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Llinks Law Bulletins | Corporate and M&A
January 2020

Improved IP Protections under the Foreign Investment Law

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On 1 January 2020, the *PRC Foreign Investment Law* (the "***Foreign Investment Law***") and the *PRC Implementation Regulation of the Foreign Investment Law* (the "***Foreign Investment Regulation***") (collectively, "***FI Laws***") came into effect. Among other provisions regulating foreign equity investment in China, the FI Laws restate China's position to strengthen the protections over foreign intellectual properties. Although it is still too early to see the real effects, the FI Laws have at least shown us a likely improved environment to protect foreign investors' IP rights.

I. Prohibition on Forced Technology Transfer

In response to US' accusation of "forced technology transfer," Art. 24 of the Foreign Investment Regulation clearly confirms that none government agency or its officials are allowed to force foreign investors to transfer their technology by exercising administrative powers.

There is actually no law or regulation which contemplates "forced technology transfers" and the accusation probably derives from misunderstanding of the PRC laws. For example,

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the government encourages the investment in high-tech sector by granting qualified high-tech companies fiscal subsidies and one of the conditions to qualify as a "high-tech company" is that the company must hold patents. This incentive may have been misinterpreted as forcing foreign investors to transfer their technology to the Chinese subsidiaries. The provision in the Foreign Investment Regulation, to certain degree, clarifies that the government has no intention to force foreign investors to transfer their technology.

More importantly, the FI Laws abolished the earlier *Sino-foreign Joint Venture Law* and the *Implementation Regulation to Sino-Foreign Joint Venture Law* (the "***JV Implementation Regulation***"), which contain obsolete provisions. For example, Art. 43 of the JV Implementation Regulation provides that a technology transfer agreement shall, in principle, have a term no more than 10 years and the technology importer (i.e., the JV) shall have the right to continue using the transferred technology after the expiration of the term. This provision was written under the assumption that foreign investors would agree to transfer its technology for use by the JV for the life time of the JV, which may be the case in transfers of complete production lines but not always the cases. The abolishment of this article as part of the JV Implementation Regulation removes such obsolete assumption and supports the position that the foreign shareholders have no obligation to transfer its technology to the JV.

II. Protection of Trade Secrets

Art. 23 of the Foreign Investment Law requires that government agencies and government officials keep confidential the trade secrets which they received in performing their duties. Art. 25 of the Foreign Investment Regulation further sets out detailed requirements on trade secrets protections, including the access on a need-to-know basis, internal protocols, and security measures. Additionally, if the government infringes trade secrets, it appears that the foreign investor of which the trade secrets have been infringed can plea for government's investigation under Art. 30 of the Foreign Investment Regulation and can also initiate an administrative proceeding.

These articles fill the gap in the previous trade secret protection system, where the *PRC Anti-unfair Competition Law*, which is the primary source of legislation protecting trade secrets, regulates only business operators, and not government agencies. These provisions obviously help relieve foreign investors' concerns that the disclosure of trade secrets to the government will result in such secrets being released to the competitors or to the public. However, it remains vague as to how the government will improve their internal system to protect trade secrets and, if there is any breach, how foreign investors can receive remedies.

III. Strengthening of IP Enforcement

The FI Laws set out the objective to strengthen protections on IP rights. To achieve this objective, according to Art. 23 of the Foreign Investment Regulation, the government will be (1) imposing more serious sanctions on infringers, (2) establishing a synergistic mechanism by which IP rights can enjoy protections in civil, criminal, and administrative proceedings in an efficient and consistent manner; and (3) establishing all-dimensional IP protection mechanism.

Despite that the provisions setting out the objective and these enforcing plans are vague, the inclusion of these provisions demonstrate the governments' commitments to strengthen protections over foreign IP rights.

IV. Equal Access to Standard Formulation

According to Art. 15 of the Foreign Investment Law, foreign-invested companies are granted with equal rights to participate in the formulation of national, industrial, local, and organizational standards. Art. 13 of the Foreign Investment Regulation further elaborates foreign-invested companies' possible roles in contributing to standard formulation.

If these provisions are well implemented, the scenario where domestic companies dominate the formulation of standards applicable in China will likely be changed. However, these provisions must be read together with the *Provisional Administrative Rule on National Standards Concerning Patents* where the inclusion of patented technology into a national standard requires that the patent owner committing to granting third parties licenses on fair, reasonable, and non-discriminatory terms.

V. Equal Access to Government Procurement Market

Art. 16 of the Foreign Investment Law grants foreign-invested companies equal right to participate in the government procurement market. Art. 15 of the Foreign Investment Regulation further provides foreign-invested companies will not be prejudiced because of equity structures, organizational structures, nationalities of investors, brands of products, or other unfair conditions.

These equal access provisions may be a response to western countries' requests for opening up government procurement market but they are not consistent with provisions under the *PRC Government Procurement Law*, which prioritizes the procurement of domestic products. A possible harmonized position is that products which foreign-invested companies make in China will receive equal treatments in the government procurement market whilst products made outside of China will still be excluded from the government procurement market.

Additionally, the equal access treatment may not be consistent with the national policy about encouraging "self-owned IP rights." The government may still, out of national security reasons, prioritize the products in which the IP rights are controlled by Chinese companies and those software programs of which sources codes are released to China.

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