



MMLC Group 

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China Update

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Business News

Increased Innovation in China - WIPO

A recent significant trend in the global innovation landscape is the impressive rise of China, which shows China as having the most patent and industrial design rights filed in the world since 2011. Specifically, the State Intellectual Property Office received 928,000 applications for invention patents in 2014, which is an increase of 12.5% from 2013, therefore enabling China to retain its number one world ranking in patent filing for the fourth year in the a row.

Furthermore, China has been at the top of the world in trademark applications for thirteen consecutive years, with approximately 2.28 million filed in 2014, therefore ensuring Chinese products and technologies are emerging as globally competitive. The World Intellectual Property Organisation data shows an approximate amount of 25,600 international trademarks filed in 2014 originating from China, which ranks the country the third largest PCT filer worldwide and the only country realizing a double-digit growth.

Universal Studios Theme Park for Beijing

A Universal Studios theme park in Beijing, approved by the National Development and Reform Commission and led by the Beijing government, will cover 2.02 million square metres of floor space, set to attract a total investment of RMB 50 billion, and is expected to open in 2019. An exciting part of this project is the incorporation of traditional and modern Chinese culture elements to boost the city's tourist appeal to foreign visitors.

JD.com to Develop e-Commerce in Rural Areas

JD.com has recently signed a strategic partnership with the Commerce Department of Guizhou province to develop e-Commerce in rural areas. With this agreement, there will be an increase in

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the allocation of resources to support rural e-Commerce, including the construction of logistics network and training in e-Commerce and finance, therefore creating accessibility and benefiting many villages.

China and Georgia Sign A Framework Deal on Currency Swap

Beijing, China's central bank, has signed a framework agreement on a currency swap program with the National Bank of Georgia on the sidelines of the 34th Meeting of the Central Bank Governors' Club of the Central Asia, Black Sea Region and Balkan Countries. Both banks expressed a willingness to establish the currency swap program, which will strengthen bilateral currency cooperation, promote settlement directly in the two currencies, and facilitate trade and investment. Therefore, both banks took into consideration global and regional economic situations, as well as the influence of dollarization on emerging markets, indicating their awareness and the need for an improvement in the current global economy.

Cheaper Financial Leasing to Companies

The banking regulator of China has pledged to broaden the fundraising channels for China's financial leasing companies to provide cheaper financial services for cash-strapped firms. Presently, financial leasing companies rely on traditional bank lending as their main source of financing, which results in higher financing costs for companies in need of capital to purchase assets and to expand their business. These companies are now encouraged to raise funds by issuing bonds, asset-backed securities, and set up overseas subsidiaries to gain access to international funds. In this, China's support for financial leasing companies is aimed at reducing debt obligations of companies, improve capital allocation efficiently, support start-up companies, to support new strategic industries, therefore better serving the economy that is facing increasing downside pressure.

China Releases Guide for State-Owned Enterprises Mixed Ownership

The State Council of China have recently indicated clearly that foreign investors are welcome to participate in China's mixed-ownership reforms, and have made improvements in its security review mechanisms, therefore moving towards reforms necessary to attract further foreign investors. Now, foreign investors are encouraged to participate in China's reform and reorganisation of state-owned enterprises, form joint ventures and cooperative arrangements through overseas mergers, and finance cooperation and offshore financing. In return, China will seek to improve its system for security reviews of foreign assets on the basis of the Catalogue for the Guidance of Industries for Foreign Investment, along with related security review regulations, to reduce risks. Furthermore, China has indicated that mixed-share holdings of State-owned capital, collective capital and non-SOE capital will be an important form of China's fundamental economic system, with a structure which divides the natural monopoly industries into two parts: a competitive portion, and a monopoly portion, where SOE's assets are mainly state-owned, including key telecommunication infrastructure, crucial transportation hubs, the development of important water, forest and strategic mineral resources, major pipelines of oil and natural gas, electricity networks, nuclear facilities, important public technical platforms, and special industries such as the military. Therefore, China is sending a clear signal of its opening up to foreign investors and deepened reforms to attract foreign investment.

