
New Rules on the Registration of Technology Import and Export Contracts

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China's Ministry of Commerce (MOFCOM) issued new administrative rules on the registration of technology import and export contracts, the Measures on the Administration of the Registration of Technology Import and Export Contracts (the New Rules), on February 1, 2009. The New Rules replace the Administrative Rules on the Registration of Technology Import and Export Contracts (the Administrative Rules), promulgated by MOFCOM's predecessor, the Ministry of Foreign Trade and Economic Cooperation, on January 1, 2002, and will take effect March 3, 2009. Both the New Rules and the Administrative Rules are supplementary regulations issued by MOFCOM to facilitate implementation of the Technology Import and Export Administrative Regulations (the Regulations), a regulation governing import of technologies into, and export of technologies from, the People's Republic of China, in effect since December 10, 2001.

Under the New Rules, most technology transfer and technology license contracts, including patent transfer contracts, patent application rights transfer contracts, patent implementation license contracts, trade secrets license contracts, technology service contracts and other contracts with technology trade provisions, with respect to freely tradable technology, continue to be subject to a registration requirement. This covers a broad range of technology license and transfer contracts between multinationals and their China-based subsidiaries or third parties, under which the China-based subsidiaries or third parties serve as the contract registrants. Contracts not covered by the New Rules include contracts with respect to restricted technologies under the Catalogue of Technologies Prohibited or Restricted to be Imported issued by MOFCOM on October 23, 2007, which are subject to MOFCOM's prior approval; trademark license contracts, which are subject to registration in the Trademark Bureau of the State Administration for Industry & Commerce; and technology license or transfer contracts in which the technology is a capital contribution, submitted as attachments to wholly foreign-owned enterprise and joint venture establishment applications, which are subject to foreign investment approval by MOFCOM or its local branch.

The new rules, for the first time, set a time limit for the registration of technology import and export contracts. All contracts subject to registration, except those providing for a royalty payment, are required to be registered online within 60 days after the contract's effective date. Contracts subject to royalty payments are to be registered within 60 days after the base amount for the first installment

of the royalty is accrued. The registration is required to be amended whenever the base amount of each subsequent royalty payment is accrued. The New Rules further require the registrant to amend the registration whenever there is a change to the contract. The New Rules clearly provide that the registration requirement does not affect the validity of a contract between private parties in freely tradable technologies which are effective upon execution, thus making the registration requirement an ex post facto registration rather than a prior approval requirement.

MOFCOM is the authority in charge of the online registration of technology import and export contracts. After completing the contract information online, the registrant is required to submit the registration application, a copy of the technology transfer or license contracts, and the incorporation documents of the contract parties to MOFCOM or its local branch to complete the registration process. Completion of the process results in issuance of a Technology Import/Export Certificate. The New Rules clarify the scope of contracts to be submitted to MOFCOM. Such contracts include contracts signed under projects governed by the “Catalogue on Projects Subject to Government Verification” and government invested projects subject to central government approval. Other contracts shall be submitted to local MOFCOM branches. The technology trade department of MOFCOM or its counterpart in MOFCOM's local branch (the Authority) is responsible for the collection of registration documents and the issuance of Technology Import/Export Certificates. The Authority does not conduct substantive review of the registration documents. It can challenge the registration only on a very limited basis, e.g., the registered technology is subject to restriction or the contract information submitted online is inconsistent with the contract provisions. Structuring the technology license or transfer merely to avoid substantive review by the Authority is unnecessary under the New Rules.

WilmerHale advises clients on their technology transfer or license transactions in China. For background on the old Administrative Rules and the Regulations, please see Lester Ross, et al., “China’s New Regulation on Technology Imports and Exports,” 8 International Trade Law & Regulation No. 3, 97-103 (2002).

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