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

UK and European Union

First High Court order for deletion of misappropriated confidential information

In proceedings for breach of confidence, the UK High Court has ordered that computers and other electronic devices belonging to ex-employees and their new employer be inspected and, most notably, any confidential information found on them belonging to the former employer be deleted. The High Court has never before made an order requiring deletion in these circumstances. Factors which persuaded the court to make this order in the absence of previous judicial authority included the fact that the ex-employees had admitted knowingly using their former employer's confidential information. The evidence showed a "high degree of subterfuge" in the use of this information and that the ex-employees could not be trusted to delete the information themselves. This is a useful decision for employers to know about. It is particularly noteworthy as the order for deletion was made in the context of an interim injunction. There had been no decision on the merits of the case, although the court was satisfied that the former employer was likely to succeed in its breach of confidence claim.

Arthur J Gallagher (UK) Ltd v Skriptchenko (only subscription based links to the judgment are currently available)

Court of Appeal considers effect of contractual priority clauses

The UK Court of Appeal has considered how to approach priority clauses where a contract contains conflicting terms. In so doing, it overturned the earlier High Court ruling on this issue. In this case, the contract was a mortgage which incorporated terms from two separate documents – the offer letter and the standard conditions. The mortgage contract included a priority clause which provided that the terms of the offer letter would prevail over the standard conditions in the event of inconsistencies. The mortgage company varied the interest rate in accordance with the standard conditions. The claimant argued that these conditions were at odds with the terms of the offer letter which should prevail under the priority clause. The High Court held that priority clauses should be given effect only in the case of a "clear and irreconcilable discrepancy". Here, there was no inconsistency between the two documents. They could simply be read as modifying or qualifying each other. The priority clause had no effect. The Court of Appeal disagreed and overturned this ruling. The court held that an assessment of whether there was inconsistency in the contract should be made without any pre-conceived assumptions, so a court should not strive to avoid or find inconsistency. The Court of Appeal held that the offer letter and the standard terms were inconsistent. They did not merely modify or qualify each other. Accordingly, the priority clause had full effect and the offer letter prevailed.

The differing approaches of the High Court and the Court of Appeal mean there is some uncertainty around the approach to be taken to priority clauses – should they be given effect where there is inconsistency (as per the Court of Appeal) or should they be avoided where possible by adopting a consistent interpretation of the conflicting terms as a whole (as per the High Court). In light of this, reliance on priority clauses is best avoided. Those drafting contracts should ensure that all terms and documents work together and avoid any inconsistencies or ambiguities. It is still worth including a priority clause but there is little certainty at the moment around whether such a clause will be given its intended effect.

Alexander v West Bromwich Mortgage Company

Court of Appeal considers when a signature requirement will be waived

The UK High Court, and subsequently the Court of Appeal, have confirmed, once again, that an unsigned agreement may still bind parties. In this case, the parties entered into negotiations for a legally binding short form agreement (the 'Deal Memo'). The Deal Memo stated that it was not binding until signed by both parties. The defendant signed but the claimant did not. The claimant subsequently performed all of its obligations under the Deal Memo, but the defendant later argued that it was not binding because the claimant had not signed it. The High Court held that the Deal Memo was binding, even in the absence of the claimant's signature. It was clear that the claimant had accepted the contract by conduct and this had been communicated to the defendant. The claimant's conduct was not merely pre-contractual preparation – its acts were significant and consistent only with being contractually bound by the Deal Memo. The Court of Appeal agreed. It adopted an offer and acceptance analysis of the situation, looking at the "reasonable expectations of honest sensible businessmen". It held that a party can waive a prescribed mode of acceptance (such as a signature) if it accepts in a different way (such as by conduct) provided that acceptance does not prejudice the other party. On the facts, the defendant had not been prejudiced. Indeed, it had benefitted from the claimant's performance. No real uncertainty (other than the precise date on which the contract had been made) had been caused by the absence of the claimant's signature. The case shows that, even where a contract sets out formalities that must be complied with, it can still bind the parties if their conduct demonstrates they have waived those requirements.

