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China offices

Legal flash

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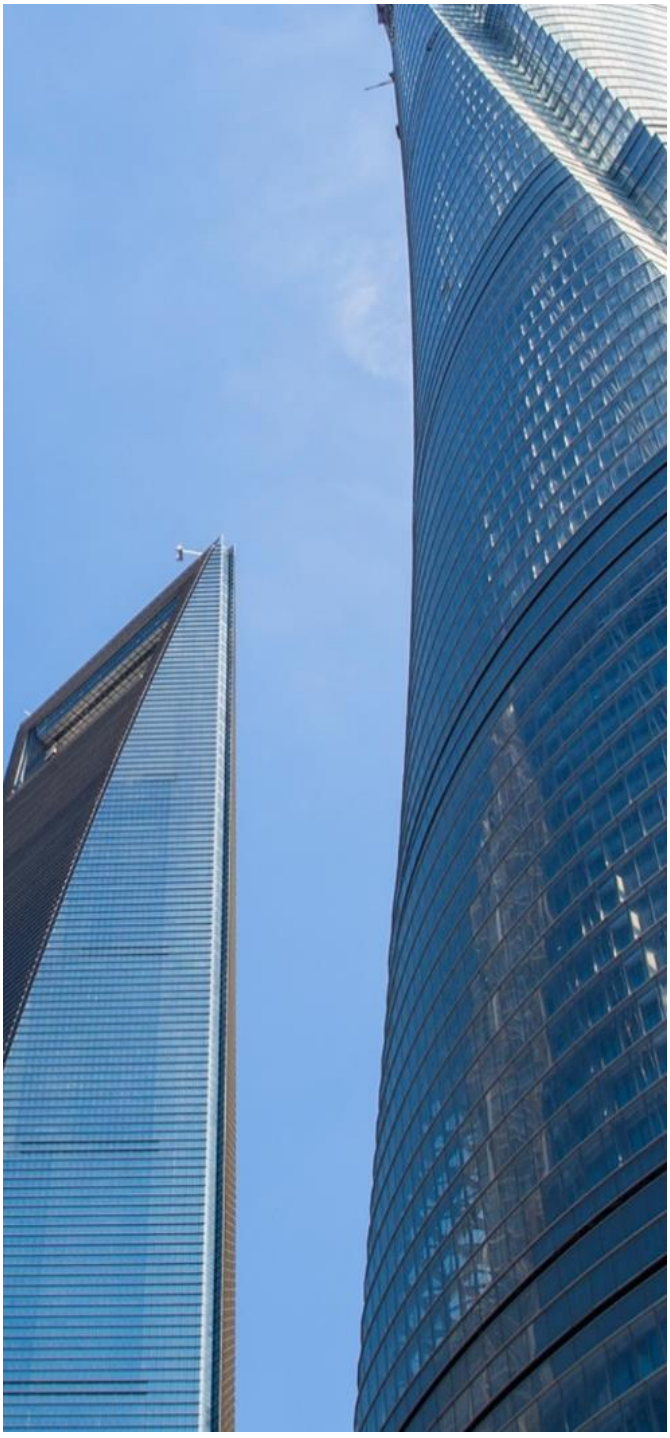

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Hong Kong Special Administrative Region ("HKSAR") and the Mainland sign the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region (《关于内地与香港特别行政区法院就仲裁程序互相协助保全的安排》签署)

On April 2, 2019, the Department of Justice of the HKSAR and the PRC Supreme People's Court signed the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region (the "Arrangement"). The Arrangement allows parties to the "arbitral proceedings in Hong Kong" (defined in its article 2) to apply to the competent People's Court in the Mainland for interim measures (or "preservation measures" under PRC law), including property preservation, evidence preservation and conduct preservation.

The Arrangement also provides for reciprocal rights so that parties to arbitral proceedings administered by an arbitration institution in the Mainland can also apply to the High Court of the HKSAR for interim measures under Honk Kong law. However, as Hong Kong's Arbitration Ordinance already allows parties to arbitrations seated outside Hong Kong to seek interim relief from its courts, we will not cover this topic here.

Highlights:

- The applicant for interim measures to the Mainland court must be a party to certain arbitral proceedings seated in Hong Kong and administered by any of the following institutions or permanent offices:

    - Arbitration institutions established or headquartered in the HKSAR and with their principal place of management located in the HKSAR;

    - Dispute resolution institutions or permanent offices established in the HKSAR by international inter-governmental organizations of which the PRC is a member; or

- Dispute resolution institutions or permanent offices established in the HKSAR by other arbitration institutions that meet the criteria set by the Government of the HKSAR (e.g., the number of arbitration cases and the amount in dispute).

