

## **Monthly legal update**

### **UK and European Union**

#### **Supreme Court ruling on the authority of agents**

The UK Supreme Court has confirmed that an irrevocable agency will only be created in exceptional circumstances.

In this case, D&D Wines International Limited (the agent) contracted to sell wines for Angove's PTY Limited (the principal). It was agreed that customers would make payment to D&D Wines, who would then pay this on to Angove's, minus its commission. D&D Wines went into insolvent liquidation and Angove's terminated the contract. Post termination, D&D Wines received more than A\$800,000 in customer payments. The question arose as to whether the agent retained authority to receive payments from customers after termination of the contract. If so, then the monies would fall to be distributed to D&D Wines' creditors as part of the insolvency proceedings. Angove's would be nothing more than an unsecured creditor and would have to prove for the monies due to it. If, however, D&D Wines did not retain authority to receive customer payments post-termination, then the A\$800,000 should be paid directly to Angove's and would form no part of the insolvency process.

The Supreme Court found for Angove's and held that D&D Wines' authority to receive payments from customers ended when Angove's terminated the contract. The result was that the A\$800,000 should go straight to Angove's. An irrevocable agency had not been created. The Supreme Court confirmed that an agent's authority can always be terminated, even where the parties have agreed that the authority is irrevocable (although, in this case, the principal may have to pay damages to the agent). The agent's authority could not be preserved by a clause

which merely referred to 'accrued rights or remedies'. The only exception to this rule is where the parties have agreed that an agent's authority will be irrevocable and the authority is given to secure an interest of the agent, being either a proprietary interest (for example, a power of attorney given to enable the holder of the equitable interest to perfect it) or a liability (generally in debt) owed to him personally. In either case, the agent's authority will be irrevocable while the interest subsists.

The ruling will be of some comfort to principals, confirming as it does that, absent a secured interest, an agent's authority can usually always be terminated, regardless of what the contract says.

#### [Bailey v Angove PTY Limited](#)

#### **Good faith terms in commercial agreements**

The UK High Court has ruled on whether a term to exercise express contractual rights in good faith should be implied into a commercial agreement, and the test to be applied by the court when assessing this.

In this case, Westerzagros (W) was involved in negotiations with the Kurdistan government concerning an oil exploration and production project. Monde (M) was assisting as consultant. The contract between W and M provided that, once the project was underway, M would receive a share of the oil production profits. The negotiations were concluded successfully. Shortly afterwards, W terminated the contract with M pursuant to the express termination provisions. M argued that the termination had deprived it of its right to participate in the profits of the oil production and that W had, therefore, terminated the contract in bad faith. It argued that it should be an implied term of the contract that W would not exercise its right to terminate in bad faith.

The High Court refused to imply a term into the contract that W would not exercise its right to terminate in bad faith. It reviewed those recent cases in which the courts have been willing to imply terms into contracts requiring parties to exercise their contractual rights in good faith. Importantly, the court confirmed that the usual tests for implying a term into contracts should be used when deciding whether to imply a good faith requirement into a contract (the implied term must be necessary to give business efficacy to the contract or be so obvious as to go without saying). The mere fact that a contract concerned a long term relationship between the parties was not enough in itself to justify the implication of such a term. The court also went on to say that it was unlikely that an express contractual right to terminate could ever be subject to a restriction to exercise it in good faith. A party, the court said, should always be able to exercise this right, regardless of its reasons for doing so.

There is no general principle of good faith around contracts in English law, and this ruling is consistent with that position. It confirms that the courts respect freedom of contracting and will give effect to the bargain agreed by the parties without interference, unless it is clearly necessary for the courts to intervene. Therefore, no changes to drafting practice are required in response to this judgment.

