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OCTOBER 2017

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

China

MOFCOM Calls for Effective Work in Tax Relief for Equipment Imported by FIEs Engaging in Encouraged Category of Foreign Investment

On September 5, 2017, the General Office of the Ministry of Commerce ("MOFCOM") issued the Circular on Further Effectively Implementing Tax Relief for Equipment Imported by Foreign-invested Enterprises (FIEs) Engaging in Encouraged Category of Foreign Investment (the "Circular"), with immediate effect from the issue date.

The Circular states that, from July 30, 2017, for an FIE that will invest in a project falling under the encouraged category in the Catalog for the Guidance of Foreign Investment Industries or any category in the Catalog of Priority Industries for Foreign Investment in the Central-Western Region and is eligible to get established, or increase its registered capital under record-filing procedures, such enterprise or its investor is required to provide particulars about the encouraged foreign-invested project while filling in the record-filing report online through the Integrated Management Information System for Foreign Investment. Also, the Circular expressly states that, once the record-filing authority has published the record-filing result on the said system, the enterprise or its investor may obtain from the record-filing authority a Record-filing Receipt for the Incorporation of Foreign-invested Enterprises or a Record-filing Receipt for the Change of Foreign-invested Enterprises with relevant information on the encouraged foreign-invested project indicated in the "Note" on such receipt. In addition, the Circular requires that any record-filing authority shall notify the customs office with the direct jurisdiction of an enterprise's violation of laws or regulations regarding the tax relief for equipment imported by FIEs engaging in the encouraged category of foreign investment.

MOFCOM Seeks Public Comments on the Measures for the Review of Concentration of Undertakings

On September 8, 2017, the Ministry of Commerce ("MOFCOM") issued the Measures for the Review of Concentration of Undertakings (Revised Draft for Comment) (the "Draft for Comment") for public comments by October 9, 2017.

Encompassing 54 articles in total, the Draft for Comment provides in six chapters for the criteria to judge the concentration of undertakings, methods to calculate the turnover, notification of concentration, review of concentration, etc. The Draft for Comment specifies that a business operator should notify the MOFCOM of concentration after it has signed an agreement for this purpose but has not yet implemented it. The party making such notification may offer proposals to the MOFCOM to subject itself to a conditional concentration approval. There are three categories of such restrictive conditions, including structural conditions which involve divesting tangible assets, such intangible assets as intellectual property rights, relevant equities, etc. Where an evaluation shows that certain proposals are likely to mitigate adverse effects of the concentration on competition, the MOFCOM may grant a conditional approval to the concentration of undertakings, stating in the review decision on a conditional approval that the party obliged to divest relevant assets should not implement the sales before the buyer to purchase the sold business is finalized, the sales agreement is executed and such sale is reviewed and approved by the MOFCOM.

SPC Issues Judicial Interpretations (IV) of the Company Law

On August 25, 2017, the Supreme People's Court ("SPC") issued the Provisions on Several Issues Concerning the Application of the Company Law of the People's Republic of China (IV) (the "Provisions"), which will take effect on September 1, 2017.

The Provisions elaborate in 27 articles several issues on the application of law in hearing cases involving disputes over five subjects, namely the effectiveness of corporate resolutions, shareholders' right to know, right to share profits, preemptive right, and suits brought by shareholder representatives. Specifically, the first is improving the mechanism for bringing proceedings against defects of corporate resolutions; the second is reinforcing protection of shareholders' statutory rights to know according to law; the third is actively considering ways to improve judicial remedies available for shareholders in respect of their right to share profits; the fourth is regulating the exercise of the preemptive right by shareholders and the damage compensation if such right is infringed upon; and the fifth is perfecting the shareholder representative litigation mechanism. According to the Provisions, if a shareholder requests a distribution of the company's profits but fails to present a resolution approved at the board of shareholders or the general meeting of shareholders in respect of the detailed profit distribution plan, the court should dismiss such claim, unless the failure to distribute the company's profits is attributed to any shareholder's abuse of shareholder rights and results in losses suffered by other shareholders.

Issues on Handling Work Permits for Overseas NGOs' Foreign Employees Clarified

On July 27, 2017, the State Administration of Foreign Experts Affairs ("SAFEA") and the Ministry of Public Security ("MPS") jointly issued the Circular on Issues concerning Handling Work Permits for Foreign Staff of Overseas Non-Governmental Organizations (the "Circular").