Free Trade Area Agreement

The eighth round of talks between China, Japan and the Republic of Korea on establishing a free trade area begun recently in where chief negotiations representatives from the three countries, including Chinese vice commerce minister Wang Shouwen, focused on commodity trade, service trade, investment and the domain of the free trade area agreement. In this initiative, the parties seek to establish a comprehensive framework for trade, investment and cooperation in other fields among the three countries to promote a regional open market and boost growth.

China Removes Overseas Debt Quotas

The National Development and Reform Commission (NDRC) has removed the quota approval process for foreign currency or Yuan notes and loans with a term of more than one years in an effort to staunch capital outflows spurred by a currency devaluation. Currently, companies are only required to register with the regulator, when previously, the NDRC reviewed each firm's application for foreign borrowing. The move is a result of when the Yuan positions at the central bank and financial institutions fell in August, resulting in the nation's foreign exchange reserves tumbling an unprecedented USD 93.9 billion. The NDRC will also be encouraging companies with good credit quality and strong debt repayment ability to raise money overseas for projects including the 'One Belt, One Road' initiative. Therefore, the government is seeking to encourage overseas borrowing, which will result in more capital inflows.

Tencent Holdings Invests in Cloud Computing

Tencent Holdings have recently revealed its intention to invest RMB 10 billion over the next five years to boost a multi-national cloud computing operation across North America, Hong Kong and China. Like the other Internet giants, such as Alibaba and Baidu, Tencent is looking to expand and has entered into a MOU with IBM to extend its presence in corporate cloud computing. Therefore, the expansion into overseas markets by some of China's biggest players signals their readiness to take on world leaders Microsoft Azure and Amazon AWS in cloud computing, and indicates China's growth in the world economy.

China Pledges 8,000 UN Peacekeeping Troops

In the latest United Nations General Assembly, China's President Xi Jinping stated its intention to contribute 8,000 troops to a United Nations peacekeeping standby force, which may make China one of the largest players in UN peacekeeping efforts. In addition, China will provide USD \$100 million in military assistance for African Union peacekeeping missions in the next five years, and Beijing will commit USD \$1 billion to a 10-year joint China-UN peace and development fund.

It has also been stated that China will give favourable consideration to future UN requests for additional Chinese engineering, transport, and medical staff. Therefore, China's pledge and involvement seeks to demonstrate it is a responsible international player amid concern over its continuing military build up and territorial disputes with Asian neighbours, and seeks to emphasize the fact that despite China's military might, China seeks to pursue a peaceful development path.

The Creation of a National Carbon-Trading Market

China has recently announced its plan to launch a national emission trading system in 2017, which will cover power generation, steel, cement, and other key industrial sectors, as well as implement a green dispatch system to favour low-carbon sources in the electric grid. Although the trials first

began in 2011 in seven locations, it has been indicated the creation of a carbon trading market and putting a price on greenhouse gas emissions has become a national-level strategy.

This launch is part of moving towards the deal reached between U.S. President Barack Obama and President Xi Jinping, where China pledged to cap carbon dioxide emissions around 2030, and part of the agreement where both China and the U.S. are developing heavy-duty vehicle fuel efficiency standards to be finalised in 2016 and implemented in 2019. Furthermore, both countries have announced additional steps to accelerate the transition to low-carbon development internationally, including a new climate finance commitment by China of RMB 20 billion to help develop economies combat climate change and new steps to control public support for high carbon activities.

Creating a national market and putting a price on greenhouse gas emissions, especially in highly polluting industries, will assist China in implementing its climate change goals as well as help it transition from coal to renewable energies, as well as further China's strategy to promote green, low carbon development and meet its goals for cutting greenhouse gas emissions.

