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

China

MEP Solicits Comments on the Administrative Measures for Pollutant Discharge Licensing

On July 17, 2017, The General Office of the Ministry of Environmental Protection ("MEP") issued the Administrative Measures for Pollutant Discharge Licensing (Draft for Comment) (the "Draft for Comment") for public comments before August 19, 2017.

The Draft for Comment applies to the application for, issuance and implementation of the pollutant discharge permit, as well as other practices, such as regulation and punishment, in respect of pollutant discharge licensing. Six types of enterprises, public institutions and other producers and operators as specified by laws and regulations, including "enterprises and public institutions that discharge industrial waste gases or poisonous and harmful air pollutants as listed by the State", will be subject to pollutant discharge licensing administration. Additionally, the Draft for Comment clearly states that pollutant discharge entities should comply with seven requirements, such as "discharging pollutants in accordance with the licensed items, such as the emission concentration and emission load, as indicated on the pollutant discharge permit". Furthermore, the Draft for Comment stresses that a pollutant discharge entity which discharges pollutants without a legally acquired pollutant discharge permit will be punished by competent authorities of environmental protection under the governments at or above the county level pursuant to applicable laws, regulations or rules. For an entity that has received a penalty but refuses to make rectification, though it is ordered to do so, further penalties may be imposed incessantly on a daily basis.

环保部对排污许可管理办法征求意见

2017年07月17日，环保部办公厅发布《排污许可管理办法（征求意见稿）》（下称《征求意见稿》），面向社会公开征求意见，意见反馈截止于8月19日。

《征求意见稿》适用于排污许可证的申请、核发、执行以及与排污许可相关的监管和处罚等行为。法律法规等规定的企事业单位和其他生产经营者实行排污许可管理，具体包括"排放工业废气或排放国家规定的有毒有害大气污染物的企事业单位"等六部分。《征求意见稿》明确，排污单位应遵守"按排污许可证规定的排放浓度、排放量等许可事项进行排污"等七项要求。《征求意见稿》还强调，排污单位未依法取得排污许可证排放污染物的，由县级以上政府环保主管部门按相关法律法规规章给予处罚。对于已受到罚款处罚，被责令改正拒不改正的，可实施按日连续处罚。

MOHRSS to Fully Apply the Real-Name Administration for Employment

On July 7, 2017, the General Office of the Ministry of Human Resources and Social Security ("MOHRSS") issued the Three-year Action Plan for Crackdown upon Wage Arrears and Guarantee of Wage Payment (2017-2019) (the "Plan").

The Plan clearly states that the real-name administration for employment will be put into practice in all aspects, expected to apply to over 40 percent of engineering projects under construction by the end of 2017 and 70 percent by the end of 2018 and cover almost

all such projects by the end of 2019. The Plan points out that the wage deposits system will be fully promoted in the engineering construction sector, and the deposits should be paid in a differential way according to the payment of wages made by each employer; it also calls for promoting the third-party guarantee system, such as the bank guarantee, and standardizing methods concerning the collection, payment, use and return of the wage deposits. Moreover, the Plan calls for more efforts to impose harsher credit punishments on default of wages, launch a memorandum of understanding for various departments on taking joint disciplinary actions against serious wage arrears by the end of 2017, establish and organize the implementation of the blacklist of enterprises default in payment of wages, and regularly make public seriously illegal cases in respect of wages in arrears. Additionally, the Plan stresses the need to improve the system of monitoring the payment of wages, put in place provisions that require the monthly payment of wages in full amount, and give full play to the role of mediation and arbitration in resolving labor disputes.

