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Business news

Auto

Geely eyes China market to revive Volvo brand

China's Zhejiang Geely Holding Group faces a long, uphill journey to return Ford Motor's prestigious but loss-making Volvo brand to profitability. But it also has an equally big opportunity: the chance to use the foreign brand to ramp up sales in the world's largest car market. Geely Automobile said the parent company would sell all or part of the Volvo business to the listed company.

Mercedes' China sales to outdo UK

Mercedes-Benz believes its strong market success in China comes from the German carmaker's ability to assimilate the trends and demands of the local market. That strategy has been key to zipping ahead in China's fiercely competitive and dynamic automobile market. Just in February 2010, Mercedes-Benz (China) Ltd. posted record year-on-year growth of 160 percent in China.

Toyota says to compensate Chinese car owners

Toyota promised to compensate Chinese car owners on the latest recalls, the first of its kind in the country. It agreed to offer substitute vehicles and return purchase subscription. But it did not reveal the amount of compensation.

Audi sales up in China

China could overtake Germany as the biggest market for luxury car maker Audi this year. Sales volumes in Germany and China could be the same this year after the launch of new models in both countries, and a decline in sales in Germany in February. The German car maker reported a 20% rise in global sales, with a 62% hike in China.

Banking and Finance

Bank of China to issue less new loans in 2010

Bank of China (BOC) will offer less new loans this year as the bank strives to rein in its credit growth at a reasonable rate. But it will still maintain its relatively high lending growth rate in order to meet client demand and allow for economic growth. Total value of transactions of RMB settlements by the bank came to 18.7 billion yuan (\$2.74 billion) by the end of February.

Commonwealth Bank opens first Chinese branch

Commonwealth Bank of Australia (CBA), the largest lender by market capitalization in Australia, opened its first Chinese branch in Shanghai on 26 March, with an eye on the ballooning natural resources trade between the two countries. The Sydney-based bank is only allowed to operate wholesale business in non-local currency for the first three years in China subject to the nation's regulatory policies.

HSBC ready for float in Shanghai

HSBC Holdings Plc, Europe's biggest bank by market value, is ready to list its shares on the proposed international board in Shanghai. The lender will use the proceeds from the initial public offering (IPO) for investments in China. China plans to set up an international board this year to allow foreign firms to float shares in Shanghai. The move will fuel Shanghai's ambition to become a global financial center by 2020.

SSF eyes overseas investments

The Social Security Fund (SSF) is looking to invest in overseas markets, including private equities. The SSF is keen on expanding its overseas footprint through its investments in stocks, bonds as well as new avenues like private equities. China's largest pension fund can invest as much as 20% of its total assets overseas, but

foreign holdings represented a mere 6.54% of assets in 2009.

Resources and Energy

Chalco reports losses in 2009 on low product prices

The Aluminum Corporation of China Limited (Chalco), the country's top aluminium producer, reported losses in 2009 as average prices of its major products were lower compared to a year ago. Net losses in 2009 stood at 4.65 billion yuan (\$681 million) while the company netted 9 million yuan of profit in 2008, according to the company's annual business report filed to the Shanghai stock market.

Smelter shut over lead poisoning of villagers

A lead smelter in Sichuan has been ordered to close after at least 94 nearby residents, including 88 children, were found to have excessive levels of lead in their blood despite the local environmental watchdog insisting that emissions were within legal limits. The lead poisoning was discovered after a villager told the local environmental protection bureau that blood tests on his family showed an excessive level of lead and he suspected it was caused by pollution from the Zhongyi Alloy plant.

PetroChina, Shell agree price for Australian Arrow Energy

PetroChina and Royal Dutch Shell will buy Australian coal-seam gas producer Arrow Energy after raising their offer to US\$3.2 billion. The two firms will pay A\$4.70 a share for Arrow's Australian business, a 5.6% hike on the A\$4.45 offer made 8 March. Arrow investors will also receive stock in Dart Energy, a new holding company for the firm's international assets, which are not part of the PetroChina-Shell sale.

China's gold demand could double by 2020

The World Gold Council, a gold industry group, predicts that China's demand for gold for jewelry and investment could double by 2020. China's demand for gold in 2009 was 423 metric tons, but its domestic supply was only 314 tons. In the coming years, China's market is expected to become even more dependent on gold imports.

Wind-power farms 'vanity projects'

Environmentalists worldwide have praised China as a leading harnesser of the wind for electricity, but a vice-minister said most of the ventures in the country were "vanity projects" - all for show. He also said that one particular project that is backed by the country's top economic planner would have a "fatal result" in five years because of the sand that came with the dry wind.

