

**Baker
McKenzie
FenXun.**

奋迅 · 贝克麦坚时



DOING BUSINESS IN **CHINA**

2020



Baker McKenzie FenXun
A Leading Chinese and
International Law Joint Platform

Doing Business in China

2020

Table of Contents

1	Introduction.....	1
2	Foreign Invested Enterprises.....	2
3	Foreign Invested Partnerships.....	6
4	Representative Offices.....	8
5	Mergers and Acquisitions.....	10
6	Distribution.....	13
7	Imports and Exports in China.....	15
8	Data Protection and Cybersecurity Compliance.....	19
9	Antitrust and Competition Laws.....	24
10	Intellectual Property Protection.....	33
11	Employment Issues.....	44
12	Taxation.....	47
13	Dispute Resolution.....	50
14	Anti-Bribery and Compliance.....	60
15	About the Firm.....	65

1 Introduction

This guide provides an introduction to selected aspects relating to investment and business operations in the People's Republic of China ("PRC" or "China") under current Chinese laws and policy. China is a vast country, where national laws, local regulations and implementing procedures provide a complex legal framework for doing business.

As discussed in further detail in Section 2, the newly enacted Foreign Investment Law generally grants foreign investments national treatment and allows investors to set up business in China in a variety of forms: companies (which include limited liability companies and joint stock companies), partnerships, branches, representative offices, etc. This guide provides a brief outline of the most frequently used forms of foreign investment: companies, partnerships, and representative offices.

The guide also includes a summary of important areas of concern to all investors in China: mergers and acquisitions, competition issues, taxation, employment, intellectual property protection, trade and import and export rules, as well as compliance and dispute resolution issues.

2 Foreign Invested Enterprises

2.1 Foreign Investment Law

In 2019, the National People's Congress of the PRC passed the Foreign Investment Law ("FIL"), a landmark fundamental legislation to regulate foreign investments in the PRC and provide stronger protection for foreign investors. The FIL took effect from January 1, 2020, repealing at the same time the prior laws governing Sino-foreign equity joint ventures, Sino-foreign cooperative joint ventures, and wholly foreign owned enterprises and their respective implementation regulations. From the effectiveness of the FIL, all foreign-invested enterprises (the "FIEs"), be it joint ventures or wholly foreign owned entities, will be governed by the Company Law of the PRC (the "Company Law") if they are incorporated, or other relevant laws such as the Partnership Law, if they are unincorporated, in the same way as all Chinese domestic entities. This section focuses only on entities in the form of companies under the Company Law including limited liability companies and joint stock companies.

As the FIL has fundamentally altered the existing foreign investment laws, it is unsurprising that local regulators need some additional time to respond to the new law and additional regulations and precedents are needed to provide clear guidance in resolving some issues of corporate organization, management and government procedures. Further implementation regulations and rules are expected to be issued, which hopefully can provide practical guidance on these issues.

2.2 National treatment and restrictions

The FIL establishes that China continues to maintain its "opening-up" policy and encourages foreign investment in China. Under the current regime, foreign investors are accorded national treatment for investment in most sectors and treated the same as domestic investors. Only a small number of sectors are restricted or prohibited for foreign investment. These restricted or prohibited sectors are specified in a nationwide Negative List as issued and amended from time to time.

Generally, foreign investors investing in a restricted sector will have to satisfy certain additional requirements that are inapplicable to domestic investors. These requirements include, for example, caps on foreign shareholding percentages and requirements that Chinese citizens hold certain management positions.

In addition to the nationwide Negative List, there is also a less restrictive Negative List applicable to the free trade zones in a few selected cities. In these free trade zones, foreign investors may invest in certain sectors that are restricted for foreign investments outside the zones without any or with lesser restrictions than elsewhere in China.

2.3 Establishment

The applicable procedure for establishing an FIE first hinges on whether foreign investment in the sector is restricted.

Over the past decade, China has implemented several reforms to simplify the procedures for foreign investments. Currently, the procedures are largely reduced to a so-called "business license first, operating permits later" approach. This approach means, for most sectors, the investor can set up the operating entity and receive the business license - the equivalent of a certificate of incorporation - from the State Administration for Market Regulation ("SAMR") or its local counterparts without having to apply for various operating permits beforehand.

In greenfield projects involving fixed asset investments such as building a plant, the project will have to be approved or recorded with the National Development and Reform Commission or its local government counterparts depending on the size and nature of the project. Approvals of the construction plan and construction work are also necessary.

There are general trends placing greater importance on environmental protection for projects having potential impact on the environment. These projects will require environment impact assessment ("EIA"), which is usually under the jurisdiction of the competent local environmental protection bureau.

Subsequent to or in parallel with the EIA and the land or construction related approvals, additional regulatory approvals or operating permits may be required depending on the nature of the business. For example, a food manufacturer will have to apply for a food production permit before the production line can be put in use.

Although the above "business license first, operating permits later" approach applies to most foreign investments, for certain highly regulated businesses, the investor still have to obtain the prerequisite approval of the industrial authority before setting up the entity. For example, to invest in general aviation activities, the investor must first obtain a corresponding general aviation operating license before it can apply for the business license with the SAMR.

After or in parallel with the EIA and the land and construction related approvals, and depending on the specific situation of each case, additional approvals may be required.

2.4 Documentation

Under the current regime, documents required for setting up an FIE typically include a standard application form, the articles of association, appointment letters and identification documents of the directors and supervisors, office ownership or lease documents, etc.

For joint venture companies, the Company Law unlike the prior Sino-foreign joint venture laws requires no joint venture contract (or shareholders' agreement) to be part of the constitutional documents of a joint venture company. Nevertheless, it is recommended that the joint venture partners negotiate and execute a joint venture contract to govern their relationship and specify arrangements such as right of first offer or refusal, tag-along or drag-along right, change of control trigger, reserved matters, information rights, etc. Due to the change in law, certain issues such as whether the joint venture contract can be governed by foreign laws other than the PRC law remain to be clarified with the authorities.

Depending on what other regulatory approvals are applicable, additional documents such as a project feasibility study, an EIA report and other various qualification documents may be required.

2.5 Capital contributions

Under the Company Law, each company maintains a "registered capital" that is subscribed for by its investors. The registered capital will be stipulated in the articles of association and registered with the SAMR. Save for certain regulated businesses, investors are generally allowed to pay in their respective subscribed portion of the registered capital in accordance with an agreed schedule provided in the articles of association.

A company is permitted to increase or decrease its registered capital. However, once the registered capital is paid in, the investors cannot withdraw any portion thereof without complying with the registered capital reduction procedures. Unauthorized withdrawal of the registered capital may result in a piercing of the corporate veil and shareholder liability.

Capital contributions may be made either in cash or in kind. Generally, the Company Law recognizes in-kind contributions in the following forms: buildings, equipment, technology, land use rights, intellectual property rights, etc. However, "sweat equity", goodwill or licenses cannot be used for capital contributions.

In addition to registered capital, foreign investors may use shareholder loans to fund FIEs. Such loans are subject to prescribed debt to equity ratios, or FIEs may alternatively choose net asset value based restrictions on loan financing.

2.6 Term of operation

Companies in China typically have a fixed term of operation, which is renewable before its expiration. In practice, the usual range is between 15 years and 50 years depending on the size and nature of the project, with most substantial manufacturing ventures having a term of 25 years or more. Indefinite terms are permitted in some cities, but companies in land development and real estate, natural resource exploration and exploitation projects, and certain other regulated industries must have a fixed term.

A company will be dissolved upon the expiration of its term of operation unless renewed. Upon its dissolution, the company's remaining property after clearance of debts can be distributed in accordance with the shareholders' respective capital contribution ratios except where the articles of association have other stipulations or the shareholders agree otherwise.

2.7 Scope of activities

Under the current corporate law regime, all companies in China have a definitive "business scope" approved by the governmental authorities, which specifies the business activities which the company is permitted to carry on. Formulation of the business scope is generally very brief and quite specific. In practice, many local government authorities have adopted certain standardized language for the business scope and investors are often required to carefully draft the business scope in conformity with the standardized language to the extent possible. Minor deviations are often tolerated and can be negotiated with the local authorities but material variations are often rejected.

2.8 Financial administration

Under PRC law, companies are required to adopt accounting procedures based on a dual-entry, accrual system. All accounting records, books and statements are required to be prepared and kept in Chinese. Chinese legislation also requires a certified accountant registered in China to act as the auditor of the company.

A company is also required to allocate 10% of its after-tax profits to a statutory reserve fund until the fund reaches up to 50% of the registered capital of the company. The shareholders may resolve to allocate additional after-tax profits to a supplementary reserve fund. The reserve funds may be used for making up prior losses.

2.9 Foreign exchange

In spite of recent relaxation of foreign exchange regulations, FIEs have to comply with foreign exchange control procedures for both incoming and outward remittances.

2.10 Management

Companies may have a board of directors or, in the case of those with a small number of shareholders, a sole director referred to as an executive director, in addition to a legal representative (who can be the general

manager or the chairman of the board of directors or the executive director, as the case may be) and supervisor(s). The shareholders meeting is the highest authority of the company. The daily operations of a company will be controlled solely by its own management, and should not be subject to interference by the government when operating in accordance with its articles of association, and in compliance with Chinese laws and regulations.

2.11 Corporate Maintenance

FIEs have annual reporting requirements administered by different local government departments and recently consolidated under SAMR's online system. In most cities, the annual reporting deadline is June 30 of each year, and local notices are published to confirm the annual requirements. For example, the information in the annual report of an FIE will be shared between the various government departments, such as SAMR and the Ministry of Commerce's local counterparts, Customs, and the foreign exchange and taxation authorities.

3 Foreign Invested Partnerships

3.1 Legal status

Except for certain highly regulated industries, foreign investors are generally permitted to establish partnerships, including general partnerships and limited partnerships, to conduct business in China in accordance with the Partnership Law of the PRC and the relevant implementation regulations. For general partnerships, all its partners will be jointly and severally liable for the partnership's liabilities and there are only limited exceptions. For limited partnerships, only the general partner will be jointly and severally liable for the partnership's liabilities, while the limited partners are liable only to the extent of the respective capital contribution they subscribed for.

In practice, foreign invested partnerships are less commonly used forms of foreign investment in China as compared to companies.

3.2 Establishment

The "business license first, operating permits later" approach also applies to partnerships in general. Hence, investors can set up the partnership and obtain the business license from the SAMR or its local counterparts so long as the invested business does not fall under a regulated industry for which prerequisite approval of the industrial authority is required. Upon completion of its establishment, the partnership will be able to proceed to apply for the necessary operating permits as applicable.

For general partnerships, there is no upper limit on the number of partners. For limited partnerships, the number of partners cannot exceed 50 and there shall be at least one general partner. Under the Partnership Law, general partners can be entities (whether incorporated or not) or individuals, except that the following entities are not permitted to act as general partners: Chinese state-owned enterprises, listed companies, not-for-profit public institutions, and social group organisations. Where the general partner is an entity, it must appoint a representative to execute the affairs of the partnership on its behalf.

3.3 Documentation

Typically, the documents required for establishing a partnership include a standard application form, a partnership agreement, powers of attorney, identification documents of the partners, office ownership or lease documents, and other documents as the registration authority may require. For foreign partners, their identification documents are required to be notarized and legalized by the Chinese embassy or consulate. A properly executed power of attorney is also required as evidence that the foreign partner has appointed a process agent for purposes of service of process.

Similarly, depending on what other regulatory approvals are applicable, additional documents may be required.

3.4 Capital contributions

Capital contributions to a partnership may be made either in cash or in kind. The value of in-kind contributions can be either agreed upon by all the partners in writing or determined by a qualified third party appraiser.

Unlike the Company Law, the Partnership Law recognizes "sweat equity", i.e., labour capital, in addition to assets that are typically used for capital contributions such as buildings, technology, land use rights and

intellectual property rights. If an individual foreign partner intends to contribute by means of labour, he or she must also apply for a work permit.

4 Representative Offices

4.1 Legal status

Representative offices established in China by non-resident enterprises are regulated by national regulations, as well as local policies, which supplement the national regulations. In general, representative offices may not conduct direct business activities. A representative office is permitted only to carry out market research, exhibition and publicity activities in connection with the products or services of its head office and liaison activities in connection with the sale of products, provision of services, procurement in China or investment in China by its head office. Personnel of a representative office of a non-resident enterprise should not sign contracts on behalf of either the non-resident enterprise or third parties.

There are certain operational restrictions and requirements imposed on representative offices, e.g. a limitation on the number of registered representatives (essentially setting a limit of four foreign personnel who can be seconded to a representative office), and the requirement to complete annual reporting to the local SAMR. Fewer foreign companies are setting up representative offices in China as a result of the limitations on activities.

4.2 Registration

Only a few types of representative offices (e.g., banking, securities, insurance) are required to obtain approval for establishment, and for any subsequent changes, the majority of representative offices do not need to obtain special approval. Instead, direct registration with the SAMR is required. Some SAMR authorities require an applicant company to submit application materials through designated agencies, and the documentation requirements will also vary among the different localities in China.

In general, the documents to be submitted include:

- a registration form for the representative office and for each of the representative office's foreign personnel (including the chief representative);
- resume of the chief representative;
- appointment letter for the chief representative and any other representative;
- a letter of creditworthiness from the foreign company's bank; and
- copies of the foreign company's incorporation certificate, business registration certificate and constitutional document (e.g. articles of association).

The foreign company's incorporation documents, letter of creditworthiness, appointment letter for the representatives, and the identity document of the chief representative will need to be notarized and legalized by the Chinese embassy in the home jurisdiction of the foreign company before submission.

In addition to attending to the above registration, the representative office must register with the local tax bureau and a number of other government departments including the public security bureau (for a foreign employee's residence permit, if applicable) and the local customs authority (for importation of personal belongings). The representative office must also open a bank account in China in order to fund the expenses of the representative office and for the payment of local taxes.

4.3 Continuing Obligations

It is necessary to report to the local SAMR any change to the head office's company name, registered address, and designated authorized representative as well as any change to the representative office's registered representatives and registered address.

In order to close a representative office, it is necessary to formally de-register with the relevant government departments including the tax bureau and the SAMR, and close the bank account. It is not possible to convert a representative office to another corporate form.

5 Mergers and Acquisitions

China's regulatory framework for mergers and acquisitions involving foreign investors is undergoing substantial change following the enactment of the FIL, which took effect on January 1, 2020. While the primary governing legislation is still the Regulations on the Merger and Acquisition of Domestic Enterprises by Foreign Investors ("Foreign M&A Regulations"), which was last revised in June 2009, we expect the Foreign M&A Regulations to be repealed or updated in the near future as part of the implementation of the FIL.

5.1 General framework

Under the FIL, the definition of foreign investment includes a foreign investor acquiring shares and assets of a Chinese enterprise. Similar to the undertaking of greenfield projects, foreign investors acquiring Chinese companies are subject to a management system of pre-establishment national treatment: the treatment given to foreign investors during the acquisition should not be lower than that applied to domestic investors. They are also subject to the negative list for foreign investment as issued from time to time by the relevant authorities ("Negative List"). A foreign investor is not allowed to acquire an interest in an enterprise operating in a field in which foreign investment is prohibited under the Negative List. If the target company operates in a field in which foreign investment is restricted under the Negative List, the investment must comply with the relevant conditions provided in the Negative List, such as limits on the foreign investor's shareholding percentage in the target company. The FIL also provides that foreign investors who acquire Chinese companies are subject to antitrust review as required by the Anti-Monopoly Law of the PRC. When acquiring interests in Chinese enterprises, relevant registration procedures and information reporting will need to be completed respectively with the SAMR and Ministry of Commerce ("MOFCOM"), similar to greenfield investments.

The Foreign M&A Regulations remain in effect at the date of writing, but many of their provisions are superseded by the FIL and it is expected that the Foreign M&A Regulations will be repealed or replaced in the near future.

5.2 National security review

The FIL contemplates that foreign investment, including acquisitions of domestic enterprises by foreign investors, will be subject to a national security review system, but at the time of writing, no detailed regulations have been promulgated pursuant to the FIL. The national security review procedure established by the regulations issued by the State Council and MOFCOM in 2011 should continue to apply.

A joint committee led by the National Development and Reform Commission and MOFCOM is responsible for carrying out a review to determine whether a transaction will have a major impact on national security. If that impact cannot be mitigated, the transaction will not be permitted to go forward.

Under the Foreign M&A Regulations, the onus is on the investor to file for a national security review if the transaction could raise national security concerns. MOFCOM may also at its own discretion decide that a national security filing is required.

A filing is required if the acquisition would give a foreign investor actual control of a domestic defense enterprise or a non-defense enterprise which (1) has a bearing on national security and (2) involves industries such as major agricultural products, major energy sources and resources, major infrastructure facilities, major transportation services, key technologies and the manufacture of major equipment.

5.3 Equity acquisitions vs. asset acquisitions

A foreign investor can acquire equity in a wholly Chinese-owned enterprise and convert it into an FIE. When assets, rather than equity, are acquired, it is necessary to establish a commercial presence in China in order to use the assets for operational purposes. In these circumstances, an FIE may be established prior to the acquisition or, in some circumstances, may be established as part of the acquisition process.

In comparison, asset acquisitions have some advantages over equity acquisitions. The foreign investor can pick and choose which parts of the PRC target company it wishes to buy. Generally, existing obligations, liabilities or restrictions of the PRC target company will remain the sole responsibility of the PRC target company. Asset acquisitions tend to be more complex and time-consuming than equity acquisitions since the transactions typically involve the transfer of different categories of assets and liabilities, each carrying separate statutory requirements. In addition, if a new FIE is to be established for the purpose of carrying out the asset acquisition, the foreign investor will be required to file for the relevant approval or registration with the Chinese authorities in accordance with the same requirements applicable to a greenfield investment in the same industry. Finally, there may be tax considerations for the parties in relation to the transfer of assets, as asset acquisitions are taxable in China.

5.4 Other specific target groups or acquisition means

If a foreign investor wishes to acquire an FIE, it may simply acquire the foreign parent of the target rather than the target itself. This form of acquisition is particularly suitable when the parent is a special purpose vehicle established for the sole purpose of holding the FIE. While the FIL has streamlined the foreign investment process, offshore acquisitions are still simpler and more convenient than direct acquisitions because Chinese approval and filing requirements are normally avoided (except for a reporting of a change of beneficial owner). Note that there are PRC tax implications relating to such indirect transfers.

The implementing regulations of the FIL ("FIL Implementing Regulations") also provide that investments carried out by FIEs have to comply with the FIL and the FIL Implementing Regulations. Therefore, foreign investors will not be able to avoid restrictions on particular foreign investments by investing through another FIE (holding vehicle without business substance) not subject to such restrictions.

5.5 VIE structure

The VIE (variable interest entity) structure in China enables a foreign investor to invest in businesses restricted for foreign investment (for example, media, telecommunications, education etc.) through contractual control over a Chinese-owned enterprise holding the requisite licenses and approvals necessary for operating such restricted businesses.

The Chinese government and courts have not officially addressed the legitimacy of using the VIE structure to circumvent foreign investment restrictions. The final version of the FIL and the FIL Implementing Regulations remain silent on this issue. Despite concerns about the legality of the VIE structure, we still see this structure being used in sectors where foreign investment is restricted.

5.6 State-owned equity acquisitions

The PRC Enterprise State-owned Assets Law regulates, among other things, the transfer of state-owned equity interests. Under this law, equity transfers in state-owned enterprises generally are subject to approvals by the State-owned Assets Supervision and Administration Commission (or its local counterparts). If a transfer will result in the State losing majority control, approval from the PRC government at corresponding level would also be required.

