

China

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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.¹ 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 2011.² According to official data, China's relevant authorities handled 146,000 cases that were worth \$4.76 billion.³ Even though the long-term effect of the campaign remains to

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1. *22nd U.S.-China Joint Commission on Commerce and Trade Fact Sheet*, DEP'T OF COMMERCE (Nov. 21, 2011, 8:30 AM), <http://www.commerce.gov/news/fact-sheets/2011/11/21/22nd-us-china-joint-commission-commerce-and-trade-fact-sheet>.

2. *Program for Special Campaign on Combating IPR Infringement and Manufacture and Sales of Counterfeiting and Shoddy Commodities*, IPR IN CHINA (Nov. 11, 2010, 10:52:35), available at http://www.chinaipr.gov.cn/newsarticle/news/headlines/201011/976853_1.html.

3. *Crackdown on IPR Infringement is Set to Continue*, CHINA DAILY (July 5, 2011, 09:02:15), available at http://www.chinaipr.gov.cn/newsarticle/news/government/201107/1235817_1.html.

be seen, international IPR owners have praised the efforts against counterfeiters.⁴ In response, China agreed at the 22nd JCCT to make the State Council-level leadership structure under the recent campaign permanent.⁵

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.⁶

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.⁷ 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.⁸ 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.⁹ 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.¹⁰ 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

4. *2011 Special 301 Review*, THE US-CHINA BUS. COUNCIL (Feb. 15, 2011), available at https://www.uschina.org/public/documents/2011/ustr_special_301_review.pdf.

5. *China's JCCT Commitments, 2004-11*, THE US-CHINA BUS. COUNCIL (Nov. 21, 2011), available at https://www.uschina.org/public/documents/2012/jcct_2004-2011.pdf.

6. Kathrin Hille, *Apple Loses iPad Trademark Case in China*, FIN. TIMES (Dec. 7, 2011), available at <http://www.ft.com/cms/s/2/6bc5ba86-20b7-11e1-8133-00144feabdc0.html#axzzlfrMMAm8a>.

7. *Draft of Trademark Law Amendment for Public Comment*, IPR IN CHINA (Sept. 6, 2011, 14:36:35), available at http://www.chinaipr.gov.cn/lawsarticle/laws/lawsar/trademark/201109/1250596_1.html.

8. At the JCCT, the United States and China agreed to "continue and enhance" the work to address the issue of bad faith trademark registrations, come up with solutions to reduce such filings, and improve and streamline the opposition/cancellation process. OFFICE OF THE U.S. TRADE REPRESENTATIVE, 22ND US-CHINA JOINT COMMISSION ON COMMERCE AND TRADE OUTCOMES (Nov. 2011), <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/2011-us-china-joint-commission-commerce-and-trade-ou>.

9. Zhong Hua Ren Min Gong He Guo Shang Biao Fa (中华人民共和国商标法) [Trademark Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Congress, Aug. 23, 1982, effective Mar. 1, 1983) art. 31, available at <http://www.chinaipr.com/english/laws/laws11.htm>.

10. *Draft of the Chinese Trademark Law Third Amendment Released for Public Comment*, FOLEY & LARDNER LLP (Sept. 2011), <http://www.foley.com/abc.aspx?Publication=8493>.

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.¹¹

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.¹² 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).¹³

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.¹⁴ 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.¹⁵ The increased comments re-

11. Zui Fao Fa Jia Da e Zhi e Yi Quiang Zhu Shang Biao Cheng Zhi Li Du (最高法：加大遏制恶意抢注商标惩治力度) [Supreme People's Court: Increasing Intensity of Curbing Activities of Bad Faith Trademark Squatting], NEWS.QQ.COM (Nov. 28, 2011), <http://news.qq.com/a/20111128/001082.htm> (in Chinese).

