SQUIRE PATTON BOGGS

# November 2016

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

We are happy to discuss any of the developments in more detail. Please feel free to call Stuart James or any of the individuals named below.

## UK and European Union

### Court of Appeal reviews common law right to terminate contracts for breach

In a recent case, the UK Court of Appeal has considered the issues around termination of contracts relying on common law rights. Although the case itself concerned charterparties of ships, the judgment contains a number of practical messages relevant to anyone drafting termination provisions in commercial agreements.

In the case, the owner of three ships hired them out under three charterparties of five years' duration. Each contract gave the owner the express contractual right to withdraw the ship if the charterers were late paying the hire charges. The contracts provided:

"*Failing the punctual and regular payment of the hire, or on any fundamental breach whatsoever of this Charter Party, the Owners shall be at liberty to withdraw the Vessel from the service of the Charterers without prejudice to any claims they (the Owners) may otherwise have on the Charterers*."

The contracts required the charterers to pay the hire charges in advance.

In breach of contract, the charterers were late paying the hire charges under all three contracts. They claimed financial difficulties and made a number of promises to pay off the arrears, but these were not kept. Accordingly, the owners withdrew the ships and terminated the contracts, seeking payment of the arrears of fees and damages for breach of contract covering the reminder of the five year term.

On appeal, the Court of Appeal held that the charterers had shown that they were unable (due to financial difficulties), and therefore unwilling, to pay the fees as the contract required, for the remainder of the contract. They were, therefore, in breach of contract. The Court of Appeal was satisfied that this would trigger the owners' express contractual termination rights. But what about the position at common law?

The Court of Appeal said that the payment obligation in the contracts was an "essential" term but then went on to classify it as an 'innominate term' and not as a condition. This meant that the charterers' failure to pay the hire charges did not necessarily give the owners the right to terminate the contract at common law. Significantly, the Court of Appeal said that most contractual terms are innominate unless the contract makes clear a contrary intention. It said that the courts should not be too ready to interpret contractual terms as conditions. If the consequence of a breach could vary from the trivial to the serious that would be indicative of the term being an innominate term and not a condition. Even if a breach triggers an express termination right, that does not necessarily make it a breach of condition.

Although the payment term was not a condition, the Court of Appeal considered that the owners had been justified in terminating the contracts at common law. The Court was satisfied that failure to pay the hire charges as required by the contracts was a repudiatory breach by the charterers. The Court said that missing a few payments might not be repudiatory if it cast no doubt on the charterers' willingness and ability to pay off the arrears and pay promptly in future. However, the evidence in this case had shown that the charterers were unwilling, because unable, to pay promptly in future.

In the alternative, the Court of Appeal said, although the contracts required payment in advance, the charterers had shown an intention to pay in arrears for the remainder of the term. That was a substantially different bargain from that contained in the contract and deprived the owners of substantially all the benefit of the contracts, giving them the right to terminate at common law.

In light of the Court of Appeal's observations in this case about conditions and innominate terms, anyone drafting commercial agreements should work on the basis that every term in the contract is innominate unless they expressly identify it as a condition or a warranty. Also, when drafting a termination clause, consider whether to agree expressly that any breach that triggers termination is a condition, leading to damages for loss of the contract, or that the rights arising under the termination clause are the sole remedy for the terminating party, excluding common law rights to terminate and claim damages for loss of the contract.

**UK - New Payment Complaints Scheme for Suppliers**

The UK Government is consulting on the scope of a new complaints scheme to be operated by the Small Business Commissioner. In particular, the scheme will allow small businesses to complain about payment issues they are having with large businesses.

The office of Small Business Commissioner was set up by the Enterprise Act 2016. The Commissioner's remit is to support small businesses generally, but the Government wants the Commissioner to begin offering a complaints handling scheme whereby small suppliers that are experiencing payment problems with their large business customers can refer the payment dispute to the Commissioner for a determination. The Government plans to set out the detail of the Commissioner's complaints handling function in new legislation (Regulations) and is currently consulting on what scope of this function should be, before introducing the Regulations in Parliament.