The Circular expressly states that the foreign chief representative of an overseas non-governmental organization (NGO) that has legally established a representative office within the territory of China may be eligible for a work permit with a term of validity of up to five years, provided that criteria on top foreign talents are fulfilled. Also, the Circular says that if an overseas NGO has legally filed a record for its temporary activities within the territory of China, although it has no representative office in China, the approved term for the work permit granted to its foreign head or key employee who will come to China for such temporary activities should not be longer than the duration of these temporary activities. According to the Circular, a foreigner who intends to work in China for above 90 days but no more than one year (inclusive) may apply for a Work Permit for Foreigners Working in China online by submitting the receipt of the record filed for temporary activities, employment contract or certification on his or her employment, and medical check certification, but has to make a commitment in respect of certifications for his or her work experience, no criminal history and the highest degree (educational background).

MIIT Issues the Latest Standard Conditions for the Printing and Dyeing Industry

On August 31, 2017, the Ministry of Industry and Information Technology ("MIIT") issued the Standard Conditions for the Printing and Dyeing Industry (2017 Edition) (the "Standard Conditions") and the Interim Administrative Measures for the Standard Announcements of the Printing and Dyeing Enterprises, which shall come into force as of October 1, 2017.

According to the Standard Conditions, the place selected to construct a printing and

dyeing enterprise shall conform to the State's industrial planning and policies, as well as the planning made by the local place in respect of its main functional zones, urban and rural planning, overall planning for land utilization, and ecological environment planning. Meantime, the Standard Conditions clearly state that printing and dyeing enterprises should develop and produce green products with low energy consumption and little pollution; they are also encouraged to employ new technologies, advanced techniques, new equipment, and new materials to develop textile products with intellectual property rights and high extra value. The quality of products should comply with the requirements set out in applicable national and industry standards, with the acceptable product rate reaching 95% or above. Additionally, the Standard Conditions provide that environmental protection facilities of enterprises specializing in the printing and dyeing business should be designed and constructed in accordance with the requirements stated in the Standards on the Environmental Friendly Designs of Enterprises in the Textile Industry, and that the system requiring environmental protection facilities to be synchronously designed, constructed and put into use together with the main part of a project should be implemented.

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

Hong Kong

Two-tier tax system introduced in 2018 using HKD 2 million as cap

On October 11, 2017, Chief Executive Carrie Lam announced the implementation of the new tax system within 2018 in her Policy Address.

Under the plan, the tax rate for the first HKD 2 million of profits of enterprises will be lowered to 8.25%, or half of the standard profits tax rate. Profits over HKD 2 million will be subject to the current standard tax rate of 16.5%. For encouraging enterprises to invest in R&D, the first eligible R&D expenditure will enjoy a 300% tax deduction with the remainder at 200%.

The Government will impose tax restrictions such that each group of enterprises can only nominate one enterprise to benefit from the lower tax rate in ensuring the tax benefits small and medium size enterprises.

Company and director fined for non-payment of holiday pay, annual leave pay and Labour Tribunal Award

On October 9, 2017, Wing Kee Construction Company Limited and its director were fined HKD 47,200 and HKD 20,000 respectively by the Labour Tribunal for failing to pay an employee holiday pay and annual leave pay. The company also failed to pay a sum of HKD 111,000 within 14 days after the issuing of the Labour Tribunal Award.

As required by the Employment Ordinance, employers need to pay holiday pay and annual leave pay within 7 days upon termination of employment of an employee. The director was convicted for his consent, connivance or neglect in offence related to the Labour Tribunal Award.

Landmark visa application appeal

On 25 September 2017, the Hong Kong Court of Appeal passed down a unanimous decision judgment to allow a person, identified only as QT, to obtain a dependent visa through her same-sex partner who works in Hong Kong. The spousal visa in question previously was only granted by the Immigration Department to heterosexual couples.

The Court of Appeal ruled that it was a form of indirect discrimination for the Immigration Department to interpret “spouse” as either

the man or the woman in a heterosexual marriage. They opted that homosexual couples should be able to produce the same certificated proof of relationship as heterosexual couples. Therefore, it was not rational to exclude homosexual couples based on administrative workability and convenience. The court also clarified that, even if the Immigration Department was to grant a dependent visa to QT, this action was not a formal and official validation of same-sex unions. The chief judge of the court further recognized that there is a societal attitude change towards sexual minority rights.

