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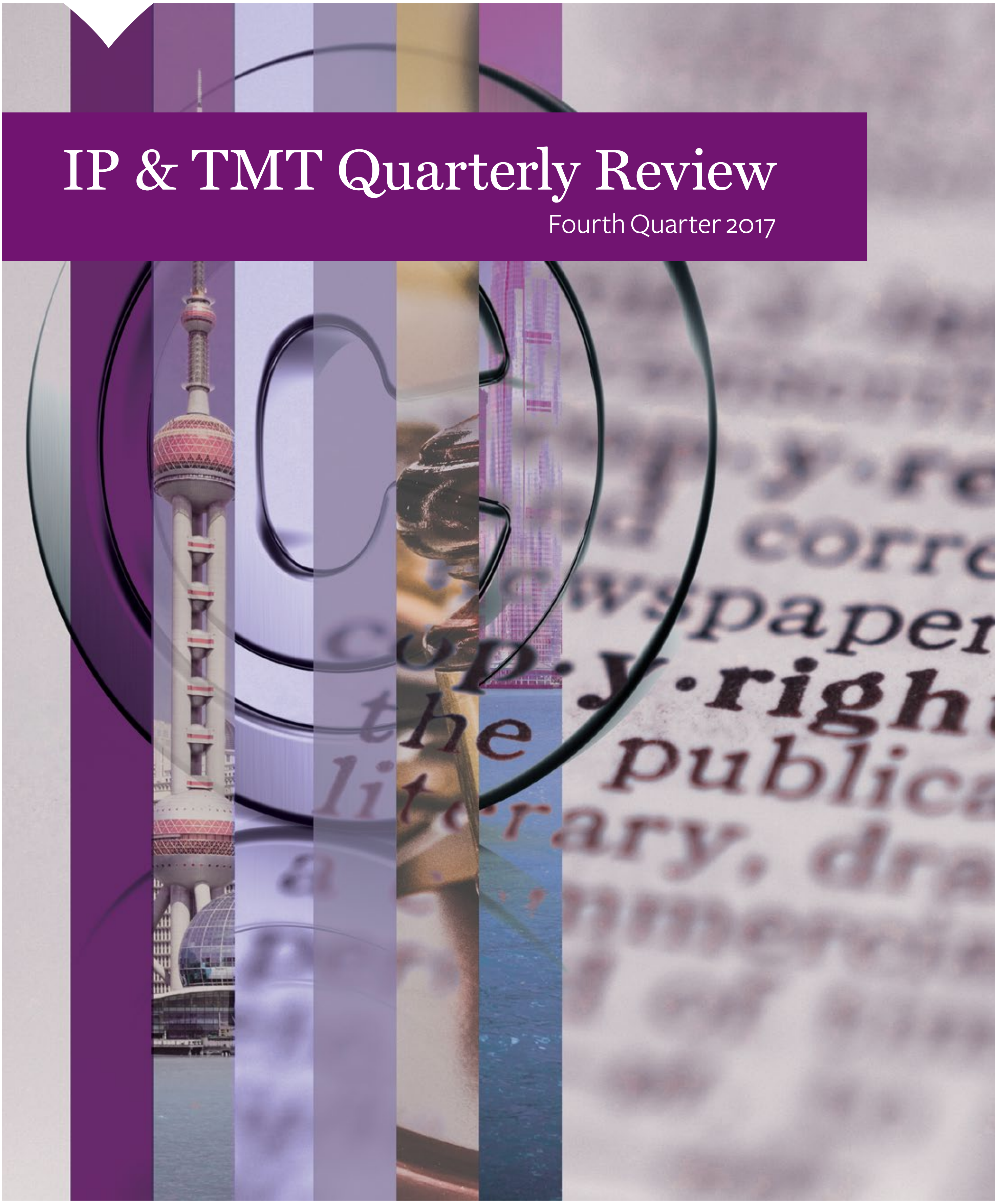

IP & TMT Quarterly Review

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Trade Marks

By Rosita Li, Partner, Mayer Brown JSM, Hong Kong
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China Case Update: TAG HEUER vs TAG HEUER

After a 5 year opposition battle starting with the China Trademark Office and ending at the final appeal stage, LVMH SWISS MANUFACTURES SA ("**LVMH**") finally obtained a favourable ruling from the Beijing Municipal High People's Court ("**the High Court**") on 30 October 2017.

The High Court allowed LVMH's appeal against the lower court's decision to permit the application filed by an unrelated third party to register the mark "TAG HEUER" in Class 35 covering import-export services and purchasing and promotion services for others. The High Court overturned the Beijing Intermediate People Court's decision which confirmed the China Trademark Review and Adjudication Board's ("**the TRAB**") and the China Trademark Office's ("**the CTMO**") decisions rejecting the opposition and allowing the application. In its decision, the High Court held that LVMH's mark "TAG HEUER & DEVICE" had attained the well-known mark status in respect of its class 14 goods i.e. clocks, watches, timing devices, etc. and was entitled to prevent others from registering a mark which is the same as the well-known mark in Class 35, although the services were not related to the Class 14 goods.

The Facts

TAG Heuer S.A. is a Swiss luxury manufacturing company that designs, manufactures and markets watches under the mark "TAG HEUER". The name "TAG Heuer" is a combination of TAG (acronym for "Techniques d'Avant Garde", i.e. Avant Garde Techniques) and the surname of its founder, Edouard Heuer. In 1999, it became a subsidiary of the French luxury goods conglomerate LVMH. LVMH is the proprietor of China trade mark registration "TAG HEUER & DEVICE" under No. 268951 which was registered in 1986 in respect of watches and clocks in Class 14.

The subject application "TAG HEUER" was filed by Hin Yang Trade Co., Ltd. ("**the Original Applicant**") under Application No. 7477778 in 2009 in respect of import-export services and purchasing and promotion services for others in Class 35. It was subsequently assigned to HEGIL BOOKSTORE LIMITED ("**the Applicant**").

Previous Decisions

LVMH filed an opposition against the trade mark application with the CTMO. The opposition was rejected in 2012. LVMH then filed a review with the TRAB against the refusal and submitted further evidence in support of the review. In 2014, the TRAB maintained the CTMO's refusal and allowed the application to be registered on the following grounds:-

1. The applied-for services in Class 35 including import-export agency were generally not considered similar to the registered goods of clocks and watches in Class 14, thus the two marks were not considered similar under the PRC Trademark Law.
2. The evidence submitted by LVMH including a list of its shops in China and its China advertising expenditures were not sufficient to establish well-known trade mark status for the mark "TAG HEUER & DEVICE".
3. LVMH's claim that the applied-for mark should not be allowed for registration on the basis that it would adversely affect socialist morale or cause bad influences under Article 10(1)(8) of the Trademark Law was rejected. The TRAB held that the registration of the mark would not cause negative impact on public interest or public order.

LVMH was naturally dissatisfied with the TRAB's ruling and filed an administrative appeal with the Beijing Intermediate People's Court ("**the Intermediate Court**"). During the appeal, LVMH submitted further substantial supporting evidence which included purchase orders and invoices for TAG HEUER products and photos of promotion campaigns in China, etc. Nevertheless, the Intermediate Court maintained that the co-existence of the two marks in respect of dissimilar goods would not cause confusion to the public. As regards LVMH's request for well-known trade mark recognition, the Intermediate Court considered that the "TAG HEUER & DEVICE" mark had attained a relatively high reputation. However, as there would be no confusion, damage to LVMH was not very likely. Further, as the applied-for mark "TAG HEUER" did not carry any negative connotation, there would not be any bad influence to the public. The Intermediate Court therefore confirmed the CTMO's and TRAB's decisions.

