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This article reviews important legal developments in China during 2013.[1]

I. China's National People's Congress Amends the Chinese Trademark Law

China's National People's Congress enacted the third amendment to the trademark law (2013 Trademark Law) on August 30, 2013, and it will come into force on May 1, 2014.[2] The 2013 Trademark Law appears to be a significant improvement on the past version of the trademark law as it potentially reduces trademark squatting, significantly improves the amount of damages available, imposes time limits on the Chinese Trademark Office (CTMO) and Trademark Review and Adjudication Board (TRAB), and allows for sound marks and possibly other types of marks.[3]

Some of the key changes include:

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1. For developments during 2011, see Ying Deng et al., *China*, 46 Int'l Law. 517 (2012). For developments during 2012, see Qiang Bjornbak et al., *China*, 47 Int'l Law. 563 (2013).

2. Trademark Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2013, effective August 31, 2013) (China), *available at* http://sbj.saic.gov.cn/flfg1/flfg/201309/t20130903_137807.html [hereinafter 2013 Trademark Law].

3. *Id.*

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A. SQUATTING

As many foreign companies can attest to, squatting (bad faith trademark registration) is a problem in China. It is hoped that the 2013 Trademark Law will decrease the prevalence of squatting.[4]

Specifically, the 2013 Trademark Law now requires applications for registrations to be in good faith.[5] Further, it prevents registrations of a first party's unregistered mark by a second party having a relationship with the first party.[6] This will prevent the situation where a distributor registers a supplier's mark or a contract manufacturer registers a designer's unregistered mark. Third, it prevents the awarding of damages if the registered mark at issue has not been used by the plaintiff.[7] But assuming the plaintiff who is a squatter wins, the judge may be more inclined to grant an injunction if he or she cannot grant damages. Finally, non-use cancellations must be decided within nine months,[8] which is a significant improvement over current cancellation timelines. Nonetheless, hiring a trademark watch service is highly recommended so oppositions can be filed timely to prevent registration.

B. DAMAGES

Statutory damages will be increased to ¥3,000,000 (about U.S. $492,500)[9] from only ¥500,000 (about U.S. $82,100).[10] Statutory damages are available when it is difficult to prove actual damages,[11] which is a common occurrence because discovery has been generally unavailable in China.[12]

But if a plaintiff in a trademark infringement action provides all available evidence, the people's court can now order a defendant to produce its accounting data for determining damages.[13] Whether Chinese courts will actually do this is unknown because the law does not require the courts to order defendants to produce.[14] Further, the penalties under the 2013 Trademark Law for failing to produce or for producing false evidence are only that the people's court may reference plaintiff's evidence when determining the amount of damages.[15] Punitive damages, up to treble damages, are available when infringement oc-

4. *See* David Pierson, *Trademark Squatting in China Doesn't Sit Well with U.S. Retailers*, L.A. TIMES (Mar. 28, 2012), http://articles.latimes.com/2012/mar/28/business/la-fi-china-trademark-squatting-20120328.

5. 2013 Trademark Law art. 7.1.

6. *Id.* art. 15.

7. *Id.* art. 64.1.

8. *Id.* art. 49.2.

9. *Id.* art. 63.3.

10. Trademark Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2001) (China), art. 56, *available at* http://sbj.saic.gov.cn/flfg1/flfg/200501/t20050104_53010.html [hereinafter 2001 Trademark Law].

11. Trademark Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2013, effective August 31, 2013) (China), *available at* http://sbj.saic.gov.cn/flfg1/flfg/201309/t20130903_137807.html, art. 63.3.

12. John J. Capowski, *China's Evidentiary and Procedural Reforms, the Federal Rules of Evidence, and the Harmonization of Civil and Common Law*, 47 TEX. INT'L L.J. 455, 462–69 (2012).

13. 2013 Trademark Law art. 63.2.

14. *Id.*

15. *Id.*

curs in bad faith.[16] As in the current Trademark Law, the plaintiff can also recover the reasonable cost of stopping the infringement.[17]

C. Sound Marks and Other Nontraditional Marks

The 2013 Trademark Law specifically recites that sounds can be registered.[18] It is unclear, however, in what manner a sound trademark can be registered (e.g., via musical notes, a written description of the trademark, a recording of the mark, etc.). Most likely, this will be clarified when the implementing regulations are released, presumably sometime in 2014 before the 2013 Trademark Law comes into force.

The 2013 Trademark Law also removes the requirement that the mark be visual.[19] While other nonvisual marks besides sounds were not specifically mentioned, it may be theoretically possible to register other types of nontraditional marks including motions, scents, and tastes because these types were not specifically excluded. This is speculative at this point, however, and the implementing regulations must first be published before anyone will know what other types of nonvisual marks are registerable.

D. More Convenience in Registration

The 2013 Trademark Law allows for multiclass registrations by removing the requirement of one application per class.[20] As stipulated in the 2013 Trademark Law, where necessary, the CTMO will issue examiner's advice to require applicants to provide explanations or make corrections.[21] But it is unclear what examiner's advice is. From 1993 to 2002, the CTMO could issue examiner's advice (e.g., suggestions to correct a non-standard description of goods/services or to delete part of texts/drawings in the mark to avoid conflicts) to applicants.[22] Currently, however, the CTMO can only issue notices of rectification (mainly for non-standard description of goods) before making decisions of publication or rejection.[23] This new provision may reduce the number of rejected applications, thereby shortening the total examination period.

16. *Id.* art. 63.1.

