China

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 exhibits 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.

The judiciary is organised into a hierarchical structure with the Supreme People's Court (SPC) at its apex, followed by higher, intermediate and basic people's courts. On 1 January 2019, the Intellectual Property Court of the SPC was established. At present, China has established four local intellectual property (IP) courts and 27 intellectual property tribunals. Foreign enterprises often choose to settle IP disputes in these IP courts.

Although China does not acknowledge binding case precedents, judicial practice still draws on the experience of common law in crafting decisions. The SPC began releasing 'guiding cases' in 2011 and, to date, the number has risen to over 200 cases. While not a formal source of law, 'guiding cases' are a form of judicial interpretation used to harmonise judicial standards and adjudication. To decrease discrepancies resulting from similar cases, the SPC issued Implementing Measures for the Uniform Application of Laws on 1 December 2021. According to these measures, 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 rapid economic development, China has entered a new economic phase with the goal of high-quality growth, necessitating continuous legal reforms to keep pace with social and economic changes. Since joining the World Trade Organization, China has developed a comprehensive legal system. As of March 2023, the PRC has adopted its Constitution, enacted 294 laws, and promulgated approximately 599 administrative rules and 13,000 local regulations. Significant efforts have been made since 2012 to revise and harmonise existing laws to meet contemporary needs.

A landmark achievement in China's legislative history is the enactment of its first Civil Code on 28 May 2020. This legislation, effective from 1 January 2021, consolidates various laws into a cohesive framework, covering general provisions, real rights, contracts, personality rights, marriage and family, inheritance, and tort liability. Additionally, the revised Securities Law,

effective from 1 March 2020, aims to establish a multi-tier capital market system with stringent supervision and risk control, promoting a registration system for securities issuance, increasing penalties for violations and enhancing investor protection.

For international investors, a significant change is the Foreign Investment Law of the PRC, effective from 1 January 2020, which replaces three foreign investment laws dating back to their original adoption between 1979 and 1988 and revised from time to time. The unification of the three laws into one aims to facilitate foreign investment into China.

As China moves towards becoming an innovation-driven economy, it has strengthened intellectual property protection to safeguard both foreign and domestic creators. The E-Commerce Law, effective from 1 January 2019, imposes obligations on e-commerce platforms to protect intellectual property. The revised Trademark Law, implemented in late 2019, and the updated Patent Law, revised in 2020, further promote patent utilisation and protection. In 2024, a draft amendment to the Anti-Money Laundering Law was submitted to the Standing Committee of the NPC for deliberation, aiming to prevent and control emerging money-laundering risks. The newly revised Law on Guarding State Secrets, also updated in 2024, enhances the classification and declassification system.

Lastly, the amended Company Law, effective from 1 July 2024, aims to improve the business environment, strengthen property rights protection and support the development of the capital market. This revision addresses the corporate capital regime, corporate governance and shareholder protection.

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 nine per cent annually, which is far higher than the world's economic growth rate during the same period. China has become the world's second-largest economy since 2010, accounting for about 18 per cent of the world economy, and is now one of the top trade and foreign direct investment (FDI) inflow countries.

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 last amended on 27 December 2023, and the Catalogue of Encouraged Industries for Foreign Investment by the NDRC and Ministry of Commerce of the PRC (MOFCOM) on 30 June 2019 and

last amended on 26 October 2022, 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 *World Investment Report 2023* released by UN Conference on Trade and Development, the amount of foreign direct investment attracted by China in 2022 increased byfive per cent, reaching a record high of US$189.1bn. This chapter presents a snapshot of China's business environment.

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 which should obtain licences 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. Nowadays, the timeline for the SAMR to deal with formalities for starting a business is shortened to within five working days. 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 the submission of 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 low-risk industrial projects in order to reduce the approval process to within 23 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 the latest amended on 29 November 2020), 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 29 December 2023) 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. Company Law also provides that the shareholder may launch litigation in the case of damage to the shareholder's interests caused by misbehaviour from 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, 2018 and 2023.

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 stipulated by law, the amount of capital contributions subscribed by all shareholders shall, according to the articles of association of the company, be fully paid up by the shareholders within five years as of the date of establishment of the company.

Unless otherwise provided in the articles of association, the shareholders are entitled to profit sharing in accordance with the ratio of their capital contribution. In the event that a shareholder proposes to transfer its equity interests to a non-shareholder, other shareholders shall have the right of first refusal under equivalent conditions. The legal representative of the company who represents the company in civil activities shall be the director or manager of the company who represents the company to execute corporate affairs. 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 (exception: companies with a small scale or a small number of shareholders may choose to appoint a sole director instead of the board of directors); (3) the board of supervisors (exception: (i) the audit committee, which is a specialised committee under the board of directors and composed of directors; (ii) companies with a small scale or a small number of shareholders may choose to appoint a sole supervisor instead of the board of supervisors; furthermore, with the unanimous consent of all shareholders, the company may decide not to have a supervisor at all); and (4) the managerial staff (optional; not mandatorily required to have), usually including a manager and other board-appointed officers, such as a deputy manager and a chief financial officer.

If a limited liability company has 300 or more employees, the board of directors shall include the employee representative(s) of the company unless the board of supervisors has been established and includes employee representative(s) of the company according to law. Specifically, the board of supervisors shall have at least three members, with the proportion of the employee representative(s)

not less than one-third of the total number of the members. The employee representative(s) in the board of directors (or the board of supervisors, if applicable) shall be democratically elected by the employees through the employee representative assembly, employee general assembly, or other forms of democratic elections.

The shareholders' meeting is the authority of the company, which shall decide the most important matters of the company. The board of directors is the executive organ of the shareholders' meeting, which shall have at least three board members (in the case of companies with a small scale or a small number of shareholders, the board of directors can be replaced with one sole director). The board of supervisors (or the audit committee, or the sole supervisor) shall exercise supervisory functions over the company. The manager is responsible to the board of directors. The manager exercises his/her rights and duties pursuant to the Company Law and the articles of association of the company.

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 2023 to December 2023, the newly established FIEs in China totalled 53,766, up by 39.7 per cent year-on-year. Actual use of foreign investment reached US$163.3bn, down by 13.7 per cent year-on-year; among which 13,649 FIEs are invested in by investors from Belt and Road countries, up by 82.7 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 22 cities/regions in China: Chongqing, Fujian, Guangdong, Guangxi, Hainan, Hebei, Henan, Heilongjiang, Hubei, Jiangsu, Liaoning, Shandong, Shanghai, Shanxi, Sichuan, Tianjin, Yunnan, Zhejiang, Beijing, Hunan, Anhui and Xinjiang.

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.

Based on the Foreign Investment Law which came into effect on 1 January 2020, as well as other related PRC laws and regulations, FTZs in China have been continuously implementing institutional reforms and innovative measures to further optimise the business environment.

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 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

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 Foreign Investment Law of the PRC 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 environmental 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 (mergers and acquisitions) 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, 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 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 in China for M&A 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. However, as of the end of June 2024, 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 US$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
- 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.

Special procedures for the acquisition of state-owned enterprises

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, cybersecurity and personal information protection

Following the release of an array of new laws, regulations and rules in the field of data privacy, cybersecurity and personal information protection, 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, cybersecurity and personal information protection 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 United States 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

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 Securities and Futures Investment Made in China by Qualified Foreign Institutional Investors and RMB Qualified Foreign Institutional Investors, 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 25 September 2020 ('Measures on QFII and RQFII');
- legislation on securities regulation:
  - Measures for the Administration of the Takeover of Listed Companies, as promulgated by the CSRC on 20 March 2020, and its subsequent implementation opinions ('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 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).

4.2.2 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 and RQFII (eg, financial capacity, qualified and experienced experts, and well-rounded internal control) can apply for a QFII/RQFII 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/RQFII licence, as an alternative, it can entrust any existing QFII/RQFII to invest in an A-share listed company.

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 US$100m or managing overseas assets worth more than US$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; unless the acquirer meets the requirements of the Takeover of Listed Companies and is exempt 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 meet such requirements for an exemption of tender offer, 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 is 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 2022, China received a total of US$2,809.89bn in foreign investment and 1,126,357 FIEs were established. Further, against a background of slowing global economic growth, sluggish cross-border investment and intensified competition, foreign investment in China in recent years maintained growth, placing it among the top ten countries/regions in the world for the amount of foreign direct investment (FDI). According to the statistics of the MOFCOM, throughout the year of 2023, 53,766 new FIEs were established, making a 39.7 per cent year-on-year increase, while the scale of realised FDI amounted to RMB 1,133.91bn, remaining at historically high level. From January to April in 2024, the total amount of newly established FIEs has reached

a peak of 16,805 and the amount of realised FDI was RMB 369.2bn. Benefiting from a stable business environment and a large domestic market, China has consistently remained a hotspot for global multinational investment, with the scale of actual use of foreign capital continuously hitting historical highs.

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 Sino-Foreign Equity Joint Venture Enterprise Law of the PRC (the 'EJV Law') was promulgated in 1979 and the Implementing Regulations for the EJV Law was promulgated in 1983. In 1986, 1988, 1990 and 1995, the Wholly Foreign-Owned Enterprise Law of the PRC (the 'WFOE Law'), the Sino-Foreign Cooperative Joint Venture Enterprise Law of the PRC (the 'CJV Law'), the Implementing Rules for the WFOE Law, and the Implementing Rules for the CJV Law were also promulgated, respectively. The promulgation of these three 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. 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 (the '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:

- newly established FIEs: foreign investors establish FIEs solely or jointly with other investors;
- M&A: foreign investors acquire shares, equity, property shares, or other similar rights or interests in domestic enterprises;
- new projects: foreign investors invest in new projects solely or jointly with other investors; and
- other forms of investment: foreign investors make other types of investment permitted by laws, administrative regulations or provisions of the State Council.

