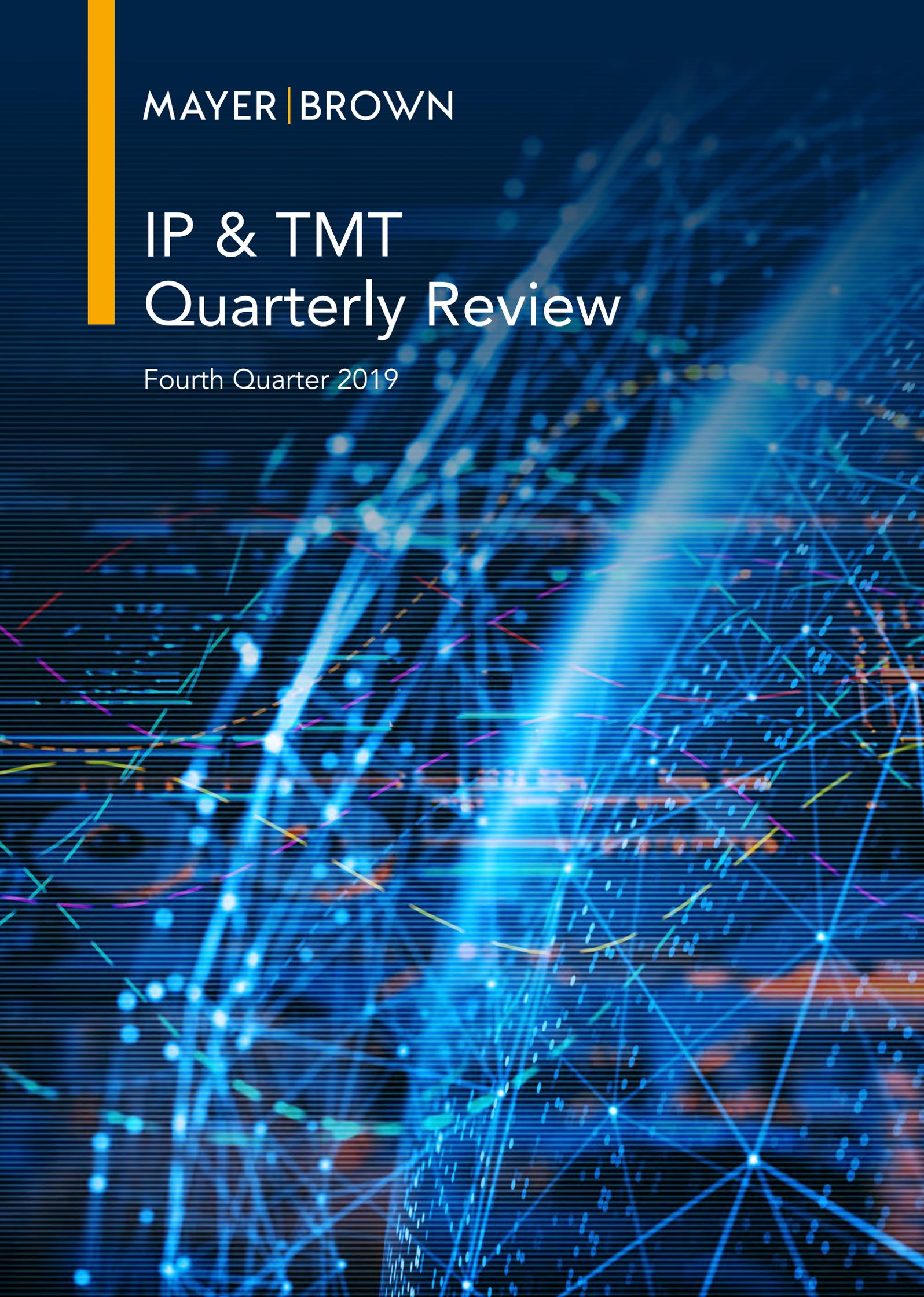




MAYER | BROWN

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The background of the cover is a complex, abstract network graphic. It features a dense web of interconnected nodes and lines in various colors, including blue, green, yellow, and red. The lines are of varying thickness and some are dashed, creating a sense of depth and connectivity. The overall aesthetic is futuristic and technological, typical of a quarterly review in the IP & TMT sector.