17. *Id.*

18. *Id.* art. 8.

19. *Id.*

20. *Id.* art. 22.2.

21. *Id.* art. 29.

22. Regulations for the Implementation of the Trademark Law of the People's Republic of China (promulgated by State Council on July 15, 1993, effective July 28, 1993) (China), *available at* http://www.eol.cn/20010101/21378.shtml.

23. Regulations for the Implementation of the Trademark Law of the People's Republic of China (promulgated by State Council on Aug. 3, 2002, effective Sept. 15, 2002) (China), *available at* http://sbj.saic.gov.cn/flfg1/flfg/200408/t20040826_53011.html [hereinafter Current Regulations].

E. Additional Changes to Note

Administrative enforcement of trademark infringement has also been strengthened.[24] Administrative enforcement, versus judicial enforcement, may be preferred when the amount of damages may be small, when damages may be unavailable, and/or when speed is required as Administration for Industry and Commerce (AIC) proceedings tend to be much quicker than court proceedings.[25] Under the 2013 Trademark Law, AIC-imposed fines can now be up to five times the illegal business revenue.[26] The fines will be increased if trademark infringements occur more than twice within five years, etc.[27] Further, the AIC is entitled to seize and/or destroy "primary tools" instead of just "specially used tools" used in the manufacture of infringing goods.[28]

It is also clarified that Chinese national well-known trademarks may be recognized by the CTMO, TRAB, and the courts designated by the Supreme People's Court.[29] But the "Chinese well-known trademark" indication will not be allowed on goods or on packaging or containers of goods, advertisements, at exhibitions, and other commercial activities.[30] This provision will prevent improper use of the words "well-known trademark" in commercial activities. Whoever violates such provision may be punished by a local AIC with a fine of ¥100,000 (about U.S. $16,400).[31]

While the 2013 Trademark Law appears to be quite an improvement for foreign applicants, the implementing regulations have not yet been published and it remains to be seen how courts and the AIC will handle infringement in practice.

II. Trademark Enforcement in Mainland China in 2014 and Beyond

The 2013 Trademark Law provides several substantial administrative and judicial changes to Chinese trademark enforcement procedures.[32] This section begins by outlining the current administrative and judicial procedures surrounding trademark enforcement. It then covers each administrative and judicial change and concludes with a general analysis and specific insight into the implementation of these provisions.

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24. *See generally* Trademark Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2013, effective August 31, 2013) (China), *available at* http://sbj.saic.gov.cn/flfg1/flfg/201309/t20130903_137807.html.

25. Ryan Ong, *Tackling Intellectual Property Infringement in China*, China Business Review (March 1, 2009, 5:33 PM), http://www.chinabusinessreview.com/tackling-intellectual-property-infringement-in-china/.

26. 2013 Trademark Law art. 60.2.

27. *Id.*

28. *Id.*

29. *Id.* art. 14.

30. *Id.*

31. *Id.* art. 53.

32. *See generally* Trademark Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2013, effective August 31, 2013) (China), *available at* http://sbj.saic.gov.cn/flfg1/flfg/201309/t20130903_137807.html.

A. Trademark Enforcement Procedure

1. *Administrative Enforcement*

The majority of administrative enforcement of trademark rights in China is enacted through local administrations for industry and commerce (AICs).[33] A trademark owner that pursues an AIC action must first collect sufficient evidence of infringement.[34] Afterwards, the owner may petition the AIC to conduct a raid.[35] Infringing goods that are seized during a raid will be subject to either the removal of the infringing mark or destruction.[36] Additionally, the local AIC may issue a penalty against a trademark infringer.[37]

Trademark owners often pursue AIC enforcement of trademark rights because it is less expensive than a trademark infringement lawsuit.[38] But AICs often require a higher amount of proof than people's courts and they also cannot issue injunctions.[39] Therefore, it is often more effective to focus trademark enforcement efforts into a trademark infringement lawsuit.

2. *Judicial Enforcement*

Unlike with AIC actions, trademark infringers begin spending money to defend against trademark infringement claims as soon as they are filed.[40] The mere anticipation of attorney and court fees is sometimes enough to deter the trademark infringer from producing additional infringing goods. Also, people's courts have the power to issue injunctions against trademark infringers.[41]

Another attractive element of trademark infringement actions is that people's courts may impose damages determinations that far exceed AIC statutory limitations.[42] A hefty judgment against a trademark infringer makes a great addition to future cease and desist letters.[43]

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33. Jessica Jiong Zhou, *Trademark Law & Enforcement in China: A Transnational Perspective*, 20 Wis. Int'l L.J. 415, 438 (2002).

34. Trademark Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2001) (China), art. 56, *available at* http://sbj.saic.gov.cn/flfg1/flfg/200501/t20050104_53010.html, art. 56.

35. *Id.*

36. *Id.* art. 53.

37. *Id.* art. 56.

38. Jing "Brad" Luo & Shubha Ghosh, *Protection and Enforcement of Well-Known Mark Rights in China: History, Theory and Future*, 7 Nw. J. Tech. & Intell. Prop. 119, 134 (2009).

39. *Id.*

40. Ong, *supra* note 25.

41. Trademark Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2001) (China), art. 56, *available at* http://sbj.saic.gov.cn/flfg1/flfg/200501/t20050104_53010.html, art. 57; *see also* Civil Procedure Law of the People's Republic of China (promulgated by Order No. 44 of the President on April 9, 1991) (China), art. 93–96, *available at* http://www.china.org.cn/english/government/207332.htm.

