



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 publishes general PMI to better track economy

The National Bureau of Statistics, for the first time, published a general purchasing managers' index (PMI) covering both manufacturing and service sectors on 31 January. The general PMI came in at 54.6 for January – a reading above 50 indicates expansion and below reflects contraction. China's manufacturing and non-manufacturing PMIs stood at 51.3 and 55.3 in January, respectively.

Most online fraud in China involves fake job ads, finance

Most cases of fraud in China involved fake part-time job information and online financial products in 2017. A tipoff platform operated by the security software provider and the Beijing Public Security Bureau received 24,260 leads concerning online fraud last year, up by 17.6 percent year-on-year. The majority - 3,804 - were related to false part-time recruitment, followed by fake online finance and shopping products and services. Economic losses from fraud reached more than RMB350 million (US\$54.7 million).

China FTZs expand opening for foreign business

Thomas Cook China, a Sino-British joint venture registered in the Shanghai Free Trade Zone (FTZ) in 2015 by Thomas Cook Group and Fosun International will soon begin outbound tourism business for Chinese tourists. Previous regulations meant joint ventures had to work with local travel agencies on outbound tourism, but could apply for their own license after two years. Thomas Cook China is one of the beneficiaries of fine-tuning to some laws and regulations in China's FTZs to further opening-up and reform. Eleven regulations including those on ship registration, urban rail transit and foreign investment are to be temporarily adjusted.

BEIJING

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Partners and Associates in the MMLC Group are admitted to practice law in China, Australia and Europe (UK)

China's Ruyi emerges as leading bidder for Bally

Shandong Ruyi Group, the Chinese textile producer is emerging as the leading bidder for Bally International AG, the Swiss luxury brand known for its dress shoes and leather man bags. Ruyi is in advanced negotiations with Bally's owner and has been discussing a price of about US\$700 million. Ruyi has pulled ahead of other suitors including Club Med owner Fosun International Ltd. and Chinese apparel maker Fujian Septwolves Industry Co., which had earlier expressed interest in the assets. They haven't reached a final agreement on terms of a deal yet so far.

Softer but better growth expected for Chinese economy in 2018

China's economy totaled RMB82.7 trillion (US\$13 trillion) in volume in 2017, expanding 6.9 percent as it picked up pace for the first time in seven years. A moderation in GDP growth is the popular view among global investors given a high comparison base, while a more balanced and sustainable economy is expected to take shape faster. It is expected that China's economy would expand about 6.7 percent and 6.4 percent this year respectively. The property sector remains one of the major uncertainties facing China's economic growth in 2018 though.

China's inbound foreign direct investment hits record high

China hauled in US\$144 billion in foreign direct investment (FDI) in 2017 - its most ever - and ranked second globally after the U.S. In contrast with rebounding global trade and a strengthening global economy, the total amount of outbound investment sent to foreign countries and regions fell 16% to US\$1.52 trillion in 2017, its second straight year of contraction. China's FDI grew 7.9% though in 2017, amounting to stable growth, as announced by China's Ministry of Commerce in January.

China is expected to open financial sector in 2018

China will implement measures this year to meet a commitment announced in November to give foreign investors greater access to its financial sector. It will continue to open up its manufacturing sector and some services industries and remove or reduce restrictions on foreign investment, and gradually reduce the tariffs on imported automobiles. The Chinese government announced plans to open up the financial sector wider to overseas investors on 10 November 2017, pledging to create a more level playing field for foreign firms in the country's sprawling financial sector. The proposals involve a significant relaxation of foreign ownership rules on banks, securities and asset management companies, and insurers. The government will raise the cap on direct or indirect foreign ownership of securities companies, fund management companies and futures companies to 51% from 49% currently and will abolish the limit entirely three years after the rules come into force.

China publishes the three-year action plan for AI development

The Ministry of Industry and Information Technology (MIIT) published the three-year action plan to encourage the industrial development of the new generation of AI (Action Plan) on 14 December 2017. The Action Plan identifies the key areas of AI development between 2018 and 2020, which include intelligent vehicles, service robots, drones, medical image aided diagnosis systems, video and image identification systems, voice interaction systems, translation systems, smart home products, intelligent sensors, neural network chips, and open source platforms. AI development is considered as a critical catalyst of the Made in China 2025 initiative.

