS. Likewise, one of the copies of the receipt must be physically located in Uruguay and remain accessible to SFS officials, and formal and duly documented evidence must also be carried out of the operation of said access and the integrity of the reservation located in the country. A similar solution is adopted in the event that the Contract does not provide for the termination instruction by the SFS. As a substitution mechanism, the regulated entity must accept the responsibility that may

eventually arise in the event that the SFS instructs the cessation.

b) a contractual agreement regarding the level of services of at least 99.9% availability of services, and provides for penalties for non-compliance.

c) The service must be ISO 27001 certified, and alternatively ISO 27017 certified or have applied for CSA STAR Level 1.

On the other hand, these regulations introduced some minimum requirements to the outsourcing contracts for services provided in the country, which are tacitly authorized as long as they comply with these requirements.

On the other hand, it is convenient to provide a detail of what are the minimum requirements that service outsourcing contracts must provide.

With respect to Contracts that outsource the provision of the data processing service, the requirement is established to provide in these Contracts that the provider assumes the obligation on which, at the end of the contractual term, it undertakes to: i) transfer or offer tools that allow the transfer of the data to whomever the supervised institution disposes; and (ii) delete them, once the availability and integrity of the data at the destination has been confirmed.

In addition to the above, the aforementioned circulars introduced in an alternative way the possibility that the provider does not directly assume the transfer of the data at the end of the Contract, limiting itself to offering tools that enable the aforementioned transfer.

For our part, we emphasize that the maintenance of the requirement provided for in the draft regulation referring to the provider being obliged to delete the data received at the end of the contractual relationship, may imply that it is impossible to adhere to the tacit authorization regime studied above, with the flexibilizations that were analyzed, specifically when the provider is legally or regulatorily obliged to keep such data for a certain period.

As projected by the CBU authorities through the presentation of the draft standard, the Circulars establish that the obligation to provide unrestricted access to data and to all documentation and technical information related to outsourced services, must be complied with with respect to the person in charge of carrying out the periodic audits and/or evaluations carried out by the CBU through the SFS or the supervised entity, with what is already provided for in the regulations in force, and also with respect to the person responsible for the intervention, resolution or liquidation process, if applicable.

Likewise, and in line with the projections, the Circulars provide that the Contracts must provide for the obligation of the service provider to inform the supervised entity about any type of event that significantly jeopardizes the provision of the outsourced service in question.

It also establishes the need to include in these Contracts the obligation of the provider to continue providing the service, even when the supervised entity faces an

intervention, resolution or liquidation process. In this sense, the rules add that such obligation will be enforceable as long as the supervised institution continues to exercise its main obligations under the contract, essentially including the obligation to pay.

However, we must emphasize that the incorporation of the requirement detailed above could imply that it is impossible to benefit from the tacit authorization that we have studied, including the flexibility of the outsourcing regime, especially when agreeing this type of clause is valid under the Law that governs the respective Contract.

In addition, the Circulars establish that all the requirements mentioned above must also be included in the Contracts that may be entered into with subcontracted third parties, provided that the main Contract so authorizes.

III. AMENDMENT INTRODUCED BY COMMUNICATION N°2024/103

The essential modification provided for in the new Communication is that the prerogatives established by Communication No. 2022/254 applicable to the Contract between the supervised entity and the contracted supplier, will be extended to the companies subcontracted by the provider that provides the services to the regulated entity, considering the same alternative solutions for the case in which the Contract between the supplier and the subcontracted company does not contain the minimum requirements that we analyze.

As stated, these original requirements are, among others, unrestricted access to data and to all documentation and technical information related to the services provided and/or the right to carry out periodic audits or evaluations by the SFS and the contracting institution, either directly or through independent audits.

In view of this, contracts with subcontracted companies that do not contemplate these clauses will be tacitly authorized when the institution has exclusive and unrestricted read-only access (technical or administrative) to the externally processed data, usable at all times from the institution's offices by SFS officials.

This extension is also applicable to the case in which the Contract between the supplier and the subcontracted company does not provide as a termination clause the termination instruction for the provision of services through the outsourced company by the SFS, accepting as an alternative that the controlled institution accepts the liability that may eventually arise in the event that said Superintendence instructs the termination of the outsourcing and subcontracting.

IV. FINAL REMARKS

By way of conclusion, we can affirm that this new regulation brings with it on the one hand a certain flexibility by expanding the scope of application of the regime of tacit authorizations to the extent that outsourcing provided from abroad is included, provided that the detailed prerogatives are complied with, and on the other hand new requirements are added for the authorization of outsourcing provided in

the country. Notwithstanding this, our assessment of this new regulation is favorable insofar as the difficulties we referred to at the beginning of this work arise mainly in the outsourcing of services provided from abroad, by virtue of the current predominance of adhesion contracts in this type of activity.

In order to facilitate access to this type of services by regulated entities, it is expected that over time the requirements will be adapted to the current realities in terms of contracting services, mainly linked to those of a technological nature.

Contributors: Santiago Camacho from Hughes & Hughes. For further information, please send an e-mail to scamacho@hughes.com.uy.