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China Head Office
Level 7, Tower W3, The Towers, Oriental Plaza
No.1 East Chang Avenue, Dongcheng 100738, Beijing, China
p: +86 10 8515 1091
f: +86 10 8515 1089
w: www.mmlcgroup.com

Legal News

Intellectual Property

China continues to attempt to strengthen IP Protection

In 2009 China implemented its national IP strategy and took important steps in amending its trademark legislation. The key legislative developments were: (1) In late 2009 the SAIC submitted the third draft of the Trademark Law amendments to the State Council for further review. The corresponding modification of the implementing rules is also underway. (2) In a bid to reach international standards, the SAIC's five-year plan for 2008 to 2012 aims to (i) "perfect" China's system of examining trademarks at registration, and (ii) make trademark examination more efficient. (3) In April 2009 the SAIC promulgated the Working Specifications on the Recognition of Well-Known Trademarks. (4) In April 2009 the Supreme Court issued Several Opinions on IP-related Trials. (5) Echoing the April 2009 opinion, the Supreme Court issued the Judicial Interpretation on Well-Known Trademarks in 2009. (6) China has continued to intensify its border protection strategy. In March 2010 the IP

Rights Customs Protection Rule was further modified following its amendment in 2009. There is little doubt that China's efforts in the legislative arena have been considerable, however consistent and mature enforcement of the laws at the examination, administrative and judicial levels, remains China's real area for concern regarding IP rights.

China Issues Draft Rules on National Indigenous Innovation Product

China's National Development and Reform Commission (NDRC), the Ministry of Science and Technology ("MOST"), and the Ministry of Finance ("MOF") recently issued draft rules on the accreditation of indigenous innovation products. The scope of the products covered by the accreditation includes: computing and

application hardware, telecommunications hardware, modern office equipment, software, new-energy products, and highly efficient energy-reducing products. Any product covered by the scope and meets the following conditions is eligible for the accreditation: the product complies with PRC laws, and conforms to national industrial and technology policies; the applicant owns the intellectual property right in China pursuant to its own innovation, or has licensed the use of the intellectual property right in China. The intellectual property must not be subject to any disputes; the applicant owns the registered trademark of the product or is permitted to use the trademark in China; the technology used in the product is advanced, meaning that it raises energy efficiency or reduces pollution, or substantially improves on the structure, quality, production, or performance of the original product; the product is reliable. If the product is regulated, the relevant production license and certificate must have already been obtained; the product is already on sale in the market or has potential economic benefits or positive market outlook.

Securities

China allows foreigners to invest in stock futures after slump

China will allow qualified foreign institutional investors, or QFIIs, to invest in the country's stock-index futures, after its benchmark measure slumped in May. The US Treasury Department announced the proposal at the end of the US-China Strategic & Economic Dialogue in Beijing. Futures, or agreements to buy or sell the CSI 300 Index at a preset value, began trading on the China Financial Futures Exchange in Shanghai on April 16, while margin trading and short selling was introduced March 31. The move will make more investment options available to foreign investors. The Shanghai Composite Index, which surged 80 percent last year, fell 20 percent from its November 23 high. The measure lost 20 percent in 2010, Asia's worst performer, while the CSI 300, which tracks 300 of the largest companies on China's two equities exchanges, dropped 21 percent, as the central bank raised the amount funds banks must set aside as reserves three times this year. China has set the total combined quota for QFII funds at US\$30 billion.

Employment

Courts side with individuals claiming *de facto* employment

Several recently published employment cases indicate that courts in Shanghai are inclined to accept various types of evidence to support employees' claims of *de facto* employment with employers, despite the absence of a formal employment agreement. A court in Jing'an District supported the plaintiff's claim of employment with a Shanghai branch of a Beijing photography company, based on a private recording of a telephone call between the plaintiff and one of the company's managers, in which the manager recognized that the claimant worked for the branch without having an employment contract. In a separate case against a furniture company, a court in Minhang District found that a *de facto* employment relationship existed because the claimant's work was supervised by an assistant manager of the company and the claimant's salary was remitted by the company's accountant every month. The Chinese employment laws provide strong protection for an employee's rights as compared with a person who is treated as a mere contractor or agent. It is important that agency and consulting arrangements be reduced to writing to ensure that the relationship does not become ambiguous.