The High Court Decision

LVMH subsequently filed an appeal against the Intermediate Court's decision to the High Court on the basis that the applied-for services and the registered goods were associated, that its mark was well-known to the Chinese public and that the applied-for mark was a copy of the LVMH mark. LVMH also argued that the Applicant/the Original Applicant were obviously acting in bad faith because they had registered numerous third parties' marks. To support this, LVMH also submitted further bad faith evidence which included internet printouts showing the Applicant's registrations of third parties' marks, including "Chopard".

The High Court considered the evidence in support of bad faith but ruled that they were inadmissible since they were merely printouts but not originals, or that they were simply irrelevant. It also confirmed the lower court's ruling that Article 10(1)(8) was not applicable to the present case.

Regarding LVMH's request for well-known trade mark recognition, the High Court considered the evidence submitted before the TRAB and the Intermediate Court and noted that the TAG HEUER brand entered the Chinese market in 2002, with retail points in at least 8 provinces and substantial advertising expenditures. The advertising efforts were supported by search reports from the National Library showing that the TAG HEUER brand had featured on numerous Chinese publications. The High Court therefore adjudged the "TAG HEUER & DEVICE" mark to be well-known in the registered goods in Class 14 including clocks and watches.

CHINA

Trade Marks Cont'd

The High Court went on to say that the word part of the two marks, namely, "TAG HEUER", were identical. As the composition of "TAG" and "HEUER" was not commonly used in the foreign language, it was of relatively high distinctiveness and the application could not be said to have been made in good faith. The High Court also stated that the target consumers of watches were the general public; thus, there was a certain degree of overlapping of consumers with those of the applied-for services. As such, the public would associate the two marks which would weaken the association between the registered mark with the registered goods and affect LVMH's legitimate interests.

Of particular interest was that the High Court noted that the Applicant would not be able to rely on the "bona fide purchaser" doctrine to claim that it was entitled to enjoy ownership over the applied-for mark since it acquired rights from the Original Applicant in good faith. The High Court further commented that the bona fide purchaser argument was applicable to registrations only. It was therefore inapplicable in the present case as the mark had yet to be registered.

The High Court ruled that it would revoke the decisions made by the Intermediate Court and the TRAB, and remit the opposition to be re-considered by the CTMO. The CTMO is likely to adopt the High Court's reasoning and refuse the application for "TAG HEUER" in due course.

Takeaway

The decision of the High Court in this opposition review is indeed encouraging for brand owners who have long faced the issue of bad faith applications/registrations by third parties especially in Class 35. Class 35 services cover import-export agency and promotion services which have always been a target for bad faith registrants to prevent brand owners from selling and/or promoting their goods in China and to extort financial compensation. This shows that the court is more willing to find in favour of trade mark owners even though the services may generally be considered to be different from the goods of the cited mark if there is sufficient evidence to show bad faith on the part of the applicant and the fame of the cited mark.

This is yet another reminder that brand owners should obtain pre-emptive registrations in other classes which may be of business interest to them, in particular in Class 35.

Brand owners and their legal representatives should also ensure that they submit all relevant evidence in support of their case which complies with China's evidential requirements (including the requirements of originals/notarised evidence) and be persistent to achieve the best possible outcome. ◆

Trade Marks

By Gabriela Kennedy, Partner, Mayer Brown JSM, Hong Kong
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Jurisdiction Jeopardy: What Happens When Summonses are Filed in the Wrong Court?

Introduction

In a recent Hong Kong District Court judgement, the Judge had to make a call on the court's jurisdiction to hear a trade mark infringement case. The case of *Chi Fung Engineering Company v Chi Fung Engineering Limited, Yong Qiu Engineering Company, Yong Qiu Engineering Limited and Tang Wai Hung* (*DCCJ 1697/2016*) put into question the District Court's jurisdiction over trade mark infringement violations. An application for a default judgement was taken out by the Plaintiff against the fourth defendant ("**the 4th Defendant**") as it did not respond to the amended writ of summons or file a defence on time.

Background

The case came about when the Plaintiff filed a claim for passing off and trade mark infringement. The Plaintiff claimed that its registered trade mark was infringed upon by the defendants. The 4th Defendant failed to respond to the amended writ of summons and file a defence within the allotted timeframe. The Plaintiff then filed an application for default judgement. Questions were raised about the District Court's jurisdiction over the case which meant the Judge had to first determine whether or not the District Court was the right place for the Plaintiff to file their application.

Judgement

The District Court had jurisdiction to hear the passing off claim given that it is a common law tort and also because the claim did not exceed HKD$1,000,000, as per the District Court Ordinance (Cap. 336) ("**the DCO**"). There was, however, concern regarding the jurisdiction of the trade mark infringement claim. The Plaintiff failed to include a plea in its application stating the relief it sought fell within the jurisdiction of the

Trade Marks Cont'd

District Court. This is an important requirement for all writs and originating summonses which is set out in Practice Direction 27[1]. In any event , the DCO does not confer jurisdiction on the District Court to hear a case arising out of trade mark infringement matters. This was the first strike against the District Court having jurisdiction over the claim.

The Trade Marks Ordinance (Cap. 559) ("**the TMO**") was also considered by the Judge when deciding the issue of jurisdiction. The TMO does not give jurisdiction over trade mark cases to the District Court, but rather to the Court of First Instance, and even though the TMO does not expressly say so, the Judge determined that this jurisdiction is exclusive, leaving aside the power and jurisdiction of the Registrar of Trade Marks. This was the second strike against the District Court having jurisdiction over the claim. The Judge also pointed out that following a review of case law, none had been found where trade mark cases had been handled by the District Court[2]. This conclusion was the third and final strike.

The Judge determined that the Plaintiff had wrongly filed its application for a default judgement and the District Court did not have jurisdiction over the matter.

The consequences of the wrong filing were far from simple, and went beyond just going through the process to re-file the claim in the proper court. The Plaintiff was required to withdraw its summons until the application was transferred, and also to pay the 4th Defendant's cost for the summons.

Conclusion

The misfiling could have been avoided. The TMO explicitly makes reference to the Court of First Instance[3] and the Plaintiff's solicitors clearly failed to spot this. By the time the Judge had decided the jurisdiction of the trade mark claim, both sides had incurred legal costs. In the end, the Plaintiff had to pay the very party it was suing - because it was the one that had wrongly filed the claim. ◆

1 Paragraph 4
2 The Judge noticed one exception, a case that had been commenced in the High Court, and which was then transferred to the District Court with no discussion of jurisdiction subsequently highlighted or discussed by the parties
3 Under Section 2 of the Trade Marks Ordinance, "court" means the Court of First Instance.

Trade Marks and Patents

By Benjamin Choi, Partner, Mayer Brown JSM, Hong Kong
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Madrid Protocol and "Original Grant Patent" – An Update

The Hong Kong Government is keen to see the implementation of the International System under the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks ("**Madrid Protocol**") as well as introduction of a new patent system in Hong Kong as evidenced by the fact that the Chief Executive referenced these developments in her address at the recent Business of IP Asia Forum[4].

A huge amount of resources have been invested by various sectors including the Intellectual Property Department ("**IPD**"), IP industry organizations (represented by some of the leading IP practitioners in Hong Kong) and stakeholders (owners and beneficiaries of IP rights) throughout the proposal, consultation and review process. In this article, we look at recent developments in relation to these two major changes to the IP landscape in Hong Kong.

Joining Madrid – Soon or not so Soon?