Reveille Independent LLC v Anotech International UK Ltd

Court of Appeal takes robust approach to the construction of an exclusion clause

The UK Court of Appeal has adopted a robust approach to the construction of an exclusion clause, rejecting some of the more traditional 'rules' of construction that could have suggested a more restrictive interpretation of the clause. In this case, the owner of a drilling rig and contractor entered into a contract for the drilling of a well. The work was delayed due to the contractor's breach and the drilling rig owner brought proceedings to recover his 'spread costs'(the cost of goods and services that were obtained and paid for but were wasted as a result of the breach) – all items of consequential loss. The contractor relied on an exclusion clause (clause 20) which said:

20. CONSEQUENTIAL LOSS

For the purposes of this Clause 20 the expression "Consequential Loss" shall mean:

(i) any indirect or consequential loss or damages under English law, and/or

(ii) to the extent not covered by (i) above, loss or deferment of production, loss of product, loss of use (including, without limitation, loss of use or the cost of use of property, equipment, materials and services including without limitation, those provided by contractors or subcontractors of every tier or by third parties)……

Applying some traditional rules of construction (including the contra proferentum rule and the eiusdem generis principle), the High Court held that clause 20 did not exclude the contractor's liability for the spread costs. The Court of Appeal disagreed. It held that the language used by the parties was of paramount importance and that it should be given its plain and natural meaning in the context of the contract. The contra proferentum rule should only be used with regard to language that was ambiguous – that was not the case here. This was also not a proper case in which to apply the eiusdem generis principle. The words in clause 20(ii)

were plainly apt on the face of them to cover the spread costs, particularly as the parties had emphasised the width of the exclusion clause by using the phrase 'without limitation' twice.

This judgment can be both a help and a hindrance depending on whether you are seeking to rely on or avoid an exclusion clause. It is helpful in showing that the courts are willing to construe exclusion clauses at face value, avoiding strict legal principles which could result in a more restrictive interpretation. This is particularly so where the contracting parties are of equal bargaining power. Accordingly, contracting parties can have greater confidence that the exclusion clauses they negotiate will be upheld.

Transocean Drilling UK Ltd v Providence Resources plc

For more information on any of the items included for the UK or EU, please feel free to call Alastair Purssell.

China

Foreign Investment Statistical System (2016) issued

On May 19 2016, the Ministry of Commerce issued the Foreign Investment Statistical System (2016) (the "System"). The System is applicable to the local competent commerce administrative departments at all levels, the state's comprehensive departments and entities with utilization of foreign investments, and the foreign-funded enterprises and cooperative development projects within China. In comparison with last year, the new Statistical Policy revises the Statistical Table of Operating Status of Foreign Invested Enterprises, sorting out and summarizing the explanations of the indicators under the Table.

Circular of the State Administration of Foreign Exchange on Issuing the Administrative Provisions on Exchange Business by Foreign Currency Exchange Agencies and Automatic Foreign Exchange Machines

On May 19 2016, The State Administration of Foreign Exchange ("SAFE") formulated and distributed the Administrative Provisions on Exchange Business by Foreign Currency Exchange Agencies and Automatic Foreign Exchange Machines (the "Provisions"). The Provisions: (1) streamline administration and delegate powers; (2) change the supervision method; (3) clarify the business scope as foreign currency exchange agencies and automatic foreign exchange machines are deemed as the extension of businesses handled on counters; (4) improve the business management method to prevent any money laundering risk; and (5) promote the integration of regulations as three administrative regulations for foreign currency exchange businesses are repealed.

Supreme People's Court issued the twelfth instalment of Guiding Cases in 2016

On May 30 2016, the Supreme People's Court has issued the twelfth instalment of Guiding Cases in 2016, among which the case Chengdu Tongdefu Hechuan Peach Co. Ltd. v. Chongqing Hechuan Tongdefu Peach Co. Ltd. & Yu Xiaohua concerns the boundary of trademark infringement and unfair competition. During the trial, the court ruled that, in case of persons or entities without historical origins with a "Time-Honored Brand" promoting their brands in name of the "Time-Honored Brand", it shall be deemed to be false propaganda and constitute unfair competition.

