



MMLC Group 

北京铭辉达知识产权代理有限公司

## *China Update*

*Lawyers and Consultants*

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### *Business News*

#### **China issuing “strict controls” on overseas investment**

China plans to clamp tighter controls on Chinese companies seeking to invest overseas, intensifying efforts to slow a surge in capital fleeing offshore amid tepid growth and an uncertain economic outlook. The State Council will soon announce new measures that subject many overseas deals to reviews of “strict control”. Targeted for particular scrutiny by the pending measure are “extra-large” foreign acquisitions valued at US\$10 billion or more per deal, property investments by state-owned firms above US\$1 billion and investments of US\$1 billion or more by any Chinese company in an overseas entity unrelated to the investor’s core business.

#### **China gives the nod for Shenzhen-Hong Kong Stock Connect**

China will commence the Shenzhen-Hong Kong Stock Connect program on 5 December, in a much-anticipated liberalization of the Chinese financial system that gives global capital greater access to Asia’s largest and third-largest equity markets. The program allows overseas investors to trade in 881 stocks on the Shenzhen Stock Exchange, while giving mainland Chinese brokers access to execute transactions in 417 stocks in Hong Kong. The latest move, coming on the second anniversary of the first Shanghai-Hong Kong Stock Connect program, is another step in China’s strategy to liberalize its financial markets. Under that first scheme, international investors got a taste of trading in about 600 of Shanghai’s A shares, while the city’s brokers got access to 318 Hong Kong stocks for mainland investors.

#### **China about to start US\$35 billion Silk Road plan in Pakistan**

More than three quarters of US\$46 billion of planned Chinese-led investment in Pakistan will be implemented by next year as part of the world’s second-largest economy’s flagship Silk Road plan. Pakistan is seeking to boost growth to the highest in about a decade after China

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announced its investment plans in the nation of about 190 million people last year. It is part of an initiative the Chinese government calls “One Belt, One Road” that aims to revive trade across Central Asia and into Europe via a network of railways, ports and highways.

### **Crown staff face at least two months detainment on arrest**

A group of Crown Resorts Ltd. employees detained in China since last month have been formally arrested and will be held for another two months, paving the way for prosecutions as the government clamps down on casinos that woo its citizens to gamble overseas. The employees were arrested on 18 November for alleged gambling-related crimes and their detainment could be extended beyond two months while the case is investigated. The case signals the government in Beijing is again focusing on overseas casino operators with marketing operations in China. In 2014, GlaxoSmithKline Plc’s British country manager in charge of its China unit, Mark Reilly, was prosecuted along with other China-based executives in a high-profile bribery case that resulted in a RMB3 billion (US\$436 million) fine for the drug giant.

### **China, New Zealand agree on mutual recognition of organic food certification**

China and New Zealand inked an agreement on 14 November to mutually recognize organic food with official certification labels to facilitate organic food development and trade. This is the first mutual recognition agreement for organic food certification China has signed with a foreign country. China mainly exports coffee, frozen vegetables, and pet food to New Zealand and imports dairy products, meat and fruit from the country. Under the agreement, all organic food should be marked with Chinese certification labels and codes. Official data showed that China sold organic food worth RMB60 billion (US\$8.78 billion) last year. China is the fourth largest destination for New Zealand's organic food exports.

### **China expands tax breaks for service outsourcing industry**

China will extend tax breaks to outsourcing service providers in more cities as part of attempts to boost service trade. Service firms with advanced technology in 10 cities, including Shenyang, Urumqi, Qingdao and Ningbo, will have their corporate income tax lowered from 25 percent to 15 percent, from 2016 to 2018. Meanwhile, the firms' staff education expenses will be tax-deductible as long as they account for no more than 8 percent of total wages. The move is additional to existing tax breaks that apply to similar firms in 21 other cities.

