



MMLC Group 

北京铭辉达知识产权代理有限公司

China Update

10 November 2017

Lawyers and Consultants

BEIJING
1209 Tower W3
The Towers
No.1 East Chang An Avenue
Dongcheng District 100738
Beijing, China
北京东城区东长安街1号东方广场
西三办公楼1209室, 邮编100738
writer's p: +86 10 8515 1091
f: +86 10 8515 1089
w: mmlcgroup.com

Business News

China moves to cut taxes to help smaller businesses

China will exempt added value taxes on interest payments for loans made by banks to farmers, small and micro businesses, and individual entrepreneurs, in a bid to encourage financial institutions to increase their support to the real economy. The tax exemption will start from 1 December of this year and end on 31 December 2019. Contracts of loans signed between financial institutions and small business owners will also be exempt from the stamp tax from 1 January 2018 to 31 December 2020.

China's top 5 investors in tech sector

A list of China's top 50 investors in tech sector was released on 17 October. The ranking was conducted based on anonymous votes by 100 influential Chinese entrepreneurs and 15 media opinion leaders on 113 candidates.

Top 1 - Shen Nanpeng, founding and managing partner of Sequoia Capital China

Top 2 - Xiong Xiaoge, chairman and founding partner of IDG Capital

Top 3 - Kai-Fu Lee, founder and CEO of Sinovation Ventures

Top 4 - Bob Xu (Xu Xiaoping), founder of ZhenFund

Top 5 - Bao Fan, chairman and CEO of China Renaissance Group

Chinese SOEs speed up mixed-ownership drive

Chinese State-owned enterprises (SOEs) are picking up pace in mixed-ownership reforms, as the country expects private investment to improve competitiveness in the state sector. More than 40 listed SOEs have announced trading suspensions due to major asset reorganizations on the A-share market. On 2 November, Telecom giant, China Unicom unveiled plans to sell more shares to investors by private placement after it kicked off a mixed-ownership adjustment in August. The

BEIJING

With support offices in Brisbane

Matthew Murphy Ellen Wang Hong Mei Yu Du Xia Yu
Sarah Xuan Fei Dang

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

deal worth around RMB61.5 billion (US\$10 billion) will grant more shares to companies including Alibaba and Tencent, with China Unicom Group still the controlling shareholder.

Xi'an to build new energy auto base

A total investment of RMB10 billion (US\$1.5 billion) will be used to establish an intelligent manufacturing headquarter for new energy vehicles in Xi'an High-Tech Industries Development Zone, according to an agreement signed by the Xi'an municipal government and the Skywell New Energy Vehicle Group on 30 October. The new manufacturing base will have a profound influence across northwestern China.

Bell inks helicopter deal with Chinese company

Bell Helicopter Textron Inc, a Texas-based helicopter manufacturer, signed a new sales agreement with Reignwood International Investment Group Co., Ltd. in Beijing on 8 November. Reignwood, a multi-industrial conglomerate, has agreed to purchase an additional 50 Bell 505s, a light single-engine helicopter. Reignwood will become the exclusive reseller for the aircraft in China and establish a Bell 505 delivery and maintenance center.

U.S. senator, ranchers hail multi-million-dollar beef deal with Chinese commerce giant

U.S. Senator Steve Daines and ranchers from the northwestern state of Montana applauded a US\$300 million beef deal between Chinese commerce giant JD.com and the Montana Stockgrowers Association on 8 November. According to the terms in the memorandum of agreement, JD intends to import Montana-sourced beef from member companies of MSGA to China and directly sell to Chinese consumers through its e-commerce platform. Bank of China will provide financial services to facilitate these imports and settlement process. The procurement agreement is for an initial three years starting from 1 January 2018.