42. *Compare* 2001 Trademark Law art. 56 (providing that the statutory limitation for trademark infringement damages under the 2001 Trademark Law is ¥500,000), *with China IP Litigation Analysis (CIELA)*, Instant Statistics http://www.ciela.cn/Content2.aspx?pageId=14&ppId=3&language=en (last visited Jan. 20, 2014) (showing that multiple trademark infringement damages awards have exceeded ¥4,000,000).

43. Ong, *supra* note 25.

B. Trademark Enforcement Under the 2013 Trademark Law

1. *Amendments to Administrative Procedure*

The 2013 Trademark Law includes five direct amendments to the administrative enforcement of trademark rights in China. First, it explicitly expands trademark infringement to parties that intentionally facilitate trademark infringement.[44] This amendment will deter third parties that, until now, have escaped trademark enforcement and it will allow AICs without sufficient evidence of direct infringement to punish infringers for facilitating infringement.

Second, the new law determines AIC fines according to illegal business revenue.[45] If the trademark infringer's illegal revenue is less than ¥50,000 (U.S. $8,200), then the fine cannot exceed ¥250,000 (U.S. $41,000).[46] If the illegal revenue exceeds ¥50,000, then the AIC may issue a fine up to five times the illegal revenue.[47]

Third, the 2013 Trademark Law provides more severe AIC penalties for repeat infringers.[48] A more severe penalty may be issued if the same party infringes any trademark more than once within five years or if there are other serious circumstances.[49] But this amendment does not define "other serious circumstances" and it also does not clarify what a "more severe" penalty is.[50]

Fourth, an AIC may suspend its investigation if a trademark owner also files a lawsuit under the same potential trademark infringement.[51] The 2013 Trademark Law also provides that the AIC should wait for the court to issue its decision, and then continue proceedings.[52]

Fifth, the parties to an AIC infringement action may ask the AIC to mediate their dispute.[53]

2. *Amendments to Judicial Procedure*

The changes to judicial enforcement of trademark rights under the 2013 Trademark Law can be broken down into four distinct amendments. First, the facilitation of trademark infringement complaints discussed above applies to judicial proceedings.[54] Thus, trademark owners may file joint or separate lawsuits against parties that are not directly involved in trademark infringement but intentionally facilitated the infringement.

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44. Trademark Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2013, effective August 31, 2013) (China), *available at* http://sbj.saic.gov.cn/flfg1/flfg/201309/t20130903_137807.html, art. 57.6.

45. *Id.* art. 60.2.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* art. 62.3.

52. *Id.*

53. *Id.* art. 60.1.

54. *See supra* text accompanying note 36.

Second, the 2013 Trademark Law substantially increases the statutory damages maximum for trademark infringement.[55] This amendment increases statutory damages from ¥500,000 (U.S. $82,100) to ¥3,000,000 (U.S. $492,500).[56]

Third, punitive damages for trademark infringement shall be available for the first time.[57] If intentional infringement of a trademark right is "malicious," then a people's court may impose punitive damages up to three times the actual damages.[58]

Fourth, the 2013 Trademark Law lowers the burden of proof imposed on the trademark owner in a trademark infringement lawsuit.[59] It is generally very difficult for trademark owners to procure documents related to trademark infringement that are generated by the trademark owner. In consideration of this obstacle to evidence collection, a people's court shall be allowed to order an alleged infringer to submit associated accounting materials and other information if the trademark owner has exercised its best efforts to provide such information to the court.[60] Furthermore, if the alleged infringer fails to provide this information, then the people's court may determine the damages amount by considering the information submitted by the trademark owner.[61]

C. The Future of Chinese Trademark Enforcement

As statistical data from CIELA, maintained by Rouse & Co., demonstrates, Chinese judicial judgments increasingly correspond to "international" trademark practices, especially in China's most developed city centers such as Beijing, Shanghai, Shenzhen, and Guangzhou.[62] Although AICs are typically less progressive than people's courts, they have also shown increased awareness of domestic and international trademark enforcement trends.

In consideration of the substantial improvements to trademark enforcement between 2001 and 2013, the amendments in the 2013 Trademark Law that directly relate to trademark enforcement demonstrate China's recognition of the obstacles to trademark enforcement and its conscious steps to advance trademark enforcement practices. For more information on China's new trademark law, see *Chinese Trademark Law: The New Chinese Trademark Law of 2014*, published by Carolina Academic Press.

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55. Trademark Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2013, effective August 31, 2013) (China), *available at* http://sbj.saic.gov.cn/flfg1/flfg/201309/t20130903_137807.html, art. 63.3.

56. *Id.*

57. *Id.* art. 63.1.

58. *Id.*

59. *Id.* art. 63.2.

60. *Id.*

61. *Id.*

62. *See China IP Litigation Analysis (CIELA)*, CIELA, http://www.ciela.cn/ (last visited Jan. 20, 2014). CIELA provides comprehensive up-to-date intellectual property (IP) litigation statistics and also allows the user to search IP court judgments by venue comparison, ranking by city, or trend by year.

III. New Regulations on Domestic Direct Investment of Foreign Investors in China

On May 10, 2013, the State Administration of Foreign Exchange promulgated the Notice of the State Administration of Foreign Exchange on Issuing the Provisions on the Foreign Exchange Administration of Domestic Direct Investment of Foreign Investors and the Supporting Documents (Notice).[63] The aim of the Notice is to promote and facilitate domestic direct investment by foreign investors and regulate domestic direct investment in foreign exchange administration by foreign investors.