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. 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 licenses, standard setting, project applications and human resource policies. 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.

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.

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'[1] as an example, the website displays Shanghai's investment environment, investment policies, industrial distribution and various available investment promotion services.

Additionally, recent years have witnessed the issuance of several regulations and measures especially for foreign investors. The State Council successively issued Regulation on Optimizing the Business

1 'Invest Shanghai' is the investment service platform of Shanghai.

Environment in 2020, Further Optimizing the Foreign Investment Environment and Intensifying Efforts to Attract Foreign Investments in 2023 and Action Plan for Further Attracting and Utilizing Foreign Investment in early 2024. These regulations aim to establish a more friendly investment environment for foreign investors.

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 22 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.[2] For example, the value-added telecommunication service industry used to be a restricted industry. Before 2014, foreign investors in the value-added tele-communication service industry could not hold more than 50 per cent of the shares in a company. Since 2014, Shanghai Free Trade Zone (FTZ) has relaxed the restrictions on the shareholding of foreign investors in some value-added telecommunication services, including storage and transfer services, call center services, domestic multi-party communication services and internet access services for internet users.[3] This relaxation of the shareholding requirement by foreign investors was extended to all pilot FTZs in 2018.[4] Later, in 2019, the shareholding restriction on the storage and transfer services, call center services and domestic multi-party communication services were relaxed nationwide.[5]

- *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. The latest revision was updated in 2022 with 239 terms added. Foreign investment projects listed in the Encouraging FI Catalogue enjoy preferential treatment in areas such as tariff, income tax, the preferential usage of lands and so on in accordance with laws, administrative regulations or the provisions of the State Council. For example, FIEs who invest in Hainan Province and Western China could further enjoy a reduced enterprise income tax rate of 15 per cent.[6] 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.[7]

2 See art 13 of the Foreign Investment Law and art 10 of the Implementing Regulations.

3 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.

4 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.

5 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.

6 See 'Press Conferences of the Ministry of Commerce on Catalogue of Industries for Encouraging Foreign Investment' (2022 Version).

7 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 shall not compel foreign investors and FIEs to transfer technology through administrative licensing, inspection, punishment or any other administrative actions[8] 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 (the 'Regulations on Technology Import and Export') promulgated by the State Council on 8 January 2011 stipulated 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.[9] The revised Regulations on Technology Import and Export promulgated by the State Council on 2 March 2019 removed such a prohibition and the current effective Regulations on Technology Import and Export promulgated by the State Council on 29 November 2020 keeps such amendments.

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 cannot 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.[10]

No expropriation except in special circumstances and fair compensation

The government cannot 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.[11]

Protection of trade secrets

8 See art 24 of the Implementing Regulations.

9 See art 29 of the Regulations on Technology Import and Export.

10 See art 25 of the Foreign Investment Law and art 27 of the Implementing Regulations.

11 See art 20 of the Foreign Investment Law.

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 shall not divulge or illegally provide such trade secrets to third parties.[12]

Free repatriation of lawful income outside of China

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.[13]

5.3.3 Foreign investment administration

Depending on its form and features, the foreign investment 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 system; (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 system 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)[14] 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) (2021 Version) (the 'National Negative List')[15] and the Special Administrative Measures for the Market Entry of Foreign Investment in Pilot FTZs (Negative List) (2021 Version)[16] (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.

12 See art 23 of the Foreign Investment Law.

13 See art 21 of the Foreign Investment Law.

14 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. This version is now superseded.

15 The National Negative List was jointly released by the NDRC and MOFCOM on 27 December 2021 and became effective on 1 January 2022.

16 The FTZ Negative List was jointly released by the NDRC and MOFCOM on 27 December 2021 and became effective on 1 January 2022.

Compared with the National Negative List, the FTZ Negative List is less restrictive, as it includes fewer prohibited and restricted industries. The National Negative List includes 31 prohibited and restricted industries. The FTZ Negative List includes only 27 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. Also, the restrictions imposed on restricted industries are 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 shall be controlled by the Chinese party.

Foreign investment information reporting system

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,[17] 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.[18] 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.[19]

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.[20]

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

18 See art 35 of the Foreign Investment Law.

19 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).

20 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).

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[21] and other laws apply to FIEs. However, since the Foreign Investment Law no longer prescribes the organisation form and corporate governance structure of FIEs, FIEs established before the 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[22] and other applicable laws[23] within five years of the implementation of the Foreign Investment Law (the 'Transition Period').[24] If any FIEs fail to do so within 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 the registration matters and will make this public.

Notably, on 29 December 2023, the newly revised PRC Company Law (the 'New Company Law') was officially released and came into effect on 1 July 2024.

Compared to the Company Law previously in force, the New Company Law adopts comprehensive amendments related to capital contribution rules, corporate governance structure, shareholders' rights, responsibilities of directors, supervisors and senior management, etc. The Transition Period required by the Foreign Investment Law will end on 31 December 2024, and the release and implementation of the New Company Law coincide towards the end of this Transition Period. Therefore, whether FIEs have already completed the adjustments according to the previous Company Law or not, they will need to re-examine and update their existing articles of association, shareholder agreements, or joint venture contracts, and other legal documents in order to comply with the New Company Law.

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.[25]

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

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

22 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.

23 See art 31 of the Foreign Investment Law.

24 See art 42 of the Foreign Investment Law.

25 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).

Shareholders' meeting

The now-abolished EJV Law provided different corporate governance rules than those provided in the New Company Law. For example, under the now-abolished EJV Law, EJVs did not have shareholders' meetings. The highest authority of an EJV was the board of directors. Under the New Company Law, the highest authority of a limited liability company is the shareholders' meeting. Therefore, EJVs established before the implementation of the Foreign Investment Law 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 of such shareholders' meeting must also be formulated.

Board of directors

As discussed above and according to the New Company Law, the power of the board of directors has been changed. Hence EJVs shall revise the articles of association, the joint venture contract and other legal documents to adjust the governance structure.

Additionally, the New Company Law requires limited liability companies with 300 or more employees to include an employee representative on the board of directors unless a board of supervisors is established with employee representatives. Thus, if FIEs in the form of limited liability company have 300 or more employees, such FIEs shall either have at least one employee representative director on the board or have a board of supervisors where at least one-third of the members are employee representative supervisor(s) according to the New Company Law.

Board of supervisors

Article 76 of the New Company Law provides that the board of supervisors of a limited liability company shall have no less than three members, which shall include shareholders' representatives and an appropriate proportion of employee representatives; among them, employee representatives shall not be less than one-third of the members of the board of supervisors.

The New Company Law also provides that, in the following two situations, the board of supervisors or supervisor is not required: (1) the company has set up an audit committee composed of directors on its board to exercise the functions and powers of the board of supervisors; (2) the company is small scale or has a small number of shareholders, in such case, the company may opt to have one supervisor in lieu of the supervisory board or have no supervisor upon unanimously agreed by all shareholders.

Audit committee

As discussed above, companies could choose to establish an audit committee instead of the board of supervisors to perform the functions of the board of supervisors. The audit committee shall be composed of directors, and the employee representative of the board of directors could also be included.

5.4.2 Equity transfer rules

Under the now-abolished 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 New Company Law, which applies to FIEs in the form of limited liability company, unless otherwise agreed by the shareholders, a party must inform the other shareholders in writing before transferring its equity interest to a third party. If any other shareholder does not reply to such written notice within 30 days upon receiving the notice, the shareholder will be deemed to waive its right of first refusal.

5.4.3 Profit distribution

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

5.4.4 Adjustment of capital contribution period

According to the requirements of the New Company Law, the subscribed capital contributions of shareholders in a limited liability company must be fully paid within five years of the establishment date of the company. Additionally, as provided by the New Company Law, existing companies (including EJVs) with excessively long capital contribution periods must gradually adjust their contribution periods to comply with the time limit set in the New Company Law. Therefore, EJVs must comply with the above regulations and adjust their capital contribution periods.

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, including but not limited to the Foreign Investment Law, its Implementing Regulations, the supporting measures especially for foreign investors, demonstrate China's desire to create a fair, convenient and open business environment. Under the foreign investment supervision and protection system, foreign investors will be treated equally as 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 influence, and keep a close eye on the relevant 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 and cross-border bankruptcy

Special regime 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.

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 the bankruptcy proceeding initiated pursuant to the Bankruptcy Law shall be binding on the debtor's property outside China; and 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.

The bankruptcy of financial institutions and cross-border bankruptcy cases were relatively rare for some time after the implementation of the Enterprise Bankruptcy Law. However, in recent years, due to the increase of judicial practice cases in these areas, significant progress has been made in, as detailed in paragraphs 6.3.3 and 6.3.4 below.

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 vigorously promoted reform measures and the policy of 'optimizing the business environment and building a modern economic system' by the Chinese government. In this context, a series of influential cases have emerged, of which the reorganisation of HNA Group, involving a debt of RMB 1.1tn (approximately US$154bn), is so far the largest bankruptcy case in China.