人社部：全面推行劳动用工实名制管理

2017年7月7日，人社部办公厅印发《治欠保支三年行动计划（2017-2019）》（下称《计划》）。

《计划》明确，全面推行劳动用工实名制管理，2017年底前实名制管理覆盖40%以上在建工程项目，2018年底前覆盖率达到70%，到2019年底基本实现全覆盖。《计划》提出，在工程建设领域全面推行工资保证金制度，根据用人单位工资支付情况，实行差异化缴存，推行银行保函等第三方担保制度，规范工资保证金收缴、使用、退还办法。《计划》要求，加大对欠薪违法行为的信用惩戒力度，2017年底前制定严重欠薪联合惩戒部门合作备忘录，制定并组织实施欠薪企业“黑名单”制度，定期公布重大欠薪违法案件。《计划》还强调完善工资支付监控机制，落实按月足额支付工资规定，充分发挥劳动争议调解仲裁作用等。

SAT Clarifies Matters on Preferential EIT Policies for High-Tech Firms

On June 19, 2017, the State Administration of Taxation ("SAT") issued the Announcement on Relevant Matters concerning the Implementation of Preferential Enterprise Income Tax (EIT) Policies for High-Tech Enterprises (the "Announcement"), which applies to the final settlement and payment of EIT from the year 2017 and thereafter.

The Announcement stipulates that an enterprise, after being qualified as a high-tech enterprise, could apply for the entitlement to tax incentives as of the year in which the certificate of high-tech enterprises is issued and complete record-filing formalities with the competent tax authority as required. In the exact year when the certificate of high-tech enterprises expires, the EIT should be levied and pre-paid at a rate of 15 percent temporarily before the enterprise concerned is re-identified as a high-tech enterprise; if it has not obtained the qualification as a high-tech enterprise yet by the end of that year, it should make supplementary payment of taxes for relevant periods as required. Furthermore, the Announcement makes it clear that as to any enterprise identified as the high-tech enterprise and entitled to tax incentives, the tax authority, if finding that such enterprise does not comply with relevant certification conditions as set forth in the Administrative Measures for Certification of High-Tech Enterprises in daily administration when its application for being certified as a high-tech enterprise was processed or it enjoyed tax

incentives, should request the certification institution to make a review; where its failure to satisfy relevant conditions is affirmed, it should be disqualified as a high-tech enterprise.

2017年6月19日，国税总局发布《关于实施高新技术企业所得税优惠政策有关问题的公告》（下称《公告》），适用于2017及以后年度企业所得税汇算清缴。

《公告》规定，企业获得高新技术企业资格后，自高新技术企业证书注明的发证时间所在年度起申报享受税收优惠，并按规定向主管税务机关办理备案手续。高新技术企业资格期满当年，在通过重新认定前，企业所得税暂按15%的税率预缴，在年底前仍未取得高新技术企业资格的，应按规定补缴相应期间的税款。《公告》明确，对取得高新技术企业资格且享受税收优惠的企业，税务部门如在日常管理中发现其在高新技术企业认定过程中或享受优惠期间不符合《高新技术企业认定管理办法》有关认定条件的，应提请认定机构复核，确认不符合条件的，取消其资格。

Interim Administrative Measures for the Operation of the National Online Platform for Approving and Regulating Investment Projects Issued

Recently, eighteen departments including the National Development and Reform Commission ("NDRC") jointly issued the Interim Administrative Measures for the Operation of the National Online Platform for Approving and Regulating Investment Projects (the "Measures"), which will enter into force from June 25, 2017.

The Measures, comprised of six chapters with 25 articles, cover the system architecture, project codes, operating processes, operation guarantee, and other contents. According to the Measures, a uniform code system applies to all types of fixed assets investment projects, with one project linked with one code. Even if a project is extended or adjusted, its project code will remain the same; but in case of any material change to a project, which results in the necessity to file another application for review, approval or record-filing, a new code will be assigned to the project. In addition, the Measures clarify that the national online platform for approving and regulating investment projects should count the time in accordance with the required timeframe for application management departments to process relevant matters, and automatically give a notification in the light of the actual progress. Furthermore, the Measures set out that information about the project review and approval, project regulation, punishment results, etc. shall be made accessible to the public via the online platform in a timely manner. The project unit could check the progress of project processing and the review and approval result with the project code.