### **China seeks to replicate FTZ reform trials nationwide**

Chinese government is seeking to replicate its success in several free trade zones (FTZs) nationwide. The State Council has published a circular mapping out the replication, which will see 19 new items applied across the country. Among the successes of the FTZs has been the introduction of a negative list, which specifies investment sectors off-limits to foreign investors and allows industries not on the list to follow the same new investment rules as domestic firms. The expansion comes more than three years after the launch of China's first FTZ in Shanghai. In late 2014, Tianjin, Fujian and Guangdong were allowed to set up the second group of FTZs. Another seven were added across the country in August this year.

### **China approves new guideline on environmental improvements**

A national guideline on environmental improvements was approved at a State Council executive meeting on 15 November. China will improve environmental protection and restoration to ensure a greener, more sustainable development, according to the new guideline for environmental protection during the 13th Five-Year Plan period (2016-2020). The new guideline makes it clear that equally strong efforts are required both in environmental protection and restoration, while minimizing industrial disruption to the environment. It sets the goals of a more environmental friendly way of living, considerable reduction of major pollutants, and a sounder ecological system by 2020.

## **Legal News**

### **Intellectual Property**

#### **Beijing IP Court establishes speedy trial panel**

The Beijing IP Court recently established an internal Speedy Trial Panel for administrative litigation cases concerning the review of trademark application refusals. The panel will set the date for the court hearing and serve parties with subpoenas on the day on which the case is filed. Trademark applicants can now apply to the court for a summary procedure, which will halve their legal fees and allow them to adduce evidence at the court hearing, instead of within a specific time limit. The court will issue its judgment in cases tried via the summary procedure within 45 days. The summary procedure will greatly improve the court's trial efficiency.

#### **SPC resolves trademark dispute in favor of famous steamed bun**

In the trademark dispute case involving the Chinese time-honored brand “Qingfeng”, the Supreme People's court (SPC) recently rendered judgment holding that the defendant Shandong Qingfeng Restaurant Management Co., Ltd. (Shandong Qingfeng) had infringed the trademark rights of Beijing Qingfeng Steamed Buns Shop (Beijing Qingfeng) and had committed unfair competition. The SPC likewise ordered Shandong Qingfeng to cease and desist from the further use of the characters “Qingfeng” and pay RMB50,000 in damages as well as reasonable costs.

Established in 1956, Beijing Qingfeng, had registered the trademark “Qingfeng” in 1998, and the trademark “LaoQingfeng” in 2003. Defendant Shandong Qingfeng, established in 2009, is in no way related to Beijing Qingfeng, but has an owner named “Xu Qingfeng”. Beijing Qingfeng claimed that Shandong Qingfeng had infringed its trademark rights and committed unfair competition by overtly using the characters “Qingfeng” in its establishments and advertising materials.

The Jinan Intermediate People's Court held that no infringement or unfair competition had been committed. Beijing Qingfeng thereafter appealed to the Shandong High People's Court, which likewise sustained the first instance judgment. Undeterred, Beijing Qingfeng lodged a petition for retrial with the SPC. Ruling in Beijing Qingfeng's favor, SPC held that, although the name of Shandong Qingfeng's owner Xu Qingfeng includes the characters “Qingfeng”, considering Beijing Qingfeng's reputation and its extensive use of its trademarks, Shandong

Qingfeng is deemed to have known such facts. Such therefore proves Shandong Qingfeng's intention to free-ride on Beijing Qingfeng's popularity, and therefore cannot amount to the fair use of such name. The SPC ultimately rendered judgment modifying the first and second instance judgments and holding that Shandong Qingfeng had infringed Beijing Qingfeng's trademark rights and had committed unfair competition.

