Newsletter Nr. 190 (EN)

Current Legal Development in Hong Kong and China

January 2015

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I. Arbitration

1. New CIETAC-Rules

The „China International Economic and Trade Arbitration Commission" (**CIETAC**) in China has recently announced a revision to its arbitration rules, which came into effect on 1 January 2015. Based upon these new rules structural changes, new procedural reforms (e.g. an emergency arbitration) and special provisions to the **CIETAC Hong Kong Arbitration Centre** are introduced.

a) Procedural Reforms

Part of the new rules is a new emergency arbitration procedure. Comparable to the ICC arbitration rules, the procedure allows parties to apply for an emergency arbitrator to grant urgent relief. Similar to the ICC rules, the new emergency procedure can be expressly excluded in the agreement (opt-out-system). If the parties agree on the application of the new rules as a whole, the possibility of the emergency arbitration is included by default.

Besides the emergency arbitration the possibility for parties to apply for a single arbitration under multiple contracts is introduced in Article 14, if the contracts are master and accessory contracts or are of the same nature and between the same parties, or if the dispute arises from the same transaction or the same series of transactions, or if the arbitration agreements of those contracts are the same or comparable.

Furthermore new provisions are introduced under Article 18 for third parties to join an existing arbitration. A party may file a request with CIETAC that a third party joins the arbitration proceedings, if the requesting party can establish a prima facie case that the third party is also bound by the arbitration agreement.

b) CIETAC Hong Kong

A new chapter of special provisions for arbitration in Hong Kong is introduced, where CIETAC set up its Hong Kong Arbitration Centre in 2012. There exist some special regulations for arbitration proceedings in Hong Kong, which are different to the domestic proceedings in Mainland China.

The provisions expressly state that, unless otherwise agreed between the parties, the law applicable to arbitral proceedings with CIETAC Hong Kong shall be the arbitration law of Hong Kong (Chapter VI) and that the arbitral award shall be a Hong Kong award. The Hong Kong specific provisions are more aligned with international practice than the generally applicable provisions. For example, the requirements for the legal existence of an arbitration clause are aligned with the international practice and much lower than the one in Mainland China.

Pursuant to Article 76, the parties have more flexibility in nominating arbitrators not listed in CIETAC's Panel of Arbitrators.

The new rules in the CIETAC-Guidelines are a significant step in CIETAC's continuing efforts toward internationalisation and could help CIETAC

Hong Kong to become a further alternative to CIETAC China and even to HKIAC.

2. *New Jurisdiction about the relation claim – arbitration*

In the recent case of *Schindler Lifts (Hong Kong) Ltd vs Sui Chong Construction and Engineering Co., Ltd.*, the competent District Court held that by participating in a Small Claims Tribunal proceedings (where claims up to an amount of HK$ 50.000 (Euro 5.000) can be enforced), a party does not waive its right to arbitration under certain circumstances. The court set out three requirements, which according to Article 8 of the UNCRITAL Model Law must be complied with, and which were assumed by Section 20 of the Hong Kong Arbitration Ordinance (Cap 609):

1. A party has filed the request for the referral to arbitration not later than when submitting its first statement on the substance and merits of the dispute,
2. the court finds that the arbitration agreement is not null and void, and
3. the arbitration agreement is not inoperative or incapable of being performed.

II. Trade Marks

1. *Hong Kong's accession to the Madrid Protocol*

On 11 November 2014, the Commerce and Economic Development Bureau and the Intellectual Property Department of the Hong Kong Government jointly issued a consultation paper on the proposed application of the Protocol relating to the Madrid Agreement concerning the International Registration of Marks ("**Madrid Protocol**")

a) The Madrid Protocol

The Madrid System is the primary international system for facilitating the registration of trademarks in multiple jurisdictions around the world. Its legal basis is the 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 Protocol system provides a simple way for the international registration of trademarks by one application that can cover more than one country.
Currently there are 56 countries party of the Madrid Agreement and 92 countries are party to the Madrid Protocol, e.g. Germany, Austria, Switzerland, Mainland China, USA, Australia, Japan, South Korea and Singapore. Further ASEAN-Members are planning to join the Protocol in 2015.

