

Technology, Media, and Telecommunications
Intellectual Property

China's Anti-Unfair Competition Law Revised

Introduction

On 4 November 2017, the 29th Standing Committee of the National People's Congress ("**NPC**") approved proposed revisions to China's Anti-Unfair Competition Law ("**AUCL 2017**"). This is the first revision made to the AUCL since it first became effective in 1993. The 29th NPC revised the AUCL to safeguard the market order of fair competition, in light of new developments in the Chinese economy.

The AUCL 2017 came into effect on 1 January 2018. There are 5 major amendments to the AUCL. These are set out as follows:

Greater Protection Afforded to Unregistered Trademarks

Article 6 of the AUCL 2017 is a welcome change for businesses seeking greater protection of their well-known identifiers in China. The Article prohibits the imitation of the well-known identifiers of individuals or organisations, to prevent the relevant public from being confused. This prohibition is comprehensive, as list of acts is non-exhaustive. Comparing the Article with the old AUCL, which prohibited only 4 types of misleading acts, businesses would likely enjoy greater protection of unregistered well-known trademarks forming part of their identifiers under the AUCL 2017.

These misleading acts specified under the AUCL 2017 include:

- (1) the unpermitted use of a label identical or similar to the indicia of another's goods. This includes the name, packaging or decoration of another's goods which has a certain degree of influence;
- (2) the unpermitted use of another's name which has a certain degree of influence, such as:
 - a. an enterprise name (including abbreviations and trade names);
 - b. a social organisation's name (including abbreviations); or
 - c. an individual's name (including pseudonyms, stage names, and translated names);
- (3) the unpermitted use of web-related items with a certain degree of influence including:
 - a. the principal part of another's domain name,
 - b. a website; or
 - c. a webpage;

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- (4) other acts sufficient to mislead a person into believing that one's goods have a particular connection with another's.

New Online Acts Deemed Unfair

New provisions have been added to the AUCL 2017 that define certain unfair online acts of businesses, which did not exist when the AUCL was first enacted.

Inflating online orders and fabricating online reviews

Article 8 of the AUCL 2017 prohibits businesses from conducting misleading commercial publicity for themselves through fabricating user reviews. Article 8 also further prohibits businesses from conducting misleading commercial publicity for others through organising false transactions, or by any other means.

The NPC states that this Article largely governs e-commerce, to combat the large-scale inflation of orders and fabrication of reviews online that is currently taking place in China.

Interfering with other businesses

Article 12 of the AUCL 2017 also states that an online business may not use the following technical means to affect users' options and sabotage with another's business operations through:

- (1) inserting a link or forcing a URL redirection without another's consent;
- (2) misleading, defrauding or forcing users to alter, shut down, or uninstall an online product or service legally provided by another business;
- (3) causing in bad faith incompatibility with an online product or service legally provided by another business;
- (4) other acts of interfering with or sabotaging the normal operation of online products or services legally provided by another business.

Article 12 provides much certainty to the law, as the old AUCL provided little guidance on unfair online acts. As seen in the controversial decision of *Beijing Financial City v Chengdu Caizhi* ("**Beijing Financial City**"), the Court relied on the broad principle under Article 2 of the old AUCL to hold that the redirecting of a URL amounted to an unfair act. This decision was seen as expanding the scope of Article 2 beyond the legislative intent, and an unprincipled application of the law. Given the definition of various online acts under Article 12, cases such as *Beijing Financial City* will now instead fall under the better-defined Article 12. Accordingly, businesses will thus be accorded greater certainty as to the protection of their online businesses moving forward.

Expanding the Protection Afforded to Trade Secrets

Old AUCL protection retained

Like the old AUCL, Article 9 of the AUCL 2017 continues to prohibit businesses from acting in three ways that infringe upon trade secrets:

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- (1) acquiring a trade secret from the rights holder through various improper means;
- (2) disclosing, using or allowing another to use a trade secret acquired from the rights holder by means specified in (1); and
- (3) disclosing, using or allowing another to use a trade secret under its control in violation of an agreement with, or requests of, the rights holder.

Businesses prevented from using trade secrets illegally obtained by others

Moreover, Article 9 of the AUCL 2017 now deems a business liable for infringing upon trade secrets, even if such trade secrets were obtained by others. Such a situation occurs when a business using a trade secret knows, or ought to have known that an employee or a former employee of the rights holder of the trade secret, or any other entity or individual has committed any of the 3 acts mentioned above against the rights holder.

The provision of this additional situation is a welcome addition to the AUCL as businesses infringing on trade secrets may no longer deny their liability merely because the trade secrets in question are obtained by others. Nonetheless, given the lack of guidance on this Article, it is likely that a potential source of dispute will be regarding the level of knowledge imputed to the business.

Commercial Bribery Redefined

Given the redefinition of commercial bribery in the AUCL 2017, we are of the opinion that businesses should be cautious when providing any benefit to transaction counterparties, and to third parties in a transaction. This is especially the case when dealing with state organs, state officials, and state-owned enterprises (“**SOEs**”). Businesses will also need to assess whether such counterparties or third parties utilise the influence of state officials. Businesses should also actively monitor their employees and ensure that they do not commit acts of bribery falling within the definition of the AUCL 2017. We detail our analysis as follows:

Expanded scope of commercial bribery

Article 7 of the AUCL 2017 expanded the scope of commercial bribery. Businesses are now prohibited from seeking transaction opportunities or competitive edges by offering financial interests. This may be contrasted with the previous position stated in Article 8 of the old AUCL, and Article 2 of the Interim Provisions on Prohibiting Commercial Bribery (“**Interim Provisions**”) issued by the State Administration for Industry and Commerce (“**SAIC**”). These articles had previously limited the purpose of bribery to that of selling and purchasing goods.

