漢坤律師事務所
HAN KUN LAW OFFICES

Newsletter

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Legal Updates

1. Anti-monopoly Implementation Rules in Shanghai FTZ
2. The Supreme People's Court Issued Draft Provisions on Several Issues concerning the Trial of Administrative Cases Involving Granting and Determination of Trademark Rights

1. Anti-monopoly Implementation Rules in Shanghai FTZ (Authors: Haoze LI, Huanhao HE)

Shanghai Administration for Industry and Commerce, Shanghai Municipal Development and Reform Commission and Shanghai Municipal Commission of Commerce respectively issued three Anti-monopoly implementation rules in the China (Shanghai) Pilot Free Trade Zone ("**SHFTZ**"), namely, Measures for the Law Enforcement Anti-monopoly against the Monopoly Agreement, Abuse of Market Dominance and Administrative Monopoly in the China (Shanghai) Pilot Free Trade Zone, Measures for Anti-price Monopoly in the China (Shanghai) Pilot Free Trade Zone and Measures for the Anti-monopoly Review of Concentration of Business Operators in the China (Shanghai) Pilot Free Trade Zone (collectively "**Anti-monopoly Implementation Rules in FTZ**"). Each of the abovementioned Anti-monopoly Implementation Rules in FTZ went into effect on October 15, 2014.

Please note that Anti-monopoly Implementation Rules in the FTZ do not change current Anti-monopoly implementation system (i.e. the development and reform authorities are responsible for price monopoly, the commerce authorities are responsible for concentration of business operators report and industrial and commercial authorities are responsible for other types of monopoly) or amend the current anti-monopoly laws and regulations, but only grant the Administrative Committee of the SHFTZ (the "**Administrative Committee**") certain auxiliary powers and authorities and further set out corresponding procedures for the implementation of such powers and authorities. Please see below for detailed summaries.

Anti-monopoly Responsibilities of the Administrative Committee

Anti-monopoly Implementation Rules in the FTZ further set forth Anti-monopoly responsibilities of the Administrative Committee, as illustrated in the table below:

Anti-monopoly Acts	Competent Authorities	Anti-monopoly Responsibilities of the Administrative Committee
Monopoly Agreement (excluding price monopoly), Abuse of Market Dominance and Administrative Monopoly	Industrial and commercial authorities	(1) Receive anti-monopoly reports and consultations within the SHFTZ; (2) assist the municipal administration for industry and commerce to carry out investigations on the implementation of the anti-monopolies and pay return visits within the SHFTZ; (3) receive commitments or reports involving

Anti-monopoly Acts	Competent Authorities	Anti-monopoly Responsibilities of the Administrative Committee
		suspected monopoly operators within the SHFTZ (4) assist the municipal administration for industry and commerce to carry out publicity and trainings of the antimonopoly laws, regulations and policies in the SHFTZ
Price monopoly	Competent price authority under the Development and Reform Commissions	(1) receive anti-monopoly reports and consultations within the SHFTZ; (2) assist the municipal price authority to carry out investigations on the implementation of the anti-monopolies and pay return visits within the SHFTZ; (3) accept the active reporting about the information on the price monopoly agreements entered into by and between the business operators within the SHFTZ (4) carry out the publicity and training activities with respect to the anti-price monopoly laws and regulations in the SHFTZ; (5) assist the municipal price authority in researching and analyzing the market competition conditions in the SHFTZ; (6) carry out the study on the major issues concerning anti-price monopoly in concert with the municipal price authority
Concentration of Business Operators	Commerce authority	(1) together with the municipal commission of commerce, jointly cooperate with the Ministry of Commerce to carry out the anti–monopoly review of concentration of business operators in the SHFTZ; (2) assume specific responsibilities such as

Anti-monopoly Acts	Competent Authorities	Anti-monopoly Responsibilities of the Administrative Committee
		detection and identification, investigation and evidence collection, follow-up supervision, performance evaluation, and training and publicity concerning the cases involving anti-monopoly review of concentration of business operators in the SHFTZ under the entrustment of the Ministry of Commerce and under the guidance of the Municipal Commission of Commerce.

Anti-monopoly Implementation Procedures in the SHFTZ

Pursuant to the Anti-monopoly Implementation Rules in the FTZ, industrial and commercial authorities,, competent price authorities under development and reform commissions and commerce authorities remain law-enforcing departments. And the Administrative Committee, as a subsidiary law-enforcing department, participates in specific anti-monopoly implementation procedures. However, since the anti-monopoly responsibilities for each of the departments differ from each other, the responsibilities of Administrative Committee in relevant implementation procedures vary as follows.

