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China

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CHINA

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This article reviews significant legal developments during 2017 in the field of Chinese antitrust litigation, company law, banking law, data compliance, trademark law, foreign investment, family law, and enforcement of judgments and court agreements.

I. China's Antitrust Litigation Development¹

This year witnessed a variety of developments in administrative and civil litigation under the China Anti-Monopoly Law (AML).²

A. AML ADMINISTRATIVE LITIGATION

Two appellate rulings regarding AML administrative litigation were issued in 2017. In *Thsware*, defendant Guangdong Province Education Bureau formed a committee with a software company, Guanglianda, and a local trade association to prepare for a national vocational school skills contest. The committee designated Guanglianda to be the sole provider of software and equipment for the engineering-cost-estimate contest in Guangdong. Guangdong Higher People's Court affirmed the judgment of first instance that the Education Bureau abused its administrative power by failing to choose a software and equipment provider in a transparent and fair process and by causing damages to Guanglinda's competitors.³

In *Honglin*, the court affirmed Shanxi Province Price Bureau's finding that a vehicle inspection service provider engaged in an illegal agreement with its competitors through a local trade association to fix the prices of vehicle

* Athena Jiangxiao Hou, Michael Dewey and Qing Lyu, Chief Legal Officer and Corporate Counsel of Fuyao Glass America Inc., edited this article.

1. Wei Huang, Senior Partner of Tian Yuan Law Firm (Beijing) authored this section.

2. Zhonghua Renmin Gongheguo Fanlongduan Fa (中华人民共和国反垄断法) [Anti-Monopoly Law of the People's Republic of China] (promulgated by the Standing Comm. of the Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008). [hereinafter].

3. Shenzhen Thsware Tech. Co. Ltd. v. Guangdong Education Bureau & Guanglianda Software Co., Ltd., Yue Gao Fa Xing Zhong Zi, Guangdong Higher People's Court [2015] No. 228 Administrative Judgment (June 28, 2017) ("*Thsware*").

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inspection services.⁴ Defendant denied the allegations, asserting that it had objected to the price agreement discussed at the association meetings and refused to submit guarantee fees. The Shanxi Province Price Bureau ruled, and the court affirmed, that defendant had participated in a tacit price-fixing agreement in coordination with competitors.⁵

B. AML CIVIL LITIGATION

Antitrust litigation related to Standard Essential Patents (SEPs) gained momentum in 2017. Apple sued Qualcomm in China, alleging Qualcomm abused its market dominance in violation of the AML and seeking CNY one billion damages.⁶ Apple asserted multiple claims, including excessive pricing, refusal to deal, restrictive dealing, bundled sale, imposition of unreasonable trading conditions, and discriminatory treatment. The case is at an early stage with the parties still litigating jurisdiction.

1. SEP Litigation and Licensing Negotiation

SEP holders seeking injunctions can be held liable for abusing their market dominance in certain jurisdictions.⁷ In China, courts balance the interests of SEP holders and those of SEP users. The court granted the SEP holder's injunction application in *IWNCOMM v. Sony* on the ground that the user defendant had made unreasonable information requests and had intentionally stalled the licensing negotiation in about six years.⁸

Detailed guidelines on IP abuses under the AML are in deliberation. A recent draft guideline on IP abuses⁹ by the Anti-Monopoly Committee

4. Honglin Industrial Co., Ltd. v. Shanxi Price Bureau, Shan 71 Xing Zhong, Xi'an Rail Transportation Intermediate People's Court [2017] No. 231 Administrative Judgment (Apr. 25, 2017) ("*Honglin*").

5. Chinese Courts will hold an industry agreement illegal, whether it is blessed by a government agency or reached for otherwise benign reasons. See Linyi Shengda Lianhe Accounting Firms v. Shandong Administration of Industrial and Commerce, Jing 02 Xing Zhong, Beijing No. 2 Intermediate People's Court, [2017] No. 538 Administrative Judgment (May 31, 2017) (affirming an administrative enforcement finding that certain CPA firms in Linyi City violated AML by agreeing to submit their business account details to a "self-disciplinary" association which determines business and profit distribution).

6. See Lin Zhou, *Suopei 10 Yi! Meiguo Guansi Gangda, Pingguo You Zai Zhongguo Su Gaotong Lanyong Shichang Dirwei* (索赔10亿! 美国官司刚打, 苹果又在中国诉高通滥用市场地位) [*Seeking One Billion! Apple Sues Qualcomm in China for Abusing Market Dominance when the American Lawsuit Has Just Started*], THE PAPER (Jan. 25, 2017, 11:29 PM), http://www.thepaper.cn/newsDetail_forward_1608390.

7. See, Case C-170/13, Huawei Technologies Co. v. ZTE Corp., 2015 E.C.R. 00000.

8. IWNCOMM Wireless Communication Co., Ltd. v. Sony Communication Products (China) Co., Ltd., Beijing IP Court, Jing Zhi Min Chu [2015] No. 1194. Civil Judgment (Mar. 22, 2017).

9. Guanyu Lanyong Zhishi Chanquan De Fanlongduan Zhinan (Zhengqiu Yijiangao), (关于滥用知识产权的反垄断指南(征求意见稿)) [Antitrust Guidelines on Abuse of Intellectual Property Rights (Draft for Comments)] Art. 26, (Mar. 23, 2017, 3:11 PM), <http://fldj.mofcom.gov.cn/article/zcfb/201703/20170302539418.shtml>.

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provides that SEP holders having market dominance may not use injunction requests to force patent users to accept unreasonable licensing terms and that such conduct may be deemed as anticompetitive. The draft guideline does not explicitly state an injunction request can support an independent antitrust claim.

