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Han Kun Law Offices
Newsletter

漢坤律師事務所
HAN KUN LAW OFFICES

6th Edition of 2010

Han Kun Newsletter Working Group

Insights & Ideas

Legal Updates

Insights & Ideas

China's Central Bank Released New Rules to Regulate Payment Services of Non-financial Institutions (Author: Li ZHANG)

The People's Bank of China (the "**Central Bank**") published the *Administrative Measures for Payment Services of Non-financial Institutions* (the "**Measures**") on its website on June 21, 2010. The Measures officially bring the third party payment institutions under the supervision and administration of the Central Bank, which are developing rapidly without supervision in recent years. The Measures will become effective on September 1, 2010.

The key issues of the Measures are as follows:

A non-financial institution shall apply for and obtain Payment Business Permit (the "Permit") to engage in payment business.

The Measures provide for the first time that a non-financial institution shall be approved by the Central Bank to obtain the Permit to provide payment services and thus qualifies as a payment institution which is subject to the supervision and administration of the Central Bank. No non-financial institution or individual may engage in payment business without the approval of the Central Bank whether explicitly or otherwise.

Pursuant to the Measures, the payment services of a non-financial institution include online payment, issuance and acceptance of prepaid cards, bank card acceptance and other payment services as specified by the Central Bank, among which online payment includes currency exchange and remittance, internet payment, payment by mobile phone, payment by landline telephone, and digital TV payment etc.

Any non-financial institutions which have been engaged in payment business before the implementation of the Measures shall apply for and obtain the Permit within one year from the date on which the Measures become effective. Those institutions that fail to obtain the Permit within the stipulated time limit are not allowed to continue conducting payment business.

A non-financial institution shall satisfy the requirements for application for the Permit.

The Measures provide the following specific requirements for a non-financial institution to apply for and obtain the Permit: 1) the applicant shall be a limited liability company or a joint stock limited company duly incorporated under PRC laws within China and shall be a non-financial institution with legal person status; 2) the applicant shall have minimum registered capital as specified under the Measures; 3) the investor of the applicant shall satisfy certain requirements as provided in the Measures; 4) the applicant shall have personnel, offices and facilities, organizations, internal management system and anti-money laundering measures etc.

Some influential internet payment companies in the current domestic market including Alipay, Tenpay have announced that they will apply for the Permit. It is still not clear how the Central Bank will operate in the approval procedures, and whether it is easy or difficult for the companies engaging in payment services to obtain the Permit. It is worth mentioning that the Measures specifically provide that the applicants for the Permit and senior management thereof shall have not been punished for committing any illegal criminal activities by abusing payment business or handling payment business for illegal criminal activities etc. for the latest three years. However, just one week before the promulgation of the Measures, the Ministry of Public Security issued a bulletin on its official website concerning the case of "Happy Paradise" Casino in Suzhou, Jiangsu. In this case, a senior management, whose surname was MEI, of 99Bill Information Service Corporation, a third party payment platform, was arrested for collaborating with a foreign gabling group and assisting it in transferring a sum of RMB 3 billion. 99Bill Information Service Corporation made profits of RMB 17 million in such activity. If the provisions of the Measures are strictly interpreted and implemented, 99Bill Information Service Corporation may not satisfy the foregoing application condition of the Permit. It is concerned by all parties what measures will be taken by the Central Bank in respect of 99Bill Information Service Corporation in the future, and whether 99Bill Information Service Corporation's future application for the Permit will be denied due to failing to comply with the foregoing application condition.

◆ **Minimum Registered Capital**

The Measures provide that the minimum registered capital of an applicant who intends to engage in payment business on a national scale shall be RMB 100 million and the minimum registered capital of an applicant who intends to engage in payment business within a province (an autonomous region or a municipality) shall be RMB 30 million. The minimum registered capital shall be paid-in monetary capital. Such minimum registered capital requirements may force a large number of existing payment companies which cannot meet the foregoing minimum registered capital requirement to exit from the payment market. It is estimated by the insiders that the companies which are able to satisfy the capital requirement for engaging in payment business on a national scale are limited to a few large companies such as Alipay, Yeepay and Tenpay and the current registered capital of half of the remaining more than 300 existing companies engaging in payment business may not reach RMB 30 million or RMB 100 million.

