NEWSLETTER ASIA

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SUMMARY

China

Reform on the trademark law

(Measure adopted by the Standing Committee of the National People's Congress on 30th of August 2013 and which came into force on the 1st of May 2014).

The main changes are the followings:

- **Possibility to record as a sound mark a sound with distinctive properties**

- **Introduction of a multi-class trademark's registration**

An applicant is now allowed, into one application, to register its trademark in different classes. Before, it was obliged to fill in one application per class.

- **Modification of the opposition system**

Now, only the trademark owner of his earlier trademark will be able to make an opposition against a trademark application ("relative grounds for refusal"). An exception is made when the trademark application is for a descriptive trademark or cannot be granted because it is morally wrong ("absolute grounds for refusal"); in this case anyone with an individual legal interest will be able to make an opposition against this trademark application.

In addition to that, in case of favorable decision granted to the applicant, the opponent will not be able to appeal against the decision before the Trade Mark Review and Adjudication Board of the Trademark Bureau (TRAB), but he will only be able to initiate cancellation action before the TRAB, once the registration of the trademark is granted. However, the applicant will be allowed to appeal against an unfavorable decision, and initiate a judicial procedure.

- **Prohibition of the use of the words « well-known trademark » on products, packaging, containers, advertising materials (etc.)**

- **Proceeding time for applications**

Now, the law provides application proceeding deadlines which the Trademark Office and the TRAB must follow. For example, the proceeding time to register a trademark is 9 months; the proceeding time to make an appeal against a refusal to register is 9 months, with a right to extend of 3 months, etc.

- **Use of a trademark as company name**

If a third person uses a registered trademark or a non-registered trademark but regarded as well-known as its company name, creating a risk of confusion among the public, the provisions of the unfair competition law must apply.

- **Increasing of fines and damages**

In case of trademark infringement, if the turnover of the infringer is over RMB 50.000, its fine could now be equal to five times its turnover (before it was only three times). If its turnover is under RMB 50.000, its fine could not be more than RMB 250.000 (before it was RMB 100.000). The total amount of the damages could be up to RMB 3.000.000 (before it was RMB 500.000).

Japan

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Compliance - Japan under OECD pressure to combat bribery of foreign public officials

Japanese companies are facing a shrinking market and a declining population at home and outbound M&A has soared to all-time highs over the last few years. Competition abroad, especially in emerging markets, is fierce and corruption distorts competition in the absence of a level playing field. The main purpose of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions is to establish legally binding standards to criminalize bribery of foreign public officials in international business transactions and to provide related measures that make this effective. Further steps are being taken in Japan to implement and enforce this Convention and its own laws.

Japan signed the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in 1997 and joined the Working Group on Bribery (Working Group) of the Organisation for Economic Co-operation and Development (OECD). The Convention deals with active corruption, i.e. the offence committed by the person who promises or gives the bribe, as opposed to passive bribery, the offence committed by the official who receives the bribe. In pursuance of Article 12, after acceding to the Convention, Japan started co-operating in carrying out a programme of systematic follow-up to monitor and promote its implementation of the Convention within the framework of the Working Group which oversees implementation through a "peer review" system. Monitoring is subject to specific agreed upon principles and takes place in three phases: Phase 1 evaluates the adequacy of a country's legislation to implement the Convention, Phase 2 assesses whether a country is applying this legislation effectively and Phase 3 focuses on enforcement of the Convention, the 2009 Anti-Bribery Recommendation and outstanding recommendations from Phase 2.

After acceding to the Convention in 1997, Japan enacted implementing legislation outlawing foreign bribery, which came into force in 1999 by amending the Unfair Competition Prevention Law (*fusei kyōsō bōshi-hō*; UCPL). Article 18 of the UCPL makes it unlawful to give, offer, or promise a bribe to a foreign public official while Article 21 deals with punishments and criminal sanctions (the Working Group would

have clearly preferred the sanctions to be entrenched in the Penal Code to gain more visibility). Under the UCPL, the punishment for bribery of a foreign public official is a maximum of five years imprisonment or/and a five million yen fine for individuals and a maximum fine of 300 million yen for legal persons. Actions are time-barred after 5 years under current statutes of limitations. Article 18 defines a foreign public official very broadly. As far as perpetrators are concerned, it applies to Japanese nationals and Japanese legal persons anywhere in the world under the nationality principle of jurisdiction and, where the offense is committed or has effects in Japan, to foreign nationals and legal persons under the principle of territorial jurisdiction. The Ministry of Economy, Trade and Industry (METI) is the lead ministry responsible for implementation of Article 18 of the UCPL (and the Convention, due to placement of the offence in the UCPL) but the Ministry of Justice, the National Police Agency and public prosecutors' offices also play a significant role in the investigation and prosecution of violations.

