國楓律師事務所
GRANDWAY LAW OFFICES

# Newsletter

Update November 1, 2022



## Update

### SSE Issued Growth Index of STAR Market and Revised 32 Index Compilation Schemes

On October 13, 2022, SSE and China Securities Index issued the Growth Index of STAR Market. The Growth Index selects the top 50 listed securities in terms of overall growth performance as the sample of the index, reflecting the high growth characteristics of the SSE STAR Market.

The SSE revised 32 Index compilation schemes, including the SSE 180 Dividend Index, to meet investors' needs for low-risk, stable-return investments and to guide the concepts of long-term and value investment.

### Shanxi Passed Anti-Unfair Competition Regulations

Shanxi Anti-Unfair Competition Regulations will come into effect on December 1, 2022. The revised Regulations have strengthened the efforts to stop unfair competition, encourage and protect fair competition, and accelerate the construction of a business environment based on fair competition.

The Regulations require the strengthening of the intelligent supervision system and the use of big data and other technical methods to improve the ability to investigate and deal with unfair competition. Information

on the administrative penalties for unfair competition will be recorded in the credit records, and will be made public in the National Enterprise Credit Information Publicity System (Shanxi) and the Credit Information Sharing Platform in Shanxi Province.

**Issuance of First International Standard of Test Scenarios for Automated Driving System**

On October 13, 2022, the first international standard of test scenarios for automated driving system, i.e., 2022 Road Vehicles-Test scenarios for automated driving system-Vocabulary (ISO 34501), led by China, was officially issued.

This standard is the first international standard to be issued in a series of international standards for autonomous driving test scenario planning, along with ISO 34502 Safety Assessment Framework, ISO 34503 Design Operating Range, ISO 34504 Scenario Classification, and ISO 34505 Evaluation and Use Case Generation. ISO 34501 specifies the basic terminology and elements of test scenarios, and the scenario vocabulary standard regulates concepts such as autonomous driving systems, dynamic driving tasks, and design operating ranges and conditions.

**Customs General Issued Measures for Supervision of Goods in Transit**

General Administration of Customs issued Measures for the Supervision of Goods in Transit by the Customs on September 13, 2022, which will come into effect on November 1, 2022.

Goods in transit refers to goods that are shipped from abroad and continue to be shipped to abroad by land in China. Goods in transit from countries or regions with which China has concluded or jointly participated in international treaties or agreements containing provisions on the transit of goods shall be allowed to transit in accordance with the provisions of the relevant treaties or agreements. Other goods in transit shall be allowed to transit after approval by the competent departments of commerce, transport and other authorities and filing with the importing customs.

**NMPA Released Announcement on Issuance of Electronic Drug Registration Certificates**

On October 9, 2022, the National Medical Products Administration of the PRC ("NMPA") released the Announcement on Issuance of Electronic Drug Registration Certificates ("Announcement"). The Announcement notifies that NMPA will start to issue Electronic Drug Registration Certificates ("E-Certificates") on November 1, 2022. The E-Certificates have the same effect as the traditional paper certificates, and will apply to certificates for drug clinical trials, drug marketing licenses, drug re-registration, drug supplement applications, protection of traditional Chinese medicine varieties, imported medicinal materials, chemical raw materials, as well as certificates of quality management standard for non-clinical studies of drugs approved by NMPA. Holders or applicants of aforementioned-certificates will be able to view and download the E-Certificates on NMPA website or APP.

**Shanghai Lin-gang Special Area Released Measures to Support Exchange Rate Risk**

**Management for Companies in the Area**

On October 11, 2022, the Management Committee of the Shanghai Lin-gang Special Area ("Area") released Measures on Further Supporting Businesses in the Lin-gang Special Area to Manage Exchange Rate Risk ("Measures") together with the Shanghai Branch of the State Administration of Foreign Exchange. The Measures mainly aim to support micro, small and medium enterprises in the Area to cope with the two-way fluctuation of CNY exchange rate. Specific measures include free training on exchange rate risk management, low-cost guarantees and rewarding for certain exchange rate hedging business, active guidance towards exchange rate risk exposure analysis and anti-risk measures, and establishment of exchange rate risk management service evaluation system for banks and financial institutions in the Area.

