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Relevant Information for the Primerus Asia Pacific Region

LETTER FROM THE CHAIR

Written by: Caroline Berube
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Written by: Caroline Berube – HJM Asia Law & Co LLC (Singapore & Guangzhou, China)

I welcome all of you to this year's first (and long awaited) Primerus APAC newsletter of 2024.

2024 appears to be a busy year for Primerus APAC firms as we see a rebound to Asia economies and international/global commerce worldwide.

I therefore wish to extend a special thanks to all firms/individuals who have agreed to kindly contribute articles/updates to this year's newsletter which I am sure members (and others) will find of extreme interest particularly due to certain 'hot topics' and recent/upcoming substantial developments in the law.

Without further ado, I wish to provide a brief summary of the articles, new members and firm updates for this edition of the Primerus APAC newsletter of 2024:

Australia

1. **Is your business ready for a new era of privacy regulation: Insights from the "Government response to the Privacy Act Review Report",** by Yue Lucy Han (Associate) and Selwyn Black (Partner) of Carroll & O'Dea Lawyers, explore the evolution of Australia's privacy laws and comment on the Australian Government's recent review of the Australia Privacy Act 1988.

China

2. **China's New Company Law: What you Need to Know,** by Caroline Berube (Managing Partner) and Matthew Boyd (Associate) of HJM Asia Law & Co LLC outline key amendments to China's Company Law which will come into force for foreign-invested and local China companies from July 1st, 2024.

3. **Introduction of Priority Restoration under the Implementing Rules of Patent Law (2023 Amendment),** by Guohua Tang, Patent Practitioner at Watson & Band, outlines recent changes (since January 20th, 2024) to China's recognising restoration of priority regarding international patent applications.

4. **CIETAC's New Arbitration Rules,** by Caroline Berube (Managing Partner) and Ralf Ho (Legal Counsel) of HJM Asia Law & Co LLC provides an analysis of CIETAC's recently amended arbitration rules (since January 1st, 2024) and the impact this may have on both procedural and substantive elements of arbitration in China.

5. **Patent Examination Practice for Novelty in the Field of Life Sciences in China,** by Guohua Tang (Patent Practitioner) and Qianhui Yang (Patent Attorney) of Watson & Band, explore patent examination considerations in China for novelty in the field of life sciences including increased/stringent requirements to other places such as Europe and the United States.

6. **Significant Amendments to the *Civil Procedure Law* of the People's Republic of China: Focus on Foreign-related Civil Procedures,** by Ze Gao, Vice Director, Senior Partner and Attorney-at-law at Watson & Band takes us through the various significant amendments to China's *Civil Procedure Law* – with a specific focus on foreign-related civil procedures - which took effect on January 1st, 2024.

7. **The New Company Law: Highlights and Suggestions for Foreign-invested Enterprises,** by Yiqi Cai, Partner at Watson & Band, provides updates to China's new Company Law with specific suggestions for both local and foreign companies in light of the substantial revisions.

8. **Significant Impact of the "Judicial Interpretation of the General Provisions of the Contract" on Advancing China's Legal System and Practical Legal Operations,** by Xuyang Deng, Associate from Watson & Band, provides a detailed outline of China's "Judicial Interpretation of the General Provisions of the Contract", a supplement to interpretation of certain aspects of China's *Civil Procedure Law* (issued on December 5th, 2023), including a summary of illustrative cases provided by the Supreme Court of China.

9. **China's New Sustainability Regulations,** by Nicholas Chen (Managing Partner) and Jose Mario Ponce of Pamir Law Group inform us as to China's Ministry of Finance and China Securities Regulation Commission's newly announced sustainability disclosure regulations that will apply to companies listed on the Shanghai, Shenzhen and Beijing stock exchanges as well as an analysis of China's current/prospective stance on the important topic of sustainability in the upcoming years.

Hong Kong

10. **The New Arrangement on Cross-Border Reciprocal Enforcement of Judgments,** by Sherman Yan, Managing Partner and Head of Litigation and Dispute Resolution at ONC Lawyers, analyzess Hong Kong's recently enacted (January 29th, 2024) ordinance and arrangement for recognition and enforcement of civil and commercial judgments between mainland China and Hong Kong.

India

11. **Impact of the Digital Personal Data Protection act on Employee Data in India,** by Utkarsh Mishra, Associate at Sarthak Advocates & Solicitors, explores India's passed (but yet to come into force) Digital Personal Data Protection Act, 2023 and what local and foreign data processors need to be aware of and how best they can ensure they are compliant when the act eventually comes into law.

Vietnam

12. **Updates on new regulations of real estate,** by Tran Anh Hung (Managing Partner) and Dinh Cao Thanh (Senior Associate) at Bross & Partners LLC provide an overview of Vietnam's to-be enacted (on January 1st, 2025) Law on Land 2024, Law on Housing 2023 and Law on Real Estate Business 2023 and how this will affect local and foreign companies/persons purchasing and renting property/land in Vietnam.

New Members

13. **Discover Some of Our New Members Section for Olivia Kung,** Partner at ONC Lawyers (Hong Kong) who shares her interesting inspirations for becoming a lawyer and her 'out-of-office' hobbies and businesses.
14. **Discover Some of Our New Members Section for Carlo Rubio Wijaya,** Senior Associate at Leks&Co Lawyers (Indonesia) who shares impactful cases to date and advice for growing as professional.

Firm Updates

15. **Carroll & O'Dea Lawyers celebrates its 125th Anniversary!**
16. **Sarthak Advocates and Solicitors assist High Court of Delhi in laying down the law in the field of arbitration/dispute resolution.**
17. **Leks&Co wins claim at employment tribunal palm oil company, on a dispute over employment termination at Industrial Relations Court (PHI) of Jakarta.**

IS YOUR BUSINESS READY FOR A NEW ERA OF PRIVACY REGULATION: INSIGHTS FROM THE "GOVERNMENT RESPONSE TO THE PRIVACY ACT REVIEW REPORT"

The cornerstone of privacy regulations in Australia, *the Privacy Act 1988 (Cth)* (the Act) has recently undergone comprehensive review to adapt to the profound transformations in technology, data usage, and societal norms since its inception.

Evolution of privacy law in Australia

The Act was originally enacted to regulate the handling of personal information by federal government agencies and private sector organisations. However, the landscape has since undergone a seismic shift. The emergence of social media platforms, the smart phone, the increasing commercialisation of personal data, and artificial intelligence have outpaced the Act's original framework.

To address these developments, the Australian government initiated a Review of the Act which was conducted by the Attorney-General's Department.

This is further supported by the 2023 Australian Community Attitudes to Privacy Survey which revealed that 84% of Australian citizens want more control and choice over the collection and use of their information and about 9 in 10 want businesses and government agencies to do more to protect their personal information. This article will look at the key focus areas of the Privacy Act Review Report and the Government's response to the report.

Written by: Selwyn Black & Lucy Han – Carroll & O'Dea Lawyers (Sydney, Australia)

Selwyn Black leads the Business Lawyers Group at Carroll & O'Dea, Australian lawyers. His practice includes advising on a variety of issues for businesses including IP, acquisitions and disposals, joint ventures, contracts and employment arrangements, international supply and distributorship arrangements and associated disputes and regulatory issues.

Key focus areas of the Review

The Privacy Act Review Report (the Review Report) which was released in February 2023 identified several critical areas requiring attention to align the Act with contemporary privacy challenges:

1. **Enhanced consumer rights** – strengthening individuals' rights over their data, including the right to access and correct their information, and potentially introducing a right to be forgotten.
2. **Transparency and accountability** – encouraging organisations to be more transparent about how they handle personal data and ensuring greater accountability for data breaches.
3. **Cross-border data flow** – addressing the complexities of cross-border data transfers and ensuring adequate protection of personal information when transferred overseas.
4. **Regulation of big tech** – assessing the practices of tech giants and considering measures to curb their data dominance and potential misuse of personal information.
5. **Enforcement and penalties** – reviewing enforcement mechanisms and penalties for non-compliance to ensure they act as effective deterrents.

Lucy Han works in Business Practice. She has a wide range of experience working on matters across commercial advisory and dispute resolution. Lucy has been involved in commercial negotiations and transactions in the start-up innovation space, cross-border M&A, privacy compliance projects, intellectual property disputes and strata disputes.

Government response?

On 28 September 2023, the Government released its formal response to the Review Report. The response agrees, or agrees in principle, with the majority of the 116 proposals that were made.

The Government's response can be seen as sending a clear message to Australian business that while the legislation to implement these changes must still be drafted, it can be expected to happen soon.

This is an important consideration as many of the changes will affect the way certain organisations structure themselves and the way existing IT systems and information management channels are organised within a business. Prudent businesses should embrace the lead time to review their current processes and consider how they might change and update their systems and procedures.

While some changes primarily increase individual rights, key issues for business will require consideration to be given to:

- the extended definition of *'personal information'*;
- the strengthening of obligations regarding policies and collection notices; and
- introducing a requirement for processing of personal information to be *'fair and reasonable'*.

The requirement that the collection, use and disclosure of information should be fair and reasonable in all the circumstances is a new test. This new test is also a high standard than has been applied previously.

Some of the agreed proposals will also give the Office of the Australian Information Commissioner (OAIC) stronger enforcement powers. An example is that the Government has agreed to introduce tiers of civil penalty provisions which will allow for more agile implementation of sanctions.

The Data Breach Scheme will change which will require quicker notice in line with the General Data Protection Regulation (**GDPR**) and to allow entities to stagger their notifications to an individual as more information becomes available.

While the review process has been considerable and ongoing, there have been some interim measures introduced to address immediate concerns. This can be seen by amendments to the Act in 2021 which expanded the notification requirements for data breaches, which emphasizes the importance of prompt and transparent disclosure in the event of a breach.

For the future, the final recommendations from the Review report are anticipated to introduce substantial changes to Australia's privacy landscape. The potential for implementation of a statutory tort for serious invasions of privacy will no doubt remain a topic of high interest.

The evolving nature of technology ensures that the discourse on privacy will continue to be persistent. Balancing innovation with the protection of individual privacy rights poses a continuous challenge for legislators and stakeholders. However, it also presents an opportunity to craft a more robust, adaptive, and privacy-centric legal framework. Australia stands at a critical juncture in redefining its privacy laws to suit the digital era's demands. The review of the Act reflects a concerted effort to recalibrate the nation's privacy landscape, ensuring that it remains relevant, protective, and adaptive to the evolving challenges of the modern world. As the contours of the revised Act now begin to take shape, it is imperative to strike a balance between fostering innovation and safeguarding individual privacy, thereby fostering a digital ecosystem that thrives on trust, responsibility, and respect for personal information.

Please note that this article does not constitute legal advice. If you are seeking professional advice on any legal matters, you can contact Carroll & O'Dea Lawyers on 1800 059 278 or via our Contact Page and one of our lawyers will be able to assist you.

CHINA'S NEW COMPANY LAW: WHAT YOU NEED TO KNOW

Background

On December 29th, 2023, the Standing Committee of the People's Congress of the People's Republic of China passed the Company Law 2023 (the "**New Company Law**") which will come into law on July 1st, 2024.

The New Company Law follows a lengthy period of public consultation since the end of 2021, represents a major overhaul to the previous Company Law 2005 and, among its 266 articles, there are 70 new or substantially amended articles.

The New Company Law applies to local and foreign owned companies in China.

In this article, we shall briefly summarize some of the important amendments contained in the New Company Law which both existing and newly formed companies should take note of.

Corporate Governance

1. Board of Directors

Whilst the existing statutory powers of directors have remained largely unchanged, the New Company Law provides a restatement/elaboration of directors fiduciary duties of "loyalty" and "diligence" to the China company on which he/she sits.

The duty of loyalty requires directors (including supervisors and senior managers) to take measures to avoid conflicts between their own interests and the interests of the company and shall not use their powers to seek improper benefits whereas the duty of diligence requires directors (including supervisors and senior managers) to exercise reasonable care in the best interests of the company when performing their duties.

In addition, the New Company Law imposes requirements for directors to:

a. Report any contracts/transactions entered into between the director or any close relatives/affiliates to the shareholders/board of directors of the company for pre-approval purposes;

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b. Not take advantage of business opportunities which could be entered into by the company unless the company expressly declares that it is not interested in pursuing such business opportunity or approves the directors entry into such business opportunity having been provided with all relevant information; and

c. Not to engage in the same type of business as the company on which they are appointed a director. Again, an exception is provided where the company approves the director's engagement in the same business as the company.

2. Supervisors

China operates a so-called "two-tiered" governance structure whereby there is a board of directors and a supervisory board.

The purpose of the supervisory board is to represent the shareholder(s) interests in the company by monitoring the business conducted by the board of directors. By its nature, a supervisor cannot be an existing director of the China company.

The New Company Law has now created an exception whereby the board of directors of a Chinese company can – rather than appointing a supervisory board – instead appoint an audit committee which will undertake similar responsibilities to the supervisory board.

3. Legal Representative

China companies must appoint a legal representative who, subject to the articles of association/shareholder's decision of the company, has wide and extensive powers (and, concomitantly, liabilities) to act and represent the company in dealings with third parties (e.g. entering into legal contracts etc).

Presently, only the chairman of the board of directors or general manager of a China company can be appointed to the position of legal representative.

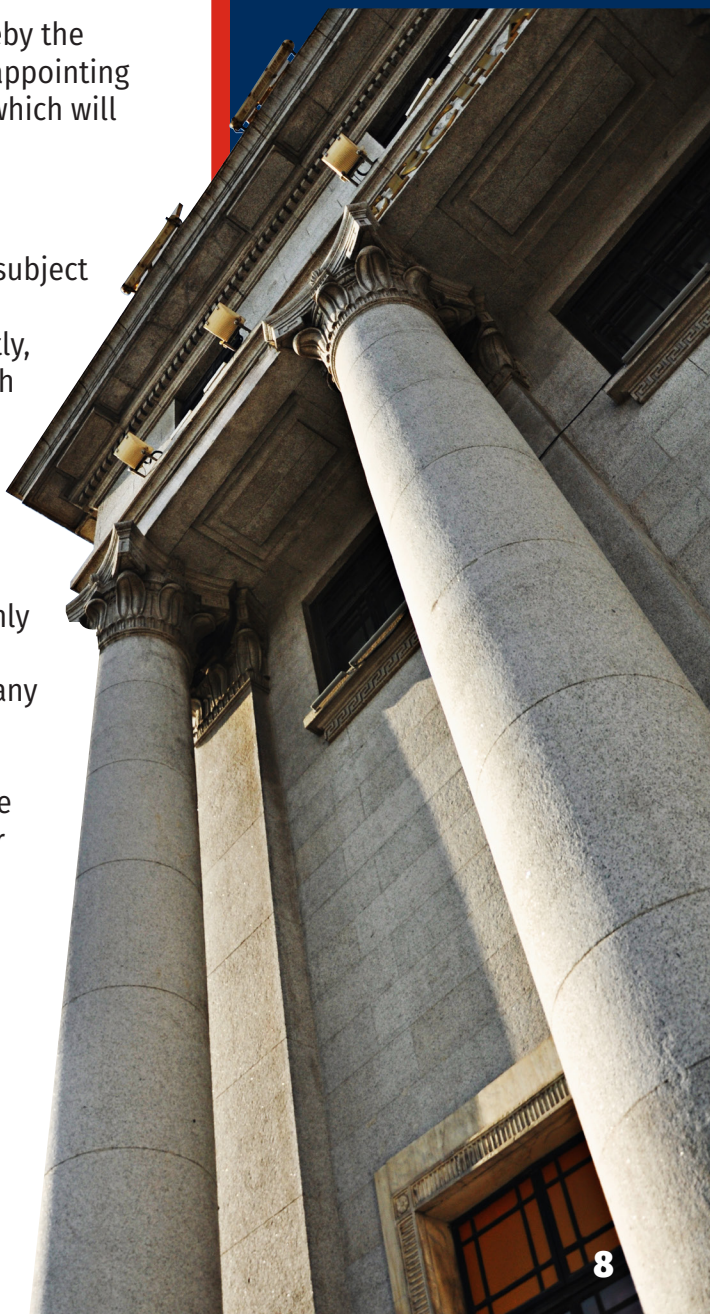
The New Company Law now permits any director (e.g. not only the chairman of the board of directors) to be appointed to the position of legal representative. Further, the New Company Law provides that where a director or general manager who occupies the position of legal representative resigns from his/her position as director or general manager then he/she will automatically be deemed to have resigned from his/her position as legal representative by operation of law.