It is worth noticing that as online payment business is virtual, there is the probability that a payment institution which has been approved to conduct payment business within a province (an autonomous region or a municipality) may actually conduct online payment business by network on a national scale. It may be difficult for the Central Bank to discover and supervise such operation of payment business on a national scale in reality. The Central Bank needs to further specify the rules to differentiate between the payment institutions which engage in online payment business within a province and those on a national scale and approves, issues the Permit and conducts daily supervision and administration accordingly.

◆ **Measures Regarding Foreign-invested Payment Institutions**

The Measures state specifically that the Central Bank will separately stipulate the rules for the business scope, the qualifications of foreign investors and the contribution ratio of foreign-invested payment institutions and the Central Bank will report such rules to the State Council for approval. Such statement excludes foreign-invested payment companies from the companies which are qualified to apply for the Permit pursuant to the Measures. Thus, foreign-invested payment companies may have to wait for further rules to be issued by the Central Bank and adjust their equity interest structure accordingly. It is predicted by the insiders that existing foreign-invested payment companies such as Tencent, Alibaba, 99Bill may obtain the payment business license later than those domestic companies due to lack of specific rules for the time being.

◆ **Qualifications of Major Capital Contributors**

The Measures also provide for the following specific qualifications and conditions of the major capital contributors of an applicant: the major capital contributors shall be duly incorporated limited liability companies or duly incorporated joint stock limited companies; shall have been providing information processing and support service for financial institutions or e-commerce activities for more than two consecutive years up to the application date; shall have made profits for more than two consecutive years; shall have not been punished for committing illegal criminal activities by abusing payment business or handling payment business for illegal criminal activities etc. for the latest three years. Pursuant to the Measures, the major capital contributors include the capital contributors who have actual control over an applicant or which hold more than 10% equity interest of an applicant.

The Administration of the Permit and the Operation of Payment Institutions

The Permit shall be valid for five years as of the date of issuance. If a payment institution intends to continue engaging in payment business after the expiration of the Permit, it shall apply for renewal of the Permit within six months before the expiration. The period granted by the Central Bank for each renewal of the Permit shall be five years. A payment institution shall conduct business within the approved business scope as indicated in the Permit and shall not carry out business beyond the approved scope nor outsource its business. A payment institution shall not assign, lease or lend its Permit.

In addition, in respect of monetary capital transfer between payment institutions, the Measures require payment institutions to entrust banking financial institutions to handle such monetary capital transfer. Payment institutions are not allowed to mutually deposit monetary capital in other payment institutions or to entrust other payment institutions to handle such monetary capital transfer. Except otherwise specially permitted, payment institutions are not allowed to handle the monetary capital transfer between banking financial institutions.

The Measures require that a payment institution shall publicly disclose its charge items and standards of its payment business, formulate rules for payment business and measures for protecting clients' rights and interests and establish and improve risk management and internal control system in accordance with the requirements of prudent operation.

For the purpose of protecting clients' cash reserve and regulating the operation and management of clients' cash reserve by payment institutions, the Measures provide that the clients' cash reserve received by payment institutions does not constitute self-owned property of such payment institutions. Payment institutions may only transfer cash reserve as per payment instruction given by a client and shall not appropriate clients' cash reserve in any for. The proportion of the paid-in monetary capital of payment institutions to the average daily balance of clients' cash reserve shall not be lower than 10%. However, the Measures do not provide a specific definition for "clients' cash reserve".

It is reported that in the draft of the Measures, the Central Bank proposed that the clients' cash reserve shall only be used in bank deposit, stock up, and other financial investment products free of risks. However, it is hard in practice for third-party payment institutions to make profits if they do not engage in feasible financial investment and management for their cumulated capital and funds (including the clients' cash reserve received). Based on the foregoing fact, a large number of existing payment companies brought forward their opinions regarding such provision. Under these circumstances, the Measures provide vague rules in this regard, which provide general protecting prohibitive provisions regarding clients' cash reserve and nevertheless withhold the definition of it for further specification and interpretation.

It is worth mentioning that the Measures require that a payment institution can only choose one commercial bank as the deposition-management bank of clients' cash reserve and can only open one deposit account for cash reserve especially with one branch of the commercial bank. The commercial bank and the Central Bank shall supervise the deposition-management condition and the using condition of clients' cash reserve of a payment institution. The foregoing provision may force a large number of payment institutions to adjust the deposition and management of their clients' cash reserve to comply with such provision as currently they may have several deposition-management bank accounts for clients' cash reserve.