[Monde Petroleum SA v Westernzagros Ltd](#)

## **China**

### **Ministry of Industry and Information Technology of the People's Republic of China Issued Development Plan of Light Industry (2016-2020)**

Light industry is a traditional industry of the Chinese national economy and has international competitiveness. It also undertakes the important task of stabilizing consumptions, exports, and employments and plays a pivotal role in economic and social development. This Development Plan of Light

Industry (2016-2020) ("Plan") was drawn up to implement the "Five-Year Plan of National Economic and Social Development" and "Made in China 2025", and to guide the development of light industry in the next five years and realize the transition from "a big country of light industry" to "a strong country of light industry".

The Plan mainly includes the objectives as follows:

- i. during the period of "Thirteenth Five-Year Plan", the added value of light industry of an average annual growth rate to reach 6% to 7%;
- ii. further improving the light industry standard system and the degree of consistency of international standards of the key field to reach more than 95%;
- iii. research and experimental development expenditures accounted for the proportion of main business income enterprise above designated size of key field of light industry over 2.2%;
- iv. to support and promote industrial clusters to create about 10 new industrialization demonstration bases;
- v. enterprise above designated size energy consumption decreased by 18% over 2015, industrial added value of water, down 23% compared with 2015, carbon dioxide emissions per unit of industrial added value in 2015 decreased by 22%; and
- vi. strive to maintain a dominant position in the light industrial products in international market share.

### **工业和信息化部发布《轻工业发展规划（2016—2020年）》**

轻工业是我国国民经济的传统优势产业和具有较强国际竞争力的产业，承担着满足消费、稳定出口、就业的重要任务，在经

济和社会发展中发挥着举足轻重的作用。为落实《国民经济和社会发展第十三个五年规划纲要》和《中国制造2025》，指导未来五年轻工业创新发展，由“轻工大国”向“轻工强国”转变，编制《轻工业发展规划（2016-2020年）》。

主要目标包括：

- i. “十三五”期间，轻工业增加值年均增长6%~7%；
- ii. 轻工标准体系进一步完善，重点领域与国际标准一致性程度达到95%以上；
- iii. 轻工领域重点行业规模以上企业研究与实验发展经费支出占主营业务收入的比重超2.2%；
- iv. 支持推进10个左右产业集群创建新型工业化产业示范基地；
- v. 规模以上单位工业增加值能耗比2015年下降18%、单位工业增加值用水比2015年下降23%、单位工业增加值二氧化碳排放量比2015年下降22%；
- vi. 力争保持轻工产品在国际市场份额中的优势地位。

根据国务院的决策部署,我局对历年来印发的文件进行了清理。为进一步深入推进稳增长、促改革、调结构、惠民生,破除体制机制障碍,我局决定宣布失效一批已不适应社会主义市场经济发展需要的文件。其中包括,质检总局2006年8月24日发布的《关于墨西哥公布对纺织品及服装新标签规定的通知》。

**General Administration of Quality  
Supervision, Inspection and Quarantine of  
the People's Republic of China ("AQSIQ")  
Annul A Batch of File**

According to the decisions and arrangements of the State Council, AQSIQ sorted out the documents issued over the years. For the purpose of steady growth, promoting reform, structural adjustment and benefit people's livelihood, and to get rid of structural and institutional obstacles, AQSIQ decided to declare to annul a batch of files which no longer meet the needs of economic development, including Notice on Mexico's Announcement of the New Label for Textiles and Clothing issued by AQSIQ.

**2016年7月21日国家质量监督检验检疫总局  
宣布一批文件失效**

## **Labor and Social Security Credit Rating Evaluation Results of Enterprises Will Become the Basis for Regulation**

Human Resources and Social Security Department issued Measures for the Evaluation of the Labor Protection and Law-abiding Rating Evaluation of Enterprises (hereinafter referred to as the "Evaluation Measures") on July 25, 2016, and decided to carry out the labor and social security credit rating evaluation of enterprises from January 1, 2017.

