# CHINA BUSINESS LAW JOURNAL 商法

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# 巾帼律师

## 女律师们带给我们的思考

# Ladies in justice

## Gender agendas in the legal profession


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## 商法摘要 BUSINESS LAW DIGEST



## 商法剖析 IN FOCUS



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## 商法词汇 LEXICON




巾帼律师
Ladies in justice


争端解决新局面
Resolution revolution


你往何处去?
Major miners


商法词汇
Lexicon

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# 女士优先
# Ladies first

自古罗马以来，正义女神 Justitia 一直是司法公正的象征。本月封面文章《巾帼律师》探讨女性在中国法律界的作用，听取那些身处职业阶梯顶端的女律师的真知灼见。我们的报道灵感来自一项对女律师的调查，受访者大多在上海和北京的中国律所工作。该调查的部分结果出人所料，我们看到了中国女律师如何看待性别对其职业的影响，以及她们与西方女律师的观点有何不同。

我们采访了各类型的女律师，从中国人到外国人，从律师、法律顾问、高级律师到管理合伙人，甚至法官。通过分析她们的观点，我们探讨在中国法律界，女性身份为女律师带来的利弊得失。探讨的话题包括善用女性特质、兼顾工作与生活、抚养子女，以及令女律师望而却步的执业领域，例如一向以男律师为主导的诉讼领域，受访者的观点或许会出乎你的意料。无论是男性还是女性，都不容错过这篇封面文章。

随后的一篇文章中，争端解决是我们关注的焦点。在中国海外并购的热潮中，"国际仲裁"成了许多走出去的中国企业使用的时髦术语。专题报道《争端解决新局面》（第 39 页）指出，目前国际仲裁业务炙手可热，但国内、国外的仲裁规则之间存在着显著差异，这点公司法务和律所律师都需要留意。我们还探讨了以诉讼途径解决争端的利与弊。专家指出，如何应对争端应该是企业决策者考虑的首要问题之一，甚至在还未走出去时就应该考虑。在中国国内，我们探讨了贸仲的内部纠纷。一些律师认为，这一纠纷反映出贸仲内部更深层次的组织结构问题。所有律师都同意，目前的局面对中国在仲裁领域的名誉并无益处，更使那些正在起早合同仲裁条款者无所适从。我们也在报道中包含了国内和国际各主要仲裁中心的指南。

最后，《你往何处去?》为您发掘能源和天然资源领域的新趋势。由于面对过多或过于繁琐的法律规条，中国投资者似乎正逐渐离开澳大利亚甚或拉丁美洲，而被一些近期放宽监管力度的国家所吸引，例如放宽了外国投资审批门槛的加拿大。同时，投资于非洲和中亚国家虽然需要承受更大风险，但面对的限制较少，回报也更丰厚。我们也探讨了国内情况，包括一些或许会影响外国投资的重大法律动向。其他国内的法规动向包括《资源税暂行条例》的修改，一些律师认为这次修改将促使企业改变矿产和天然资源的开采模式。国土资源部和国家能源局出台的各项意见鼓励民间投资，并承诺确保国土资源领域的公平竞争。


Since the ancient Romans, the iconic image of justice was the goddess Justitia, or "Lady Justice" as she has come to be known. Our cover story this month, *Ladies in justice*, explores the roles of women in China's legal profession and gleans insightful opinions from those who have risen to the top. We look at a recent survey of female lawyers, most of whom work for domestic firms in Shanghai and Beijing, which explores the impact of gender on legal careers and has some surprising findings on perceptions of gender bias in China, and how they differ from the views of Western female lawyers.

We talk to all sections of the profession – domestic and expatriate, lawyers at law firms and in-house counsel, managing partners, even judges – to gauge views on the pros and cons of being a woman who works in the law in China. Issues such as leveraging of femininity, work-life balance and the childbearing role are examined, as well as practice areas that attract or repel women, including some insights into the male domain of litigation. It's a must read – for both genders.

From there our coverage moves to dispute resolution, where, following China's relentless frenzy of overseas acquisitions, "international arbitration" has become the buzzword of the moment for many Chinese companies that have ventured abroad. As our coverage reveals (*Resolution revolution*, page 39), international arbitration is now big business and there are chasms of difference between domestic and offshore game rules that in-house counsel and law firms alike need to be well aware of. We also explore the advantages and disadvantages of the alternative option of litigation. Experts advise that dispute management measures should factor among the top strategic issues that companies consider, even prior to going abroad. At home, we explore the turf war that erupted at the China International Economic and Trade Arbitration Commission. Some lawyers believe the dispute reveals a deeper structural problem with the commission. All agree the situation is not good for China's reputation in this field, causing confusion for those drawing up contracts. We also include a guide to the major domestic and international arbitration centres.

Finally, *Major miners* unearths some new trends in mining, energy and natural resources. Chinese investors may be moving away from partners like Australia and perhaps even Latin America, due to excessive or bureaucratic regulation, while shining lights like Canada beckon due to recent regulatory changes that include a higher threshold for review of foreign investments. African and central Asian countries, meanwhile, offer higher risk but easier access and greater reward. We also explore the domestic horizon and, perhaps, some significant changes affecting foreign investment. Other recent developments include an amendment of the *Interim Regulations on Resource Tax* by the State Council, which some believe will change the way that companies approach mining and extraction of resources. And opinions issued by the Ministry of Land and Resources and National Energy Administration should ensure fair competition in the land and resources sectors, while encouraging private investment.

文化娱乐 CULTURE AND ENTERTAINMENT

# 宝维斯助梦工厂东方探险

# Paul Weiss assists DreamWorks Animation with Oriental adventure

2012 年 8 月 7 日，梦工厂动画公司（梦工厂）与华人文化产业投资基金（CMC）、上海东方传媒集团有限公司（SMG）及上海联和投资有限公司（SAIL）签订协议，携手合资创立上海东方梦工厂影视技术有限公司（东方梦工厂）。这份协议的签订将中国、知识产权、文化、传媒及西方这些元素全部都串联起来了，有着出人意料的积极影响。

这一份具有历史意义的协议使《怪物史莱克》、《功夫熊猫》及《马达加斯加》等系列卖座动画片的制作公司可以大力进军中国娱乐产业。梦工厂的法律顾问宝维斯律师事务所称这是一项具有“开创意义”的交易。

宝维斯律师事务所团队由公司业务部合伙人陈剑音、律师 Peter Davies、前律师李汉斌、中国法律顾问周源源及高级律师助理叶顺仪组成。

陈剑音向《商法》介绍说，在处理中国法律相关事务时，最有趣的部分是“在处理知识产权出资及中国有关外商投资传媒及娱乐产业法规的同时，进行投资架构、建立合资企业的工作。”

她说道：“梦工厂向合资企业投入了许多重要的、获国际认可的知识产权，引出了大量有关版权许可、商标及技术的问题。”

关于文化产业及法律问题，陈剑音律师表示：“众所周知，中国对于保护文化边界十分小心谨慎，因此传媒和娱乐业一直受到比较严厉的监管，在中国制作电影和电视剧需要遵守严格的许可要求，这些要求旨在排除外商投资企业的进入。”

“我们现在可以看到一些解冻的迹象了，中国正在努力履行自己的 WTO 义务，当然这也与习近平副主席今年 2 月谈成的各种协议有关。”

陈剑音说，完成这笔交易花了将近一年的时间，从 2011 年 9、10 月份开始谈判，直到今年 8 月初才达成了最终协议。

正如所有东西合璧的合资企业一样，陈剑音说，双方总是会有一个适应彼此文化的过程，特别是在学习每个法域的法律程序及合规要求时。“幸运的是，梦工厂与中国合作伙伴双方已经就合作安排的目标及战略重要性达成了完全一致的意见，这些要素对于合资企业在中国的成功而言是非常重要的。”

“如大家所见，美国传媒业的运作方式与中国存在非常大的区别，因此从产业角度来看也自然是存在一些挑战的。”

Cravath Swaine & Moore 律师事务所纽约办公室律师 Faiza Saeed 和 Eric Schiele

Mentioning China, intellectual property, culture, media and the West in one sentence has a surprisingly positive spin with the signing of an agreement on 7 August between DreamWorks Animation SKG and media fund China Media Capital, media conglomerate Shanghai Media Group and investment company Shanghai Alliance Investment to establish a joint venture company, Oriental DreamWorks.

The historic agreement allows the makers of such box office smashes as the Shrek, Kung Fu Panda and Madagascar series to forge a major inroad into Chinese entertainment, and according to Dreamworks legal advisers Paul Weiss Rifkind Wharton & Garrison was a “groundbreaking” transaction. The Paul Weiss team included corporate partner Jeanette Chan, associate Peter Davies, former associate David Lee, China law consultant Yuanyuan Zhou and senior paralegal Bianca Ip.

Chan told *China Business Law Journal* the most interesting aspects of the deal with regard to PRC law included “structuring the investment and the formation of the joint venture, together with the contribution of IP and the rules governing

要让美国和中国的传媒公司携手合作，法律顾问所面对的挑战犹如怪物史莱克那么巨大。
Marrying US and Chinese media businesses provided a Shrek-sized challenge for legal teams.

担任了梦工厂的美国法律顾问，就美国披露要求提供法律意见，并协助起草最终文件。“我们作为梦工厂的国际法律顾问，负责整个交易架构并就交易的合规性提供法律意见。”陈剑音说道。参与这笔交易的其他律师事务所还有担任知识产权法律顾问的美富律师事务所。普衡律师事务所也宣布担任东方梦工厂股东之一的华人文化产业投资基金（CMC）的法律顾问。

“这是一笔具有开创意义的交易，中国政府似乎对这个制作华语媒体节目的外商合资企业给予了重大支持，”陈剑音说，“习近平副主席的认可增强了这种支持，并可能为将来建立类似的合资企业铺平道路，这是外国投资者进入中国大陆的一个令人鼓舞的信号。”

中方合作伙伴将持有东方梦工厂约55%的多数股权，梦工厂将持有约45%的股权。

foreign investment in media and entertainment in China".

"DreamWorks is contributing significant, globally recognised intellectual property to the joint venture, which raised a whole host of issues around licensing copyrights, trademarks and technology," she said.

Regarding cultural concerns and laws, Chan said: "It is well known that the PRC is very careful about guarding its cultural borders, and so media and entertainment have always been regulated comparatively heavily, with the production of films and TV dramas in China being subject to strict licensing requirements that exclude foreign-invested entities.

"We are seeing some thawing now, as China works to meet its WTO obligations, and of course this deal was one of those announced by [Vice President] Xi Jinping in February in that connection."

Chan said the deal took just under a year to put together, with negotiations commencing in September/October 2011 and definitive agreements signed in August this year.

As with any East meets West-style venture, Chan said, there is always a cultural learning curve for both sides, especially in terms of legal processes and compliance requirements by each jurisdiction. "Fortunately, in the case of DreamWorks and the Chinese partners, both sides are fully aligned with regards to the objectives and strategic importance of the arrangement – factors which are of great importance in determining the success of joint ventures in China.

"As one can appreciate, the media industry in the US operates very differently to that of Chinese media businesses, so there were natural challenges from an industry perspective too."

Faiza Saeed and Eric Schiele of Cravath Swaine & Moore in New York acted as US corporate counsel to DreamWorks, advising on US disclosure requirements and assisting in drafting the definitive documentation.

"We acted as international counsel to DreamWorks, leading and advising on the overall structure and legalities of the transaction," Chan said. Other firms involved in the transaction included Morrison & Foerster, acting as IP counsel, while Paul Hastings also announced it is representing China media Capital in the joint venture.

"This is a ground-breaking transaction as there seems to be significant support from the Chinese government in a joint venture involving foreign entities in the production of Chinese-language media content," Chan said. "The endorsement by Xi Jinping cements such support and may pave the way for similar style ventures in the future – an encouraging sign for foreign investors into mainland China."

The Chinese companies will hold a majority stake of approximately 55% in Oriental DreamWorks and DreamWorks Animation will hold approximately 45%.

资本市场 CAPITAL MARKETS

# 贝克·麦坚时助 DYNAM 在港上市
# Baker & McKenzie helps DYNAM show off its pachinko in Hong Kong

如果你喜欢追求古怪，那么这笔交易就是为你而准备的。一家经营日本特有游戏——弹珠机游戏室的公司成为了日本历史上第一家在香港完成 IPO 并上市的公司。DYNAM Japan Holdings 有限公司（DYNAM）还是全球第一个在证券交易所上市的弹珠机游戏室运营商。

对于外行人——几乎是除了日本人以外的所有人来说，对弹珠机最好的描述就是，这是一种介于弹球机（不带弹球杆）和扑克机（除了你不能赢钱之外）之间的游戏机。比起概念而言，也许更让人觉得奇怪的是这种游戏机风靡日本的现象。

最近，DYNAM 公司——日本最大的弹珠机游戏室运营商之一全球发售 2 亿美元股份，贝克·麦坚时律师事务所证券团队在交易中担任了全球联席协调人、联席账簿管理人及联席牵头经办人申银万国（香港）有限公司、派杰亚洲证券有限公司及中信证券融资（香港）有限公司的香港法、美国法及日本法顾问。

这一跨法域的贝克·麦坚时律师事务所


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贝克·麦坚时香港团队发现，弹珠机游戏可谓风靡日本。
Pachinko is wildly popular in Japan, as Baker & McKenzie's Hong Kong team discovered.

团队由香港办事处证券合伙人陈世芝、史博文 (Brian Spires) 及东京办事处合伙人 Ken Takahashi 带领。

该团队主要负责准备法律文件，起草招股说明书，公司监管工作以及日常事务的管理工作。为了更好地完成工作，陈世芝和史博文律师不得不对弹珠机进行一定的深入了解。

贝克·麦坚时香港合伙人史博文告诉我们："除了日本人之外的大多数人，包括我们自己在内，可能以前最多只是听过这种游戏，但对弹珠机行业及游戏室的运营方式可能并不了解。"

"作为起草招股说明书的主要法律顾问以及承销商的法律顾问，为了对交易涉及的法律、信息披露及其他问题做出合适的评估，以清晰易懂的方式准确无误地向公众描述弹珠机行业及商业模式，我们必须首先花一些时间去充分了解这一行业。"

史博文说，因此招股说明书中有许多详尽的信息介绍，从如何进行弹珠机游戏及游戏体验到对弹珠机行业内监管架构的讨论。

DYNAM 股票于 8 月 6 日起开始在香港联交所上市交易。除了涉及弹珠机行业这一特殊之处外，这笔交易本身也是十分复杂的。"DYNAM 是一家在日本注册的公司，使得这笔交易十分具有挑战性也令人兴奋，因为它不同于香港常见的在开曼群岛或百慕大群岛或中国大陆注册的公司。" 陈世芝律师说。

"这项交易提出了许多复杂的公司及监管问题，包括调和香港与日本有关股东权利保护法律制度之间的差异，处理日本法律下有关股票发行、股权转让及预提税等复杂的法律、税务及监管事务。"

"为满足包括港交所在内的各相关方，圆满地解决这些问题，我们需要与东京的同事及其他的交易顾问进行密切的配合。总的来说，这次 DYNAM 的 IPO 交易对我们来说确实是一次独特的经历，我们很高兴能够参与这笔里程碑式的交易。"

If you're into oddball pursuits, this deal is for you. A company that runs parlours for a Japanese game called pachinko has made history as the first Japanese company to complete an IPO in Hong Kong and list shares here.

What's more, DYNAM Japan Holdings is the first pachinko hall operator listed on any exchange in the world.

Pachinko, for the uninitiated – which includes just about the entire world outside Japan – can best be described as a cross between a pinball machine (without flippers) and a poker machine (except you can't win money). What's perhaps stranger than the concept is its insane popularity in the land of the rising sun.

Baker & McKenzie's securities team recently acted as Hong Kong, US and Japanese law counsel to the joint global co-ordinators, joint bookrunners and joint lead managers, Shenyin Wanguo Capital (HK), Piper Jaffray Asia and CITIC Securities Corporate Finance (HK) on the US$200 million global offering by DYNAM, one of the biggest pachinko hall operators in Japan.

The multi-jurisdictional Baker & McKenzie team was led by Hong Kong-based securities partners Elsa Chan and Brian Spires and Tokyo-based partner Ken Takahashi.

The team had lead responsibility for legal documentation, drafting of the prospectus, corporate and regulatory issues and general transaction management. In order to do this, Chan and Spires in the Hong Kong team had to become experts on pachinko themselves.

"People outside of Japan, ourselves included, may at best have heard of this game before, but may not be familiar with the industry and the operation of pachinko halls," Spires told *China Business Law Journal*.

"As leading counsel in drafting of the offering documents and as underwriters' counsel, we had to first take the time to fully understand the business and the industry ourselves in order to properly evaluate the legal, disclosure and other issues involved, and to present the information in a way that was straightforward and easy for readers to understand, while accurately and thoroughly describing the industry and business model."

As a result, he said, the offering documents contain specific information ranging from a description of how to play pachinko and the gaming experience, to a discussion of the regulatory framework within which the industry operates.

The shares commenced trading on the Hong Kong Stock Exchange on 6 August. Apart from the delightful oddity, the deal itself was a complex arrangement. "It was a challenging yet exciting deal as DYNAM was incorporated in Japan, as opposed to jurisdictions such as the Cayman Islands or Bermuda or the PRC, which are more commonly seen in Hong Kong," Chan told the Journal.

"The transaction presented complex corporate and regulatory issues. These included reconciling the differences between the Hong Kong and Japanese legal regimes on shareholders' protection matters, and dealing with complicated legal, tax and regulatory issues relating to the issue of share certificates, transfer of shares and withholding tax under Japanese law.

"Resolving these issues to the satisfaction of all parties involved, including the Hong Kong Stock Exchange, required extensive co-ordination with our colleagues in Tokyo, as well as various other transaction counsel. All in all, DYNAM's IPO was indeed a unique experience for us and we are delighted to be part of this milestone."

# 市场急盼美味“点心债”

# Clifford Chance partner says market still hungry for gourmet dim sum bonds

一位刚协助中国国家发展银行发行了20年期点心债的律师合伙人表示，市场对中国龙头国有企业发行的点心债券的需求依然是显而易见的。不过，她补充说道，香港交易所还可以努力在债券上市方面提高自己的竞争力。

高伟绅律师事务所为联席牵头经办人就国开行发行25亿元人民币（3.9亿美元）债券提供了法律意见。这25亿元人民币的点心债包括10亿元于2032年到期的长期债券（息率为4.3%）以及15亿元于2015年到期的三年债券（息率为2.95%）。该20年期债券是目前市场上年期最长的点心债，为市场设下了新的20年期债券基准。

“我们应当站在亚洲的角度来看这次长期债券的发行。发行20年期债券需要有足够的可信度和实力，这反映出了某些中国发行人的成熟，”带领这笔交易的高伟绅资本市场业务合伙人王彦琳告诉《商法》。“在点心债发行量很小的市场中，投资者十分欢迎这种长期债券。”

王彦琳律师表示，市场对发行点心债的热情无疑有些冷却，“但是我们可以看到投资者对中国优质国有企业发行的点心债仍然有很大需求。国开行是很有实力的发行人，其信用相当于国债。”

她在与新加坡市场进行对比之后表示，港交所可以对信息披露规则做出修改以增强竞争力。“为了提高港交所在债券上市方面的竞争力，可以对《证券及期货条例》第XV部权益披露制度的适用范围进行改进，目前根据条例规定，权益披露制度仅适用于在港交所上市债券的发行人。希望排除条例第XV部分适用的发行人需要向香港证监会申请豁免。这对于发行人来说，在香港上市可能不如在新加坡证券交易所上市那么具有吸引力。”

王彦琳合伙人由高级律师陈菀淇、律师李琳和黄秀芳协助其完成工作。

An appetite for dim sum bonds from top state-owned enterprises (SOEs) is still evident, said the partner who led the deal on China Development Bank's (CDB) latest benchmark 20-year issuance.

But she added more could be done to improve the Hong Kong Stock Exchange's competitiveness in debt listings.

Clifford Chance advised the joint lead managers on CDB's RMB2.5 billion (US$390 million) bond issuance, which comprised RMB1billion un 4.3% bonds due in 2032 and RMB1.5billion worth of 2.95% bonds due in 2015. The former is the longest tenor yet for a dim sum bond and sets a new 20-year benchmark for the market.

“It's significant to see this issuance from Asia in long-term paper. You need credibility and strength to issue 20-year paper and it shows the maturity of some Chinese issuers,” capital markets partner Connie Heng, who led the deal on this transaction, told *China Business law Journal*. “In a market where we are seeing low issue volume, investors will welcome this.”

Heng said the market for dim sum bond issuance has certainly cooled, “but we are seeing continued investor appetite for dim sum bonds issued by high-grade Chinese SOEs. The CDB is a strong issuer, with a similar credit to the sovereign.”

She drew comparisons with the Singapore market and said the Hong Kong exchange could improve its game with changes to disclosure rules.

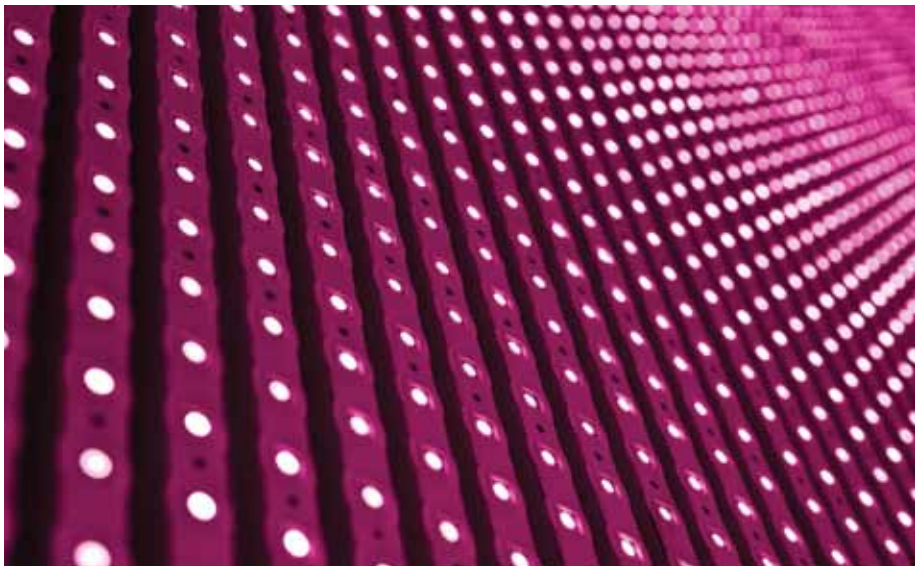
“To improve the Hong Kong Stock Exchange's competitiveness in debt listings, one area which still needs to be looked at is the application of the disclosure of interest regime under Part XV of the Securities and Futures Ordinance (SFO), to issuers with debt only listed on the Hong Kong exchange. To avoid application of Part XV of the SFO to them, these issuers need to apply for a waiver from the Securities and Futures Commission, which may make a Hong Kong listing look less attractive to an issuer than a listing on the Singapore Stock Exchange.”

Heng was assisted by senior associate Angela Chan and associates Li Lin and Ng Siu-fang.

公司并购 MERGERS & ACQUISITIONS

# 文思与海辉达成少有的平等合并

# Orrick partner says VanceInfo's tech merger with hiSoft is uniquely equal



奥睿律师事务所在一笔合并交易中担任了其中一方的法律顾问，这项合并将成立中国最大的海外 IT 服务提供商。奥睿团队的带领者表示，这笔交易最主要的特点应该是双方谈判的筹码十分平等。

文思信息技术有限公司与海辉软件（国际）集团公司这次平等合并的交易总值约为 8.75 亿美元，是在美上市的中国公司之间最大的一笔合并交易。

奥睿律师事务所担任文思（纽约证券交易所上市）的法律顾问，盛信律师事务所担任海辉（纳斯达克上市）的法律顾问。

奥睿律师事务所上海代表处资本市场业务部合伙人孙捷告诉我们："合并后新公司的董事会将由文思和海辉各选派四名董事组成，这与其他的合并交易，例如优酷土豆合并交易，有很大的不同。"

"优酷与土豆的合并交易中，优酷在合并后公司的董事会中处于优势地位，而文思与海辉这次的合并十分平等，从董事会权力到股东股权份额都是 50 对 50。事实上，这两家公司都是 IT 行业的领军者。"

奥睿律师事务所团队由合伙人孙捷及旧金山并购及私募业务合伙人 Richard Vernon Smith 带领，奥睿香港、上海及旧金山办公室都参与了这笔交易。

孙捷说："从法律角度来看，这笔交易非常复杂。在开曼群岛注册的文思与海辉均是离岸 IT 外包公司，不仅仅在中国有业务活动，它们还在全球范围内开展业务。我们组成了一个强大的法律团队支持这笔交易。"

"合并后的新公司目前所面临的挑战是如何提高并保持其历史悠久的公司治理水平，我认为这对中国公司而言是极具挑战的。自 2010 年起，许多人开始对中国企业的公司治理情况表示出强烈的质疑。"

"如之前所说，平等合并实际上并不简单。合并之后总是会有大量的整合及其他过渡问题出现，影响包括雇员、消费者、供应商等在内的所有利益相关者。"

根据协议条款规定，文思与海辉的股东将分别持有合并后公司约 50% 的股份。海辉在合并后将继续经营，其股票也将继续保留在纳斯达克全球精选市场进行交易。合并后公司的新名字将在合适的时间公布。

A team leader for Orrick Herrington & Sutcliffe, representing one side of the merger to create the biggest China-based offshore IT services provider, said the uniqueness of this deal may well be the equal weighting each party brings to the table.

The deal to merge VanceInfo Technologies with hiSoft Technology International is valued at about US$875 million and represents one of the largest mergers between two Chinese companies listed in the US.

Orrick is representing VanceInfo Technologies, which is listed on the New York Stock Exchange, while Simpson Thacher is representing hiSoft Technology International, which is traded on the NASDAQ.

"The post-merger board comprises four members from both hiSoft and VanceInfo boards. It's different from other transactions, like the Youku-Tudou transaction," Orrick's Shanghai capital markets partner Jeffrey Sun told *China Business Law Journal*.

"In that transaction it was more in favour of the Youku board, post-merger. This merger was one of equals – from the board power to the weight of the shareholder shareholding it was 50-50. Really, these two companies are leaders in their industry."

The Orrick team is led by Sun and San Francisco M&A and private equity partner Richard Vernon Smith, and includes the firm's Hong Kong, Shanghai and San Francisco offices. "From a legal perspective it's a complicated transaction. There are Cayman-incorporated companies with operations in China, but also across the globe because they are offshore IT outsourcing companies. We put together a very strong legal team to support the transaction across our offices," said Sun.

"Now the challenge for the post-merger company is how to enhance and maintain their historic corporate governance levels. I think for China-based companies these are challenging topics. Since 2010, there has been a lot of suspicion and doubt about China-based companies' corporate governance.

"Having said that, a merger of equals is not that simple. There is always post-merger lots of integration and other transition problems that impact all the stakeholders, from employees to customers, suppliers and so on."

Under the terms of the agreement, VanceInfo and hiSoft shareholders will each own about 50% of the combined company; hiSoft will be the surviving listed company in the merger, and its shares will continue to be listed on the NASDAQ Global Select Market. A new name for the combined company will be announced in due course.

外商投资 FOREIGN INVESTMENT

# 商务部批准沃尔玛收购可能为 VIE 敲响丧钟

# Wal-Mart's China approval may sound death knell for VIEs


中国商务部近日批准了沃尔玛收购纽海控股有限公司 33.6% 股权，沃尔玛从而取得了对中国最大的网上超市——1 号店的控制权，更重要的是，这可能是开始取缔备受争议的 VIE 架构的信号。

可变利益实体（VIE）架构是外国公司常用的一种海外投资架构，用于投资中国的外资限入行业。

史密夫律师事务所合伙人兼亚洲地区技术、媒体及电信业务主管陈曼珊对商务部的这项批准做出了这样的评论："商务部于 2012 年 6 月 27 日发布的并购审查决定是中国政府机关首次明确使用 'VIE' 这一术语，"陈曼珊告诉我们，"应当强调的是商务部并没有明确地表示采用 VIE 架构本身是 '违法' 的。"

商务部的这种做法也许是有充分理由的。"我们知道 VIE 架构在中国的互联网领域被外国投资者广泛采用，以避开十余年来对外商投资的限制。大部分在中国运营并在美国上市的互联网公司采用的都是这种架构，如阿里巴巴、腾讯、百度、新浪、土豆等公司。"陈曼珊说道。

为了消除有关公平竞争问题的担忧，商务部决定附加三个限制性条件批准这项并购：

- 沃尔玛间接控制的实体仅限于直接从事网络商品和服务的销售活动。从事这些活动不再受到电信行业许可要求的限制，但是仍然需要向电信行业监管机构进行注册登记。因此，陈曼珊说，这一条件是符合现行的电信行业规定的。
- 在未获得中国电信业务许可的情况下，沃尔玛间接控制的实体不得利用自身网络平台向其他交易方提供网络服务销售产品及服务，这也是符合中国现行的电信业法规的。有关条例规定，如果经营商希望在中国提供相关服务，必须取得增值电信业务许可。
- 在没有首先取得必要的外商投资批准的情况下，沃尔玛不得通过 VIE 架构从事增值电信业务。要求取得外商投资批准的条件也与中国现行的电信业及外商直接投资有关法规是一致的。

陈曼珊说："商务部在这一点上是否还会采取进一步的行动，我们仍要耐心等待。"不过，有人在中国金融的网站上发文预测："商务部不会简单地说 VIE 架构是违法的，否则会意味着有关合同都是违法的……商务部从沃尔玛开始将收紧有关管理。最终，采用 VIE 架构进行经营将会变得非常困难，公司需要找到其他方法。"

商务部为什么选择沃尔玛交易作为其传达对 VIE 态度的信鸽？"除了由于本案涉及互联网领域，需要受到商务部反垄断审查之外，我们并不十分确定商务部为何会在沃尔玛这笔交易中明确提到 VIE 架构的使用，"陈曼珊说，"例如，最近中国两家互联网公司优酷与土豆的合并并没有受到商务部的反垄断审查。"

根据会计事务所德勤介绍，1 号店是中国 2010 年发展速度最快的公司。

Wal-Mart Stores' recent nod of approval from Chinese regulators to take a 33.6% share in Niu Hai Holdings, which gives it a controlling stake in China's largest online supermarket, Yihaodian, may be more significant in signalling the beginning of the end for the controversial VIE structure.

VIEs (variable interest entities) are a popular offshore vehicle utilised by foreign companies to invest in restricted sectors of China's economy.

"The MOFCOM [Ministry of Commerce] merger control decision of 27 June 2012 was the first time that the term 'VIE' had been expressly used by a PRC authority," Herbert Smith Hong Kong partner and head of technology, media and telecoms in Asia, Michelle Chan, told *China Business Law Journal* following the approval.

"We should stress that MOFCOM did not go so far as to declare categorically that any use of VIE structure is 'illegal' per se."

And there may be good reason for this. "We understand that the VIE structure has been widely adopted by foreign investors in the PRC internet sector to overcome foreign investments restrictions for more than a decade. Most internet companies operating in China and listed in the US have adopted this structure, for example Alibaba, Tencent, Baidu, Sina, Tudou, etc.," Chan said.

To eliminate concerns surrounding fair competition, MOFCOM imposed three conditions:

- The entity to be indirectly acquired by Wal-Mart is only allowed to engage

in online sales activities involving the sale of the company's own products and services. The carrying out of these activities is no longer subject to telecom licensing requirements. However, registration with the telecom regulator is still required. This condition, therefore, is consistent with existing telecom regulations, Chan said.

- The entity to be indirectly acquired by Wal-Mart is not permitted to allow third parties to use its platform to sell their products and services in the absence of the PRC domestic entity holding a telecom licence. This is, again, consistent with current PRC telecom regulations, which provide that a value-added telecom business (VATB) licence must be obtained if an entity wishes to provide such services in China.
- Wal-Mart is not permitted, through the use of a VIE structure, to operate a VATB business, without first obtaining the requisite foreign investment approval. The requirement to obtain a foreign investment approval is again consistent with current PRC telecom and FDI regulations.

"It remains to be seen whether MOFCOM will take any further action in this regard," Chan said.

However, as one blogger on the China Finance website predicted: "MOFCOM cannot simply say VIEs are illegal – that would involve saying that contracts are illegal ... With Wal-Mart, they are beginning to tighten the vice. In time, it will become so difficult to operate with a VIE that companies will need to find another approach."

So why choose the Wal-Mart deal to send a message on VIEs? "We are not sure the reason behind MOFCOM expressly referring to the use of VIE structure in the Wal-Mart deal, other than the obvious that this case does involve the internet sector and is subject to MOFCOM's anti-trust review," Chan said. "The recent merger of Youku and Tudou, two PRC internet companies, for example, has not been subject to its anti-trust review."

Yihaodian was the fastest-growing company in China in 2010, according to accounting firm Deloitte.

资本市场 CAPITAL MARKETS

# 分众传媒聚焦复杂的私有化交易提议

# Focus Media considers consortium's going private transaction offer

美国盛信律师事务所宣布其正在就一个联合体成员提出的私有化交易提议担任分众传媒的法律顾问，这项交易价值约 35 亿美元。

该联合体成员包括分众传媒主席兼 CEO 江南春及方源资本、凯雷投资、中信资本、鼎辉投资、光大控股的关联方。联合体成员拟采用债务资本和股权资本两种方式对交易进行融资。

分众传媒作为一家中国数字广告公司，经营着中国最大的生活互动数字媒体网络。根据分众传媒网站资料介绍，联合体成员提议进行"私有化"交易，对每份美国存托股支付现金 27 美元，折合每股普通股现金对价 5.4 美元。

分众传媒的网站发布新闻指出，公司董事会已成立一个独立董事委员会对交易进行斟酌。独立董事委员会被授权聘用顾问（包括独立的财务顾问和法律顾问）协助其工作。

根据分众传媒网站上公布的私有化建议书内容，联合体成员已经聘用法朗克律师事务所、苏利文·克伦威尔律师事务所担任发起人的国际法律顾问，世达律师事务所担任主席江南春的国际法律顾问，中伦律师事务所担任中国法律顾问，康德明律师事务所担任开曼群岛法律顾问，并由安永会计师事务所担任会计及税务顾问。

Simpson Thacher & Bartlett is representing Focus Media Holding in connection with a proposal by a consortium for a going private transaction valued at approximately US$3.5 billion.

The consortium includes Jason Nanchun Jiang, chairman and chief executive officer of Focus Media, and

广告业巨头分众传媒擅长生活时尚品牌的营销。
Advertising giant Focus Media specialises in marketing lifestyle brands.

his affiliates, FountainVest Partners, The Carlyle Group, CITIC Capital Partners, CDH Investments and China Everbright.

The consortium intends to finance the proposed transaction with a combination of debt and equity capital.

Focus Media, a Chinese digital advertising company, operates China's largest lifestyle-targeted interactive digital media network. According to its website, the consortium proposes a "going private" transaction for US$27 in cash per American depositary share, or US$5.40 in cash per ordinary share.

The company's board of directors has formed a committee of independent directors to consider the proposed transaction, the website stated. This committee is authorised to retain advisers, including an independent financial adviser and legal counsel, to assist it in its work.

According to the proposal letter, posted on the Focus Media website, the consortium has engaged Fried Frank Harris Shriver & Jacobson, and Sullivan & Cromwell, as international legal counsel to the sponsors; Skadden Arps Slate Meagher & Flom as international legal counsel to the chairman; Zhong Lun Law Firm as PRC legal counsel; Conyers Dill & Pearman as Cayman Islands legal counsel; and Ernst & Young as accounting and tax adviser.

外商投资 FOREIGN INVESTMENT

# GE 项目尽显蒙古之长、中国之短

# Hogan Lovells partner says Mongolian project compares well to China deals

霍金路伟律师事务所合伙人带领一个跨国团队，顺利完成了蒙古第一个独立的可再生能源——风力发电站项目。这位合伙人表示这笔交易完成的速度和容易度与在中国进行类似交易时常常遇到的阻力形成了鲜明的对比。

在中国非常希望进军的可再生能源市场，霍金路伟国际律师事务所乌兰巴托办公室管理合伙人 Michael Aldrich 带领着跨国团队就 Salkhit 风力发电站价值 1.22 亿美元的融资及股权事务为通用电气 (GE) 提供了法律意见。Salkhit 风力发电站位于蒙古首都乌兰巴托以东 70 千米处，发电能力达 50 兆瓦。

Aldrich 告诉我们："这笔交易涉及到股权及贷款协议。我们的新加坡办事处协助准备融资文件，香港办事处负责准备有关股权的文件，蒙古办事处则负责协调所有的工作并完成最终文件，同时负责解决蒙古法律问题，实际上这个项目是由三个办事处合作完成的。"

"事实上，这笔交易十分简单，也反映出某些蒙古私人企业的工作人员是十分新潮的。从我们参与项目到整个项目结束大约是七个月的时间，我认为与在中国大陆遇到的麻烦相比，这实在是十分顺利。"

三年前，Aldrich 被调往蒙古，在此之前他曾在中国工作过 18 年。他表示，对于熟悉中国的投资者来说，"投资某个战略经济部门需要经过详尽的审批过程，这十分正常——人的反应取决于其视角"。

他说蒙古"与其他新兴国家相比，在制定繁文缛节和监管规定方面力度相对较小"，"相比之下，在蒙古处理许多事情要比在亚洲其他法域快得多，这是我第一次到蒙古时

蒙古的一处风力发电站。随着蒙古推动替代能源行业的发展，像这样的投资项目或许将在蒙古随处可见。
A wind farm in Mongolia. Projects such as this are likely to become a common sight as the nation fast tracks its alternative energy strategy.

的认识……我发现自己现在仍然很尊敬蒙古人民。尽管在新兴法域工作并不容易，但人们可以在这里更快地开展他们的业务。”

Aldrich 的团队包括香港办事处合伙人 Jamie Barr 和高级律师 Laurence Davidson，新加坡办事处合伙人 James Harris 和高级律师 Lawrence Low，乌兰巴托办事处合伙人 Chris Melville、高级律师 Anthony Woolley 及律师 Solongoo Bayarsaikhan。

Salkhit 风力发电站是可再生能源项目的一部分。该项目旨在减少蒙古对煤炭的依赖，预计今年开始运营，将为蒙古供应大约 5% 的电力。

The leader of a multi-jurisdictional team put together to make Mongolia's first renewable energy independent power project a reality said the speed and ease of the deal makes for a strong contrast with the frustrations often faced in similar transactions in China.

In the key industry area of renewable energy, where China is intent on making competitive inroads, Michael Aldrich, managing partner of the Hogan Lovells' Ulaanbaatar office, led a cross-border team that advised General Electric (GE) on the financing and equity aspects of a US$122 million 50MW wind farm in Salkhit, Mongolia, 70km southeast of the capital.

"[The deal ] consisted of equity and loan agreements – with our Singapore office assisting with the financing documents, and our Hong Kong office with the equity documents, and all that being co-ordinated and put into a final form here in Mongolia, along with addressing Mongolian legal issues. In essence there was co-operation with three offices on the project," Aldrich told *China Business Law Journal*.

"Actually it was extraordinarily straightforward, and it's a reflection of the fact that certain members of the Mongolian private sector are extremely switched on. The project, from the time we were involved to closing, was seven months or so, which I think compares extremely favourably with some of the frustrations that people deal with in mainland China."

Aldrich, who spent some 18 years in China before moving to Mongolia three years ago, said for investors familiar with China, "it is not unusual having to go through a detailed approval process in a strategic economic sector – one's reaction depends on one's point of reference".

He said Mongolia "continues to have a comparatively light touch in dealing with red tape and regulatory matters when compared to other emerging jurisdictions".

"On a comparative basis, things can be done much more rapidly in Mongolia than other jurisdictions in Asia. It's an observation I had when I first came to Mongolia ... and I still find myself tipping my hat to the Mongolians. While it's never easy working in emerging jurisdictions, people can get to the business of their business here faster."

Aldrich's team included partner Jamie Barr and senior associate Laurence Davidson in Hong Kong, partner James Harris and senior associate Lawrence Low in Singapore, and partner Chris Melville, senior associate Anthony Woolley and associate Solongoo Bayarsaikhan in Ulaanbaatar.

The wind farm is part of a renewable energy programme intended to reduce the country's dependence on coal. The project, which is expected to start operating this year, will supply almost 5% of Mongolia's electricity.

人士动态 PEOPLE MOVES

# 德杰香港办事处注入新血液
# Dechert Hong Kong corporate practice gains new blood


赵载经 David Cho

德杰律师事务所宣布赵载经律师已加入其香港办事处，担任公司及证券业务部合伙人。

在加盟德杰之前，赵载经曾担任奥睿律师事务所合伙人。赵载经律师向许多亚洲大型公司就复杂的公司交易及融资项目提供法律意见，包括跨境并购、美国证券交易委员会注册公开发行、144A 条例及 S 条例，以及股票 / 债券及股票挂钩产品发行业务，他还代理能源、电信、银行及生命科学行业的客户。

德杰律师事务所公司及并购业务部主管 Henry Nassau 表示："赵载经是一名非常优秀的律师，会对我们的全球公司及并购业务的发展做出重要贡献，并将加强德杰在亚洲业务的广度和深度。"

Dechert has announced that David Cho has joined the firm's Hong Kong office as a partner in the corporate and securities practice.

Cho was most recently a partner at Orrick Herrington & Sutcliffe. He has advised major companies throughout Asia on a wide range of complex corporate transactions and financings, including cross-border mergers and acquisitions, US SEC-registered public offerings and Rule 144A/Regulation S, and equity/debt and equity-linked offerings. He has also represented clients in the energy, telecoms, banking and life sciences industries.

"David is a very talented lawyer who will contribute greatly to our global corporate and M&A practices and will strengthen the breadth and depth of our Asian practice," said Henry Nassau, head of Dechert's corporate and M&A practices.

# 郑黄林律师行聘请保险业务专家
# CWL recruits insurance expert


黄苑桁 Kelly Wong

郑黄林律师行于8月1日宣布任命黄苑桁为合伙人，担任新成立的保险业务部主管。

黄苑桁为保险公司及客户提供法律意见已有逾十七年的丰富经验，她为保险公司提供法律服务并在各种索赔纠纷中代理保险公司，特别是人身伤亡索赔、财产保险索赔、产品责任索赔及相关保险纠纷领域。

黄苑桁在代表各个行业的投保公司方面也富有经验，包括餐饮业、酒店业、娱乐休闲业、建造业、建筑物管理业、机场服务业、航空工程业、造船业、物流业及零售连锁店。

郑黄林律师行创始合伙人郑豪表示:“黄苑桁加入郑黄林律师行，与我们现有的公司及监管业务相结合，意味着我们的保险业务部现在能够向保险行业的客户提供更多深入而有针对性的服务。”

CWL Partners appointed Kelly Wong as a partner and head of a new insurance practice group of the firm from 1 August.

Wong has over 17 years of experience of acting for insurance companies and policy holders. She has advised and represented insurers in defending a variety of claims, in particular in the area of casualty, property and product liability claims and related policy disputes.

She has extensive experience in representing insured companies operating in various industries including catering, hospitality, entertainment and leisure, construction, building management, airport services, aircraft engineering, shipbuilding, logistics, and retail chain stores.

CWL founding partner Cheng Hoo commented that “Kelly’s arrival at CWL Partners combined with our existing practices in corporate and regulatory work means that we now have an insurance practice group that can provide more in-depth and focused services for insurance industry clients”.

# 人民币基金专家加盟美国盛智北京团队
# RMB funds specialist joins Sheppard Mullin in Beijing


章开志 Simon Cheong

美国盛智律师事务所北京代表处迎来了新合伙人章开志，加盟其公司、金融及破产业务团队。在加盟盛智之前，章开志曾在中伦律师事务所的北京办公室工作。

章开志是中国目前少数专注于香港人民币“点心债”发行的律师之一，主要为客户就境外人民币融资以及境内再投资的跨境监管问题提供法律咨询。

章开志律师为跨国公司和金融机构的跨境并购及融资项目提供法律服务已有逾十六年的丰富经验。除了私人执业经历之外，章开志律师还曾担任世界银行下属国际金融公司(IFC)的高级法律顾问，负责管理国际金融公司在中国大陆的所有法律活动。

美国盛智律师事务所主席 Guy Halgren 表示:“章开志的专业知识与经验对我们现有的业务实践来说是一种重要补充，特别是他在项目融资和商业融资方面的丰富经验对我们北京代表处是巨大的财富。”

Simon Cheong Kai-tse has joined Sheppard Mullin Richter & Hampton as a Beijing partner in the firm's corporate and finance and bankruptcy practice groups. Cheong joins from the Chinese law firm Zhong Lun in Beijing.

Cheong is one of the few lawyers in China to have worked on RMB “dim sum bond” issues in Hong Kong, and specialises in advising clients on cross-border regulatory matters associated with raising RMB funds outside of China for reinvestment into mainland China.

He has more than 16 years of experience advising multinational companies and financial institutions on cross-border M&A and financing matters. In addition to his private practice experience, Cheong served as senior counsel for the World Bank Group’s International Finance Corporation (IFC) and was responsible for managing the IFC’s legal activities in mainland China.

“His knowledge and experience is both complementary and supplementary to our existing practices, especially given his significant project finance and commercial finance expertise that is a great addition to our Beijing office,” said Guy Halgren, chairman of Sheppard Mullin.

争议解决 DISPUTE RESOLUTION

# 贸仲叫停两分会仲裁案件受理权 仲裁规则、协议前景不明

# CIETAC time-outs cause uncertainty over arbitration rules, agreements

中国国际经济贸易仲裁委员会（贸仲）最近宣布中止对上海分会、深圳分会接受仲裁申请并管理仲裁案件的授权。

贸仲华南分会（深圳贸仲）与贸仲上海分会（上海贸仲）拒绝采用 2012 年版贸仲仲裁规则（已自 2012 年 5 月 1 日起施行）。上海贸仲反而在 2005 年版仲裁规则的基础上，颁布了自己的仲裁规则，并宣称上海贸仲是一个名为“贸仲上海委员会”的独立的仲裁委员会。深圳贸仲同样也宣布将继续采用 2005 年版仲裁规则。

这一冲突随着贸仲的公告再次激化。贸仲发表公告称，为了保护当事人的仲裁权利，当事人约定将争议提交上海贸仲或深圳贸仲仲裁的，应当取得贸仲北京总会（贸仲北京总会）的授权。贸仲接受仲裁申请的，由贸仲北京总会管理案件，当事人约定由上海贸仲或深圳贸仲仲裁的案件，仲裁地分别为上海或深圳，除非当事人另有约定。随后，上海贸仲与深圳贸仲发表联合声明作出回应，称贸仲的管理公告不具有约束力，不会影响上海与深圳贸仲的正常运作以及任何希望继续在上海与深圳贸仲进行仲裁的当事人。

现有 2012 年版、上海贸仲版以及 2005 年版三套贸仲仲裁规则。2012 年版仲裁规则对 2005 年版仲裁规则进行了大幅度的修改，使贸仲仲裁程序更加接近国际最佳实践做法。修订的要点主要有：

- 在特定情况下，仲裁庭可以决定采取临时措施；
- 适用简易程序的案件争议金额不超过人民币 200 万元（31.5 万美元）；
- 专家或鉴定人应在必要时就作出的报告进行解释；
- 合并审理有关联性的仲裁案件；
- 贸仲可以视案件的具体情形确定其他地点为仲裁地，而不一定是“贸仲或其分会所在地”；
- 默认的仲裁语言不再仅仅为中文；
- 多方当事人指定仲裁员。

## 对客户的影响

由于贸仲内乱，许多领域都出现了不确定的情况：1、上海贸仲与深圳贸仲的仲裁应由哪些机构管理？2、应采用哪些仲裁规则——2012 年版、上海贸仲版还是 2005 年版仲裁规则？

当争议发生时，申请人很有可能会根据贸仲最近发布的公告向贸仲北京总会申请仲裁。如果当事人没有约定适用的仲裁规则，或者仲裁条款约定适用根据仲裁规则提交仲裁申请时生效的贸仲仲裁规则，那么将适用 2012 年版仲裁规则。

如果仲裁条款规定上海贸仲为仲裁地点，被申请人可以根据仲裁协议，以不符合当事人达成的协议为由对程序提出异议。被申请人可以根据上海贸仲仲裁规则申请仲裁，并将争议提交上海贸仲管理。反过来，如果申请人直接向上海贸仲提交申请，也可能会发生同样的情况。以上情形都可能造成仲裁裁决被撤销或不予执行。

## 可采取的行动

对于已经签署仲裁协议并选择了上海贸仲或深圳贸仲的当事人，最好就以下事项达成协议：

- 修改仲裁条款，规定由贸仲北京总会管理争议。这样将带来更大的确定性，同时继续以上海或者深圳为仲裁地。
- 或者，当事人可以考虑签订补充协议，将以后发生的争议提交贸仲北京总会进行仲裁（仲裁地为北京）。

同样的，当事人在签订新合同时，应当考虑选择贸仲北京总会作为仲裁地（或者如果由于商业或政治原因，需要选择上海作为仲裁地的，当事人最好明确规定由贸仲北京总会进行管理）。如果客户已签订的仲裁协议受到了上述不确定因素的影响，我们可以协助您达成替代性条款。

## 结论

贸仲与其上海及深圳分会之间的冲突对未来发生的争议有重要意义，并且当事人在仲裁条款中约定由上海或深圳贸仲进行仲裁的，这场内乱会对仲裁裁决的执行产生重大影响。为了降低未来的风险及不确定性，商业伙伴最好借此机会在争议发生之前共同重新审视已签订的合同。

■ **见第 39 页专题文章《争端解决新局面》**

The China International Economic and Trade Arbitration Commission (CIETAC) recently announced the suspension of the Shanghai and Shenzhen sub-commissions for accepting and administering arbitration cases.

