MMLC Group China Update

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Recent Firm News:

- *Legal Media - MMLC listed as a leading firm in China Competition and Antitrust Law.*
- *Corporate Intl. – MMLC wins China IT Law Firm of the Year for 2011.*

Legal News

Intellectual Property

BMW Fails to Block BMWCO Trademark Application

In 2004, the Chinese Trademark Office ("CTO") decided that BMW's opposition proceedings regarding an application by Jiangxi Machinery to register "BMWCO" for "motorcycles", were without grounds. BMW appealed this decision to the Trademark Review and Adjudication Bureau ("TRAB") and in early 2009, the TRAB issued its decision upholding the original decision of the CTO. BMW then appealed to the First Intermediate Court of Beijing, claiming that the TRAB and CTO erred in deciding that BMW and BMWCO were not similar in appearance and confusion was unlikely. In a surprising decision, the court concluded that the goods involved were indeed the same or similar, but that the marks were not so similar that confusion was likely – the court upheld the decision of the TRAB and ordered that the application for BMWCO be permitted to register for motorcycles. This decision highlights two issues – (i) the importance of providing extensive and well thought out submissions and evidence to the TRAB and courts regarding marks being similar, the meaning of the marks and the likelihood of confusion (we note that survey evidence can often be very useful in China) and (ii) the need for foreign companies to consider filing defensive registrations in China, in both English and Chinese characters – we are starting to see the TRAB and courts, take a very narrow view as to whether a mark is similar or not, to another mark, even in the case of well known marks, like BMW or Apple. The intelligent registration of defensive marks will allow a company's central marks to be protected with relative ease.

Taobao Sued for Selling Counterfeits

Omega, Longines and Rado have filed a lawsuit against Taobao (the well known Chinese online shopping mall – owned by Alibaba) and qinalong.com (another online shopping site) in the Beijing Intermediate Court, claiming damages for trademark infringement in the vicinity of US$350,000. The three watch makers have stated in submissions to the court that, given the price of its genuine products are around US$5,000 or more, it would have been obvious to Taobao that any advertisements for genuine new products, priced at US$50 or less, must indicate that the products concerned are not genuine. Taobao has defended itself, saying that prices can change depending on the sales channels involved so there was no way for its staff to be able to effectively determine the authenticity of a product from the price included in its advertisement. It is hoped that the court will lay down some sensible and logical guidelines for Taobao in its decision, putting an onus on Taobao to set up filters in order to catch advertisements for products that are clearly counterfeit – no doubt most brand owners would be happy to assist Taobao (and other similar sites) in setting up these filters in order to reduce the access to counterfeits and knock-offs. A decision is expected by the end of 2011.

Hong Kong's Trademark Office Considers "Bad Faith"

The owner of an unregistered trademark, 雪狼湖, filed opposition proceedings regarding an application to register SOLOVE 雪狼湖 in Hong Kong. The opponent did not have a relevant registration for 雪狼湖 to cover the goods referred to in the application, but nevertheless, it was able to show wide and long use of this mark in Hong Kong in relation to a wide range of products – the musical named 雪狼湖 was first staged in Hong kong in 1997 for 43 shows, and then taken to Singapore and the PRC for over 54 shows from 2004 to 2006 – evidence was produced showing that the musical was also performed in Zhengzhou in China, where the owner of the application for SOLOVE 雪狼湖 lived. The HKTMO held that the applicant had knowledge of the existence of the opponent and its mark at the time he filed the application to register the mark, and the applicant's intention to ride on the fame and reputation of the opponent's mark and its musical was clear, and that this constituted "bad faith" applying the "reasonable man test" under the Hong Kong Trademarks Ordinance.

Hong Kong Tables Copyright (Amendment) Bill 2011

In June 2011, the Hong Kong Government tabled a Bill aimed at updating the Hong Kong Copyright Ordinance given recent technological developments, provide for better cooperation between online service providers and copyright owners in relation to infringement, and to encourage the reasonable use of copyright works in certain circumstances, such as online learning and research. Key provisions include (i) imposing criminal liability on a person who (without consent of the copyright owner) communicates a copyright work to the public, whether or not profit is involved (ii) establishing of safe harbor provisions for online service providers provided that they comply with various practices including a responsible notice and take-down policy (iii) setting out specific guidelines for courts to consider when looking at whether a substantial part of a copyright work has been reproduced (iv) allowing media shifting for private enjoyment and (v) the expansion of fair dealing defence provisions. Although some provisions in the Bill offer sensible and well thought out solutions to difficult issues, it is hoped that the Government will revisit the safe harbor provisions being offered to online service providers, as we are certain that these will be abused so that in effect, it will become very difficult to take action against rogue online shopping sites and sites specialising in infringements and knock-offs.

