

2011

China

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Recommended Citation

Jordan Brandt et al., *China*, 45 INT'L L. 487 (2011)
<https://scholar.smu.edu/til/vol45/iss1/34>

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I. Tort Liability Law

Seven years after the first draft was circulated for public consultation, the Tort Liability Law (“Tort Law”)¹ became effective on July 1, 2010. For the first time, the Tort Law strives to integrate tort-related liabilities into a single law. The Tort Law also reflects a growing trend of litigation in China.

A. GENERAL PRINCIPLES

The Tort Law first sets out several general principles and concepts.

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1. Qin quan ze ren fa (侵权责任法) [Tort Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 26, 2009, effective July 1, 2010), Lawinfochina (last visited Jan. 27, 2011) (China), *available at* http://www.procedurallaw.cn/english/law/201001/t20100110_300173.html [hereinafter Tort Law].

1. *Apportionment of Liability*

Under the Tort Law, a tortfeasor is liable where the tortfeasor: (1) infringes upon a civil right or interest of another person;² (2) is at fault as construed according to legal provisions and cannot prove otherwise;³ or (3) infringes upon a civil right or interest of another person, whether at fault or not, as provided by law.⁴ “Civil rights and interests”⁵ are defined to include the rights to life, health, name, reputation, honor, self image and privacy, marital autonomy, guardianship, ownership, usufruct, security interest, copyright, patent right, exclusive right to use a trademark, right to discovery, equities, right of succession, and other personal and property rights and interests.

2. *Concepts and Scope of Liability*

The Tort Law sets out the concepts of causation,⁶ comparative negligence,⁷ joint and several liability,⁸ and equal compensatory liability.⁹ It also sets forth the categories of persons who may bear responsibility under the principles of vicarious and occupier’s liability. Vicarious liability may be imposed on: legal guardians for their charges;¹⁰ employers for their employees;¹¹ owners for contractors;¹² and network service providers for actions of network users.¹³ Occupier’s liability may be imposed on: managers of public venues and organizers of mass activities for injuries caused by their failure to implement safety measures¹⁴ and on educational institutions for their failure to fulfill their duties in connection with injuries to persons under their care who have no or limited capacity for civil conduct.¹⁵

3. *Remedies and Damages*

The Tort Law sets forth the remedies that are available to victims of a tort and provides a foundation for determining damages. The remedies are the same as those provided under the General Principles of Civil Law:¹⁶ compensation, cessation of infringement, removal of obstruction, elimination of danger, return or restoration of property, apology, and elimination of consequences and restoration of reputation.¹⁷ For personal injury, actual damages include medical expenses, nursing care expenses, travel expenses, and loss of in-

2. *Id.* art. 6.

3. *Id.*

4. *Id.* art. 7.

5. *Id.* art. 2.

6. *Id.* arts. 10-12.

7. *Id.* arts. 26, 27.

8. *Id.* arts. 8-11, 13, 14.

9. *Id.* arts. 12, 14.

10. *Id.* art. 32.

11. *Id.* art. 34.

12. *Id.* art. 35.

13. *Id.* art. 36.

14. *Id.* art. 37.

15. *Id.* arts. 38-40.

16. *Ming fa tong ze* (民法通则) [General Principles of the Civil Law] (promulgated by the Nat’l People’s Cong., Apr. 12, 1986, effective Jan. 1, 1987), Lawinfochina (last visited Jan. 27, 2011) (China), available at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383941.htm [hereinafter “GPCL”].

17. Tort Law, art. 15; GPCL, art. 134.

come.¹⁸ Additional types of actual damages may be awarded in cases of disability or death.¹⁹ Property loss can be measured by reference to the market price at the time of loss.²⁰ If loss is not ascertainable, it can be measured by reference to the benefit obtained by the tortfeasor.²¹ Under the Tort Law, damages are now available in cases where the defendant has inflicted serious mental distress on the plaintiff.²²

4. *Defenses*

Liability may be waived or mitigated where the harm is caused by the victim or a third party.²³ A tortfeasor may also have a defense where the conduct occurred as result or in the course of: (1) intentional infliction of harm by the victim,²⁴ (2) force majeure,²⁵ (3) self-defense,²⁶ or (4) conduct of necessity.²⁷

5. *Relationship with Criminal and Administrative Liability*

Under the Tort Law, tort liability takes precedence in the event a tortfeasor does not have sufficient resources to discharge his administrative or criminal liability for the incident arising from the tortious act.²⁸

B. SPECIAL TORT LIABILITY

The Tort Law then sets out special tort liabilities based on the principles set forth in the first Chapters: product liability,²⁹ motor vehicle traffic accidents,³⁰ medical malpractice,³¹ environmental pollution,³² ultra-hazardous activities,³³ domestic animals,³⁴ and dangerous objects.³⁵

1. *Product Liability*

The Tort Law stipulates that product liability claims may be made against the manufacturer or seller.³⁶ Where the seller can establish that the defect was caused by the manufac-

18. Tort Law, art. 16.

19. *Id.* arts. 16-18.

20. *Id.* art. 19.

21. *Id.* art. 20.

22. *Id.* art. 22.

23. *Id.* arts. 26, 28.

24. *Id.* art. 27.

25. *Id.* art. 29.

26. *Id.* art. 30.

27. *Id.* art. 31.

28. *Id.*

29. *Id.* ch. V.

30. *Id.* ch. VI.

31. *Id.* ch. VII.

32. *Id.* ch. VIII.

33. *Id.* ch. IX.

34. *Id.* ch. X.

