



浦瑞律师事务所
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NEWSLETTER

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SHANGHAI . CHINA

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Preface

As the host city of Expo 2010, Shanghai passionately welcomes people all over the world.

The once-in-a-century historical opportunity also provides Cenlaw & Partners with convenience to establish closer and friendlier relationship with colleagues worldwide. With our joint efforts, we will undoubtedly make remarkable achievements in offering our clients efficient cross-border legal service of higher quality and strengthening economic and cultural ties between us.

Recently, the State Administration of Industry and Commerce promulgated (SAIC) a new order on the registration of foreign-invested partnership enterprises;

The State Council revised the Rule on Enforcing the Patent Law of the People's Republic of China;

Ministry of Commerce revised the Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors;

The New Regulation of Pudong New Area on Establishment of Foreign-Invested Equity Investment Management Enterprises also came into force;

Some other legislations and regulations to foster connection between China and overseas are also already on their way.

All the laws, regulations and policies are significantly beneficial to foreign investment and commercial business, which is an act of Chinese government to enlarge foreign business in China.

In 2010, Cenlaw & Partners is displaying a look.

By the end of January, Cenlaw has received visits from our cooperating colleagues from US and Italy. Thanks to the assistance of our cooperators overseas, our clients have received professional legal services for both litigation and non-litigation matters in US, South Africa, Italy, Hong Kong, Belgium.

The year of 2010, is not only a brand new but also an inspiring start for both Shanghai and Cenlaw,

Cooperation News

NEW ZEALAND

In December 2009, BARRATT-BOYES LAW PRACTICE in New Zealand was authorized by Cenlaw & Partners to provide notarized document for the marriage status of some New Zealand citizens as the evidence of a civil litigation in Shanghai, China.

FRANCE

In December 2009, THIEFFRY & ASSOCIES in France was authorized by Cenlaw & Partners to provide notarization and authentication for the judgment by a French court.

SOUTH AFRICA

Cenlaw & Partners' Cooperator in South Africa, Deneys Reitz Law Firm, assisted Cenlaw's client with share acquisition of an enterprise in South Africa at the beginning of January, 2010.

CHICAGO U.S.A

Cenlaw & Partners' Cooperator in Chicago Had Substantive Communication with MERVYNS' Bankruptcy Administrator on Behalf of Cenlaw's Client

At the end of 2008, Mervyns Department Store filed for bankruptcy. Therefore, Cenlaw's client authorized Cenlaw's cooperator in Chicago, Chuhak & Tecson.P.C., to apply bankruptcy protection to the United States Bankruptcy Court, District of Delaware.

After more than one year's hard work, they entered into substantive negotiation in January 2010.

HONGKONG

In January 2010, Cenlaw & Partners' Cooperator in Hong Kong, Chui, Szeto and Cheng Solicitors, assisted Cenlaw with a civil litigation in Hong Kong, and provided attesting document for the transfer of another domestic litigation's evidence.

ITALY

On January 31, 2010, Cenlaw & Partners assisted the client of our cooperator in Italy, Selle Royal, the giant of bicycle saddle industry, with the equity acquisition of three joint ventures of the industry in PRC.

International Trade & Foreign Investment

MOFCOM Amends Rules On Foreign Investors' Merging Or Acquiring Domestic Enterprises

The Ministry of Commerce (MOFCOM) has announced the amendments to the "*Provisions on Foreign Investors' Merger or Acquiring Domestic Enterprises*" such that: (1) Chapter 5 - Anti-Monopoly Investigation has been removed; (2) Article 51 has been inserted such that, "According to the '*Anti-Monopoly Law*', a foreign investor intending to merge or acquire a domestic enterprise at the level requiring to make an application under the '*Provisions of the State Council on the Application Criteria for Concentration of Business Operators*' shall make the application to the Ministry of Commerce in advance such that the related transactions shall not be proceeded without making such application"; and the term, "end-controller" in Articles 42 (i) and 44 (i) (c) has been changed to "actual controller".

