



MMLC Group 

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China Update

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Legal News

Intellectual Property

Apple's trademark 'iPhone' in China

On March 31, 2016, in a case between Xintong Tiandi Technology Co. (Xintong Tiandi) and Apple, the Beijing Municipal High People's Court ruled in favour of Xintong Tiandi. Xintong Tiandi was granted the trademark 'iPhone' in 2010 in relation to a line of leather goods. Meanwhile, Apple filed trademark applications to trademark the same mark 'iPhone' for the sale of electronic goods in 2002, and was granted the trademark in 2013. Subsequently, Apple brought a lawsuit against Xintong Tiandi to prevent their use of the trademark 'iPhone'. In its decision, the Court held that Apple was not able to prove it was a well-known brand in China before Xintong Tiandi filed for its trademark in 2007, as Apple's iPhone was only introduced for sale in China in 2009. While Xintong Tiandi intends to open itself to commercial cooperation with Apple in order to benefit both companies, Apple is reported to have plans to request a retrial with the PRC Supreme People's Court, which is the highest court in main land China. Apple is one of the most famous brands in the world, and its trademark 'iPhone' has collected a near equal status in relation to electronic goods through extensive promotion and use. As a result, the 'iPhone' trademark under Apple has gained a high degree of public recognition in relation to its designated goods, which under the PRC Trademark Law, should be recognised as a 'famous mark', which means the prohibition of use by another party, such as Xintong Tiandi.

Technical investigators in China's intellectual property courts

On 21 January, 2016, the Supreme People's Courts released the *Provisional Regulations of the Supreme People's Court on Several Issues Concerning the Participation of Technical Investigators in Intellectual Property Court Proceedings* (the 'Provisional Regulations'). The

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Provisional Regulations is a first of a kind in China, and directly relates to the regulation of technical investigators in their activities in intellectual property courts. Under the Provisional Regulations, it states that the role of the technical investigators is to assist the intellectual property courts in China as juridical auxiliary staff. Their duties and responsibilities include the following:

1. pinpoint the focus of dispute as to technical facts by consulting litigation documents and evidential materials;
2. make recommendations as to the scope, sequence and method of investigation of technical facts;
3. participate in investigation, evidence collection, inspection, and preservation, and make recommendations as to the methods and procedures thereof;
4. participate in inquiries, hearings, and trials;
5. advance technical examination opinions, and attend collegiate panel deliberations;
6. assist the judge, when necessary, in calling together appraisers and professionals in related specific technical fields to gather appraisal opinions and advisory opinions thereof; and
7. complete other tasks assigned by the judge.

Technical investigators are also given power under the Provisional Regulations to ask questions from the litigants, agents ad litem, witnesses, appraisers, inspectors and persons with specialised knowledge with regard to case-related technical issues, which allows them to get further involved in a proceeding to ensure all the necessary and relevant details are taken into account and the right decision is reached considering the merits of the case. However, technical investigators do not hold any sort of authoritative position, with no right to vote on case adjudication. Therefore, technical investigators are employed solely as a supplementary service for the court to ensure all details of a complex case have been understood properly and taken into account, resulting in a fair resolution of intellectual property disputes.

WIPO agreement to enhance global IP cooperation

On May 12, 2016, China and the World Intellectual Property Organisation (WIPO) signed a memorandum of understanding to enhance the field of intellectual property rights protection. In recognition of China's economic growth, the agreement acknowledges China's growing presence in the field of intellectual property, as well as its corresponding efforts in trademark law reforms and in streamlining trademark registrations. For example, approximately 2.9 million trademark applications were made in China in 2015, and China currently ranks 6th from 2015 in relation to the number of applications filed under the Madrid System, with 2,321 applications filed by Chinese applicants. Therefore, with a particular emphasis on the Madrid System, the memorandum builds upon the relationship China has with the WIPO, and looks to strengthen the promotion, training and consultancy of the Madrid System, as well as carrying out universal education on international registration of trademarks.

Taobao.com to perform authenticity checks

On May 20, 2016, Alibaba Group Holdings' platform Taobao.com will be beginning authenticity checks to ensure the sale of genuine and authentic products. As China's biggest online marketplace, Taobao.com will be requiring proof of authenticity, the lack of provision of which will result in having the products removed or the store closed down. Also, sellers who violate the rules on a frequent and large basis will have their details supplied to commercial regulators or police bureaus for further investigation and potential prosecution. In providing proof of authenticity, sellers must provide proof such as invoices, receipts or letters of authorisation, which will then be examined and verified in 3-5 working days before the products are given the green check to be sold online.

Nike sues for patent infringement

On March 28, 2016, Nike began proceedings against Bestwinn Company (Xiamen Chengda) (Bestwinn), a Chinese shoe manufacturer, for patent infringement. Specifically, Nike claimed the Chinese shoe manufacturer had infringed on at least twenty design patents through producing, using, selling, and exporting footwear identical to those holding Nike patents in the United States. It was revealed that in the past Nike had warned Bestwinn of alleged patent infringement on many occasions, though the latter continued its illegal activities, forcing Nike to then commence sending emails in 2013 as well as Nike representatives to meet representatives of Bestwinn at an International Shoe Expo. However, such actions by Nike did not have any effect, causing Nike to file a lawsuit against Bestwinn, with a request for the court to order indemnities and the prohibition of Bestwinn from producing and selling products that infringes on Nike's intellectual property rights.

Qualcomm sued for trademark infringement

Qualcomm Incorporated has been sued for trademark infringement by a Chinese semiconductor company, who also filed the same trademark rights lawsuit against two other companies. The compensation amount claimed is RMB 100 million, and the trademark in dispute is the mark 'GAOTONG', which the Chinese semiconductor company claimed it registered in 1992. While there was a hearing on 18 May 2016, a judgment is still yet to be issued.

