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CHINA LAW REPORTER

中国法律报道

*REPORTING ON DEVELOPMENTS IN THE FOUR LEGAL SYSTEMS OF
GREATER CHINA*

As recently announced, the China Committee received the Section of International Law's award for Outstanding Committee during the 2006-07 year. For the Committee's leaders, the award signifies recognition of the Committee's tremendous activity and energy. Currently, the Committee has almost 500 members and when Michael Burke recently circulated a query for Committee members to serve on the Steering Committee of the China Committee, he was inundated with offers of assistance from almost 50 Committee members. Clearly the China Committee benefits from the tremendous energy and spirit of volunteerism of its members. However, the energy surrounding the Committee also reflects the interest and energy surrounding China. The speed at which its legal environment is changing and developing is breathtaking: at the end of August, China's long-awaited Anti-Monopoly Law was promulgated; two months earlier, the Labor Contract Law, another important law, was passed; also in 2007, China adopted a new Enterprise Income Tax Law, as well as a Property Rights Law.

From a U.S. perspective, it's hard to grasp the scale at which change in China's legal environment is progressing. Perhaps the closest analogy is the First Hundred Days of Franklin Roosevelt's first term as President, when he sent Congress numerous bills for adoption, including the Emergency Banking Act, legislation creating the Federal Deposit Insurance Corporation, the Agricultural Adjustment Act and many others. Of course, the analogy fails in some sense because the reason underlying the pace at which new legislation and regulation were enacted arose from the immediate crisis imposed by the Great Depression. In China's case, the pace of change reflects (and aims to shape) surging *economic growth* – growth at a rate that has become something of a norm in the past two decades.

Co-Chairs Message, continued

Writing on behalf of the Committee's leadership, as its departing co-chair, it has been really gratifying to work with the China Committee, its leaders and members. Committee members are exceedingly generous with their time and insights and these are key factors in the vibrancy and usefulness of the Committee's work. There's also tremendous interest among younger lawyers in becoming involved in China practice – a far cry from when I entered law school 20 years ago and was greeted with skepticism about the feasibility of combining an interest in law with an interest in China (the most frequent comment that greeted my announcement of my proposed career path was along the lines of: “China? Law? There is no law in China!”).

The recognition received by the China Committee for its work and the level of involvement it enjoys from its members stand as testimony that there is law in China and more of it all the time. We look forward to seeing what the next year brings to this most dynamic state of affairs!

This issue of the China Law Reporter includes articles discussing the new Anti-Monopoly Law, product safety and a review of the new labor law, the new property law and the new enterprise income tax law. Enjoy!

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RECENT DEVELOPMENTS

China's New Anti-Monopoly Law: An Economic Constitution for the New Market Economy?

by Paul Jones

On August 30, 2007, after 13 years of discussion, the 29th Session of the 10th National People's Congress adopted the Anti-Monopoly Law¹ ("AML") to come into effect on August 1, 2008. Will this be the new "economic constitution" for China's market economy as hoped by the sponsors;² or a source of "uncertainty for domestic and foreign companies over how the government will use its new powers?"³ Foreign companies are particularly concerned about provisions⁴ allowing for a review of mergers and acquisitions on national security grounds.⁵

The answer at this time must be that, like the development of China's market economy, the AML is still a work in progress. While the basic framework of general principles has been set out in the AML, as would be appropriate for a fundamental piece of civil law legislation, the details that expand upon and clarify the principles will come in the regulations, measures and guidelines that hopefully will be issued in the months to come.

In addition the AML specifies that the State Council shall create two new entities to develop and enforce the law; namely the Anti-Monopoly Commission⁶ (the "Commission") and the Anti-Monopoly Enforcement Agency (the "Agency").⁷ Some observers question whether the Agency will be a truly independent body under the State

¹ 中华人民共和国反垄断法 (Zhonghua Renmin Gongheguo Fan Longduan Fa), Presidential Decree No. 68, adopted at the 29th Session of the Standing Committee of the 10th National Peoples Congress and promulgated on August 30, 2007 to come into effect August 1, 2008.

² 郭晓宇, "经济宪法"剑指垄断行为, 法制日报, 2007-08-26 (Guo Xiaoyu, "Jingji Xianfa" Jian Zhi Longduan Xingwei, Fazhi Ribao – Guo Xiaoyu, "The Economic Constitution" A Sword Pointed at Monopoly Behavior, Legal Daily) available online at: <http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=370729&pdmc=110106>.

³ Andrew Batson and Jason Leow, Beijing's Antitrust Plan Raises Questions, Wall Street Journal Online, August 30, 2007.

⁴ Article 31.

⁵ Keith Bradsher, Beijing Seeks New Scrutiny of Investments by Outsiders, The New York Times, August 28, 2007.

⁶ 反垄断委员会 (Fan Longduan Weiyuanhui); in Article 9. The Chinese word "委员会 – weiyuanhui" can also be translated as "committee."

⁷ 反垄断执法机构 (Fan Longduan Zhifa Jigou); in Article 10. The Chinese word "机构 – Jigou" can also be translated as a state "authority."

Council or will be part of a particular Ministry.⁸ This too will become clear over the coming year.

Still the AML will not be the only Chinese law dealing with competition issues. The 1993 Unfair Competition Law⁹ has provisions on exclusive dealing by firms in a dominant market position, predatory pricing, tied selling and bid rigging¹⁰ and the 1997 Price Law¹¹ has provisions on price-fixing and predatory pricing.¹² A previous draft of the AML had suggested that these laws would pre-empt the application of the AML, but this wording was removed. And there are other laws and regulations with competition provisions.

This article will review the basic components of the new law and discuss the possible indicators of how the law and the enforcement will develop and what the remedies under the new law may be.

Chapter I – General Provisions

Article 1 of the AML sets out the purposes of the law. They may be summarized as (1) stopping monopolistic conduct; (2) safeguarding fair competition; (3) improving economic efficiency; (4) protecting consumer and public interests; and (5) promoting the healthy development of the “socialist market economy.” Aside from the choice of nomenclature in the last provision none of these would be out of place in a competition statute outside of China.

For example, Canada’s Competition Act,¹³ has a purpose clause that was inserted in 1986. The purposes in the Canadian Act may be summarized as (1) to maintain and encourage competition; (2) to promote the efficiency and adaptability of the economy; (3) to expand opportunities in world markets; (4) to ensure that small and medium-sized enterprises have equitable opportunities; and (5) to provide consumers with competitive prices and product choices.¹⁴ Arguably the reference in the Canadian statute to opportunities for small and medium-sized enterprises is not quite in keeping with modern notions of competition law as having consumer welfare as its purpose.¹⁵

The AML also provides that businesses may grow through fair competition and voluntary mergers in accordance with the law to expand their scale and increase their

⁸ Batson and Leow, *supra* note 3.

⁹ 中华人民共和国反不正当竞争法 (Zhonghua Remin Gongheguo Fan Bu Zhengdang Jingzheng Fa) adopted at the 3rd Session of the Standing Committee of the 8th National People’s Congress on September 2, 1993, effective December 1, 1993.

¹⁰ Articles 6, 11, 12, and 15, respectively.

¹¹ 中华人民共和国价格法 (Zhonghua Renmin Gongheguo Jiage Fa) adopted at the 29th Meeting of the Standing Committee of the 8th National People’s Congress, effective as of May 1, 1998.

¹² Articles 14(1) and (2), respectively.

¹³ R.S.C., c. C-34 as amended.

¹⁴ *Ibid.*, Section 1.1.

¹⁵ See for example Robert H. Bork, *The Antitrust Paradox: A Policy at War With Itself* (New York: The Free Press, 1978) Chapter 4.

competitiveness.¹⁶ In other words, being a large and dominant business is not prohibited. But such positions shall not be used to eliminate or restrict competition.¹⁷

It also provides that so long as firms simply exercise their intellectual property rights in accordance with the laws and regulations, then the provisions of the AML are not applicable.¹⁸

Chapter II – Monopoly Agreements

This Chapter is organized into three basic sets of provisions. Article 13 lists six types of agreements that are prohibited between competitors. Article 14 lists three types of agreements that are prohibited in vertical relationships. Finally Article 15 lists seven purposes for which the agreements prohibited by Articles 13 and 14 would be exempt from the restrictions.

The majority of the prohibitions listed in Article 13 are what one would expect to see; fixing prices, restricting output or sales, dividing up the markets, and boycotts. In addition there is a prohibition on the “restriction of the purchase of new technology or new equipment, or restrictions on the development of new technology or new products.”¹⁹ Concerns about the relationship between intellectual property rights and competition policy have increased significantly over the last decade or so.²⁰ In Canada the Competition Act has provisions regarding the abuse of intellectual property rights in a separate and very rarely used section.²¹ China has now integrated these concerns into the basic structure of the AML.

The final prohibition in Article 13 has probably raised some concerns amongst foreign lawyers, and particularly amongst common law lawyers who expect statutes to precisely set out the boundaries of the prohibitions. It reads “[o]ther monopoly agreements as otherwise determined by the Anti-Monopoly Enforcement Agency under the State Council.”²²

¹⁶ Article 5.

¹⁷ Article 6.

¹⁸ Article 55.

¹⁹ Article 13(4).

²⁰ For example, see the Reports, “To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy” (October 2003), <http://www.ftc.gov/opp/intellect/index.shtm> ; and “Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition: A Report Issued By the U.S. Department of Justice and the Federal Trade Commission” (April 2007), <http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf> .

²¹ *Supra* note 13, Section 32.

²² Article 13(6). The Anti-Monopoly Enforcement Agency under the State Council is established in Article 10. See note 7, *supra*.

However China is a civil law jurisdiction, modeled on Germany's legal system,²³ and in civil law statutes are general statements of legal principles rather than precise and narrowly read restrictions on freedoms. In such statutes the prohibitions need not be as precisely stated as in common law statutes and it is acceptable to allow the lawmakers (through regulation or judicial decision) to elaborate on the general principles. In other regulations China has used the character “等” which can be translated as “so on and so forth, etcetera (etc.)” to indicate that the requirements listed are not exhaustive.²⁴ This has not found much favor with foreign commentators from common law jurisdictions and phrases similar to those used in Article 13(6) have replaced the use of “等.”²⁵

The exemptions listed in Article 15 are also illustrative of the general principles prohibiting restrictions of competition. Two of the seven exceptions are based on the achievement of efficiencies in the economy or the sector.²⁶ One is where the agreement is for the purpose of “technology improvement or the research and development of new products,”²⁷ and three more are based on broader public interests such as disaster relief, environmental protection and mitigating economic depression; and in implementing foreign trade agreements.²⁸ Arguably the objective of the exemptions continues to be overall consumer welfare, albeit in the later case with the government stepping in and setting priorities in areas where market failure is likely.