The transfers of state-owned equity interests (other than shares in listed companies) normally have to be conducted at government-affiliated equity exchanges by means of an open bidding process. The minimum transfer price has to be determined by reference to the appraised value. A commitment to maintain employee's stability is often one of the qualifying requirements for interested bidders. On the other hand, any proposal relating to redeployment of employees requires approval from the workers congress of the target.

5.7 Acquiring PRC listed companies

Since 2006, foreign investors may directly acquire tradable shares of PRC listed companies by way of transfer, private placement or other legal means for medium- to long-term investments.

Where the target shares of a PRC listed company are state-owned, the transfer normally should be done by public solicitation where the seller must publish key details of potential dispositions through an indicative announcement disclosed by the listed company and invite interested buyers to submit acquisition proposals for selection. The transfer price shall not be lower than the higher of the (1) the daily weighted average prices of the stocks of the listed company over a period of 30 trading days prior to the date of the indicative announcement, or (2) the audited net asset value per share of the listed company in the past fiscal year.

5.8 Mergers

PRC laws recognize two forms of merger: "merger by absorption" and "merger by new establishment." A "merger by absorption" involves the absorption by one company of another pursuant to which the absorbed company is dissolved and its registered capital and assets merged into the surviving entity. In a "merger by new establishment," each of the pre-merger companies is dissolved and a new company established holding an aggregate of the pre-merger companies' assets and registered capital.

Cross-border mergers are currently unavailable under PRC law, i.e. it is not possible to directly merge a foreign entity with a domestic company (including FIEs). As far as foreign investors are concerned, the only permissible forms of merger in China are between FIEs, or between FIEs and domestic companies. In practice, however, mergers are still not as common as asset acquisitions.

5.9 Recent developments

The most significant development for foreign M&A in China is the implementation of the FIL and revamping of the laws governing foreign investment that began in 2020. The FIL and the FIL Implementing Regulations replaced the laws and regulations that had governed foreign investments in China for several decades. This marked a new era for the management of foreign investment in China, including acquisitions by foreign investors and their subsidiaries in China.

At the same time, China's foreign exchange regulator, the State Administration of Foreign Exchange, liberalized certain controls on foreign exchange capital accounts and issued a circular in late 2019 that allows FIEs to use their registered capital to make investments in China. Previously, except for foreign-invested investment and venture capital enterprises, FIEs were not permitted to use registered capital or foreign currency loans to invest in or acquire equity of other enterprises. Under the new policy, all FIEs, not just specialized investment companies, can be used to acquire and hold interests in other Chinese entities. As a result, foreign investors have more options and flexibility to structure acquisitions in China.

6 Distribution

6.1 Wholesaling and retailing

Foreign investment in wholesale and retail activities was traditionally governed by standalone regulations promulgated by MOFCOM, amongst which the most important one was the Measures for the Administration of Foreign Investment in the Commercial Sector (the “Commercial Sector Measures”), which came into force on June 1, 2004.

Starting from November 3, 2016, the Commercial Sector Measures, along with other relevant regulations promulgated by MOFCOM, were repealed. On January 1, 2020, China’s newly enacted FIL and its implementation rules took effect. As a result, the only market access requirements for wholesale and retail activities in China are based on the new Negative List developed under the new law, which generally allows foreign investors to establish 100% wholly foreign-owned wholesale or retail enterprises in all industries in China, except for certain specified industries, including most notably, shipping agency (which must be majority-owned by a Chinese investor), and tobacco (for which foreign investment is prohibited in wholesale and retail activities - tobacco is still subject to a State monopoly in China).

6.2 Franchise operations

China permits foreign investors to engage in franchising activities through wholly foreign-owned or joint venture commercial enterprises. Cross-border franchising is also permitted.

In order for a foreign investor or foreign-invested commercial enterprise to become a franchisor, the franchisor must have at least two directly-operated stores that have been operating for over one year.

Applications to establish a foreign-invested commercial enterprise to engage in franchising activities must be submitted to the commerce authorities, and a specimen franchise contract must be submitted together with other application materials.

6.3 Direct selling

Pursuant to its WTO commitments, China liberalized foreign investment in wholesale and retail distribution away from a fixed location with the promulgation of the Regulations for the Administration of Direct Selling by the State Council and effective from December 1, 2005 (the “Direct Sales Regulations”) and amended in 2017. Following the promulgation of the Direct Sales Regulations, China issued implementing regulations to supplement various aspects of the Direct Sales Regulations.

At the same time as the promulgation of the Direct Sales Regulations, China issued the Regulations on the Prohibition of Pyramid Marketing, promulgated by the State Council and effective November 1, 2005 (the “Pyramid Marketing Prohibition Regulations”). The stated aims of the Pyramid Marketing Prohibition Regulations are to ban certain activities which are considered to be harmful to the society and business environment.

“Direct sales” is broadly defined as “a sales method whereby a direct selling enterprise recruits direct sellers, who market products directly to the ultimate consumers other than through a fixed place of business”. The Direct Sales Regulations restrict the products that can be sold using direct sales methods in two different ways. A direct sales enterprise may only sell products that were produced by itself or by its parent or holding company. Additionally, China has limited the overall scope of products that can be sold through direct sales.

The Direct Sales Regulations impose a certain number of requirements on enterprises in China that intend to engage in direct sales in China. The Direct Sales Regulations allow investors (both foreign and local) to expand the business scopes of existing Chinese enterprises to include direct sales.

MOFCOM is the issuing authority of the Direct Selling Permits. In order to apply for a Direct Sales Permit from MOFCOM, an applicant would have to submit a set of application documents. The application for the Direct Selling Permit must be submitted to MOFCOM through their provincial level counterpart where the applicant enterprise is registered. During the application process, MOFCOM will solicit the opinion of SAMR regarding the application before it decides whether to grant its approval.

6.4 E-Commerce

China introduced a cross-border e-commerce pilot program in early 2014 in order to regulate the sale of goods by overseas retailers directly to Chinese customers through approved e-commerce platforms. Effective from January 1, 2019, a set of new cross-border e-commerce regulations have been published. Under the new programme, qualifying consumer goods are treated as “personal articles” and are allowed importation into China under exempted tariffs and reduced import taxes.

Two models of retail activities are currently permitted under the cross-border e-commerce pilot program. The “bonded sale” model allows a foreign seller to route the goods through a free trade zone before dispatching them to the individual Chinese buyers. The “direct sale” model in contrast allows shipment of goods directly from a foreign seller to the individual Chinese buyers through designated courier service providers. Sales under both models are entitled to certain customs duty and import tax saving benefits, as compared to the imports through the ordinary channel of commercial trade.

Neither model requires the foreign seller to establish a legal presence in China. Nevertheless, the foreign seller is required to engage qualified third party logistics service providers and a cross-border e-commerce platform approved by China Customs in order to sell goods under the pilot program.

Starting from April 8, 2016, China also has in place a “positive list” regime for the pilot program, whereby only products listed as “permitted” on the two tariff code-based catalogues can be imported under the pilot program, subject to the product regulatory requirements specified in the relevant portions of the catalogues, such as pre-importation registration and approval of specified categories of products (e.g., cosmetics, infant milk formula, health food and medical devices, etc.), as well as compliance with China’s national standards and labelling requirements. In addition to the fact that most product regulatory requirements were originally suspended until December 31, 2018, the new regulations further extend such waivers on an indefinite basis. The new regulations also expand the scope of the “positive lists” to include 63 new tariff categories.

7 Imports and Exports in China

There are several issues affecting imports and exports in China. These issues are described in the following sections below and should be considered when importing / exporting goods to / from China.

7.1 Import and export rights

China's implementation of its WTO commitment to grant import / export rights to foreign-invested enterprises was controversial. However, a significant step forward was taken when China amended the Law of the People's Republic of China on Foreign Trade (the "Foreign Trade Law"). The amendments replace the system of special, licensed import/export companies with a registration system under which enterprises, other organizations or individuals may engage in import / export business after registering with the foreign trade authorities. To implement the changes, MOFCOM issued the Measures for the Registration of Foreign Trade Operators (the "Registration Measures") on June 24, 2004. Prior to introduction of the registration system, FIEs were generally only authorized to import goods, materials and equipment for their own use and to export self-manufactured products. Now, they are able to obtain import / export rights for all types of products other than goods subject to state trading. However, it is important to note that import rights do not equal distribution rights (e.g., retail or wholesale distribution rights). Even if a foreign-invested enterprise obtains import rights, it will not be able to sell the imports unless it also has distribution rights.

7.2 Taxes affecting imports and exports

Imports and exports are subject to Customs duties and value-added tax. They may also be subject to consumption tax. Please refer to the chapter on "Taxation" for further details.

In addition to Customs duties imposed on general imports, effective April 4, 2018, imports of certain U.S.-origin goods are also subject to additional tariffs, in retaliation to the U.S. Section 301 tariffs on Chinese-origin goods. Generally, goods can only be exempted from additional tariffs through a product exclusion process.

7.3 Customs valuation

As part of China's accession to the WTO, China committed to adopt the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (the "GATT Valuation Code"), which is reflected in the Measures of the PRC Customs for the Assessment and Determination of Dutiable Value of Import and Export Goods issued by the General Administration of Customs, amended and effective from February 1, 2014. The value of imported goods must be measured accurately in order to determine the amount of customs duty payable.

In general, all imported goods are appraised in accordance with the transaction value of the goods. However, where the transaction valuation is not an appropriate method of valuation (e.g., the goods are transferred to China free of charge or the relationship between related parties affected the price), one of the following valuation methodologies may be used:

- (a) Transaction value of identical merchandize
- (b) Transaction value of similar merchandize
- (c) Deductive value
- (d) Computed value, and

(e) Derivative value

The valuation methodologies above are applied in sequence. Nevertheless, the order of deductive value and computed value may be switched upon the importer's application.

7.4 Tariff classification

China adopts a commodity classification system based on the Harmonized Commodity Description and Coding System ("HS"). Commodity classification determines the applicable customs duty rate, import / export licensing requirements, export refund rates, etc.

There are 97 different chapters with detailed import duty rates for all goods and commodities. Both "general rates" and "most favoured nation rates" are shown for each category. For specific tariff classifications, exports may also be subject to duty at applicable rates. Failure to provide an accurate HS Code will attract penalties and can impact the customs duty rate applied to imports. If this results in underpayment of customs duty, China Customs can penalize the importer for duty evasion.

China Customs has adopted the six General Rules of Interpretation ("GRIs") for classifying imports and exports in accordance with the HS system.

7.5 Customs declaration

A declaration to Customs must be made at the place of importation within 14 days of entry into the country. Taxpayers for exports must submit a declaration to Customs at the place of exportation upon arrival of the goods at the Customs supervision and control zone at least 24 hours prior to loading¹.

The duty payable will be calculated based on the product's customs tariff classification and the dutiable value, and is payable to a designated bank within 15 days from the date of the Customs Duty Certificate(s). If payment is not made on time, taxpayers may be liable to pay daily late payment interest of 0.05% of the total amount of duties payable commencing from the due date, or additional penalties if payment is more than three months late. A taxpayer who is unable to pay customs duties on time due to the occurrence of a force majeure event or State adjustment of tax policies may defer payment after paying a duty bond.

7.6 Origin

Place of origin rules exist in order to implement two customs duty rates on import commodities, i.e. MFN rate and preferential rate. If the imported product has been produced in two or more countries, the last country in which there has been substantial transformation to the product shall be deemed as its country of origin, as a general rule applicable to standard custom duty rates.

Preferential custom duty rates, which are reduced rates, are applicable to imported goods that fall within the ambit of a free trade agreement. It is therefore important to ascertain the origin of the goods so as to know whether they are entitled to preferential treatment. Specific preferential rules are provided under the various free trade agreements. In some instances, the rules are product-specific.

7.7 Other non-tariff barriers

China also imposes non-tariff prohibitions, restrictions and controls on imports and exports in various forms, including, amongst others, licensing requirements, quotas, certification processes, mandatory inspections and quarantines, trade sanctions, and product labelling requirements. These restrictions may generally apply, or

¹ Under a pilot program initiated by the General Administration of Customs ("GAC") in 2006 and subsequently expanded in 2017 nationwide, all enterprises may file import or export declarations to Customs in any location.

apply only in relation to specific goods. For example, China prescribes import licensing and export control requirements on commercial encryption products.

7.8 Special customs supervision zones

China has a number of different special custom supervision zones that offer preferential customs and VAT treatment. These zones are specific geographical areas that are marked out and administered by Customs. They may be considered to be outside the Customs territory of China, but may be considered to be part of China proper by other agencies. The preferential treatment that applies to an enterprise established within the various zones may be different, and the type of activities permitted may also be different. Below is a table that lists the major types of special custom zones in China:

	Processing	Logistics	Trading	Exhibitions	Export VAT Refunds
Bonded Zones	√	√	√	√	X
Export Processing Zones	√	√	X	X	√
Bonded Logistics Zones	X	√	√	√	√
Bonded Logistic Centers (Type B)	X	√	√	X	√
Bonded Port Zones	√	√	√	√	√
Integrated Bonded Zones	√	√	√	√	√
Free Trade Zone	√	√	√	√	√

7.9 Free trade agreements / preferential trade agreements

China has signed numerous Free Trade Agreements ("FTAs") with various countries, all providing customs duty concessions for imports into China, as well as according China originating exports to these countries at preferential import duty rates. Importers / exporters should consider whether such agreements could be used to reduce the amount of customs duty paid. As of February 2020, the following FTAs are in force:

- China - Association of Southeast Nations ("ASEAN") FTA and upgraded protocols;
- China - South Korea FTA;
- China - Australia FTA;
- China - Chile FTA and upgraded protocols;
- China - Pakistan FTA and second phase protocols;;
- China - New Zealand FTA;

- China - Singapore FTA and upgraded protocols;;
- China - Peru FTA;
- China - Costa Rica FTA;
- China - Iceland FTA;
- China - Switzerland FTA;
- Mainland and Taiwan Economic Cooperation Framework Agreement ("ECFA");
- Mainland and Hong Kong Close Economic Partnership Arrangement ("CEPA");
- Mainland and Macau CEPA;
- Asia Pacific Trade Agreement;
- China - Mauritius FTA;
- China - Maldives FTA; and
- China - Georgia FTA.

8 Data Protection and Cybersecurity Compliance

In the era when everything can be connected and will be connected, data protection and cybersecurity are becoming an increasingly significant area of law and focus of compliance regimes globally and in China. This chapter aims to provide an overview of the Chinese data protection and cybersecurity rules that are generally applicable to companies operating in China and outline notable, recent legislative developments.

8.1 Legal framework

Unlike the General Data Protection Regulation of the European Union or the Cybersecurity Information Sharing Act of 2015 of the United States, there is no specific, unified national legislation concerning the protection of personal information in China to date. Rather, the applicable laws, regulations and suggested rules in relation to the data privacy are scattered among various statutes, government circulars and recommended national standards.

The Cybersecurity Law ("CSL"), effective from June 1, 2017, is the key rule governing data protection and cybersecurity matters in China and signifies China's implementation of a more comprehensive data regulatory regime to bolster Chinese government's "Internet Plus" initiative and its "Internet Sovereignty" doctrine. The CSL is broadly applicable to the construction, operation, maintenance and use of networks² in China and imposes various obligations primarily on network operators, defined as "owners and administrators of networks as well as network service providers," to conform to the requirements and rules prescribed under the CSL and the overall data protection requirements. That said, with the rapid development of information technologies, because all kinds of businesses and entities utilize certain kinds of networks (e.g. internet, intranet, LAN, IoT, etc.) in the course of daily activities in China to digitize data and process the data through e-technologies, almost every entity conducting business in China will be captured by the broad coverage of network operators, thus making the CSL extensively applicable.

In addition, certain national standards and guidelines have been formulated to describe the best practices for network operators to follow in their data operations in China. One of the most important standards is the Information Security Technology - Personal Information Security Specification ("Specification"), initially issued on December 29, 2017 and last amended on March 7, 2020 (GB/T 35273-2020), which provides detailed guidance and recommended practices for collection, processing, sharing, transfer, storage and retention of personal information. While those guidelines are not mandatory in nature and therefore do not have legal binding force on companies doing business in China, it is commonly acknowledged that the Chinese authorities would refer to them in assessing a company's compliance with data protection requirements. Therefore, those guidelines, albeit recommended in nature, should warrant serious attention.

Aside from the general rules applicable to business operators in all sectors, there are industry-specific regulations as well as sector-specific standards issued by various industrial regulators that provide for more detailed rules and/or heightened requirements for companies operating in particular lines of business, especially in those heavily regulated sectors such as finance (including banking, securities and insurance), medical and healthcare, ride-sharing, online publishing, etc.. Business operators in the special industries should also beware of the additional, sector-oriented data protection requirements.

There is currently no single designated data protection authority in China. The Cyberspace Administration of China ("CAC") is taking the lead in formulating the implementation rules and measures of the CSL, but the

² The "(cyber) network" is defined under the CSL as "a system that consists of computers or other information terminals and relevant devices and serves to collect, store, transmit, exchange and process information per certain rules and procedures."

Ministry of Public Security, the SAMR as well as various industry regulators all take on certain responsibilities in enforcing data protection requirements.

8.2 Territorial reach

The PRC data protection laws, regulations and standards generally apply to organizations located in China and should not apply to foreign entities that operate completely outside China due to the principle of territoriality. That being noted, the subsidiaries, branches or representative offices in China are expected to ensure their overseas affiliates will comply with the relevant PRC data protection requirements (e.g., certain requirements stipulated under the CSL) where such overseas affiliates process the data collected from data subjects in China.

8.3 Personal information; sensitive personal information

“Personal information” is defined under the CSL and the Specification to include “information, recorded in electronic or other forms, that can alone or in combination with other information be used to identify a natural person,” and specific references are made by the Specification to identification data, biometric data, health data, educational and occupational data, financial information, communication data, geo-information, web logs, device information or other categories of data.

The concept of sensitive personal information is not statutorily used in the CSL or other statutes. Rather, “sensitive personal information” is defined under the Specification as “personal information that, if disclosed, leaked or abused, may lead to bodily harm, property damage, reputational harm, harm to personal health, or discriminative treatment of an individual,” plus personal information of children under the age of 14. The Specification proposes that certain strengthened measures be adopted concerning the processing of sensitive personal information, for instance, to the extent practically feasible, a data subject’s explicit consent should be obtained prior to the collection and processing of sensitive personal information of such data subject; while for general personal information, implicit consent may suffice.

8.4 Main obligations of network operators

Collection and Processing of Personal Information

The CSL stipulates the general principles of “legitimacy, reasonableness and necessity” for collecting and processing personal information by network operators. More specifically, when collecting and processing personal information, a network operator must: (i) expressly inform the data subjects of the purposes, scope and manner of data collection and processing and obtain their consent to the same; (ii) keep the data subjects’ personal information strictly confidential; (iii) refrain from collecting personal information which is not relevant to the services it provides to the data subjects; (iv) process the data subjects’ personal information in accordance with the agreement with the data subjects; (v) refrain from leaking, altering or damaging the personal information collected; and (vi) refrain from disclosing personal information of the data subjects to third parties without the consent of the data subjects.

The prescribed information (i.e., purposes, scope and manner of data collection and processing) is usually provided in the form of a privacy notice or policy.

Data Residency and International Data Transfers

Under the CSL and other currently-effective PRC laws and regulations, expect for CII operators (as discussed below), network operators are generally not required to store personal information in China and are generally free to transfer the data across China’s borders (without the need to complete the governmental formalities to conduct such transfers).