The Government proposes that the Commissioner's complaints scheme should not only hear complaints about non-payment of invoices but also deal with wider payment issues, including where the large business customer seeks to alter the agreed prices or seeks to enforce aspects of the contract concerning payment it has not previously relied on. The Commissioner's determinations will be based on what is fair and reasonable in the circumstances of each case. The determinations will not be legally binding (so parties will not be obliged to comply with them), but the Government hopes that they will help contracting parties to resolve payment related issues quickly and amicably. The scheme will not affect the ability of either party to launch legal proceedings.

The consultation closes on 7 December 2016, following which the Government will publish details of the responses received to the consultation and announce the parameters within which the Commissioner's complaints scheme will operate. Regulations will then be drafted and introduced in Parliament.

Significantly, the Commissioner is empowered to identify the large business which is the subject of a complaint in a determination. This is an important issue for large businesses because of the potential adverse PR implications. One of the matters being considered in the consultation is whether the Regulations should specify the factors to be taken into account by the Commissioner in deciding whether the large business should indeed be named.

This latest development is part of a series of initiatives by the UK Government to tackle payment problems experienced by small businesses. It is not yet known when the Regulations will be published. However, large businesses need to be aware that these Regulations are on the horizon and of the possible impact on their reputation should

they find themselves subject to a complaint and named in a Commissioner determination. Once finalised, they also should familiarize themselves with the detail of the Commissioner's complaints handling function so they are ready to respond to a complaint made by a small business supplier should that occur.

**IP Addresses are personal data says CJEU**

In a recent decision, the Court of Justice of the European Union (CJEU) has provided much needed clarification on a long-standing issue in EU data protection law.

A German politician brought an action concerning websites operated by the Federal Republic of Germany that stored personal data, including IP addresses, on logfiles for two weeks. The question before the CJEU was – are IP addresses personal data? The CJEU ruled that dynamic IP addresses constitute personal data. The ruling has direct relevance for website providers.

A dynamic IP address means that the computer's IP address is newly assigned each time a website is visited by a user. Generally, the data included in a dynamic IP address does not enable a website provider to identify the user. However, according to the CJEU, a dynamic IP address will be personal data if it is "reasonably likely" that a website provider will be able to combine a dynamic IP address with additional data held by the user's internet service provider (ISP) such that the user can be identified. In practice, this means that dynamic IP addresses will be personal data unless it is practically impossible or unlawful for the website provider to access the additional data held by the ISP.

This decision has significant practical implications for all website providers, because the storing of user information falls under existing data protection laws. Ultimately, the website provider will need the consent of the user to store the dynamic IP address. This will also be the case when the General Data Protection Regulation (GDPR) comes into force in May 2018.

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

## China

The pilot licensing system for foreign employees in China will be launched in Shanghai and the formal system will be implemented nationwide next year.

The pilot licensing system for foreign employees in China will be conducted in Shanghai from October 2016 to March 2017 and the formal system will expand nationwide on April 1, 2017.

Foreign employees in China will be classified into three categories, i.e. foreign high-level talents (Category A), foreign professional talents (Category B), foreign ordinary employees (Category C) for administration under the licensing system.

Category A talents will enjoy the "green passageway" without the restriction of age and working experience and need no written materials for inspection before entering the country. Furthermore, the certificate of no criminal record may be made in the form of a commitment. Where a foreign high-level talent applies for the Notice of Permit for Foreigners Working in China overseas, the process may speed up and the time of examination may be cut by half. A foreign high-level talent selected into a domestic talent plan may make a commitment of working experience, expertise or certificate of academic degree as required in application.

