

# China

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# Chapter 1: Introduction

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## 1.1 General legal framework

The legal system of the People's Republic of China (PRC or China; for the purpose of this guidebook, referring only to mainland China) is a civil law system influenced by both German law as well as the former Soviet Union's legal system. The sources of law mainly include the Constitution of the PRC; national laws enacted by the National People's Congress (NPC) and its Standing Committee; administrative regulations promulgated by the State Council; and regulations and rules promulgated by the ministries and local legislative bodies. Legal practice in the PRC has distinctive regional patterns at the provincial level; major cities and special economic zones, as local legislative bodies, enjoy a certain degree of local legislative power.

Although China does not acknowledge binding case precedents, judicial practice still draws on the experience of common law in crafting decisions. The Supreme People's Court (SPC) began releasing 'guiding cases' in 2011 and, to date, the number has risen to over 100 cases. While not a formal source of law, 'guiding cases' are a form of judicial interpretation used to harmonise judicial standards and adjudication. To further decrease discrepancies resulting from similar cases, the SPC issued Implementing Measures for Establishing the Mechanism Resolving Law Application Differences on 11 October 2019, according to which all courts must apply to the SPC for resolutions if they find that any pending case may conflict with the SPC's effective judgments.

## 1.2 Recent legal developments

After 40 years of high-speed development since the last century's economic reform, China has entered into a period of high-quality development. To keep pace with social and economic changes, the PRC has continuously reformed its legal system. Since its accession to the World Trade Organization (WTO), China has built a comprehensive and complex legal system. By the end of 2011, the PRC had adopted its Constitution, enacted 236 laws, and promulgated about 690 administrative rules and 8,500 local regulations. Since 2012, the PRC has made great efforts to revise and harmonise its current laws.

The most ambitious achievement in the PRC's legislative history is the passing of its first Civil Code on 28 May 2020. The Civil Code is now the most extensive piece of legislation in the PRC and is the first to be named a 'code'. It consists of seven parts, including the general provisions, real rights, contracts, personality rights, marriage and family, inheritance, and tort liability. It will be effective from 1 January 2021 and will supersede any existing laws.

For international investors, the most direct and significant change is the Foreign Investment Law of the PRC, effective from 1 January 2020, superseding three foreign investment laws dating back to the original adoption in years from 1979 to 1988 and revised from time to time. The unification of the three laws into one will facilitate foreign investment into China.

As China is in the process of shifting from a world factory to an innovative power, it has been strengthening intellectual property protection to safeguard both foreign and domestic creators. The E-Commerce Law of the PRC, effective on 1 January 2019, prescribed obligations to e-commerce platforms to protect intellectual property, and the newly revised Trademark Law of the PRC came into force in late 2019. The revision of the Patent Law of the PRC is also ongoing.

In addition, the Standing Committee of the NPC adopted the revised Securities Law of the PRC, effective on 1 March 2020. Aimed at establishing a multi-tier capital market system with more stringent supervision and risk-control, the revised law promotes the registration system of securities issuance, increases penalties for violating rules and regulations, and enhances protection for investors.

This handbook briefly covers China's business environment, legal framework and business operations in the following chapters.

## Chapter 2: Business environment

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Since the initiation of economic reforms in the late 1970s, China has experienced an economic growth averaging 9.4 per cent annually, which is far higher than the world's economic growth rate during the same period. China became the world's second-largest economy in 2010, accounting for about 16 per cent of the world economy, and is now a top trade and foreign direct investment (FDI) inflow country.

A comprehensive industrial system has been established. In recent years, China has been seeking economic growth pattern transformation from the traditional investment-driven industries to technology and innovation-driven and environmentally friendly industries. The government has promulgated relevant documents, such as the Guidance Catalogue of Industrial Structure Adjustment by the National Development and Reform Commission (NDRC) on 30 October 2019, and the Catalogue of Encouraged Industries for Foreign Investment by the NDRC and Ministry of Commerce of the PRC (MOFCOM) on 30 June 2019, to encourage investment in new industries. Meanwhile, market size and diversity across the country also offer diverse investment opportunities.

Laws and policies are constantly evolving to keep up with the rapid economic development of the past four decades, recording or guiding the changes and developments in the business field. China's centrally controlled political system has enabled the NPC and central government to promulgate legislation that is universally applied across the whole nation. On the other hand, the ministries and the local congresses and governments may issue industry or locality-specific legislative documents or policies with more guidance to bridge the gap and reduce ambiguity in laws. It is thus important for investors to keep track of changes in laws and their subordinate regulations and rules, and understand the practical differences in different localities.

The business environment has been continuously improving, especially in recent years. According to the *Global Business Environment Report 2020*, released by the World Bank, China's business environment in general has reached 77.9 per cent of the world's best level, ranking 31st in the world and climbing up 15 places compared with the previous year. According to this report, China is, for the second year in a row, among the top ten economies in the world with the most notable improvements in its business environment as a result of pushing forward the reform agenda. This chapter presents a snapshot of China's business environment by summarising the relevant indicators the World Bank uses to evaluate the ease of doing business in an economy.

## 2.1 Starting a business

China implements a unified negative list of market entry. In areas other than those listed on the negative list, entry is equally open to all kinds of market entities. For foreign investors, a negative list of foreign investment is also applicable and the principle of the national treatment for foreign-invested enterprises (FIEs) is adopted.

Except for a few businesses that should obtain a licence in advance as required by law, investors can go directly to register the business entity with the State Administration for Market Regulation (SAMR) or its local branches. The SAMR is now actively promoting the use of an online 'one-stop' application procedure, that is, completing all formalities required for starting a business via an online centralised platform, including obtaining the business licence, the company chops (seal/stamp) and taxation registration. According to the central government, the timeline for the SAMR to deal with formalities for starting a business should be shortened to within five working days as of the end of 2019. Many local governments have promised a shorter timeline, for instance, the local branches of the SAMR in Beijing and Shanghai have promised that all formalities will be completed within one day if the application materials are in order.

## 2.2 Enforcing contracts

Investors can enforce a contract via litigation at court or arbitration (if arbitration is chosen by the parties). China's courts adopt the two-instance trial system, and judgments and orders of the second instance court are final and enforceable in general, except that, under exceptional circumstances, the parties can apply for a retrial of the case. Summary procedure is also available for simple cases. The court's decisions are published online with limited exceptions of, for instance, divorces cases and cases involving state secrets. Arbitration is also an effective and well-recognised way to resolve disputes. Courts generally recognise and enforce effective arbitration awards, including foreign arbitration awards, because China is a party to the Convention on the Recognition and Enforcement of Foreign Arbitration Awards (the 'New York Convention').

## 2.3 Registering property

Land in China is owned by the state or, in rural areas, by collective organisations. A private party can obtain the land use right and the ownership of houses built on the land. The land use right and house ownership can and should be registered with the real estate administration authority so that the land use right and house ownership are formally established. In the same way, the

mortgage on the land use right or house ownership should be registered. The registration is carried out using the centralised, electronic and computer-based registration system managed by the real estate administration authority of each city. The rights holder and interested party may access the information maintained in the registration system.

## **2.4 Obtaining credit**

Commercial banks consist of large-scale state-owned banks, medium-sized joint-stock banks, small-scale urban commercial banks and rural credit cooperatives. All commercial entities have access to financing from a bank, subject to the bank's review of the borrower's credit. A commercial loan provided by a bank is mainly priced by reference to the loan prime rate (LPR). Generally, banks are willing to accept the borrower's real estate and movable property as collateral. Laws also permit the use of certain kinds of rights as collateral, such as shares or equity interests in companies, patents, copyrighted content, trademarks, accounts receivable, bonds, deposit certificates, warehouse receipts and bills of lading. Generally, the perfection of a mortgage and pledge is accomplished by registration with the relevant registration authorities in charge; and the perfection of a pledge over a tangible movable property is accomplished through the transfer of possession of the property by the pledgor to the pledgee. The secured party enjoys the priority of being repaid from the proceeds of the disposal of the collateral.

## **2.5 Obtaining electricity**

Generally, obtaining electricity requires submitting a request for electricity demand, an application for a signing contract and power connection construction. In Shanghai, the local government has promised that the process of power supply for low-voltage projects will take ten days. In Guangzhou, for low-voltage non-residential users, it will take no more than three days to complete the process if the construction of external lines is not required, and no more than eight days if the construction of external lines is required.

## **2.6 Dealing with construction permits**

China has established a comprehensive system covering the whole process from the granting of a land use right and issuance of a construction permit to the completion, acceptance and registration of real property. The government makes an effort to streamline the process and requires a reduction of the time required to within 120 working days, including by simplifying the requirements for low-risk construction projects, reducing the time to receive water and drainage connections, and promoting the integration of multiple verifications and joint acceptance. In Shanghai, the local government has implemented an online and offline 'one-stop centre' process for industrial projects with an area of less than 10,000 square metres in order to reduce the approval process to within 24 days.



## 2.7 Trading across borders

Enterprises may carry out independent cross-border trade (goods and technology) after filing with the commercial authority and registering with customs. The import and export of goods and technologies are subject to a list of prohibited or restricted goods and technologies issued by the state. Customs are piloting a ‘two-step declaration’ customs clearance model by which the enterprise may take delivery of goods after a summary declaration upon the consent of customs, and complete the entire declaration within a specified time.

The general trend for cross-border technology trade is that conditions for technical cooperation are primarily determined by the parties involved through consultation in accordance with the principle of fairness. Notably, some relevant regulations have been amended. For instance, the statutory provisions in relation to guarantee obligations by the transferor and entitlement to the improvement of intellectual property rights were removed from the Regulations on the Administration of Technology Import and Export (promulgated by the State Council on 10 December 2001 and last amended on 2 March 2019), which used to be a subject of consultation between the transferor (licensor) and transferee (licensee).

## 2.8 Protecting minority investors

For a limited liability company, laws provide for the protection of the rights and interests of minority shareholders in certain circumstances. For instance, the Company Law (promulgated by the Standing Committee of the NPC on 29 December 1993 and last amended on 26 October 2018) provides that if a company has been profitable for five consecutive years and meets the conditions for profit distribution but fails to make dividends for five consecutive years, the shareholder who votes against such a shareholders’ resolution has the right to request that the company purchases its equity at a reasonable price. The Company Law also provides that the shareholder may launch litigation in the case of damage to the shareholder’s interests caused by misbehaving directors or senior managers, or in the case of damage to the company’s interests. In addition, protective provisions that are prevalent in international markets can also be commonly seen in China’s investment cases, especially those with private equity funds, for example, veto rights, the supermajority voting requirement, pre-emptive rights, redemption rights, liquidation preferences, and tag-along and drag-along rights.

For a public company, laws and regulator’s rules provide some additional protections to minority shareholders, such as cumulative voting; restrictions on the amount of and time for controlling shareholders to sell stock; and a more stringent approval procedure for the company to provide security for the shareholders or *de facto* controller of the company. Chinese companies have the option to list publicly in domestic and/or overseas stock markets. For those that are listed overseas, directly or indirectly, the interests of minority shareholders are protected by local applicable rules.

## 2.9 Improving the business environment

The Chinese government has made significant efforts to improve the business environment in recent years. To this end, in addition to the promulgation of the new Foreign Investment Law in 2019, a series of regulations have been issued. The State Council issued the Regulations on Optimizing the

Business Environment on 22 October 2019. Subsequently, the Ministry of Finance, SAMR, State Intellectual Property Office, Ministry of Natural Resources and other ministries/commissions have issued circulars on the implementation of the Regulations on Optimizing the Business Environment. Major cities, such as Beijing, Guangzhou, Shanghai and Shenzhen, have also issued local regulations on optimising the business environment. All of these have created a positive influence on the investment convenience for investors.

## Chapter 3: Business and corporate structures

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### 3.1 Structures for doing business in China and relevant laws

#### 3.1.1 Structures for doing business

##### COMPANIES AND PARTNERSHIPS

Companies and partnerships are two major ways for foreign investors to structure a business in China. Companies are independent legal persons, whose liability shall be limited to the companies' assets. Partnerships do not operate as independent legal persons; investors or founders shall bear unlimited liability if the assets of partnerships are insufficient to pay off the debts. Most FIEs take the form of companies, and partnerships are more often seen and used in foreign investment in the venture capital and private equity fields.

##### LIMITED LIABILITY COMPANY AND COMPANIES LIMITED BY SHARES

Companies in the PRC include limited liability companies and companies limited by shares. Compared with limited liability companies, there are stricter requirements for forming and operating companies limited by shares in terms of corporate governance, public disclosure and so on. Most foreign investors choose the form of limited liability companies for new investment. Businesses aiming at a public listing in a stock exchange in the PRC may consider choosing the form of a company limited by shares from the beginning, as it is the only acceptable form of organisation for a public listing in the PRC.

#### 3.1.2 Legal requirements under relevant PRC law

The major law governing PRC companies is the PRC Company Law, which was initially promulgated by the Standing Committee of the NPC in 1993 and subsequently amended in 1999, 2004, 2005, 2013 and 2018.

##### GENERAL REQUIREMENTS FOR A LIMITED LIABILITY COMPANY

Pursuant to the Company Law, a limited liability company (the most commonly used form by foreign investors) shall have less than 50 shareholders, and its registered capital shall be the amount of

capital contribution subscribed by all shareholders registered with the company registration authority. Capital contributions may be in cash or in-kind (eg, intellectual property, land use rights and other non-cash properties that can be valued and transferred in accordance with the law). Except certain special industry and business as specifically required under relevant laws, there is no requirement for a minimum amount of capital contribution.

Unless otherwise provided in the articles of association, the shareholders are entitled to profit sharing in accordance with the ratio of their capital contribution. A shareholder proposing to transfer its equity interests to a non-shareholder shall obtain the consent of more than half of the other shareholders. The legal representative of the company who represents the company in civil activities shall be either the chairman of the board of directors/executive director or the general manager of the company. In addition, the legal representative shall be registered with the company registration authority, and all such information is available to the public in China through a public search.

#### GOVERNANCE STRUCTURE OF A LIMITED LIABILITY COMPANY

The governance structure of a limited liability company under the PRC Company Law consists of: (1) the shareholders' meeting; (2) the board of directors or executive director; (3) the board of supervisors or the supervisor(s); and (4) the managerial staff, including a general manager and other board-appointed officers, such as a deputy general manager and a chief financial officer.

The shareholders' meeting is the highest authority of the company. The group decides the most important matters of the company. The board of directors is the executive organ of the shareholders' meeting, which shall have three to 13 board members (in the case of smaller companies, the board of directors can be replaced with one executive director). The board of supervisors, which exercises supervisory functions over the company, shall have at least three members (in the case of smaller companies, the board of supervisors can be replaced with one or two supervisors). The general manager is responsible to the board of directors/executive director. The general manager exercises his/her rights and duties pursuant to the Company Law and the articles of association of the company.

#### ONE-PERSON LIMITED LIABILITY COMPANY

The limited liability company includes a special category called a one-person limited liability company. A one-person limited liability company only has one shareholder instead of a shareholders' meeting, and the shareholder can be either a natural person or a legal person. A natural person can only invest in one one-person liability company. If the shareholder of a one-person limited liability is unable to prove that the company's assets are independent of the shareholder's personal assets, the shareholder shall bear joint liability for the company's debt.

## 3.2 Statistics on newly established foreign investment enterprises

Pursuant to the official statistics of the National Bureau of Statistics of the PRC, from January 2019 to December 2019, the newly approved FIEs in China totalled 40,888 (enterprises in the area of banking, insurance and security not included), down by 32.5 per cent year-on-year. Actual use of

foreign investment reached \$138.1bn, up by 2.4 per cent year-on-year; among which 5,591 FIEs are invested in by investors from Belt and Road countries, up by 24.8 per cent year-on-year.

### **3.3 Free trade zones**

Free trade zones (FTZs) in China are a specific class of special economic zones where goods can be landed, handled and re-exported without the intervention of customs authorities. China's opening-up policy has driven the establishment of FTZs in major cities and regions over the past several years. The first FTZ was launched in Shanghai in 2013 as a milestone in doing business in China. To date, FTZs have been launched in 18 cities/regions in China: Chongqing, Fujian, Guangdong, Guangxi, Hainan, Hebei, Henan, Heilongjiang, Hubei, Jiangsu, Liaoning, Shandong, Shanghai, Shanxi, Sichuan, Tianjin, Yunnan and Zhejiang.