Legal News

Intellectual Property

Draft Amendments to Copyright Administrative Punishment Implementation Measures

Recently, the National Copyright Administration of China (NCAC) published the Measures for Implementation of Copyright Administration Punishment for public opinions on the proposed amendments to the Measures. The current proposed amendments intend to align the Measures with the Chinese Copyright Law and other related laws and regulations, as well as address issues emerging in practice over the years related to administrative enforcement of copyright infringement, including content such as:

- (a) enforcement procedures;
- (b) administrative liabilities of Internet service providers;
- (c) enforcement in the context of the Internet;
- (d) harmonizing administrative enforcement with recent judicial interpretations and enforcement guidance such as lowering thresholds for what constitutes a 'serious circumstance';
- (e) providing for seizures of servers used for providing infringing network service; and
- (f) clarifying time lines and procedures for enforcement.

Therefore, China is taking proactive measures to ensure their intellectual property laws are aligned and are up to date by first taking steps to improve its administrative enforcement.

Data Privacy Amendments to the PRC Criminal Law

On 29 August 2015, the National People's Congress enacted the Ninth Amendments to the PRC Criminal Law, which will be effective as of November 1, 2015. The amendments mainly concern

two matters: anti-corruption and data privacy, and illustrates China's desire to bring their legislation in line with international standards.

In relation to the anti-corruption regime, the amendments include:

- (a) imposing liability on persons who offer bribes to close relatives of, or any person close to, current or former state personnel;
- (b) allowing fines to be imposed on individuals convicted of bribery, including on employees of a unit that are responsible for bribe payments made by the unit; and
- (c) conditions under which self-reporting will mitigate or exempt liability for bribery violations have been clarified, where in particular, when the underlying crimes are relatively minor and the offenders have assisted with exposing corrupt activities of others, liability may be mitigated or exempted.

In relation to the data privacy regime, there were considerable amendments concerning the sale or provision of personal information. Previously, the relevant provisions targeted statutory violations by employees in certain industries where the employees were likely to have extensive access to personal data, such as finance, telecommunications, transportation and healthcare, and general provisions did not limit employees in specific industries where the personal information was obtained in violation of the PRC law.

Now, the amendments have broadened the scope of the provision by simply providing that anyone who sells or provides personal information to third parties is subject to punishment. Furthermore, the application of punishments available has also been changed, where previously a violation under 'serious circumstances' was punishable by imprisonment of less than three years, or detention, and/or criminal fees, the new provision increases the imprisonment penalty to between three and seven years for violations that constitutes 'very serious circumstances', and even harsher penalties may be imposed on persons who violate the provision in the course of employment.

The amendments also added a further provision in the data privacy regime to impose an affirmative obligation on network service providers to comply with information network safety administration obligations as provided under relevant laws or regulations. If a failure to comply with such obligations results in the wide dissemination of illegal information, a leak of user information that leads to serious consequences, the loss of evidence for criminal cases, or other serious circumstances, the service provider is subject to criminal fines and punishment.

Therefore, the amendments add valuable contributions to the current PRC Criminal Law regime and signify China's insistence on updating their laws to a standard equal to international standards, and thus attract foreign investment as well as further their economy growth.

A Review of Licensing Intellectual Property and the Antitrust Regulations

The conflict between the Anti-Monopoly Law (AML) and intellectual property laws has always existed, because while intellectual property laws seeks to encourage new innovations in the form of technologies, artistic expressions and inventions by bestowing exclusive rights to the intellectual property and preventing others without a license, the AML's purpose stated in Article 1 includes restraining monopolistic conducts and protecting fair competition in the market. However, the AML and intellectual property laws have mutual goals, including enhancing economic efficiency, safeguarding the interests of consumers and social public interest, and promoting the healthy development of the socialist market economy.

The AML provides a general provision to address the application of antitrust laws to intellectual property rights in Article 55, which states that the AML does not govern the conduct of business operators to exercise their intellectual property rights under laws and relevant administration regulations on intellectual property rights; however, business operators' conduct to eliminate or restrict market competition by abusing their intellectual property rights shall be governed by this Law.

