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## China

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# China

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This article reviews legal developments in China during 2012.<sup>1</sup>

## I. Intellectual Property Review\*\*

In 2012, an unprecedented number of laws, judiciary guidelines, and regulations in the intellectual property (IP) field were in the process of being drafted, debated, or reviewed, covering copyrights, patents, trademarks, secondary liability of ISPs, IP abuse, and Internet counterfeiting. In addition, the “iPad” trademark case received significant attention, symbolizing the importance foreign companies now place on Chinese IP.

### A. COPYRIGHT LAW AMENDMENT

The Copyright Law Amendment received the most public attention among all the IP legislative changes in 2012. The National Copyright Administration of China (NCAC) initiated the amendments in late 2011 and, after six months of research and consultation, released the first draft of the Copyright Law Amendment<sup>2</sup> on March 31, 2012. There was immediate controversy as local music artists and writers focused on statutory licenses that allegedly diminished their rights and harmed their copyright interests.<sup>3</sup>

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\* The views expressed in this article reflect the individual authors' respective analysis and do not reflect the views of the authors' employers or of the authors as a group. The authors are identified at the beginning of their respective sections. Kevin Blood, December 2012 J.D. at Sandra Day O'Connor College of Law; Wesley Pang, an attorney with Shearman & Sterling LLP; and Adria Warren, an attorney with Foley & Lardner LLP, edited this article.

1. For developments during 2011, see Ying Deng et al., *China*, 46 INT'L LAW. 517 (2012). For developments during 2010, see Jordan Brandt et al., *China*, 45 INT'L LAW. 487 (2011).

\*\* Jing He, a partner with AnJie Law Firm (Beijing).

2. Zhōng Huá Rén Mín Gong Hé Guó Zhù Zuò Quán Fa (Xiū Gai Cao An) (中華人民共和國著作權法(修改草案)) [Copyright Law of the People's Republic of China (Revised Draft)] (promulgated by the Nat'l Copyright Admin., Mar. 2012) (China), available at <http://www.ncac.gov.cn/cms/html/309/3502/201203/740608.html>.

3. *China to Fix Copyright Law Draft Amendment*, CHINADAILY (May 19, 2012, 11:07 AM), [http://www.chinadaily.com.cn/bizchina/2012-05/19/content\\_15337482.htm](http://www.chinadaily.com.cn/bizchina/2012-05/19/content_15337482.htm).

One article allowed producers to use music works to produce other audio work without license from the copyright owner three months after the audio work is published. Another article allowed radio and television studios to broadcast a published work without license from the copyright owner. For writers, written work that has appeared in print may be reprinted or digested as an abstract or reference without license from the author. Licenses must be received from publishers with exclusive right of publication or from producers when broadcasting a video work.

The amendments detailed the scope of protection including subject matter and terms, copyright ownership in various situations, rights limitations, the exercise of rights, technological measures for protection and rights management information, enforcement measures for rights protection, and dispute resolutions. Public feedback has mostly been in response to statutory licensing, collective copyright management organizations, network service providers' review obligations, non-exclusive license's legal liabilities, damages compensation, and copyright registration.

The second draft of the Copyright Law Amendment<sup>4</sup> has extensive changes, including twenty-two articles amended in substance and three new articles. Given the uproar, unsurprisingly, many of the changes addressed the concerns raised by local communities, especially those raised by local music artists. A controversial article on a statutory license to use music works for audio records has been removed and changes have been made to the provisions regarding collective copyright management. The NCAC has completed its final draft by the end of 2012, and has submitted it to the State Council Legislative Affairs Office (SCLAO) for further review.

## B. PROPOSED PATENT LAW AMENDMENTS

China's State Intellectual Property Office (SIPO) initiated a new round of patent law amendments this year.<sup>5</sup> The proposed amendment, if passed without change, will strengthen the administrative enforcement of patent infringement remedies and expand the powers of the same agency.<sup>6</sup>

The proposed amendments include a provision to effectuate the decisions on invalidity proceedings upon the issuance of a decision. Invalidity decisions will come into effect when the decision is publicly announced by the Patent Administration under the State Council. This will allow local intellectual property offices (IPOs) to conclude administrative enforcement proceedings without waiting for the end of a judicial review. Another proposed amendment includes the addition of a ban on any retroactive effects of invalidity

4. See Zhōng Huá Rén Mín Gong Hé Guó Zhù Zuò Quán Fa (Xiū Gai Cao An Dì èr Gāo) (中華人民共和國著作權法 (修改草案第二稿)) [Copyright Law of the People's Republic of China (Second Revised Draft)] (promulgated by the Nat'l Copyright Admin., June 6, 2012) (China), available at <http://www.ncac.gov.cn/cms/html/309/3502/201207/759779.html>.

5. Zhōng Huá Rén Mín Gong Hé Guó Zhuān Lì Fa (Xiū Zhèng) (中華人民共和國專利法 (2008 修正)) [Patent Law of the People's Republic of China (2008 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 2008, effective Oct. 1, 2009) (China), available at [http://english.sipo.gov.cn/laws/lawsregulations/201101/t20110119\\_566244.html](http://english.sipo.gov.cn/laws/lawsregulations/201101/t20110119_566244.html).

6. Zhuān Lì Fa Xiū Gai Cao àn (Zhōng Qiú Yì Jiàn Gāo) Tiáo Wén Duì Zhào (專利法修改草案 (征求意见稿) 條文對照) [The Provisions of the Patent Law Amendment Bill (Draft)] (promulgated by the State Intellectual Prop. Office, Aug. 9, 2012) (China), available at <http://www.sipo.gov.cn/tz/gz/201208/P020120810275509917855.doc>.

decisions on penalties that have already been complied with or compulsorily executed. The two proposed amendments seek to make administrative enforcement more effective while preventing disputes over past judgments or penalties.

Other amendments include greater powers for SIPO to punish infringers and award damages. The power of awarding damages, if granted by the legislature, will be significant as no other administrative agency has such powers in enforcing trademark rights or copyright. SIPO is also asking for powers through the draft amendment to investigate and order infringers to stop infringing acts and to confiscate, or destroy, infringing products or special production equipment.

In addition, the proposed amendments seek to increase evidence-gathering powers for plaintiffs. The proposed amendments grant SIPO powers to penalize parties who refuse to cooperate with investigations or otherwise impede SIPO in their performance.

