



浦瑞律师事务所
CENLAW & PARTNERS

PERIODICAL

October 2010

SHANGHAI. CHINA

Preface

Cooperation News

U.S.A

Germany, Hamburg

Italy

Germany & France

Britain

Burma

Legal Express from China

International Trade & Foreign Investment

- Central Bank Announces Rules On Bank Accounts For RMB Clearance By Overseas Institutions
- NDRC Demands Acceleration Of Merger And Restructuring Of Coal Mine Enterprises
- Time Limit For Levy Of Anti-Dumping Duty May Be Extended Appropriately
- SAFE To Implement Import Payment Verification Reform Nationwide

Finance & Taxation

- SAFE Regulates Administration Of Foreign Currency Bank Cards
- CSRC Issues Reform Measures For Phase II Of IPO System

Intellectual Property Right

- Additional Requirements For Enhancing Genuine Software In Government Offices
- Foreign-Related Civil Relations Application Law Clarifies IPR Rules

Others

- CIRC Restricts Interested Persons In Insurance Cases From Leaving Country
- State Council Consults Public On Draft State Compensation Regulations
- SAIC Promulgates Measures Against Unlawful Contract-Related Acts

Legal Comments

- New Trend to FDI in China
- Concise Review of The Law of the People's Republic of China on Application of Laws on Foreign Related Civil Relations



Add: SuiteA-B,4/F,Crystal Century Tower,No.567

Weihai Road,Jing'an District,Shanghai,200041

Tel: 86 21-6288 6799 Fax: 86 21-6288 6825

Preface

China declared its biggest tourism event ever, the Shanghai World Expo, a stunning success Sunday, after introducing a record 72 million visitors to a smorgasbord of cultures and technologies meant to illustrate ideas for urban sustainability.

Premier Wen Jiabao praised the fair Sunday as a "splendid event" that "truly brought together people around the globe."

World Expositions are galleries of human inspirations and thoughts. Since 1851 when the Great Exhibition of Industries of All Nations was held in London, the World Expositions have attained increasing prominence as grand events for economic, scientific, technological and cultural exchanges, serving as an important platform for displaying historical experience, exchanging innovative ideas, demonstrating esprit de corps and looking to the future.

Chinese people have presented to the world a successful, splendid and unforgettable exposition. Expo 2010 Shanghai China is a great event to explore the full potential of urban life in the 21st century and a significant period in urban evolution. The prospect of future urban life, a subject of global interest, concerns all nations, developed or less developed, and their people. Being the first World Exposition on the theme of city, Exposition 2010 attracted governments and people from across the world, focusing on the theme "Better City, Better Life." For its 184 days, participants have displayed urban civilization to the full extent, exchanged their experiences of urban development, disseminate advanced notions on cities and explored new approaches to human habitat, lifestyle and working conditions in the new century. They will learn how to create an eco-friendly society and maintain the sustainable development of human beings.

Expo 2010 Shanghai China focused on innovation and interaction. Innovation is the soul, while cultural interaction is an important mission of the World Expositions. In the new era, Expo 2010 Shanghai China contributed to human-centered development, scientific and technological innovation, cultural diversity and win-win cooperation for a better future, thus composing a melody with the key notes of highlighting innovation and interaction in the new century.

In addition, Expo 2010 Shanghai China will offer a wonderful opportunity for cross-culture dialogues. Before the conclusion of the Exposition, a "Shanghai Declaration" is issued. This declaration, hopefully a milestone in the history of the World Expositions, will epitomize the insights to be offered by the participants and embody people's ideas for future cooperation and development and extensive common aspirations, thereby leaving a rich spiritual legacy of urban development to people throughout the world.

