



Newsletter

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December 30, 2022

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Update

Company Law Will Be Revised

On December 27, 2022, the second revised draft of Company Law was brought up for consideration at the Standing Committee of the 13th National People's Congress.

The second revised draft of Company Law mainly strengthens shareholders' capital contribution responsibilities, improves corporate governance and the provisions of directors' responsibilities, as well as strengthens the governance of listed companies. If the company cannot pay off its debts when they are due, the shareholders' capital contribution will be accelerated to maturity; if the shareholders transfer their equity before the deadline of capital contribution, the transferor will assume supplementary liability for the capital contribution not paid by the transferee as scheduled.

GASC officially Issued Sports Arbitration Rules

On December 25, 2022, General Administration of Sport of China (GASC) issued *Sport Arbitration Rules* ("Rules"), which will enter into force on January 1, 2023. The Rules consists of eight chapters and seventy-eight articles, which includes the basis and jurisdiction of sports arbitration, application &

acceptance, arbitral tribunal, hearing, decision & award, special procedures, etc.

The Rules clarifies that the special procedural rules for sports arbitration shall apply to disputes over sports events that occur during major sports events or within ten days before the opening ceremony and need to be dealt with immediately. In sports arbitration related to anti-doping, there shall be at least one anti-doping arbitrator and one arbitrator with a jurisprudence background or legal professional experience. Lawyers can register as arbitrators after eight years of practice.

Regulation on Import and Export of Narcotic Drugs and Psychotropic Substances Issued

On December 22, 2022, National Medical Products Administration and General Administration of Customs issued the *Notice on Matters Relating to the Import and Export Management of Narcotic Drugs and Psychotropic Substances*.

Import and export of narcotic drugs and psychotropic substances shall obtain import permit and export permit issued by National Medical Products Administration. Imports of narcotic drugs and psychotropic substances do not need to apply for import drug customs clearance forms. In addition, the import permit is valid for one year and can be used across the calendar year; export permit is valid for no more than three months and cannot be used across the calendar year. The import and export permits implement the systems of “one permit, one customs clearance” (customs clearance procedures can only be handled at the port specified on the permit), and can only be used once within the validity period.

Beijing Optimizes International Tax Services

On December 20, 2022, Beijing issued the *Work Plan for Reform of the Whole Process of Balance of Payments Facilitation in the Construction of “Two Zones”* (“Work Plan”).

The Work Plan focuses on improving the facilitation level of foreign exchange business under the current accounts, promoting the reform of foreign exchange business facilitation under the current accounts, promoting cross-border RMB settlement business, enhancing the risk prevention and control capabilities of enterprise, and improving the management and service level of the balance of payments in Beijing Pilot Free Trade Zone and National Comprehensive Demonstration Zone for Expanding Opening-up of the Service Sector.

CBIRC Improves the Regulatory Rating System of Foreign Bank Branches

The China Banking and Insurance Regulatory Commission (“CBIRC”) released the *Measures for the Integrated Regulatory Rating of Foreign Bank Branches (for Trial Implementation)* (“Measures”) on November 30, 2022.

The Measures stipulates the basic definitions, scope of application, main principles and factors of the rating of foreign bank branches. It clarifies that the integrated regulatory rating of foreign bank branches includes the rating of core factors and the strength of support assessment (“SOSA”). The rating results are based on the core factor rating results, and the SOSA is used as an adjustment item. It also regulates the

rating procedures and provides a guidance for the application of the rating results.

A New Regulation for Photovoltaic Power Stations

The National Energy Administration (“NEA”) released the *Administrative Measures for the Development and Construction of Photovoltaic Power Stations* (“Measures”) on November 30, 2022.

The Measures focuses on management of preparations for photovoltaic power station projects, and clarifies that the projects construction should meet the requirements of ecological environmental protection. In addition, local governments can formulate their own administrative measures for the filing of photovoltaic power station projects in the province, clarify the filing authority and its authority, and announce it to the public.

SAMR Strengthens the Supervision of Formula Foods for Special Medical Purposes

The State Administration for Market Supervision (“SAMR”) released the *Guidance for the Labeling of Formula Foods for Special Medical Purposes* (“Guidance”) on December 27, 2022.