SIPO's proposal has generated a huge amount of attention among the IP community.

### C. CIVIL PROCEDURE LAW AMENDMENT

The reform of the China Civil Procedure Law (CPL) will have a significant impact on IP enforcement. The amendment to the CPL<sup>7</sup> was passed by China's National People Congress (NPC) on August 31, 2012, and will take effect on January 1, 2013. It includes over one hundred reforms to the current civil enforcement system. In general, the reforms introduce more flexibility for parties to resolve disputes efficiently and establish provisions for the effective enforcement of court decisions.<sup>8</sup>

One of the important changes relates to preliminary injunctions, previously only allowed for copyright, patent, and trademark cases. The new law makes the remedies available for all types of civil cases, including unfair competition and trade secret cases. Parties can seek court orders to require a party to act (or not act) to ensure execution of future court judgments or to prevent further damages. IP holders may well expect that the wider use of preliminary injunction by the Chinese courts will substantially free judges from the extreme caution they have had about using this remedy in IP cases.

The new amendments also require that all judgments be made available to the public and that every decision state the reasoning and grounds.

Procedurally, these amendments point to increased sophistication in Chinese IP lawsuits. Courts may appoint outside experts to authenticate electronic evidence. Parties may also employ external consultants in the authentication process or even to evaluate the authenticator's judgment. To encourage more witness evidence, the amendment stipulates that the losing party must pay the costs incurred by the witnesses.<sup>9</sup>

The changes also strengthen enforcement. Courts may compel entities that manage stocks, mutual funds, and bonds to fully cooperate with the courts in enforcing judgments

7. Zhōng Huá Rén Mín Gòn Hé Guó Mín Shì Sù Sòng Fa (中華人民共和國民事訴訟法) [Civil Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Congress, Aug. 31, 2012, effective Jan. 1, 2013) (China), available at <http://www.iolaw.org.cn/showLaws.asp?id=31495>.

8. For more analysis of this subject, see Ariel Ye, *Insight into China's Revision on Civil Procedure Law*, WOLTERS KLUWER (Oct. 18, 2012), [http://law.wkinfo.com.cn/document/showarticle?sysLang=zh\\_CN&free=0&showType=&collection=article&aid=NJAwMDAwMDQ2NjY%3D&searchKeys=&bid=&lang=en\\_US](http://law.wkinfo.com.cn/document/showarticle?sysLang=zh_CN&free=0&showType=&collection=article&aid=NJAwMDAwMDQ2NjY%3D&searchKeys=&bid=&lang=en_US).

9. *Id.*

relevant to such activities. This will help parties collect damages from IPR infringers and increase the effectiveness of court enforcement.

Finally, prosecutors have been given powers to supervise the process of executing court orders, which means prosecutors may intervene when courts fail to properly execute judgments.

#### D. DRAFT EMPLOYMENT INVENTION REGULATIONS

SIPO issued its draft of “Employment Invention Regulations” for public comments on November 12, 2012.<sup>10</sup>

The concept of employment invention has long existed in the Chinese patent law system. According to the explanatory note it issued, SIPO proposes to enact this regulation to fulfill a legislative agenda aimed at increasing commercialization of patented technologies. The draft regulations focus on inventor remuneration.

The draft regulations revived some controversial debates:

- (1) The Chinese Patent Law allows employers to use contracts or company rules to define what levels of awards and remuneration should be paid to inventors. The draft regulation, however, introduces some constraints on this process. For example, some provisions require companies to disclose the profitability of each invention to the inventors and to take into account the profitability contribution from each invention.
- (2) Under the draft regulations, companies would be required to respond to any declaration of non-service invention by employees within two months. Failure to respond will result in presumption of consent.
- (3) The draft regulations require companies to consider individual inventors’ contribution to inventions in determining award and remuneration.
- (4) Both trade secrets and software appear to be a subject matter of the draft regulations. It is hard to imagine how companies can effectively divide profits related to these IP areas and compensate every involved employee based on individual contribution.

SIPO seems determined to impose a variety of obligations over companies, R&D institutions, and universities to ensure inventors receive the incentives. SIPO may quickly put forward the draft to the State Council for review and approval, after which the regulations will become the law.

#### E. PRECEDENTS ISSUED BY SUPREME COURT IN ADJUDICATING IP PROSECUTION

The Supreme People’s Court of China (SPC) has been taking a proactive approach in setting precedent for lower courts to adjudicate IP cases even though precedent is not binding as in common law jurisdictions. The SPC issued its 2011 IP Case Report announcing thirty-four guiding precedents with detailed analysis. In particular, twenty-two of the cases were dedicated to judiciary review of decisions made by the Trademark Reex-

10. Zhí Wù Fā Míng Tiáo Lì Cao An (職務發明條例草案) [Service Invention Bill (Draft)] (promulgated by the State Intellectual Prop. Office, Dec. 3, 2012) (China), available at <http://www.sipo.gov.cn/tz/gz/201211/P020121112538168422871.doc>.

amination and Appeal Board (TRAB) and the Patent Review Board (PRB). The decisions reshaped how lower courts adjudicated IP cases. Some key highlights:

Citing the *Seiko Epson v. PRB* case, the SPC disagreed with SIPO's practice and reversed claim amendments, holding that patent applicants are entitled to either narrow or broaden the scope for claims.

Under the guiding precedents, judges can now review evidence previously unseen by the Trademark Office (TMO) or the TRAB. The SPC further held that the presence of a descriptive element does not necessarily negate the distinctiveness of a trademark, and thus, the mark may still be registered if the relevant public can recognize the source of the goods. The SPC stressed that the TMO's Classification Chart could not be the sole basis for determining the similarity of goods, and instead, judges should determine similarity using the likelihood of confusion as the key principal.

The SPC officially endorsed non-infringement declaratory actions for all kinds of IP claims. This expands declaratory judgments from just patent and trademark cases to copyright and other types of IP cases.

#### F. SUPREME COURT'S DRAFT JUDICIAL INTERPRETATION OVER ISP LIABILITY FOR COPYRIGHT INFRINGEMENT

In April 2012, the SPC released a draft Judicial Interpretation (JI) regarding the infringement of rights of transmission over information networks.<sup>11</sup> The JI marked a great step in embracing internationally accepted standards and advanced the relevant rules and regulations to meet changing realities and challenges brought about by rapid technological developments. This JI has been approved and released at the end of 2012.

