

Chemical Industry Update - April 2019

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Q1 2019 Legal Trends

Lawyers in the highly regulated chemical industry manage unique areas of risk and exposure. At no time has this been more evident than today. Below we have highlighted some of the key industry legal trends we are seeing during the first quarter of 2019. None of these will be a surprise, as we have touched on each of them in past issues, but the pace of change demands attention.

- **Product Liability.** New litigation fronts have opened in recent months on chemical products like glyphosate and per- and polyfluoroalkyl substances (PFAS). So far in 2019, plaintiffs cases across the U.S. have proliferated, in some cases with eye-popping awards. There are also rumblings of other new areas tort exposure. The pathways by which a chemical product becomes a source of liability are many and varied. Vigilance and early engagement is advised.
- **Chemical Regulation.** The scale and number of updates in this area is head-spinning. In the first quarter, China announced its plans to revamp its chemical regulation laws to make them more robust. There is an expectation that Eurasia-REACH may finally be happening, as Russia's adoption of its own chemical regulation last year has created momentum in the broader bloc of eastern European countries. As noted below, passage of USMCA will encourage regulatory coordination among the U.S., Canada and Mexico, potentially leading to expanded regulation across the trading block. Going the other direction, Brazil shelved its draft chemical regulation as it sorts out its candidacy for the OECD. And as we [previously reported](#), the total cost for companies submitting new data packages for a proposed UK chemical regulation under a hard Brexit has been estimated to be as much as £1 billion. The evolution of robust chemical regulation around the world carries many benefits, but the costs are also growing. One can envision a future where chemical companies become as cost-sensitive about where they register their compounds as they are, for example, with IP & patent strategies.
- **Sustainability & Plastic Waste.** The social debate over chemical waste and circular economy has crossed over into legal policy. Bans of single-use plastics are widespread at local levels, and mainstream publications are discussing proxy votes about [nurdles](#). What's interesting to us is how legal mechanisms like shareholder proposals in the U.S. and institutional investment requirements in the EU are being

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employed to promote these causes, and with growing success.

- **Trade.** Traditionally viewed more as an area of compliance than strategy, trade policy became daily news during 2018 and it remains that way into early 2019. Last week, the USTR proposed tariffs on \$11 billion of imports into the U.S. from Europe. Also in the U.S., Section 301 tariffs on \$250 billion of Chinese imports remain in place despite ongoing talks, affecting a high number of chemical products and raw materials. Brexit persists as an open question and an ongoing threat to upend supply chains. On the whole, companies are facing more and more uncertainty in this area, leading to work-arounds and contingency plans and where possible, government engagement.

Commercial Law Updates

Nuanced Drafting in Merger Clauses Required

Earlier this month, the Second Circuit issued its decision in *FIH, LLC v. Foundation Capital Partners LLC*, holding that even in contracts between sophisticated parties a general merger clause may not be sufficient, as a matter of law, to prevent reasonable reliance by a party on material factual misrepresentations made by the other. No. 18-357 (2d Cir. Apr. 1, 2019). The Court explained that, although the intended purpose of a merger clause is to limit the scope of the parties' contractual obligations to the text of the agreement itself, a merger clause is not a "catch-all disclaimer" of reliance on any pre-contract misrepresentations. Rather, explicit disclaimer language specific to the alleged misrepresentation must be included in the agreement to preclude reasonable reliance as a matter of law.

FIH holds important lessons for contracting parties, particularly in light of *FIH's* broad applicability to commercial agreements, generally. Principally, care should be taken with respect to representations made in the course of negotiations, understanding that material misrepresentations could prove a basis for future claims, even where not incorporated into the definitive agreement unless specific language to the contrary is applied.