The last exemption in Article 15 is a new provision added in the last hearings in the State Council on August 24-30, 2007 that allows the State Council to prescribe other exemptions. Again it is suggested that this is a product of China's civil law drafting.

²³ In 1902, following the coming into force of Germany's Bürgerliches Gesetzbuch (BGB or Civil Code) in 1900, officials of the Qing Dynasty started work on a new civil code patterned after the German model. A draft was presented to the Emperor on October 26, 1911 just before the end of the dynasty, but it was never adopted. It was not until 1929-30 that a similar form of civil code was promulgated under the 国民党 (Guomindang) administration in Nanjing. See Philip C.C. Huang, *Code, Custom and Legal Practice in China: The Qing and the Republic Compared* (Stanford: Stanford University Press, 2001) at 16.

²⁴ See for example, the 商业特许经营管理办法 (Shangye Texujingying Guanli Ban Fa - Measures for the Regulation of Commercial Franchising), Ministry of Commerce Order No. 25 of 2004, in effect February 1, 2005, Article 19 in general and 19(9) in particular.

²⁵ See the author's discussion of the reaction to the Measures for the Regulation of Commercial Franchising in The Regulation of Franchising in China and the Development of a Civil Law Legal System – 中国特许经营法规及其民法体系的发展, 2(1) Chinese Law & Policy Review, 60-80, July 2007, University of Pennsylvania, <http://www.law.upenn.edu/groups/clsa/clr/articles/volume2.html> ; and Article 22 of the new “商业特许经营管理条例- Shangye Texujingying Guanli Tiaoli - Commercial Franchise Administration Regulation” Decree No. 485, adopted on January 31, 2007 at 167th Regular Meeting of the State Council, in effect from May 1, 2007.

²⁶ Articles 15(2) and (3).

²⁷ Article 15(1).

²⁸ Articles 15(4), (5), and (6).

Chapter III – Abuse of Dominant Market Position

This Chapter of the AML consists of just three Articles. One article sets out the prohibitions on unilateral conduct; the second sets out the basis for finding that a firm is in a dominant market position; and the third sets out when market dominance may be presumed, subject to the submission of evidence to the contrary.

Most of the prohibitions contained in Article 17 are common in any law on competition; predation, refusal to deal, exclusive dealing, tied sales and price discrimination.²⁹ Each of these is qualified by a requirement that the conduct must be “without justification.” There is another prohibition that is not qualified in that manner and is the subject of some controversy in Western competition statutes.³⁰ Dominant firms are prohibited from selling at “unfairly high prices” or buying at “unfairly low prices.”³¹ The concept of what is “unfair” suggests a circular definition.

It should also be noted that again the last of the sub-articles in Article 17 allows the Anti-Monopoly Agency to define other prohibitions. And Article 18, which sets out the factors to consider in determining whether a firm has a dominant market position, includes a provision permitting the consideration of “other factors relating to the dominant market position of the firm.”³²

Chapter IV - Concentrations of Firms

One of the major policy concerns for the AML, as expressed in the press, in the hearings of the Standing Committee and in the full session of the National People’s Congress,³³ was that foreign firms were using their superior access to capital to acquire dominant positions in certain industries. While security concerns were frequently cited, they were not always clearly articulated. It was sometimes suggested that Chinese industries still needed protection in order to grow.³⁴ Such sentiments are not new in China, and China had previously issued two sets of regulations on acquisitions and mergers by foreign firms.³⁵

²⁹ Articles 17(2), (3), (4), (5), and (6) respectively.

³⁰ David S. Evans and A. Jorge Padilla, “Excessive Prices: Using Economics to Define Administrable Legal Rules” (September 2004). CEPR Discussion Paper No. 4626. Available at SSRN: <http://ssrn.com/abstract=620402>

³¹ Article 17(1).

³² Article 18(6).

³³ See for example: Yang Fan, *Are M&As Suffocating Chinese Businesses?*, Beijing Review, June 4, 2007 http://www.bjreview.com.cn/expert/txt/2007-06/04/content_65184.htm ; *Chinese lawmakers call for cautious handling of foreign mergers*, People’s Daily Online, March 4, 2007; *Improved laws sought on M&A by foreign firms*, Shanghai Daily, March 5, 2007; Wang Jun, *A Law to Curb Monopoly-Finally*, Beijing Review, July 13, 2006.

³⁴ People’s Daily Online, *Id.*

³⁵ “Regulations on Acquisitions of Domestic Enterprises by Foreign Investors,” issued jointly by the Ministry of Commerce, the State Assets Supervision and Administration Commission, the State Taxation Administration, the State Administration for Industry and Commerce, the China Securities Regulatory Commission and the State Administration of Foreign Exchange on August 6, 2006, effective September 8,

The provisions of this Chapter of the AML, however, apply to both foreign and domestic firms, except for Article 31. Article 31 provides that mergers, acquisitions and other forms of concentration involving foreign investors that raise security concerns shall also be examined “in accordance with the relevant provisions of the State for national security review.”

While some see the addition of a national security review as an indication of an “industrial strategy” component to what should be a law regulating competition, China has found itself subject to such concerns in Western nations. The Chinese state-owned firm CNOOC faced strong opposition from U.S. lawmakers when it made a bid for Unocal, and ultimately withdrew the bid.³⁶ Canada is currently considering formally adopting such national security review measures and there is concern in other countries as well.³⁷

Foreign firms may take some comfort in the release of the 2007 China Foreign Investment Report by the Ministry of Commerce. The English language news reports state that China “does not face an imminent risk of monopoly by foreign companies in any industry.”³⁸

This Chapter provides for notification³⁹ of mergers, acquisitions of shares or assets, or acquisitions of control⁴⁰ to the Anti-Monopoly Enforcement Agency and a decision by the Agency as to whether or not the proposed transaction “has or may have the effect of eliminating or restricting competition”⁴¹ based on a review that must include consideration of the factors set out in Article 27.

The thresholds for notification are not set in the AML but are left to the State Council to set by regulation. While this has caused some concern, arguably it is better to have monetary limits set in regulations that can be more easily adjusted to take into account changes in China’s fast moving economy. Article 23 set out the primary items to be submitted in the notification with further items to be stipulated by the Agency. There is a requirement for an initial response from the Agency within 30 days, failing which the transactions may proceed.⁴² If the Agency decides to undertake a further review it is to be

2006; which superseded the “Temporary Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors issued on March 7, 2003.

³⁶ David Teather, Washington opposition forces Chinese to withdraw oil offer, Guardian, August 3, 2005. Later a Dubai based corporation was forced to sell off its U.S. operations when it acquired London based Peninsular and Oriental Steam Navigation Co. See Jonathan Weisman and Bradley Graham, Dubai Firm to Sell U.S. Port Operations, Washington Post, March 11, 2006.

³⁷ Steven Chase, Takeovers will face national security test, Globe and Mail, June 26, 2007.

³⁸ Jiang Wei, No threat of foreign monopoly in any industry – Report, China Daily, September 10, 2007, available online at: http://www.chinadaily.com.cn/china/2007-09/10/content_6092203.htm . Interestingly the Chinese language news articles on the release of the Report are silent on this aspect.

³⁹ Article 21.

⁴⁰ As defined in Article 20.

⁴¹ Article 28.

⁴² Article 25.

completed within 90 days from the date that the Agency decides on such further review,⁴³ essentially from the end of the initial 30 review day period.

The factors that must be considered in reviewing a proposed merger include items such as market shares of the participants, degree of concentration in the relevant market and the effect on consumers.⁴⁴ Once again the Agency is given the authority to take other factors into consideration.⁴⁵ Concerns about the relationship between intellectual property and competition have been built into the basic review through the requirement to consider “the effect of the proposed concentration on market access and technological progress.”⁴⁶ The Agency is also required to consider the effect on the “development of the national economy.” This might be generally described as a public interest consideration beyond the usual scope of competition law. This is also an example of what some have described as the “industrial policy” taint to the AML.

It is important to note that if the proponents of the transaction can prove that the positive effects on competition significantly exceed the negative effects, or that the transactions are in the public interest, the Agency may⁴⁷ decide not to prohibit the transaction.

Chapter V – Abuse of Administrative Powers to Eliminate or Restrict Competition

In the United States and Canada the state action doctrine⁴⁸ and its Canadian equivalent,⁴⁹ while of interest to the regulating agencies,⁵⁰ have not caught the interest of the general public as evidenced in press stories.

In China there is comparatively widespread interest in the role of state-owned enterprises and government regulators in the economy.⁵¹ One of the concerns is that the employees in state controlled industries such as oil, electricity telecommunications and tobacco are taking advantage of their position to enrich themselves using public assets. Such concerns

⁴³ Article 26.

⁴⁴ Articles 27(1), (2), and (4).

⁴⁵ Article 27(6).

⁴⁶ Article 27(3).

⁴⁷ The Chinese word is “可以” (keyi) which is usually translated as “may.” However the concepts of “may” and “shall” in English do not precisely overlap with similar concepts in Chinese, with the Chinese having a slightly more imperative quality to them. The imperative quality may be added to somewhat when the word is used in a law or regulation. But when it refers to the authority of the government, as here, it is best translated as “may.”

⁴⁸ As established in *Parker v. Brown*, 317 U.S. 341 (1943).

⁴⁹ The “regulated conduct defense” as first articulated in *R. v. Chung Chuck* [1929] 1D.L.R. 756. See also Canadian Competition Bureau, Technical Bulletin on “Regulated” Conduct, June 2006.

⁵⁰ FTC Office of Policy Planning, Report of the State Action Task Force, September 2003; available on line at: <http://www.ftc.gov/os/2003/09/stateactionreport.pdf> .

⁵¹ See , for example: Shangguan Zhoudong, *China considers pay caps in monopoly industries*, China Daily, July 18, 2007 available at: http://www.chinadaily.com.cn/bizchina/2007-07/18/content_6000875.htm ; Liang Qiwen, *Monopolies wages in the cross hairs*, China Daily, June 6, 2007, available at: http://www.chinadaily.com.cn/china/2007-06/06/content_887864.htm ; Fu Chenghao, *State firms hold monopoly on income*, ShanghaiDaily.com, August 2, 2006.

are significant features of transitional economies such as Russia and China where state-owned assets must be re-distributed to develop a private sector market economy.

A review of the press stories on the AML prior to adoption suggests that concerns about administrative monopolies exceeded concerns regarding foreign domination of key Chinese industries. The history and size of China's state-owned sector is obviously an important factor in such attitudes. Thus the inclusion of a separate chapter on administrative monopolies in China's AML is not so surprising, giving this aspect of competition law more prominence than it has held in Western statutes.

