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Current Legal Developments in China, Myanmar and Cambodia

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In the following newsletter, we would like to inform you about the latest legal developments in Mainland China, Myanmar and Cambodia. The main focus of this newsletter is on recent decisions regarding tax and arbitration law.

China

I. Tax

Special Tax Treatment on Intra-Group Transfers

On 27 May 2015, the State Administration of Taxation (“**SAT**”) issued an Announcement on “Levy and Administration of Enterprise Income Tax on Assets (Equity) Transfer” (Announcement [2015] No. 40, “**Circular 40**”). Circular 40 follows Circular 109 on “Enterprise Income Tax Treatments for Promotion of Enterprise Restructurings” issued in December 2014 jointly by the SAT and the Ministry of Finance. Circular 40 provides further guidance on certain provisions of Circular 109.

Key points of Circular 40 are special tax treatments for intra-group share/asset transfers conducted between either resident enterprises under 100% direct control of and/or directly owned by the same enterprise. The following conditions need to be met:

- If both parties’ original substantial business activities regarding the transferred share/asset have not changed within 12 months after the completion of the transfer, the parties shall submit an according written statement (together with their annual income tax report) following the transfer date.
- If one party’s business activity changes within 12 months after the transfer date and these changes disqualify this party for special tax treatments, the party has to report to the competent tax authorities. The report has to be filed within 30 days after the change of business. The reporting party has to notify the other party in writing. The other party likewise has 30 days to report to the competent tax authorities. Both parties have to amend their tax returns within 60 days of the change.

II. Arbitration

1. Disputes between CIETAC and SHIAC settled [PRC Supreme People’s Court, Decision of 15 July 2015]

a) Background

The China International Economic Trade and Arbitration Commission (“**CIETAC**”) is one of the world’s largest arbitration organisations. In the case of contracts with Chinese parties, the CIETAC is often chosen as the competent arbitration body. The CIETAC’s main office is in Beijing with sub-commissions in Shanghai and Shenzhen.

In 2012, CIETAC Shanghai and CIETAC Shenzhen declared its dissociation from the CIETAC Beijing whereupon the latter declared the CIETAC Shanghai and CIETAC Shenzhen not competent to perform arbitration procedures according to the CIETAC Beijing rules any longer.

As a consequence, two new arbitration bodies came into existence:

- The Shanghai International Arbitration Centre ("**SHIAC**"), previously CIETAC Shanghai Sub-Commission, was established on 11 April 2013;

- The Shenzhen Court of International Arbitration ("**SCIA**"), previously CIETAC South China Sub-Commission, was established on 22 October 2012.

The secession led to problems regarding the validity of arbitration clauses in contracts that opted for CIETAC Shanghai or CIETAC Shenzhen as the competent arbitration body. This, in consequence, led to problems regarding the enforceability of the awards. On 15 July 2015, the Supreme People's Court ("**SPC**") finally decided on a guidance note on how to solve cases, and the note took effect on 17 July 2015.

b) Decision

First scenario:
The arbitration agreement foresees the "CIETAC Shanghai Sub-Commission" or the "CIETAC South China Sub-Commission" as competent tribunal, and the arbitration agreement was signed

- before the former CIETAC Shanghai Sub-Commission was renamed to SHIAC (i.e. before 11 April 2013) or

- before the former CIETAC South China Sub-Commission was renamed to SCIA (i.e. before 22 October 2012).

In this scenario, SHIAC or SCIA, respectively, shall have jurisdiction.

Second scenario:
The arbitration agreement was signed

- after the CIETAC sub-commissions were renamed to SHIAC or SCIA, and

- before the note took effect on 17 July 2015.

CIETAC Beijing shall have jurisdiction over these cases.

Third scenario:
If the arbitration agreement was signed after the note took effect on 17 July 2015, CIETAC Beijing shall have jurisdiction over these arbitration cases.

c) Impacts

This uncertainty led to odd results, for example two opposing awards in the same matter. The SPC's guidelines finally settled the dispute. However, a problem remains if two arbitration awards have been rendered in the same issue by different arbitration institutions. The SPC note does not give any guidance for this scenario.

III. Advertisement Law

China's amended Advertising Law

The amended PRC Advertising Law came into force on 1 September 2015, following 20 years of no changes to the existing advertising law. Given the economic changes of the last 20 years, the amendment was overdue. One of the new legislation's objectives is to reduce existing grey areas.