Anti-monopoly Acts	Participation of Administrative Committee in Anti-monopoly Implementation Procedures
Monopoly Agreement (excluding price monopoly), Abuse of Market Dominance and Administrative Monopoly	(1) **Report Acceptance**: the Shanghai Administration for Industry and Commerce shall, after verifying the report materials, consult with the Administrative Committee in respect of the information about the verification and the opinion on whether to file a case or not. Where a case-filing and investigation is needed, the Shanghai Administration for Industry and Commerce shall apply to the State Administration for Industry and Commerce for authorization in accordance with the provisions. (2) **Case Investigation:** the Administrative Committee shall assist the Shanghai Administration for Industry and Commerce in

Anti-monopoly Acts	Participation of Administrative Committee in Anti-monopoly Implementation Procedures
	case investigation and provide necessary support. (3) **Suspension of Investigation:** during the period of investigating the suspected monopoly operators, an application for suspending the investigation may be submitted to the Shanghai Administration for Industry and Commerce directly or through the Administrative Committee or the State Administration for Industry and Commerce. (4) **Commitment Supervision:** where the Shanghai Administration for Industry and Commerce decides to suspend the case investigation, it shall send copies of the Letter of Decision on Suspension of Investigation and the Letter of Commitment by the suspected monopoly operators to the Administrative Committee, and supervise the operators' commitment fulfillment in concert with the Administrative Committee. Once the Administrative Committee finds any failure of fulfillment or timely fulfillment, it shall apply to the Shanghai Administration for Industry and Commerce for resuming investigation. (5) **Post-Case Supervision:** the Shanghai Administration for Industry and Commerce shall, in concert with the Administrative Committee, intensify the post-case visits to the punished operators and jointly supervise and inspect the implementation of their corrective measures.
Price Monopoly	(1) **Reporting and Consultation:** Where an informer provide relevant facts and evidence in writing, the Administrative Committee may learn from the informer about the basic information of the informed, whether the informer has reported to other administrative organs or filed an lawsuit with the people's court or not, and other information, and according to the information acquired, notify the informer to directly contact the relevant administrative organs or courts, or conduct identification or transfer of the case. (2) **Identification and Transfer:** The Administrative Committee

Anti-monopoly Acts	Participation of Administrative Committee in Anti-monopoly Implementation Procedures
	shall make preliminary analysis and identification of the information on a case under suspicion of involving price monopoly, which is obtained through the problems raised to consultants, the relevant facts and evidences reflected by the informer, results of other investigations carried out within the SHFTZ, and acceptance of active reporting about the information on the price monopoly agreements entered into by and between the business operators in the SHFTZ, and hand over the analysis and identification results to the competent price authority of Shanghai Municipality. (3) **Record-filing of Penalty Decision:** after making a decision on administrative penalty, investigation suspension or investigation termination for a price monopoly case arising in the SHFTZ, the competent price authority of Shanghai Municipality shall file the decision for record at the NDRC-BPSA in accordance with the relevant provisions, and send a copy of the said decision to the Administrative Committee at the same time.
Concentration of Business Operators	(1) **Declaration of Concentration of Business Operators:** (a) the Administrative Committee shall, through the collection of information on enterprises in the SHFTZ or based on the suggestions from the industry associations, enterprises in the same trades, and upstream and downstream enterprises, timely inform the business operators that are qualified for declaration of concentration of business operators and urge them to declare so. (b) for the concentration of business operators i n the SHFTZ that fails to reach the threshold of statutory declaration, but the facts and evidence collected under legal procedures show that the concentration of business operators may have an impact of excluding or restricting competition, the Administrative Committee shall apply to the Ministry of Commerce for carrying out investigation in accordance with l aw. (c) upon receipt of such report, the Administrative Committee may, as required by the informant, assist him/her in submitting the relevant materials to the

Anti-monopoly Acts	Participation of Administrative Committee in Anti-monopoly Implementation Procedures
	Ministry of Commerce, and keep confidential for him/her. The Administrative Committee shall report any concentration of business operators that should be declared but fails to do so to the Ministry of Commerce. (2) **Review of Concentration of Business Operators:** After a case involving anti -monopoly review of concentration of business operators is filed, if the Ministry of Commerce needs to solicit local opinions, the Administrative Committee shall, as required by the Ministry of Commerce, on the basis of a preliminary understanding of the information on the case, timely give relevant feedbacks to the Ministry of Commerce. In the process of review of a case, if the Ministry of Commerce needs to hold a hearing, carry out investigation and evidence collection or listen to the views of various parties concerned in the SHFTZ, the Administrative Committee on shall, as required by the Ministry of Commerce, help with organization and coordination work. In the process of review of a case, if the business operators participating in the concentration make a written statement or defense on the relevant declaration matters to the Ministry of Commerce, the Administrative Committee may, as demanded by the enterprises, assist them in submitting the relevant statement and defense material s to the Ministry of Commerce. (3) **Follow-up Supervision:** the Administrative Committee shall timely trace the development of a case, promptly provide feedbacks to the business operators participating in concentration, and publicize the review decision on the case and the follow-up supervisions at the portal website of the SHFTZ as required by the Ministry of Commerce. For the concentration of business operators that the Ministry of Commerce decides to prohibit, the Administrative Committee shall, as required by the Ministry of Commerce, supervise that such concentration shall not be carried out. Any concentration of business operators carried out in violation of laws, if discovered, shall be reported to the Ministry of Commerce. For

