THE NEWSLETTER OF LAWEXCHANGE INTERNATIONAL Fall/Winter 2012

The Globe

LawExchange International Newsletter

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Portrait of LawExchange-- A Pretty Picture

By Fred Tannenbaum

The Fall 2012 LawExchange International ("LEI") conference is in Amsterdam. Our host is Levenbach Gerritsen and this meeting also marks the inaugural session over which our new Chairman, Auke deVries of The Netherlands, our host firm, is presiding.

Besides Amsterdam's many world famous allures, Rembrandt's masterpiece "The Nightwatch" sits proudly in the Rijks Museum, not far from Levenbach's offices. The symbolism of the painting and LEI share much in common. The Dutch burghers whom Rembrandt portrayed were prominent and distinguished leaders of their thriving city. Most LEI lawyers (certainly your author excluded) fit that description as leaders of their respective 30 plus major cities across the world.

The characters on Rembrandt's canvas also displayed unity and a common sense of purpose. LEI's members share that same unity and commonality of purpose as well. Our semi-annual meetings, constant e-mail and other communication, discussions on law firm management and other salient topics and long standing working relationships forge those bonds of unity as well. Just as Rembrandt's burghers formed a seamless web of powerful protection for the city, so do the LEI member firms form this seamless web of client protection throughout most of the world.

Certainly the Dutchmen on duty embodied strength, both physical and character. LEI lawyers and their work product convey similar attributes. What client would not gladly dispense with a 17th century Dutch musket for the powerful shot of a Levenbach Gerritsen brief? Or oral arguments from Levenbach's Schiphol office?

Nightwatch by Rembrandt

Rembrandt's images bestride a colossal canvas over 14 feet long. LEI's firms are pictured throughout most of the major commercial centers across the globe and also portray a vibrant and huge tapestry.

The convivial sportsmanship in the painting also connotes the bonds of camaraderie and friendship. Attendance at regular LEI meetings as well as successful working relationships over many years have likewise forged inextricable bonds of friendship and bon homie between and among LEI lawyers across not just the city but the world.

Finally, what discussion of a Rembrandt work would be complete without analyzing the different shades of browns and blacks and then how they are pierced by a stream of light? LEI lawyers are trained to discern all shades of a commercial transaction or dispute. At the same time, LEI lawyers make sure that our clients radiate in the incandescent glow of the dominant light.

The only aspect of the Night Watch on which LEI cannot hold its own is that, unlike the painting, none of our lawyers carry around a dead chicken to symbolize vanquishing our enemy. We have definitely made great progress since the 17th century.

LEI and Rembrandt . . . . both eternal Masters. ◆

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Facebook: A new method of serving legal proceedings?

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Earlier this year the English High Court gave permission for a commercial claim to be served on an individual through his Facebook account, in what is believed to be a first in the UK for a commercial case. The English Courts are accordingly following the lead of Courts in Australia, New Zealand and Canada, which have already sanctioned the service of claims via Facebook.

Facebook Logo

Background

Investment house AKO Capital ("**AKO**") sought to recover £1.3 million from stockbrokers TFS Derivatives ("**TFS**") on account of overpayments of commissions it had made to TFS.

TFS denied liability and argued alternatively that the funds claimed ought to have been recovered from its former cash equities broker Fabio de Biase and from AKO's hedge fund trader Anjam Ahmad.

In September 2010, Mr. de Biase received a prohibition order and financial penalty from the UK's Financial Services Authority for his involvement in an arrangement with Mr. Ahmad, whereby commissions paid by TFS to AKO were "improved". Mr. de Biase consequently received a higher commission income, which he then split with Mr. Ahmad.

AKO had experienced difficulties in tracing Mr. de Biase in order to join him as a defendant to the claim as he was no longer residing at his last known address. However, they had located his Facebook profile. AKO was able to demonstrate to the Court that not only did the Facebook profile located belong to Mr. De Biase, but also that he regularly accessed his profile, as demonstrated by the fact that recent friend requests sent to Mr. De Biase were being accepted by him.