Goldman, China's sovereign-wealth fund plan up to \$5 Billion in U.S. Investments

Goldman Sachs Group Inc. (Goldman) and China Investment Corp. (CIC) are partnering on a multibillion-dollar fund to help the giant Chinese sovereign-wealth fund invest in U.S. manufacturing and other sectors. The fund is targeting as much as US\$5 billion and is a co-investment partnership between Goldman and CIC.

Tencent announces partnership with Springer Nature

Chinese tech behemoth Tencent Holdings Ltd inked a strategic partnership with leading science publisher Springer Nature on 5 November, in an effort to encourage young scientists to make breakthroughs on science and technology. According to the deal, Springer Nature, home to some of the best-known names in research, educational and professional publishing, will unearth and encourage potential young scientists with a strict examination system, while Tencent will be the supporter. In addition, Springer Nature will officially become a partner of Tencent's We Summit.

New name for McDonald's franchisee in China

The recent buyers of McDonald's China have decided to distinguish their franchise from the global burger behemoth by adopting the name Golden Arches China. The name officially changed on 12 October. Golden Arches, which is also the name of the fast-food chain's famous logo, is the English-language version of the franchise name chosen by its new owners - a Chinese

conglomerate of Citic Ltd., Citic Capital and Carlyle Capital that completed the acquisition of a majority stake in McDonald's Corp.'s China business for US\$2.08 billion in August.

Chinese consumer stocks are up 65%

In China, consumer staples, a refuge from the hype, are up 64 percent this year. An index of Kweichow Moutai Co., Yonghui Superstores Co. and peers has jumped 13 percent in October alone, taking it to a record relative to the broader CSI 300 Index. Retail sales beat expectations in September, rising 10.3 percent from a year earlier. The consumer staples sector is the most overbought since 2007, and Kweichow Moutai and Yonghui are among the most sought after stocks out of China's 300 biggest listed companies.

Construction of Mercedes-Benz remanufacturing plant begins in Shanghai

The construction of German carmaker Mercedes-Benz's auto parts remanufacturing plant in Shanghai began on 19 October. Once completed, the plant in the Shanghai Lingang Remanufacturing Industry Demonstration Base will be the only remanufacturing base Mercedes-Benz's parent company Daimler AG has outside Europe. With an intended investment in excess of RMB600 million (US\$91 million), the plant will focus on auto component recycling in Asia Pacific in modern areas such as electric vehicles.

Legal News

Intellectual Property

POWERPOINT is determined by Beijing High People's Court as registrable

According to one of the ten creative cases of the Beijing High People's Court in 2016, POWERPOINT is determined as registrable. The case history is summarized as follows:

Microsoft Corporation (Microsoft) filed an application for the registration of the trademark POWERPOINT in relation to computer services and cloud computing services in Class 42 in China. The China Trademark Office (CTO) refused the application, on the grounds that the mark lack distinctiveness in respect of the designated services. The Trademark Review and Adjudication Board (TRAB) and the Beijing IP court both held that POWERPOINT is a kind of file format developed by Microsoft, the use of it by Microsoft makes consumers generally recognize PowerPoint as the name of a file format rather than as a sign which distinguishes the origin of goods or services. Therefore, they found that POWERPOINT lacked distinctiveness and was unregistrable. The Beijing Higher People's Court noted Microsoft had applied to register the trademark POWERPOINT for computer software in Class 9 in 1999 and had obtained a registration in 2000, and that this registration was still valid. This meant that, in 2000, "PowerPoint" was not a generic name for presentation software. Since 2000, POWERPOINT as a trademark for presentation software has been known by the relevant public, but this did not weaken the connection between the product and the trademark owner, Microsoft. Instead, it strengthened the connection. There was no evidence filed by the TRAB and showing that other competitors in the same industry were using PowerPoint as a product name or as a software format, so the TRAB could not prove that "PowerPoint" had become a generic name for presentation software. The Beijing High People's Court accordingly withdrew the first-instance judgment.