The JI lays out clearer rules that courts use to test and determine infringement and secondary liability. ISPs have no liability if they merely provide the basic network services like automatic access, automatic transmission, information hosting, search, linking, and point-to-point technology. But ISPs that have fault and "jointly commit" infringement will bear joint and several liability.

The JI uses a "know or should have known" standard to determine liability of ISPs. Rules similar to a "red flag" standard are incorporated to determine constructive knowledge of ISPs. The draft JI also provides rules regarding what kind of takedown notices are deemed sufficient. The draft JI clearly requires that ISPs promptly remove or block links to pirated content after receiving takedown notices. An earlier version sets a twenty-four-hour standard, but a more recent version is said to require ISPs to take actions to the extent necessary. If this stays true, it means some copyright owners may be able to ask the ISPs to remove time-sensitive content immediately.

It is notable that the Beijing Higher People's Court is currently circulating a draft judiciary guideline to deal with ISP's liability in e-commerce cases. This JI is not nationally binding but will have significant impact on the courts' adjudicating ISP's liability in online transactions.

11. Zuì Gāo Rén Mǐn Fǎ Yuàn Jiù Wáng Luò Zhù Zuò Quán Bao Hù Sī Fǎ Jī Shì (最高人民法院就网络著作权保护司法解释) [*The Supreme People's Court on the Judicial Interpretation of Internet Copyright Protection*], SUP. PEOPLE'S CT. PEOPLE'S REP. CHINA (Apr. 22, 2012, 10:36 PM), [http://www.court.gov.cn/xwzx/fyxw/zgrmfyxw/201204/t20120422\\_176202.htm](http://www.court.gov.cn/xwzx/fyxw/zgrmfyxw/201204/t20120422_176202.htm).

## G. TRADEMARK LAW UPDATE

China is in the midst of updating its Trademark Law, and a draft was submitted to the SCLAO over a year ago. The State Council officially approved its draft proposals and the NPC may ratify the amendments as soon as mid-December 2012. While the latest version is not publicly available for review, a senior government official recently revealed some details in state media.<sup>12</sup> The key content is consistent with what *The Year in Review* reported in 2011,<sup>13</sup> including:

- Expanding trademark subject matters to include sounds, smell, colors, and moving objects;
- Allowing trademark applications to cover goods in multiple classes;
- Imposing requirements to determine eligible opposition filers;
- Addressing bad faith trademark applications and abuse of well-known trademarks. This will be a significant aspect to watch for in this amendment as many foreign brands suffer seriously from trademark squatting problems in China; and
- Regarding contributory infringement and unauthorized use of trademarks in trade names and product names as infringement.

It remains to be seen whether China can effectively deter repeated infringement and bad faith filings and respond to the fast-growing online counterfeiting problems through the trademark law amendment.

## II. China's New Exit-Entry Administration Law\*

The Exit-Entry Administration Law of the People's Republic of China (New Law)<sup>14</sup> consolidates and replaces the Law on Entry and Exit Administration of Foreigners and the Law on Entry and Exit Administration of Chinese Citizens (Existing Laws). The New Law addresses the problems of illegal entry, illegal stay, and illegal employment in China. It also is designed to improve Chinese immigration law to meet the needs of current economic development. The New Law takes effect on July 1, 2013.

### A. NEW "TALENTED" VISA CATEGORY AND PERMANENT RESIDENT STATUS (GREEN CARD)

Article 16 of the New Law introduces a "talented visa" category for the first time.<sup>15</sup> This special visa category is used to attract foreign capital and talent. The specific qualifications required for this visa category are to be set by agency implantation rules. At the

12. Zhang Zhao, *Revisions Give Trademark Law More Teeth*, CHINADAILY (Nov. 16, 2012, 6:18 AM), [http://www.chinadaily.com.cn/cndy/2012-11/16/content\\_15934407.htm](http://www.chinadaily.com.cn/cndy/2012-11/16/content_15934407.htm).

13. See Ying Deng et al., *supra* note 1, at 518-19.

\* Qiang Bjornbak, an attorney with the Law Offices of Qiang Bjornbak.

14. Zhōng Huá Rén Mǐn Gònǎ Hé Guó Chū Jīng Rù Jīng Guān Lǐ Fǎ (中华人民共和国出境入境管理法) [Exit-Entry Administration Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Congress, June 30, 2012, effective July 1, 2013) (China) [hereinafter *Exit-Entry*], available at <http://www.lawinfochina.com/display.aspx?lib=law&id=10183&CGid=>

15. *Id.* art. 16.

time being, the criteria for Chinese permanent resident status might shed light on the qualifications for a talented visa.<sup>16</sup>

Article 47 of the New Law<sup>17</sup> empowers the Ministry of Public Security Bureau to grant permanent resident status to foreigners who have made outstanding contributions to China. Future implementation rules will clarify the qualifications of “outstanding contributions,” set quotas or targets for the number of green cards, and help increase the number of permanent resident permits granted to foreigners.

## B. BIOMETRIC DATA

Article 30 of the New Law<sup>18</sup> also requires foreigners who apply for resident permits to provide their fingerprints and “other biometric data” to the Public Security Bureau (PSB).

## C. RESIDENCE PERMIT

According to Article 30 of the New Law, a work-related resident permit will be valid for a minimum of ninety days (half of the current 180 day period), up to a maximum of five years. The non-work related resident permit remains with the original period of 180 days to five years. The New Law intends to more stringently scrutinize and regulate work-related residency.

## D. HARSHER PUNISHMENT FOR VIOLATORS

Article 78 of the New Law<sup>19</sup> imposes a fine of ¥500 a day to a maximum of ¥10,000 or a detention of five to fifteen days for those illegally staying in China. Any foreigner who illegally works in China will be fined ¥5000 to ¥20,000, and under certain circumstances, such alien may be detained from five to fifteen days.<sup>20</sup> The New Law imposes harsher penalties on employers to tackle the problems of illegal employment. Employer fines are ¥10,000 for each foreigner illegally employed, up to a maximum of ¥100,000.<sup>21</sup> Any illegal gain resulting from such employment will also be confiscated. Additionally, employers will be responsible for committing visa fraud if they provide false invitation letters or other visa application documents. Such employers will be fined from ¥5000 to ¥10,000 if the employers are individuals, or ¥10,000 to ¥50,000 if the employers are entities.<sup>22</sup> Employer illegal gains will be confiscated, and employers will be held responsible for deportation expenses.<sup>23</sup>

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16. Measures for the Administration of Examination and Approval of Aliens' Permanent Residence in China (promulgated by the Ministry of Public Security and the Ministry of Foreign Affairs, Aug. 15, 2004, effective Aug. 15, 2004).

