I. Intellectual Property Review

On November 21 and 22, 2011, China and the United States reached several important agreements covering intellectual property rights at the 22nd U.S.-China Joint Commission on Commerce and Trade (JCCT) in Chengdu, China. JCCT outcomes often capture significant issues at the core of China’s developing IP system, and provide a guide for predicting future developments. This review tracks the key policy and legislative developments that are reflected by the outcome of the 22nd JCCT.

A. Special IPR Enforcement Campaign

China initiated a special IPR campaign in October 2010 that extended through March 2011. According to official data, China’s relevant authorities handled 146,000 cases that were worth $4.76 billion. Even though the long-term effect of the campaign remains to

* This article reviews developments in China during the year 2011. Ying Deng, an attorney with Baker and McKenzie, authored the section on choice of law for foreign related civil disputes. Jing He, a Senior Consultant with ZY Partners (Beijing), authored the section on Intellectual Property Review. Brenda Horrigan, an attorney with Salans, authored the section on proposed revised CIETAC rules. Qingqing Miao, an attorney with Shatz Law Group plc, authored the section on China’s Social Insurance Law. Susan Ning, a partner with King & Wood, authored the sections on national security review for foreign M&A and antitrust enforcement. Wesley Pang and Anna Tevini, attorneys with Shearman & Sterling LLP, authored the section on Hong Kong’s new arbitration ordinance. Chang Wang, an attorney and Chief Research and Academic Officer for China, Thomson Reuters, authored the section on proposed amendments to China’s Criminal Procedure Law. Adria Warren, Senior Counsel with Foley & Lardner LLP, edited the article. Robin Gerofsky Kaptzan, Senior Foreign Attorney with Grandall Legal Group (Shanghai), provided editorial support. For developments during 2010, see Jordan Brandt et al., China, 45 INT’L LAW. 487 (2011). For developments during 2009, see Adam Bobrow, Jin Ma, & Adria Warren, China, 44 INT’L LAW. 631 (2010).


be seen, international IPR owners have praised the efforts against counterfeiters. In response, China agreed at the 22nd JCCT to make the State Council-level leadership structure under the recent campaign permanent.

Online counterfeiting is increasingly challenging for many brand owners. The State Administration for Industry and Commerce (SAIC) is the authority in charge of enforcement against online counterfeiting. SAIC’s efforts include legislative actions to deal with jurisdictional issues and handling electronic evidence in online counterfeiting cases. New rules in dealing with electronic evidence are expected in the next few months.

B. TRADEMARK LAW AMENDMENT

Trademark law has been a focal point for many companies that are vying for China’s market. Apple’s recent loss in its “iPad” case in China highlighted the huge stake of trademark protection.

On September 2, 2011, the Legislative Affairs Office (LAO) of the State Council released a second version of its draft amendment to the Trademark Law (Amendment) for public comment. The Amendment leaves untouched most of the clauses in the existing law, reflecting the authorities’ intent to avoid dramatic changes. But the Amendment does address some notable concerns.

First, bad faith filings (also referred to as “trademark squatting”) have long been a problem for both domestic and international brand owners. Authorities have taken a tolerant approach in regard to bad faith filings. One of the most relevant provisions in the current law simply states that an applicant should not use “improper means” to register a mark that has a reputation and has been used by others. The Amendment expands on the current rules. According to the draft, if an applicant tries to register a trademark similar to an earlier mark for similar goods, and the applicant is aware of the existence of the earlier mark due to prior dealings with the brand owner, a geographical closeness, or any other relationship, then the Trademark Office must refuse to register the mark. Moreover, if an applicant copies a distinctive mark with a reputation, causing confusion, the Trademark Office must also reject the application. This change should help owners of

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well-known foreign brands. Additionally, the problem of trademark squatting has also attracted substantial attention from the Supreme People’s Court (SPC). The SPC has called for the full exploitation of current laws in order to curb bad faith trademark filings in order to send a strong signal to local judges to decide against applicants who act in bad faith by registering or attempting to register trademarks that are similar to earlier marks.\(^\text{1}\)

Second, an important change relates to opposition proceedings. Currently, opponents have a three-month window to oppose an application once it has been preliminarily approved by the Trademark Office. This can easily delay registration for a few years. Under the draft Amendment, only interested parties or parties that have prior rights can file an opposition.