Conclusion

The Measures enhance market access for payment industry and specify the operation rules and the administration system for the third party payment industry. Before the promulgation of the Measures, the external environment of most non-financial payment institutions is unstable. The Measures provide same competition environment for all third party payment institutions which is conducive to the fair competition of the industry. However, the promulgation of the Measures

means that the regulatory authorities have commenced systemic administration of third party payment industry, especially the online payment industry. The emerging mobile phone payment industry is also included in the regulatory system beforehand. The emerging network finance based on full marketization is stopped. It is reported that the Central Bank will set off “Super Net-Banks”, which is the second generation of payment system between the individual network bank systems of domestic banks. It is said that this may be one of the reasons for the Central Bank to promulgate the Measures to sort and regulate the existing domestic third party payment institutions. It is reported that the Central Bank will formulate detailed implementation rules and relevant operating measures in relation to the Measures. The implementation rules will provide specific rules regarding the qualifications and conditions of applicants, the requirements and contents of application documents and the obligations of relevant parties. The operating measures will focus on the operating rules or guidance for payment institutions to engage in different kinds of business, especially for the issuance and acceptance of prepaid cards and bank card acceptance. The Central Bank will also cooperate with relevant authorities such as the Ministry of Public Security to formulate ancillary measures and organize and conduct special examinations over the third party payment industry. We will pay close attention to and update you on any implementation rules and operating measures to be issued in the future.

Legal Updates

1. MOFCOM Further Delegates the Examination and Approval Power of Foreign Investment (Author: Hong JIANG)

The Ministry of Commerce of the People's Republic of China ("**MOFCOM**") issued the *Circular on Issues Relevant to Delegation of the Examination and Approval Authority over Foreign Investment to Lower Levels* (Shang Zi Fa [2010] No.209, "**Circular 209**") on June 10, 2010. Pursuant to Circular 209, the MOFCOM further delegates the right of examination and approval of foreign investment to its local branches of the provinces, autonomous regions, municipalities directly under the central government, cities with independent plans, the Xinjiang Production and Construction Corp and sub-provincial municipalities, including Harbin, Changchun, Shenyang, Jinan, Nanjing, Hangzhou, Guangzhou, Wuhan, Chengdu and Xi'an, and state-level economic and technology development zones ("**Local Authorities**"). Circular 209 mainly addresses the following issues: 1) lift the approval threshold of Local Authorities on general matters; 2) clarify the approval power of Local Authorities on certain specific matters; and 3) lift the approval threshold of Local Authorities on special enterprises. The differences between Circular 209 and former provisions are as follow:

	Circular 209	Former Provisions
Approval Threshold of Local Authorities on General Matters	Pursuant to Article 1 of Circular 209, the establishment and change in the particulars of foreign-invested enterprises ("**FIEs**") in the encouraged and permitted categories of the Foreign Investment Industrial Guidance Catalogue with a total investment under USD300 million and in the restricted category with a total investment under USD50 million ("**Limit**") shall be subjected to the examination, approval and administration of the Local Authorities. The Limit for FIEs limited by shares shall be calculated based on their appraised net assets and the Limit for domestic enterprises acquired by foreign investors shall be calculated based on the acquisition transaction amount. Pursuant to Article 3 of Circular 209, Local Authorities shall be responsible for the examination, approval and administration of the establishment and changes in the particulars of FIEs in the encouraged category above the Limit provided that comprehensive balancing by the state in connection therewith is not required.	Pursuant to the *State Council's Decision on Investment System Reform* (Guo Fa [2004] No.20), projects under encouraged or permitted categories of the Foreign Investment Industrial Guidance Catalogue with a total investment amount (inclusive of capital increase) exceeding USD100 million is subject to approval of the National Development and Reform Commission ("**NDRC**"). Projects under restricted categories with a total investment amount (inclusive of capital increase) exceeding USD50 million is subject to approval of central NDRC. The establishment of and changes of FIEs with a registered capital of USD100 million or below under the encouraged or permitted categories, and with a registered capital of USD50 million or below under the restricted categories, articles of association, contracts and major changes as specified by law (capital increase and decrease, equity transfer, merger and acquisition) of large-scale foreign-invested projects, are subject to approval of the MOFCOM. Foreign-invested projects other than the foregoing are subject to approval of local government in accordance with applicable laws and regulations. Pursuant to *Circular of the Ministry of Commerce on Further Improving the Work of Examination and Approval of Foreign Investment* (Shang Zi Han [2009] No.7, "**Circular 7**"), the approval for establishment, capital increase and change of articles of association/contracts of FIEs (including foreign-invested stock companies), which were originally subject to the MOFCOM approval, fall within the encouraged categories and do not require comprehensive balance to be carried out by the State, is delegated to the Local Authorities .

