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CHINA LAW REPORTER

中国法律报道

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

In the past 12 months, numerous articles in the US media have reported on China's efforts to force Wal-Mart to accept unionization of its workers in China, culminating with the news in December that a union had in fact been formed. These articles typically presented the Wal-Mart unionization effort as the most visible part of a larger drive by the All-China Federation of Trade Unions to impose unions on foreign-invested companies under the guise of protecting workers' rights, but in reality to create added costs for the foreign-invested companies, making them less competitive with the Chinese companies.

However, the focus on this issue as it affects foreign-invested companies arguably obscures the connection of this effort to a broader effort by the Chinese Communist Party (the "Party" or the "CCP") to identify means of inserting itself into a wider range of settings in a society with an increasing proportion of its wealth held in private hands (be they Chinese or foreign). Why is the effort to expand the presence of trade unions linked to the growth and relevance of the Party? The Constitution of the All China Federation of Trade Unions states that "Chinese trade unions are mass organizations of the Chinese working class led by the Communist Party of China and formed by the workers and staff members on a voluntary basis." It goes on to observe that unions "are a bridge and bond linking the Party and the masses of the workers and staff members, an important social pillar of the state power of the country." As unions are under the leadership of the Party, whether a work unit establishes a union, a small Party unit, or both, the Party avoids seeing another diminution of its breadth and reach.

As foreign observers (journalists, representatives of foreign governments posted to China and individuals working for entities intermediating investor interests, such as law firms, accounting firms and chambers of commerce), we are naturally focused on measures as they affect "our" constituents. Whether it is due to China's complexity or the propensity to focus on how events affect certain stakeholders, the tendency to concentrate on real or perceived bias by the Chinese government against foreign companies can

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distort how foreign investors interpret events and in turn affect how they choose to respond. As such, evaluating the current drive to expand the reach of unions is perhaps representative of one of the challenges in interpreting the significance of legal developments in China generally: is a development related simply to the specific identified group targeted by the change or is there a connection or subtext that has wider significance?

In the case of the push toward unionization, this bias may have obscured observation of the Party's general effort, championed in various arenas, to retain or arguably reassert its primacy. Certainly, its political primacy is not challenged at this point, but its economic and moral relevance is. These efforts do not appear targeted against foreign-invested companies, and not limited to the realm of union organizing, but rather endeavor to reach broadly across a spectrum of economic units, with the particular aim of creating connections to and within new organizations (both economic and social; these new organizations are referred to by the term “两新”; the “two news”).

At the same time the All China Federation of Unions has been making pronouncements regarding the percentage of foreign companies in which it aims to have unions (60%). The Party has also been making efforts to encourage the formation of small Party units (党支部) in private enterprises. Under the Party's constitution, when a work unit has more than three employees who are Party members, it [the work unit] should form a small Party unit. This is not a new rule, but in the past year articles have appeared in the Chinese media urging that the Party and its members make greater efforts to expand the number of units in private enterprises generally. (The discussion is not focused on “foreign” private enterprises, but on ‘非公有制企业’ (feigongyouzhiqiye; literally, non-publicly owned enterprises.) For example, an article from Phoenix TV dated January 9 of this year (http://finance.phoenixtv.com/news/domestic/200701/0109_193_60610.shtml) notes the Central Party's Personnel Department, a powerful body within the Party structure, appointed 33 representatives to establish and train work groups (i.e., Party units) in non-publicly owned enterprises. Also noted is the fact that Wal-Mart China's headquarters in 2006 formed a small Party unit! The article states that Chinese officials have declared the formation in Wal-Mart of a small Party Unit “an historic breakthrough”. The fact that this happened in tandem with the effort to establish a union in Wal-Mart seems to buttress the argument that unionization is not the whole story.

One might respond that the fact Wal-Mart's forming a Party unit adds weight to the argument that the Chinese government (and as used here, government could be considered as aligned to the point of holding alter-ego status with the Party) is “pushing around” foreign-invested companies. That they may be, but a point to consider is that they are also “pushing” their way *into* domestic private enterprises. For example, the Beihu District of Chenzhou City, Hunan Province, announced in

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December that of the 150-plus model enterprises in the District, 68 have formed small Party units and that as a result of “innovative structuring and management methods”, an “inclusive Party-member management network has been formed so that Party members in new organizations (such as non-public enterprises) are included in the scope of Party management, the *implementation of Party guidelines, principles and policies*” (emphasis added). The article makes no reference to foreign-invested enterprises.

It appears that one might draw several conclusions from these developments: (1) the effort to expand unions is not limited merely to the cause of placing unions in FIEs alone; (2) expansion of Party units generally is also desired; (3) the Chinese government/Party will likely endeavor to continue to expand formation of unions and small Party units in non-publicly owned enterprises, be they domestic or foreign-owned; and thus, (4) the argument that the catalyst for the effort reflects bias against foreign-invested enterprises is not likely to prove fruitful. We will see what new developments 2007 bring.

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RECENT DEVELOPMENTS

Energy Conservation: China Means Business

By Charles R. McElwee

One by-product of China's rapid growth is its inefficient use of energy. Chinese companies consume a much greater amount of energy in their manufacturing operations to produce an item than the world average. In recent years the Chinese government has raised concerns that this level of consumption is inefficient and expensive, has had a damaging effect on the environment, and may potentially pose a national security threat to China as an energy importer. It has set ambitious national goals for energy efficiency improvements (20% by 2010) and assigned each province and provincial-level city an energy reduction target (ranging from 30% to 12%). The results for 2006 were not encouraging. Through the first half of the year, energy use per production unit *rose* by 0.8%, and the year-end figure reportedly missed the target of a 4% reduction by a significant margin. As might be expected, more stringent measures are being implemented to get the numbers moving in the right direction.

One of those measures impacts any entity planning a “fixed asset investment” in China in 2007. At the end of 2006 the National Development and Reform Commission (NDRC) issued a notice “*On Strengthening Energy-Conservation Evaluation and Review of Fixed-Asset Investment Projects*” (Fa Gai Tou Zi [2006] no. 2787) (“Energy Conservation Notice”).¹ This Notice requires that after January 1, 2007 all project feasibility reports or project application reports submitted to the NDRC for approval must contain a chapter on “Energy Conservation Analysis.” If they do not, the NDRC will reject the application. The Energy Conservation Notice appears to implement a widely ignored provision of the Law of the People's Republic of China on Conserving Energy (effective January 1, 1998) (“Energy Conservation Law”) which requires that “fixed asset projects” be “designed and constructed in conformity with the standards for rational use of energy and for energy conservation design” and prohibits the approval of projects which fail to conform to the applicable standards.