12. U.S. CHAMBER OF COMMERCE, CHINA'S IPR ENFORCEMENT ASSESSMENT AND RECOMMENDATIONS, U.S. CHAMBER OF COMMERCE 11 (2006), available at <http://www.thecap.org/sites/default/files/programs/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/ecc8e2c6-0c4d-44a5-bef1-f853c843974e/Presentation/PublicationAttachment/0bc4da52-971b-49fa-938c-f88891755029/nl_china_cldb_julysept10.pdf (containing a full case summary of Shenda Sound Electronics v. Jiulide Electronics, 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. CENTER (Oct. 18, 2011), <http://www.coreach-ipr.org/documents/Li%20Mingde%202011.pdf>.

15. Jiang Zhipei, *Suggestions on Copyright Law Amendment*, CHINA COPYRIGHT MAGAZINE (Aug. 18, 2011), available at <http://www.chinaipmagazine.com/en/journal-show.asp?id=725>.

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.¹⁶ 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.¹⁷ Currently, the Beijing Higher People’s Court is reportedly working on new draft guidelines governing patent infringement trials.¹⁸

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.¹⁹ The SIL aims to 1) establish a national social insurance fund;²⁰ 2) unify the existing social security system; and 3) ensure equal access to social insurance benefits.²¹

16. He Jing, *China Just Issued New Judicial Opinions Updating Liability Thresholds for Internet Piracy and Other IP Crimes. What Can We Expect from This?*, ZY PARTNERS (Feb. 2, 2011), http://www.zypartners.com/zjys/Blog/show_e.asp?newsid=31.

17. State Intellectual Property Office, *State Intellectual Property Office to Seek the “Patent Compulsory Licensing Revised Draft (Draft)” Opinions*, LEGISLATIVE AFFAIRS OFFICE OF THE STATE COUNCIL P. R. CHINA (Oct. 12, 2011), available at <http://www.chinalaw.gov.cn/article/caizgg/201110/20111000350961.shtml>.

18. *Beijing Higher People’s Court Conducted Analysis of Difficult Issues in Patent Trials*, STATE INTELLECTUAL PROPERTY OFFICE OF P.R.C. (Aug. 18, 2011), available at http://www.sipo.gov.cn/mtj/2011/201108/t20110818_616590.html (in Chinese).

19. *Campaign to Promote Social Insurance Law*, CHINA DAILY (July 5, 2011), http://www.chinadaily.com.cn/china/2011-07/05/content_12832939.htm; *China’s Legislature Ends Bimonthly Session, Adopting Social Insurance Law*, GOV.CN (Oct. 29, 2010), http://english.gov.cn/2010-10/29/content_1732949.htm; SOCIAL SECURITY ONLINE, SOCIAL SECURITY PROGRAM THROUGHOUT THE WORLD: ASIA AND THE PACIFIC, 2010 (March 2011), available at <http://www.ssa.gov/policy/docs/progdesc/ssptw/2010-2011/asia/china.pdf>.

20. *Zhong Hua Ren Min Gong He Guo She Hui Bao Xian Fa* (中华人民共和国社会保险法) [PRC Social Insurance Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 28, 2010, effective July 1, 2011) art. 64 (China), available at http://cmx.sh.gov.cn/html/shcm/shcm_zfxxgk_zcfg_zxzcfg/2011-07-06/Detail_145161.htm.

21. *Id.* arts. 1–2, 6; see also Adam Livermore, *China’s Social Insurance Law—What Does it Mean for Employers and Foreign Individuals?*, CHINA BRIEFING (Oct. 2011), <http://www.corporatelivewire.com/top-story.html?id=139>.

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.²² The SIL provides the first detailed national regulatory guidelines for each mandatory category of insurance.²³

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.²⁴ The SIL also requires joint contribution by employers and employees with contributions respectively based on total wages paid and on a monthly income.²⁵ Self-employed workers, part-time workers, and independent contractors may also contribute.²⁶ Migrant workers are also eligible to participate in the system.²⁷ Rural residents are eligible to participate in the “rural pension pilot program.”²⁸

In recognition of increased labor mobility in China, the SIL specifically allows the transfer of pension funds when employees change regions.²⁹

2. *Basic Medical Insurance*

Medical insurance coverage is available for urban employees, independent contractors, self-employed, part-time workers, and migrant workers.³⁰ The SIL provides that the national government will establish a new rural cooperative medical insurance system.³¹ An insured person will not lose medical coverage or accumulated contribution due to relocation.³²

