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HFG @INTA Annual Meeting, speech for IPWG at the Italian Embassy in China

Dear readers,

Welcome back to our appointment with the hottest legal matters in China.

For this issue we offer you the second part of the analysis about the New Company Law in China: this part describes the new provisions of the Company Law that will have a significant impact on the officers (legal representative, directors, supervisors) and senior managers of LLCs, with, as in Part I, a particular regard to foreign-invested enterprises (FIEs).

The second article regards a recent judgement released by Guangzhou Internet Court ruling in favor of a super IP rights owner, Ultraman, victim of copyright infringement perpetrated by a generative AI platform that created images substantially similar to the copyrighted work.

The next contribution deepens the topic of the tremendous increase of copyright registrations in China: in February 2024 the National Copyright Administration of China (NCAC) released the relation about copyright registration in 2023: according to it, the total number of copyright registrations reached 8,923,901, a year-on-year increase of 40.46%.

As per IP News, The China National Intellectual Property Administration (CNIPA) and the German Patent and Trade Mark Office (DPMA) have jointly decided to extend their Patent Prosecution Highway (PPH) pilot program for another three years from January 2024. The program is also extended with the Danish Patent and Trademark Office (DKPTO) and with the National Institute of Industrial Property of Chile (INAPI), for both Countries for another five years.

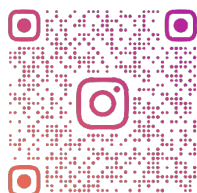
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COMPANY LAW

Part Two: Legal representative, directors, supervisors, and senior managers



In this Part II we will describe the new provisions of the Company Law that will have a significant impact on the officers (legal representative, directors, supervisors) and senior managers of LLCs, with, as we did in Part I, a particular regard to foreign-invested enterprises (FIEs).

Legal representative

The new Company Law will bring a significant change, from a practical point of view, in relation to the choice of the legal representative of LLCs, affecting more particularly FIEs. Whilst the law currently provides for that only the chairman or the general manager of an LLC can be appointed legal representative, pursuant to the new Company Law such position may be held by either one of the directors or a manager who “represents the company in executing company affairs”.

On the one hand, the choice is, therefore, wider for the shareholders, but, on the other hand, it must fall onto a person who is actually involved in the management of the company’s activities. For foreign-invested LLCs, this may mean the end of the commonly adopted practice to appoint an individual overseas as legal representative (just to fill in the position) without such a person being actually involved with the decision-making process of the company.

The new Company Law also states that the resignation of the legal representative from the position of director or manager will also determine the end of office as legal representative. Under the provisions currently in force, a legal representative would remain in office until a successor is appointed. This rule sometimes gives rise to situations where a person, having resigned as director or manager and, therefore, no longer holding any relationship with the company, would still be formally the company’s legal representative.

The new provisions now require that a successor be appointed within 30 days. However, they are silent on the event (and consequences) where the appointment of a replacement does not occur within the prescribed term.

Directors

As far as directors are concerned, the new Company Law also introduces a few significant changes.

From 1st July 2024 the board of directors of an LLC shall have at least three directors and there will no longer be an upper limit to the number of directors (currently capped at 13). Like in the law currently in force, smaller scale companies or companies with a small number of shareholders will still have the possibility to appoint a sole director (instead of a board of directors).

The new Company Law also states that, if a company has not less than 300 employees and there is no employee representative on the board of supervisors, at least one employee representative is required to sit on the board of directors.

This is a significant change and for relatively large foreign-invested companies this provision will require adjustments to be made to their organisation and governance structure, especially where the composition of the board of directors has been originally designed to specifically reflect the influence of the shareholders on the company (as it is, typically, in joint venture companies).

The presence of an employee director in the board may also raise concerns as to the confidentiality of certain issues dealt with by the directors and that may relate to or affect the company’s employees.

We would, therefore, expect that companies will rather opt to have employee representatives sitting on the board of supervisors, and avoid to have one appointed as director.

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The new law has also slightly amended the distribution of functions and powers between the shareholders' meeting and the board of directors. Unlike in the law currently in force, the function and power of "deliberating and approving annual financial budget plans and final account plans of the company" is not listed as an item of the functions and powers attributed to the shareholders' meeting (thus - by exclusion - attributing the same to the board of directors). Such an exclusion may be seen as surprising because many corporate legal systems actually consider the power to decide over the budget and approve the financials of the company as a prerogative of the shareholders. The articles of association of the company can, of course, provide for otherwise.