If this decision is not appealed, it will have wide-ranging implications for global companies wanting to transfer homosexual employees to Hong Kong. This might be a catalyst for the government and lawmakers to reform and recognize same-sex relationships as a whole.

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

United States

Janus v. American Federation – U.S. Supreme Court

The U.S. Supreme Court is set to hear the issue of whether public sector agency shop arrangements violate the First Amendment.

In the matter of *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, Docket No. 16-1466, the governor of Illinois, along with two public sector employees, brought suit challenging a law that allows public sector employers to require nonmember employees to pay a fee to the union. The governor alleged the law violates the First Amendment by forcing public employees to contribute money to an organization that they may not approve of.

The district court looked to the landmark U.S. Supreme Court case, *Abood v. Detroit Board of Education*, on the issue for precedent and dismissed the suit. The Seventh Circuit affirmed.

Abood v. Detroit Board of Education, 431 U.S. 209 (1977), involved a Michigan law authorizing union representation of public sector employees through an agency shop arrangement. The agency shop arrangement required all employees represented by the union, even if the employee is not a union member, to pay a fee as a condition of employment. A group of teachers filed suit alleging they opposed unions in the public sector, that the union was engaged in political activities the teachers did not approve and were not related to the collective bargaining activities, and requested the agency shop clause be declared invalid under state law and the U.S. Constitution. The U.S. Supreme Court ultimately held that the service charges used to finance expenditures by the union for collective bargaining, contract administration, and grievance adjustment purposes, are valid. Union expenditures not germane to its duties as a collective bargaining representative, however, must be financed from employees who do not object to advancing those causes or coerced into doing so against their will by threat of loss of employment.

Just last year, the U.S. Supreme Court examined this very issue in *Friedrichs v. California Teachers Association*, Docket No. 14-915, and found for the teachers union in an equally divided court. The decision came just after the death of Justice Antonin Scalia, who many believed was positioned to rule against the union.

Now the U.S. Supreme Court has decided to examine the issue during the 2018 docket with *Janus v. American Federation*. It is widely anticipated Justice Neil Gorsuch will find in favor of the public sector employees and rule against the unions.

The outcome of this case will have a wide reaching impact on the power of public sector unions, particularly as it affects whether the unions can collect a large source of their revenue.

U.S. Consumer Product Safety Commission – Ban on OFRs

On September 20, 2017, the U.S. Consumer Product Safety Commission ("CPSC" or the "Commission") voted to adopt a rulemaking process that will effectively ban an entire class of chemicals – non-polymeric organohalogen flame retardants ("OFRs") – from certain consumer products.

In 2015, several NGOs (including, among others, the American Academy of Pediatrics, American Medical Women's Association, International Association of Fire Fighters, and League of United Latin American Citizens) filed a petition for rulemaking requesting the Commission to initiate rulemaking to declare four categories of consumer products containing additive OFRs to be banned hazardous substances under the Federal Hazardous Substances Act ("FHSA"). The NGOs argued that the OFRs should be banned from four types of products as the additives could be harmful to consumers: (1) durable infant or toddler products, children's toys, child care articles or other children's products other than car seats; (2) upholstered furniture sold for use in residences; (3) mattresses and mattress pads; and (4) plastic casings surrounding electronics.

Despite a May 24, 2017 CPSC staff recommendation to deny the ban as overly broad, three Democratic-appointed commissioners voted in favor of the petition while the two Republic-appointed commissioners voted against it. The Commission has directed staff to convene a Chronic Hazard Advisory panel pursuant to the Consumer Product Safety Act to assess and issue a report on the risks to consumers' health and safety from the use of OFRs as a class of chemicals for the four types of products. The staff will review data to assess the toxicity of and exposure to this class of chemicals.

Under the FHSA, the Commission has the authority to address products containing OFRs on a class-wide basis. In order to determine that OFRs as a class constitute a "hazardous substance" under the FHSA, the Commission only needs to determine that OFRs are toxic – that they have the capacity to produce injury or illness through ingestion, inhalation, or absorption through any bodily surface, and may cause substantial illness during or as proximate result of any customary or reasonably foreseeable handling or use of those products.