In spite of the abovementioned legal framework, Japan's track record is far from satisfactory and this is an understatement considering the provisions outlawing anti-bribery have been in force since 1999: to date, Japan has only brought three prosecutions under the UCPL. Theoretically, the higher the level of exports and outward foreign direct investment, the greater the risk of exposure to bribe solicitation in foreign jurisdictions and Japan is the world's third largest economy. In December 2011, the Working Group adopted its Phase 3 Report on Japan, evaluating and making recommendations on Japan's implementation of the Convention and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. A recent Working Group follow-up report (the Phase 3 follow-up report) was adopted and released in February 2014 which is the report submitted by Japan in order to provide information on its progress made in implementing the recommendations of its Phase 3 report since 2011 as supplemented and summarized by the Working Group.

The Phase 3 follow-up report is still very critical of Japan's lack of concrete enforcement efforts and contains a list of Phase 3 Report recommendations distinguishing between those which have been followed, partially followed or ignored. Yet progress has been achieved in a number of areas: Japan intends to include in its bilateral tax treaties language from the Multilateral Convention on Mutual Administrative Assistance in Tax Matters which allows the sharing of tax information by tax authorities with other law enforcement and judicial authorities on foreign bribery cases; recommendations have been implemented in relation to the accounting and auditing framework to prevent and detect bribery; Japan has provided targeted training on foreign bribery at its overseas missions; and The Japan Bank for International Cooperation (JBIC) and Nippon Export

and Investment Insurance (NEXI) have raised awareness of foreign bribery in the private sector, including SMEs. Partially implemented recommendations regard whistle blowers' protection; reaching the proper balance of emphasis between prevention and enforcement by METI; increased coordination between ministries and agencies to achieve this; investigation methods; the ambiguous treatment of so-called facilitation payments in publicly available METI materials, etc. Since 2005, the Working Group has repeatedly asked Japan to establish the legal authority to confiscate the proceeds of foreign bribery, which is required by the Convention and punish those who launder such proceeds. To no avail and in the absence of these measures, Japan may not effectively implement the Convention and sanction bribers.

Due to serious concerns about the extremely low level of enforcement of Japan's offence of bribing foreign public officials, as a conclusion of the Phase 3 follow-up report, Japan was requested to draw up and implement an action plan to organize police and prosecution resources to be able to proactively detect, investigate and prosecute cases of foreign bribery by Japanese companies. Japan's action plan became operational in April 2014 but the plan is not available to the public. According to the June 2014 Statement of OECD on Japan's Efforts to Increase Foreign Bribery Enforcement, newly specialized resources have been created for detecting and investigating cases of foreign bribery in the three largest district prosecutors' offices and each prefectural police office, prosecutors and police in Japan have been assigned responsibility for specific crimes for the first time. It transpires from the Statement that the plan lacks important details but it is expected to be more fully developed by December 2014. The Working Group optimistically expects to see a major increase in the number of foreign bribery cases detected, investigated, prosecuted and punished in the near future. The action plan was to address the aforesaid continuing lack of clarity in METI materials about the legality of facilitation payments and means by which tax examiners could proactively detect bribe payments disguised as "miscellaneous" expenses in tax returns. However, the plan still fails to address the issue of the misleading information on facilitation payments in the METI guidelines on foreign bribery but the Working Group nonetheless expects METI to clarify the point. It commends the National Tax Agency (NTA) for its contribution through the provision of training and guidance to tax inspectors on detecting bribe payments disguised as "miscellaneous expenses" and improving the reporting of suspicious payments. The Working Group intends to continue monitoring Japan's progress on enacting the required legislation and implementing its plan. In December 2014, the Working Group will also assess the implementation of other outstanding recommendations.

It is clear from the above that Japan is stepping up its efforts to combat international bribery. A large number of Japanese groups with international exposure are already familiar with the long-arm reach of the US Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act. One can expect that a number of Japanese companies will further develop effective internal controls, ethics, and compliance programs or take measures for preventing and detecting foreign bribery on the basis of due diligence audits and other risk assessment methods.