The list of institutions and permanent offices is to be provided by the Government of the HKSAR to the Supreme People's Court and be subject to acknowledgement by both sides.

- Qualified applicants must apply to only one intermediate People's Court of the Mainland, either in (i) the place of residence of the party against whom the application is made, or (ii) the place where the property or evidence in question is located.

- Applications for interim measures can be submitted any time before an arbitral award is granted, before or after a relevant institution or permanent office has accepted the arbitration case.

- If an application for interim measures is submitted before the case has been accepted by a relevant institution or permanent office for arbitration, it will be submitted directly to the competent Mainland court. The measure imposed will be lifted if the Mainland court does not receive a letter from the relevant institution or permanent office certifying that it accepts the case for arbitration within 30 days after the interim measures are enforced.

- If an application for an interim measure is submitted after the case has been accepted by a relevant institution or permanent office for arbitration, the application will be forwarded to the relevant court in the Mainland through the institution or permanent office.

The Arrangement is highly welcome, maintaining Hong Kong as one of the most popular arbitral seats to resolve China-related disputes.

Date of signature: April 2, 2019

Effective date: to be announced

Trademark Law and Anti-unfair Competition Law revised (商标法和反不正当竞争法修改)

On April 23, the Tenth Session of the Standing Committee of the Thirteenth National People's Congress passed a resolution to revise eight laws, including the Trademark Law and the Anti-unfair Competition Law. According to the resolution, the revisions introduced to the Anti-unfair Competition Law will take effect immediately, while those introduced to the Trademark Law will become effective from November 1, 2019.

Main changes to the Trademark Law:

- It provides the rejection of the malicious application for trademark registration that is not filed with the intent to use, and the trademark agent must not accept the entrustment from the client if it is aware (or should have been aware) of the situation.
- It adds the malicious application for trademark application as a legitimate reason to object to or invalidate a trademark.
- It includes the corresponding punishments for the person who files a malicious application and the non-complying trademark agent.
- It increases the maximum punitive damage and the court-determined monetary compensation for trademark infringement.
- For the first time, it establishes that (i) the court will order the destruction of the goods bearing counterfeit registered trademarks and the materials and tools used to manufacture these goods, if requested, except under special circumstances, or prohibit those materials and tools from entering any commercial channel; and (ii) goods bearing counterfeit registered trademarks will not enter any commercial channel by merely having their counterfeit registered trademarks removed.

Main changes to the Anti-unfair Competition Law:

- It expands the definition of trade secret to include any other commercial information (no longer limited to technical and operational information) that is not known to the public and has commercial value, and for which the obligee has adopted measures to make sure it remains confidential.

- It expands the circumstances that constitute the infringement of trade secrets. Along with business operators, individuals, legal persons and unincorporated organizations will be liable for infringing trade secrets. Following the revision, the infringement of trade secrets now includes the following behaviors of an individual, legal person and unincorporated organization:

  - Obtaining an obligee's trade secrets by theft, bribery, intimidation, electronic intrusion (newly added), or other improper means;

  - Disclosing, using, or allowing others to use an obligee's trade secrets obtained by the means mentioned in the preceding paragraph;

  - Disclosing, using or allowing others to use an obligee's trade secrets in violation of confidentiality obligations (limited only to "contractual obligations" before revision) or the obligee's requirements to keep the trade secrets confidential; and

  - Obtaining, disclosing, using or allowing any other party to use an obligee's trade secrets by instigating, tempting or helping any other party to violate confidentiality obligations or the obligee's requirements to keep the trade secrets confidential (newly added).

- It adopts punitive damages and increases the maximum court-determined monetary compensation for the trade secret infringement.

- It includes the confiscation of illegal gains and increases the maximum administrative penalties for trade secret infringement.

- It adopts a lower burden of proof for trade secret infringement claims.

  Under the Anti-unfair Competition Law, trade secrets must have three basic characteristics: they (i) cannot be known to the public; (ii) must have commercial value; and (iii) must be subject to measures to keep them confidential.

  Before the revision, the claimant of trade secret infringement must establish that (i) the information is not known to the public; (ii) the information has commercial value; (iii) measures have been taken to keep the information confidential; (iv) the information of the other party concerned is identical or substantially identical to its trade secret; and (v) the other party concerned has used improper means.

