SQUIRE PATTON BOGGS

August 2016

Monthly legal update

UK and European Union

Contractual anti-oral variation clauses do not prevent variation orally

The UK Court of Appeal has confirmed that parties may vary a contract orally despite the contract containing a clause requiring all variations to be in writing.

In this case, the defendant (Rock) leased premises from the claimant (MWB). Rock was unable to afford the rent and defaulted on payments. MWB terminated the contract and issued proceedings claiming the rent arrears. Rock argued that this termination was wrongful on the basis that its managing director had orally agreed a restructuring of the rent payments with the claimant's credit controller. MWB responded by arguing that no such agreement had been made but, even if it had, it did not bind the parties because of clause 7.6 of the written agreement between the claimant and Rock which provided:

"*This licence sets out all of the terms as agreed between MWB and the licensee. No other representations or terms shall apply or form part of this licence. All variations to this licence must be agreed, set out in writing and signed on behalf of both parties before they take effect*."

The Court of Appeal held that an oral agreement had been made between the claimant's and defendant's representatives and that this agreement bound the parties, despite clause 7.6. The Court of Appeal said that the most powerful factor in this decision was the need to respect the autonomy of the contracting parties and the principle that "*whenever two men contract, no limitation self-imposed can destroy their power to contract again*… ". The court was satisfied that any concerns about false allegations of oral variation could be dealt with by a court requiring evidence which showed, on the balance of probabilities, that a variation was indeed concluded.

This reasoning is likely to be followed in subsequent cases. However, it is still worth including anti-oral variation clauses in commercial agreements as most parties will, in practice, comply with them, thereby providing certainty around contractual terms. It will also be the presumptive starting point, requiring a party seeking to rely on an alleged oral variation to adduce clear evidence to establish this.

MWB Business Exchange Centres Ltd v Rock Advertising Limited

Interpretation of jurisdiction clauses

The High Court has been asked to determine whether a jurisdiction clause in a commercial agreement was exclusive or non-exclusive. As drafted, clause 9.1 said:

"[The defendant] agrees for the benefit of [Perella] that the courts of England will have non-exclusive jurisdiction to settle any dispute which may arise in connection with this engagement."

The proceedings concerned the repudiation of a contract. The defendant issued proceedings in Spain and the claimant, Perella, subsequently issued in England. The defendant applied to stay the English proceedings in favour of the Spanish court but Perella argued that the contract was subject to exclusive English jurisdiction.

The High Court held that the jurisdiction clause should be interpreted as drafted and was non-exclusive. Although the clause was expressed to be "for the benefit of Perella" this was not to be interpreted as meaning that Perella was entitled to insist on exclusive English jurisdiction. The 'benefit' was merely to enable Perella to invoke the (non-exclusive) jurisdiction of the English courts if it wished. It did not bar proceedings elsewhere by the defendant or, indeed, Perella.

The clause expressly referred to non-exclusive jurisdiction and a non-exclusive jurisdiction interpretation was consistent with business common sense. The fact that the clause gave an asymmetrical benefit to Perella was irrelevant in the interpretation.

Contract drafters can take comfort from this, and other recent rulings of the English courts, that the language of agreements, as drafted, will usually be given full effect. The courts will be slow to interfere with the autonomy of contracting parties by rewriting the agreement.

Perella Weinberg Partners v Codere SA

Repeal of S52 CDPA 1988

Section 52 of the Copyright Designs and Patents Act 1988 was repealed on 28 July 2016. Section 52 provided that when a work protected by artistic copyright had been exploited industrially (by making and selling more than 50 copies) the copyright term in the work was automatically reduced from the usual life of the author plus 70 years to just 25 years from the date of first marketing. Since 28 July, all artistic works (whether industrially exploited or not) have copyright protection for the life of the author plus 70 years. There are detailed transitional provisions. Copyright owners will welcome the repeal as meaning businesses will no longer be able to produce and sell 'replica' copies of products on the market.

The UK Intellectual Property Office has published guidance on the repeal.