However, a trend towards regulating international data transfers is reflected in recent legislative developments. It is proposed under the draft Measures for Security Assessment of Export of Personal Information (“Draft Security Assessment Measures”) published by CAC on June 13, 2019 for public comments that any cross-border transfer of personal information by network operators be undertaken on the condition of completion of security assessment and proper contractual arrangements. Specifically, prior to transfer of any personal information overseas, network operators in China (i.e. data exporters) must (i) enter into a contract or other forms of legally binding document with the foreign recipient concerning export of personal information; (ii) conduct self-assessment of security risks associated with the intended export and the security safeguards and measures to be adopted to address such risks, and prepare an assessment report; and (iii) file the said report with the provincial counterpart of CAC for its security assessment review and obtain clearance from CAC. The Draft Security Assessment Measures also describe certain ongoing compliance requirements, such as network operators should (i) establish and maintain certain records relating to export of personal information for five years, and (ii) submit an annual report on export of personal information to the provincial counterpart of CAC by December 31 of each calendar year.

So far, the Draft Security Assessment Measures have not been formally finalized and adopted, and requirements described therein have not been implemented in practice. Companies operating in China are advised to closely monitor the developments in this respect as they would significantly impact their ability to freely transfer data abroad and even the information systems and technologies used to store and process personal information collected in China.

Retention

Except for some industry-specific rules that may provide for minimum retention periods for certain types of data, there is no statutory requirement under current PRC laws in relation to retention or disposal periods for personal information. That said, according to the Specification, it is advisable that data retention periods should be limited to the shortest time period needed to achieve the purpose for which the personal information is collected, and personal information should be deleted or anonymized once such retention period expires.

Rights of Data Subjects

Under the CSL, data subjects have the right to request network operators (i) to rectify the personal information that is inaccurate or incomplete and (ii) to delete the personal information if network operators violate the laws, regulations or the covenants with the data subject. Network operators should also provide the data subjects with a channel for complaints in respect of collection and use of their personal data and respond to such complaints within a reasonable timeframe.

In addition, the Specification recommends the following additional rights of data subjects as a matter of best practice: (i) the right to access their personal information; (ii) the right to withdraw consent in part or entirely; (iii) the right to de-register / cancel the account; (iv) the right to request copies of personal information; and (v) the right to restrict the automated decision-making of the information system.

Data Breach Reporting

The CSL generally requires network operators to promptly notify the data subjects and the relevant authorities in the event of an actual or potential leakage, damage or loss of personal data and take remedial measures, but the enforcement of such requirement has not been strict.

Multi-level Network Protection Scheme

Under the CSL, network operators should adopt certain security protection measures pursuant to a multi-level network security protection scheme, whereby each network operator is to be certified at a specific level based on the level of cybersecurity risk that may arise with its network(s) and is required to comply with the applicable level of cybersecurity protection requirements (the details of which are still under deliberation and will likely be included in the final version of the draft Regulations on Multi-level Network Security Protection³ to be released by the Ministry of Public Security).

8.5 Enhanced obligations of CII operators

The CSL also contains provisions that apply to “critical information infrastructure” security. “Critical information infrastructure” or “CII” is defined as the infrastructure used for “public communication and information services, energy, transportation, water conservancy, finance, public service, electronic governance, and any other infrastructure that—if destroyed, disabled, or suffering a data leak—would seriously endanger national security, national welfare, people’s livelihood, or the public interest.” The exact scope of CII is not entirely clear under the CSL and is expected to be further defined.⁴

The CSL imposes a local data residency requirement on CII operators. According to the CSL, any personal information collected or important data⁵ generated by CII operators through the operation of its CII(s) must be stored and processed on servers within China. Additionally, transferring personal information or important data by CII operators to overseas recipients is only permissible if there is a business necessity and the relevant state authorities have conducted a security assessment. Detailed rules in this connection are being drafted and will be released by CAC in the near future.

8.6 Special protection of personal information of children

The Regulations on Network Protection of Personal Information of Children (“Children’s Personal Information Regulations”), which took effect on October 1, 2019, is the first piece of legislation in China specifically designed to protect the personal information of children who are under the age of 14.

In addition to the general personal information protection requirements under the CSL, the Specification and other related laws and rules, the Children’s Personal Information Regulations set forth certain specially designed obligations and reiterate the obligations stipulated under the CSL on network operators in respect of protection of children’s personal information, including: (i) to obtain consent from children’s legal guardian (in most cases, their parents) to collect, use, transfer or disclose the personal information of children; (ii) to adopt and publish terms of use and privacy policy specifically designed for children; (iii) to appoint data protection officer(s) who will be responsible for protection of children’s personal information;

³ The draft Regulations on Multi-level Network Security Protection were issued by the Ministry of Public Security on June 27, 2018 for public comments.

⁴ On July 10, 2017, CAC released a draft of the Regulations for the Security Protection of Critical Information Infrastructure, aiming to provide more detailed guidance on the scope of CII and obligations on CII operators. According to the regulations, CAC will work together with the industrial regulators to formulate guidelines on the identification of CII, and the industry regulators will, in accordance with such CII identification guidelines, identify the CII within their respective industries.

⁵ The term “important data” is not specifically defined under the CSL; however, the draft Measures for Data Security Management issued by CAC in May 28, 2019 defines “important data” as “the data—if leaked—may directly have impact on national security, economic security, social stability or public health and safety.” Examples of important data given in the said draft measures include unpublished government information, large scale/coverage of population data, genetic and health data, geo-information and mineral resource data, but would exclude personal information, CII operators’ production and operation related information, and internal management information.

and (iv) to conduct a security assessment (carried out by network operators themselves or by an entrusted third party institution) before transfer of children's person information to a third party.

8.7 Penalties

Under the CSL, network operators infringing upon personal information will be subject to a warning, confiscation of illegal gains, a fine of no less than one but no more than ten times the illegal gains (or if there is no illegal gain, a fine of up to RMB1 million), or a combination of these administrative penalties. Notably, the infringement will also be recorded in the credit files of the infringing network operator which are publicly accessible.

The Law on Protection of Consumer Rights and Interests and the Tort Liability Law provide for civil remedies available to data subjects whose personal information has been infringed upon by business operators, including the relevant business operators being ordered to cease the infringement, rehabilitate the consumer's reputation, take action to mitigate adverse consequences, provide an apology, and/or provide indemnities. In addition, administrative authorities may impose monetary penalties of up to ten times the illegal income derived from an infringement or, if there is no illegal income, a fine of up to RMB 500,000, or/plus an order to suspend business for rectification or revoke the business license.

Under the Criminal Law, the person who illegally sells or otherwise provides the personal information to third parties may be subject to a fixed-term imprisonment of not more than three years or criminal detention (or in a severe case, a fixed-term imprisonment of not less than three years but not more than seven years), and concurrently or separately, sentenced to a penalty. Where the violator is an entity, the entity shall be sentenced to a penalty, while the directly responsible person shall be subject to imprisonment in accordance with the foregoing.

8.8 Fast evolving regulatory landscape

As an omnibus law regarding cybersecurity, the CSL's requirements are broad with few specific implementation details. In the post-CSL era, the Chinese government has been actively drafting and enacting legislation, regulations, rules and standards (such as those mentioned above) to serve as supplementary, detailed principles and requirements prescribed by the CSL. Thus, data protection and cybersecurity rules in China are fast evolving, and it can be anticipated that more rules will be announced and implemented in the near future to further strengthen the protection of personal information. Companies operating in China are advised to keep close track of the relevant legislative developments to ensure compliance in a timely manner.

9 Antitrust and Competition Laws

9.1 Legal framework

The basic law governing antitrust and competition issues in China is the Anti-Monopoly Law (“AML”), which entered force on August 1, 2008. The AML is China’s first comprehensive competition law, applying to almost all sectors of the economy. The main features of the AML are:

- a merger filing system, requiring mergers and acquisitions, meeting specific financial thresholds, to be notified to the China competition authority, the SAMR and approved prior to closing;
- a prohibition on monopoly agreements; and
- a prohibition on the abuse of a dominant market position.

On January 2, 2020, for the first time since the AML came into force, China has introduced a draft of proposed amendments for public consultation (“Draft Amendments”). The Draft Amendments, as issued by SAMR, propose sweeping changes to the AML, including among others, harsher penalties for violations (especially for failure to notify mergers), a mechanism to stop the clock in merger reviews and more clarity on what will be considered anticompetitive, including hub-and-spoke cartels, abuse of dominance in the internet sector and unfair discrimination. These proposed changes are discussed in more detail in the relevant sections below.

The Draft Amendments are also subject to further review by the government and legislative agencies. As at January 2020, there is no fixed timetable for their adoption.

Over the years, the Chinese antitrust regulators have issued a number of AML rules and regulations. On July 1, 2019, SAMR published three new regulations, all of which took effect on September 1, 2019, namely:

- the Interim Provisions on the Prohibition of Monopoly Agreements;
- the Interim Provisions on Abuse of Dominant Market Position; and
- the Interim Provisions on Prevention of the Abuse of Administrative Power to Exclude or Restrict Competition,

(collectively, the “Interim Provisions”).

The Interim Provisions serve to consolidate many of the previous rules and regulations. They provide further guidance to business operators on compliance with and application of the procedures under the AML and set out a unified approach on the enforcement of the AML.

On January 7, 2020, SAMR also issued the draft Interim Provisions on the Review of Concentration of Business Operators for public consultation, which seek to serve as the “all-in-one” document regarding merger control review. They cover transactions that are caught as “concentration of business operators”, criteria of simple cases, the notification and review process, competition analysis, type of remedies and remedies imposing mechanisms and investigations for failure to notify, etc.

In recent years, the antitrust regulator has issued a number of guidelines and draft guidelines, covering a wide range of topics including (but not limited to):

- market definition;
- price-related conduct by industry associations;

- pricing conduct of undertakings in relation to drugs in short supply and active pharmaceutical ingredients;
- motor vehicle industry (draft);
- antitrust compliance of business operators (draft);
- determination of illicit gains and fines (draft);
- undertakings' commitment in antitrust cases (draft);
- abuse of intellectual property rights (draft);
- leniency application in cases involving horizontal monopoly agreements (draft), and
- application of exemption of monopoly agreements.

The AML enforcement in China is still rapidly evolving and the information contained in this section is therefore especially vulnerable to change.

9.2 Extraterritorial application

The AML applies to both agreements and conduct within China as well as agreements and conduct outside China, where these have the effect of restricting competition in the Chinese market.

9.3 Enforcement agencies

Following national institutional reforms in 2018, SAMR was established as the single antitrust authority with both investigative and enforcement powers in respect of antitrust investigations, merger review and all other matters relating to antitrust in China.

Prior to March 2018, China's antitrust enforcement was delegated in turn to three agencies:

- the Antimonopoly Bureau of MOFCOM was responsible for merger control filings and investigations;
- the Department of Price Supervision of the National Development and Reform Commission ("NDRC") was responsible for pricing-related infringements; and
- the Law Enforcement Bureau for Anti-Monopoly and Unfair Competition of the State Administration for Industry and Commerce ("SAIC") was in charge of enforcing non-price-related infringements.

SAMR has been active in enforcement since its establishment:

- SAMR completed review of 432 merger filings in 2019, with 427 filings receiving unconditional approval and five receiving conditional approvals. The number of filings reviewed in 2019 was slightly lower than the 448 filings reviewed in 2018. As of 2019, there were only two transactions blocked by the China competition authority under the merger control regime.
- SAMR's enforcement efforts against failure to notify/gun-jumping cases have also increased year-on-year, penalising 15 cases in 2018 and 18 cases in 2019.
- In 2019, SAMR had issued enforcement decisions in 18 cases, out of which 13 involved the imposition of penalties. The 18 cases concerned a wide range of industries, including pharmaceuticals, automobiles, public utilities and consumer goods, with the construction materials industry punished most frequently.

9.4 Merger filings – when are they required?

9.4.1 Filing thresholds

The AML requires transactions qualifying as “concentrations” to be notified to SAMR where, in their last completed accounting year:

- each of at least two “relevant business operators” generated at least RMB400 million (approx. USD57.24 million) in revenues from sales in or into China (excluding Hong Kong and Macau); and
- all the “relevant business operators” have aggregate revenues exceeding either RMB10 billion (approx. USD1.43 billion) globally or RMB2 billion (approx. USD286.46 million) generated from sales in or into China (excluding Hong Kong and Macau).⁶

Higher specific thresholds exist for banks, insurance companies and other financial institutions.

Transactions between related parties, such as reorganizations taking place entirely within a corporate group, are expressly exempted from the AML filing obligation.

It is worth noting that:

- the thresholds can be met through imports into China alone – no Chinese assets or presence are needed;
- an AML filing will be required regardless of whether a transaction takes place in China or offshore;
- transactions that are closed without filing in China, despite meeting the thresholds above, expose both the acquirer and the seller to substantial penalties (see “Penalties” below); and
- even if the thresholds set out above are not met, SAMR has the ability to require a filing to be made, either before or after closing. As at the date of issuance of this guide, there are no cases of SAMR initiating investigations concerning transactions below the notification thresholds. However, SAMR has stated it would like to revive the use of this power.

9.4.2 “Relevant business operators”

The “relevant business operators” will typically be (1) the acquiring entity and its entire corporate group; and (2) the businesses or companies being acquired, including any affiliates or subsidiaries they control. The seller will not, in most cases, be regarded as relevant. Where there are two or more acquirers, the revenues of each acquirer will usually be relevant.

9.4.3 “Concentration”

“Concentration” is a wide term, covering not just acquisitions of complete or majority control, but also acquisitions of substantial minority stakes, as well as asset-based acquisitions, where the acquirer gains rights amounting to “decisive influence” over a business for the purposes of the AML.

“Decisive influence” is also a wide concept, usually including the right to appoint one or more directors or core management personnel, and obtaining veto rights over matters such as the budget, sales and operations decisions.

⁶ The exchange rate is 1 USD=RMB 6.98169, which is the average exchange rate between November 2019 to January 2020. (<https://www.xe.com/currencyconverter/convert/?Amount=1&From=USD&To=CNY>)

9.4.4 Joint ventures

Formations of joint ventures and substantial changes to their ownership will usually give rise to a “concentration”, with the “relevant business operators” being the parents to the joint venture and their corporate groups, as well as the joint venture itself.

9.5 Merger filings – procedure

Filings are detailed, and transactions may not be closed until SAMR has completed its review and issued a clearance decision. The merger review process in China usually takes a significantly longer period compared to other jurisdictions. It is therefore important to address this issue early.

Once a filing is received, SAMR will review the filing and either declare it complete or request further information or clarification (known as the pre-acceptance phase). SAMR may also reject a filing as inadequate. The formal review timetable does not commence until the filing has been declared complete.

SAMR has a two-track review procedure, namely:

- standard/long form filing procedure; and
- simplified/short form filing procedure.

9.5.1 Standard Procedure

The standard procedure typically involves the following phases:

- Pre-acceptance phase – typically 4 to 8 weeks (but can be even longer);
- Phase 1 review – 30 days;
- Phase 2 review – 90 days; and
- Phase 3 review – 60 days.

Transactions that qualify as simple case filings can be reviewed under the simplified procedure under which the filings can be cleared by SAMR in Phase 1.

The majority of cases reviewed under the standard procedure are approved after Day 45 of Phase 2. However, if the parties offer commitments and / or the transaction raises significant competition law concerns, then the review process may be extended to Phase 3. In exceptional cases, the parties may be required to re-file the transaction at the end of Phase 3. For instance, SAMR took 19 months to approve one particular review in 2019.

During the review process, SAMR will consult with competitors, suppliers, customers and relevant industry associations. Where objections are raised, parties may need to make additional submissions to SAMR, either in writing or in person.

The Draft Amendments also propose the addition of a “stop the clock” mechanism that would suspend the review procedure in the following circumstances:

- the parties apply for or agree to a suspension of the review;
- the parties supplement information or materials as required by SAMR; or
- the parties and SAMR are in negotiation with respect to remedies for conditional approvals.

Such a stop the clock mechanism could be of some benefit in complex cases. Currently, multiple re-filings are common in circumstances where the parties are unable to conclude remedy discussions with SAMR within the prescribed timeframe. The introduction of a stop the clock mechanism could make this process more efficient, by avoiding the need to pull and refile in these circumstances. That being said, if this indeed is adopted, it is still expected that SAMR will issue detailed rules regulating the “stop the clock” mechanism to avoid unpredictable review timelines.

Additionally, the Draft Amendments also propose to allow SAMR to revoke a clearance decision if it later finds that the information submitted for review is inaccurate.

9.5.2 Simplified Procedure

In 2014, MOFCOM introduced the simplified procedure, which intends to expedite the review process for cases raising no major competition issues. Two rules, namely the Tentative Provisions on the Applicable Standards for Cases of Concentration of Operators Subject to Summary Procedure and the Guiding Opinions on the Declaration for Concentration of Operators Subject to Summary Procedure, were issued by MOFCOM in February and April 2014 respectively. The standards for cases qualified for summary procedure are as follows:

- horizontal mergers when the parties’ combined market share in the overlap market is less than 15%;
- vertical mergers when the parties’ market share in the relevant upstream and downstream market is less than 25%;
- conglomerate mergers when the parties’ market share in their respective markets is less than 25%;
- offshore joint ventures which do not engage in any economic activities in China;
- the acquisition of equity or assets of an offshore target which does not engage in any economic activities in China; or
- the reduction of the number of controlling shareholders in a joint venture which results in the joint venture being controlled by one or more of the remaining shareholders.

Please note that even if a transaction satisfies one of the above-mentioned conditions, SAMR reserves the right not to apply the summary procedures for exceptional cases (e.g., it is difficult to define the relevant market, or the concentration may have an adverse impact on consumers or relevant business operators).

The new procedure has substantially accelerated the currently lengthy merger review process in China for transactions that do not have a significant impact on competition. The pre-acceptance phase in simplified procedure usually takes two to six weeks. It is expected that a majority of the notified transactions subject to the simplified procedure will be cleared within Phase 1. In addition, the content requirements of the simplified form are substantially less, thereby reducing preparation time.

As of 2019, there have been 44 conditional clearance decisions and two prohibition decisions. The conditions imposed can be wide-ranging, requiring the disposal of businesses both within and outside China. Behavioral conditions can also be imposed, for example requiring parties to refrain from further acquisitions in a particular sector; continue supplying the China market on fair, reasonable and non-discriminatory terms; or maintain separation between the acquirer and the businesses being acquired. More details relating to the conditions can be found in an interim rule published by MOFCOM on restrictive conditions for concentrations of undertakings, which took effect from January 5, 2015. The rule lays out types of merger review conditions, as well as the process of forming, implementing and monitoring restrictive conditions.

In September 2018, parts of the regulations and measures set out above were amended to reflect the change from MOFCOM to SAMR. The substantive rules remain unchanged for now.

9.5.3 Sanctions

SAMR is increasingly taking action against parties to notifiable transactions that fail to notify and jump the gun before clearance is obtained. As highlighted above, SAMR had imposed penalties against 15 cases in 2018 and 18 cases in 2019 for failure to notify/gun-jumping.

Under the current AML, the SAMR may impose a fine of up to RMB500,000 (approx. USD71,615.90)⁷. SAMR can also theoretically require the parties to unwind the problematic transactions. However, so far, the China competition authority has never exerted the authority to unwind transactions in failure to notify/gun jumping investigations.

However, in the event that the proposed increase in fines in the Draft Amendments is adopted, the fine for a failure to notify/gun-jumping will be up to 10% of the sales revenue of the parties in the last year.