China the world leader in trademark applications

On 19 April 2016, the Chinese State Administration for Industry and Commerce revealed that in 2015, it had received more than 2.8 million trademark applications. China currently represents half the trademark applications filed worldwide, has been the world leader in trademark filings since 2002, and the 2.8 million trademark applications represents a 400% increase from applications filed in 2008. This increase is in line with China's Five Year Plans, which is to support innovation and protect intellectual property in order to fuel economy growth.

Guidelines for the adjudication of network-related IP cases

On April 13, 2016, the Beijing High People's Court published *Guidelines for Adjudication of Network-Related Intellectual Property Cases* (the "Guidelines"), which standardised rules in relation to the adjudication of network-related intellectual property cases. In terms of judicial protection over network-related copyright issues, the Guidelines addresses the following matters:

- the allocation of the burden of proof between copyright owners and network service providers;
- the identification of the nature of the act of network service providers;
- the determination of division of labour behaviour;
- the relationship between the Guidelines and tort liabilities and exemption requirements;
- the fair use of a snapshot of a website; and
- the applicable law in relation to online real-time broadcasting, which under Article 10 (1)(17) of the Guidelines, provides that the Copyright shall be applied to determine liability.

In terms of judicial protection over network-related trademark rights, the Guidelines addresses the following matters:

- the application of the principles of balanced interests and reasonable prevention in all cases;
- the platform service provider's burden of proof in proving whether its actions constitute direct infringement;

- the identification of effective notifications;
- the legal consequences of incorrect notifications;
- the factors determining whether the platform service provider had knowledge of an infringing act; and
- the determination of whether goods or services provided by application software are identical with or similar to goods or services designated by another's trademark.

Furthermore, the Guidelines state it is the platform service provider's responsibility to provide proof of an online seller's information.

In terms of judicial protection over network-related unfair competition disputes rights, the Guidelines addresses the following matters:

- the basic judgment rules;
- the identification of publicly recognised business ethics;
- the application of Article 2 of the Anti-Unfair Competition Law;
- the specific acts deemed to be false advertising or commercial defamation;
- the legal regulation of paid listing services; and
- the method for calculating damages.

The Guidelines also provides for the Anti-Unfair Competition Law's role, which is to act as a complementary piece of legislation in relation to the intellectual property legislations. For example, the Anti-Unfair Competition Law will be applied in circumstances where sufficient relief is unable to be obtained under the other pieces of intellectual property legislation.

Samsung sued by Chinese company over mobile patents

Huawei Technologies Co. Ltd is suing Samsung in China and the United States over alleged patent infringement. This marks the first case where a domestic manufacturer is attempting to take on one of the world's largest electronic manufacturer and provider. In the United States, the dispute involves the fourth-generation wireless standard, while in China, the dispute relates to the 4G standards as well as other smartphone functions. Meanwhile, Huawei claims Samsung's counterpart in South Korea has also committed as many as 11 patent infringements. However, Huawei has expressed its willingness to negotiate peacefully with Samsung, indicating its belief of players in the industry working together to push the sector through open, joint innovations, though all the while ensuring all intellectual property rights are expected. Meanwhile, Samsung is intending to take appropriate actions to defend its business interests.

Trademark battle over 'TRUMP'

Recently, billionaire and television personality Donald Trump has succeeded in a long-running battle in Macau over the trademark 'TRUMP'. The company involved was Trump Compania Limitada, which registered the trademark 'TRUMP' in 2006 under the category of coffee shops, restaurants and catering. In 2012, when the Macau Economic Services filed Donald Trump's trademark requests, the company initiated a lawsuit against those relevant trademark requests. While the court concluded the trademark 'TRUMP' held by the company as valid, in an appeal by Donald Trump, the ruling went in his favour due to the company's expired trademark.

Competition law

Failing to file a merger notification with MOFCOM

The Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM) of China has published three cases where administrative penalties were awarded on three foreign companies and two

Chinese companies due to the violation of relevant regulations within the Anti-Monopoly Law of the People's Republic of China. Specifically, the parties involved failed to comply with the prior notification rule, which states that a prior merger notification with MOFCOM applies in the case of mergers, acquisitions and other transactions qualifying as 'concentrations', where the following turnover thresholds are met under the *Provisions of the State Council on Thresholds for Prior Notification of Concentrations of Undertakings*:

1. aggregate global turnover of all the undertakings to the concentration exceeds RMB 10 billion, with at least two of the undertakings each having a turnover of at least RMB 400 million in China in the previous financial year; or
2. aggregate Chinese turnover of all the undertakings to the concentration exceeds RMB 2 billion, with at least two of the undertakings each having a turnover of at least RMB 400 million in China in the previous financial year.

In the first case, Dade Holdings Co Ltd., a company manufacturing testing machinery and supplies for the medical diagnostic industry, failed to notify MOFCOM of the acquisition of a 50% shareholding in a PRC company. Both companies had a turnover exceeding RMB 400 million in China (USD \$62 million), and a combined turnover exceeding RMB 2 billion (USD \$307 million), which were well over the threshold permitted by MOFCOM and triggered the prior notification rule, which both companies failed. Therefore, a fine of RMB 150,000 (USD \$23,000) was awarded to Dade Holdings.

In the second case, an establishment of a joint venture between a PRC company, Xinyu Group Co Ltd., and a Swedish company specialising in the business of train and transportation materials, Bombardier Transportation Group Sweden Co Ltd., was fined RMB 400,000 (USD \$62,000) and RMB 300,000 (USD \$46,000), respectively, for the failure to file a merger notification accordingly with MOFCOM. In this case, both the companies exceeded the thresholds permitted by MOFCOM, and because it was Bombardier Transportation Group's second time in less than a year for incurring a fine on similar grounds, its fine was doubled.

Finally, the third case also involved an establishment of a joint venture between a PRC company, Beijing CNR Investment Co Ltd, and a Japanese electronics and home appliances manufacturer, Hitachi Ltd. Both companies were fined for the same reasons as above, with the fine coming to RMB 150,000 for each company (USD \$23,000). With increasingly strict and improved monitoring and enforcement measures, it is important for parties completing mergers and acquisition transactions to obtain clearance with MOFCOM before closing the transaction.