According to the work reports of the SPC from 2007 through 2023 and other public data, the number of bankruptcy cases concluded by China's courts has increased rapidly from between 2,000–4,000 cases before 2015 to exceeding 10,000 cases each year since 2020, with 47,000 cases being concluded in 2022.

It is worth noting that the number of reorganisation cases of listed companies has also significantly increased in recent years, rising from two to four cases per year between 2012 and 2018 to over ten cases per year between 2020–2023. In addition, the prepackaged reorganisation procedure has increasingly become an important prerequisite tool for listed companies to address financial difficulties. Given the administrative and judicial approval processes involved in the reorganisation of listed companies, the timely initiation of prepackaged reorganisation procedures can advance various reorganisation tasks and largely improve the efficiency of the reorganisation process. According to our statistics based on public data, 16 listed companies underwent bankruptcy reorganisation in 2023, 15 of which had opted for the prepackaged reorganisation procedure.

6.3.2 Bankruptcy procedures adopted by financial institutions

From 2021 to 2023, numerous financial institutions have successively initiated bankruptcy procedures, and the people's courts have handled bankruptcy cases of various financial institutions such as Wangxin Securities Co Ltd, Liaoyang Rural Commercial Bank Co Ltd, New China Trust Co Ltd and E An Property & Casualty Insurance Co Ltd. These cases involve a range of financial institutions such as trust companies, local regional banks, insurance companies, and finance companies. The applicable procedures include liquidation and reorganisation. At the same time, the capabilities of pressure bearing and risk prevention of the financial institutions (trust companies, large wealth companies, local regional banks and local debt platforms) have received continuous attention.

In order to coordinate and improve the legal system for bankruptcy of financial institutions, the Standing Committee of the 14th NPC added the formulation of the Financial Stability Law to its legislative agenda in September 2023, and is also considering to address the bankruptcy system of financial institutions in its plan to revise the Bankruptcy Law. With the continuous deepening of China's reform measures in preventing systemic financial risks, it is expected that China will establish a sound basic legal framework for financial risk prevention, resolution and disposal mechanism through legislation and judicial practice, and thus form an institutional arrangement that is properly connected with the bankruptcy legal system.

6.3.3 Further improvement of cross-border bankruptcy procedures

On 14 May 2021, the SPC and the Hong Kong SAR Government signed the Meeting Minutes between the SPC and the Hong Kong SAR Government on Mutual Recognition and Assistance in Bankruptcy Proceedings by Courts of the Mainland and Hong Kong SAR, and issued the Opinions of the SPC on the Pilot Program for Recognition and Assistance in Bankruptcy Proceedings of Hong Kong SAR. Pursuant the two documents, the SPC designated the people's courts of Shanghai, Xiamen, and Shenzhen to carry out the pilot work in relation to the recognition and assistance of bankruptcy procedures with Hong Kong SAR. This is the first time that the mainland China and the Hong Kong SAR have jointly issued special documents on the cross-border bankruptcy assistance, opening a new chapter in the judicial recognition and assistance of bankruptcy between both regions.

In July 2021, Shenzhen Intermediate People's Court issued a ruling to recognise the liquidation decision and appointment of the liquidator in relation to the winding up of *Samson Paper Company Limited*, marking the first mainland court acknowledgment of foreign court liquidation procedures. Subsequently, judicial practice in cross-border bankruptcy cases has continued to develop. In 2023, the people's courts also recognised the bankruptcy proceedings conducted in Germany and Japan for the first time, by applying Article 5 of the Bankruptcy Law, the principle of legal reciprocity. As a result, the bankruptcy administrators involved were recognised and were allowed to perform their duties in the mainland China under certain conditions of China law. With the wide application of Article 5 of the Bankruptcy Law by mainland courts for the recognition and assistance involving extraterritorial bankruptcy proceedings, the mainland China is expected to engage in more international cross-border bankruptcy cooperation with a wider range of countries and jurisdictions around the world in the future.

6.3.4 Exploring individual bankruptcy system

Although the Bankruptcy Law does not apply to individuals, there is a growing demand for individual bankruptcy in judicial practice. In 2018, Zhejiang Province started a centralised clearing of individual debts in its judicial practice, and four other provinces of Jiangsu, Shandong, Guangdong and Sichuan have followed suit. On 26 August 2020, the Standing Committee of Shenzhen MPC passed the Regulation on Individual Bankruptcy in Shenzhen Special Economic Zone, which is the first individual bankruptcy regulation in mainland China. The proceedings for the first actual individual bankruptcy cases involving respectively reorganisation, liquidation and settlement procedures were concluded by the people's courts from July to November 2021.

As of 31 December 2023, Shenzhen Intermediate People's Court has received more than 2,200 individual bankruptcy applications, over 800 of them were accepted by the courts through review and 116 reorganisation plans were approved. Of these reorganisation plans, most plans have been successfully executed and only four plans failed due to heavy loss of the debtor's income. Given the gradual emerging of the individual bankruptcy system, many provinces have issued rules to address the individual bankruptcy in their jurisdiction and the centralised debt clearance. The relevant rules regarding individual bankruptcy are expected to be further refined, and more consensus from all circles to be reached in relation to the development of individual bankruptcy system.

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 17 years and has lagged behind growing bankruptcy practice in the country. Given China' s current economic work guideline of 'seeking progress while maintaining stability and promoting stability through progress', the role of the bankruptcy trial system in the facilitating of market competition and the maintaining of the economic and social stability has been further and widely recognised. China is continuing to explore and develop a coordinated system of bankruptcy of financial institutions and individuals, as well as cross-border bankruptcy.

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
2024 minimum wages (RMB)	2,420	2,690	2,010–2490	1,620–2,300

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,[26] 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.

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.

26 Labor Contract Law of the PRC, effective on 1 January 2008 and revised by the NPC Standing Committee on 28 December 2012.

According to data published by the Ministry of Human Resources and Social Security, nationwide mediation organisations for employment disputes in 2023 dealt with 3,850,000 cases, 98.1 per cent of which were closed. The average rate for successful mediation in recent years is about 75 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 50 per cent of employment dispute cases. Many of these claims occur in more developed cities and provinces with larger populations of migrant workers (eg, Beijung, 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 People's Supreme Court (PSC).

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. Most tax disputes are resolved through negotiations with the relevant tax authority or by using the relevant tax authority's own internal review mechanism.

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. The exercise of amending this network in accordance with the OECD's

Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting has begun with China ratifying selected parts of the Convention in September 2022.

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.

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 registered resident companies and Chinese registered 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 (WHT)

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 whilst 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 is calculated on property in one of two ways: firstly, at 1.2 per cent of the residual value following the subtraction of between ten per cent and 30 per cent of the original value; or secondly, 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 Key software enterprises or key integrated circuit design enterprises may be eligible for an exemption or reduction of CIT for certain periods of time starting with the year the enterprise generates a profit. In both cases, the enterprise must be assessed and meet certain criteria.
- For enterprises in encouraged industries that meet the conditions and are established in Hainan Free Trade Port Pingtan area of the China (Fujian) Pilot Free Trade Zone Qianhai Shenzhen-Hong Kong Modern Service Industry Cooperation Zone Guangdong-Macao In-depth Cooperation Zone in Hengqin and Nansha Pilot Start-up Zone, a preferential CIT rate of 15 per cent will be levied. Qualified legal entities in the Lingang New Area of China (Shanghai) Pilot Free Trade Zone engaged in key technology areas such as integrated circuit, artificial intelligence (AI), biomedicine, civil aviation involving substantial production or research and development (R&D) activities shall be subject to corporate income tax at a reduced tax rate of 15 per cent for five years from the date of their establishment. Several further preferential tax policies of differing durations also exist within these zones.
- Until 31 December 2027, the portion of the annual taxable income of a low profit small enterprise, which does not exceed RMB 3m, shall be computed at a reduced rate of 25 per cent as taxable income amount, and be subject to CIT at a tax rate of 20 per cent.
- For the R&D expenses actually incurred by an enterprise in carrying out R&D activities, which have not formed intangible assets and have not been included in the current profits and losses, on the basis of actual deduction pursuant to the provisions, 100 per cent of the actually incurred amount are allowed for weighted pre-tax deduction as from 1 January 2023; where intangible assets are formed, pre-tax amortisation based on 200 per cent of the costs of the intangible assets are allowed as from 1 January 2023.

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.

China, like many other countries around the world, uses the General Anti-Avoidance Regulation (sometimes also called General Anti-Abuse Regulation) (GAAR) to both CIT and Individual Income Tax (IIT) assessments where they feel the main purpose of the transaction was to reduce, exempt or defer tax payments. Enterprises and individuals should be aware that regardless of whether their transactions are lawful in form the SAT may use the GAAR to make adjustments to the tax payable

Two recent developments give an indication of the increasing desire to develop consistency in tax matters. Firstly, Xiamen Siming District People's Court has set up a specialised tax court which will hear civil, criminal and administrative tax-related cases. Secondly, the Shanghai Tax Authority has announced a trial of an advanced ruling process in order to enhance the certainty of the application of tax policies.

Chapter 9: Intellectual property protection

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9.1 Main characteristics of intellectual property protection

The Chinese government regards the strengthening of intellectual property (IP) protection as the most crucial component of improving the property rights protection system and as the greatest incentive to enhance the competitiveness of China's economy. According to article 123 of the Civil Code of the PRC, 'intellectual property' refers to the exclusive rights that the rights holders enjoy in accordance with the law concerning their works, inventions, utility models, designs, trademarks, geographical indications, trade secrets, layout designs of integrated circuits, new plant varieties and other objects protected by law.