35. *Id.* ch. XI.

36. *Id.* art. 43.

turer, the seller may seek indemnification.³⁷ If a defective product causes harm and the defect is caused by a third party, the manufacturer or seller may seek contribution from such party.³⁸

The manufacturer and the seller of a product must now take remedial measures (timely warning and recall).³⁹ In the past, recall obligations applied only to specified products, including toys and food. Now, the obligation is extended to all products manufactured or sold in China. In addition, a victim may require that a manufacturer or seller eliminate the harm caused by the defective product.⁴⁰

2. Punitive Damages

Punitive damages are available for product liability if (1) the manufacturer or seller knows of the defect and still chooses to continue manufacturing or selling the product, and (2) the defect has resulted in death or serious injury.⁴¹ The Tort Law is the first legislation ever in China specifically to use the term “punitive damages.”

C. IMPLEMENTATION AND INTERPRETATION

Although the Tort Law provides a general framework for tortious liability, it lacks specificity in fundamental areas. The Tort Law fails to define key terms including negligence, gross negligence, and intentional act, or to clarify the type of “defect” that triggers product liability. The Tort Law also provides no guidelines to calculate damages for mental distress or punitive damages.

Further, the interplay of the Tort Law and other related legislation is unclear. For example, under the Product Quality Law, a manufacturer may raise a defense and would not be held liable if it could prove that: (1) a product has not been put to market, (2) the defect did not exist at the time the product was put to market, or (3) the defect could not be discovered based on scientific knowledge at the time the product was put to market.⁴² The Tort Law, on the other hand, only requires that the defective product cause harm to find liability. Moreover, the Tort Law does not provide any defense.⁴³ It is unclear whether the defenses in the Product Quality Law would also be available under the Tort Law to absolve a manufacturer or seller from tortious liability.

Implementing regulations or judicial interpretations are necessary and anticipated to provide better understanding of the Tort Law.

37. *Id.*

38. *Id.* art. 44.

39. *Id.* art. 46.

40. *Id.* art. 45.

41. *Id.* art. 47.

42. Chan ping zhi lian fa (产品质量法) [Product Quality Law] (promulgated by the Standing Comm., Nat'l People's Cong., Feb. 22, 1993, amended on July 8, 2000), art. 41, Lawinfochina (last visited Jan. 27, 2011) (China), available at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383813.htm.

43. Tort Law, arts. 41-43.

II. Amendments to China's Renewable Energy Law

China was recently named the most attractive country in which to invest in renewable energy projects for 2010.⁴⁴ At the end of 2009, China's renewable power capacity represented approximately thirty percent of China's total power capacity and twenty percent of the world total renewable power capacity.⁴⁵ In 2007, China adopted an ambitious development plan for 2020 ("Plan"),⁴⁶ which required a revision of the original Renewable Energy Law⁴⁷ ("2006 Law").

Amendments to the 2006 Law⁴⁸ ("Amendments") became effective April 1, 2010. The Amendments strengthen the 2006 Law in certain areas, notably energy off-take and grid infrastructure, to modernize China's renewable energy industry, however, it remains to be seen whether the Chinese government can enforce and monitor the effect of the Amendments.

This article will focus on three key areas addressed under the Amendments: Offtake Grid Obligations; Grid Infrastructure and Interconnection; and Renewable Energy Fund.

A. OFFTAKE GRID OBLIGATIONS

Under the 2006 Law, power grid companies must enter into grid connection agreements with renewable power generation enterprises and purchase all on-power produced from renewable energy resources.⁴⁹ However, power grid companies were not always able to keep up with rapid development. They did not have the ability to utilize all energy produced⁵⁰ and lacked sufficient grid connectivity.⁵¹

The Amendments require power grid enterprises to purchase all on-grid power produced with renewable energy within their power grid coverage. The power must comply with the renewable energy plan and be connected in accordance with grid-connection

44. Press Release, Ernst & Young, China Tops Renewable League (Sept. 8, 2010), available at http://www.ey.com/CN/en/Newsroom/News-releases/2010_China-tops-renewable-league.

45. Eric Martinot, *Renewable Power for China: Past, Present, and Future*, 3 FRONTIERS OF ENERGY AND POWER ENG'G IN CHINA 287 (2010).

46. Ke zai sheng nengyuan zhong chang qi fazhan jihua (中国可再生能源长期发展计划) [Long-term Development Plan for Renewable Energy in China] (released by the Zhonghua Renmin Gongheguo Guojia Fazhan He Gaige Weiyuanhui [National Development and Reform Commission], Aug. 31, 2007) No. 2174 (China), available at <http://www.chinaenvironmentallaw.com/wp-content/uploads/2008/04/medium-and-long-term-development-plan-for-renewable-energy.pdf>.

47. Zhonghua renmin gongheguo ke zaisheng nengyuan fa (第33号主席令) [Presidential Decree No. 33] (adopted by the Standing Comm. Nat'l People's Cong., Feb. 28, 2005, effective Jan. 1, 2006) Lawinfochina (last visited Jan. 27, 2011) (China) [hereinafter 2006 Law], amended by Quan guo ren min daibiao da hui chang yuyuanhui guanyu xiugai zhonghua renmin gongheguo ke xaisheng nengyuan fa (全国人民代表大会常务委员会关于修改可再生能源法的决定) [Decision of the Standing Comm. Nat'l People's Congress on Amending the Renewable Energy Resources Law] (adopted by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective Apr. 1, 2010) Lawinfochina (last visited Jan. 27, 2011) (China) [as amended, hereinafter 2009 Law].