Corporate

New Measures for Equity Contributions

The Ministry of Commerce has issued the draft "Measures for the Administration of Capital Contributions in the Form of Equity Involving Foreign-Invested Enterprises" and invited comments from the public. These Measures seem to officially allow an investor to make a capital injection into a Chinese company (local or foreign-owned) by way of injecting equity interest of another Chinese company (local or foreign-owned). Not surprisingly, such a practice will require the equity interest to be valued by a licensed Chinese valuation firm. Further, this practice must comply with China's Foreign Investment Guidance Catalogue, as amended from time to time. In accordance with the Chinese Company Law, such an investment will be limited to 70% of the total registered capital contribution, as 30% must be in cash. Foreign investors will welcome the Measures as they will allow for more flexible corporate structuring in China.

Taxation

Western China Tax Incentives Extended

The Ministry of Finance has said that its Western China tax incentive program will be extended to 2021 in order to maintain the attractiveness of the region for local and foreign investment. Companies that invest in Western China benefit from a number of tax incentives, including a 15% reduction in company taxes and duty free benefits for imports.

Hong Kong Signs New Tax Agreements

The Hong Kong Government has signed two new tax avoidance agreements – one with Japan, which commenced operation on 10 August, and another with Liechtenstein which commenced operation on 15 August. Under these agreements, Hong Kong will be able to more easily share tax and income information with these countries.

Employment

Labor Agency Arrangements

In the past, some types of foreign entities were required to hire local Chinese employees through employment agents such as FESCO or CIIC. Despite the regulations becoming more flexible and allowing the direct recruitment of locals in many cases, many foreign entities have continued to hire recruits through these employment agencies in order to cut down on administrative management issues, and potentially limit employer liability. Given the continued popularity of these arrangements, the Shanghai Municipal Human Resources and Social Security Bureau, the All-China Federation of Trade Unions, the Shanghai Enterprise Federation and the Shanghai Chamber of Commerce, have just issued guidelines aimed at regulating these practices. The guidelines are aimed at gradually restricting the use of these arrangements for temporary positions as opposed to full-time positions, ensuring equal pay arrangements whether or not an employment agency is used as an intermediary, encouraging admission of the persons employed through agencies into trade unions and employee representative councils. It is likely that the national regulations on the use of employment agencies in any part of China, will look similar to these Shanghai guidelines – the national regulations are expected in 2012.

Anti-Trust/Competition

China and US Collaborate on Competition Law

In late July 2011, China's Ministry of Commerce, National Development and Reform Commission, and the State Administration of Industry and Commerce, signed an MOU with the US Federal Trade Commission and the US Department of Justice, regarding the promotion of better communication and cooperation between China and the USA in dealing with competition and anti-trust issues. Two years in the making, it is hoped that the MOU will lead to greater transparency in the decision making in international M&A competition review cases in particular. China and the US make up two out of the top three busiest competition review jurisdictions in the world, with China dealing with more than 130 major M&A review cases in 2010 alone. Specific areas of cooperation referred to under the MOU, include – exchanging of key information regarding enforcement and policy, the provision of training programs, open discussion of policy and law, and the exchange of industry experience and information.

Dispute Resolution and Enforcement

China's State Immunity Principles Extends to Hong Kong

The Hong Kong Court of Final Appeal was recently asked to look at the principle of sovereign immunity when dealing with the enforcement of two arbitral wards (worth over US$120m) against assets belonging to the Democratic Republic of Congo in Hong Kong. The court held (by a three to two majority) that, "it is for the sovereign state to determine the principle of state immunity which it applies in its relation with other sovereign states." The Court of Final Appeal has referred the issue to Beijing for guidance and it is expected that China's Standing Committee of the National People's Congress will deliver its interpretation of Hong Kong's Basic Law and this issue within the next few days. It is expected that the Standing Committee will confirm that Hong Kong courts must adopt China's doctrine of absolute immunity in dealing with these sorts of cases – this was the view of China's Ministry of Foreign Affairs, which in evidence declared that the principle of absolute state immunity was still alive and well in China, and that it should apply in China's autonomous regions as well.

