



CHINA UPDATE 2006

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China Plans to Unionize 60% of Foreign-Invested Companies

Key Points:

- *Promotes employee rights*
- *Enables negotiating and collective bargaining*

While there are 20 million PRC employees working at foreign-invested enterprises (“FIEs”), only 1/3 of FIEs in China have established trade unions. Although the PRC Trade Union Law grants employees the right to establish trade unions, it does not impose an obligation on employers to form trade unions. Because unionization has always been an option for employees rather than a responsibility of their employers, FIEs have not voluntarily encouraged their employees, and employees generally have not had the power or enthusiasm, to set up a trade union.

In order to change the current situation, the All-China Federation of Trade Unions, the top trade union organization in China, held a recent meeting on its plans to unionize 60% of foreign-invested companies by the end of this year. At the meeting, the federation urged local union leaders to approach companies and workers to set up more unions, setting the target of having 80% of foreign companies in China unionized by the end of 2007. The head federation official also indicated that this goal is an important policy of the central government.

Under the PRC Trade Union Law, if employees choose to form a trade union, their employer must support and fund it in an amount equaling 2% of the total annual wages paid by that employer. The trade union functions to protect employees’ rights and welfare and holds the right to negotiate and enter into collective contracts on behalf of the employees. Trade unions commonly existing in state-owned enterprises generally stand in line with the employer, and their main function is to arrange employee activities and coordinate the employer-employee relationship. In contrast, because FIEs are not state-owned enterprises, it is more likely that FIE trade unions will protect employees’ interests, as opposed to siding with employers. – *Lindsay Zhu*

Amendments to Clarify Administrative Rules on the Penalties for Price Offenses

Key Points:

- *Protects customers*
- *Regulates unfair competition*

The Amendments to the Administrative Rules on the Penalties for Price Offenses, which come into effect on May 1, 2006, clarify and numerate specific inappropriate pricing offenses subject to mandatory refund of overcharged prices to consumers or businesses, as well as potential forfeiture of the overcharged price not refunded, if any, by the

pricing supervision authority. Such inappropriate pricing offenses include conspiracies involving market price speculation, dumping to achieve a market monopoly, significantly increasing prices through dissemination of false market information, and price discrimination. The amendments also clarify that customers or businesses suffering from overcharging as a result of these offenses will still be entitled to a refund from the offending business after these administrative actions. In addition, refusal to refund the consumers or business for overcharging will further constitute a grave offense, subject to more serious administrative penalties.

The PRC Pricing Law, adopted early in 1997, specifies certain inappropriate pricing activities and the corresponding administrative penalties, which are further implemented in the Administrative Rules on the Penalties for Price Offenses and other applicable rules. It also provides for the basis and extent of government regulation for control on pricing. This Pricing Law and the implementing administrative rules complement and reiterate principles set up in China to stop unfair competition.

– Li Zijie

2006 IPR Protection Action Plan Issued

Key Points:

- *Promotes innovation*
- • *Ramps up enforcement*
- • *Revises existing laws*

The National IPR Working Group, an interagency body under the State Council chaired by Vice Premier Wu Yi, issued China's 2006 IPR Protection Action Plan on March 8, 2006.

The plan presents a notable shift in several key areas. First, the plan's language suggests a stronger emphasis, in comparison to past efforts, on promoting innovation and protection of intellectual property rights ("IPR") by and for domestic companies. Second, the plan features a clear shift in focus from the promulgation of new laws and regulations to the revision of existing laws to close loopholes and gaps in the IPR legal regime. Finally, the plan clearly lays out China's intention to significantly ramp up enforcement, information collection and public relations efforts.

The plan indicates that China will draft, finalize or revise 17 laws and regulations related to trademarks, copyrights and patents. These include finalizing draft revisions to the Trademark Law, issuing an Opinion on Problems Encountered in Administrative Enforcement of Trademarks, and drafting Rules on Handling Trademark and Company Name Conflicts and Rules on Protecting Information Network Broadcasting Rights. The

Supreme People's Court ("SPC") will finalize the four judicial interpretations it issued for comment last fall. The interpretations clarify IPR-related provisions in the PRC Anti-Unfair Competition Law, Copyright Law, Trademark Law and other relevant regulations and provide guidelines for civil cases concerning IPR conflicts, unfair competition, and IPR infringement of music videos and new plant varieties.

In 2006, government agencies will strengthen enforcement of IP laws. Local public security bureaus will continue the Mountain Eagle campaign, directed at egregious copyright infringements. Local cultural bureaus and administrations of industry and commerce ("AICs") will undertake the Sunshine campaign, designed to clear major cities of pirated recorded materials. AICs will conduct raids against counterfeiting and trademark infringement. Local customs and commerce authorities, AICs and other offices will launch the Blue Sky campaign, intended to promote compliance with the recently issued Regulations on IPR Protection at Trade Shows. These regulations mandate the establishment of IPR complaint centers at exhibitions and the removal of infringing products from exhibition booths and displays.