	Circular 209	Former Provisions
Approval Threshold of Local Authorities on Certain Specific Matters	Pursuant to Article 2 of Circular 209, Local Authorities shall be responsible for the examination, approval and administration of single capital increases the amount of which falls below the Limit. Pursuant to Article 5 of Circular 209, Local Authorities shall be responsible for the examination, approval and administration of the establishment and changes in the particulars (including those at or above the Limit and capital increases) of FIEs in the service sector in accordance with relevant state provisions, except for those subject to the examination and approval of MOFCOM as expressly provided in laws and regulations. Pursuant to Article 6 of Circular 209, Local Authorities shall be responsible for the examination, approval and administration of changes in the particulars (except for single capital increases that are equal to or above the Limit and the circumstances specified in Article 5 hereof) of FIEs, the establishment of which was approved by MOFCOM, the former Ministry of Foreign Trade and Economic Co-operation and relevant department of the State Council.	Pursuant to *Circular of the Ministry of Commerce on Further Simplifying and Standardizing the Administrative Approval of Foreign Investments* (Shang Zi Han [2008] No.21, "**Circular 21**"), 1) Approval for non-material change in respect of FIEs originally approved by MOFCOM is delegated to provincial MOFCOM, such as the change in the name of a FIE, name of the FIE's investors, place of business within the same city, the size of the board of directors, the operation term in accordance with law. The provincial MOFCOM shall file the copies of approval letter and the approval certificate with MOFCOM; and 2) Pursuant to the *State Council's Decision on Investment System Reform*, approval for changes in respect of FIEs with a registered capital of USD100 million or below under the encouraged or permitted categories, and with a registered capital of USD50 million or below under the restricted categories originally approved by MOFCOM is delegated to provincial MOFCOM (excluding FIEs with an investment nature, and FIEs subject to special regulations, special industry policies and national macroeconomic control). The provincial MOFCOM shall file the copies of approval letter and the approval certificate with MOFCOM.

	Circular 209	Former Provisions
Approval Threshold of Local Authorities on Special Enterprises	Pursuant to Article 4 of Circular 209, Local Authorities shall be responsible for the examination, approval and administration of the establishment and changes in the particulars of FIEs with an investment nature with registered capital under USD300 million and of foreign-invested venture capital enterprises and foreign-invested venture capital management enterprises with total capital under USD300 million.	Pursuant to *Circular of the Ministry of Commerce on Delegating the Right of Examination and Approval of the Establishment of Investment Companies by Foreign Investors to Lower Administrative Authorities* (Shang Zi Han [2009] No.8, "**Circular 8**"), the establishment and change of FIEs with an investment nature with a registered capital of USD 100 million or below (except where a single capital increase is more than USD 100 million) shall be subject to the examination and approval of Local Authorities. Except where a single capital increase of more than USD100 million and the change of the investor of FIEs with an investment nature is still subject to the approval of MOFCOM, changes in respect of FIEs with an investment nature originally approved by MOFCOM in other respects are subject to the approval of Local Authorities. Pursuant to *Circular of the Ministry of Commerce on Items of Examining and Approving Foreign Investment in Venture Capital Enterprises and Venture Capital Management Enterprises* (Shang Zi Han [2009] No.9, "**Circular 9**"), the establishment and change of foreign-invested venture capital investment enterprises and venture capital investment management enterprises with a total investment amount of USD100 million (including USD100 million) or below shall be subject to the approval of Local Authorities.

2. China's MOC Issued Interim Measures on the Administration of Online Games (Author: Yeting CAI)

The General Administration of Press and Publication ("**GAPP**") has been responsible for the pre-examination and approval of online games since 2004. However, after the regulations issued by the General Office of the State Council and the State Commission Office for Public Sector Reform ("**SCOPSR**"), which re-clarifies the respective authorities of the Ministry of

Culture ("**MOC**") and GAPP, the administrative authorities on online games (excluding the pre-examination and approval of online publishing of online games) held by GAPP before are assigned to MOC. After that, SCOPSR issued the *Circular on Printing and Issuing the Interpretations by the State Commission Office for Public Sector Reform of Relevant Articles in the Regulations Regarding Animation, Online Games and Comprehensive Law Enforcement of Culture Markets* (Zhong Yang Bian Ban Fa [2009] No. 35, the "**Interpretations**") on September 7, 2009. The Interpretations specified that MOC is the competent department of online game administration, and under the unified administration of MOC, GAPP is responsible for the "pre-examination and approval of the online publishing of online games". Based on the understanding of MOC, "online publishing of online games" shall mean the publications of online games, such as game dicks and other tangible media in which the game introduction, playing methods and the client information are stored. Therefore, GAPP has no authority to make pre-examination and approval of online games.