Such a provision consistently goes in the direction that seems to be followed by the new law, that is giving more powers (and a higher level of liability associated with such powers) to the directors.

In this same direction, for example, the new law now considers the directors liable for

- i** any loss caused to the company for not complying with their duty to call for payment of the subscribed capital by the shareholders and to send a notice of forfeiture of the shareholders' rights to the defaulting shareholders that have not remedied their default within the grace period assigned to them, or
- ii** for losses caused for not calling the payment of the capital subscription ahead of the agreed term in the event of insolvency of the company, or
- iii** for losses caused to the company as a consequence of providing financial assistance for others to acquire shares in the company, or
- iv** for losses that are caused to the company or its creditors in a liquidation procedure where the directors appointed as liquidators have not fulfilled their duties in a timely manner, or
- v** for losses caused to the company by an illegitimate reduction of capital.

Most of these provisions stating liabilities onto the directors are also applicable to the supervisors and senior managers of an LLC.

The officers and senior personnel of a company should, therefore, start familiarising themselves with the latest requirements relating to the liability assigned to them by the new Company Law.

In this regard, the new law expressly mentions the possibility that a company takes up insurance for the liability of its directors. So called "D&O policies" (i.e. directors and officers insurance coverage) are likely to become more and more commonly used and popular products once the new law comes into force.

Fiduciary duties

The new Company Law adds some indications as to the contents of the fiduciary duties of the directors (as well as of those of the supervisors and senior managers). Such duties mainly consisting in a "duty of loyalty" and a "duty of diligence".

Under the duty of loyalty, directors (as well as supervisors and senior managers) will be required to take measures to avoid conflicts between their own interests and the interests of the company, and not to use their powers to pursue improper benefits. Under the duty of diligence, directors (as well as supervisors and senior managers) will be required to exercise such reasonable care as is normally expected of managers in the best interests of the company when performing their duties.

As a specification of such duties, directors (as well as supervisors and senior managers), will be required to report any contracts and other transactions to which they may be a party with the company (including those of their close relatives and affiliates) to the shareholders' meeting or the board of directors and seek its approval as required under the company's articles of association.

Similarly, they will be required not to take advantage from their positions to seek business opportunities belonging to the company for themselves or other persons, unless the company cannot pursue such opportunities, or such a situation is reported to and (as required under the articles of association) approved by the shareholders' meeting or the board of directors.

More generally, they will also be required not to engage in the same type of business as that of the company, whether for themselves or other persons, without reporting such a situation and (as required under the articles of association) getting approval from the shareholders' meeting or the board of directors.

Directors, supervisors, and senior executives may, therefore, have to re-examine their position vis-à-vis the company so as to avoid any actual or potential conflict of interests and consequent liability.

Although the new law has made improvements in defining the fiduciary duties of the directors (and other officers and senior managers of a company), such concepts will still have to be further defined by judicial interpretation and application.

Finally, the definition in greater details of the fiduciary duties of the directors, may also have an effect on the commonly adopted structure of foreign-invested LLCs.

As a matter of fact, some of the directors of an LLC are often individuals residing abroad (often working for one of the shareholders of the LLC, a company of the same group, or the regional headquarters) and are barely involved with the day-to-day management and decision-making process of the Chinese LLC.

Considering that the liabilities of the directors are now being more precisely defined by the law, and that such provisions are based on the assumption that liabilities are a consequence of actions taken and decisions made, it may be advisable to appoint individuals as directors (or senior managers) who are actively involved with the operations and affairs, and relevant decision-making process, of the Chinese LLC.

The new law also specifically provides for the “actual controller” or the “controlling shareholder” of a company will be subject to the same fiduciary duties normally applying to the officers of the company, where such persons actually hold a conduct that is typical of that of a director (so-called “de facto director”, that is a person who, regardless of any title he or she might be using or appointed with, actually behaves like a director, or “shadow director”, that is a person whom has not been appointed as a director but whose influence or wishes normally determine the conduct and decisions of the directors).

Consequently, “controlling shareholders” or “actual controllers” that determine, or are actually involved in, the company’s decision-making process may be held directly responsible when their conduct can be associated with that of a director (or senior manager) and claims have been brought forward against them by the company, other (minority) shareholders, officers of the company or creditors of the company.

The application and consequences of these provisions are not merely theoretical since, as a matter of fact, many foreign-invested LLCs are organised under a structure where the directors (often the sole director) operate under a close supervision (if not the direction and control) of the foreign shareholder(s) who ultimately determine the level and scope of authority of the management organ of the company, sometimes to an extent where the management organ may be considered as not actually operating and deciding in full autonomy.