CIETAC South China Sub-Commission (CIETAC Shenzhen) and CIETAC Shanghai Sub-Commission (CIETAC Shanghai) refused to adopt CIETAC's 2012 Arbitration Rules, which came into effect on 1 May 2012.

Instead, CIETAC Shanghai published its own arbitration rules based on the CIETAC 2005 rules and announced that it is an independent arbitration commission, namely the CIETAC Shanghai Commission. Similarly, CIETAC Shenzhen has announced that it will retain the 2005 rules.

The position has been further compounded by CIETAC's announcement that to safeguard parties' arbitration rights, parties that have agreed to arbitrate their disputes through CIETAC Shanghai or CIETAC Shenzhen have to seek prior authorisation from CIETAC's headquarters in Beijing. Upon acceptance of the case, CIETAC Beijing will administer the case and select Shanghai or Shenzhen for those cases previously agreed to be arbitrated by CIETAC Shanghai or CIETAC Shenzhen respectively, unless the parties agree otherwise. In response, CIETAC Shanghai and CIETAC Shenzhen jointly issued an announcement stating that CIETAC Beijing's announcement is not binding and will not impact their operations or any entities that wish to proceed to arbitrate before them.

There are now three sets of CIETAC rules – the 2012 rules, the Shanghai rules and the 2005 rules. The 2012 rules amend the 2005 rules quite substantially, bringing the procedures closer to international best practice. Some of the key revisions include:

- Interim measures may be granted by an arbitral tribunal in certain circumstances
- Summary procedure where the amount in dispute does not exceed RMB2 million (US$315,000)
- Expert witnesses required to give oral evidence if called
- Consolidation of related arbitration proceedings
- CIETAC can determine the seat of arbitration to be a place other than "the domicile of CIETAC or its sub-commission", taking into account the circumstances of the case
- Default language is no longer Chinese
- Multi-party appointment of arbitrators

## Implications for clients

As a consequence of the conflict within CIETAC, uncertainties have arisen in the following areas:

a. Which institutions will administer CIETAC Shanghai and CIETAC Shenzhen arbitrations?
b. Which rules will apply – 2012 rules, Shanghai rules, or 2005 rules?

A potential scenario when a dispute arises is for a claimant to apply to CIETAC Beijing pursuant to CIETAC's recent announcement. The arbitration would be conducted under the 2012 rules if the arbitration clause is silent as to which version of the rules apply, or if the arbitration clause provides that the CIETAC rules in force when the Request for Arbitration is served under the rules apply.

If the arbitration clause stipulates CIETAC Shanghai as the agreed venue, a respondent may challenge the procedure as not being in accordance with the agreement of the parties pursuant to the arbitration agreement. The respondent could commence arbitration and submit the disputes to be administered by CIETAC Shanghai, under the Shanghai rules. The situation could also apply in reverse if a claimant goes directly to CIETAC Shanghai. Both these scenarios create the risk that awards may be set aside or rendered unenforceable.

## Actions to consider

Parties with existing arbitration clauses providing for CIETAC Shanghai or CIETAC Shenzhen arbitration are advised to seek agreement on the following:

- Amend their clause so that CIETAC Beijing administers the dispute. This provides for more certainty while retaining the same place of arbitration in either Shanghai or Shenzhen.
- Alternatively, parties may consider entering into a supplemental agreement to submit future disputes to arbitration in CIETAC Beijing (with Beijing being the place of arbitration).

Likewise, parties entering into future contracts should consider adopting CIETAC Beijing as the seat of the arbitration (or, if for business or political reasons, the venue needs to be in Shanghai, parties will need to specify that the administration will be by CIETAC Beijing). Lawyers can assist with alternative clauses that clients can adopt if their existing agreements are impacted by the uncertainties.

## Conclusion

The conflict between CIETAC's central body and its Shanghai and Shenzhen sub-commissions has important implications for future disputes and the enforcement of arbitral awards arising from clauses which specify the CIETAC Shanghai and Shenzhen sub-commissions. To mitigate future risks and uncertainties, business parties are encouraged to take the opportunity to review their contracts with their counterparties while they are not in an existing dispute.

**See** *Resolution revolution,* **page 39**

医疗卫生 HEALTHCARE

# 价格草案限制药品流通环节价格
# Draft measures to limit drug prices over entire distribution chain

关于药品过分加成的新闻报道，促使发改委加强对药品行业的监管。
Reports of excessive drug price mark-ups have prompted scrutiny on the pharmaceutical industry.

国家发展和改革委员会（国家发改委）于 2012 年 1 月发布了《药品流通环节价格管理暂行办法（意见征求稿）》。《暂行办法》未能按照原计划于 7 月 1 日起实施，具体的实施时间尚待确定。长期以来，公众及政府一直认为中国的药品价格及利润过高，并且最近有关药品过分加成的新闻引起了公众的愤怒，《暂行办法》在这种背景下出台是为了对此作出回应。

《暂行办法》十分简短，仅有十五个条文及两个简短的附表，但是可能会对中国医药行业及市场销售产生极其重要的影响。中国目前的价格调控政策主要是针对药品的最终零售价格，并且企业可以自主决定药品的交易价格，只要不超过最高零售价格。医院还可以在购进价格的基础上最多加成 15% 销售药品。通常，药品出厂价格较低，要加上分销成本、利润及医院部分成本作为药品流通环节加价（因此医院更偏爱高价药品）。

《暂行办法》适用于政府定价范围内的药品，通过对两个环节的药品差价率（额）实行上限控制，可以限制药品从出厂（进口）经非营利性医疗机构销售给患者这整个药品流通环节的加价。

- 批发环节：药品从出厂（进口）到医疗机构购进的过程（附表一）；及

**附表一：**

| 药品批发环节实际差价率 | |
|---|---|
| 出厂（口岸）价格 | 差价率（额） |
| 1. 10 元以下 | 30% |
| 2. 10 元 - 40 元 | 20%+1 元 |
| 3. 40 元 - 200 元 | 15%+3 元 |
| 4. 200 元 - 800 元 | 10%+18 元 |
| 5. 800 元 - 2000 元 | 8%+34 元 |
| 6. 2000 元以上 | 194 元 |

- 医疗机构销售环节：药品从医疗机构购进到销售给患者的过程（附表二）。

**附表二：**

| 药品医疗机构销售环节实际差价率 | |
|---|---|
| 医疗机构购进价格 | 差价率（额） |
| 1. 10 元以下 | 25% |
| 2. 10 元 - 40 元 | 15%+1 元 |
| 3. 40 元 - 200 元 | 10%+3 元 |
| 4. 200 元 - 800 元 | 8%+5 元 |
| 5. 800 元以上 | 69 元 |

对于低价药品，《暂行办法》规定的差价率（额）上限相对较高，这显然是为了鼓励低价药品的发展。药品的出厂或口岸价格由经营者按照公平、合法和诚实信用的原则自主确定（第 2 至 4 条）。

限制整个药品流通环节的差价可能会打破传统的商业模式（出厂价格低，流通环节加价高），促使更高的出厂价格，会对长期利润造成压力，并鼓励经销商之间进行整合。

在中国市场进行药品销售的国内外供应商还需要向政府报送价格信息，以确定价格基线及差价的上限。经营者应当及时将上一年度的最低、最高和平均出厂（口岸）价格报送至国家发改委制定的药品价格信息平台。（口岸价格可由生产企业或境外生产企业授权的国内经营企业报送。）平均价格是按照药品年销售收入和年销售数量计算的。以下信息应当与药品价格信息同时报送：

- 药品说明书扫描件以及药品最小零售包装的外观照片一张；
- 不少于三张完税凭证扫描件（PDF 格式），完税凭证可以是完税发票或增值税专用缴款书，每张完税凭证的开具时间间隔不少于 2 个月；
- 价格主管部门要求补充的其他材料（第 4 至 6 条）。

各省（区、市）级价格主管部门可以通过药品价格信息平台，对本行政区域内药品流通环节的价格行为实施监管。药品批发环节实行“低价高差率，高价低差率”的控

制（见附表一）。在医疗机构销售环节，将逐步取消医疗机构销售药品加成，同时不超过附表二中规定的医疗机构销售环节差价率（额）（取代现行规定的 15%）。医疗机构销售不同品牌的同种药品，所加差额不得超过按统一最高零售价格计算的最大加价额（第 7 至 9 条）。

各省（区、市）级价格主管部门应按照本办法规定的差率（额）审核公布中标（入围）药品的医疗机构零售价格。对于不按规定报送出厂（口岸）价格的生产企业，以及批发环节差价超过规定标准的药品，不公布其医疗机构零售价格，并通报当地药品招标采购机构（第 10 条）。

麻醉药品、一类精神药品、按国家指令性计划生产并由国家统一收购的避孕药具、免疫规划疫苗、医疗机构制剂、中药饮片仍由其他的现行规定调整。国家和省有关部门公布的廉价短缺药品和国家另有规定的其他药品，在不超过政府规定价格的前提下，不受《暂行办法》的限制。（第 11 和 12 条）

价格主管部门依据《价格法》、《价格违法行为行政处罚规定》等有关规定对下列行为予以处罚：（1）向价格主管部门提供虚假材料的；（2）超过规定差率（额）销售药品的；（3）其他价格违法行为。（第 13 条）

The National Development and Reform Commission (NDRC) released its *Interim Measures on Drug Products Distribution-Stage Price Management* (January 2012, Draft for Comments) earlier this year with a target introduction date of 1 July 2012. The target was not met and a second date has yet to be set. The measures are a response to longstanding public and government perceptions that drug prices and profits in China are too high, and to more recent public outrage over news reports on exorbitant drug mark-ups.

The measures are short – just 15 articles and two brief appendices – but are likely to have a major impact on the Chinese pharmaceutical industry and its sales and marketing practices. Current price control policies focus on retail end-prices, and enterprises may determine prices for drug transactions themselves as long as the maximum retail prices are not exceeded. There is also a 15% maximum permitted mark-up for hospitals over the price they pay their suppliers. Ex-factory prices are typically low, with distribution costs and profits and part of hospitals' costs all booked as drug distribution mark-up (hence hospitals' preference for higher priced drugs).

The measures would, for all drugs subject to government price determination, limit permitted price mark-ups over the whole distribution process in China, from factory or importation to sale by non-profit medical institutions to patients, by setting upper limits for drug price mark-ups (in percentages and amounts) in two stages:

- **Wholesale:** from factories or importation to medical institutions (Appendix 1); and

**Appendix 1:**

| Drug wholesale stage mark-up ratios | |
|---|---|
| Ex-factory / import price | Mark-up ratio (amount) |
| 1. < RMB10 | 30% |
| 2. RMB10 - 40 | 20%+RMB1 |
| 3. RMB40 - 200 | 15%+RMB3 |
| 4. RMB200 - 800 | 10%+RMB18 |
| 5. RMB800 - 2,000 | 8%+RMB34 |
| 6. > RMB2,000 | RMB194 |

- **Medical institution sales:** from medical institutions to patients (Appendix 2).

**Appendix 2:**

| Medical institution sale stage mark-up ratios | |
|---|---|
| Medical institution purchase price | Mark-up ratio (amount) |
| 1. < RMB10 | 25% |
| 2. RMB10 - 40 | 15%+RMB1 |
| 3. RMB40 - 200 | 10%+RMB3 |
| 4. RMB200 - 800 | 8%+RMB5 |
| 5. > RMB800 | RMB69 |

Permitted mark-ups are proportionately higher on low-price drugs, apparently to encourage them. Business operators determine the initial drug prices – ex-factory or at port of importation – autonomously in accordance with the principles of fairness, legality and good faith (articles 2-4). Limiting mark-ups over the whole distribution chain would tend to undermine the traditional business model (with low ex-factory prices and high distribution mark-ups), encourage higher ex-factory prices, put pressure on long-term profits and encourage consolidation of distributors.

Suppliers (domestic or foreign) of drugs to the Chinese market will also need to submit price data to the government, for its baseline data base, for the prescribed limits on mark-ups. Business operators will have to submit promptly each year the previous year's lowest, highest and average ex-factory or port of importation prices to a drug price information platform designated by the NDRC. (For import prices, this is done by either the foreign manufacturer or its authorised business enterprise in China.) The average prices are calculated by dividing total annual sales by total annual volume. The following information is also submitted together with the price information:

- A scanned copy of the drug package insert and photo of minimal retail packaging;
- At least three scanned PDF copies of proof of payment of taxes dated at least two months apart in the form of receipts or VAT bills on sales from manufacturers to distributors;
- Other information the price authorities require (articles 4-6).

Provincial-level price authorities then regulate "distribution stage" drug prices in their jurisdictions using information from the drug price information platform. At the wholesale stage, limits on mark-ups are higher for low-priced products and lower for high-priced products (see Appendix 1). At the medical institution sales stage, mark-ups are to be gradually eliminated altogether, but in the meantime should not exceed those in Appendix 2 (instead of the current 15%). Mark-ups by medical institutions for different brands of the same drug must not exceed the maximum calculated on the basis of the drug's overall maximum retail price (articles 7-9).

Provincial-level price authorities will verify and publish hospital retail prices for drug products selected by tender according to mark-ups provided in the measures. For drug products where manufacturers do not report ex-factory or import prices as required, or whose wholesale stage mark-ups exceed the

standard, a medical institution retail price will not be published and local drug purchase tender agencies will be notified (article 10).

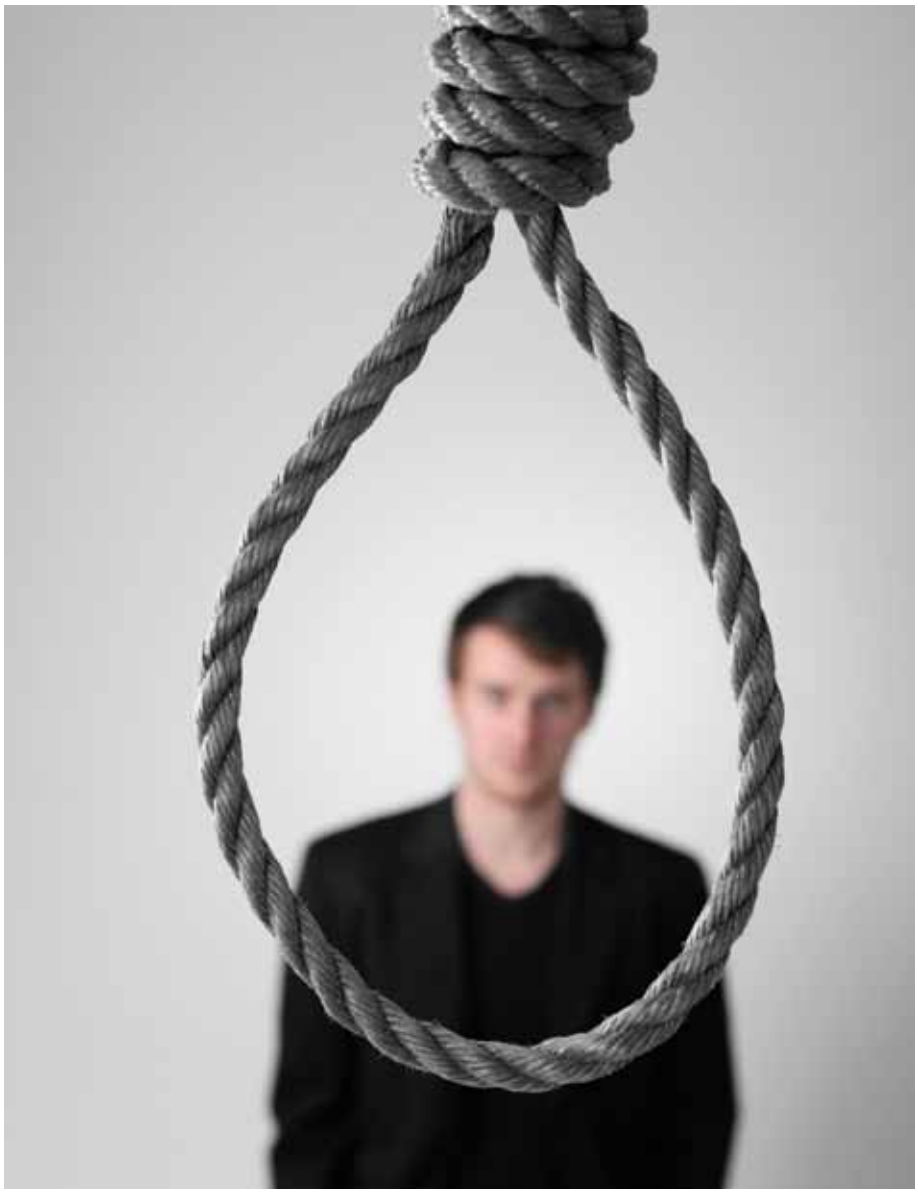
Narcotics, class I psychotropics, contraceptives produced and purchased under the mandatory state plan, vaccines for the state immunisation programme, medical institution preparations and Chinese medicine piece preparations will still be regulated under other existing regulations. Low-priced drugs in short supply, as published by the national and provincial governments, and other drugs covered by other regulations will not fall under the measures, as long as their prices do not exceed the government-set prices (articles 11 and 12).

Under the Price Law and Price Violations Administrative Penalty Rule, price authorities can penalise (1) providing false information to the price authorities; (2) exceeding mark-ups set in the measures, and (3) other price violations (article 13).

入境管理 IMMIGRATION

# 雇主小心：中国收紧外国人出入境管理

# Employers beware: noose is tightening on unwanted or illegal foreign workers



新法针对外国人在中国的居留和就业做出了规定，加强了监管力度。
The new law reviews the work and residence status of foreigners, with tighter controls.

全国人大常委会已经通过了《中华人民共和国出境入境管理法》，该法将于 2013 年 7 月 1 日起施行。

新法不仅规范了中国公民和外国人的出境入境，还针对外国人在中国的居留和就业做出了规定。新法将取代现行的出境入境管理法。

## 与就业相关的重要条款

《出境入境管理法》对外国人在中国境内工作进行了明文规定。具体来说，法律规定外国人应当申请工作许可，并禁止雇主聘用未取得工作许可的外国人。如果外国人有下列行为之一的，将被视为非法就业：（一）未取得工作许可和工作类居留证件在中国境内工作的；（二）超出工作许可限定范围在中国境内工作的；（三）外国留学生超出勤工助学管理规定的范围在中国境内工作的。

《出境入境管理法》还在更广泛的层面上做出了规定，外国人在中国境内活动应当取得相应种类的签证。外国人在中国境内不得从事与停留居留事由不相符的活动，否则可能会不准入境。如果一名外国人申请取得旅游（L）签证入境后，却在中国境内工作，这会触犯《出境入境管理法》的有关规定。

## 法律责任

与现行法律相比，新法中规定的惩罚措施有所增加，示例如下。

外国人在中国非法居留、非法就业的，可以被遣送出境，被遣送出境的人员最长在五年内不准入境。外国人违法新法规定，情节严重的，可能被处驱逐出境，并且自被驱逐出境之日起十年内不准入境。对于哪些具体情形会导致被遣送或驱逐出境，我们还需要耐心等待。

| 违法行为 | 现行法律 | 新法 |
|---|---|---|
| 非法就业 | **雇主**：处五千元以上五万元以下罚款，并责令其承担所邀请外国人的出境费用<br><br>**非法就业的外国人**：不超过一千元罚款 | **雇主**：处每非法聘用一人一万元，总额不超过十万元的罚款；有违法所得的，没收违法所得<br><br>**非法就业的外国人**：处五千元以上二万元以下罚款；情节严重的，并处五日以上十五日以下拘留 |
| 非法居留 / 超期居留 | 给予警告；情节严重的，处每非法居留一日五百元，总额不超过五千元的罚款或者三日以上十日以下拘留 | 给予警告；情节严重的，处每非法居留一日五百元，总额不超过一万元的罚款或者五日以上十五日以下拘留 |
| 出具虚假邀请函件（根据新法规定，出具邀请函件的单位或个人应当对邀请内容的真实性负责） | 未规定 | **个人**：处五千元以上一万元以下罚款<br><br>**单位**：处一万元以上五万元以下的罚款<br><br>有违法所得的，没收违法所得，并责令其承担所邀请外国人的出境费用 |

## 其他值得关注的条款

- 新法有几处提到了“人才”签证，这是雇主们翘首期待的一种新的签证类别，在现有的工作及商务签证类别之外，为向中国输入外国员工提供了更多的选择。实施条例将有望对这种签证类别要求的资格标准及允许从事的活动范围进行规定。
- 教育主管部门被授权建立外国留学生勤工助学管理制度。这些规定将为雇主在向学习签证持有者提供实习机会时提供明确的指南，特别是根据新法规定，违反以上勤工助学管理规定将构成非法就业。
- 中国公民发现外国人有非法入境、非法居留、非法就业情形的，有义务向当地公安机关报告。但新法没有对公民未履行报告义务规定相应的处罚。
- 国家将为有关管理部门建立统一的出境入境管理信息平台，其中可能包括指纹采集系统及其他生物识别技术。这将使中国与世界其他法域（如香港、新加坡）的做法接轨，许多国家规定在工作许可申请的过程中需要生物识别信息。

## 结论

在未来几个月内，实施条例将对有关新的人才签证类别及外国留学生工作等重要条款做出详细规定，还将对签证及居留证件的有效问题做出明确的指南，并将对地方的实践作法及程序产生影响。现行的有关外国人在中国就业的管理法规也可能受到影响。作为企业需要保持敏感度，提前应对法律修改，因此敬请雇主们继续关注未来的有关发展。

The National People's Congress has passed the Law of the People's Republic of China on Entry and Exit Control, which takes effect on 1 July 2013. The new law not only governs the exit and entry of citizens and foreigners, but also contains provisions concerning foreigners' residence and employment in China. The new law supersedes the existing entry and exit control laws, which will be repealed.

## Key employment provisions

The new law expressly addresses the employment of foreigners in China. Specifically, the law requires foreign nationals to apply for work authorisation and prohibits employers from engaging foreign nationals who lack work authorisation. A foreign national is deemed to be illegally employed if he or she:
(1) works without having secured a work permit or related residence permit;
(2) engages in activities beyond the scope permitted by the work permit; or
(3) is a foreign student engaging in activities beyond the scope permitted by the work-study position.

On a broader level, the law requires in-country activities to match the type of visa held. Foreigners are prohibited from engaging in activities not consistent with the purpose of their visit or stay in China. Engaging in such activities can be a basis for being denied entry.

A foreigner would run afoul of these provisions, for example, by applying for an L visitor or tourist visa, but entering China to work.

## Failure to comply

Compared to the current law, penalties for non-compliance have been increased (see table below).

| Violation | Current law | New law |
|---|---|---|
| Illegal employment | **Employer**: RMB5,000 to 50,000, plus expenses for sending the foreigner out of the country<br><br>**Employee**: Up to RMB 1,000 | **Employer**: RMB10,000 per person up to maximum RMB100,000, plus confiscation of income derived from the employment<br><br>**Employee**: From RMB5,000 to 20,000, plus possible detention of five to 15 days |
| Illegal stay (or overstay) | Warning, and possible fine of RMB500 per day up to maximum RMB5,000, or three to 10 days detention. | Warning, plus possible fine of RMB500 per day up to maximum RMB10,000, or detention of five to 15 days. |
| Fraud in issuing invitation letter (individual or entity issuing the letter liable under the new law for truthfulness of the invitation) | Not covered | **Individual**: RMB5,000 to 10,000<br><br>**Entity**: RMB10,000 to 50,000, plus confiscation of illegal income, and expenses for sending the foreigner out of the country |

A foreigner may be removed from China for illegal residence or employment, and in such a case will not be permitted entry for up to five years. Violation of the new law under "serious" circumstances may lead to deportation, resulting in a 10-year ban from entry. What specific actions will lead to a removal or deportation under these provisions remain to be seen.

## Noteworthy provisions

- Few references are made to the "talent" visa, a new category highly anticipated by employers looking for options beyond the limited work and business visas currently available for sending foreign employees into China. It is hoped that implementing regulations define eligibility criteria and activities permitted under this visa type.
- The education authority is mandated to issue regulations governing work-study activities for foreign students. Such regulations are expected to provide long sought after guidance to employers seeking to provide internships to student visa holders, particularly as violations of these regulations would constitute illegal employment under the new law.
- Upon discovery of a foreigner's illegal entry, residence or employment, Chinese citizens have an affirmative duty to report to the local public security authority. The new law does not state penalties for failure to report.
- A unified platform for information sharing will be established for the relevant government authorities, which may include a system for the collection of fingerprints and other biometrics. This would bring China in line with other jurisdictions, such as Hong Kong and Singapore, which have biometrics requirements for the work permit process.

## Conclusion

In the coming months, implementing regulations are expected on key provisions ranging from the new "talent" visa category to the employment of foreign students. The regulations are also expected to provide clarifying guidance on the validity of visas and residence permits, and to impact local practice and procedure.

The existing regulations governing the administration of the employment of foreigners may be impacted. Employers are encouraged to stay tuned for future updates, as businesses will need to remain agile to meet the legal changes ahead.

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# 巾帼律师
# Ladies in justice

*中国有自己独特的法律制度，这一制度下的女律师们也有着独特的执业历程。高小云（Alice Gartland）采访了中国杰出的女性律师，为您讲述女性在中国法律界的点点滴滴*

*China's legal system is unique, as are the women who practise within it. Alice Gartland raises gender issues with the nation's top female professionals*

在英美两国律师事务所的长廊和管理委员会会议上，性别平等是一个日趋热门的话题。但是中国法律界尚处于“讨论多样化问题的发端阶段”，香港 Asia Legal Resources 公司总裁 Beth Bunnell 说。

While the gender equality dialogue is increasingly audible in corridors and management committees of law firms in the UK and US, the legal profession in China is only just “on the cusp of discussing diversity issues”, says Beth Bunnell, managing director at Asia Legal Resources in Hong Kong.

其中一个原因是，对许多女士而言，性别对她们没有什么实质影响。就算有，那也是“做女人挺好”，宝维斯律师事务所中国业务部主管陈剑音说。她认为，越来越多的中国女性担任高级管理职务意味着“你能得到不少尊重，同时你能得到［和男性］一样的机会”。万商天勤律师事务所执行合伙人王霁虹也表达了类似的看法：“女性身份［对我的职业］的影响基本上是正面的。”

富而德律师事务所中国区主席高育贤近日被香港证券及期货事务监察委员会（香港证监会）任命为非执行董事，显示出这一地区女性律师的实力。不断发展壮大的女性律师队伍主导了中国市场的国外法业务，高育贤、陈剑音和孖士打律师事务所亚洲区董事会主席及高级合伙人罗婉文都是这支队伍的一份子。

这一趋势令人印象深刻，并为全球法律界树立了鲜明的榜样。“事实证明，女性的能力与男性一样强，这一点已经受到了今天大多数人的认可。”中伦律师事务所驻上海高级合伙人李红表示。“与其他国家相比，［中国的情况］还不错。”锦天城律师事务所高级合伙人

*女性身份［对我的职业］的影响基本上是正面的*

*The impact of gender [on my career] has generally been positive*

**王霁虹**
**Wang Jihong**
万商天勤律师事务所
执行合伙人
Managing Partner
V&T Law Firm

One reason for that is that for many women, gender hasn't really been an issue. If anything, “being a woman is a good thing”, says Jeanette Chan, head of Paul Weiss Rifkind Wharton & Garrison's China practice. She believes the prevalence of women in senior executive positions in China means “you get a lot of respect and you are given the same opportunities [as men]”. Similarly, Wang Jihong, a managing partner at V&T Law Firm, says: “The impact of gender [on her career] has been generally positive.”

The recent appointment of Freshfields Bruckhaus Deringer's China chairman Teresa Ko as a non-executive director of Hong Kong's Securities and Futures Commission (SFC) is demonstrative of the strength of female lawyers in the region. Ko and Chan, along with Elaine Lo, Asia chair and senior partner of Mayer Brown JSM, are part of an expanding group of female lawyers dominating foreign law practices in China.

It's impressive stuff, and sets a strong example for the profession globally. “Women are proven to be as equally capable as men. Most people have recognised that,” says Audry Li, a senior partner at Zhong Lun Law Firm in Shanghai. Things are “pretty good compared to other countries”, says Donna Li, senior partner at Allbright Law Offices.

It's tempting to conclude that women walk a straightforward career path in the Chinese legal profession. But in reality, it's a little more complicated than that.

Where Chinese women lawyers are able to thrive in China law practice when working for Western firms, the Chinese and Western mix is “a very powerful combination”, says Amy Sommers, a partner at K&L Gates in Shanghai. However, not everyone can meet that challenge, and walking “the cultural tightrope can be exhausting”. As a result, both male and female Chinese lawyers may end up abandoning Western firms and prefer working in a Chinese firm context.

On International Women's Day, Sommers and Bunnell presented a paper, “The role and impact of globalisation on women's careers: women in the Chinese legal profession”, at the International Women in Law Summit in London. The summit was jointly organised by the Law Society of England and Wales and the National Association of Women Lawyers in the US.

The aim of the summit was to identify and address barriers to women's career progression and, as a legacy, create a manifesto to drive a more proactive agenda on the issue at both national and international levels.

Sommers and Bunnell's paper suggests that although there are many positive things that female lawyers around the world can learn from the experiences of women in the profession in China, they still face some very real challenges.

“It's not the case that there are a lot of voices crying out that there is a problem, but there is the potential to prepare for change before any issues become too strong,” says Bunnell.

Familial and social pressures on women are far from diminishing in modern Chinese society, and it seems like now could be a good time to talk; both to celebrate the strength of women in the Chinese legal profession and reflect on the reasons behind that success. In turn, and perhaps most importantly, their stories can help set the tone for the progression of the role of women in the Chinese legal profession going forward.

*China Business Law Journal* spoke to several leading female lawyers in China to find out more about their experiences, the challenges they face and their strategies for success.

李东力说道。

这些不禁让人以为在中国法律界打拼的女律师们有一条平坦的职业晋升之路，但实际情况却比人们所想的复杂一些。

在外国律所从事中国法业务的中国女律师可谓前程似锦，因为中西合璧是“一种强有力的结合”，高盖茨律师事务所驻上海合伙人李雅美（Amy Sommers）表示。不过，不是所有人都能应付这种挑战，行走在“文化钢丝上能令人筋疲力尽”。由于这个原因，不论是男性还是女性中国律师都有可能最终放弃外国律所，宁愿在中国律所工作。

在国际妇女节当天，李雅美和 Bunnell 在伦敦“国际女性律师峰会（International Women in Law Summit）”上联名发表了两人的文章《全球化对女性职业的作用和影响：论中国法律职业界的女性》。这次峰会由英格兰及威尔士律师协会与美国全国女性律师协会共同筹办。

本次峰会旨在识别和探讨女性律师职业晋升之路上的各类障碍，并发表峰会宣言，以便日后在国家和国际层面上更积极地推动工作，帮助女律师应对职业道路上的阻碍。

李雅美和 Bunnell 的文章指出，虽然中国女性律师身上有许多宝贵的经验可供世界各地的女律师们参考，不过中国女律师仍然面对着一些非常现实的挑战。

“目前还没有多少问题遭人抱怨。不过，在潜在的问题变得难以应付之前，可以做好应变的准备。”Bunnell 说道。

加诸女性身上的家庭和社会压力在当今的中国社会还远未消除。在祝贺中国法律界女性成绩斐然的同时，或许也是时候应该思考她们成功背后的原因了。相应的，或许也是最重要的是，她们的故事和经历能为我们勾画一幅蓝图，告诉我们女性在中国法律界可以如何发挥才能、如何更上一层楼。

《商法》采访了一些在中国工作的杰出女律师，进一步了解她们的经历、她们面对的挑战以及事业成功的秘诀。

## Digging deeper

It's not just the ascension of female lawyers to the very top of the profession in China that is attracting attention. The relative youth of the Chinese legal system, in combination with the historic and cultural influence of egalitarian socialist doctrine, makes China an interesting point of comparison with other countries.

In 1979, there were fewer than 200 licensed lawyers in China. By 2010 there were 206,000 lawyers nationwide, and of those, it is roughly estimated that 22%, or 45,000 plus, are female. The role of international lawyers and in-house counsel is also growing.

While it is not possible to ascertain the percentage of female partners in China, there is consensus that although at least as many women as men are entering the profession, for now their representation at partnership level is significantly lower than men and comparable to the trends found in other countries. A similar imbalance is found in the representation of men and women in the judiciary.

“In the US and UK, for the past 15-25 years, law school classes have been roughly equal in their division between men and women. Yet, if you look at law firms at a partner level there are relatively few female partners – around 15% on overage in the US,” explains Sommers.

She was “interested to see what was happening in [China's] relatively new [legal] profession and to find out whether the challenges women faced were the same as those encountered in Anglo-Saxon heritage countries”.

Sommers and Bunnell conducted a survey of female Chinese lawyers, most of whom worked for domestic Chinese firms in Shanghai and Beijing, to investigate the impact of gender on their careers. The interview results are set out on page 26.

The striking point of the survey's findings was the “strength of the perception that gender does not impact on issues that are frequently discussed as problematic in the US/UK legal profession”. In the West, “women lawyers will say on average they are not paid as much, don't get the chance to pitch for or get the

*我很善于保持与客户的关系。一旦客户看到我的工作能力，他们就不会离开了*

*I am very good at keeping clients. Once they see my work, they won't leave*

**李东力**
**Donna Li**
锦天城律师事务所
高级合伙人
Senior Partner
Allbright Law Offices

## 深度发掘

引起大家关注的，并不只是女性律师在中国能够晋升至业界顶端那么简单。由于中国的法律体系相对年轻，加之社会主义男女平等政策造成的历史和文化影响，因此将中国与其他国家做一番比较是颇有趣味的。

1979 年，中国的注册律师人数还不到 200 人。到了 2010 年，全国律师人数已增至 20 万 6000 人，据粗略估计，其中女性律师的比例为 22%，达到 45000 人以上。女性外国律师和公司法务也发挥着日益重要的作用。

要确切知道女性合伙人的比例不太可能，不过人们普遍认为：虽然每年迈入法律职业界的女性人数与男性持平甚至超出男性。不过，中国合伙人级别的女性律师人数依然大大少于男性。类似的性别失衡现象也存在于中国的司法机关中。

plum assignments, and in meetings can feel marginalised", says Sommers. Yet the research conducted by Sommers and Bunnell suggests that these issues are not a problem for women in China.

However those responses are juxtaposed against the surveys finding that "only 16% of the women reported that their gender has a positive impact on their profession and 33% indicated that it has a negative impact; 38% also expressed the view that gender has a more negative impact in China on career advancement and success in the legal profession than in the US and UK. So, by several measures [the women that Sommers and Bunnell spoke to] reported that they were doing well professionally, and yet they also acknowledged that their position was negatively impacted by their gender".

The paper also identifies some broad themes in the experiences of those surveyed: the impact of work-life balance and a childbearing role; a pragmatic approach that emphasises hard work as a means of overcoming challenges; and the importance of leveraging femininity. It also suggests that some practice areas

## 调查结果

李雅美和 Bunnell 在调查问卷中对受访者提出的问题以及每一类答复所占的比例如下：

## Survey Results

The questions posed to the interview subjects in the Sommers and Bunnell survey and the percentage of responses in each category are as follows:

| 性别是否会影响<br>Does gender impact? | 正面影响<br>Positive impact | 很少或没有影响<br>Little or no impact | 负面影响<br>Negative impact |
|---|---|---|---|
| **你的职业晋升<br>Your career advancement** | 16% | 50% | 33% |
| **委派给你的任务类型<br>The types of assignments you receive** | 15% | 70% | 8% |
| **你在内部会议上的言行举止<br>The way you conduct yourself in internal meetings** | 12% | 88% | |
| **你的报酬<br>Your compensation** | – | 83% | 13% |
| **你建立重要人际关系的能力（例如：与客户的关系、与上司和潜在导师的关系等）<br>Your ability to cultivate influential relationships (e.g. client relationships, relationships with superiors and potential mentors)** | 33% | 38% | 20% |

| 问题<br>Issue | 比美国/英国小<br>Less impact than US / UK | 比美国/英国更为负面<br>More negative impact than US / UK | 和美国/英国一样<br>Equal impact |
|---|---|---|---|
| **在中国的法律行业，性别对你的职业晋升和工作成功所造成的影响：*<br>In the context of career advancement and success in the legal profession in China, do you think gender has:*** | 21% | 38% | 21% |

*一些受访者没有回答这个问题，原因是他们不熟悉性别差异在中国以外的其他国家的法律行业有何影响。
*Some respondents did not answer this question, given that they were not familiar with the impact of gender in the legal profession outside of China.

*学法律的女大学生应该在大学阶段准备得更充分，以便应付日后的挑战*

*More should be done at a university level to help prepare female law students for challenges that lie ahead*

**孙志祥**
**Sophie Sun**
上海市浦栋律师事务所
高级合伙人
Senior Partner
Shanghai Pudong Law Office

“在美国和英国，在过去的 15 至 25 年间，法学院开设的课程中男女比例大致相当。不过，在律所合伙人这一级别，女性合伙人的数量相对较少，如美国女性合伙人所占的比例平均约为 15%。”李雅美说。

李雅美“很有兴趣关注 [ 中国 ] 相对较新的 [ 法律服务 ] 行业，看看中国女律师今天所面对的问题，是否正是继承英美法律传统的国家曾经出现过的。”

李雅美和 Bunnell 曾对中国女律师做过一次问卷调查。受访者大部分都在上海和北京的中国本土律所工作。调查旨在研究各受访者的性别对其职业的影响。调查结果请见第 26 页附栏。

调查结果有一点让人惊讶，“受访者颇为确信，一些在英美法律界常常引发讨论的性别差异问题，在中国并不存在。”在西方国家，“女性律师一般会抱怨报酬偏低、得不到好的委派或表现机会、在开会时遭人漠视等问题。”李雅美说。她和 Bunnell 的研究显示，中国的女律师并不受这些问题困扰。

然而，上述受访者的回应却与两人的另一项调查结果形成鲜明

are more challenging than others for women in China, in particular litigation.

These were themes that were reiterated in the experiences of the lawyers that spoke to *China Business Law Journal.*

## Starting point

While some lawyers pointed to the issue of bias towards hiring male lawyers in the initial recruitment phase, this was counterbalanced by the growing perception that female graduates are often stronger than their male counterparts.

“Today there are more girls than boys among top law school candidates,” says Zhao Xiaohong, a partner at King & Wood Mallesons. Jeanette Wang, an associate at Global Law Office, agrees. “At law school, the girls generally perform better than the boys. The competition is not coming from male lawyers, but from other female lawyers.”

This is beginning to show in the graduate recruitment phase. “Most of our new hires on graduate level are female,” says Ulrike Glueck, managing partner at CMS, China. Why? “We do assessment tests and [women] do better.”

*中国律所的女性律师，特别是女性合伙人和高级律师，必须要关注于拓展新的业务*

*Female lawyers in PRC firms, especially female partners and senior lawyers, have to be focused on generating new work*

**何丽娟**
**He Lijuan**
上海理德律师事务所
管理合伙人
Managing Partner
Shanghai Veritas Law

对比："只有 16% 的受访者认为她们的女性身份对其职业产生了正面影响，33% 的受访者表示女性身份造成了负面影响。38% 的受访女律师还认为，在中国女性身份对升职和在事业成功的负面影响比在英美更严重。因此，在某些方面［李雅美和 Bunnell 访谈的女律师］表示她们的工作较为顺利，但同时她们也承认女性身份对其职位高低造成了负面影响。"

两人的文章还从受访者的经历中提炼出了一些值得探讨的话题：兼顾工作、家庭和养育子女所造成的影响；强调以辛勤工作克服困难的务实作风；充分利用女性特质的重要性。文章还指出，某些执业领域，尤其是诉讼，对中国的女性律师而言更富挑战性。

上述这些探讨话题，同样也反映在接受《商法》访问的女性律师的职业历程中。

## 起步阶段

一些受访者表示，存在着男性求职者在单位招聘初期更受青睐的现象。然而，女性毕业生通常比男性更优秀的看法，也已经成为越来越多人的共识。

"今天，毕业于顶尖法学院的女性人数多于男性。"金杜律师事务所合伙人赵晓红说道。环球律师事务所律师王嘉瑛也有同样的看法："在法学院，女生的表现通常比男生好。女律师的竞争压力来自其他女律师，而非男律师。"

这一点在毕业生招聘阶段就开始体现出来了。"我们新招聘的毕业生大部分是女性。"CMS，中国管理合伙人邬丽福（Ulrike Glueck）介绍说。原因是什么？"在我们要求应聘者做的评估测试

Many lawyers considered the early years as a time when gender has very little impact. "At a junior level you will be chosen for assignments if you prove yourself as capable, regardless of gender," says Lo.

However, the apparent success of women at a junior level is no reason to become complacent and Sophie Sun, a senior partner at Shanghai Pudong Law Office and vice chairman of the Shanghai Women Lawyers Association from 2008-11, believes that "more should be done at a university level to help prepare female law students for the challenges that lie ahead".

## Business development

Sommers and Bunnell's research highlights the success of female Chinese lawyers at tapping relationships to develop business. One reason is the emphasis given in daily life in China to personal relationships. Added to this is the influence of the traditional organisational structure of PRC firms whereby "you eat what you kill". From the outset, women have an awareness and understanding of the importance of developing relationships.

"In the US, women tend to think it's potentially uncomfortable to leverage off their personal relationships," says Bunnell. Women tend to compartmentalise business and personal relationships, but in China "[women] do not see a boundary in that way".

"Women [in other countries] can really benefit from emulating the approach of Chinese women lawyers," adds Sommers. He Lijuan, managing partner at Shanghai Veritas Law, says: "Female lawyers in PRC firms, especially female partners and senior lawyers, have to be focused on generating new work."

"Women lawyers at Chinese firms come up through the ranks with a much greater sense of business development issues and

*又要工作又要做妈妈实在不容易……，[做一名律师]……是一份收获颇丰的工作。勤奋工作也能为我们的孩子树立一个积极的好榜样*

*Being a working mum is not easy ... [being a lawyer] is a rewarding career ... [and] working hard also provides a positive role model for our kids*

**何芳**
**He Fang**
君合律师事务所
合伙人
Partner
Jun He Law Offices

*做女人挺好。……你能得到不少尊重，同时你能得到[和男性]一样的机会。*

*Being a woman is a good thing. You get a lot of respect and you are given the same opportunities [as men]*

**陈剑音**
**Jeanette Chan**
宝维斯律师事务所
中国业务部主管
Head of China Practice
Paul Weiss Rifkind
Wharton & Garrison

中，[ 女性 ] 的表现更出色。”

许多受访者认为，在从事律师工作的最初几年，性别差异的影响微乎其微。“在职业生涯的初级阶段，如果你能证明自己有能力，那么无论你是男是女，都会被选中接手项目。”罗婉文说。

虽然女性律师在工作初级阶段的表现明显更优秀，但她们不应该为此沾沾自喜。上海市浦栋律师事务所高级合伙人、曾于 2008 年至 2011 年担任上海市女律师联谊会副会长的孙志祥认为：“学法律的女大学生应该在大学阶段准备得更充分，以便应付日后的挑战。”

## 业务拓展

李雅美和 Bunnell 的研究还显示，中国女性律师的成功还得益于她们能运用人脉来发展业务。这一方面是因为中国人在日常生活中看重人际关系，另一方面也是受到中国律所“论功行赏”的传统组织模式的影响。女性律师们从一开始就能意识并且了解到发展人脉的重要性。

“美国女性总是觉得，依靠人脉有可能会引起尴尬。” Bunnell 说道。美国女性倾向于在业务和人际关系之间划清界线，但是在中国，“[ 女性 ] 不认为需要划出这样的界线”。

“[ 其他国家的 ] 女性律师的确可以通过效仿中国女律师对人脉的运用而获益匪浅。”李雅美补充说。上海理德律师事务所管理合伙人何丽娟表示：“中国律所的女性律师，特别是女性合伙人和高级律师，必须要关注于拓展新的业务。”

“中国律所的女律师想在职业阶梯上不断攀升，需要有更强的业务拓展意识并且更清楚要成功完成哪些任务。”富而德律师事务所驻北京主管合伙人汤玛丽 (Melissa Thomas) 说，“国际律师事务所长年以来非常关注专业能力，而不太重视拓展业务的能力。”

中国的律所文化有助于女性律师拓展业务。不过，我们的受访

what's needed to succeed," says Melissa Thomas, a partner at Freshfields Bruckhaus Deringer in Beijing. "In an international firm, things are very focused for many years on technical competence, with less emphasis on business development."

That cultural backdrop is helpful. However, in general, lawyers who spoke to *China Business Law Journal* felt that men tended to be more aggressive and outgoing in terms of winning new clients. Many said they have built their businesses in a more organic way, through referrals and the development of their reputation and expertise over time. Also, while they may not win new clients so easily, the general consensus was that women are much better at maintaining client relationships.

"I am very good at keeping clients. Once they see my work, they won't leave," says Donna Li, and a "softer touch" often helps you to become a friend and build trust, adds Chan of Paul Weiss.

"[As a woman] you have better communication skills and from this perspective clients prefer female lawyers," says Wang Jihong.

It is in the business development area, in particular, that the pragmatism and ability of female Chinese lawyers to leverage their femininity really comes to the fore. Sommers and Bunnell found that many Chinese women lawyers they interviewed are not afraid to use gender perceptions of behaviour to reinforce their strengths. "If women are seen as more detail-orientated they play that up, or [if they are seen] as good communicators, they emphasise their capabilities in that area," says Sommers.

Having moved from an international firm to King & Wood in 2010, Meg Utterback, a partner at King & Wood Mallesons in Shanghai, is appreciating the benefits of the firm's new business platform. "Working as a female expat lawyer in a small satellite office trying to focus on business development amongst all your other responsibilities was challenging. Now I have the collegiality and the platform of a bigger firm. It's easy to sell what I have now. As a woman I am unique. There are only a few Western women doing what I am doing in local firms. I speak Chinese, I am a blonde Westerner and I have international experience. When I go into meetings, it affords me attention I might not otherwise garner."