Shareholders

1. Share Classes

At present, China joint stock companies could only issue multiple classes of shares if they met certain criteria as laid out in regulations promulgated by the State Council (e.g. financial institutions and hi-tech companies).

Matthew Boyd has been an Associate at HJM Asia Law since 2019. Based in HJM Asia's Singapore office, Matthew advises clients in the fields of M&A, private equity, joint ventures, contractual/ transactional negotiation and general corporate matters. Prior to joining HJM Asia Law, Matthew worked for a German law firm in Singapore.



Under the New Company Law, all joint stock companies will be able to issue multiple classes of shares which differ from ordinary shares in the following manner:

a. preferred or subordinated distribution of profits or residual assets;

b. greater or fewer voting rights per share (except that for the election and replacement of supervisors or audit committee members, the voting rights of each class of shares including ordinary shares shall be the same);

c. transfer (of the shares) subject to restrictions, such as the consent of the company; and/or

d. other differences as specified by the State Council.

2. Capital Contributions

Numerous amendments in the New Company Law were enacted in relation to shareholder capital contributions.

Most notably, the New Company Law provides that:

No	Article Number	Subject Matter
1.	47	All shareholders of a limited liability company must transfer their entire committed and outstanding capital contributions to the company within a period of five (5) years from the date of establishment of the company.
2.	54	If a limited liability company becomes insolvent, then the five (5) year period referred to at point 1 above will be accelerated such that the shareholders will be immediately required to transfer their committed and outstanding capital contributions
3.	40	A limited liability company must publish not only the issued amount of capital but, additionally, the paid-in amount of capital in the National Enterprise Credit Information Publicity System
4.	50	If a shareholder fails to pay its capital contribution when a limited liability company is established, the other shareholders at the time of establishment shall be jointly and severally liable for the shortfall
5.	88	If a shareholder transfers its equity interest in a limited liability company before its capital contribution is fully paid, the buyer and the seller shall be jointly and severally liable for the outstanding amount.

3. Piercing the Corporate Veil "Horizontally"

Whilst China law presently recognises "vertical" piercing of the corporate veil where, for example, X operates a China company with the benefit of limited liability and the "veil" is pierced to make X personally liable for the liabilities of company Y (e.g. due to evasion of debts or seriously damaging the interests of the company's creditors), the New Company Law introduces another newly recognised form of piercing the corporate veil.

Namely, where X owns companies Y and Z, companies Y and Z can now under certain conditions - such as those stated immediately above – be found liable to contribute to the liabilities of the other company each owned by X.

4. Transfers of Equity Interests – Right of First Refusal

The New Company Law provides for a right of first refusal without the need, as at present (subject to what may otherwise be stated within the company's articles of association), to firstly seek majority shareholder approval.

Instead, a transferring shareholder may simply notify all remaining shareholders in writing of his/her/its intention to transfer his/her/its shareholding interest in a company by stating the number and sale price of the shares. Remaining shareholders of the company then have thirty (30) days to accept or reject purchase of the sale shares on the terms and conditions as stated within the notice.

Deregistration of Companies

The New Company Law provides for a "simplified" deregistration procedure for companies that have not incurred any debts during their existence or have paid off all debts with the prior approval of all company shareholders.

The "simplified" deregistration procedures will permit announcing the deregistration of the company through the National Enterprise Credit Information Disclosure System for a period of at least twenty (20) days.

Following the expiration of the above-referred announcement period, such company may apply to cancel the company registration.

Conclusion

The New Company Law in many ways modernises the existing Company Law 2005 which will be welcome in many ways by local and foreign invested enterprises/companies.

Having said that, certain provisions including – for example, the 5-year capital contribution period – may lead to issues particularly for existing companies which have an already lengthier registered capital contribution period. It does appear clear however that such existing companies will need to adjust their existing capital contribution period to meet the newly introduced 5-year period.

PRIORITY RESTORABLE IN CHINA SINCE JANUARY 20, 2024: NO WORRY MISSING THE 12-MONTH PRIORITY PERIOD! – INTRODUCTION OF PRIORITY RESTORATION UNDER THE IMPLEMENTING RULES OF PATENT LAW (2023 AMENDMENT)

Patent priority system allows an applicant of a domestic patent application (**prior application**) to seek patent protection in another country by filing an application in said country or a PCT application (**later application**) that claims the priority of said domestic application within 12 months from the filing date of said domestic application. Missing the 12-month priority period will result in loss of right of priority. Restoration of priority is a remedy measure of losing priority under the *Patent Cooperation Treaty (PCT)*. Up to the end of 2023, China has made reservations from this provision. However, the *Implementing Rules of the P.R.C. Patent Law* amended and passed at

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the end of 2023 (the "*2023 Rules*") introduced remedial measure, which undoubtedly sent good news for patent applicants.

According to the Paris Convention, a later application claiming priority shall be filed within the priority period of 12 months from filing the prior application (for an invention or a utility model). The worst consequence of losing priority due to missing the priority period is that the later application lacks novelty/inventiveness if the same invention has been published during the priority period, and ultimately the later application cannot be granted. According to Rule 36 of the 2023 Rules, however, an application for an invention or a utility model filed beyond the 12-month priority period may be restored within 2 months from the date of expiration of the priority period (i.e., 14 months from the priority date), which may be regarded as allowing a 2-month extension to the priority period.

> **Rule 36 of the *Implementing Rules of the Patent Law (2023 Amendment)***
>
> **Applicants, who submit an invention or utility model patent application concerning the same subject matter but fail to meet the deadline stipulated in Article 29 of the Patent Law, may petition for restoration of priority accompanied by a justified excuse within two months from the missed deadline.**

As to excuse for restoration, "a justified cause" is needed under Rule 36. The newly amended *Patent Examination Guidelines* do not define what excuse(s) should be deemed "justified". We understand that this excuse should apply the principle of "unintentional", that is, the missing of the priority period can be caused by the negligence of the applicant, for which the applicant is not required to provide special evidence to prove.

Where the PCT application has been requested for restoration of priority at the international phase and the restoration has been approved by the receiving office (RO), the PCT application shall be deemed as having been submitted for a request of priority restoration when it enters the Chinese national phase. Furthermore, even if a restoration request has never been filed at the international phase or has been rejected by the receiving office, priority restoration can still be requested when the PCT application enters the national phase. The applicable *2023 Rules* provides as follows:

> **Rule 128 of the *Implementing Rules of the Patent Law (2023 Amendment)***
>
> **If an international application is filed within 2 months after the expiration of the priority period, and the receiving office has approved the restoration of priority in the international phase, a request for priority restoration shall be deemed as having been made in accordance with Rule 36 of the Implementing Rules. If the applicant does not request for priority restoration during the international phase, or if such a request has not been approved by the receiving office, the applicant may request for restoration of priority to the patent administration department under the State Council within two months from entering the national phase where the applicant has justified excuse.**

Mr. Tang has a master's degree in materials science. He joined Watson & Band in 2004 and became a patent practitioner ever since.

For 20 years' practice, Mr. Tang has processed a great number of chemistry-related patent cases involving polymers, inorganic materials, biotech and medicine, and successfully helped clients obtaining patent rights.

Mr. Tang's practice also involves patentability/invalidity analyses, FTO analyses. He attends patent invalidation proceedings and administrative litigation relating invalidation or reexamination decisions. Mr. Tang also provides support in patent infringement litigations in matter of infringement analysis and technical appraisement.

Enjoying extensive experience in patent invalidity and patent infringement analysis, Mr. Tang has been ranked in Chambers rankings -Intellectual Property: Non-litigation (PRC Firms) for year 2022 and 2023.

In addition to priority restoration, the *2023 Rules* also introduces a provision for correcting priority. In the past, if incorrect priority information is filed or priority is not claimed in the application, the priority may be regarded as being not claimed and cannot be corrected. From January 20, 2024 and on, correcting or adding priority is allowed, which will further expand the remedy for formality errors.

> **Rule 37 of the *Implementing Rules of the Patent Law (2023 Amendment)***
>
> **An applicant of an invention or a utility model patent who has claimed priority is entitled to request amendments or additions to the priority for the patent application within 16 months from the priority date or within 4 months from the filing date.**

In addition, according to Article 3 of the *CNIPA Announcement (No. 559) – the Interim Measures for the Processing of Relevant Examination involved in the Implementation of the Revised Patent Law and its Implementing Rules*, from January 20, 2024, the applicant may, in accordance with Rules 36 and 37 of the *2023 Rules*, request to restore priority restoration, or adding or correcting priority claiming. It can be understood that January 20 is the starting point for requesting restoration, other than the filing date of a patent application. In other words, if the filing date of a prior application is after November 20, 2022 and no priority is claimed within the 12-month period, the priority for the application can be restored from January 20, 2024 (and within 14 months from the priority date) due to missing the 12-month period. Such circumstance shall also apply to correction of priority.

Although patent applications where the priority period is missed can be requested for priority restoration in the future, applicants still need to pay special attention to monitoring the priority period, because there is only two-month restoration period. If there is no monitoring of the priority period and the deadline is missed, the subsequent two-month restoration period will also lapse quickly, and once the two-month restoration period is missed, there will be no other remedy. Patent applications taken care of by Watson & Band will be automatically set for the priority time limit monitor, and when the priority period is approaching to the end, we will proactively remind the applicants to file PCT applications or direct foreign applications with priority claiming.

CIETAC'S NEW RULES

Background

On September 5th, 2023, the China International Economic And Trade Arbitration Commission (the "**CIETAC**") issued the CIETAC Arbitration Rules (the "**Rules 2024**") which came into force on January 1st, 2024.

In this article, we shall briefly summarize some of the important amendments contained in the Rules 2024.

Efficiency

1. Article 12

A typical arbitration clause is like "Any and all disputes, claims, or differences arising under or by virtue of this Agreement shall be settled by mutual consultation between the Parties in good faith as promptly as possible. In the event that such amicable settlement cannot be reached within thirty (30) days after delivery of the written notice requesting the said amicable settlement, such dispute, claim or difference shall be submitted for arbitration to the CIETAC in Beijing." Accordingly, such 30-days negotiation would be a precondition for the application of the arbitration pursuant to the former Article 12 of Rules 2015.

Article 12 of Rules 2024 adds a new paragraph "Where it is agreed in the arbitration agreement that negotiation or mediation shall be conducted before arbitration, the applicant may apply for arbitration after conducting negotiation or mediation. However, failure to negotiate or mediate shall neither prevent the applicant from applying for arbitration nor prevent the Arbitration Court from accepting the case, unless the applicable law to the arbitral proceedings or the arbitration agreement expressly provides otherwise." In this regard, either party may file the application for arbitration with CIETAC directly even though the 30-days negotiation is still stipulated in the arbitration clause/agreement.

2. Article 8

Article 8 explicitly stipulates that all documents, notices and materials in relation to the arbitration (the "**Arbitration Documents**") may be delivered by electronic means. Electronic means of delivery includes service of arbitration documents by electronic means to the email addresses or other electronic addresses agreed/designated by the parties, or via the digitalized information exchange system of CIETAC or other information system easily accessible to all parties, etc. In addition,

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Arbitration documents may be served by electronic means as a preferred way of delivery.

3. **Article 11 and 21**

   Except for the traditional submission of hardcopy documents for the application of arbitration, the applicant may also submit a request for arbitration via CIETAC's online case filing system, the arbitral proceedings shall commence on the day when such Request is first received.

   When submitting the request for arbitration, the statement of defense, the statement of counterclaim, evidence, and other arbitration documents, the parties may use electronic communication as a preferred means.

4. **Article 37**

   Paragraph 5 of Article 37 stipulates the arbitral tribunal may, at its own discretion after consultation with the parties and taking into consideration of the circumstances of the case, decide to conduct the hearing by remote virtual conference, or by other appropriate means of electronic communication.

5. **Article 52**

   Paragraphs 7 and 10 of Article 52 stipulates that where the parties agree, or where CIETAC deems it necessary, the arbitral award may be delivered to the parties in electronic form and an electronic signature of an arbitrator bears the same effect of his/her handwritten signature.

6. **Article 22**

   Paragraph 2 of Article 22 provides that if a party changes or adds representative(s) after the arbitral tribunal is formed, the President of the Arbitration Court may take necessary measures to prevent the occurrence of conflicts of interest on the arbitrator(s) as a result of the

Ralf Ho is a China-qualified attorney whose practice focuses on labor dispute and civil cases. Prior to joining HJM, Ralf was an associate at a Chinese law firm specializing in corporate compliance and employment law. In addition to his corporate practice, Ralf has assisted clients on a variety of litigation and arbitration matters, including the resolution of redundancy and class action labor disputes before various courts and arbitration commissions in China.

change including exclusion of the new representative(s) from participating in the arbitral proceedings, having regard to factors such as the parties' opinions made within a reasonable time on the challenge of arbitrator(s) and the progress of the arbitral tribunal's hearing of the case.

In this regard, the CIETAC may prevent a party from delaying the arbitral proceedings by changing/appointing a new representative, who may have conflict of interest with the arbitrator(s), to challenge the arbitrator(s).

Procedure

1. **Article 49**

   This article provides that the arbitral tribunal deems necessary, or where a party requests and the arbitral tribunal approves, the arbitral tribunal may render an interim award on any issue in the case before rendering the final award. While failure of either party to perform an interim award shall neither affect the arbitral proceedings nor prevent the arbitral tribunal from making the final award.

   For example, the arbitral tribunal may render an interim decision on the eligibility of the subject of the contract, the validity of the contract, the application of law, and the understanding of a particular contractual clause before the final award is rendered. Hence, interim award is not rendered in response to the arbitration claim(s), or it is not the final determination of the parties' arbitration claim.

2. **Article 50**

   A party may request for the early dismissal of a claim or counterclaim in whole or in part on the ground that the claim or counterclaim is manifestly without legal merits, or is manifestly outside the jurisdiction of the arbitral tribunal (the "Request for Early Dismissal"). The arbitral tribunal shall render a decision or an award on the Request for Early Dismissal with reasons stated within sixty (60) days from the date on which such request is made.

   Should the arbitral tribunal render an award granting the Request for Early Dismissal, in whole or in part, such award shall not prevent the arbitral tribunal from continuing the hearing of other claims or counterclaims, if any.

3. **Article 14**

   Should all of the circumstances set forth below be met, the applicant may apply to add contract(s) during the arbitral proceedings:

   a. such contracts consist of a principal contract and its ancillary contract(s), or such contracts involve the same parties as well as legal relationships of the same nature, or such contracts involve related subject matters;

   b. the disputes in such contracts arise out of the same transaction or the same series of transactions; and

   c. the arbitration agreements in such contracts are identical or compatible.