Following the revision, if the claimant can provide preliminary evidence to prove that it has adopted measures to keep its trade secrets confidential and can reasonably show that the trade secrets have been infringed, the defendant will be the one that has to show whether the claimed trade secrets are trade secrets under the Anti-unfair Competition Law. The defendant will also have to prove that there was no trade secret infringement. If the claimant can provide preliminary evidence that can reasonably indicate that its trade secrets have been infringed and provide any of the following pieces of evidence, the defendant must prove that there is no infringement of trade secret:

- There is evidence that the alleged infringer has access to or opportunities to obtain the trade secrets, and the information used by the alleged infringer is substantially identical to the trade secrets;
- There is evidence that the trade secrets have been or have the possibility of being published or used by the alleged infringer; or
- There is any other evidence showing that the alleged infringer has infringed the trade secrets.

Provisions of the Supreme People's Court on Several Issues Concerning the Application of the Company Law of the People's Republic of China (V) released (《最高人民法院关于适用<中华人民共和国公司法>若干问题的规定（五）》发布)

On April 28, the Supreme Court issued the Provisions of the Supreme People's Court on Several Issues Concerning the Application of the Company Law of the People's Republic of China (V) (the "Fifth Judicial Interpretation"), which took effect on April 29, 2019.

With only six articles, the Fifth Judicial Interpretation covers certain issues regarding related transactions, director removal, profit distribution, and resolving shareholder disputes through court mediation.

Highlights:

- The defense merely on the grounds that a certain statutory procedure (e.g., following information disclosure and obtaining the consent of the board of shareholders or general meeting) has been performed will not exempt the party from liability for related-party transactions.

- If the company does not file a lawsuit when the contract on related-party transactions is invalid or revocable, the qualified shareholder may initiate a derivative lawsuit against the counterparty for invalidating or revoking the contract under article 151 of the Company Law (the scope of shareholder derivative lawsuit has been expanded).

- A principal-agent relationship forms between the company and the director.

    - A director can be removed any time without cause through an effective resolution of the board of shareholders or general meeting.

    - If disputes arise regarding a director's compensation after removal, in accordance with laws, administrative regulations, articles of association or the terms of the contract (and based on factors such as the reasons for removal, the term of office remaining and the director's remuneration), the court will determine whether compensation must be paid and, if so, the amount of that compensation.

- The company must distribute profit in accordance with the time stipulated in the resolution on profit distribution. If no time is established in the resolution, the company must distribute the profit under the provisions of the articles of association. In all cases, the company must distribute the profit within one year from the date of the resolution.

Additional Tariffs on Cars and Spare Parts from the United States Continue to be Postponed

On March 31, 2019, the Customs Tariff Committee of the State Council released a public notice (Customs Tariff Committee Public Notice [2019] No. 1) to continue to postpone additional tariffs on cars and spare parts from the United States.

Date of issue: March 31, 2019

Announcement of the State Taxation Administration on Matters Relating to Adjustments to the Certificate of Chinese Fiscal Residence（《国家税务总局关于调整《中国税收居民身份证明》有关事项的公告》）

To implement the reform of the collection and management system of the State Administration of Taxation ("SAT"), and the Local Taxation Bureau and Individual Income Tax, on April 1, 2019, SAT released the announcement of the State Taxation Administration on Matters Relating to Adjustments to the Certificate of Chinese Fiscal Residence ("Announcement No. 17").
When Announcement No. 17 becomes effective on May 1, 2019, the clauses in the previous announcement related to this reform will no longer apply.

Date of issue: April 1, 2019
Effective date: May 1, 2019

Announcement on Issues Concerning Enterprise Income Tax Policy ("EIT") for Third-Party Enterprises Engaged in Pollution Prevention and Control (《关于从事污染防治的第三方企业所得税政策问题的公告》)

On April 13, 2019, the Ministry of Finance, the State Administration of Taxation, the National Development and Reform Commission, and the Ministry of Ecology and the Environment jointly released the announcement on Issues Concerning Enterprise Income Tax Policy for Third-Party Enterprises Engaged in Pollution Prevention and Control, effective on January 1, 2019.

The EIT preferential policy for pollution prevention encourages the professional and large-scale development of enterprises engaged in pollution prevention and control by applying a reduced EIT rate of 15%.

The implementation period will be January 1, 2019, to December 31, 2021.
Date of issue: April 13, 2019
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