When considering the impact of the new Energy Conservation Notice, the preliminary question, of course, is to whom does it apply? The Notice is clear that it applies to all “fixed asset investment” projects, but “fixed asset investments” are not defined in the notice or the Energy Conservation Law. The National Bureau of Statistics (NBS) uses a rather detailed definition of the term. Basically, pursuant to the NBS definition, a fixed asset investment includes an investment of more than

¹ The English translations of the Notice and Guidelines, referenced below, were prepared by Squire, Sanders & Dempsey, LLP. They are considered accurate, but are unofficial. If you would like a copy of the translations, please contact the author at the email address provided at the end of this article.

RMB500,000 by an enterprise, institution or authority in a new construction project, expansion project, renovation project or project designed to enhance production ability or project efficiency.²

Informal inquiries to the NDRC confirmed that the NDRC intends to utilize this definition in applying the Energy Conservation Notice.

Given this expansive definition and the relatively low monetary thresholds, it should be assumed that if a project involves any construction and requires the filing of a “feasibility study” or a “project application report” with the NDRC for approval, it should include an “Energy Conservation Analysis.”

If a project is subject only to local government approvals, the application of the Energy Conservation Notice is less clear; however, inclusion of an “Energy Conservation Analysis” is advisable. The Energy Conservation Notice itself encourages local authorities to “formulate measures for energy conservation evaluation and review of local fixed-asset investment projects, by reference to the requirements of the State Development and Reform Commission for project examination and approval, and carry out energy conservation evaluation and review work by integrating existing examination and approval procedures for fixed-asset investment projects and on the basis of local and national standards for rational energy utilization and energy conservation design.” In addition, given the fact that energy conservation goals are a key national government priority, that specific reduction targets have been assigned each province and provincial-level city, and that the poor performance in 2006 was accurately reported and publicly critiqued, this is one area where the national government has clearly informed the local governments it will be watching closely. Most local governments, therefore, will probably opt for compliance with the national standard.

If compliance is required, what must the “Energy Conservation Analysis” analyze? The Notice provides that it shall be prepared “on principles of rationally utilizing energy and improving energy efficiencies by following national standards for rational energy consumption and codes for energy conservation design” and contain “analysis of the types and quantity of energy consumption . . . , analysis of the energy supply status in places where the projects are located, targeted energy consumption, and analysis of energy-conservation measures and effect.”

To aid the energy-conservation evaluation of fixed-asset investment projects, the NDRC issued a set of “Guidelines for Energy-Conservation Evaluation and Review of Fixed-Asset Investment Projects” (Fa Gai Huan Zi [2007] No. 21) on January 5, 2007 and directed them to all “development and reform commissions and economic and trade committees of all provinces, autonomous regions, municipalities, cities under independent development programs, and relevant departments of the State Council.” These guidelines collect “the existing applicable laws and regulations, industrial

² See, the National Bureau of Statistics of China official website, http://www.stats.gov.cn/tjzd/tjzjbs/t20020327_14286.htm

and technological policies, standards and design codes” to serve as a basis for the energy-saving evaluation and review of fixed-asset investment projects. They are extremely comprehensive, including approximately 155 laws, regulations and policies. The guidelines specifically address several sectors (for instance the “Building” sector), and include specific relevant guidelines for those sectors (for instance, the “Standards for Evaluation of Green Buildings” (Ref. GB/T50378-2006)). The guidelines are also meant to speed up the formulation of new energy conservation standards or the amendment of existing ones, “given that some of the standards were launched a considerable time ago.”

Even after project approval, the Energy Conservation Notice provides that the monitoring of project construction is to be “enhanced in order to ensure energy measures are implemented and energy efficiency targets are met.” If a construction-phase inspection reveals non-compliance “an order shall be issued to urge stopping the construction and making corrections within a prescribed time, while relevant entities shall be held liable therefore according to law.” This provision reflects the fact that the gap between “as designed” and “as built” projects has become a significant problem. Xinhua reported on January 19, 2007 that “[w]hile new buildings in China are designed with energy conservation measures, *barely half of them are actually built that way, according to official statistics.* The Ministry of Construction inspected over 600 construction projects around the country last year and ordered those that failed to comply with energy saving codes to make repairs so that they meet the standard.” (Emphasis added.) In 2007, expect increased project construction inspections to confirm compliance with energy conserving codes and requirements.

Moreover, additional measures encouraging energy conservation can be expected in 2007, especially after the planned amendments to the 1997 Energy Conservation Law are adopted, probably in the second half of the year. The central government recognizes the need for vast improvement in its energy efficiency and has started the process in earnest to correct the situation. It means business. If you plan construction in China in 2007, keep this fact in mind.

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Policy-Oriented vs. Market-Oriented Bankruptcy: A Tour on the PRC New Enterprise Bankruptcy Law

By Will Fung¹

Historically, the Chinese legal system has never formally recognized the concept of bankruptcy. “*Debts incurred by the father shall be assumed by the son*” has been a cultural tradition passed down from generation to generation. The first attempt to create bankruptcy laws took place in 1906 during the late Qing Dynasty. However, these laws proved too difficult to implement² and were annulled two years later. From that unimpressive beginning, bankruptcy law never really took hold in China.

For decades thereafter, the Chinese government did not have any concrete insolvency laws in place, particularly after establishment of the People’s Republic of China in 1949. The Chinese government used a system whereby State-owned enterprises would have any losses offset by subsidization by the State. This meant that bankruptcy was never an issue. If, however, the State-owned enterprises were in serious financial difficulties, either they would be closed, suspended or consolidated or the business model would be changed. Bankruptcy, it seemed, would occur without any legal recourse and nothing would be due or owing to the creditors.³

The “Old” Bankruptcy Law

The 1986 Enterprise Bankruptcy Law of the People’s Republic of China, promulgated on December 2, 1986 and effective on October 1, 1988 (the “1986 Enterprise Bankruptcy Law”, also known as the “Old” Bankruptcy Law), was the first significant attempt at bankruptcy reform in China since the Qing dynasty. However, the 1986 Enterprise Bankruptcy Law was not viewed as adequately effective in regulating bankruptcy issues and was to a general extent applicable only to State-owned enterprises. As a result, a large number of State-owned enterprises incurred significant losses, but had their debts and loans written off by State-controlled banks.