A major improvement under the SIL is the direct payment for any covered treatment by the medical insurance fund.³³

3. *Unemployment Insurance*

Under the SIL, employers and employees are jointly responsible for making contributions.³⁴ 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-

22. KPMG, CHINA’S NEW SOCIAL INSURANCE LAW (Sept. 2011), available at <http://www.kpmg.com/CN/en/IssuesAndInsights/ArticlesPublications/Newsletters/Tax-alert/Documents/tax-alert-1109-17-2.pdf>.

23. PRC Social Insurance Law, *supra* note 20, arts. 2–4.

24. *Id.* art. 16.

25. *Id.* arts. 10, 12.

26. *Id.*

27. *Id.* art. 95.

28. *Id.* art. 21.

29. *Id.* art. 19.

30. *Id.* arts. 23, 95.

31. *Id.* art. 24.

32. *Id.* art. 32.

33. Livermore, *supra* note 21.

34. PRC Social Insurance Law, *supra* note 20, art. 44.

ing employment.³⁵ Article 46 of the SIL defines the length of time that an individual may claim benefits.³⁶ The provincial government establishes the rate of benefits.³⁷

4. *Maternity Insurance*

Employers are solely responsible for maternity insurance premiums.³⁸ Employees are entitled to maternity insurance benefits and subsidies, while non-working spouses are only entitled to medical benefits.³⁹

Subsidies are available during maternity leave or any leave relating to planned parenthood surgeries.⁴⁰ The amount is determined based on the average wage of the employer.⁴¹ This is a significant change because the amount was previously based on an employee's actual salary.⁴²

5. *Work-Related Injury Insurance*

Premiums for work-related injury insurance are also the employer's sole responsibility.⁴³ The new law defines when employees can claim benefits and who is responsible for making payments.⁴⁴ Premiums are established by social insurance administrative agencies (She Hui Bao Xian Jing Ban Ji Gou [社会保险经办机构]).⁴⁵ Coverage is now provided for injured workers even when their employers fail to pay premiums.⁴⁶ 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.⁴⁷

B. POTENTIAL IMPACTS ON FOREIGN EMPLOYEES AND THEIR EMPLOYERS

The SIL now applies to foreigners lawfully employed in China.⁴⁸ The Tentative Measures for the Enrollment in Social Insurance of Foreigners Employed in China (Tentative Measures) became effective on October 15, 2011.⁴⁹ Under the Tentative Measures, foreign employees and their employers must pay premiums for the "five insurances."⁵⁰

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.

49. Zai Zhong Guo Jing Nei Jiu Ye de Wai Guo Ren Can Jia She Hui Bao Xian Zan Xing Bao Fa (在中国境内就业的外国人参加社会保险暂行办法) [Tentative Measures for the Enrollment in Social Insurance of Foreigners Employed in China] (promulgated by the Ministry of Human Resources and Social Security of the People's Republic of China, Sept. 6, 2011, effective Oct. 15, 2011), <http://www.zjhz.lss.gov.cn/html/zcfg/zcfgk/zh/40172.html> [hereinafter Tentative Measures].

50. *Id.* art. 3.

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.⁵¹ Early withdrawal is only available for foreign employees, as their employment tends to be temporary or intermittent.⁵² The Tentative Measures further exempt citizens of countries that have bilateral or multilateral treaties on social insurance.⁵³ For employers, operating costs will increase.⁵⁴ 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.⁵⁵

III. National Security Review for Foreign M&A

A. INTRODUCTION

On February 3, 2011, China's State Council released the Notice *Institution of National Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* (State Council Notice),⁵⁶ which, for the first time, formalized and set out a national security review (NSR) process for foreign acquisitions of domestic companies in China. On August 25, 2011, the Ministry of Commerce (MOFCOM) released the *Rules for Implementation of Relevant Issues regarding National Security Review Mechanism for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* (NSR Rules),⁵⁷ setting out the NSR procedures.⁵⁸

51. *Id.* art. 5.

