

▶

▶ Chapter 10. The Commercial Laws of the People's Republic of China

By:

*David C. Buxbaum**

I. General System of Law

10:1. Description of system of law

▶ Mainland China's legal system originated from continental law traditions with socialist influence. Currently, there are other genealogies of law in China, namely Common law in the Hong Kong Special Administrative Region and Portuguese continental law in the Macao Special Administrative Region. In the Chinese mainland's system of law consists of statutory laws, administrative regulations, interpretations of the Supreme Court, and local regulations. All statutes promulgated by the National People's Congress (NPC) and its Standing Committee are divided into basic laws which are enacted by the NPC and have a general impact throughout the nation and non-basic laws which are enacted by the Standing Committee of the NPC and have a wide impact in certain areas only. Administrative regulations concerning nationwide issues are made by the State Council, which shall not contravene the Constitution and the law. Local congresses and their respective standing committees enact local regulations. The effects of local regulations are confined within their respective geographical territories. China's courts have four levels: the Supreme Court, the Higher Courts, the Intermediate Courts, and the Basic Courts. The Supreme Court is the highest judicial organ of the State. The Supreme Court gives interpretation on questions concerning specific application of laws and decrees in judicial proceedings. The higher level courts supervise and direct the work of the lower level courts. China's court practices the system of two instances of appeal, the first and the final instance, although a third review is feasible with the consent of the highest court. This is not, however a right of appeal. They are special Admiralty, railway and Military Courts.

10:2. Role of the Communist Party

▶*

Anderson & Anderson LLP, Guangzhou
Suite 3901, 39th Floor, Profit Plaza
76 Huangpu Avenue West, Tianhe District
Guangzhou 510623, China
Tel: (86)(20) 3839-2008
Fax: (86)(20) 3839-2009
E-mail: ▶ <mailto:anderson@anallp.com>
Anderson & Anderson LLP, Shanghai
Suite 1621, 16th Floor, Tower 1, Zhonghuan Binjiang
2742 Pudong Avenue, Shanghai 200136, China
Tel: (86)(21) 5846-0290
Fax: (86)(21) 5846-0329

▶ The Chinese government is under the leadership and control of the Communist Party of China.¹

▶ The Communist Party of China (CPC) was founded on July 1, 1921 in Shanghai. It is the ruling party in China. The CPC leadership provides political and ideological leadership. After the People's Republic of China was established in 1949, the party became the administrative and policymaking center of the government. The party transforms its ideas and policies into state laws and decisions to be adopted by the National Congress through legal procedures. It continues to exercise exclusive political and military power. It now welcomes capitalist, as member of the Party.

▶ The highest leading body of the Party is the National Congress Executive and the Central Committee elected by it. The National Congress of the Party is held once every five years and convened by the Central Committee. Currently, the CPC has more than 73 million members with over 3.6 million grass-roots organizations.

10:3. Constitutional law

▶ Since 1949 when the People's Republic of China was founded and the Common Program was enacted, the First, the Fourth, and the Fifth NPC promulgated four constitutions in 1954, 1975, 1978, and 1982 respectively; the current applicable constitution was promulgated in 1982 and was amended by the Seventh and Eighth NPC, and in 2004 amended again. Such Important amendment that illustrate the endless nature of the Chinese government, are the addition of Article 5, The People's Republic of China is a nation under the rule of law, establishing a socialist legality. The rights to private property were enhanced in the Constitution.

▶ Pursuant to the Constitution, the People's Republic of China is a socialist state under the democratic dictatorship led by the working class and based on the alliance of workers and peasants.¹ The basis of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people.² The state practices socialist market economy, and private property³ and private enterprise are protected by law. China permits foreign enterprises, other foreign economic organizations, and individual foreigners to invest in China or enter into various forms of economic cooperation with Chinese enterprises and other Chinese economic organizations in accordance with Chinese law.⁴ The Constitution of China protects the

1▶

▶ Constitution Preamble, Paragraph 7.

1▶

▶ Art. 1.

2▶

▶ Art. 6.

3▶

▶ Art. 15.

4▶

▶ Art. 18.

lawful rights and interests of foreigners within Chinese territory.⁵

▶The National People's Congress of China is the highest organ of state power,⁶ aside from the Communist Party. The National People's Congress and its Standing Committee exercise the legislative power of the state.⁷ The President and the Vice-Presidents of China are elected by the National People's Congress.⁸

▶The State Council is the executive branch of government of China, the executive body of the highest organs of state power.⁹

▶The courts of China are the judicial organs of the state.¹⁰ China has a Supreme Court and the courts at various local levels, military courts, admiralty courts, and other special courts.¹¹ The Supreme Court is the highest judicial organ, although the Standing Committee of the NPC can integrate laws and regulations over the decisions of the Supreme Court. The Supreme Court supervises the administration of justice by the courts at various local levels and of the special courts. Courts at higher levels supervise the administration of justice by those at lower levels.¹² The Supreme Court is responsible to the National People's Congress and its Standing committee. Local courts at various levels are responsible to the organs of the state power which created them.¹³ The procurators or prosecutors of China are state organs for prosecution of criminals.¹⁴

5▶

▶Art. 32.

6▶

▶Art. 57.

7▶

▶Art. 58.

8▶

▶Art. 79.

9▶

▶Art. 85.

10▶

▶Art. 123.

11▶

▶Art. 124.

12▶

▶Art. 127.

13▶

▶Art. 128.

14▶

▶Art. 129.

The courts, the procurators, and public security organs shall, in handling criminal cases, divide their functions, each taking responsibility for its own work, and shall coordinate their efforts and check each other to ensure the correct and effective enforcement of the law.¹⁵

10:4. Statutory law

▶ China began developing its legal system in 1949, but this work was decimated by various movements commencing in 1958 and finally by the Cultural Revolution from 1966 to 1976. China has established a statutory system of law in the past 32 years, based largely on a mixed market economy.

10:5. Constitution

▶ The Constitution was adopted on December 4th, 1982, amended on April 12th, 1988 and March 29th, 1993; Organic Law of the National Congress was adopted on December 10th, 1982; Organic Law of the State Council was adopted on December 10th, 1982; Organic Law of the Courts was adopted on July 1st, 1979, amended on September 2nd, 1983; Organic Law of the Procurator was adopted on July 1st, 1979, amended on September 2nd, 1983; Organic Law of the Congresses and Governments at all local levels was adopted on July 1st, 1979, amended on December 10th, 1982 and December 2nd, 1986; Electoral Law for the Congress and local congresses at all local levels was adopted on July 1st, 1979, amended on December 10th, 1982, December 2nd, 1986 and February 28, 1995. The Regional National Autonomy Law was adopted on May 31st, 1984; Basic Law of the Hong Kong Special Administrative Region was adopted on April 4th, 1990; Basic Law of the Macao Special Administrative Region was adopted on March 31st, 1993; Legislation Law was adopted on March 15, 2000. In recent Amendments to the Constitution, the right to our private property was further enhanced.

II. Traders and Non-traders

10:6. Definition of traders

▶ Foreign trade is carried out by legally authorized Chinese enterprises and organizations which include authorized corporations, government entities, as well as specialized trading companies, authorized to undertake international trade transactions. In addition, various entities, including ventures with foreign investment, may receive authorization to purchase goods from abroad and to export. Exports of joint Chinese-foreign entities or wholly owned foreign ventures can be processed through authorized trading companies or may be carried out by corporations directly authorized to export.¹ Wholly owned subsidiaries of foreign entities similarly can be authorized by their charter to engage in related exports and imports, and special trading companies may be established by foreign investors.

▶ “Traders,” a term not generally utilized in Chinese legal parlance, may be defined as: those entities, either public enterprises, government owned corporations, jointly owned

¹⁵▶

▶ Art. 135.

¹▶

▶ Joint Venture Law, Art. 10.

corporations, cooperative enterprises, private companies, or foreign-owned domestic enterprises authorized by their charter or government license to engage in foreign trade.

10:7. Subject to special commercial tribunals

▶ There are various tribunals in Chinese courts at all levels. The Supreme Court¹ provides for said tribunals. Most commercial disputes are handled by the economic tribunals, civil tribunals or intellectual property tribunals. In addition, arbitration tribunals of the Chinese Council for the Promotion of International Trade are authorized to settle disputes between foreign and Chinese entities, and contracting parties may utilize these or other agreed arbitral bodies to resolve disputes. Labor tribunals handle labor disputes.

▶ Notarial offices also may, pursuant to the Notarization Law (adopted on April 28, 2005, effective March 1, 2006), play a role in dispute adjudication in that they have authority to evidence the fact that a document reflecting compensation due on a debt or for goods is an authentic document, and this said compensation can be compulsorily enforced.

10:8. Requirement to keep certain books of account

▶ The Joint Venture law, adopted on July 1, 1979 and amended on April 4, 1990 and March 15, 2001, provides that limited liability companies combining foreign and Chinese investors and other foreign enterprises are required to keep books and records of account in Chinese or both Chinese and a foreign language and to retain such records for 15 years. Normally, quarterly tax returns are submitted by said entities.

▶ The Law on Foreign Capital Enterprises requires that an enterprise, wholly owned by foreign Parties in China, must set up books of account in China, have independent audits, and submit financial and tax statements required by Chinese Law.¹

▶ The Law on Chinese-Foreign Contractual Joint Ventures, promulgated on Apr. 13, 1988 and amended on Oct. 31, 2000, requires the joint venture corporation to keep its books of account and file its account statements in accordance with the relevant Provisions of Chinese Law.

▶ The Accounting Law provides that Chinese organizations, including all foreign owned entities, shall maintain a uniform system of accounts and said accounts are to be authentic and complete.²

10:9. Registration

▶ Regulations on Registration of Enterprise Legal Persons were adopted on May 13, 1988. The Administration of Commerce and Industry is responsible for handling said registration¹ and

1▶

▶ Court Organization Statute, adopted on July 1, 1979, as amended on September 2, 1983 and October 31, 2006, Arts. 19, 24, 27, 31.

1▶

▶ Art. 14.

2▶

▶ Art. 3.

1▶

its Registration Authority must decide, within 30 days of receiving an application, whether or not to approve registration.²

▶ Detailed Rules for the Implementation of aforementioned Regulations was adopted on Nov. 3, 1988, amended on Dec. 25, 1996, and Dec. 1, 2000. Accordingly, all state enterprises, collectively owned enterprises, jointly operated enterprises, enterprises having foreign investment in China (including Chinese-foreign joint ventures, Chinese-foreign corporations and enterprises operated exclusively with foreign capital) and other enterprises must register with Administration of Industry and Commerce.³ Enterprise having foreign investment must also register its offices with Administration of Industry and Commerce.⁴ Said registration requires enterprise having foreign investment to demonstrate name in conformity with regulations; location, equipment, working capital, scope of business and employees must be registered and approved, and it must have authorized system of finance and accounting, etc.⁵ Similarly, aforementioned approvals are required for said enterprises to obtain business registration of offices.⁶ Specifically, enterprises having foreign investment must use system of unified accounting.⁷ They must register name, identity of individual in charge, etc.⁸

▶ Registration fees, as determined by the Administration of Industry and Commerce, shall be 1% of the sum of the enterprise's registered capital up to RMB 10 million yuan; the fee to be charged on the portion in excess of said sum shall be 0.5% of the amount exceeded. The minimum registration fee shall be RMB 50 yuan.⁹ The relevant Administration of Industry and

▶ Art. 4.

2▶

▶ Art. 14.

3▶

▶ Art. 2.

4▶

▶ Art. 5.

5▶

▶ Art. 16.

6▶

▶ Art. 17.

7▶

▶ Art. 16.

8▶

▶ Art. 17.

9▶

▶ Art. 26.

Commerce has authority to supervise and examine all enterprises under its jurisdiction, and said enterprises shall submit an annual check-up report, its balance sheet, or statement of assets and liabilities and other relevant materials.¹⁰

▶ Sanctions imposed by the Administration of Industry and Commerce for the violation of regulations include, depending on circumstances, warning, fine, confiscation of illegal earnings, suspension of business for consideration, or revoking business license, in cases where enterprises are involved in any of the following:

- ▶ (1) concealing true facts and resorting to deception in the course of registration;
- ▶ (2) altering major items in the registration without approval or engaging in business operations beyond the scope approved in registration;
- ▶ (3) failing to cancel registration according to the regulations or failing to submit check-up report;
- ▶ (4) forging, altering leasing, lending, transferring, selling, or reproducing the business license without approval;
- ▶ (5) withdrawing or transferring capital concealing assets or avoiding liabilities; or
- ▶ (6) engaging in illegal business operations.¹¹

Enterprises disagreeing with the sanctions imposed may appeal within 15 days after receipt of the notice of sanctions to the next highest registration authority for reconsideration.

▶ Said enterprises disagreeing with reconsideration decisions may further institute litigation within 30 days from receipt of the decision.¹²

10:10. Other requirements

▶ Special licenses and approvals are required for carrying out certain types of business, such as banking, land, sea, and air transportation etc. Foreign corporations continuously doing business in China may be required to apply to register long term representative offices.

▶ The Regulation Governing the Registration of a Resident Office of a Foreign Enterprise was approved by the State Council on March 5, 1983 and became effective March 15, 1983. The State Administration for Industry and Commerce of China is the organization responsible for registration of resident offices for foreign enterprisers. It empowers administrative departments for industry and commerce in provinces, autonomous regions, and municipalities directly under the Central Government to handle registration procedures.¹

▶ The main items to be registered for a resident office of a foreign enterprise are: name of officer, address of residence, number of representatives and their names, business scope, and

¹⁰▶

▶ Art. 24.

¹¹▶

▶ Art. 30.

¹²▶

▶ Art. 32.

¹▶

▶ Art. 4.

period of residence.² Foreign enterprises and other economic organizations shall go through the prescribed registration procedure at the administrative Department of Industry and Commerce in provinces, autonomous regions, and municipalities directly under the Central Government, where said offices are to be located, within 30 days from the date that their applications for setting up resident offices within China were approved by the authorities.³

▶The foreign enterprise or economic organization shall submit the following documents to apply for registration for a resident office: (1) approval document issued by the appropriate authorities and (2) documents and information as listed in Art. 3 of the Interim Provisions.⁴

▶If upon examination documents submitted by the a foreign enterprise or economic organizations for registration are established as conforming to these requirements, the registration office shall grant permission for registration and issue a certificate of registration and certificates for representatives after the registration fee is paid. The resident office of a foreign enterprise shall, on the strength of approval documents, certificate of registration, and certificates for representatives, register with the public security organization, banks, customs and tax authorities, and other related offices.⁵

▶The resident office of a foreign enterprise is deemed as formally established from the date of its registration and legitimate activities of said office, and its representative shall thereafter be protected by the law of China. A resident office that has not been approved and registered shall not proceed with its business activities.⁶

▶A registration certificate for the resident office of foreign enterprise is valid for a period of one year. Said office must, upon expiration, renew the aforesaid document if it wishes to continue its residence. To renew its registration, the resident office of foreign enterprise must, within 30 days before the date of expiration, submit to the registration authorities an annual report of its business operations and application for renewal. Where the renewal of a resident office is approved, the document of approval for renewal issued by such authorities must also be submitted at the time of renewal of the registration of the office; the original certificate shall be turned in and a new certificate of registration shall be issued.⁷

2▶

▶Art. 5.

3▶

▶Art. 6.

4▶

▶Art. 7.

5▶

▶Art. 8.

6▶

▶Art. 9.

7▶

▶Art. 11.

▶ If the resident office of a foreign enterprise desires to terminate its business operations upon or before expiration of the term of residence or an enterprise represented by an office declares bankruptcy, it shall go through the deregistration procedure at the registration office. In this deregistration procedure, documents issued by tax authorities, banks and customs to certify payment of taxes, liabilities, and other related matters shall be produced before approval is granted for deregistration and cancellation of the certificate of registration. Should the office leave any matter unsettled, the foreign enterprise or economic organization office representing it shall be held responsible for settlement of that matter.⁸

▶ Exploration of offshore petroleum is covered by the Law on Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises. Promulgated on Jan. 30, 1982, amended on Sep. 23, 2001, it permits foreign enterprises to participate in the exploitation of Chinese offshore petroleum resources.⁹ The statute provides that the government of China will protect foreign investments, foreign shares of profit, and other legitimate rights in these cooperative enterprises.¹⁰ The China National Offshore Oil Cooperation (CNOOC), a state corporation, is responsible for working with foreign enterprises to exploit said resources.¹¹ CNOOC has authority to enter into contracts with foreign enterprises, which are subject to the approval of the Ministry of Foreign Trade and Economic Cooperation.¹²

10:11. Privileges and obligations of traders

▶ Those registered pursuant to the registration regulations as traders have the right to conduct business within the scope of said license. This normally includes the right to maintain bank accounts, to hire personnel through the proper channels, the right to an office, to conduct business within the scope of one's charter and the law, the right to enter into contracts, to remit profits in foreign exchange, and the right to import and/or export if within the scope of one's approval document and charter of registration.

III. Foreign Trade

10:12. In general

▶ Foreign trade of China is still largely a government monopoly, but this situation is changing rapidly. Commencing in 1949, import and export corporations were organized by the

⁸▶

▶ Art. 13.

⁹▶

▶ Art. 1.

¹⁰▶

▶ Art. 3.

¹¹▶

▶ Art. 6.

¹²▶

▶ Art. 7.

state pursuant to the category of commodities with subsidiaries established locally in provinces and municipalities to deal with imports and exports. Import and export companies act as agents, deputized by most enterprises for their import and export businesses; in fact, only a few state-owned enterprises have direct power of management over foreign trade. The administration of operating licenses for foreign trade in China has evolved from a licensing system to a registration system; the operation of which is being opened to private enterprises including foreign-invested enterprises. Foreign trade enterprises in China are divided into the following categories: companies in the field of distribution, manufacturing enterprises, institutions of scientific research (colleges and universities), commercial and equipment enterprises, supply and marketing cooperative enterprises, and foreign trade enterprises. Said enterprises, whether privately-owned or otherwise, may apply for relevant import and export power pursuant to the relevant policy of the Ministry of Foreign Trade and Economic Cooperation (“MOFTEC”), as the restriction on admission of non-publicly-owned enterprises to engage in foreign trade has been abolished.

▶ China has been the fourth largest trading nation since 2001, second only to European Union, USA, and Japan. The value of its imports and exports expand from US\$20.60 billion in 1978 to US\$2.1738 trillion in 2007. Foreign-capital enterprises are playing an important role in exports in recent years, with China becoming a factory of the world.

10:13. Regulations and restrictions

▶ China shall, under international treaties or agreements to which China is a contracting party or a participating party, including the World Trade Organization, grant other contracting parties or participating parties, based on the principles of mutual advantage and reciprocity, most-favored-nation treatment or national treatment within the field of foreign trade.¹ Goods whose imports or exports are restricted shall be subject to quotas and/or licensing control; technologies whose imports or exports are restricted shall be subject to licensing control.² The State Council enacted Countervailing Regulations and Antidumping Regulations (both were adopted on November 26, 2001, amended on March 31, 2004), which are intended to protect the foreign trade and the market environment in fair competition and to be used as instance to fight against antidumping laws in other countries. In respect of import and export of intellectual property, technologies falling into a category prohibited for import or export shall not be imported or exported. For those restricted for import and export, license management is applied; without which, they are not permitted to be imported or exported.

▶ New Regulations on the Administration of Technology Import and Export were promulgated February 1, 2009. Contracts for patents rights by assignment or licensing are required to be registered with the departments of commerce of all provinces, autonomous regions, and municipalities.³ If the contract payments are made according to a percentage

1▶

▶▶ Foreign Trade Law, Art. 6.

2▶

▶▶ Foreign Trade Law, Art. 19.

3▶

▶ Art. 5.

calculation, this percentage and any changes to the percentage is also required to be registered.⁴

▶ Foreign merchants with annual exports exceeding US\$10 million are permitted to invest in manufacturing enterprises and engage in acquisition and exports of commodities with nonexclusive rights, which are not subject to quota licensing controls.⁵ The non-publicly-owned economy allows for foreign trade enterprises in the field of distribution. Said enterprises are provided with the power of management over the imports and exports, but the publicly-owned enterprise must assume a dominant position in said company (ratio of investments of 51% or more), and private enterprise is not to own more than 49%.⁶

10:14. Taxation of foreign trade

▶ When acceding to WTO, on 1 January 2002, China reduced import duties for over five thousand kinds of commodities. General tariff levels declined from 15.3% to 12%. Average tax rates on industrial products and agricultural products (not including aquatic products) also dropped from 14.7% to 11.3%, and 18.8% to 15.8% respectively.