¹ The author wishes to acknowledge the contribution by his research intern in the firm, Steven Kuo, a LL.B (Hons) Graduate from the University of Westminster, UK.

² Li Shuguang, Bankruptcy Law in China: Lessons of the Past Twelve Years, Harvard Asia Quarterly (9/4/06).

³ *Ibid.*

There were additional problems with the 1986 Enterprise Bankruptcy Law. It allowed significant discretion by the administrative authorities in the bankruptcy process. Under that law, State-owned enterprises required government approval before bankruptcy could occur. This was because employees and existing assets needed to be resettled before bankruptcy would be considered.⁴ As a result, only “leftovers” were paid to creditors, which meant creditors had few rights and remedies in the bankruptcy process. The issue was further plagued by the long tradition of “identity” and “instability”, as State employees or the so-called government servants (to the outside world) were guaranteed an “*iron rice bowl*” or life-time employment.⁵

Other insolvency laws were also enacted in China over this period supplementing the 1986 Enterprise Bankruptcy Law. In April 1991 (at the fourth Session of the Seventh National People’s Congress (“NPC”)), the NPC issued the amended 19th Chapter of the Code of Civil Procedure (the “Civil Procedure Law”), which enacted a procedure for bankruptcy repayment of enterprises as legal persons. Articles 199-206 discussed bankruptcy for non-state-owned enterprises⁶, specified repayment procedures (Art. 199) and provided a three-month period for creditors to file claims in the People’s Courts (Art. 200). Art. 204 established priorities for repayments: (1) wages of employees and labour insurances, (2) unpaid taxes, and (3) finally, bankruptcy claims.

Despite the grant of these legal rights to creditors in the Civil Procedure Law, heavy intervention from government departments impeded the effectiveness of the courts, and creditors rights were not upheld in equity. Even though the law provided for a 3-month time period for claims, a claim would be deemed abandoned if the creditor was unable to notify the courts in time.⁷

There were also issues of interpretation. For example in the Civil Procedure Law the instrument used to identify rights between parties is the use of “judgment” or “*panjue*” and of “ruling” or “*caiding*”. These methods are often confused with bankruptcy law and deprive parties the right to challenge evidence and appeal.

Other problems under that regime persisted. In some cases assets were distributed to local creditors but not creditors from other jurisdictions.⁸ In other instances major creditors such as commercial banks had a significant influence in court proceedings, while smaller trade creditors were ignored or not even notified at all. Some judges lacked capacity and experience, especially in smaller, undeveloped cities, in comparison to bigger and more advanced cities, where judges had more

⁴ Lan Xinzhen, Outdated Bankruptcy law Upgraded, China Submits New Drafts of Bankruptcy Law to Facilitate Move Toward a Full Market Economy, The Beijing Review.

⁵ Li Shuguang, *op. cit.*, p. 2.

⁶ Civil Procedure Law of the People’s Republic of China, promulgated April 9, 1991 and effective immediately (adopted at the 4th Session of the 7th National People’s Congress) (<http://www.lawinfochina.com>).

⁷ Wang Xinxin, On the Implementation and Perfection of China’s Bankruptcy Law.

⁸ Professor Wang Weiguo (Dean, Department of Economics Law, China University of Politics and Law, Beijing, China), Strengthening Judicial Expertise in Bankruptcy Proceedings in China – Judges’ Predicaments in Bankruptcy Proceedings: Hardship in Keeping Equitable Treatment to Creditors, Paper delivered in Forum for Asian Insolvency Reform, Bali – Indonesia, February 7-8, 2001.

experience in handling bankruptcy proceedings. The miscarriage of justice from even one incorrect judgment clearly damages the rule of law. However the problem cannot be solely based on incorrect judgments from the courts. Implementation of the poorly drafted old bankruptcy legislation was a major contributory factor for its failure.⁹

In *Liquidation Group of Wenzhou Trust Company v. Xinfu Industrial Co. Ltd.* (3/21/00), the Higher People's Court of Hubei Province, and on appeal the Supreme People's Court (7/18/02), demonstrated a need to protect creditors' rights. However, a year later, in 2003, the Higher People's Court of Guangdong Province, construed the 1986 Enterprise Bankruptcy Law strictly and placed the creditors' group as the lowest priority, resulting in minimal recovery for the creditors. This inconsistent approach adopted by the courts at different levels demonstrated the need for further bankruptcy reform.

Statistics

From 1989 until 1994 only a few bankruptcy cases were filed. In 1989 the courts accepted 98 cases; in 1990, 32 cases; in 1991, 117 cases; and in 1992, 428 cases.¹⁰

In 1994 the government attempted to draft a new national bankruptcy law, despite concerns over unemployment. The first draft was completed in 1995. This was then redrafted in 1998 and numerous times subsequently, resulting in the draft of 2004¹¹, which formed the basis of the newly enacted Enterprise Bankruptcy Law discussed below.

Between 1994 and 2004, 3,484 state companies went bankrupt, with US\$28.5 billion in repayment debts, written-off by State-controlled banks. 1,828 State-owned enterprises still await approval for declaration of insolvency, amounting to US\$14.7 billion.¹²

From a slow start in 1988, the number of bankruptcy cases steadily increased. More than 16,000 enterprises declared bankruptcy from 1988 to 2004. In 1994 only 395 of the total 1,624 bankrupt enterprises were State-owned. In 1997, approximately 3,060 of the 5,396 enterprises filing for bankruptcy protection were State-owned, while the remainder were private and Sino-foreign joint enterprises, indicating a mix of enterprises filing for bankruptcy.¹³

⁹ Wang Xinxin, *op. cit.*, Defects in Bankruptcy Law: Problems with the Judicial Interpretation by The People's Supreme Court.

