



浦瑞律师事务所
CENLAW & PARTNERS

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Preface

CENLAW'S CLIENTS AND BUSINESS NETWORK

CENLAW & PARTNERS aims to serve for medium-sized or above level corporate customers. To date, we have provided legal services for nearly 1,000 business customers, which are featured as follows:

- 1.some are the world's top-500 companies, some are new excellent potential companies;
- 2.most domestic customers are located in the most developed Yangtze River Delta region in China(especially in Shanghai), as well as any other part of China;
- 3.Most overseas customers are located in the United States and Europe; in recent years, the number of customers from developing countries and their demand for legal services has been grown drastically;
- 4.The customers' cross-border demands for legal services are mainly focusing on international investment, acquisition, merger, international trade and maritime affairs.

Permanently, CENLAW & PARTNERS is devoted to provide a package of legal solutions for foreign customers in respect to investment or trade in China. Meanwhile, we are also helping more and more Chinese customers to go abroad for investment and trade. Based on the practice for many years, we have built an effective platform for cooperation, and extended a wide range of network and channels, and accumulated lots of successful cases.

CENLAW & PARTNERS have cooperated with various law firms from more 60 countries, and have provided efficient, safe and convenient legal services for domestic and foreign customers. In Shanghai, we also provide legal advice and services for the consulates of many countries in Shanghai.

Cooperation News

Canada

On the morning of September 29th, MS.E.C.Dong, the Chinese business representative of Charness,Charness&Charness law firm in Quebec, Canada, visited Cenlaw & Partners. MS.E.C.Dong had a sufficient and pleasant communication with Partners of foreign business department of Cenlaw & Partner in terms of business areas, cooperative orientation and model.

New Zealand

Cenlaw & Partners recently assisted Newsland consulate to provide consulting service and legal opinions for a Newsland citizen in Shanghai.

Israel

To assist an Israel company to handle a trade dispute in China and to conduct the initial investigation.

Canada

To assist a Canadian company in applying for trademark registration protection.

Italy

To provide initial legal opinions on foreign investment in China for an Italian company.

France

To contact with the French cooperative lawyers for a arbitration case in Paris.

Germany

Kingward Gan, partner of Cenlaw, was recently entrusted by a German client for the custody of his bastardy.

Sweden

Entrusted by a Sweden company, Kingward Gan represented to handle a contract dispute of international sale of goods with the supplier in Shijiazhuang.

International Trade & Foreign Investment

State Council Announces Its Opinions On Advancing M&A And Restructurings

The State Council has recently announced the "*Opinions of the State Council on Advancing Corporate Mergers, Acquisitions and Restructurings*", which mainly focus on a number of industries, including automobile, iron and steel, cement, machinery production, electrolyzed aluminium and rare-earth. Leading enterprises in these industries will be encouraged to jointly develop business opportunities, transact inter-regional mergers, acquisitions or restructurings, merge or acquire overseas businesses and develop investment cooperation. The incentives include: (1) preferential tax treatments in connection with the value added determined in asset appraisals, benefits identified in debt restructurings and transfer of properties in mergers, acquisitions and restructurings; (2) more fiscal funding available; (3) better financial services offered by commercial banks, such as development of M&A loans as well as expansion of the amount and term of such loans; and (4) enterprises being encouraged to lead business innovation and advancement of technology.

Rules On Hearing Maritime Cases Regarding Limitation Of Damages & Liability Issued

According to the "*Certain Provisions of the Supreme People's Court on Hearing Maritime Cases Regarding Limitation of Damages and Liability*" issued by the Supreme People's Court with effect from 15 September 2010, an interested party in a maritime case who intends to apply for the Maritime Liability and Damages Fund (the Fund) shall make an application to the trial court. Where the court opens the case and the court hears the case are not the same court and the parties do not have any agreement on jurisdiction, the application must be submitted to the court which opened the case. An application for the Fund does not affect the applicant's defence in limiting his/her liability and damages.

Procedures For Short Maintenance Of Customs Declaration Documents By Enterprises Issued

The General Administration of Customs (GAC) has announced the activation of the trial procedures for enterprises keeping customs declaration documentation for exported goods and certain imported goods for a short period of time. In different events, the qualifying forms and documents may be either kept by consignors of imported or exported goods or centrally kept by the enterprises which have the duty to declare customs. The trial procedures for enterprises keeping or centrally keeping declaration forms and related documents for exported goods shall be activated throughout the country. The trial procedures for enterprises keeping or centrally keeping declaration forms and related documents for imported goods shall be activated in Shanghai, Nanjing, Qingdao and Huangpu only.

