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猎人还是猎物?

外资慎勿成为监管者的目标

Hunting the hunter

Regulators target inbound investors

Vantage Asia

PROGRAMME AT A GLANCE

14 10.14

HK Arbitration Week Welcome Reception
6:30 - 8:30 pm

Enjoy the spectacular vista of Victoria Harbour over canapés and cocktails as we usher in the beginning of the third, fabulous Hong Kong Arbitration Week.

15 10.14

Transparency in Investor-State Arbitration: The Way Forward
8:30 - 11:30 am

Don't miss Hong Kong's first UNCITRAL seminar. Enjoy a stimulating debate by leading experts over the need for transparency in treaty-based investment

An In-House Counsel's Perspective on Effective Management of Arbitration
12:00 - 2:00 pm

Following the release of the ICC Commission on Arbitration and ADR's new guide for in-house counsel, ICC and ICC-HK have gathered an international panel of experienced in-house counsel to discuss how internal and external counsel can manage arbitrations in a more strategic and effective way.

Dealing with Last-Mile Challenges
3:00 - 5:00 pm

A practical examination of the enforcement of awards in China as well as the enforcement of Chinese awards worldwide.

HK Arbitration Charity Ball
7:00 pm - late

A marvellous evening of fine dining, drinks and dancing await those who attend this year's Charity Ball, while also raising much needed funds to support local charities.

16 10.14

ADR in Asia - Asia at the Cutting Edge
8:30 am - 8:00 pm

Be part of Asia's premier arbitration event. Join arbitration experts from across the globe to tackle some of the most significant issues in international arbitration today.

17 10.14

4th Annual GAR Live, Asia
9:00 am - 6:00 pm

Chaired by two stars of Asian arbitration, GAR Live Asia promises a day of debates, Tylney Hall-style discussion, and the latest inside information from key jurisdictions, delivered by a fantastic line up of names.

HONG KONG ARBITRATION WEEK

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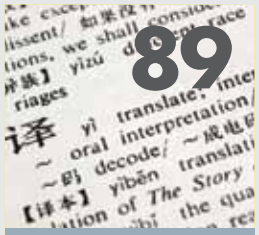
Hunting the hunter: Regulators target inbound investors

冷暖自知：为投资美加提供天气预测
Hot and cold: Investor forecast for US, Canda

托付何人？比较不同避税港
Placing your trust: A comparison of havens



商法词汇：谁是委托人？
Lexicon: Who is the client?

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编辑委员会 EDITORIAL BOARD

狩猎时节

Hunting season

无论在境内还是境外，今年的投资都非常活跃，这是个猎取目标的季节。监管机构严打不合规的商业活动，为赚快钱而罔顾法规的投资人很容易成为监管者的捕捉目标。

本期文章《猎人还是猎物?》探讨外商境内并购所面临的风险和陷阱。境内并购活动今年异常火热，并购市场资讯（Mergermarket）的数据显示，今年境内并购的交易价值已经超过了有记录的其他任何一年。

交易日益活跃，执法机构也日趋成熟，更敏于发觉垄断等违规行为。商务部密切监视与市场竞争有关的问题，商业腐败也是执法者的关注重点。如果不做好详尽、专业的尽职调查，外国投资者所收购的可能只是一堆刺眼的贿赂问题。

商务部对申报前商谈程序给出了更多的细节，但一些律师认为仍有不确定的因素存在。对简易并购交易的快车道程序也已实施，不过请留意：如果您的申请被驳回，就需要在正常程序下重新申报，从而比一开始就遵从正常程序花费更多时间。《猎人还是猎物?》对所有外国投资者和律师而言都是必读的文章。

Whether inbound or outbound, activity this year is heating up – and it's hunting season. Authorities are targeting irregular business activities and hawkish entrepreneurs may find themselves easy targets if they sacrifice compliance for a quick profit. In this issue of *China Business Law Journal*, we explore inbound M&A in *Hunting the hunter*, which by its definition spells out the pitfalls in an area that has seen unprecedented activity this year, with Mergermarket figures showing deal value has already surpassed the value of any other year on record.

With activity on the uptick, authorities are also becoming better enforcers, adept at tracking wayward antitrust situations and other anomalies. The Ministry of Commerce is monitoring competition concerns closely, along with commercial corruption. Foreign acquirers may find themselves the unwitting owners of glaring bribery problems if due diligence is not performed extensively and professionally.

More details have been forthcoming on issues like pre-filing consultations, but some lawyers believe the opinions have not gone far enough and do not remove uncertainties. Fast-tracking procedures for simple cases are also now in place, but beware: if your application is declined you may have to re-file under normal procedures, adding more time than using that procedure to begin with. *Hunting the hunter* is a must read for all foreign investors and their advocates.

Hot and Cold explores the changeable investment climate in the US and Canada, and while the ice appears to be thawing on Chinese investment into the US, following a rather cold spell, in Canada the frost is still evident due to the introduction of stiff foreign takeover rules.

《冷暖自知》探索美国、加拿大多变的投资气候。中国在美国的投资环境在经历了一段严冬之后，似乎正逐渐冰雪消融。但是在加拿大，由于该国出台了严格的外资境内收购规则，投资环境依然被寒霜覆盖。

随着中国放松对企业海外投资的监管，中国企业赴美国搜寻猎物的热情也逐渐高涨，尤其是在科技领域。了解内情的律师表示，中国投资者现在正学会如何用美国的法律系统保护自己的权益。《冷暖自知》探讨海外账户纳税法和反海外腐败法所造成的紧张气氛和对投资的潜在影响。在加拿大，新的外资并购规定的影响显而易见。国有企业将来收购油砂产业的控制权益只有在“特殊情况下”才会获得批准，不过还有其他投资机会。收购纯勘探资产就不需受到加拿大外商投资审查，也不受并购限制。

最后，《托付何人?》对若干优秀司法区的信托和特别信托制度进行了比较。保护投资保密性所面对的挑战日益增加，美国通过推行海外账户纳税法追踪不法逃税者，中国也正大力搜寻更多其公民和公司的财务信息。您值得看看香港、开曼岛、英属维尔京群岛这些一线司法区能提供些什么保护?

With outbound investment rules loosened substantially, activity is heating up in the US once again and it's Chinese investors who are on the hunt – for bargains, particularly in the tech sector. Lawyers in the know are commenting that Chinese investors are now learning to protect their industries and interests by utilising the American legal system. *Hot and Cold* explores tensions under Foreign Account Tax Compliance Act (FATCA) and the Foreign Corrupt Practice Act, and whether this is likely to impact investment.

In Canada, meanwhile, the impact of new rules governing takeovers is apparent. Continued acquisitions by state-owned enterprises of controlling interests in the oil sands industry will only be approved on an “exceptional basis” going forward, but there are other options. Acquisitions of pure exploration properties are not subject to Investment Canada review and are exempt from takeover restrictions.

Finally, *Placing your trust* explores the best global alternatives for trusts and newer, so-called special trusts. Transparency challenges to confidential investments are on the increase, and the implementation of FATCA and the US hunt for fraudsters has been compounded by China hunting for more information on the financial affairs of its citizens and companies. It's enlightening to see what some of the top-tier jurisdictions – Hong Kong, Cayman Island and British Virgin Islands – have available.

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律所动态 LAW FIRM NEWS

Livdahl团队创立普盈北京代表处
Livdahl team sets up Pillsbury's Beijing office

近日，David Livdahl 决定加入普盈律师事务所，他绝对没有三心二意，他带领包括另一位专家、三位律师和两位长期秘书在内的整个团队加入了普盈律师事务所 (Pillsbury)，开始运作已经设立的北京代表处。

为了在业务上协助其上海代表处，普盈律师事务所近期宣布其北京代表处开业。

“这个团队有与我共事八年的同事盛佳，有三位拥有三至五年经验的优秀律师，他们非常得力并且可以直接处理客户的问题，”Livdahl 告诉《商法》月刊。“团队中还有两位非常重要的秘书，他们在普衡律师事务所 (Paul Hastings) 已经与我们共事了十余年，因此他们很熟悉客户资料。”

“现在，北京代表处只有我们。但我们计划今年晚些时候招募两到三名律师。现在，我所带领的团队足以满足我们客户的需要，”他说。“我是北京代表处的高层，不过我也会把更多的时间放到上海。”

这位普衡的前合伙人表示，一起离开对于紧密合作的团队来说合情合理。“我们并不是想破坏普衡，不过最终我们的团队还是希望继续一起工作，因此这是非常合理的，”他说。

事实上，作为公司法、仲裁和争议解决业务专家的 Livdahl 与普盈就律师事务所在中国的发展理想方面保持着长期的联系。“我很早就与普盈聊过并告诉他们，如果打算在中国发展，就必须在北京和上海有代表处。普盈是一家保守谨慎的律师事务所，不过我想他们最终认为他们的确有必要在这里 [北京] 开业，特别是考虑到他们的能源和科技业务。”


盛佳 Jenny Sheng

“普盈律师事务所花了很多的时间和精力去思考业务的扩张以及在北京设立代表处的计划。最终他们认为我们是适合他们的团队，并为我们做好了准备。”

普盈律师事务所主席 James Rishwain Jr 表示，北京是普盈许多客户的总部所在地，包括国有企业。“最重要的是，有 David 和盛佳这样经验丰富的律师在那里坐镇，我们会因为他们而不断发展。”

Livdahl 曾在普衡律师事务所北京代表处工作了超过十二年，他曾是普衡北京代表处负责人，并且自 2000 年起 Livdahl 开始担任中国国际经济贸易仲裁委员会 (贸仲) 正式仲裁小组成员。盛佳在十五余年前开始私人执业之前，曾在北京市商务委员会条法处担任法律顾问五年。

Livdahl 表示，普盈的不同客户带来各种境内外工作，对其团队发展很有利，日本会成为新代表处的一个关注重点。

“我在日本工作过十年，过去三、四个月我都在那里。普盈律师事务所在日本有很棒的办公室，更加专注于日本境外业务，特别是能源领域、贸易公司、制造公司和日本银行。我们希望在中国也能接到更多这样的工作，我们发现中国公司对日本的兴趣越来越浓厚，特别是在科技领域。”

“因此，我们会看看这将如何发展。虽然我主要在中国，但是我会参与普盈律师事务所的大量日本业务。我感觉普盈的日本和中国团队的合作会更加紧密。”

“我将于十月回到美国，与日本和中国团队参加一些会议，了解那里的人希望得到什么。我认为我们需要花几个月的时间安定下来，了解那里的人希望去哪里。”


David Livdahl

When David Livdahl decided to make the move to Pillsbury recently, there was nothing half-hearted about it – his entire team, consisting of another specialist, three associates and two long-term secretarial staff made the jump with him to form a ready-made Beijing office for the firm.

Pillsbury announced the opening of its Beijing office recently, complementing the firm's Shanghai operations.

“The team is my colleague, Jenny Sheng, who I've been with about eight years, and three of our very best attorneys with from three to five years' experience, but they're at that level where they're very functional and working directly with clients,” Livdahl told *China Business Law Journal*. “And there are two secretaries who are very important as they were each with us over 10 years at Paul Hastings, so they're familiar with client files.

“Right now we are the [Beijing] group. The plan is to add two or three more attorneys later this year, or early next year. The group I have now is sufficient for clients we're working with.

“I'm the senior guy in Beijing but I'll be dividing more time in Shanghai as well.”

The former head of Paul Hastings' Beijing office said the departures were common sense for the close team. “We weren't trying to disrupt Paul Hastings, but it ended up [the team] wanted to stay together, so it just made a lot of sense.”

In fact, Livdahl, a specialist in corporate work, arbitration and dispute resolution,

had been in touch with Pillsbury for some time over the firm's ambitions in China.

"I talked to Pillsbury quite a while ago and told them, if you are going to do China right, you have to be in Beijing and Shanghai. They're a conservative and careful firm, but I think they finally decided they really do need to be here [Beijing], particularly given their energy and technology practice.

"Pillsbury spent a lot of time and effort thinking about expanding and having an office here. So it worked out we were the right team for them and they were ready for us."

Pillsbury chair James Rishwain Jr said Beijing is the headquarters for many of the firm's clients, including state-owned enterprises. "It is essential that we have experienced lawyers like David and Jenny on the ground there and around whom we will grow."

Livdahl had spent over 12 years at Paul Hastings in Beijing, and has been on the official arbitration panel for the China International Economic and Trade Arbitration Commission since 2000.

Sheng spent five years as a legal counsellor in the Treaty and Law Department at the Beijing Commission of Commerce before entering private practice more than 15 years ago.

Livdahl said the client mix at his new firm favoured the team, with a good mix of inbound and outbound work, and Japan would be a focus for the new office.

"I worked 10 years in Japan and have spent the last three or four months there. Pillsbury has a good office in Japan and has focused more on outbound Japan work, particularly in the energy area and trading companies, manufacturing companies and Japanese banks. We're hoping to pick up more of that work in China and we're seeing more interest from Chinese companies in Japan, particularly in technology.

"So we'll see how that plays out. Although I'm based in china, I will be a part of Pillsbury's substantial Japan practice. My sense is that [the firm's] Japan and China groups will be working a lot more closely together.

"I'm going back to the US in October for some meetings with both Japan and China groups to figure out what people there want. I think we'll take a couple of months to get us settled in and see where people want to go from there."

律所动态 LAW FIRM NEWS

Duane 上海首席代表展望新代表处宏图

Duane's Shanghai chief expects good things from new office

Duane Morris & Selvam 律师事务所新上海代表处经数月等待后正式获准开业，其负责人冀望此处的业务拔地而起。

"到明年这个时候，我预计我们的规模会扩大一倍，"该所新代表处首席代表兼管理合伙人 Leon Yee 向本刊介绍说。上海代表处正式启动之初有五名律师和两名辅助人员。

"但我们的增长须与我们的业务扩展紧密关联，而且我们打算以一种精干高效的结构和方式进行经营。至于是否会在中国国内其他地方开业，我们尚未形成既定的计划，但未来有这种可能。"

"本所在全球的经营有各种布局独特的市场，而我们的关键重点将是发展中国与这些市场之间的连通性。"

Yee 介绍说，Duane 上海代表处的设立时机"很大程度上取决于客户的需要"。"在我们的全球业务中，对中国及涉华事务已经经历了一个关注度逐渐升高的过程，这促使我们在上海设立代表处，"他说。

他证实，从本月起 Chong Eng Wee 将担任上海办事处常驻合伙人。"他将帮助本所建立中国业务。我将分身于新加坡和上海之间，但会根据客户需求来调整在两地的工作时间。"

Yee 介绍说，Duane 上海代表处主要集中于中国对外投资业务，包括公司和商业、企业金融、银行、知识产权、私募股权投资和反海外腐败法等事务，以及其他业务。

The head of Duane Morris & Selvam's new Shanghai office sees a sharp rise in activity on the horizon following official approval for the firm's opening. "By this time next year, I expect us to have doubled in size, Leon Yee, chief representative of the new office and a managing director at the firm, told *China Business Law Journal.* The Shanghai office officially launched with five lawyers and two support staff.

"Our growth will however, be closely related to the expansion of our business and we intend to operate a lean and efficient structure and approach. While there are no existing plans for us to open in other locations within the PRC, this may be on the horizon in the future. A key focus for us will be developing connectivity between China and the various uniquely placed markets in which we operate globally."

Yee said the timing of Duane's Shanghai office was "largely governed by client needs".


Leon Yee


Chong Eng Wee

"We have experienced an increased focus on China and matters related to China within our practice globally, and this spurred our opening of an office in Shanghai," he said.

He confirmed that Chong Eng Wee would be acting as resident director for the firm, beginning this month. "He will help build up the China business for the firm. I will be dividing my time between Singapore and Shanghai, although as and when client needs require it I may spend more or less time in either one of these jurisdictions."

Yee said Duane would largely focus on outbound investment from China, including corporate and commercial, corporate finance, banking, intellectual property, private equity and anti-corruption matters, among others.

资本市场 CAPITAL MARKETS

最大猪肉企业万洲国际重启香港 IPO

WH Group's re-launched IPO brings home the bacon

据参与交易的一名法律顾问透露，万洲国际重启在香港联交所的首次公开售股 (IPO) 取得成功，尽管此前四月份第一次申请 IPO 曾遭遇挫折。

万洲国际有限公司是世界最大的猪肉生产企业。公司本来计划于今年四月完成在港 IPO，但是中途却以“市场条件恶化”为由撤销了新股发行计划。

普衡律师事务所香港合伙人曾慧怡向《商法》介绍说：“在 4 月份的上市申请中，我们面临了许多实际困难，例如各投行之间的协调问题。但是，在 7 月份再次启动上市后这些问题已经基本解决了。”

此次香港上市中，普衡担任了万洲国际的法律顾问。普衡的顾问团队由其大中华区负责人李曙峰牵头，除曾慧怡外，团队成员还有香港另外两名资本市场业务合伙人韦嘉 (Steven Winegar) 和任昭宇。

在此前尝试新股发行时，万洲国际聘请了 29 家投行，批评人士指出这么多家投行同时工作造成了有关交易细节的信息混乱。因此在本次发行中投行数量被缩减到了两家，由摩根斯坦利亚洲有限公司和中银国际亚洲有限公司作为联席保荐人、联席全球协调人、联席账簿管理人及联席牵头经办人。

万洲国际此次再度启动新股发行得到了投资人的热烈响应。曾慧怡指出：“公司完成了超额认购，证明市场反映十分积极”。在未计算超额配售部分的情况下，公司从此次全球发售中总共筹得资金约 159 亿港元 (合 20.5 亿美元)。

原名双汇国际控股有限公司的万洲国际去年收购了史密斯菲尔德公司。该交易是目前中国企业在美最大规模的收购项目。

曾慧怡表示：“万洲国际收购史密斯菲尔德后不久，即启动了香港 IPO。即使没有史密斯菲尔德，万洲国际也完全可以凭借自身实力完成上市。并且，至少从管理层来说，公司与史密斯菲尔德的合并是相当顺利和成功的。”

WH Group's initial public offering (IPO) on the Hong Kong Stock Exchange (HKEx) was well received despite an initial setback in April, said one legal counsel involved in the offering.

The world's largest pork producer could have made its Hong Kong IPO earlier this year, but the company announced it decided to withdraw its original offering plan in April "in light of deteriorating market conditions".

"During the April offer, which did not close, there were practical challenges, for example co-ordination among so many investment banks. However, during the July re-launch these difficulties were no longer apparent," Catherine Tsang, a Hong Kong-based partner at Paul Hastings, told *China Business Law Journal*.

Paul Hastings represented WH Group in its Hong Kong debut. The firm's team was led by Raymond Li, chair of Greater China, with support from Tsang and fellow Hong Kong capital markets partners Steven Winegar and Ren Zhaoyu.

There were 29 investment banks working for WH Group on the original deal, which critics said created confusing messages about details of the offer. The number of investment banks was cut to only two in the re-launched offering. Morgan Stanley Asia and BOCI Asia acted as the joint sponsors, joint global co-ordinators, joint bookrunners and joint lead managers for WH.

Investors gave a positive reception to WH's re-launched offering. "Market response was very positive, as evidenced by the oversubscription of the offering," Tsang said. Not counting the over-allotment option, the company's gross proceeds from the global offering amounted to about HK$15.9 billion (US$2.05 billion).

WH Group, formerly known as Shuanghui International Holdings, acquired Smithfield last year, which was the biggest Chinese acquisition of a US company.

"The Smithfield acquisition completed only shortly before the IPO and HKEx listing, but even without Smithfield the other operations of WH Group could qualify for listing on their own," Tsang said. "Also, the integration with Smithfield, at least at management level, was rather seamless, smooth and successful."

并购交易 MERGERS & ACQUISITIONS

复星国际拓展零售和电影市场业务
Fosun expands presence in retail, film markets

瑞生律师事务所和复星国际优秀的内部法务团队一起成功解决了该公司在发达国家市场中两项重要投资所涉及的复杂问题。

复星国际是一家中国企业集团，业务遍布世界各地。瑞生为该公司对德国时装和生活时尚产品公司汤姆泰勒（TOM TAILOR）的投资提供法律顾问服务。复星有意凭借此举进军德国零售市场。

瑞生律师事务所上海代表处的合伙人严茂向《商法》月刊介绍说："该项交易结构巧妙新奇，涉及大量复杂的税务和商业限制。"

据严茂透露，此项交易涉及德国公司法和证券法以及葡萄牙保险合规问题。瑞生的跨国律师团队和复星内部优秀的法务团队协同作战，在短期内成功拿下了交易。

复星是通过其间接子公司、葡萄牙最大的保险公司 Fidelidade-Companhia de Seguros 获得此次投资机会的。复星和汤姆泰勒的管理层共同从这家德国上市时装零售连锁企业之前的大股东手中收购了 23.16% 的股份。

瑞生律师团队由严茂及该所法兰克福合伙人 Roland Maass 和 Wilhelm Reinhardt 牵头。复星的法务团队由许垚和邵砺君牵头。

在收购汤姆泰勒之前，复星已经完成了一系列国际时装品牌的战略收购，包括希腊的 FolliFollie、美国的 St. John 和意大利的 Caruso 等。

在早些时候的一项电影业交易中，复星签署协议承诺向 Studio 8 投入 1 亿多美元。Studio 8 是一家美国电影和娱乐公司，由华纳兄弟影业公司前总裁 Jeff Robinov 创办。

严茂表示："双方的谈判十分激烈，谈判用时打破了记录。谈判涉及公司控制权、投资回报、商业发行权、人员聘用等问题"。

"由于有实现合作的强烈愿望，律师必须对双方的共同目标具有敏锐的触觉，着眼于提供合理的观点并提供切合实际的解决方案。"

Studio 8 交易的法律专家组由瑞生律师事务所的严律师及复星内部顾问许律师和邵律师负责。

Latham & Watkins and a strong in-house team at Fosun International overcame complex and challenging issues in Fosun's two significant investments in developed markets, said a lead partner in the deal.

Latham advised Fosun, a Chinese conglomerate with operations around the world, on its entry into the German retail market by investing in TOM TAILOR Holding, a leading German fashion and lifestyle company. "The deal deployed an innovative and sophisticated mechanism in the structuring, with a host of complex tax and commercial driven restrictions," Karen Yan, a Shanghai-based partner at Latham & Watkins, told *China Business Law Journal*.

According to Yan, the transaction involved German corporate and securities law, and a Portuguese insurance compliance component. She added that Latham's cross-border team and a strong in-house counsel team from Fosun pulled the deal off in a co-ordinated way in a short span of time.

Fosun achieved this investment through Fidelidade–Companhia de Seguros, the largest insurance company in Portugal, and an indirectly owned subsidiary of the Chinese conglomerate. Fosun, together with the management of TOM TAILOR, acquired a 23.16% stake from the former major shareholder of this publicly listed German fashion retail chain.

The Latham team was led by Yan and Frankfurt partners Roland Maass and


严茂 Karen Yan

Wilhelm Reinhardt. The Fosun team was led by Xu Yao and Shao Lijun.

Before the TOM TAILOR deal, Fosun had already made a string of strategic investments in international fashion brands such as Greece-based Folli Follie, US-based St. John and Italy-based Caruso.

In an earlier transaction in the film industry, Fosun agreed to invest more than US$100 million in Studio 8, a US movie and entertainment business founded by Jeff Robinov, the former president of Warner Bros Pictures Group.

"The negotiation was intense and completed in record time. The negotiation touched on corporate control, investment returns, commercial distribution rights, employment and other issues," Yan said.

"The desire to form a partnership demands that counsels be sensitive to the common goals, and focus on offering sensible arguments and practical solutions." Legal experts in the Studio 8 deal were led by Yan from Latham, as well as in-house counsel Xu and Shao from Fosun.

人士动态 PEOPLE MOVES

贝克提升香港区雇佣和反垄断业务
Baker shores up Hong Kong employment, antitrust teams

贝克·麦坚时律师事务所在雇佣和反垄断领域已完成一系列重要招募，以加强其香港团队。

以合伙人身份加入的Stephen Crosswell此前任高伟绅律师事务所香港和亚洲地区反垄断和竞争法业务负责人。Crosswell 专注于事务性和咨询性的竞争法问题，集中在电信和媒体、能源（石油、天然气和电力）、基础设施、房地产及零售等行业。

Rowan McKenzie 本月也以合伙人身份加入，他此前为年利达律师事务所亚洲区雇佣业务负责人。

McKenzie 专注于咨询性和事务性的雇佣法问题，为企业集团、投资银行、保险公司、对冲基金、私募股权投资公司和经纪公司统筹协调整个亚太主要地区的区域雇佣法咨询服务。

梁家茵本月也以资深律师的身份加入该所的雇佣法业务部门，她此前任职于 Howse Williams Bowers 律师事务所，专长于香港雇佣法事务。

"[McKenzie 和梁家茵] 的经验将进一步增强和补充我们屡获殊荣的顶级雇佣法团队的深度，" 贝克·麦坚时律师事务所香港、中国大陆、韩国及越南各办事处的管理合伙人陈传仁说。"[Crosswell] 丰富的国际经验和强大的业务能力则使我们向客户提供世界级服务的能力优势更进一步。"

Baker & McKenzie has made a series of significant hires in employment and antitrust areas to bolster its Hong Kong team.

Stephen Crosswell joins as a partner from Clifford Chance, where he headed the firm's antitrust and competition practice in Hong Kong and Asia.

Crosswell focuses on transactional and advisory competition law issues, with an emphasis on telecoms and media, energy (oil and gas, and electricity), infrastructure, property and retail sectors.

Rowan McKenzie also joins this month as a partner from Linklaters, where he was head of the employment and incentives practice in Asia. McKenzie focuses on advisory and transactional employment law issues, co-ordinating regional employment law advice across all major Asia-Pacific jurisdictions for conglomerates, investment banks, insurance companies, hedge funds, private equity firms and brokerages.

Catherine Leung was also recruited to the firm's employment law group as a senior associate, joining this month from Howse Williams Bowers, where she focused on Hong Kong employment law matters.

"[McKenzie and Leung's] collective experience will further enhance and add depth to our award-winning and top-tier employment law group," said Paul Tan, managing partner of Baker & McKenzie's Hong Kong, China, Korea and Vietnam offices. "[Crosswell's] extensive international experience and strong technical skills add further strength to our ability to deliver world-class service to our clients."


Stephen Crosswell


Rowan McKenzie


梁家茵 Catherine Leung

人士动态 PEOPLE MOVES

卫达士招募移民专家
Withers takes on immigration expert


Mark Lanning

卫达士律师事务所招募Mark Lanning，旨在壮大并指导该所在香港的移民业务。

据该所介绍，Mark Lanning 以前任职于美国驻香港领事馆，为高净值人士和中国大陆及香港的财富 500 强公司提供赴美签证和投资监管方面的咨询服务。

“卫达士的移民事务咨询业务正面临前所未有的增长，需求来自于高净值人士和家庭及跨国企业，”卫达士美国和亚洲移民业务负责人 Reaz Jafri 说。

Withers has recruited Mark Lanning to expand and direct the firm's immigration practice in Hong Kong.

Withers said Lanning was previously with the US Consulate in Hong Kong, where he advised high net worth individuals and Fortune 500 Chinese and Hong Kong companies on US visa and investment regulations. “Withers is experiencing an ever-increasing demand for advice on immigration issues from high net worth individuals and families, as well as multinational businesses,” said Reaz Jafri, the firm's head of immigration for the US and Asia.

安睿获得企业银行业务专家
Eversheds hire brings corporate banking experience to table


周耀深 Samuel Chau

安睿律师事务所任命周耀深为合伙人，以扩充其面向机构和企业的香港银行业务团队。周耀深之前任职于基德律师事务所香港办公室，对企业银行、资产和项目融资及房地产融资等方面的业务有经验。

“耀深的着重点是为本所开发新的企业银行业务流，”该所银行和金融业务亚洲区负责人 Fung King-tak 介绍说。

Eversheds has appointed Samuel Chau as a partner to expand its Hong Kong banking team's offering to institutional and corporate clients.

Chau was formerly with Gide Loyrette Nouel in Hong Kong and has experience in corporate banking, asset and project finance, and real estate finance.

“Samuel's focus will be on the development of new streams of corporate banking business for the firm,” said Fung King-tak, Asia head of banking and finance at the firm.

盛德聘用私募股权投资人才
Sidley appoints counsel with private equity experience


Vivek Baid

盛德律师事务所为香港办公室聘来 Vivek Baid，以顾问身份加入其全球私募股权投资业务。Baid 主要从事于跨境私募股权和并购交易业务，在成长型股权投资、上市后私募投资、战略联盟和合资企业等方面有经验。他曾代理包括中国、印尼、菲律宾和印度在内的全球各地的基金公司和机构在美国和亚洲进行交易。加入盛德前，Baid 任职于宝维斯香港办公室。

Sidley Austin has hired Vivek Baid to the firm's Hong Kong office, joining its global private equity practice as counsel.

Baid focuses his practice on cross-border private equity and M&A transactions, with experience in growth equity investments, private investments in public equity, strategic alliances and joint ventures. He has represented global funds and institutions on their transactions in the US and in Asia, including in China, Indonesia, the Philippines and India. Prior to joining Sidley, Baid worked for Paul Weiss Rifkind Wharton & Garrison in Hong Kong.

劳动法规 LABOUR LAW

政府和中华全国总工会采取措施应对近期罢工浪潮

ACFTU, government respond to the recent wave of strikes

中华全国总工会最近宣布了 2014 年至 2018 年的集体协商工作规划，要求各级工会组织在更多企业开展集体协商工作并提高集体协商工作质量。该工作规划强调，集体协商的内容应当详实具体，便于履行，而工会应当尽力扩大集体协商在职工中的覆盖范围，提供职工的集体协商意识以及对集体协商的满意度。

过去虽然许多企业也与职工进行集体协商并签订集体劳动合同，但是这些合同的内容都非常笼统，许多合同仅仅体现了法律最低要求或者企业现有的薪酬和福利政策。

工作规划要求各级工会进一步推进地方立法工作，促进集体协商的发展。响应这一要求，深圳市人大常委会 6 月 26 日对《深圳经济特区集体协商条例》草案进行了第四次审议。如果该草案最终能够通过，将包含下列规定：(1) 授予职工有关财务报表、工资、税务和社会保险缴费的知情权；以及 (2) 要求企业和职工都要在十个工作日内就对方的集体协商请求做出答复。

较早一版草案曾规定在劳动谈判陷入僵局时可进行强制性劳动仲裁，但是最新的版本仅规定在集体协商过程中出现职工罢工或者雇主将工厂关闭的情况，任何一方均可向地方劳动关系调解委员会申请争议调解。该委员会通常由来自企业协会、劳动局和工会的代表组成。

另外，广东省总工会日前提出了《广东省基层工会民主选举实施办法》草案。鉴于在实践中企业管理层常常对工会选举程序或工会活动施加影响力，而该草案旨在使工会摆脱企业管理层的影响，获得更大的独立性。例如，根据该草案的规定，工会筹备组成员将由公司党组织和上级工会选定，而不再由公司管理层选定。

The All-China Federation of Trade Unions (ACFTU) recently announced its collective bargaining working plan for 2014-2018, which calls on all lower-level union organisations to conduct collective bargaining in more companies, and improve the quality of collective bargaining. The working plan emphasises that the terms of the collective contract must be detailed enough to be easily performed, and the labour unions should involve as many employees as possible in the collective bargaining process to increase the employees' awareness of, and satisfaction with, the collective bargaining.

In the past, although many companies had conducted collective bargaining and signed collective contracts with their employees, the terms of most such collective contracts were very general, and in many cases just a reflection of the basic legal requirements or the company's existing compensation and benefits policy.

The working plan also calls on the unions to enhance their efforts in pushing for local legislation to promote collective bargaining. In a related development, the local legislature in Shenzhen on 26 June conducted a fourth reading of the Shenzhen Collective Bargaining Regulations. If passed, the regulations would include: (i) granting employees the right of information concerning financial statements, wages, taxes and social insurance contribution payments; and (ii) requiring a party to respond to the other party's collective bargaining request within 10 working days.

While an earlier draft had included a provision requiring mandatory arbitration in cases of stalled negotiations, the latest draft only states that if during the collective bargaining process the employees go on strike, or the employer closes the factory, either party may apply for mediation of the dispute by the local Labour Relations Reconciliation Commission, which usually consists of representatives from enterprise associations, the labour bureau and labour unions.

In a related development, the Guangdong ACFTU is proposing a draft set of Guangdong Province Implementing Measures on Democratic Elections in Grass-Roots Unions, which would allow company unions to act more independently of company management influence. Often, in practice, company management can exert influence over the union election process or union activities. For example, the preparatory team responsible for driving the union establishment process would be selected by the company party organisation and upper-level union, rather than company management.

劳动法规 LABOUR LAW

厦门仲裁机构裁定：解聘参与罢工职工为非法

Termination of employees over Xiamen strike is ruled illegal

在2014 年 6 月 9 日的一项劳动争议仲裁中，厦门的仲裁机构裁定某公司因员工参与罢工而解除与其劳动关系的行为不合法。仲裁机构裁定该公司员工罢工具有合理依据，因此其罢工行为不能视为违反了公司规定。

该公司 2014 年 1 月计划将其厦门的工厂迁至其他地点。当公司宣布对员工的搬迁补偿计划时，工厂职工拒绝接受补偿并且大约 40 名员工在 2014 年 2 月 13 日开始了罢工。罢工持续了两周时间，之后公司以严重违反公司规定为由单方解除了与参与罢工员工之间的劳动关系。这些员工对解聘决定不服，申请了劳动争议仲裁。

仲裁机构裁定公司单方解除劳动关系不合法，理由是：

(1) 对工厂搬迁的争议构成罢工的合理依据，因此罢工不能视为对公司规定的恶意违反；并且 (2) 公司声称罢工的职工在罢工中有不当行为，例如阻止其他员工工作，或者对有关人员进行打骂等，但是并未提出充分证据证明其主张。

虽然中国和某些国际媒体称该裁决在中国开创了历史先河，但是实际情况是东莞和佛山的法院分别于 2004 和 2007 年就已针对罢工员工被解聘的情况做出了类似判决。

而在其他一些案件中，法院认为员工罢工理由不充分，而做出了有利于公司的判决。例如在 2010 年上海的一桩案件中，在公司表示愿意满足工人提出的改善工作条件的部分要求的情况下，员工仍然以要求两名被解聘经理复职为由继续罢工，因此法院判定该公司解聘罢工工人的行为具有合法性。

在实践中，对于罢工职工的解聘争议，仲裁机构和法院在相当长一段时间内都采用这种“合理性透视法”进行审理。如果仲裁机构或法院认为罢工具有合理性——例如，员工因雇主违反法律或者权利受到雇主侵害而进行罢工——仲裁机构或法院往往会裁定解聘罢工员工不合法。

另一方面，如果仲裁机构或法院认为罢工理由不充分，或者职工在罢工中有不当行为——例如破坏财物、阻止其他员工工作、威胁管理层人员等——仲裁机构或法院则更加倾向于裁定解聘罢工员工具有合法性。

> “而在其他一些案件中，法院……做出了有利于公司的判决”

In a case reported on 9 June 2014, an employment disputes arbitration tribunal in Xiamen ruled that a company's unilateral termination of employees for participating in a strike was illegal. The arbitration tribunal held that the basis for the strike was reasonable and therefore the strike did not constitute a serious violation of company policy.

The company planned to relocate its Xiamen factory in January 2014. When the company announced its plan to compensate employees for the relocation, the factory employees refused to accept the compensation plan and on 13 February 2014, approximately 40 employees went on strike. The strike lasted for two weeks and afterwards the company unilaterally terminated all the employees who had participated in the strike on the basis that it was a serious violation of company policy. The employees challenged the termination and submitted the dispute to arbitration.

> “In contrast, courts in other cases have ruled in favour of the company”

The arbitration tribunal ruled the termination illegal because: (1) the disagreement over the factory relocation provided reasonable grounds for the strike, which therefore should not be viewed as an intentional violation of company policy in bad faith; and (2) the company provided insufficient evidence to prove that the employees conducted the strike in an inappropriate manner, e.g. prevented other employees from returning to work, verbal or physical abuse of anyone, etc.

While Chinese and some international media hailed the case as being the first of its kind, this is actually not true. Courts in Dongguan (in 2004) and Foshan (2007) have issued similar rulings in relation to the termination of striking employees. In contrast, courts in other cases have ruled in favour of the company if they believed that the grounds for the employee strike were unreasonable. For example, in a 2010 Shanghai case, the court ruled that termination of striking workers was lawful in a case where the company was willing to compromise with workers' demands for improved working conditions, but employees continued their strike to demand the reinstatement of two sacked managers.

In practice, arbitration tribunals and courts have been examining disputes over the termination of employees for participating in strikes through this “reasonableness lens” for quite some time. If the tribunal or court believes the strike is reasonable – e.g. conducted in response to legal non-compliance or abuse of employee rights by the employer – the tribunal or court will be more likely to hold that the termination of employees for participating in the strike is illegal.

On the other hand, if the tribunal or court believes that the strike is based on unreasonable grounds, or the employees conduct themselves in an inappropriate manner – e.g. destroying property, obstructing other employees from returning to work, threatening management, etc. – the tribunal or court will be more likely to hold that the termination of the employees for participating in the strike is legal.

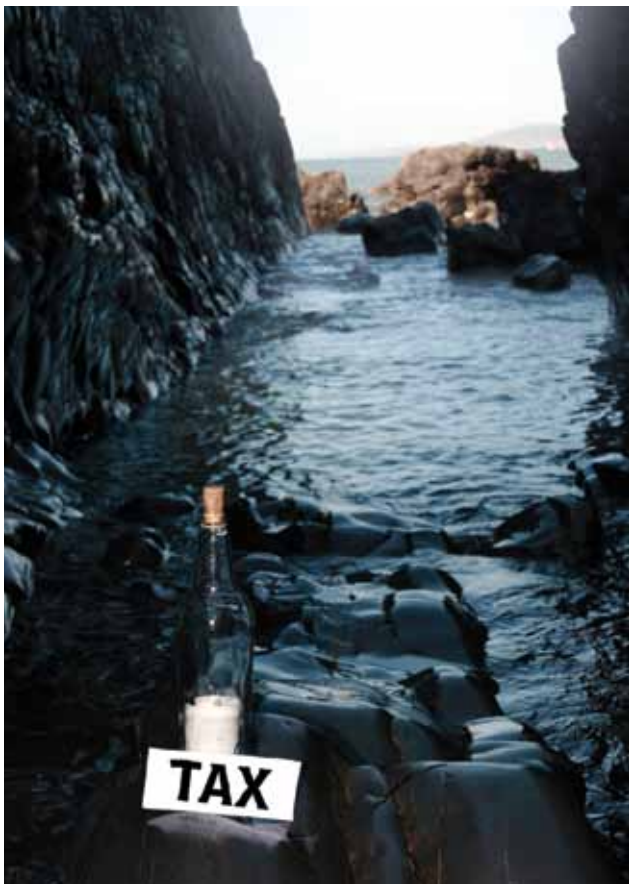
税务 TAXATION

成都案突显税务机关对跨境许可使用费支付的关注

Chengdu case highlights attention on cross-border royalty payments

据《中国税务报》近期报道，成都国税局对从事奢侈品销售的一家外商投资企业进行了转让定价调整，拒绝了其就商标许可使用费付款提出的约人民币 1 亿元（折合 1620 万美元）的税务减免要求，促使其补缴企业所得税 2300 万元。

在 2013 年初审查该企业的完税证明过程中，成都税务局发现其持续向注册于英属维尔京群岛的一家关联公司（以下简称许可人）支付大额特许权使用费。据悉，2013 年 9 月 1 日前，企业对外支付必须要提供税务机关出具的完税证明。2013 年 9 月 1 日起这一规定被废除了。



税务机关对该企业这一做法产生了疑问。通过这一做法，该企业将其在中国所获利润转移到了著名的避税港——英属维尔京群岛，同时规避了在中国的纳税义务。因此，成都国税局对该企业进行了转让定价审查工作。

在审查期间，成都市国税局调查人员发现三个明显疑点：一是该企业没有向税务局提交关联交易转让定价文件（即商标许可协议）；二是其商标的合法所有人位于避税港英属维尔京群岛境内；三是其销售利润率明显低于成都、南京、武汉和其他城市其他同类销售企业。

最重要的是，税务局发现，该企业多年的营销推广活动对其商标的价值形成做出了重要贡献。因此，税务局认定，按照“支出与收益相匹配”的原则，商标价值所带来的利润应由该企业享有，而不应以许可使用费形式支付给许可人。

近年来，中国税务机关加强了对跨境许可使用费支付中转让定价的审查，特别是对在中国境内开展大量营销或宣传活动的关联企业而言更是如此。

在这些审查过程中，税务机关认定，在中国境内推广或宣传海外关联公司无形资产的中国关联企业可以最终获得无形资产的部分经济所有权，只要海外关联企业未按照正常的利润率向中国关联企业提供足额的经济补偿。

这种经济所有权意味着随着时间推移，中国企业将逐渐减少向海外关联企业支付的许可使用费，因为这些企业已获得了无形资产的部分所有权。

经济合作和发展组织也认为，法律上的所有权人并不一定有权获得无形资产的所有收益；为无形资产的开发、增强、维持和保护而履行职责、承担风险、做出贡献或因此使用资产的人——也就是经济上的所有人——应当享有无形资产部分甚至全部收益。

本案突显了对跨境知识产权交易进行认真规划的必要性。跨国企业在中国开展业务可能需要认真审查其许可使用费是否是按照中国转让定价规则定价且按正常交易条件收取的。另外，如果中国关联企业为跨国企业履行营销或宣传职能，跨国企业应当按照正常交易条件对其提供经济补偿。

Recently, *China Taxation News* reported that the Chengdu State Tax Bureau made a transfer pricing adjustment to: (i) deny a tax deduction of approximately RMB100 million (US$16.2 million) claimed for trademark royalty payments; and (ii) collect RMB23 million in enterprise income tax from a foreign invested enterprise (FIE) engaging in the sale of luxury goods.

During the review of the FIE's tax clearance certificate (TCC) application in early 2013, the tax bureau discovered that the FIE paid significant royalties to a related party, a company incorporated in the British Virgin Islands (the licensor). As background, before 1 September 2013, a TCC issued by the tax authorities was a precondition to remittance. Effective from 1 September 2013, the requirement to obtain a TCC was abolished.

The tax bureau was sceptical of the arrangement because it shifted profits from the FIE in China to the licensor in BVI, a well-known tax haven, while simultaneously enabling the FIE in China to avoid Chinese taxation. Consequently, the tax bureau conducted a transfer pricing audit on the FIE.

During the audit, the tax bureau discovered the following negative factors that indicated a tax avoidance scheme: (i) the FIE did not submit the transfer

pricing documentation for the related transaction (i.e. trademark licensing agreement) to the tax bureau; (ii) the legal owner of the trademark was located in a tax haven; and (iii) the FIE's sales profit margin was low based on Chinese comparables from Chengdu, Nanjing, Wuhan and other cities in China.

Most importantly, the tax bureau found that the FIE had made a significant contribution to the trademark value through many years of marketing activities. Therefore, the tax bureau concluded that profits arising from the value of the trademark should be retained by the FIE, and the FIE should not pay any royalties to the licensor in accordance with the "principle of matching expenditure and benefits".

In recent years, Chinese tax authorities have been strengthening transfer pricing audits of cross-border royalty payments, especially for affiliate companies performing significant marketing or advertising activities in China.

During these audits, the authorities have taken the view that a Chinese affiliate that performs marketing or advertising functions within China for an offshore affiliate's intangible property may eventually obtain partial economic ownership over the intangible property, if the offshore affiliate does not fully compensate the Chinese affiliate with an arm's length profit margin.

This economic ownership would therefore mean that the Chinese affiliate should see a reduction in the royalties it pays to the offshore affiliate over time because the Chinese affiliate should not pay for the right to use intangible property that it owns.

The Organisation for Economic Co-operation and Development shares a similar view, that legal ownership alone does not entail a right to retain all income attributable to an intangible property; instead, the party performing functions, contributing/using assets, and undertaking risks related to developing, enhancing, maintaining and protecting intangibles – that is, the economic owner – should retain a portion or in some cases all of the returns attributable to the intangible property.

This case highlights the need for careful planning of cross-border IP transactions. Multinationals doing business in China may need to carefully review whether their royalties are charged at arm's length in accordance with Chinese transfer pricing rules. In addition, if the Chinese affiliate performs any marketing or advertising functions, the multinational should fully compensate the Chinese affiliate with a profit margin consistent with an arm's length transaction.

