

Technology M&A

Contributing editors

Arlene Arin Hahn and Jason Rabbitt-Tomita



2019

GETTING THE
DEAL THROUGH 

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Technology M&A 2019

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White & Case LLP

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For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

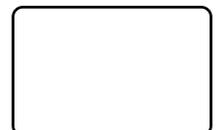


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Preface

Technology M&A 2019

First edition

Getting the Deal Through is delighted to publish the first edition of *Technology M&A*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Getting the Deal Through titles are published annually in print and online. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Arlene Arin Hahn and Jason Rabbitt-Tomita, the contributing editors, for their assistance in devising and editing this volume.

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DEAL THROUGH

London
October 2018

China

Vivian Tsoi, Siyuan Pan, Xiaofeng Gong and Yan Yan

White & Case LLP

Structuring and legal considerations

1 What are the key laws and regulations implicated in technology M&A transactions that may not be relevant to other types of M&A transactions? Are there particular government approvals required, and how are those addressed in the definitive documentation?

The Chinese government regulates technology transactions through several laws and regulations. The key laws and regulations include the following.

Transfer of technology

The Contract Law, 1 October 1999

This law defines ‘technology transfer agreements’ to include patent transfer agreements, patent application right transfer agreements, know-how transfer agreements and patent licence agreements. The law sets out rights and obligations of the transferor and transferee under technology transfer agreements, as well as the liabilities for breach of contract. For example, the law provides that the transferor shall guarantee that it is the legal owner of the technology to be transferred, and that such technology be complete, accurate, valid and able to achieve the goals agreed to by the parties.

Pursuant to this law, the transferee must keep confidential the ‘secret’ part of the technology to be transferred within the agreed scope and term. If the transferor fails to transfer the technology as agreed, it must return part or all of the royalties it received for the transfer and will be liable for breach of contract. If the transferee fails to pay royalties as agreed, it will have to pay the liquidated damages set forth in the agreement. If the transferee fails to do so, it must terminate using the patents or know-how, return relevant technical materials and be liable for breach of contract.

In addition, the law provides that any technology contract that illegally monopolises technology (see below), impairs technological development (see below) or infringes a third party’s technology, is invalid.

The Interpretation of the Supreme People’s Court concerning Some Issues on Application of Law for the Trial of Cases on Disputes over Technology Contracts, 1 January 2005

This interpretation further explained the meaning of ‘illegally monopolises technology’ and ‘impairs technological development’ in the Contract Law described above. Applicable situations include:

- restricting the other party’s technology development based on the transferred technology or use of any improved technology;
- prohibiting the other party from obtaining similar or competing technology from third parties;
- restricting the other party from reasonable implementation of the technology;
- forcing the other party to accept additional conditions for the purpose of implementing the technology;
- unreasonably restricting sources of raw materials, accessories or equipment of the other party; or
- prohibiting the other party from questioning the validity of the technology.

The Patent Law, 1 April 1985

According to this law, patent and patent application rights can be transferred. To transfer the patent or the patent application rights, parties need to enter into a written contract and apply with the State Intellectual Property Office (SIPO) for registration. The transfer will be effective on the date of registration.

The Copyright Law, 1 June 1991

According to this law, copyrights, other than rights of publication, authorship, alteration and integrity, may be transferred. To transfer copyrights, the parties must enter into a written contract, and they may choose to file such contract with the National Copyright Administration or its local branch.

The Trademark Law, 1 March 1983

The law provides that, to transfer registered trademarks, parties need to enter into a transfer agreement and apply to the Trademark Office of the State Administration for Industry and Commerce (the Trademark Office) for approval. The Trademark Office will make a public announcement once it approves the transfer and the transferee will have title to the registered trademark on the date of the announcement.

The Computers Software Protection Regulation, 1 January 2002, and the Computer Software Copyright Registration Measures, 20 February 2002

According to these two regulations, to transfer computer software the parties must enter into a written contract, and they may choose to register said contract with the China Copyright Protection Centre.

The Integrated Circuit Layout Design Protection Regulations, 1 October 2001

According to the regulation and its implementing rules, to transfer an integrated circuit layout design, the parties must enter into a written contract and register such contract with the SIPO. The transfer will be effective upon the date of registration. In addition, if a Chinese entity intends to transfer its layout design to a foreign person, it shall submit such transfer to relevant governmental authorities for approval when applying for the transfer contract registration.