Residence permits to replace hukou

The central government has decided to adopt a residence permit system nationwide as a step forward in the reform of *hukou*, the household registration system that has prevented rural residents enjoying the same social welfare benefits as their urban counterparts. It is the first time that the State Council set out guidelines extending the system to all cities. The issue of *hukou* reform has been repeated in the central government's documents in the past three years but has seen small leaps. This year's measures to make residence permits nationwide involve not only the Ministry of

Public Security, but also the ministries of Finance, Land Resources, Agriculture, and Human Resources and Social Security. Residence permits are being implemented in 10 cities - Shenzhen, Guangzhou, Zhuhai and Dongguan in Guangdong; Shanghai, Cixi and Jiaxing in Zhejiang; Taiyuan in Shanxi; Dalian in Liaoning; and Changchun in Jilin. With such permits, migrants can enjoy the same social security benefits as urban residents.

Beijing extends residence permits for foreigners

Foreigners who need to stay in China for more than six months are now eligible to get residence permits in Beijing from June 1 according to a revised policy of the Ministry of Public Security. Five categories of foreigners have now been included in the new guidelines. Among them are foreign spouses, parents and children under 18 years old of Chinese citizens or foreign people with permanent residence rights; and foreigners over 60 who have purchased property in the Chinese mainland, their parents, and children under 18 years old, according to the Beijing Public Security Bureau. These groups of people could not only apply for a six-month tourist visa to China, but also apply for a one- or two-year residence permit. Those who want an extension to their permit could also apply after the expiration of their current permit.

Data Protection and Privacy

Data stored on work computers may receive privacy protection

According to media reports, a local people's court in Beijing's Daxing District announced during trial that a company had violated an employee's privacy rights when it copied personal photos and other personal data that the employee had saved on her work computer. The court reportedly pressured the company to reach a settlement agreement with the employee to destroy the copied data and pay RMB20,000 for

emotional damages. While the status of employee information on company computers and electronic systems is ambiguous under the law, this case shows that personal data stored on work computers may receive privacy protection. We recommend that employers develop clear rules as to how employees can use work computers, and the ownership of all information and files recorded on a work computer, so as to avoid this potentially awkward situation.

Protection of Information by Domestic Enterprises Undertaking Service Outsourcing Business

The Provisions on Protection of Information by Domestic Enterprises Undertaking Service Outsourcing Business (Provisions) came into effect on 1 February 2010. The Provisions require Chinese domestic IT and technical business process outsourcing service providers (Service Providers) to implement effective and practical measures to protect the Confidential Information provided to them by their overseas clients (Clients). Under the Provisions, "confidential information" is defined as: (i) any information obtained by a Service Provider from its Client to provide outsourcing services; (ii) any information not known to the public and for which the Client has put in place measures to protect its secrecy; and (iii) any information deemed confidential under the relevant outsourcing service contracts. In addition, the Provisions require Service Providers and Clients to clearly stipulate in their outsourcing service contract the position agreed between them as to the ownership of any intellectual property rights associated with technological achievements arising from the provision of services.

Corporate

Due diligence

How should multinational companies arrive at a realistic appraisal of the potential risks and opportunities of a specific deal in China?

Extended due diligence involving independent verification is usually the best way to do this in China. Further, Chinese companies are growing more accustomed to due diligence, making it an easier process for all. In addition to the traditional types of M&A due diligence, covering financial, legal and environmental issues, foreign companies often appreciate having a firm carry out independent verification of a target's documents, via database and online research, discussions with government agencies and other sources, and key employee and partner interviews – this is particularly important in equity transactions involving private companies or state owned enterprises, so as to get as close as possible to obtaining a clear picture of the target entity's assets, liabilities and business reputation.

Prosecution standards clarified for insider trading

China's Supreme People's Procuratorate and the Ministry of Public Security issued new rules to clarify prosecution standards for insider trading and the leaking of inside information. Under the new rules, insiders who trade securities will be prosecuted if the cumulative trading volume exceeds RMB500,000 yuan (\$73,000). For those trading futures, they will face government suits if their appropriation of margin in insider trading exceeds RMB300,000 yuan. The government will also bring suits against those whose benefits or loss aversion from insider trading tops RMB150,000 yuan. The government will also prosecute those insiders who trade on inside information and leak information more than once. The new rules also clarify prosecution standards for the publication of false financial reports and the withholding of important company information.