52. Laney Zhang, *China: Social Insurance to Cover Foreigners Employed in China*, GLOBAL LEGAL MONITOR (July 1, 2011), http://www.loc.gov/lawweb/servlet/loc_news?disp3_1205402729_text.

53. Tentative Measures, *supra* note 49, art. 9; *China Weighs Social Security Law [on] Foreign Workers*, PEOPLE'S DAILY ONLINE (Oct. 26, 2011, 5:12 PM), <http://english.people.com.cn/90780/7627463.html>.

54. Mandy Kwok et al., *Foreign Employees Required to Make Social Security Contributions in China*, NEWS FLASH (PwC TAX Knowledge Management Center, China), Oct. 2011, at 3, available at http://www.pwcias.com/webmedia/doc/634540086536283142_chinatax_news_oct2011_27.pdf.

55. *Id.*

56. Guo Wu Yuan Ban Gong Ting Guan Yu Jian Li Wai Guo Tou Zi Zhe Bing Gou Jing Nei Qi Ye An Quan Shen Cha Zhi Du De Tong Zhi

(国务院办公厅关于建立外国投资者并购境内企业安全审查制度的通知) [State Council on the Establishment of a Domestic Enterprise Security Review System for Foreign Investor Mergers], (promulgated by the General Office of the State Council, Feb. 3, 2011, effective March 3, 2011), Guo Ban Fa 2011 at No. 6, http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/MinisterialRulings/P020110222352839068480.pdf.

57. Shang Wu Bu Shi Shi Wai Guo Tou Zi Zhe Bing Gou Jing Nei Qi Ye An Quan Shen Cha Zhi Du De Gui Ding (商务部实施外国投资者并购境内企业安全审查制度的规定) [Rules for the Implementation of Relevant Issues regarding National Security Review Mechanism for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors] (promulgated by the Ministry of Commerce of the People's Republic of China, Aug. 25, 2011, effective on Sept. 1, 2011), available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/MinisterialRulings/t20111024_138085.jsp [hereinafter NSR Rules].

58. Before implementation of the NSR Rules, MOFCOM released the Interim Rules for Implementation of Relevant Issues regarding National Security Review Mechanism for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, set to expire August 31, 2011. Shang Wu Bu Gong Gao Nian Di Hao Shang Wu Bu Shi Shi Wai Guo Tou Zi Zhe Bing Gou Jing Nei Qi Ye An Quan Shen Cha Zhi Du You Guan Shi Xiang De Zan Hang Gui Ding

(商务部公告2011年第8号商务部实施外国投资者并购境内企业安全审查制度有关事项的暂行规定) [Interim Rules for Implementation of Relevant Issues regarding National Security Review Mechanism for Mergers

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

and Acquisitions of Domestic Enterprises by Foreign Investors] (promulgated by the Ministry of Commerce, Mar. 4, 2011, effective Mar. 5, 2011), available at <http://wzs.mofcom.gov.cn/aarticle/n/201103/20110307432685.html> (China).

59. State Council on the Establishment of a Domestic Enterprise Security Review System, art. I(I).

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.

69. State Council on the Establishment of a Domestic Enterprise Security Review System, art. IV(III).

2. *General Review*

The general review process may last up to thirty working days from the date the Committee receives MOFCOM's application.⁷⁰ The Committee will solicit written opinions from other relevant departments.⁷¹ Decisions at this stage will be adopted by unanimous consent.⁷² 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.⁷³ The Committee will organize a security evaluation of the deal and take into account the evaluation result in reviewing the deal.⁷⁴ 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.⁷⁵ 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.⁷⁶

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.⁷⁷ 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.⁷⁸ 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.⁷⁹

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.

79. State Council on the Establishment of a Domestic Enterprise Security Review System, art. V.

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 agencies⁸⁰ 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

80. The antitrust enforcement authorities are shared by MOFCOM (merger control), SAIC (non-price-related monopoly agreements, abuse of market dominance and administrative monopoly), and NDRC (price-related monopoly agreements, abuse of market dominance and administrative monopoly). See Franki Cheung, *An Overview of China's New Anti-Monopoly Law and its Relevance to Foreign Investors*, CHINA TRADE & INV. (Jan. 2009), http://www.deaconslaw.com/eng/knowledge/knowledge_317.htm.