Criminal Procedure Law Overhauled

China's Standing Committee has commenced finalising a new Criminal Procedure Law. The law was first enacted in 1979 and has not been substantially amended since 1996. Mainland media reports say that for the first time the draft states that it is a citizen's duty to testify about what they know about a case. It also sets up a system to compel witnesses to testify in court and protect witnesses in cases where retribution is feared. Also for the first time, the draft reportedly says that police may be made to testify in court, and witnesses who refuse to give evidence to police or testify in court without an appropriate reason may be detained. It is hoped that the draft will be released for public comment in the near future.

Business News

Auto

Chery Plans African Factory

Chery Automobile has announced plans to open a factory in Kenya. Chinese truck manufacturer, Beiqi Foton (owned by BAIC) announced plans to set up a factory in Kenya recently as well. Chery has said that it is seeking US$50m in funding from the Chinese Government for investing in the Kenyan facility. This would be the 17th overseas facility for Chery.

Ecommerce

Alibaba's Growth Slows

Alibaba recently reported an increase in profits of 28%, but warned that its margins are under pressure due to increased competition. Alibaba operates a number of online shopping sites including alibaba.com, taobao.com, aliexpress.com and others. Yahoo owns 39% of Alibaba. Alibaba has reported that although its number of users actually dropped during the second quarter of this year, it offered additional services to its users making its profits per user actually increase. Alibaba has also signaled that it is on the look out for acquisitions, both within and outside of China.

Tencent Sees Growth Slow

Tencent Holdings, China's largest online games company (with over 30% of the market, according to Analysys International), and owner of the QQ Instant Messaging business, recently reported that net profits rose by 23% year on year – a higher rise was expected, but Tencent has said that increased operating expenses offset the increased revenue over the last 12 months. Tencent has reported that it is looking to aggressively expand through acquisition and strategic investments and has announced that would be buying 15% of software developer Kingsoft for US$114m.

Estee Lauder Set to Expand

Estee Lauder has announced plans to open more stores across China and increase e-commerce channels for its luxury lines. The CEO of Estee Lauder recently stated that he estimated that Chinese consumers spent more than US$1b on various Estee Lauder products during the 2010/2011 fiscal year. Estee Lauder currently sells products in shops in 38 Chinese cities, and this number will increase to 43 by the end of 2011. E-commerce developments are reportedly looking promising, and new channels are expected for Origins and Bobbi Brown brands soon.

Finance

Loans Drop

The People's Bank of China, China's central bank, has reported that RMB loans have fallen sharply over the last month, with July recording the lowest amount of new RMB loans at RMB492.6b (US$77b). This was a decrease of around RMB140b based on June's figures. This in itself was potentially positive for the wider economy, given the Chinese Government has gone to lengths to slow down the Chinese economy, and in particular, property speculation, over the last 6 months – it would appear that China's monetary policy will continue to be of a restrictive nature in general, although indications are being given that a more flexible monetary policy will be provided for the agriculture and affordable-housing sectors.

CBRC Seeks Opinions on Capital Rules

The China Banking Regulatory Commission has commenced seeking opinions from selected firms and individuals, as to its plans to keep the minimum capital adequacy ratio for major banks at 11.5% and raising the ratio for "banks of non-systematic importance" to 10.5%. This change is aimed at ensuring compliance with the Basel III Framework as agreed to by G20 leaders at the end of 2010. Prior to the GFC kicking in, the minimum ratio for Chinese banks was generally 8%.

China Construction Bank Sees Profits Rise by 31%

CCB has reported an increase in profits of 31% in the first half of 2011, on the back of China's monetary policy allowing banks to charge higher interest rates on loans. CCB has also said that it would be opening a banking entity in Moscow soon, and increasing its investment in its insurance unit, CCB Life Insurance. It claims to have reduced bad loans from 1.14% to 1.03% as well. Bank of America owns a 10% stake in CCB.

Materials

New 5 Year Plan for Materials

Chinese news sources are reporting that a 12th Five Year Plan for the "new materials industry" will be released in September. The new materials industry of one of the seven strategic emerging industries in China – the plan is likely to promote China's increased participation in the development of rare earth metals, special metallic functional metals and advanced polymer materials.

Free Trade Agreements

New Zealand's FTA Saves over US$20m in tariffs

New Zealand's Free Trade Agreement with China has saved NZ's meat exporters over US$20m in tariffs, according to a report issued by NZ's meat marketing board. The report says that exports of sheep and beef products totaled NZ$687m in 2010. The China/NZ FTA agreement was signed in 2008, and NZ is currently exploring new FTAs with other Asian powerhouses, such as India.