Third, the Amendment would increase maximum statutory damages for counterfeiting from 500,000 to 1 million RMB and strengthen penalties against repeat offenders.\(^\text{2}\) The Amendment also incorporates the principle of general criminal liability for counterfeiters, but does not specify the prosecution threshold. Finally, it would become possible to register sounds as trademarks. This is seen as a step closer to international practice.

To many practitioners, the draft fails to address a very important issue related to Original Equipment Manufacturer (OEM) liability (i.e., whether a Chinese factory is liable for trademark infringement if it merely acts as an OEM for an overseas buyer by exporting ordered goods to overseas markets).\(^\text{3}\)

It is widely expected that the Amendment will be submitted to the National People’s Congress (NPC) for review and ratification in 2012.

C. UPCOMING COPYRIGHT LAW REFORM

On July 13, 2011, the National Copyright Administration of China (NCAC) announced its plan to initiate the amendment of the Copyright Law.\(^\text{4}\) The copyright agency formed an advisory group of approximately twenty leading experts from diverse fields. The NCAC plans to finalize the initial draft amendment by the end of 2011.

While the proposed amendments have not been widely publicized, it appears that local copyright industries are likely to be active in the debate.\(^\text{5}\) The increased comments re-


grams/resources/ChinasIPREnforcementAssessment.pdf.

\(^{13}\) See, e.g., Joseph Simone, PRC Trademark Enforcement: Shanghai Appeal Court Ruling Sparks Controversy Over OEM Infringement Liability, CHINA LEGAL DEVELOPMENTS BULLETIN (Baker & McKenzie) July—Sept. 2010, at 13–14, available at http://www.bakermckenzie.com/files/Publication/ecce82c6-0c4d-44a5-beb1-853c843974e/Presentation/PublicationAttachment/0bc4da52-971b-49fa-938c-f8889175029/ nl_china_elcb_fulysept2010.pdf (containing a full case summary of Shenda Sound Electronics v. Jiulide Elec-
tronics, a Sept. 2009 decision of the Shanghai High People’s Ct.).

\(^{14}\) Mingde Li, Some Proposals for the Amendment of the Copyright Law of China, INTELLECTUAL PROP.

flect the fast growth of the content industry in recent years, which has directly resulted from the quick expansion of the Internet and entertainment industries in China.

It must be noted that China has been making efforts to improve its criminal enforcement system to protect property rights. China issued new Judicial Opinions for handling IP criminal cases in January 2011, which are intended to address a variety of pending issues in IP criminal prosecution. The Opinions have clarified some of the key issues necessary to convict online pirates. Specifically, the Opinions provide more specific examples to illustrate what are “for profits” in piracy cases. The Opinions also set out numerical thresholds to prosecute Internet piracy. Another encouraging sign is that in November 2011 Premier Wen Jiabao announced China is going to research the possibility of amending the criminal code with respect to the IP crimes.

D. Patent Law Development

The year 2011 was a quiet year for patent law. Few cases of significance are currently in the press. In October 2011, the State Intellectual Property Office (SIPO) released a draft for public comment on the topic of compulsory licenses, but none of the rules are contentious or suggest major improvements. Currently, the Beijing Higher People’s Court is reportedly working on new draft guidelines governing patent infringement trials.

II. China’s Social Insurance Law

On July 1, 2011, the long-awaited Social Insurance Law (SIL), China’s first national law on social insurance, officially took effect. The SIL aims to 1) establish a national social insurance fund; 2) unify the existing social security system; and 3) ensure equal access to social insurance benefits.


A. THE "FIVE INSURANCES"

For the first time, the SIL codifies the basic insurance framework consisting of five mandatory insurances: old-age, medical, unemployment, maternity, and work-related injury. The SIL provides the first detailed national regulatory guidelines for each mandatory category of insurance.

