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China Update

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Business News

Three new FTZs get nod

Three new free trade zones will be established in China from 1 March 2015, according to an announcement released during a regular meeting of the National People's Congress. Based on the successful model used at the country's flagship China (Shanghai) Pilot Free Trade Zone over the past 15 months, new zones will now open in South China's Guangdong province, East China's Fujian province and North China's Tianjin Municipality. The three will be roughly the same size, at around 116-119 square kilometers. In addition, the State Council said the total area of Shanghai FTZ will be more than quadrupled in size from the current 28.78 square kilometers to 120.72 square kilometers.

China eases market access for foreign banks

The State Council announced new rules on 20 December that will ease market access for foreign banks in a move to further open up the domestic banking sector. The new rules which took effect on 1 January 2015 will no longer require a specific amount of operating funds to be transferred from the parent foreign bank to its newly-established Chinese branch. The new rules will also scrap the previous requirement that foreign banks or Sino-foreign joint venture banks should first establish a China representative office before they could set up branches. Meanwhile, the new rules have relaxed requirements on foreign banks' application to carry out RMB business. Foreign banks will be able to apply for such business if they have operated in China for at least a year, down from the previous requirement of three years. If a foreign bank has one branch already carrying out RMB business, its other branches will no longer face restrictions in launching the same business.

China's services sector PMI grows at fastest pace in three months in December

China's services sector grew at its fastest pace in three months in December 2014 as new orders remained strong, an encouraging sign of strength even as manufacturing activity slows and the property market softens. The HSBC/Markit Services Purchasing Managers' Index (PMI) picked

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up to 53.4 in December from November's 53.0, well above the 50-point level that separates growth from contraction in activity on a monthly basis.

China 2014 exports rise 6.1%, imports up 0.4%

China's exports rose 6.1 percent year on year in 2014, while imports increased 0.4 percent, customs data revealed on 13 January. Last year, the country's total exports and imports value increased 3.4 percent year on year. Growth in the consumer price index (CPI), the main gauge of inflation, rebounded to 1.5 percent in December from November's 1.4 percent, its slowest increase since November 2009.

China plans property tax in 2017

China will accelerate the property tax legislation but will not rush its implementation this year. In a reform plan approved by the Third Plenary Session of the 18th Communist Party of China Central Committee last year, the country vowed to accelerate the legislation of taxes and finish the reform of the fiscal and taxation system by 2016. Property tax along with consumption tax, recourse taxes, environmental tax, personal income tax and the change from business tax to value-added tax will be the focus of the reform

Probes net 70 SOE bosses

More than 70 top executives in State-owned enterprises were placed under investigation last year amid a nationwide campaign to crack down on corruption, according to a recent survey by the website of People's Daily. SOEs in the energy and resources sector are the most prone to corruption, and nearly 20 executives in such companies were charged with corruption last year, followed by companies in the finance, media and telecommunication sectors, according to the survey.

Refineries face brunt of tax rise

China's finance and taxation authorities announced on 12 January a third increase on consumption tax for oil products in the past three months, altogether pushing the levy 50 percent higher. It may dampen the production incentives among oil refineries which are normally advanced payers for the tax and despite the tax rebate are already plagued by recent price drops.

China regulator approves operation of private Webank

China Banking Regulatory Commission (CBRC) has given its greenlight to the actual operation of private bank Webank, a major step in deepening the financial reform. Webank has a registered capital of RMB3 billion (US\$490 million) and its business scope includes personal banking, corporate banking and international banking. Webank, partly funded by Chinese Internet giant Tencent, is the first among them to open its doors to clients.

Executives of Credit Suisse's China partner summoned in probe

The parent of Founder Securities, Credit Suisse AG's brokerage venture partner in China, said four of its executives were ordered to cooperate with an official investigation, stirring concerns as a dispute heats up with a major shareholder. Neither Founder Securities nor its parent, Founder Group, gave any details on the investigation, including the authorities involved, and both declined to comment beyond brief statements on 5 January that the executives had been called in. The statements closely followed an announcement by Founder Securities on Friday that a court had

frozen RMB1.77 billion (US\$285 million) in its bank accounts, in connection with a dispute with Beijing Zenith Holding Ltd, its second-largest shareholder.