A long-exposure photograph of a city street at night. The road in the foreground is filled with colorful light trails from moving vehicles, creating a sense of motion and energy. The trails are primarily yellow, red, and blue. In the background, several tall skyscrapers are illuminated with various colors, including blue, red, and white. The sky is dark, and the overall scene is a dynamic and modern urban environment.

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CHINA

Intellectual Property

Update on Measures Targeting Bad Faith Applications in China

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Introduction

In the past year, the Chinese government has signalled its intention to crack down on rampant trade mark hijacking by making important changes in the law, including amendments to the Trade Mark Law (“**Amendments**”) that took effect in November 2019 specifically targeting bad faith applications filed without intent to use. On 10 October 2019, the State Administration for Market Regulation (the government authority that oversees the China National Intellectual Property Administration) approved and published “Several Measures on Regulating Applications to Register Trade Marks” (“**Measures**”) that took effect on 1 December 2019, which provide further guidance on how the Amendments will be implemented.

Types of Bad Faith Filings Targeted

A previous draft of the Measures published in February 2019 (“**February Draft**”) set out specific categories of “abnormal filings” that exemplified the types of bad faith applications typically encountered in China. The final version of the Measures makes no

mention of “abnormal filings” and instead frames bad faith filings in terms of prohibited behaviour violating the principles of honesty and good faith:

COMPARISON OF “ABNORMAL FILINGS” UNDER THE FEBRUARY DRAFT AND PROHIBITED FILING BEHAVIOUR IN THE MEASURES

“Abnormal filings” under Article 3 of February Draft	Prohibited behaviour under Article 3 of the Measures
Applications filed without a genuine intent to use, or where there is no actual need to obtain trade mark rights in respect of the relevant goods or services	Applications filed in bad faith without intent to use as set out in Article 4 of the Trade Mark Law (Article 3.1)
Applications that copy marks widely recognised by the relevant public and free-ride on the goodwill of others	Applications that copy, imitate or are translations of well-known marks as set out in Article 13 of the Trade Mark Law (Article 3.2)
Applications for similar or identical marks where the applicant knows or should have known of the third party's prior rights	Unauthorised applications filed by agents or representatives in their own names for their client's / principal's marks, or applications for marks filed by an applicant with a contractual, business or other relationship with the legitimate brand owner, as set out in Article 15 of the Trade Mark Law (Article 3.3)
Applications for marks that enjoy a "certain degree of influence" and are already being used by others	Applications that infringe a third party's existing prior rights, or bad faith applications for third party marks "with a certain degree of influence" that are already in use, as set out in Article 32 of the Trade Mark Law (Article 3.4)
Repeated applications for a clearly improper purpose	Applications filed through fraudulent or other improper means (Article 3.5)
Applications that violate the principle of good faith, infringe upon the legitimate interests of other parties, or disrupt market order	Any acts that violate the principles of honesty and good faith, public order or have other adverse effects (Article 3.6)
Applications filed in large numbers within a short period of time that clearly exceed reasonable limits	<i>No corresponding provision in the Measures</i>

As can be seen from the above table, the provision relating to bulk filings made within a short period of time has been deleted from the final version of the Measures. It is possible that the bulk filing provision was removed for being too vague (for example, would 200 filings made over several months exceed “reasonable limits”? What if the filings were made by a multinational corporation with a large portfolio of brands?). Bulk filings made in bad faith could arguably fall within other categories under Article 3, including applications filed through fraudulent or other improper means, or applications filed in bad faith with no intent to use under Article 4 of the Trade Mark Law.