## 执业领域差异

李雅美和 Bunnell 的研究调查显示，诉讼业务对女性律师而言是最富挑战性的执业领域。这是因为诉讼会将律师置于一个富有攻击性的环境中，有时甚至会涉及人身伤害。通常，诉讼律师需要与检察机关和司法机关的人员打交道，而打交道的方式是许多女性律师所厌恶的。

《商法》采访的一些律师十分赞同这一看法。接受《商法》采访的一位女法官认为，对饮酒的重视和侧重男性喜好的娱乐活动使许多女性对诉讼领域望而却步。

曾经负责诉讼业务的一位商业律师表示："诉讼会使许多女律师觉得不舒服。律师需要花很多时间建立关系，参加社交活动，以致减少了与家人相处的时间。"

但是问题并不只是难以兼顾工作和家庭而已。另一位律师表示："案件的裁决并不总是基于当事人的证据和能力做出的，'关系'也可能影响裁决。"

在司法机关的高层职位中，女性也属于少数群体。或许，司法机关运作的大环境是导致这一现象的原因之一。

一位在中级人民法院工作的女法官介绍说："有时候我们的确需要参加社交活动，需要喝酒。但是如果这样做让我觉得不舒服，我就会拒绝。我坚持着自己的工作方式，但这并不总是对我的职业前程有帮助。这是我过去八年来未能升职的原因之一。"

在沉思上述观点的同时，我们还需要注意，中国的法律服务行业包含了广泛的执业领域和工作环境。因此，硬是要对女性律师在业界的角色做一个总体上的判断或许是不合理的。我们采访的许多律师选择通过细分执业领域来探讨这个问题，这样做更有帮助。国际法和公司法业务就是一个非常不同的世界，不过也不像许多人想的那样有天壤之别。

李雅美，探讨性别对职业影响的研究调查的发起人之一。
Amy Sommers, co-author of a survey exploring gender issues.

我们也不应该忽视女性在诉讼领域和司法机关中取得的成功和展现的业务能力。世事总是在不停变化。"今天有越来越多的女性步入了诉讼领域。"在中院工作的女法官说，"为什么呢？首先，通过司法考试对女生而言更容易［女生更会应考］。第二，［法官］这个职业虽然收入不算高，但是稳定、体面。不过，对于需要为家庭承担起更大［经济］责任的男性而言，［法官］可能不是一个理想的职业。第三，女性更有耐心也更包容，在作出裁决时也更慎重。由于这些原因，我认为这份工作更适合女性做。"

## The divide

Sommers and Bunnell's survey found that litigation was singled out as the most challenging practice area for female lawyers. This is because litigation can be an aggressive environment that can at times involve threats of physical harm.

Often litigators are also expected to engage in socialising in a way that most women would find distasteful, with members of the prosecutorial and judicial apparatus.

This view was echoed in the opinions of a number of the lawyers, and one female judge, that *China Business Law Journal* spoke to who felt the emphasis on drinking and male-focused entertainment was a barrier for women.

One commercial lawyer who previously worked in litigation explained: "Litigation is not a comfortable environment for a woman. The importance of *guanxi* and entertainment reduces the time one can spend with the family."

And it's not just work-life balance that feels the impact. As another lawyer explained, "matters are not always judged on the parties' evidence and capabilities, but may be influenced by *guanxi*".

Women are also the minority when it comes to senior positions in the judiciary, and perhaps one explanation for that is the wider context in which the judicial apparatus operates.

As one female judge working in an intermediate people's court describes: "We do need to socialise and drink sometimes, but I refuse to do that if I do not feel comfortable. I insist on my way of working, which is not always helpful to my career. That is one of the reasons why I have not been promoted in the last eight years."

Reflecting on these comments one is reminded that the Chinese legal profession spans a range of practice areas and contexts, which perhaps make general assessments of the role of women unfair, and, as many of the lawyers we spoke to chose to do, taking a more compartmentalised approach to the issue is helpful. The world of international and corporate law is a very different context, yet at the same time it is not quite so distant as perhaps many would like to think.

It is also wrong to ignore the success and skills that women bring to litigation and the judicial apparatus. Times are changing. "More and more women are joining the team nowadays," the judge says. "Why? First, passing the examination is easier for girls [they perform better in exams]. Second, although the career [of a judge] is not well paid, it is stable and decent. It is not a good choice for men who may need to take on a greater [financial] burden for the whole family. Third, women are more patient and tolerant with their clients and more careful with their judgments. For those reasons I think the job is more suitable for women."

者普遍感受到，男性律师在争取新客户方面更为积极进取。相比之下，我们采访的许多女律师则是凭借更为渐进的方式建立起自己的业务，比如通过他人介绍客户、通过不断地积累自身经验和树立自身在业界的名望。另外，虽然女律师们未必能轻松地赢取新客户，但是受访者普遍认为，女性律师在保持客户关系方面远胜于男性同行。

“我很善于保持与客户的关系。一旦客户看到我的工作能力，他们就不会离开了。”李东力说。陈剑音认为，待人接物“更为和风细雨”有助于你与客户成为朋友，使彼此间建立起信任。

“[ 作为一名女性 ]，你有更好的沟通能力。出于这个原因，客户们更喜欢女律师。”王霁虹说。

中国女律师们善用其女性特长的务实作风和能力在业务拓展方面显得尤为重要。李雅美和 Bunnell 发现，她们采访的许多中国女律师并不介意利用客户眼中女性具有的特长来加强她们的优势。“如果客户认为女性更注重细节，她们就充分发挥这一特点；如果 [ 在客户眼中 ] 女性有良好的沟通技巧，那她们就会着重突出这方


## Work-life balance

“Being a working mum is not easy,” says He Fang, a partner at Jun He Law Offices. “Lawyers are service providers, and we should provide a quality service to our clients. That means we often have to work late, work on the weekend and change our

*各个企业也需要有更多女性决策制定者，包括女公司法务*

*There needs to be more women in decision making roles in client companies, including legal counsel*

**王雪珍**
**Catherine Wang**
帝斯曼中国
总法律顾问
General Counsel
DSM China

面的能力。”李雅美说。

金杜律师事务所驻上海合伙人胡梅（Meg Utterback）在离开了一家国际律师事务所之后，于 2010 年加入了合并前的金杜律所，她对金杜提供的新业务平台赞不绝口。“一个外国的女律师在中国一个受总部遥控的小办公室工作，除了把注意力放在业务拓展上，还要负责许多其他事务，这样的工作十分艰巨。现在我能得到同事更多的支持，还获得了更大的业务平台。现在要让人聘请我做法律顾问比以前容易多了。我是一个很特别的女律师，像我这样在中国本地律所工作的西方女律师并不多。我说的是中文，却长着一头金发，又具备国际经验。没有这些，我去开会时恐怕也不会那么引人注意。”

## 工作、家庭两不误

“又要工作又要做妈妈实在不容易。律师是提供法律服务的，我们应该为客户提供高素质的服务。这就意味着我们常常要工作到很晚、要在周末工作，为了满足客户需要，还要在接到客户的临

original plans with family and friends at short notice to meet the needs of our clients.” That challenge is balanced with the understanding that, “[being a lawyer] is a rewarding career in terms of developing your knowledge, experience and confidence. Working hard also provides a positive role model for our kids.”

One thing that may ease the pressure is the family structure in China. It's perceived to be more supportive than in the West because traditionally grandparents are keen to take an active role in child rearing responsibilities. Also the social stigma of getting hired help is much less than in the West, so women are more able to bring in outside help.

Utterback observes a pragmatic attitude among her Chinese colleagues that she believes expat lawyers can learn from. She says it tells her: “I need to do what I need to do for my career and I believe my child will be better for it. I am providing for her. What I am learning from my Chinese colleagues is that maybe I don't have to be there 24/7 if the role model I am giving inspires her to be a better person when she grows up.” In China, the cultural system gives a lot of support to women working long hours because of parents, in-laws and domestic help.

*我说的是中文，却长着一头金发，又具备国际经验。没有这些，我去开会时恐怕也不会那么引人注意*

*I speak Chinese, I am a blonde Westerner and I have international experience ... it affords me attention I might not otherwise garner*

**胡梅**
**Meg Utterback**
金杜律师事务所
合伙人
Partner
King & Wood Mallesons

时通知后改变原先与家人和朋友约定好的计划，”君合律师事务所合伙人何芳说。

虽然有这样的挑战，但是何芳认为还是值得的，因为“[做一名律师]可以增长你的知识、经验和自信，是一份收获颇丰的工作。勤奋工作也能为我们的孩子树立一个积极的好榜样”。

中国的家庭结构或许有助于舒缓这种压力。与西方的家庭结构相比，中国的能给予孩子父母更大的支持，因为祖父母一直以来都很乐意分担抚养孩子的责任。此外，中国对雇用家政服务人员处理家务的接受程度比西方国家高，因此中国女性能够更容易地去外面请人来处理家务。

胡梅也认为，她的中国同事所具有的务实作风值得外国律师借鉴。她说：“我需要为我的职业尽力而为，我相信我的孩子会因此过得更好。我工作是为了抚养她。我从周围的中国同事身上学到，如果我所树立的榜样已经能激励孩子在长大后成为一个更好的人，那么我或许没必要整天都陪在她身边。”

中国文化的确为长时间工作的女性提供了足够的支持，因为有父母、公婆和家政服务的帮助。

中国女性律师出国留学而把孩子留在国内的情况并不鲜见。在中国，抚养孩子的方式与西方不同。

## 仍然不容易

“年轻的中国女性要承受很多压力。就算她们在经济上有能力负担家政服务，身为妻子和母亲，她们在社会眼中依然在抚养孩子、照顾老人和丈夫方面负有更重的责任。”汤玛丽说。但是，正如环球律所驻上海律师王嘉瑛所说，律师这个职业的特点是“你想更加出类拔萃，就必需准备好牺牲更多”，因此女律师们要在照顾孩子、老人和丈夫方面达到社会对女性的期望似乎是不可能的。

“你必须热爱你的职业，同时喜爱这份职业带来的挑战。你必须勤奋工作、自立自足。”何丽娟说。

It is commonplace for female Chinese lawyers to go and study abroad while their children remain in China. It is a different approach to child rearing than in the West.

## It's still not easy

“Young Chinese women are under a lot of pressure. Even if they can afford to have help, there is still an emphasis on a wife and mother playing a heavier role in child, elder and husband care,” says Thomas. Aligning that with a profession where, as Jeanette Wang, an associate at Global Law Offices in Shanghai puts it, “the more you want to stand out the more you have to be prepared to sacrifice”, can seem impossible.

“You have to love your career and like the challenge. You have to be hard working and self- sufficient,” says Lijuan He.

Retention of talent is a growing problem for law firms as many women opt to go in-house. Others put partnership ambitions on hold and become counsel.

“Being able to retain people through that difficult senior associate time and bring them on to partnership is somewhere we are focusing our efforts,” says Thomas. Freshfields has set up the Senior Woman Associate Programme for Asia to help address that issue. “We want to ensure that those with the desire, talent and potential to succeed are given the opportunity to do just that, rather than get to the point where they leave out of frustration,” says Thomas. The programme, which involves mentoring by male and female partners, gives those associates “the opportunity to think about the issues that face them and to start building up their business case for partnership”.

Catherine Wang, general counsel at DSM China and the only woman on DSM's global legal management team in China, also helps run the company's Women Inspired Network (WIN), which aims to respond to the need to increase representation of female employees at senior levels of the business. “Sometimes women are shy to speak out. As management we need to help provide more tools, systems, training and events to better understand this situation,” she says.

*我们新招聘的毕业生大部分是女性。在我们要求应聘者做的评估测试中，[女性]的表现更出色*

*Most of our new hires on graduate level are female. We do assessment tests and [women] do better*

**邬丽福**
**Ulrike Glueck**
CMS,中国
管理合伙人
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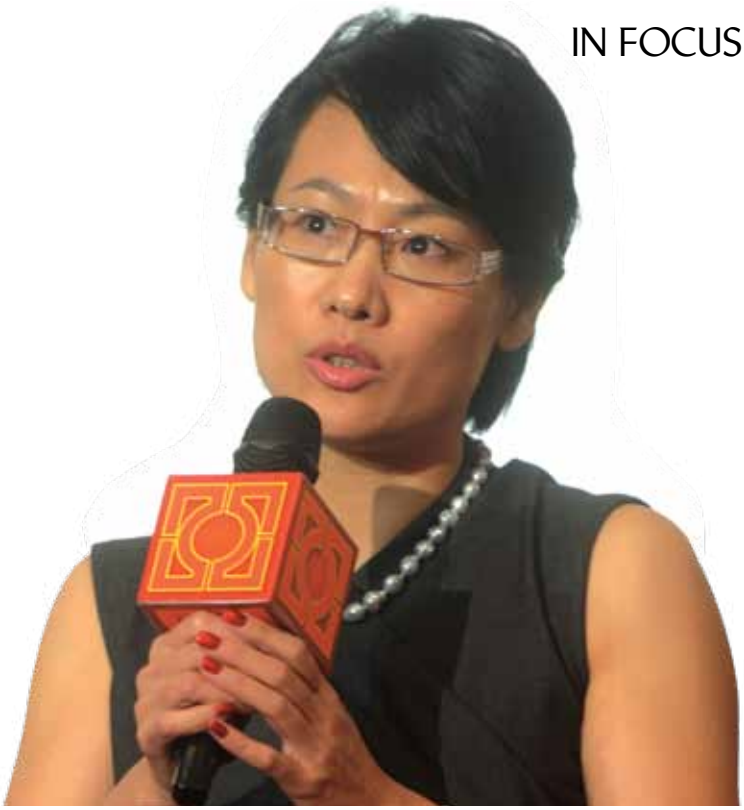
*事实证明，*
*女性的能力与男性一样强，这一点*
*已经受到了今天大多数人的认可*

*Women are proven to be as equally capable as men. Most people have recognised that*



**李红**
**Audry Li**
中伦律师事务所
高级合伙人
Senior Partner
Zhong Lun Law Firm

由于许多女律师选择去做公司法务，保持自身的业务能力对各律所而言越来越成问题。有些女律师则暂时放下了成为合伙人的奋斗目标，只担任法律顾问。

“想办法让律师挺过最辛苦的高级律师阶段，并带领律师们最终成为合伙人，这是我们正努力达到的一个目标。”汤玛丽说。富而德律师事务所在亚洲设立了“女性高级律师培训计划”，旨在帮助女律师们应对她们遇到的困难。“我们想确保那些渴望成功、也有才能和潜力取得成功的人都能有机会实现目标，而不是达到某个阶段以后就沮丧地离开。”汤玛丽说。富而德的培训计划让男性和女性合伙人担任培训导师，让女性高级律师“有机会思考她们面对的问题，并开始建立她们晋升为合伙人所需要的业务表现。”

帝斯曼中国总法律顾问王雪珍是帝斯曼集团全球法务管理团队的唯一女性成员。她帮助公司开展的“女性职员激励网络（Women Inspired Network）”项目，也是为了帮助更多的女性职员步入公司的高级职员之列。王雪珍说：“女性有时候羞于说出自己的工作情况。作为管理人员，我们需要提供更多的工具、体制、培训项目和活动，以便更好地了解她们的情况。”

## 如何兼顾两者?

“兼职工作［在中国］并不是很常见。”邬丽福说。虽然律师事务所或许会允许律师做兼职工作，但是在许多女律师看来，兼职工作并不是她们在生完孩子后重返工作的一种切实可行的方式。很多人把弹性工作时间视为兼顾工作和家庭的一种途径，但是这种工作模式的执行情况似乎在很大程度上取决于你的团队情况和管理者的管理方式。

那么，女律师们是怎样做到两者兼顾的呢?

“在工作和个人生活之间取得平衡并不容易。”李红说，“我刚开始工作的时候，把大部分时间都用在了工作上。现在，随着我人生阅历和工作经验日益丰富，我已经学会如何更好地管理自己的工作和生活。”

## Strategies

“Part-time work is not very common [in China],” says Glueck, and while firms might be open to it, it isn’t really seen by many female lawyers as a viable solution for returning to work after pregnancy. Flexible working in general is part of the emerging discourse around work-life balance, but its implementation seems to depend very much on your team and your manager’s approach.

So what do the experts do? “Work-life balance is not easy,” says Audry Li. “Early on in my career, I devoted the vast majority of my time to work. Now, as I grow older and more experienced, I have learnt how to better manage my work and life.

“You are much more efficient if you have good communication with your team and create the right culture. I set clear quality and ethical standards and expectations of the high level of work products, and also create an environment that everybody should focus their energy on doing the work and building up team working spirit. This helps to bring out the talents and potential of each team member. That gives them more responsibility and confidence (of course pressure, too) and then they can work more independently and more responsively, of course while also always maintaining an eye on quality. That allows me to have more spare time to do marketing as well as organisational administrative work as a managing partner.”

Many lawyers “crave mentoring and want support”, says Utterback. “I act as a mentor to some of the junior partners and some of the female Chinese partners act as a mentor to me. The focus is on managerial and work-life balance issues.”

## Networked

Our interviews found that more and more women are seeing the importance of greater collegiality, mentoring and networks to help support their careers. The forums for that can be formal or informal. Utterback describes how the female partners at King & Wood Mallesons in Shanghai “hang out and go for dinner once a month”.

Some said they had become mentors and confidantes to women at junior levels in their firm to help them navigate the

“如果你能与自己的团队做好沟通，并且营造一个正确的工作文化，你的工作就能更有效率。我定下了明确的工作质量和职业道德标准，要求团队成员有高水准的工作表现，并且创造一种工作环境让每一个人都把精力用在工作和建立团队精神上。这样做可以让团队的每一个成员都发挥出自己的才能和潜能，让每一个成员都能有更强的责任心和自信心（当然也会有更大的压力），他们的工作也能变得更加独立、积极，当然同时也会始终注意工作的质量。这使我能有更多时间做市场推广工作，以及身为管理合伙人应担负的行政工作。”

许多律师“十分想要得到指导和支持。”胡梅说，“我自己就负责指导一些刚晋升的合伙人，同时也有一些中国女律师负责指导我。指导的重点放在管理事务和如何兼顾工作和生活上。”

## 沟通网络

我们的受访者发现，越来越多的女性律师意识到，建立一个沟通网络让同事之间相互提供支持和指导对推动她们职业的发展十分重要。这个沟通平台可以是正式的或非正式的。胡梅介绍说，金杜律所在上海的女合伙人“每个月都会一起出去逛一次街、吃一顿饭”。接受我们采访的女律师们也指导自己律所刚入行的女律师，与她们做知心朋友，并帮助她们看出将会面对的更为棘手的问题（有些问题在她们的晋升过程中未必会立即显现出来）。

奥杰律师事务所中国区总裁施煜琼、美迈斯律师事务所驻北京合伙人郭冰娜携手创办的职业女性交流平台 3WC（Third Wednesday Night Club）已经于今年启动。施煜琼说：“我们依然认为，就全球而言担任高级职位的女性人数还不够多。职业女性可以通过这个平台互相交流，分享她们的共同兴趣，探讨商业交易和经济动向，分享如何在兼顾工作、个人生活和兴趣爱好的同时工作得更有效率。”

胡梅发现，你是一位女律师并不意味着你只能将自己局限在女律师的社交网络中，在性别和业务范围方面扩大自己的交际网络是明智之举。

“与人交流、去世界各地旅行、参加各样不同的活动能让你开阔眼界、让你能够更好地理解国际客户的需要。”李红说。

## 向前看

“事情不会一夜改变，变化过程是渐进的。”王雪珍说。而中国法律界的变化步伐十分迅速，Bunnell 说：“十年或二十年后，中国法律界将与今天大不相同。”

“顺其自然。”罗婉文说，“律师很大程度上是一个精英职业。获得晋升是因为你的工作表现和优势。”步入律师行业的女性“现在远远多于男性”。

“我们［孖士打律师事务所］的聘用和晋升决定都是基于一套关键业绩的评核指标。我们看重的是谁有更聪明的法律头脑，以及谁有更出色的业务拓展能力。这些与性别无关。”

同样地，能否成为合伙人也取决于是否有“出色的商业交易案例”，邬丽福表示。

需要作出改变的并不是只有外聘律所而已。“各个企业也需要有更多女性决策制定者，包括女公司法务。”王雪珍说，“这样对律所

more challenging issues they face (something that was not always immediately available when they were moving up the hierarchy).

Professional women's network 3WC (Third Wednesday Night Club), launched this year, was founded by Ogier's managing director for China, Kristy Calvert, and Bingna Guo, a partner at O'Melveny & Myers. “We still think that there are not enough females in senior positions globally and the network allows females to interact with each other to share their joint interests, talk about business deals, economy and ideas on how to operate more effectively while balancing work, lifestyle commitments and interests,” says Calvert.

Utterback points out that, just because you are a female lawyer doesn't mean you have to limit yourself to female lawyer networks. Spreading the net wider is sensible both in terms of gender and business scope.

“Networking and global travel, and joining different activities broaden your horizons and put you in a better position to understand the needs of international clients,” says Audry Li.

## Looking forward

“Things wont change overnight. It's a gradual process,” says Catherine Wang. But the pace of change in the Chinese legal profession is rapid and “the legal profession in China will look very different in the next 10 or 20 years,” says Bunnell.

“Let nature take its course,” says Elaine Lo. “We are very much a meritocratic profession. Promotion is based on performance and merit.” Women entrants to the profession “now far outnumber men”.

“We [Mayer Brown] recruit and promote according to a set of key performance criteria. It's about who has the better legal brain and greater business generation capability. Gender has nothing to do with it.”

Similarly, winning partnership is about having the “best business case”, says Glueck.

It's not just change within private practice that's necessary. “There needs to be more women in decision making roles in client

*我们依然认为，就全球而言担任高级职位的女性人数还不够多*

*We still think that there are not enough females in senior positions globally*

**施煜琼**
**Kristy Calvert**
奥杰律师事务所
中国区总裁
China Managing Director
Ogier

工作的改进也有帮助。”

无疑，中国法律界的女性从业者拥有不俗的才华，她们正在为其他国家的女性树立杰出的榜样。

中国法律职业界作为一个整体目前需要面对的挑战是，如何借鉴这些法律界女性先驱的经验，确保有更多、更优秀的新一代女性律师能够登上职业阶梯的最高一级，并且能广泛分布于各个执业领域。

## 设定目标?

国际女性律师峰会的峰会报告将于今年 10 月出版（李雅美和 Bunnell 正是在这次峰会上发表了她们的文章）。峰会报告将总结会议期间与会者提出的各项建议，帮助法律界的女性从业者扫清其晋升道路上的各种阻碍。

峰会报告可能会建议各律所根据自身情况，为本律所合伙人级别的女性比例设定相应目标。这个建议旨在使各律所有一个努力的方向，协调各部门之间做好安排，以便实现设定的目标。

为女合伙人比例设定最低指标或许是推动机构变革的一项有力措施，但是或许有人会将此视为对坚定奉行唯才是举原则的律师界的挑衅。

不过可以确信的是，这肯定是一个值得探讨的问题。■

companies, including legal counsel," says Catherine Wang. "That will also help the firms improve."

There's no doubt about the talent of women in the Chinese profession and that they are providing a strong example for women in other countries.

The challenge now is for the Chinese legal profession as a whole to respond to the experiences of these trailblazers to ensure a new generation of female lawyers can rise to the top in even greater strength and number and across all practice areas.

## On Target?

A report on the International Women in Law Summit (where Sommers and Bunnell presented their paper) will be published in October. The report will set out general recommendations emerging from the summit to help remove barriers to the progression of women in the legal profession.

One of the recommendations is likely to be that law firms set diversity targets for the number of women they have represented at partnership level, the idea being that it will give firms something to aspire to and help establish best practice across organisations to help facilitate that aim.

Setting benchmarks for the profession could be a powerful tool for organisational change, but may also be seen as a provocative intrusion into the resolutely meritocratic world of law. One thing's for sure, the discussion is far from over. ■

# HK ARBITRATION WEEK
## 15 - 18 OCTOBER 2012

DISCOUNTS AVAILABLE! With the purchase of tickets for multiple events

SAVE THE DATES

## Programme at a glance

**15 October**

ICC/HK45 Early Evening Seminar and Cocktail Party

To kick off Hong Kong Arbitration Week, join Julian Lew QC and a panel of arbitration experts for an early evening seminar to discuss Asia's role as a dominant force in international arbitration in the 21st Century, followed by a cocktail party.

**16 October**

ICSID 101

A comprehensive one day seminar guiding participants through the workings of the ICSID system of arbitration.

HK Arbitration Charity Ball

A night of glamour and camaraderie on the Hong Kong calendar aimed at raising funds to support local Hong Kong charities and to assist in the development of arbitration across Asia.

**17 October**

ADR in Asia Conference

Join prominent members of the ADR community from across the globe to address important issues and developments in international arbitration. The overarching theme of this year's conference will be whether party autonomy helps or hinders the arbitral process.

HKIAC New Premises Launch Party

The HKIAC welcomes delegates from the ADR in Asia Conference to join in the inauguration of the newly remodeled centre with stunning views overlooking Hong Kong harbour and state of the art facilities.

**18 October**

GAR Live 2nd Annual Asia Conference

Co-chaired by Michael Moser and Justin D'Agostino, speakers from CIETAC, the ICC and prominent law firms around Asia will discuss the current topics in Global Arbitration finishing with an Oxford-style debate about "India and international arbitration".

To register your interest, please email us at hkaweek@hkiac.org

www.hkiac.org/hkaweek

# 争端解决新局面
# Resolution revolution

*争端解决，绝非小事；如果不了解国内外法院和仲裁机构的基本规章，那么代价将是沉重的。*

*作者：杨春雷*

*Resolving disputes is big business and not knowing the ground rules at home and abroad will cost you dearly, writes Raymond Yang. Your move.*

中国借全球经济危机之“机”，在海外市场讨价还价，不断以廉价购买因经济危机而贬值的海外资产。但与此同时，越来越多的中国企业及其法务顾问有可能卷入跨境争端，而解决争端的战场或许是一片陌生之地，有时甚至坎坷不平。

在中国，外国企业和国际律师事务所常常抱怨中国的制度偏袒中方当事人。当这些外国企业回到主场，他们就会抓住中方当事人在中国受到偏袒这一点，通过诉讼或其他争端解决方式战胜在海外拥有资产的中国企业。

现在，对公司法务及其外聘律所而言，争端解决策略比以往任何时候都更重要。

中国的仲裁机构已经颁布了新的仲裁规则，并努力争取更多业

As China has expanded its overseas ownership of assets via bargains and fire sales following the global economic crisis, more and more Chinese companies and their counsel will be drawn into cross-border disputes on battlegrounds that may be unfamiliar, and at times less than even, terrain.

In China, foreign companies and international law firms habitually grapple with a system they complain is less than impartial. When conflict flares abroad these same companies may point to that perception of bias to pursue victories via litigation or otherwise against the assets of Chinese companies in overseas jurisdictions.

Now, more than ever, dispute resolution strategies are crucial for counsel and the firms that advise them.

务，同时诉讼依然是广受欢迎的争端解决方式。然而，中国企业在海外诉讼中面临的境遇却难言乐观。

## 差异巨大

竞天公诚律师事务所合伙人董纯钢说，中外法律制度存在巨大差异、国外诉讼的开支惊人，“中国公司在国外诉讼中常常面临很大的困难和不适应，常常受到很大的损失或者受到不公平的裁决。”

上述分析一语中的。元达律师事务所驻上海合伙人陈立彤指出，在美国的诉讼费用可能会非常昂贵。知识产权诉讼是中国企业在海外以及外国企业在中国最常遇到的一类跨境诉讼。以知识产权诉讼为例，陈立彤介绍说，美国的证据开示程序和联邦法院陪审制是导致开支巨大的主要原因，证据开示程序可能“涉及到成千上万甚至上百万页公司文件的披露”和“有众多的证人需要出庭宣誓和作证。”联邦法院陪审制则可导致案件的审理拖上数周甚至数月。可以想象其耗资之巨！

客观来说，很多中国企业也没有做足功课。“他们在对目标市场的法律法规不够熟悉时，就贸然作出投资决定，也没有对因此可能造成的风险进行充分评估。”中伦律师事务所驻北京合伙人霍伟说。

另外，一些中国律所可能也对独立处理境外诉讼有心无力。兰台律师事务所创始合伙人杨光说，很多中国企业的境外诉讼“由中国律师和外国律师合作处理相关诉讼争议”。

然而，这种合作能做到无缝对接吗？董纯钢认为：“中国律师整体上仍然非常缺乏境外诉讼战略和战术两方面的经验，无法与境外律师充分合作……”。

由于上述原因，面对艰难的海外诉讼，中国企业往往选择退缩。例如，在美国遭遇产品责任诉讼的泰山石膏股份有限公司在一审中就没有应诉。2010 年，在泰山石膏缺席的情况下，美国法院判决其向原告赔偿260万美元。泰山石膏随后提起上诉，但就在本月，

*[中国企业]对目标市场的法律法规不够熟悉*

*[Chinese companies] are not familiar enough with the local laws and regulations of their targeted markets*

**霍伟**
**Wilson Huo**
中伦律师事务所
合伙人
北京
Partner
Zhong Lun Law Firm
Beijing

New rules are being drawn in China and arbitration centres are clawing for more business, but litigation is still the popular option. However, the outlook for Chinese companies in overseas court battles remains unoptimistic.

## Big differences

Pointing to the big differences between Chinese and foreign legal regimes, and the staggering expenses on overseas court proceedings, Dong Chungang, a partner at Beijing-based law firm Jingtian & Gongcheng, says: “In foreign court proceedings, Chinese companies often face a lot of difficulties, suffer heavy losses or are treated unfairly.”

To the point. As MWE China Law Offices’ Shanghai-based partner Henry Chen points out, in the US litigation can be very expensive. Take IP, for example, the most commonly seen type of cross-border litigation involving Chinese companies in overseas courts, and of foreign companies in China.

Chen says a primary reason for the expense is that there is discovery in the US, and generally there is a right to a trial by jury in its federal courts. Discovery in a complex US IP litigation can involve tens of thousands of pages (or more) of company documents, as well as the depositions of dozens of witnesses. Trial by a jury in US federal courts can last weeks or months.

In addition, many Chinese companies are not armed with sufficient global vision before heading abroad. “They are not familiar enough with the local laws and regulations of their targeted markets, and have not estimated the legal risks incurred because of the unfamiliarity when they make business decisions,” says Wilson Huo, a partner at Zhong Lun Law Firm in Beijing.

Some Chinese law firms may also be ill-equipped to deal with overseas court proceedings independently. Beijing-based Lantai Partners’ founding partner Yang Guang says many overseas litigation disputes involving Chinese companies “are handled by Chinese lawyers in collaboration with foreign lawyers”.

But the collaboration is too often fraught with problems. “Because of the serious lack of experience in the strategies and tactics for overseas court proceedings as a whole, Chinese lawyers find themselves unable to work easily with foreign lawyers,” Dong notes.

As a result, Chinese companies often choose to retreat from tough overseas lawsuits. Tai Shan Gypsum, involved in a product liability suit in the US, did not respond in the first instance to the lawsuit. A US court awarded US$2.6 million to the plaintiff in a default judgment against the company in 2010 after it failed to make an appearance in the case. Tai Shan then appealed, but just this month a US federal court dismissed Tai Shan’s arguments that it had no jurisdiction over the company and ruled it must answers other claims from plaintiffs, meaning the likelihood of expensive settlements.

However, Yang has noticed that things are changing for Chinese companies. “They are increasingly experienced in dealing with overseas litigation cases,” he says. Hogan Lovells’ Shanghai office partner Huang Taizhang says Chinese companies have decided to participate in court proceedings in foreign countries for two reasons: to protect their foreign business and assets; and to protect their corporate image.

Protecting the company in overseas markets is essential. Shanghai-based Llinks Law Offices partner Charles Qin says foreign companies most often commence IP litigation “not for

*中国企业完全可以有效管理诉讼、采取战略应对措施，并取得最终胜利*

*Chinese companies are able to manage litigation effectively by employing strategic measures, and win in the end*

**陈立彤**
**Henry Chen**
元达律师事务所
合伙人
上海
Partner
MWE China Law Offices
Shanghai

美国联邦法院驳回了泰山石膏声称美国法院对该公司没有司法管辖权的说法，并裁定泰山石膏必须回应原告提出的其他诉求。这意味着，泰山石膏可能需要花一大笔钱才能最终解决此事。

不过，据杨光观察，中国企业对境外诉讼正从不予理睬变为积极应对，“处理境外诉讼的经验日益丰富”。

霍金路伟律师事务所上海代表处合伙人黄大彰分析，中国企业开始主动参加境外诉讼有两个原因：一是保护其海外业务和资产；二是为了维护公司的海外形象。

此外，捍卫企业在海外的市场也是一个重要原因。通力律师事务所合伙人秦悦民说，很多时候“外国企业启动知识产权诉讼‘醉翁之意不在酒’，而在于阻止中国企业进入相关市场。”

未雨绸缪往往是上策。霍伟建议，中国企业在走出去前“首要的战略性工作就是进行法律风险评估和做好管理争议的准备。”

一旦出现争议，消极应对并不可取。“[由于]法院地的缺席审理、临时禁令和强制执行等法律制度或制裁措施，中国企业如果消极应对相关境外诉讼，可能会遭受更大损失。”杨光提醒道。

而积极应对才是正道，通领科技集团在美国积极应诉长达 8 年并最终胜诉就是最好例证。陈立彤说：“尽管美国知识产权诉讼程序复杂、开支巨大。中国企业完全可以有效管理诉讼、采取战略应对措施，并取得最终胜利。”他向中国企业赠送了几条妙计：第一，被诉中国企业之间“可以合理分工，以降低各自承担的诉讼开支”；第二，要熟练运用抗辩理由，例如“要求美国专利和商标局对争议专利的有效性进行重新审查”；第三，利用 2011 年《美国发明法案》中对被告有利的条款进行抗辩。

抗辩即使得不到法院支持，至少也可以争取应诉时间。法朗克律师事务所亚洲区诉讼及仲裁业务主管 Philip Nunn 注意到，近年来中国企业常常以违反中国《保守国家保密法》为由，拒绝向外方当事人、外国法院或仲裁机构、海外监管机构提供文件。

东南融通和德勤便是一例。东南融通是一家在美国上市的中国

their real interests, but rather to prevent Chinese companies from accessing a market”. Huo adds that legal risk assessment and dispute management measures are of such significance, they should be the first few strategic activities considered and undertaken by Chinese enterprises, even prior to going abroad.

Once a dispute arises, inaction is undesirable. “[Because of] the legal regime or sanctions imposed by a court, like a hearing by default, interim injunction and enforcement, Chinese companies may suffer greater losses if they choose to respond to an overseas court with a negative approach,” Yang cautions.

Positive action pays dividends, a good example being General Protecht Group’s eight-year case in the US, and its eventual victory. Chen says: “Despite the complexity of proceedings and huge spending involved in US IP suits, Chinese companies are able to manage litigation effectively by employing strategic measures, and win in the end.”

Chen presents some recommendations to consider: first, respondent Chinese companies can “share out a reasonable amount of work among themselves to reduce their respective litigation expenses”; second, be proficient in using the system, for example, “asking the US Patent and Trademark Office to re-examine the validity of the patent in dispute”; and third, companies can defend themselves by using the provisins of the 2011 America Invents Act in favour of a defendant.

Even if a defence is not supported by a court, it may buy more time to prepare a response. Fried Frank Harris Shriver & Jacobson’s head of litigation and arbitration, Asia, Philip Nunn, has observed a rise in the number of instances where PRC-based entities are refusing to hand over documentation to opposing parties, foreign courts, arbitral tribunals or overseas regulators on the basis of potential breaches of state secrecy laws.

A case in point is that of Deloitte and Longtop Financial Technologies. Longtop, a China-based company that was listed in the US, was charged in November 2011 with failing to file accurate financial reports. Deloitte refused to provide records to the Securities and Exchange Commission (SEC) on the basis of Chinese secrecy laws. The SEC has now asked for a six-month stay in proceedings while it negotiates with the China Securities Regulatory Commission on cross-border co-operation.

外国企业可能通过知识产权诉讼，将中国企业拒于市场之外。
Foreign companies may launch IP litigation to prevent Chinese access.

# 仲裁机构指南

**按字母顺序排列**

## 美国仲裁协会 (AAA)

国际争议解决中心 (ICDR) 是美国仲裁协会 (AAA) 的下属业务部。ICDR 称自己是“临时救济措施的紧急仲裁员”规则的首创者，这一机制使当事人可以向紧急仲裁员而不用向当地法院申请临时救济。

据 ICDR 亚洲区总监李麦珂 (Michael Lee) 介绍，ICDR 可能是唯一一家提供两种管理费用标准的仲裁机构。如果当事人在案件提出后 90 日内达成和解的，可以减免一大部分费用。为避免仲裁程序的延误，ICDR 提供调解服务，可以与仲裁同时进行。

为了避免外国当事人所担心的美国诉讼中的证据开示程序，ICDR 发布了《仲裁员信息交换指南》。李麦珂说：“当事人可以积极参与指定仲裁员的过程，以确定具有特定资质、能力和国籍的仲裁员。”

## 北京仲裁委员会 (北仲)

在过去三年中，北京仲裁委员会受理的案件涉及国际货物销售、建筑、股份收购以及技术转让等领域。

据北仲张皓亮处长介绍，北仲正在着手仲裁规则的修订。此次修订将吸收国际先进经验，同时贯彻“尊重当事人意思自治，赋予仲裁庭及仲裁机构更广泛的推进仲裁程序的权利”之理念，例如明确仲裁庭认定证据之权力。

张皓亮表示，由于现行有多种撤销和拒绝执行仲裁裁决的制度，导致这些制度被滥用，而修改相关的立法可以解决这个问题。他补充道，还应明确对仲裁裁决不予执行申请的司法审查程序，赋予当事人上诉等救济权利。

## 中国国际经济贸易仲裁委员会 (贸仲)

“贸仲近三年受理的案件争议类型进一步多样化，新争议类型包括资产并购、特许经营合同、融资租赁合同、造船合同等，”贸仲秘书长于健龙介绍说。

另一个重大发展是 2012 年通过的新贸仲仲裁规则，其中允许仲裁庭采取临时措施，这引起了仲裁界的广泛关注。

杨春雷
Yang Chunlei

据贸仲原副秘书长、现共和律师事务所合伙人杨春雷介绍，《中华人民共和国民事诉讼法》修正案引入了仲裁前保全措施及禁令，而新版贸仲仲裁规则也相应

# A guide to arbitration

**In alphabetical order:**

## American Arbitration Association (AAA)

The International Centre for Dispute Resolution (ICDR), a division under the AAA, claims to be the creator of the “emergency arbitrator for interim relief” rule, which allows parties to have an emergency arbitrator instead of going to local courts.

According to Michael Lee, a director at ICDR, this institution may be the only one that provides two options for filing fees. Parties are entitled to significantly reduced rates if they reach settlement within 90 days after filing their claims. The mediation service provided by ICDR can proceed on a parallel track with arbitration to avoid delays.

To avoid US litigation-style discovery, which is a major concern of foreign parties, the ICDR has prepared Guidelines for Arbitrators Concerning Exchanges of Information. “Parties can actively get involved in the appointment process to find arbitrators with specific qualifications, skills and nationalities,” Lee says.

## Beijing Arbitration Commission (BAC)

In the past three years, the subject matter of arbitration cases submitted to the BAC has included international sale of goods, construction, share purchase and technology transfer.

The BAC is revising its arbitration rules. According to Zhang Haoliang, a division director at the BAC, the revisions will adopt advanced practices of international institutions and follow the principles of “autonomy of parties”, granting the BAC and tribunals “broader powers to expedite arbitration proceedings”, e.g. specifying a tribunal’s power to admit evidence.

Zhang says the concurrent regimes of setting aside and refusal to enforce arbitral awards have led to an abuse of such processes, which could be resolved by amendment to relevant legislation. The court procedure to hear an application for refusal of enforcement also needs clarification, including granting parties appeal or other remedies, he adds.

## China International Economic and Trade Arbitration Commission (CIETAC)

“The case categories we arbitrate have continued to diversify over the past three years, including asset acquisition, franchises, finance leases and ship-building contracts,” says Yu Jianlong, the secretary-general at CIETAC.

Another significant development is its 2012 Arbitration Rules, in which the interim measures powers granted to tribunals received considerable attention from the arbitration community.

The Bill of Amendment to the PRC Civil Procedure Law proposes to introduce pre-arbitration preservation measures and injunctions, according to Yang Chunlei, the former deputy secretary-general of CIETAC and now a partner at Concord & Partners, and the new rules already have some provisions in place to interact with the proposed changes.

However, whether the rules and the new law work well together depends on coordination between CIETAC and the Supreme People’s Court. “Without the emergency arbitrator procedures,

地修改了部分条款。

不过，新的贸仲仲裁规则与《民事诉讼法》能否配合默契还要取决于贸仲与最高人民法院之间的协调。中伦律师事务所北京办公室合伙人霍伟说："虽然贸仲秘书处会在仲裁庭设立前转交当事人的临时措施申请，但紧急仲裁员程序的缺失仍然令人担心临时措施能否有效地发挥作用。"

## 香港国际仲裁中心 (HKIAC)

香港国际仲裁中心正在修订其于2008年9月1日生效的《机构仲裁规则》。

"这些规则是为中国公司使用而设计的。"富而德律师事务所顾问钟津翰说，"涉及中国的合同已经广泛采用了这些规则。"

据香港国际仲裁中心秘书长鲍其安介绍，不会对原来的仲裁规则进行大幅度修订，"因为总的看来，原来的这些规则效果还不错"。可能会对有关合并当事人、合并仲裁程序及证据开示程序的条款做出部分修改。为了使港仲与其他国际仲裁机构接轨，紧急仲裁员条款也正在酝酿之中。

## 英国伦敦国际仲裁院 (LCIA)

伦敦国际仲裁院也正在对自 1998 年起施行的仲裁规则进行审议及修改。据伦敦国际仲裁院副注册员 Keisha Williams 介绍，新的仲裁规则将于明年初发布。

Williams 列举了三个与英国仲裁的重要发展相关的案件：

- 在"Ingosstrakh Investments 诉法国巴黎银行案"中，上诉法院支持了对仲裁协议第三方做出的禁诉令；
- 在漫长的"尤科斯诉俄罗斯石油公司案"中，涉及的仲裁裁决被仲裁地宣布无效，英国法院是否会允许执行这样的仲裁裁决，仍需拭目以待；
- 在"Jivraj 诉 Hashwani 案"中，最高法院对仲裁员国籍的有关问题做出了裁决。

Williams 说，伦敦国际仲裁院在过去三年中审理了 581 宗国际仲裁案件，其中11宗涉及中国当事人，这是"一个完全中立的、世界闻名的仲裁机构，不论当事人国籍或住所而平等地对待所有当事人"。

## 国际商会 (ICC)

ICC 发布的 2012 年版仲裁规则被元达律师事务所合伙人陈立彤称为"国际仲裁领域近来最重要的发展"。

律师们十分关注这次修订中有关多方仲裁的新条款（第 7 至第 10 条）。中伦律师事务所合伙人霍伟表示，有关选择外国仲裁的条款对在中国的外商投资企业十分有益，因为现在可以通过让第三方（外国个人或实体）加入交易，更方便地满足"外国要素"这一要求。（霍伟注意到，虽然贸仲规则对多方仲裁没有具体规定，但是在实践中，贸仲显然也采用了同样的方式在仲

how efficient the interim measures can turn out to be is worrying, although the CIETAC secretariat will transfer the parties' applications for interim measures prior to establishment of the tribunal," says Wilson Huo, partner at Zhong Lun Law Firm in Beijing.

## Hong Kong International Arbitration Centre (HKIAC)

The HKIAC is now reviewing its Administered Arbitration Rules, which went into effect on 1 September 2008.

"These rules were designed to be used by Chinese companies," says John Choong, a counsel at Freshfields Bruckhaus Deringer, "and they have become widely used in China-related contracts."

According to Chiann Bao, secretary-general of the HKIAC, a wholesale revision of the rules is not being contemplated "as the overall view is that the rules are working well". Certain modification may be made to provisions on joinder of parties or consolidation of arbitration proceedings, and test and procedure of discovery. The introduction of an emergency arbitrator procedure is also under consideration, to bring the centre in line with other institutions.

## International Chamber of Commerce (ICC)

Henry Chen, a partner at MWE China Law Offices, calls the 2012 Rules of Arbitration of the ICC "the most significant recent development in the field of international arbitration".

Among the amendments, lawyers attach particular importance to the new provisions (from article 7 to 10) on multi-party arbitration. Huo says foreign-invested companies in China can benefit in terms of selection of foreign arbitration, as it is now easier for them to satisfy the "foreign element" test by introducing a third party (foreign individual or entity) into their transaction. (Huo says although CIETAC rules do not have a specific clause on multi-party arbitration, that in practice the same means appears to have been adopted to incorporate "foreign elements" into CIETAC arbitration. He also expects this to be a point for the next round of updating CIETAC rules.) In addition to the emergency arbitrator regime, the new ICC rules also address parties' complaints on costs and delays, by incorporating cost sanctions against unreasonable delays and a number of other cost-saving techniques.

## London Court of International Arbitration (LCIA)

The LCIA is in the process of reviewing and amending its 1998 Arbitration Rules. According to Keisha Williams, the LCIA deputy registrar, the new rules should be published early next year.

Williams sets out three cases as significant developments in relation to arbitration in England:

- In *Joint Stock Asset Management Company Ingosstrakh Investments v BNP Paribas*, the Court of Appeal upheld an anti-suit injunction against a non-party to an arbitration clause;
- The long-running *Yukos Capital v Rosneft* case on enforcement of awards annulled at the seat. Whether the English court would allow the enforcement of such awards remains to be seen;
- The Supreme Court decision in *Jivraj v Hashwani,* regarding the nationality of arbitrators.

Having managed 581 international arbitration cases

裁中加入“外国要素”。他也期望这一点可以体现在贸仲规则的下一轮修订中。）除了新增紧急仲裁员制度之外，新规则针对当事人对费用和延误的不满，引入了对不合理延误的费用制裁以及其他许多节省成本的措施。

## 上海仲裁委员会（上仲）

上海仲裁委员会下设金融仲裁院、知识产权仲裁院以及国际航运仲裁院三个仲裁部门，自 1995 年起已审理了大约 1 万 3000 宗民商事仲裁案件，包括过去三年中审理的 3837 宗案件。

上海仲裁委员会也正在审议其 2008 年版仲裁规则。据上海仲裁委员会秘书长方雄介绍，修订的内容主要涉及根据初步证据对管辖权的审查、仲裁协议效力的认定、仲裁员更换机制、仲裁庭调查制度等。

方雄说，除了《民事诉讼法》已被修订之外，《仲裁法》也将被修订。对于法院在审理涉外仲裁裁决与国内裁决是否可执行时采取不同标准的现象，方雄表示“应该在立法修订时予以统一”。

## 斯德哥尔摩商会（SCC）

在 2009 年至 2011 年间，SCC 审理了 11 宗涉及中国当事人的案件，其中有 5 宗案件是今年立案的，这些案件中最常见的纠纷是有关供应协议的。

SCC 于 2010 年修改了仲裁规则，加入了紧急仲裁员条款。“这是基于 SCC 的 2008 年客户调查做出的修改，” SCC 秘书长 Annette Magnusson 说，“调查显示 SCC 仲裁院 82% 的顾问认为，在仲裁程序开始之后应该可以采用临时措施。”自 2010 年 1 月 1 日以来，SCC 执行了 8 次紧急仲裁员程序，其中历时最长的一次决定也仅仅花了 13 天。

## 新加坡国际仲裁中心（SIAC）

SIAC 对其仲裁规则的最近一次修订是在 2010 年进行的。SIAC 中国区副主任李威运说，此次修订最重要的一个目的是“确保无论来自大陆法系还是普通法系的律师都容易运用 SIAC 仲裁规则。”

除了紧急仲裁员授予紧急临时救济的机制之外，另一个重要的修订是引入快速程序，使当事人可以在仲裁庭组成的 6 个月内完成仲裁。

另外值得注意的是《国际仲裁法》的修订，该法的修订部分已于 2012 年 5 月生效，其中修订的内容包括：

- 放宽达成有效仲裁协议的书面形式要求，只要以某种形式记录下来即可；
- 允许法院审查仲裁庭作出的“无管辖权的裁定”；
- 明确仲裁庭对利息作出裁决的权力。

Factors outside of the court should not be ignored. “Some Chinese enterprises may not be familiar with unspoken local rules or conventions. When in Rome, do as the Romans do,” says Huo. “Playing by the rules not only means abiding by local laws and regulations, it also requires us to follow the local social practice, for instance lobbying the government, valuing NGOs’ functions, exerting pressure on industry associations, etc.”