### **AIPLA issues comments Amendment of Guidelines for Patent Examination**

The American Intellectual Property Law Association (AIPLA) formally sent its comments on the draft Amendments of the Guidelines for Patent Examination (For Public Comment) to the State Intellectual Property Office (SIPO) on 25 November. According to the comments, AIPLA considers that it would be very helpful to both applicants and examiners to include an example of an invention claimed in computer-readable medium plus computer program process format. AIPLA also considers it helpful to clarify whether computer readable medium includes transitory mediums (transmission over a network) by way of an example. Further, AIPLA considers the proposed amendments which provide that during invalidation proceedings the patentee can amend an issued claim by incorporating technical features recited in other issued claims do not provide additional time to allow the petitioner to submit additional evidence directed to the claims amended by the patentee. AIPLA observes that in some situations, the petitioner may not have previously provided evidence related to that particular technical feature. AIPLA recommends that in such situations, the petitioner should be given an opportunity (and additional time) to submit additional evidence.

### **Non-use cancellation action in China**

In China, the non-use cancellation can be initiated by any entity or individual after the trademark is registered for more than three years. To prove the non-use status, a simple investigation report (usually an on-line search result) will be sufficient. After that, the burden of proof will be shifted to the trademark owner who needs to prove the real business use of the trademark during the past three years, counting back from the non-use cancellation filing date. The effective use evidence needs to prove the five necessary elements for use, including date, place, trademark, user's name, goods or services. The evidence should separate or jointly prove the valid use. Below are some tips for initiating non-use cancellation procedure.

- If the applicant does not want to expose its identity to the registrant of the trademark, it can file the cancellation under a third party's name;
- CTO accepts both applications to cancel a trademark registration in relation to all or only part of the designated goods or services. In some cases, focus on the key or relevant goods or services can increase the chances of successful cancellation;
- Many recent cases indicate that OEM use evidence alone is insufficient, though several years ago such use evidence was considered sufficient to maintain a trademark;
- It is advisable for the companies which defensively register its trademarks in more classes and subclasses but do not use such trademarks to file back-up applications in relevant classes where non-use cancellation arises, particularly for their important house trademarks.

### **China's applications for evaluation report of patent for design exceed 20,000**

According to the data from the SIPO, as of 28 October 2016, the total amount of applications for evaluation report of patent for design exceeded the benchmark number of 20,000. The

definition of “evaluation report” was introduced in the current Patent Law when it came into force from 1 October 2009, and is applied to a patent for design or utility model, which is granted without substantive examination. The purpose of an evaluation report, among others, is for a patent owner to evaluate whether his patent for design is valid, and to block a patent owner from enforcing his patent for design or utility model, which is obviously not new. A court would be inclined to stay a patent infringement litigation if the evaluation report shows that the involved patent for design is obviously not new and the defendant has already filed a request for invalidation in time with the Patent Reexamination Board of the SIPO.

### **China becomes the first country to file one million patent apps in one year**

China is driving Asian-led growth in innovation worldwide, becoming the first country to file 1 million patent applications in a single year, the World Intellectual Property Organization (WIPO) said on 21 November. Chinese innovators filed most of their 2015 applications in electrical engineering, which includes telecoms, followed by computer technology and semiconductors, and measurement instruments, including medical technology. Worldwide, some 2.9 million patent applications were filed last year, a 7.8 percent increase over 2014.

### **Geox prevents the registration of the similar trademark “Leox”**

Geox, famous Italian shoes brand that is developing its business in China recently won a difficult case in front of Beijing High People’s Court against the Trademark “LEOX” and Trademark review and Adjudication Board (TRAB).

According to trademark regulations and practices trademarks with different first letter(s) are often not considered as similar. And indeed in the phase of opposition and opposition appeal, CTO and TRAB didn’t support the claims of the Italian shoes brand, they deemed the opposed trademark “LEOX” is dissimilar to “GEOX”. Nevertheless, in the administrative litigation phase, GEOX insisted on the similarity and supplemented more evidence, so that Beijing First Intermediate People’s Court supported the opposition claim, and later Beijing High Court reaffirmed the favorable decision. According to the High Court, “LEOX” is just different from “GEOX” in the first letter, even though it is decorated with two dots above the letter “O”, it is confusingly similar in terms of word component, pronunciation and overall visual effect.