**Zhejiang Province Revised Anti-Unfair Competition Ordinance**

Anti-unfair Competition Ordinance of Zhejiang Province (Revision 2022) ("Ordinance") was released on July 29, 2022 and came into effect on October 1, 2022. The newly revised Ordinance consists of five chapters and 32 articles, respectively provide for description of unfair competition behaviors, supervision and inspection, and legal liabilities, etc. Furthermore, the Ordinance clarifies duties of e-commerce platform operators to establish rules on fair competition and mechanisms of dispute resolution within the platform, provide clear guidance in the platform service agreement and transaction rules, and stipulate liabilities for failing to comply with the Ordinance.

**Chongqing Released China's First Local Declaration Guidelines for Operator Concentration**

On October 19, 2022, Chongqing Administration for Market Regulation released the Declaration Guidelines on Chongqing Municipality Antitrust Review for Operator Concentration, which includes brief guides, the basic requirements, and the flow chart for negotiating applications.

The negotiation for the antitrust review of operator concentration is not the necessary procedure for the declaration, and operators may decide themselves whether to apply for the negotiation. The concentration involved in the negotiation should be true and relatively certain. The issues to be negotiated should be directly related to the concentration to be declared. In principle, the application for negotiations on hypothetical issues or concentrations not yet determined will not be processed. The negotiations mainly include: (i) clarifying whether the transaction needs to be declared; (ii) clarifying whether the transaction can be declared as the simple procedure; (iii) ensuring the completeness of documents for the declaration; (iv) discussing the specific legal and factual issues; (v) providing guidance on the declaration and review procedures; and (vi) other related issues.

## Article(s)

**How to Protect Technology in China: Patent or Know-how**

*by Qiao Bo*

Foreign companies or foreign invested companies in China usually have concerns about how to protect their new technologies in China. In particular, a question that may always be asked is whether the

technologies should be protected in China by way of patent, or in the form of know-how (trade secret), and how to protect them in either way.

Chinese patent law offers three types/levels of patent and with their respective protection period as follows:

| | |
|---|---|
| Invention | 20 years |
| Utility model | 10 years |
| Design | 15 years |

Here below are some brief features and requirements of a patentable new products, methods or design:

| Type of patent | Brief Features | Requirements to meet |
|---|---|---|
| Invention | new product, new process or the improvement thereto | novelty, creativity, practicality |
| utility model | new solution for a shape or structure of product or combination | novelty, creativity, practicality, good for its use |
| Design | new and aesthetic design of shape, pattern or their combination, of a product or part of it (including combination of color with shape or pattern) | different from and not falling under existing design |

For the protection of a technical know-how, however, the law does not have a time limit as the patent law would do. As long as a technology is effectively kept secret by a company, it is possibly protected as know-how, though of course there will be a lot of legal jobs to do in order to make a good case.

Another particular note of Chinese IP law is that one will not be able to count on copyright law much to protect its technologies when someone else copied his/her technical drawings in producing competing products. The reason is that Chinese copyright law does not treat the infringer's use of a copied technical drawing for the purpose of producing a competitive product as an illegal act. Thus, if one wishes to protect his/her technical or engineering drawings which carry lots of valuable data or secret technical information, he or she has to seek for protection of these drawings as know-how or technical secret.

It is sometimes a major decision to balance whether a company wants to patent a new technology or just keep it as a know-how in confidentiality. This is also a delicate balance.

Among various factors, a major one to consider is that when a company applies to patent a new product or technology, the key technical information would inevitably made known to the public at certain early stage of the application process. The obvious risk is that, even if the application fails and the patent is not granted, the key technical information was then already not a secret anymore to competitors.

At some other times, a company would rather not to patent a technology even if the technology is quite advanced and patentable. For example, companies usually do not want to patent its new production processes. The reason is that it is very hard to prove that someone, like a competitor, copied and used such

processes in producing same or similar products. Thus, a company would rather keep those processes confidential, even if they are potentially patentable.