The law of 1995 stipulates that advertisements must

- be true and must not contain false or misleading information;
- act according to the rules of fairness and trustworthiness;
- not be harmful to the physical health of the people of China and not impair the physical and mental health of minors or disabled persons;

- only contain data, statistics and findings that are factually true;
- not discredit the product or services of third parties;
- safeguard the dignity and interest of the state and be compliant with social morality and professional ethics.

Specific restrictions apply regarding advertisement of pharmaceutical and medical devices, agricultural chemicals, tobacco and health food.

The amendment's key provisions are as follows:

- It broadens the definition of false advertising by expressly prohibiting both false and misleading advertising contents and gives specific examples as to what is deemed misleading;

- It introduces additional regulations of advertising aimed at children, for example, a ban on advertising in schools and kindergartens;

- Without prior consent, advertisement must not be sent to home addresses; other forms of direct marketing are also prohibited unless consented to by an individual, e.g. normal usages of the internet must not be inferred by advertisement (pop-ups must closable with one click);

- Electronic advertisement must contain the sender's true identity, contact information, and information on how to unsubscribe;

- Celebrities or other people endorsing a product or service may be held liable if they know or ought to know that the advertisement amounts to false advertising. Also, the amendment imposes a ban on further engaging endorsers who were held liable of endorsing false advertising for a 3-year period;

- It contains restrictions on advertising healthcare, food and breast milk substitutes;

- It prohibits the advertising of healthcare food, pharmaceutical products, medical equipment and the like under the disguise of "health information" programmes or columns on radio or TV stations, printed media or the internet;

- It introduces specific requirements when promoting investment products and tobacco products.

The sanctions are wider ranging and include fines up to RMB 1,000,000 and the imposition of criminal liability and revocation of business licenses for serious instances of infringement.

China seeks to send a signal that it is keen to strengthen consumer protection by clamping down on undesirable advertising activities. As the new law has a wide scope, it is to be expected that further implementing measures or interpretations may be issued in the future. For brand owners, it is advisable to ensure compliance with the new law.

C. Myanmar

New Minimum Wage Law

a) Background

Myanmar is undergoing a period of rapid change and in particular, Myanmar's legal framework has been significantly improved in recent years, but a lot of challenges remain. Recently, a new minimum wage rate was proposed, and the Ministry of Labour published Notification 84/2915, introducing increased severance payments for the termination of a labour contract by the employer, which came into effect on 3 July 2015.

b) The Minimum Wage Law

In 2013, a Minimum Wage Law was enacted. The National Committee was authorised to determine the rates of minimum wage for different industries taking into consideration the specific criteria in the determination of the rate provided by the Law.

An extensive debate regarding the actual minimum wage rates ensued and the garment industry threatened to close their factories if the minimum wage was set too high. On 29 June 2015, the National Minimum Wage Committee of Myanmar released a notification proposing the following rules:

- A minimum wage of MMK 3,600 (ca. EUR 2.50) for an eight hour day;
- MMK 450 (ca. EUR 0.30) as basic hourly wage for all workers across the country;
- Different rates shall apply to a training and probationary period of up to three months each, during which only 50% and 75%, respectively, of the foresaid amounts has to be paid;
- Small businesses with less than 15 workers and businesses qualified as family run-businesses are to be exempted from the regulation.

The Minimum Wage Law stipulated a consultation period of sixty days after the rate had been released. The public had two weeks to file objections. By Notification No. 2/2015 (Announcement of Stipulation of Minimum Wage) dated 28 August 2015, the Minimum Wage Law entered into force.

D. Cambodia

1. Cambodia's current trademark registration procedures

Cambodia joined the "Madrid Protocol for the International Registration of Marks" on 5 March 2015, thus becoming its 95th member. Its accession entered into force on 5 June 2015.

Currently, 55 countries are party to the Madrid Agreement, and 96 countries are party to the Madrid Protocol, with Cambodia being the fourth ASEAN country to join the Madrid Protocol, following Vietnam, Singapore and the Philippines.

The "Madrid System" is the primary international system for facilitating the registration of trademarks in multiple jurisdictions around the world. Its legal basis is a multilateral treaty (Madrid Agreement concerning the International Registration of Marks of 1891), as well as the Protocol Relating to the Madrid Agreement (1989).

The Madrid System provides a simple way for the international registration of trademarks by one application that can cover more than one country.

2. The first patent granted in Cambodia

In 2003, Cambodia, as part of its WTO obligations introduced a patent law but was not able to process patent applications due to a lack of internal mechanisms required for processing.

However, recently the first successful Cambodian patent was granted.

We hope that the information provided in this newsletter was helpful for you.
If you have any further questions please do not hesitate to contact us.

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