Over 1M fake fruit trademarks in high-profile IP case

Shanghai Pudong District Intellectual Property Court conducted a public trial for a case involving fraudulent trademark sales and manufacturing. Fake logos and trademarks of companies such as Dole, Zespri, and Sunkist were used to illegally increase the selling price of domestic fruit. Thirteen convicted defendants confessed to crimes relating to the sale and manufacturing of counterfeit registered logos and trademarks. The total number of counterfeit articles discovered in this case exceeds one million. The thirteen defendants engaged in a fruit packaging operation at multiple fruit and agricultural product wholesale markets. In March this year, a branch of Pudong's Public Security Bureau responsible for food, drug, and environmental crime investigation received a report concerning counterfeit sales at a wholesale fruit market in Pudong District. After a few months of investigation, authorities demolished nine illegal dens in Qingpu District and Pudong New District. Moreover, the raids led to the arrest of 18 individuals and the discovery of over two million fake registered trademarks of which over 400 thousand were seized. Pudong District Court noted that the sale of bogus trademarks was also carried out online. The 13 defendants confessed to their crimes at trial. A later date will be decided to give the first-instance ruling.

China's courts revisit bad faith trademark applications - *Beijing Jiahe vs. TRAB and Doosan*

Beijing Nissan Jiahe Lubricant Co., Ltd. (Nissan Jiahe, which name was changed to Jiahe Xingchan) filed an application for registration of the trademark DOOSAN in Chinese characters with the CTO on 25 July 2005, in relation to lubricating oil etc. in class 4. Doosan filed an opposition in relation to this application, after it was preliminarily approved by the CTO, based on its trademark registrations for "DOOSAN in Chinese characters and DOOSAN" registered in class 7 from 4 July 2001. The CTO made a decision in relation to this opposition matter on 13 July 2011. It concluded that the opposed trademark application was similar to the prior registrations owned by Doosan, and that the registration of the trademark would mislead the public and lead to negative social influence, when it was used for lubricating oil.

The TRAB made a decision on 9 October 2013, considering 1) although the goods covered by the opposed trademark application, such as lubricating oil, were not similar to those covered by Doosan's trademark registrations, such as excavators and bulldozers, but "DOOSAN in Chinese characters and DOOSAN" was a trademark registered by Doosan in relation to excavators and bulldozers, and before filing of the opposed trademark application, Doosan carried out an acquisition and established Doosan Engineering Machinery (China) Co., Ltd. in China, which was widely reported by the media. Doosan also promoted its "DOOSAN in Chinese characters and DOOSAN" brand before filing of the opposed trademark; 2) The opposed trademark was similar to "DOOSAN in Chinese characters and DOOSAN" that was registered by Doosan earlier; 3) Jiahe filed the applications to register other well-known car brands, such as "Honda", "Toyota", "Dongfeng Citroen", "Mondeo", "Elysee", "Regal", "Camry", "Skoda" (all is in Chinese characters), in addition to the opposed trademark application, which was not a coincidence but showed Jiahe's intentional copying and imitation of other's trademarks having great reputation; 4) Jiahe's filing of the opposed trademark would not only cause relevant public's confusion as to the sources of the goods, but also disturb the normal trademark registration and management order, undermine fair competition, violate the principles of good faith, and lead to negative social influences, which constituted the situation referred to in Item 8, Paragraph 1, Article 10 of the Trademark Law 2001. The TRAB accordingly determined that the opposed trademark application should not be registered, which was supported by the Beijing No.1 Intermediate People's Court. On 20 July 2015, the Beijing Municipal Higher People's Court issued its decision, maintaining most of the original decision issued by the Intermediate Court and rejecting all of Jiahe's claims.

Jiahe filed an application for retrial of this case with the Supreme People's Court. It claimed that its filing of car brands only damaged specific civil rights and interests but should not be identified as a situation involving unhealthy influence. In the decision issued by the Supreme Court on 30 March 2016, it confirmed that the decision issued by the Higher Court applied the correct law so it was supported, and Jiahe's claim regarding the opposed trademark application did not violate the provision of Item 8 of Paragraph 1 of Article 1 of the Trademark Law could not be established and was not supported.