In accordance with Evaluation Measures, Human Resources and Social Security Department will evaluate the labor and social security credit rating evaluation of enterprises in view of nine items of enterprise status as follows:

- (i) the status of development of internal labor and social security regulations;
- (ii) the status of execution of labor contracts between enterprises and their employees;
- (iii) the status of compliance with the provisions of labor dispatch;
- (iv) the status of compliance with regulations prohibiting the use of child labors;
- (v) the status of compliance with provisions on special labor protections of female employees and underage employees;
- (vi) the status of compliance with the provisions of working hours, rest and vacation;
- (vii) the status of payment of salaries and implementation of minimum salary standard;
- (viii) the status of participation in social insurances and payment of social insurances premiums; and (ix) status of compliance with other labor security laws, regulations and rules.

Evaluation Measures prescribe that, the labor and social security credit rating evaluation of enterprises shall be conducted on an annual basis. The evaluation result will be filed to enterprises archive of business ethics of labor and social security and be kept for at least 3 years. It is understood that, in the future, Human Resources and Social Security Department will establish the exchange of

credit information sharing mechanism with the industry and commerce, financial, housing and urban construction, taxation and other departments and trade union organizations, to reward or discipline the enterprises credit jointly.

## **企业劳动保障诚信等级评价结果将成为监管依据**

2016年7月25日人力资源和社会保障部颁布《企业劳动保障守法诚信等级评价办法》(以下简称《评价办法》), 决定自2017年1月1日起对企业进行劳动保障守法诚信等级评价。

根据《评价办法》, 人力资源社会保障行政部门根据9类情况对企业劳动保障守法诚信等级进行评价: (一) 制定内部劳动保障规章制度的情况; (二) 与劳动者订立劳动合同的情况; (三) 遵守劳务派遣规定的情况; (四) 遵守禁止使用童工规定的情况; (五) 遵守女职工和未成年工特殊劳动保护规定的情况; (六) 遵守工作时间和休息休假规定的情况; (七) 支付劳动者工资和执行最低工资标准的情况; (八) 参加各项社会保险和缴纳社会保险费的情况; (九) 其他遵守劳动保障法律、法规和规章的情况。

《评价办法》规定, 企业劳动保障守法诚信等级评价工作每年开展一次。评价结果归入企业劳动保障守法诚信档案, 至少保留3年。据了解, 今后, 人社部门将与工商、金融、住房城乡建设、税务等部门和工会组织建立信用信息交换共享机制, 对企业实行守信联合激励和失信联合惩戒。

## **Publicity of 88 Items of Standards Involving Industries of Textile, Gold, Chemical, Metallurgy and Nonferrous Metals for Approval**

On July 25, 2016, Ministry of Industry and Information Technology publicized 88 items of standards involving industries of textile, gold, chemical, metallurgy and nonferrous metals for approval. Among the 88 items of standards, 74 items are related to textile industry, such as the standard of combed

natural colored cotton yarn. The 88 items of standards were publicized for the purpose of listening to opinions from various sectors in the community before being formally issued. The deadline of publicity is August 24, 2016.

### **88项纺织、黄金、化工、冶金、有色行业标准报批公示**

2016年7月25日工业和信息化部关于88项纺织、黄金、化工、冶金、有色行业标准报批公示。在以上88项目标准中，有77项标准是与纺织行业相关的，例如精梳天然彩色棉纱的标准。为进一步听取社会各界意见，以上88项行业标准在正式发布前予以公示，截止日期2016年8月24日。

### **Leading Plan of Circular Development (Draft) Released to Public**

On August 9, 2016, Resource Conservation and Environmental Protection Sector of National Development and Reform Commission released the Leading Plan of Circular Development (“Plan”) for the comments from the public. In this draft of the Plan, it is going to establish about thirty promotion platforms and demonstration bases and choose electronic appliance manufacturing enterprise, automobile manufacturing enterprise, textile enterprise, etc. to promote the use of recycled materials in the production process.