¹⁰ Charles Booth, Drafting Bankruptcy Laws in Socialist Market Economies: Recent Developments In China and Vietnam, p. 95

¹¹ *Ibid.*, p. 96.

¹² Li Shi, Push For Market-Oriented Bankruptcy, China Daily (5/23/05).

¹³ Li Shuguang, *op. cit.*, p. 2.

The 2006 Enterprise Bankruptcy Law

On August 27, 2006, with the adoption of a new Enterprise Bankruptcy Law in China, the attempt by the government to carefully shift bankruptcy towards a more market-oriented policy seems promising. The new law, which will take effect on June 1, 2007, has an expanded scope and includes legal corporate persons, encompassing not only State-owned enterprises, but also private and public companies, whether foreign or Chinese, and to a certain extent is applicable to financial institutions as well.

The new law also seeks to protect creditors' rights as well as workers' rights. The legislation not only allows creditors to take actions against debtors and companies that are unwilling to file for bankruptcy, it also limits State intervention in bankruptcies of State-owned companies. Another improvement is the ability of companies or enterprises in financial difficulty to reorganize, restructure and rectify their financial problems prior to filing for bankruptcy (Art. 73).

Previously, bankruptcy administrators were comprised of State-appointed personnel, leading to government interference in the bankruptcy process. The new law gives creditors the ability to participate in the selection of bankruptcy administrators. For instance, the role of bankruptcy administrator may be assumed by a liquidation group comprised of the relevant departments and organs or by intermediary agencies, and creditors may nominate a law firm, accounting firm, manager or receiver in accordance with law (Art. 24).

The 2006 Enterprise Bankruptcy Law will certainly boost investor confidence, particularly for foreign investors.

Conclusion

This article examines some of the constructive changes made by the 2006 Enterprise Bankruptcy Law. The general perception of the new law is positive and welcoming. The relevant authorities are more than open to feedback to further enhance and improve the 2006 Enterprise Bankruptcy Law.

The true test will come upon pronouncement of a series of implementation guidelines and bylaws under the new law. It is everyone's hope that these pronouncements do not render the new law a "toothless tiger".

Only time will tell. Experts and experienced professionals in handling liquidation processes must be engaged. The fee arrangement by creditors in appointing a bankruptcy administrator, private manager or receiver must be made independently and transparently, without interference by the courts except for verification of the qualification of such appointment. To discourage non-compliance by debtors with the instructions of a bankruptcy administrator, effective judicial recourse must be available in an expedited manner. Lastly, this author respectfully submits that the creation of a specialized court, or division within the People's Courts, to deal specifically with Enterprise Bankruptcy cases would vastly enhance the competency and transparency of the bankruptcy process.

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CHINA BRIEFS

Summary of Selected New Laws and Regulations From June 1, 2006 to July 10, 2006

Contributed by Jun He Law Firm (君合律师事务所)

General Office of the Ministry of Commerce Notice Concerning Strengthening the Filing of Confirmation Letters Regarding Domestic-Funded and Foreign-Funded Projects Encouraged by the State

In order to further regulate tax exemption procedures for imported equipment for foreign-invested enterprises, to identify the specific requirements for foreign-invested enterprises wishing to obtain a Confirmation Letter Regarding Domestic-funded and Foreign-funded Projects Encouraged by the State (the “Confirmation Letter”), as well as a Certificate for the Importation and Upgrade of Equipment, Technology, Fittings and Spare Parts by Foreign-invested Enterprises (the “Importation Certificate”), and to meet the emerging needs for e-government affairs, the General Office of the Ministry of Commerce promulgated the Notice Concerning Strengthening the Filing of Confirmation Letters Regarding Domestic-funded and Foreign-funded Projects Encouraged by the State (the “Notice”), which stipulates that effective July 1, 2006, the competent commerce authorities at the provincial level shall adopt a system of network filing when handling applications for “Confirmation Letters” and “Importation Certificates.”

I. Main Provisions of the Notice

1. The “Confirmation Letter” and the “Importation Certificate” shall be filled out based on the Ministry of Commerce’s Management System for Foreign Investment Examination and Approval.
2. The competent commerce authority at the provincial level shall, after filling out the “Confirmation Letter” and the “Importation Certificate,” submit them to the Ministry of Commerce for filing through its network.
3. The filed “Confirmation Letter” and “Importation Certificate” shall be printed and issued by the competent commerce authority at the provincial level.
4. The Management System for Foreign Investment Examination and Approval shall be updated promptly in accordance with this Notice.
5. The competent commerce authorities at the provincial level shall not use their own discretion to enlarge the scope of items encouraged by the State, and shall not issue the “Confirmation Letter” and “Importation Certificate” in violation of relevant provisions.
6. The handling of “Confirmation Letters” and “Importation Certificates” with an amount below the prescribed limit shall be subject to more stringent supervision and direction. A regular report shall be submitted to the General Administration on Customs, which shall contain information on the filing status of the “Confirmation Letters” and “Importation Certificates,” so that the administration may check the data.

II. Comments

The Notice is an improvement to the provisions concerning the filing of “Confirmation Letters” under the Supplementary Notice on Issues Related to the Implementation of the State Council’s Adjustment of Tax Policies on Imported Equipment (Wai Jing Mao Zi Fa [1998] No. 286), promulgated by the original Ministry of Foreign Trade and Economic Cooperation. When trying to promote work efficiency, the Ministry of Commerce does not forget to exert strict supervision over the handling of “Confirmation Letters” and “Importation Certificates” with an amount below the prescribed limit. The Notice also emphasizes that the Confirmation Letter or the Importation Certificate shall not be issued for enterprises that do not meet the relevant State environmental protection requirements, which indicates further progress in the regulation of tax exemption practices for equipment imported by foreign-invested enterprises.

Administrative Measures for Insurance Companies Establishing Overseas Insurance Institutions

In order to strengthen the administration of insurance companies establishing overseas insurance institutions, to prevent risks and protect the interests of the insured, the CIRC’s chairman’s executive meeting discussed and promulgated the Administrative Measures for Insurance Companies Establishing Overseas Insurance Institutions (the “Measures”) on March 13, 2006, which became effective as of September 1, 2006.