CNOOC buys Bridas stake for \$3.1b

CNOOC Ltd, China's biggest offshore oil explorer, agreed to buy a 50 percent stake in Argentine producer Bridas Corp for \$3.1 billion to meet demand in the world's fastest-growing major economy.

Consumer Goods, Real Estate, Internet, Electronics

SABMiller, China Resources eye further beer market growth

SABMiller and China Resources Enterprise, the joint venture partners behind Snow, China's best-selling beer, will seek to boost growth through acquisitions and increased production capacity. The China Resources Snow JV is also diversifying its output, increasing production of higher-margin premium beers and introducing new products such as an alcohol-free beer and a draft made from imported malt.

Foreign luxury retail brands fail quality control test

Clothes imported from some of the world top luxury brands, such as Hermes and Versace, have proven to be substandard in a routine quality control test. The faults uncovered by the test included poor color fastness, unacceptable amounts of acid, high levels of formaldehyde and improper labeling. The administration has ordered the clothes to be withdrawn from sale and for the retailers to be fined.

Overseas realty proves safer bet

More wealthy Chinese are buying overseas properties for better investment returns as skyrocketing property prices in the country makes domestic home purchases more risky. Prices in 70 major Chinese cities rose 10.7 percent year-on-year in February, the fastest pace in almost two years, fueling concerns that an asset bubble is forming in China.

Google mobile services blocked

Google has revealed that its mobile internet services are now being partially blocked in China. In the wake of Google's decision to offer mainland users uncensored searches through its Hong Kong site, companies like China Unicom have already announced plans to distance themselves from the search giant.

Ericsson lands \$1.8b mobile network contract

L.M. Ericsson Telephone has signed a US\$1.8 billion contract to provide network equipment to China Mobile and China Unicom. The US\$1 billion contract with China Mobile will allow the largest Chinese carrier by user base to develop an IP network using Ericsson's radio access equipment. The US\$800 million China Unicom deal will enable it to provide faster

3G service using HSPA Evolution technology.

McDonald's eyes China growth

Fast food giant McDonald's has seen a 10% increase in sales in Asia in February 2010, with China among the company's three biggest markets in the continent. McDonald's, which had a total of 1,135 outlets in China by the end of 2009, plans to increase investment in the country by 25% this year in an attempt to cash in on China's love affair with fast food.

Legal News

Intellectual Property

Effect of the Tort Liability Law on IP protection

After many years of drafting and discussion, the new Tort Law was passed by the National People's Congress on 26 December 2009. It is to commence operation on 1 July 2010. Although the law deals with general tort law principles, its potential application to IP matters, has been welcomed by brand and technology owners:

- Last-resort protection

The new law provides that "where other laws specifically provide for tort liability, those laws apply". However, if there are no applicable provisions, the Tort Liability Law becomes operational, effectively providing last-recourse protection for intellectual property, as well as guiding principles for IP-specific laws.

- Priority of civil damages

The Chinese law enforcement entities have often suppressed IP rights owners' claims for civil damages in order to secure administrative fines. The new law states that

if the infringer is answerable in terms of tort, administrative and criminal liability for the same act, but has insufficient means to discharge his obligations, his tort liability takes precedence.

- Moral damages for infringement of personal rights

Article 22 of the law provides that "where infringement of personal rights results in serious moral damage to the victim, the victim may claim compensation for such damage". When a copyright holder's rights of publication, authorship, alternation and integrity are violated, this provides a legal basis for the rights holder to claim for moral damages.

- Joint and several liability for abetting infringement

Article 9 of the law provides that "whoever aids and abets others in effecting infringing acts shall be liable jointly and severally with the infringer". This unequivocal provision applies to all tort cases, including IP cases, and leaves IP infringement facilitators with no place to hide.

- Joint and several liability for internet service providers

Where an internet user takes advantage of online services to carry out infringing activities, the victim has the right to require the service provider to remove, block or disable access to infringing material upon notification. If the service provider fails to take necessary measures immediately after receipt of such notification, it shall be liable jointly and severally with the user for any extended damage.

An Update related to the PRC IP Laws

Like other countries IP regimes, China's laws are constantly evolving. Recent key developments in China's IP laws are:

- Trademarks

In April 2009, the Supreme People's Court of China issued an important opinion addressing certain issues related to the adjudication of intellectual property disputes. The guidelines include:

- ✧ Courts need not award damages or account for profits relative to a mark that is registered but not put into actual use, although injunctions may still be granted against unauthorised use.

- ✧ Trade names or their abbreviations that have attained certain market reputation and public recognition through actual trade use are afforded protection against unfair competition.

- ✧ An enterprise name that is properly obtained overseas cannot be defended if its use within the People's Republic amounts to trademark infringement and/or unfair competition under Chinese law.