Bribe recipients as third parties to the transaction, and relevance of transaction counterparties

Article 7 of the AUCL 2017 defines bribe recipients as third parties to a transaction, which include:

- (1) an employee of the transaction counterparty;
- (2) an entity or individual authorised by the transaction counterparty to handle relevant affairs; or
- (3) an entity or an individual that uses power or influence to affect a transaction.

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These third parties include state officials and organisations. Limb (3) of Article 7 of the AUCL 2017 is a summary of limbs (3) and (4) in Article 7 of the second AUCL 2017 draft. Limb (3) of the AUCL 2017 should therefore be read to cover entities and officials as set out in the second draft. Accordingly, state organs, SOEs, public institutions, people's organisations, state officials; and organisations and individuals who may make use of the influence of state officials would fall within the ambit of limb (3).

It must also be noted that "transaction counterparties" are not expressly excluded under Article 7. Thus, the definition of a transaction counterparty under the old AUCL may continue to be a possible bribe recipient under the new AUCL if it falls under either of the 3 limbs.

Exceptions

The exceptions to commercial bribery from the Interim Provisions and the old AUCL are retained. Under Article 7 of the AUCL 2017, discounts made in favour of a transaction counterparty and commissions paid to an intermediary are allowed, if such discounts and commissions are recorded in a business' accounts.

Incorporation of vicarious liability for own employees' bribery

Article 7 also incorporates the Interim Provisions' imposition of vicarious liability for commercial bribery. Essentially, a business would be deemed liable if its employee commits an act of commercial bribery.

Exception

Article 7 provides that a business will not be liable for the bribery committed by its employee if it is able to show that the employee's act is irrelevant to seeking a transaction opportunity or competitive edge for the business.

Revised Compensation and Stiffer Fines for Violating the AUCL

Compensation for imitation

Similar to the old AUCL, any aggrieved party may seek damages from the tortfeasor under the AUCL 2017. However, there are two main differences.

- (1) First, the AUCL 2017 clarifies that actual losses will have to be shown by the aggrieved party.
- (2) Next, where actual losses cannot be established for a breach under Article 6 (imitation), and Article 9 (trade secrets), any disgorgement of the tortfeasor's profits is capped at RMB 3,000,000.

Fines

The old AUCL provided for fines ranging from RMB 10,000 to RMB 200,000 for violation of the old provisions. However, under the new AUCL, fines now range from RMB 50,000 to RMB 500,000.

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Conclusion

While the AUCL 2017 increases monitoring costs for businesses to prevent employees from committing bribery, the AUCL 2017 is a welcome change for many businesses that are seeking greater protection of their intellectual property rights and trade secrets in China.

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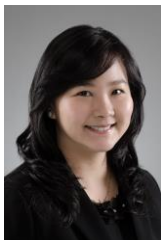
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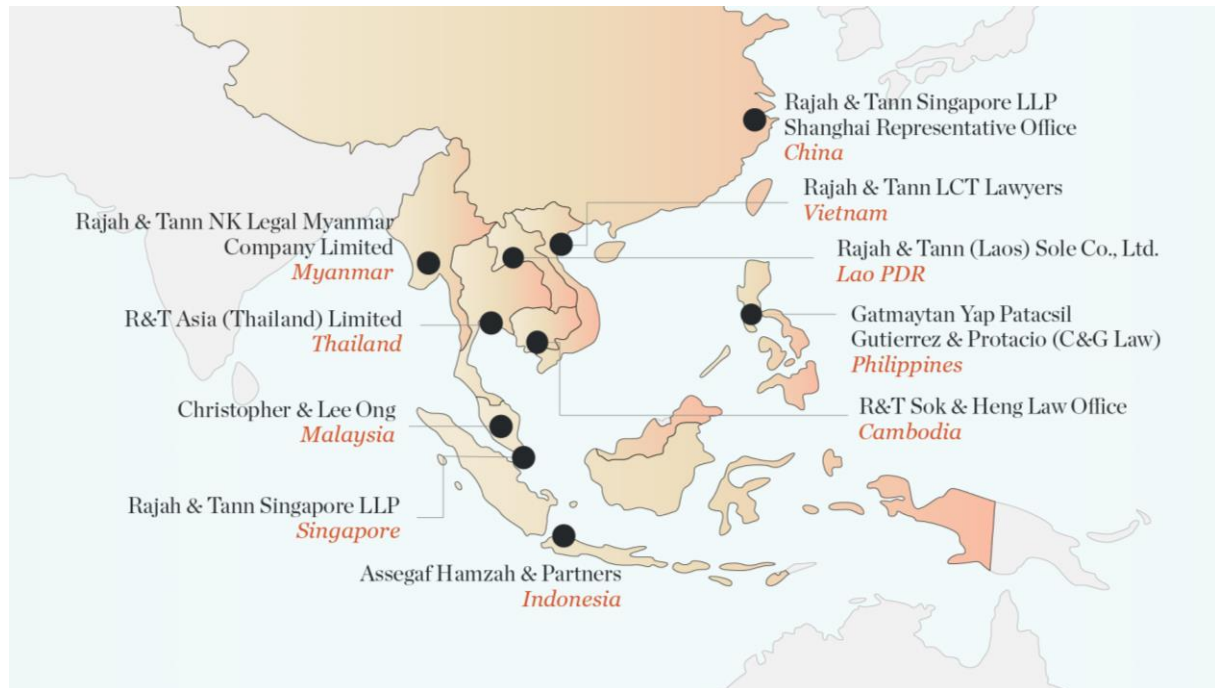
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