SAFE Announces New List Of Items Requiring Approval

The State Administration of Foreign Exchange (SAFE) has announced its new list of items subject to SAFE licensing, after which the SAFE licensing procedures will be further simplified. Under the new list, "verification and approval of foreign currencies received by exporters", "approval for financial institutions to conduct settlement and sale of huge amounts of foreign currencies for

arranging purchase instructions", "approval for multi-national companies to sell or make payment in foreign currencies for non-business purposes also applicable to foreign-invested enterprises or Sino-invested enterprises" and four other activities have been removed. The Notice states that enterprises which lease their properties for less than a year, and are engaging in leasing business or purchase or sale of foreign currencies for taxable lease purposes shall complete the foreign exchange arrangement with their banks by producing valid documents and evidence in compliance with the relevant rules governing settlement, sale and purchase of foreign currencies.

SC Gives Opinions To Central & Western Regions In Developing Seven Industries

The "*Opinions of the State Council on Guiding Central and Western Regions in Transforming their Industries*", which were officially announced on 6 September, suggest that regions in central and western China may take their own advantages of local infrastructure, labour force and resources to further develop labour intensive industry, energy and mineral prospecting and process industry, agricultural product processing industry, equipment manufacturing industry, modern service industry, high-tech industry and processing trade industry. The Opinions express that the government will support these regions by offering incentives and allowances in six key areas, including taxation, financial services, industry and investment, land, trading and education.

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.

Intellectual Property Right

Pledged Patent Right Registration Rules Promulgated

The "*Measures on the Registration of Pledged Patent Rights*" have been promulgated with effect from 1 October 2010. According to the Measures, where a patent right is to be pledged, the pledgor and pledgee in question must reach a written agreement on the pledge. The pledge agreement may be concluded as the entire contract or included as clauses in a master agreement. To pledge a co-owned patent right, all owners' consent is required unless all such owners have previous contractual agreements. The registration may be completed by post or in person. The State Intellectual Property Office (SIPO) shall examine applications for the registration of pledged patent rights and make conclusions within 7 working days after receiving such applications.

Electronic Patent Application Rules Announced

Following the earlier consultation, the State Intellectual Property Office (SIPO) has officially announced the "*Electronic Patent Application Rules*". Under the Rules, where the number of applicants for the same application is more than two but the applicants have not appointed an

agent, the applicant who submits the application electronically will become the agent. Applications for inventions, utility models and designs may be submitted electronically, supported by the electronic copies of the required documents rather than hardcopies, unless they are approved by the SIPO. All documents which do not meet the specific requirements will be deemed as not submitted.

SIPO Proposes To Amend Rules On Administrative Enforcement Of Patent Rights

The State Intellectual Property Office (SIPO) has initiated a consultation on the "*Draft Amendments to the Rules on Administrative Enforcement of Patent Rights (Consultative Draft)*". It is proposed that the Draft Amendments will govern patent authorities' administrative enforcement of patent rights, including handling disputes over patent infringements, mediation of disputes over patent rights and handling false patent cases. Applications for mediation of disputes over patent rights must be made in writing. The authorities shall have the jurisdiction over false patent cases which take place within their administrative regions. The Draft Amendments also specify the power of the patent authorities to collect evidence in handling disputes over patent infringements and false patent cases.

Finance & Taxation

Rules On Exported Goods Tax Arrangements Sent By Official Post Issued

The State Administration of Taxation (SAT) has issued the "*Measures on the Administration of Exported Goods Tax Arrangements Sent by Official Post*" with effect from 1 September 2010. The Measures specify that the departments responsible for tax refund shall, after receiving the letters from other taxation departments concerned confirming one of the following events, cease to arrange a tax refund: (1) the VAT invoice issued by the supplier in question is proved to be false; (2) the supplier in question claims that the products sold are manufactured by the supplier but the supplier actually does not have the equipment or facilities to manufacture such products; or (3) the supplier in question claims that the products sold are manufactured by the supplier but the supplier does not have capacity to manufacture the batch of products in question. The departments which have already refunded the taxes for any suppliers in the above events shall take action to reclaim such taxes. Suppliers found to be in one of the above events shall also pay tax as they are liable under the relevant tax rules.

