China

MPS Clearly Announces to Take Foreigners' Fingerprints at Entry Checkpoints

On January 29, 2017, the Ministry of Public Security ("MPS") issued an announcement, deciding to collect foreigners' fingerprints and other human biological identification information at entry checkpoints.

From 2017, border control authorities will take the fingerprints of all foreigners aged between 14 and 70 when they enter China this year, and such policy will be rolled out gradually at all open ports across the whole nation. Any foreigner who satisfies any of the following enumerated circumstances when entering China may be exempt from leaving fingerprints: firstly, the foreigner is a person holding a diplomatic passport or a diplomatic or courtesy visa, except for persons from a country having reciprocal arrangements; secondly, the foreigner is a person who is entitled to reciprocal exemption from leaving fingerprints under relevant bilateral agreements or reciprocal arrangements; thirdly, the foreigner is an official at or above the vice-ministerial level from a foreign country and members of the delegation led by such official who are entitled to facilitated entry procedures in a centralized manner under relevant provisions of the MPS; fourthly, the foreigner is a person who has incomplete fingerprints of all ten fingers or is incapable of leaving the fingerprint of any finger; or fifthly, the foreigner is a person to whom an exemption is granted by the MPS from leaving the fingerprints under special circumstances.

Guiding Catalogue of Key Products and Services for Strategic Emerging Industries (2016 Edition) Issued

On January 25, 2017, the National Development and Reform Commission issued the Guiding Catalogue of Key Products and Services for Strategic Emerging Industries (2016 Edition) (the "Catalogue").

The Catalogue products that cover the textile industry include: antibacterial fibre materials, anti-static textile materials, flame retardant fibre materials, anti-droplet fibre materials, phase change energy storage fibre materials, conductive fibre materials, anti-radiation textile materials, anti-ultraviolet functional fibre materials, chemical resistant fibre materials, lightweight fibre materials, geotextile materials, medical fibre materials, environmental protection filter cloth materials and anti-thorn and anti-cut cloth.

NDRC Clarifies the Authority to Approve Foreign Invested Projects

On January 14, 2017, the National Development and Reform Commission ("NDRC") released the Circular on Effectively Implementing Foreign Capital Related Work in the Catalogue of Investment Projects Subject to Governmental Approval (2016 Version) (the "Circular").

The Circular clearly states that any project of the limited category with a total investment amount (including capital increase) of USD300 million or above indicated in the Catalogue for the Guidance of Foreign Investment Industries (the "Catalogue") shall be examined and approved by the NDRC, and it shall be submitted to the State Council for the record provided the total investment amount (including capital increase) reaches the level of USD2 billion or above; other projects of the limited category which are invested with a total amount of less than USD300 million shall be examined and approved by the provincial government. According to the Circular, other foreign-invested projects that are not described in the abovementioned two provisions but are enumerated in Article 1 to Article 10 of the Catalogue of Investment

Projects Subject to Governmental Approval (2016 Version) shall be examined and approved pursuant to the provisions of Article 1 to Article 10. Moreover, the Circular sets forth that those foreign-invested projects beyond the scope of examination and approval and not in the prohibited category provided in the Catalogue shall be presented to local development and reform commissions for the record.

Administrative Measures for Environmental Protection Archives Issued

On December 27, 2016, the Ministry of Environmental Protection and the State Archives Bureau jointly issued the Administrative Measures for Environmental Protection Archives (the "Measures"), which came into force on March 1, 2017.

The Measures include contents such as the responsibilities of environmental protection departments in respect of archives, the responsibilities of archive management institutions and documents (projects) undertaking entities, the archiving of documents and materials, the management of archives, the utilization of archives, and rewards and punishments. The Measures provide that the scope of documents and materials on environmental protection to be archived shall comprehensively and systematically reflect the integrated administration, policies and regulations, science and technology, environmental impact assessment, environmental monitoring, pollution prevention and control, ecological protection, safety supervision over nuclear and radiation, and law enforcement for environmental monitoring, and other business activities. In addition, the Measures clarify that environmental protection departments shall clarify the archiving requirements of documents and materials while laying out specific work, such as the general investigation of pollution sources and the investigation of environmental quality; and shall check the collection and arrangement of documents and materials while inspecting the progress of specific work. Where the documents and materials for major construction projects, important scientific and research projects and key ecological protection projects fail to meet the archiving requirements, the project identification, acceptance inspection and application for award shall not be allowed for such projects.

