China

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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") 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. *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) is at fault as construed according to legal provisions and cannot prove otherwise; or (3) infringes upon a civil right or interest of another person, whether at fault or not, as provided by law. "Civil rights and interests" 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, comparative negligence, joint and several liability, and equal compensatory liability. 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; employers for their employees; owners for contractors; and network service providers for actions of network users. 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 measures 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.

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: compensation, cessation of infringement, removal of obstruction, elimination of danger, return or restoration of property, apology, and elimination of consequences and restoration of reputation. For personal injury, actual damages include medical expenses, nursing care expenses, travel expenses, and loss of in-

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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.


17. Tort Law, art. 15; GPCL, art. 134.
come. Additional types of actual damages may be awarded in cases of disability or death. Property loss can be measured by reference to the market price at the time of loss. If loss is not ascertainable, it can be measured by reference to the benefit obtained by the tortfeasor. Under the Tort Law, damages are now available in cases where the defendant has inflicted serious mental distress on the plaintiff.

4. Defenses

Liability may be waived or mitigated where the harm is caused by the victim or a third party. 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, (2) force majeure, (3) self-defense, or (4) conduct of necessity.

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.

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, motor vehicle traffic accidents, medical malpractice, environmental pollution, ultra-hazardous activities, domestic animals, and dangerous objects.

1. Product Liability

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

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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. 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.

The manufacturer and the seller of a product must now take remedial measures (timely warning and recall). 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.

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. 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. 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. 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.
43. Tort Law, arts. 41-43.

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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. 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. In 2007, China adopted an ambitious development plan for 2020 (“Plan”), which required a revision of the original Renewable Energy Law (“2006 Law”).

Amendments to the 2006 Law (“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. However, power grid companies were not always able to keep up with rapid development. They did not have the ability to utilize all energy produced and lacked sufficient grid connectivity.

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

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48. 2009 Law.
49. 2006 Law, art. 14.
51. Bai, Miles & Wong, supra note 50; Ng, supra note 50.
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. 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. 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.

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. 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.

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. Companies must also apply energy saving technologies to satisfy their off-take obligations. 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.

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.

C. RE FUND

The 2006 Law created a renewable energy fund ("RE Fund") to provide support for the development and advancement of renewable energy. 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

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52. 2009 Law, art. 14.
53. Id.
54. Id. art. 29.
55. Id.
59. Id.
60. Id.
generated with conventional energy was passed onto the end user, through a deduction in the end user's electricity bill.\textsuperscript{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.\textsuperscript{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.\textsuperscript{65} Once the surcharges have been pooled, power grid enterprises can seek compensation for additional costs of purchasing renewable energy through such a subsidy\textsuperscript{66} and expenses associated with interconnection into the grid.\textsuperscript{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.\textsuperscript{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.\textsuperscript{69}

(2) **Profit Margin Limitation:** The certified profit margin of all ROs shall not be lower than fifteen percent.\textsuperscript{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.\textsuperscript{71} Effective December 1, 2010, all foreign invested enterprises, foreign enterprises, and individuals with for-

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\textsuperscript{63} See id. arts. 20, 22.
\textsuperscript{64} 2009 Law, art. 24.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
\textsuperscript{67} Id.
\textsuperscript{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.].
\textsuperscript{69} Id. art. 4.
\textsuperscript{70} Id. art. 8.
foreign nationalities were required to pay two additional taxes from which foreign companies had previously been exempt.\(^7\)

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).\(^7\)

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.\(^7\)

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.\(^7\) At the beginning of the year, two principal regulations also entered into force, establishing the basic framework for the application and review procedures.\(^7\) A January administrative interpretation then clarified them further.\(^7\) 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.\(^7\) The new regulation clarifies the implementation process.

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\(^7\) Id.

\(^7\) Id.

\(^7\) Id.

\(^7\) 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.].


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

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. If the applicants cannot complete the divestiture within MOFCOM’s approval period, the regulation requires the applicants to appoint a divestiture agent. The agent is then given the same length of time to sell the Business. 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. In addition, the divestiture shall not negatively affect market competition.