税务 TAXATION

国税总局公告解释资产划入的税务处理问题

Authority's bulletin explains tax treatment of asset contributions

国家税务总局近期发布了 2014 年第 29 号公告，解释了《企业所得税法》下有关应税收入的若干问题。其中，公告第 2 条解释了资产划入的税务处理问题。

第 2 条规定，企业接收股东免费划入资产，凡合同、协议约定作为资本金（包括资本公积）且在会计上已做实际处理的，不计入企业的应税收入总额，企业应按公允价值确定该项资产的计税基础。

在 29 号公告出台前，如果股东向其所投资的企业提供资产或股份而又不想计入企业的应税收入，通常的做法是将资产划入企业的注册资本。但是，企业注册资本的增加需要征得主管部门的批准。

而 29 号公告出台后，股东可不必将资产划入注册资本，企业也不必申请主管部门对增资的批准。29 号公告允许股东将资产划入资本公积，而非注册资本，使得该项资产划入从性质上类似于享受免税待遇的资产赠与。由于注册资本保持不变，获得免费资产赠与的企业自然不必征得主管部门的批准。

但是 29 号公告并没有说明股东是否必须承认其持有的被投资企业股权升值所带来的潜在资本收益。

根据《企业所得税法实施细则》规定的基本原则，股东应当承认此类潜在资本收益，只有在财税 2009 年第 59 号通知规定的个别情况下例外。

我们还无法完全确定 29 号公告是否是在 59 号通知基础上增加了一项新的例外。

29 号公告还涉及了其他一些问题，例如保险企业准备金支出的企业所得税处理和固定资产折旧的企业所得税处理问题等。

The State Administration of Taxation (SAT) recently issued SAT bulletin [2014] No. 29 to clarify several issues relating to taxable income under the Enterprise Income Tax (EIT) Law. Among others, article 2 of bulletin No. 29 clarifies the tax treatment of an asset contribution.

Article 2 provides that assets or shares received by an enterprise from its shareholders for free will not be treated as taxable income of the enterprise if the enterprise has booked the assets or shares received as capital (including capital surplus) as agreed in the contract or agreement.

In addition, the tax basis of the assets received by the enterprise will be fair market value.

Before bulletin No. 29, the common way a shareholder could contribute assets, or shares, to its invested enterprise without creating taxable income for the invested enterprise was to contribute the assets to the invested enterprise's registered capital.

Unfortunately, this increase in the registered capital meant that the invested enterprise would need to seek approval for the transaction from the competent authorities.

Bulletin No. 29 gives the shareholder an alternative method that does not increase the registered capital and does not force the invested enterprise to seek approval for the transaction.

Bulletin No. 29 permits the shareholder to contribute the assets to capital surplus rather than registered capital, which essentially makes the contribution akin to a tax-free gifting of the assets.

With the registered capital remaining unchanged, the enterprise receiving the tax-free gift does not need to obtain approval for the transaction.

Bulletin No. 29, however, does not address whether the shareholder must recognise latent capital gains from the appreciation in the value of the equity interest held in the invested enterprise.

According to the basic rule under the Implementing Regulations of the EIT Law, the shareholder should recognise the latent capital gains unless a narrow exception in Caishui [2009] No. 59 applies.

It is not entirely clear whether bulletin No. 29 creates another exception, in addition to circular No. 59.

Bulletin No. 29 addresses several other issues, such as EIT treatment of expenses for insurance company reserves and EIT treatment of fixed asset depreciation.

《商法摘要》由贝克·麦坚时律师事务所协助提供，内容仅供参考之用。读者如欲开展与本栏内容相关之工作，须寻求专业法律意见。读者可通过以下电邮与贝克·麦坚时联系：张大年（上海）
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The 4th Annual Asia Counsel-to-Counsel exchange C2C™

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9 OCTOBER, 2014
HONG KONG

Overview

The 4th Annual Asia Counsel-to-Counsel (C2C) Exchange in 2014 is a premier event exclusively for General Counsel, Head of Legal, Head of Compliance and C-suite executive. The exchange gathers more than 80 legal professionals in various industries, providing an extensive platform for business collaboration, high value networking and experience sharing. Planned receptions and breakout sessions allow participants to deep-dive into the hottest topics in the legal field for the year with business peers and other legal professionals. The Asia C2C Exchange 2014 showcases Asia's top General Counsel, Head of Legal and legal practitioners in Asia with dynamic and comprehensive panel discussion, workshops, focus group discussions and one-to-one meetings. It is an event you cannot miss!

Event Highlights

- 20+ speakers in Asia Pacific Region
- Convergence of diverse experience in different industries
- 9 exciting sessions
- All day one-to-one business collaboration meetings
- Excellent networking opportunity
- Opportunity to share latest legal best practices
- Discussion on latest litigation cases
- Covers topics such as anti-corruption, China legal business, in-house legal management practices and global regulatory compliance

Speakers

Andrew Ning, Head of Legal, CCB International
Angelyn Lim, Partner, Dechert LLP
Arthur Wong, Head of IT, China Construction Bank Asia
Bella Chhoa, Company Secretary, General Counsel, Assistant Director - Corporate Affairs, Hang Lung Properties Limited
Brent Carlson, Director, AlixPartners
Danh Nguyen, Senior Counsel and Head of Legal, Asia Pacific, The Western Union Company
David K. Cho, Partner, Dechert LLP
Dean Ward, Head of EDD APAC, Thomson Reuters
Erica Chan, Senior Vice President, General Counsel, Walmart Asia
Henry Yu, Executive Director, Deputy Head of Legal Counsel, ICBC International
Jingzhou Tao, Partner, Dechert LLP
Jonathan Crompton, Associate, Dechert LLP
Jonty Lim, Director and Legal Counsel, KPMG China
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香港国际仲裁中心 HONG KONG INTERNATIONAL ARBITRATION CENTRE

当事人在国际仲裁中是否应当坚持中立性?

Should parties insist on neutrality in arbitration?

中立性是国际仲裁的主要优势之一。因此，如果对方当事人不同意将仲裁地 (seat of arbitration) 定在你自己的法域中，也不必感到意外。但是除了仲裁地点以外，当事人也应当考虑如何选择中立的仲裁规则和一个中立的仲裁机构来管理仲裁。例如，双方当事人可以选择香港国际仲裁中心 (HKIAC) 根据 2013 年香港国际仲裁中心机构仲裁规则 (HKIAC 规则) 来管理一个仲裁地点在香港或其它地方的仲裁程序。

当事人总是希望有一个中立的平台以使他们确信其争议会被公正的裁定而无需担心会有偏袒的问题。因此，简单来说，当事人确实应当坚持仲裁的中立性。

当事人应当考虑的因素

地理因素: 为了确保中立性，当事人通常的出发点往往是找一个不在任何一方所在国或地区的仲裁地点。但是仅仅考虑这一点不太可能会得到令人满意的选择。对仲裁地点的约定很大程度上取决于双方当事人所在地、合同的履行地以及双方当事人各自的谈判实力。约定仲裁地点的目标在于找一个司法独立以及支持仲裁的中立地点。值得注意的是，有些地区的法律会要求仲裁地点必须在本地区内——例如，中国法律规定只有“涉外”的合同才能将仲裁地点选定在中国大陆以外，不过，此话题不在本文的讨论范围内。

司法机构: 司法机构是任何一个法律体系的核心之一。所以无论考虑使用哪一个争议解决的地点，该地点的司法机构必须能够独立自由的运作。当然，法院必须公正地适用仲裁法来作出与仲裁相关的决定，这就要求“法官按照法律的字面含义和精神去恰当地适用法律”（摘译自香港终审法院首席法官马道立今年 1 月在香港法律年度开启典礼上的发言）。

对法官的委任应当只考虑其司法公正和职业素养。香港的司法机构内有许多来自其它普通法国家和地区的知名法律人士，这增强了香港司法机构的公正性。在世界经济论坛发布的“2013-2014 环球竞争力报告”中，香港的司法机构在 148 个经济体中在司法独立方面排名第四。其它有影响力的国家，例如英国、日本、澳大利亚、新加坡和美国等，排名都在香港之后。

仲裁法律: 仲裁地点的仲裁法管辖仲裁程序。如果当事人选择的中立仲裁地点的法律是被双方当事人所熟悉的，往往能为当事人所接受。《联合国国际贸易法委员会

Neutrality is a key advantage of international arbitration. So don't be surprised if your counterparty is not comfortable agreeing to a seat of arbitration in your home jurisdiction. But beyond the seat of arbitration, the choice of a neutral set of arbitration rules and/or a neutral institution to administer the dispute should also be considered. For example, parties can choose the Hong Kong International Arbitration Centre (HKIAC) to administer an arbitration under the 2013 HKIAC administered arbitration rules with the seat in or outside Hong Kong.

Parties want a neutral forum, which provides a setting where they can be sure to have their dispute decided impartially and without fear of bias. So yes, put simply, parties should insist.

What parties should consider

Geography. Usually, and unsurprisingly, the starting point for ensuring a sense of neutrality is to find a place of arbitration that is not the home jurisdiction of any of the parties. But that step alone is unlikely to leave you with just one satisfactory option. Much will depend on where the parties are located, where the contract is performed and the bargaining power of the parties. The goal is to find a neutral place that is judicially independent and arbitration-friendly.

国际商事仲裁示范法》（示范法）是一部为许多国家或地区所熟悉的示范法律。虽然这套法律还没有被所有的国家或地区采纳，但如果了解哪些国家和地区采纳了该示范法，会有助于选择一个合适的仲裁地点。

尽管有许多亚洲的国家和地区都已经采纳了示范法，但香港是亚洲第一个也是目前唯一的一个采纳了最新版本示范法的地区。如今，香港的仲裁法已采纳了大部分示范法的内容，这使得全球各个地区的当事人都能即刻熟悉香港仲裁法。

仲裁员：仲裁员的委任机制必须能够产生一个公正的仲裁庭，以免仲裁庭作出的裁决被撤销而导致额外的费用和延迟。当事人为了确保自己委任仲裁员的权利，常常会在争议解决条款中明确约定仲裁员委任机制，或者更常见的做法是采用一套吸收了最佳仲裁员委任程序的仲裁规则，例如HKIAC 规则。根据 HKIAC 规则的规定，当事人可以在规定的时间内共同委任一位独任仲裁员（第 7 条），或若是在三人仲裁庭的情况下，由双方先各自委任一名仲裁员，再由两位当事人委任的仲裁员共同委任第三名仲裁员（第 8 条）。

若当事人未能委任仲裁员，则需要一个中立机构来进行委任，否则仲裁就可能无法继续进行下去。在 HKIAC 规则下（第 7.2，8.1 及 8.2 条）HKIAC 被授权在这种情况下进行委任；若一个临时仲裁的仲裁地是香港，HKIAC 则依法作为仲裁员指定机构。在 HKIAC，仲裁员的委任并非由某个人决定，而是有专门的委任委员会（Appointments Committee）负责。该委员会尽可能地从 HKIAC 在线可查的仲裁员数据库中选择，当事人也因此更明确哪些仲裁员可能会被委任。

选择一套好的仲裁规则也会提供多一层的保障，那就是仲裁规则常常会要求备选仲裁员作出独立性和公正性的声明。HKIAC 在委任每一个仲裁员之前都会要求仲裁员确认他们的独立性和公正性，同时要求仲裁员在整个仲裁过程中有义务保持独立性和公正性。

此外，HKIAC 规则还作出了进一步确保中立性的规定，即要求在当事人为不同国籍的情况下，除非当事人另行约定，独任仲裁员或首席仲裁员的国籍不得与任何一方当事人的国籍相同。

在洽谈生意、谈判交易金额以及权利义务的过程中，寻找一个仲裁条款的中立选项往往不是当事人优先考虑的因素。但是一旦出现争议，中立性则意味着公正的决定、程序质疑的低风险以及争议解决的高效性。这可以进一步节省了时间和金钱。知识是最好的工具。你要掌握能使各方满意的选择，并做好准备打消任何对该选择中立性的疑虑。

It's worth noting that certain local laws may require an arbitration to be seated locally – e.g. PRC law provides that only parties to "foreign-related" contracts are entitled to select arbitration outside mainland China.

Judiciary. A core feature of any legal system is the judiciary. So whichever venue is sought, the judiciary must act freely, without interference. Of course, the arbitration-related decisions rendered by the courts should apply the local arbitration laws impartially where judges, in the words of Hong Kong Chief Justice Geoffrey Ma, "look no further than the proper application of the law, both in letter and in spirit".

Judges should be appointed on the basis of judicial and professional qualities only. The Hong Kong judiciary includes many eminent jurists from other common law jurisdictions reinforcing impartiality, and is ranked fourth out of 148 in the index of judicial independence published in the World Economic Forum's *Global Competitiveness Report 2013-2014*. Other influential jurisdictions such as the UK, Japan, Australia, Singapore, and the US also ranked highly – after Hong Kong.

Arbitration Laws. The arbitration laws at the seat of the arbitration govern the applicable procedure. Selecting a neutral venue where local laws are equally familiar to all parties should be satisfactory. As many jurisdictions are familiar with the UNCITRAL Model Law, even if it is not fully adopted in all jurisdictions, being aware of such jurisdictions will assist in agreeing on a suitable seat.

While a number of jurisdictions in Asia have adopted the UNCITRAL Model Law, Hong Kong is the first and only Asian jurisdiction to adopt the latest version of the Model Law. Hong Kong's Arbitration Ordinance has adopted much of the language found in the UNCITRAL Model Law making it immediately familiar to parties across the globe.

Arbitrators. The mechanism for the appointment of arbitrators must result in an arbitral tribunal that acts impartially to avoid the challenge of any final award, which can lead to additional costs and delay. Parties usually afford themselves the opportunity to appoint arbitrators by drafting a mechanism into the dispute resolution clause or, more commonly, by adopting a set of arbitration rules, such as the HKIAC rules, which reflect best practice regarding the appointment of arbitrators in international arbitration. Parties are given time to jointly agree on a sole arbitrator (article 7), and in the case of a three-member tribunal, each side can appoint an arbitrator, and the third arbitrator is appointed jointly by the two party-appointed arbitrators (article 8).

Where parties fail to appoint, it is crucial to allow appointment by a neutral entity, otherwise the arbitration may not continue. The HKIAC is empowered to appoint in such cases under the HKIAC rules (articles 7.2, 8.1 and 8.2) and as appointing authority in ad hoc cases where the seat is Hong Kong. The HKIAC appointments committee is responsible for making appointments so the power to appoint is not held by one person alone and, wherever possible, the committee appoints from the HKIAC online searchable database of arbitrators, giving parties more certainty as to the arbitrators that may be appointed.

A set of arbitration rules adds a further layer of protection, as often the rules will require potential arbitrators to declare independence and impartiality. For every appointment, the HKIAC requires arbitrators to confirm their independence and impartiality before appointment, and also imposes an obligation on arbitrators to remain independent and impartial throughout the proceedings.

The HKIAC rules go a step further to ensure neutrality, by including a general rule that a sole arbitrator or presiding arbitrator cannot have the same nationality as any party where the parties are of different nationalities, unless the parties agree otherwise.

During the deal-making process, when figures are being crunched and obligations negotiated, finding a neutral option for your arbitration clause may not be a priority. However, where a dispute arises, neutrality will mean impartiality in decision-making, reduced risk of challenge and increased efficiency, saving time and money. The best tool is knowledge; be aware of your options and those that are likely to satisfy your counterparty, and be prepared to dispel any concerns over the neutrality of your preferred options.

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新加坡国际仲裁中心 SINGAPORE INTERNATIONAL ARBITRATION CENTRE

中国对境外仲裁的大门可能正徐徐打开

Door may be opening for foreign arbitration in China

《最高人民法院关于适用＜中华人民共和国涉外民事关系法律适用法＞若干问题的解释（一）》已自 2013 年 1 月 7 日起施行。该司法解释被认为是通过鼓励中国的涉外非政府交流来推动仲裁相关活动和积极性的一种措施。

此外，在《最高人民法院关于申请人安徽省龙利得包装印刷有限公司与被申请人 BP Agnati SRL 申请确认仲裁协议效力案的复函》中，最高人民法院认为涉外仲裁在中国一般是予以承认和执行的，即使该裁决是按照境外仲裁机构的规则在境外作出的。

本案的事实和论证十分具有启发性。申请人安徽省龙利得包装印刷有限公司是一家位于安徽的中国公司，它与被申请人意大利的 BP Agnati SRL 公司签订了销售合同，其中仲裁条款约定为："任何因本合同引起的或与其有关的争议应被提交国际商会仲裁院，并根据国际商会仲裁院规则由按照该等规则所指定的一位或多位仲裁员予以最终仲裁。管辖地应为中国上海，仲裁应以英语进行。"

申请人诉称根据中国法律规定，该仲裁条款应属无效。合肥市中级法院首先对该案进行了审查。合肥中院认为，在判断仲裁协议效力时，准据法应当为中国法。不过，该判决没有解决国际商会是否可以在中国进行仲裁的问题。

随后安徽高级人民法院对该案进行了复审，安徽高院对准据法为中国法表示了肯定，不过该院以仲裁协议缺少法律依据而认定该协议无效。安徽高院还认为，由于中国政府还没有对境外机构开放其仲裁业务市场，因此该仲裁条款违反了中国仲裁法。

最后，最高人民法院进行了终审。最高院认为，由于当事人没有约定确认仲裁协议效力的适用法律，根据《最高人民法院关于使用＜中华人民共和国仲裁法＞若干问题的解释》第 16 条，审查该仲裁条款效力的适用法应为仲裁地法律，即中国法。

根据《仲裁法》第 16 条规定："仲裁协议包括合同中订立的仲裁条款和以其他书面方式在纠纷发生前或者纠纷发生后达成的请求仲裁的协议。仲裁协议应当具有下列内容：（一）请求仲裁的意思表示；（二）仲裁事项；（三）选定的仲裁委员会。"

该仲裁条款体现了当事人将争议提交仲裁的意思表示，约定了仲裁事项，并选定了明确具体的仲裁机构，因此该仲裁条款被认定有效。

总而言之，虽然最高法院没有表明如果本案当事人在中国境内进行仲裁，国际商会的裁决是否可以得到执行，但该批复可能解决了或者至少澄清了境外仲裁机构是否可以在中国管理仲裁的问题。

这是中国仲裁领域的一个良好发展，中国对新加坡国际仲裁中心等境外仲裁机构为中国仲裁事业作出贡献的大门可能正在徐徐打开。

The Supreme People's Court recently announced the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Law of the People's Republic of China on Foreign-related Civil Relations I, which came into effect on 7 January 2013. This interpretation is being viewed as a measure to boost arbitration-related activities and initiatives by encouraging foreign-related non-governmental exchanges in China.

Additionally, the Supreme People's Court recently clarified in the case of *Longlide Packaging v BP Agnati SRL* that foreign-related arbitral awards can generally be recognised and enforced in the courts of mainland China, even when rendered in foreign jurisdictions under the rules of foreign arbitral institutions.

The facts and reasoning in the Longlide case are instructive. Longlide Packaging (the claimant), a Chinese company located in Anhui province, entered into a sales contract with BP Agnati SRL (the respondent), a company located in Italy. The arbitration clause provided that "any dispute

arising from, or in connection with, this contract shall be submitted to arbitration by the International Chamber of Commerce (ICC) Court of Arbitration according to its arbitration rules, by one or more arbitrators. The place of jurisdiction shall be Shanghai, China. The arbitration shall be conducted in English".

The claimant argued that under Chinese law the arbitration clause should be invalid. The case was first reviewed by the intermediate court in Hefei city. The intermediate court found that, in determining the validity of the arbitration agreement, Chinese law would be the governing law. However, the judgment did not address the issue of whether the ICC is allowed to conduct an arbitration in China.

After review by the higher people's court of Anhui province, the higher court affirmed that Chinese law should be the governing law, but found that the arbitration agreement was invalid because it lacked merit. The higher court also found that since the central government has not opened up the market of arbitration service to foreign institutions, the arbitration clause violated Chinese arbitration law.

In the final judicial review by the Supreme People's Court, it was clarified that as the parties had not agreed on the applicable law governing the validity of the arbitration agreement, pursuant to article 16 of the 2006 judicial interpretation, the law of the seat of arbitration, i.e. Chinese law, was found to be applicable to the arbitration.

According to article 16 of the Arbitration Law, "[a]n arbitration agreement shall include arbitration clauses stipulated in the contract and agreements of submission to arbitration that are concluded in other written forms before or after disputes arise. An arbitration agreement shall contain the following particulars: (1) an expression of intention to apply for arbitration; (2) matters for arbitration; and (3) a designated arbitration commission".

As the disputed arbitration clause indicated the parties' intention to refer their disputes to arbitration, the issues to be arbitrated and the specific arbitration institution, the arbitration clause was found to be valid.

In sum, although the Supreme People's Court did not clarify whether the resulting award could be enforced in the future if the parties proceed with their arbitration in China, this case may have resolved, or at least clarified, the question of whether a foreign arbitration institution could administer an arbitration in China.

This is a favourable development for China in that the door may now be open for foreign arbitration institutions to contribute to the arbitration scene in China.

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北京仲裁委员会 BEIJING ARBITRATION COMMISSION

利用商事仲裁方式解决互联网行业纠纷
Growth of dispute resolution for internet enterprises

互联网行业在过去十几年间一直处于蓬勃的高速发展阶段，而且在可以预见的相当长一段时间内，互联网仍然是中国经济领域中最具吸引力、最具活力的产业之一。快速发展必然伴随争议产生，如何专业高效解决争议并由此积累风险防控经验以及树立规则意识，是互联网行业健康可持续发展的重要保障。

北京仲裁委员会（北仲）拥有丰富的互联网领域争议的审理经验。据不完全统计，在北仲每年受理的案件中，约有 20% 的争议涉及互联网企业，纠纷类型涉及：软硬件采购的买卖纠纷；各类服务合同纠纷（电信服务、搜索服务、主机托管服务等）；技术开发纠纷（办公系统开发、网站建设、电子商务系统开发等）；广告纠纷（互联网广告、移动广告等）；业务推广、代理纠纷（手机邮箱代理、网络实名代理、无线网址代理等）；数字版权纠纷（数字图书、数字音乐）；电子商务纠纷；互联网企业投资的影视剧制作、发行纠纷等。

北仲始终密切关注、研究互联网行业的发展与争议解决情况，在充分了解互联网企业在争议解决方面的需求的基础上，努力为互联网企业提供更优质的争议解决服务。2012 年 1 月，北仲调解中心与中国互联网协会调解中心合作签署了《战略合作框架协议书》；2012 年 9 月，北仲组织召开"互联网企业争议解决需求与应对研讨会"。

2013 年，北仲与工业和信息化部电子知识产权中心合作开展"互联网领域替代性

纠纷解决机制（ADR）课题调研”，并形成调研报告。另外，北仲的仲裁员知识产权沙龙研究小组将熟悉互联网领域情况的仲裁员集合起来，定期进行专业研讨。

通过我们对企业的调查，仲裁程序的灵活、高效，仲裁员的专业性，仲裁管辖确定不受地域限制以及仲裁程序的保密性，是尤为受互联网企业青睐的优势。

但同时，一些企业对仲裁也存在一定的认识误区，如认为仲裁一裁终局，缺少救济途径，同时仲裁收费过高等。而实际上，以北仲为例，仲裁案件结果的公正性和专业性根本上是靠良好的制度设置和公正专业的裁判主体所保障的。

由于仲裁必须依靠当事人的选择，所以对那些追求良好声誉和口碑的仲裁机构来讲，对于案件裁决结果公正性和专业性的维护是仲裁机构的第一要务。司法的救济途径主要起监督的作用。

而就收费而言，大部分仲裁机构实行的是阶梯收费办法。简而言之，争议金额越大，收费比例越低。以北仲为例，争议标的为 200 万元人民币的案件，两审费用合计 45,600 元，而仲裁费为 41,550 元；标的为 1 亿元人民币的案件，仲裁费用为 487,550 元，而两审费用合计为 1,083,600 元。

总之，未来，以仲裁为代表的现代多元争议解决方式在互联网行业纠纷解决中将有更大的发展空间。北仲也将不断提升专业水准，继续探索更多更好的制度设计和服务方式。

The internet industry has seen rapid development in the past decade, and for some foreseeable time should remain one of the most attractive industries in China.

But rapid development is inevitably accompanied by disputes. How to resolve disputes in a professional and efficient manner, as well as accumulating the experience to prevent and control risk and establish rule consciousness, will determine the health and sustainability of the internet industry's development.

The Beijing Arbitration Commission (BAC) has experience with hearing disputes in this area. According to our statistics – which are still incomplete – about 20% of the cases accepted by the BAC every year involve internet enterprises, and can be broken down into the following types: transaction disputes regarding the purchase of software and hardware; disputes on various service contracts (telecoms services, search services, content hosting services, etc.); disputes regarding technological development (development of office systems, website construction, development of electronic commerce systems, etc.); disputes regarding advertisements (internet advertisements, mobile advertisements, etc.); disputes regarding business promotion and associated agent services (mobile email services, real-name networks, wireless URLs, etc.); disputes regarding digital copyright (digital books and digital music); disputes regarding e-commerce; disputes regarding the production and distribution of film and television products in which internet enterprises have invested.

> “在北仲每年受理的案件中，约有 20% 的争议涉及互联网企业”

The BAC has always paid close attention to, and carried out R&D into, dispute resolution in the internet sector in an effort to fully understand the needs of internet enterprises involved in dispute resolution, and to provide a better dispute resolution service to these enterprises.

In January 2012, the BAC's Mediation Centre entered into a strategic co-operation framework agreement with the Mediation Centre of the Internet Society of China. In September of the same year, the BAC organised a symposium on the needs of, and measures for, dispute resolution of internet enterprises.

In 2013, the BAC co-operated with the Ministry of Industry and Information Technology's Electronic Intellectual Property Centre to carry out topical research on alternative dispute resolution in the internet field, and created a research report. The BAC's Arbitration Salon on the Research of Intellectual Property will also recruit arbitrators familiar with this sector to carry out research.

A survey of enterprises by us implies that the reason that arbitration is popular with internet enterprises is that arbitration possesses the following advantages: flexibility and efficiency of proceedings; professionalism of arbitrators; no geographic restrictions to determine the arbitration jurisdiction; and confidentiality of proceedings.

But some enterprises have misunderstood arbitration to a certain degree, believing that arbitral awards are final and binding, that arbitration lacks relief approaches, and that the parties are overcharged in terms of arbitration fees.

> *About 20% of the cases accepted by the BAC ... involve internet enterprises*

In fact, to use the BAC as an example, the fairness and professionalism of arbitral awards are secured ultimately by the installation of a good system, as well as impartial and professional arbitrators. Arbitration is an alternative chosen by the parties, and arbitral institutions pursuing a good reputation will give priority to upholding fairness and professionalism with arbitral awards. The judicial relief approach serves more as a supervising party.

As far as fees are concerned, most arbitral institutions charge on a sliding scale. Generally, the larger the amount in dispute is, the lower the ratio of charges. For a case with the subject matter of RMB2 million (US$323,000), the fees for the first and second instances add up to RMB45,600, while arbitration fees are RMB 41,550. For a case with the subject matter of RMB100 million arbitration fees add up to RMB487,550, while fees for the first and second instances are RMB1,083,600.

There will be more room for pluralism of dispute resolution, especially arbitration, to develop in the internet industry, and the BAC will continue to promote its standards and explore the better development of the industry.

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《商法》欢迎您对“争议摘要”栏目的内容提出宝贵意见。我们力求将该栏目打造成意见交流、案例分享及时事互动的平台，因此我们诚邀您提供稿件，长度最好在600英文字或1000中文字上下。请将稿件发至我们的邮箱editor@cblj.com。《商法》将于每月甄选出版最好、最贴近时事热点的文章。

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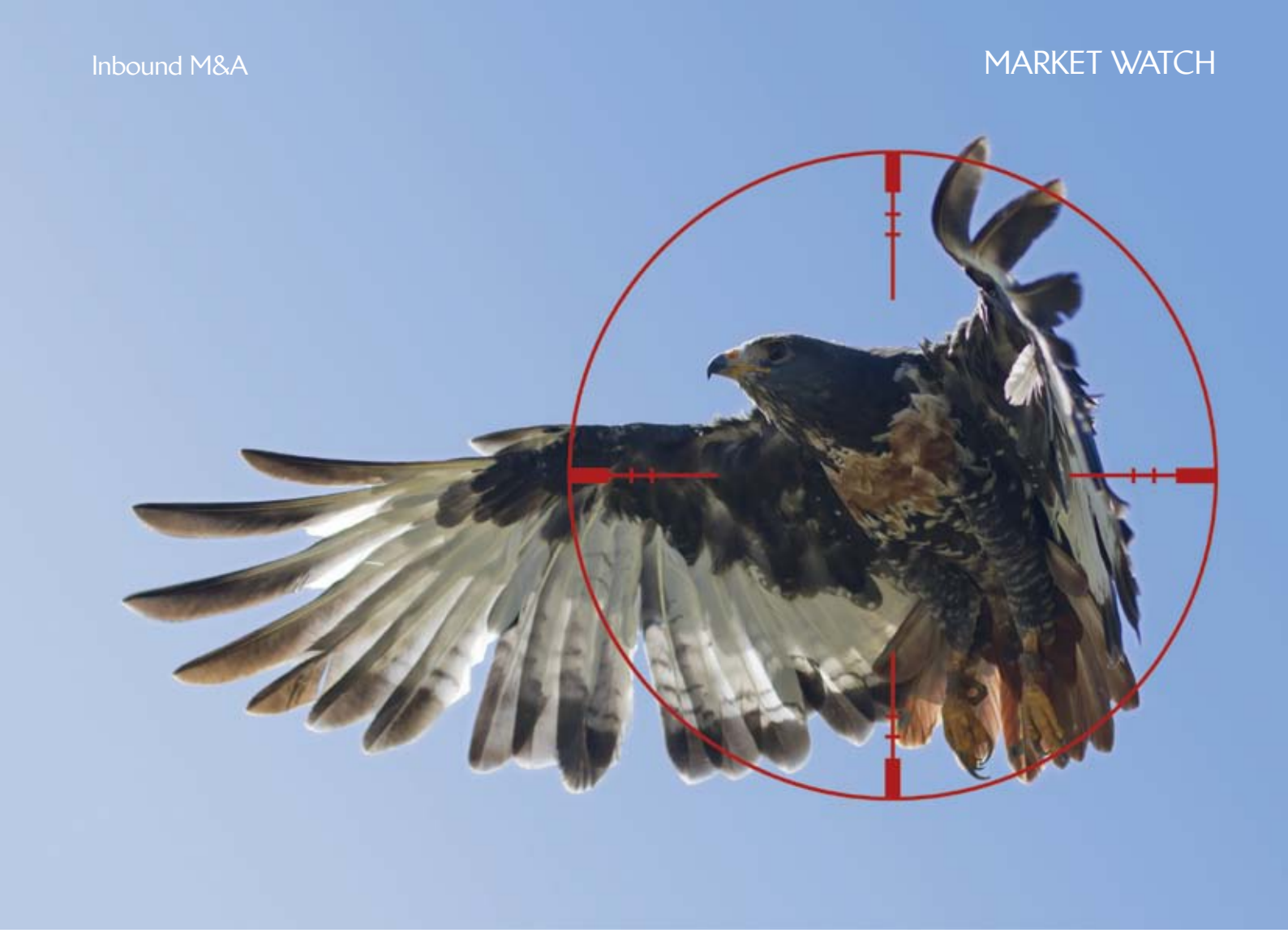

猎人还是猎物?
Hunting the hunter

目光锐利的外商投资者或许会成为监管机构的目标。在扑向中国境内的收购目标前，他们应该知道要避开哪些合规风险。作者：李俊辰

Inbound investors seeking to make a killing may find themselves targeted by regulators. Richard Li lays out the compliance risks they should be aware of before swooping on any bargain acquisition in China

随着中国监管机构加强他们对不合规商业活动的打击力度，合规成为了几乎所有商业活动在中国取得成功的关键因素。兼并和收购也不例外。

中国市场从未像今天这样有吸引力。根据并购市场资讯(Mergermarket)的记录，今年在华境内并购活动的交易价值已经超过了有记录的其他任何一年，该信息服务公司常驻英国的全球

With Chinese authorities stepping up their hunt for irregular business activities, compliance has become critical to the success of almost all business activities in China – and mergers and acquisitions (M&A) are no exception.

The stakes have never been higher. Inbound M&A activity in China has already surpassed the value of every other year on Mergermarket's record, notes Kirsty Wilson, a UK-based global

我国商务部在进行集中审查时，会充分结合中国市场的特点和现状

In merger reviews, MOFCOM will scrupulously analyse the features and status quo of the China market

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调研编辑 Kirsty Wilson 说。“市场显然公布了更多更大金额的交易。到目前为止，2014 年已经有四笔金额超过 10 亿美元的境内交易，这个数目是 2013 年同期的两倍。”

“在交易数量和交易金额两方面，能源、矿产资源和公共设施都是最活跃的领域，” Wilson 补充说。“科技领域的并购交易时机似乎也已成熟，2014 年已经有 15 起总计金额达 24 亿美元的交易被公布，是 2013 年全年总额的两倍还多。”（请见第 26 页附栏 “境内投资热点”。）

但是，外国投资者在忙于捕捉富有吸引力的收购目标时，他们也必须时时留意自己的一举一动是否也正在被追踪。否则，他们可能最后会发现自己也成为了中国或海外监管机构的目标。

美国商会近期的调查问卷发现，近半数在华跨国公司感到自己正面对反垄断、食品安全和其他法规领域的执法机构的不公正待遇。

在形形色色的合规问题中，反垄断和反腐败目前是中国最活跃的其中两个领域。在反垄断执法方面，如果跨国企业的并购交易牵涉到中国市场，那么中国似乎已经成为了跨国公司不容忽视的一个重要司法管辖区。原因之一是，中国商务部可能会做出与发达国家的反垄断机构不同的审查决定。

“我国商务部在进行集中审查时，会充分结合中国市场的特点和现状，并可能采取比其他主要司法区域更为严格的审核标准，”中伦律师事务所常驻北京的管理合伙人吴鹏说。

安杰律师事务所北京办公室合伙人顾正平认为：“商务部随着执法经验的积累，越来越有自信做出独立于欧美国家的决定。”

2014 年 4 月，商务部附加限制性条件批准了微软对诺基亚设备和服务业务的收购交易。而该项交易此前已获得了欧盟的无条件批准。“[商务部] 认定此项交易对中国智能手机市场可能具有排除、限制竞争效果，”吴鹏说。

另一个最近的案例是，商务部 6 月决定禁止全球最大三家班轮运输企业——即马士基航运公司、地中海航运公司和法国达飞海运集团——计划组建的航运联盟 (P3 联盟)。

research editor for the intelligence service company. “It is clear that larger deals are being announced more often. In 2014 so far, there have been four inbound deals valued higher than US$1 billion, that’s double the number compared to the same time in 2013,” she says.

“The most active sector by both deal count and deal value is energy, mining and utilities,” Wilson adds. “Technology M&A also seems ripe for activity during 2014 with 15 deals valued at US$2.4 billion already over double the value of 2013’s annual total.” (See ‘Hot inbound activity’, page 27.)

But while foreign investors are busy hunting for attractive acquisition targets, they would be wise to keep a wary eye on whether they also are being tracked. Otherwise they may find themselves targeted by both domestic and overseas regulators scrutinising their every move for improprieties, in one jurisdiction or another.

外资境内并购-杰出中国律所（累计交易金额）
Top PRC law firms by inbound M&A deal value

排名 Ranking	律师事务所 Law firms	金额（百万美元）Value (US$m)	交易数量 No. of deals
1	嘉源律师事务所 Jia Yuan Law Offices	36,572	2
2	方达律师事务所 Fangda Partners	2,396	11
3	国浩律师事务所 Grandall Law Firm	2,008	4
4	君合律师事务所 Jun He Law Offices	843	6
5	湖南启元律师事务所 Hunan Qiyuan Law Firm	574	1
6	天元律师事务所 Tian Yuan Law Firm	553	1
7	金杜律师事务所 King & Wood Mallesons	456	6
8	通商律师事务所 Commerce & Finance Law Offices	336	3
9	海问律师事务所 Haiwen & Partners	304	1
10	通力律师事务所 Llinks Law Offices	116	2
11	环球律师事务所 Global Law Office	77	1
12	汉坤律师事务所 Han Kun Law Offices	71	2
13	福建闽江律师事务所 Fujian Minjiang Law Firm	37	1
14=	锦天城律师事务所 AllBright Law Offices	36	1
14=	元达律师事务所 MWE China Law Offices	36	1

基于2013年7月28日至2014年7月28日期间公布的交易
Based on announced deals between 28 July 2013 and 28 July 2014

资料来源：并购市场资讯 Source: Mergermarket

外资境内并购-杰出中国律所（累计交易数量）
Top PRC law firms by the number of inbound M&A deals

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6	嘉源律师事务所 Jia Yuan Law Offices	36,572	2
7	通力律师事务所 Llinks Law Offices	116	2
8	汉坤律师事务所 Han Kun Law Offices	71	2
9	浙江天册律师事务所 Zhejiang T&C Law Firm	29	2
10	湖南启元律师事务所 Hunan Qiyuan Law firm	574	1

基于2013年7月28日至2014年7月28日期间公布的交易
Based on announced deals between 28 July 2013 and 28 July 2014

资料来源：并购市场资讯 Source: Mergermarket

顾正平说，在商务部做出决定之前，美国联邦海事委员会已经批准了 P3 联盟，欧盟委员会也已经决定不对 P3 联盟展开反垄断调查。他说这是商务部首次阻止了一项备受瞩目的全球级别的交易。

“本案提醒那些正在考虑进行大规模全球并购的公司在其战略规划中应充分考虑商务部的反垄断审查。尤其是在并购涉及重大的竞争问题时，相关方应当提供具体且有说服力的救济方案，解决这些备受关注的问题，”顾正平补充说。

商业腐败，尤其是贿赂问题，是跨国企业在中国需要提防的另一个危险的陷阱。葛兰素史克（GSK）案件就是震动业界的一个代表案例。“无论真实的情况如何，那些考虑在中国进行并购或合资项目的外国企业总是应该假定目标企业存在贿赂问题，并且如果交易最终完成他们会遇到贿赂问题，”斌瀚律师事务所北京代表处联席主管合伙人 Brian Beglin 说。

高伟绅律师事务所亚太地区反腐败业务负责人Wendy Wysong 认为，葛兰素史克案证明由中国加强执法而带来的风险增加。“就行贿问题而言，虽然并购交易或合资项目面对的威胁在类型上跟以往一样，但这些威胁变得更真实了。”

欧华律师事务所上海代表处合伙人郭杰说，对在华并购交易及合资项目而言，商业操作一直是一个非常重要的问题。“简单来说，如果收入和利润，或者说商业模式，是以不能被接受的商业做法为基础的，那么无论这些做法是普遍存在的还是所谓的‘市场实践’，收购方都不会得到他们在交易谈判中所争取的东西，”他说。

The American Chamber of Commerce found that almost half of multinationals responding to a recent survey think they are targeted for unfair enforcement of anti-monopoly, food safety and other rules in China.

Among various compliance issues, anti-monopoly and anti-corruption stand out as two of the most active areas in China. In terms of antitrust enforcement, China seems to have become a key jurisdiction that no multinationals can afford to trivialise if their M&As are related to the China market. One reason is that the Ministry of Commerce (MOFCOM) decision is likely to be different from antitrust authorities in developed markets.

“In merger reviews, MOFCOM will scrupulously analyse the features and status quo of the China market, and may apply stricter standards compared to other important jurisdictions,” says Wu Peng, the Beijing-based managing partner of Zhong Lun Law Firm.

Michael Gu, a Beijing-based partner at AnJie Law Firm, says “with increasing enforcement experience, MOFCOM has become more confident in giving independent decisions different from Europe and the US authorities”.

In April 2014, with restrictive conditions, MOFCOM approved Microsoft’s acquisition of Nokia’s devices and services business, a transaction unconditionally cleared by the EU earlier. “MOFCOM reckons the deal may eliminate or restrict competition in China’s smartphone market,” Wu says.

Another recent example is MOFCOM’s decision to prohibit the proposed alliance of the world’s three largest container shipping lines – Maersk Line, Mediterranean Shipping and CMA CGM (the P3 alliance).

Before MOFCOM’s decision, Gu says the US Federal Maritime Commission had approved the P3 alliance and the European Commission had decided not to launch an antitrust investigation into it. He says MOFCOM has blocked a high-profile global transaction for the first time.

“Companies considering large-scale M&As with a global dimension should take MOFCOM’s antitrust review into account in their strategic planning. Especially when substantial competition concerns are involved, relevant parties should provide specific and convincing solutions to address these concerns,” Gu adds.

[商务部]越来越有自信做出独立于欧美国家的决定

MOFCOM has become more confident in giving independent decisions different from Europe and the US authorities

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因此很重要的一点是，外国投资者及其法律顾问在交易之初就需要认真做好尽职调查，并探查可能存在的风险。不过，如何进行尽职调查却存在不确定性，尤其是在最近上海法院对韩飞龙（Peter Humphrey）案做出判决之后。来自英国的韩飞龙作为共同所有人在中国开设了一家风险顾问公司，他因为在调查过程中非法获取个人信息而被判入狱。

韩飞龙在为包括葛兰素史克在内的数家跨国企业进行调查工作期间，非法获取了中国公民的个人信息。上海法院的判决震动了外商投资界，一些律师不禁担心，他们目前为了开展尽职调查而采取的信息收集方法是否有可能触犯那些保护隐私和信息安全的法规。

“尽职调查本身并没有不合法，只是某些调查方法不合法。有鉴于韩飞龙案，以后重点要确保的是，你只选用那些明了法律界线并且不会越界行事的可靠调查员，”Beglin 提醒说。

合并申报

商务部于 6 月 6 日发布了最新的《关于经营者集中申报的指导

境内投资热点

并购市场资讯（Mergermarket）常驻英国的全球调研编辑 Kirsty Wilson 观察到，能源和矿产资源，以及科技行业，是目前非常活跃的两大领域。

Wilson 表示，能源和矿产资源行业在经历了交易数量下滑、交易金额平稳无起色的三年之后，终于在 2013 年强力反弹，并且今年也继续着这股上升势头。例如，今年 5 月，曼哈顿资源宣布将以 8 亿美元的价格收购乌鲁木齐金石徽龙矿业公司 70% 的股权。

“全球市场对石墨的需求可能会成为该行业未来的一个推动力，欧盟和美国地质调查局都将石墨称为战略性矿产资源。鉴于中国是全球最大的石墨生产国，我们预计该行业将出现合并整合，从而产生实力强劲的出口商，这也可能会吸引外资前来中国进行并购交易，”她说。

随着中国在互联网等科技领域继续成长和进步，一些外国投资者有意在中国设立机构提供与互联网相关的服务，宝维斯律师事务所中国业务团队负责人陈剑音说。

“虽然外商在电信行业的投资目前仍然受到限制，不过随着［上海］自贸区放宽了一些行业限制，以及中国政府计划改善国家数据存储能力和网络服务质量，我们相信电信行业在接下来一年会非常活跃。”

陈剑音注意到，随着中国互联网行业竞争的加剧，腾讯、百度及阿里巴巴等行业巨头都在积极对其他业务进行战略投资。“腾讯在这方面尤其积极，已经与乐居控股、搜狐网、华南城控股有限公司达成了战略投资和战略合作安排，”她说。

外国投资者可以在收购或合资的合同中要求对方做出合规承诺

The foreign investor may ask the counterparty to make compliance commitments in the M&A or JV contract

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Commercial corruption, especially bribery, is another dangerous pitfall for multinationals in China, with the GlaxoSmithKline (GSK) case sounding one of the loudest alarms.

“Those considering an M&A or joint venture in China should always assume, whether or not it is true, that the target has, and if you complete your deal you will have, a [bribery] problem,” says Brian Beglin, the co-managing partner of Bingham McCutchen’s Beijing office.

Wendy Wysong, Clifford Chance’s head of anti-corruption Asia Pacific, thinks the GSK case is evidence of an increased enforcement risk. “The types of threats to the success of M&A or joint venture deals in the context of anti-bribery remain the same, but these threats have become more real.”

Kit Kwok, a Shanghai-based partner at DLA Piper, says that business practice has always been a very important issue in the context of M&As and joint venture (JV) deals in China. “To put it simply, if the revenues and profits, i.e. the business model, are based on unacceptable practices, whether they be prevailing or ‘market practice’, then acquirers would not be getting what they are bargaining for in the transaction,” he says.

It’s therefore crucial for foreign investors and their lawyers to carry out careful due diligence and detect possible risks at the beginning of the transaction – although this important practice faces some uncertainty, particularly after the recent Shanghai court verdict on Peter Humphrey, the British co-owner of a risk advisory firm in China who was jailed for illegally obtaining information in the course of his investigations.

Humphrey obtained Chinese citizens’ personal information while working for several multinationals, including GSK. The Shanghai court’s decision shocked the foreign investment community and led lawyers and others to question whether or not their current methods for due diligence and information gathering may fall foul of rules governing information privacy and security.

“Due diligence investigations are not illegal, but certain investigative techniques are illegal. The key going forward after the Humphrey case is to ensure that one only deals with investigators who know where the lines are and can be trusted to stay within bounds,” Beglin warns.