48. 2009 Law.

49. 2006 Law, art. 14.

50. Jim Bai, Tom Miles & Jacqueline Wong, *China Eyes 90GW Effective Wind Capacity by 2015*, REUTERS, Apr. 29, 2010, <http://www.reuters.com/article/idUSTRE63Q23V20100427>; Eric Ng, *Wind Power Loses Puff in Planning*, S. CHINA MORNING POST, July 13, 2009, <http://www.elementscap.com/en/newscontent.asp?unid=122&menuid=5>.

51. Bai, Miles & Wong, *supra* note 50; Ng, *supra* note 50.

technological standards.⁵² In addition, specific measures are to be formulated that address the renewable energy power that can be generated during a planned period and that can be purchased by power grid enterprises.⁵³

Power grid enterprises that do not satisfy their off-take obligations will have to compensate renewable power generation enterprises where such failure results in economic loss.⁵⁴ Where the enterprises fail to rectify the situation within the stipulated time, a fine of less than twice the amount of the economic loss will be imposed.⁵⁵

B. GRID INFRASTRUCTURE AND INTERCONNECTION

Under the 2006 Law, power grid companies must enter into interconnection agreements with renewable power generation companies and provide grid-connection services and related support.⁵⁶ Enforcing these requirements has not always been feasible because there is no guidance on the requirements, which are unclear. Numerous renewable energy project sites were built in remote regions without developed power grids, further impeding enforcement.⁵⁷

The Amendments reinforce the grid infrastructure by requiring power grid enterprises to strengthen grid construction, expand the grid network and increase their ability to off-take power from renewable energy projects.⁵⁸ Companies must also apply energy saving technologies to satisfy their off-take obligations.⁵⁹ Renewable power generation companies must cooperate with power grid enterprises to ensure that the grids are safe and that renewable energy produced meets technological standards for interconnection.⁶⁰

Grid infrastructure is particularly vital to China's future renewable energy market. Of RMB5 trillion included in the proposed Emerging Energy Industry Development Plan, RMB2-3 trillion is expected to be used for the renewable energy sector.⁶¹

C. RE FUND

The 2006 Law created a renewable energy fund ("RE Fund") to provide support for the development and advancement of renewable energy.⁶² The 2006 Law, however, failed to identify the RE Fund's source of funding. Additionally, the difference between expenses incurred by power grid enterprises in the purchase of grid-connected power generated from renewable sources and expenses incurred in the purchase of grid-connected power

52. 2009 Law, art. 14.

53. *Id.*

54. *Id.* art. 29.

55. *Id.*

56. 2006 Law, art. 14.

57. Sara Schuman, *Improving China's Existing Renewable Energy Legal Framework: Lessons From the International and Domestic Experience*, NATURAL RES. DEF. COUNCIL WHITE PAPER 8-9 (Oct. 2010), http://china.nrdc.org/files/china_nrdc_org/NRDC%20-%20China%20Renewable%20Energy%20Legal%20Framework.pdf.

58. 2009 Law, art. 14.

59. *Id.*

60. *Id.*

61. *China Plans CHY1.5 Billion Injection into Wind*, WINDPOWER MONTHLY, Sept. 29, 2010, <http://www.windpowermonthly.com/go/asiaPacific/news/1031536/China-plans-CHY15billion-injection-wind>.

62. 2006 Law, art. 24.

generated with conventional energy was passed onto the end user, through a deduction in the end user's electricity bill.⁶³

Under the Amendments, the State will establish an RE Fund budget, and the source of funding will come from specialized funds arranged by the State and surcharges on power generated from renewable energy sources.⁶⁴ Additionally, the difference between renewable energy expenses and conventional energy expenses will no longer be directly reimbursed to power grid enterprises. Instead, such surcharges are pooled into the RE Fund.⁶⁵ Once the surcharges have been pooled, power grid enterprises can seek compensation for additional costs of purchasing renewable energy through such a subsidy⁶⁶ and expenses associated with interconnection into the grid.⁶⁷

III. New Tax Laws for Foreign Companies

In 2010, numerous tax laws were passed affecting China based foreign companies. Two laws greatly affected businesses and demonstrate tighter government control.

A. AFFECTING REPRESENTATIVE OFFICES

On February 20, 2010, China's State Administration of Taxation released the *Tentative Measures for Taxation of Resident Representative Offices of Foreign Enterprises* ("TaxReg"), effective retroactively on January 1, 2010.⁶⁸ The Regulation has two significant requirements.

- (1) **Deadline for Application:** Representative Offices ("ROs") must apply for taxation registration to the local taxation authorities within thirty days from the date of receiving the industrial and commercial certificate.⁶⁹
- (2) **Profit Margin Limitation:** The certified profit margin of all ROs shall not be lower than fifteen percent.⁷⁰

B. AFFECTING ALL FOREIGN ENTERPRISES

On October 18, 2010, the State Council released Circular No. 35 ("Circular"), aimed at unifying the tax system and ensuring equal taxation for all businesses.⁷¹ Effective December 1, 2010, *all* foreign invested enterprises, foreign enterprises, and individuals with for-

63. See *id.* arts. 20, 22.

64. 2009 Law, art. 24.

65. *Id.*

66. *Id.*

67. *Id.*

68. Notice on Issuing the Interim Measures for Administration of Tax Collection against the Permanent Representative Offices of Foreign Enterprises (promulgated by the State Administration of Taxation, Feb. 20, 2010, effective Jan. 1, 2010) Lawinfochina (China) [hereinafter Tax Reg.].