2. *Court Jurisdiction*

China established Intellectual Property (IP) Courts in Beijing, Shanghai, and Guangzhou in 2014 to hear patent-related cases.¹⁰ Courts are expected to form a consensus that the determination of IP Court jurisdiction will be based on the amount of AML disputes. The Beijing Higher Court has clarified the jurisdiction of courts in Beijing, finding that when the claimed amount in an AML lawsuit is more than CNY 100 million and involves a foreign entity, the lawsuit is to be heard by the Beijing Higher Court (and not the IP Court) for first instance.¹¹ Shanghai Higher People's Court issued similar directions.¹² Guangzhou IP Court and Guangdong Higher Court are expected to note these decisions when they determine their respective jurisdictions over AML cases involving patents in Guangdong.

3. *Market Definition in AML Cases Involving Internet Products*

After the Supreme People's Court's (SPC) ruling in *Qihoo v. Tencent*,¹³ the definition of a relevant market continues to be the litigation focus in cases concerning internet products with varied platform characteristics. Plaintiffs typically define relevant markets based on defendants' business scope. Courts frequently dismiss plaintiffs' claims for failure to define a relevant

10. Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Zai Beijing, Shanghai, Guangzhou Sheli Zhishi Chanquan Fayuan De Jueding (全国人民代表大会常务委员会关于在北京、上海、广州设立知识产权法院的决定) [Decision of the Standing Comm. of the Nat'l People's Cong. on the Establishment of IP Courts in Beijing, Shanghai and Guangzhou] (promulgated by Standing Comm. Nat'l People's Cong., Aug. 31, 2014, effective Aug. 31, 2014), http://www.npc.gov.cn/npc/xinwen/2014-09/01/content_1877042.htm.

11. Beijingshi Gaoji Renmin Fayuan Guanyu Tiaozheng Benshi Fayuan Zhishi Chanquan Minshi Anjian Guanxia de Guiding (北京市高级人民法院关于调整本市法院知识产权民事案件管辖的规定) [Provisions of the Beijing Higher Court to Modify the Jurisdiction of Beijing Courts over Intellectual Property Rights Civil Cases] (promulgated by Beijing Higher People's Ct., Nov. 2, 2017) [hereinafter New Rules].

12. See Shanghaishi Gaoji Renmin Fayuan Guanyu Tiaozheng Benshi Fayuan Zhishi Chanquan Minshi Anjian Guanxia de Guiding (上海市高级人民法院关于调整本市法院知识产权民事案件管辖的规定) [Provisions of the Shanghai Higher Court to Modify the Jurisdiction of Shanghai Courts over Intellectual Property Rights Civil Cases] (promulgated by Shanghai High People's Ct., Feb. 19, 2016, effective Mar. 1, 2016).

13. *Qihoo Tech. Co. v. Tencent Tech. (Shenzhen) Co.*, LAWINFOCHINA, (Sup. People's Ct. Oct. 8, 2014) (affirming lower court's dismissal of Qihoo's claims against Tencent, holding Qihoo failed to define an appropriate relevant market and failed to prove Tencent's market dominance with a presumption that Qihoo's market definition is appropriate).

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market properly. In *Emoji*,¹⁴ plaintiff based its proffered market definition on defendant's business operations and defined the relevant market as the instant-messaging service market in China. The court rejected this definition, holding the proffered definition is not related to plaintiff's need to distribute his emojis on defendant's instant messaging platform.

C. ANTITRUST LITIGATION IN OIL INDUSTRY

In the first antitrust civil litigation involving the oil industry, Yunnan Province Higher People's Court affirmed the retrial judgment, finding that defendants did not abuse market dominance by refusing to sell plaintiffs' bio-diesel.¹⁵ The court did not address the essential facility doctrine that is common in refusal-to-deal cases in the United States. The focus of the appeal was whether defendants violated the AML for not selling plaintiffs' product when the government had not issued Renewable Energy Law (REL) implementation details. The court held, while the AML does not preempt the application of the REL, the court cannot compel parties to deal with each other when the complementary regulatory policies do not exist. The court affirmed the dismissal of plaintiffs' claim.

II. Judicial Interpretation IV on Company Law Unveiled¹⁶

China promulgated its Company Law¹⁷ in 1993, and several amendments have followed. The SPC issued three judicial interpretations to fill gaps and clarify certain key elements. Disputes and enforcement variations also increased in light of rapid economic and corporate growth. The SPC announced Judicial Interpretation IV to the Company Law that became effective on September 1, 2017.¹⁸

The twenty-seven-article Judicial Interpretation IV addresses several key elements that had been debated in the legal and business fields for years, including the validity of corporate resolution, shareholder's right to information and profit distribution, preemptive right, and shareholder derivative actions. Judicial Interpretation IV also focuses on the validity of

14. Xu Shuqing v. Shenzhen Tencent Computer System Co. Ltd. & Tencent Tech. (Shenzhen) Co., Ltd., Shenzhen Intermediate People's Court, Yue Min Zhong [2016] No. 1938.

15. Yunan Yingding Bioenergy Co., Ltd v. Sinopec Chemical Commercial Holding Co., Ltd. & Yunnan Branch of Sinopec Chemical Commercial Holding Co., Ltd., Yunnan Province Higher People's Court, Yun Min Zhong [2017] No. 122 Civil Judgment (Aug. 28, 2017).

16. This section is authored by Steven Shengxing Yu, partner of Hiways Law Firm (Shanghai).

17. Zhonghua Renmin Gongheguo Gongsifa (中华人民共和国公司法) [Company Law of the People's Republic of China] (promulgated by Standing Committee of National People's Congress Dec. 29, 1993, effective July 1, 1994).

18. Zuigao Renmin Fayuan Guanyu Shiyong <Zhonghua Renmin Gongheguo Gongsifa> Ruogan Wenti De Guiding (Si) (最高人民法院关于适用《中华人民共和国公司法》若干问题的规定(四)) [Provisions of the Supreme People's Court on Several Issues Concerning the Application of the Company Law of the People's Republic of China (IV)] (Promulgated by the Supreme People's Court, Aug. 25, 2017, effective Sept. 1, 2017), <http://www.court.gov.cn/fabu-xiangqing-57402.html> [hereinafter Judicial Interpretation IV].