意见》。“[指导意见] 可以说是中国商务部结合近六年的执法实践经验，对经营者集中申报所涉及的重要和常见问题予以明确，”共和律师事务所北京办公室律师成岩说。

吴鹏表示，最新的《指导意见》首次对“控制权”进行了具体的有操作性的规定。“《指导意见》第三条……强调控制权可由经营者直接取得，也可通过其已控制的经营者间接取得，”他说。

天元律师事务所北京办公室高级顾问林丹蓉认为，对构成“控制”的判断因素进行了明确是《指导意见》的核心。“最直接的影响是可能扩大了商务部的经营者集中审查范围，未来可能会有更多案件需要被审查，”她说。“商务部在判断控制权时，不会单纯以股权比例为唯一考虑因素，还会考虑很多其他实际的因素。”

品诚梅森律师事务所北京办公室资深法律顾问鲍爱萍表示，在最新《指导意见》颁布以前，商务部倾向于将双方或多方共同设立的合营企业也视为经营者集中的一种类型，不过由于缺少明确的规定，业界此前对这个问题存在争议。

而在新《指导意见》中，“第 4 条明确规定，如果新设立的合营企业由至少两个经营者共同控制，那么就构成需要申报的经营者集中，”鲍爱萍说。

不过，“如果新设的合营企业并非全功能的合营企业，或是特殊目的公司，这些情况是否要申报仍不清楚，”她说。

史密夫·斐尔律师事务所常驻香港的亚洲竞争法业务部负责人马英杰 (Mark Jephcott) 关注申报前的商谈程序。“《指导意见》对此提供了更多细节规定，包括当事人可以期望在商谈中讨论的问题、需要提交哪些文件和资料等，这些应该都能帮助当事人从商谈中获得最大裨益。”

不过，郭杰对申报前商谈程序存在疑虑。“就反馈时间而言，商谈程序的效率高低并不明确；因此，该程序能否在消除申报的不确定因素方面做出改善，还有待观察，”他说。

至少在目前，当事人还需要留心考虑商务部及其同行可能采取的态度

Parties will also need to take care to consider MOFCOM's likely attitude, and that of their industry counterparts

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Hot inbound activity

Energy and mining and technology are regarded as two active sectors by Kirsty Wilson, a UK-based global research editor of Mergermarket.

As for energy and mining, Wilson says after three years of a declining deal count and relatively flat deal value, the sector made a sharp recovery in 2013, which continued into this year. For example, in May, Manhattan Resources announced the US$800 million acquisition of a 70% stake in Urumqi Jinshi Huilong Mining.

“One future driver could be the global demand for graphite, declared [to be] a strategic mineral by the EU and the US Geological Survey. As China is the world's largest producer, Mergermarket expects to see consolidation in this area so they can become strong providers to foreign players, which could also attract inbound transactions,” she says.

As China continues to grow and advance in technology, especially in the internet sector, there is an interest from foreign investors to establish a presence in China to provide internet-related services, says Jeanette Chan, head of the China practice group at Paul Weiss Rifkind Wharton & Garrison.

“Foreign investment in the telecoms sector is still restricted at present, but with the [Shanghai] free trade zone relaxing some of these restrictions and the PRC government's plans to improve data storage capacity in China, and the quality of internet services, we believe there will be significant activity in the telecoms sector in the next year.”

Chan has observed that Chinese internet giants such as Tencent, Baidu and Alibaba have been actively making strategic investments in other businesses, as competition intensifies in the industry. “Tencent has been particularly active in this regard and has created strategic investments and strategic co-operation arrangements with Leju Holdings, Sohu.com and China South City Holdings,” she says.

Merger filings

On 6 June, MOFCOM issued the new Guiding Opinions on Filing for Concentration of Undertakings. “With nearly six years' experience in law enforcement, MOFCOM gives clarification [in the guiding opinions] to important common issues involved in merger filings,” notes Cheng Yan, a Beijing-based associate at Concord & Partners.

Wu says with the guiding opinions issued, for the first time specific and practical rules have been provided on how to define the acquisition of “control” of another undertaking. “Article 3 of the guiding opinions emphasises that ‘control’ can be acquired by an undertaking directly, or indirectly through some other undertaking already under its control,” he says.

Cathy Lin, a Beijing-based senior consultant at Tian Yuan Law Firm, regards the clarification of “control” as the core of the guiding opinions. “The most direct impact is that the scope of MOFCOM's concentration review may expand, and

简易案件

除了颁布新的合并申报规定以外，今年商务部还在反垄断法下启动了一项新的快车道程序，旨在加快对其认可的“简易”并购和合营项目的审批进程。相关的规定包括 2 月 12 日起施行的《关于经营者集中简易案件适用标准的暂行规定》，以及 4 月 18 日公布的《关于经营者集中简易案件申报的指导意见（试行）》。

简易案件程序能改进商务部的工作效率，这对目前的商务部而言很重要。“简易程序可以让商务部较快地完成对简易案件的审查工作。目前商务部非常有限的人手每年要处理大约 200 件申报案例。因此，商务部必须把这些有限的人力资源集中在重大案例上，”霍金路伟律师事务所北京办公室合伙人 Adrian Emch 说。

孖士打律师事务所香港办公室合伙人夏卓玲介绍说：“对于被认定符合标准的简易案件，要求提交审查的信息减少了，征求第三方意见的过程也得到了简化。到目前为止，简易程序看上去还运作得不错，第一例简易案件只用了 19 天时间就获得了批准。”

不过夏卓玲指出，对于认定某一案件不符合简易案件标准，商务部握有自由裁量权，使得合并当事人面对很大的不确定性。“如果商务部裁定某一案件不符合简易案件标准，合并当事人就不得不根据普通程序再次申报同一案件，这样会比一开始就走普通程序花费更多的时间，”她说。

CMS 中国律师事务所上海代表处管理合伙人邬丽福（Ulrike Glueck）建议：“交易当事人在中国正式提交简易案件申报之前，对利与弊事先做一番仔细的评估是明智之举。”

天地和律师事务所常驻北京的任勇主任介绍说，简易程序的申请人可能满足简易程序的一般性条件，“但是［存在］因属于不应被视为简易程序的特定情形而被要求作为非简易案件重新申报的风险”。

任勇表示，对于《暂行规定》第三条第（三）至（六）项列出的不能被视为简易案件的特定情形，“需要申报人进行准确的把握和判断”。这些情形包括：经营者集中对市场进入和技术进步、对消费

第三方可针对某一案件被认定为适用简易程序向商务部提出异议

A third party may submit its opposition ... to MOFCOM regarding the adoption of the simplified procedures

邬丽福
Ulrike Glueck
CMS中国律师事务所
管理合伙人
上海
Managing Partner
CMS, China
Shanghai

[申请简易程序的案件可能]属于不应被视为简易程序的特定情形

[Mergers may] fall within the scope of particular situations where cases should not be regarded as simple

任勇
Ren Yong
天地和律师事务所
主任
北京
Managing Partner
T&D Associates
Beijing

more cases may be subject to this review in future,” she says. “Equity ratio will not be the only factor to be considered by MOFCOM in identifying control. Many other actual factors will also be considered.”

Bao Aiping, a Beijing-based legal director at Pinsent Masons, says before the new guiding opinions were issued, MOFCOM tended to view the creation of JVs by two or more parties as a type of concentration, but with no express regulations there were arguments in this regard.

In the new guiding opinions, “article 4 ... expressly provides that it is a notifiable concentration if the newly created joint venture is jointly controlled by at least two undertakings,” Bao says.

But still, “it is not clear whether it is notifiable or not if the newly established joint venture is either a non-full-function joint venture or a special purpose vehicle,” she says.

Mark Jephcott, the Hong Kong-based head of competition, Asia at Herbert Smith Freehills, is interested in pre-filing consultations. “The guiding opinions provide further details on, among other things, what topics parties can expect to be able to address in discussions, and what will be required by way of documentation and materials, both of which should assist parties in getting the most out of such discussions.”

But Kwok has concerns about the pre-filing consultations. “It is unclear how efficient this process is in terms of response time, and thus it remains to be seen whether this would be an improvement in terms of removing uncertainty,” he says.

Simple cases

In addition to new merger filing rules, this year MOFCOM also started a new fast-track procedure under the Antitrust Law to facilitate the approval of its recognised “simple” M&A and JV transactions. Relevant regulations are the Interim Provisions on Criteria Applicable to Simple Cases of Concentration of Undertakings, effective on 12 February, and the Guiding Opinions on Filing Simple Cases of Concentration of Undertakings (Trial), issued on 18 April.

This could improve the efficiency of MOFCOM’s work, which is important to the ministry at the moment. “It may

者和其他有关经营者、对国民经济发展可能产生不利影响的情形；以及商务部认为可能对市场竞争产生不利影响的其他情形。

此外，商务部的决定也可能会受到第三方的影响。“简易程序引入了公示信息接收公众异议的环节。在公示过程中，任何第三方均可针对某一案件被认定为适用简易程序向商务部提出异议并提供相关证据，”邬丽福说。

马英杰补充说，申报的简易案件的信息会在商务部网站上公示10天，给竞争对手等第三方提出反对意见的机会。他表示，交易当事人仅仅评估自身是否符合简易案件标准是不够的。“至少在目前，当事人还需要留心考虑商务部及其同行可能采取的态度。”

外资境内并购-杰出国际律所（累计交易金额）
Top international law firms by inbound M&A deal value

排名 Ranking	律师事务所 Law firms	金额（百万美元）Value (US$m)	交易数量 No. of deals
1	富而德律师事务所 Freshfields Bruckhaus Deringer	40,016	8
2	威嘉律师事务所 Weil Gotshal & Manges	3,287	6
3	高伟绅律师事务所 Clifford Chance	3,026	10
4	达维律师事务所 Davis Polk & Wardwell	2,976	5
5	美迈斯律师事务所 O'Melveny & Myers	2,662	13
6	王律师事务所 WongPartnership	2,603	5
7	腾福律师事务所 Stamford Law Corporation	2,456	2
8=	艾伦格禧律师事务所 Allen & Gledhill	2,104	1
8=	美富律师事务所 Morrison & Foerster	2,104	1
10	谢尔曼·思特灵律师事务所 Shearman & Sterling	2,070	3
11	世达律师事务所 Skadden Arps Slate Meagher & Flom	1,776	7
12	康德明律师事务所 Conyers Dill & Pearman	1,762	3
13	威尔逊·桑西尼·古奇·罗沙迪律师事务所 Wilson Sonsini Goodrich & Rosati	1,722	2
14	迈普达律师事务所 Maples and Calder	1,667	2
15	艾金·岗波律师事务所 Akin Gump Strauss Hauer & Feld	1,509	2

基于2013年7月28日至2014年7月28日期间公布的交易
Based on announced deals between 28 July 2013 and 28 July 2014

资料来源：并购市场资讯 Source: Mergermarket

allow MOFCOM to finish work on simple cases rather quickly. MOFCOM has very few people dealing with about 200 filings each year. Therefore the ministry must be concentrating its limited human resources on important cases,” says Adrian Emch, a Beijing-based partner at Hogan Lovells.

Hannah Ha, a Hong Kong-based partner at Mayer Brown JSM, says “for a qualified simple case, less information will be required to be submitted and reviewed, and the process of seeking third parties’ opinions is also simplified. So far the simplified procedure seems to work well, with the first simple case being cleared in only 19 calendar days”.

However, Ha says the merging parties face the big uncertainty of MOFCOM’s discretion to disqualify a simple case. “If a simple case is disqualified by MOFCOM, the merging parties will have to re-file the case and follow the normal case procedures, which may take more time than using the normal procedure to begin with,” she says.

Ulrike Glueck, the managing partner of CMS, China’s Shanghai office, suggests that “it is advisable for the parties to the transaction to conduct a careful benefit-risk assessment before filing a formal notification for a simple case in China”.

Applicants for the simple-case procedure may satisfy the general requirements for application, says Ren Yong, the Beijing-based managing partner of T&D Associates. “But they face the risk that their mergers also fall within the scope of particular situations where cases should not be regarded as simple, and should be re-filed as normal cases.”

Ren says “the notifying party needs to make an accurate judgement” regarding items (3) to (6) in article 3 of the interim provisions, which involve the following situations to disqualify a simple case: (a) the concentration of undertakings that may negatively affect market entry or technological improvement, consumers and other relevant businesses, or development of the national economy; and (b) situations where MOFCOM believes the concentration may adversely affect market competition in other ways.

Also, MOFCOM’s decision may be affected by third parties. “For the simplified procedures, the process of public disclosure for opposition is introduced. During such process, a third party may submit its opposition with evidence to MOFCOM regarding the adoption of the simplified procedures,” Glueck says.

Jephcott adds that information of a filed simple transaction will be posted on MOFCOM’s website for 10 days, giving competitors and other third parties the opportunity to raise objections. He says it’s not enough for parties only to assess if they meet the standards for simple cases. “At least for the time being, parties will also need to take care to consider MOFCOM’s likely attitude, and that of their industry counterparts.”

On the other hand, Emch says the publication of the simple cases online in real time boosts transparency. “In the past, you would know that a particular transaction, other than your own, is under examination only if you were very well connected,” he adds.

More details needed

Some lawyers think the rules about simple cases may need more clarification. For example, article 2 of the interim provisions stipulates that a merger can be regarded as simple if the total market share of all undertakings to the concentration is less than 15% in the same relevant market.

另一方面，Emch 认为，将简易案件的信息在网上即时公布提高了透明度。“在过去，除非你有深厚的人脉，否则你不可能知道其他人的某项交易是否在审查过程中，”他说。

需要更多细节

部分律师认为，关于简易案件的规定可能需要进一步的澄清。例如，《暂行规定》第二条规定，如果在同一相关市场，所有参与集中的经营者所占的市场总份额之和小于 15%，那么该合并可以被视为简易案件。

外资境内并购-杰出国际律所（累计交易数量）
Top international law firms by number of inbound M&A deals

排名 Ranking	律师事务所 Law firms	金额（百万美元）Value (US$m)	交易数量 No. of deals
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7	王律师事务所 WongPartnership	2,603	5
8	盛信律师事务所 Simpson Thacher & Bartlett	1,393	5
9	安理律师事务所 Allen & Overy	1,026	5
10	普衡律师事务所 Paul Hastings	243	5
11	贝克·麦坚时律师事务所 Baker & McKenzie	1,227	4
12	谢尔曼·思特灵律师事务所 Shearman & Sterling	2,070	3
13	康德明律师事务所 Conyers Dill & Pearman	1,762	3
14	年利达律师事务所 Linklaters	1,191	3
15	苏利文·克伦威尔律师事务所 Sullivan & Cromwell	1,149	3

基于2013年7月28日至2014年7月28日期间公布的交易
Based on announced deals between 28 July 2013 and 28 July 2014

资料来源：并购市场资讯 Source: Mergermarket

However, to define the relevant market is not always an easy task, says Richard Blewett, Clifford Chance's head of antitrust Greater China. "In practice, MOFCOM tends to define relevant market narrowly and there is little guidance on market definition in MOFCOM's published decisions," he says.

"To achieve legal certainty, the parties to a deal may need to consider all possible approaches to market definition, and in particular, the narrowest possible market, when assessing whether their deal would be treated as a simple merger."

Article 2 also says that a merger can be regarded simple if undertakings to the concentration establish a JV outside China and this JV does not engage in economic activities in China. However, Blewett says it is also unclear what constitutes "economic activities".

MOFCOM trends

In general, MOFCOM has become increasingly sophisticated and less tolerant to non-compliant activities. Wu, from Zhong Lun, says MOFCOM attaches more weight to expert opinions and economic theories in their reviews. "MOFCOM people tend to use economic theories more often to support their concentration reviews, especially theories of industrial organisation and industrial economics, when they analyse the positive aspects of a certain merger, and its possible influences to eliminate or restrict competition," he says.

Ha, at Mayer Brown JSM, says MOFCOM is "heading to a right direction". From a pure competition law perspective, she says MOFCOM's review practice appears to display the following trends: (1) developing more complete theories of harm; (2) increasing use of economic analysis; and (3) co-operating with competition authorities in other jurisdictions more often.

However, "M&A deal makers have to take note that MOFCOM still appears to take into account non-competition factors in its review process," she adds.

Jiang Liyong, a Beijing-based partner at Gaopeng & Partners, says MOFCOM has recently strengthened its examination of M&A deals in newly emerging industries. "These transactions involve the interaction of anti-monopoly with other areas, as in Microsoft's acquisition of Nokia's mobile business," he says.

"MOFCOM pays special attention to the influences of such transactions on the competitors, and the upstream and downstream companies. MOFCOM also makes scrupulous analyses of the relationship between intellectual property and anti-monopoly," Jiang continues.

According to Cheng from Concord, MOFCOM will publish online its decisions of administrative punishment on unlawful merger transactions for all investigations into deals from 1 May this year.

"We can anticipate that MOFCOM will strengthen its regulation of unlawful concentrations this year," she says, adding that the ministry has also opened a hotline for the public to report unlawful mergers.

Ren, from T&D Associates, says MOFCOM previously didn't disclose such punishment decisions on mergers not filed according to the law.

"The publication of the punishment decisions will exert some influence on the reputation, credibility and business operations of the merging parties, especially listed companies," he says.

然而，界定相关市场并不总是一件容易的事，高伟绅律师事务所大中华区反垄断业务负责人 Richard Blewett 说。“实践中，商务部倾向于对相关市场进行狭义界定，并且商务部已经公布的决定对解释市场界定问题几乎没有帮助，”他说。

“为了确保符合规定，交易当事人在评估其合并是否会被视为简易案件时，可能需要考虑各种可能的市场界定方法，尤其是可能存在的最狭义的市场定义。”

《暂行规定》第二条还规定，如果参与集中的经营者在中国境外设立合营企业，且该合营企业不在中国境内从事经济活动，那么该合并可以被视为简易案件。不过 Blewett 表示，对于什么构成“经济活动”，规定并不明确。

商务部趋势

总体而言，商务部的执法能力日益老练、成熟；与此同时，对不合规行为的容忍度也越来越小。

来自中伦所的吴鹏表示，商务部在审查中更注重听取专家意见和运用经济学理论。“执法人员在审查案件时，更多采用经济学理论为集中审查提供法律支持，特别是产业组织理论、产业经济学等，分析企业并购的有利方面，以及可能产生排除、限制竞争的一些弊端，”他说。

来自孖士打的夏卓玲表示，商务部“正在朝正确的方向前进”。单纯从竞争法的角度来看，她认为商务部的审查实践表现出了以下趋势：(1) 发展更完善的损害理论 (theory of harm)；(2) 更多地运用经济分析；(3) 与其他司法管辖区的反垄断机构展开合作的次数增加。

不过，“并购交易的实施者还是要注意，商务部似乎仍然会在审查过程中把非竞争因素考虑在内，”她说。

高朋律师事务所北京办公室合伙人姜丽勇表示，商务部近期加强了对于新兴领域的并购案件的审查。“这些交易涉及到了反垄断和其他领域的交叉，例如微软并购诺基亚手机业务的交易，”他说。

“商务部在此类交易中，特别重视考察交易对于竞争对手，以及上下游企业的影响。商务部也细致分析了知识产权和反垄断之间的关系，”姜丽勇说。

据共和所的成岩介绍，对于今年 5 月 1 日后立案调查的违法实施经营者集中案件，商务部决定将通过其网站向社会公布对案件的行政处罚决定。“由此可见，商务部今年将会加强对违法实施经营者集中的监管，”她说。据成律师介绍，商务部还开通了电话接受公众对违法集中案件的举报。

来自天地和的任勇主任介绍说，此前商务部对于未依法申报的集中案件并不公开其行政处罚决定。“公开处罚结果后，会对并购交易人的声誉、信用以及业务经营造成一定程度的影响，尤其是上市公司，”他说。

腐败风险

商业腐败行为是另一块可能严重妨碍在华并购或合营项目成功的绊脚石。品诚梅森律师事务所上海代表处资深法律顾问

[新兴领域的并购交易]涉及到了反垄断和其他领域的交叉

[M&A deals in newly emerging industries] involve the interaction of anti-monopoly with other areas

姜丽勇
Jiang Liyong
高朋律师事务所
合伙人
北京
Partner
Gaopeng & Partners
Beijing

Corruption risks

Commercial corruption is another big stumbling block to the success of M&As or JVs in China.

Philipp Senff, a Shanghai-based legal director at Pinsent Masons, points out that “transactions that [should] be executed in a confidential way will not be confidential anymore if a corruption scandal has been leaked by the power of social media, former employees or other whistle-blowers”.

George Wang, a Shanghai-based partner at Jun He Law Offices, says that if the target company has been involved in commercial corruption before the M&A transaction, then: (a) in equity M&As, legal liabilities for such pre-merger corruption will be assumed by the new company after the M&A, and (b) in asset M&As, if the asset-related business relates to such pre-merger corruption, the potential liabilities will also be assumed by the new company.

“In the course of a joint venture transaction, if the Chinese party has commercial corruption problems before setting up the venture, and after that transfers some of its corruption-related business to the venture, then the joint venture may also have to bear the corruption risks,” he says.

Therefore, George Wang recommends compliance due diligence before any M&A or JV deal, in which the foreign investor needs to find out: (a) whether the Chinese counterpart has commercial corruption problems; (b) the corruption risks in the business model of the Chinese counterparty; and (c) whether the Chinese party has a compliance programme and provides compliance training, which reflects how aware the company and its staff are of compliance.

Beglin, from Bingham, also emphasises the importance of deeper due diligence. “We typically recommend engaging outside professionals to assist, focusing not just on managers, but also on vendors, distributors and agents and employees below manager level, where the benefits of any corruption are not typically shared and the resulting resentment may help to uncover the truth,” he says.

Gao Jun, a Shanghai-based partner at Zhong Lun Law Firm, says that in the course of M&A or JV deals, “it’s very important for the foreign investor to investigate the background of the

十大外资在华境内并购交易 (2013 年 7 月 28 日至 2014 年 7 月 28 日)
Top 10 China inbound M&A deals (from 28 July 2013 to 28 July 2014)

公布日期 Announcement date	收购方 Bidder	收购方法律顾问 Bidder legal adviser	收购方所在地 Bidder location	被收购方 Target	被收购方所在行业 Target ndustry	被收购方法律顾问 Target legal adviser	出售方 Seller	出售方法律顾问 Seller legal adviser	金额 (百万美元) Value (US$m)
16/4/2014	中信泰富 CITIC Pacific	富而德律师事务所 Freshfields Bruckhaus Deringer; 嘉源律师事务所 Jia Yuan Law Offices	香港 Hong Kong	中国中信股份有限公司 CITIC Limited	其他 Other		中国中信集团有限公司 CITIC Group Corporation		36,501
17/3/2014	巨人投资有限公司牵头的收购集团 A consortium led by Giant Investment	世达律师事务所 Skadden Arps Slate Meagher & Flom 威嘉律师事务所 Weil Gotshal & Manges 威尔逊·桑西尼·古奇·罗沙迪律师事务所 Wilson Sonsini Goodrich & Rosati	香港 Hong Kong	巨人网络集团有限公司 (50.7% 股权) Giant Interactive Group (50.7% stake)	科技 Technology	康德明律师事务所 Conyers Dill & Pearman 泛伟律师事务所 Fenwick & West 国浩律师事务所 Grandall Law Firm 迈普达律师事务所 Maples and Calder 美迈斯律师事务所 O'Melveny & Myers 为财务顾问提供法律意见 Advising Financial Advisers: 谢尔曼·思特灵律师事务所 Shearman & Sterling 艾金·岗波律师事务所 Akin Gump Strauss Hauer & Feld			1,395
19/8/2013	超越集团有限公司 Chaoyue Group		香港 Hong Kong	Shi Yi Investments Hong Ming Investments	工业生产及化工业 Industrial & Chemicals		Chung Ming Metal Resources Holdings		1,290
17/2/2014	光汇石油 (控股) 有限公司 Brightoil Petroleum (Holdings)	富而德律师事务所 Freshfields Bruckhaus Deringer	香港 Hong Kong	Kerr-McGee China Petroleum	能源、矿产资源及公共设施 Energy, Mining & Utilities		Anadarko Petroleum Corporation	文森·艾尔斯律师事务所 Vinson & Elkins	1,075
12/10/2013	中海码头发展 (香港) 有限公司 China Shipping Terminal Development (Hong Kong)		香港 Hong Kong	中海码头发展有限公司 China Shipping Terminal Development	交通运输 Transport		中海集装箱运输有限公司 China Shipping Container Lines	年利达律师事务所 Linklaters	859
22/5/2014	曼哈顿资源有限公司 Manhattan Resources	德尊律师事务所 Drew & Napier	新加坡 Singapore	乌鲁木齐金石徽龙矿业公司 (70% 股权) Urumqi Jinshi Huilong Mining (70% stake)	能源、矿产资源及公共设施 Energy, Mining & Utilities	蓝钰法律事务所 Opal Lawyers	恺宜投资私人有限公司 Kaiyi Investment		799
12/2/2014	COFCO Dairy Investments	盛信律师事务所 Simpson Thacher & Bartlett	法国 France	中国蒙牛乳业有限公司 (6.19% 股权) China Mengniu Dairy Company (6.19% stake)	消费品 Consumer	苏利文·克伦威尔律师事务所 Sullivan & Cromwell			664
29/5/2014	汇盈集团 APG Group	贝克·麦坚时律师事务所 Baker & McKenzie	荷兰 Netherlands	上海易商仓储服务有限公司 (20% 股权) Shanghai e-Shang Warehousing Services (20% stake)	房地产 Real Estate	安理律师事务所 Allen & Overy			650
10/12/2013	西班牙国际银行 Banco Santander	高伟绅律师事务所 Clifford Chance	西班牙 Spain	上海银行 (8% 股权) Bank of Shanghai Co (8% stake)	金融服务 Financial Services		汇丰控股有限公司 HSBC Holdings	富而德律师事务所 Freshfields Bruckhaus Deringer	647
8/4/2014	百威英博 Anheuser-Busch InBev	富而德律师事务所 Freshfields Bruckhaus Deringer	比利时 Belgium	金士百纯生啤酒股份有限公司 Ginsber Beer Company	消费品 Consumer				621

资料来源: 并购市场资讯 Source: Mergermarket

Philipp Senff 指出："对于应该保密进行的交易而言，如果大众传媒、公司前职员或其他检举者把腐败丑闻公之于众，那么这笔交易也就不再是个秘密了。"

君合律师事务所上海办公室合伙人王钊表示，在并购交易中，如果目标公司在并购前存在商业腐败行为，那么：(1) 在股权并购中，上述并购前腐败行为的法律责任将会由并购后形成的新公司承担；(2) 在资产并购中，如果与资产相应的业务与上述并购前腐败行为有关，新公司依然会承担这些商业腐败可能带来的法律责任。

"在合资过程中，如果中方在合资前存在着商业腐败，中方在合资后将原先的一些业务转让合资公司，而这些业务与商业腐败有关，则合资公司也可能会承担这些商业腐败的风险，"他说。

因此，王钊建议外国投资者在并购或合资交易前，必须进行专门的合规尽职调查。需要注意的项目包括：(1) 目标公司或者中方有无商业腐败的情况；(2) 目标公司或中方原有商业模式中的腐败风险；(3) 目标公司或中方有关合规方面的制度和培训情况，以便了解该公司或其员工有无合规方面的意识。

来自斌瀚的 Beglin 同样也强调了进行更深入的尽职调查的重要性。"我们常常建议客户请外部专家协助调查，不仅注意管理人员，还要关注出售方、分销商和代理商，以及管理层以下的员工——他们通常不能从任何贿赂中分得好处，由此产生的不满可能会促使其将事件揭发出来，"他说。

Chinese party and its relationships with government officials", because such background and relationships may bring harm to foreign investors given the current anti-corruption environment.

Gao also says that in the transaction process, foreign investors should impose a stringent system for expense claims to control the use of money. "Without money, it's difficult to have corruption," he says.

If a foreign investor thinks it's able to manage the compliance risks spotted in the investigation, it needs to set up preventive arrangements and measures. "For example, the foreign investor may ask the counterparty to make compliance commitments in the M&A or joint venture contract. On one hand, the Chinese party should be co-operative in establishing a compliance system with the foreign party in future," says Lin from Tian Yuan. "On the other hand, if the compliance risks exist before the M&A deal is closed or the joint venture is set up, but have not been disclosed or spotted in the process, then the foreign investor doesn't need to assume liabilities for consequences resulting from these risks."

Anti-corruption programme

In the post-M&A stage, a strong compliance programme is very important. Wysong, from Clifford Chance, says a lesson foreign investors can learn from GSK is that "the anti-bribery compliance programmes that work for multinational corporations across the globe, may not work in China".

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中伦律师事务所上海代表处合伙人高俊认为，在并购或合资项目的推进过程中，“[外国投资者] 对于其中方合作对象的身份背景及政商关系的调查是非常重要的”，因为在目前的反腐形势下，这种背景和关系可能会最终损害外国投资者的利益。

高俊还说，在项目推进过程中，外国投资者要建立严格的报销制度，控制钱款的流向。“没有金钱，腐败很难实施，”他说。

如果外国投资者认为自己有能力控制在合规尽职调查中发现的风险点，就需要预先做好一些防范安排和措施。“例如，外国投资者可以在收购或合资的合同中要求对方做出合规承诺：一方面，中国企业在未来要配合外方建立合规体系，”来自天元所的林丹蓉说。

“另一方面，如果合规风险在收购交易交割或合资企业设立之前就已经存在，但在交易或合资时未披露或被发现，那么外方投资者不需要对这些风险引起的后果承担责任。”

反腐败合规制度

在并购完成之后，建立一套强有力的合规制度就显得非常重要。来自高伟绅的 Wysong 表示，外国投资者可以从葛兰素史克身上吸取的一个教训是，“跨国公司统一推行的反贿赂合规制度可能在全球许多地方都适用，但在中国却未必有效。”

斌瀚律师事务所北京代表处的联席主管合伙人叶小玮建议外国投资者说：“当你设计在华反贿赂合规制度时，必须结合中国独特的环境因地制宜，制度必须得到严格执行，并根据你本身的经验定期进行检讨和调正。”

叶小玮还建议，外国投资者在培训中国本地员工和商业伙伴时，不要太过强调外国投资者本国的反贿赂法律，因为基于“外国施加的”法律开展的培训可能会导致关系紧张。

“相反，开展的培训应该基于 [中国] 本地的法律要求以及一套覆盖面广泛、足以照顾到企业运营涉及的所有司法管辖区的公司行为准则，”她说。“比如说，多数违反《反海外腐败法》(FCPA) 的行为同样触犯中国的法律，而一些不会违反 FCPA 的行为还是会触犯中国法律。”

另一方面，外国投资者还是应该密切关注他们在中国的活动，以确保不会触发在海外的反腐败调查。例如，在中国，外资活动所触发的美国在调查中的 FCPA 案件数量依然是世界各国中最高的，Wysong 提醒说。

“就反腐败合规而言，许多人认为中国是一个高风险的司法管辖区，”她说。“其中的原因包括，中国有大量国有企业分布在许多不同的行业中，而这些国企的员工通常被美国视为外国公职人员；另外，运用个人关系等一些商业习惯在中国很普遍，而发展这些关系可能会导致行贿情况的出现。”

CMS 中国上海代表处合伙人王琦介绍说，英国《反贿赂法》(Bribery Act) 将未阻止贿赂行为发生也列为罪名之一。“如果‘与公司有关的’某个人向另一方行贿是为了帮助该公司获得、保持业务或业务优势，[公司就可能违法]，”他说。

“比方说，如果一个在华分公司的员工或代理人代表该分公司行贿，并且可以证明该员工或代理人是为了帮助在英国的母公司取得业务优势，那么该贿赂行为就会自动导致需要由母公司承担的法律责任。这是因为，母公司按理说可能会从该贿赂行为间接得益。” ■

跨国公司[全球]统一推行的反贿赂合规制度……在中国却未必有效

The anti-bribery compliance programmes that work for multinational corporations across the globe may not work in China

Wendy Wysong
高伟绅律师事务所
亚太地区
反腐败业务负责人
Head of Anti-corruption
Asia Pacific
Clifford Chance

Ye Xiaowei, the co-managing partner of Bingham's Beijing office, advises foreign investors that "your anti-bribery programme within China must be tailored to China's unique environment, implemented rigorously, and monitored and adjusted periodically in response to what you experience".

Ye also suggests that foreign investors not emphasise too much their home country's anti-bribery laws when training local employees and business partners in China, since training based on a "foreign-imposed" law may create tensions.

"Instead, conduct training based on local law requirements and a company code of conduct that is broad enough to cover all the jurisdictions in which you operate," she says. "For example, most behaviours that would violate the FCPA [US Foreign Corrupt Practices Act] would also violate Chinese law, and some actions that would not violate the FCPA would violate Chinese law."

On the other hand, foreign investors should still closely monitor their behaviour in China to ensure it doesn't trigger problems overseas. China continues to be the country with the highest number of ongoing US FCPA investigations, Wysong cautions.

"In the context of corruption, China is considered by many to be a high-risk jurisdiction," she says. "This is in part because of the large number of state-owned companies operating across most industries – the workers of which are generally regarded by the US to be foreign officials – and because certain business practices, like the use of close personal relationships, are very common and can lead to instances of bribery to favour these relationships."

Kevin Wang, a Shanghai-based partner at CMS, China, says the UK Bribery Act introduces the crime of failure to prevent bribery. "[The crime may be committed] if a person 'associated with a company' bribes another person intending to obtain or retain business or a business advantage for that company," he says.

"For example, a bribe on behalf of a PRC-based subsidiary by one of its employees or agents will automatically involve liability on the UK-based parent if it can be shown that the employee or agent intended to obtain an advantage for the parent company. The reason is that the parent company may technically benefit indirectly from the bribe." ■

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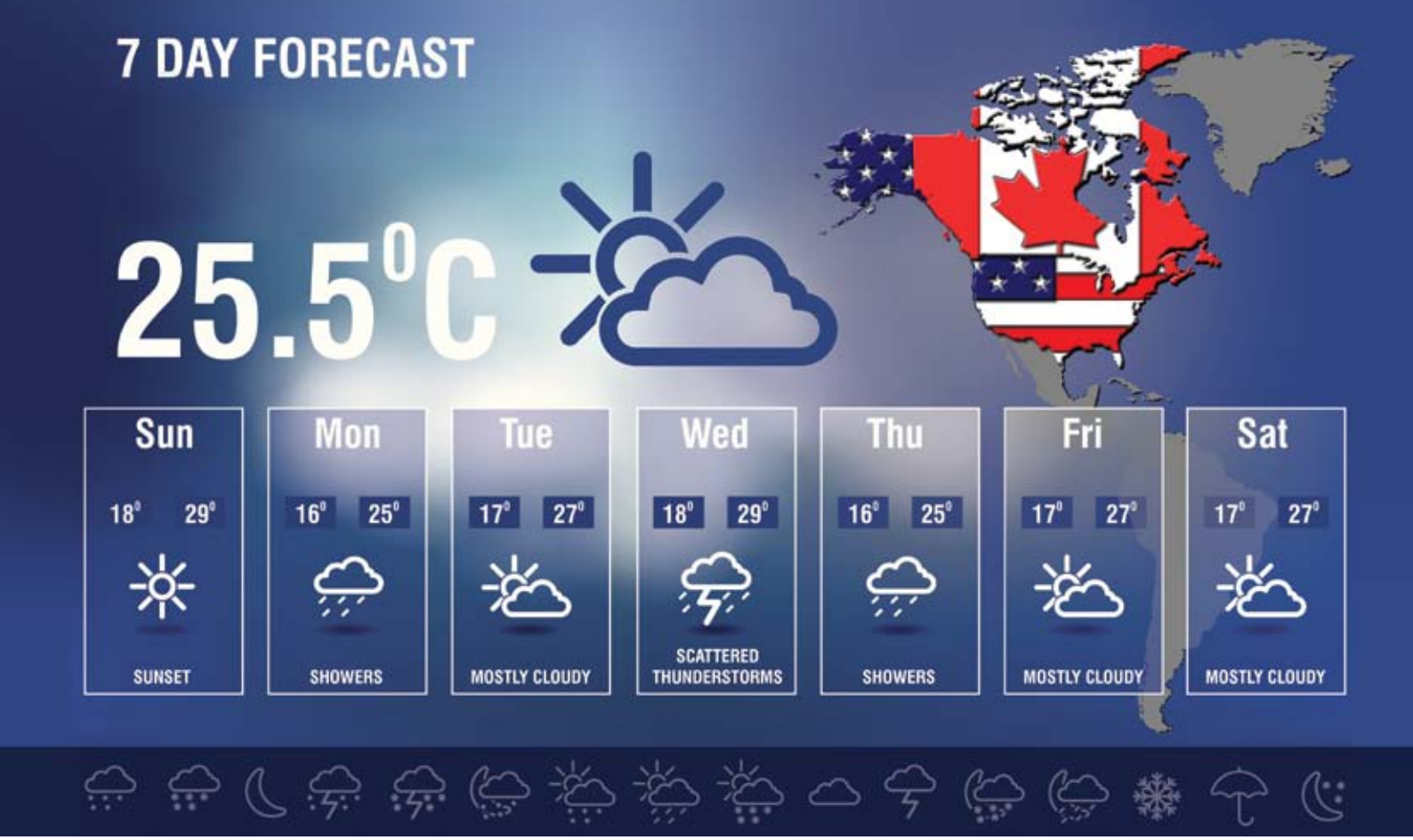

冷暖自知
Hot and cold

北美对于中国投资来说仍然是热点地区，不过总体投资环境仍然风云变幻。中美关系趋暖的同时，加拿大的冷锋却遮挡了中国投资者的艳阳天，Vanessa Ip为您报道

North America continues to be a hot spot for Chinese investment, but the overall investment forecast remains changeable. Sino-American relations are warming, but in Canada a cold front has descended for Chinese investors, writes Vanessa Ip

中国与美国和加拿大的关系一直变幻无常，这主要是因为政治旋风带来的天气时而是晴天时而是暴风雨。中国公司在美国的投资环境似乎直至最近随着投资的增多才从不稳定趋于平静；与此同时，加拿大正在寒风肆虐，既然加拿大拥有丰富的能源资源，这种寒风会持续多久呢？

2013 年中国总体的境外并购活动并没有打破任何记录，但与过去几年相比，仍然在健康发展。据报道，2013 年进行了两百笔

China's relationships with the US and Canada have a history of running hot and cold, depending mostly on the swirling winds of politics for the fine or stormy atmospheres that intermittently prevail. The until very recently volatile investment climate for Chinese companies in the US appears to be clearing as investment is on the uptick, while frosty winds prevail in Canada, but for how long, given that nation's wealth of desirable energy resources?

Chinese overall outbound M&A didn't break any records in 2013 but remained healthy, comparing well with the past few

交易，2012 年则有 191 笔，不过公布的交易价值从 2012 年的 660 亿美元下降到了 2013 年的 515 亿美元。但是随着更大规模交易的进行、中国投资者的日益成熟以及全国性的政府支持，预计 2014 年会成为中国境外投资的创纪录年度。

专长于处理中国相关并购业务的年利达律师事务所上海代表处合伙人方健说："由于许多顶级公司的参与、市场的广度和深度、美元和加元的相对疲软、最近在北美地区大量页岩储备的发现以及美国经济复苏的良好迹象，美国和加拿大对于中国投资者来说仍然非常具有吸引力。在过去的大约一年中，有好几个中方投资项目在美国得以成功实施和完成，这也向中国投资者发出了积极的信号并增强了他们克服法律和监管障碍的信心，这些障碍在以往几年曾使许多中国投资者更青睐欧洲等其他市场。"

今年早些时候，中国放松了一些对境外投资的限制。根据新规定，只要不涉及敏感国家地区或行业，中国公司投资 10 亿美元以下的项目不再需要取得政府核准。此前，几乎所有的中方投资都需要取得国家发展和改革委员会（发改委）以及商务部的核准，这使得中国投资者处于不利的地位。

"需要取得中国政府的核准使得中国投资者很难与其他不需要进行（国家）审批的竞标者站在同一起跑线上竞争，"瑞格律师事务所香港办公室合伙人和全球并购业务负责人 Jim Lidbury 说。"这些新规定将大幅放宽对境外并购的审批要求。我们仍然在等最终的实施条例出台，可以预见其将会使中国投资者更加容易参与竞争。"

盛德国际律师事务所上海代表处合伙人陈永坚将近期的投资自由化改革形容为"朝着正确方向迈进的一步"，"随着时间的推移，这定会鼓励并促进中国更多境外的投资活动"。

然而，东道国在多大程度上欢迎中国投资却不那么确定。中国正在不断将资金注入到美国的并购交易中，尤其是科技和创新的热门领域，据报道，2014 年有价值 100 亿美元的交易正在进行中。不过，当涉及科技、知识产权保护和国家安全等因素时，中美两国在监管和执法方面的关系仍然紧张。

穿过美国边境进入加拿大，更加严格的外国并购法规因为国家

中国在保护自己的地盘方面变得更加咄咄逼人

China has become a lot more aggressive in protecting its own turf

Jamie Barr
霍金路伟律师事务所
合伙人
香港
Partner
Hogan Lovells
Hong Kong

中国政府的核准使得中国投资者很难……站在同一起跑线上竞争

Approvals from China have made it hard for Chinese investors to compete on an even playing field

Jim Lidbury
瑞格律师事务所
合伙人
香港
Partner
Ropes & Gray
Hong Kong

years. There were 200 deals announced in 2013 versus 191 in 2012, however the announced deal value fell from over US$66 billion in 2012 to US$51.5 billion in the following year. But it's predicted that 2014 will be a record year for China outbound investment, driven by bigger deals, the increasing sophistication of Chinese investors, and national government support.

According to Fang Jian, a partner specialising in China-related M&A at Linklaters, Shanghai: "The US and Canada remain attractive M&A jurisdictions for Chinese investors, given the presence of leading players, the width and depth of the market, the relatively weaker American and Canadian currencies, the recent discovery of huge shale reserves in the North America region, and the promising signs of recovery of the US economy.

"The successful execution and completion of a few Chinese investments in the US during the past year or so also send positive signals to Chinese investors and raise their confidence level in overcoming the legal and regulatory obstacles that drove many Chinese investors to favour other markets such as the EU in the past few years."

Earlier this year, China eased some restrictions on outbound investment. Under the new rules, Chinese companies no longer have to obtain government approval for foreign investments under US$1 billion, provided they do not involve sensitive countries or industries. Previously, approvals from the National Development and Reform Commission (NDRC) and the Ministry of Commerce (MOFCOM) were required for almost all outbound investments, putting Chinese investors at a disadvantage.

"Approvals from China have made it hard for Chinese investors to compete on an even playing field against other bidders that don't have to go through a [state] approval process," says Jim Lidbury, a partner at Ropes & Gray in Hong Kong and co-leader of the firm's global M&A practice. "The new rules will substantially loosen the outbound M&A approval requirements. We're still waiting on the final implementing rules, but this will make it a lot easier for Chinese investors to compete."

Joseph Chan, a partner at Sidley Austin in Shanghai, describes the recent liberalisation reforms as "a step in the right direction", which "over time should encourage and facilitate more successful outbound activities in China".

安全问题阻挡着并购活动的进行，并且对战略资源流失的担忧导致了中国近期的投资冷却。这些紧张局面能否得到缓和，还是说投资仍然会如履薄冰？

美国

位于北加州的美国 Womble Carlyle Sandridge & Rice 律师事务所合伙人 Randy Hanson 表示，中国对美国投资是势在必行。Hanson 是 Womble Carlyle Sandridge & Rice 律师事务所全球商事业务主管，他代理许多在美国特别是大西洋东南部和中部地区进行商业活动的中国公司。“由于希望在美国市场中取得一定声望，也由于美国经济的规模和实力，许多中国企业都有在美国开展商业活动的强烈愿望，”他表示。

不过，中美关系最近“在许多领域都充满了紧张气氛并出现恶化”，霍金路伟律师事务所香港办事处合伙人和公司业务主管 Jamie Barr 说。

“中国在保护自己的地盘方面变得更加咄咄逼人，尤其是在科技领域——美国在该领域有许多针对中国人盗取和非正当取得公司信息的行为提起的诉讼。很难说这是否为报复行为，但我们看到，中国竞争主管机关越来越有兴趣整顿在其看来可能会影响中国和其他地区竞争情况的协议，” Barr 说。

Less certain, however, is how receptive host countries are to incoming Chinese investment. China is pumping money into US acquisitions, notably the hot sectors of technology and innovation, with a reported US$10 billion worth of deals in the pipeline for 2014. However Sino-American relations over regulation and enforcement involving technology, intellectual property (IP) protection and national security continue to be strained.

Across the US border into Canada, stricter foreign takeover rules have blocked takeovers on national security grounds, and concerns over the loss of strategic resources are being blamed for the recent Chinese investment chill. Can these tensions be tempered, or will investment remain on ice?

The state of the union

Randy Hanson, a partner at Womble Carlyle Sandridge & Rice in North Carolina, says China's participation in the US is a given. Hanson is a leader in the firm's global business practice, which represents Chinese companies in the US, particularly in the southeast and mid-Atlantic regions. "[There is] a strong desire on the part of many Chinese businesses to be in the US, based on their perception of achieving a certain cachet at home of being in our market, and due to the size and strength of the US economy," he observes.