But the ministries in charge of the relevant industrial sectors opposed the inclusion of this chapter. At one point it was dropped altogether,⁵² and in the next draft the article on the application of the law stated that it did not apply where other laws and regulations provided corresponding provisions. Thus regulated industries were not subject to the law.⁵³

Interestingly the Articles that were finally adopted are not arranged from the general to the particular as is common in civil law statutes, and as occurs in other chapters of the AML. The most general provision is the last Article, Article 37, which provides that "[a]dministrative agencies shall not abuse their administrative powers to make laws and regulations containing provisions eliminating or restricting competition."

The first Article in the Chapter, Article 32, provides that administrative agencies shall not mandate the use of any one firm's products. The Article does not even contain the defense or limitation of the phrase "without justification." Articles 33, 34 and 35 focus on prohibiting artificial regional trade barriers within China. Until March of 2007 provincial governors were evaluated on their performance based on the economic growth of their province. This was a further incentive to the historical Chinese tendency for "地方保护主义"⁵⁴ or "local protectionism." These provisions are designed to reverse that tendency.

The inclusion of this Chapter in the AML is both a major victory for competitive markets in China and a major enforcement problem for the Anti-Monopoly Enforcement Agency. In this regard the development of the Agency and the enforcement of this aspect of the AML will be part of a larger struggle taking place to implement the 1999 amendment to the Constitution mandating that the country be "依法治国" or ruled by law.⁵⁵

⁵² Susan Ning, *Overview of the Anti-Monopoly Law of China (Draft)*, King & Wood, April 2007.

⁵³ *Id.* The adopted form of Article 2 has no such limitations. It states:

This Law is applicable to monopolistic conduct in economic activities within the territory of the People's Republic of China. This Law is applicable to monopolistic conduct outside the territory of the People's Republic of China that eliminates or has restrictive effects on competition in the domestic market of the People's Republic of China.

⁵⁴ Difang baohu zhuyi.

⁵⁵ "Yi fa zhi guo," as adopted on March 15, 1999 by the Second Session of the Ninth National People's Congress.

Chapter VI – Investigation of Suspected Monopolistic Conduct

The Anti-Monopoly Enforcement Agency has both the authority to investigate suspected monopolistic conduct⁵⁶ and the authority to make a decision as to whether a violation has occurred.⁵⁷ In civil law courts judges play a significantly different role than in common law courts. Civil law judges are presumed to know the law and have the power, even in criminal matters, to conduct their own investigations. In this regard the fact that the Agency has both investigative and decision making powers is in accordance with Chinese civil procedure.

Anyone can report suspected monopolistic conduct,⁵⁸ but investigative measures such as the search of premises and seizure of documents may only be implemented after the investigators have submitted a written report to the head of the Agency and approval has been obtained.⁵⁹

Article 44 provides that the decisions of the Agency “may”⁶⁰ be published. Notwithstanding this choice of words it is likely that the decisions will be published, given the volume of court decisions that are now being put online, the foreign interest in such decisions, and China’s WTO commitments to transparency.

Chapter VII – Legal Liability

This Chapter sets out the administrative penalties that may be levied by the Anti-Monopoly Enforcement Agency for violations of the AML. The administrative penalties are not likely to be the only risks faced by violators. Generally in China and other civil law jurisdictions there is an implied private right of action in the courts for private parties. Here Article 50 of the AML specifically identifies such rights.

For violations of the monopoly agreement and abuse of dominant position provisions the AML provides that the Agency is authorized to order firms to cease and desist from such actions, to confiscate the illegal gains, and to impose fines of more than 1% and less than 10% of gross sales in the preceding year.⁶¹ This Article also has a provision for a leniency or immunity program for self-reporting for monopoly agreements.

Just before the third reading of the AML in August there was a significant concern in the press over the actions of the Chinese members of the International Ramen Manufacturers Association who implemented an across the board increase in the price of instant noodles

⁵⁶ Article 38.

⁵⁷ Article 44.

⁵⁸ Article 38, Second paragraph.

⁵⁹ Article 39.

⁶⁰ “可以” (keyi), see discussion *supra* note 47.

⁶¹ Articles 46 and 47.

on July 25, 2007. Although reports in the Western press suggest that the price hikes may have been justified,⁶² the authorities quickly ordered the prices rolled back.⁶³

The uproar caused members of the Standing Committee to be concerned that the penalties for cartelization by industry associations were not strong enough, so the draft AML was amended to specify fines of up to 500,000 RMB and, in serious circumstances, revocation of the registration of the industry association.⁶⁴

For violation of the concentration provisions the Agency is empowered to unwind the transaction and may impose fines of up to 500,000 RMB. There are also disciplinary sanctions of abuse of administrative power⁶⁵ and penalties for obstructing an investigation.⁶⁶

Article 53 provides for an appeal of the decisions of the Anti-Monopoly Agency by way of administrative review in accordance with the Administrative Procedure Law.⁶⁷

Final Comments

Is the new law simply a source of uncertainty or a new economic constitution? Constitutions are not noted for the specificity of their wording, so the two views of the law are not mutually contradictory.

Certainly much (although not all) of the AML is based upon generally accepted competition principles. The AML has codified doctrines regarding state action and integrated the problems of the intellectual property/antitrust interface into its overall structure. It sets out the general principles of the competition regime but leaves many specific terms to be developed later in regulations and guidelines. It is a work in progress.

⁶² China's Battle Against Inflation Puts Noodle Makers in Hot Water, Wall Street Journal Online, August 29, 2007.

⁶³ Lan Xinzhen, Nefarious Noodles, Beijing Review, August 30, 2007, available online at: http://www.bjreview.com.cn/quotes/txt/2007-08/30/content_74250_2.htm.

⁶⁴ 反垄断法草案禁止行业协会组织垄断行为 (Fan Longduan Fa Caoan Jinzhi Hangye Xiehui Zuzhi Longduan Xingwei – Draft Anti-Monopoly Law to Prohibit Monopolistic Conduct by Industry Associations), 法制日报 (Fazhi Ribao – Legal Daily), August 30, 2007, available online at: <http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=371090&pdm=110106>;

反垄断法草案有望明日表决 (Fan Longduan Fa Caoan Youwang Mingri Biaojue – The Draft Anti-Monopoly law is expected to be Voted on Tomorrow), 新华网 (Xinhua Wang – New China Online), August 29, 2007, available online at: <http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=371097&pdm=110106>.

⁶⁵ Article 51.

⁶⁶ Article 52.

⁶⁷ 中华人民共和国行政诉讼法 (Zhonghua Renmin Gongheguo Xingzheng Susong Fa – Administrative Litigation Law of the People's Republic of China), adopted at the Second Session of the Seventh National People's Congress on April 4, 1989 and promulgated by Order No.16 of the President of the People's Republic of China on April 4, 1989.

Accordingly it will be important for those whose interests or plans may be affected by the new law to monitor the setting up of the Commission and the Agency by the State Council, and the development of regulations and guidelines by the State Council. While the general structure of the AML indicates that China intends to implement a modern competition regime for the most part, there is still opportunity for special interests to affect these implementation measures in their favor.

If the government is to deliver a law that limits the power of the administrative monopolies in a meaningful way, as appears to be sought by many Chinese citizens, it will be necessary to have a strong agency that is independent of any particular ministry. The best chance for doing that is likely to occur by having it directly under the State Council in the beginning. But it may gain further independence as time passes. Certainly the China Securities Regulatory Commission has over the years successfully moved away from the direct sponsorship of government to become an independent agency.

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Chinese Products, American Lawsuits: Where Do We Go From Here?

Nancy M. Erfle and Joshua S. DeCristo

Over the last few months a litany of high-profile product recalls involving products manufactured in China have been reported including tainted dog food, defective tires, contaminated toothpaste, and lead paint on children's toys. These incidents have captured headlines and led many, especially in America, to question whether Chinese products are safe.¹ Whether products manufactured in China are perceived as safe in the United States cannot be ignored, particularly in light of the volume of Chinese-made products sold in America. Recent statistics indicate:

- Chinese imports to the United States totaled \$288 billion in 2006²
- 10% of products sold in the United States are made in China³
- 80% of the toys sold in the United States are made in China⁴

Some statistics suggest that Chinese products account for an inordinate number of recalled products:

- All product recalls of toys involved products made in China⁵
- 60% of the recalls announced so far this year by the CPSC involved products made in China⁶

The combination of the sheer volume of products manufactured in China that are sold in the United States, and safety issues that have come to light with respect to some of those products, makes "Made in China" a target for product liability lawsuits. This article will discuss how Chinese manufacturers can remain competitive by recognizing

¹ *Poll: U.S. Shares Blame for China Recall, Most Say*, USA TODAY, Aug. 31, 2007.

² *Id.*

³ *Id.*

⁴ *Mattel Eyes \$30M Loss from Recall of Chinese-Made Toys*, CNNMONEY.COM (Aug. 2, 2007), <http://www.money.cnn.com/2007/08/02/news/companies/bc.mattel.charge.reut/index.htm?postversion=2007080208>.

⁵ *Poll: U.S. Shares Blame for China Recall, Most Say*, USA TODAY, Aug. 31, 2007.

⁶ *Id.*

and responding to American concerns about product safety generally, and product liability lawsuits in particular.

In the United States, product liability lawsuits have impacted how American companies do business for many years. Despite the existence of several important federal agencies responsible for ensuring product safety, including the Food and Drug Administration (FDA), the National Highway Transportation Safety Administration (NHTSA) and the Consumer Protection and Safety Commission (CPSC), by and large the United States government typically prefers to let the market regulate industries rather than implement onerous regulations. Consequently, product liability lawsuits are seen as a way to force businesses to make safer products or suffer a financial loss for selling an unsafe product.

Product liability lawsuits tend to result in very large verdicts for a number of reasons. One is the perception that when the defendant is a large corporation, as is often the case in product liability lawsuits, it will only change its behavior (i.e., make a safer product) if it is economically necessary to do so. The McDonald's coffee case is a prime example.⁷ In awarding \$2.9 million to a woman who was burned when she spilled hot coffee on herself, it is believed that the jurors arrived at this figure to penalize McDonald's for one or two days' worth of coffee revenues, which were about \$1.35 million per day.⁸ If the defendant does not feel the economic sting of a large verdict, the theory goes, it will not modify its behavior.