81. The statistics were released by Mr. Shang Ming, Director General of MOFCOM's Anti-Monopoly Bureau at the BRICS International Competition Conference 2011 held in Beijing on Sept. 21, 2011. CHINA COMPETITION RESEARCH CTR., CHINA COMPETITION BULLETIN (Allan Fels, Xiaoye Wang, Jessica Su eds., 13th ed. 2011), available at http://www.anzsog.edu.au/magma/media/upload/ckeditor/files/Research/Publications/The%20China%20Bulletin%20Competition/40_china_competition_bulletin_2011_09_september.pdf.

82. Zhonghua Renmin Gongheguo Shangwubu Di Hao Gonggao (中华人民共和国商务部[2011]第33号公告) [Ministry of Commerce of the People's Republic of China [2011] No. 33 Notice] (promulgated by the Anti-Monopoly Service of the Ministry of Commerce, June 2, 2011), available at <http://fldj.mofcom.gov.cn/aarticle/ztcx/201106/20110607583288.html>.

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

3. *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.⁸⁴

B. NDRC ACTIONS

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

1. *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.⁸⁵

2. *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 2011.⁸⁶ This raised public suspicion as to whether the manufacturers had colluded to increase prices. The NDRC sent officials to investigate.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.⁸⁸

83. Shangwubu Gonggao Nian Di Hao (商务部公告2011年第73号) [The Ministry of Commerce Notice No. 73 of 2011] (promulgated by the Anti-Monopoly Service of the Ministry of Commerce, Oct. 31, 2011), available at <http://fldj.mofcom.gov.cn/aarticle/zcfb/201111/20111107809156.html>.

84. Shangwubu Gonggao Nian Di Hao (商务部公告2011年第74号) [Ministry of Commerce Announcement No. 74 of 2011] (promulgated by the Anti-Monopoly Service of the Ministry of Commerce, Nov. 10, 2011), available at <http://fldj.mofcom.gov.cn/aarticle/zcfb/201111/20111107824342.html>.

85. Press Release, Nat'l Dev. and Reform Comm'n, Zhejiangsheng Fu Yang Shi Zao Zhi Hangye Xiehui Zuzhi Shishi Jiage Longduan Xingwei Shoudao Yanli Chufa (浙江省富阳市造纸行业协会组织实施价格垄断行为受到严厉处罚) [The Paper Industry Associations in Fuyang City, Zhejiang Province: The Implementation of Price Fixing Behavior is Punished Severely] (Feb. 12, 2012), http://jjs.ndrc.gov.cn/gzdt/t20110119_391551.htm.

86. *Consumers Set to See Biggest Price Hikes*, SHANGHAI DAILY (Mar. 24, 2011), http://www.china.org.cn/business/2011-03/24/content_22208704.htm.

87. He Shan, *China to Investigate Price Hikes of Daily Consumer Goods*, CHINA.ORG.CN (Mar. 30, 2011), http://www.china.org.cn/business/2011-03/30/content_22256612.htm.

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 Xinxu Raoluan Shichang Zhixu 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.

(联合利华散布涨价信息扰乱市场秩序受到严厉处罚) [Unilever Spread Price Information, Punished Severely for Disrupting the Market Order] (Feb. 12, 2012), http://jjs.ndrc.gov.cn/gzdt/t20110506_410563.htm.

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 Anti-monopoly Probe*, CNTV (Nov. 10, 2011), <http://english.cntv.cn/program/china24/20111110/104010.shtml>.