9.6 Prohibition on monopoly agreements

The AML prohibits “monopoly agreements”. These are defined as agreements, decisions or other concerted practices between business operators that have the purpose or effect of eliminating or restricting competition.

The following monopoly agreements between competing business operators are prohibited:

- agreements to fix or change the price of goods;
- agreements to restrict the quantity of goods produced or sold;
- agreements to divide a sales market or a raw materials procurement market;
- agreements to restrict the purchase of new technology or new equipment, or to restrict the development of new technology or new products; and
- concerted refusals to deal.

The AML also expressly prohibits direct or indirect attempts by a supplier to impose fixed or minimum resale prices on customers. In fact, enforcement against resale price maintenance (i.e., “RPM”) has become a high priority of SAMR and its predecessor (i.e. NDRC) since 2013.

Both NDRC and SAIC have issued implementing rules to provide further clarifications on types of monopoly agreements, which can be between competitors or non-competitors. In late December 2010, NDRC issued the Regulations on Price Monopoly and SAIC issued the Regulations on Prohibition of Monopoly Agreements. The NDRC rule clarifies that among others, an agreement to fix or change commissions or discounts that affect prices, or use an agreed price as the base for negotiation with third parties will be viewed a monopoly agreement. The SAIC rule clarifies that agreements allocating product sales by territory, by customer or by category or volume; restricting the purchase, lease or use of new equipment; or jointly refusing to supply or sell products to a business operator among competitors will be viewed as monopoly agreements. These rules have generally been consolidated into the Interim Provisions on the Prohibition of Monopoly Agreements.

⁷ The exchange rate is 1 USD=RMB 6.98169, which is the average exchange rate between November 2019 to January 2020.

9.6.1 Exemption from the prohibition

The prohibitions on horizontal and vertical monopoly agreements are not applicable if the parties are able to prove that:

- the agreements would not seriously restrict competition in the relevant market;
- consumers can share the benefits resulting from these agreements; and
- one of a list of specified goals are met. These include technological advancement and / or product development, improvements in overall product quality, increases in efficiency, and reduction in costs.

There is currently no mechanism under the AML which would allow parties to apply in advance for a formal ruling that a given case falls within an exemption. Parties to agreements are therefore expected to self-assess whether an agreement, if later investigated by SAMR, would qualify for an exemption. SAMR is currently working on the draft Guidelines regarding Exemption of Monopoly Agreements, which aims to provide general conditions and procedures for application of exemptions.

9.7 Prohibition on abuse of dominant market position

The AML defines a “dominant market position” as the ability of one or more business operators to control the price or quantity of goods in a relevant market or to otherwise affect conditions of a transaction, so as to hinder or influence the ability of other business operators to enter into the market.

9.7.1 When is a business operator dominant?

This is often a complex analysis based on a number of criteria, including market share, control over the market, financial and technical resources and barriers to market entry.

Under the AML, a dominant market position is presumed to exist where one, two, or three business operators achieve combined market shares of 50%, 66%, or 75% respectively. However, if any of the operators has a market share of less than 10%, or can produce evidence to rebut the presumptions, then that operator will not be assumed to have a dominant market position.

9.7.2 Types of conduct prohibited

A dominant market position is not, in itself, unlawful. It is only the abuse of such a dominant market position that raises issues. The AML prohibits the following types of conduct by business operators occupying a dominant market position:

- selling goods at prices that are unfairly high or purchasing goods at prices that are unfairly low;
- without a legitimate reason, selling goods at below cost;
- without a legitimate reason, refusing to deal with a business operator;
- without a legitimate reason, restricting a trading partner by requiring it to deal only with the dominant operator(s) or with other designated operators;
- without a legitimate reason, tying goods or attaching other unreasonable conditions to a transaction; and
- without a legitimate reason, treating equivalent trading partners in a discriminatory manner with respect to price or other trading conditions.

This list is not exhaustive, and the SAMR is empowered to define further abuses. As with monopoly agreements, the Interim Provisions on Abuse of Dominant Market Position seeks to further provide guidance on, among others, the definition of dominance and what constitutes an abuse of dominance.

9.8 Penalties

For anti-competitive agreements and conduct, fines of up to 10% of the total turnover in the preceding year can be levied, plus confiscation of illegal gains resulting from the agreement or conduct. In addition, agreements that violate the AML are automatically invalid. Cease and desist orders can also be issued in respect of anti-competitive behaviour.

For failure to make a merger filing, or closing a transaction before clearance is granted, fines of up to RMB 500,000 (approx. USD 71,615.90) are available, plus the ability for the SAMR to order the annulment or unwinding of the transaction. However, as highlighted above, in the event that the proposed increase in fines in the Draft Amendments is adopted, the fine for a failure to notify/gun-jumping will be up to 10% of the sales revenue of the parties in the last year.

In addition to the above, under the Draft Amendments, the maximum fines applicable to the following violations will be increased:

Violation	Fines under the current rules	Fines proposed in the Draft Amendments
Violation by a trade association for organizing or facilitating a monopoly agreement	Up to RMB500,000	Up to RMB5 million
Obstructing an investigation, refusing to provide required information, destroying evidence, providing false information, etc.	Fines for individuals: up to RMB100,000; Fines for the company: RMB0.2 million - 1 million	Fines for individuals: up to RMB1 million Fines for the company: up to 1% of sales revenues in the last year OR up to RMB5 million if the company did not generate revenues in the last year
Monopoly agreements that have been entered into but not yet implemented	Up to RMB500,000	Up to RMB50 million

9.9 Procedure

Rules have been published setting out how investigations are conducted. These include basic details of a "leniency" program (the legal basis for which is provided under the AML), which rewards those confessing illegal conduct or agreements with either full or partial immunity from fines. The Interim Provisions on the Prohibition of Monopoly Agreements provide some high level rules regarding the leniency regime. Under the SAMR's leniency rules provided in the interim provisions:

- (f) a business operator which voluntarily reports the relevant information regarding the monopoly agreement and provides substantial evidence may receive full or partial immunity from potential fines by the SAMR:
 - (i) the first applicant may receive 100% or no less than 80% immunity from potential fines;
 - (ii) the second applicant may receive a 30% to 50% reduction in potential fines; and
 - (iii) the third applicant may receive a 20% to 30% reduction in potential fines.

9.10 Litigation

In addition to administrative enforcement, the AML allows customers, competitors and third parties to bring civil damages claims against any business that has caused them to suffer loss by engaging in a monopoly agreement or abusing its dominant market position.

Business operators that have been subject to administrative penalties for antitrust violations (i.e. monopoly agreement or abuse of dominance), can pursue administrative litigation if they disagree with the administrative penalties imposed by the competition authority. However, for merger control decisions made by SAMR, the business operator concerned who disagrees with such decision should apply for an administrative review first and then proceed with administrative litigation if the business operator still disagrees with the administrative review decision.

10 Intellectual Property Protection

China is a member of the WTO and consequently a party to all major intellectual property conventions of the organization, as well as others, including the Paris Convention, Patent Cooperation Treaty, Berne Convention, Universal Copyright Convention, Geneva Convention and Madrid Agreement on International Registration of Marks.

10.1 Patents

The Patent Law of the People's Republic of China (the "Patent Law") was amended on December 27, 2008. The revision came into effect on October 1, 2009. The Implementing Regulation supplementing the Patent Law was revised on December 30, 2009 and came into effect on February 1, 2010. The Patent Law is currently undergoing another round of revisions (i.e. the fourth amendment). The latest draft of the fourth amendment was released on January 4, 2019, which includes rules regulating patent term extension, utilization of service inventions, statutory and punitive damages, standard essential patents and internet service provider's infringement liabilities.

In terms of prosecution, the Patent Examination Guideline ("Examination Guideline") has been amended several times since 2006, and the latest version came into effect on February 1, 2020. The amended Examination Guideline includes the qualification of algorithms and business methods as subject matter, design of graphic user interfaces, and other procedural issues. The Supreme People's Court ("SPC") also drafted Several Provisions on Issues concerning the Trial of Cases on Patent Allowance and Validation on June 1, 2018.

In terms of enforcement, the Standing Committee of the National People's Congress issued its Decision on Several Issues concerning Judicial Procedures for Patent and Other Intellectual Property Cases ("Congress Decision") on October 29, 2018. The Congress Decision changed the appeal jurisdiction of an IP-related civil case involving technology. Since January 1, 2019, the SPC IP Tribunal instead of the Provincial High People's Courts will hear an appeal of an IP-related cases involving technology, including invention and utility model patents, new variety of plants, layout design of integrated circuits, know-how, computer software and antitrust. The coverage includes both civil and administrative cases. Further, the SPC established three IP courts in Beijing, Shanghai and Guangzhou and 21 IP tribunals in certain municipal intermediate courts across the nation to hear the first instance of an IP-related civil case involving technology. The number of IP tribunals may further increase in the future. These jurisdiction adjustments are aimed at concentrating the above mentioned types of IP cases and improving the consistency of judicial practice in IP cases.

The SPC has also issued several judicial interpretations related to patent dispute resolution, including Several Provisions on Technical Investigators' Participation in the Trial of Intellectual Property Cases on May 1, 2019, Provisions on Several Issues concerning the Application of Law in Cases Involving Act Preservation in Intellectual Property Disputes on January 1, 2019, Several Provisions on Issues concerning the Application of Law in Pre-suit Preliminary Injunction against Patent Infringement on July 1, 2001, Interpretations on Several Issues concerning the Application of Law in the Trial of Patent Disputes Cases No. 2 and No. 1 on April 1, 2016 and January 1, 2010 respectively, and Several Provisions on Issues concerning the Application of Law in the Trial of Cases on Patent Disputes (2015 Amendment) on February 1, 2015. These judicial interpretations further supplement the legal framework on issues related to patent enforcement, including preliminary injunction, claim construction, doctrine of equivalence, estoppel, burden of proof, liabilities, and relation between invalidation and infringement cases.

The China National Intellectual Property Administration ("CNIPA") also released several rules and guidelines related to patent dispute resolution, including Guideline for Administrative Review of Patent Administrative Enforcement (pilot version) and Guideline for Judicial Review of Patent Administrative Enforcement (pilot

version) on December 25, 2017, and Guideline for Patent Infringement Determination (pilot version), Evidence Rules for Patent Administrative Enforcement (pilot version), Guideline for Patent Disputes Mediation (pilot version) on May 5, 2016. CNIPA also set up 25 IP Protection Centres across the nation to provide prosecution and enforcement assistance, and one Overseas IP Enforcement Centre to provide guidance and assistance to companies in their overseas enforcement.

China adopts a “first-to-file” rather than “first-to-invent” system. There are three types of patents: patents for inventions of 20 years duration from the application filing date; patents for utility models of 10 years duration; and patents for designs of 10 years duration. The system is compliant with the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (“TRIPS Agreement”), with Paris Convention priority. This means that if a patent application for an invention or utility model patent is first filed in another Convention-member country within 12 months before the filing date in China, the prior filing date will be regarded as the priority date in China. In the case of a patent application for a design, the relevant period is six months.

An invention patent protects any novel technical solution regarding a product, a process or an improvement thereof. For example, it could protect a pharmaceutical substance and composition, its manufacturing process, and its application. A utility model patent protects any novel technical solution regarding the shape or structure of a product or a combination thereof that is capable of practical use. A design patent protects any novel shape or pattern of a product or the combination of color, shape and pattern thereof that creates an aesthetic feeling and is suitable for industrial application.

China requires absolute novelty for these three types of patents. That is, a technology or design for a patent application shall not be identical to any technologies or designs that are known to the public inside or outside China before the application date of the application. Further invention and utility model patents also need to possess inventiveness, though the requirements of inventiveness for utility models is lower than inventions. The criteria for patenting designs are also tightened to combat “junk” design patents. To enjoy protection, designs must now possess “obvious distinctions” from either the prior design or combinations of prior design features. Two-dimensional designs (e.g., labels) will not qualify for patenting where the graphics or colors or their combination are mainly used as source indications.

Patent applications for inventions, utility models and designs all need to go through preliminary examination, and inventions need to further go through substantive examination. A patent applicant whose application is rejected by CNIPA may request a re-examination. The re-examination decision can be subject to judicial review before Beijing IP Court as the first instance trial and further SPC IP Tribunal as the second instance. From the date a patent is granted, any party may apply to the CNIPA to invalidate the patent on the ground that its grant does not comply with certain rules of the Patent Law. A CNIPA’s invalidation decision can also be subject to judicial review before the Beijing IP Court and later SPC IP Tribunal.

Foreign applicants are required to submit their patent applications in China through a licensed Chinese patent agent, and cannot apply directly to the Patent Office by themselves.

Under the Patent Law, inventions that are completed in China need to first be filed in China or undergo a security review in China, before being filed overseas. Parties that fail to do so risk losing their patent rights.

The right to apply for patents in relation to inventions, utility models and designs lies in the first instance with the inventor, subject to contractual provisions to the contrary. Where inventions, utility models or designs are created as a result of carrying out employment duties or primarily by using the materials and resources of an employer, the right to apply for patents belongs to the employer. The right to apply for patents in relation to inventions or designs unrelated to employment belongs to the inventor or designer. Thus, defining the scope of employment is crucial in determining patent rights. The Patent Law further states that in cases where inventions or designs are created as a result of using the materials and resources

of the employer, if the employer and the employee have entered into a contract stipulating ownership of the patent application rights and patent rights, the contract will prevail.

Patent infringement occurs when aspects of a product or a process fall within the scope of the protected claims of a patented product or process, or when a design of a product is identical or similar to a patented design of an identical or similar product. The statute of limitation to file an infringement action is three years from the date the plaintiff becomes aware of or should have become aware of alleged infringing activity. Infringement disputes may be brought either through the People's Courts or through local patent offices at the municipal level. The two avenues provide different remedies to a patentee. Administrative decisions issued by the local patent office in a patent infringement dispute may, however, be appealed to the People's Courts. In a civil lawsuit of patent infringement, as an interim measure, a patent owner may request the Court to issue orders for preservation of property and / or evidence and preliminary injunction. Security may be required with the application.

The Patent Law stipulates that compensation for patent infringement should be calculated by reference to the loss suffered by the patent owner or the gain reaped by the infringer as a result of the infringement. If the patent owner's loss and the infringer's gain are both difficult to calculate, the reasonable patent license fee may be considered as a reference. The Patent Law additionally provides that the patent owner is entitled to claim back reasonable expenditures incurred as a result of any actions taken to stop infringement. It also raises the maximum amount of statutory damages the court can award in situations where the license fee is difficult to determine from RMB10,000 to RMB1,000,000. In the fourth amendment draft, the legislation proposes to increase the statutory damages to RMB100,000 to RMB5,000,000 and introduce punitive damage of 1-5 times of calculated damages for wilful infringement. Furthermore, an SPC judicial interpretation introduces a pro-patentee damage calculation and a mechanism to shift the burden of proof on damages. If a plaintiff has provided *prima facie* evidence on damages, but account books and materials are in possession or control of the infringer, the court may then order the infringer to submit such account books and materials. If the infringer refuses, then the court may determine the amount in accordance with the plaintiff's claim.

The Patent Law permits two categories of acts, which previously would have been regarded as patent infringement. Parallel importing has essentially been legalized. A new "Bolar Exemption", which allows the manufacture, use and import of patented pharmaceutical products or medical devices to obtain a regulatory approval, has also been introduced.

In addition, the Patent Law sets out compulsory licensing, mainly to codify existing regulations and ensure compliance with China's obligations under the TRIPS Agreement. On March 15, 2012, CNIPA issued the revised Measures for Compulsory Licensing of Patent Implementation (the "Measures"), which entered into effect on May 1, 2012. The Measures incorporate relevant provisions from the Patent Law and set out the procedural requirements for compulsory license applications. Overall, these Measures formalize the procedures for the application and issuance of compulsory licenses, including for the purpose of dealing with public health crises, and arguably provide patentees with greater legal certainty. Various forms of compulsory licenses may be applied for in different cases, such as non-exploitation of a patent or national emergency, but all are subject to payment of license fees to the patentee as mutually agreed by the parties or as stipulated by CNIPA.

The above mentioned changes reflect China's continued efforts to improve its patent law system, motivate and protect innovation in industries, and strongly enhance the national economy and competitiveness in the global market.

10.2 Trademarks

The Trademark Law of the People's Republic of China (the "Trademark Law") was amended for the fourth time with effect on November 1, 2019.

With effect on April 1, 2019, the original Trademark Office and the Trademark Review and Adjudication Board ("TRAB") under the original SAIC were officially integrated into the National Intellectual Property Administration, PRC ("NIPA"). NIPA has taken over the function of the now-defunct TRAB.⁸

The Trademark Law imposes a strict first-to-file rule for obtaining trademark rights, whereby the first party to file for registration of a mark pre-empts later applicants. Prior use of an unregistered mark is generally irrelevant for trademark registration purposes, unless the prior mark in question is a well-known mark, or the later filing is a bad-faith pre-emption of the prior mark that has achieved a certain degree of fame through use.

An application for trademark registration must be filed with the Trademark Office of the NIPA ("Trademark Office"). The Trademark Office is required to complete preliminary examination of an application within a timeframe of nine months from the filing date. After a trademark application has been granted preliminary approval by the Trademark Office, it will be published in the Trademark Gazette. If no opposition is filed within the statutory three-month opposition period, the Trademark Office will publish an announcement in the Trademark Gazette and issue a registration certificate.

The Trademark Law provides that any "visually or acoustically perceptible" sign capable of distinguishing the goods of one natural person, legal person or other organization from those of another may qualify for registration as a trademark. The sign may take the form of words, figures, letters, numbers, three-dimensional signs, color combinations, sounds, or a combination of any of these elements. However, single-color marks, smell and taste marks are still not available for registration. Collective marks and certification marks may be registered as trademarks in China. Geographical indications may be registered as collective or certification marks.

The Trademark Law permits multi-class trademark applications. Applicants are generally required to follow standard specifications of goods and services when filing their trademark applications, and the Trademark Office will issue amendment notices if changes to non-standard specifications are necessary.

The Trademark Law strengthens the regulation of bad-faith applications for trademark registrations. Article 4 provides that a bad-faith application for trademark registration without intention of use shall be rejected by the Trademark Office. Bad faith application without intention of use is one of the absolute grounds for filing oppositions or invalidations against applied-for or registered marks. In addition, for the first time the Trademark Law introduces administrative penalties against bad-faith applications for trademark registrations.

Under the Trademark Law, oppositions based on absolute grounds may be filed by anyone, but oppositions based on relative grounds (i.e., conflicts with prior trademarks or other rights) may only be filed by a prior rights holder or a "materially-interested party". If the Trademark Office rejects an opposition, the opposed mark will proceed straight to registration. If dissatisfied, the opposing party has no opportunity to appeal the Trademark Office's decision but will instead have to apply to the NIPA to invalidate the disputed trademark. Alternatively, a party interested in removing a mark may consider filing a cancellation action against that mark based on three years of non-use, if applicable.

⁸ <http://www.sipo.gov.cn/zfqg/1135993.htm>

A trademark registration is valid for 10 years from the final date of approval (i.e., upon expiration of the three-month opposition period or, for international trademark registrations extended to China under the Madrid Agreement or the Madrid Protocol, the date of filing), with further 10-year renewal terms available. Renewal applications can be filed with the Trademark Office during the last 12 months of the current term or, subject to payment of an additional fee, within six months after expiration of the term.

Trademark owners pursuing oppositions and cancellations may seek formal recognition of their marks as “well-known” (*chi ming* in Chinese), thereby aiding attempts to block others from registering similar marks covering technically dissimilar goods or services. Determinations on well-known status are made on a case-by-case basis. An interpretation issued by the SPC allows courts to formally recognize the well-known status of a mark during a civil dispute.