In addition, the lack of universal health care in the United States means that someone must pay for the medical costs of people who are injured. Although many people have private health insurance, the law does not assume that to be the case, and typically allows injured plaintiffs to seek all of their medical costs, which can often be hundreds of thousands of dollars in cases in which people are seriously hurt. Finally, a fundamental principle of American personal injury law is that people who are injured deserve to be compensated for their "pain-and-suffering." It can be difficult for juries to make such value determinations, and often the verdicts are millions of dollars.⁹

In short, huge amounts of money are at stake in product liability suits. Not surprisingly, when large amounts of money are at stake, clever and enterprising people will find opportunities. Enter the plaintiffs' lawyers. Smart and well funded, plaintiffs' lawyers often develop new areas of litigation, seeking out entire industries to target, not just individual companies. For better or worse, product liability plaintiffs' lawyers have taken on many industries (for example, asbestos, tobacco, silicon breast implants) and

⁷ Liebeck v. McDonald's Restaurants, P.T.S., Inc., No. D-202 CV-93-02419, 1995 WL 360309 (Bernalillo County, N.M. Dist. Ct. Aug. 18, 1994).

⁸ Andrea Gerlin, *A Matter of Degree: How a Jury Decided That a Coffee Spill Is Worth \$2.9 Million*, WALL STREET JOURNAL, Sept. 1, 1994.

⁹ A commonly used ratio for pain-and-suffering damages to medical expenses is 3:1, though the actual ratio varies widely.

bankrupted or nearly bankrupted many companies in the process. Plaintiffs' lawyers have even pioneered new ways of attacking not just individual companies but entire industries based on "enterprise liability."¹⁰

Let's consider the following hypothetical story: A young boy rides his new bike in a small town in middle America. Suddenly the front wheel falls off, and the boy crashes. He is severely injured, and spends several weeks in a hospital, and many months in physical therapy. His parents do not have health insurance and cannot pay the medical bills, which are hundreds of thousands of dollars. The boy's injuries are permanent, and will limit his ability to earn a living for the rest of his life. In the United States, such a scenario will almost certainly lead to a product liability lawsuit.

The boy's parents purchased the bicycle at a large retail chain called the "Bike Store Co." that has retail outlets across the United States. The brand of the bicycle is "Kids Bikes, Inc." Kids Bikes contracts with "Hong Kong Manufacturing" to make the bicycles in China, and Hong Kong Mfg. then contracts with "South China Factory" to actually fabricate and assemble the bicycle and its component parts.

Let us assume that the reason the front wheel fell off and the boy crashed was a defect in the fasteners that hold the wheel in place. With hundreds of thousands of dollars in medical bills, a lifetime of lost-earning capacity, and pain-and-suffering damages on top of that, it would not be unreasonable for the boy's family to assume they could recover millions of dollars through a product liability lawsuit. The only question is: who will be sued?

Though this may seem like a strictly American problem, as the global economy continues to develop, all companies whose products reach American consumers are at risk. American consumers, conditioned to sue if they are injured by a product and expecting huge awards, may attempt to file lawsuits against Chinese companies, or against the importers and retailers of products made in China. Both scenarios present significant risks to Chinese manufacturers.

A Brief Primer on U.S. Product Liability Law

Plaintiffs

Plaintiffs are typically consumers who have been injured by a product—for example, the boy injured in the bicycle accident described above. However, people are not necessarily injured instantly, but may be harmed over time from the cumulative effect of using a product repetitively. Cigarettes, medications, and asbestos are examples of the types of products that have been found to be dangerous when used over time.

¹⁰ Enterprise liability is ["Liability imposed on each member of an industry responsible for manufacturing a harmful or defective product, allotted by each manufacturer's market share of the industry."] BLACK'S LAW DICTIONARY 926 (7th ed. 1999).

Product liability lawsuits may be filed individually, or as a class-action lawsuit, claiming that the defendant's product injured a large number of people, all of whom are entitled to recover damages. Class action lawsuits tend to be exceptionally expensive because of the large number of claimants involved, even though the injuries to each individual may not be severe.

In some cases the plaintiff is not an injured person but another business. Businesses typically find themselves suing each other for product liability claims in two circumstances. First, if one business, such as a retailer, was required to pay an individual plaintiff damages because of a manufacturing defect in a product it sold, that retailer may seek indemnity from the manufacturer. Second, businesses may have a direct claim for product liability due to economic losses caused by defective products. Suppose, for example, that the retailer in our example, the Bike Store Co., had purchased thousands of bikes from Kids Bikes, Inc., all of which were defective. Even if no one was injured by the bikes, the Bike Store Co. may nonetheless sue Kids Bikes, Inc. for the economic harm it suffered because of the defective bikes.

The lawyers representing plaintiffs in product liability suits often have many resources available to pursue lengthy litigation against large companies, and they know how to litigate against big companies. Plaintiffs' lawyers often have as much political influence as businesses, especially with judges.¹¹ Much of this stems from the fact that they typically get 30%-40% of settlements or verdicts, which can amount to fees in the millions of dollars. In class action suits it is not uncommon for the lawyers to make many times more than what the individual members of the class get in settlement.

Finally, it is important to recognize that a major product liability lawsuit can cost upwards of \$100,000 to litigate. In the American system, defendants typically do not get their attorney fees back, even if they win. Therefore, simply getting sued can be a very expensive proposition, even if the defendant ultimately wins. The cost of litigating cases, combined with the potential enormous adverse verdicts if cases do go to trial, results in most cases settling—more than 90% of cases never reach a jury.

Defendants

Plaintiffs can generally sue any "sellers" which may include retailers, distributors, and importers as well as manufacturers. Plaintiffs in product liability claims can, and generally do, file suit against anyone involved in the manufacture or sale of the product that they claim injured them. Although it is often in the plaintiff's interest to name as many defendants as possible in order to increase number of entities available to pay settlements or judgments, sometimes plaintiffs will make strategic decisions not to name some parties because they think it will be too expensive to pursue litigation against them, because they do not think they can ultimately recover from them, or because they want to

¹¹ *Skewering America's Lawyers*, THE ECONOMIST, Feb. 17, 2005.

file the suit in state court rather than federal court.¹² In our example, let us assume that the defect in the fasteners that held the front wheel of the bicycle in place was the result of improper manufacturing. Although the Bike Store was not responsible for manufacturing the bicycle, it may nonetheless be sued.

Each defendant can look to an “upstream” party for indemnity. A retailer that was not involved in the design or manufacture of product, but simply sold the finished product may seek indemnity from the designer or manufacturer, even if the injured plaintiff did not sue the designer or manufacturer. Thus, the Bike Store may look to Kids Bikes, Inc., for indemnity, which may in turn look to Hong Kong Manufacturing and South China Factory. Thus, even if the plaintiff does not name a Chinese company as a defendant initially, the other defendants may want to bring them into the case.

Product Liability Lawsuits

American product liability laws hold manufactures and retailers strictly liable for “unreasonably dangerous” products. A jury ultimately will decide whether a particular product is unreasonably dangerous for its intended use (or even foreseeable misuse). Not all products can be made completely safe, and therefore some balancing is required. However, if the jury ultimately decides that the product is unreasonably dangerous, the manufacturer or retailer will be liable, regardless of whether they knew or should have known that it was dangerous or what precautions they took.

Most strict product liability claims will be based on either a design defect or manufacturing defect theory. A design defect claim alleges that the product was dangerous as it was designed, and that a safer alternative was available and should have been used. A manufacturing defect claim alleges that something went wrong in the manufacturing process that made the product dangerous. Assuming the product design was performed by another party, Chinese companies are most likely to face manufacturing defect claims. Plaintiffs also may bring a strict product liability claim based on a failure to warn theory, which requires showing the product would have been safe if a proper warning was provided.

In addition to bringing a strict product liability claim, plaintiffs often will file a negligence claim alleging that the manufacturer or retailer knew or should have known of a specific danger of the product.

Finally, plaintiffs may allege breach of warranty. Express warranties are typically provided by the manufacturer or seller. Most consumer products are also subject to implied warranties unless specifically disclaimed.

A bicycle cannot be made 100% safe. There will always be some degree of danger associated with riding a bicycle. But, again building on the example of the bicycle accident, suppose that although there was a manufacturing defect that caused the

¹² Typically, plaintiffs prefer to file suits in state courts, which are often viewed as more “plaintiff friendly.” Suing companies from other states or countries may result in diversity jurisdiction and lead to the defendants successfully removing the case to federal court.

fasteners holding the front wheel in place to fail, the bike did not include safety washers which are designed to keep the front wheel in place even if the fasteners fail. Such safety washers are a common feature on recreational bicycles.

The plaintiffs in our hypothetical case may argue that a defect in the fasteners that hold the front wheel in place makes the bike unreasonably dangerous, and that moreover failing to include safety washers was a defective design that also made the bicycle unreasonably dangerous. Although in our scenario the Bike Store Co. and Kids Bikes, Inc. could both be sued for selling a defective product, they could only seek indemnity from Hong Kong Mfg. and South China Factory for the manufacturing defect.

How American Product Liability Lawsuits May Reach China: Two Possible Avenues of Attack

One possible development is for American plaintiffs—injured consumers or businesses seeking indemnity or economic damages—to sue Chinese companies directly in American courts. As will be discussed below, several hurdles may make such direct lawsuits impractical.

Regardless of whether American plaintiffs sue Chinese companies in significant numbers, American plaintiffs will certainly continue to sue American companies who sell products made in China, often alleging a manufacturing defect. Plaintiffs may also begin to allege American companies were directly negligent in failing to ensure adequate quality control in Chinese manufacturing plants. Faced with the threat of product liability lawsuits, many American companies have instituted voluntary recalls of products that they perceive to be dangerous, and no doubt will continue to do so.

Recalls can be extremely expensive as well. Foreign Tire Sales, a small business with only 16-employees, has begun a recall of 450,000 Chinese-made tires at a projected cost of \$90 million.¹³ The recent recall of toys by Mattel is estimated to cost that company \$30 million.¹⁴ The net result of these recalls and lawsuits is that American company's will likely look to their Chinese manufacturers for greater accountability.

Obstacles to a U.S. Plaintiff Suing a Chinese Company

In order for an American company or individual to properly bring a lawsuit against a Chinese company in the United States, certain prerequisites must be met. First, the American court must have “personal jurisdiction” over the Chinese company. Second, the plaintiff must promptly and properly notify the Chinese company of the lawsuit. Both may be difficult requirements to meet. Assuming these prerequisites are met,

¹³ Roger Parloff, *China's Newest Export: Lawsuits*, FORTUNE (July 5, 2007), http://money.cnn.com/2007/07/05/news/international/chinese_lawsuits.fortune/index.htm.

¹⁴ *Mattel Eyes \$30M Loss from Recall of Chinese-Made Toys*, CNNMONEY.COM (Aug. 2, 2007), <http://www.money.cnn.com/2007/08/02/news/companies/bc.mattel.charge.reut/index.htm?postversion=2007080208>.

an American plaintiff would face further difficulties in conducting discovery in China and may find enforcing a judgment impractical or impossible.