69. *Id.* art. 4.

70. *Id.* art. 8.

71. Notice on Extending the Urban Maint. & Constr. Tax & Educ. Surcharges from Chinese to Foreign-funded Enterprises & Citizens (promulgated by the State Council, Oct. 18, 2010, effective Dec. 1, 2010) Lawinfochina (China).

eign nationalities were required to pay two additional taxes from which foreign companies had previously been exempt.⁷²

- (1) *Urban Maintenance and Construction Tax* (“UMCT”): UMCT of seven percent (urban districts), five percent (towns), and one percent (other areas) is levied on a certain percentage of the paid actual turnover tax (i.e.: VAT, business tax and consumption tax).⁷³
- (2) *Educational Surcharges* (“ESC”): ESC of three percent levied on the actual turnover tax paid. For an RO, the amount is calculated on the amount of business tax paid.⁷⁴

It is unclear how, or if, these taxes will apply to non-resident enterprises, which provide services outside China or to service recipients inside China or will receive interest or royalties not connected with a permanent establishment in China.

IV. MOFCOM Rule Making Regarding Merger Review

In July 2010, the Ministry of Commerce (“MOFCOM”) issued an interim regulation on divestiture of assets and business operation by merger applicants, effective upon release. The rule clarifies the steps for a divestiture ordered by MOFCOM in a conditional approval.⁷⁵ At the beginning of the year, two principal regulations also entered into force, establishing the basic framework for the application and review procedures.⁷⁶ A January administrative interpretation then clarified them further.⁷⁷ This section summarizes key provisions of these new rules.

A. THE NEW ASSETS DIVESTITURE REGIME

China’s Anti-Monopoly Law (“AML”) authorized MOFCOM to approve a merger application conditioned on the applicants’ agreeing to divest certain assets or operations (“Business”) for the purpose of mitigating the merger’s negative impact on market competition.⁷⁸ The new regulation clarifies the implementation process.

72. *Id.*

73. *Id.*

74. *Id.*

75. Interim Regulation on Assets and Operation Divestiture in Undertaking Concentration (promulgated by the Ministry of Commerce (MOFCOM), July 5, 2010, effective on July 5, 2010) Lawinfochina (China) [hereinafter Interim Reg.].

76. See Measure for the Undertaking Concentration Examination (promulgated by MOFCOM, Nov. 24, 2009, effective Jan. 1, 2010) Lawinfochina (China), available at <http://www.lawinfochina.com/law/display.asp?ID=8184&DB=1> [hereinafter Review Reg.]; Measure for the Undertaking Concentration Declaration (promulgated by MOFCOM, Nov. 21, 2009, effective Jan. 1, 2010) Chinalawinfo (China), available at <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=123908> [hereinafter *AppReg*].

77. See Shang wu bu fan long duan ju guan yu jing yin zhe ji zhong shen bao ban fa he jing yin zhe ji zhong shen ca pan fa de jie du (中华人民共和国商务部反垄断局关于经营者集中申报和审查的解读) [Interpretation by MOFCOM Anti-trust Bureau on the Declaration of Business Concentration and the Business Concentration Review] (promulgated by MOFCOM, effective Jan. 15, 2010) (China), available at <http://fdj.mofcom.gov.cn/article/y/201001/20100106747363.html> [hereinafter MOFCOM Interpretation].

78. Fan long duan fa (反垄断法) [Anti-Monopoly Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 29, Lawinfochina (China), available at <http://www.lawinfochina.com/law/display.asp?ID=6351&DB=1>.

As a first step, the applicants must appoint a supervising agent within fifteen days after MOFCOM issues its conditional approval decision.⁷⁹ The supervising agent monitors and reports to MOFCOM on the divestiture process. The regulation identifies five functions for the supervising agent.⁸⁰ The applicants must grant the supervising agent access to their business records and information on the divestiture negotiations and provide other assistance.⁸¹

The regulations clarify that a divestiture obligation is deemed accomplished when the applicants execute a transfer agreement within the period specified by MOFCOM, so long as the actual transfer of the Business concerned occurs within three months.⁸² If the applicants cannot complete the divestiture within MOFCOM's approval period, the regulation requires the applicants to appoint a divestiture agent.⁸³ The agent is then given the same length of time to sell the Business.⁸⁴

The regulation also sets forth criteria for a qualified transferee. The transferee must be independent from the applicants, with the resources, capacity, and willingness to maintain and develop the divested Business.⁸⁵ In addition, the divestiture shall not negatively affect market competition.⁸⁶

The applicants may not engage in conduct that will diminish the Business's value.⁸⁷ Prohibited conduct includes hiring away employees and attempting to divulge trade secrets.⁸⁸ Rather, during the interim period, the applicants must designate qualified personnel to properly manage the Business, supply the potential purchasers with information necessary for evaluating the assets, and otherwise facilitate the divestiture.⁸⁹

Although the supervising agent and the divestiture agent are appointed and paid for by the merger applicant, both operate independently and report only to MOFCOM.⁹⁰ Thus, their compensation will not compromise their independence.⁹¹

B. SALES REVENUE CALCULATION IN DETERMINING REPORTING OBLIGATIONS

In general, only large mergers and acquisitions need to be reported to and obtain prior approval from MOFCOM. An early regulation stipulated that such an approval is required when a merger or acquisition involves at least two undertakings with Chinese sales⁹² exceeding RMB400 million in the most recently completed fiscal year, and one of the following two criteria is satisfied:

79. Interim Reg., art. 4, fourth sentence.

80. These are to: (1) monitor the applicants obligation; (2) assess and report on the transferees and transfer agreements; (3) regularly monitor and report on the implementation of the transfer agreements; (4) mediate and report on disputes; and (5) report on other matters as instructed by MOFCOM. *Id.* art. 7.