The Guidance clarifies the 13 items of product name, product category, ingredient list, and nutritional composition list marked on the labels and instructions of formular foods for special medical purposes, as well as the content of the main display layout. It also clarifies that formula foods for special medical purposes should have an exclusive logo area reserved in the upper left or upper right of the main display page of the minimum sales package labels. In addition, it restricts product advertising to prevent companies from misleading consumers.

CNIPA Formulates a New Classification System

The China National Intellectual Property Administration (“CNIPA”) released the *Classification System of Green and Low-Carbon Technology Patents* (“System”) on December 27, 2022.

This System adopts the structure of international patent classification and green low-carbon technology comparison, and draws on the World Intellectual Property Organization’s green technology list and the Japanese Patent Office’s green transformation technology list to achieve international comparability of the classification system. It also establishes the reference relationship between green and low-carbon technologies and the *International Patent Classification* and adopts an independent classification system to code different patented technologies.

Article(s)

Analysis of Compensation System of a Service Invention-Creation in China

by Esther Lin

This article will mainly analyze whether an entity has an obligation to pay compensation to inventors/employees if the entity is not the patent owner or does not commercialize the service invention-creation [Service Invention and Creation: i.e., work-related invention.].

1. Laws and Regulations

(1) Patent Law

Pursuant to Article 6 of *Patent Law* promulgated in 2020, an invention-creation made by a person in the execution of tasks of the entity employing the person or mainly by taking advantage of the entity's material and technical conditions is a service invention-creation. The right to apply for a patent for a service invention-creation belongs to the entity, and after the application is granted, the entity is the patentee. The entity may, in accordance with the law, dispose of its right to apply for the patent for the service invention-creation and the patent right, and promote the exploitation and application of the invention-creation. According to Article 15, the entity which has been granted patent rights shall give to the inventor or designer of the service invention a reward and shall, after exploitation of the patented invention, pay the inventor or designer a reasonable remuneration on the basis of the scope of commercialization and application as well as the economic benefits yielded. *Implementation Regulations for the Patent Law* ("Regulations")

Pursuant to Article 77 of the Regulations issued by State Council in 2020, if an entity to which the patent right is granted has not agreed with the inventor or designer, nor stipulated the method and amount of the reward stipulated in Article 16 of the Patent Law in its legally formulated rules and regulations, it shall give the inventor or designer a monetary award within 3 months as of the announcement of the patent. The amount of monetary award for an invention patent shall be no less than RMB 3,000; the amount of monetary award for a patent for utility model or design shall be no less than RMB 1,000.

Article 78 of the Regulations stipulated the standard of compensation to inventor or designer. If an entity to which the patent right is granted has not agreed with the inventor or designer, nor stipulated the method and amount of the reward stipulated in Article 16 of the Patent Law in its legally formulated rules and regulations, after exploiting the patent for invention-creation and within the duration of the patent right, draw each year at least 2% of the profits from exploiting the patent for invention or utility model or at least 0.2% of the profits from exploiting the patent for design and give it to the inventor or designer as remuneration, or give a lump-sum of remuneration to the inventor or designer according to the aforesaid proportions; if an entity which is granted a patent right authorizes any other entity or individual to exploit the patent, it shall draw at least 10% of the royalties it has charged and give it to the inventor or designer as remuneration.

(2) *Guidelines for Trial of Inventor or Designer Reward and Remuneration Disputes for Service Inventions and Creations* ("Guidelines")

The Guidelines issued by Shanghai Higher People's Court in 2013 clarifies the rules for commissioned development situations. According to Article 11 of the Guidelines, the prerequisite for the inventors and designers to request payment of rewards and remuneration for service invention -creation is that the inventors and designers are employees of the entity to which the patent right belongs. If it is agreed that the right to apply for a patent belongs to the entrusting party, the entrusting party shall have the right to apply for a patent. After the patent is granted, the entrusted party is not involved in the payment of rewards and remuneration for service inventions and creations because they do not enjoy the patent right. Although the entrusting party enjoys the patent right, since the inventor and designer are not employees of

the entrusting party, it is not involved in the payment of rewards for service inventions and creations.