I. Main Contents of the Measures

The Measures shall apply to the establishment of overseas branches (including representative offices and other non-operational institutions) by commercial insurance companies that are established upon CIRC approval, and also the establishment or acquisition of overseas insurance companies and insurance intermediaries (i.e., insurance agencies, brokers and assessment institutions). The Measures set forth the specific conditions and a list of application materials required for the establishment and acquisition of the above-mentioned overseas insurance institutions. It also requests that a written report be submitted to CIRC upon the completion of such establishment or acquisition, and a well-developed risk management system be set up for the overseas insurance institutions. In addition, CIRC also stipulates that the overseas insurance institutions shall report in writing any material investment and business adjustments occurred therein; and where an insurance company transfers or holds additional shares in the overseas insurance institutions established thereby, or where they enter into material connected transactions, CIRC approval shall be obtained.

II. Comments

As stated by Mr. Wu Dingfu, CIRC’s chairman, at present China’s insurance sector has ushered in a new era of all-around opening up, and during the “11th five-year planning” period, the insurance operation will gradually become an international operation. The Measures, together with the Administrative Measures for Non-Insurance Institutions

Investing in Overseas Insurance Companies, promulgated on the same date, are clear testimony of its intention to “support the establishment of overseas business institutions by qualified domestic insurance companies, providing insurance services for the ‘going global’ strategy... and enhancing the competitive edge and room for development of China’s insurance sector under the circumstances of all-around opening up,” as mentioned in the Several Opinions of the State Council on the Reform and Development of the Insurance Sector. The promulgation of a preliminarily feasible regulation will, from another perspective, promote the cross-border development of China’s insurance sector.

Administrative Measures for Non-insurance Institutions Investing in Overseas Insurance Companies

In order to promote the healthy development of the insurance sector, to strengthen the regulation of investments made by non-insurance institutions in overseas insurance enterprises, the CIRC’s chairman’s executive meeting discussed and promulgated the Administrative Measures for Non-insurance Institutions Investing in Overseas Insurance Companies (the “Measures”) on March 13, 2006, which became effective as of September 1, 2006.

I. Main Contents of the Measures

The Measures shall apply to the establishment or acquisition of insurance companies, insurance agencies, insurance brokers and insurance assessment institutions outside China by domestic enterprises (other than insurance companies and insurance assets management companies). The Measures set forth certain conditions and a list of application materials required for the establishment and acquisition of the above-mentioned overseas insurance enterprises, and additionally request a written report to be submitted to CIRC upon the completion of such establishment or acquisition. In addition, CIRC also stipulates that the overseas insurance enterprises shall report in writing any material investment and business adjustments occurred therein; where an insurance company transfers the shares it holds in the overseas insurance enterprises, it shall first obtain CIRC’s approval.

II. Comments

Similar to the Administrative Measures for Insurance Companies Establishing Overseas Insurance Institutions, promulgated by CIRC on the same date, the Measures encourage and provide certain regulations for domestic enterprises to develop insurance businesses overseas. However, judging from the details contained in the Measures, we found that the conditions set forth regarding overseas investment by non-insurance institutions are relatively loose. An institution is allowed to invest in overseas insurance enterprises so long as it has a lawful source of foreign exchange, good standing and a favorable financial status. Additionally, the Measures do not contain any provisions concerning internal risk management systems for overseas insurance companies and any transactions taking place between domestic investors and overseas insurance enterprises.

Administrative Measures for Representative Offices in China Established by Overseas Insurance Institutions

In order to strengthen the administration of representative offices of foreign insurance institutions in China and to meet the needs of opening up the Chinese insurance market, the CIRC's chairman's executive meeting discussed and promulgated the Administrative Measures for Representative Offices in China Established by Overseas Insurance Institutions (the "Measures") on June 12, 2006, which became effective as of August 1, 2006.

I. Main Contents of the Measures

The Measures shall apply to representative offices and general representative offices established in China by insurance companies, reinsurance companies, insurance intermediaries, insurance associations and other insurance organizations registered outside China's territory, to engage in liaison, market research and other non-business activities. The Measures set forth the specific requirements, the list of documents to be submitted, and the time limit for issuance of approval if the above-mentioned foreign insurance institutions apply for the establishment of representative offices. Additionally, the Measures contain detailed provisions on the naming and personnel qualifications of such representative offices, as well as circumstances that require written reports to CIRC. The Measures also clearly state that CIRC has the right to request that the representative offices established by foreign insurance institutions in China provide explanation on issues subject to supervision and regulation, and also has the right to perform routine and annual inspection of such representative offices.

II. Comments

China's insurance market will be fully opened up in November 2006. At that point, the new Measures will replace the Measures published January 15, 2004, which quietly raises the threshold for foreign insurance institutions to establish representative offices in China. In order to ensure the high quality of foreign insurance companies investing in China, the new Measures contain a few market access provisions, such as "if the foreign insurance institution operates an insurance business, it shall have operated such insurance business for more than 20 years; if it does not operate an insurance business, it shall have been established for more than 20 years." CIRC also emphasizes for the first time that the foreign insurance institutions applying for establishing representative offices must submit a study report on the feasibility and necessity of such establishment. Additionally, it has set higher requirements for chief representatives and working staff and the withdrawal mechanism for such representative offices is also proposed for the first time. It is widely believed that the new Measures will better regulate the entry of foreign insurance companies into China's insurance market.

Notice Concerning Strengthening the Administration of Foreign Investment in Value-Added Telecommunications Services

The Notice Concerning Strengthening the Administration of Foreign Investment in Value-Added Telecommunications Services (hereinafter referred to as the “Notice”) was promulgated by the Ministry of Information Industry and became effective on July 13, 2006.

Firstly, the Notice provides some basic principles to be observed by foreign investors when investing in telecom businesses in China. The Notice specifies that when a foreign investor intends to invest in telecom businesses, it shall establish a foreign-invested enterprise and apply for a Telecommunications Business Operation License in accordance with the Regulations regarding the Administration of Foreign Investment in Telecommunications Enterprises. Domestic telecom enterprises shall not “lease or lend in disguised form, transfer or sell any telecommunications business operation license” by whatsoever means to a foreign investor. Nor shall they provide “resources, premises, facilities and other conditions” to a foreign investor to conduct a telecom business illegally.