But, obviously, GAPP and MOC have different opinions regarding the division of their respective authorities. On September 28, 2009, GAPP, National Copyright Administration and National Office of Combating Pornography and Illegal Publications jointly published the *Notice Regarding the Consistent Implementation of the* "*Stipulations on 'Three Provisions'" of the State Council and the Relevant Interpretations of the State Commission Office for Public Sector Reform and the Further Strengthening of the Administration of the Pre-examination and Approval of Internet Game and the Examination and of Imported Internet Games* (Xin Chu Lian [2009] No. 13, "**Notice 13**"), according to which, the acts of providing online interactive or downloading services of online games to the public via internet are "online game publication activities", which are subject to the pre-examination and approval of GAPP. In addition, Notice 13 specified, *inter alia*, that "no online game is allowed to be put on the internet without obtaining the pre-approval of GAPP", and "GAPP is responsible for the approval of imported online games". Thereon, fight for administrative powers over online games intensifies between MOC and GAPP.

For the purposes of streamlining the overlapping jurisdiction on, strengthening the administration and operational order of online games, MOC promulgated the *Interim Measures on the Administration of Online Games* (No. 49 Order of MOC) (the "**Measures**") on June 3, 2010, which will become effective on August 1, 2010. The Measures can be deemed as the first regulations especially for the administration of online games. It appears that the Measures only restate old powers bestowed to MOC by the Interpretations and other previous circulars issued by it, but fail to bring any obvious breakthrough to the fight between MOC and GAPP.

The Measures have six chapters and thirty-nine articles in all. The main contents of the Measures are introduced as follows:

Define Online Games and Virtual Currency

The Measures further clarify the relevant concepts of online games, online game operation, and virtual currency for online games. "Online Games" mean the game products and services consisting of software programs and information data and provided through internet, mobile telecommunication network and other information network, including various online games operated in the form of client terminals, web browser and other terminals; "Online Game Operation" means the operating activities providing game products and services to the public through information network, user systems or charging systems; and "Virtual Currency for Online Games" means a virtual exchange tool represented by special numerical units, issued by an online game operators and deposited by magnetic recording in a server outside online games and should be directly or indirectly purchased at certain rates by game players with legal tender.

Clarify Requirements and Qualifications of Online Game Operators

Chapter Two of the Measures clarify that entities which engage in online game operation, issuance and exchange services of virtual currency, online games R&D and other operating activities shall fall into the administration scope of MOC and specify that online game operators shall meet the following conditions: 1) having a name, domicile, organizational structure and articles of association in compliance with the laws, and a definite online game business scope; 2) having employees in conformity with the laws; 3) having a registered capital of not less than RMB 10 million; and 4) other requirements in compliance with the laws, regulations and other relevant state provisions. After meeting the above requirements, these operators shall apply for and obtain a Internet Culture Operating License, which is valid for three years. It is worthwhile to note that the Measures have delegate MOC's power and authority in approving Internet Culture Operating License to its counterparts at the provincial level.

Further Strengthen Content Administration of Online Games

The Measures further strengthen the administration on the content of online games. Firstly, Article 9 of the Measures specifies that the following contents shall not be contained in online games, i.e. contents 1) violating the basic principals of the Constitution; 2) endangering the state's unity, sovereignty and territorial integrity; 3) disclosing the state's secrets, endangering the state's security or damaging the state's glory and interests, undermining the unity of the ethnic groups; 4) advocating cults, superstition, obscenity, pornography, gambling, violent or abetting the commission of a crime; 5) insulting or slandering the other people, infringing the other persons' lawful rights and interests; 6) violating the social moralities and other prohibited contents provided by the laws, regulations and state provisions. Secondly, the Measures specify that MOC is in charge of the administration on the content of online games

and will not re-exam the online game publications which have been pre-examined and approved by the relevant departments and allow them to be put on the internet for operating. Meanwhile, MOC is also responsible for examining the content of the imported online games. Where the content of online games put on the internet is intended to be substantially changed, the game operating companies shall report the content proposed to be changed to MOC for re-examination and approval.

