February 2017

China

Judicial Interpretations on Granting and Ownership Determination of Trademark Rights Issued

On January 1, 2017, the Supreme People's Court issued the Provisions on Several Issues concerning the Trial of Administrative Cases Involving the Granting and Ownership Determination of Trademark Rights (the "Provisions"), which shall come into force as of March 1, 2017.

The Provisions consist of 31 articles, touching upon the scope of examination, judgement of distinguishing features, protection of well-known trademarks, protection of prior rights such as the copyright and the right of name, and other substantial contents, and also providing for such procedural contents as the violation of due procedures and the ne bis in idem principle. All these contents clarify both important issues arising in administrative cases involving the granting and ownership determination of trademark rights and difficulties in judicial practices. The Provisions include various contents. The first is to clearly define the boundaries between articles of law in accordance with original legislative intent of the trademark law so as to apply laws in a better way; the second is to advocate the principle of good faith, protect prior rights, curb pre-emptive registration behaviours, maintain good order for trademark applications and granting; the third is to focus on the latest developments of industries and uniform the standards on law application based on the existing provisions of laws as the fundamental principles; the fourth is to play the function of judicial examination, redouble efforts to settle disputes in substance and improve the efficiency in the granting and ownership determination of trademarks, in consideration of characteristics of cases involving the granting and ownership determination of trademark rights.

最高法发布商标授权确权司法解释

2017年1月1日，最高法院下发《关于审理商标授权确权行政案件若干问题的规定》（下称《规定》），自2017年3月1日施行。

《规定》共31条，涉及审查范围、显著特征判断、驰名商标保护、著作权、姓名权等在先权利保护等实体内容，以及违反法定程序、一事不再理等程序内容，对商标授权确权行政案件所涉及的重要问题和审判实践中的难点进行了明确。《规定》主要内容如下：一、根据商标法的立法本意，厘清法律条文之间的界限，准确适用法律。二、倡导诚实信用原则，保护在先权利，遏制恶意抢注，维护商标申请和授权的良好秩序。三、以现行法律规定为基本原则，关注产业发展的最新动态，统一法律适用标准。四、遵循商标授权确权案件的特点，发挥司法审查功能，加大实质性解决纠纷力度，提高商标授权确权效率

MEP Issues Interim Provisions for the Administration of Pollutant Discharge License

On December 23, 2016, the Ministry of Environmental Protection ("MEP") issued the Interim Provisions for the Administration of Pollutant Discharge License (the "Provisions").

The Provisions clearly state that the MEP, depending on the amount of pollutants generated and discharged and on the degree of harm to the environment, will administer the pollutant discharge licensing in a different manner for pollutant discharge entities in different industries or those of different types in the same industry as provided in the catalogues for the classification-based management. Those entities discharging pollutants that do relatively little harm to the environment shall be subject to streamlined administration of pollutant discharging

licensing. Besides, the Provisions require that the pollutant discharging license shall indicate the following particulars, such as the locations of all draining exits and the number thereof, ways of discharging pollutants, whereabouts of pollutants discharged, types of pollutants discharged, permitted discharging concentration, permitted discharging amount and other matters. The Provisions also provide in detail for specific procedures for applying for, issuing and administering a pollutant discharging license, application materials and the time limit for handling such matters, pointing out that the existing pollutant discharge entities shall apply for and acquire a pollutant discharge license within the required time limit, while pollutant discharging entities for new construction projects shall apply for and acquire a pollutant discharge license before such project is put into production or use and the pollutant discharge occurs in practice.

环保部制发排污许可证管理暂行规定

2016年12月23日，环保部发布《排污许可证管理暂行规定》（下称《规定》）。

《规定》明确，环保部根据污染物产生量、排放量和环境危害程度的不同，在排污许可分类管理名录中规定对不同行业或同一行业的不同类型排污单位，实行排污许可差异化管理。对环境危害程度较低的排污单位实行排污许可简化管理。《规定》要求，排污许可证应载明下列许可事项：排污口位置和数量、排放方式、排放去向等；排放污染物种类、许可排放浓度、许可排放量；其他事项。《规定》还对排污许可证申请、核发、管理的具体程序、申请材料和办理期限作出详尽规定，指出现有排污单位应在规定的期限内申领排污许可证，新建项目的排污单位应在投入生产或使用并产生实际排污行为之前申领排污许可证。

SAIC to Comprehensively Advance Reform of Streamlined Deregistration of Enterprises

On December 26, 2016, the State Administration for Industry and Commerce ("SAIC") distributed the Guiding Opinions on Comprehensively Advancing the Reform of Streamlined Deregistration of Enterprises (the "Opinions").