Where a PRC-registered trademark is assigned, the assignor and assignee must execute an application, which must be filed for approval with the Trademark Office. Upon approval, the assignment will be gazetted. Legal title to the trademark is not deemed to pass from the assignor to the assignee until the assignment has been approved by the Trademark Office.

A trademark registrant may, by concluding a trademark license contract, authorize others to use a PRC-registered trademark. The Trademark Law does not require submission of a copy of the trademark license contract for recording purpose. However, a trademark license that has not been recorded may not be used against a bona fide third party.

The Trademark Law provides a list of acts of registered trademark infringement. Also, it stipulates the fair use defense. This includes an exception for the legitimate use of generic and directly descriptive wordings. More importantly, the Trademark Law provides a prior use exception. Although not stipulated, prior use generally needs to have occurred in China for the exception to apply.

Interim measures are available in trademark infringement cases brought before civil courts, including the issuance of injunctions, preservation of evidence and assets by judicial authorities. The statutory damages of up to RMB5,000,000 can be applied, in cases where the plaintiff’s losses, the defendant’s profits, or trademark royalties cannot be easily proved. The Trademark Law also provides punitive damages (up to five times of the amount of damages) in cases involving bad-faith infringement of a trademark. Further, civil courts can compensate trademark owners for enforcement-related expenses, including legal and investigation costs (although such awards are normally modest).

An alleged infringer can raise the non-use defense against damages sought by a right owner in a trademark infringement case. If the right owner cannot provide evidence to prove the use of its registered mark(s) in the past three years or any other damages arising from the infringing acts, the alleged infringer will not be liable for monetary damages.

Administrative enforcement authorities, known as Administration for Market Regulation (“AMRs”), and civil courts are authorized to confiscate and destroy infringing products, trademark representations, and the equipment and materials predominantly used to manufacture them. AMRs are entitled to impose fines. If there is no illegal turnover or the illegal turnover is less than RMB50,000, AMRs can impose a fine of up to RMB250,000. Where the illegal turnover is over RMB50,000, AMRs can impose a fine of up to five times the illegal turnover. The Trademark Law also provides for heavier penalties in cases involving repeat offenders or other serious circumstances.

There may be criminal liability if the value of the counterfeited goods exceeds certain thresholds. Currently, the matter will be regarded as serious and criminal liability could attach where the illegal proceeds generated exceed RMB50,000.

The 11th edition, Version 2020 of the Nice Classification, entered into force on January 1, 2020⁹. The Trademark Office has made corresponding changes to the Classification Index of Similar Goods and Services, which took effect on January 1, 2020¹⁰. In general, the Trademark Office adheres quite strictly to the Classification Index and applications to register trademarks in China should be for “standard” items as the Trademark Office may issue amendment notices for applicants to fix “non-standard” items. Since July 13, 2016, the Trademark Office has been publishing the names of “acceptable” goods and services from time to time. The “acceptable” items are supplemental to the Classification Index and are also allowed to be designated for trademark applications.

10.3 Copyright

The Copyright Law of the People’s Republic of China (the “Copyright Law”) was amended with effect from October 27, 2001, and its Implementing Regulations (the “Implementing Regulations”) were amended with effect from September 15, 2002. The Copyright Law was again amended in 2010 with effect from April 1, 2010 (the “2010 Amendment”) and the Implementing Regulations were revised with effect from March 1, 2013. The 2010 Amendment was in response to a 2009 WTO dispute, and attempts to confirm that “illegal” works can obtain copyright protection. In recent years, the PRC National Copyright Administration (“NCA”) and the State Council have been working on draft amendments to revise the Copyright Law. Between 2012 and 2014, the proposed draft amendments have gone through four rounds of public consultation. The latest draft amendments were discussed and passed by the PRC Ministry of Justice in November 2018. In May 2019, the revision of the Copyright Law was listed in *the Legislation Plan of the State Council* in 2019. Hopefully, the draft amendments will be submitted to the Standing Committee of the National People’s Congress for approval in 2020.

The current Copyright Law introduces protection for (1) written works, (2) oral works, (3) musical, dramatic, Chinese folk art, choreographic and acrobatic works, (4) works of fine art and architectural works, (5) photographic works, (6) cinematographic works, (7) graphic works, (8) model works, and (9) computer software. The Copyright Law does not protect databases, i.e., collections of original information that do not qualify for copyright protection. However, if the means of compilation satisfies the requirement of originality, then such compilation can be protected.

The Implementing Regulations provide protection for performances and sound recordings produced or distributed by foreigners and stateless persons, provided that (1) the performances or sound recordings are performed or created in China, or (2) the foreign country where the foreigner performed or created the performances or sound recordings has signed treaties with China. Likewise, protection is explicitly recognized for rights in radio and television programs broadcasted by foreign radio and television stations, provided the country where the radio / television station is located has signed treaties with China.

In compliance with Article 3 of the Berne Convention, the Implementing Regulations clarify that works created by foreigners or stateless persons that are published in China within 30 days after first publication outside China will be deemed to have been simultaneously published in China.

Under the Copyright Law, an author’s moral rights of attribution, revision and integrity are perpetual. A citizen’s right of publication and the various economic rights are protected for the duration of the life of the author plus 50 years. For works of a legal person or other organization, or works for hire vested in a legal person or other organization, as well as for photographic works and cinematographic works, the right of

⁹ <https://www.wipo.int/classifications/nice/en/>

¹⁰ http://sbi.cnipa.gov.cn/tzqg/201912/t20191231_310085.html

publication and other economic rights are protected for a period of 50 years from the date of first publication.

Registration is not a precondition to copyright enforcement but can provide prima facie evidence of ownership in enforcement actions.

The Implementing Regulations require exclusive license agreements to be in writing, and also provide for the voluntary recordal of licenses and assignments. Both full and partial assignment of economic rights in copyrighted subject matter is permissible.

The Copyright Law and relevant judicial interpretations introduce provisions on the enforcement of copyright through civil and administrative measures. Preliminary injunctions may now be sought against copyright infringers, but this is rare in practice. In cases where the plaintiff's damages or the infringer's profits cannot be determined, statutory damages of up to RMB500,000 may be awarded. In the latest draft amendments to the Copyright Law, this ceiling has been raised to RMB1,000,000.

The NCA and local copyright bureaus, the primary government bodies designated to handle administrative enforcement against infringers, are authorized to exercise a wide range of powers. These include the power to issue administrative injunctions, confiscate the illegal income of infringers, confiscate and destroy infringing copies, impose fines, and confiscate materials, tools and facilities primarily used for the production of infringing copies. The 2013 amendment to the Implementing Regulations empowers the local enforcement authorities to fine infringers up to five times the revenue generated from the illegal transactions, or up to RMB250,000 in cases where the revenue cannot be calculated. However, in practice, the copyright bureaus' enforcement capability is poor, as they do not have sufficient resources. In several provinces such as Guangdong and Zhejiang, a local administrative body called the Bureau of Culture, Radio, Television, News and Publication has been established to handle administrative enforcement for copyright, and appears to have greater resources for anti-piracy actions.

The Criminal Code sets out the criminal penalties for copyright infringement. For individuals and sole proprietors engaged in the illegal reproduction or distribution of copyrighted works, crimes may be deemed to have been committed when the illegal proceeds generated exceed RMB50,000, the illegal profits generated exceed RMB30,000, or the unauthorized units reproduced exceed 500 units. For enterprise offenders, the thresholds are three times the above amounts.

10.4 Internet

Article 10(12) of the Copyright Law provides a "right of communication through information networks" for copyright holders. The Measures for the Administrative Protection of Internet Copyright (the "Internet Copyright Measures"), which came into effect on May 30, 2005, facilitate more efficient administrative enforcement against copyright infringement on the Internet by imposing administrative liability on Internet service providers ("ISPs") and by providing for administrative penalties. Under the Internet Copyright Measures, upon receipt of a notice from a copyright owner of alleged infringement, the ISP is required to remove the offending content from its service and retain records of the provided information. The content provider of the alleged infringement can provide a counter-notice to the ISP with proof of its rights. The ISP could restore the removed content. Similar take-down provisions are found in the Regulations for the Protection of Right of Communication through Information Networks ("RPRCIN"), which entered into force on July 1, 2006 and was revised on March 1, 2013, and the E-Commerce Law, which entered into force on January 1, 2019. The RPRCIN introduced civil liability for circumventing technical protection measures, as well as ISP liability and safe harbors for third party copyright infringement. According to the newly amended RPRCIN, an infringer may be fined up to five times the revenue generated from the illegal transaction, or up to RMB250,000 in cases where the revenue cannot be determined. E-commerce operators may face civil and

administrative liabilities for failing to take timely action after receiving notice from IP right owners. The SPC also introduced judicial interpretations which explicitly criminalize online infringements, subject to the requirement in the Criminal Code that such infringements be for profit. The civil enforcement against online infringements is governed by a separate judicial interpretation concerning online copyright disputes, the Provisions of the SPC on Several Issues Concerning the Application of Law to Trial of Civil Dispute Cases of Infringement of Information Network Transmission Rights, which was last amended on January 1, 2013.

The China Academy of Telecommunication Research's annual report for Internet copyright protection in 2018 revealed that China copyright enforcement authorities investigated and penalized a total of 544 copyright infringement cases in 2018. Of these 544 cases, 74 cases were transferred to the judiciary for criminal treatment. In total, around 1.85 million infringing links were removed and 1.23 million pieces of pirated products were confiscated¹¹.

10.5 Computer software

Copyright in computer software is governed by general provisions in the Copyright Law and the Regulations for the Protection of Computer Software ("Software Regulations"), issued in 1991, amended in 2001 and more recently on January 30, 2013.

To implement the TRIPS Agreement, the Software Regulations provide for rental rights and the right of communication through information networks for software. Consequently, online distribution of software without authorization (whether for profit or otherwise) is considered a prohibited form of reproduction. Further, the Software Regulations provide explicit protection against activities that attempt to circumvent or sabotage technological measures used by software copyright owners. Likewise, the Software Regulations outlaw the removal or alteration of electronic rights management information incorporated into works to facilitate copyright protection.

In the case of software owned by legal persons and other organizations, the period of protection is 50 years, ending on December 31 of the fiftieth year after the work was published. If the software is not published within 50 years after its creation, no protection is provided.

The Software Regulations permit registration for the purpose of providing prima facie evidence of ownership and validity of software. The Measures for the Registration of Copyright in Computer Software apply to the registration of software copyright, exclusive software copyright license contracts, and assignment contracts.

Under the Software Regulations, administrative and civil liability for infringement by reproducers of software appears to be provided on a strict liability basis, and reproducers will only be able to avoid liability if they can prove they were lawfully authorized. Parties accused of distributing or renting software can be pursued if they are unable to provide evidence that the software is from a lawful source. The Software Regulations impose a significant limitation on the ability of copyright owners to pursue infringing end-users, i.e. parties that use software, but do not copy it in the routine sense. A party that possesses infringing software will not be liable to pay compensation if he or she did not know or did not have any reasonable grounds to know that the software was infringing. However, they may be ordered to immediately stop using such software and destroy infringing copies.

Rights holders can file complaints with either civil courts or administrative enforcement authorities. The Software Regulations also give administrative authorities powers to deal with infringements, including the power to issue injunctions, confiscate illegal income of infringers, confiscate or destroy infringing products,

¹¹ See the news report at <http://www.ncac.gov.cn/chinacopyright/contents/11344/398162.html>, and the full text at <http://www.caict.ac.cn/kxyj/qwfb/ztbq/201904/P020190429564006047715.pdf>.

and impose fines. In serious cases, administrative authorities may also confiscate materials, tools, and facilities primarily used for the production of infringing copies.

The Software Regulations specify a maximum fine of RMB100 for each pirate reproduction. Alternatively, a fine of one to five times of the value of the goods may be imposed in cases involving unauthorized reproduction of all or a portion of the software, as well as unauthorized distribution, rental or transmission via information networks (e.g., the Internet). Furthermore, fines of up to RMB200,000 may be imposed for wilful evasion or destruction of anti-circumvention measures.

The Software Regulations refer to the possibility of obtaining preliminary injunctions in software disputes brought before the Chinese courts. In addition, the Software Regulations explicitly state the possibility of pursuing copyright violations under China's Criminal Code.

10.6 Domain names

China has issued various regulations to regulate the use of domain names. These include the Regulation for the Administration of Internet Domain Names in China (the "Regulation"), which took effect on November 1, 2017, and the Detailed Implementing Rules of the China Internet Network Information Center for the Registration of Domain Names (the "Registration Rules"), effective from 2002. The Registration Rules were amended in 2009, and again in 2012. The current Registration Rules are effective from May 29, 2012.

The Regulation introduced some key changes, including the removal of having a requisite capital for registrar approval and the addition of the requirement of good credit records for the main registered personnel, and capability of identity verification and personal information protection. It also provides rules to ensure authenticity and accuracy of the registration information. In the Draft Regulation circulated in 2016, Article 37 raised some controversy by providing that network access for domain names within China should be provided by domestic domain name registration service agencies. This provision was eventually removed from the Regulation.

The Registration Rules cover applications to register domain names with ".cn" as the top-level domain and Chinese-language domain names administered by the China Internet Network Information Center ("CNNIC"). Any natural person or organization that can independently assume civil liability may apply for domain name registration. Applications should be submitted in writing. The "first-to-file" principle continues to apply, i.e., priority is given to the first applicant who files a valid application. Applications for approval can be made to the domain name registrar for the assignment of domain names.

The Registration Rules have strengthened the privacy of domain name registration information through explicit provisions on the transmission, storage, disposal, and destruction of such information.

Domain name dispute resolution is governed by several measures, which focus on the procedural rules for registration and dispute resolution. These measures apply to disputes that arise due to the registration or use of ".cn" domain names or Chinese-language domain names under the administration of the CNNIC. Such disputes can be accepted and resolved by special dispute resolution bodies recognized by the CNNIC, which include the Domain Name Dispute Settlement Center of the China International Economic and Trade Arbitration Commission ("CIETAC"), the Hong Kong International Arbitration Center ("HKIAC"), and World Intellectual Property Organization ("WIPO"). Any organization or person that believes there is a conflict between a domain name registered by another party, and its lawful rights and interests, may submit a complaint to one of these dispute resolution bodies. If the complaint meets the specified conditions, the domain name holder will be required to participate in the dispute resolution proceedings. The measures are only applicable to disputes relating to domain names that have been registered for less than three years.

Rulings of the dispute resolution bodies, however, are not final. Either party is entitled to commence civil litigation before, during or after such proceedings.

The SPC Explanation issued in October 2002 makes it clear that the following conduct constitutes trademark infringement: registering, as a domain name, words that are identical or similar to the registered trademark of a third party, and using that domain name to carry out e-commerce trade in related products, thereby easily causing confusion among the relevant public.

10.7 Trade secrets

A trade secret is defined in the Law of the PRC Anti-Unfair Competition ("Unfair Competition Law", revised in 2019) as commercial information including but not limited to technical information, business information and other information that is non-public, has commercial value and is the subject of appropriate non-disclosure measures taken by the holder of rights therein. A non-exhaustive list of measures to maintain confidentiality is set forth in the SPC's Interpretation on Some Issues Concerning the Application of Law in the Trial of Civil Cases Involving Unfair Competition, effective from February 1, 2007. Such measures include disclosing secrets on a need-to-know basis only, adopting physical preventive measures such as locking, marking information "confidential", requiring access codes and passwords, and requiring confidentiality agreements.

Trade secrets are protected under the Anti-Unfair Competition Law and Criminal Law. Under the legislation, individuals and entities are prohibited from misappropriating trade secrets by: (i) obtaining trade secrets of the holder of rights therein by theft, bribery, fraud, duress, electronic trespassing or other unfair methods; (ii) disclosing, using or allowing to be used trade secrets of the holder of rights therein, where such trade secrets were obtained by any of the methods set forth in the preceding item; (iii) disclosing, using or allowing to be used trade secrets in one's possession, where such is contrary to one's confidentiality obligation or to the confidentiality requirements of the holder of rights in the trade secrets; or (iv) instigating, enticing or helping others to act contrary to their confidentiality obligations or to the confidentiality requirements of the holder of rights in the trade secrets, so as to obtain, divulge, use or allow to be used trade secrets of the holder of rights therein.

According to the PRC Criminal Law and Interpretation of Some Issues Concerning the Specific Application of Law for Handling Criminal Cases of Infringement upon Intellectual Property Rights jointly issued by the SPC and the Supreme People's Procuratorate in 2004, misappropriation of a trade secret causing loss in excess of RMB500,000 will be regarded as serious and will trigger criminal liabilities with an imprisonment sentence of no more than three years and/or fines, but losses caused in excess of RMB2.5 million are considered exceptionally serious and will trigger criminal liabilities with an imprisonment sentence of three to seven years and fines.

The production of evidence to prove that the asserted information constitutes trade secrets and the defendants have infringed the trade secrets has long been a barrier for trade secret owners to protect and enforce their legitimate rights over trade secrets in China. The 2019 Anti-Unfair Competition Law has relocated the burden of proof to the defendants where the trade secrets owners adduce *prima facie* evidence proving that they had taken non-disclosure measures in respect of the alleged trade secrets and reasonably showing that the trade secret was misappropriated.

China's legal framework for the protection of intellectual property is comprehensive, but the challenge is for China to enforce the legislation effectively and transparently. On November 24, 2019, the General Office of the Communist Party of China and the State Council jointly released the Opinions Concerning Enhancing Intellectual Property Rights Protection ("Opinions"). The Opinions proposed that by 2022, measures would be taken to effectively curtail infringements of intellectual property rights, and significantly change the situation that right holders find it difficult to protect their rights because of difficulty in producing evidence,

prolonged trials, high costs, and low damages. By 2025, the society's satisfaction in intellectual property protection will reach and remain at a high level, the protection capabilities will be greatly advanced, the protection system will be upgraded, the business environment in which knowledge is respected will be optimized, and the role of intellectual property right system in stimulating innovation will be harnessed in a more effective way.

11 Employment Issues

11.1 Employment contracts

Under China's Labor Law and Employment Contract Law, employers, including FIEs, must conclude an individual written contract with each full-time employee.

Employment contracts may be for a fixed or open term (or, more rarely, the term may be determined based on the completion of a project), though in light of potential difficulties that employers may encounter in trying to terminate employees, it is generally advisable for employers to fix the term of an employment contract to keep the term relatively short. However, under the Employment Contract Law (and subject to local interpretations of the law), employers will only be able to sign or renew an employment contract with an employee for two fixed terms after January 1, 2008, before having to sign an open-term contract with that employee. As of the date of publication, with the exception of Shanghai, this requirement under the Employment Contract Law effectively shortens the time for an employee to become entitled to request an open-term contract from 10 years to the expiration of the second fixed term contract (which may take place in as short as two years if both contracts are for a one-year term).

Probationary periods are generally included in the first employment contract signed with an employer. Under the Employment Contract Law, the allowable length of the probationary period depends on the length of the contract term, with a maximum possible period of six months.

Restrictions apply to agency or contingency workers who can be hired only for "temporary" (lasting for no more than six months), "auxiliary" (supporting core business of a company, as determined through the mandatory "employee consultation" procedures), or "substitutable" (where the employee who originally took the position is on leave for a certain period of time for full-time study or leave) positions, and cannot exceed 10% of a company's total workforce.