Dismissal of directors

The new Company Law introduces a provision regarding remedies for dismissed directors by giving the right to a director whom has been dismissed without any justifiable reason before the end of the term to ask the company for compensation.

The understanding of shareholders has always been that, under the law currently in force and the current practice (at least as far as FIEs are concerned), no compensation has

to be given in the event a director is removed from office before the expiry of the term.

The new provision will require that shareholders refrain from removing directors at will or, at least, that they motivate a decision for earlier removal of directors, so as to avoid the company being requested compensation for unjustified dismissal.

This new provision raises an additional issue in the event a dismissed director also serves the company under an employment contract (for example, as general manager). In the event of an unjustified dismissal as director (which, presumably, will also determine the end of the employment relationship) the dismissed director may now be entitled to claim compensation (under the new provisions) and severance payment (under the labour contract law provisions).

The new Company Law does not provide any element of coordination between the two situations and, probably, we will have to wait for interpretation measures to be issued in the future or a judicial practice to be established by courts.

Supervisors

The current law allows LLCs to have only one supervisor, or two supervisors, instead of a board of supervisors, where they are relatively small in scale or have a relatively small number of shareholders. The new Company Law now provides that an “small scale” LLC can decide to have one supervisor only (but not two anymore) instead of a board of supervisors or even no supervisor at all if the shareholders so approve.

The requirement of having a board of supervisors can also be avoided in an LLC where the company opts for the establishment of an audit committee.

An audit committee is an organ of control that is to be formed only by members of the board of directors (including employee representatives) and shall exercise the same powers of a board of supervisors. The new provisions were probably designed with in mind the governance structure of companies, such as listed companies or companies operating in finance, where the establishment of an audit committee is already required.

As far as LLCs are concerned, having an internal committee may create problems in the governance structure as the members of the committee would be called to supervise the activities of the company, and in particular of the board of directors (of which they are members too), thus giving rise to situations of conflict of interests.

IP CHINA

Ultraman defeats AI generated copies



Recently, Guangzhou Internet Court released its judgement ruling in favor of a super IPR, Ultraman, victim of copyright infringement perpetrated by a generative AI (“GAI”) platform that created images substantially similar to the copyrighted work.

Herein brief details of the case.

Plaintiff

Shanghai Character License Administrative Co., Ltd. (上海新创华文化发展有限公司 , exclusive licensee of Tsuburaya Productions, the IPR owner of Ultraman series IP)

Defendant

A generative art platform website, alias in the decision as “TAB”

Cause of Action

Copyright Infringement (Infringement against Right of Reproduction, Right of Adaptation, Right of Network Dissemination of Information)

Claim

1. An order that the defendant shall immediately stop generating infringing Ultraman images and remove the Ultraman materials involved from their training dataset, including the defendant shall take reasonable measures to prevent TAB from generating images that are identical or similar to the Ultraman works at issue.
2. An order that the defendant shall assume damage and reasonable cost for RMB 300,000 to the Plaintiff.
3. An order that the defendant shall assume all court fee in this case.



Court Decision

1. The Defendant shall immediately cease infringing on the copyright of Ultraman works from the date this judgment takes legal effect and shall take corresponding technical measures to prevent users from generating images that infringe on the copyright of the plaintiff during the provision of services.
2. The Defendant shall assume damage for RMB 10,000 (including reasonable expenses) within ten days from the date of this judgment becoming legally effective.

3. Other claims of the Plaintiff shall be rejected.

In short, the court found that the copyrighted work at issue enjoys high popularity and can be accessed, viewed, and downloaded on major video websites. In the absence of evidence to the contrary, there is a possibility for the defendant to have the access of the work.

In addition, the work generated on the platform has maintained entirely or partially the originality of Ultraman work, constituting substantial similarity with the works at issue. Therefore, the images generated on the platform have infringed upon the right of reproduction and right of adaptation of the copyrighted work.

What’s interesting here is that the court elaborated on the liability to be borne by the platform, and such elaboration highly rely on the Provisional Measures for the Administration of Generative Artificial Intelligence Services (hereinafter “Provisional Measures”).



Cease of Infringement

The Defendant argued that the platform is providing its service on images generated through a 3rd party service provider and therefore shall not be held liable for the infringement claim.