81. *Id.*

82. *Id.* art. 3.

83. *Id.* arts. 3, 8.

84. *Id.*

85. *Id.* art. 9.

86. *Id.*

87. *Id.* art. 12.

88. *Id.*

89. *Id.*

90. *See id.* art. 7.

91. *Id.*

92. Includes sales inside China's territory (not exports). AppReg, art. 4.

- (1) The combined Chinese sales for all the businesses involved exceed RMB2 billion in the preceding fiscal year; or
- (2) The combined global sales exceed RMB10 billion.⁹³

The regulation further specifies how to calculate sales revenue for businesses involved in a merger or acquisition to determine whether the reporting threshold has been reached.⁹⁴

C. PROTECTION OF BUSINESS PROPRIETARY INFORMATION

MOFCOM, in its new regulations, undertakes to protect the business proprietary information (“BPI”) submitted in a merger review proceeding.⁹⁵ Applicants must submit two versions of their applications: a BPI version and a public version. Applicants must identify the information they want protected in the BPI version. The public version should contain enough information sufficient to other interested parties to assess the competitive impact of the transaction.⁹⁶

V. Recent Developments Regarding Foreign Private Equity Investments

China’s private equity (“PE”) market has grown rapidly in recent years. Nonetheless, it could grow more. Even though foreign PE firms are attracted to the China market, they have not been able to invest to the extent they would like because Chinese law has impeded them from doing so. National and local policies were introduced in 2010 to ease restrictions and hurdles to foreign PE investment, both legally and factually.

A. NATIONAL POLICIES

In April 2010, the State Council declared a national policy to ease restrictions and facilitate the growth of foreign investment through foreign-invested PE funds and directed the various government agencies to issue implementing regulations.⁹⁷ The opinion encourages five specific actions:

- (1) Expand encouraged industries in the foreign investment industry catalogue in high-end manufacturing, alternative energy, and green and modern service industries;
- (2) Promote the use of foreign capital in restructuring and merging domestic enterprises. This includes opening the domestic stock market even further;

93. Provisions on the Standard for Declaration of Concentration of Business Operators (promulgated by the State Council, effective Aug. 3, 2008), art. 3 (Lawinfochina) (China), available at <http://www.lawinfochina.com/law/display.asp?ID=7024&DB=1>.

94. *Id.* art. 5.

95. Review Reg., art. 16.

96. Shang wu bu fan long duan ju guan yu jing ying zhe ji zhong shen bao ban fa he jing ying zhe ji zhong shen ca ban fa de jie du (解读条对审查反垄断部) [Interpretation on the Anti-Monopoly Division of the Review Reg. and the AppReg] (promulgated by MOFCOM, effective Jan. 15, 2010), art. 4 (China), available at <http://fldj.mofcom.gov.cn/aarticle/j/201001/20100106747363.html>.

97. Several Opinions of the State Council on Further Utilizing Foreign Capital, issued by the State Council of the People’s Republic of China, GUO FA [2010] No. 9 (Apr. 6, 2010) (China), available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/MinisterialRulings/P020100422347293597538.pdf.

- (3) Increase the threshold amount for acquisitions of certain investments where foreign invested enterprises (“FIE”) must seek MOFCOM approval. FIE have had to seek MOFCOM approval at US\$100 million. The new encouraged level is US\$300 million;
- (4) Streamline approval processes for foreign investors; and
- (5) Simplify foreign exchange management.⁹⁸

B. AUTHORIZATION FOR FOREIGN INVESTED LIMITED PARTNERSHIPS

The *Administrative Measures for the Establishment of Partnership Enterprises by Foreign Enterprises and Individuals* (Foreign Partnership Measures),⁹⁹ effective March 1, 2010, allow foreign investors to form or invest in partnerships under China’s Partnership Enterprise Law.¹⁰⁰ This is the first time they can do so. Foreign PE firms may now create onshore limited partnership funds with pass-through tax treatment. A caveat—the laws are still unclear on certain distinctions between domestic RMB partnership funds and foreign-invested limited partnerships (“FILPs”). The Foreign Partnership Measures empowered the State Administration of Industry and Commerce (“SAIC”), and not MOFCOM, to approve FILPs,¹⁰¹ thereby ensuring a quicker and simpler approval process. The Measures also eliminated several structural impediments of traditional foreign investment structures, such as registered capital requirements, which do not apply to FILPs.

SAIC issued *Administrative Provisions on the Registration of Foreign-Funded Partnership Enterprises* (“Foreign Partnership Administrative Regulations”)¹⁰² to implement these measures. Under the regulations, a FILP must have at least two, but not more than fifty partners, with at least one general partner (“GP”).¹⁰³ GPs are liable for all FILP debts. The liability of limited partners (“LPs”) is limited to their capital contributions.¹⁰⁴ State-owned enterprises and listed companies are not permitted to act as GPs.¹⁰⁵ FILPs may establish a branch office without approval, although registration is required.¹⁰⁶ While the Foreign Partnership Measures state that MOFCOM approval is not required to establish a FILP, SAIC’s administrative regulations reserve the right to require local MOFCOM or NDRC approval in specified instances and a FILP may not be used where foreign invest-

98. *Id.*

99. *Administrative Measures for the Establishment of Partnership Enterprises by Foreign Enterprises or Individuals* (promulgated by the State Council, Nov. 25, 2009, effective Mar. 1, 2010) Lawinfochina (China), available at http://www.bjreview.com.cn/document/txt/2010-01/18/content_240521.htm [hereinafter Foreign Partnership Measures].

