

**Baker
McKenzie
FenXun.**
奋迅·贝克麦坚时

Doing Business in **China** 2022



Editorial Contributions

Bofu An

Zhi Bao

Henry Chen

Jocelyn Chen

Soshan Cheung

Stephen Crosswell

Simon Hui

Jonathan Isaacs

Nancy Lai

Binxin Li

Lucca Li

Aggie Liu

Honghuan Liu

Laura Liu

Zheng Lu

Frank Pan

Jay Ruan

Scott Silverman

Howard Wu

Vivian Wu

Tracy Wut

Kevin Yuan

Xi Zhou

Zheng Zhou

Table of Contents

1. Introduction.....	1
2. Foreign Invested Enterprises	2
3. Foreign Invested Partnerships	6
4. Representative Offices.....	7
5. Mergers and Acquisitions.....	9
6. Distribution.....	13
7. Imports and Exports in China.....	15
8. Privacy and Data Protection Compliance	19
9. Antitrust and Competition Laws.....	25
10. Intellectual Property Protection	35
11. Employment Issues.....	47
12. Taxation.....	51
13. Dispute Resolution.....	54
14. Anti-Bribery and Compliance	65
15. Financial Services Regulatory.....	71
16. About Us.....	74

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 during the COVID pandemic.

The guide 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.

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 a securities company, the investor must first obtain approval from the China Securities Regulatory Commission 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. Under the Civil Code of the PRC, contracts for Sino-foreign joint ventures, Sino-foreign contractual joint ventures and Sino-foreign cooperative exploration and development of natural resources, which are performed within the territory of the PRC, must be governed by the laws of the PRC.

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.

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.

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 and procurement in China by its head office. Personnel of a representative office of a non-resident enterprise should not sign contracts on behalf of the non-resident enterprise or affiliates.

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, although 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 (certifying that the foreign company has been in existence for over two years) 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 bank account(s) 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 corporate information that has been registered with the local SAMR, such as the head office's company name, registered address, entity type, business scope, 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.

On December 19, 2020, the National Development and Reform Commission (NDRC) and MOFCOM jointly issued the Measures for Security Review of Foreign Investment which took effect from January 18, 2021. The Measures cover both direct and indirect foreign investments in China, such that any investor acquiring indirect "actual control" of a Chinese target covered by the Measures in an offshore transaction may be subject to a national security review in China. The Measures also apply to greenfield investments.

The Measures establish a working mechanism jointly headed by NDRC and the MOFCOM at the central level. A Working Office will be set up under NDRC but will be jointly led by NDRC and MOFCOM, who will be responsible for the national security review of foreign investment.

Under the Measures, the onus is on the investor to file for a national security review if the transaction could raise national security concerns. The Working Office may also at its own discretion decide that a national security filing is required.

A filing is required if the acquisition (1) involves investment in sectors with a bearing on national defense and security, such as the arms industry and sectors that supply the arms industry, and investment in locations near military facilities or arms industry facilities, or (2) would give a foreign investor actual control of a target company that falls within covered sectors, which include key

agricultural products, key energy and resources, key major equipment manufacturing, key infrastructure, key transportation services, key cultural products and services, key information technology and internet products and services, key financial services, key technology, and other key sectors. What is considered "key" is not set out in any regulation, leaving the Working Office with discretion to make a determination that may shift with changes in China's foreign investment policies or national security outlook from time to time.

A filing will potentially entail a three-stage process consisting of: (1) jurisdiction review - the Working Office has 15 working days to determine whether they will commence a security review of the investment in question; (2) general review - if the Working Office decides to commence a security review, they will then have 30 working days to perform a general review of the investment in question. After the general review, the Working Office will either approve the transaction or decide to commence the special review process; and (3) special review - the special review can take up to 60 working days and may be extended if circumstances so require.

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

Historically, foreign investment in wholesale and retail activities was traditionally governed by standalone regulations promulgated by MOFCOM. On January 1, 2020, China's newly enacted Foreign Investment Law ("**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 controlled 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 special customs supervision 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 tariff code-based catalogue ("**Catalogue**") can be imported under the pilot program. The Catalogue was last updated on December 24, 2019 (updates effective January 1, 2020).

Retail goods imported under the cross-border e-commerce pilot program constitute a standalone category of imported goods, different from ordinary commercial goods and personal articles, and not subject to the requirements for licensing, registration or filing which apply to goods imported through the ordinary channel of commercial trade. Further, for product regulatory purposes, goods imported under the e-commerce pilot program are treated as personal articles.

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

Historically, FIEs were generally only authorized to import goods, materials and equipment for their own use and to export self-manufactured products. Pursuant to the Measures for the Registration of Foreign Trade Operators (the "**Registration Measures**"), which were last updated in 2021, FIEs are able to obtain import / export rights for all types of products other than goods subject to state trading. Additionally, FIEs also need to obtain customs registration for acting as the importer/exporter of record for customs declaration purposes. In absence of such registration, an FIE will have to engage an agent with customs registration status to act as the importer/exporter of record and make customs declarations on its behalf.

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 goods;
- (b) Transaction value of similar goods;
- (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 98 different chapters with detailed import duty rates for all goods and commodities under the Tariff Book of China. 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 within 14 days of entry into the country. Taxpayers for exports must submit a declaration to Customs upon arrival of the goods at the Customs supervision and control zone at least 24 hours prior to loading.

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 imported commodities, i.e. MFN rate and preferential rate. As a general rule applicable to standard custom duty rates, 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.

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 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 customs 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	✓	✓	✓	✓	✓

With effect from April 1, 2022, under Order No. 256 issued by the General Administration of Customs ("GAC"), all Bonded Logistics Zones and Bonded Port Zones will be transformed to Integrated Bonded Zones.

7.9 Free trade agreements / preferential trade agreements

China has signed numerous Free Trade Agreements ("FTAs") with various countries/regions, all providing customs duty concessions for imports into China, as well as according China originating exports to these countries/regions 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 2022, the following FTAs are in force:

- China - Association of Southeast Asian 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 Closer Economic Partnership Arrangement ("**CEPA**");
- Mainland and Macau CEPA;
- Asia Pacific Trade Agreement;

- China - Mauritius FTA;
- China - Maldives FTA;
- China - Georgia FTA;
- China - Cambodia; and
- Regional Comprehensive Economic Partnership ("**RCEP**").

8. Privacy and Data Protection Compliance

As the adoption of the Internet applications and digital technologies are common for companies doing business in China, the use of data to empower digital transformation and enhance business operation in a compliant manner have 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 privacy and data protection rules that are generally applicable to companies operating in China and highlight notable requirements.

8.1 Legal Framework

China has embarked on establishing comprehensive regulatory regimes in regard to privacy, data protection and cybersecurity since 2021. This was achieved with the aid of "Three Pillars" primary legislations, i.e. the PIPL, DSL and CSL, each of which has different focus.

- (a) The Personal Information Protection Law ("**PIPL**"), effective from 1 November 2021, introduces robust and comprehensive rules concerning the processing and protection of personal information.
- (b) The Data Security Law ("**DSL**"), effective from 1 September 2021, applies to processing of all data, but focuses on important data and core data that have a significant bearing on national security, social stability and public interests.
- (c) The Cybersecurity Law ("**CSL**"), effective from 1 June 2017, primarily regulates the construction, maintenance, operation and use of connected network and ensures cybersecurity.

As omnibus laws, the PIPL, DSL and CSL contain rather broad and general rules and requirements under with few specific implementation details. The Chinese regulators are in the course of deliberating and enacting implementation regulations and measures to provide for the parameters and details of the relevant rules.

Aside from the general rules applicable to business operators in all sectors, there are industry-specific regulations and 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, automobile, e-hailing, etc. Business operators in the special industries should also beware of the additional, sector-oriented data protection requirements.

In addition, there are national or sector-specific standards, specifications or guidelines that lay out the best practices for business operators to follow in their data processing activities in China. While those guidelines are recommended in nature and therefore do not have force of law, it is commonly acknowledged that the Chinese regulators would refer to them in assessing a company's compliance with data protection requirements. Those guidelines should, therefore, also warrant attention.

There is currently no single designated data protection authority in China. The Cyberspace Administration of China ("**CAC**") is in charge of the overall planning and coordination and relevant regulatory affairs, and takes the lead in formulating the implementation regulations and measures of the PIPL, DSL and CSL. Alongside the CAC, industrial regulators are and will continue to be responsible for overseeing and enforcing various requirements in relation to privacy and data protection within their respective purview.

8.2 Extraterritorial Application

While the DSL and the PIPL are primarily applicable to data processing activities conducted within China, China expanded the geographic scope of application of its privacy and data protection

regulatory regimes through the PIPL and DSL to overseas organizations and data processing activities.

- The PIPL applies to processing activities conducted outside of China involving personal information of individuals resident in China, where the processing activities: (i) are for the purpose of offering products or services to individuals in China; (ii) analyze and evaluate the behavior of individuals in China; or (iii) meet other circumstances stipulated in law. A foreign PIP (as defined below) that is subject to extraterritorial application of the PIPL should establish a dedicated local organization or representative in China, and report its/his/her name and contact details to the competent regulators.
- The DSL applies to data processing activities conducted outside of China that impair the national security of China, public interests, or legitimate rights and interests of organizations and individuals in China.