Secondly, the Notice contains some restrictive provisions regarding the ownership of major assets needed for telecom operations. Internet domain names and registered trademarks used for operating a telecom business shall be held by the operators who have obtained the required approvals to operate a telecom business. The premises, servers and other facilities needed shall be set up within the scope prescribed in the operation license and shall conform to the telecom businesses in which the operator is approved to engage. In addition, the operators of value-added telecom services shall develop relevant safeguard measures for network and information security according to applicable laws, including management rules for information security, emergency processes for network and information security, and information security responsibilities.

The Notice further requires that companies that have obtained an operation license for value-added telecom services shall perform self-examinations and self-correction as set forth by telecom administration bureaus at the provincial level. If a company fails to meet the Notice requirements, the telecom administration bureau shall order such company to make corrections within a prescribed time limit. If the company fails to make such corrections within the prescribed time limit, the bureau may revoke its telecom business operation license. The results of any supervision and inspections performed by local telecom authorities shall be submitted to the Ministry of Information Industry before November 1, 2006.

Comments:

The Regulations regarding the Administration of Foreign Investment in Telecommunications Enterprises (the “Regulations”), which became effective in January 2002, provide to foreign investors how to invest in and operate telecom businesses in China. However, since the Regulations requirements for foreign-invested telecom

enterprises are very strict, some foreign investors may prefer other indirect profit-making methods rather than establishing a foreign-invested telecom enterprise. For example, a foreign investor has been able to gain telecom business earnings from enterprises that are approved to operate a telecom business, mainly through licensing of trademarks and domain names requiring royalty payments. However, as of the implementation of the Notice, such a profit-making method may need to be reconsidered and changed by investors. Due to the absence of detailed operating rules, it is unclear as to the extent of effects of the existing rules on the investments by foreign investors in the Chinese telecom market. For instance, the Notice does not provide any explanation of the concept and meaning of prohibited conduct, such as “lease or lend in disguised form.” In addition, except for cooperation in fields such as domain names and trademarks, which are clearly set out in the Notice, it is unclear as to whether other forms of cooperation between foreign investors and telecom enterprises are prohibited. However, the promulgation of the Notice has indicated an earnest effort to regulate foreign investment in the telecom market. For those foreign investors who are interested in the Chinese telecom market, if they do not obtain operation licenses in accordance with the Regulations, but earn profits by way of collecting service fees or otherwise, it is suggested that they re-evaluate the legality of and the policy risks associated with such business mode.

Ministry of Culture Notice Concerning a Crackdown on Illegally Imported Audio and Video Products

The Notice Concerning a Crackdown on Illegally Imported Audio and Video Products (hereinafter referred to as the “Notice”) was promulgated by the Ministry of Culture on July 14, 2006 for the purpose of reinforcing a crackdown on illegally imported audio and video products and safeguarding the audio-video products market. The Notice confirms the Ministry of Culture as the approval authority for the import of audio and video products. Import of audio and video products from overseas, including imports from Hong Kong, Macao and Taiwan, shall be subject to the approval of the Ministry of Culture. Audio and video products that are imported without the approval of the Ministry of Culture shall be deemed as illegal audio-video products.

The Notice mainly elaborates on an intensified action to be launched by all local authorities in charge of culture administration for the crackdown on the illegal import of audio and video products. According to the Notice, such intensified action will last from July 20, 2006 to the end of 2006. The first round of such action will take place between July 20, 2006 to August 20, 2006, when all the publishers and distributors engaged in audio and video products import shall perform a self-examination and self-correction, and submit all the illegally imported audio and video products to the competent provincial authority of culture administration for destruction. The second round will take place from August 20 to the end of 2006, when the culture administrative authority will make routine inspections of publishers and distributors of audio and video products, and impose penalties on those illegally imported audio-video products. The penalties include ceasing to accept import applications, suspending business for internal rectification, and even revoking operation licenses for audio and video products, etc. In addition, the Notice emphasizes supervision through information disclosure. The catalogue of audio and video

products that have been approved for import will be printed and distributed by the Ministry of Culture and published on www.ccm.gov.cn (the website of the Chinese Culture Market).

Comments:

The Notice is promulgated against a background where some publishers and distributors unlawfully publish and distribute imported audio and video products in the form of burned copies and some illegally imported audio and video products containing contents prohibited by the State. As part of the “100-day Anti-piracy Campaign” launched by the Publicity Department of the CPC Central Committee and the Ministry of Culture, as well as the “Intensified Culture Market Enforcement Quarter” launched by the Ministry of Culture, the intensified action called for by the Notice is one of the most important initiatives taken by the Ministry of Culture to fight against piracy and protect intellectual property rights. It will levy a more powerful blow to the illegal import of audio and video products.

List of Laws and Regulations From July 1, 2006 to August 10, 2006

Contributed by Jun He Law Firm (君合律师事务所)

I. Investment/Corporate

1. Ministry of Commerce Regulations Regarding the Merger and Acquisition of Domestic Enterprises by Foreign Investors (revised in 2006)(2006-08-08)
2. State Council Notice Concerning Printing and Distribution of Detailed Rules Regarding the Implementation of the Interim Measures for the Supervision and Administration of Investments by Central Enterprises (2006-07-18)
3. State Administration for Taxation and the National Development and Reform Commission Notice Concerning Printing and Distribution of the Trial Measures for the Administration of Tax Refunds for the Purchase of Home-Made Equipment for Foreign-Invested Projects (2006-07-24)
4. Administrative Measures Regarding Foreign-Funded Startup Business (Draft for Solicitation of Opinions) (2006-07-14)
5. Ministry of Information Industry Notice Concerning Strengthening the Administration of Foreign Investment in Value-Added Telecommunications Services (2006-07-13)
6. Ministry of Construction, Ministry of Commerce, National Development and Reform Commission, People’s Bank of China, and State Administration of Industry and Commerce Opinions Regarding Regulation of Foreign Investment Access to the Real-Estate Market and Administration of Operations of the Same (2006-07-11)
7. General Office of the Ministry of Commerce Notice Concerning Strengthening the Filing of Confirmation Letters Regarding Domestic-funded and Foreign-funded Projects Encouraged by the State

