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

China

Issues on the Implementation of the Catalog of Priority Industries for Foreign Investment in the Central-Western Region Clarified

On February 17, 2017, the General Administration of Customs distributed the Announcement [2017] No.14, clarifying relevant issues on the customs authorities' implementation of the Catalog of Priority Industries for Foreign Investment in the Central-Western Region (Revised in 2017) (the "Catalog").

The Announcement stipulates that:

- firstly, for any foreign investment project that falls under the scope indicated in the Catalog, equipment imported for self-use within the total investment amount as well as those technologies, parts, components and spare parts imported along with such equipment in accordance with relevant contracts will be exempted from the import tariff but subject to the import value-added tax as required according to applicable provisions of the Circular of the State Council on Adjusting the Tax Policy of Imported Equipment and the Announcement of the General Administration of Customs [2008] No.103 from March 20, 2017;
- secondly, once the Catalog has been implemented, the code of an "industrial policy item" for a project indicated in the Confirmation Letter on Domestic or Foreign-Funded Projects Encouraged to Develop by the State, the reply document or record-filing receipt for the incorporation (capital increase) of a foreign invested enterprise and other applicable documents issued by competent authorities of investment according to the Catalog shall be "R"; relevant units shall apply to the customs for going through formalities for tax relief with the above-said documents.

In addition, the Announcement makes specific arrangements for certain matters, such as "maintaining the continuity of policies".

Introduction of the General Rules of the Civil Law Brings China into the Age of "Civil Code"

On March 15, 2017, the General Rules of the Civil Law of the People's Republic of China (the "General Rules of the Civil Law") were adopted at the Fifth Session of the 12th National People's Congress of the People's Republic of China and issued upon approval under the Order of the President No.66, and shall come into force as of October 1, 2017.

The General Rules of the Civil Law, comprised of 11 chapters with a total of 206 articles, provide for the civil law's basic principles, civil subjects, civil rights, civil justice acts, civil liability and limitation of actions and other fundamental systems on the civil law. The General Rules of the Civil Law lower the threshold age of a minor having limited capacity for civil conduct to the age of eight, add new provisions to protect the interests of foetuses, and improve the guardianship system. Also, the General Rules of the Civil Law categorize legal persons into three groups, namely, the profit-making legal persons, non-profit legal persons and special legal persons, endowing an unincorporated association with civil subject status and providing that unincorporated associations include sole proprietorship enterprises, partnership enterprises and those

professional service agencies not qualified as legal persons. Furthermore, the General Rules of the Civil Law make specific provisions on the protection of personal information, general provisions on intellectual property rights and also other provisions on the protection of data and online virtual properties. Although the General Rules of the Civil Law have been adopted, the General Principles of the Civil Law will not be repealed temporarily. Where there is any discrepancy between the two laws, the General Rules of the Civil Law shall prevail.

Administrative Provisions on Foreigners' Employment in China has been revised

On March 13, 2017, the Ministry of Human Resources and Social Security ("MOHRSS") distributed the Decision on Revising the Administrative Provisions on the Employment of Foreigners in China (the "Decision") which will come into force as of the date of promulgation.

The Decision involves revisions made to certain articles of the Administrative Provisions on the Employment of Foreigners in China ("Provisions"). To be specific, the first is changing the "occupational visa" set forth in Article 8 and Article 10 into the "Z visa"; the second is removing Article 14; the third is revising Article 15 to read "any foreigner who has obtained an approval to work in China may apply to the Chinese embassies, consulates and offices in foreign countries for the Z visa by presenting his or her permit and valid passport issued by his or her home country or any other eligible substitutes for the passport. Anyone who meets requirements of Item 2 of Article 9 may apply for the Z visa with the notice letter issued by China National Offshore Oil Corporation, while anyone who satisfies requirements of Item 3 of Article 9 may apply for the Z visa with the approved documents from the Ministry of Culture. Anyone who meets requirements of Paragraph 1 of Article 10 of the Provisions may apply for the Z visa with the document for a cooperation and exchange project, whereas anyone meeting requirements of Item 2 of Article 10 may apply for the Z visa by showing the registration certificate issued by administrative departments for industry and commerce."