The common goal of FTZs is to implement new models and innovative and preferential policies to improve the business environment, attract investment and offer geographical advantages for trade, administrative services, flow of capital, openness of transportation, taxation and so on. Each FTZ may have its own development priorities, for example, among the six new FTZs launched in August 2019, the Guangxi FTZ seeks to tap cooperation potential with Association of Southeast Asian Nations (ASEAN) members, build a land-sea corridor for international trade and develop border areas. The Shandong FTZ, launched at the same time, regards institutional reform as its priority. It aims to carry out reforms on 16 administrative service items and release more than 20 guidelines on optimising administrative services to be provided by the local government. With the Foreign Investment Law coming into force on 1 January 2020, FTZs in China are gearing up for the implementation of more institutional reforms and innovative measures. Foreign investors may consider investing in the FTZs, taking into account their locations, policies and advantages.

### **3.4 Legal risks and challenges**

#### *3.4.1 Requirement for licences or permits*

Besides a business licence, if an FIE is engaged in a certain specific business sector, it may need to apply for specific licences or permits from the particular government authority that supervises that particular sector. Most of these licences and permits are the same as those of domestic enterprises. For example, an FIE that intends to engage in the sale of pharmaceuticals shall obtain an operating permit from the relevant drug administration bureau. If an FIE intends to engage in the value-added telecommunication business, it shall obtain an operating permit from the relevant industry and information technology bureau. The time for obtaining licences and permits may vary due to the different requirements of different government authorities.

In recent years China has gradually promoted decentralisation and the transformation of government functions. As a result of such reform, many licences or permits that were in the past obtained before registration with the market supervision authority for a business licence have either been cancelled or changed, so that they are obtained after the issuance of the business licence. The central and local governments publish a list of permits or licences that shall be obtained before registration for

business licences; permits or licences not included in such a list can be obtained after the issuance of the business licence and before relevant business is carried out by FIEs.

### *3.4.2 Foreign Investment Law*

The foreign investment regime in China is undergoing significant changes. Pursuant to the Foreign Investment Law of the PRC, the organisation form, structure and operating rules of FIEs are subject to the provisions of the Company Law, the Partnership Enterprise Law and other applicable laws. FIEs established in accordance with the three old foreign investment laws before the FIE came into effect may keep their original organisational forms for five years after 1 January 2020; that is, existing FIEs established in accordance with the three old foreign investment laws shall take action to change their organisation forms within five years and shall operate in accordance with PRC Company Law or other applicable laws from 1 January 2020.

### *3.4.3 Compliance with environmental laws*

In recent years the PRC government has increasingly emphasised environment protection. This requires foreign investors to pay more attention to compliance with environmental laws, especially with respect to the establishment of manufacturing enterprises.

### *3.4.4 Labour costs*

Labour costs in China continue to rise, especially in the form of wages and welfare across urban areas, which is another factor that needs to be taken into account by foreign investors.

## **Chapter 4: Takeovers (friendly M&A)**

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### **4.1 Takeovers of non-listed companies**

#### *4.1.1 Regulatory framework for the acquisition of non-listed companies*

There is various legislation governing M&A in China, which, to a certain extent, makes it challenging for foreign investors that do not have much experience in foreign investment in China via M&A.

Generally speaking, in terms of non-listed companies, both the target and acquiring companies are required to comply with, among other things, the primary laws and regulations, including the Company Law of the PRC and the new Foreign Investment Law of the PRC.

More specifically, foreign investors may also need to follow the detailed requirements contained in the Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors (the ‘M&A Rules’), which was first released by the State Administration for Industry and Commerce and nine

other governmental authorities in 2006 and was last revised in 2009. The M&A Rules have been important rules for M&A in China by foreign investors for many years. The M&A Rules require, among other things, that: (1) the purchase price be determined based on the valuation of the target by a qualified Chinese appraisal firm; (2) domestic enterprises or individuals' acquisition of affiliated companies through controlled overseas companies be approved by the MOFCOM; and (3) an acquisition be filed with the MOFCOM if such an acquisition will cause a change of control over a domestic company owning any renowned trademark or China's time-honoured brands.

The promulgation of the Foreign Investment Law has aroused fierce discussions in the market over the validity of the M&A Rules, partly because certain provisions of the M&A Rules may conflict with the new Foreign Investment Law. That being said, as of the end of February 2020, the M&A Rules are still in effect, without being invalidated.

#### *4.1.2 M&A statistics for non-listed companies*

Based on the statistics sourced from MOFCOM, M&As in China by foreign investors became more and more active in 2015. Particularly, in 2015, 1,466 new FIEs were established in China by way of M&A, up 14.4 per cent year-on-year, with the actual use of foreign investment amounting to \$17.77bn, up 137.1 per cent year-on-year. The share of M&A in the total amount of actual foreign investment increased from 6.3 per cent in 2014 to 14.1 per cent in 2015.

In addition, from January to November 2016, the actual use of foreign investment contributed by foreign investor's M&As maintained steady growth. In particular, 1,466 new FIEs were established in China through M&A, with the actual use of foreign investment amounting to RMB 123.5bn, up 15.6 per cent year-on-year, accounting for 4.5 per cent and 16.9 per cent of the total number of newly established FIEs and the total amount of actual use of foreign investment, respectively.

#### *4.1.3 Typical methods of acquisitions for non-listed companies*

Under PRC laws, typically, a foreign investor could take over a domestic company by either: (1) equity acquisition by which a foreign investor will purchase equities in the target from its original shareholder(s); or (2) asset acquisition, by which a foreign investor may set up a new FIE in China to purchase the target's assets, or purchase the target's assets first and then invest such assets in the establishment of a new FIE to operate such assets.

A typical M&A transaction involves, inter alia, target search and approach, negotiations with the target, valuation, deal structuring, due diligence, closing and post-acquisition integration. Taking equity acquisition as an example, the acquisition of a domestic company by a foreign investor typically and primarily involves, among other things, the following steps:

- reaching a term sheet with the target company and its shareholder(s) on the key commercial terms;
- conducting due diligence investigations (financial, legal, compliance, intellectual property, human resources, etc) into the target company;



- preparing and executing an equity purchase agreement, an investment agreement/ shareholders agreement, the amended and restated articles of association of the target company, and other transaction documents (if applicable);
- upon the satisfaction of all other conditions precedent, the target company applying to various governmental authorities for changing relevant registration/filing information so as to properly register/record the foreign investor as a shareholder of the target company; and
- the foreign investor paying transaction consideration, the payment timeline of which may be adjusted based on the deal structure.

#### 4.1.4 *Other considerations in the acquisition of a PRC non-listed company*

China has a sophisticated regulatory regime for M&A by foreign investors. Apart from the primary legislation mentioned above (ie, the Company Law, the Foreign Investment Law and the M&A Rules), there are other considerations to consider regarding M&A transactions in China, such as those illustrated, but not limited to, the below.

##### MERGER CONTROL REVIEW

Pursuant to the Anti-Monopoly Law of the PRC, if an M&A transaction constitutes the ‘concentration of undertakings’ as provided in the Anti-Monopoly Law, and if such concentration has reached the threshold of notification set forth by the State Council of China, then such an M&A transaction will be subject to a merger control review, and the parties to such concentration shall make an anti-monopoly notification to the competent anti-monopoly authority; otherwise, such concentration may not be implemented. Where the parties fail to seek the clearance of a merger control review, they may be penalised by the anti-monopoly authority, such as being ordered to cease the concentration and being fined.

##### NATIONAL SECURITY REVIEW

China has established a security review system to conduct a security review of foreign investment that impacts or may impact national security. A national security review may come into play if foreign investors are trying to acquire:

- domestic enterprises that have a bearing on national defence security; or
- domestic enterprises that are engaged in key industries concerning national security (eg, important agricultural products, important energy and resources, and key technologies), and the acquisitions of which may enable the foreign investors to acquire an effective control over such enterprises.

If a proposed takeover is likely to fall into the scope of a national security review, the foreign investor may make the national security review notification on a voluntary basis. Failing to do so may expose the deal to uncertainty because the authority in charge has the power to initiate the national security review procedures at its discretion or based on complaints made by any third parties, without regard to whether the deal has been closed.

Another factor that foreign investors should take into account is whether the target company is considered as a state-owned enterprise (SOE). Under PRC laws, the acquisition of a SOE is subject to special procedures, which may lengthen the time required for such an acquisition or cause uncertainty. These special procedures include but are not limited to:

- governmental approval: where the proposed acquisition upon closing would result in the state no longer having control of the target SOE, the parties shall seek prior approval from the competent People's government;
- asset appraisal: in general terms, the consideration for the acquired equities in a SOE should not be lower than the price appraised by a qualified Chinese appraisal firm; and
- acquisition through property right exchanges: PRC laws generally require that the sale of equities in a SOE should be conducted in public through a property right exchange, which is a quasi-government agency.

#### DATA PRIVACY AND CYBERSECURITY

Following the release of an array of new laws, regulations and rules in the field of data privacy and cybersecurity, data protection has become one of the primary considerations for M&A deals in the past few years. PRC laws have imposed various requirements on cross-border transfers of data, use and storage of consumers' personal information and so on. Hence, potential exposure in respect of data privacy and cybersecurity are important due diligence matters in M&A, especially when the M&A transactions take place in internet-based industries.

#### COMPLIANCE RISK

For M&A transactions in China, increasing emphasis has been placed by multinational corporations and US companies on potential compliance risks, in part due to the increasingly stringent enforcement of the US Foreign Corrupt Practices Act. As certain long-established business practices in China may not be improved within a short period of time, the compliance risk in undertaking M&A transactions in China may remain high. Against this backdrop, foreign acquirers should consider special anti-bribery and anti-corruption due diligence for M&A in China.

## 4.2 Takeovers of listed companies

### 4.2.1 Regulatory framework for the acquisition of a listed company

In contrast to the global economic downturn, the A-share securities market's performance remains strong in China and has been increasingly attracting foreign investors from all over the world who are keenly interested in investing in Chinese listed companies. However, as China's capital market, in particular the A-share securities market, is not currently fully open, the acquisition of a listed company by a foreign investor is subject to requirements of special laws and regulations, in addition to legislation that is generally applicable to M&A in China. These include:



- regulations governing QFII/RQFII:
  - Administrative Measures for the Domestic Securities Investment by Qualified Foreign Institutional Investors (QFII), as jointly promulgated by the China Securities and Regulatory Commission (CSRC), the State Administration of Foreign Exchange (SAFE) and the People's Bank of China (PBOC) on 1 September 2006 ( 'Measures on QFII'); and
  - Measures for the Pilot Program of Securities Investment in China by RMB Qualified Foreign Institutional Investors (RQFII), as jointly promulgated by the CSRC, PBOC and SAFE on 1 March 2013 ('Measures on RQFII');
- legislation on securities regulation:
  - Measures for the Administration of the Takeover of Listed Companies, as promulgated by the CSRC on 23 October 2014, and its subsequent implementation rules ('Measures on Takeover of Listed Companies'); and
  - Administrative Measures on the Strategic Investment in Listed Companies by Foreign Investors, as revised and promulgated by MOFCOM, CSRC, SAFE and other ministries on 28 October 2015 ('Measures on Strategic Investment'); and
- a series of rules and measures in connection with Northbound Trading Link of Shanghai-Hong Kong Stock Connect and Shenzhen-Hong Kong Stock Connect as respectively promulgated by the CSRC, Shanghai Stock Exchange (SSE) and Shenzhen Stock Exchange (SZSE).

#### 4.4.2 *Typical acquisition methods for listed companies*

Under the PRC legal regime, a foreign investor may elect either method as set out below to acquire the shares of a PRC listed company.

##### APPLY TO BE LICENSED AS A QFII/RQFII OR TRADE A-SHARES THROUGH AN EXISTING QFII/RQFII

Any foreign investor that meets certain criteria as provided in the Measures on QFII (eg, financial capacity, qualified and experienced experts, and well-rounded internal control) can apply for a QFII licence and thereafter can use the RMB settled from foreign currency to invest in RMB financial instruments (including trading A-shares listed on SSE or SZSE) within the quota as approved by CSRC on a case-by-case basis. If a foreign investor does not apply for a QFII licence, as an alternative, it can entrust any existing QFII to invest in an A-share listed company.

Similarly, a foreign investor can also apply for an RQFII licence in accordance with Measures on RQFII, and such an RQFII can use RMB capital sourced from abroad to invest in A-share-listed companies within the quota as approved by SAFE.

##### PARTICIPATING IN THE ACQUISITION OF A LISTED COMPANY AS A STRATEGIC INVESTOR

The Measures on Strategic Investment stipulate that where a foreign investor meets several thresholds as outlined thereunder (eg, possession of overseas assets exceeding \$100m or managing overseas assets worth more than \$500m), it can acquire the shares of an A-share-listed company as a qualified strategic investor.

Under the current legal regime, and in typical practice, a qualified strategic investor may conduct a strategic investment in an A-share-listed company by:

- participating in the listed company's private placement;
- transferring shares of the listed company by agreement;
- making a tender offer; or
- making an indirect acquisition through other intermediary vehicles.

#### MAKING AN INVESTMENT IN A-SHARE-LISTED COMPANIES VIA THE NORTHBOUND TRADING LINK OF SHANGHAI-HONG KONG STOCK CONNECT AND SHENZHEN-HONG KONG STOCK CONNECT

Foreign investors may engage a Hong Kong broker and apply to the SSE or SZSE to transact shares of A-share-listed companies through a securities trading service company formed by the Stock Exchange of Hong Kong Limited in Shanghai or Shenzhen. Further, SSE and SZSE have adopted different standards on the A-shares available for trading to foreign investors.

#### *4.2.3 Other considerations in the acquisition of a PRC-listed company by a foreign investor*

Apart from the universal concerns arising out of a foreign investor's M&A transactions in China, which have been addressed in the foregoing (eg, market entry for foreign investors, merger control review and national security review), there are additional considerations for a foreign investor to weigh up in the acquisition of a PRC-listed company, including, among other things:

##### EXEMPTION OF TENDER OFFER

According to the Takeover of Listed Companies, if the acquirer elects to proceed with the acquisition at the point when the shares in which they are interested reach 30 per cent of the issued shares of the listed company, the acquirer shall issue a general or partial offer to the shareholders of the listed company in accordance with the law; otherwise, the acquirer shall apply to the CSRC for exemption from issuing a tender offer. In order to protect the legitimate rights and interests of all investors, only a few particular scenarios can give rise to the possibility for the acquirer to obtain such an exemption for a tender offer from CSRC, which shall be deliberately leveraged by the acquirer.

##### HORIZONTAL COMPETITION AND CONNECTED TRANSACTIONS

Pursuant to the Measures on Takeover of Listed Companies, in connection with the investment by a foreign investor in an A-share-listed company, such an investor shall specify in the disclosure documents (1) that it has prepared and announced whether there is horizontal competition or potential horizontal competition between the business of the investor, and any of its party acting in concert, controlling shareholder and actual controller, and (2) the business of the listed company, and whether there is an ongoing connected transaction. If there will be any horizontal competition or ongoing connected transaction, relevant arrangements shall be made to avoid horizontal competition between the investor and related parties in order to maintain the independence of the listed company.