It is worthwhile to note that, according to Notice 13, GAPP is responsible for the approval of imported online games, while the Measures emphasize that MOC has the authority to exam the content of imported online games. This seems to mean that, after the Measures taking into effect, an imported online game needs to go through parallel examinations and approvals of both departments, and overlapping management between MOC and GAPP still exists.

Regulate Operating Activities of Online Game Operators

Besides, the Measures set forth the following provisions to regulate the operating activities of online game operators: 1) the promotion and advertisement of online games shall not contain any contents prohibited by laws and regulations; 2) it is prohibited to set compulsory fight without the consents from the game users and to induce online game users to spending legal or virtual currency into online game products and services by accidental means as lucky draw; 3) it is prohibited to authorize any enterprises without relevant license to operate online games; 4) online game users are required to register with their real name and valid ID cards; 5) if the online game operation ceases or rights of operating online games are transferred, it shall be announced 60 days in advance and the users' unused virtual currency and valid services must be handled properly; 6) the technical and management measures shall be taken to ensure the security of the information network and protect the state's secrets, commercial secrets and individual information of the users according to laws and regulations.

Enhance Regulation on Virtual Currency

For the purpose of resolving the disputes arising from the usage of the virtual currency for online games, the Measures provide that 1) virtual currency may only be used to purchase services and products provided by the online service provider that issues the currency; 2) the purpose of issuing virtual currency shall not be malicious appropriation of the user's advance payment; 3) the storage period of online gamers' purchase record shall not be shorter than 180 days; 4) the types, price and total amount of virtual currency shall be filed with provincial-level cultural administration department. Besides, the Measures set forth that virtual currency service providers may not provide virtual currency transaction services to minors or for online games failing to obtain approval or filings, instead, they shall deal with illegal transactions correctly, and keep transaction records, accounting records and other relevant information between the users for at least 180 days.

Stipulate Specific Liabilities for Illegal Online Game Business Activities

Chapter Five of the Measures clearly stipulates that the cultural administration departments at county level or above or the culture market comprehensive law enforcement agencies are the department in charge of punishing various kinds of online game business activities that violate laws and regulations. In addition, the Measures stipulated different legal responsibilities for different kinds of violation activities, including issuing an order for remedial actions; confiscating the illegal earnings; imposing a fine of not more than RMB 30000 depending on the seriousness of the case; ordering the business operators to suspend operations for rectification or rescinding the Internet Culture Business License if the circumstance of the offenses are serious; and where an illegal act constitutes a crime, criminal responsibility shall be investigated in accordance with law. For example, enterprises undertake online game business without approval shall be punished by the relevant departments in accordance with the *Measures Investigating, Punishing and Banning Unlicensed Business Operations*. And in the event of occurrence of any of the following circumstances, the cultural administration departments at county level or above or the comprehensive law enforcement agencies of culture market shall order the online game business units to make remedial actions, confiscate their illegal earnings, impose a fine ranging from RMB 10000 to RMB 30000; and order the online game business units to suspend operations for rectification or rescind the Internet Culture Business License if the circumstance of the offenses are serious, and where an illegal act constitutes a crime, criminal responsibility shall be investigated in accordance with law: 1) providing online game products and services which contain the contents prohibited by Article 9 of the Measures; 2) not making registration changes in according to relevant laws and regulations where they change the name and domain name of web site, legal representative, registered address, business address, registered capital, ownership structure and the permitted business scope; 3) putting on the internet and operate the imported online games without obtaining the approval of MOC; 4) not re-filing new submissions with the relevant departments where the operating enterprise of the imported online games has been changed or the contents of the imported online games has been substantially changed.

Finally, the Measures clearly state the protection measures concerning the online game users' rights and interests: the online game business units shall concentrate their efforts to protect the legal rights and interests of the online game users on the bases of regulating their own operating activities. On the one hand, they shall publish the way of handling disputes on the prominent placement of their web site providing services and take the burden of proof for the users registered in real names and have been examined the same; on the other hand, the service agreement entered into by and between the online game operating companies and the users shall contain and not conflict with all the contents of the Essential Terms of the Format Agreement for Online Game Service.

3. Taiwan and Mainland China Recently Signed a Cooperation Agreement on Intellectual Property Protection (Author: Ning LI)

Yunlin Chen, the president of PRC Association for Relations Across the Taiwan Straits, and Bingkun Jiang, the chairman of Taiwan Strait Exchange Foundation, executed the *Cross-Strait Cooperation Agreement on Intellectual Property Protection* on June 29, 2010 in Chongqing (the "**Agreement**"), which shall become effective on the next day when both parties finish the relevant procedures and notified each other in writing. This Agreement is a single agreement under the *Cross-Strait Economic Cooperation Framework Agreement*.