Incoterms 2020

The International Chamber of Commerce (the "ICC") is currently preparing for the release of Incoterms 2020, the anticipated update to the current Incoterms 2010. First published in 1936, the ICC's Incoterm rules have become widely used in commercial transactions as a means of encouraging consistency and uniformity in the interpretation of commercial terms in international trade. Using a series of three-letter terms, the Incoterms rules offer standardized provisions defining the respective obligations of buyers and sellers for the delivery of goods under sales contracts, and cover issues such as shipping, insurance, and tariffs. The wide acceptance and use of Incoterms has reduced trade disputes and litigation by increasing clarity in global trade and reducing misunderstandings among contracting parties.

To facilitate development of Incoterms 2020, the ICC has created the Incoterms 2020 Drafting Group, composed of attorneys and industry experts from around the world. The

Drafting Group has been charged with considering more than 3,000 substantive comments from ICC national committees in connection with its development of the new terms. Although the precise content of Incoterms 2020 is still unclear, it is expected that revisions could focus on issues of transportation security and transportation insurance, and conforming the Incoterm rules to new governmental regulations, such as the European Union's new Union Customs Code.

The new Incoterms 2020 are expected to be released in the last quarter of 2019, becoming effective January 1, 2020. We will look to provide further updates later in the year.

Chemical Plant Incidents Spark Legal Action

Despite the U.S. Chemical Industry having a safety record that is significantly better than that of the manufacturing industry overall, legal responses to chemical facility incidents have become more aggressive in recent years, as public perception has frequently gone against the industry. There are several recent examples that are noteworthy.

On April 10, 2019, two officers of Arkema were indicted on criminal charges of reckless assault for allegedly misrepresenting risks of exposure. The charges relate to injuries sustained to emergency workers who responded to a fire on the site during Hurricane Harvey in 2017. Arkema's attorney commented: *"I don't know how they can charge someone with assaulting someone without ever having met him."* A conviction could mean up to 10 years' incarceration. This follows criminal charges for reckless endangerment entered against two other Arkema executives last year relating to the same event. That case is scheduled to go to trial next month.

A March 17, 2019 fire in storage tanks located in the Deer Park chemical facility in Houston immediately led to prompt lawsuits against the operator at both the county and state levels for environmental violations, as well as a number of civil suits from local residents. An April 2, 2019 fire at a chemical facility in Crosby Texas that led to a death and several injuries similarly brought an immediate (same day) legal response in the form of a suit from the Texas attorney general seeking civil penalties and an injunction.

On the other side of the world, China recently placed in custody executives of a chemical plant in Jiangsu Province that resulted in the death of 78 people and injured hundreds more. This follows a deadly accident in November in Zhangjiakou China in which 23 were killed and 24 injured.

NAFTA 2.0 Update

When will Congress take up and vote on the United States, Mexico, and Canada free trade agreement ("USMCA")? The answer remains uncertain, and a core question is whether Congress will insist on re-opening negotiations concerning the terms of USMCA. While there were hopes that the approval would be expedited under the President's "Trade Promotion Authority" enacted by Congress, the schedule for U.S. ratification and implementation now looks uncertain.

The USMCA has particular relevance to the chemical industry beyond simple renewal of NAFTA free trade principles. Among other perceived benefits, the proposed treaty contains provisions encouraging regulatory cooperation on chemical regulation among the trading block and has been applauded by The American Chemistry Council.

Speaker Nancy Pelosi and the newly elected Democratic majority House of Representatives will have the first say on whether to approve the USMCA. Speaker Pelosi has not endorsed USMCA and she has identified a number of issues of concern in USMCA, including labor rights and enforcement of USMCA labor provisions. In addition, key Republicans and Democrats have stated that the USMCA will not be approved without an agreement from the Trump administration to remove the Section 232 tariffs that the United States imposed on steel and aluminum originating from Canada and Mexico. The Trump administration has opposed doing this, but such a move would be welcomed by many members of Congress as well as Canada and Mexico, which have imposed retaliatory tariffs against U.S. goods in response.