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corporate resolutions and preemptive right, which are believed to be ground breaking for extending important protection to minority shareholders.

Under the current Company Law, a shareholder resolution may be declared null or revoked through judicial remedy.¹⁹ Article 5 of Judicial Interpretation IV states a resolution need not go through the complicated judicial remedy process when circumstances exist voiding the resolution procedurally.²⁰ Examples of such circumstances include; no meeting having been convened; no resolution having been voted upon; the number of meeting attendees being legally insufficient, or a decision not being duly made.²¹ In such circumstances, the resolution has never been formed.²²

Shareholders' access to corporate information is important to protecting shareholder rights. Prior to the Judicial Interpretation IV, once an individual lost his shareholder status, that individual could no longer file a lawsuit seeking corporate information. This limitation would often cause the person to miss his opportunity to seek judicial remedy even if his exit resulted from misrepresentations. Article 7 of Judicial Interpretation IV shows the SPC attempts to strike a balance between the interests of shareholders and corporations.

Article 7 allows courts to accept a case even though the plaintiff is no longer a shareholder. Courts will permit a shareholder-plaintiff access to the relevant corporate documents if the plaintiff can provide prima facie evidence that his legal rights and interests were damaged when he was a shareholder. Furthermore, to reinforce shareholders' right to access corporate information, the SPC has limited companies' ability to defer a shareholder's request; has directed courts to issue enforceable verdicts with specificity; and has provided for accountants, lawyers, and other shareholder representatives to inspect company documents.²³

Judicial Interpretation IV also provides more guidance on exercising preemptive rights in equity transfers. First, natural-person shareholders have no preemptive rights in cases of succession, unless otherwise specified by the company bylaws or shareholder agreement.²⁴ Second, the timeframe for exercising preemptive rights shall be as prescribed by the company bylaws, absent any requirement in the bylaws, by the terms specified in the shareholder notice, or absent any requirement in the shareholder notice or if the notice provides less than a 30-day timeframe, 30 days by default. All shareholders must be offered the "same terms" including payment method

19. Zhonghua Renmin Gongheguo Gongsifa (2013 Xiuzheng) (中华人民共和国公司法 (2013 修正)) [Company Law of the People's Republic of China (2013 Amendment)] (Promulgated by Standing Committee of the National People's Congress Dec. 28, 2013 effective Mar. 1, 2014), http://www.npc.gov.cn/wxzl/gongbao/2014-03/21/content_1867695.htm [hereinafter Company Law], art. 22.

20. Judicial Interpretation IV, *supra* note 18, art. 4.

21. *Id.*

22. Judicial Interpretation IV, *supra* note 17, art. 5.

23. *Id.*, art. 7.

24. *Id.*, art. 16.

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and payment terms of the equity transfers.²⁵ Third, share transfer is not irrevocable and courts will not force a transfer when other shareholders have acted under the “same terms” (unless otherwise specified by the company bylaws or shareholder agreement).²⁶

Compared with the previously circulated draft, Judicial Interpretation IV sends a strong signal to protect the interests of “the weak,” minority shareholders and those who do not run the company’s daily operations. It also helps clarify certain controversial areas, paving the way for market forces and practice to follow.

III. Regulations to Restrain Shadow Banking²⁷

Shadow banking in China has grown rapidly in recent years into a powerful, complex, and opaque financial sector, and the Chinese economy has become increasingly dependent on it for credit.²⁸ Chinese shadow banking involves three primary types of activities: (1) banks, restricted by regulatory requirements such as loan limits and capital requirements, provide underserved credit demand via off-balance sheet channeling; (2) credit enhancement institutions help enlarge the lending pool by providing guaranteed or short-term loans to low-credit customers; and (3) non-bank institutions including insurance companies, financial leasing companies, and wealth management institutions serve credit demands not served by banks.²⁹

Shadow banking poses substantial risks to Chinese economic stability because of its extensive scope and the practical difficulty in monitoring and containing the risks. It provides alternative financing and investment solutions to small and medium-sized enterprises whose credit needs are not fully served by the traditional banking sector and an underdeveloped equity market. Emerging municipal commercial banks embrace shadow banking as an effective credit-generating business model and safe haven from various regulatory restrictions. Shadow banking is estimated to have tied up nearly 20 trillion dollars’ worth of assets in China.³⁰

Chinese regulators adopted a series of new policies in 2017 in an attempt to rein in shadow banking.

25. *Id.*, art. 17 and art.18.

26. *Id.*, art. 21.

27. This section is authored by Jiangxiao Athena Hou, Chief Legal officer of Fuyao Glass America Inc., and Ming Li, an LL.M. student at Cornell Law School.

28. Group of Thirty, *Shadow Banking and Capital Markets: Risks and Opportunities*, 2 (2016).

29. Common shadow banking instruments in China include informal loans, bank trust cooperation financial products, leveraged lease, asset-backed security and negotiable securities. See Jianjun Li & Sara Hsu, *Shadow Banking Systems in the United States and China*, Renata Karkowska (ed.), 2014, *CHALLENGES TO FINANCIAL STABILITY—PERSPECTIVE, MODELS AND POLICIES*, ASERS Publishing, Vol. 2, No. 2 (June).

30. Anjani Trivedi, *China’s \$20 Trillion Shadow Banking Business Won’t Be Easily Tamed*, *The Wall Street Journal*, Oct. 17, 2017, <https://www.wsj.com/articles/chinas-greatest-challenge-1508137030>.