Conclusion

It would appear that Courts in various jurisdictions recognise the increasing power of social networking sites such as Facebook as a means of tracing and directly contacting individuals. Provided that a Facebook profile can be verified as being that of the individual in question, and also that the profile is being actively used by that individual, the prospect of serving proceedings via Facebook would therefore appear to be viable in appropriate cases. ◆

Cambridge, England

INSIDE THIS ISSUE:

Chinese National Regulator Confirms Chinese Foreign Investment Policies Apply to Foreign-invested RMB Funds

[国家发改委确认中国外资政策法规适用于外商投资的人民币股权投资基金

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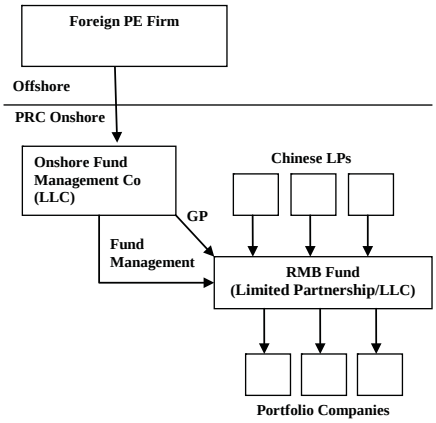
In an official reply letter recently addressed to Shanghai local government, the National Development and Reform Commission of China ("NDRC") clarified that private equity RMB funds established in China by foreign fund managers will be strictly subject to Chinese foreign investment laws and policies, even if the amount of fund contribution by the foreign fund manager is only a very small percentage.

In a typical structure for a foreign-invested private equity RMB fund (an illustrative chart on the right) ("RMB Fund"), the foreign fund manager would, directly or indirectly, contribute a small amount of foreign currency funds (e.g., 1%, 2% or up to 5% of the total capital commitment) in exchange for its general partner position in the new fund. The limiter partner fund contributions and commitments will be from Chinese domestic RMB investors.



For a typical RMB Fund structure, there remains a legal question under Chinese law whether such a private equity RMB fund will be subject to Chinese foreign investment laws and policies which impose varied types of restrictions on foreign investments in many industries and sectors. The restrictions could be equity participation limits, special approval requirements or simply the prohibition of foreign investment. For instance, if an equity investment is made in an Internet-based company, foreign investors' equity holdings in aggregate may not exceed 49%; foreign investors are prohibited from making an equity investment in companies that are engaged in some national resource (such as tungsten, antimony, tin, rare earth), and its equity holdings in an invested company may not be a controlling position for some national resources (such as development of special or rare types of coal, sea sand, oceanic manganese nodule). Moreover, special approval rules and procedures apply to foreign investment in industries that are characterized as "restricted" for foreign investment.

Well, in the absence of further changes in laws or policies, Chinese foreign investment policies and laws should apply to equity investments made by a RMB Fund. One may argue that it is not reasonable to apply Chinese foreign investment laws and policies to equity investments made by a RMB Fund, since the foreign equity position in a RMB Fund is insignificant. In the past two years, in order to attract foreign fund managers and foreign capital, local governments in Shanghai, Beijing and Tianjin had put forward special local rules stating that if the foreign capital contribution in such a RMB fund is no more than 5%, the RMB Fund will not be restricted by Chinese foreign investment laws and policies in the course of its downstream investments in portfolio companies. That is to say, the fund will be treated as a pure RMB fund, as if no foreign capital were invested in the fund. This special local policy had been hailed by many foreign fund managers as a special green light, despite its lack of legal and policy basis with regard to national laws and regulations.

Bejing, China

Chinese National Regulator . . . continues on page 6

Australia's Migration Program And Business Skills Visas

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Australia's Migration Program aims to meet Australia's economic and skilled needs. Its economic significance is reflected in the Overseas Student Visa Program which is Australia's third largest export earner after iron ore and coal.

The Department of Immigration and Citizenship receives over 13,000 visa applications each day worldwide and in 2010/2011 raised $1.137 billion from visa application fees. The demand for entry to Australia together with the progressive increase in visa fees which take place on an annual basis, will continue to generate further revenue for the Commonwealth of Australia.

Few appreciate the complexity of Australia's immigration laws. The legislative scheme consists of over 3,000 pages. It is underpinned by over 16,000 pages of policy guidelines which provide guidance to Departmental officers in respect of aspects of the decision-making process. Both the laws and policy guidelines are subject to constant and ongoing change.

As part of ongoing reforms, on 1 July 2012 the Business Skills Program will be replaced by the Business Innovation and Investment Program, which aims to create visa pathways to provide for significant migrant investment into Australia.

The Subclass 188 visa is for successful business persons, with net assets of $800,000 and an annual turnover of $500,000. Alternatively, it is for persons who invest $1.5 million in State or Territory bonds for 4 years, and have $2.25 million in net assets.

Melbourne, Australia

Points will be awarded according to age (25 – 32 year olds score the highest), English ability, qualifications, experience in business or investment, net assets, business turnover and innovation capacity, and in particular patent holders.

The Sub-Class 888 Visa enables Sub-Class 188 Visa holders, who have successfully operated a business in Australia for 4 years, to be granted permanent residency.

The Subclass 132 Business Talent visa will be a state or territory nominated permanent visa with two streams namely significant business history stream and venture capital entrepreneur stream. It is intended for high calibre business owners and entrepreneurs with private equity and venture capital funding.