100. See generally Partnership Law (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 27, 2006, effective June 1, 2007) Lawinfochina (China), available at <http://www.buyusa.gov/asianow/partnership.doc> [hereinafter Partnership Law].

101. Foreign Partnership Measures, *supra* note 99.

102. *Provisions on the Registration of Foreign-Funded Partnership Enterprises* (promulgated by the State Admin. of Indus. and Commerce, Jan. 29, 2010, effective Mar. 1, 2010), Lawinfochina (China), available at http://www.bjreview.com.cn/document/txt/2010-04/23/content_266016.htm [hereinafter Admin. Reg.].

103. See *id.* art. 3; Partnership Law, art. 61.

104. Partnership Law, art. 2.

105. Admin. Reg., art. 6.

106. *Id.* art. 35.

VI. China Tightens Registration Procedures for Representative Offices

To tighten control over the registration and maintenance processes for ROs, SAIC and the Ministry of Public Security jointly released the *Notice on Further Strengthening Administration for Registrations of Foreign Enterprises Resident Representative Institutions* (“ROCircular”),¹¹² effective January 4, 2010.¹¹³ ROs may represent their overseas parent company in business liaising, market surveys, research, promotions, and similar activities, but they cannot “charge money” or generate a profit.¹¹⁴ The ROCircular has four restrictions.

- (1) *Existence*: A foreign company must have been in existence for two consecutive years.¹¹⁵ The use of a new foreign entity to manage an RO is no longer permitted.
- (2) *Term*: The RO term can only be one year.¹¹⁶ For existing ROs, the one-year term will apply upon renewal.
- (3) *Representatives*: ROs may only have four appointed representatives each: a Chief Representative (a foreigner or Chinese national), and Ordinary Representatives (foreigner only).¹¹⁷ ROs with more than four representatives can only terminate positions until the limit of four is reached and maintained. Companies should consider training existing representatives in multiple roles, or hiring more local employees.
- (4) *Inspections*: Local branches of SAIC must inspect ROs within three months after issuance of new or renewed registrations. Consequences exist for wrongful conduct.¹¹⁸

VII. Chinese Courts Interpret “Fundamental Change in Circumstances” Provision

The Supreme People’s Court (“SPC”) issued the “Fundamental Change in Circumstances” provision of *Judicial Interpretation II on Chinese Contract Law*¹¹⁹ (Article 26) in 2009 to provide guidance on a party’s right to modify or rescind a contract when a fundamental change of circumstances occurs after formation. Before the interpretation, parties could modify or rescind a contract by mutual agreement, acting under the contract terms, or exercising a right based on other circumstances specified in Chinese law.

In Article 26, the SPC acknowledged that a contract can also be modified or rescinded if there is a “fundamental” change of circumstances. A change of circumstances is “fundamental” where performing it would be frustrated or would result in great unfairness. The

112. Guan yu jin yi bu jia qiang wei guo qi ye chang zhu dai biao ji gou deng ji guan li de tong zhi (关于进一步加强对外国企业常驻代表机构登记管理的通知) [Notice on Further Strengthening Administration of Registration of Permanent Representative Offices of Foreign Enterprises] (promulgated by State Admin. of Indus. & Commerce and Ministry of Public Security, effective Jan. 4, 2010) Lawinfochina (China).

113. *Id.*

114. *Id.*

115. *Id.* art. 1.

116. *Id.* art. 2.

117. *Id.* art. 3.

118. *Id.* art. 4.

119. Interpretations of the Sup. People’s Ct. on Certain Issues Concerning the Application of Contract Law of the P.R.C. (Part Two), FA SHI [2009] 5 (promulgated by the Sup. People’s Ct., Apr. 24, 2009, effective May 13, 2009), art. 26, 2009 China Law LEXIS 337, at *9-11 (2009) (China).

Court distinguished a fundamental change of circumstances from a *force majeure* event and from changes arising from normal commercial risks.

Chinese courts appear cautious in applying Article 26, especially in finding that a change was unanticipated and in distinguishing “fundamental changes of circumstances” from normal commercial risks. In a recent arbitral award related to swap contracts, the China International Economic and Trade Arbitration Commission did not recognize the global economic crisis as a “fundamental change of circumstances,” saying that the crisis was gradual and contracting parties should have been able to take such risks into account. In addition, the SPC specifically required stricter inspection of financial derivatives contracts because Article 26 does not protect the high risks they involve.¹²⁰ The SPC requires provincial high courts to be the primary authority applying Article 26. This is likely to limit its application.

VIII. Supreme People’s Court Issues Labor Dispute Interpretation

Responding to the substantial increase in labor disputes filed in Chinese courts, the SPC issued an interpretation on how to handle certain labor disputes on September 13, 2010.¹²¹ Among the issues addressed are the following:

- Employees who have been laid off, but who maintain employment relationships with their prior employers, can form separate employment relationships with new employers.¹²² In the past, these employees, many of whom were laid off from state-owned enterprises, were not fully protected by labor laws in their new positions. They will now have legal rights such as social insurance contributions and severance.
- Employees who are drawing statutory pension benefits while working should be deemed to have labor service relationships, and as such, labor law protections generally should not apply.¹²³
- Employment disputes resulting from the voluntary restructuring of an employer should be treated as labor law disputes.¹²⁴
- For overtime claims, employees have the initial burden of proving that they performed overtime work. The burden then shifts to the employer if the employee can show that the employer had control over the workload evidence.¹²⁵

120. Guiding Opinions of the Sup. People’s Ct. on Several Issues Concerning Trial of Cases on Disputes over Civil and Commercial Contracts in the Current Situation, FA FA [2009] 40 (promulgated by the Sup. People’s Ct., July 7, 2009, effective July 7, 2009), art. 1, 2009 China Law LEXIS 790, at *2 (2009) (China).