11.2 Labor unions and collective contracts

There is strong political pressure to establish labor unions in FIEs, although national law assigns the primary responsibility for initiating union establishment with the employees rather than enterprise management. The labor union may be controlled by an enterprise branch of the Communist Party. Other bodies potentially participating in "democratic management" of FIEs are employee representative councils and employee representatives on Supervisory Boards.

Collective contracts may be concluded between an enterprise and its labor union or an elected employee representative. If an enterprise receives a written request for collective bargaining from its labor union or an elected employee representative, enterprise management cannot refuse the request unless it has a justifiable reason for doing so. Collective contracts are binding for all employees of the company. Accordingly, individual employment contracts cannot include standards that are lower than those set forth in the collective contracts. However, it is possible to agree in an individual employment contract on terms that are more favorable to the employee.

There are also special consultation procedures for the adoption of employee handbooks and other company rules and matters that directly affect the immediate interests of the employees.

11.3 Representative offices

Representative offices are a special case. Representative offices are not permitted to directly employ their staff. Instead, representative offices enter into labor service contracts with qualified labor service companies,

pursuant to which Chinese nationals are employed by the labor service companies and are then seconded to work as the staff of the representative offices.

In exchange for providing this employment service, the labor service companies receive a service fee. Depending on the practice of the particular labor service company and the labor service contract agreed to by the relevant representative office, salary and social insurance and housing fund payments in respect of the Chinese staff may be paid to the labor service company, which then distributes payments to the staff and social insurance and housing fund authorities respectively, or salary may be paid by the representative offices directly to the staff (representative offices generally cannot make social insurance and housing fund contributions directly to the relevant authorities, but this may vary by local practice).

While there is no employment contract between representative offices and their Chinese staff, representative offices may enter into agreements with their Chinese staff that supplement the provisions of the relevant labor service contracts. Such supplementary agreements typically cover subjects such as remuneration, duties, certain company policies and confidentiality and non-competition obligations.

Though technically, representative offices are not the employer, labor service companies will generally bring in the representative offices as co-defendants if the employee raises any claims against the labor service company in relation to a dispute with the representative office.

Expatriate (non-Chinese, including Hong Kong, Macau and Taiwan residents) staff of representative offices generally are employed by the foreign parent company pursuant to employment contracts governed by foreign law. Such expatriates should be registered as representatives in accordance with registration formalities prescribed by the Chinese authorities. One representative office is only allowed to have up to four registered representatives.

11.4 Termination and resignation

In China, there is no concept of “at will” employment or simple termination with notice as in some other countries. While employees generally may resign upon 30 days’ prior notice to the employer or three days’ notice during the probationary period, employers in China are permitted to unilaterally terminate employees only in accordance with circumstances stipulated in relevant laws and regulations.

In some permitted circumstances of termination (such as where an employee is incompetent and remains incompetent after training or assignment to another post), 30 days’ prior notice (or pay in lieu) and severance payments are required. The severance payment will generally equal one month’s total wages for each year of service. For any period of service after January 1, 2008, if the employee’s monthly wage exceeds 300% of the average local wage, then his “monthly wage” amount is capped at that ceiling, and the employee would only be entitled to up to 12 months’ wages for severance. The specific statutory calculation methods are subject to local regulations.

There are also grounds for summary dismissal with no severance payable (e.g. serious violation of company rules and regulations).

11.5 Social insurance and housing

Under Chinese law, both Chinese citizens and foreign employees are required to participate in China’s social insurance scheme. In practice, most cities now mandate foreigners working under a work permit in China to participate in the social insurance system, though some cities (e.g., Shanghai) currently have not yet implemented a system to mandate social insurance contributions for foreign employees. Currently Hong Kong, Macau and Taiwan residents (“HMT residents”) working in mainland China are also required to participate in China’s social insurance scheme.

China's social insurance scheme consists of five funds: Old Age Pension Insurance, Basic Medical Insurance, Occupational Injury Insurance, Unemployment Insurance and Maternity Insurance. Employers and employees are required to make contributions to the funds, and in some cases to individual employee government-held accounts, in accordance with rates determined by local authorities. In addition, employers and employees are required to contribute to a Housing Provident Fund for the purpose of buying, building and renovating employee housing. Housing fund contributions are currently not required for expatriates.

11.6 Visas and residence

Under various laws and regulations, all foreigners, except those with permanent resident status in China, may only work in China with prior permission of the relevant authorities. The term "work" in these rules is defined as engaging in behavior of a remunerative nature, and "work in China" means discharging one's employment duties in China pursuant to either (a) an employment contract signed directly with a legal person in China, regardless of the length of employment in China or (b) an employment contract signed with a legal person outside China, the source of employment compensation is located outside China, and the work performed within China territory is for more than 3 months (90 days) in any year. According to a notice regarding the trial procedures for foreigners to enter China and accomplish short-term work assignments, there is a short-term work certificate option that came into effect as from January 2015. Foreigners who will stay in China for not more than 90 days under the following circumstances must go through a certain process to obtain short-term work authorization in China: (i) to carry out assignments regarding technology, scientific research, management, guidance with domestic partners; (ii) to be on trials with domestic sports institutions (including coaches, athletes); (iii) to shoot films (including commercials, documentary); (iv) to perform in fashion shows (including car models, models for print advertisement); (v) to participate in a commercial art performance; and (vi) other circumstances as recognized by human resources and social security departments.

Generally, the immigration and labor registration procedures for a foreigner working in China can be summarized by the following six steps for obtaining the required permits as stated below: (i) medical examination; (ii) Work Permit Notice; (iii) Single Entry "Z" Visa; (iv) Temporary Residence Registration; (v) Work Permit; and (vi) Residence Permit. A Residence Permit functions as a multi-entry Chinese visa, which will enable the foreigner to stay in China for a certain period of time (normally one year) and to exit and re-enter China for international travel within this period.

For foreign representative offices in China who wish to employ a foreigner as a chief representative or ordinary representative, the Work Permit Notice is not required. Instead, the representative office should first register the foreigner with the local SAMR as its chief representative or ordinary representative. Thereafter, the foreigner can go through the above steps (other than step 2) to secure his / her Work and Residence Permits. There is a cap (which is currently four) on the number of representatives that a representative office may register.

Change of status, where the foreigner first arrives on either a business or a tourist visa, and then seeks to obtain a Work Permit directly in China, may be possible in some localities but usually is limited to very exceptional cases.

Different rules and application procedures apply to HMT residents and Chinese nationals with permanent residence abroad. Currently, there is no immigration and labor registration requirement for HMT residents working in China. On the other hand, Chinese nationals with permanent residence abroad may be required in some cities to complete some type of employment registration, though practice varies by locality.

12 Taxation

This section introduces the major taxes applicable to foreign investors doing business in China and outlines recent legislative developments.

12.1 Income taxes

12.1.1 Enterprise income tax

Starting from January 1, 2008, the Enterprise Income Tax Law ("EIT Law") and the Enterprise Income Tax Implementing Rules ("Implementing Rules") provide unified income tax treatment for both domestic enterprises ("DEs") and FIEs with a tax rate of 25%. Pursuant to the EIT Law and the Implementing Rules, a resident enterprise (including an FIE) is subject to tax on its worldwide income. Foreign tax credits are allowed for income taxes paid to other countries by the resident enterprise, limited to the Chinese income tax payable on the same income. Non-resident enterprises and other economic organizations which have establishments in China, or which derive certain income from China, are subject to tax only on their income from China sources. Group consolidation is not allowed in China.

The EIT Law provides tax incentives for both FIEs and DEs that invest in high technology, venture capital, and certain other encouraged industries.

Withholding tax is imposed on dividends, interest, royalties, rental income, gain from the transfer of property and other China-sourced income, which is derived either:

- by a non-resident enterprise without an establishment in China; or
- by a non-resident enterprise with an establishment in China, when the income is not effectively connected with that establishment.

The statutory withholding tax rate on all forms of passive income paid to non-resident enterprises is 20% but the Implementing Rules reduce the rate to 10%. The statutory withholding tax rate is also subject to reduction by a tax treaty when applicable. The vast majority of China's tax treaties provide a 5% reduced withholding tax rate on dividends distributed to qualified shareholders that hold at least 25% of equity interest of PRC enterprises and capital gains tax exemption on sale of less than 25% of equity interest of PRC enterprises the property of which does not consist, directly or indirectly, mainly of immovable property situated in China.

12.1.2 Individual income tax

In accordance with the Individual Income Tax ("IIT") Law, IIT is imposed on all individuals, including both Chinese and foreign nationals, residing in or deriving income from China. Chinese residents (which may include both Chinese and foreign nationals) are generally subject to tax on their worldwide income while non-residents are taxed on their China-sourced income only. Chinese residents are individuals domiciled in China or have stayed in China for 183 days in a calendar year. The implementing regulations of the IIT Law further provide that a non-domiciliary tax resident is exempt from tax on income that is both foreign-sourced and foreign-paid, if the non-domiciliary (i) is absent from China for more than 30 days in a single trip in a tax year within any consecutive six-year period (starting from 2019), or (ii) stays in China for less than 183 days in a tax year within any consecutive six-year period.

IIT is imposed on income from wages and salaries, labor remuneration, author's remuneration and royalties (collectively "comprehensive income") at progressive rates from 3% to 45%; on capital gains at a flat 20%

rate; and on interest, dividends and royalties at a flat 20% rate. Resident taxpayers are obligated to conduct annual filing on their comprehensive income, unless otherwise exempted under the applicable rules.

12.2 Turnover taxes

12.2.1 Value-added tax

The sale of goods, repair and replacement services and the provision of labor services in relation to the processing of goods within China are subject to value-added tax ("VAT"). VAT is also levied on the import of goods into China unless the imports are specifically exempted under special rules. Provision of other services and transfer of immovable or intangible properties within China used to be subject to business tax, but are now brought within the scope of VAT under the VAT pilot program. According to Cai Shui [2016] No. 36, the phrase "provision of services within the territory of China" is interpreted to mean that either the service provider or the service recipient is located in China, but should exclude services provided by a foreign individual or unit to a Chinese individual or unit if such services take place completely outside of China.

The standard VAT rates for general VAT taxpayers are 13% for the sale or importation of goods, 9% for the transfer of immovable properties and land use rights, 6% for the transfer of intangibles other than land use rights, and 13%, 9% or 6% for the provision of services, depending on the nature of services. General VAT taxpayers may utilize input VAT credits, including the VAT paid for the purchase of fixed assets, to offset against output VAT. Since April 1, 2019, China has allowed qualified companies to obtain refund for part of their excess accumulated input VAT amount, compared to their accumulated input VAT credit at the end of March 2019. The standard VAT rate for small-scale VAT taxpayers is 3%, with an exception that small-scale VAT taxpayers will be taxed at 5% on revenues from the leasing or sale of immovable property. No input credits are available to small-scale VAT taxpayers. In general, exports are exempted from VAT, and the related input VAT may be wholly or partially refunded. The non-refundable portion is absorbed as a cost of export.

12.2.2 Stamp duty

Stamp duty is levied on the execution or receipt in China of certain documents, including contracts for the sale of goods, the undertaking of processing work, the contracting of construction and engineering projects, leases, loans, and agency and other non-trade contracts. Stamp duty is also levied on documentation effecting the transfer of property / shares, on business account books and on certificates evidencing rights and licenses. The rates of stamp duty vary. For the transfer of shares in a Chinese enterprise, the applicable stamp duty rate is 0.05% of the contract value for each party.

12.2.3 Consumption tax

Consumption tax is levied on the importation, production and processing of 14 categories of consumable goods, including tobacco; liquor and alcohol; luxury cosmetics; expensive ornaments, pearls, jewels and jade; firecrackers and fireworks; oil products; motor vehicle tyres; motor cycles; motor cars; golf balls and golf equipment; luxury watches; yachts; disposable wooden chopsticks; and solid wood flooring.

12.3 Other taxes

Customs duties are imposed on exports and imports of goods. Most export items are duty free, and the duty to be paid on exports that are not exempt is based on the FOB value. Imports are generally assessed on their CIF (cost, insurance and freight) value, with all included charges verified by the customs administration. When applicable, the rate of duty ranges from 0% to 270%, depending on the nature and the country of origin of the goods concerned. Customs duties paid are deductible expenses for enterprise income tax purposes.

Land appreciation tax ("LAT") is levied on gains realized from real property transactions at progressive rates from 30% to 60%, based on the land value appreciation amount, which is the excess of the consideration received from the transfer or disposition of real property over the total deductible amount.

Deed tax is levied on the purchase or sale, gift or exchange of ownership of real property. The transferee / assignee is the taxpayer. Generally, the rates range from 3% to 5%.

Other taxes include real estate taxes, vehicle and vessel taxes and resource tax.

12.4 Transfer pricing rules

The EIT Law includes rules on transfer pricing. Over recent years, the transfer pricing regulations and practice have experienced very fast and significant evolution in China, which is the combined effect of a very dynamic international transfer pricing environment and the fast China domestic transfer pricing climate change. In response to the Base Erosion and Profit Shifting (BEPS) actions, over the 2016 and 2017 period China issued a series of new transfer pricing regulations that cover different transfer pricing practicing areas including compliance, adjustment, and dispute resolution. The current BEPS 2.0 and digital taxation are bringing new challenges to the existing transfer pricing framework worldwide, and also very likely going to affect the transfer pricing practice in China in the coming years.

12.5 Tax treaties

China has signed bilateral tax treaties with approximately 110 jurisdictions. The treaties are primarily to avoid double taxation and to prevent tax evasion. The tax treaties generally follow the model treaty of the Organisation for Economic Co-operation and Development ("OECD") and the model United Nations treaty.

13 Dispute Resolution

Along with rapid economic growth, the number of commercial disputes submitted to litigation or arbitration in China has increased in recent years. Because sales contracts are the most common form of transaction in China, the number of disputes related to sales contracts is very considerable. Most of them relate to payment for goods or quality of goods, which makes arbitration a very important mode of dispute resolution in China. In addition, as a result of the demands of China's own technological progress, disputes over intellectual property (including technology transfer, patent, trademark, copyright, IT and software), especially disputes over foreign intellectual property, have increased rapidly. This has been a prominent feature of disputes in China for a long time, and will continue for a long time in the future. The occurrence of disputes over joint ventures, investments and M&A transactions is also on the rise in recent years. Disputes in the areas of construction, loans, freight, shipping and warehousing, financial derivatives, funding, financing, insurance, are also escalating.

Meanwhile, the issues faced by disputing parties have become more complex. China's courts at all levels, including the SPC, are also exploring new ways to resolve disputes. For example, as investment products and structures become more innovative and complicated, issues arising can now include matters such as satisfaction of conditions precedent, valuation adjustment mechanisms, variable interest entities and dividend pay-outs, to name a few.

13.1 Common methods of dispute resolution

The most common forms of dispute resolution in China include litigation, arbitration, and several other alternative dispute resolution ("ADR") methods such as negotiation or mediation and conciliation. Similar to other regimes, ADR methods are less adversarial and more informal than litigation. As dispute resolution develops, there also exist combinations of these methods. Some dispute resolution clauses provide that any dispute shall first be discussed among the parties, then submitted to a mediation center and finally submitted to litigation (or arbitration). Even after the litigation or arbitration is initiated, negotiation or mediation during the litigation or arbitration proceeding is also quite common in China.

Arbitration and litigation each have their own advantages and disadvantages. The choice of method depends on a variety of factors including the needs of the parties. For example, for international transactions involving a Chinese party, arbitration is generally recommended due to the ease of enforcement of awards internationally, and the flexibility allowed to the parties to choose the place of arbitration and the procedures for the arbitration. Each method is discussed below.

13.1.1 Litigation

China's legal system is based on the civil law system. In principle, China's civil litigation system of commercial disputes adopts the system of "four levels with two instances of litigation to get the final adjudication". The "four levels" refers to the four levels of Chinese courts, which from highest to lowest are: the SPC, provincial level Higher People's Courts, intermediate level courts and the basic-level courts. The concept of "dispatched court" may appear in specific cases, but it is not an independent level of court, but the dispatched office of a court.

The so called "two instances of litigation to get the final adjudication" refers to the rule that a final judgement for a case should be issued at most after getting heard and adjudicated by two levels of courts (i.e. after the trial and one appeal, the judgment should be final). There are a series of detailed procedural rules for determining which local court (geographical jurisdiction) and which level of court (hierarchical jurisdiction) should hear a case.

With respect to geographical jurisdiction, the basic principle is that the court where a defendant is domiciled should have jurisdiction. But, the rules allow the parties to agree to the jurisdiction of a court in a location where there are factors connected to the dispute, such as the place where the plaintiff is domiciled or the place where the subject matter of the dispute is located.

Hierarchical jurisdiction is mainly determined by the monetary amount of the claim, but may also consider other factors. A higher level court is the second instance court, i.e. the appellate court above its lower level court. After the judgment of the court of first instance is made, any party who refuses to accept the judgement can appeal to the higher level court. If there is no appeal from the parties after the first trial judgment is made, that judgment will take effect after expiration of the statutory period to file appeal; if there is an appeal filed by either party, the appellate judgment will take effect right after it is made.

The court system and trial mechanism described above have been in place for many years. In recent years, China's court and trial system have undergone a series of substantial changes, especially in the trial of intellectual property cases.

First of all, China's SPC only had one location in Beijing. From January 2015 to November 2016, the SPC established six circuit courts in Shenzhen, Shenyang, Nanjing, Zhengzhou, Chongqing and Xi'an respectively. The jurisdiction of the SPC was divided into seven districts. The authority of the circuit courts and the SPC are equivalent, and each is responsible for hearing cases in their respective jurisdictions.

Secondly, on June 29, 2018, the SPC established the first and second China International Commercial Court (CICC) of the SPC in Shenzhen and Xi'an respectively. It has jurisdiction over commercial disputes of more than RMB300 million, where there are foreign factors (excluding trade or investment disputes between countries or investment disputes between the host country and investors). The parties may agree that the trial be conducted by the CICC. The CICC adopts the first instance as the final instance. This means that the parties can, by agreement, place the dispute before the SPC (i.e. CICC).

Another institutional innovation of the CICC of the SPC is the establishment of a one-stop dispute resolution mechanism of litigation, arbitration and mediation. The parties may first choose the expert committee or one of the two legal mediation institutions to preside over the mediation in the CICC. If the mediation fails, the dispute will be directly settled by the CICC through litigation. If the mediation succeeds but the parties refuse to implement the decision, the mediation decision will be directly executed by the CICC.

A third change in China's court system and trial system in recent years is the establishment of intellectual property courts and tribunals. Since the end of 2014, China has established three intermediate level, specialized IP courts in Beijing, Shanghai and Guangzhou respectively, which have centralized jurisdiction over around seven types of intellectual property cases in Beijing, Shanghai and Guangdong Province, including patents, new varieties of plants, layout design of integrated circuits, technical secrets, computer software, antitrust, and recognition of well-known trademarks.

Since 2017, China has established internal, specialized intellectual property tribunals within some intermediate courts to centrally manage the above-mentioned intellectual property cases in the corresponding provincial or municipal regions. As of September 2019, 21 intellectual property tribunals have been set up. Consequently, in principle, all intellectual property cases in the relevant regions will be tried by the intellectual property courts or tribunals in the first instance.

In addition, on January 1, 2019, the SPC established its own internal intellectual property tribunal. After January 2019, the above local intermediate level intellectual property courts or local intellectual property tribunals will make the first trial decision, and the intellectual property tribunal of the SPC will conduct the second trial.