All intending migrants interested in a business skills visa will be required to submit an Expression of Interest (**EOI**) and then, based on claims of their attributes, will need to receive an invitation in order to lodge a visa application. The highest ranking migrants may be invited to apply for the business skills visa.

SkillSelect will provide greater control over who can apply for a business skills visa and when they can apply. It will enable the government to better manage the overwhelming demand for migration to Australia and to encourage greater ventures by business migrants and foster innovation.

Australia's targeted migration policies and programs continue to offer new paradigms in encouraging business innovation and investment which is to the economic benefit of Australia. ◆

What do Michael Jordan and Jeremy Lin Have in Common?

Trademark Fling Tips - First to File and Chinese Equivalents

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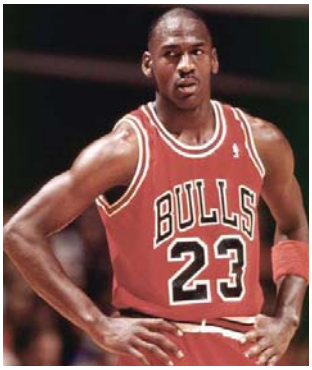
Michael Jordan — One of the greatest athletes of all time; active entrepreneur. He is often credited as being instrumental in popularizing basketball and the NBA around the world.

Jeremy Lin — "Linsanity" personified; newcomer star athlete. He stunned the sports audience with a winning streak and sparked a popularity fire storm across the sport of basketball.

Both Michael Jordan and Jeremy Lin have their names registered as trademarks in China - but by others.



Michael Jordan

In 2003, "Qiao Dan," the Chinese phonetic translation of "Jordan," was registered as a trademark in the Chinese Trademark Office by "Qiao Dan Sports Company Limited" a Chinese Company, http://www.qiaodan.com. Since 2000, "Qiao Dan" sporting goods and apparel were widely marketed and sold in China by this company. In 2009, the Chinese Trademark Office recognized "Qiao Dan" as a well known trademark. Neither Michael Jordan nor his enterprise has anything to do with "Qiao Dan" or the goods.

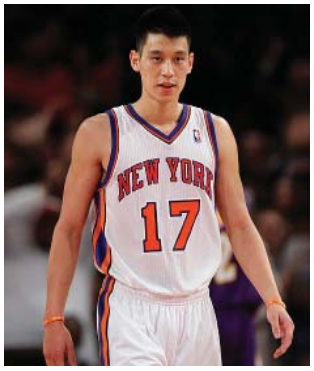
Same theme as above - "Jeremy Lin" and "Lin Shu Hao," Jeremy Lin's Chinese birth name also appeared in two July, 2010 trademark applications filed by the WuXi Risheng Sporting Goods Co. Ltd., Jiangsi Province, China. Notably, the trademark applications were said to have cost the WuXi company about $700. (Coincidentally, WuXi Haoqiu Sporting Goods Co. Ltd. from the same neighborhood also filed a trademark application of the "Michael Jordan" name in 2011.)

Currently, the "Jordan" and "Lin" names are being exploited in China without authorization from Michael Jordan or Jeremy Lin. Recently, the news reported that Mr. Jordan has filed a lawsuit in a China court against "Qiao Dan" Sporting Goods. As for Mr. Lin, there is no word on whether he may take any action to deal with the WuXi trademark application.

At this time, how these trademark rights and liabilities issues will be sorted out between the superstar athletes and Qiao Dan Sports and the WuXi company is uncertain. What we do know is that there will be expensive lawsuits, negotiations and/or payouts. What should one learn from this story to protect oneself in a global intellectual property community?[1]

File early!

China has a first-to-file system for trademark registration. Whoever first registers the mark enjoys the exclusive right to use it for the goods or services designated in the registration. Evidence of prior use of the mark is not required for the registration. Worse yet, the brand owner's first use of his trademark is usually not given much weight against another party who has already registered the same or similar mark. In a trademark contest, unless the owner of the unregistered trademark can prove that his trademark was well-known to the China market before the filing of the opponent's trademark application or that the latter has registered the mark in bad faith, the unregistered trademark owner would not have much protection.



Jeremy Lin

Failure to be the first-to-file may necessitate costly and time-consuming opposition, cancellation, litigation, and/or expensive buy-outs for the late-comer. In light of the relatively low cost for filing trademark registration, there is no reason to wait to file the application until one's brand introduction to China has become an open secret.