MOFCOM Promulgates Concentration Of Operators Application Rules

The Ministry of Commerce (MOFCOM) has promulgated the "*Concentration of Operators Application Rules*", which will become effective on 1 January 2010. The Rules provide that the same operators who, within two years, are to implement two or more concentrations that do not fall within the scope of application as specified in Article 3 of the "Provisions of the State Council on the Concentration of Operators Application Criteria" shall be deemed to implement one single concentration. Such operators' total turnover shall be accumulated up to the last concentration. The Rules also impose a duty of confidentiality on the Ministry of Commerce and applications for concentrations of operators as well as other organizations and individuals who acquire any trade secrets and other confidential information in the course of negotiation before filing applications for concentrations of operators, filing such applications and processing such applications.

MOFCOM Promulgates Concentration Of Operators Assessment Rules

The Ministry of Commerce (MOFCOM) has promulgated the "*Concentration of Operators Assessment Rules*", which will become effective on 1 January 2010. The Rules specify that the MOFCOM is the designated authority to accept and process the anti-monopoly assessment of concentrations of operators. In the course of the assessment, the interested operators may propose conditions on the concentration in question so as to remove or reduce the effect of the elimination or restriction of competition that is to be caused by their concentration. At the same time, the MOFCOM may at its discretion impose conditions on the concentrations which it approves for the purposes of removing or reducing the effect of the elimination or restriction of competition. The Rules also stress that no concentration of operators is allowed before the MOFCOM concludes and approves the corresponding assessment.

MOFCOM Drafting Block Traded Commodity Market Rules

It is reported that the Ministry of Commerce (MOFCOM) is currently drafting the "*Measures on Administering the Block Traded Commodity Market*" with the intention of further developing China's block traded commodity market, which is now seen as better organized than it was at the earlier stage. The Deputy Director of the National Development and Reform Commission (NDRC) in a conference said that

the market will be expanded and electronic trading in steel products, grains and oil will become the focus in the next stage.

“Measures On Quality And Production Safety Of Foreign Contracting Engineering” Drafted

The Ministry of Commerce has issued the “Measures for Administration of Quality and Production Safety of Foreign Contracting Engineering” (Draft), which is proposed for public comments before 15 November 2009. Pursuant to the Draft, the unit developing foreign contracting engineering business shall not subcontract the engineering project to a unit without appropriate qualifications, and the construction part of the project shall not be subcontracted to a domestic construction unit without access to production safety licence in accordance with the law. In addition, any accident which causes more than one death or at least three people are seriously injured in a foreign contracting engineering, or results in adverse impact on the host country where the engineering is located shall be reported to the relevant authorities within 24 hours after occurrence of the accident.

MOF Issues Requirements And Samples Of FIE Accounting Statements For 2009

The Ministry of Finance has issued the "*Notice on the Promulgation of the Accounting Statements Produced by Foreign-Invested Enterprises for 2009*" which is applicable to foreign-invested enterprises which have independent legal person status, are audited independently and have the capacity to produce a complete set of accounting statements. The said FIEs must follow the rules and samples provided by the Notice to produce their accounting statements as at 31 December 2009 and other information that reflects their transactions during the year. The Ministry of Finance will inspect such accounting statements in July 2010.

Intellectual Property Right

State Council Amends Patent Law Enforcement Rules

The State Council has passed the "*Decisions of the State Council on Amending the 'Rules on Enforcing the Patent Law of the People's Republic of China'*" with effect from 1 February 2010. The amended Rules clarify that "for the purpose of Article 20 of the Patent Law, an invention or utility model completed in China is the invention or utility model completed in China based on the material contents in the technical plan in question". It is also specified that "the exclusive right to a utility mode shall expire on the date of announcement that the patent on the invention is granted". Where an international application relates to one of the following events, the corresponding application in China will become ineffective: (1) the application in the international process is rejected or deemed to be rejected, or the part of the international application in connection with China is rejected; and (2) the applicant fails to complete the required procedures in China under Article 103 of the Rules within 32 months after the priority date is given.