Huadian embarks on overseas acquisition trail

After making its first overseas clean energy asset acquisition at the end of 2014, Huadian Corp—China’s largest natural gas-fired electricity provider and a Fortune 500 company—said it is firmly on the lookout for other foreign targets. Huadian bought full control of a 28-mW wind farm in Barchín del Hoyo in Spain from Elecdey Barchín SA.

China OKs Fonterra investment in dairy maker Beingmate

China’s Ministry of Commerce has approved global dairy cooperative Fonterra’s bid to buy a 20 percent stake in Beingmate, the Chinese dairy giant on 9 January. The approval will take six months to be put into effect. Fonterra bought the 20 percent stake for RMB3.68 billion (US\$593 million), which is aiming to increase the New Zealand company’s access to China’s milk market. After the share transfer, Beingmate and Fonterra will build a joint-venture milk powder factory in Victoria, Australia. Beingmate will invest more than US\$185 million in the factory, holding a 51 percent ownership stake.

China’s constructor buys Aussie John Holland

Australian construction company Leighton Holdings will sell its John Holland contracting division to Chinese-owned CCCC International Holding Ltd for AU\$1.15 billion (US\$950 million). CCCC is the financing arm of the China Communications Construction Company, the fourth-largest construction company in the world by revenue. The sale is subject to approval by Australia’s Foreign Investment Review Board.

Legal News

Intellectual Property

MIIT releases draft Intellectual Property Policies for Industry Standardization Organizations

The Electronic Intellectual Property Center of China’s Ministry of Industry and Information Technology (MIIT) has released a draft “Template for Intellectual Property Policies in Industry Standardization Organizations”, seeking public comments by January 30. The Draft Template seeks to improve standardization efforts and reduce implementation costs in the context of Standard Setting Organizations. The key points of the Draft Template are listed below.

- **Mandatory Disclosure of Potentially Essential Claims** - Article 4 requires SSO members to disclose the existence of essential patents to the extent of their “actual knowledge,” potentially covering patents registered outside of China, but stops short of mandating members to conduct patent searches. Article 5 also encourages disclosure of information about those essential patents, including patentee names and patent numbers.
- **No Injunctive Relief for FRAND-Encumbered SEPs** - Article 10 states that members under FRAND commitments “shall not” seek injunctive relief unless the potential licensee “is not subject to the jurisdiction of, fails to [attend], or fails to comply” with the outcome of, an independent adjudication. The Draft Template appears to require SEP licensors to enter into arbitration (or the like)

before initiating a plea for injunctive relief.

- Determining Reasonableness - Article 11 sets forth factors to determine the “reasonableness” of licensing terms. This is significant insofar as it moves away from the recent practice in China of using only end-user prices to determine reasonableness.

Two-dimensional trademark helps to protect three-dimensional bottle shape

The Plaintiff, The Absolut Company Aktiebolag filed a lawsuit against the infringing manufacturer and distributor on the ground of trademark infringement and unfair competition to Changsha Intermediate Court on 15 April 2013. The Court noted multiple similarities between the infringing product and the Plaintiff’s registered trademark but more importantly, considered that the two-dimensional bottle shape trademark of the Plaintiff, was infringed by the three-dimensional product. The Court ruled that, in view of the similarity of the picture and shape, and in view of the reputation and distinctiveness of the genuine product of the Plaintiff, it is still likely that the relevant public may assume that the alleged infringing product has certain association with the Plaintiff, which constitutes similarity according to the Trademark Law. On 26 May 2014, the Court rendered a judgment supporting the Plaintiff’s claims, ordered the Defendants to stop the infringing acts and to compensate the Plaintiff’s losses.