However, the Sino-American relationship has recently been fraught with "a number of tensions in a number of areas, and

私营企业进行的许多投资都是瞄准了美国的成熟技术。联想集团以 29 亿美元收购了谷歌旗下的摩托罗拉移动手机业务成为今年已公布的中国在北美地区进行的最大笔境外交易。随着阿里巴巴参与了对拼车软件 Lyft2.5 亿美元的投资，中国还将继续开拓道路进军硅谷。

方健认为这种趋势可能会继续下去。“如今，中国潜在的投资者从重点关注自然资源和基础设施交易的国企扩大到了希望得到外延式

中国企业赴美国、加拿大并购 - 国际律所前20强（排名基于交易金额）
Top 20 international law firms for China outbound US & Canada deals (by deal value)

排名 Ranking	律师事务所 Law firms	金额（百万美元）Value (US$m)	交易数量 No. of deals
1	佳利律师事务所 Cleary Gottlieb Steen & Hamilton	5,210	2
2	世达律师事务所 Skadden Arps Slate Meagher & Flom	3,296	5
3	威嘉律师事务所 Weil Gotshal & Manges	2,910	1
4	美迈斯律师事务所 O'Melveny & Myers	2,525	4
5=	AZB & Partners	2,300	1
5=	Cravath Swaine & Moore	2,300	1
5=	霍金路伟律师事务所 Hogan Lovells	2,300	1
8	司特曼律师事务所 Stikeman Elliott	1,120	1
9	达维律师事务所 Davis Polk & Wardwell	980	2
10	伟凯律师事务所 White & Case	313	2
11	Katten Muchin Rosenman	188	2
11=	麦启泰律师事务所 McCarthy Tétrault	188	1
13	The Giannuzzi Group	166	1
14	瑞格律师事务所 Ropes & Gray	143	1
14=	盛德律师事务所 Sidley Austin	143	1
16	盛信律师事务所 Simpson Thacher & Bartlett	120	1
17	摩根路易斯律师事务所 Morgan Lewis & Bockius	70	1
18	普凯律师事务所 Pryor Cashman	41	1
19=	Brown Rudnick	22	1
19=	Polsinelli Shughart	22	1

基于2013年8月21日至2014年8月21日期间公布的交易
Based on announced deals between 21 August 2013 and 21 August 2014

资料来源：并购市场资讯 Source: Mergermarket

has deteriorated", observes Jamie Barr, partner and head of the corporate practice at Hogan Lovells in Hong Kong. "China has become a lot more aggressive in protecting its own turf. Particularly in the area of technology, there have been claims brought in the US against the Chinese for spying and improper access to company information. Whether it is retaliatory is hard to say, but we've also seen Chinese competition authorities become increasingly interested in policing agreements that they feel may impact competition in China and elsewhere."

A significant portion of the investments coming from privately owned enterprises has been targeted at established technologies in the US. The largest announced China outbound deal in North America so far this year was the US$2.9 billion purchase of Google's Motorola Mobility unit by Lenovo Group. China also continues to carve out inroads into Silicon Valley with Alibaba's eyes set on the US$250 million acquisition of ride-sharing app developer Lyft.

According to Fang, this is a trend that is likely to continue. "Potential Chinese investors have now expanded from state-owned enterprises focusing mainly on natural resources and infrastructure deals, to also include private enterprises driven by the desire for inorganic growth, increase in overseas market share, and opportunities to acquire technologies and innovative businesses. Some of the bigger private enterprises include Shuanghui, Tencent, Fosun, Lenovo and Wanda, who are pursuing investment opportunities in myriad sectors … a significant proportion of China's outbound investments in terms of deal value are foreseeably still likely to be in the natural resources, technology and infrastructure sectors", he says.

Hogan Lovells is one of the sell-side advisers in the US$2.3 billion IBM-Lenovo deal involving the sale of IBM's x86 server unit to Chinese PC maker Lenovo. The deal was recently approved by US regulators, but had previously drawn national security concerns among US officials over the possibility that the servers could be abused by Chinese hackers. Hogan Lovells advised IBM on global antitrust issues with regards to the necessary approvals required by Chinese regulators.

On the increasing sophistication of Chinese investors, Barr says: "The Chinese corporates acquiring non-resource assets have had a reputation for asset stripping, in that they have been looking to acquire know-how, technology, intellectual property, which they then use to upgrade their own businesses in China. I think we're going to see more corporates going into markets and really operating those businesses in those markets."

Thomas Chan, a partner at Fox Rothschild in Los Angeles who specialises in helping Chinese companies set up operations in the US, notes that Chinese investors are learning to protect their industries and interests by utilising the US legal system. "For example, they recently began to use antitrust laws against US pharmaceutical companies, tech companies and even major auto companies," he says. "They are also using the Western legal system to grow their IP base and foster indigenous IP development. Currently they file more anti-piracy lawsuits in China against Chinese entities than we file against them here in the US."

According to Peter Thomas, managing partner at Simpson Thacher's Washington DC office, "it is no secret that there is some trepidation in US society, and among US politicians, about China's growing economic clout, especially when manifested by direct investments in US assets". But Barr believes the recent announcement that China and the US will sign up to a Model

发展、增加海外市场份额并获得收购技术和创新公司机会的私营企业。例如双汇、腾讯、复星、联想和万达等大型私营企业正在各个领域中寻求投资机会……但从交易金额来说，预计中国大部分的境外投资可能会继续进入自然资源、科技和基础设施领域，”他说。

霍金路伟律师事务所在联想以 23 亿美元收购 IBM 业务的交易中担任卖方 IBM 的法律顾问，该笔交易是 IBM 向中国电脑制造商联想出售 X86 服务器业务。美国监管当局最近批准了这笔交易，尽管此前由于担心中国黑客可能会滥用服务器，美国官员对国家安全表示了担忧。霍金路伟律师事务所就全球反垄断问题并就取得中国监管者的必要审批为 IBM 提供了法律服务。对于中国投资者的日益成熟，Barr 认为：“中国公司有利用非资源类资产收购实则进行资产剥离的名声，因为他们一直把目光放在取得技术诀窍、科技和知识产权上面，然后用其升级自己在中国的业务。我想我们会看到越来越多的公司进入市场，而且是名副其实地在那些市场经营那些业务。”

位于洛杉矶的福罗律师事务所合伙人陈德华专长于帮助中国公司在美国开始经营活动，他指出中国投资者正在学习如何通过美国的法律制度保护自己的产业和利益。“比如，他们最近开始运用反垄断法应对美国制药公司、科技公司甚至大型汽车公司，”他说。“他们还运用西方法律制度发展他们的知识产权库并培育知识产权自主开发。最近，他们在中国针对中国公司提起的反盗版诉讼比我们在美国提起的更多。”

盛信律师事务所华盛顿办公室管理合伙人 Peter Thomas 说：“美国社会和政客对中国日益增长的经济影响力，特别通过对美国资产进行直接投资展现的影响力有些许恐惧感已经不再是秘密了。”不过，Barr 认为近期宣布的中美两国将在今年年底将就信息交换签署的“《海外账户纳税法案》政府间协议模式一”可能标志着两国之间更大的妥协或者至少是更加务实的态度。不过，众说不一。

美国一家专注于中国业务的中型律师事务所 Foley & Mansfield 明尼阿波利斯办公室合伙人 Seymour Mansfield 介绍说，《海外账户纳税法案》由美国国会于 2010 年 3 月制定，旨在使美国纳税人更难隐瞒其离岸账户的资产。Mansfield 是该律所国际商事法律部

美国社会和政客对中国日益增长的经济影响力……有些许恐惧感

It is no secret that there is some trepidation [in US] about China's growing economic clout

Peter Thomas
盛信律师事务所
管理合伙人
华盛顿
Simpson Thacher & Bartlett
Managing Partner
Washington DC

为了获取有关离岸账户的信息，FATCA规定了严格的通报义务

To discover information about offshore accounts, FATCA imposes significant reporting obligations

Seymour Mansfield
Foley & Mansfield
合伙人
明尼阿波利斯
Partner
Foley & Mansfield
Minneapolis

1 Foreign Account Tax Compliance Act (FATCA) agreement on exchanges of information by the end of the year, may signal greater accommodation, or at least pragmatism, between the two countries. Opinions, however, are divided.

FATCA was enacted in March 2010 by the US congress to make it more difficult for US taxpayers to conceal assets in offshore accounts, explains Seymour Mansfield, a partner in the Minneapolis office of Foley & Mansfield, a mid-sized US firm with a China focus. Mansfield is chair of the firm's international business law group, with a specific focus on Sino-US business deals and disputes. "In order to discover information about offshore accounts, FATCA imposes significant reporting obligations on both non-US foreign financial institutions and non-US non-financial entities to identify and disclose their US account holders," he observes.

The goal, says Hanson, is to promote the global sharing of tax information, however, "FATCA has without a doubt created unwelcome business tensions between the US and other countries, as well as further animosity over the proliferation of US laws with extensive extra-territorial application, such as FCPA [Foreign Corrupt Practices Act]".

Mike Burke, a partner at Arnall Golden Gregory in Washington, agrees. Burke has experience advising clients on FCPA compliance, in particular with China-related direct investments. "FCPA and US export controls, taken together, can be a major challenge," he warns. "Foreign investors sometimes do not realise that investments in the US could cause the 'parent' company to be subject to US law, including the FCPA and export controls. With that jurisdiction, penalties are potentially high, as China remains a jurisdiction of concern for bribery, as well as US export control compliance."

Megan Mehalko, a partner at Benesch in Cleveland, also warns of fallout that could impact China investment activity. Benesch assists US companies in the establishment of China-related strategic alliances and joint ventures for manufacturing, distribution and business operations, and Mehalko is chair of the firm's corporate and securities practice group, and also active in its China practice group. "It is certainly possible that this [FATCA] co-operation will chill some Chinese investment in the US as information regarding these foreign holdings and investments will be shared with the Chinese tax authorities,

十大中国境外并购交易（以美国和加拿大为目的地） Top 10 China outbound deals targeting US and Canada								
公布日期 Announcement date	收购方 Bidder	收购方法律顾问 Bidder legal adviser	收购目标 Target	目标所在行业 Target industry	目标所在国家 Target dominant country	出售方 Seller	收购目标 / 出售方法律顾问 Target/Seller legal adviser	金额（百万美元）Value (US$m)
29/1/2014	联想集团 Lenovo Group	威嘉律师事务所 Weil Gotshal & Manges	摩托罗拉移动控股公司 Motorola Mobility Holdings	电信硬件 Telecom Hardware	美国 US	谷歌公司 Google	佳利律师事务所（代表出售方） Cleary Gottlieb Steen & Hamilton (advising seller) 世达律师事务所（代表财务顾问） Skadden Arps Slate Meagher & Flom (advising financial adviser)	2,910
23/1/2014	联想集团 Lenovo Group	AZB & Partners; 佳利律师事务所 Cleary Gottlieb Steen & Hamilton	IBM (x86 服务器业务） IBM (x86 server business)	电脑硬件 Computer Hardware	美国 US	IBM 公司 IBM Corporation	Cravath, Swaine & Moore（代表目标公司 advising target); 霍金路伟律师事务所（代表出售方）Hogan Lovells (advising seller) 美迈斯律师事务所（代表出售方）O'Melveny & Myers (advising seller)	2,300
17/4/2014	凤凰能源控股 Phoenix Energy Holdings	司特曼律师事务所 Stikeman Elliott	Athabasca Oil Corporation (Dover 商业项目 Dover Commercial Project) (40% 股权 40% stake)	能源 Energy	加拿大 Canada	Athabasca Oil Corporation		1,120
12/5/2014	方源资本 FountainVest Partners		百利得汽车安全系统公司 (67.5% 股权） Key Safety Systems (67.5% stake)	汽车 Automotive	美国 US	Crestview Partners	达维律师事务所（代表出售方） Davis Polk & Wardwell (advising seller)	700
26/12/2013	海普瑞（美国） Hepalink USA	伟凯律师事务所 White & Case; 中伦律师事务所 Zhong Lun Law Firm	Scientific Protein Laboratories	制药、医疗及生物科技 Pharma, Medical & Biotech	美国 US	American Capital		313
20/3/2014	阿里巴巴集团 Alibaba Group Holding		TangoMe	电脑软件 Computer Software	美国 US		达维律师事务所（代表目标公司） Davis Polk & Wardwell (advising target)	280
2/4/2014	阿里巴巴集团 Alibaba Group Holding Third Point		Lyft	互联网 / 电子商务 Internet/ E-commerce	美国 US			250
29/7/2014	颖泰嘉和生物科技有限公司 Nutrichem	世达律师事务所 Skadden Arps Slate Meagher & Flom	Albaugh (20% 股权 20% stake)	化工业及材料 Chemicals & Materials	美国 US			
20/12/2013	万丰奥特控股集团 Wanfeng Auto Holding Group 山西联合镁业有限公司 Shanxi United Magnesium Industry	Katten Muchin Rosenman	Meridian Lightweight Technologies	汽车 Automotive	加拿大 Canada		麦启泰律师事务所（代表目标公司） McCarthy Tétrault (advising target)	188
14/7/2014	红牛维他命饮料有限公司 Red Bull Vitamin Drink Company		All Market (25% 股权 25% stake)	消费品 Consumer	美国 US		The Giannuzzi Group（代表目标公司 advising target)	166
基于 2013 年 8 月 21 日至 2014 年 8 月 21 日期间公布的交易 Based on announced deals between 21 August 2013 and 21 August 2014								
资料来源：并购市场资讯 Source: Mergermarket								

FATCA下的合作肯定有可能使在美国的某些中国投资冷却下来

It is certainly possible that this [FATCA] co-operation will chill some Chinese investment in the US

Megan Mehalko
Benesch
合伙人
克利夫兰
Benesch
Partner
Cleveland

的主管，尤其专长于中美商业交易和争端。“为了获取有关离岸账户的信息，《海外账户纳税法案》规定了严格的通报义务，要求外国金融机构和外国非金融实体必须确定并报告其美国账户持有人，”他说道。

something that some Chinese investors may have been trying to avoid by making an investment in the first place, or sending funds out of China in anticipation of making an investment," she says.

Still, Nicholas Molan, of counsel for Vinson & Elkins in Beijing, says the anticipated entry into a Model 1 Intergovernmental Agreement between the US and China "is being viewed favourably by many companies as a barometer of broader relations between the countries". And Phillip Mills, a partner at Davis Polk in New York specialising in M&A, agrees that a US-China FATCA agreement would be an important development in terms of co-operation between the two governments. However, he adds that "it is of no consequence to Chinese outbound M&A activity into the US. Co-operation on the sharing of tax-related information will not alleviate the national security or cybersecurity concerns which are much more fundamental to M&A regulatory review".

From a political and regulatory perspective, one of the main concerns for Chinese investors is the stringent review requirements of their potential acquisitions in the US by the Committee on Foreign Investment in the United States (CFIUS). "In most cases there are no serious social, political or regulatory issues preventing Chinese investment in US assets," says Thomas, "but certain issues, such as close proximity of assets to sensitive military facilities, have repeatedly presented problems for certain Chinese investors."

在美国实施私有化需要考虑的因素
What to consider about going private in the US

中国的公司过去曾热衷于在美国上市，且往往是通过反向合并的方式进行。但是如今，中国公司却正在退出美国的资本市场，另寻其他的司法管辖区上市。

在截至 2014 年 8 月为止的过去 58 个月中，已有 26 家公司成功完成了私有化。许多中国公司由于股价被低估、空头攻击及 / 或战略调整而已经进行了私有化。

有些公司能顺利完成私有化，但另一些公司的私有化进程却碰到障碍，甚至最终失败。环球天下教育科技集团仅用 30 天便完成了私有化，相较之下，同济堂药业和哈尔滨电气却耗时超过一年。作为估值近 10 亿美元的亚洲首家在纳斯达克上市的保险中介公司，泛华保险甚至都未能实现私有化。一旦遭遇小股东反对，而要约人又没有充足的收购资金，私有化便会以失败告终。

私有化完成后，有的公司在其他司法管辖区再次成功上市。例如，中国金属资源利用有限公司于 2014 年 2 月在香港成功再上市，募集资金约 9,600 万美元。该公司早先在纽约证交所上市，名称为“古杉环境能源”，其于 2012 年 10 月从纽交所退市。

何为“私有化”?

“私有化”是指在美上市公司的全部或大多数股份被收购而归为私人所有。股份的收购人可以是私募股权机构、本公司的大股东或管理层，或者该公司的关联方。上市公司的在册股东若少于 300 名（若该公司无重大资产，则这一数字为 500 名），就可以向美国证券交易委员会 (SEC) 申请注销其股权证券，此后就无须遵守美国证券法的定期报告要求。

在美上市的公司可以通过不同的途径实施私有化。

- **合并：**在美上市公司与收购集团所有的新设私人公司合并，或者将全部或绝大部分资产出售给该新设公司；
- **要约收购：**收购集团发出收购要约，收购在美上市公司的全部或大部分公众持有的普通股；或者
- **缩股：**在美上市公司宣布缩股，将小股东持有的股份减少至不足一股，随后该公司赎回此类股份，从而减少在册股东的人数。

一步式合并

在美上市公司可以通过一步式合并实现私有化。该步骤一般涉及下列文件：

- **合并建议书：**收购集团向在美上市公司的董事会发出合并建议书，其中应表明拟收购该公司公众普通股的价格；
- **合并协议：**该协议由收购集团、上市公司及其董事会的

While it was popular for Chinese companies to list their stocks in the US in the past, often via reverse mergers, Chinese companies are now exiting US capital markets and re-listing in other jurisdictions with 26 having been successfully privatised in the last 58 months up until August 2014. Many Chinese companies have been privatised because of undervaluation of stock prices, attacks by short sellers, and/or strategic adjustment.

Although the privatisation process for some companies has gone smoothly, others encountered obstacles and even failed eventually. Compared with Global Education & Technology Group, which spent 30 days to complete its privatisation process, Tongjitang Chinese Medicine Company and Harbin Electric spent over a year. Even CNinsure, the first Asian insurance intermediary company listed in Nasdaq with a valuation of nearly US$1 billion, failed. A privatisation bid fails if there is rejection by minority shareholders and insufficient buyout funds from the offeror.

After privatisation, some companies have successfully re-listed in other jurisdictions. For instance, China Metal Resources Utilization successfully relisted in Hong Kong in February 2014, and raised roughly US$96 million. It was formerly listed on the NYSE as Gushan Environmental Energy and was delisted in October 2012.

What is ‘going private’?

“Going private” means all or most of the stock of a publicly listed company in the US is bought out and ends up in private hands. The stock may be bought out by private equity firms, by the major shareholders or management of the company, or by affiliates of the company. A listed company, if held by less than 300 shareholders of record – or 500 shareholders of record if the company does not have significant assets – can deregister its equity securities from the US Securities and Exchange Commission (SEC) and will from then not be subject to the periodic reporting requirements of the US securities laws.

There are different ways for a US public company to go private.

- **Mergers:** where a US public company merges with or sells all or substantially all of its assets to a newly formed private company owned by the buyout group;
- **Tender offer:** where a buyout group makes a tender offer to buy all or most of the company’s publicly held common stock; or
- **Reverse stock split:** where a US public company declares a reverse stock split that reduces the shares owned by small shareholders to less than one share, which will then be redeemed by the company and hence reduces the number of shareholders of record as a result.

One-step merger

A US public company may be privatised in a one-step merger. This will generally involve the following:


陆志明 Simon Luk

特别委员会（后文详述）三方商定，以确保合并条款及整个合并过程的公平性；

- **表 13E-3 备案：**若合并建议书中涉及上市公司自身或其关联方，则必须根据《1934 年证券交易法》在 13E-3 表格上作出说明，包括解释交易的目的，以及就非关联股东是否受到公平对待发表观点并说明理由等；以及
- **股东委托书：**上市公司必须呈交股东委托书，在特别会议中征求股东批准合并交易，并获得股东同意普通股的注销及 / 或退市。股东委托书应包括董事会、特别委员会及特别委员会独立财务顾问对本次交易的意见。

要约收购后的简易收购

要约收购和合并经常用于确保能成功向小股东收购全部普通股。如果在简易合并前发出收购要约，另需提供的文件还包括收购集团向在美上市公司股东发出的收购要约书以及邀请股东接受该收购要约的转送函。

特别委员会、公平性和独立性

在所有私有化交易中，尤其是一步式合并中，确保交易公平非常重要，因为收购集团与上市公司之间肯定会产生利益冲突。因此，在美上市公司的董事会将设立由无利害关系的独立董事组成的特别委员会，以协商确定最佳的交易方案，保障小股东的利益。该特别委员会必须独立运作。该委员会自行聘用财务和法律顾问，随时充分了解决策流程，并有权独立地与收购集团进行谈判。倘若原告的律师提出质疑，则证明交易不公平的举证责任就会因为特别委员会的存在而转移给质疑者，即原告方。

在美上市公司的董事会对股东负有受信责任，在批准出售公司前应当首先考虑采取其他交易方式实现股东价值的最大化。

私有化的益处和结论

考虑到 SEC 严格的监管制度，加上美国当前的投资气候差强人意，私有化对在美上市的中国公司而言未尝不是个好的选择。一旦私有化，它们就能调整业务发展的精力与资源投向，亦可避免空头的突袭。私有化也能让公司有机会考虑在其他融资条件更好的资本市场重新上市，并能促进与当地投资者的沟通交流。

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Simon Luk is a partner and chairman of Asia practice at Winston & Strawn. He can be contacted at +852 2292 2222 or by email at sluk@winston.com

- **Merger proposal:** the buyout group makes a merger proposal to the board of directors of the US public company, with an indication of the price it will pay to acquire the company's common stock in public hands;
- **Merger agreement:** it will be negotiated between the buyout group, the company and the special committee of the board (discussed later) to ensure that the terms of the merger and the entire process of merger are fair;
- **Schedule 13E-3 filing:** if an affiliate of the company, or the company, is involved in the merger proposal, a statement on schedule 13E-3 is required pursuant to the Securities Exchange Act of 1934, with discussions of the purpose of the transaction, and views and reasons as to fairness to the unaffiliated shareholders; and
- **Proxy statement:** the company has to file a proxy statement to seek shareholders' approval of the transaction in a special meeting, and obtain their consent for deregistering and/or delisting the common stock, which will include views on the transactions of the board, the special committee and the independent financial adviser to the special committee.

Tender offer followed by short-form merger

Tender offer and mergers are often used to ensure that all common stock is purchased from the minority shareholders. If there is a tender offer prior to a short-form merger, additional documents will include a tender offer statement from the buyout group to the shareholders of the US public company and a letter of transmittal, which invites the shareholders to tender their shares.

Special committee, fairness and independence

In all going-private transactions, and in particular in one-step mergers, it is important to ensure that the transactions are fair, as conflict of interests between the buyout group and the company will invariably arise. Hence, the board of directors of a US public company will set up a special committee, comprising disinterested and independent directors, to negotiate the best deal to protect minority shareholders. The special committee must operate independently. It retains its own financial and legal advisers, remains fully informed in the decision-making process, and has the power to negotiate with the buyout group at arm's length. The use of the special committee will, in the event of challenges by plaintiffs' lawyers, shift the burden of proof of unfairness to the challengers.

The board of directors of a US public company owes fiduciary duties to the shareholders and should consider alternative transactions to maximise the value for the shareholders before approving the sale of the company.

Benefits and conclusion

Under the stringent regulatory regime of the SEC and considering the current investment climate in the US, going private may be a viable option for US-listed Chinese companies to refocus their energy and resources in developing their business, as well as to avoid surprise attacks by short-sellers.

It presents a good opportunity for companies to consider relisting on other stock markets where they may obtain better financing terms, and communications with local investors may be facilitated.

Hanson 表示该法案旨在促进全球的税务情报交换，不过，“《海外账户纳税法案》无疑造成了美国和其他国家之间不受欢迎的商业紧张气氛，并且引起了对如《反海外腐败法》等美国法律超法域适用的更大反感。”

Arnall Golden Gregory 律师事务所华盛顿办公室合伙人 Mike Burke 表示同意。Burke 在为客户就《反海外腐败法》合规问题提供法律服务方面拥有丰富经验，特别是与中国有关的直接投资。“《反海外腐败法》加上美国出口管制会构成重大挑战，”他提醒道。“外国投资者有时候没有意识到在美国进行投资可能会使其‘母公司’受到《反海外腐败法》和出口管制等美国法律的管辖。由于中国仍然存在着令人关注的腐败问题，并且是美国出口管制对象国，一旦受到这些法律的管辖，就非常有可能受到处罚。

Benesch 国际律师事务所 Megan Mehalko 也提醒道，这些负面作用可能会影响中国的投资活动。Benesch 律师事务所协助美国公司在制造、分销和商业运营方面建立与中国相关的战略联盟和合营企业。驻克利夫兰的 Mehalko 是 Benesch 国际律师事务所公司和证券业务主管，同时也参与中国业务部的工作。“《海外账户纳税法案》下的合作肯定有可能使在美国的某些中国投资冷却下来，因为这些外国持股和投资的信息将与中国税务机关进行分享，而这可能是某些中国投资者从投资开始或者将资金送出中国以期进行投资时就力图尽量避免发生的事情，”她说道。

不过，美国文森·艾尔斯律师事务所北京代表处顾问 Nicholas Molan 表示，许多公司认为美国与中国即将签订政府间协议模式一是两国关系更为开放的晴雨表，因而对此表示欣然接受。达维律师事务所纽约办公室合伙人 Phillip Mills 专注于并购交易，他认为中美签订《海外账户纳税法案》协议将会成为两国政府合作的一个重大发展。不过，他补充道，“……这对于中国在美国进行境外并购活动没有影响。税务情报交换不会减轻美国并购监管者对于国家安全或者网络安全问题的担忧，这对于并购监管审查来说更为重要。”

从政治和监管角度来看，中国投资者最大的一个担心是美国外国投资委员会（CFIUS）对其在美国并购活动的严格审查要求。

从短期来看，[关于CFIUS]中国商人仍然会感到不安

In the short term, Chinese businessmen and women still have an uneasiness [regarding CFIUS]

Thomas Stiebel Jr
Quarles & Brandy
合伙人
芝加哥
Partner
Quarles & Brandy
Chicago

[中国投资者]最近开始运用反垄断法应对美国制药公司……

[Chinese investors] recently began to use antitrust laws against US pharmaceutical companies

陈德华
Thomas Chan
福罗律师事务所
合伙人
洛杉矶
Partner
Fox Rothschild
Los Angeles

Ralls v CFIUS

“There is a sense that the Chinese investors are particularly targeted by this set of rules,” adds Lidbury. There is speculation as to whether the recent decision in *Ralls v CFIUS* may signal a sea change in the level of scrutiny Chinese firms face when acquiring US assets. In July this year, A US Court of Appeals ruled for the first time that the US government must provide access to some of the evidence relied upon on when conducting national security reviews of foreign acquisitions of US businesses, and that the affected party must be given an opportunity to rebut that evidence.

In 2012, US President Barack Obama blocked the Ralls Corporation’s wind farm transaction “because the terms proposed by CFIUS to mitigate its national security considerations were unacceptable to the parties”, says Seymour. Ralls was never given access to the relied upon evidence, or the opportunity to respond, which the court held to be unconstitutional.

“The Ralls decision is helpful, I believe, in showing to the Chinese buyer community the rule of law is well established in the US, such that even actions of the executive branch are subject to scrutiny,” says Joseph Chan. “It is historic in that this is the first time a challenge of this nature has been made by a foreign buyer and prevailed.”

Traditionally, says Thomas Chan, “Chinese investors have been gun shy in using the US court system because of their dramatic losses in the past, when they should have won – or lost less. The Chinese government has been urging its citizens to vigorously defend themselves in the US, and this surprising win will encourage them to push for litigation”.

But the decision is unlikely to influence the decision making process for Chinese companies investing in the US, “with CFIUS remaining a major ‘black box’ concern in any US acquisition”, says Thomas Stiebel Jr, a partner at Quarles & Brandy in Chicago and chair of the firm’s China law group and chief representative of the firm’s Shanghai Representative Office. “In the short term, Chinese businessmen and women still have an uneasiness, with not knowing how or if CFIUS will be an issue with any given transaction, and there seems to be an opinion that the decision making process is too vague and ambiguous and will remain so for the foreseeable future.”

“在大部分交易中都没有严重的社会、政治或者监管问题阻碍中国投资美国资产，” Thomas 说道，“但是，资产的位置靠近敏感军事设施之类的特定问题不断为部分中国投资者带来麻烦”。

Ralls 诉 CFIUS 案

“从某种意义上说，中国投资者是这套规定的特别目标，”Lidbury 说道。罗尔斯 (Ralls) 诉美国外国投资委员会 (CFIUS) 案近期的判决是否标志着中国公司并购美国资产时面临的审查要求会发生重大变化?

今年七月，美国上诉法院作出一审判决，认定美国政府在就外国公司并购美国公司进行国家安全审查时必须公开相关决定所依据的部分证据，并给予受影响的一方对该证据作出回应的机会。

2012 年，美国总统奥巴马下令禁止罗尔斯公司风电项目，“由于当事人无法接受美国外国投资委员会提出的减少国家安全问题的条件”，Seymour 说道。罗尔斯未曾有机会了解作出该决定所依据的证据，也没有机会进行回应，法院认定这是违宪行为。

“我认为罗尔斯案有助于向中国买方展示美国完善的法治，即使是行政机关的行为也会受到审查，” 陈永坚说道。“这是外国买方历史上第一次提出这种挑战并且获胜。”

陈德华说道，过去，“中国投资者十分顾忌使用美国法院系统，

Burke, at Arnall Golden Gregory, says the decision does not change: (i) what transactions must be reported to CFIUS; (ii) the national security and other considerations CFIUS reviews in connection with a specific transaction; or (iii) the US president's authority to issue a final decision as to a specific transaction.

“The decision does not affect the substance of a CFIUS review, just the process,” he says. “I don't think the case changes the level of scrutiny faced by Chinese purchasers, or purchasers from any other jurisdiction. The decision addresses process, not substance, so CFIUS's focus will remain on the national security questions implicated by a specific transaction.”

Cold Canadian winds

The climate for investment from China in Canadian industries, particularly mining, has grown colder of late following the imposition of government restrictions, in late 2012, on state-owned enterprise (SOE) investments in the Canadian energy sector. “These stricter rules have impacted FDI [foreign direct investment] from China, which dropped dramatically in recent years, from C$21.5 billion (US$19.6 billion) in 2012 to C$220 million in 2013” notes Cameron Mingay, a partner at Cassels Brock in Toronto and head of the firm's China mining group.

According to Dentons' partners Mark Mahoney in Toronto and Wei Shao in Vancouver: “CNOOC's acquisition of Nexen in February 2013 did result in the tightening up of certain

因为他们曾经在本该获胜或者少输一些的案件中输的太多了。中国政府一直大力鼓励中国公司在美国保护自己的权益，这次出人意料的获胜将鼓励他们利用诉讼”。

不过，该案判决不大可能影响中国公司在美国进行投资的决策过程，“美国外国投资委员会仍然是在美进行任何并购交易时令人担心的主要‘黑匣子’，”芝加哥 Quarles & Brandy 律师事务所合伙人 兼中国法律业务部主管和上海办事处首席代表 Thomas Stiebel Jr 表示。“从短期来看，中国商人仍然会感到不安，不知道美国外国投资委员将如何或者是否会在特定交易中成为障碍，似乎有观点认为其决策过程过于含糊不清，并且在可预期的将来依然会这样。”

Arnall Golden Gregory 律师事务所 Burke 表示该判决没有改变如下事实：(1) 必须向美国外国投资委员会进行申报的交易类型；(2) 美国外国投资委员会在特定交易审查中的国家安全和其他考虑因素；或者 (3) 美国总统对特定交易作出最终决定的权力。

“这个判决不会对美国外国投资委员会审查的实质内容产生影响，只会影响其审查过程，”他说道。“我认为本案不会改变中国买方或者其他国家买方所面临的审查标准。这个判决解决了程序问题，而非实质问题，因此美国外国投资委员会的重点关注仍然会是特定交易中的国家安全问题。”

加拿大寒风

中国在加拿大各行业特别是采矿业的投资环境随着 2012 年底加拿大政府对国有企业投资加拿大能源行业的限制逐渐转冷。“这些更加严格的规定影响了来自中国的外商直接投资，投资金额从 2012 年 215 亿加元急剧下降到 2013 年 2 亿加元，”Cassels Brock 律师事务所多伦多办公室合伙人和中国采矿业部门主管 Cameron Mingay 提到。

Dentons 律师事务所多伦多办公室合伙人 Mark Mahoney 和温哥华办公室合伙人邵威表示：“中海油在 2013 年 2 月收购 Nexen 公司确实引起了许多加拿大外资并购规定的收紧，并加大了国有企业收购会受到加拿大监管者更严厉监管的可能性。特别是加拿大政府决定，将来如果国有企业继续收购油砂产业的控制权益，就只会在特殊的情况下才会获得批准。”

“这些变化影响了大型国有企业的资金流以及在加拿大进行投资的决策，因此重大交易越来越少。不过，这些变化似乎没有影响到进入加拿大的私有资金。”

加拿大政府最近澄清了外资并购法规中对“国有企业”的定义。国有企业现在的定义不仅包括按照外国政府指令、或直接或间接受到外国政府影响的企业，还包括这样的个人。这种扩大的定义给予了工业部很大的自由裁量权，并且会涵盖多种类型的中国投资。Mingay 认为“这使得大家开始研究其他方式的外商直接投资，包括收购纯勘探财产，这种收购不受到加拿大外商投资审查并且不受到并购限制，因此完全由国有企业控制是可行的。”

新的金融审查标准也开始实施，按照新标准，与非国有企业相比，国有企业更有可能受到审查。“特别是在中等到大额交易中，当资产出售方对中国投资者完成交易所需取得的审批进行影响评估时，中国投资者在投标中会遇到竞争挑战，”McCarthy Tetraut 律师事务所多伦多办公室合伙人 Ian Michael 和温哥华合伙人 Joyce Lee 说。

[在加拿大]还有许多投资机会不会遭遇同样的挑战

There are lots of opportunities for investment [in Canada] which do not pose the same challenges

Peter Mendell
戴维斯・菲利普律师事务所合伙人
蒙特利尔
Partner
Davies Ward Phillips & Vineberg, Montreal

Canadian foreign takeover rules and has raised the prospect that acquisitions by SOEs would be subject to greater scrutiny by Canadian regulators. In particular, the Canadian government has determined that continued acquisitions by SOEs of controlling interests in the oil sands industry will only be approved on an ‘exceptional basis’ going forward.

“These changes have impacted the flow of capital from major SOEs and their decisions to invest in Canada, thereby resulting in fewer major deals. However, these changes do not appear to have impacted the flow of private capital into Canada.”

The Canadian government recently clarified the definition of SOEs for the purposes of its revised foreign takeover rules. SOEs have now been defined to include not only entities but also individuals acting under the direction, or the direct or indirect influence, of a foreign government. This broadened definition grants the minister of industry a wider range of discretionary powers, and can capture significant numbers, and types of, Chinese investment. This, according to Mingay “has led to other foreign direct investment options being explored. This includes the acquisition of pure exploration properties, which are not subject to Investment Canada review and are exempt from takeover restrictions, making full state ownership still possible”.

New financial review thresholds were also implemented that put SOEs at a higher probability of review compared to a non-SOE entity, based on the threshold criteria. “Especially in connection with medium to larger transactions, Chinese investors can run into competitive challenges in an auction context, when the vendor of the assets assesses the impact of the approvals that the Chinese investor will need to complete its investment,” say McCarthy Tétraut partners Ian Michael in Toronto and Joyce Lee in Vancouver.

Mingay says: “Although the market capitalisations of resource companies have declined dramatically over the past several years, which in ordinary circumstances could be seen to represent a buying opportunity for Chinese companies, the slowing of the Chinese economy and the crackdown on corruption in that country has caused most Chinese companies to act very cautiously in making new investments.” For example, the proposed takeover by oil giant China National

Mingay 表示: “虽然能源公司的市场总值在过去几年中急剧下降，在正常情况下，这对于中国公司来说是买入的有利时机，但是中国经济的放慢以及中国对腐败的大力打击使得大多数中国公司在进行新投资时会非常谨慎。”比如，最近石油巨头中国石油天然气集团公司（中石油）对加拿大 Athabasca 石油公司的收购计划因为政府反腐败调查而重新进行谈判成为了头条新闻，此前双方同意以 12.3 亿加元收购项目 40% 的股权。随后，Athabasca 石油公司的股价开始下降，同时中石油因溢价收购外国能源资源而在国内受到批评。”

达维律师事务所 Mills 表示，在竞争激烈的并购市场中，交易的确定性和价格对于投标者的竞争力非常关键。“一般来说，由于监管要求，中国买方在竞争中不具有优势，他们天生就面临着更大的交易交割风险。中国公司进行并购活动和融资需要同时取得中国的监管审批以及美国国家安全审查和批准，并且对于合同义务的强制执行力会有更多的担忧，”他表示。

“为了提高竞争力，许多买方会在宣布取得中国监管审批之前与中国监管者进行沟通，从而获得实质性的宽松条件，这大大增强了他们的竞争实力。此外，中国海洋石油总公司（中海油）成功收购 Nexen 公司展现了中国买方如何以缜密灵活的方式成功通过美国和加拿大复杂的国家安全审查程序。”

铭伦律师事务所温哥华和香港办公室中国业务部联席主席 Stephen Worley 表示，从中加关系来说，“加拿大政府在 2012 年底出台的对国有企业投资加拿大能源领域的限制被媒体认为是对中国和其他外商投资的一种威慑”。此外，Mahoney 和邵威预计“中国在加拿大的绝大部分投资仍然会偏离正常的情况。”

不过，戴维斯·菲利普律师事务所蒙特利尔办事处合伙人 Peter Mendell 认为加拿大对于中国投资者来说仍然充满了机会。“虽然外资投资法规在油砂等某些特定领域会造成挑战，使得一些公司不愿意去投资，但还有许多投资机会不会遭遇同样的挑战。” ■

加拿大政府对国有企业投资加拿大能源领域的限制被认为是……一种威慑

The Canadian government's restrictions ... on SOE investments in the Canadian energy sector has been viewed ... as a deterrent

Stephen Worley
铭伦律师事务所
中国业务部联席主席
温哥华
Co-chair of China Practice Group
McMillan, Vancouver

[FATCA协议]对于中国在美国进行境外并购活动没有影响

[US-China FATCA agreement] is of no consequence to Chinese outbound M&A activity into the US

Phillip Mills
达维律师事务所
合伙人
纽约
Partner
Davis Polk & Wardwell
New York

Petroleum Corp (CNPC) of Canada's Athabasca Oil recently made headlines amid a government-led corruption probe leading to renegotiations over the C$1.23 billion sum previously agreed for a 40% stake in the project.

Athabasca Oil share prices have dropped and meanwhile, CNPC has been criticised at home for paying premium prices for foreign energy resources.

In the highly competitive M&A market, Mills from Davis Polk says it is vital for bidders to be competitive on deal certainty as well as price. “In general, China-based buyers are at a competitive disadvantage due to the inherently greater closing risk they present as a result of their regulatory requirements – both Chinese regulatory approvals needed to make and fund the acquisition, as well as US national security review and approval – and the greater concern around the enforceability of their contractual obligations,” he says.

“In order to improve their competitiveness, some buyers have been able to work with their Chinese regulators to provide substantial comfort before deal announcement that Chinese regulatory approvals will be obtained, which has improved their competitiveness significantly. In addition, CNOOC's successful acquisition of Nexen has demonstrated that a thoughtful and nimble approach can enable Chinese buyers to work their way through the complexities of the US and Canadian national security processes.”

Stephen Worley, who co-chairs McMillan's China Practice Group from Vancouver and Hong Kong, says in terms of Canada-China relations, “the Canadian government's restrictions in late 2012 on SOE investments in the Canadian energy sector has been viewed in the media as a deterrent for Chinese and other foreign investment”. Moreover, Mahoney and Wei Shao predict “most of the Chinese Investment in Canada is still some time away from positive case flow”.

But Peter Mendell, a partner at Davies Ward Phillips & Vineberg in Montreal, believes Canada is still ripe with opportunity for Chinese investors. “While the regulation of foreign investment can be challenging in certain limited sectors, such as the oil sands, causing certain companies to be reluctant to invest, there are lots of opportunities for investment which do not pose the same challenges.” ■

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托付何人?
Placing your trust

随着保密性投资日益困难，我们很难找到令人安心的投资方式。Steven Gallagher 教授在本文中对若干先进司法管辖区及其制定的信托和特别信托制度进行了比较

With ever increasing challenges to confidential investments, it's hard to find something you can relax with. Steven Gallagher compares some of the top jurisdictions and what they offer in trusts and special trusts

词语“离岸”和“避税港”不幸已成为贬义词，经常与逃税、洗钱和其他犯罪活动联系在一起。离岸避税港为财富提供免税的秘密安置处这一特征，使其经常被视为一种犯罪行为。

2013 年英属维京群岛 (BVI) 发生了数以万计的公司和账户持有人的私人信息泄露事件，一位知名金融记者对此撰写了题为“离岸避税港中的中国精英财富”的文章，代表了大多数人的看法。企图将个人生意保密的行为被视为是“错误的”。同理，那些通过使用合法手段降低税收负担 (即“避税”) 的行为，已经与通过犯罪

The terms “offshoring” and “tax haven” have developed unfortunate connotations and are often seen as linked to tax evasion, money laundering and other criminal activities. The identification of offshore tax havens as providing secret resting places for wealth that is not being taxed is often perceived as a criminal endeavour in itself.

A prominent financial journal's headline, “China's elite wealth in offshore tax havens” was typical of the reaction to the 2013 leaking of personal details of thousands of companies and account holders in the British Virgin Islands (BVI). Wishing to

方式企图逃避应缴税款的行为（即“逃税”）归为同类。

对秘密经营和税务筹划的猜疑在美国实施《海外账户税收合规法案》（FATCA）后进一步加剧。该法案要求世界各地的金融机构有义务报告美国公民和实体的财务信息，并对不合规者进行处罚。

中国也正在努力获取其公民和公司的财务信息。尽管然中国没有制定适用于本土的中国版 FATCA，但金融机构如果选择遵从来自中央政府部门的要求，这也在情理之中，否则他们就可能被迫缩减其在利润丰厚的中国金融行业的活动。

但是投资者和企业期望能将从事的商业活动保密有许多合理的理由，并且对个人和企业而言，通过合理筹划来减少包括税收在内的开支行为是合理的。尽管包括美国和中国在内的主要经济国家采取措施要求在离岸避税港的金融机构披露信息，但是我们还是可以通过将资产控制权转移至离岸避税港，并将资产以信托的方式进行安置或者安置于信托和公司的联合控制之下，来达到保持秘密性并进行税务筹划的目的。

本文阐述了利用信托，在包括香港在内的离岸司法管辖区内实现保密性和税务筹划目的的若干有利之处，以及在开曼群岛和 BVI 利用信托和“特殊信托”的情况。需要注意的是，本文论述的是普通法信托，或者基于普通法设立的信托，而不是在许多大陆法系国家的成文法信托。以中国为例，中国的信托受托人必须是法定机构，通常会要求相关注册来保证其执行力以及对信托财产用途的严格限制。

离岸公司

尽管有许多关于离岸公司或者信托被用作犯罪用途的案例，但是对于个人和企业而言，将其投资和商业交易处于保密状态仍是合理的诉求。在亚洲，富人阶层为防止家庭面临绑架或敲诈勒索，其商业交易往往秘密进行，并期望将其在商业交易中获取的利润保存在离岸为将来的交易融资，并最终收回利润以避免征税。

最近在中国和其他地方流行的财产所有权的公开运动可能也会促使那些希望保密自身利益的民众将他们的财富和商业交易转移至境外。离岸交易只要遵守了相关财务控制，其本质上并没有任何不正当。此外，利用被称之为避税港的税收优惠政策也是明显的诱因，并且在合法的前提下，该等税收优惠应当作为日常投资和商业决策的基础因素考虑。

然而，去年发生的 BVI 公司股份所有者信息披露事件显示，绝大多数投资者来自于中国大陆、香港和台湾。自该事件发生后，由于大众相信保密注定失败，投资者和商业专业人士可能会面对较少指责。关于保密性最主要的障碍之一在于注册需要记录私人信息，比如公司注册，不管注册的保密性有多高，仍然会有信息披露的可能性。因此，如果存在一个机构允许在不进行注册或报告的情况下对隐藏资产行使所有权和控制权，那么这样的机构更可能实现保密。

> *“对秘密经营和税务筹划的猜疑在美国实施 FATCA 后进一步加剧”*

> *“The suspicion of secrecy and tax planning has been further compounded by the US implementation of FATCA”*

keep your business secret is seen as “wrong”. Similarly, those arranging their affairs to legally minimise their liability to taxation – “tax avoidance” – have been categorised alongside those who criminally attempt to evade paying tax already owed – “tax evasion”.

The suspicion of secrecy and tax planning has been further compounded by the US implementation of the Foreign Account Tax Compliance Act (FATCA), which places a burden on financial institutions around the world to report on US persons’ and entities’ financial information, and fines those who are non-compliant.

China is also seeking more information on the financial affairs of its citizens and companies and, although it has not implemented its own version of FATCA yet, any financial institution that received a request from an organ of the central government would be forgiven for considering it easier to comply than risk curtailing its involvement in the lucrative Chinese financial sector.