# Chapter 5: Foreign investment

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According to statistics published by MOFCOM, foreign investment in China has grown steadily in recent years. From 1979 to 2019, China received a total of \$2.2874tn in foreign investment and 1,001,377 FIEs were established. Further, against a background of slowing global economic growth, sluggish cross-border investment and intensified competition, foreign investment in China in 2019 maintained steady growth of \$138.14bn, an increase of 2.4 per cent over the same period in 2018. The industries with high growth rates of foreign investment are information transmission, software and information technology services, leasing and commercial services, pharmaceutical manufacturing, electrical machinery and equipment manufacturing, instrument and meter manufacturing, and scientific research and technology services.<sup>1</sup>

## 5.1 History of the foreign investment regime in China

### 5.1.1 Establishment of the foreign investment regime

China began to implement its policy of reform and opening up in 1978. Attracting foreign investment and learning from advanced foreign industries became China's national strategy. Consequently, the NPC enacted the Sino-Foreign Equity Joint Venture Enterprise Law of the PRC<sup>2</sup> (the 'EJV Law') in 1979 and the Implementing Regulations for the EJV Law<sup>3</sup> in 1983. In 1986, 1988, 1990 and 1995, the Wholly Foreign-Owned Enterprise Law of the PRC<sup>4</sup> (the 'WFOE Law'), the Sino-Foreign Cooperative Joint Venture Enterprise Law of the PRC<sup>5</sup> (the 'CJV Law'), the Implementing Rules for the WFOE Law,<sup>6</sup> and the Implementing Rules for the CJV Law<sup>7</sup> were also promulgated, respectively. The promulgation of these four laws and their implementing regulations (collectively the 'FIE Laws') marked the establishment of the foreign investment regime in China.

### 5.1.2 Reform of the foreign investment regime

In the decades that followed promulgation of the FIE Laws, with the change of China's domestic and international presence it became increasingly difficult for the FIE Laws to meet China's expanding reform and opening up needs. As stated in section 3.4.2, in 2019, the NPC passed the Foreign Investment Law to replace the FIE Laws, and made significant changes to the foreign investment regime. Subsequently, the State Council enacted the Implementing Regulations for the 'Foreign Investment Law'<sup>8</sup> ('Implementing Regulations'). The FIE Laws have fulfilled their purpose for nearly 40 years, but have been replaced and are no longer applicable.

## 5.2 Types of foreign investment

Under the new foreign investment regime, foreign investment in China is taking the following forms: (1) newly established FIEs: foreign investors establish FIEs solely or jointly with other investors; (2) M&A: foreign investors acquire shares, equity, property shares, or other similar rights or interests in domestic enterprises; (3) new projects: foreign investors invest in new projects solely or jointly with

other investors; and (4) other forms of investment: foreign investors make other types of investment permitted by laws, administrative regulations or provisions of the State Council.<sup>9</sup>

## 5.3 Features of the Foreign Investment Law

The Foreign Investment Law and its Implementing Regulations comprise the fundamental laws and regulations for foreign investors doing business in China.<sup>10</sup> Foreign investment promotion, protection and administration are the key principles of the Foreign Investment Law and its Implementing Regulations.

### 5.3.1 Foreign investment promotion

The key principles for foreign investment legislation in China are to actively expand opening up, promote foreign investment and create a first-class international business environment. China's key policies to promote foreign investment include 'equal treatment to both foreign and domestic investors', 'improvements to the transparency of foreign investment policies' and 'preferential treatment to foreign investment in accordance with the law'.

#### EQUAL TREATMENT TO FOREIGN AND DOMESTIC INVESTORS

Under China's new foreign investment regime, government policies to support the development of enterprises apply equally to domestic enterprises and FIEs in accordance with the law. These policies include, but are not limited to, government funding arrangements, land supply, tax deductions, qualifications and licences, standard setting, project applications and human resource policies.<sup>11</sup> In particular, FIEs may participate in government procurement through fair competition in accordance with the law. Products produced and services provided by FIEs in China will be treated equally in the process of government procurement.<sup>12</sup>

#### IMPROVEMENTS TO THE TRANSPARENCY OF FOREIGN INVESTMENT POLICIES

One of the key purposes of China's foreign investment regime reform is to create an open, transparent, predictable and fair investment environment. For example, when formulating regulatory documents, competent authorities will solicit the opinions of FIEs to improve the predictability and transparency of foreign investment policies. When formulating standards, including national and industrial standards, FIEs have the right to participate equally in accordance with the law. The government and its departments shall formulate foreign investment guidelines and provide services to foreign investors and FIEs.<sup>13</sup>

Provinces and municipalities such as Beijing, Fujian, Guangdong, Guangxi, Guizhou, Jiangsu, Jiangxi, Shanghai, Tianjin and Yunnan have established comprehensive service entities and supporting websites to promote foreign investment. Taking the online platform 'Invest Shanghai'<sup>14</sup> as an

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<sup>14</sup> 'Invest Shanghai' is the investment service platform of Shanghai.

example, the website displays Shanghai's investment environment, investment policies, industrial distribution and various available investment promotion services.

#### PREFERENTIAL TREATMENT TO FOREIGN INVESTMENT IN ACCORDANCE WITH THE LAW

To promote foreign investment and further opening up, in accordance with the needs of the national economy and social development, China encourages foreign investors to invest in specific industries, fields and regions, and offers preferential treatment according to applicable laws and regulations for doing so. The preferential treatment includes, but is not limited to, the following:

#### ESTABLISHMENT OF SPECIFIC REGIONS (INCLUDING 18 FTZs) WITH MORE VIGOROUS OPENING UP POLICIES

Among the preferential opening up policies, for pilot policies implemented in certain special economic regions, once such pilot policies are deemed feasible, they may be promoted in other regions or nationwide.<sup>15</sup> For example, the value-added telecommunication service industry used to be a restrictive industry. Before 2014, foreign investors in the value-added telecommunication service industry could not hold more than 50 per cent of the shares. Since 2014, Shanghai FTZ has relaxed the restrictions on the shareholding of foreign investors in some value-added telecommunication services, including storage and transfer services, call centre services, domestic multi-party communication services and internet access services for internet users.<sup>16</sup> This relaxation of the shareholding requirement by foreign investors was extended to all pilot FTZs in 2018.<sup>17</sup> Later on in 2019, the shareholding restriction on the storage and transfer services, call centre services and domestic multi-party communication services were relaxed nationwide.<sup>18</sup>

#### FORMULATION OF THE CATALOGUE OF INDUSTRIES FOR ENCOURAGING FOREIGN INVESTMENT

The Catalogue of Industries for Encouraging Foreign Investment (the 'Encouraging FI Catalogue') is one of China's most important mechanisms for promoting foreign investment. Foreign investment projects listed in the Encouraging FI Catalogue may enjoy preferential treatment in areas such as tax in accordance with laws, administrative regulations or the provisions of the State Council. For example, from 1 January 2011 to 31 December 2020, enterprises engaged in encouraged industries in Western China may enjoy a reduced enterprise income tax rate of 15 per cent.<sup>19</sup> Also, for foreign investment within the scope of the Encouraging FI Catalogue, the tariff exemption policy shall apply to the self-use equipment imported within the total investment amount.<sup>20</sup>

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15 See Art 13 of the Foreign Investment Law and Art 10 of the Implementing Regulations.

16 See Art 2 of the *Opinions on Further Opening up Value-Added Telecommunication Business to Foreign Investments in China (Shanghai) Pilot FTZ* promulgated by the Ministry of Industry and Information Technology and Shanghai Municipal Government on 6 January 2014 and effective from the same date.

17 See the *Special Administrative Measures for the Market Entry of Foreign Investment in Pilot FTZ (Negative List) (2018 Version)*, which was jointly released by the NDRC and MOFCOM on 30 June 2018 and became effective on 30 July 2018.

18 See the *Special Administrative Measures for the Market Entry of Foreign Investment (Negative List) (2019 Version)*, which was released by the NDRC and MOFCOM on 30 June 2019 and became effective on 30 July 2019.

19 See Preferential Enterprise Income Tax for Encouraged Industries in Western China promulgated by the State Tax Administration on 16 May 2018.

20 See Art 7 of the Notice on Further Deepening Reform and Properly Handling Foreign-invested Projects to Fight the Epidemic promulgated by NDRC on 9 March 2020.

### 5.3.2 Foreign investment protection

The legitimate rights and interests of foreign investors and FIEs in China will be protected through a series of measures, the most important of which are discussed below.

#### ARRANGEMENTS TO ALLOW FREE TRANSFER OF TECHNOLOGY

The Chinese government and its officials may not compel foreign investors and FIEs to transfer technology through administrative licensing, inspection, punishment or any other administrative actions<sup>21</sup> to eliminate any perceived improper influence of the government on commercial arrangements between Chinese and foreign parties. In addition, Chinese and foreign parties now enjoy more freedom to negotiate technology cooperation. For example, the Regulations of the PRC on the Administration over Technology Import and Export promulgated by the State Council on 8 January 2011 stipulate that a technology import agreement is prohibited from restricting the transferee from improving the technology provided by the transferor or using the improved technology and so on.<sup>22</sup> The Decision of the State Council on Revising Certain Pieces of Administrative Regulations (2019) issued by the State Council on 2 March 2019 removed such a prohibition.

#### GOVERNMENT REQUIREMENTS TO FULFIL ITS CONTRACTUAL OBLIGATIONS

To better protect foreign investors, local governments and their departments must fulfil policy commitments and perform the contracts concluded with foreign investors and FIEs pursuant to the laws. Local governments and their departments may not breach contracts on the ground of administrative division adjustment, change in government, organisation or job function, or replacement of responsible persons, among others. Policy commitments made by local governments and their departments are written commitments made pursuant to the statutory authority on the support policies, preferential treatment and convenience applicable to the investment of foreign investors and FIEs in the region.<sup>23</sup>

#### NO EXPROPRIATION EXCEPT IN SPECIAL CIRCUMSTANCES AND FAIR COMPENSATION

The government may not expropriate a foreign investor's investment. Under special circumstances in which a foreign investor's investment is expropriated pursuant to law due to public interest needs, such an expropriation must be conducted according to statutory procedures. In addition, the foreign investor must be compensated in a timely, fair and reasonable manner.<sup>24</sup>

#### PROTECTION OF TRADE SECRETS

The government and its officials must keep confidential the trade secrets of foreign investors and FIEs that come to their knowledge during the performance of duties, and may not divulge or illegally provide such trade secrets to third parties.<sup>25</sup>

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21 See Art 24 of the Implementing Regulations.

22 See Art 29 of the Regulations of the PRC on the Administration over Technology Import and Export.

23 See Art 25 of the Foreign Investment Law and the Art 27 of the Implementing Regulations.

24 See Art 20 of the Foreign Investment Law.

25 See Art 23 of the Foreign Investment Law.



Foreign investors may, according to applicable laws, freely remit their capital contributions, profits, capital gains, income from asset disposal, intellectual property royalties, lawfully acquired compensation, indemnity or liquidation income and other types of lawfully earned income into or outside of China, in RMB or any foreign currency. These policies are intended to alleviate some investors' concerns about foreign exchange controls and capital requirement regulations in China.<sup>26</sup>

### 5.3.3 Foreign investment administration

Depending on its form and features, the foreign investment, it may be subject to a series of administrative measures, including but not limited to: (1) the foreign investment negative list; (2) foreign investment information reporting; (3) national security review; (4) approval by or record-filing with the NDRC; (5) antitrust review; and (6) industry-specific approval requirements for certain industries. The foreign investment negative list, foreign investment information reporting and national security review are expanded upon below.

#### FOREIGN INVESTMENT NEGATIVE LIST

For the first time in 2013, China adopted a pilot negative list approach to foreign investment in the Shanghai FTZ. After the negative list was tested and adjusted in the Shanghai FTZ, the Special Administrative Measures for the Market Entry of Foreign Investment (Negative List) (2018 Version)<sup>27</sup> was released and implemented nationwide. The negative list includes prohibited and restricted industries. Foreign investors are not entitled to invest in any prohibited industry. For restricted industries, foreign investors must meet certain conditions prescribed in the negative list. For industries not listed in the negative list, foreign investors are treated equally to domestic investors and enjoy national treatment prior to and after the investment.

There are two negative lists now in effect: the Special Administrative Measures for the Market Entry of Foreign Investment (Negative List) (2019 Version) (the 'National Negative List') and the Special Administrative Measures for the Market Entry of Foreign Investment in Pilot FTZs (Negative List) (2019 Version)<sup>28</sup> (the 'FTZ Negative List'). The National Negative List applies to FIEs established nationwide (excluding FTZs). The FTZ Negative List applies to FIEs established in FTZs.

Compared with the National Negative List, the FTZ Negative List is less restrictive. There are fewer prohibited and restricted industries. The National Negative List includes 48 prohibited and restricted industries. The FTZ Negative List includes only 37 industries. For example, foreign investment in fishing for aquatic products in China's waters and inland waters is prohibited by the National Negative List, but it is not prohibited by the FTZ Negative List. The restrictions imposed on restricted industries are also more relaxed in the FTZ Negative List. For example, the National Negative List prohibits foreign investment in artistic performance groups. The FTZ Negative List only requires that the investment in artistic performance groups be controlled by the Chinese party.

<sup>26</sup> See Art 21 of the Foreign Investment Law.

<sup>27</sup> The Special Administrative Measures for the Market Entry of Foreign Investment (Negative List) (2018 Version) was jointly released by the NDRC and MOFCOM on 28 June 2018 and became effective on 28 July 2018.

<sup>28</sup> The FTZ Negative List was released by the NDRC and MOFCOM on 30 June 2019 and became effective on 30 July 2019.

The foreign investment information reporting system has been formally in place since 1 January 2020. Under the information reporting system, foreign investors or FIEs must submit investment information to MOFCOM or its provincial counterpart based on the principle of necessity. This replaced the previous approval or filing procedures with MOFCOM or its provincial counterpart.

According to the Measures for Foreign Investment Information Reporting,<sup>29</sup> foreign investors or FIEs must submit investment information to MOFCOM or its provincial counterpart by providing an initial report, change report, deregistration report or annual report, depending on the form of foreign investment. The investment information sought includes information about the enterprise information, the investors and their actual controllers, investment transactions, enterprise operations, and enterprise assets and liabilities. For enterprises subject to special administrative measures, the applicable industry licence must also be submitted.

#### NATIONAL SECURITY REVIEW SYSTEM

Foreign investment that affects or is likely to affect national security is subject to a national security review.<sup>30</sup> A national security review of foreign investment focuses on the security review related to M&A. Where a merger or acquisition causes or is likely to cause a significant impact on national security, the foreign investors may be required to terminate the transaction or take other effective measures to eliminate the influence of the transaction on national security.<sup>31</sup> For more details regarding the national security review system, please refer to section 4.1.4 b.

It is also worth noting that the rules on national security review of foreign investment in FTZs differ slightly from national rules. In FTZs, foreign investment in ‘important culture’ and ‘important information technology products and services’ is also subject to a national security review. In addition, the scope of a national security review in FTZs also includes foreign investment in the forms of new projects and a subscription of convertible bonds.<sup>32</sup>

## 5.4 Adjustments for existing foreign investment enterprises according to the Foreign Investment Law

Before the Foreign Investment Law was implemented, in terms of organisation form and corporate governance structure, the special provisions of the FIE Laws prevailed for FIEs. Only where the FIE Laws were silent did the Company Law<sup>33</sup> and other laws apply to FIEs. However, since the Foreign Investment Law no longer prescribes the organisation form and corporate governance structure of FIEs, as mentioned in section 3.4.2, FIEs established before the

29 The Measures for Foreign Investment Information Reporting was released by MOFCOM and SAMR on 30 December 2019 and became effective on 1 January 2020.

30 See Art 35 of the Foreign Investment Law.

31 See Art 4 of the Notice of the General Office of the State Council on Launching the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (released by the General Office of the State Council on 3 February 2011 and effective on 3 March 2011).

32 See Art 1 of the Notice of the General Office of the State Council on Printing and Distributing the Trial Measures for the National Security Review of Foreign Investment in Pilot Free Trade Zones (released by the General Office of the State Council on 8 April 2015 and effective on 8 May 2015).

33 The Company Law of the PRC was revised by the Standing Committee of the NPC on 26 October 2018.



Foreign Investment Law was implemented must adjust their organisation forms and corporate governance structures to comply with the Company Law, the Partnership Enterprise Law of the PRC<sup>34</sup> and other applicable laws<sup>35</sup> within five years of the implementation of the Foreign Investment Law (the ‘Transition Period’).<sup>36</sup> After the Transition Period, the Administration for Market Regulation, the agency that administers company registrations formerly known as the Administration of Industry and Commerce or the AIC, will not process FIE registration matters and will make this public.