China's top electric-car maker to list in US\$4.5 billion deal

Beijing Electric Vehicle Co (BJEV) will gain a stock market listing through a share issue and asset swap deal valuing the state-backed electric car manufacturer at RMB28.8 billion (US\$4.5 billion). Chengdu Qianfeng Electronics Co, one of the listed arms of Beijing Automotive Group (BAIC Group), will buy BJEV in an asset swap and stock sale. As part of the arrangement, Qianfeng plans to sell 761.1 million shares at RMB37.66 per share. The deal will allow BJEV to become the listing entity after the transaction, replacing Chengdu Qianfeng Electronics. The company focuses on research and development, production and sales and services for NEVs and core components.

China to intensify clawback of electric vehicle incentives

China will start phasing out subsidies for electric vehicles this year and put an end to the incentive program by 2020. A plan to phase out the subsidies has been drafted and is awaiting approval. The proposed plan includes a four-month transition period, during which some vehicles can still qualify for the same subsidies they received in 2017. Subsidies will be slashed by 20% in 2018, rather than in 2019 as originally planned, with the subsidies scheduled to end after 2020.

Deals slide in China's technology, media and telecom sector

Mergers and acquisitions in China's technology, media and telecom (TMT) sector dropped in 2017. Both the number and value of TMT transactions declined in 2017 from the previous busy deal-making year. In 2017, 666 merger and acquisition deals were booked - 10% lower than in 2016. The total transaction value of these deals dropped 42% from 2016, to US\$74.4 billion. The average transaction value of the deals also declined 31%, to US\$134 million.

China market open for NZ avocados

A successful technical audit of the regulatory system for exporting has meant that avocados will be approved for export in the 2018/19 season. This follows a protocol agreement signed between The Ministry for Primary Industries and China's General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) in November last year. A trial airfreighted shipment to Shanghai will take place during the current 2017/18 season, to be showcased at a New Zealand trade event at NZ Central, Shanghai.

Qualcomm plugs in with four Chinese smartphone makers

U.S. telecommunications company Qualcomm signed memoranda of understanding on 25 January with four Chinese smartphone makers involving US\$2 billion in potential deals. Lenovo Mobile Communication Technology Ltd., Guangdong OPPO Mobile Telecommunications Corp. Ltd., Vivo Communication Technology Co. Ltd. and Xiaomi Communications Co. Ltd. have declared their interest in buying Qualcomm's mobile device components designed to help manufacturers adapt to 5G mobile networks. The agreements were signed at Qualcomm's China Technology Day event in Beijing.

China's Wanda confirms sale of Australian property assets

One of China's biggest property developers, Wanda, has stated that it has disposed of its flagship Australian property assets, to pay off its foreign debt. The apartment projects at Sydney's Circular Quay, which is still under construction, and the Gold Coast, had been estimated to be worth about AU\$1 billion each. Wanda made an announcement to the Hong Kong stock exchange that it had

entered into a deal to sell a subsidiary that “has rights and interests in certain property projects in Australia” to an independent third party.

China Jiefang truck sets sales record

FAW Jiefang Automotive Co., Ltd, a truck subsidiary of China’s leading auto maker FAW Group, sold a record 291,000 Jiefang trucks in 2017. Of all the trucks that entered the market last year, 265,000 were medium- and heavy-duty vehicles, holding the biggest market share in China at 19.7 percent. The company exported 6,729 units of medium- and heavy-duty trucks in 2017, up by 26.7 percent annually.