Further guidance on the new Article 4 of the Trade Mark Law

One of the welcome changes introduced by the Amendments is the new Article 4 of the Trade Mark Law, which empowers the China National Intellectual Property Administration (“CNIPA”) to proactively reject applications filed in bad faith without intent to use during substantive examination. Previously, the onus was on brand owners to take action against hijacked marks during opposition or invalidation proceedings. With the

introduction of the new Article 4, brand owners no longer need to wait for a hijacked mark to be published and can alert the CNIPA of a bad faith filing even while the application is pending examination. In theory, once the CNIPA receives such an alert, they will review the applicant's filing history and consider other relevant factors (set out in the next paragraph) during substantive examination, in order to assess whether the application was filed in bad faith without intent to use. The Measures do not provide for a formal procedure for brand owners to report bad faith filings, and much is still left to the CNIPA's discretion.

Article 8 of the Measures provides additional guidance on the new Article 4 by setting out the factors to be considered by the CNIPA when determining whether an application is filed in bad faith without intent to use, including:

1. the number of applications, designated classes and trade mark transactions involving the applicant or their related parties (individuals, legal representatives, or other entities), etc.;
2. the applicant's area of business and operating status, etc.;
3. whether there are any administrative decisions or court judgments in which the applicant was held to have filed applications in bad faith or infringed a third party's registered trade mark rights;
4. whether the applied for mark is identical or similar to any third party marks with "certain reputation";
5. whether the applied for mark is identical or similar to the names of any well-known individuals, company names, abbreviations of trade names or other commercial logos / marks; and
6. any other factors deemed relevant by the trade mark registration department.

It is clear from the above list of factors that the new Article 4 of the Trade Mark Law is intended to be a "catch-all" provision that provides the CNIPA with the flexibility to infer bad faith based on a combination of factors. However, it is important to note that Article 4 of the Trade Mark Law only applies to bad faith filings made *without intent to use*, and will not cover situations where an applicant files for a mark for use on their goods/services with the intention of free-riding on the goodwill and reputation of the legitimate brand owner.

Accountability of Trade Mark Agencies

The February Draft included a general provision prohibiting trade mark agencies from making "abnormal filings" on behalf of their clients. This general prohibition has been replaced by Article 4 in the Measures, which requires trade mark agencies to act in accordance with the principles of honesty and good faith, and to refuse instructions where they know or should have known that:

1. the application is filed in bad faith without intent to use pursuant to Article 4 of the Trade Mark Law (*corresponds to prohibited behaviour under Article 3.1 of the Measures*);
2. the application is filed without authorisation from the legitimate owner, or the application is for a similar or identical mark in respect of similar or identical goods / services to an earlier unregistered mark used by a third party with whom the applicant has a contractual, business or other relationship, pursuant to Article 15 of the Trade Mark Law (*corresponds to prohibited behaviour under Article 3.3 of the Measures*); or
3. the application will infringe a third party's existing rights, or the application is for a mark already in use that has acquired a "certain degree of influence" and is being filed through improper means pursuant to Article 32 of the Trade Mark Law (*corresponds to prohibited behaviour under Article 3.4 of the Measures*).

Trade mark agencies are also prohibited from filing applications other than those filed on behalf of clients, and are also barred from causing market disruption through improper means.

It is interesting to note that the above list does not include prohibited filing behaviour under Articles 3.2 (applications for marks that copy, imitate or are translations of well-known marks), 3.5 (applications filed through fraudulent or improper means) and 3.6 (applications that violate the principles of honesty and good faith, public order or have other adverse effects). Does this mean that trade mark agencies have no obligation to refuse instructions even where the applied for mark is a blatant copy of a well-known mark? It is unclear why a trade mark agent must refuse instructions where an application will infringe a third party's existing rights, but be allowed to act even if they are aware that the application is a copy of a well-known mark – why

the change of approach from the February Draft's blanket prohibition against making "abnormal filings" for clients?

