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The Patent Law of the People's Republic of China (as Amended 2008)

中华人民共和国专利法（2008年修正）

Issued By	The Standing Committee of the National People's Congress
Subject	Patent
Promulgated on	December 27th, 2009
Effective from	October 1st, 2009
Source	http://www.npc.gov.cn

On December 27, 2008, the Standing Committee of the National People's Congress approved the third Amendment to the Patent Law of China. It became effective on October 1, 2009. The new law will improve independent innovation and expand protection of patent rights.

One of the most important changes of the new Patent Law is raising the standard for novelty from “relative” to “absolute”. The “relative novelty” standard under the old Patent Law only required the technology to be new in China. Therefore, many Chinese companies or individuals applied for patents by using other’s technology that had been displayed in a foreign country but had not been publicly known by Chinese. Such conduct lead to very unsatisfied circumstances. Under the “absolute novelty”, an invention or utility model must not be a technology known to the general public, both in China and abroad. For a design to be novel and patentable, it must be substantially different from designs and from the combinations of existing design characteristics, existing inside or outside China. The “absolute novelty” standard not only applies to design patents, but also applies to invention and utility model.

To distinguish design patents from trademarks, the new Patent Law provides: “A design patent should not be classified as a design when it’s mainly used as a product label with pattern, color or the combinations of them on plane printing.” This provision is intended to discourage applicants from using design patents to protect trademarks.

In addition, the new Patent Law enhances the power of the government to grant compulsory licenses. If the patentee, after the lapse of 3 full years from the date when the patent is granted and after the lapse of 4 full years from the date when a patent application is filed, fails to exploit or to fully exploit his patent without any justifiable reason or the patentee’s act of exercising the patent rights is determined as a monopolizing act and it is to eliminate or reduce the adverse consequences of the said act on competition, the patent administrative department of the State Council may, upon the application of an eligible

entity or individual, grant it or him a compulsory license to exploit the patent for an invention or utility model.

The entity or individual who applies for a compulsory license should furnish evidence, which can prove that it or he has requested the patentee for a license to exploit the patent on reasonable terms, but failed to obtain such license within a reasonable time.

Moreover, for the purpose of public health, the patent administrative department of the State Council can grant a compulsory license for a patented medicine so as to produce and export it to the country or region which conforms to the provisions of the relevant international treaty to which the People's Republic of China has acceded.

According to the new law, Chinese individuals and entities can apply for international patents without first applying for Chinese patents as previously required. However, the administrative department of the State Council may undertake a security check if an applicant wants to apply for patent after it filed an application in a foreign country for the same invention. Failure to go through the security check will cause the Chinese patent not to be granted.

Administrative Measures for the Qualification of Foreign Contracted Projects

对外承包工程资格管理办法

Issued By	Ministry of Commerce of People's Republic of China / Ministry of Housing and Urban-Rural Development of People's Republic of China
Subject	Foreign Contracted Projects
Promulgated on	September 28th, 2009
Effective from	November 1st, 2009
Source	http://www.mofcom.gov.cn

In order to regulate and promote the development of foreign contracted projects, on September 28, 2009, Ministry of Commerce of People's Republic of China and Ministry of Housing and Urban-Rural Development of People's Republic of China jointly issued the Administrative Measures for the Qualification of Foreign Contracted Projects (hereinafter referred to as the Measures). The Measures provide guidance for Chinese enterprises or units on foreign contracted projects, including design, procurement, construction, installation, operations and other activities. The Measures took effect on Nov. 1, 2009.

The Measures provide details on the qualifications of foreign contracted projects, application procedures, qualification certificate management, supervision, legal liability and other aspects.

According to the Measures “foreign contracted project” refer to an activity of a Chinese enterprise or unit contracting an overseas construction project. According to the Measures make foreign contracted projects fall into two categories: project construction and non-project construction. There are different barriers to enterprises in the registered capital, qualification or performance requirement.