SAIC: To Repeal and Nullify 238 Policy Documents

On 6 June 2016, the State Administration for Industry & Commerce issued the

Announcement on Issuing the Check-up Results of the Policy Documents to perform a comprehensive check-up of 511 policy documents and normative documents effective till the end of 2015, repealing & nullifying 238 documents and retaining 273 effective documents. The documents repealed include: Reply Opinions on Questions Relating to Registration Change of Branches of Foreign Invested Companies in Absorption & Merger, Reply on Issues Concerning Investment Companies Applying for Establishment of Foreign Invested Advertising Enterprises, Reply on How to Deal with False Advertisements That Have Been Designed & Fabricated But Not Been Published and Reply on Issues Concerning Jurisdiction of Mortgage Registration of Movable Assets.

Administration Measures for Emergency Plans for Workplace Accidents

Recently, the State Administration of Work Safety has issued the Administration Measures for Emergency Plans for Workplace Accidents (the "Measures") for implementation as of July 1, 2016. The Measures apply to the preparation, review, promulgation, record-filing, publicity, education, training, drilling, assessment, revision, supervision and management of the emergency plans for workplace accidents. According to the Measures, the emergency plans prepared are classified as the general, the special and the on-site emergency plans. The Measures note that an emergency plan shall be prepared subject to eight basic requirements, and it also specifies the liabilities under certain circumstances, such as "failure to prepare an emergency plan as required".

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

Hong Kong

Reinstatement/Re-engagement - employment

The Employment Ordinance (Chapter 57 of Laws of Hong Kong) allows employees to seek a court order for reinstatement or re-engagement of employment if they make a claim against their employer for unreasonable dismissals in contravention of the law, such as dismissal during paid maternity leave or sick leave. An order for reinstatement returns the employee to the state as if he/she had not been dismissed, while an order for re-engagement requires the employer to re-engage the employee on terms comparable to the original terms or in other suitable employment. Currently, consent from both employer and employee is required. In March 2016, the Employment (Amendment) Bill ("Bill") 2016 was introduced to remove the requirement of consent from both parties for unreasonable dismissals in contravention of the law – only the employee's consent is required. The Bill also provides flexibility to the employer to apply for the reinstatement to apply to a successor or associated company, but this will require mutual consent by all parties. An employer which fails to comply with the reinstatement/re-engagement order will be liable for additional penalties under the Bill. The amount of additional compensation for the employee will be the lesser of HK$50,000 or three times the employee's average monthly wages.

Anti-Avoidance - employment

Anti-avoidance terms can now be implied into employment contracts following the decision of Sunny Tadjudin v Bank of America, National Association, [2016] HKCA 201; CACV 12/2015. The Court of First Instance ("CFI") found Bank of America, the employer, to have terminated a former senior employee's contract with the dominant intention to avoid her eligibility to receive a discretionary bonus as part of the employer's performance incentive program for that year. CFI evaluated the circumstances of the employment such as the structure of the

employee's remuneration package, the express terms of the employment contract, the principles of reasonableness and equity and the consistency with the Employment Ordinance and found that the anti-avoidance term was implied in the contract. CFI held Bank of America liable to pay damages of US$500,000 to the employee in respect of the annual discretionary bonus that would have been awarded to her. The Court of Appeal dismissed Bank of America's appeal and held the decision in May 2016. This is a significant decision as it confirmed the implied duty of anti-avoidance at common law in Hong Kong. The employer will have the burden to exclude this implied duty by express contractual provisions at the risk of reputation harm and undermining the confidence of employees. It is prudent for employers in Hong Kong to ensure that decisions regarding bonus awards and performance management are made for legitimate reasons and documented correctly. Employers may wish to provide adequate training for their HR/Legal department for managers involved in remuneration and performance related matters.

Intellectual Property – Arbitration

The Hong Kong Government in December 2015 proposed amendments to the Hong Kong Arbitration Ordinance (Chapter 609 of Hong Kong Law) to confirm that disputes over the subsistence, scope, validity, ownership, scope, infringement or any other aspect of an intellectual property ("IP") right can be submitted to arbitration in Hong Kong. To further encourage IP arbitration, the Hong Kong International Arbitration Centre ("HKIAC") launched a new Panel of Arbitrators for Intellectual Property Disputes ("Panel") in March 2016. The Panel is a specialist IP panel of arbitrators composed of leading experts in handling IP cases. It includes 30 members who have diverse backgrounds, speak a total of 7 languages, and practice from 12 jurisdictions. The Panel is the primary source for HKIAC's appointment of arbitrators for IP cases and is separate from HKIAC's regular Panel or List of Arbitrators. The proposed amendments and the establishment of the Panel demonstrate the Hong Kong Government's desire and commitment to build Hong Kong as a global arbitral centre for the resolution of IP disputes. In particular, non-U.S. companies may find the Panel to be a viable alternative to U.S. courts for handling complex IP disputes internationally.