1. Old-Age Insurance (Pension)

Under the SIL, individuals will be entitled to a monthly pension upon reaching the mandatory retirement age if they have contributed to the fund for an aggregate of fifteen years. The SIL also requires joint contribution by employers and employees with contributions respectively based on total wages paid and on a monthly income. Self-employed workers, part-time workers, and independent contractors may also contribute. Migrant workers are also eligible to participate in the system. Rural residents are eligible to participate in the "rural pension pilot program."

In recognition of increased labor mobility in China, the SIL specifically allows the transfer of pension funds when employees change regions.

2. Basic Medical Insurance

Medical insurance coverage is available for urban employees, independent contractors, self-employed, part-time workers, and migrant workers. The SIL provides that the national government will establish a new rural cooperative medical insurance system. An insured person will not lose medical coverage or accumulated contribution due to relocation.

A major improvement under the SIL is the direct payment for any covered treatment by the medical insurance fund.

3. Unemployment Insurance

Under the SIL, employers and employees are jointly responsible for making contributions. An employee is entitled to unemployment benefits if the employee has (a) been paying unemployment insurance premiums for at least one year, (b) been terminated, and (c) registered with the social insurance administration as unemployed and is actively seek-
ing employment. Article 46 of the SIL defines the length of time that an individual may claim benefits. The provincial government establishes the rate of benefits.

4. Maternity Insurance

Employers are solely responsible for maternity insurance premiums. Employees are entitled to maternity insurance benefits and subsidies, while non-working spouses are only entitled to medical benefits. 

Subsidies are available during maternity leave or any leave relating to planned parenthood surgeries. The amount is determined based on the average wage of the employer. This is a significant change because the amount was previously based on an employee’s actual salary.

5. Work-Related Injury Insurance

Premiums for work-related injury insurance are also the employer’s sole responsibility. The new law defines when employees can claim benefits and who is responsible for making payments. Premiums are established by social insurance administrative agencies (She Hui Bao Xian Jing Ban Ji Gou [社会保险经办机构]). Coverage is now provided for injured workers even when their employers fail to pay premiums. In these cases, the employer could pay the medical costs directly. If the employer does not, the injured worker’s insurance will pay, and then the administrative agency will seek payment from the conforming employer pursuant to Article 63 of the SIL.

B. Potential Impacts on Foreign Employees and Their Employers

The SIL now applies to foreigners lawfully employed in China. The Tentative Measures for the Enrollment in Social Insurance of Foreigners Employed in China (Tentative Measures) became effective on October 15, 2011. Under the Tentative Measures, foreign employees and their employers must pay premiums for the “five insurances.”

35. Id. art. 45.
36. Id. art 46.
37. Id. art. 47.
38. Id. art. 53.
39. Id. arts. 54–56.
40. Id. art. 56.
41. Id.
42. Livermore, supra note 21.
43. PRC Social Insurance Law, supra note 20, art. 33.
44. Id. arts. 38–39.
45. Id. art. 34.
46. Id. art. 41.
47. Id. art. 63.
48. Id. art. 97.
When a foreigner leaves China prior to the maturity of his or her pension, the worker has the option to either withdraw deposited funds, or retain an individual account with the total payment period calculated in the aggregate when the worker re-enters China for future employment. Early withdrawal is only available for foreign employees, as their employment tends to be temporary or intermittent. The Tentative Measures further exempt citizens of countries that have bilateral or multilateral treaties on social insurance. For employers, operating costs will increase. For foreign employees, it is not clear how they can fully benefit from their insurance payments because the Tentative Measures only elaborate on pension benefit coverage.

III. National Security Review for Foreign M&A

A. INTRODUCTION

B. M&A Deals Subject to NSR Regime

The NSR process will apply only if the target domestic enterprise is involved in a business that concerns (i) national defense security issues or (ii) national economic security issues. National defense security businesses include military industry enterprises and supporting enterprises, enterprises adjacent to major and sensitive military facilities, and other entities relevant to China's national security.59 National economic security businesses include enterprises involving major agricultural products, major natural resources and energy industries, important infrastructure projects, transportation services, and key technologies, as well as major equipment that is related to national security.60 For these businesses, a NSR process may only be triggered if the foreign investor intends to acquire de facto control of the target domestic company.61 A foreign business (or group) acquires de facto control over a domestic company when it or they: (a) acquire fifty percent or more of the shares of the target, or (b) otherwise has significant control over the target.62 A ministerial joint committee (Committee), led by the National Development and Reform Commission (NDRC) and MOFCOM, will be set up to evaluate deals against the NSR regime.63