全国投资项目在线审批监管平台运行管理暂行办法发布

近日，国家发改委等18部门联合发布《全国投资项目在线审批监管平台运行管理暂行办法》（下称《办法》），自2017年6月25日起施行。

《办法》共6章25条，涵盖体系架构、项目代码、运行流程、运行保障等内容。根据《办法》，各类固定资产投资项目实行统一代码制度，一项一码。项目延期或调整的，项目代码保持不变；项目发生重大变化，需要

重新审批、核准、备案的，应当重新赋码。《办法》明确，全国投资项目在线审批监管平台根据应用管理部门相关事项办理时限要求进行计时，并根据实际进度进行自动提示。《办法》规定，项目审批信息、监管信息、处罚结果等要及时通过在线平台向社会公开。项目单位可凭项目代码查询项目办理过程及审批结果。

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

Hong Kong

Apology Legislation in Hong Kong

On 13 July 2017, the Apology Bill was passed into law by the Legislative Council. The apology legislation seeks to promote and encourage the making of apologies with a view to preventing the escalation of disputes and facilitating their amicable resolution.

Under the apology legislation, an apology made by a person in applicable proceedings in connection with a matter will not constitute an express or implied admission of the person's fault or liability and it must not be taken into account in determining fault, liability of any other issue in connection with the matter to the prejudice of the person. In relation to contract of insurance or indemnity, an apology does not void or otherwise affect any insurance cover or compensation, regardless of when the contract of insurance or indemnity was entered into. Although the apology legislation provided that evidence of apology is inadmissible in applicable proceedings, a decision maker may exercise discretion to admit a statement of fact contained in the apology as evidence in the proceedings if he considers just and equitable in all the circumstances.

"Apology" is given a broad definition under the apology legislation. It is defined to mean an expression of a person's regret, sympathy or benevolence in connection with a matter and it includes an expression that the person is sorry about the matter. The apology also includes any part of the expression that is an expressed or implied admission of the person's fault or a statement of fact in connection with the matter. Such expression may be oral, written or by conduct.

The apology legislation will apply to an apology made on or after the commencement date of the legislation regardless of whether the matter or the applicable proceeding began before, on or after that date. The applicable proceedings include: judicial, arbitral, administrative, disciplinary and regulatory proceedings. Criminal proceedings or proceedings conducted under the Commissions of Inquiry Ordinance (Cap.86), Control of Obscene and Indecent Articles Ordinance (Cap. 390), or Coroners Ordinance (Cap. 504) are not "applicable proceedings". Furthermore, the apology legislation does not apply to (a) an apology made in a document filed or submitted in applicable proceedings (b) an apology made in a testimony, submission or similar oral statement given at a hearing of applicable proceedings; or (c) an apology adduced as evidence in applicable proceedings by, or with the consent of, the person who made it.

Free Trade Agreement Negotiation between Hong Kong and Australia

In April 2017, the Hong Kong government launched a consultation paper to seek comments and suggestions from interested parties on the proposed Free Trade Agreement (FTA) with Australia. Prior to the closing date of the consultation paper, on 16 May 2017, the Secretary for Commerce and Economic Development and the Minister for Trade, Tourism and Investment of Australia announced the official launch of the FTA

negotiation between Hong Kong and Australia.

Australia is an important trading partner of Hong Kong. Australia was Hong Kong's 19th largest goods trading partner in 2016 and 7th largest services trading partner in 2015. The cooperation between the two countries and the trade and economic liberalisation will provide a new platform for enhancing capital flow, innovation, interaction between professionals and R&D collaborations.

It is envisaged that the FTA may include the following key elements:

- elimination or reduction of tariffs for products of Hong Kong origin (the Australia's average applied tariff rate is 2.5%);
- reduction of non-tariff barriers;
- preferential rules of origin;
- customs facilitation procedures;
- better market access for trade in services;
- promotion and protection of investment;
- intellectual property rights;
- government procurement; and
- legal and institutional arrangements, including a dispute settlement mechanism for the FTA.

In addition to the negotiation with Australia, Hong Kong is also currently negotiating FTAs with Association of Southeast Asian Nations, Georgia and Maldives to expand its commercial and trading networks and create favourable business conditions for Hong Kong enterprises.

Standard Working Hours in Hong Kong

The Standard Working Hours Committee ("SWHC") was set up in April 2013 to advise on standard working hours and related issues. In January 2017, the SWHC submitted a proposal recommending the Hong Kong government focus on affording protection to lower-income employees.