Revisions to China's Anti-Unfair Competition Law

The Legislative Affairs Office of the State Council of China published a draft Amendment to the Anti-Unfair Competition Law (AUCL) in February 2016 for the purpose of a public consultation. Firstly, the Amendments concern unfair competition acts surrounding trade names. While the Trademark Law and general judicial practice indicate the unfair use of a registered or unregistered trade name by an operator hoping to benefit from such use amounts to unfair competition conduct, the AUCL fails to provide any clear provisions in relation to this issue. Therefore, in an attempt to clear the gap, Article 5.3 of the Amendments states that ' a business operation cannot use another's registered trademark or unregistered well-known trademark as the trade name in its enterprise name, and thereby mislead the public and cause market confusion. Also, Article 5.4 of the Amendments prohibits the use of another famous enterprise's trade name or short name as the dominant part of its trademark of domain name. Finally, the Amendments introduces administrative and enforcement measures in order to maximise the provisions' effect, by including under Article 18.2 of the Amendments the power of the relevant Administration for Industry and Commerce to remove an enterprise's name from the enterprise credit information publication

system by replacing it with a registration number or a uniform social credit code, as well as the power to put the offending enterprise on the List of Enterprises with Abnormal Operations, or revoke the business operator's business license. Therefore, the government of China is constantly updating its legislation in relation to intellectual property due to the recognition of the importance innovation and intellectual property rights protection plays in the growth of an economy.

Corporate Finance

Recently, the People's Bank of China (PBOC) issued the *Notice on Nationwide Implementation of Macro Prudential Management of Cross Border Financing* (the "Notice"), effective as of 3 May 2016. The Notice, by introducing a new regime, effectively changed the regulation on the incurrence of cross border debt by PRC enterprises. Specifically, the new regime, on a risk weighted basis, determines the amount of foreign debt a PRC incorporated entity may borrow based on its net asset value or capital and outstanding borrowings. Therefore, the new regime seeks to track financings provided to PRC on-shore entities by offshore financiers.

The Notice is applicable to all enterprises incorporated in China, including foreign invested enterprises (FIEs) and domestic companies, though with the exception of real estate enterprises and government financing platforms, who will continue to operate under the existing foreign debt regulatory regime. The Notice clarifies certain points the existing regime failed to address, such as whether foreign debt denominated in RMB counted towards a foreign debt and which authority had the responsibility for monitoring the incurrence of foreign debt denominated in RMB. Therefore, under the Notice, the formula through which the amount of foreign debt an enterprise may borrow is to be calculated based in RMB, and any foreign currency with denominated foreign debt will be converted into RMB-equivalent. Also, the Notice sets out the roles played by the People's Bank of China and the State Administration of Foreign Exchange to be the following:

1. PBOC:
 - a. Subject under administration: 27 banks;
 - b. Role:
 - i. administering the filing of foreign debt incurred by the 27 banks;
 - ii. monitoring the macro-economic environment and adjusting the risk ratios to determine foreign debt and the list of excluded types of cross border financings;
2. SAFE:
 - a. Subject under administration: all corporates other than real estate enterprises and government financing platforms, and financial institutions other than the 27 banks under PBOC; and
 - b. Role: administrating the filing of cross border financings incurred by the applicable enterprises.

Furthermore, under the new regime, foreign debt incurred must be filed and reported. Under the Notice, an entity is required to file with SAFE at least three days prior to the drawdown of the foreign debt. A financial institution borrower is required to complete an initial filing with PBOC of SAFE regarding their foreign debt limit, and file with PBOC or SAFE when a cross border financing agreement has been executed.

Finally, the mechanism in determining the amount of foreign debt an enterprise may borrow is on a risk weighted basis under the Notice. Essentially, at the time of incurrence of a foreign debt, the aggregate outstanding amount of foreign debt incurred or to be incurred on a risk weighted basis shall not exceed the applicable foreign debt limit of that enterprise determined by reference to its net assets (corporate) or capital (financial institution).

Dispute Resolution

Recognition and enforcement of a mainland judgment in Hong Kong

On November 4, 2014, the Shenzhen Intermediate People's Court issued a Reconciliation Statement setting out terms for settlement between the relevant parties (the "Judgment"). Subsequently, a certificate was obtained from the Shenzhen Court certifying the Judgment was final and enforceable in the mainland. However, on September 30, 2015, one of the defendants made an application to set aside the Judgment, though from the wording of the application it was interpreted it was an application to set aside the enforcement order rather than the Judgment itself. On October 28, 2015, the plaintiff obtained an order from the Court of First Instance to register parts of the Judgment pursuant to the Mainland Judgments (Reciprocal Enforcement) Ordinance, which allows recognition and enforcement of mainland money judgments in Hong Kong by way of registration. In effect, a registered mainland judgment shall have the same force as a judgment originally given by the Hong Kong Court of First Instance.

Section 5 (2) states that on an application, the Court of First Instance shall order the mainland judgment to be registered if the judgment creditor has proved to the satisfaction of the court that the following requirements are satisfied ... (d) the judgment is enforceable in the mainland. Also, section 6 (2) states that for the purposes of section 5 (2) (d), a mainland judgment is deemed, unless the contrary is proved, to be enforceable in the mainland if a certificate is issued by the original court that the judgment is final and enforceable in the mainland. In accordance with these provisions, Master Leong noted that the plaintiffs had obtained the necessary certificate to render a judgment final and enforceable. While the defendants had submitted a pending application to set aside the enforcement order, Master Leong noted this was insufficient to 'prove to the contrary the mainland judgment is deemed enforceable in the mainland'. Therefore, Master Leong concluded the case by dismissing the defendant's application with costs. This decision showcases the importance of the presumption that a judgment is final and enforceable in the mainland where the necessary certificate has been procured stating to that effect.