To receive the protection of the Madrid Protocol a company has to fulfil the following procedure:

1. Registration of the national trademark at the competent national trademark office,
2. Application for the international registration at the national trademark office with statement of the extended countries,
3. Forwarding of the Application from the national trademark office to the „World Intellectual Property Organization" (**WIPO**),
4. Publishing of the trademark through WIPO in the trademark magazine "Les Marques internationals", and
5. Forwarding the application from WIPO to the other national trademark offices for checking if there are relative or absolute protective obstacles.

If there are no obstacles in the other countries, the international trademark is registered and provides a mechanism for obtaining trademark protection in many countries around the world which is more effective than seeking protection separately in each individual country or jurisdiction of interest.

b) Impacts

The main advantage of the Madrid Protocol is that companies are receiving a competitive and efficient one-stop service for registering their trademarks abroad.

With the introduction of the Madrid Protocol to Hong Kong, applicants will be able to file applications to register their trademarks in the jurisdictions of multiple member countries of the Madrid Protocol by a single filing and registration process. Foreign companies will also have the option to expand the territorial protection of their marks by designating Hong Kong.

Statistics show a steady increase in the number of trademark applications filed with the Hong Kong Trademarks Registry in recent years, with a noticeable jump by 50 % within 4 years (2009-2013) in both the total number of applications and the number of applications filed by overseas applicants.

If Hong Kong joins the Madrid Protocol, it may take three to four years until implementation of the Madrid System in Hong Kong. However, the publishing of the consultation paper is an important first step to the implementation and a potential landmark change of the trademark regime in Hong Kong.

2. New Jurisdiction on Intellectual Property in China

The Guangzhou Intermediate People's Court recently adjudged in a case of the French company SEB SA which sued two Chinese companies for compensation for a patent infringement in the total amount of RMB 470,000 (EUR 60,000).

In 2009, SEB applied for the registration of an invention patent for a "pressure-cooking utensil" in China. The application was published in 2010 and approved in 2013. In 2012 two companies in Zhejiung province started producing and selling pressure cookers that incorporated SEB's invention.
With the judgement SEB received a monetary compensation for the patent infringement. For the period preceding the grant of the patent the court ordered further "reasonable fees" for exploiting the invention during the period between the publication and grant of the patent. This case shows that an efficient trademark protection is possible in China, if the relevant trademarks/patents are registered.

III. Foreign Investments in China

On 4 November 2014, the Chinese Government released the latest update to its „Catalogue of the Guidance of Foreign Investment Industries", outlining which industries shall be encouraged, restricted or prohibited for foreign investment. Industries which are not listed in the Catalogue are unrestrictedly permitted.

c) Encouraged Sectors

Inclusion on the list of encouraged industries is often coupled with the easing of restrictions on foreign investment, such as the ability to operate as a Wholly Foreign-Owned Enterprise („**WFOE**") rather than being restricted to a Sino-foreign Joint Venture ("**JV**").

The revised Catalogue permits WFOEs in the following industries:

- Oil field exploration and development,
- Automobile parts,
- Aircraft engines and components,
- Vessel engines and components,
- Equipment manufacturing for air traffic control systems,
- Accounting and auditing.

Meanwhile, foreign investors will soon be allowed to act as the controlling shareholder in JVs engaged in the following industries:

- Manufacturing of ground-based and water-based aircraft,
- Design and manufacture of vessel cabin machinery,
- Design and manufacture of civil satellites,
- Construction, maintenance and operation of railways,
- International sea transportation,
- Operation of performance venues.

The allowed percentage of the foreign company in the JV still depends on the particular sector (below 50%, 50%, or above 50%).
Furthermore the new Catalogue also added a few new sectors, including:

- Industrial design,
- Architecture design,
- Senior care institutions,
- Clean coal technology.

Sectors categorised as "encouraged" may enjoy exemption of tariff and import VAT for imported equipment and will be subject to a lower level of government approval.

d) Restricted Sectors

Another highlight of the new Catalogue is the reduction in the number of restricted sectors from 79 to 35. Various industries have been removed from the restricted category and the caps on foreign ownership are lifted for some of those industries, including among others:

- E-Commerce,
- Manufacturing of various chemical raw materials and chemical products,
- Manufacturing of certain pharmaceuticals,
- Development of large tracts of land; construction and operation of high-end hotels and high-end office buildings and international exhibition centres,
- Construction and operation of large theme parks,
- Finance (e.g. brokering agencies, trust companies, insurance brokerages, etc.),
- Securities companies.