1. *Personal Jurisdiction*

In the United States, the federal and state constitutions prohibit persons or companies from having to defend themselves in jurisdictions where they have no presence. However, if a person or company has “minimum contacts” with a jurisdiction, they may be sued there.¹⁵ In determining whether a person or company has the requisite contacts with a jurisdiction, American courts will apply a very fact-driven test and analyze any contacts the person or company has with the jurisdiction. The case of *Asahi Metal Industry Co. v. Superior Court of California*¹⁶ is an example of American courts applying the “minimum contacts.” In that case a Japanese manufacturer made tire valve assemblies and sold them to a Taiwanese company. The Taiwanese company then incorporated the assemblies into tires that they sold throughout the world, including the United States, where 20% of its sales took place in California. A plaintiff, who was injured in a motorcycle accident, sued the Japanese manufacturer in California state court. The court held that the California court did not have personal jurisdiction, noting the Japanese manufacturer had no control over the distribution system of its product and found no actions were “purposefully directed” at California to make the exercise of jurisdiction reasonable and fair.

However, if a Chinese company were involved in the sale of a product, even a component part, to American businesses or consumers, it may be subject to the jurisdiction of American courts depending on the specific contacts the company had with the given jurisdiction.

Going back to our bicycle example, Hong Kong Mfg. may be susceptible to the personal jurisdiction of American courts if it maintains a business office in the United States and markets itself to American customers. South China Factory would be less likely to have any substantial contacts with the United States, especially if it was contracted by Hong Kong Mfg. In fact, South China Factory may not know—or care—where the bicycles that it makes would ultimately be sold.

Finally, if a Chinese company were sued in an American court, it may be possible to argue under forum non conveniens rules that it would be unduly burdensome on the Chinese company to defend itself and the action should be pursued through the Chinese legal system.

¹⁵ See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (providing that the exercise of personal jurisdiction must not offend “traditional notions of fair play and substantial justice”).

¹⁶ 480 U.S. 102, 112–13 (1987).

2. *Notification of the Lawsuit*

Under federal and state laws, a plaintiff also must properly and promptly notify a defendant of the pendency of a lawsuit. Under the Federal Rules of Civil Procedure,¹⁷ a plaintiff typically must notify foreign companies of a lawsuit by complying with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Document (the Hague Convention). The Hague Convention provides the procedures that must be followed to properly notify a defendant of a lawsuit and is effective between the United States and China. In order for an American plaintiff to properly serve a Chinese defendant, the plaintiff must complete Form USM-94 and request service of process through the Chinese Central Authority. This process may take months to complete and can be complex. And, if an American plaintiff fails to comply with these procedural requirements, a Chinese defendant may be able to get the lawsuit dismissed on such grounds.

A plaintiff also may effect service upon a Chinese company if the company has an “agent” within the United States who can be served with process.¹⁸ Whether a representative qualifies as an “agent” depends on how closely related the Chinese company and the representative are – a very fact-driven test as well.¹⁹ In sum, if the Chinese company has an office in the United States, then it is possible that service upon that office would be sufficient notification to the Chinese company of the lawsuit.

3. *Conducting Discovery in China*

An American plaintiff who was able to properly initiate a lawsuit in an American court against a Chinese company may find that prosecuting such a lawsuit is difficult or impossible. China does not recognize some of discovery mechanisms that most American litigants take for granted, such as the right to take depositions. In addition, issues of language and culture may make it difficult to conduct litigation against a Chinese defendant. And, as a practical matter, the cost of conducting litigation thousands of miles away may be prohibitive—even for well-financed Plaintiffs’ lawyers.

These difficulties may make litigation against Chinese companies undesirable, especially when other, American defendants are available. For example, assuming the Bike Store to be a large American retail chain, it would probably be quite capable of

¹⁷ Most cases involving a foreign defendant would likely end up in federal, not state court.

¹⁸ See *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 707 (1988) (holding that where service on a domestic agent is valid and complete under both state law and the Due Process clause, a court’s inquiry ends and the Hague Convention has no further implication).

¹⁹ See *Lasky v. Continental Products Corp.*, 97 F.R.D. 716, 716-17 (D.C. Pa. 1983) (service of wholly-owned subsidiary of Japanese corporation invalid because subsidiary separate corporate entity with own management policy and separate financial books and records keeping); cf. *Mirrow v. Club Med, Inc.*, 118 F.R.D. 418, 419-20 (E.D. Pa. 1986) (service on subsidiary that acted as sales department for parent corporation and had overlapping officers and directors constituted valid service on parent corporation).

paying a settlement or judgment of even several million dollars. Because a plaintiff may assert product liability claims against the retailer, there would be no incentive for the plaintiff to spend more money attempting to sue a Chinese company. However, if in our hypothetical example the Bike Store Co. was bankrupt and Kids Biks Inc. had insufficient capital or insurance to pay a judgment, suddenly Hong Kong Mfg. may become the most attractive defendant, notwithstanding the considerable difficulties in suing such a company.

4. *Recovering a Judgment against a Chinese Company*

Assuming an American litigant did successfully sue a Chinese company in an American court serious doubt exists as to whether that judgment could ever be recovered. In fact, there appear to be few, if any, circumstances in which an American judgment has been recognized in a Chinese court.²⁰

Several reasons explain why it may be difficult or impossible for an American plaintiff to collect a judgment against a Chinese manufacturer, including convincing a Chinese court to recognize the often expansive personal jurisdiction exercised by American courts, inherent Chinese skepticism about punitive damage awards, the absence of fraudulent conveyance laws within China, and limited enforcements mechanisms available.^{21, 22}

The current realities regarding the difficulties in pursuing litigation against Chinese manufacturers discussed above may well limit the number of such lawsuits, at least in the near term. However, the evolving world market, and political pressures both in China and the United States, may require a new paradigm for the resolution of product liability lawsuit against Chinese defendants—one which may make it easier for an American plaintiff to sue and collect on judgments in China.

The Impact of Lawsuits Against American Companies on Chinese Manufacturers

In the short run, the problems associated with suing Chinese companies discussed above will do nothing to stem the tide of product liability lawsuits against American companies. In fact, one can assume that the effect may be to increase suits against American companies for several reasons.

²⁰ Donald C. Clarke, *The Enforcement of United States Court Judgments in China: A Research Note* GWU LEGAL STUDIES RESEARCH PAPER (May 27, 2004), <http://ssrn.com/abstract=943922>.

²¹ Arthur Anyuan Yuan, *Enforcing and Collecting Judgments in China From a U.S. Judgment Creditor's Perspective*, 36 GEO. WASH. INT'L L. REV. 757 (2004).

²² Xiyun Yang, *Liability Lawyers Struggle to Pierce the Chinese Curtain*, WASHINGTON POST, July 28, 2007.

First, without access to a potential defendant who may be the most culpable party—i.e., the Chinese manufacturer—plaintiffs will be required to prosecute their cases more vigorously against defendants, such as retailers, whose culpability would be merely “passive.”

Second, the current climate of negative media attention on products made in China may encourage more lawsuits, and higher settlement demands.²³

Third, creative plaintiffs’ lawyers may attempt to sue American companies for manufacturing flaws that occurred in Chinese factories, alleging for example inadequate quality controls by the American firm. Plaintiffs may even attempt to expand theories such as enterprise liability to reach industries such as the toy industry. Plaintiffs’ arguments may attempt to hold the entire toy industry liable for any injuries resulting from products made in China where a plaintiff cannot prove which American firm sold the toy, but the toy is stamped “Made in China.” The market-share theory has been adopted with some variation throughout the U.S. courts.²⁴

Whether or not such worst-case scenarios come to pass, there is no doubt that American companies are feeling the impact of product recalls. From a socially responsible perspective one can certainly expect American retailers to insist on the safest products possible, though the economic realities of inexpensive manufacturing must be recognized. From a purely economic perspective, it is reasonable to assume that American retailers will begin to allocate the costs of product recalls and product liability lawsuits to the cost of manufacturing in China.²⁵ American companies may well begin requiring more of foreign manufacturers.

Turning once more to the example of the defective bicycle, one can easily imagine that the retailer, the Bike Store Co. would not want to sell Kids Bikes, Inc. bicycles after paying a multimillion dollar settlement or judgment without some assurances that it would not happen again. If a recall of hundreds or thousands of similar bikes was necessary, the cost would be even more. Similarly, Kids Bikes, Inc. would not want to have its bicycles made in a factory that it did not believe could ensure adequate quality. At a minimum, the American firms would include the cost of the product liability suit and any recalls in the cost of manufacturing in China, and may insist on even

²³ Interestingly, many Americans are willing to spread the blame for perceived defects in Chinese products to the American importers. *Poll: U.S. Shares Blame for China Recall, Most Say*, USA TODAY, Aug. 31, 2007.

²⁴ *Sindell v. Abbott Laboratories* 163 Cal. Rptr. 132, 607 P.2d 924 (1980); *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1071 (N.Y. 1989); *Collins v. Eli Lilly Co.*, 342 N.W.2d 37, 49-50 (Wis. 1984); *Martin v. Abbott Labs.*, 689 P.2d 368, 380-83, 102 Wash.2d 581 (1984). Some States have rejected the use of enterprise liability. See, e.g., *Tillman v. Vance Equipment Co.*, 286 Or. 747, 596 P.2d 1299 (1979).

²⁵ Xiyun Yang, *Liability Lawyers Struggle to Pierce the Chinese Curtain*, WASHINGTON POST (July 28, 2007) (noting “While larger retailers or wholesalers may have the commercial leverage to force Chinese manufacturers to negotiate, some smaller importers have begun factoring liability costs into the price of doing business in China.”).

paying Chinese manufacturers even lower prices. Accordingly, such businesses may begin insisting on significant changes in the way they do business with Chinese companies, including demanding insurance, arbitration clauses and indemnity agreements and quality control assurances.

Why It Matters Now: Using the Information to Your Business's Advantage

In today's world economy it is no longer possible to simply ignore the perception that a problem exists with Chinese products—other countries are catching up, money is easier to trace, plaintiffs' lawyers are getting better at suing international companies, and the recalls and negative publicity associated with product defects costs businesses money. In addition, some American politicians are seizing on recent incidents to push for reforms that many see as protectionist trade policies, creating the prospect of changes to American trade polices and legal remedies available against Chinese firms.

However, when there is change, opportunity can be found. By understanding American product liability laws and policies, and responding to the needs of American businesses, Chinese manufacturers can remain competitive, and in many cases may be even more attractive.

For both American and Chinese companies, it is much cheaper and more effective to deal with these issues prior to distributing the product than to defend against lawsuits. Adopting proactive measures that create confidence will increase business and reduce potential lawsuits, and therefore become more profitable. Some potential proactive measures include:

- Insurance and Risk Retention Groups

The easiest way for American firms to offset possible economic consequences of recalls or product liability lawsuits is to require Chinese manufacturers to carry large insurance policies.