What do Michael Jordan and Jeremy Lin . . .
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Update Regarding Illinois "Amazon Law"

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Cook County Judge Robert Lopez Cepero recently overturned Illinois legislation passed last year requiring the collection of Illinois sales tax by certain out-of-state retailers where:

1. The retailer pays a commission or other consideration to a person located in Illinois that provides a link on such person's website to the retailer's website, provided quarterly gross receipts from customers referred via the link exceed $10,000; or

The Chicago Lion Statue at the Art Institute

2. The retailer sells a similar product to a person in Illinois, uses the same or similar name or trademark as the Illinois person, and the retailer pays the Illinois person a commission or other consideration, provided quarterly gross receipts from sales to Illinois customers exceed $10,000.

Previously, only retailers having a physical location in Illinois were obligated to collect the tax.

Like similar so-called "Amazon laws" in other states, the Illinois law has been challenged on the grounds that it violates the Interstate Commerce Clause by failing to comport with the U.S. Supreme Court's 1992 decision in Quill Corp. v. North Dakota, which held that state or local taxes could be imposed only on businesses having a physical presence in that state or locality (such businesses are sometimes referred to as having "substantial nexus" with the state or locality). Unlike Illinois, other state statutes define an internet retailer's connection with the state as a rebuttable presumption. For example, the New York law provides that the presumption of a retailer's connection with a New York person can be rebutted by a showing that the connection does not satisfy the constitutional substantial nexus requirement.

In granting summary judgment to Performance Marketing Association in their constitutional challenge to the Illinois law, Judge Cepero's brief order states, without explanation, that the law is unconstitutional as a violation of the Interstate Commerce Clause for failing the substantial nexus test and violates the Supremacy Clause. ◆

Chinese National Regulator . . . continued from page 3

NDRC's recent clarification is a clear warning to foreign fund managers and investors. Preferential, informal policy promises from local provincial or city governments may not be as good as claimed to be, or may not be true at all. We are aware of some other incidents where promises made by local governors or mayors were either not honored or were just not permissible in law or in practice. It will be too late and unfortunate if the foreign investor learns of a significant impediment after it has spent valuable resources and perhaps even wired its capital contributions to China. Furthermore, a foreign investor, including a fund manager or investor, should be mindful of the importance of national policies and laws in China. A sweet fruit promised by local officials may turn out to be a bitter bite later.

For an existing RMB Fund that has foreign capital contributed to the fund, it should strictly comply with Chinese foreign investment laws and policies in its future downstream investments. For new funds yet to be established, the sponsors and fund managers are advised to do a good job of legal due diligence and structure planning before setting foot on a RMB fund business in mainland China. ◆

Access To U.S. Courts For Import - Export Disputes On An Emergency Basis

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In the next decade, as technology and transportation logistics improve, international commerce, through import and export transactions involving the United States will. To address this prospect, LawExchange members and their clients involved in international trade with the United States should become knowledgeable about judicial remedies available to them.

When exporting to the United States or importing from the United States, it is important to understand what judicial remedies are available, in the event that a dispute arises regarding security, payment, terms of payment and delivery of a shipment of goods. In the United States, foreign litigants can address grievances before the Federal District Court or the United States Court of International Trade.

Most parties seeking judicial relief file a complaint in the United States District Court, where the goods are located, which is often the state where the goods entered the United States or are about to be exported from. The District Courts can grant various remedies.

Pre-Judgment Writs of Attachment are available from the District Courts and serve to stop goods, collateral, or funds from leaving the jurisdiction of the court prior to the adjudication of the claim. To obtain a pre-judgment writ of attachment generally, a party must show, (1) there is a probability that final judgment will be rendered in favor of the plaintiff; (2) there are statutory grounds for issuance of the writ (i.e. the defendant is not a resident of the state and a summons cannot be served upon him in the state); and (3) there is real or personal property of the defendant at a specific location within the state which is subject to attachment.

District Courts can also grant injunctive relief under the Federal Rules of Civil Procedure via a temporary restraining order.[1] Temporary restraining orders are designed to prevent a party from undertaking an action that would harm another party. For a temporary restraining order to be issued, a party must show that, "immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition."[2]

Englewood Cliffs, New Jersey

Writs of Mandamus to compel a government officer to fulfill a duty imposed on him/her may also be brought before these courts. If an importer's goods have been seized by the Government, a District Court has the power to review the seizure and subsequent forfeiture actions.[3] When challenging a seizure certain rules regarding seizures of property, pending a final dispositive action will apply.[4]

It is important to note that a party can only bring an action for review of a seizure if the party has exhausted all of the administrative remedies available to it regarding the seized goods. In Miss America Organization v. Mattel, Inc., 945 F.2d 536, 543 (2d Cir. 1991), Plaintiff, the Miss America Organization, was seized of plastic toy dolls by the United States Customs Service on the grounds that the plastic toy dolls infringed on Mattel's trademark of Barbie dolls. Plaintiff was denied a review of the Customs' seizure of goods. The denial was based on the grounds that Plaintiff had not exhausted all administrative remedies available to them under the applicable code, including filing a petition for relief from Customs' initial determination of forfeiture. This decision was upheld by the appellate court.[5]