▶ Pursuant to the U. S.-China Bilateral WTO Agreement reached on February 2, 2000, China will reduce general average tariffs from 22.1% to 17% and tax rates on agricultural products to 14.5%-15%. All quota and quantity restrictions will be removed within 5 years; most non-tariff barriers will be abolished within 2 or 3 years, apart from some exceptions.

▶ A tax refund policy is applied to export goods of foreign-invested enterprises,¹ as well as domestic enterprises.

▶ Export enterprises acquiring goods from a foreign-invested enterprise for export shall not enjoy a tax refund, as the consolidated industrial and commercial tax imposed on said goods goes beyond the scope of tax refund.²

▶ The Import and Export Customs Duty Regulations were promulgated by the State Council on 23rd November 2003, effective as of 1st January 2004. The State Council has formulated the China Customs Import and Export Tariff (the Tariff) and the China Import Duty Rates for Incoming Articles (the Import Duty Rates for Incoming Articles) to provide the tax

4▶

▶ Art. 7.

5▶

▶ Notice on Relevant Issues Concerning Expanding the Import and Export Operation Rights of Foreign-funded Enterprises, enacted by MOFTEC, Art. 1.

6▶

▶ Notice of MOFTEC on Several Issues Concerning Investment of Enterprises with the Power of Management over Import and Export Business, Art. 3, Item 5, Paragraph 1.

1▶

▶ Notice of the State Administration of Taxation on Issues Concerning the Tax Refund of Foreign-Invested Enterprises, Art. 1.

2▶

▶ Notice of the State Administration of Taxation on Issues Concerning Tax Refund, 20 April 1991, Art. 6.

headings, tax codes and tax rates of customs duty, which are constituents of these Regulations.³

▶The payment of duty on imported or exported goods shall, within 14 days of the declared arrival date of the vehicle of transportation (except as specially permitted by customs) shall, after the arrival of the goods at the customs surveillance zone and 24 hours before the goods are loaded, declare the goods to Customs at the place of entry or exit. Import and export goods in transit between customs shall be handled in accordance with the regulations of the General Administration of Customs.

IV. Foreign Direct Investment

10:15. In general

▶China has been encouraging the introduction of foreign capital since the late 1970s when the reform and opening policy was adopted. Laws, regulations, preferential policies, and guiding catalogues to attract foreign investment have been issued in succession. In 2007, foreign merchants directly invested in 1,171 projects with the amount of foreign fund actually used US\$82.658 billion; China has become a country in which foreign capital wants to intervene the most.

▶The state divides the foreign-invested projects into three catalogues: the encouraged, the restricted, and the prohibited. Projects with foreign investment encouraged, restricted, and prohibited are contained in the Guiding Catalogue for Projects Invested by Foreign Merchants. There are foreign investments permitted projects not listed in said Catalogue. Said Catalogue specifies the foreign-invested projects which cannot be operated by foreign merchants wholly and those which require the controlling or dominant position of state assets. At present, foreign merchants mostly invest in the second the third industries. After acceding to WTO, China amended and abolished laws and regulations not according with the principle of WTO and began to remove step by step the restrictions on the fields permitted for foreign investment.

10:16. Regulations and restrictions

▶China permits foreign companies, enterprises, and other economic organizations or individuals (foreign joint ventures) to establish equity joint ventures together with Chinese companies, enterprises, or other economic organizations (Chinese joint ventures).¹ The state shall not nationalize or requisition any equity joint venture. Under special circumstances, when public interest requires, legal procedures. The state may allow requisition of an equity joint ventures and appropriate compensation shall be made.² An equity joint venture shall take the form of a limited liability company. The proportion of the foreign joint venture's investment in an equity joint venture shall be, in general, not less than 25 percent of its registered capital.³ The net profit

³▶

▶Art. 3.

¹▶

▶Equity Joint Ventures Law, Art. 1.

²▶

▶Equity Joint Ventures Law, Art. 2.

³▶

which a foreign joint venture receives as its share after performing its obligations and the wages, salaries, or other legitimate income earned by a foreign worker or staff member of an equity joint venture may be remitted abroad.⁴

▶ Foreign and Chinese partners establishing a cooperative enterprise shall provide in the cooperative venture contract the terms on investment or cooperation, issues on distribution of profits or products, burden of risk or loss, manner of management, and attribution of properties when the cooperative enterprise is closed. A cooperative enterprise according with provisions of Chinese law on legal personality shall obtain Chinese corporate capacity, pursuant to law.⁵

▶ China permits foreign enterprises and other economic organizations or individuals to establish foreign-capital enterprises in China and protects their legal rights and interests.⁶ Foreign-capital enterprises refers to enterprises solely foreign-funded and established in China, pursuant to relevant Chinese law, not including subsidiaries of foreign enterprises and other economic organizations in China.⁷ Foreign investors are protected by Chinese law for their investment, profits, and other legal rights in China.⁸

▶ The State Planning Commission, the State Economic and Trade Commission, and the Ministry of Foreign Trade and Economic Cooperation on 31 October 2007, issued the Guiding Catalogue for Projects Invested by Foreign Merchants, effective 1 December 2007, which specifies that foreign investment is (1) encouraged in new and high technology, new product and resource, and export and environment oriented industries; (2) restricted in the needs of the domestic market, state monopolized, and planned industries; and (3) prohibited in state security endangered, environment destroyed, land occupied, and special craft and technique industries.

▶ In most industries with foreign investment restrictions, the foreign investor proportion of subscribed capital shall not exceed 49% in the enterprise.⁹

10:17. Taxation of foreign direct investment-- Enterprise Income Tax

▶ The new Enterprise Income Tax Law, adopted March 16, 2007, effective January 1,

▶ Equity Joint Ventures Law, Art. 4.

4▶

▶ Equity Joint Ventures, Arts. 11, 12.

5▶

▶ Law on Chinese and Foreign Cooperative Enterprises, Art. 2.

6▶

▶ Law on Foreign-capital Enterprises, Art. 1.

7▶

▶ Law on Foreign-capital Enterprises, Art. 2.

8▶

▶ Law on Foreign-capital Enterprises, Art. 4.

9▶

▶ Rules on the Management of Foreign Investment in Telecommunications Enterprises, Art. 6.

2008, unifies the tax rate between Chinese companies and companies with foreign investment. Within the territory of China, enterprises and other organizations that have incomes shall pay enterprise income taxes.¹ Balance after deducting tax-free incomes, tax-exempt incomes, all deduction items as well as permitted remedies for losses of previous year(s) from an enterprise's total amount of incomes of each tax year is the taxable amount of incomes.²

▶The term “income” includes income from sale of goods, income from labor services, income from property transfer, income from equity investment such as dividend and bonus, interest income, rental income, income from franchise royalties, income from accepting donations, and other income.³

▶The following included in the total amount of incomes are tax-free incomes: (1) appropriations from the treasury; (2) administrative fees and governmental funds that are charged according to law and fall under the treasury administration; and (3) other tax-free incomes as prescribed by the State Council.⁴

▶The following are tax-exempt incomes:

▶(1) income from treasury bonds;

▶(2) dividends, bonuses and other equity investment proceeds distributed between qualified resident enterprises;

▶(3) dividends, bonuses and other equity investment proceeds that non-resident enterprise with institutions or establishments in China obtains from a resident enterprise and which have actual connection with such institutions or establishments; and

▶(4) incomes of qualified not-for-profit organizations.⁵

▶The following items may be deducted in the calculation of taxable amount of incomes:

▶(1) reasonable disbursements that are actually incurred and in which have actual connection with business operations, including costs, expenses, taxes, losses, etc.;

▶(2) disbursements for public welfare donations that accounts for 12% of the total annual profits or less;

▶(3) depreciations of fixed assets calculated under relevant provisions;

▶(4) amortized expenses of intangible assets calculated according to relevant provisions;

▶(5) expenses treated as long-term deferred expenses;

▶(6) costs of the inventories when using or selling inventories; and

1▶

▶Art. 1.

2▶

▶Art. 5.

3▶

▶Regulation on the Implementation of the Enterprise Income Tax Law, Art. 6.

4▶

▶Art. 7.

5▶

▶Art. 26.

- ▶(7) net value of asset when transferring asset.⁶
- ▶Enterprise income tax may be exempted or reduced on the following incomes:
 - ▶(1) incomes incurred from projects of agriculture, forestry, husbandry and fishery;
 - ▶(2) incomes incurred from business operations of important public infrastructure investment projects supported by the state;
 - ▶(3) income incurred from projects of environmental protection, energy and water saving, which meet relevant requirements;
 - ▶(4) incomes incurred from transfer of technologies, which meets relevant requirements; and
 - ▶(5) income as prescribed in paragraph 3, Article 3 of this Law.⁷
- ▶The enterprise income tax rate is 25%.⁸ The tax rate for qualified small-scale enterprises with minimal profits is 20%, and 15% for high and new technology enterprises that require key state support.⁹
 - ▶Enterprises may deduct from the taxable amount of incomes of the current period the amount of income tax that the enterprise has already paid overseas for the following incomes. The limit of tax credit shall be the payable amount of taxes on such incomes computed according to this Law. Portion exceeding tax credit limit may, during five subsequent years, be offset by way of deducting the limit of tax credit of each year from the balance after the deduction of the limit of tax credit of the current year: (1) resident enterprise's taxable incomes derived outside China; and (2) taxable incomes earned outside China by non-resident enterprise having offices or establishments in China, but having no actual connection with the said offices or establishments.¹⁰ For dividends, bonuses and other equity investment proceeds derived outside China, which resident enterprise obtains from its directly or indirectly controlled foreign enterprise, the portion of income tax on this income paid by foreign enterprise outside China may be treated as allowable tax credit of overseas income tax amount of the resident enterprise and be deducted within the limit of tax credit.¹¹
 - ▶Enterprises, established with approval prior to the promulgation of this new Law and

⁶▶

▶Arts. 8, 9, 11, 12, 13, 15, 16.

⁷▶

▶Art. 27.

⁸▶

▶Art. 4.

⁹▶

▶Art. 28.

¹⁰▶

▶Art. 23.

¹¹▶

▶Art. 24.

enjoying low preferential tax rate in accordance with relevant tax laws and administrative regulations at the current period may, pursuant to provisions of the State Council, gradually transit to the 25% tax rate within 5 years upon implementation of this Law. If such enterprises enjoy regular tax exemption and reduction, treatment continues to apply until expiry after the implementation of this Law. However, those that fail to be entitled to this treatment by reason of not making any profits, preferential period is calculated from the year this Law is implemented. High and new technology enterprises that are set up in specific zones in accordance with the law for the purpose of external economic cooperation and technology exchange and that are newly set up and require key state support in the region of special policy of such region specified by the State Council may eligible for transitional treatment and specific measures shall be provided by the State Council. Other enterprises under the encouraged category confirmed by the state may be eligible for tax exemption and reduction in accordance with provisions of the State Council.¹²

10:18. Taxation of foreign direct investment-- Business tax

▶ Provisional Regulations on Business Tax, adopted December 13, 1993, effective January 1, 1994, stipulates that all units and individuals engaged in services (“taxable services”), transferring intangible assets or the sale of immovable properties within the territory of China shall be taxpayers of Business Tax.¹

▶ The following are exempt from business tax:

▶ (1) nursing services provided by nurseries, kindergartens, homes for the aged, welfare institutions for the handicapped, matchmaking and funeral services;

▶ (2) personal services provided on an individual basis by the disabled;

▶ (3) medical services provided by hospitals, clinics and other medical institutions;

▶ (4) educational services provided by schools and other educational institutions, and services provided by students participating in work-study programs;

▶ (5) agricultural mechanical ploughing, irrigation and drainage, prevention and treatment of plant diseases and insect pests, plant protection, insurance for farming and husbandry, and related technical training services, branding and the prevention and treatment of diseases of poultry, livestock and aquatic animals;

▶ (6) admission fees for cultural activities conducted by memorial halls, museums, cultural centers, art galleries, exhibition halls, academies of painting and calligraphy, libraries and cultural protective units; admission fees for cultural and religious activities conducted at places of religious worship; and

▶ (7) taxpayers whose turnover has not reached the minimum business tax threshold stipulated by the Ministry of Finance.²

▶ Taxable items and tax rates of business tax are determined by Business Tax Taxable Items and Tax Rates Table attached to the Provisional Regulations, i.e., 3% for communication

¹²▶

▶ Arts. 57-58.

¹▶

▶ Art. 1.

²▶

▶ Arts. 6, 8.

and transportation industry, 5% for finance and insurance industry, and 5% for transferring intangible assets and selling immovable assets.

10:19. Taxation of foreign direct investment-- Value-Added Tax (“VAT”)

▶ Provisional Regulations on Value-Added Tax, promulgated on December 13, 1993, effective January 1, 1994, stipulates that all units and individuals engaged in the sale of goods, processing, repair and replacement services, and import of goods within China shall pay VAT.¹

▶ The following are exempt from VAT:

▶ (1) self-produced agricultural products sold by agricultural producers;

▶ (2) contraceptive medicines and devices;

▶ (3) antique books;

▶ (4) import of instruments and equipment directly used in scientific research, experiment and education;

▶ (5) import of materials and equipment from foreign governments and international organizations as assistance free of charge;

▶ (6) equipment and machinery required to be imported under contract processing, contract assembly and compensation trade;

▶ (7) articles imported directly by organizations for the disabled for special use by the disabled;

▶ (8) sale of goods which have been used by the sellers; and

▶ (9) taxpayers whose sales amounts have not reached minimum VAT threshold stipulated by the Ministry of Finance.²

▶ The tax rate of business tax differs. For taxpayers selling or importing goods, the tax rate is usually 17%, which is also applicable to taxpayers providing processing, repair and replacement service.³

V. Contracts

10:20. Definition of contract

▶ Pursuant to the Contract Law of the People's Republic of China adopted at the Second Session of the Ninth National People's Congress on March 15, 1999, a contract refers to an agreement establishing, modifying, or terminating the civil rights and obligations between subjects of equal footing, that is, between natural persons, legal persons or other organizations.¹ A contract shall be an agreement whereby the parties establish, change, or terminate their civil

¹▶

▶ Art. 1.

²▶

▶ Arts. 16, 18.

³▶

▶ Art. 2.

¹▶

▶ Art. 2.

relationships.²

10:21. Elements of a contract-- Offer and acceptance

▶ An offer is a proposal to enter into a contract with other parties.¹ Said offeror is bound by his offer for a reasonable period of time and cannot make the same offer to a third party, but in practice offers are made to other parties without liability for breach, although some hold that such liability can arise. There is freedom to alter one's offer prior to acceptance in Chinese law. Acceptance can only be made without conditions. If one accepts with conditions, it is deemed a counter-offer. An invitation for an offer is a proposal for requesting other parties to make offers to the principal. Price lists, public notices of auction and tender, prospectuses, and commercial advertisements etc. are invitations for offers. Where the contents of a commercial advertisement comply with the terms of the offer, it may be regarded as an offer.² An acceptance is a statement made by the offeree indicating assent to an offer.³ An acceptance shall reach the offeror within the time limit fixed in the offer.⁴ The contents of an acceptance shall comply with those of the offer. If the offeree substantially modifies the contents of the offer, it shall constitute a new offer.⁵

10:22. Elements of a contract-- Capacity of the parties

▶ Legal capacity is in part defined by the Constitution,¹ which provides that all citizens of China are equal before the law and enjoy certain rights and must perform duties prescribed by law and the Constitution. Citizens reaching the age of 18 have the right to vote and stand for election. Economic organizations acquire the status of legal persons in part by registration pursuant to the Regulations for Registration of Industrial and Commercial Enterprises.

▶ Individuals, business enterprises, partnership, and legal persons, lawfully registered and approved to engage in commercial or industrial activity, have the capacity to enter into

2▶

▶ General Principles of Civil Law, Art. 85.

1▶

▶▶ Contract Law, Art. 14.

2▶

▶▶ Contract Law, Art. 15.

3▶

▶▶ Contract Law, Art. 21.

4▶

▶▶ Contract Law, Art. 23.

5▶

▶▶ Contract Law, Art. 30.

1▶

▶ Arts. 33, 34.

commercial contracts. Those who have the capacity to execute civil acts have the capacity to enter civil contracts.² Capacity to act and responsibility for actions are defined at law. Thus, for example, as to natural persons the Criminal Code provides that persons who are 14 to 18 years of age have legal responsibility for serious criminal acts, but sentencing should be comparatively lighter. The Civil Procedure Law³ provides that natural persons having litigation rights and capacity can be parties to civil litigation; normally the courts hold that an adult, namely a person 18 years of age or older, has the capacity to litigate in his own name. The responsible persons of commercial and non-commercial enterprises and organizations can act as the legal representative of these organizations so that they may be parties to litigation. Those lacking legal capacity can have a legal representative for purposes of litigation.⁴ In accordance with Contract Law, natural persons, legal persons, or other organizations have the right to enter into contracts. An organization's authority is defined in part by its business license. In addition, organizations engaged in international trade or transactions have specified authority to act, which may require approval of higher government agencies, and if foreign exchange is involved the consent and approval of the Foreign Currency Control Bureau. Joint venture corporations and wholly owned foreign corporations licensed to do business in China can enter into contracts within the scope of their approval documents and business license issued by the relevant bureau of commerce and industry.

10:23. Elements of a contract-- Permissible subject matter

▶The Constitution¹ and the General Principles of Civil Law² provide that mineral resources, water, forests, mountains, grasslands, unclaimed land, beaches, and other natural resources are state owned, except those owned by collectives; urban land is state owned and rural and suburban land owned by collectives, except for the portion that is state owned. The Constitution specifically limits the sale of natural resources. This, of course, does not limit the long term leasing of land or entering into joint ventures to exploit natural resources. While houses can and are privately owned as are the crops of private plots of land, the land itself is nominally owned by the collective or the state. As noted above, practice is at some variance with the Constitution. Contracts that violate the law, state policies, plans, or state or public interest are deemed void *ab initio*. Businesses resident in China, but not properly registered and licensed, may not enter into contracts and cannot enter into agreements beyond the scope of the license or

2▶

▶General Principles of Civil Law.

3▶

▶Art. 44.

4▶

▶Code of Civil Procedure Art. 49.

1▶

▶Arts. 9, 10.

2▶

▶Art. 81.

authority. Patently unfair contracts and those entered into by persons seriously misunderstanding the context of their acts can be set aside.³

10:24. Effectiveness of contracts

▶ The contract established according to law becomes effective when it is established. With regard to contracts which are subject to approval or registration as provided for by the laws or administrative regulations, the provisions thereof shall be followed.¹ A contract shall be null and void under any of the following circumstances:

▶ (1) a contract is concluded through the use of fraud or coercion by one party to damage the interests of the State;

▶ (2) malicious collusion is conducted to damage the interests of the State, a collective, or a third party;

▶ (3) an illegitimate purpose is concealed under the guise of legitimate acts;

▶ (4) damaging the public interests;

▶ (5) violating the compulsory provisions of the laws and administrative regulations.²

▶ A party shall have the right to request the court or an arbitration institution to modify or revoke the following contracts: (1) those concluded as a result of serious misunderstanding and (2) those that are obviously unfair at the time when concluding the contract. If a contract is concluded by one party against the other party's true intentions through the use of fraud, coercion, or exploitation of the other party's unfavorable position it can be set aside. The injured party shall have the right to request the court or an arbitration institution to modify or revoke it.³ A contract that is null and void or revoked shall have no legally binding force ever from the very beginning. If part of a contract is null and void without affecting the validity of the other parts, the other parts shall still be valid.⁴

10:25. Forms of contract

▶ The parties may conclude a contract in written, oral or other forms. Where the laws or administrative regulations require a contract to be concluded in written form, the contract shall be in written form. If the parties agree to do so, the contract shall be concluded in written form.¹

3▶

▶▶ General Principles of Civil Law.

1▶

▶▶ Contract Law, Art. 44.

2▶

▶▶ Contract Law, Art. 52.

3▶

▶▶ Contract Law, Art. 54.

4▶

▶▶ Contract Law, Art. 56.

1▶

▶▶ Contract Law, Art. 10.

Written forms mean the forms which can show the described contents visibly, such as a written contractual agreement, letters, and data-telex (including telegram, telex, fax, EDI, and e-mails).² Where the parties conclude a contract in written form, the contract is established when both parties sign or affix a seal to it.³ Where the parties conclude the contract in the form of a letter or data-telex etc., one party may request to sign a letter of confirmation before the conclusion of the contract. The contract shall be established at the time when the letter of confirmation is signed.⁴ The standard terms shall be null and void when the party which supplies the standard terms exempts itself from its liabilities and heavily weights the liabilities of the other party, excluding the rights of the other party.⁵ In addition, with regard to realty, the relevant real estate registration office must process the contract and register the transaction for the purpose of making said transaction binding.