C. Procedural Aspects of NSR Regime

1. Initiation of NSR Process

The NSR process may be triggered upon voluntary request. A foreign investor may voluntarily apply to MOFCOM for NSR.64 If MOFCOM decides the potential deal falls within NSR, MOFCOM will submit the matter to the Committee.65 The NSR process may also be triggered upon the request of third parties.66 In that case, the Committee will decide whether to commence the process.67 Moreover, the local commerce departments have the responsibility to screen transactions that are subject to the NSR regime yet not voluntarily filed.68 The NSR process may take place in two stages. A deal will be in the “special review” process if it fails to go through the “general review” process.69

60. Id.
61. Id.
62. Id. art. I(III).
63. Id. art. III(I).
64. Id. art. IV(I).
65. Id.
66. Id. art. IV(II).
67. Id.
68. Rules for the Implementation of Relevant Issues, art. 2.
2. General Review

The general review process may last up to thirty working days from the date the Committee receives MOFCOM's application. The Committee will solicit written opinions from other relevant departments. Decisions at this stage will be adopted by unanimous consent. If one department whose opinion is solicited thinks that the deal is likely to affect national security, the Committee will begin its special review.

3. Special Review

The special review process takes up to sixty working days. The Committee will organize a security evaluation of the deal and take into account the evaluation result in reviewing the deal. If a basic consensus is reached, the Committee will issue its decision; if substantial disagreements exist, the Committee will escalate the matter to the State Council for a final decision. During the whole review process, the merging parties are obligated to cooperate with the Committee and entitled to apply to MOFCOM for amendment of the deal proposal or terminate the transaction.

D. Substantive Aspects of NSR Regime

The Committee will review the potential impact of the M&A deal on (i) national defense security, including impact on the capacity to produce products as well as provide services and relevant facilities equipment necessary for national defense; (ii) economic stability; (iii) basic social order; and (iv) the research and development capacity of key technologies involving national security. In the NSR Rules, MOFCOM clearly states that the authority will assess the applicability of the NSR process from the substance and actual impact of a transaction and that foreign investors shall not evade the NSR regime via alternative transaction structures. It would be very hard for foreign companies to try to circumvent the NSR process by designing complex transaction structures, and it would be reasonable to expect the NSR regime will have a far-reaching effect on the landscape for foreign mergers and acquisitions in China.

E. Consequence for Failure of Passing the Review

If the Committee or the State Council decides the proposed deal has or is likely to have a major impact on national security, the merging parties will be required to terminate the deal or undertake certain remedies, such as the transfer of relevant shares or assets.

70. Id.
71. Id.
72. Id.
73. Id.
74. Id.
75. Id.
76. Id. art. IV(IV).
77. Id. art. 2.
78. NSR Rules, art. 9.
F. Conclusion

Since there is no requirement under China’s NSR rules for the publication of NSR decisions, it is not entirely clear how many NSR filings MOFCOM has accepted and whether MOFCOM has approved (or disapproved) a transaction under the NSR regime. As part of the government approval procedures for foreign investment in China, the impact of the NSR process on inbound M&A should not be neglected.

IV. Antitrust Enforcement

August 2011 marked the third anniversary of China’s Anti-Monopoly Law (AML). During the past year, the three antitrust enforcement agencies and the people’s courts at the central and local levels all took notable actions.

A. MOFCOM Decisions

The number of merger control notifications has been steadily rising. In 2010, MOFCOM accepted approximately 110 cases. As of August 2011, MOFCOM received 142 filings, and accepted 118. It is expected that more than 200 mergers will be reviewed in 2011.\(^{81}\) By November 2011, MOFCOM issued three conditional merger clearance decisions, lifting the total number of conditional decisions to nine.