Another option for Chinese companies is to form risk retention groups that self-insure. Risk retention groups are becoming more and more prevalent, and often have the advantage of and making insurance cheaper and risks more controlled versus traditional insurers.

Obtaining insurance will protect not only the Chinese manufacturer but also the American seller. Though buying insurance will add costs, the costs of recalls and lawsuits are already being factored into the cost of manufacturing in China. American companies may well be willing to pay slightly more to have a product manufactured in China knowing that they are protected by a third-party insurance policy. "Cheap" is not always the same as "inexpensive."

- Arbitration Clauses and Indemnity Agreements

In addition, more American firms may require arbitration clauses in their contracts with Chinese manufacturers. Both the United States and China adhere to the

New York convention, making commercial arbitration awards much easier to enforce in China—especially when compared to the prospects of attempting to enforce a civil judgment.

Chinese companies may make their manufacturing more attractive by volunteering to submit to arbitration. A willingness to submit to arbitration may provide a competitive advantage by affording American retailers confidence in Chinese manufacturers.

American firms may also press for stronger indemnity agreements to complement arbitration clauses, requiring Chinese firms to indemnify for manufacturing defects leading to recalls or lawsuits. Obtaining insurance will make submitting to such indemnity agreements more cost effective and afford Chinese manufacturers predictability, rather than infrequent but expensive cash outlays when a problem does arise.

- Industry-Funded Quality Assurance Programs vs. Government Control

American companies may press for greater oversight of quality control in Chinese plants, either by the Chinese manufacturers themselves or through third-party firms.

Although the Chinese government has declared “war” on tainted products,²⁶ American consumers and businesses will likely be leery of purely governmental oversight. It is Chinese manufacturers themselves that should take the lead in assuring the quality of the products made in their plants.

Alternatively, or perhaps additionally, American firms themselves may want a greater role in ensuring quality control standards are being met.

- Compliance with American Safety Standards

Another option for Chinese manufacturers to make their products more attractive to American retailers is to implement programs that can offer assurances that their products will meet American safety standards.

- Public Relations

Finally, it is not enough to simply improve the quality of Chinese products, it is imperative that the *perception* about Chinese product be changed. In addition to implementing some or all of the concepts discussed above, it is imperative that Chinese manufacturers embark upon a well-thought-out public relations campaign that addressed head-on the concern in the United States about product liability lawsuits.

In conclusion, by recognizing the realities American businesses face from product liability lawsuits, and taking steps to instill confidence that they will assume responsibility for their mistakes, Chinese manufacturers can not only continue to export

²⁶ *China declares 'war' on tainted products*, CNN.COM (Aug. 24, 2007)
<http://edition.cnn.com/2007/WORLD/asiapcf/08/24/china.safety.reut/index.html>.

products to the United States, but can earn a competitive advantage over competitors who continue to do business as usual.

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CHINA BRIEFS

The Employment Contract Law: A New Era in China's Labor Market

By Jiang Junlu

On June 29, 2007, the PRC Employment Contract Law (the "Law"), a milestone legislation driving the job market in China, was passed on the 28th session of the 10th National People's Congress after four deliberations. Effective on January 1, 2008, the Law is a momentous first for China's labor and social security system as an ancillary legislation to the PRC Labor Law promulgated in 1994.

1. Establishment Procedures for an Employer's Internal Rules

The Law clarifies that the employer shall negotiate with employees or the employee representatives' congress and shall bring forward schemes and opinions to stipulate internal rules on an equal basis involving the following issues: remuneration, working hours, leave and holidays, labor security and sanitation, insurance and benefits, vocational training, labor discipline, and others.

2. Conclusion of Labor Contract in Written Form

The Law prescribes that where the employer has not signed a labor contract in written form with employees, the labor contract in written form must be concluded within one month of establishing the labor relationship. Where the employer fails to sign a labor contract in written form with an employee within one year from the day the employee starts to work for the employer, the employer shall be deemed to have entered into a non-fixed term contract with the employee.

3. Non-fixed-term Contract

The Law requires the employer to enter into a non-fixed-term labor contract with the employee after the employer executes two consecutive fixed-term labor contracts with such an employee, provided that there are no grounds for the legal termination of the employee's contract.

4. Retrenchment

The Law stipulates that the employer may lay off redundant employees, subject to mandatory procedures, under the following circumstances: (1) where the employer is restructuring in accordance with laws and regulations due to the bankruptcy of the enterprise; (2) where serious difficulties occur affecting the production and management of the employer; (3) where the employer engages in a change of product line, major technical renovation, or change of business model, and the employer still needs to layoff redundant employees after amendments to the original employment contract.

5. Severance

The Law clarifies that severance shall equal the employee's monthly remuneration multiplied by the employee's period of service and any period of time more than six months but less than one year will be counted as one year. The severance shall equal the employee's semi-monthly remuneration for employees whose service year is shorter than six months. Further, it stipulates the maximum amount shall be three times the average city salary with a 12-month cap. Severance payment is required when the employer does not renew the fixed term labor contract with the employee upon the expiration date, unless the employer maintains or improves the benefits under the contract or the employee is not willing to renew the contract.

6. Labor Dispatch

The Law clarifies that the obligations for labor dispatching enterprises are: (1) entering into a labor dispatching agreement with the ultimate employer; and (2) notifying the dispatched employee of the content of the labor dispatching agreement. In addition, the dispatched employee shall have the right to organize or join a trade union in the dispatching enterprise or in the ultimate employment enterprise.

7. Non-competition

The non-competition clause shall apply to senior management, senior technical staff and other staff subject to confidentiality liabilities. The non-competition period shall be limited to the maximum of two years.

8. Trade Unions

The Law has reinforced the role of labor unions in safeguarding the legitimate rights and interests of employees in the following areas: (1) formulating corporate rules and bylaws; (2) bargaining on collective contracts; (3) providing opinions on mass layoffs; and (4) providing opinions on the termination of labor contracts.

Conclusion

The Law extensively changes labor relations. Corporate human resources management must adapt to this new era of labor employment relationship. The current letters of appointment, labor contracts, internal labor rules, and various other documents should be amended to comply with the legal requirements of the Law.

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The Property Rights Law: A Turning Point for China's Real Estate Investment and Development Businesses

By Fan Lin and Laiming Wong

The Property Rights Law of the People's Republic of China ("Property Rights Law") was enacted on March 16, 2007 and will become effective on October 1, 2007. The effect of the Property Rights Law on real estate investment and development is always a cause of much concern to real estate investors and developers. Based on relevant provisions in the Property Rights Law and taking into account the status quo of the real estate market, the authors perceive that the high-speed growth of China's real estate sector will slow down upon the implementation of the Property Rights Law.

1. As forced eviction becomes increasingly difficult, investor enthusiasm is expected to cool down

Forced eviction is a constant headache in urban development and construction. Numerous "nailhouses"²⁷ throughout China's rapidly developing cities repeatedly proved that forced eviction is the biggest roadblock to real estate development. Article 42 of the Property Rights Law provides that, "For the sake of public interests, land owned by collectives, houses and other real properties of units and individuals may be expropriated according to the authorities and procedures provided by law. Compensation for land expropriation, relocation, fixture and green crops shall be fully paid for the expropriation of land owned by collectives according to law. Social security shall be made available for the peasants whose land is expropriated to maintain their living standard and to protect their legal rights. Forced eviction compensation shall be paid to individuals whose house or real

²⁷ Nailhouses refer to those households that refuse to relocate in forced eviction and land expropriation. They received this name because making them move is as hard as removing nails securely hammered into a wooden board.

property is expropriated to protect their legitimate rights. The living condition of the individuals whose residence is expropriated shall also be secured.” The above provision will make forced eviction a more challenging task for the following reasons:

- (a) The difficulty in defining “public interests” is likely to increase the challenge of forced eviction.

Though the Property Rights Law provides expropriation of land “for the sake of public interests”, whether real estate development shall be regarded as a matter for “public interests” is always a controversial issue. Since the Property Rights Law does not define “public interests”, the government needs to be very cautious in issuing documents relating to land expropriation and forced eviction. As a result, the initiation of land expropriation and force eviction in real estate development projects will become more difficult.

- (b) Costs of real estate project development will continue to increase due to the rising costs of forced eviction.

In recent years, to protect the peasants’ interests, the Chinese government has gradually improved the standard for expropriation compensation. At the same time, to protect the interests of the households subject to forced eviction, many cities’ regulations on forced eviction provide such households the freedom to choose the method of compensation (including monetary compensation, relocation to other areas and relocation to the same area after the new residences are built). The Property Rights Law further clarifies that compensation shall be paid to the units and individuals for expropriation and forced eviction according to law to ensure the interests of such parties are protected. In the case of expropriation of the residence of individuals, the housing conditions of such individuals shall be maintained. All these legal requirements raise the developer’s costs in expropriation and forced eviction.

- (c) The implementation of forced eviction will be slow and arduous.

After promulgation of the Property Rights Law, more and more individuals subject to forced evictions have become knowledgeable about their legal rights. Such individuals now have a few options for preventing their forced eviction. They may refuse to sign the forced eviction agreement, petition to a higher government authority, or initiate a legal action. In such events, the developer must have an administrative or court ruling to proceed with the forced eviction. Obtaining these rulings would lengthen the project completion time and add steps to the process that might discourage some investors.

Due to the increasing challenges to completing forced evictions, investors tend to avoid investing in real estate projects that involve forced evictions. However, investors who continue to invest in the real estate sector may consider the following approaches to acquiring land upon which any required forced eviction has already been completed: (1)

acquiring land available for real estate development projects through public transactions, like bidding, auction and listing (usually, only investors with abundant funds are able to take this approach); or (2) acquiring the land-use right for development projects by acquiring equity of a real estate development company or directly merging with or acquiring a project development company.

2. Since commercial use of residential properties is prohibited, the demand for residential housing as investment is expected to decline.

For many years, “residential houses for commercial use” has been the selling point for a number of real estate projects in China. The developers design the residential buildings with the purpose of “residence for commercial use” and such strategy has won the favor of many purchasers. Since the land use right grant premium for residential buildings is lower, the term of the grant is longer, and the threshold for obtaining mortgage is easier to satisfy than those for commercial properties, many purchasers purchase residential property as an investment and then lease the property to business operators to earn a better rate of return. This type of investment resulted in soaring residential property prices in the last a few years. However, Article 77 of the Property Rights Law provides that “Property owners shall not convert residential property to commercial property in contravention of laws, regulations or management pacts. Where property owners need to make such conversion, they shall, other than compliance of laws, regulations and management pacts²⁸, obtain the consent of the property owner(s) with interests in the property to be converted.” The consent requirement creates another roadblock for property owners who intend to buy residential property for commercial use.