Foreign employees falling within Category B refer to professional talents as required by the catalogue for guidance of foreign employees in China, the need of position and the development of China's economy and

society. The applicant shall be a holder of a bachelor's degree or above and relevant working experience of two years or more, or a holder of a master's degree or above at domestic colleges and universities or foreign colleges and universities of top 100. A foreign language teacher shall teach the native language of its home country in principle and hold a bachelor's degree or above at a university in home country and language teaching experience of two years or more. Professional talents with 60 points or above may also apply.

Foreign ordinary employees (Category C) subject to quota administration and engaging in temporary, seasonal, nontechnical and nonservice jobs as specified by the state policies for meeting the requirements of domestic labour market, include foreigners employed under the permission (authorization) of competent administrative departments of State Council or treaties between Chinese and foreign governments, foreign teenagers taking internship in China according to agreements between governments, foreigners engaging in housekeeping following foreign high-level talents to China, foreigners working in special industries such as pelagic fishery and seasonal labours at the border.

In addition, the original Certificate of Foreign Expert and the Employment Certificate for foreigners are unified in the Permit for Foreigners Working in China with one person one code for life.

**上海试点外国人来华工作许可制度 明年全国实施**

上海将于2016年10月至2017年3月开展外国人来华工作许可制度试点工作。2017年4月1日，全国统一实施外国人来华工作许可制度。

外国人来华工作许可制度将来华工作的外国人分为外国高端人才（A类）、外国专业人才（B类）、外国普通人员（C类）三类，按照外国人来华工作分类标准实行分类管理。

A类的外国高端人才来华工作享受“绿色通道”，不设年龄和工作经历限制，且申请人在入境前无需提供纸质材料核验，无犯罪记录证明采用承诺制。外国高端人才境外申请《外国人工作许可通知》的，享受加快办理，仅审查阶段就可缩短一半时间。入选国内相关人才计划的外国高端人才，申请时所需的工作资历、专业技术或学历证明等亦可采用承诺制。

B类是指符合外国人来华工作指导目录和岗位需求，为中国经济社会事业发展急需的外国专业人才。申请人需具有学士及以上学位和两年及以上相关工作经历，或在中国境内高校、国（境）外排名前100名的高校取得硕士及以上学位。外国语言教学人员原则上应从事其母语国母语教学，并取得母语国大学学士及以上学位且具有两年以上语言教育工作经历。计点积分在60分以上的专业人才也可以申请。

外国普通人员（C类）实行配额管理，以满足国内劳动力市场需求为目的，从事符合国家政策规定的临时性、季节性、非技术性或服务性工作，包括：经国务院相关行政主管部门批准（授权）聘用或依据中外政府协议聘用的外国人、根据政府间协议来华实习、见习的外国青年、随从外国高端人才来华从事家政服务的外国人、远洋捕捞等特殊领域工作的外国人、边境季节性劳工等。

此外，原《外国专家证》和《外国人就业证》统一为《外国人工作许可证》，实现一人一码、终生不变。

**Newly revised Regulations on Protecting Environment in Shanghai has been promulgated**

The new Regulations on Protecting Environment in Shanghai (the "Regulations") with effect as of October 1, 2016 provides 9 subjects of accountability against governmental departments including:

- Approving the administrative licensing for those not meeting the conditions of administrative licensing;
- Shielding the environmental violations;
- Failing to make decisions to order the suspension, limitation of production in accordance with the law;
- Failing to punish without delay after finding or receiving a report of such violations as discharging pollutants in excess of standards or discharging pollutants by means of avoiding supervision, thus leading to environmental incidents, as well as failing to implement the ecological protection measures, thus leading to ecological damage;
- Sealing up and detaining in violation of laws and regulations and the circumstance is severe;
- Manipulating, forging the detecting data or instigating to do so;
- Failing to disclose the environmental information in accordance with the law;
- Withholding or occupying the collected fees for pollutant discharge or divert such fees for other use;
- Other violations stipulated by laws and regulations.