Legal News

Intellectual Property

Mycoskie, LLC vs. TRAB

The plaintiff, Mycoskie, LLC filed an application for registration of trademark “TOMS and design” in relation to glasses and glasses cases in class 9 on 8 March 2013. This application was rejected by the CTO, and then by the TRAB on 17 November 2015, based on a Chinese person, Zhu Liangtai’s prior registration of trademark “TOMS” in relation to similar goods in class 9. Mycoskie appealed to Beijing Intellectual Property (IP) Court. The IP Court considered that 1) the cited “TOMS” trademark was still effective prior application and constituted the obstacle of registration of the trademark “TOMS and design”, 2) the trademark at issue and the cited trademark constituted similar trademarks in relation to identical or similar goods, which was confirmed, based on Mycoskie’s clear recognition, 3) the cited trademark had not been preliminarily accepted when the trademark at issue was filed, so Article 31 of the Trademark Law should be applied to this case, whilst Article 30 cited by the TRAB was incorrect. Based on the above, the IP Court rejected Mycoskie’s claims.

Dissatisfied with the decision in the first instance, Mycoskie appealed to the Beijing Municipal Higher People’s Court, on the grounds that 1) it had sufficient evidence showing that the cited trademark would probably be invalidated, and 2) an application for suspension of trial was filed with the IP court but was not considered, which violated the legal procedures. During the second instance, Mycoskie filed a decision on invalidation of the cited “TOMS” trademark issued by the TRAB on 12 January 2017 with the Higher Court. On 30 August 2017, the Higher Court issued the final decision in favor of Mycoskie. It indicated in the decision that 1) Mycoskie’s claim on the IP Court’s violation of legal procedures was not supported, 2) even if so, it was not suitable to maintain the decisions issued by the IP Court and TRAB, since the factual basis changed, and 3) so the litigation fees in both first and second instance were paid by Mycoskie, even if the TRAB lost the appeal.

Trademark DISCOVERY EXPEDITION was infringed

Regarding the trademark infringement dispute between the plaintiff, DISCOVERY COMMUNICATIONS, LLC. and the respondents, Zhongshan Discovery Outdoor Supplies Co., Ltd. and JD.com, Beijing IP Court issued a decision on 20 July 2017, ordering Zhongshan Discovery to bear the economic compensation RMB3 million and JD.com to bear joint and several liability RMB100,000 within its scope of profit.

In this case, the plaintiff is a world-renowned documentary media company that launched its outdoor brand “DISCOVERY EXPEDITION” based on the exploration of the link between channels and outdoor sports. Zhongshan Discovery used the trademarks “DISCOVERY ACTIVE” and “DISCOVERY” in English and Chinese characters in relation to the outdoor apparel and backpacks produced and sold by it, as well as in related commercial promotion activities, and it also opened a “DISCOVERY outdoor flagship shop” on JD.com. The plaintiff sued Zhongshan Discovery to Beijing IP Court, claiming that Zhongshan Discovery infringed its exclusive right to use its trademark DISCOVERY EXPEDITION registered in relation to suitcases and backpacks in class 18 and outerwear and sportswear in class 25. Further, the plaintiff also claimed that JD.com should assume joint and several liability for not having performed its due censorship obligation on the flagship shop opened by Zhongshan Discovery. The collegial panel considered that Zhongshan Discovery’s use of DISCOVERY ACTIVE and other trademarks, for its backpacks and apparel products and in its online and offline advertisement constituted trademark infringement. However, the plaintiff’s claim that its DISCOVERY trademarks constitute well-known trademarks in relation to television program production services in class 41 was not supported by the Court. The collegial panel also considered that E-commerce platforms should make reasonable care obligations, when allowing users to set up online shops.

Whether this case was appealed to Beijing Municipal Higher People’s Court by any parties is unknown for now.

Beijing IP Court looks at “Qingfeng Buns”, a famous old Beijing brand

Beijing IP Court recently reviewed a case of trademark infringement and unfair competition, filed by a famous old Beijing brand, Beijing Qingfeng Buns Shop, against the Qingfeng (Tangshan) Food Co., Ltd. and Daoxiangcun (Yutian) Food Co., Ltd., and protected the plaintiff’s legitimate rights, and fully supported the plaintiff’s requests of damage compensation RMB300,000 and reasonable expenses RMB150,000. Beijing Qingfeng Buns Shop found the respondents produced and sell the products under a mark that was extremely similar to its well-known trademark, which caused actual confusion, and sued to Beijing IP Court. The IP Court accepted the lawsuit on 23 May 2017 and issue a decision on 20 July 2017, ordering the respondents to immediately stop their acts infringing the plaintiff’s exclusive right to use its “Qingfeng” trademarks, and stop selling the goods marked with Qingfeng, and publish a statement in the newspaper China IP News to eliminate the adverse effects caused by the infringement, within 30 days form the effective date of the judgement. The Court also required Qingfeng (Tangshan) Food Co., Ltd. to change its corporate name, by removing “Qingfeng” characters. For now, it is unknown if any parties appealed to the higher court.

