



Featured Article

Management System and Regulations of Technology Export in China

Introduction:

As the number of multinationals setting up local legal entities in China increases, many multinationals have doubts about whether new technology developed by local legal entities in China can be used by foreign corporations and what procedures are required. This article makes a detailed introduction to the management system and provisions on the administration of technology export as well as relevant regulations on intellectual property rights of technology export in China.

1. Management system of technology export

In China, technology export is mainly managed by two lines. The first line is the export management of technology in the civil field. The relevant major laws, regulations and documents are as follows according to the legal hierarchy from top to bottom: the Foreign Trade Law of the People's Republic of China (hereinafter

referred to as the Foreign Trade Law), the Regulations on Technology Import and Export Administration of the People's Republic of China (hereinafter referred to as the Regulations on Technology Import and Export Administration), the Measures for the Administration of Technologies Prohibited or Restricted from Export (hereinafter referred to as the Measures for the Administration), and the China Bans Export Restrictions on Export Technology (hereinafter referred to as the Export Ban).

The second line is the export management of technologies in related fields of sensitive items such as military and civil dual-purpose goods, military goods, nuclear and missile. The relevant major laws, regulations and documents are as follows according to the legal hierarchy from top to bottom: the Export Control Law of the People's Republic of China, the Regulations of the People's Republic of China for Export Control on Nuclear Dual-purpose Goods and Related Technologies, the Regulations on the Export Control of Biological Dual-use Goods and Related Equipment and Technologies in People's Republic of China, the Regulations of the People's Republic of China on Export Control of Missiles and Missile-related Items and Technologies, the Catalogue for the Administration of Import License for Dual-use Items and Technologies, and the Catalogue for the Administration of Export Licenses for Sensitive Items and Technologies. Through the above two lines, the technology export in the field of civil use and sensitive items is managed respectively. In the two lines, there are not only laws formulated by the National People's Congress and its Standing Committee, but also administrative regulations (rules) and departmental rules (catalogues), etc., such that laws, regulations, rules, and the like cooperate with each other to form a relatively complete system.

Under the two-line management system, if a technology falls into both the catalogue under the management of sensitive items and the catalogue of technologies in the

civil field, according to Article 43 of the Regulations on Technology Import and Export Administration "Exporting a nuclear technology, a relevant technology of nuclear products for both military and civil purposes, a technology for supervising or monitoring the manufacture of chemicals, a technology for military purposes, or any other technology under export control shall be conducted pursuant to the relevant administrative laws and regulations", and according to the regulation in the Announcement on Adjusting and Issuing the "Export Ban" that "technologies that belong to military and civil dual-use shall be included in the export control management", the technology shall be managed in accordance with the Export Control Law.

Due to the limitation of business field, reading audience and space, this article only introduces the technology export in civil field in detail.

2. Provisions on the administration of technology export

2.1 The meaning of technology export

According to Article 2 of the Regulations on Technology Import and Export Administration, technology export means acts of the transferring technology from the territory of China into outside the territory of China by way of trade,

investment or economic and technological cooperation, and the acts include assignment of the patent right, assignment of patent application right, licensing for patent exploitation, assignment of technology secrets, technology services and transfer of technology by other means. That is to say, technology export includes various ways such as trade, investment or economic cooperation, which belong to the category of technology export. As mentioned in the introduction, the technology transfer between the local legal entities established by multinational enterprises in China and their head office is also the technology export from the territory of China into outside the territory of China, and thus it is also regulated by the regulations such as the Regulations on Technology Import and Export Administration.

2.2 Provisions on technology export

According to the Foreign Trade Law and the Regulations on Technology Import and Export Administration, the exported technology is divided into three categories: free export, restricted export and prohibited export.

According to Article 15 of the Foreign Trade Law and Articles 37 and 38 of the Regulations on Technology Import and Export Administration, it is stipulated that the technology that belongs to free export shall be subject to contract registration administration. In the case of exporting technologies subject to free export, the

contract shall come into effect when it is established according to law, and registration shall not be the condition for the contract to come into effect. In the case of exporting technologies subject to free export, the contracts thereof shall be registered with the competent foreign trade department under the State Council and the following documents shall be submitted: (1) an application for registration of technology export contract; (2) a copy of the technology export contract; and (3) any regulatory document certifying the legal status of the contracting parties.