   However, such application may be denied if it is too late and may delay the arbitral proceedings.

4. **Article 23**

   Item 1 of this article provides that where a party applies for conservatory measures, CIETAC shall forward the party's application to the competent court designated by that party. Upon the request of a party, CIETAC may forward its application for conservatory measures to such court in advance of issuing the Notice of Arbitration.

In practice, the court may take a longer time than expected for conservatory measures. However, such article does not provide for how long CIETAC shall wait for the implementation of conservatory measures before issuing the Notice of Arbitration. Hence, the Notice of Arbitration may be issued to the counterparty before the conservatory measures under some extreme circumstances.

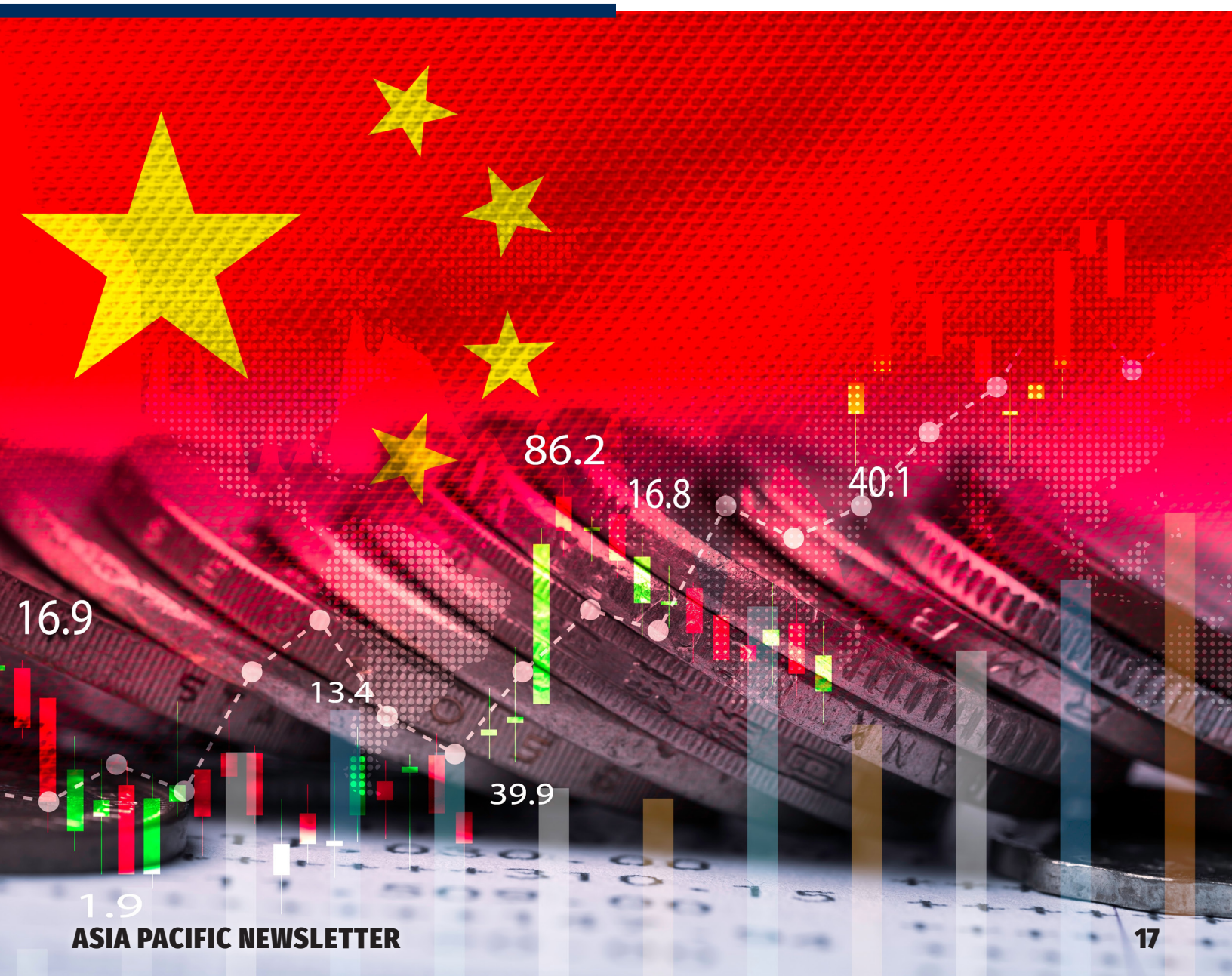
5. Article 48

Once a third party funding agreement is concluded, the funded party shall communicate to the Arbitration Court, without any delay, the existence of the third party funding arrangement, the financial interest therein, the name and address of the third party funder and other relevant information. The Arbitration Court shall forward such information to the other parties and the arbitral tribunal. The arbitral tribunal may order the funded party to disclose other relevant information of the funding if it deems necessary.

In light of that the funding party may have conflict of interest with the arbitrator(s). Hence, disclosure of the funding party may prevent the arbitral award from being cancelled or refused to enforce by the court.

Conclusion

The Rules 2024 shall enhance the efficiency and fairness of CIETAC's arbitration. In addition, the Rules 2024 also absorbs some legal practices from International Arbitration Commissions and the Judicial Review.



PATENT EXAMINATION PRACTICE FOR NOVELTY IN THE FIELD OF LIFE SCIENCES IN CHINA

When evaluating the novelty of patents in life science and pharmaceutical, the examination practice in China is more stringent than in EP or US regarding whether i) a technical feature has a limiting effect on a pharmaceutical-use claim; and ii) whether a disclosure of the prior art affects the novelty of the claim.

I. Limiting effect of a technical feature on a pharmaceutical-use claim.

The method for treatment of diseases is a patentable subject in the US, but not in EPO or China. In EPO, however, the method for treatment of diseases can be modified into a use-related product claim (e.g., compound X for use in the treatment of disease Y). In China, the method for treatment of diseases could be modified into a pharmaceutical-use claim (i.e., Swiss-style).

The Guidelines for Examination in EPO (Part G-Chapter VI-5, March 2021) recites that, "Therapeutic uses of a substance/composition may be based not only on the treatment of a different disease but also on the treatment of the same disease by a different therapeutic method differing for example in the dosage, administration regime, group of subjects or route of administration (G 2/08)."

In contrast, the Guidelines for Examination in China (section 5.4, Part II, Chapter 10, 2023) recites that, "The distinguishing features merely presenting in the course of administration do not enable the use to possess novelty." Accordingly, the technical features of method for treatment have no limiting effect on a pharmaceutical-use claim, thus cannot confer novelty on the claim.

According to the current examination practice in China, to determine whether a certain technical feature has a limiting effect on the pharmaceutical-use claim, the key is to determine whether the feature has an impact on the pharmaceutical process. Generally, it is considered that:

- substance, disease to be treated (indication), dosage form and unit dose (dosage in one package) are limiting features;

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Ms. Yang is mainly engaged in domestic and overseas patent applications in the fields of life science, biochemistry, and pharmaceutical. She is experienced in drafting patent documents and making response to the office action. The clients she served include Baxalta, Beckman, Angimmune, etc.

- administration regime (dosage, duration, frequency), different mechanisms of action of the same disease, etc. have no limiting effects;
- route of administration is controversial, depending on whether it affects the dosage form; and
- the subject of administration is also controversial, depending on whether it affects the indication.

Therefore, when the applicant intends to incorporate technical features to confer novelty on a pharmaceutical-use claim, care should be taken to select technical features that have a limiting effect on the claim. In the following, this will be further discussed in conjunction with Case 1.

Case 1

Claim 1 and D1:

Claim 1 relates to the use of ADAMTS13 in the manufacturing of a medicament for the treatment of coagulopathy in mammals by subcutaneous administration, wherein ADAMTS13 is in a therapeutically effective amount from 20 to 4,000 activity units per kilogram body weight.

D1 discloses that ADAMTS13 can treat coagulopathy in mammals. D1 also mentioned that ADAMTS13 can be administered by subcutaneous or other routes.

Office Action:

Although D1 did not disclose the claimed therapeutically effective amount of ADAMTS13, such technical feature is not a pharmaceutical feature and therefore has no limiting effect on the pharmaceutical use of Claim 1. Therefore, the claim is not novel in view of D1.

Analysis:

In this case, the initial Claim 1 relates to a method for treatment of diseases.

Mr. Tang has a master's degree in materials science. He joined Watson & Band in 2004 and became a patent practitioner ever since.

For 20 years' practice, Mr. Tang has processed a great number of chemistry-related patent cases involving polymers, inorganic materials, biotech and medicine, and successfully helped clients obtaining patent rights.

Mr. Tang's practice also involves patentability/invalidity analyses, FTO analyses. He attends patent invalidation proceedings and administrative litigation relating invalidation or reexamination decisions. Mr. Tang also provides support in patent infringement litigations in matter of infringement analysis and technical appraisement.

Enjoying extensive experience in patent invalidity and patent infringement analysis, Mr. Tang has been ranked in Chambers rankings -Intellectual Property: Non-litigation (PRC Firms) for year 2022 and 2023.

Since the method for treatment of diseases is not a patentable subject, the applicant amended it to a Swiss-style pharmaceutical-use claim. The main technical features of Claim 1 include a) known substance: ADAMTS13; b) route of administration: subcutaneous administration; c) subject of administration: mammal; d) indication: coagulopathy; e) administration dosage: therapeutically effective amount of ADAMTS13.

According to the current examination practice, for a pharmaceutical-use claim, the feature e) of Claim 1 (i.e., administration dosage) is not a pharmaceutical feature (since it does not affect the pharmaceutical process), and has no limiting effect on the pharmaceutical use of Claim 1. However, it is generally considered that the unit dose (dosage in one package) has a limiting effect on the claim (since it can affect the pharmaceutical process and then the product). Therefore, as an option, the applicant may consider modifying the administration dosage to a unit dose.

In the examination process, the examiner and the applicant argued over whether D1 disclosed the "subcutaneous administration" of ADAMTS13, which indicates that the examiner is of the opinion that the route of administration of "subcutaneous administration" has a limiting effect on the pharmaceutical use of Claim 1, different routes of administration have an impact on the dosage form, thereby affecting the pharmaceutical process and the product made therefrom.

In addition, even if D1 does not disclose the feature c) of Claim 1 (i.e., subject of administration: mammal), since the feature does not affect the indication, it has no limiting effect on the pharmaceutical use of Claim 1.

II. Impact of a disclosure of the prior art on the novelty of the claims.

With respect to the novelty of a compound, the Guidelines for Examination in China (section 5.1, Part II, Chapter 10, 2023) recites that, "For a compound claimed in an application, if it has been referred to in a reference document, it is deduced that the compound does not possess novelty, unless the applicant can provided counter-evidence proving that the compound is not available before the date of filing." The relevant recital in the Guidelines for Examination in EPO are as follows (Part G–Chapter IV-2, March 2021): "Subject-matter can only be regarded as having been made available to the public, and therefore as comprised in the state of the art pursuant to Art 54(1), if the information given is sufficient to enable the skilled person, at the relevant date (see G-VI, 3) and taking into account the common general knowledge in the field at that time, to practice the technical teaching which is the subject of the disclosure (see T 26/85, T 206/83 and T 491/99)."

By comparing the provisions in China and EPO, it can be seen that China has stricter requirements for determining that the disclosure of the prior art does not destroy the novelty of the invention. This will be further discussed in conjunction with Case 2.

Case 2

Claim 1 and D1:

Claim 1 relates to a protein construct comprising a Factor VIII molecule and a PEG attached to the Factor VIII via carbohydrate moieties of Factor VIII.

D1 involves the attachment of PEG to Factor VIII via the amino acid moiety. D1 provided examples and protocols for attaching PEG to the amino acid moiety of Factor VIII in detail. D1 mentioned in one place in the specification that PEG can also be attached to the carbohydrate moiety of FVIII. However, D1 does not provide any examples of attaching PEG to the carbohydrate moiety of FVIII or any other description of the solution.

Examination:

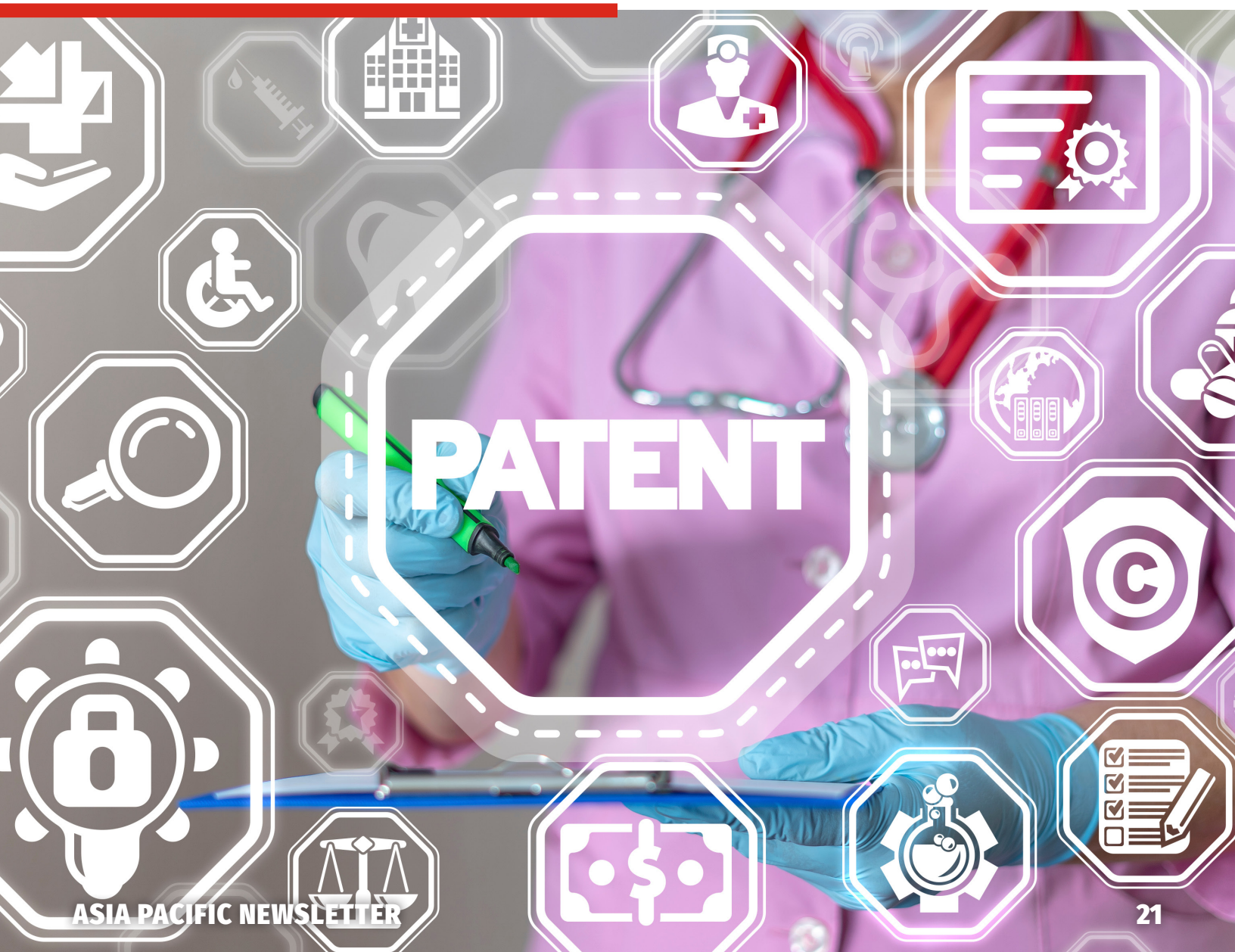
The applicant argued that D1 only proposes an idea that PEG can be attached to the carbohydrate moiety of FVIII, while does not disclose any reaction conditions or feasible ways to realize this idea. The applicant stated that there are many differences between the reaction conditions for attachment via amino acid moieties and via carbohydrate moieties. The applicant submitted a large amount of experimental data, trying to prove that

the “protein construct with PEG attached to the carbohydrate moieties of FVIII” (i.e., the protein construct as claimed in Claim 1) is not available before the date of filing. The applicant concluded that D1 does not disclose the protein construct claimed in Claim 1.