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A. FINANCIAL STABILITY AND DEVELOPMENT COMMITTEE

Speaking at a high-level financial policy meeting in July 2017, President Xi Jinping announced the establishment of a cabinet-level committee to coordinate China's financial regulation.³¹ Subsequently in November 2017, the State Council created the Financial Stability and Development Committee (the Committee). Vice Prime Minister Ma Kai, who is in charge of the national financial sector, serves as its Chairman.³² The central bank People's Bank of China (PBOC), China Banking Regulatory Commission (CBRC), China Insurance Regulatory Commission (CIRC), and China Securities Regulatory Commission (CSRC) will each nominate a representative to the Committee as Vice Chairpersons to coordinate the Committee's activities.³³ This Committee will coordinate regulatory efforts across the government agencies and address systemic risks including, in particular, shadow banking.³⁴

B. NEW REGULATORY MEASURES

Starting from the first quarter of 2017, the PBOC requires off-balance-sheet wealth-management products (WMP) be reported as "broad-based credit" in the Macro Prudential Assessment (MPA)³⁵—a point-based framework to evaluate the risks in bank credit exposure. The funds from WMPs are often invested by banks and non-banking institutions with many layers—a typical scheme of shadow banking.³⁶ The requirement also helps to control banks' lending growth at a "rational and appropriate" pace.³⁷ As a result, WMP sales and interbank negotiable certificates of deposit (NCDs) decreased substantially. The PBOC also sanctioned three municipal commercial banks for failing to satisfy MPA requirements.³⁸

Following PBOC's new policy, the CBRC published a set of new rules to control a broad range of risks in the financial system and, in particular, NCDs. All banks are required to conduct self-examination and report their

31. Wu Hongyuran & Han Wei, *China to Set Up Cabinet-Level Committee for Financial Oversight*, Caixin Global, July 15, 2017, <https://www.caixinglobal.com/2017-07-16/101116427.html>.

32. *The Financial Stable Development Commission of State Council Was Established and the First Meeting Was Convened*, Nov. 9, 2017, THE PEOPLE'S DAILY, at Important News 2.

33. See Leng Cheng, *China Financial Super Regulator Begins Operations*, Caixin Global, Nov. 9, 2017, <https://www.caixinglobal.com/2017-11-09/china-financial-super-regulator-begins-operations-101168026.html>.

34. *Id.*

35. *Interview with Relevant Person in Charge in the Central Bank about Off-Balance-Sheet Wealth Management Business to be Included into the Macro Prudential Assessment*, The People's Bank of China, Nov. 9, 2017, <http://www.pbc.gov.cn/goutongjiaoliu/113456/113469/3215090/index.html>.

36. *Id.*

37. *Id.*

38. Wang Lijuan, *Shadow Banking Is Facing the First MPA*, China Financial Weekly, Oct. 25, 2017, <http://finance.sina.com.cn/manage/mroll/2017-04-19/doc-ifyeimqy2616798.shtml>.

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arbitrage-related business, including any intentional circumvention of regulatory parameters by moving non-performing assets off the balance sheets through various asset-management plans; circumvention of asset-adequacy-ratio requirements by converting asset types and using WMPs and other banking tools, and circumvention of liquidity indexes through NCDs and interbank facilities.³⁹

C. COURT JUDGMENT

In addition to these new regulatory rules, a recent court decision sent a chilling message to shadow banking participants. Plaintiff, a financial trust company, alleged in defendant's bankruptcy proceeding that its investment in defendant's real estate company was debt, not equity or investment, and therefore plaintiff was a secured creditor with a priority claim over defendant's assets. Plaintiff asserted that its agreement with defendant and two of defendant's principals (and shareholders) was a financing arrangement that provided for a specific maturity date, a fixed return rate, and corresponding pledge of assets.⁴⁰ To circumvent the banking regulations, plaintiff received defendant's shares in return so that it would appear to be an equity acquisition agreement, but the agreement explicitly limited plaintiff's participation in the management of the defendant company.⁴¹

The court held plaintiff acquired the shares from defendant's principals and became a majority shareholder of the defendant company.⁴² The arrangement was a stock-purchase agreement between the shareholders, not a loan agreement between a debtor and a secured creditor.⁴³ Had the parties intended to make a financing arrangement, they could have entered into a loan agreement with appropriate language about the pledging of assets.⁴⁴ The court showed no sympathy to the plaintiff, noting that the plaintiff was well aware of its "trust company" status—the prohibition for trust companies to provide financing to the real estate project at issue—and the legal consequences of its own actions.⁴⁵

This case received nationwide attention because it detailed the legal risks of shadow banking activities. While shadow banking is an attractive business

39. Yinhangye Jinrong Jigou "Jianguan Taoli, Kongzhuan Taoli, Guanlian Taoli" Zhuanxiang Zhili Gongzuo Yaodian (银行业金融机构“监管套利、空转套利、关联套利”专项治理工作要点) [Key Working Points for “Regulatory Arbitrage, Churning Funds Arbitrage and Related Party Arbitrage” in Financial Institution of Banking Industry] (promulgated by the China Banking Regulatory Commission, Mar. 28, 2017, effective Mar. 28, 2017), <http://www.waizi.org.cn/law/18867.html>.

40. Xinhua Trust Co., Ltd. v. Huzhou Gangcheng Real Estate Co., Ltd., (2016) Zhe 0502 Min Chu No. 1671 Civil Judgment (Aug. 22, 2016).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

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model to small and medium-sized companies, it poses significant risks to business and national economic stability. These new policies are the first steps and have thus far produced positive results in monitoring risk and curbing shadow banking's rapid growth.

IV. Navigating the New Regulatory Hurdles on Data Compliance⁴⁶

A. OVERVIEW OF CHINA'S CYBERSECURITY LAW

China's Cybersecurity Law (CSL),⁴⁷ effective on June 1, 2017, is the first national law regulating personal information, data, and cybersecurity protection. The CSL adopts a graded system for cybersecurity protection and puts forward the concept of Critical Information Infrastructure (CII) for the first time. Among the requirements, the cross-border-data-transfer restriction may be one of the biggest challenges to multinational corporations.