Enforcement of foreign arbitral awards in China

In the recent case *Siemens International Trading (Shanghai) Co., Ltd vs. Shanghai Golden Landmark Co., Ltd (2013) Hu Yi Zhong Min Ren (Wai Zhong) Zi No.2 (27 November 2015)* (Shanghai No. 1 Intermediate People's Court), the Court recognised and enforced a foreign arbitration award in China, where the arbitration was set in Singapore between two PRC-incorporated companies.

In the case, the two PRC wholly foreign owned enterprises (WFOEs) entered into a sale and purchase contract, which was governed under the PRC law but provided for any dispute resolution to be resolved through the Singapore International Arbitration Centre (SIAC). In 2007, the Buyer commenced arbitration in Singapore against the Seller. In the SIAC proceedings, the Seller challenged the SIAC's jurisdiction by arguing the relevant PRC laws did not recognise disputes without a foreign element to be arbitrated outside the PRC. However, the SIAC rejected this argument, and the Seller accordingly submitted to the proceedings and additionally filed a counter-claim. In the SIAC's decision, it rejected the Buyer's claims and issued an award in favour of the Seller. Subsequently, the Buyer failed to fulfill the entire award, forcing the Seller to commence proceedings in the Shanghai No. 1 Intermediate People's Court for the recognition and the enforcement of the SIAC award. Ironically, the Buyer challenged this application on the basis the dispute had no foreign element, and therefore the award was outside SIAC's jurisdiction and therefore invalid.

The general rule regarding arbitration is that domestic disputes are confined to the PRC only, whereas foreign-related disputes may be arbitrated within or outside the PRC. Consequently, awards seated in jurisdictions outside the PRC relating to a domestic dispute may not be recognised and enforced in the PRC. Usually, the test for what constitutes a foreign-related dispute is whether any of the parties are foreign parties, with PRC-incorporated foreign-invested entities (FIEs) and WFOEs considered to be domestic entities.

On 27 November 2015, the Shanghai No.1 Intermediate People's Court, in an unprecedented ruling, ruled the dispute as foreign-related, and recognised and enforced the SIAC award. While the Court acknowledged all the factors of the case indicated the dispute as a domestic dispute, the court considered one of the considerations to take account when considering if a case was foreign-related under Article 1 of the *Interpretation on Certain Issues Concerning the Application of the Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations*, which provided 'any circumstances whereby the legal relationships can be regarded as foreign-related'.

The Shanghai Court noted both parties were WFOEs and incorporated under the Shanghai Waigaoqiao Bonded Zone, which formed part of the China (Shanghai) Pilot Free Trade Zone. Ultimately, this differentiated them from ordinary domestic companies as their source of registered capital, their ownership interests, and business decisions were related closely with foreign investors. Furthermore, the Shanghai Free Trade Zone was created to facilitate foreign investment, therefore particular emphasis was placed on these considerations to contribute to the decision that the dispute was foreign-related, as well as the fact that the Seller had procured the goods under the contract from overseas. Therefore, this case was significant, as not only did it widen the circumstances contributing to a foreign element in a dispute, it specified considerations such as the parties' investors and business dealings as important factors contributing to whether a case was domestic or foreign-related, and therefore whether recognisable or enforceable in China.

Corporate

New requirement to use Companies Registry in Hong Kong

On May 1, 2016, a new change by the Companies Registry in Hong Kong came into effect; an arrangement where users seeking the particulars of a registered company or their directors through the Companies Registry's online search service must declare a reason for doing so. Otherwise, the users may be exposed to legal risks. While the Companies Registry claim that the requirement is to prevent any abuse of personal information and falls within the powers given under the Companies Ordinance, there have been many reporters, academics and researches expressing reservations and concerns in relation to the potential risk on corporate transparency and the free flow of information. There are nine purposes a user may choose from, including:

1. whether the searcher is dealing with a company or its directors or other officers, in matters of or connected with any act of the company;
2. whether the searcher is dealing with a director or other officers of a company in matters of or connected with the administration of the company, or of its property;
3. whether the searcher is dealing with a person against whom a disqualification order has been made by a court;
4. whether the searcher is dealing with a person who has entered into possession of the property of a company as mortgagee;
5. whether the searcher is dealing with a person who is appointed as the provisional liquidator or dilator in the winding up of a company;
6. whether the searcher is dealing with a person who is appointed as the receiver or manager

- of the property of a company;
7. the particulars of the company, its director or other officers, or its former directors (if any), or the particulars of the person mentioned in (1) above;
 8. the particulars of a limited partnership registered under the Limited Partnership Ordinance; or
 9. the particulars of trustees corporation registered under the Registered Trustees Incorporate Ordinance.

Privacy Commissioner Stephen Wong Kay-yi has claimed the new policy has struck a balance between the protection of privacy and access to information. However, many disagree, including corporate transparency advocates and university professors, who claim that such a requirement may be used as an obstacle against journalists and residents, and that a move like that went against the global trend of increased corporate transparency.

TMT

Baidu ordered to revise operations after the death of a student

China's biggest search engine, Baidu.com, has been ordered by China's Internet regulator to change its methods on medical advertisements and on the way it ranks results, in the aftermath of a death of a student with cancer. In response, Baidu stated its plans to acquiesce with the orders to make the necessary changes, as well as establish a billion-Yuan fund to compensate consumers who have suffered from misleading advertisements hosted on its site. Meanwhile, at the hospital where the student received their treatment, it was found the hospital was in violation of regulations on outsourcing specialist departments, as well as guilty of false claims in medical advertisements. As a result, two senior executives were fired and six other staff punished. Currently, the hospital has suspended its services in order to manage and evaluate internal management.

In the Baidu investigation, it was revealed Baidu's business model allows advertisers who pay a fee to be featured more prominently in search results. This negatively affected the student's choice of treatment. Therefore, Baidu has been ordered to examine all medical advertisements on its site and to remove those that are not qualified by regulators. Also, the orders require Baidu to provide distinctive labeling for sponsored search results, which should account for no more than 30% of results displayed on a page.