But there are many legitimate reasons for keeping affairs secret, and arranging affairs to reduce any bill, including tax, is sensible for individuals and businesses. Even with the moves of major financial states such as the US and China to force disclosure of information from financial institutions in offshore tax havens there may still be ways to maintain privacy and plan tax affairs by moving control of assets to these jurisdictions and placing the assets in trust, or under the control of a combination of companies and trusts.

This article considers some of the benefits of using trusts for privacy and tax planning in offshore jurisdictions such as Hong Kong, and the use of trusts and “special trusts” in the Cayman Islands and BVI. It should be noted that this article is referring to common law trusts, or trusts based on the common law, rather than the statutory trusts available in many civil jurisdictions, for example China, which are really statutory institutions of custodianship, usually requiring some form of registration to ensure their enforcement and very limited in their use.

Offshore companies

Although there are many instances where the offshore company or trust has been used for criminal purposes, there are legitimate reasons why individuals and businesses may wish to keep their investments and commercial transactions private. In Asia, there may be the fear of kidnap or extortion for the family of the wealthy, or an attempt to keep commercial transactions secret from business rivals, or the wish to maintain funds from commercial transactions offshore to finance further transactions and eventually repatriate profits for taxation.

The recent popular campaigns for transparency as to wealth and property ownership in China and elsewhere may also encourage those wishing to keep their interests private to relocate their wealth and business transactions offshore. As long as the relevant financial controls are complied with, there is nothing intrinsically wrong with offshoring. In addition, the tax benefits of using what are sometimes referred to as tax havens are an obvious incentive, and if legal, should be considered on the

然而，投资者和企业也关心其对资产的控制问题。注册制公司因其设立的便捷性和灵活性，长期被视为最佳的离岸投资和商业活动的工具。但是，注册制公司需要代理人、董事来进行交易，并且需要符合公司所在司法管辖区的注册要求。公司有义务汇报其资本活动、收入分红和其他支出情况，并报告其进行收费和发行证券的行为。即使某些司法管辖区限制公众接触这些信息，注册行为依然有信息“泄露”的风险，BVI 事件就是实例。

信托

普通法下设立除土地外的任何财产的信托没有手续上的要求。除了有当事方的要求外，在某地注册或向公众公开通常并不是信托设立的必要条件。在普通法司法管辖区内设立信托的条件为：一名有法律行为能力的信托设立人将受信托合约规范的财产委托给一名或多名受托人，并告知受托人信托义务和信托期限，向受托人确定一名或多名受益人，或提供确定受益人的方式。

长久以来，投资者和企业的许多希望秘密达成的目的都可以通过信托方式实现。例如，为了家族财产，为了隐秘转移财产，为了避免债权人追索而隔离资产，为了减小税务负担，甚至为了能够与不完全信赖的当事方、或在经济或政治不稳定的司法管辖区从事交易。但是，对普通法信托的限制性有如下三点非议：(1) 对信托永久存续的限制；(2) 对没有明确的自然人受益人、仅以纯粹目的设立信托的限制；(3) 信托设立后，设立人会失去对信托财产的控制。

信托、特殊信托的宽松法规

鉴于许多信托设立人希望能够设立一种信托，其持续时间长于限制期限，可以不需要包含明确的自然人受益人，而且设立人可以保留部分资产或信托控制权；部分司法管辖区已经随之更新修订了普通法信托的法律制度，甚至增加了“特殊信托”的类型。特殊信托虽然是法定的，但是得益于普通法的规定和受托人制度的诚信本质，其额外优势在于该等信托存续期限比通常允许期限更长，也不需要有明确的自然人受益人，以及允许设立人对信托和受托资产保留权力。

纯目的信托的设立得到了广泛的运用，因为该种信托可以满足各种商业需求，例如为了将商业交易转移到无税或低税率的境外，为了保留在避税港管辖区交易产生的利润以期用于将来的商业活动，为了保留家族企业的控制权，并且限制子孙后代对家族企业的处置，甚至为了进行在本国可能并不会被认定为善举的慈善活动。许多特殊信托的司法管辖区也会规定信托设立人可以保留对信托财产的特定权力；例如，设立人可以享有对受托人所做投资决策的指示权，甚至享有撤销信托并取回信托财产的权力。

香港的信托制度

香港受益于一个完善的普通法系法律制度，并长期被视为离岸避税港。香港没有资本税种，收入税和利润税的税率相对较低，并且对境外取得的利润有许多免税规定。香港非同寻常，不仅因为它是一个离岸司法管辖区，同时它也是一个离岸外包业务的司法管

basis of normal investment and commercial decision making. However, after last year's disclosure of information on company ownership in BVI, which identified the majority of investors in these companies as coming from mainland China, Hong Kong and Taiwan, investors and business professionals might be forgiven for believing that privacy was a lost cause.

One of the greatest obstacles to privacy is the requirement for recording of personal details on registers, for example for incorporation, because no matter how confidential the register is, there is still the possibility of leaking of the information. So an institution that permits underlying ownership and control of an asset but does not require registration or reporting is much more likely to remain private. However, investors and businesses are also concerned with retaining control of their assets. The registered company has long been considered the most appropriate vehicle for offshore investment and business because of its ease of creation and flexibility. However, it requires human agents, directors, to enter into any transaction, and is subject to the registration requirements of the jurisdiction in which it is incorporated. Companies are also subject to reporting requirements involving capital, income, dividend declarations and other disbursements, and charges and securities the company has granted. Even in jurisdictions that restrict public access to this information, the fact that it is on a register means that it is susceptible to "leaks" – as in BVI.

Trusts

There are no formalities required in the creation of a common law trust of any property, except land. Any evidence of the existence of the trust does not usually have to be registered anywhere, or made public in any way, unless the parties wish to do so. To create a trust in common law jurisdictions all that is usually required is: a legally competent settlor transferring the property that is to be subject to the trust obligation to the legally competent trustee(s) informing them of the trust obligation and the terms of the trust, and identifying to the trustee(s) or providing the means for identification of the beneficiary or beneficiaries.

Many of the purposes that investors and businesses seek to achieve privately have been carried out using trusts for centuries; for example to provide for families, to privately convey property, to isolate assets from creditors, to minimise liability to taxation, and even to conduct business transactions with parties that they are not completely sure of, or in jurisdictions that are not financially or politically stable. However, there are criticisms of the three main limitations of common law trusts: (1) the restriction on perpetuities; (2) the restriction on trusts that do not identify human beneficiaries but are purely for purposes; and (3) the loss of control by the settlor of assets when the trust is formed.

Relaxing the law of trusts, special trusts

In recognition that there were many settlors who wished to set up trusts that would last for longer than the restricted periods, and for purposes that did not necessarily involve identifiable human beneficiaries, and where the settlor could retain some input or control of the trust, some jurisdictions have developed their common law of trusts, and even developed "special trusts". These special trusts are statutory, but benefit from the common law and the fiduciary nature of trusteeship with the added benefit that they may last for a much longer period than usually permitted, may have no

辖区，拥有非常成熟的咨询机构对向其他司法管辖区的公司和信托进行的投资和商业活动提出建议。尽管有大量关于香港金融机构洗钱嫌疑的公开报道，可是香港被国际社会认可为一个符合反洗钱规定的司法管辖区，它是反洗钱金融行动特别工作组（FATF）和亚太反洗钱小组（APG）的成员。

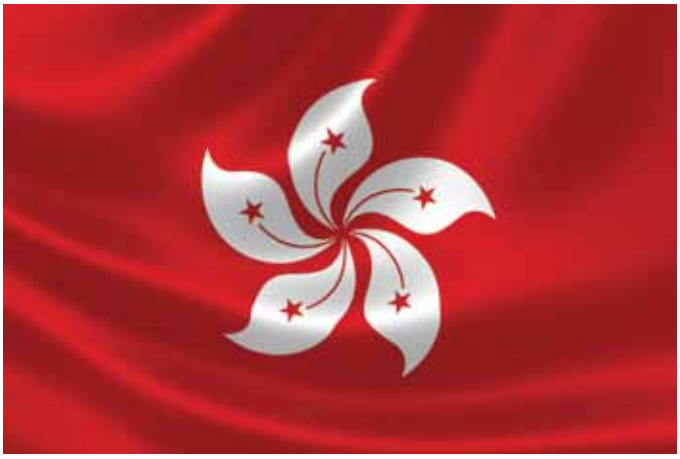
香港并没有特殊信托制度，但是有完善的普通法信托制度，并且于近期修订了信托法来吸引信托设立人。在香港设立的普通法信托可以赋予信托设立人明确的撤销权，使得信托设立人在特定情形下可以收回信托财产。信托设立人现在可以利用明确的成文规定，保留指示受托人投资信托财产的权力。该规定在设立人利用家族企业的股份设立信托，并希望阻止受托人出售股份的情形下，对设立人十分有利。

根据普通法，受托人应以受益人的最佳利益为出发点，所以如果家族公司的股份并不是最佳的投资回报方式，受托人应出售股份并将获利用于再投资。然而根据新的规定，受托人依据信托设立人的指示保留股份的行为将不会被视为其对受益人信托义务的违反。

如果信托设立人来自的司法管辖区具有强行的继承法律法规，会依法直接分配家庭成员取得遗嘱人不动产的比例，信托设立人可以考虑在香港就动产设立信托；在受托人是香港居民并且明确说明信托适用法律为香港法的前提下，该动产可以得到香港法律的保护，以避免本国司法管辖区法院的追索。对于所有在 2013 年 12 月 1 日后生效的信托，香港还废除了反永续规定，所以现在能设立可以永久延续的王朝保护信托。不过在民事诉讼和刑事调查中，信托的保密性可以被打破。

开曼群岛

开曼群岛是英国的海外领土，它在英国普通法基础上发展形成了具有英国枢密院上诉制度的完善的信托法。它是遵守 FATF 建议的法域。它的一般信托法规能够保护来自强制执行继承法的司法区域的私人财产。信托设立人可以选择设立最长至 150 年的永久存续期间，并可以保留多项特定权力，包括：有权撤销、变更或修改信托；有权向受托人下达有约束力的指示；有权任命、增加或撤销受托人或受益人。开曼群岛还允许设立“免税信托”，该信托需要注册，开曼政府承诺在特定期限（通常最长期限 50 年）内该等信托可以免于缴税义务。



identifiable human beneficiaries, and allow settlors to retain powers with regard to the trust and its property.

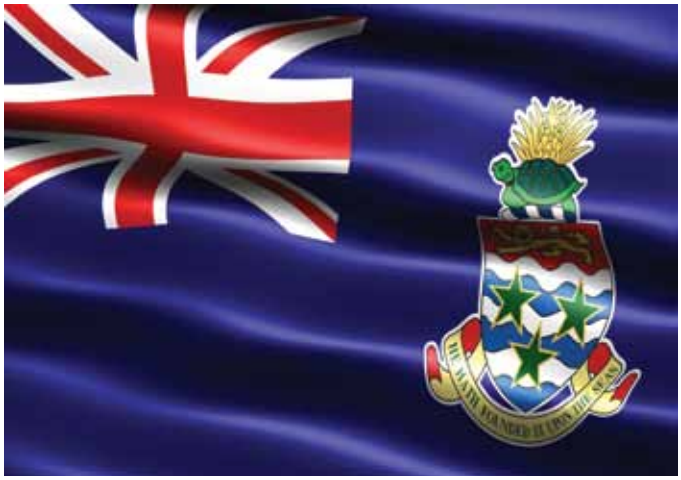
Of most use has proved the formation of pure purpose trusts, which allow trusts to be created for many business purposes, for instance the offshoring of a commercial transaction where there is no or little taxation, the maintenance of profit from transactions in a tax haven jurisdiction and its use in future business enterprises, the maintenance of control over a family business and restrictions on future generations disposing of the family business, or even the carrying out of philanthropic purposes that are not necessarily recognised as charitable purposes in the home jurisdictions. Many of these special trust jurisdictions also provide that settlors may retain control of specific powers regarding the trust property, for example the power to instruct the trustees as to investment decisions, and even the power to revoke the trust and take back the trust property.

Trusts in Hong Kong

Hong Kong benefits from the rule of law under a developed common law system, and has long been regarded as an offshore tax haven. There is no capital taxation in Hong Kong and relatively low income and profits taxation, with many exemptions for profits earned overseas. Hong Kong is also unusual as not only is it an offshore jurisdiction, it is also an offshoring jurisdiction, having a very developed sector advising on investing and conducting business using companies and trusts in other jurisdictions. Although there has been adverse publicity regarding the reporting of suspected money laundering by financial institutions in Hong Kong, internationally Hong Kong is perceived as a compliant anti-money laundering jurisdiction, being a member of the Financial Action Taskforce (FATF) and Asia/Pacific Group on Money Laundering (APG).

Hong Kong does not have a special trust regime, but its common law of trusts is well developed and has recently been augmented by a revision of the statutory law of trusts intended to attract settlors. It is possible to create a common law trust in Hong Kong with an express power of revocation so that the settlor may call for the return of the trust property in certain circumstances. Settlors may now take advantage of the express statutory provision that they may retain the power to instruct trustees as to investment of the trust property. This may be particularly beneficial to settlors creating trusts of shares in the family company and wishing to prevent trustees from selling the shares.

At common law, the trustees should consider the best financial interests of the beneficiaries, thus if the shares in the family company were not the best investment return they should sell them and reinvest the funds. However, under the new provision, trustees who follow the instructions of the settlor to retain the shares will not be in breach of their trust to the beneficiaries. Settlors from jurisdictions that have forced heirship rules – laws that direct shares of the testator's estate to be paid to family members – may now create trusts in Hong Kong of movable property that will be protected from attack by the courts of the settlor's home jurisdiction, if the trustees are resident in Hong Kong and the trust is expressly stated to be subject to Hong Kong law. Hong Kong has also abolished the rules against perpetuities for all trusts coming into effect after 1 December 2013, so dynastic protection trusts may now be created that may last forever. Confidentiality of a trust can be pierced for a civil action or a criminal investigation.



开曼群岛在其《1997 年特殊信托（另类制度）法》中制定了一种特殊信托制度。该制度允许设立特殊信托（另类制度）（STAR）信托，该信托目的只要满足“具体性、合理性和可行性”和“不道德败坏、不违背公共政策和不违法”的要求，那么就不需要有确定的自然人受益人，并且可以用于非慈善目的。该等信托由设立人任命的执行人来执行，保证受托人履行其义务。STAR 信托不受反永续规定的限制，可以永久存续。STAR 信托被广泛运用于资产保护、财富规划，以及作为国际结构化交易的组成部分的特殊目的载体或单纯目的载体，用于行使投票权来推进交易，或者作为持有私人信托公司股份的载体，来实现家族成员对标的信托管理权的控制。至少一名 STAR 信托的受托人必须是根据《银行和信托公司法》取得开曼群岛信托执业牌照的信托公司。受托人必须在开曼群岛保存以下记录：信托条款，受托人和执行人的身份证明，设立人、信托资产和账目的所有设立和身份证明文件，以及所有的分红记录。信托的具体情况不需要披露，除非是免税信托的设立注册，不过该注册不向公众公开。所有的文件可以保密，除非开曼群岛法院下达了披露命令。

英属维京群岛（BVI）

BVI 也是英国海外领地，属于普通法司法管辖区，有英国枢密院的上诉制度。BVI 的信托行业得益于基于英国普通法制定的完善的信托法律，其发展后的信托法律使得 BVI 是全世界最先进的信托司法管辖区。BVI 一般信托法增加的内容包括：保护私人信托财产免于被强制执行继承法；积累整个信托存续期的收入；采用 360 年永久存续期间的信托；允许受托人通过多数表决而非一致同意的方式进行决策；保留设立人撤销和任命受托人的权力；任命“管理受托人”以减少其他受托人的责任；任命保护人来监督受托；向其他司法管辖区的信托财产提供保护以避免债权人追索。BVI 的信托没有注册要求。

BVI 推出了最早的特殊信托之一。《1961 年信托条例》规定，允许设立非慈善目的之信托，只要该信托的目的符合“具体性、合理性和可行性”和“不道德败坏、不违背公共政策和不违法”的要求。BVI 的特殊信托必须有一名执行人。特殊信托不受反永续规定的限制。至少一名受托人必须根据《1990 年银行与信托公司法》

Cayman Islands

The Cayman Islands is a British overseas territory that has a well developed trusts law based on English common law, with appeals to the Privy Council. It is compliant with FATF's recommendations. The general law of trusts protects personal property in trust from forced heirship rules in other jurisdictions. Settlors may select up to 150 years as the maximum perpetuity period and may reserve to themselves various specified powers, including: the power to revoke, vary or amend the trust; the power to give binding directions to the trustees; and the power to appoint, add or remove trustees or beneficiaries. The territory also permits the creation of "exempted trusts", which are registered trusts that the Cayman government has undertaken will not be subject to taxation for a fixed period (maximum of, and usually, 50 years).

The Cayman Islands introduced a special trust regime in the Special Trusts (Alternative Regime) Law 1997. This permits the creation of STAR trusts, which are not required to have identifiable human beneficiaries and may be for non-charitable purposes as long as they are "specific, reasonable and possible" and "not immoral, contrary to public policy or unlawful". Enforcement of the trust is by way of a settlor-appointed enforcer who ensures the trustees perform their duties. STARs are not subject to the rule against perpetuities and may continue indefinitely.

STARs have proved popular for asset protection, estate planning and as special purpose vehicles or single purpose vehicles incorporated as part of an international structured transaction for the purpose of exercising voting rights to further the transaction, or as a vehicle to hold shares in a private trust company, thus allowing family members to control the administration of underlying trusts.

At least one trustee of a STAR must be a trust company licensed to conduct trust business in the Cayman Islands under the Banks and Trust Companies Law. The trustees must keep records in the Cayman Islands of the trust terms, identity of trustees and enforcer, all settlements and identity of settlor, trust property and accounts, and all distributions. Disclosure of trust details is not required except for registration of the existence of an exempted trust and this register is not open to the public. All documents may remain private subject to an order for disclosure from the Cayman Island courts.

British Virgin Islands

BVI is another British overseas territory and secure common law jurisdiction, with appeal to the Privy Council, whose trust industry benefits from a well established law of trusts based upon English common law, but which has been developed to make it possibly the most advanced trust jurisdiction in the world.

Among the augmentations to the BVI general law of trusts are the possibility to protect personal property in trusts from forced heirship rules, accumulate income for the whole life of the trust, adopt a perpetuity period of 360 years, permit decisions of trustees by majority rather than unanimity, reserve powers to the settlor including removal and appointment of trustees, appoint a "managing trustee" to minimise liability to other trustees, appoint a protector to supervise the trustees, offer protection of trust assets from creditors in other jurisdictions. There is no registration requirement for trusts.

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取得了信托业务的执业牌照，或者是根据《2007 年金融服务（豁免）条例》设立的私人信托公司，或者是在 BVI 执业的律师或会计师。青睐于这一制度的包括王朝信托、慈善信托和阻止受益人在特定情形下获取信托资产的保护信托。

BVI 还依据《2003 年维京群岛特别信托法》，发展产生了一种名为 Vista 的信托：在信托设立人指示受托人保留对家族公司股份的投资行为，而根据受益人最佳利益原则受托人应当建议出售股份的情形下，该种信托可以为受托人应对可能的利益冲突问题。Vista 信托的信托资产必须是 BVI 公司的股份，但是该 BVI 公司可以持有包括其他司法管辖区公司股份在内的任何财产。Vista 信托可以明确规定受托人必须保留股份，限制受托人对公司运行的干预，并解除其监督公司的任何义务。Vista 信托经常适用于资产证券化、表外交易和投机性投资，这些对受托人向受益人的传统信托义务而言风险过大。

尽管 BVI 的保密性因为去年公司股份持有者和银行账户泄露事件而受到影响，如仅有受托人的身份被记录，信托的或通过信托隐藏的所有权者信息很难被发现。

信托从业者经常会建议采用以离岸信托和公司的混合形式，以增加隐私层级，也有助于税务筹划。随着特殊信托的发展，普通法信托的灵活性得到进一步提高，解除了普通法的限制规定，允许信托被用于长期金融支持和商业交易目的。

尽管包括信托从业者在内的离岸司法管辖区的金融机构，在未来立法或其他压力之下，可能需要向经济大国的政府部门披露有关于公司成员或信托受益人身份的信息；但是，普通法信托因其不需要专业受托人的简单制度可能仍会应用于税务筹划中，来避免最终受益对象的披露。

拥有先进信托立法的开曼群岛和 BVI 较香港等传统司法管辖区而言，赋予了信托设立人更多的控制权。尽管 BVI 去年发生了信息泄露丑闻，但是对于期望获得信托控制权和保密性的信托设立人，BVI 仍然是最佳的选择。因为公司和银行账户所有者的信息可能并不会透露出最终受益人是谁，而且那些基于合法目的设立信托的投资者可以依靠 BVI 法院的保护。■

BVI developed one of the first special trusts. The Trustee Ordinance, 1961, permitted the settling of non-charitable purpose trusts as long as the purposes are "specific, reasonable and possible" and not "immoral, contrary to public policy or unlawful". There must be an enforcer. Special trusts are not subject to the rules against perpetuities.

At least one trustee must be licensed to undertake trust business under the Banks and Trust Companies Act, 1990, or a private trust company under the Financial Services (Exemptions) Regulations, 2007, or a lawyer or accountant practising in BVI. Again, these have proved popular for dynastic trusts, philanthropic trusts, and protective trusts preventing beneficiaries taking the trust property in specified circumstances.

BVI has also developed the Vista trust, under the Virgin Islands Special Trusts Act 2003, which deals with the problem of possible conflicts of interest for trustees when settlors instruct them to retain investment in shares in the family company and the best financial interests of the beneficiaries would suggest selling these shares.

The trust property of a Vista must be shares in a BVI company, but that company may hold any property including shares in a company in another jurisdiction. The Vista may specify that the trustees must retain the shares and restrict trustees' interference in the running of the company and relieve them of any duty to monitor the company. Vistas are often used for securitisation, off-balance sheet transactions and speculative investments that might be considered too risky for traditional trustees' duties to the beneficiaries.

Although confidence in BVI was damaged by the revelations regarding company ownership and bank accounts last year, the underlying ownership by trusts and of trusts would be much harder to establish as only the identity of trustees would be recorded.

Trust practitioners will often advise a combination of offshore trusts and companies to add layers of privacy and aid tax planning. With the development of special trusts, the flexibility of the common law trust has been further advanced and the restrictions of the common law removed to permit their use for long-term financial provision and commercial transactions.

Although financial institutions including trust practitioners in offshore jurisdictions may find they have to disclose information to government organs from the major economic powers on the identity of members of companies or beneficiaries of a trust under future legislation or other pressure, the simple common law trust with a lay trustee may still be inserted into a tax planning strategy to avoid disclosure of ultimate beneficial ownership.

The more advanced trust jurisdictions of Caymans and BVI offer more control for the settlor than traditional jurisdictions such as Hong Kong, even with its recent changes. The destination of choice for the settlor requiring control of the trust and privacy may still be the BVI, even after last year's disclosure of information, as details of corporate and bank account ownership may still not disclose underlying beneficial ownership and those using trusts for lawful purposes may count on the protection of the BVI court. ■

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P2P 网络借贷亟需监管细则出台
Regulation desperately needed for peer-to-peer lending

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P2P 网络贷款的英文名称为 Peer-to-Peer lending，即点对点信贷，国内又称“人人贷”。P2P 网络借贷是指个人或法人通过独立的第三方网络平台相互借贷，即由 P2P 网贷平台作为中介平台，借款人在平台发放借款标，投资者进行竞标向借款人放贷的行为。网络借贷模式下，资金借出人获取利息收益，并承担风险；资金借入人到期偿还本金；网络信贷公司收取中介服务费。

中国的 P2P 网贷平台成立于 2007 年，在其后的几年间，国内的网贷平台凤毛麟角，鲜有创业人士涉足其中。直到 2010 年，网贷平台才被许多创业人士看中，开始陆续出现了一些试水者。2011 年，网贷平台进入快速发展期，一批网贷平台踊跃上线。2012 年至 2013 年，中国网贷平台进入了爆发期，尤其是 2013 年 9 月后，网贷平台更是以每天 3 至 4 家的速度快速增长。据零壹数据公司监测，截止 2013 年底，全国各类线上 P2P 借贷平台的数量接近 700 家，较之 2012 年的 110 家增长了 5 倍多；年度交易额约为 1100 亿元，较之 2012 年的 100 亿元增长了 10 倍。线下运营的 P2P 借贷平台，其增长率与线上相当，成交额较大的 5 家 P2P 公司借贷总额在 600 亿至 800 亿元左右。行业累计借贷人数在 10 万至 20 万，累计投资人数达 100 万人左右。

2014 年上半年，互联网金融依旧热度不减。由网贷之家发布的《2014 中国网络借贷行业上半年报》显示，截至 2014 年上半年，全国共有 1184 家 P2P 平台，上半年的成交量为 818.37 亿元。

巨大的发展潜力，使 P2P 网络贷款受到了私募股权投资、风险投资机构等资本市场主体的青睐。然而，这一行业的风险也不容投资者忽视。

> “直到 2010 年，网贷平台才被许多创业人士看中”

风险高发

伴随着爆发性增长而来的是部分网贷平台公司出现资金挪用、线下私自放贷、跑路破产等丑闻。

信用风险。P2P 网络信贷是一项严重依赖征信体系、诚信环境的行业。在欧美发达国家，有完善的征信服务体系作支撑，个人的征信数据相对全面、准确。但是，在中国目前征信环境下，缺少征信数据，又没有长期培养的诚信环境，给 P2P 网络信贷带来了较大的信用风险。

资质风险。P2P 网贷不同于金融机构，金融机构是“净资本”管理，无论是银行还是信托公司都要有自己的注册资本，其注册资本少则几个亿，多则十几个亿甚至几十个亿，且注册资本不是用来经营的，而是一种担保、是一种“门槛”。但由于 P2P 网贷公司门槛低，平台软件几千到几万都可以买到，很多在民间借贷欠款很多的人，买了个平台虚拟借款人、虚拟抵押物品，以高利率吸引投资人投资。这样缺少资质“门槛”的准入限制，给诈骗、跑路破产留下了发生余地。

管理风险。P2P 网络借贷看似简单，其实是一个比银行及其它金融机构都要复杂的模式，且发展时间短，市场并没有达到成熟的地步，管理体制也不健全，组织架构中缺乏专业的信贷风险管理人员，不具备贷款风险管理的知识、资质，管理风险相对较大。

亟需规则

目前，中国并没有相关的法律法规对 P2P 网络借贷进行明确的法律定性，只有《中国银监会办公厅关于人人贷有关风险提示的通知》提到 P2P 网络借贷平台是信贷中介服务公司。

在法律法规明确规定禁止企业间借贷的背景下，P2P 网络借贷走的是个人借款的路径，至于借贷合同的达成通过什么方式、什么平台，并没有明确的法律限制。笔者认为，应从以下方面对 P2P 网络借贷进行监管。

设立准入门槛。由于 P2P 网络贷款平台撬动的市场资金量巨大，而且不少 P2P 网贷平台直接参与到借贷关系中或者成为其中的担保人，监管部门迫切需要对 P2P 网络贷款平台的法律地位进行明确，设置资格条件，对 P2P 网贷平台进行市场准入限制。

要求网贷平台对借款人进行监管。为了防范借款人的违约风险，P2P 网络借款平台都必须完善身份信用审核机制，对借款用户的身份、资信状况、收入情况、借款用途、业务范围进行必要的了解和审核。

加强立法工作，确定监管主体。中国应尽快推出相应的法律法规，针对其可能存在的风险进行有效控制，规范其业务流程、资金存管方式，并对可能存在的非法行为进行明确肯定，以有效促进 P2P 网贷行业的规范化、标准化，防止系统危险发生，保障借款人的合法利益。■

Peer-to-peer (P2P) lending means an individual or a corporate body lends to, or borrows from, another through an independent third-party online platform. That is to say, a P2P lending platform serves as an intermediary platform on which a borrower offers a bid for borrowing, while investors bid for the borrowing and lend it to the borrower. In this online lending method, the lender earns interest income and bears risk, while the borrower repays the principal together with interest when due, and online credit companies charge an intermediary fee.

A P2P lending platform was established in 2007 in China. Several years later, there were few online lending platforms in the country, with few entrepreneurs involved. It was not until 2010 that entrepreneurs began taking a fancy to online lending platforms and testing the water. Online lending platforms entered a period of rapid development in 2011, with a batch of enthusiastic lending platforms going online.

Speedy growth

Development accelerated further from 2012 to 2013. Especially after September 2013, online lending platforms were growing at a speed where three to four platforms were being launched every day. According to www.01-DataStorage.Com, there were nearly 700 types of online P2P lending platforms across the country by the end of 2013, more than five times the total of 110 platforms in 2012, while annual turnover amounted to about RMB110 billion (US$17.8 billion), 10 times the turnover of RMB10 billion in 2012.

The growth rate of P2P offline lending platforms was more or less the same as that of online lending platforms. The total amount of borrowings from the top five P2P companies with a large turnover ranged from RMB60-80 billion approximately. The total number of lenders in the industry was between 100,000 and 200,000, and the total of investors was about 1 million.

Internet finance increased in popularity during the first half of 2014. The *2014 First Half Report on China's Internet Lending Industry*, released by the website www.wangdaizhijia.com, suggests that there were 1,184 P2P platforms across the country in the first half of the year, with a trading volume of RMB81.83 billion in the first half. The huge potential of P2P lending for development has won the favour

> *"It was not until 2010 that entrepreneurs began taking a fancy to online lending platforms"*

of various capital market players, such as private equity and venture capital institutions. However, investors must be cautious of the risks associated with this sector.

High-risk exposure

Coming along with the explosive growth are scandals involving some online lending platform companies, such as misappropriation of funds, unauthorised offline lending, executives fleeing from troubled companies, and bankruptcy.

Credit risk. P2P lending relies heavily upon the credit system and the environment of integrity. In North American and European countries, there is an impeccable credit service system as a support, and personal credit data are relatively comprehensive and accurate. However, under the current credit environment in China, the lack of credit data and lack of a long-term culture of integrity has given rise to a greater credit risk exposure for P2P lending.

Qualification risk. P2P lending is `different from financial institutions in the way that financial institutions are based on "net capital" management. Whether a financial institution is a bank or a trust company, it must have its own registered capital – which amounts to at least several hundred millions of renminbi or as many as dozens of hundred millions – that is not used for operations, but acts as a guarantee and a "threshold".

Frauds and escapes

However, due to the low thresholds for P2P lending companies and inexpensive platform software, a lot of people who have a lot of debt in private lending have purchased a platform to act as virtual borrowers, to mortgage virtual goods and to attract investors with high interest rates. These access restrictions without any qualification "thresholds" have given rise to frauds and escapes due to bankruptcy.

Management risk. P2P lending sounds simple, but it is actually more complex than banks and other financial institutions, as far as its model is concerned. It has a short development period such that the market has not reached a mature stage, the management system is not comprehensive, and there is a lack of credit risk management professionals in the organisational structure, and of knowledge and qualification of credit risk management, thus resulting in relatively high management risks.

Rules urgently needed

China does not have any relevant legislation to explicitly regulate P2P lending, with the Notice of CBRC [China Banking Regulatory Commission] Office on Risk Alerts for P2P only saying that P2P platforms are credit intermediary services companies. Where inter-enterprise lending is expressly banned under current legislation, P2P lending is taking an approach of personal borrowings, without any clear legal restrictions on the methods and platforms for reaching a loan contract.

The author believes P2P lending should be regulated in the following aspects.

Set up access thresholds. Since P2P lending platforms leverage a huge amount of market money, and a lot of them are directly involved in the loan lending relationships or act as guarantors in such relationships, the regulatory authorities have an urgent need to define the legal status of P2P lending platforms, set eligibility conditions and impose restrictions on the access of P2P lending platforms to the market.

Call on online lending platforms to govern borrowers. In order to guard against the risk of default of borrowers, P2P lending platforms should be required to improve their mechanisms for credit and identity verification by verifying the identity, credit status, income details, purposes of borrowings, and business scope of borrowers.

Step up legislation to determine which principal parties are to be regulated. Introduce appropriate legislation as soon as possible for the effective control of possible risks, regulation of business processes, methods of money depositing, and positive identification of any possible illegal acts in order to effectively facilitate the regulation and standardisation of the P2P lending sector, to prevent the occurrence of systemic risks and to safeguard the legitimate interests of borrowers. ■

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企业防止驰名商标被淡化的合规措施
Compliance measures available to prevent dilution of trademarks

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驰名商标的淡化行为是一种减少、削弱驰名商标显著性，损害、玷污驰名商标商誉的行为。淡化行为人利用他人驰名商标的知名度和声誉，赚取了非法商业利益，由此给驰名商标所有人造成损害，拥有驰名商标的企业应当对此引起重视。

三种分类

驰名商标的淡化行为可分为弱化、丑化、退化三类。弱化是指他人将与驰名商标相同或近似的商标使用在不相同或不近似的商品或服务上的行为。如将电脑上的“联想”商标用于自己生产的啤酒上。

丑化又称玷污或贬损，是指他人将与驰名商标相同或近似的商标用于对驰名商标的信誉产生玷污、丑化、负效应的不同类别商品或服务上的行为，例如将香水上的“channel”商标用于抽水马桶上。

退化是指驰名商标因使用不当，最终演变成商品的通用名称而失去识别功能，例如拜耳公司的阿司匹林商标，就已经退化成为了“乙酰水杨酸”药品的通用名称。

对商标的损害

淡化行为对驰名商标的损害主要表现在以下三个方面。

首先，破坏驰名商标与特定商品或服务之间的联系。对于驰名商标，消费者的脑海中会存在该商标与特定的商品或服务之间的一种必然联系。

比如，当人们提及“COCA-COLA”商标时，脑海之中马上会出现“碳酸饮料”的商品形象。而驰名商标淡化行为则破坏了这种无法分割的联系。当他人将“COCA-COLA”商标用于饭店或衣服等商品之上时，无形中就冲淡了人们心目中“COCA-COLA”与“碳酸饮料”之间的联系。

其次，损害消费者的利益。当今社会消费者认牌购物的情况非常普遍，消费者使用驰名商标的商品，不仅会享受到货真价实的商品和服务，还能体现出一种身份和品位。在此情况下，若驰名商标被他人用在不相同或不类似的商品及服务上，则极易造成对消费者的误导，从而使消费者购买到价高质次的商品或接受不正宗的服务。

最后，损害驰名商标的显著性、识别性及美誉度。淡化行为中的“退化”会损害驰名商标在相关公众中的显著性、识别性，使驰名商标从私有财产变为公共资源，造成驰名商标所有人的巨大经济损失。而丑化行为则会直接损害驰名商标的美誉度和商誉。

合规建议

由于驰名商标的淡化行为会对驰名商标造成诸多损害，笔者就企业防止其驰名商标被淡化问题提出合规建议如下:

商标设计中的合规管理: 在设计商标时，应当尽可能选用臆造词等显著性较强的文字。商标固有显著性较弱是引起商标淡化的原因之一，某些商标的含义与所指商品或服务的特点和用途密切相关，容易被淡化为通用名称。

> *“在设计商标时，应当尽可能选用臆造词等显著性较强的文字”*

商标申请中的合规管理: 驰名商标所有人除申请一些文字类商标之外，还应当设计一些独创的图形并申请图形商标，或图形与文字结合申请组合商标。根据商标法的规定，图形中所包含的著作权可以作为一项在先权利，阻止他人在不同类别上申请包含有相同图形的商标。

驰名商标使用过程中的合规管理。第一，驰名商标所有人应当在驰名商标一旁加注“注册商标”、“®”、“TM”等标记，以将驰名商标与商品说明、广告用语、商品名称等区别开来。

第二，驰名商标所有人不应轻易将驰名商标扩大使用到不同类别商品或服务上使用。在消费者的心目中，驰名商标与特定商品或服务之间存在着特定联系。若驰名商标所有人将驰名商标扩大使用到不同类别的商品或服务上，会导致消费者心目中的上述特定联系被削弱，从而降低驰名商标的品牌价值。

及时维权

驰名商标被淡化的救济手段。驰名商标所有人一旦发现他人有搭驰名商标便车的行为时，要及时维权。首先，驰名商标所有人可以指派专人或委托商标代理人定时查阅商标公告，审查商标局是否公告了不同类别上与驰名商标相同或近似的商标。如有发现，应当在法定期间内提起异议。其次，若存在淡化风险的商标已获得了注册，驰名商标所有人可以向商标评审委员会申请宣告该注册商标无效。最后，若发现他人实施了商标淡化行为，应及时维权诉讼，采取法律途径防止驰名商标被持续淡化。■

The dilution of a well known trademark is an act that reduces and weakens the distinctiveness of the mark and harms and tarnishes the goodwill therein. The diluter exploits the notoriety and reputation of another's well known trademark to earn illegal commercial gain, in doing so causing harm to the trademark's owner. Enterprises that own well known trademarks need to pay close attention to this.

Types of dilution

Well known trademark dilution is divided into three types – blurring, tarnishing and genericisation. The term "blurring" means the act whereby someone uses a trademark identical or similar to the well known mark for non-identical or non-similar goods or services. For example, using the computer trademark Lenovo on beer products.

The term "tarnishing" means the act whereby someone uses a trademark identical or similar to a well-known trademark for a non-identical class of goods or services that tarnishes, defames or has a negative impact on the reputation of the well known trademark. For example, using the perfume trademark Chanel for toilets.

The term "genericisation" means that a well known trademark ultimately becomes the generic name of the good due to improper use, thereby losing its distinguishing function, for example Bayer's trademark Aspirin becoming the generic name for acetylsalicylic acid pharmaceuticals.

Harming the marks

The harm to well known trademarks due to dilution is principally manifested in three ways. First is undermining of the connection between the well known trademark and a specific good or service. In the consumer's mind, there will be a natural association between the well known trademark and the specific good or service.

For example, when the trademark Coca-Cola is mentioned, the image of a "carbonated beverage" will immediately come to mind. The dilution of a well known trademark then undermines this unbreakable association. Once someone else uses the trademark Coca-Cola for such things as restaurants or clothes, it imperceptibly dilutes the association between Coca-Cola and carbonated beverages in people's minds.

Second is harming of consumers' interests. In modern society, the purchase of goods based on brand name is very common. By using a good bearing a well known trademark, not only will consumers be able to enjoy a genuine good or service at a fair price, but will also be able to project their status and taste. In such a circumstance, if a well known trademark is used by someone for non-identical or non-similar goods or services, consumers are likely to be misled, thereby resulting in the consumer purchasing an inferior quality good at a higher price, or receiving a non-genuine service.

Finally there is harm to the distinctiveness, distinguishing function and reputation of the well known trademark. In the acts of dilution, genericisation harms the distinctiveness and distinguishing function of the well known trademark among the relevant public, causing the mark to change from private property to public resource, and causing the owner of the well known trademark to incur huge economic losses. As for tarnishing, it can directly harm the reputation of, and goodwill in, the well known trademark.

Compliance recommendations

As dilution causes much harm to a well known trademark, the authors wish to set out the following compliance recommendations for preventing the dilution of well known marks:

Compliance management in trademark design. When designing a trademark, it is best to select a fanciful word or other such relatively distinctive word. Innate weak distinctiveness is one of the reasons that gives rise to the dilution of a trademark, and where the meaning of a certain trademark is closely related to the features and/or purpose of the goods or services for which it is designated, it can easily be diluted into a generic name.

Compliance management in the course of trademark application. In addition to applying for certain word marks, the owner of a well known trademark should additionally design some original figures and apply for figurative marks, or for associated marks that combine a figure and word. Pursuant to the Trademark Law, the copyright in a figure may, as a prior right, serve to bar others from applying for a trademark containing an identical figure for a different class.

Compliance management in the course of the use of a well known trademark.

> *"When designing a trademark, it is best to select a ... relatively distinctive word"*

First, the owner of a well known trademark should add "注册商标" (the Chinese characters for "registered trademark"), "®", "TM" or other such symbols beside its well known trademark to distinguish it from the instructions for the goods, advertising slogans, the description of the goods, etc.

Second, the owner of a well known trademark should not rashly broaden use of the mark to goods or services in a different class. In the minds of consumers, there exists a specific connection between the well known trademark and specific goods or services. If the owner of a well known trademark broadens its use to goods or services in a different class, the above-mentioned specific connection will be weakened in consumers' minds, reducing the mark's brand value.

Prompt safeguarding of rights

Well known trademark dilution remedies. Once the owner of a well known trademark discovers that another is free riding on its mark, it needs to promptly safeguard its rights. First, the owner of the well known trademark can assign someone or engage a trademark agency to regularly review the trademark gazette to examine whether the Trademark Office has gazetted a trademark identical or similar to its well known trademark for a different class. If that is the case, it should file an opposition within the statutory period of time.

Second, if the trademark that poses a risk of dilution has been registered, the owner of the well known trademark can apply to the Trademark Review and Adjudication Board for invalidation of the registered trademark. Finally, if it is discovered that another has carried out an act of trademark dilution, a legal action for the protection of rights should be promptly instituted and legal means taken to prevent further dilution of the well known trademark. ■

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中国大陆公司解散诉讼制度（下）
Delving further on litigation for the dissolution of companies

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前文论及，各占50%公司股权的治理结构具有严重的缺陷：公司的“人合性”一旦遭到破坏而形成“公司僵局”，根本无法通过公司自身的股权治理结构进行修复。显然，在此种情形下，只要两名股东的意见存有分歧、互不配合，就无法形成有效决议，势必形成公司解散纠纷。

举证责任及规则

在公司解散之诉中，由于各方诉讼利益的差异，导致举证思路的不同。但是任何一方的诉辩主张如要得到司法支持，都必须遵循公司法及其司法解释所设定的证明规则。

公司法“解释二”设定了公司解散的条件，即单独或者合计持有公司全部股东表决权10%以上的股东，以下列事由之一提起解散公司诉讼，并符合公司法第183条规定的，人民法院应予受理：

1. 公司持续两年以上无法召开股东会或者股东大会，公司经营管理发生严重困难的；
2. 股东表决时无法达到法定或者公司章程规定的比例，持续两年以上不能做出有效的股东会或者股东大会决议，公司经营管理发生严重困难的；
3. 公司董事长期冲突，且无法通过股东会或者股东大会解决，公司经营管理发生严重困难的；
4. 经营管理发生其他严重困难，公司继续存续会使股东利益受到重大损失的情形。

> “诉辩双方应当……承担举证责任和遵循相应的证明规则”

笔者认为，上述受理条件既是法院立案时的形式审查要素，也是公司解散之诉的实体审查要件，因此诉辩双方应当围绕上述法定条件承担举证责任和遵循相应的证明规则。

主张解散的一方必须围绕公司解散的法定条件进行举证，并应当坚持解散制度中的“经营管理困难”是指公司股权治理结构方面的困难，体现为公司的经营决策困难及公司决策机制的失灵，并非指公司不能开展事实上的商事经营活动。

如果将之理解为商业经营方面的困难，则公司解散制度的法律基础将丧失，其原因是：在一方股东把控下的公司，其商业性经营将更有效率，决策更加灵活而不受制约；但是，这种状态显然是公司法所反对的，因为其损坏了公司投资制度的整体安全性。

反对解散公司的股东一般对公司具有实际掌控的权利，其证明要点应该是：公司的决策机制正常，未形成公司僵局。

主张解散的一方往往无法参与公司的决策和经营性活动，导致公司异化为“一人公司”。由于存在上述情形，反对解散一方的举证思路容易陷入误区。他们采取的证明思路往往是提出诸如公司正常年检、纳税、给员工发工资并缴纳社保费用并且公司处在“盈利”状态等证据，并以此认为公司没有出现“经营管理困难”，从而否定公司的解散条件已经成立。但根据现行指导性案例的裁判精神，此类证据实质上是没有证明力的。

目的正当性

司法实践中还应当注意的是，是否应该对公司解散诉讼的“目的正当性”进行审查？笔者认为，“目的正当性”之类的抗辩意见，是套用股东知情权诉讼法律制度的产物，是一种错误适用法律的意见。解散之诉的原因是公司的“人合性”遭到了严重损害且无法修复，公司的继续存在与当初设立公司的目的具有本质性冲突，因此在公司解散之诉中要求审查所谓的“目的正当性”根本没有任何法律根据。

再次提起诉讼

根据大陆民事诉讼法的规定，对错误裁判的纠正机制主要依靠审判监督制度（又称再审制度）。但是，公司法“解释二”规定，法院关于解散公司诉讼作出的判决，对公司全体股东具有法律约束力；法院判决驳回解散公司诉讼请求后，提起该诉讼的股东或者其他股东又以同一事实和理由提起解散公司诉讼的，法院不予受理。

笔者认为，即使某一案中的解散请求未能得到支持，也不等于股东不能在后续诉讼中再次主张解散公司。事实上，股东对公司的解散请求权是其合同解除权在公司投资领域延伸的产物。解散公司等同于股东之间对公司投资协议的解除。

当公司再次符合解散条件的，股东可以再次提起解散之诉，而不必拘泥于必须通过再审程序纠正原错误判决来达到解散公司的目的。此时，股东在第二次符合公司解散条件的情形下所再次提起的公司解散之诉，已经不再属于前述司法解释中所谓的“同一事实和理由”的范畴了。■

As mentioned in last month's issue, a governance structure where each party holds 50% equity interest has a serious defect: once the "personalised nature" of the company breaks down, giving rise to a "deadlock", it is impossible to cure the situation through the company's own equity governance structure. Under this situation, it is likely that a company dissolution dispute will occur, as no effective resolution can be passed.