To some extent, Chinese companies are following a path beaten by Japanese and South Korean companies that have expanded overseas. Dong says Chinese companies will “learn from litigation cases” and “turn into truly multinational corporations through litigation challenges”.

## Enforcement weakness

Back on the home court, the game is played slightly differently. It is difficult for foreign courts’ judgments to be recognised and enforced in China. This is the biggest weakness for foreign companies but is considered to be the only advantage of Chinese companies during court proceedings in foreign countries.

According to the Civil Procedure Law of China, a decision made by a foreign court can be recognised and enforced in China provided that: the foreign country in which the decision was made has concluded with China – or the said country and China have jointly acceded to – a bilateral or multilateral treaty on reciprocal recognition and enforcement of judgments delivered by the court in the said country, or in China; or that the said country has a reciprocal relationship with China. However, China has so far not yet acceded to the Hague Convention on Choice of Court Agreements.

Arbitral awards made by international arbitration bodies, although highly respected by the legal profession, are also difficult to have enforced in China. Although foreign arbitral awards that meet the requirements under the New York Convention are recognised in China, they are likely to encounter various obstacles to enforcement.

First, an application for enforcement must be presented to a Chinese court. But foreign parties have little faith in China’s version of blind justice. “Foreign parties believe China’s legal system is not independent and impartial enough,” says Joe McArthur, a partner in the civil litigation and arbitration practice at Blake Cassels & Graydon’s Vancouver office, adding bluntly that they “are worried that [Chinese courts] will favour Chinese parties in dealing with disputes involving Chinese and foreign parties”.

Second, before an arbitral award is made, the interim measures or orders – for preservation of evidence or property, etc. – made by a foreign arbitral tribunal may not be recognised and enforced by a Chinese court. Therefore, Chinese companies that are in an uncomfortable position during foreign arbitration “will probably conceal or destroy the evidence against them in China, or hide or transfer their property in China”, says Zhang Shouzhi, a Beijing partner at King & Wood Mallesons. “Even if the opposing party has identified such an act, it is unable to stop it by means of the interim measures ordered by the arbitral tribunal.”

Finally, once an arbitral tribunal makes a decision against a Chinese company, the Chinese company will apply for non-enforcement during the enforcement stage. Run Ming Law Office’s executive partner, Wang Yadong, says: “In the absence of prior seizure of property, the losing party in the arbitration can easily transfer assets during this period so that the arbitral award will

*中国律师整体上仍然非常缺乏……经验，无法与境外律师充分合作*

*Because of the serious lack of experience ... Chinese lawyers find themselves unable to work easily with foreign lawyers*

**董纯钢**
**Dong Chungang**
竞天公诚律师事务所
合伙人
北京
Partner
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公司，2011 年 11 月被控财务造假。其外聘审计机构德勤会计师事务所就以中国《保守国家保密法》为由拒绝向美国证监会提供有关文件。美国证监会不得不暂停调查程序 6 个月，以便与中国证监会就合作调查取证进行谈判。

法庭之外的因素也不可忽视。“中国企业可能不熟悉当地的潜规则和习惯做法。”霍伟说，“他们要做到入乡随俗，例如学会游说政府、评估非政府组织的功效、对行业协会施加压力等。”

某种程度上，中国企业也在重复日本和韩国企业当初海外扩展时所走过的路。董纯钢期望中国企业“在诉讼中学习”、“在诉讼的挑战下转变成真正的国际企业”。

## 执行难

让我们将目光转回中国。解决争议的游戏规则在中国略有不同。

外国法院判决在中国难以得到承认和执行，这是外国企业的最大短板，却被中国企业视作自己面对海外诉讼时的唯一优势。

中国《民事诉讼法》规定，外国法院判决在中国获得承认和执行的前提是，判决国必须同中国缔结或共同参加了相互承认与执行对方法院判决的双边或多边条约，或与中国存在互惠关系。而中国迄今还未加入海牙《选择法院协议公约》。

备受律师界推崇的国际仲裁，也难逃在中国“执行难”的宿命。符合《纽约公约》规定条件的外国仲裁裁决虽然可以在中国得到承认，然而其在中国的执行可能会遇到各种困难。

首先，执行申请必须向中国法院提出，但外国当事人却不太相信中国法院能做到铁面无私。“外国当事人认为中国的法律制度可能不够独立和公正。”布雷克律师事务所驻温哥华合伙人、负责民事诉讼及仲裁业务的 Joe McArthur 说。他坦言，外国人“担心 [ 中国法院 ] 在处理中外双方的争议时会偏袒中方当事人。”

其次，在仲裁裁决作出前，外国仲裁庭的临时措施或命令（证

including 11 involving Chinese parties in the past three years, the LCIA is “an entirely neutral and world-renowned institution which treats all parties equally irrespective of nationality or domicile,” Williams says.

## Shanghai Arbitration Commission (SAC)

With three arbitration divisions in finance, intellectual property and shipping, the SAC has administered about 13,000 civil and commercial arbitration cases since 1995, including 3,837 in the past three years.

The SAC is reviewing its 2008 Arbitration Rules. According to Fang Xiong, secretary-general of the SAC, the proposed revisions will be related to examination of jurisdiction on prima facie evidence, determination of validity of arbitration agreement, and substitute of arbitrator and investigation by tribunal.

Apart from the Civil Procedure Law, Fang says the Arbitration Law will also be amended. As to the different tests for foreign-related awards and domestic awards when their enforceability is reviewed by courts, “the relevant legislation will be harmonised”, he says.

## Singapore International Arbitration Centre (SIAC)

The SIAC’s arbitration rules were last revised in 2010. One of the main objectives of the revisions was “to ensure that the rules were as easy to adopt and apply for lawyers from civil law jurisdictions as lawyers from common law jurisdictions”, says Arvin Lee, the centre’s deputy head (China).

In addition to the emergency arbitrator procedure for urgent interim relief, another featured revision is the expedited procedure, which allows parties to complete arbitration within six months of the constitution of a tribunal.

Another thing to note is the latest amendments to the International Arbitration Act, which came into effect in May 2012. The amendments include:

- relaxing the writing requirement in concluding a valid arbitration agreement, subject to there being a record of such agreement;
- allowing courts to review a tribunal’s negative jurisdictional rulings;
- clarifying the powers of tribunals to award interest.

## Stockholm Chamber of Commerce (SCC)

The SCC registered 11 cases involving Chinese parties from 2009-2011, with five new cases filed so far this year. Of these, supply agreements are the most common subject matter of disputes.

The SCC updated its rules in 2010 to include the emergency arbitrator procedure. “[This was] in response to the SCC 2008 user survey,” says Annette Magnusson, secretary-general of the chamber. “It showed that 82% of counsel in SCC arbitrations are of the opinion that interim measures ought to be available when arbitration is commenced.” Since 1 January 2010, the SCC has administered eight emergency arbitrator proceedings, among which the longest decision-making period was just 13 days.

据保全或财产保全等）可能得不到中国法院的承认和执行。因此，在境外仲裁中处于不利局面的中国企业，“可能会在中国隐匿、销毁对其不利的证据，或者隐藏、转移其在中国境内的财产。”金杜律师事务所北京合伙人张守志说，“即使另一方当事人发现了上述行为，也无法通过仲裁庭下达的临时措施予以阻止。”

最后，一旦仲裁庭作出对其不利的裁决，中国企业会在执行阶段提出不予执行的申请。润明律师事务所执行合伙人王亚东说：“由于没有事先查封财产，在仲裁中失败的一方可以利用这段时间轻易地转移资产，从而使仲裁裁决最终成为废纸一张。”

霍金路伟国际律师事务所驻上海合伙人黄大彰总结道：“在中国承认和执行外国裁决或法院判决可不是一件容易的事情，特别是在二、三线城市，因为那里经常会碰到地方保护的问题。”王亚东补充说：“有些法院会以政法委不同意执行或者以维护社会稳定为由拒绝执行。”

## 日益不安

围绕外国仲裁裁决在中国能否得到执行的诸多不确定因素或许能在短期内使中国公司获益，不过却为卷入海外诉讼或仲裁的中国企业带来潜在的不利影响。

对中国执行问题的忧虑“可能会给中国企业带来意想不到的后果，包括境外的资产被法院冻结。”布雷克 McArthur 说。的确，随着中国企业在海外的资产越来越多，外国当事人也在逐渐调整策略，向国外法院申请对中国企业的境外资产采取临时强制措施。

此外，外国企业在诉诸仲裁的同时开始更多地利用与仲裁相关的诉讼程序，包括要求法院颁令禁止或开展仲裁、启动证据开示等。

“当事人启动这些诉讼程序都有战略考虑，例如获得优势地位、取得相关文件或者利用纽约法院的财产冻结权力。”美国 Chaffetz Lindsey 律师事务所合伙人 James Hosking 说，“纽约法院现在有

*在中国承认和执行外国裁决或法院判决可不是一件容易的事情，特别是在二、三线城市……*

*It can be difficult to enforce arbitral awards and court judgments in China, especially in second and third-tier cities ...*

**黄大彰**
**Terence Wong**
霍金路伟律师事务所
合伙人
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Partner
Hogan Lovells
Shanghai

eventually become null and void.” Terence Wong, a partner at Hogan Lovells in Shanghai, sums up: “It can be difficult to enforce arbitral awards and court judgments in China, especially in second and third-tier cities and below, where one would often encounter problems such as local protectionism.”

"Some courts refuse to enforce them because the Politics and Law Committee disagrees [with the foreign arbitral award], or perhaps to maintain social stability,” adds Wang Yadong.

## Disturbing trend

All the uncertainty surrounding enforcement of arbitral awards may benefit Chinese companies in the short term, but it is leading to a disturbing trend in overseas jurisdictions for Chinese companies involved in litigation or arbitration.

“Concerns about the uncertainty of enforcing foreign awards in China could potentially lead to undesirable outcomes for the Chinese party, including the freezing of assets located in the foreign jurisdiction,” warns McArthur.

Given the increasing amount of overseas assets owned by Chinese companies, foreign parties are adjusting their strategies by applying to foreign courts to take interim enforcement measures against these overseas assets.

There is also a growing use of litigation proceedings in parallel with arbitration. The litigation matters may involve attempts to enjoin or compel arbitration, or requests for discovery.

“Often these cases are brought for strategic reasons to gain leverage, access to documents, or take advantage of New York courts’ powers to attach assets,” says James Hosking, a partner at US-based Chaffetz Lindsey. “For example, there is now case law in New York empowering courts to order a bank to have its overseas branches transfer funds or other assets to New York to satisfy a judgment against the bank’s customer.” Given the increasing number of Chinese-owned banks in New York, he says this is a development to watch.

“Nonetheless, obtaining interim measures from foreign courts against Chinese companies is often not a perfect substitute,” says John Choong, a Hong Kong-based counsel at Freshfields Bruckhaus Deringer. “If a foreign party obtains interim relief from the Hong Kong courts against the PRC company, and the subject matter of the dispute is entirely in the PRC, the PRC company may choose to disregard that order … Instead, the foreign party may well have no choice but to commence proceedings in the PRC itself.”

Although the *Arrangement between the Mainland and the Hong Kong Special Administrative Region on Reciprocal Recognition and Enforcement of the Decisions of Civil and Commercial Cases under Consensual Jurisdiction* is in effect, this arrangement is limited and does not include interim measures like injunctions.

However, the Hague Convention on Choice of Court Agreements may bring a ray of hope to foreign parties. A Beijing partner at Global Law Office, Chen Huanzhong, says China’s accession to the convention in future should have an impact on the direction and progress of transnational lawsuits involving Chinese companies.

## Which court?

Given the drawbacks of commencing proceedings in a foreign court, most lawyers tend to prefer international arbitration to resolve cross-border commercial disputes. “This is becoming the dispute resolution method first chosen by Chinese companies

*在中国做生意的跨国企业，通常会拒绝……将争议提交中国法院或中国仲裁机构解决*

*Multinationals doing business in China typically refuse to submit to the jurisdiction of Chinese courts or arbitral bodies*

**Emmanuel Gaillard**
谢尔曼・思特灵律师事务所
国际仲裁部全球主管
Global Head of International Arbitration Practice
Shearman & Sterling

权通过发出冻结命令，要求银行将其海外分行的资金或其他资产汇至纽约，以配合法院对该银行客户的裁决。”他提醒中资银行要关注这一最新发展，因为它们在纽约的分支机构日益增多。

“但是，针对中国企业的外国法院临时措施通常并非最佳解决办法。”富尔德律师事务所驻香港顾问钟津翰指出。以香港法院对中国内地企业作出的临时措施为例，他说：“如果争议标的全部位于中国内地，”他说，“中方企业会选择无视香港法院的命令…。外方当事人别无选择，不得不在中国内地法院重新起诉…。”

虽然香港与内地签订有《相互认可和执行民商事案件判决的安排》，但是该安排的适用范围有限，也不包括禁令等临时措施。

不过，2005 年海牙《选择法院协议公约》或许能为外国当事人带来一线曙光。环球律师事务所驻北京合伙人陈幻中说，对于涉及中国企业的跨国诉讼，“中国将来对《选择法院协议公约》的参约情况，将左右其方向和进程”。

## 去哪里仲裁?

在外国法院诉讼的上述弊端，使大多数外国律师倾向于以国际仲裁解决跨境商事争议。这也正成为中国企业“对外签订合同中首要选择的争议解决方式”，杨光说。

但是中外律师对仲裁地的选择存在分歧。谢尔曼·思特灵律师事务所国际仲裁部全球主管 Emmanuel Gaillard 说：“在中国做生意的跨国企业，通常会拒绝在其商业合同中约定将争议提交中国法院或中国仲裁机构解决，而会坚持选用中立的仲裁机构和规则。”

in their contracts with foreign companies," Yang says. However, Chinese and foreign lawyers are divided over the choice of seat for arbitration. "Multinationals doing business in China typically refuse to submit to the jurisdiction of Chinese courts or arbitral bodies in commercial contracts and instead insist on arbitration under more neutral rules," says Emmanuel Gaillard, global head of international arbitration practice at Shearman & Sterling.

However, Chinese lawyers tend not to favour foreign arbitration. As one Chinese lawyer who preferred not to be named says: "For apparent reasons including language, costs and differing legal systems, as well as discrimination by foreign arbitrators and arbitration bodies against Chinese people, it is not an exaggeration to say that Chinese parties have lost 50% of their case before they even begin in foreign arbitration."

Cedric Chao, co-president of international litigation and arbitration practice at Morrison & Foerster in San Francisco, offers another angle, saying Asian companies often dislike foreign arbitrators because of cultural differences, rather than discrimination. He says Chinese companies should try to choose arbitrators familiar with international arbitration and Chinese cultural backgrounds. As to differences in legal systems, he says the international arbitration law is actually a mixture of continental law and common law, and lawyers with different legal backgrounds all take time to get used to it.

"Most Chinese companies are still unfamiliar with international arbitration processes outside of China, e.g. document production and discovery process, agrees Peter Chow, a Hong Kong partner at Squire Sanders & Dempsey, adding, "but the Chinese are fast learners."

Deputy head (China) and counsel at the Singapore International Arbitration Centre, Arvin Lee, notes: "As Chinese companies and law firms become more international, they will quickly become as adept as lawyers and parties from other jurisdictions."

A lack of understanding of the rules of evidence under the common law system has also made life difficult for mainland lawyers, but as more become exposed to international arbitration, Chiann Bao, secretary-general of the Hong Kong International Arbitration Centre, says "they are certainly able to make perfect through practise".

法律专家指出，中国企业或许会发现境外仲裁在开始阶段就困难重重。
Experts say Chinese companies may find international arbitration daunting to begin with.

# 仲裁新局面

贸仲于八月在其官方网站上发布的一份公告彻底公开了该仲裁机构的内部纠纷，这让一些人大吃一惊，但某些仲裁领域的专家表示，冰冻三尺非一日之寒，这次内部纠纷的祸根早已埋下。

“贸仲和分会之间的内部争执已经有一段时间了。”中伦律师事务所霍伟律师说，“不过，直到贸仲公布新规则和双方发表一连串的声明，这才被外界所了解。”

中国国际经济贸易仲裁委员会（贸仲）于 8 月 1 日在其官方网站上刊登公告称，其上海分会和华南分会“拒不执行 2012 年《中国国际经济贸易仲裁委员会仲裁规则》，拒绝继续接受中国国际经济贸易仲裁委员会统一的业务管理”。

贸仲公告宣布：自 8 月 1 日起，“中止对上海分会、华南分会接受仲裁申请并管理仲裁案件的授权”；当事人约定将争议提交分会仲裁的案件自该日起“由贸仲秘书局接受仲裁申请并管理案件”。

8 月 4 日，上海与华南发布《联合声明》，称贸仲的公告对分会和当事人均无约束力，因为分会的“仲裁管辖权来自当事人的约定，而非任何其他机构的‘授权’”，他们将继续受理和管理当事人约定由分会仲裁的案件。

## 仲裁规则

律师们表示，2012 年贸仲规则的出台无疑是导致此次纷争的导火索。

霍金路伟律师事务所上海代表处合伙人黄大彰表示，因为在新规则中被称作贸仲的“派出机构”，而非之前所称的“组成

# Arbitration revolution

The arbitration turf war that erupted in August via the CIETAC website surprised some for its very public airing, but other experts in the field of arbitration say the dispute is a tree with long roots.

“The friction between CIETAC Beijing and Shanghai has already existed for a period of time,” says Wilson Huo at Zhong Lun Law Firm, adding the effectiveness of new rules and recent announcements from both sides “have rendered this friction formally being known by the public”.

The China International Economic and Trade Arbitration Commission (CIETAC) published an announcement on its official website on 1 August, saying its Shanghai and South China sub-commissions “have refused to enforce the 2012 China International Economic and Trade Arbitration Commission Arbitration Rules, and to have their operations continued to be administered exclusively by CIETAC”.

The announcement said that authorisation for the two CIETAC branches to accept arbitration applications and administer arbitration cases would be suspended with immediate effect. Clients who had agreed to submit their dispute cases to the two branches should from the same date file their applications with the CIETAC secretariat, which would handle their cases, it added.

The Shanghai and South China sub-commissions published a joint statement on 4 August, claiming CIETAC’s announcement was not binding upon them or their clients because their arbitration jurisdiction originated from agreements with their clients, rather than an “authorisation” by any other agency. The statement said they would continue to accept and administer the cases to be arbitrated by them as agreed by their clients.

## Arbitration rules

Lawyers say the introduction of the 2012 CIETAC Rules is undoubtedly the element that lit the fuse to the dispute.

Terence Wong, a partner at Hogan Lovells in Shanghai, observes that the language of the rules had the effect of turning the sub-commissions into CIETAC’s outposts, rather than their remaining “integral parts” of CIETAC, and the sub-commissions saw the new rules as a challenge to their independence.

He adds that CIETAC Beijing asserted that the whole of CIETAC, including the sub-commissions, is under the direct leadership of the China Council for the Promotion of International Trade (CCPIT). But the sub-commissions claim that they merely co-operate with CCPIT, and that they are independent legal bodies registered with the relevant Shanghai and Guangdong authorities.

In accordance with the 2005 CIETAC Rules, a case may be accepted by CIETAC Beijing or any one of its branches only when a client agrees to submit the case to CIETAC for arbitration, but there is no specification that such cases must be arbitrated by a sub-commission. Former CIETAC deputy secretary-general and partner at Concord & Partners, Yang Chunlei, says this has made parties uncertain about where to submit a

部分”，分会认为“新规则是对他们独立性的挑战”。他补充介绍说，贸仲主张总会和分会都接受中国国际贸易促进委员会的直接领导，按照贸仲章程属于同一机构，但是分会声称自己过去和现在都是依法登记的独立事业单位法人，与贸促会之间只是合作关系。

按照 2005 年规则，当事人仅约定将争议提交贸仲仲裁但未明确由分会仲裁时，案件既可以在北京总会受理，也可以在任何一个分会受理，贸仲原副秘书长、共和所合伙人杨春雷认为：“这使得案件的受理地点存在不确定性。甚至出现多起案件在贸仲某分会受理，但当事人选择在总会提出仲裁反请求的情况。”

“按照新规则，”谢尔曼·思特灵律师事务所驻巴黎国际仲裁部全球主管 Emmanuel Gaillard 说，“当事人约定仲裁机构为贸仲的，除非当事人明确约定了分会，案件将 [ 统一 ] 由贸仲受理。”

“这一修订据说将减少分会的案件受理数量，”史密夫律师事务所驻北京合伙人费佳补充说。据黄大彰律师介绍，从今年 3 月份起，上海分会也的确不再受理仅约定由贸仲 [ 而未明确由上海分会 ] 仲裁的争议。

在竞天公诚律师事务所驻北京合伙人董纯钢律师看来，更深层次的原因在于贸仲“长期以来潜伏的体制问题的爆发”。他补充说：“在某些方面显示了中国仲裁机构要实现真正的独立性和民间性还有很长的路要走。”

元达律师事务所驻上海合伙人陈立彤进一步表示：“这次纷争彰显了中国仲裁机构与境外的仲裁机构的区别，他们仍非民间机构”。

总会与分会之间的争议是“贸仲崛起为国际仲裁机构道路上的一个倒退”，美富律师事务所旧金山分所国际诉讼和仲裁部联席主席 Cedric Chao 表示。

法朗克律师事务所香港办公室亚洲区诉讼及仲裁业务主管 Philip Nunn 担心，如果约定分会仲裁的案件全部交由总会处理，“这可能导致总会的案件积压和程序的迟延”。

霍伟表示，更有人担心如果内部纠纷和不确定因素持续存在，贸仲将因此失去吸引力，因为当事人更喜欢选择氛围融洽的仲裁机构。“除非分会受理案件的管辖权和权限的问题得以澄清，否则当事人在签订合同时会对是否选择贸仲犹豫不决。” Cedric 补充说。

无论如何，其他仲裁机构都将“渔翁得利”。新加坡和香港国际仲裁中心“更容易被中国客户接受和适应。”董纯钢说。当然，陈立彤认为，中国国内的一些仲裁机构也不会放过这个机会，例如上海仲裁委员会。

另外，约定上海或华南分会仲裁的当事人可能会面临极大的风险。“一方当事人会主张分会已经对案件丧失管辖权，分会作出的裁决因此可能会被申请撤销或不予执行。”普衡律师事务所北京代表处主管李德维 (David Livdahl) 表示。

律师们相信，双方当事人很有可能会面临尴尬的情况。如果一方当事人按照约定提交分会仲裁，对方当事人会主张分会无权受理，因为贸仲已经中止了对其的授权；但是，如果将争议

case. “There may even be an instance where many cases are filed with a sub-commission, but the parties lodge a counter-claim for choosing arbitration at CIETAC Beijing.”

Emmanuel Gaillard, global head of international arbitration practice at Shearman & Sterling in Paris, says under the new rules, “cases submitted to CIETAC will be administered by its headquarters in Beijing unless the parties have expressly consented to a sub-commission”.

Jessica Fei, a partner at Herbert Smith in Beijing, adds: “The change has been said to potentially reduce the number of new cases that the sub-commissions can handle.” According to Wong, as from March this year, the Shanghai sub-commission has not accepted cases that simply stated arbitration at CIETAC, because it considers that definition to be too vague.

Dong Chungang, a partner at Jingtian & Gongcheng in Beijing, believes the real reason for all the fuss is the “eruption of the prolonged underlying problem with the structure” of CIETAC. “In some aspects, it indicates Chinese arbitration organisations still have a long way to go before becoming truly independent and private organisations,” Dong says.

Henry Chen, a Shanghai-based partner at MWE China Law Offices, goes further: “This dispute has highlighted the differences between Chinese arbitration organisations and their overseas counterparts, as they are still non-private organisations.”

Cedric Chao, co-president of international litigation and arbitration practice at Morrison & Foerster in San Francisco, says the friction is a setback to the emergence of CIETAC as an international arbitration provider.

Philip Nunn, head of litigation and arbitration, Asia at Fried Frank Harris Shriver & Jacobson in Hong Kong, is worried that if all the cases agreed to be arbitrated by sub-commissions are processed by CIETAC Beijing, this may result in CIETAC Beijing being overloaded with case referrals, which may cause delays to the administration of cases.

There are also concerns that CIETAC will become less attractive as parties prefer to select an arbitration organisation with a more friendly environment if the struggle continues and uncertainty remains, says Huo at Zhong Lun Law Firm. “The uncertainty caused by this friction will make some parties hesitant to designate CIETAC in new contracts until there is clarity over the jurisdiction and authority of the CIETAC regional commissions,” adds Chao.

In any case, other arbitration organisations will benefit from the conflict. “It is easier for Chinese clients to accept and adapt to Singapore International Arbitration Centre or Hong Kong International Arbitration Centre,” Dong says. Chen, at MWE China Law Offices, says Chinese domestic arbitration bodies like the Shanghai Arbitration Commission will not miss this opportunity.

Parties that have agreed to arbitration by the Shanghai or South China sub-commissions may also encounter greater risks. “The awards issued by the sub-commissions after the issuance of the announcement may be challenged and potentially denied recognition and enforcement on the ground that the sub-commissions have no jurisdiction over the cases,” says David Livdahl, chair of the Beijing office of Paul Hastings.

Lawyers believe there is plenty of room for conflict between opposing parties. If a party submits a case to a sub-commission for arbitration as agreed, the other party may claim that the sub-commission has no right to accept it, as its authori-

提交贸仲北京管理也并非万无一失，因为对方当事人此时会主张，北京总会并非仲裁协议中约定的仲裁机构。

由此看来，解决问题的关键是必须弄清楚分会是否属于《仲裁法》规定的独立的仲裁委员会？如果是，根据《仲裁法》第14条“仲裁委员会之间没有隶属关系”的规定，分会就应该属于独立的仲裁机构，从而不受中止授权通知的影响；反之，则分会可能是贸仲的派出机构，约定分会仲裁的当事人可能面临上述风险。

## 解决之道

“内部纠纷的最终结果掌握在中国监管机构的手中；因此现在就预测结局显得为时过早。”费佳表示。好在，律师们给出了可行的建议。

对于拟约定贸仲的新仲裁协议，李德维表示：“因为各方对贸仲总会的管辖权并无任何争议，所以最好不要约定分会仲裁，而是交由总会仲裁。”他还建议：“当事人在中国法律允许的情况下选择在中国境外仲裁。”

对于约定分会仲裁的协议，环球律师事务所驻北京合伙人邢修松建议双方当事人“在产生争议之前就通过签订补充协议的方式，对仲裁条款进行必要的修改与澄清”。此时，当事人如仍选择分会《仲裁规则》，金杜律师事务所张守志律师认为，如果是“仲裁当事人达成的共识，应属有效，并不会造成实质性的法律风险”；但是，在选择仲裁员时，“较为稳妥的做法是选择两个《仲裁员名册》中共同记载的仲裁员”。

但是，最难处理的是已经发生争议的情况。理想的解决方案是，双方当事人借鉴国际商会仲裁院的做法，在按照贸仲的通知将争议提交贸仲管理后，在仲裁庭的主持下签署书面备忘录说明双方愿意改由贸仲仲裁案件。

对于分会正在管理的仲裁案件是否受中止授权的影响，贸仲的通知不够明确。“中止授权可能仅限于分会新受理的案件，”黄大彰表示，“但不能排除已经裁决的案件中的败诉方以中止授权为由申请撤销或不予执行裁决。”

除了采取以上的预防措施，“最有效的解决办法，”邢修松表示，“还是贸仲总会与分会尽快携手解决目前的僵局。”

sation has been suspended by CIETAC. However, it is not completely risk-free to have the dispute submitted to CIETAC Beijing because the other party may then argue that CIETAC Beijing is not the arbitration body agreed upon in an arbitration agreement.

It seems the key to solving the row is to figure out whether sub-commissions are independent arbitration commissions, as provided for under the Arbitration Law. If they are, then according to article 14 of the Arbitration Law – that there is no relationship of administrative subordination between arbitration commissions – the sub-commissions are independent arbitration bodies not subject to suspension of authorisation as stated in the announcement. More likely is the conclusion that the sub-commissions are outposts of CIETAC, and parties that have agreed to arbitration by sub-commissions all face that risk.

## Solutions

“The ultimate outcome of the dispute will be in the hands of the Chinese regulators; it is too early to predict what will happen,” says Fei.

Fortunately, lawyers offer some valuable recommendations. “Since there is no dispute over CIETAC Beijing’s own jurisdiction to administer cases, and while the controversy between CIETAC and its sub-commissions continues, for any new contract, it is best to provide for arbitration by CIETAC, rather than by one of its sub-commissions,” says Livdahl. He also recommends that arbitration outside of mainland China be selected, when it is permitted under Chinese law.

As to any agreement under which arbitration by a sub-commission has been agreed, Xing Xiusong, a partner at Global Law Office in Beijing, advises the parties to “make necessary changes and clarifications to the arbitration clauses before a dispute arises, by entering into a supplemental agreement”.

Zhang Shouzhi at King & Wood says: “If the parties to the arbitration have reached a consensus, the agreement should be effective and will not cause a substantial legal risk. However, in the choice of arbitrators, the safer approach is to select two arbitrators who have both been recorded in the Register of Arbitrators”.

The toughest problem is where a dispute has already arisen. The ideal solution is for both parties to learn from the practice of the International Court of Arbitration by signing a written memorandum under the auspices of an arbitration tribunal after the dispute is referred to CIETAC, in accordance with the CIETAC notice, saying both parties are willing to have the case arbitrated by CIETAC. However, CIETAC’s announcement is not clear enough about whether the cases now being handled by the sub-commissions will be affected by the suspension of authorisation. “The suspension may be limited to the new cases accepted by the sub-commissions,” says Wong. “But we cannot rule out the possibility that a losing party in a case already decided will apply for revocation or non-enforcement of the award on the ground of the suspension of authorisation.”

Apart from adopting the above precautions, “the most effective solution,” says Xing, “is for CIETAC to work together with its sub-commissions to resolve the present impasse as soon as possible”.

然而，许多中国律师对境外仲裁并没有太多好感。“因为显而易见的语言、费用、法律体系、外国仲裁员和仲裁机构对中国人的歧视等原因，可以不夸张地说中国当事人在面对境外仲裁时首先就输掉了一半。”一位不愿透露姓名的中国律师这样说道。

美富律师事务所驻旧金山国际诉讼和仲裁部联席主席 Cedric Chao 的分析比较客观。他认为，亚洲企业不喜欢外国仲裁员的原因在于文化差异而非歧视；为此，中国企业要尽量选择熟悉国际仲裁和中国文化背景的仲裁员。对于法律体系的差异，他表示国际仲裁法实际上是大陆法和普通法的混合体，不同法律背景的律师都需要一个适应的过程。的确，“大多数中国企业对位于境外的国际仲裁程序还不熟悉，例如证据出示和证据开示程序。”翰宇国际律师事务所驻香港合伙人邹德恩说，“但是中国人学得很快。”

新加坡国际仲裁中心中国区副主任兼法务顾问李威运说：“随着中国公司和律师事务所越来越国际化，相信他们很快就会和其他国家的公司和律师一样熟练掌握相关知识和技能。”

对普通法系的证据规则缺乏足够的了解，也造成中国律师不适应境外仲裁。不过，随着内地律师更多地参加国际仲裁，香港国际仲裁中心秘书长鲍其安相信“他们一定能够做到熟能生巧”。

## 避免错误

仲裁专家表示，对仲裁程序尚不熟悉的当事人应注意防范一些常见错误。斯德哥尔摩商会仲裁院秘书长 Annette Magnusson 介绍说，该商会审理的仲裁案件中一个常见的错误是仲裁条款不规范，仲裁当事人对仲裁机构名称的列示可能有误，或者对仲裁地、仲裁员人数、语言和适用法律的约定不明确甚至相互抵触。

就中英双语合同而言，“一个常见的错误是中英文合同中的仲裁条款不匹配、不一致”，李威运说。


对中国公司而言，知识产权诉讼是一种常见的跨境诉讼类型。

IP is a common subject of cross-border litigation for Chinese companies.

## Things to avoid

Arbitration experts say there are some recognisable dos and don'ts in proceedings for the uninitiated. A common mistake seen in arbitral proceedings in the cases administered by the Stockholm Chamber of Commerce is a defective arbitral clause. Parties, from all jurisdictions, can incorrectly state the name of the institution or include provisions on the seat, number of arbitrators, language or applicable law that are unclear or contradictory, says Annette Magnusson, secretary-general of the Arbitration Institute of the Stockholm Chamber of Commerce.

Another issue involves Chinese-English bilingual contracts. “One common error that we have seen is the introduction of ambiguity by not ensuring that the English and Chinese versions of the arbitration agreement in a contract match and conform to each other,” says Arvin Lee.

Michael Lee, global practice leader at the American Arbitration Association, adds that attempts to over-control by detailing the procedural steps within a clause may also create problems. His advice is keep arbitration clauses short and simple, and use the model clause of the arbitration body.

Still, due to the home court advantage, arbitration in China is favoured by Chinese companies. This is more apparent as China begins to play a more dominant role in negotiations. “Arbitration at CIETAC was agreed under various agreements signed for the Beijing-Shanghai high-speed railway construction project in China,” Dong says. Chinese companies sometimes also make some compromises or concessions in order to persuade foreign parties to choose arbitration in China by, for example, by agreeing to choose a presiding arbitrator with a third country's nationality.

As arbitration in China has been more international in recent years, arbitration bodies in China are increasingly accepted by foreign parties. For example, the 2012 CIETAC Rules were well received by foreign lawyers. CIETAC secretary-general Yu Jianlong says the new rules “have improved the procedural rules by fully drawing on international and domestic practices to ensure arbitration proceedings are conducted in a flexible and efficient manner”. The secretary-general of the Shanghai Arbitration Commission, Fang Xiong, and a division director of the Beijing Arbitration Commission, Zhang Haoliang, say they are working to revise their respective arbitration rules as well.

## Court advantage

Although international arbitration is generally accepted as the first choice of foreign companies, and court proceedings in China still contain drawbacks, an increasing number of foreign companies are instituting court proceedings in China.

This is because a court still has some advantages over an arbitration body during proceedings. “Some [foreign] companies have even removed the arbitration clauses in their contracts to allow them to commence proceedings in the event of a dispute,” says MWE's Chen.

Taking IP as an example, disputes regarding the validity of Chinese patents are non-arbitrable under Chinese law and can only be decided by state administrative bodies or Chinese courts, Gaillard says. For IP infringement cases, it is difficult to imagine that the parties will reach an arbitration agreement after a dispute has arisen, and therefore the dispute can only be dealt with by the appropriate court in accordance with article 29 of the Civil Procedure Law.

IP infringement disputes are “more suitable to be resolved, or can only be resolved through courts,” says Deng Yongquan, a

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北京仲裁委员会
BEIJING ARBITRATION COMMISSION

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北京仲裁委员会致力于向世界各国当事人提供公正、专业、高效的商事仲裁、商事调解及工程评审服务。目前，北京仲裁委员会共有仲裁员421名，其中外籍仲裁员83名，当事人遍布美洲、亚洲、欧洲、大洋洲等国家和地区。

"The only local arbitration commission which meets or surpasses global standards"

*--Economist Intelligence Unit*

## 示范仲裁条款

因本合同引起的或与本合同有关的任何争议，均提请北京仲裁委员会按照该会现行仲裁规则进行仲裁。仲裁地在北京，仲裁裁决是终局的，对双方均有约束力。

## MODEL ARBITRATION CLAUSE

All disputes arising from or in connection with this contract shall be submitted to Beijing Arbitration Commission for arbitration in accordance with its rules of arbitration in effect at the time of applying for arbitration. The seat of arbitration shall be Beijing. The arbitral award is final and binding upon both parties.

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此外，在仲裁条款中对仲裁程序作出事无巨细的约定、唯恐有任何疏漏的做法，在美国仲裁协会国际部主任李麦珂（Michael Lee）看来，反倒“可能导致麻烦”。他们建议，仲裁条款不要过分复杂，简明扼要即可，最好采用有关机构的示范仲裁条款。

但是由于显而易见的主场优势，国内仲裁依然更受中国企业青睐。随着中国开始在谈判中占据主导地位，这种情况更加明显。“在中国京沪高铁建设中签署的很多协议都是约定在贸仲仲裁。”董纯钢说。当然，为了说服外国当事人选择在中国仲裁，中国企业有时也会作出一些妥协和让步，例如约定首席仲裁员为第三国国籍等。

近年来随着中国仲裁的国际化，中国仲裁机构也逐渐被外国当事人所接受。例如，贸仲 2012 年规则就受到了外国律师的好评，贸仲于健龙秘书长介绍，新规则“充分借鉴了国际和国内的先进做法，完善了程序规则以保障仲裁程序灵活高效地进行”。据上海仲裁委员会方雄秘书长和北京仲裁委员会张皓亮处长介绍，他们也正在修订各自的仲裁规则。

## 法院的优势

尽管国际仲裁是外国企业公认的首选仲裁方式，尽管中国诉讼程序仍存在很多弊端，但却有越来越多的外国企业在中国法院提起诉讼。这是为什么？

答案是：法院诉讼具有仲裁所不具备的一些优势。为了利用这些优势，“一些［外国］企业甚至会在合同中剔除仲裁条款，以方便在发生争议时启动诉讼程序”，陈立彤说。

以知识产权诉讼为例，Emmanuel Gaillard 介绍说：“根据中国法，关于中国专利有效性的争议不能仲裁，只能交由中国专利管理机关或法院解决。”而对于知识产权侵权案件，很难想象当事人能够在争议发生后达成仲裁协议，因此只能按照《民事诉讼法》第 29 条的规定由有关法院管辖。

知识产权侵权争议也“更适合或者只能通过法院解决”，大成律师事务所高级合伙人邓永泉表示。“特别是突发侵权案件的处理，”方达律师事务所资深律师王晓萌补充道。因为目前唯有知识产权案件才享有“诉前禁令”这一特权。陈立彤指出，权利人申请诉前禁令可以“在紧急情况下阻止侵权人继续从事侵权行为。”

更重要的是，中国法院日益重视对知识产权的保护。邹德恩律师曾与中国法官就此做过交流，他们“对待知识产权的态度很严肃，因为他们知道这对中国吸引外资有着潜在的影响。”

中国企业不断研发出的新技术和专利也需要中国法律的保护。“［这］就需要一个程序正当、透明的法律制度。”Cedric Chao 说道。

在中国，合资纠纷并不鲜见。如果约定仲裁，“仲裁条款只能约束合资各方而不涉及合资企业”，王晓萌说。对于合资企业被一方股东控制而损害其他方股东利益的情形，仲裁庭无权进行裁决。她建议选择法院诉讼，因为“法院可以依职权将合资企业或其他方股东追加到正在进行的程序中。”

邓永泉表示，中国法官素质的提高是吸引外国企业在华诉讼的重要原因：“中国的法院，特别是北京和上海的法院越来越重视涉外诉讼的业务水平提高。”

另外，“中国企业的市场地位上升，他们更喜欢选择法院，外国合作方不得不接受选择法院诉讼。”邓永泉补充道。■

*中国企业的新技术和专利也需要中国法律的保护，［这］就需要一个程序正当、透明的法律制度*

*[Companies'] rights can be protected only if the legal system assures due process of law and transparency*

**Cedric Chao**
美富律师事务所
国际诉讼仲裁部共同主席
旧金山
Co-president of
International Litigation
and Arbitration Practice
Morrison & Foerster
San Francisco

senior partner at Dacheng Law Offices. This is especially so “for the handling of infringement cases under urgent circumstances,” adds Wang Xiaomeng, a senior lawyer at Fangda Partners.

Currently, only IP cases carry the pre-litigation injunction privilege. Chen points out that the plaintiff in a lawsuit can apply to the jurisdictional court for a pre-litigation injunction to stop a defendant from conducting infringing activities under certain urgent circumstances.

More importantly, Chinese courts are placing more emphasis on IP protection. Chow at Squire Sanders has exchanged ideas with Chinese judges on the subject, and says their attitude towards IP is serious because they realise the potential impact on China's attraction of foreign investment.

Because Chinese-owned companies are developing new technology and intellectual property, they will also demand that China's legal system protect their rights. “Their rights can be protected only if the legal system assures due process of law and transparency,” Chao of Morrison & Foerster says.

Joint venture disputes are not uncommon in China. If both parties to a joint venture agree to arbitration, “the arbitration clause is only binding upon the parties to the joint venture rather than the joint venture itself”, Wang Xiaomeng says, explaining that an arbitration tribunal has no right to make a ruling if the interests of the shareholders of one party to the joint venture are prejudiced by the control of the joint venture by the shareholders of another party. He suggests switching to court proceedings because “the court can add ex officio the joint venture or other shareholders to the ongoing procedures”.

Deng says the improved quality of Chinese judges could help to attract foreign companies to commence proceedings in China. “Chinese courts, especially those in Beijing and Shanghai, are paying more attention to raising the level of services for litigations involving foreign parties.

“Moreover, given their growing status in the market, Chinese companies prefer courts more, and foreign partners have no choice but to accept court proceedings,” he adds. ■

# 选择境内仲裁可能更有效
# Domestic appeal for effective arbitration

根据多年来在涉外仲裁业务中代理境外当事人的经验，笔者注意到，很多境外当事人在获得胜诉仲裁裁决后，经常遇到无法执行的困难，由于无法执行，当事人通过辛苦努力获得的胜诉裁决成为了一纸空文。而导致执行困难的原因归纳起来主要有如下两个：

1. 被执行人转移或隐藏可供执行的财产，导致表面上看似被执行人没有财产可供执行。
2. 各种人为因素导致涉外仲裁裁决在法院执行环节受到干扰。

仲裁裁决执行困难是个由来已久的话题，针对被执行人情况的不同，仲裁执行时面临的情况也有所不同，因此选择什么样的仲裁机构对权利人的保护最优就成为一个值得研究的问题。为此，本文将从仲裁裁决的执行角度重新审视涉外仲裁条款中仲裁机构的选定条件。

## 裁决的执行情况

众所周知，境内外当事人在讨论仲裁条款时，通常均希望在己方国家所在地的仲裁机构进行仲裁。当双方的谈判实力无法让对方接受在己方的司法管辖区域内解决可能产生的争议时，会出现由申请人到被申请人所在地进行仲裁的条款。由于此类条款在效力上会存在一定问题，此时如果选择第三地仲裁机构进行仲裁实际上是一个更佳方案。在第三地仲裁机构的选择方面，香港国际仲裁中心由于其所处的优越地理位置以及香港特区独立于中国内地的、以英国普通法为基础的司法体制而成为境内外当事人首选的第三地仲裁机构。虽然香港特区为中国的一部分，但是根据《最高人民法院关于内地与香港特别行政区相互执行仲裁裁决的安排》，对于在香港国际仲裁中心作出的仲裁裁决，实际上是比照在境外仲裁机构的裁决来处理的。

Based on many years of experience acting as counsel for foreign parties in foreign-related arbitration, the author has noticed that many foreign parties have often been unable to enforce arbitration awards rendered in their favour, with the result being that favourable awards won through great effort become a mere piece of paper, because they are unenforceable. The reasons for the difficulties in enforcing awards may be summarised as follows:

1. the judgment debtor diverts or conceals property that could have been available for enforcement, making it seem that the judgment debtor has no property available for enforcement of the award; or
2. various human-related factors result in obstruction of the foreign-related arbitration award at the court enforcement stage.

Difficulty in enforcing arbitration awards is a topic with a long history. Depending on the different circumstances of different judgment debtors, the difficulties faced in enforcement also differ. Accordingly, choosing the arbitration institution that can best protect the rights holder has become a question that is well worth studying. For this purpose, this column will look at the criteria for the selection of an arbitration institution in foreign-related arbitration provisions from the perspective of the enforcement of arbitration awards.

## Enforcement of awards

As is well known, domestic and foreign parties, when discussing arbitration provisions, will typically hope to have arbitration conducted by an arbitration institution in their home country. When the bargaining power of each party is insufficient to convince the other party to accept resolution in its jurisdiction of any disputes that could arise, what one will see is a provision that requires the applicant to have arbitration conducted in the place where the respondent is located. As such provisions will pose certain problems in terms of validity, at such a point, selecting a third country arbitration institution for arbitration is the better solution. With respect to the selection of a third country arbitration institution, the Hong Kong International Arbitration Centre (HKIAC) has become the third country arbitration institution most favoured by domestic and foreign parties, due to its favourable geographical location, Hong Kong's independence from mainland China and its legal system based on UK common law. Although the Hong Kong Special Administrative Region is a part of China, pursuant to the *Arrangement of the Supreme People's Court for the Mutual Enforcement of Arbitration Awards Between the Mainland and the Hong Kong Special Administrative Region*, arbitration awards rendered by the HKIAC are treated in much the same way as awards rendered by foreign arbitration institutions.

However, the choice of a foreign arbitration institution will not always be the first choice of foreign parties. In practice, the party that has lost in arbitration will seldom voluntarily comply with the arbitration award, the majority requiring the winning party to apply to a competent court for enforcement. At such a point, enforcement of the arbitration award becomes an unavoidable key stage.


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但是，选择在境外仲裁机构进行仲裁并非永远是境外当事人的首选。实践中，仲裁败诉一方很少会主动履行仲裁裁决，大都需要由获胜一方当事人向有管辖权的法院申请强制执行，此时仲裁裁决的执行就成为一个不可避免的关键环节。

如果被执行人的资信情况不好，其很可能会在仲裁过程中或在获得不利仲裁结果后转移或隐藏财产。如果在仲裁开始时就对其财产予以财产保全，则在很大程度上会避免此种情况的发生。然而，现行《民事诉讼法》第 256 条的规定，内地的法院只接受内地的涉外仲裁机构转交的申请人的保全申请，而不会直接接受申请人的财产保全申请，更不会接受境外仲裁机构提出的财产保全申请。这就决定了，如果选择境外仲裁机构，境外当事人无法请求内地的法院对内地当事人的财产进行财产保全，这就为内地当事人转移或隐藏财产留下了机会。一旦内地当事人转移了其在内地的资产，而且其在海外没有资产，这时境外当事人获得的胜诉裁决就不可避免地成为一纸空文。

但是，如果该涉外仲裁选定的仲裁机构是内地的仲裁机构，在境外当事人提起仲裁时，可以依据现行《民事诉讼法》第 256 条的规定，及时通过内地的仲裁机构向内地当事人住所地或财产所在地的中级人民法院申请财产保全，从而在很大程度上避免其转移或隐藏财产并且为今后的裁决执行打下良好的基础。

## 如何选择内地仲裁机构

如上所述，从涉外仲裁裁决的执行角度看，当内地当事人在海外无财产可供执行并且有可能转移内地财产时，境外当事人选择内地比较有声望的涉外仲裁机构进行仲裁也不失为一个好的选择。

同时，考虑到内地当事人与其住所地的法院或其他部门有着千丝万缕的联系，在选择内地仲裁机构时，也要尽量选择内地当事人住所地以外的比较有声望的仲裁机构，以防止内地当事人在仲裁过程中或仲裁后对仲裁机构和相关法院可能产生的人为影响。例如，如果内地当事人的住所地在北京市以外的地区，则中国国际经济贸易仲裁委员会（贸仲）和北京仲裁委员会都是比较好的选择。如果内地一方当事人的住所地在北京，则上海仲裁委员会、广州仲裁委员会等也是不错的选择。

综上所述，对于涉外仲裁条款中仲裁机构的选择要综合考虑各方面的因素，并非选择境外仲裁机构就一定对境外当事人有利，更不要认为选择中国内地的仲裁机构就一定对境外当事人不利。

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If the credit standing of the judgment debtor is weak, it is likely that it will divert or conceal property during the arbitration procedure, or after it receives the unfavourable arbitration result. If preservation of property is accorded at the outset of arbitration, the foregoing can be avoided to a large extent. However, article 256 of the current Civil Procedure Law specifies that a domestic court will only accept an applicant's preservation application that has been forwarded by a domestic foreign-related arbitration institution, and it is not to accept a property preservation application directly from the applicant, let alone one submitted by a foreign arbitration institution. This means that, if a foreign arbitration institution is selected, the foreign party cannot petition a domestic court to preserve the property of a domestic party, thus giving the domestic party the opportunity to divert or conceal property. Once a domestic party has diverted its assets in China, and if it does not have any assets abroad, the favourable award obtained by the foreign party becomes a mere piece of paper.