### **《循环发展引领计划》（征求意见稿）向社会公开**

2016年8月9日国家发展和改革委员会环资司关于就《循环发展引领计划》（征求意见稿）向社会公开征求意见的公告。其中包括，设30个左右再生产品再制造产品推

广平台和示范应用基地，选择电子电器生产企业、汽车生产企业、纺织企业等在生产环节推广使用再生材料。

For more information on any of the items included for PRC, please feel free to call [Nicholas Chan](#).

## **Hong Kong**

### **Personal Data (Privacy) Ordinance: Cyber-Attack Prevention**

Data protection principle 4 (“DPP 4”) of the Personal Data (Privacy) Ordinance stipulates that data users are required to take all practical steps to ensure that personal data held by them is protected against unauthorised or accidental access, processing, erasure or use.

However, just because a system has been hacked, does not automatically mean that a data user is in breach of DPP 4. Whether or not a data user is in breach depends on the level of security and safeguarding measures the data user had in place and whether or not they were reasonably sufficient, taking into account the type of personal data concerned and the harm that could occur if there was a data breach. If such measures are considered by the Privacy Commissioner to be sufficient, then the relevant data user may not be found to be in breach of DPP 4.

According to the “Guidance on Data Breach Handling and the Giving of Breach Notifications” issued by the Privacy Commissioner, a data user is encouraged to report a data breach to the Privacy Commissioner by filing a formal notification at [https://www.pcpd.org.hk/english/enforcement/data\\_breach\\_notification/dbn.html](https://www.pcpd.org.hk/english/enforcement/data_breach_notification/dbn.html). Please note, however, that self-reporting on data breach is not a mandatory legal obligation. In some cases it may trigger investigation by the Commissioner into the matter for suspected breach of DPP 4.

A breach of the data protection principles is not immediately an offence. The Privacy Commissioner is empowered under law to issue an enforcement notice and/or disclose the investigation report to the public upon finding of breach. A data user should therefore make a decision on reporting data breach taking into account the seriousness of the matter, potential reputational damage and possible legal consequences.

### **Hong Kong as a “Tax Haven” for Belgian Tax Purposes**

The Belgian Program Law of 1 July 2016 has broadened the scope of application of the existing reporting obligation for payments to tax havens. The main consequence is that Belgian companies and permanent establishments will soon have to disclose to the Belgian tax administration any payments they make to Hong Kong based persons or entities, provided that the total amount of tax haven payments made during a certain taxable period exceeds 100.000 EUR.

The reporting has to be done using a special tax form that has to be annexed to the relevant entity’s annual corporate income tax return. Failure to comply with this obligation is sanctioned with the relevant unreported payments not being tax deductible. And even where this reporting obligation has been duly complied with, the tax deductibility of the relevant payments is subject to an increased burden of proof.

There is still some uncertainty with respect to the exact date on which the new reporting rules will enter into force. This will depend on when exactly the Belgian government will issue the Royal Decree that formally indicates Hong Kong as a targeted “tax haven” jurisdiction.

### **Competition Ordinance: Recent Developments**

More than six months have passed since the full implementation of the Competition Ordinance on 14 December 2015. On 14 June 2016, the Competition Commission disclosed for the first time statistics on its enforcement activities. It had received 1,250 enforcement contacts and had moved 111 cases to the initial assessment phase, 10 cases of which were under in-depth investigation. Its first ever enforcement action was published on 31 May 2016, in which the Hong Kong Newspaper Hawker Association issued a notice to its members to increase the recommended price at which they sold certain branded cigarette products. The Commission decided not to take any further action after the association quickly rectified its conduct.

#### Assessing risk exposure

Anna Wu, chairwoman of the Commission, has signalled that the agency will be “very much complaints driven”. Apart from the complaints/queries, the Commission has other sources of intelligence which may trigger its powers of investigation, including powers to compel the production and/or seizure of evidence from a business:

- **Leniency programs** are the number one source of cartel investigations in many jurisdictions. For some agencies, over 70% of cartel cases are brought to their attention by the first member to report the cartel and cooperate with the agency in exchange for full immunity.
- **Complaints** about a business or sector-wide practices can come from end consumers and the general public, as well as suppliers, competitors, whistle-blowers and government bodies.
- **Agency intelligence** from its own research, other processes and the media is often used in an enforcement context. This includes information provided in informal “friendly” interactions with competition agencies by a business

and its customers, suppliers and competitors.