II. (International) Trade/Anti-Dumping

1. Ministry of Commerce Notice Concerning Issues Related to Reinforcement of the

- Administration of Direct-Sales Activities by Direct-Sales Companies (2006-08-08)
2. Regulations Regarding Response to Antidumping Actions Against Exports (2006-07-14)
 3. State Administration of Taxation Notice Concerning Several Issues Related to Tax Refunds (Exemptions) for Exports (2006-07-12)
 4. State Administration of Taxation Notice Concerning Distribution of the 2006 Export Tax Refund Rates Library (20060615 B Version) (2006-07-11)
 5. State Administration of Taxation Reply in Respect to Relevant Issues Concerning Export Tax Refunds for Export Enterprises in Bonded Zones (2006-07-06)

III. Mergers & Acquisitions

1. Ministry of Commerce Regulations Concerning Issues Relating to the Merger and Acquisition of Domestic Enterprises by Foreign Investors (revised in 2006)(2006-08-08)
2. Administrative Measures for the Acquisition of Listed Companies (2006) (2006-07-31)

IV. Finance/Banking

1. Administrative Measures for Insurance Companies Establishing Overseas Insurance Institutions (2006-07-31)
2. Administrative Measures for Non-Insurance Institutions Investing in Overseas Insurance Companies (2006-07-31)
3. China Insurance Regulatory Commission Interpretation of Issues Regarding the Application of Commercial Banks for Concurrent-Business Insurance Agencies Qualifications (2006-07-27)
4. Administrative Regulations Concerning the Qualifications of Insurance Company Directors and Senior Management Personnel (2006-07-12)
5. Administrative Measures for Representative Offices in China Established by Overseas Insurance Institutions (2006) (2006-07-12)
6. China Insurance Regulatory Commission Announcement Concerning the Market Withdrawal and Transformation Status of Professional Insurance Brokers (2006-07-10)
7. People's Bank of China Notice Concerning Several Matters Related to the Access of Currency Brokerage Companies to the Inter-Bank Market (2006-07-06)
8. Measures in respect to the Examination and Approval of Qualifications of Government Bond Underwriting Syndicate Members (2006-07-04)
9. Administrative Measures Regarding Loans and Grants for International Finance Organizations and Foreign Governments (2006-07-03)

V. Securities/Capital Markets

1. Administrative Measures for the Acquisition of Listed Companies (2006) (2006-07-31)
2. Notice from China Securities Depository and Clearing Corporation Limited Concerning the Promulgation of Rules Regarding Securities Deposition with China Securities Depository and Clearing Corporation (2006-07-25)
3. Administrative Measures for Securities Companies Risk Control Indicators (2006-07-20)
4. China Securities Regulatory Commission Notice Concerning Several Issues Related to Capital Investment in Non-Publicly Offered Shares and Other Securities with Restricted Negotiability (2006-07-20)

5. China Securities Regulatory Commission Notice Concerning Several Issues Related to Payment of the Securities Investor Protection Fund (2006-07-12)
6. Notice from China Securities Depository and Clearing Corporation Limited, the Shanghai Stock Exchange, and the Shenzhen Stock Exchange Concerning Transference of the Registration of Cross-Market Allotted Shares between the Shanghai Stock Exchange and the Shenzhen Stock Exchange (2006-07-05)

VI. Intellectual Property/Hi-Tech

1. Ministry of Culture Notice Concerning a Crackdown on Illegally Imported Audio & Video Products (2006-07-14)
2. General Office of the Ministry of Commerce Notice Concerning Improvement of Technology Export Work (2006-07-13)
3. Ministry of Information Industry Notice Concerning Strengthening the Administration of Foreign Investment in Value-Added Telecommunications Services (2006-07-13)

VII. Entertainment/Sports/Media

1. State Administration of Radio, Film and Television Notice Concerning Printing and Distribution of Provisional Regulations Regarding the Administration System of Registration and Publication of Homemade Cartoons (2006-07-11)

VIII. Mining/Natural Resources/Environmental Protection

1. Supreme People's Court Interpretation Concerning Certain Issues Related to the Specific Application of Laws in the Hearing of Criminal Cases Regarding Environmental Pollution (2006-07-21)
2. China State Environmental Protection Administration Notice Concerning Reinforcement of the Examination and Approval of Newly Started Project by Environmental Protection Authorities to Strictly Control Such Projects (2006-07-06)

IX. Real Estate/Construction

1. State Administration of Taxation Notice Concerning the Collection of the Individual Income Taxes on Personal House Transfers (2006-07-18)
2. Opinions from the Ministry of Construction, the Ministry of Commerce, and the National Development and Reform Commission Concerning Regulation of Foreign Investment Access to the Real Estate Market and the Administration of the Operations of the Same (2006-07-11)
3. Notice from the Ministry of Construction, the National Development and Reform Commission, and the State Administration for Commerce and Industry Concerning Further Regulation and Standardization of the Order of Real Estate Transactions (2006-07-06)
4. Several Opinions from the Ministry of Construction Concerning the Implementation of Requirements for the Structure and Proportion of Newly-Built Houses (2006-07-06)
5. Notice from the PRC Ministry of Finance, the Ministry of Construction, and the Ministry of Land and Resources Concerning Thoroughly Ensuring Security Funds for Urban Low-Rent Houses (2006-07-05)

X. Litigation/ Arbitration

1. Supreme People's Court Reply Concerning Issues Related to Time Limits for the Seizing, Confiscation, and Freezing of Properties in Civil Enforcement Actions (2006-07-11)

XI. Medicine/Food/Sanitation/Authentication/Security

1. Urgent Notice from the Ministry of Communications Concerning Reinforcement of Work Safety Regulations for Communication Construction Projects (2006-07-14)
2. State Food and Drug Administration Notice Concerning Printing and Distribution of Work Plans for National Special Rectification of Medical Equipment (2006-07-10)
3. Administrative Measures for Hospital Infection Control (2006-07-06)
4. Measures for the Dispersal of Information Regarding Severe and Particularly Severe Work Safety Accidents and Severe Near Accidents (for trial implementation) (2006-07-02)
5. Ministry of Health Notice Concerning Printing and Distribution of Administrative Measures for Health Standards (2006-07)