The Madrid Protocol is an international agreement to facilitate registration and management of trade marks in multiple countries/jurisdictions under one registration. The Madrid Protocol was first adopted in 1989, and Indonesia will become its 100th member from 2 January 2018. The Madrid system for international registration of trade marks ("**Madrid System**")[5] is administered by the International Bureau ("**IB**") of the World Intellectual Property Organization ("**WIPO**").

The applicant of an international application must have a basic registration of the mark in the Office of Origin to be relied on as the basis of the international application. The international application can

4 Held in Hong Kong on 7 and 8 December 2017

5 The Madrid System is governed by two international treaties: the Madrid Agreement Concerning the International Registration of Marks and Madrid Protocol

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designate one or more Madrid Protocol contracting parties. Substantive examination of trade marks under the Madrid Protocol will be handled by the trade mark office of each designated contracting party ("**Designated Office**") in accordance with the local laws and procedures. If no refusal is notified by the Designated Office to the IB, the protection of the mark in each designated contracting party will be granted and recorded in both the Madrid System and the local trade mark register.

Joining the Madrid Protocol will no doubt enhance the credibility of Hong Kong's trade mark regime, help establish Hong Kong as an international IP trading hub and reinforce Hong Kong's image as an international city and a knowledge-based economy.

STAGE 1 - CONSULTATION

In November 2014, the Commerce and Economic Development Bureau and the IPD jointly issued a consultation paper on the proposed application of the Madrid Protocol in Hong Kong to gather views on the benefits, implications and implementation from local stakeholders. Key contributors included trade mark practitioners who sent in various submissions. In general, the majority view was supportive of the proposal but some concerns were raised as well. From the perspective of trade mark owners, the Madrid System provides an additional option to manage trade mark portfolios at reduced costs for registration, renewal and post registration amendments. Local businesses would be able to extend trade mark protection to other jurisdictions and foreign companies may extend the protection of their trade marks to cover Hong Kong in light of the lower costs of registration. Some of the concerns raised were that the Madrid System will not allow: 1) an applicant based in Hong Kong to extend a trade mark designation to China; and 2) conversely, an applicant based in China to extend a trade mark designation to Hong Kong, but it is possible to extend designations in both China and Hong Kong if the applicant is based in any other contracting state. This does not seem to better or sufficiently serve the interests of Hong Kong SMEs having their cross border operations in China and vice versa.

STAGE 2 –UPDATES SINCE THE CONSULTATION AND INTERIM PROCESSES WITHIN THE GOVERNMENT

- There have been a number of updates since the consultation and interim processes were carried out within various Government bodies:
- The Working Group on IP Trading recommended pursuing the application of Madrid Protocol;
- The Consultation was reported to LegCo Panel on Commerce and Industry in May 2015;
- Discussions with Central People's Government and WIPO were held to iron out arrangements for implementation of Madrid Protocol;
- Government put forward a proposal to adopt the Madrid System in Hong Kong in January 2017; and
- The IPD held briefing sessions to stakeholders to update them on the Government's decision in January 2017

STAGE 3 – ONGOING LEGISLATIVE WORK AND DESIGN OF NEW IT SYSTEM

The Trade Marks Ordinance (Cap. 559) will be substantially revamped and expanded to reflect all the changes. The IPD intends to take this opportunity to consider other reviews of the law to bring other provisions in the trade mark law up-to-date. Other issues that affect the implementation of the Madrid Protocol in Hong Kong include the adoption of supporting IT systems, online Trade Marks Register, Work Manual, manpower allocation and training. All this will come under the remit of the IPD. It is envisaged the drafting of the Trade Marks (Amendment) Bill will be completed in early 2018 and scheduled for first readings before the Legislative Council by June 2018. The IPD will hold further briefing sessions for practitioners in the near future to update them on on progress.

After the new trade mark law is passed, the IPD has set aside 18-24 months for procurement of the IT system, manpower allocation and training, preparation of guidance notes and manuals. One administrative step that needs to be undertaken is for the Central People's Government to endorse and declare the official accession of Hong Kong to the Madrid Protocol.

STAGE 4 – IMPLEMENTATION AND LAUNCH

The IPD's published time line indicates 2020.

"Original Grant Patent"

WHAT DO WE HAVE NOW?

Any invention which is new, involves an inventive step and is susceptible to industrial application can be patented in Hong Kong. There are currently two types (or tiers) of patents which may be applied for and granted in Hong Kong under the Patents Ordinance (Cap. 514): standard patents and short-term patents.

Standard patents (20 years maximum validity) are granted in Hong Kong by way of a re-registration system, meaning the patents must be granted in one of the designated patent offices (China, UK or Europe) before they can be re-registered as standard patents in Hong Kong. The Patents Registry only conducts formality checks on the documents and information filed to ensure the particulars as entered are in order. It is presumed that the patent applied for re-registration in Hong Kong, which is granted in China, UK or Europe, has satisfied the registration requirements such as being novel, involving an inventive step and is susceptible to industrial application. The Patents Registry does not conduct substantive examination on patentability of a standard patent separately.

Short-term patents (8 years maximum validity) are granted in Hong Kong after a formality check of the documents and information filed (including a prior art report). The Patents Registry does not conduct substantive examination on patentability of a short-term patent either. Short-term patents are generally more exposed to being challenged on their validity.

WHAT WILL WE HAVE SOON?

In June 2016, the Hong Kong Legislative Council passed the Patents (Amendment) Bill to amend the existing Patents Ordinance to introduce the "Original Grant Patent" ("OGP") in the patent registration system. The current "re-registration" system will continue to be available after OGP is introduced (and implemented). The OGP system gives applicants an alternative option to file applications to register standard patents directly in Hong Kong. The new law will also introduce the feature of substantive examination on short-term patents.

The current patent re-registration system has been operating in Hong Kong for almost two decades. Through periodic conferences and seminars held both outside and in Hong Kong, the IPD has been keeping the public updated on the progress of implementation of the new patent system. It has also sponsored courses and workshops organized by the Hong Kong Productivity Council and local chambers of commerce to provide updates.

The IPD has set up a dedicated Patents Team to handle all aspects of legislative and technical changes as well as preparation and support in anticipation of the implementation of the OGP system. The target kick-off date is mid- 2019.

Work in Progress

In anticipation of implementing the OGP system in Hong Kong, the IPD is undertaking the following:

- Proposing amendments to the Patents (General) Rules (Cap 514C) to map out procedures for applications of standard patents under the OGP system and substantive examination of short-term patents;
- Devising guidelines and workflows on how patent cases are examined under the new system;
- Expanding the Patents Registry's capacity to take on substantive examination, including recruiting patent examiners to examine cases under the new system;

Trade Marks and Patents Cont'd

- Setting up a new electronic system for internal use by the Registry, and external use by the general public and practitioners;
- Engaging stakeholders for updates and comments; and
- Furthering promotion of the new patent system.

The Patents Registry has yet to decide or release information on the fees of an OGP application. Currently, the Innovation and Technology Commission has been administering a Patent Application Grant (subsidy) which provides a maximum of 90% sponsorship of the application cost, subject to a cap of $250,000 per application, to local companies and individuals for first-time patent applications. ◆

Intellectual Property

By Amita Haylock, Senior Associate, Mayer Brown JSM, Hong Kong
Maggie Lee, Associate, Mayer Brown JSM, Hong Kong

2017 Provisions on Jurisdiction over Intellectual Property Cases in Beijing

On 2 November 2017, the Beijing Higher People's Court issued new provisions on the jurisdiction of different Beijing courts over civil Intellectual Property ("**IP**") cases ("**2017 Provisions**")[6]. The 2017 Provisions supersede the previous rules which were published in 2008.

