SQUIRE PATTON BOGGS

January 2018

This update highlights some key commercial and intellectual property developments across Mainland China, Hong Kong, and the United States.

China

MEP Issues the Interim Measures on Acceptance Inspections for Environmental Protection Purposes over Completed Construction Projects

On November 20, 2017, the Ministry of Environmental Protection ("MEP") formulated and issued the Interim Measures on Acceptance Inspections for Environmental Protection Purposes over Completed Construction Projects (the "Measures"), with immediate effect from the issue date.

The Measures consist of 19 articles in four chapters, which are titled as the general provisions, procedures and items of acceptance inspections, supervision and inspection, and supplementary provisions. The Measures clarify that a construction entity shall not pass the acceptance inspection when environmental protection facilities built for the construction project fall under any of nine given circumstances, including "where the construction project subject to the pollutant discharge licensing administration has pollutants discharged without the license or not in conformity with requirements indicated on the license obtained". In addition, the Measures provide that the main body of a construction project shall not be put into production or use until environmental protection facilities ancillary to such project have passed the acceptance inspection. However, the main body is not allowed to be put into production or use if the acceptance check has not been performed or the environmental protection facilities are not up to standard. Furthermore, the Measures state that the construction entity shall, within five working days after completion of the acceptance inspection report, make public such report on its official website or in other ways that are easily accessible to the general public, for a period of 20 working days at least.

Interim Administrative Provisions on the Pilot Program for Standardization in China's High-end Equipment Manufacturing Industry Issued

On November 13, 2017, the Standardization Administration of China ("SAC") and the Ministry of Industry and Information Technology ("MIIT") issued the Interim Administrative Provisions on the Pilot Program for Standardization in China's High-end Equipment Manufacturing Industry (the "Provisions"), immediately effective from the issue date.

The Provisions, comprised of 22 articles in five chapters, apply to applications filed for the standardization pilot program in China's cutting-edge equipment manufacturing industry, acceptance of these applications, and implementation, assessment and administration of the pilot program. The Provisions clearly specify that, to be engaged in the pilot program, a unit must meet three essential conditions, such as "having no record of any major liability accident in respect of the quality of products (services), safety and health, and environmental protection in the past three years". The pilot program will involve major tasks in six respects, including "promoting the formation of standards for technological innovations", "pressing ahead the implementation of standards" and "strengthening standardized services". In terms of "pressing ahead the implementation of standards", among other things, the Provisions state that efforts shall be made to ensure mandatory standards regarding energy conservation, environmental protection, and safety are put into place

effectively; recommended standards that are advanced and applicable shall be adopted, making over 90 percent of these recommended standards implemented in practice.

MEP Seeks Comments on the Comprehensive Environmental Protection List (2017 Edition)

On November 23, 2017, the Ministry of Environmental Protection ("MEP") issued the Comprehensive Environmental Protection List (2017 Edition) (Draft for Comment) (the "Draft for Comment") for public consultation.

Comprised of two sections, including the List of Products with Heavy Pollution and High Environmental Risks (2017 Edition) and the Equipment Specially Used for Environmental Protection (2017 Edition), the Draft for Comment aims to provide the basis for the environmental protection purpose to justify the formulation and adjustment of relevant economic policies and market supervision policies of the State. Compared with its 2015 Edition, the Draft for Comment includes an additional 52 products that cause heavy pollution or give rise to high environmental risks. These mainly involve five categories, such as "products that have seriously negative impacts on the quality of the atmospheric environment" and "products that are of heavy and long-lasting toxicity and bring serious damage to the ecological environment health". However, 14 techniques, that have relatively slight effects on the environment, are classified as exceptions and are unrestricted.

MIIT Issues the Emergency Response Plan for Unexpected Network Security Incidents of the Public Internet

On November 14, 2017, the Ministry of Industry and Information Technology ("MIIT") issued the Emergency Response Plan for Unexpected Network Security Incidents of the Public Internet (the "Emergency Response Plan"), immediately effective from the issue date.