Some industries that have been waiting for a long time to be fully open to foreign investors remain subject to stringent restrictions and foreign ownership is still capped at a certain percentage.

e) Prohibited Sectors

The new Catalogue also shortened the list of prohibited sectors and opened more industries to foreign investors. Sectors that have been closed to foreign investors for a long time, such as processing of green tea and other certain teas with Chinese traditional techniques, are now open to foreign investment.

The new guidelines also introduce several new prohibitions on foreign investment, including:

- Genetically modified plant seeds,
- Processing of petroleum and coking,
- Processing and production of nuclear fuel,
- Sale of tobacco.

IV. Shanghai - Hong Kong Stock Connect

On 17 November 2014, the much anticipated cross-border stock trading pilot program, the Shanghai - Hong Kong Stock Connect (**Stock Connect**), was officially launched. It is now possible for Hong Kong investors to buy and sell designated stocks listed on the Shanghai Stock Exchange (**SSE**) through Hong Kong brokers ("northbound trading link") which were limited to Chinese investors before ("A-shares"). Chinese mainland investors can simultaneously buy and sell designated stocks listed on the Hong Kong Exchanges and Clearing Ltd. (**HKEx**) through Chinese securities companies („southbound trading link"). Currently, almost 600 companies

traded on the SSE and nearly 300 companies trading on the HKEx have been approved for the pilot program.

V. Guidelines for the new Competition Ordinance in Hong Kong

On 9 October 2014, Hong Kong's Competition Commission published a suite of six draft guidelines which offer guidance on how the Commission will interpret and enforce the new Competition Ordinance, which will be in force in May 2015.

The first three guidelines relate to substantive rules, whilst the other three relate to procedural/enforcement rules.

According to the guidelines the First Conduct Rule will apply to vertical agreements and the commission will consider resale price maintenance ("**RPM**") as serious anti-competitive conduct. Certain practices such as monitoring customers' resale prices or marking the resale price on a product may also be treated as RPM.

The guidelines confirm that most forms of vertical agreements will only give rise to competition concerns where one or both parties have market power, although there is no guidance to suggest what level of market share might constitute market power in these circumstances.

The Second Conduct Rule applies only to undertakings which have "substantial market power". The guidelines do not contain any market share thresholds to suggest when an undertaking might be treated as having substantial market power.

The guidelines underline the importance for companies of assessing the economic and legal context in which they operate. Agreements which enhance overall economic efficiency are exempt from the First Conduct Rule, although the Guidelines make it clear that this exemption should be treated as a defence, with the burden of proving the efficiency falling on the undertaking.

VI. Labour Law

3. New statutory paternity leave in Hong Kong

On 24 December 2014, the Employment Ordinance („**EO**") was amended to introduce a three days paid paternity leave for working fathers. This statutory paternity leave will come into operation on 27 February 2015.
A male employee will be entitled to paternity leave in respect of the birth of a child, if he is the child's father, he has been employed under a "continuous contract" and has complied with the specified notification requirements to his employer. The three days of paternity leave can be taken consecutively or separately in the period beginning four weeks before the expected date of delivery of the child and ending ten weeks after the actual birth of the child. The rate of paternity leave pay is 80% of the average wage of the employee.

4. Labour Tribunal's exclusive jurisdiction

A recent Hong Kong Case (*Lee Man Yee Norman vs. International Contractors Supply Limited*) has highlighted the important point that the Labour Tribunal's exclusive jurisdiction does not extend to dealing with matters which arise outside of an employee's contract of employment.

An employer and an employee agreed to pay the employee a commission, if the employee successfully obtains projects for the employer. They signed a commission agreement letter. After conclusion of a business transaction the employee issued four invoices to his employer which were never paid.

The employee claimed the amount before the Labour Tribunal but the tribunal held that the defendant had to show that it was plain and obvious that the claim is in the exclusive jurisdiction of the Tribunal. Due to the fact that it was no breach of a contract

of employment the claim was not within the Labour Tribunals' exclusive jurisdiction.

5. *Increasing of the Statutory Minimum Wage*

On 01 Mai 2015 the Statutory Minimum Wage will be increased from HK$ 30 (EUR 3.20) to HK$ 32.5 (EUR 3.50) per hour.
To reflect the change to the minimum wage rate, the current HK$ 12,300 (EUR 1,330) monthly cap (above which it is not necessary to keep a written record of hours worked) will be increased to HK$ 13,300 (EUR 1.410) per month.

We believe that the information provided was helpful for you.
If you have any further questions, please do not hesitate to contact:

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