New regulations on the publishing and operation of foreign online games in China

On February 4, 2016, the State Administration of Press, Publication, Radio, Film and Television (SAPPRFT), and the Ministry of Industry and Information Technology (MIIT) jointly promulgated the *Regulations on the Administration of Online Publishing Services* (the "Regulations"), effective as of March 10, 2016. Meanwhile, the Ministry of Culture promulgated the *Administrative Measures on Cultural Market Blacklisting* (the "Blacklisting Measures"), effective as on February 3, 2016.

Effectively, the Regulations and the Blacklisting Measures together indicate the Chinese government's tightening of the administration of online games, and especially, foreign-copyrighted games. The Regulations, in comparison to its predecessor, the *Interim Regulations on Internet Publishing*, include online games under the category of online publications, therefore widening its scope of application to regulate over online games. Under the Regulations, online publishing services is defined as providing online publications to the public through information networks. Therefore, any entity engaging in online publishing services must obtain the Online Publishing Service License from the SAPPRFT before commencing operations. Also, regarding

online gaming operations, the Regulations require entities to satisfy specific infrastructure requirements, including domain names, onshore servers, technical equipment and applications for mobile devices. Finally, the Regulations contain the following staffing requirements:

1. the engaging entity must obtain a qualified legal representative as well as a qualified manager. The legal representative must be a Chinese citizen who is residing in China. At least one of the two must have the Intermediate Professional Qualification for Publishing; and
2. the engaging entity must maintain at least eight full-time editing staff. All the staff must hold qualifying certificates recognised by the SAPPRFT, among whom three must hold an Intermediate Professional Qualification for Publishing or above.

Secondly, foreign investors and enterprises are prohibited under the Regulations from engaging in any online publishing services in China. In the Regulations, the use of any alternative arrangement to circumvent such restrictions, including the use of the various interest entity structures, is prohibited. Furthermore, the Regulations require prior approval from SAPPRFT if any license holder is cooperating with a foreign investor to provide online publishing services.

Also, the Regulations require entities to obtain SAPPRFT's approval before publishing any online games. While most online games are handled by one entity, if there is a separation of publishing and operating duties, it is provided that the publishing entity shall be responsible for the reviewing and supervising of the game, and any such publishing entity must hold the relevant publishing license. In contrast, the operating entity shall be responsible for the commercial operation of the game, as well as having an Internet Content Provider License obtained from the MIIT.

Finally, a license holder must adopt several accountability systems to monitor and control its online publications, which will ensure the legality and appropriateness of the content. These systems must cover comprehensively every feature of the publication, including, but not limited to, editing, proofreading, and reviewing. Additionally, there is a responsibility to censor and monitor players' intra-game communications by implementing relevant monitoring and enforcement measures.

The Blacklisting Measures establishes a blacklisting system to regulate non-compliant cultural products and their operators. During its one year trial, the system monitoring products will be implemented nationwide, and the system monitoring operators will be piloted in Shanghai, Tianjin, Chongqing and several provinces, including Guangdong and Zhejiang. Where a product contains prohibited information, the product may be blacklisted, during which circulation or operation of the product will be banned nationwide. Additionally, the operator of the product will be blacklisted and closely reviewed in the future.

Hong Kong Monetary Authority's plan to improve cyber-security for city's banking system

On 18 May 2016, the head of the Hong Kong Monetary Authority (HKMA) shared its plan to launch an initiative to improve the cyber-security for the city's banking system due to an increase in cyber attacks. Also, security experts have found the banking sector 300% more likely to face cyber attacks than any other sector, and the Hong Kong Applied Science and Technology Research Institute warned HKMA was on a list of central banks targeted by the hacking group Anonymous.

In the initiative, HKMA seeks to undergo the following tasks: assess banks' risk profile, offer a professional development program to train more cyber-security professionals, create a platform for banks to share cyber intelligence, and take steps to minimise the chance of being attacked. Following up mechanisms include a check-up on banks and their cyber-security measures to

ensure their adequateness, as well as the implementation of a training and certification program to stimulate and encourage involvement.

Tax, Customs and Trade

New requirement to declare royalty payments to China Customs

On March 24, 2016, the General Administration of Customs (GAC) issued an Announcement [2016] No. 20 revising requirements in relation to Customs Import/Export Declarations Forms. One of the notable revisions included a new requirement for an importer to declare to Customs any direct or indirect royalty payments made to an exporter or any other associated party in relation to a given shipment. These royalty payments are in relation to patent, know-how, trademark, copyright, distribution rights, resale rights, or other similar rights. Therefore, royalty payments, if related to a given import shipment, shall now be dutiable as part of the transaction value of the imported goods in relation to customs duty and value-added tax. A failure to make a proper declaration may result in additional payments or administrative penalties, including fines or a downgrade in the Customs' AEO program. Also, other non-monetary penalties may apply, such as a slowing down in clearance speed, and a potential smuggling charge by the Anti-Smuggling Bureau of China Customs.

Complaint by China to WTO of United States' failure to implement tariff ruling

In 2012, a case between the China and the United States was first brought to the World Trade Organisation (WTO) against the United States duties on fifteen diverse product categories, including thermal paper, steel sinks and tow-behind lawn grooming equipment. In December 2014, the WTO's Appellate Body ruled in favour of China and supported its claim that the products subject to duties had not benefited from subsidies from public bodies favouring particular manufacturers, with a deadline for implementation set at April 1, 2016. On May 13, 2016, Beijing informed the WTO of Washington's failure to implement a WTO ruling against punitive United States tariffs on a range of Chinese goods. This complaint was filed a few days after Washington had failed a similar complaint against China, which contained accusations of unfairly continuing punitive duties on United States exports of broiler chicken products in violation of WTO rules. Meanwhile, the Ministry of Commerce of China stated it had requested consultations with the United States to discuss anti-subsidy duties on products with solar panels, wind towers and steel pipe used in the oil industry. In a statement, the Ministry of Commerce stated that the "US had severely impaired the integrity of WTO rules and the interests of Chinese industries" by disregarding the relevant WTO ruling. However, a United States Representative confirmed the United States had been "working diligently to comply with the recommendations" and that a full compliance could be expected of the United States with the relevant WTO ruling.