Supreme Court Sets Forth Judicial Interpretation To Strengthen Patent Protection

The Supreme People's Court has issued the "*Interpretation on Issues concerning the Application of Law to the Trial of Cases regarding Patent Infringement Disputes*", which shall come into force as of 1 January 2010. The Interpretation contains a total of 20 articles involving major issues concerning the application

of laws in the trial of patent infringement disputes as follows: determination of the protection scope for invention and utility model patents, principles to establish patent infringement and appearance design patent infringement, application to existing technologies defence and the defence of prior use, confirmation of the admissibility of non-infringement lawsuits and so on.

GAPP To Investigate Foreign Investment For Unlawfully Releasing & Running Online Games

Sun Shoushan, the deputy director of the General Administration of Press and Publication, has recently said at the China Game Industry Annual Conference that where a new version or a new expansion is incorporated in an online game which has gone through the advance or import examination and approval of the GAPP, or the operating unit of an online game is changed, the advance or import examination and approval formalities must be transacted again, or else, such online game shall be banned as an illegal publication. The GAPP shall take severe measures to investigate and punish foreign investment's involvement in the publication and operation of online games. All imported and domestic online games must go through strict examination and approval formalities; an applicant will be allowed to operate an online game on the internet only if it has "one licence and three numbers", i.e. the internet publication licence which covers the business scope of operating online games, copyright authentication number, examination and approval number, and online game publication number.

Finance & Taxation

State Council Approves Margin Trading & Securities Lending And Shares Index Futures

The China Securities Regulatory Commission (CSRC) reports that the State Council has in principle approved eligible securities companies to launch the services for margin trading and securities lending as well as shares index futures. The CSRC will first select the first batch of securities companies which are eligible for providing margin trading and securities lending services based on the specific criteria and their proposals, and expand the scope of such services based on the actual operations and market status. The CSRC will also introduce a series of mechanisms in the preparations for the launch of shares index futures, such as eligibility of shares index futures investors, policies on the admission of financial institutions to the market and approval procedures for shares index futures contracts.

Beijing Issues Measures on Foreign Invested Equity Investment Fund Management Enterprises

Recently, Beijing Municipal Financial Bureau, Beijing Municipal Commission of Commerce, Beijing Administration for Commerce and Industry and Beijing Municipal Commission of Development and Reform jointly issued the Interim Measures on Establishment of Foreign Invested Equity Investment Fund Management Enterprises in Beijing (the "Measures"). The Measures came into force on January 1, 2010. The Measures will be implemented on a pilot basis in the Zhongguancun National Innovation Model Park for a period of 3 years commencing from January 1, 2010. Under the Measures, foreign invested equity investment fund management enterprises are allowed to be registered under the form of partnership or other non-company forms in Beijing as long as the national policy allows.

MOF & SAT Clarify Off-Set Of Overseas Income Tax Payable By Enterprises

The Ministry of Finance (MOF) and State Administration of Taxation (SAT) have jointly issued a notice to clarify the rules on the off-set of corporate income tax on income generated overseas by income tax paid overseas. The notice has retroactive effect back to 1 January 2008. Enterprises which intend to offset their corporate income tax by income tax paid overseas in reliance on Articles 23 and 24 of the "Corporate Income Tax Law" will be bound by this notice. Interested enterprises shall first determine the items subject to the off-set of the overseas income tax liability within the specific period and then determine the taxable amount as well as off-set amount by country (region). The notice also specifies the conditions enabling eligible enterprises to undergo the fast track off-set procedures upon approval of the competent taxation authorities.

Proceeds From Personal Transfers Of Restricted Shares In Listed Companies Will Be Taxable

The Ministry of Finance, the State Administration of Taxation and the China Securities Regulatory Commission have jointly released the "Notice on the Relevant Issues concerning Individual Income Tax (IIT) Imposed on Income from the Transfer of Restricted Shares of Listed Companies by Individuals". From 1 January 2010, the income gained from the transfer of restricted shares by individuals shall be subject to IIT as "income from transfer of property" at the rate of 20%. The income gained from the transfer of shares of listed companies acquired on the public offering market and the secondary market on the Shanghai Stock Exchange and Shenzhen Stock Exchange shall still be exempted from IIT. The Notice has also clarified the concerned three types of restricted shares.