1. Russian Potash Deal (June 2, 2011)

This decision relates to Uralkali’s proposed acquisition of Silvinit, both of which are Russian potash fertilizer companies. MOFCOM imposed behavioral remedies on this acquisition, requesting the combined entity to, inter alia, continue to maintain its current sales practices and procedures, and continue to meet China’s demands for potassium chloride.\(^{82}\)

2. Alpha V/Savio Deal (October 31, 2011)

Alpha V is a private equity fund that holds 27.9% shares of Uster Technologies Ltd., the global leader in textile testing and quality control machines. Savio is an Italian-based textile machinery producer. Uster and Leopfe (Savio’s wholly-owned subsidiary) are the

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only two suppliers of yarn clearers in the world. MOFCOM requested Alpha V to divest its entire shares in Uster within six months.\textsuperscript{83}

3. \textit{GE/Shenhua Deal (November 10, 2011)}

This decision is the first conditional decision in China involving a state-owned enterprise. General Electric China and China Shenhua Coal to Liquid and Chemical Co., Ltd. (CSCLC) planned to establish a joint venture to license technology in China. MOFCOM imposed behavioral remedies on the deal, requesting CSCLC and Shenhua Group not to compel licensees use of the joint venture’s technology, and not to raise supply costs for those using alternative technologies.\textsuperscript{84}

B. NDRC ACTIONS

The NDRC has been active in enforcement of the AML and Price Law.

1. \textit{Zhejiang Fuyang Paper Making Industry Association}

On January 4, 2011, NDRC fined Zhejiang Fuyang Paper Making Industry Association for facilitating its members to engage in monopoly agreements in breach of the AML and Price Law. This was the first enforcement action by the NDRC in 2011, and the NDRC fined the association 500,000 RMB.\textsuperscript{85}

2. \textit{Price Hikes for Household and Personal Care Products}

In March 2011, several major manufacturers of household and personal care products, including multinationals such as Procter & Gamble and Unilever, as well as domestic manufacturers, separately announced that the retail prices for their respective brands of washing agents would increase by as much as ten percent commencing early April 2011.\textsuperscript{86} This raised public suspicion as to whether the manufacturers had colluded to increase prices. The NDRC sent officials to investigate.\textsuperscript{87} Eventually, the NDRC fined Unilever two million RMB under the Price Law for spreading news of the price increase and disturbing the market order.\textsuperscript{88}


\textsuperscript{88} Information can be found at the NDRC’s website. Press Release, Nat’l Dev. and Reform Comm’n, Lianhe Li Hua/Hua Sanbu Zhangjia Xinxin Ruojuan Shichang Zhiu Shoudao Yanli Chufa
3. China Telecom and China Unicom

On November 9, 2011, NDRC confirmed that it had been investigating China Telecom and China Unicom for their alleged abuse of dominance in the broadband access and inter-network settlement sector.89 Two of three giant state-owned telecommunication operators are suspected of exercising price discrimination by charging their competitors much higher prices than non-competitors charge. The investigation is ongoing.

4. Pharmaceutical Actions

NDRC also announced its decision to fine two private pharmaceutical companies nearly seven million RMB for violating the AML.90 The companies were penalized mainly for abusing their dominance in their applicable market by charging unfairly high prices to manufacturers.

C. SAIC Actions

In 2011, the SAIC announced the following decisions regarding AML enforcement.

1. Concrete Manufacturers Fined

In February 2011, Jiangsu Administration for Industry & Commerce (AIC) issued sanctions against the Concrete Committee of the Construction Materials and Construction Machinery Industry Association of Lianyungang City and sixteen concrete manufacturers for breach of the AML for entering into a monopoly agreement.91 Jiangsu AIC ordered an injunction against the association to cease the illegal conduct and fined the association 200,000 RMB.92 This is the first publicly-released AML enforcement decision by the SAIC (which delegated power to the provincial AIC) since the enactment of the AML in August 2008.

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89. The news was released by News in 30 Minutes, the daily midday news program of CCTV (China’s state television broadcaster) on Nov. 9. For a report of the case in English, see China Telecom Giants Get Antimonopoly Probe, CNTV (Nov. 10, 2011), http://english.cntv.cn/program/china24/20111110/104010.shtml.