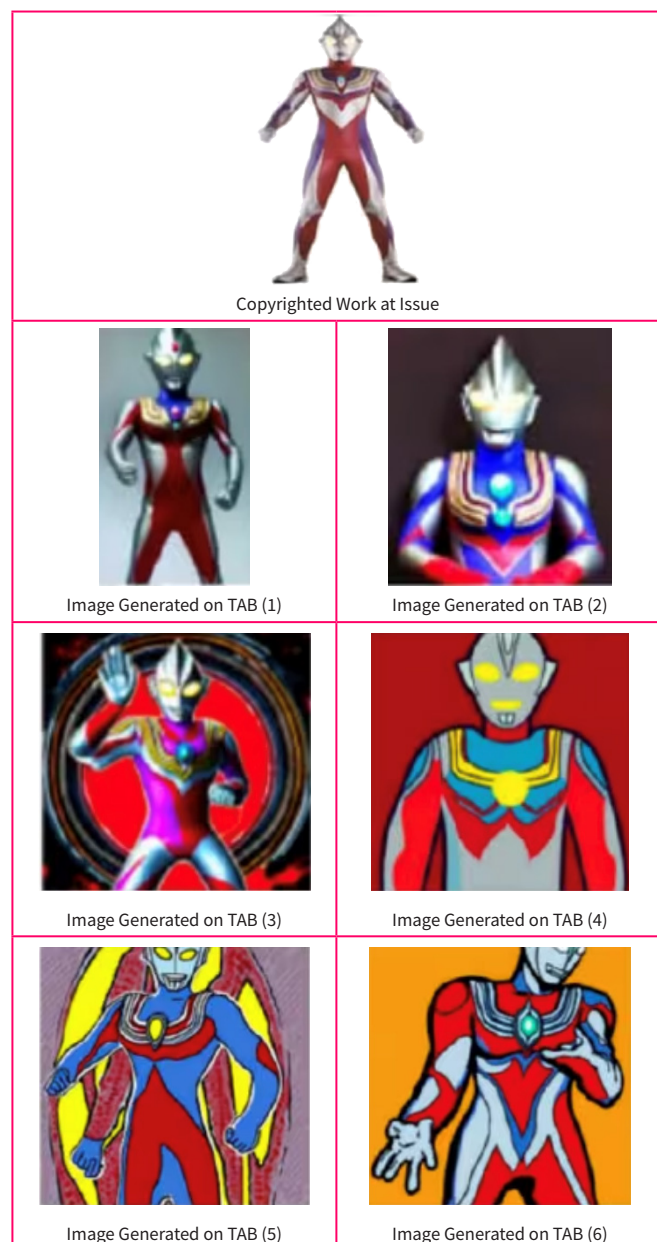
The court ruled that the Defendant shall be considered a GAI service provider, given Art 22.2 of the Provisional Measures regulated that "GAI service providers" refer to the organizations and individuals that provide GAI services (including providing GAI services by providing programmable interfaces or otherwise) by using GAI technologies.

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In the meantime, the court also cited Art. 14, where it regulated that *“Where any illegal content is found out, the Provider concerned shall timely take such handling measures as stopping the generation or transmission, or elimination, adopt measures such as model optimization training to make rectification, and report the case to the competent authority.”* Hence the liability on cease of infringement falls on the Defendant.

During the trial, the court found that the Defendant has already used Keyword Filtering, stopping the users to use certain keywords to generate the image.

However, by adjusting slightly the keywords, Ultraman images can still be generated. In this sense, the court also stipulated the level of cessation that shall be done: users can use prompt words related to Ultraman normally and the images generated shall not be substantially similar to the Ultraman works involved in the case.



Damage

The court analyze that despite GAI has certain property of a tool, where it can be used legally and also illegally, however in present case, the Defendant has not performed reasonable diligence in performing the service as below:

a. A mechanism for complaint and report was not set up.

The court found that a mechanism for online complaint was not set up by the Defendant on the website, causing difficulty for the Plaintiff to make complaint.

The court also cited Art. 15 of the Provisional Measure, where it regulated that *“A Provider shall establish a sound complaint and whistleblowing mechanism, set up convenient portals for complaints and whistleblowing, make public the handling process and time limit for feedback, timely accept and handle the public complaints and whistleblowing, and give feedback on the handling results.”*

b. No Risk Warning

The court found that the Defendant, as a service provider, did not remind the user through service agreements or other methods not to infringe on the copyright of others. The court believes the users of GAI services might lack clear awareness of the potential risk of infringement of others, especially copyright owners.