In June 2017, the Executive Council of Hong Kong passed a proposal that requires employers of employees who earn HK$11,000 or less per month to (a) enter into written employment contracts which include terms on working hours and overtime remuneration agreements; and (b) to compensate their employees overtime wages at a rate no less than the regular wages.

The trade unionists criticize the coverage of the proposal as too narrow and that the Government has twisted the concept of standard working hours. The unions have repeatedly demanded a standard working week of 40 to 44 hours with an overtime rate of 1.5 times the regular wages. However, the current proposal is estimated to benefit approximately 550,000 part-time and full-time workers only (accounting for about 14 per cent of the total workforce in Hong Kong). As low-income workers do not have much bargaining power, the employers may use the employment contract to legitimise the long working hours. All in all, the proposed framework does not appear to have any substantial meaning.

In response to the comments raised by the unions, the Labour Department said that the proposal would be a useful first step for standard working hours and if it is implemented, the framework would be reviewed after two years. It is envisaged that a bill for the standard working hours proposal may be ready in 2018 and if the bill is passed, the expected implementation date would be in 2020 or 2021.

The New Copyright Tribunal Rules

The Copyright Tribunal is a quasi-judicial body established under the Copyright Ordinance (Cap. 528) to provide a forum for resolving disputes in relation to the use or licensing of copyright materials. On 1 May 2017, the new

Copyright Tribunal Rules (Cap. 528D) (the "Tribunal Rules") came into effect. The main objectives of the Tribunal Rules include: promoting use of alternative dispute resolution, exercising active case management, standardizing procedures and application forms for all types of applications/references before the Copyright Tribunal, and empowering a single member of the Tribunal to exercise certain adjudication powers. If there are disputes that fall within the jurisdiction of the Copyright Tribunal, the Tribunal Rules should be considered and complied with.

Inland Revenue (Amendment) (No. 3) Bill 2017

The Hong Kong government introduced the Inland Revenue (Amendment) (No. 3) Bill 2017 to the Legislative Council in March this year and passed on 7 June 2017, seeking to expand the list of "reportable jurisdictions" (from the existing 2 jurisdictions to 75 jurisdictions), so that the automatic exchange of financial account information ("AEOI") arrangement can have more effective implementation.

Following the amendment to the Hong Kong tax laws, a financial institution in Hong Kong will be required to conduct due diligence procedures and collect the required information from account holders who are tax residents of both prospective and confirmed AEOI partners of Hong Kong, and to furnish the Inland Revenue Department ("IRD") with the relevant information collected. This is to enable the IRD to maintain the financial account information from the second half of 2017 for future exchanges with other jurisdictions. Therefore, companies should expect to see more due diligence procedures from banks in the near future.

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

United States

Federal Arbitration Act preempts – U.S. Supreme Court decision

On May 15, 2017, the U.S. Supreme Court held the Federal Arbitration Act preempts state precedent that an agent cannot deprive a principal of the right to trial by jury through an arbitration agreement that is only provided for in the power of attorney.

In *Kindred Nursing Centers Limited Partnership v. Clark*, 581 US ___ (2017), No. 16-32, two residents at a nursing home operated by Kindred Nursing Centers Limited Partnership ("Kindred Nursing") in Kentucky had designated relatives as attorney-in-facts, giving their relatives broad authority to enter into transactions and agreements on their behalf. The relatives then used their authority to sign alternative dispute resolution agreements with Kindred Nursing that stipulated that any disputes arising from the residents' stays at the facility would be resolved through arbitration. When the residents both passed away, the relatives filed lawsuits against Kindred Nursing for personal injury and wrongful death on their behalf. Kindred Nursing moved to compel arbitration based on the alternative dispute resolution agreements. The Supreme Court of Kentucky refused to enforce the parties' arbitration agreements and held that the power of attorney that authorized an attorney-in-fact to manage the principal's "financial affairs" and "health-care decisions" did not include the authority to bind the principal to an optional arbitration agreement.