10:26. Performance

▶The parties shall perform their obligations thoroughly according to the terms of the contract.¹ If both parties have obligations toward each other and there is no order of priority in respect of the performance of obligation, the parties shall perform the obligations simultaneously. One party has the right reject the other party's request for performance if the other party's performance was not timely or of course failed to meet contractual requirements. One party has the right to reject the other party's corresponding request for performance if the other party's performance does not meet the terms of the contract.² One party, which shall render its performance first, may suspend its performance, if it has conclusive evidence that the other party is under any of the following disabilities: (1) its business conditions are seriously deteriorating; (2) it moves away its property and takes out its capital secretly to evade its debts; (3) it loses its commercial credibility; or (4) other circumstances showing that it loses or will possibly lose its capacity for credit.³

2▶

▶▶Contract Law, Art. 11.

3▶

▶▶Contract Law, Art. 32.

4▶

▶▶Contract Law, Art. 33.

5▶

▶▶Contract Law, Art. 40.

1▶

▶▶Contract Law, Art. 60.

2▶

▶▶Contract Law, Art. 66.

3▶

▶▶Contract Law, Art. 68.

10:27. Breach, termination, discharges, damages

► Damages occur when one party to a contract fails to perform its contractual obligations or its performance fails to satisfy the terms of the contract, or to take remedial measures, or to compensate for losses.¹ Where one party to a contract fails to perform the contract obligations or its performance fails to satisfy the terms of the contract, the other party shall, after performing its obligations or taking remedial measures, compensate the other party, if the other party suffers losses from said breach.² The parties to a contract may agree that one party shall, when violating the contract, pay breach of contract damages of specific amount in light of the breach, or may agree upon the method of calculation to compensate for losses resulting from the breach of contract.³ The parties to a contract may agree that one party pays a deposit to the other party as the guaranty for the creditor's rights. After the debt obligations are performed by the obligor, the deposit shall be returned or offset against the price. If the party that pays the deposit fails to perform its agreed debt obligations, it shall have no right to reclaim the deposit. If the party that receives the deposit fails to perform its agreed debt obligations, it shall return twice the amount of the deposit.⁴ Where the parties to a contract agree on both breach of contract damages and a deposit, when one party violates the contract, the other party may choose to apply the breach of contract damages clause or the deposit clause.⁵

► A contract may be rescinded if the parties to the contract reach a consensus through consultation. The parties to a contract may agree upon the conditions to rescind the contract by one party. When such conditions are accomplished, the party entitled to rescind the contract may rescind it.⁶ The parties to a contract may rescind the contract under any of the following circumstances:

- (1) the purpose of the contract is not able to be realized because of force majeure;
- (2) one party to the contract expresses explicitly or indicates through its acts, before the expiry of the performance period, that it will not perform the principal debt obligations;
- (3) one party to the contract delays in performing the principal debt obligations and

1 ►

►► Contract Law, Art. 107.

2 ►

►► Contract Law, Art. 112.

3 ►

►► Contract Law, Art. 114.

4 ►

►► Contract Law, Art. 115.

5 ►

►► Contract Law, Art. 116.

6 ►

►► Contract Law, Art. 93.

fails, after being urged, to perform them within a reasonable time period;

▶(4) one party to the contract delays in performing the debt obligations or commits other acts in breach of the contract so that the purpose of the contract is not able to be realized; or

▶(5) other circumstances as stipulated by law.⁷

▶If a contract has not yet been performed, its performance shall be terminated after the rescission. If it has been performed, a party to the contract may, in light of the performance and the character of the contract, request that the original status be restored or other remedial measures be taken.⁸ Where the parties to a contract have debts due mutually and the category and character of the debts are the same, any party may offset his debt against the other's, except where the debts may not be offset according to the provisions of the laws or to the character of the contract.⁹

10:28. Categories of contracts-- Contracts for sales

▶A sales contract is a contract whereby the seller transfers the ownership of an object to the buyer, and the buyer pays the price for it.¹

10:29. Categories of contracts-- Contracts for supply and use of electricity, water, gas or heating

▶A contract for supply and use of electricity refers to a contract whereby the supplier of electricity supplies electricity to the user of electricity, and the user pays the electric fee.¹

10:30. Categories of contracts-- Contracts for donation

▶A donation contract refers to a contract whereby the donator presents gratis its property to the donee, and the donee expresses its acceptance of the donation.¹

10:31. Categories of contracts-- Contracts for loans

▶A loan contract refers to a contract whereby the borrower raises a loan from the lender

7▶

▶▶Contract Law, Art. 94.

8▶

▶▶Contract Law, Art. 97.

9▶

▶▶Contract Law, Art. 99.

1▶

▶▶Contract Law, Art. 130.

1▶

▶▶Contract Law, Art. 176.

1▶

▶▶Contract Law, Art. 185.

and repays the loan with interest thereof, when it becomes due.¹

10:32. Categories of contracts-- Contracts for lease

▶ A lease contract refers to a contract whereby the lessor delivers leased property to the lessee for the latter's use or ability to obtain proceeds through the use, and the lessee pays the rent.¹

10:33. Categories of contracts-- Contracts for financial lease

▶ A financial lease contract refers to a contract whereby the lessor buys the leased property from the seller, based on the lessee's choice of the seller and the leased property and supplies it to the lessee for the lessee's use, and the lessee pays the rent.¹

10:34. Categories of contracts-- Contracts for work

▶ A work contract refers to a contract whereby the contractor shall, in light of the requirements of the ordering party, complete the work specified and deliver the results therefrom, and the ordering party pays the remuneration therefore. Work includes processing, ordering, repairing, duplicating, testing, inspecting etc.¹

10:35. Categories of contracts-- Contracts for construction projects

▶ A construction project contract refers to a contract whereby the contractor undertakes the construction of the project and the contract letting party pays the cost and remuneration.¹

10:36. Categories of contracts-- Contracts for transportation

▶ A transportation contract refers to a contract whereby the carrier carries passengers or goods from the starting place of carriage to the agreed destination, and the passenger, the shipper, or the consignee pays for the ticket-fare or freight.¹

10:37. Categories of contracts-- Contracts for technology

▶ A technology contract refers to a contract that the parties conclude for purpose of

1 ▶

▶▶ Contract Law, Art. 196.

1 ▶

▶▶ Contract Law, Art. 212.

1 ▶

▶▶ Contract Law, Art. 237.

1 ▶

▶▶ Contract Law, Art. 251.

1 ▶

▶▶ Contract Law, Art. 269.

1 ▶

▶▶ Contract Law, Art. 288.

establishing rights and obligations of the parties regarding technology development, technology transfer, technical consultancy, and technical services.¹

10:38. Categories of contracts-- Contracts for storage

▶ A storage contract refers to a contract whereby the safekeeping party keeps in store the article handed over by the storing party and returns the said article,¹ and the storing party pays fee for storage.

10:39. Categories of contracts-- Contracts for warehousing

▶ A warehouse contract refers to a contract whereby the safekeeping party keeps in store the goods handed over by the storing party, while the storing party pays the warehousing fee.¹

10:40. Categories of contracts-- Contracts for commission

▶ A commission contract refers to a contract whereby the principal and the agent agree that the agent shall handle the matters of the principal for a specified fee.¹

10:41. Categories of contracts-- Contracts for brokerage

▶ A brokerage contract refers to a contract whereby the broker is, in his/her own name, engaged in trade activities for the benefit of the principal, and the principal pays the remuneration to the broker.¹

10:42. Categories of contracts-- Contracts for intermediation

▶ An intermediation contract refers to a contract where by the intermediary reports to the principal the opportunity for concluding a contract or provides intermediate service for concluding a contract, and the principal pays remuneration for said services.¹

10:43. Categories of contracts-- Labor contracts

▶ A labor contract is governed by a newly adopted law, Labor Contract Law, adopted on June 29, 2007, effective January 1, 2008. Pursuant to this law, employment relationship is

1▶

▶▶ Contract Law, Art. 322.

1▶

▶▶ Contract Law, Art. 365.

1▶

▶▶ Contract Law, Art. 381.

1▶

▶▶ Contract Law, Art. 396.

1▶

▶▶ Contract Law, Art. 414.

1▶

▶▶ Contract Law, Art. 424.

established on the date on which the employer starts using the employee.¹ To establish an employment relationship, a written contract shall be concluded. If no written contract was concluded at the time of establishing employment relationship, a written contract shall be concluded within one month after the date on which the employer starts using the employee. If employment contract was concluded before the employer starts using the employee, employment relationship is established on the date on which the employer starts using the employee.²

▶ If the employer fails to conclude a written employment contract with the employee within 1 year from the date on which it starts using the employee, an open-ended employment contract shall be deemed to have been concluded between the employer and the employee.³ An Open-ended Employment Contract is an employment contract in which no definite ending date is stipulated.⁴

▶ Employer may terminate contract without prior notice if the employee is in any of the following situations:

▶ (1) not meeting employment conditions during the probation period;

▶ (2) material breach of the employer's rules and regulations;

▶ (3) serious dereliction of duty or practices graft, causing substantial damage to the employer;

▶ (4) having additional employment relationship with another the employer which materially affects the completion of his tasks with the first-mentioned the employer, or refusing to rectify the matter after the same is brought to his attention by the employer;

▶ (5) causing the contract invalid due to the circumstance specified in item (1) of the first paragraph of Article 26; or

▶ (6) bearing criminal liability.⁵

▶ The employer may terminate contract by giving the employee 30 days' prior written notice, or one month's wage in lieu of notice in any of the following situations: (1) worker's inability to work due to sickness or nonindustrial injuries after medical treatment has expired; (2) worker's continued incompetence to work despite training or reallocation of job; (3) performance of contract is impossible due to great changes in objective conditions under which contract was made, and parties could not reach agreement to modify terms.⁶

1▶

▶ Art. 7.

2▶

▶ Art. 10.

3▶

▶ Art. 14.

4▶

▶ Art. 14.

5▶

▶ Art. 39.

6▶

- ▶ It is illegal for the employer to dismiss the employee in any of the following situations:
 - ▶ (1) employees engaging in operations exposed to occupational disease hazards have not had pre-departure occupational health check-up, or during diagnosis or medical observation period in case of suspicion of having occupational disease;
 - ▶ (2) employee's incapability of work due to occupational disease or industrial accidents;
 - ▶ (3) during recovery period for sickness or nonindustrial injury;
 - ▶ (4) women employee during pregnancy, childbirth or breast-feeding period;
 - ▶ (5) having been working for the employer continuously for not less than 15 years and is less than 5 years away from legal retirement age;
 - ▶ (6) other circumstances stipulated in laws or administrative statutes.⁷

▶ If the employer terminates or ends the contract in violation of this Law and the employee demands continued performance of such contract, the employer shall continue performing the same. If the employee does not demand continued performance of the contract or if continued performance of the contract has become impossible, the employer shall pay damages.⁸

▶ The employee may terminate the contract upon 30 days' prior written notice to his employer, or upon three days' prior notice during the probation period.⁹ The employee may terminate contract if the employer is in any of the following situations:

- ▶ (1) failure to provide labor protection or working conditions specified in the contract;
- ▶ (2) failure to pay labor compensation in full and on time;
- ▶ (3) failure to pay social insurance premiums for the employee in accordance with the law;
- ▶ (4) having rules and regulations in violation of laws or regulations, and thereby harming the employee' rights and interests;
- ▶ (5) causing contracts invalid due to circumstances specified in the first paragraph of Article 26;
- ▶ (6) other circumstances in which laws or administrative statutes permit the employee to terminate contract.¹⁰

▶ In case the employer uses violence, threats or unlawful restriction of personal freedom to compel the employee to work, or if the employee is instructed in violation of rules and regulations or peremptorily ordered by the employer to perform dangerous operations which

▶ Art. 40.

7▶

▶ Art. 42.

8▶

▶ Art. 48.

9▶

▶ Art. 36.

10▶

▶ Art. 38.

threaten the employee' personal safety, the employee may terminate contract forthwith without giving prior notice to the employer.¹¹

▶ In any of the following circumstances, the employer shall pay the employee severance pay:

- ▶ (1) termination of contract by the employer pursuant to Article 38;
- ▶ (2) termination of contract proposed by the employer pursuant to Article 36 and the parties reached agreement for such termination;
- ▶ (3) termination of contract by the employer pursuant to Article 40;
- ▶ (4) termination of contract by the employer pursuant to the paragraph one of Article 41;
- ▶ (5) fixed--term contracts end pursuant to item (1) of Article 44, unless the employee do not agree to renew the contract even the employer offers same or better conditions than those stipulated in the current contract;
- ▶ (6) contracts end pursuant to item (4) or (5) of Article 44;
- ▶ (7) other circumstances specified in laws or administrative statutes.¹²

▶ If the employer terminates or ends contract in violation of this Law, it shall pay damages to the employee at twice the rate of the severance pay.¹³

10:44. Element of fraud in contracts

▶ The Contract Law provides that contracts executed by means of fraud or coercion are voidable. The term fraud is composed of the intent to defraud, false statements or deceptive acts, and concealment of the actual facts. The General Principles of Civil Law provide that civil acts, including entering into contracts by fraudulent inducement or coercion are null and void.¹

VI. Agency and Representation

10:45. Contracts of commercial representation

▶ There are various forms of representation in commercial transactions, including the power of attorney, commercial agency, etc. In numerous international transactions, corporations are licensed to transact international business act on behalf of other Chinese organizations to purchase or sell goods or services. These organizations, including foreign trade corporations, act as agents. The General Principles of Civil Law provides that an agent shall perform civil acts on behalf of its principal within the scope of its agency, and the principal is liable at civil law for such acts.¹

11 ▶

▶ Art. 38.

12 ▶

▶ Art. 46.

13 ▶

▶ Art. 87.

1 ▶

▶ Arts. 8.2.

1 ▶

10:46. Power of attorney

▶ In addition to the legal recognition of agency relationships in commercial transactions, agents are used in litigation. The Civil Procedure Law¹ gives parties the right to retain a legal representative. The court can also appoint a legal representative for persons lacking legal capacity. Close relations of the parties, attorneys, social organizations, persons recommended by the unit of a party and with the consent of the court, other citizens, can all be entrusted as legal representatives for purposes of litigation. The Civil Procedure Law² provides that foreign nationals and enterprises enjoy the same rights and obligations in civil litigations as Chinese citizens. When employing an attorney to represent them in court, the foreign national must employ an attorney admitted to practice before the Chinese courts, but can employ an agent for litigation, pursuant to a power of attorney, who is not admitted to practice in China.

▶ Powers of attorney granted either to an attorney or a Chinese or foreign citizen from foreigners residing outside China, in addition to being notarized, must have the attestation of the Chinese embassy or consulate in the foreign locality.

▶ Representation in court by counsel or other Chinese or foreign citizens requires a written power of attorney containing the signature or seal of the individual entrusted with said authority. The document granting power of attorney must specify the matter to which it is applicable, its scope, and the time limit of said power of attorney.³ Specific authority of one's client is necessary in order for a person having power of attorney to admit, abandon, conciliate, counterclaim, appeal, or alter the objectives of the litigation.

▶ A power of attorney to represent Chinese citizens living abroad must contain the attestation of the Chinese consulate or embassy in that locality or, if there is none, the attestation of a patriotic overseas Chinese organization.

▶ The parties are required to inform the court in writing of alterations or termination of a power of attorney and through the court inform the other parties.

▶ In cases such as divorce, the individual concerned, in absence of special circumstances and despite having provided someone with power of attorney, must in appear in court.⁴ If a party is overseas, an appearance in court may not be required.

10:47. Differences between commercial agency and power of attorney

▶ As noted above, there is a difference between the power of attorney to act in either litigation or other matters and a contract of commercial representation. In the former case,

▶ Art. 63.

1▶

▶ Arts. 57, 58, 59.

2▶

▶ Art. 5.

3▶

▶▶ Civil Procedure Law, Art. 59.

4▶

▶▶ Civil Procedure Law, Art. 62.

particularly with reference to litigation, there are certain persons, including relatives, who can act on behalf of a party within the scope of the specific power of attorney. The contract of commercial representation between domestic Chinese organizations or foreign and domestic Chinese organizations can only be entered into with those Chinese organizations licensed to conclude international business transactions and only within the scope of said Chinese organizations' authority.

10:48. Statutory agents

▶ In addition to the two types of agency relationships noted above, there are agents provided for by law. For example, under the Trademark Law effective March 1, 1983, and amended on February 2, 1993, foreign nationals or enterprises are required to entrust intermediary organizations designated by the state to handle their trademark application. Parents are statutory agents of their children, and unions may, pursuant to the Trade Union Law, represent its members in negotiations and in executing collective bargaining agreements.

▶ The General Principles of Civil Law differentiate between (1) an entrusted agent who exercises power as authorized by his principal; (2) an agent appointed by a court who exercises authority as designated by such court; and (3) a statutory agent, who exercises power as prescribed in law.¹

10:49. Termination of agency

▶ Agency can ordinarily be terminated by the unilateral act of a principal on notice to the agent. An attorney, however, may require consent of his client or the court, under certain circumstances, in order to be released from his legal responsibility on behalf of his client or the court.

▶ When the acts of the agent, within the scope of the agency agreement, have been fulfilled, the agency relationship automatically terminates. Similarly a statutory agent's authority may be terminated by change of status, for example, by a minor reaching his majority etc. Clearly, death or loss of capacity of the agent would ordinarily terminate the principal-agent relationship.

▶ Entrusted agency terminates, when the period of agency expires, when the tasks entrusted are completed, or when the principal rescinds the entrustment, the agent dies, or the principal loses his capacity for civil conduct. A statutory or appointed agency ends when either the principal or agent dies or the principal loses his capacity for civil conduct, or when the court rescinds the agency.

10:50. Limits of liability of principal for acts of agents

▶ Since the law provides that agreements entered into by agents in excess of their authority or without authority are void, the principal who does not expressly or impliedly assent to the wrongful acts of an agent, has no liability to third parties.

VII. Assignments

10:51. Assignments of contracts and rights thereunder

▶ An assignment of a property right is normally effected in writing. If the assignment is of

¹▶

▶ Art. 64.

private realty, registration procedures must be complied with. Similarly, assignment of the assets of one business, normally requires amendment of the business license of the parties.

▶The obligee may assign, wholly or in part, its rights under a contract to a third party, except in the following circumstances: (1) the rights under the contract may not be assigned according to the character of the contract; (2) the rights under the contract may not be assigned according to the agreement between the parties; and (3) the rights under the contract may not be assigned according to the provisions of the law.¹

▶One party to a contract may assign its rights and obligations under the contract together to a third party with the consent of the other party.² Where the laws or administrative regulations stipulate that the assignment of rights or transfer of obligations shall go through approval or registration procedures, such provisions shall be followed.³ For instance, assignment of real property or shares requires registration procedures.

10:52. Assignments of debts

▶Assignment of debts is not a common practice in China. If the obligor assigns its obligations, wholly or in part, to a third party, it shall obtain consent from the obligee first.¹

VIII. Bills of Exchange, Promissory Notes and Checks

10:53. In general

▶There are numerous currency regulations, particularly concerned with foreign exchange. However, as of yet China has not promulgated comprehensive legislation relative to bills of exchange or promissory notes.

▶Bills of exchange and promissory notes were not used in China until 1980s when checks began to be recognized and used widely. In 1980s, bills of exchange and promissory notes, together with checks, began to appear in some regulations concerning clearing forms in banks. Clearing Forms in Bank, regulation law promulgated by People's Bank of China in Dec. 1988, says bills of exchange, promissory notes and checks can all be used as clearing forms. From then on, they became important Instruments of payment and credit. In China, bills of exchange, promissory notes, and checks are generally referred to as negotiable instruments. Idea of making general rule on negotiable instruments was proposed by State Council, and People's Bank of China started process in 1986. The Negotiable Instruments Law of the PRC, adopted by 13th Session of Standing Committee of the National People's Congress on May 10, 1995, was revised on Aug. 28, 2004.

1▶

▶▶Contract Law, Art. 79.

2▶

▶▶Contract Law, Art. 88.

3▶

▶▶Contract Law, Art. 87.

1▶

▶▶Contract Law, Art. 84.