B. DETERMINATION OF CII

CII operators, under the CSL, must comply with stricter cybersecurity protections and restrictions on data cross-border transfer. The determination of CII status is of great significance for businesses. The CSL lists certain sectors related to CII, including public communications, information service, energy, transport, water conservancy, finance, public service, and electronic government administration.⁴⁸ Furthermore, the Draft CII Regulation⁴⁹ details and extends the CII scope by including additional sectors, which will likely increase the challenges and potential exposure.

C. DATA CROSS-BORDER-DATA-TRANSFER RESTRICTION

Under the CSL, if a company is determined to be a CII operator, personal information and important data collected and generated by it within China must be stored in China. Such restrictions, however, may also apply to general network operators under the data exporting rules of the CSL, which are under review. Furthermore, under certain conditions, statutory security

46. This section is authored by Ken Dai, Partner at Dentons Law Offices (Shanghai).

47. Zhonghua Renmin Gongheguo Wangluo Anquan Fa (中华人民共和国网络安全法) [Cybersecurity Law of the People's Republic of China] (promulgated by Standing Committee of National People's Congress, Nov. 7, 2016, effective June 1, 2017). [hereinafter CSL].

48. CSL, *supra* note 44, art. 31.

49. Guanjian Xinxi Jichu Sheshi Anquan Baohu Tiaoli (Zhengqiu Yijiangao) (关键信息基础设施安全保护条例) (征求意见稿) [Draft Regulations on the Security Protection of Critical Information Infrastructure] (promulgated by Cyberspace Administration of China, July 11, 2017), http://www.cac.gov.cn/2017-07/11/c_1121294220.htm. [hereinafter Draft CII Regulation].

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assessments must be conducted before transferring personal information and important data outside China.

D. INCREASINGLY ACTIVE ENFORCEMENT

In the past six months, internet police in several provinces and cities have actively taken enforcement actions under the CSL. Most investigations targeted companies that fail to fulfill their obligations under the graded system for data protection. For example, the Public Security Bureau of Chongqing found that a technology company failed to maintain its network logs for more than six months in violation of the CSL. The SPC has released seven guiding cases involving the infringement of personal information,⁵⁰ indicating increased enforcement attention to personal information infringement.

E. SPECIAL CRIMINAL ENFORCEMENT CASE

Nestlé employees' infringement of pregnant women's personal information was one of the biggest data privacy cases in 2017. From 2011 to 2013, to promote formula milk powder, six Nestlé employees paid hospital medical staff in Lanzhou city for more than 120,000 pieces of personal information, including names and mobile phone numbers. The court held these employees criminally liable for infringing personal information and sentenced them to imprisonment. Defendants appealed on grounds that it was Nestlé and not they who should be liable for the privacy infringement. The Intermediate People's Court dismissed the appeal and affirmed the original judgment. Significantly, Nestlé's Employee Code of Conduct and other policies, which contain provisions protecting personal information, were important factors for the court to find no corporate liability.

F. CONCLUSION

A preliminary legal framework of cybersecurity and data protection is established in China. While specific guidance is in deliberation, enforcement authorities are expected to focus on protecting personal information, ensuring cybersecurity, and regulating CII. Compliance with cybersecurity and data protection will become a top priority for domestic and international companies.

V. Trademark Law Development in China⁵¹

In 2017, Chinese courts enhanced rules to address bad-faith filings, including stronger anti-dilution protection for well-known trademarks,

50. See Supreme People's Court, Typical Criminal Cases Concerning Infringing Citizen Personal Information, (May 09, 2017) <http://www.court.gov.cn/zixun-xiangqing-43952.html>.

51. This section is authored by Jingbing Li and Yanling Zheng, senior partner and partner of ZY Partners respectively.

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correcting abuse of the inclusive development rule, protection for celebrity names, and broadening application of Article 44.1 of the Trademark Law⁵² to prohibit rampant squatting.

A. ANTI-DILUTION PROTECTION OF WELL-KNOWN TRADEMARKS

Chinese courts have become more open to the anti-dilution doctrine. The SPC recognized 星巴克 (Chinese transliteration of Starbucks) as a well-known trademark and extended anti-dilution protection to the trademarks for floorboards and other wood-related goods.⁵³ The Beijing Higher People's Court provided anti-dilution protection for the famous auto brand Jeep and rejected a bad-faith filing from AFS Jeep for import-export agencies and other services.⁵⁴ Also, an application for 米其林 (Chinese transliteration of MICHELIN) for medical devices was denied because of its potential dilution of the MICHELIN tire brand.⁵⁵

B. LIMITING APPLICATIONS OF INCLUSIVE DEVELOPMENT RULE

The SPC introduced the Inclusive Development Rule in 2009,⁵⁶ under which courts can allow two similar trademarks to co-exist if the junior mark had acquired a reputation through use. The rule poses great challenges for famous international brands in their attempts to invalidate bad-faith registrations. To prevent abuse of this rule, the SPC directed courts to determine whether the later registrant filed and used its trademark in bad faith and whether the later registered mark had already been used and well-recognized before the application date of the senior trademark. Bad-faith registrations, like 拉菲庄园 (Château Lafite in Chinese characters) for wine, have since been invalidated by the SPC.⁵⁷

52. Zhonghua Renmin Gongheguo Shangbiao Fa (中华人民共和国商标法) [Trademark Law of the People's Republic of China] (Promulgated by Standing Committee of National People's Congress, Aug. 23, 1982, effective Mar. 1, 1983) [hereinafter Trademark Law].

53. Starbucks Corporation v. TRAB & Zhongshan City Jindao Wood Processing Co., Ltd., (2016) Zui Gao Fa Xing Zai No.100 Administrative Judgment (Jan. 17, 2017).