The Regulations prescribe that where any governmental department commits one of the above acts, the persons in direct charge and other persons directly liable shall be given the penalties such as recording a demerit, recording a serious demerit or degradation; where a serious consequence is caused, the penalties such as removal or dismissal shall be imposed and the persons in charge shall take the blame and resign.

**新修订的《上海市环境保护条例》颁布**

于2016年10月1日起正式实施的新版《上海市环境保护条例》对政府部门列出的九大问责事由包括：不符合行政许可条件准予行政许可的；对环境违法行为进行包庇的；依法应当作出责令停产、限产的决定而未作出的；对超标排放污染物、采用逃避监管的方式排放污染物、造成环境事故以及不落实生态保护措施造成生态破坏等行为，发现或者接到举报未及时查处的；未按照规定实施查封、扣押，情节严重的；篡改、伪造或者指使篡改、伪造监测数据的；应当依法公开环境信息而未公开的；将征收的排污费截留、挤占或者挪作他用的；法律、法规规定的其他违法行为。

《条例》规定，有上述行为之一的，对直接负责的主管人员和其他直接责任人员给予记过、记大过或者降级处分；造成严重后果的，给予撤职或者开除处分，其主要负责人应当引咎辞职

**The State Administration of Taxation (the "SAT") issued Administrative Measures for Due Diligence of Tax-related Information on Financial Accounts of Non-residents (the "Administrative Measures") for public comments**

The PRC undertakes to exchange the tax-related information on financial accounts of non-residents with foreign countries for the first time on September 2018. Pursuant to the schedule, domestic financial institutions will operate the due diligence as per the "standards" from January 1, 2017, identify non-resident's accounts and accounts of enterprises and collect and report account-related information which will be exchanged by the SAT with the competent tax authorities of other countries (regions) regularly.

The Administrative Measures, comprised of 7 chapters, 43 articles and 3 schedules, mainly specify the principles and procedures for

domestic financial institutions to identify non-residents' accounts and collect relevant information, including the interpretations to basic definitions, due diligence procedures applicable to newly created accounts and existing accounts, the scope of financial accounts for which financial institutions without the need of engaging in due diligence, scope of information that shall be collected and reported by financial institutions, and sanctions imposed on any financial institution or client in breach of laws or regulations.

**国家税务总局发布《非居民金融账户涉税信息尽职调查管理办法（征求意见稿）》**

我国承诺将于2018年9月首次对外交换非居民金融账户涉税信息。按照时间表，我国境内金融机构将从2017年1月1日起按照“标准”履行尽职调查程序，识别在本机构开立的非居民个人和企业账户，收集并报送账户相关信息，由国家税务总局定期与其他国家（地区）税务主管当局相互交换信息。

《管理办法》共7章43条，包括3个附表，主要规定了我国境内金融机构识别非居民账户并收集相关信息的原则和程序，包括对基本定义的解释、新开账户与存量账户的尽职调查程序、无需开展尽职调查的金融机构和金融账户的范围、金融机构需收集和报送的信息范围，以及对违规金融机构和客户的处罚措施等。

**Customs：the digital signature will be applied in a wider range**

On October 13, 2016, the PRC General Administration of Customs published No. 57 Announcement in 2016 (the Announcement on Issues concerning Access to the Unified Information System for Cross-border E-commerce Import by Enterprises) (the “Announcement”).

According to the Announcement, Customs will freely provide the input function for the unified system for import. E-commerce enterprises or their agents may log into the Subsystem for Customs Clearance under the Unified Information System for Cross-border E-commerce Import to input, modify, and inquire, etc. Customs will further release the enterprise's access message standards for the unified system for import. Any enterprise shall bear legal liability for any electronic data it has declared or transmitted to Customs. Technologies on digital signature are temporarily applied only to the data filled in the inventory, the application form for revision or cancellation, the application form for sales return, and the warehouse-in record, and will be applied in a wider range subsequently.