▶The Negotiable Instruments Law is applicable to bills of exchange, promissory notes and checks.¹ Drawer should have his signature or seal on negotiable instrument in legal way and bear liability of payment.² Agent may, within scope of power of agency, have its signature or seal in place of its principal, but agency relationship must be indicated on negotiable instrument.³ Signature or seal by person having no or limited capacity for civil conduct is ineffective, but it does not lead to ineffectiveness of rest of signatures or seals on negotiable instrument.⁴ Corresponding consideration is required in exchange for negotiable instrument, except if negotiable instrument was acquired by tax, inheritance or gift, which makes consideration unnecessary.⁵ Any counterargument of debtor of negotiable instrument against drawer or holder's predecessor cannot be applied as evidence against holder unless holder clearly knows about it.⁶ The loser of a negotiable instrument has right to inform payer of losing negotiable instrument and prevent payment from paying to anyone else, and loser can also apply for procedure of presentment and information or bringing suit in court.⁷ The holder's right to a negotiable instrument will not be protected if holder does not exercise its rights within statutory term: term for drawer's and acceptor's right to negotiable instrument is two years from due date; term for bill of exchange or promissory note payable at sight is two years from date of issue; term for right of drawer of check is six months from date of issue; term for recourse to predecessor is six months from day when payment was refused; and term for second recourse to predecessor is three months from day of payment or day when case was brought in court.⁸

▶The Enforcement Regulations on Management of Negotiable Instrument (hereinafter "Regulation") was approved by State Council of P.R.C. on June 23, 1997 and issued by People's

1▶

▶Art. 2.

2▶

▶Art. 4.

3▶

▶Art. 5.

4▶

▶Art. 6.

5▶

▶Arts. 10, 11.

6▶

▶Art. 13.

7▶

▶Art. 15.

8▶

▶Art. 17.

Bank of China (“PBOC”) on Aug. 21st; Regulations are effective as of Oct. 1, 1997.

▶ **Authority:** Regulations are promulgated according to Negotiable Instruments Law⁹ and apply to management of negotiable instruments within China.¹⁰ PBOC is responsible for management of negotiable instruments;¹¹ parties concerned shall use unified forms of negotiable instruments which stipulated by PBOC.¹²

▶ **Drawer:** Drawer of banker's draft shall be bank which has been approved to engage in bank's draft business by PBOC;¹³ drawer of banker's promissory note shall be bank which has been approved to do bank's promissory business by PBOC;¹⁴ drawer of commercial draft shall be enterprise or other organization except bank.¹⁵ Drawers of check shall be enterprises, other organizations and individuals who have opened check deposit accounts in banks, cities trust cooperation companies and countryside trust cooperation companies which have been approved to do check deposit business by PBOC.¹⁶

▶ **Warrantor:** “Warrantor” specified in Negotiable Instrument Law means legal persons, other organizations or individuals which are capable of reimbursing guaranteed debts. Unless there are different regulations in laws, State institutions, undertaking institution units for public interest, social organizations, branches of legal persons and functional departments cannot act as warrantor.¹⁷

▶ **Signature:** if signature of drawer on negotiable instrument does not meet requirements

9▶

▶ Art. 1.

10▶

▶ Art. 2.

11▶

▶ Art. 3.

12▶

▶ Art. 5.

13▶

▶ Art. 6.

14▶

▶ Art. 7.

15▶

▶ Art. 8.

16▶

▶ Art. 11.

17▶

▶ Art. 12.

specified in Negotiable Instruments Law and these Regulations, negotiable instrument is invalid. If signature of endorser, acceptor or warrantor does not meet said requirements, signature is invalid, but does not affect validity of other signature on negotiable instrument.¹⁸ Warrantor shall record warranty matter in negotiable instrument and its attachment.¹⁹ No enterprise or individual can freeze capital of negotiable instrument which has been endorsed legally.²⁰

▶ **Others:** Regulations also define some concept in Negotiable Instrument Law²¹ and stipulate penalties for violation of regulations and provisions to invalidate certain activities.²²

▶ **Issue of Bills of Exchange:** Bills of exchange can be divided into bank drafts and commercial drafts.²³ There should be real relationship of entrustment of payment between drawer and payer, and drawer should have reliable capital sources.²⁴ Bills of exchange without consideration, intended to cheat banks or other persons concerned, not allowed to be issued.²⁵ Following items must be recorded on bill of exchange: words “bill of exchange” or the like, entrustment of payment without any conditions, fixed amount of money, name of payer, name of payee, date of issue, and signature or seal of drawer.²⁶ In terms of date of payment, bill of exchange may be payable at sight, on specific date, after sight, or after fixed date.²⁷

18 ▶

▶ Art. 17.

19 ▶

▶ Art. 23.

20 ▶

▶ Art. 24.

21 ▶

▶ Arts. 25-29.

22 ▶

▶ Arts. 30-35.

23 ▶

▶ Art. 19.

24 ▶

▶ Art. 21.

25 ▶

▶ Art. 21.

26 ▶

▶ Art. 22.

27 ▶

▶ Art. 25.

► **Issue of Promissory Note:** Promissory note refers to cashier's check.²⁸ Drawer should have reliable capital sources to ensure payment.²⁹ Following items must be recorded on promissory note: words “promissory note” or the like, promise of payment without any conditions, fixed amount of money, name of payee, date of issue, and signature or seal of drawer.³⁰

► **Issue of Check:** Drawer of check should open checking account and deposit certain amount of money into that account.³¹ Checks can be used to obtain cash or transfer funds between accounts.³² Following items must be recorded on check: word “check” or the like, entrustment of payment without any conditions, fixed amount of money, name of payer, date of issue, and signature or seal of drawer.³³ Amount of money drawn on check cannot be more than monetary total in checking account.³⁴

► **Endorsement:** Negotiable instrument is transferable unless drawer clearly states that it is not.³⁵ Holder's endorsement is required for transferring negotiable instrument.³⁶ Endorsement must include signatures or seals of endorser and endorsee, and date of endorsement.³⁷ Every successor of negotiable instrument should make sure that contents of its direct predecessor's

28 ►

► Art. 73.

29 ►

► Art. 74.

30 ►

► Art. 76.

31 ►

► Art. 83.

32 ►

► Art. 84.

33 ►

► Art. 85.

34 ►

► Art. 88.

35 ►

► Art. 27.

36 ►

► Art. 27.

37 ►

► Arts. 27, 29.

endorsement are true.³⁸ Endorsement with any kind of condition is ineffective, and endorsement by which money is only partially transferred or money is transferred to two or more persons is also ineffective.³⁹ Negotiable instrument can also be used as mortgage, which must be recorded on it.⁴⁰ If negotiable instrument is dishonored or term for presentment expires, it can no longer be transferred.⁴¹

▶ **Acceptance:** Provisions on acceptance apply only to bills of exchange.⁴² Holder of bill of exchange payable on or after fixed date should present bill of exchange to payer and ask for payment before date.⁴³ Holder of bill of exchange payable after sight should present it to payer and ask for payment one month after date of issue.⁴⁴ Holder of bill of exchange payable at sight is exempt from requirement of presentment.⁴⁵ Payer should agree or refuse to accept bill of exchange presented to it within three days after presentment.⁴⁶ Acceptance must not be attached with any conditions, or else it is considered refusal of bill of exchange.⁴⁷

▶ **Warranty:** Provisions on warranty apply only to bills of exchange and promissory notes.⁴⁸ Liability of bills and notes can be warranted by anyone except debtor of bill or note.⁴⁹

38 ▶

▶ Art. 32.

39 ▶

▶ Art. 33.

40 ▶

▶ Art. 35.

41 ▶

▶ Art. 36.

42 ▶

▶ Arts. 38, 81, 94.

43 ▶

▶ Art. 39.

44 ▶

▶ Art. 40.

45 ▶

▶ Art. 40.

46 ▶

▶ Art. 41.

47 ▶

▶ Art. 43.

48 ▶

Following items must be recorded on bill or note: words like “bill of exchange” or “promissory note”, name and domicile of warrantor, name of warrantee, date of warranty, and signature or seal of warrantor.⁵⁰ Warranty cannot be attached with any conditions, and any condition attached to warranty will not affect liability of warranty.⁵¹ Warrantor and warrantee share joint and several liability to holder of bill or note.⁵² After discharging debt, warrantor has recourse to warrantee and its predecessors.

► **Payment:** Holder of bill of exchange at sight should present bill of exchange to payer and ask for payment within one month, and holder of other bills of exchange should make presentment within ten days after due date.⁵³ Payer must pay fully on day of holder's presentment.⁵⁴ Drawer of promissory note must pay holder, not more than two months after date holder presents promissory note.⁵⁵ Holder of promissory note will be deprived of recourse to all predecessors except drawer if it does not present promissory note according to this law.⁵⁶ Check is payable at sight and any payment date included is ineffective.⁵⁷ Holder of check should present check to payer and ask for payment within ten days from date of issue.⁵⁸ After payment,

► Arts. 45, 81.

49 ►

► Art. 45.

50 ►

► Art. 46.

51 ►

► Art. 48.

52 ►

► Art. 50.

53 ►

► Art. 53.

54 ►

► Art. 54.

55 ►

► Art. 78.

56 ►

► Art. 80.

57 ►

► Art. 91.

58 ►

► Art. 92.

negotiable instrument should go to payer.⁵⁹ Before payment, payer should examine endorsement, holder's legal identification or other effective certificates.⁶⁰ After payment, all liabilities of negotiable instrument are canceled.⁶¹

▶ **Recourse:** If past due negotiable instrument is dishonored, holder can have recourse against endorser, drawer, and other debtors of negotiable instrument.⁶² Holder should provide protest or other documents verifying protest.⁶³ If holder is not able to provide protest or other legal documents when it is refused payment, it will lose recourse to its predecessors, but acceptor and drawer will still bear liability of negotiable instrument.⁶⁴ Holder should inform its predecessor of reasons for being refused within three days after protest, and holder's predecessor has same obligations to own predecessor.⁶⁵ Drawer, endorser, acceptor and warrantor bear joint and several liability to holder.⁶⁶ However, if holder is also drawer, it has no recourse to predecessors; and if holder is also endorser, it has no recourse to successors.⁶⁷ Holder can require monetary total refused by payer, and interests and expenses spent on obtaining protest and on informing.⁶⁸

59 ▶

▶ Art. 55.

60 ▶

▶ Art. 57.

61 ▶

▶ Art. 60.

62 ▶

▶ Art. 61.

63 ▶

▶ Art. 62.

64 ▶

▶ Art. 65.

65 ▶

▶ Art. 66.

66 ▶

▶ Art. 68.

67 ▶

▶ Art. 69.

68 ▶

▶ Art. 70.

▶ Negotiable instrument involving foreign elements refers to negotiable instrument where some of elements--issue, endorsement, acceptance, warranty and payment--take place in China and some in foreign country.⁶⁹ Where there are conflicted between this law and treaties which China has concluded or acceded to, provisions of treaty will prevail, unless reservations to treaty have been made.⁷⁰ If there are no provisions in either this law or treaties to which China is party, then customary international practice will be applicable.⁷¹ Civil capacity of debtor of negotiable instrument is subject to its country's law.⁷² Required items recorded on negotiable instrument are subject to law of country where it is issued, and required items recorded on check may be subject to law of country where payment takes place if parties agree. Endorsement, acceptance, payment, and warranty of negotiable instrument are subject to law of country where they take place.⁷³ Term for recourse is subject to law of country where negotiable instrument is issue.⁷⁴ Term for presentment, form of protest, and term for providing protest are subject to law of country where payment takes place.⁷⁵ When negotiable instrument is lost, application for preservation of negotiable instrument right is subject to law of country where payment takes place.⁷⁶

▶ **Legal Liability:** Person who breaches law may be administratively or criminally liable.⁷⁷

▶ **Supplementary Provisions:** Terms in this law should be calculated according to

⁶⁹ ▶

▶ Art. 95.

⁷⁰ ▶

▶ Art. 96.

⁷¹ ▶

▶ Art. 96.

⁷² ▶

▶ Art. 97.

⁷³ ▶

▶ Art. 99.

⁷⁴ ▶

▶ Art. 100.

⁷⁵ ▶

▶ Art. 101.

⁷⁶ ▶

▶ Art. 102.

⁷⁷ ▶

▶ Arts. 14, 103-107.

provisions in General Rules of Civil Law.⁷⁸ People's Bank of China will provide unified forms, printing procedures, and management procedures of negotiable instruments.⁷⁹ Rules for the Implementation of the Negotiable Instruments Law will be made by People's Bank of China and approved by State Council.⁸⁰

10:54. Checks: formal requirements

▶ There are also various local regulations and temporary regulations that cover these intangible documents. For example, in Shanghai a check must be presented for collection three days from the date of said check, while in Guangzhou and Beijing a 30-day limit for presentation is normal. Checks are unconditional orders to pay a certain sum of money from the drawer's account. Checks can be made to order, bearer, or cash, and can be written, in most localities, at the Bank of China, in either English or Chinese. The Bank of China handles accounts on behalf of foreign entities and persons.

10:55. Special promissory notes: bonds; etc.

▶ The Chinese government sells various types of securities and notes such as treasury bonds¹ which pay interest. The principal is returned after a period of time specified in the bond.

▶ Regulations for the Handling of Enterprise Bonds was promulgated in 1993 specifying the required contents of the bonds, the necessity for obtaining approval from the central bank (People's Bank) to issue said bonds, and the limits on the value that can be placed on the bonds relative to its assets. There are limits on interest, the value of which cannot be higher than 40% above the fixed deposit note for individuals over the same period of time. Certain localities have issued regulations on equity securities which have stock exchanges such as Shanghai and Shenzhen.

▶ Utility shares are sold in certain locations to raise funds, as in Shandong province and Yantai prefecture, but municipal or provincial bonds are a variety.

▶ Various investment trust corporations in China are authorized to issue different types of notes, make loans, and issue securities or bonds to raise capital, some of which is undertaken in overseas markets.

10:56. Securities markets

▶ A major step taken in China's effort to develop its securities market was the promulgation of the Securities Law, and effective in July the announcement of several central regulations governing securities exchanges by central departments and a fairly complete set of

⁷⁸ ▶

▶ Art. 108.

⁷⁹ ▶

▶ Art. 109.

⁸⁰ ▶

▶ Art. 110.

¹ ▶

▶ Regulations on 1992 Treasury Bonds, March 18, 1992.

local regulations regarding the securities exchanges in Shanghai and Shenzhen.

10:57. Securities markets-- Regulations on securities prior to the newer Securities Law

▶ First, the Interim Regulations of Stock Issuance and Exchange Administration (hereinafter “Interim Regulations”) was enacted by the State Council, on April 22, 1993, and covers major areas of stock issuance and exchange. Second, the Interim Provisions of the Securities Exchange Administration promulgated by the Securities Commission of the State Council on July 7, 1993, set forth functions, organization, creation, dissolution, and supervision over securities trading. Third, the Implementing Rules Concerning Information Disclosure of Corporation Issuing Stock to Public (hereinafter “Rules”) (for trial implementation) was promulgated by Central Securities Supervision Commission June 10, 1993.

▶ A stock issuer must be a share limited company, (hereinafter “SLC”) including existing SLCs and approved prospective SLCs qualified to issue stocks to the general public.¹ A prospective SLC intending to raise capital through stock issuance should satisfy the following requirements:

▶ (1) initiators shall subscribe to 35% or above of total shares to be issued, with an amount not less than RMB 30,000,000, unless otherwise provided by the state;

▶ (2) only one class of common stock will be issued, in which equal shares shall enjoy equal rights;

▶ (3) the proportion to be issued to the general public shall be twenty-five percent or more of the total shares, among which the staff of the SLC may subscribe ten percent or less; the Central Securities Supervision Commission may reduce the proportion to be issued to general public if the total shares to be issued exceed RMB 400,000,000. However, the proportion of public shares shall cover at least ten percent of total shares;

▶ (4) there have been no major violations of law by the SLC in the preceding consecutive three years; and

▶ (5) other requirements provided by the Central Securities Commission are satisfied.²

▶ An existing enterprise intending to raise capital through stock issuance to restructure an SLC should satisfy additional requirements apart from the above mentioned requirements: (1) net assets shall cover not less than 30% of total assets and intangible assets shall not exceed 20% of assets at end of the first year preceding the issuance; and (2) an existing enterprise must be profitable for the preceding consecutive three years.³ The proportion of state-owned shares shall be established by the State Council or authorized central departments where an existing state-owned enterprise intends to transform into a SLC.⁴ An SLC intending to issue stock to the

1▶

▶ Int. Regs., Art. 7.

2▶

▶ Int. Regs., Art. 8.

3▶

▶ Int. Regs., Art. 9.

4▶

▶ Int. Regs., Art. 9.

general public to increase capital shall satisfy the following further requirements in addition to those described above: (1) the utilization of capital raised through a preceding stock issuance conforms with the prospectus and produced good economic results; (2) a prior stock issuance shall be at least twelve months or earlier; (3) no major violations of law were made in a prior stock issuance by the applicants for re-issuance; and (4) other requirements provided by Central Securities Commission are satisfied.⁵ The SLC must retain an accounting firm, assets evaluation agency, and law firm to audit and evaluate its assets, credibility, and financial situation, and offer legal opinions regarding relevant issues.⁶ Application for stock issuance shall be subject to review by the Central Securities Supervision Commission for reexamination after preliminary approval by the government of provinces, centrally directed municipalities, autonomous regions, and centrally directed municipalities in economic affairs.⁷ Where the Central Securities Supervision Commission approves the application, the applicant shall file an application with the Listing Committee of the Security Exchange for final approval.⁸

▶ The SLC must file a prospectus with the controlling authorities in the form established by Central Securities Supervision Commission, containing:

- ▶ (1) the name and domicile of the SLC;
- ▶ (2) the initiators and their background;
- ▶ (3) the purpose of raising capital;
- ▶ (4) the existing total shares, classes and total shares of stock, face value and price of each share, net value represented by each share before and after stock issuance, distribution fees and commissions;
- ▶ (5) the subscription of initiators, structure of share holding and capital verification;
- ▶ (6) the name of distributor, means, and amount of distribution;
- ▶ (7) the target shareholders, time and place of issuance, means of subscription, and capital payment;
- ▶ (8) the plan for capital utilization and expected profits and risks;
- ▶ (9) the short-term development programs of the SLC and expected profits for the next year audited by a chartered accountant;
- ▶ (10) major contracts of the SLC;
- ▶ (11) major lawsuits against the SLC;
- ▶ (12) the production and business operations of the preceding consecutive three years or from creation of the SLC;
- ▶ (13) financial reports of the preceding consecutive three years or from creation of the

5▶

▶ Int. Regs., Art. 10.

6▶

▶ Int. Regs., Art. 12.

7▶

▶ Int. Reg., Art. 12.

8▶

▶ Int. Reg., Art. 12.

SLC, audited by an accounting firm and an auditing report signed and sealed by at least two accountants and their accounting firm;

- ▶(14) the directors and supervisors, including biographical notes;

- ▶(15) where the SLC increases capital through stock issuance, utilization of capital from preceding stock issuance is required; and

- ▶(16) other items required by Central Securities Supervision commission.⁹

- ▶All initiators or directors and the chief distributor shall sign the prospectus, guarantee no false and misleading representation or major omissions, and guarantee to assume joint liability therefrom.¹⁰

- ▶Stock Trading must be conducted in a legally organized Security Exchange.¹¹ An SLC satisfying the following requirements may apply to trade its stock:

- ▶(1) its stock must be publicly issued;

- ▶(2) total shares after issuance are worth not less than RMB 50,000,000;

- ▶(3) individual shareholders bearing shares with a face value of RMB 1000 or more are not less than 1000 and have a face value not less than RMB 10,000,000;

- ▶(4) the SLC has maintained records indicating a profit in the preceding consecutive three years, and where the SLC was transformed from an existing enterprise, said enterprise must have maintained records of profits earned in the preceding consecutive three years; and

- ▶(5) other requirements provided by the Central Securities Supervision Commission are satisfied.¹²

- ▶The SLC shall file an application with the Listing Committee of the Security Exchange which will decide whether to approve it within twenty days after receiving it.¹³ After approval, the SLC shall publish a listing announcement containing the main contents of the prospectus, the approval date, and number of the approval document and list the ten largest shareholders and amount of shares held by each.¹⁴ Trading of state-owned shares shall be subject to approval of

9▶

▶Int. Regs., Art. 15.

10▶

▶Int. Regs., Art. 17.

11▶

▶Int. Regs., Art. 29.

12▶

▶Int. Reg., Art. 30.

13▶

▶Int. Reg., Art. 31.