8.3 Categories of Data Regulated in China

The Chinese privacy and data protection regulatory regimes principally regulate the following general categories of data:

- (a) personal information - means any information that relates to an identified or identifiable individual, excluding the anonymized information. Sensitive personal information is a sub-category under personal information and means personal information that, once leaked or illegally used, is likely to cause harm to an individual's dignity or endanger an individual's personal or property safety, such as biometric information, religious beliefs, specific identity, medical and health information, financial account information, personal tracks, and personal information of minors below the age of 14.
- (b) important data - generally refer to the data that may endanger national security and public interests once it is falsified, destroyed, leaked or illegally obtained or illegally used. This may include undisclosed government information, and information concerning genetic health, geography and mineral resources. Industrial regulators are in the course of formulating the rules for identifying the scope of important data.

Data in certain regulated sectors such as automobile, finance and healthcare may be additionally governed by sector-specific regulations and standards.

8.4 Detailed Rules Specifically Pertinent to Personal Information

Protection of personal information has been a primary focus of the Chinese privacy and data protection regulatory regimes, and specifically, under the PIPL.

The PIPL imposes requirements on business operators dependent on the roles that they play in personal information processing activities. The personal information processor, or "PIP", is defined to mean an organization or individual that independently determines the purposes for and means of the processing of personal information. This concept is akin to the controller defined in the GDPR. Relevantly, the term "entrusted processing party" is used to refer to a person who processes personal information on behalf of a PIP and in accordance with the PIP's instructions. This concept is akin to the processor used in the GDPR. A PIP is subject to virtually all personal information protection requirements under the law, while an entrusted processing party should assist the relevant PIP in complying with the PIP's statutory obligations.

The detailed rules of processing personal information are as follows.

Requirement of A Privacy Notice

A PIP is under obligation to inform data subjects, before or concurrently with the collection and processing of their personal information, of certain privacy information by way of a written personal information protection policy or notice (i.e. privacy notice). Specifically, data subjects should be informed of the following: (i) the name and contact details of the PIP, (ii) the purposes for and means of processing, (iii) the types of personal information to be processed, (iv) the retention period of personal information, and (v) the way in which individuals can exercise their data subject rights.

Additional details must be included in the privacy notice in cases of special processing activities:

- For processing of sensitive personal information, individuals must be specifically informed of (i) the necessity of processing, and (ii) the impacts of processing on personal rights and interests.
- For cross-border transfer of personal information, individuals must be additionally informed of (i) the name and contact details of the foreign recipient, (ii) the purposes for and means of processing and transfer, (iii) the types of personal information to be transferred abroad, and (iv) the way made available by the foreign recipient to Chinese residents for exercising their rights.
- For transfer of personal information to another PIP, individuals must also be informed of (i) the name and contact details of the PIP recipient, (ii) the purposes for and means of processing and transfer, and (iii) the types of personal information to be transferred.

Fulfillment of Legal Basis for Processing: Consent and Non-Consent

Pursuant to the PIPL, a PIP is permitted to process personal information only if one of the following legal basis is fulfilled:

- the individuals have given their proper consent;
- the processing is necessary to perform statutory obligations or legal duties;
- the processing is necessary for the conclusion and performance of a contract with the individual;
- the processing is necessary to conduct human resources management in accordance with the legally-formulated employment policies;
- the personal information is publicly available through legitimate means and the processing of the same is performed to a reasonable extent;
- the processing is required to respond to public health emergencies, or protect the life, health, and property safety of individuals in emergencies; and
- the processing is to a reasonable extent for the purposes of news report, public opinion supervision, and other acts for public interest.

In regard to the form of consent, the PIPL requires consent to be given on an informed basis, meaning that individuals are only able to give their legally effective and binding consent after being informed of the details outlined above. Where individuals are minors below the age of 14, consent from their parents or other legal guardian is required.

Also, a separate informed consent must be obtained with respect to each of the following processing activities: (i) collection and processing of sensitive information; (ii) transferring personal information outside of China; and (iii) providing personal information by a PIP to another PIP. At this juncture, the

prevalent market interpretation is that a separate check box or consent form is needed to secure "separate consent".

Data Subject Rights

Individuals have a broad suite of rights pertaining to their personal information, in particular, the right to be informed of the personal information processing rules, withdraw consent previously given, restrict the processing of their personal information, access and copy their personal information, correct their personal information if inaccurate or incomplete, delete their personal information in certain circumstances, disallow PIPs from making a decision solely based on automated processing, request the transfer of their personal information to other PIP when the relevant requirements are met, and require PIPs to explain its processing practices or rules. PIPs must put in place a mechanism to respond to and entertain data subjects' requests to exercise the rights.

8.5 Requirements Applicable to Cross-Border Data Transfers and Data Localization

Pursuant to the PIPL, transfer of personal information abroad must be for genuine business needs, and an exporting PIP should ensure that the processing of data by the foreign recipient meets the level of data protection standard provided under the PIPL, and at least one (or more) of the following conditions has to be satisfied (to the extent applicable):

- (a) (i) Critical information infrastructure operators ("**CIIO**") and (ii) PIPs processing an aggregate volume of personal information that exceeds certain thresholds (which is anticipated to be set at personal information of more than 1 million individuals) ("**Large-scale PIP**") will generally be required to undergo and pass (as clearance) the CAC-administered security assessment as a prerequisite for it to be permitted to export personal information or important data overseas. CIIOs and Large-scale PIPs are additionally required to store personal information and important data in relation to their business infrastructure within China.

CIIO means the operator of important network facilities and information systems, etc. in important industries and sectors such as public telecommunications and information services, energy, transportation, water conservancy, finance, public services, e-government, and national defense science and technology industry, as well as other important network facilities and information systems, etc. that, once destroyed, disabled, or suffering a data leak, would seriously endanger national security, national welfare, the people's livelihood, and public interests.

Aside from the above, transfer of personal information of more than 100,000 persons in the aggregate abroad or sensitive personal information of more than 10,000 persons in the aggregate abroad by PIPs would also be subject to the CAC-administered security assessment as proposed under CAC's draft measures.

- (b) A PIP exporting personal information may have to obtain a personal information protection certification from an eligible institution in accordance with the CAC regulations (to be issued). Details of the circumstances triggering certification, the certification requirements, and the scope of qualified certification institutions are currently unclear and require further clarification.
- (c) An exporting PIP would need to enter into a legally compliant contract with the foreign recipient concerning the export of personal information in accordance with standard contract to be issued by the CAC. It is likely to be a default requirement.

8.6 Data Protection Impact Assessment ("DPIA")

The DPIA is a new requirement introduced through the PIPL and DSL, but is likely to be a requirement that the Chinese regulators may closely and randomly enforce to assess companies' compliance with the requirements concerning processing of data (especially personal information). The scope of processing activities subject to DPIA is quite broad. Specifically, the PIP will need to conduct DPIA under any of the following circumstances:

- processing sensitive personal information;
- providing personal information to third parties acting as PIP or entrusted processing party;
- transferring personal information abroad;
- using personal information for automated decision-making;
- disclosing personal information to the public; and
- processing important data or transferring important data abroad.

In conducting the DPIA, the PIP should assess and evaluate (a) whether the intended processing activity meets the lawfulness, legitimacy and necessity principles; (b) the impacts of the intended processing activity on the rights and interests of data subjects and other parties, and the proposed remedial measures to address such impacts; and (c) the level of security risks associated with the intended processing activity, and the proposed security measures to safeguard data security. Only if it is concluded through the DPIA process that the intended processing activity meets the requirements under Chinese data protection law and carries low or manageable risk (with effective remedial and security measures being adopted), the PIP may proceed with performing such processing activity.

The DPIA reports and the records of the relevant personal information processing activities covered by the DPIA reports should be kept for at least 3 years.

8.7 Data Breach Notifications

Where the data have been or are likely to be leaked, tampered with, lost, or any other incidents endangering the data security or cybersecurity occurs ("**data breach**"), the PIP must promptly take remedial actions and notify the in-charge authority and affected individuals of the data breach. The notification should include (i) the cause of the data breach, (ii) the types of data breached and the harm that may be entailed, (iii) the remedial actions that have been adopted, (iv) the actions that individuals may take to mitigate the harm, and (v) the contact details of the PIP. There is one exception to the notification to individuals - if the PIP has adopted measures that can effectively prevent the data breach from causing harm, it may opt not to notify affected individuals, unless the in-charge authority disagrees and instructs the PIP to notify such individuals.

It is a statutory requirement that the PIP should formulate a data breach incident response plan.

8.8 Data Protection Officer

Pursuant to the PIPL, a Large-scale PIP needs to designate a person responsible for the protection of personal information, commonly referred to as "DPO". The name and contact details of the DPO must be made public, and be reported to the competent authorities.

Pursuant to the CSL, CIOs should appoint a person responsible for (data and cyber) security management.

8.9 Multi-Level Cybersecurity Protection Scheme ("MLPS")

The MLPS is a long-standing cybersecurity protection mechanism in China. Specifically, each organization making use of or operating connected network should be certified at a specific level based on the level of cybersecurity risk that may arise with its network and be required to comply with the applicable level of cybersecurity protection requirements. A string of national standards and industrial standards are promulgated to provide guidance for the MLPS.

8.10 Penalties

Similar to the GDPR, the PIPL imposes significant penalties for serious breaches that are measured in proportion to the yearly turnover of the institutional offender. For a severe violation of the law or in the absence of required data security measures, fines can be up to the greater of: (i) RMB 50 million (the analogous maximum under the GDPR is EUR 20 million); and (ii) 5% of the offending entity's annual turnover in the preceding year (the analogous maximum under the GDPR is 4% of global annual turnover). Additional administrative sanctions include the warning, confiscation of illegal gains (if any), suspension or shutdown of relevant business, or revocation of operating permit or business license.