According to the above laws and regulations, it seems that if the WFOE is not the patent owner, it does not need to pay rewards or compensation to the inventor or employee. However, some judicial cases show that even if the employer is not the patent owner, the obligation to pay rewards and compensation still cannot be exempted.

2. Judicial Cases of Reward and Remuneration Disputes

(1) *Zhang Zhenhua vs Shenzhen Ocean King Lighting Engineering Co., Ltd. (Case No: (2019) Supreme Court Min Shen No. 220)*

In this case, the plaintiff Zhang Zhenhua filed a complaint against the company to pay the rewards and compensation. The defendant rebutted that it is not the patent owner of the patent involved in the case, thus, it does not undertake the obligation to give rewards or compensation to inventors of service inventions and creations. The first instance court ruled in the plaintiff's favor and the company appealed. The second instance court affirmed the initial judgment after the trial, and the company applied for retrial to the Supreme Court.

The Supreme Court dismissed the company's petition for retrial holding that "the entity which has been granted patent rights" stipulated in Article 15 of Patent Law refers to the entity to which a specific service invention-creation belongs. Once the service invention-creation is approved to be granted a patent right, the entity is obliged to reward the inventor. In addition, the right to apply for a patent is a private right, and the entity to which the service invention-creation belongs has the right to transfer and dispose of the patent application right for the service invention-creation. It does not affect the obligation of the original entity of the service invention-creation to reward the inventor of the service invention-creation. Whether the company is the patent owner involved in the case cannot change the fact that the plaintiff has a labor relationship with Company, and the invention-creation involved in the case is a service invention-creation completed during his work in Company. Therefore, the company's application for retrial has no grounds.

(2) *Chen Haidong vs Coca-Cola Beverages (Shanghai) Co., Ltd. (Case No: (2020) Shanghai Higher Court Civil Final No. 568)*

In this case, the plaintiff Chen Haidong is the employee of the defendant and designed the appearance of bottles for the defendant during the employment. The defendant is the WFOE of Coca-Cola (China) Investment Co., Ltd ("Company A"), the Company A is the WFOE of Coca-Cola South Asia Holding Company ("Company B"), and the Company B is the WFOE of Coca-Cola Company. According to the requirements of Coca-Cola Company, the patent application rights of the inventions and creations made by the defendant employees were transferred to Coca-Cola Company. There was no written agreement or institutional arrangement between the two parties, and no transfer fee was paid.

The plaintiff filed the suit requesting the defendant to pay RMB 1 million as remuneration for his design patent service invention at the rate of 0.1% of the defendant's operating profit. The first instance court ordered the defendant to pay RMB 150,000 to the plaintiff, and the plaintiff appealed to Shanghai Higher

Court. In the appeal, one of the issues is whether the appellant has the right to claim remuneration.

The court held that although the patent involved in this case was applied for and obtained by Coca-Cola Company, the provisions of the Patent Law on remuneration to inventors or designers are intended to give them the labor remuneration they deserve, such legal rights should not be compromised by the internal arrangement of the multinational enterprise. Even if the patent is transferred, the inventor or designer should be given a reasonable remuneration. Therefore, although the appellee is not the patentee of the patent in question, it is the employer of the appellant, and the patent in question was created by the appellant during the appellee's employment, which is the appellant's work invention, and the patent in question has been implemented and achieved economic benefits, so the appellant has the right to claim remuneration for the work invention from the appellee.

3. Conclusions

According to the relevant laws and regulations, such as Shanghai Guidelines issued in 2013, in the situation of commissioned development, the Developer is not involved in the payment of rewards and remuneration for service inventions-creations because they do not enjoy the patent right, and the employer is not involved in the payment of rewards for service invention-creation either since the inventor and designer are not employees of company. However, according to judicial cases of recent years, there is a strong tendency to protect inventor/employee's benefits. The court tends to judge that the entity has the obligation to pay rewards and remuneration even though the entity is not the patent owner. Therefore, the employer may still have an obligation to pay compensation to inventors/employees even if it is not the patent owner or does not commercialize the workout.

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