**海关：逐步扩大数字签名使用范围**

2016年10月13日，海关总署发布2016年第57号公告（关于跨境电子商务进口统一版信息化系统企业接入事宜的公告）。

根据公告，海关将免费提供进口统一版系统清单录入功能。电子商务企业或其代理人可登录进口统一版系统通关服务子系统进行清单的手工录入、修改、申报、查询等操作。海关还将公开进口统一版系统企业对接报文标准。企业将对于其向海关所申报及传输的电子数据承担法律责任。暂时仅对清单、修改或撤销申请单、退货申请单、入库明细单数据使用数字签名技术，今后逐步扩大数字签名使用范围。

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

## Hong Kong

**Unfair Trade Practices – Case Study**

The Trade Descriptions Ordinance (Chapter 362 of the Laws of Hong Kong) ("TDO"), as amended by the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012, prohibits common unfair trade practices deployed against consumers, including:

- false trade descriptions;
- misleading omissions;
- aggressive commercial practices;
- bait advertising;
- bait-and-switch; and
- wrongly accepting payment

The maximum penalty upon conviction of the above offences is a fine of HK$500,000 and imprisonment for 5 years. The Customs and Excise Department ("C&ED") is the principal enforcement agency of the TDO.

As an alternative to pursuing prosecution, the TDO provides for a civil compliance-based mechanism under which C&ED may, with the consent of the Secretary for Justice, accept an undertaking from a trader believed to have engaged, be engaging, or be likely to engage in conduct that constitutes any of the above offences. This undertaking is a commitment by the trader not to continue or repeat the conduct concerned, providing a means to encourage compliance and resolve infringements expeditiously.

In the case KCCC 1279 of 2014, a beauty parlor solicited consumers to purchase prepaid service plans without telling them that all existing clients and equipment would be taken over by another operator. Although the level and quality of service provided might not be affected in any way, such a piece of material information was essential for an average consumer to make informed transactional decisions. A director of the beauty parlor was convicted for engaging in commercial practice that was a misleading omission and was fined HK$4,000.

**Direct Marketing – Case Study**

Direct marketing is a common business practice in Hong Kong. It often involves collection and use of personal data by an organisation for direct marketing itself and in some cases, the provision of such data by the organisation to another person for use in direct marketing. In the process, compliance with the requirements under the Personal Data (Privacy) Ordinance (Chapter 486 of the Laws of Hong Kong) ("PDPO") is essential.

The PDPO does not regulate all types of direct marketing activities. It defines "direct marketing" as:

> *"(a) the offering, or advertising of the availability, of goods, facilities or services; or*
> *(b) the solicitation of donations or contributions for charitable, cultural, philanthropic, recreational, political or other purposes, through direct marketing means*."

"Direct marketing means" is further defined to mean:

> *"(a) sending information or goods, addressed to specific persons by name, by mail, fax, electronic mail or other means of communication; or*
> *(b) making telephone calls to specific persons*."

Hence, "direct marketing" under the PDPO does not include unsolicited business electronic messages sent to telephones, fax machines or email addresses without being addressed to specific persons by name, and person-to-person calls being made to phone numbers randomly generated (this is regulated by the Unsolicited Electronic Messages Ordinance (Chapter 593 of the Laws of Hong Kong).

A data user who intends to use a data subject's personal data in direct marketing must take specific actions which include:

- inform the data subject of the data user's intention to use the personal data in direct marketing;

- provide the data subject with the prescribed information;
- not to use the personal data in direct marketing without the data subject's consent;
- notify the data subject of his/her right to request the data user to cease to use the data in direct marketing when using his/her personal data for the first time;
- cease to use personal data in direct marketing when so requested by a data subject; and
- retention of opt-out lists and records of consent.