With respect to the organisation form, FIEs established as limited liability companies or partnerships are not required to register a change of organisation forms, and FIEs without a legal personality may apply to be restructured into partnerships during the Transition Period.<sup>37</sup>

With respect to the corporate governance structure, equity joint ventures (EJVs) must make corresponding adjustments, which may involve equity transfer rules and profit distribution rules, among others. To illustrate some of the adjustments required under the new foreign investment regime, the adjustments required for EJVs that were established before the Foreign Investment Law was implemented are discussed below.

#### *5.4.1 Corporate governance structures*

The now-abolished EJV Law provided different corporate governance rules than those contained in the Company Law. For example, under the EJV Law, EJVs did not have shareholders’ meetings. The highest authority of an EJV was the board of directors. Under the Company Law, the highest authority of a limited liability company (including an EJV) is the shareholders’ meeting. Therefore, EJVs established before the Foreign Investment Law was implemented must incorporate a procedure for holding shareholders’ meetings, and shareholders’ meetings must be the highest authority of the company. The corresponding rules of procedure and voting mechanisms must also be formulated.

#### *5.4.2 Equity transfer rules*

Further, under the EJV Law, to transfer equity interest in an EJV to a third party, the transferring party must obtain the consent of the other party to the EJV. Under the Company Law, which now applies to EJVs, unless otherwise agreed by the shareholders, a party must only obtain the consent of a shareholder holding more than 50 per cent of the voting rights to transfer its equity interest to a third party. If any other shareholder does not consent to the transfer but refuses to purchase the equity interest to be transferred, the objecting shareholder will be deemed to agree to the proposed transfer.

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34 The Partnership Enterprise Law of the PRC was revised and passed by the Standing Committee of the NPC on 27 August 2006 and implemented on 1 June 2007.

35 See Art 31 of the Foreign Investment Law.

36 See Art 42 of the Foreign Investment Law.

37 See the Notice of the State Administration of Market Regulation on Implementation of the Foreign Investment Law for Proper Handling of Foreign Investment Enterprise Registration (released by State Administration of Market Regulation on 28 December 2019).

### 5.4.3 Profit distribution

Finally, under the EJV Law, the parties to the EJV must share profits in proportion to their registered capital contributions. By contrast, under the Company Law, limited liability companies may distribute profits in the manner as agreed by all shareholders. Therefore, FIEs in the form of limited liability companies may adjust their profit distribution method based on their agreement.

## 5.5 Conclusion

The expansion of the opening up and promotion of foreign investment dominate China's current foreign investment legislation. The promulgation and implementation of foreign investment laws and regulations, such as the Foreign Investment Law and its Implementing Regulations, demonstrate China's desire to create a fair, convenient and open business environment. Under the Foreign Investment Law, foreign investors will be treated equally to domestic investors, and their investment will be better protected in China. Foreign investors will also have opportunities to invest in more industries and regions. With the further opening up of China, foreign investors should proactively assess the Foreign Investment Law's impact, and keep a close eye on the supporting legislation, regulations, local administrative approvals and even 'window guidance' of relevant bureaus in charge.

# Chapter 6: Legislation and practice of China's bankruptcy regime

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## 6.1 Statutory framework of China's bankruptcy regime

China's bankruptcy system mainly consists of laws, relevant judicial interpretations and normative documents formulated by the courts.

### 6.1.1 The Bankruptcy Law

The Enterprise Bankruptcy Law of the PRC (the 'Bankruptcy Law'), issued by the Standing Committee of the NPC and effective as of 1 June 2007, is the main legislation that governs mainland China's bankruptcy regime. The Bankruptcy Law applies to all legal entities in China, including state-owned, private and foreign-invested companies in the form of limited liability companies or joint-stock limited companies. The Bankruptcy Law does not apply to individuals.

### *6.1.2 Judicial interpretations and normative documents of the courts*

The judicial interpretations of the SPC on the Bankruptcy Law mainly include Provisions on Appointing Administrators for Hearing Enterprise Bankruptcy Cases and Provisions on Determining Administrators' Compensation for Hearing Enterprise Bankruptcy Cases effective in 2007, as well as Provisions (I), (II) and (III) on Several Issues Concerning Application of the Bankruptcy Law effective in 2011, 2013 and 2019, respectively.

Some local high courts and intermediate courts have also formulated guidelines applicable to their jurisdictions, such as Guidelines for Trials of Bankruptcy Cases (Trial) formulated by Shanghai High People's Court on 31 August 2018 and Guidelines for Trials of Reorganization Cases (Trial) by Shenzhen Intermediate People's Court on 25 March 2019. In addition, some normative documents of the SPC, such as Minutes of the National Court's Work Meeting on Bankruptcy Trials and Minutes of the Conference on Civil and Commercial Trials Heard by Courts in China issued in March 2018 and September 2019 respectively, also play an important role in guiding China's bankruptcy practice.

## **6.2 Bankruptcy procedures in China**

Bankruptcy procedures in China include liquidation, reorganisation and settlement. Liquidation is a straightforward process of the disposal of debtor's property in a short space of time, and the debtor shall be deregistered after the procedure. Reorganisation and settlement may regenerate a company, but with a different emphasis and applying different situations.

### *6.2.1 Commencement of bankruptcy procedures*

The statutory circumstances triggering bankruptcy procedures are: (1) the debtor is unable to pay debts due and its assets are insufficient to pay off debts; (2) there is clear lack of ability for the debtor to pay off debts; or (3) there is a possibility of the debtor losing its ability to pay off debts. Under the first or second circumstance, the debtor may initiate a proceeding of either liquidation, reorganisation or settlement, but under the third circumstance, the debtor may only apply for a reorganisation proceeding. Where a debtor is unable to repay debts due, the creditor may also apply for reorganisation or liquidation of the debtor.

If a company is found not to have sufficient assets to pay off debts during liquidation of a voluntary dissolution or is dissolved before the completion of liquidation, the liquidation committee shall apply to the court for bankruptcy liquidation.

### *6.2.2 Control of bankruptcy procedures*

Bankruptcy procedures are judicial proceedings subject to the direction and supervision of the court. In a liquidation or settlement procedure, the administrator takes over the debtor, while in a reorganisation procedure, upon the application of the debtor and approval of the court, the debtor may manage its own assets and operate its business under the supervision of the administrator. The administrator is appointed by and reports to the court, and performs its duties in accordance with law

under the supervision of the creditors' meeting and creditor committee. Creditors may exercise their rights via the creditors' meeting or creditor committee.

### *6.2.3 Special regimes for financial institutions*

The bankruptcy of commercial banks, securities companies, insurance companies and other financial institutions has special features under the Bankruptcy Law. Where either of the statutory circumstances for bankruptcy occurs to a financial institution, the financial supervision and administration authority of the State Council may choose to apply the takeover and custody procedures or apply to the court for reorganisation or liquidation.

After the effectiveness of the Bankruptcy Law, with the government's focus on the comprehensive management of high-risk financial companies, some securities companies withdrew from the market through liquidation and several trust companies regenerated through reorganisation.

### *6.2.4 Cross-border bankruptcy: recognition and enforcement of foreign court judgments*

The Bankruptcy Law has set forth the principle of cross-border bankruptcy by providing that: (1) the bankruptcy proceeding initiated pursuant to the Bankruptcy Law shall be binding on the debtor's property outside China; and (2) for the bankruptcy proceedings conducted in foreign courts involving debtor's property located within the territory of China, the Chinese court shall review the valid judgment or ruling of the foreign court and decide whether to recognise and enforce it in accordance with international treaties concluded or acceded to by China, or on the basis of the principle of reciprocity.

In practice, courts in some foreign countries and regions have already given recognition and assistance to the enforcement of judgments of bankruptcy cases made by China's courts. However, so far, there are very few cases where Chinese courts have recognised and enforced the judgments or rulings of bankruptcy cases made by foreign courts. Given the increasing presence of Chinese investment globally, cross-border bankruptcy has been a hot topic in academic and practical discussions in recent years.

## **6.3 Overview of bankruptcy practice**

### *6.3.1 A growing number of bankruptcy cases*

After the Bankruptcy Law came into force in 2007, the number of bankruptcy cases did not increase for several years. In fact, it retrogressed. However, since 2015 the number of cases accepted and concluded by the courts has risen rapidly, which might be linked to the cleaning up of 'zombie enterprises' and the policy of 'promoting structural reforms to build a modern economic system' by the Chinese government. A series of influential cases have emerged, of which the reorganisation case of Bohai Steel Group, involving a debt in total of RMB 280bn (approximately \$40bn), is so far the largest bankruptcy case in China.

According to the public database including work reports of the SPC for the last ten years, the number of bankruptcy cases concluded by China's courts has increased rapidly from between 2,000–4,000 cases before 2015 to 16,000 cases by 2018.

### **6.3.2 Establishment of bankruptcy tribunals and courts**

Guided by the SPC, since 2016 some local intermediate and high courts have successively set up bankruptcy tribunals to handle bankruptcy cases. The number of bankruptcy tribunals nationwide has increased from five in early 2016 to 73 by the end of 2016, and further to 97 by 2017. In January 2019 Shenzhen Intermediate People's Court took the lead in setting up the first special bankruptcy court in China, and since then more bankruptcy courts have been established in Beijing, Chongqing, Hangzhou, Guangzhou, Shanghai, Tianjin and Wenzhou. The establishment of bankruptcy tribunals and courts has helped to improve the international credibility and influence of China's bankruptcy trials.

### **6.3.3 Construction of e-bankruptcy**

The SPC is also committed to disclosing information on bankruptcy cases through an e-bankruptcy channel. This means that the courts use the internet to facilitate bankruptcy procedures. In 2016 the SPC set up the National Enterprise Bankruptcy Information Disclosure Platform, whereby the trial process information on bankruptcy cases, including announcements, legal documents and debtor information, is published in a unified manner, and the creditors may convene creditors' meetings and voting through the Platform. In addition, the online auction of property is also widely adopted in bankruptcy procedures. When hearing the bankruptcy case of Jadeite Airlines, the Shenzhen Intermediate People's Court auctioned two aircraft engines through the online auction platform. Foreign companies from the US and Israel participated in the auction via the platform.

## **6.4 Development trends for bankruptcy practice**

It is to be expected that the number of bankruptcy cases will continue to rise and that the bankruptcy regimes in China expand. The current Bankruptcy Law has been implemented for more than 12 years and has lagged behind growing bankruptcy practice in the country. In 2018 the Standing Committee of the NPC added a revision of the Bankruptcy Law into its legislative plan. Currently, the revision work is in progress and has not been completed. It is worth noting that the mechanism of bankruptcy for individuals is being explored and it may be formally legislated, either separately or by incorporation into the revised Bankruptcy Law.

# Chapter 7: Employment law

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## 7.1 Major laws and regulations

China's modern employment regulatory regime was developed in the 1980s, reflecting historic changes to the employment market. Centred on contractual employment relationships, the regulatory regime is comprehensive, mature, complex and location-dependent. The NPC and its standing committee adopt employment legislation prescribing nationally basic principles and rules for employment issues. Administrative agencies under the central government promulgate detailed administrative regulations and departmental rules implementing employment legislation. To accommodate local conditions, legislative bodies and administrative agencies at local levels promulgate their own regulations and rules.

## 7.2 Key issues in employment law practice

### 7.2.1 Regional differences

There are regional differences in the execution and performance of employment contracts, settlement of work-related injuries, standard of social insurance payments and approaches to disputes. For example, minimum wage is higher in developed cities and provinces. A comparison chart of minimum wages for four developed cities and cities is below.

City/Province	Beijing	Shanghai	Jiangsu	Guangdong
2019 minimum wages (RMB)	2,200	2,480	1,620–2020	1,410–2,200

Regional differences are also reflected in the conditions for signing an open-ended term employment contract. In Beijing and most local jurisdictions, an employer must renew employment for the employee with an open-ended term contract when the second fixed-term contract expires. On the other hand, the employee may choose to end the employment relationship or enter into another fixed-term contract. While in Shanghai, the employer has the choice of renewal or termination of the employment relationship after the second fixed-term contract expires.

### 7.2.2 Dismissal and termination of employment contracts by employers

China has relatively strict protections against dismissal, which is conceptually different from termination. As set out in Articles 36 and 39–41 of the Labor Contract Law,<sup>38</sup> an employer cannot dismiss an employee without mutual consent or without statutory grounds for dismissal. Some of the statutory grounds provided by the Labor Contract Law are material breach of company rules and serious dereliction causing substantial loss to the employer. As for termination, according to Article 44 of the Labor Contract Law, termination only occurs upon expiration of the employment contract or satisfaction of termination conditions provided in the laws and regulations.

<sup>38</sup> Labor Contract Law of the PRC, effective on 1 January 2008 and revised by the NPC Standing Committee on 28 December 2012.

### 7.2.3 Expatriate employees

Expatriates can fill posts in China with special requirements that have no available domestic candidates. Before obtaining work and residence permits, an expatriate employee must enter into an employment contract with the employer. Only the employer may submit applications for relevant permits for the expatriate employee.

Subject to compulsory Chinese laws and regulations, employers and expatriate employees may negotiate the terms of wages, working hours, rest and vacation, and health and safety protections. Employers, however, must pay social insurance for expatriate employees in China. In the case where an expatriate employee is a citizen of a country that has entered into a bilateral or multilateral treaty with China on social insurance, the provisions of the treaty prevail.

## 7.3 Recent trends

The procedure for employment dispute resolution in China includes negotiation, mediation, arbitration and litigation. Note that arbitration is a prerequisite for employment dispute litigation. In recent years, employers and employees have been increasingly willing to choose ADR methods. According to data published by the Ministry of Human Resources and Social Security, nationwide mediation organisations for employment disputes in 2019 mediated 1,070,000 cases, almost all of which were closed. The average rate for successful mediation in recent years is above 65 per cent.

Major claims in employment dispute cases revolve around remuneration, employment relationship recognition, work-related injury insurance and so on. Remuneration claims account for over 45 per cent of employment dispute cases. Many of these claims occur in more developed cities and provinces with larger populations of migrant workers (eg, Beijing, Guangdong, Jiangsu and Shanghai). Data suggests that more claims are pursued by employees working in developed regions.

## 7.4 Conclusion

As new technology – like the Internet Plus model, which integrates mobile internet, cloud networking, big data and the Internet of Things – develop and facilitate the emergence of new types of work under the sharing economy, future society and employment relationships will change. In the future, employment legislation will need to protect the rights of employees while adapting to changes in the marketplace. Employment law is expected to achieve a balance between the rights and obligations of employers and employees. We also expect the SPC and the Ministry of Human Resources and Social Security to work more closely to resolve regional differences in the field.



# Chapter 8: Tax law

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## 8.1 Tax overview

Chinese tax law stems from five sources: legislation passed by the NPC (or its standing committee), regulations passed by the State Council, bilateral tax treaties agreed between China and other countries, circulars and announcements made by the State Administration of Taxation (SAT) and judicial interpretations issued by the SPC.

Legislation is passed by the NPC; it is then supplemented by regulations passed by the State Council, such as implementation regulations. The SAT and other state organs may then produce circulars and announcements regarding practice and procedure. These publications have the force of law. In 2019 over 160 such documents were produced. Most tax disputes are resolved through negotiations with the relevant tax authority or by using the relevant tax authority's own internal review mechanism. While a judicial remedy does exist for taxpayers who are dissatisfied with the SAT's decisions, tax litigation in Chinese courts is rare. As such, judicial guidance is sparse.

In addition to domestic sources of law, China also has a network of over 100 bilateral tax treaties governing taxation methods and, in some cases, the maximum rates to be applied to cross-border transactions. In cases of conflict between these sources, Chinese law is clear that relevant treaty provisions should prevail. This network is due to be amended by the provisions of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, but while China has signed the Multilateral Convention, it has yet to ratify it into domestic law.

### 8.1.1 Corporate income tax and other taxes affecting enterprises (non-exhaustive)

In the early 1990s China passed a series of laws wherein the worldwide profits of domestically resident enterprises were subject to corporate income tax (CIT) in China. The last major overhaul of CIT took place in 2008 with the passing of the Enterprise Income Tax Law. Since that date, both China-registered enterprises and overseas enterprises resident in China have been taxed equally on their worldwide corporate income and at a standard rate of 25 per cent (see 8.2 below for exceptions) with tax credits given for tax paid overseas. This is in striking contrast with the legislation in some other Asian countries, such as Hong Kong and Singapore, where foreign-sourced profits are not subject to tax. While the Chinese approach to taxation of worldwide income is unusual, its approach to taxation of domestically sourced income follows the international standard, as both foreign resident companies and Chinese resident companies are subject to tax.