17. *Exit-Entry*, *supra* note 14, art. 47.

18. *Id.* art. 30.

19. *Id.* art. 78.

20. *Id.* art. 80.

21. *Id.*

22. *Id.*

23. *Id.* arts. 71-72, 80.

### E. VOLUNTARY DEPARTURE, DEPORTATION, 5-10 BAR

Article 81 of the New Law<sup>24</sup> subjects foreigners to voluntary departure within a specified time if they violate China's laws and regulations and are deemed "unsuitable" to stay in China. Article 62 of the New Law<sup>25</sup> further provides that a foreigner who fails to depart the country timely under a voluntary departure order or stays and works in China illegally will be subject to involuntary removal and a one to five year bar on re-entry. Moreover, the Ministry of Public Security can deport a foreigner and impose a ten-year bar on re-entry if the foreigner commits severe violations still short of a criminal violation.<sup>26</sup>

In short, the New Law seeks to enhance the administration of China's immigration law by imposing more severe penalties on those who violate Chinese entry and exit laws. Time will tell the effectiveness of these changes.

### III. The iPad Case\*

In 2012, the iPad trademark case dominated headlines in China. In July, the Higher People's Court of Guangdong announced a settlement with Apple paying US \$60 million for the rights to the iPad trademark in China.<sup>27</sup> To many legal experts, this case was one of the most obvious examples of the wrongful use of extra-legal judicial coercion by the High Court in Guangdong, pressuring Apple to settle its case against Proview, so as to acquire trademarks it had already purchased.<sup>28</sup>

#### A. BACKGROUND

The Proview Group, founded by Yang Rongshan (Yang), also known as Yang Long San, Rowell, consists of several corporations that were listed on the Hong Kong Stock Exchange, including Proview International Holdings Limited; Proview Electronics (Taiwan) Co., Ltd., a Taiwan company; and Proview Technology (Shenzhen) Co., a Shenzhen company. Yang is the Chairman and CEO of Proview International and is the legal representative of both Proview Electronics and Proview Technology.<sup>29</sup>

According to the complaint, the Proview Group owned trademark registrations for iPad in eight jurisdictions before Apple launched its iPad on April 3, 2010. IP Application Development Limited, a specialty corporation set up by Apple, entered into an agreement in December 2009 with Proview International Holdings Limited and Proview Electronics

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24. *Id.* art. 81.

25. *Id.* art. 62.

26. *Id.* art. 81.

\* David C Buxbaum, an attorney with Anderson & Anderson LLP.

27. Melanie Lee & Samuel Shen, Apple Pays \$60 Million to Settle China iPad Trademark Dispute, Reuters (July 2, 2012, 2:01 PM), <http://www.reuters.com/article/2012/07/02/us-apple-china-idUSBRE86104320120702>.

28. David C. Buxbaum, *Rule of Law in China: The Falling Trajectory*, 2012 J. AM. CHAMBER COM. IN HONG KONG 22, 22-27.

29. Apple Inc., IP Application Dev. Ltd. v. Proview Int'l Holdings Ltd., Proview Electronics Co. Ltd., Proview Tech. (Shenzhen) Co., Ltd, Yang Long-San, Rowell, Yoke Tech. (Shenzhen) Co. Ltd., HCA 739/2010 (High Ct. Hong Kong Special Admin. Region July 14, 2011), at 2-3, available at [http://www.arnasonfaktor.is/files/ProviewHongKongDecision\\_715262011.PDF](http://www.arnasonfaktor.is/files/ProviewHongKongDecision_715262011.PDF).

Co. Ltd., who “agreed to sell, transfer and assign trademarks to IP Application for £35,000 (the Agreement).”<sup>30</sup> Two trademark registrations in China, registration numbers 1590557 and 1682310, were included in the Agreement (the Subject Trademarks).<sup>31</sup>

The Agreement and attending trademark assignments executed on December 23, 2009, expressly and falsely stated that Proview Electronics Co. Ltd. was the proprietor of the Subject Trademarks. In January 2010, it was discovered that the Subject Trademarks were registered in the name of Proview Technology (Shenzhen) Co. Ltd. (Proview Shenzhen). On March 24, 2010, Apple and IP Application wrote to Proview Technology requesting transfer of the Subject Trademarks. Proview refused.<sup>32</sup>

The Proview Group’s financial difficulties began to emerge early in 2010 when the trading of Proview Holdings’s shares were suspended by the Hong Kong Stock Exchange, and China Minsheng Banking froze assets of Proview Shenzhen. Because of these actions, Apple and IP Application commenced suit in Hong Kong and Shenzhen against Proview Shenzhen and others.<sup>33</sup>

#### B. HONG KONG LITIGATION: *Apple v. Proview*, HCA739/2010

Before commencing these suits, the Proview Group had given several assurances to Apple and IP Application that it would not transfer the Subject Trademarks; however, “searches revealed that contrary to its undertakings, Proview Shenzhen had in fact lodged applications with the TMO to transfer the China Trademarks to Yoke Technology on 7 May 2010.”<sup>34</sup> Pursuant to application by Apple and IP Application, the Hong Kong court granted injunctive relief to preserve the China Trademarks. Judge Poon of the Hong Kong court, in confirming the injunction, distilled the essence of this case succinctly:<sup>35</sup>

Here, the conduct of all the defendants demonstrate that they have combined together with the common intention of injuring Apple and IP Application by acting in breach of the Agreement. Proview Holdings, Proview Electronics, and Proview Shenzhen, all clearly under Yang’s control, have refused to take any steps to ensure compliance with the Agreement so that the China Trademarks are properly assigned or transferred to IP Application. Instead, they attempt to exploit the situation as a business opportunity for Proview Group by seeking an amount of [US \$]10,000,000 from Apple.<sup>36</sup>

The court found that the defendants Proview International, Proview Electronics, Proview Technology, Yang, and Yoke Technology engaged in a conspiracy to the detriment of Apple and IP Application. The court further held: “A contract for valuable consideration to

30. *Id.* at 4; *see also* Limited Assignment of the Trade Marks in China Between Proview Electronics Co. & IP Application Development, art. 1 (Dec. 23, 2009) (on file with author) [hereinafter Limited Assignment of Trade Marks].