New measures aimed at increasing exports

In an effort to improve China trade conditions, which have remain complex and rigorous amid global market uncertainties, the State Council issued a guideline document to encourage the improvement of efficiency across different areas. These areas include optimizing tax refund policies for certain export, enhancing export credit insurance, and offering an increase of financial support to Chinese manufacturers. Additionally, the guidelines state that the following new measures will be included, such as cross-border e-commerce, multi-model logistics services and the government procurement trade, which will assist private companies in diversifying their global sales channels and enhance their earning ability. Finally, the Chinese government will be increasing support for high-end manufacturing industries to build after-sales stations or centres and

training schools overseas to improve brand influence and increase education. Therefore, China's policymakers are constantly evaluating economic, environmental and operational efficiency to improve China's situation in current uncertain global market.

NGOs

China's new law on foreign NGOs

China has recently released a new piece of legislation, the foreign NGO management law, which is effective as of 1 January 2017. Under the proposed law, Article 9 requires foreign non-governmental organisations (NGOs) conducting activities within China to establish and register a representative office, and those that have not yet registered a representative office but are conducting activities within China to file such movements accordingly. However, foreign NGOs failing at the above provisions shall not be permitted to directly or indirectly conduct activities within China. Furthermore, under Article 10, the following requirements must be established in order to register a representative office in China:

1. the NGO was lawfully established outside China;
2. the Ngo is capable to independently assume civil liability;
3. the NGO's objective and business scope are beneficial to the development of public welfare;
4. the NGO has been in existence for a ongoing period of at least two years outside China and has conducted significant activities during such time; and
5. other conditions provided by relevant laws and regulations.

In accordance with Article 11, a foreign Ngo applying for the establishment of a representative office shall secure consent from the Supervising Authority, which is to be issued jointly by the Ministry of Public Security.

Due to the strict new provisions in relation to the operation of foreign NGOs in China, many foreign governments and rights groups have complained against the new law, which they claim violates China's legal commitments towards freedom of association, and that distorting the growth of civil society may increase economic inequality and social injustice in China.

In relation to monitoring and enforcement measures, the decision of whether groups are friendly or hostile is a responsibility allocated to the police in accordance with Article 39, which states that foreign NGOs shall accept the supervision and administration of public security organs, relevant departments and the Supervising Authority. Also, under Article 41, it states that public security organs shall be responsible for the registration and annual inspection of representative offices of foreign NGOs for the record filing of activities of foreign NGOs, and for the investigation and punishment of illegal activities of foreign NGOs and their representative offices, with powers to do the following measures:

1. interview the head representative and others in charge of the representative office;
2. enter into the premises and activity venues to carry on-site inspections;
3. query the units and individuals relating to the activity under investigation;
4. inspect and duplicate relevant documents and materials, and seal up any documents or materials that might be removed, destroyed, hidden, or falsified; and
5. seal or seize venues, equipment, or properties related to suspected illegal activities.

Therefore, many have complained the new proposed laws contains quite onerous registration requirements and vague and sweeping enforcement measures, which may seek to exclude the operation of foreign NGOs in China. However, Guo Linmao, an official with China's legislature,

has stated China welcomes and supports all foreign NGOs to come to China to conduct friendly exchanges.

Business News

China Broadcasting Network is granted telecom license

On May 5, 2016, China Broadcasting Network Ltd (CBN) was issued a telecom license by the Ministry of Industry and Information Technology, making it China's fourth telecom operator, alongside China Mobile Communications Corp, China United Network Communications group Co. Ltd., and China Telecommunications Corp. The business license will allow CBN to operate an Internet domestic data transmission business and a domestic telecommunication infrastructure service business. The Ministry's purpose, it was revealed, was to promote the nation's progress in three-network convergence, therefore combining cable television, telecommunications and the Internet into one seamless chain, as well as the promotion of competition in the economy.

Increase in China's retail sales

In accordance with the National Bureau of Statistics, in April 2016, China's retail sales of consumer goods grew 10.1% year on year, which contributes overall to a 10.3% increase year on year for the first four months of 2016. It is reported that a massive part contributing to this increase belongs to urban consumers, although rural consumer spending climbed faster than that of urban consumers. Also, online sales for the first four months of 2016 increased by 27.5% year on year, which accounted for 11.1% of gross retail sales. Therefore, retail sales is a major contributor to China's economic growth as the country shifts from an export-driven economy to a consumer economy.

Excitement for Shanghai Disneyland is barely containable

As Walt Disney Co. prepares to officially open its gates to its Magic Kingdom in June; approximately one million Chinese have already visited its public areas (Disneytown), including a commercial strip of shops and the lake. Shanghai Disneyland is Disney's sixth in the world and the first in Mainland China, and is valued at \$5.5 billion. Currently, ticket prices are at RMB 370 (USD \$57), which is the lowest of all Disney parks around the world to suit Chinese middle class consumers.

Alibaba accused of breaching takeover rules

Alibaba Group Holding Ltd purchased a healthcare firm (CITIC 21CN) in 2014 for USD \$170 million, now known as Alibaba Health Information Technology Ltd. Recently, however, the Hong Kong's securities regulator has stated Alibaba breached takeover rules because during the acquisition process, Alibaba also agreed to purchase Hebei Huiyan Medical Technology Co from Chen Wenxin, who happened to be a shareholder of CITIC 21CN and is the younger brother of the company's vice chairman. Therefore, the Hong Kong's Takeovers and Mergers Panel, which is part of the Securities and Futures Commission, has ruled Alibaba's purchase of Hebei Huiyan as "constituting a special deal with favourable conditions which were not extended to all shareholders and was a clear breach of the Takeovers Code". Alibaba intends to appeal the panel's decision, as

it believes it complied with the takeover code, especially as the 533% surge in Alibaba Health shares since the takeover benefitted all shareholders of the health unit.