54. FCA US LLC v. TRAB & Zhongshan City Shiqi District Yuansheng Garments Factory, (2017) Jing Xing Zhong No.2226 Administrative Judgment (June 30, 2017).

55. Compagnie Generale Des Etablissements Michelin v. TRAB & Wanhua Zhang, (2016) Jing Xing Zhong No.4875 Administrative Judgment (May 8, 2017).

56. Zuigao Renmin Fayuan Guanyu Dangqian Jingji Xingshixia Zhishi Chanquan Shepan Fuwu Daju Ruogan Wenti De Yijian (最高人民法院关于当前经济形势下知识产权审判服务大局若干问题的意见) [Opinions of the Supreme People's Court on Several Issues Concerning the Service of Intellectual Property Trials for Overall Situation under the Current Economic Situation] No.23 Fa 2009, (promulgated by the Supreme People's Court, Apr. 21, 2009, effective Apr. 21, 2009), art. 9.

57. Chateau Lafite Rothschild v. TRAB & Nanjing Jinse Xiwang Wine Co., Ltd., (2016) Zui Gao Fa Xing Zai No.34 Administrative Judgment (Dec. 23, 2016).

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C. PROTECTION FOR CELEBRITY NAMES

Among the series of high-profile *Jordan* cases, the SPC determined that American sports star Michael Jordan enjoyed prior personal name rights to 乔丹 (Chinese transliteration of Jordan and pronounced as Qiaodan in Mandarin). The SPC found bad faith on the part of Qiaodan Sports Co., Ltd., and denied Qiaodan's registrations for 乔丹.⁵⁸ The SPC concluded that Qiaodan's use of 乔丹 would mislead the relevant public into believing that Michael Jordan endorsed or licensed the use of his name. The SPC directed courts to consider the following in granting protection to a person's name: first, the claimed specific name must be well-recognized among the relevant Chinese public; second, the relevant public must use the specific name to refer to the natural person; and third, there must have been a stable, corresponding relationship between the specific name and the natural person.

D. PROHIBITING RAMPANT SQUATTING BEHAVIORS

Article 44.1 of the Trademark Law provides an absolute bar to bad-faith registrations obtained through fraud or other illicit means. The Trademark Review and Adjudication Board, Beijing IP Court, and Beijing Higher People's Court have consistently applied Article 44.1 to stop rampant trademark squatting.

VI. Expanding Application of the Record-Filing System⁵⁹

China took major steps in 2017 to further liberalize its foreign investment regime by expanding the use of a much-simplified approval process.

A. THE PRE-EXISTING RECORD-FILING SYSTEM

China significantly transformed its regulatory regime on inbound foreign investment and introduced "record-filing" procedures in late 2016 with the promulgation of two sets of rules: the Provisional Measures on record-filing⁶⁰ and the 2016 Announcement No. 22,⁶¹ both effective on October 8, 2016. Under the record-filing system, foreign investment in China no

58. Michael Jeffery Jordan v. TRAB & Qiaodan Sports Co., Ltd., (2016) Zui Gao Fa Xing Zai No.15, 26 and 27 Administrative Judgment (Dec. 7 and 8, 2016).

59. This section is authored by Wenxiong Qiu and Qiuming Chen, partner and associate of Zhong Lun Law Firm (Shanghai) respectively.

60. Waishang Touzi Qiye Sheli Ji Biangeng Beian Guanli Zanxing Banfa (外商投资企业设立及变更备案管理暂行办法) [Provisional Administrative Measures on the Record-filing for the Incorporation and Change of Foreign-invested Enterprises] (promulgated by Ministry of Commerce, Oct 8, 2016, effective Oct 8, 2016) [hereinafter Provisional Measures].

61. Fazhan He Gai Ge Weiyuanhui, Shangwubu Gonggao, 2016 Nian Di 22 Hao (发展和改革委员会、商务部公告，2016年第22号) [National Development and Reform Commission, Ministry of Commerce Notice, 2016 Announcement No. 22] (promulgated

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longer requires case-by-case approval by Ministry of Commerce (MOFCOM), so long as the establishment and changes of the foreign-invested enterprises are not in a restricted industry sector explicitly identified in a “Negative List” issued by MOFCOM. MOFCOM conducts only a prima facie review of the filings in the simplified record-filing system.⁶²

B. EXPANDED APPLICATION OF THE RECORD-FILING SYSTEM

An amendment to the *Catalogue of Industries for Guiding Foreign Investments* was enacted and made effective on July 28, 2017 (the 2017 Catalogue).⁶³ To implement the amendment, MOFCOM enacted the *Decision on the Amendment to the Provisional Measures* (the Amendment).⁶⁴ Under the 2017 Catalogue and the Amendment (known collectively as the New Rules), the record-filing system has been expanded significantly. The New Rules address the absence of a nationwide uniform Negative List and the loopholes in the regulatory scope.

Under the New Rules, the record-filing procedures are expanded to apply to the following type of transactions.

1. Circular 10 M&As

Prior to July 30, 2017, foreign investors’ mergers with and acquisitions of domestic companies, including both equity and asset transactions (the so-called Circular 10 M&As), were subject to MOFCOM’s case-by-case approval.⁶⁵ Now that the New Rules have removed most of the Circular 10 M&As from the Negative List,⁶⁶ these foreign acquisitions of domestic companies not on the Negative List are no longer subject to MOFCOM approval.

jointly by National Development and Reform Commission and Ministry of Commerce, Oct 8, 2016, effective Oct 8, 2016) [hereinafter No. 22 Announcement].

62. See detailed discussion of this record-filing system at Wenxiong Hunter Qiu, *China*, 51 ABA/SIL YIR 620-622 (2017).

63. Waishang Touzi Chanye Zhidao Mulu (2017 Nian Xiuding) (外商投资产业指导目录 (2017 年修订)) [Catalogue of Industries for Guiding Foreign Investment (2017 Revision)] (promulgated jointly by Ministry of Commerce and Nat’l Dev. and Reform Comm’n, June 28, 2017, effective July 28, 2017).