The Notice includes the following three documents: the Provisions on Foreign Exchange Administration of Direct Investment Made by Foreign Investors in China, the List of Repealed Regulations on Foreign Exchange Administration of Direct Investment in China, and the Operating Guidelines for Business Relating to Direct Investment in China.[64]

The following issues are attention-worthy:

A. The Definition of Direct Investment Made by Foreign Investors in China

The Provisions on Foreign Exchange Administration of Direct Investment Made by Foreign Investors in China (Provisions) clearly define "direct investment made by foreign investors in china."[65] The Provisions extend the scale of the investment act from "ownership" to "control" and "operating and management rights,"[66] which will enlarge the power of the State Administration of Foreign Exchange (SAFE) to supervise the contractual arrangements that enable a foreign investor to control or operate and manage an Foreign Investment Enterprise (FIE) or a domestic company.

B. Simplify the Relevant Foreign Exchange Matters

On the basis of the policies on foreign exchange administration in foreign investment business, the Provisions further simplified and integrated the foreign exchange registration, account opening and using, receipt and payment, foreign change settlement and sale, etc.

Additionally, the Operating Guidelines for Business Relating to Direct Investment in China (Guidelines) further specified the different operating procedures and guided and simplified the foreign exchange registration, account opening and using, receipt and payment foreign exchange settlement and sale, etc., which are related to foreign direct invest-

63. Guójia Wàihuì Guanli Jú Guanyú Yìn Fa Wàiguó Tóu Zí Zhe Jìngnèi Zhíjie Tóuzí Wàihuì Guanli Guidìng Jí Pèitào Wénjiàn De Tongzhi
(国家外汇管理局关于印发《外国投资者境内直接投资外汇管理规定》及配套文件的通知) [Notice of the State Administration of Foreign Exchange on Issuing the Provisions on the Foreign Exchange Administration of Domestic Direct Investment of Foreign Investors and the Supporting Documents] (promulgated by the State Admin. of Foreign Exch., May 11, 2013, effective May 13, 2013) (China), *available at* http://en.pkulaw.cn/display.aspx?id=14459&lib=law.

64. *Id.*

65. *Id.* Annex 1, art. 2.

66. *Id.*

ment (FDI). The Guidelines includes twenty-three registration forms pertinent to FDI. Such forms contain specific instructions and needed documents for different FDI transactions.

C. Cleanup the Existing Foreign Exchange Regulations

The Provisions also increase efforts to clean up the relevant FDI regulations, and the List of Repealed Regulations on Foreign Exchange Administration of Direct Investment in China, promulgated at the same time, repeals twenty-four regulations of the FDI Foreign Exchange Administration. This includes the Notice on Printing and Distributing, the "Notice on Issuing the Interim Measures for the Administration of Foreign Exchange Registration of Foreign-Invested Enterprises" ([96] Hui Zi Han Zi No. 187), and the Reply on the Issues Concerning Foreign Exchange Administration of Domestic Projects Contracted for by Overseas Enterprises ([98] Hui Zi Han Zi No. 204).[67]

Such efforts make the relevant regulations on FDI's registration procedures relatively more concise and easier to follow, which is convenient for foreign investors.

IV. Employment Contract Law Amendment and Financial Guarantee Update

A. Employment Law Amendment

The amendment to the Labor Contract Law (LCL) that was implemented this year will impact common employment practices in the PRC.[68] The amendment to the LCL was passed by China's National People Congress (NPC) on December 28, 2012, and took effect on July 1, 2013.[69] It includes amendments to four articles of the LCL, all of which deal with temporary labor, referred to as dispatch labor. In general, the amendments introduce a narrow view of what constitutes dispatch labor, as well as outline guidelines and enforcement procedures for companies supplying such a labor force.

The new amendments make procuring and defining employees as dispatch labor difficult. The amendment to Article 66 of the LCL only allows employees who are in "provisional, auxiliary or substitutive" positions to be considered dispatch labor.[70] The new amendments to the LCL define a provisional position as a position lasting less than six months, an auxiliary position as a "non-major" business position, and a substitutive posi-

67. *Id.* Annex 2.

68. Zhong Huá Rén Mín Gòng Hé Guó Láo Dòng Hé Tóng Fa (中華人民共和國勞動合同法) [Labor Contract Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008) (China), *available at* http://en.pkulaw.cn/display.aspx?id=6133&lib=law.

69. Quán Guó Rén Dà Cháng Wei Huì Guan Yú Xiu Gai "Zhong Huá Rén Mín Gòng Hé Guó Láo Dòng Hé Tóng Fa" De Jué Dìng (全國人大常委會關於修改《中華人民共和國勞動合同法》的決定) [Decision of the Standing Committee of the National People's Congress on Amending the Employment Contract Law of the People's Republic of China (2012)] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 2012, effective July 1, 2013) (China), *available at* http://en.pkulaw.cn/display.aspx?id=12548&lib=Law.

70. *Id.* § 3.

tion as a position that may be held by any other employee in lieu of another employee's inability to work for a period of time.[71]

Contractually, the amendments will further China's firm pro-employee labor stance. This will give PRC courts a means to afford dispatch laborers with the same protection given to long-term employees, unless they fall under the narrow definition supplied by the newly enforced amendments. To discourage the hiring of dispatch laborers, the amendment also states that each employer will only be able to hire a proportion of their firm's labor as dispatch labor, and this proportion will be set forth by the Labor Administrative Department of the State Council.[72]

Additionally, the amendment to Article 57 of the LCL further defines guidelines for firms providing dispatch labor. These companies must now meet registered capital minimum, business premises, and other administrative regulations, including a licensing procedure.[73] This new amendment ensures that anyone involved in the labor dispatch business has gone through all necessary procedures and is licensed by the Labor Administrative Department.