Cooperation News

U.S.A

- (a) CENLAW cooperated with American lawyers to provide legal service of M&A affairs in U.S.A including Equity Acquisition, Employee Settlement and Trademark transferring etc for a Shanghai client.
- (b) In the morning of October 23, three lawyers of Blank Rome LLP United States visited Cenlaw & Partners. They are Mr. Barry H. Genkin, the chairman of business department, Jeffrey A. Rinde and William Zheng. Both sides introduced the team, contents of services and arrangements regarding the cross-border legal services of respective law firm. Two law firms had a good communication in respect of the feasibility and basic framework of the future cooperation.
- (c) Kingward Gan, partner of CENLAW, was entrusted by an American client for disposing the labor dispute with his Shanghai employer.

Germany, Hamburg

CENLAW provided the legal service of establishing a company in Germany for a Chinese client in cooperation with German lawyer.

Italy

CENLAW provided legal consultancy in cooperation with an Italian law firm for an Italian Company of setting up a Representative Office in China.

Germany & France

On the morning of October 12, five european lawyers visited Cenlaw & Partners. They are Mr. Thierry Clerc, partner of Busekist Winter & Partner, Germany, Mr. Johannes Vogel, partner of Sagawe & Klages Rechtsanwälte, Germany, Mr. Johannes Klages, partner of Sagawe & Klages Rechtsanwälte, Netherlands, Mr. Edward Dijkhoorn, partner of marree & dijxhoorn, France and Ms. Corinne Pilletn from France. Five lawyers had a sufficient and pleasant communication with Partners of foreign business department of Cenlaw & Partner in terms of business areas, cooperative orientation.

Britain

Kingward Gan, partner of CENLAW, was entrusted by a British client for dealing with setting up a new company in China.

Burma

CENLAW had a successful business negotiation with McMillan Woods Global Limited (MCMWG). Both sides reached a preliminary opinion of the cooperation of providing cross-border legal service for the China and Burma's clients in the future.

International Trade & Foreign Investment

Central Bank Announces Rules On Bank Accounts For RMB Clearance By Overseas Institutions

It is reported that The People's Bank of China has announced the "*Measures on the Administration of Bank Accounts for Clearance of Renminbi by Overseas Institutions*" with effect from 1 October 2010 for the purpose of regulating the opening and use of such banks accounts by overseas companies. Cash transactions are generally not allowed to be made via such accounts unless approved by The People's Bank of China upon request. In addition, RMB in such accounts are not allowed to be converted into any foreign currency unless otherwise expressly permitted by the relevant statutory provisions.

NDRC Demands Acceleration Of Merger And Restructuring Of Coal Mine Enterprises

The National Development and Reform Commission recently promulgated the Several Opinions on Accelerating the Merger and Restructuring of Coal Mine Enterprises ("the Opinions") which stipulates the policy measures for promoting the merger and restructuring of coal mine enterprises including, without limitation, that: (a) the fiscal and tax policy support shall be strengthened: the safety improvement and technology reform of coal mine and other projects in a consolidated or restructured enterprise shall be given first priority for fiscal investment subsidies or interest free funds; and the increased value in assets appraisal, the revenue from debt reconstruction and the ownership transfer of land and real estate shall enjoy favourable taxation; and (b) the financing channels shall be extended: the financing and refinancing on the market of qualified enterprises involving merger or restructuring and the capital raising and development of the enterprises involving merger or restructuring through bond issuing and equity transfer shall be supported.

Time Limit For Levy Of Anti-Dumping Duty May Be Extended Appropriately

The Ministry of Commerce has recently issued a public notice, declaring that according to Article 48 of the Anti-dumping Rules of the People's Republic of China, where it has been determined upon re-examination that the termination of the levy of an anti-dumping duty may result in the continuation or re-occurrence of dumping and damage, the time limit for the levy of such anti-dumping duty may be extended approximately. As of the date of promulgation of this Public Notice, the domestic industry or any natural person, legal person or relevant organization which represents the domestic industry may, before 60 days prior to the expiry date for the anti-dumping measures for imported cold-rolled stainless steel sheet from Japan and South Korea, submit to the Ministry Commerce a written application for re-examination of the termination. The written application shall include an explicit expression of the applicant's request for the re-examination and sufficient evidence to prove that the termination of the anti-dumping measures may result in the continuation or re-occurrence of dumping and damage.