In June 2006, the Beijing Municipal Administration for Industry and Commerce explicitly prohibited the use of residential property for commercial purposes. As a result, the owners of this type of residential property cannot lease out their property for commercial purposes and the commercial lessees of such property have to operate their business illegally because they cannot obtain or renew their business license. This situation has caused many disputes between the developers, property owners and lessees. After prohibition of the use of residential property for commercial purposes, the number of purchases of residential property as investment is likely to decrease, which will slow down the rise of residential property prices or even cause its fall. Consequently, the medium or low-end office space rental market is anticipated to flourish.

3. Since the nature of ownership of different areas in the building premises is differentiated, the developer’s control over the resources in the real estate project will be weakened.

One of the highlights of the Property Rights Law is the identification of different ownership rights of different parts of the building premises. The Property Rights Law

²⁸ Such compliance means that property owners shall perform certain formalities required by laws and regulations.

clarifies the exclusive ownership, co-ownership and membership²⁹ rights of a property owner to the building premises. Articles 72 to 74 of the Property Rights Law provides expressly that roads within the complex (excluding municipal and township public roads), greenery areas (excluding those exclusively owned by individuals), other public premises within the complex, infrastructures, and property management premises are collectively owned by all property owners in the complex.³⁰ Such provision resolves the disputes that have long existed between developers and property owners about the ownership right of such areas. The Property Rights Law also sets forth that parking lots and garages within the complex shall first meet the needs of property owners. The ownership of parking lots and garages shall be obtained by sale, gift or agreement. However, parking lots that take up the space of the roads or other premises collectively owned by the owners shall still be collectively owned by the owners.

The above provisions help to mediate or lessen the potential disputes between the developer and the owners, prevent the developers from claiming their right to occupy or use such areas and resources of building premises on the ground that “who invests, who owns, who benefits”, and impair the bargaining power of the developer over such facilities and resources.

4. Since the owners have the right to appoint a property manager, the developer is no longer be the “de facto manager”.

Articles 75 and 81 of the Property Rights Law provide that the owners are empowered to establish the Owners’ Committee and to elect Committee members. Local governments shall provide guidance and assistance to the establishment of the Committee and the election of the Committee members. The Law also sets forth that the owners may either manage the building premises and ancillary facilities themselves or authorize a property management service provider or other property managers. The owners shall have the right to replace the property manager appointed by the developer.

In practice, many developers and property managers selected by the developers are usually affiliates or related parties. Property managers in fact act as the spokesperson of the developer. Where disputes arise between the developer and the owners, the property manager, in most cases, represents the interests of the developer instead of the owners, which is inconsistent with the property manager’s role. The right of the owners to replace the property manager appointed by the developer fundamentally alters scenarios where the property manager is “managing the owners” instead of “serving the owners.”

Based on the above analysis, the authors believe that shortly after the implementation of the Property Rights Law, the development costs of the developers will unavoidably increase. The demand for real estate for investment purposes will further be decreased

²⁹ The membership right refers to the right of property owners as a member of the property owner community.

³⁰ It shall be noted that such collective ownership also covers the right of using the external walls and rooftops of the building for commercial rental. These parts of the building are all important resources for advertising.

due to the restriction on the use of residential properties for commercial purposes. Furthermore, the developer is expected to have less control over the facilities and resources in the building premises. Due to the aforesaid factors, investors and developers should be much more prudent in planning their investment in real estate development business. It is predictable that the growth of investment in the real estate sector will be mild and many of the real estate projects that involve forced eviction may be temporarily suspended after the implementation of the Property Rights Law.

In general, the Property Rights Law is advantageous to property owners. Since the owners' rights in property are better respected and protected, the owners will be more confident in the purchase of real properties. In the long run, driven real estate investors and developers will have to develop new products to meet stronger market demand, which is a win-win situation to both the buyers and developers.

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The Enterprise Income Tax Law and the Venture Capital Industry

By Stephen Nelson and Xu Zifeng

China has undergone fundamental changes to its economy and system over the past decade and its focus is now moving from the traditional labor-intensive manufacturing industries to developing more sophisticated and technologically advanced industries. This trend can best be demonstrated by the rapid development in the telecommunication and internet related sectors, and the growing acceptance and use of mobile messaging, email and instant internet communications applications in China.

The development of these industries generally calls for a constant inflow of capital, management skills and financial support, especially in the early stages. The characteristics of these industries, though (e.g. high risk, knowledge or technology-based with little fixed assets) make it difficult especially for startups to obtain sufficient financing from traditional channels. Venture capital fills this gap. A strong and vibrant venture capital industry therefore is important for the development of sophisticated and technologically advanced industries. This article examines how the recent changes in tax laws may affect China's venture capital industry.

1. The Enterprise Income Tax Law and its Application

The recently passed PRC Income Tax Law will come into effect on January 1, 2008 and will unify for the first time enterprise income taxes for foreign-invested enterprises (FIEs) and domestic enterprises.

By way of introduction, the new tax law distinguishes between “resident enterprises” and “non-resident enterprises.” Resident enterprises include FIEs, domestic enterprises and enterprises with actual management and control in the PRC. Non-resident enterprises refer to enterprises established outside the PRC with no actual management in the PRC but having establishments in the PRC, or deriving income from the PRC without a PRC establishment.

Pursuant to the tax law, a unified general enterprise income tax of 25% will be applicable to resident enterprises (that is, FIEs and domestic enterprises) on income derived from both within and outside the PRC, and a lower enterprise income tax rate of 20% will be available to “small and less profitable” enterprises. The 25% rate will also apply to income related to a foreign company’s establishment in the PRC. Foreign companies deriving PRC income unrelated to any PRC establishment will be subject to withholding enterprise income tax at the rate of 20%.

Under current PRC laws, both foreign and domestic investors are allowed to invest in and establish venture capital enterprises in China for investing in other enterprises and the provision of management and investment consultancy services. While a venture capital enterprise may be established in the form of a company with legal person status, it may also be set up in other legal forms.

Nevertheless, most venture capital funds in China are in the form of companies and they will be resident enterprises under the new tax law, and be subject to the general income tax rate of 25%. Therefore, the general tax rate applicable to foreign-invested venture capital enterprises will be reduced from the current rate of 33% to 25%. Where they are established in regions with low tax rates (such as the Special Economic Zones, the Pudong New Area in Shanghai, etc), the applicable income tax rate will be increased from the existing preferential rate of 15% or 24% to the rate of 25% under the new tax law. For domestic venture capital enterprises, the applicable income tax rate will be reduced from the current rate of 33% to 25%.

For venture capital companies and funds established outside China which make investments in China, they will be regarded as non-resident enterprises under the new tax law unless their actual management is situated in China. Income related to their China establishments will be subject to income tax at 25% and withholding income tax at 20% will be levied on income unrelated to their China establishments, subject to a lower rate offered under applicable double tax arrangements.

2. Tax Incentives under the Enterprise Income Tax Law

2.1 Income Tax Deductions

Venture capital enterprises established in China will be eligible for tax incentives under the new tax law. Article 31 of the tax law provides that where a venture capital enterprise carries out investment encouraged by the government, it is entitled to deduct from its taxable income an amount calculated by reference to a fixed percentage of its investment amount.

The new tax law states only that a venture capital enterprise may be entitled to deduct from taxable income an amount by reference to a fixed percentage of its investment amount without providing details of such deduction. However, it is believed that this provision has been included in the law in order to allow for the continued availability of existing incentives set forth in a 2007 State Administration of Taxation notice (Caishui (2007) 31) (“2007 Notice”).

Pursuant to the 2007 Notice, a venture capital enterprise investing by way of equity or shares in unlisted small or medium technologically advanced enterprises for more than two years may deduct from its taxable income up to 70% of the amount invested provided that:

- (a) its business scope is venture capital investments, provision of investment agency services to other venture capital enterprises or individuals, provision of venture capital investments consultancy services, provision of management services to startup enterprises or engaging in the establishment of venture capital management and consultancy establishments, and having completed its registration with the State Administration of Industry and Commerce;
- (b) having completed all registrations set forth in the Interim Administration Measures for Venture Capital Enterprises;
- (c) the enterprise it invests in employs 500 or less employees with annual sales and total assets of no more than RMB200 million; and
- (d) the enterprise it invests in must spend during the year of application at least 5% of annual sales on advanced technology and related products research, and the aggregated income from technology and technologically advanced products amounts to at least 60% of annual income.

While not entirely certain at present, the consensus among practitioners is that this 2007 Notice is the actual implementing notice for the tax incentives available to venture capital enterprises in the new tax law and will continue in force.

The availability of the 70% deduction on income for venture capital enterprises in the 2007 Notice is certainly a very favorable treatment even in comparison to most jurisdictions.

2.2 Advertising Deductions

Pursuant to a 2001 State Administration of Taxation notice (Guoshuifa (2001) 89) (“2001 Notice”), advertising expenses of a venture capital enterprise with investments in high and new technology sectors may be deducted on an incurred basis from taxable income for the first five years from establishment upon application.

Presently, this notice is of use to domestic venture capital enterprises since the cap for advertising deductions for domestic enterprises is 2% to 8% of sales in general depending on the industry, but has been of less significance for foreign invested venture capital enterprises as there is no cap on advertising deduction for FIEs.

This position will be changed from January 1, 2008 by the new tax law. Under the new tax law, expenses may be deducted from taxable income on an incurred basis and for advertising expenses. It is generally expected that a limit of 15% of annual sales will be set (applicable to FIEs and domestic enterprises) by separate regulation to be promulgated pursuant to the new tax law.

The 2001 Notice is expected to continue in effect after the new tax law comes into force. If this is the case, it will have a positive effect on both domestic and foreign invested venture capital enterprises as they will both be entitled to take advantage of the 5-years advertising expenses deduction in the 2001 Notice.

2.3 Deductions for Investee Enterprises

Under the new tax law, a preferential tax rate at 15% is available to technologically advanced enterprises supported by the government and tax exemptions or reductions will be available to income from infrastructure, environmentally friendly and water or energy conservation projects. While these may not be of direct benefit to the venture capital industry, the industry will still benefit indirectly through its investee enterprises eligible for the tax incentives, particularly in the technology sector. In addition, while previously a foreign holding of more than 25% was necessary in order to qualify for FIE incentives, an investee enterprise with only a limited venture capital interest will be eligible for these incentives after the new law take effect.

Looking Forward

These tax incentives represent China’s focus and commitment in developing a strong and vibrant venture capital industry, and further preferential tax treatments are expected to be promulgated in the future.