However, if the arbitration institution selected for foreign-related arbitration is a domestic arbitration institution, the foreign party may, when instituting the arbitration, pursuant to article 256 of the Civil Procedure Law, promptly apply for property preservation to the intermediate people's court of the place where the domestic party is domiciled, or of the place where its property is located by way of the domestic arbitration institution. In this way, it can avoid the diversion or concealment of property by the domestic party to a great extent and lay down a good foundation for enforcement of the award in future.

## Selecting a domestic institution

As mentioned above, the selection by the foreign party of a reputable domestic foreign-related arbitration institution to conduct arbitration may in the end prove to be the better choice. Of course, when selecting a domestic arbitration institution, it is necessary to note whether it has international arbitration experience, professional support personnel and arbitrators familiar with China and foreign laws.

Additionally, given that domestic parties have tendril-like connections with the courts or other authorities of the places where they are domiciled, it is imperative to select a reputable arbitration institution located somewhere other than in the place where the domestic party is domiciled, so as to avoid any influence it could bring to bear on the arbitration institution and the relevant court during or after the arbitration. For example, if the domestic party is domiciled in a place other than Beijing, the China International Economic and Trade Arbitration Commission and Beijing Arbitration Commission are both relatively good options. If the domestic party is domiciled in Beijing, then the Shanghai Arbitration Commission and Guangzhou Arbitration Commission are not bad options.

In summary, the selection of an arbitration institution in a foreign-related arbitration provision requires the comprehensive consideration of various factors, and selection of a foreign arbitration institution will not necessarily be of benefit to a foreign party. It should also not be thought that the selection of a PRC domestic arbitration institution will necessarily be adverse to the interests of a foreign party.

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# 民事诉讼法修法亮点评析
# Analysis of amendment to the Civil Procedure Law

中国第 11 届全国人大常委员会第 28 次会议于 8 月 31 日通过了《民事诉讼法》第二次修正，并将于明年 1 月 1 日起施行。本次修法共涉及 60 处修改，是对《民事诉讼法》学理研究成果的体现，也是对司法实践经验及中国其他纠纷解决经验的总结，并进行了一些突破性的尝试。总体上说，可以从公平性、实际操作性和系统性三个角度，看到本次修法的亮点。

## 公平性

本次修法的一大亮点是强化了程序的公平性。首先，本次修法将诚实信用原则纳入《民事诉讼法》之中（第 13 条第 1 款）。其次，进一步限制管辖下移，保障当事人在审级上的程序权利。第三，进一步完善了回避制度和对审判人员的监督。第四，防止恶意诉讼，加强了对真正权利人或有可能承受生效法律文书不利后果者的程序保护。

在以往的诉讼实践中，知识产权、劳动、财产纠纷等领域出现了各种类型的恶意诉讼，引起了最高人民法院的注意。本次修法通过了一系列规则，以防止恶意诉讼，保障诉讼程序的公平性和真实性（第 56 条第 3 款、第 112 条、第 113 条及第 170 条）。第五，进一步明确了裁判文书的论证要求。第六，规定了公众知情权（第 156 条），即公众查阅发生法律效力的判决书、裁定书的权利。

## 实际操作性

本次《民事诉讼法》修法的另一大亮点是实际操作性。《民事诉讼法》的实际操作性通过一系列具体规则的修改得到增强。这些

On 31 August the Amendment of the Civil Procedure Law (CPL), adopted at the 28th session of the Standing Committee of the 11th National People's Congress, was promulgated and is to come into force from 1 January next year.

Concerning 60 amendments, the latest modifications to the CPL are the fruit of extensive academic research, but they also summarise the judicial experience, as well as other Chinese nuances, with regard to dispute solution, with the aim of making some worthwhile changes.

Generally, the improvements brought about by the amendment can be discussed in three dimensions – fairness, operability and the ability to systematise.

## Fairness

An outstanding feature of the amendment is the strengthened fairness. First, the "good faith" principle has been introduced into the CPL (article 13, item I). Second, the delegation of jurisdiction authority has been further limited, so that the parties' procedural trial level rights can be protected.

Third, withdrawal rules have been improved and the supervision of judicial personnel has been consolidated. Fourth, legal actions of bad faith have been opposed to procedurally protect persons with real rights, or persons susceptible to unfavourable judgments.

The Supreme People's Court noted that various bad faith litigations had emerged in the areas of intellectual property, labour and property rights, etc.

The amendment is composed of a series of rules to guard against malicious actions and ensure the fairness of the procedure (article 56, item III, article 112, article 113 and article 170). Fifth, the reasoning of judgments has been further clarified. Sixth, the right to know of the public has been embodied, i.e. the public right to look over legally effective written judgments or orders.

## Operability

Excellence can also be seen in its operability, which should be heightened by a series of changes to specific rules. These changes are based on summaries of former procedural experiences, accommodations with new laws or lately revised laws, and new attempts to solve some old problems.

**Summaries.** Two examples are the rules of agreement jurisdiction (article 34) and tacit jurisdiction (article 127), which were formerly applied in international lawsuits, yet were equally effective in internal actions, then raised as


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规则的修改，有些是基于对以往诉讼经验的总结，有些是基于出台的新法而进行的修正，有些则是对原有诉讼制度的突破。

**总结以往诉讼经验。**例如：协议管辖（第 34 条）和默示管辖（第 127 条），原适用于涉外民事诉讼，但是在实践中，这两个规则在国内民事诉讼中也同样有效，因此，这两个规则提升到更具有普遍性的地位。又如，在证据方面，结合审判实践，增加了新的证据种类（电子数据），进一步明确和强化了法院的调查取证权，细化了当事人质证及证据效力的有关规则，加强了证据保全的可操作性。

**适应新法、新规则的出台。**例如，基于公司法修订后关于确认股东资格、分配利润、解散等纠纷提起的诉讼，新民诉法明确了管辖法院；基于侵权责任法等新修订的法律，明确了有关的公益诉讼之诉讼主体事宜。

**制度突破。**例如，在简易程序的设计方面，本次修正不仅仅增加了意定适用简单程序的规定，并加入了审理民事案件一审终审的情形（第 162 条）。再如，在特别程序的设计方面，加入两种适用特别程序的案件，即确认调解协议案件与实现担保物权案件。

## 系统性

本次修法体现出对系统性更高的追求。这种系统性体现在与其他法律规范的呼应、民事诉讼制度本身逻辑性与概念的统一上。

**呼应其他法律规范。**新《民事诉讼法》与修正后的《公司法》相呼应，明确了在因公司设立、确认股东资格、分配利润、解散等纠纷提起诉讼时，应由公司住所地法院管辖。

新民诉法与《侵权责任法》相呼应，明确了对污染环境、侵害众多消费者合法权益等损害社会公共利益的行为，法律规定的机关和有关组织可以向人民法院提起诉讼。

与《人民调解法》相呼应，修改了既有调解制度，增加了确认调解协议效力的特别程序；与《物权法》等法律制度相呼应，增加了实现担保物权的特别程序。

**民事诉讼制度本身的逻辑性。**例如，在关于生效判决、裁定的有关规定中，加入了"调解书"（第 56 条、第 87 条、第 124 条、第 198 条、第 202 条、第 206 条、第 212 条及第 208 条等）。因为调解书本身也是生效法律文书，并具有可强制执行性，对当事人的实体权利义务可产生重大影响，因此，在送达、再审、抗诉等规则中加入调解书，民事诉讼规则更具有逻辑性。

新法的系统性，还体现在概念的统一上。例如将第 62 条"本人除不能表达意志的以外"修改为"本人除不能表达意思的以外"，实现了民法和民诉法在"意思"这一法律概念上的统一。

universal rules. Another example that can be given relates to the rules of evidence.

Judicial experiences have been heavily considered; new evidence types have been specified; procedures involving court authorities on investigation and the taking of evidence are more clear and reinforced; the rules of confrontation and of evidence effectiveness have been specified; and the operability of evidence preservation has been augmented.

**Accommodations.** The amendment enables the CPL to clarify the jurisdiction of new litigation of shareholder qualification, distribution and dissolution, based on the 2005 revised Company Law, and provides the subjects of lawsuits based on new laws like the Tort Law.

**Breakthrough.** Not only is an agreement on summary procedure stipulated in the amendment, but also some civil cases through the first instance can be final (article 162). Two types of cases fall into the domain of special procedure, i.e. cases of confirmation of conciliation agreement and cases of realisation of real rights of pledge.

## Ability to systematise

The amendment seeks a higher level of co-ordination with other laws and a better understanding of, and greater integration with, the civil procedure system.

**Co-ordination with other laws.** Courts where a company resides should have the jurisdiction over cases concerning disputes of the establishment of a company, qualification of the shareholders, distribution of interest and dissolution of a company according to the revised Company Law.

The law now specifies what can be counted as breaches in areas such as environmental pollution, infringements of consumers rights, and other cases involving public interest stipulated in the Tort Law. Relevant authorities and organisations can then pursue these breaches through the courts.

Pursuant to the People's Mediation Law, the previous conciliation system is modified and a special procedure of judicial confirmation of validity of a conciliation agreement is established; in accordance with the Law of Real Rights, a special procedure of realisation of real rights of pledge emerges.

**Understanding of civil procedure system.** Conciliation statements are included in rules related to legally effective written judgments or orders (articles 56, 87, 124, 198, 202, 206, 212 and 208). Rules embracing conciliation statements in the procedures of service, retrial and counterappeal are more logical, as the conciliation statements are also legally effective written documents that are enforceable, and can engender a substantial impact on the parties.

The vague notion "will" in article 62 of the Chinese version of the CPL has been changed into "intention", a more precise concept expressed both in civil law and civil procedure law.

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# RK&O 的自我介绍
# RK&O states its case

Richards Kibbe & Orbe 律师事务所从 1995 年开始担任中国公司的法律代表。那年，我们受聘代理一家受害于几起金融诈骗的中国国有企业的纽约分公司。其中一起是庞氏骗局 (Ponzi scheme)一位“财务顾问”引诱该公司的管理人员“投资”外汇期货。投资屡次得到按期偿还，且有收益。然而，这些“收益”实际上来自同样受到欺诈的其他中国公司的现金投资。该公司的损失最终达数千万美元。在我们的协助下，骗局策划者在美国联邦法院被提起诉讼。我们的调查也导致纽约州的一项刑事调查，诈骗案的一名主犯从澳大利亚被引渡回美国，并被定罪和监禁。我们也代表客户，协助了 1997 年《中美法律互助协定》签署后的第一次中美联合刑事调查。我们的律师协助中国公安部以及美国联邦调查局和美国司法部的官员调查、访谈案件中的证人和嫌疑人。

我们还成功地代理了一家大型中国公司在美针对雷曼兄弟公司的诉讼，该案涉及因不适当金融衍生品交易造成的数千万美元损失。这些衍生品完全受制于泰铢的波动。诉讼最终以我们委托人满意的方式和解。

我们的一位合伙人曾任美国证券交易委员会 (证交会) 国际事务办公室的第一任主管，在 1994 年与中国证券监督管理委员会谈判达成《第一谅解备忘录》，与其他一些国家也达成了类似的协定。这些协议促进了执法、跨境交易监管和证券市场发展等方面的合作。

我们的律师团队中有一些人的母语为中文，有诉讼律师、前检察官和证交会前高级官员。本所的事务律师也代表国内和国外公司处理涉及债务股票和衍生品的事务。我们的监管律师则提供法律意见，帮助客户遵守美国的监管制度，如《反海外腐败法》、对伊朗和古巴的制裁、联邦和州证券法和反垄断法等。

## 公司和商事业务

自成立以来，RK & O 一直积极参与交易市场上的标准贷款和不良银行贷款业务，以及其他对陷入困境或破产的公司的金融债权业务。我们是国际公认的有关不良债务的产业开发和法律实务方面的佼佼者。

我们的并购业务经验包括：在公共和私人公司的收购及处置，以及在杠杆收购、管理层收购和其他转为非上市公司事务中，担任买方和卖方的法律顾问。我们的私募股权代理业务不仅涵盖传统的私人和公共公司私募股权投资，而且包括非常规的投资项目和投资结构。

我们在借贷业务中，不仅在贷款发放和银团贷款过程中出任法律顾问，而且也为中型公司的基于现金流的贷款，资产保证型贷款，杠杆收购融资，收购融资，资本重组，和其他担保 (包括多留置权和设施并合抵押 multi-lien and unitranche facilities) 及无担保融资提供意见。

我们在债务和资本市场以及美国的破产程序等方面积累的丰

Richards Kibbe & Orbe has represented companies based in China since 1995. That year, we were retained to represent the New York branch of a Chinese state-owned enterprise (SOE) that had been victimised in several financial frauds. One of the frauds was a Ponzi scheme in which a “financial adviser” induced the company’s officers in New York to “invest” in foreign currency futures. Those investments were repeatedly repaid on time, with a profit. The “profit”, however, was from the cash invested by other PRC companies that had been defrauded as well. The losses were ultimately in the tens of millions of dollars. Our representation of the SOE resulted in federal court litigation in the US against the mastermind of the scheme. Our investigation also resulted in a criminal investigation in New York, the extradition from Australia of one of the key players in the fraud, and his conviction and incarceration. We also assisted in, and represented the interests of our client in, the first US-China joint criminal investigation under the US/PRC Mutual Legal Assistance Arrangement of 1997. Our attorneys assisted agents of the Ministry of Public Security as well as the US Federal Bureau of Investigation and the US Department of Justice in interviewing witnesses and suspects in the case.

We also successfully represented a major Chinese company in litigation in the US against Lehman Brothers arising out of tens of millions of dollars of losses from inappropriate derivative transactions. Those derivatives were tied to fluctuations in the Thai baht. Our litigation resulted in a satisfactory settlement.

One of our partners formerly served as the first director of the Office of International Affairs at the US Securities and Exchange Commission (SEC), and negotiated the first memorandum of understanding with the Chinese Securities Regulatory Commission in 1994, as well as similar arrangements with other countries. Our lawyers are litigators, former prosecutors and former senior officials from the SEC.

The firm’s transactional lawyers also represent domestic and foreign companies in transactions involving debt, equity and derivatives. Our regulatory lawyers provide advice and assistance in complying with US regulatory schemes including the Foreign Corrupt Practices Act, Iran and Cuba sanctions, federal and state securities laws, and antitrust laws.

## Corporate and business transactions

Since our inception, RK&O has had a strong presence in the trading market for par and distressed bank loans, and other financial claims against troubled or insolvent companies. We are recognised internationally as a leader in distressed debt industry developments and legal practices.

Our mergers and acquisitions (M&A) experience includes acquisitions and dispositions of both public and private companies, as well as the representation of buyers and sellers in leveraged buyout, management buyout and other going-private transactions. Our private equity representations include traditional private equity investments in private and public companies, and also more unconventional investments and investment structures. In our lending practice, RK&O not only represents clients in the loan


Brian Fraser

富经验为我们开展衍生品业务提供了基础。我们代理行业集团与新的衍生产品有关的设计和文件编制；代理交易商和做市商制订需要对债务及股权工具有全面了解的交易策略；代理终端用户建立与主衍生品经销商和主要经纪商的交易关系。

## 诉讼、监管和合规

RK & O 的监管和合规业务在全球金融市场居于领先地位。我们的监管和合规业务的客户范围广泛，从公共和私营公司到会计师事务所、金融服务公司、对冲基金和其他投资基金、经纪交易商以及其他市场参与者。我们帮助客户设计并实施有效的合规政策、内部程序和经营手法，并向他们提供有关信息披露、交易和事务性事项的意见，以及有关现有法律和新的监管措施的实际应用方面的意见。

RK&O 的民事诉讼团队以其经验、决心和奉献精神而闻名。我们的律师都是在难缠案件中多次经历审判和上诉洗礼的行家里手。他们中有许多人曾经做过检察官、在证交会担任过高级职务或曾被任命为联邦法院或州法院的法律雇员。

RK&O 的诉讼律师为国际客户提供法律服务，其中包括各大商业银行、投资银行、对冲基金、保险公司、投资顾问、经纪交易商、会计师事务所以及制造和技术公司。我们在广告、飞机制造、半导体和制药等行业中也拥有丰富的经验，而且我们也在公共和私人公司出任管理人员和董事。我们的成功不仅在于赢得诉讼，而且在于避免未来的冲突。

长久以来，RK&O 在证券法的执法、政府调查和刑事辩护领域具有重要地位。我们担任机构和个人客户的辩护，而更经常是帮助其避免监管和刑事程序。我们的客户包括：金融和证券市场的参与者，包括发行人及其董事会、审计委员会和特别委员会、私人公司、会计师事务所、金融服务公司、对冲基金、经纪交易商，以及这些实体的管理人员、官员和董事。

我们的客户在牵涉到如下事项时聘用我们作为他们的代理：对财务和会计欺诈的国内和跨境调查；证券交易和市场操纵；证券经纪公司的销售手法；腐败，贿赂和洗钱；以及涉及国内和国际监管机构的广泛的监管和刑事问题。

## 结语

可以理解，许多中国公司担心会在美国受到诉讼和监管，但好的法律顾问可以帮助中国公司遵守美国法律并保护他们在美国的利益。

origination and syndication process, but also advises mid-cap companies on cash flow-based lending, asset-based lending, leveraged buyout financing, acquisition financing, recapitalisations, and other secured (including multi-lien and unitranche facilities) and unsecured financings.

Our extensive experience in the underlying debt and equity markets as well as US bankruptcy proceedings provide the foundation for our derivatives practice.

We represent industry groups in connection with structuring and documenting new derivative products; dealers and market makers in developing trading strategies that require a comprehensive understanding of debt and equity instruments; and end users in connection with establishing master derivatives trading relationships with dealers and prime brokers.

## Litigation, regulation and compliance

RK&O's regulation and compliance practice serves leading participants in the global financial markets. Our regulation and compliance clients range from public and private companies to accounting firms, financial services companies, hedge funds and other investment funds, broker-dealers and other market participants. We assist in our clients' design and implementation of effective compliance policies, internal procedures and business practices, and we provide them with advice on disclosure, trading and transactional matters, and on the practical application of existing laws and new regulatory initiatives.

RK&O's litigation group is also well known for its experience, determination and dedication to its clients. Our lawyers are veterans of hard-fought cases through trial and appeal. Many of our litigators were assistant US Attorneys, held senior positions in the SEC, or were appointed law clerks in federal or state courts.

RK&O's litigators advise and represent an international clientele, including major commercial banks, investment banks, hedge funds, insurance companies, investment advisers, broker-dealers, accounting firms, and manufacturing and technology companies. We also have deep experience in the advertising, aircraft, manufacturing, semiconductor and pharmaceutical industries, and we represent officers and directors of public and private companies. We succeed not only by winning cases, but by avoiding future conflicts.

RK&O has long been a go-to firm in the fields of securities enforcement, government investigations and criminal defence. We help institutional and individual clients defend – or more often avoid altogether – regulatory and criminal proceedings. Our clients retain us to represent them in the context of matters involving: domestic and cross-border investigations of financial and accounting fraud; securities trading and market manipulation; broker-dealer sales practices; corruption, bribery and money laundering; and a wide range of regulatory and criminal issues involving domestic and international regulators.

## Conclusion

While many companies in the PRC are understandably concerned about being subject to litigation and regulation in the US, the right counsel can help Chinese companies comply with US law and protect their interests in the US.

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FBL ADVOGADOS

**THE FARIA DE BASTOS & LOPES LAWYERS (also known as "FBL Lawyers"), arose in 2004 as a result of the merger of three lawyer offices in which already experienced and distinguished lawyers detach.**

**Currently FBL Lawyers has a team of more than 20 lawyers and a framework of technical, administrative and auxiliary staff of approximately 15 persons. FBL Advogados main office is located in the capital city of Angola (Luanda), but the firm is also present in Benguela, the second city of Angola.**

## Firm Highlights

Significant marketplace recognition include Private Investment and Corporate Law, Financial and Tax Law, Oil and Gas

Key clients include Pan-China Construction Group Co. Ltd.; Century Huafeng Construction Angola, Lda ; China Tiesiju Civil Engeneering Group; Sabmiller; Total, Eni;Bp; Chevron; Lufthansa; Bayer; Coca-Cola Bottling; Standard Bank; Commerzbank; Barloworld; Banesto; World Bank; Bloomberg; Ceva Logistic; Dhl; Credit Suisse; Dutch Bank; General Electric.

## Main Areas of Practice

The FBL Lawyers is internally structured in various Practice Areas on the basis of the activity undertaken by their lawyers, being each area of practice coordinated by a partner.

The currently existing practice areas are the following: (i) Civil Law and Civil Litigation, Labour Law, (iii) Corporate Law, Immovable Property and Private Investment Law, (iv) Financial, Banking and Tax Law, (v) Natural Resources Law (Oil, Gas and Mining) and, (vi) Law and Administrative Litigation.

### Civil Law and Civil Litigation

- Preparation of Civil Contracts;
- Records and Notaries;
- Civil Litigation;
- Industrial Property Litigation (trade marks and patents);
- Maritime Litigation;
- National and International Arbitration.

### Labour Law

- Companies Labour Consultancy;
- Individual and collective recruitment contracts;
- Labour Litigation;

### Corporate Law, Real Estate and Private Investment

- Incorporation, procurement, merger, processing, division, liquidation and dissolution of companies;
- Companies administration legal consultancy;
- Companies legal audits (due diligence);
- Commercial Contracts Preparation, including joint ventures and clusters;
- Bankruptcy Monitoring;
- Legal advice in the promotion of real estate projects;
- Contract work, Urban Planning, Construction and Real Estate;
- Monitoring and conduction of foreign investment procedures.

### Financial, Bank and Tax Law

- Banks and insurance companies incorporation, procurement and legal advice
- Financing Bank Contracts Preparation;
- Legal advice for Investment Funds;
- Legal advice on tax issues;
- Taxation Litigation.

### Natural Resources Law (oil, gas and mining)

- Advice within the framework of public procurement for the supply and provision of services within the sector of oil and gas processes;
- Preparation and negotiation of contracts within the sector of oil and gas;
- Support for the licensing of the activities of companies in the sector of oil and gas;
- Assistance to companies in the mining sector, namely diamantiferous.

### Administrative Law and Administrative Litigation

- Preparation of administrative contracts and assistance in negotiation;
- Privatizations Negotiation;
- Public-private partnerships;
- Advice for the management of public undertakings and undertakings holding concessions of public services;
- Administrative and constitutional Litigation.

**The FBL Lawyers collaborates with various international lawyer offices, ensuring to clients quickly and personalised legal support in those jurisdictions where they operate.**


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# 你往何处去?
# Major miners

*近一年来中国和其他国家政策法规的不断变化，为中国在矿产、能源和天然资源领域的境内外投资走向开启了新的趋势。作者李俊辰在世界范围内发掘该领域的机会与风险，以供有意占得先机的投资者借鉴*

*Fast-tracked regulatory changes have preceded new trends for Chinese investment. Richard Li unearths gold for those wanting to stay ahead in the challenging sectors of mining, energy and natural resources*

凭借中国企业过往的投资记录，你真的能确定中国投资者的钱目前正在投向哪些地方的矿产和能源项目吗?

中国的经济发展需要消耗不少能源和资源，而一些国家正通过矿产、能源和天然资源领域的开发项目，争相吸引中国为该国萎靡不振的经济注入大量资金。投资形势也相应发生着迅速的变化。

一些开明的国家正在放松他们对外国投资的限制，从而争取来自中国的投资。另一些国家却受缚于错综复杂的改革，或是缺乏继续促进外国投资的政治意愿。

在一些专家眼中，在这场争夺中国投资的赛跑中，澳大利亚这个

If you have been following past deals to determine where China's pot of gold for mining and energy commodities is being spent, think again.

As nations vie for the massive capital injections China can provide their often flagging economies through mining, energy and natural resources projects to feed ever hungry Chinese industry, the ground can move quickly.

And while some savvy nations are liberalising and easing regulation to woo that pot of gold, others are finding themselves caught up in tangled reforms or a lack of political will to ensure continued favour.

传统的矿产资源大国似乎正逐渐落后于其他国家。曾经风光无限的巴西在中国投资者眼中的魅力也在下降，只能靠最近与中国签订的一笔巨额交易支撑门面。

在非洲和中亚，那些天然资源丰富的国家正吸引着那些愿意承受更大风险的中国企业前去投资。这些国家和地区能为投资者带来更高的回报，然而当地模糊不清的监管制度也使投资者面临着当地政府朝秦暮楚的风险。在加拿大，政府为了吸引大额投资而推出了更为宽松的监管规定。

根据 A CAPITAL 龙指数的数据，今年第一季度的中国境外并购交易中，天然资源和能源领域的并购交易额所占比例高达 92%（龙指数是由 A CAPITAL 的研究团队按季发布的跟踪中国全球海外投资活动的指数）。

在矿产、能源和天然资源领域，过去一年来世界各国在政策和监管法规方面的变化异常迅速，人们因而很难把握究竟哪里才是中国企业投资的理想目的地。

联合国贸易及发展会议发布的《世界投资报告 2012》指出，过去一年来世界各国继续有针对外商投资的新法规政策出台，推动新规出台的因素包括对国家安全问题的担忧、意图加强国家对关键经济领域的控制等。这份报告还指出，这些外资监管政策的变化在两方面显得尤为突出：(1) 调整对外商投资的准入政策；(2) 针对采掘行业推出更多的监管政策。

例如在中亚地区，哈萨克斯坦和蒙古就加强了国家在矿产和天然资源领域的影响力；在南美洲，阿根廷和巴西对外国人持有本国土地所有权施加了限制。

然而，中国投资者遭遇的麻烦并不总是来自监管法规的限制。有些麻烦是因他们自身经验不足而产生的。共和律师事务所驻北京合伙人徐斌表示，加拿大、澳大利亚等高端市场“正在给中国的企业家们上投资和金融课”。

“中国的企业正在用远远高于市场的价格收购他们还根本不清楚价值、不懂得如何控制的资产和企业。”徐斌说道。

*中国的企业正在用远远高于市场的价格收购……资产和企业*

*Chinese investors are buying assets and companies at a price much higher than the market level*

**徐斌**
**Xu Bin**
共和律师事务所
合伙人
北京
Partner
Concord & Partners
Beijing

Experts warn mainstay mining colossuses like Australia may be falling behind. Brazil, once brimming with new deals, is sliding too, if you discount a couple of larger deals that have had the effect of propping up an otherwise negative outlook.

In Africa and central Asia, resource-rich nations are beckoning Chinese investors willing to move into riskier environments where the rewards are greater but often blurry regulation can help or hinder at a government's whim. And in Canada, opportunities abound under a more liberal regulatory structure deigned to lure big-ticket investment.

In the first quarter of this year, the resources and energy sector accounted for 92% of all Chinese outbound M&A deals, according to the A CAPITAL Dragon Index, an index published by A CAPITAL's research team to track Chinese outbound investments globally.

International policy and the regulatory landscape for the sector has shifted more quickly than usual in the past year, and this has caused the uncertainty in China's investment destinations.

According to the World Investment Report 2012, issued by the United Nations Conference on Trade and Development (UNCTAD), the past year saw a continuation of new regulatory policies on foreign direct investment (FDI), motivated by security concerns, sovereign desires to control strategic industries, etc. According to the report, state regulation was especially manifest in two areas: (i) an adjustment of entry policies with regard to inward FDI; and (ii) more regulatory policies in extractive industries.

In central Asia, for example, Kazakhstan and Mongolia have strengthened state influence in their mining and natural resources sectors. In South America,

一些目光不够开阔的政府不断加强监管力度，可能会令这些国家痛失大额外国投资项目。
Regulatory tunnel vision by some governments may be costing them big projects.

而在非洲、南美洲等低端市场，徐斌说："中国以在国内同等低劣的劳动待遇和环保水平开展经营，正面临矿产国国民的强烈不满。"

虽然有一些限制性政策，但是大多数的政策和法规变化还是有利于外商投资的。《世界投资报告 2012》指出，2011 年各国采取的 67 项对外国投资具有影响的政策措施中，52 项与促进投资和放宽限制有关。举例来说，加拿大放宽了对外国投资者的审批门槛安哥拉出台了新的投资机制，为国内外投资者提供激励措施。

有鉴于此，不同法域为争取中国投资而彼此间互相竞争也就不足为奇了。金杜律师事务所驻悉尼合伙人韦雅凡（Nicola Wakefield Evans）就感受到了来自其他法域的竞争压力。"加拿大和非洲的大部分国家目前表现得积极进取。"她在金杜的一份分析报告中这样写道。韦雅凡在接受《商法》采访时进一步表示，她注意到今年上半年中国在澳大利亚的投资下降了。"这一下降……可能是因为其他国家或地区加强了吸引投资的竞争力。越来越多国家意识到了吸引中国投资带来的益处，因而减少了对中国投资的阻碍。"

如果情况真的是这样，那我们就有必要对这些国家的投资环境作一番具体探讨了。

## 澳大利亚

两项新税的实施，为投资者在矿产、能源和天然资源领域的投资前景蒙上了一层阴影。

自 7 月 1 日起，石油资源租赁税（PRRT）开始征收，适用于澳大利亚所有在岸和离岸的石油和天然气项目。"而 [PRRT] 在此之前只适用于离岸项目。"亚司特律师事务所驻墨尔本合伙人 Martin Kudnig 说道。

**矿业新上市项目优秀律所前5强（中国律所）**
**Top 5 mining legal advisers for new listings (PRC firms)**

| 律师事务所 Law firms | 金额（百万美元） Value (US$m) |
|---|---|
| 竞天公诚律师事务所 Jingtian & Gongcheng | 1,657 |
| 嘉源律师事务所 Jiayuan Law Offices | 1,154 |
| 通商律师事务所 Commerce & Finance Law Offices | 522 |
| 金杜律师事务所* King & Wood* | 367 |
| 君泽君律师事务所 JunZeJun Law Offices | 252 |

* 金杜律师事务所与澳大利亚万盛律师事务所结成的联盟已于2012 年3 月1 日生效，联盟仍以"金杜律师事务所"为中文名
* King & Wood and Australian law firm Mallesons Stephen Jaques joined on 1 March 2012, with the new name King & Wood Mallesons

排名是根据Dealogic数据 Based on Dealogic data

**矿业新上市项目优秀律所前5强（国际律所）**
**Top 5 mining legal advisers for new listings (international firms)**

| 律师事务所 Law firms | 金额（百万美元） Value (US$m) |
|---|---|
| 高伟绅律师事务所 Clifford Chance | 1,050 |
| 富而德律师事务所 Freshfields Bruckhaus Deringer | 902 |
| 世达律师事务所 Skadden Arps Slate Meagher & Flom | 417 |
| 诺顿罗氏律师事务所 Norton Rose | 403 |
| • Corpus Legal Practitioners<br>• 达维律师事务所 Davis Polk & Wardwell | 252 |

排名是根据Dealogic数据 Based on Dealogic data

Argentina and Brazil have imposed restrictions on land ownership by foreigners.

Yet issues that trouble Chinese investors are not always caused by regulatory restrictions – sometimes the investors cause their own problems. According to Xu Bin, a partner at Concord & Partners in Beijing, high-end markets such as Canada and Australia "are teaching investment and finance lessons to Chinese investors".

"Chinese investors are buying assets and companies at a price much higher than the market level, but they are neither clear about the value of the assets and companies, nor how to manage them well," Xu says.

In low-end markets such as Africa and South America, "Chinese investors are now facing much dissatisfaction ... because [they] are operating in the same way as they do in China, poorly treating their workers and not caring much about environmental protection."

Although there are restrictions, most policy or legislative developments are about facilitating foreign investment. According to the World Investment Report 2012, in 2011, of the 67 policy measures adopted across the world affecting foreign investment, 52 were related to investment liberalisation and promotion. Canada, for example, increased the threshold for review of foreign investors, and Angola introduced a new investment regime that offers incentives to domestic and foreign investors.

It's not surprising that there is competition among different jurisdictions for Chinese money. Nicola Wakefield Evans, a partner at King & Wood Mallesons in Sydney, feels the pressure from other jurisdictions. "Canada and much of Africa are being very proactive," she writes in an analysis report by her law firm. Wakefield Evans tells *China Business Law Journal* that she has seen a reduction in China's investment in Australia in the first half of 2012. "This reduction ... may be attributable to increased competition for investment in other regions as more countries realise the benefits of, and reduce the barriers to, Chinese outbound investment."

If that is indeed the case, it's worth examining the investment terrain down under.

根据澳大利亚资源、能源及旅游部公布的信息，PRRT 税率为一个项目应税利润的 40%，应税利润是指一个项目的收入在扣去所有项目成本及其他勘探成本后的余额。

同样是在 7 月 1 日，澳洲政府开始征收新的矿产资源租赁税 (MRRT)。“该税的征税对象为从澳大利亚煤矿和铁矿石项目赚取的利润。规定的基准税率为 30%，但是 25% 的开采成本减让额使得实际税率下降为 22.5%。”欧华律师事务所驻珀斯合伙人、该所全球矿产业务主管 Robert Edel 说。

**矿业新上市项目优秀律所前3强（离岸律所）**
**Top 3 mining legal advisers for new listings (offshore firms)**

| 律师事务所 Law firms | 金额（百万美元） Value (US$m) |
|---|---|
| 康德明律师事务所 Conyers Dill & Pearman | 483 |
| 汇嘉开曼群岛律师事务所 Walkers | 477 |
| 毅柏律师事务所 Appleby | 151 |

排名是根据Dealogic数据 Based on Dealogic data

## Australia


The commencement of two taxes has cast a shadow on investors in the mining, energy and natural resources sectors.

On 1 July, the petroleum resource rent tax (PRRT) became a compulsory tax applied to all Australian onshore and offshore oil and gas projects. “[PRRT] previously only applied offshore,” says Martin Kudnig, a partner at Ashurst in Melbourne.

According to Australia’s Department of Resources, Energy and Tourism, PRRT is levied at a 40% rate of a project's taxable profit, which refers to the project's income after all project and

## 我们错怪了澳大利亚吗?

“小报报道和只求吸引观众的娱乐化新闻刺激了公众的神经，使其担忧亚洲投资者在资源大国收购重要资产的活动。在这种大环境下，外界误以为澳大利亚不再欢迎外商投资，特别是来自中国的投资。”金杜律师事务所驻悉尼合伙人韦雅凡 (Nicola Wakefield Evans) 表示。


韦雅凡 Nicola Wakefield Evans

而事实似乎并非如此。根据澳洲外国投资审查委员会 (FIRB) 发布的 2010-2011 年度报告，该委员会于 2010 至 2011 年间审查的投资申请数量为 10865 个，其中被驳回的只有 43 个，还不到所有已审查申请的 0.4%。而且除一例交易外，所有被驳回的投资申请都与购买房地产有关。

根据该 FIRB 年度报告，就通过审批的交易总额而言，中国于 2010 至 2011 年度已成为澳大利亚的第三大投资来源国。FIRB 报告称：“这已经是中国连续第三年跻身澳洲前三大投资来源国之列。”

FIRB 的数据印证了韦雅凡的以下观点：“尽管有人在散布澳大利亚反对外国投资的不实之词，但事实上澳大利亚对来自中国的投资者抱着开放、欢迎的态度。”

## Australia misunderstood?

“In the midst of tabloid reporting and ‘shock-jock’ journalism that has whipped up public concern about Asian investors ‘buying up big’ in resource-rich nations, there has developed a misconception that foreign investment, and particularly investment from China, is unwelcome in Australia,” remarks Nicola Wakefield Evans, a partner at King & Wood Mallesons in Sydney.

The reality appears to be different. According to a 2010-2011 annual report published by Australia’s Foreign Investment Review Board (FIRB), the number of applications considered during 2010-2011 was 10,865, but only 43 proposals were rejected, accounting for less than 0.4% of all proposals considered. All except one of the rejected proposals were related to real estate purchases.

According to the report, China was Australia’s third-largest investor in 2010-2011, in terms of the value of approvals. “This is the third consecutive year that China has been ranked in the top three sources of proposed investment,” says the report.

The statistics support Wakefield Evans’ words: “Despite the anti-foreign investment rhetoric, Australia is open to, and welcoming of, foreign investment by Chinese investors.”

*在加拿大作出计划周详的投资，将为投资者带来理想的回报、安全的投资环境和政治上的支持*

*A well planned investment in Canada offers a combination of return, security and political co-operation*

**Christopher Murray**
Osler律师事务所
合伙人
多伦多
Osler Hoskin & Harcourt
Partner
Toronto

不过，据 Johnson Winter & Slattery 律师事务所合伙人 Richard Gelski 介绍，澳大利亚反对党承诺，若该党赢得下轮选举，他们将撤销 MRRT。下一轮选举最迟将于明年 11 月 30 日举行。

澳洲碳价机制同样也于 7 月 1 日生效。韦雅凡介绍说，根据该机制的要求，大约有 500 家二氧化碳的大型排放企业需要上报它们的排放情况，并且向政府购买或返还碳单位 (carbon unit)，每个碳单位对应一吨碳的排放量。澳洲政府为达到其减排目标，将会控制碳单位的发放总量。

据 Gelski 介绍，碳单位价格在施行伊始将由政府决定。2015 年 7 月 1 日以后，碳单位的价格将由市场决定，由市场决定后的最初三年将设价格上限和下限，三年过后只设价格上限。

碳价格机制是澳洲政府《气候改善计划》的核心内容。为了执行该计划，政府拟定了清洁能源一揽子法规，并且由参议院于去年通过。

一揽子法规“有可能增加企业在天然资源开发过程中的用电、用气成本和其他碳排放密集型投入的成本，对成本的影响大小取决于该企业有权获得多少免费的碳单位。”亚司特驻墨尔本合伙人 Jeff Lynn 说。

Kudnig 说：“投资者需要评估购买碳单位可能产生的成本以及他们可获得多少免费碳单位，作为其投资决定的一部分。”

那么加拿大和非洲的情况又怎样呢？为什么韦雅凡认为这两个地区对澳大利亚造成了威胁呢？

## 加拿大

于去年 5 月当选的加拿大现任政府对外商投资持开放态度，Osler Hoskin & Harcourt 律师事务所驻多伦多合伙人 Christopher Murray 表示：“我们看到中国在加拿大的投资正稳定、健康地增长。”

other exploration costs have been deducted. Also on 1 July, the government began to levy a new mineral resource rent tax (MRRT). “This is a tax levied on profits from coal and iron ore projects in Australia. The headline tax rate is 30%, but the effective rate is 22.5% after applying an extraction allowance of 25%,” says Robert Edel, a partner at DLA Piper in Perth and the head of the firm’s global mining sector.

Australia’s federal opposition has stated that it will repeal the MRRT if they win the next election, to be held no later than 30 November next year, says Richard Gelski, a partner at Johnson Winter & Slattery.

Again on 1 July, the carbon price mechanism took effect. According to Wakefield Evans, about 500 large emitters of carbon dioxide are required to report on their emissions, and buy and surrender to the government a carbon unit for each tonne of carbon emissions. The government will control the supply of permits to achieve its aim of emissions reduction.

According to Gelski, at the beginning the carbon unit will be sold at fixed prices, but from 1 July 2015, the price will be set by the market with a price ceiling and floor applied in the first three years, and price caps applied thereafter.

The carbon price mechanism is a core part of the government's Climate Change Plan. To implement the plan, a clean energy legislative package was introduced by the government and passed by the senate in November last year.

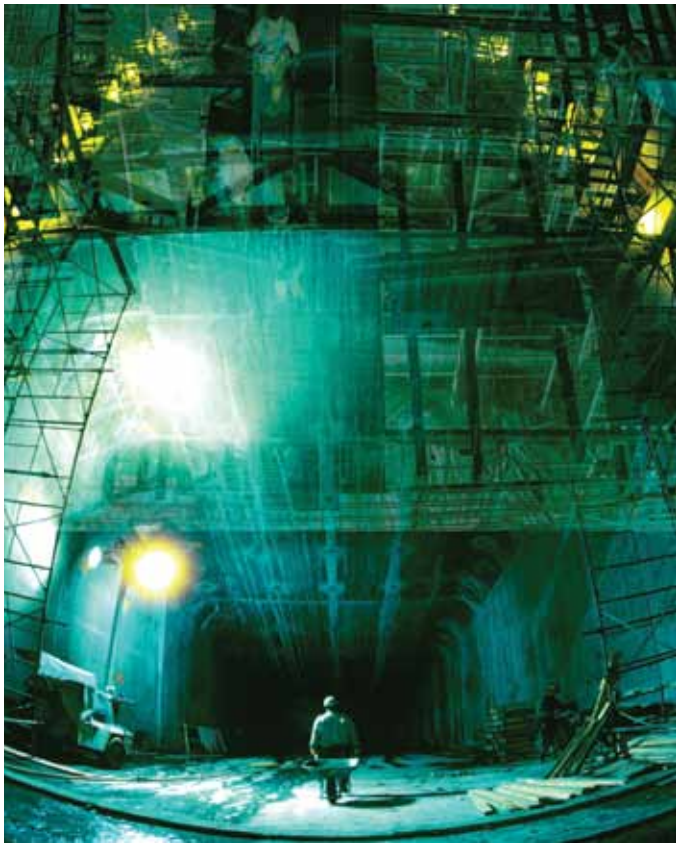
The package “has the potential to increase costs of electricity, gas and other carbon emission-intensive inputs to natural resources activities depending on the entitlement of the industry participant to an allocation of free carbon units,” says Jeff Lynn, a partner at Ashurst in Melbourne. Kudnig says: “An investor will need to assess the potential cost of carbon units and the level of assistance available as part of the investment decision.”

So what about Canada and Africa? Why should Australia be concerned, as Wakefield Evans warns?

## Canada


The Canadian government, elected in May last year, has an open mind for foreign investment, says Christopher Murray, a partner at Osler Hoskin & Harcourt in Toronto. “We have seen a steady and healthy growth of Chinese investments in Canada,” he says.

Steve Vaughan, a partner at Heenan Blaikie in Toronto, agrees. “Generally speaking, the government of Canada has signalled that it is welcoming Chinese investment in Canada’s resource sector, which has already seen Chinese investment in various Alberta



在进入加拿大的矿产行业之前，需要考虑政治因素并听取专家意见。
Before entering a mine in Canada, get advice on political considerations.

Heenan Blaikie 律师事务所驻多伦多合伙人 Steve Vaughan 也表示："总体来说，加拿大政府的举措显示它欢迎中国在加拿大的资源领域投资。在天然资源领域，中国投资已可见于许多艾伯塔省油砂项目以及其他矿业开采项目之中。"

与其他资源丰富的国家相比，"在加拿大作出计划周详的投资，将为投资者带来理想的回报、安全的投资环境和政治上的支持。" Murray 说。

《加拿大投资法》的修订或许是过去 12 个月以来加拿大最重大的法规变化，许多受访律师都为这次修订拍手叫好。"加拿大法律的这次修订，使加拿大的天然资源领域向来自外国的绝大部分投资敞开了大门。" Cassels Brock & Blackwell 律师事务所驻多伦多高级合伙人 Cameron Mingay 表示。

这次修订将外国投资必须接受政府或监管机构审批的门槛放宽至 10 亿加元 (10 亿美元)。Murray 介绍说，在接下来的四年时间里，审批门槛将根据 "企业价值" 决定。对 "企业价值" 的定义尚待确定，一旦确定，"审批门槛将由资产价值 3 亿 3000 万加元放宽至企业价值 6 亿加元，两年后进一步放宽至企业价值 8 亿加元，两年后再进一步放宽至企业价值 10 亿加元。之后，审批门槛将与加拿大的 GDP 变动挂钩。" Murray 说。

虽然加拿大对外资并购交易持开放态度，不过投资者 "预先计划妥当是十分重要的，不仅需要考虑法律事务，还不能忘记公共关系和与政府的关系。" Murray 说。国有企业所作的大型投资 "可能会受到政治和传媒等因素的干扰，更需要下工夫做好预先计划，并听取专家意见。"

oil sands projects, as well as other mining projects." Compared to other resource-rich countries, "a well planned investment in Canada offers a great combination of return, security and political co-operation," says Murray.

Perhaps the most significant legal development in the past 12 months that has these lawyers beating their drums has been the amendment of the Investment Canada Act. "This change in Canadian law has opened up the Canadian resource sector to the overwhelming majority of investments from foreign sources," says Cameron Mingay, a senior partner at Cassels Brock & Blackwell in Toronto.

The amendment raises the threshold for the government or regulatory review of foreign investments to C$1 billion (US$1 billion). This amount, according to Murray, will be based on a yet-to-be-defined "enterprise value" over a four-year period. Once the definition comes into force, "the review threshold will be raised from C$330 million in asset value to C$600 million in enterprise value for two years, then to C$800 million in enterprise value for two years, then to C$1 billion in enterprise value, and subsequently the threshold will be indexed to changes in Canada's GDP," he says.

Although Canada is open to acquisitions, "it is critical to ensure advance planning, not only for legal matters but also public relations and government relations," says Murray. Larger investments from state-owned enterprises "can be subject to political and media considerations that require significant advance planning and specialised advice".

Vaughan warns Chinese investors in the mining sector not to overpay for the acquisition of Canadian mineral assets. "[This] unfortunately has been the case in numerous examples in the recent past," he says.

In order to understand how and how long it may take to develop mining and energy assets, "advice on how resources can be regulated by both federal and provincial governments, and how that fits together legally and practically is important," says Shawn Denstedt, a partner at Osler in Calgary. Aboriginal rights, protected by Canada's constitution, are complex and

*在矿产和能源资产的开发过程中，了解与原住民权利相关的潜在风险……是至关重要的*

*Understanding the potential rsks associated with aboriginal rights in the development of mining and energy assets ... is critical*

**Shawn Denstedt**
Osler律师事务所
合伙人
卡尔加里
Partner
Osler Hoskin & Harcourt
Calgary

*加拿大法律的这次修订，使加拿大的天然资源领域向来自外国的……投资敞开了大门*

*This change in Canadian law has opened the resource sector to ... investments from foreign sources*

**Cameron Mingay**
Cassels Brock & Blackwell 律师事务所
高级合伙人
多伦多
Senior Partner
Cassels Brock & Blackwell
Toronto

Vaughan 则提醒投资矿业领域的中国企业在收购加拿大的矿业资产时不要多花冤枉钱。“遗憾的是，近年来这样的情况并不少见。”他说。

为了弄清楚开发矿产和能源资产的方式和所需的时间，“投资者需要了解联邦和省级政府对资源开发的监管模式，以及如何使开发活动同时符合法律规定和实践需要。就上述问题咨询法律意见很有必要。”Osler 律所驻卡尔加里合伙人 Shawn Denstedt 说道。

受加拿大宪法保护的原住民权利是一个复杂的领域，应该得到投资者的关注。“在矿产和能源资产的开发过程中，了解与原住民权利相关的潜在风险以及如何管理这些风险是至关重要的。”Denstedt 说。

## 非洲

根据中国商务部网站上刊登的《2010 年度中国对外直接投资统计公报》，2010 年中国在非洲的投资覆盖率高达 85%，在各大洲中位居第二。

Werksmans Attorneys 律师事务所驻约翰内斯堡律师陈莉婷在一篇文章中指出，中国在非洲的投资主要集中在几个天然资源丰富的国家。她写道：“中国已经做好准备，要把握非洲这个遭人忽视的巨大市场，并确保非洲对中国的石油和矿产资源供应。”

南非和尼日利亚是非洲大陆上最受投资者青睐的两个国家。联合国《世界投资报告 2012》指出，在众多非洲国家中，

should also receive investors' attention. "Understanding the potential risks associated with aboriginal rights in the development of mining and energy assets and how to manage those risks is critical," says Denstedt.