According to a poll regarding the issues which shall be put under cross-strait negotiation conducted by Taiwan's Mainland Committee of Executive Yuan in 2009, the establishment of a cross-strait communication platform for intellectual property and solving issues on the priority right of trademarks and patents are listed as the "most urgent issues concerned by Taiwanese businessmen to be solved", besides which, Taiwanese businessmen also subscribe to the view that strictly punishment against counterfeit and piracy, the establishment of across-strait expressway system for patent examination, the establishment of databases of mainland expert witnesses or appraiser from different areas and different industries, the issues on trademark squatting, strengthening the intellectual property management capacity of Taiwanese businesses, are also urgent issues to be solved. Since the Agreement covers most of the above issues, its execution shall be broadly welcomed.

The material parts of the Agreement are summarized as below.

Mutual Admission of the "Priority Right"

It is agreed under the Agreement that "both Parties agree to confirm the effectiveness of the first application date of patent, trademark and variety right made by the other Party pursuant to its own rules, promote the corresponding arrangements, and protect the priority rights of people from both sides." This means that within 12 month from the date of first application for a invention or utility model patent in Taiwan, or 6 month from the date of first application for design patent in Taiwan, the applicant are entitled to a priority right when applying for patent for the same subject in mainland; within 6 month from the date of first application for trademark registration in Taiwan, the applicant are entitled to a priority right when applying for trademark registration for the same product in mainland. Likewise, the patent or trademark registration applicant who applies for a patent or registered trademark for the first time can also be entitled to a priority right in Taiwan.

Variety Protection

The Agreement provides that each party shall accept the other party's application for the variety rights pursuant to such party's declared plant variety protection directory (plant variety), and both parties shall consult with each other on the expansion of the plant variety protection

directory (plant variety which can be applied for variety rights). This means that the garden crop, flowers, fruits and agricultural products can be applied for plant variety rights. For example, practitioners from mainland who want to plant Taiwan moth orchid, a popular plant well-accepted by the market, shall obtain an authorization from Taiwan side.

Enlarge the Cooperation

The parties reached a consensus under the Agreement to:

- Promote the cooperation and consultation on patent search and examination results, the examination and test of the variety rights;
- Promote the cooperation between both sides' patent and trademark industries;
- Establish a copyright certification cooperation system, and exchange views on establishment of certification systems for books, software (computer programs) and other works or products.

Among the above, the copyrights certification cooperation system is especially noteworthy. At present, Taiwan video and audio products have to be certificated by Asian Headquarter of International Federation of the Phonographic Industry in Hong Kong, which only accept those applications made by its member record corporations. In future, video and audio products from Taiwan will be certified by associations or organizations designated by Taiwan and published or released in mainland without any certification by Hong Kong.

Co-disposal System

The Agreement formulates a co-disposal system to deal with those high-profile cross-strait intellectual property infringements, such as piracy, counterfeit, mala fide registration of famous trademark, geography symbol or famous name of origin, and false marks of origin of fruits and other agricultural products.

At present, a large number of video or audio products from Taiwan are flooding on the mainland's Internet, though Taiwan right holders of such products have not grant any relevant authorization. After the execution of the Agreement, both parties will strengthen the punishment against these illegal infringements through the communication platform and cooperative co-disposal system established pursuant to the Agreement, and strictly investigates, dispose and clamp down on those websites who provide download services for unauthorized music and films.

In addition, famous Taiwan trademarks such as "Yonghe Soybean Milk", "Giant", "Tzu Chi (Hospital)", "Ali Mountain Tea", "Chi Shang Mi", are always been mala fide registered and counterfeited by mainland businesses. The Agreement also provides a more efficient communication and co-disposal system to deal with such problem.

Four Official Platforms Will Be Established

The Agreement states that both parties will separately establish its own work groups to take charge of specific work plans and schemes. It is reported that after the execution of the Agreement, four official platforms will be established to deal with issues on patent, trademark, copyright and variety rights, etc. The former three areas shall be respectively taken charge by the patent group, trademark group and copyright group under the Intellectual Property Office of Ministry of Economic Affairs on Taiwan side, and the State Intellectual Property Office, Trademark Bureau of State Administration for Industry and Commerce and the General Administration of Press and Publication on the mainland side. As to the "variety rights", the relevant issues are vested in Agriculture Committee of Taiwan, and the Ministry of Agriculture and the State Forestry Bureau of the mainland.