14▶

▶Int. Reg., Art. 34.

the competent department of the state.¹⁵ Directors, supervisors, senior officers of the SLC, and legal person shareholders bearing five percent or more of total shares with the right to vote may sell shares within six months after issue, and profits derived therefrom shall belong to said SLC.¹⁶

► Persons engaged in the securities business and administration and supervision of the securities business and other persons forbidden by the state to purchase and sell stocks shall not hold, purchase, or sell stocks either directly or indirectly.¹⁷ Professionals offering auditing reports, asset evaluation reports, or legal opinions for stock issuance shall not purchase or hold stock of said SLC during the distribution period.¹⁸ Professionals offering auditing reports, asset evaluation reports, or legal opinions for a listed SLC shall not purchase or hold stock of said SLC before said documents are published and shall not purchase stocks of said SLC within five working days from when said documents are published.¹⁹ An SLC shall not buy back stocks having been issued without approval of the controlling department of the state.²⁰ Any and all financial institutions shall not provide loans for stock trading.²¹ Securities institutions shall not lend client's stock to others or provide them as security.²²

► The Security Exchange, as a non-profit making institution legal person whose creation and dissolution shall be subject to examination by the Securities Commission of the State Council and approval of the State Council, is administered by the municipal government where it is located and supervised by the Central Securities Supervision Commission.²³ The Security

15 ►

► Int. Reg., Art. 36.

16 ►

► Int. Reg., Art. 38.

17 ►

► Int. Regs., Art. 39.

18 ►

► Int. Regs., Art. 40.

19 ►

► Int. Regs., Art. 40.

20 ►

► Int. Regs., Art. 41.

21 ►

► Int. Regs., Art. 43.

22 ►

► Int. Regs., Art. 44.

23 ►

► Int. Prov., Arts. 3, 4, 6, 9.

Exchange shall create a public and fair market environment and provide convenient conditions facilitating smooth operation of securities trading.²⁴ The functions of the Security Exchange include:

- ▶ (1) to provide space and facilities for securities trading;
- ▶ (2) to formulate a code of conduct of the Security Exchange;
- ▶ (3) to examine and approve listing applications;
- ▶ (4) to organize and supervise securities trading;
- ▶ (5) to supervise a listed SLC;
- ▶ (6) to supervise securities trading activities of members of the Security Exchange;
- ▶ (7) to provide and administer information on the security market; and
- ▶ (8) to provide other functions authorized by Central Securities Supervision

Commission.²⁵

▶ The Security Exchange is comprised of the Members Meeting, the Council, and specialized committees.²⁶ The Members Meeting is the supreme authority and is held at least once a year.²⁷ The functions of the Members Meeting include:

- ▶ (1) adopting articles of association;
- ▶ (2) electing and dismissing directors;
- ▶ (3) examining and approving work reports of the Council and President;
- ▶ (4) examining and approving the financial budget and final accounts; and
- ▶ (5) managing other major issues.²⁸

▶ The Council is the policy-making body with tenure of three years and is responsible to the Members Meeting.²⁹ Entry of members is subject to approval of the Council.³⁰ The Council has at least seven Directors, among which non-member directors shall include at least one-third

24 ▶

▶ Int. Prov., Art. 10.

25 ▶

▶ Int. Prov., Art. 11.

26 ▶

▶ Int. Prov., Art. 13.

27 ▶

▶ Int. Prov., Arts. 14, 15.

28 ▶

▶ Int. Prov., Art. 14.

29 ▶

▶ Int. Prov., Art. 16.

30 ▶

▶ Int. Prov., Art. 17.

of the total member of directors.³¹ A quorum of the Council meeting is two-thirds of all Directors, and decisions shall be adopted by a two-thirds consensus of Directors present at a meeting.³²

▶ The President, with a term of three years, is the legal representative of the Security Exchange. The President conducts the daily management of the Exchange.³³ In absence of the President, the Deputy President shall assume the functions and powers of the President.³⁴ The Security Exchange Listing Committee is composed of thirteen members, and a Supervision Committee is composed of nine members.³⁵ The Directors of the Council, the President, Deputy Presidents, and members of the specialized committees are the senior officers of the Security Exchange.³⁶

10:58. Securities markets-- Securities Law

▶ The Securities Law has 12 chapters and 240 articles. It regulates conduct in the securities market including issuance of securities, securities trading, continuous disclosure, prohibited behavior in securities trading, and takeovers. It also contains provisions relating to stock exchanges, securities companies, securities registration and settlement institutions, and securities trading service institutions, as well as provisions relation to associations of securities industry and securities regulatory institution. It has one chapter on civil, administrative and criminal liabilities. It also sets out principles for regulation of share, other than A-shares. A-shares can only be purchased by Chinese citizens or Chinese legal persons.¹ Specific procedures for shares of companies in China that are to be subscribed and traded in foreign currencies shall be separately formulated by the State Council.²

31 ▶

▶ Int. Prov., Art. 18.

32 ▶

▶ Int. Prov., Art. 18.

33 ▶

▶ Int. Prov., Art. 20.

34 ▶

▶ Int. Prov., Art. 20.

35 ▶

▶ Int. Prov., Art. 22, 23, 26, 27.

36 ▶

▶ Int. Prov., Art. 30.

1 ▶

▶ Art. 138.

2 ▶

▶ Art. 239.

▶ Under the Law, Chinese Association of Securities Industry is a social organization. All securities companies must be members of this association.³ Articles of Association shall be made by members' meeting and reported to CSRC for recording.⁴

▶ The Securities registration and settlement institution is a nonprofit legal person that provides registration, collection and settlement services for securities trading.⁵

▶ Securities registration and settlement system must be established and provide services such as:

- ▶ (1) the establishment of securities accounts and clearing accounts;
- ▶ (2) the custody and transfer of ownership of securities;
- ▶ (3) the registration of the names of the holders of securities;
- ▶ (4) the clearing and delivery of listed securities traded on the stock exchange;
- ▶ (5) the allotment of securities rights and interests upon entrustment by the issuer;
- ▶ (6) the handling of inquiries concerning the aforementioned businesses;
- ▶ (7) and other businesses approved by the State Council's securities regulatory authority.⁶
- ▶ Current securities registration and settlement institutions are all within stock exchanges.

After the securities Law come into effect, new securities registration and settlement institutions do not have to be within stock exchanges but must obtain approval from the CSRC.⁷ Articles of Association and business rules of securities registration and settlement institutions must first be approved by the CSRC.⁸

▶ Securities registration and settlement institutions must establish settlement risk funds. This fund is to be used to pay for or make good losses of securities registration and settlement institutions caused by default on delivery, technical reasons, negligence or *force majeure*.⁹

▶ The Securities Law defines a securities company as Limited Liability Company or joint

3▶

▶ Art. 174.

4▶

▶ Art. 175.

5▶

▶ Art. 155.

6▶

▶ Art. 157.

7▶

▶ Art. 155.

8▶

▶ Art. 158.

9▶

▶ Art. 163.

stock company.¹⁰

▶ The Securities Law sets out requirements for securities companies. To establish a securities company, the following conditions shall be fulfilled:

▶ (1) articles of association of the company shall comply with the provisions of laws and administrative regulations;

▶ (2) major shareholders shall have the ability to maintain continuous profitability, good reputation, no record of major violation of laws or regulations within the most recent three years, and net assets of not less than RMB 200 million;

▶ (3) have a registered capital that complies with the provisions hereof;

▶ (4) directors, supervisors and senior management personnel shall have employment qualifications, and employees shall have securities business qualifications;

▶ (5) have sound risk management and internal control system;

▶ (6) have up-to-standard business premises and business facilities;

▶ (7) and other conditions stipulated in the provisions of laws and administrative regulations and by the State Council's securities regulatory authority that have been approved by the State Council.¹¹

▶ Securities companies may, upon approval of the State Council's securities regulatory authority, engage in activities such as:

▶ (1) securities brokerage;

▶ (2) securities investment consultancy;

▶ (3) financial consultancy related to securities trading and securities investment activities;

▶ (4) securities distribution and sponsoring; securities business on own account;

▶ (5) securities asset management;

▶ (6) and other securities businesses.¹²

▶ Under the Securities Law, securities dealers must assume following obligations:

▶ (1) Securities companies must maintain trading risk funds which will be used to make good any losses incurred in securities trading or other transactions, or to compensate clients for negligence of securities companies; these risk funds must be drawn from post-tax profits in proportion to be decided by the CSRC;¹³

▶ (2) securities companies must not:

▶ a. accept discretionary order of clients to decide on the purchase or sale of securities, choose the types of securities or decide on the quantities to be purchased or sold or the

¹⁰▶

▶ Art. 123.

¹¹▶

▶ Art. 124.

¹²▶

▶ Art. 125.

¹³▶

▶ Art. 163.

purchase or sales price;

▶ b. give any form of commitment to clients concerning earnings from purchase or sale of securities or compensation for losses from the purchase or sale of securities;

▶ c. privately accept instructions from client to purchase or sell securities that has not gone through the company's place of business established according to law.¹⁴

▶ Trading Institutions include investment consulting institutions, financial consultancy institutions, credit rating institutions, asset valuation institutions and accounting firms.¹⁵ To provide securities trading services, business personnel of securities investment consulting institutions, financial consultancy institutions, and credit rating institutions must have securities knowledge and two years experience in securities business.¹⁶ Law leaves administration of examination and approval, to be made by the CSRC.¹⁷ Securities investment consulting institutions and their employees are prohibited from:

▶ (1) investing in securities by trading as agent of its client;

▶ (2) entering into sharing agreements with respect to securities investment profits and losses with its clients;

▶ (3) trading shares of a listed company to which it provides its services;

▶ (4) providing or disseminating information that is false or misleads investors using the media or through other methods; and

▶ (5) other acts prohibited by laws and administrative regulations.¹⁸

▶ Institutions provide auditing reports, assets appraisal, financial consultancy reports, credit rating reports, and legal opinions, etc., with respect to securities issue and trading. If documents formulated and issued by them contain falsehoods, misleading statements or major omissions, thereby causing loss to others, it shall bear joint and several liability for such damages with the issuer and the listed company, unless it is able to prove that it is not at fault.¹⁹

▶ Underwriting may be conducted by way of distribution or agency.²⁰ If total face value of

14 ▶

▶ Arts. 143-145.

15 ▶

▶ Art. 169.

16 ▶

▶ Art. 170.

17 ▶

▶ Art. 169.

18 ▶

▶ Art. 171.

19 ▶

▶ Art. 173.

20 ▶

▶ Art. 28.

a stock to be issued to non-specified objects exceeds RMB 50 million yuan, issuance must be underwritten by an underwriting syndicate.²¹ In a public offer of stocks, when the term for sale by proxy or exclusive sale expires, the issuer shall report the information on stock issuance to the securities regulatory authority under the State Council for archival filing within the prescribed term.²²

▶ Once application has received preliminary approval from relevant provincial government, or centrally directed municipalities or autonomous regions, application must then be verified by the CSRC.²³ The CSRC has a verification committee for share issuance that consists of professional staff, or CSRC, as well as outside securities experts.²⁴ Verification will be voted upon within three months of receipt of an application.²⁵

▶ As application for issuance of company bonds must be examined and approved by the competent department authorized by the State Council.²⁶ After the CSRC and the competent department (authorized by State Council) verifies or examines and approves issuance. The stock exchange should arrange issuance.

▶ Where an investor holds 30% of issued shares of a listed company by means of agreement or any other arrangement through securities trading at the stock exchange and continues to acquire shares, it must make a tender offer to all other shareholders unless otherwise exempt by CSRC.²⁷

▶ The period of the takeover offer must be no less than 30 working days and no more than 60 days from date when the offer is first made.²⁸ A takeover offer must not be revoked within

²¹ ▶

▶ Art. 32.

²² ▶

▶ Art. 36.

²³ ▶

▶ Arts. 19-21.

²⁴ ▶

▶ Art. 22.

²⁵ ▶

▶ Art. 24.

²⁶ ▶

▶ Art. 10.

²⁷ ▶

▶ Art. 88.

²⁸ ▶

▶ Art. 90.

such offering period. The offeror may only change terms of the offer within the offering period with the approval of the CSRC.²⁹

▶ An offeror must submit a written report regarding a proposed takeover to the CSRC and the stock exchange before the takeover offer is made. A takeover offer should be publicly announced 15 days after date when such written report is submitted.³⁰

▶ According to ▶ Art. 74 of Securities Law, insiders are referred to as the following persons:

- ▶ (1) directors, supervisors and other senior managerial personnel of the issuer;
- ▶ (2) a shareholder holding 5% or more of shares of a company as well as directors, supervisors, and senior managers thereof, or the actual controller of a company as well as directors, supervisors, and senior managers thereof;
- ▶ (3) the holding company of an issuer as well as directors, supervisors, and senior managers thereof;
- ▶ (4) any company staff who can acquire insider information as result of their positions in the company;
- ▶ (5) the staff of the CSRC and other personnel involved in administration of securities issuance and trading in accordance with laws;
- ▶ (6) relevant personnel of the recommendation institutions, securities companies engaging in underwriting, stock exchanges, securities registration and clearing institutions, and securities trading service organizations; and
- ▶ (7) other personnel specified by the CSRC.

▶ Under ▶ Art. 75 of the Securities Law, the following information is referred to as inside information:

- ▶ (1) major events that may have great influence on price of share trading and that are unknown to investors;³¹
- ▶ (2) company's plan to distribute profits or company's plan to increase capita;
- ▶ (3) any major change in shareholding structure;
- ▶ (4) any major change in debt's security;
- ▶ (5) mortgage, sale or other disposition of more than 30% of a company's major business assets;
- ▶ (6) acts of directors, supervisors, and other senior managerial personnel that may result in payment of major compensatory damages;
- ▶ (7) company's takeover plans; and
- ▶ (8) any other information which may have a major impact on share-trading price and required to be filed with CSRC.

▶ The following market controlling activities are illegal:

29 ▶

▶ Art. 91.

30 ▶

▶ Arts. 89-90.

31 ▶

▶ Art. 67 specifies these major events.

▶(1) influencing prices of securities, or trading quantity of securities, along or in conspiracy, by concentrating superiority of capital or shareholding or by relying on superiority of information to trade securities jointly or continuously;

▶(2) influence prices of securities or trading volume of securities, by conspiring with others, to trade securities with each other, at arrange time, price or in any other arrange way;

▶(3) influencing the price of securities or trading volume of securities by trading between the accounts under his own control; or

▶(4) other acts of manipulation of securities price.³²

▶Public servants, professional sin a media, and other relevant personnel are not allowed to forge or pass on false information. Stock exchanges, securities companies, securities registration and settlement institutions, securities trading service institutions, and their staff, as well as associations of securities industry, CSRC, and their staff, are not allowed to make false statements or give misleading information with respect to securities trading.³³

▶Under Art. 79, the following acts, which may infringe upon interests of clients are considered fraudulent and are prohibited:

▶(1) trading of securities of clients in violation of clients' instructions or under guise of clients' names;

▶(2) failing to provide confirmation documents of securities trading to clients within designated time limits;

▶(3) diverting clients' securities entrusted fro trading, or diverting clients' capital from clients' accounts;

▶(4) unlawfully purchasing or selling securities for its client without authorization, or unlawfully purchasing or selling any securities in the name of any client;

▶(5) inducing clients to conduct unnecessary securities trading for purpose of obtaining commission;

▶(6) making use of mass media or by any other means to provide or disseminate any false or misleading information to investors; or

▶(7) any other acts which violate the genuine intent of clients and infringe upon interests of client.

▶Prohibited acts include:

▶(a) any legal person to unlawfully make use of any other person's account to undertake any securities trading. It's prohibited for any legal person to lend its own or any other person's securities account;³⁴

▶(b) diverting State-owned funds for securities trading.³⁵

32▶

▶Art. 77.

33▶

▶Art. 78.

34▶

▶Art. 80.

35▶

▶ State-owned enterprises and state-controlled enterprises that engage in any trading of listed stocks shall observe relevant provisions of the state.³⁶

▶ The Hallmark of Chinese securities law, like securities law elsewhere, is disclosure. China has accepted international accounting standards as the norm. disclosure laws and reporting requirements are of great significance in context of protection of shareholders. After public listing of its securities, an issuer must file various documents or report materials to stock exchanges and the CSRC. All shareholders shall have access to information disclosed by these documents. Information must be made public nationally circulated newspapers. The issuer may also disclose information simultaneously in local publications designated by the CSRC.

▶ After a securities issue is verified by the CSRC and the competent department authorized by the State Council, an issuer must make announcement of securities issue documents, and put documents in designate public locations for the public to examine.³⁷ Securities issue documents including applications prospectus, company bonds issue measures and company's accounting report.

▶ After securities are issued, a company must continue to disclose any information which may have major impact on securities trading. A listed company must submit half yearly report to the CCSRC and a stock exchange within two months after the first half fiscal year ends.³⁸ This report must also be made public. Half-yearly report must contain the following items:

- ▶ (1) the company's financial and accounting report as well as its business operation;
- ▶ (2) major lawsuits in which the company is involved;
- ▶ (3) any changes to issued shares and bonds;
- ▶ (4) major issues for debate to be discusses at shareholders' meeting; and
- ▶ (5) any other items specified by the CSRC.

▶ A listed company must submit its annual report to the CSRC and stock exchange within four months of its financial year-ending.³⁹ This report should also be made public. Annual reports must contain following items:

- ▶ (1) overview of company;
- ▶ (2) company's financial and accounting report as well as its business operations report;
- ▶ (3) introduction to directors, supervisors and relevant senior managerial staff and their share-holdings in the company;
- ▶ (4) situation of listed shares or company bonds including list of the ten largest

▶ Art. 82.

36▶

▶ Art. 83.

37▶

▶ Art. 25.

38▶

▶ Art. 65.

39▶

▶ Art. 66.

shareholders and size of their shareholdings;

- ▶(5) actual controller of the company; and
- ▶(6) any other item required by the CSRC.

▶Wherever there is major event which may have great impact on share prices, and that is unknown to investors, a listed company must report to the CSRC and stock exchange, and then announce major event to the public. Securities Law has a list of “major events”:⁴⁰

- ▶(1) major changes in business policies and business scope of company;
- ▶(2) major investment movements or major decisions to purchase property;
- ▶(3) major contracts made by the company which may have major impact on the company's assets, debts, legal rights and interests, and operational results;
- ▶(4) incurrence of any major debt in the company or default on any major debt that is due;
- ▶(5) incurrence of any major deficit or a major loss in the company;
- ▶(6) major changes of outside conditions relevant to the production and operational environment of company;
- ▶(7) changes of chairman of board of directors, or one-third or more of directors or managers;
- ▶(8) major shareholding changes by a shareholder or the actual controller that holds 5% or more of total shares issued by a listed company;
- ▶(9) issuer's decisions with respect to reducing capital merging, division or filing application for insolvency;
- ▶(10) major lawsuits involving issuer or revocation or invalidation of resolutions of shareholder's meetings or board of directors;
- ▶(11) company's involvement in any crime, which has been filed as a case as well as investigated into by the judicial organ or any director, supervisor or senior manager of the company is subject to compulsory measures as rendered by the judicial organ; and
- ▶(12) other major events provided for by the securities regulatory authority under the State Council.

▶Under Art. 232, civil compensation liability, administrative fines and criminal fines are imposed for any violation of the Securities Law. Where there is insufficient funds to fulfill all of these liabilities simultaneously, civil compensation liability has priority. The following activities may incur civil, administrative or even criminal liabilities:

- ▶(a) publicly offering securities or doing so in a disguised manner without verification and approval by the statutory authority;⁴¹
- ▶(b) underwriting securities or selling securities as a broker without verification or approval;⁴²

⁴⁰▶

▶Art. 62.

⁴¹▶

▶Art. 188.

⁴²▶

▶Art. 190.

- ▶(c) failing to disclose information, disclosing false records, making misleading statements or disclosing information with omissions by the issuer, the listed company or other person with information disclosure obligations;⁴³
 - ▶(d) employing personnel prohibited from participating in securities trading securities;⁴⁴
 - ▶(e) manipulating the securities market;⁴⁵
 - ▶(f) securities company conducting its own securities business in another company's name or in name of individual;⁴⁶
 - ▶(g) brokerage accepting full power entrustment to trade securities or making promises with respect to profits or compensation of losses to its clients;⁴⁷
 - ▶(h) securities company conducting brokerage business, securities distribution business, securities business on its own account and securities asset management business simultaneously and without proper separation;⁴⁸
 - ▶(i) securities service organization failing to act with due diligence and the documents prepared or issued by it contain falsehoods, misleading statements or major omissions;⁴⁹
 - ▶(j) member of the working personnel of the securities regulatory authority or member of the issuance examination commission failing to perform his duties as specified in this Law, abusing his authority, derelict in his duties, using his position to seek improper benefits, or divulging the trade secrets of the relevant work units and individuals that he knows of.⁵⁰
- ▶Where professional personnel of stock exchanges, securities companies, securities registration and settlement institutions, securities trading service institutions, as well as staff of associations of securities industry, intentionally provide false material, conceal, forge, alter or

43 ▶

▶Art. 193.