An amendment to Article 92 of the LCL outlines the punishments for violations, which range from modest financial fines to revocation of the company's license to do business in the dispatch labor sector.[74] This will ensure a decrease in the use and supply of dispatch laborers by companies.

B. Financial Guarantee Update

In late 2012, upon the application of a Chinese company, the Sichuan High People's Court granted injunctive relief on claims of fraud to prevent a Sichuan financial institution from paying an independent counter guarantee that the Chinese company sought for its wholly-owned subsidiary in an Eastern European country.

Chinese law requires financial institutes issuing financial guarantees internationally to abide by the Administration of External Guarantees (AEG).[75] While the AEG outlines how financial institutions may qualify, perform, and provide international financial guarantees,[76] there are no laws or regulations regarding enforcement of guarantees. In practice, courts across China have granted the majority of injunctions for merely being filed on the grounds of fraud, as there is no law or regulation outlining a standard to grant or dismiss such applications.

On December 28, 2012, the Supreme People's Court of China (SPC) released a draft titled "Guidelines on Rigidly Regulating the Adjudication of Independent Bank Guarantee Disputes for the Purpose of Keeping the International Financial Transaction Order"

71. *Id.*
72. *Id.*
73. *Id.* § 1
74. *Id.* § 4.
75. Press Release, State Administration of Foreign Exchange, Improve the Administration of External Guarantees, Encourage Domestic Institutions to Go Global (July 30, 2010), *available at* http://www.safe.gov.cn/wps/portal/!ut/p/c4/04_SB8K8xLLM9MSSzPy8xBz9CP0os3gPZxdnX293QwN_f0tXA08zR9PgYGd3Yx8fE_2CbEdFAM9sw9Y!/?WCM_GLOBAL_CONTEXT=/Wps/wcm/connect/safe_web_store/state+administration+of+foreign+exchange/safe+news/46a1ea804865a2a1a149b7057866611e.
76. *See generally id.*

(Guidelines).[77] The Guidelines set standards by which an injunction should be granted in such cases, stating that the following conditions should be met:

(1) the court accepting the application has jurisdiction over the case;[78]

(2) the applying party submits evidence that the beneficiary has committed one of the following acts:

   a. presented fake or forged documents;[79] or

   b. made claims not based on any factual or reliable grounds;[80]

(3) the guarantor has not paid;[81]

(4) if the injunction is not granted, interest of the applying party will suffer irreparable damage;[82] and

(5) sufficient financial or other guarantee is offered by the applying party.[83]

These measures are part of a draft that is widely expected to be promulgated in order to cure the onslaught of injunctions being granted by Chinese courts in favor of domestic firms, damaging both the financial institutions' and China's credibility.

V. China's New Exit-Entry Administration Regulations for Foreigners

The new "Exit-Entry Administration Regulations for Foreigners" (Regulations) became effective on September 1, 2013. The new regulations replaced the "Implementing Rules of the PRC Administration Law on Entry and Exit of Foreigners" issued in December 1986.[84]

The Regulations created new visa and residence categories based on the term of stay and the purpose of stay, among other things. The Regulations also changed some of the current visa and residence policies. For example, the short-term stay (180 days or less) is differentiated from long-term stay (over 180 days) in different visa categories and residence permits.[85]

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77. Jiang Rongqing, *China: Independent Bank Guarantees at the People's Courts of the People's Republic of China*, MONDAQ (May 14, 2013), http://www.mondaq.com/x/238938/Arbitration+Dispute+Resolution/Independent+Bank+Guarantees+at+the+Peoples+Courts; *see* Guidelines on Rigidly Regulating the Adjudication of Independent Bank Guarantee Disputes for the Purpose of Keeping the International Financial Transaction Order (promulgated by the Supreme People's Court of PRC, Dec. 28, 2012) (China), *available at* http://letterofcreditforum.com/content/chinese-supreme-court-draft-regarding-bank-guarantees.

78. *Id.* art. 15.

79. *Id.* art. 14.

80. *Id.*

81. *Id.* art. 15.

82. *Id.*

83. *Id.*

84. Pattie Walsh, Chris Lin & Ying Wang, *New Regulation on Foreigners' Exit and Entry Administration Has Taken Effect on 1 September 2013 in China*, DLA PIPER (Sept. 23, 2013), http://www.dlapiper.com/china/publications/detail.aspx?pub=8512.

85. Foreigner Exit-Entry Regulations of the People's Republic of China (promulgated by the State Council, July 1, 2013, effective Sept. 1, 2013), art. 36(4)–(5), *available at* http://lawandborder.com/translation-foreigner-exit-entry-administration-regulations-of-the-peoples-republic-of-china/.