The determinative factor in the assessment of whether an enterprise is subject to CIT on its worldwide income in China is whether the enterprise is regarded as resident in China. Resident enterprises are defined as those enterprises that are either incorporated in China and also those foreign-registered enterprises that have their place of effective management in China. The place of effective management is regarded as the place where the implementing substantive and comprehensive



management and control over the production and business operations, staff, accounts and property and so on of an enterprise takes place. Consequently, an enterprise registered in a foreign jurisdiction may be regarded as resident in China if, for example, the directors are resident in China and key decisions relating to the management and control of the enterprise take place within China. In such cases, a foreign-registered enterprise will be required to adhere to all the relevant provisions of domestic Chinese tax law and pay tax on its worldwide income in China.

#### CAPITAL GAINS TAX

No separate CGT regime exists. Capital gains are instead rolled into the operating profits and taxed using normal CIT principles.

#### DIVIDENDS

A tax credit is available if the Chinese enterprise either holds directly or indirectly at least 20 per cent of shares in the underlying profit-making overseas enterprise, provided relevant criteria are met. The concept of indirect holding is limited to five tiers. Such dividends are regarded as corporate income. Domestic dividends are exempt from CIT.

#### WITHHOLDING TAX

Outbound China-sourced income, such as dividends, interest, rental income, royalties and gains from the sale or transfer of shares in a China-resident enterprise, are subject to WHT at ten per cent. This figure may be lowered by a tax treaty. A temporary WHT deferral is available for dividends distributed to foreign investors that are reinvested into China, provided relevant criteria are met. In addition to WHT, VAT is also levied on some types of income.

### **8.1.2 Individual income tax**

Chinese residents are subject to tax on their worldwide income. Non-residents are only taxed on their China-sourced income. An exemption on overseas income exists for non-domiciled Chinese residents who have not been present in China for more than 183 days for six consecutive tax years, commonly referred to as the 'six-year rule'. If an individual is absent for more than 30 consecutive days in a calendar year, then the six year counter is reset to zero.

### **8.1.3 VAT**

The Chinese VAT system for larger enterprises follows the international norm, with enterprises being able to offset their input and output VAT. In general, the VAT rate for most goods is currently 13 per cent and the VAT rate for most services is six per cent.

### 8.1.4 Other taxes (non-exhaustive)

#### LAND VALUE APPRECIATION TAX AND REAL ESTATE TAX

Land value appreciation tax is applied every time an individual or enterprise realises a gain from the sale of a land use right, building or premises and its associated structures. The gain is taxed on a four-band progressive rate from 30 per cent to 60 per cent. Real estate tax applies to land and buildings at either 1.2 per cent of the original value less a regional allowance or 12 per cent of the annual rental income.

#### CONSUMPTION TAX

Manufacturers or importers of certain types of consumable or luxury goods, such as alcoholic beverages, tobacco, cars and motorcycles, must pay consumption tax at rates ranging from one per cent to 56 per cent. Certain goods are taxed at a fixed amount based on quantity.

#### DEED TAX

The transferee or assignee of land use rights or real properties is subject to deed tax at a rate of between three per cent and five per cent, even where such a transfer is a gift or an exchange.

## 8.2 Preferential tax policies

Preferential tax policies are mostly aimed at technology enterprises or small enterprises. This is a non-exhaustive list:

- New/hi-tech enterprises may be eligible for a reduced CIT rate of 15 per cent, and key software enterprises or key integrated circuit design enterprises may be eligible for a reduced CIT rate of ten per cent. In both cases, the enterprise must be assessed and meet certain criteria. In addition, certain integrated circuit enterprises may also qualify for a tax free initial period of two or five years followed by CIT applied at 50 per cent of the normal rate for an additional three or five years, respectively.
- In the Shanghai FTZ, a number of preferential policies exist. Most notably, machinery and equipment imported by manufacturing enterprises and manufacturing service enterprises are tax exempt, although limited specific exceptions do exist. A number of preferential policies also exist in other FTZs and in parts of China, such as in Pingtan, Zinjiang and Zhuhai, but are due to expire in December 2020 unless formally extended.
- From 1 January 2019 to 31 December 2021, small and thin-profit enterprises with an annual taxable income of RMB 1m or less will be subject to a preferential CIT rate of five per cent. If such enterprises have a taxable income between RMB 1m and RMB 3m then, in addition to the above, income in excess of RMB 1m will be subject to a CIT rate of ten per cent.
- A super deduction of 75 per cent<sup>39</sup> for qualifying R&D expenditure incurred by qualifying high-tech and technology service enterprises applies until the end of 2020.

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<sup>39</sup> A super deduction of 75 per cent (ie, a deduction of 100 per cent of the value with an additional deduction of 75 per cent of the value, an aggregate deduction of 175 per cent)

## 8.3 Legal risks and challenges

Enterprises incorporated outside China should carefully assess where their key decision makers are situated and where key decisions are made. If the SAT determines that a foreign incorporated enterprise has its place of effective management in China, then that enterprise will be taxed in China on its worldwide income.

For several decades, tax authorities around the world have found that the established practice of creating specific or targeted tax rules has led to enterprises creating evermore complex and innovative tax schemes, creating systemic problems in global taxation, particularly regarding base erosion and profit shifting. In response, many countries have adopted a flexible General Anti-Avoidance Regulation or General Anti-Abuse Regulation (GAAR) to counter such schemes. Although CIT in China has long been subject to a GAAR, 2019 saw the introduction of a GAAR for IIT purposes. Enterprises and individuals should be aware that regardless of whether their transactions are lawful in form, should the SAT determine that the main purpose of the transaction was to reduce, exempt or defer tax payments, then the SAT may exercise its power to make adjustments to the tax payable. GAAR by its intended nature is flexible, thereby making its application hard to predict. As a consequence, enterprises should approach their tax planning activities in China with care.

# Chapter 9: Intellectual property protection

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## 9.1 Primary features of intellectual property protection

In 2017 the NPC introduced legislation to strengthen the protection of intellectual property rights in China. According to Article 123 of the General Rules of the Civil Law of the PRC (promulgated on 15 March 2017), exclusive rights are granted to owners of the following types of intellectual property rights: works, patents (including invention, utility model and design), trademarks, geographical indications, trade secrets, IC layout designs, new plant varieties and other objects protected by law.

After thorough consideration of national conditions and legal standards, China adopted a ‘dual-track system’ of intellectual property rights protection, which consists of administrative protection and judicial protection, supplemented by arbitration and mediation.

Administrative protection provides an efficient, simple and inexpensive approach to intellectual property rights protection, by seeking the assistance of administrative authorities to address issues of infringement and counterfeiting. Judicial protection of intellectual property rights protection is provided by courts at all levels, whose function is to safeguard lawful intellectual property rights and interests through civil, administrative and criminal adjudication.

## 9.2 Improvements to intellectual property rights laws and regulations

China is continuously reviewing and updating its intellectual property laws. These updates include the Patent Law of the PRC (promulgated on 12 March 1984, last amended on 27 December 2008); the

Trademark Law of the PRC (promulgated on 23 August 1982, last amended on 23 April 2019); the Copyright Law of the PRC (promulgated on 7 September 1990, last amended on 26 February 2010); and the Anti-Unfair Competition Law of the PRC (promulgated on 2 September 1993, last amended on 23 April 2019). All of these updates were promulgated by the Standing Committee of the NPC.

China is accelerating the development of a punitive damages scheme under its intellectual property rights laws and regulations. For example, the Trademark Law now prohibits malicious applications to register trademarks and trademark hoarding. The Anti-Unfair Competition Law strengthens protections available to trade secrets owners. A draft amendment to the Patent Law that increases the penalties for patent infringement is being reviewed by the Standing Committee of the NPC.

## **9.3 Administrative protection of intellectual property rights**

### *9.3.1 Intellectual property rights applications and authorisations*

In recent years the number of intellectual property rights applications and authorisations in China has grown rapidly. In 2019 over 1.4 million new applications to register invention patents were accepted, and over 450,000 patents were granted. In the same year, over 7.8 million applications to register trademarks were accepted, and 6.4 million trademarks were registered.

To process such a significant volume of applications, the application review time has been shortened substantially, which indicates that the authorisation process has become more efficient and convenient.

### *9.3.2 Administrative protection of intellectual property rights*

To fulfil China's commitment to strengthening the administrative protection of intellectual property rights, the National Intellectual Property Administration (NIPA) has enhanced intellectual property rights protection in e-commerce by actively investigating and penalising e-commerce patent infringement and counterfeit goods. Similarly, the National Copyright Administration, along with three other government agencies, has led a special task force, which focuses on the infringement of copyright of online short videos, and has enhanced efforts to combat copyright infringement and piracy. The General Administration of Customs has also strengthened intellectual property rights protection at China's customs borders, and restricted the import and export of counterfeit and low-quality goods.

## **9.4 Judicial protection of intellectual property rights**

### *9.4.1 Establishment of specialised intellectual property rights courts*

In China, cases related to patents, new varieties of plants, layout-design of ICs, technical secrets, computer software, monopoly and well-known trademarks are subject to a centralised jurisdiction. To accommodate the centralised jurisdiction of intellectual property disputes, China established three independent intellectual property courts in Beijing, Guangzhou and Shanghai in 2014 and 21 intellectual property trial departments in intermediate people's courts around the country to hear disputes concerning these types of intellectual property rights in 2017.

Further, in 2019 the SPC established an intellectual property court to hear nationwide appeals of cases involving patents and other technical expertise. China also established three independent internet courts in Beijing, Guangzhou and Hangzhou in 2017 and 2018 to hear online copyright disputes and other related online disputes. China also developed a new online trial mechanism to adjudicate intellectual property rights disputes. China is dedicated to improving the judicial protection of intellectual property rights and to protecting new types of intellectual property rights stemming from technological innovation.

#### *9.4.2 Enhanced judicial protection of intellectual property rights*

In recent years, the number of intellectual property cases accepted by Chinese courts has increased significantly. Concurrently, PRC courts have adopted a precedents system in rendering judgments and have taken measures to improve the quality of litigation proceedings in intellectual property rights cases. By penalising intellectual property rights violations, the courts better safeguard the legitimate interests of intellectual property rights owners and increasingly deter intellectual property rights violations.

### **9.5 Alternative dispute resolution development of intellectual property rights protection**

China is also actively exploring applying ADR in intellectual property rights protection. By introducing arbitration into intellectual property rights dispute settlements, the number of arbitration cases involving intellectual property rights, especially intellectual property rights contractual disputes, has grown significantly. In 2019 the China Patent Protection Association released the Standard of Mediation on intellectual property rights Disputes, which provides an alternative way to solve disputes through mediation presided over by the people's mediation committee. As an innovative development of ADR, it is promising that it will play an increasingly essential supplementary role in intellectual property rights protection in future.

### **9.6 New trends and potential risks concerning intellectual property rights protection**

In recent years China has optimised and integrated administrative functions for intellectual property rights protection at the national level. To allow a comprehensive enforcement of intellectual property laws, China established the SAMR to facilitate supervision over patent and trademark infringement and counterfeiting. China also restructured the NIPA in 2018, integrating the Patent Re-examination Board and Trademark Review and Adjudication Board, which further improves the administrative protection rendered over intellectual property rights. The establishment of special intellectual property rights courts is also improving the quality and efficiency of intellectual property rights proceedings in China. These measures have been taken to ensure that IPR protection and management in China is and continues to be more efficient and effective in practice.

Given the continuous review of and amendments to intellectual property laws and enhancements to the judicial protection of intellectual property rights, intellectual property rights owners should stay apprised of changes in applicable law and the appropriate forum for seeking intellectual property rights recognition and protection.

# Chapter 10: Financing

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## 10.1 Banking and finance

### 10.1.1 Introduction

#### FINANCIAL REGULATORY FRAMEWORK

Under the current financial regulatory framework in China, the financial market is subject to the supervision of: (1) the Financial Stability and Development Commission of the State Council; (2) the PBOC; (3) the China Banking and Insurance Regulatory Commission (CBIRC) (which is a merged entity of the China Banking Regulatory Commission and the China Insurance Regulatory Commission as of 2018); and (4) the CSRC. This group is collectively known as the ‘One Committee, One Bank and Two Commissions’.

The Financial Stability and Development Commission of the State Council, established in 2017, is mainly responsible for promulgating macroeconomic policies and maintaining economic stability. The PBOC, acting as the central bank of China, focuses on formulating and implementing monetary policies (including the interest rates of deposits and loans), and one of its most important subdivisions, SAFE, is mainly responsible for foreign exchange control. The CBIRC is the direct regulator of both the banking industry and insurance industry. The CSRC is the direct regulator of the securities and futures industry.

#### CRITERIA FOR FINANCIAL BUSINESS

Currently, there are around 15 types of financial institutions in China subject to the supervision of the CBIRC. For these institutions, the industry entry criteria are very strict, and most such institutions must obtain a financial licence before conducting financial business.

#### MAIN BANK FINANCING REGULATIONS

The commercial loan is the most important business of banks. As the most fundamental regulation and guideline for regulating loan financing, the General Rules for Loans, implemented by the PBOC and published on 1 August 1996, set out the basic rules for loan transactions, that is, loan types, tenor and interest, the respective obligations and rights of the lenders and borrowers, the relevant supervisions and penalties, and so on.

In 2009 and 2010 CBIRC promulgated three measures and one guideline to regulate the four main types of commercial loans in China’s market: the Interim Measures on the Management of Working Capital Loans; the Interim measures on the Management of Personal Loans; the Interim Measures on

the Management of Fixed Assets Loans; and the Guidelines on Project Financing Business. All four are regarded as an important supplement to and implementing rules of the General Rules for Loans.

#### LOAN INTEREST RATE

Since the 1990s all financial institutions in China's loan market have determined their interest rate by floating up or down certain proportions of the benchmark interest rate announced by the PBOC (the 'PBOC base rate').

In the second half of 2019 the PBOC issued [2019] Notices 15 and 30, aiming to reform and improve the LPR mechanism debuted in October 2013. The notices stipulated that the facility interest rate must be quoted by reference to the LPR, which is calculated on the basis of the LPR quotations submitted by 18 quotation banks on the 20th of each month.

#### SECURITY

In China, security types are mainly stipulated in the PRC Property Law, the Security Law and its corresponding judicial interpretation, and relevant department rules and regulations.

A basic principle for all security arrangements in China is that only such a type of security that is explicitly stipulated in PRC laws will be recognised and effectively performed.

Another important feature of the security laws in China is that the security contract will come into effect when it is duly signed, but the security right will only be created upon the completion of certain perfection formalities (ie, approval, registration and filing) with relevant government authorities.

#### FX MATTERS

Cross-border bank financing transactions are highly supervised and controlled by SAFE in China. Such cross-border transactions can be mainly divided into: (1) cross-border debt financing; and (2) cross-border guarantee. Conducting any such transactions shall be subject to strict regulations and formalities (including registration, filing and reporting) by SAFE, CBIRC and other authorities.

### *10.1.2 Financial market in China*

#### FINANCING SCALE

In recent years China's financing scale has increased at an annual growth rate of around ten per cent. Although the growth rate has slowed down as a result of the government's financial deleveraging policy, the trend of the financing scale is growing steadily. According to data published by the PBOC, the social financing scale was RMB 256.36tn at the end of January 2020, an increase of 10.7 per cent.

#### COST OF FINANCING

Starting from 4.15 per cent on 20 August 2019, China's one-year loan LPR decreased to 4.05 per cent on 20 February 2020. The five-year LPR edged down by ten basis points (bps) as well to 4.75 per cent on 20 February 2020 from 4.85 per cent on 20 August 2019. In response to the difficulties and high



costs of financing, the Chinese government has reduced the required reserve ratios four times and applied a series of measures to ease funding shortages faced by small and micro enterprises.

### *10.1.3 Regional difference in practice*

In China, when the central government authority issues an administrative regulation, local government authorities will usually issue corresponding implementing rules to provide details on the implementation and operation of these administrative regulations. Such local implementing rules are stipulated within the regime of the administrative regulation at the central level, but will differ in detail, as each will take into consideration their respective local practice and situation.