31. Limited Assignment of Trade Marks, *supra* note 30, sched. A.

32. *Apple Inc.*, No. HCA 739/2010, at 5.

33. *Id.* at 6; (2010) Shenzhongfa Minsan Chuzi di 208, 233 Hao ((2010) 深中法民三初字第208, 233号) [(2010) the 208th and 233rd Decisions of First Instance by the Third Civil Tribunal of the Intermediate Court of Shenzhen City].

34. *Apple Inc.*, No. HCA 739/2010, at 7.

35. *Id.* at 14, 16-17.

36. *Id.* at 11.

transfer a subject matter passes a beneficial interest by way of property in that subject matter if the contract is one of which a court of equity will decree specific performance and the vendor becomes in equity a trustee for the purchaser of the subject matter.<sup>37</sup>

### C. CALIFORNIAN LITIGATION

Proview Electronics Co. and Proview Technology, Inc. further commenced suit in the Superior Court of the state of California against Apple and IP Application for fraud-intentional misrepresentation, fraud-concealment, fraudulent inducement, and unfair competition.<sup>38</sup> While admitting that the Proview Group entered into an agreement with IP Application to purchase the Subject Trademarks, it alleged that the IP Application refused to state the nature of its business and that it was deceived because IP Application said that it would not compete with the Proview Group. This case is still pending.

### D. SHENZHEN LITIGATION

Apple and IP Application also sued Proview in the Shenzhen Intermediate Court, which issued a decision on November 17, 2011, stating:

According to the laws and regulations of our country, one has to deal with the relevant procedures when they sign a contract on transferring the ownership of trademarks with the owner. The plaintiff-IP Application signed the contract on transferring the ownership of trademarks in this case with Proview Electronics Co. Limited and the prima facie agent relationship with the defendant is untenable. Therefore, in that the litigation claims by the plaintiff lack a factual basis and legal evidence, we reject them.<sup>39</sup>

The court rejected the claims and ordered the two plaintiffs to undertake litigation fees of ¥45,600. The court further said:

Because not all the parties took part in the negotiating process; the defendant and Proview are different independent legal entities; Proview Electronics Co. Limited is the only unit that is authorized to conclude a contract on transferring the ownership of trademarks and concluding contracts. Therefore, we cannot consider that Proview's behavior is a collective act.<sup>40</sup>

The court studiously ignored the General Principles of Civil Law, Article 66, which provides: "If a principle is aware that a civil act is being executed in his name but fails to repudiate it, his consent shall be deemed to have been given."<sup>41</sup> Furthermore, Article 66 also states: "If an agent and a third party in collusion harm the principle's interests, the

37. *Id.* at 9.

38. Proview Elecs. Co. Ltd. v Apple, Inc., No. 1-12-CV-219219 (Cal. Super. Ct. Feb. 17, 2012).

39. (2010) Shenzhongfa Minsan Chuizi di 208, 233 Hao ((2010) 深中法民三初字第208, 233号) [(2010) the 208th and 233rd Decisions of First Instance by the Third Civil Tribunal of the Intermediate Court of Shenzhen City].

40. *Id.*

41. Gong Wu Yuan Fa Di Yi Ban Yuan Ze (公務員法的一般原則) [General Principles of the Civil Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987).

agent and the third party shall be held jointly liable.”<sup>42</sup> In addition, the Contract Law, Article 49 states:

Where the person lacking agency authority, acting beyond his agency authority, or whose agency authority was extinguished, concluded a contract in the name of the principle, if it was reasonable for the other party to believe that the person performing the act had agency authority, such act of agency is valid.<sup>43</sup>

Nevertheless, the court further held:

Besides the above, as to the issue of the plaintiffs’ application for litigation claims for compensation from the defendants; firstly, the dispute of trademark ownership is a case concerning ownership affirmation, in which one cannot assert compensation at the same time. Thus, the litigation claims by the plaintiffs lack a factual basis and legal evidence, to which this court can offer no support.<sup>44</sup>

The court cited no law when holding that the plaintiffs, IP Application and Apple, could not claim compensation for breach of warranty and breach of contract in a case where there was a dispute as to an ownership of trademarks—nor does such law exist.

#### E. SHANGHAI LITIGATION

Proview Shenzhen commenced suit in Shanghai to prevent Apple from using the iPad mark. The Shanghai Court’s preliminary decision rejected Proview Shenzhen’s application, pointing out that the Guangdong High Court was handling the matter.

#### F. HUIZHOU LITIGATION

Litigation also was commenced in Huizhou in the case entitled *Proview Technology Co., Ltd. (Shenzhen) v. Jiabua Branch in Huizhou of Shenzhen Shundian Chain Co., Ltd., and the Third Party Apple Trade Co., Ltd.*,<sup>45</sup> for trademark infringement. Here, Apple was accused of selling iPads through an agent. The court said:

We consider the trademark used by iPad . . . the same as the plaintiff’s [Proview’s] registered trademark which defendant used without the plaintiff’s permission. This act infringes the first and the second section of the Trademark Law . . . Article 52.

42. *Id.*

43. Zhōng Huá Rén Mín Gònǎo Hé Guó Hé Tóng Fǎ (中華人民共和國合同法) [Contract Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Congress, Mar. 15, 1999, effective Oct. 1, 1999).

44. Shenzhen Intermediate Court, *supra* note 33.

45. Wéi Guān Kè Jì (Shèn Zhèn) You Xiàn Gōng Sī Sù Shèn Zhèn Shì Shùn Diàn Lián Suo Gu Fèn You Xiàn Gōng Sī Hui Zhōu Jiā Huá Fēn Diàn Dì Sān Rén Píng Guo Diàn Nào Mào Yì (Shàng Hǎi) You Xiàn Gōng Sī Qīn Fàn Shāng Biāo Zhuān Yòng Quán Jiū Fēn Àn (唯冠科技(深圳)有限公司诉深圳市硕电连锁股份有限公司惠州家华分店、第三人苹果电脑贸易(上海)有限公司侵犯商标专用权纠纷案) [Proview Tech. (Shenzhen) Co. Ltd. v. Shenzhen Shundian Chain Joint Stock Co. Huizhou Jia Hua Branch Store, Third Person Apple Computer Trading (Shanghai) Co. Ltd.] (Intermediate People’s Ct. of Shenzhen City, Guangdong Province, Nov. 17, 2011) (China); (2011) 惠中法民三初字第271号 (2011) Huizhongfa Minsan Chuzi di 271 Hao, (2011) the 271st Decision of First Instance by the Third Civil Tribunal of the Intermediate Court of Huizhou City.