121. Guan yu shen li lao dong zheng yi an jian shiyong falu ruo gan wen ti de jie shi (san) (最高人民法院关于劳动纠纷案件若干问题的解释) [Interpretation of the Sup. People’s Ct. on Several Issues Concerning the Application of Law in the Trial of Labor Disputes (III)], FA SHI [2010] 12 (promulgated by the Sup. People’s Ct., Sept. 13, 2010, effective Sept. 13, 2010), 2010 China Law LEXIS 299, at *1 (2010) (China).

122. *Id.* art. 8.

123. *Id.* art. 7.

124. *Id.* art. 2.

125. *Id.* art. 9.

- Termination agreements are enforceable if they do not violate mandatory provisions of law, and if they do not result from fraud, coercion, or taking advantage of employee hardship.¹²⁶

IX. Top Five IP Developments

For the second consecutive year, the Congressional International Anti-Piracy Caucus (“CIAPC”) listed China as one of the top five violators on its “International Piracy Watch List.”¹²⁷ In 2010, however, China’s intellectual property (“IP”) legal regime made significant developments. This article will address “Top Five” IP developments in China.¹²⁸

A. FIFTH: “TIME-HONORED” BRANDING

In China, MOFCOM grants “time-honored” status to companies whose brand has a long history in China, is attached to a product or service passed down through generations, and is widely recognized by society. As recently as 2009, it came to the attention of the Chinese government that up to seventy percent of the top 500 Chinese brands were not registered internationally.¹²⁹

In 2010, the Beijing Government released the *Measures for the Administration of Special Funds Used for the Promotion of the Development of the Old Shops and Enterprises of the Commercial and Service Industries in Beijing*,¹³⁰ under which it began to provide financial support and advice for “time honored” brands. To assist stores that had lost their time-honored locations to city expansion in prior years and could not qualify as a “time-honored brand” without their location, MOFCOM started the “Project of Revitalizing the Old-Branded Shops and Businesses.” In addition, the Beijing Time-Honored Brands Association assists the dislocated brands by providing them online “virtual stores.”¹³¹

B. FOURTH: ENFORCEMENT THROUGH GOVERNMENT INITIATIVES

In an early 2010 article, Judge Wang Zhuo of the IP Division, No. 1 Intermediate People’s Court of Beijing, analyzed the 2008 case in which Baidu, a company mentioned by name in the Anti-Piracy Caucus list, was sued for providing song download links.¹³² Judge Wang found clear search engine liability under Articles 14¹³³ and 23¹³⁴ of the *Regu-*

126. *Id.* art. 10.

127. *Congressional International Anti-Piracy Caucus: 2010 Watch List*, COUNCIL ON FOREIGN REL., May 19, 2010, http://www.cfr.org/publication/22216/congressional_international_antipiracy_caucus.html.

128. This list is limited to situations that the author has specific knowledge about. It is subjective and not meant to advocate or criticize.

129. See Xue Li, Yi Zhou, Shihai Nie & Qi Zhang, *Ups and Downs of China’s Time-Honored Brands*, CHINA INTEL. PROP., June 2010, at 29, available at <http://www.chinaipmagazine.com/en/journal-show.asp?id=607>.

130. See Doris Li, *Behind Time-honored Names: It’s More Than Business*, CHINA INTEL. PROP., June 2010, at 39, available at <http://www.chinaipmagazine.com/en/journal-show.asp?id=611>.

131. *Id.*; see also LZHE SHOP, <http://www.lzheshop.cn/en/index.html> (last visited Jan. 27, 2011).

132. Zhou Wang, *Deciding the Infringement Liabilities of the Search Engine Provider*, CHINA INTEL. PROP., Aug. 2010, at 53, available at <http://www.chinaipmagazine.com/en/journal-show.asp?id=635>.

133. Provisions on the Protection of the Right to Network Dissemination of Information, (promulgated by St. Council, May 18, 2006, effective July 1, 2006), art. 14, 2006 China Law LEXIS 8161, at *9-10 (2006) (China).

lations on Protection of the Right of Information Network Dissemination. The court found that liability attaches if a site receives timely notice of:

- the name and contact of the rights holder;
- the name(s) and network address(es) of the infringing work, performance, or audio/visual fixation; and
- preliminary evidence of the infringement.¹³⁵

Judge Wang further stated that if the information is properly provided and, “[i]f the alleged infringer does not disconnect . . . then it will be deemed as knowing of those infringing songs and should be held jointly liable for the infringement.”¹³⁶

In late 2009, the China State Administration of Radio, Film and Television (“SARFT”) clamped down on more than 530 BT sites. This gave rise to a boom of pirated DVDs in subway stations and electronic zones.¹³⁷ This created a “Whack-A-Mole”¹³⁸ phenomenon for Chinese officials. Netizens,¹³⁹ on the other hand, responded as if they had been deprived of a public right.¹⁴⁰ As a result, mandatory IP education started in school programs,¹⁴¹ and Renmin University introduced China’s first university program on IP law.¹⁴²

C. THIRD: LOCAL ARTISTS UNITE WITH COLLECTIVE ORGANIZATIONS

Under Article 47 of the Regulations on the Collective Management of Copyright, artists may form collective organizations to collect fees for IP infringement.¹⁴³ In 2010, artists used Article 47 to form collective organizations with the legal right to collect royalties and sue over the unauthorized use of copyrighted materials in the literature,¹⁴⁴ film,¹⁴⁵ and music¹⁴⁶ industries. The China Written Works Copyright Society (WWCS) also

134. *Id.* art. 23.