Access To U.S. Courts For Import . . . continues on page 10

The Renewed Procedure Of Liquidation Of Companies

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The procedure of judicial and voluntary liquidation of companies (outside of bankruptcy) is governed by articles 183 et seq. of the Belgian Company Code, which was amended substantially by the law of June 2nd, 2006 whereby the Belgian legislature envisioned a practical simplification of this procedure. This objective was not fully achieved, because the procedure showed crucial difficulties, impracticalities and gaps.

The bill of March 30th, 2010 has now led to another modification of liquidation proceedings caused by the law of March 19th, 2012, amending the Belgian Company Code in this area. This law was published on May 7th, 2012 in the Official Gazette and, in the absence of transitional provisions, came into force on May, 17th, 2012. (10 days after publication)

The major achievements of this new legislative action relate to the following:

- The matter of the liquidation of a company and its various aspects are now fully entrusted to the presidents of Belgium's Commercial Courts, whereas this authority was formerly divided. This change should help to enhance the effectiveness of the procedural aspects of the liquidation. The Commercial Court remains responsible for assessing whether to relocate the headquarters of the company in liquidation. By simultaneous changes to the Belgian Judicial Code, the Commercial Court alone has jurisdiction over the matter of liquidation, regardless of whether or not the liquidated company had a civil or a commercial purpose.
- The right to decide on the appointment of a liquidator belongs to the privileges of the company's shareholders, with different majority and quorum requirements for the various types of companies. The instrumentum holding the decision of appointment of a certain liquidator or certain liquidators, may now suggest different candidates, practically in order of preference. This simplifies the procedure considerably, as the Commercial Court can now appoint a candidate-liquidator ex officio when the candidacy of another candidate-liquidator should be refused. (For example when the candidate was formerly confronted with a personal bankruptcy or a criminal conviction.) Thereby it is avoided that the company should convene a new shareholders meeting. If none of the proposed candidates can be appointed, the Commercial Court will appoint a liquidator ex officio all together.

Het Steen, Antwerp, Belgium

- When the directors of the company (Article 181 of the Belgian Company Code) propose themselves the dissolution and liquidation of the company, the board of directors should explain and justify the proposal on the basis of an accounting report with a statement of assets and liabilities. This report may not be older than three months at the time it is submitted to the shareholders. Article 184 of the

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STEM Graduates and Sponsoring U.S. Employers

Most Likely to Benefit from Any U.S. Immigration Reforms

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For well over a decade it has been clear that not enough U.S. students are pursuing degrees in the science, technology, engineering and mathematics (STEM) fields. Foreign students have filled that void and they represent the majority of the pool of advanced degree professionals entering the U.S. job market in the STEM fields. They have also been responsible for helping to drive the economy and keep the U.S. at the forefront of science, technology and innovation. But many of these graduates are finding that the current U.S. immigration system places too many obstacles in their paths and little in the way of visa options to make pursuing a career in this country worth the sacrifice.

Boston, Massachusetts

Promoting the urgent need for more employment-based visas and new pathways to citizenship for highly skilled foreign workers is a tough sell in a recession. Yet, in a climate full of bitter political partisanship and anti-immigrant sentiment, this is the one area in the immigration policy debate where both parties see eye to eye. And, studies such as those published by the Kauffman Foundation and the Partnership for a New American Economy make it quite clear that providing visa pathways to citizenship for foreign students who graduate from our universities, helps create jobs and revitalize the U.S. economy. Over the past two years several bills have been proposed to provide foreign graduates in the STEM disciplines a more secure, direct and fast path to Permanent Residence.

Most of the proposed bills provide special handling routes whereby U.S. employers can directly file immigrant visa sponsorship of U.S. educated foreign graduates in designated STEM fields without need of a labor certification – a costly, time-consuming process which requires an employer to first demonstrate that it is unable to find a willing, qualified and available U.S. worker to fill the position. Echoed in several bills is the proposal to remove the numerical limitations on immigrant visas to applicants under this new category as well to other priority visa applicants such as those in "Outstanding Professors and Researchers" category. Similarly, most of the proposed bills would allow STEM graduates to have "dual intent" – i.e. the ability to pursue an immigrant visa without prejudice to readmission. Other provisions include the extension of employment authorization until green card approval; providing exemption from H-1B numerical limitations for temporary employment in a STEM field; and new entrepreneur visa categories for STEM graduates who are able to attract capital and show the ability to employ new workers.