SAFE To Implement Import Payment Verification Reform Nationwide

The State Administration of Foreign Exchange (SAFE) has released the "*Notice on Relevant Issues concerning the Implementation of the Reform of the Import Payment Verification System*" to promote and implement the reform of import payment verification across the country and clarify the relevant works. The "*Interim Measures on the Administration of Import Payment in*

Goods Trade” and its Implementing Rules have also been released in the Notice, which shall take effect from 1 December 2010. From the date of implementation, import entities shall deal with the import payment business under the provisions of the Interim Measures; and banks shall handle the import payment business for import entities under the Interim Measures.

Finance & Taxation

SAFE Regulates Administration Of Foreign Currency Bank Cards

In order to regulate the administration of foreign currency bank cards and to facilitate the public to understand foreign currency bank cards’ administration policies, the State Administration of Foreign Exchange has recently promulgated the *Circular on the Regulation of the Administration of Foreign Currency Bank Cards*, which shall become effective from 1st November 2010. The circular combines the original 4 foreign exchange administrative regulations on foreign currency bank cards into 1, and regulates services such as categorization of domestic cards, issuance and usage, overseas card receipt service, and issues such as clearance, repayment and purchase of currencies under the foreign currency card. The circular indicates that domestic financial institutions may issue foreign currency credit unit cards, but no foreign currency funds are allowed to be saved in the cards.

CSRC Issues Reform Measures For Phase II Of IPO System

In order to further improve the IPO system and strengthen the market discipline mechanism, the China Securities Regulatory Commission recently issued the Guiding Opinions on Deepening the Reform of the IPO System (“the Opinions”) which puts forward the second stage of reform measures. In accordance with the Opinions, a lead underwriter may, at its own discretion, recommend a certain amount of institutional investors with high pricing power and long-term investment orientation to participate in offline inquiry and placing; and the principles of and standards for the recommendation of institutional investors shall be formulated simultaneously and be registered and filed with the Securities Association of China.

nk cards into 1, and regulates services such as categorization of domestic cards, issuance and usage, overseas card receipt service, and issues such as clearance, repayment and purchase of currencies under the foreign currency card. The circular indicates that domestic financial institutions may issue foreign currency credit unit cards, but no foreign currency funds are allowed to be saved in the cards.

Intellectual Property

Additional Requirements For Enhancing Genuine Software In Government Offices

The General Office of the State Council promulgated on 28th the Circular of the General Office of the State Council on Further Enhancing the Usage of Genuine Software in Government Offices. The circular requires that government offices at each level shall conduct a special check on the status of genuine software usage in the organization, and especially the status of office software and antivirus programme usage. Government offices at each level must purchase office computer equipment satisfying the requirements of installing genuine operating system software, and all organizations must use genuine products when updating the computer operating system software.

Foreign-Related Civil Relations Application Law Clarifies IPR Rules

The “Law of the People’s Republic of China on the Application of Law on Civil Relations Involving Foreign Interests” has been approved by voting and released recently. Under the Law, the attribution and content of an intellectual property right (IPR) apply to the laws of the region where the request for protection is made. The parties concerned may select by agreement the applicable laws on the assignment and licensed use of the IPR or relevant provisions on contract under the law shall apply if no party selects the applicable law. If the liabilities for IPR infringement apply to the laws of the region where the request for protection is made, the parties concerned may also apply the law where the court is located by agreement after the infringing act occurs.