The above changes mean that the first instance of the above-mentioned types of intellectual property cases, regardless of the amount of the subject matter, will be tried by an intermediate court, and the second instance will be tried by the SPC directly, thereby bypassing the hierarchical jurisdiction of the provincial level courts. This has improved the level and professionalism of intellectual property case adjudications. In addition, the elevation of second instance cases to the SPC avoids local protectionism issues and will result in greater consistency and predictability of intellectual property case outcomes.

Fourth, in addition to the intellectual property courts and tribunals, China has set up a series of other professional courts in recent years, including specialized Financial Litigation Courts (Shanghai Financial Court was established in April 2018) and specialized financial litigation tribunals within some courts (such as Shenzhen, Nanchang, Guiyang, etc.), which specialize in hearing financial civil and commercial cases (such as securities, trust, insurance, bank finance, etc.) within their jurisdictions. China also established several Free Trade Zone Courts and free trade zone tribunals. Currently there are two Free Trade Zone Courts and 10 free trade zone tribunals, which specialize in hearing cases related to the free trade zone. In addition, several Internet Courts have also been set up: there are three Internet Courts in Hangzhou, Beijing and Guangzhou, which adjudicate cases related to the Internet, especially Internet infringement and e-commerce related disputes.

Chinese is the official language of civil proceedings. All foreign language documents to be submitted to the courts must be translated into Chinese. Parties submitting these documents are responsible for their translation and cost. Documents formed outside China should be notarized and legalized before they can be accepted as evidence by Chinese courts.

In a lawsuit, the parties may entrust up to two agents to represent them in the lawsuit. In arbitration proceedings, there is usually no limit to the number of agents.

Litigation cases are usually heard by a collegial panel composed of three judges, one of whom is the "presiding judge in charge of the case" and is responsible for the specific trial affairs of the case. The results of the case are discussed by the collegial panel, but the discussion opinions are not reflected in the judgment. For a relatively simple case, the court can apply a "simplified procedure", with a single judge presiding.

Unlike certain common law jurisdictions, there is no discovery process in China. A party does not need to submit evidence against its own interests, because a party has no legal obligation to disclose all documents it possesses. This makes evidence investigation and discovery difficult. The Civil Procedure Law of China provides for an evidence exchange system under which the parties exchange the evidence submitted to court before a formal court hearing is held, but this is not equivalent to the system of discovery in common law countries. There are also provisions for obtaining evidence from third parties.

In order to prevent the deterioration of the debtor's property or the debtor's transfer of assets by other means in the process of litigation, which could result in the inability to obtain compensation from the debtor if a winning judgment is obtained, a party can apply to the court for property preservation before or after the litigation, but the courts rarely implement property preservation before the litigation. Common ways of property preservation include freezing the debtor's bank account or sealing up real estate, equity or other property held by the debtor. The court may require the party applying for preservation to provide security. The party against whom the preservation order is issued may also terminate the preservation measures by providing counter security.

When China's civil procedure law was revised in 2012, the provision of "behaviour preservation" was added, which is very similar to a "temporary injunction" in common law countries, that is, the parties can apply to the court to decide that the defendant should engage in certain behaviours or not engage in certain behaviours immediately before or after the litigation. This measure is of great significance to intellectual

property cases, especially trade secret cases. For example, the court can require the defendant to stop disclosing and using the plaintiff's trade secret immediately, so as to avoid continuous infringement in the course of litigation. However, the review of such requests by Chinese courts is very strict, and it can be difficult in practice for a party to obtain such injunctive relief.

Litigants must pay various fees. The most important of these is the case acceptance fee (i.e. litigation fee), which is levied on a sliding scale based on the value of the claim (the aggregate amount of damages sought by the plaintiff). The general rule on costs is that the plaintiff will pay the litigation fee in advance, and the court will determine which party must eventually bear it. Normally, the losing party will bear the case acceptance fee. If both parties are held liable, the litigation fee may be shared, normally in proportion to their respective share of the final monetary judgment.

Additional costs usually include the appraisal fee paid to the appraisal institution, notarization fees and lawyer fees incurred for investigation and evidence collection. The judicial appraisal fee is usually paid in advance by the party applying for appraisal (that is, the party bearing the burden of proof), and the court will determine which party will ultimately bear the fee. Currently, courts tend not to support plaintiff's requests for defendants to bear notarization and lawyer fees, but this may gradually change in future judicial practice.

In principle, the hearing is open to the public except for cases related to state secrets and privacy (required to be in private session) or commercial secrets and divorce cases (to be in private session upon application by parties). But regardless if the court hearing session was held in private or not, all judgments of all cases shall be publicly announced.

In recent years, the courts have endeavoured to improve the transparency of civil proceedings. The SPC has already demanded all effective judgments of judicial courts be disclosed through internet websites, and has established three online internet website platforms called "China Judicial Document Network", "China Judicial Process Information Network" and "China Court Hearing Public Access Network". In 2016, the SPC further required disclosure of other types of litigation documents besides judgments, for example Orders to Pay and Lawsuit Dismissal Notices.

An increasing number of local courts have also set up their own online litigation service website platforms allowing the general public to search the status of cases handled by the courts. The SPC also maintains a "Network of Enforcement Information of China" to facilitate public searches for individuals and entities subject to enforcement actions and tracking the status of these actions.

In a domestic case without any foreign factors, Chinese law has fixed a term within which the courts must conclude a case. The first instance proceeding of a general case should be completed within six months. The head of the court can approve one extension of six months, while further extensions must be approved by the higher court. The appeal proceeding should be completed within three months. The head of the appellate court can only approve extensions in special cases. However, these time limits do not apply to foreign related cases. The Civil Procedural Law does not impose a requirement for courts to finish foreign related cases within a certain period of time. It is quite common that the courts may take one to three years to conclude a foreign related case.

Other than a trial case directly adjudicated by the SPC, judgments made by all first instance courts are appealable. Judgments made by both the appellate or first instance courts without any party's appeal within the prescribed period are final. The appeal mechanism gives the parties a chance to rectify any errors made by the first instance court, including errors in fact findings and those in applications of law.

In case of any errors in the final judgment or material injustice in the proceeding, the parties can apply to the higher level court for a rehearing of the case. In addition, the court issuing the final judgment or the higher

level court can also initiate the rehearing process by itself or upon the request of the people's procuratorate. To be clear, a retrial should not be treated as a "third instance" of a lawsuit, rather, it is a "judicial review proceeding" in respect of the existing effective and final judgment. The court has no statutory duty to accept a party's petition for retrial. After a preliminary review of the petition, the court may decide to dismiss this petition.

13.1.2 Arbitration

In China, arbitration is a popular alternative to litigation. The arbitration must be based on the agreement of both parties.

China has a well-established structure for resolution of disputes by arbitration. In recent years, China has continuously stressed the role of arbitration in dispute resolution, reduced the judicial review of arbitral awards, and strengthened the effectiveness of arbitration agreements. Once the parties choose arbitration, the court's jurisdiction over the case will be excluded. However, disputes over marriage, adoption, guardianship, support and inheritance cannot be arbitrated. Administrative disputes that should be handled by administrative organs according to law are also outside the scope of arbitration.

China's arbitration law only recognizes institutional arbitration, which is conducted by approved local arbitration committees. It is worth noting that China does not recognize interim arbitration, but the parties can still apply for recognition and enforcement in China of an interim arbitration award obtained in a country where the parties recognize the interim arbitration.

There are about 250 arbitration institutions in China, among which the most advanced and high-level ones are the China International Economic and Trade Arbitration Commission, Beijing Arbitration Commission (Beijing International Arbitration Center), Shanghai International Economic and Trade Arbitration Commission (Shanghai International Arbitration Center), Shenzhen Court of International Arbitration (Shenzhen Arbitration Commission) and China Maritime Arbitration Commission. They are the main ones dealing with foreign economic and trade disputes and commercial disputes in China.

The parties can choose the place of arbitration, arbitration rules, arbitration language, and their own arbitrators. Parties can appoint one or three arbitrators. This allows parties the opportunity to select professional arbitrators who can also be industry experts.

In an arbitration proceeding conducted in Chinese, the parties may not have to translate the English documents into Chinese as long as the arbitrators can read English. In addition, for documents created outside China, China's arbitration law does not provide specific rules for acceptance, and there are few direct provisions in major arbitration institutions. Generally, the arbitral tribunal has much discretion to accept evidence without notarization and legalization.

The arbitration process is usually held in private. The arbitral award is also not subject to public disclosure. This avoids any possible adverse influence from the media. Parties can also be assured that their business relationship and details of the dispute will not be disclosed in an open court hearing.

Unlike litigation, the award is final and binding on the parties once it is rendered by the tribunal. The award cannot be appealed to the courts or any higher review process. If one party refuses to perform the award, the opposing party can petition the court to enforce the award.

A party that disagrees with the arbitral decision has two measures to challenge the effective arbitral award: either apply to the intermediate level judicial court where the arbitration institution is located to revoke the award within six months after getting the award decision; or the party can petition the enforcement action court not to enforce the award during the compulsory enforcement proceeding initiated by the opposing

party. The award can only be set aside or refused to be enforced in limited circumstances where: (i) the parties did not include an arbitration clause in their contract or conclude a written agreement; (ii) the matters decided in the award exceeded the scope of the agreement or arbitration institution; (iii) the arbitration tribunal or procedure did not conform to the applicable rules; (iv) the evidence on which the award is based is forged; (v) the other party conceals the evidence enough to affect the award; or (vi) the arbitrators ask for bribes, take bribes, engage in malpractice for personal gain and bend the law in the arbitration of the case.

The parties must provide evidence to prove the existence of such circumstances. If the court finds that there are indeed any of the above six circumstances affecting the arbitral award, the arbitral award will be revoked or not enforced. In addition to the above situations, if the court finds that the ruling is against the public interest, it will also rule to cancel it. But this rarely happens.

The court may intervene as necessary to preserve evidence for the purpose of the proceedings, or to maintain the status quo of the parties, or to prevent the other party from removing assets from the jurisdiction which may be used for later enforcement.

13.1.3 Alternative Dispute Resolution

In China, mediation is quite common in both civil and arbitration proceedings. In civil proceedings, the court can conduct mediation if the parties agree. According to China's Civil Procedure Law, trying to mediate is a legal and necessary procedure, but whether to do it depends on the will of the parties. If the parties reach agreement during the mediation, the court will issue an official mediation paper according to the parties' settlement agreement, which can be enforced in the same way as a judgment, and the parties have no right to appeal. However, if there is evidence proving that a mediation violates the principle of voluntariness or the content of the mediation agreement violates the law, party can apply for retrial and cancel the mediation agreement.

In addition, the parties can reach a settlement by themselves out of court whereupon the plaintiff withdraws the lawsuit. Different from the mediation statement issued by the court, the settlement agreement reached at this time is only a contract between the parties and will not be enforced as a judgement.

In arbitration, the rules of some arbitration institutions provide that where both parties wish for mediation, the arbitral tribunal may resolve the case by mediation during the course of the arbitration proceedings. If mediation does not result in an agreement, the arbitral tribunal will continue with the arbitration and render an award. The parties are prohibited from using any statements made by the parties during the mediation as grounds for any claim, defense or counterclaim in later arbitral or judicial proceedings. To mitigate the risk that arbitrators may be influenced by information obtained in the course of mediation, CIETAC amended its arbitration rules in 2012 giving the parties the right to choose CIETAC, rather than the arbitral tribunal, to conduct mediation.

In addition, there are several commercial mediation institutions in China. The most prominent one is China Council for the Promotion of International Trade ("CCPIT") / China Chamber of International Commerce ("CCOIC") Mediation Center. The settlement agreement reached by the parties with the help of the commercial mediation institution is binding on the parties. However, in the event that one party breaches the settlement agreement, the parties have to submit the dispute to a competent court or arbitration institution for enforcement of the obligations under the settlement agreement.

China is vigorously promoting diversified dispute resolution mechanisms. The United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation) signed in August 2019 is an important step, providing more dispute resolution options for parties involved in

international commercial transactions. After the entry into force of the Convention, the settlement agreements reached between the parties with business operations in different countries will, in principle, be subject to direct enforcement mechanisms.

Administrative remedies can also provide an efficient and effective means of resolving disputes in China. Depending on the type of dispute in question, there are a number of government departments and organizations that can provide assistance by mediating the dispute between private parties. Primary among these is the SAMR and its local bureaus, which has a statutory obligation to mediate consumer related disputes at the request of the parties. The SAMR and its local bureaus are also empowered to investigate and impose sanctions in a number of areas, including cases of trademark infringement and unfair competition.

13.2 Enforcement actions available

In China, court judgments and arbitral awards are all enforced by the courts. Each court has internally set up offices called the “Bureau of Enforcement”, which is in charge of enforcing judgments and arbitral awards. The PRC Civil Procedure Law grants a creditor up to two years to apply for enforcement of a judgment or award.

13.2.1 Enforcement of domestic judgments and awards

The judgment and award will determine the time limit (usually a period after the judgment or award) for the party who has the obligation to perform the judgment or award. If the party who has the obligation to perform fails to perform the effective judgment, the other party may apply to the court for compulsory execution.

When a party applies for an execution of the judgment, the execution officer of the court will notify the party against whom enforcement is to be made and require performance within a stipulated time limit. Failure to perform within this time limit will result in measures for compulsory execution.

The winning party may require the other party to pay additional penalty interest during the period of refusing to perform the judgment or ruling; in addition, the court may take such measures as restricting exit from the country, recording the credit records, publishing its refusal to perform, etc. to punish the failure to perform the judgment.

A court may grant a stay of execution where the prevailing party seeks a postponement; a non-party presents a reasonable objection to the execution; one of the parties ceases to exist or dies and the other parties must await the appointment of a successor; or in other circumstances which the court deems appropriate.

A court may also terminate the execution of the judgment. This may take place when the prevailing party withdraws the application for execution; a higher court revokes the legal document upon which the execution is based; the losing party dies and leaves no estate or persons to assume obligations; the losing party, being a citizen, is unable to make repayment due to poor financial circumstances or has lost the ability to work; or in other situations the court deems appropriate. A ruling by a court to stay or terminate execution will take effect immediately.

To improve the transparency of enforcement proceedings, the courts have set up an online platform for the public called “China Enforcement Information Public Access Network” to check and track if an enforcement proceeding has been initiated against an individual or a company. In addition, to expedite a debtor’s performance of its obligations under a judgment and award, there is an online platform by which the public can check the status of debtors who have failed to honor their obligations under a judgment or an award.

Domestic and foreign-related awards are enforced through the same procedure as a domestic judgment.

13.2.2 Recognition and enforcement of foreign judgments

China's courts will recognize and enforce foreign judgments on the basis of bilateral and multilateral treaties on recognition and enforcement of judgments concluded or acceded to by China; if there is no bilateral or multilateral treaty, the courts will review on the basis of reciprocity, provided doing so does not violate the basic principles of Chinese law, national sovereignty and security, and public interest. Reciprocity refers to the act of a foreign court executing a judgment of a Chinese people's court in the absence of a treaty.

There are few cases of recognition of foreign judgments based on reciprocity. Chinese courts usually require that foreign courts have recognized the judgments of Chinese courts previously. For example, the Nanjing Intermediate People's Court's recognition of a commercial judgment of the Singapore high court in December 2016 was the first time a Chinese court recognized and enforced a commercial judgment of the Singapore high court. This was based on the principle of reciprocity and the Singapore High Court having previously enforced a civil judgment of a Chinese court.

It is difficult for foreign court decisions to be recognized and enforced in China without the support of international treaties or reciprocal relations with China, and the parties will need to file a new lawsuit. However, there has been positive developments recently. In 2015, the SPC issued a number of opinions on the provision of judicial services and guarantees for "Belt and Road" projects, which specifically referred to China taking the lead in promoting reciprocity without an existing bilateral agreement for judicial assistance and without existing reciprocal relations.

Also, on July 2, 2019, the Hague Conference on Private International Law adopted the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. The Chinese delegation confirmed the text of the Convention, as have 83 other member states. China's legislature is expected to formally ratify the Convention through domestic legislative procedures in the near future. The entry into force and application of the Convention will mean that, in principle, Chinese courts will no longer conduct substantive review of foreign judgments in line with the Convention. The refusal of recognition by Chinese courts will be limited to cases of service procedures, fraud, violation of public policy, lack of jurisdiction and conflict of judgment as stipulated in the Convention.

On July 14, 2006, the Hong Kong SAR and the mainland of China signed an Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region pursuant to Choice of Court Arrangements between Parties Concerned (the "Arrangement"). The Arrangement applies only to contracts entered into after August 1, 2008 which contain an exclusive choice of jurisdiction clause selecting either Hong Kong or China. Judgments which do not fall within the Arrangement will have to be enforced at common law; this usually means re-litigating the issue in the place where enforcement is intended.

The Arrangement covers final judgments in civil and commercial matters (excluding employment, family and contracts for personal arrangements). Only money judgments will be recognized and enforceable. Recognition extends to the interest on judgments, as well as cost judgments. Non-monetary judgments, such as injunctions, do not fall within the mutual recognition regime.

A similar recognition regime has been entered into by the Mainland with Macau by way of the Arrangement between the Mainland and Macau Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments. This Arrangement has been effective since April 1, 2006 and applies retrospectively to any judgment issued after December 20, 1999. It differs in some ways from the Hong Kong Arrangement. For example, unlike the Hong Kong Arrangement, it applies to judgments in labor disputes as well as judgments for civil damages resulting from criminal proceedings.

Civil judgments made in Taiwan can also be recognized and enforced in Mainland by a Chinese court pursuant to the Provisions of the SPC on the Recognition and Enforcement of Civil Judgments Made by Courts of Taiwan Region (effective as of July 1, 2015). However, recognition may be denied in limited circumstances, e.g. the dispute falls within the exclusive jurisdiction of the Chinese court or enforcement may prejudice the principle of one - China policy.

13.2.3 Enforcement of foreign awards

For an award made by a foreign arbitration institution, a party can apply to the Chinese court with jurisdiction for recognition and enforcement. The competent court is the intermediate court of the place where the legal person has its domicile or property.

The time limit for application for recognition and enforcement is the same as that for domestic arbitration enforcement procedures. The parties must apply to the court for recognition and enforcement of foreign arbitration awards within two years.

Generally, it is easier to enforce arbitral awards than court judgments overseas through the New York Convention 1958 (the "New York Convention") which was ratified by more than 142 member states including China.

Pursuant to the New York Convention, an arbitral award made in one member state is enforceable in another state. Since the awards are readily enforceable in many countries, parties facing adverse awards are generally inclined to comply with them voluntarily. The grounds of refusing enforcement of arbitral awards are limited. They are basically confined to procedural irregularities that occurred in the arbitration process and on grounds of public policy.

A court that refuses to enforce an arbitral award or a foreign arbitral award must report the case to the people's court at the next higher level for examination and approval. If the higher people's court also agrees not to enforce the award, it must report to the SPC for approval. Without the approval of the SPC, the court may not refuse to enforce the award.

However, Chinese courts generally will not recognize and enforce preliminary injunctive relief orders issued by foreign arbitration tribunals. At present, the only exception is the Arrangement on Mutual Assistance and Preservation of Arbitration Proceedings between the Courts of the Mainland and Hong Kong SAR concluded between Hong Kong and the Mainland in April 2019. According to the agreement, the parties to Hong Kong arbitration proceedings can apply for preservation measures in mainland China before obtaining a final arbitration decision from certain Hong Kong arbitration institutions. An application for preservation must be filed with the Mainland intermediate people's court of the place where the respondent has its domicile, property or evidence. At present, these institutions include six institutes: Hong Kong International Arbitration Centre, China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center, International Court of Arbitration of the International Chamber of Commerce – Asia Office, South China International Arbitration Center (HK) and eBRAM International Online Dispute Resolution Centre.