92. Id.
2. First AML Enforcement Action

On January 26, 2011, three GPS operators filed a complaint to the Guangdong AIC, claiming that the municipal government of Heyuan City, Guangdong Province abused its administrative power in the course of promoting GPS for automobiles, which eliminated and restricted competition in the industry. After its investigation, the Guangdong AIC officially requested that the Guangdong Government rectify the conduct. In response, on June 12, 2011, Guangdong issued an administrative decision finding that the Heyuan government violated the AML.\(^9\)

D. Judicial Interpretation & Private Litigation

On April 25, 2011, the SPC issued the public comment draft of *Provisions on Issues Concerning the Application of Law in the Trial of Monopoly Civil Dispute Cases* (Draft Rules), which governs private AML actions.\(^4\) The Draft Rules contain twenty articles covering jurisdiction, plaintiffs' standing, burden of proof, evidentiary rules, the relationship of antitrust administrative investigations and judicial process, form of civil liabilities, and the statute of limitations. The Draft Rules have not yet been enacted.

Despite the lack of detailed rules regarding AML civil actions, it has taken private actions in 2011. Below are two typical cases filed under the AML.

1. *Hudong v. Baidu*

Beijing Hudong v. Baidu was heard at Beijing No.1 Intermediate People's Court on November 1, 2011. Beijing Hudong (a Chinese internet search engine) sued Baidu for alleged abuse of its dominance by manipulating online search results and lowering the ranking of, or eliminating, Hudong Bai Ke (Hudong's wiki-like encyclopedia services) from online search results.\(^5\) The court's judgment is pending.

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93. Press Release, State Admin. for Indus. & Com. of China, Huy Yy Jy Yao Zhi Ding Jing Ying Zhe, Gong Shang Ji Guan Shou Cx Xing Shi Jian Yy Quan (Fan Long Duan Fa) Jian Zhi Dy Fang Zheng Fu Pài Chu Xian Zhj Ying Zheng—Guang Dong Sheng Xing Gong Shang Jü Dia Chà Làn Yong Xing Zhèng Quàn Lý Pà Chú, Xian Zhj Ying Zheng An Jy Shí

94. The full text of the Draft Rules is released on the Supreme Court's website.


SPRING 2012
2. Shanxi Combined Transportation v. Taiyuan Bureau of Railways

On September 7, 2011, the Shanxi Combined Transportation Group Company (SCTG) filed an administrative lawsuit with the Taiyuan Xinghualing District People’s Court against the Taiyuan Bureau of Railways (TBR). According to SCTG, TBR’s failure to respond to its applications for establishing new railway ticket agent stores was a violation of the AML, and constituted administrative omission. The court’s judgment is pending.

V. Proposed Amendments to China’s Criminal Procedure Law

On August 30, 2011, the NPC Standing Committee published proposed amendments to China’s Criminal Procedure Law (CPL) on the NPC website. This is the first time the public has had an opportunity to comment on major criminal procedure legislation before its promulgation. The proposed amendments to the CPL in this revision draft cover seven areas: evidentiary system, compulsory measures, defense system, investigation measures, trial procedures, enforcement provisions, and special procedures.

A. Evidence Rules

The draft proposed new rules against coercing someone into self-incrimination, as well as rules to exclude illegal evidence. The proposed evidence amendments incorporate some essential elements of the SPC’s 2010 judicial interpretation on the exclusion of illegal evidence in criminal cases.

B. Criminal Defense

The draft confirms lawyers’ rights to discuss cases with detained clients before trial without being monitored, electronically or personally, by prison employees. It also restricts their ability to “verify” evidence with clients until investigators recommend indictment. The draft also encourages and expands the availability of legal aid in criminal proceedings.


97. See generally id.

98. Id.


100. Id., ¶¶ 14, 17, 21.


102. Amendments, supra note 96, ¶ 3, 6-7.

103. Id. at 4, 95.
C. SPECIAL PROCEDURES

The draft authorizes more benevolent procedures for alleged juvenile offenders. It also proposes the “Provisions on Compulsory Medical Treatment Procedures for Mentally Ill Persons Committing a Violent Act” that would allow the courts, not the police or prosecutors, to order compulsory medical treatment.