The PRC government will create a database for statistics on IPR protection and establish IPR complaint service centers in major cities. Supreme Courts will begin publicizing their IP case judgments

online and the Supreme People's Court will create a magazine, *China Trials*, publicizing details of selected IP cases.

The plan will launch strong educational campaigns on IP protection to the public in the form of new reports, exhibitions, TV programs, books and forums. It will also create training vehicles for IP professionals, groups, IP law enforcement staff and the general public. The government will also strengthen international cooperation in IP legislation and protection, including holding a meeting of high-level officials regarding Sino-American IP enforcement efforts.

The plan requires provision of protection services to IP rights owners, including increasing the efficiency of trademark registration, ensuring the fairness of trademark dispute adjudications and strengthening the establishment and protection of famous marks.

– *Wei Zhong*

New Rules Issued for Resolving Domain Name Disputes

Key Points:

- *Two-year limitation period for initiating complaints*
- *Cybersquatting now more narrowly defined*
- *Respondents now better equipped to defend complaints*

Effective March 17, 2006, the China Internet Network Information Center ("CNNIC") has issued

new measures for resolving domain name registration disputes. The CNNIC, the PRC state network information center for China established in 1997, is subject to the Ministry of Information Industry ("MII") and operates and administers the China Domain Name Registry Service for the ".cn" country code top level domain ("ccTLD") and the Chinese Domain Name ("CDN") system. CNNIC also maintains a state top-level network catalog database providing information search services for websites, Internet users and domain names.

To resolve .cn domain name disputes, in September 2002, the CNNIC issued its Domain Name Dispute Resolution Policy, in which the resolution of such disputes would be resolved by appointed dispute resolution service providers – namely, the China International Economic and Trade Arbitration Commission ("CIETAC") and the well-known Hong Kong International Arbitration Centre ("HKIAC"). The dispute resolution process involves panels of experts composed of one or three listed panelists who have expertise on computer networks and laws and are capable of rendering independent and unbiased decisions in domain name disputes. This independent dispute resolution service requires complainants to prove the following information:

- whether the disputed domain name is identical with or confusingly similar to the complainant's

name or a mark in which the complaint has civil rights or interests;

- whether the disputed domain name holder has no right or legitimate interest in respect of the domain name or a major part of the domain name;
- whether the disputed domain name holder has registered, or is using, the domain name in bad faith.

An examination of cases published by the dispute resolution service providers indicates that in the overwhelming majority of cases, the disputed domain name is transferred to the complainant. While the evidential requirements are already quite strict, the new rules now make it more difficult for complainants to initiate a complaint or to succeed in that complaint. The primary changes imposed by the new rules are as follows:

(1) Two-Year Rule: Complainants are now required to file a complaint within two years of the commencement of use of a domain name by the respondent – i.e., there is a two-year limitation period on complaints. Therefore, if a respondent can prove that he has used a CNNIC registered domain name for at least two years prior to the filing of the complaint, the complainant will be barred from succeeding against the respondent in domain name proceedings. However, this will not prevent the complainant from filing a claim against the respondent via the courts.

(2) Cybersquatting: One of the primary reasons for establishing a domain name dispute resolution service is to counter the phenomenon of cybersquatting, in which persons register domain names solely for the purpose of selling them to third parties for improper financial gain. The new rules have narrowed the scope of definition of the term "cybersquatting" by defining it as the practice of registering a domain name for the purpose of selling or transferring it to the rightful owners or their competitors. Therefore, cybersquatting is not committed if a respondent sells or transfers a domain name to a third party other than the rightful owner or the rightful owner's competitor.

(3) Defending Successfully: The new rules set forth the conditions under which the respondent can successfully demonstrate their rights to the disputed domain name, thereby successfully defending a complaint, by proving any one or more of the following:

- (a) That it has innocently used this domain name or the name corresponding to this domain name during the course of offering goods or services;
- (b) That the domain name held by the respondent has already become well known even if the respondent has not acquired the relevant trademark or service mark; or

- (c) The respondent has properly used or noncommercially and lawfully used the domain name and has no intent to mislead consumers for commercial gains.

The new rules, clearly drawn up in favor of respondents, will undoubtedly have the effect of making it more difficult for morally rightful owners to successfully prosecute a domain name dispute under the CNNIC's approved resolution process. It also means that companies should regularly consult the .cn domain name registry to ensure that there is no attempt by third parties to register a domain name. – *Diarmuid O'Brien*

Ministry of Finance Updates Enterprise Accounting Standards

Key Points:

- *Listed companies must follow both basic and item-specific updated standards*
- *Unlisted companies encouraged to implement item-specific standards*

The PRC Ministry of Finance ("MOF") recently promulgated the revised Enterprise Accounting Standards, complying with the International Financial Reporting Standards ("IFRS") and creating a unified enterprise accounting standards system in China. These new Enterprise Accounting Standards, which come into effect on January 1, 2007, are composed of one set of basic standards and 38 item-specific standard sets. Listed

companies must follow the basic standards and the 38 item-specific standard sets beginning January 1, 2007. Unlisted companies are also encouraged to implement the 38 item-specific standard sets.