CSRC Promulgates Securities Companies Borrowing Subordinated Debts Rules

The China Securities Regulatory Commission (CSRC) has promulgated the "*Provisions on Securities Companies Borrowing Subordinated Debts*" to replace the "*Notice concerning Securities Companies Borrowing Subordinated Debts*" with immediate effect. Under the Provisions, subordinated debts borrowed by securities companies for a term of less than two years are short-term subordinated debts and that for a term of more than two years are long-term subordinated debts. A percentage of a long-term subordinated debt may be included in net capital. The percentage should be 100%, 90%, 70%, 50% and 20% respectively for the terms of 5, 4, 3, 2 and 1 years. Short-term subordinated debts cannot be included in that net capital but are deductible from risk reserves in compliance with the statutory requirements where the securities companies in question are to launch a specific business.

CIRC Drafts Opinions On Capital Guaranteed Fund For Public Consultation

The China Insurance Regulatory Commission (CIRC) has published the draft "*Opinions on Guiding Capital Guaranteed Fund*" for public consultation until 14 September 2010. The draft provides the definition of capital guaranteed fund as well as rules governing identification of risk, methods of guarantee and disclosure. According to the draft, a capital guaranteed fund may make investment in shares, bonds, currency instruments, warrants, futures and other diversities. It is, however, proposed that assets providing fixed return, such as bonds and currencies, must be maintained at least 70% of the fund.

Favourable Policies For Deed Tax & Individual Income Tax In Real Estate Trade Adjusted

The Ministry of Finance, the State Administration of Taxation and the Ministry of Housing and Urban-Rural Development recently promulgated a Circular which comes into force on 1 October, 2010 and adjusts favourable policies for deed tax and individual income tax in real estate trade as follows: (I) policies for deed tax: (1) where an individual purchases ordinary housing which is the only housing for his/her family (including the purchaser and his/her spouse and minor children), the deed tax is reduced by half; if an individual purchases ordinary housing the floor plan of which is under 90 square metres and which is the only housing for his/her family, the deed tax rate is reduced to 1%; and (2) an individual who purchases ordinary housing outside the aforesaid conditions may not enjoy such favourable policies; and (II) policies for individual income tax: the taxpayer who purchases housing within one year after selling his/her own housing may not enjoy any reduction and exemption of individual income tax.

Others

SPC Issues Interpretation On Application Of Law In Trial Of Labour Disputes

China's Supreme People's Court has issued the Interpretation on Several Matters concerning the Application of Law in the Trial of Labour Dispute Cases (III) ("this Interpretation") which mainly include the following five aspects: they reasonably define the scope of labour dispute cases; definitely set out the litigation subjects of labour dispute cases; assign in a reasonable way the responsibility of proof for overtime work; particularly refine the standards for making final decisions; and smooth the coordination between arbitration and litigation. In accordance with the specific provisions of this Interpretation, the people's court shall accept the following cases: (a) an employee asks an employing unit for damages because he/she cannot enjoy social insurance due to the employing unit's failure of going through social insurance procedures for the employee; (b) dispute cases arising from the reorganization of a company; and (c) an employee applies for compensation for overtime work in addition to salary.

Highest Judicial Authorities: Withdrawal From Appeals Against Death Penalty Not Permissible

The Supreme People's Court and Supreme People's Procuratorate have jointly issued the "*Reply Regarding the Authority of People's Courts to Permit Appellants to Withdraw their Appeals against the Death Penalty after the Expiry of the Appeal Period but Before the Announcements of the Appeal Judgments*" which reaffirm that appellants in death penalty cases will not be allowed to

withdraw their appeals after the hearings at second instance commencement but before the final judgments are awarded. That is the court procedures for appeal cases will continue.

GAC Issues Criteria For Inspection & Release Of Articles & Baggage Carried By Inbound Tourists

The General Administration of Customs (GAC) has made an announcement specifying the criteria for the inspection and release of articles and baggage carried by inbound tourists that: (1) articles with a total value of not more than RMB5,000 (inclusive) carried and used by an inbound non-resident or articles with a total value of not more than RMB2,000 (inclusive) carried and used by an inbound resident may be duty free and released by Customs officers, provided that the articles are for personal consumption and the quantity is reasonable. Tobacco, alcoholic drinks and other specified goods must be taxed in accordance with the relevant rules; and (2) Customs will only impose tax on the excess quantity of the articles carried and used by inbound tourists. If the articles in question cannot be quantified or separated, such articles will be fully taxed.