135. *Id.* art. 14.

136. Wang, *supra* at 132.

137. Sara Yan, *BT Sites Shut Down—Is Piracy Blocked or Circulated*, CHINA INTELL. PROP., Feb. 2010, at 16, available at <http://www.chinaipmagazine.com/en/journal-show.asp?id=563>.

138. See generally William Safire, *Whac-A-Mole*, N.Y. TIMES MAG., Oct. 26, 2009, http://www.nytimes.com/2006/10/29/magazine/29wwln_safire.html (whack-a-mole is a repetitious or futile task).

139. A netizen is a person involved on an online community.

140. Kevin Nie, *The Difficulties and Misconceptions of IP Education in School*, CHINA INTELL. PROP., Apr. 2010, available at <http://www.chinaipmagazine.com/journal-show.asp?id=576>.

141. *Id.*

142. Kevin Nie, *Scholar Liu Chuntian*, CHINA INTELL. PROP., Feb. 2010, at 59, available at <http://www.chinaipmagazine.com/en/journal-show.asp?id=572>.

143. Regulation on the Collective Administration of Copyright (promulgated by the St. Council, Dec. 28, 2004, effective Mar. 1, 2005), art. 47, 2005 China Law LEXIS 11823, at *25-26 (2005) (China).

144. Kevin Nie, *Infringement and Protection: Unchanged Topic of Copyright at “The Two Sessions,”* CHINA INTELL. PROP., Apr. 2010, at 16, available at <http://www.chinaipmagazine.com/en/journal-show.asp?id=582>.

145. Kevin Nie, *The Staggering Collective Management of Film Copyright—An Interview with Zhu Yongde, President of the China Film Copyright Association*, CHINA INTELL. PROP., Apr. 2010, at 56, available at <http://www.chinaipmagazine.com/en/journal-show.asp?id=595>.

146. See Nie, *supra* note 144.

worked to strengthen the law so that an organization can file a lawsuit in its name on artists' behalf.¹⁴⁷

D. SECOND: ACQUISITION OF IP

China's auto industry demonstrated its new strategy for acquiring IP rights: acquisition. In early 2010, Geely purchased Volvo in a deal involving IP rights transfers.¹⁴⁸ Geely acquired some key technologies, such as safety and environmental protection IP.¹⁴⁹ Beijing Automobile ("BAIC") acquired Sweden's Saab's IP. This acquisition is an even better example of the new strategy. The Saab technology provided BAIC with a great leap forward. BAIC plans to develop at least two independent car models based on the IP. Some estimate that BAIC saved over RMB \$1 billion and over five years in R&D through the transaction.¹⁵⁰

E. FIRST: PARALLEL IMPORTS - A THEORY WITHOUT A LEGAL FOUNDATION

Parallel importers ordinarily buy goods in a foreign country for a cheaper price than they are being sold domestically in order to import and sell the goods in the country of origin.¹⁵¹ This is normally an issue for countries with strong currencies. Some countries allow IP rights holders to restrict sales and re-importation. Other countries, like the United States, follow the exhaustion doctrine in which IP rights holders have limited ability to restrict re-sales. China has no law on parallel importation.¹⁵² In 2010, however, legislators were increasingly pressured to act.

The 2010 legislative debate is the latest chapter in the ongoing story of how China will progress domestically, and how it will manage its own IP and its economy. China is now worried about protecting its own trademarked goods from being re-imported at a lower price. The debate indicates how China sees itself in the future and is why parallel importation tops the "Top Five" list.¹⁵³

147. *Id.*; see also *Music Royalties to Be Collected From Beijing Subways "By the Square Meter,"* CHINA INTELL. PROP., June 2009, available at <http://www.chinaipmagazine.com/en/journal-show.asp?id=495> (royalty fees imposed even for music played in subways).

148. Doris Li, *Beijing Automobile Speeds up Brand Development by M&A*, CHINA INTELL. PROP., Apr. 2010, at 35, available at <http://www.chinaipmagazine.com/en/journal-show.asp?id=589>.

149. *Id.*

150. *Id.*

151. See *International Exhaustion and Parallel Importation*, WORLD INTELL. PROP. ORG., http://www.wipo.int/sme/en/ip_business/export/international_exhaustion.htm (last visited Feb. 3, 2011). See also Yan Guizhen, *Overview of Regulations on Parallel Importation in China—From the Perspective of Trademark Parallel Importation*, CHINA INTELL. PROP., Oct. 2010, at 40, available at <http://www.chinaipmagazine.com/en/journal-show.asp?id=653>.

152. Kevin Nie, Doris Li, Anne Zhang & Aimee Wang, *Trademark Parallel Importation Requires Urgent Legislation*, CHINA INTELL. PROP., Oct. 2010, at 31, available at <http://www.chinaipmagazine.com/en/journal-show.asp?id=645>.

153. See *id.*

