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China Update

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Legal News

Intellectual Property and Privacy

Supreme People's Court Issues New IP and Competition Interpretation

The Chinese Supreme People's Court released a *Draft Interpretation of the Supreme People's Court on Issues Related to the Application of Law in Reviewing Act Preservation Cases of Disputes over Intellectual Property Rights and Competitions* in order to specify over reviewing evidence preservation cases of disputes over intellectual property rights and competition. The Draft formulates detailed provisions on the following issues:

1. Applicant: Parties to a dispute may file an application for act preservation measures before the commencement of a judgment or an arbitral award, and IP holders are entitled to apply for act preservation measures over IP infringements;
2. Application: an application for act preservation measures will have the basic situation of the Applicant and the Respondent, content and duration of act preservation measures, and the rights, basis, facts and reasons of filing the application;
3. Review: solutions include the Court reviewing the application after it decides to proceed to an act preservation measure; or the Court shall make a decision within 30 days since the date of acceptance of an application in a non-emergency situation;
4. Act preservation: the Court shall consider factors such as the winning possibilities of the Applicant, whether the Respondent's acts or any other reasons will make it difficult to implement any future judgments or cause irreparable damage to the Applicant's rights and interests, the comparable damage to the Respondent or Applicant if a preservation measure is taken, and if there will be harm to the public interest;
5. Security: security determined by the Court according to Article 100 and Article 101 of the *PRC Civil Procedure Law* shall be valid and can be used as reference to determine the amount of compensation for a wrong application, and the Court may order the Applicant to append the appropriate securities when reviewing whether to take any act preservation measures;
6. Lifting preservation: the Court may rescind an act preservation measure in situations

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where the Applicant doesn't file a lawsuit or request an arbitration within 30 days after a measure is taken; the basis of an act preservation measure ceases to exist; or the Applicant applies for rescission while application error is found; and

7. Miscellaneous: the Court determines the effectiveness period of an act preservation measure which can be extended, and the decision can be reviewed once by the Court.

China's New Data Privacy Legislation

Foreign and local entities conducting businesses in China will now have to factor the new developments in relation to the data privacy protection which includes new consumer protection provisions that clarify how companies may collect, use and protect personal information. In January 2015, the State Administration of Industry and Commerce (SAIC) issued a regulation based on Articles 14 and 29 of the PRC Consumer Rights Protection Law (CRPL) to take effect from 15 March 2015. The regulation '*Measures for Penalties Regarding the Infringement of Consumers' Rights and Interests*' addresses a range of consumer protection issues including clarifying the definition of 'personal information of consumers', providing more detail on CPRL's requirements for collection, use and protection of consumers' personal information, and provided for significant penalties for violations. The CRPL and the Implementing Measures require businesses to:

1. Inform and obtain consent from consumers regarding the purpose, method, and scope of collection or use of consumers' personal protection;
2. Publish rules for collection and use of consumers' personal protection;
3. Not collect or use information in ways that violate laws, regulations, or contractual agreements;
4. Not divulge, sell, or illegally disclose consumer personal protection to third parties;
5. Implement measures to ensure the security of consumers' personal information and immediately take remedial action if information is improperly disclosed or lost; and
6. Not send commercial information to consumers without consent, particularly if consumers have expressly indicated an unwillingness to receive such information.

Therefore, the substantial enforcement authority granted to SAIC and its local counterparts illustrates China's seriousness about cracking down on improper use, disclosure and sale of consumers' personal protection.

Chinese Trademark Office's Acceptance of New Nice Classifications

China Trademark Office have now accepted into the Nice Classification the description 'retail or wholesale services for pharmaceutical, veterinary and sanitary preparations and medical supplies' under sub-class 3509, and the description 'provision of an online marketplace for buyers and sellers of goods and services' under sub-class 3503, which covers sales and promotion services provided for others and not in relation to the applicant's products. This arguably may mean sub-class 3503 doesn't cover the applicant's own online site, but the Trademark Office can take the view that the description is suitable for trademark owners that provide an online marketplace for the sale of goods of other parties.

Measures for the Deposit of Biological Materials

The State Intellectual Property Office has issued the revised *Measures for the Deposit of Biological Materials for the Purposes of Patent Procedure* (the 'Measures'), as of March 1 2015. The revision focuses on the provision of the rights and responsibilities among SIPO, the depositary authority and the applicant, in the procedure of providing biological material samples and depositing biological material. Furthermore, the Measures supplements the crucial procedural

standards such as the depositary authority furnishing a sample of the biological material to any eligible requestor or entity, and the depositary authority shall be entitled to the disposal of the biological material if the patent does not retrieve the material deposited. The Measures coming into effect consequently caused both the *Regulations for the Deposit of Microorganisms for the Purposes of Patent Procedure of the China General Microbiological Culture Collection Center*; and the *Regulations for the Deposit of Microorganisms for the Purposes of Patent Procedure of the China Center for Typical Culture Collection* to be abolished.