Samsung liable for infringing Huawei patents after maliciously delaying negotiations

China’s Shenzhen Intermediate Court issued a decision in favor of Chinese smartphone maker Huawei in a patent infringement case on 11 January that Huawei had filed against Korean electronics conglomerate Samsung. The Court ordered Samsung to stop manufacturing and sales of its infringing products and found that the Korean firm “maliciously delayed negotiations”

between the two companies, which began back in July 2011. The Court did not specify the specific Samsung phone models infringing the Huawei patents. In April 2017, Huawei scored its first patent infringement win in Chinese courts when it was awarded RMB80 million (USD\$11.6 million) in damages from Samsung. In July 2016, Samsung had filed its own patent infringement case against Huawei, seeking RMB161 million (USD\$24.14 million) in from against Huawei. As of September 2017, Samsung and Huawei were respectively first-and second-place among smartphone companies in terms of unit sales.

China's SAIC confirms 2017 trademark registration figures

The State Administration for Industry and Commerce (SAIC) indicated in a press conference held on 18 January that 5.74 million new trademark applications were filed in 2017, an increase of 55.7% over the previous year, and current total registrations were 14.92 million which is the highest in the world for the 17th consecutive year. A total of 30,000 trademark infringement cases were investigated and dealt with by the national AIC offices. Among them, the number of counterfeiting cases was 27,000.

Beijing IP Court released the judicial data in 2016

As per the judicial trademark protection data released by Beijing IP Court recently, in 2016, the Beijing IP Court totally accepted 4840 administrative cases regarding authorization and affirmation affairs, among them 88.31% administrative cases (4274 in total) relating trademark affairs. In the trademark-related administrative cases concluded by Beijing IP Court in 2016, there are 284 cases involving preemption in bad faith in total, representing 7.1% of the total cases judged; among them, there are 129 cases with preemption in bad faith affirmed by the court, representing 45.4% of the total cases involving such issue.

Beijing AIC carried out crackdown on pirated ASICS shoes

The Beijing Municipal Administration of Industry and Commerce recently performed a product-focused crackdown on pirated sneakers of ASICS (a brand sourced from Kobe, Japan) in the city and online. The haul of suspected pirated goods (over 31,000) was estimated to have a market value of RMB10.06 million (US\$1.5 million). The pirated goods had slightly altered spellings like "asikas" and logos closely resembling those on true ASICS products.

Competition

Employment related issues under the new Anti-Unfair Competition Law

The new revision to the Anti-Unfair Competition Law was adopted at the 30th Session of the Standing Committee of the 12th National People's Congress on 4 November 2017. The revision focused on detailed methods and investigation procedures relating to acts of unfair competition as well as the corresponding punitive measures, which commenced operation on 1 January 2018. The significant changes in terms of employment issues are listed below.

- Article 9 has clarified that a trade secret is technical or operational information which has "commercial value". This means certain trade secrets which seemingly have no practical use, but which have potential economic value, may also be protected under this article.
- The illegal acts that a third party knows or should know of when determining such third party's infringement include acts of an employee or former employee of the rightful owner of trade secrets or any other entity or individual. This means, although certain businesses may

not have obtained trade secrets directly from an employee, they could be punished if the employee or former employee discloses the trade secret unlawfully.

- Article 21 indicates that the cost of the penalty will range from RMB0.1 to 3 million. The maximum penalty has increased considerably compared to RMB0.2 million under the 1993 revision.
- The new revision has added “to seek a transaction opportunity or competitive advantage” as the purpose of commercial bribery. This emphasizes the competition requirement for this kind of bribe; bribes without such purpose or effect cannot be identified as commercial bribes even if they are made in the course of commercial activities.
- Any employee’s act of commercial bribery shall be deemed to be an act of the business operator which employs such employee, unless there is evidence to the contrary. Businesses are reminded to guard against risks of being held liable for their employees’ acts.