Others

CIRC Restricts Interested Persons In Insurance Cases From Leaving Country

In order to strengthen insurance supervision, to regulate the task of preventing responsible persons of legal cases in the insurance area from leaving the country, recently, the China Insurance Regulatory Commission (CIRC) promulgated the Circular on Regulating the Task of Preventing Responsible Persons of Legal Cases in the Insurance Area from Leaving the Country, to further clarify the relevant issues. The circular points out that where the responsible persons of the legal cases belong to corporate entities of insurance companies or where the legal cases are being investigated and processed by the CIRC, the CIRC shall directly make a decision whether arrangements for the prevention of leaving the country should be taken. The circular prescribes that the period during which responsible persons can be prevented from leaving the country is normally 3 months.

State Council Consults Public On Draft State Compensation Regulations

The Legislative Affairs Office of the State Council has published the “*Regulations on the Administration of Making State Compensation (Draft for Approval)*” for public consultation which will be open until 1 November 2010. The draft Regulations specify that the government authorities concerned shall have the duty to process applications for compensation and compensate eligible applicants in compliance with the State Compensation Law. The requirement of using the authority's own budgeted expenses or funding to indemnify eligible applicants is proposed to be removed. In addition, the draft Regulations introduce two sets of criteria for the determination of the amount of compensation respectively under the administrative compensation system and criminal compensation system.

SAIC Promulgates Measures Against Unlawful Contract-Related Acts

The State Administration for Industry and Commerce recently promulgated the Measures for Supervision and Administration of Contract-related Unlawful Acts. Contract-related unlawful acts mentioned in the Measures refer to the acts of natural persons, legal persons and other organizations, making use of a contract and intending to obtain illegal profits, which violate laws and regulations or these measures. The Measures clearly indicate that the parties are prohibited from using such contract to implement the following fraudulent acts: 1 forging a contract; 2. forging the right as principal of the contract or entering into a contract under the guise of others’

names; 3. distributing or using false information in order to seduce others into a contract; 4. maliciously drawing up provisions which in reality are impossible to be performed, resulting in the parties being unable to perform the contract, etc. The Measures also prescribe that where the operators and the consumers have entered into a contract using standard terms, the operator is prohibited from imposing additional responsibilities on the consumers in the standard terms; the operators are also prohibited from eliminating the relevant rights of the consumers in the standard terms.

Legal Comments

New Trend to FDI in China

In order to promote FDI in China, a number of regulations have been issued recently, including the Several Opinion on Further Improving the Work of Utilizing Foreign Investment issued by the PRC State Council, which sets out additional policies at the national level for attracting foreign investment. This Opinion has been recently supplemented by the PRC State Council's Notice on the Proposal on the Division of Work Among Departments for Implementing the Several Opinion on Further Improving the Work of Utilizing Foreign Investment dated 18 August 2010. Following the release of the Opinion, the detailed rules to implement these policies have been issued by the National Development and Reform Commission ("NDRC"), the State Administration for Industry and Commerce ("SAIC"), and the Ministry of Commerce ("MOFCOM").

Five principles for guiding foreign investment:

- (1) to direct foreign investment into certain encouraged industries related to high technology, modern services, new energy, energy-saving and environmental protection;
- (2) to direct foreign investment to the middle and western regions of China;
- (3) to diversify the use of foreign investment;
- (4) to streamline regulatory framework for foreign investment; and
- (5) to foster a better foreign investment environment.

Three notable policy changes set out in the Opinion are:

(1) Land-intensive foreign investment projects classified as encouraged in the existing foreign investment catalogues may have priority in obtaining land-use rights and may enjoy up to a 30% discount off the statutory minimum industrial land prices.

(2) The approval authority of the provincial level counterparts of MOFCOM and the NDRC to approve foreign investment projects classified as encouraged or permitted in the foreign investment catalogues has been expanded to include projects with total investment amounts of less than US\$300 million. The approval authorization applicable to foreign-invested projects classified as restricted remains unchanged at US\$50 million.