D. RESIDENTIAL SURVEILLANCE; SECRET DETENTION; SECRET ARREST

The proposed amendments authorize secret arrest and detention tactics, which are already commonly practiced by police and investigators. This may be at odds with provisions in current Chinese law that provides for such legal protections as the notification of the family as to detainees’ whereabouts as well as access to counsel and international law. The proposed amendments in this category have received considerable attention.

In cases of crimes suspected to threaten national security, crimes of terrorist activities (and in residential surveillance cases, major crimes of bribery), or crimes wherein investigation may be impeded, the proposed amendments authorize up to six months of surveillance, and the family members of the person under surveillance, or the arrestee, will not be notified. “National security” or “crimes of terrorist activities” are not defined in the draft and are not subject to independent review. Both secret detention and secret arrest provisions include a “catch-all” clause (“or other serious
crimes"), which was considered by some legal scholars to conflict with the International Convention on Civil and Political Rights (ICCPR).\(^{115}\)

The proposed amendments will be discussed and likely passed by the NPC in March 2012.\(^{116}\)

VI. Choice of Law for Foreign Related Civil Disputes

The Law of the Choice of Law for Foreign Related Civil Disputes (Law),\(^{117}\) effective April 2011, provides choice of law rules for foreign-related civil suits in specific areas such as civil subjects, marriage and family, inheritance, property, contracts, and IP rights.\(^{118}\) It also systematically summarizes and codifies general principles of existing Chinese conflict laws and practices including: (1) the mandatory rule principle;\(^{119}\) (2) the party autonomy principle;\(^{120}\) and (3) the most significant contact test.\(^{121}\)

Chinese law has to be applied when either public interest or specific Chinese laws require. In the absence of mandatory rules, private parties may expressly choose the law of a particular country to govern.\(^{122}\) Where neither the mandatory rule principle nor the party autonomy principle applies, the most significant contact test is applied. In general, the law provides an integrated framework for future Chinese private foreign civil actions.

VII. CIETAC

Recent years have seen a steady increase in the number of arbitration proceedings involving Chinese entities. All “domestic” disputes (which include most disputes between mainland Chinese entities, even if those entities are foreign-owned—with Hong Kong being “foreign” for this purpose) must be heard under the auspices of an arbitral institution registered in mainland China. The most important arbitral institution within the mainland by far is the China International Economic and Trade Arbitration Commission (CIETAC).

Proposed revisions to CIETAC’s rules are anticipated to come into effect early in 2012. Available drafts contain some useful clarifications and improvements, although they do not contain dramatic changes. The revisions would make it easier for the parties to agree, with the consent of the tribunal, to exchange pleadings and other correspondence di-


\(^{118}\) Id. at chs. 2-7.

\(^{119}\) Id. arts. IV–V.

\(^{120}\) Id. art. III.

\(^{121}\) Id. arts. II, XLI.

\(^{122}\) See, e.g., id. arts. XVI-XVII, XLI, XLII.

VOL. 46, NO. 1
This new flexibility could help to alleviate current bottlenecks. In addition, CIETAC would be able to accept both contractual and non-contractual commercial disputes as long as an arbitral agreement exists between the parties. While applications for the preservation of property or for the protection of evidence would still be submitted to CIETAC to forward to the relevant court, requests for other types of interim measures could be submitted to the tribunal. There would no longer be a requirement that the tribunal bases its award, not only on the facts and in accordance with the law and the contract, but also "with reference to international practices and in compliance with the principle of fairness and reasonableness." The threshold for invocation of special "Summary Procedure" rules would increase from 500,000 RMB to two million RMB. Finally, although the Chinese language will be the default if the parties have not otherwise agreed, CIETAC can "designate any other language as the official language for the arbitration, having regard to the circumstances of the case." Taken in combination, the proposed revisions would move the CIETAC Rules progressively closer to international practice.