Blacklisting of Bad Faith Filers

In recent years, the CNIPA has maintained an internal blacklist of bad faith filers whose applications will automatically be rejected, and whilst brand owners can informally report bad faith filers to the CNIPA, there is no formal complaint procedure, nor any transparency in the blacklisting process. The February Draft included provisions that expressly allowed any individual or organisation to report abnormal filing behaviour to the CNIPA, and required that such reports be dealt with in a timely manner in accordance with the law (Article 7 of the February Draft). These provisions have been removed from the final version of the Measures, and brand owners are thus left with the current situation in which the blacklisting process is completely at the CNIPA's discretion, with no guarantee that any reports made will be actioned.

Conclusion

The Amendments and Measures introduce welcome changes to the law, such as the new Article 4 of the Trade Mark Law that empowers the CNIPA to refuse bad faith applications during substantive examination, without having to wait for brand owners to oppose or invalidate them later. However, there are still important limitations to these changes – the new Article 4 only applies to applications filed without intent to use, and its effectiveness will also depend on how proactive the CNIPA chooses to be. Given the large number of applications filed in China, it seems unlikely that CNIPA examiners will take the initiative to review an applicant's filing history and consider various factors to infer bad faith, and will most likely leave it up to brand owners to alert them of bad faith filings. The jury is out as to whether the CNIPA will deal with reports of bad faith on a case by case basis, or whether they will take a more aggressive approach and actively blacklist repeat offenders.



HONG KONG

Intellectual Property

Hong Kong Patents – A New Era

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Introduction

A new patent system will come into effect on 19 December 2019 with the commencement of the Patents (Amendment) Ordinance 2016 and the Patents (General) (Amendment) Rules 2019 (the “**System**”).

The System introduces an original grant patent (“**OGP**”) mechanism, which provides a direct filing route for standard patent protection in parallel with the existing route. This means that invention owners now have more flexibility when filing standard patents to cater for their individual business needs and patent protection strategies.

Background

Under the current regime, an invention owner may apply for one of two types of patents:

- A **standard patent** protects an invention for a maximum term of 20 years. It can be obtained through a two-stage “re-registration” system. The first stage involves filing a request to record a patent with the Hong Kong Patents Registry based on an application in one of three designated patent offices outside of Hong Kong (China, the United Kingdom, or the European Patent Office (designating the United Kingdom)). The request must be made within 6 months of publication of the designated patent

application. Once granted, an application for registration and grant must be filed in Hong Kong within 6 months. This inevitably means that there is no substantive examination of the patent by the Hong Kong Patents Registrar (the “Registrar”).

- A **short-term patent** offers a more efficient and less costly method to protect inventions for a maximum term of 8 years. An application can be filed directly with the Hong Kong Patents Registry. The Registrar merely checks the formalities of the application, with no substantive examination.

Hong Kong’s New Patent System

INTRODUCTION OF AN OGP ROUTE FOR STANDARD PATENTS

The new OGP route will run parallel with the existing system. The OGP system will enable direct filing of standard patent applications in Hong Kong, without the need to first file a patent application outside the jurisdiction. The OGP application procedure is similar to those in other common law jurisdictions.

When an application is submitted, the Registrar will first carry out a formal examination to ensure that the patent application may be published. If necessary, the Registrar will issue a notice to the applicant asking for any deficiencies in the application to be rectified. Once a patent is published, the Registrar (on request by the applicant) will proceed with a substantive examination, to determine if the application fulfils the requirements for a patent grant. Any third party observations on the application and subsequent submissions/proposed amendments by the applicant need to be taken into consideration by the Registrar. The standard patent will then be granted on completion of the substantive examination.