The fact that several different bills have been introduced by Democrats and Republicans to provide clear paths for work visa sponsorship and Permanent Residence for STEM graduates is telling. Both President Obama and Mitt Romney have expressed their support of legislation that offers incentives and opportunity to STEM graduates. If common sense prevails, U.S. employers and STEM graduates are poised to benefit post-election. ◆

What do Michael Jordan and Jeremy Lin . . . continued from page 5

Protect the Chinese equivalents!

As the Michael Jordan story tells us, the well-known "Michael Jordan" brand does not guarantee that it will be recognized and protected in China. Chinese consumers tend to verbalize a foreign word with Chinese words (characters). To those who are not familiar with the foreign language, the sound and the meaning of the trademark, if any, would not help connect the brand with the goods. To facilitate the consumers' audio and mental association with the foreign brands, many companies routinely adopt a Chinese version of their trademarks from the foreign language.

The Chinese version may be derived from translation, transliteration, homophones (words with similar sounds but different meaning), or any combination of them. The Chinese language is rich in characters. This presents many opportunities for creating character sets with unique sounds and meanings that are pleasing to the ears and heart of the consumers. These Chinese marks can be as important as their foreign counterparts. So, a foreign brand owner is well advised to consider and adopt the Chinese equivalents of his trademark and file for trademark registration as soon as possible. Additionally, the owner should keep a watchful eye on any infringers who might sneak into the market with different character combinations that carry similar phonetic attributes.

Prevention in the filing strategy!

Filing early to secure registration of both foreign and Chinese trademark versions is a cost-effective, preventative means of trademark protection and enforcement. From an economic perspective, the cost of filing a trademark application is thousands of dollars less than that associated with other enforcement actions such as opposition/cancellation proceedings and lawsuits.

Though there is no assurance that a third party's application of an identical or similar trademark will automatically be rejected, an earlier registration or a first-filed trademark application can create a barrier to impede/reduce the number of potentially conflicting third party registrations. Without such a barrier, the trademark owner could face difficult and expensive challenges of extended opposition/cancellation proceedings, lawsuits, negotiations and/or payouts with uncertain outcomes.

There are many ways to protect intellectual property rights in China, all of which demand the development of procedural, legal and practical strategies and actions to provide maximum, cost-effective protection. The above points may seem simple, but they are the necessary foundation of a strong protection strategy in China for foreign brand owners. ◆

1 It is worth noting that abuses of trademark rights are not a unique Chinese phenomenon. There are plenty of examples of similar abuses all over the world.

San Diego Harbor

Access To U.S. Courts For Import . . . continued from page 7

Another court that parties can utilize is the United States Court of International Trade. The Court is located in the City of New York and has the ability to hold teleconference based proceedings with parties around the world. The Court of International Trade can also provide the same remedies as a District Court above, including injunctions and Writs of Mandamus. The Court can provide remedies for the parties in most circumstances. However, if goods are seized, the aggrieved party can only challenge that determination in District Court.[6] Likewise, when goods are excluded from importation into the United States, the Court of International Trade has jurisdiction over exclusions, so long as an exclusion has taken place and not a seizure.[7]

Most practitioners agree that it is advantageous to file an application in the Court of International Trade since it has expert knowledge of international trade issues and has quick turnaround times. The Court of International Trade provides preferential determinations of certain actions as they are understood to be time sensitive, such as exclusion of imports and redelivery of perishable items.

Understanding the remedies available as well as the correct court to file for relief can make a difference between a successful resolution of an import/export dispute to avoid significant financial expenses involved in rerouting goods or returning them to their country of origin. ◆

1 Fed. R. Civ. P. 65.
2 Id.
3 28 U.S.C. § 1356.
4 Fed. R. Civ. P. 64.
5 Miss Am. Org. v. Mattel, Inc., 945 F.2d 536, 547 (2d Cir. 1991).
6 Tempco Mktg. v. United States, 21 C.I.T. 191, 193 (1997).
7 See, H &H Wholesale Services, Inc. v. United States, 30 C.I.T. 689, 692 (2006).

Amended Patent Law Activated in Japan

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Japan has experienced a major amendment in patent law. This amendment became effective April 1st, 2012, and covers:

- Procedure of the invalidation trial
- Restriction of assertion by the court based on the ultimate conclusion of the invalidation trial
- Wide-scope grace period
- Position of licensee after the patent has been assigned

In terms of international legal practice, the last two points are important.