Cross-border transfer of technology

The Special Management Measures (Negative List) for the Access of Foreign Investment, 28 July 2018

The Negative List sets out industries that are restricted or prohibited from receiving foreign investment. Foreign persons may not invest in certain industries where the Chinese government does not wish to disclose relevant technologies or sensitive information, such as the development and production of precious plant or animal species, production of traditional Chinese medicine, genetic diagnosis and therapy, and nuclear ore and fuel production.

The Notice of the General Office of the State Council on the Establishment of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, 3 February 2011 (the National Security Review Notice)

This notice provides that the government may conduct a national security review of a foreign investor's acquisition of domestic enterprises that have key technologies, important energy and resources, or produce material equipment that may have national security concerns. If the government considers that the acquisition may have material adverse impact on Chinese national security, the Ministry of Commerce (MOFCOM) and other relevant authorities have the right to terminate the transaction or ask the acquirer to dispose relevant equity interests or assets to eliminate relevant adverse effects.

The Foreign Trade Law, 1 July 1994

According to this law, the Chinese government divides technologies into three categories: (i) technology that may be freely imported or exported, (ii) technology that is restricted from import or export, and (iii) technology that is prohibited from import or export. Companies that import or export technologies in category (i) must register the import or export contract with MOFCOM or its designated department. Companies that import or export restricted technologies in category (ii) must obtain permits from MOFCOM or other relevant authorities. In addition, the state may restrict or prohibit the import or export of certain technology due to other reasons including the protection of national security, social public interest, or human health or safety; exhausted natural resources; and maintaining the state's international financial status or balance of international payments. The law further provides that the state may adopt any measure to regulate the import to export of technology relating to nuclear, weapons and other military supplies or for the purpose of maintaining international peace and security during wartime.

Regulations on Administration of Import and Export of Technologies, 1 January 2002

This regulation provides that MOFCOM will categorise technologies that are restricted or prohibited from import or export, which categories MOFCOM may revise from time to time. Contracts for importing or exporting restricted technologies may only take effect when the import or export permit is issued, while contracts for importing or exporting unrestricted technologies may take effect upon signing. This regulation further provides that technology import or export contracts must not contain provisions prohibiting or restricting competition.

The Implementing Rules of the PRC Sino-Foreign Equity Joint Ventures Law, 20 September 1983

These rules regulate technologies that may be contributed by foreign investors into joint ventures and technologies that joint ventures may obtain from their shareholders or third parties. The rules require that imported technology be advanced and competitive such that it improves functionality and quality of the joint venture's products, and increase production efficiency or save energy. Further, the technology transfer agreement entered into by the joint venture must meet specific requirements, including:

- the royalties must be fair and reasonable;
- unless otherwise agreed to by the parties, the transferor cannot restrict the area, amount and price at which the transferee exports its products;
- the term of the agreement cannot exceed 10 years;
- the transferee shall have the right to continue using the transferred technology after the expiration of the term of the agreement;
- the conditions for each party to exchange improved technology must be equal;
- the transferee shall have the right to purchase equipment, devices, parts and raw materials using resources as they think fit; and
- the agreement cannot contain any unreasonable restrictions that Chinese law prohibits.

Laws and regulations on the transfer of technology in certain industries

In addition to the general technology transfer regulations mentioned above, the Chinese government has enacted special rules regulating

the transfer of technologies in certain industries, including in the areas of medical, aviation, health food, chemicals, biological products, nuclear and military technology.

For technology transfers subject to governmental approval, parties usually include obtaining relevant approval as a condition precedent to the closing of the transaction.

2 Are there government march-in or step-in rights with respect to certain categories of technologies?

See question 1. According to the National Security Review Notice, if the government considers any acquisition by a foreign investor of domestic enterprises (including the acquisition of a domestic company having key technology) to have a material adverse impact on national security, MOFCOM and other relevant authorities have the right to terminate the transaction, and ask the acquirer to dispose relevant equity interests or assets to eliminate relevant adverse effects. The national security review can be initiated by the foreign investor, relevant department under the State Council, relevant industry association, other enterprises in the same industry or in the upstream or downstream industries, or by the review authority itself (ie, an inter-ministerial joint meeting).