Comments Sought on the National Standards as the General Principles for the Evaluation of Green Factories

On March 8, 2017, the National Standardization Technical Committee on Environmental Management enacted and issued the national standards titled as the General Principles for the Evaluation of Green Factories (Draft for Comment) (the "Draft for Comment") to solicit comments from units concerned until April 8, 2017.

The Draft for Comment applies to any factory that involves any actual production process, such as processing, manufacturing and assembling. Besides, the Draft for Comment is deemed as the overall requirements for various sectors of the industry to develop the guidelines or specific requirements for evaluating green factories. Accordingly, green factories shall prioritize the green processes, technologies and equipment for the purpose of meeting integrated evaluation requirements in respect of the infrastructure, management system, input of energy and resources, products, environmental emission and performance, on condition that they are able to ensure the functions and quality of their products as well as the occupational health and safety of persons involved in the production. The Draft for Comment specifies that green factories shall be legally incorporated and has no record of major accidents in safety, environmental protection and quality. If a promise is made about the environmental requirements as defined by interested parties, relevant requirements under the promise shall be met as well.

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

Hong Kong

Sex and pregnancy discrimination in the employment context

In a recent decision *Waliyah v. Yip Hoi Sun Terence and Chan Man Hong* (DCEO 1/2015 & DCCJ 1041/2015), the Court held in favour of a sex and pregnancy discrimination claim brought by an Indonesian domestic helper (the "Claimant") against her former employer ("the Employer") and his wife (the "Wife") for forcing her to take a pregnancy test and thereafter firing her and forcing her out of their home prematurely after a positive result was yielded.

In that case, having noticed that the Claimant's abdomen was growing bigger, the Wife asked the Claimant to conduct a home-pregnancy test. A positive result was yielded which was later confirmed by a physician. A few days later, the Employer terminated the Claimant's employment by giving her one month's notice. The Claimant was however required to move out of the Employer's residence before the notice period had expired. The Claimant claimed against the Employer and the Wife for damages arising from sex and pregnancy discrimination, breach of contract, breach of statutory maternity protections under the Employment Ordinance (Cap. 57) and unlawful dismissal.

Sections 5 and 8 of the Sex Discrimination Ordinance (Cap. 480) prohibit sex discrimination and pregnancy discrimination against a woman. In deciding whether a claimant has a cause of action, the Court would apply a two-part test (as laid out in *M v Secretary for Justice* [2009] 2 HKLRD), (i) whether less favourable treatment to the claimant had occurred; and (ii) whether it had been caused by one of the prohibited discriminatory grounds. Insofar as (i) is concerned, the comparison is not one simply with another person without the relevant attribute of the claimant, but with another person not having the relevant attribute but behaving in the same way as the claimant did. The second part of the test involves the application of an objective "but for" test (i.e. would the claimant receive the less favourable treatment but for the existence of the particular attribute). Intention or motive to discriminate is not a necessary condition of liability, although it may be relevant when determining the appropriate remedies. If the discriminatory act was caused by two or more reasons and one of the reasons is the prohibited discriminatory ground, the act would be taken to have been done because of that ground, regardless of whether or not it is a dominant reason for doing the act. The claimant bears the burden to prove discrimination on the balance of probabilities.

At trial, the Claimant gave evidence that the Wife had asked the Claimant in a polite manner to take part in the home pregnancy test and that the Claimant took part in the test voluntarily, as she too was eager to know whether she was in fact pregnant. Nonetheless, the Court decided that the Wife committed sex discrimination against the Claimant by requesting her to urinate into a potty for the purpose of a pregnancy test because (a) whether an employee is pregnant is a private matter about which the employer has no right to know; and (b) the request to take a pregnancy test and without giving the employee an option not to inform the employer is considered "less favourable treatment" on the ground of her gender (a male employee would not be subject to the same request). The Court also opined that the consent or co-operation of the Claimant is not determinative because:

(1) the absence of a subjective intention nor motive to discrimination would not prevent an act from being discriminatory against an employee;

(2) an employee's consent or compliance could have been the result of her general servile and subservient character or ignorance of her legal rights; and

(3) the spirit of the anti-discrimination law focuses on the nature of the employer's conduct, rather than the employee's response to her employer's request.