According to Article 19 of the Foreign Trade Law and Articles 31, 32 and 33 of the Regulations on Technology Import and Export Administration, technology restricted from export shall be subject to licensing administration; and shall not be exported without a license. To export any technology restricted from export, an application shall be submitted to the competent foreign trade department under the State Council. When a technology restricted from export requires confidential examination by the relevant departments, the relevant regulations of the State shall be complied with. According to the provisions of the Measures for the Administration, the export license of the technology restricted from export by the provisions of Article 3 of the Measures shall be managed by the competent commerce department of the province, autonomous region or municipality where the technology exporter is located (hereinafter referred to as the "local competent

commerce department") in conjunction with the administrative department of science and technology of the province, autonomous region or municipality (hereinafter referred to as the "local administrative department of science and technology"). After receiving the application for technology export, the competent commerce department, in conjunction with the administrative department of science and technology, shall examine it, make a decision on approval or disapproval within 30 working days from the date of receiving the application, and issue a "Letter of Intent for Technology Export License of the People's Republic of China" to those approved. After obtaining the letter of intent, the applicant may begin substantive negotiation and conclude a contract for the technology export. After concluding the contract for the technology export, the applicant shall also apply for the "Technology Export License of the People's Republic of China". The competent commerce department shall examine the authenticity of the technology export contract, and make a decision on approval or disapproval of the technology export within 15 working days from the date of receiving the relevant documents. When the license is granted, the Technology Export License of the People's Republic of China is issued. The technology export contract shall come into effect on the date when the Technology Export License is issued.

According to Article 30 of the Regulations on Technology Import and Export

Administration, technologies that are prohibited from export shall not be exported.

The China Bans Export Restrictions on Export Technology (the Export Ban) provides specific provisions on technologies prohibited and restricted from export.

2.3 Penalties for violation of relevant regulations

According to the provisions of Articles 44 and 45 of the Regulations on Technology Import and Export Administration, where a technology prohibited or restricted from import and export is imported or exported without approval shall be prosecuted for criminal liability according to the provisions of the crimes of smuggling, illegal business operations, or divulging national secrets or other crimes under the Criminal Law; where such import or export is not so serious as to be prosecuted for criminal liability, penalty shall be imposed according to circumstances pursuant to the relevant provisions of the Customs Law, or the competent foreign trade department under the State Council issues a warning against it, confiscates illegal income and impose a fine of not less than 1 time but not more than 5 times the illegal income; and the competent foreign trade department under the State Council may revoke the foreign trade business license. Any act of importing or exporting technology restricted from import or export by exceeding the scope of business licensed

shall be prosecuted from criminal liability according to provisions for the crime of illegal business operation, or other crimes under the Criminal Law; where the act of import or export is not so serious as to be prosecuted for criminal liability, penalty shall be imposed according to circumstances pursuant to the relevant provisions of the Customs Law, or the competent foreign trade department under the State Council issues a warning against it, confiscates illegal income and/or impose a fine of one to three times the illegal income; and the competent foreign trade department under the State Council may suspend, and even revoke, the foreign trade business license.

It can be seen that those who export technology in violation of relevant regulations may be subject to criminal penalty, in addition to administrative punishment, and thus technologies that are prohibited or restricted from export shall be strictly managed.

3. Relevant regulations on intellectual property rights

As an important part of technological achievements, intellectual property rights such as patents and layout-designs of integrated circuits are important parts of technology export management. In addition to the above-mentioned general regulations on technology export, the state has also made more detailed regulations on the export of intellectual property rights.

In the "Working Measure on External Transfer of Intellectual Property Rights (Trial)" issued by the General Office of the State Council in 2018, the external transfer of intellectual property rights such as patent rights, exclusive rights to layout-designs of integrated circuits, computer software copyrights and new plant varieties involved in technology export and foreign investors' merger and acquisition of domestic enterprises, as stipulated in this Measure, needs to be examined in accordance with this Measure. The intellectual property rights include the right to apply for it. The transfer of intellectual property rights to foreign countries as mentioned in the Measure refers to the transfer of intellectual property rights within the territory of China by Chinese units or individuals to foreign enterprises, individuals or other organizations, including the change of the obligee, the change of the actual controller of intellectual property rights and the exclusive implementation license of intellectual property rights.