China’s first Patent, Trademark & Copyright Integrated IP Office started operation in January 2015

The Pudong New Area Intellectual Property Office – China’s first IP office empowered with integrated responsibilities for administration and law enforcement of patents, trademarks, and copyright – was set up in Pudong New Area of Shanghai on 16 November 2014 and started operation on 1 January 2015. The new IP office is an institutional innovation in the way that it has unified authority over the three IP areas of patents, trademarks and copyright, which are otherwise regulated in China by different agencies, namely, the State Intellectual Property Office (SIPO), the State Administration of Industry and Commerce (SAIC), and the National Copyright Administration (NCA) respectively. The IP office, rather than structured along the divisions of patents, trademarks and copyright, will handle matters related to these IP rights collectively along such functional divisions as IP protection, administration, and law enforcement.

China aiming to triple patents by 2020

China is aiming to triple the number of patents it files by 2020 as Beijing looks to boost the country’s high-tech economy in areas from agriculture to pharmaceuticals. China is targeting 14 invention patents per 10,000 inhabitants by 2020 compared to four in 2013. It published 629,612 patents in 2013, over 200,000 more than the United States. Beijing wants to become a bigger player in high technology industries as the country grapples with slower growth and rising costs for its manufacturing base. This is likely to raise a challenge to global players operating in China and abroad who have typically dominated in more innovative sectors.

Competition

Antitrust law may reshape vehicle sector

A new survey of vehicle industry experts sheds light on the expected impact of antitrust law enforcement on the automotive value chain in 2015 and beyond. The latest guidelines on China's antitrust law, jointly issued by 10 government ministries in September, the renewed discussion on parallel imports in the China (Shanghai) Pilot Free Trade Zone in November, and the Automobile

Dealers Association's letter on dealer inventories and original equipment manufacturers' controls in December—these will likely be the catalyst for significant change. Findings from the survey suggest that the after sales parts industry will emerge as the big winner from the new regulations. These players will now be able to supply spare parts directly to both independent repair shops and to so-called 4S dealers. New regulations requiring technology disclosure and warranty coverage could drive down parts prices to consumers, undercut margins from counterfeit products and enable aftermarket parts suppliers to legitimately build market share.

Arbitration

New CIETAC Rules commenced operation on 1 January 2015

New China International Economic Trade Arbitration Commission (CIETAC) Rules were published in November 2014 and came into effect on 1 January 2015. The amendments incorporated into the 2015 Rules include:

- Split between CIETAC Beijing, Shanghai and Shenzhen sub-commissions - the structure of CIETAC “post split” is set out in Appendix I of the 2015 Rules. It provides details of the Beijing Commission and the various sub-commissions/arbitration centers. The Shanghai and Shenzhen sub-commissions are referred to as the “Shanghai Office, Arbitration Court of CIETAC” and the “South China Office, Arbitration Court of CIETAC” respectively.
- Emergency arbitrators - The 2015 Rules include provisions to allow parties to apply for the appointment of an emergency arbitrator to grant interim relief, including orders for preservation of evidence, early disclosure and the provision of security.
- Consolidation of related arbitration proceedings - The new Article 19 provides that CIETAC may consolidate into a single arbitration two or more arbitrations pending under the Rules if 1) All of the claims are made under the same arbitration agreement; 2) The claims are made under multiple arbitration agreements that are identical or compatible and the arbitrations involve the same parties, as well as legal relationships of the same nature; and 3) All the parties to the arbitrations have agreed to the consolidations.
- Tribunal's powers to join third parties - This is done by the party wishing to join a third party making a formal “Request for Joinder” to CIETAC, setting out why that party considers the subject arbitration agreement binds the third party. Where the “Request for Joinder” is filed after the formation of the arbitral tribunal, a decision shall be made by CIETAC after the tribunal has heard from all parties, including the potential third party, if necessary.
- Summary procedure - the 2015 Rules have increased the threshold for its application to cases where the amount in dispute does not exceed RMB5 million. It may also apply where the sum in dispute exceeds RMB5 million, but both parties agree to apply the summary procedure.
- CIETAC Hong Kong - Parties may nominate an arbitrator who is not on the CIETAC panel, with such nomination to be approved by the Chairman of CIETAC. The emergency appointment procures and the powers to order interim measures also apply to CIETAC Hong Kong arbitrations.