The Emergency Response Plan applies to the handling of and response to network security emergencies that take place at basic telecommunications enterprises, domain name registration management and service agencies and internet enterprises that offer services to the general public. According to the Emergency Response Plan, unexpected network security incidents of the public internet are classified into four different levels, namely the extremely major incidents, major incidents, severe incidents and ordinary incidents. In case an incident falls under any of five circumstances, such as "where the information of over 100 million internet users is leaked in the incident", it shall be considered as an extremely major incident. In addition, the Emergency Response Plan states that basic telecommunications enterprises, domain name agencies, internet enterprises, professional agencies of network security, and enterprises specialized in network security are required to monitor and collect in diverse ways the potential network security dangers and warning information, such as the latest trends in network vulnerabilities, viruses, and network attacks, in order to analyse and evaluate the likelihood of unexpected incidents and potential impacts caused by them.

MOF and SAT Seek Opinions on the Law on Resource Tax

On November 20, 2017, the Ministry of Finance ("MOF") and the State Administration of Taxation ("SAT") issued the Law of the People's Republic of China on Resource Tax (Draft for Comment) (the "Draft for Comment") for public consultation by December 20, 2017.

The Draft for Comment clearly states that the taxpayer for the resource tax purpose refers

to an entity or individual that exploits mineral products or produces salt within the territory of China or in other sea waters under China's jurisdiction, and that mineral products and salt are subject to the resource tax. When it comes to the taxation methods and the tax payable, the Table of Taxable Items and Tax Rates of Resource Tax affixed to the Draft for Comment sets forth tax rates for 146 taxable items divided into four major categories, including energy mineral resources, metallic ores, nonmetallic ores, and salt. Tax rates for only a few taxable items are adjusted appropriately, leaving those for other items still determined under the existing method and at the same rate. Furthermore, the Draft for Comment notes that tax reliefs are granted under four circumstances, such as "where the crude oil and natural gas used for heating during the process of exploiting crude oil and transporting crude oil within the oil fields are exempt from the resource tax", and it further provides that if a Chinese enterprise and a foreign enterprise work together to exploit crude oil and natural gas and pay the mining royalties, they will be subject to the resource tax according to the Law on Resource Tax in the future instead of paying the mining royalties.

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

Hong Kong

Amendment to Employment Contract Void Due to Lack of Consideration

In *Wu Kit Man v Dragonway Group Holdings Limited*, the Court of First Instance held that an addendum amending an employee's contract of employment, by requiring the employer to pay the employee a bonus of HK$350,000, was void as the addendum was only beneficial to the employee and the employee had not provided sufficient consideration for the addendum to be binding.

In this case, the addendum granted Wu the right to receive the bonus but she was not required to fulfil additional conditions in order to receive the bonus. She only needed to continue to carry out her existing role which was to assist with preparing Dragonway for listing. The Court ruled the addendum invalid and Wu was ordered to repay the cash bonus. The Court stated that if any amendment to a contract only benefits one party, the amendment would be invalid due to lack of consideration.

To avoid any dispute over consideration, any amendments to an employment contract should be executed as a deed, as a deed does not need consideration to be binding on the parties.

Employee Who Affirms Employer's Breach Cannot Claim Constructive Dismissal

In the case of *Chen Xiang（陈翔）v. China Daye Non-Ferrous Metals Mining Limited （中国大冶有色金属矿业有限公司）*, Chen was employed by the Company on a salary of HK$80,000. From March 2014 to May 2014, his salary was reduced by 52.5%. On 23 May 2014, Chen tendered a written notice of resignation ("the Resignation Letter") and he ceased employment a month later. The employee lodged a claim against his employer for constructive dismissal at the Labour Tribunal.

The Labour Tribunal held that although Chen's salary reduction had unquestionably changed a fundamental term of his contract of employment ("the Contract"), he had affirmed the Contract such that he had not been constructively dismissed. The employee appealed to the CFI.

The CFI dismissed the appeal. The judge ruled that, expressing in the Resignation Letter that he "wishes" to quit 30 days after tendering his resignation, indicated that Chen had affirmed the contract. He was, nonetheless, tied to the Notice Period as stipulated in his Contract but he was trying to come to an agreement with the Company for a (shorter) 30-day notice period. Furthermore, Chen had not sought to rely on the Company's repudiation as a reason to resign.