Grace Period

Before this amendment, a 6 month grace period applied only to restricted situations, such as an assignee who made a presentation in a predetermined conference, or where a presentation was made on a literal disclosure basis. However, this restriction was abandoned in this amendment, concluding that any act caused by an assignee to lose novelty of the invention contained in a patent application be deemed invalid, if filed within 6 months of such act, provided that the assignee furnish proof of the act by submitting evidence to the JPO within 30 days of the filing date. (Article 30, Japanese Patent Law)

Logically, this enables the inventor to file his invention to JPO, after he has commenced his service via the internet or has sold his product in the market,

Cherry Tree in blossom, Japan

in order to determine if the service or product will be popular enough to require patent protection.

Licensee's Position

As for the licensee issue, Japanese patent law allowed a licensee to assert his license to the assignee of the patent, only if he had registered his license with the JPO. However, this registration system was very inactive, due to the fact that the patentee did not grant consent to the licensee to make such a registration, making the position of the licensee very unstable in Japan. This worked in the past, because there were fewer patent transactions. However, due to the recession, the number of bankruptcies increased, and M&A transactions have become significant. Given these Japanese business circumstances, this amendment enabled the licensee to assert his license to the assignee of the patent, assuming the licensee proved his position at the time of such assignment (Article 99, Japanese Patent Law).

Despite all of these factors, the scope within which the licensee can assert its position is not yet fixed. For example, if the license was exclusive, can the licensee assert his exclusivity to the assignee? How about royalty rate, cross license arrangement, or right to sub-license? These are large issues, which will be determined through the course of legal dispute, ultimately being deemed by the court in the future. ◆

The Renewed Procedure Of Liquidation . . .
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Belgian Company Code currently no longer requires that the petition to confirm the appointment of the liquidator be accompanied by a another (usually new) accounting report of assets and liabilities.

- The possibility of relocating the company's headquarters remains when the relocation is appropriate and useful for the purposes of the liquidation. The relocation can however only be executed after approval by the Commercial Court of the jurisdiction in which the company has its headquarters (before relocation). At present, the law provides that if the company's headquarters were relocated within six months before the decision to liquidate the company, the jurisdiction of the district where the company had its headquarters before its relocation will retain jurisdiction. The Belgian legislator aimed to prevent abuse of company relocation.

Antwerp, Belgium

- The law now expressly provides that a petition to confirm the appointment of the liquidator may be signed and filed by the liquidator himself or by a lawyer, or by a notary or a company director.
- Previously the law provided that the Commercial Court ruled on the petition and request for confirmation of the appointment of the liquidator within a period of 24 hours. In practice, this was not feasible. Therefore this term was extended to 5 days. For the same reason it was anticipated that if the presiding judge does not respond within this period of 5 days, and if the period is not suspended by the court, the first candidate-liquidator proposed by the company's shareholders shall be deemed to have been appointed and this appointment will be confirmed as such.
- A more detailed regulation on the validity of interim liquidation operations (between nomination and approval of appointment) is now provided. The law no longer provides the possibility of (actually superfluous) 'retrospective' ratification of such acts. Therefore the interim operations of the liquidator are considered to be valid. The president of the Commercial Court is however still competent to assess these interim liquidation operations and also to declare them void if they conflict with the rights of third parties.
- The law now expressly provides the possibility of dissolution and liquidation of the company in a single instrumentum. In certain circumstances, the use of this technique is appropriate, for example in order to avoid the obligation to draw up new annual accounts. The former 2006 law made this technique (and practice) impossible, which was particularly an issue for the liquidation of companies with little or no outstanding debts which were then nevertheless required to conform to the time-consuming and cost-ineffective procedure of liquidation.

The current law explicitly re-installs the option of opening and closing the liquidation in one act, provided that the following conditions are met:

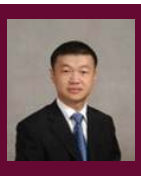
√ no liquidator is appointed (c.q. there is no need to appoint a liquidator);

√ there are no liabilities according to the accounting report of assets and liabilities required by article 181 of the Belgian Company Code.

√ all shareholders were present at (or represented) and took part in the decision to dissolve and liquidate the company, whereby it was unanimously decided to dissolve .

All in all, the Belgian Legislature has finally introduced important changes in the field of liquidation of companies, thereby fulfilling some of the initial objectives of simplification and rationalization which were partially missed in 2006 and before. Whether or not these changes, hereby briefly outlined, are successful or not, will no doubt become apparent in the near future. ◆

Tax Treaty Beneficial Ownership Further Clarified by Chinese Tax Authority



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In October 2009, the State Administration of Taxation ("SAT") of the People's Republic of China ("PRC") issued Guoshuihan [2009] No. 601 ("Circular 601"), providing guidance on how to determine who is the beneficial owner ("BO") of certain China sourced passive income under relevant bilateral tax treaties between China and foreign countries. However, issues and disputes have been arising in practice concerning the assessment of BO status during the implementation of Circulation 601. To address these concerns, the SAT recently released Public Notice [2012] No. 30 ("Public Notice 30") to further clarify the application of Circular 601 and to provide administrative guidelines. Public Notice 30 took effect on June 29, 2012.