In accordance with the Measures, in order to contract for foreign projects an enterprise must obtain the foreign project contracting qualification. To obtain such qualification, the enterprise shall meet the following requirements:

1. Having the status of a legal person, and, for a project constructing entity, having the special grade or grade A qualification certificate issued by the competent department of construction or other relevant department;
2. Having the capital and technical professionals required for contracting foreign projects, and having at least two managers who have engaged in contracting foreign projects for two years or more;
3. Having the security maintaining capability required for contracting foreign projects;
4. Having the rules and regulations for guaranteeing project quality and production safety, and having no big project quality problem or any relatively serious or serious safety accident in the last two years; and
5. Having a good business reputation, no material breach of contract or serious illegal operation in the last three years.

If an enterprise contracts for foreign projects without the foreign project contracting qualification, the competent authority will order it to correct it. Additionally, the competent authority shall impose a fine of not more than 1 million yuan but not less than 500,000 yuan on it, confiscate the illegal gains and impose a fine of not more than 100,000 yuan but not less than 50,000 yuan on the chief person-in-charge.

The Measures shall further promote the standardization and institutionalization of qualification management of foreign contracted projects and enhance the healthy development of foreign contracted projects. Moreover, it contributes to China's "going abroad" strategy.

Administrative Measures on Internal Members of Domestic Enterprises to Operate Foreign Funds Intensively

境内企业内部成员外汇资金集中运营管理规定

Issued By	The State Administration of Foreign Exchange
Subject	Foreign Exchange
Promulgated on	October 12th, 2009
Effective from	November 1st, 2009
Source	http://www.safe.gov.cn

China still knows many restrictions on foreign exchange operations. For purposes of facilitating and supporting the use and transaction of foreign exchange funds of domestic enterprises, improving the use efficiency of funds of domestic enterprises, the State Administration of Foreign Exchange issued Administrative Measures on Internal Members of Domestic Enterprises to Operate Foreign Funds Intensively (“the Measures”) on Oct. 12, 2009. It took effect on Nov. 1, 2009.

The Measures apply only to foreign exchange operations among so-called internal members of domestic enterprises. It simplifies formalities and makes the foreign exchange operations among internal members of the domestic enterprises more convenient.

Domestic enterprise means a legal person, which is registered in the PRC (excluding financial institutions).

The term internal members include:

- (i) The parent company;
- (ii) The subsidiary, in which the parent company holds 51% or more;
- (iii) Any other company, in which the parent company and its subsidiaries individually or jointly hold more than 20%;
- (iv) Any other company, in which the parent company and its subsidiaries individually or jointly are the largest shareholder;
- (v) Institution and corporate social groups, which are affiliated to the parent or the subsidiary company.

The Measures include mainly the following reform measures:

1. Relax the qualifications of the business entity;

2. Clarify the business operation of the domestic foreign capital, regulate the basic principles, business structure, the audit procedures and other related content of the foreign capital.
3. Further decentralization matters related to foreign exchange covered by the Measures are handled by SAFE branches (Management Department). SAFE will no longer undertake a specific work;
4. Regulate and perfect the management regulations on foreign exchange funds. The content of “Notice about management issues related to spot exchange settlement and sales carried out by financial companies of enterprise groups” (Hui Fa [2008] 68) are incorporated into the Measures.
5. Further simplify approval formalities related to foreign exchange business. Matters such as account opening and foreign exchange transfer related to operate foreign funds can be handled by the qualified bank (financial company). SAFE’s approval is no longer needed.

According to the Measures, the entrusted loan of domestic enterprises shall not be used for settlement of foreign exchange loans. If they want to use the entrusted loan to handle foreign exchange settlement business, domestic enterprises shall first return the entrusted loan fund to its capital of foreign exchange accounts or current items of foreign exchange accounts, then apply for foreign exchange settlement according to the relevant provisions. The Measures intend to standardize the centralized management of foreign exchange settlement operations and make it better. More importantly, it shall enable domestic enterprises to improve fund use efficiency, reduce financial costs and enhance competitive advantage. At the same time, the Measures will promote the bank-enterprise cooperation, business innovation and accelerate the development of China’s financial services industry.

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