The Chinese legal system for IP protection is characterised by its comprehensiveness and multi-layered structure. The main laws and regulations currently in force for IP protection in China include the Civil Code, the Copyright Law, the Trademark Law, the Patent Law, the Anti-Unfair Competition Law, the Seed Law, as well as the Regulations on the Protection of Computer Software, the Regulations on the Protection of New Plant Varieties and the Regulations on the Protection of Layout Designs of Integrated Circuits. Additionally, relevant judicial interpretations by the Supreme People's Court on civil disputes regarding copyrights, patents, trademarks and unfair competition are important bases for IP protection in practice. Moreover, based on a series of international IP treaties and bilateral or multilateral agreements that China has acceded to, the rights of Chinese IP holders can receive corresponding protection in other contracting states, and foreign IP can receive reciprocal legal protection in China.

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.

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. 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. Concurrently, China has implemented a mechanism where administrative enforcement and judicial protection operate in parallel, comprehensively advancing the reform of integrating civil, criminal and

administrative cases involving IP. This reform aims to enhance the efficiency of both administrative and judicial protection.

9.2 Legal development of intellectual property protection

China is continually reviewing and updating its IP laws. Updates between 2020 and 2024 include:

- *Amendment to the Patent Law and its Implementing Regulations:* In 2020, China amended the Patent Law to meet the needs of legal reform and social development. In December 2023, the State Council issued the Decision of the State Council on Amending the Detailed Rules for the Implementation of the Patent Law of the People's Republic of China, which was in force and enforced in January 2024. This amendment is an adaptive revision to the new Patent Law.
- *Issuance of the Patent Examination Guidelines:* In December 2023, the China National Intellectual Property Administration (CNIPA) released the Patent Examination Guidelines (2023), which was in force and enforced in January 2024, replacing the 2010 version. The new guidelines include modifications to the patent application and examination procedures to protect the rights of patent applicants and patent holders.
- *Issuance of Provisions on Regulating Patent Application Activities:* To regulate patent application activities, the CNIPA issued the Provisions on Regulating Patent Application Activities in December 2023, which was in force and enforced in January 2024.
- *Amendment to the Trademark Law and its Implementing Regulations:* In 2024, a comprehensive amendment to the Trademark Law and its implementing regulations is planned to further improve the IP legal system.
- *Amendment to the Regulation for the Implementation of the Copyright Law:* The revision of the Regulation for the Implementation of the Copyright Law is being expedited to meet the needs of new technologies and new industries.

9.3 Legal practice of intellectual property protection

9.3.1 Intellectual property registration and authorisation

In recent years, the number of intellectual property applications and authorisations in China has grown rapidly. In 2023, China granted 920,800 invention patents, a year-on-year increase of 15.3 per cent. As of the end of 2023, the total number of valid registered trademarks in China was 46.1464 million, a year-on-year increase of 8.1 per cent. Additionally, the total number of copyright registrations in China reached 8.9239m, a year-on-year increase of 40.46 per cent.

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

Administrative departments at all levels in China have continuously improved administrative enforcement mechanisms and enhanced the effectiveness of administrative law enforcement, working in synergy to strengthen intellectual property protection. Recent notable achievements include the following.

Strengthening administrative protection for patents

On 1 June 2021, the 'Measures for Administrative Adjudication of Major Patent Infringement Disputes' promulgated by CNIPA officially came into effect. It specifies that major patent infringement disputes, which involve significant public interest, severely impact industry development, or span across provincial regions, should be handled by CNIPA. This is distinct from general patent infringement cases, which are managed by local intellectual property offices. In August 2022, CNIPA issued the first national administrative adjudication decision for a major patent infringement dispute since the implementation of these measures, with the Case Number of GUO ZHI BAO CAI ZI No 2021-1, represented by King & Wood Mallesons. By 2023, CNIPA has concluded the second batch of ten major patent infringement administrative adjudication cases.

Strengthening administrative protection for trademarks and copyrights

In 2023 alone, administrations for market regulation at all levels nationwide investigated and handled 39,400 trademark violation cases, with case values amounting to RMB 7.9bn. Copyright enforcement departments inspected 720,000 related entities in physical markets, handled 4,745 infringement and piracy cases, and referred 231 cases to judicial authorities involving a total of RMB 2.664bn.

Strengthening administrative protection against unfair competition and for online transactions and standard copyrights

In 2023 alone, administrations for market regulation at all levels nationwide investigated and handled 12,496 various unfair competition cases, with fines and confiscations amounting to RMB 580m. They mandated the removal of 160,000 illegal product listings from online trading platforms, ordered the rectification of 32,000 websites, investigated and punished 27,000 online violations, and referred 267 cases to public security authorities. Concurrently, online e-commerce platform standard infringement and piracy monitoring was conducted – monitoring 5,743 suspected infringing websites, deleting 323,467 infringing links and identifying and removing over 3,000 texts suspected of infringement.

9.3.3 Judicial protection of intellectual property

Establishment of specialised intellectual property courts in China

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 has established

four independent intellectual property courts in Beijing, Guangzhou, Shanghai and Hainan, and 27 intellectual property tribunals in intermediate people's courts, exercising jurisdiction over certain types of intellectual property cases across regions.

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.

Judicial protection of intellectual property

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.

9.3.4 Development of Alternative Dispute Resolution (ADR) for intellectual property protection

Promotion of intellectual property dispute mediation

Administrative and judicial departments have collaborated to establish intellectual property dispute mediation organisations in qualified regions and industries. By the end of 2023, there were 1,944 mediation organisations under the guidance and management of the national intellectual property system, handling 134,000 cases. The nationwide 'General-to-General' online litigation-mediation docking work for intellectual property achieved full coverage scope across all 31 provinces (autonomous regions and municipalities), with over 100,000 cases handled through the online litigation-mediation docking platform.

Establish a robust mechanism for handling intellectual property arbitration cases

Some arbitration institutions have established Intellectual Property Arbitration Tribunals and Mediation Centres, continuously enhancing the specialisation of IP arbitration services. Efforts are being made to broaden the channels for selecting arbitrators, recruiting a group of domestic and international arbitrators with IP expertise and practical experience to strengthen talent support. The mechanism for linking IP arbitration, mediation, and litigation is continuously improving, fully leveraging the role of diversified dispute resolution mechanisms. In 2023, arbitration institutions across the country handled over 5,000 IP-related cases, with a total disputed amount of RMB 4.9bn,

mainly involving contract disputes in the fields of copyright transfer, trademarks, computer software development, technical cooperation development and technical services.

9.4 New trends in intellectual property protection

In recent years, the following trends have emerged in China's intellectual property protection:

- *Increasing judicial protection for innovation and creation:* Chinese courts are increasingly enforcing punitive damages to intensify the crackdown on malicious infringement and curb such behaviors. In 2023, Chinese courts applied punitive damages in 319 cases, a 117 per cent increase, with awarded compensation totaling RMB 1.16bn, a 3.5-fold increase.
- *Enhancing role of IP protection in emerging technology fields:* Chinese courts are refining adjudication rules for high-tech achievements and new business models, focusing on the protection of key technologies and emerging industries such as big data, AI, advanced chips and biotechnology.
- *Further developing of specialised IP judicial systems:* Coordination between administrative enforcement and judicial protection is being strengthened to enhance overall IP protection effectiveness. The reform of the 'three-in-one' trial mechanism for IP cases is progressing, maximising the specialised IP adjudication system's role in unifying judgment standards, optimising the legal environment for technological innovation, and supporting the construction of an IP powerhouse.
- *Strengthening cross-corder IP protection:* Chinese courts are actively participating in global IP governance under the framework of the World Intellectual Property Organization, promoting a more just and reasonable global IP governance system. Additionally, China is actively establishing cross-border IP protection cooperation mechanisms, enhancing cooperation with major trade partners to jointly combat cross-border infringement.

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 Committee of the State Council; (2) the PBOC; (3) the National Financial Regulatory Administration (NFRA) (whose former is the China Banking and Insurance Regulatory Commission); and (4) the CSRC.

The Financial Committee of the State Council, established in 2023, 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 NFRA 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 19 types of financial institutions in China subject to the supervision of the NFRA. 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 2024, NFRA promulgated the new revision of three measures to regulate the three main types of commercial loans in China's market: the Measures on the Management of Working Capital Loans; the measures on the Management of Personal Loans; and the Measures on the Management of Fixed Assets Loans. All three are regarded as an important supplement to, and implementing rules of, the General Rules for Loans. Besides, the Guidelines on Syndicated Loans implemented in 2011 and the

Guidelines for Commercial Banks on the Risk Management of M&A Loans implemented in 2015, are also the significant rules to the loan transactions.

Loan interest rate

With the issuance of the PBOC's Notices [2019] 15 and 30 in the second half of 2019, a new rate mechanism, the LPR, came to the market. Since then, 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 is mainly regulated by the PRC Civil Code, its corresponding judicial interpretation, and relevant department rules and regulations.

An important feature of the security system 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.

Particularly, since the PRC Civil Code came into force, a noticeable change on China's security system is that the new design is more oriented towards the protection of commercial transactions, whereas the previous one is focused on the protection of the interests of the creditor.

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, NFRA, NDRC 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 395.11tn at the end of June 2024, an increase of 8.1 per cent.