## Africa

Chinese investment in Africa reached 85% of the continent's countries in 2010, the second-highest level of all continents, according to the 2010 Statistical Bulletin of China's Outward Foreign Direct Investment, published on the website of the Ministry of Commerce (MOFCOM).

According to Rita Chen, an associate at Werksmans Attorneys in Johannesburg, China's investment in Africa is dominated by a few resource-rich countries. "China has positioned itself to capture the vast neglected African market and secure supplies of African oil and mineral resources," she writes.

South Africa and Nigeria are the two most popular investment targets in Africa. According to the UN's World Investment Report 2012, Nigeria and South Africa are the top two African countries in terms of FDI inflows.

In Nigeria, the electric power sector has recently seen changes. According to Elu Mbakwe, an associate at ÆLEX in Lagos, two sets of regulations have been issued by Nigeria's Electricity Regulatory Commission: the Regulations for Embedded Generation 2012, "which allows embedded generators to evacuate electricity through a distribution system that is connected to a transmission network"; and the Regulations for Independent Electricity Distribution Networks 2012, "which covers the operation of isolated off-grid independent electricity distribution networks in rural or urban areas, which are not connected to a distribution network".

Mbakwe thinks the regulations bring Chinese investors opportunities, because "Chinese investors will be able to use diverse energy sources to generate power in rural and urban areas not served by the national grid and develop distribution networks in urban areas where there is inadequate distribution infrastructure."

**公共事业/能源业新上市项目优秀律所前5强（国际律所）**
**Top 5 utility/energy legal advisers for new listings (International firms)**

| 律师事务所 Law firms | 金额（百万美元） Value (US$m) |
|---|---|
| 富而德律师事务所 Freshfields Bruckhaus Deringer | 1,122 |
| 世达律师事务所 Skadden Arps Slate Meagher & Flom | 851 |
| 高伟绅律师事务所 Clifford Chance | 345 |
| 普衡律师事务所 Paul Hastings | 345 |
| 瑞生国际律师事务所 Latham & Watkins | 271 |

排名是根据Dealogic数据 Based on Dealogic data

*中国已经做好准备，要把握非洲这个遭人忽视的巨大市场*

*China has positioned itself to capture the vast neglected African market*

**陈莉婷**
**Rita Chen**
Werksmans Attorneys
律师事务所
律师
约翰内斯堡
Associate
Werksmans Attorneys
Johannesburg

尼日利亚和南非吸纳的外商直接投资 (FDI) 金额位居前两位。

在尼日利亚，电力领域最近经历了一些法规变化。据 ÆLEX 律师事务所驻拉各斯律师 Elu Mbakwe 介绍，尼日利亚电力监管委员会颁布了两项新的法规：一是《2012 年嵌入式发电规定》，“该规定允许嵌入式发电厂通过与输电网络相连的配电系统输送电力”；二是《2012 年独立配电网络法规》，“[ 该法规 ] 是针对在乡村或城市地区运营独立配电网络的规定，这些独立配电网络并不与其他配电网相连。”

Greg Nott, a director at Werksmans Attorneys in Johannesburg, thinks that South Africa's recent interest in renewable energy has led to a most influential legal development. To ensure the supply of electricity, the country's minister of energy, Dipuo Peters, has decided to generate 3,725 megawatts (MW) from renewable energy sources. To reach this target, the Renewable Energy Independent Power Producer Procurement Programme has been introduced by the Department of Energy. The following technologies are qualified for selection under the programme: onshore wind, solar photovoltaic, concentrated solar thermal, solid biomass, biogas, landfill gas and small hydroelectric.

"This renewable industry has spawned a whole lot of other industries, particularly manufacturing" says Nott. "The government attracts manufacturers for this industry, and China is one of the big ones that come here to set up manufacturing facilities."

Angola is another key country. According to MOFCOM, Angola became China's largest trading partner in Africa in the first half of this year, with oil the major Chinese import. Chinese investors have advantages in the country, and China and Angola have established several partnerships and informal agreements on the exchange of services and manpower. Since China has provided Angola with loans for projects, "if a Chinese investor seeks to do business in this country, when filing its private foreign investment, it may apply for certain benefits and tax exemptions", says António Vicente Marques, a founder partner at AVM Advogados in Luanda.

One big challenge for Chinese investors is posed by the repatriation of profits to China. "It is important to note that the minimum guideline amount for investment projects in Angola is fixed by law at US$100 million per investor in order to be able to repatriate profits or apply for tax benefits," says Vicente Marques.

He says investors should also pay attention to a foreign exchange regime applicable to the oil sector (Law No. 2/2012), which took effect on 12 May. "This new law, which is being implemented in different steps until October 2013, may create additional bureaucratic and economic limitations."

## 非洲：让我们参与开发

“非洲各国政府采用的一项主要策略是：如果你来开采我们的资源，你就必须让我们的人参与资源的开发。” Werksmans 律所驻约翰内斯堡合伙人 Greg Nott 说道。他认为这是外国投资者在非洲遭遇的主要挑战。

例如，在南非就有“黑人经济振兴政策 (BEE)”。根据 BEE 政策的要求，“国际投资者必须与南非本土居民合作，特别是那些过去社会地位低下的南非黑人公民。” Werksmans 律所驻约翰内斯堡律师陈莉婷介绍说。

“[BEE 给外国投资者带来的 ] 障碍主要有两方面：一是如何理解 BEE 政策，二是如何执行 BEE 政策。” Nott 说，“在非洲其他国家，你会遭遇所谓的‘土著权利法’，这些法规的目的和 BEE 差不多。”

**Greg Nott**

## Africa: get our people involved

"One of the main strategies applied by governments in Africa is that if you take our resources, our people must be involved," says Greg Nott, a director at Werksmans Attorneys in Johannesburg, who adds this is the main challenge foreign investors have in Africa.

South Africa, for example, imposes a programme called Black Economic Empowerment (BEE). As the BEE programme requires, "international investors have to partner up with local South Africans, especially previously disadvantaged black South Africans," says Rita Chen, an associate at Werksmans Attorneys in Johannesburg. Foreign investors should give at least a 26% shareholding to these local people.

"One of the main barriers is understanding, and the other is to carry [BEE] out," says Nott. "In other parts of Africa, you have what we call 'indigenous laws', which are about the same things."

**石油及天然气业新上市项目优秀律所前5强（中国律所）**
**Top 5 oil & gas legal advisers for new listings (PRC firms)**

| 律师事务所 Law firms | 金额（百万美元）Value (US$m) |
|---|---|
| 金杜律师事务所* King & Wood* | 291 |
| 北京市东易律师事务所 EastBright Law Firm | 266 |
| 通商律师事务所 Commerce & Finance Law Offices | 207 |
| 竞天公诚律师事务所 Jingtian & Gongcheng | 193 |
| 君合律师事务所 Jun He Law Offices | 190 |

* 金杜律师事务所与澳大利亚万盛律师事务所结成的联盟已于2012 年3月1 日生效，联盟仍以“金杜律师事务所”为中文名
* King & Wood and Australian law firm Mallesons Stephen Jaques joined on 1 March 2012, with the new name King & Wood Mallesons

排名是根据Dealogic数据 Based on Dealogic data

Mbakwe 认为，以上两项规定为中国投资者带来了机遇，原因是“中国投资者将能在［尼日利亚］国家电网未能覆盖的乡村和城市地区利用多种能源来生产电力，以及在配电基础设施不足的城市地区架设电力配送网络。”

Werksmans Attorneys 律师事务所驻约翰内斯堡合伙人 Greg Nott 认为，南非近期最具影响力的法规变化来自该国对可再生能源的关注。

为了确保该国的电力供应，南非能源部长 Dipuo Peters 决定利用可再生能源生产 3725 兆瓦的电能。

为了实现这一目标，南非能源部出台了《可再生能源独立电力生产商采购计划》（IPP 采购计划）。在《IPP 采购计划》下，具有竞标资格的可再生能源发电类型有：陆上风力发电、太阳能光伏发电、集光型太阳能发电、生物质能发电、沼气发电、垃圾填埋气发电和小型水力发电。

“可再生能源行业带动了许多其他行业的发展，尤其是制造业。”Nott 说，“政府为了可再生能源行业的发展鼓励制造企业到南非来，中国是最积极的国家之一，有许多中国企业来南非建造了生产设施。”

安哥拉也是非洲大陆上的一个资源大国。根据中国商务部发布的信息，安哥拉于今年上半年成为中国在非洲的最大贸易伙伴。中国主要从该国进口石油。

中国投资者在安哥拉具有优势，中国和安哥拉建立了若干合作关系，并就两国间的服务和劳务交流达成了一些非正式协议。此外，由于中国向安哥拉提供了许多项目贷款，“如果中国投资者寻求在安哥拉投资，他们在提交外国民营企业投资计划时，可以申请某些优惠或税收豁免待遇。”安哥拉 AVM 律师事务所驻该国首都罗安达的创始合伙人 António Vicente Marques 说道。

中国投资者在安哥拉面对的一项主要挑战是如何将利润转回

## Brazil

“Certain measures adopted by the Brazilian government seemed to curb down foreign investment,” says Adriano Drummond Trindade, a counsel at Pinheiro Neto Advogados in Brasilia. “On the other hand, other jurisdictions have also adopted policies to attract Chinese investment such as Canada, so competition may have reduced slightly investment in Brazil.”

Proof of this may be seen in China’s shrinking demand for Brazil’s iron ore. Jiro Iokibe, a senior analyst at Daiwa Capital Markets in Tokyo, recently told Reuters he expects that the surplus in the global iron ore market will rise to 28 million tonnes in 2013, and to 53 million tonnes in 2014, due to growing capacity in Australia and Brazil, planned as a result of China’s once-large demand.

Concerns about China’s traditionally high demand for Brazilian iron ore led to the introduction of a bill to update the country’s current mining code, including the removal of tax incentives for the export of ores. “The bill also establishes that exploration of mining resources shall be done by Brazilians or companies duly organised under Brazilian law, and with their principal place of business and administration in Brazil,” says Fabio Kujawski, a partner at Barretto Ferreira Kujawski e Brancher in Sao Paulo.

The Mining Code, established in 1960s, is the main Brazilian legal regulation in the sector. “There are many bills of law under discussion in the Brazilian congress aiming at modifying the current Mining Code,” says Carlos Roberto Siqueira Castro, a senior partner at Siqueira Castro Advogados.

But as Chinese demand for iron ore has tapered off, Brazil has been left with too much capacity and, perhaps, too much regulation.

There have been discussions about a new mining law since 2009, according to Reinaldo Guang Ruey Ma, the co-head of TozziniFreire Advogados’ China practice group in Sao Paulo. “However, such a bill of law has not yet been disclosed, which

*巴西的一些州政府……颁布州法针对矿产资源的开采征收新的监管费用，这样的做法引起了争议*

*Some state governments in Brazil have enacted controversial laws imposing supervision fees on mineral resources exploitation*

**Reinaldo Guang Ruey Ma**
TozziniFreire律师事务所
中国业务联席主管
圣保罗
Co-head of China Practice Group
TozziniFreire Advogados
Sao Paulo

中国国内。“有一点需要留意：安哥拉法律规定，每个投资者的出资金额只有在超过 1 亿美元时，项目投资者才能将利润转回本国或申请税收优惠。” Vicente Marques 说道。

他提醒投资者还应该留意专门适用于安哥拉石油领域的外汇法规（法律编号 2/2012），该法已于 5 月 12 日生效。“新法目前正处于分步执行阶段，将于 2013 年 10 月前全部实施；新法可能导致投资者履行更多手续，并面对更多经济方面的限制。”

## 巴西

“巴西政府的一些举措似乎抑制了外商在巴西的投资。” Pinheiro Neto 律师事务所巴西利亚办公室顾问律师 Adriano Drummond Trindade 说，“另一方面，加拿大等国家出台政策吸引中国投资者，因此来自其他国家的竞争或许也是中国在巴西的投资有所减少的原因。”

或许，中国对巴西铁矿石的需求下降能印证上述看法。根据路透社最近的报道，大和资本市场（Daiwa Capital Markets）驻东京高级分析师 Jiro Iokibe 预计，由于中国以往的旺盛需求刺激了澳大利亚和巴西的铁矿石产能不断增加，全球铁矿石市场的过剩产能在 2013 年将达到 2800 万吨，在 2014 年将进一步上升至 5300 万吨。

一直以来，巴西铁矿石集中于向中国出口，而巴西则对此感到担忧。有鉴于此，巴西立法部门提出一项对现行《矿业法》的修订法案，包括撤销铁矿石出口的税收优惠。“该法案明确规定，有权进行矿产资源勘探的只有巴西公司或者按照巴西法律要求成立的公司，而且公司的主要经营和管理地点必须在巴西。” Kujawski 说道。

巴西于 60 年代颁布的《矿业法》是该国在天然资源领域的主要法规。“目前有许多旨在修订现行《矿业法》的法案，巴西国会正在审议这些法案。” Siqueira Castro 律师事务所高级合伙人 Carlos

generates a certain level of uncertainty of what may be effectively changed on the legislation.”

In addition, he says, “some state governments in Brazil, particularly those mineral resource-rich states, have enacted controversial state laws imposing new supervision fees on the mineral resources exploitation”.

These fees are being challenged by large Brazilian mining companies in the courts. “Such uncertainty greatly impacts studies and assessments of current and new mineral resource projects in Brazil,” says Ma.

In 2011, the government published a National Mining Plan for the mining sector to cover the next 20 years. “This is the first long-term plan that addresses the first phase of industrialisation of minerals and mineral processing,” says Kujawski. The plan includes the creation of a regulatory agency for the sector.

Adds Joao Almeida, a partner at Demarest e Almeida in Rio de Janeiro: “Certain foreign investors are not comfortable in acquiring [exploration] and mining rights specially because of the uncertainty regarding the tax model to be adopted under the new mining legislation.”

Restriction on rural land acquisition is another big issue. A company set up by a foreign investor in Brazil will often be regarded as a Brazilian company according to Brazilian laws. One of the few exceptions, however, includes land acquisition by Brazilian company controlled by foreign shareholder, says José Ricardo dos Santos Luz Jr, a partner at Duarte Garcia, Caselli Guimarães e Terra Advogados.

Sergio Bronstein, a partner at Veirano Advogados in Sao Paulo, observes: “The major obstacle to Chinese investment in agribusiness and other natural resource areas relates to certain restrictions on the acquisition/long-term lease of rural properties by foreign-controlled entities.” These restrictions on rural land acquisition may also apply to Brazilian companies under foreign control.

“The authorities have mobilised to enforce the legal restrictions with a ‘substance over form’ approach,”says Eduardo Wanderley, a colleague of Bronstein. He says corporate reorganisations such as change of control and spin-off are deemed to have an impact on the ultimate ownership of the rural land under the restrictions.

“As the exploration of natural resources involves in certain cases the acquisition of land, this restriction has been impacting foreign investments,” says Almeida.

However, there is also good news. Investment in mining, energy and natural resources in Brazil used to face barriers related to environmental proceedings, says Castro. This situation has improved.

Some regulations issued last year, such as acts 419, 420, 421, 422 and 424 are related to obtaining environmental permits in Brazil. “These acts establish shorter deadlines and specific procedures for each permit to be obtained,” says Castro.

A new Forest Code was enacted in May, but “at this point it is not possible to determine whether the Forest Code

巴西对土地收购的限制，使一些矿产资源投资者空手而归。
Land restrictions in Brazil have kept the scoops empty on some mining projects.

Roberto Siqueira Castro 介绍说。

但是，随着中国对铁矿石的旺盛需求逐渐冷却，巴西在铁矿石产能过剩的同时，或许各种规条也显得太多了。

据 TozziniFreire 律师事务所驻圣保罗中国业务联席主管 Reinaldo Guang Ruey Ma 介绍，自 2009 年起巴西国内就一直在讨论推出新的矿业法。“然而，相关修订法案尚未公开。因此，矿业法最后究竟会有怎样的改动，目前还存在一定的不确定性。”

此外，Ma 补充说：“巴西的一些州政府（特别是那些矿产资源丰富的州）颁布州法针对矿产资源的开采征收新的监管费用，这样的做法引起了争议。”

目前，几家大型巴西矿业公司正在法庭上力争撤销该费用。“由此造成的不确定因素严重影响了投资者对现有和未来巴西矿产资源项目的研究与评估。” Ma 说道。

2011 年，巴西政府针对矿产行业未来 20 年的发展发布了“国家矿业计划”。“这是第一份为实现矿物开采和加工工业化第一阶段而制订的长期发展计划。” 巴西 BKBG 律师事务所驻圣保罗合伙人 Fabio Kujawski 介绍说。这份发展计划还决定在矿产行业设立一个监管机构。

Demarest e Almeida 律师事务所驻里约热内卢合伙人 Joao

**公共事业/能源业新上市项目优秀律所前10强（中国律所）**
**Top 10 utility/energy legal advisers for new listings (PRC firms)**

| 律师事务所 Law firms | 金额（百万美元） Value (US$m) |
|---|---|
| 嘉源律师事务所 Jiayuan Law Offices | 2,462 |
| 竞天公诚律师事务所 Jingtian & Gongcheng | 860 |
| 德恒律师事务所 DeHeng Law Offices | 851 |
| 国浩律师事务所 Grandall Law Firm | 648 |
| 君合律师事务所 Jun He Law Offices | 637 |
| 内蒙古建中律师事务所 Inner Mongolia Jianzhong Law Firm | 456 |
| 天元律师事务所 Tian Yuan Law Firm | 271 |
| 通力律师事务所 Llinks Law Offices | 214 |
| 江苏世纪同仁律师事务所 C&T Partners | 168 |
| 广东启源律师事务所 Guangdong Qiyuan Law Firm | 102 |

排名是根据Dealogic数据 Based on Dealogic data

eases investment, because the new complementary regulations are still being discussed in the House of Representatives," says Pedro Garcia, a partner at Veirano in Rio de Janeiro. "However, as it stands now, the new Forest Code diminishes the restrictions for the exploration of certain previously environmentally protected areas."

## Kazakhstan and Mongolia


According to the UN World Investment Report 2012, Kazakhstan and Mongolia stand out among landlocked developing countries in terms of attracting FDI. Kazakhstan and Mongolia rank seventh and eighth respectively on UNCTAD's FDI Attraction Index. "The vast majority of inward flows continued to be greenfield investments in mining, quarrying and petroleum," says the UN report.

In January, Kazakh president Nursultan Nazarbayev signed the Law on Gas and Gas Supply, a new law for the country. "The law is intended to formulate a new governmental policy in the gas sector, striving to strengthen the role of the state in all gas turnover and supply spheres," says Olga Chentsova, the managing partner at AEQUITAS Law Firm, in Almaty.

For example, under the new gas law, the state has the preemptive right to purchase crude and commercial gas through the "national operator", a company named by the government mainly to ensure the country's demand for commercial gas can be met. This effectively limits a subsoil user's rights to sell gas to third parties.

Although subsoil users still have the right to determine the prices of crude and commercial gas, "the provisions of the [new] gas law significantly limit this subsoil user's right," says Chentsova. "In particular, the gas law secures the procedure for setting the gas prices and the general price-setting and profitability provisions." The gas prices set by subsoil users are also subject to evaluation and approval by a government-authorised body.

Besides an increased influence from the state, Chinese investors face a degree of legal uncertainty. "Kazakhstan legislation is in a state of rapid and unpredictable change, and changes thereto could be retroactive in effect," says Yerzhan Kumarov, the managing partner at Norton Rose in Almaty. "In our experience, enforcement of laws in Kazakhstan may depend on, and be subject to, the interpretation placed upon such laws by the

## 中国能从美国学到什么?

中国可以考虑借鉴美国的油气租约法律制度，推动页岩气领域的市场化改革，张利宾在其《美国油气行业市场化核心制度——油气租约法律制度》一文中表达了以上的看法。

张利宾在文中指出，油气租约是油气勘探开发中土地所有者和开发商之间的一个核心法律文件。根据油气租约，土地所有者将油气资源的矿产权益授予油气开发商，而开发商则在获得矿产权益后，利用其资金、技术进行油气资源的勘探和开发。在油气租约中，土地所有者享有提成费权益(royalty interests)。

张利宾在接受《商法》采访时表示，中国油气开发行业存在三大不完善之处：(1) 中国法规对矿权和地上权的界定不清楚，权利之间时常发生冲突和矛盾，行使矿权也存在困难；(2) 垄断问题，只有大型国有石油公司能进入石油天然气领域，其他公司则没有这些上游资源的市场准入权；与此同时，“主要的大型国有石油公司却坐拥资源，缺乏开采的积极性”。(3) 环境法的执法力度很低，监管污染行为的法规不足，导致了对环境的威胁。

“中国要努力地建立起一套市场化的监管制度，以应对这三方面的问题。中国有许多可以向美国学习的地方，其中最核心的就是美国的油气租约制度。”张利宾说。

他认为，中国首先要放开市场准入，让有能力的投资者都能进入市场。“在这一过程中，中国可以借鉴美国的油气租约制度，特别是美国联邦政府和各州政府为政府土地订立的租约。作为开发商的投资人和作为土地所有者的国家之间可以签订一个类似美国油气租约的合同，界定开发商的权利和义务。”张利宾认为，开发商的义务要通过合同约定，对开发商的管理也应该根据合同进行。对于相关地块的投标人，政府可以考虑采用[统一的]合同范本。不过，由于每个项目各不相同，对于各项目中的具体问题，当事各方应该就具体的合同条款进行磋商。

Almeida 补充说：“某些外国投资者之所以不愿意在巴西收购矿权，正是因为新矿业法会采用怎样的税收模式目前还不明确。”

巴西对收购农村土地的限制是另一个热点问题。一般情况下，外国投资者在巴西成立的公司会被巴西法律视为巴西公司，享有国民待遇。但也存在例外情况，其中就包括“外国股东控制的巴西公司进行的土地收购行为”，巴西 DGCGT 律师事务所合伙人 José Ricardo dos Santos Luz Jr 介绍说。

Veirano 律师事务所驻圣保罗合伙人 Sergio Bronstein 认为：“中国投资者在农业和其他天然资源领域面对的投资障碍，与巴西对外方控制的实体收购或长期租用农村土地的某些限制措施有关。”这些对收购农村土地的限制措施或许也将适用于受外国股东控制的巴西公司。

“主管机构已经动议在执行这些限制法规时采用‘实质重于形式’的评判标准。”Bronstein 的同事 Eduardo Wanderley 介绍说。Wanderley 说，在主管机构看来，变更控制权、企业分拆等公司重

relevant Kazakhstan authority, and such authority may adopt an interpretation of an aspect of Kazakhstan Law which differs from [our opinions].”

Yessen Massalin, a department director at Olympex Advisers in the Kazakh capital, Astana, flags tax disputes as another common concern for investors. “There are many big tax disputes with the state, especially in the natural resources sector,” says Massalin. His company has been assisting Chinese companies in disputes with tax authorities on billions of dollars worth of accrued taxes and penalties charged by the state.

Mongolia has also strengthened the government’s role in the mining sector. “The government of Mongolia is highly sensitive to its geographical dependence upon Russia and China as outlets for its resource wealth,” says Michael Aldrich, a partner at Hogan Lovells in the capital, Ulaanbaatar. Chris Melville, also a partner in the firm's Ulaanbaatar office, says Mongolia has also become “increasingly aware of the limitations on state power because of free market legislation enacted in the 1990s”.

In this context, a law came into effect in May to regulate foreign investment, requiring a mandatory approval in strategically important sectors including mining.

“According to the new law, all foreign investments exceeding 5% of interest in the companies in these [strategic] sectors have to seek approval. This affects not just companies in Mongolia, but also upstream companies held offshore,” says Luke Lkhaasuren, the managing partner at Logos Advocates in Ulaanbaatar.

The approval requirement can cause headaches for Chinese investors as well, but according to Aldrich it’s not because the requirement is demanding or unfamiliar. “The problem is that the Mongolian law creating this approval process is very vague,” he says. “Furthermore, no implementing regulations have been issued, thus obscuring the procedures for obtaining the necessary approvals for lawful investments.”

### China


Back in China, the energy and natural resource sectors are still highly exclusive to the country’s large state-owned companies, but there are signs of change.

Two major developments in the past 12 months, according to Wang Jihong, the managing partner at V&T Law Firm in Beijing,

组交易会对买卖受限制的农村土地的最终所有权产生实质影响。

“由于天然资源勘探在某些情况下会牵涉到土地收购，因此对土地收购的限制对外国投资一直都有影响。” Almeida 说。

不过，在巴西也有利好消息。Castro 说，在巴西矿产、能源和天然资源领域的投资过去总是在取得环境许可证方面遇到阻碍。但是这一情况现已改善。

巴西去年颁布的一些法规，例如第 419 号、第 420 号、第 421 号、第 422 号和第 424 号法令，都与取得巴西的环境许可证有关。“这些法令要求缩短环境许可证的审批时间，并且对审批程序作出了更具体的要求。” Castro 说。

巴西于 5 月颁布了新的《林业法》。“目前很难说《林业法》是否会对投资产生有利影响，因为众议院仍在审议该法的配套规定。” Veirano 律所驻里约热内卢合伙人 Pedro Garcia 表示。“不过，就目前来说，新《林业法》的确放松了在某些曾经的环保区的勘探限制。”

## 哈萨克斯坦与蒙古

联合国《世界投资报告 2012》的数据显示，哈萨克斯坦和蒙古凭借其对 FDI 的吸引力在所有内陆发展中国家里脱颖而出。联合国贸发会的 FDI 吸引力指数排名中，哈萨克斯坦和蒙古分别排名世界第七和第八。该报告指出：“绝大部分的外商资金继续用于矿产、采石和石油领域的绿地投资项目。”

哈萨克斯坦总统纳扎尔巴耶夫于今年 1 月签署了该国的一项新法，即《天然气及天然气供应法》。“该法的目的是在天然气领域树立新的政府政策，力求加强国家在所有天然气营运和供应环节的影响力。” AEQUITAS 律师事务所驻阿拉木图管理合伙人 Olga Chentsova 表示。

例如，根据新的天然气法，国家拥有通过“国家运营公司”优先购买原煤气和商品气的权利。“国家运营公司”由政府委任，主要负责确保该国对商品气的需求能得到满足。新天然气法将有效地

*这些法令要求缩短环境许可证的审批时间，并且对审批程序作出了更具体的要求*

*These acts establish shorter deadlines and specific procedures for each permit to be obtained*

**Carlos Roberto Siqueira Castro**
Siqueira Castro律师事务所高级合伙人
Senior Partner
Siqueira Castro Advogados

## Can China learn from the US?

China can learn from the oil and gas lease system of the US to carry out market-oriented reform in the shale gas sector, writes Zhang Libin in his article *The oil and gas lease system: the core of the market-oriented oil and gas sector of the US*.

According to Zhang, the oil and gas lease is a key legal document between the land owner and the developer for oil and gas exploitation. Under the lease, the land owner grants the developer the mining right, and the developer proceeds to explore and exploit the oil and gas resources with necessary funds and technology. Land owners enjoy royalty interests under this system.

Zhang tells *China Business Law Journal* that there are three major problems with China's oil and gas sector: (1) the mining rights and the surface rights are not clearly defined in China's statutes, which often leads to conflicts between different rights and difficulty in exercising the mining rights; (2) the sector is monopolised by state-owned oil giants, and other companies have no market access to the upstream resources while “the major state-owned oil giants do not have sufficient incentive to exploit the resources they have at hand”; and (3) very weak environmental law enforcement and inadequate regulation of polluting acts, causing threats to the environment.

“To deal with the three problems, China needs to make efforts to set up a market-oriented regulatory system, and our country has much to learn from the US, among which the oil and gas lease system of the US is of the essence,” Zhang says.

He thinks China should first open this market to all capable investors. “When doing this, China can refer to America's oil and gas lease system, especially the ones adopted by the federal and state governments for government-owned land. The market participant, as the developer, and the government, as the land owner, can sign a contract similar to the oil and gas lease in America, defining the developers' rights and their obligations.” He says these obligations should be agreed through the contract, and investors should be administered according to the contract. The government can adopt a model contract for the bidders for relevant blocks which are open for bidding. However, since various projects all differ from each other, there should be specific terms and conditions to be negotiated between the parties for particular issues for the projects.

are: (1) The amendment of the *Interim Regulations on Resource Tax* by the State Council; (2) the Ministry of Land and Resources (MLR) and National Energy Administration have both issued opinions for encouraging private investment in the sectors of energy, land and resources.

In September last year, the State Council announced its decision to amend the *Interim Regulations on Resource Tax*. Wang thinks that the focus of the amendment is the change of tax calculation. Before this amendment, resource taxes were all calculated by the “assessment by quantity” method (the sales volume

**能源、矿产及公用事业领域中国5大境外并购交易（2011年1月至2012年8月）**
**Top 5 Chinese outbound deals in energy, mining and utilities (January 2011 - August 2012)**

| 公布日期 Announcement date | 被收购方 Target | 被收购方所在地 Target location | 收购方 Bidder | 收购方法律顾问 Bidder legal adviser | 出售方 Seller | 金额（百万美元） Value (US$m) |
|---|---|---|---|---|---|---|
| 11/11/2011 | Petrogal Brasil Lda (30%股权 30% stake) | 巴西 Brazil | 中国石化集团 China Petrochemical Corporation | 文森·艾尔斯律师事务所 Vinson & Elkins<br>Machado Meyer Sendacz e Opice | Galp Energia SGPS | 4,800 |
| 22/12/2011 | Energias de Portugal (21.35%股权 21.35% stake) | 葡萄牙 Portugal | 中国长江三峡集团公司 China Three Gorges Corporation | 百思通律师事务所 De Brauw Blackstone Westbroek<br>嘉里盖思律师事务所 Garrigues<br>君合律师事务所 Jun He Law Offices<br>世达律师事务所 Skadden Arps Slate Meagher & Flom | 葡萄牙政府 Government of Portugal | 3,510 |
| 31/10/2011 | GDF SUEZ E&P Norge (30%股权 30% stake) | 法国 France | 中国投资有限责任公司 China Investment Corporation | 文森·艾尔斯律师事务所 Vinson & Elkins | | 3,187 |
| 10/10/2011 | 日光能源公司 Daylight Energy | 加拿大 Canada | 中国石油化工股份有限公司 China Petroleum & Chemical Corporation | 贝内特琼斯律师事务所 Bennett Jones<br>文森·艾尔斯律师事务所 Vinson & Elkins | | 2,760 |
| 03/01/2012 | 戴文能源公司 Devon Energy Corporation (5个美国石油及天然气项目33%股权 33.3% stake in five US oil and gas projects) | 美国 USA | 中国石化集团国际石油勘探开发有限公司 Sinopec International Petroleum Exploration and Production Corporation | Fulbright & Jaworski | 戴文能源公司 Devon Energy Corporation | 2,500 |

资料来源：并购市场资讯 Source: mergermarket

限制底土使用人 (subsoil user) 向第三方出售天然气的权利。

虽然底土使用人仍然拥有原煤气和商品气的定价权，但是“[ 新 ] 天然气法的规定大大限制了底土使用人的这项权利。” Chentsova 说，“特别是，新天然气法明确了天然气的定价机制，以及关于定价及营利水平的一般性规定。” 由底土使用人制定的天然气价格还要受到政府授权机构的评估和审批。

除了要面对日益增加的来自国家的影响，在哈萨克斯坦的中国投资者还要面对一定程度的法律上的不确定因素。“哈萨克斯坦的法律目前变化迅速、难以预测，而且法规的变化在生效后可能会具有追溯效力。” 诺顿罗氏律师事务所驻阿拉木图管理合伙人 Yerzhan Kumarov 说道。“根据我们的经验，在哈萨克斯坦，法律的执行情况可能会依据并依赖于相关主管机构对法律作出的解释，而这些主管机构对哈萨克斯坦法律作出的解释可能会与 [ 我们的意见 ] 不同。”

Olympex 律师事务所驻哈萨克斯坦首都阿斯塔纳的部门主管 Yessen Massalin 认为，税务争议是另一个投资者普遍关注的问题。“特别是在天然资源行业，有许多 [ 投资者 ] 与政府之间的重大税务争议。” Massalin 介绍说。Olympex 律所一直在中国企业与哈萨克斯坦税务部门的争议中协助其中国客户，争议涉及的应交税金及罚款金额可高达数十亿美元。

像哈萨克斯坦一样，蒙古也加强了政府在矿产行业的影响力。“对蒙古在地理位置上需要依赖俄罗斯和中国作为其天然资源输出途径的现状，蒙古政府是高度敏感的。” 霍金路伟律师事务所驻蒙古首都乌兰巴托合伙人 Michael Aldrich 说。同样来自霍金路伟

of taxable resource products multiplied by a specified tax rate). Under the amended interim regulations, however, tax on crude oil and natural gas are calculated by a “rate fixing by prices” approach, i.e. sales revenue from taxable resource products to be multiplied by a certain tax rate (5% to 10%).

“Such a change of tax calculation approach is also the core of the resource tax reform,” says Wang. “Through raising the production costs of resource companies, [this change] can force these companies to reduce mining in a style that is not cost-effective, to improve the utilisation and recycling of natural resources, and make these companies more proactive to save energy and reduce emissions.”

The opinion published by the MLR has promised to ensure fair competition in the land and resources sectors, and to encourage private investors to explore and exploit mineral resources, as well as oil and gas. The opinion issued by the National Energy Administration states that all projects listed in the national energy plan will be open to private investment (except certain projects legally prohibited from so opening).

“China is now abundant in private capital, but private investors have few investment choices,” says Wang. Since projects in the traditional energy, mining and natural resources areas need a large amount of investment, encouraging private capital “can effectively resolve the outstanding problem of capital insufficiency in these sectors, and meanwhile make an effective use of private capital”, she says.

Foreign investors traditionally face restrictions on the scope and mode of their investment. Now they face another wall. The State Council issued the *Notice on Establishing a Security Review System for the Merger and Acquisition of Domestic Enterprises by*

乌兰巴托办公室的合伙人 Chris Melville 表示，蒙古政府也已经“日益感受到 90 年代颁布的自由市场法规对政府影响力的限制”。

在这一大背景下，一项监管外国投资的法律于 5 月份起生效。在矿产开采等具有战略意义的重要行业，外国投资必须按照该法要求接受审批。

“根据这项新出台的法律，在这些 [ 具有战略意义的 ] 行业，外国投资如果在企业中所占的股份比例超过 5%，就必须接受审批。受到影响的不仅是身在蒙古的公司，还包括那些在海外注册的上游控股公司。” Logos 律师事务所驻乌兰巴托管理合伙人 Luke Lkhaasuren 介绍说。

审批的要求可能给投资者造成麻烦，中国投资者也不例外。不过 Aldrich 认为，问题并不在于审批要求过高或是中国投资者不熟悉“审批”这一事物。“问题在于，包含这项审批规定的法律很不清晰。”他说，“此外，政府没有颁布任何实施这项法律的细则。因此，对于合法的投资如何取得必需的审批决定，也没有明确的说法。”

## 中国

让我们把目光转回中国。虽然中国的能源和自然资源领域仍然在很大程度上由大型国有企业所垄断，但是有迹象显示这一情形正在改变。

*目前，中国民间资本充足，但是投资渠道单一*

*China is now abundant in private capital, but private investors have few investment choices*

**王霁虹**
**Wang Jihong**
万商天勤律师事务所
执行合伙人
北京
Managing Partner
V&T Law Firm
Beijing

*Foreign Investors* in February last year, and MOFCM's regulations to implement the security review came into force on 1 September last year. “The notice has made foreign investment in sectors of important energies and resources subject to the security review,”

LEGAL PRACTITIONERS

# Corpus

Charles Mkokweza - Managing Partner
Mabvuto Sakala - Partner
Sharon Sakuwaha - Partner
Sydney Chisenga - Partner
Jacqueline Cornhill Jhala - Head of Department
Namakuzu Shandavu - Head of Department

## Our Business Approach

Our business strategy is underpinned by our aspiration to be the region's premier law practice. We aim to achieve this by striving to match the world's best practices and by continuously improving the way in which we work, through investment in process optimistic training and technology. We strive to create a work environment that primes our people to meet client's legal and commercial needs by offering practical, timely and incisive advice.

Each team member at Corpus is drilled to merge our mission and our business approach when interpreting and acting on client instructions by adhering to the following three principal guidelines:

- The service provision must match global standard;
- The service must be commercially intelligent to address the impact of any existing policy, law on the commercial objectives of the client; and
- The advice must be kept current.

## Our Departments and Practice Groups

Corpus Legal Practitioners' core competences lie in the provision of professional legal services to the corporate world and this is made feasible through the expertise offered in our 4 operating structured departments, namely:

- Banking & Finance - headed by Sharon Sakuwaha, Partner
- Corporate Advisory headed by Mabvuto Sakala, Partner in Charge and Jacqueline Cornhill Jhala, Head of Department
- Dispute Resolution - headed by Sydney Chisenga, Partner
- Real Estate & Construction - headed by Namakuzu Shandavu, Head of Department

In addition, we have seven specialised practice groups:

- Energy Mining & Infrastructure - headed by Charles Mkokweza, Senior Partner
- Technology, Media & Telecommunications - also headed by Sydney Chisenga, Partner
- Tax Law - also headed by Jacqueline Cornhill Jhala, Head of Department
- Competition Law - also headed by Sydney Chisenga, Partner
- Employment Law - headed by Mabvuto Sakala, Partner
- Intellectual Property - also headed by Namakuzu Shandavu, Head of Department
- Mergers & Acquisitions - also headed by Sharon Sakuwaha, Partner

The specialised practice groups enable our dedicated professionals acquire a unique and intimate understanding of the technical and commercial requirements of our clients and allows us to offer our clients specialised advice unrivalled by any law firm in Zambia.

## 运营方针

成为赞比亚顶尖律师事务所的目标是我们制定商业战略时的基石。我们努力达到世界最佳水平，通过投资积极态度培训和技术，不断完善我们的工作方式，以实现我们的目标。我们努力创造能够让律师们随时准备为客户提供实用、及时和敏锐法律意见的工作环境，以满足客户的法律和商业需求。

Corpus律师事务所的所有成员秉持着我们的使命和经营理念，在理解和完成客户交代的工作时坚持以下三个重要原则：

- 必须提供符合国际标准的服务；
- 提供的服务必须具有商业合理性，以解决任何现行政策及法律对客户商业目标的影响；
- 必须提供符合最新实际情况的意见。

## 业务部门及团队

Corpus的律师擅长为世界各地的公司提供专业的法律服务，并通过律师事务所四个结构化的部门实现：

- 银行及金融部门—由合伙人Sharon Sakuwaha带领
- 公司业务咨询部门—由主管合伙人Mabvuto Sakala及部门主管Jacqueline Cornhill Jhala带领
- 争议解决部门—由合伙人Sydney Chisenga带领
- 房地产及建筑工程部门—由部门主管Namakuzu Shandavu带领

此外，我们还拥有七个专业的业务团队：

- 能源、矿业及基础设施
- 技术、传媒及电信
- 税法
- 竞争法
- 劳动法
- 知识产权
- 收购兼并

专业的业务团队使我们的专业律师能够对客户的技术和商业要求有独特和深入的理解，为客户提供赞比亚其他律师事务所无法比拟的专业法律意见。

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万商天勤律师事务所驻北京执行合伙人王霁虹认为，过去的12个月里，中国在这一领域有两项最值得关注的动向：(1) 国务院修改《资源税暂行条例》；(2) 国土资源部和国家能源局相继出台鼓励民间资本投资于国土资源和能源领域的意见。

去年9月，国务院宣布了修改《资源税暂行条例》的决定。王霁虹认为，计征办法是这次修改的重点。此次修改前，资源税统一按照“从量定额”方式计税（按照应纳税资源产品的销售数量乘以规定的单位税额）。而根据修改后的《资源税暂行条例》，原油及天然气的资源税改为“从价定率”的计税方式，即按照应纳税资源产品的销售收入乘以规定的税率（5%-10%）。

“计征方法的这一变化也正是资源税改革的核心内容。”王霁虹说，“通过提高资源类企业的生产成本，[ 这一调整 ] 促使这些企业减少粗放式开采、提高资源的利用率和回收率、增强企业节能减排的主观能动性。”

国土资源部发布的意见承诺将确保国土及资源行业的公平竞争，并鼓励民间资本参与矿产、石油及天然气资源的勘探和开发。国家能源局发布的意见则承诺，列入国家能源规划的项目均向民间资本开放（法律法规明确禁止的项目除外）。

“目前，中国民间资本充足，但是投资渠道单一。”王霁虹说。由于常规能源、矿产和天然资源领域的开发开采项目需要大量资金投入，鼓励民间资本进入这一领域“既能有效解决这些领域资金不足的突出问题，又能有效利用民间资本”，她说。

外国投资者在中国一直以来都面对着投资范围和投资模式的限制，而现在他们的面前又多了一道关卡。国务院于去年二月颁布了《关于建立外国投资者并购境内企业安全审查制度的通知》，商务部颁布的安全审查实施规定也已于去年9月1日正式实施。“该通知将重要能源和资源列入安全审查范围之内。”通力律师事务所驻上海合伙人俞卫锋说，“外国投资者的此类并购项目可能会因无法通过安全审查而被迫终止。”

如果外国投资者拟投资项目涉及重要资源和能源，“[ 他们 ] 可考虑在尽职调查过程中与商务部安全审查官员沟通，以降低交易的不确定性。”俞卫锋说。

不过在矿产、能源和天然资源领域，中国对外资的态度似乎也有软化的一面。于今年1月30日生效的《外商投资产业指导目录(2011年修订)》将非常规天然气资源的勘探、开发列入了“鼓励类”。“虽然在这一产业领域的外商投资仅限于合资、合作形式，但这显示了中国政府支持那些需要使用先进或复杂开发技术的领域，例如页岩气。”美国众达律师事务所在其六月份发布的一篇文章中指出。

页岩气同样也引起了能源律师兼北京大学资源、能源与环境法研究中心研究员张利宾的关注。经国务院批准，页岩气于去年年底被国土资源部列入“独立矿种”。“现在页岩气作为独立矿种列出来，它的意义就是被置于三大国有石油公司的垄断之外。”张利宾说，“[ 政府 ] 有意以此作为突破口进行市场化改革的实验，让更多的公司参与进来。”

张利宾认为这一举措是积极的，但是“改革最后是否能变成现实，还有很多困难”。从基础设施方面来看，由于页岩气需要通过管道运输，但管道仍然由中石油一家垄断。“这可能会妨碍 [ 其他公司 ] 使用管道运送其生产的页岩气。”张利宾说，“真正的改革不能只改一小块，在能源领域需要从整个体系上做一些事。” ■

*外国投资者的此类并购项目可能会因无法通过安全审查而被迫终止*

*M&A transactions made by foreign investors... may have to be abandoned because they cannot get through the security review*

**俞卫锋**
**David Yu**
通力律师事务所
合伙人
上海
Partner
Llinks Law Offices
Shanghai

says David Yu, a partner at Llinks Law Offices in Shanghai. “M&A transactions made by foreign investors in those sectors may have to be abandoned because they cannot get through the security review.”

If foreign investors plan to engage in projects involving important energies and resources, “when performing due diligence, they can think about talking with security review officials of MOFCOM over relevant issues, so that they may reduce the uncertainty of the deal”, says Yu.

China’s attitude towards foreign investment in this sector seems to be easing. The 2011 *Foreign Investment Guidance Catalogue*, which took effect on 30 January this year, puts the exploration and exploitation of unconventional natural gas resources in the “encouraged” category. “Although investment in this sector is limited to joint ventures, it shows that the government is favouring those industries that utilise new or sophisticated exploitation technology, such as shale gas,” Jones Day says in a June article.

Shale gas has also caught the attention of Zhang Libin, an energy lawyer and a research fellow at the Resources, Energy and Environmental Law Institute of Peking University. With the approval of the State Council, shale gas was listed as “an independent mineral resource” by the MLR towards the end of last year. “To put shale gas as an independent mineral resource implies that it’s out of the monopolistic control of the three largest state-owned oil enterprises,” says Zhang. “[The government] has the intention to make it a breakthrough point for the experiment of the market-oriented reform to allow more companies to enter this sector.”

Zhang thinks this is a positive move, but “there are still many difficulties to overcome before the reform can be eventually realised”. In terms of infrastructure, for example, because pipeline is necessary for the transmission of the shale gas, while the pipeline is still monopolised by the state oil company CNPC, “this is likely to prevent [other companies] from accessing to the pipelines for transportation of the gas produced,” says Zhang. “True reform is not about reforming a small portion – something needs to be done to the whole system in the energy sector,” he says. ■

# 海外并购 步步为营

# Steady as she goes through tough challenges of overseas acquisitions

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海外并购是一项庞大的系统工程，牵涉到复杂的交易结构设计、细致的调查与谈判、境内与境外政府审批等诸多方面，需要收购方、财务顾问、律师事务所、会计师事务所、行业顾问等各方的密切配合，中国律师在其中的作用非常关键。

## 交易结构设计

为最大限度地减少并购涉及的税负、简化审批手续，收购方要与财务顾问、律师、会计师、税务师共同研究，设计出最佳的交易结构。这就需要对各国的审批流程与期限、国与国之间的税收优惠政策、国际会计准则等进行全面分析与权衡。根据我们的经验，跨国并购中，收购方通常会在海外设立多层子公司架构，以最末端的海外子公司作为收购主体。

## 尽职调查

**数据室（Data Room）** 跨国并购中的尽职调查常通过 Data Room 进行。转让方会将尽职调查涉及的资料置于一个 Data Room 中，收购方参与尽职调查的顾问根据授权进入该 Data Room 进行浏览、分析。Data Room 一般有开放期限，而且非经转让方特别授权，其中的资料无法下载或打印。

由于通过 Data Room 获得的信息是间接且未必全面的，因而在最终签订买卖合同时，收购方可以要求转让方对 Data Room 中信息的真实性、完整性作出保证。

**问与答（Q&A）** 研究数据库中的资料时，收购方顾问应将需要转让方解释的问题以清单方式提交于转让方。转让方应及时回答清单中的问题，或向 Data Room 添加进一步资料供收购方审核。

**尽职调查报告** 尽职调查报告通常分正文与附件两部分，正文包括定义、背景、总体概要及报告，对目标公司历史沿革、股权状况、资产、负债、保险、员工、合同、争议与诉讼、知识产权、环境保护、竞争与反垄断、税收等事项出具审查意见；附件包括调查范围与程序、假设与限制、未回答问题等。其中，员工与环境保护事宜在国外法律环境下至关重要，但最易被中国公司忽视。

对于尽职调查中发现的问题，收购方顾问通常会以清单方式列出事项（Issue）、存在的风险（Implication）及解决建议（Action），同时会特别列出关键事项（Key Issues）与关键发现（Key Findings）供收购方决策时参考。

## 融资

从事海外并购通常需要向金融机构融资。标准的贷款合同分正文与附件两部分，正文在此不再赘述，附件通常包括提款先决条件和后续条件、提款请求格式、还款计划等内容。

银行为了确保贷款安全，会要求借款人提供担保。实践中，除由第三方提供连带责任保证担保外，银行有时还会要求将收购方的多个海外子公司及目标公司股权全部质押给银行。需要注意的是，国内企业的海外子公司向他人提供担保，会涉及到海外资产监管、对外担保及外债审批事宜，需要履行必要的国内审批程序。

## 反垄断

**国内反垄断审查** 根据中国《反垄断法》（2008 年），如商务部认定并购后的企业在市场上（主要是国内市场）形成垄断，则可禁止该并购。

目前，由于《反垄断法》的执行力度不足，中国企业的境内或海外并购行为并未因垄断事由受到国内反垄断主管机构的有力规制。自《反垄断法》于 2008 年 8 月开始实施至 2011 年 8 月，商务部受理的经营者集中类反垄断案共计 332 件。已审结的案件中，无条件通过的占绝大多数，禁止的仅一件（可口可乐收购汇源果汁案），附条件批准的七件。

**国外反垄断审查** 中国企业海外并购面临的真正挑战来自国外政府的反垄断审查。我们近期参与的海外并购项目先后面临了欧盟、巴西、俄罗斯等国家或地区的反垄断审查，其中以欧盟的审查最为关键。欧盟各国的反垄断审查工作由欧盟委员会负责，在面对中国国有企业（尤其是央企）的并购申请时，欧盟委员会考虑的问题主要包括：中国的国有企业是否具有独立性？中国国资委是否涉嫌操纵国有企业从事海外并购？如怀疑成立，欧盟委员会将把中国某一行业的全体国有企业视为一个收购方，从而判定垄断成立。

因而，中国企业在进行海外并购时，应高度重视海外的反垄断审查程序。收购方的顾问，尤其是国内律师与反垄断审查所在国律师应密切配合，充分阐述中国国企具有独立性、国企的海外收购行为不受中国政府机构或组织的指挥或控制。国内律师的法律意见通常包括以下四方面：（1）国资委与国有企业的关系；（2）国有企业与其他国家机关的关系；（3）国务院国资委与地方国资委的关系；（4）中央企业与其他企业的竞争关系。■

An overseas acquisition is a huge systemic project, involving complex transaction structure design, detailed investigation and negotiations, domestic and foreign government approvals, and requiring close co-operation among the acquirer, financial advisers, law firms, accounting firms, industry consultants, etc. The role of Chinese lawyers is extremely important.