The institutional offender may further face civil claims brought by the impaired individuals or public interest litigation brought by the people's procuratorate or other competent institutions if the offender infringes upon the rights and interests of many individuals. In civil proceedings, burden of proof is shifted to the PIP in proving that it has no misconduct.

Criminal liabilities may be triggered in case of malicious acts (such as the illegal sales of personal information) with severe consequence of the breach.

Concluding Comments

The PIPL, DSL and CSL jointly formed the framework of the Chinese privacy and data protection regulatory regimes and brought it to a new age. With that said, many of the detailed rules thereunder are still under deliberation by the Chinese regulators, and it can be anticipated that a string of implementation regulations and measures will be announced and implemented in the foreseeable future. Companies doing business in China are advised to keep close track of the relevant 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, and approved prior to closing;
- a prohibition on monopoly agreements; and
- a prohibition on the abuse of a dominant market position.

Over the years, China competition authority has issued a number of AML rules and regulations. On July 1, 2019, the State Administration for Market Regulation ("**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 October 23, 2020, SAMR also issued the 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 ("**Merger Control Regulation**") which came into effect on December 1, 2020. 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 China competition authority 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
- API industry
- online platform economy;
- antitrust compliance of business operators;
- undertakings' commitment in antitrust cases;

- abuse of intellectual property rights;
- leniency application in cases involving horizontal monopoly agreements,
- determination of illicit gains and fines (draft); and
- application of exemption of monopoly agreements (draft).

On January 2, 2020, for the first time since the AML came into force, China introduced a draft of proposed amendments for public consultation. Additional proposed reforms were later published for public comments on 23 October 2021 ("**Draft Amendments**"), with the final version expected to be issued in 2022.

The Draft Amendments, as published for comments by the legislation body, propose sweeping changes to the AML, including harsher penalties for violations (especially for failure to notify mergers, personal liabilities on responsible senior management) and a mechanism to stop the clock in merger reviews and more clarity on what will be considered anticompetitive, (for example, 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. AML enforcement in China is still rapidly evolving and the information contained in this section is therefore subject 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

9.3.1 Antitrust authorities

On 18 November 2021, China's National Anti-monopoly Bureau ("**AMB**") of SAMR was restructured as the central-level antitrust regulator. The AMB consists of three departments in charge of competition policy cooperation, antitrust enforcement against anti-competitive behaviours and merger review respectively. There are 3 to 6 divisions under each department responsible for different work-streams.

Its predecessor, the anti-monopoly bureau of the SAMR, was established following national institutional reforms in 2018 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.

Compared with its predecessor, the AMB has been elevated to a vice-ministerial level central government authority. This will allow for an increase in staffing and resources. During the AMB inauguration, the leadership emphasized that antitrust enforcement in the areas of platform economy, technology innovation, data security, and daily necessities for consumers would be a key priority.

9.3.2 Enforcement trends

The China competition authority has actively enforced the AML in recent years:

- China continues to actively regulate its tech sector by issuing guidelines for the platform economy.¹ In parallel, the AMB has started to increase enforcement activities against certain strategies long employed by China's Internet platforms/tech companies. As this sector was not previously subject to heavy enforcement, platform operators in China should take the

¹ The finalised Anti-Monopoly Guidelines for the Platform Economy were issued by SAMR on 7 February 2021.

opportunity to assess their conduct; put in place robust compliance programmes, and refresh existing programmes if necessary.

- Notable antitrust decisions include a record high antitrust fine of USD 2.8 billion alongside unprecedented compliance requirements in a milestone abuse of dominance case in 2021, which involved the imposition of abusive exclusivity requirements on in-platform merchants by an online platform business operator. The China competition authority also imposed two significant fines for resale price maintenance, historically subject to strict enforcement, including a record USD 117 million fine for such conduct.
- China has been intensifying the crackdown on merger control procedural violations since late 2020, in particular those involving online platform operators with VIE structures. It has regularly imposed the maximum fine for procedural violations, notwithstanding that investigations did not reveal any competition concerns. The China competition authority has also shown a continuous willingness and preference to impose behavioural remedies to sustain a degree of market competition and supply chain stability. Also in 2021, the China competition authority, for the first time since the AML came into effect, exercised its authority under Article 48 to impose behavioural remedies in addition to a monetary fine of RMB 500,000 in a failure-to notify-investigation.

9.3.3 Compliance programs and credit

The AMB's Anti-Monopoly Compliance Guidelines for Business Operators ("**Antitrust Compliance Guidelines**"), issued in September 2020, urge business operators doing business in China to build a robust antitrust compliance program based on their respective business coverage, scope and industry areas. Key requirements are:

- Leadership commitment - have senior management fully commit to antitrust compliance.
- Adequate resources - establish a department and/or in-house lawyer(s)/compliance officer(s) to be in charge of antitrust compliance.
- Risk assessment and management - conduct internal self-assessment to identify antitrust law risk and consider appropriate mitigating measures (for example, considerations for reporting to SAMR and applying for leniency).
- Implementation and monitoring - ensure that the program is well implemented and monitored (including by establishing an internal reward and punishment system and internal channels for whistleblowers; building up an effective compliance culture; having sufficient resources and capacity for compliance system, and providing antitrust compliance training).

The Antitrust Compliance Guidelines are silent on how such compliance efforts may be credited, and SAMR has not expressly rewarded compliance efforts to date. There would appear to be scope for the authority to consider an effective compliance programme as a mitigating factor in the calculation of fines, in line with the growing number of competition authorities worldwide.

9.4 Merger filings – when are they required?

9.4.1 Filing thresholds

The AML requires transactions qualifying as "concentrations" to be notified to the AMB where, in their last completed accounting year:

- each of at least two "relevant business operators" generated at least RMB 400 million (approx. USD 62 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 RMB 10 billion (approx. USD 1.55 billion) globally or RMB 2 billion (approx. USD 310 million) generated from sales in or into China (excluding Hong Kong and Macau).²

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

Transactions between related parties under the same control, such as reorganizations taking place entirely within a corporate group, are 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 merger 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 the acquirer and the seller (in certain circumstance) to substantial penalties (see "Penalties" below); and
- even if the thresholds set out above are not met, the AMB has the ability to require a filing to be made, either before or after closing. As at the date of issuance of this guide, no public available information indicates that there are cases of the authority initiating investigations concerning transactions below the notification thresholds. However, the AMB 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.

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 implemented or closed until the AMB has completed its review and issued a clearance decision. It is therefore important to address this issue early.

Once a filing is received, the AMB will review the filing and either declare it complete or request further information or clarification (known as the pre-acceptance phase). The AMB may also reject a

² The exchange rate is 1 USD=RMB 6.4515, which is the 2021 average exchange rate.

filing as inadequate. The formal review timetable does not commence until the filing has been declared complete.

The AMB 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.

The majority of cases reviewed under the standard procedure are approved after Day 45 of Phase 2. However, if the transaction raises competition concerns and thus commitments/remedies are required, 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, the authority took 19 months to approve one particular review in 2019.

Under the standard procedure, the AMB will consult with competitors, suppliers, customers and relevant industry associations during the review process. Where objections are raised, parties may need to make additional submissions to the AMB, 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 the AMB; or
- the parties and authority 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 the regulator 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 the AMB will issue detailed rules regulating the "stop the clock" mechanism to avoid unpredictable review timelines.

As of March 1, 2022, there have been 54 conditional clearance decisions and three prohibition decisions. The conditions imposed can be wide-ranging, requiring the disposal of businesses both within and outside China. Behavioural 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 Merger Control Regulation. The rule lays out types of merger review conditions, as well as the process of forming, implementing and monitoring restrictive conditions.

9.5.2 Simplified Procedure

In 2014, the China competition authority introduced the simplified procedure, which intends to expedite the review process for cases raising no major competition issues. The standards for cases qualified for summary procedure are as follows³:

- 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.

Compared to the standard filing procedure, the short form filing procedure has substantially accelerated the merger review process in China for transactions that do not have impact on competition. The pre-acceptance phase in simplified procedure usually takes two to five weeks. Notified transactions agreed by the AMB to review under 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. In 2021, more than 85% transactions were reviewed and cleared under the simplified procedure.

9.5.3 Failure to notify/gun-jumping

The AMB is increasingly taking action against parties to notifiable transactions that fail to notify and jump the gun before clearance is obtained. In 2021 alone, the authority has penalized 107 failure-to-notify cases.

Under the current AML, the AMB may impose a fine of up to RMB 500,000 (approx. USD 77,501)⁴. The AMB 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. As mentioned above, there is only one case where the authority imposed behavioural remedies in addition to a monetary fine of RMB 500,000 in a failure-to-notify-investigation.

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 RMB 5 million for transactions without competition concerns and up to 10% of the sales revenue of the parties in the last year for transactions with competition concerns.

³ Note that the AMB reserves the right not to apply the simplified procedures for exceptional cases (for example, where it is difficult to define the relevant market, or the concentration may have an adverse impact on consumers or relevant business operators), even if a transaction satisfies one of the above mentioned conditions.

⁴ The exchange rate is 1 USD=RMB 6.4515, which is the 2021 average exchange rate.

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 Draft Amendments introduce a separate prohibition on organizing or assisting others to enter into monopoly agreements. Fines for this type of 'facilitation' violation would be the same as those for parties to monopolistic agreements. The newly added provision could be used against "hub-and-spoke" cartels where the "hub" is not directly involved as a member of the cartel or active on the relevant market but coordinates the conduct of the cartel members.