Privacy

China issues personal information national standards

The final text of the Information Security Technology - Personal Information Security Specification (Personal Information National Standards) was released by the National Information Security Standardization Technical Committee on 29 December 2017. The new Standards are one of the most important national standards concerning protection of personal information in China and will commence operation on 1 May 2018. The Standards set out data protection principles and requirements on protection of personal information which are much more extensive than the provisions under the PRC Cyber Security Law. The key provisions of the Standards include the following:

- Personal Information is defined as the information that will reflect the activities of an identified natural person. Personal Sensitive Information is defined to refer to information which, if leaked, illegally provided or used without authorization, will endanger human rights and property security, easily lead to damage to reputation, physical and mental health or discriminatory treatment.
- A request for consent must be given in an intelligible and easily accessible form with the purposes of processing personal information attached to the consent request. The request for consent must also be distinguishable from other matters by using clear and in plain language.
- Personal information subjects shall have the right to access their personal information controlled by a personal information controller and obtain confirmation from the personal information controller where and for what purpose their personal information is being processed.
- Personal information subjects may request the personal information controller to either rectify the personal information or provide the means for the personal information subject to rectify their personal information when personal information subjects find that their personal information controlled by personal information controller is incorrect or incomplete.
- Personal information subjects have the right to request the personal information controller to erase their personal information, cease further dissemination of the personal information and have the third parties halt processing of the personal information if the personal information controller terminates its service or products or if the processing of personal information by the personal information controller is against applicable laws and administrative regulations or the agreed scope with the personal information subjects.

Although the Standards is a “recommended” national standard as opposed to a mandatory one, it is already being specifically referred to by the Cybersecurity Administration of China in recent cases concerning protection of personal information under the Cyber Security Law. Clearly, compliance

with the Standards will be instrumental for businesses in China to demonstrate compliance with the data protection requirements under the Cyber Security Law.

Baidu sued over claim it illegally obtained users' data

Baidu Inc., China's largest search-engine operator, is being sued by Jiangsu provincial consumer-protection organization in December 2017 in a Nanjing court that claims it collected users' information without consent, in the latest privacy dispute involving the country's tech giants. Two mobile apps operated by Baidu, a search engine and a web browser, could access a user's calls, location data, messages and contacts without notifying the user, as claimed by the Jiangsu consumer association. Baidu denied the accusation, saying the apps "do not have the capability of monitoring phone calls and will never do it". This lawsuit was accepted by the court on 2 January.

Tax/Environment

The PRC environmental protection tax law and implementing regulations commenced operation on 1 January

On 1 January 2018, the Law on Environmental Protection Tax and its Implementing Regulations are implemented, effectively ending the pollutant discharge fee that had been in effect for the past 40 years. The Environmental Protection Tax marks the beginning of a slew of new policies aimed at getting China's pollution under control and will undoubtedly affect businesses, especially manufacturing firms, albeit in varying ways. The Environmental Protection Tax applies to the same four categories as the pollutant discharge fee that it is effectively replacing: water pollution, air pollution, noise pollution, and solid wastes. What differentiate the new tax from the fee are summarized as following:

- All of the revenue collected will be retained at the local level. Previously, the central government took 10 percent of the fee. Now, local authorities collect 100 percent of the tax revenue and have more power to enforce the tax.
- The Environmental Protection Tax provides more nuance than the fee system. The fee system made no distinction between light and heavy polluters, meaning that firms had no incentive to cut down on their emissions as they had to pay a uniform fee regardless. In contrast, the Environmental Protection Tax applies different tax rates depending on the level of pollution, which means that heavy polluters will have to pay more than light polluters.
- The tax system offers more attainable tax reductions as an incentive to curtail emissions. Previously, there was only one way to reduce the fee payable, namely a 50 percent fee reduction if the firm polluted at least 50 percent less than the local standard. Now, in addition to the 50 percent reduction, firms that pollute 30 to 49 percent less than the standard receive a 25 percent tax reduction.
- The penalty for not paying the tax is more serious. Under the fee system, failure to pay could result in a fine of up to three times the fee. Under the tax system, failure to pay can result in a fine up to five times the tax, and criminal penalties can be brought forward for egregious offenders.