The defendant's sales of products . . . and the selling authorized by the Third Party infringe the plaintiff's exclusive right to use its registered trademark. When Shenzhen Shundian Chain Co., Ltd. signed an agreement with the Authorized Retailer of Apple in China with the Third Party, they did not review whether the Third Party had obtained the exclusive right to use the registered trademarks for the products. The defendant's defense is only based on the evidence they submitted, the agreement of the Authorized Retailer of Apple in China. Although this evidence demonstrates that it is the Third Party who supplies the involved products in this case, the defendant offers no evidence to show that when they sold the product, they acted after reviewing all procedures. Therefore, the third section of the Trademark Law, Article 56 does not exempt the defendant from liability for compensation. The Third Party thinks that they have the exclusive right to use the involved trademark and asserts that they did not infringe the plaintiff's exclusive right to use a registered trademark.<sup>46</sup>

But the Third Party did not provide any corresponding valid evidence to support its assertion. Interpreting Article 2 of the Several Regulations on Evidence of Civil Procedure of the Supreme People's Court, the court held that it should be the defendant and the Third Party who undertake the unfavorable consequences of their inability to provide evidence.<sup>47</sup> Therefore, the defendant and the Third Party should have ceased their infringement promptly and compensated the plaintiff for its loss. Considering that the plaintiff did not make litigation claims against the Third Party, and that the defendant did not put forward any explicit assertions as to infringement liability, this court did not put infringement liability on the Third Party. According to the first section of the Trademark Law, Article 56, and the second paragraph of The Explanation of Several Problems of the Applicable Laws on the Trial of Civil Disputes by the Supreme People's Court, Article 16, the court confirmed the defendant should compensate the plaintiff in the amount of ¥7,580 as the reasonable expense for restraining the act of infringement.<sup>48</sup>

Mr. Yang was found bankrupt on August 2, 2010, and his companies lack funds to satisfy any judgment.<sup>49</sup>

In the author's view, the refusal of the Shenzhen Intermediate Court to allow IP Application and Apple to sue Proview for damages in the Shenzhen case is absurd. The suit against Proview Technology (Shenzhen) Co., Ltd. and other Proview companies may well have resulted in substantial damages for breach of warranty and breach of contract. Ultimately, enforcement of the damages award could have been made against the iPad Rele-

46. *Proview Tech. (Shenzhen) Co. Ltd.*, *supra* note 45.

47. *Zui Gāo Rén Mǐn Fǎ Yuàn Guān Yú Mǐn Shì Sù Sòng Zhèng Jù Dì Guī Dìng* (最高人民法院關於民事訴訟證據的規定) [Provisions of the Supreme People's Court on Evidence in Civil Proceedings] (promulgated by the Supreme People's Court, Dec. 21, 2001, effective Apr. 1, 2002).

48. *Proview Tech. (Shenzhen) Co. Ltd.*, *supra* note 45.

49. *See China to Fix Copyright Law Draft Amendment*, *supra* note 3, at 3, 6-7; *Fù Bāng Chān Wù Bào Xiān Gu Fèn You Xiàn Gōng Sī, Wéi Guān Kē Jì (Shēn Zhèn) You Xiàn Gōng Sī* (富邦产物保险股份有限公司, 唯冠科技(深圳)有限公司) [*Fubang Prop. Ins. Joint Stock Co. v. Proview Tech. (Shenzhen) Co. Ltd.*]; (2012) Yuegaofa Min'erpo Zhongzi Di 3 Hao ((2012) 粤高法民二破终字第3号) [(2012) the Third Decision of Last Result from the Second Civil Tribunal for Bankruptcy of the Guangdong High Court]. *See also* Doris Li, "iPad" Is in Danger, CHINA IP (July 4, 2012), <http://www.chinaipmagazine.com/en/journal-show.asp?id=833>.

vant Trademarks, perhaps the only asset of the relevant Proview companies, which the court could then transfer to IP Application. The action of the Intermediate Court in Guangdong in requiring an additional US \$60 million from Apple and IP Application for the Relevant Trademarks they had already purchased for £35,000 from Proview, appears to be an abuse of authority.<sup>50</sup>

#### IV. China, Japan, and South Korea Trilateral Investment Agreement\*

On May 13, 2012, after thirteen rounds of formal negotiations and a series of informal consultations that have taken place since 2007, the Agreement Among the Government of Japan, the Government of the Republic of Korea, and the Government of the People's Republic of China for the Promotion, Facilitation, and Protection of Investment (the Agreement) was formally signed in Beijing.<sup>51</sup>

The Agreement is the first legal document and institutional arrangement of milestone significance that looks to boost and protect cross-border investments among the three states. The Agreement intends to provide a more stable, equitable, and transparent investment environment for investors from territories of the contracting parties to facilitate cooperation, development, and prosperity. The Agreement is a significant step toward a free trade agreement among the states.

The Agreement includes twenty-seven articles and an additional protocol covering substantive investment protections, such as expropriation and compensation, fair and equitable treatment, full protection and security, national treatment, and most-favored nation treatment, as well as provisions addressing transfers, subrogation, settlement of investment disputes, security exceptions, temporary safeguard measures, and denial of benefits.

The Agreement adopted certain high-level substantive investment protection provisions based on the U.S. Model BIT (2004)<sup>52</sup> and perfected certain key provisions from existing bilateral investment treaties (BITs) signed between China, Japan, and the Republic of Korea (ROK).

##### A. UPDATES ON THE DEFINITION OF INVESTMENT

One significant change made to the Agreement from the prior BITs was updating the definition of "investment," bringing it more in line with the U.S. Model BIT (2004). The Agreement and prior BITs both define "investments" on an "asset" basis; namely, the term "investments" is defined as every kind of asset complying with specific conditions or criteria. But the Agreement's definition takes "investment characteristics" (including the com-

50. Not coincidentally, the High Court's action was potentially to the benefit of certain creditors of Proview, including China Minsheng Bank Co., who in March 2010 received an asset preservation order over the Trademarks.