Background

In 2014, China set up three specialized Intellectual Property Courts ("**IP Courts**") in Beijing, Shanghai and Guangzhou, with the aim to develop and improve China's IP protection framework. According to provisions issued by the Supreme People's Court in 2014[7] ("**2014 Provisions**"), the IP Courts have first-instance jurisdiction over:

1. Civil and administrative cases involving patent, plant varieties, integrated circuit layout designs, technical know-how or computer software ("**Technical IPs**");
2. Administrative review cases against decisions regarding copyrights, trade marks and unfair competition made by a department of the State Council or a local people's government at or above the county level; and
3. Civil cases involving the recognition of well-known trade marks.

While the 2014 Provisions set out which types of cases IP Courts could hear, they were silent on the jurisdiction of the Higher People's Court over civil IP disputes. In particular, it was unclear whether the IP Courts had exclusive first-instance jurisdiction over the

6 *Provisions of the Higher People's Court of Beijing on Adjustment in Jurisdiction over Civil Cases regarding Intellectual Property Rights.*

7 *Provisions of the Supreme People's Court on the Jurisdiction of the Intellectual Property Courts of Beijing, Shanghai and Guangzhou over Cases and Notice of the Supreme People's Court on Issues concerning the Jurisdiction of Intellectual Property Courts over Cases*

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types of cases set out in the 2014 Provisions, or whether the Higher People's Courts also had jurisdiction to hear those types of cases if certain criteria were satisfied. This has led to disputes where parties challenge the jurisdiction of the Higher People's Court in cases involving patents[8] and other IP matters. Clarification of the 2014 Provisions was necessary.

The 2017 Provisions

The 2017 Provisions clarify the hierarchical jurisdiction of each level of Beijing court[9] on civil IP and unfair competition cases post establishment of the Beijing IP Court. Under the 2017 Provisions, a case would be heard by different levels of Beijing courts according to the disputed amount, where the parties are domiciled and the types of IP /unfair competition involved. For instance, the Beijing Higher People's Court has jurisdiction over:

- First instance civil IP cases involving a disputed amount of RMB 200 million or more where all parties are domiciled in Beijing;
- First instance civil IP cases involving a disputed amount of RMB 100 million or more where the dispute has a foreign element[10];
- Appeals against the first instance civil judgments or decisions rendered by the Beijing IP Court;
- Retrial applications against civil judgments and rulings rendered by the Beijing IP Court; and
- Any other first instance IP case which is going to have substantial impact on Beijing.

The Beijing IP Court has jurisdiction to handle:

- First instance civil cases concerning Technical IPs, monopoly or recognition of well-known trade marks, with a disputed amount below RMB 200 million where parties are domiciled in Beijing; or with a disputed amount below RMB 200 million but not less than RMB 100 million if the dispute has a foreign element;
- First instance civil cases concerning copyright, trade marks, technical agreements, unfair competition, etc., with a disputed amount below RMB 200 million but not less than RMB 100 million where parties are domiciled in Beijing; or with a disputed amount below RMB 100 million but not less than RMB 50 million if the dispute has a foreign element;
- Appeals against the first instance civil judgments or decisions rendered by the Beijing Basic People's Courts;
- Retrial applications against civil judgments and rulings rendered by the Beijing Basic People's Courts; and
- Any other first instance IP case which is going to have substantial impact on Beijing, except those to be heard by the Beijing Higher People's Court.

The Beijing Basic People's Court has jurisdiction to hear cases concerning copyright, trade marks, technical agreements, unfair competition, etc. which are below RMB 100 million if all parties are domiciled in Beijing, and below RMB 50 million if there is a foreign element.

Furthermore, the 2017 Provisions stipulate that a case with major impact can be escalated to a higher court, if a higher court deems it necessary to hear it itself, or by an application for transfer by a lower court. This means cases with great complexity, great impact would be adjudicated in a higher court, by more experienced judges.

Remarks

The 2017 Provisions resolves the ambiguities in the 2014 Provisions and provides helpful guidance to potential litigants who wish to bring IP or unfair competition proceedings in Beijing. This follows on from the Shanghai Higher People's Court, which issued similar provisions clarifying the jurisdiction of Shanghai

8 See for example, *Beijing Sogou Technology Development Co. Ltd. V. Shanghai Tianxi Trade Co. Ltd., Baidu Online Network Technology (Beijing) Co. Ltd. And Beijing Baidu Network Technology Co. Ltd.*

9 For IP matters, the highest court in Beijing is the Beijing Higher People's Court, followed by the Beijing IP Court, and then the Beijing Basic People's Court.

10 When one or more of the parties is not domiciled in Beijing, or where foreign, Hong Kong, Macao or Taiwan IP is involved.

courts in respect of civil IP and unfair competition cases last year. The Guangzhou Higher People's Court is expected to publish similar provisions in the near future.

With the introduction of these new rules on hierarchical jurisdiction of regional courts, jurisdictional challenges against courts are likely to reduce and the courts will be able to handle civil IP and unfair competition cases much more efficiently. ◆

Patents

By Gary M. Hnath, Partner, Mayer Brown LLP, Washington DC
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New Rule on Patent International Exhaustion Opening the Door for "Used Goods" Entering the US Market

Your company in China is in the business of buying used computers, repairing them, and reselling them. What if the computers are covered by U.S. patents? Can you collect the used computers in China, repair them, and resell them in the United States?

Until recently, the answer to that question was "no." In an earlier case decided in 2001, *Jazz Photo Corp. v. United States International Trade Commission*, the Federal Circuit Court of Appeals had decided that U.S. patent rights were limited to the U.S., and that sales of products outside the U.S. did not exhaust a patent owner's rights.

In an important case recently decided on 30 May 2017, *Impression Products v. Lexmark International*, the U.S. Supreme Court changed the law and decided that a patent owner's rights are exhausted by the authorised sale of a product outside of the United States. Mayer Brown represented the successful appellant, Impression Products before the Supreme Court in this landmark case. As a result of the decision, Chinese companies can now purchase products that have been sold by the patent owner outside of the United States, repair those products, and resell them in the United States without infringing any U.S. patents relating to the products.

This article will summarise the *Impression Products* decision and, at the same time, provide some insights into how one can successfully bring a case before the U.S. Supreme Court.

The *Impression Products* case involved toner cartridges used in laser printers. Lexmark designs, manufactures, and sells toner cartridges to consumers in the United States and worldwide. When toner cartridges run out of toner, they can be refilled and used again. This creates an opportunity for other companies, known as "remanufacturers," to acquire empty Lexmark cartridges, refill them with toner, and then resell them at a lower price than new cartridges or refilled cartridges sold by Lexmark.