However, the examiner is of the opinion that since D1 objectively records that “PEG can also be attached to the carbohydrate moiety of FVIII”, regardless of whether D1 provides reaction conditions or examples, D1 clearly discloses a protein construct with this structure. Therefore, the claims are not novel in view of D1. The examiner did not accept the experimental data provided by the applicant to prove that the protein construct is not available before the date of filing.

Analysis:

In this case, the protein construct claimed in Claim 1 is a compound. The applicant tried to argue for the novelty of Claim 1 by providing evidence to prove that the compound is not available before the filing date. Such evidence, however, was not accepted by the examiner. It can be seen from this case that for the compound that has been referred to in a reference document, although the Guidelines give an exception where the reference document does not destroy the novelty of the compound (that is, to verify that the compound is not available before the date of filing), the chance of success of this approach is rather slim. Generally, the examiner considers that as long as the reference document objectively records the structure of the compound, it indicates that the compound has been disclosed and is not novel.



SIGNIFICANT AMENDMENTS TO THE *CIVIL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA*: FOCUS ON FOREIGN-RELATED CIVIL PROCEDURES

On September 1, 2023, the Fifth Session of the Standing Committee of the Fourteenth National People's Congress adopted the Decision on Amending the *Civil Procedure Law of the People's Republic of China* (hereinafter called "*Civil Procedure Law*"), which came into effect on January 1, 2024. This amendment absorbs international experience and local practice, integrates the rules of foreign-related civil procedures, and fixes them in legal form, representing the first substantive amendment to the relevant contents of foreign-related civil litigation procedures since 1991. Overall, this amendment focuses on expanding the jurisdiction of court , establishing a parallel litigation system and the doctrine of forum non-convenience, resolving the difficulty of service of process, supplementing extraterritorial investigative and evidentiary provisions and refining the provisions on the recognition of judgments and rulings in force.

1. ***The Civil Procedure Law* further expands the jurisdiction of foreign-related cases.**

For a foreign-related civil dispute lawsuit other than the personal status relationships filed against a defendant who has no domicile within the territory of the P.R.C., it is also stipulated that as long as there exists "appropriate connection" with China, such as the place of execution of contract or performance of contract is located in the territory of the People's Republic of China and etc., a foreign-related civil dispute may fall under the jurisdiction of the people's court. This amendment has greatly broadened the scope of cases under China's jurisdiction.

Meanwhile, the *Civil Procedure Law* has made a new breakthrough. Even if there is no "appropriate connection" with China, the parties to a foreign-

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Graduated from Fudan University with an LLB degree, **Ms. Gao** was sent to the United Kingdom by the Shanghai Justice Bureau and received an LLM in commercial and e-commerce law from the University of Hertfordshire (UK), majoring in company law and information technology protection law.

Ms. Gao specializes in dispute resolutions in the fields of corporate governance, M&A, BOT, FIDIC, FCPA and civil and commercial litigation issues. She

related civil dispute may agree to select a people's court for jurisdiction, thereby fully respecting the autonomy of the parties and safeguarding their lawful rights and interests.

2. **In compliance with international trends, this amendment establishes relevant provisions on parallel litigation proceedings and the doctrine of forum non-convenience.**

To start with, regarding the rule of parallel litigation proceedings, if the parties to the same dispute file the lawsuit with a foreign court and a people's court respectively, the people's court which has jurisdiction pursuant to the *Civil Procedure Law* may accept the dispute[1]. Furthermore, where a party applies to the people's court in writing for suspension of the lawsuit, on the ground that the foreign court has accepted the case prior to the people's court, the people's court may rule on suspension of the lawsuit.

In addition, the *Civil Procedure Law* elevated the doctrine of forum non-convenience into law for the first time. For a foreign-related civil case accepted by a people's court, where the defendant raises a jurisdictional objection, and the following circumstances are satisfied concurrently, the people's court may rule on rejection of the lawsuit: (1) the basic facts of the dispute have not occurred in China, and it is evidently inconvenient for the people's court to try the case and for the litigants to participate in the lawsuit; (2) the litigants have not agreed on selection of the people's court for jurisdiction; (3) the case does not fall under exclusive jurisdiction of the people's court; (4) the case does not involve China's sovereignty, security or public interest of the People's Republic of China; and (5) it is more convenient for a foreign court to try the case[2].

3. **Amending the relevant provisions on foreign-related service of process to enhance the efficiency of service.**

Service of process is of great significance in foreign-related civil litigation, and has a crucial effect in facilitating the process of litigation process and applying for recognition and enforcement of judgments. The amendment further revises the provisions on service of process, endeavours to solve the problem of "difficulty to service of process" in foreign-related cases, whereby the people's court may serve documents to any representative entrusted by the parties in the lawsuit, which broadens the authority of the representative to accept judicial service of process. In terms of the methods of service, electronic service and other methods agreed to by the party being served have been added as supplementary methods to facilitate the people's court in completing the service of process on litigants without domicile in China and to promote the smooth conduct of the litigation process.

4. **New extraterritorial investigative and evidentiary provisions are supplemented as complementary methods of obtaining evidence through treaties and the principle of reciprocity.**

has a long-term commitment to corporate legal affairs and she intimately understands the rules of company operation. She has provided clients with a large number of legal advice on corporate governance, legal risk control and prevention, contract review, legal training seminars, legal due diligence and legal advice for specific projects. As a team leader, her team has provided perennial legal advisory services to dozens of multinational corporations, state-owned enterprises and domestic companies.

1 *Civil Procedure Law of the People's Republic of China*, Article 280.

2 *Civil Procedure Law of the People's Republic of China*, Article 282.

According to the Ministry of Justice's statistics on MLA (Mutual Legal Assistance) cases in 2022, as of the end of December 2022, the MLA Exchange Centre had sent zero requests for extraterritorial assistance in the taking of evidence to foreign countries based on the Hague Service Convention and the Hague Evidence Convention, as well as bilateral treaties on mutual legal assistance in civil and commercial matters. This amendment has increased three new ways in which evidence can be obtained extraterritorially, significantly reducing the difficulty and time cost of obtaining evidence extraterritorially, which will help to improve the efforts of the people's courts to ascertain the facts extraterritorially in foreign-related cases, and also facilitates the parties' application to the courts for access to extraterritorial evidence: (1) where a litigant or witness is of PRC nationality, the people's court may entrust the embassy or consulate of the People's Republic of China based in the country of the litigant or witness to collect evidence on its behalf; (2) upon consent of both parties to the case, it may collect evidence through instant messaging tools; and (3) it may collect evidence by any other method agreed by both parties to the case[3].

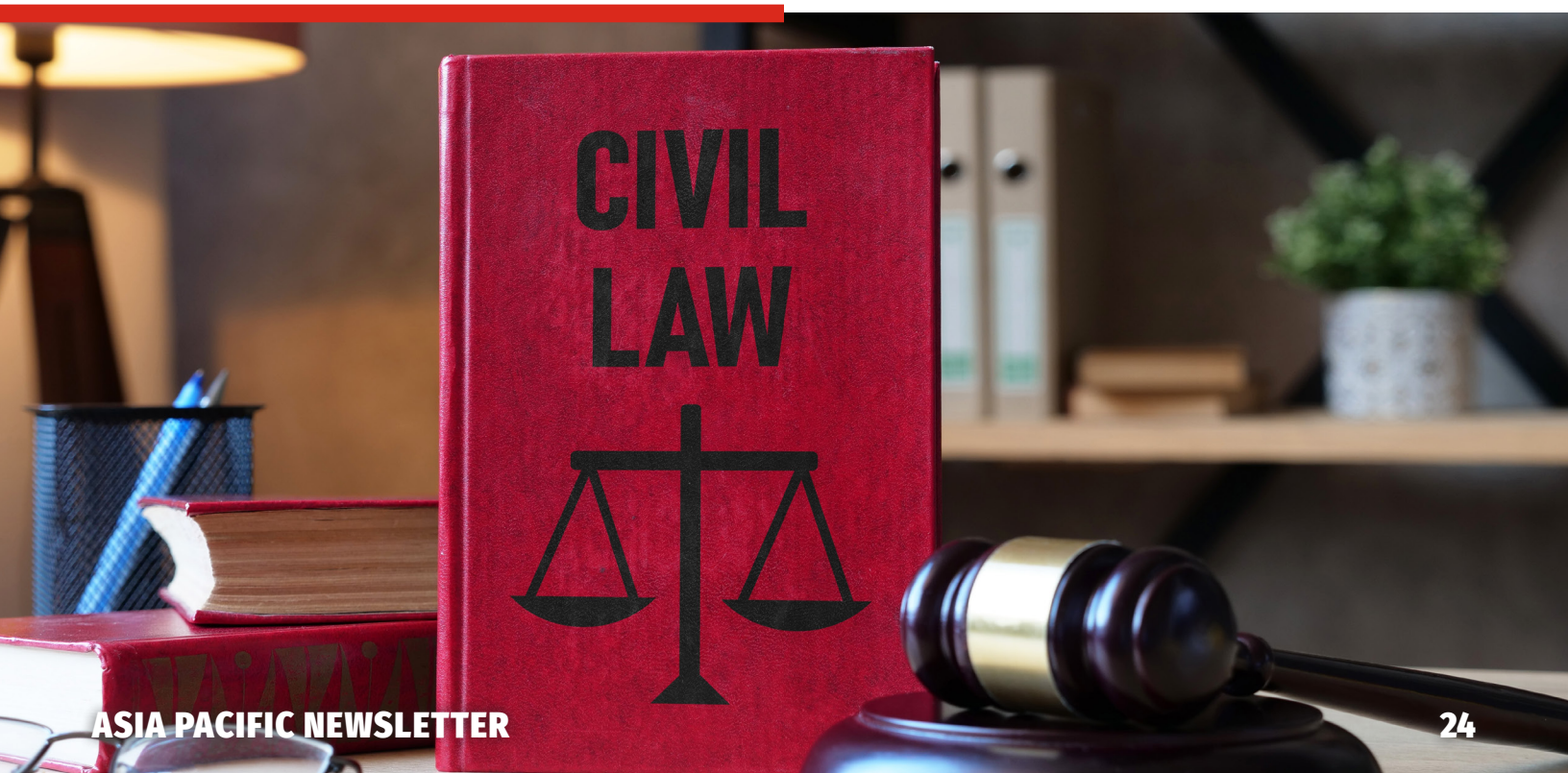
5. Articles 300 and 304 of the *Civil Procedure Law* set out new provisions on the recognition and enforcement of judgments and rulings.

Drawing on existing experience, the *Civil Procedure Law* specifies five situations in which a people's court shall rule upon examination not to recognize and enforce a judgment or ruling[4].

Besides, it also adds an appropriate connection for a people's court to receive an application for the recognition and enforcement of an arbitral award made outside of P.R.C. Where the domicile of the person subject to enforcement or the properties are not located in China, the litigant may apply to the intermediate people's court at the domicile of the applicant or the location which has an appropriate connection with the ruling of the dispute[5].

As stated previously, this amendment has refined and improved the specific provisions on foreign-related litigation, which is conducive to further enhancing the quality and efficiency of trials of foreign-related civil cases, conforming to the new trend of international judicial practice, resolving foreign-related civil disputes in a more efficient way, and safeguarding the legal rights and interests of both Chinese and foreign parties.

3 *Civil Procedure Law of the People's Republic of China*, Article 284.
4 *Civil Procedure Law of the People's Republic of China*, Article 300.
5 *Civil Procedure Law of the People's Republic of China*, Article 304.



CHINA'S NEW SUSTAINABILITY REGULATIONS

"There is no issue more important to life on earth than how human societies respond to (or fail to respond to) the climate crisis."

- Emma Sky, Yale Jackson School of Global Affairs and Founding Director of Yale's International Leadership Center to Nicholas V. Chen, PLG Managing Partner during her visit to Taiwan on March 2023

China and U.S. have tried to create a climate cooperation framework. U.S. and China climate cooperation is incredibly important as they are the world's largest economies and emitters of GHG, because of this, John Kerry of the U.S. and Xie Zhenhua of China met for a discussion around key climate issues prior to the UN climate summit[1]. Unfortunately, for all living beings on

1 At climate summit, nations want more from the U.S.: 'There's just a trust deficit': https://www.npr.org/2023/12/01/1209658639/cop28-climate-change

Photo by: William Vasta/The Annenberg Foundation Trust at Sunnylands
Subject: John Kerry of the U.S. and Xie Zhenhua of China – California, United States – November 2023
Original Source: https://www.npr.org/2023/12/01/1209658639/cop28-climate-change

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Nicholas "Nick" Chen has been traveling and working in China since 1973. He is the managing partner of Pamir Law Group, an international law and business consulting firm with offices in Shanghai and Taipei. Nick has a long track record of successfully closing transactions in a broad range of industries in China and Taiwan. He is a practical, street-smart client resource who provides an integrated business and legal approach focused on client growth. He is focused on results, cost effectiveness and effective communication.

Nick has successfully completed hundreds of foreign investments into Greater China in all coastal and many interior provinces for Fortune 100 multinational corporations, privately held and family group companies

planet Earth, the U.S.' geo-political instability and government infighting is preventing U.S. cooperation with China on the climate crisis.

Fortunately, China, the world's second largest economy and largest GHG emitter is already in the process of actively transforming its environmental and sustainability regulations and overall financial system to become a global model jurisdiction striving to respond to the climate crisis by focusing on the *key climate solution: decarbonization and energy transition i.e. replacing dirty fossil fuels with zero emissions energy sources.* China is implementing systems and frameworks to deliver decarbonization and energy transition for itself and is becoming an example for other jurisdictions to follow. This is good news for the future generations of China and the world, and will go a long way to addressing the climate crisis.

Nations, government regulators, supply chains/enterprises, banks, insurers and investors (the "stakeholders") all face the five challenges of (i) inflation, (ii) geo-political stress, (iii) supply chain disruption, (iv) global pandemics, and (v) climate catastrophe. The most challenging of these "five waves" is climate catastrophe.

Few stakeholders know enough to understand what is happening. Few have any context/overview. Few even have a basic literacy of the vocabulary/issues/tools available, let alone how to respond by designing/implementing solutions. Each stakeholder urgently needs to know what to do to navigate the current climate catastrophe. What should each stakeholder implement to decarbonize and complete energy transition? This is the gazillion dollar question for the leaders of each stakeholder.

If each stakeholder integrates decarbonization and energy transition into their operations, then climate catastrophe can be addressed. What they need is a roadmap on what to do.