Therefore, Article 55 fundamentally provides an exemption from the application of the AML for intellectual property rights holders, who therefore are not subject to scrutiny for merely exercising their intellectual property rights consistent with the relevant laws and administration regulations. However, this exemption is conditional upon the fact the intellectual property rights holders do not seek to eliminate or restrict market competition by the abuse of their intellectual property rights.

Furthermore, the State Administration on Industry and Commerce enacted the Regulation on the Prohibition of Conduct Eliminating or Restricting Competition by Abusing Intellectual Property Rights on August 1, 2015, which clarifies how Article 17 of the AML may apply to issues surrounding the abuse of intellectual property rights, including the refusal to license, exclusive dealing, the imposition of unreasonable conditions, discriminatory treatment, and the practice of tying.

Particularly, in relation to licensing, Article 7 of the Regulations provides that where its intellectual property rights constitute an essential facility for production and business operations, an undertaking in a dominant position shall not refuse to confer license to other undertakings to use such intellectual property rights under reasonable conditions without legitimate reasons. The case *Huawei v IDC* directly involves this issue and the application of the FRAND principle (fair, reasonable, and non-discriminatory terms) for standard essential patents (SEPs), and is significant as it is a case in which a SEP holder assumed civil compensation liabilities under the AML for violating the FRAND principle.

In December 2011, Huawei filed a complaint against IDC before the Shenzhen Intermediate People's Court accusing IDC of abusing its market dominant position by reporting that the amount of royalties IDC demanded from Huawei were significantly higher than those offered to other companies, such as Apple and Samsung, therefore imposing discriminatory rates; and giving Huawei global non-exclusive licenses for which royalties must be paid for all of IDC's patents, rather than just the SEPs for 2G, 3G and 4G, therefore tying the licensing of SEPs with non-SEPs.

In determining the relevant market, the court took into account the definition included in the AML, which states that the relevant market means the range of commodities for which, and regions where, business operators compete with each other during a given period of time for the specific commodities or services, therefore covering a relevant commodity market and a relevant regional market. In SEP FRAND licensing, technologies protected by each SEP constitute an independent relevant market. Therefore, in this case, it was held that every essential patent licensing market under the China 3G wireless communication standard for IDC is unique and irreplaceable, therefore constituting many independent markets.

At first instance and on appeal in the Guangdong High People's Court, it was found such criteria for a relevant market was satisfied due to the SEPs' uniqueness and irreplaceability, and that IDC had abused its dominant market position by applying discriminatory rates. However, the practice of tying SEPs with non-SEPs was later held justified on efficiency grounds; and therefore not in violation of the AML.

The case is significant because it demonstrates a range of factors in the determination of FRAND terms and the application of the AML regarding SEPs, including principles such as:

- (a) the holders of SEPs have a duty to license patents to implementers under the FRAND principle;
- (b) where an implementer cannot reach an agreement with a SEP holder regarding licensing terms, it can seek assistance from the court to determine a reasonable rate under the law;
- (c) the court may consider factors such as quantity, quality, the value of the SEPs, the relevant licensing situations in the industry, and the share of the Chinese SEPs among all the SEPs of the holder, when determining reasonable royalties; and
- (d) if, during negotiations with the implementer of the patent, the patent holder abuses its market-dominant position, it will bear the legal consequences under the AML, including ceasing monopolistic conduct, and compensating the implementer's loss due to its monopolistic conduct.

Furthermore, the court provided factors for determining the amount of damages, including:

- (a) the reasonable expenses the plaintiff paid for deterring the defendant's monopolistic conduct, including attorney fees in both China and the United States;
- (b) the competing interest losses;
- (c) the nature of the defendant's infringement;
- (d) the level of subjective mistakes; and
- (e) the severity of damage caused to the plaintiff.

There is an inherent conflict in relation to licensing due to the right of exclusivity inherent in patents rights or copyright, and the compulsory licensing based on antitrust law, however, China has implemented many laws and regulations, including the Anti-Monopoly law and its various intellectual property laws in relation to this issue to minimise confusion, and to provide for economic growth by encouraging innovation and the maximisation of consumer welfare.