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

Hong Kong

Proposed Abolition of the Mandatory Provident Fund's Offsetting Mechanism

Under the current mandatory provident fund scheme ("MPF scheme"), an employer who is liable to pay an employee severance payments or long service payments under the Employment Ordinance (CAP 57) is allowed to offset these payments with the accrued retirement funds of the employee derived from the employer's contributions made to MPF scheme. This claw-back mechanism is seen to be against the public interest and therefore has been the subject of controversy over the years. To honor the election campaign promises, the Chief Executive of Hong Kong, Mr. Leung Chun-ying, announced a proposed progressive abolition of the offsetting mechanism on 18 January 2017.

Currently, an employee who has not less than 5 years of service is entitled to a long service payment (or a severance payment if the employee has not less than 24 months of service) equal to two-thirds of the monthly wages for each year of service, up to HK$15,000 each year (or a maximum of

HK$390,000). After the proposed reform, although the employee will be able to keep the employer's contribution to their MPF scheme, the long service payment or severance payment may be calculated on a less favorable basis (decreased from two-thirds of the monthly wages to half of that).

The proposed reform has been attacked by several business groups as totally unjustified as the abolition would impose heavy financial burden on businesses especially SMEs and cripple entrepreneurism. To pacify the business groups and to lessen the effect on employers, the government proposed to progressively reduce the proportion of employer's contributions to the MPF scheme that can be used for offsetting over a 10-year period. During the 10-year transition period, the government would bear part of the costs; the government proposed to set aside HK$6 billion to partially subsidize the long service and severance payments on a sliding scale for up to 10 years. The proposed amendment will not have retrospective effect.

The proposal is now undergoing a three-month consultation period. A final plan will be submitted to the Executive Council for approval in June 2017.

Consultations on Enhanced Regulatory Regime for Combating Money Laundering and Terrorist Financing

The Hong Kong government has launched two consultations on legislative proposals to enhance the regulatory regime for combating money laundering and terrorist financing in January 2017. The government propose to (1) amend the Companies Ordinance (CAP 622) to improve the transparency of beneficial ownership of companies incorporated in Hong Kong; and (2) amend the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (CAP 615), imposing a statutory duty on designated non-financial institutions and professions to conduct customer due diligence ("CDD") on their clients and keep the relevant records for a specified period. The objective of the legislative proposals is to bring the local regulatory regime in line with international requirements set out by the Financial Action Task Force (the "FATF").

Insofar as transparency of beneficial ownership is concerned, the FATF requires the member jurisdictions to take measures to ensure there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities. In contrast with the FATF's requirements, the Companies Ordinance focuses only on the disclosure of legal ownership, but not information about the company's ultimate beneficial owner. In light of the discrepancy and to promote greater transparency, there is a need to implement a statutory regime to enable beneficial ownership information of companies to be captured.

The second consultation paper deals with FSTF's recommendation that, in addition to financial institutions, certain designated non-financial businesses and professions which engage in specified transactions should subject to CDD and record-keeping requirements to deter money laundering activities and ensure the integrity of financial systems. The current Hong Kong statutory regime has implemented the relevant FSTF's recommendations in respect of financial institutions (for example, banks, securities firms, insurance companies, and money changers) only. To fill the regulatory gap, the government has proposed to (1) extend the statutory obligation to conduct CDD and record-keeping requirements to solicitors, accountants, real estate agents, and trust and company service providers ("TCSPs"); and (2) introduce a licensing regime for TCSPs for the

purpose of overseeing the anti-money laundering and counter-financing of terrorism regulation.

Liquidator's Avoidance Power under the New Corporate Insolvency Regime

The Companies (Winding Up and Miscellaneous Provisions) (Amendment) Ordinance 2016 (CAP 32) (the "Amendment Ordinance") came into force on 13 February 2017. One of the key objectives of the Amendment Ordinance is to increase protection of creditors. Under the Amendment Ordinance, liquidators are given the avoidance power to set aside transactions at an undervalue and unfair preferences.