In the complaint case no. 2014C11, the Complainant engaged the storage service of Company A and provided it with his personal data including his name, credit card number, mobile phone number, company email address managed by him and current residential address. Subsequently, Company A ceased its business in Hong Kong, and the business was taken over by Company B which provided a similar storage service. Thereafter, Company B sent a direct marketing email to the Complainant addressing the Complainant by his name and enclosing a storage service quotation with the terms and conditions of the service. The Complainant had no prior dealings with Company B and he had not been informed of, or given consent to, Company B's use of his personal data in direct marketing. Company B was charged with the offence of using the personal data of the Complainant in direct marketing without taking the specified actions, contrary to section 35C(2) of the PDPO. Company B pleaded guilty to the charge and was fined HK$10,000.

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

**United States**

**California Proposition 65 – State Regulation update**

Starting on August 30, 2018, consumer products to be released into the California marketplace must meet new regulations under California's Safe Drinking Water and Toxic Enforcement Act of 1986, or Proposition 65 ("Proposition 65"). The proposition was originally enacted with the goal of protecting California's drinking water sources from being contaminated with chemicals known to cause cancer, birth defects or other reproductive harm, and requires businesses to inform consumers in California about exposures to such chemicals. Proposition 65 also requires the Governor of California to publish and periodically update a list of known carcinogens and reproductive toxins. To date, almost 1,000 substances appear on this list.

On August 30, 2016, the California Office of Administrative Law approved the adoption of new regulations for clear and reasonable warnings under Proposition 65. The new regulations require businesses with 10 or more employees to give "clear and reasonable" warning to California consumers before knowingly and intentionally exposing them to known carcinogens or reproductive toxins. The warnings must provide more detailed information to the public, including a clear statement that a person "can be exposed" to a Listed Chemical, the names of the Listed Chemicals that are the subject of the warning, and a link to a website maintained by the California Office of Environment Health Hazard Assesment containing supplemental information. There are also safe harbor warning methods for internet and catalog sales, requiring that businesses provide the warning on the webpage or in the catalog, as well as on the product.

Proposition 65 also clarifies requirements of the manufacturer, producer, packager, importer, supplier or distributor of a product to either affix a warning on the product, or

provide directly to the authorized agent for a retail seller, written notice which identifies the exact name or description of the product requiring a notice and encloses all necessary warning materials such as labels, labeling, shelf signs or tags, and warning language for products sold on the Internet for the product at issue. The written notice must be renewed annually, or within 90 days when a different or additional Listed Chemical or endpoint (cancer or reproductive toxin) needs to be added to the warning. The retailer is then responsible for the placement and maintenance of the warning materials, particularly if the retailer is selling the product under its own brand, the retailer itself is responsible for introducing a Listed Chemical into the product, or the retailer has covered, obscured, or altered a warning label affixed to the product.

Before Proposition 65 becomes effective in 2018, businesses will have the option to comply with the current regulations or the new regulations. Warnings on products manufactured before the operative date that comply with the current regulations are still considered clear and reasonable. Under the current regulations, a warning is "clear" if it effectively communicates that the Listed Chemical in question is known to the State of California to cause cancer and/or birth defects or other reproductive harm. It is "reasonable" if the method used by a business to transmit the warning is reasonably calculated to make the warning message available to the individual before exposure for a consumer product, before purchase. However, businesses may want to begin planning for the new regulations, particularly if the company is contemplating introducing new products to the California market, or is contemplating other changes to the labels on existing products.

A current list of chemicals under Proposition 65 may be found here.

**Equal Employment Opportunity Commission – Federal Regulation update**

On September 29, 2016, the U.S. Equal Employment Opportunity Commission ("EEOC") announced it has finalized a regulation to collect summary employee pay data from certain employers. The new regulation will require thousands of businesses to disclose more information about employee compensation in an effort to better combat pay discrimination. The summary pay data will be added to the annual Employer Information Report, or EEO-1 report, that is coordinated by the EEOC and the Department of Labor's Office of Federal Contract Compliance Programs.