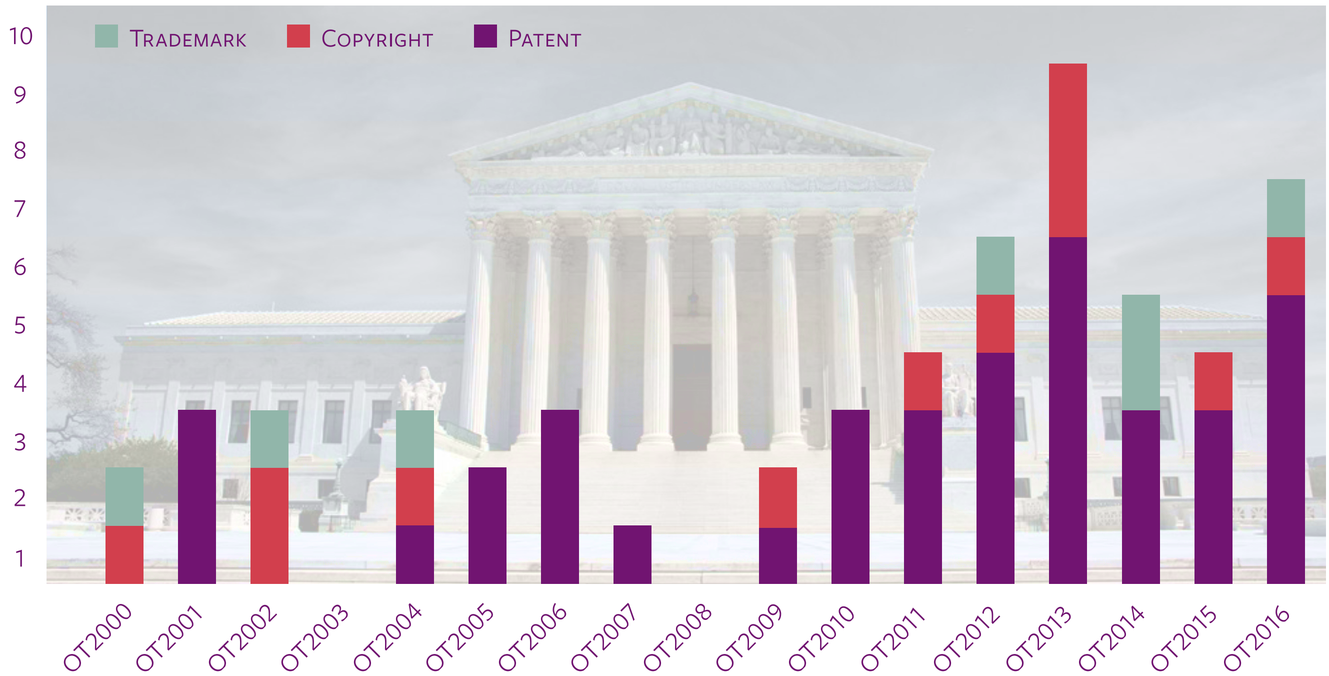
Lexmark attempted to restrict this practice of selling its manufactured cartridges in two ways. First, it started a “Return Program” in which it reduced the price of its cartridges if purchasers agrees to return the empty cartridges to Lexmark, rather than having them recycled by third parties. Second, Lexmark, citing the Federal Circuit’s earlier decision in *Jazz Photo*, asserted that repairing and reselling cartridges that were first sold outside of the United States infringed Lexmark’s patent rights.

Impression Products sold remanufactured toner cartridges that were made from empty cartridges that had been collected outside of the United States. Lexmark sued Impression Products for patent infringement in the U.S. District Court in Kentucky. The district court judge found in part for Impression Products that it was illegal to place resale restrictions on the cartridges, but agreed with Lexmark that international exhaustion did not apply. On appeal, the Federal Circuit, citing its previous decisions, including *Jazz Photo*, sided with Lexmark on both issues.

Impression Products decided to appeal the Federal Circuit decision in this case. The challenge was to overturn the *Jazz Photo* decision and create new law. This was not an easy task. While Federal Circuit decisions can be appealed to the U.S. Supreme Court, very few decisions are actually accepted by the Supreme Court. The Supreme Court generally only takes about 1% or 2% of the cases in which parties ask for review - and parties ask for review in only a small fraction of the total cases decided each year.

In recent years, however, the Supreme Court has taken a greater interest in intellectual property cases, including patent cases, because of the importance of these cases to technology and the economy. The following graph shows this increasing trend in recent years:

THE U.S. SUPREME COURT’S SIGNIFICANTLY INCREASED INTEREST IN IP LAW



Patents Cont'd

Still, it was a challenge to position the case for review since the Supreme Court accepts very few cases. The first step was to file a "petition for certiorari" asking the Supreme Court to consider the case. In the "petition for certiorari," parties typically explain why the Supreme Court should consider the case by arguing that the case is exceptionally important. In order to convince the Supreme Court that this was a case of great importance, Impression Products obtained the support of many other companies and organisations who sided with its position and agreed to file "amicus," or "friend of the Court," briefs. To obtain such support, it was important to explain to potential supporters how they were individually impacted by the legal rules at issue. These briefs were critical in Impression Products' effort to convince the Supreme Court that this was an issue which it should consider.

As a result of these efforts, the Supreme Court "granted certiorari" and agreed to take the case to consider the issue of international patent exhaustion. Both sides filed briefs with the Supreme Court. Impression Products' key position on the international exhaustion issue was that exhaustion is compelled by the common law and protects consumer rights, while Lexmark countered that it should be able to price-discriminate based on the country in which the product is sold. Once again, Impression Products obtained the support of many important companies and organisations, e.g., Intel and the American Antitrust Institute. Of course, Lexmark also enlisted companies and organisations that filed amicus briefs to support its position, including IBM and Qualcomm. Amicus briefs were important in this case, similar to other cases, because they helped explain the underlying policy concerns to the Supreme Court.

The final step was oral argument before the Supreme Court. The case was argued on 21 March 2017, before eight of the Supreme Court Justices (Justice Gorsuch was new and did not participate in the argument or decision). The oral argument lasted for one hour, with each side having one half hour to present its case. The courtroom was packed with many interested observers wanting to see the argument and get some sense for how the Court might decide the issue. It is interesting that the Court asked comparatively few questions; often, the Court asks many more questions when the issues are so important.

On 30 May 2017, the Supreme Court announced its decision in favour of Impression Products. The Court held that patent rights in a product are exhausted after an authorised sale of the product by the patent owner, and that the doctrine of patent exhaustion applies "regardless of any restrictions the patentee purports to impose or the location of the sale."

On the issue of international patent exhaustion, the Court held in a 7 to 1 vote (only one Justice dissenting) that a patentee's U.S. rights are exhausted by the authorised sale of an article outside of the U.S. The Supreme Court reversed the Federal Circuit's earlier decision in *Jazz Photo*, and consistent with a prior decision of the Court in the copyright area, it held that the patent exhaustion doctrine is "borderless" and that U.S. patent rights are therefore exhausted by foreign sales in the same way as by domestic sales. As the Court explained, exhaustion occurs because, in a sale, the patentee elects to give up title to an item in exchange for payment. As a result, "restrictions and location are irrelevant; what matters is the patentee's decision to make a sale."

The Court also held that a patentee such as Lexmark could not use patent law to enforce post sale restrictions on how an article may be used or resold, because the authorised first sale exhaust the patentee rights. The Court explained that "patent exhaustion is uniform and automatic." Any limitation a patentee wishes to impose on a good must be done by contract. But contracts will generally not apply to persons or entities that have no direct relationship with the product manufacturer.

Before the Supreme Court's decision, companies wishing to repair used products covered by patents had to obtain the used products from the United States, along with evidence that those products had first been sold in the United States, which was not always easy to demonstrate. As a result of our victory in the Supreme Court, companies in China may now purchase products that have been sold by the patentee in foreign countries, including China, repair those products, and resell them in the United States without fear of being sued for patent infringement. The case represents an extremely important development which will greatly increase the ability of Chinese companies to compete internationally. ◆

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Anti-Unfair Competition Law

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China Revises Its Anti-Unfair Competition Law – New Implications for Commercial Trading

Introduction

China's Anti-Unfair Competition Law (the "**AUCL**"), which was promulgated in 1993, is China's main legislation which regulates trading practices by prohibiting unfair practices, such as the misuse of trade names, false and misleading advertising, commercial bribery, and the like. The AUCL has not been revised over the last 24 years to take into account the evolution of business practice, most notably in relation to online commercial trading.