4. China Introduced Fiscal Incentive Funds for Energy Performance Contracting Projects (Author: Jiaxin LIU)

The Ministry of Finance (MOF) and National Development and Reform Commission (NDRC) issued the *Interim Measures on Management of the Fiscal Incentive Funds for Energy Performance Contracting* (the "**Measures**") on June 3, 2010. To regulate the management of the fiscal incentive funds for energy performance contracting and promote efficiency of utilization of the funds, the Measures regulates five major issues as follows.

Supporting Scope of Incentive Funds

Fiscal funds under the Measures are applicable to the energy saving reconstruction projects adopting energy performance contracting in the fields of industry, agriculture, transportation and of the public institutions. Energy performance contracting projects that have enjoyed other relevant national subsidy policies shall not be included within the supporting scope of the incentive funds.

Companies Eligible for Incentive Funds

Companies eligible for he incentive funds are energy saving service companies. For the purpose of the Measures, the term of 'energy performance contracting' refers to the model where an energy saving service company and an energy consuming unit agree on a energy saving target in contract, whereby the energy saving service company provides necessary services to the energy consuming unit, which will pay the cost and reasonable profit thereof in virtue of the benefit from energy saving. The Measures is mainly applicable to energy performance contracting with shared energy saving benefit.

The term of 'energy saving service companies' refers to professional companies providing

services of diagnose of energy consuming conditions and design, financing, reconstruction, operation management of energy saving projects. The Measures provides that qualified energy saving service companies are subject to examination and record and a dynamic administration. Energy saving service companies file an application to the provincial-level energy saving administration in the place where the companies are located. The provincial-level energy saving administrations then will conduct a preliminary examination together with the finance departments and report the integrated results to NDRC and MOC. NDRC and MOC will publicize a list of energy saving service companies and their business scope after experts' assessment and examination organized thereby.

Conditions for Application of Incentive Funds

According to the Measures, energy performance contracting projects eligible for fiscal incentive funds shall satisfy the following conditions: 1) the investment of the energy saving service company accounts for more than 70% and the energy saving benefit sharing method is agreed in contract; 2) the annual energy saving amount for a single project (refers to energy saving capacity) is equivalent to that provided by less than 10000 tons of standard coal and more than 100 tons (inclusive of 100 tons) of standard coal. The annual energy saving amount for the industrial project is equivalent to that provided by more than 500 tons (inclusive of 500 tons) of standard coal; 3) having complete sets of energy consumption measuring equipment and sound energy statistic and management system. The energy saving amount is measurable and is able to be supervised and examined.

An energy saving service company qualified for fiscal incentive funds shall satisfy the following conditions: 1) having an independent legal person status and is engaged in energy saving services (e.g. energy saving diagnose, design, reconstruction and operation) as main business and having passed NDRC and MOF's examination and recordation; 2) having a registered capital of above RMB 5 million (inclusive of 5 million) and the company has a strong financing capacity; 3) having a sound business operation condition and credit record and a sophisticated finance management system; 4) having competent professional technicians and management specialists on energy performance contracting and the capacity to safeguard the smooth implementation and stable operation of the project(s).

Standards of Incentive Funds

The incentive funds shall be released to the energy saving contracting project in a lump sum according to the annual energy saving amount and the regulated standard, and shall be mainly used for the relevant expenditures of the energy performance contracting project and development of the energy saving industry. Such funds shall be jointly burdened by the central finance and the finance at the provincial level. The standard for incentive funds released by the central finance shall be 240 Yuan/per ton of standard coal and the standard

for the finance at the provincial level shall not be less than 60 Yuan/ per ton of standard coal. The standard for incentive funds can be properly raised in some regions where conditions permit.

Allocation of Incentive Funds

Upon completion of an energy performance contract project, the energy saving service company can apply for the fiscal incentive funds with the finance department and energy saving administrations at the provincial level where the project is located (the specific application form and requirements will be determined by local authorities). Energy saving administrations and t finance departments at the provincial level will organize examination on the application project and contract and determine the annual energy saving amount of the project. The finance department at the provincial level will allocate the incentive funds from the central finance and provincial finance to the energy saving service company according to the said examination results.

Important Announcement

This Newsletter has been prepared for clients and professional associates of Han Kun Law Offices. 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 publication 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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