Guangdong Authorities Destroy Fake Goods

In China's fight against violations of intellectual property rights, the law enforcement authorities in Guangdong province destroyed 46,012 fake brand-named goods intended for export to Africa. In this batch of goods stored by a subsidiary of the Guangdong Entry-Exit Inspection and Quarantine Bureau in Guangzhou's Huangpu district, were brand names including Hermes, Gucci, Levi's, Dior, Chanel, Burberry and Diesel, and products such as belts, wallets, and purses.

Additionally on that same day, fake products of other brands, including 8,000 items of sportswear marked Nike and approximately 15,000 marked Adidas products were destroyed. This further illustrates China's firm move towards a fairer market, with emphasis by the General Administration of Quality Supervision, Inspection and Quarantine on improving supervision and inspection of exported Chinese products, especially those headed towards Africa and western Asia.

Antitrust/Competition

Simplifying the PRC Merger Review Process

Since China's Anti-Monopoly Law took effect on August 1, 2008, the government has asserted its authority to prevent abusive market dominance that may negatively affect competition in China. This included introducing the merger control regime, which was regulated by China's Ministry of Commerce (MOFCOM), and especially relevant due to China's increasing influence in global mergers and acquisitions.

Recently, however, it has been announced by MOFCOM that as part of an internal restructuring review in the merger control regime, the PRC merger review process or the Consultation Division will be abolished due to the long, unpredictable pre-acceptance phase for which there was no statutory time limit. MOFCOM's reforms further includes:

- (a) the conversion of the Consultation Division into a case review team, which will collaborate with other divisions to move cases from submission through to clearance;
- (b) the organisation by the three case teams to allocate notifications among themselves by sectors, which involves contacting the relevant parties proactively and in a timely manner when there are supplemental requests; and
- (c) imposing time limits on both the case teams and parties in terms of making and responding to supplemental requests, which includes reducing the overall timing of the pre-acceptance phase to less than one month before the formal Phase 1 review period is initiated whether a transaction is notified under the simple case route.

Therefore, this new procedure allows for increased manpower to focus on case review, but indicates MOFCOM's non-involvement in relation to the preparation of a notification and in principle, consultation on general matters, including jurisdictional issues, will no longer be available. This also means MOFCOM transfers the determination of control and the calculation of turnover to merging parties and their legal advisers to self-assess on a case-by-case basis.

Furthermore, there are several technical issues under the new procedure, which includes:

- (a) submission of notifications are required to be made in the morning to allow MOFCOM to enter the case into the internal system on the same day;
- (b) date of confirmation on receipt of relevant materials will be of practical significance in relation to the calculation of review time limits, which means MOFCOM will apply a higher standard to the completeness of submissions as well as requiring notifications to be technically complete and of credible quality; and
- (c) parties are required to specify the sector statistical code in their notification to facilitate smooth case allocation.

However, the abolishment of the Consultation Division is seen as an improvement, especially because it was previously difficult to obtain a firm and clear view from MOFCOM on complex issues via consultation, which resulted in companies feeling obliged to notify anyway. Therefore, the shortened pre-acceptance phase will impact more heavily than the loss of the Consultation Division, and overall will have a positive effect on the duration of the merger review process.

Microsoft Fined RMB 200,000 for Breaching Antitrust Rules

The Ministry of Commerce recently fined Microsoft Corporation and its Chinese partner, Shanghai Oriental Pearl Media Co. RMB 200,000, in an Xbox game console venture for breaching antitrust rules, specifically, failing to report to antitrust regulators that their joint venture exceeded a market share threshold that normally triggers a disclosure requirement.

This is another example of China's insistence on moving towards and promoting a fair market environment to attract more global investment, especially due to the country's shift towards a slower economic growth. Therefore, China has established an effective framework of commercial laws in most key business areas and its main issues presently are its implementation and enforcement, with a focus on tightening regulatory control on both giant and foreign businesses in the country through administrative actions.