In its 7-1 holding, the U.S. Supreme Court found that Kentucky's clear-statement rule, which states that an agent cannot deprive their principal of the rights of access to the court and trial by jury through an arbitration agreement if that agreement is only expressly provided for in the power of attorney, violates the Federal Arbitration Act ("FAA") by singling out arbitration agreements for disfavored

treatment. The Court found that, under the FAA, arbitration agreements may only be found invalid and unenforceable based on legal rules that would apply to any contract. However, rules that apply only to arbitration agreements, even if they do not do so explicitly but focus on contracts that have the characteristics of arbitration agreements, violate the FAA and are therefore preempted. The Court went on to find that because Kentucky's clear statement rule focuses exclusively on the primary characteristic of an arbitration agreement – the waiver of the right to a jury trial – it does not put arbitration agreements on equal footing with other contracts, and therefore the FAA preempts it.

Justice Thomas dissented, stating because the FAA did not apply in state court proceeding, it did not preempt state-law precedent. Justice Gorsuch did not participate in the discussion or decision.

Forum Shopping – U.S. Supreme Court decision

On April 25, 2017, the Supreme Court held in BNSF Railway Co. v. Tyrrell, et al., 581 U.S. __ (2017), No. 16-405, a state court may not exercise personal jurisdiction over claims made by nonresident employees injured while working outside of the state.

Kelli Tyrrell, resident of North Dakota and administrator of her husband Brent Tyrrell's estate, brought a Federal Employers' Liability Act ("FELA") suit against Brent's employer BNSF Railway Company ("BNSF"), alleging Brent developed a fatal cancer from his exposer to carcinogenic chemicals while working for BNSF. Another employee, Robert Nelson, a resident of North Dakota, also brought a FELA suit against his employer, BNSF, alleging he sustained injuries while working for BNSF. Both Tyrrell and Nelson filed their suit in Montana state court even though neither worker was injured in Montana, BNSF is not incorporated nor headquartered in Montana, and BNSF maintains less than 5% of its work force and 6% of its total track mileage in Montana.

The Montana Supreme Court held that Montana courts could exercise general personal jurisdiction over BNSF because the railroad both "d[id] business" in the State within the meaning of Section 56 of the FELA and was "found within" the State within the compass of Montana Civil Procedure Rules.

The U.S. Supreme Court reversed and remanded, finding that Section 56 of FELA – which provides that "an action may be brought in a district court of the United States," in, among other places, the district "in which the defendant shall be doing business at the time of commencing such action" – does not address personal jurisdiction over railroads, nor do any of the cases featured by the Montana Supreme Court resolve the question of personal jurisdiction. In an 8-1 opinion, the U.S. Supreme Court ultimately held that the Montana court's exercise of personal jurisdiction under Montana state law does not comport with the 14th Amendment's due process clause, and therefore the Supreme Court's precedent in *Daimler AG v. Baumann*, controls a state court's exercise of general jurisdiction.

Justice Sotomayor filed an opinion concurring in part and dissenting in part, stating the "comparative contacts" test set forth in *International Shoe Co. v. Washington* should apply instead of the "at home" test found in *Daimler AG v. Bauman,* and warned the holding could have the effect of limiting general jurisdiction to only the company's principal place of business or incorporation.

This holding highlights the importance *Daimler AG v. Bauman* has on limiting a plaintiff's ability to forum shop. Where a statute is silent on personal jurisdiction and the parties fail to show personal connection with the forum state, general jurisdiction using the test found in *Daimler AG* will be used. If a company becomes the subject of a FELA suit, and the plaintiffs cannot show

personal jurisdiction, the exercise of general jurisdiction using the "at home" test will apply and jurisdiction will be limited to the forum state with sufficient substantial contact.

Forum Shopping – U.S. Supreme Court decision

On June 19, 2017, the U.S. Supreme Court held where a plaintiff's claims would be exactly the same even if the defendant had no forum contacts, there is no basis for specific jurisdiction because the case does not sufficiently arise out of or relate to the defendant's forum activities. Similar to the ruling in *BNSF Railway Co. v. Tyrrell*, the panel ruled 8-1 to limit forum shopping in the case of *Bristol-Meyers Squibb Co. v. Superior Court of California,* 528 U.S. __ (2017), No. 16-466 and Justice Sotomayor dissented.