Shanghai court ruling confirms SHIAC's jurisdiction over arbitrations referred to “CIETAC Shanghai Sub-commission”

On 4 January 2015, only three days after the China International Economic and Trade Arbitration Commission (CIETAC) announced the reorganisation of its Shanghai and South China/Shenzhen sub-commissions, the Shanghai International Arbitration Centre (SHIAC) published on its website the civil ruling in *Ni Laibao and Liu Donglian v. Soudal Investment Limited*, which confirmed that SHIAC, as an arbitration commission duly registered in Shanghai, has jurisdiction over an arbitration where the parties agreed in a 2010 contract to arbitrate before the CIETAC Shanghai sub-commission.

In this case, the plaintiffs and the defendant entered into an equity purchase agreement (EPA) on 8 July 2010, including the arbitration clause “any dispute, litigation [sic] or damage seeking arising from or in connection with this agreement, including the validity, expiration, breach of and termination of this agreement, shall be submitted to China International Economic and Trade Arbitration Commission Shanghai Sub-commission for arbitration. The arbitration shall be conducted in Chinese and English. The arbitral award shall be final and binding upon both parties”. Regarding the validity of the arbitration clause in question, Shanghai No.2 Intermediate People’s Court states in the ruling that “the arbitration commission designated by said arbitration clause, i.e. ‘CIETAC Shanghai Sub-commission’ (which has now changed its name to SHIAC), is an arbitration commission duly established by law and is competent to accept cases and make awards according to the parties’ arbitration agreement. Therefore, the arbitration clause in this case is a valid arbitration clause. The dispute between the parties in this case shall be administered by SHIAC as expressly agreed in the arbitration clause”.

In light of the ruling, we recommend that parties consider the following before entering into arbitration clauses:

- Parties who wish to refer to arbitration before CIETAC in mainland China should still refer disputes to “CIETAC Beijing”;
- Parties who have a strong preference to arbitrate in Shanghai should opt for SHIAC for the time being, until the situation is made clearer by further court rulings, or from the operational practice of the newly reorganized CIETAC Shanghai sub-commission. The clause should state SHIAC’s full name (“Shanghai International Arbitration Centre”) to avoid confusion or uncertainty;
- Parties who wish to arbitrate before CIETAC’s Shanghai sub-commission should refer to “CIETAC Shanghai Sub-commission as reorganized by CIETAC as of 31 December 2014”, or wording to that effect, to avoid potential disputes.

Environment

Chinese court orders 6 companies to pay US\$26 million for polluting

The Higher People’s Court of Jiangsu Province has ordered six companies to pay fines totaling about US\$26 million for discharging waste acid into two waterways. The companies had discharged 25,000 tons of acid into the two waterways, the Rutai Canal and Gumagan River, from January 2012 to February 2013. The fine, RMB160 million, is the biggest of any Chinese environmental pollution case and seems to signal that officials are trying to crack down on companies that have steadily degraded much of China’s land, water and air.

China’s harsher environmental protection law took effect

China’s revised Environmental Protection Law came into effect on 1 January, bringing with it heavier punishments. According to the revised law, extra fines accumulating on a daily basis will be imposed on enterprises that fail to rectify violations. Local officials may be demoted or sacked

for misconduct, including the concealment of offenses, falsifying data, failing to publicize environmental data, and not giving closure orders to enterprises that illegally discharge pollutants. The new law also urges economic and social development should be coordinated with environmental protection and encourages studies on the impact environmental quality causes on public health, urging prevention and control of pollution-related diseases. Specific articles and provisions are included that tackle smog, public environmental protection awareness and the protection of whistleblowers.

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.