As between Hong Kong and the Mainland, a Hong Kong award is enforceable in China pursuant to Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region. The grounds of refusing enforcement of arbitral awards are similar to those laid down under the New York Convention. Macau awards are recognized and enforced in China pursuant to the Arrangement on Mutual Recognition and Enforcement of Arbitral Awards Made in the Mainland and Macau Special Administrative Region ("Macau Mutual Arrangement"). The enforcement regime provided in the Macau Mutual Arrangement is very similar to that applicable to Hong Kong awards. Taiwan awards can be recognized and enforced in China pursuant to Provisions of the SPC on the Recognition and Enforcement of Arbitral Awards Made in Taiwan Region. The grounds for non-recognition of Taiwan awards are similar to

Hong Kong and Macau awards, except it is required that enforcement of the Taiwan award shall not prejudice the "one China principle".

14 Anti-Bribery and Compliance

Transparency International's 2019 Corruption Perception Index¹² ranked China at #80 out of 180 countries. Although China improved seven places from the previous year and its scores increased from 39 to 41 in the last year, companies doing business in China need to be continually vigilant and regularly review their compliance policies and business practices. In recent years, the Chinese anti-corruption landscape has become more stringent than ever, with an increased focus on bribe-givers and multinational corporations doing business in China, and the introduction of additional compliance risks for executives in responsible positions.

14.1 Legal framework

Bribery of public officials is regulated by the PRC Criminal Code (the "Criminal Code"). The Criminal Code (revised in 2015) prohibits the giving of money or property to an incumbent or former public official, a person related to the public official or a person close to the public official, for the purpose of securing illegitimate benefits. While this prohibition applies to both individuals and companies, the Criminal Code also imposes statutory penalties on persons in charge of a company or directly responsible for its business activities for bribery offences committed by the company.

Commercial bribery is regulated by the Criminal Code and the PRC Anti-Unfair Competition Law ("AUCL"). Under the Criminal Code, commercial bribery means the giving of money, property or anything of value to any employee of a company, enterprise or other entity for the purpose of seeking improper interests and benefits. Under the AUCL¹³, the definition of commercial bribery refers to a business operator who uses cash, property or other means to seek transaction opportunities or competitive advantage by bribing any of the following entities or individuals: (i) employees of a transaction counterparty; (ii) entities or individuals entrusted by a transaction counterparty to handle relevant affairs; or (iii) entities or individuals that use authority or influence to exert influence on a transaction. The Interim Provisions on Prohibition of Commercial Bribery¹⁴ also describe the forms of commercial bribery under the AUCL, which include any money or property provided to the business counterparty or its employee for promotion, publicity, sponsorship, scientific research, labor, consultancy, commission, reimbursement, or any other benefits such as trips or visits.

In April 2016, the SPC and the Supreme People's Procuratorate released the Interpretation of Several Issues Concerning the Application of Law in Handling Criminal Cases Related to Graft and Bribery ("Interpretation") clarifying sentencing criteria in both official and commercial bribery cases. The Interpretation provides guidance on the definition of bribery and expressly states that bribes include intangible benefits such as material benefits of monetary value (e.g. exemption of debt) and other benefits for which payment is made in exchange (e.g. membership service or paid travel).

Enterprises committing commercial bribery can be placed on a blacklist by the SAMR under its Interim Measures for the Administration of the List of Dishonest Enterprises Committing Serious Illegal Activities ("Interim Measures"). The Interim Measures, which became effective on April 1, 2016, applies to all companies registered in China, including state-owned-enterprises, private companies and foreign-invested enterprises, and blacklists enterprises committing certain illegal activities including commercial bribery. Blacklisted companies which repeatedly violate the law may be subject to joint sanctions imposed by multiple

¹² Transparency International's 2019 CPI was released on 23 January 2020.

¹³ The AUCL was revised on 4 November 2017 and 23 April 2019 respectively. The commercial bribery related provisions were revised on 4 November 2017 and those provisions have become effective since 1 January 2018.

¹⁴ Please note that the Interim Provision on Prohibition of Commercial Bribery have not been revised in accordance with the most updated version of AUCL.

government authorities such as restrictions or prohibitions in relation to business operations, import and export, market entry and exit, registration of new companies and safety and production licensing. They may also receive additional sanctions even if the violations did not result in significant administrative penalties under the AUCL, e.g. where the bribe amount was relatively small.

14.2 Facilitation payments

There is no exemption for facilitation payments under the Criminal Code. Any form of payment or property would be assessed according to the elements of the offence under the Criminal Code or AUCL.

14.3 Gifts, hospitality and other payments

Gifts and entertainment continue to pose challenges for companies doing business in China. While the Criminal Code does not establish quantitative limitations on gifts or hospitality expenses, there is a threshold amount for the prosecution of official bribery of RMB30,000 (or RMB10,000 with aggravating factors¹⁵) for individual bribe-givers, RMB200,000 (or RMB100,000 with aggravating factors) for corporate bribe-givers, and RMB30,000 for bribe-recipients. Likewise, the criminal threshold for prosecution of commercial bribery is RMB60,000 for individual bribe-givers, RMB200,000 (or RMB100,000 with aggravating factors) for corporate bribe-givers, and RMB60,000 for bribe-recipients. However, a 1995 internal regulation applicable to public officials of central party and government organs requires public officials to hand over the gift to the government if the value of the gift exceeds RMB200 per person per occasion. Public officials are also obliged to turn the gift in if the cumulative value of all the gifts received by the public officials exceed RMB600 per person per year.

As a result of inflation, a gift of the value of RMB200 is no longer considered a sizable gift in China. We have observed that the 1995 internal regulation mentioned above has only been loosely followed. Whether a hospitality expense can be considered as bribery will need to be determined on a case-by-case basis, taking into account all the facts and circumstances surrounding the case, and applying the criteria in the said 1995 regulation. In practice, most multinationals in China adopt a threshold amount of around RMB200 to RMB500 (about USD29 to USD73) for courtesy gifts or entertainment by meal, per occasion, per person. Many companies also provide for a frequency limit, for example, no gifts can be given to the same person over three to four times per year. Some industry associations have set up benchmarking rules on gifts, meals and entertainment, for consideration by the members to level the playing field.

In the healthcare sector, a donation could be considered as commercial bribery if it is provided in an inappropriate way for purchasing or selling goods. The Administrative Measures on Accepting Donations for Public Welfare by Healthcare Entities (for Trial Implementation) ("New Donation Rules") promulgated in 2015 provide specific guidance on donations to healthcare and family planning entities for the non-profit purpose of public wealth such as training, academic or research. The New Donation Rules prohibit donations to these entities to be used for any illegal or commercial purpose, or as commercial bribery or an incentive to purchase the goods.

¹⁵ These aggravating factors include (a) the giver offers bribes to more than three officials; (b) the giver uses illegal gains to give bribes; (c) the giver seeks promotion and change of position by offering bribes; (d) the giver offers bribes to officials who are responsible for supervision and management over food, medicine, safe production, environment protection, etc. and who carry out illegal activities; (e) the giver offers bribes to judicial officers which affects justice in judicial activities; and (f) the bribery act has caused loss of more than RMB500,000 and less than RMB1 million.

14.4 Extraterritoriality and foreign public officials

The prohibition against official bribery applies to acts taking place within China or elsewhere. For commercial bribery, offers of bribery to employees of Chinese enterprises or companies (including foreign-invested companies) outside China and acceptances by Chinese companies and their employees outside China would potentially attract extraterritorial liability.

The Criminal Code was also revised in 2011 to prohibit bribery of foreign public officials or officials of international public organizations. Under Article 164 of the Criminal Code, bribery of foreign public officials means the giving of money or property to foreign government functionaries or officials of international public organizations for the purpose of seeking improper commercial interests. For the purpose of this offence, a foreign public official means a foreign government functionary or an official of an international public organization.

14.5 Penalties

Individuals who are found guilty of paying bribes to public officials face up to life imprisonment plus confiscation of property or a criminal fine. Individuals who are found guilty of paying bribes to former public officials or persons related or close to the public officials can be sentenced to criminal detention or fixed-term imprisonment plus a criminal fine. Companies that offer bribes to public officials or the persons related or close to public officials can be subject to a criminal fine. Responsible persons directly in charge of those companies and persons directly responsible for such offenses face up to five or three years imprisonment respectively (depending on the status of the recipients), and a criminal fine and confiscation of illegal personal gains (if any). Bribe recipients can also be liable. A public official who receives a large amount of bribes can be sentenced to imprisonment including the death penalty. A non-official bribe recipient (e.g., former public official or person related or close to the public official) can be sentenced to criminal detention, fixed-term imprisonment, confiscation of property and a criminal fine.

In relation to commercial bribery, under the Criminal Code, penalties for individual bribe givers are up to ten years imprisonment and a fine. For the company or legal entity involved, the penalty is a criminal fine for the legal entity, while persons directly in charge of the company and other persons who were directly responsible for the offense face up to ten years imprisonment and a criminal fine. The AUCL establishes administrative penalties for business operators committing commercial bribery in circumstances where the violations have not constituted criminal offences. According to the AUCL, the penalties include an administrative fine ranging between RMB100,000 and RMB3,000,000, confiscation of illegal gains, and revocation of the company's business license in cases of severe violations.

In relation to the bribery of foreign public officials, penalties are up to ten years imprisonment and a fine for individuals involved. For legal entities, the penalties are a criminal fine while persons who are directly in charge and other persons who are directly responsible for the offense face up to ten years imprisonment and a criminal fine.

14.6 Defences

Bribe givers of official bribery may seek to have their punishment mitigated or waived if they "voluntarily confess" their bribe-giving activities. However, recent changes to the law require the underlying crime to be relatively minor and offenders to assist with exposing corrupt activities which lead to successful investigations. Further, leniency for voluntary disclosure will not be available in certain circumstances, such as when bribes are offered to more than three persons, or when the bribery results in "harmful consequences".

For commercial bribery, reasonable business expenditures may be a defence as long as it is supported by a genuine underlying transaction with proper documentation. Similarly, low-value promotional gifts may be acceptable depending on the purpose of the gift and its value.

In addition, the AUCL states that if a business operator's employee engages in commercial bribery, the employee's activity will be viewed as the conduct of that business operator. The AUCL provides the business operators with a ground of defence if the business operator can prove that the employee's activity does not relate to the business operator's objective of obtaining specific business transaction opportunities or other competitive advantages.

14.7 Enforcement authorities

The Public Security Bureau has the jurisdiction to investigate commercial bribery crimes related to non-public officials. The National Supervision Commission (or its local counterparts)¹⁶ has the jurisdiction to investigate official bribery. The Procuratorate is responsible for prosecuting bribery related to public officials or commercial bribery. The AMR has the power to investigate and sanction companies for commercial bribery that is not a criminal offence in nature. In addition, if a member of the Communist Party of China ("CPC") is involved, the Central Commission for Discipline Inspection of the CPC (or its local counterparts) can also investigate and penalize the corruption activity in accordance with special CPC disciplinary rules. If the CPC member is also a government official, the National Supervision Commission (or its local counterparts) can also conduct the enforcement.

14.8 Compliance programs

The Criminal Code and AUCL do not specifically recognize compliance programs as instruments to mitigate or eliminate liability for legal entities. However, if a legal entity can prove that it had exercised due control over its employees by means of a compliance program or otherwise, a company may seek leniency or mitigate the risk of liability arising from the corrupt behavior of its employees.

While having a compliance program does not offer a legal defense for the offense of bribery, it is recommended that legal entities adopt a robust compliance program to prevent internal corruption and bribery. It is also useful to draw a clear line between the legal entities' liability and the employees' individual liability in order to mitigate the potential legal risks of the legal entity.

14.9 Whistleblowing

Chinese laws provide Chinese citizens and entities with the right (and a general obligation) to report crimes such as corruption, commercial bribery, embezzlement and malfeasance. These rights were enhanced on March 30, 2016 when the Supreme People's Procuratorate, Ministry of Public Security and Ministry of Finance released new regulations offering greater protection and incentives. Local authorities also encourage reports in relation to commercial bribery by offering monetary rewards.

Organizations doing business in China need to be in a position to respond to and manage internal complaints swiftly and in a credible manner. Companies implicated in whistle-blower complaints alleging that it is involved in a bribery scheme may attract an investigation by Chinese authorities or the attention of foreign enforcement bodies such as the US Department of Justice, the US Securities and Exchange Commission or the UK's Serious Fraud Office. In addition to compliance with Chinese laws, it is imperative that compliance

¹⁶ The National Supervision Commission was established in March 2018 and it is the highest enforcement authority for official bribery. It merges anti-corruption arm of the Supreme People's Procuratorate and the Central Commission for Discipline Inspection of the CPC.

programs are aligned with standards laid down by global regimes (such as the US Foreign Corrupt Practices Act and the UK Bribery Act) and best practices adopted by peer entities in the same or similar industry.

15 About the Firm

Baker McKenzie FenXun (FTZ) Joint Operation Office

The Baker McKenzie FenXun (FTZ) Joint Operation is the world's leading China legal platform, delivering integrated international and PRC legal services.

Established in April, 2015 in the China (Shanghai) Free Trade Zone, it is the first that has been approved by the Shanghai Justice Bureau. For both Baker McKenzie and FenXun Partners, the Joint Operation is a historic step in providing clients with a joint global and local PRC law capacity from one single and uniquely aligned platform.

The Joint Operation is staffed by both locally admitted and foreign-licensed lawyers from Baker McKenzie and FenXun Partners, advising leading Chinese and multinational companies on both China domestic and cross-border issues across the full spectrum of corporate and commercial law, including M&A, capital markets, corporate finance, private equity, funds and derivatives, employment, tax, intellectual property, disputes resolution and litigation, antitrust and competition.

The Joint Operation allows Baker McKenzie and FenXun Partners to provide collaborative responses to client needs, including joint execution of client matters, secondments of lawyers between the firms and exchange of know-how. Through the Joint Operation Office, they are able to provide PRC law related legal advice as well as legal opinions for our Chinese and Multinational clients.

Baker McKenzie and FenXun Partners will remain structurally separate and independent, as required by current PRC regulations.

Baker McKenzie in China

Baker McKenzie has maintained a presence in China since the late 1970s. With over 40 years' experience in advising on doing business in the region, we bring an in-depth understanding of China's cultural, political and legal structure. We partner with clients, taking into account their commercial objectives and work through complex issues through strategic advice, innovative approaches and exceptional practical solutions. We add value by helping clients manage risks and seize opportunities in today's complex, ever changing global economy.

Our offices in Hong Kong, Beijing and Shanghai were established in 1974, 1993 and 2002 respectively. Our team encompasses over 300 lawyers, who are fully conversant with the systems, practicalities, and language of law, and are fluent in English, spoken and written Mandarin, as well as other Chinese dialects and European languages. These lawyers are backed by a team of experienced paralegals and translators.

We provide dedicated on-the-ground legal services to foreign multinational companies and domestic corporations doing business in China. With our diverse capabilities and experience, we serve clients across all major industry sectors. We are regularly involved in high-profile and first-to-market transactions with blue-chip multinational corporations and financial institutions and regularly coordinate significant cross-border assignments for market leading companies. In recent years, we have also assisted a number of leading PRC entities on their significant outbound investment projects across the globe.

FenXun Partners

FenXun is a law firm established in Beijing in 2009. Ever since FenXun has been growing very fast and now there are more than 100 legal professionals in our Beijing, Shanghai and Hainan offices. Our main practice areas include: M&A, Capital Market, Asset Securitization, Fund Formation & Investment, Competition & Anti-

trust, Banking & Finance, Financial Services, Intellectual Property, Dispute Resolution, Employment, Real Estate and Taxation.

FenXun provides top-tier legal service to clients based on its abundant experience and efficiency. Our service combined business savvy and deep knowledge of PRC market and international business circle. Our team is specialised in serving both domestic clients such as SOEs and international clients such as fortune 500 enterprises. Many of our lawyers have worked for top international law firms overseas and participated in high-profile transactions in various sectors including natural resources, power and energy, infrastructure, communication, TMT and industrial products.

Our Working Scope:

Our services cover a wide spectrum of:

- Antitrust & Competition
- Asset-backed securitization
- Banking & Finance
- Capital Markets & Securities
- Compliance & Investigations
- Consumer Goods & Retail
- Construction
- Corporate Services
- Dispute Resolution & Litigation
- Employment & Compensation
- Energy, Mining & Infrastructure
- Environment & Climate Change
- FDI into China
- Financial Services
- Healthcare
- Hotels, Resorts & Tourism
- Information Technology & Communications
- Insurance
- Intellectual Property
- International Trade
- Investment Funds
- Mergers & Acquisitions
- Private Equity
- Real Estate & Property
- Restructuring & Insolvency
- Regulatory & Compliance
- Tax
- Wealth Management

Latest awards

Baker McKenzie FenXun (FTZ) Joint Operation Office

- **Joint Venture Office Award** - Chambers China Awards 2020
- **Winner of "Innovation in the Business of Law** (Internationally Headquartered Law Firms)" (for establishment of Baker & McKenzie FenXun (FTZ) Joint Operation Office, the first Joint Operation between an international and a Chinese law firm in the Shanghai Free Trade Zone and also in China) – Financial Times Innovative Lawyers Awards, Asia Pacific 2016

Baker McKenzie China Offices

- **“Strongest Law Firm Brand Worldwide”** – sharplegal® Global Elite Brand Index 2010-2020
- For the 6th consecutive year, rank **#1 of China top 30 international law firm rankings** - ALB China 2018, 2017, 2016, 2015, 2014, 2013, 2012
- **Law Firm of the Year (International)** - China Business Law Journal, China Business Law Awards 2019, 2018, 2017, 2016
- **Best Overall International Law Firm for China Work** - China Business Law Journal, China Business Law Awards 2019, 2017, 2016, 2014, 2013
- **Most Responsive International Firm of the Year** - Asian-MENA Counsel In-house Community Counsel of the Year Awards 2018
- **Hong Kong Law Firm of the Year** - ALB Hong Kong Law Awards 2018 (The Macallan Highland Single Malt Scotch Whisky Award Hong Kong Law Firm of the Year)
- **In-house Community Firm of the Year** (HONG KONG: Alternative Investment Funds (including Private Equity), Anti-trust/Competition, Banking & Finance, Compliance/Regulatory, Corporate & M&A, Employment, Intellectual Property, Restructuring & Insolvency, TMT) - Asian-MENA Counsel Firm of the Year 2018

FenXun Partners

- **Notable Achievers** – China Business Law Awards, 2019
- **Rising Law Firm of the Year** – China Legal Awards, Asia Legal Business, 2019, 2018, 2017
- **Top 10 Fastest growing firms in China** – Asia Legal Business, 2019, 2018, 2017



The Baker McKenzie FenXun (FTZ) Joint Operation is the world's leading China legal platform, delivering integrated international and PRC legal services.

**Baker
McKenzie
FenXun.**

奋迅 · 贝克麦坚时



**bakermckenziefenxun.com
bakermckenzie.com
fenxunlaw.com**

©2020 Baker McKenzie FenXun (FTZ) Joint Operation Office. All rights reserved. Baker McKenzie FenXun (FTZ) Joint Operation Office is a joint operation between Baker & McKenzie LLP, an Illinois limited liability partnership, and FenXun Partners, a Chinese law firm. The Joint Operation has been approved by the Shanghai Justice Bureau. In accordance with the common terminology used in professional service organizations, reference to a "partner" means a person who is a partner, or equivalent, in such a law firm. Similarly, reference to an "office" means an office of any such law firm. This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.