Transaction at an undervalue: The Amendment Ordinance allows the courts of Hong Kong, upon application of liquidators, to set aside transactions at an undervalue entered into by the liquidating company within 5 years before the commencement of its winding-up, provided that the company was insolvent at the time of the transaction or became insolvent as a result of the transaction. A transaction is regarded as "undervalue" if (a) the company receives no consideration in the transaction or (b) the value of the consideration the company receives is significantly less than the value of the consideration provided by the company. The only defence available is that the company entered into the transaction in good faith for the purpose of carrying on its business and there were reasonable grounds for believing that the transaction would benefit the company.

Unfair preferences: The Amendment Ordinance introduces a standalone unfair preference rule, empowering the liquidators to apply to the court for an order to set aside unfair preferences provided by the liquidating company within 6 months before the commencement of its winding-up, provided that the company had a desire to prefer the recipient and that the company was insolvent at the time of the transaction or became insolvent as a result of the transaction. If the unfair preferences were given to a person connected to the company (otherwise than being its employee), then the relevant period would be within 2 years before the commencement of its winding-up. A company is regarded to have given unfair preference to a person if the person is the company's creditor or a surety or guarantor for any of the company's debt and the company does anything which has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position that person who have been in if that thing had not been done. A person who received an unfair preference from the company in good faith will not be subject to court orders.

Court orders: If the Court considers that a transaction entered into by the winding-up company was at an undervalue or the company has given unfair preferences to a person, it can make such order it thinks fit to restore the position to what it would have been if the company had not entered into that transaction. Orders which the Court will make include, for example, (a) orders requiring any property transferred as part of the transaction to be re-vested in the company; (b) orders requiring the release or discharge of any security given by the company; and (c) orders requiring any person to pay to the liquidator the benefits received from the company.

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

United States

Mnuchin Confirmed As Treasury Secretary

Following the Senate Finance Committee approval of nomination by a vote of 11-0 (where all Democrats boycotted the vote), Steven Mnuchin was confirmed as Treasury Secretary with a near party line vote of 53-47 on February 13, 2017. All Republicans voted in favor of his confirmation stating that Mnuchin has the experience, credentials and qualifications to fill the position. Mnuchin's former roles include executive of Goldman Sachs, CEO and chairman of OneWest Bank (formerly failed mortgage lender IndyMac), and national finance chairman for Trump's presidential campaign.

During the Senate confirmation hearing, Mnuchin was criticized for his role in running OneWest which had foreclosed on tens of thousands of homes during the mortgage crisis and for failing to disclose almost $100 million of real estate. Democrats raised concerns that he would not represent the financial interest of ordinary U.S. citizens. Mnuchin supporters countered that the OneWest foreclosures were largely in accordance with federal guidelines. Mnuchin himself stated that he had "been maligned as taking advantage of others' hardships in order to earn a buck" and that "nothing could be further from the truth."

While the new Treasury Secretary has provided little details of his plans for his new role, Mnuchin is expected to follow the Trump administration's pledge for financial regulatory reform under the Dodd-Frank reform law (Mnuchin has called for a 21st century Glass-Steagall), tax reform including reducing business tax rates, and pursuing tougher trade policies to reduce U.S. trade deficits. He is due to report to Congress in April on whether foreign countries, such as China, are manipulating their currencies. After swearing in, Mnuchin stated that he is "committed to using the full powers of the office to create more jobs, to combat terrorist activities and financing, and to make America great again."

U.S. Patent Act – U.S. Supreme Court Decision

On February 22, 2017, the U.S. Supreme Court held that the supply of a single component of a multicomponent invention for manufacture abroad does not give rise to liability under Section 271(f)(1) of the Patent Act, which prohibits the supply from the U.S. of "all or a substantial portion of the components of a patented invention" for combination abroad. In reaching its unanimous decision, the Court analyzed whether the term "substantial" referred to a qualitative or quantitative measure of components used in the invention.