First introduced in January 2016, the new regulation requires all businesses with 100 or more workers to submit pay data by gender, race, and ethnicity on their EEO-1 report. Currently, the EEO-1 report only collects data about race, gender, and job category. The revised form will require private employers to also include summary pay data. Businesses will also have to report the number of hours worked by employees.

Because of lack of transparency, pay discrimination often goes undetected. The EEOC hopes the information will help to improve the enforcement agencies' investigations and prevent pay discrimination. The EEOC also addressed concerns about the potential burden this may place on businesses, noting that the measure of wages is information the employers already have and further, employers should already be familiar with the EEO-1 form.

The regulation is expected to cover 60,000 employers and 63 million employees. The impact on U.S. operations will be significant, as data collection and reporting burdens will increase. Additionally, opponents predict the regulation may subject employers to investigations that are not merited and even result in the increase of EEOC-led class action lawsuits. In order to prepare for the March 31, 2018 reporting deadline, businesses should take steps now to ensure the company will be in compliance with the EEO-1 filing requirements and additionally it may be prudent to begin conducting proactive

evaluations of compensation programs to ensure compliance with pay equity laws.

The EEOC has made available supporting materials, recordings of informational webinars, and sample forms here.

**IRS Tax Rule – Federal Regulations update**

On October 13, 2016, the Internal Revenue Service ("IRS") and U.S. Treasury Department ("Treasury") announced the final regulations under Section 385 of the U.S. tax code to address earnings stripping. The new regulations aim to limit the ability of companies to lower their tax bills through transactions involving debt by recharacterizing certain cross-border intercompany debt instruments as equity for U.S. tax purposes. The regulations will also require large corporations claiming interest deductions to document loans to and from their affiliates.

The final Section 385 regulations, originally issued in April 2016, went through an unprecedented volume of taxpayer comments and an unsuccessful congressional effort to block their issuance. The regulations retained much of the original framework, though, after taking the concerns of companies into account, the Treasury implemented significant carve-outs and limitations to the rules.

Notably, the final regulations will: (a) treat as stock certain related-party interests that otherwise would be treated as indebtedness for federal tax purposes under the Recharacterization Rule; and (b) establish extensive documentation requirements with respect to related-party indebtedness under the Documentation Rule. The Recharacterization Rule will generally apply to tax years ending on or after 90 days after the final regulations are published in January 2017, and will not apply to debt instruments issued prior to April 5, 2016. The Documentation Rule will generally apply to debt instruments issued on or after January 1, 2018.

During the commentary period, the Treasury stated the rule changes would cut down on cross-border mergers levelling the playing field between U.S. and non-U.S. businesses, however critics maintained it would make it harder to do business in the United States by keeping millions of dollars of investment and jobs away. After the commentary period closed, the Treasury assured that comments and recommendations from businesses, tax experts, the public and lawmakers were carefully considered, and the final rule addresses the concerns by more narrowly focusing the regulations on aggressive tax avoidance tactics and providing certain exemptions.

The Treasury has issued a Fact Sheet on the new regulations, available here.

**Unfair Trade Practices – Connecticut caselaw: *Jolen, Inc. v. Brodie & Stone, PLC*, 2016 WL 3179753 (Conn. Super. Ct. 2016).**

At issue in *Jolen, Inc. v. Brodie & Stone, PLC* was whether misrepresentations of costs were sufficient to allege violation under the Connecticut Unfair Trade Practices Act.

