



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

### **Shaolin pays AU\$4m to close land deal in Australia**

China's Shaolin Temple has paid AU\$4.162 million to a southeastern coastal city in Australia's New South Wales state, closing an outstanding land purchase deal. A complex project that includes a temple, hotels and a golf course is expected to be built, according to an application sent to the planning department of the NSW government, local Chinese media said. The deal is not the first time the 1,500-year-old birthplace of kung fu has been involved in commercial activities. Since 2010, the temple has had an online social media presence on Twitter-like Sina Weibo, and now boasts more than 77,000 followers.

### **Guangdong to raise minimum wage by 19%**

South China's Guangdong province is to raise the minimum wage by an average 19 percent from May to combat a labor shortage and rising living costs. The pay raises will go into effect in all parts of Guangdong except Shenzhen on 1 May, the provincial department of human resources and social security said in a press release on 26 February. Guangdong last raised the minimum salary in May 2013.

### **Free trade agreement with S. Korea one step nearer completion**

China and South Korea on Wednesday initialed a bilateral free trade agreement as both sides are hoping to increase trade, according to a press release from China's Ministry of Commerce. The ministry said negotiations have concluded and both sides have confirmed all the details.

### **State Council unveils tax break for small firms**

Beijing unveiled tax reductions for small companies on 25 February in a bid to ease their financial burden amid a weakening economy and free up funds for them to invest in technology. The policy could herald a round of stimulus measures from the central

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government amid concerns the mainland is headed for a period of deflation after consumer inflation hit a five-year low in January. According to policy, small firms that pay RMB200,000 (HK\$251,800) or less in profits tax will need to pay only half the amount. The policy comes into effect this year and continues until 2017.

### **“Capital account opened” for firms in free trade zone**

The long-anticipated detailed rules for capital-account transactions, which will allow companies operating in the China (Shanghai) Pilot Free Trade Zone to borrow abroad under a simpler regulatory regime, have been released. The rules will allow FTZ-registered enterprises that borrow abroad to choose the length and currency of the loan. FTZ-registered enterprises that seek financing overseas will be monitored by the People’s Bank of China during and after the financing process, but they will no longer need to seek prior approval.

### **Risks rise for Chinese companies’ in M&A transactions**

While Chinese companies have been making headlines for their global hunt for investment projects and acquisitions, a slew of troubled overseas deals have exposed increasing risks and potential losses behind these high-profile cases. On 11 February, the Mexican authorities confirmed that they have received the official document filed by the Chinese side seeking compensation for losses in its bid for the scrapped US\$3.75 billion high-speed rail project. The deal would have been the largest single overseas construction deal won by a Chinese-led consortium. The compensation that China has demanded will likely be valued at RMB100 million (US\$16 million).

### **New survey shows US businesses feel less welcome in China**

American businesses feel increasingly less welcome in China, according to a new survey. Of the 477 American companies polled in the 2015 China Business Climate Survey Report conducted by the American Chamber of Commerce and Bain & Company, 47 percent said they felt less welcome in China than before, up from 44 percent last year. Survey respondents represent a broad set of industries, from resources to IT, with a presence across China.

### **Shanghai tertiary industry attracts foreign money**

Foreign investors are eager to invest in Shanghai’s tertiary industry, with the sector accounting for some 90 percent of the city’s total actual foreign investment in 2014. The Shanghai Municipal Commission of Commerce claims that the tertiary industry absorbed US\$16.4 billion in actual foreign investment in 2014, up 20.8 percent from the previous year. The monthly figure stood at US\$1 billion this January, 87.3 percent of the total. Further, the added value of the city’s tertiary industry represented 64.8 percent of the city’s GDP in 2014, compared to 63.2 percent in 2013.