(3) The two existing catalogues for guiding foreign investment, i.e. the Catalogue for Guiding Foreign Investment (amended in 2007) and the Catalogue of Priority Industries for Foreign Investment in the Central and Western Regions (amended in 2008) are to be further amended to give preference to high-end manufacturing projects, high-technology projects, modern service projects, and new energy, energy-saving or environmental protection projects. Industries that are highly polluting, energy-consuming and resource-dependent may become restricted. Also, environmentally friendly labour-intensive projects shall be encouraged in the central and western regions of China.

On 4 May 2010, NDRC issued the Circular on Effectively Delegating Approval Authority for Foreign-Invested Projects to permit local level NDRC to approve foreign-invested projects falling into the "encouraged" or "permitted" category with a total investment amount of less than US\$300 million.

The MOFCOM Circular

On 10 June 2010, MOFCOM issued the Circular on Delegating the Examination and Approval Power for Foreign Investment Projects to delegate its approval power to its local counterparts for foreign-invested projects in the encouraged and permitted categories with a total investment amount of less than US\$300 million. Further, the establishment and amendment filing for foreign-invested enterprises in the encouraged category that do not require national comprehensive balancing can be examined and reviewed by the local counterparts of MOFCOM even if the total investment amount exceeds US\$ 300 million.

Some provincial governments have started to revise the local foreign investment regulations accordingly.

State Council concluded the fifth batch of administrative items (including foreign-invested projects) to be cancelled or delegated

On 4 July 2010, the State Council issued the Decision on Cancelling and Delegating the Administrative Examination and Approval Power for the Fifth Batch of Items ("Decision"), which cancelled administrative approval requirements for 113 items and delegated the administrative approval power for 71 items to lower level departments.

One of the most important changes set out in the Decision is that the establishment of a domestic branch of a foreign invested enterprise and certain registration amendments (e.g. changing the name, investor's name or legal address) for a foreign-invested enterprise are now exempt from the examination and approval of MOFCOM and its local counterparts.

Some of the administrative items that have been abolished are industry-specific. For example, the establishment, change of particulars and closing-down of a representative office of a foreign financial institution (excluding banks) no longer requires the approval from the China Banking Regulatory Commission.

Conclusion

These policy changes reflect the Chinese government's strategic efforts to attract new foreign investment into industries that require a high skilled labor force, while attempting to push labor-intensive industries into the less developed central and western regions of China. The latest policy changes also benefit industry sectors that are already open to foreign investment.

Concise Review
Of
The Law of the People's Republic of China on Application of Laws on Foreign
Related Civil Relations

By Paul Huang & Lawrence Nie

Frequency of foreign related civil communication will inevitably cause increase of foreign related civil disputes, and put forward the problem that what kind of laws shall be applied in the foreign related civil relations: Chinese laws or foreign laws? If foreign laws shall be applied, but the case involves two or more countries, which country's laws shall be applied? The rules for resolving such problems as provided in the laws of a country are called conflict rules, all of which constitute an independent legal branch, the law on application of laws on foreign related civil relations, also known as the private international law.

The Law of the People's Republic of China on Application of Laws on Foreign Related Civil Relations (hereinafter referred to as "the Law") was adopted at the seventeenth session of the Standing Committee of the Eleventh National People's Congress of China, on October 28, 2010, and will come into effect as of April 1, 2011. It consists of eight chapters (fifty-two articles), namely: general provisions, civil subject, marriage and family, inheritance, property rights, creditor's rights, intellectual property rights, and supplementary provisions.

The Law has classified the following matters existing in the field of the private international law for a long period:

I. About the Applicable Law Chosen by Parties concerned

The Law has specific provisions on the applications on laws of the foreign related civil relations, such as marriage and family, inheritance, property right, creditor's right, intellectual property right, and other related matters. In consideration that the parties concerned are entitled to dispose any of their civil rights, and to adapt the international trend that the extent of the applicable laws chosen by the parties concerned becomes more widely, it is clearly provided in the Law that the parties concerned in the foreign related civil relations may choose any applicable law. Furthermore, the extent of the applicable laws chosen by the parties concerned is also restricted by the Law clearly, "If there is any mandatory provision in the laws of the People's Republic of China in respect to the foreign related civil relations, it shall be applied directly."