In addition, according to the Foreign Trade Law, the government may restrict or prohibit the import or export of certain technology in order to:

- protect national security or public policy;
- protect human health or safety, animal or plant life, and environmental health;
- implement gold or silver import or export related measures;
- protect scarce resources or exhausted natural resources;
- limit the market of the export destination;
- maintain a trading order;
- establish a certain domestic industry;
- protect domestic agriculture, stock farming or fishery industry; or
- maintain the state's international financial status or balance of international payments.

The law further provides that the state may adopt any measure to regulate the import or export of technology relating to nuclear, weapons and other military supplies to protect national security, or adopt any measure to regulate the import or export of technology for the purposes of maintaining international peace and security during war.

3 How is legal title to each type of technology and intellectual property asset conveyed in your jurisdiction? What types of formalities are required to effect transfer?

Patent and patent application rights

According to the Patent Law, to transfer patent or patent application rights, the parties need to enter into a written contract and apply with SIPO for registration. The transfer will be effective on the date of registration.

Copyright (including computer software)

According to the Copyright Law, to transfer a copyright, the parties need to enter into a written contract, which shall include the name of the work; type of the rights being transferred and the relevant territory; consideration and payment method and date; and liabilities for breach of contract. The Implementing Rules of the Copyright Law provide that parties may choose to file the copyright transfer agreement with the National Copyright Administration or its local branch, but such filing is not mandatory. The transfer will be effective on the effective date of the transfer contract.

Trademark

The Trademark Law provides that, to transfer registered trademarks, the parties need to enter into a transfer agreement and apply with the Trademark Office for approval. The Trademark Office will make a public announcement once it approves the transfer and the transfer will be effective upon such announcement.

Integrated circuit layout design

According to Integrated Circuit Layout Design Protection Regulations and its implementing rules, to transfer an integrated circuit layout

Update and trends

Artificial intelligence, blockchain and cryptocurrency are subject to ongoing consideration by legal professionals and scrutiny by regulators. When acquiring or selling any such technologies, practitioners should work closely with local counsel to understand the potential ramifications of ongoing development of the law and regulation of these areas.

design, the parties need to enter into a written contract and register such contract with the SIPO. The transfer will be effective on the date of registration. In addition, if a Chinese entity intends to transfer its layout design to a foreign person, it shall submit approval of such transfer issued by relevant authorities when applying for the transfer contract registration.

Other technology

Chinese law does not provide specific formalities for the conveyance of non-registered technologies, such as know-how. Usually, such technology can be transferred in the manner and on the date as agreed to by the parties.

Due diligence

4 What are the typical areas of due diligence undertaken in your jurisdiction with respect to technology and intellectual property assets in technology M&A transactions? How is due diligence different for mergers or share acquisitions as compared to carveouts or asset purchases?

With respect to technology and IP assets in technology M&A transactions, to help identify issues that may affect the valuation or closing of the transaction, due diligence normally focuses on the following areas:

- title and encumbrances of the technology and IP assets (eg, whether the IP assets are owned by the target or licensed to the target by a third party, whether the intellectual property is developed by the target or acquired from a third party and whether the IP assets are subject to any pledge);
- IP-related agreements, including relevant employee invention assignment or work for hire provisions in employment contracts, IP licences or assignment agreements, and IP-related provisions in commercial contracts;
- IP disputes and infringement claims, including all past, pending and threatened infringement and other IP-related claims and proceedings;
- IT assets (eg, software systems and support services); and
- data privacy, including the target's internal policies and practices on the collection, use, transfer and protection of personal information.

For carveouts or asset purchases, the parameters of due diligence will be the technology and IP assets to be acquired. Due diligence is also necessary to properly define and describe the scope of assets, and rights and liabilities pertaining to such assets, in the asset purchase agreement.

In a share acquisition, in addition to the typical due diligence areas for an asset transfer, the buyer should review, from a commercial standpoint, whether the target has all the technology and intellectual property necessary for operation of its business as a going concern, after closing. Particular care must be paid to the IT-related agreements to identify change of control provisions that may be triggered by the contemplated transaction.