One of the purposes of revising the Enterprise Accounting Standards was to make the reporting process more transparent and strict, to enable better access to accurate information for investors,

creditors, the government and the general public. Through implementing the new standards, however, the Chinese government hopes to improve the domestic investment environment. Some analysts believe that the new standards are simply "localized" versions of the IFRS – which may disappoint some global investors. – *Jennifer Liu*

Articles and Publications

James M. Zimmerman, *China Law Deskbook, Second Edition (2005): A Legal Guide for Foreign-Invested Enterprises*. More information is available on the ABA website:

<http://www.abanet.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5210139>.

Amy L. Sommers, "Foreign Investment Verification: Reform, Status Quo, or Bafflement?," *China Business Review*, November-December 2005. Access to the article is available at: http://www.ssd.com/publications/pub_detail.aspx?pubid=9426

"Cal Law 2005 Roundtable Series: Doing Business in China," *GC California Magazine*, November 2005. The article features **Jerome J. Joondeph Jr.**, partner in Squire Sanders' Palo Alto office, on a panel discussing US companies and law firms setting up operations in China. Access to the article is available at: http://www.ssd.com/resources/news_detail.aspx?newsid=12381

Wei Zhong, "Legal Analysis for International Protection of Chinese Brands," *China Development Observation*, Issue 12, 2005. Mr. Zhong is an associate in Squire Sanders' Beijing office. *China Development Observation* is a journal published by the State Council Development Research Center, the most influential think tank in China. Access to the article (in Chinese) is available at: <http://www.chinado.cn/ReadNews.asp?NewsID=466>

Aaron R. Winger, "Awareness of Foreign Filing Requirements for Inventions Originating Abroad Prevents Adverse Consequences for Foreign Investors," *New Matter* (quarterly publication of the Intellectual Property Section of the California State Bar), Vol. 31, No. 1. Mr. Winger is a national partner in Squire Sanders' Shanghai and Palo Alto offices.

Dan Roules, partner in Squire Sanders' Shanghai and Beijing offices, was quoted about the economic climate of China in an article, "Keeping Pace: Fast-Moving Markets Bring New Challenges" in the March 2006 issue of *Counsel to Counsel* magazine. The article is available on the Squire Sanders website at: http://www.ssd.com/publications/pub_detail.aspx?pubid=9555

China Alert, "Revised PRC Company Law Leads to Contradictions: Representative Offices, Branches and Liaison Offices of Domestic Companies (Including FIEs)," April 2006. The article is available on the Squire Sanders website at:

http://www.ssd.com/publications/pub_detail.aspx?pubid=9557

Presentations and Recent Events

Sungbo Shim, partner in Squire Sanders' Beijing office, made a presentation on Venture Capital Issues and Trends in China and participated in a panel discussion on Venture Capital in Asia at the VentureOne Summit held in San Francisco on March 22-23, 2006. The VentureOne Summit is one of the venture capital industry's premier annual gatherings, backed by the editorial expertise of Dow Jones and The Wall Street Journal. Squire Sanders was a cosponsor of this year's event.

Nicholas Chan, national partner in Squire, Sanders' Hong Kong office, represented the Law Society of Hong Kong as a lecturer at a public seminar organized by the Metro Broadcast radio station on March 26, 2006. His topic, presented to 500+ attendees, was "franchise law and entrepreneurship."

Zijie (Lesley) Li, GuoJun Ye and Ju (Lindsay) Zhu, respectively, consultants in Squire Sanders' Shanghai office, presented "Employment Matters in China Today," "Getting Your Money Out" and "Common Real Estate Issues" to the participants in the China Business Immersion Trip organized by China Centric Associates and Squire Sanders on March 27, 2006.

Aaron R. Winger spoke at an April 12, 2006 seminar sponsored by the U.S. & Foreign Commercial Service section of the American Consulate General, Shanghai on China's Audiovisual Market: Opportunities & Challenges for U.S. Exporters. Mr. Winger, a national partner in the Palo Alto and Shanghai offices, spoke on the topic of "How to Secure Patents in the Audiovisual Industry."

Charles R. McElwee II, counsel in the Shanghai office, attended an invitation-only dinner with US Environmental Protection Agency (EPA) Administrator Stephen Johnson on April 13, 2006 in Shanghai. The Administrator was on his first trip to China and was interested in discussing the environmental issues facing China and ideas for US-China cooperation on the environment with environmental specialists in China.

James M. Zimmerman spoke at a seminar devoted to International and China-related Arbitration topics sponsored by the European Union Chamber of Commerce in China on April 27, 2006. Mr. Zimmerman is a partner in Squire, Sanders' Beijing office; his PowerPoint presentation is available upon request.

On May 19, 2006, **James M. Zimmerman**, will make a presentation entitled "Shaping your China Strategy: A Legal Perspective" to the San Diego World Trade Center. More information, including how to register for this event, may be found at:

http://www.sdwtc.org/events_detail.asp?PartnerId=&EventsRegionID=sandiego&EventID=668

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