Mexico, for its part, took steps this month to adopt provisions to improve labor rights, a requirement under USMCA and one tentatively welcomed by U.S. labor unions. This could build momentum for passage of USMCA. On the other hand, House Democrats have stated that portions of the USMCA must be changed, which could require a new round of lengthy renegotiation among the United States, Mexico and Canada. If such renegotiation is necessary, it seems unlikely that renegotiation, and subsequent approval by the U.S. Congress, could occur prior to the 2020 election.

In short, the timeline for USMCA's consideration by Congress is uncertain.

M&A

India's National Elections: What they Mean for Investment

The chemical industry in India is significant and growing. A few months ago, Economic Times of India reported \$26.1 billion of investment in four petrochemical regions. The country's specialty chemicals sector is also growing, at a robust 14 percent. And on the deal side, India passed \$100 billion in M&A transaction value for the first time in 2018. Now would seem an optimal time to pursue expanded investment in the region. Recent political trends however merit close monitoring.

Currently, India is in the middle of an important national election cycle. Speculation that the incumbent BJP party will emerge weakened or forced to lead by coalition has led to concerns that business reforms in the country could be at risk. In recent years, under Prime Minister Modi, India has taken important steps to facilitate foreign investment. Cross-border mergers are now permitted, even if the process remains overly complex. A unified goods and services tax in the country has facilitated commercial transactions. On the antitrust front, de-minimis exemptions added in 2017 did much to counter the low filing thresholds that sometimes felt like a tax on transactions with minimal contacts in the jurisdiction.

These reforms have been well received by the investment community, but much remains to be done. Getting business and manufacturing permits is still an uncertain process in India, and keeping them can be just as unpredictable. Then there is the obnoxious effective 20 percent tax on declared dividends. Not technically a withholding tax, dividends are taxed at the company level whether or not they are being paid out of profits--and while they are received tax free by an India parent company, recipients in foreign jurisdictions will still need to account for them as income. This approach reduces returns on joint venture projects, impacts flexibility and is a disincentive to foreign investment in domestic companies.

The elections run through May, but it will likely be later in the year before there is clarity on what they mean for the future. Opportunity will continue to exist regardless, but the shape of India's evolving legal landscape will need to be monitored and assessed.

Foreign Investment Review Developments

This month, the European Union's new rules on foreign investment review go into effect. While inspired by the U.S. system, the EU regime takes a different approach by coordinating reviews and advising member states who make the ultimate decision whether to approve an investment or not.

On the U.S. side, earlier this month the Committee on Foreign Investment (CFIUS) announced it had issued a \$1 mm fine on an unnamed company "for repeated breaches" of a 2016 mitigation agreement. This unusual announcement suggests a desire to warn companies that CFIUS is about enforcement and not just a filing and review process.

Notes from All Over

Last month, Senators Diane Feinstein (D) and Susan Collins (R) introduced the Personal Care Products Safety Act bill, which would require the FDA to review chemicals commonly found in personal care items and make a determination that could result in restriction or labeling.

In response to the explosion last month at a chemical facility in Jiangsu province that killed 78 and injured over 600, China has announced a plan to revise and strengthen its production safety laws. As has happened in other crackdowns, there is speculation as to whether this could ultimately lead to closures of facilities and shortages of some materials.

The U.S. Office of Management and Budget (OMB) issued a memo last week that directs federal regulators to submit to OMB in advance any guidance they propose to issue. The effect could be a reduction in this type of quasi-rulemaking commonly issued by regulators such as the EPA and the SEC. Such a step cuts both ways as such guidance is frequently well received by companies looking for clarity in the short-term.

In the 2018 proxy season, ESG related shareholder proposals again broke records in terms of numbers of such proposals and shareholder support obtained. There is also

speculation that say-on-pay votes are being influenced by perceived leadership (or lack thereof) from companies on social issues.

To learn more about Dorsey's chemical industry practice, contact Troy Keller.