II. Application of Laws for Contracts

Nowadays, around ten thousand foreign related civil and commercial cases are accepted annually by all courts in China, most of which are foreign-related contract cases. The Law provides that: "The parties concerned may agree to choose the law applicable to the contract between them. If no

applicable law is chosen by them, the laws of the habitual residence of one party whose performance of obligation can indicate the characteristics of the contract in the best way, or any other law closely related to the contract, shall be applied."

In respect to the contractual issues related to protection of the legitimate rights and interests of consumers or labors, there are also expressly provisions in the Law.

III. Inheritance

The Law provides that, as for the statutory inheritance, the laws of the last habitual residence of the decedent shall be applied; but for the statutory inheritance of any immovable property, the laws of the place where the property is located shall be applied.

It is also provided in the Law that, if the form of any will is in consistent with the provisions of the laws of the place where the will is made by the testator or the laws of the place where the last habitual residence of the testator is located, or the laws of the country of the testator's citizenship, or the laws of the place where any testamentary act occurs, the will shall be deemed to duly established. In respect to the effectiveness of the will, the laws of the place where the will is made by the testator or the laws of the place where the last habitual residence of the testator is located, or the laws of the country of the testator's citizenship shall be applied. The laws of the place where the heritage is located shall be applied for the matters such as management of heritage.

IV. Foreign Related Marriage and Adoption

The Law provides that, as for the conditions of marriage, the laws of the place where the common habitual residence of the parties concerned is located shall be applied; if they have no common habitual residence, the laws of the common country of citizenship of the parties shall be applied; if they have no common citizenship, the laws of the place where the marriage is concluded shall be applied. Regarding to the matters related to the marital properties, the parties concerned may, upon mutual agreement, choose to apply the laws of the place where the habitual residence of either party is located, or the laws of the country of the citizenship of either party, or the place where the principal property of either party is located.

As for uncontested divorce, the parties concerned may, upon mutual agreement, choose to apply the laws of the place where the habitual residence of either party is located, or the laws of the country of the citizenship of either party. If no choice is made, the laws of the place where the common habitual residence of the parties concerned is located shall be applied; if they have no common habitual residence, the laws of the common country of citizenship of the parties shall be applied; if they have no common citizenship, the laws of the place where the divorce proceedings are undergoing shall be applied. As for contested divorce, the laws of the place where the court concerned is located shall be applied.

The Law also has provisions for application of laws on foreign related adoption. The laws of the

place where the habitual residence of the adoptee is located shall be applied for the conditions and procedures of adoption. With respect to the effectiveness of the adoption, the laws of the place where the habitual residence of the adopter is located shall be applied. The laws of the place where the habitual residence of the adoptee is located, or the laws of the place where the court concerned is located, shall be applied for termination of the adoptive relationship.

V. Ownership and Contents of Intellectual Property Rights

Under the Law, the parties concerned may, upon mutual agreement, choose the laws applicable for the transfer and license of intellectual property rights; if no law is chosen, the relevant provisions applicable for contracts as provided herein shall be applied.

It is also provided in the Law that as for any infringement liability related to intellectual property rights, the laws of the place where the request for protection is made shall be applied, and the parties concerned, upon mutual agreement, may also choose to apply the laws of the place where the court concerned is located, after the infringing act occurs.

This Periodical has been prepared for CLIENTS and COOPERATION PARTNERS of CENLAW&PARTNERS . Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this Periodical should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

If you have any questions regarding this Periodical, please contact:

Paul Huang

Partner of CENLAW

**Add: Suite A-B of 4th Floor, Crystal Century Tower,
No.567 Weihai Road, Shanghai 200041 PRC**

Tel: (86 21)6288 6989

MP:+86 138 1841 6222

Fax:(86 21)6288 6825

Email: paul@cenlaw.com