The Court further held that the Employer's acts of terminating the Claimant's employment contract and demand the Claimant to leave the Employer's residence before the expiry of the notice period amounted to (i) breach of the implied term of trust and confidence; (ii) breach of the Employment Ordinance regarding pregnancy protection; and (iii) unlawful dismissal.

The key takeaway of this decision is that an employer should never direct their employees to undergo a pregnancy test even though the employee is willing to do so. The absence of a subjective intent or motive to discriminate would not exonerate the employer from discrimination liability.

Competition Commission takes first bid-rigging case to Competition Tribunal

The Competition Ordinance (Cap. 619) came into force in Hong Kong on 14 December 2015. The Competition Ordinance aims to prohibit conduct that prevents, restricts, or distorts competition in Hong Kong and prohibits mergers that substantially lessen competition in Hong Kong.

On 23 March 2017, the Competition Commission (the "Commission"), an independent statutory body established under the Competition Ordinance, commenced enforcement proceedings in the Competition Tribunal for the first time since the Competition Ordinance came into force. The proceedings are brought against five information technology companies in relation to a tender issued by a social services organization (YWCA) in July 2016. The contract in question was for the supply and installation of a new IT server system. Relying on the email messages and WhatsApp messages exchanges between the parties, the Commission alleges that the information technology companies colluded by engaging in bid-rigging, which involved the submission of "dummy" bids by certain parties, contravening the First Conduct Rule of the Competition Ordinance.

The First Conduct Rule prohibits anti-competitive agreements and concerted practices and decisions. Pursuant to the First Conduct Rule, an undertaking must not: (a) make or give effect to an agreement; (b) engage in a concerted practice; or (c) as a member of an association of undertakings, make or give effect to a decision of the association, if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong. Bid-rigging is a conduct that contravenes the First Conduct Rule. Bid-rigging occurs when, without the knowledge of the person calling for bids or requesting a tender, two or more competitors enter into an agreement whereby one or more of the competitors agrees not to submit a bid or tender (i.e. not to compete), allowing one of the cartel members to win the bid or tender. Bid-rigging can take a number of forms, including, bid suppression (i.e. competitors agree not to bid or withdraw their bids), cover bidding (submit a bid with less attractive terms than the bid of the designated winner), or bid rotation (competitors agree to take turns at being the winning bidder on a series of contracts).

Generally, if the Commission has reasonable cause to believe that (a) a contravention of the First Conduct Rule has occurred; and (b) the contravention does not involve "serious anti-competition conduct", the Commission must first issue a warning notice, which gives the parties an opportunity to cease the anti-

competitive practice, before commencing proceedings in the Competition Tribunal. "Serious anti-competition conduct" means any conduct that consists of any of the following or any combination of the following: (i) fixing, maintaining, increasing, or controlling the price for the supply of goods or services; (ii) allocating sales, territories, customers or markets for the production or supply of goods and services; (iii) fixing, maintaining, controlling, preventing, limiting or eliminating the production or supply of goods or services, and (iv) bid-rigging practices. Since bid-rigging is considered to be a form of "serious anti-competitive conduct" under the Competition Ordinance, the Commission may commence proceedings in the Competition Tribunal directly without first issuing a warning notice.

If the Competition Tribunal finds that there is a contravention of a competition rule stipulated under the Competition Ordinance, it may make orders including: (a) imposing a pecuniary penalty; (b) disqualifying a person from acting as a director of a company or taking part in the management of a company; (c) prohibiting an entity from making or giving effect to an agreement; (d) terminating or modifying an agreement; and (e) requiring the person to compensate any person who has suffered loss or damage.