REFINEMENT OF THE EXISTING SHORT-TERM PATENT SYSTEM

The new short-term patent system will now provide for a post-grant substantive examination, at the request of a patent owner or a third party with a legitimate interest in the patent. Such request is also a pre-requisite for a patent proprietor for commencing patent infringement proceedings. This

ensures that a patent proprietor can only litigate in relation to examined patents. Similar to the OGP route, the Registrar will issue a notice to the short-term patent owner if the patent does not fulfil the examination requirements. A third party may submit observations on the validity of the patent, which the Registrar must take into account during the substantive examination. The applicant will then have an opportunity to make further submissions or propose amendments for the application. A certificate of substantive examination will be issued to the patent proprietor once all the examination requirements are satisfied, otherwise the patent will be revoked.

In order to prevent potential abuse of the short-term patent system, the owner of an unexamined short-term patent who threatens another person with infringement proceedings must, upon request by the alleged infringer, provide information identifying the patent in question. Where such information is not provided, the alleged infringer threatened with legal proceedings may be entitled to relief, on the basis of groundless threats of infringement proceedings.

Under the System, wider protection of a patent is afforded as an application may contain two independent claims. The former system permitted only one claim.

REGULATION OF TITLES AND DESCRIPTIONS RELATING TO PATENT PRACTICE

Interim measures will be introduced to regulate patent agency services in Hong Kong. This means that patent practitioners will be prohibited from using confusing or misleading titles or descriptions such as “registered/certified patent agent” or “registered/certified patent attorney”. The use of titles and descriptions of those qualifications lawfully obtained for patent practice outside of Hong Kong will be permitted, provided the qualifying jurisdiction is clearly indicated.

Benefits of the System

The option of the new OGP route means that an invention owner, who does not require patent protection in other jurisdictions, can apply for a standard patent protection in Hong Kong directly. This is likely to provide secure protection in a more efficient and cost effective way.

Further, the introduction of a post-grant substantive examination will improve the overall integrity of the short-term patent system, by preventing potential abuse by patent owners through litigation or groundless threats. Under the new short-term patent system, the increase from one to two independent claims broadens the protection of the patent.

Conclusion

The System is a milestone for Hong Kong patent protection and will greatly support Hong Kong's role as a leader in technology and innovation in Asia.



HONG KONG

Intellectual Property

Arbitration: Interim Measures Arrangement Between Mainland China and Hong Kong – An Update

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On 1 October 2019, an important new arrangement to facilitate cross-border arbitration between Mainland China and Hong Kong came into force with “The Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and the Hong Kong Special Administrative Region” (the “**Arrangement**”).

Chinese courts formerly only granted interim measures in aid of arbitration where the arbitration was seated in Mainland China. With the Arrangement, Chinese courts are now able to grant interim measures in favour of Hong Kong-seated arbitrations, when administered by qualified institutions.

The Arrangement gives Hong Kong a distinct advantage over other jurisdictions in arbitrations which involve Chinese companies.

Recent Developments Since the Arrangement Came into Force

According to the Hong Kong International Arbitration Centre (“**HKIAC**”), since 9

December 2019, eight interim measure applications under the Arrangement have been made by parties in Hong Kong-seated arbitrations.

Each of the eight applications relate to ex parte orders seeking to preserve assets in Mainland China. Under the Arrangement, two other types of interim measures, i.e. evidence preservation and conduct preservation, are also available to parties in a Hong Kong arbitration from the Chinese courts.

Aside from the HKIAC, Hong Kong-seated arbitrations administered by the Asia Office of the International Court of Arbitration of the International Chamber of Commerce ("**ICC**"), China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center ("**CIETAC**") and the Hong Kong Maritime Arbitration Group also qualify under the Arrangement.

The Arrangement further provides that the court accepting the application should examine the application expeditiously. In fact, three applications under the Arrangement have already been successfully granted as of 9 December 2019. One of the applications, which was submitted to the HKIAC on 1 October 2019, was swiftly processed by the Shanghai Maritime Court and interim relief was granted on 8 October 2019.