According to the Opinions, the reform of streamlined deregistration of enterprises will be carried out comprehensively across the whole nation from March 1, 2017. To this end, the Opinions set forth requirements from three perspectives, including "clarifying the applicable scope and respecting enterprises' autonomous rights".

Besides, the Opinions make it clear that any limited liability corporation, non-corporate enterprise legal person, sole proprietorship enterprise or partnership enterprise that has not carried out any business activity after obtaining the business license, or has no credit or debt or has settled all credit and debt before applying for the deregistration, may choose at its discretion the general deregistration procedures or the streamlined deregistration procedures. Where an enterprise falls under any of certain circumstances, such as "a foreign-invested enterprise that involves the implementation of special access administrative measures prescribed by the state", "being included into the list of enterprises under the abnormal operation or the list of enterprises with serious illegalities or dishonest acts" or "being suspended from going through streamlined deregistration procedures", the said simplified deregistration procedures shall not apply to such enterprise.

工商总局：全面推进企业简易注销登记改革

2016年12月26日，国家工商总局下发《关于全面推进企业简易注销登记改革的指导意见》（下称《意见》）。

根据《意见》，自2017年3月1日起，在全国范围内全面实行企业简易注销登记改

革。为此，《意见》提出“明确适用范围，尊重企业自主权”等3方面的要求。《意见》明确，对领取营业执照后未开展经营活动、申请注销登记前未发生债权债务或已将债权债务清算完结的有限责任公司、非公司企业法人、个人独资企业、合伙企业，由其自主选择适用一般注销程序或简易注销程序。企业有“涉及国家规定实施准入特别管理措施的外商投资企业”、“被列入企业经营异常名录或严重违法失信企业名单的”、“曾被终止简易注销程序的”等情形的，不适用简易注销程序。

Judicial Interpretations on Handling Criminal Cases of Environmental Pollution Issued

On December 23, 2016, the Supreme People's Court and the Supreme People's Procuratorate have jointly issued the Interpretations on Certain Issues Concerning the Application of Law in the Handling of Criminal Cases of Environmental Pollution (the "Interpretations"), which shall take effect on January 1, 2017.

The Interpretations, based on the clear definition of "serious pollution of the environment", further specify that, whoever fails any of four circumstances such as "an enterprise with an operating permit for hazardous waste, in violation of State regulations, discharges, dumps, or disposes radioactive waste, waste containing infectious diseases pathogens, toxic materials or other harmful substances" shall be given a heavier punishment. According to the Interpretations, whoever, knowing that another person has no operating permit for hazardous waste, provides it or entrusts it to collect, store, utilize or dispose of hazardous waste, thereby causing severe environmental pollution, shall be punished as an accomplice to the crime. The Interpretations provide that the amount of hazardous waste can be identified by comprehensively taking into account the statements of the defendant, the production process, material consumption and energy consumption of the enterprise involved, as well as the environmental impact assessment document filed for approval or record, and other evidence.

两高发布办理环境污染刑事案件司法解释

2016年12月23日，最高人民法院、最高人民检察院联合发布《关于办理环境污染刑事案件适用法律若干问题的解释》（下称《解释》），自2017年1月1日起施行。

《解释》在明确“严重污染环境”等定义的基础上，进一步规定，具有“具有危险废物经营许可证的企业违反国家规定排放、倾倒、处置有放射性的废物、含传染病病原体的废物、有毒物质或者其他有害物质的”等4种情形之一的，应当从重处罚。根据《解释》，明知他人无危险废物经营许可证，向其提供或者委托其收集、贮存、利用、处置危险废物，严重污染环境的，以共同犯罪论处。《解释》规定，对于危险废物的数量，可以综合被告人供述，涉案企业的生产工艺、物耗、能耗情况，以及经批准或者备案的环境影响评价文件等证据作出认定。

Law on Environmental Protection Tax to Take Effect from 2018

On December 25, 2016, the Law of the People's Republic of China on Environmental Protection Tax (the "Law") was adopted at the 25th session of the Standing Committee of the 12th National People's Congress and issued upon Order of President No.61 for implementation as of January 1, 2018.