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

China

Administration Measures for Emergency Plans for Workplace Accidents

On June 3, 2016, the State Administration of Work Safety issued the revised Administration Measures for Emergency Plans for Workplace Accidents (the "Measures"), which will take effect on July 1, 2016. The revised Measures mainly cover three new aspects: (1) to become prevention-oriented and focus on preparation in advance; (2) to solve the formalistic problem of contingency plans, and put the contingency plans under daily dynamic management in workplaces; (3) to stress the operability in the development process of plans. The Measures provide a targeted response to the long existing risks in the emergency plans of production safety accidents.

Public Comments Sought for Guidelines on Identification of Illegal Proceeds of Operators by Monopolistic Practices and Determination of Fines

Recently, the National Development and Reform Commission issued the Guidelines on the Identification of Illegal Proceeds of Operators by Monopolistic Practices and the Determination of Fines (Draft for Comment) (the "Guidelines") to seek public comments from June 17, 2016 to July 6, 2016.

The Guidelines provide an analytical framework and some basic methods, through which the anti-monopoly law enforcement authorities may, when conducting investigations on any operator who has concluded and implemented any monopoly agreement or abused its dominant market position, identify the illegal proceeds obtained by such operator and determine the fine to be imposed on the same. Meanwhile, the Guidelines also clarify that, when identifying any illegal proceeds, the anti-monopoly law enforcement authorities will consider comprehensively the changes of the relevant products, sales volume, the shares of the operator in relevant market and the profit margin of the operator due to the implementation of monopolistic practices, as well as the industrial characteristics, etc., and may carry out economic analysis if necessary.

SAIC Adjusts Catalog of Business Registration Matters Subject to Prior Approval

On June 24, 2016, the State Administration for Industry and Commerce ("SAIC") issued the Circular on Adjusting the Catalog of Business Registration Matters Subject to Prior Approval (the "Circular").

The Circular adjusts the Catalog of Business Registration Matters Subject to Prior Approval (the "Catalog") attached to the Circular of the State Administration for Industry and Commerce on Strictly Implementing the Reform of Issuing a License before an Operating Permit and Business Registration Matters Subject to Prior Approval and the Catalog of Guidance on Prior Approval before Enterprises' Changes in or Cancellation of Registration again. After adjustment, the Catalog retains 34 business registration matters determined by the State Council to be subject to prior approval, which include approval for establishment of and changes to foreign-invested enterprises. The Catalog lists the implementation organ and the basis on which prior approval is set for each matter.

Beijing Municipal Environmental Protection Bureau issued the first instalment of Environmental Protection Guiding Cases in 2016

On July 13, 2016, Beijing Municipal Environmental Protection Bureau issued the first instalment of Environmental Protection Guiding Cases in 2016. The ten cases at list cover various types of manufacturers and different means of disposing methods, among which there is one case concerning textile enterprises. On December 1, 2015, during the site inspection of PKUCare Beijing Medical Textile Co. Ltd., Tongzhou District Environmental Protection Bureau found that the chemical oxygen demand (COD) of the sewage exceeded 3.25 times the emission standard. Consequently, PKUCare was fined 5 times the sewage charges they should have paid annually; the total fine reached RMB 776,664. The case was listed as guiding case for its huge amount of penalties, cracking down on illegal pollutant discharge of enterprises, and acting as a strong deterrent on other enterprises.

Measures for Payment of Wage by Companies of Shanghai

According to Shanghai Municipal Human Resources and Social Security Bureau, the newly revised Measures for Payment of Wage by Companies of Shanghai will be implemented on August 1, 2016.

The Measures states that if the workers provide regular work during probation, wages paid by the company shall not be less than 80 percent of minimum wages paid to persons of the same position in the same company, or less than 80 percent of the wages agreed in the labor contract, and at the same time not under the minimum wage standard specified by the municipal government. It also provides while the per-hour wage of non-full-time employment shall be agreed between the company and the workers, likewise, it shall not be less than the minimum wage standard specified by the municipal government, and the period of remuneration shall not be longer than 15 days.