90. The decision was released by the NDRC on November 15, at its website. See Press Release, Nat'l Dev. and Reform Comm'n, Ljiang Yiyao Gongsi Longduan Fu Fang Li Xie/Xue Pingyuan Liao Yao Shoudao Yanli Chufa (两医药公司垄断复方利血平原料药受到严厉处罚) [Two Pharmaceutical Companies Who Monopolized the Compound Reserpine to Be Severely Punished] (Feb. 12, 2012), http://jjs.ndrc.gov.cn/gzdt/t20111115_444599.htm. For a report in English, see *Drug Firms Face Monopoly Fines*, CHINA DAILY (Nov. 15, 2011), http://www.china.org.cn/business/2011-11/15/content_23922033.htm.

91. Press Release, State Admin. for Indus. & Com. of China, Qianding Xieyi Fenge Shichang Ming Wei Zilu: Shi Longduan Gongshang Jiguan Diyi Qi Yuyi Xingzheng Chufa Longduan Anjian Jie An (签订协议分割市场 名为自律实为垄断 工商机关第一起予以行政处罚垄断案件结案) [Signed an Agreement to Split the Market Called Self-Regulation is Indeed the First Since the Monopoly of Indus. and Commerce Authorities to be the Monopoly of the Admin. Penalty Cases Closed] (Jan. 26, 2011), http://www.saic.gov.cn/ywdt/gsyw/dfdtxb/201101/t20110126_103772.html.

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.⁹³

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.⁹⁴ 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.⁹⁵ The court's judgment is pending.

93. Press Release, State Admin. for Indus. & Com. of China, *Huì Yì Jù Yào Zhì Yào Zhì Dìng Jīng Yíng Zhē, Gōng Shāng Jī Guān Shòu Cù Xíng Shì Jiàn Yì Quán (Fān Lóng Duàn Fǎ) Jiàn Zhì Dì Fāng Zhèng Fú Pái Chū Xiàn Zhì Jìng Zhēng—Guāng Dōng Shēng Xíng Gōng Shāng Jū Diào Chá Làn Yòng Xíng Zhèng Quán Lǚ Pái Chū, Xiàn Zhì Jìng Zhēng Ān Jù Shì* (会议纪要指定经营者，工商机关首次行使建议权(反垄断法)剑指地方政府排除限制竞争—广东省工商局调查滥用行政权力排除、限制竞争案纪实) [The Meeting Minutes of Designated Operators, Industrial and Commercial Authorities for the First Time the Exercise of the Right to Make Recommendations "Antitrust Laws" Prove Safety of Local Government to Exclude Restrict Competition—Trade and Industry Bureau of Guangdong Province Survey Abuse of Administrative Power to Eliminate or Restrict Competition in the Case of Documentary] (July 27, 2011), http://www.saic.gov.cn/ywdt/gsyw/dfdt/xxb/201107/t20110727_111694.html.

94. The full text of the Draft Rules is released on the Supreme Court's website. *Zuì Gāo Rén Mǐn Fǎ Yuàn Jiù Fān Lóng Duàn Mǐn Shì Sù Sòng Sì Fǎ Jiě Shì Gōng Kāi Zhèng Qǐ Shè Huì Gè Jiè Yì Jiàn* (最高人民法院就反垄断民事诉讼司法解释公开征求社会各界意见) [The Supreme People's Court on Anti-Monopoly Civil Proceedings of Judicial Interpretation to Publicly Solicit the Views of the Community], SUP. PEOPLE'S CT. (Apr. 25, 2011), http://www.court.gov.cn/gzhd/zqyj/201104/t20110425_19850.htm.

95. Hou Yusheng, *Baidu She Xian Long Duan An Kai Ting Bei Suo Pei Bai Wan* (百度涉嫌垄断案开庭被告索赔百万) [Alleged Monopoly Case to Court Claims One Million], CHINACOURT.ORG (Nov. 1, 2011), <http://www.chinacourt.org/html/article/201111/01/468235.shtml>.

