

THE PEOPLE'S REPUBLIC OF CHINA ADMINISTRATIVE PROCEDURE LAW

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The Administrative Procedure Law adopted some eighteen months ago by the National People's Congress became effective on October 1, 1990, the 41st anniversary of the founding of the PRC. The Law provides substance to Article 41 of the Constitution of the PRC (1982) which granted citizens "the right to criticize and make suggestions regarding any state organ or functionary" and to make complaints or charges against state organs and their personnel for violation of the law or dereliction of duty.

The Law establishes detailed procedures for challenges of administrative actions in the People's Courts but not of the administrative rules under which such actions were taken. Citizens, legal persons or other organizations may initiate proceedings in the courts. The Law is of special interest to foreigners and foreign businesses in that Chapter 10, 'Administrative Litigation Involving Foreign Entities', in Article 71, states that "foreigners, stateless persons and foreign organizations shall have litigation rights and obligations equal to those of citizens and organizations of the PRC".

Article 11 lists eight specific administrative acts within the scope of acceptance of cases. Some of these could be of interest to the foreign business enterprise in China e.g., when an administrative agency is considered to have infringed upon the statutory autonomy of a business organization, or when applications for permits or licences are rejected or left unanswered when the applicant feels that legal requirements have been satisfied. Several recent press reports have concentrated on the prospect of foreign businesses and individuals suing government departments and officials. The Vice Minister of Foreign Economic Relations and Trade, Li Langing, recently urged foreign trade officials to familiarize themselves with the Law's provisions. MOFERT is apparently reviewing a Foreign Trade Law, under consideration since 1983, to complement the Administrative Procedure Law.

Administrative acts which are excluded from the scope of the Law include "state acts" such as those related to diplomacy and defense, "administrative laws, regulations or rules, or universally binding decisions or orders formulated and promulgated by an administrative agency", internal personnel decisions of an administrative agency and specific acts for which the law provides an administrative agency with "final adjudication" powers. These exclusions are rather vague and certainly terms such as "state acts" and "universally binding decisions" are very much open to interpretation.

The Law provides that hearings shall be held in public except where state secrets or the private affairs of individuals are concerned. The Court will be made up of an odd number of judges with a minimum of three. Mediation shall not be applied in administrative cases except in proceedings for damages arising from a tort. The burden of proof shall be borne by the respondent with

respect to its administrative actions and to supporting documentation.

Article 53 states that courts shall refer to administrative rules and regulations. The courts do not have the power to review the validity of such rules though in cases where rules are seen to be inconsistent with State Council regulations, The Supreme People's Court shall submit the matter to the State Council for interpretation or a ruling.

The Law establishes a right to one appeal to a higher court within ten days of the original ruling.

The ability of foreign individuals and businesses to initiate a suit is subject to reciprocity, that is, if the courts in the country of nationality of the plaintiff restrict the administrative litigation rights of PRC citizens and organizations, the same restrictions will apply. Foreigners wishing to appoint a lawyer as agent ad litem have to appoint a lawyer from a Chinese law firm.

While the Administrative Procedure Law certainly amounts to an improvement in basic litigation rights in China, it remains to be seen how effective it is going to be. Despite the ongoing campaign throughout China to spread knowledge of this Law, legal awareness remains low and scepticism runs high among the citizenry. Although the Law clearly states that "parties to administrative proceedings shall be equal before the law"(article 7), individuals may be reluctant to act against powerful government organs. In the coming months we can expect to read about specific cases brought against administrative agencies that will receive China-wide publicity. Such cases will be followed closely by citizens, enterprises and legal observers.