The complicated policy-making mechanism in China requires that the foreign investor or financial institutions pay attention not only to the central regulations but also local policies and practice when carrying on financial transactions in China.

### *10.1.4 Challenges with opportunities*

#### PROFESSIONALISM AND INTERNALISATION

With China's 'Going Out' policy, more and more Chinese companies are investing abroad. Overseas or cross-border M&A financial transactions, therefore, occur frequently. PRC domestic banks play an important role in these financial transactions. However, because of a lack of practice, PRC domestic banks still need to gain more international financing experience and become more professional in the financing industry.

#### MARKETISATION OF THE INTEREST RATE

As a result of the aforementioned LPR reform, the majority of financial institutions in China's market now face a dilemma: on the one hand, they have no clue as to how to quote a proper interest rate, and on the other, they have strong doubts about how the final LPR formed on the basis of quotations could reflect their actual funding costs and the loan price. This dilemma casts a shadow over the future of the LPR.

Seeking innovation is the best way to escape the existing situation. Financial institutions urge the establishment via Fintech of a scientific pricing mode; however, perfecting the provisions related to the market interest rate (eg, adding a market disruption definition and a flexible pricing adjustment mechanism) could be a choice.

#### A MORE OPEN AND INTERNATIONAL FINANCIAL MARKET

Since 2017 the Chinese government has issued a series of regulations and policies to ease restrictions for foreign enterprises in finance. In particular, in June 2019 the Financial Committee of China's State Council published 11 measures to further promote the opening up of the financial market.



With the continuous economic growth and the government's efforts, the Chinese financial market is moving towards a more open and international market with more consistent rules. It is foreseeable that the Chinese government will implement more policies for the opening up and internationalisation of the financial market.

## 10.2 Equity financing

There are two main methods for a company to raise funds using equity financing: seeking a private equity investment or conducting an initial public offering (IPO). This section outlines the two financing tools.

### 10.2.1 Private equity investment

#### A BOOMING MARKET OF PRIVATE EQUITY INVESTMENT

China has emerged as one of the largest equity investment markets; its importance is globally recognised. According to data released by the Asset Management Association of China (AMAC), by the end of November 2019 China had more than 14,000 equity investment institutions, managing assets with a total value in excess of RMB 11tn (approximately \$1.6tn).<sup>40</sup>

#### TYPICAL STRUCTURES OF FOREIGN INVESTOR'S PRIVATE EQUITY DEALS

To become involved in China's private equity market, foreign investors typically use two structures: (1) FDI, whereby a foreign investor directly invests into a PRC target company in exchange for equity interest or shares; and (2) setting up a foreign-funded investment platform in China and using the foreign-funded investment platform to invest in a PRC target company. The regulatory framework for FDI has been discussed in other chapters and thus does not require elaboration here.

With respect to foreign-funded investment platforms, there are currently three types of platform that can be set up by a foreign investor: a qualified foreign limited partnership (QFLP), a foreign-funded investment company or a foreign-funded startup investment enterprise.

#### Qualified foreign limited partnership

A QFLP refers to a private equity investment fund that a foreign investor subscribes to for its capital commitment as a limited partner. A QFLP is generally established in the form of a limited partnership, involving one or more foreign investors as its limited partners. The general partner of such a fund may be either a domestic or foreign resident. A QFLP's fund manager may be a foreign-funded equity investment management enterprise incorporated in China, provided it has been registered with AMAC as a private equity fund manager, for which a PRC legal counsel's due diligence report and legal opinion are required to be submitted to AMAC for filing.

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<sup>40</sup> The exchange rate between the US dollar and RMB is around 6.9.

In China many local municipality governments have enacted and implemented rules governing thresholds for foreign investors of a QFLP, as well as established, compliance requirements on any preferential tax treatment entitled to the QFLP.

To set up a QFLP, the foreign investor must meet a threshold in terms of financial capacity, industrial experience, existing investment projects and personnel qualifications. For example, if a foreign investor elects to set up a QFLP in Shanghai, it shall self-own capital of at least \$500m or manage funds or assets of no less than \$1bn; the total subscribed capital commitment to a QFLP shall be no less than \$15m; and any sole limited partner's capital contribution to a QFLP shall be no less than \$1m.

#### Investment company

A foreign investor is allowed to set up an investment company, provided that it can meet the entry criteria to be an eligible promoter of such a company. An investment company can discretionarily use RMB sourced from the settlement of its capital fund in foreign currency to make an equity investment in a domestic company.

It is noteworthy that SAFE issued a new circular in October 2019, according to which a non-investment FIE is permitted to legally make an equity investment in a domestic company with its capital funds under several compliance requirements. As such, the difference between an investment company and a non-investment FIE has been narrowed.

#### Startup investment enterprise

Foreign-funded investment enterprises incorporated for the purpose of engaging in an investment of startup enterprises and providing management services to the same will be categorised as a startup investment enterprise. Compared with the QFLP, the investment of a startup investment enterprise is subject to a smaller scope, namely a high-tech enterprise that has not been listed on a stock exchange.

### *10.2.3 Initial public offering in China*

#### OVERVIEW OF CHINA'S INITIAL PUBLIC OFFERING MARKET

China's IPO market is undergoing rapid and steady growth. Statistically speaking, a total of 373 Chinese companies completed their IPOs in 2019, raising RMB 514.705bn (approximately \$74.59bn) in total, which works out as a yearly growth of 16.20 per cent and 23.67 per cent, respectively.

#### INTRODUCTION TO CHINA'S STOCK MARKETS AND REGULATION FRAMEWORK

In development since the 1990s, China's stock market has formed a multi-level capital market system, which includes: (1) the 'floor market', consisting of the main board (the 'Main Board'), the Small and Medium-sized Enterprise Board (the 'SME Board'), the Growth Enterprise Market (GEM) and the SSE Science and Technology Innovation Board (the 'STAR Board'), which was newly launched in June 2019; and (2) the 'over-the-counter market', comprised of the National Equities Exchange and Quotations and various regional equity trading markets.

Among these markets, the Main Board has the strictest listing thresholds on the issuer in terms of its operating period, capital size, profits (eg, the accumulative net profits for the last three fiscal years exceeds RMB 30m, approximately equivalent to \$4.35m), market value and other aspects, and thus many big players choose to be listed on the Main Board, while the enterprises listed on the SME Board, GEM and the National Equities Exchange Quotations have a relatively smaller scale and are less profitable. In addition, the unprecedented listing rules of the STAR Board allow an overseas company with a ‘variable interest entities’ structure to list its stock or issue its depository receipts on the STAR Board, provided that such an issuer has fulfilled certain financial indications and compliance requirements. Therefore, the STAR Board may become more open and compatible to multinational high-tech companies.

#### REGULATORY FRAMEWORK OF IPOs

China has promulgated numerous laws governing the issue and trading of shares, as well as the disclosure of information of an issuer, which includes various guidelines from the security regulatory authority and stock exchanges. The CSRC is the highest supervisory and regulatory institution for securities in the PRC, responsible for the formulation of policies relating to securities; drafting of securities laws and regulations; and supervision of the securities markets, market intermediaries and participants; as well as the supervision and regulation of securities transactions.

The primary laws, regulations and rules that lay the cornerstones of the current regulatory framework for IPO in China (including the STAR Board) are set out below:

- PRC Securities Law (2019 Revision) issued by the Standing Committee of the NPC on 28 December 2019 (the ‘New Securities Law’), which became effective on 1 March 2020 and regulates, among other things, the issue and trading of securities, takeovers by listed companies, securities exchanges, securities companies, and the duties and responsibilities of the PRC State Council’s securities regulatory authorities;
- Measures for the Administration of the Initial Public Offerings and Listing of Stocks, promulgated by CSRC with the latest version revised on 6 June 2018;
- Measures for the Administration of the Registration of IPO Stocks on the Science and Technology Innovation Board (for Trial Implementation), promulgated by CSRC on 1 March 2019;
- Listing Rules of the SSE, promulgated by the SSE, with the latest version revised on 30 April 2019, and Listing Rules of the SZSE, promulgated by the SZSE, with the latest version revised on 30 April 2019; and
- Listing Rules of the Science and Technology Innovation Board, promulgated by the SSE, with the latest version revised on 1 March 2019.

#### FOCUS ON ISSUES IN CONNECTION WITH THE REFORM OF CHINA’S IPO SYSTEM

After several years of amendments and deliberations, the long-awaited New Securities Law recently came into effect on 1 March 2020. The New Securities Law showcased vast changes and reforming measures, including: (1) adopting a registration-based IPO system to replace the existing approval

system; (2) imposing more severe punishments for violations (eg, financial fraud and insider trading); and (3) enhancing information disclosure and protection for retail investors.

Prior to the promulgation of the New Securities Law, the public issuance of securities had to be reported to the CSRC for case-by-case approval, and now the New Securities Law has officially abolished such an administrative approval system. Instead, a registration system will be used under a prescribed timeframe. However, as the detailed rules and guidance for such a registration system have not yet been published, there are many uncertainties concerning the implementation of the registration system and the linkage between the new legislation and old legislation during the interim period.

## Chapter 11: Privacy laws and data protection

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### 11.1 General legal framework

#### 11.1.1 Applicable laws and regulations

There is no single comprehensive privacy or data protection law in China. At present, the principal personal data protection legislation in China is the Cybersecurity Law of the PRC (CSL), which became effective on 1 June 2017. It sets out general data protection requirements for all network operators regarding personal data collection, use and sharing. When a foreign investment company owns or manages networks (including websites, internet platforms, local area networks and industrial control systems), or provides a network service within the territory of China, it is identified as a network operator and the CSL applies. Further, companies providing services to Chinese citizens/users via offshore entities, especially those involving data cross-border transfer, may also be subject to personal data protection rules established by the CSL.

To refine and supplement the general requirements in the CSL, the regulatory departments and national standard-formulating agencies have enacted a number of regulations and normative documents, including Provisions on the Cyber Protection of Children's Personal Information; Administrative Measures on Data Security (Draft for Comments); Measures for Security Assessment for Cross-border Transfer of Personal Information (Draft for Comments); Regulations for the Security Protection of Critical Information Infrastructure (Draft for Comments); and GB/T 35273-2017 Information Security Technology – Personal Information Security Specification (the 'Standard'). Although the Standard is not compulsory, it has been widely recognised as guidance for good practice by both the competent authorities and companies. The Standard is designed to regulate personal data controllers' behaviour in collecting, storing, using, sharing, transferring or publicly disclosing information, or at other stages of data processing.

Some general regulations, such as the Criminal Law, the General Rules of the Civil Law and the Tort Liability Law, also have an impact on privacy and data protection in China. In addition, data

protection requirements also exist in certain sector-specific legislation, especially the sectors of banking and finance, medical and health, e-commerce, telecommunications and so on.

### *11.1.2 Competent authorities*

China has no single authority responsible for enforcing provisions relating to data protection. Under the CSL regime, the main competent authorities are the Cyberspace Administration of China (CAC), Ministry of Public Security, Ministry of Industry and Information Technology and SAMR. Certain sector-specific regulators, such as the PBOC and National Health Council, are also authorised to implement and enforce relevant sector-specific legislation.

### *11.1.3 Data protection obligations of network operators*

Foreign companies, as network operators or data controllers, shall bear the data protection obligations during their operations in China, including but not limited to:

- abiding by the ‘lawful, justifiable and necessary’ principles to collect and use personal data;
- obtaining prior consent from the relevant data subjects when sharing or disclosing the collected personal data to a third party (including their affiliates);
- responding promptly to requests from data subjects to provide access to, rectify or delete their personal data;
- taking technical and other necessary measures to ensure the security of the collected data, and to establish and improve the system for data protection;
- taking immediate remedies and reporting to the competent authority and affected data subjects in case of actual or threatened disclosure, damage or loss of data collected; and
- appointing network security officer(s) to protect the security of the network, and, if necessary, appointing a data protection officer or setting up a data protection department.

## **11.2 Trends and development**

The implementation of the CSL and its supporting measures show that Chinese legislators are gradually consolidating the laws to protect national cyberspace sovereignty and network security. The illegal processing of personal data and privacy policies has been the central concern for data protection regulators.

In 2019 the CAC, Ministry of Industry and Information Technology, Ministry of Public Security and SAMR jointly carried out their one-year ‘special campaign’ against apps unlawfully collecting and using personal data. The authorities aim to enhance the supervision and punishment of unlawful collection and use of personal data, requiring industrial associates to assess their privacy policies, as well as the collection and use of personal data by, in particular, apps that have a large user base and are frequently used in daily life.

According to published statistics in September 2019, more than 8,000 complaints have been accepted by the authorised working group of the campaign. The group has conducted security assessments of over 400 frequently used apps and sent out rectification suggestions to more than 100 app-operating entities.

Furthermore, in order to regulate the collection and use of user information by mobile apps, the CAC and SAMR launched the Implementation Rules on Security Certification for Mobile Internet Applications in March 2019, which encourages apps operators voluntarily to apply for app security certification.

## **11.3 Key compliance risks for foreign companies**

### *11.3.1 Consent of the data subject*

In general, if a foreign company wishes to collect, use or transfer personal data from data subjects (eg, registered users of an app) during operation, prior consent is required from the data subjects, just as it is for domestic companies.

Pursuant to Article 41 of the CSL, foreign companies (as network operators) shall abide by ‘lawful, justifiable and necessary’ principles to collect and use personal data by announcing their rules for collection and use, expressly notifying the subject of the purpose, methods and scope of such collection and use, and obtaining consent from the subject of such personal data. If the collected personal data includes sensitive personal data (eg, phone numbers, ID number and address), pursuant to section 5.5 of the Standard, foreign companies shall obtain explicit consent, meaning the specific and unambiguous expression of will freely made by fully informed data subjects.

In contrast to the CSL, section 5.4 of the Standard further provides certain exceptions to the requirements to obtain consent, including national security, public health and security necessary for executing or performing contracts, among others. Nonetheless, it is important to note that the Standard is not an enforceable legal document but a set of recommendations and guidelines. Therefore, it is recommended to obtain consent from the data subject whenever possible.

### *11.3.2 Sharing and disclosure of personal data*

According to the Standard, when foreign companies intend to share or disclose the collected personal data to a third party (including their affiliates), they shall obtain prior consent from the relevant subjects. To meet the consent requirements, foreign companies shall inform subjects, usually in the form of a privacy policy, of the purposes of the sharing, disclosure or transfer of the personal data, the scope of the transferred data and the data recipient. There is an exception when the personal data to be shared or transferred has been processed for de-identification purposes and the data recipient is unable to reidentify the data subjects.

Pursuant to section 8.2 of the Standard, foreign companies are also recommended to:

- assess the personal data security impact in advance, and take effective measures to protect data subjects according to the assessment findings;

- maintain accurate records of the particulars of sharing and transferring personal data, including the date on which the data is shared or transferred, amount of data shared or transferred, purposes for sharing or transferring the data, and basic information of data recipients, and keep these records safe; and
- help data subjects to understand the particulars of the data recipients' storage and use of their personal data and learn about the rights of data subjects, such as accessing, modifying and deleting their own personal data and cancelling their own account.

### *11.3.3 Cross-border data transfer restrictions under the CSL*

It is common practice for multinational companies to deploy unified and connected IT systems and office networks to realise global centralised management. When foreign companies transfer certain personal data or operation data collected within China to overseas affiliates or cooperative partners, the cross-border data transfer regulatory requirements apply.

Pursuant to Article 3 of Measures for Security Assessment for Cross-border Transfer of Personal Information (Draft for Comments), published by the CAC on 13 June 2019, before the cross-border transfer of personal data, foreign companies shall bear the data protection obligations below, including but not limited to:

- obtaining prior consent from the data subjects and informing them of the purposes of the sharing, disclosure or transfer of the personal data, the scope of the transferred data and the data recipient;
- conducting a security assessment for the cross-border transfer of personal data, and filing the assessment results with the local CAC office;
- executing data transfer agreements with overseas data recipients;
- maintaining a log of all cross-border transfers of personal data for at least five years; and
- submitting an annual report to the CAC on the status of cross-border transfers and the performance of data transfer agreements.