Burden of proof and rules

The different interests of the parties for the dissolution of a company result in a difference in their approaches to the adducement of evidence. However, if the claims of either party are to secure judicial support, they must comply with the rules of evidence set out in the Company Law and its judicial interpretations.

The Interpretations of the Company Law (2) specify the conditions for the dissolution of a company where a shareholder alone or shareholders together hold at least 10% of all the shareholder voting rights and institute a legal action for the dissolution of the company on the grounds set out below, and if the provisions of article 183 of the Company Law are satisfied, the people's court is required to accept the same:

1. The company has been unable to call a shareholders' meeting or shareholders' general meeting for at least two years and serious difficulties have arisen in its operations and management;
2. When they vote, the shareholders have been unable to reach the statutory percentage or the percentage specified in the company's articles of association, making it impossible to pass a valid resolution of the shareholders' meeting or shareholders' general meeting for at least two years, and serious difficulties have arisen in the company's operations and management;
3. There has been a longstanding conflict between company directors that cannot be resolved by the shareholders' meeting or shareholders' general meeting, and serious difficulties have arisen in the company's operations and management; or
4. Another serious difficulty has arisen in the company's operations and management and its continued existence would cause a material loss to the interests of the shareholders.

These conditions are key for substantive examination in legal action to dissolve the company. Both plaintiff and defendant should bear the burden of proof and comply with the corresponding rules of evidence.

> *"Both plaintiff and defendant should bear the burden of proof and comply with ... rules of evidence"*

The party advocating dissolution must adduce evidence around the statutory conditions for the dissolution of a company. It must recognise that the "operational and management difficulties" in the dissolution system refers to difficulties in the company's equity governance structure, which are manifested in difficulties in making decisions on the company's operations and the breakdown in the company's decision-making mechanism, not to the fact that the company is unable to carry on actual commercial operation activities.

If they are understood as difficulties in commercial operation, then the legal basis of the company dissolution system will be lost, the reason being that where a company is under the control of one of the shareholders, its commercial operations will be more efficient and decision-making more flexible; however, this is a situation that is clearly opposed by the Company Law, as it damages the overall safety of the company investment system.

Generally, the shareholder that opposes the dissolution of the company has de facto control of the company, the proof being the decision-making mechanism of the company working normally without any deadlock.

The party advocating dissolution is usually unable to participate in the decision-making and business activities of the company, resulting in the company perversely becoming a "one-person company". Due to the existence of this circumstance, the line of thinking on the adducement of evidence of the party opposed to dissolution can easily fall into error. The evidentiary approach that they adopt usually takes the form of presenting evidence showing that the company has undergone annual inspections, paid taxes, paid wages to employees and paid social insurance premiums normally, and that the company is profitable, and on this basis deem that the company is not experiencing "operational and management difficulties", thus denying that the conditions for dissolution of the company have been fulfilled. However, based on the adjudicatory spirit of current guiding precedents, such evidence in fact lacks probative force.

Another point worth noting in judicial practice is whether an examination of the legitimacy of the objective of the legal action to dissolve the company needs to be carried out. It is the author's opinion that defence arguments of the type that deny the "legitimacy of the objective" are a product of mechanically applying the legal system for legal actions involving shareholders' right to know, an argument that involves erroneous application of the law.

The reason for a legal action to dissolve a company is that the "personalised nature" of the company has been seriously and irreparably damaged, and that there is an essential conflict between the continued existence of the company and the objectives of the company at the time of its establishment. Accordingly, requiring an examination of the so-called "legitimacy of the objective" has absolutely no legal basis.

Instituting a further legal action

Pursuant to the Civil Procedure Law, the mechanism for correcting erroneous rulings or judgments mainly relies on the adjudication supervision system, also known as the retrial system. However, the Interpretations of the Company Law (2) specify that the judgment rendered by a court in a legal action to dissolve a company is legally binding on all of the shareholders of the company. If, after the court renders a ruling rejecting the claims in the legal action to dissolve the company, the shareholder that instituted the legal action or another shareholder institutes a legal action to dissolve the company on the basis of the same facts and grounds, the court will not accept the case.

It is the author's opinion that even though the claims for dissolution in any single case are not upheld, this does not mean that the shareholders cannot again advocate the dissolution of the company in a subsequent legal action. The dissolution of a company is equivalent to the termination of an agreement to invest in a company between the shareholders.

Once the conditions for dissolution are again satisfied, a shareholder may again institute a legal action for dissolution and need not stickle on correction of the original erroneous judgment through a retrial procedure to achieve its objective of dissolving the company. In such a circumstance, it will not fall within the confines of the so-called "same facts and grounds" in the above-mentioned judicial interpretations. ■

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PPP 掀起中国第三次基建高潮

Lack of PPP knowledge may hinder wave of infrastructure construction

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在世界各国正在艰难的走出全球金融危机的背景下，中国政府一方面清理、规范地方政府债务，另外一方面支持推进新型城镇化建设和加快基础设施建设。中央政府自 2013 年底决定在全国范围内推广 PPP 模式，以加快中国基础设施的开发建设。PPP 作为基础设施建设新模式，是中央政府掀起的第三次基础设施建设高潮。但是笔者目前在实践中发现，无论是政府部门还是企业本身，对 PPP 模式的认识都比较模糊。

PPP 内涵

PPP 模式即 Public-Private-Partnership 的缩写，是指政府与企业之间为了合作建设城市基础设施项目，或是为了提供某种公共物品和服务，彼此之间合作开发并共担风险、共享收益的建设模式。在此模式下，政府与企业之间通过签署合同来明确双方的权利和义务，最终使合作各方达到比单独行动更为有利的结果。

PPP 的概念较为宽泛，相关国际组织及开发机构对 PPP 作出的定义大同小异。笔者在此列举一些主要国际组织对于 PPP 的认定。

- 亚洲开发银行：PPP 是指为开展基础设施建设和提供公共服务，公共部门和私营部门之间可能建立的一系列合作伙伴关系。
- 联合国发展计划署：PPP 是指政府、营利性企业和非营利性组织基于某个项目而形成的相互合作关系。在这种关系中，政府并不是把项目的责任全部转移给私营部门，而是由参与合作的各方共同承担责任和融资风险。
- 欧盟委员会：PPP 是公共部门和私人部门之间的一种合作关系，其目的是为了提供传统上由公共部门提供的公共项目或服务。
- 世界银行：PPP 是私营部门和政府机构间就提供公共资产和公共服务签订的长期合同，而私营部门须承担重大风险和管理责任。

笔者认为，PPP 模式就是政府与企业之间合作开发建设的一种长期合作伙伴关系，其特征就在于政府和企业之间的利益共享、风险共担。

这种模式注重的是产出标准而不是实现方式，其目的在于发挥社会资本的积极性，有利于鼓励服务和技术创新，实现政府、企业、公众多方共赢。

对政府而言，PPP 模式拓宽了基础设施建设的资金来源，还有利于增加投资、就业，促进经济增长，帮助政府转移财务、建设、运营等风险，减少政府财政支出和债务负担。

国务院总理李克强 2014 年 3 月在政府工作报告中提出，要制定非国有资本参与中央企业投资项目的办法，制定非公有制企业进入基础设施领域的具体办法，为民间资本提供大显身手的舞台。PPP 模式正是符合上述精神的一种非常有优势的投资模式。

实施方式

PPP 适用的领域非常广泛。从最初的供水、供电、污水处理、电信、电力、管线等公用事业，到高速公路、铁路、港口、机场、保障房、医院、学校、养老院、监狱、土地收储、生态建设和环境保护、工业和能源、农林水利建设等城市基础设施，再到目前各级政府大力推进的新型城镇化建设和城市综合体的开发建设，都适用 PPP 模式。

不同模式

根据世界各国的实践，PPP 没有一个固定的模式，而是根据各个项目的特点而有一定的差别，主要有以下实施方式：

一是非融资性质的 PPP，主要包括服务外包、运营与维护合同 (O&M) 及移交 - 运营 - 移交 (TOT) 等。这些实施形式中，企业主要代替政府为社会公众提供服务，但不涉及融资。

二是股权 / 产权转让及合资合作形式的 PPP。股权 / 产权转让的合作形式通过民营经济受让国有股权 / 产权的形式实现；合资合作主要就是通过国有企业与民营企业共同设立新的经济实体的形式实现。

三是融资性质的 PPP，这种实施形式的表现方式比较多，主要有以下种类：建造 - 运营 - 移交 (BOT)、民间主动融资 (PFI)、建造 - 拥有 - 运营 - 移交 (BOOT)、建造 - 移交 (BT)、建设 - 移交 - 运营 (BTO)、重构 - 运营 - 移交 (ROT)、设计建造 (DB)、设计 - 建造 - 融资 - 经营 (DB-FO)、建造 - 拥有 - 运营 (BOO)、购买 - 建造 - 营运 (BBO)、只投资。融资性 PPP 当前非常受地方政府欢迎，能够有效减轻政府债务压力和资金压力，并能够快速推进当地基础设施的投资建设。

相比前两次基础设施建设高潮，中央政府在本次高潮中主要依靠制度创新，而非单纯的资金投入，而 PPP 正是本次高潮中的关键。■

Against the background of countries around the world painfully extricating themselves from the global financial crisis, the central government has on the one hand been clearing and regulating local government debt, and on the other been supporting and promoting new urbanisation and accelerating the construction of infrastructure. The central government has decided to promote the PPP (public-private partnership) model on a nationwide scale since the end of 2013, so as to accelerate the development and construction of the nation's infrastructure. As a new infrastructure construction model, PPP represents central government efforts to spark a third wave of infrastructure construction. However, the author has discovered that, in practice, both government authorities' and enterprises' knowledge of the PPP model is rather vague.

The meaning of PPP

The term "PPP model" means a construction co-operation model between a government and an enterprise for the purpose of co-operating in the construction of an urban infrastructure project, or the provision of certain public goods or services, where the parties co-operate for the development of the project, jointly bear the risks, and share in the benefits. Under this model, the government and the enterprise clarify their respective rights and obligations through the execution of a contract. Such a model ultimately leads to a more beneficial result for the parties than if they act independently.

The concept of PPP is relatively broad. The definitions of PPP given by relevant international organisations and development organisations are more or less similar. The author has listed some definitions of PPP given by some major international organisations.

Asian Development Bank: PPP means a series of co-operative partnership relationships, possibly established between public and private departments, for the purpose of carrying out infrastructure construction and public service.

United Nations Development Programme: PPP means a mutual co-operation relationship formed among the government, private enterprises, and non-profit organisations on the basis of a specific project. In this relationship, the government does not entirely pass the liabilities of the project to the private departments. Rather, the participating parties share the liabilities and financing risks.

European Commission: PPP means a co-operation relationship between public departments and the private sector for the purpose of providing public projects or services traditionally provided by public departments.

World Bank: PPP is a long-term contract between a private department and a government institution for the purpose of providing public assets or services, in which the private department bears significant risks and management responsibilities.

The author is of the opinion that the PPP model is a long-term co-operative partnership relationship between a government and an enterprise for the purpose of co-operating in development and construction. The character of such a relationship is the sharing of risks and benefits between a government and an enterprise. This model pays attention to the output standards rather than the method of realisation. Its purpose is to stimulate the enthusiasm of private funds, to encourage innovation in service and technology, and realise the aim of win-win among multiple parties including the government, an enterprise and the public.

For the government, PPP broadens the source of funds for infrastructure construction and facilitates the increase of investment and employment, the promotion of economic growth, the shift of the risks related to financing, construction and operation the government faces, and the reduction of fiscal expenses and debt burden of the government.

Premier Li Keqiang mentioned in his government work report in March 2014 that the government will formulate measures for the participation of non-state capital in investment in projects of enterprises under the central government, and detailed measures for the entry of private enterprises into the infrastructure sector, to provide a stage on which private capital could play a part. The PPP model is an advantageous investment model that is in compliance with this spirit.

Implementation methods

PPP can be applied to a broad range of sectors, and is a suitable model for public utility projects such as water supply, power supply, sewage treatment and telecoms. It also applies to infrastructure projects such as highways, railways, ports, airports, subsidised housing, hospitals, schools, retirement homes, prisons, land reserves, ecological construction and environmental protection, industry and energy, agricultural, forestry and water resources construction later on, and also to the new urbanisation and urban complex development and construction now being vigorously promoted by governments at every level.

Models vary

Based on practice in various countries around the world, PPP does not have a fixed model. Rather, it varies to a certain extent depending on the features of each individual project. The following are the principal methods of implementation.

The first is a PPP of a non-financing nature, mainly including service outsourcing, operation and maintenance contracts (O&M) and transfer-operate-transfer (TOT). In these forms of implementation, an enterprise mainly replaces the government in providing services to the public, but financing is not involved.

The second is an equity/property rights transfer PPP and equity joint venture or co-operative joint venture PPP. The co-operative form in an equity/property rights transfer is realised in the form of a private concern acquiring state-owned equity/property rights; and equity joint venture co-operation is mainly realised in the form of a state-owned enterprise and private enterprise jointly establishing a new economic entity.

The third is a PPP of a financing nature. The ways of manifestation of this implementation method are relatively numerous, the following being the principal ones: build-operate-transfer (BOT); private finance initiative (PFI); build-own-operate-transfer (BOOT); build-transfer (BT); build-transfer-operate (BTO); rehabilitate-operate-transfer (ROT); design-build (DB); design-build-finance-operate (DB-FO); build-own-operate (BOO); buy-build-operate (BBO). The financing type PPP is being enthusiastically embraced by local governments at present, as it can effectively relieve governments' debt burden and funding pressures, and rapidly promote the investment in, and construction of, local infrastructure.

As compared to the previous two waves of infrastructure construction, the central government is mainly relying on system innovation, not simple injection of funds, in this current wave, and the PPP is key to this wave. ■

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专利权入股中的法律风险
Legal risks in equity investment by means of patent rights

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当前，以专利技术投资入股成为了一种较为常见的商业行为，而由此引发的法律纠纷也随之而来。例如，投资人与公司未就专利权的归属、转让等事宜明确约定的情况下，公司是否有权将专利转让第三人等问题在实践中极易引发争议。本文旨在探讨专利权入股存在的法律风险。

情况一：投资人将专利技术入股公司，但是并未作著录项目变更。在此情形下，虽然专利登记主管部门记录的权利人为投资人，但真正的专利权人为公司。这一局面对公司极为不利，很有可能会带来对其不利的法律风险。通常，如果公司是由投资人创立，其作为法定代表人或者公司的实际控制人时，公司的利益和投资人的利益是一致的，此时公司风险很小。

法律瑕疵

实践中，由于真正的专利权人与实际的专利权持有人相分离，所以有的公司在被吊销、注销等情况下，还能够指示投资人进行专利转让、许可等行为，以实现公司的利益。当然，这种行为因股东出资未履行出资登记义务，实际上是存在法律瑕疵的。

此外，当投资人并非公司法定代表人或实际控制人时，投资人的利益和公司的利益可能并不完全一致，投资人如果在接受相应对价的基础上将专利权转让给第三人，并做了著录项目变更，并且第三人对真正的专利权人为公司这一情况并不知情，那么第三人很有可能会取得相关专利的所有权。实践中有过这样的案例，公司起诉投资人和第三人，请求返还专利，尽管投资人在专利入股之后对于专利已经是无权处分人，其对于专利应属于受托占有的关系，但其仍然具有在国家知识产权局办理著录项目变更等相关手续的能力。

> “有过这样的案例：公司起诉投资人和第三人，请求返还专利”

第三人在不知道或者不应该知道投资人为非法转让的情况下，以正常价格受让的，则第三人对专利的取得为“善意取得”，其取得专利的行为合法有效，公司则丧失专利权。

恶意串通

实务中，公司如果想索回专利，则需要证明第三人知道或应该知道公司为专利权人，但通常情况下很难。不过也有例外，在司法实践中，曾有公司的几位股东未经法定代表人同意擅自将公司的专利转让给自己，然后又转让给他们担任法定代表人和股东的公司。法院认定上述行为属恶意串通，转让无效。

情况二：投资人将专利技术入股公司，著录项目中专利权人变更为公司。在此情形下，当投资人与公司之间产生争议时，公司的利益较为有保障。相反的，投资人往往居于不利地位。以另一起专利权属纠纷案为例，投资人将专利入股到某公司后，因合作不愉快，投资人离开了该公司。其后，该公司将专利转让给第三人，第三人与投资人形成竞争关系，投资人诉至法院，请求确认该转让无效，返还专利权。

法院认定，自该专利著录项目变更之日起专利权为公司所有，公司有权对该专利进行处分，第三人取得该专利合法有效。投资人只能通过股权转让或者清算程序才能够维护自己权益。

其他主体

情况三：投资人将专利技术入股公司，公司指示将其他主体登记为专利权人。在此情形下，风险主要在于被指定人的可靠性，如果被指定人未经公司许可擅自处分专利，第三人“善意取得”，那么公司无法追索该专利，只能通过起诉被指定人赔偿的方式挽回损失。

在司法实践中，专利的价值很难合理评估。在出现这种纠纷时，除非原告能够充分举证（这很难做到），否则法院对专利的价值往往保守估算。而且即使赔偿请求得到支持，也往往很难让被指定人履行赔偿责任。

此外，如果被指定人意外死亡，公司亦无法指示被指定人行使专利权，只能通过诉讼的方式确认专利权属，如果之前没有保留好相关证据，又遇到被指定人的继承人不予配合，这时公司的风险就会凸显出来，有可能因此而丧失对该专利的相关权益。

明确归属

专利权出资存在着诸多法律风险，导致这些风险的原因，可能来自于外部市场的发展，也可能来自内部股东出资行为的法律瑕疵等原因。

在此，我们提示各方商业主体，要加强出资前的预防措施，尽可能的在公司章程、出资协议中明确专利权的归属、转让等具体法律问题。■

Equity investment by means of patented technology has become a more common business activity nowadays, and given rise to legal disputes as a result. For example, if an investor has not expressly agreed with a company on the ownership, transfer and other matters related to a patent, whether the company has the right to transfer the patent to a third party can easily lead to disputes. This article explores relevant legal risks involved.

Scenario 1: an investor injects a patented technology into a company as an equity investment, but it has not made changes to the bibliographic description. In this case, although the patentee recorded at the competent patent registry is the investor, the real patentee is the company. This situation is extremely unfavourable to the company because it is likely to bring legal risks against it. Usually, if the company is founded by the investor, the investor, as the legal representative or actual controller of the company, has interests consistent with those of the company, and the company is exposed to very low risk.

Legal flaws

In practice, since the real patentee is separated from the actual holder of patent rights, it is still able to instruct the investor to transfer or license the patent in the interest of the company even after the licence of the company is cancelled, revoked, etc. Of course, this move has legal flaws because the investor has not fulfilled its obligations for the registration of its capital contribution.

However, if the investor is not a legal representative or an actual controller of the company, its interests may not be exactly the same as those of the company. If it transfers the patent to a third party upon acceptance of an appropriate consideration, and has made changes to the bibliographic description, and the third party is not aware that the real patentee is the company, then the third party is likely to be able to acquire the ownership of the patent.

In practice, once a company sued its investor and a third party, and demanded the return of the patent. Even though the investor had no right to dispose of the patent after making an equity investment using the patent – it only had a fiduciary possession relationship with the patent – it still had the capacity to change the bibliographic description.

> *"Once a company sued its investor and a third party, and demanded the return of the patent"*

If a third party is assigned a patent at a normal price without knowing or having to know that an investor has assigned the patent illegally, the third party has acquired the patent "in good faith". This acquisition is legitimate and effective, while the company has lost the patent right.

Malicious conspiracy

In practice, if the company wants to reclaim the patent, it needs to prove that the third party knew, or should have known, that the company is the patentee. It is usually difficult to do so, but there are exceptions. In judicial practice, once several shareholders of a company transferred a patent to themselves without the consent of the legal representative of the company, and then transferred it to a company in which they served as the legal representatives and shareholders. The court found that since such acts constituted malicious conspiracy, the transfer was invalid.

Scenario 2: an investor injects a patented technology into a company as an equity investment, and changes the patentee in the bibliographic description to the company. In this case, when a dispute arises between the investor and the company, the interests of the company will be more secure, but the investor will often be in an unfavourable position.

In another dispute over patent right ownership, an investor, after making an equity investment into a company with a patent, left the company because it was not happy with the co-operation. Subsequently, the company transferred the patent to a third party who was in competition with the investor. The investor took the company to court, asking for confirmation of the invalidity of the transfer and the return of the patent right.

Safeguard interests

The court found that from the date of change to the bibliographic description for the patent, the patent right was owned by the company, and so the company had the right to dispose of the patent, and the third party's acquisition of the patent was legal and valid. The investor is able to safeguard its own interests only through equity transfer or liquidation proceedings.

Scenario 3: an investor injects a patented technology into a company as an equity investment, and the company directs that another party be registered as the patentee. In this case, the risk lies in whether the nominee is reliable or not. If the nominee disposes of the patent without the permission of the company, and a third party "acquires it in good faith", then the company will not be able to reclaim the patent, and can recoup its losses only by suing the nominee.

In judicial practice, it is difficult to assess the value of a patent in a reasonable way. In the event of a dispute, unless the plaintiff can provide sufficient evidence, which is difficult to do, a court will often make a conservative estimate of the value of a patent.

And even if a claim is sustained, it is often difficult to make the nominee fulfil its liability for indemnity. Moreover, if the nominee dies in an accident, for example, the company will not be able to instruct the nominee to exercise the patent rights. It can confirm the ownership of the patent only through litigation.

If the evidence is not properly preserved beforehand, and the heir of the nominee fails to co-operate, the company will be exposed to more prominent risks, and is likely to lose the relevant interests in the patent.

Define ownership

Various legal risks are involved in capital contribution by means of patent rights, probably as a result of the development of the external market, or the legal flaws in capital contribution by internal shareholders.

We would like to remind business parties to strengthen preventive measures by defining the patent ownership, transfer and other specific legal issues in the articles of association and capital contribution agreements. ■

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商标行政诉讼新证据采信问题研究
Evolution of admission of new evidence in trademark lawsuits

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中国政府加入世界贸易组织(WTO)后，根据相关协议于2001年对商标法进行了相应的修改，规定商标行政行为应该接受司法审查。如果当事人对商标评审委员会做出的裁定书不服，可以在法定的期限内向北京市第一中级人民法院提起行政诉讼。从2001年开始，商标行政诉讼的案件数量急剧增加，2002年的案件量是19件，2010年的案件量升到2002件。从2002年到2012年，北京法院总共受理7896件商标行政诉讼案件，其中结案6793件。

在商标行政诉讼案件中，一个热点法律问题就是新证据的采信问题。当事人经常在诉讼程序中提交新证据，并要求法院采信上述证据的效力。法院有权根据案件的情况，行使自由裁量权决定是否采信新证据，而新证据是否被采信有时候直接关系到案件能否胜诉。根据笔者的经验，法院对于商标行政诉讼中能否接受新证据的态度有一个逐渐演变的过程，可以概括为如下的三个阶段。

卷宗主义

第一阶段：法院奉行严格的卷宗主义，审查商标行政行为的合法性，并不采信诉讼阶段中所提交的新证据。

一个典型的案例就是海尼根公司与泰中烟草国际贸易公司“喜力”商标行政案件(案号：[2004]高行终字第67号行政判决书)。北京高院认定：商标评审委员会依据行政相对人(即海尼根)的请求及理由居间裁决商标异议复审案件，是符合法律规定及法定程序的。根据“谁主张，谁举证”的原则，海尼根作为商标异议复审申请人，对其商标为驰名商标等问题负有举证义务。海尼根在商标异议复审程序中未向商标评审委员提交足够证据证明其主张，未完成法律法规所要求的举证责任。

如果法院接受申请人在行政诉讼中提出的而在商标异议复审程序中没有提出的证据或理由，则有可能导致商标评审委员会的裁定被撤销，不符合诉讼当事人权利对等的原则。因此，海尼根在一审期间提供的新证据在本案中不应当被采纳。”

> “关于新证据的提交的时间点……当事人最好在一审诉讼阶段提交”

救济机会

第二阶段：法院主要从“当事人有没有救济机会”的角度来考虑该法律问题。如果法院不接受当事人所提供的新证据，当事人就会败诉并没有其它的救济手段。法院从行政诉讼的救济价值出发，逐步地接受一些新的证据。一个典型案例就是佳选企业服务公司诉商标评审委员会行政案件(案号：2011行提字第9号)。

在案件的一审期间，佳选企业服务公司向法院提交了在中国大陆使用申请商标从事商业活动以及与之有关的报刊杂志等证据。一审法院认为这些证据均为诉讼中提交的新证据，且无正当理由，故不予采纳。经调查，佳选企业服务公司为世界500强企业。2007年，佳选企业服务公司在中国的第一家门店在上海市开业经营，引发媒体的广泛报道和业界的关注。佳选企业服务公司在经营活动和广告宣传中使用申请商标。

最高人民法院认定：“商标驳回复审案件中，申请商标的注册程序尚未完成，评审时包括诉讼过程中的事实状态都是决定是否驳回商标注册需要考虑的。本案中，佳选企业服务公司在一审诉讼过程中提交了申请商标实际使用的大量证据，这些证据所反映的事实影响了申请商标显著性的判断，如果不予考虑，佳选公司将失去救济机会，因此在判断申请商标是否具有显著特征时，应当考虑这些证据。一审法院以这些证据为诉讼中提交的新证据，而无正当理由，对上述证据不予采信的做法不妥。”

开放态度

第三阶段：法院对于新证据持相对开放的态度，对新证据的接受程度越来越高。根据笔者的经验，目前法院基本上接受下面三种类型的新证据：

1. 补强性的新证据：当事人行政复审阶段已经提交了理由及相关证据，诉讼阶段补充提交新证据，用以补强自己的主张；
2. 有合理理由的新证据：例如，当事人复审阶段确实没有收到商标评审委员会的通知书，所以只能在诉讼阶段提交新证据；
3. 足以影响案件实体审理的新证据：例如，当事人在诉讼阶段提交了在先商标被撤销的生效的裁判书，证明阻挡申请商标获得注册的阻碍已经消除。

关于新证据的提交的时间点，笔者认为从公平的角度出发，当事人最好在一审诉讼阶段提交，不要拖延到二审诉讼阶段。■

After the central government acceded to the World Trade Organisation (WTO), it amended the trademark law accordingly, pursuant to the relevant agreement in 2001, by requiring trademark administrative actions to be subject to judicial review. If a party is not satisfied with a judgement made by the Trademark Review and Adjudication Board (TRAB), it may bring an administrative lawsuit at the Beijing First Intermediate People's Court within a statutory deadline.

Since 2001, caseload involving trademark administrative litigation has increased dramatically, from 19 cases in 2002 to just over 2,000 cases in 2010. From 2002 to 2012, the Beijing court accepted a total of 7,896 cases of trademark administrative litigation, of which 6,793 have been disposed of.

A hot legal issue in trademark administrative litigation is the admission of new evidence. The parties often submit new evidence in litigation proceedings and ask the court to admit such evidence as valid. Depending on the circumstances of a case, the court has the right to decide at its discretion whether new evidence is admissible, and whether the new evidence is admissible is sometimes directly related to whether the case can win. According to the author's experience, the court is gradually evolving in its attitude towards whether it can accept new evidence in trademark administrative proceedings. This evolution process can be summarised in three stages.

Review based on file

Stage one: the court reviewed the legality of a trademark administrative action strictly based on the details of a file, and did not admit the new evidence submitted during litigation proceedings. A typical case was the Heineken trademark administrative case between Heineken and Thai Chung Tobacco International Trading (2004).

Beijing High People's Court found that the intermediate decision by TRAB based on the request of the administrative counterpart, Heineken, over the review of a trademark opposition case was in compliance with the law and legal procedures. According to the principle that a party is required to provide evidence to substantiate the claim lodged by itself, Heineken as an applicant for the review of the trademark opposition had the burden of proof on its trademark as a well known trademark, and other issues. Since Heineken did not submit sufficient evidence to the TRAB during review procedures to substantiate its claim, it had not fulfilled the burden of proof required by legislation.

> *"The parties should submit new evidence during the proceedings at first instance"*

If the court accepted the evidence or reasons presented by the applicant in the litigation proceedings, which were not presented in the trademark review process, it would probably result in revoking the TRAB's judgment, which was not in compliance with the principle of equal rights for the litigants. Therefore, the new evidence provided by Heineken during the first trial was not adopted in this case.

Chance of relief

Stage two: the court considered legal issues mainly from the point of view of "whether a party has a chance of relief". If the court did not accept the new evidence provided by the party, the party would lose the case without any relief. Taking this into account, the court began to gradually accept some new evidence in administrative proceedings. A typical case is the administrative case of *Best Buy Enterprise Services v TRAB* (2011).

During the first trial of the case, Best Buy submitted to the court evidence on the use of the filed trademark in commercial activities in China, including promotional materials that appeared in newspapers and magazines related to its use. The court of first instance held that this evidence was new evidence submitted in the litigation proceedings without any justified reason, and that such evidence not be accepted. Subsequent investigations found that Best Buy was among the top 500 companies worldwide. It opened its first store in Shanghai in 2007, attracting extensive media coverage and industry attention. It used the trademark it applied for in its business and advertising activities.

The Supreme People's Court found that since the registration process for the trademark in dispute had not been completed, the facts included in the litigation during the review process needed to be considered to determine whether to dismiss the trademark registration. In this case, Best Buy submitted substantial evidence on the actual use of the trademark during the first-instance proceedings.

The facts reflected by this evidence could affect the judgment of the distinctiveness of the trademark. If this evidence was not taken into account, Best Buy would lose its chance for relief. Therefore, in determining whether the trademark had any distinctive feature, such evidence should be considered. It was not right for the court of first instance to deny the admission of new evidence on the ground that such evidence was submitted in the litigation proceedings without any justified reason.

Open attitude

Stage three: the court held a relatively open attitude towards new evidence, with increasing acceptance of new evidence. According to the author's experience, the court generally accepts three types of new evidence:

1. New evidence of a reinforcement nature. A party has submitted reasons and relevant evidence during review proceedings, and then submits supplementary new evidence during litigation proceedings to reinforce its claims;
2. New evidence with reasonable grounds. For example, if a party confirms during review stage that it did not receive notice from the TRAB, and so it can only submit new evidence in the litigation stage;
3. New evidence sufficient to affect the substantive hearing of a case. For example, a party submits in the litigation stage an effective judgment on the revocation of a prior trademark to substantiate that the obstacles blocking access to an application for trademark registration have been removed.

As to the point of time for submission of new evidence, the author believes that, based on the principle of fairness, the parties should submit new evidence during the proceedings at first instance instead of the proceedings at second instance. ■

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商业保理企业的设立与并购
Establishment and acquisition of commercial factoring enterprises

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保理，又称保付代理，是基于企业在交易过程中订立的货物销售或服务合同所产生的应收账款，由商业银行或者商业保理企业提供贸易融资、应收账款管理、账款催收、坏账担保等综合性信用服务。

保理业务现已成为新兴的贸易融资工具，将迎来快速发展时期。

政策初步明确

2012 年 6 月 27 日，商务部颁布《关于商业保理试点有关工作的通知》。同年 10 月，商务部下发《商务部关于商业保理试点实施方案的复函》，同意在天津滨海新区、上海浦东新区开展商业保理试点，设立商业保理公司。

同年 12 月，商务部又下发了《商务部关于香港、澳门服务提供者在深圳市、广州市试点设立商业保理企业通知》，开放了广州、深圳作为外资商业保理试点，允许香港、澳门服务提供者以中外合资、中外合作或外资形式设立商业保理企业。此后，上述地区相继出台了有关商业保理企业的试行管理办法，对商业保理公司的股东资质、注册资本金、从业人员及风险资本等各方面做了进一步要求，并同时明确试点地区的商务主管部门为商业保理行业的主管部门。

股东资质要求

各地商务主管部门对商业保理企业的准入条件略有不同。

以深圳市外资商业保理公司为例，根据《深圳市外资商业保理试点审批工作暂行细则》的规定，商业保理企业的设立和变更需由市经济贸易和信息化委员会受理、并按照现行审批权限负责审核，再向商业保理企业颁发《外商投资企业批准证书》后，报送广东省对外贸易经济合作厅备案。

相关基本要求如下：

（一）商业保理企业的港澳股东应具有良好信誉和从事保理业务的业绩和经验；

（二）港澳股东应分别符合《内地与香港关于建立更紧密经贸关系的安排》及《内地与澳门关于建立更紧密经贸关系的安排》及其有关补充协议中关于“服务提供者”的定义与要求；

（三）商业保理企业的高管中应包括 2 名以上具有金融领域管理经验且无不良信用记录的高管人员；

（四）企业注册资本不低于人民币 5000 万元等。

对于法人形式的香港投资者，其需要在香港从事实质性商业经营才可符合上述规定的要求。具体判断标准为：

（一）香港投资者在香港所从事的服务，应同样包含商业保理的性质和范围；

（二）除另有规定外，香港投资者应已在香港注册或登记设立并从事实质性商业经营 3 年或 3 年以上（若拟通过收购或兼并的方式取得香港投资者 50% 以上股权，则需持股满 1 年，该被收购或兼并的香港投资者才符合条件）；

（三）香港投资者在实质性商业经营期间依法缴纳利得税；

（四）香港投资者应在香港拥有或租用业务场所从事实质性商业经营，且应与其业务范围和规模相符合；

（五）香港投资者在香港雇用的员工中在香港居留不受限制的居民和持单程证来香港定居的内地人士应占其员工总数的 50% 以上。

并购建议

在 2012 年以前，整个商业保理行业大多处于自然发展状态。虽然近年来政府先后颁布了一系列规定，但商业保理公司的并购相对并不成熟。

现阶段，因规范商业保理公司设立、并购的法规政策起步较晚且各地标准不一，很多方面存在不确定性，已设立的名称中含“商业保理”的公司也并非必然符合监管要求。

如深圳近年来涌现了大量的内资商业保理公司，并取得了营业执照，但他们往往并未实际经营，且资本实力参差不齐。

究其原因，在于深圳较早实施了公司商事登记改革，注册资本实施认缴制。而且根据深圳的商事登记规定以及笔者了解到的部分公司实践操作，对于包括“商业保理”字样的公司名称在通过名称预核准后，只要经营范围中不包括银行金融类、融资担保类等需另行审批的事项，则并不需进行“前置审批”即可取得营业执照。但是，对此类“商业保理公司”，并不能排除日后被要求采取合规审核的后续监管措施的可能。

所以，在并购商业保理公司时，需要慎重考虑该商业保理公司是否符合当地的具体要求，并对其股东资质、注册资本、资质审批、实质经营情况、业务团队运营能力等进行全面尽职调查及评估，谨慎选择拟并购的目标公司。■

Factoring is a comprehensive credit service based on the accounts receivable of an enterprise that arise in connection with the goods sale or service contracts that it enters into in the course of transactions, where a commercial bank or commercial factoring enterprise provides trade financing, accounts receivable management, accounts collection, security for bad debts, etc.

Clarification of policies

On 27 June 2012, the Ministry of Commerce (MOFCOM) issued the Notice on Work Relevant to the Commercial Factoring Pilot Project. In October of the same year, MOFCOM issued the Reply of the Ministry of Commerce on the Implementing Plan for the Commercial Factoring Pilot Project, consenting to the launching of a commercial factoring pilot project and the establishment of commercial factoring companies in the Tianjin Binhai New Area and Shanghai Pudong New Area.

In December of the same year, MOFCOM further issued the Notice of the Ministry of Commerce on the Establishment by Hong Kong and Macau Service Providers of Commercial Factoring Enterprises in Shenzhen and Guangzhou on a Pilot Basis, opening Guangzhou and Shenzhen as pilot regions for foreign-invested commercial factoring, and permitting Hong Kong and Macau service providers to establish commercial factoring enterprises in the form of Sino-foreign equity joint ventures, Sino-foreign co-operative joint ventures, or wholly foreign-owned enterprises.

Subsequently, the above-mentioned jurisdictions each issued trial measures for the administration of commercial factoring enterprises, setting out further requirements in respect of the qualifications of the shareholders, registered capital, employees and risk capital of commercial factoring companies, and expressly providing that the competent commerce authorities of the pilot jurisdictions are the authorities in charge of the commercial factoring industry.

Shareholder qualifications

The access conditions for commercial factoring enterprises set by the competent commerce authorities of the different jurisdictions vary somewhat. Taking Shenzhen as an example, pursuant to the Interim Rules of Shenzhen Municipality for the Approval Work Associated with the Foreign-Invested Commercial Factoring Pilot Project, an application for the establishment or modification of a commercial factoring enterprise is to be accepted and reviewed by the Municipal Economy, Trade and Information Commission. Once an Approval Certificate of a Foreign-Invested Enterprise has been issued to the commercial factoring enterprise, the same is to be reported to the Guangdong Provincial Department of Foreign Trade and Economic Co-operation for the record.

The relevant basic requirements are as follows: (1) the Hong Kong or Macau shareholder of a commercial factoring enterprise is required to have a good reputation, and a track record and experience in engaging in the factoring business; (2) Hong Kong and Macau shareholders are required to satisfy the definition of, and requirements in respect of, a "service provider" of the Mainland and Hong Kong Closer Economic Partnership Arrangement and the Mainland and Macau Closer Economic Partnership Arrangement, respectively, and their respective supplementary agreements; (3) among the senior officers of the commercial factoring enterprise, at least two are required to have management experience in the financial sector and not have a poor integrity record; and (4) the registered capital of the enterprise may not be less than RMB50 million (US$8.1 million).

Additional obligation

Hong Kong investors in the form of a legal person are under an additional obligation to carry on a substantive business in Hong Kong in order to fully satisfy the requirements mentioned above. The particular test standard is as follows: (1) the services that the Hong Kong investor provides in Hong Kong should likewise include the nature and scope of commercial factoring; (2) unless otherwise provided, the Hong Kong investor should be incorporated in Hong Kong and should have been engaged in substantive business operations for at least three years (if it proposes to acquire at least 50% of the equity of a Hong Kong investor through an acquisition or merger, it is required to have held the shares for at least one year – only in this way can the Hong Kong investor that is the target of the acquisition or merger satisfy the conditions); (3) the Hong Kong investor has paid profits tax in accordance with the law while it has been engaged in substantive business operations; (4) the Hong Kong investor is required to own or be leased a premises in Hong Kong to carry on its substantive business operations, with the same required to be consistent with its scope and scale of business; and (5) at least 50% of the employees employed by the Hong Kong investor in Hong Kong should be unrestricted Hong Kong residents and/or mainland persons who have settled in Hong Kong on the strength of a one-way permit.

Prior to 2012, the entire commercial factoring industry found itself in a state of natural development. Although the government has issued a series of regulations in recent years, the acquisition of commercial factoring companies remains relatively immature. The legislative lag and variant standards with regard to the establishment and acquisition of commercial factoring companies brings some uncertainty.

The authors believe companies with the words "commercial factoring" in their names do not necessarily satisfy regulatory requirements. For example, in recent years many licensed wholly Chinese-owned commercial factoring companies in Shenzhen have rarely commenced actual operations, and their capital strength is uneven.

The reason can be found in Shenzhen's implementation of reform of company business registration relatively early, implementing the subscription system for registered capital. Based on Shenzhen's business registration regulations and the author's understanding of the practical operations of certain companies, once a company whose name contains the words "commercial factoring" has passed preliminary approval, it can secure a business licence without undergoing prior examination and approval, provided that its scope of business does not include bank financing, finance security or other such matters that require separate approval.

However, the possibility that from now on such "commercial factoring companies" will be required to adopt follow-up regulatory measures that have undergone compliance review cannot be discounted.

Therefore, when acquiring a commercial factoring company, it is necessary to carefully consider whether it complies with the specific local requirements, and carry out comprehensive due diligence of, and assess, the qualifications of its shareholders, its registered capital, the approval of its qualifications, details of its substantive operations, the operating capabilities of its business team, etc., and prudently select the company targeted for acquisition. ■

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利用专利审查高速路加快SIPO审查

Riding the patent highway to fast-track SIPO examinations

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专利审查高速路 (PPH) 是指，如果受理首次申请的专利局 (OFF) 认为申请的至少一项或多项权利要求可授权，只要相关后续申请满足一定条件，申请人即可以 OFF 的工作结果为基础，请求受理后续申请的专利局 (OSF) 加快审查。

通常 PPH 有常规 PPH 和 PCT-PPH 两种模式。常规 PPH 是基于 OFF 的工作结果，例如审查意见通知书、授权决定等，向 OSF 提出 PPH 请求；PCT-PPH 是基于 PCT 国际阶段的工作结果，即国际检索单位的书面意见 (WO/ISA)、国际初步审查单位的书面意见 (WO/IPEA)、或国际初步审查报告 (IPER)，向 OSF 提出 PPH 请求。

PPH 是基于双边或多边协议而进行的。中国国家知识产权局 (SIPO) 与日本等十几个国家正在进行 PPH 试点。自 2014 年 1 月 6 日起，欧洲专利局 (EPO)、日本特许厅 (JPO)、韩国特许厅 (KIPO)、中国国家知识产权局 (SIPO) 和美国专利商标局 (USPTO) 五局 (IP5) 之间已经开始为期三年的 PPH 试点。

上述十几个国家中，在中国与日本、美国、韩国、俄罗斯、芬兰、奥地利、西班牙等国的试点项目下，既可以向中国申请常规 PPH，也可以申请 PCT-PPH；在与德国、丹麦、墨西哥、波兰、新加坡、加拿大、葡萄牙、英国等国的试点项目下，只能向中国申请常规 PPH。在上述 IP5 局试点项目下，既可以向中国申请常规 PPH，也可以申请 PCT-PPH。

申请条件

根据“向 SIPO 提出 PPH 请求的流程”的规定，提出 PPH 请求的申请必须满足以下条件：

a. 对应申请与 SIPO 申请之间的对应关系属于规定的情形。在中国与各国 PPH 试点项目下“向 SIPO 提出 PPH 请求的流程”中，列出了各种对应关系符合规定的情形；
b. 对应申请中至少有一项或多项权利要求被认定为可授权 / 具有可专利性，即使该申请尚未得到专利授权；
c. SIPO 申请的所有权利要求，无论是原始提交的或者是修改后的，必须与被认定为具有可专利性 / 可授权的一项或多项权利要求充分对应；
d. SIPO 申请必须已经公开；
e. SIPO 申请必须已经进入实质审查阶段。一个允许的例外情形是，申请人可以在提出实质审查请求的同时提出 PPH 请求。但是即使利用该特殊规定，也必须满足其他条件。例如，在提出实质审查请求时，如果该 SIPO 申请尚未公开，则仍不能提出 PPH 请求。
f. 在提出 PPH 请求之前及之时，SIPO 尚未对该申请进行审查，即尚未收到 SIPO 实质审查部门作出的任何审查意见通知书。

根据“向 SIPO 提出 PPH 请求的流程”的规定，提出 PPH 请求时必须随“参与专利审查高速路项目请求表”提交以下文件：

a. 就对应申请作出的所有审查意见通知书的副本及其中文或英文译文；
b. 被认定为具有可专利性 / 可授权的权利要求的副本及其中文或英文译文；
c. 审查员所引用的文件的副本，但不需要提交引用文件的任何译文。仅系参考文件而未构成驳回理由的引用文件不必提交。专利文献可以不提交，但若 SIPO 没有某些专利文献，则申请人必须应审查员要求提交这些专利文献。另外，非专利文献必须提交。但是注意，不必提交的文件也必须列入“请求表”中。
d. 说明 SIPO 申请的所有权利要求是如何与对应申请中被认为具有可专利性 / 可授权的权利要求充分对应的“权利要求对应表”。以下三种情况可以被认定为充分对应：1) 完全相同；2) 修改了 SIPO 申请与对应申请的权利要求之间的引用关系；3) SIPO 申请的权利要求是在对应申请的权利要求基础上增加了说明书中的一些技术特征。

审批决定

SIPO 在收到 PPH 请求及其附加文件后将会作出申请是否能被给予加快审查的决定。若 SIPO 决定批准请求，申请将获得 PPH 下加快审查的特殊状态。

若 PPH 请求未能完全符合上述要求，申请人将被告知结果以及请求中存在的缺陷。SIPO 将视情况给予申请人一次补正的机会，以克服请求中存在的某些缺陷。若请求未被批准，申请人可以再次提交 PPH 请求，但至多一次。

实践中，如果 PPH 请求中存在缺陷，审查员一般不会给予补正的机会，而是直接发出不予加快的审批决定通知书。关于缺陷，很少属于实质性缺陷，多数为形式缺陷，例如：通知书中文译名不符合审查员所认可的译名；权利要求虽然实质上是对应的，但没有用审查员所认可的表述；“请求表”漏列了审查意见通知书、引用文件；未附上审查意见通知书；等等。■

The term "patent prosecution highway" (PPH) means that if at least one or more of the claims of the application have been determined to be patentable/allowable by the Office of First Filing (OFF), as long as the relevant second application satisfies certain conditions, the applicant may, on the basis of OFF work products, request that the office of second filing (OSF) fast-track the examination.