Customs Affairs Guarantee Regulations To Take Effect

The State Council has released the “*Regulations of the People’s Republic of China on Customs Affairs Guarantee*” with effect from 1 January 2011. The Regulations apply where a party applies for a guarantee to the Customs office and commits itself to performing legal obligations and the Customs office provides Customs affairs guarantee to the party concerned. Under the Regulations, a party may apply for guarantee to the Customs office before completing the Customs procedures and require advance release of goods in any of the following circumstances: (1) where the classification of goods, duty-paid price or country of origin of the imported or exported goods is not determined; (2) where any valid Customs clearance document is not provided; or (3) where the tax payable during the term of tax is unpaid. In addition, no Customs office may provide a guarantee to any suspected illegal goods, articles or means of transport that fall into those prohibited from import and export, or that must be evidenced by presenting the original ones, or that should be confiscated in accordance with the law.

Three Depts. Clarify Law Application Criteria For Online Gambling Cases

The Supreme People’s Court, the Supreme People’s Procuratorate and the Ministry of Public Security have jointly released the “*Opinions on Issues concerning the Application of Law in the Handling of Online Gambling Criminal Cases*” which provide that: 1. criteria for conviction of and imposing penalties for the crime of operating a gambling house to organize online gambling activities through the Internet and mobile communication terminals; 2. criteria for conviction of and imposing penalties for the joint offender who is fully aware that the website is a gambling site but provides such services or assistance as Internet access, server hosting, online storage space, communication transmission channels, advertising, member development, software development, technical support and money payment and settlement; 3. four circumstances under which the person “is fully aware” that the concerned website is a gambling site; 4. method for identifying the number of gamblers, amount of gambling funds and website agents; 5. jurisdiction of cases of online gambling crime, collection and preservation of electronic evidence and other relevant issues.

Legal Comments

Summary on Provisional Measures on Energy-conservation Assessment and Review for Fixed Asset Investment Projects Enacted by the National Development and Reform Commission

By Kingward Gan & Sherry XU

According to the newly amended Energy Conservation Law of the People's Republic of China, the National Development and Reform Commission has recently established and enacted *Provisional Measures on Energy-conservation Assessment and Review for Fixed Asset Investment Projects* (hereinafter referred to as the "Measures"), representing that the systems on energy conservation assessment and review for fixed-asset investment projects have officially come to the stage of implementation.

In recent years, with the speeding-up of the domestic industrialization and urbanization, the energy consumption of China has grown substantially, the need for crude oil import has increased year by year, and the limitation of energy and environmental pressure have exerted negative impacts on the economic and social development of China. Meanwhile, dealing with the global climate change and control of emission of the green house gas has become a hot point of the whole world. Therefore, it is important and urgent to restrain excessive energy consumption growth and also to utilize it both rationally and efficiently. Establishing and implementing the systems on energy conservation assessment and review for fixed-asset investment projects, setting energy conservation as a precondition for examination, approval and start-up of a project, and providing the pre-veto procedures for projects inconsistent with the energy conservation criteria, can urge the energy conservation rules to be implemented in new projects as well as restrain irrational growth of the energy consumption fundamentally. The *Measures* provides a new solution for lack of effective restriction on energy consumption, which has been a long term issue in China.

It is specified in the *Measures* that the energy conservation assessment and review is essential to every new project. The energy conservation assessment shall be conducted by a third party in accordance with the relevant rules and criteria on the energy conservation, in order to analyze and assess whether the energy consumption of a new project is rational or not. The energy conservation review shall be conducted by relevant governmental authority, which is in charge of profiles reviewing or documents filing.

The *Measures* stipulates that the assessment management shall be sorted by the quantity of energy consumption. As for a project that consumes 3000 tons standard coal and above p.a., a report on the energy conservation assessment shall be prepared. As for a project that consumes between 1000 and 3000 tons standard coal and above p.a., a report form related to the energy conservation assessment shall be prepared, and a registration form shall be completed and submitted for other low energy consumption projects. The review management shall be conducted by the corresponding governmental authorities at different levels.

The *Measures* requires that, upon receipt of the energy conservation assessment documents of a project, the reviewing authority shall entrust the relevant institution to evaluate the same and give a comment, which will be considered as the basis for review. The evaluating institution as entrusted shall give the comment within the period designated by the reviewing authority. The evaluation fees shall be included in the financial budget of the government at the same level with the reviewing authority, and shall be paid based on the standards as stipulated in the relevant national regulations.

Additionally, implementation, supervision and punishment of energy-conservation assessment and review for fixed asset investment projects and other matters are also provided in the *Measures*.

The *Measures* shall come into effect as of November 1, 2010.