Conclusion

The Arrangement is a welcomed development in terms dispute resolution for Hong Kong as it offers a significant advantage for cross border disputes involving Mainland Chinese parties. It is expected that the number of applications made under the Arrangement will continue to rise.

In terms of intellectual property related arbitrations, if a party has breached a licence agreement by infringing the counterparty's intellectual property rights, then an evidence preservation order via the Arrangement would be extremely helpful in compelling the party to preserve evidence, which may otherwise be at risk of being destroyed.



CHINA

Data Privacy

Third Times a Charm – Further Draft Amendments Issued for the PRC Personal Information Security Specification

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On 24 October 2019, a third round of draft amendments (“**Third Draft**”) to the “Information Technology – Personal Information Security Specification” (National Standard GB/T 35273-2017) (GB/T 35273-2017 信息安全技术 个人信息安全规范) (“**Specification**”) were issued. This Third Draft follows two earlier versions that had been released for public consultation on 1 February 2019 and 25 June 2019¹.

The original Specification came into effect on 1 May 2018, and sets out recommended best practices for the protection of personal information. Even though the Specification does not have the force of law, the PRC authorities take into account any non-compliance when carrying out

¹ See our previous article concerning the first draft of the amendments to the Specifications: <https://www.mayerbrown.com/en/perspectives-events/blogs/2019/07/safe-as-houses-the-prc-issues-revised-draft-of-the-personal-information-security-specification>

investigations or enforcement actions (e.g. in relation to the PRC Cybersecurity Law).

The Third Draft provides further clarification and some additional restrictions not seen in the earlier versions of the draft amendments. The following are some of the latest key changes introduced by the Third Draft that do not appear in the previous versions:

1. NO FORCED CONSENT DUE TO IMPROVEMENTS

Individuals cannot be obligated to provide their consent to the collection of their personal information on the basis of receiving an improved quality of service or security, enhanced user experience or for the development of any new products;

2. USERS' TERMINATION OF ONLINE SERVICES

Data controllers must comply with the following requirements regarding their users' ability to terminate their subscription for online services:

- a. provide an interface that enables the user to easily unsubscribe from further receipt of the services;
- b. comply with any termination request within 15 days;
- c. for the purposes of verifying the identity of the user, not collect any additional personal information above what has already been collected by the data controller during the registration process and provision of the services;
- d. specify how sensitive personal information, which was collected for the purpose of identity verification in relation to the cancellation of the services, shall be dealt with; and
- e. not impose any unreasonable conditions or additional requirements on users in relation to termination of the services.

3. REMEDIAL STEPS TO BE TAKEN IN THE EVENT OF A DATA PROCESSOR'S BREACH

A data controller must take appropriate remedial steps (including, where necessary, terminating its agreement with the data processor and requiring it to delete all personal information provided), if its data processor fails to process the personal information pursuant to the relevant agreement with the

data controller, or fails to implement adequate measures to protect the personal information.

4. JOINT DATA CONTROLLERS

If personal information is under the joint control of 2 data controllers, then the data controllers must execute an agreement setting out their respective obligations, including in relation to security and data breach notifications. A data controller shall remain liable and responsible for the actions of its joint data controller, if it fails to notify the data subjects of the identity of the joint data controller and their relevant obligations regarding the personal information collected.

Takeaway

The PRC authorities are continuing to take a proactive role in enforcing any data breaches involving personal information under various laws, including the PRC Cybersecurity Law. While the Specification does not have the force of law, once finalised and issued, the amendments introduced by the Third Draft will provide a clear indication of what the PRC authorities expect of data controllers and the sanctions for the non-compliance.



HONG KONG

Technology

Artificial Intelligence: Guidelines Issued by HKMA

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On 1 and 5 November 2019, respectively, the Hong Kong Monetary Authority (“**HKMA**”) issued a Circular on High-level Principles on Artificial Intelligence² (“**Circular on AI Principles**”) and a Circular on Consumer Protection in respect of Use of Big Data Analytics and Artificial Intelligence by Authorised Institutions³ (“**Circular on Customer Protection**”).