64. Guanyu Xiugai Waishang Touzi Qiye Sheli Ji Biangeng Beian Guanli Zanzing Banfa De Jueding (关于修改《外商投资企业设立及变更备案管理暂行办法》的决定) [Decision on the Amendment to the Provisional Administrative Measures on the Record-filing for the Incorporation and Change of Foreign-invested Enterprises] (promulgated by Ministry of Commerce, July 30, 2017, effective July 30, 2017) [hereinafter Amendment].

65. Guanyu Waiguo Touzizhe Bingou Jingnei Qiye De Guiding (关于外国投资者并购境内企业的规定) [Provisions on Foreign Investors’ Merger and Acquisition of Domestic Enterprises] (promulgated jointly by State Admin. of Taxation, State Admin. for Indus. and Commerce, State Admin. of Foreign Exch., Ministry of Commerce, China Sec. Regulatory Comm’n and State-owned Assets Supervision and Admin. Comm’n, June 22, 2009, effective June 22, 2009) [hereinafter Circular 10], art. 6.

66. Amendment, *supra* note 64, art.1.

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Note that M&As between-affiliates (Connected M&As) are still subject to MOFCOM approval under the New Rules. Connected M&As refer to transactions whereby a Chinese domestic entity (Domestic Investor) merges or acquires its domestic affiliates through an offshore entity established or controlled by such Domestic Investor.⁶⁷ A Connected M&A is essentially a restructuring of a Domestic Investor and its offshore affiliate. The New Rules expressly exclude Connected M&As from the application of the record-filing system.⁶⁸

2. *Foreign Strategic Investments*

Previously, foreign investors' strategic investments in shares of listed companies (Strategic Investments) were subject to MOFCOM approval.⁶⁹ Under the New Rules the record-filing system becomes applicable to Strategic Investments as well, except when the target company is in an industry sector on the Negative List.⁷⁰

C. FOREIGN INVESTMENT SUBJECT TO OWNERSHIP OR MANAGEMENT CONTROL RESTRICTIONS

Previously, foreign investments into industry sectors that are in the encouraged category—but subject to foreign ownership or management control restrictions—were subject to MOFCOM approval.⁷¹ In keeping with this rule, the 2017 Catalogue includes those industries in the restricted category. Certain industry sectors could appear in both the encouraged and restricted categories. In practice it means foreign investments into these sectors are permitted subject to MOFCOM approval.

VII. Family Law Update in the General Provisions of Civil Law⁷²

The General Provisions of Civil Law (General Provisions),⁷³ effective on October 1, 2017, set forth a new family law framework and mark the critical first step to modernize Chinese family law.

67. Circular 10, *supra* note 65, art. 11.

68. Amendment, *supra* note 64.

69. Waiguo Touzizhe Dui Shangshi Gongsì Zhanlue Touzi Guanli Banfa (外国投资者对上市公司战略投资管理办法) [Administrative Measures for Strategic Investment by Foreign Investors in Listed Companies] (jointly promulgated by State Admin. of Taxation, State Admin. for Indust. and Commerce, State Admin. of Foreign Exch., Ministry of Commerce and China Sec. Regulatory Comm'n, Dec. 31, 2005, effective Jan. 30, 2006), art. 3.

70. Amendment, *supra* note 64, art. 3.

71. Announcement No. 22, *supra* note 61, art. 1.

72. This section is authored by Rong Kohtz, principal attorney of Law Offices of Rong T. Kohtz in New York and Michigan.

73. Zhonghua Renmin Gongheguo Minfa Zongze (中华人民共和国民法总则) [General Provisions of the Civil Law of People's Republic of China] (promulgated by Standing Comm. of the Nat'l People's Cong., Mar. 15, 2017, effective Oct. 1, 2017), art. 2 [hereinafter General Provisions].

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A. SUBJECT MATTER

The General Provisions expand the subject matter from 公民 (citizens) to 自然人 (natural persons), and therefore apply to any individual conducting civil activities in China, regardless of his or her citizenship. In contrast, the existing General Principles of Civil Law (GPCL) only apply to 公民 (Chinese citizens).⁷⁴ As a result, family matters related to foreign nationals are governed by a different set of rules or no rules. With the expansion of subject matter of the civil law, a uniform set of rules will apply to both Chinese and foreign nationals in family law matters.

B. FETAL RIGHTS

For the first time, the General Provisions grant a fetus, if it survives birth, civil rights (民事权利) in succession and other interests.⁷⁵ Recognition of fetal rights will likely generate new laws on the protection of fetal rights and related issues.

1. *Limited Civil Conduct Capability of a Minor*

The GPCL provides a minor — ten and older — limited legal capacity.⁷⁶ Chinese courts must consider wishes of a minor in custody matters.⁷⁷ The General Provisions lower the statutory age of a minor with limited legal capacity from ten to eight.⁷⁸ Whether the revision would benefit young children is uncertain because of their particular vulnerability in family disputes and their susceptibility to parental influence.

2. *Guardianship*

Chinese population has aged significantly in recent years. Multi-generational families are being replaced by nuclear families. Employers no longer provide essential social services. In this context, the General Provisions have repealed the antiquated employer guardianship⁷⁹ and provide a family-based guardianship system.

The General Provisions reinforce the individual obligation to support, care for, and protect aging parents.⁸⁰ Filial obligation was not in the GPCL.

74. Zhonghua Renmin Gongheguo Minfa Tongze (中华人民共和国民法通则) [General Principles of the Civil Law of the People's Republic of China] (promulgated by Standing Comm. of the Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), art. 2 [hereinafter GPCL].