Presently, a majority of venture capitalists operate and structure their PRC investments in Chinese companies offshore through Hong Kong or tax haven holding companies. Given the tax incentives available to onshore venture capital enterprises set up in China, venture capitalists may consider whether it may in the long run be beneficial to structure investments through venture capital enterprises established in China.

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ITEMS OF INTEREST

Selected Recent English Language Books on Chinese Law

China's Media & Entertainment Law (Volume II), TransAsia Publishing, Ltd.
1400 p. (2006) ISBN: 962-85738-8-8

<http://www.transasialawyers.com/order1.htm>

From the publisher: “*China's Media & Entertainment Law (Volume II)*” is the most comprehensive and authoritative legal publication available on the dynamic PRC media sector. Reviewed and endorsed by industry executives and Chinese government officials, this publication is intended to give readers an update of China's key market and regulatory developments.

This edition incorporates the most recent legislation and regulatory analysis, including:

- the most up-to-date analysis of the television, film, audiovisual product, print and advertising sectors and event management;
- commentary on the current regulatory environment, legislative developments, foreign investment requirements and market entry issues and opportunities; and
- 103 pieces of key legislation in both English and Chinese.

Submitted by Chris Shen, TransAsia Lawyers – Beijing. Mr. Shen can be reached at: cshen@transasialawyers.com.

Courts and Criminal Justice in Contemporary China, by Susan Trevaskes, Lexington Books, 2007, 240 p. ISBN: 978-0-7391-1988-4

<http://www.lexingtonbooks.com/Catalog/SingleBook.shtml?command=Search&db=^DB/CATALOG.db&eqSKUdata=0739119877>

From the Publisher: “*Courts and Criminal Justice in Contemporary China* is a study of Chinese judicial power as it is manifested in law-and-order campaigns and shame punishment. Dr. Sue Trevaskes examines today's court practices and their antecedents in China by exploring "law on display" in local court trials, rallies, and campaigns. By emphasizing the justice system of the 1980s it becomes apparent how criminal court practices in this period set the foundation for practices into the Twenty-First Century. Trevaskes argues that many aspects of Chinese law, especially civil and economic law, have developed into modern and sophisticated systems of justice administration, criminal law has not.”

International Law as World Order in Late Imperial China: Translation, Reception and Discourse, 1947-1911, by Rune Svarverud, Brill Academic Publishers, Inc., 2007, 322 p. ISBN: 9789004160194

<http://www.brill.nl/default.aspx?partid=18&pid=28581>

From the Publisher: “This is the first systematic analysis of the early introduction and reception of international law as a Western political and legal science in China. International law in late imperial China is studied both as part of the introduction of the Western sciences and as a theoretical orientation in international affairs between 1847 and 1911. The first chapters serve the purpose of analysing the political, institutional, intellectual and linguistic process of adapting the theories of international law to the Chinese context language. The second major part of the book is dedicated to the discourse on China and world order within this framework.”

Managing Business Disputes in Today’s China: Duelling with Dragons, edited by Michael Moser, Kluwer Law International, 2007, 319 p. ISBN: 9041124624

<http://www.kluwerlaw.com/KLI/Catalogue/titleinfo.htm?ProdID=9041124624>

From the Publisher: “As more and more transnational businesses invest in China, the spectre of commercial disputes looms larger and larger. This book, a deeply knowledgeable introduction to the law and practice of commercial dispute settlement in today’s China, is especially valuable because such disputes raise a plethora of issues that challenge the expertise of non-Chinese lawyers.

Written by senior lawyers with rich practical experience in China, *Duelling with Dragons* uses a hypothetical scenario to highlight the kinds of disputes that can arise in the course of initiating and operating a Chinese joint venture. After introductory chapters setting out the background and the disputes facing Ricepower and its investors, subsequent chapters deal with an overview and evaluation of the various options available to the parties to resolve their conflicts. These include such mechanisms as the following: arbitration inside China; arbitration outside China; litigation in the People’s Courts; administrative appeals; and investor-state arbitration.

Specialized themes include intellectual property disputes, employment and labour disputes, criminal law aspects of business disputes, and enforcement of dispute outcomes both inside China and abroad. The book also features a detailed table of legislation and cases, and statistics on arbitration and litigation in China.”

Raising the Bar: the Emerging Legal Profession in East Asia, edited by William Alford, Harvard University Press, 2007, 436 p. ISBN 0-674-01452-9

<http://www.hup.harvard.edu/catalog/ALFRAI.html>

From the Publisher: “Over the past two decades, China, Japan, Korea, Malaysia and Indonesia have been engaged in unprecedented efforts to re-cast and rapidly expand the legal profession—with profound implications not only for law, but also for politics, international relations, and society itself. Raising the Bar is the first book-length study in English of this phenomenon. It examines a broad range of topics, including changes underway in the profession's size and composition, its evolving relationship to state authority, the outlet it may be providing for historically disadvantaged sectors of society, and its impact on economic and political development. The book also explores the implications of these findings for broader theoretical work about both the legal profession and globalization.”

Submitted by Kara Phillips, Collection Development Librarian/Associate Director, Seattle University Law Library. Kara Phillips can be reached at: phillips@seattleu.edu.

Selected English Language Legal Articles

Benjamin Liebman and Tim Wu, China's Network Justice, 8 Chicago Journal of International Law 257 (Summer 2007) - From the authors: “This Article, the product of extensive interviews across China, asks a new and different question. What has China's Internet revolution meant for its legal system? What does cheaper, if not free, speech mean for Chinese judges? The broader goal of this Article is to better understand the relationship between how a legal system functions and how judges communicate, both with each other and with other parties, including the media, the public, and political actors.”

Volker Behr, Development of a New Legal System in the People's Republic of China, 67 Louisiana Law Review 1161 (Summer 2007) - From the author: “This article does not intend to give an introduction to modern Chinese law, nor does it intend to discuss at length the content of that law. Instead, it will try to discover what we can learn from the development in the People's Republic of China with respect to the problem of law making in a global world. To this end, Part II will summarize the historic development of the law in China up to the Cultural Revolution, while Part III will bring us up to the present day, focusing on the last thirty years. Part IV will evaluate this development as it pertains to law making in a global world. Finally, Part V will briefly summarize the results.”

Michael E. Burke, Wei Cui, Paul Jones, International Legal Developments in Review: 2006 Regional & Comparative Law China, 41 International Lawyer 777 (Summer 2007) - From the authors: “The year 2006 was a very busy year in the development of the People's Republic of China's (China or PRC) legal system. In the limited space available, this Year in Review will examine ten legal developments that occurred between January 1 and December 1, 2006. On January 1, 2006, China's new Company Law and new Securities Law came into effect, fundamentally changing company and securities regulation in China. In August, the Chinese government changed the regulation affecting qualified foreign institutional investors in an attempt to attract medium and long-term

investment in China. The Chinese government released new regulations that fundamentally changed how foreign-invested mergers and acquisitions would be regulated. The government also issued revised regulations aimed at cooling off foreign investment in real estate ventures. For the first time, the National People's Congress issued a comprehensive bankruptcy code. The Chinese government also changed how personal income taxes are assessed. Further, many Chinese court cases have begun to appear online. Finally, certain aspects of China's enforcement of arbitration clauses and awards were changed.”

Silvia Hodges, Modern Marco Polos or Lemmings to the Sea? ...Law Firms and Legal Marketing in China, *Of Counsel*, July 2007, at 9 – From the author: “As the economic attraction of China's rapid growth brings an ever-rising amount of business and investment from the West, law firms feel increasingly under pressure to open an office in Mainland China, Hong Kong, or other countries in the region. The last few years have seen a wave of office openings in China, the majority by US and UK firms looking to establish a Chinese presence or to increase their existing Asian network (although a number of the largest international firms have had representative offices in China since the early or mid-90s)...”

Submitted by Kara Phillips, Collection Development Librarian/Associate Director, Seattle University Law Library. Kara Phillips can be reached at: phillips@seattleu.edu.

China Program Announcements

1. The ABA Section of International Law is a cooperating entity for the symposium, “Entrepreneurialism, Risk Assessment & Private Investment in China” hosted by the Institute of Asian-Pacific Business Law (IAPBL) at The William S. Richardson School of Law, University of Hawai‘i at Mānoa and the Asian Institute of International financial Law (AIIFL), Faculty of Law, University of Hong Kong. This symposium will be held on October 18, 2007 at the Convocation Room, University of Hong Kong, Hong Kong. This symposium will involve discussions among academics, investment bankers, venture capitalists, and accountants from Hawai‘i, Hong Kong and China on entrepreneurialism, risk assessment, and private investment in China. Topics of discussion will include perspectives of venture capitalists and lawyers, psychological perspectives, and situation investing in undervalued assets. For further information on this symposium, including registration information, please contact Elizabeth Chan, IAPBL Program Coordinator and Research Fellow at iapbl@hawaii.edu or Flora Leung, AIIFL Secretary, at fkleung@hku.hk.

2. In conjunction with the Section's International Commercial Transactions Committee, the China Committee will host a CLE teleconference, in late October, on China's franchising regulations. Information about this CLE teleconference will be distributed through the China Committee listserve.

3. In conjunction with the China Committee, the Section's International Antitrust Committee will host a brown-bag teleconference, in late October, on China's new Anti-Monopoly Law. Information about this brown-bag teleconference will be distributed through the China Committee listserv.

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About the China Committee

This committee supports ABA members with interests in China-related legal matters. Committee work, both in the U.S. and in Greater China (the Chinese mainland, Hong Kong, Taiwan and Macau), includes review, analysis, comment and information-sharing on matters of law, legal practice and related policy. Within Greater China, the China Committee works to facilitate links and understanding between US and local legal practitioners and law students and to further the development of the rule of law, including implementation by China of its WTO commitments.

About the China Law Reporter

The *China Law Reporter* is a publication of the China Committee of the Section of International Law of the American Bar Association. Editors are Qiang Bjornbak, Esq., of the Law Offices of Qiang Bjornbak in Los Angeles, California and Vice Chair of the China Committee (qbjornba@yahoo.com), Paul B. Edelberg, Esq., Counsel to Murtha Cullina LLP in its Stamford, Connecticut office (pedelberg@murthalaw.com), Cameron J. Smith, a law student at Northern Illinois University (cjsmith82@gmail.com) and Russell K.L. Leu, Esq., Of Counsel to the law firm Taft, Stettinius & Hollister LLP (leu@taftlaw.com). Contributions of articles and other items for the *China Law Reporter* are welcome. Please submit to all of the editors simultaneously. All articles are subject to editing by the editors. Guidelines for authors of articles for this Reporter can be obtained by contacting any of the editors or found at <http://www.abanet.org/dch/committee.cfm?com=IC860000>.

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