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

United States

United States Army Corps of Engineers v. Hawkes Co., Inc., 578 U.S. ___, No. 15-290 (May 31, 2016) (slip op.); United States Supreme Court decision.

The Supreme Court ruled unanimously that landowners can go directly to court after federal regulators decide that a piece of property containing wetlands is covered by the Clean Water Act. The case stemmed from a proposed peat mining operation in Minnesota, where the U.S. Corps of Engineers decided the property contains wetlands that fall under the Clean Water Act. Whether a particular plot of land falls under the law's jurisdiction is important to developers and other property owners because such a finding triggers a lengthy and expensive permitting process. The decision may be read here: http://www.supremecourt.gov/opinions/15pdf/15-290_6k37.pdf.

Manufacturing news update: NAM dispels trade myths

The National Association of Manufacturers ("NAM") has launched a social media campaign to dispel trade myths perpetuated by presidential candidates Donald Trump, Hillary Clinton, and Bernie Sanders. Vice President of International Economic Affairs Linda Dempsey states "the most oft-repeated claims in the campaigns of both major parties are flat-out wrong." In a blog posted on NAM's website, Dempsey responds to claims

made by the candidates regarding China, the North American Free Trade Agreement ("NAFTA"), the Trans-Pacific Partnership ("TPP"), and trade deficits.

In response to the candidates' focus on the US trading relationship with China, Dempsey acknowledged that more steps need to be taken to improve the US-China partnership and that there are complexities that eclipse short-sighted campaign promises. Dempsey echoed the same note trade deficits, arguing that the long-standing shortfall could be narrowed by trade agreements. Dempsey additionally raises the point that the US exports more manufactured goods to countries with which it has free-trade pacts than it imports from them.

In regards to Trump proclaiming NAFTA as "the worst economic deal in U.S. history" and Sanders also blaming NAFTA for the economic slowdown in the late 1909s, Dempsey responds that criticism behind NAFTA "is an enduring but deeply flawed myth." Dempsey counters that the "recession in the late 1990s had a negative effect on the U.S. economy and jobs, but if anything, NAFTA helped the United States endure that downturn more successfully and has been critical to sustaining and growing the U.S. manufacturing sector that then faced even stronger challenges from Asian emerging economies."

The complete NAM blog post is found here: http://www.shopfloor.org/2016/05/truthonthetrail-trade-realities-campaigns-need-to-consider/.

Toxic Substances Control Act; Federal legislation

Congress approved a major overhaul of the Toxic Substances Control Act ("TSCA") with bipartisan support and has sent the bill to the President on June 14, 2016 for his signature. Once enacted, the Environmental Protection Agency ("EPA") will be empowered to review toxic chemicals already on the market, evaluate new ones, and impose restrictions if any are deemed unsafe. The bill would clarify an assortment of contradictory state rules, resulting in a streamlined set of federal regulations for manufactures to navigate. The new bill would require the EPA to begin conducting tests on 64,000 chemicals at a pace of 20 chemicals at a time, with a deadline of seven years per chemical. Additionally, the bill would restrict states from passing new laws regulating chemicals, however will allow those already passed to remain on the books.

Information on the bill may be found here**:** **https://www.congress.gov/bill/114th-congress/house-bill/2576.**

Update-Miscellaneous Tariff Bill; Federal legislation

On May 20, 2016, President Obama has signed into law the American Manufacturing Competitiveness Act of 2016, which will streamline the miscellaneous tariff bill ("MTB") process for reducing or eliminating duties on imports of inputs or products that are not made domestically. The MTB process provides for tariff-relief petitions to go directly to the Commerce Department's International Trade Commission, which would analyze the requests "and issue public reports to Congress with recommendations."