In a previous update, we discussed the U.S. Supreme Court's decision to address the California Supreme Court's attempts to widen the limits of specific jurisdiction in *Bristol-Myers Squibb*. The California Supreme Court had found that California courts had specific jurisdiction of the claims of almost 600 out-of-state plaintiffs against Bristol-Meyers Squibb Co., a global pharmaceutical company incorporated in Delaware and headquarters in New York, even though the actions giving rise to their claims occurred entirely outside of California.

The U.S. Supreme Court held that the exercise of personal jurisdiction must comport with the requirements of the Due Process Clause of the 14th Amendment, which examined whether the defendant had a sufficient relationship with the forum state to subject it to jurisdiction. The Court looked to *Daimler AG v. Bauman* for the precedent that general personal jurisdiction over corporate entities is essentially limited where the corporation is at home, the state of incorporation and the state where the company has its principal place of business. For specific, or case-linked, jurisdiction, the Court held the suit had to arise out of the defendant's contacts with the forum state. As such, a connection must exist between the controversy at issue and the state seeking to exercise specific jurisdiction. In *Bristol-Meyers Squibb,* the relevant plaintiffs were not residents of California, did not claim to have suffered harm in California, nor did any relevant act occur inside California. As such, the case did not sufficiently arise out of or relate to the defendant's contacts with California for the state to exercise specific jurisdiction.

Similar to her dissent in *BNSF Railway Co.,* Justice Sotomayor delivered a dissent in which she argued that the basis for personal jurisdiction should be whether the defendant has sufficient minimum contacts with a state such that subjecting the defendant to a lawsuit within that state does not offend traditional notions of fair play and substantial justice (the *International Shoe Co. v. Washington* test). Justice Sotomayor further notes that the majority decision would make it unnecessarily difficult to hold a nationwide corporation liable for acts that harm plaintiffs in different states.

This decision was expected in light of the holding in *BNSF Railway Co. v. Tyrrell,* where the Supreme Court limited a plaintiff's ability to forum shop using the standard found in *Daimler AG*. However, while the Court noted that its decision will not "result in a parade of horribles," the Court did provide alternatives to how the litigation can still proceed: (1) the in-state and out-of-state plaintiffs could join together in a consolidated action in the states that have general jurisdiction over Bristol-Meyers Squibb; (2) the nonresident plaintiffs could bring suit in their respective home states; and (3) the Court left open the question of whether the 5th Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.

U.S. Department of Labor Withdrawal of Guidance

On June 7, 2017, the U.S. Department of Labor ("DOL") withdrew two guidance memos issued during the Obama administration, a 2015 informal guidance on determining joint employment and a 2016 informal guidance on the classification of independent contractors.

The 2015 informal guidance broadly expanded the concept of employment generally and advised that where two or more employers jointly employee an employee, the employee's hours worked for all of the joint employers during the workweek are aggregated and considered as one employment, including for the purposes of calculating whether overtime pay is due. The guidance explicitly stated the concept of joint employment was to be defined expansively under the Fair Labor Standards Act ("FLSA") and the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA").

The 2016 informal guidance warned against misclassification of employees as independent contractors. The guidance set forth the test in determining an employee or an independent contractor is whether the worker is economically dependent on the employer or in the business for him or herself. Because the guidance defined "employ" broadly as including "to suffer or permit to work," "a worker who is economically dependent on an employer is suffered or permitted to work by the employer."

The Obama era guidance memos were considered to be controversial because, although they were not binding, they clearly expanded the interpretation of what an employee is and designated most workers as employees under the FLSA. The withdrawal is considered a sign of the Trump administration's shift towards reducing enforcement actions, though continued actions of noncompliance are still expected. Critics argue the move is an attempt to weaken the strength of workers' cases in court.

In its press release, the DOL cautioned that the removal of the interpretations does not change the legal responsibilities of employers under the FLSA and MSPA.

Notwithstanding the withdrawal of the informal guidance memos, the underlying regulations are still in effect. As such, companies will need to ensure continued compliance with relevant labor laws.

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