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 RPM has become a high priority of China antitrust authorities since 2013. Recent RPM enforcements in China include fine of \$117 million (3% of its turnover in China in 2020) against a pharmaceutical group in April 2021 for distribution contracts including RPM clauses; written and oral notice of price adjustment, and a punishment mechanism for distributors not following the instruction. In September 2021, a fine of \$45.63 million (3% of its turnover in China in 2020) was imposed against an electronic-products manufacturer for distribution contracts including RPM clauses and price adjustment policies to fix discounts offered to customers by distributors.

Separately, the Draft Provisions on the Administrative Punishment of Price-related Violation under the Pricing Law, issued in late 2021, signal that China antitrust authorities may be ready to take active Pricing Law enforcement, in addition to the AML, to crackdown on illegal pricing behaviours during and after the COVID-19 pandemic. There are some areas of overlap between the two laws. Notably, the Pricing Law imposes a lower threshold for findings of certain violations - for example, as there is no requirement to establish "dominance" to penalise price dumping and certain price discrimination under the Pricing Law. It is unclear how any such divergence will be addressed in practice.

9.6.1 Exemptions

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 the AMB, would qualify for an exemption. The AMB is currently working on the draft Guidelines regarding Exemption of Monopoly Agreements, which aims to provide general conditions and procedures for application of exemptions.

The Draft Amendments also seek to introduce a presumption of legality for certain types of cooperation between businesses whose market share(s) are below prescribed thresholds. Note that even with the new presumption, the authority could still take enforcement action against conduct within the safe harbour where it has evidence of harm to competition.

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. As previously noted, the China competition authority imposed a record high antitrust fine of USD 2.8 billion for such conduct in the platform/digital economy sector in 2021.

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 AMB 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 violation of the AML

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 77,501) are available, plus the ability for the AMB to order the annulment or unwinding of the transaction.

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

Violation	Fines under the AML	Fines proposed in the Updated Amendment
Merger control violations <ul style="list-style-type: none"> • Failure to notify • Implementing pre-clearance (gun-jumping) • Breach of remedies in a conditional approval decisions; OR • Implementing a deal that was blocked 	Up to RMB 0.5 million / USD 0.08 million	Concentrations with anti-competitive effect: Up to 10% of the turnover in last year. <hr/> No anti-competitive effect: Up to RMB 5 million / USD 0.77 million
Monopoly agreements that have been entered into but yet to be implemented	Up to RMB 0.5 million / USD 0.08 million	Up to RMB 3 million / USD 0.46 million
Where the relevant undertaking does not generate turnover in last year	N/A	Up to RMB 5 million / USD 0.77 million
Where the undertaking's legal representative, persons in charge and those most directly responsible are personally responsible for entering into the monopoly agreement	N/A	Up to RMB 1 million / USD 0.15 million
Violation by a trade association for organizing or facilitating a monopoly agreement	Up to RMB 0.5 million / USD 0.08 million	Up to RMB 3 million / USD 0.46 million
Obstructing an investigation, refusing to provide required information, destructing	Fines for individuals: Up to RMB 0.1 million / USD 0.02 million	Fines for individuals: Up to RMB 0.5 million / USD 0.08 million

Violation	Fines under the AML	Fines proposed in the Updated Amendment
evidence, providing false information, etc.	Fines for the company: RMB 0.2 million-1 million / USD 0.03-0.15 million	Fines for the company: Up to 1% of the turnover in last year Where the relevant undertaking does not generate turnover in last year or the turnover is difficult to calculate: Up to RMB 5 million / USD 0.77 million
Where the circumstances of violation of the AML are particularly serious, the impact is extremely bad, and the violation results in serious consequences	N/A	2-5 times the original amount of the fine under the AML
Where the violation of the AML constitutes a crime	N/A	The criminal liabilities will arise

9.9 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. The antitrust administrative enforcement is not a precondition for bringing private litigation before a court under the AML regime.

The volume and significance of private antitrust litigation in China have grown steadily in recent years. Since the creation of the dedicated intellectual property appellate tribunal within the Supreme People's Court ("**SPC**") in 2019, an increasing number of judgments have been handed down by the highest court to provide further guidance on private antitrust litigation. We expect that the SPC will provide a more prominent role in private antitrust enforcement given its exclusive jurisdiction over all antitrust-related appeals.

While private litigation remains challenging for plaintiffs due to the complexity and high evidentiary burden, there have been a number of successful claims in the past few years. The SPC is expected to issue a second set of judicial interpretation which is expected to introduce pro-plaintiff measures, such as lowering the burden of proof and improving plaintiffs' access to evidence.

Separately, business operators that have been subject to administrative penalties for antitrust violations (i.e. monopoly agreement or abuse of dominance), can also pursue administrative litigation if they disagree with the administrative penalties imposed by the competition authority. However, for merger control decisions made by the AMB, the business operator concerned who disagrees with such decision should apply for an administrative review first and then proceed with administrative litigation if it still disagrees with the 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. China also has joined WIPO's Hague System for the International Registration of Industrial Designs, which will come into effect in May 2022.

10.1 Patents

The Patent Law of the People's Republic of China (the "**Patent Law**") was amended in 2020 and came into effective on June 1, 2021. The amended Patent Law introduced multiple new mechanisms and regulations including early resolution mechanism for drug patent disputes ("**Patent Linkage**"), patent term extension, application and protection of partial design, open licensing, punitive damages, which are of milestone significance to the improvement of China's patent protection. The current Implementing Regulation supplementing the Patent Law (Revised in 2010) is undergoing revisions to supplement the amended Patent Law.

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 January 15, 2021. This amendment focused on chemistry and biotechnology inventions, clarified issues including the novelty of a compound and post-filing data submission. The Supreme People's Court ("**SPC**") also issued Provisions (I) on Several Issues concerning the Application of Law in the Trial of Administrative Cases with Respect to Granting and Confirmation of Patent Rights (the "**Provisions (I)**") which took effect on September 12, 2020, to address patent prosecution issues.

On February 5, 2022, China deposited its instrument of accession to the Hague Agreement concerning the International Deposit of Industrial Designs ("**Hague System**") and became the 77th member thereof. This means non-resident will be able to secure international design protection in China, and companies and designers in China will be able to quickly and easily seek international protection of their designs in as many of the 94 countries covered by the Hague System as desired. China amended its Patent Law to introduce partial design protection, extend protection term to 15 years and allow domestic priority for design patent to keep in line with the international practice.

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 26, 2018. The Congress Decision changed the appeal jurisdiction of technology-related IP litigation. Since January 1, 2019, the SPC IP Tribunal instead of the Provincial High People's Courts hears an appeal of technology-related IP cases, including invention and utility model patents, new variety of plants, layout design of integrated circuits, know-how, computer software and antitrust issues. Further, the SPC established four IP courts in Beijing, Shanghai, Guangzhou and Haikou, and 26 IP tribunals (up to Feb 12, 2022) in certain municipal intermediate courts across the nation to hear the first instance of such cases. More IP tribunals may be set up in the future. These jurisdiction adjustments are aimed at concentrating above mentioned types of IP cases and improving the consistency of judicial practice.

The SPC has also issued and amended several judicial interpretations related to patent dispute resolution, including: (1) Several Provisions on Technical Investigators' Participation in the Trial of Intellectual Property Cases; (2) Interpretations II on Several Issues concerning the Application of Law in the Trial of Patent Disputes Cases (2020 Amendment); (3) Several Provisions on Issues concerning the Application of Law in the Trial of Cases on Patent Disputes (2020 Amendment); (4) Provisions (I) of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Administrative Cases Involving the Grant and Confirmation of Patents; and (5) Provisions on Several Issues concerning the Application of Law to the Trial of Civil Dispute Cases Related to the Patent

Right Pertaining to Drug under Application for Registration. These judicial interpretations further supplement the legal framework on issues related to patent disputes, including patent linkage, 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 Measures for Administrative Decisions on Major Patent Infringement Disputes. In addition, CNIPA sets up 52 IP Protection Centres across the nation to facilitate patent prosecution and enforcement⁵, and one Overseas IP Enforcement Centre to provide guidance and assistance to companies for handling overseas disputes.

China adopts a "first-to-file" rather than "first-to-invent" system for patent prosecution. There are three types of patents: inventions of 20 years duration from a filing date; utility models of 10 years duration; and designs of 15 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 a patent application in China may claim priority of an application first filed in another Convention-member country within 12 months for an invention or utility model patent and 6 months for a design before the filing date of this first filed application.

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. A design patent protects any novel shape and/or pattern, or the combination of color with shape and/or pattern of a whole or part of a product.

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 anywhere around the globe before the filing 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 ones for inventions. Designs also need to possess "obvious distinctions" from 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 examinations. An applicant may request re-examination against a rejection by CNIPA. The re-examination decision can be subject to judicial review before Beijing IP Court for the first instance and further SPC IP Tribunal for the second instance. From the grant date, any party may apply to the CNIPA to invalidate the patent based on certain patentability issues. A CNIPA's invalidation decision can also be subject to judicial review before the Beijing IP Court and later SPC IP Tribunal.

Foreign applicants must submit their patent applications in China through a licensed Chinese patent agent, and cannot apply directly to the CNIPA by themselves.

Under the Patent Law, inventions that are completed in the territory of mainland China need first to be filed in China or alternatively 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 or laws 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

⁵ https://www.cnipa.gov.cn/art/2021/7/13/art_53_165864.html

employer. The right to apply for patents 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.