The Law states that environmental protection tax (the "Tax") shall be levied in accordance with the Law in lieu of pollutant discharge fees as of the effective date of the Law. According to the Law, payers of the Tax shall be enterprises, public institutions, and other manufacturers and business operators directly discharging pollutants into the environment and pollutants subject to the Tax shall include air pollutants, water pollutants,

solid waste, and noise. The Law prescribes five circumstances exempted from the Tax for the time being and stipulates that where the concentration value of taxable air pollutants or water pollutants discharged by a taxpayer is 30% lower than the State and local pollutant discharge standard, the Tax shall be levied at its 75% rate, and where the said concentration is 50% lower, the Tax shall be levied at its 50% rate.

环境保护税法获通过 将于2018年起施行

2016年12月25日，第十二届全国人民代表大会常务委员会第二十五次会议表决通过《中华人民共和国环境保护税法》（下称《环保税法》），经第六十一号主席令签署公布，自2018年1月1日起施行。

《环保税法》明确，自本法施行之日起，依照本法规定征收环境保护税，不再征收排污费。根据《环保税法》，直接向环境排放应税污染物的企业事业单位和其他生产经营者为纳税人，大气污染物、水污染物、固体废物和噪声为应税污染物。《环保税法》规定了5种暂予免征环境保护税的情形，同时规定，纳税人排放应税大气污染物或者水污染物的浓度值低于国家和地方规定的污染物排放标准百分之三十的，减按百分之七十五征收环境保护税；低于百分之五十的，减按百分之五十征收。

For more information on any of the items included for PRC, please feel free to call Nicholas Chan.

Hong Kong

International Convention on the Harmonized Commodity Description and Coding System to apply to HKSAR

On 29 December, 2016, the Customs and Excise Department announced that the International Convention on the Harmonized Commodity Description and Coding System (the "Convention") shall apply to the Hong Kong Special Administrative Region starting from 1 January, 2017.

The purpose of the Convention is to facilitate trade and information exchange by standardizing the description, classification and coding of goods in international trade through the Harmonized Commodity Description and Coding System. This harmonized system was developed by the World Customs Organization, which is an independent intergovernmental body that aims to enhance the effectiveness and efficiency of customs administration. To ensure harmonization, parties to the Convention agree to base their national tariff schedules on the Harmonized Commodity Description and Coding System.

Although Hong Kong is newly party to the Convention, it should be noted that the application of the Convention to Hong Kong does not require any change in Hong Kong's current legislation, trade declaration policy and practice. This is because Hong Kong has adopted the harmonized system since 1992.

Under Hong Kong's Import and Export (Registration) Regulations, those who import or export articles are required to declare any imports or exports (excluding exempted articles) to the Commissioner of Customs and Excise within 14 days after the date of importation or exportation. When completing the declaration, importers and exporters are required to use the commodity code published in the Hong Kong Imports and Exports Classification List, which is the same as the harmonized system referred to in the Convention.

There are currently 154 contracting parties to the Convention, and more than 200 countries and economies use the harmonized system. This effectively covers over 98% of the merchandise in international trade.

Hong Kong and Korea enter into a Tax Agreement

On 25 January 2017, the Hong Kong government announced that Hong Kong and Korea have signed an agreement for the automatic exchange of financial account information in tax matters. Such exchanges will commence in 2019.

The Automatic Exchange of Information ("AEOI") requires financial institutions to identify financial accounts held by tax residents in reportable jurisdictions, and such information will be exchanged on an annual basis. This exchange enables the discovery of formerly undetected tax evasion activities.

Korea is the third country to sign such an agreement with Hong Kong. A Hong Kong spokesman has said, "Since the signing of the first two agreements for AEOI with Japan and the United Kingdom in late 2016, we have been seeking to expand Hong Kong's AEOI network with other tax treaty partners. The signing of the agreement with Korea signifies the government's efforts in this respect." The Hong Kong government will include Korea in the list of "reportable jurisdictions" under the Inland Revenue Ordinance.

Apology Bill to be Tabled

It has been announced by the Hong Kong Government that the Apology Bill will be tabled at the Legislative Council in February 2017. This means that the Government is now seriously considering the implementation of such legislation.

An apology is an alternate dispute resolution mechanism, usually applying to a dispute where one party feels that it has been wronged by another. In such situations, an apology may help to prevent the escalation of disputes and, instead, facilitate resolution. Parties are traditionally advised not to make an apology, as it is currently an admissible piece of evidence in civil proceedings.

However, the proposed legislation aims to promote the making of apologies in order to facilitate the amicable resolution of disputes. This is achieved by providing that an apology does not constitute an admission of fault or liability and that it is inadmissible as evidence detrimental to the apology maker. Moreover, an apology will not affect any insurance coverage available to the apology maker.