- **Overseas investigations** by a competition authority can result in parallel investigations in other jurisdictions. Leniency applicants often provide waivers to agencies to facilitate their cooperation on cross-border cartels.

Pro-actively managing your company's internal/external communications and documents is therefore a critical part of any competition law compliance strategy and can go a long way in protecting the business from assertions of a potential contravention.

#### Project on trade and professional associations

On 14 March 2016, the Commission published a press release announcing the progress of its compliance project on trade and professional associations. The statement noted that the Commission had identified over 20 associations whose public practices appeared to place them at high risk of contravening the Competition Ordinance. Examples of high risk practices include price recommendations or fee scales as well as codes of conduct or rules that may restrict price competition between competing association members.

Among the identified associations, the Commission noted that 12 associations removed or were in the course of removing their price restrictions or fee scales. The Commission warned that those associations not taking steps to end problematic practices were risking enforcement action.

For more information on any of the items included for Hong Kong, please feel free to call [Nicholas Chan](#).

## **United States**

### **GSA Clarification of Nondiscrimination in the Federal Workplace – Federal Bulletin Issuance**

On August 18, 2016, the General Services Administration issued a Federal Management Regulation bulletin clarifying that the nondiscrimination requirement includes gender identity as a prohibited basis of discrimination under the existing prohibition of sex discrimination for any facility under the jurisdiction, custody, or control of the GSA. This interpretation is aligned with other agencies such as the U.S. Equal Employment Opportunity Commission, the Department of Education, and the U.S. Department of Justice. Previously, the EEOC had clarified that discrimination based on transgender status is sex discrimination in violation of Title VII (*Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 12, 2012)) and then further ruled that denying an employee equal access to a common restroom corresponding to the employee's gender identity is sex discrimination, that an employer cannot condition this right on the employee undergoing or providing proof of surgery or any other medical procedure, and an employer cannot avoid the requirement to provide equal access to a common restroom by restricting a transgender employee to a single-user restroom instead (*Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Mar. 27, 2015)).

The GSA now requires federal agencies to allow individuals to use restroom facilities and related areas consistent with their gender identity. The self-identification of gender identity by any individual is sufficient to establish which restroom or other single-sex facilities should be used. Transgender individuals do not have to be undergoing or have completed any medical procedure, nor can they be required to show proof of surgery to be treated in accordance with their gender identity and obtain access to the restroom corresponding with their gender identity.

While this rule does not extend to the private sector, it may serve as a model for state and local governments and eventually to private entities. This will continue to be an area of law for clients to keep an eye on, particularly

in light of the passage of the North Carolina law banning transgender individuals from using public restrooms that do not match the sex on their birth certificates.

The bulletin may be read [here](#).

**Exception to at-will employment doctrine: Swindol v. Aurora Flight Sciences Corp. (14-60779); Federal Appeals Decision**

On August 8, 2016, the Fifth Circuit Court of Appeals held that a former employee can sue his employer for terminating his employment for legally storing a gun in his locked car on company property.

In this case, the Defendant employer terminated the Plaintiff employee's employment upon learning he had a firearm in his car, in violation of company policy. The employee filed suit claiming wrongful discharge and further for defamation based on statements made by the company in labeling him a "security risk" and warning other employees to alert authorities if he was sighted near the employer's facility. The state where the incident happened, Mississippi, has a gun owners' protection law that prohibits an employer from maintaining or enforcing a policy that prohibits a person from storing a firearm in a locked vehicle in any parking lot, garage, or other designated parking area open to the public.