\* Jianwen Huang, an attorney with King & Wood Mallesons.

51. Agreement among the Government of Japan, the Government of the Republic of Korea and the Government of the People's Republic of China for the Promotion, Facilitation and Protection of Investment (May 2012) [hereinafter Jap.-China-ROK Agreement], available at [http://www.meti.go.jp/policy/trade\\_policy/epa/pdf/CJK%28English%29.pdf](http://www.meti.go.jp/policy/trade_policy/epa/pdf/CJK%28English%29.pdf).

52. See 2004 Model BIT Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, 2004, available at <http://www.state.gov/documents/organization/117601.pdf>.

mitment of capital or other resources, the expectation of gain or profit, or the assumption of risk) as the criterion for the investment assets other than those “in accordance with/not in violation of the laws and regulations of the host country” under the prior BITs between China and Japan/ROK.<sup>53</sup>

#### B. IMPROVED INVESTMENT TREATMENT PROVIDED TO INVESTORS

The Agreement provides investors with high-level national treatment and most-favored nation treatment to a great extent involving investment activities, access to the courts of justice, and compensation for losses or damages due to armed conflict or a state of emergency. But regarding said compensation for losses or damages, the BIT between China and Japan only provides investors with most-favored-nation treatment (without national treatment).

The Agreement has set out requirements for the parties to improve its treatment of investments and to build a fair and equitable investment environment through other specific measures. Such measures include progressively removing all non-conforming measures excluding national treatment, facilitating the procedures for entry of personnel conducting investments, and creating other favorable conditions for investors to make investments.

#### C. PREVENTION AND GUARANTEE MEASURES TO INVESTMENT RISKS

Since investors generally face more legal and political risks in cross-border investments than in inbound investments, the Agreement includes different kinds of measures for reducing such investment risks. The Agreement specifically provides that the contracting parties shall make its laws, regulations, and basic information of competent authorities responsible for such laws and regulations publicly available, and respond to specific questions and provide information that might materially affect the interests of the investors. It also prescribes strict conditions and compensation measures for expropriation and nationalization, as well as free transfers relating to investments.

#### D. INCREASED PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

Under the Agreement, no contracting party shall, in its territory, impose unreasonable or discriminatory measures on investments by investors of another contracting party concerning performance requirements on export or transfer of technology. Meanwhile, each contracting party shall protect intellectual property rights in accordance with its laws and regulations, establish and maintain transparent intellectual property rights regimes, and promote cooperation and communication among the contracting parties in the intellectual property field under the existing consultation mechanism.

Intellectual property protection and transparency of the regulatory environment has always been one of the main concerns of the Japanese and ROK investors in China. Little or no intellectual property protection provisions are present among the BITs between China and Japan or the ROK. The Agreement addresses this concern by specifying that it

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53. Jap.-China-ROK Agreement, *supra* note 51.

will make the regulation requirements more available to investors and promote the protection level of intellectual property to effectively prevent technology losses.

#### E. COMPREHENSIVE SAFEGUARDS FOR INVESTOR RIGHTS TO SETTLE INVESTMENT DISPUTES

Under the Agreement, if any dispute between a contracting party and an investor of another contracting party has incurred losses or damages by reason of, or arising out of, an alleged breach of any obligation of the former contracting party under the Agreement and cannot be settled amicably through consultation, the investor may submit the dispute to a competent court or international arbitration. This is an improvement on the investor-state dispute settlement provisions of the BIT between China and Japan, which allows disputes concerning the amount of compensation for expropriation and nationalization to be submitted for international arbitration.

Under the Agreement, Chinese and Japanese investors investing in the territory of the other contracting party will be afforded more comprehensive dispute settlement avenues or at least a more powerful bargaining chip during negotiations with the host state.

A more expansive investment dispute settlement provision will be a powerful legal weapon for investors, especially Chinese investors who are engaging in more outbound investments and are unfamiliar with the safeguarding of their rights.

#### F. FURTHER ATTENTION TO THE INTERESTS OF THE HOST STATES

The Agreement provides various investment protection exceptions to safeguard the reasonable interests of the host state, *e.g.*, each contracting party may take any measures that it considers necessary for the protection of its essential security interests under specific conditions and may take temporary safeguard measures in the event of serious balance-of-payments and external financial difficulties.

But before the Agreement can come into force and effect, it still requires the completion of certain necessary internal procedures within each contracting party as well as the appropriate handling of sensitive political and economic relationships among the contracting parties and other relevant supporting measures that need to be made.

### V. Arbitration Developments\*

#### A. CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION (CIETAC)

In February 2012, CIETAC adopted a revised version of its institutional rules, which came into effect on May 1, 2012 (the 2012 Rules). The changes introduced by the 2012 Rules aim to bring CIETAC arbitrations into line with international standards and to ensure that it remains competitive among other international arbitration centers.

Provided below are some of the key amendments in the 2012 Rules:

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\* Brenda Horrigan and Tracy (Min) Wu, attorneys at Herbert Smith Freehills LLP.

- (1) CIETAC arbitral tribunals have power to grant interim measures in certain circumstances;<sup>54</sup>
- (2) Expert witnesses are required to give oral evidence at the request of either party and with the approval of the tribunal;<sup>55</sup>
- (3) CIETAC arbitrations can be consolidated, with consent from all parties;<sup>56</sup>
- (4) CIETAC may specify a seat outside mainland China where the parties have not agreed or the parties' agreement is ambiguous (previously, proceedings could only be seated within mainland China);<sup>57</sup>
- (5) CIETAC may administer arbitrations under the rules of other arbitral institutions;<sup>58</sup>
- (6) CIETAC is free to determine the language where the parties are silent (previously, the default language was Chinese);<sup>59</sup>
- (7) If the arbitration clause does not specify which CIETAC sub-commission is to administer the proceedings, CIETAC Beijing will administer the arbitration (previously, if the clause was silent the claimant had the option to submit the case for arbitration by CIETAC Beijing or by the Shanghai or South China (Shenzhen) sub-commission);<sup>60</sup> and
- (8) In multi-party appointment of arbitrators, if either the claimants or respondents fail to jointly nominate an arbitrator, CIETAC will appoint the entire tribunal.<sup>61</sup>

On April 30, 2012, the day before the 2012 Rules were to come into force, CIETAC Shanghai declared itself an independent arbitral institution with independent jurisdiction, establishing its own set of arbitration rules and panel of arbitrators.<sup>62</sup> CIETAC Shenzhen followed suit, and an internal conflict between CIETAC Beijing and the Shanghai and Shenzhen sub-commissions has been ongoing for several months.