The report and guidance, however, is not a binding or enforceable rule. Furthermore, the adoption of the petition is simply the first step and the ban has not commenced. The advisory panel still needs to gather data and draft proposed regulations. A notice and comment period will then follow before the final rule is passed. And in yet another obstacle to the process, the Trump administration has recently nominated Dana Baiocco to replace the current CPSC Commissioner appointed by the Obama administration. The replacement has shifted the balance of the Commission to a Republican majority and the adopted petition will most likely face even more challenges in moving forward.

Choice of Law and Forum - North Carolina Senate Bill 621

North Carolina has recently passed Senate Bill 621, the North Carolina Choice of Law and Forum in Business Contracts Act, in an effort to validate choice of North Carolina law and forum provisions in business contracts.

Now parties to a business contract may agree in the contract that North Carolina law shall govern their rights and duties in whole or in

part, whether or not the parties, business contract, or transaction that is the subject of the business contract bear a reasonable relation to North Carolina or whether a provision of the business contract is contrary to the fundamental policy of the jurisdiction whose law would apply in the absence of the parties' choice of North Carolina law.

Parties to a business contract may bring an action in the courts of North Carolina for a dispute arising from the business contract if the business contract contains two provisions: (1) the parties agree that North Carolina law shall govern their rights and duties in whole or in part; and (2) the parties agree to litigate a dispute arising from the business contracts in the courts of North Carolina.

A party that enters into a business contract that satisfies the requirements of choice of forum consents to the personal jurisdiction of the courts of North Carolina in an action for a dispute arising from the business contract and the court cannot stay or dismiss the action. Further, the parties may designate one or more counties in North Carolina as the proper venue for a dispute arising from the contract. An action brought in a county in North Carolina can be moved to another county in the state, however, the court cannot change the place of trial to another state.

A choice of law and forum clause merits considerable attention in a business contract as certain states may contain more favorable law and certain forums may provide an advantage for a party. The purpose of this law is for North Carolina businesses to obtain certainty that their state law will apply or that they can litigate in their home state. North Carolina is seeking to provide assurance and predictability to contracting for businesses. The law will also help to cut down on litigation costs as the question of law and forum will no longer need to be litigated. However, the law does not apply to clauses that select the law or forum of another state and therefore the courts will utilize the substantially related test in those cases.

Consumer contracts and employment contracts will not be affected. Furthermore, the law is retroactive and will apply to contracts entered into before the bill was signed into law. Companies that have been using boilerplate choice of law and choice of forum clauses selecting North Carolina will need to edit the clauses to ensure compliance with the new law requirements.

Prop 65 Warning Required – California Office of Environmental Health Hazard Assessment

Effective September 30, 2017, California will require a clear and reasonable warning on products containing furfuryl alcohol (CAS No. 98-00-0) providing notice to people the chemical is known to cause cancer or reproductive toxicity. The requirement is part of California's Safe Drinking Water and Toxic Enforcement Act of 1986, or Prop 65, which requires products containing chemicals on the Prop. 65 List to be labeled with warnings of exposures.

Furfuryl alcohol is a primary alcohol and is colorless or pale yellow in appearance. It is used in the manufacture of resins and as a wetting agent and solvent for coating resins, nitrocellulose, cellulose acetate, and other soluble dyes. Furfuryl alcohol is also commonly found in thermally processed foods such as coffee, fruit juices, baked goods, cask-stored alcoholic beverages, and flavoring agents.

California's Office of Environmental Health Hazard Assessment ("OEHHA") added furfuryl alcohol to the list of chemicals known to cause cancer one year prior on September 30, 2016. Furfuryl alcohol was added to the list based on formal identification by the US Environmental Protection Agency ("US EPA") that the chemical causes cancer.

Under Title 27, Cal. Code of Regulations, section 25306, a chemical has been "formally identified" as causing cancer by an authoritative body if: (1) the chemical has been included in a list of chemicals causing cancer published by the authoritative body; is the subject of a report which is published by the authoritative body and which concludes that the chemical causes cancer; or has been "otherwise identified" as causing cancer by the authoritative body in a document that indicates that the identification is a final action; and (2) if the list, report, or document meets specified criteria in Section 25306(d)(2). The OEHHA reviewed the data and conclusions in the US EPA 2014 report entitled *Cancer Assessment Document, Evaluation of the Carcinogenic Potential of Furfural and Furfuryl Alcohol* and determined that the conclusions and statements satisfy the Section 25306 requirement.

The complete chemical list is available on the OEHHA website at: https://oehha.ca.gov/proposition-65/proposition-65-list

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