Note that, as outlined in sector-specific regulation, certain sensitive personal data, such as personal biometric information and credit information, can only be stored or processed within the territory of China. In principle, it is prohibited for such sensitive personal data to be transferred to overseas entities.

### *11.3.4 Data security standard*

The CSL implements a multi-level protection system for cybersecure network protection, which classifies networks into five grades and progressively imposes higher security requirements for each grade.

Foreign companies, as network operators, are responsible for taking technical and other necessary measures to ensure the security of data they collect and to prevent the data from being accidentally disclosed or destroyed. Companies shall evaluate and determine the grades of their



operating networks, and companies with networks of Grade 2 or higher shall file such networks with the local public security bureau.

If a foreign company entrusts a third party to process personal data on its behalf, it shall ensure that such a processor provides an adequate level of protection to the personal data involved, as provided in section 8.1 of the Standard.

## 11.4 Conclusion

With the strict enforcement of the CSL, cybersecurity and data protection has become a priority of corporate compliance review. Although many multinational companies have established comprehensive data protection management systems based on a European or American standard, it is highly recommended to examine the above compliance risks and localise the management system to meet Chinese regulatory requirements.

# Chapter 12: Competition law

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## 12.1 Legal framework of China's competition law

A competition law system is a synthesis of various laws and regulations that regulate the competition of market entities. It takes the competition relationship in market activities and the competition management relationship between managers and operators as the regulative object and, in the main, is intended to maintain the normal competition order, with anti-monopoly and anti-unfair competition as the core content.

### 12.1.1 Laws and administrative regulations

In addition to the Antitrust Law (released on 30 August 2007) and Law of the PRC Against Unfair Competition (revised on 23 April 2019), there are also other provisions in relation to competition regulation among other laws in the current Chinese competition legal system, such as the Pricing Law (released on 29 December 1997), Law on the Protection of Rights and Interests of Consumers (revised on 25 October 2013), E-commerce Law (released on 31 August 2019) and Advertising Law (revised on 26 October 2018).

Administrative regulations also make up an important part of the competition legal system, such as the Interim Provisions on the Prohibition of Monopoly Agreements; the Interim Provisions on the Abuse of Dominant Position in the Market; the Interim Provisions on Stopping Abuse of Administrative Power; and the Interim Provisions on Restricting Competition, which was promulgated by SAMR and came into effect on 1 September 2019. Others include the Regulation on Prohibiting Infringement upon Trade Secrets (1998); Certain Regulations on Prohibiting Unfair Competition Activity Concerning Imitating Specific Names, Packaging or Decoration of Well-known Commodities (1995); Interim Provisions on Prohibition of Commercial Bribery (1996); and Interim Provisions on

Prohibiting Bid-Rigging (1998), which were issued by the former State Administration for Industry and Commerce; and Provisions on the Merger and Acquisition of Domestic Enterprises by Foreign Investors, which was released in 2009 by MOFCOM.

### *12.1.2 Judicial and other interpretations*

In China judicial interpretations have a unique function as an important component of the legal system. The most important judicial interpretations about competition law include the Provisions on Several Issues concerning the Application of Law in the Trial of Monopoly Civil Disputes (2012); Several Issues Concerning the Applicable Laws in the Trial of Unfair Competition Civil Cases Interpretation (2007) issued by the SPC; and Answers to Several Questions in the Trial of Unfair Competition Cases (Trial) (1998), issued by the Beijing Higher People's Court. In addition, the provisions on competition in the international conventions to which China is a party also play a significant role in China's competition legal system. In addition, some competition policies issued by relevant government agencies are also worthy of attention, that is, various policies and measures adopted by the government to promote and protect competition.

## **12.2 Competition enforcement practices in 2019**

In April 2018 the SAMR was officially founded and became the main enforcement agency of competition law. According to the Law of the PRC Against Unfair Competition, some other administrative organisations, such as NIPA and CBIRC, also have corresponding anti-unfair competition enforcement power in their respective fields.

The competition law enforcement agencies are divided across central and provincial levels. In 2019 the general authorisation system was established, that is, the SAMR is responsible for investigating and dealing with cases that are inter-provincial, extremely complicated or have a significant influence on the country, and that need to be investigated by SAMR directly. Provincial enforcement agencies can investigate monopoly acts within their own administrative regions.

A total of 38 cases of monopoly behaviour were investigated and handled by the national market supervision system in 2019. At present, SAMR announces on its official website 17 cases concerning monopoly agreements and abuse of market dominant position. A total of 432 cases of concentrations of undertakings have been concluded. Among them, there are five cases with conditional approval. A total of 17 non-legally notified cases were punished. As for administrative monopoly, the SAMR announced a total of 16 typical cases in 2018.

China currently regulates seven types of unfair competition behaviours: commercial confusion acts; commercial bribery; false publicity; infringement of trade secrets; unfair prize-attached sales; damage to commercial reputation; and new types of unfair competition in the internet field. In July 2019 the SAMR launched anti-unfair competition enforcement actions in key areas across the country from August to December, focusing on investigating counterfeiting, commercial confusion, commercial bribery, false publicity, commercial defamation and other acts of unfair competition. As of 25 October 2019, a total of 2,173 cases of unfair competition were investigated and dealt with nationwide, with a value of RMB 101m.

## 12.3 Competition judicial practice in 2019

According to the statistics of the Judgment Documents Network, in 2019 courts of all levels across the country concluded 41 antitrust civil lawsuits. From judicial practice, we can see that it is very difficult for the plaintiff to prove the dominant position of the defendant in the relevant market in most cases. As of March 2020, according to Chinese law database pkulaw.com, courts of all levels across the country concluded 1,027 unfair competition disputes in 2019, mainly involving commercial bribery, infringement of trade secrets and counterfeiting.

Currently, the SPC hears appeals in intellectual property cases heard by intellectual property courts and intermediate people's courts. The SPC applied the so-called 'Leap Appeal System' for the first time in an antitrust lawsuit in September 2019.

## 12.4 Competition policy trends and hint for companies

At present China is one of the world's three major competition law enforcement regions. Competition law enforcement is becoming more stringent and commonplace. When it comes to competition law enforcement and judicial practice, it's foreseeable that international cooperation will continue to improve at pace with economic globalisation. Much emphasis will be placed on internet-related competition violations and cases where competition law overlaps with intellectual property.

The Regulation on the Optimization of the Business Environment (2020) promulgated by the State Council has underlined that law enforcement efforts against monopoly and unfair competition shall be stepped up so as to create a market environment for fair competition. It can be expected that the vigorous promotion of the fair competition review system will improve the business environment significantly.

# Chapter 13: Dispute Resolution

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Similar to other legal systems around the world, mediation, arbitration and litigation are the three main mechanisms for resolving international commercial disputes in the PRC. According to a work report released by the SPC in 2019, more than 3 million commercial disputes were concluded at the stage of first instance trial in 2018.<sup>41</sup> Meanwhile, arbitration institutions in China also saw an increase in the number of cases handled in 2018. For example, the China International Economic and Trade Arbitration Commission presided over 2,962 cases in 2018, whereas the Beijing Arbitration Commission/Beijing International Arbitration Center oversaw 4,872 arbitration cases at the end of that year.<sup>42, 43</sup> As such, it is of little doubt that a large number of commercial disputes in China are now resolved with litigation and arbitration proceedings.

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41 ChinaCourt, *Report on the Work of the SPC* (full text) [www.chinacourt.org/article/detail/2019/03/id/3791943.shtml](http://www.chinacourt.org/article/detail/2019/03/id/3791943.shtml) accessed 13 May 2020.

42 China International Economic and Trade Arbitration Commission, *CIETAC 2018 Work Report and 2019 Work Plan* [www.cietac.org/index.php?m=Article&a=show&id=15803](http://www.cietac.org/index.php?m=Article&a=show&id=15803) accessed 13 May 2020.

43 Beijing International Arbitration Centre, *2018 Annual Report* [www.bjac.org.cn/news/view?id=3375](http://www.bjac.org.cn/news/view?id=3375) accessed 13 May 2020.

## 13.1 Commercial litigation

Judicial litigation has always been one of the most effective methods in China for resolving international commercial disputes. To avoid irreparable harm, and to ensure effective legal enforcements after prevailing in a lawsuit, disputing parties in China often prefer judicial litigation because of the various preservation measures (ie, interim/provisional measures and/or injunctive relief) available against an adverse party. Adopting a ‘second instance ruling being final’ doctrine, the selection of the appropriate jurisdiction/forum for commercial litigation often depends on the amount of controversy and geographical locations in the case.

As such, this type of litigation system might sometimes result in prolonged/protracted trial time. However, in contrast with arbitration-like proceedings, an extensive review by the appellate court (second instance) may provide more legal certainty and clarification.

In recent years the number of foreign-related cases resolved via litigation in China has increased drastically, which in turn has resulted in corresponding legal reforms initiated by both the legislative body and the judicial system.<sup>44</sup> As a result, in April 2011 the Applicable Laws on Foreign-Related Civil and Commercial Relations came into effect.

At the same time, the judicial system has greatly increased the number of courts authorised to handle these foreign-related cases. More specifically, before 2011 the ‘first instance’ jurisdiction of foreign-related commercial disputes was exclusively limited to provincial intermediate people’s courts and courts of identical jurisdictional level. Only recently, pursuant to a notice issued by the SPC that came into effect on 1 January 2018, all intermediate and basic courts can now hear foreign-related civil and commercial cases.

With the ever-increasing number of international commercial disputes, in January 2018 the Chinese government issued the Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions, in which three recommendations for resolving cross-border commercial disputes were put forward: first, the SPC will establish China International Commercial Courts (CICC); second, the SPC will lead in establishing the International Commercial Expert Committee; third, the establishment of diversified dispute resolution mechanisms, which effectively integrate litigation, mediation and arbitration so as to create a convenient, expeditious and low-cost ‘one stop’ centre for dispute resolution, will be promoted. Subsequently, the First and Second International Commercial Courts were established in Shenzhen and Xi’an, respectively. Cases tried by the CICC shall be heard by a collegial panel consisting of three or more judges. The CICC practices the ‘first instance being

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<sup>44</sup> ‘Since the second half year of 2013, the number of international cases in civil or commercial matters has increased dramatically’, according to Chen Yifan, ‘Big Data analytic based on international civil or commercial cases’, *Legal System and Society*, January 2018 (part one).

final' doctrine. All judgments and rulings made by the CICC are final and binding on the parties with legal effect.<sup>45</sup> By the end of 2019, CICC had accepted 13 cases.<sup>46</sup>

## 13.2 Commercial arbitration

Many foreign enterprises prefer arbitration as a way of dispute resolution. By the end of 2018, there were 255 arbitration institutions in China.<sup>47</sup> The total number of cases accepted by the China International Economic and Trade Arbitration Commission in 2019 was 3,333 (a year-on-year growth of 12.53 per cent), of which 617 were foreign-related, with parties coming from 72 countries and regions. An increasing number of parties are selecting international conventions and various national laws as substantive reference in arbitration, such as the UN Convention on Contracts for the International Sale of Goods, Australian law and Italian law.<sup>48</sup> In addition, since China is a member of the New York Convention, at least in theory, a party with an arbitral award rendered in China may petition for recognition and enforcement in any other member countries of the Convention.

In accordance with China's arbitration law and civil procedure law, as well as relevant judicial interpretations, the standard of review of a domestic arbitral award differs from a foreign arbitral award. The people's courts set forth different grounds and conditions for the non-enforcement or cancellation of domestic and overseas arbitration awards. As a result, the court generally follows a stricter standard when reviewing a domestic arbitration award; however, it focuses mainly on procedural matters/issues with overseas arbitral awards.

## 13.3 Mediation and alternative dispute resolution

Compared with arbitration proceedings, the process of mediation is considered by many as more flexible, confidential and effective. It is sometimes much easier for parties involved in a commercial dispute to come to terms simply because of the less stressful atmosphere and flexibility provided in a mediation process.

Under relevant laws and regulations of the PRC, mediation is also common practice. Currently, however, judicial authorities in China only recognise mediation agreements issued by the people's courts, arbitration institutions and People's Mediation Committees. A mediation agreement reached under the supervision of the People's Mediation Committee shall be enforced only after a confirmation made by the court. However, with respect to a settlement agreement resulting from a mediation proceeding abroad, there is no existing law addressing the process of application and/or enforcement of remedy as of yet.

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- 45 Provisions of the SPC on Several Issues Regarding the Establishment of CICC (Fa Shi [2018] No 11):  
Art 5 s: 'Cases tried by the International Commercial Court shall be heard by a collegial panel consisting of three or more judges.'  
Art 15: 'A judgment or ruling made by the International Commercial Court is a legally effective judgment or ruling. A conciliation statement made by the International Commercial Court shall have the same legal effect as of a judgment after its receipt signed by the parties.'
- 46 CICC Court, 'The First International Commercial Court of the SPC Concluded the First Five Cases Efficiently' <http://cicc.court.gov.cn/html/1/218/149/156/1545.html?from=groupmessage> accessed 13 May 2020.
- 47 'According to the statistics of the Ministry of Justice, there were 255 arbitration committees with more than 60000 staff by the end of 2018', Ministry of Justice of the PCR, the Ministry of justice declares the Reform and Development Goals of arbitration in the new era [www.moj.gov.cn/Department/content/2019-04/02/612\\_231935.html](http://www.moj.gov.cn/Department/content/2019-04/02/612_231935.html) accessed 13 May 2020.
- 48 China International Economic and Trade Arbitration Commission, *CIETAC 2019 Work Report*, [www.cietac.org/index.php?m=Article&a=show&id=16447](http://www.cietac.org/index.php?m=Article&a=show&id=16447) accessed 13 May 2020.

Another recent phenomenon in the realm of mediation is that China's judicial authorities have intentionally expanded the scope of subject matter in mediation. On 16 October 2017 the SPC and the Ministry of Justice issued the Opinions on the Pilot Work of Mediation by Lawyers, allowing one or more lawyers, under the colour of mediators, to assist relevant parties in reaching an agreement through voluntary negotiation in 11 provinces and cities.<sup>49</sup> In addition, the establishment of an ad hoc arbitration system in various pilot FTZs is also under active discussion and preparation.<sup>50</sup>

### 13.4 New trends and challenges

With ever-increasing globalisation, dispute resolutions such as litigation, arbitration and mediation have advantages and disadvantages. Most importantly, the modern legal profession recognises these proceedings to be mutually beneficial, seamlessly integrating with each other. For example, the idea and principle of mediation is effectively combined into both litigation and arbitration proceedings in China.

In order legally to promote holistic approach integrating the various dispute resolutions on a singular platform, in 2018 Justice Luo Dongchuan from the SPC stressed the idea of creating a 'one-stop' international commercial dispute resolution mechanism. With support from CICC and the International Expert Committee, this mechanism is expected to become one of the first 'one-stop' platforms integrating litigation, mediation and arbitration in a coherent and systematic format.<sup>51</sup> With such elevated expectations, some questions still remain as to how effectively to identify competent arbitration and mediation institutions and how to transfer cases effectively among the various institutions, as well as how to allocate relevant expenses among the parties while ensuring the purpose of the 'one-stop' mechanism. These issues indeed demand cautious deliberation, as we continuously acquaint ourselves with professional experiences, as well as the implementation of new laws and policies.

## Chapter 14: Development and practice of wealth management legal business

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With the continuous development of the Chinese economy, the affluent class in China has grown rapidly in the past few decades. As of 2018 the number of HNWI with personal investable assets of more than RMB 10m (about \$1.43m) nationwide reached 1.97 million, and the overall size of investable assets held by individuals across the country reached RMB 190tn (about \$27.2tn).<sup>52</sup> The affluent class is paying more attention to the safety of its wealth. Wealth management for private

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49 Opinions on the pilot work of lawyers' mediation by the Ministry of Justice of the SPC.

50 Wen Xiantao, 'UN Convention on International Settlement Agreements Resulting from Mediation and Commercial Mediation in China', *China Law Review*, No 1 (2019).

51 CICC Court, 'Integration-based Resolutions': China's solution to international commercial dispute' <http://cicc.court.gov.cn/html/1/218/149/156/1117.html> accessed 13 May 2020.