New Judicial Interpretation for Foreign Invested Enterprises Solves Disputes Involved in Entrustment Investment

By Paul Huang & Aileen Wen

On August 5, the Supreme People's Court released a new judicial interpretation which is critical to foreign invested enterprises, namely *the Regulation on Certain Issues Regarding Adjudicating Disputes of Foreign Invested Enterprises* (the Interpretation). In recent years, people's courts at various levels witnessed a growing number of disputes related to foreign invested enterprises (FIEs). During the recent two years, the number of such cases has increased to 1/5 of total foreign related civil & commercial cases. The new Interpretation aims to solve disputes in relation to establishment and alteration of FIEs.

The Interpretation has retroactive effect on cases which are not finally judged. However, the Interpretation does not apply to cases where the parties apply for rehearing,

In practice, some investment made to FIEs is entrustment investment for the sake of convenience or confidentiality. The legitimate rights of investors may not be duly protected if such entrustment investment is recognized as null and void on a wide basis. Therefore, according to the Interpretation, entrustment agreement is acknowledged as effective except for violation of laws and administrative regulations. In addition, the Interpretation prescribes various relief measures corresponding to different situations for entrustment investment.

Confirmation of shareholder's identity

The New Interpretation conditionally upholds the claim by de facto shareholder for confirmation of shareholder's identity.

Under the circumstance where disputes arise between the nominal shareholder and the de facto investor, the de facto investor usually requires the people's court to confirm his/her/its shareholder's identity and number of shares directly in the judgment. Nevertheless, pursuant to relevant laws and regulations, any alterations made to the share structure of FIEs are required to be approved by relevant authorities. Judgment of people's court should not substitute the review of approval authorities. Therefore, people's court generally will not uphold claim raised by the de facto investor to confirm the shareholder's identity.

However, the new Interpretation is more flexible in terms of this issue. In case the following requirements are met, the people's court may directly confirm the shareholder's identity of de facto investor and the number of shares he/she/it holds:

- (1) the de facto investor has actually made the investment;
- (2) the identity of de facto investor has been acknowledged by other shareholders;

(3) the people's court or parties to the litigation has obtained the approval of authorities in charge of FIEs for confirming de facto investor as shareholder.

Performance of entrustment agreement

In accordance with the Interpretation, the people's court should uphold the petition filed by de facto investor for performance of the entrustment agreement with the nominal shareholder. The entrustment agreement should not be recognized as null and void solely for the reason of lack of approval procedures.

People's court should uphold the de facto investor's claim for paying distributed profits and other interests of FIEs by the nominal shareholder. Where the nominal shareholder breaches the agreement and causes damages to the de facto investor, the nominal shareholder shall undertake the compensation liabilities.

Consequences after Annulment of Entrustment Agreement

In the event that an entrustment agreement is recognized as void, different measures should be taken to the shares held by the nominal shareholder under different situations.

When the value of shares exceeds the investment, the court may make a judgment under which the shares remain to be held by the nominal shareholder and the actual investment amount should be paid by the nominal shareholder to de facto investor. The portion in excess of the actual investment should be divided by nominal shareholder and de facto investor reasonably.

When the value of shares is below the investment, the court may make a judgment under which the nominal shareholder should return to de facto investor the investment equaling to share value. The losses will be undertaken by the nominal shareholder and de facto investor pursuant to their respective fault.

The Interpretation provides a remedy for de facto investor when the nominal shareholder expressly waives the shares in the FIE. People's court may verdict to sell or auction the said shares and repay the consideration to de facto investor.

Avoidance of Legal Risks in Entrustment Investment

The foregoing prescriptions in the Interpretation are not meant to encourage entrustment investment, but to seek remedies under current legal framework. Entrustment investment has substantial legal risks to be considered before making a decision. For avoidance of certain legal risks in entrustment investment, the following points may be referred to:

(1) The de facto investor needs to clarify the relationship with the nominal shareholder in the entrustment agreement. The said relationship must not be defined as lending relationship, or this will cause great potential problems in the future.

(2) The de facto investor needs to disclose the identity to other shareholders of the FIE and attend shareholders' meeting. This disclosure will reduce potential risks in profit distribution and exercise of shareholder's rights.

(3) Where the nominal shareholder transfer the shares to a bona fide third party, it's difficult for de facto investor to protect his/her/its rights. The de facto investor may only require the nominal shareholder to undertake the liability for breach of contract and return the proceeds for transfer of shares. Nevertheless, where the de facto investor discloses the identity to other shareholders and procure the proof of the disclosure, the investor may require the shareholders passing the share transfer resolution to compensate his/her/its damages.

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.

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