The Defendants were the exclusive distributors of the Plaintiff's products in the United Kingdom and Ireland. Per their arrangement, the Plaintiff would ship products to the Defendants, and receive in return the net revenues from Defendants' sales, minus expenses and commission. However, after the Plaintiff noticed that the warehousing and shipping costs claimed by the Defendants had increased over a two-year period, the parties agreed to set up separate accounts for those expenses. It was then the Plaintiff observed the costs suddenly reverted back to levels consistent with past charges. After the Plaintiff decided not to renew the parties' contract, the Defendants allegedly refused to return the remaining inventory or to pay the Plaintiff revenue received from

sales of the product. The Plaintiff filed an action against the Defendants alleging that the Defendants were surreptitiously charging the Plaintiff for storage and shipping costs associated with the Defendants' own products in breach of the parties' contract and in violation of the Connecticut Unfair Trade Practices Act ("CUTPA"). The Defendants filed a motion to strike the CUTPA claim on the ground that the facts alleged by the Plaintiff amounted to a mere breach of contract claim. The Plaintiff responded that the false representations the Defendants were alleged to have made regarding the storage and shipping costs were adequate to state a claim under the CUTPA. The court agreed.

In denying the Defendants' motion to strike, the court held the Plaintiff's pleading satisfied the minimum threshold for a sufficiently pleaded CUTPA claim against the Defendants, however the court cautioned that "admittedly this case presents a close call." The court found that the Defendants misrepresented the amount of warehousing and shipping costs properly assessable to the Plaintiff during the two years at issue, that until the Plaintiff discovered the Defendants' misrepresentations, the Plaintiff reasonably accepted and paid the Defendants' charges for two years, and that the Defendants' misrepresentations were material in that they were likely to cause the Plaintiff to accept them on the basis of their long-standing relationship to the Plaintiff's detriment. The court made special note of the relationship between the parties, which had lasted since the 1960s.

While not binding outside of matters involving Connecticut law, other jurisdictions may look to this ruling in guidance if there is no other precedent to follow. A successful claim under unfair trade practice regulation may lead to awards of punitive damages even when the existence of actual damages flowing from the violation is not shown. This will be an area of law for businesses to watch as courts provide more clarity on what types of conduct constitutes unfair acts or practices. Unfair trade practice claims can cover acts that may not be considered unlawful under other statutes or common law and allow a successful plaintiff to recover attorneys' fees and expenses, punitive damages, and injunctive relief, in addition to actual damages.

**Magnuson-Moss Warranty-Federal Trade Commission Improvement Act – Federal Regulation update**

On September 6, 2016, the Federal Trade Commission ("FTC") announced that it will be adopting amendments to its regulations under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act ("Magnuson-Moss Act"). The revisions enact key provisions of the E-Warranty Act, signed into law by President Obama in September 2015. The amendments will allow manufacturers and suppliers to satisfy written warranty requirements by making their written warranties accessible online, subject to certain requirements protecting consumers. Specifically, the amendments make changes to the FTC's Pre-Sale Availability Rule and Disclosure Rule.

The Pre-Sale Availability Rule describes methods warrantors and sellers may use to provide warranty terms to consumers prior to sale. The revised rule gives warrantors the option of providing warranty terms in an accessible digital format on the warrantor's website, provided that the warrantor also: (i) informs consumers of how to obtain warranty terms in a clear and conspicuous manner on the product, packaging or manual; (ii) provides a hard copy of the warranty terms promptly and free of charge upon request by consumer; (iii) ensures warranty terms posted online are clear, conspicuous, and remain accessible to consumers; and (iv) sufficiently informs consumers of the warranty terms in a way that allows the consumer to readily identify the terms that apply to the specific warranted product.

The Disclosure Rule already requires warrantors to disclose any limitation on the

duration of implied warranties on the face of the warranty; however, to comply with the E-warranty Act, the FTC has revised the definition of "on the face of the warranty" to include an option for a warranty posted online. The new definition is revised to include: (i) on the first page of the warranty, if the warranty is printed on one or more sheets of paper; (ii) on the page on which the warranty text begins, if the warranty is printed as part of a larger document; or (iii) in close proximity to the location where the warranty text begins, if the warranty is on a website or otherwise displayed electronically.

The new rules went into effect on October 17, 2016. A copy of the Act may be found here.

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