The world has watched decades of politicians' and national climate pledges, as seen in Isaac Cordal's "Follow the Leaders"; not one has delivered any

Artwork by: Isaac Cordal
Subject: "Follow the Leaders" – Berlin, Germany – April 2021
Original Source: https://theworld.org/stories/2016/07/30/what-politicians-debating-global-warming-will-look-soon

and private equity groups from the US, Europe and Japan. He has closed over USD5 billion in deals in the region, assisting companies and investors to develop and implement practical cross-border strategies and programs to achieve safer business operations and growth. He attended Yale College and NYU School of Law. He is admitted to practice in the District of Columbia.

Jose Mario Ponce holds a degree in Bioenvironmental Systems Engineering from National Taiwan University and has a strong background in climate sustainability and energy transition. With a keen interest in addressing the global challenge of climate change, Jose Mario has been involved in various research projects related to climate change, renewable energy, and green financing. As part of the Climate Sustainability, Energy Transition, and Green Financing Research Project, Jose has been actively involved in conducting research, co-developing presentations, drafting reports and advising clients on key sustainability issues in Taiwan.

decarbonization or energy transition! Humans and for-profit industries have only delivered ever-rising emissions. China is actively and quietly engaged in implementing processes that are delivering decarbonization and energy transition[2,3].

If China succeeds at changing from a maximizing profits mentality to a balancing the interests of all stakeholders mentality, then she can successfully lead a results driven, whole of government and whole of society effort to develop, plan and implement concrete market shaping regulations that will result in decarbonization and energy transition on a national scale. These can guide each and every stakeholder step by step to decarbonize and complete energy transition. By doing this, China becomes more sustainable and also becomes an example or catalyst for the world. Then other nations can follow China's experience, lessons and leadership and localize systems and processes based on their own societal conditions. The global climate implications cannot be under-estimated.

Photo by: Nicholas Chen, Pamir Law Group

Currently, there is no global Environmental, Social and Governance ("ESG") standard or system to measure, monitor or report on sustainability criteria. In the U.S. there are currently over 110 different major ESG standards/systems. The many current systems result in chaos and implementation is plagued with conflicts of interests and greenwashing (paying to pollute).

With China's systematic top to bottom rule making system, she is ideally positioned to seize the opportunity to create and implement a universal all-inclusive set of standards based on balancing the interests of all stakeholders rather than maximizing profits to become the first catalyst jurisdiction to enforce operable, implementable and effective global sustainable standards, legal frameworks and guardrails to properly monitor, measure and report on comprehensive sustainability criteria (with incentives and penalties to enforce changed behavior) that drive decarbonization and energy transition. China can create SOPs for all stakeholders so they know how to implement the comprehensive standards and systems.

China is transforming from being the dirty factory floor of the world to the green factory floor of the world with plans to reach 86% zero-carbon energy by 2060 (currently 36% (2023)).

By implementing this decarbonization and energy transition process for each of the stakeholders, China will be showing the way for other jurisdictions to implement systems and SOPs for their own regulators, banks, institutional investors, insurance companies and listed and private companies. This will make China a worldwide catalyst and a model jurisdiction for global climate transformation.

Government regulators including the Chinese Ministry of the Environment, the Ministry of Finance ("MoF"), the China Banking Regulatory Commission ("CRBC") and the China Securities Regulatory Commission ("CSRC") are working together to ensure compliance across the entire Chinese financial ecosystem so China can accomplish it climate goals.

1. Chinese Stock Exchanges and Public Companies

2 China's Climate Transition Outlook 2023: https://energyandcleanair.org/wp/wp-content/uploads/2023/11/CREA_BOELL_Chinas-Climate-Transition-Outlook-2023_EN2.pdf

3 Top 10 Countries by Energy Transition Investment: https://elements.visualcapitalist.com/ranked-the-top-10-countries-by-energy-transition-investment/

The MoF and the CSRC have announced new sustainability disclosure regulations that will apply to companies listed on the Shanghai, Shenzhen and Beijing stock exchanges. The first disclosure reports will be due by 2026. Disclosures include but are not limited to[4,5]:

- **Scope 1, 2 and 3 GHG Emissions**
- **Discharge of Pollutants**
  - Details on the types and quantities of pollutants discharged into air, water and soil by the company's operations.
- **Energy Transition and Decarbonization Plans and Targets**
  - Companies must outline their strategies and specific goals for reducing their carbon footprint and transitioning to a low-carbon business model.
- **Usage of Carbon Offsets**
  - If a company utilizes carbon offsets to compensate for their emissions, they must disclose the type, source and verification process.
- **Analysis of Potential Climate Risks: Physical and Transition**
  - Physical Risks: These are the potential impacts of extreme weather events, rising sea levels and other climate-related changes on the company's operations and assets.
  - Transition Risks: These are the potential economic and regulatory changes that could arise as the world transitions to a low-carbon economy. This might include impacts on markets, supply chains and the company's business model.
- **Resource Consumption**
  - Information on the company's use of resources such as water, energy and raw materials.

The Shanghai stock exchange said in a statement "We are focusing on promoting behavioral change." In addition to promoting mentality and behavioral change, the CRBC and MoF have set serious penalties for non-compliance especially when it comes to large polluters.

Penalties include large fines, suspension of operations and limited access to bank financing[6].

The new regulations are set to apply to company activities from 2025 onwards, with the first reports due at the end of April 2026.

2. Banks and Financial Institutions

The MoF and CRBC agree that *banks and financial institutions are responsible for deploying capital in ways that are sustainable and lead to decarbonization and energy transition*. Historically, banks have financed the fossil fuel expansion that led to the current climate catastrophe. Multiple studies demonstrate how most banks, including banks that have signed onto the Equator Principles continue to finance and profit from fossil fuels. The Equator Compliant Climate Destruction report reveals how since the adoption of the EPs, banks have continued to pour billions of dollars into fossil fuels and climate killer projects. The Banking on

4 China's stock exchanges unveil disclosure rules for big companies: https://greencentralbanking.com/2024/02/23/china-stock-exchange-disclosure-rules/

5 China Stock Exchanges announces mandatory ESG reporting requirements: https://www.linkedin.com/pulse/new-mandatory-esg-reporting-requirements-china-handle-recyclings-mm3xf/

6 Notice on China's CRBC Green Credit Guidelines: https://www.gov.cn/gongbao/content/2012/content_2163593.htm

Climate Chaos report shows how the world's largest financial institutions all claim to be part of an effort to reduce emissions and be sustainable. However, the world's 60 largest commercial and investment banks (and lenders) are actually lending and deploying capital in ways that increase the use of fossil fuels[7,8]. Chinese regulators are setting guidelines for banks to make them more resilient, sustainable and help move towards large scale decarbonization. Disclosures include but are not limited to[9,10]:

- Environmental Policy and Strategy
  - › Describe the institution's commitment to environmental sustainability, including its environmental policies and overall green finance strategy.
- Governance Structures
  - › Outline the internal structures responsible for integrating environmental considerations into decision-making processes.
- Green Financing Activities
  - › Details on green loans, bonds and other financial products specifically designed to support environmentally friendly projects or businesses.
- Environmental Risk Identification and Assessment and Mitigation Strategies
  - › Explain how the financial institution identifies, assesses and manages environmental risks associated with its financing activities.
- Direct Environmental Footprint
  - › Report on the institution's own environmental impact, including greenhouse gas emissions, energy consumption and waste generation from its operations.
- Environmental Footprint of Financed Activities
  - › Disclose the environmental footprint of their loan portfolios or financed activities. This could involve metrics on the environmental performance of borrowers or the carbon intensity of financed projects (Not mandatory yet but will most probably be required in the future).

China's new guidelines intend to actually change the way financial institutions think and how they deploy capital. China's push for sustainable finance sets a significant example for the global financial sector.

The new regulations are set to apply to company activities from 2025 onwards.

3. Institutional Investors, Insurance Companies and ESG Funds

Institutional investors and insurance companies should Invest effectively using world-class sustainability criteria, find more and better invested companies that promote decarbonization and energy transition. China is going through a major transformation to ensure ESG leadership and compliance. Since 2016, seven state

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7 Equator Compliant Climate Destruction: https://www.banktrack.org/download/equator_compliant_climate_destruction_how_banks_finance_fossil_fuels_under_the_equator_principles/211118_equatorcompliantclimatedestruction.pdf

8 Banking on Climate Chaos: https://www.bankingonclimatechaos.org/wp-content/uploads/2023/08/BOCC_2023_vF.pdf

9 Guidelines on Environmental Disclosure for Financial Institutions: https://chinadevelopmentbrief.org/wp-content/uploads/2021/08/Guidelines-for-financial-institutions-environmental-information-disclosure.pdf

10 China: Climate risk disclosure strategies for financial institutions: https://www.iflr.com/article/2bfovtwrsr5an9cy1dgxs/sponsored/china-climate-risk-disclosure-strategies-for-financial-institutions

ministries jointly issued Guidelines for Establishing the Green Financial System, which was approved by the State Council, the People's Bank of China, the Ministry of Finance, the National Development and Reform Commission, CRBC, CSRC and the China Insurance Regulatory Commission[11]. In 2022 *China revealed its first comprehensive ESG framework which measures 118 indicators. New ESG regulations for investors will need to be reported starting 2026*, these include but are not limited to:

- **General Information:**
  - Fund Name and Strategy: Clearly state the fund's ESG focus area (e.g., climate change, social responsibility) and overall investment strategy.
  - Management Structure: Disclose details about the team responsible for ESG integration and decision-making.
- **ESG Integration Process:**
  - Explain how ESG factors are considered throughout the investment process, including screening, analysis and portfolio construction.
  - Outline methodologies used to assess ESG risks and opportunities for potential investments.
- **Portfolio Characteristics:**
  - Provide metrics that demonstrate the environmental and social impact of the fund's portfolio holdings. This could include data on carbon footprint, energy efficiency, diversity metrics of investee companies, etc.
  - Disclose the breakdown of the portfolio by ESG-related categories (e.g., percentage invested in renewable energy companies).
- **Performance Measurement:**
  - Outline how the fund measures its performance, considering both financial returns and ESG impact. This might involve the use of specific ESG performance indicators or benchmarks.
  - Disclose relevant performance data related to both financial returns and ESG metrics.
- **Risk Management:**
  - Describe the fund's approach to managing ESG-related risks within the portfolio. This could include strategies for mitigating climate risk, social justice issues, or governance concerns.
- **Additional Considerations:**
  - Alignment with Standards: While mandatory national ESG disclosure standards are still under development, some funds might choose to disclose information aligned with international ESG reporting frameworks like the Global Reporting Initiative (GRI) Standards.
  - Transparency and Consistency: Disclosures should be clear, concise, and easy for investors to understand. Consistency in reporting metrics and methodologies used year-over-year is also crucial.
  - Verification and Assurance: Some ESG funds might choose to have their disclosures independently verified by third-party assurance providers to enhance credibility.

11 An Evolving Landscape of ESG in China: https://morrowsodali.com/insights/an-evolving-landscape-of-esg-in-china

The regulations also are stricter than global guidelines set by the International Sustainability Standards Board, which only cover the impact of ESG risks and opportunities on companies' financials[12].

Conclusion/Takeaway

China is proactively driving decarbonization and energy transition through a comprehensive whole of government and whole of society approach. Their results-oriented strategy, with clear legal frameworks and enforceable regulations, is paving the way for a more sustainable future.

China's green push has the potential to be a global game-changer. By combining stricter environmental regulations (with actual penalties that include large fines, suspension of operations and limited access to bank financing) and innovative green finance, China can not only reduce its own emissions but also set a powerful example for other developing nations facing similar challenges.

Photo by: Anil T Prabhakar, Reminiscence Frames
Instagram Caption: "Let me help you? : Once Humanity dying in Mankind, sometime animals are guiding us back to our basics."
Original Source: https://www.instagram.com/p/B7phq1TFUyT/

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By aiming to become the first to implement effective global standards and transitioning from the world's "dirty factory floor" to a "green" leader, China is not only tackling its own environmental challenges but potentially setting a new standard for others in the world to follow. Their ambitious goal of reaching 86% zero-carbon energy by 2060 demonstrates a strong commitment to a sustainable future, not just for China, but for everyone on the planet.

12 China proposes new ESG rules to keep up with Europe: https://www.businesstimes.com.sg/esg/china-proposes-new-esg-rules-keep-europe

13 Amateur photographer Anil Prabhakar captured the fleeting moment, in which one of the Indonesian island's critically endangered apes stretched out its hand to help a man out of snake-infested water: https://edition.cnn.com/2020/02/07/asia/orangutan-borneo-intl-scli/index.html

THE NEW COMPANY LAW: HIGHLIGHTS AND SUGGESTIONS FOR FOREIGN-INVESTED ENTERPRISES

On December 29, 2023, the new Company Law was passed, making substantial adjustments to nearly 40% of the provisions in the current Company Law. This revision of the Company Law has become the most concerning issue for Foreign-Invested Enterprises ("FIEs") in recent times.

Considering that the majority of existing FIEs are limited liability companies ("LLCs"), this article will provide insights from the perspective of LLCs on the revised provisions in the new Company Law that will have most highlighted impacts on FIEs, specifically in areas of corporate governance structure, shareholder contribution liability, and duties of the board of directors, supervisors and senior management ("Senior Managers").

I. Corporate Governance Structure

1. Requirements of employee directors to the board of directors

Highlights:

The new Company Law mandates employee directors to all enterprises, which previously only applied to state-owned enterprises. It stipulates that for LLCs with more than 300 employees, except for those companies with a board of supervisors having employee representative, the board of directors should also include employee representative. Both the board of directors and the board of supervisors' employee representatives should be democratically elected by the employees through the employees' representative congress, employees' congress, or by other means.

Suggestions:

FIEs with over 300 employees should pay attention to the implications of an employee director on the composition of the board of directors and make reasonable arrangements in advance. In the short term, FIEs may consider

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establishing a board of supervisors with employee representative to avoid substantial adjustments to the structure of the board of directors.

Notably, although the new Company Law does not specify the qualifications for employee directors or supervisors, according to relevant regulations issued by the All-China Federation of Trade Unions, Senior Managers of a company cannot concurrently serve as employee directors or employee supervisors. Further clarification on this issue will be subject to subsequent judicial interpretations.

2. Adjustments to the establishment of supervisors/board of supervisors

Highlights:

Under the current company law, LLCs can choose to establish a board of supervisors or to appoint one to two supervisors instead. The new Company Law explicitly states that the board of directors can establish an audit committee to exercise the functions of the board of supervisors, and the board of supervisors will no longer be required. Small-scale companies or companies with few shareholders can choose not to establish a board of supervisors and appoint one supervisor, or not appoint any supervisors; in other words, the scheme of two supervisors will no longer exist.

Suggestions:

In practice, most FIEs establish supervisors solely for purpose of meeting the statutory requirements of the law and the company registration department, and the actual supervisory functions are always failed to be fulfilled. In terms of that, since the new Company Law increases the duties and responsibilities of supervisors, most wholly-owned FIEs may consider cancelling the board of supervisors (or supervisors) which may better meet their needs.

On the other hand, for joint venture FIEs, for better control over the company and protection of interests, it may still be advisable to retain the board of supervisors (or supervisors). In addition, if FIEs (eg. Sino-foreign joint ventures) currently appointed two supervisors respectively from both sides, it is necessary to establish a board of supervisors, increase the number of supervisors, and add employee supervisors accordingly.

law. She has helped many multinational companies with their investments in China by providing full-process legal services from establishment to liquidation for their subsidiaries and branches. She has also been acting as the legal counsel of many foreign invested companies to provide daily legal support, including advising on compliance and employment matters.