Cost of financing

Starting from 3.55 per cent on 20 June 2023, China's one-year loan LPR decreased to 3.45 per cent on 20 June 2024. The five-year LPR edged down by ten basis points (bps) as well to 3.95 per cent on 20 June 2024 from 4.20 per cent on 20 June 2023. In response to the difficulties and high costs of financing, the Chinese Government has reduced the required reserve ratios 25 times and applied a series of measures to ease funding shortages faced by small and micro enterprises since 2013.

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

After five years of practice and development, the LPR, to some extent, reflects the actual funding costs and the loan price of the majority of financial institutions in China's market, although the pricing method of LPR poses higher requirements for financial institutions to identify risks and improve pricing capabilities, especially in the current economic environment where there are increasingly uncertain factors.

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.

Since 2019, the Chinese government has promoted the construction of the Guangdong-Hong Kong-Macao Greater Bay Area, accelerated the Hainan Free Trade Port development and implemented the strategy to upgrade the various Pilot Free Trade Zones via introducing a range of preferential policies facilitating the cross-border finance, investment, trade, etc, aiming to work with all countries and all parties to share the opportunities from the institutional opening-up.

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), at the end of May 2024, China has 162 public fund managers and 20,860 private fund managers, managing assets with a total value in excess of RMB 51.13tn (approximately US$7.3tn).[27]

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: (1) a qualified foreign limited partnership (QFLP); (2) a foreign-funded investment company; or (3) 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

27 The exchange rate between the US dollar and RMB is approximately 7.1 (Oct 2024).

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.

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 US$500m or manage funds or assets of no less than US$1bn; the total subscribed capital commitment to a QFLP shall be no less than US$15m; and any sole limited partner's capital contribution to a QFLP shall be no less than US$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 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.

10.2.2 Initial public offering in China

Overview of China's initial public offering market

China's IPO market is undergoing some complex and profound changes. Statistically speaking, a total of 412 Chinese companies completed their IPOs in 2023, raising RMB 404.7bn (approximately US$57.81bn) in total, a decrease of 34 per cent compared to 2022.

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'),[28] the Growth Enterprise Market (GEM),the SSE Science and Technology Innovation Board (the 'STAR Board'), which was launched in June 2019, and the Beijing Stock Exchange (incorporated in September 2021); 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 200m, approximately equivalent to US$28.57m), market value and other aspects, and thus many big players choose to be listed on the Main Board, while the enterprises listed on the GEM, the Beijing Stock Exchange and the National Equities Exchange Quotations have a relatively smaller scale and are less profitable. In addition, the 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 responsible for performing unified regulation and supervision of the securities industry, with strengthened oversight of the capital markets in accordance to laws and regulations; 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 Registration of Initial Public Offerings of Stocks, promulgated by CSRC with the latest version issued on 17 February 2023.
- Listing Rules of the SSE, promulgated by the SSE, with the latest version revised on 30 April 2024, and Listing Rules of the SZSE, promulgated by the SZSE, with the latest version revised on 30 April 2024.

28 In April 2021, the Small and Medium-sized Enterprise Board (the 'SME Board') was incorporated into the SZSE Main Board.

- Rules Governing the Listing of Stocks on the STAR Market of the SSE, promulgated by SSE with the latest version revised on 30 April 2024.
- Rules Governing the Listing of Stocks on the GEM of the SZSE, promulgated by SZSE with the latest version revised on 30 April 2024.
- Rules Governing the Listing of Stocks on the Beijing Stock Exchange, promulgated by the Beijing Stock Exchange with the latest version revised on 30 April 2024.

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 came into effect on 1 March 2020. The New Securities Law showcased vast changes and reforming measures, including adopting a registration-based IPO system to replace the existing approval.

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, revised on 1 August 2022) and Law Against Unfair Competition (revised on 23 April 2019), there are also other provisions in relation

to competition regulation 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 29 April 2018).

Administrative regulations also make up an important part of the competition legal system. On 26 January 2024, the State Council released Regulations on Filing Thresholds for Concentration of Undertakings, revising the declaration thresholds for concentrations of undertakings that have been unchanged for more than 15 years since 2008.

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 interpretation about competition law include Provisions of Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Monopoly Civil Disputes (amended in 2020); Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Law of the People's Republic of China against Unfair Competition (amended in 2022).

12.1.3 Departmental Rules and Guidelines

Departmental rules, also known as ministerial rules, are released by the ministries and commissions under the State Council, the People's Bank of China, and other departments with administrative responsibilities directly under the State Council. They constitute the primary legal resources complementing the amended Antitrust Law and have a significant impact on antitrust enforcement.

Following the revision of the Antitrust Law, a series of administrative regulations were released to facilitate the implementation and interpretation of the law. These include: Provisions on Review of Concentration of Undertakings, Provisions on Prohibition of Monopoly Agreements, Provisions on Prohibition of Abuse of Dominance, Provisions on Prohibition of Elimination and Restriction of Competition Through Abuse of Administrative Powers, Provisions on Prohibition of Elimination and Restriction of Competition Through Intellectual Property Rights. Recently, SAMR has promulgated Interim Provisions Against Unfair Competition in Cyberspace, which came into effect on 1 September 2024.

Guidelines, though not as mandatory as laws, regulations and departmental rules, function as important references for the interpretation and implementation of antitrust law. Prior to the release of the amended Antitrust Law, such guidelines include Guidelines of the Anti-monopoly Commission on the Definition of a Relevant Market, Anti-monopoly Declaration Guidelines for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, Guiding Opinions for the Declaration of Concentration of Undertakings (revised in 2018), Anti-monopoly Review Guides for Concentrations of Undertakings, Anti-monopoly Guidelines for the Field of Intellectual Property Rights, Anti-monopoly Guidelines for Automotive Industry, Guide to Application of the Leniency Program to Cases Involving Horizontal Monopoly Agreements, Guidelines on Anti-monopoly in the field of Active Pharmaceutical Ingredients, Anti-Monopoly

Guidelines for the Platform Economy Industries, and the Guidelines for Overseas Anti-monopoly Compliance of Enterprises.

After the amendment of Antitrust Law, Anti-monopoly Compliance Guidance for Concentrations of Undertakings, Anti-monopoly Guidelines for Trade Associations, Guidelines for Implementation of Third-party Appraisal for Fair Competition Review, Guidelines for Regulatory Talks on Law Enforcement Against the Abuse of Administrative Power to Exclude or Restrict Competition, Rules for Fair Competition Review in the Field of Bid-invitation and Bidding were released.

12.1.4 Other rules and regulations

Other rules and regulates 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 Provisions on the Merger and Acquisition of Domestic Enterprises by Foreign Investors (2009). In addition, the provisions on competition in the international conventions of which China is a party also play a significant role in China's competition legal system.

To be noted, local governments have been taking an active role in releasing their legislation to tackle anti-competitive behaviour. Examples include Beijing Antitrust Compliance Guidelines (issued by Beijing Administration for Market Regulation) and Guidelines for Competition Compliance Evaluation of Internet Platform Enterprises (issued by Shanghai Administration for Market Regulation).

12.2 Competition enforcement practices in 2023

The SAMR, as well as the local authorities to which enforcement has been delegated, are in charge of the enforcement of the antitrust law. Among the 768 enforcement decisions published by SAMR, most cases focus on public utilities, pharmaceutical corporations, energy suppliers, construction material manufacturers, and industry associations.

In 2023, SAMR released three batches of typical anti-monopoly cases involving livelihood issues, including 18 monopoly agreement cases and 11 abuse of dominant market position cases. Among these cases, eight cases involve the pharmaceutical industry and eight cases involve public utilities. Few antitrust cases concerning internet companies took place in 2023, a significant shift from that in 2022 and 2021. For instance, from 1 January 2021 to 14 December 2021, SAMR published a total of 118 antitrust cases, of which 89 involved internet companies, accounting for 75.42 per cent of the total.

In 2023, SAMR announced 21 cases of abuse of administrative power to exclude and restrict competition. Most of these cases concern designated transactions by local government departments, mainly involving the construction industry and public utilities.

12.3 Competition judicial practice in 2023

On 14 September 2023, the Supreme People's Court released the typical cases of anti-monopoly and anti-unfair competition of the People's Courts in 2023, including five typical anti-monopoly cases and five typical anti-unfair competition cases. Among the five typical anti-monopoly cases, three cases involve abuse of market dominance and two involve monopoly agreements. The industries involved include medicine, funerals, automobile sales and building materials, all of which are closely related to livelihood issues.

The five typical anti-unfair competition cases released by the Supreme People's Court concern confusion, false advertising, infringement of trade secrets and online unfair competition disputes. The cases mainly involve fields of daily consumption such as household appliances, short videos, online games, restaurant reviews, as well as high-tech industries such as diagnostic reagents.

12.4 Competition policy trends and hint for companies

Companies should keep an eye on the drafting and promulgation of the following laws, regulations and guidelines, including Anti-unfair Competition Law of the People's Republic of China (draft released on 22 November 2022), Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Monopoly-related Civil Dispute Cases (draft released on 18 November 2022), Regulations on Fair Competition Review (draft released on 12 May 2023), Anti-monopoly Guidelines for the Field of Standard Essential Patents (draft released on 30 June 2023).

Judging from the exposure draft, major changes are expected to be made to the Anti-unfair Competition Law so that the law not only covers a broader range of unfair competition activities, but also enhanced penalties for certain anti-competitive behaviour. Of equal importance is the drafting of Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Monopoly-related Civil Dispute Cases. This judicial interpretation, covering all aspects of the procedures and substance of antitrust civil litigation, is the largest judicial interpretation since the establishment of the Intellectual Property Court of the Supreme Court.