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.⁹⁶ This is the first time the public has had an opportunity to comment on major criminal procedure legislation before its promulgation.⁹⁷ 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.⁹⁸

A. EVIDENCE RULES

The draft proposed new rules against coercing someone into self-incrimination, as well as rules to exclude illegal evidence.⁹⁹ The proposed evidence amendments¹⁰⁰ incorporate some essential elements of the SPC's 2010 judicial interpretation on the exclusion of illegal evidence in criminal cases.¹⁰¹

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.¹⁰² The draft also encourages and expands the availability of legal aid in criminal proceedings.¹⁰³

96. Xing Shi Su Song Fa Xiu Zhen An (Cao An) Tiao Wen Ji Cao An Shuo Ming (刑事诉讼法修正案(草案)条文及草案说明) [Amendments to the Criminal Procedure Law of the People's Republic of China (Draft) and Explanatory Notes] (promulgated by the Nat'l People's Cong., Aug. 30, 2011), http://www.npc.gov.cn/npc/xinwen/lfgz/2011-08/30/content_1668503.htm (China) [hereinafter Amendments].

97. See generally *id.*

98. *Id.*

99. *Id.* ¶ 14.

100. *Id.* ¶¶ 14, 17, 21.

101. *Guan Yu Ban Li Xing Shi An Jian Pei Chu Fei Fa Zheng Ju Ruo Gan Wen Ti De Gui Ding* (关于办理刑事案件排除非法证据若干问题的规定) [Rules Concerning Questions about the Exclusion of Illegal Evidence in Handling Criminal Cases], PEOPLE'S COURT DAILY (June 25, 2010), http://rmfyb.chinacourt.org/paper/html/2010-06/25/content_11353.htm.

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.¹⁰⁴ 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.¹⁰⁵

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.¹⁰⁶ 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 counsel¹⁰⁷ and international law.¹⁰⁸ The proposed amendments in this category have received considerable attention.¹⁰⁹

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 months¹¹⁰ of surveillance,¹¹¹ and the family members of the person under surveillance,¹¹² the detainee¹¹³ or the arrestee,¹¹⁴ 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

104. *Id.* at 95.

105. *Id.* at 98.

106. See generally Jerome A. Cohen & Yu Han, *China’s Struggle for Criminal Justice*, U.S.-ASIA LAW INSTITUTE (Sept. 27, 2011), <http://www.usasialaw.org/?p=5928>.

107. See Office of the Spokesperson, U.S. Dep’t of Justice, Question Taken at Daily Press Briefing (Aug. 31, 2011), <http://www.state.gov/r/pa/prs/ps/2011/08/171320.htm>.

108. Press Release, Comm’n on Human Rights, China: U.N. Expert Body Concerned About Recent Wave of Enforced Disappearances, U.N. Press Release HR/CN (Apr. 8, 2011), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10928&LangID=E>.

109. See He Weifang, *Zhe Yang De Li Fa Wei Bei Le Zheng Fu De Cheng Nuo* (这样的立法违背了政府的承诺) [*This Kind of Legislation Broke the Government’s Promise*], CAIJING (财经网) [FINANCIAL NETWORK] (Sept. 2, 2011), <http://www.caijing.com.cn/2011-09-02/110839364.html>; Donald Clark, *More on Proposed Revisions to China’s Criminal Procedure Law*, CHINESE LAW PROF BLOG (Oct. 9, 2011), http://lawprofessors.typepad.com/china_law_prof_blog/2011/10/more-on-proposed-revisions-to-chinas-criminal-procedure-law.html; Chris Buckley, *China Announces Plans to Boost Secret Detention Powers*, REUTERS NEWS (Aug. 30, 2011, 9:41 AM), <http://www.reuters.com/article/2011/08/30/us-china-law-detention-idUSTRE77T2HJ20110830>.

110. Zhong Hua Ren Min Gong He Guo Xing Shi SU Song Fa (中华人民共和国刑事诉讼法) [Criminal Procedure Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 17, 1996) art. 58, available at http://www.law-lib.com/law/law_view.asp?id=321.

111. Amendments, *supra* note 96, ¶ 30.

112. *Id.*

113. *Id.* at 36; see also Guo Zhiyuan, Professor, Chinese U. Pol. Sci. & L., Presentations at the U.S.-Asia Law Institute, NYU School of Law: Chance and Challenge for Chinese Criminal Procedure Law Reform (Sept. 13 & 19, 2011), available at <http://www.usasialaw.org/wp-content/uploads/2011/09/20110926-Chance-and-Challenge-for-Chinese-Criminal-Procedure-Law-Reform.pdf>.