The applicants may not engage in conduct that will diminish the Business’s value. Prohibited conduct includes hiring away employees and attempting to divulge trade secrets. 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.

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. Thus, their compensation will not compromise their independence.

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 sales exceeding RMB400 million in the most recently completed fiscal year, and one of the following two criteria is satisfied:

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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;

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 (赔偿未对审查反垄断) [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].
(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.  

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-

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98. *Id.*


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

104. Partnership Law, art. 2.


106. *Id.* art. 35.

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ment regulations require that the business be operated through a Chinese-foreign joint venture.107

Chinese law does not expressly authorize an onshore FIE who is a GP of a FILP to convert its foreign currency into RMB and invest in the FILP. This is a major obstacle to foreign PE investment, of course. The State Administration of Foreign Exchange ("SAFE") expressly prohibited these conversions in 2008.108 Unless or until SAFE amends this rule, a FILP is not a viable structure for a foreign PE firm seeking to funnel its own capital into its Chinese investments.

C. LOCAL POLICIES

The government has encouraged the PE industry in certain municipalities, including Shanghai, Beijing, Tianjin, and Chongqing. Pilot programs were adopted in these cities in 2009 and early 2010 that allow foreign-invested equity investment management enterprises ("FEIMEs") to be formed, and authorize them to manage domestic RMB funds. The FEIME, as G, may convert up to five percent of their foreign currency into RMB.09

D. AUTHORIZATION FOR QUALIFIED FOREIGN LPs

On October 12, 2010, SAFE announced that it had approved "in principle" a proposal by the Shanghai municipal government ("Trial Program") to allow foreign equity investments in domestic FILPs to convert a portion of their capital into RMB.110 The Trial Program creates the concept of a "qualified foreign" LP ("QFLP"). A QFLP is an enterprise with capital of at least US$500 million and cumulative capital of at least US$5 billion over a prescribed period. A QFLP may invest up to the lesser of fifty percent of the aggregate size of the fund, or US$100 million. A qualified GP may invest up to five percent of the aggregate size of the fund. The qualifications appear to be limited to larger foreign PE firms.111

107. Id. art. 6.
111. See Wei Su, supra note 110.
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”), effective January 4, 2010. 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. The ROCircular has four restrictions.

1. **Existence**: A foreign company must have been in existence for two consecutive years. 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. 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). 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.

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 (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.

113. Id.
114. Id.
115. Id. art. 1.
116. Id. art. 2.
117. Id. art. 3.
118. Id. art. 4.
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. 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. 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. 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.
- Employment disputes resulting from the voluntary restructuring of an employer should be treated as labor law disputes.
- 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.

122. Id. art. 8.
123. Id. art. 7.
124. Id. art. 2.
125. Id. art. 9.
**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." In 2010, however, China's intellectual property ("IP") legal regime made significant developments. This article will address "Top Five" IP developments in China.

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.

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,* 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."

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. Judge Wang found clear search engine liability under Articles 14 and 23 of the *Regulations 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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{137} This created a "Whack-A-Mole"\textsuperscript{138} phenomenon for Chinese officials. Netizens,\textsuperscript{139} on the other hand, responded as if they had been deprived of a public right.\textsuperscript{140} As a result, mandatory IP education started in school programs,\textsuperscript{141} and Renmin University introduced China's first university program on IP law.\textsuperscript{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.\textsuperscript{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,\textsuperscript{144} film,\textsuperscript{145} and music\textsuperscript{146} industries. The China Written Works Copyright Society (WWCS) also

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\textsuperscript{134} Id. art. 23.  \\
\textsuperscript{135} Id. art. 14. \\
\textsuperscript{136} Wang, supra at 132. \\
\textsuperscript{139} A netizen is a person involved on an online community. \\
\textsuperscript{141} Id. \\
\textsuperscript{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. \\
\textsuperscript{146} See Nie, supra note 144.
\end{flushleft}
worked to strengthen the law so that an organization can file a lawsuit in its name on artists’ behalf.\textsuperscript{147}

D. \textbf{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.\textsuperscript{148} Geely acquired some key technologies, such as safety and environmental protection IP.\textsuperscript{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.\textsuperscript{150}

E. \textbf{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{153}

\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{153} See id.

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