A technology must be advanced or innovative enough in order to get patented. The patent authority will have already searched among all available resources before granting a patent. Thus, one with a patent can enforce the legal protection against an infringer via court lawsuit with relatively little burden of proof, as long as he or she can show that the same technology was used or being used by the alleged infringer.

For example, a patentee does not need to prove to the court how the infringer has accessed or obtained the said technology because the contents of a patented technology are already made publicly known at the time when the patent is granted.

A patentee/plaintiff only needs to prove to the court that the patented technology has been or is being used by the infringer. That is all for him to do. The rest thing is just to calculate or quantify his/her losses caused by the infringement. So, you may well say that a patent certificate is sort of “absolute proof” of a right.

However, for a know-how claim or lawsuit, one has to prove a lot of things in the court proceedings. A know-how claim or lawsuit is often a multiple-task job, involving both technical expertise and legal expertise to get the above-said jobs done. What is even more important to note is that, lots of above elements guaranteeing a good case have to be planned and done in the daily management and operation and long before the infringement and enforcement action takes place.

Unless a new product or new technology is pretty much advanced and innovative so to be patentable, most technologies of a company are obviously not patentable. So, it is pretty important to understand the key issues as to how to protect technologies through know-how.

Know-how can take many forms of assets that are important to a client, and often includes technology. Enforcing a protection of a technical know-how is usually more complicated than that of a patent, in particular at the time when one finds that his know-how is stolen or used by others and seek to take a legal action.

A lot of efforts of protecting a technical know-how is taken about how to identify the said technical know-how that one claims for legal protection.

Typically, from clients’ perspectives, they would believe or think that it will be the whole range or a particular part or parts of technologies involved in their products or production, processes, methods, etc., or a particular new technology recently developed, or a design.

This is of course not incorrect. But this will only serve as a high-level scoping purpose, and client can use this as a starting point, along with questions such as what would be valuable technologies of the company, the disclosing of which must jeopardize the company’s commercial benefit and/or its competitiveness.

From Chinese courts' view and as per Chinese laws, only such technologies that meets all the following three conditions can be identified as a technical know-now or technical secret: (1) the technology is unknow to the public; (2) it is kept confidential through reasonable measures of confidentiality; and (3) it has commercial value.

A prevailing interpretation of being unknown to the public is that certain technology is not generally known to, nor easily accessible by, a relevant staff in the same industry. This is the most important element to identify a know-how. Normally in a legal action one will need an expert opinion from an independent third-party technical expert to help proving this.

Reasonable measures of confidentiality mean that the owner of the technical know-how should take reasonable steps to keep the information confidential, such as by way of entering into confidentiality agreement or clauses, NDA, confidentiality policy/regulations, limitation of access to confidential contents, places, computers, and so on. In civil trial proceedings for infringement of technical secrets, the claimant shall provide evidence showing that these confidentiality measures have been taken.

There are certain typical defenses or arguments that an infringer may use to deny the existence of an identifiable know-how. For example, the alleged technology is already known to the public; the alleged technology contains lots of technical contents that are already known to the public; the said technology is not having a clear feature or not describable with proper language; or the vehicle of the alleged technology or know-how is not seen or clear, etc.. Preparation shall be made to defeat these arguments.

Chinese law recognized forms of technical know-how are mainly following technical/technological information and their related documents, such as:

- structures
- raw materials
- composition
- formulas
- materials
- samples
- patterns
- techniques
- methods of steps
- algorithm
- data
- computer programs

In each of real court cases, the know-how at dispute are quite different or very specialized, and not many clients have already sorted out or extracted, as per the above said criteria or tests, those legally recognized know-how among its full range of technical information or document files in the client's data room, so it would be crucial for any client seeking protection of its know-how to be aware that its know-how should be able to be described or expressed using one or more terms or forms listed above, so that the court would admit and offer protection to them.

In conclusion, we could see that the ways to enforce the two types of IP rights, i.e., patents and know-how, are very different. So, it is necessary for the company to assess two ways of protection and choose one. The major factor is to consider whether or not the company could accept the risk that the key technical information would inevitably be made known to the public at certain early stage of the application process, even if the application fails and the patent is not granted for any reason. And for protection of a technology as know-how, one will need to be able to identify it as per the three criteria as explained in this article in general.

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