A. New Visa Categories

The former F Visa is split into two current visa categories, the new F Visa and M Visa. F Visas are issued to persons engaged in exchanges, visits, inspections, etc.[86] M Visas are created for those who come for business or commercial activities.[87]

Q Visas are created for family reunions, foster care, or similar visitors. Relatives of Chinese citizens or Chinese permanent residents can apply for a Q1 Visa for a long-term stay or a Q2 Visa for a short-term stay. Q Visas make it easier for the first generation of emigrants to visit China and to take care of their old parents. Q Visas can also let foreign-born minors come back to stay with their adult relatives in China for a longer period of time without applying for extension of visas.[88]

It is noticeable that R Visas are created to attract foreign professionals who are highly skilled or whose skills are urgently needed in China.[89] Such a move reflects government policy to bring in high-end professionals. So far, the government has not clarified the qualifications of such high-level professionals or special talents.

Rather than Z Visas, family members of Z Visa holders will obtain S1 Visas if their stay is over 180 days or S2 Visas if their stay is 180 days or less.[90] Q Visas are different from S Visas because Q Visas require Chinese relatives.

The former X Visa is divided into two visa categories, X1 Visas and X2 Visas. X1 Visas are issued to students who pursue long-term studies in China, and X2 Visas are issued to students who pursue short-term studies in China.[91] Students are not allowed to work without permission from the school and the notification recorded by Exit-Entry Administration Bureau relating to the working place and the working period.[92]

B. Five Different Residence Permits

1. A residence permit for work purposes is issued to foreign employees in China. The validity period varies from ninety days up to five years.[93]
2. A residence permit for study is issued to foreign students who study in China.[94]
3. A residence permit for journalists is issued to foreign journalists who reside in China on behalf of permanent offices of foreign news agencies.[95]
4. A residence permit for family reunion is issued to foreigners who need to reside in China for purposes of family reunions with relatives who are Chinese citizens or permanent residents or who need to live in China because of adoption.[96]

86. *Id.* art. 6(3).
87. *Id.* art. 6(7).
88. *Id.* art. 7(8).
89. *Id.* art. 7(9).
90. *Id.* art. 6(10).
91. *Id.* art. 6(11).
92. *Id.* art. 22.
93. *Id.* art. 15(1), 30.
94. *Id.* art. 15(2).
95. *Id.* art. 15(3).
96. *Id.* art. 15(4).

5. A residence permit for private matters is issued to the relatives of foreigners who reside in China for purposes of work, study, etc.[97] The validity period varies from 180 days up to five years.[98]

C. Additional Compliance Requirements

A Chinese entity that recruits foreign employees or foreign students has the obligation to report to the Entry-Exit Administration Bureau if a foreign employee/student leaves the entity, changes his or her work location, violates the exit-entry administrative regulations, dies, or disappears.[99] At the same time, foreigners must report to the competent entry and exit administrative authority if their purpose for staying has changed.[100]

Visas or residence permits will be declared invalid if a foreigner is under a deportation order or under an order to depart within a specified period. Foreigners' visas or residence permit will also be canceled if they fail to report to Exit-Entry Administration Bureau within the required period of time or that their purposes to stay have changed.[101]

D. Shanghai Free Trade Zone (SFTZ)

1. *Birth of SFTZ*

Influenced by the Trans-Pacific Partnership Agreement (TPP), the Shanghai Free Trade Zone was established in an effort to eliminate tariffs and open a free trade market.[102]

SFTZ was officially approved by State Council on August 22, 2013. On August 30, 2013, a "Decision on Authorizing the State Council to Temporarily Adjust Administrative Approvals under Relevant Laws within the China (Shanghai) Pilot Free Trade Zone" (Decision) was issued by the Standing Committee of People's Congress. The Decision authorizes State Council to eliminate prior administrative approvals in SFTZ for Foreign Invested Enterprises (FIE) in fields outside of the Foreign Investment Negative List (Negative List) for a trial term of three years from October 1, 2013. To further implement the Decision, the State Council issued the "General Plan for China (Shanghai) Pilot Free Trade Zone" (General Plan). The General Plan serves as a roadmap for the proposed regulatory reforms in SFTZ. On September 29, the Shanghai government released Special Administrative Measures on Foreign Investment Access to the China (Shanghai) Pilot Free Trade Zone (2013) (Negative List).[103]

97. *Id.* art. 15(5).
98. *Id.* art. 36(4)–(5).
99. *Id.* art. 26.
100. *Id.* art. 34(3).
101. *Id.*
102. Bo Chen, *Pilot Free Trade Zone in Shanghai to Build Open Economy*, East Asia Forum (Oct. 19, 2013), http://www.eastasiaforum.org/2013/10/19/pilot-free-trade-zone-in-shanghai-to-build-open-economy/.
103. Linbo Yang & Steven J. Dickinson, *China (Shanghai) Pilot Free Trade Zone: A New Landscape for Foreign Investment*, Lexology (Oct. 24, 2013), http://www.lexology.com/library/detail.aspx?g=98c7c937-9280-44b8-8d45-f658872642a6.

2. *Main Goals of SFTZ*

Four main goals of SFTZ are to (1) achieve zero tariffs on traded merchandise; (2) protect intellectual property rights and ensure international standards in labor, environmental, and safety issues; (3) enhance economic and regulatory fairness and transparency by removing subsidies and preferential support for specific industries and state-owned enterprises; and (4) liberalize "the financial services industry, and open the capital account to facilitate the free convertibility of currency and movement of capital."[104]

3. *Major Changes*

An FIE in a field not on the Negative List only needs to go through a new record-filing procedure with the SFTZ Administration Committee. The registration is achieved by a one-stop service platform, where all related government authorities work together on necessary filing and registration for the establishment or alteration of an enterprise.[105]