China's aim for its aviation industry

The Chinese government has announced its plans to build more than 500 airports to contribute to the goal of having an aviation industry worth more than RMB 1 trillion (USD \$153.8 billion) by 2020. The location of these 500 airports will be spread out, including major agricultural areas, major forest regions, and over 50% designated to 5A tourist scenic spots. The State Council's guidelines also emphasise the government's plans to increase the number of general aircraft, including helicopters and private jets to over 5000 by 2020. Therefore, it is estimated that total annual flying time will rise to 2 million hours. At the same time, China will be opening up its lower altitude airspace for the following purposes:

1. civilian use;
2. to promote the research and manufacturing of the aviation sector;
3. to encourage private investment in the general aviation sector;
4. to boost pilot training; and
5. to expand the use of general aircraft in disaster relief, emergency medical services, environmental monitoring, and national land and resources exploration.

Rising house prices in China due to the advance of smaller cities

For two years, home prices have been steadily rising in an increasing number of Chinese cities, with gains in second-tier cities surpassing advances in larger hubs. The National Bureau of Statistics recorded new home prices excluding government-subsidised housing to have climbed in 65 cities, in comparison to the 62 cities in the previous month. Therefore, the government's plan, which was to clear unsold homes in smaller cities while curb top economic hubs, such as Shanghai and Shenzhen, is working. As a result, it is expected that the growth in home prices in first-tier cities will slow further as the government winds back some of the liquidity, creating a positive effect on other regions.

The increase was led by the Anhui province of Hefei, where prices rose 5.7%, followed by a 3.1% increase in prices in Shanghai, a 2.3% increase in the southern hub of Shenzhen, a 2.7% increase in Beijing and a 2.4% increase in Guangzhou. Meanwhile, new home sales rose 63.5% from the previous year to RMB 793.7 billion (USD \$122 billion), and the new average home price rose 1.03% from the previous month, seeing the fastest pace in six years.

Artificial intelligence growth in China

On 24 May 2016, National Development and Reform Commission (NDRC) stated its plans to invest in its artificial intelligence sector to create a market worth more than RMB 100 billion (USD \$15.26 billion). Therefore, the plan, which was formulated jointly by the NDRC, the Ministry of Science and Technology, the Ministry of Industry and Information Technology, and the Cyberspace Administration of China, sets out the proposal for China to have platforms for fundamental artificial intelligence resources and innovation to make breakthroughs on basic core technology by 2018. At this rate, China will be in line with global artificial intelligence technology and industries. The program contains the following matters:

1. the development and manufacture of artificial intelligence products: intelligent home appliances, smart automobiles, intelligent unmanned systems, intelligent wearable devices and robots; and
2. the implementation of several guarantee measures relating to financial support, intellectual property protection, talents, and international cooperation.

The world's first quantum satellite by China

In July, China plans to launch the world's first quantum satellite. The satellite will allow quantum communications between space and Earth, and will be dedicated to quantum science experiments, as well as serving as evidence of China leading the world to achieve satellite-earth quantum communications technology. The quantum satellite is part of the country's Strategic Priority Program on Space Science, which began in 2011, and has so far launched two satellites. The first, a dark-matter satellite, was launched into space in December and is currently collecting data. The second, the country's first microgravity satellite, was launched in April 2016. Finally, the fourth satellite, a hard X-ray telescope for black hole and neutron star studies will be launched in later half of 2016.

Encouragement of rural entrepreneurship in China

On 19 May 2016, the State Council released a circular with the main aim of improving the scientific technology commissioner system in order to encourage and boost entrepreneurship and innovation in rural areas through the integration of modern production elements, such as technology, information, capital, and management. Not only will such an initiative drive the integration and development of primary, secondary and tertiary industries, but it will also urge increasing policy support for the cultivation of rural innovative businesses and service platforms, therefore enhancing the combination of technology and finance for the benefit of rural areas. The Circular includes the following matters:

- to engage local governments and social forces in the innovation of agricultural technology;
- to achieve new and practical results in the following fields: breeding, new fertilizer and farm chemicals, processing and storage, agricultural internet of things, intelligent equipment and people's livelihood; and
- to increase and improve the promotion and industrialization of scientific technology research.

China's Shenyang-Dalian innovation zone

Recently, the State Council issued a reply to the Ministry of Science and Technology and the Liaoning provincial government approving the construction of a national innovation demonstration zone in Shenyang-Dalian. The reply contained the following significant matters:

1. the innovation demonstration zone is to be developed into a hub leading in high-end equipment research, development and manufacturing, and in general a world leader in economic transformation, innovation and entrepreneurship; and
2. the Shenyang-Dalian innovation zone has the following priority tasks through carrying out system and mechanism reforms and innovation: stock incentives, research projects and budget management, technology and financial integration, talent training and recruiting, industry-academy-research coordination, a service system for innovation and entrepreneurship, northeast Asia cooperation innovation, and intellectual rights protection.

Hong Kong crowned the world's most competitive economy

In accordance with IMD World Competitiveness Centre and its annual survey of 61 jurisdictions around the world, Hong Kong has been claimed the most competitive economy, mainly through its encouragement of innovation through low and simple taxation and the lack of restrictions on capital flows. In this survey, more than 5,400 businesses executives on four main factors – economic performance, government efficiency, business efficiency and infrastructure – were

employed. Meanwhile, in a separate report released by the Chinese Academy of Social sciences, Hong Kong came second while Shenzhen was declared the most competitive.

Car-hailing service Didi to target an IPO in New York

Chinese car-hailing service Didi Chuxing (Didi) will be targeting an initial public offering (IPO) in New York in 2017, while currently raising approximately USD \$3 billion in funding, including a contribution by Apple of USD \$1 billion, which swelled its valuation to around USD \$26 billion. Didi has already been backed by Alibaba Group Holding Ltd and Tencent Holdings Ltd, allowing it to break even in half of the 400 Chinese cities it currently operates in. However, the timing of the IPO will depend on its battle with Uber Technologies Inc.