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

Hong Kong

Employment-Amendment Ordinance not Likely to be Passed before October 2016

In the July Edition, we reported that when an employee is unreasonably and unlawfully terminated, the Labour Tribunal may make a reinstatement or re-engagement order without the consent of the employer, only the employee's consent is required. If an employer refuses to re-engage a dismissed employee, he or she will need to pay the employee a maximum sum of three times the

employee's average monthly wages, subject to a cap of HK$50,000.

However, on 22 June 2016, the Secretary for Labour and Welfare of the Government of the Hong Kong Special Administrative Region made a statement that the Labour Advisory Board still requires extensive discussion and consultation regarding the proposed amendments to the Employment (Amendment) Bill 2016. If the Bill does indeed lapse, it may be reintroduced during the next Legislative Council term commencing in October 2016.

Anti-Corruption and Bribery-Newly Published Training Package

The Independent Commission Against Corruption has recently published a training package titled "Integrity + Quality: Shopper's Paradise - Corruption Prevention Training Package for Retail Industry" ("Guidebook") on 13 May 2016.

In light of the retail industry's vulnerability to risks of corruption and misconduct, the Guidebook aids employers in training frontline employees and management staff. Although the Guidebook is targeted at the retail industry, the principles and tips contained in it have a wide applicability to all employers.

The Guidebook reminds employers that in a situation where there is a reservation of high demand goods for customers by directors, staff and agents, there could be a breach of anti-bribery laws, because they may reserve goods in high-demand for certain customers for unauthorized advantages in return, or abuse their employers' staff discount policy by reselling the purchased items for profit. This means that employees in specific retail outlets are vulnerable to being approached by parallel traders who would offer monetary rewards, commission payments or kickbacks in return for "special VIP treatment", including reserving or setting aside a certain number of these high-demand goods for parallel trading.

Trade Description Ordinance

Troubled gym chain California Fitness, being the 2nd largest gym operator in Hong Kong, closed down all of its business operation in Hong Kong pending the outcome of the winding-up proceedings. Two senior executives (a company secretary and a senior manager) from the fitness chain were arrested by the Hong Kong Customs and Excise Department for failing to provide relevant services after having accepted payment from consumers under the Trade Descriptions Ordinance ("TDO").

Back in April, the Consumer Council also shamed California Fitness for misleading sales practices, such as forcing customers to take out loans from financing companies to pay for their membership fees at the club.

Under the TDO, a trader commits an offence if at the time of acceptance of payment, the trader intends not to supply the product, or to supply a materially different product, or there are no reasonable grounds for believing that the trader will be able to supply the product within a specified or reasonable period. Moreover, the TDO prohibits specified unfair trade practices deployed by traders against consumers, including false trade descriptions of services, misleading omissions, aggressive commercial practices, bait advertising, bait-and-switch and wrongly accepting payment. The management staff will also be liable if the offence is committed with their consent or connivance or is attributed to their neglect. The maximum penalty upon conviction is a fine of HK$500,000 and imprisonment of five years.

It is therefore important that a company provides training to the sales staff not to engage in unfair trade practices that are in breach of the TDO. The management should also not turn a blind eye to such practices as the directors may be found personally liable for knowingly endorsing such practices.

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

United States

Update-Toxic Substances Control Act; Federal legislation

On June 22, 2016, President Obama signed into law the Frank R. Lautenberg Chemical Safety for the 21st Century Act, which amends the Toxic Substances Control Act. The new law mandates the Environmental Protection Agency ("EPA") to evaluate the safety of new and existing chemicals against a new risk-based safety standard and establish clear and enforceable deadlines that ensure both timely review of prioritized chemicals and timely action on identified risks. The most immediate effects will be on the new chemicals review process. The EPA is now required to make an affirmative determination on a new chemical or significant new use of an existing chemical before manufacturing can commence. The law may be read here: https://www.epa.gov/sites/production/files/2016-06/documents/bills-114hr2576eah.pdf.