## Transaction design

With a view to minimising the tax burden involved in an acquisition and simplifying the approval procedures, the acquirer needs to research and design the best transaction structure with its financial advisers, lawyers, accountants and tax accountants. This requires a comprehensive analysis and consideration of the national approval procedures and timelines, tax break policies between countries, international accounting standards, etc. In our experience, in a cross-border acquisition the acquirer will generally establish a multi-level subsidiary structure overseas, with the overseas subsidiary on the lowest rung acting as the acquiring entity.

## Due diligence

**Data room.** Due diligence in a cross-border acquisition is generally effected via a data room. The transferor will place the information pertinent for the due diligence in a data room, with the acquirer's advisers participating in the due diligence entering the data room as authorised to access and analyse the information. Generally, there will be a time limit within which the data room is open, and information cannot be downloaded or printed without special authorisation from the transferor.

The acquirer may, at the time of final execution of the sale and purchase contract, require the transferor to give warranties as to the truthfulness and completeness of the information in the data room.

**Q&A.** When studying the information in the data base, the acquirer's advisers should submit to the transferor a list of the issues requiring explanation. The transferor should promptly reply to the questions on the list or place additional information in the data room for review by the acquirer.

**Due diligence report.** A due diligence report is commonly divided into two parts: the main text, including the definitions, background, general overview and report, and a review opinion on such matters as the historical evolution of the target company, its equity situation, assets, liabilities, insurance, personnel, contracts, disputes and litigation, intellectual property, environmental protection, competition and anti-monopoly issues, and taxation; and the annexes, including the scope of the due diligence and the procedure, the assumptions and limitations, and unanswered questions. Of this information, personnel and environmental protection matters are of extreme importance in foreign legal environments, but are easily overlooked by Chinese companies.

The acquirer's advisers will frequently make a list of the problems found in the course of due diligence, their implications and the actions to be taken, and will additionally list in particular the key issues and key findings for reference by the acquirer in its decision making.

## Financing

Overseas acquisitions frequently require financing from a financial institution. Standard loan contracts are divided into two parts – the main text and the annexes. The main text needs no further explanation, but the annexes will normally include the conditions precedent for drawdowns and conditions subsequent, the format of drawdown requests, and the repayment schedule.

A bank will require the borrower to provide security for a loan. In practice, unless a third party provides security in the form of a joint and several guarantee, a bank will sometimes additionally require the pledging in its favour of all of the equity of multiple overseas subsidiaries of the acquirer, and that of the target company. When an overseas subsidiary of a domestic Chinese enterprise provides security for a third party, such matters as overseas asset oversight, approval of security provided for foreign parties and foreign debt will be involved, and will require the carrying out of necessary domestic approval procedures.

## Anti-monopoly

**Domestic anti-monopoly reviews.** Pursuant to China's Anti-Monopoly Law (2008), if the Ministry of Commerce (MOFCOM) deems that an enterprise would constitute a monopoly in the market (principally the domestic market) after an acquisition, it can prohibit the acquisition.

Nevertheless, intensity has been lacking in enforcement of the Anti-Monopoly Law to date. From the implementation of the law in August 2008 to August 2011, MOFCOM accepted 332 anti-monopoly cases involving business operator concentrations. Of the cases concluded, the great majority passed unconditionally, only one has been prohibited (the acquisition of Huiyuan Juice by Coca-Cola), and seven cases have been approved conditionally.

**Foreign anti-monopoly reviews.** The real challenge facing overseas acquisitions by Chinese enterprises is posed by the anti-monopoly reviews of foreign governments. The overseas acquisition projects that we have been involved in recently faced anti-monopoly reviews by such countries and regions as the EU, Brazil and Russia, with the EU review being most important. Responsibility for the anti-monopoly review work of the countries of the EU rests with the European Commission under certain conditions. Faced with an acquisition application by a Chinese state-owned enterprise (SOE), particularly one under the central government, the major questions that the European Commission will consider include: is the SOE independent?; and is there suspicion that the State-owned Assets Supervision and Administration Commission (SASAC) of the State Council is manipulating the SOE into carrying out the overseas acquisition? If the doubts are found to be substantiated, the European Commission will deem all the SOEs in a certain industry in China to be one acquirer and rule that a monopoly is constituted.

Accordingly, when effecting overseas acquisitions, Chinese enterprises should attach a great deal of weight to foreign anti-monopoly review procedures. The acquirer's advisers, in particular its domestic lawyers and the lawyers in the place where the anti-monopoly review is conducted, should co-operate closely and fully explain that the SOE is independent, and that the overseas acquisition by the SOE is not being orchestrated or controlled by Chinese authorities or organisations. The legal opinions of domestic lawyers will normally cover the following four aspects: (1) the relationship between SASAC and SOEs; (2) the relationship between SOEs and other state authorities; (3) the relationship between SASAC and local state-owned assets commissions; and (4) the competitive relationship between enterprises under the central government and other enterprises. ■

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# “地铁加物业”模式与用地障碍

# 'Subway plus property' model highlights land use obstacles

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中国现行的土地制度，尤其是《物权法》对于商业等经营性用地出让方式的规定，使得“地铁加物业”模式的BOT特许经营项目在实施过程中遭遇诸多法律障碍。

**土地出让方式** 香港地铁成功的“地铁+物业”模式的核心即在以BOT方式推进的特许经营地铁项目。

政府将地铁线路的特许经营权授予地铁公司的同时，为补贴地铁项目的经营亏损，将地铁沿线的建设用地一并出让给项目投资人，从而以地铁的人流带动沿线地产的升值，以沿线的地产带动地铁的客流，使地铁经营和地产开发相互裨益，均获得最佳投资效益。

## 经营用地

然而，港铁的成功模式欲嫁接至内地却有难度，主要障碍就是中国的经营性用地招拍挂制度。

中国《物权法》第137条第2款规定，工业、商业、旅游、娱乐和商品住宅等经营性用地以及同一土地有两个以上意向用地者的，应当采取招标、拍卖等公开竞价的方式出让。该条从法律的层面确定了土地招拍挂政策。

若政府不采取上述方式出让经营性用地，将违反《物权法》，导致土地出让合同被认定为无效的法律风险。

> “有些城市地铁开发过程中的土地补偿受到……法律障碍的困扰”

**土地收益补偿地铁的限制** 实践中，地铁公司可通过两种方式以沿线地产的开发收益弥补地铁本身的运营亏损：(一) 公司取得土地使用权并缴纳全部出让金（或经政府允许延期缴纳），土地开发收益及增值归公司；(二) 公司只缴纳部分出让金取得土地使用权，其余出让金作为对公司的补偿免于缴纳，土地开发收益及增值亦归公司。

笔者认为，在目前的招拍挂土地制度下，采取第一种方式无须政府的特别批准，没有法律障碍；第二种方式则涉及土地出让金的返还，目前缺乏明确的法律依据，存在一定的法律障碍。有些城市地铁开发过程中的土地补偿就受到上述法律障碍的困扰。

**沿线土地开发进度及结合建设** 沿线物业的开发与地铁的建设在开发进度、结合建设、费用承担等多方面均有密切联系，但是目前在开发进度和结合建设方面并无相关规定。因此，地铁项目涉及相关情况时，尤其是在物业由独立开发商开发或地铁项目公司与其他开发商合作开发的情况下，应在相关特许经营协议以及合作开发协议中做出相应约定，避免开发过程中发生纠纷影响进度。在法律法规缺位的情况下，建议结合建设各方在律师协助下，充分利用“法无明文禁止不违法”的原则，通过合同明确界定双方的权利义务。

## 批复要求

上述结合建设方式同时也给立项和规划部门提出了新课题。建议有关部门在批复方案和意见中对轨道交通项目沿线的地产开发项目提出相应的配合要求。如天津地铁自2号线地铁开始，沿线土地使用权改由政府招拍挂，但摘牌人的地产开发方案在获得政府主管部门审批的同时，还要获得天津地铁集团的认可，从而使地铁和沿线地产的结合建设可以落到实处。

在现有土地法律制度下，关于地铁项目公司如何合法取得土地使用权，笔者提出如下建议以供讨论。

**捆绑招标方式** 捆绑招标方式是将两个或多个项目捆绑起来进行招标。这一做法在体育场馆等特许经营项目中已有实践。笔者认为，在某些地铁项目中也可适当尝试。由于这种操作模式下的招标文件要求投标人具备雄厚融资实力、地铁项目的建设运营经验等诸多条件，因此一般的地产开发商将望而却步，从而使真正适格的地铁投资商在中标赢得特许经营权的同时，又以招拍挂的方式获得地铁沿线项目的土地使用权。但必须指出的是，这种模式一般只适用于招标时地铁沿线地块已经确定的情形，不适用于分批分期给予土地补偿且地块不确定的情况。

**以土地作为出资的模式** 有些地方政府提出了以土地作为出资，和中标投资商共同组成项目公司共同开发地铁项目的模式。在此模式下，政府将拟授予地铁公司开发的土地使用权评估作价，以资产出资方式投入地铁公司。土地使用权出资作为政府与投资商合作的条件，不需经招拍挂，确保项目公司合法取得土地使用权。采用该种操作方式须考虑的因素很多，比如政府股权的持有方式、股权的价格、出资比例、收益分配等，须与地铁公司的整个架构设计相衔接。此外，鉴于土地使用权价值的不断波动，采取该方式还须考虑到土地的未来增值因素。■

The current China land system, especially the Property Law provisions on the grant method for land of a business nature, means the "subway plus property" mode of build-operate-transfer (BOT) concession projects may encounter many legal obstacles.

**Land grant method:** The core of the successful "subway plus property" model implemented by the Hong Kong MTR is the promotion of concession rail projects by way of BOT. While granting the MTR Corporation rail line concessions, the government additionally grants the project investor construction land along the subway lines to subsidise the business deficits of the subway projects. In this way, the passenger numbers of the subway increase the value of the property along the lines, and the property along the lines drives the subway's passenger numbers, allowing the subway operations and property development to complement each other and both derive the best investment returns.

## Land of a business nature

However, China's system requires the granting of land of a business nature by the invitation of bids, auction or listing on a land exchange. The second paragraph of article 137 of the Property Law specifies that land of a business nature – such as for industry, commerce, tourism, amusement and commercially developed residential premises, as well as land the use of which two or more parties have indicated an interest in – shall be granted by way of an open competition, such as by an invitation of bids or auction. If a government fails to adopt one of the above mentioned methods to grant land of a business nature, it will be in violation of the Property Law, giving rise to the legal risk that the grant contract will be found to be invalid.

**Restriction on compensating subways with returns on land:** in practice, a subway company can make up subway operating deficits with returns on the development of property along a line in one of two ways: (1) the company secures the land use rights and pays the entirety of the grant fee (or pays it later with government permission), with the returns on the development of the land and the increase in value vesting in the company; or (2) the company pays only a part of the grant fee to secure the land use rights and it is exempted from paying the remainder as compensation and, as before, the returns on the development of the land and the increase in value vesting in the company.

This author believes that, under the current land grant system, adoption of the first method does not require special government approval and is not subject to legal impediments, whereas the second method involves the refunding of land grant fees for which, at present, there is an absence of a clear legal basis. The land compensation in the course of subway development in certain cities has been troubled by the above-mentioned legal obstacles.

**Land development schedule and combined construction:** In the development of property along a line, and subway construction, there is a close connection in aspects such as development schedule, combined construction and bearing of expenses, but at present there are no regulations in this area. Accordingly, when a subway project involves a relevant circumstance – particularly when property is developed by an independent developer, or the subway project company and another developer co-operate in its development – pertinent provisions should be written into the relevant concession agreement or co-operative development agreement to avoid the occurrence of any disputes in the course of development that would affect the schedule. In the absence of laws and regulations, it is recommended that the parties make full use of the principle of "where there is no law expressly forbidding something, it is not a violation of the law", and clearly spell out each other's rights and obligations contractually.

## Approval plan requirements

Project approval and planning authorities are recommended to put forward in their approval plans and opinions the corresponding co-operation requirements for the development of real property along lines that accompany rail transport projects. For example, from the start of the No. 2 line of the Tianjin subway, the use rights to the land along the line shifted to government invitation of bids, auctioning and listing on a land exchange, however the winner's land development plan required the approval of the Tianjin Subway Group, in addition to that of the competent government authorities, thereby ensuring that the combined construction of the subway and the real property along the line was realised.

**Bundled bid invitation method:** This method involves the invitation of bids for two or more projects that are bundled together. There are examples of this practice in concession projects for sports fields and gymnasiums. This author believes this could also be tried in certain subway projects. As the bid invitation documents under this operational model require the bidder to have strong financing capabilities, experience in the construction and operation of subway projects, only truly qualified subway investors will be allowed to both secure the concession with a winning bid and the land use rights for the project for developing land along the line secured by way of an invitation of bids, auction or listing on a land exchange. However, this model is generally only applicable where the lots along the subway line have already been determined at the time of the invitation of bids, and is not applicable in circumstances where the land compensation is given in batches, and at different periods, or where the lots have not been determined.

> *"Land compensation in ... subway development ... has been troubled by legal obstacles"*

**Model where land is used as a capital contribution:** Certain local governments have proposed a model where land would be used as a capital contribution and the government would establish the project company jointly with the winning investor to jointly develop the subway project. Under this model, the government has the relevant land use rights and injects them into the subway company as a capital contribution made in the form of assets. Land use rights in this form do not require an invitation of bids, auction or listing on a land exchange, and ensure that the project company lawfully secures the land use rights. There are many factors to be considered when adopting this operational method, for example the way the government's equity is to be held, the value of the equity, the capital contribution percentages, the distribution of returns, etc., and they need to dovetail with the subway company's overall structural design. Consideration must also be given to the factors that will contribute to the future increase in the value of the land when adopting this method. ■

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# QFII 境内证券投资管理新趋势

# New regulations for QFIIs foreshadow trend of increased foreign investment

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中国证监会于 7 月 27 日正式发布并实施了《关于实施 < 合格境外机构投资者境内证券投资管理办法 > 有关问题的规定》，取代了于 2006 年 9 月 1 日实施的《关于实施 < 合格境外机构投资者境内证券投资管理办法 > 有关问题的通知》。至此，实施了近六年的《通知》宣告失效。

《规定》的正式出台，意味着在国际收支形势好转的同时，证监会将加快审批合格境外机构投资者 (QFII) 的速度。根据证监会网站提供的数据，截至今年 7 月，证监会一共审批通过了 173 家 QFII。可以预见会有越来越多的境外机构投资者加入到申请 QFII 牌照的队伍中。

通过分析《规定》和《通知》，我们发现中国证监会在对 QFII 境内证券投资的管理方面显现出新的发展趋势。

例如，为了加快 QFII 资格的审批速度，证监会简化了之前的资格申请程序，主要表现在：

- 不再要求提交申请者的公司章程和与托管人签订的托管协议草案，取而代之的是提交对托管人的授权委托书；
- 不再要求提供最近 3 年经审计的财务报表，只需提交最近 1 年经审计的财务报表即可。

## 降低准入门槛

《规定》大幅度降低了 QFII 资格申请人的资产规模和经营时间。

就资产管理机构、保险公司和其他机构投资者 (包括养老基金、慈善基金会、捐赠基金、信托公司、政府投资管理公司等) 而言，经营资产管理业务或成立时间的要求从“5 年以上”降为“2 年以上”，最近一个会计年度管理的证券资产要求从“不少于 50 亿美元”降为“不少于 5 亿美元”。

就证券公司而言，经营证券业务的时间要求从“30 年以上”降为“5 年以上”，“实收资本不少于 10 亿美元”降为“净资产不少于 5 亿美元”，最近一个会计年度管理的证券资产要求从“不少于 100 亿美元”降为“不少于 50 亿美元”。

就商业银行而言，取消了要求总资产世界排名的限制，而是以“经营银行业务 10 年以上，一级资本不少于 3 亿美元”取代之，且不以管理的证券资产不少于 100 亿美元为要求，取而代之的是“最近仅一个会计年度管理的证券资产不少于 50 亿美元”。

## 灵活处理账户开立

根据《通知》规定，申请者应当委托托管人向中国证券登记结算有限责任公司 (中国结算公司) 申请开立多个证券账户，且要求这些证券账户与国家外汇管理局批准的人民币特殊账户一一对应。根据该要求，QFII 只能开立一个资金账户对应沪、深证券交易市场各一个证券账户。

《规定》虽然同样要求申请者委托托管人向中国结算公司申请开立证券账户，但不再强制要求开立的账户应当与人民币特殊账户一一对应，从而使 QFII 的一个资金账户可以分别在不同券商处开立账户进行交易，进一步便利其投资。

此外，《规定》简化了证券账户资金分类，仅分为：为自有资金开立的证券账户和为客户资金开立的证券账户。

《规定》取消了《通知》中规定的名义持有人账户。相应地，《通知》中关于“合格投资者作为名义持有人，可以根据其名下境外投资者的持股进行部分或分拆投票”的规定也被删除。

《规定》还新增了允许 QFII 委托境内基金公司为其提供特定客户资产管理服务的规定，并且要求境内基金公司开立相应账户，投资范围应符合 QFII 的有关规定。

## 放宽限制

根据之前的《通知》，QFII 可以投资于在证券交易所挂牌交易的股票、债券、权证和证券投资基金以及证监会允许的其他金融工具。

而《规定》在此基础上增加了两类可投资的品种：在银行间债券市场交易的固定收益产品和股指期货，从而扩大了允许 QFII 投资的范围。

此外，《规定》还放宽了对 QFII 持有上市公司 A 股股份的比例限制，所有境外投资者对单个上市公司 A 股的持股比例总和，由之前的“不超过该上市公司股份总数的 20%”放宽为“不超过该上市公司股份总数的 30%”。

## 电子化管理

根据《规定》，申请者在向证监会报送申请文件之前，应当通过证监会网站以电子方式先提交申请材料。

并且，《规定》正式以部门规章的形式规定，在 QFII 发生变更托管人、变更法定代表人、变更控股股东、调整注册资本、涉及重大诉讼及其他重大事件、在境外受到重大处罚或证监会和国家外汇局规定的其他情形时，应当及时通过证监会网站以电子报送方式备案。■

On 27 July, the China Securities Regulatory Commission (CSRC) formally issued and implemented the *Regulations on Issues Relevant to the Implementation of the Measures for the Administration of Investment in Domestic Securities by Qualified Foreign Institutional Investors*, which supercedes the *Notice on Issues Relevant to the Implementation of the Measures for the Administration of Investment in Domestic Securities by Qualified Foreign Institutional Investors* implemented on 1 September 2006. The notice, which was in force for close to six years, thus became invalid.

The formal issuance of the regulations signifies that with the improvement in the international balance of payments, the CSRC will speed up its examination and approval of qualified foreign institutional investors (QFIIs). According to its website, as at July this year the CSRC had approved a total of 173 QFIIs. It can be anticipated that an increasing number of foreign institutional investors will join the ranks applying for QFII licences.

Through an analysis of the regulations and the notice, we have found that the CSRC is showing a new development trend in the administration of the investment by QFIIs in domestic securities. For example, in order to speed up the approval of QFII qualifications, the CSRC has simplified the previous application procedure. An application: (1) no longer requires submission of the applicant's articles of association or a draft of the custody agreement to be executed with the custodian, instead requiring the submission of the power of attorney issued to the custodian; and (2) no longer requires the provision of audited financial statements for the most recent three years, instead requiring the submission of the audited financial statements for the past year.

## Lower entry threshold

The regulations greatly reduce the size of the assets and the period of operation required of applicants for QFII status. For asset management firms, insurance companies and other institutional investors – including pension funds, charity foundations, endowment funds, trust companies, government investment management companies, etc. – the requirement in respect of the time that they have been engaged in asset management business, or established, has been reduced from "at least five years" to "at least two years", and the requirement in respect of the securities assets under their management in the most recent fiscal year has been reduced from "not less than US$5 billion" to "not less than US$500 million".

For securities companies, the requirement in respect of the time engaged in securities business has been reduced from "at least 30 years" to "at least five years", while "paid-in capital of not less than US$1 billion" has been reduced to "net assets of not less than US$500 million", and the requirement in respect of the securities assets under management in the most recent fiscal year has been reduced from "not less than US$10 billion" to "not less than US$5 billion".

For commercial banks, the requirement that their total assets ranks them near the top in the world has been eliminated and replaced by "has been engaging in banking business for at least 10 years and has Tier 1 capital of not less than US$300 million". A commercial bank is no longer required to have not less than US$10 billion in securities assets under their management, instead needing "securities assets of not less than US$5 billion under its management in the most recent fiscal year".

## Flexible account opening

Under the notice, an applicant was required to entrust its custodian to apply to Securities Depository and Clearing Corporation Limited (SDCCL) to open securities accounts, and such accounts were required to correspond on a one-to-one basis with special renminbi accounts approved by the State Administration of Foreign Exchange. QFIIs could only open one fund account corresponding to one securities account with each of the Shanghai and Shenzhen stock exchanges. Although the regulations similarly require an applicant to entrust its custodian to apply to SDCCL to open securities accounts, they no longer make it mandatory for such accounts to correspond on a one-to-one basis with special renminbi accounts, thereby making it possible for a QFII to open fund accounts with different securities houses to carry on trading.

The regulations also simplify the fund categories for securities accounts, dividing them only into securities accounts opened for a QFII's own funds and securities accounts opened for customers' funds. The regulations eliminate the nominal holder accounts specified in the notice. Correspondingly, the provision of the notice specifying that "A Qualified Investor, as a nominal holder, may, based on the shareholdings of the overseas investors under its name, cast part of the votes or divide its votes" has also been deleted.

The regulations have also added a provision that permits a QFII to engage a domestic fund company to provide it with specific customer asset management services, and require such domestic fund company to open the corresponding account. The scope of investment is required to comply with relevant QFII regulations.

## Easing restrictions

Pursuant to the notice, QFIIs could invest in stocks, bonds, warrants and securities investment funds listed and traded on a stock exchange, as well as other financial instruments permitted by the CSRC. The regulations also allow QFIIs to invest in fixed-return products traded on the interbank bond market and stock index futures.

The regulations also ease the restriction on the percentage of A shares of listed companies that QFIIs can hold, easing the total holding of the A shares of a listed company by all foreign investors from the previous "not exceeding 20% of the total shares of said listed company" to "not exceeding 30% of the total shares of said listed company".

## Electronic administration

An applicant is required under the regulations to first submit its application materials electronically via the CSRC's website before submitting the application documents to the CSRC. The regulations formally provide, in the form of ministerial-level rules and regulations, that when a change occurs in the custodian, legal representative or controlling shareholder of a QFII, an adjustment is made to its registered capital, it is involved in a material legal action or other material event, is subjected to major penalties abroad or another circumstance specified by the CSRC or State Administration of Foreign Exchange arises, it is required to promptly carry out recordal of the development electronically via the CSRC's website. ■

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# 涉外定牌加工的商标侵权认定

# Parrying the risks of trademark infringements from OEM business

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涉外定牌加工俗称“贴牌加工”，是指中国境内企业接受境外商标权人的委托，为委托方加工贴附特定商标的产品、将加工产品全部交付给境外委托人并收取加工费的贸易形式。

涉外定牌加工贸易在中国由来已久，广东、福建、浙江等沿海地区有数以万计的企业从事该类加工贸易。与此同时，该类贸易导致的与商标有关的法律风险已成为不容回避的现实问题。

如果国外委托人未在中国获得所贴附商标的商标权，而该商标与中国商标权人在相同或类似商品上已注册的商标相同或近似，则工商、海关行政部门很有可能根据中国商标权人的举报或依职权对定牌加工作出侵权认定，进而作出停止侵权、没收侵权产品、罚款等行政处罚。

除此之外，定牌加工还有可能面临国内商标权人的侵权诉讼指控。近年来发生了多起类似案件。

《商标法》等法律对于涉外定牌加工中的“贴牌行为”是否构成对中国商标权的侵犯并无明确规定。而在中国的行政、司法实践中，对此也存在着不同的观点。

工商、海关在处理涉外定牌加工商标权纠纷中，态度比较一致，认为定牌加工属于使用商标的环节；加之《商标法》在构成侵权方面不考虑使用人是否主观故意及是否造成实际损害，因此工商、海关只要发现擅自使用商标，就认定为商标侵权。

> “与[涉外定牌加工贸易]有关的法律风险已成为不容回避的现实问题”

## 司法部门观点

**观点一：认为构成商标侵权。**依据是《商标法》第52条及商标的“地域性”特点。因为商标权具有地域性，所以如果委托人在中国不享有商标权利，而加工所涉及的标识及商品与中国注册商标构成相同或类似，则根据《商标法》第52条第1款的规定，未经商标注册人许可，在同一种商品或类似商品上使用与注册商标相同或近似的商标，构成侵犯注册商标专用权。

## 深圳中院裁决

在2001年的美国耐克公司与西班牙CIDESPORT公司等的商标侵权案件中，深圳中院认为，商标权具有地域性，在中国法院拥有司法权的范围内，原告取得的NIKE商标的专有使用权，被告未经原告许可不得以任何方式侵害原告的注册商标专用权。近年来依然有不少体现这一观点的生效判决。

**观点二：不构成商标侵权。**主要理由是涉外定牌加工产品不在中国销售，不可能导致相关公众产生混淆和误认；而最高人民法院在相关规定中已明确将“容易使相关公众产生误认”作为认定侵犯商标权的必要条件。

商标的基本功能是区分、识别商品或服务的来源，侵犯商标权的本质就是对商标识别功能的破坏，使得相关公众对商品来源产生混淆、误认。而涉外定牌加工产品并不在中国市场销售，因此不存在混淆和误认的可能性。所以，“贴牌行为”不构成商标侵权。

目前也有体现这一观点的生效判决。例如：2009年上海高级人民法院审理的上海申达音箱电子有限公司与玖丽得电子（上海）有限公司侵犯商标权上诉案中，上海市高级法院就认为：本案涉案商品所贴商标只在中国境外具有商品来源的识别意义，并不在国内市场发挥识别商品来源的功能，因此不构成商标侵权。

虽然中国目前对于涉外定牌加工的侵权认定存在不同观点，但行政及司法实践更倾向于认定构成侵权。因此我们建议，在中国委托了定牌加工业务的国外委托人，可根据自身情况，在不同阶段采用不同的商标策略，最大限度地维护自身利益。

首先，国外委托人应重视在中国取得商标权利，就定牌加工所贴附商标可通过注册、转让、许可等途径取得相应的权利；如果该商标已被他人恶意抢注或模仿注册，则国外委托人可通过商标异议、撤销等程序清除该商标障碍。

## 采取预防措施

其次，实践中，定牌加工产品可能会因各种原因流入中国市场，如果贴附商标与中国商标权人在相同或类似商品上已注册的商标相同或近似，则会被认定构成侵权，而不论该流入行为是否基于国外委托人的意愿。对此，国外委托人应事先采取预防措施，在加工合同中明确加工方不得有任何销售行为以及加工方的违约责任。

当然，在中国商标权人提起的侵权指控中，国外委托人可根据实际情况，积极主张定牌加工中的“贴牌行为”并非商标法意义上的使用行为、未造成相关公众混淆和误认等不构成侵权的抗辩理由；以争取到对己有利的判决。■

Original equipment manufacturing (OEM) is a form of trade in which an enterprise in China accepts a commission from an offshore trademark rights holder to process a product and affixes a specific trademark to it for the commissioning party, then delivers the products to the offshore commissioning party and receives a processing fee. There has been a long history of OEM in China, and in conjunction with this, trademark-related legal risks arising in connection with this trade have become an unavoidable practical problem.

If the foreign commissioning party has not secured the trademark rights in China to the trademark that it is affixing, and that trademark is identical or similar to a trademark registered on identical or similar goods by a PRC trademark rights holder, there is a strong possibility that the Administration for Industry and Commerce (AIC) or customs will render a finding of infringement in respect of the OEM, pursuant to a filing by the PRC trademark rights holder or *ex officio*, and impose such penalties as ordering a halt to the infringement, confiscation of infringing products, a fine, etc. There is also a possibility that the OEM will face an infringement charge by the domestic trademark rights holder. Numerous such cases have arisen in recent years.

Laws, such as the Trademark Law, are silent on whether the "act of affixing a brand" in OEM constitutes infringement of China's trademark rights, and different perspectives on this issue exist in PRC administrative and judicial practice.

Both the AIC and customs hold that OEM falls within the area of trademark use. In addition, with respect to what constitutes an infringement, the Trademark Law neither considers whether the user subjectively acted deliberately nor whether it caused actual harm. Accordingly, once the AIC or customs discovers that a trademark has been used without authorisation, it will determine the same to be trademark infringement.

## Judicial perspectives

**Perspective 1: trademark infringement is constituted.** The basis for this is article 52 of the Trademark Law and the territorial nature of trademarks. As trademark rights are territorial in nature, if the commissioning party does not enjoy the rights in a trademark in the PRC, and the mark and goods involved in the processing are identical or similar to a trademark registered in the PRC then, according to the first paragraph of article 52, the use of a trademark identical or similar to a registered trademark on identical or similar goods without the permission of the trademark registrant constitutes infringement of the exclusive right to use a registered trademark.

## Shenzhen findings

In the 2001 *Nike v Cidesport et al.* trademark infringement case, the Shenzhen Intermediate Court held that trademark rights are territorial in nature and that, within the jurisdiction of PRC courts, the plaintiff had secured the exclusive right to use the trademark "Nike", and without the permission of the plaintiff, the defendant could not infringe the plaintiff's exclusive right to use its registered trademark in any manner. Numerous effective judgments in recent years have continued to adopt this perspective.

**Perspective 2: trademark infringement not constituted.** The basic function of a trademark is the distinguishing and identification of the source of a product or service, and the essence of trademark infringement is the undermining of the identification function of trademarks, causing the public to confuse or misidentify the source of the goods. As OEM products are not sold in China, there is no possibility of confusion or misidentification. Therefore, the "act of affixing a brand" does not constitute trademark infringement. The Supreme People's Court has expressly provided in relevant regulations that "likely to cause misidentification by the relevant public" is one of the necessary conditions for a determination of trademark infringement.

At present, there are also effective judgments that manifest this perspective. For example, in the *Shanghai Shenda Sound Electronic v Jiulide Electronics (Shanghai)* trademark infringement appeal case heard by the Shanghai Higher People's Court, the court held that the trademark affixed on the goods involved in the case only served to identify the source of the goods outside China and did not fulfil that function inside China, so trademark infringement was not constituted.

Although different perspectives on the determination of infringement in connection with OEM in China exist, administrative and judicial practice tends toward

> *"Legal risks arising in connection with [OEM] have become an unavoidable problem"*

determinations that infringement is constituted. Accordingly, we recommend that foreign parties that commission OEM business in China adopt different trademark strategies at different stages, based on their own circumstances, to safeguard their interests to the greatest extent possible.

First, foreign commissioning parties should put an emphasis on securing trademark rights in China, securing the appropriate rights to the trademarks affixed in the course of OEM through such means as registration, transfer, licensing, etc. If such a trademark has been pre-emptively registered in bad faith or imitatively registered by another, the foreign commissioning party can eliminate such a trademark obstacle through a trademark opposition or cancellation procedure.

## Precautionary measures

Second, in practice OEM products may flow into the Chinese market for a variety of reasons, and if an affixed trademark is identical or similar to a trademark registered on identical or similar goods by a Chinese trademark registrant, it will be found to be infringing, regardless of whether the appearance of the OEM product in the market was based on the intention of the foreign commissioning party. In this regard, a foreign commissioning party should take advance precautionary measures by expressly prohibiting, in the processing contract, the processor from selling any of the product, and specifying its liability for breach of contract.

When a Chinese trademark rights holder brings an accusation of infringement, the foreign commissioning party can defend that the "act of affixing a brand" in the course of OEM is not an act of use as contemplated in the Trademark Law, that confusion among or misidentification by the relevant public was not caused, etc., in hopes of obtaining a favourable judgment. ■

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# 汽车服务业如何合理使用商标?

# What issues drive infringements of trademark in automotive industry?

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M公司是一家全球性的多元化科技企业，在国内汽车维修和汽车美容装潢两个前沿市场中占有一席之地，提供专业的汽车售后类产品及服务。

为在中国获得全面的知识产权保护，经国家工商总局商标局核准，M 公司已在第 17 类用于汽车、船及类似商品上的塑料防护贴面，汽车玻璃粘性密封胶取得“M”商品商标，即常用的汽车各类“贴膜”，以及在第 37 类车辆修理服务注册取得“M”服务商标。

由于其汽车贴膜在汽车美容领域享有很高的声誉，一些未经 M 公司授权的汽车美容店不仅在提供服务时选择使用 M 产品；同时为吸引客户，提供服务时直接在店招上突出使用 M 标识，因而有可能侵犯了 M 公司对“M”商品及服务商标的专用权。本文将探讨一些在汽车服务业中对认定是否侵犯商标专用权有实际意义的问题。

## 能否使用?

在提供汽车服务的过程中能否使用他人商品、服务商标呢？根据《商标法》的规定，商标权人对其注册商标所指定使用的商品 / 服务享有商标专用权。因此，就“M”服务商标而言，只有 M 公司及其特许的汽车美容店才有权在提供汽车美容服务时使用该注册商标。未经授权的汽车美容店若使用“M”服务商标即构成侵犯注册商标专用权的行为。就“M”商品商标而言，即使非 M 授权的汽车美容店，也有销售 M 公司商品的权利。那么在销售 M 公司商品的过程中，自然也有合理使用“M”商品商标的权利。

> “即使非 M 授权的汽车美容店，也有销售 M 公司商品的权利”

## 怎样正当使用?

《商标法实施条例》第 49 条规定：“注册商标中含有的本商品的通用名称、图形、型号，或者直接表示商品的质量、主要原料、功能、用途、重量、数量及其他特点，或者含有地名，注册商标专用权人无权禁止他人正当使用。”

2006 年北京市高级人民法院发布的《关于审理商标纠纷案件若干问题的解答》中，第 26 条和 27 条对“正当使用”有更明确的阐述。

第 26 条规定，构成正当使用商标标识的行为应当具备以下要件：(1) 使用出于善意；(2) 不是作为自己商品的商标使用；(3) 使用只是为了说明或者描述自己的商品。

第 27 条规定，满足该《解答》第 26 条规定要件的下列行为，属于正当使用商标标识的行为：…… (3) 在销售商品时，为说明来源、指示用途等在必要范围内使用他人注册商标标识的；(4) 规范使用与他人注册商标相同或者近似的自己的企业名称及其字号的；……

## 需要考虑的因素

鉴于“M”商标并不含有该商品的通用名称、图形、型号，也没有直接表示商品的质量、主要原料、功能、用途、重量、数量及其他特点，或者含有地名，因此非 M 公司授权的汽车美容店在销售、使用 M 牌汽车贴膜的过程中，“合理正当”的使用只能是：为说明汽车贴膜是 M 公司产品以及在服务的叙述性描述中使用该商标。此外，该使用还有一个前提：提供销售的 M 牌产品为真。

笔者认为，为了消费者利益，应允许商家为了说明本店经营商品及提供服务的范围而直接使用叙述性的文字，如“本店销售 M 牌产品”、“本店贴膜服务使用 M 牌贴膜”。如此使用，目的是为了对消费者明示，不会产生混淆和误导结果，且不会侵害商标权人的利益。

商品与服务类似是指商品和服务之间存在特定联系，容易使相关公众发生混淆，误认商品和服务的来源。诸如将“M”突出使用的店招，或将店名命名为“M 汽车美容装饰品牌店”，会使相关公众对该店提供的服务来源产生误解，以为其与 M 公司有某种特定联系（比如，误认为是 M 公司的特许汽车美容店），从而在客观上起到利用他人注册商标的市场声誉推销自己的服务的作用。这显然侵犯了“M”商品商标的注册商标专用权，损害了 M 公司的利益。

国家工商总局商标局和商标评审委员会制定的《商标审查及审理标准》规定，“商品与服务类似，是指商品和服务之间存在特定联系，容易使相关公众混淆”；“判定商品与服务是否类似，应当综合考虑商品与服务在用途、用户、通常效用、销售渠道、销售习惯等方面一致性。”

作为汽车美容服务项目中使用到的商品，汽车贴膜和该服务无疑在用途、用户、通常效用及销售习惯等多方面是一致的。在这种情况下，服务提供者也并非绝对不可以使用他人商品商标，只要在使用中，做到避免相关公众会因为服务供应者对某一商品商标的使用，而误认为该商品与该服务之间存在特定联系。■

M Company is a global, diversified technology enterprise that occupies a significant position in the markets of motor vehicle maintenance, repair and automotive care in China, and provides professional automotive after sales products and services.

M Company, following approval from the Trademark Office of the State Administration for Industry and Commerce (SAIC), secured the goods mark "M" for protective plastic overlays for motor vehicles, vessels and similar goods, and adhesive sealants for automotive glass in Class 17, namely the various types of "adhesive films" frequently used on motor vehicles, as well as registering and securing the service mark "M" for vehicle repair services in Class 37.

Certain car care shops that have not been authorised by M Company not only have opted to use M products when providing their services, but also have prominently used M representations directly on their shop signs when providing the services, thereby potentially infringing M Company's exclusive right to use the M goods and service marks. This column explores significant issues with respect to determining infringements of the exclusive right to use a trademark in the automotive service industry.

## Using someone else's mark

Can another's goods or service mark be used in the course of providing automotive services? Pursuant to the Trademark Law, a trademark rights holder enjoys exclusive trademark use rights to the goods or services for which its registered trademark is designated. Accordingly, with respect to the service mark "M", only M Company and the automotive care shops licensed by it have the right to use the registered trademark when providing automotive care services. The use of the service mark "M" by a car care shop without authorisation constitutes infringement of the exclusive right to use a registered trademark. With respect to the goods mark "M", even though an automotive care shop has not been authorised by M, it nonetheless has the right to sell M Company goods. Accordingly, it naturally has the right to reasonably use the goods mark "M" in selling M Company goods.

## What is legitimate use?

Article 49 of the *Implementing Regulations for the Trademark Law* specifies that, "The holder of the exclusive right to use a registered trademark has no right to prohibit others from making legitimate use of the generic name, device or model number of the goods in question, or direct expressions of the quality, principal raw materials, functions, purpose, weight, quantity or other characteristics of the goods, or place names, which are included in the registered trademark".

Reference can also be made to the *Answers to Several Questions Concerning the Trial of Trademark Dispute Cases* issued by the Beijing Municipal Higher People's Court in 2006.

Article 26 specifies that an act that constitutes legitimate use of a representation of a trademark is required to fulfil the following conditions: (1) use is made in good faith; (2) it is not used as a trademark for one's own goods; and (3) the use is solely for the purpose of explaining or describing one's goods.

Article 27 specifies that the acts set forth below that satisfy the conditions specified in Article 26 constitute legitimate acts of use of a trademark representation: "(3) when selling goods, using a representation of another's registered trademark within the necessary scope to explain the source, indicate the purpose, etc.; (4) compliant use of one's enterprise name and the trade name therein that is identical or similar to another's registered trademark."

## Elements to consider

Given that the trademark "M" does not contain the generic name, device or model number of the goods in question, does not directly express the quality, principal raw materials, functions, purpose, weight, quantity or other characteristics of the goods, and does not contain a place name, "reasonable and legitimate" use, in the course of the sale and use of M brand automotive adhesive film by automotive care shops not authorised by M Company may only be for the purpose of explaining that the automotive adhesive film is M Company's product, and the trademark may only be used in the narrative description of their services. Such use is predicated on the M brand products that they provide and sell being genuine.

This author believes that, for the benefit of consumers, a business should be permitted to directly use descriptive language that explains the scope of the goods it deals in and the services it provides, e.g. "we sell M brand products" and "we use M brand adhesive film in our adhesive film services". The purpose is to make things clear to consumers and would not result in confusion or misidentification, or harm the interests of the trademark rights holder.

> *"Even though a shop has not been authorised by M ... it has the right to sell M Company goods"*

The *Standards for Trademark Examinations and Hearings* formulated by the Trademark Office of the SAIC and the Trademark Review and Adjudication Board specify that, "Similarity of a product and a service means that there exists a specific connection between a product and a service such that it is likely to cause confusion among the relevant public"; "when determining whether a product and a service are similar, the uniformity of such aspects of the product and the service as their purpose, users, normal effect, sales channels, sales practice, etc., shall be comprehensively considered".

In our example, the prominent use of "M" on a shop sign or naming a shop "M Automotive Care and Decoration Brand Store" would cause the relevant public to mistake the source of the services provided by the shop and mistakenly believe that there is a specific connection between the shop and M Company (e.g. mistakenly believing that the shop is an automotive care shop licensed by M Company), thereby objectively having the effect of utilising the market reputation of another's registered trademark to promote one's own services. This clearly infringes the exclusive right to use the registered goods mark "M", harming M Company's interests.

As a product used in automotive care services, there is no doubt that there is uniformity in several such aspects of the automotive adhesive film and the services as their purpose, users, normal effect, sales practice, etc. In such a circumstance, a service provider is not absolutely prohibited from using another's goods mark as long as, in the course of use, it is able to ensure that the relevant public will not, as a result of its use of a certain goods mark, mistakenly believe that there exists a specific connection between such goods and the service. ■

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# 外资为何退出煤层气开发?

# Why are foreign investors pulling out of coalbed methane development?

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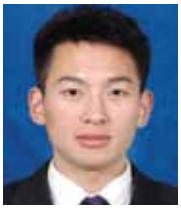

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煤层气(煤矿瓦斯)是优质清洁能源。从1997年到2011年《外商投资产业指导目录》的四次修订中,煤层气的勘查、开发一直列在鼓励类。尽管如此,外商投资煤层气所遭遇的困扰却从未间断过。据报道,截至目前已经有菲利普斯、格瑞克、壳牌、BP、力拓、必和必拓、康菲等能源巨头部分或全部退出了国内煤层气领域的合作,而正在实施的项目也进退维谷。究其原因,有以下几个方面:

## 矿业权重叠

自1995年起,随着对煤炭资源的需求不断增长,国内原有煤炭企业占有的资源区块总量不断增加。加之新增煤炭矿业权区块的设置在速度上远远超过煤层气探矿权的设置,煤层气合作企业不得不在原有煤炭矿业权区块上另行设置煤层气矿业权。据报道,仅根据2007年的统计,全国98个煤层气探矿权中有86个涉及矿权重叠,这86个煤层气探矿权与1406个煤炭矿业权重叠。

煤层气的勘查与开发非但不能给煤炭企业带来利益,反而妨碍了他们对煤炭的开采。煤炭企业为了自身的效率,非但不愿意与煤层气企业配合,反而会以各种方式阻挠煤层气企业开展工作。

## 逼煤争气

2006年《国务院办公厅关于加快煤层气(煤矿瓦斯)抽采利用的若干意见》确定"必须坚持先抽后采"的方针,要求:"煤层中吨煤瓦斯含量高于规定标准且具备地面开发条件的,必须统一编制煤层气和煤炭开发利用方案,并优先选择地面煤层气抽采";同时还"限制企业直接向大气中排放煤层气"。

这些合理规定,迫使原煤炭采矿权人不得不重新审视其区块中的煤层气利益,并力争获得话语权。毕竟,如果煤层气矿业权人消极开展工作,也必然妨碍煤炭企业采煤。

## 专营权放宽

中联煤层气有限责任公司(中联煤)曾是中国唯一一家享有煤层气对外合作专营权的煤层气企业。2007年9月,修订后的《对外合作开采陆上石油资源条例》将专营权赋予中联煤和"国务院指定的其他公司"。同年10月,《商务部、国家发展和改革委员会、国土资源部关于进一步扩大煤层气开采对外合作有关事项的通知》(商资函[2007]第94号)指出,商务部、发改委同相关部门在中联煤之外"再选择若干家企业……与外国企业开展煤层气合作开采的试点工作"。2010年12月,商务部、发改委、国土资源部等发出通知,同意中石油、中石化、河南省煤层气开发利用有限公司与外国企业合作开采煤层气。

商资函[2007]第94号还规定:"……在煤炭开采过程中伴随的煤层气地面抽采和井下回收,煤炭采矿权人可开展对外合作,不列入煤层气对外合作专营的管理范围……"。自此,煤炭企业也获得了与外资直接合作开发煤矿瓦斯的权力。这项规定,使已经在其煤炭采矿权上重叠设置煤层气矿业权的煤炭采矿权人有了吃亏的感觉,并成为其自行开发煤层气和驱赶原有煤层气合作方的依据。

依法设定的煤层气矿业权应当受到保护,然而实践中却并非如此。地方企业的侵占和村民的干扰,往往受到地方政府和某些司法部门的庇护。由于勘查作业的复杂性,如果没有中央政府、地方政府、土地所有权人、相关矿业权人的支持与合作,没有公正的司法部门提供强有力的保护,外商投资者的工作根本无法开展。

另外,政策方面的支持也不足。配套输气管道的建设和使用缺乏强制性规定,税费的优惠和补贴不足,这些也削弱了煤层气领域外商投资者的积极性。

## 建议

由于以上不利因素,外商投资者正退出中国煤层气勘查和开发领域。过去10多年中,外商投资者为国内煤层气的勘查和开发贡献了宝贵技术和巨额资金。如果因为矿业权设置不合理、非法侵占、政府和司法保护不力而使外商退出,将严重损害中国政府和企业的信用,打击外商投资的积极性,阻碍相关勘查与开采技术的进口,最终损害煤层气行业的长远发展。因此我们建议:

对于重点盆地,煤炭采矿权与煤层气开采权的审批应当统一到国土资源部,鼓励煤炭企业与煤层气企业采取联合经营的模式。另外,在煤层气储量较低的区域,给予煤炭企业优先开采煤层气的权利,缓解某些区块开采搁置问题。

输送煤层气的大型骨干管道可以由国家统一规划、建设,避免管网垄断现象。短距离输送管道积极鼓励民企参与,增强竞争意识。

煤层气勘探开发投资大,成本回收周期长。为促进该产业的发展,国家应出台更多的优惠政策来鼓励煤层气的开发利用,尤其在前期投入方面。■

Coalbed methane is a high-quality, clean energy source. Throughout the four revisions of the *Catalogue for Guiding Foreign Investment in Industry*, between 1997 and 2011, coalbed methane exploration and development have consistently been in the "encouraged" category. Nevertheless, according to reports, to date energy giants such as Greka, Shell, BP, Rio Tinto, BHP Billiton and ConocoPhillips have partially or entirely pulled out of their co-operation ventures in the coalbed methane sector in China, or are hesitating in projects currently being implemented, for reasons explained below.