The establishment of Patent Linkage is another most significant milestone of the patent system. It addresses the patent protection for branded drugs and the timely market approval of generic drugs. Article 76 of the Patent Law introduces the framework of Patent Linkage. The Measures for the Early Resolution Mechanism for Drug Patent Disputes (pilot version) issued by CNIPA on July 4, 2021, together with other implementing rules consecutively issued by the National Medical Products Administration ("**NMPA**") and the SPC further supplement details to complete Patent Linkage system. Under current mechanism, only chemical drugs can enjoy the full benefits of Patent Linkage, which leaves biologic drugs and traditional Chinese medicines with limited protection. Use patents for all the three types of drugs are eligible for Patent Linkage. Both civil action and administrative action are available to address Patent Linkage disputes over chemical drug related patents.

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 loss suffered by the patent owner, the gain reaped by the infringer or the license fee is difficult to determine from RMB 30,000 to RMB 5,000,000 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 Patent Law also sets out open licensing with the latest amendment in 2021, where a patentee can voluntarily apply to CNIPA to make an announcement thereon and implement open licensing, open licensing shall be non-exclusive.

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 CNIPA. CNIPA has taken over the function of the now-defunct TRAB.⁶

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 CNIPA. 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 preliminarily granted 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, administrative penalties would be applied to those bad-faith applicants. The entities submitting malicious trademark applications that harmed public interests would also be listed in the Illegal and Dishonest Acts List and marked in their credit records. In March 2021, the Special Action

⁶ <http://www.sipo.gov.cn/zfgq/1135993.htm>

Plan for Cracking down on Malicious Trademark Squatting was initiated by CNIPA to practically step up efforts to combat malicious 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 CNIPA 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.

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 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. Trademark owners can seek recognition of well-known status of their marks during in civil lawsuits.

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 RMB 5,000,000 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 RMB 50,000, AMRs can impose a fine of up to RMB 250,000. Where the illegal turnover is over RMB 50,000, 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 gain from the infringing actions exceed RMB 50,000.

On December 12, 2021, CNIPA issued the Judgment Standards for General Trademark Violations⁷. With the purpose of strengthening trademark administration, unifying law enforcement standards, and enhancing law enforcement level, the issued Standard provides detailed explanations on nine specific violation conducts of the trademark administration order.

The 11th edition, Version 2022 of the Nice Classification, entered into force on January 1, 2022⁸. The Trademark Office has made corresponding changes to the Classification Index of Similar Goods and Services, which took effect on January 1, 2022⁹. 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 third amendment of the Copyright Law was made in 2020 with effect from June 1, 2021 (the "**2020 Amendment**") and the Implementing Regulations were revised with effect from January 1, 2021.

The 2020 Amendment 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) audio-visual 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.

Under the 2020 Amendment, the approach used to determine on whether a work is subject to copyright protection has been changed. The previous exhaustive approach has now replaced by an open-ended approach. Further, the category of "audio-visual works", which covers a broader spectrum of works has been included in lieu of the previous "cinematographic works and works created in a way similar to cinematography" category. This revision leaves room for the emergence of a new type of work in light of rapid technological development. In addition, the 2020 Amendment has strengthened copyright protection on the internet, increased the maximum statutory damage and provided punitive damages.

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,

⁷ https://www.cnipa.gov.cn/art/2021/12/16/art_75_172237.html

⁸ <https://www.wipo.int/classifications/nice/en/>

⁹ http://sbj.cnipa.gov.cn/tzgg/202112/t20211227_338446.html

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 2020 Amendment, 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 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 2020 Amendment 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 RMB5,000,000 may be awarded under the amended Copyright Law.

The National Copyright Administration ("**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 2020 Amendment empowers the local enforcement authorities to fine infringers up to five times the revenue generated from the illegal transactions, or up to RMB 250,000 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 RMB 50,000, the illegal profits generated exceed RMB 30,000, or the unauthorized units reproduced exceed 500 units. For enterprise offenders, the thresholds are three times the above amounts. The longest-term of imprisonment of the Crime of Copyright Infringement raised from 7 to 10 years under the amended Criminal Code with effect from March 1, 2021.

10.4 Internet

Article 12 of the amended 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 ISPs' 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 RMB 250,000 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, i.e. 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. Digitalization has also been included in the amended Copyright Law as a mean of making copies of work under the provision of the right of reproduction. The State AMR issued the Provisions on Prohibition of Unfair Competition on the Internet (Draft for Public Comments) ("**Draft for Comments**") as a necessity in the digital era by updating the regulatory model to combat unfair competition and monopoly activities, and seek for public comments in August 2021. The document states that business operators shall not adopt nine types of acts such as "engaging in fake transactions or organizing false transactions" to make false or misleading advertising about themselves or their products' sales status, transaction information, operating data, and user evaluations, thereby deceiving and misleading the relevant public. It also underlines that, business operators shall not use data, algorithms and other technical means to commit traffic hijacking, interference, malicious incompatibility and other acts by influencing user choices or other ways, hindering or damaging the normal operation of network products or services legally provided by other business operators.

The China Academy of Telecommunication Research's annual report for Internet copyright protection in 2020 revealed that China copyright enforcement authorities investigated and penalized a total of 724 internet copyright infringement cases in 2020. Of these 724 cases, 177 cases were transferred to the judiciary for criminal treatment. In total, around 3.23 million infringing links were removed¹⁰.

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. The amended Copyright Law further prohibits activities that deliberately manufacturing, importing and providing to others with devices or components used mainly for circumventing or sabotaging any technical measures, or deliberately providing technical services to others for circumventing or sabotaging any technical measures. Likewise, the Software Regulations outlaw the removal or

¹⁰ See the news report at <https://www.ncac.gov.cn/chinacopyright/contents/12639/354457.shtml>

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, 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 Implementing Rules of China ccTLD Registration along with China ccTLD Dispute Resolution Policy and China ccTLD Dispute Resolution Policy Rules (collectively as the "**ccTLD Rules**"), revised by the China Internet Network Information Center (the "**CNNIC**") on June 18, 2019, on purpose to standardize the services for and management of country code top-level domain names ("**ccTLDs**").

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 ccTLD Rules cover applications to register domain names with ".cn" as the top-level domain and Chinese-language domain names administered by the CNNIC. Any natural person or organization that can independently assume civil liability may apply for domain name registration. Applications should be submitted in writing or electronic form. 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 ccTLD Rules have strengthened the network and information security through explicit provisions on obligations of Registrar.

Domain name disputes that arise due to the registration or use of ".cn" domain names or Chinese-language domain names under the administration of the CNNIC is also governed by the ccTLD Rules, which focus on the procedural rules for registration and dispute resolution. 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 on December 2020 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. In addition, punitive damages could be implied against malicious and severe infringement.

10.7 Trade secrets

A trade secret is defined in the Law of the PRC Anti-Unfair Competition (the "**Anti-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. The definitions of technical information and business information are further stipulated in the Provisions on Several Issues Concerning the Application of the Law in the Trial of Civil Trade Secret Infringement Cases, effective from September 12, 2020 (the "**Provisions**"). The technical information refers to the information of technique-related structure, raw materials, components, formulas, materials, samples, styles, new plant variety breeding materials, processes, methods or steps, algorithms, data, computer programs and relevant documents, etc. while the business information includes business activity-related creativity, management, sale, finance, planning, sampling, bidding and tendering materials, customer information and data, etc.

A non-exhaustive list of measures to maintain confidentiality is set forth in the Provisions, and such measures include (i) execution of a non-disclosure agreement or stipulating the obligation of confidentiality in a contract; (ii) putting forward confidentiality requirements on those who can access and acquire trade secrets, including its employees, former employees, suppliers, customers and visitors, by means of articles of association, training, rules and regulations, written notification, etc.; (iii) restricting visitors' access to, or conducting differentiated management of secret-involved factory buildings, workshops and other production and business premises; (iv) differentiating and managing trade secrets and the carriers thereof by means of marking, classifying, isolating, encrypting, and sealing them, and by limiting the scope of personnel that can access or acquire them; (v) taking

measures to prohibit or restrict the use of, access to, storage in or reproduction from computer devices, electronic devices, network devices, storage devices, software, etc. that can access or acquire trade secrets; (vi) requiring departing employees to register, return, remove or destroy trade secrets and the carriers thereof accessed or acquired by them, and continue to assume the obligation of confidentiality.

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.

Trade secrets are also protected under the Criminal Law. According to the Decision on revising the standards for filing and Prosecuting Criminal cases involving infringement of trade secrets jointly issued by the Supreme People's Procuratorate and the Ministry of Public Security in September 2020, misappropriation of a trade secret causing loss in excess of RMB 300,000 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 RMB 2.5 million are considered exceptionally serious and will trigger criminal liabilities with an imprisonment sentence of three to ten years and fines. It is also added by the amended Criminal Code 2020.

The Criminal Code also sets out the criminal penalties of corporate espionage stipulating that whoever steals, detects, buys or illegally provides business secrets for any foreign agency, organization or person shall be sentenced to fixed-term imprisonment of not more than five years and/or fines; or if the circumstances are serious, such person shall be triggered criminal liabilities with an imprisonment sentence of not less than five 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. In practice, the SPC confirmed that for a fact such as "not known to the public", which is difficult for a trade secret owner to prove, the burden of proof should be appropriately reduced according to Article 32 of the 2019 Anti-Unfair Competition Law.

The SPC also ruled the highest amount of damages (RMB 159 million) award in one of its cases in 2021 which has set up a new record of the highest damages for trade secret misappropriation.