44 ▶

▶Art. 199.

45 ▶

▶Art. 203.

46 ▶

▶Art. 209.

47 ▶

▶Art. 212.

48 ▶

▶Art. 220.

49 ▶

▶Art. 223.

50 ▶

▶Art. 228.

destroy trading records, or induce investors to trade securities in such circumstances, the staffs' securities trading quality certificates shall be revoked, and a fine of between RMB 30,000 yuan and RMB 100,000 yuan shall be imposed. Public servants shall also be subject to disciplinary sanctions by their organizations.⁵¹

▶ Guidelines on the Participation in Stock Index Futures Trading by Securities Companies has been effect since April 21, 2010. It provides further guidance for hedge funds and securities asset management businesses.⁵² Specifically, it requires the use of effective risk management tools by these companies to identify and alert of the risks of stock index futures trading, and specifying capital requirements for certain investment types.⁵³

▶ Measures for the Spot Inspection of Listed Companies effective May 20, 2010 provides additional powers to regulate listed companies on the securities market.⁵⁴ It allows the China Securities Regulatory Commission to perform spot inspections of listed companies at their office locations by inspecting documents, interviewing employees, etc.⁵⁵

IX. Real Estate

10:59. Forms of ownership of realty: buildings

▶ The present housing ownership system of China is now composed of public housing, private housing, housing with Chinese and foreign investment, and housing of other natures, classified in detail as below:

▶ (1) State housing ownership, that is, the state assumes the ownership of the housing;

▶ (2) Collective housing ownership, that is, the work unit under collective ownership assumes the ownership of the housing;

▶ (3) Private housing ownership, that is, the individual, family, individuals, or private enterprise assumes the housing ownership;

▶ (4) Foreign housing ownership, that is, foreign government, enterprise, social organization, international institution, or foreign national assumes the housing ownership in China;

▶ (5) Sino-foreign housing ownership, that is, a Chinese enterprise or other economic organization assumes the housing ownership jointly with foreign enterprise, other economic organization, or individual in China; and

⁵¹ ▶

▶ Art. 200.

⁵² ▶

▶ Art. 2.

⁵³ ▶

▶ Art. 5, 7.

⁵⁴ ▶

▶ Art. 1.

⁵⁵ ▶

▶ Art. 2.

▶(6) Other housing ownership, for example, a religious group assumes housing ownership.

10:60. Land registration and transfer of title of realty and buildings

▶Ownership of land in China is generally by purchase of land-use rights. There is now five simple absolute in land in China.

▶China practices a system of registration and certification of the house ownership.¹ The registration of house title shall comply with the principle that the subject of the house ownership shall be in conformity with that of the land use right of the house site.² Certificate of house title shall be the only lawful document on the basis of which the right-holder shall have the ownership of the house, i.e. the rights to possess, utilize, profit from and dispose of the house. The rights to a house registered shall be protected by the State law.³

▶The alteration of title to property shall be registered.⁴ Any change to land use rights, land ownership and other rights of land must be registered with the land administration department.⁵

▶A land user shall go through the formalities for registration to obtain the certificate for land use and the land-use right after paying all the remuneration for assignment of said right.⁶ Assignment of real estate refers to the act of real estate owner transferring his real estate to others by means of sale, gift, or otherwise.⁷ Assignment of real estate shall be performed with parties signing transfer contract in written form, indicating how the land-use right is acquired.⁸ When real estate is assigned, the rights and obligations contained in the contract for assignment

1▶

▶Measures on the Administration of the Registration of Urban House Title, Art. 4.

2▶

▶Measures on the Administration of the Registration of Urban House Title, Art. 6.

3▶

▶Measures on the Administration of the Registration of Urban House Title, Art. 5.

4▶

▶Law on the Administration of Urban Real Estate, Arts. 61-62.

5▶

▶Rules on Land Registration, Art. 32.

6▶

▶Provisional Regulations on the Assignment and Transfer of State-owned Urban Land, Art. 16.

7▶

▶Law on the Administration of Urban Real Estate, Art. 37; Rules on the Administration of Transfer of Urban Real Estate, Art. 3.

8▶

▶Law on the Administration of Urban Real Estate, Art. 41.

of the right to the use of land are transferred herewith.⁹

10:61. Foreign investment in real estate

► Opinions on Regulating the Access to and Administration of Foreign Investment in the Real Estate Market, issued on July 11, 2006, provides regulations on the access to and administration of foreign investment in the real estate market. An overseas institution or individual shall, when investing in China to purchase any not-for-self-use real estate, abide by the principles of commercial presence and apply, according to the relevant provisions on foreign investment in real estate, for establishing a foreign investment enterprise and may, upon obtaining the approval of the relevant department as well as completing the relevant registration, engage in the relevant operation according to its approved business scope.¹ An overseas investor that has not obtained an Approval Certificate of Foreign-funded Enterprises or a Business License shall not engage in any development or operation of real estate.² If any foreign-funded enterprise fails to make full payment of its registered capital, fails to obtain the Use Certificate of State-owned Land or fails to make its project development capital reach 35% the total project investment amount, it shall not deal with any domestic or overseas loan and the administrative department of foreign exchange shall not approve the settlement of the foreign exchange loan thereof.³

► Notice on Further Strengthening and Regulating the Examination, Approval and Supervision of Foreign Direct Investment in Real Estate Industry, issued on May 23, 2007, further strengthens and regulates the examination, approval, registration and supervision of foreign investment in real estate industry. Foreign investment in the development and operation of real estate shall follow the principle of project companies.⁴ Applicant for establishing a real estate company shall acquire the land use right or the ownership of real property or building, or conclude a contract on the advance assignment/purchase of land use right or building property right with relevant administrative department of land, land developer or owner of building property right. The examining and approving organ may not approve the application of any applicant that fails to satisfy the above-mentioned requirement.⁵

⁹►

► Law on the Administration of Urban Real Estate, Art. 42.

¹►

► Opinion, Art. 1.

²►

► Art. 6.

³►

► Art. 7.

⁴►

► Notice, Art. 2.

⁵►

► Notice, Art. 2.1.

▶Circular on Better Implementation of the Filing of Foreign Investment in Real Estate Industry issued June 18, 2008 has simplified the process by allowing the verification of foreign investment to provincial level commerce authorities as opposed to the Ministry of Commerce.

10:62. Leases

▶As for lease of houses, the lessor and lessee shall sign a written lease contract and register it with the housing administration department for recording.¹

10:63. Zoning and land use planning

▶Pursuant to the Law on Land Administration, land is classified as land for farming purposes, land used for building, and land unused, in the overall planning of land uses. Regulations for the Implementation above Law requires that protective zone of basic farmland, zone of land reclamation, zone of land used for building, and zone prohibited for reclamation be designated in the overall planning of land uses at county and town levels. A two-level examination and approval is performed for the overall planning of land uses in China; a three-level examination and approval is undertaken in individual circumstances. State overall planning of land uses is prepared by the land administrative department of the State Council, which will be reported to the State Council for approval. Overall planning of land uses in provinces, autonomous regions, and municipalities directly under the Central Government is reported to the State Council for approval. Overall planning of land uses in municipality where provincial government is located or with a population of over 1,000,000 shall be reported to the State Council for approval after having been examined and approved by provincial government.

10:64. Oil, gas & mineral law

▶Oil and gas are special mining resources for which the state performs a single-level certification management system. Any unit or individual who engages in the exploration or exploitation of oil or gas must register according to law and report to the State Planning Commission, the Office for the Management of Oil and Gas Conservation, for examination and approval. Local governments or departments have no power to issue oil or gas exploration or exploitation licenses.

▶China permits foreign oil companies to exploit oil resources in cooperation with China. Chinese oil companies signs contracts for exploring and developing land oil resources in cooperation with foreign enterprises within the scope the State Council approves for the above purposes, pursuant to the sections divided for cooperation through bidding or negotiation. Said contract will not be established unless the Ministry of Foreign Trade and Economic Cooperation of the PRC approves. Chinese oil companies may also sign other cooperative contracts within the above scope with foreign enterprises, which must be submitted to the MFTEC for recording.¹ Chinese oil companies must sign contracts for exploring and developing land oil resources in cooperation with foreign enterprises. The foreign enterprise to the contract shall invest solely in

¹▶

▶Law on the Administration of Urban Real Estate, Art. 54.

¹▶

▶Regulations on Exploring and Developing Land Oil Resources in Cooperation with Foreign Countries, Art. 8.

the exploration, perform the exploration, and assume exploring risks, unless otherwise provided by laws, regulations, or contracts. Chinese oil companies will invest jointly with the foreign party in the exploitation after oil or gas field of commercial value for exploitation is detected. A foreign party shall perform the exploitation and production operations till the latter is taken over by the Chinese oil companies pursuant to provisions of the contract.² A foreign party to a contract may recoup its capital outlay and expenses from the oil it produces and be compensated pursuant to provisions of the contract.³ A foreign party to a contract may transport the oil it is entitled to or purchases or remit the capital it recoups, its profits, or other legal income to abroad. Oil belonged to and sold by a foreign party in China shall be purchased collectively by the Chinese oil companies.⁴

▶ Mineral resources belong to the state, the ownership of which is exercised by the State Council. State ownership of surface or underground mineral resources will not be affected by the changes in the ownership and right to the use of land to which above resources is attached. Different applications must be filed for the exploration and exploitation of mineral resources according to law. Those approved shall be provided the exploration and exploitation rights and be registered as well.⁵ It is not allowed to resell the exploration and exploitation rights for profiteering.⁶ The state exercises a unitary administration system of section registration for the exploration of mineral resources.⁷

X. Liens and Real Property

10:65. Property subject to liens

▶ Measures on the Management of Urban Real Estate Mortgage provide that all houses may be mortgaged except for those specified as below:
▶ (1) real estate with ownership disputed;

2▶

▶ Regulations on Exploring and Developing Land Oil Resources in Cooperation with Foreign Countries, Art. 13.

3▶

▶ Regulations on Exploring and Developing Land Oil Resources in Cooperation with Foreign Countries, Art. 14.

4▶

▶ Regulations on Exploring and Developing Land Oil Resources in Cooperation with Foreign Countries, Art. 15.

5▶

▶ Mineral Resources Law, Art. 3.

6▶

▶ Mineral Resources Law, Art. 6.

7▶

▶ Mineral Resources Law, Art.12.

- ▶(2) real estate used for public utilities such as education, public health, and city planning;
- ▶(3) buildings protected for historical and cultural value and those with commemorative importance;
- ▶(4) real estate listed in a relocation notice pursuant to law;
- ▶(5) real estate restricted by forms of seizure, impoundment, custody, or otherwise; and
- ▶(6) other real estate prohibited by law for mortgage.¹

10:66. Creation of liens

▶Liens can be created by agreement or by court order to protect a litigant.¹ A debtor can pledge his property in the form of a mortgage, thus creating a lien on said property. State enterprises or artificial persons of institutions mortgaging real estate authorized by the state for its operations and management, shall accord with relevant regulations on the administration of state-owned assets.² Mortgages of real estate by collectively-owned enterprises shall be approved by the workers' congress of said enterprise and be reported to the competent organization of a higher level for recording.³ Mortgages of real estate by Chinese and foreign equity joint venture, Chinese and foreign cooperative joint venture, and solely foreign-funded enterprises shall be approved by its board of directors, unless otherwise provided by the enterprise Articles.⁴ Mortgage of real estate by a company of limited liability or limited by shares shall be approved by the board of directors or meeting of stockholders, unless otherwise provided by enterprise constitution.⁵ For mortgage of a joint estate, the mortgagor shall first obtain the written consent of other co-owners.⁶ For mortgages of commercial housing purchased in advance, the development project must accord with real estate assignment terms and be provided with a license for advance sales of commercial housing.⁷ For mortgages of real estate, the mortgagor

1▶

▶Measures on the Management of Urban Real Estate Mortgage, Art. 8.

1▶

▶See ▶§§10:116 through 10:123 (on writs of execution and attachments).

2▶

▶Measures on the Management of Urban Real Estate Mortgage, Art. 13.

3▶

▶Measures on the Management of Urban Real Estate Mortgage, Art. 14.

4▶

▶Measures on the Management of Urban Real Estate Mortgage, Art. 15.

5▶

▶Measures on the Management of Urban Real Estate Mortgage, Art. 16.

6▶

▶Measures on the Management of Urban Real Estate Mortgage, Art. 19.

7▶

shall primarily hold the certificate of the right to use of the land, the certificate of housing ownership, or the contract for advance sales of housing, in order to sign a written contract for real estate mortgage with the mortgagee.

10:67. Perfection of liens

▶ Within 30 days of the execution of mortgage contract, the parties concerned shall register the real estate mortgage with the realty department where the real estate is located.¹ Registration is an essential element of real estate mortgage. Contracts for real estate mortgage will take effect on the day it is registered.²

10:68. Judicial liens

▶ In the course of execution, if a person subjected to execution provides a guaranty, the court may, with the consent of the person who has applied for execution, decide on the suspension of the execution and the time limit for such suspension. If the person subjected to execution still fails to perform his obligations after the time limit, the court shall have the power to execute on the property he provided as security or the property of the guarantor.¹

10:69. Realization on property subject to lien

▶ In case liabilities are not satisfied when the deadline for debt performance expires, the mortgagee may negotiate with the mortgagor for debt repayment by conversion, sell-off, or auction of the estate under mortgage. The mortgagee may take the proceeding in the court if negotiations fail.¹ In case one estate is mortgaged to two or more creditors, money obtained from auction or sale of the estate subject to a mortgage, shall be repaid in the order of its registration or credit proportion, if the registration time is the same.²

10:70. Termination of liens

▶ The right to a mortgage terminates when the principal creditor's right to the property is lost.¹

▶ Measures on the Management of Urban Real Estate Mortgage, Art. 20.

1▶

▶ Measures on the Management of Urban Real Estate Mortgage, Art. 30.

2▶

▶ Measures on the Management of Urban Real Estate Mortgages, Art. 31.

1▶

▶ Civil Procedure Code, Art. 208.

1▶

▶ Law on Security, Art. 53.

2▶

▶ Law on Security, Art. 54.

1▶

XI. Pledges and Chattel Mortgages

10:71. In general

▶ Chattel mortgages are permissible, primarily governed by Contract. Mortgages subject to registration can rely on said requested in addition to contract, to protect the mortgage.

10:72. Property subject to pledge or chattel mortgage

- ▶ The following properties may be mortgaged:
 - ▶ (1) housing owned by the mortgagor and its annex;
 - ▶ (2) machines, means of transportation, or other properties owned by the mortgagor;
 - ▶ (3) right to use state-owned land, housing, and its annex, which the mortgagor has the right to dispose of according to law;
 - ▶ (4) state-owned machines, means of transportation, and other properties which the mortgagor has a right to dispose of according to law;
 - ▶ (5) right to use the wasteland such as barren hills and gullies and desolate sands, which the mortgagor contracts for with approval to mortgage by the party executing out the contract; and
 - ▶ (6) other properties permitted to be mortgaged by law.¹
- ▶ The following properties must not be mortgaged:
 - ▶ (1) land ownership;
 - ▶ (2) collectively-owned right to use cultivated land, homestead, privately farmed plots of cropland, and hilly land etc.;
 - ▶ (3) educational, public health, and other public benefit utilities by schools, nurseries, hospitals, and other institutions and social organizations devoted to public benefit;
 - ▶ (4) property with ownership or right of use, which is not clear or disputed;
 - ▶ (5) property seized, impounded or in custody; or
 - ▶ (6) other properties which must not be mortgaged.²
- ▶ The following rights may be held in pledge:
 - ▶ (1) bills, checks, promissory notes, bonds, certificates of deposit, storage notes, and bills of lading;
 - ▶ (2) stock and share negotiable by operation of law;
 - ▶ (3) right to the exclusive use of a trademark and property rights involved in patent rights and copyright negotiable by operation of law; and
 - ▶ (4) other rights which may be held in pledge according to law.³

▶ Law on Security, Art. 58.

¹▶

▶ Guarantee Law, Art. 34.

²▶

▶ Guarantee Law, Art. 37.

³▶

▶ Guarantee Law, Art. 75.

10:73. Creation of pledge or chattel mortgage

▶ The mortgagor and mortgagee shall sign a written mortgage contract.¹ The pledger and pledgee shall sign a written contract of pledge.² A pledge is classified as a pledge of chattel and that of right. The former refers to a debtor or a third party transferring his chattel to a creditor for his possession, making said chattel a security for the credit.³ As for delivery of pledge in a bill, check, promissory note, bond, certificate of deposit, storage note, and bill of lading, the certificate of right shall be delivered to the pledgee within the time limit prescribed by the contract.⁴

10:74. Perfection of pledge or chattel mortgage

▶ A contract of pledge will take effect once the pledge is transferred to the pledgee for possession.¹ A contract of pledge will take effect on the day the certificate of right is delivered.² For delivery of a pledge in a stock negotiable by operation of law, the pledger and pledgee shall sign a written contract of a pledge and register with the security registration organ for the pledge. The contract of pledge will take effect on the registration day. For delivery of pledge in shares of a limited liability company, the contract of pledge will take effect on the day the pledge of shares is listed in the register of members.³ For delivery of a pledge in right to the exclusive use of a trademark and property rights involved in patent rights and copyright, the pledger and pledgee shall sign a written contract of pledge and register it with the relevant administrative department. The contract of pledge will take effect on the registration day.⁴

10:75. Realization on property subject to pledge or chattel mortgage

1▶

▶ Guarantee Law, Art. 38.

2▶

▶ Guarantee Law, Art. 64.

3▶

▶ Guarantee Law, Art. 63.

4▶

▶ Guarantee Law, Art. 76.

1▶

▶ Guarantee Law, Art. 64.

2▶

▶ Guarantee Law, Art. 76.

3▶

▶ Guarantee Law, Art. 78.

4▶

▶ Guarantee Law, Art. 79.

▶ The pledgee shall return the pledge if the debtor fulfils its obligation on time or sooner. In case the liabilities are not satisfied when the deadline for debts performance expires, the pledgee may negotiate with the pledger for debt repayment by conversion, sell-off, or auction of the pledge according to law, which shall be performed based on the market price.¹

10:76. Termination of pledge or chattel mortgage

▶ The right of pledge terminates on loss of the pledge.¹ The right of pledge exists simultaneously with the credit secured thereby, and the right of pledge terminates in termination of the credit.²

XII. Intellectual Property

10:77. Copyright

▶ Works of Chinese citizens, legal entities, or other organizations, whether published or not, shall enjoy copyright protection in accordance with this Law. Any work of a foreigner or stateless person which is eligible to enjoy copyright under an agreement concluded between the country to which the foreigner belongs or in which he has habitual residence and China, or under an international treaty to which both countries are party, shall be protected in accordance with this Law. Works of foreigners or stateless persons first published in the territory of the People's Republic of China shall enjoy copyright in accordance with this Law. Any work of a foreigner who belongs to a country which has not concluded an agreement with China or which is not a party to an international treaty with China or a stateless person first published in a country which is a party to an international treaty with China, or in such a member state or nonmember state, shall be protected in accordance with this Law.¹

▶ The term “works” includes works of literature, art, natural science, social science, engineering technology, and the like which are expressed in the following forms:

- ▶ (1) written works;
- ▶ (2) oral works;
- ▶ (3) musical, dramatic, quyi, choreographic, and acrobatic works;
- ▶ (4) works of fine art and architecture;
- ▶ (5) photographic works;
- ▶ (6) cinematographic works and works created by virtue of an analogous method of film production;
- ▶ (7) drawings of engineering designs and product designs, maps, sketches and other

1▶

▶ Guarantee Law, Arts. 71, 94.

1▶

▶ Guarantee Law, Art. 73.

2▶

▶ Guarantee Law, Art. 74.

1▶

▶ Copyright Law, Art. 2.

graphic works and model works;

- ▶(8) computer software; and
- ▶(9) other works as provided for in law and administrative regulations.²

▶Copyright owners, in exercising their copyright, shall not violate the Constitution or laws or prejudice the public interests. The State supervises and administers the publication and circulation of works according to law (the Copyright Law, Art. 4). This clearly shows that in China, illegal works are not protected by the copyright law.