Labor & Employment

Rules On Transfer Of Urban Corporate Employees' Basic Endowment Insurance Issued

On 28 December, the Ministry of Human Resources and Social Security and the Ministry of Finance jointly published the Interim Measures for Transfer and Continuation of the Basic Endowment Insurance Relationship of Urban Enterprise Employees which shall take effect as of 1 January 2010. The Measures provide in detail the computing method of transferred funds and the procedure for transfer and continuation in the trans-provincial transfer of an insurance participant's basic endowment insurance relationship. The Measures provide that where an insurance participant has reached the conditions for drawing his/her basic endowment insurance benefits, his/her number of years of participation in insurance and payment of premiums in each region shall be computed on a consolidated basis, and the savings amount in his/her personal account shall be computed on an accumulated basis; insurance participants who fail to reach the conditions must not terminate their basic endowment insurance relationship and transact formalities for cancellation of insurance; persons who have drawn their basic endowment insurance benefits in accordance with national provisions must not transfer their basic endowment insurance relationship.

Legal Comments

Pudong Allows Establishment of Foreign Invested Private Equity Investment Management Firms

By Kingward Gan and Aileen Weng

Recently, the Pudong government released one set of ice-breaking rules permitting foreign invested private equity investment management companies (“PEMC”) to be established in Pudong Area (the Implementation Measures for Establishing Foreign Invested Private Equity Investment Management Enterprises in Pudong New Area, hereinafter referred to as the “Measures”).

Foreign investors are now allowed under the Measures to establish PEMC in Pudong Area in the form of sino-foreign equity joint venture, sino-foreign contractual joint venture and wholly foreign owned enterprise under the only organizational structure of limited liability company. The major business of PEMC should be equity investment management which is defined as being appointed by private equity investment enterprises to engage in investment management and relevant consulting business. Existing FIEs that meet relevant requirements may alter into foreign invested private equity management enterprises.

And according to relevant official from Pudong Financial Service Office, foreign invested private equity management enterprises may manage overseas fund or legally established RMB fund in mainland.

BASIC REQUIREMENTS

Basic requirements of PEMC include:

1. PEMC should have at least one investor (shareholder) whose business scope covers equity investment or equity investment management, or the business scope of the investor’s associated entity covers the above mentioned area;
2. The PEMC is required to have senior management officers meeting both of the following requirements when submitting the establishment application:
 - At least two years’ experience in private equity investment or private equity investment management;
 - At least two years’ experience as senior officer.
3. PEMC is required to be limited liability company with a registered capital of no less than USD 2 million, among which at least 20% to be paid within 3 months and the remains to be paid within 2 years of the issuance of business license.

Approvals, registration, management and supervision of PEMC are carried out at local level by Pudong Economic Committee, Financial Service Office and Pudong New Area Administration of Industry and Commerce.

INCENTIVES

The Measures further clarify that the incentive policies of Implementation Measures for Encouraging Equity Investment Enterprise and Equity Investment Management Enterprise in Pudong New Area are also applicable to PEMC.

Specifically, the incentive policies mentioned above cover a range from tax incentives to housing assistance:

1. Board chairman, vice chairman, general manager, vice general manager may get 40% refund of tax paid on salaries of the same year; key employees such as investment manager or project manager may get 20% refund of tax paid on salaries of the same year;
2. Where the capital managed by the PEMC reaches RMB 1 billion, board chairman, vice chairman, general manager, vice general manager may obtain RMB 200,000 housing allowance at a lump sum each person.

It is notable that the incentives granted to PEMC are the same as those granted to financial institutions.

And the Measures will expire after June 30, 2010 while the incentive policies will expire after December 31, 2010.