China adjusts foreign investment regime

The State Council has released *Opinions on Further Improving the Utilization of Foreign Investment* (No 9, 2010) which will have a significant impact on foreign investors. *Opinions on Further Improving the Utilization of Foreign Investment (Opinion No. 9)*, provides high-level direction to reforming the current regulatory system in China relating to foreign investment. It indicates proposed revisions at the policy level as well as detailed implementation rules. And it is likely be followed by a new wave of regulatory system reforms. Opinion No. 9 sets out a target to reform the current implementing rules and guidance in connection with foreign investment in China. Guidance and regulatory

rules that will be amended include: revising the Foreign Investment Industrial Guidance Catalogue; revising Catalogue of Priority Industries for Foreign Investment in Central and Western China; reforming the determination procedure for new and high tech FIEs; further opening of capital markets in China; new measures to benefit foreign investors. Opinion No. 9 seeks to emphasise the overall position of the Chinese Government of wanting to attract and support foreign investment. However, it delivers a clear message that the investment direction has been altered from a somewhat generalist and broad approach to a more focused model that aims to support China's development requirements and benefit China's global competitiveness.

Civil Procedure

Reminder - Limitation of actions in China

Article 135 of the General Principles of Civil Law of the PRC ("Civil Law") provides that "unless otherwise stipulated by law, the limitation of actions for protection of civil rights ... shall be 2 years." This period is relatively short as compared to many Western and European countries, thus many are often caught by surprise when settlement negotiations fail to resolve a commercial dispute. It should be noted that this period can be varied by contract, so it is important that foreign companies check agreements and the current law, when a dispute arises, so that their ability to file a lawsuit or arbitration action, does not become compromised by time.

Tax

Property tax may be levied

The government has signaled that it will "gradually" levy a new property holding tax. The tax, which is similar to a property or land tax in other countries, is expected to increase

the cost of holding more than one apartment and help prevent speculation. The State Council, China's cabinet, has approved guidelines on the systematic reform of the economy submitted by the National Development and Reform Commission, which included the clause "gradually push the reform of tax on holding of properties". The Shanghai government is already working on introducing this type of property tax later this year.

Business News

Carbon tax likely, expert forecasts

A senior researcher in the Energy Research Institute under the National Development and Reform Commission forecasts that China may start levying a carbon tax and further boost prices of fossil fuel for the next five years as a crucial incentive to cut greenhouse gas emissions and help realize green targets. He thought a carbon tax was likely to be levied during the 12th Five-year plan (2011-15) period. Apart from a carbon tax, the government may begin to levy environmental and resource taxes. At the same time, China will greatly boost subsidies to support low-carbon technology research and development. At a weekend climate change forum, he said that the government was serious about realizing its target of cutting carbon intensity by 40-45 percent by 2020 from 2005 levels and the government would implement "tougher measures" in the coming five years to realize the green goal. However, he was pessimistic about the coming 10 years.

China Longyuan to spend \$13b to lead wind power league

China Longyuan Power Group Corp plans to spend about 92 billion yuan (\$13 billion) over the next five years to become the world's No 1 wind-power producer as global demand for clean energy increases. The Hong Kong-listed company aims to

install at least 16,000 megawatts of wind turbines in China and overseas by 2015. The expansion plan comes as the Chinese government encourages the use of renewable energy to cut reliance on more polluting coal. It ranks fifth globally by wind-power capacity and plans to be third by 2012. The company had 4,503 megawatts of capacity last year and may have 6,500 megawatts by the end of this year. China Longyuan may issue bonds in the domestic market to raise funds. China Longyuan purchases turbines from domestic suppliers whose prices are about 20 percent less than those of their overseas rivals. Xinjiang Goldwind Science & Technology Co and Sinovel Wind Group Co are among the largest suppliers to China Longyuan.

China Mobile eyeing iPad, Chinese domestic market

China Mobile, the world's biggest mobile operator by subscriber numbers, said it is interested in selling Apple's iPad tablet computer in China. The company claims that it is also in discussions with Apple about developing a next-generation iPhone that would run on TD-SCDMA - the home-grown 3G mobile standard being used by China Mobile.

Dongfeng Nissan starts building new plant in Guangzhou

Dongfeng Nissan Passenger Vehicle Company, has begun construction of its second plant in Guangzhou city's Huadu district. The new plant will cover 2.4 million square meters. With an investment of 5 billion yuan (\$732 million), the new plant is expected to begin production in 2012 with an annual production capacity of 240,000 units. It will bring the company's production capacity in Huadu up to 600,000 units per year, making Huadu Nissan's largest automobile production base. Together with its production base in Xiangfan, Hubei province, annual capacity of the Sino-Japanese joint venture will exceed 900,000 units by 2012. Dongfeng Nissan was co-founded by the Dongfeng Automobile Group Co Ltd. and the Nissan

Automobile Co Ltd in 2003. It sold 520,000 units in 2009 to rank sixth among China's passenger car makers.