10.8 Implementation of Punitive Damages

The Interpretation on Application of Punitive Damages in the Trial of Civil Intellectual Property Infringement Cases¹¹ (the "**Interpretation**"), which works in tandem with the punitive damages provisions in the laws of copyright, trademark, patent and anti-unfair competition, was published and became effective from March 3, 2021. The Interpretation clearly stipulates the scope, factors that the court should consider (such as the seriousness of the circumstances, the intention of the defendant), calculation method, and other aspects of the application of punitive damages. The Interpretation

¹¹ <https://www.court.gov.cn/fabu-xiangqing-288861.html>

provides detailed clarifications to further ensure the effective implementation of the punitive damages system.

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. The Chinese Government released a 15-year plan (2021-2035) on the development of IP (the "**Plan**") in September 2021. The Plan states that China aims at ranking among the top players in the world in terms of IP competitiveness with a comprehensive IP system by 2035. To achieve this, China will enhance its IP protection. In the meantime, it is acknowledged that new challenges will emerge when new industries and sectors arise in light of advancement in areas such as internet-related technology, big data, artificial intelligence and block chain.

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 can only be 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) 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.

The Chinese authorities do not impose mandatory requirements for Hong Kong, Macau and Taiwan residents ("**HMT residents**") to be registered as representatives. Nevertheless, whether HMT residents have to be employed by the foreign parent company (which is more common) or are allowed to be employment by local labor service companies and seconded to work at the representative offices is not clear under current law.

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, enforcement of the requirement for foreign employees to be enrolled in the social insurance scheme is not very strong in some cities. Currently 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) continuously in a single trip or cumulatively in a calendar 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 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 can be exempted. 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.

In addition, some expatriate professionals, such as lawyers and reporters, are subject to additional Work Permit approvals.

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. Currently, there is no mandatory immigration and labor registration requirement for HMT residents working in China. Eligible HMT residents may opt to apply for mainland Residence Permits for HMT residents and enjoy the same

rights as mainland Chinese residents in accessing 18 types of schemes and services, including participation in local social insurance, use of housing fund and other benefits according to the law of their residence. The implementation will vary by locality due to the local introduction of substitute policies and measures to supervise the employment of HMT residents.

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 and/or specified zones.

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 for a minority shareholder (i.e., a shareholder holding less than 25% equity interest in a PRC enterprise) on sale of equity interest of PRC enterprise the value 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 or more 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 in a tax year, if the non-domiciliary (i) is absent from China for more than 30 days in a single trip in a tax year within a consecutive six-year period immediately preceding the respective tax year, or (ii) stays in China for less than 183 days in a tax year within such consecutive six-year period. Please note that the consecutive six-year period starts from a year in or after 2019.

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% or 9% for the sale or importation of goods, depending on the nature 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 and on business account books. 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 16 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; solid wood flooring; batteries; and coatings.

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. In addition, the Two-Pillar Solution under the OECD/G20 Inclusive Framework on BEPS is also 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 OECD model treaty and the United Nations model 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. Although the number of cases submitted to litigation and arbitration declined in 2020 due to COVID-19, the number of litigation cases in 2021 has resumed its upward trend and reached a record high. 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 in recent years, however, due to COVID-19, the number of cases in these areas, with the exception of insurance disputes, declined in 2020.

Meanwhile, the issues faced by disputing parties have become more complex. China's courts at all levels, including the Supreme People's Court ("**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.

In addition, with the implementation of the Civil Code, the SPC has also sorted out the then existing judicial interpretations systematically, some of which have been directly repealed or replaced by new judicial interpretations, and some of which have been amended, or incorporated in the Civil Code. With regard to investment disputes, the SPC has also formulated relevant judicial interpretations to further clarify certain issues in areas such as guarantees, bankruptcy, shareholder representative actions and misrepresentation. The SPC has also issued judicial interpretations to the General Rules Part of the Civil Code to guide people's courts at different levels to that the lower court decisions are made consistently and correctly.

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. For certain cases, the relevant people's courts shall have exclusive jurisdiction, for instance: (1) a litigation involving a dispute over immovable property shall come under the jurisdiction of the people's court of the place where the immovable property is located; (2) a litigation involving a dispute arising from port operations shall come under the jurisdiction of the people's court of the place where the port is located; and (3) a litigation involving a dispute over an inheritance shall come under the jurisdiction of the people's court of the place of domicile at the time of death of the person whose property is inherited or where the major portion of the estate 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 RMB 300 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 enforced 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, Beijing Financial Court in March 2021) and specialized financial litigation tribunals within courts in some cities (such as Shenzhen, Nanchang, Guiyang, Shijiazhuang, Nanjing, etc.), which specialize in hearing financial civil and commercial cases (such as securities, trust, insurance, bank finance, etc.). China also established several Free Trade Zone Courts in some major cities (Such as Guangzhou, Chendgu, Zhengzhou, Chongqing, etc.) and free trade zone tribunals (Such as Shanghai, Tianjin, etc.), 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. However, in proceedings before the CICC, notarization and authentication of foreign evidence is not mandatory, and, with the consent of both parties, the parties may not provide Chinese translations of English-language evidence.

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 ("the facts are evident, the relationship of rights and

obligations is definite and the disputes are minor") case, or based on the agreement of the parties , the basic level court can apply a "simplified procedure", with a single judge presiding.

In year 2021, China amended the Civil Procedure Law, after a 2-year pilot programme aiming to explore new approaches that could accelerate civil litigation procedures and reduce the workload caused by the rapid growth of civil disputes. Since January 1st 2022, we can see significant changes, for example: all proceedings, including hearings, may be conducted online and all litigation document may be properly served by electronic means, upon consent from the involved parties; more cases with clear facts and legal relation will be tried by one single judge instead of a 3-judge panel, including controversial first instance cases before the courts of basic level, as well as appealing cases before the intermediate court with consent from both parties; for some small monetary claims applying "simplified procedure", the judgement of the first instance shall be final, but this special mechanism will not apply to foreign-related cases.

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 mostly 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 despite ongoing legislative discussion, 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.

It is also noteworthy that, the Arbitration Law of the People's Republic of China (Amendment) (Draft for Public Comments), drafted by the Ministry of Justice and published on July 30, 2021, adds a provision for "interim arbitration", among other significant changes, which makes the future implementation of "interim arbitration" in China a realistic possibility.

There are about 270 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. In general, the award can 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 arbitrators ask for bribes, take bribes, engage in malpractice for personal gain and bend the law in the arbitration of the case; or (v) the arbitration award violates the public interest. Two extra circumstances apply only in challenging arbitral award of dispute without foreign elements: (i) the evidence on which the award is based is forged; (ii) the other party conceals the evidence enough to affect the award.

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 State Administration for Market Regulation ("**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 within the prescribed time limit, 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 repay his or her borrowings for living in hardship, has no source of income, and has lost his or her 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. There is a notable development in recent years indicating the PRC courts' attitude towards arbitration awards rendered by foreign arbitration institutions in China. In 2020, the Guangzhou Intermediate People's Court issued a court decision in the "Brentwood case" where Brentwood applied to enforce an award rendered by the International Chamber of Commerce in Guangzhou. The Guangzhou Intermediate People's Court, under the guidance of the SPC, ruled that the award should be considered a foreign-related PRC award and therefore, should be enforced in accordance with the PRC Civil Procedure Law. Prior to the "Brentwood case", in the absence of legal provisions, the PRC courts tended to determine such awards as "non-domestic awards" which shall be enforced according to the New York Convention¹². This is the first-ever case where a PRC court determines the nationality of an award rendered by a foreign arbitration institution within the territory of China to be a

¹² However, the problem with enforcing non-domestic award in China is that when acceding to the New York Convention, China has reserved that the New York Convention only applies to "*the recognition and enforcement of awards made only in the territory of another Contracting State*". It has been argued that this reservation not only excludes the application of New York Convention to the arbitral award made in non-contracting states, but also excludes non-domestic awards where the state making the award and the state where recognition and enforcement of the award is sought are the same state.

PRC award, bringing it closer to the international practice.¹³ 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 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.

¹³ Under the PRC Civil Procedure law, a foreign award is referred to as award issued by foreign arbitration institutions (i.e. the nationality of the award is decided by the location of the arbitration institution and an award made by foreign arbitration is considered a foreign award despite that the seat is in the PRC). This approach is different from that under the New York Convention where a foreign award means award made in the territory of a state other than the state where the recognition and enforcement of such award is sought. This means that the nationality of the award is determined by the seat of the arbitration.

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.

13.2.2 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, or grant such injunctive relief in course of foreign arbitration procedure in areas other than maritime arbitration proceeding. At present, one 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 2021 Corruption Perception Index¹⁴ ranked China at #66 out of 180 countries. Although China improved 12 places from 2020 to 2021 and its scores increased from 42 to 45, there are still various challenges to manage the anti-bribery and other compliance risks and companies doing business in China are advisable to be continually vigilant and regularly review their business practices and upgrade their compliance policies as needed. 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) first added the prohibition on the giving of money or property to an incumbent or former public official, a person related to or 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 entities for the purpose of seeking improper interests and benefits. Under the AUCL¹⁵, commercial bribery refers to a business operator who uses cash, property or other means to seek transaction opportunities or competitive advantages 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 Bribery¹⁶ also describes 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 Measures for the Administration of the List of Dishonest Parties Committing Serious Illegal Activities ("**Administration Measures**"). The Administration Measures, which took effect on September 1, 2021,¹⁷ applies to parties committing certain illegal activities in China, including state-owned enterprises, private companies and foreign-invested enterprises registered in China, 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 government

¹⁴ Transparency International's 2021 CPI was released in January 2022.