As examination mechanism, the Measure stipulates that, in technology export activities, the intellectual property rights such as patent rights, exclusive rights to layout-designs of integrated circuits, and computer software copyrights should be examined, when the export technology belongs to the technology restricted from export in the China Bans Export Restrictions on Export Technology specified by the Chinese government. After receiving the application for the

technology restricted from export from China submitted by technology exporter, the local trade authorities shall transfer the relevant documents to the local intellectual property management department in cases involving the external transfer of intellectual property rights such as patent rights and exclusive rights to layout-designs of integrated circuits. After receiving the relevant documents, the local intellectual property management department shall examine the intellectual property to be transferred and issue a written opinion, and then provide feedback to the local trade department and report to the State Council intellectual property department for the record. The local trade administrative department shall, based on the written opinion issued by the local intellectual property management department, make an examination decision in accordance with relevant regulations such as the Regulations on Technology Import and Export Administration. It can be seen that this Measure clearly stipulates the connection between the transfer of intellectual property rights related to restricted export technologies and the examination mechanism stipulated in the Regulations on Technology Import and Export Administration.

In addition, some local administrative units have also issued corresponding local laws and regulations regarding the transfer of intellectual property rights related to technology restricted by the state for export to foreign countries. For example,

according to Article 21 of the Beijing Intellectual Property Protection Regulations stipulates that in cases where the transfer of technology restricted by the state for export by units or individuals involves the transfer of intellectual property to foreign countries, the municipal departments such as commerce, intellectual property, science and technology, agriculture and rural areas, and landscaping should conduct an examination in accordance with the provisions. If the external transfer of intellectual property rights is involved when foreign investors merge enterprises in Beijing, and the merger falls within the scope of safety review stipulated by the state, the municipal departments such as intellectual property, copyright, agriculture and rural areas, landscaping shall cooperate with the relevant departments of the State Council to carry out the examination work. Article 16 of the Shanghai Intellectual Property Protection Regulations stipulates that, according to state regulations, regarding the external transfer of intellectual property rights involved in technology exports, the municipal intellectual property department shall cooperate with relevant departments such as the city's economic informatization, commerce, and technology to formulate and improve transfer examination procedures and rules, standardize the order of intellectual property transfer to the outside, and maintain national security and major public interests; and regarding the external transfer of intellectual property rights

involved in the merger and acquisition of domestic enterprises by foreign investors, the relevant departments of the city shall cooperate with the relevant national departments to carry out the examination. In addition, according to Article 19 of the Chinese Patent Law, any unit or individual who applies for a patent for an invention or utility model completed in China to a foreign country shall submit it to the Patent Administration Department of the State Council for confidentiality examination in advance. The procedures and deadlines of confidentiality examination shall be implemented in accordance with the regulations of the State Council. According to the Implementation Rules of the Patent Law, the invention or utility model completed in China refers to the invention or utility model of which substantive content of the technical solution is completed in China. If the invention involved in a patent application is completed in China but has not been submitted to the Patent Office for confidentiality examination before applying in foreign country, the Patent Office may reject the patent application. In addition, if a patent is not submitted to the patent office for confidentiality examination before applying in foreign country, it also constitutes a reason for the patent to be declared invalid.

4. Summary

Above, we have introduced the management system and provisions on the administration of technology export as well

as relevant regulations on intellectual property rights of technology export in China. Based on these regulations, we suggest that the local legal person in China may manage the technology export and technology exchange activities between the local legal person and the head office from the following aspects.

(1) According to the regulations such as China Bans Export Restrictions on Export Technology (the Export Ban), it is necessary to clarify whether the technologies newly developed by local legal persons in China are prohibited, restricted or free to export.

(2) Regarding technologies that are freely exported, registration should be processed with the competent foreign trade department under the State Council. Regarding technologies that are subject to export restrictions, an application shall be submitted to the competent foreign trade department under the State Council. Technologies that are subject to export restrictions need to be subject to confidentiality examination by relevant departments and shall be implemented in accordance with relevant state regulations. After obtaining the "Letter of Intent for Technology Export License of the People's Republic of China", a technology export contract can be signed with the export target. After signing the technology export contract, it is also necessary to apply for the "Technology Export License of the People's Republic of China". After obtaining the "Technology Export License of the People's

Republic of China", the relevant technology can be exported. Technologies that are prohibited from export shall not be exported.

(3) Regarding the transfer or export of intellectual property rights, in addition to fulfilling the above obligations, it needs to be examined by relevant departments in

accordance with the provisions of corresponding national and local laws and regulations. The patent application should also be subject to confidentiality examination, otherwise the patent application may be rejected or invalid.

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If you need special legal opinions, please consult our professional consultants and lawyers.

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Dr. Chunshi FENG is experienced in patent filing, office action responding, reexamination, invalidation, patent administrative litigation, patent analysis etc., and he focuses mainly in patent cases in technical areas of computer software and hardware, electrical and electronics, automation, mechanics, motor vehicle etc. Since January 2009, Dr. FENG has handled 1000+ patent cases on behalf of clients from China and abroad.