China's investments in Germany

A report by the Germany Trade and Invest recently showed China as Germany's biggest investing country, with 260 green field projects invested in 2015, which was a 37% increase from 2014. Following behind at 252 projects was the United States, and Switzerland at 203 projects. This achievement follows the general trend of China going overseas and increasing its foreign investment, as well as its desire to be a part of cutting-edge technology to upgrade their productions and in general bring China's standards to a higher level. Therefore, in order for China to start playing on the top level, it has heavily concentrated its foreign investment in the following areas: mechanical engineering, electronics, automobile, and information and communication technology.

China a leader in technology acquisitions

For the first time ever, China has come out on top as the world's largest acquiring nation for mergers and acquisition in the technology industry, with a 45% share of the market at the start of 2016. In the period January-April 2016, technology acquisitions made by China reached USD \$65.7 billion, involving a total of 456 transactions, which is an increase from the previous year of USD \$41.6 billion with 434 transactions in the same period. Usually, the United States is the consistent winner as the biggest buying nation in technology mergers and acquisitions. However, this year in the same period, United States came up short against China, although still with an impressive technology mergers and acquisitions amount of USD \$45.6 billion. Therefore, China's new lead falls in line with the trend of Chinese companies making their way into the international arena and capturing as many foreign investment as they can. Among the deals completed by China in the January-April 2016 period include the USD \$6 billion deal between Chinese aviation and logistics conglomerate HNA Group and U.S. based Ingram Micro, the USD \$4.5 billion round of funding completed by Alibaba Group affiliate Ant Financial Services Group, and the USD \$300 million acquisition completed by Wanfeng Technology Group.

Chinese investment in AC Milan

Fininvest SPA, the holding company for the Italian Serie A soccer club AC Milan, is currently in exclusive talks with unidentified Chinese investors to buy the club, currently valued at approximately USD \$797.5 million. The negotiations will be between the consortium and Fininvest, with the makeup of the Chinese investors remaining uncertain, though it has been stated a memorandum of understanding has been signed, establishing the foundation for more detailed negotiations.

Alibaba to sponsor FIFA

Alibaba Group Holding Ltd is currently in discussions to become a top sponsor of FIFA, which would result in a partnership strengthening China's power brokers ties with the international soccer's top executives. Following President Xi Jinping's emphasis on soccer success as a national priority, Chinese companies have been showing an increased interest in investing in national and international clubs, with Dalian Wanda Group Co. also committing to the soccer's governing body at a high level earlier this year. FIFA has three tiers of sponsorship, with six to eight slots designated for FIFA partners, a commitment costing USD \$40 million per year and lasting the four-year World Cup cycle. Currently, at this top level, the sponsors are Dalian Wanda, Adidas AG, Coca-Cola Co., Gazprom, Hyundai Motor Co., and Visa Inc.

China's contribution to the UN peacekeeping budget

It has been recently reported that China is set to become the second largest contributor to the United Nations' peacekeeping budget for the period 2016-18, accounting for 10.2% of the total. China is willing to bear such fees as long as they are calculated in a just, impartial and reasonable manner, which has also led to its bearing the responsibility of supporting another 7.92% of the total UN budget for the period 2016-18. Herve Lasous, the UN Under-Secretary-General for Peacekeeping Operations, has reported this contribution from China as 'remarkable' and has expressed his appreciation for China's contribution to peacekeeping efforts.

Worldwide taxation cooperation

On May 12, 2016, at the 10th meeting of the Organisation for Economic Cooperation and Development Forum on Tax Administration, China added its signature to an agreement on the exchange of country-by-country reports by multinationals, in an effort by the international community to increase detection of tax avoidance and evasion and further increase deterrence of such activity. The effort is known as the Base Erosion and Profit Shifting project, to which 39 jurisdictions have already added their signature. The agreement in particular seeks to target multinationals, as transfer pricing, where companies within a multinational group can manipulate prices to minimise tax bills, has become a massive issue in relation to tax reporting and evasion. For example, it is believed that the resulting revenue losses to national treasuries have grown to approximately USD \$240 billion per year, or at least 10% of global corporate income tax receipts. Therefore, the agreement is designed to be a tool to enhance tax transparency and enable global collaboration on tax issues and facilitate efforts to fight cross-border tax avoidance, and China's signature indicates its keenness in fighting international tax avoidance and evasion through global cooperation.

Implementation rules on super-deduction for research and development

The SAT Gong Gao [2015] No. 97 (the "Implementations"), published on January 11, 2016, and effective for the tax year 2016 and subsequent tax years, was issued by the State Administration of Taxation for the clarification of the implementation rules on super-deduction for research and development (R&D) activities. The Implementations define R&D employees as the following: employees involved in R&D including researchers, technical staff and assistants, where researchers are clarified as experts of the project, and assistants are technical workers. In relation to the calculation of expenses relating to accelerated depreciation of fixed assets, the Implementations provide that if the fixed assets used in R&D activities are depreciated on an accelerated basis, the depreciation expenses calculated shall include total expenses for super-deduction, provided the total amount does not exceed the amount in the tax law. Also the Implementations state that where there are mixed activities (R&D and non-R&D activities), these must be separated accordingly so that the proportion of R&D expenses can be eligible for super-

deduction, and the material costs of products resulting from an R&D activity are excluded from super-deduction if these products are sold.

However, where expenses are incurred by foreign research institutes or foreign individuals to whom research activities have been assigned, these expenses are not eligible for super-deduction. The following documents must be filed with the tax authority when filing the tax return of enterprise income tax:

- the project plan;
- a list of employees involved in the R&D project;
- the contracts on assignment or joint research registered with the competent science-technology department;
- allocation chart of expenses on research staff, machines and equipment for R&D activities;
- charts of the budget and breakdowns of the expenses and the information on sharing of the benefits;
- sub-ledger for R&D activities;
- the opinion of the local science-technology department regarding the valuation of the project; and
- other information stipulated by the provincial tax bureaus.

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.