▶The term “copyright” shall include the following personality rights and property rights:

- ▶(1) the right of publication;
- ▶(2) the right of authorship;
- ▶(3) the right of alteration;
- ▶(4) the right of integrity;
- ▶(5) the right of reproduction;
- ▶(6) the right of distribution;
- ▶(7) the right of rental;
- ▶(8) the right of exhibition;
- ▶(9) the right of performance;
- ▶(10) the right to show;
- ▶(11) the right to broadcast;
- ▶(12) the right of communication of information on networks;
- ▶(13) the right of making cinematographic work;
- ▶(14) the right of adaptation;
- ▶(15) the right of translation;
- ▶(16) the right of compilation; and
- ▶(17) any other rights a copyright owner is entitled to enjoy.³

▶The rights of authorship, alteration, and integrity of an author shall be unlimited in time.⁴ The term of protection for the right of publication and the rights referred to in Article 10, paragraphs (5) to (17), of this Law in respect of a work of a citizen shall be the lifetime of the author and fifty years after his death, expiring on 31 December of the fiftieth year after the death of the author. In the case of a work of joint authorship, such term shall expire on 31 December of the fiftieth year after the death of the last surviving author. The term of protection for the right of publication and the rights provided for in Article 10, paragraphs (5) to (17), of this Law in respect of a work where the copyright belongs to a legal entity or other organization or in respect of a work created in the course of employment where the legal entity or other organization enjoys the copyright (except the right of authorship), shall be fifty years, and expire on 31 December of the fiftieth year after the first Publication of such work, provided that any such

²▶

▶Copyright Law, Art. 3.

³▶

▶Copyright Law, Art. 10.

⁴▶

▶Copyright Law, Art. 20.

work that has not been published within fifty years after the completion of its creation shall no longer be protected under this Law. The term of protection for the right of publication or protection for the right of publication or the rights referred to in Article 10, paragraphs (5) to (17), of this Law in respect of a cinematographic work, a work created by virtue of an analogous method of film production or a photographic work shall be fifty years and expire on 31 December of the fiftieth year after the first publication of such work, provided that any such work that has not been published within fifty years after the completion of its creation and shall no longer be protected under this Law.⁵

▶ If a copyright is to be pledged, the pledgor and the pledgee shall handle the registration of pledge with the Copyright Administration Authority of the State Council.⁶

▶ Anyone who commits any of the following infringing acts shall bear civil liability for such remedies as ceasing infringing act, eliminating effects of the act, making public apology or paying compensation for damages, depending on the circumstances:

▶ (1) publishing a work without permission from copyright owner;

▶ (2) publishing a work of joint authorship as a work created solely by oneself, without permission from the other co-authors;

▶ (3) having his name mentioned in connection with a work created by another, in order to seek personal fame and gain, where he has not taken part in the creation of the work;

▶ (4) distorting a work created by another;

▶ (5) plagiarizing works of others;

▶ (6) exploiting a work by means of exhibition, making cinematographic productions or means similar to making cinematographic productions, or by means of adaptation, translation, annotation, etc. without permission from copyright owner, unless otherwise provided in this Law;

▶ (7) exploiting a work of another without paying remuneration;

▶ (8) without permission from copyright owner or obligee related to copyright of cinematographic work or work created in a way similar to cinematography, computer software, sound recordings or video recordings, leasing his work or sound recordings or video recordings, except where otherwise provided in this Law;

▶ (9) without permission from a publisher, exploiting the format design of his published book or periodical;

▶ (10) without permission from performer, broadcasting or publicly transmitting his live performance or recording his performance;

▶ (11) committing other acts of infringement upon copyright and upon other rights related to copyright.⁷

▶ Infringer shall, when having infringed upon copyright or rights related to copyright,

⁵▶

▶ Copyright Law, Art. 21.

⁶▶

▶ Art. 26.

⁷▶

▶ Copyright Law, Art. 47.

make a compensation on the basis of obligee's actual losses; where the actual losses are difficult to be calculated, compensation may be made on the basis of infringer's illegal gains. The amount of compensation shall also include reasonable expenses paid by obligee for stopping the infringing act. Where obligee's actual losses or infringer's illegal gains cannot be determined, court shall, on the basis of the seriousness of the infringing act, adjudicate a compensation of RMB 500,000 or less.⁸

▶ For the purpose of stopping the infringing acts, copyright owner or obligee related to copyright may, under circumstances that the evidence may be destroyed or lost or difficult to obtain later on, apply to the court for evidence preservation.⁹

10:78. Trademarks

▶ Registered trademarks mean trademarks that have been approved and registered by the Trademark Office, including trademarks, service marks, collective marks, and certification marks; the trademark registrants shall enjoy the exclusive right to use the trademarks, and be protected by law. Said collective marks mean signs which are registered in the name of bodies, associations, or other organizations to be used by the members thereof in their commercial activities to indicate their membership of the organizations. Said certification marks mean signs which are controlled by organizations capable of supervising some goods or services and used by entities or individual persons outside the organization for their goods or services to certify the origin, material, mode of manufacture, quality, or other characteristics of the goods or services.¹

▶ Where a trademark in respect of which the application for registration is filed for use for identical or similar goods is a reproduction, imitation, or translation of another person's trademark, registered in China and likely to cause confusion, it shall be rejected for registration and prohibited from use. Where a trademark in respect of which the application for registration is filed for use for non-identical or dissimilar goods is a reproduction, imitation, or translation of the well-known mark of another person that has been registered in China, misleads the public and is likely to create prejudice to the interests of the well-known mark registrant, it shall be rejected for registration and prohibited from use.²

▶ Account shall be taken of the following factors in establishment of a well-known mark:

- ▶ (1) reputation of the mark to the relevant public;
- ▶ (2) time of continued use of the mark;
- ▶ (3) consecutive time, extent, and geographical area of advertisement of the mark;
- ▶ (4) records of protection of the mark as a well-known mark; and

⁸▶

▶ Copyright Law, Art. 49.

⁹▶

▶ Copyright Law, Art. 51.

¹▶

▶ Trademark Law, Art. 3.

²▶

▶ Trademark Law, Art. 13.

▶(5) any other factors relevant to the reputation of the mark.³

▶When determining a well-known mark, the Trademark Office or the Trademark Adjudication Board shall comprehensively consider each and every factor under Article 14 of the Trademark Law, but it shall not be the prerequisite that the mark shall satisfy all factors prescribed therein.⁴ In the protection of well-known marks, the Trademark Office, the Trademark Review and Adjudication Board, and the local administrative authorities for industry and commerce shall take into account of the mark's distinctiveness and the extent of its being well-known.⁵

▶Any foreign person or foreign enterprise intending to apply for the registration of a trademark in China shall file an application in accordance with an agreement concluded between the People's Republic of China and the country to which the applicant belongs, according to the international treaty to which both countries are parties, or on the basis of the principles of reciprocity.⁶ Any foreign person or foreign enterprise intending to apply for the registration of a trademark or for any other matters concerning a trademark in China shall appoint any of such organizations as designated by the State to act as its or his agent.⁷

▶Any applicant for the registration of a trademark who files an application for registration of the same trademark for identical goods in China within six months from the date of filing the first application for the trademark registration overseas may enjoy the right of priority in accordance with any agreement concluded between the People's Republic of China and the country to which the applicant belongs, or according to the international treaty to which both countries are parties, or on the basis of the principle whereby each acknowledges the right of priority of the other. Anyone claiming the right of priority according to the preceding paragraph shall make a statement in writing when it or he/she files the application for the trademark registration, and submit, within three months, a copy of the application documents it or he/she first filed for the registration of the trademark; Where the applicant fails to make the claim in writing or submit the copy of the application documents within the time limit, the claim shall be deemed not to have been made for the right of priority.⁸

3▶

▶Trademark Law, Art. 14.

4▶

▶Provisions on the Determination and Protection of Well-known Trademarks, Art. 10.

5▶

▶Provisions on the Determination and Protection of Well-known Trademarks, Art. 11.

6▶

▶Trademark Law, Art. 17.

7▶

▶Trademark Law, Art. 18.

8▶

▶Trademark Law, Art. 24.

▶ Where a trademark is first used for goods in an international exhibition sponsored or recognized by the Chinese Government, the applicant for the registration of the trademark may enjoy the right of priority within six months from the date of exhibition of the goods. Anyone claiming the right of priority according to the preceding paragraph shall make a claim in writing when it or he/she files the application for the registration of the trademark, and submit, within three months, documents showing the title of the exhibition in which its or his/her goods was displayed, proof that the trademark was used for the goods exhibited, and the date of exhibition; where the claim is not made in writing, or the documents of proof not submitted within the time limit, the claim shall be deemed not to have been made for the right of priority.⁹

▶ The period of validity of a registered trademark shall be ten years, counted from the date of approval of registration.¹⁰ Where the registrant intends to continue to use the registered trademark beyond the expiration of the period of validity, an application for renewal of the registration shall be made within six months before the said expiration. Where no application has been filed within the said period, a grace period of six months may be allowed. If no application has been filed at the expiration the grace period, the registered trademark shall be cancelled. The period of validity of each renewal of registration shall be ten years.¹¹

▶ Any of the following acts shall be an infringement upon the right to exclusive use of registered trademark:

▶ (1) using a trademark which is identical with or similar to registered trademark on the same kind of commodities or similar commodities without a license from the registrant of that trademark;

▶ (2) selling commodities that infringe upon the right to exclusive use of registered trademark;

▶ (3) forging, manufacturing without authorization the marks of registered trademark of others, or selling the marks of registered trademark forged or manufactured without authorization;

▶ (4) changing registered trademark and putting commodities with the changed trademark into the market without consent of the registrant of that trademark; and

▶ (5) causing other damage to the right to exclusive use of registered trademark of another person.¹²

▶ The amount of compensation for infringing upon the right to exclusive use of trademark shall be the proceeds obtained from the infringement during the period of infringement, or the losses suffered by the infringed due to the infringement during the period of being infringed,

9▶

▶ Trademark Law, Art. 25.

10▶

▶ Trademark Law, Art. 37.

11▶

▶ Trademark Law, Art. 38.

12▶

▶ Trademark Law, Art. 52.

including reasonable expenses paid by the infringer to stop infringing acts. If it is difficult to determine the proceeds obtained from the infringement, or it is difficult to determine the losses suffered by the infringer due to the infringement, court shall determine a compensation of RMB 500,000 or below according to the circumstances of the infringing acts. If any person sells commodities that have, not knowing the facts, infringed upon the right to exclusive right of trademark and is able to prove that it has obtained those commodities legally and to specify the provider, it shall not bear the liability for compensation.¹³

▶ If the registrant of a trademark or an interested person has evidence to prove that another person is conducting or is going to conduct infringing acts upon its right to the exclusive use of registered trademark, and if the acts are not stopped promptly, irreparable damages will occur to its legal rights and interests, it may apply to court for a order of measures for stopping relevant acts and for assets preservation.¹⁴

▶ In order to stop the infringing acts, the registrant of a trademark or the interested person may apply to court for evidence preservation before filing the suit under the circumstances that evidence may get lost or will be hard to acquire afterwards.¹⁵

10:79. Trade secrets¹

▶ A business secret the parties learn in concluding a contract shall not be disclosed or unfairly used, whether the contract is established or not. The party who causes the other party to suffer from losses due to disclosing or unfairly using business secrets shall be liable for damages.² An operator shall not adopt any of the following means to infringe on the business secrets of others: (1) obtaining business secrets from the owner of the right by stealing, promising of gain, resorting to coercion, or other illegitimate means; (2) disclosing, using, or allowing others to use the business secrets of the owner of the right obtained by the means mentioned in the preceding item; or (3) disclosing, using, or allowing others to use the business secrets that it has obtained by breaking an engagement or disregarding the requirements of the owner of the right to preserve the business secrets. Where a third party obtains, uses, or discloses the business secrets of others when it or he has or should have full knowledge of the illegal acts mentioned in the preceding section, it shall be deemed to have infringed on business secrets of others.

▶ Business secrets refer to the technical information and operational information which is

¹³▶

▶ Trademark Law, Art. 56.

¹⁴▶

▶ Trademark Law, Art. 57.

¹⁵▶

▶ Trademark Law, Art. 58.

¹▶

▶ See also ▶ §10:88 on countering unfair competition.

²▶

▶▶ Contract Law, Art. 43.

not known to the public, which is capable of bringing economic benefits to the owners of the rights, which has practical applicability, and which the owners of the rights have taken measures to keep secret.³ Criminal Code Article 219 prescribes that anybody who commits the said actions breach of the Countering Unfair Competition Law, Article 10 will be found guilty of infringing business secret.

10:80. Patents

▶“Inventions-creations” mean inventions, utility models, and designs.¹ Any assignment, by a Chinese entity or individual, of the right to apply for a patent, or of the patent right, to a foreigner must be approved by the competent department of the State Council.² Where any foreigner, foreign enterprise, or other foreign organization, having no habitual residence or business office in China files an application for a patent in China, the application shall be treated under this Law in accordance with any agreement concluded between the country to which the applicant belongs and China, in accordance with any international treaty to which both countries are a party, or on the basis of the principle of reciprocity.³ Where any foreigner, foreign enterprise, or other foreign organization, having no habitual residence or business office in China applies for a patent, or has other patent matters to attend to in China, it shall appoint a patent agency designated by the patent administrative organ under the State Council to act as his or its agent.⁴ Any invention or utility model for which a patent right may be granted must possess novelty, inventiveness, and practical applicability.⁵ Any design for which a patent right may be granted must not be identical with or similar to any design which, before the date of filing, has been publicly disclosed in publications in the country or abroad or has been publicly used in the country and it must not collide with any legal prior rights obtained by any other person.⁶

▶The duration of a patent right for inventions shall be twenty years, and the duration of patent right for utility models and patent right for designs shall be ten years, counted from the

3▶

▶▶Counteracting Unfair Competition Law, Art. 10.

1▶

▶▶Patent Law, Art. 2.

2▶

▶▶Patent Law, Art. 10.

3▶

▶▶Patent Law, Art. 18.

4▶

▶▶Patent Law, Art. 19.

5▶

▶▶Patent Law, Art. 22.

6▶

▶▶Patent Law, Art. 23.

date of filing.⁷ Where any person passes off the patent of another person, aside from bearing civil liabilities according to law, shall be ordered to amend his acts by the authorities for patent work, and the order shall be announced. The illegal income of the said person shall be confiscated. He may be fined no more than 3 times his illegal income, and where there is no illegal income, he may be imposed a fine of no more than 50,000 RMB. Where the infringement constitutes a crime, he shall be prosecuted for his criminal liability.⁸

▶ The amount of damages for infringing a patent right shall be calculated according to the losses suffered by the patentee or the profits gained by the infringer out of the infringement. If it is too difficult to determine the damages based on such losses of the patentee or the profits of the infringer, the appropriate times of the royalties for licenses for the said patent may be applied *mutatis mutandis*.⁹ Where a patentee or any interested party who can provide any reasonable evidence that his right is being infringed or that such infringement is imminent and any delay to stop the acts is likely to cause irreparable harm to his or its legitimate rights, may, before instituting legal proceedings, request the court to order the suspension of related acts and to provide for property preservation.¹⁰ Prescription for instituting legal proceedings concerning the infringement of patent right is two years counted from the date on which the patentee or any interested party obtains or should have obtained knowledge of the infringing act.¹¹

▶ The Decision of the State Council on Amending the Detailed Rules for the Implementation of the Patent Law of the People's Republic of China effective February 1, 2010, further elaborates on Patent Law in China. If a patent is issued to an entity for the work done by an employee, remuneration is to be provided to the inventor in an amount no less than 3,000 Yuan for an invention patent, or 1,000 Yuan for a utility or design patent unless otherwise stated in legally formed bylaws.¹² If a patent is applied for under the Patent Cooperation Treaty, the patent must enter the National Phase of examination in China within 30 months of the priority date or within 32 months within the priority with an additional fee for the extension of time.¹³

7▶

▶▶ Patent Law, Art. 42.

8▶

▶▶ Patent Law, Art. 58.

9▶

▶▶ Patent Law, Art. 60.

10▶

▶▶ Patent Law, Art. 61.

11▶

▶▶ Patent Law, Art. 62.

12▶

▶ Amended Patent Law, Paragraph 28.

13▶

▶ Amended Patent Law, Paragraph 43.

XIII. Electronic Commerce

10:81. Digital signatures/encryption policy

▶ The Electronic Signature Law of China was promulgated on 28th August 2004 and became effective as of 1st April 2005. In the ▶ Electronic Signature Law, Art. 3 provides that in regards to contracts or other documents or certificates in civil activities, parties may agree on the use or non-use of electronic signatures and electronic data messages. Parties that agree on using electronic signatures and electronic data messages in documents may not deny the legal validity of such signatures and data messages solely on the grounds of their form. The preceding provisions shall not apply to the following documents: documents involving personal relationships such as marriage, adoption and inheritance; documents involving the transfer of rights in real properties such as land and buildings; documents involving the cessation of public utility services such as the supply of water, heat, gas and electricity; and other circumstances in which laws or administrative regulations stipulate that electronic documents are not applicable.

▶ Regarding the “written forms,” Art. 4 states that: electronic data messages that are able to demonstrate the contents tangibly and that may be retrieved and accessed at any time shall be deemed as complying with the written format required by laws and regulations.

▶ As to the reliability of a digital signature: an electronic signature that fulfills all the following criteria shall be deemed as a reliable electronic signature: the data for producing electronic signature belongs exclusively to the electronic signer when it is used in the electronic signature; the data for producing electronic signature is under the sole control of the electronic signer at the time of signing; it is possible to discover any changes to the electronic signature after signing; and it is possible to discover any changes to the contents and format of the electronic data message after signing. The parties may also choose to use electronic signatures that fulfill the reliable criteria stipulated in their agreement.¹ A reliable electronic signature shall have the same legal validity as a hand-written signature or a seal.²

▶ In addition, the ▶ Contract Law, Article 11 and ▶ 33 contain legislative regulations on digital signature, providing respectively that written forms of a contract include digital messages, and parties to a contract containing digital messages may require execution of a confirmation. The former confirms the validity of an electronic contract and the latter involves the essential elements of its effectiveness. The ▶ Contract Law, Article 16, ▶ 26, and ▶ 31 also provide the entry-into-force required for an electronic contract, is the point of acceptance, and place of establishment of said contract. These articles do not agree with international regulations that electronic commerce is of the same legal status and validity as traditional commerce.

10:82. Liability of online service providers for actions of subscribers

▶ An Internet information service provider shall provide good services to online users and ensure that the information content it provides is lawful.¹ For legal rights and interests of

¹▶

▶ Art. 13.

²▶

▶ Art. 14.

¹▶

citizens, legal persons and other organizations damaged, owing to information released on the internet that is untrue or unfair, the internet publishing institution shall make a public correction to eliminate ill effects and bear civil responsibilities according to law.² ISP, ICP or IAP causing damage to consumers shall bear not only the civil responsibilities, but also the criminal responsibilities in case the circumstance is of serious nature.

10:83. Internet jurisdictional issues

▶ China now has various laws or regulations concerning the right of internet jurisdiction, and the court will in general determine said right pursuant to different cases according to regulations on jurisdiction over civil or criminal action.

10:84. Licensing issues

▶ There is no regional restriction for practitioners such as an attorney or doctor or business to perform their professions or activities throughout China, and they are permitted to develop their businesses in other cities or provinces through internet. But if one desires to leave the place of registration of his practicing license to practice in other places, he must file an application to the administrative organ in charge in the relevant locations and go through the alteration procedures.

10:85. Restrictions on use of the internet

▶ Internet information service providers may not produce, duplicate, publish, or disseminate any of the following information that:

- ▶ (1) is contrary to the basic principles laid down in the Constitution;
- ▶ (2) seeks to endanger state security, disclose state secrets, subvert state power, or disrupt the unification of the State;
- ▶ (3) infringes upon the honor and interests of the State;
- ▶ (4) incites ethnic hostility, racial discrimination, or disrupts ethnic unity;
- ▶ (5) disrupt the religious policy of the State and propagate heresies and feudal superstitions;
- ▶ (6) spreads rumors, disrupts the social order, and break down social stability;
- ▶ (7) disseminates obscenity, pornography, gambling, violence, murder, terror, or instigate others to commit offences;
- ▶ (8) insult or defame others or infringes upon the lawful rights and interests of others; or
- ▶ (9) contains other contents prohibited under laws or administrative laws and regulations.¹

▶ Individuals, legal persons, or other organizations using computer or computer information networks and needing to connect with international networks must achieve said

▶ Measures for the Administration of Internet Information Service, Art. 13.

2▶

▶ Provisional Regulations on the Administration of Internet Publication, Art. 19.