### **Qualcomm’s ITC action against Meizu instituted**

Qualcomm’s Section 337 case against Meizu was initiated on 15 November 2016. The products covered by this investigation are electronic mobile devices that include hardware and software components within the mobile electronic devices, such as integrated circuits, cameras, RF transmitters, capacitors, and System-on-chips. Qualcomm had announced on 14 October 2016 that it was filing a complaint with the United States International Trade Commission (ITC), filing a patent infringement action in Germany with the Mannheim Regional Court, and initiating an infringement-seizure action in France to obtain evidence for a possible future infringement action there. Qualcomm had previously initiated litigation against Meizu in Beijing and Shanghai.

### **Hong Kong arbitration law amendments proposed**

Amendments to the Arbitration Ordinance (Cap 609) will be tabled to clarify that disputes over intellectual property rights can be resolved through arbitration. The amendments also

clarify it is not contrary to Hong Kong's public policy to enforce arbitral awards involving intellectual property rights. The amendments are to help more parties resolve their intellectual property rights disputes through arbitration in Hong Kong. Currently the ordinance does not have a specific provision on the issue nor is there relevant authoritative judgment in Hong Kong. The Arbitration (Amendment) Bill 2016 will be gazetted on December 2 and tabled at the Legislative Council on December 14.

### **Hong Kong Customs officers raid tutoring chain suspected of copyright offence**

A Hongkonger who allegedly ran a tutoring chain franchise using notes copied from books was one of 14 people arrested by customs officers for violating copyright laws. The suspect, who is in his 30s, charged franchisees up to HK\$200,000 for setting up a private tutorial centre and received between HK\$3,000 and HK\$10,000 a month from each branch. Customs officers began their investigation after receiving a tip-off that a large number of copyright infringing tutorial notes were being handed out to students at the tuition chain. After a six-month investigation, officers raided 13 centres as well as the chain's headquarters. During the operation, more than 50,000 pages of notes, 25 computers and 13 photocopiers were seized. The haul was estimated to be worth about HK\$580,000.

## **Competition**

### **Tetra Pak is punished for abuse of dominance**

On 16 November 2016, the State Administration for Industry and Commerce (SAIC) published its administrative penalty decision to fine Tetra Pak's (TP) for abuse of dominant market position. The SAIC imposed a fine totaling RMB667.7 million bringing to an end a case that started in January 2012 and lasted for almost five years. The SAIC found that from 2009 to 2013, TP abused its dominant position in aseptic carton packaging machinery for liquid food products (machinery market), technical services for aseptic carton packaging machinery for liquid food products (technical service market), and cartons for liquid food product aseptic packaging (carton market). The SAIC found that in Mainland China TP had without justifiable reasons conducted tie-in sales, exclusive dealing and loyalty discounts. In this case the SAIC for the first time defined a "loyalty discount" as an "other forms of abuse of dominant market position confirmed as such by the Anti-Monopoly Enforcement Authority under the State Council" regulated under Article 17(1) (vii) of the Anti-Monopoly Law. By doing so, the theory of loyalty discounting (already widely acknowledged in the EU and the US) has been adopted as the seventh approach to regulate abusive conduct. This decision has great practical significance, and also brings new challenges and requirements to companies' compliance mechanisms.