The case at issue, Life Technologies Corp. et al. v. Promega Corp., stems from the sublicense of the patent by Promega Corporation to Life Technologies for the manufacture and sale of genetic testing kits. Life Technologies manufactured one of the five components in the U.S. where it was then shipped to the U.K. to be combined with the other four U.K. manufactured components of the kit. Promega brought suit against Life Technologies on the grounds that Life Technologies had infringed the patent by selling the kits outside the licensed fields of use to clinical and research markets. Promega alleged that Life Technologies' supply of the U.S. component to the U.K. manufacturing facilities triggered liability under Section 271(f)(1). The jury returned a verdict in favor of Promega, however, the trial court granted Life Technologies' motion for judgment as a matter of law, finding that Section 271(f)(1)'s mention of "a substantial portion of the components" does not cover the export of a single component of a multicomponent invention. The appellate court reversed the trial court's judgment finding that based upon

the dictionary definition of the word "substantial", the U.S. made component is a significant component of the testing kit and therefore found that Section 271(f)(1) can apply to a single component of a multicomponent invention.

The Supreme Court reversed and remanded the appellate court's decision, concluding that although the term "substantial" is not defined in the Patent Act and could therefore refer to either the qualitative significance or the quantitative amount of the component, the context to which the term appears indicates the meaning is quantitative. In reaching its decision, the Court examined the phrase "all or a substantial portion of the components of a patented invention" and noted that a qualitative interpretation of "substantial" would not make sense as it would render the phrase "of the components" superfluous. Once it came to the conclusion the term "substantial" is a quantitative measure, the Court went on to find that a single component cannot meet the statute because the text uses the plural word "components" and ultimately concluded that supplying a single, commodity component of a multicomponent invention from the U.S. is not an infringing act.
Justice Sotomayor delivered the opinion of the Court, framing the matter as a case that "concerns the intersection of international supply chains and federal patent law." The Supreme Court's decision provides welcome news for manufacturers that supply commodities that are assembled into kits abroad as it effectively limits the exposure to liability for worldwide sales.

Challenge to Hague Service Convention – U.S. Supreme Court oral argument

On March 22, 2017, the U.S. Supreme Court is set to hear arguments on the issue of international service of process in the case of Water Splash v. Menon. The question before the Court is whether the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Service Convention") allows service of process by mail. The Hague Service Convention is a multilateral treaty that allows for service of process of legal documents from one member country to another without the use of consular or diplomatic channels for the purpose of providing a uniform method for delivering notice of foreign lawsuit to entities overseas.

The case involves Water Splash, Inc., a Delaware corporation that makes aquatic playgrounds known as "splash pads" used in public parks, and Tara Menon, a Canadian citizen living in Quebec who had at one point worked for Water Splash as a regional sales representative. Menon left Water Splash to work for its competitor South Pool. Water Splash filed suit against Menon in Texas state court, alleging that South Pool had used some of Water Splash's drawings and designs in a bid to construct splash pads at two city parks in Galveston, Texas. Water Splash followed the Texas Rules of Civil Procedure and served Menon by mail. Menon failed to respond and the trial court awarded Water Splash a default judgment. Menon thereafter filed a motion for a new trial seeking to set aside the default judgment, arguing that service was not accomplished pursuant to the Hague Service Convention. The trial court denied Menon's motion. The Texas Court of Appeals reversed and held that the Hague Service Convention did not authorize service by mail. The Supreme Court of Texas denied review.

The U.S. Supreme Court granted certiorari to decide whether the Hague Service Convention allows for service by mail on defendants residing in foreign countries. The United States has submitted an amicus curiae arguing in favor of the majority view that service of process by mail is permitted provided the

state of designation does not object to such service. Supporters of the majority view point to Article 10(a) of the Hague Service Convention, which states that provided there is no objection, the Convention does not interfere with the freedom to send judicial documents by mail directly to persons abroad. Under the default provisions of the treaty, service must be performed through a lengthy and expensive process involving a state designated central authority that would funnel service from foreign courts to the defendants residing in that state.
The decision will have a particularly significant impact on manufacturers in the context of product liability suits as the Supreme Court may finally resolve the circuit split across the U.S. over the interpretation of the Hague Service Convention.

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