## **Technology**

### **Chinese tech giants become hot targets for class-action lawsuits**

Capital-rich Chinese technology firms such as top PC maker Lenovo and e-commerce giant Alibaba have apparently become hot targets for class-action lawsuits in the United States as their investors and customers pay more attention to possible business misconduct. The class-

action lawsuit against Lenovo came just a few weeks after Hangzhou-based Alibaba's trouble with some of its minority shareholders in the US, where Alibaba launched the world's largest initial public offering (IPO) of stocks late last year. Lenovo was sued by professional blogger Jessica Bennett, who claimed she received unwanted pop-up adverts on a Lenovo Yoga 2 laptop she used for business – which she later learned had been preloaded with Superfish Visual Discovery adware.

### **Patent applications still strong**

China recorded 928,000 invention patent applications in 2014, more than that of any other country, for the fourth consecutive year. About 663,000 inventions had high quality and market value. About 4.9 patents per 10,000 population were filed. Enterprises have been pillars of research and the development of new technologies and products. In 2014, about 485,000 invention patent applications were filed by enterprises, more than the number filed by individuals, academies or research institutes.

## **Legal News**

### **Intellectual Property and Privacy**

#### **Supreme Court declares the provision on the jurisdiction of the Intellectual Property Courts of Beijing, Shanghai, and Guangzhou**

The Supreme People's Court of the PRC promulgated the Provisions of the Supreme People's Court on the Jurisdiction of the Intellectual Property Courts of Beijing, Shanghai and Guangzhou over Cases on 3 November 2014. Based on these Provisions, the jurisdiction of the intellectual property cases involving intensive technology, expertise and regional characteristics will be further centralized in the future by establishing intellectual property courts in Beijing, Shanghai and Guangzhou of better judicial infrastructures. The Provisions are summarized as below:

- **Exclusive Jurisdiction** - The intellectual property courts of Beijing, Shanghai and Guangzhou shall exclusively govern first instance cases. These include not only administrative cases concerning the disproval of patent applications/determination of ownership of patent rights made by the patent administration department under the State Council, but also administrative penalties and compulsory administrative measures involving intellectual property rights.
- **Jurisdiction of Appeals** - The appeals filed against the first instance civil or administrative judgments concerning intellectual property are within the jurisdiction of the intellectual property court, no matter whether or not the said first instance case was heard by an intellectual property rights tribunal or an administrative tribunal of the basic court.
- **Jurisdiction of Second Instances** - The appeal filed against a first instance civil or administrative judgment made by the intellectual property court shall be heard by an intellectual property tribunal of the high court in the location

where said intellectual property court is seated.

- Cross-regional Jurisdiction - The Beijing, Shanghai and Guangzhou Intellectual Property Courts shall have the cross-regional jurisdiction over the civil and administrative cases concerning intellectual property such as patents, new plant varieties, integrated circuits layouts, technical secrets, etc., if they have occurred within the province or directly-controlled municipality where said court is located.
- Jurisdiction of First Instances - The Beijing Intellectual Property Court shall hear all first instance intellectual property administrative cases filed against the decisions made by the patent administration department under the State Council.

On December 26, 2014, the Supreme People's Court announced in a report that China may consider setting up a national IP court which will play an important role in promoting the judicial progress on IP laws in China.

### **SAIC releases measures defining consumer personal information**

In January, China's State Administration for Industry and Commerce (SAIC) released its Measures on Penalties for Infringing upon the Rights and Interests of Consumers which are due to take effect 15 March 2015. These Measures flesh out China's Consumer Rights Protection Law which was amended in March 2014 and provides guidance as to how companies may collect, use and protect personal information of consumers. The Measures helpfully defines "consumer personal information" as "information collected by an enterprise operator during the sale of products or provision of services, that can, singly or in combination with other information, identify a consumer." Examples of consumer personal information provide additional clarity, such as information which refers to a consumer's name, gender, occupation, birth date, identification card number, residential address, contact information, income and financial status, health status, and consumer status. Regarding violations and penalties, the Measures state that the SAIC may impose a fine of up to RMB 500,000 if there are no illegal earnings. In the event that there are illegal earnings, however, they may issue fines of up to 10 times the amount of the illegal earnings and confiscate all illegal earnings.