In May 2009, the Supreme People's Court of China issued a judicial opinion offering guidance on a number of questions concerning well-known trademarks:

- ✧ The circumstances under which a court may or may not decide if a mark is "well-known" are defined. The court may determine if a mark is well-known in a trademark infringement or unfair competition claim that involves the mark's identity or similarity relative to an enterprise name.

- ✧ Factors to be taken into account when considering whether a trademark is well-known in China include the mark's fame and history of use, the market share of goods bearing the mark, past recognitions, and the extent and geographical scope of

associated advertising activities.

- ✧ The Court found that "confusion" relative to trademark infringement occurs when the public may not recognize that products bearing a well-known trademark and a mark under complaint come from the same source.

- Patents

On 1 October 2009, the revised patent law of China came into effect. Some key changes in the new law are:

- ✧ Higher standard of novelty - The revised patent law removes territorial limit and lifts the standard of novelty by stipulating that the applied-for patent must not belong to the state of the art known to the public inside or outside China before the application date.

- ✧ First-filing requirement - The revised patent law removes first-filing-in-China requirement, however, imposes a new measure requiring that all local and foreign entities wishing to apply for foreign patents for inventions or utility models completed in China must first apply to the State Patent Office for a "confidentiality scrutiny."

- ✧ Statutory damages - The new law codifies and increases the range of statutory damages applicable in certain infringement situations. Where the rightful owner's loss or the infringer's illicit profit is difficult to quantify, the court may take into account factors such as the type of patent and the nature of infringement, and it may award damages ranging from RMB 10,000 to RMB 1,000,000.

Primary Taxes Involved in the Transfers of IP into China

Given increased efforts by China's Tax Office to increase its tax base and improve enforcement, it is worth reminding ourselves of some of the basic taxes applying to transactions involving IP:

- **Enterprise Income Tax**

If a foreign enterprise (non-resident) licenses IP to a China transferee for consideration, the foreign enterprise shall be subject to the PRC enterprise income tax. The tax rate applying to the foreign enterprise shall generally be 10%, unless it is found to have a permanent establishment in China.

- **Business Tax**

Business tax is assessed at the rate of 5% on the total price and any additional fees and charges it receives from the IP transfer. However, if the foreign transferor transfers the IP to China transferee in the form of technology contribution to the capital of the Chinese company, the IP transfer is not subject to the PRC business tax.

- **Stamp Duty**

Both parties to any IP transfer or license contract shall pay stamp duty at the rate of 0.03% or 0.05%.

Unregistered certification marks halted in China

Unlicensed use of an unregistered certification mark in China can be halted through application of the PRC Anti-Unfair Competition Law - FM Approvals (FM), a leading property insurance entity operating product certification systems for loss prevention products, initiated an administrative action with the AIC against the use of its diamond-shaped certification mark by Omayya Automation Apparatus Equipment Co., Ltd., (Omayya). The AIC concluded that Omayya's

use of the mark on its products constituted "false and misleading indications as to the quality of their commodities", and ordered Omayya to close down the unlicensed operation, confiscated all infringing goods seized, and imposed a fine of RMB 20,000 (USD2,928). This law has been used on many occasions to stop the use of a well known ordinary mark or get up of a product, but to our knowledge, it has not been used to stop the use of a certification mark before.

Beijing court throws out Avatar plagiarism case

A man who claimed that director James Cameron's Avatar was a plagiarism of his online novel, has had his case dismissed by a Beijing court. The Chinese plaintiff was demanding 8% of total worldwide revenue earned by Avatar. The court dismissed the case, claiming that the man had insufficient evidence to prove that Cameron had had access to the man's story 'The Legend of the Blue Crow', which he wrote in 1997, such that he had an opportunity to steal ideas from the story.

771 geographical indications registered and preliminarily examined in China

According to the Trademark Office, a total of 771 geographical indication marks have been registered or preliminarily examined by the Chinese Trademark Office by 31 December 2009, including 470 in the last 2 years. China consistently rejects common trademark applications containing a geographical indication, requiring special applications to be filed in accordance with the provisions in the law and implementing regulations.

Arbitration

Arbitration in China

Arbitration continues to be a very popular method for resolving disputes in China,

given concerns the maturity of the Chinese courts and local protectionism. It is worth reviewing some of the fundamental principles of arbitration under the PRC Arbitration Law:

- Legal representation - There are no limitations on legal representation for arbitration proceedings in China. A party is free to appoint an attorney or any person, of a foreign country in arbitration proceedings.

- Commencement of proceedings - An arbitration proceeding is commenced by filing a written application for arbitration with the arbitration commission.

- Appointment of arbitrators - The law requires that each arbitration commission establish and maintain a list of arbitrators. The parties must appoint an arbitrator from the commission's list.