Additionally, it is obvious that the SAMR, as well as the Anti-monopoly and Anti-unfair Competition Commission of the State Council, is encouraging companies to develop internal anti-monopoly compliance mechanisms. The Anti-monopoly Compliance Guide for Undertakings, for example, includes a chapter on antitrust compliance incentives. This chapter outlines how anti-monopoly law enforcement agencies may consider the establishment and implementation of anti-monopoly compliance mechanism before and during law enforcement. Under such circumstances, companies are suggested to establish or improve their compliance mechanism, which is expected to be pragmatic, efficient and cover all aspects of business areas, departments and employees.

Finally, Interim Provisions Against Unfair Competition in Cyberspace became effective on 1 September 2024. It is recommended that relevant companies, including internet companies and their collaborators, take a close look at the provision and, if necessary, make changes to their business model in advance.

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 2024, a total of 24,000 foreign-related civil and commercial cases and 16,000 maritime cases were concluded. Compared to the previous year the average trial time was almost ten days shorter, representing an increase of 3.6 per cent and 5.3 per cent, respectively.[29] Arbitration institutions in China also saw an increase in the number of cases. For example, in 2023, the China International Economic and Trade Arbitration Commission (CIETAC)[30] and the Beijing Arbitration Commission/Beijing International Arbitration Center (BIAC) handled 5,237 cases and 12,222 arbitration cases respectively.[31]

There is no doubt that a large number of commercial disputes in China are now resolved through litigation and arbitration proceedings.

13.1 Commercial litigation

Judicial litigation is one of the most effective methods for resolving international commercial disputes in China. Preservation measures (ie, interim/provisional measures and/or injunctive relief) are available to parties in judicial litigation in China, which ensure the effective enforcement of successful cases and avoid irreparable damage. Therefore, disputing parties in China often choose judicial litigation. Adopting the 'second instance ruling being final' doctrine, the selection of the appropriate jurisdiction or forum for commercial litigation often depends on the amount of controversy and geographical locations in the case.

In this type of litigation system, prolonged trial time may sometimes occur. However, in contrast to 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. The Law on the Application of Laws to Foreign Related Civil Relations of the PRC, which came into effect in April 2011 has recently witnessed its second judicial interpretation. Since 1 January 2024, the responsibility for identifying foreign laws in the trial of foreign-related cases shall be ascertained by the court and supplemented by the parties in dispute. China has not yet provided for the means of identifying foreign laws at the legislative level, however, the new judicial interpretation concluded seven means for foreign laws to be ascertained by the court, including provision by the parties, provision by the central or competent authorities of

29 Ministry of Justice, Work Report of the Supreme People's Court, https://www.gov.cn/yaowen/liebiao/202403/content_6939583.htm accessed 17 February 2025

30 China International Economic and Trade Arbitration Commission, 'CIETAC 2023 Work Report': www.ccpit.org/a/20240127/2024012767fm.html accessed 17 October 2024.

31 Beijing International Arbitration Centre, '2023 Annual Report': www.bjac.org.cn/news/view?id=4714 accessed 17 October 2024.

the other party through the channel of mutual legal assistance, provision by the Supreme People's Court through its request to China's embassies and consulates in that country, or provision by that country's embassies and consulates in China, and provision by the Committee of Experts from the China International Commercial Court.[32]

With the drastically increasing number of international commercial disputes, the Supreme People's Court of the PRC (SPC) launched two international commercial courts (China International Commercial Court or CICC) in June 2018. These courts are based in Shenzhen and Xi'an, respectively. The International Commercial Expert Committee of CICC, as of 2024, comprises 61 members from 24 countries and regions. It plays a crucial role in mediating international commercial disputes and providing consultative opinions on foreign law clarification and application. 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 final' doctrine. All judgments and rulings made by the CICC are final and binding on the parties with legal effect.

The 'One Stop' Mechanism for Dispute Resolution effectively integrating litigation, mediation and arbitration has been continuously promoted by the SPC since 2018. On 29 December 2023, the Working Guidelines for the 'One-Stop' Diversified International Commercial Dispute Resolution of International Commercial Disputes (Trial) was issued, establishing a mechanism where the parties can reach different dispute resolution methods through the 'One-Stop' Online Platform with a single click. They can choose to file a lawsuit with the CICC, or to choose non-litigation dispute resolution methods such as mediation, arbitration or neutral evaluation. By pooling the resources of various dispute resolution services, the 'One-Stop' Online Platform further reduces the time and economic costs of dispute resolution in China.[33]

13.2 Commercial arbitration

Many foreign enterprises prefer arbitration as a way of dispute resolution in China. As of the end of 2023, a total of over five million arbitration cases were handled by 279 arbitration institutions nationwide, with a combined value exceeding RMB 80tn. Notably, between 2012 and 2023, the number of arbitration cases in China nearly quintupled, while the value of arbitration claims increased eightfold.[34] In 2023, CIETAC handled a total of 645 foreign-related cases, among which 93 cases were conducted in English or bilingual Chinese-English as the arbitration language. The top ten sources of foreign-related cases, in descending order, were Hong Kong SAR, the US, the British Virgin Islands, Germany, Singapore, South Korea, the Cayman Islands, Taiwan Region, the UK and Canada. As for the applicable laws, the involved parties agreed to apply various laws, including the United Nations Convention on Contracts for the International Sale of Goods

32 Supreme People's Court, Judicial Interpretation of the Law on the Legal Application of Foreign-related Civil Relations (II), https://www.court.gov.cn/zixun/xiangqing/419042.html accessed 5 June 2024. {See AQs}

33 CICC, Supreme People's Court Issues Guidelines for the 'One-Stop' Platform for Diversified Settlement of International Commercial Disputes (for Trial Implementation): https://cicc.court.gov.cn/html/1/218/149/192/2436.html accessed 17 October 2024.

34 Ministry of Justice, Promoting the Integration and Development of Hong Kong and the Mainland in the Field of Arbitration in a Complementary Manner: www.moj.gov.cn/pub/sfbgwapp/fzgzapp/ggfzfwapp/ggfzfwapp2/202405/t20240506_498312.html accessed 17 October 2024.

(CISG), laws of Hong Kong SAR, the UK, Pakistan, Mongolia, Russia, Brunei and Iraq, as well as international trade practices like Incoterms 2000.[35]

China is a member of the New York Convention (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards), which means that an arbitral award rendered in China can be recognised and enforced in any other member countries of the Convention. According to the CIETAC 2023 Work Report, CIETAC's arbitral awards remained unrevoked by any courts and had been widely acknowledged and enforced by courts in countries and regions such as the US, Argentina, Russia, Hong Kong SAR, etc, enhancing the credibility of Chinese arbitration globally. Besides, CIETAC also provided essential auxiliary services in compliance with the legal requirements of enforcement jurisdictions like Indonesia, the US, Iran and Brazil, to aid parties in executing arbitral awards abroad. These services included issuing certificates of award validity, authenticity and registration for enforcement applications.

When it comes to enforcing foreign arbitral awards domestically, China adopts different standards of review for a domestic arbitral award and a foreign arbitral award. The court generally follows a stricter standard when reviewing a domestic arbitration award whereas it focuses mainly on procedural matters/issues with overseas arbitral awards. The most recent amendment to the Civil Procedure Law, which came into effect on 1 January 2024, heavily focuses on expanding China's courts' scope to accept arbitral awards made outside China's territory. For example, according to the new Article 304, even if the domicile or property of the foreign person subject to enforcement is not in China, the enforcement applicant in China can apply to the relevant people's court. The court, will then request assistance from an extraterritorial court to enforce the arbitral awards outside the territory of China based on international treaties, bilateral agreements, the principle of reciprocity, etc. This has enhanced the completeness and flexibility of China's rules relating to the recognition and enforcement of extraterritorial awards, making China's courts more popular for the settlement of foreign-related civil and commercial disputes.[36]

13.3 Mediation and alternative dispute resolution

Compared with arbitration proceedings, the process of mediation is considered by many to be 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.

Currently, judicial authorities in China 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 with 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 to date.

35 China International Economic and Trade Arbitration Commission, 'CIETAC 2023 Work Report': /www.cietac.org/index.php?m=Article&a=show&id=20122 accessed 17 October 2024.

36 The State Council, Decision of the Standing Committee of the National People's Congress on Amending the Civil Procedure Law of the People's Republic of China, https://www.gov.cn/yaowen/liebiao/202309/content_6901570.htm accessed 5 June 2024.

As China continuously promotes a comprehensive and diversified mechanism for dispute resolution, the mediation platform of people's courts is used as a main vehicle. There are now 12 mediation cooperation units of the Supreme People's Court, among which, the Mediation Center of the China Council for the Promotion of International Trade (CCPIT) is one of the first mediation organisations to be included in the 'One-Stop' Centre for Dispute Resolution, and it has also established joint mediation mechanisms with renowned dispute resolution organisations in 22 countries and regions around the world. The number of commercial mediation cases received has increased from more than 1,800 in 2012 to more than 9,500 in 2022, with an average annual growth rate of 18 per cent and a subject matter of more than RMB 48bn.[37]

There is no uniform and strict legal concept of commercial mediation, which is a commercial dispute resolution mechanism consisting of a variety of systems, rules and practices. At present, China's domestic normative documents tend to define the scope of commercial disputes by positive enumeration, for example, the Regulations on the Diversified Resolution of Conflicts and Disputes in the Shenzhen Special Economic Zone consider commercial disputes to include 'conflicts and disputes occurring in the commercial fields of trade, investment, finance, transportation, real estate, intellectual property rights, technology transfer, and engineering and construction'. Any foreign-related commercial disputes falling within this scope may be selected for mediation within China.