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3. Adjustments to the statutory powers of the shareholders' meeting, the board of directors, and the manager

Highlights:

The new Company Law reduces the statutory powers of the shareholders' meeting and removes the specific enumeration of powers for the managers in the current Company Law. It clarifies that the powers of the board of directors and the managers can be expanded based on the Articles of Association and internal authorizations. For FIEs, these adjustments provide greater flexibility and operational space in internal decision-making and are more in line with the board-centric corporate governance model adopted by many overseas companies.

Suggestions:

Enterprises can optimize the scope of powers for the shareholders' meeting, the board of directors, and the executive management based on their own circumstances to improve management efficiency.

4. Addition of statutory requirements for the procedural rules for the shareholders' meeting and the board of directors

Highlights:

The current Company Law barely imposes substantial constraints on the meetings and voting procedural rules for LLCs, allowing the companies to determine the rules through the Articles of Association at discretion. The new Company Law introduces statutory requirements for the procedural rules, including (1) resolutions of the shareholders' meeting should be passed by the shareholders with a majority of voting rights in attendance; (2) the quorum of a board meeting will be met by the attendance of a majority of all directors, and decisions of the board of directors should be approved by a majority of all directors.

Suggestions:

FIEs should review the provisions in the Articles of Association regarding the voting mechanisms and the quorum rules for the shareholders' meeting and the board of directors in accordance with the new Company Law, to ensure their validity. At the same time, it may be advisable to consider incorporating certain mechanisms for substituting absent directors and resolving board deadlock, among others, in order to prevent decision-making delays due to an inability to meet the quorum for a valid board meeting.

II. Shareholders' Capital Contribution Obligations

1. Addition of statutory deadline for LLC capital contributions

Highlights:

The new Company Law mandates a statutory deadline for LLC capital contributions. Unless otherwise specified by laws and regulations, shareholders are required to fully contribute their subscribed capital (including the subsequent capital increases) within five years from the establishment of LLCs. If the capital contribution deadline or amount is significantly abnormal, the registration authority may require timely adjustments according to the law.

According to the draft regulations recently issued by the State Administration for Market Regulation on February 6, 2024, a three-year transition period will be set for the existing LLCs established before the effective date of the new Company Law, a.k.a. from July 1, 2024, to June 30, 2027. During the transition period, LLCs can adjust the capital contribution deadline and should complete the capital contribution by June 30, 2032. In short, the existing LLCs will have a total of eight years for capital contributions.

Suggestions:

For FIEs that have not yet fully contributed their registered capital, it is recommended to assess the outstanding contribution amount and the payment schedule, or to process the reduction of capital through legal procedures.

For newly established FIEs after the effectiveness of the new Company Law, it is advisable to be cautious when setting the registered capital, ensuring sufficient funds to meet the ongoing operational needs of the enterprise and at the same time avoiding excessively high registered capital to mitigate the risk of failing to fulfill the capital contribution obligation.

2. Expansion of applicable situations for acceleration of capital contribution

Highlights:

In addition to the requirement for the 5-year statutory deadline, the new Company Law also introduces provisions regarding acceleration of shareholders' capital contribution obligations. The triggering condition has been expanded to the situation where "the company is unable to repay its due debts". Under the current judicial interpretation, the acceleration is only subject to the situations where the LLC is not applying for bankruptcy when having no assets available for execution, or LLC is extending the capital contribution deadline after the occurrence of debts; such special restrictions seem no longer imposed following the effectiveness of the new Company Law.

Suggestions:

For FIEs, it is recommended to avoid excessively high registered capital, and to assess the risks in conjunction with the company's liabilities. For future funding needs, apart from capital increases, the company may also consider financing by means of foreign loans from shareholders.

3. Strengthening shareholder liabilities when capital is not fully contributed

Highlights:

The new Company Law restates the joint liabilities of co-founders when the initial capital is not fully contributed. It also imposes supplementary liability of the transferor and joint liability of the transferee in cases where the equity transfer involves uncontributed capital.

Suggestions:

To mitigate related risks, when acquiring a Chinese company, foreign investors should pay special attention to the actual contribution of registered capital of the target. Apart from checking whether the payment of registered capital complies with the Articles of Association and requesting representations and warranties regarding capital adequacy, it is also advisable to require the counterparty to provide capital verification reports on capital contributions or asset appraisal reports for non-monetary contributions. If feasible, the foreign investor may request the counterparty to complete the payment of the outstanding portion of registered capital before the closing of the transaction.

III. Duties of Senior Managers

1. Clarification of fiduciary duty and diligence duty, and addition of fiduciary duty and diligence duty for controlling shareholders and actual controllers

Highlights:

The new Company Law stipulates the definitions of the fiduciary duty and diligence duty of Senior Managers. Fiduciary duty refers to the obligation of Senior Managers to take measures to avoid conflicts of interest with the company's interests and not to use their authority for personal gains. Diligence duty refers to the obligation of Senior Manager to fulfill their duties with the reasonable care that a manager would normally exercise for the maximum interests of the company. Furthermore, the new Company Law explicitly states that controlling shareholders and actual controllers who are not appointed as directors but are actually involved in the company's affairs (a.k.a. de facto directors) should also be subject to a duty of diligence and fiduciary duty.

Suggestions:

In practice, it is common for FIEs to have non-residents from overseas headquarters appointed as Senior Managers. These persons may have limited involvement in the actual operations and decision-making of the company. With the clarification of the diligence duty under the new Company Law, it is recommended to appoint persons who are familiar with the business and capable to actively participate in the operations of the company as Senior Managers in the future, in order to reduce the risks associated with their duties. Additionally, FIEs could also consider purchasing the liability insurance to help alleviate concerns of Senior Managers as well as to share some risks with the company.

2. Strengthening the personal liability of Senior Managers for capital contribution defects

Highlights:

The new Company Law clarifies that the board of directors should verify the shareholders' capital contributions.

Directors who fail to fulfill such obligation and cause losses to the company will be subject to personal liabilities for compensations. Furthermore, Senior Managers who are responsible for losses caused by illegal capital withdrawal will also be jointly liable with the shareholder.

Suggestions:

Board members should regularly verify the shareholders' capital contributions to ensure no capital withdrawal is conducted. They should also promptly issue written reminders to shareholders who fail to make timely capital contributions and keep relevant written records.

3. Changing the liquidation obligor from shareholders to directors

Highlights:

The new Company Law changes the obligor of liquidation from shareholders to directors. If directors fail to fulfill their liquidation obligations properly, they may be personally liable for the losses incurred by the company and creditors.

Suggestions:

After the occurrence of dissolution events, directors of FIEs should promptly fulfill their liquidation obligations, including promptly establishing a liquidation committee, liquidating the company's assets and debts, and notifying creditors, in order to avoid personal liabilities.

Conclusion

The new Company Law comprehensively revises the existing law and will come into effect on July 1, 2024. FIEs should pay attention to the implications of the new Company Law on corporate governance structure, capital contribution plans and other core matters, and make timely adjustments and updates accordingly based on their specific circumstances.

SIGNIFICANT IMPACT OF THE "JUDICIAL INTERPRETATION OF THE GENERAL PROVISIONS OF THE CONTRACT" ON ADVANCING CHINA'S LEGAL SYSTEM AND PRACTICAL LEGAL OPERATIONS

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Since the Civil Code of the People's Republic of China became effective on January 1, 2021, there has been an ongoing effort by legislative and judicial authorities to adapt to practical requirements and address intricate legal challenges. This endeavor has led to the introduction of a range of supplementary laws, regulations, and judicial interpretations. A notable development in this process occurred on December 5, 2023, when the Supreme People's Court issued the "Interpretation on Several Issues concerning the Application of the General Provisions of the Contract of the Civil Code of the People's Republic of China" (hereafter, the "Judicial Interpretation of the General Provisions of the Contract"). This judicial interpretation marks a significant milestone, updating numerous substantive and procedural norms against the backdrop of evolving historical circumstances.

1. Background and Development of the Judicial Interpretation of the General Provisions of the Contract

The Civil Code was enacted on May 28, 2020. The following day, the CPC Central Committee's Political Bureau emphasized the need for effective implementation during their twentieth collective study session. Echoing

General Secretary Xi Jinping's emphasis on the Civil Code's role in enhancing the rule of law and protecting citizens' rights, the Supreme Court embarked on a comprehensive review of existing judicial interpretations. This review led to the abolishment of 116, amendment of 111, and retention of 364 interpretations, including the significant "Interpretation I" and "Interpretation II" of the Contract Law. The need to align these interpretations with the Civil Code's new provisions, particularly those pertaining to the contract's general provisions requiring precise judicial standards, catalyzed the decision to formulate a new interpretation. This endeavor was guided by Xi Jinping's socialist thought and his directives on the rule of law, integrating practical judicial experiences with inputs from the Legislative Affairs Commission of the National People's Congress (the "NPC") Standing Committee. The aim was to achieve a consensus that reflects legislative intent, addresses judicial realities, and resonates with academic perspectives.

The drafting process, initiated in June 2020 by the Supreme Court's Party Group, involved a meticulous review and initial drafting phase, informed by research in various cities including Hangzhou and Wuhan. This phase was followed by further studies and expert discussions in major cities and academic institutions. A preliminary draft emerged from this extensive consultation and research. To ensure the draft's scientific rigor, the Supreme Court sought written feedback from ten high courts and organized symposiums with local court judges and legal professionals, including those from the All-China Lawyers Association and the Civil Law Research Association of the China Law Society.

In October 2022, after considering insights from legislative, judicial, and academic experts, the Supreme People's Court conducted a detailed examination of the draft, leading to substantial revisions and the formulation of a solicitation draft. This draft was circulated for feedback to key political and legal institutions and high courts nationwide. The call for public opinion in November 2022 yielded over 2,000 responses, complemented by reviews from over twenty law schools and research institutes. Integrating these diverse inputs, the Supreme People's Court sought further advice from the Legislative Affairs Commission of the NPC Standing Committee between December 2022 and February 2023. This comprehensive consultative process culminated in the formation of the final interpretation, which was subsequently ratified at the 1889th meeting of the Judicial Committee of the Supreme People's Court.

Economics. He successfully passed both the New York State Bar Examination and the Legal Professional Qualification Examination of China, demonstrating his proficiency in diverse legal systems and his commitment to the legal profession on an international scale. His career began in New York, where he gained extensive experience in international arbitration and foreign investment.

In September 2023, Mr. Deng joined Watson & Band, focusing on areas such as Foreign Investment and Compliance.

2. Principles Guiding the Formulation of the Judicial Interpretation of the General Provisions of the Contract

Firstly, fidelity to legislative intent. The drafting process prioritized a precise understanding and implementation of the Civil Code's legislative spirit, with special focus on incorporating insights from the Civil Law Office of the Legislative Affairs Commission of the NPC Standing Committee. This approach ensured strict adherence to the original legislative purpose, avoiding any deviation in rule formulation. The interpretation respected the judicial authority established by the Legislation Law, refrained from creating new rules, and accurately implemented the Civil Code's advanced system design in contract law, particularly enhancing the obligation preservation system to prevent debt evasion. The interpretation includes detailed operational provisions on issues like jurisdiction and party involvement in subrogation and revocation litigation, addressing theoretical and practical concerns such as the interplay between subrogation litigation and arbitration agreements, and the legal effects of exercising the right of revocation, thereby harmonizing legal application standards.

Secondly, problem-oriented approach. Echoing the 20th National Congress of the Communist Party of China's emphasis on problem-solving, the drafting maintained a focus on addressing real-world issues, aiming for articles that are specific, context-aware, and solution-driven, while prioritizing precision over breadth. For instance, the interpretation addresses complexities in reservation contracts as defined in the Civil Code, clarifying issues such as contract identification, breach recognition, and liability, without delving into general provisions like offers and promises. It also provides clarity on job representation versus unauthorized representation in contract signing by employees of legal or unincorporated entities, and establishes a unified standard for the retrospective effect of set-offs, resolving long-standing ambiguities in judicial practice.

Thirdly, continuity in judicial policy. The drafting process endeavored to preserve or appropriately modify effective provisions from previous interpretations ("Interpretation I" and "Interpretation II" of the Contract Law and the "Interpretation of the Guarantee Law") that are compatible with the Civil Code. Additionally, it integrated and elevated practical insights from sources like the "National Court Civil and Commercial Trial Work Conference Minutes" into judicial interpretations, ensuring their relevance and applicability. This approach maintains the essence of previous judicial policies and adjusts them to contemporary needs, as seen in the application of issues like liquidated damages and deposits.

Fourthly, systemic and dialectical thinking. In line with the 20th CPC National Congress's view of interconnectedness and interdependence, the drafting process embraced a comprehensive, systemic approach, recognizing the interconnected nature of legal systems and aiming for holistic problem-solving. This included addressing the effectiveness of contracts made without authority and the integration of these issues with the Civil Code's property rights and other related systems. The drafting also employed dialectical thinking, balancing equal and inclined protection in standard clause determinations, and requiring judges to discern the essence beneath appearances in civil and commercial trials. Additionally, it addressed the dialectic of quantitative and qualitative changes, such as in assessing price variations as changes in circumstances and determining the validity of contracts based on compliance with mandatory regulations and public order.

3. The Supreme People's Court's Publication of Ten Illustrative Cases Significantly Enriches and Complements the Interpretation Process

The Supreme People's Court, in tandem with its judicial interpretation of the Civil Code's Contract Compilation, has published ten illustrative cases. This initiative is designed to enrich the interpretation process.

The development of these interpretations and the release of illustrative cases are key strategies of the Supreme People's Court to ensure the uniform application of law across national courts and to standardize judicial decision-making. These illustrative cases, with their vivid, graphic, and direct nature, significantly contribute to providing direction, assessment, and exemplification, thereby augmenting the effectiveness of the interpretations. Consequently, in parallel with the proclamation of the interpretation, the Court disseminated ten illustrative cases, fostering a comprehensive method for guiding the resolution of contract

disputes. The publication of these cases serves dual purposes.

Firstly, it enhances understanding of the interpretation's specific stipulations. Addressing a multitude of complex issues in contract dispute adjudication, the interpretative cases present these rules in a tangible and accessible manner, aiding in the public's accurate interpretation and understanding. Furthermore, these cases, adjudicated prior to the interpretation's release, were integral to its development. Publishing them thus clarifies the core objectives that informed the establishment of these rules.

Secondly, these cases provide a practical complement to the interpretative rules. Given the complexity and variability of contract disputes, the interpretation's rules cannot cover all possible situations but are crafted to address the most typical and significant issues encountered in judicial practice. The release of related illustrative cases offers guidance for similar cases, creating a synergistic and enhancing effect.

It's important to note that the Supreme People's Court, in emphasizing the pertinence of these illustrative cases, streamlined the case facts and rationale in their publication. Only those elements that align with and do not contradict the interpretation's specifics were retained. This implies that only the preserved elements of the cases hold exemplary value, whereas the unretained elements do not inherently possess such significance.

In conclusion, the promulgation of the "Judicial Interpretation of the General Provisions of the Contract" under the Civil Code by the Supreme People's Court represents a monumental stride in the evolution of China's legal framework and its practical legal operations. This judicial interpretation, bolstered by the release of ten illustrative cases, not only clarifies and enriches the understanding of complex legal provisions but also serves as a pivotal tool in standardizing judicial practices across the nation. It signifies a commitment to ensuring that the interpretation and application of laws are aligned with the evolving societal needs and legal realities, thereby reinforcing the rule of law in China. The interpretative guidance, coupled with real-life case examples, offers invaluable insights for legal practitioners, enhancing their ability to navigate the intricacies of contract law with greater precision and confidence. This development undoubtedly marks a progressive step in China's legal system, reflecting a deepened understanding of the law and its practical implications, which is essential for the continuous advancement and sophistication of legal practices in the country.