A revision to the AUCL was finally adopted by the 12th National People's Congress on 4th November 2017. The revision addresses new economic practices such as:

- Trade practices on the internet;
- Acts causing market confusion;
- Protection of trade secrets;
- Commercial bribery; and
- Powers of enforcement, and remedies and penalties for violations.

The new law underwent public consultation and multiple draft amendments, and will come into effect on **1 January 2018**. In this article, we look at the key changes to the AUCL and their implications on commercial trading in China.

Internet-Related Unfair Trading Practices

The amended AUCL contains a new prohibition against the use of technical means by one business to interfere with or sabotage the provision of online products or services by another business, whether by influencing the choices of online users or by other means.

A list of prohibited acts is expressly set out in the amended AUCL, namely:

- Inserting a link or forcing a URL redirection in respect of the provision of products or services legally provided by another business without the business owner's consent;
- Misleading, deceiving or forcing users to alter, shut down or uninstall an online product or service legally provided by another business;
- Causing incompatibility with the online products or services legally provided by another business in bad faith; and
- Other acts which interfere with or sabotage the normal provision of products or services legally provided by another business.

It is clear from the last 'catch-all' prohibition in the list that the categories of prohibited acts are intended to be open-ended to allow the authorities to capture a wide variety of issues raised by advances in technology and the way doing business online evolves.

Acts Which Cause Market Confusion

The prohibited categories of acts which cause market confusion (e.g. misuse of brand names, trade names, personality rights, etc) have also been revised.

New categories of prohibited acts that contemplate online trading practices have been added, in particular, a prohibition against using the principal part of a domain name, website or webpage name of a certain degree of influence without the permission of its owner. A new 'catch-all' provision has also been added which prohibits *other acts of confusion sufficient to mislead* a person into believing that a commodity originates from another person, or is otherwise associated with another person.

The prohibitions relating to the counterfeiting of *registered trade marks* have however, been removed. This reduces the overlap with the PRC Trademark Law that also has provisions governing the counterfeiting of registered trade marks. Nevertheless, the prohibitions in relation to the misuse of *unregistered rights*, such as brand names, trade names and name rights, remain intact.

Protection of Trade Secrets

The definition of a 'trade secret' has been broadened by removing the limitation requiring the trade secret to have *practical utility*. Under the amended regime, even abstract concepts and theories (which may lack practicability) may qualify as trade secrets. This is a welcome change that arguably extends protection to nascent experimental concepts and theories, provided the other qualifying conditions of a trade secret are met (i.e. that the information is unknown to the public, is of commercial value, and is protected by confidentiality measures).

The scope of third-party liability has been clarified to cover the misuse of trade secrets by a third-party despite having the requisite knowledge that the trade secret was illegally acquired by an employee or former employee of the trade secret's owner. The current AUCL is silent on whether a third-party's knowledge of the illegal acts of an employee to acquire a trade secret would attribute liability for subsequent use of that secret. Under the revised AUCL however, a third-party would be liable for the misuse of a trade secret if he or she knew, or ought to have known, that the secret was acquired by illegal means (e.g. by theft or in breach of an agreement) by *an employee or former employee of the trade secret owner, or by any other entity or individual*.

Commercial Bribery

The prohibitions relating to commercial bribery have been expanded. It is an offence not only to bribe parties *directly related* to a transaction (e.g. employees or representatives of a counterparty), but also any entity or individual which (*indirectly*) uses power or influence to affect a transaction.

Unlike the current AUCL, the amended legislation expressly states that employers may be vicariously liable for acts of bribery committed by their employees to obtain a transaction opportunity or competitive edge for the business ("**business advantages**"), unless it can be proved that the act of bribery was an independent act of the employee, unrelated to obtaining business advantages.

Anti-Unfair Competition Law

Supervisory Powers, Compensation and Penalties

The powers of supervisory departments to investigate acts of unfair competition have been enhanced. Officials have been granted powers to seize or impound property, and to inquire about bank accounts of businesses, in relation to suspected acts of unfair competition.

Civil remedies for injured parties have been augmented in cases where it is difficult to estimate actual losses. For example, a relatively large amount of compensation, of up to RMB 3,000,000, may now be awarded by the People's Courts for misuse of trade secrets or for acts causing confusion, where it is difficult to determine the actual loss incurred by the rights holder or the benefits acquired by the tortfeasor. The enhanced remedy is helpful because the damage caused by and the benefits reaped from the misuse of a trade name, or the wrongful disclosure of a trade secret, may be intangible and difficult to estimate.

New and stiffer penalties will also be imposed under the new AUCL, for example:

- Maximum fines for violations have been increased, in some cases more than tenfold, e.g. maximum fines for the misuse of trade secrets have been increased from RMB 200,000 to RMB 3,000,000.
- The new prohibition against the use of technical means to interfere with or sabotage the provision of online products or services is punishable by a fine of up to RMB 3,000,000.
- Conducting false and misleading commercial publicity and carrying out commercial bribery may now result in the revocation of a business licence in serious cases.

Conclusion

The new AUCL addresses some of the issues raised by advances in technology and the attendant new ways of doing business in the 21st century. While the AUCL may not necessarily address all facets of modern business practices, many of the key revised provisions benefit from broad drafting or contain 'catch-all' provisions that should keep the new law current for awhile.

Businesses that have a link to China (e.g. having Chinese business operations, a Chinese-hosted website, etc.) should, at minimum, review their online trading practices (and related trading means/technologies) to ensure that they are not interfering with the goods and services provided by their competitors or other businesses (e.g. by unfairly influencing consumer choice), or causing market confusion with another brand or trade name. Employees should be educated about unfair practices under the revised legislation, and be provided straightforward guidelines on proper/improper trade practices, in light of the increasing focus on vicarious liability under the revised legislation. ◆

ASIA

Data Privacy

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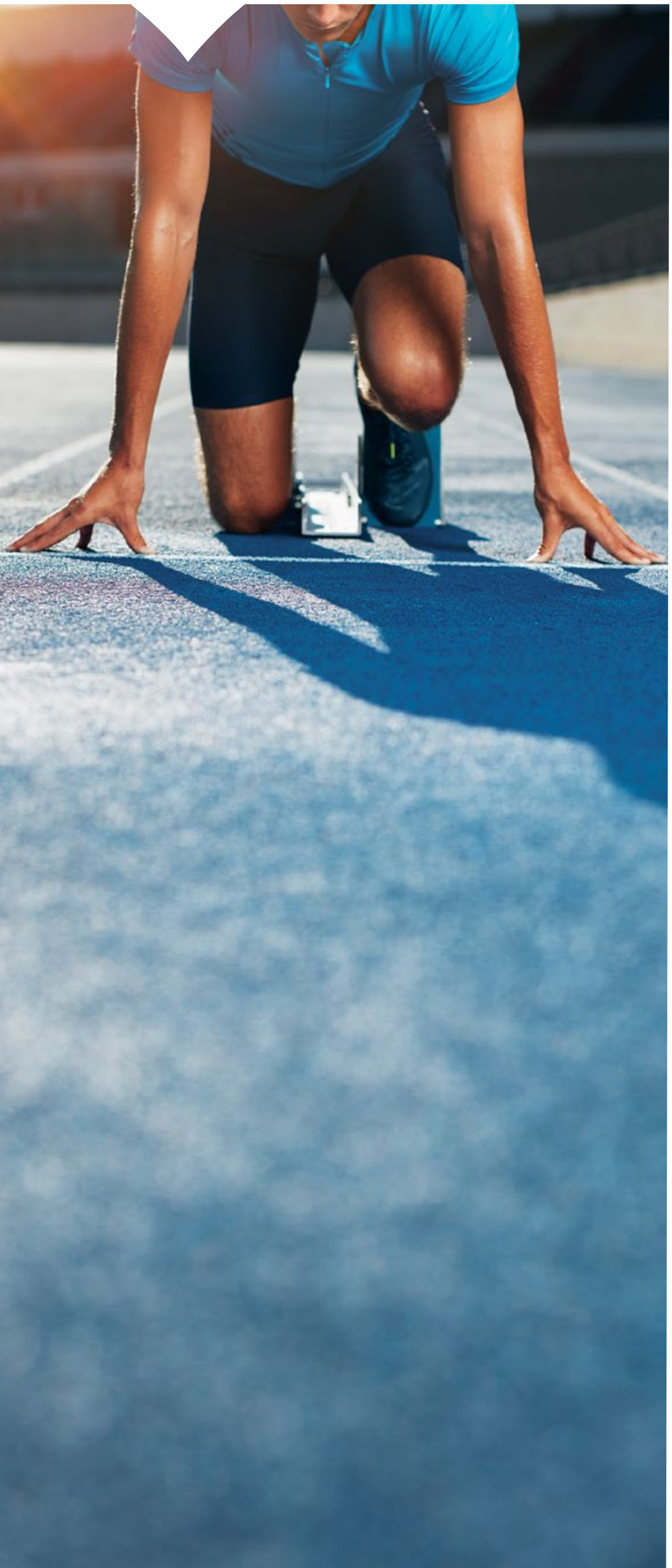