Dongfeng Nissan Fined for Antitrust Behaviour

Recently, Nissan Motor Corporation joint venture with China's second largest automaker Dongfeng Motor Corp has been fined RMB 123 million by the Guangdong Development and Reform Commission for violating antitrust laws. The automaker was discovered imposing strict price restrictions on new car sales by its authorised dealers in Guangdong province, as well as colluding on price fixing with a number of its authorised dealers. Therefore, this shows China's willingness to discourage unethical and anti-monopoly behaviour, especially in its fight to create a fairer market in China.

Corporate Finance

NDRC's Reform in the Administration of Foreign Debts

In an effort by the Chinese government to further liberalise the market and encourage the development of the Chinese leading industry, the National Development and Reform Commission (NDRC) of the People's Republic of China issued the Circular on Promoting the Reform of the Filing and Registration Regime for Issuance of Foreign Debt by Corporate Entities to replace the previous approval system with a national quota and filing regime for foreign debts.

Therefore, where PRC domestic companies are borrowers, an NDRC approval is no longer required and is replaced by a national quota system and pre-incurrence filing with NDRC for a mid/long term debt, while for a short term debt, a State Administration of Foreign Exchange (SAFE) approval is still required. Meanwhile, where foreign-invested enterprises are the borrowers, the impact is still uncertain although the borrowing gap regime is likely to remain.

The introduction of the Circular has many improvements in relation to the administration of foreign debts, including:

- (a) requiring the issuer or borrower to register certain information with NDRC prior to incurring a foreign debt, and documents submitted to NDRC requires for the inclusion of an application report, a plan setting out the currency, size, interest rate, term, purpose of the debt and remittance detail;
- (b) imposing a standard timeframe for reviewing the pre-incurrence filing applications;
- (c) requiring eligible issuers and borrowers to meet certain requirements such as having a good credit track record and a sound corporate governance and risk-control system;
- (d) NDRC making a public announcement stating the filing of foreign debts will no longer be accepted in the relevant year when the aggregate registered foreign debt reaches the stipulated annual national quota; and
- (e) requiring the issuer or the borrower to report foreign debts to NDRC in the relevant form within 10 working days of the drawdown or issuance of the foreign debt.

However, as with any new law or regulations, there are several uncertainties and challenges involved with the Circular, including:

- (a) it does not eliminate the current requirement of registering foreign debts with SAFE;
- (b) it does not override the current restrictions on utilisation of foreign debt proceeds prescribed by SAFE;
- (c) it is uncertain if NDRC will take a restrictive or a liberal stance when determining the annual national quota for foreign debts;
- (d) it is unclear whether the pre-incurrence filing system will be a procedural matter or will involve any discretionary review;
- (e) it has included offshore subsidiaries and branches controlled by PRC entities for the

- purpose of the new foreign debt pre-incurrence filing regime;
- (f) it does not differentiate between PRC domestic companies and FIEs and how this would affect the current total investment/registered capital regime of FIEs remain to be seen; and
 - (g) it is uncertain how the new requirements will apply to deals that have already been agreed on and how the borrower can comply with the Circular before the pre-incurrence filing system is established.

This recent development reflects the Chinese government's increasingly liberal attitude towards foreign exchange matters, as well as its determination to open international financing opportunities to PRC companies and to develop its financial leasing industry.

Dispute Resolution

Online Mediation

The first online pre-litigation mediation platform in Shanghai made its debut recently in response to a rising number of civil cases involving foreign parties. Because several foreign parties find it difficult to attend mediations, a rising number of civil and commercial cases may now be moved to online mediation to offer convenience, efficiency and reduced costs. However, there is a criterion for which cases may use online mediation, which requires cases:

- (a) to have clear facts;
- (b) to have the rights and obligations of the parties involved to be unambiguous; and
- (c) to have cases that do not include much evidence, such as disputes over loans or labour contracts.

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.