On August 1, 2012, CIETAC Beijing issued a statement suspending its authorization for the Shanghai and Shenzhen sub-commissions to accept and administer arbitrations, and requiring parties who had agreed to arbitrate before these sub-commissions to submit their disputes to CIETAC Beijing instead.<sup>63</sup>

In response, on August 4, 2012, the CIETAC Shanghai and Shenzhen sub-commissions (the latter of which recently changed its name to Shenzhen Court of International Arbitration (SCIA)) jointly published an announcement that declared (1) the sub-commissions have been independent arbitration entities since their establishment; (2) the so-called "sus-

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54. Zhōng Guó Guó Jì Jīng Jì Mào Yì Zhōng Cǎi Wì Yuán Huì Zhòng Cǎi Yuán (中國國際經濟貿易仲裁委員會仲裁員) [China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules] (adopted by the China Council for the Promotion of International Trade/China Chamber of International Commerce, Feb. 3, 2012, effective May 1, 2012), available at <http://www.cietac.org/index.cms>.

55. *Id.* art. 42.3.

56. *Id.* art. 17.2.

57. *Id.* art. 7.2.

58. *Id.* art. 4.3.

59. *Id.* art. 71.1.

60. *Id.* art. 2.6.

61. *Id.* art. 27.3.

62. *Announcement of China International Economic and Trade Arbitration Commission Shanghai Commission*, CIETAC (Apr. 30, 2012), <http://www.cietac-sh.org/Untitled-7.aspx>.

63. *China International Economic and Trade Arbitration Commission Announcement on the Administration of Cases Agreed to be Arbitrated by CIETAC Shanghai Sub-Commission and CIETAC South China Sub-Commission*, CIETAC (Aug. 1, 2012), <http://www.cietac.org/index/news/477bc3110798bf7f01.cms>.

pension of authorization” by CIETAC Beijing had no legal ground and no binding effect on them or relevant parties; and (3) CIETAC Shanghai and SCIA will continue to accept and administer cases submitted to them.<sup>64</sup> On August 31, 2012, CIETAC Shanghai and SCIA published a further joint announcement in the *Legal Daily* reiterating their position.<sup>65</sup>

In November 2012, the Secretariat of CIETAC Beijing commented on the dispute,<sup>66</sup> and then on December 31, 2012 CIETAC Beijing issued a statement in which it (i) reiterated its position that CIETAC Shanghai and SCIA were acting unlawfully, (ii) terminated the authority of those bodies to accept arbitrations under the CIETAC Rules, and (iii) directed affected parties to submit their disputes to CIETAC Beijing. CIETAC Shanghai and SCIA have ignored these instructions and announced on January 29, 2013 that disputes under agreements calling for arbitration by the Shanghai or Shenzhie sub-commissions should now be referred to the new CIETAC Shanghai and SCIA entities.

This issue continues to develop and could change rapidly. As such, it is difficult to predict the outcome, and it is ultimately up to Chinese regulators to resolve the dispute.

Until clarification, the likelihood of jurisdictional challenges and problems with enforcement in relation to cases submitted to CIETAC Shanghai or SCIA is greatly increased. Accordingly, for the time being, parties are recommended to select CIETAC Beijing and to state so expressly in their arbitration clause/agreement. Parties that have previously entered into arbitration agreements referring disputes to the CIETAC Shanghai or CIETAC South China sub-commission may consider amending those agreements to refer to CIETAC Beijing before a dispute arises.

## B. AMENDMENTS TO THE CIVIL PROCEDURE LAW

As noted above, the recently amended CPL will come into force on January 1, 2013. These amendments introduce several important changes to the domestic and foreign-related arbitration regimes in Mainland China.

The new CPL will permit applications directly to PRC courts for pre-arbitration evidence and asset preservation in domestic/foreign related arbitrations seated in China. These measures are referred to in mainland China as “Conservatory Measures” (保全措施).<sup>67</sup> Under the current regime, parties must wait until after the commencement of the arbitration before they can apply for such orders.

The new CPL also narrows the scope for challenges to domestic awards at the enforcement stage.<sup>68</sup> Under the new CPL, PRC courts can refuse to enforce domestic arbitration

64. *Joint Statement of CIETAC Shanghai Commission and CIETAC South China Commission on CIETAC's Administrative Announcement*, CIETAC (Aug. 4, 2012), <http://www.cietac-sh.org/Untitled-16.aspx>.

65. *China International Economic and Trade Arbitration Commission Shanghai Branch and China International Economic and Trade Arbitration Commission South China Sub Joint Announcement*, *LEGAL DAILY* (Aug. 30, 2012), [http://www.societac.org/upload/20120831/2012831\\_1346383374400.pdf](http://www.societac.org/upload/20120831/2012831_1346383374400.pdf).

66. *CIETAC Speaks Out on a Year of Turmoil: Interview*, *CHINA L. & PRAC.* (Nov.-Dec. 2012), <http://www.chinalawandpractice.com/Article/3112324/Channel/203650/CIETAC-speaks-out-on-a-year-of-turmoil-interview.html>.

67. *Zhōng Huá Rén Mín Gònghé Guó Mín Shì Sù Sòng Fa* (中華人民共和國民事訴訟法) [Civil Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Jan. 1, 2013), 2012 *STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.* 101, art. 81 (China).

68. *Id.* art. 236.

awards where a case was based on forged evidence or where the opposing party withholds evidence that affects the impartiality of the award. Before the amendment, courts could refuse enforcement if evidence is insufficient or the law is incorrectly applied.

Other changes include:

- New provision prohibiting vexatious litigation and arbitration claims which aim to avoid complying with agreements in the enforcement stage;<sup>69</sup>
- Requirement for courts to issue written rulings and explain reasons for decisions that set aside an award (currently this only applies to refusals to enforce);<sup>70</sup> and
- Amendment to clarify that parties can agree to arbitrate non-contractual disputes.<sup>71</sup>

These changes demonstrate that the Chinese government is conscious of the need to bring its domestic and foreign-related arbitration regimes in line with international practice and is taking gradual steps to do so.

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69. *Id.* art. 113.

70. *Id.* art. 154.

71. *Id.* art. 124.