IP measures unveiled in Hong Kong

The Hong Kong government has accepted and will be setting aside \$23 million for the approaching three years for the proposed measures to further develop Hong Kong as a regional intellectual property trading hub. These measures fall under four strategic areas: enhancing the IP protection regime; supporting IP creation and exploitation; fostering IP intermediary services and manpower capacity; and pursuing promotion, education and external collaboration efforts. Additionally, an IP consultation service scheme will be launched to provide free initial advice to small and medium enterprises as a support measure, as well as facilitating the provision of specialised IP intermediary services, such as valuation and due diligence, and arbitration and mediation.

IT

China's Anti-Terrorism IT Law

China's proposed anti-terrorism law required technology firms to provide encryption keys and install backdoors to grant law enforcement access for counterterrorism investigations. However, this proposal may complicate market access for foreign companies in China, as information is seen as no longer secure if these measures are followed, and there is no allowance for corporate secrets or funds to be transmitted securely. The US have protested against the proposal, claiming the proposed regulation would render secure communications unfeasible in China and providing access to such commercially sensitive information would harm businesses' credibility. However, China has responded that Western governments, including the US, have made similar requests for encryption keys and Chinese companies operating in the US have long been subjected to intense security checks. While the third reading of the law has been suspended, the Foreign Ministry claimed the deliberation of the law is still ongoing.

Corporate

Foreign Investment Industrial Guidance Catalogue

On 13 March, the 2015 version of the Foreign Investment Industrial Guidance Catalogue was released, which will enter into effect as of 10 April 2015. As well as classifying industry sectors into encouraged, restricted and prohibited, the Catalogue is an important legal document in the regime of foreign investment in China as it is guidance from the PRC government to direct foreign investment. The key changes involved in the 2015 Catalogue centers around the aim to relax the regulatory environmental for foreign exchange in sectors including steel, automobile, electronics, subway and many more. Therefore, it's an important measure to expand and change foreign management, to build an open and transparent investment environment, improve the quality of foreign capital utilisation, and promote reform and development.

Amendment to Securities Law to Get Green Light

China's National People's Congress will be approving the amendment to the Securities Law this year, paving way for the reform of the new-shares sales mechanism. Its primary purpose is to promote a market-driven securities sector, rein in administrative control and intervention, enhance regulators' oversight, and to better protect individual investors' interest. Included in this revision is an expansion of the definition of securities exchanges, new rules on cash dividends to small shareholders, expansion of the business scope for securities firm, and administrative approvals for domestic companies to issue securities in overseas markets.

Dispute Resolution

China's First White Paper on Judicial Transparency

China's Supreme People's Court have published a white paper '*Judicial Transparency of Chinese Courts*' which included the creation of three online platforms devoted to disclosing trial proceedings, judgment documents and enforcement information, therefore expanding the scope and the depth of judicial openness, as well as building national platforms to disseminate information in a uniform manner to improve transparency.

Legislation Policy

China Paves Way for Legal Reform

China's national legislators have adopted a revision to the Legislation Law, which was enacted in 2000, and is considered to be a foundation of China's legal system as it regulates over the structure of government regulations, national and local laws. One of the reforms include expanding legislative power from 49 cities in China to 288 cities nationwide, indicating a changing perspective towards national and local governance as well as illustrating central authority's delegation of power in exchange for local wisdom and vitality in the face of major economic restructuring and social reform. However, to prevent abuse of this newfound power, the revised law allows the cities to issue local laws only about rural and urban development and management, environmental protection, and preservation of historical heritage and cultural values. Furthermore, the revised law focuses on the checking of administrative power, including provisions to ban ministries and local governments from issuing rules and policies that mitigate citizens' rights or increase their obligations without legal foundation as well as enhancing legislature power of examining whether regulatory documents are in line with the Constitution.

Business News

Asian Infrastructure Investment Bank

Beijing's creation of a new infrastructure bank, Asian Infrastructure Investment Bank (AIIB), has drawn support from the International Monetary Fund as well as around the globe as it illustrates their efforts to reform to combat corruption, control pollution and clear the path to an increased engagement with the world. This may then lead to slower, safer, and more sustainable growth with

a focus on innovation and entrepreneurship. At least 47 countries and territories have applied to join the China-backed AIIB.