Ready from the Starting Line – Why and How Companies in Asia Should Prepare for the EU General Data Protection Regulation

In less than six months' time, the General Data Protection Regulation ("**GDPR**") will take effect to introduce a new regime for the protection of personal data in the European Union ("**EU**"). However, global research conducted earlier this year revealed that 86% of participating organisations worldwide were concerned that a failure to adhere to GDPR could have major negative impact on their businesses and almost half feared that they would not be ready to meet the relevant legal requirements.[11]

What is the GDPR?

The GDPR, adopted on 27 April 2016 and coming into force on 25 May 2018, is a harmonisation of data protection laws across the EU on storing, transferring, collecting and processing of personal data.

With GDPR comes not only enhanced control for individuals over their personal data but also a full range of compliance obligations for companies both inside and outside of the EU. For instance, companies must implement "privacy by design" to ensure that an appropriate level of data protection is provided by default when personal data is being processed. Where companies are relying on consent as a ground to process personal data, those companies will need to obtain an "unambiguous" consent in the form of a statement or a clear affirmative action from the customers concerned. In addition, companies carrying out higher risk processing will be required to map their personal data processing and to undertake data protection impact assessments. In the event of a data breach, companies are required to notify the relevant EU data protection authority without undue delay and

11 Source: 2017 Veritas GDPR Report https://www.veritas.com/content/dam/Veritas/docs/reports/gdpr-report-en.pdf

Data Privacy Cont'd

where feasible within 72 hours. The individuals concerned should also be notified if the breach presents a high risk to them. There are also circumstances under which companies may need to appoint a data protection officer to ensure compliance within the organisation.

When will European Data Protection Laws Apply to Businesses in Asia?

Organisations headquartered outside of the EU will have to comply with the GDPR if they have a business presence or customers in Europe. Companies that are based in Asia will have to comply with the GDPR where those businesses (a) have subsidiaries, offices or other operations in the EU that use personal data to operate their business; (b) process personal data about individuals located in the EU to offer them goods or services; or (c) monitor their behaviour. So for example, if an Asian based business offers products or services to individuals located in the EU via a global website, or provides a mobile device application that is available for individuals in the EU to download which collects users' personal data and profiles their online behaviour, that company will have to comply with the new EU data protection rules.

The restrictions imposed by GDPR on transferring data from the EU to a location outside of the EU may also present a practical challenge to Asian companies. In this context, even the remote access to personal data stored in an EU based subsidiary or server by a member of staff at the Asian based business will be regarded as a "transfer", which under the GDPR is prohibited unless certain conditions are met.

The consequences for non-compliance can be draconian – the maximum fine that can be issued by a data protection authority under GDPR is 4% of an enterprise's worldwide turnover or €20 million per infringement, whichever is higher. In addition, most Asian companies will be expected by their European counterparts, business partners and customers to demonstrate compliance with the GDPR, or otherwise run the risk of losing important business relationships or being subject to repetitive auditing.

What Should Asian Companies Do to Prepare to Comply with the GDPR?

If a preliminary assessment determines that an Asian based organisation will have to comply with the GDPR, the business should take the following key steps before the GDPR comes into effect next year:

- **Inform the leadership** of the upcoming changes in data protection law, appoint a cross-departmental or even cross-border **GDPR implementation team** and plan for how the organisation will achieve compliance;
- **Review all relevant processes** and systems that deal with the collection, processing and use of personal data from the EU and **map the flows of personal data** comprehensively;
- Review the **legal basis under which personal data is being processed** and consider whether any changes need to be made under the GDPR;
- Conduct a **data protection impact assessment** where it is required to minimise the risks of "high risk" processing activities;
- Decide whether a **data protection officer** needs to be appointed;
- Implement **new compliance systems** to ensure that the company can respond to a data breach and the new data breach notification requirements, the rights to be forgotten, to data portability, to object to automated data profiling, to be provided with access to personal data and other rights that individuals can exercise in relation to their personal data;
- Update the **data governance controls** within the business and provide **training and updates** to employees regularly;
- Draft and maintain written/electronic **records of processing activities** specifying, among other things, a description of the processing activity, the categories of data subjects and personal data concerned, the purposes of the processing activity, and the parties that the personal data is being shared with;

- Review, and if necessary, renegotiate the organisation's **supply chain contracts** and other arrangements to ensure that the company has imposed the contractual requirements that are required under the GDPR to ensure their compliance; and
- Assess the **international data transfers** taking place, paying particular attention to the restrictions on the transfer of personal data from the EU/ European Economic Area to Asian countries and update the mechanisms that are being used to achieve this accordingly.

Becoming GDPR ready is more than just a matter of compliance. With less than six months remaining until the GDPR has to be complied with, those organisations that have already begun their preparations will be best placed to demonstrate to their customers that they understand the importance of data protection and have put in place a programme to effectively govern their use of personal data from May 2018. ◆