After two rounds of public consultation, the Steering Committee on Mediation recommended the formulation of the Apology Bill. The legislative proposal was supported by the public and by the Legislative Council's Panel on Administration of Justice & Legal Services.

This kind of apology legislation has been in force in other common law jurisdictions such as Australia, Canada and the United Kingdom, but was only suggested in Hong Kong in 2010. The Department of Justice stated that Hong Kong would be the first Asian jurisdiction to implement apology legislation. It is considered that this will help to enhance Hong Kong's standing as a dispute resolution centre, especially in the context of mediation.

Third Party Funding of Arbitration

After publication of the Law Reform Commission's October 2016 report which recommended amending the law to permit third party funding of arbitration in Hong Kong, the Government has announced that it will introduce legislative amendments to the Arbitration Ordinance so as to permit such funding.

Third party funding of arbitration is a practice where third party firms provide financial assistance to a party who would otherwise lack the financial resources to pursue arbitration. As such, it is thought that the making of third party funding permissible in Hong Kong will promote access to justice.

Third party funding of litigation remains unlawful in Hong Kong, however the position of third party funding of arbitration is unclear as the Court of Final Appeal expressly left the question unanswered in the case of Unruh v

Seeberger (2007) 10 HKCFAR 31. Although the common law doctrines of maintenance and champerty still remain a tort and a crime in Hong Kong, the amendments clarify that they do not apply to the funding of arbitration. Furthermore, the amendments seek to propose an addition of a code of practice to the Arbitration Ordinance, with the aim of regulating and preserving the integrity of the justice system.

For more information on any of the items included for Hong Kong, please feel free to call Nicholas Chan.

United States

Declaratory Judgment Jurisdiction – Federal Caselaw

On December 9, 2016, in *Simoniz USA, Inc. v. Dollar Shave Club,* the United States District Court for the District of Connecticut dismissed a declaratory judgment complaint filed in an intellectual property lawsuit. Simoniz USA, Inc. ("Simoniz"), a company that sells cleaning products, filed the complaint against Dollar Shave Club ("DSC"), a company that sells personal care products, alleging trademark infringement. DSC had concerns about the potential for confusion between the brands of the two companies and had formally opposed Simoniz's trademark applications in the U.S. and Europe. In response to Simoniz's repeated requests that DSC withdraw its opposition, DSC sent Simoniz an e-mail containing "cease and desist" language. While DSC did not formally threaten any trademark infringement claim on the part of Simoniz, it did include a demand at the conclusion of its letter that Simoniz stop using the mark in the U.S. as well as in the E.U. Simoniz thereafter sought a declaratory judgment from the court stating that Simoniz's use of the DOLLAR CLEAN CLUB trademark in the U.S. did not infringe U.S. law.

The U.S. Supreme Court has clarified that a party seeking a declaratory judgment must show that there is a "substantial controversy between the parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment" (see MedImmune v. Genentech Inc., 549 U.S. 118 (2007)). Although the court in this matter did not find DSC's opposition to the Simoniz trademark application in Europe constituted a "substantial controversy" for declaratory judgment purposes, the court found its demand that Simoniz cease all use of the contested trademark may rise to this level. However, substantial controversy alone is not sufficient to confer subject matter jurisdiction for the purposes of a declaratory judgment action and the court needed to look to whether there was sufficient immediacy and reality.

In dismissing the action, the court found that any "substantial controversy" between the parties was not of sufficient "immediacy and reality" as required to confer subject matter jurisdiction. Specifically, the court noted Simoniz failed to establish that it had a definite intent and apparent ability to use the trademark in the U.S. at the time it requested a declaratory judgment. As such, Simoniz failed to establish an actual case of controversy required to survive a motion to dismiss.

This decision is important in that the court found "cease and desist" language could be sufficient to demonstrate a substantial controversy between parties for the purposes of subject matter jurisdiction. Although here, the court noted that substantial controversy alone is not enough to sustain a declaratory judgment action without a showing of an immediacy and reality sufficient to justify the court taking action, and ultimately dismissed the case. Companies may now find it easier to preemptively file suit and request declaratory judgment claiming they are under the threat of an intellectual property lawsuit.

Forum Shopping - Federal Update

The U.S. Supreme Court is set to hear a case that could finally answer the question about the limits of specific jurisdiction when it reviews the California Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Courts of San Francisco County,* 377 P.3d 874 (Cal. 2016). In *Bristol-Myers*, the California Supreme Court held that hundreds of non-California plaintiffs could bring claims under various state laws in the California courts.