This was a case of first impression: whether a gun owners' protection law creates an exception to the at-will employment doctrine. The federal district court dismissed the suit because the Mississippi gun owners' protection law provides a release for liability to employers for damages caused by employees' firearms on company property, but does not create any exceptions to the general at-will employment statutes. However, the Fifth Circuit reversed that decision, based on the Mississippi Supreme Court finding in March of 2016 that the law does indeed create such an exception. As such, the Fifth Circuit

concluded the employee had properly stated a claim for wrongful discharge.

This case serves as a warning to businesses to use caution when maintaining or enforcing policies contrary to state statutes. As multiple states have passed similar firearm protection laws, at-will employers will need to carefully consider any potential liabilities that may be created by their own firearm policies.

The decision may be read [here](#).

**FTC Targeting Deceptive Endorsements – Federal Agency**

The United States Federal Trade Commission ("FTC") is targeting "deceptive endorsements" appearing through social media accounts. For the past several years, fashion, music, and lifestyle social media personalities have been associating themselves with a brand or products online for compensation. The FTC is planning on requiring celebrities to be clear when they are receiving payment to promote a product or brand on their social media accounts. Previously, Users would designate "paid posts" with subtle forms of identifications such as hashtags at the end of the post. However, Michael Ostheimer, a deputy in the FTC's Ad Practices Division, states this is not effective disclosure, particularly if the hashtags are mixed with other things making it easier for viewers to skip it entirely. "The real test" states Ostheimer, "is did consumers read it and comprehend it?" Now the FTC is calling for disclosures to be at the beginning of the post, said out loud, or displayed clearly on the screen.

Examples of past enforcement include the FTC reaching a settlement with Warner Bros. Home Entertainment Inc., over charges of deceiving customers by paying internet personalities to promote video games with a positive review without disclosing that the reviews had been paid for. As part of that settlement, Warner Bros. was required to implement an internal compliance system in order to ensure that advertising partners are

also aware of the rules regarding disclosure. Another example is when the FTC issued a complaint against Lord & Taylor for paying online fashion personalities to post information on clothing without disclosing that those items of clothing had been given to them for free.

Any online advertising by businesses will need to be careful so as not to violate FTC regulations related to disclosures of paid media content. Ostheimer has warned that the FTC will be increasing the requirements for disclosure on sponsored posts and that the burden will fall on the advertisers. The FTC's interview can be found on [Bloomberg](#).

### **Equal Pay – Massachusetts State Legislation**

Massachusetts has become the first state to bar employers from asking about applicants' salaries before offering them a job. The new law, Bill S.2119, will require the hiring employer to state a compensation figure upfront based on the applicant's worth rather than what the applicant had made in a previous position. Whereas previously there was no requirement for equal pay unless the employees' positions were considered comparable, this law will better define comparable work and put in place other protections aimed at ensuring all, particularly women, are paid equally. The employers are permitted to take certain attributes of a prospective employee into account when determining variation in pay, such as work experience, education, job training, or measurements of production. However, the law provides a clearer definition for what criteria employers can use to determine what is "comparable work" for equal pay purposes. The law, which will go into effect in 2018, also prohibits employers from stopping employees from discussing their salaries with each other, which is designed to increase

salary transparency and help employees discover disparities.

This new piece of legislation is being pushed as a model for other states, particularly as the issue of gender wage gap has become a prominent political topic during this election year. Legislators hope that barring companies from asking prospective employees about their previous salary will ensure that the historically lower wages and salaries assigned to women and minorities do not follow them for their entire careers. Maryland and California have also recently passed similar legislation requiring equal pay for equal work.

As this issue gains more attention, other states are updating their equal pay statutes to more clearly define "comparable work" and include further protections for workers. Job titles will not be enough and companies will need to take a closer look at job duties to ensure workers with similar responsibilities are being paid equally.

For more information on any of the items included for the US, please feel free to call [Huu Nguyen](#) or [Sarah Rathke](#).

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