Therefore, GAI service providers have an obligation to remind users, including that users cannot use their services to infringe on the copyright of others.

c. No Prominent Markings

The court found that GAI service providers have an obligation to prominently mark the products they provide when they may cause confusion or misidentification among the public.^{[1][2]}

After identification, the relevant rights holders can clearly recognize that the generated objects are generated by artificial intelligence, and then take more targeted and effective rights protection measures to better protect their rights.

Therefore, the obligation of identification is not only a respect for the public's right of knowledge, but also a protective obligation for rights holders. In this case, the defendant did not significantly mark the generated images at issue and did not fulfill the obligation of identification.

This decision would be a second jurisprudence regarding AI generated copyright vs copyright in China, where the first one was decided by Beijing Internet Court, ruling AI generative images can enjoy copyright, while the second was decided by Guangzhou Internet Court, ruling GAI service providers shall assume liability for copyright infringement.

The court also affirmed the following issues:

- 1.** The cessation shall be done in a method that still allows the users to use the prompt words normally without generating contents infringing upon the copyrighted works.
- 2.** Liability for damage claim shall be supported if the platform did not perform certain diligence, which includes:
 - a.** a mechanism for online complaint;
 - b.** warning users on the potential risk of infringement;
 - c.** labeling the content as AI generated.



Fredrick Xie
HFG Law & Intellectual Property

[1] Article 12: A Provider shall mark pictures, videos and other generated content in accordance with the Administrative Provisions on In-depth Synthesis of Internet-based Information Services.

[2] Article 17: Where a deep synthesis service provider provides the following deep synthesis services, which may cause confusion or misidentification of the public, it shall make prominent marks at reasonable positions or areas of the information contents generated or edited to inform the public of the deep synthesis situation:

- (I) Generation or editing of texts by simulating a natural person through intelligent dialogue, intelligent writing, etc.;
 - (II) Editing services that generate speech such as synthesis of voice, voice imitation, etc., or noticeably change personal identity features;
 - (III) Editing services that generate image or video images or videos or noticeably change personal identity features such as face generation, face swap, face control, posture control, etc.;
 - (IV) Immersive simulation scene generation or editing services; and
 - (V) Other services that have the function of generating or noticeably changing information content.
-

IP CHINA

Why copyright registrations in China increased by 40% in 2023



On February 19, 2024 the National Copyright Administration of China (NCAC) released the relation about copyright registration in 2023: according to it, the total number of copyright registrations reached 8,923,901, a year-on-year increase of 40.46%.

This data underscores the increasing importance of copyright registration for creators and businesses in China. With nearly 9 million copyright registrations in 2023 alone, it's evident that individuals and organizations are recognizing the value of protecting their original works and intellectual property assets.

The efforts of the NCAC and other relevant authorities in promoting copyright registration and strengthening intellectual property laws and enforcement mechanisms are likely contributing factors to this remarkable growth.

By providing clearer pathways for copyright registration and enforcing penalties for copyright infringement, China aims to foster a more conducive environment for innovation, creativity, and economic development.

This announcement also highlights China's commitment to aligning its intellectual property practices with international standards and best practices, which is crucial for promoting global trade, investment, and collaboration in the digital age.

This rise may be attributed to several factors:

- ▶ **Government Initiatives:** China has been taking steps to strengthen its intellectual property laws and enforcement mechanisms. Government initiatives aimed at promoting copyright registration and protecting intellectual property rights could have contributed to the increase.
- ▶ **Economic Development:** As China continues to develop economically, there may be a greater emphasis on innovation and creativity. Individuals and businesses may be more inclined to seek copyright registrations to protect their original works and creations.

- ▶ **Digitalization and Technology:** The digitalization of content and advancements in technology have made it easier for creators to produce and distribute their works. With the proliferation of digital content, there may be a higher demand for copyright protection.

- ▶ **Globalization:** China's integration into the global economy has heightened awareness of the importance of intellectual property rights protection. Businesses operating in China, as well as Chinese companies expanding internationally, may recognize the need to secure copyright registrations for their intellectual property assets.

- ▶ **Legal Reforms:** Reforms in China's legal system, including updates to copyright laws and regulations, could have simplified the copyright registration process and incentivized more creators to register their works.

Overall, the significant increase in Chinese copyright registrations in 2023 reflects a positive trend towards strengthening intellectual property rights protection in the country, which is essential for fostering innovation, creativity, and economic growth.