Anti-monopoly Acts	Participation of Administrative Committee in Anti-monopoly Implementation Procedures
	the concentration of business operators that the Ministry of Commerce has imposed additional restrictive conditions, the Administrative Committee shall, as required by the Ministry of Commerce, supervise and inspect the performance of restrictive conditions by the business operators participating in concentration, and shall timely report the inspection result to the Ministry of Commerce.

2. The Supreme People's Court Issued Draft Provisions on Several Issues concerning the Trial of Administrative Cases Involving Granting and Determination of Trademark Rights (Authors: Estella CHEN, Qihui LI, Yanbing ZHANG)

On October 15, the Supreme People's Court released the *Provisions of the Supreme People's Court on Several Issues concerning the Trial of Administrative Cases Involving the Granting and Determination of Trademark Rights (Draft for Comments)*(the "Draft Provisions") to solicit public comments. As the administrative cases involving granting and determination of trademark rights are an important category of lawsuits heard by the people's court, the Draft Provisions responds to several controversial issues in current practice. Key points of the Draft Provisions are set forth below:

Specify terms of the new Trademark Law

The Draft Provisions specifies the conditions and circumstances for applying the provisions of the new Trademark Law and can be concluded into the following three aspects:]

(1) Refine the provisions regarding the identification of applicant's intention

As a response to the questions arising from the juridical practice, the Draft Provisions clearly sets forth the presumptions, factors and instances that shall be taken into consideration when identifying the existence of true intention of use and malevolence of preemptive registration.

Article 3 of the Draft Provisions provides that people's court shall support if the Trademark Review and Adjudication Board ("TRAB") rejects the registration or declares it invalid on the grounds of violating Article 4 and Article 44 of the Trademark Law, where a trademark registrant makes massive applications for trademarks without justified reasons or the marks for registration are identical with or similar to other's trademarks with certain popularity. The Draft

Provisions unifies the applicable terms when dealing with the case involving the massive preemptive registration behavior and strengthens the operability of intention of use as a condition for registration.

With respect to the preemptive registration by agent, representative or other associates, the Draft Provisions revises Article 15 of the Trademark Law through Article 11 and Article 12. Article 11 of the Draft Provisions sets forth that Paragraph 1 of Article 15 of the Trademark Law is applicable where a registrant has a specific identity relation or other specific connection with the agent or representative provided in Article 15 of the Trademark Law and the said relation can trigger a presumption that the trademark registrant is colluding and conspiring with such agent; Paragraph 2 of Article 15 applies where the said relation can trigger a presumption that the applicant knows or should have known the existence of the trademark.

Article 12 of the Draft Provisions further defines the “other relations” provided in Paragraph 2 Article 15 of the Trademark Law by listing three such situations': (i) the trademark applicant and prior user are in the same region or work in the same industry, and the prior trademark has relatively strong distinctiveness; (ii) the two parties have undertaken negotiation regarding the establishment of agent or representative relation while no such relation is formed eventually; (iii) the trademark applicant applies several trademarks of the prior user for registration. The aforesaid articles clarify the scope of Article 15 of the Trademark Law and intensify the legal sanction towards preemptive registrations.

With respect to identifying the malevolence of preemptive registration by improper means, the Article 18 of the Draft Provisions stipulates that the following factors can be recognized as conducive to such identification: (i) whether the applicant knows or should have known the prior mark exists; (ii) the prior trademark has enjoyed a high level of distinctiveness; (iii) the applicant and the prior mark are located and used in the same region.

(2) Specify instances of “other adverse effects” in the conditions of trademark registration examination

The “other adverse effects” provided in Item 8, Paragraph 1 of Article 10 of the Trademark Law has never been interpreted in any relevant laws, regulations or judicial interpretations, and such fact gave rise to a certain degree of inconformity and disorder in current legal practice. Not only did the people’s court have no legal guidance in trademark administration cases, but the parties also misused this condition as cause of action. Article 5 of the Draft Provisions explicitly defines “other adverse effects” and illustrates it with two instances: (i) where the applicant applies the name of a public figure for registration without authorization; or (ii) where the applicant applies the name of a deceased without their heir’s permission and such registration leads to an establishment of connection between the deceased and the goods bearing the trademark among the relevant public. This new provision will undoubtedly offers an effective protection for the interests of names of the deceased and public figures.