During the first year after the Competition Ordinance came into force, the Commission received around 1,900 complaints and inquiries. Over 50% were relating to the violation of the First Conduct Rule with cartel conduct and bid-rigging being the major concern. The Commission considers bid-rigging to be a matter of grave public concern because of its potential to cause significant harm to consumers and the economy as a whole. The Chairperson of the Commission, Ms. Anna Wu, has commented that combatting bid-rigging is a major enforcement priority of the Commission. The Commission launched the "Fighting Bid-Rigging Cartels" Campaign in May 2016 to raise awareness of bid-rigging as well as to educate on how to detect and prevent bid-rigging. The Commission is committed to using the full extent of its powers to combat bid-rigging and to work closely with other law enforcement agencies and public bodies to ensure a coordinated and effective approach to tackling bid-rigging cartels in Hong Kong.

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

United States

Terms incorporated by reference

In the case of *Lincoln Composites, Inc. v. Firetrace USA, LLC*, 825 F.3d 453, 89 U.C.C. Rep. Serv. 2d 1060 (8th Cir. 2016), the plaintiff Lincoln Composites, Inc. ("Lincoln") purchased fire detection tubing from the defendant Firetrace USA, LLC ("Firetrace"). Lincoln found the tubing to be defective, and although Firetrace attempted to fix it, Lincoln determined the tubing was no longer usable and demanded a refund. When Firetrace refused a refund, Lincoln filed an action for breach of express warranty, claiming their terms and conditions, which did not limit damages, applied. Firetrace argued Lincoln's terms and conditions did not apply, but rather Firetrace's terms and conditions did and these did limit the remedies available. Firetrace's argument relied on the fact that Lincoln's terms and conditions only appeared on their website and therefore should not apply.

Lincoln's purchasing agent testified that she sent at least 10 purchase orders to Firetrace that all contained the following notice: "LINCOLN COMPOSITES GENERAL TERMS & CONDITIONS APPLY. PLEASE DOWNLOAD A COPY AT WWW.LINCOLNCOMPOSITES.COM." Lincoln's purchasing agent further testified that while she did not personally check Lincoln's website to make sure Lincoln's terms and conditions were there, other suppliers

she had worked with attempted to renegotiate terms and conditions, suggesting that those suppliers were able to access the terms and conditions on Lincoln's website. In affirming the lower court, the federal court of appeals held that there was sufficient evidence for a reasonable jury to conclude that Firetrace was on notice that Lincoln's terms and conditions existed and that Lincoln intended those terms and conditions to be binding on Firetrace.

While this court relied on Nebraska law, a majority of states agree that a party is generally charged with knowledge of the contents of a writing he or she signs and cannot avoid a contract just because he or she failed to read the entire writing.

Discovery of defect

In *Alexin, LLC v. Olympic Metals, LLC*, 53 N.E.3d 1184, 89 U.C.C. Rep. Serv. 2d 608 (Ind. Ct. App. 2016), the Plaintiff Alexin, LLC ("Alexin") ordered scrap aluminum from the defendant Olympic Metals, LLC ("Olympic Metals"), specifying the scrap to be of a certain quality designated as "2024 aluminum." The scrap delivered by Olympic Metals was both 2024 and 2090 aluminum, clearly identified with stamps and segregated into separate pallets. Alexin's shipping clerk stamped "received" on the delivery documents and subsequently melted down the metal. Alexin thereafter claimed they had to discard the ingots because the 2090 aluminum tainted the entire batch and filed suit for breach of warranty. Olympic Metals counterclaimed for attorney's fees and argued the claim was frivolous. Alexin dismissed its complaint, leaving only the counterclaim.

In finding for Olympic Metals, the court agreed Alexin's claims were unsupported. The court held the evidence showed there were three types of aluminum scrap in the shipment: 2024 aluminum sheets, 2024 extruded aluminum, and 2090 aluminum sheets. While the bill of lading and purchase order stated only 2024 sheets were delivered, there was a hand written note accompanying the shipment that indicated 2090 aluminum was included, and all three types of aluminum were clearly stamped and segregated on separate pallets.