¹⁵ 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.

¹⁶ Please note that the Interim Provisions on Prohibition of Commercial Bribery has not been revised in accordance with the most updated version of AUCL.

¹⁷ The blacklisting mechanism was stipulated by the SAMR under its "Interim Measures for the Administration of the List of Dishonest Enterprises Committing Serious Illegal Activities" (effective from 1 April 2016 to 1 September 2021), which has been replaced by the Administration Measures.

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 do not result in significant administrative penalties under the AUCL, e.g. where the bribe amount is relatively small.

In 2021, China has strengthened its commitment to investigate commercial bribery offenses, as indicated by two legislative developments — Guiding Opinions on Establishing a Mechanism for Third-Party Supervision and Evaluation of the Compliance of Enterprises Involved in Cases (for Trial Implementation) ("**Third-Party Mechanism Guiding Opinions**")¹⁸ and Opinions on Further Promoting the Investigation of Bribery and Acceptance of Bribes ("**Opinions on Dual Investigations**").¹⁹ The Third-Party Mechanism Guiding Opinions is the first time China has implemented a comprehensive non-prosecution compliance mechanism for third-party supervision and evaluation of enterprises implicated in criminal cases ("**Third-Party Mechanism**"). The Third-Party Mechanism is intended to mitigate the negative consequences of bribery violations and protect an enterprise's rights and interests pending the prosecution decision. As to the Opinions on Dual Investigations, it demonstrates a shift from the traditional approach taken by Chinese authorities where investigations primarily focused on bribe recipients. It is expected that both bribe givers and bribe recipients will be the targets of investigations going forward.

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 any aggravating factors²⁰) for individual bribe-givers, RMB200,000 (or RMB100,000 with any aggravating factors²¹) for corporate bribe-givers, and RMB30,000 (including 10,000 with any aggravating factors²²) for bribe-recipients. Likewise, the criminal threshold for prosecution of commercial bribery is

¹⁸ Third-Party Mechanism Guiding Opinions was issued jointly issued by Supreme People's Procuratorate, Ministry of Justice, Ministry of Finance, State Administration for Market Regulation, Ministry of Ecology and Environment, State-owned Assets Supervision and Administration Commission of the State Council, State Tax Administration, All-China Federation of Industry and Commerce, and China Council for the Promotion of International Trade on 3 June 2021.

¹⁹ Opinions on Dual Investigations was issued in September 2021

²⁰ 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 or 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.

²¹ These aggravating factors include (a) the giver offers bribes for the purpose of securing illegal benefits; (b) the giver offers bribes to more than three officials; (c) the giver offers bribes to senior officials in the Communist Party of China or governments, judicial officials and administrative law enforcement officials; and (d) the bribery act has caused huge losses to the interests of the State or society.

²² These aggravating factors include (a) the recipient has been subject to discipline of the Communist Party of China or administrative sanctions, due to corruption, bribe-taking or misappropriation of public funds; (b) the recipient has been subject to criminal prosecution due to an intentional offence; (c) the illicit money or goods are used for illegal activities; (d) the recipient refuses to confess the whereabouts of the illicit money or goods, or refuses to cooperate in the recovery of the illicit money or goods, having resulted in the inability of the recovery; (e) the bribery has caused dreadful influence or other serious consequences; (f) the recipient has solicited bribes multiple times; (g) the bribery is for the purpose of securing illegitimate benefits for a third party, having caused losses to public property or the interests of the State or the people; and (h) the bribery is for the purpose of securing promotion or change of position for a third party.

RMB60,000 for individual bribe-givers, RMB200,000 for corporate bribe-givers, and RMB60,000 for bribe-recipients. However, a 1995 internal regulation applicable to public officials of the 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 in the gift if the cumulative value of all the gifts received by the public officials exceeds 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 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 provides 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 prohibits donations to these entities to be used for any illegal or commercial purpose, or as commercial bribery or an incentive to purchase the goods.

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 incur 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.

Notably, the 11th Amendment to the Criminal Code (effective from March 1, 2021) has increased the sentencing of commercial bribery recipients which is now similar to official bribery. Specifically, the commercial bribery recipients will be subject to: (1) up to 3 years imprisonment or criminal detention and fine if the bribe amount is "relatively large"; (2) between 3 to 10 years imprisonment and fine if the amount of the bribe is "large" or the situation is "serious"; or (3) more than 10 years imprisonment or life imprisonment and fine if the amount of the bribe is "extremely large" or the situation is "extremely serious".

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 the offender 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)²³ 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

²³ 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.

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 investigation.

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 has exercised due control over its employees by means of a compliance program or otherwise, it 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.

More importantly, China has taken its first step toward the establishment of a "compliance program for non-prosecution". In April 2021, the Supreme People's Procuratorate ("**SPP**") announced a *Pilot Program on Corporate Compliance Reform* (the "**Pilot Program**"), which has been implemented in 10 provinces and municipalities²⁴. The Pilot Program provides that in criminal cases involving enterprises, the procuratorate can encourage enterprises to undertake and implement certain compliance commitments. The procuratorate/court may make decisions of non-detention, non-prosecution, or mitigated penalties taking into consideration the level of the compliance commitment and its results.

Further, as mentioned above, another important development is the Third-Party Mechanism implemented by China in June 2021. The Third-Party Mechanism provides a framework for evaluating the compliance status of enterprises and encourages enterprises to operate in a legitimate and compliant way. Further, the evaluation results of the Third-party Mechanism provide an important reference for procuratorial authorities to decide how they may want to proceed with the handling of alleged violation of compliance law case and its enforcement outcome. For example, a positive evaluation result may lead to a less severe enforcement outcome for the implicated enterprise.

Therefore, the recent legislative developments suggest that China is committed to building a comprehensive anti-corruption regime. It would be advisable for companies doing business in China to review their compliance programs by taking into consideration the guidance provided by the Third-Party Mechanism.

14.9 Whistleblowing

Chinese laws provide Chinese citizens and entities with the right (and a general obligation) to report crimes including 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 expose to the risk of 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 programs are aligned with standards laid down by

²⁴ These provinces and municipalities include Beijing, Liaoning, Shanghai, Jiangsu, Zhejiang, Fujian, Shandong, Hubei, Hunan and Guangdong.

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. Financial Services Regulatory

15.1 Who regulates banking and financial services in China?

In the past, the supervision over the banking, securities and insurance industries was all carried out by the central bank of China, that is, the People's Bank of China ("**PBOC**"). With the establishment of the China Securities Regulatory Commission ("**CSRC**") in 1992, the China Insurance Regulatory Commission ("**CIRC**") in 1998 and the China Banking Regulatory Commission ("**CBRC**") in 2003, the regulatory and supervisory functions of the three industries have been officially taken over from the PBOC and assumed by these respective authorities. In 2004, the CSRC, CIRC and CBRC entered into the Memorandum of the Three Financial Supervisory Commissions concerning the Division of and Cooperative Supervision over the Financial Industry, which clarified the division of the regulatory and supervisory functions of the three industries. In 2018 the CBRC and CIRC merged, and the China Banking and Insurance Regulatory Commission ("**CBIRC**") was formed to regulate both banking and insurance industries.

China has a civil law legal system based largely on the continental model, which mainly includes: (a) laws at the state level; (b) regulations published by the State Council; (c) local regulations; and (d) rules published by the governmental agencies.

With few exceptions, foreign investors are generally required to obtain appropriate approvals from competent Chinese regulators before they can set up a business presence or carry on business or marketing activities in China.

China has two regulators responsible for the authorization and supervision of banks, insurers, securities firms and other financial institutions. The allocation of responsibilities between the CBIRC and the CSRC is as follows:

- The CBIRC is responsible for supervising banks, finance companies, trust companies, financial lease companies, financial assets management companies, consumer finance companies, auto finance companies, other deposit-taking financial institutions, insurance companies, and other insurance-related institutions in China.
- The CSRC is responsible for supervising securities products and services providers in China, such as listed companies, securities companies, securities investment fund management companies, and stock exchanges.

The PBOC also plays an important role in supervising the financial services, such as making the monetary policies and supervising the interbank bond market and interbank clearing system.

Non-financial institution payment service providers ("**Payment Service Providers**") in China are regulated and supervised by the PBOC. In 2010, the PBOC started to allow Payment Service Providers to operate upon securing a payment service permit. The PBOC is also responsible for regulating anti-money laundering and anti-terrorism financing activities in China. Financial institutions and Payment Service Providers are required to develop and implement robust and effective internal control policies against anti-money laundering and anti-terrorism financing activities and report any such cases to the PBOC. In case of any non-compliance, the PBOC may impose penalties (including warning and monetary fines).

15.2 What are the main sources of regulatory laws in China?

The Chinese legislative regime includes the following:

- Laws that are promulgated by the National People's Congress or the Standing Committee of National People's Congress

- Administrative regulations that are published by the State Council
- Local regulations that are published by the local People's Congress or the Standing Committee of the local People's Congress
- Rules that are published by the ministries, commissions and other governmental authorities at the central level or the local government

The Supreme Court of the PRC may publish judicial interpretations on certain specific issues from time to time. Technically speaking, such judicial interpretations are not "laws" under the Legislation Law, per se, but are widely complied with by the governmental authorities and the courts hence from a practical point of view are usually considered as one of the sources of laws.