According to the Framework Plan for the China (Shanghai) Pilot Free Trade Zone, SFTZ intends to open up the following sectors: (1) financial services, including banking services, specialized health and medical insurance, and financial leasing; (2) transportation services; (3) commercial and trade services; (4) professional services; (5) cultural services; and (6) public services.[106]

VI. The New Tourism Law of China: Regulating the World's Largest Tourism Industry

With a population of over a billion people and a steadily growing middle class, China is experiencing an unprecedented surge in domestic and international tourism. The industry has come to represent a major pillar of the Chinese economy and, until recently, has been largely unregulated. Adopted at the second session of the standing committee of the twelfth NPC, and in force as of October 1, 2013, the Tourism Law of the People's Republic of China (Law) is the first major piece of legislation regulating the Chinese tourism industry.[107] The Law was created to promote the sustained and healthy development of tourism, to protect the rights and interests of domestic and international tourists, and to address concerns relating to tourist safety and unfair competition practices.[108]

A very important aim of the Law is to provide tourists with greater protection from coercive trade practices. Pursuant to the Law, tourists are granted the right to independently choose products and services and to obtain accurate information on the tourism products and services that they purchase in order to minimize abusive behavior.[109] In an

104. Chen, *supra* note 102.
105. Yang & Dickinson, *supra* note 103.
106. *Framework Plan for the China (Shanghai) Pilot Free Trade Zone*, CHINA (SHANGHAI) PILOT FREE TRADE ZONE, http://en.shftz.gov.cn/FrameworkPlan.html (last visited Jan. 20, 2014).
107. Zhongguó Rénmín Gònghéguó Luyóu Fa (中国人民共和国旅游法) [Tourism Law of the People's Republic of China] (promulgated by the 2nd session of the Standing Comm. of the 12th Nat'l People's Congress, Apr. 25, 2013, effective Oct. 1, 2013), China National Tourism Administration (China), *available at* http://en.cnta.gov.cn/html/2013-6/2013-6-4-10-1-12844.html (last visited Jan. 4, 2014).
108. *Id.* art. 1.
109. *Id.*

attempt to prohibit illegitimate gains, travel agencies are forbidden from "luring tourists with unreasonably low prices" and obtaining additional payment by requiring tourists to make purchases at designated shopping areas.[110] This does not apply to circumstances where both sides have consented or where tourists have requested such arrangements and they do not impede on the itinerary of other tourists.[111] In the event that these consumer rights are violated, the Law provides that tourists shall have the right to return the purchased item within thirty days from the end of travel and to require their travel agency to pay the price of the returned purchases.[112] Tourists also have the right to request a refund from their travel agency for tourism services that required an additional payment.[113]

Additionally, tourists have the right to require operators to set forth the terms and conditions of their agreement in a contract.[114] Tourism package contracts, in particular, are required to be made in writing.[115] In addition, package contracts must contain items such as basic information regarding the travel agency, the proposed travel itinerary, the minimum number of tourists needed to form a group, and the arrangements made for transportation, accommodation, and catering services.[116] From a legal perspective, perhaps the most important requirement for a package contract is provisions outlining responsibility for breach of contract and dispute settlement methods.[117] In the event that a travel agency fails to perform its contractual obligations, the Law maintains that it must take responsibility for the breach, continue to fulfill the terms of the contract, and adopt measures to remedy the breach or provide compensation.[118] Finally, where a travel agency is able to fulfill its contractual obligations but refuses to do so despite the tourist's request, and such breach causes serious consequences to the tourist, the travel agency may be liable to pay between one and three times the travel costs in compensation.[119] Examples of serious consequences of a breach include the retention of a tourist and harm to a tourist's personal health.[120]

As previously mentioned, a major goal of the Law is to promote and protect tourist safety. While the idea of a travel agency being held liable for the personal or property damages that it causes to a tourist may seem conventional, it is important to note that the Law may also hold travel agencies responsible for any personal damage or property loss caused to the tourist during periods of (presumably unsupervised) free time. The Law imposes this liability on travel agencies for their failure to "fully fulfill [their] obligation of giving safety warnings or offering assistance."[121] Furthermore, the Law imposes a duty on tourism operators to expressly explain risks and warn tourists of circumstances that may endanger their personal safety and property. In particular, tourism operators must explain

110. *Id.* art. 35.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* art. 9, 57.
115. *Id.* art. 58.
116. *Id.*
117. *See id.* art. 58(8).
118. *Id.* art. 70.
119. *Id.*
120. *Id.*
121. *Id.*

how to properly use relevant facilities and equipment and must explain safety precautions and emergency measures relating to their activities.[122]

The Law imposes fairly onerous penalties for those who violate its provisions. For example, if a travel agency is found to operate without authorization, the tourism authority has the authority to confiscate the illegal gains and impose a fine ranging between ¥10,000 to ¥100,000.[123] But if the illegal gains are found to exceed ¥100,000, a fine of one to five times the sum of illegal gains can be imposed.[124] In addition to these fines, individuals responsible for the violations of the law may also be personally fined between ¥2,000 and ¥20,000.[125] Travel agencies who lure tourists with unreasonably low prices or who attain illegitimate gains through shopping related rebates or provide services requiring additional payment may be fined an amount between ¥30,000 to ¥300,000.[126] If the illegal gains exceed ¥300,000, a fine of one to five times the amount of the illegal gains can be imposed. In serious circumstances, a travel agency's license to do business may be revoked and other fines imposed.[127]

The Law has certainly made great strides in providing a strong regulatory framework for the Chinese tourism industry. The provisions guiding the industry are general and far-reaching. As the number of inbound and outbound tourists continue to rise, it will be most interesting to observe how the people's court will apply the Law and how it will be enforced.