The HKMA issued the Circulars after conducting a survey during the third quarter of 2019, which found widespread adoption of artificial intelligence (“**AI**”) by banks in Hong Kong across all areas of their operations, from customer service chatbots to fraud and risk management.

Circular on AI Principles

The Circular on AI Principles was issued by the HKMA with the intent of providing guidance to banks on the design and adoption of AI. The guidelines are not intended to be stringent or prescriptive in nature, but to provide a balance between protecting consumers without hindering further technological developments. Banks are expected to take a risk-based approach

2 <https://www.hkma.gov.hk/media/eng/doc/key-information/guidelines-and-circular/2019/20191101e1.pdf>

3 <https://www.hkma.gov.hk/media/eng/doc/key-information/guidelines-and-circular/2019/20191105e1.pdf>

when applying the principles, depending on the type of AI being adopted.

The Circular on AI Principles sets out 12 principles, which generally cover 3 areas – governance, application design and development, and ongoing monitoring and maintenance. In brief, these principles are as follows:

A. BOARD AND SENIOR MANAGEMENT TO REMAIN ACCOUNTABLE

The board and senior management shall remain accountable for all automated and AI-driven decisions made by a bank. This brings into focus the importance of maintaining a clear governance framework and the deployment of risk management measures to ensure effective oversight over the use of AI within the bank.

B. DEVELOPERS TO HAVE REQUIRED COMPETENCE

Banks should only use personnel who have the necessary experience and competence to design and develop their AI applications. To achieve this, senior management must establish appropriate recruitment and training programmes, and implement supervisory mechanisms.

C. ENSURE THE AI APPLICATION CAN BE EXPLAINED

By implementing appropriate measures during the design phase, banks should ensure that their AI applications have an appropriate level of explainability taking into account the significance of each AI application deployed.

D. USING GOOD QUALITY DATA

The data being used as part of the AI machine learning must be relevant and of good quality, e.g. by carrying out data quality assessments within appropriately set metrics. Any issues that are discovered should be promptly escalated and rectified.

E. AI MODEL VALIDATION

Before any AI application is launched, extensive testing of the AI model must be carried out to confirm its accuracy and appropriateness (preferably this should be carried out by an independent third party).

F. AUDITS

Banks should maintain audit logs and relevant documentation for an appropriate period of time, to ensure that they can be used as evidence in the event of an investigation into an incident or unfavourable outcome in relation to the AI application.

G. VENDOR OVERSIGHT

Due diligence should be carried out by the bank regarding any third party vendor used to develop the AI application, and management controls should be implemented to manage any risks.

H. ETHICAL, FAIR AND TRANSPARENT AI

Measures must be implemented to ensure that any AI-driven decisions do not discriminate or unintentionally result in bias. The AI application must also be designed in a manner that complies with the bank's corporate values and ethical standards, and upholds consumer protection principles. Banks should be transparent with customers and clearly notify them if any service is powered by AI and the related risks.

I. ONGOING REVIEWS AND MONITORING

Banks should carry out periodic reviews and ongoing monitoring of the AI application to ensure that it still performs properly, in light of the fact that AI models may change due to their continued machine learning based on live data.

J. COMPLIANCE WITH DATA PROTECTION REQUIREMENTS

Effective data protection measures must be implemented by banks to ensure that any personal data collected and processed by the AI application complies with the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO"), and other applicable local and overseas regulatory requirements. Banks should use anonymised data to the extent possible.

K. IMPLEMENT CYBERSECURITY MEASURES

Banks need to ensure on an ongoing basis that their security measures are effective enough to handle new cyber threats that may be presented by the AI application.