Three dimensional trademarks registration in China

3D trademarks are registrable, as per China's current policy and legal practice. 3D trademarks are usually presented as product appearance or substantial packaging in three-dimensional images. However, such a 3D symbol may not be registered as a trademark, if 1) it is only a shape resulting from the nature of the goods; 2) it is only a shape of the goods necessary for achieving a technical effect; or 3) it is only a shape making the goods become substantially valuable. It is worth noting that China has a limitation on applications to register 3D trademarks that the device must be "non-functional". Namely, if a three-dimensional device has some technical function or aesthetic function, it cannot be allowed to register due to absence of distinctiveness. It's especially significant for 3D trademarks to be "distinctive". In short, 3D trademarks needs to bring new visual impression, beyond the product attributes, so the public can think of the corresponding goods when they see the 3D trademark. There are usually two ways to get a three-dimensional device product shape or packaging distinctive: 1) Add to the product shape or packaging device distinctive design/elements. This will definitely increase the possibility of registration. A combination of a 3D device and certain characters or pattern may be a good choice. The famous Michelin tire people, Bibendum is exactly a successful example. 2) Obtain the distinctiveness through use, even if the 3D device was identified to be lack inherent distinctiveness. Companies are encouraged to register their reputable packaging of product or shape of product as 3D trademarks, to obtain stronger protection in the Chinese market. It is also suggested that companies maintain the evidence of use, in response to China's relatively strict standards on inherent distinctiveness of trademarks.

Requests for patent right evaluation reports on designs in China reached 30,000

By 4 September 4 2017, the requests for patent right evaluation reports on designs in China accumulated to 30,000. The first "10,000" of design patent evaluation reports took 5 years, the second "10,000" took 1 year and 2 months, and the third "10,000" only took 10 months. The industries having over 1000 requests includes bags, lights, cups and bowls and dishes, toys, furniture, beauty cosmetics, and camera, which is consistent with the design patent application numbers, and also basically in line with the industries of the Quick Rights Maintenance Center of SIPO.

The characters "Xiong'an" to be protected

On 10 October, SAIC issued the Opinions about Supporting the Planning and Construction of Xiong'an New Area in Hebei Province which were targeted at the company registration, regular supervision, trademark and IPR as well as advertisement development, etc. in Xiong'an. According to the Opinions, the Chinese characters "Xiong'an China" and "Xiong'an" would be under protection in the trademark registration.

SAIC publishes rules regulating enterprise name registration

On July 31 2017, the State Administration for Industry and Commerce (SAIC) published the Rules on the Prohibitions and Restrictions for Enterprise Name Registration and the Rules on the Criteria for Finding Enterprise Names Identical or Similar. Both aim to regulate the examination of enterprise names during registration in order to establish a method of comparison and provide convenience for applicants.

- An applied-for enterprise name must not contain any content or text that may deceive or cause misunderstanding among the public.
- A well-known trademark recognized by the SAIC shall not be used by another practitioner in the same industry as its enterprise name, unless licensed by the owner of the said well-known trademark.

Competition

China's NPC has approved the proposed amendments to China's Law Against Unfair Competition

China's top legislature, the Standing Committee of the National People's Congress (NPC) adopted a revision to its Law Against Unfair Competition on 4 November. The revision, commencing operation on 1 January 2018, will better address new problems emerging in the market, and protect the rights and interests of both business operators and consumers. The revision adds four kinds of behaviors considered as unfair competition, and therefore should be forbidden, which are 1) without agreement, insert links in the online products or services legally provided by other operator and enforce a redirect; 2) mislead, fraud, force users to modify, shut down, uninstall online products or services legally provided by others; 3) disturb or damage normal operation of the online products or services legally provided by others; 4) maliciously make the online products or services legally provided by others incompatible. In case of violation of such provisions, the imposed fine may be as high as RMB3 million. Further, the revision also states that industrial associations shall uphold market order through self-discipline and by guiding their members to compete in accordance with law, and officials of supervision and inspection departments shall not disclose any commercial secrets of the entities they investigate.