FURTHER STEPS TO BE TAKEN

To establish PEMC is to make preparation for raising RMB funds in China later on. However, according to current foreign investment laws and regulations, there are still restrictions on raising and establishing RMB fund by foreign invested enterprises.

Under the practice of the sector, PEMC, as a general partner, should inject capital of certain percentage to the RMB fund to be raised for establishing confidence of other investors. However, SAFE released Circular 142 in 2008 prescribing that foreign invested enterprises are not allowed to use their RMB settled from foreign exchange capital for equity investment in PRC except as otherwise provided for.

Shanghai government has submitted application to SAFE for abolishment of this restriction on PEMC.

And Shanghai has also suggested taking funds raised in Pudong with foreign investment below 20% as RMB funds for more investment targets and withdrawal methods.

Comments on Rules on Foreign Investors' Merging or Acquiring Domestic Enterprises

By Paul Huang and Susan Zheng

Rules on Foreign Investors' Merging or Acquiring Domestic Enterprises was promulgated on August 8, 2006, which is a vital legislation for listed enterprises and M&A issues.

Division for Asset Acquisition and Equity Acquisition

The general rules make it clear that there are two circumstances for foreign investors' M&A, asset acquisition and equity acquisition.

Improvement on the *Interim Provisions on the Takeover of Domestic Enterprises by Foreign Investors* in Procedural Aspect

Compared to Article 26 of the *Interim Provisions on the Takeover of Domestic Enterprises by Foreign Investors*, which was promulgated in 2003, the new regulations represent clearer legal procedure with 6 chapter and 61 articles. In addition to the first chapter and supplementary provisions, the main contents of the legislation include the basic system for foreign M&A, approval & registration, equity-payment-based takeover of domestic companies by foreign investors, and antitrust scrutiny.

Aggregate Investment Limited to the Amount of Registered Capital

The general rules limit the aggregate investment according to the amount of registered capital, for asset acquisition and equity acquisition respectively.

Registered Capital(\$)	2.1 million and below	from 2.1 million to under 5 million	from 5 million to under 12 million	12million and above
Aggregate investment : registered investment	No more than 10:7	2:1	2.5:1	3:1

Equity-payment-based Takeover of Domestic Companies by Foreign Investors

As for equity-payment-based takeover of domestic companies by foreign investors, as the rules provided, *The term "overseas company" as mentioned in this Chapter shall be a lawfully established company, there is a sound system of company law in its registration place, and the company and its management level have no record of punishment by the regulatory institution within recent 3 years;*

The overseas company or its shareholders shall hire an intermediary institution registered within China to serve as a consultant;

An equity-based takeover of a domestic company by a foreign investor shall be subject to the examination and approval of the MOFCOM.

As for the overseas special-purpose company, which a domestic company or natural person directly or indirectly controls for the purpose of making its actual domestic company equities get listed abroad, the special provisions includes

To set up a special-purpose company abroad, an overseas company shall apply to the MOFCOM for going through the examination and approval formalities;

The transaction for the overseas listing of a special-purpose company shall be subject to approval of the securities regulatory institution of the State Council;

The total value of the stocks of a special-purpose company listed abroad shall not be lower than the value of the equities of the domestic company upon the assessment of the relevant asset assessment institution;

The funds of a special-purpose company raised from overseas listing shall, according to the transfer-back plan submitted to the foreign exchange control organ for archival purposes, be transferred back into China according to the existing foreign exchange control provisions.

The Confirmation of Equity-payment-based Takeover in Law and Supervision on Offshore Companies

The innovation of the rules is the confirmation of equity-payment-based takeover in law for the first time, and offshore companies are listed in the supervision scope. Equity-payment-based takeover of domestic companies by foreign investors makes its debut in the rules. The practice of equity-payment-based takeover and offshore companies is quiet common overseas. However, the legislation for them was still blank in China before the rules were promulgated. The promulgation of the rules would help the government to manage the loss of assets and falsely foreign investment, and meanwhile, M&A by offshore companies is protected by law now.