L. RISK MANAGEMENT AND CONTINGENCY PLAN

Appropriate risk-management controls and contingency measures must be implemented, e.g. quality assurance checks, human intervention where necessary, ability to suspend the AI application and replace it with conventional processes if necessary, and so on.

The principles will be periodically reviewed and further guidance may be issued by the HKMA, from time to time.

Circular on Customer Protection

Along with the Circular on AI Principles, the HKMA issued the Circular on Consumer Protection to provide more specific guidance to banks on how to protect consumers in relation to the use of big data and AI in their operations. Whilst there is some overlap between the Circulars, the Circular on Consumer Protection provides more detail of what is expected of banks from a customer perspective. Similar to the Circular on AI Principles, banks should take a risk-based approach when applying the guidelines, depending on the type of big data and AI they use.

In summary, the Circular on Consumer Protection covers the following principles:

A. GOVERNANCE AND ACCOUNTABILITY

The board and senior management must remain accountable for any decisions and processes driven by AI applications or big data. This includes ensuring that there is an appropriately documented governance, oversight and accountability framework in place; compliance with the consumer protection principles under the Code of Banking Practice, Treat Customers Fairly Charter and other relevant regulatory requirements; and validating the big data and AI applications prior to launch and on an ongoing basis, and so on.

B. FAIRNESS

Banks should ensure that big data and AI models result in objective, consistent, ethical and fair outcomes for customers. For example, ensuring that they comply with applicable laws regarding discrimination; that customers are not unjustifiably

denied access to basic banking services; enabling manual intervention where necessary in order to mitigate any AI lending decision; taking customers' financial capabilities, situation and needs into account; and so on.

C. TRANSPARENCY AND DISCLOSURE

Banks need to be appropriately transparent with customers regarding the use of big data and AI applications, and how they work. For example, they must clearly inform customers of the fact that a service will be powered by big data and AI technology and the risks involved; information should be provided to customers so that they can understand how their data is used by the AI; where requested by the customer, explain the type of data being used and what factors affect big data and AI-driven decisions (save that such explanations do not need to be provided for systems used to monitor and prevent frauds, money laundering or terrorist activities); implement a mechanism to enable customers to request a review on any decisions made by the big data and AI applications; and so on. The language used to communicate with the customer must be clear and simple (i.e. user friendly, and not too technical).

D. DATA PRIVACY AND PROTECTION

In addition to ensuring compliance with the PDPO and other relevant regulatory requirements, banks should also have due regard for the relevant guidelines issued by the Hong Kong Privacy Commissioner for Personal Data (e.g. Ethical Accountability Framework, Information Leaflet on Fintech, and so on). Further, banks are advised to take a privacy-by-design approach and to only collect and store the minimum amount of data necessary, for the shortest time possible. Where consent needs to be obtained in relation to the collection and use of personal data for any products or services to be provided by the bank, which are powered by big data and AI, banks need to obtain the consent in a clear and understandable manner to ensure that valid informed consent has been provided.

Takeaway

Whilst no one disputes the potential benefits of AI technology, many jurisdictions have started to become concerned with the associated risks –

accountability, cybersecurity, ethics and bias, and consumer protection. Hong Kong is not the first country to issue guidelines to address some of these concerns. For example, in January 2019, the Singapore Personal Data Protection Commissioner issued a Proposed Model Artificial Intelligence Governance Framework, and in April 2019, the EU issued Ethics Guidelines for Trustworthy Artificial Intelligence (the first draft of which had been issued in December 2018).

Due to the broad nature of AI technology and their applicability, it is difficult to establish a one-size fits all regulation or policy. In order not to stifle innovation, but to also address the growing concerns regarding consumer protection, the regulators so far have taken a light approach, by providing guidelines and overarching principles to be taken into account by companies implementing AI technology.

As this area continues to develop, regulators globally will continue to pay close attention to the potential impact of AI, and we can expect to see more guidelines (and potentially mandatory regulations) issued in the future.



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