114. Amendments, *supra* note 96, ¶ 39.

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-

115. See He Weifang, *supra* note 109; International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (Mar. 23, 1976).

116. Chen Guangzhong, *Xing Su Song Fa Xiu Gai Zhong De Ji Ge Zhong Dian Wen Ti* (刑事诉讼修改中的几个重点问题) [*A Few Important Issues in Revising the Criminal Procedure Law*], NAT’L PEOPLE’S CONG. (Aug. 24, 2011), available at http://www.npc.gov.cn/huiyi/lfzt/xsssfxg/2011-08/24/content_1666933.htm.

117. She Wai Min Shi Guan Xi Fa Lv Shi Yong Fa (涉外民事关系法律适用法) [The Law of the Choice of Law for Foreign Related Civil Disputes] (promulgated by the Standing Comm. Nat’l People’s Cong. Oct. 28, 2010, effective Apr. 1, 2011), available at <http://en.pkulaw.cn/display.aspx?cgid=139684&lib=law>.

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.

rectly.¹²³ 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.¹²⁴ 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.¹²⁵ 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.”¹²⁶ The threshold for invocation of special “Summary Procedure” rules would increase from 500,000 RMB to two million RMB.¹²⁷ 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.”¹²⁸ Taken in combination, the proposed revisions would move the CIETAC Rules progressively closer to international practice.

VIII. Hong Kong’s New Arbitration Ordinance¹²⁹

On June 1, 2011, Hong Kong’s new arbitration law, the Arbitration Ordinance Cap. 609 (Ordinance), came into effect.¹³⁰ 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)¹³¹ with effect for all arbitrations in Hong Kong.¹³² Hong Kong’s new arbitration regime thus generally reflects best international practices in terms of, *e.g.*, broad-party autonomy, extensive tribunal powers,¹³³ and minimal court interference.¹³⁴ However, certain provisions of the

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.

130. Hong Kong Arbitration Ordinance, Cap. 609, Ord. No. 17, 2010 [hereinafter Cap. 609 or Ordinance], available at [http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/C05151C760F783AD482577D900541075/\\$FILE/CAP_609_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/C05151C760F783AD482577D900541075/$FILE/CAP_609_e_b5.pdf) (last visited Nov. 24, 2011) (replacing Hong Kong Arbitration Ordinance, Cap. 341, Ord. No. 22, 1963 [hereinafter Cap. 341], available at http://www.wipo.int/wipolex/en/text.jsp?file_id=182024 (last visited Feb. 20, 2012)).

131. UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006, G.A. Res. 61/22, U.N. Doc. A/61/453 (Dec. 4, 2006), available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

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 measures¹³⁵ and arbitral awards¹³⁶ and (b) assignment of functions of arbitration assistance and supervision to the Hong Kong International Arbitration Centre (HKIAC) as a non-judicial authority.¹³⁷

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.¹³⁸ 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.¹³⁹

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.¹⁴⁰ Moreover, an arbitral tribunal is also empowered to issue preliminary orders directing a party not to frustrate the purpose of interim measures.¹⁴¹ 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.¹⁴²

B. CONFIDENTIALITY

The Ordinance introduces an explicit confidentiality obligation.¹⁴³ Arbitration-related court proceedings are now generally to be heard *in camera*,¹⁴⁴ unless the court orders proceedings to be heard in open court.¹⁴⁵

C. 'MEDIATION-ARBITRATION' AND 'ARBITRATION-MEDIATION' PROCEDURES

Conciliation procedures¹⁴⁶ have been replaced with mediation.¹⁴⁷ 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.¹⁴⁸ 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).¹⁴⁹

E. ENFORCEMENT

Enforcement of arbitral awards remains significantly the same as under the old law.¹⁵⁰

148. *Id.* §§ 74–76.

149. *Id.* §§ 74(1), 75(1).

150. *Id.* § 84(1).