15.3 What types of activities require a license in China?

PRC regulators oversee a broad range of activities, as follows:

- Setting up a bank would require approval from the CBIRC.
- A bank would need to apply for a separate CBIRC approval for certain business activities, such as issuing bankcards, acting as custodian for securities investment funds, derivative business, electronic banking, foreign exchange business, and wealth management.
- Setting up an insurance company, insurance assets management company, insurance agency, and insurance brokerage would require approval from the CBIRC.
- Setting up a securities company, fund investment company, futures company and investment advisory institution would require approval from the CSRC.
- Setting up a non-financial institution payment service provider (including prepaid card issuance, bankcard acquiring, internet payment, etc.) would require approval from the PBOC.
- Setting up a bankcard clearing institution would require approval from the PBOC.

There is no established legal regime regulating cryptoassets and cryptocurrencies-related activities are relatively limited in China. However, as a long-standing view taken by PRC regulators, such activities are prohibited. We summarize the policies and guidance given by PRC regulators from time to time as follows:

- Financial institutions and Payment Service Providers are prohibited from undertaking any business in relation to Bitcoin.
- Initial coin (i.e. cryptoassets and cryptocurrencies) offering is prohibited.
- Online platforms of cryptoassets and cryptocurrencies are prohibited from providing services (including but not limited to trading services) in relation to such assets and currencies in China.

15.4 How do the licensing requirements apply to cross-border business in China?

With a few exceptions (such as cross-border loans provided by foreign banks to Chinese companies), a foreign individual or financial institution is not allowed to carry on any "operational activities" in China that may be deemed as a regulated financial business if they do not have the appropriate business presence in China or approval from a competent Chinese regulator. Activities that involve soliciting business or clients for specific products or transactions that are only allowed to be provided

by licensed financial institutions in China may be considered as carrying on such regulated business activities in China.

Generally, the supervisory power of PRC regulators would not extend to foreign individuals or institutions. Note, however, that any non-compliance with PRC law by a foreign individual or institution may leave a "bad record" with the authorities and may adversely affect future activities and local affiliates' (if any) business operations in China.

15.5 What are the requirements to obtain authorization in China?

The regulatory requirements for authorization differ depending on various factors, such as (i) type of investor; (ii) type of financial institution in China; and (iii) business activities that the financial institution in China intends to carry on.

In general, the requirements may involve the following:

- The financial institution in China would need to have a minimum registered capital (for financial institutions, typically, the capital should be actual paid-in capital).
- The investor would need to be in the relevant financial industry (where the investor is foreign, it typically needs to be a financial institution in its home jurisdiction).
- The investor would need to satisfy certain qualification requirements, such as assets scale.
- Where the investor is foreign, there would need to be a certain memorandum of understanding between the competent regulator in its home jurisdiction and the relevant regulator in China.

15.6 What is the process for becoming authorized in China?

In order for a financial institution to be set up in China and become authorized to carry on business activities, the investors will need to apply to the competent regulator (e.g., CBIRC for commercial banks) for approval. While the detailed requirements and procedures of the CBIRC and CSRC may differ, the application process, in general, will comprise two phases:

- Application for preparation - Once approved, the financial institution can be formally established.
- Application for commencement of operation - Once approved, the financial institution can then formally start with its business operations.

The whole approval and registration process for setting up a completely new financial institution in China may take around 18 months or even longer.

The legal regime regulating fintech is not yet well developed in China. There is no nationwide regulation on the licensing requirement. However, the PRC government has started setting up a Fintech Innovation Working Group to encourage the development of innovative services adopting fintech in some pilot cities. However, detailed licensing and implementing regulations are still under development.

16. About Us

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, 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, 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 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 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 400 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

FenXun is a law firm established in Beijing in 2009. Ever since FenXun has been growing very fast and now there are more than 120 legal professionals in our Beijing, Shanghai, Hainan and Shenzhen 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
- Securitization
- Banking & Finance
- Capital Markets
- Compliance & Investigations
- Consumer Goods & Retail
- Corporate Services
- Dispute Resolution & Litigation
- Employment & Compensation
- Energy, Mining & Infrastructure
- Environment & Climate Change
- Financial Services
- Healthcare
- Technology, Media and Communications
- Insurance
- Intellectual Property
- International Trade
- Investment Funds
- Mergers & Acquisitions
- Private Equity
- Real Estate & Property
- Restructuring & Insolvency
- Tax
- Wealth Management

Latest awards

Baker McKenzie FenXun (FTZ) Joint Operation Office

- "Joint Operation 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

- **"World's leading law firm brand"** for the 12th consecutive year - Thomson Reuters Global Elite Law Firm Brand Index 2022
- **Top Firm in Asia-Pacific Law Firm Brand Index 2022** - Thomson Reuters Regional Law Firm Brand Indexes (the Indexes)
- **"Strongest Law Firm Brand Worldwide"** - sharplegal® Global Elite Brand Index 2010 - 2021

- **"Best International Law Firm"** - China Business Law Journal, China Business Law Awards 2016 – 2021
- **Best Firm for Gender Diversity by International Firm; Best International Firm for Talent Management; Best International Firm for Pro Bono** - Euromoney Asia Women in Business Law Awards 2020
- **International Law Firm of the Year** - China Law & Practice Awards 2020
- **Leading Law firm for Antitrust & Competition (China, International Firm)** - Legal 500 Asia Pacific 2022, 2021, 2020
- **Leading Law Firm for Banking & Finance Foreign Firms (China)** - Legal 500 Asia Pacific 2022, 2021, 2020
- **Leading Law Firm for Corporate Investigations/Anti-Corruption (China) (International Firms)** - Chambers Greater China 2022
- **Tier 1: Dispute Resolution: Litigation (China, Foreign Firms)** - Legal 500 Asia Pacific 2021
- **Band 1: Employment: Mainland China-based (International Firms)** - Chambers Greater China 2022
- **Tier 1: Employment (China, International)** - Legal 500 Asia Pacific 2022, 2021, 2020
- **Leading Law Firm: Financial Services (China) (International Firms)** - Chambers Greater China 2022
- **Band 1 Law firm for Fintech (China, International Firm)** - Legal 500 Asia Pacific 2022, 2021, 2020
- **Band 1: Intellectual Property (International Firms)** - Chambers Greater China 2022
- **Tier 1: Intellectual Property (China, International law firm)** - Legal 500 Asia Pacific 2022, 2021, 2020
- **Band 1: Insurance: Non-Contentious (China) (International Firms)** - Chambers Greater China 2022
- **Leading Law Firm for Corporate/M&A (China)** - Legal 500 Asia Pacific 2022, 2021, 2020,
- **Industrials & Chemicals M&A Legal Adviser of the Year** - Mergermarket China M&A Awards 2021
- **Tier 1: Healthcare and Life Sciences (China, International law firm)** - Legal 500 Asia Pacific 2022, 2021
- **Leading Law Firm for Investment Funds: Private Equity (China) (International Firms)** - Chambers Greater China 2022
- **Leading Law Firm for International Trade/WTO (Mainland China/Hong Kong)** - Chambers Greater China 2022
- **Tier 1: Regulatory and Compliance (China, International law firm)** - Legal 500 Asia Pacific 2022, 2021, 2020
- **Leading Law Firm: Restructuring & Insolvency (China, International Law Firm)** - Legal 500 Asia Pacific 2022

- **Band 1: Real Estate (China) (International Firms)** - Chambers Greater China 2022
- **Band 1: Tax: Mainland China-based (International Firms)** - Chambers Greater China 2022
- **Tier 1: TMT (China, International Law Firm)** - Legal 500 Asia Pacific 2021

FenXun

- **Top 10 Fastest Growing Firms in China** - Asia Legal Business 2020, 2019, 2018, 2017
- **Notable Achievers** - China Business Law Awards 2019
- **Rising Law Firm of the Year** - China Legal Awards, Asia Legal Business, 2019, 2018, 2017
- **Leading Law Firm: Banking & Finance (PRC Firms), China** - Chamber Greater China 2022
- **Leading Law Firm: Banking & Finance (PRC Firms)** - Legal 500 Asia Pacific 2022, 2021, 2020
- **Band 1: Capital Markets: Securitisation & Derivatives (PRC Firms)** - Chambers Greater China 2022
- **Leading Law Firm: Corporate and M&A (PRC Firms)** - Legal 500 Asia Pacific 2022, 2021, 2020
- **Leading Law Firm: Dispute Resolution (PRC Firms), China** - Chamber Greater China 2022
- **IP Law Firm of the Year (China Firm)** - China Law & Practice Awards 2021
- **Leading Law Firm: Intellectual Property: Contentious (PRC Firms)** - Legal 500 Asia Pacific 2022, 2021
- **Leading Law Firm: Labour and Employment (PRC Firms)** - Legal 500 Asia Pacific 2022, 2021, 2020
- **Band 1: Tax: PRC Law (China) (International Firms)** - Chambers Greater China 2022
- **Leading Law Firm: TMT (PRC Firms)** - Legal 500 Asia Pacific 2022

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

bakermckenziefenxun.com
bakermckenzie.com
fenxunlaw.com

This publication has been prepared for clients and professional associates of Baker & McKenzie FenXun (FTZ) Joint Operation Office. Whilst every effort has been made to ensure accuracy, this publication is not an exhaustive treatment of the area of law discussed and no responsibility for any loss occasioned to any person acting or refraining from action as a result of material in this publication is accepted by Baker & McKenzie FenXun (FTZ) Joint Operation Office.

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 organisations, reference to a "partner" means a person who is a partner, or equivalent, in such a law firm. This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.

© 2022 Baker & McKenzie FenXun (FTZ) Joint Operation Office