China's New Business Rules

The Chinese government have been reducing the number of government approvals required for new businesses, including eliminating all minimum capital requirements to start a limited liability business in China. This has resulted in a 50% rise in the number of enterprise registrations in China, therefore illustrating the success of China's efforts to boost entrepreneurship by providing the ability to start a liability company more easily. In the past, many small businesses have been reluctant to go to the expense of setting up proper corporations in China, thus leading them to carry on business with unnecessary liability and tax exposure. Foreign investors have also welcomed the changes.

China's Plan for a New Wave of State Firm Consolidation

China is preparing to embark on a new round of industrial consolidation by focusing on promoting key sectors such as railways and nuclear power plant construction in offshore markets to create leading international giants. The initiative, '*Made in China 2025*' is part of a plan to reinvigorate China's state-owned enterprises and raise global competitiveness of the domestic industry, and will address issues ranging from the establishment of asset management companies to oversee state shareholding, to the introduction of non-state investment and performance-based compensation programs at government-controlled firms.

China's Cross-Border Payment Mechanism

China aims to launch a cross-border interbank payment system (CIPS) this year to allow the handling of large sums of capital and integrate it with domestic real-time gross settlement system, which will increase global usage of the Chinese currency by cutting transaction costs and processing times. While the old networks were sufficient in meeting demands of overseas settlement in CNY in regions such as Hong Kong, CIPS will be a top-level design to comprehensively promote the internationalisation of a payment and clearing system. Therefore, CIPS will assist the central bank to improve efficiency of cross-border settlements in CNY and better control the systemic risk associated with cross-border payments via information monitoring.

China-US's Bilateral Investment Treaty

The text of a bilateral investment treaty (BIT) between China and the US has been completed. It will serve as a cornerstone for the bilateral economic relationship as it places important rules that ensure non-discriminatory access to each other's country and fair treatment of investments once established. BITs provide substantive legal obligations to protect investors, including protections against expropriation without compensation, protection from discriminatory or arbitrary treatment, allowing investment-related capital to be freely transferred in and out of country, and fair and equitable treatment of investments. A significant part of this BIT is China's agreement to take a 'negative list' approach, signaling their willingness to allow foreign investment in all industries and sectors, except as specifically excluded, which leads to broader coverage generally. Therefore, the US-China BIT presents significant opportunity for US companies to address barriers in the Chinese market since China's accession to the World Trade Organisation.

China's Free Trade Zones

China is creating new free trade zones in Guangdong, Fujian provinces and Tianjin to restructure China's slowing economy and put it on a more sustainable growth path. The free trade zones have the purpose of liberalising regulations governing finance, increasing investment and trade in areas, and being a key initiative to provide a strong impetus for development. Innovation is an important driving force for development, therefore the new free trade zones, and China's plans to conduct more experimentation in the existing Shanghai's zone to encourage foreign investment and development of advanced manufacturing is promising.

Beijing's Attempt to Reduce Pollution

Beijing will be closing the last of its four major coal-fired power plants in 2016. Coal is the leading source of carbon-dioxide emissions and Beijing, whose pollution averaged more than twice China's national standard last year, will be replacing the facilities with four gas-fired stations with the capacity to supply 2.6 times more electricity than the coal plants. Although this alternative is more expensive, it will produce less pollution. Its plan to cut annual coal consumption by 13 million metric tons by 2017 from the 2012 level to slash the concentration of pollutants is a result of pressure from both home and abroad to address the environmental damage which is a byproduct of economic growth. China's emissions of carbon dioxide fell 2% from 2013 to 2014, therefore signaling Beijing's efforts are working.

FDI Rises 17%

China's foreign direct investment rose 17% to US\$22.48 billion in the first two months of 2015. Even though foreign companies have been affected by rising operating costs and general slowdown in the Chinese economy, the revenue growth has been stable due to China readjusting their industrial structure by developing new growth points from service industries such as e-commerce, transportation and logistics to ensure the service sector becomes the new growth engine driving the inflow of foreign investment.

China's New Regulations to Fight Tax Evasion

Authorities have strengthened its management of transfer pricing of external pricing by promulgating the Base Erosion Profit Shifting (BEPS) action plan to combat international tax evasion. This involves targeting tax evasion by multinationals by implementing new regulations aimed at unreasonable payments such as for service and royalties to overseas-related parties. This new policy is in line with the G20 and Organisation for Economic Cooperation and Development BEPS and plans to fight tax evasion by stipulating payments by companies to related parties overseas must be conducted at arm's length, such as payments to parties with no ability to execute and without actual business operations; labour service payments that do not bring economic benefits to the company; royalties that have only intangible assets but do not add value; and royalties for fringe benefits from capital-market financing activities.

This update is aimed at keeping our clients and partners informed as to the latest legal and business developments in the Greater China region. Whilst every care has been taken to ensure the accuracy of the information contained in this update, it should not be relied upon for any purpose prior to formal legal advice being obtained.