China issued rules on implementation of fair competition review system

China's three Anti-Monopoly Law enforcement agencies, the National Development and Reform Commission (NDRC), the Ministry of Commerce (MOFCOM) and the State Administration for Industry and Commerce (SAIC), together with the Ministry of Finance and the State Council Legislative Affairs Office, jointly published the Rules on Implementation of the Fair Competition Review System on 26 October. The Rules signify a determination to prohibit anti-competitive protectionism by sub-central governments in order to enhance market-based competition. While privately-owned domestically-invested companies will be the primary beneficiaries, foreign-invested companies and foreign exporters to China should also benefit.

- Both administrative agencies and organizations with responsibilities to administer public affairs are required to (i) conduct a fair competition review when formulating rules, policies, normative documents, and other policy measures that involve economic activities in the market by business operators regarding market entry, industry development, investment, tender and bid competitions, government procurement, business operating behavior norms,

and qualification standards; (ii) evaluate the impact on market competition; and (iii) prevent exclusion or restriction of market competition.

- The interested parties, namely, those with an interest in horizontal or vertical competitive effects of the policy measures under consideration including competitors and consumers will have an opportunity to comment during the draft stage. Aggrieved interested parties may appeal to the issuing entity or to its immediately superior entity.
- The Rules apply to the exclusion or restriction of products and services produced in parts of China that are not under the jurisdiction of the relevant administrative agency or organization or imported, and apply to discrimination against investment by business operators from elsewhere in China.

Yunnan Ying Ding v SINOPEC, regarding refusal to deal

Yunnan Ying Ding Bio-energy Co, Ltd., (Yunnan Ying Ding) the largest waste-oil processing enterprise in Yunnan Province initiated a litigation in January 2014 and claimed that SINOPEC had abused their dominant market position - for no justifiable reason - by refusing to purchase Yunnan Ying Ding's biodiesel (produced from waste oil) for use in their distribution system, which violated Article 17 of the Anti-Monopoly Law. After more than four court proceedings in three-and-a-half years, the Yunnan Province Higher People's Court issued a judgment on 28 August 2017, dismissing the appeal and upholding the original verdict. The court held that the economic focus in this case should be on the supply side of the market and that the extent to which the supplier (ie, Yunnan Ying Ding) would obtain access for products sales and circulation should be examined; or the actual or potential purchasers of the supplier's products in the market should be evaluated.

MOFCOM concludes 1,408 anti-monopoly investigations

China has made great efforts in facilitating fair market competition through the implementation of anti-monopoly regulations and a faster review process during the past five years. From 2013 to the end of August this year, the ministry received 1,483 anti-monopoly declarations on concentration of undertakings and concluded 1,408 cases. In 2016, the cases concluded by the ministry involved a transaction value of RMB6.1 trillion (US\$926.5 billion), accounting for about 25 percent of the total transaction volume of China's global mergers and acquisitions. The Minister of Commerce (MOFCOM) has also been improving the efficiency of antitrust investigations, cutting the average review time by about 11.6 percent in the first half of 2017. Some 82 percent of cases were concluded during the 30-day preliminary review stage in 2016, compared with only 12 percent in 2013.