5 What types of public searches are customarily performed when conducting technology M&A due diligence? What other types of publicly available information can be collected or reviewed in the conduct of technology M&A due diligence?

Public searches at the following online databases or tools are customarily performed when conducting technology M&A due diligence in China:

- the National Enterprise Credit Information Disclosure System, maintained by the State Administration for Industry and Commerce, for corporate particulars of the target;

- the Patent Search and Analysis System of the SIPO for registered patents and published pending patent registrations;
- the China Trademark Database of the China Trademark Office (TMO) for registered trademarks and pending trademark registrations; and
- the '.cn' domain name database of China Internet Network Information Centre for '.cn' domain names.

The buyer may also run a public search at the website of the Copyright Protection Centre of China (CPCC) for registered copyright works (including software). Under Chinese law, copyright is an automatic right, and is not created upon registration. Many copyright owners (especially software owners) nonetheless still register their copyright works with the CPCC as evidence of title in case of potential infringement claims.

6 What types of intellectual property are registrable, what types of intellectual property are not, and what due diligence is typically undertaken with respect to each?

Registerable intellectual property includes patents (ie, invention, utility model and industrial design), copyrights, trademarks, plant variety rights and layout designs of integrated circuits. Non-registrable intellectual properties include trade secrets and know-how. In China, copyright works can be registered with the CPCC, but registration is not a prerequisite for the creation of a copyright.

To verify the title of registrable intellectual property, the buyer should request registration certificates or receipts of acceptance of registration applications for registered and pending registrations. Public searches with relevant registration authorities (eg, the SIPO and TMO) are normally performed to independently verify the title of the registered intellectual property.

In terms of non-registrable intellectual property, the buyer may review confidentiality policies, non-disclosure agreements, IP assignments, and work-for-hire provisions under relevant contracts, to form a general view on ownership status of key unregistered intellectual property.

7 Can liens or security interests be granted on intellectual property or technology assets, and if so, how do acquirers conduct due diligence on them?

Yes, certain intellectual property (ie, registered trademarks, patents and copyrights) can be pledged under Chinese law. Pledges over registered trademarks, patents and copyrights are perfected by registration of such pledge with the competent authorities (ie, the TMO, SIPO and CPCC, respectively). The release of pledges is also effectuated upon registration of the release with said authorities. The time required for completing the process of perfecting or releasing pledges varies depending on the type of pledged intellectual property. For instance, perfecting or releasing a pledge of patents with the SIPO will normally take a week.

If there is any encumbrance, such as pledge, over intellectual property or technology assets that are to be acquired, the release of such encumbrances, if required, is typically effected on or prior to closing and after the signing of the relevant asset or share purchase agreement.

8 What due diligence is typically undertaken with respect to employee-created and contractor-created intellectual property and technology?

For employee-created and contractor-created intellectual property and technology, the buyer would need to review the intellectual property ownership and assignment or work for hire clauses under relevant employment or development contracts. Public searches will also be undertaken to verify the current title of those intellectual properties if being registered or pending registration with the competent authorities.

Under Chinese law, title to copyrights and patents developed or created by the target's employees in the course of performing their job duties or by utilisation of materials and tools provided by the target automatically vests in the target. However, unless otherwise agreed, ownership of contractor-created copyrights and patents automatically vests in the contractor. Assignment of title of contractor-created patents to the target is deemed effective upon registration of the

assignment with the SIPO. No registration formalities are required for the assignment of copyrights.

9 Are there any requirements to enable the transfer or assignment of licensed intellectual property and technology? Are exclusive and non-exclusive licences treated differently?

The transfer or assignment of licensed intellectual property and technology by its owner does not require consent of the licensee. Note that transfers or assignments of trademarks and patents are effectuated upon registration of such transfer or assignment with the TMO and SIPO, respectively. The transfer of registered patents or pending patent registrations by a Chinese individual or entity to a foreign individual is deemed a technology export, which may be subject to certain approval or filing requirements under the Chinese export control regime.

The transfer or assignment by a licensee of its rights and obligations pertaining to licensed intellectual property and technology normally requires consent of the licensor, unless the licence agreement states otherwise.

There is no differentiation between exclusive and non-exclusive licences in connection with the above-mentioned transfer or assignment.