As reported in earlier updates, the introduction of the new MTB process would help manufacturers remain competitive, particularly as manufacturers have been paying duties on various products since the last miscellaneous tariff bill had expired in 2012.

Please see the previous updates regarding the passage of H.R.4923 - American Manufacturing Competitiveness Act of 2016. The text of the law may be found here: https://www.congress.gov/bill/114th-congress/house-bill/4923.

Green v. Brennan, 578 U.S. __, No. 14-613 (May 23, 2016); United States Supreme Court decision.

The United States Supreme Court ruled Monday, May 23, 2016, that the filing period for a constructive discharge claim begins to run when an employee resigns as a result of discriminatory behavior.

In a 7-1 vote penned by Justice Sonia Sotomayor, the high court vacated a September 2014 Tenth Circuit ruling that the clock for a claim of constructive discharge — when an employer creates an environment so adversarial that an employee feels forced to resign — starts running at the time of the employer's last alleged act of discrimination that forces an employee to quit. Instead the court held that the filing period begins when an employee resigns after having to endure any such discrimination.

In its ruling, the high court concluded in part that an employee's resignation is part of the "complete and present cause of action" for a constructive discharge claim that is necessary before a limitations period can begin to run. The majority also clarified that the clock on the limitations period begins at the time an employee gives notice of resignation, and not their actual last work day.

The practical effect of the Court's decision is it will make it more difficult for an employer to argue that a constructive discharge claim is untimely as the decision will expand the statute of limitations period in Title VII cases alleging constructive discharge.

The Supreme Court opinion may be read here: http://www.supremecourt.gov/opinions/15pdf/14-613_l5gm.pdf.

Manufacturing news update: Rethink Red Tape.

The National Association of Manufacturers ("NAM"), in partnership with the Small Business & Entrepreneurship Council, launched a multimillion dollar campaign called Rethink Red Tape to build momentum for regulatory reform.

Rethink Red Tape aims to broaden consensus for regulatory reform by explaining the problems that regulations cause, particularly for small companies. The objective is to press the federal government for transparency, accountability and to provide candid evaluations of how much regulations will cost businesses. It also aims to identify bipartisan solutions that could improve the way regulations are implemented and would give small businesses a voice in the process

The campaign will focus on five key principles: 1) Meaningful public engagement in the rulemaking process; 2) Prioritization of unbiased, scientific information in rulemaking; 3) Consideration of public costs and benefits; 4) Transparency and clarity in how rules will be enforced and how compliance can be attained; and 5) Regular evaluation of whether regulations are working.

While the campaign targets regulatory reform for small-businesses, it will have an impact on how regulations affect large manufacturers. The campaign's plan to invest more than $1 million in order to urge the federal government and states to reduce regulatory burdens on businesses may lead to lowering the cost of doing business and thus making it easier to compete in the global economy.

EEOC Employer Wellness Programs and the Genetic Information Nondiscrimination Act; Federal rule

On May 17, 2016, the U.S. Equal Employment Opportunity Commission ("EEOC") finalized the rule specifying the extent to which employer-sponsored wellness plans can comply with the Americans with Disabilities Act by offering incentives while still protecting employees against discrimination. The final rule says employers may provide limited financial and other inducements in exchange for an employee's spouse providing

information about his or her current or past health status as part of a wellness program, whether or not the program is part of a group health plan.

The Genetic Information Nondiscrimination Act ("GINA") is a federal law that prohibits discrimination in insurance and employment on the basis of genetic information. Title II of GINA prohibits employers from using genetic information in making decisions about employment and strictly limits employers from disclosing genetic information. Genetic information includes information about the manifestation of a disease or disorder in family member, including spouses, of an individual.

Because some employers may offer inducements for employees and their family members to answer questions about their health or to take medical examinations as part of a wellness program, this rule clarifies that an employer may offer a limited incentive for an employee's spouse to provide information about the spouse's current or past health status as part of a voluntary wellness program.

The final rule prohibits an employer from requiring an employee or spouse to agree to the sale, exchange, transfer, or other distribution of health information in exchange for an inducement or as a condition for participating in a wellness program.

The final rule may be found here: https://www.federalregister.gov/articles/2016/05/17/2016-11557/genetic-information-nondiscrimination-act

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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