National Labor Relations Board – Federal rule

Miller & Anderson, Inc. and Tradesmen International and Sheet Metal Workers International Association, Local Union No. 19, AFL-CIO. Case 05-RC-079249

On July 11, 2016, the National Labor Relations Board held that proposed bargaining units that combine solely (only employed by one company) and jointly (outsourced workers from a staffing agency) employed workers of a single-user employer must share a community of interest in order for a single unit combining the two to be appropriate. Meaning, for purposes of a combined bargaining unit, temporary workers from a staffing agency could be included with traditional workers if they had an adequate "community of interest."

Previously, bargaining units needed employer consent to combine solely employed and jointly employed workers into the same bargaining unit. Now the employer's consent is not required. Further, a user company (the company employing temporary workers) will only be obligated to bargain over the jointly-employed workers' terms and conditions which it possesses the authority to control.

The decision is available here: https://www.nlrb.gov/cases-decisions/board-decisions

Independent Contractors – caselaw developments

In several recent cases, federal courts have addressed whether particular groups of workers should be appropriately classified as employees or independent contractors under the Fair Labor Standards Act ("FLSA") and through common law tests.

In Keller v. Miri Microsystems LLC, 781 F.3d 799 (6th Cir. 2015), the plaintiff alleged that he was not properly compensated for overtime work as an employee under the FLSA. On appeal from the district court's granting of summary judgment for the employer and finding the plaintiff was an independent contractor, the Appellate Court applied the economic reality test used in FLSA cases. Factors considered include the plaintiff did not have an exclusive working relationship with the employer, and the plaintiff chose to work exclusively for the employer for almost 2 years. Additionally, the Court looked at the amount of time consumed by travel and labor as employer's de facto control over the plaintiff's working hours and ability to work for other companies. The Court concluded there were many issues of genuine material fact and reasonable inferences from which a jury could find that the plaintiff was an employee, therefore summary judgment for the employer was inappropriate. The judge noted the FLSA's definition of "employee" had

stretched to cover parties who might not qualify as such under a strict application of traditional agency law principles.

In Gray v. FedEx Ground Package Sys., Inc., 799 F.3d 995, 997 (8th Cir. 2015), FedEx drivers have sued all across the country to prove they are employees, rather than independent contractors, in order to secure benefits such as overtime pay. The District Court of the Eastern District of Missouri had granted summary judgment to the drivers, finding that they were employees rather than independent contractors. The question on appeal was whether a reasonable jury could disagree and conclude that the plaintiffs were independent contractors, and the appellate court found that it could. The court held that there was a genuine dispute as to whether the plaintiffs were independent contractors or employees, as only two of the eight factors supported a finding that they were employees and the remaining, including control and the right to control, suggested a genuine dispute.

Businesses should keep these issues in mind and reassess, if necessary, employee classifications. Recent decisions are showing it is not enough to merely classify a worker as an independent contractor and that additional factors must be taken into consideration.

Keller v. Miri Microsystems LLC can be found here: http://www.opn.ca6.uscourts.gov/opinions.pdf/15a0055p-06.pdf.

Gray v. FedEx Ground Package Sys., Inc. can be found here: http://caselaw.findlaw.com/us-8th-circuit/1711506.html

Equal Employment Opportunity Commission – Proposed Rule

On July 13, 2016, the U.S. Equal Employment Opportunity Commission ("EEOC") proposed a revision to the Employer Information Report (EEO-1). The EEO-1 report is required by the EEOC, pursuant to its authority in Title VII of the Civil Rights Act of 1964 (Title VII), and requests submission of information aimed at detecting discriminatory practices. The revised proposal will expand pay data collection from federal contractors and other employers with more than 100 workers to include additional data on pay ranges and hours worked. Additionally the date of the first required employer report will be pushed back to allow for the use of workers' W-2 reports, which are calculated based on the calendar year.

The EEOC stated collecting pay data is a step forward in addressing discriminatory pay practices and will assist employers in evaluating pay practices to prevent pay discrimination and strengthen enforcement of anti-discrimination laws. Critics of the proposed rule state the EEOC underestimates the hurdles employers would face in implementing the rule and that any compensation data collected would not be enough for a meaningful analysis.

The proposal would change effective the 2017 reporting cycle and they would need to add the additional information by March 31, 2018. The comment period for the new revisions closes August 15, 2016.

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