Just as an employee can affirm a breach by his/her employer, an employer can also affirm a breach by an employee. As such, employers should be careful when dealing with an employee who has breached his/her contract of employment (e.g., misconduct, breach of confidentiality, failing to follow lawful and reasonable instructions, etc.) not to (inadvertently) affirm the breach.

Case Update on Enforceability of Arbitration Clause

Townsend Ventures, LLC v. Hybrid Kinetic Grp. Ltd concerned a motion to compel arbitration. There were three agreements signed between the Plaintiff and the Defendant, namely a Memorandum of Understanding, a supply agreement and a framework agreement. Among the three agreements, only the supply agreement contained an arbitration clause, which provided that any dispute, controversy or claim relating to the supply agreement would be heard before the Hong Kong International Arbitration Center (the "HKIAC").

The defendant in the case responded by moving to stay the proceedings and compel arbitration. The court ruled that there should be a two-stage inquiry on this particular issue: (1) the court should determine who decides whether a particular dispute is arbitrable: the arbitrator or the court; and (2) if the court concludes that it is the proper forum in which to adjudicate arbitrability, the court should then decide whether the dispute is, in fact, arbitrable. The court also found that it could compel arbitration under the Convention on Recognition and Enforcement of Foreign Arbitral Awards.

For more information on any of the items included for Hong Kong, please feel free to call Nicholas Chan.
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United States

US Department of Labor Intern Test – Federal Update

The US Department of Labor (DOL) announced on January 5, 2018 that it will use the "primary beneficiary" test when determining whether students and interns are employees under the Fair Labor Standards Act (FLSA). Under Section 6 of the FLSA, nonexempt employees must be paid at least the minimum hourly wage and any applicably overtime. If unpaid interns have been misclassified and are in fact employees under FLSA, then they may sue their employers for misclassification and wage violations.

Before this announcement, the DOL used a six-part test expressed in agency guidance from 2010 to determine whether it was permissible to use unpaid interns. Under the 2010 test, employers were required to show that all six factors supported the unpaid intern's classification. The DOL press release notes that the "primary beneficiary" test provides "the Division's investigators with increased flexibility to holistically analyze internships on a case-by-case basis." The case-by-case nature of the test, examining the

economic reality to assess whether the intern or the employer is the primary beneficiary of their relationship, suggests that class actions and other collective actions may not be appropriate for internship misclassification lawsuits.

The "primary beneficiary" test was first applied by the Second Circuit Court of Appeals in *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376 (2d Cir. 2015) and has since been adopted by the Sixth, Ninth and Eleventh Circuits. The test analyzes seven factors, described in a new fact sheet issued by the DOL's Wage and Hour Division, to determine whether an intern or student is an employee under the FLSA and thus entitled to compensation. These factors assess whether the internship provides educational training or is affiliated with academic institutions, whether the interns replace the work of paid employees, and whether it was clear to the intern that the position was unpaid.

National Labor Relations Board Ruling Overturned

In 1962, the U.S. Supreme Court held that unionized employers must refrain from making a unilateral change in employment terms, unless the union first receives notice and the opportunity to bargain over the change. This led to the question: what exactly constitutes a change?

On December 15, 2017, in Raytheon Network Centric Systems and United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO, Case 25-CA-092145 (2017), the National Labor Relations Board ("NLRB" or the "Board") issued a ruling finding actions do not constitute a change if they are similar in kind and degree with an established past practice consisting of comparable unilateral actions. The Board's decision applies retroactively.

The most recent decision involves Raytheon Network modifying unit employee healthcare benefits as part of a continuation of its past practice of making similar changes at the same time every year for over ten years. The union filed an unfair labor practice charge alleging Raytheon's announcement and implementation of the changes, over the union's objection, violated Section 8(a)(5) of the National Labor Relations Act.