CHINA

Cybersecurity

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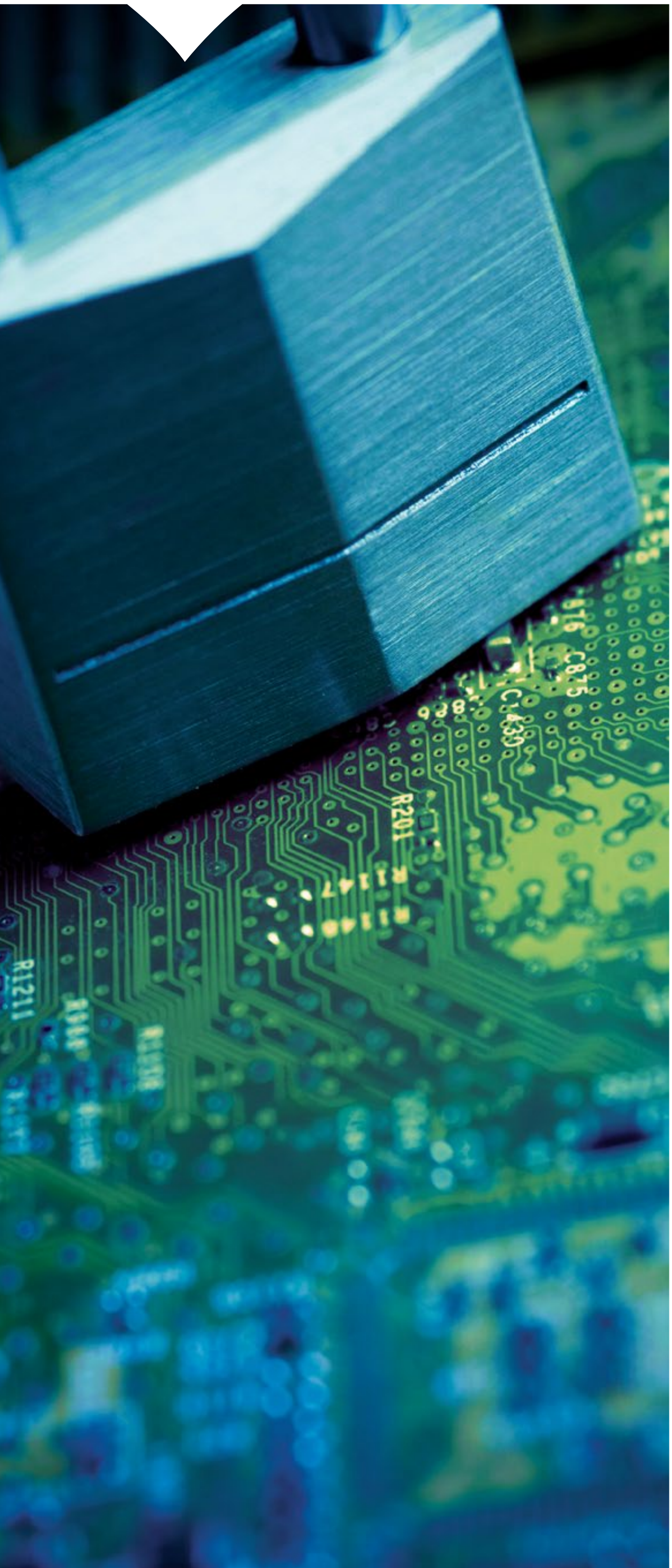

An Update on China's Cybersecurity Law

Background

China's Cybersecurity Law ("**CSL**") has been in force since 1 June 2017, but a more important deadline for many multi national corporations ("**MNCs**") that operate in China has been deferred to 31 December 2018. This is because the Security Assessment Measures for Cross-Border Transfer of Personal Information and Important Data ("**Cross-Border Measures**") granted an 18 month grace period for network operators to comply with the data transfer rules (for more details on the Cross-Border Measures, please see the article "Navigating the Latest Developments in China's Cybersecurity Law" in the IP & TMT Quarterly Review, Third Quarter 2017[12]). Given the uncertainty over how the CSL and the related measures ("**CSL Measures**") will be interpreted and enforced when the grace period ends, new guidelines, measures or regulations are awaited with a certain degree of anticipation. We look at two recent developments relating to the CSL Measures below.

Enforcement Actions Under the CSL

The Cyberspace Administration of China ("**CAC**") announced the commencement of investigations into three of China's largest social media platform operators, Tencent's WeChat, Baidu's Tieba and Sina's Weibo, on 11 August 2017[13] on the grounds that users of these social platforms had disseminated information that involve violence or terror, false rumours, pornography or that would otherwise endanger national security, public safety and social order. On 25 September 2017, the Beijing and Guangdong Cyberspace Administration Offices found the three companies to have violated Article 47 of the CSL and

12 See https://www.mayerbrown.com/Asia-IP--TMT-Quarterly-Review-09-13-2017/

13 See http://www.cac.gov.cn/2017-08/11/c_1121467425.htm; Chinese language only

fined each company for the maximum amount of fines allowed under Article 68 of the CSL, or 500,000 yuan[14] (about $75,600 USD) ("**Enforcement Actions**"). The fines were based on each company's violation of Article 47 of the CSL, which requires network operators to manage the information released by their users and immediately cease the transmission of, and delete or take any other appropriate actions to prevent the spreading of, information which is prohibited by any law or administrative regulations.

Articles 47 and 68 of the CSL apply to network operators and not the more restrictive class of operators of critical information infrastructure ("**CII**") (for more details on the definitions for network operators and CII operators, please see the article "China Passes Cybersecurity Law" in the IP & TMT Quarterly Review, Fourth Quarter 2016[15]). The broad definition of network operator under the CSL potentially extends the applicability of the CSL to any MNC that uses IT systems in China or operates a Chinese website, irrespective of the industry in which the MNC conducts its business. While the companies involved in the Enforcement Actions are amongst the largest internet companies in China, the same regulations would also apply to any MNC operating in China currently and which uses an IT system that would allow its users to transmit information to others (e.g., an internal company chat room or bulletin board). MNCs operating in China are well advised to immediately start reviewing and monitoring their existing policies and practices to ensure compliance with these and other obligations placed on network operators under the CSL.

United States Tells WTO that it is Concerned with China's Cybersecurity Law

The United States submitted a communication to the World Trade Organization's Council for Trade in Services (the "**Services Council**") on 25 September, 2017[16] (the "**Communication**") outlining its concerns with the CSL as part of the Service Council's next agenda. The Services Council is the WTO organization responsible for overseeing the functioning of the General Agreement on Trade in Services ("**GATS**"), a trade agreement between all members of the WTO relating to the cross-border trade for services[17]. Under the GATS, member nations agree to adhere to certain principles as they relate to the trade of services such as transparency in trade governance, treating all other member nations equally, and having no discriminatory measures to the detriment of foreign services or service suppliers[18]. While the WTO has a set of dispute resolution rules to help its member nations resolve their differences, this Communication will not trigger the commencement of the dispute resolution process. Instead, the United States may seek to exert more political pressure on China during Services Council meetings and thereby achieve its goal without having to submit a formal WTO complaint.

The Communication notes that the CSL Measures "could have a significant adverse effect on trade in services, including services supplied through a commercial presence and on a cross-border basis".In particular, the United States is concerned that the CSL Measures would: a) encompass any foreign company that has a website or uses the internet in its business operations; b) place overly burdensome conditions on cross-border transfer of personal information, including the security assessment and obtaining the consent of each individual data subject; and c) create very broad and vaguely defined obligations such as restrictions on cross-border transfer for risks to "national security" or "economic development".

The United States believes the CSL Measures as they are currently written would affect China's "market access and national treatment commitments under the

14 See http://www.sohu.com/a/194422338_260616 and http://www.sohu.com/a/194423923_260616; Chinese language only

15 See https://www.mayerbrown.com/Asia-IP--TMT-Quarterly-Review-12-22-2016/

16 Communication from the United States: Measures adopted and under development by China relating to its cybersecurity law

17 See https://www.wto.org/english/tratop_e/serv_e/s_coun_e.htm

18 See "The General Agreement on Trade in Services An Introduction" https://www.wto.org/english/tratop_e/serv_e/gsintr_e.pdf

Cybersecurity Cont'd

General Agreement on Trade in Services" and China's cross-border commitments to sectors ranging from accounting to travel services. This echoes the same concerns expressed by many MNCs during the public consultation process in the lead up to the passing of the CSL, that the CSL Measures will significantly impact their ability to operate in China. In parallel to the Communication, the United States is also feeding through these concerns directly to high level officials in China in the hope of dissuading China from enforcing the CSL Measures in the form in which they are currently written. ◆

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