Hong Kong is home to the largest consumers of wine in Asia

The latest 2010 market study has found that wine consumption in Hong Kong continues to grow. The annual per capita consumption among the population of legal drinking age now stands at 3.6 litres. This makes Hong Kong the region's most mature market, significantly ahead of both Japan and Singapore. Hong Kong's total wine consumption increased by 75.9% from 2004 to 2008, and the study forecasts continued growth of 70.8% between 2009 and 2013 -- reaching 4.793 million nine-litre cases, or the equivalent of 57.5 million bottles at the end of that period. The study noted significant growth in Hong Kong consumption since duty on wine was abolished by the Hong Kong government in February 2008.

IKEA opens largest Asian store in Shenyang

The IKEA group started a three-day test operation of a new store in Shenyang, capital of northeast China's Liaoning Province. The store is the Swedish company's largest store in Asia and the second largest in the world. The new store, with a total investment of \$60 million, is expected to have an annual business turnover of 400 million Yuan and provide 400 jobs. The store has a total floor space of 116,400 square meters. It officially started operations on May 20. The new store brings to eight the number of IKEA stores in China.

Lenovo's LePhone

The new LePhone is ready for a fight with Apple's iPhone in the Chinese market and is bound to succeed since LePhone is customized for Chinese users and has received strong support from top domestic service and content suppliers, including Baidu Inc, Alibaba Group and Tencent Inc, Liu, 66. Based on Google Inc's Android operating system, the first version of LePhone, running on the third-generation (3G) standard WCDMA, which is used by China

Unicom, will be available in stores from May 17. Lenovo is also working on several versions of LePhone for China's other two 3G standards - CDMA2000 by China Telecom and homegrown TD-SCDMA by China Mobile, which will enter the market gradually. Lenovo will also launch other models of the phone with modified functions, designs and business models after conducting large-scale surveys of market response and consumer acceptance. LePhone's top-notch domestic content suppliers are the key 'weapon' to compete with the iPhone in the Chinese market. Lenovo now is working with over 500 content developers on its new application download store, in which some 200 suppliers have designed their products specifically for LePhone. However, the company does not expect the new LePhone to make a meaningful contribution to the company's profit for the next two to three years, as it has to compete with more established players.

Sinopec says China refining capacity rises
China's refining capacity rose to 477 million metric tons in 2009, China Petrochemical Corp, known as Sinopec Group, said in a statement on its website. Sinopec Group and PetroChina Co together accounted for 76.8 percent of the country's capacity while foreign companies accounted for 2.2 percent, according to the statement.

TELSTRA has bolstered its long-held ambition to create a \$1 billion-a-year business in China

The Australian telecoms and media giant has invested US\$100 million to take a 67 per cent stake in a Chinese news and advertising group that serves up news services and mobile advertisements to about 10 million users. Telstra completed the purchase at the end of February but did not disclose it to the Australian Securities Exchange as it did not consider it to be sufficiently material. The acquisition was,

however, disclosed in Telstra's European debt prospectus in March.

China's May manufacturing expands at slower pace

Chinese manufacturing expanded at a slower pace in May, adding to signs that growth may moderate in the world's third-biggest economy. A government crackdown on property speculation is cooling the economy by damping sales and construction, while Europe's sovereign-debt crisis could exacerbate a slowdown by cutting demand for exports. China's policy makers may delay raising benchmark interest rates or letting the Yuan appreciate against the dollar even after the economy grew 11.9 percent in the first quarter.

China May property sales drop in Shanghai, Beijing

Property sales in Beijing, Shanghai and Shenzhen fell as much as 70 percent in May as developers delay sales following government tightening measures. In Beijing, property signings slumped nearly 70 percent to 3,357 in May from April. In Shanghai, the nation's main commercial center, transactions may have dropped about 70 percent to 2,550 signings, and in the industrial city of Shenzhen, sales fell by 62 percent. China has restricted pre-sales by developers, curbed loans for third-home purchases, raised minimum mortgage rates and tightened down-payment requirements for second-home purchases. The government is trying to peel back a stimulus plan and a US\$1.4 trillion lending binge that revived economic growth while raising the risk of asset bubbles.

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.