52 *Private Wealth Report 2019* of China Merchants Bank – Bain & Company.



client legal services, especially for HNWI, has become an emerging area of legal services in China in recent years.

## 14.1 Main legal applications of wealth management services

A client's wealth management business involves comprehensive needs, such as marriage, inheritance, tax planning, immigration, family business governance and succession, involving multiple departmental laws, including non-litigation and litigation businesses, and domestic and foreign legal relationships recognising typical integrated legal practices. The main substantive laws are outlined below:

### 14.1.1 Application of the Marriage Law

The marriage risks of HNWI directly affect their wealth security. Lawyers need to provide services based on client needs, such as drafting legal documents, including marital asset agreements, divorce agreements and marital asset division agreements, as well as representing clients in divorce proceedings. Therefore, the Marriage Law of the PRC<sup>53</sup> and related judicial interpretations are important laws applicable to the wealth management business.

### 14.1.2 Application of the Succession Law

In recent years more HNWI have entrusted lawyers to take into consideration comprehensive factors with respect to the inheritance arrangements of wealth, before or even after life. Inheritance is done mainly through statutory succession, testamentary succession and legacy. The above arrangements and legal documents need to comply with the Succession Law of the PRC,<sup>54</sup> the judicial interpretation and the guiding cases of the SPC.

### 14.1.3 Application of the Company Law

The family wealth management business is always accompanied by issues such as the standardisation of family business governance and the delegation of business management rights. Clients usually entrust lawyers to design a complete plan for the inheritance of family businesses to optimise the governance structure of family businesses and plan the inheritance arrangements of equity ownership and operating rights. The validity of the aforementioned legal documents relates to the application of legal provisions, such as the Company Law<sup>55</sup> of the PRC and related judicial interpretations.

### 14.1.4 Application of the Trust Law

The Trust Law of the PRC<sup>56</sup> was promulgated and taken into effect in 2001. The trust system in China has yet to be improved. However, due to the unique advantages of trusts in wealth management and inheritance arrangements, more clients have begun to engage with lawyers to set up family asset trusts to arrange wealth.

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53 Promulgated and implemented on 10 September 1980, amended on 28 April 2001.

54 Promulgated on 10 April 1985, implemented on 1 October 1985.

55 Promulgated on 29 December 1993, fourth amendment on 26 October 2018.

56 Promulgated on 28 April 2001, implemented on 1 October 2001.



### 14.1.5 Application of tax laws

In any wealth plan, the tax issues of clients, families and family businesses are involved. If clients or family members have already emigrated, overseas tax issues will also be involved. Chinese clients have begun to entrust lawyers to provide planning solutions for tax risks of family members or assets in accordance with domestic and overseas tax laws.

In addition to the above laws that are important for wealth management, there are other laws, such as the Insurance Law of the PRC<sup>57</sup> and the application of the Law of the PRC on Choice of Law for Foreign-Related Civil Relationships.<sup>58</sup> When serving clients in China, lawyers often need to help clients achieve their wealth management goals with laws of different disciplines in non-litigation plan formulation, as well as legal representation in litigation.

## 14.2 Development of China's wealth management services and demand status

In recent decades the scale of China's economic and social wealth has grown rapidly. In 2019, China's share of global wealth reached 17.7 per cent, and China has the second-largest number of HNWI's in the world. The per capita income level and wealth of Chinese residents have increased significantly, and the accumulation of family assets has also brought about the rapid development of the wealth management industry. Chinese HNWI's have begun to pay attention to the long-term allocation of assets and the prevention of legal risks. Currently, more clients are actively commissioning lawyers for overall wealth management and planning, spawning the novel legal service field of wealth management.

## 14.3 Regional differences in China's wealth management services

As of the end of 2018, the number of HNWI's in 23 provinces and cities in China exceeded 20,000. Among them, HNWI's in provinces like Beijing, Guangdong, Jiangsu, Shanghai and Zhejiang account for about 43 per cent of the national total HNWI's;<sup>59</sup> therefore, judging from the distribution of wealth throughout China, the proportion of HNWI's in first-tier cities is relatively high, and their corresponding wealth management demands have also increased. At the same time, with the continuous development of second and third-tier cities, demand for wealth management legal services in those regions has gradually increased as well. However, holistically speaking, wealth management services and clients are mainly concentrated in first-tier cities with developed

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57 Promulgated on 30 June 1995, amended for the third time on 24 April 2015.

58 Promulgated on 28 October 2010, and implemented on 1 April 2011.

59 *Private Wealth Report 2019* of China Merchants Bank – Bain & Company.

economies. Lawyers and wealth management agencies in this business are also mainly concentrated in large cities with developed economies.

## **14.4 Challenges in wealth management services**

### *14.4.1 Inadequate risk awareness of HNWIs*

Although family wealth security and inheritance have become a necessity for HNWIs, due to insufficient publicity and education around the legal risks of assets, clients have paid more attention to investment than security planning, and lack the inclination to entrust lawyers to prevent risks.

### *14.4.2 Insufficient experience of wealth management professionals and service agencies*

Although China's economy is well developed, the corresponding legal framework to meet the needs of HNWIs in respect of private wealth management has yet to mature. Compared with the wealth management industry in Western developed countries, mainland China's wealth management services still have problems, lagging behind the clients' need in terms of cultivating professionals and the experience of legal practices, which at the same time indicates the huge demand gap for wealth management legal services in the market and the vast space for it to develop.

### *14.4.3 A systematic service pattern of wealth management is needed*

HNWIs have diverse asset types and relatively complex familial structures. They face global asset allocation requirements and the challenges of family business inheritance. Wealth management institutions are required to provide a professional service and to coordinate law, tax, finance, immigration, education and other fields to form a systematic service pattern. Generally speaking, China's wealth management industry has not yet formed a systematic and collaborative service model. The main reasons for this include a lack of detail in the laws about wealth management, insufficient experience of professional institutions and practitioners in this field, non-existent systematic industry service standards and the immaturity of the localised legal service model.

### *14.4.4 Global cooperation ecology is needed*

At present, China's wealth management industry has not yet established a global cooperation system. It is difficult to achieve clients' globally integrated wealth management and risk prevention goals. International professional cooperation is in urgent need of development.

From a holistic perspective, the size of China's wealth management market is considerable, and demand is increasing. In future, there will be a vast space for development of China's wealth management legal services, and the entire industry needs to promote the development of services in a coordinated way and pay more attention to international legal service cooperation.

# Chapter 15: Environmental policy and law

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When making environmental decisions, Chinese policy and law makers adopt the following two analysis dimensions: sustainable development, and utilitarianism and cost-benefit analysis. So how does environmental policy and law in the PRC unfold from those two dimensions? What is the impact on enterprise?

## 15.1 Sustainable development

Although China's economic aggregate ranks second in the world in terms of gross domestic product (GDP), China is still declared as a developing country because its per capita GDP is only about \$10,000, and, according to UN standards, many people are still subsisting on very low-level income. Although the number of people in this category makes up just 0.6 per cent of the total population, which is far lower than many developed countries, development is still China's top priority. At present, the annual growth rate of China's GDP will not, nor can it be, lower than six per cent.

China has proposed a policy of high-quality development. Focusing on this policy, China has put forward the policy orientation that 'both gold mountain and silver mountain is needed, and green water and green mountain is needed too, and green mountains and lucid waters are indeed mountains of gold and silver'.

The Constitution of the PRC was amended in 2018 and includes 'ecological civilization', paralleled with 'material civilization', and 'beautiful China' paralleled with 'prosperous and powerful China'. It lists 'ecological civilization construction' into the scope of functions and powers of the State Council which is given equal importance to 'economic affairs, urban and rural development'.

Article 6 of the new Environmental Protection Law of the PRC stipulates that '[t]he local people's governments at all levels shall be responsible for the environmental quality within their respective administrative regions'.

For this reason, in 2015 Central Committee of the Communist Party of China (CPC) launched circular inspections of environmental protection across various provinces. During the inspections, special report telephone numbers and email addresses for environmental supervision and inspection were set up. Public accountability and punishment was applied by the Central Environmental Protection Supervision Group to address the problem of weak supervision of environmental protection.

The Secretary of the Gansu Provincial Party Committee of the CPC and the Secretary of the Shanxi Provincial Party Committee of the CPC were held accountable for their criminal responsibility because they had not followed the central environmental policy and even acted in opposition to it. The former was responsible for ecological damage in the Qilian Mountains National Nature Reserve. The latter illegally approved the construction of a large group of villas in the hinterland of

Qinling Mountains. Tens of thousands of other leaders (Chinese middle and senior cadres) at or above the county level, including provincial governors, ministers, county heads and directors, have also been held accountable. The clear signal is that local leaders must focus not only on the economy and development but also on environmental protection.

In addition to the Central Environmental Protection Inspectorate, China has implemented local air and water environmental quality rankings. Lower-ranked local government leaders will be held accountable for any breach of quality levels. The forms of accountability include admonitions, administrative sanctions and party discipline (eg, firing party members and dismissing positions), and criminal responsibility. To this end, the Provisions of the CPC Central Committee and the State Council on the Supervision over the Work of Ecological and Environmental Protection and Measures for the Accountability of Party and Government Leaders for Damage to the Ecological Environment (for Trial Implementation) and so on were specifically issued, and the Regulation of the CPC on Disciplinary Actions, the Regulation on the Selection and Appointment of CPC and Government Leaders and other intra-party regulations were amended.

In the past ten years China has continuously reduced the production capacity of industries such as cement, glass, steel and paper-making; eliminated small-scale and high-energy-consuming industries; proposed to save space for the development environment for high-end services, finance, bio-medicine, the electronic information industry, the aerospace industry, education, culture and tourism, renewable new energy, ecological environmental protection, modern agriculture and animal husbandry, and food; has continuously adjusted and optimised the industrial structure; and has issued a series of environmental supervision policies and laws, and enforced them strictly.

Despite this, China's environmental policies and laws will not and cannot be separated from the reality of development.

Taking the air environment quality standard as an example, which is also a unified standard in China and the US, for the index of carcinogen PM<sub>2.5</sub>, the first-class (good) standard in the US is below 12, but the first-class (excellent) standard in China is below 35 (unit: micrograms/cubic metre, the same below). The standards of American Grade 3 (unhealthy for sensitive people) and Grade 4 (unhealthy) are 35–55 and 55–150 respectively, but China's second-level (good) and Grade 3 (slight pollution) are 35–75 and 75–115, respectively. Therefore, it can be concluded that the grading system in the US is more stringent. When the PM<sub>2.5</sub> indicator in China is Grade 2 (good), the US may conclude that it has already reached a moderate pollution level, namely Grade 4 (unhealthy) level.

Obviously, China is pursuing the Sustainable Development Goals and has adopted a progressive environmental protection development strategy. It may take another ten years, but the environmental quality standard in China will gradually increase to be in line with developed countries.

## **15.2 Utilitarianism and cost-benefit analysis**

China has been vigorously pursuing ecological environmental protection policies and laws since 2012 based on the pragmatic notion of 'gains cannot make up for losses'. President Xi Jinping has often been quoted saying 'good ecology represents the prosperity of civilization; bad ecology represents the decay of civilisation'.

In the final two decades of the 20th century, China's accelerated desertification, water pollution and water shortage caused by high consumption, and the danger of climate change on the Qinghai-Tibet Plateau caused by greenhouse gases, were major events directly impacting the survival and revival of Chinese civilization.

Since 2012 China has focused on solving the very prominent problem of the low cost of pollution and consequent low illegal cost. To address this, in addition to amending the Environmental Protection Law, five supporting implementation measures have been introduced, which have greatly improved environmental supervision and law enforcement, given the ecological environment law enforcement. The relevant departments now have powers to enforce measures such as a daily penalty, freeze and seizure, limited production and shutdown, disclosure of environmental information and administrative detention.

Such measures include the Measures for the Implementation by Competent Environmental Protection Departments of Consecutive Daily Penalties; Measures for the Implementation of Sealing-up and Impounding by Competent Environmental Protection Departments; Measures for the Implementation by Competent Environmental Protection Departments of Limiting and Halting Production for Remediation; Measures for the Disclosure of Environmental Information by Enterprises and Public Institutions; and Interim Measures for the Transfer by Administrative Departments of Cases of Environmental Violations for which the Penalty of Administrative Detention May Be Applied. These measures are unprecedented. At the same time, the Atmospheric Pollution Prevention and Control Law of the PRC; the Water Pollution Prevention and Control Law of the PRC; and the Law of PRC on the Prevention and Control of Environment Pollution Caused by Solid Waste were amended. The Soil Pollution Prevention and Control Law of the PRC was formulated. The sum of penalties was increased greatly and penalty items were added, such as the maximum sum of RMB 5m for each administrative violation. The sum of daily penalties is currently more than RMB 200m.

From January to November 2018 the total number of cases implemented nationwide was 36,302. Among them, 691 cases were continuously punished on a daily basis, 33.94 per cent less than the same period last year (1,046), and fines amounted to RMB 985m, a decrease of 8.41 per cent compared with the same period last year (RMB 1.075bn). 6,196 cases of production limitation and suspension, a decrease of 20.99 per cent compared with the same period last year (7,842); 7,145 administrative detentions were transferred, a decrease of 8.71 per cent compared with the same period last year (7,827); and 2,367 suspected environmental pollution crimes were transferred, a decrease of 6.18 per cent compared with the same period last year (2,523).

In 2013, the Interpretation of the SPC and the Supreme People's Procuratorate on Several Issues concerning the Application of Law in the Handling of Criminal Cases of Environmental Pollution was issued. The IALCCEP was revised in 2016.

Before 2013 the average annual number of criminal cases of environmental pollution was between 20–30; however, the number of such cases in 2013 was 1,300, four times the total cases before 2013. The number of criminal cases has increased by about 30 per cent each year. According to statistics, in 2017 and 2018 the court's newly accepted criminal cases of environmental pollution were 2,344 and 2,409, and closed criminal cases of environmental pollution were 2,258 and 2,204, respectively.

According to data released by the Supreme People's Procuratorate on 14 February 2019, 26,527 people were arrested for the crime of destroying the protection of the environment and resources. From 2015-2017, 91,131 people were prosecuted for crimes against the environment. In 2018, 15,095 people were arrested and 42,195 people were prosecuted for crimes against the environment.

Environmental pollution crimes include the crime of quantity. The Interpretation of the SPC and the Supreme People's Procuratorate on Several Issues concerning the Application of Law in the Handling of Criminal Cases of Environmental Pollution stipulates that if the environmental pollution causes the loss of public or private property of more than RMB 300,000, criminal responsibility shall be investigated, and if the amount exceeds RMB 1m, the punishment shall be increased. China has issued a series of ecological environmental damage assessment guidelines or methods, such as the Recommended Methods for Authentication and Assessment of Environmental Damage (Edition II) (formerly formulated by the Ministry of Environmental Protection in 2014); Technical Guidelines for Identification and Assessment of Eco-environmental Damage, Soil and Groundwater (Established by the Ministry of Ecology and Environment in 2018); and Regulations on the Classification of Environmental Damage Judicial Authentication (jointly formulated by the Ministry of Justice and the Ministry of Ecology and Environment in 2019) for use in determining the loss amount. Currently there are about 200 environmental damage judicial authentication agencies in China, divided into seven major environmental judicial authentication practice categories, such as identification of wildlife damage caused by ecological pollution, wetland ecosystem damage caused by ecological pollution and urban ecosystem damage caused by ecological pollution.

In 2020 the Supreme People's Procuratorate of the PRC announced a criminal case with supplementary civil claims related to the protection of endangered wild fauna. The defendant was accused of killing and selling 11 pangolins and pangolin products. In this case, the prosecutor hired Wu Shibao, a professor at the School of Life Sciences of South China Normal University and a member of the pangolin expert group of the International Union for Conservation of Nature Species Survival Committee. The professor issued a quantified expert opinion on the damage to the ecological environment in this case. Professor Wu used the Methods of Value Assessment on Wild Animals and Their Products, Catalogue of Terrestrial Wild Animals Standard Value Standards to assess the ecological loss. As a result, the defendant was not only sentenced but also paid fines of RMB 880,000.