The Chapter of Antitrust Review

A whole chapter is contributed to antitrust review, which provides

If the market share of the takeover of a domestic company by a foreign investor is significant or it's influence to the market is vital, the investor shall report the relevant information to the MOFCOM and the State Administration for Industry and Commerce (hereinafter referred to as the SAIC).

The Duteous Investigations Requirement

The rules introduce the duteous investigation to M&A issues, which says

For an equity-based takeover of a domestic company by a foreign investor, the overseas company or its shareholders shall hire an intermediary institution registered within China to serve as a consultant.

This provision will directly stimulate the development of M&A market, and protect the interest of the acquired companies by an independent third party, the consultant.

Analysis on Measures for the Notification of Concentrations of Business Operators and Measures for Examining of Concentrations of Business Operators

By Sherry Xu and Susan Zheng

News Background

The Ministry of Commerce (MOFCOM) has promulgated the "*Measures for the Notification of Concentrations*" and "*Measures for the Examining of Concentrations of Business Operators*", which came into force on 1 January 2010.

This article is the analysis on the new legislation.

Turnover is the Basic Element to Identify Concentration of Operators Application Criteria

Article 4 of the application rule provides the amount of turnover, for which operators should apply to the government, and the meanwhile, the definition of turnover in China is given in the rules.

"Turnover" includes the revenue of related operators for the previous fiscal year by selling products and services, minus the various tariff and annex;

The expression "within the territory of China" as mentioned in Article 3 of the Regulations means that the location of the purchaser of the products or services provided by a business operator is within the territory of China.

Article 5 provides the sum of turnover for each business operator participating in concentration, which shall exclude the turnover among other business operators with direct or indirect control relationship and the business operator participating in concentration. In addition, *if any business operators participating in the concentration jointly control other business operator(s), or a business operator participating in the concentration and a business operator that does not participate in the concentration jointly control another business operator, the turnover of such business operator participating in the concentration shall include the turnover of the controlled business operator and the turnover of the third-party business operator, which shall be calculated once.*

Procedure of Examining the Submitted Documents and Materials

In terms of examining the submitted documents and materials, the Ministry of Commerce shall exam the completeness of the documents and materials according to Article 10, Article 12, and Article 13. As for *the specific time limited for submitting supplemental documents and materials* mentioned in Article 13, the Ministry of Commerce shall set a reasonable period as the case may be.

The time for establishing a case is the start point to calculate preliminary examination period, which is legally binding to both the Ministry of Commerce and the applicants.

If MOFCOM, through examination, considers that the concentration of business operators meets the statutory notification threshold and that the submitted documents and materials meet relevant requirements, it shall establish the case on the date of receipt of the complete notification documents and materials;

If the Applicant intentionally conceals important circumstances or provides false information, MOFCOM is entitled to refuse to accept the notification.

Further Examining Period

During the further examination, it is common practice in US and European countries that if the examining organization believes that the concentration of business operators may result, or has resulted, in eliminating or restricting competition, it may notify the participating business operators of its objections, and meanwhile, in order to eliminate the effect of the concentration of business operators that may result, or has resulted, in eliminating or restricting competition, either the participating business operators may suggest restrictive conditions to adjust the proposed concentration transaction. *The Regulations* provide relevant provisions for measures to submit defending response, categories, measures to submit, and modification for restrictive conditions. As provided in Article 11, the participating business operator can suggest restrictive conditions during the whole process of examining, with no regard to the objection of the Ministry of Commerce.

Decisions for Further Examining

There are three types of decisions for further examining, decision on forbidding the concentration of business operators, or not forbidding, and decision on concentrations of business operators with restrictive conditions. According to Article 15, paragraph 2, the restrictive conditions are the obligations for the participating business operators, and the violating of which is breaching of Anti-monopoly Law, against which MOFCOM may impose sanctions in accordance with the Anti-monopoly Law.

This Newsletter 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 Newsletter 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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