## **Tax**

### **The SAT issued Administrative Measures for Due Diligence of Tax-related Information on Financial Accounts of Non-residents for public comment**

The PRC undertakes to exchange the tax-related information on financial accounts of non-residents with foreign countries for the first time on September 2018. Pursuant to the schedule, domestic financial institutions will operate the due diligence as per the "standards" from 1 January 2017, identify non-resident's accounts and accounts of enterprises and collect and report account-related information which will be exchanged by the SAT with the competent

tax authorities of other countries regularly. The Administrative Measures for Due Diligence of Tax-related Information on Financial Accounts of Non-residents mainly specify the principles and procedures for domestic financial institutions to identify nonresidents' accounts and collect relevant information, including the interpretations to basic definitions, due diligence procedures applicable to newly created accounts and existing accounts, the scope of financial accounts for which financial institutions without the need of engaging in due diligence, scope of information that shall be collected and reported by financial institutions, and sanctions imposed on any financial institution or client in breach of laws or regulations.

## **Privacy**

### **China mulls regulation to protect privacy further**

The Ministry of Public Security released on 26 November a draft regulation on surveillance cameras installed in public places. The document banned the installation of security cameras in public places where they could infringe on the public's privacy, such as hotel rooms, dressing rooms and toilets. Organizations or people are not allowed to use cameras to illegally obtain state and business secrets or infringe on the public's right to privacy. When security surveillance footage is disclosed for public use, personal information, such as individual body features and plate numbers, should be obscured, unless otherwise stipulated by law. Those who illegally install surveillance cameras in public places will be fined up to RMB100,000 (around USD14,500), according to the document.

## **Internet**

### **China issues its first Network Security Law**

On 7 November 2016, the Standing Committee of the National People's Congress issued China's first and comprehensive Network Security Law, which will come into effect on 1 June 2017. The Law establishes an overarching regulatory framework to ensure network security and the law covers the construction, operation, maintenance and use of networks in the PRC by international and domestic individuals and entities, as well as regulators' administration and supervision of network security. The Law introduces a set of general requirements to ensure secure network operations and an additional set of enhanced rules applicable to "critical information infrastructure" (CII). A class-based network security protection system applies to all network operators in the PRC. The Network Security Law does not further clarify standards or thresholds for each class. While the details of the class-based network security protection system require further definition, the Network Security Law sets out general compliance requirements to ensure security of network operations, which are highlighted below:

- Network operators must establish internal network security protection systems and fulfill certain obligations to ensure network security, such as setting up internal network security policies, appointing a responsible person in charge of network security matters, adopting anti-virus technologies, and implementing data backup and encryption measures.
- Network operators must implement measures to monitor and record network operations and network security incidents, and are required to retain network daily logs for at least six months.
- Network operators must require verification of a user's real name and identity, upon execution of a service agreement or upon confirmation by network operators to provide

users with network access, domain name registration, local/mobile phone networking access, instant messaging and information publication services.

- Network operators are required to monitor the information that users post, to promptly remove prohibited information and prevent further dissemination of such information, and to report such information to government authorities.

## **Civil Procedure**

### **New Supreme People's Court opinion simplifies the service of process in China**

On 12 September 2016, the SPC issued the Several Opinions on Further Promoting the Separation of Complicated Cases from Simple Ones and Optimizing the Allocation of Judicial Resources, which aims to streamline and promote efficiency in the service of process in Chinese civil litigation proceedings. An important point in the Opinion is that any address agreed upon by parties in an agreement will be treated by Chinese courts as a valid address for service. The effect of the Opinion is that when parties agree upon an address for notices to be sent and provides for this in an agreement, that address would be identified by Chinese courts as a valid address for service in civil proceedings. The simplified process also confirms that even if the mail does not reach the intended recipient for whatever reason, the Chinese court will still consider the service as completed and can proceed to hear the case in the absence of the recipient. We recommend that companies doing business in China consider the following actions:

- If companies doing business in China wish to follow the new development, they should expressly specify in the contract that the address for notices also applies to court proceedings.
- If parties wish to mitigate the potential risk of any default judgment, they should expressly state in the contract that the address for notices cannot be used for court service purposes.
- Parties should avoid any reference or stipulation that the external counsel's address be used as the address for notice under a contract.
- Parties should keep counterparties informed of any changes to the address agreed in the contract.

*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.*