75. General Provisions, *supra* note 73, art. 2, §16.

76. GPCL, *supra* note 74, art. 2, § 12.

77. Guanyu Renmin Fayuan Shenli Lihun Anjian Chuli Ziniv Fuyang Wenti De Ruogan Juti Yijian (关于人民法院审理离婚案件处理子女抚养问题的若干具体意见) [Specific Opinions of the Sup. People's Court on Adjudication of Child Custody Issues in Divorce Actions] (promulgated by the Supreme People's Ct., Nov. 03, 1993, effective Nov. 03, 1993), art. 5.

78. General Provisions, *supra* note 73, art. 2, §§ 19, 20.

79. *Id.*, art. 2, § 17.

80. *Id.*, art. 2, §§ 26, 28.

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The provision of filial obligation in the General Provisions signifies China's policy directive that caring for the elderly is no longer the State's duty but a private, family affair.

Guardianship is assumed automatically, without any State intervention, by a family member according to a priority list inherited from the General Principles.⁸¹ Families are given greater autonomy to decide how to care for their elderly and children. Parents may appoint a guardian for a minor by will or agreement. Adults may appoint a guardian for themselves in case of incapacity.⁸² The GPCL requires the consideration of the wishes of a ward⁸³ but provide little protection of his/her interests.

C. VIRTUAL ASSETS

The General Provisions recognize "virtual assets" as a new type of property⁸⁴ separate from any other types of property identified in the Marriage Law.⁸⁵ Further clarification for defining and dividing virtual marital assets is expected.

D. STATUTES OF LIMITATIONS

The General Provisions eliminate statutes of limitations in cases involving child support, filial support, and spousal support.⁸⁶ Unpaid support is a major socio-economic problem worldwide with billions owed. This change would ease the support recipients' burden in pursuing support claims.

VIII. Enforcing Judgments and Court Agreements⁸⁷

On June 30, 2017, the Wuhan Intermediate People's Court recognized the Los Angeles Superior Court's decision in the *Liu Li v. Tao Li and Tong Wu* cases⁸⁸ – a default judgment in a commercial case for the amount of \$147,492. The decision is of interest because it is the first one in which a Chinese court recognizes a US court decision.⁸⁹ Under the relevant articles of the Civil

81. *Id.*, art. 2, §§ 27, 28.

82. *Id.*, art. 2, § 33.

83. *Id.*, art. 2, § 30, 31.

84. *Id.*, art. 5, § § 111, 127.

85. Zhonghua Renmin Gongheguo Hunyin Fa (中华人民共和国婚姻法) [The Marriage Law of People's Republic of China] (promulgated by the Central People's Government, Apr. 30, 1950, effective May 1, 1950), [hereinafter Marriage Law], sec. 17(3).

86. General Provisions, *supra* note 73, art. 5, § 111, 127.

87. Authored by Asen Velinov, Young Lawyers Interest Network Committee.

88. *Liu Li v. Tao Li*, (Wuhan City Intermediate People's Ct., Hubei Province June 30, 2017) (China).

89. Wuhan Zhongyuan Zai Quanguo Shuaixian Caiding Chengren He Zhixing Meiguo Fayuan Shangshi Panjue (武汉中院在全国率先裁定承认和执行美国法院商事判决) [Wuhan Intermediate People's Court ruling in the country decided to recognize and implement commercial judgments of the United States court], SUPREME PEOPLE'S COURT OF THE

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Procedure Law of the PRC,⁹⁰ a Chinese court might recognize and enforce a decision issued by a foreign court, after examining the relevant treaties between the foreign court's jurisdiction and China,⁹¹ or on the basis of reciprocity. Here the court found that the reciprocity needed for the recognition and enforcement of judgments between the US and China (or at least California and Hubei Province) was established by the 2009 *Hubei Gezhoubu Sanlian Industrial Co.Ltd v. Robinson Co., Inc.* case.⁹² In 2016, a Singaporean court decision⁹³ (another first) was recognized by a Nanjing Court, again based on the principle of reciprocity between the two jurisdictions.

On September 12, 2017, China signed the Hague Convention of 30 June 2005 on Choice of Court Agreements,⁹⁴ and in October it added its commitment to the Belt and Road Initiative to the Party Constitution.⁹⁵ This acceptance is noteworthy, because, as the Civil Procedure law indicates, the basis for recognition and enforcement can either be reciprocity or a relevant agreement. As of 2017, China has 37 bilateral judicial assistance agreements, most of which with Belt and Road countries.⁹⁶ Furthermore, after over a decade of outbound investment by China, with significant Chinese assets abroad, and very clearly signaled commitment to the continued growth of China's international role, these developments and cases could be read as indications for the direction in which China's government and courts are going in the area of judicial cooperation and not as outliers.

REPUBLIC OF CHINA (Sept. 9, 2017, 4:56 PM), <http://www.court.gov.cn/zixun-xiangqing-59352.html>.

90. Civil Procedure Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., June 6, 2017, effective July 1, 2017), CLI.1.297379(EN), art. 281-282.

91. No relevant treaty exists between China and the United States. www.npc.gov.cn.

92. *Hubei Gezhoubu Sanlian Industrial Co. v. Robinson Helicopter Co.*, No. 2:06-cv-01798-FMC-SSx, 2009 WL 2190187 (C.D. Cal. July 22, 2009).

93. *Kolma v. SUTEX Group*, Case No. (2016) Su-01 Xie Wai Ren 3 Civil Judgment, Intermediate People's Court, Nanjing City, Jiangsu Province China, issued in 2016.

94. *China signs the 2005 Choice of Court Convention*, HCCH (Sept. 12, 2017), <https://www.hcch.net/en/news-archive/details/?varevent=569>.

95. *'Belt and Road' Incorporated into CPC Constitution*, BELT AND ROAD PORTAL (Oct. 25, 2017), <https://eng.yidaiyilu.gov.cn/qwyw/rdxw/31395.htm>.

96. NATIONAL PEOPLE'S CONGRESS, www.npc.gov.cn (last visited Feb. 1, 2018).

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