(3) Refine rules on determination of prior rights

The Draft Provisions further revises the rules in connection with the determination of prior copyright, interests of names and interests involving names and images of the characters in an art work.

Article 14 of the Draft Provisions stipulates that the party who claims their prior copyright is infringed shall provide evidence proving he or she is the copyright holder or an interested party enjoying the right for claiming such copyright. As for the evidential effect of the trademark registration certificate, trademark announcement and the copyright registration certificate for proving the existence of prior copyright, the Draft Provisions sets forth two opinions according to the divergence arising from the current legal practice: (i) the trademark registration certificate, trademark announcement can be used as preliminary evidence to determine the identity of the copyright holder or interested person; (ii) the aforesaid documents and the copyright registration certificate obtained during or after the procedures of trademark review can only be taken as preliminary evidence to prove the ownership of the copyright together with other relevant evidence, the documents alone cannot prove the ownership of the trademark copyright. Obviously, the first opinion sets a relatively low standard of the burden of proof for the prior rights holder, and the burden of proof to the trademark is born by the applicant in question.

Article 17 of the Draft Provisions provides that, people's court shall examine whether the roles and images that are claimed to be infringed upon constitute a work in the sense of copyright law and are thus protected thereby. As for the name of a work or the name of a character that does not constitute a work, it can be protected as prior rights under the condition that the name enjoys a high awareness and the use of such name as trademark can easily mislead the relevant public. This article enriches the definition of the "prior existing rights" mentioned in Article 32 of the Trademark Law and incorporates the names of works (such as the name of a movie, a TV program and the title of a novel) and the names of characters in works into the protection scope of the Trademark Law, which has had difficulties in seeking remedies in the current practice.

Article 15 of the Draft Provisions sets forth a two-level standard to identify the infringement upon the right of names. Firstly, the relevant public shall consider the mark in dispute refers to a natural person; secondly, the relevant public shall believe that a specific connection exists between the mark and the natural person. While, to determine the use of trademark has constituted a specific representation remains a difficulty, and the standard of identification needs to be summarized in the practice.

Article 16 concludes three conditions to identify a prior trade name based on previous judicial interpretations and judiciary experiences: (i) the prior trade name enjoys certain awareness; (ii) the designated goods or services bearing the trademark in dispute are identical or similar to the goods or services provided by the prior right holder of trade name; (iii) the unauthorized use and registration invite a confusion among the relevant public about the source of the goods or

services.

New terms on procedures

The Draft Provisions adds several articles on administrative trial procedures which covers the conditions of admitting supplementary evidence during the administrative litigation, the situations where res judicata and rebus sic stantibus are applied and the terms to prevent loop suits. Among such, the requirements to the adoption of the evidence submitted during the trademark administrative litigation weigh more importance. Article 22 clearly provides that the evidence submitted during the litigation that was not submitted in the administrative procedure shall be generally rejected by the court unless such evidence is used as supplementary evidence to support issues that have been heard by the Trademark Review and Adjudication Board, or such evidence can affect the substantial result of the trial and the parties submitting the evidence have exhausted other remedies. In addition, the evidence mentioned in Article 22 shall be submitted within the prescribed deadline of inducing evidence in the first instance.

It has become a common practice to submit supplementary evidence during the litigation due to lack of attention or preparation in administrative procedures. However, none of the previous laws, regulations or interpretations clarified the relevant evidentiary rules, and only a few cases heard by the Supreme Court referred to the relevant content. The Draft Provisions sets forth a clear rule that the supplementary evidence submitted in the litigation procedure, which is used to prove the fact that has not been heard during the administrative procedure, shall be rejected by the court, in general.

New terms based on current practice

Regarding the issues arising from the practice, the Draft Provisions adds several new terms as a response. The acknowledgement to the validity of the trademark co-existence agreement is among the most remarkable terms. The Draft Provisions recognizes the co-existence agreement in principle by the way that, the people's court may approve the trademark registration in dispute if the right holder of the cited mark approves such registration of the later trademark. While the Provision (Draft for Comments) neither clarifies the standard for "may approve" nor provides guidelines with respect to the boundary between "may" and "may not". In practice, the people's court usually rejects the registration of the later mark because the co-existence cannot rule out the possibility for causing confusion to the relevant public when seeing the similar trademark in the similar industries. We are looking forward to the official version of the Provisions specifying the aforesaid question.

Important Announcement

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