In 2014, the U.S. Supreme Court held in its opinion in *Daimler AG v. Bauman* that general jurisdiction over corporate entities is limited to two locations, the state of incorporation and the state where the company has its principle place of business. However, in *Bristol-Myers Squibb*, the California Supreme Court effectively threatened the U.S. Supreme Court's efforts to limit forum shopping by using specific jurisdiction. The California Supreme Court found that California courts had specific jurisdiction over the claims of almost 600 out-of-state plaintiffs, even though the actions giving rise to their claims occurred entirely outside the state. The majority opinion found that specific jurisdiction was permissible because the out-of-state plaintiffs were joined with several California plaintiffs whose claims were based on the same allegedly defective product and purportedly misleading marketing and promotion of that product, which allegedly caused injuries in and outside the state.

The U.S. Supreme Court's decision will address the California Supreme Court's attempts to widen the limits of specific jurisdiction and could have far reaching impacts on plaintiffs' ability to forum shop. A decision is expected sometime in the summer of 2017.

President Executive Order - Regulatory Overhaul

On January 30, 2017, President Trump signed an executive order requiring government agencies to repeal two regulations for each new one issued, prompting concerns about the unintended consequences such as increasing an already lengthy rulemaking process and creating a new wave of litigation at the state level if they are no longer federally preempted.

Currently, federal agencies already go through a lengthy rulemaking process for both new regulations and those to be repealed, including an extensive public comment period. The executive order could burden regulators as they now need to submit their suggested two-rule cuts for review in order to enact new legislation. Additionally, executive agencies will have zero budget for new rules this fiscal year. Industry groups waiting for regulations are looking at long and frustrating wait times.

Further, if an agency is hampered from issuing expected rulemakings, the freeze could create an increase in litigation. For example, a number of courts have stayed cases over "natural" label claims on food products after the FDA stated it may undertake a rulemaking to define the term. Plaintiffs lawyers could argue that these new regulations will not happen and request their cases to proceed. The effects of the executive order may not be felt immediately. However, industries that are heavily regulated, such as by the FDA, should expect a lengthier rulemaking process and the possibility of a rise in state actions.

President Executive Order – Consumer Product Safety Commission Response to Regulatory Overhaul

In response to President Trump's executive order requiring government agencies to repeal two regulations for each new one issued, the head of the Consumer Product Safety Commission ("CPSC") issued a statement that the order does not apply to the CPSC and that following the order would undermine public safety. CPSC Chair Eliot

Kaye noted that although the CPSC had in the past looked to follow the spirit of executive orders that advance sound public policy and do not conflict with the agency's public health and safety mission, this order "clearly fails" on those counts. Kaye stated that to voluntarily follow the order "would lead to poor public policy decisions by ignoring the many necessary benefits provided by consumer protections that save lives and protect all of America's families." He further stated that following the order would be "counter to our safety mission, as it would cruelly and unfairly have us pit vulnerable populations against each other when it comes to making safety decisions."

The executive order only applies to agencies under the direct oversight of the Office of Management and Budget, and not to independent agencies.

National Right-To-Work Act – Federal Bill

On February 1, 2017, a national right-to-work bill was introduced in the House of Representatives. The bill, called the National Right-to-Work Act, would amend the National Labor Relations Act ("NLRA") to remove language allowing requirements that workers pay dues as a condition of employment, known as union security clauses. The NLRA was amended by the Taft-Hartly Act in 1947 to allow states to pass laws barring mandatory union dues. Under these laws, unions are required to bargain on behalf of an entire bargaining unit; however members do not have to pay dues.

Currently 28 states, including North Carolina and Georgia, have passed right-to-work laws. Traditionally, states enacting right-to-work laws were in the south where union support is perceived to be lower. Unions fear that a national right-to-work law would be a crushing blow to union coffers. Past attempts at a national right-to-work law have failed to make it through both houses of Congress, however, support for such laws is expanding, with traditionally "pro-union" states passing their own right-to-work laws in the past several years.

Supporters of right-to-work laws state that it gives workers the right to opt out of paying for union memberships they do not want. Opponents state that the laws allow workers to enjoy benefits collectively bargained for by a union without paying to be represented. Right-to-work laws typically benefit companies as weaker unions are seen as easier to work with. However, labor attorney and former union organizer Larry Cary believes a national right-to-work might not cause a gradual erosion of union power but rather motivate unions to assert itself to survive. "Faced with that reality, the union has to more effectively represent people than they might have otherwise represented in order to win them over, to get them to pay dues, which means the shop floor becomes a battleground."

For more information on any of the items included for the US, please feel free to call Huu Nguyen or Sarah Rathke.