XII. Miscellaneous

1. Regulations for the Examination of Law Enforcement Statistics (revised in 2006) (2006-07-12)
2. Provisional Measures for the Administration of Foreign Aid Materials Projects (2006-07-07)
3. Regulations of the Supervision and Administration of Cotton Quality (revised in 2006) (2006-07-04)
4. State Administration for Industry and Commerce Notice Concerning the Publication of the List of Brand Automobiles Sales Enterprises (2006-07-03)
5. State Tobacco Monopoly Administration Notice Concerning the Adoption of the 2006 Transport Permit for Tobacco Monopoly Products. (2006-07-03)

ITEMS OF INTEREST

Selected English Language Books on Chinese Law

Implementation of the WTO Agreements in China by Zhang Xin, Simmonds & Hill Publishing, ISBN: 1898029792

http://www.wildy.co.uk/isbn/1898029792/implementation_of_the_wto_agreements_in_.html

From the Publisher: “This book researches the legal institutions, mechanisms and processes for the WTO implementation in China during more than three years of accession (up to 1 May 2005) and proposes legal solutions to improve the implementation status.”

International Economic Law and China in Its Economic Transition edited by Chen Huiping, William S. Hein & Co., ISBN: 0837731100

<http://www.wshein.com/Catalog/Product.aspx?sku=6234>

From the Publisher: “The fifteen articles contained in this volume are based on presentations made at an international economic law conference held at Xiamen University in 2004. Officials, scholars and practitioners from China and abroad were called upon to discuss and offer advice on international economic law matters as they relate to the growing influence of China’s economic impact on the world.”

International Securities Markets: Insider Trading in China by Hui Huang, Kluwer Law International, ISBN: 9041125574

<http://www.kluwerlaw.com/KLI/Catalogue/titleinfo.htm?ProdID=9041125574>

From the Publisher: “This book offers the first detailed analysis of China’s insider trading law, explaining what constitutes insider trading in China and what the consequences of unlawful insider trading might be there. More importantly, it suggests ways in which the law might more effectively prevent the occurrence of insider trading in the first place.”

Law on Product Quality Control and Product Liability in China by Li Jiansheng, William S. Hein & Co., ISBN: 083773407X

<http://www.wshein.com/Catalog/Product.aspx?sku=4305>

From the Publisher: “This is the first work written in English that introduces and discusses the laws, regulations and cases of China concerning product quality control and product liability.”

The Legal Culture and System of Taiwan by Chang-fa Lo, Kluwer Law International, ISBN: 9041125256

<http://www.kluwerlaw.com/KLI/Catalogue/titleinfo.htm?ProdID=9041125256>

From the Publisher: “This convenient guide, written by a scholar-practitioner who is both Dean of Law at the National Taiwan University and a panelist in the World Trade Organization’s Dispute Settlement Body, is an ideal introduction and practical handbook for anyone involved in a transaction that raises issues in Taiwanese law. After detailed summaries of Taiwan’s system of government, its court system, sources of law, and administrative law and procedure, the author covers practice and procedure in such fields of legal activity as the following: contracts; torts; consumer protection; property rights; family law; law of succession; alternative dispute resolution; intellectual property law; trade; government procurement; labor law; and criminal law and procedure.”

Selected English Language Legal Articles

Emerging Legal Issues in China (symposium), 3 Loyola University of Chicago International Law Review 149 (Spring/Summer 2006). Contains the following articles:

- *Remarks: Emerging Legal Issues In China* by Ying White p. 149.
- *A Practitioner’s View of Chinese Legal Developments Keynote Address* by William Spence p. 157.
- *Coming Out of Denial: An Analysis of Aids Law and Policy in China (1987 – 2006)* by John Balzano and Jia Ping p. 187.
- *Competition in China’s Securities Market: Reform of Current Regulatory System* by Chenxia Shi p. 213.
- *The Rape and Return of China’s Cultural Property: How Can Bilateral Agreements Stem the Bleeding of China’s Cultural Heritage in a Flawed System?* By Jason Taylor p. 233.
- *A Rose by Any Other Name: Protecting Geographical Indications for Wines and Spirits in China* by Mark Calaguas p. 257.

Melanie Ries & Bryant Woo, *International Arbitration in Japan and China*, 61 Dispute Resolution Journal 63 (November 2006 – January 2007): Discusses the China International Economic and Trade Arbitration Commission’s (CIETAC) amendments to its arbitration rules effective May 2005.

Annie Y.S. Li & Simon S.M. Ho, *Legislative Comment: Rebuilding Market Confidence: China’s Revised Company Law*, 27(10) Company Lawyer 311 (2006): Analyzes amendments to China’s Company law in terms of capital and shareholders.

Yuwa Wei, *Volatility of China’s Securities Markets and Corporate Governance*, 29 Suffolk Transnational Law Review 207 (Summer 2006): Discusses “the interaction between corporate governance and market volatility. It assesses the impact of corporate governance on the volatility of China’s securities market, and examines whether China can accelerate the modernization of governance practice through the securities market.” (From the author).

Online Resources

Working Papers – With the ease of web publishing, many legal scholars have opted to publish working papers online to stimulate discussion and feedback before they are officially published in print. There are two main websites for legal working papers: Bepress (www.bepress.com) and SSRN's Legal Scholarship Network (www.ssrn.com). On both sites, you can browse working papers by subject area and by institution, do keyword searches, view the most frequently downloaded papers and sign up for working paper notifications.

Both websites contain working papers on China. SSRN's Legal Scholarship Network also publishes Asian Law Abstracts, a notification service of new working papers on Asian law. Asian Law Abstracts is edited by Professors Donald Clarke at George Washington University Law School and Veronica Taylor at the University of Washington Law School: <http://www.ssrn.com/link/asian-law.html>.

Bepress has recently launched the Asian Journal of Comparative Law. This online journal is an initiative of the Asian Law Institute, an association of 13 leading law schools in Asia and was created by the National University of Singapore Law School. It is available by subscription: <http://www.bepress.com/asjcl>.

Submitted by Kara Phillips, Collection Development Librarian/ Associate Director, Seattle University Law Library. Kara Phillips can be reached at 206-398-4188 or phillips@seattleu.edu.

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