13.4 New trends and challenges

With ever-increasing globalisation, dispute resolutions such as litigation, arbitration and mediation may function better when mutually beneficial and seamlessly integrated. For example, the idea and principle of mediation are effectively combined into both litigation and arbitration proceedings in China. On 30 July 2021, the Ministry of Justice issued the Arbitration Law (Revised) (Draft for Public Comments), updating the basic framework to more closely resemble the prevailing international practice as represented by the UNCITRAL Model Law on International Commercial Arbitration. Notably, the Draft allows, for the first time, parties with China as the seat of arbitration to submit their 'foreign-related commercial disputes' to arbitration by an ad-hoc arbitral tribunal (Article 91). Previously, arbitral awards made by foreign ad-hoc arbitral tribunals could only be enforced in China through the New York Convention, but the arbitration itself cannot be conducted in Mainland China. The adoption of the Draft would make it easier for commercial entities to resolve their disputes quickly and efficiently in China, and it will allow commercial transactions to return to their normal course.[38]

In the process of promoting the construction of the rule of law in relation to foreign affairs, China is still facing considerable challenges regarding the application of laws and the extraterritorial effects of legal rules for dispute resolution, the convergence and coordination of domestic and foreign legal rules, cyberlegal relations, the protection of personal information, the flow of cross-border data, intellectual property rights of emerging technologies, provisional measures of preservation, and group litigation. It is necessary to learn from the advanced experience of extra-territorial dispute resolution organisations and further integrate with the international dispute resolution community to achieve better development.

37 BIAC, 'Annual Observations on Commercial Mediation in China' (2023): www.bjac.org.cn/news/view?id=4673 accessed 17 October 2024.

38 Public Consultation System, 'Arbitration Law of the People's Republic of China (Revisions) (Draft for Opinion)', https://zqyj.chinalaw.gov.cn/h5/readmore?listType=&id=4518 accessed 17 February 2025.

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 2022 the number of high-net-worth individuals (HNWIs) with personal investable assets of more than RMB 10m (about US$1.43m) nationwide reached 3.16 million, and the overall size of investable assets held by individuals across the country reached RMB 101tn (about US$13.9tn).[39] The affluent class is paying more attention to the safety of its wealth. Wealth management for private client legal services, especially for HNWIs, 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 HNWIs 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 and Family Part of the Civil Code of the PRC[40] 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 HNWIs 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 Part of the Civil Code of the PRC,[41] the judicial interpretation and the guiding cases of the SPC.

39 'Private Wealth Report 2023' of China Merchants Bank – Bain & Company.

40 Promulgated and implemented on 28 May 2020, implemented on 1 January 2021.

41 Promulgated and implemented on 28 May 2020, implemented on 1 January 2021.

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 of the PRC[42] and related judicial interpretations.

14.1.4 Application of the Trust Law

The Trust Law of the PRC[43] was promulgated and taken into effect in 2001, Notice on Standardizing the Classification of Trust Business of Trust Companies was promulgated and taken into effect in 2023.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.

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[44] and the application of the Law of the PRC on Choice of Law for Foreign-Related Civil Relationships.[45] 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 2022, the total financial assets of Chinese private households are estimated to reach €32tn, accounting for 14.1 per cent of the global total financial assets.[46] 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 HNWIs have begun to pay attention to the long-term allocation of assets and the prevention of legal risks. Currently, more

42 Promulgated on 29 December 1993, second revised on 1 July 2024.

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

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

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

46 The 2023 Global Wealth Report- Credit Suisse& UBS.

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 2022, the number of 'high net worth households' with net assets of millions of RMB reached 2.11 million. Among them, the five cities with the most 'high net worth households' are 306,000 households in Beijing, 271,000 households in Shanghai, 215,000 households in Hong Kong, 80,000 households in Shenzhen, and 73,000 households in Guangzhou;[47] therefore, judging from the distribution of wealth throughout China, the proportion of HNWIs 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 also gradually increased. However, holistically speaking, wealth management services and clients are mainly concentrated in first-tier cities with developed 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' needs 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,

47 Hurun Baifu's 2023 'China High Net Worth Household Cash Flow Management Report'.

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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This is the final chapter, but perhaps the least attention grabbing yet the most important one. Before making investment decisions in Chinese Mainland, if enterprises in the Asia Pacific region do not carefully study the current ecological environment laws and policies in Chinese Mainland, or green transformation laws and policies, investment failure or low investment efficiency may be a high probability event.

Why? The following two analytical dimensions are available for reference: the comprehensive green transformation of China's economy and society; and how to demonstrate it in specific investment cases.

15.1 Comprehensive green transformation of China's economy and society

The constitution and its implementation have ultimate value for investment decisions in most countries. In 2018, the Constitution of the PRC was revised, which included the parallel of 'ecological civilization' and 'material civilization', as well as the parallel of 'beautiful China' and 'prosperous and strong China', and included the construction of 'ecological civilization' in the scope of the State Council's authority, which is equally important as 'economic affairs and urban-rural development'.

On the basis of the above basic policies, Article 16 of the Environmental Protection Law of the People's Republic of China stipulates that 'The local people's governments at various levels shall be responsible for the environment quality of areas under their jurisdiction'.

Therefore, since 2015, the Central Committee of the CPC has carried out patrol inspections of ecological environment protection in all provinces, and has so far conducted three rounds of

inspections in 31 provinces, municipalities and autonomous regions. During the inspection process, a special reporting telephone number and mailing address for environmental supervision and inspection materials were set up. The central ecological environment protection inspection team has publicly held accountable and punished the problem of inadequate supervision of ecological environment protection. Among them, the cases where the Secretary of the Communist Party of China Gansu Provincial Committee and the Secretary of the Communist Party of China Shaanxi Provincial Committee were held criminally responsible are the most typical. A clear signal is that local leaders should not only focus on the economy and development, but also on ecological environment protection, which will inevitably indirectly affect industrial development measures and corporate profit models.

In addition to the central ecological environment protection inspection, China has also implemented local air, water, and soil environmental quality rankings. Local government leaders with lower rankings will be responsible for the results and held accountable by the central and higher-level governments. The forms of accountability include admonishment, administrative sanctions, disciplinary actions (such as expulsion from the party, revocation of position), and criminal responsibility. To this end, the Central Committee of the Communist Party of China and the State Council issued the Measures for Supervision of Ecological Environment Protection (for Trial Implementation), the Measures for Accountability of Party and Government Leading Cadres for Ecological Environment Damage (for Trial Implementation) and other documents, revised the Regulations of the CPC on Disciplinary Punishment, the Regulations on the Selection and Appointment of Party and Government Leading Cadres and other intra party laws and regulations.

In terms of direct impact on enterprises, in addition to amending the Environmental Protection Law, China has also introduced five supporting implementation measures. Relevant departments have the right to impose daily penalties, freeze and detain, production restriction and shutdown, disclose environmental information, and administrative detention on enterprises for ecological and environmental violations.

At present, the Chinese legislative body has completed the revision of special laws in the field of ecological environment, such as the Air Pollution Prevention and Control Law, the Water Pollution Prevention and Control Law, the Solid Waste Pollution Prevention and Control Law, the Forest Law, the Grassland Law, the Water Law, and the Mineral Resources Law. It has also formulated laws such as the Soil Pollution Prevention and Control Law, the Yangtze River Protection Law, the Yellow River Protection Law, and the Wetland Protection Law, and is currently formulating the Ecological Environment Code. For example, in the aforementioned laws, the amount of penalties has significantly increased, the number of penalty items has been added, and the maximum amount of administrative violation fines for a single violation can reach RMB 5m, and so on. The amendment to the Criminal Law of the People's Republic of China has made three revisions to Article 338, changing the crime of polluting the environment from a result crime to a behavior crime, and raising the statutory sentence for the crime of 'polluting the environment' to more than seven years. In theory, the maximum penalty for the crime of polluting the environment is the death penalty. At the same time, this charge also competes with the crimes of 'illegal business operations', 'endangering public safety by dangerous means', 'issuing false certification documents' and 'damaging computer information systems'. Among them, the statutory maximum

penalty for the crime of 'endangering public safety by dangerous means' is the death penalty. The judicial authorities have revised the 'Interpretation of the Supreme People's Procuratorate and the Supreme People's Procuratorate on Several Issues Concerning the Application of Law in Handling Criminal Cases of Environmental Pollution' three times, refining the forms of criminal liability and sentencing standards for enterprises and their directors, executives, and responsible persons in the field of ecological environment.

Recently, The Resolution of the Central Committee of the CPC on Further Deepening Reform Comprehensively to Advance Chinese Modernization was adopted at the Third Plenary Session of the 20th Central Committee of the CPC. According to this decision, the Central Committee of the CPC and the State Council issued 'Opinions on Accelerating the Comprehensive Green Transformation of Economic and Social Development' on 31 July 2024 and the purpose is to comprehensively implement Xi Jinping's 'Economic Thought' and Xi Jinping's 'Thought on Eco-Civilization'. These two policy documents directly affect the investment decisions of enterprises in China. From a detail, it can be seen that the comprehensive green transformation of China's economic and social development is not a slogan, but an action with specific measures. This detail is that China also needs to learn from many developed countries and build bicycle lanes for urban residents. In the eyes of many developing countries that advocate the priority development of the automobile industry and particularly emphasise GDP, this suggests that China is undergoing a significant change in its economic development path (of course, this change is an inevitable choice for China's economic and social development to a certain extent).