## Overlapping mining rights

Since 1995, the total number of resource blocks held by domestic coal enterprises has continually risen. The speed of establishing new coal mining concession blocks has also far exceeded that of coalbed methane concessions, leaving coalbed methane co-operation enterprises with little recourse other than to establish coalbed methane concessions in existing coal mining concession blocks. According to reports, based on 2007 statistics, of the 98 coalbed methane exploration concessions nationwide, 86 involve overlapping concessions, and these 86 coalbed methane exploration concessions overlap with 1,406 coal mining concessions.

Coalbed methane exploration and development does not benefit coal enterprises, but impedes their extraction of coal. For their own efficiency, coal enterprises are not willing to co-operate with coalbed methane enterprises, and will use various means to impede coalbed methane enterprises in their work.

## Delaying coal to secure gas

The 2006 *Several Opinions of the General Office of the State Council on Accelerating the Extraction and Utilisation of Coalbed Methane* specifies the policy that "extraction first, mining after must be adhered to" and requires that "where the gas volume per tonne of coal in a coalbed exceeds the specified standard, and where the conditions for surface development are satisfied, a unified coalbed methane and coal development and utilisation plan must be prepared, and surface extraction of the coalbed methane shall be selected preferentially". Additionally, they specify that "enterprises are restricted from directly discharging coalbed methane into the atmosphere".

These reasonable provisions have compelled coal mining rights holders to take a new look at the coalbed methane benefits in their blocks and strive for the right to be heard. After all, if a coalbed methane mining rights holder unhurriedly carries out its work, it will necessarily impede the coal enterprise in its coal extraction.

## Easing monopoly rights

China United Coalbed Methane Corporation (CUCBM) was formerly the only coalbed methane enterprise with monopoly rights to co-operate with foreign parties in the exploitation of coalbed methane. In September 2007, the amended *Regulations on the Exploitation of Onshore Petroleum Resources in Co-operation with Foreign Parties* granted monopoly rights to CUCBM and "other companies designated by the State Council". In October 2007, the *Notice of the Ministry of Commerce, the National Development and Reform Commission and the Ministry of Land and Resources on Matters Relevant to Further Expanding Co-operation with Foreign Parties in the Exploitation of Coalbed Methane* (document No. 94) specified that the Ministry of Commerce (MOFCOM) and National Development and Reform Commission (NDRC), together with relevant authorities will "select several enterprises ... for pilot projects to exploit coalbed methane in co-operation with foreign enterprises" in addition to CUCBM. In December 2010, MOFCOM, the NDRC and the Ministry of Land and Resources issued a notice consenting to CNPC, Sinopec and Henan Provincial Coal Seam Gas Development and Utilisation exploiting coalbed methane in co-operation with foreign enterprises. Document No. 94 further specifies: "With respect to the surface extraction and down-hole recovery of associated coalbed methane in the course of coal exploitation, the coal mining rights holder may co-operate with foreign parties and the same shall not fall within the scope of administration of the monopolies on co-operation with foreign parties in the exploitation of coalbed methane." This provision has caused coal mining rights holders with overlapping coalbed methane mining rights to feel that they have gotten the short end of the stick, and has become the basis for their developing coalbed methane on their own and driving out their coalbed gas development partners.

In practice, coalbed methane mining concessions established under law are not protected. Encroachment by local enterprises and interference by villagers are frequently shielded by the local government and certain judicial authorities. If a foreign investor does not have the support and co-operation of the central government, the local government, the landowner, the relevant mining rights holders and the powerful protection of an impartial judicial authority, its work is impossible to carry out. Furthermore, there is a lack of mandatory regulations governing the construction and use of gas pipelines, and insufficient tax breaks and subsidies.

## Recommendations

Due to these unfavourable factors, foreign investors are pulling out of the sector. In the past 10 or so years, foreign investors have contributed valuable technology and funds to coalbed methane exploration and development in China. If they pull out, this will seriously harm the credibility of the central government and enterprises, deflate enthusiasm from foreign investors, hamper the importation of relevant technologies, and ultimately harm the long-term development of the coalbed methane industry. We recommend:

- With respect to key basins, the examination and approval of coal mining rights and coalbed methane exploitation rights should be unified under the Ministry of Land and Resources, and coal enterprises and coalbed methane enterprises should be encouraged to adopt the joint operation model. In areas with modest coalbed methane reserves, the coal enterprises should be given the preemptive right to exploit the coalbed methane to resolve the problem of exploitation being put on hold.
- Large backbone pipelines for the transport of coalbed methane could be centrally planned and constructed by the state to avoid network monopolisation. For short-distance transport pipelines, the participation of private enterprises should be actively encouraged to bring in competition.
- In order to promote the industry, the state should issue more preferential policies to encourage the development and utilisation of coalbed methane, particularly with regard to initial outlays. ■

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# 政府改革原住民土地所有权

# Can native title reforms deliver on Australian government's vision?

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司法部长于今年 6 月 6 日发布了深入改革《原住民土地权法》的公告。公告主要提议包括：(1) 对“磋商权”中“善意”一词的标准进行立法；(2) 澄清原住民土地所有权协议中款项支付涉及的税务规定；(3) 修订法律，确保公园和保护区先前的土地权消失问题得到处理；(4) 扩大原住民土地使用协议 (ILUA) 各项条款的适用范围。

## “善意”及税务议题

公告提议扩大倡议者及州政府在磋商权下的义务，而政府将如何操作尚有待观察。不过，制订明确的标准必为倡议者和州政府带来难题。

公告并没有表示政府将提议早前由澳大利亚绿党提出的较为激进的法律修正案（《原住民土地权修正案 (改革) 2012 年 (1 号)》）。绿党法案提议：逆转原住民土地权的举证责任；规定一方在尚未证明已进行善意磋商之前，不能向原住民土地权仲裁庭申请关于采矿租赁的裁决。

而如何处理原住民土地使用协议 (ILUA) 中支付款项的纳税问题是非常重要的，这个问题一直相当复杂。这一问题随着金额的增长而愈加重要，潜在税务目前影响的金额高达数亿美元。

咨询阶段还有一些重要问题有待解决：实务问题，如改革会对现有的公司和信托结构产生哪些影响；向个人支付的款项 (有时数额庞大) 是否享受减税优惠的问题。

## ILUA 与先前消失的土地权

《原住民土地权法》第 47A 和 B 款规定了几种尽管原住民土地权先前已消失，但该权利消失可被忽视的情况 (基于在皇家土地上的居住行为和原住民持有的牧场租赁权)。公告指出将把这些例外情况延伸至公园以及保护区。

绿党法案出现困难，是因为由州政府和原住民土地权群体之间订立的协议没有提及任何第三方。政府的提案将如何发挥作用则有待进一步观察。此外，公告并未清楚说明对 ILUA 将有哪些提议，只提到目前在灵活性以及法律议题方面存在一些问题。

根据我们的经验，ILUA 协商中的障碍并非灵活性或《原住民土地权法》所规定的议题。真正的障碍是，当州政府要求事先参提交 ILUA 以进行下一步行动前，《原住民土地权法》没有对协商过程制定规范。但从法律角度看，没有制定规范不具任何错误，因为 ILUA 完全是自愿签订的。

## 更快解决原住民土地权

最近的预算变动将调解争议的责任从原住民土地权仲裁庭转至联邦法院，这是政府针对如何判定索赔要求进行的最新一项改革，已有许多令人满意的判定。绝大多数的索赔诉求关联方，特别是倡议者乐于见到能为他们带来确切、稳当利益的景象。这就是一项妥善制定且依据适当举证标准的原住民土地权判定制度所能达成的。

但政府愿景并未说明联邦和州政府目前造成众多判定延误的情况，这些情况包括 (i) 无原住民土地权的区域 - 解决这些区域的所有权通常最费时，制度没有说明在解决这些区域中的土地所有权问题后，能继续提出进一步索赔的可能性；(ii) 如何清晰界定原住民土地权所有人 - 所有权人会员资格不清晰、不透明会为原住民间的争议判定带来永久风险。

## 政府愿景

司法部长指出了未来 20 年内政府对原住民土地权制度的两大政策愿景：“未来 20 年，我们的目标是解决大量的原住民土地权索赔要求，达成该目标有赖于工党制定的改革措施，这些改革旨在加快解决原住民土地权索赔案件；未来 20 年，我们也希望看到原住民土地权制度为澳大利亚原住民和非原住民带来经济和社会机遇。”

而拟议改革是否有助于实现这一愿景取决于详细的拟议修改内容。如能切实执行，部分拟议的改革也许能改进现行制度。不过，不论细节为何，拟议的改革本身是否能对实现政府愿景起到重要作用还有待验证。但如果认为在《原住民土地权法》下提出的改革能达成司法部长提及的一系列改变，这就是将原住民土地权误解成了财产权。

原住民土地权为原住民提供一些重要权利，特别是对那些能与大型采矿企业和工业倡议者进行合同谈判的原住民群体。不过事实上，该群体只占原住民土地权持有者的一小部分，甚至是占澳洲原住民和托雷斯海峡岛民的更小一部分。某些由倡议者谈判的原住民土地权协议，对原住民是否具有与大型采矿企业和工业倡议者进行合同谈判的能力已经做出分类和辨识。政府不能忽视为所有原住民提供机会的需求。■

本所名称已于2012年3月1日起由“澳大利亚博雷道盛律师事务所”变更为“澳大利亚亚司特律师事务所”。本代表处正在申请将名称从“澳大利亚博雷道盛律师事务所驻上海代表处”变更为“澳大利亚亚司特律师事务所上海代表处”。

The firm has changed its name from Blake Dawson to Ashurst Australia with effect on and from 1 March 2012. The Shanghai Representative Office is applying for a change of name from Blake Dawson Shanghai Representative Office to Ashurst Australia Shanghai Representative Office.

On 6 June this year, the Australian attorney-general announced plans for further reform to the Native Title Act. Key proposals in the announcement are: (i) legislating "good faith" criteria in the "right to negotiate" process; (ii) clarifying the tax treatment of payments from native title agreements; (iii) introducing legislative change to enable prior extinguishment to be overlooked in parks and reserves; and (iv) expanding the scope of the indigenous land use agreement (ILUA) provisions.

## Good faith and tax

The announcement suggests an expansion of the obligations of proponents and the Australian states under the right to negotiate. It remains to be seen how the government intends to do this. However, setting out explicit criteria will inevitably provide more prescription and raise the hurdle for proponents and the states.

The announcement does not suggest the government is proposing some of the more radical amendments that the earlier Greens Bill – (the Native Title Amendment (Reform) Bill (No. 1) *2012* – advocated. The proposal of the Australian Greens (a political party) included reversing the onus of proof in relation to the existence of native title and providing that a party may not apply to the National Native Title Tribunal for a determination that a mining lease should be granted until that party has first demonstrated that good faith negotiations have taken place.

In addition, the announcement about clarifying the tax treatment of payments from native title agreements is potentially very significant. The complexities around the taxation treatment of these payments has posed significant difficulties to date. The issue is becoming increasingly important as the quantum of benefits grows and the potential taxation consequences now affect hundreds of millions of dollars.

There will be significant issues that need to be resolved in the consultation process. This will include practical issues like how the reforms will impact existing corporate and trust structures, and whether the tax breaks will apply to the sometimes very substantial payments made to individuals for personal benefit.

## Prior extinguishment and ILUAs

Sections 47A and B of the Native Title Act currently provide for circumstances in which prior extinguishment of native title can be overlooked, based on occupation of Crown land and Aboriginal ownership of pastoral leases. The announcement flags extending these exceptions to parks and reserves, and potentially further.

A difficulty with the previous Greens proposals arose because the arrangements operated through a bilateral agreement between the relevant state and native title group, without reference to any third party rights. It remains to be seen how the government proposal will work.

In addition, the announcement does not clearly explain what is proposed in relation to ILUAs. It suggests there are currently problems with flexibility and topics.

In our experience, the real impediment to negotiating ILUAs is not any limit on flexibility or subject matter imposed by the Native Title Act, but rather where the state is requiring an ILUA before a future act can be done, the Native Title Act does not provide a conclusion to the negotiation process. However, there is nothing inherently wrong with this from a legal perspective, as ILUAs are contracts that are entirely voluntary.

## Faster native title claims

The recent budgetary changes that shifted the responsibility for mediation of claims from the National Native Title Tribunal to the federal court are the latest in a series of reforms made by successive governments to the claim determination process. Many consent determinations have already been made. Most parties, particularly proponents, would prefer a landscape that delivers certainty and security for their interests. This is what a determination of native title, properly formulated and based on appropriate evidentiary hurdles, achieves.

Perhaps what is missing in the government's vision is a preparedness by the federal and state governments to address the circumstances that are contributing to delays in many determinations at the moment including: i) Areas where native title does not exist. It is often these areas that take the longest to resolve and until finally resolved, the system does not address the likelihood of the continued lodgment of further claims; and ii) How to clearly identify the holders of native title. A lack of clarity and transparency around membership can risk determinations entrenching intra-indigenous disputes on a permanent basis.

## Government's vision

The attorney-general identified two key planks in the government's vision for the native title system in another 20 years:

"Our aim in 20 years time is that the vast majority of native title claims will be settled, helped substantially by the reforms [the Labor Party] has instituted to deliver faster native title claims.

"In 20 years time, I also want to see a native title system that creates economic and social opportunities for Indigenous and non-Indigenous Australians alike."

Whether the reforms proposed will assist to achieve this vision will depend on the detail of the changes proposed. Properly implemented, some of them may represent improvements to the system. However, regardless of what the detail entails, it seems doubtful that the proposed reforms will of themselves substantially contribute to the delivery of the government's vision.

To think that any reforms under the umbrella of the Native Title Act by themselves can deliver the sort of change referred to by the attorney-general misconceives the nature of native title as a property right. Native title offers some Aboriginal people quite significant rights, particularly those that are able to negotiate agreements with large mining and industrial proponents.

However, the reality is that these groups represent a small portion of native title holders, and an even smaller portion of Aboriginal and Torres Strait Island people in Australia. Some native title agreements negotiated by proponents already recognise this dichotomy. Government must also not lose sight of the need to support the delivery of opportunities to all indigenous people. ■

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# 挪威并购法的经营者集中规定

# Norway's merger regulations can require a degree of concentration

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并购挪威企业应按照挪威相关的强制性法规进行，包括并购和竞争法规。挪威在外商投资方面并无统一的立法，但在部分行业，尤其是金融、传媒和能源行业，对特许经营权、所有权限制等则有专门规定。本专题共有两篇文章，本文着眼于最重要的并购和竞争法规，不会研究特定行业的具体规定。下一期我们将探讨商业转让中的职工权利问题。

**挪威并购与竞争法规概览**

| 实质性审查标准 | 罚款 | 备注 |
|---|---|---|
| 挪威竞争局必须干预会形成或加剧重大竞争限制的经营者集中。竞争局将调查经营者集中可能造成的单方面、协调性、纵向和集团性效果。如果当事人有记录，竞争局也会考虑集中可能带来的绩效利得，但并不要求证明绩效利得的好处会转移给消费者。 | 无论是违反禁止交易实施的规定（即交易自动暂停规则），还是违反挪威竞争局的最终干预决定，都可能导致最高可达相关企业全球营业额的 10% 的巨额罚款。 | 2012 年 2 月，有专家委员会出具报告，建议对挪威的并购管理规则进行多项修订。 |

## 并购和竞争法规

挪威并购管理法规主要为 2004 年 3 月 5 日起生效的《挪威竞争法》第 4 章及 2004 年 4 月 28 日起生效的《经营者集中申报条例》，主要执法机构是挪威竞争局。

《挪威竞争法》的并购管理规则适用于“经营者集中”的情况。经营者集中是指两家或两家以上独立的企业或其独立的部分相互合并，或者一家或多家企业的控制人直接或间接地长期取得一家或多家其他企业的全部或部分控制权。新设联营企业并长期行使一家自主经营的经济实体的全部职能，也构成经营者集中，因此受上述并购管理规则的管辖。

符合下列情况的经营者集中案例必须向挪威竞争局申报：

- 至少两家参与集中的企业在挪威境内的年营业额各超过 2000 万挪威克朗（337 万美元）；且
- 所有参与集中的企业在挪威境内的年营业额合计超过 5000 万挪威克朗。

一旦达到上述标准，经营者集中参与方就必须根据《挪威竞争法》向挪威竞争管理局申报该项集中。如果集中参与方的营业额达到《欧盟并购条例》（EUMR）规定的标准，挪威竞争监管部门就无权审查此项交易，该集中也无需在挪威申报。

合并交易的申报义务由合并各方共同承担。两家或两家以上企业取得一家或多家其他企业的共同控制权的，申报义务由所有收购方共同承担。一家企业取得一家或多家其他企业的控制权的，申报义务由收购方承担。申报无需手续费。

所有必须申报的经营者集中都适用交易自动暂停规则，但经过个案分析后，挪威竞争局已允许多项集中交易可以不受上述规则的约束。大部分得到豁免的案例中，收购对象都面临财务危机，且如果当事人不能在取得监管核准前就实施集中，收购对象的业务价值就可能大幅下降。交易自动暂停规定不适用于公开要约收购。

申报审查分为两阶段。第一阶段中，挪威竞争局用15个工作日审查一份标准申报。如果决定对交易进一步调查，则竞争局将要求申报方提交一份“全面申报”，从而启动审查的第二阶段。如果未被要求提交“全面申报”，则交易自动视为得到核准。大部分交易都能在 15 个工作日的审查第一阶段期满后通过，只有不到 5% 的经营者集中申报会进入审查第二阶段。

挪威竞争局有义务依法保护商业秘密和其他保密信息，但也必须在其网站上公布每项经营者集中申报的部分基本资料。在提交申报的同时，申报方还必须提交一份公开申报的建议，或者明确声明其视为商业秘密的信息。■

**挪威并购与竞争法规概览**

| 自愿或强制申报 | 申报门槛 / 申报截止期限 | 审查期限（第一阶段 / 第二阶段） |
|---|---|---|
| 相关企业营业额达到一定标准的，就必须申报经营者集中。具体为，所有参与集中的企业在挪威的年营业额合计达到 5000 万挪威克朗（843 万美元），且至少两家参与集中的企业在挪威境内的年营业额各超过2000万挪威克朗。外资之间的并购并无特殊规定。 | 申报无截止期限。只要经营者集中尚未实施，何时提交初始的标准申报完全由当事人决定。一旦当事人愿意公开经营者集中的计划，且满足内容要求，他们即可尽早提交申报。 | 挪威竞争局用 15 个工作日审查一份标准申报（即第一阶段），并决定是否要求申报方提交“全面申报”。收到“全面申报”后（标志着第二阶段启动），挪威竞争局须在 25 个工作日内决定是否干预此项集中；若决定干预，则须在之后的 45 个工作日内起草干预决定并说明理由。当事人可在 15 个工作日内对决定草案提出意见，而竞争局必须在之后的 15 个工作日内作出最终决定。从提交“全面申报”开始到竞争局作出最终决定，整个过程可长达 100 个工作日，且如果当事人提出补救方案，该过程还可延长 25 个工作日。 |

When acquiring or merging with a Norwegian business, certain mandatory Norwegian regulations apply, such as merger and competition regulations. There is no general legislation in Norway applicable to foreign investments. Within some sectors there is special legislation on concessions, limitations on ownership, etc., in particular within the finance, media and energy sectors. In the first of two articles on this topic, we look at some of the most relevant merger and competition regulations, without looking at specific legislation for individual sectors of business. Next month, we will explore employees' rights in connection with a transfer of business.

## The regulations

The relevant legislation for merger control in Norway is Chapter 4 of the Norwegian Competition Act of 5 March 2004 and the Regulation on Notification of Concentrations of 28 April 2004. The Norwegian Competition Authority (NCA) is the primary enforcer.

The merger control rules of the Norwegian Competition Act apply to "concentrations". A concentration is deemed to arise where two or more previously independent undertakings, or parts of undertakings, merge, or one or more persons already controlling one or more undertakings acquire direct or indirect control on a lasting basis of the whole or parts of one or more other undertakings. The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity constitutes a concentration, and is therefore subject to the merger control rules of the act.

**Norway – Overview of Merger Competition Regulations**

| Substantive test for clearance | Penalties | Remarks |
|---|---|---|
| The NCA shall intervene against concentrations that create or strengthen a significant restriction of competition. The NCA will investigate possible unilateral, co-ordinated, vertical and conglomerate effects of the concentration. Efficiency gains are taken into consideration if documented by the parties. There is no requirement to demonstrate that the efficiencies are passed on to consumers. | Infringement of the prohibition against implementation of the transaction (automatic suspension) may lead to significant fines. The same goes for infringement of a final decision of intervention. The NCA may issue a fine of up to 10% of the undertaking's global turnover. | In February 2012, an expert committee issued a report recommending a number of amendments to Norway's merger control rules. |

A concentration must be notified to the NCA if;

- At least two of the undertakings concerned have an annual turnover in Norway exceeding 20 million kroner (US$3.4 million); and
- The combined annual turnover in Norway of the undertakings concerned exceeds 50 million kroner.

The Competition Act contains a mandatory obligation to notify a concentration to the NCA, provided that the thresholds are met. If the turnover thresholds of the EU Merger Regulations are met, Norwegian competition authorities will not have the authority to review the merger and no notification is required in Norway.

In the case of mergers, the obligation to notify rests with the merging parties jointly. If two or more undertakings acquire joint control over one or more other undertakings, the obligation to notify rests with the acquiring undertakings jointly. If a single undertaking acquires control over one or more other undertakings, the obligation to notify rests with the acquiring undertaking. No filing fees are required.

An automatic standstill rule applies to all concentrations that are subject to notification to the NCA. The NCA has granted a number of exemptions from the standstill obligation on a case-by-case basis. Several cases concern acquisitions where the target has been in financial difficulties and the value of the target business could be significantly diminished if the parties could not begin implementation prior to the NCA's clearance. A specific regulation provides for an exemption for public takeover bids from the automatic standstill obligation.

The NCA has 15 working days to consider a standardised notification. This is often described as Phase I. If the NCA decides to investigate the transaction further, it will order the submission of a "complete notification", which brings the case to Phase II. If the NCA does not impose such an obligation, the transaction is automatically considered cleared. Most transactions are cleared in Phase I as a result of the expiry of the initial 15 working days deadline. Less than 5% of the notified concentrations proceed to Phase II.

The NCA is obliged by law to protect business secrets and other confidential information. The NCA is required to publish some basic information about every notification on its website. A proposal for a public version of the notification, or a clear statement of which information in the notification is regarded by the notifying party (or parties) as business secrets, must be submitted at the same time as a notification. ■

**Norway – Overview of Merger Competition Regulations**

| Voluntary or mandatory system | Notification trigger/ filing deadline | Clearance deadlines (Phase I/Phase II) |
|---|---|---|
| Mandatory notification of concentrations, where the undertakings concerned exceed certain turnover thresholds. No particular rules for foreign-to-foreign mergers. Combined threshold is 50 million kroner (US$8.7 million) annual turnover in Norway. Individual threshold is 20 million kroner annual turnover in Norway. | No deadline for filing. As long as the transaction is not implemented, it is entirely up to the parties when to submit the initial standardised notification. The notification can be submitted as early as desired by the parties, as long as the content requirements can be fulfilled, and as soon as the parties are ready to go public. | The NCA has 15 working days to review a standardised notification (Phase I), i.e. to order the submission of a "complete notification". After receipt of a "complete notification" (commencing Phase II), the NCA has 25 working days to give notice that intervention may take place and then an additional 45 working days to present a reasoned draft intervention decision. The parties have 15 working days to comment on the draft decision and the NCA then has another 15 working days to render its decision. This period of up to 100 working days from submission of the complete notification can be extended by 25 working days if the parties propose remedies. |

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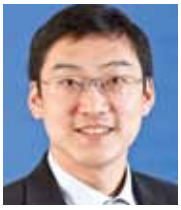
# 避免双重征税协定为企业减负
# Hong Kong strives to reduce double taxation burdens on enterprises



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香港采用地域来源原则征税，即只有源自香港的利润才须在香港纳税，本港居民从外地来源获得的收益，一般不需要在香港纳税。

不少实施全球征税原则的国家，对于在香港经营业务的国民都提供单方面的税务豁免，若他们源自香港的利润或收入已经在香港纳税，这些税款便可以抵免其本国税款。另一方面，对于应该在香港纳税的收益，香港特区政府也容许已经在其他国家纳税的收益根据周转原则减免赋税。

综上所述，在香港运作的商业机构基本上不需要担心双重征税的问题，但是在个别情况下，仍会有人遇到困难。税务上的不确定性始终是商界扩展业务的障碍。

## 避免双重征税协定的好处

香港投资推广署署长贾沛年(Simon Galpin)表示："对于投资者而言，避免双重征税协定清楚界定协议双方的征税权利。有了避免双重征税协定，投资者能比较准确地评估一切经济活动的潜在税务负担，有利于鼓励外地公司在香港发展业务，也有利于香港公司往外地发展。"

香港政府的一贯政策，是尽力建立本港与其他经济体之间的避免双重征税协定网络，以减低香港居民和缔约国居民需要负担双重征税的可能性。

## 国际标准

避免双重征税协定一般参考经济合作与发展组织(简称经合组织或OECD)的《避免双重课税协定范本》(Model Double Taxation Convention)而制定，明确指出立约的司法辖区之间如何分配征税权利，以及针对各类收入的税率宽免。

在签订避免双重征税协定时，香港采用国际普遍认可的交换资料原则，以强调香港对税务公开透明的原则，以及对国际社会努力提高税务透明度的支持。截至2012年4月30日，与香港签订避免双重征税协定/安排的24个贸易伙伴包括：中国内地、奥地利、比利时、文莱、捷克、法国、匈牙利、印度尼西亚、爱尔兰、日本、列支敦士登、卢森堡、荷兰、新西兰、西班牙、泰国、英国、越南、泽西岛*、科威特*、马来西亚*、马耳他*、葡萄牙*、瑞士*(*表示尚未生效)。商讨中的国家和地区包括：孟加拉、加拿大、芬兰、根西岛、印度、意大利、韩国、澳门、墨西哥、沙特阿拉伯、阿联酋。

## 明确掌握税务负担

香港与荷兰和卢森堡签订了避免双重征税协议，吸引到来自比荷卢的隆路律师事务所在香港开设办公室，负责该所的大中华区业务。(比荷卢即比利时、荷兰、卢森堡三国组成的经济联盟，简称Benelux。)

隆路律所合伙人高若兰(Carola van den Bruinhorst)表示："对于本公司的客户而言，避免双重征税协定让他们能够更明确地掌握本身的税务负担，对他们制定投资策略和重大决策十分有利。"她还说："本事务所在比荷卢三国以外设有12所办公室……，并安排香港办事处负责大中华区业务。"

> *"[避免双重征税协定]有利于鼓励外地公司在香港发展业务"*

## 运输方式

香港与中国大陆签署的《关于对所得避免双重征税和防止偷漏税的安排》第八条明确规定了一方企业(即内地或香港企业)以船舶、飞机或陆运车辆经营海运、空运和陆运(不包括仅在另一方各地之间以船舶、飞机或陆运车辆经营的运输)所得的收入和利润，可在另一方豁免征税。收入和利润是指企业从事跨境海运、空运和陆运取得的收入和利润。在另一方提供跨境服务所取得的收入和利润，如通过设在该另一方的常设机构进行，则不会再从另一方获得豁免征税。该条也适用于参加合伙经营、联合经营或参加国际经营机构取得的收入和利润。

## 航空业面临的问题

由于航空公司的营运是国际性的，因此比其他行业面对更多的双重征税问题。由于商讨和签订全面性避免双重征税协定需要时间，香港政府与其他航空伙伴国往往在商讨签订双边航空协议(Air Services Agreement)时，都争取把避免航空公司收益被双重征税的条件加入协议中。

船运业方面，香港已修改法例，从1998年4月1日起实施船运收入互免征税，使船运企业能受惠于其他国家类似法例提供的税务宽免。另一方面，香港也积极与两类国家争取签订对船运收入的避免双重征税协定：(1)没有实施船运收入互免征税的国家；(2)设有相关法例，但希望以双边协议界定船运收入征税权利的国家。此外，尚有其他同时针对航空业和船运业的协议。■

Hong Kong has adopted the territorial source principle of taxation – that is, only profits that have a source in Hong Kong are taxable in Hong Kong. Profits sourced elsewhere are in general not subject to tax.

Several countries that implement the principle of levying tax on income earned worldwide offer unilateral tax exemptions to citizens who operate a business in Hong Kong, and if they have paid taxes on their profits or income sourced in Hong Kong, these taxes can be set off against their taxes payable in their home country. With respect to profit on which tax is payable in Hong Kong, the government of the Hong Kong Special Administrative Region (SAR) also allows, based on the turnover principle, tax reductions or exemptions for profits on which tax has been paid in another country.

In short, companies operating in Hong Kong basically need not worry about double taxation, although in certain circumstances some may run into trouble. Uncertainty in taxation is, and has always been, an obstacle to business expansion.

## Benefits of tax agreements

"For investors, double taxation agreements clearly define the taxation rights of the parties to the agreement," said Simon Galpin, director-general of investment promotion at Invest Hong Kong. "With a double taxation agreement, investors can better evaluate the potential tax burden for any economic activity and it is conducive to encouraging foreign companies to develop their business in Hong Kong – and it benefits Hong Kong companies that wish to develop abroad."

A consistent policy of the Hong Kong SAR government has been to develop a network of double taxation agreements with other economic jurisdictions so as to reduce the possibility of Hong Kong residents, and residents of contracting parties, having to bear a double tax burden.

## International standard

In general, double taxation agreements are formulated with reference to the Organisation for Economic Co-operation and Development's Model Double Taxation Convention on Income and on Capital, and clearly set out the allocation of taxing rights between the two jurisdictions, as well as the relief on tax rates on different types of income.

When executing double taxation agreements, Hong Kong adopts the internationally recognised data exchange principle, which also helps to emphasise Hong Kong principles of transparency in taxation, as well as the SAR's support for the international community's efforts in increasing transparency in taxation.

The 24 trading partners that have executed double taxation agreements and arrangements with Hong Kong, as at 30 April 30, are: mainland China, Austria, Belgium, Brunei, the Czech Republic, France, Hungary, Indonesia, Ireland, Japan, Liechtenstein, Luxembourg, the Netherlands, New Zealand, Spain, Thailand, the UK, Vietnam, Jersey*, Kuwait*, Malaysia*, Malta*, Portugal* and Switzerland (* denotes agreements that were not yet effective). Countries and regions currently negotiating such agreements include: Bangladesh, Canada, Finland, Guernsey, India, Italy, South Korea, Macau, Mexico, Saudi Arabia and the United Arab Emirates.

## Understanding tax burden

Hong Kong's double taxation agreements with the Netherlands and Luxembourg attracted Benelux law firm Loyens & Loeff to set up an office in Hong Kong to look after its businesses in the Greater China region.

"The bilateral treaties between the jurisdictions bring certainty in taxation issues, which is an important factor in investment decision making, and an important consideration for our clients," Carola van den Bruinhorst, a partner at Loyens & Loeff, said. "Outside Benelux, we have 12 offices worldwide ... The Hong Kong office's role is to look after the Greater China region."

## Forms of transport

Section 8 of the Inland Revenue Department's Double Taxation Arrangement between Hong Kong and mainland China expressly provides that the income and profits derived by an enterprise of one side (i.e. a mainland enterprise or a Hong Kong enterprise) from the operation of ships, aircraft or land transport vehicles in shipping, air and land transport may be exempted from tax by the other side, except when the ship, aircraft or land transport vehicle is operated solely between places within the other side. The terms income and profits refer to the income and profits derived by an enterprise from engaging in cross-border shipping, air or land transport. If the cross-border services provided in the other side, from which the income and profits are derived, are provided by a permanent establishment established in the other side, no tax exemption will be available from the other side. This provision also applies to income and profits derived from participation in partnership businesses, joint venture businesses or international business agencies.

> *"... it is conducive to encouraging foreign companies to develop their business in Hong Kong"*

## Problems for airlines

As the operations of airline companies are international, they face more double taxation issues than other industries. As the negotiation and execution of comprehensive double taxation agreements require a considerable amount of time, the Hong Kong government and other airline partner countries will frequently strive, when negotiating and executing bilateral air services agreements, to add the conditions under which airline profits can avoid being subject to double taxation in the agreement.

As to the shipping industry, Hong Kong has amended its ordinances and implemented mutual tax exemptions on shipping income since 1 April 1998, enabling shipping enterprises to benefit from the tax relief offered under similar laws of other countries. Furthermore, Hong Kong is actively seeking to execute double taxation agreements that address shipping income with two types of countries: countries that have not implemented mutual tax exemptions on shipping income; and countries that have passed relevant legislation but wish to have a bilateral agreement to define the right of taxing shipping income. Additionally, there are other agreements that address the airline and shipping industries. ■

*胡盛龙在香港政府投资推广署担任华北投资推广总监*

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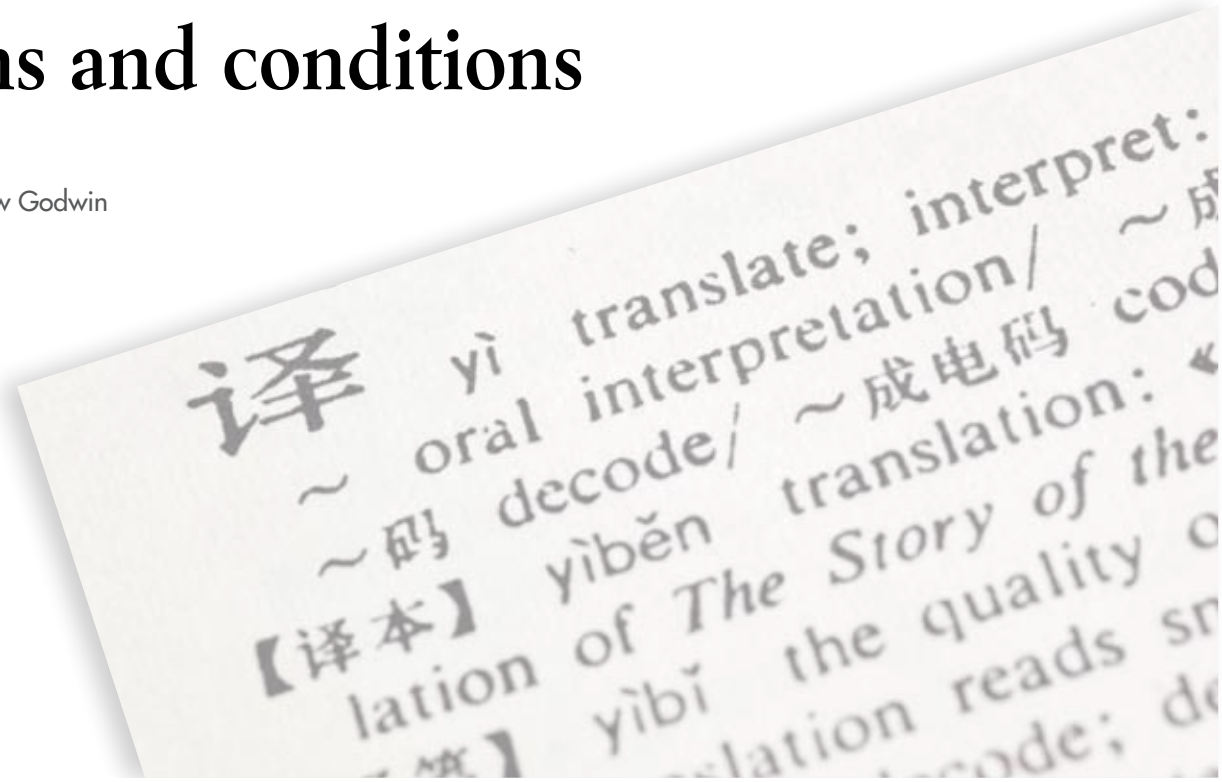
# 条款和条件
# Terms and conditions

葛安德 Andrew Godwin




合同条文常被称为“条款和条件”，如“使用条款和条件”和“出售条款和条件”。本文将对这些词语在中英文中的用法加以考察，并从法律角度分析是否存在含义上的区别，同时探讨在违反条款或条件时守约方有权终止合同的情况。

## “条款和条件”的含义

英文词“term”（即“条款”或“条文”）一般是指合同的条款。“term”也用来表示合同或安排（如租约）的有效期限。

“condition”一词的含义则比较复杂。在英文中，“condition”有三重含义。第一个含义与“term”一词相同，亦指合同的一般条款。例如，销售合同的条款通常称为“出售条件”。

“condition”的第二个含义是指某些权利或义务产生之前必须满足的要求。这种要求可划分为两类：“先决条件”和“解除条件”。

先决条件是权利或义务产生之前必须满足的要求或必须发生的事件。例如，银行是否履行出借资金予借款人的义务取决于借款人满足一定的先决条件，如提供法律意见书或发出提款通知。

解除条件则指可导致权利、义务或整个合同终止的事件。例如，房地产购买协议的买方若未能筹足购买价款可以解除协议。

We often refer to the provisions in a contract as “terms and conditions”. Examples include “Terms and Conditions of Use” and “Terms and Conditions of Sale”. This article examines how these words are used in English and Chinese, and whether there is a difference in meaning, from a legal perspective. It also considers the circumstances in which the breach of a term or condition will entitle the non-defaulting party to terminate the contract.

## The meaning of ‘terms and conditions’

In both English and Chinese, the word “term” [in Chinese “条款” or “条文”] refers generally to any provision in a contract. In English, the word “term” is also used to refer to the period of time during which a contract or an arrangement (e.g. a lease) will have effect.

The meaning of “condition”, on the other hand, is more complicated. In English, “condition” has three possible meanings. The first meaning is synonymous with the word “term”; in other words, it refers to the general terms in a contract. For example, the terms of a sale contract are often referred to as “Conditions of Sale”.

In its second meaning, the word “condition” refers to a requirement that must be satisfied before certain rights or obligations will arise. Such a requirement can be divided into two categories: a “condition precedent” and a “condition subsequent”. A condition precedent is a requirement that must be satisfied – or an event that must occur – before a right or obligation will arise. For example, a bank’s obligation to lend money to a borrower may be conditional upon the borrower satisfying certain conditions precedent, such as the provision of a legal opinion or a drawdown notice. A condition subsequent, on the other hand, refers to an event, the occurrence of which will terminate a right, an obligation or the contract in its entirety. For example, a buyer to an agreement for the purchase of real estate may be able to terminate the

上述第二个含义是“condition”一词在日常英语中最为常见的用法，与“条件”一词在中文里（不论法律协议或日常用语）的最常见用法也是一致的。《中华人民共和国合同法》第四十五条对“先决条件”和“解除条件”之间的区别作了如下解释：

agreement if it is unable to raise finance for the purchase. The second meaning above reflects the way in which the term is most commonly used in everyday English. It is also consistent with the way in which the term is most commonly used in Chinese, in both legal agreements and everyday language. Article 45 of the PRC Contract Law explains the difference between a “condition precedent” and a “condition subsequent” as follows:

*第四十五条*
*当事人对合同的效力可以约定附条件。附生效条件的合同，自条件成就时生效。附解除条件的合同，自条件成就时失效。*
*当事人为自己的利益不正当地阻止条件成就的，视为条件已成就；不正当地促成条件成就的，视为条件不成就。*

*Article 45*
*The parties may agree conditions in relation to the effectiveness of a contract. A contract subject to a condition precedent becomes effective when such condition is satisfied. A contract subject to a condition subsequent loses effect when such condition is satisfied.*
*If a party improperly obstructs the satisfaction of a condition to further its own interests, the condition is deemed to have been satisfied; if a party improperly facilitates the satisfaction of a condition, the condition is deemed not to have been satisfied.*

“condition”的第三个含义属于非常专业的用法，在普通法法域是指基本的（亦即重要的）合同条款，违反该等条款可使守约方有权终止有关合同（除了有权要求赔偿损失以外）。“condition”常被称为“构成合同基础”的条款，有别于“warranty”（此情形下可以翻成“一般条款”），后者若被违反则守约方仅可要求赔偿损失。

The third meaning of “condition” is very technical and is used in common law jurisdictions to describe an essential (i.e. important) contractual term, the breach of which allows the non-defaulting party the right to terminate the contract (in addition to claiming damages for any loss). Often referred to as a term that “goes to the root of the contract”, a condition is distinguished from the term “warranty”, a breach of which will only allow the non-defaulting party to claim damages for any loss.

## 普通法下的条件和担保

在普通法法域，对于合同各方界定为条件的合同条款，法院并不一定会视之为条件，而是通过客观测试来确定一项条款是属于条件或是一般条款，同时还会考虑一系列因素，如合同各方在订立合同之时的意图、有关条款对于整个合同的重要性，以及不遵守该条款所导致的后果等。

条件性质的条款的一个常见例子是合同中规定“时间为要素”的条款。该条款的作用在于，如果一方不严格依照约定的时间和日期履行义务，另一方可终止合同。

在香港杉木运输公司诉川崎株式会社案（见《全英判例汇编大全》1962 年合订本第 1 卷第 474 页）这一经典案例中，英国上诉法院的 Diplock 法官确认某些条款（即无名条款或中间条款）既可以是条件，也可以是一般条款，具体视乎违约性质及违约是否使守约方丧失实质上全部合同利益而定。换言之，法院在确定该等条款是条件抑或一般条款时会依具体情况决定。尽管如今这已是普通法法域的惯例做法，但仍因其削弱了商业合同的确定性而招致了某些非议。

在消费者保护法等领域，法律条文对合同条款属于条件抑或一般条款有着明确的规定。例如英国 1979 年《货物买卖法》规定，除有限的部分情形外，关于名称、说明和品质的条款属于条件。

## A condition and a warranty under common law

In common law jurisdictions, the fact that the parties describe a contractual term as a “condition” does not automatically mean that it will be treated as such by the courts. Instead, the courts adopt an objective test to determine whether a term is a condition or a warranty, and consider a range of factors. These include the intention of the parties when they entered into the contract, the importance of the term to the overall contract and the consequences of failing to comply with it.

A common example of a condition is a clause in a contract that provides that “time is of the essence”. The effect of this is that if a party does not perform its obligations strictly in accordance with the agreed time periods and dates, the other party may terminate the contract.

In the landmark case of *Hong Kong Fir Shipping v Kawasaki Kisen Kaisha* (1962), Lord Diplock of the English Court of Appeal recognised that some terms – known as innominate or intermediate terms – may be either conditions or warranties, depending on the nature of the breach and whether it deprives the non-defaulting party of substantially the whole benefit of the contract.

In other words, the courts will consider the circumstances in determining whether such terms are conditions or warranties. Although this is now the established position in common law jurisdictions, it has attracted some criticism on the basis that it diminishes certainty in commercial contracts.

In some areas, such as consumer protection law, legislation declares whether certain contractual provisions are conditions or warranties. For example, the Sale of Goods Act 1979 (UK) provides that terms as to

普通法法域的法院需要确定的一个重要问题是，如果合同本身包含终止条款（即载明可以解除合同之情形的条款），上文所述的普通法下因违反条件而终止合同的权利是否因此而被排除在外。法院采用的一般规则是，如果终止条款显然已载明了合同可予终止的所有情形，或者业已明确规定合同取代普通法下可享有的一切权利和救济，则普通法权利将被排除在外。

## 按照中国法律在何种情况下可以解除合同?

这一问题的答案可参考《中华人民共和国合同法》第九十三条和第九十四条：

*第九十三条*
*当事人协商一致，可以解除合同。*
*当事人可以约定一方解除合同的条件。解除合同的条件成就时，解除权人可以解除合同。*

*第九十四条*
*有下列情形之一的，当事人可以解除合同：*
*（一）因不可抗力致使不能实现合同目的；*
*（二）在履行期限届满之前，当事人一方明确表示或者以自己的行为表明不履行主要债务；*
*（三）当事人一方迟延履行主要债务，经催告后在合理期限内仍未履行；*
*（四）当事人一方迟延履行债务或者有其他违约行为致使不能实现合同目的；*
*（五）法律规定的其他情形。*

第九十四条第（一）款指的是因不可抗力导致合同解除。第九十四条第（二）款指的是合同一方拒绝履行合同。第九十四条第（四）款指的是因合同一方不履行债务造成合同目的落空（即不能实现合同目的）。

与本文最相关的条款是第九十四条第（三）款，该款允许合同一方在另一方经催告后在合理期限内不履行其主要债务的情况下解除合同。

title, description and quality are conditions, except in certain limited circumstances. An important question that the courts in common law jurisdictions have been called upon to determine is whether the common law right to terminate a contract for breach of a condition, as outlined above, is excluded if the contract itself contains a termination clause (i.e. a clause that sets out the circumstances in which the contract may be terminated). The general rule that the courts have adopted is that the common law right will be excluded if it is clear that the termination clause sets out all of the circumstances in which the contract can be terminated, or it provides clearly that the contract displaces all rights and remedies that would otherwise be available under the common law.

## When can a contract be terminated under Chinese law?

The answer to this question can be found in articles 93 and 94 of the PRC Contract Law:

*Article 93*
*The parties may terminate a contract if they have so agreed.*
*The parties may prescribe conditions allowing a party to terminate the contract. Upon satisfaction of a condition for terminating the contract, the party with the termination right may terminate the contract.*

*Article 94*
*The parties may terminate a contract in any of the following circumstances:*
*(i) the purpose of the contract cannot be realised as a result of an act of force majeure;*
*(ii) before the period for performance expires, a party expressly states or indicates by its own conduct that it will not perform its main obligations;*
*(iii) a party delays performance of its main obligations, and fails to perform within a reasonable time after being urged;*
*(iv) a party delays performance or otherwise breaches the contract, thereby making it impossible to realise the purpose of the contract;*
*(v) any other circumstance as provided by law.*

Article 94(i) refers to termination as a result of an act of force majeure. Article 94(ii) refers to repudiation of the contract by one of the parties. Article 94(iv) refers to frustration (i.e. the inability to achieve the purpose of the contract) as a result of the failure of one party to perform its obligations.

For our purposes, the most relevant provision is article 94(iii), which allows a party to terminate the contract if the other party fails to perform its main obligation within a reasonable time after being

这一条款蕴含的是德国法律中的“nachfrist”概念（意即宽限期或延长期）。在这一概念中，如果合同一方违反了合同义务且在守约方给予的额外期限内仍不履行合同，则守约方可以解除合同。《联合国国际货物销售合同公约》(1980年）也体现了类似的原则。

但与德国法律的倾向不同的是，中国法律对上述原则在违反“主要债务”情况下的适用有所限制。其中的“主要债务”一词并无确切的定义。“合理期限”一词也未作明确界定，不过一些中国法学界人士认为合理期限一般不应超过三个月，这是最高人民法院对于其他情况（如房屋销售合同中延迟交付的情况）所允许的期限。

urged. This provision incorporates the German concept of *“nachfrist”* (meaning grace period, or extension), under which a non-defaulting party is able to terminate if the other party is in breach of a contractual obligation and does not perform within an additional period of time given by the non-defaulting party. A similar approach is adopted in the United Nations Convention on Contracts for the International Sale of Goods (1980).

Unlike the position under German law, however, PRC law limits the application of the principle to a breach of a “main obligation”, a term that is not expressly defined. The term “reasonable time” has also not been expressly defined, although some Chinese legal scholars have suggested that in general it should not exceed three months, which is the period of time that the Supreme People’s Court has allowed in other circumstances such as late delivery under a contract for the sale of a house.

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