VIII. Hong Kong's New Arbitration Ordinance

On June 1, 2011, Hong Kong's new arbitration law, the Arbitration Ordinance Cap. 609 (Ordinance), came into effect. The Ordinance generally removes the previous distinction between 'domestic' and 'international' arbitrations. Accordingly, providing for arbitration in Hong Kong will not need to differentiate between international and domestic proceedings.

The Ordinance largely adopts the UNCITRAL Model Law (Model Law) with effect for all arbitrations in Hong Kong. Hong Kong's new arbitration regime thus generally reflects best international practices in terms of, e.g., broad-party autonomy, extensive tribunal powers, and minimal court interference. However, certain provisions of the

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123. CIETAC Arbitration Rules (promulgated by the China Council for the Promotion of International Trade/China Chamber of International Commerce, effective Mar. 1, 2012) art. 18 (China) [hereinafter Proposed Rules].
124. Id. art. 3.
125. Id. art. 21.
126. CIETAC Arbitration Rules (promulgated by the China Council for the Promotion of International Trade/China Chamber of International Commerce, Jan. 11, 2005, effective May 1, 2005) art. 43.1 (China) [hereinafter Existing Rules]; Proposed Rules, supra note 123, art. 47.
127. Existing Rules, supra note 126, art. 50; Proposed Rules, supra note 123, art. 54.
128. Existing Rules, supra note 126, art. 67; Proposed Rules, supra note 123, art. 71.
129. The views expressed herein do not necessarily reflect the views of Shearman & Sterling LLP or its clients.
132. Cap. 341, supra note 130, § 34C.
133. Cap. 609, supra note 130, § 34 (giving full effect to Article 16 of the Model Law).
ordinance diverge from the Model Law, including: (a) rules on the recognition and enforcement of interim measures and arbitral awards and (b) assignment of functions of arbitration assistance and supervision to the Hong Kong International Arbitration Centre (HKIAC) as a non-judicial authority.

For a transitional period, certain key features of the old domestic arbitration regime will continue to apply to arbitration agreements that provide for ‘domestic’ arbitration and that were entered into before or within six years of the new law coming into effect. These provisions primarily provide for greater intervention by Hong Kong’s courts. The parties to any domestic or international arbitration may also expressly ‘opt-in’ to any or all of the provisions set out in Schedule 2 of the Ordinance.

A. INTERIM MEASURES AND PRELIMINARY ORDERS

An arbitral tribunal can now order interim measures directed at: (a) maintaining or restoring the status quo, (b) protecting the arbitral process, (c) preserving assets out of which a subsequent award may be satisfied, and (d) preserving evidence. Moreover, an arbitral tribunal is also empowered to issue preliminary orders directing a party not to frustrate the purpose of interim measures. Finally, the new Ordinance now expressly states that Hong Kong courts may, in certain circumstances, grant interim relief in aid of arbitrations outside Hong Kong.

B. CONFIDENTIALITY

The Ordinance introduces an explicit confidentiality obligation. Arbitration-related court proceedings are now generally to be heard in camera, unless the court orders proceedings to be heard in open court.

C. ‘MEDIATION-ARBITRATION’ AND ‘ARBITRATION-MEDIATION’ PROCEDURES

Conciliation procedures have been replaced with mediation. Parties may conduct “mediation-arbitration” or “arbitration-mediation” proceedings, alternating between the two forms, subject to written consent by the parties.

134. Id. § 12 (giving full effect to Article 5 of the Model Law).
135. Id. §§ 4–5.
136. Id. §§ 82–98.
137. Id. § 13.
138. Id. §§ 100–04.
139. Id. § 99.
140. Id. § 35 (giving effect to Article 17 of the Model Law).
141. Id. §§ 37–38.
142. Id. § 45(5).
143. Id. § 18.
144. Id. § 16(1).
145. Id. § 16 (2).
146. Cap. 341, supra note 130, §§ 2A–2B.
147. Cap. 609, supra note 130, §§ 32–33.
D. Costs

The new law contains considerably more detailed provisions on the costs of the proceedings. It is now the arbitral tribunal that, as a matter of principle, determines the costs of the proceedings (including the arbitral tribunal's fees and expenses).

E. Enforcement

Enforcement of arbitral awards remains significantly the same as under the old law.