Notice 601 lists certain factors that are generally regarded as reverse to the assessment of BO status. However, in practice, there are great uncertainties in the application of such adverse factors by Chinese tax authorities. Public Notice 30 stresses that all relevant factors shall be comprehensively considered and no negative or positive determination shall be made solely on the basis of a single adverse factor. For example, if the applicant has relatively small or few assets, scale or staffing and can barely match its income, in practice the applicant may lose its BO status due to such single adverse factor. However, according to Public Notice 30, applicant's BO status will be determined based on the totality of all factors, instead of any single factor. In reviewing the factors, Public Notice 30 emphasizes the importance of reviewing relevant legal and financial documents including, inter alia, articles of association, financial statements, records of cash movements, board resolutions and etc. Although this may help treaty resident applicants claim their BO status, it will also add compliance burdens to such applicants during their operation and in preparation for the application of BO status.

Public Notice 30 explicitly states that a qualified listed company will be automatically regarded as a BO for any dividends received from its Chinese subsidiaries (the "Safe-harbor Rule"). The Safe-harbor rule also applies to the subsidiaries wholly owned by the listed company and who are tax residents of the same treaty jurisdiction. Given such stringent conditions, which will be difficult for many listed companies with a group structure to fulfill, it seems that the applicability of the Safe-harbor Rule will be quite limited. For instance, the safe-harbor rule will be applicable to a group structure where, for example, a listed company in Hong Kong (a treaty jurisdiction) wholly owns a Chinese subsidiary and the Hong Kong listed company will be automatically regarded as a BO. Nevertheless, in case the listed company is incorporated in UK (also a treaty jurisdiction) and it owns a Chinese subsidiary through a wholly owned Hong Kong holding company, the Hong Kong holding company will not be automatically given the BO status as it is not a tax resident of the same treaty jurisdiction as the UK listed company.

Shanghai, China

It is also clarified under Public Notice 30 that, if a treaty resident receives China-sourced passive income through an agent or a designated person (collectively called "agent"), regardless of whether the agent is in a treaty jurisdiction or not, the identification of that treaty resident as a BO shall not be affected. As a prerequisite, the agent has to disclaim its BO status so that the principal can claim the BO status.

It is obvious that Public Notice 30 is helpful in further clarifying certain technical and practical issues for the determination of BO status, as discussed above. Since BO is a complex concept, it is unrealistic to expect that Pubic Notice 30 will solve all the existing issues with regard to the implementation of Circular 601 in practice. It is hoped that those unsolved issues can be further clarified by the Chinese Tax authority so that Circular 601 can be better implemented. As always, taxpayers are strongly advised to communicate with the local tax authorities in charge to understand the local interpretations and practices of Public Notice 30 for their specific cases.

Significant Events:
Remembrances of LawExchange Spring 2012 Israel Conference

The Romans never saw the Cardo (in the Old City of Jerusalem) as bustling as our LEI delegation in Jerusalem in Spring 2012. It is further doubtful that many Chinese, Indian, North American, and South American visitors ever shopped in Jerusalem during the era of Roman domination.

Remembrances of LawExchange Spring 2012 Israel Conference (continued)

Our new Chairman, Auke de Vries from the Netherlands, places a prayer in the Western Wall. Hopefully his prayers for a successful term and continued success of LEI will be answered.

The new first lady of LEI is single handedly holding up the Western Wall!!

Remembrances of LawExchange Spring 2012 Israel Conference (continued)

One of our delegates, Roland Gerritsen from the Netherlands, took a wrong turn on the way to the conference and seems slightly lost.

Lively banter and intrigue in the Muslim Quarter of the Old City of Jerusalem. Fred Tannenbaum of Chicago discusses world affairs with Vijay Sambamurthi of Bangalore. David Walker and Chris Lovell of Australia discuss ways to increase the price of iron ore.

Remembrances of LawExchange Spring 2012 Israel Conference (continued)

The lovely gala at the close of the LEI Conference in Israel.

Eitan Israeli of Israeli Ben-Zvi welcomes the LEI delegates at the start of the recent conference in Tel Aviv.

Either that, or he is testing the microphone.

Remembrances of LawExchange Spring 2012 Israel Conference (continued)

LEI delegates and their guests in Rothschild Plaza in Tel Aviv.

The Global Postman

LawExchange International

Submissions

Comments, questions, suggestions and requests for additional copies of this newsletter can be directed to:

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The Global Postman (continued)

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