The court further concluded that the evidence showed that Alexin's acceptance of the nonconforming goods was not reasonably induced either by the difficulty of discovering the nonconformity or by any assurances from Olympic Metals. As such, Alexin did not rightfully revoke its acceptance of the nonconforming aluminum under Indiana's code (interpreting a similar prior statute under the Uniform Sales Act to prohibit revocation of acceptance where the buyer did not allege latent defects in the product accepted). The court further noted it is well settled the UCC limits a non-breaching party's damages to those that are proximately caused by the breach, and where the injury involved follows the use of goods without discovery of the defect causing the damage, the question of "proximate" cause turns on whether it was reasonable for the buyer to use the goods without such inspection as would have revealed the defects. Where it is not reasonable to do so, or if the buyer did in fact discover the defect prior to use, the injury would not proximately result from the breach of warranty.

EEOC under the Trump Administration

Equal Employment Opportunity Commission ("EEOC") members stated at a recent conference that the EEOC will continue to follow the enforcement priorities outlined in the agency's strategic enforcement plan ("SEP") for 2017-2021. The SEP goals prioritize: (1) eliminating barriers in recruitment and hiring; (2) protecting vulnerable workers, including immigrant and migrant workers, and underserved communities from discrimination; (3) addressing selected emerging and developing

issues; (4) ensuring equal pay protections for all workers; (5) preserving access to the legal system; (6) and preventing systematic harassment.

EEOC Commissioner Chai Feldblum stated that although some changes are to be expected under the Trump administration, the EEOC will continue to follow the 2017-2021 SEP enforcement priorities. "You might see some modifications in terms of focus, but these are the priorities." Currently, the commission consists of three Democrats, one Republican, and one open seat. Victoria Lipnic, the sole Republican commissioner, was named acting chair by President Trump in January 2017. The Trump administration is expected to name another commissioner and the new General Counsel. Additionally, one of the seats held by a Democratic commissioner will expire later this year, and will also need to be filled by the Trump administration.

Commissioner Lipnic reiterated the EEOC will stay committed to its central mission of enforcing anti-discrimination laws, though with an increased emphasis on job growth. Businesses will be keeping an eye on the EEO-1 regulation, which has been discussed in a previous legal update. EEO-1 requires businesses with 100 or more workers to submit data on hours worked and wages, along with corresponding demographic information. The regulation has been heavily criticized by Republicans and business groups as overly burdensome and costly. Businesses covered by the regulation must report the data by March 2018, unless the reporting requirements are changed before then.

OSHA rule repealed by Trump administration

On April 3, 2017, President Trump signed a bill repealing the Obama-era Occupational Safety and Health Administration ("OSHA") rule, "Clarification of Employer's Continuing Obligation to Make and Maintain Accurate Records of Each Recordable Injury and Illness." The worker safety rule implemented by the Obama administration clarified that employers would be penalized for failing to keep records of work-related injuries and illnesses for five years. The rule amended recordkeeping regulations in response to a 2012 D.C. Court of Appeals decision which held OSHA only had six months to issue a citation from the time the recordkeeping violation occurred. The clarifying rule was finalized in December 2016 and became effective in January 2017.

The Trump administration bill not only repeals the clarifying rule and shortens the window to issue citations, but also prohibits OSHA from implementing a rule in substantially the same form as the nullified rule. However, OSHA recordkeeping regulations still impose a continuing obligation on employers to make and maintain accurate records of work-related injuries and illnesses for five years following the end of the calendar year they cover. Effectively, while covered employers are still required to maintain injury and illness records for five years, OSHA can no longer issue citations for failing to keep records beyond six months.

Critics of Trump's bill warn the repeal will shorten the time employers will keep accurate records of injuries to just six months instead of the required five years. They claim that without the threat of penalties, companies will be able to skew employee injury/illness data and conceal workplace hazards. Labor groups, including AFL-CIO, further claim the shortened time makes the recordkeeping regulation impossible to enforce and OSHA will have a difficult time finding the violations before the six-month window expires.

Supporters of Trump's bill, including the Chamber of Commerce and other business groups, claim the Obama-era clarifying rule was nothing more than an unlawful power grab by OSHA and that it improperly

subjected businesses to citations for paperwork violations rather than improving worker health and safety.

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