Usually the PPH will take one of two forms – the conventional PPH or Patent Co-operation Treaty PPH (PCT-PPH). The conventional PPH is a request made to the OSF on the basis of the work products of the OFF, e.g. the examination opinion notice, grant decision, etc. PCT-PPH is a PPH request made to the OSF on the basis of the work products at the PCT international phase, namely the written opinion of the International Searching Authority, written opinion of the International Preliminary Examining Authority, or an international preliminary examination report.

The PPH is carried out on the basis of a bilateral or multilateral agreement. China's State Intellectual Property Office (SIPO) is currently carrying out a PPH pilot programme with Japan and several other countries. The five offices – the European Patent Office, Japan Patent Office, Korean Intellectual Property Office, SIPO and the US Patent and Trademark Office – commenced the three-year PPH pilot programme on 6 January 2014.

The countries mentioned may apply for either a conventional PPH or PCT-PPH in China under the pilot projects between China and such countries as Japan, the US, South Korea, Russia, Finland, Austria and Spain. But they may only apply for a conventional PPH under pilot projects with such countries as Germany, Denmark, Mexico, Poland, Singapore, Canada, Portugal, and the UK. Under the above-mentioned programme that commenced in January, they may apply either for a conventional PPH or PCT-PPH in China.

Application conditions

Pursuant to the procedures for submitting a PPH request to SIPO, an application for submitting a PPH request must satisfy the following conditions:

a. The corresponding relationship between the corresponding application and the SIPO application falls within those specified; the SIPO procedures in the PPH pilot projects between China and the various countries lists the circumstances under which the corresponding relationships comply with those specified;
b. In the corresponding application, there are one or more claims determined to be patentable/allowable, even though a patent has not yet been granted for such application;
c. All of the claims in the SIPO application, whether original or revised, must fully correspond with one or more of the claims determined to be patentable/allowable;
d. The SIPO application must have been published;
e. The SIPO application must have entered the substantive examination stage; one permitted exception is the situation where an applicant submits a PPH request simultaneously with a request for substantive examination; however, even if such special provision is employed, other conditions must be satisfied, e.g. when submitting the request for substantive examination, if the SIPO application has not been published, the PPH request may not be submitted; and
f. Before and at the time of submission of the PPH request, SIPO has not conducted an examination of the application, namely it has not received any office action issued from its examination department.

Pursuant to the SIPO procedures, when submitting the PPH request, the following documents must be submitted with the request for participation in the PPH pilot programme:

a. Copies of all examination opinion notices rendered in respect of the corresponding application and its Chinese or English translations;
b. Copies of all claims determined to be patentable/allowable, as well as Chinese or English translations;
c. Copies of the documents cited by the examiner (translations not needed); cited documents that are solely for reference purposes and do not constitute grounds for rejection need not be submitted; patent literature need not be submitted, however, if SIPO does not have certain patent documents, the applicant must provide these at the request of the examiner; furthermore, non-patent documents must be submitted, however, documents that need not be submitted must be indicated on the request; and
d. A claim correspondence table explaining how all of the claims in the SIPO application fully correspond with the patentable/allowable claims in the corresponding application; the following three circumstances may be deemed full correspondence: (1) complete identity; (2) revision of the citation relationship between the claims of the SIPO application and of the corresponding application; or (3) the claims in the SIPO application are obtained by incorporating certain technical features from the description into the claims of the corresponding application.

Approval decision

After SIPO has received a PPH request and the accompanying documents, it will decide whether examination of the application can be fast-tracked. If SIPO decides to approve the request, the application will be fast tracked under PPH.

If the PPH request does not fully conform with the above-mentioned requirements, the applicant will be informed of the result, and the defects in the request. Depending on the circumstances, SIPO will give the applicant one opportunity to correct the situation. If the first PPH request is rejected, the applicant may file a second PPH request, but no further request is allowed.

In practice, if there is a defect in a PPH request, the examiner will generally not offer an opportunity to correct the situation and will directly issue a decision notice denying fast-tracking. With respect to defects, very few are substantive defects, most of them being formal defects, e.g. the Chinese translation of the title of a notice is not consistent with the translated title recognised by the examiner; although the claims substantively correspond, the formulation recognised by the examiner was not used; the request omits an examination opinion notice or cited document; an examination opinion notice was not attached, etc. ■

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中国公司如何通过境内债券市场融资
How to secure low-cost financing on the domestic bond market

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在中国目前的金融监管环境下，对于中国公司来说，如何以最低的成本来获得融资，始终是一个关系企业生存与发展的重要问题。除银行贷款等传统方式外，在目前法律框架下，中国公司还可以选择通过境内债券市场进行债务融资。

问：对于中国企业来说，有哪些境内债券市场融资方式？

答：中国目前没有统一的债券市场，根据监管部门的不同，境内债券市场融资主要有以下方式：

1）通过国家及各地发改委（发改部门）核准发行企业债券；2）通过证监会、证券交易所核准或备案发行的公司债券、中小企业私募债；3）通过银行间市场交易商协会注册发行的非金融企业债务融资工具；4）通过银监会注册发行的理财直接融资工具。

问：发改部门的企业债券和证监会的公司债券，两者有什么区别？

答：发改委核准企业债券的主要依据是《企业债券管理条例》（国务院令第121号）。根据该条例，中国境内具有法人资格的企业，在符合一定条件的情况下均可申请发行企业债券。实践中，发改部门根据国家产业政策，也出台一些具体指导意见。

> “证监会对于发行主体渐有放宽趋势”

证监会管理的公司债券，根据《公司债券发行试点办法》，发行主体目前暂限于沪深证券交易所上市的公司及发行境外上市外资股的境内股份有限公司。但证监会对于发行主体渐有放宽趋势，比如证监会在《关于进一步推进新股发行体制改革的意见》中提出，“申请首次公开发行股票的在审企业，可申请先行发行公司债”；在《公司债券发行管理暂行办法》（征求意见稿）中，也拟将发行主体（非公开发行）扩展至全部公司制法人。

问：中小企业私募债有什么特点？

答：中小企业私募债是为落实国务院《关于进一步促进中小企业发展的若干意见》（国发[2009]36号），促进中小企业发展而推出的一种债券品种。中小企业私募债具有四个特点：

1）其发行主体限定于中小企业（以工信部等四部委《中小企业划型标准规定》为标准）；2）以非公开方式发行，投资者不得超过200人；3）需经沪深交易所备案，并可在交易所平台转让；4）两个或两个以上的中小企业可以采取集合方式发行私募债券。

上海证券交易所、深圳证券交易所都分别出台了中小企业私募债券业务试点办法及相关业务规则。

问：非金融企业债务融资工具包括哪些类型？

答：非金融企业债务融资工具是指具有法人资格的非金融企业在银行间债券市场发行的，约定在一定期限内还本付息的有价证券的统称。企业发行债务融资工具，应在中国银行间市场交易商协会注册；债务融资工具在中央国债登记结算有限责任公司登记、托管、结算。

根据融资工具发行方式及期限的不同，主要包括中期票据、短期融资券、非公开定向债务融资工具等三类。

问：能简单介绍一下理财直接融资工具吗？

答：理财直接融资工具是银监会在2013年10月推出的一种创新产品，是“银行资产管理计划+理财直接融资工具”的组合，即银行发行理财资管计划募集资金投资理财直接融资工具，由理财直接融资工具投资融资企业项目。

理财融资工具目前尚处于部分商业银行试点阶段。理财直接融资工具的推出，除有利于规范银行理财非标准债权市场外，也为企业开辟了新的融资渠道。

问：企业如何选择发行的债券种类？

答：上述债券各有其不同的适用范围、不同的审批程序及不同的监管要求。企业需结合自身实际情况，选择最适合的债券融资方式，需要考虑的因素包括：1）企业类型；2）融资期限；3）企业能够负担的融资成本等。

另外，中国债券市场也处于不断创新的过程中，不断会有一些新的债券品种推出，比如目前在企业债券市场及银行间债券市场，都出现了“可续期债券”等具有永续债特点的债券品种，虽然目前规模不是很大，具有融资需要的企业也可关注。■

In the current financial regulatory environment in China, securing finance at the lowest cost is crucial to the existence and development of Chinese companies. In addition to traditional means, such as bank loans, Chinese companies can, under the current legal framework, opt for debt financing on the domestic bond market.

Q: What means of financing on the domestic bond market are available to Chinese enterprises?

A: China does not have a unified bond market and, depending on the regulator, the principal means of financing on the domestic bond market are as follows: (1) enterprise bonds issued with the approval of the national or local development and reform commissions; (2) corporate bonds or small and medium-sized enterprise (SME) private bonds issued following the approval of, or recordal with, the China Securities Regulatory Commission (CSRC) and stock exchange; (3) non-financial enterprise debt financing instruments registered by, and issued through, the National Association of Financial Market Institutional Investors; and (4) wealth management direct financing instruments registered by, and issued through, the China Banking Regulatory Commission (CBRC).

Q: What are the differences between the enterprise bonds of the reform and development authorities and the corporate bonds of the CSRC?

A: The principal basis for the approval of enterprise bonds by the reform and development commissions is the Administrative Regulations for Enterprise Bonds (order No. 121 of the State Council). Pursuant to those regulations, an enterprise in China with legal personality may apply to offer enterprise bonds, provided that it satisfies certain conditions. In practice, the development and reform authorities have issued some specific guiding opinions based on state industrial policy.

Regarding corporate bonds under the charge of the CSRC, pursuant to the Tentative Measures for the Offering of Corporate Bonds, the issuing entities are currently limited to companies listed on the Shanghai and Shenzhen stock exchanges and domestic joint stock limited companies that have issued offshore listed foreign investment shares. However, the CSRC has been moving toward a more relaxed posture vis-à-vis issuing entities. For example, in the Opinions on Further Promoting the Reform of the System for the Offering of New Shares, the CSRC proposes that "enterprises whose applications for an initial public offering of shares are undergoing review may first apply to offer corporate bonds". And in the Management of the Offering of Corporate Bonds Interim Measures (draft for comment) it also proposes to expand issuing entities (private placement) to all legal persons organised as companies.

Q: What are the distinguishing features of SME private bonds?

A: SME private bonds are a type of bond product launched to implement the Several Opinions on Further Promoting the Development of Small and Medium-Sized Enterprises (Guo Fa [2009] No. 36) and promote the development of SMEs. SME private bonds have four distinctive features: (1) the issuing entities are limited to SMEs (with the Provisions for the Criteria for the Typing of Small and Medium-Sized Enterprises of the Ministry of Industry and Information Technology and three other authorities serving as the standard); (2) they are offered privately to no more than 200 investors; (3) recordal must be carried out with the Shanghai or Shenzhen stock exchange, and they are transferable on the exchange platform; and (4) two or more SMEs may come together to offer private bonds.

The Shanghai Stock Exchange and Shenzhen Stock Exchange have issued tentative measures for SME private bonds and related operating rules.

Q: What types of non-financial enterprise debt financing instruments are there?

A: The term "non-financial enterprise debt financing instrument" is the general term for negotiable securities issued on the interbank bond market by non-financial enterprises with legal personality, which specify that the issuer will repay the principal and pay the interest within a specified period of time. An enterprise that wishes to offer debt financing instruments is required to register with the National Association of Financial Market Institutional Investors; and the debt financing instruments are registered and deposited with, and cleared by, China Government Securities Depository Trust & Clearing. Based on the offering method and different terms, the financing instruments mainly include medium-term notes, short-term financing bills and private targeted debt financing instruments.

> *"The CSRC has been moving toward a more relaxed posture vis-à-vis issuing entities"*

Q: Can you give a brief explanation of wealth management direct financing instruments?

A: The wealth management direct financing instrument is an innovative product launched by the CBRC in October 2013, consisting of a combination of "bank asset management plan plus wealth management direct financing instrument", that is to say that a bank offers a wealth management asset management plan and uses the proceeds to invest in a wealth management direct financing instrument, which finally invests in the project of the enterprises seeking the financing. Wealth management financing instruments are still at the pilot stage among certain commercial banks. In addition to being beneficial in regulating the bank wealth management non-standard debt market, the launch of wealth management direct financing instruments opens a new financing channel for enterprises.

Q: How does an enterprise choose what type of bonds to offer?

A: Each of the above-mentioned bonds has its own scope of application, approval procedure and regulatory requirements. An enterprise needs to select the most appropriate bond financing method based on its actual circumstances. The factors to be considered include: (1) the type of enterprise; (2) the financing term; and (3) the financing costs that the enterprise is capable of bearing, etc.

Furthermore, the bond market in China is in a process of continuous innovation, with new bond products being launched all the time. For example, products with a perpetual bond flavour, such as "renewable bonds", have recently appeared both in the enterprise bond market and interbank bond market. Although to date their scale has been relatively small, enterprises with a financing need should keep an eye on them. ■

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香港买壳上市融资的优势与风险

Rewards and risks of financing through a HK reverse merger

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买壳上市是指: 定向增发的发行对象(收购方)用其资产认购发行方(目标公司)新发行股份, 借此向目标公司注入资产并获得控股权, 实现收购方的买壳上市。

IPO 受限制的企业主要选择买壳上市, 如房地产企业和证券公司。前者受国家宏观调控政策影响, 后者因为盈利能力波动太大而导致不能符合连续三年盈利的基本要求。万达在尝试 REITs、IPO、A 股等多种上市途径受阻后, 成功收购了恒力 65% 股权, 完成了在香港的买壳上市。买壳上市可以令企业先控制上市公司, 再按实际成熟的程度逐渐注入业务。

主流市场

企业买壳可选的主流市场有 A 股市场、香港联交所、新加坡交易所和美国的各个交易所。

企业选择哪个市场, 需要根据自己的切身利益, 针对壳价、壳干净程度、后续筹资能力、资产注入速度、股东个税筹划、成功率、交易时机等因素进行综合考量。

香港的优胜之处在于其国际水准的市场监管和公司治理结构使壳的或然负债风险较小, 全球化的金融市场和多种金融工具能使企业拥有较强的后续筹资能力, 但资产注入可能需要更精密的设计, 否则可能需要较长时间才能完成。

> “光汇石油曾通过注入客户而不注入资产的方法避免了资产注入被当做上市处理”

但是香港市场的壳价较贵, 一方面是由于上述优势, 一方面是因为香港“壳”公司的上市地位较稳定。除非公司出现破产和成为净现金公司, 否则极少被除牌。

香港位置上靠近内地, 投资者更容易掌握最新的行业和公司咨询, 有助于提高投资意图和交易的活跃度, 这直接影响买壳后续融资的成功率。

问题及解决方案

反收购行动: 联交所《证券上市规则》规定, 如果买方在成为拥有超过 30% 普通股的股东后的 24 个月内, 累计注入资产的任一指标高于壳公司的收益、市值、资产、盈利、股本等五个测试指标中任何一条的 100%, 则该交易构成非常重大交易, 该注入可能要以 IPO 申请的标准来审批。这就令买壳上市失去了意义。

光汇石油曾通过注入客户而不注入资产的方法避免了资产注入被当做上市处理, 其策略可资借鉴。

收购股权比例太小存在风险: 收购壳公司股权的股价由于增加了壳价和控股权溢价而高于一般流通股。

部分买壳者通过代理人持有股权, 以降低成本并避开公司被作为新上市处理等限制, 致使其在后续的资产注入时无法投票, 受制于其他小股东。

通过这种曲线方式进行全面收购的买家需要注意, 此举违反股东应如实披露权益的条例, 一旦被证明可能面临刑事指控。

而且, 香港证监会会关注原上市公司大股东处置余下股份的安排(如售予其他独立第三者), 不会令买方对这些剩余股份行使控制权。

全面收购要约风险: 根据《公司收购、合并及股份回购守则》, 新股东如持有股权超过 30%, 可能被要求向全体股东提出全面收购要约, 并证明买方拥有收购所需资金。只有在证明如果没有买家的资金注入, 壳公司可能面临清盘时, 才可通过香港证监会的批准豁免全面收购要约, 减少现金压力。

保持上市地位: 香港上市公司要保持上市地位, 要有真实业务, 不能是纯现金公司。

壳资源风险评估: 壳中业务的资产构成决定收购方在买壳后进行清理的难度和成本。买家应该尽量避免业务需要持续关注和精良管理的壳。涉及庞大生产性机器设备、存货、应收账款和产品周转期长的壳公司最难清理, 该类资产套现困难, 原大股东赎回也会因须动用大量现金而无法实施。而且, 拥有大量经营性资产的壳如果资产置换耗时长, 其业务和资产就存在贬值风险, 且这些业务的管理需要专业技能, 容易陷入经营困境。

避免现金支付

缓解现金支付压力: 针对买壳上市过程中的大量资金要求, 壳公司应当尽可能采取现金以外的支付方式。例如, 可以考虑以股权置换的方式换取壳公司股权, 然后现以资产置换的方式剥离壳公司不良资产并向壳公司注入优质资产。

此外, 为了节约现金支出, 买壳公司还可以考虑采用先向壳公司注入资金, 然后再由壳公司收购买壳公司优质资产的的方式, 或者先由壳公司举借债务, 收购买壳公司的优质资产, 然后再由买壳企业利用资产转让收入收购壳公司。■

The term "reverse merger" means that the investor involved in a private placement (i.e. the acquirer) uses its assets to subscribe for the newly offered shares of the issuer (i.e. the target company) and, on this basis, injects the assets into the target company and secures a controlling interest, thereby realising the acquirer's reverse merger.

Enterprises subject to restrictions on initial public offerings (IPOs) mainly opt for reverse mergers to achieve a listing, e.g. real estate enterprises and securities companies. After encountering obstacles to listing through such means as REITs, IPO and A-shares, Wanda successfully acquired a 65% stake in Hengli and completed a reverse merger in Hong Kong. A reverse merger can allow an enterprise to first secure control of a listed company, and then, depending on the actual degree of maturity, gradually inject business into it.

Why Hong Kong?

The main markets available to an enterprise for a reverse merger include the A-share market, Hong Kong Stock Exchange (HKEx), the Singapore Exchange and US exchanges. When considering which market to choose, the enterprise must, based on its own immediate interests, consider such factors as the price of the shell, how clean it is, follow-up fundraising capabilities, the speed at which the assets can be injected, shareholder tax planning, success rate, timing of the transaction, etc.

The advantages of Hong Kong lie in its world class market regulation and corporate governance structure making for relatively low risk in the shell's contingent liabilities, and its globalised market and multitude of financing instruments giving enterprises relatively strong follow-up fundraising capabilities. However, asset injection may require more meticulous design.

The price of shells on the Hong Kong market is relatively steep, due on the one hand to the above-mentioned advantages, and on the other to the relative stability of the listing status of shell companies in Hong Kong. Unless a company goes bankrupt or becomes a pure cash company, very few are delisted.

Given that Hong Kong is close to the mainland, investors can more easily access the newest industry and company information, which is conducive to enhancing the degree of investment and transaction activity. This directly affects the rate of success of follow-up financing after a reverse merger.

Reverse mergers. The HKEx Securities Listing Rules specify that if any indicator of the assets cumulatively injected by the buyer within the 24 months after the buyer becomes a shareholder holding more than 30% of the common shares is greater than 100% of any of the five test indicators of the shell – i.e. revenues, market value, assets, profits or equity capital – such transaction constitutes a very substantial transaction, and such injection may require approval based on the same criteria as for an IPO application.

Brightoil's strategy

This would defeat the purpose of the reverse merger. Brightoil Petroleum avoided its asset injection being treated as a listing by injecting customers rather than assets. Such a strategy can serve as reference.

Risk if percentage of equity acquired too small. The price for the acquisition of equity in a shell company is higher than that for the average tradable shares due to the addition of the shell price and control premium. Certain shell buyers hold the equity through an agent to reduce costs and circumvent such restrictions as the company being treated as newly listed, resulting in their being unable to vote when they subsequently wish to inject assets, being constrained by other small shareholders.

Buyers carrying out a takeover by this roundabout method need to be aware that this violates the regulation that shareholders are required to truthfully disclose their interests, and should the same come to light, they may be subject to criminal prosecution. Furthermore, the Securities and Futures Commission of Hong Kong (SFC) will pay attention to the arrangement of the original major shareholder of the listed company for the disposal of the remaining shares – for example, sale to other independent third parties – and will not permit the buyer to exercise control over these remaining shares.

Proof of funds

Takeover offer risk. Pursuant to the codes on takeovers and mergers and share repurchases, if a new shareholder holds more than 30% of the equity, it may be required to make a general takeover offer to all of the shareholders and show that it has the funds required for the takeover. Only where it can be shown that the shell company would face the prospect of being wound up, if not for the injection of funds by the buyer, can a general takeover offer be waived with the approval of the SFC, reducing the funding pressures.

> *"Brightoil ... avoided its asset injection being treated as a listing by injecting customers rather than assets"*

Maintenance of listed status. To maintain its listed status, a company listed in Hong Kong is required to have genuine business, and may not be a pure cash company.

Shell resource risk assessment. The business assets of the shell will operate in such a way as to decide the difficulty and costs of clearance after acquisition of the shell by the acquirer. Shell companies involving large production-type machinery and equipment, inventory, accounts receivable and long product turnaround times are the most difficult to clear. Furthermore, if the asset swap of a shell with a large quantity of operating-type assets requires a long period of time, there is a risk of impairment of its business and assets, and the management of such assets requires professional skills, easily leading to operational difficulties.

Avoid cash payment

Easing of cash payment pressures. Regarding the large amount of funds needed in a reverse merger, the shell company should try to use a payment method other than cash. For example, consideration can be given to an equity swap to obtain equity in the shell company and then, to an asset swap, to strip away the non-performing assets of, and inject quality assets into, the shell company.

Furthermore, with a view to reducing cash expenditures, the buyer of the shell company can additionally consider first injecting funds into the shell company, and then having the shell company purchase quality assets from the buyer of the shell company, or first have the shell company take out a loan to acquire quality assets from the buyer of the shell, following which the buyer of the shell uses the proceeds from the asset transfer to acquire the shell company. ■

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自贸区负面清单的变化

Caution needed on amended version of FTZ Negative List

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上海市政府于 2014 年 6 月 30 日发布了《中国（上海）自由贸易试验区外商投资准入特别管理措施（负面清单）(2014 年修订）》，对 2013 年 9 月 29 日发布的《中国（上海）自由贸易试验区外商投资准入特别管理措施（负面清单）(2013 年）》做出了修订。

这次修订中，2014 年负面清单对多个行业中的特别管理措施进行了删减，尤其是卫生、文化、体育和娱乐业等一直广受外国投资者关注的行业。

文化、体育和娱乐业

2014 年负面清单删减了“禁止投资互联网上网服务营业场所（网吧活动）”、“禁止投资博彩业（含赌博类跑马场）”等，这使得外界猜想：这是否意味着自贸区开放了这些行业的外资准入?

根据 2014 年负面清单的文字说明，“除列明的外商投资准入特别管理措施，禁止（限制）外商投资国家以及中国缔结或者参加的国际条约规定禁止（限制）的产业”。

此外，2013 年国务院发布的《中国（上海）自由贸易试验区总体方案》和上海市政府发布的《中国（上海）自由贸易试验区管理办法》也均指出，“对外商投资准入特别管理措施（负面清单）之外的领域，按照内外资一致的原则，将外商投资项目由核准制改为备案制，但国务院规定对国内投资项目保留核准的除外”。

因此，网吧活动以及博彩业等投资领域从 2014 年负面清单中被删除，并不单纯意味着自贸区内即开放了该等投资领域的外资准入，外资在自贸区内进行相关投资时还是受限于“国家以及中国缔结或者参加的国际条约规定禁止（限制）的产业”，以及“国务院规定对国内投资项目保留核准的除外”两个限制性条件。

禁止博彩

博彩业——国家禁止的产业：关于内资企业禁止从事博彩业的相关规定，1993 年《公安部关于如何对待异性按摩、博彩等问题的批复》早已明确公安机关需坚决禁止开办博彩等具有赌博性质的经营项目。

而 2006 年全国人大常委会发布的《刑法修正案（六）》则对于“以营利为目的，聚众赌博或以赌博为业”及“开设赌场”作出刑罚上的明确规定。

此外，2002 年 2 月 26 日《公安部、监察部、国家工商总局、国家旅游局关于严厉查处博彩性赛马活动的通知》也明确禁止博彩性赛马活动。

因此，2014 年负面清单中虽然删除了对于禁止投资博彩业（含赌博类跑马场）的特别管理措施，但外国投资者仍需受限于“国家禁止的产业”之限制，不得在自贸区内从事该等行业。

互联网上网服务营业场所——国务院规定对国内投资项目保留核准：根据 2002 年 9 月 29 日国务院发布的《互联网上网服务营业场所管理条例》，网吧活动经营者必须在多部门批准和审核，并获得《网络文化经营许可证》之后方可从事该类经营活动。这就体现了外资在自贸区内除了负面清单所明确的特别管理措施外，还需受限于“国务院规定对国内投资项目保留核准”这一条件。

虽然 2014 年负面清单中虽然删除了“禁止投资互联网上网服务营业场所（网吧活动）”，但外资仍需遵守上述《条例》的相关规定，且经相关部门批准和审核之后方可在自贸区内从事该等经营活动。

卫生行业

2014 年负面清单中，卫生行业的特别管理措施仅剩“不允许设立分支机构”一项，删去了有关投资总额下限以及经营期限上限的特别管理措施。

但值得注意的是：在自贸区之外，内资设立医疗机构需遵照《医疗机构管理条例》和《医疗机构管理条例实施细则》，而外商投资则还需遵照《中外合资、合作医疗机构管理暂行办法》。

虽然首家外商独资医疗机构已被批准设立，对于除 2014 年负面清单特别管理措施外，如何适用这些有关内资及外商投资医疗机构设立的法律法规及规范性文件，自贸区仍需要明确相关细则规定。

模糊之处

2014 年负面清单对多个行业的特别管理措施进行了修订，调整了自贸区内投资部分行业的特别管理措施。

但仍然在适用法律方面存在一些模糊的区域需要在实践中进一步厘清，甚至有待于有关部门在未来的一些规定及文件中进一步在制度上加以明确。■

> “但仍然在适用法律方面存在一些模糊的区域需要在实践中进一步厘清”

On 30 June 2014, the Shanghai government issued the Special Administrative Measures for Foreign Investment Access in the China (Shanghai) Pilot Free Trade Zone (Negative List) As Amended in 2014, amending the Special Administrative Measures for Foreign Investment Access in the China (Shanghai) Pilot Free Trade Zone (Negative List 2013).

In this amended version, the special administrative measures for numerous industries – particularly for industries of great concern to foreign investors, such as the healthcare, culture, sports and entertainment industries – have been deleted from the 2014 Negative List.

Culture, sports and leisure

"Investment in internet access service business premises (internet cafes) is prohibited", "investment in the gaming industry (including horse racing tracks with betting) is prohibited", etc., have been deleted from the 2014 Negative List, leading some to wonder if this signifies that the China (Shanghai) Pilot Free Trade Zone (FTZ) is opening access to these industries to foreign investment.

According to the written explanation for the 2014 Negative List, "in addition to the listed special administrative measures for foreign investment access, foreign investment in industries that are prohibited (or restricted) by the state or in international treaties to which China is a signatory or a party is prohibited (or restricted)".

Furthermore, both the General Plan for the China (Shanghai) Pilot Free Trade Zone, issued by the State Council, and the Administrative Measures for the China (Shanghai) Pilot Free Trade Zone, issued by the Shanghai government in 2013, point out that "with respect to sectors other than those subject to special administrative measures for foreign investment access (the negative list), in accordance with the principle of treating domestic and foreign investors identically, foreign-invested projects are made subject to the recordal system instead of the approval system, with the exception of those domestic investment projects for which the State Council has specified approval will be retained".

Accordingly, the deletion of such investment sectors as internet cafes and gaming from the 2014 Negative List does not simply signify that access to such investment sectors has been opened to foreign investment in the FTZ. When making relevant investments in the FTZ, foreign investors remain subject to the two restrictive conditions: "industries that are prohibited (or restricted) by the state or in international treaties to which China is a signatory or a party"; and "with the exception of those domestic investment projects for which the State Council has specified approval will be retained".

> *"Certain ambiguities exist that will require further clarification in practice"*

The gaming industry – prohibited by the state. With respect to regulations prohibiting wholly Chinese-owned enterprises from engaging in the gaming industry, the Official Reply of the Ministry of Public Security on How to Handle Such Issues as Opposite Sex Massages, Gaming, Etc. of 1993 already expressly specified that the public security authorities were to resolutely prohibit the establishment of gaming and other such business projects of a gambling nature. The Bill for Amending the Criminal Law (6) issued by the Standing Committee of the National People's Congress in 2006 also sets out express criminal provisions in respect of "assembling large numbers of people for gambling or establishing gambling as a business for the purposes of making a profit" and "establishing gambling halls".

Further, the Notice of the Ministry of Public Security, the Ministry of Supervision, the State Administration for Industry and Commerce and the National Tourism Administration on Strictly Investigating and Dealing with Betting Type Horse Racing Activities, dated 26 February 2002, also expressly prohibits activities that involve betting on horse races.

Accordingly, although the special administrative measures prohibiting investment in the gaming industry – including horse racing tracks with betting – are deleted from the 2014 Negative List, foreign investors nevertheless remain subject to the restriction on "industries prohibited by the state", and may not engage in such an industry in the FTZ.

Internet access service business premises – domestic projects for which the State Council has specified approval will be retained. Pursuant to the Administrative Regulations for Internet Access Service Business Premises, issued by the State Council on 29 September 2002, internet cafe operators must secure approval from numerous authorities and may only engage in such business activities after securing an Online Cultural Business Permit. This indicates that, in addition to the special administrative measures set out in the Negative List, foreign investors in the FTZ are subject to the condition of "domestic investment projects for which the State Council has specified approval will be retained".

Although "investment in internet access service business premises (internet cafes) is prohibited" has been deleted from the 2014 Negative List, foreign investors still need to observe the relevant provisions of the above-mentioned regulations and may only engage in such business activities in the FTZ after having secured the approvals of the relevant authorities.

The healthcare industry

In the 2014 Negative List, only the special administrative measure of "establishment of branches not permitted" is retained for the healthcare industry, with the special administrative measures of minimum total investment and maximum term of operation deleted.

However, it should be noted that, outside the FTZ, domestic investors establishing a medical institution are required to observe the Administrative Regulations for Medical Institutions and the Implementing Rules for the Administrative Regulations for Medical Institutions and foreign investors are additionally required to observe the Management of Sino-Foreign Equity and Cooperative Joint Venture Medical Institutions Interim Measures. Although the first wholly foreign-owned medical institution has been approved, the FTZ still lacks relevant regulations clarifying how these regulatory documents governing the establishment of wholly Chinese-owned and foreign-invested medical institutions are to apply.

The special administrative measures for a number of industries have been amended in the 2014 Negative List, revising the special administrative measures for investment in certain industries in the FTZ. However, in terms of application of the law, certain ambiguities exist that will require further clarification in practice, or even await further clear stipulation in terms of system, by the relevant authorities in future regulations and documents. ■

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塞浦路斯合同法中的代理

How agency relationships work under Contracts Law of Cyprus

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代理人是指接受委任在与第三方交易时为他人的利益而从事任何行为或者代表他人的人。上述行为所为之对象或以上述方式被代表的人，即委托人。任何有合同能力的人都可以委任代理人。《塞浦路斯成文法》第 149 章即为《合同法》，其第 145 条明文规定，设立代理无需说明原因。授权既可以明示也可以默示。以口头或书面方式给予的授权为明示授权，根据具体情形推断得出的授权为默示授权。口头 / 书面表达或常规的交易过程都可以用于解释具体情形。

代理关系中双方当事人之间的责任如下：合同法第 148 条规定，代理人的法定权限延伸至为履行委托人指令的行为而进行的每一项必要的合法事务。如果这类行为属于委托人的业务范围，那么为此目的而进行的每一项必要的合法事务或者在从事该类业务过程中所采取的惯常做法，都包含在代理权限之内。在紧急情况下，代理人的权限将会扩展至为保护其委托人的利益不受损失而采取的任何行为，如果类似情形下一个具备一般谨慎标准的人也会采取这种行为。

根据《合同法》第 150 条，明示或默示由代理人亲自承担履行责任的行为，代理人不能合法地委任他人履行，除非依据一般的交易惯例可以委任子代理人，或者按子代理的性质必须任命子代理人。对于相关第三方而言，只要子代理人得到了正确的委任，并且所代理的行为在其被授予的权限范围之内，其行为就等同于原代理人所为，将产生约束力并使委托人对该行为负责。对于子代理人的行为，代理人仍然要向委托人负责。

经代理人签订的合同以及因代理人的行为而引起的义务，其效力和可强制执行力等同于由委托人所签和所为。如果代理人超越委托人所授予之权限而行事，那么重点要看经授权的行为是否可以从未经授权的行为中提取出来。如果可以提取出来经授权的行为，那么该行为在代理人和委托人之间有约束力。如果这种提取是不可能的，那么委托人可以不承认该笔交易。

对于代理人未经授权之行为和 / 或在自己不知情的情况下的所为，委托人可以选择认可或放弃。如果这类行为被委托人认可，无论以明示还是默示的方式，其将被视为经委托人授权而为。然而，如果委托人对于具体事实的知情状态存在着实质性缺陷，那么委托人的认可也是无效的。

代理关系可因如下图所示的任何原因而终止，无论以明示还是默示的方式。代理人权限的终止同时也意味着该代理人委任的所有子代理人的权限自动终止。如果以撤销或放弃的方式终止代理关系，应作出合理的通知使终止有序，以免对委托人或代理人造成损害。根据《合同法》第 168 条，代理人权限的终止生效于：(1) 对于代理人来说，当终止的通知为其所知时；或者 (2) 对于第三方，当终止的通知为其所知时。

《合同法》第 181 条明确承认代理人对委托人财产的留置权。特别是在合同中没有相反的约定时，代理人有权保留委托人的货物、文件和其他财产，直至相关的佣金、开支和服务费等所有委托人应付给代理人的款项得到解决。■

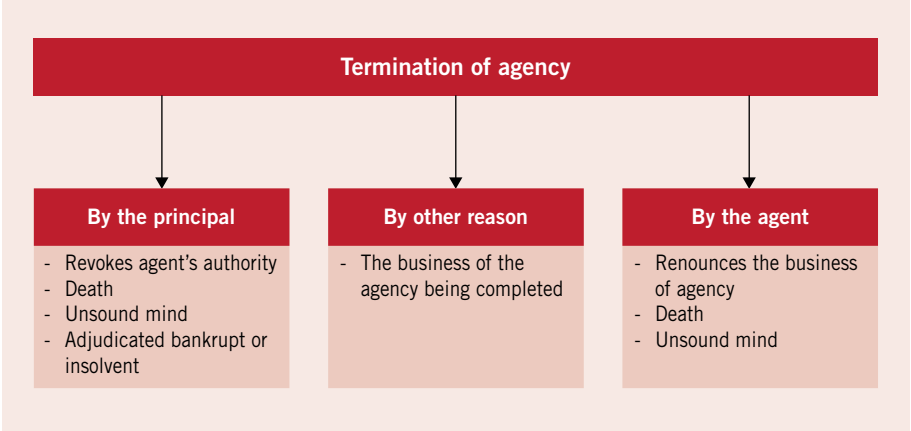
代理关系的终止

委托人原因	其他原因	代理人原因
- 撤销代理权限 - 死亡 - 心智不健全 - 法庭裁定破产或经营不善破产	- 所代理的业务完成	- 宣布放弃代理业务 - 死亡 - 心智不健全

代理的法定责任

委托人 → 代理人	代理人 → 委托人
- 保护代理人在合法地和 / 或善意地行使权限的过程中免受行为后果的危害； - 补偿因委托人疏忽或缺乏技术而对代理人造成的损害。	- 按照委托人的指令或通行的商业惯例（如无指令）为委托人从事业务； - 为指令以外的行为导致的应计损失和利润向委托人报账； - 按要求提交正确的账目； - 以合理的勤勉与委托人交流并寻求其指令； - 将收到的所有款项交付给委托人。

An agent is a person appointed to do any act for another, or to represent another, in dealings with third parties. The person for whom such an act is done, or who is so represented, is called the principal. Any person who is competent to contract may appoint an agent. Section 145 of the Contracts Law of Cyprus expressly states that no consideration is necessary to create an agency. The authority may be express or implied. An authority is said to be express when it is given orally or in writing, and implied when it is inferred from the circumstances of the case. Oral/written representations or the ordinary course of dealing may be taken into account as circumstances of the case.



Duties owed

The duties owed between the parties to an agency relationship are depicted below. Section 148 encompasses the statutory extent of the agent's authority to every lawful thing that is necessary to perform the act instructed on by the principal.

Where such an act is the carrying on of the principal's business, every lawful thing necessary for the purpose or usually done in the course of conducting such business will be included.

In case of emergency, the agent's authority will extend to all such acts for the purpose of protecting his or her principal from loss as would be done by a person of ordinary prudence under similar circumstances.

Pursuant to section 150, an agent cannot lawfully appoint another to perform an act which the agent has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or, from the nature of sub-agency must, be appointed.

As far as third parties are concerned, when a sub-agent is properly appointed and acts within the authority confines granted to him/her, he/she will bind and make the principal responsible for his/her acts as if he/she were an agent originally appointed by the principal. The agent remains responsible to the principal for the acts of the sub-agent.

Important consideration

Contracts entered into through an agent, as well as obligations arising from acts done by an agent, may be valid and enforceable as if the contracts had been entered into, and the acts done, by the principal. When an agent exceeds the authority conferred to him/her by the principal, the important consideration will be whether the authorised act can be extracted from the unauthorised act.

If the authorised act can be separated, then it will be binding between him/her and the principal. Where such separation is impossible, then the principal is not bound to recognise the transaction.

A principal may elect to ratify or renounce acts of the agent that have not been authorised and/or have been performed without his/her knowledge. Where such acts are ratified by the principal, whether expressly or by conduct, then they will be deemed as having been performed under the authority of the principal.

However no valid ratification can be made by the principal if the principal's knowledge of the facts of the case is materially defective.

Termination of an agency

An agency may be terminated for any of the reasons illustrated below, the same being express or implied. The termination of an agent's authority automatically terminates the authority of all sub-agents appointed by that agent.

Where the agency is terminated by revocation or renunciation, reasonable notice must be given as otherwise any damage resulting to the principal or the agent as the case may be must be made good.

Pursuant to section 168, the termination of the agent's authority becomes effective: (a) to the agent, when it becomes known to the agent; or (b) to third parties, when it becomes known to them.

Section 181 expressly recognises the agent's lien on the principal's property. In particular, in the absence of any contract to the contrary, an agent is entitled to retain goods, papers and other property of the principal received by the agent until any amount due to the agent for commission, disbursements and services in respect of them has been settled to the agent by the principal. ■

Statutory duties owed in agency

Principal → Agent	Agent → Principal
- To indemnify the agent against the consequences of acts performed lawfully and/or in good faith during the exercise of authority - To compensate the agent in respect of injury caused to the agent by the principal's neglect or want of skill	- To conduct the principal's business according to his/her instructions or the prevailing business custom (if no instructions given) - To account to the principal for losses and profits accrued for acts outside those instructed; - To render proper accounts on demand - Reasonable diligence in communicating and seeking instructions of the principal - To pay all sums received on account for the principal

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家门口的国际仲裁机构仲裁？
Is arbitration before a foreign institution in China on the way?

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近期，最高人民法院一份于 2013 年 3 月作出的复函在公开出版物上曝光。因该复函（[2013] 民四他字第 13 号）首次明确认可约定“境外仲裁机构在中国开展仲裁”一类仲裁协议的效力，引起国内外法律界的强烈关注。

该案件中，安徽省龙利得包装印刷有限公司与 BP Agnati S.R.L. 在仲裁协议中约定：“争议应被提交国际商会仲裁院……管辖地（笔者注：即仲裁地）应为中国上海。”根据这一仲裁协议，国际商会仲裁院将在中国上海开展案件审理。

早已出现

最高人民法院此次复函的答复虽属首创，但“境外仲裁机构 + 境内仲裁”的仲裁协议此前早已出现过。2004 年，德国旭普林国际有限责任公司与无锡沃可通用工程橡胶有限公司仲裁协议效力案中，就曾涉及一条“Arbitration: ICC Rules, Shanghai shall apply”的仲裁条款。

最高人民法院在该案复函（[2003] 民四他字第 23 号）中指出，因选定的仲裁地为上海，仲裁协议效力应依据中国法判断。又由于该仲裁协议仅选择了国际商会仲裁院仲裁规则而没有明确指出仲裁机构，不满足中国法对于有效仲裁协议的要求，应属于无效仲裁协议。其后，业内曾热议一个假设：如果当事人选择的是国际商会仲裁院而非其仲裁规则，可以在上海仲裁吗？

> “仲裁活动的监督权事实上并非由法院系统掌握，而是由政府部门行使”

十年之后，[2013] 民四他字第 13 号案件的当事人真的将前述假设转变为仲裁协议的约定，而最高人民法院此次的答复也干脆利落地终结了上述疑问。

协议效力

首先，与十年前一样，最高人民法院指出因当事人选择上海为仲裁地，仲裁协议效力应依据中国法判断；其次，鉴于当事人明确选择了国际商会仲裁院，中国法对于仲裁协议必须包含“选定的仲裁委员会”的要求已获满足。据此，最高人民法院认为该仲裁协议有效。

[2013] 民四他字第 13 号复函曝光后，业内将其视作境外仲裁机构的重大利好消息。有看法认为，该复函意味着具有涉外因素的争议当事人此后可以在家门口享受国际知名仲裁机构的贴身服务，这或将改变整个中国仲裁市场的版图。（关于不具备涉外因素案件的当事人能否从中受益，请参考笔者于 2014 年 3 月至 4 月在本刊连载的文章《无涉外因素的争议能否在国外仲裁》。）但笔者认为，目前作出上述结论为时尚早。以下三方面的问题仍有待进一步的观察：

境外仲裁机构在中国开展仲裁活动的合法性。必须高度注意的是，该复函仅表明最高人民法院认为当事人对于国际商会仲裁院的选择是“明确”的。至于国际商会仲裁院是不是“中国法意义上的仲裁委员会”，以及国际商会仲裁院在中国的仲裁活动是否“合法”，最高人民法院并没有表明态度。根据中国《仲裁法》，设立仲裁机构以及开展仲裁活动的监督权事实上也并非由法院系统掌握，而是由政府部门行使。

因此，最高人民法院的复函并不意味着境外仲裁机构在中国境内开展仲裁一定合法合规，境外仲裁机构乃至于仲裁员未来仍有可能面临来自地方政府、工商、外资和税务部门的查处。这种“此条线合规不代表彼条线合规”的管理思路在中国近期的行政管理中屡见不鲜。

境外仲裁机构在中国仲裁后裁决的执行。在仲裁协议的效力得到确认的前提下，除非仲裁过程中出现低级程序失误，此类仲裁裁决在中国获得执行的概率极高。根据中国现行法律，无论直接将其作为国内裁决抑或纽约公约范畴下的外国裁决、非内国裁决，执行均不存在障碍。

重要看点

然而，中国法院最终对此类仲裁裁决国籍的判断仍不失为一个重要看点。此前，我国法院在仲裁裁决国籍问题上曾经以仲裁机构国籍作为认定标准，有将国际商会仲裁院在香港作出的裁决认定为法国裁决的先例（[2004 民四他字第 6 号复函]）。而在 2009 年《关于香港仲裁裁决在内地执行的有关问题的通知》（法 [2009]415 号）中，最高人民法院又转向根据仲裁地判断仲裁国籍。

境外仲裁机构在中国仲裁的临时措施。紧接上一问题，不妨追问，如果境外仲裁机构在中国作出的裁决被认定为中国籍，境外仲裁机构能否直接申请中国法院配合执行其仲裁程序中的临时措施？如果答案是肯定的，那么境外仲裁机构在国内的仲裁活动将如虎添翼，吸引更多当事人的参与。而这一问题的答案，我们或许不需要再等待另一个十年。■

Recently, a reply given by the Supreme People's Court (SPC) in March 2013 came to light in a publicly available publication (Min Si Ta Zi [2013] No. 13). The reply expressly recognises the validity of an arbitration agreement providing for "a foreign arbitration institution conducting arbitration in China" for first time.

In the case, Anhui LD Packing Printing and BP Agnati SRL provided as follows in their arbitration agreement: "Any dispute shall be referred to the ICC International Court of Arbitration ... jurisdiction [place of arbitration] shall be Shanghai, China". That means the ICC International Court of Arbitration would hear a case in Shanghai.

Earlier appearance

In fact, an arbitration agreement with "foreign arbitration institution plus arbitration in China" made its first appearance much earlier than this. In 2004, in the arbitration agreement validity case between Züblin International GmbH and Wuxi Woke General Engineering Rubber, an arbitration clause specifying "Arbitration: ICC Rules, Shanghai shall apply" was involved.