VII. Consumer Protection Law

On October 25, 2013, China's NPC passed a revision to the Law on the Protection of Consumer Rights and Interests (CRL).[128] This was the first revision to the law since it was enacted two decades ago. Most notably, the new legislation introduces regulations for China's rapidly growing e-commerce sector. It also strengthens consumer rights in several other important areas while at the same time raising potential liability for those doing business in China. The changes go into effect on March 15, 2014.[129]

A. E-Commerce

Article 25 gives online consumers the unconditional right to return goods purchased over the Internet within seven days of receiving them.[130] Consumers shall receive the full purchase price for their return but have the responsibility to pay the cost of shipping.[131]

122. *Id.* art. 80.
123. *Id.* art. 95.
124. *Id.*
125. *Id.*
126. *Id.* art. 98.
127. *Id.*
128. Zhong Huá Rén Mín Gòng Hé Guó Xiao Fèi Zhe Quán Yì Bao Hù Fa (中华人民共和国消费者权益保护法) [Law on the Protection of Consumer Rights and Interests of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Congress, Oct. 25, 2013, effective March 15, 2014) (China), *available at* http://www.gov.cn/flfg/2013-10/25/content_2516547.htm (last visited Jan. 4, 2014).
129. *Id.*
130. *Id.* art. 25.
131. *Id.*

In addition, the goods must be returned "intact," although this word is not specifically defined in the statute.[132]

Article 25 lists certain products excluded from the unconditional right of return, ostensibly because of their nature. These include special ordered goods, perishables, online downloads, software, and newspapers and periodicals. In addition, the article excludes other unlisted products from the right to return if, by their nature, they are not suitable for return and the consumer acknowledges this fact during the time of purchase.[133]

The CLR also introduces new requirements for Internet trading platforms. Article 44 makes Internet trading platforms that know or should have known that sellers are using their platform to violate consumer rights and that do not take appropriate measures jointly and severally liable with sellers.[134] Internet trading platforms must also be able to provide the real name, address, and contact information of sellers who use their service.[135]

B. False Advertising

In cases where false advertising causes damage to a consumer's health, Article 45 provides that other participants to the false advertising should also be held liable.[136] Social groups and individuals that endorse products in false advertising will be jointly and severally liable with the business proprietor.[137] Designers and publishers of the false advertising are also subject to joint and several liability.[138]

The extension of liability for false advertising to parties other than the business proprietor is quite possibly the part of the CRL revision that has received the most attention in China. Celebrities that promote dangerous or substandard products in their commercials or ads could potentially be sued by consumers for their involvement.

C. Consumer Privacy

The CRL provides strict guidelines for business proprietors to follow in the area of consumer privacy. Article 29 provides that consumer consent is required for the collection and use of consumer personal information.[139] Furthermore, consumer personal information collected by a business proprietor should be kept strictly confidential; the leaking, selling, or illegal provision of consumer information is prohibited.[140]

Business proprietors are required to take technological measures to ensure consumer privacy and prevent data loss. When a data loss does occur, a business proprietor should take immediate measures to remedy the loss.[141]

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132. *Id.*
133. *Id.*
134. *Id.* art. 44.
135. *Id.*
136. *Id.* art. 45.
137. *Id.*
138. *Id.*
139. *Id.* art. 29.
140. *Id.*
141. *Id.*

Article 29 also prohibits the transmission of commercial messages to consumers unless the consumer gives prior consent, requests the information, or does not explicitly express disapproval.[142]

D. Heightened Liabilities for Businesses

Article 55 of the CRL increases business liability for fraudulent sales substantially.[143] Under the original CRL, a business proprietor was only liable for damages equal to the amount paid for the good or service. The revised CRL increases liability in connection with a fraudulent sale to three times the price paid.[144]

In cases where a business proprietor is fully aware that a product or service is defective in nature but proceeds with a sale and the product or service causes severe bodily harm or death, the CRL permits the aggrieved party to demand punitive damages. The amount of punitive damages is limited to not more than two times the amount of loss suffered.[145] Article 51 of the CRL further increases potential liabilities for companies operating in China by permitting consumers to collect damages for mental anguish from business proprietors.[146]

E. Consumer Organizations

The revised CRL also aims to strengthen the China Consumers Association's (CCA) and its role in protecting consumer rights. It redefines the CCA from its previous designation as a social group to a social organization, thus acknowledging the critical role the CCA plays in the public interest.[147] Article 37 solidifies funding for the CCA by making the government responsible for funding the CCA.[148] It also prohibits the CCA from taking part in for-profit business activities, including taking fees for recommending products and services.[149]

Perhaps most significantly for businesses, Article 47 of the CRL gives the CCA the power to bring lawsuits in a people's court when the legal rights of a large number of consumers are involved.[150] This suggests that the CCA will be able to carry out class actions against companies operating in China in the future.

Overall, the revised CRL appears to establish a robust system for consumer protection in China. It takes into account changes in technology since the law was first enacted as well as the increasing popularity of e-commerce. It also provides both heightened potential liability for businesses and additional rights for Chinese consumers.

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142. *Id.*
143. *Id.* art. 55.
144. *Id.*
145. *Id.*
146. *Id.* art. 51.
147. *Id.* art. 36.
148. *Id.* art. 37.
149. *Id.* art. 38.
150. *Id.* art. 47.