- Further pleadings - The parties often expand their pleadings after the case has been referred to the arbitral tribunal. This may include providing additional evidence to support their respective cases and further developing their arguments.

- Hearing - Arbitration hearings in China are typically brief - most last no longer than one day. This is partly because the parties generally rely on documentary evidence and seldom provide oral evidence.

- Rules of evidence - Arbitrators are not required to comply strictly with specific rules of evidence. Arbitrators in comparison with judges have a higher degree of discretionary power in evaluating the evidence produced in proceedings, particularly in international arbitrations.

- Post-hearing pleadings - Arbitral tribunals often allow parties to make post-hearing submissions. However, the tribunal may order that no new issues be raised in such submissions; in some cases it may also state that no additional evidence will be accepted after the hearing.

- Preservative measures - A party to arbitration proceedings in China may ask a court of competent jurisdiction to order interim measures for taking evidence or seizing, freezing or detaining property.

- Awards - The PRC Arbitration Law does not set a time limit for issuing an award; rather, such time limits are set by the arbitration commissions.

- Enforcement of foreign arbitration awards - An application for recognition and enforcement of a foreign arbitration award falls within the jurisdiction of an intermediate people's court at the place where the award debtor is located or where the award debtor's assets are located.

Employment

Tort Liability Law: vicarious liability for employers

The new Tort Law also can be seen to have potential applicability to employment law matters. The law formally imposes vicarious liability on employers if their employees commit a tort against a third party "in the course of their working duties". The new element in the law is that the vicarious liability provision specifically covers employees who are hired through labour staffing agencies. If the staffing agencies are found to be at fault, they will become jointly liable along with the host company to which the secondees were sent. These new legal principles make it even more important for employers to carefully hire employees, provide regular training to employees as to their legal responsibilities, and to take swift action in relation to misconduct as required.

Provincial-level courts split on Employment Contract Law issues

The Jiangsu High Court has recently interpreted a national regulation with significant implications for employment aspects of M&A transactions – it has concluded that if an employee is transferred from one entity to another "for a reason not attributable to him/her", the new employer must recognize the employee's prior years of service for the purposes of the Labor Contract Law concerning redundancy compensation and other issues, which applies to any business transfer or asset acquisition, even between unrelated entities. By contrast, the Shanghai courts have taken a narrower view, finding that the national rule applies only to internal transfers between group companies. We expect that the Supreme People's Court will issue a clarifying Interpretation in the near future. In the meantime, it is thought that entities should follow the dicta of the Jiangsu High Court as it would seem to provide a more reasonable interpretation of the relevant regulations.

Stern Hu sentenced to 10 years

Stern Hu, the Rio Tinto executive accused of bribery and stealing commercial secrets, was sentenced to 10 years in prison. Hu and his three likewise-accused Chinese colleagues admitted to accepting US\$13.6 million in bribes from private steel mills trying to avoid purchasing iron ore at higher prices from state-run mills. This case is a good reminder to all businesses operating in China, that the PRC bribery and corruption laws are enforced in China on a regular basis. We are aware of countless numbers of employees of foreign and local entities, that are in prison serving sentences similar to that which Stern Hu received for crimes involving bribery, smuggling and even counterfeiting.

Taxation

Property tax plans accelerate

China plans to accelerate the introduction of a property tax. As property prices rose 10.7% year-on-year in February, a property tax could serve as another valuable tool to curb speculative buying, alleviating upward pressure on housing prices while generating a stable source of local government revenue. Skeptics feel that this tax will simply be passed on to tenants, and will be more aimed at raising revenue as opposed to slowing investment in property in China.

A tax blow for representative offices

On 20 February 2010 the State Administration of Taxation issued Circular 18/2010 outlining a new tax treatment for representative offices of foreign enterprises in China. The circular indicates that the exemption for representative offices for taxation purposes, will no longer apply either to existing exempt representative offices or to representative offices established in future, which means a radical shift in profitability for foreign enterprises that have operated with such an exemption. It is anticipated that entities with exempt representative offices, may be able to negotiate some kind of time frame for dealing with the new way that they are taxed. It is understood that many are considering converting their representative offices into companies, given this latest blow to their regulation.

Government

Regulations for PRC Government Procurement Law released for comments

The State Council released for comments draft Implementing Regulations on the

Government Procurement Law on 11 January 2010. The draft allows foreign invested enterprises' products to pass a local content threshold and to qualify as domestic for the purpose of government procurement, but it is silent on the percentage of domestic content required to qualify a product as domestic.

This update is aimed at keeping our clients informed of developments in Greater China. Whilst every care has been taken to ensure the accuracy of this update, it should not be relied upon before individual advice is obtained. The MMLC Group is an international legal and corporate advisory group.

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