Commercial / Trading

Draft Export Control Law of China

The Ministry of Commerce (MOFCOM) published the draft Export Control Law for public comments on 16 June 2017. Once enacted, the Export Control Law will be the first comprehensive

and unified export control legislation in China. Below are the notable provisions included in the draft Law.

- The draft Law sets forth four categories of controlled items, including dual-use items which may be used for civilian and military purposes, military items, nuclear items, as well as other goods, technologies, services and items that are related to national security. Items outside the Control Lists could also be temporarily controlled for up to two years, subject to the approval of the competent authorities.
- The competent authorities may also maintain blacklists of foreign importers and end-users that breach the Law, and may prohibit the export of controlled items to such persons.
- If China is subject to any discriminatory export control measures by any country, the State may adopt retaliatory measures against such country. The State may also put in place any necessary controls over the export of any goods, technologies and services in order to safeguard security and interests during wartime or urgent situations concerning international relations.
- Deemed exports include the provision of controlled items by a citizen, legal person or other organization in China to any foreign person; the item need not be physically exported from China.
- The competent authorities may request the exporters to submit end-use certificates or documents issued by the importers or the relevant agencies in the countries of import. The exporters are also under a positive obligation to review the end-users and uses of the exported items, and to immediately report to the competent authorities of any change in end-users or uses.
- The competent authorities may enter the business premises of parties under investigation, conduct interviews with relevant parties, access and copy relevant documents, examine the conveyance used for export, seize items and even freeze bank account of the export operators.
- In a case of export without a permit, the operator may receive an administrative penalty of not more than 10 times the illegal business revenues and confiscation of any illegal gains derived from such activity. Persons directly in charge may also be given a fined up to RMB300,000.

The Export Control Law is widely expected to be introduced in the National People's Congress within 2018.

Arbitration/Dispute Resolution

HK establishes Belt and Road arbitration solution

A Belt and Road-themed arbitration mechanism will be established in Hong Kong, according to a guideline for setting up such a procedure and organization approved by the Leading Group for Deepening Overall Reform. According to the guideline, the dispute-solving procedure and organization should be built with the principle of extensive consultation, joint contribution and shared benefits, and should be based on China's existing judicial, arbitration and mediation institutions. According to the statistics, the number of cases handled by the Hong Kong International Arbitration Center (HKIAC) in 2017 increased by 47 percent from 2016. Among them, approximately a third of the cases involved Chinese enterprises and Belt and Road jurisdictions.

China to establish court for Belt and Road disputes

China is planning to establish a brand new dispute settlement mechanism in Beijing, Xi'an and Shenzhen, so as to provide legal protections including litigation, mediation and arbitration solutions for business along the Belt and Road Initiative. The one in Xi'an aims to cover

commercial disputes along the land-based Silk Road Economic Belt. While the one in Shenzhen will mainly deal with litigations from the oceangoing Maritime Silk Road. The headquarters will be set up in Beijing. Further, the China Council for the Promotion of International Trade (CCPIT) is also planning to launch a new organization to prevent and resolve international disputes in accordance with the principle of “cooperating and sharing”.

Beijing court starts offering legal services on WeChat

Beijing No 4 Intermediate People’s Court began offering legal services on its WeChat platform on Jan 10, aiming to make lawsuits easier for litigants. Residents can file cases, provide judicial materials, follow lawsuits and receive verdicts on the WeChat platform instead of going to the court. And senior citizens who are not good at typing can also use voice input on the platform to understand lawsuits.

China’s top court to select 10 major cases from 2017

The Supreme People’s Court stated on 4 January that it will select 10 classic cases among 20 candidates in 2017 that influenced the country and pushed forward the building of a stronger legal framework. The 20 candidates covered several high-profile cases that ignited heated discussions in the public last year, and were open to the public. The result will be disclosed earlier February.

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.