### **China issues draft counter-terrorism law**

China is weighing a far-reaching counterterrorism law that would require technology firms to hand over encryption keys and install security "backdoors", a potential escalation of what some firms view as the increasingly onerous terms of doing business in China. The initial draft, published by the National People's Congress late 2014, requires companies to also keep servers and user data within China, supply law enforcement authorities with communications records and censor terrorism-related internet content. Its scope reaches far beyond a recently adopted set of financial industry regulations that pushed Chinese banks to purchase from domestic technology vendors.

## **Tax**

### **China issues new guidelines on the taxation of the indirect offshore transfer of PRC assets**

On 3 February 2015, China's State Administration of Taxation (SAT) promulgated the "Announcement 7" which became effective on the same day. Announcement 7 goes beyond the previous Circular 698 that imposed 10% capital gains tax on the indirect offshore transfer of PRC equity interests. It introduces material changes which may significantly complicate future M&A deals conducted offshore that involve substantive Chinese assets. The key points of Announcement 7 are as follow:

- Broader scope of "China Taxable Property" - A broader concept of "China taxable property" (being the subject of the offshore indirect transfer) is introduced under Announcement 7, which includes not only the indirect transfer of equity interests in PRC resident enterprises, but also PRC real property and assets attributed to an offshore entity's establishment in China.
- Controversial withholding and penalty mechanisms - Announcement 7 imposes a withholding obligation on the buyer and associated penalty mechanisms affecting both the seller and the buyer.
- If an offshore transaction is subject to PRC corporate income tax, the party which, pursuant to law or contractual arrangement, makes payment to the transferor/seller (i.e. typically the buyer), will be the withholding agent of the taxes which are payable.
- If the buyer/withholding agent fails to withhold and pay the required taxes, the seller should make a tax filing with the relevant PRC tax authority and pay the taxes within 7 days from the day on which the tax payment obligation arises.
- In the event that the withholding agent fails to withhold and pay the taxes in the first place, and if the seller also fails to file its tax return and pay taxes, apart from its liability to pay the unpaid taxes, the seller will be subject to a daily late payment interest of 0.05% per day on the unpaid amount.

## **Foreign Investment**

### **MOFCOM issued draft Foreign Investment Law for public comment**

On 19 January 2015, the Ministry of Commerce (MOFCOM) published a discussion draft of the proposed new Foreign Investment Law on its official website for public comments. As part of a trend of transforming the role of government in the economy and simplifying red tape, this new legislation will revamp how China interacts with foreign investment. The draft Law completely abandoned the existing comprehensive approval system, and adopted instead a limited foreign investment entry clearance system for selected industries and an information reporting system that is more in alignment with international practices. The major changes introduced by the draft Law and their potential impact on the foreign investment activities are summarized as below.

- The draft Law specifies that foreign investments will receive national treatment, except for ones that fall under the special administrative measure catalogue (i.e. the "negative list"). The negative list will only comprise of two

categories: the prohibited industries and the restricted industries; foreign investment in industries not listed in the negative list will not be required to apply for entry clearance or make record filing and will only be required to submit information reports.

- Investment implementation report may be submitted before or within thirty days after the completion of an investment. Share transfer, pledge, capital increase and other matters that used to require prior approvals, can now be reported within thirty days after the completion of such event.
- Any company found to be non-compliant with its information reporting obligations or concealing truth, providing misleading or false information will not only be subject to monetary fines arising from administrative or criminal liabilities, the persons directly responsible may also be criminally liable.
- National security review will likely apply to “any foreign investment that harms or likely endanger the national security” and is not limited to acquisition of controlling stake of domestic enterprises or to any particular industry. The decisions of the review cannot be appealed or subject to administrative review.

*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.*