HFG Law & Intellectual Property

NEWS

Patent Prosecution Highway (PPH) Pilot programs extended



Patent Prosecution Highway (PPH) is a fast track linking patent examination duties of different countries or regions, allowing patent examination authorities to speed up patent examination by work sharing. Since the initiation of the first PPH program in November 2011, the CNIPA has built PPH ties with patent examination authorities of 32 countries or regions.

The China National Intellectual Property Administration (CNIPA) and the German Patent and Trade Mark Office (DPMA) have jointly decided to extend their Patent Prosecution Highway (PPH) pilot program for another three years from January 23, 2024 to January 22, 2027.

The program has been extended also with the Danish Patent and Trademark Office (DKPTO) and with the National Institute of Industrial Property of Chile (INAPI), for both Countries for another five years from January 1, 2024 to December 31, 2028.

The established Procedures to file a request to the DPMA/DKPTO/INAPI for Patent Prosecution Highway ("PPH") Pilot Program with CNIPA remains controlling the pertinent requirements and procedures governing applicants' PPH requests at the two offices.

The extension of the PPH pilot program will continuously advance communication and cooperation in IP, serve both Chinese and others innovators by accelerating the patent examination process and deepen the offices' cooperation in patent examination.

HFG Law & Intellectual Property

HFG NEWS

HFG news & updates



HFG @INTA Annual Meeting in Atlanta + Pre-Annual Meeting Reception in Rome!

The 2024 INTA Annual Meeting will be held in Atlanta, Georgia - USA, on May 18-22. The theme of the program for the 2024 Annual Meeting is "The Business of Innovation," which focuses on how creativity, change, and technology are transforming how IP professionals conduct business.

More than 8,400 colleagues from around the world are already registered, 500 from China! Connect and exchange best practices with the most influential brand professionals: You will find there HFG colleagues [Antonio Lovecchio](#), [Crystal Yulan Zhang](#), [Daniel de Prado Escudero](#), [Lanny Li](#) and [Qian Liu](#).

Daniel de Prado will also attend INTA Pre-Annual Meeting Reception in Rome on April 18, 2024.

Click [here](#) for the details of Pre-Annual Meeting Reception in Rome!

Want to know why you should attend? here a couple of reasons:

- Exchange valuable learning experiences and success stories from past Annual Meetings
- Network and meet new professionals with a common interest in trademark and related areas of law.

See you at INTA Annual Meeting @Atlanta!

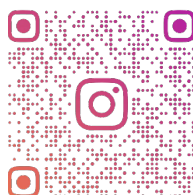
Pre-Annual Meeting Reception (PAMR)

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HFG NEWS

HFG news & updates



Fabio Giacopello spoke for IPWG at the Italian Embassy in China.

On March 5th, the Embassy of Italy in Beijing organized a Meeting with the Italian Business Community in China.

The event, opened by Ambassador of Italy Massimo Ambrosetti, saw the participation of over 100 representatives from the institutional components of the Country System and the Italian entrepreneurial fabric from all over China.

The meeting was a useful opportunity to deepen coordination and exchange of ideas between institutions and companies, particularly in view of the upcoming edition of the Italy-China Joint Economic Commission.

Fabio Giacopello, HFG Senior and Managing Partner, was invited to speak as Coordinator of the Intellectual Property Working Group (IPWG).

Giacopello spoke about mega trends of Chinese IP, presenting some data regarding the stunning increase of Trademark and Patent registrations in China, that in 2022 accounted respectively for 48% and 46% of the registrations worldwide, and giving a general overview on other astonishing facts and trends of IP in China.

Following this, on March 7th, the Meeting of the associational base of the CCIC of Eastern China was held in Shanghai.

The event was opened by President Paolo Bazzoni, followed by speeches from Consul General Tiziana D'Angelo, by the Director of the ICE/ITA Office in Shanghai Augusto Di Giacinto, the Head of the SACE Shanghai Office Donato Morea, the Treasurer of CICC Lorenzo Riccardi, and the CICC Councilors Giacomo Bove and Emilio Cassanelli.

The event saw the participation of over 80 member companies of the Chamber, operating in various sectors. During the meeting, the various speakers introduced the main activities that have engaged and will engage the Italian system in the coming months to support Italian companies in China, with a focus on the first half of 2024.

The last part of the meeting featured coordinators of some of the Working Groups of the CCIC who presented the initiatives planned for the current year.

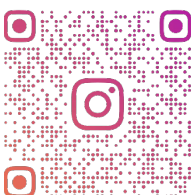
Fabio Giacopello held a speech sharing the program of IPWG.

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