LITIGATION & DISPUTE RESOLUTION: THE NEW ARRANGEMENT ON CROSS-BORDER RECIPROCAL ENFORCEMENT OF JUDGMENTS

The new arrangement

Gazetted on 10 November 2023, the Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance (Cap 645) ("**Ordinance**") and the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region (HKSAR) (Civil and Commercial Arrangement) ("**Arrangement**") finally came into operation on 29 January 2024. The Ordinance and Arrangement apply to judgments handed down on or after the commencement date (i.e. 29 January 2024). In other words, the Ordinance replaces the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597). For the avoidance of doubt, the existing regime under Cap 597 continues to apply for judgments handed down prior to 29 January 2024. This newsletter sets out the key features of the Arrangement.

Removal of the exclusive jurisdiction clause requirement

Upon the implementation of the Ordinance, restrictions such as "non-exclusive jurisdiction clauses" and "asymmetric jurisdiction clauses" will no longer be obstacles to recognition and enforcement, enabling seamless cross border recognition and enforcement of judgments. The applicant may apply to the relevant courts with jurisdiction in the Mainland and Hong Kong simultaneously for recognition and enforcement of relevant judgments. The Mainland and Hong Kong courts should provide each other with information on the execution of the judgment upon the request of the counterpart court, and ensure that the total enforced amount does not exceed the amount determined in the original judgment.

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Scope of applicable judgments, rulings etc.

Interim relief or anti-suit injunctions

Under the Arrangement, orders for interim relief or anti-suit injunctions cannot be directly recognized and/or enforced. However, interim measures can be applied for during the recognition and enforcement procedures. Mainland judgments that can be directly recognized under the Arrangement include judgments, rulings, conciliatory statements, orders of payment given or made by a court in the Mainland, and yet expressly exclude rulings given in respect of an interim measure. Hong Kong judgments that can be directly recognized, as discussed, do not include anti-suit injunctions and interim relief orders.

For a Mainland judgment that has been recognized in Hong Kong, the applicant can also request the Hong Kong court to issue a post-judgment injunction against the defendant's Hong Kong assets. In the case 苏州太合汇投資管理有限公司 v 霍尔果斯市摩伽互联娱乐有限公司 [2023] 1 HKLRD 342, the plaintiff successfully applied for recognition of the Mainland judgment in Hong Kong, and based on this, obtained a freezing order from the Hong Kong court against the assets of the defendant (and its wholly-owned subsidiary) in Hong Kong.

Excluded judgments

Article 3 of the Arrangement excludes certain types of judgments in civil and commercial cases from the scope of application, such as cases involving payment of maintenance and the dissolution of an adoptive relationship in matrimonial cases, and cases in relation to succession to, or the administration or distribution of, an estate etc. Intellectual property cases in respect of patents are also excluded by the Ordinance expressly. Nonetheless, according to Article 14 of the Arrangement, if only the preliminary issues (i.e. not the key legal issues in question) in certain cases involve the above-mentioned issues, the Hong Kong courts should not refuse to recognize and enforce the relevant Mainland judgments.

Although the Arrangement does not apply to judgments in bankruptcy or insolvency cases, the Mainland and Hong Kong already have practices and relevant regulations for mutual recognition and assistance in the same and the Arrangement merely seek to supplement the existing legal regimes. For example, Hong Kong courts have recognized the winding-up proceedings of Mainland courts in *Re CEFC Shanghai International Group Ltd* [2020] 1 HKLRD 676 (Shanghai Huaxin case) in 2019.

In principle, the Arrangement does not apply to the recognition and enforcement of punitive damages. However, exceptions are made for cases such as intellectual property infringement cases. According to Article 17 of the Arrangement, i.e. section 18(3) of the Ordinance, punitive or exemplary damages in respect of a tortious dispute over an infringement of a specified intellectual property right committed in the Mainland or a civil dispute over an act of unfair competition under Article 6 of the Mainland Anti-Unfair Competition Law committed in the Mainland can be awarded. The same applies for judgments in cases of an infringement of a right in a trade secret.

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Due process and setting aside

Whether the service of writs is lawful should be determined according to the law of the place of original proceedings. In order to reduce the risk that the judgment will not be recognized and enforced, the parties that seek to enforce the judgment may try to ensure that the Mainland court has given the parties sufficient opportunities to be heard. On the other hand, expert evidence may also be provided to prove that due process has been observed in the course of obtaining judgment.

Indeed, registration would be set aside if the court is satisfied that the judgment was obtained by fraud. That said, how to determine "fraud" may trigger another round of legal debate.

Parallel litigation

It is not uncommon for cases with non-exclusive jurisdiction to be tried simultaneously in the Mainland and Hong Kong based on the same set of facts and basis. The Arrangement provides that in case of parallel litigation and if an applicant applies to a court in one place to recognize and enforce a judgment of a court in another place, the court must accept the application of registration. It is for the applicant of the registration application to notify the adjudicating court of the application as soon as the application is made, and on receiving the notification, the adjudicating court must order that the parallel proceedings be stayed (Article 22 of the Arrangement).

The procedures of recognition

Enforcement of Hong Kong judgments in the Mainland

Such application shall be made to the Intermediate People's Court of the place of residence of the applicant or the respondent, or where the property of the respondent lies. It should be noted that the "applicant's place of residence" is a new option contained in the Arrangement to cater for the situations where a respondent may not reside in, or have any property in the Mainland. Relevant supporting documents would include an application containing matters stipulated in Article 9 of the Arrangement, a sealed judgment, the identity documents and evidence in respect of the respondent's property.

Apart from recognizing and enforcing the judgment debt in full, the Mainland courts may either recognize and enforce the whole of the judgment debt, or only to recognize and enforce part of the judgment debt upon hearing of the matter. It should be noted that under Article 23 of the Arrangement, the applicant may not apply for recognition and enforcement if the Mainland court opts not to recognize the judgment debt at all and can only resort to commencing a fresh litigation. In case that the judgment debt is only recognized partially, certain injunctive measures may be applied by the Mainland court to prohibit dissipation of assets. Under Article 26 of the Arrangement, upon a ruling being made, the party aggrieved by the court decision may apply for a review within 10 days to a higher People's Court.

Enforcement of Mainland judgments in Hong Kong

For Mainland judgments handed down on or after 29 January 2024, applications must be made in accordance with the Ordinance and the Arrangement by way of an Originating Summons and an ex-parte application, supported by a verifying affirmation, a draft order and other supporting documents such as identity documents and a sealed copy of the Mainland judgment. Such application must be made within two years from the date of relevant court documents or the last day of the performance period stipulated in the said court documents. Any applications to set aside registration by the respondent shall be made by way of a summons supported by an affirmation. A substantive hearing may be fixed to determine on the issues in question.

IMPACT OF THE DIGITAL PERSONAL DATA PROTECTION ACT ON EMPLOYEE DATA IN INDIA

Introduction

The Digital Personal Data Protection Act, 2023 ("**Act**") received Presidential assent on August 11, 2023. Although no rules have been formulated thereunder and the Act is yet to come into force, the applicability of this Act is imminent. The Act encompasses the processing of digital personal data, defined under the Act as data about an individual who is identifiable by or in relation to such data in digital form[1], in a manner that recognizes both the right of individuals to protect their personal data and the need to process such personal data for lawful purposes. Processing as defined under the Act and inter alia includes in relation to personal data operations such as collection, recording, structuring, storage, use, indexing, disclosure by transmission, erasure and destruction[2].

The Data Fiduciaries, meaning the individuals or entities responsible for determining the purpose and methods of processing personal data, are bound by the provisions of the Act aimed at safeguarding the Data Principals to whom the personal data relates to. The Act applies to processing of digital personal data collected within the territory of India either in digital form or in non-digital form and digitized subsequently. It even applies to processing of digital personal data outside the territory of India if the processing is related to offering of goods and services to Data Principals in India[3].

Processing Employee Data

The Act does not differentiate between personal data of the users/ consumers utilized by an employer to provide goods and services, or personal data of its employees. However, Section 7 of the Act does enable a Data Fiduciary to process employees' personal data, "***for the purposes of employment or those related to safeguarding the employer from loss***

1 Section 2(t) and Section 2(n) of the Act.
2 Section 2(x) of the Act.
3 Section 3 of the Act.

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Utkarsh Mishra is a corporate transactional lawyer holding a dual degree in law and business administration. He advises clients in the fields of private equity, joint ventures, foreign exchange, technology, energy and contractual negotiation. His expertise and interest lie in contemporary topics such as data privacy and carbon neutrality.

Utkarsh has considerable experience in drafting and reviewing transactional documents, commercial contracts, legal notices and legal opinions. He also regularly conducts research on a variety of legal propositions and has gotten his work published on notable platforms.

***or liability**, such as prevention of corporate espionage, maintenance of confidentiality of trade secrets, intellectual property, classified information or **provision of any service or benefit sought by a Data Principal who is an employee**".* Relevant portion of Section 7 is reproduced below for the ease of reference:

> *7. A Data Fiduciary may process personal data of a Data Principal for any of following uses, namely:*
>
> ...
>
> *(i) for the purposes of employment or those related to safeguarding the employer from loss or liability, such as prevention of corporate espionage, maintenance of confidentiality of trade secrets, intellectual property, classified information or provision of any service or benefit sought by a Data Principal who is an employee.*

Thus, an employer can process personal data for fulfilling any employment purpose or for safeguarding themselves from any loss or liability, even without obtaining employees' consent. These may include processing data for numerous reasons such as performance assessment, payroll, legal compliance, medical benefits and insurance claims.

For any other purpose not covered under this scope and for which the employee has already given his/her consent to processing before enactment of this Act, the employer must as soon as practicable provide a notice to the employee informing him/her of (i) the personal data and the purpose for which it has been processed or will be processed, (ii) their right of withdrawal of consent and right of grievance redressal, and (iii) the manner in which he/she can make a complaint to the Data Protection Board constituted under the Act[4].

4 Section 5(2) of the Act.

Moving forward, if the employer wishes to process employee's personal data for a purpose not covered under Section 7 and for which consent has not already been given, then they must follow the abovementioned process again by intimating the purpose of the usage in the notice, which precedes or accompanies the request made to the employees for their consent. The consent in question must be in accordance with Section 6 of the Act, which provides it to be free, specific, informed, unconditional and unambiguous with a clear affirmative action in a clear and plain English language or any other language from the Eighth Schedule of the Constitution[5].

EMPLOYER'S DUTIES AND OBLIGATIONS

The Act enforces numerous obligations upon the employers which are primarily enumerated under Section 8 of the Act. The employers are responsible for complying with the Act and the rules made thereunder in respect of the processing of personal data undertaken by it or by Data Processors on its behalf and the employer must engage the Data Processor only under a valid contract. In the event where the processing of personal data is likely to be used to make a decision affecting the employee or is being disclosed to another Data Fiduciary, the employer must ensure its completeness, accuracy and consistency. The employer shall also implement appropriate technical and organizational measures to ensure adherence to the Act. The employer shall take reasonable security measures to ensure the protection of the personal data in its possession and to prevent personal data breach and a failure to observe this obligation may result in the employer incurring some penalties. If there is any personal data breach, the employer must inform each affected employee and the Data Protection Board about this breach and monetary penalty may be imposed on the employer if it fails to intimate the parties. Once the purpose for which the personal data taken is complete or if the employee withdraws his/her consent, whichever is earlier, the employer must erase the personal data and cause its Data Processors to do the same, unless retention of this data is required under law. The employer shall also publish the contact information of a person able to answer the employees' queries, if any, regarding the processing of their personal data and establish and implement an effective grievance redressal mechanism. The personal data must not be processed in any restricted territory or country outside India as notified from time to time[6].

The employee has the right to ascertain a summary of the personal data being processed, the processing activities undertaken by the employer and the identities of all the other Data Fiduciaries and Data Processors in possession of his/her personal data[7]. The employee also has the right to correct, complete, update or erase his/her personal data for which he/she has previously given consent[8].

The employer, if it engages any third party to process employees' personal data for any purpose such as accounting, bookkeeping or payroll must revisit their existing contracts to ensure there are obligations on such Data Processors to safeguard the data in accordance with the Act to limit the risk of liability for non-compliance under the Act.

Additionally, the Act is silent whether the ground of processing personal data for employers includes processing done before and after employment, such as recruitment, verification and post-termination processing, and whether it applies to contractual hires like consultants, agents, interns and any other person not strictly falling under the ambit of employee. It must be noted that clarity with respect to the mechanism to be followed under several provisions will only be attained once the rules are formulated and enacted under the Act.

5 Section 6 of the Act.

6 Section 16 of the Act.

7 Section 11 of the Act

8 Section 12 of the Act.

VIETNAM - UPDATES ON NEW REGULATIONS OF REAL ESTATE

The National Assembly of Vietnam has recently passed three new laws that are the backbone of real estate market namely Law on Land 2024, Law on Housing 2023 and Law on Real Estate Business 2023. As these laws will come into effect from 1 January 2025, there are two points that foreign investors interested in the real estate market of Vietnam should be aware of.

1. Expanded scope of propriety and business rights of foreign-invested companies

Traditionally, private corporate entities in Vietnam enjoy different scopes of propriety and business rights depending on their foreign/domestic status. The treatment differs between purely domestic companies and foreign-invested companies[1]. In this regard, the ratio of foreign ownership in foreign-invested companies is not relevant from the three land-related law perspective. This is incompatible with the Law on Investment 2020 where only companies whose direct or indirect foreign-ownership reaches a critical threshold are discriminated. These companies include[2]:

- those of which more than 50% of charter capital is held by foreign investors or of which the majority of partners are foreigners ("**F1 companies**"); and
- those of which more than 50% of charter capital is held by F1 Companies, and those of which more than 50% of charter capital is commonly held by foreign investors and F1 Companies ("**F2 companies**").

While the Law on Housing 2023 continues restricting all foreign-invested companies in the same way regardless of their foreign ownership ratio[3], the Law on Land 2024 and the Law on Real Estate Business 2023 now only

1 Law on Land No. 45/2013/QH13, as amended by Law No. 35/2018/QH14 (effective from 1 July 2014 to 31 December 2024) ("**Law on Land 2013**"), Article 5; Law on Housing No. 65/2014/QH13, as amended by Laws No. 40/2019/QH14, 61/2020/QH14, 62/2020/QH14, 64/2020/QH14, and 03/2022/QH15 (effective from 1 July 2015 to 31 December 2024) ("**Law on Housing 2015**"), Articles 10, and 11; and Law on Real Estate Business No. 66/2014/QH13, as amended by Law No. 61/2020/QH14 (effective from 1 July 2015 to 31 December 2024) ("**Law on Real Estate Business 2014**"), Article 11.

2 Law on Investment No. 61/2020/QH14 dated 17 June 2020, Article 23.

3 Law on Housing 2023, Article 17.

Written by: Tran Anh Hung & Dinh Cao Thanh – BROSS & Partners (Hanoi, Vietnam)

Mr. Tran Anh Hung is a co-founder and the Managing Partner of BROSS & Partners LLC. He has over 20 years of experience in practicing law in Vietnam. His expertise encompasses Investment Projects, Corporate and M&A, Real Estate & Construction, TMT, Energy, Securities & Capital Markets, Litigation & Arbitration, Insurance & Banking.