10 What types of software due diligence is typically undertaken in your jurisdiction? Do targets customarily provide code scans for third-party or open source code?

Software due diligence undertaken by the buyer's lawyers will normally be focused on the title and encumbrances over the target's software copyright. In China, it is still not common for a target to provide code scans for third-party or open source code as part of due diligence.

11 What are the additional areas of due diligence undertaken or unique legal considerations in your jurisdiction with respect to special or emerging technologies?

Data security and protection has become an increasingly hot-button area for due diligence with respect to some emerging technologies (eg, big data). The potential buyer must have a thorough understanding of the internal policies and practices of the target on the collection, processing, storage, and transfer of personal data and the target's privacy and information security measures. Data privacy experts may be engaged to conduct standalone data privacy due diligence on the target to assess the target's compliance with privacy and data security requirements and standards, and to identify potential risks that may affect the valuation of the target or create any residual liabilities to the buyer.

Purchase agreement

12 In technology M&A transactions, is it customary to include representations and warranties for intellectual property, technology, cybersecurity or data privacy?

It is customary to include representations and warranties for intellectual property, technology, cybersecurity and data privacy. For intellectual property and technology, representations and warranties usually

cover title or the right to use, no infringement, full disclosure on restrictions and no breach of material contracts. For cybersecurity and data privacy, representations and warranties will at least cover compliance with applicable laws and regulations and industry guidelines.

13 What types of ancillary agreements are customary in a carveout or asset sale?

Customary ancillary agreements typically include transitional trademark licences, cross-licence agreements and transition services agreements.

14 What kinds of intellectual property or tech-related pre- or post-closing conditions or covenants do acquirers typically require?

Typical intellectual property or tech-related pre-closing conditions include signing assignment agreements for intellectual property or inventions, obtaining consents or waivers for asset transfers, correcting chain of title issues, obtaining necessary governmental approvals, and submitting applications to the Chinese registration authorities for the transfer of patents, trademarks, copyright and integrated circuit layout designs. Typical post-closing conditions or covenants include completion of registration of IP transfers (as it generally takes several months for the registration to be completed). Whether remediation of source code issues will be a pre-closing or post-closing condition depends on the commercial negotiations.

15 Are intellectual property representations and warranties typically subject to longer survival periods than other representations and warranties?

The statute of limitations for patent, trademark and copyright infringement under Chinese law is two years. The survival period for representations and warranties generally ranges between one and two years.

16 Are liabilities for breach of intellectual property representations and warranties typically subject to a cap that is higher than the liability cap for breach of other representations and warranties?

The liability cap for breach of IP-related representations and warranties is typically the same as the general liability cap for breach of non-fundamental representations and warranties. The general liability cap can range from a certain percentage of the purchase price to 100 per cent of the purchase price.

17 Are liabilities for breach of intellectual property representations subject to, or carved out from, de minimis thresholds, baskets, or deductibles or other limitations on recovery?

Liabilities for breach of IP representations and warranties are generally subject to the same de minimis thresholds, baskets or deductions (or other limitations) as the other representations and warranties, unless buyer has a specific concern regarding the target's intellectual property.

WHITE & CASE

Vivian Tsoi
Siyuan Pan
Xiaofeng Gong
Yan Yan

vtsoi@whitecase.com
span@whitecase.com
xiaofeng.gong@whitecase.com
yan.yan@whitecase.com

Citic Square, 39th Floor
1168 Nanjing Road (West)
Shanghai, 200041
China

Tel: +86 21 6132 5900
Fax: +86 21 6323 9252
www.whitecase.com

18 Does the definitive agreement customarily include specific indemnities related to intellectual property, data security or privacy matters?

The parties may negotiate specific indemnities relating to intellectual property. A target's data security or data privacy compliance issues has increasingly become a point for negotiation of specific indemnities as Chinese law compliance on these two issues has become more stringent. The parties will focus on indemnification for regulatory fines imposed on the target, or any compliance issues that may affect any regulatory permits issued to the target for operations affecting data security or data privacy.

19 As a closing condition, are intellectual property representations and warranties required to be true in all respects, in all material respects, or except as would not cause a material adverse effect?

Generally, all representations and warranties, including with respect to intellectual property, are brought down at closing, subject to a materiality qualifier. The common practice is to have a materiality qualifier.

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