The aspects that affect enterprises include both the requirement to achieve 'greenization' in the production process and the requirement to achieve greenization in the consumption end. The greenization of the production process includes the greenization of energy and raw materials, as well as the greenization of waste disposal and the greenization of the consumption end. The latter includes the greenization of citizens' daily consumption as well as government procurement and public consumption. The above policy proposes that by 2035, greening will reach the international advanced level, and measures for greening include carbon reduction, pollution reduction, green expansion and high-quality growth.

Therefore, when investing in China, greening is both a challenge and an opportunity The challenge comes from high energy consuming and high polluting industries that will not be able to invest in China. Existing investments will face pressure for green transformation and upgrading. The opportunity comes from low-carbon green industries and their industrial chain capital, which will receive strong support and relatively high long-term stable profit returns in China through various business models.

15.2 How to demonstrate in specific investment cases

A Guangdong enterprise with its investment source in the British Virgin Islands, which is also a subsidiary of a paper company listed in Hong Kong, had been investing in a certain location in Guangdong for more than ten years before the following incident. In 2021, the enterprise was designated as a coal ban zone, and its self-owned power plant for cogeneration was shut down, resulting in the company's shutdown and inability to operate normally. In 2024, the lawsuit between

the company and the local government was brought to the Supreme People's Court of the PRC, and currently the relevant lawsuit has returned to the local court.

The core cause of the serious consequences mentioned above lies in the air quality ranking of the city where the enterprise is located, which ranks among the bottom three in Guangdong Province. The leaders of the city's party committee and government have received negative evaluations on party discipline and government affairs, so they have taken radical measures to shut down all coal-fired power plants in the region and only allow the use of natural gas. But the local government does not provide subsidies for the 'coal to gas' project, nor does it actively provide administrative compensation for the withdrawal of self-owned coal-fired power plants.

Of course, the above case is just an extreme adverse case of China's comprehensive green transformation process, which occurred in an underdeveloped non-Pearl River Delta city in Guangdong. In cities in the Pearl River Delta, such as Dongguan, similar paper-making enterprises are still alive. These enterprises' coal-fired units only require ultra-low emission transformation, and the emissions of major pollutants need to reach the level of natural gas combustion. Obviously, supervision and management are strict. These enterprises are generally classified as national or provincial key pollutant control emission units, and online monitoring systems are installed at the emission outlets to automatically upload real-time monitoring data to the Ministry of Ecology and Environment or the Provincial Department of Ecology and Environment. Moreover, key legislation, law enforcement, and severe penalties will be imposed on behaviours that disrupt, interfere with, or falsify monitoring data. In the past five years, several cases of damaging computer systems have been reported almost every year, and the vast majority of the criminal targets are ecological environment automatic monitoring systems. Every year, the Chinese Ministry of Ecology and Environment organises special inspections of state-owned and private environmental monitoring institutions and companies. Effective inspection measures include mutual inspection between institutions and companies, and institutions and companies that have not been found to have problems will become direct inspection targets. Such measures have made the effectiveness of special inspections very prominent. Therefore, the authenticity of China's ecological environment monitoring data has been greatly improved. When investing in physical enterprises with pollutant emissions in China, they try to reduce cost expenditures on pollution prevention and control facilities, including operating expenses, which greatly increases the risk. The practice risk of foreign shareholder representatives sent to China has greatly increased.

A Japanese owned chemical company located in Zhaoqing City, Guangdong Province, recently commissioned our legal team to conduct a third-party independent investigation. The investigation project is the sustainable third-party independent demonstration of the company's ecological environment compliance and safety environment investment. The reason is that China has issued strict management rules for hazardous chemical industrial enterprises. The construction, renovation, and expansion of hazardous chemical production and manufacturing enterprises must enter specialised hazardous chemical industrial parks (some special areas, such as the Yangtze River Protection Law that came into effect in 2021, prohibit the construction or expansion of chemical parks and projects within one kilometer of the Yangtze River main and branch banks). At the same time, strict control is imposed on the volatile organic compounds (VOCs) of chemical enterprises. Based on the above changes, this Japanese chemical company has commissioned a lawyer to conduct

a third-party independent assessment of the legal and compliant environmental and safety measures for expanding its 1,000-ton production capacity. This assessment report will be directly reported to the Japanese headquarters as the basis for investment decisions.

Further, several companies investing in the chemical industrial park in northern Guangdong will be affected by the protection of the Xinfengjiang Reservoir, which serves as a drinking water source for Hong Kong, Shenzhen and eastern Guangzhou. But the chemical industrial park in a county in northern Guangdong is built more than 20 kilometers upstream of the Xinfeng River reservoir, and is only one kilometer away from the Xinfeng River. Moreover, the enterprise waste water is not zero discharge, and after treatment, it is discharged into the Xinfeng River. Due to significant risks and hidden dangers, an ecological environment protection public welfare organisation from Shenzhen has initiated a preventive civil public interest lawsuit against the relevant park, with the aim of preventing the expansion of the chemical park and preventing major and sensitive incidents of drinking water source pollution. This type of lawsuit was highly unlikely to be accepted by Chinese courts five years ago, but now it has occurred in many western provinces of China, including Yunnan Province.

In Yunnan Province, China, a large hydropower group's investment project was ordered by the court to stop construction only because it could lead to the flooding of large areas of forests and wetlands, seriously threatening the living environment of green peacocks – which are first-class protected animals in China. During the trial of the case, the court listened to the opinions of various experts, conducted on-site investigations and held multiple hearings. Environmental organisations have provided ample evidence to prove that the construction of hydropower stations will pose a serious threat to the survival of green peacocks. This is the most well-known preventive ecological environment civil public interest litigation case in China in recent years.

In Hainan Province, China, two real estate companies listed in Hong Kong failed to invest in real estate projects due to the destruction of the ecological environment. One company was forced to remove and restore the artificial island due to unauthorised land reclamation, resulting in a loss of reportedly RMB 20bn; another company was ordered to stop construction, demolish existing commercial housing, and restore the original state due to unauthorised occupation of coastal mangrove growth areas, resulting in significant losses. At present, one of these two real estate companies is undergoing bankruptcy liquidation procedures, and the other has also planned bankruptcy reorganisation. Although the reasons for the difficulties faced by the two real estate companies are not limited to the aforementioned reasons, their failure to act after planning and their risky investments in violation of ecological and environmental regulations and policies remain important drivers.

The author emphasises that the current case is not limited to the traditional field of ecological environment protection. In response to the common challenge of climate change for all mankind, a company in Shenzhen was fined three times the corresponding monetary value of the unpaid carbon emission quota for failing to reform and clear it on time. The company filed an administrative lawsuit against the Shenzhen Ecology and Environment Bureau, but ultimately lost. In Guizhou Province, an energy company has been sued for ecological and environmental civil public interest litigation for failing to timely pay 800,000 tons of carbon emission quotas, which is considered to have damaged the environment. According to the Interpretation on Several Issues Concerning the Application of

Law in Handling Criminal Cases of Environmental Pollution issued by the Supreme People's Court and the Supreme People's Procuratorate of China in 2023, the falsification of carbon emission data has been included in the scope of criminal sanctions. This means that if a company or individual intentionally forges, alters, or provides false carbon emission data, they will face criminal liability, with a maximum sentence of ten years.

The above cases are listed from the perspective of challenges.

From an opportunity perspective, the most classic case is undoubtedly the miracle of Tesla's Shanghai Gigafactory, an electric car brand. This factory is not only Tesla's first super factory outside the US, but also the first foreign-owned automobile manufacturing project approved by China to encourage the development of new energy vehicles. Its miracle is evident to all, achieving the goal of 'starting construction, starting production, and delivering in the same year'.

Investment projects like Tesla, which comply with the legal policies of China's comprehensive green transformation of the economy and society, have been warmly welcomed and strongly supported by the central government and local governments at all levels in China. Taking the Chinese real estate industry, which is most likely to be underestimated, as an example, the green building market in China is not yet large, and the market space for high-quality and environmentally friendly residential and office buildings is actually quite large. Recently, the 25th Tsinghua University Environmental President Class in China visited Japan for inspection and learning. This is also the fifth time that the class has organised an exchange and mutual learning trip to Japan. Japan's ecological and environmental protection technology and related industries, including hydrogen battery technology, air purification technology, fine chemical technology, high-end material technology, forest health and medical care, biotechnology and other related industries, are all very popular in China and have great investment opportunities. There are many developed countries in the Asia Pacific region, and green and low-carbon technologies and related industries are correspondingly more developed. Therefore, investing in China by developed countries in the Asia Pacific region can anchor a new round of opportunities.

According to the Opinion on Accelerating the Comprehensive Green Transformation of Economic and Social Development issued by the Central Committee of the Communist Party of China and the State Council, the Opinion proposes quantitative work goals for different fields: by 2030, the scale of the energy-saving and environmental protection industry will reach about RMB 15tn; the proportion of non-fossil energy consumption has increased to around 25 per cent, and the installed capacity of pumped storage has exceeded 120 million kilowatts; the carbon emission intensity of operating transportation units converted to turnover has decreased by about 9.5 per cent compared to 2020, and so on. Obviously, it contains a lot of investment and profit opportunities.