In its reply in that case (Min Si Ta Zi [2003] No. 23), the SPC pointed out that because Shanghai was selected as the place of arbitration, the validity of the arbitration agreement should be determined based on the laws of China. Furthermore, because the arbitration agreement only selected the arbitration rules of the ICC Court of Arbitration and did not expressly designate an arbitration institution, it did not satisfy the requirements of Chinese laws for a valid arbitration agreement and was, therefore, invalid.

Ten years later, the parties to the Min Si Ta Zi [2013] No. 13 case took the above-mentioned supposition and converted it into a provision of their arbitration agreement, and the SPC's response this time crisply put the above question to rest.

Valid agreement

First, as was the case 10 years before, the SPC pointed out that as the parties selected Shanghai as the place of arbitration, the determination of the validity of arbitration agreement should be based on the laws of China; second, given that the parties had expressly opted for the ICC Court of Arbitration, the requirement in Chinese law that an arbitration agreement include "the selected arbitration commission" was satisfied. Based on this, the SPC found that the arbitration agreement was valid.

After Min Si Ta Zi [2013] No. 13 came to light, the industry deemed it major favourable news for foreign arbitration institutions. One opinion held that the reply signified that parties to a dispute with a foreign element could enjoy the tailored services of famous international arbitration institutions right at their doorstep, which could perhaps change the entire layout of the arbitration market in China. (As to whether parties to a case without a foreign element can benefit from this, please refer to the author's columns this year in *China Business Law Journal*, volume 5 issue 3, and volume 5 issue 4).

However, it is the author's opinion that it is still too early to come to such a conclusion. The following three issues require further scrutiny:

Lawfulness of foreign arbitration institutions conducting arbitration activities in China. It should be closely noted that the reply only indicates that the SPC found that the parties opting for the ICC Court of Arbitration was done "expressly". As to whether the ICC Court of Arbitration is an "arbitration commission for the purposes of Chinese laws", and whether arbitration activities conducted in China by the ICC Court of Arbitration would be "lawful", the SPC has not indicated its stance. Besides, pursuant to the Arbitration Law, the authority to monitor the establishment of arbitration institutions and the conduct of arbitration activities is exercised by government authorities, not by courts.

Prospect of investigation

Accordingly, the SPC's reply does not signify that the conduct of arbitration in China by foreign arbitration institutions is necessarily lawful or compliant, and foreign arbitration institutions and even arbitrators could face the prospect of being investigated and dealt with by local governments and industry and commerce, foreign investment and tax authorities. This administrative approach of "the compliance of this line does not indicate the compliance of that line" has repeatedly raised its head in administration in China in recent times.

Enforcement of an award after arbitration in China by a foreign arbitration institution. Provided that the validity of an arbitration agreement is confirmed, the probability of the award rendered in such arbitration being enforced in China is extremely high, absent any low-level procedural errors during the arbitration process. Pursuant to current Chinese laws, there are no barriers to enforcement regardless of whether it is directly deemed a domestic award or deemed a foreign or non-domestic award under the auspices of the New York Convention.

> *"Authority to monitor ... arbitration activities is exercised by government authorities, not by courts"*

Important focus

However, the determination of the nationality of such arbitration awards by Chinese courts will remain an important focus of attention. In the past, Chinese courts have treated the nationality of the arbitration institution as the criterion for determining the nationality of an arbitration award, and there is a precedent in which an award by the ICC Court of Arbitration rendered in Hong Kong was determined to be a French award (Min Si Ta Zi [2004] No. 6).

However, in the Notice on Issues Relevant to the Enforcement of Hong Kong Arbitration Awards in Mainland China (Fa [2009] No. 415), the SPC moved to determining the nationality of arbitration based on the place of arbitration.

Interim measures in arbitration in China conducted by a foreign arbitration institution. Closely following on the previous issue, there is no harm in asking whether, if the award rendered in China by a foreign arbitration institution is recognised as being of Chinese nationality, the foreign arbitration institution could directly apply to a Chinese court for co-operation in enforcing interim measures in its arbitration procedure.

If the answer is yes, the arbitration activities of foreign arbitration institutions in China will get a powerful boost, and attract the participation of many more parties. Perhaps we will not have to wait another 10 years for the answer to this question. ■

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印度法院受理基于产业标准的侵权指控

Indian courts accept infringement cases based on industry standards

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知识产权法律及其在国家运行中所起的重要作用已经得到了全球的广泛认可。强有力的知识产权立法和执法体系有助于吸引投资和鼓励技术开发，在专利领域这一点体现得尤其明显。而印度专利制度正面临一系列重要障碍，其中之一是举证责任方面的障碍。

世贸组织《与贸易相关知识产权协定》(TRIPS)规定，在满足下列任何一个条件时，印度法院会将制造方法专利的举证责任转移给被告：1）制造方法导致“新”产品的产生；或 2）通过该方法生产相同产品的可能性很大，并且原告已尽合理努力确认对方的制造方法，但是失败了。但在不久前，在专利产品侵权案件中，印度法院仍遵循传统的“举证责任”由原告承担的原则。

证据范围

法院需要注意的一点是，专利权人在执行其将行业标准包含在权利范围内的专利时，为证明其侵权主张需要提交的证据的范围。行业标准是产品商业销售需要达到的基本条件。

换言之，法院会要求专利权人为包含行业标准的专利遭侵权提供与一般专利侵权同样程度的证据，还是会放宽要求？这点不太明确，因为直到最近，专利权人即使在试图执行其包含行业标准的专利时，也会主张涉案产品侵犯了其专利权——换句话说，需要采用专利权结构图对产品进行解析。

例如，在“科聚亚公司诉印度联邦政府”一案中，尽管依据第 213608 号印度专利项下侧轴承垫组件技术绘制的两份商用图纸得到了印度铁道部下属的研究设计和标准组织 (RDSO) 的批准，因此获得了与行业标准同等的地位（特别是对印度铁路公司而言）；但是，专利权人还是根据涉案产品的图纸和描述产品的计划书，采用专利权结构图对涉案产品进行了逐项技术分析。另外，专利权人还提供了专家证词，专家为原告绘制了专利权结构图，与被告出售产品的特性进行比较。

同样地，在“Garware-Wall Ropes 诉 AIChopra 和 Anr”一案中，尽管第 196240 号防岩石坠落的镀锌钢缆系统专利以及第 201177 号螺旋锁系统专利将 RDSO 制定的行业标准包含在权利范围内，专利权人仍然采用结构图对涉案产品进行了逐项技术分析。

但是，随着印度大量产品专利诉讼的涌现（特别是在制药以外的行业），专利权人凭借专利权包含行业标准这一事实作为充分证据，基于产业标准向法院提出侵权指控将在不远的将来成为现实。

由于印度在这一领域没有先例可循，印度法院很可能将参考世界各地法院处理这类案件的方法。在美国联邦巡回法院“富士通诉美国网件公司”一案中，法院指出，基于产业标准分析侵权问题通常是可取的。在另一桩案件中，美国联邦法院认可了基于产业标准进行侵权分析的做法。

尚未澄清

但即使印度法院普遍接受了基于产业标准进行分析的做法，仍有许多问题尚未澄清，例如专利权人是否需将专利权与产业标准进行比较？或者，如果专利权人指控被告一系列产品侵犯其包含产业标准的专利权，专利权人是否要分开指控每项侵权产品？

在印度近期一桩涉及标准核心专利 (standard essential patents [SEP]) 的诉讼中，法院对此做出了一些解释。

在“Vringo Infrastructure 诉 Xu Dejun（中兴通讯）”一案中，Vringo 主张被告侵犯第 243980 号名为“通过无线接入网络和分组数据服务节点操作的移动台以及用于操作这种移动站的方法”的专利权。该专利是 CDMA2000 和 CDMA2000 Rev A 和 CDMA2000 Rev B 中使用的移动电话核心技术之一。

Vringo 向法院提交了能够证明中兴通讯使用了 CDMA2000 和 CDMA2000 Rev A 和 CDMA2000 Rev B 技术的网站记录。另外，Vringo 还提交了一份专家报告，指出在核查该项专利的完整说明之后，可认定中兴通讯侵犯了 CDMA2000 EV-DO Rev A 或在印度实行的更新标准。除此之外，ZTE Optik V55、ZTE N880E、ZTE Chorus、ZTE AR910、ZTE Flash 和 ZTE AC2736 等手机型号被认定为侵权的代表型号。最后，Vringo 还提交了将涉案专利权与相关 3GPP2 标准联系起来的专利权结构图，作为补充说明。德里高等法院据此发布了对 Vringo 有利的单方临时禁制令。

笔者高兴地注意到了立法院认可在判定专利侵权时应用产业标准进行分析的做法。虽然法院并未就此做出明确声明，但是从法院行为（也就是在涉及 SEP 的案件中，根据基于专利权与行业标准比较而提出的侵权主张，发布了临时禁制令）可以推断出其对应用产业标准的认可。

虽然这无疑预示着专利权一个新时代的良好起点，但我们必须继续关注印度法院采取的相关策略以及他们在充分和非充分信息披露之间划定的界限。■

Intellectual property laws and their relevance in the functioning of a country are recognised globally. Strong IP legislation and an equally strong IP enforcement regime help attract new investment and allow innovators to develop new technologies. This situation is particularly true in the area of patents. India's patent enforcement regime was plagued with major impediments, with the burden of proof being one.

India's courts shift the burden of proof onto the defendant in respect of a process patent as per the requirement of the World Trade Organisation's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), i.e. if either of these two conditions are met: (1) the process results in "new" product; or (2) there is substantial likelihood that an identical product is made by the process and the plaintiff has made reasonable efforts to determine the process but has failed. Until recently, the courts adhered to the traditional rule of burden of proof when it came to infringement of patent claims directed towards a product. Thus, in case of alleged infringement of a patented product, the "onus of proof" rests on the plaintiff.

Extent of proof

One of the areas that required the courts' attention was the extent of proof needed to be submitted by the patentee as a basis for infringement contentions when enforcing patents reading upon – or covering within the scope of monopoly – industry standards. Industry standards are benchmarks that are required to be met by a product for its commercial sale.

In other words, would the courts expect the patentee to provide the same level of proof for infringement of a patent, reading upon an industry standard, or would there be some dilution? This aspect was not very clear because of the fact that until recently, the patentees alleged that the product is violating the claims of the patent – or in other words, provided product to claim mapping – even when trying to enforce patents which read upon industry standards.

For example, in *Chemtura Corporation v Union of India*, despite the fact that two drawings for commercial use according to the technology covered by Indian patent No. 213608 for a side bearing pad assembly were approved by the Research Designs and Standard Organisation (RDSO), which comes under the Ministry of Railways of India – thus, having a status equivalent to industry standard, especially in respect of Indian Railways – the patentee provided a claim to the accused product with element-by-element mapping, using drawings of the accused product and proposals describing the accused product. Additionally, the patentee provided an expert affidavit wherein the expert maps the features of the claims of the plaintiff's subject patent with the defendant's product offered for sale.

Similarly, in *Garware-Wall Ropes v A I Chopra and Anr*, despite the fact that patent No. 196240 for a galvanised steel wire rope net system for protection from falling boulders, and patent No. 201177 for spiral lock systems read upon standards as formulated by RDSO, the patentee provided a claim to the accused product using element-by-element mapping.

However, with the explosion of product patent litigation in India, especially in areas other than pharmaceutical industry, it was only a matter of time before a patentee would approach the courts with infringement contentions on the basis of industry standards, relying upon the fact that the patent allegedly reads upon an industry standard as a sufficient proof for infringement of the patent.

Since there was no precedent in this regard, it was believed that India's courts would look at how other courts around the world have dealt with the issue. In the US federal circuit case of *Fujitsu v Netgear*, the court noted that is generally proper to rely on an industry standard to analyse infringement issues. There are also other cases in the US where federal courts have accepted reliance upon industry standard for the purposes of infringement analysis.

Issues still unclear

But even if India's courts generally accept reliance upon an industry standard, there are many other issues that are unclear, such as would the patentee be required to compare claims to the standard? Or, in case of a scenario where the patentee relies upon a patent that reads upon a standard and alleges that a plurality of products of the defendant infringe the patent, is the patentee required to separately identify each accused product?

Thanks to a recent litigation in India involving standard essential patents (SEPs), some clarity has been provided by the courts.

For example, in *Vringo Infrastructure v Xu Dejun* (ZTE), Vringo alleged infringement of Indian patent No. 243980, entitled "Mobile station operable with radio access network and a packet data serving node and a method for operating such mobile station", which is one of the essential ingredients of the mobile phone technology used in CDMA2000 and CDMA2000 Rev A and Rev B.

Expert's report

Vringo placed on record ZTE's websites demonstrating use of CDMA2000 and CDMA2000 Rev A and Rev B technology. Vringo also placed on record an expert's report stating that, after reviewing the complete specification of the patent, it was found that ZTE infringed CDMA2000 EV-DO Rev A or later standards in India. Apart from the above, specific cell phone models such as ZTE Optik V55, ZTE N880E, ZTE Chorus, ZTE AR910, ZTE Flash and ZTE AC2736 were identified as illustrative of infringing models. Last but not least, illustrative claim chart mapping, correlating the claims of the patent suit with relevant standards of 3GPP2, were placed on record. The Delhi High Court issue an *ex parte* interim injunction in favour of Vringo.

New era

The author is pleased to note that Delhi High Court has accepted the use of standards in assessing patent infringement. Although such acceptance has not come in the form of a clear statement, the same can be inferred by way of conduct, i.e. granting an interim injunction in cases involving SEPs on the basis of plaints which compare claims to the standard and allege infringement on the basis of the same. While this is definitely the starting point of a new era, one has to continuously monitor the approach taken by India's courts and where they draw distinction between sufficient and insufficient disclosures. ■

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中国海外并购策略分析

Overseas M&A diagnostic of the 'Chinese' approach

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最近，我们有幸拜访了一家活跃在海外并购中的私募基金公司。我们惊讶地发现，他们并不是想聘请我们成为他们的当地律师，而只是希望我们为他们的海外交易提供一些“线索”。与大多数中国商人相同，他们也将律师当作“中间人”来看待。

在中国商界，律师通常被称作“中间人”，这显然与西方人所持观念大相径庭。本文将分析造成这种差异的原因，帮助您规避这种错误观念造成的误区。

为何律师不是中间人？

在与私募股权基金经理的谈话中，我们自然问到，为什么不通过与并购顾问合作而获得交易线索。他们的答复是，他们曾经与并购顾问合作过，但是后来发现这些顾问竟然与卖方站在同一立场上。他们感到“受了骗”，因此毅然决定再也不与并购顾问合作了。

我们回应说，如果我们的客户有意出售或者收购某家公司，我们当然会了解到这一信息，但是职业规范要求我们必须全心全意为客户服务。如果我们将客户出售的公司介绍给潜在买家，显然将违反对客户的忠诚义务，因为我们不能同时代表卖方和潜在买家的利益。而如果我们在客户有意收购某家公司时作为中间人将收购对象介绍给与客户竞争的另一潜在买家，显然也违反了对客户的忠诚义务。

许多中国商人期待找到“公正”的中间人，但是律师的工作性质决定他们必然具有倾向性，并且职业规范禁止律师在损害客户利益的情况下维持所谓的“公正”。因此，试图通过律师事务所寻找收购对象的思路根本就是错误的。

并购交易需要专业服务

并购咨询服务通常是指由投行或者并购咨询公司提供的专业服务。中国商界更熟悉投行在 IPO 业务中的角色，但是其实投行的服务还包括并购和重组交易，以及为机构和个人投资者提供交易经纪服务。在瑞士，瑞银集团和瑞士信贷集团旗下都有提供全方位服务的投行，为许多国家的各种产业提供专业服务。全方位服务投行通常为涉及大型市场（上市）企业和大中型市场企业的大宗交易服务。

而中型市场企业规模较小的交易是专业型投行和本地并购咨询公司的领地。他们的业务主要包括他们擅长的某些投行业务，例如企业金融、资本筹集、并购融资咨询以及与重组和改制有关的商业咨询等。

专业型投行和本地并购咨询公司可能专注于某些行业，如媒体、医疗、工业、科技或能源。有些公司擅长特定类型的交易，如资本筹集或并购，或改制和重组。他们通常仅开设少数几个办事处，或仅在特定区域开展业务。换言之，这些公司大多数有很强的专业化和本地化的特点，为中小型企业所在的中型市场服务，在该市场内有很大知名度。而在瑞士及欧洲其他经济最发达的国家中，中型市场和中小型企业扮演着重要角色。

寻找收购目标是收费服务

在西方国家，当一家投行或并购咨询公司为收购资产而与某公司接洽时，该公司通常会自行聘请并购顾问，以共同应对对方投行或并购顾，而不是搭卖方顾问的顺风车，指望他们能够“公平”行事。另外，如果某家公司欲从战略需求出发买入特定资产，它将会聘用投行或者并购咨询公司在较大范围内侦查、遴选能够满足其战略需求的收购目标。通常，此类并购顾问将提供一整套后续服务，例如收购对象的调查和估值、项目评估、对收购要约的财务和商业建议、战略性建议和交易规划协助等。这些服务均需要在金融领域以及所涉业务或行业方面的丰富知识和经验才能完成。

这些服务为客户创造价值，因此对客户收费也是合情合理的。与许多其他专业服务相同，费用根据工作量收取，是按照人工时计算的。在为客户寻找收购目标时，投行或并购顾问公司通常仅先收取少量的成本费，如果交易成功后再收取数额较大的佣金。

我们强烈建议中国企业在开展战略性海外收购时借鉴上述最佳实践。但遗憾的是，大多数中国买家仍然只喜欢便宜货。他们吝于在专业服务方面花钱，因此在这些买家眼里，我们的建议只会显得十分可笑。

并购交易中律师的作用

律师能够就潜在交易的法律环节提供建议，包括进行法律、税务和知识产权尽职调查、起草和谈判股权购买协议和相关协议、协助申请政府批准（包括合并批准）并完成交易交割。凭借本所的多元文化环境、与并购顾问和投行合作的经验以及对中国和瑞士法律和金融体系的了解，我们完全有能力为您提供上述服务。■

> “如果我们……将收购对象介绍给与客户竞争的另一潜在买家，显然也违反了对客户的忠诚义务”

Recently, we had the honour of visiting a Chinese private equity (PE) fund playing a leading role in overseas acquisitions. We were soon surprised to learn that the fund did not actually intend to hire a law firm in our jurisdiction, but wanted us to feed them with potential leads for their overseas deals. Like the average Chinese businessman, they, too, see lawyers as so-called "intermediaries".

In the Chinese business world, lawyers are commonly referred to as "intermediaries", which is obviously very different to Western concepts. In this column we will show you the reason why, in order to help you avoid the pitfalls that result from such misconceptions.

Why lawyers aren't intermediaries

During our conversation with these PE fund managers, we of course asked them why they were not working with M&A advisers for this purpose. The answer was that they had worked with M&A advisers in the past, only to discover later that they had been on the seller's side. They felt "cheated", which led to the radical decision to never work again with M&A advisers.

We replied that we certainly know companies for sale if they happen to be for sale by, or targets of, our clients, but that we are obliged by our professional laws and standards to exclusively pledge all loyalty and allegiance to our clients. We would clearly breach this obligation if we were to broker companies put on sale by our clients as we could not possibly safeguard the interests of potential buyers while representing the seller. It is also clear that we would not be loyal to our clients if we were to broker their targets to a competing potential buyer.

So, many Chinese businesspeople expect an impartial intermediary, but lawyers are by definition not only partial, but prohibited by professional laws and standards from being impartial to the detriment of their clients, which is why it is a misconception to try to search for acquisition targets through law firms from the outset.

M&A search a professional service

M&A advice is typically a service provided by an investment bank or an M&A advisory or consultancy firm. The Chinese business community may be more familiar with the notion of investment banks in association with IPOs, but an investment bank can facilitate mergers and acquisitions, and reorganisations, and broker trades for institutions and private investors as well.

In Switzerland, all major banks such as UBS and Credit Suisse have full-service investment banks that have extensive expertise across a range of industries and countries. The full-service investment banks usually work on big deals involving large-market (listed) and upper middle-market companies.

Smaller deals involving middle-market companies are the market segment of the boutique investment banks and local M&A advisory firms. They specialise in some aspects of investment banking such as corporate finance, capital raising, M&A finance consultancy, as well as business consultancy relating to reorganisations and restructurings as their primary activities.

Boutique investment banks and local M&A advisory firms may specialise in certain industries such as media, healthcare, industrials, technology or energy. Some may specialise in certain types of transactions, such as capital raising or mergers and acquisitions, or restructuring and reorganisation.

They typically have a limited number of offices and may be active only in certain geographic areas. In other words, they are mostly specialised and local, serving the middle-market or SME segment, and are well known within their niche. Middle-market and SME companies play a key role in the Swiss and other top European economies.

Target search is fee-based service

In the West, whenever a company is approached by an investment bank or M&A advisory firm to acquire certain assets, it will most likely hire its own M&A consultant to deal with the issue jointly, and not jump on the bandwagon by also relying on the seller's consultants and expect them to be "fair".

Further, if the company has the strategic need to buy in certain assets, it will hire an investment bank or M&A advisory firm to extend the scope of possible targets by identifying businesses that offer a good strategic fit.

Such an M&A consultant is then meant to deliver a whole range of subsequent services like investigation and valuation of the target, project evaluation, financial and commercial advice on takeover offers, strategic advice and assistance with deal planning, etc.

> *"We would not be loyal to our clients if we were to broker their targets to a competing potential buyer"*

All such services demand considerable experience and knowledge in finance, as well as in the business or industry concerned.

It goes without saying that such services create value for the client and are therefore fee-based. Like other professional service providers, the fees are effort-based and calculated according to the hours spent. For target search activities, usually a small fee covering costs is charged, supplemented by a considerable success fee.

We strongly recommend Chinese companies to apply the same best practice when conducting their strategy-led overseas acquisitions. Regrettably, bargain hunters – which unfortunately the majority of Chinese buyers still are – find this recommendation quite senseless, as, by nature bargain hunters dread any penny spent on professional fees.

Lawyer's job in M&A transactions

The lawyer's job is advising you on all legal aspects of the possible transaction, including performing the legal, tax and IP due diligence, drafting and negotiating your share purchase agreement and all related agreements, assisting you in attaining government approvals – including securing merger clearance – and in deal closing.

Thanks to our multiculturalism, our experience of working closely with M&A advisers and investment banks, and our deep knowledge of both the Chinese and Swiss legal and financial systems, we are in an excellent position to perform this task. ■

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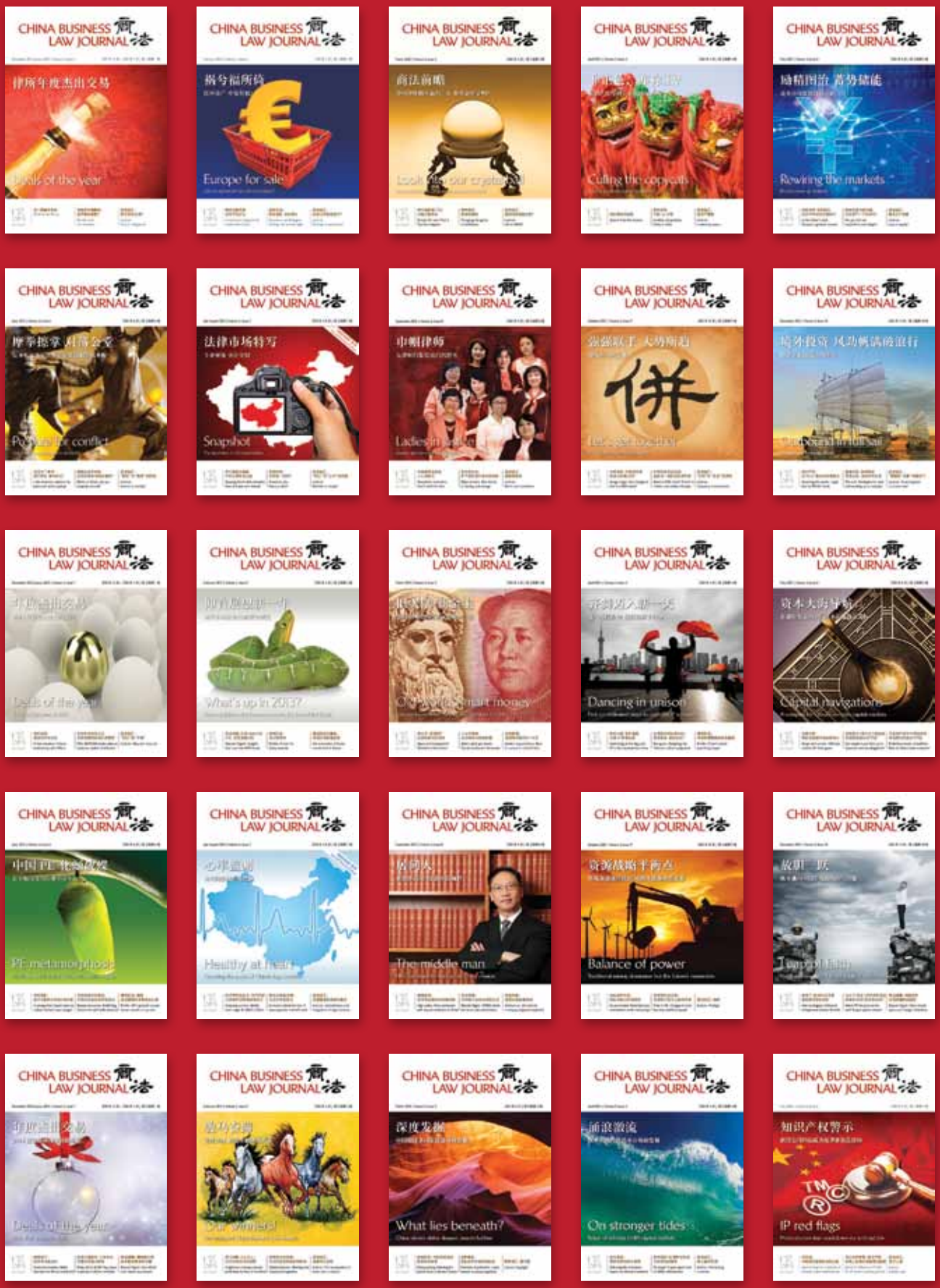
Felix Egli is a senior partner and the head of China Desk at Vischer; Wu Fan is a counsel on Vischer's China Desk

Your partner in China



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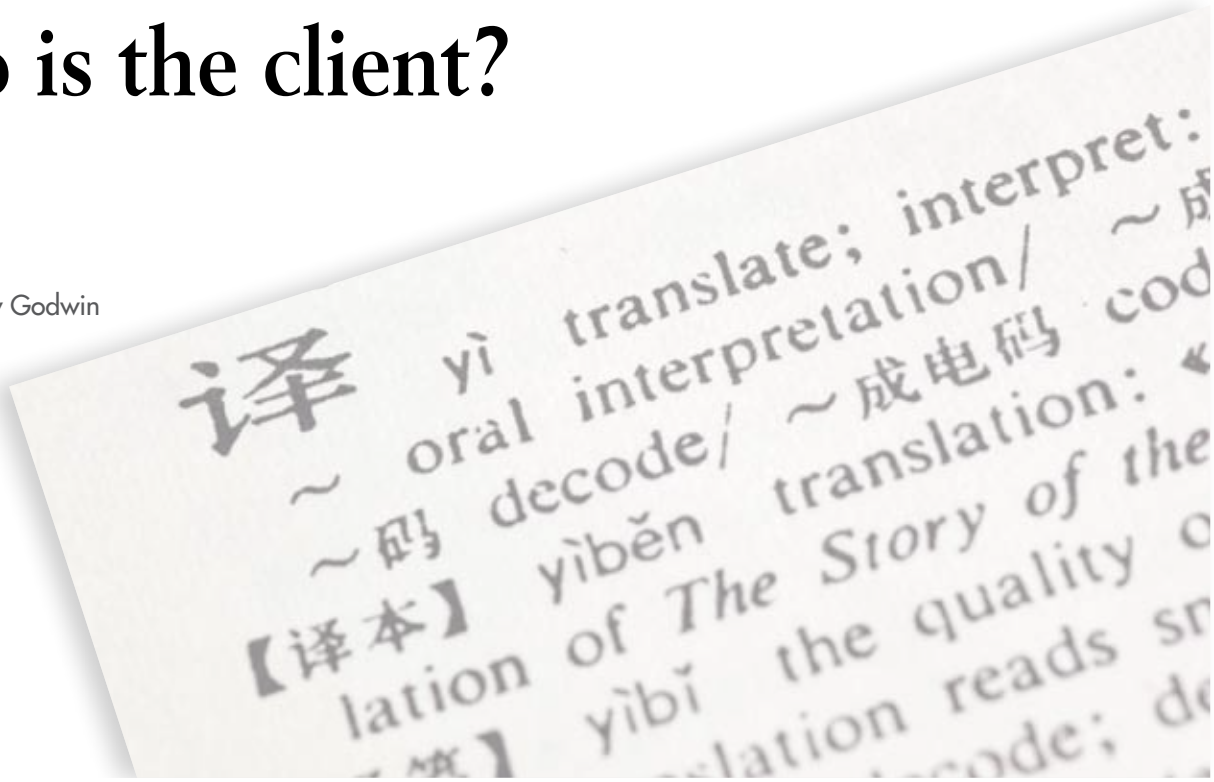
谁是委托人?
Who is the client?

葛安德 Andrew Godwin



谁是委托人? 这似乎是律师在提供法律服务时理所应当最先了解的事情。有趣的是, 这个问题似乎不如大家想象的那么不证自明, 比如在普通法法域和其他法域的许多案例中, 法院都不得不就律师与委托人关系是否成立的问题进行判决。

当律师为不是委托人的第三方, 至少不是合同意义上的委托人提供法律意见时, 这个问题就变得更为复杂。比如, 律师事务所可能会为了贷款银团或者承销团中所有银行的利益出具法律意见。再比如, 代表卖方公司的律师事务所可能会同意买方使用其为卖方准备的尽职调查报告 (参见《商法》第 5 辑第 5 期第 101 页:《责任上限》)。本期文章将讨论两个问题: 1) 律师与委托人的关系何时成立? 以及 2) 律师或律师事务所何时对第三方 (即非委托人) 承担责任? 本文将从普通法和中国法的角度来分析这些问题。

律师与委托人的关系何时成立?

这是一个非常重要的问题, 因为律师与委托人的关系一旦成立, 就会产生许多影响。部分影响因法律规定而产生, 而其他影响是由于合同约定而产生。比如, 在普通法法域中, 律师对委托人负有衡平法下的信义责任 (参见《商法》第 3 辑第 1 期第 94 页《责任还是义务?》)。信义责任有两个核心要求: 第一, 律师必须要避免利益冲突 (参见《商法》第 1 辑第 4 期第 78 页《案件, 事务和利益冲突》); 第二, 未经委托人同意, 律师不得利用其受托人的地位谋利。

It would appear self-evident that the first thing a lawyer should know when providing legal services is who the lawyer's client is. Interestingly, this question is not as self-evident as one might think – there are many examples, in common law and other jurisdictions, where the courts have had to resolve disputes over the question of whether a lawyer-client relationship has been created.

The question is complicated by the practice whereby lawyers provide legal opinions in favour of third parties; namely, persons who are not clients – at least not in a contractual sense. For example, a law firm might issue an opinion in favour of all of the banks in a lending or underwriting syndicate. Alternatively, a law firm acting for the vendor of a business might agree to extend the benefit of the vendor due diligence report that the law firm has prepared to the purchaser (see *China Business Law Journal* volume 5 issue 5, page 101: Liability caps).

The column considers two questions: (1) when will a lawyer-client relationship be created?; and (2) when will a lawyer or law firm be liable to third parties (i.e. non-clients)? These questions are examined from a common law and a Chinese law perspective.

When will a lawyer-client relationship be created?

This question is a very important one, as there are several implications that arise if a lawyer-client relationship is created. Some of these implications arise by law; other implications arise by contract. For example, in common law jurisdictions, a lawyer owes a fiduciary duty to a client under the body of law that is called "equity" (see *China Business Law Journal* volume 3 issue 1, page 94: Duty or obligation?). A fiduciary duty has two core requirements: first, lawyers must avoid conflicts of interest (see *China Business Law Journal* volume 1 issue 4, page 78: Cases, matters and conflicts of interest); second, lawyers must not profit from their position unless the client consents.

此外，职业规范或者合同的默示也会规定律师对委托人负有的责任。比如，律师对委托人负有保密责任以及告知责任，并且他们还需要遵守默示的合同注意义务。

在普通法法域，律师与委托人关系的另外一个影响是委托人可以就其与律师的通讯内容享受律师 - 当事人保密特权（参见《商法》第 4 辑第 9 期第 78 页《特权》）。

换种方式问这个问题：在律师与委托人的合同成立之前需要满足哪些条件？让我们来看看普通法法域和中国是如何规定这个问题的。

普通法法域

在许多普通法法域中，律师与委托人可以通过书面或者口头形式订立合同。此外，具体的行为或者系列交易等默示形式也可以成立合同。英国上诉法院在 *Dean 诉 Allin & Watts* 案 [2001 年] 中判定，只有在“对所有的情况都进行了客观的考虑，在当事人之间加入成立合同关系的意图可以适当地并公平地推论得出”的时候，默示合同或者说是英语法域通常所称的律师聘用 (retainer) 合同才会成立。

Dean 诉 Allin & Watts 案涉及到一笔由一名律师代理两名自然人向另一名自然人借款的交易。该律师向借款人就如何为贷款人提供有效的财产担保提供了法律意见。该贷款人没有聘请律师，而是依赖了借款人律师确保财产担保是有效的。不幸的是，该担保实际上是无效的，于是贷款人以多项理由起诉了借款人律师，其中包括该律师与贷款人之间已建立了默示的聘用关系，该律师出具错误的法律意见违反了合同项下的注意责任。

法院拒绝了贷款人提出的建立了默示聘用关系的论点。与其他案件的判决一致，法院认为在判定是否建立了律师与委托人的关系时需要分析的相关情况包括：1）索赔人是否有义务支付律师费；2）索赔人是否直接对律师发出指示；3）过去是否存在合同关系。上述情况在本案中均不存在，因此贷款人与律师之间并没有建立默示的聘用关系。相反，如下文所述，法院认定该律师违反了对贷款人负有的侵权法下的注意责任。

在英国，聘用合同不一定要以书面形式订立。根据合同法一般原则，法院认为律师与委托人的关系也可以通过口头形式建立（参见英国高等法院近期对 *Fladgate 诉 Harrison* 案作出的判决 [2012 年]）。

从实践角度看，律师或者律师事务所与委托人签订书面聘用合同非常有意义，其原因有许多。比如，律师的代理范围可能会更加清楚明了。其次，双方可以达成许多保护律师事务所和委托人的合同条款，包括保密、利益冲突和责任限制等条款。

中国

根据中国法律，律师与委托人之间的聘用合同似乎只有以书面形式，而不是以口头或者默示形式订立的情况下才

In addition, duties to clients will either be imposed on lawyers under the professional rules or be implied by contract. For example, lawyers owe a duty of confidentiality and a duty of disclosure to their clients, and they also have an implied contractual duty to take care.

A further implication of a lawyer-client relationship in common law jurisdictions is that the client will be able to claim legal professional privilege in relation to communications with the lawyer (see *China Business Law Journal* volume 4 issue 9, page 78: Privilege).

Another way of asking this question is as follows: what conditions need to be satisfied before a contract between a lawyer and a client is created? Let's consider how this question is resolved in common law jurisdictions and in China.

Common law jurisdictions

In many common law jurisdictions, a contract between a lawyer and a client may be created either in writing or orally. In addition, a contract may arise on an implied basis (e.g. by conduct or a course of dealing). In England, the Court of Appeal in *Dean v Allin & Watts* (2001) held that an implied contract – or retainer as it is often called in English-speaking jurisdictions – could only arise "where on an objective consideration of all of the circumstances, an intention to enter into such a contractual relationship ought fairly and properly to be imputed to the parties".

Dean v Allin & Watts involved a transaction in which a lawyer acted for two individuals who borrowed money from another individual. The lawyer advised the borrowers on how to grant effective security over property to the lender. The lender, who did not instruct a lawyer, relied on the lawyer to ensure that the security was effective. Unfortunately, the security proved to be ineffective and the lender sued the lawyer on a number of grounds, including that there was an implied retainer between the lawyer and the lender, and that the lawyer had breached a contractual duty of care by giving the wrong advice.

The court rejected the argument that an implied retainer had been created. Consistent with decisions in other cases, the court recognised that the circumstances that are relevant in determining whether a lawyer-client relationship has been created include the following: (1) whether the claimant is liable for the lawyer's fees; (2) whether the claimant directly instructed the lawyer; and (3) whether a contractual relationship has existed in the past. In this case none of these circumstances existed, and consequently a retainer could not be implied. Instead, as discussed below, the court decided that the lawyer was liable to the lender on the basis of a breach of a duty of care in tort.

In England, a retainer does not have to be in writing. In accordance with the general principles of contract law, the courts have recognised that a lawyer-client relationship may be created on the basis of an oral contract (see the recent case of *Fladgate v Harrison* [2012]).

In a practical sense, there are many reasons why it makes sense for the lawyer, or the law firm, and the client to enter into a written retainer. For example, there is a greater chance that the scope of the retainer will be clear. Second, the parties can agree on many provisions that provide protection to both the law firm and the client. These include provisions concerning confidentiality, conflicts and limitations on liability.

China

Under PRC law, it appears that a contract between a lawyer and a client will only be effective if it has been entered into in writing, and that such a contract cannot be oral or implied. This is because article 25 of

是有效的。这是因为《律师法》第 25 条规定，律师事务所必须与委托人签订书面委托合同。此外，《合同法》第 10 条规定，如果法律或行政法规规定采用书面形式的，应当采用书面形式。

这与《北京市律师执业规范》第 41 条规定是一致的：

the Lawyers Law provides that a law firm must sign a written engagement contract with a client. Further, article 10 of the Contract Law provides that a contract must be in writing if a relevant law or administrative regulation so requires.

This is consistent with the Beijing City Lawyer Practice Standards, which provides as follows:

第四十一条［建立委托代理关系］

律师应当与委托人就委托事项的代理范围、代理内容、代理权限、代理费用、代理期限等进行讨论，经协商达成一致后，由律师事务所与委托人签署委托代理协议或者取得委托人的确认。

Article 41 [Establishment of the Entrustment Retainer Relationship]

A lawyer must undertake negotiations with a client on issues including the scope of the retainer for the entrusted matter, the content of the retainer, the limits of the retainer, the fees for the retainer and the term of the retainer. After reaching agreement, the law firm will sign a retainer agreement with the client or obtain the client's confirmation.

律师或律师事务所何时对第三方承担责任?

如上文所述，律师事务所可能会同意或者按照委托人要求允许第三方使用其向委托人出具的法律意见。这会引起许多重要的问题。首先，如果出具的法律意见不正确，那么律师事务所在什么情况下需要承担责任? 其次，即使在律师事务所没有明确同意第三方可以信赖其所出具的意见，或者在律师事务所并不知晓第三方身份的情况下，律师事务所是否有可能对第三方承担责任?

在这个问题上，普通法法域和中国的规定大致相同，尽管中国的法律规定还有所不足，并且似乎尚未在实践中得到全面检验。让我们来依次看看普通法法域和中国的有关规定。

普通法法域

在具有里程碑意义的 *Hedley Byrne 诉 Heller & Partners* 案 [1963 年] 中，英国上议院 (现最高法院) 认定具有专业技能的人士 (如专业顾问) 在向其知道或者应当知道会依赖其所提出的信息或建议的他人提供这些信息或者建议时可能会产生侵权法下 (即独立于合同) 的注意责任。该案件涉及到一家银行就一家公司的信誉向打算与该公司做生意的第三方作出了过失不实陈述。

When is a lawyer or law firm liable to third parties?

As noted above, there may be circumstances in which a law firm agrees that a third party may enjoy the benefit of the advice that it has given, either to a client or at the request of a client. This gives rise to some important questions. First, in what circumstances will the law firm be liable if the advice is incorrect? Second, is it possible that a law firm will be liable to a third party who relies on advice given by the law firm, even if the law firm has not expressly agreed that the third party may rely on the advice, or does not know the identity of the third party?

In this regard, the position appears to be broadly the same in both common law jurisdictions and in China, although Chinese law is less developed and does not appear to have been fully tested in practice. Let's consider each position in turn.

Common law jurisdictions

In the landmark case of *Hedley Byrne v Heller & Partners* (1963), the House of Lords (now, the Supreme Court) recognised that a duty of care may arise in tort (i.e. independent of contract) where a person with special skill (e.g. a professional adviser) gives information or advice to another party whom the person knows, or should know, will rely on it. This case involved a negligent misstatement given by a bank to a third party in relation to the credit-worthiness of a company with which the third party was proposing to do business.

It is now a well established principle in common law jurisdictions that a professional adviser such as a lawyer may be liable to third parties if the relevant elements for a duty of care in tort are satisfied. In addition,

普通法法域如今已经确立了一项原则，如果满足了侵权法下注意责任的相关要件，那么律师等专业顾问可能会对第三方承担责任。此外，即使不知晓信赖其意见的人士，只要专业顾问是针对可确定的群体出具意见的，那么该专业顾问可能仍然需要承担责任。正是因为如此，律师事务所出具的法律意见通常会明确限于收件人使用，并规定未经律师事务所同意，不得将法律意见披露给第三方。

在 *Dean 诉 Allin & Watts* 案中，法院正是基于该理由认定借款人律师对第三方贷款人负有责任。因此，法院认定借款人律师在提供有效担保问题上对贷款人负有注意责任。法律要求构成注意责任所必需的对损失的可预见性以及接近关系在本案中都是存在的。此外，要求借款人律师承担该注意责任是公平合理的。

还存在其他一些案件，法院也判定律师对第三方承担注意责任。比如，为立遗嘱者起草遗嘱的律师对遗嘱的准受益人负有注意责任。在澳大利亚近期一起引起很大关注的案件中，侵权法下的注意责任被延伸至一家信用评级机构，该机构因为评级过失被判定对投资者承担责任（联邦法院 2014 年 *Bathurst Regional Council 诉 Local Government Financial Services (No 5)* 案）。如果其他普通法法域的法院也遵循该判决，这将会很有趣的。

中国

《侵权责任法》似乎足够涵盖由于过失意见引起的经济损失。《侵权责任法》第 2 条规定侵害民事权益，应当承担侵权责任。“民事权益”的定义包括财产权益在内。

迄今为止，《侵权责任法》在实践中似乎并没有适用于过律师和其他专业顾问。不过，《最高人民法院关于审理证券市场因虚假陈述引发的民事赔偿案件的若干规定》明确规定律师在证券市场上进行虚假陈述需要对投资者承担民事责任。此外，《律师法》第 54 条规定律师违法执业或者因过错给当事人造成损失的，由其所在的律师事务所承担赔偿责任。中国律师表示“当事人”的概念十分宽泛，足够包括第三方即非委托人在内。

even if the identity of the persons relying on the advice is not known, the professional adviser may still be liable if the advice was communicated to an identifiable class of people. It is for this reason that legal opinions issued by law firms are usually expressed to be limited to the addressees of the opinion, and provide that they cannot be disclosed to third parties without the consent of the law firm.

This was the basis on which the court in *Dean v Allin & Watts* decided that the lawyer was liable to the third party lender. In the circumstances, the court recognised that the lawyer had a duty of care to the lender in respect of the provision of effective security. There was the necessary foreseeability of damage and the necessary relationship of proximity for the law to impose such a duty. In addition, it was fair and reasonable that such a duty should be imposed.

There have been other cases in which a lawyer has been held to owe a duty of care to third parties. For example, a lawyer who draws up a will on behalf of a testator can owe a duty of care to the potential beneficiary of the will. In a recent case in Australia that has attracted a lot of attention, liability in tort has been extended to a rating agency which was liable to investors for issuing ratings negligently: *Bathurst Regional Council v Local Government Financial Services (No 5)* [2014] (Federal Court). It will be interesting to see if this approach is followed by courts in other common law jurisdictions.

China

The Tort Law appears to be broad enough to cover claims for economic loss caused by negligent advice. Article 2 provides that tort liability must be borne in cases where “civil interests” are infringed. The term “civil interests” is defined to include proprietary interests.

As yet, it does not appear that the application of the Tort Law to lawyers and other professional advisers has been fully tested in practice. However, the possibility that lawyers will be civilly liable to investors for false statements made in the context of the securities market has been expressly recognised by the Supreme People’s Court in its Several Provisions Concerning the Handling of Civil Compensations Cases Caused by False Statements in the Securities Market.

In addition, article 54 of the Lawyers Law provides that law firms will bear liability to compensate in circumstances where loss is caused to “parties” as a result of unlawful practice by a lawyer, or the fault of the lawyer. PRC lawyers have suggested that the reference to “parties” is broad enough to include third parties, i.e. non-clients.

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2014中国（北京）国际投资洽谈会
The World 's Investment Summit

时间：2014年10月29日–30日
Time: Oct.29–30, 2014
地点：北京饭店国际会展中心
Venue: Beijing Hotel International Exhibition Center

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