Singapore

Employment law update on restraint clauses

On 8 April 2014 in the *Lek Gwee Noi v Humming Flowers & Gifts Pte Ltd* the High Court of Singapore made a ruling regarding the width and enforceability of the non-compete covenant and the non-solicitation covenant in an employment contract.

In this case, the terms of those covenants prevented the employee for 2 years from the date of termination from (i) setting up a business similar to the employer's business in Singapore, Malaysia and anywhere else the employer may carry out business, (ii) solicit orders from any person or company who was a customer of any company in the employer's group of companies while the employee was employed by the employer or from any customer of the employer.

The threshold condition set by the common law is that restrictive covenants are not void if they protect a legitimate interest of the employer and they are reasonable in the interests of the parties and in the public interest. The Court found that the employer had legitimate interests to protect because (i) the employee was in a position to habitually handle confidential information so the employer had trade connections to protect, (ii) the employee had access to confidential information of commercial significance, so, even if it did not amount to trade secrets, it was confidential enough to require that same level of protection as trade secrets.

However, the non-competition covenant was not found to be reasonable. In determining the reasonableness of such clauses the court would consider geographical restrictions and activity restrictions. And, since the non-competition covenant would include any company in the employer's group of companies, it meant the non-competition covenant would prevent the employee from engaging in activities outside her scope of employment as long as any company related to the employer engaged in those activities as well. This was not

found to be reasonable as it went beyond what was necessary to protect the employer's trade connection. The geographical restrictions extended to Malaysia where the employer had no business interests, which again made the non-competition covenant unnecessarily wide. The Court also found the two years restriction unreasonably long given the legitimate interest it was seeking to protect.

India

SNAPSHOT OF INDIAN FDI POLICY IN RETAIL

Whereas the new business-friendly Modi-led government has clearly opposed foreign direct investment (FDI) in multi-brand retail trading, where do International traders stand in India?

	Activity	Equity cap (in %)	Entry route
1	**Cash & carry wholesale trading**	100	Automatic (no prior approval required)
2	**Single brand product retail trading**	100 subject to conditions	Automatic up to 49% Government route beyond 49%
	FDI in single brand product retail trading is subject to certain conditions, i.e. products to be of a single brand, to be sold under the same brand internationally, sourcing clause if proposal involve FDI beyond 51%, etc. Application to be processed by the Secretariat for Industrial Assistance (SIA) in the Department of Industrial Policy & Promotion (DIPP) and then considered by the Foreign Investment Promotion Board (FIPB).		
3	**Multi brand product retail trading**	51 subject to conditions	Government route
	FDI in multi brand product retail trading is subject to conditions such as sourcing from Indian SMEs, minimum amount of investment, minimum investment in back-end infrastructure, etc. The new government being opposed to multi brand retail, it is not clear whether they would revert the 2013 decision of the erstwhile government to open FDI in this sector or keep the policy unchanged but forbid any new investment. Only one application (Tesco's) was processed prior to the elections.		

4	**E-commerce**	100	Automatic
	Only B2B activities through an e-commerce platform is authorized. Existing restrictions on FDI in domestic trading apply to e-commerce. The new government has however announced that they are keen on liberalising e-commerce in retail trading up to 100%. Notification of such measure is still pending.		

Vietnam

New circular on foreign borrowings

On March 31st, 2014 the State Bank of Vietnam issued Circular 12/2014/TT-NHNN that aims to confirm or strengthen the restrictions on foreign borrowings without government guarantee in favor of enterprises, cooperatives, credit institutions and branches of foreign banks established in Vietnam. It entered into force on the 15th of May 2014 and follows Decrees 219/2013 and 156/2013.

The Circular sets the principle that the foreign loans shall be made in foreign currencies except for some specific cases where Vietnamese Dong can be used.

Furthermore the amount of foreign borrowings with a more than one year term to foreign-owned companies shall not exceed the difference between the total investment capital and the paid up capital stated in the investment certificate (Article 11.2 b/).

The State Bank of Vietnam is entitled to check that borrowers comply with the provisions of the Law (Article 4) and to assess a ceiling to the loan costs including interest rates (Article 9).

Although the Circular reaffirms the principle of freedom of the parties with regard to the financial conditions of the loan the Governor of the State Bank of Vietnam can limit such freedom and regulate foreign borrowings conditions.

The Circular entered into force on May 15th but does not apply to loan contracts entered into before this date. However subsequent amendments of previous loan contracts shall be in compliance with this new rule.

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