Technology

China revises proposals on regulations of commercial encryption

On 29 September 2017, the State Council released the Decision on Removing a Batch of Administrative Approval Requirements, which removed some approval requirements for the manufacturing, sale, and use of commercial encryption products. On 12 October 2017, the State Cryptography Administration (SCA) further released a notice to instruct local Bureaus of Cryptography Administration on the plan to implement the Decision. The Decision reveals a major change in the regulatory regime governing commercial encryption products in China, potentially paving the way for an Encryption Law that would establish a uniformed encryption regime. The Decision removed approval requirements for manufacturers and distributors of commercial encryption products, as well as the use permit requirement for foreign entities and foreign individuals located in China. The remaining approval requirements focus on: i) the approval for

commercial encryption products themselves to ensure the quality of the commercial encryption products; and ii) the import permit requirement for the limited types of foreign-produced encryption hardware listed in a catalogue issued by the SCA and China's General Administration of Customs.

AQSIQ issued rules on import/export inspection and quarantine

General Administration of Quality Supervision Inspection and Quarantine (AQSIQ) issued the Rules regarding the Regulation of Procedures of Import/Export Inspection and Quarantine on 16 October, and the Announcement regarding the Simplification of inspection and Quarantine Procedures to Improve Efficiency of Customs Clearance on 24 October, and both commenced operation on 1 November 2017. The Rules and the Announcement clarify certain procedural aspects of the inspection process and significantly reduce the "random check ratio" for those import products. The Rules also require the relevant authorities to comply strictly with the statutory time limits for completing the procedures with the aim of improving customs clearance efficiency. The new rules improve the existing inspection and quarantine regime in the following ways:

- Simplifying inspection and quarantine procedures - For a particular product, detailed inspection and quarantine procedures will be determined based on the nature of the product, the historical compliance of the importer/exporter and the certification/authentication obtained for the product. A simplified procedure may apply to low-risk products imported by companies with a good compliance record.
- Adjusting random sampling ratio - After the new rules come into effect, it is estimated that the overall onsite inspection ratio will be reduced by 76% to 22%. However, the random sampling ratio may be increased (up to 100%) if an importer fails to maintain a good compliance record with AQSIQ. Random sampling ratios may also be increased if there is evidence that products may pose a high risk to health or there are safety concerns.
- Specifying strict timelines - Accepting an application and reviewing application documents must be completed within half a working day. For most products, onsite inspection must be completed within one working day and laboratory inspection within seven working days.
- If an applied-for enterprise name is found to be identical with a prior registration, the application will be rejected. However, if the name is merely similar, the system will produce a list of similar registrations and alert the applicant that the application may be rejected; or it may be subject to an infringement dispute or ordered to change its name if the application is approved.

Health

China's new medical device regulations ready for public comments

On 31 October, The China Food and Drug Administration (CFDA) published its proposed amendment of the Regulations on Supervision and Management of Medical Device, for public comments. The proposed amendment does not entail structural changes, but reflects a fundamental shift of the regulatory philosophy. Compared with the current Regulations, which emphasize pre-approval administration, the amendment strengthens post-approval compliance obligations. The notable provisions are summarized as following:

- The marketing authorization holders will be responsible for the liabilities related to pre-clinical research, clinical studies, manufacturing, distribution, adverse events reporting and product recalls. Foreign marketing authorization holders will need to appoint a domestic

agent, who can be jointly liable with the foreign marketing authorization holders for product quality and services issues.

- Foreign manufacturers seeking approval for innovative imported devices that will be launched first in China will not need to present the Country of Origin Certificate at the time of filing. Nevertheless, Country of Origin Certificate is still required for the issuance of import device permits if the products are not deemed innovative as per the CFDA regulations.
- Clinical trial authorizations for certain high-risk devices will be deemed issued if no rejection or deficiency notice was issued within 60 working days from the date of acceptance. Clinical study sites will be qualified by record-filing; no certification by the CFDA and the National Health and Family Planning Commission will be required.
- Conditional approvals will be made available for devices treating rare diseases, critical diseases that do not have an effective treatment method, or responding to abrupt public health incidents.
- Foreign clinical study data can be used in marketing authorization applications in China if it meets the CFDA requirements.
- Companies can use their own testing reports or reports issued by qualified third-party testing labs in place of type-testing reports issued by the testing centers designated by the CFDA.

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.