Hung has gained great successes and been highly appreciated by his clients for his knowledge and pragmatic approach. Hung and his law firm are frequently ranked by Legal500, IFLR100, Chambers & Partners, Asialaw Profiles, Benchmark Litigation. Hung is ranked as Litigation Star by Benchmark Litigation, Distinguished Practitioner by Asialaw Profiles. He is also on the A-List Vietnam's Top 100 Lawyers by Asia Business Law Journal.

distinguish F1 and F2 companies from other domestic companies[4]. These changes extend the scope of propriety and business rights of foreign-invested companies that are not F1 or F2 companies to encompass the following:

a. They can purchase land-use right ("**LUR**")[5] outside industrial zones, industrial clusters, and high-tech zones. F1 and F2 companies can only purchase LUR in these special zones[6].

b. They can obtain LUR via donation or inheritance. F1 and F2 companies cannot obtain LUR via these modes[7].

c. They can mortgage the LUR and properties attached to land in favor of credit institutions in Vietnam, Vietnamese citizens and other domestic economic organizations in Vietnam that are not F1 or F2 companies. F1 and F2 companies can only mortgage LUR in favor of credit institutions in Vietnam[8].

d. They can conduct the following real estate business while F1 and F2 companies cannot[9]:

    i. purchase or buy on hire purchase residential houses, construction works and areas of construction works in order to re-sell, lease out or sell on hire purchase;

4 Law on Land 2024, Articles 3.46, 4.1(b), and 4.7; and Law on Real Estate Business 2023, Articles 10.4, and 10.5.

5 The laws of Vietnam do not allow private ownership of land. Instead, private parties hold LUR with respect to their parcel of land. A LUR confers on its holder important propriety rights with respect to the relevant parcel of land that are similar, but not equivalent, to ownership.

6 Law on Land 2024, Articles 3.46, 4.1(b), 28.1(b), and 28.1(c).

7 Law on Land 2024, Articles 3.46, 4.1(b), 28.1(e), and 28.1(g).

8 Law on Land 2024, Articles 33.1(dd), 34.1(b), 41.2(b), and 41.3(d).

9 Law on Real Estate Business, Article 10.

Mr. Dinh Cao Thanh is a Senior Associate of BROSS & Partners LLC. Prior to joining the firm in 2022, Thanh had been working as a Legal Manager for one of the Big Four Accounting Firms for 5 years. He also authored multiple articles published by The People's Court Journal and the External Economics Review of the Foreign Trade University. Thanh focuses on Inbound Investment, M&A, Real Estates, Litigation and Arbitration and General Corporate.

ii. purchase LUR equipped with infrastructures in real estate project in order to re-sell or lease out; and

iii. lease LUR equipped with infrastructures in real estate project in order to re-lease out.

It should be noted that by virtue of the new classification of the new laws, foreign-invested companies other than F1 and F2 companies can immediately enjoy these new rights as from 1 January 2025.

2. <u>New Governmental policy on land rental</u>

The Law on Land 2024's new approach to rent is that annual payment would be the main option for private entities leasing land from the State. Unlike the Law on Land 2013 where private entities can choose to make either a one-off payment for the whole term of lease ("**One-off Lease**") or multiple annual payments over the period ("**Annual Lease**")[10], the new Law on Land 2024 enumerated specific cases where one-off payment is applicable and require all other cases to be subject to annual rent. From 1 January 2025, only the following land leased from the State is eligible for one-off payment[11]:

- land leased from the State to implement projects in in agriculture, forestry, aquaculture, and salt making;
- land leased from the State that is situated in industrial parks, industrial clusters, high-tech parks, worker accommodation areas in industrial parks; land used for public purposes with business purposes; commercial and service land used for tourism and office business activities; and
- land leased from the State to build social housing for rent.

This change's implication is twofold. First, unlike One-off Lease where the rent of the whole term is determined at the outset when State authorities issue decisions on land lease, for Annual Lease, the rent is determined for each 5-year period. Rent for the next cycle is calculated based on a land price table issued by State authority. If the rent increases, the amount payable will be adjusted but not exceeding a rate prescribed by the Government for each period. Such adjustment rate will not exceed the CPI of the previous 5-year period[12]. Considering that a lease term is normally 50 years (and 70 years for special cases)[13], adjustment of land rent for each 5 years will affect foreign investors' financial projection for their investments in Vietnam.

Second, from 1 January 2025, companies would more often obtain LUR from the State under Annual Lease hence enjoying less propriety rights. In particular[14]:

- One-off Lease LUR holder can lease out the LUR whereas Annual Lease LUR holder can only sub-lease out the LUR on the condition that the land is equipped with infrastructures.
- One-off Lease LUR holder can transfer the LUR, mortgage the LUR and contribute the LUR as capital in kind whereas the Annual Lease LUR holder cannot.

10 Law on Land 2013, Article 172.
11 Law on Land 2024, Article 120.2.
12 Law on Land 2024, Article 153.2.
13 Law on Land 2024, Article 172.1.
14 Law on Land 2024, Articles

MEMBER PROFILE

Olivia Kung

ONC Lawyers (Hong Kong)

What was your motivation to become a lawyer?

My father was a senior investigator for the Independent Commission Against Corruption (ICAC) for many years and had successfully prosecuted many landmark corruption cases in Hong Kong. Since I was a little girl, he had encouraged me to be in the legal industry. When I was 5 years old, one afternoon my father came home with a big bag and asked me to stand in front of a mirror. I stood in front of the mirror excitedly thinking there would be some sort of surprise. Instead of any exciting toys or cuddly animals, which I expected, he took out a court dress from the bag. He put the court dress on me and asked me whether I liked the look. I saw my reflection in the mirror and even though the court dress was a lot bigger than me, I liked it. My father explained to me that was a lawyer's uniform and if I wanted to wear that when I became an adult, I would need to become a lawyer. At 5 years old, I decided to become a lawyer and the decision was made purely on "the look".

During my teenage years, I did internships in different law firms, and I realised at that point, apart from "the look", I find legal work itself exciting and intellectually stimulating. At 17 years old, I decided for the second time I wanted to become a lawyer and this time my decision was based on substance of the occupation. I studied law at university, and I became a UK lawyer after graduation from law school and 2 years training contract with a law firm in London.

I returned to Hong Kong in 2010 and for the third time, I decided to become a lawyer, this time as a Hong Kong lawyer.

What are the most memorable experiences you have had thus far as a lawyer?

Despite being involved in a lot of exciting cases, I find being appointed as an adjunct professor of Beijing Normal University; Distinguished mentor for the Chinese University of Hong Kong, Mentor for City University Executive Programme etc. are the most memorable experiences for me. Apart from being the "warrior" to go to legal battles for clients, as a professor and mentor, I can share my knowledge and guide students to help them in their careers.

What are your interests and/or hobbies?

I love travelling and explore different cultures. Addicted to watching Netflix documentaries. Organising and attending events. I love everything beautiful.

Share with us something that Primerus members would be surprised to know about you.

Apart from being a lawyer, I also own and run a PR and Event company.

Do you have any special messages for Primerus members?

I love making friends from all over the world and from different walks of life, I look forward to meeting all of you in person!

MEMBER PROFILE

Carlo Rubio Wijaya

Leks&Co (Jakarta, Indonesia)

What was your motivation to become a lawyer?

My motivation to become a lawyer is mainly because the work is interesting and challenging. There is always something new to learn every day. Even when you've been practicing for years and think that you are reasonably knowledgeable in certain practice areas, there is always a joy in finding out new things. Diversity of role is also why I enjoy being a lawyer. There is always a different role to fill depending on the circumstance. One day I have to act as an impassioned advocate pleading my client's interest, while the next I have to act as a dispassionate counsel giving my client an objective advice. To conclude, the work of a lawyer is always interesting, sometimes grueling, but never dull.

What are the most memorable experiences you have had thus far as a lawyer?

I think my most memorable experiences I have had thus far as a lawyer was knowing that the work that I have done affected my client in a real and impactful way. When it happens, it is also very fulfilling. As a professional services provider delivering intangible products, sometimes it is hard to know whether I have made any difference or impact for my client or that I'm just shuffling papers. But when clients tell me that my work helps them in solving their problems, I know that my work makes a difference and it adds to the satisfaction of being a lawyer.

What are your interests and/or hobbies?

Like any good craftsman, I have to maintain my tools of the trade, namely my physical and mental health. Therefore, I like to read and exercise when I'm not at work. Aside from that, my interest lies in making and repairing things.

Do you have any special messages for Primerus members?

My message for Primerus members is to never stop learning and embrace change with open eyes. Take the advance in information technology and artificial intelligence for example. We can fret that software and artificial intelligence will replace lawyers within the decade. Or we can adapt and learn to capitalize on the advance of technology to deliver even better services for our client.

CARROLL & O'DEA LAWYERS 125TH ANNIVERSARY

October 2024 will mark the 125th anniversary of the founding of Carroll & O'Dea Lawyers. It is much more than a commemoration of our longevity as a firm. As we see it, it is a recognition of the enduring values that have underpinned our success to date and which inspire us for the future.

The Carroll & O'Dea Lawyers journey began in 1899 when JJ Carroll set up his practice in Sydney, in the heart of the city's legal precinct. Access to justice inspired JJ Carroll and it has always been a fundamental value for the Firm. By example, in 1952 the firm secured history making compensation for the widows of workers killed in a major dam disaster. It was a win which foreshadowed modern day compensation law in Australia whereby workers and their families are protected with access to justice and compensation.

Community and giving back through our pro-bono work has been an essential part of our story through successive generations. We have always recognised that our success is measured not just through our commercial and legal achievements, but also by how strong we are as a partner in the community in which we live and work. Our pro-bono work has helped deliver outcomes to those who would never have been able to access justice and our support in volunteering and financial assistance to many organisations, has helped change lives.

The Firm's work with Australia's First Nations peoples underlines how lives have been changed, as well as legal practice in Australia. 1995 saw the firm secure the very first settlement in an Aboriginal death in custody case. Carroll & O'Dea Lawyers has also secured compensation and apologies for hundreds of members of the Stolen Generations.

Nowhere is respect more important than in the legal community and over 125 years Carroll & O'Dea Lawyers has a well-earned reputation amongst our clients, our peers, our colleagues and the judiciary. People understand that Carroll & O'Dea is a firm that they can trust, that will work with them with dignity and we mean, and do, what we say.

Finally one of our great achievements over 125 years has been to retain the strong family values at our core, and today members of the Carroll and O'Dea families still work in the firm daily. What has been incredible to witness in my time is how that sense of family and 'caring for each other'

Written by: Hanaan Indari – Carroll & O'Dea Lawyers (Sydney, Australia)

As an expert litigation partner, **Hanaan Indari** has successfully conducted many thousands of cases since joining Carroll and O'Dea in 1997. Hanaan has been a Partner since 2003 and leads a busy practice, supervising a team of lawyers.

Hanaan's strong people skills, compassion, and deep understanding of the issues clients face coupled with her many years of experience have led to her reputation as one of the leading lawyers in the areas of personal injury and estates litigation.

Hanaan's expertise is impressively wide, including litigation, insurance disputes, motor accidents, public liability, medical negligence, workplace injuries and estates litigation. She excels when challenged,

has become such a part of the whole team at Carroll & O'Dea. It's not just the descendants of the founders who feel this way, it is something everyone at Carroll & O'Dea feels. We are a family firm in the truest and widest sense, and our clients across Business, Community and Associations, Personal and Compensation Law feel that today as much as they have over the last 125 years.

absorbing the full complexities of a brief rapidly, and able to devise a winning strategy, both in and out of the courtroom. She appears regularly before the District and Supreme Courts and a variety of commissions.

Hanaan has stayed with Carroll & O'Dea for the duration of her career because of Carroll & O'Dea's outstanding ethics and track record in helping people.

SARTHAK ADVOCATES AND SOLICITORS ASSIST HIGH COURT OF DELHI IN LAYING DOWN THE LAW IN THE FIELD OF ARBITRATION/DISPUTE RESOLUTION

Sarthak Advocates & Solicitors ("Firm") recently represented a client and assisted the High Court of Delhi in laying down the law regarding maintainability of an application for extension of mandate of a domestic tribunal, when the arbitral award has been rendered during the pendency of such application.

As per the Arbitration & Conciliation Act, 1996 (Arbitration Act) all domestic arbitrations in India are to be completed within a fixed time-period of 12 months from the date of filing Statement of Defense by Respondent. This period can be mutually extended for 6 (six) months by the parties, whereafter they are required to approach the Court for further extension of time. Failing such extension(s), any award passed by the arbitral tribunal would be a nullity and susceptible to challenge.

While generally following the practice of minimal intervention, Courts in India tend to allow Section 29A applications as a matter of procedure, but in the peculiar facts and circumstances of this case, the final award came to be passed during the pendency of Section 29A Application. As per a previous precedent and judgment of Delhi High Court[1], Section 29A Applications filed after passing of the award were rendered non-maintainable and therefore dismissed.

We assisted the Court by pointing out another precedent where also the final award was rendered during the pendency of Section 29A Application and Court had extended the mandate until the date of award[2]. The only distinguishing factor was that in the said case, Section 29A Application was also filed prior to the expiry of mandate.

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1 Powergrid Corpn. of India Ltd. v. SPML Infra Ltd. 2023 SCC OnLine Del 8324 @ Paras 18, 28 and 49

2 Harkirat Singh Sodhi v. Oram Foods (P) Ltd. 2023 SCC OnLine Del 3674 @ Paras 25.5 and 25.6

The Delhi High Court in its judgment has clarified the position of law and held where a Section 29A Application is filed prior to the award having been delivered, and the award is delivered during the pendency of the petition, the petition would be maintainable. However, a petition filed after the award is delivered and proceedings for setting aside have been instituted, is not maintainable.

Lastly, the Court also reiterated the already settled position of law that a petition under Section 29A of the Act can be filed even after the mandate has expired[3].

The case has been covered in the local media at the following link: https://www.livelaw.in/high-court/delhi-high-court/section-29a-petition-maintainable-if-filed-before-award-is-delivered-and-not-if-award-is-delivered-delhi-high-court-251316

3 ATC Telecom Infrastructure (P) Ltd. v. BSNL 2023 SCC OnLine Del 7135 @ Paras 25 – 27

LEKS&CO WINS CLAIM AT EMPLOYMENT TRIBUNAL PALM OIL COMPANY, ON A DISPUTE OVER EMPLOYMENT TERMINATION AT INDUSTRIAL RELATIONS COURT (PHI) OF JAKARTA.

Jakarta, January 2024. Our firm has successfully defended our client, PT Kartika Cipta Pratama, a palm oil company, on a dispute over employment termination at Industrial Relations Court (PHI) of Jakarta.

The Claimant, as a former Senior Executive HR & Corporate Communication of our client, challenged the reasons of employment termination claiming that the termination was unlawful and therefore, requested to be recruited back as an employee. The claimant also underlies her claim that she has been working for three different companies and demanded to be paid three times the salary from the defendant.

The PHI court declared that the claim was inadmissible due to its obscurity on the mixing of dispute over right and over employment termination. Our CEO and Managing Partner, Dr. Eddy Marek Leks says, “We learn that mixing dispute on right and dispute on termination may cause obscurity of the claim challenging the employment termination.”

This accomplishment was made possible thanks to the collective efforts of the entire team, with special recognition to Carlo R. Wijaya and Avaya Ruzha Avicenna for their significant contributions.

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