This decision overturned a 2016 ruling, *E.I. du Pont de Nemours*, 364 NLRB No. 113 (2016) ("DuPont"). In that case, a majority panel held that if an employer takes actions constituting change, even if that employer has been taking the same action for years, the change must be preceded by notice to the union and the opportunity for bargaining, if a collective-bargaining agreement ("CBA") permitted the employer's past actions and the CBA is no longer in effect.

In rendering its decision, the Board characterized the DuPont decision as "fundamentally flawed" and inconsistent with Section 8(a)(5) of the National Labor Relations Act as it "distorts the long-understood, commonsense understanding of what constitutes a 'change,' and it contradicts well-established Board and court precedent."

The Board noted its decision is intended to align with its responsibility to foster stable bargaining relationships.

Supreme Court Declined to Review Sexual Orientation Discrimination Matter

On December 11, 2017, in *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017), the U.S. Supreme Court declined to review the Eleventh Circuit case, *Evans v. Georgia Regional Hospital*. The issue on appeal was whether the prohibition in Title VII of the Civil Rights Act of 1964 against employment discrimination "because of … sex"

encompasses discrimination based on an individual's sexual orientation.

Plaintiff Evans filed an employment discrimination complaint alleging she was discriminated against because of her sexual orientation and gender non-conformity, and retaliated against after she lodged a complaint with her employer's human resources department.

The Eleventh Circuit Court of Appeals considered Evans's argument that she properly stated a claim under Title VII by alleging she endured workplace discrimination because of her sexual orientation. The appellate court then concluded that under the prior precedent rule, the court is bound to follow binding precedent in the circuit unless and until it is overruled by the court en banc or by the Supreme Court. However, the appellate court did acknowledge a claim for discrimination based on gender non-conformity is actionable and provided Evans with an opportunity to amend her complaint to plead with the requisite sufficiency. On July 6, 2017, the Eleventh Circuit declined to rehear the case en banc and on September 7, 2017, a writ of certiorari was filed with the U.S. Supreme Court.

In a previous update, we examined the Seventh Circuit opinion in *Hively v. Ivey Tech Community College*, where the court found sexual orientation is a protected characteristic under Title VII. Recently, the Second Circuit granted rehearing en banc on the issue of whether Title VII prohibits discrimination on the basis of sexual orientation through its prohibition of discrimination because of sex. The Second Circuit case of *Zarda v. Altitute Express* held oral argument on Sep. 26, 2017 and a decision is still pending. This leaves a circuit split on whether federal law prohibits employment discrimination based on an individual's sexual orientation.

Employers should continue to monitor developments on this issue.

OSHA Silica Rule Upheld by D.C. Circuit

In 2016, the U.S. Occupational Safety and Health Administration (OSHA) promulgated a new rule ("Silica Rule" or "Rule") with significant requirements for workplaces containing respirable crystalline silica. Various industry groups brought suit in six federal Courts of Appeal, challenging the Silica Rule for being too stringent, while union groups challenged the Rule as not stringent enough. These suits were consolidated into one case, *North America's Building Trades Union v. Occupational Safety and Health Admin., et al.*, No. 16-1105 (D.C. Cir. Dec. 22, 2017).

Industry groups argued there was not substantial evidence to support "OSHA's finding that limiting workers' silica exposure to the level set by the Rule reduces a significant risk of material health impairment" or OSHA's findings that the Rule was technologically or economically feasible for various industries. The D.C. Circuit rejected these challenges and upheld OSHA's Silica Rule on December 22, 2017. Compliance obligations under most aspects of the Rule begin on June 23, 2018.

The new Silica Rule reduces the permissible exposure limit (PEL) for respirable crystalline silica from 100 $\mu g/m^3$ to 50 $\mu g/m^3$ and sets a new "action level" of 25 $\mu g/m^3$, requiring employers to monitor for silica in the workplace at or above that level. The Silica Rule also requires employers to limit workers' access to areas exposed to respirable silica, develop plans to limit exposure, and provide medical exams at least every three years for certain exposed employees.

The portion of the Silica Rule that applies to general industries, including all new requirements, can be found at 29 C.F.R. Section 1910.1053 (2016).

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