1▶

▶ Measures for the Administration of Internet Information Service, Art. 15.

connection via an authorized admission network.² Any unit or individual engaging in international networks must observe relevant laws, administrative regulations of the state, and strictly perform safety and secrecy system; it is not allowed to use international networks to perform illegal and criminal activities such as jeopardizing state security, betraying state secrets, producing, consulting, duplicating, or disseminating information obscene and pornographic, or hampering social security.³

10:86. Privacy and e-mail issues

▶ Electronic bulletin service providers shall keep secret personal information of internet consumers and must not betray them to others without internet consumers' approval, unless otherwise provided by law.¹ For betrayal of internet consumers' information without their approval, administrative departments of province, autonomous regions, and municipalities directly under the Central Government in charge of telecommunications shall order corrections; for damage or loss caused to internet consumers, the electronic bulletin service provider shall be held responsible for legal consequences of its acts.² Any law or regulation concerning management by an employer of an employee's e-mail or internet account can be treated according to provisions of the Civil Law on privacy.

10:87. Miscellaneous issues

▶ Domain name registration service adopts the principle of first registering.¹ The holder of a domain name shall participate in the procedures of an appeal for a domain name registered or used, according to the terms of regulations for settling dispute over domain names, lodged by anyone with an organ for above purpose.²

XIV. Competition and Antitrust Laws

2▶

▶ Provisional Measures on the Management of Computer Information Networks Connecting with International Network, Art. 10.

3▶

▶ Provisional Measures on the Management of Computer Information Networks Connecting with International Network, Art. 13.

1▶

▶ Regulations on the Management of Internet Electronic Bulletin Service, Art. 12.

2▶

▶ Regulations on the Management of Internet Electronic Bulletin Service, Art. 19.

1▶

▶ Art. 16.

2▶

▶ Art. 27.

10:88. Countering Unfair Competition

▶ Pursuant to the Countering Unfair Competition Law, unfair competition refers to acts of operators which contravene the provisions of this Law, with a result of damaging the lawful rights and interests of other persons and disturbing socio-economic order.¹ Persons shall not adopt any of the following unfair means to carry on transactions in the market and cause damage to competitors:

▶ (1) passing off the registered trademarks of others;

▶ (2) using, without authorization, the names, packaging, or decoration peculiar to well-known goods or using names, packaging, or decoration similar to those of well-known goods so that their goods are confused with the well-known goods of others, causing buyers to mistake them for the well-known goods of others;

▶ (3) using, without authorization, the enterprise names or personal names of others on their own goods, leading purchasers to mistake them for the goods of others; and

▶ (4) forging or falsely using, on their goods, symbols of quality such as symbols of authentication and symbols of famous and high-quality goods, falsifying the origin of their goods, and making false representations which are misleading as to the quality of the goods.²

▶ If the decoration of the business place, the pattern of business tools, or the clothes of business staff of a business operator, etc. constitutes an overall business image with a unique style, it may be affirmed as a “decoration”, the copying of which is prescribed in the Anti-unfair Competition Law.³ If it is sufficient to cause the relevant public to misunderstand the source of a commodity, including the misunderstanding of such a specific relationship as licensed use or affiliation with the business operator of a well-known commodity, it shall be affirmed as “causing confusion with the well-known commodity of someone else, and making the purchasers mistake it to be a well-known commodity” prescribed in the Anti-unfair Competition Law.⁴

▶ The use of a fundamentally similar name, package or decoration of a commodity or the one that is hardly different from the counterfeited one in terms of visual effect on the same commodity shall be regarded as sufficient to cause confusion with another person's well-known commodity.⁵ The commercial use by another party within the territory of China, including the

1▶

▶ Art. 2.

2▶

▶ Art. 5.

3▶

▶ Interpretation Concerning the Application of Law in the Trial of Civil Cases Involving Unfair Competition, Art. 3.

4▶

▶ Interpretation Concerning the Application of Law in the Trial of Civil Cases Involving Unfair Competition, Art. 4.

5▶

▶ Interpretation Concerning the Application of Law in the Trial of Civil Cases Involving Unfair

use of the specific name, package or decoration of a well-known commodity, or the enterprise title or name of a commodity, commodity packages or commodity exchange documents, or for advertisements, exhibitions or other commercial activities, shall be affirmed as the “use” prescribed in the Anti-unfair Competition Law.⁶

▶ Public utility enterprises or other operators having monopolistic status according to law shall not force others to buy the goods of the operators designated by them so as to exclude other operators from competing fairly.⁷ A local government and its subordinate departments shall not abuse their administrative power to force others to buy the goods of the persons designated by them so as to restrict the lawful business activities of other persons. A local government and its subordinate departments shall not abuse their administrative power to restrict the entry of goods from other parts of the country into the local market or the flow of local goods to markets in other parts of the country.⁸ An operator shall not practice bribery by using money, valuables, or other means to sell or buy goods.⁹ An operator shall not adopt any of the following means to infringe on the business secrets of others:

▶ (1) obtaining business secrets from the owner of the right by stealing, promising of gain, resorting to coercion or other illegitimate means;

▶ (2) disclosing, using, or allowing others to use the business secrets of the owner of the right obtained by the means mentioned in the preceding item;

▶ (3) disclosing, using, or allowing others to use the business secrets that it has obtained by breaking an engagement or disregarding the requirements of the owner of the right to preserve business secrets.

▶ Where a third party obtains, uses, or discloses the business secrets of others when it or he has or should have full knowledge of the illegal acts mentioned in the preceding section, it or he shall be deemed to have infringed on the business secrets of others. Business secrets in this Article refer to the technical information and operational information which is not known to the public, which is capable of bringing economic benefits to the owners of the rights, which has practical applicability, and which the owners of the rights have taken measures to keep secret.¹⁰

Competition, Art. 4.

6▶

▶ Interpretation Concerning the Application of Law in the Trial of Civil Cases Involving Unfair Competition, Art. 7.

7▶

▶ Art. 6.

8▶

▶ Art. 7.

9▶

▶ Art. 8.

10▶

▶ Art. 10.

An operator shall not sell its goods at a price that is below cost, for the purpose of excluding its or his competitors. In any of the following events, such sales do not come under acts of unfair competition:

- ▶ (1) selling fresh goods;
- ▶ (2) disposing of goods the useful life of which is about to expire or of other overstocked goods;
- ▶ (3) seasonal lowering of prices; and
- ▶ (4) selling goods at lowered prices for paying off debts, changing a line of production, or closing a business.¹¹

▶ Tenderers shall not submit tenders in collusion with one another to force the tender price up or down. A tenderer shall not collaborate with the party inviting tenders to exclude competitors from fair competition.¹²

10:89. Antitrust laws

▶ The Anti-monopoly Law, adopted on August 30, 2007, effective August 1, 2008, applies to monopolistic conducts in economic activities within the territory of China, and also, monopolistic conducts outside the territory of China that has the effect of eliminating or restricting competition on the domestic market of China.¹

▶ Monopolistic conducts include: (1) monopoly agreements reached between business operators; (2) abuse of dominant market position by business operators; and (3) concentration of business operators that may have the effect of eliminating or restricting competition.²

▶ Monopoly Agreement refers to agreements, decisions or other concerted behaviors that may eliminate or restrict competition.³ Competing business operators are prohibited from reaching any of the following monopoly agreements with each other:

- ▶ (1) fixing or changing the price of commodities;
- ▶ (2) restricting production quantity or sales volume of commodities;
- ▶ (3) dividing the sales market or the raw material supply market;
- ▶ (4) restricting the purchase of new technology or new facilities or the development of new technology or new products;
- ▶ (5) jointly boycotting transactions; or
- ▶ (6) other monopoly agreements as determined by the Anti-monopoly Law Enforcement

¹¹ ▶

▶ Art. 11.

¹² ▶

▶ Art. 15.

¹ ▶

▶ Art. 2.

² ▶

▶ Art. 3.

³ ▶

▶ Art. 13.

Agency under the State Council.⁴

▶ No business operator with dominant market position may abuse its dominant position to eliminate or restrict competition.⁵ Dominant Market Position refers to a market position held by business operators that have the ability to control the price or quantity of commodities or other trading conditions in the relevant market or block or affect the entry of other business operators into the relevant market.⁶ Under any of the following circumstances, a business operator may be presumed to have a dominant market position:

▶ (1) market share of one business operator accounts for 1/2 or more in the relevant market;

▶ (2) the joint market share of two business operators accounts for 2/3 or more in the relevant market; or

▶ (3) the joint market share of three business operators accounts for 3/4 or more in the relevant market.

▶ Under the circumstance prescribed in Item 2 or 3, if any of the business operators has a market share of less than 1/10, that business operator shall not be considered to have a dominant market position. A business operator that has been presumed to have a dominant market position shall not be considered as having a dominant market position if the operator can provide opposite evidence.⁷

▶ As to industries controlled by the State-owned economy and concerning the lifeline of national economy and national security or the industries lawfully enjoying exclusive production and sales, the State shall protect lawful business operations conducted by the business operators therein, and shall supervise and control business operations and the prices of commodities and services provided by these business operators, so as to protect consumer interests and facilitate technological advancements. Business operators mentioned herein shall operate according to law, be honest, faithful and strictly self-disciplined, and accept public supervision, and shall not harm consumer interests by taking advantage of their controlling or exclusive dealing position.⁸

▶ No administrative organ or organization empowered by law or administrative regulations to administer public affairs may abuse its administrative powers to eliminate or restrict competition.⁹ No administrative organ or organization empowered by law or

⁴▶

▶ Art. 13.

⁵▶

▶ Art. 6.

⁶▶

▶ Art. 17.

⁷▶

▶ Art. 19.

⁸▶

▶ Art. 7.

⁹▶

administrative regulations to administer public affairs may abuse its administrative power to reject or restrict participation of non-local business operators in local tendering and bidding activities by imposing discriminatory qualification requirements or assessment standards or by failing to publicize information according to law; to reject or restrict either investment in its jurisdiction or the establishment of local branches by non-local business operators by imposing unequal treatments on them that are different from those on the local business operators; to compel business operators to engage in monopolistic activities that are prohibited by this Law; and to formulate provisions on eliminating or restricting competition.¹⁰

XV. Partnerships and Corporations

10:90. Partnerships-- Between citizens¹

▶ Since domestic private enterprises exist, and cooperative ventures with foreign entities can be with individual foreign person(s), partnerships can exist. Small private partnerships in urban areas would have to be registered and licensed for certain purposes, such as establishing restaurant. Foreign ventures with local entities also must be licensed but are unlikely to be partnerships in that other than partnerships between two entities, viz., joint ventures, partnerships with individual Chinese persons will not be common in normal international transactions.

▶ The Partnership Law was promulgated on Feb. 28, 1997, in order to regulate behavior of partnerships, to protect the legal rights of partnerships and their partners as well as their partners and creditors, to protect social economic order, and to promote economic development. Effective Aug. 1, 1997 Amended on Aug. 27, 2006, effective June 1, 2007 Civil Code of China ensures legal status of partnerships.²

▶ Partnership Law defines partnership as general partnership enterprises and limited liability partnership enterprises established within China by natural persons, legal persons and other organizations in accordance with law.³

▶ General partnership enterprise may be formed by general partners. Partners shall bear unlimited joint and several liabilities for debts of partnership enterprise, unless otherwise any special provisions provided by this Law.⁴

▶ Art. 8.

10▶

▶ Arts. 34-37.

1▶

▶ See also ▶ §§10:102 to 10:105.

2▶

▶ Arts. 30-35.

3▶

▶ Art. 2.

4▶

▶ Art. 2.

▶ Limited liability partnership enterprise shall be formed by general partners and limited partners. General partners shall bear unlimited joint and several liabilities for debts of limited liability partnership enterprise. Limited partners bear liabilities for its debts to the extent of their capital contributions.⁵

▶ No partner may, solely or jointly with others, operate any business competing with partnership enterprise, unless otherwise stipulated in partnership agreement or unanimously consented by all partners. No partner may have any transaction with partnership enterprise.⁶

▶ Partnership Law requires that partnership agreement must be negotiated by partners before reaching agreement, it shall be in writing,⁷ and based on principals of “equality, fairness and honesty”.⁸

▶ Establishment of partnership should meet following requirements:

▶ (1) there are more than two partners. If partners are natural persons, they shall have complete civil capacity;

▶ (2) partnership agreement in writing;

▶ (3) capital subscribed or actually contributed from each party;

▶ (4) there is name and production and business operation place for partnership;

▶ (5) other conditions as provided for by laws and administrative regulations.⁹

▶ Name of partnership enterprises shall use identification of general partnership.¹⁰

▶ To establish limited liability partnership, the number of partners must be at least two and not more than 50, with at least a general partner.¹¹ Name of limited liability partnership enterprises shall use identification of limited liability partnership.¹²

5▶

▶ Art. 2.

6▶

▶ Art. 32.

7▶

▶ Art. 4.

8▶

▶ Art. 5.

9▶

▶ Art. 14.

10▶

▶ Art. 15.

11▶

▶ Art. 61.

12▶

▶ Art. 62.

▶ No wholly state-funded company, state-owned company, listed company, public-welfare-oriented public institution or social organization may become general partner.¹³

▶ Partners can contribute currency, goods, land use rights, intellectual property or other property or rights, or labor services, as capital. Value of capital, except currency, goods, intellectual property, land use rights or other property or rights may be determined by all partners through negotiation or may be assessed by the a statutory assessment institution entrusted by all partners.¹⁴ Limited partners cannot contribute labor services as capital.¹⁵ Assessment of value of labor services shall be determined by all partners and stated in partnership agreement.¹⁶

▶ Partners cannot unreasonably oppose transfer assignment of property before settlement.¹⁷ Unless otherwise provided in partnership agreement, partners should negotiate with each other and reach agreement before they transfer any part of property to third party.¹⁸ Without agreement with other partners, it is regarded invalid for any partner to use property of partnership as new capital for other enterprise. All partners should take responsibility for compensation if they cause any losses to bona fide third party, pursuant Law.¹⁹

▶ Each partner has equal right to execute business of partnership. In accordance to stipulations of partnership agreement or upon decision of all partners, one or several partners may be authorized to execute partnership affairs on behalf of partnership enterprise.²⁰ Restrictions on partners' execution of partnership affairs as well as on their right to represent partnership enterprise in the face of outsiders shall not challenge any bona fide third party.²¹

13 ▶

▶ Art. 3.

14 ▶

▶ Art. 16.

15 ▶

▶ Art. 64.

16 ▶

▶ Art. 16.

17 ▶

▶ Art. 21.

18 ▶

▶ Art. 22.

19 ▶

▶ Art. 25.

20 ▶

▶ Art. 26.

21 ▶

▶ Art. 37.

- ▶ Partnership will be dissolved if any of following circumstances exist:
 - ▶ (1) partners decide not to extend operation when partnership expires;
 - ▶ (2) any circumstances regarding dissolution of partnership as determined in agreement;
 - ▶ (3) all partners agree to dissolve partnership;
 - ▶ (4) number of partners falls below legal requirement for 30 days;
 - ▶ (5) goal of partnership as determined by agreement has been achieved or cannot be achieved;
 - ▶ (6) cancelled of business license, ordered to close down, or revoked pursuant to law;
 - ▶ (7) other reasons determined by laws and administrative regulations.²²
 - ▶ Satisfaction of liabilities after settlement has following order of payment: (1) wages and insurance of employees due; (2) taxes due; (3) other debt; (4) capital of partners. Any remainder should be distributed in proportions pursuant to Art. 33 of this Law after the partnership enterprise has paid the liquidation expenses, wages and social insurance of employees, statutory compensation, taxes due and other debts.²³
 - ▶ Administrative Provisions for Registration of Partnerships were promulgated on Nov. 19, 1997, amended on May 9, 2007. Partnerships must register with Administration of Industry and Commerce.²⁴ Registering party must provide following documents: completed registration form; proof of partners' status; documents indicating legal representative of each partner and/or all partners; partnership agreement; confirmation letters issued by all partners for each partner's financial subscription or actual payment; certificate on main business place; and other documents as required by Administration of Industry and Commerce.²⁵ Alterations to partnership's registration materials must be reported by the managing partners within 15 days of change.²⁶ After modification is reported, approval will be made within 20 days; if it affects business license, new one will be issued.²⁷ If partnership is dissolved pursuant to Partnership Law, registration must be made within 15 days to cancel registration.²⁸ Parties must provide following
-

22▶

▶ Art. 85.

23▶

▶ Art. 89.

24▶

▶ Art. 4.

25▶

▶ Art. 11.

26▶

▶ Art. 18.

27▶

▶ Art. 20.

28▶

documents: form signed by liquidators to register conciliation of accounts; adjudication of bankruptcy by court, decision made by partnership enterprise pursuant to Partnership Law, and documents by administrative authorities to close down partnership enterprise, to cancel business license of partnership enterprise, or to revoke partnership enterprise; and other documents as required by Administration of Industry and Commerce.²⁹ At time of registering partnership's dissolution, business license must also be returned.³⁰ Once partnership registers to dissolve, it is deemed dissolved.³¹ Partnership can also register branch office.³²

▶ Partnership must provide yearly report in accordance with demands of government office where partnership registered.³³ Partnership license cannot be forged, assigned, sold, leased, or exchanged.³⁴ If one does not act in accordance with these regulations, one may be subject to fines or loss of business license.³⁵

10:91. Partnerships-- Foreign partnerships

▶ Administrative Measures for the Establishment of Partnership Enterprises within China by Foreign Enterprises or Individuals has been effective since March 1, 2010. This order allows the establishment of partnership enterprises within China by two or more enterprises or individuals who may not all be Chinese nationals.¹ The registration requirements for a foreign partnership are the same as those specified in the Registration of Partnerships.² However, if all

▶ Art. 22.

29 ▶

▶ Art. 23.

30 ▶

▶ Art. 23.

31 ▶

▶ Art. 24.

32 ▶

▶ Art. 25.

33 ▶

▶ Art. 31.

34 ▶

▶ Art. 33.

35 ▶

▶ Arts. 36-47.

1 ▶

▶ Art. 2.

2 ▶

▶ Art. 5.

foreign partners of a registered foreign partnership leave the partnership, the registration must be modified.³

10:92. Partnerships-- Tax aspects

▶ Industrial and commercial taxes are imposed on an entity and individuals pay income tax on their individual income from the partnership proceeds.

▶ According to the Enterprise Income Tax Law, Art. 60 effected on 1st January 2008, the prior relevant Income Tax Law was abolished.

10:93. Corporations-- Representative offices

▶ Foreign corporations permanently based in China, and those frequently doing business there, may apply for registration of a representative office.¹ Different organizations may approve these applications, and once approved the foreign firm must register with the relevant office of the Administration of Industry and Commerce. License fees are paid on an annual basis.

10:94. Corporations-- Wholly owned foreign corporations

▶ Foreign corporations may, and do, establish wholly owned corporate entities.¹ These corporations often manufacture in China for export. All entities in the various special economic zones (Shezhen, Zhuhai, Shantou, Shekou, Xiamen and Hainan Island) enjoy special tax relief.

10:95. Corporations-- Registration

▶ All corporations whether domestic or foreign, must register with the relevant Bureau of Industry and Commerce. The registration license defines the scope of business activity of the entity. If said activity changes, then the business license must be amended. Failure to register may involve sanctions.

10:96. Corporations-- Dissolution and/or liquidation of a foreign-invested enterprise

▶ The Ministry of Commerce promulgated the Directional Opinions on the Dissolution and Liquidation Work of Foreign-invested Enterprises According to Law while establishing the prior relevant act. According to the Opinions, the dissolution and liquidation of foreign-invested enterprises shall be handled according to the relevant provisions of the Company Law and the laws and administrative regulations of foreign investment. Where the laws and administrative regulations of foreign investment have special provisions and no detailed provisions are set forth in the Company Law, said special provisions shall apply.¹ For some shareholders of a

³▶

▶ Art. 8.

¹▶

▶ Regulation concerning the Registration of Resident Office of a Foreign Enterprise, March 15, 1983.

¹▶

▶ Regulations having Foreign Investment.

¹▶

▶ Art. 1.

foreign-invested enterprise, who request to dissolve a company according to the provisions the Company Law, Art 183, they shall directly apply to having jurisdiction over the matter.²

10:97. Corporations-- Elements

- ▶ Company organization is generally governed by the Company Law.

- ▶ There are numerous corporate forms, namely share limited company (hereinafter SLC), limited liability company (hereinafter LLC), sole proprietorship, equity joint venture, and contractual joint venture. Foreign investors may employ any form except the LLC. In addition, foreign enterprises or individuals may create and maintain long term representative offices in China. Besides the Equity Joint Venture Law adopted on July 1, 1979 and amended on 4th April 1986 and the Contractual Joint Venture Law adopted on 13th April 1988, progress has been made in corporation legislation in 1992 and 1993, and on 29th December 1993, the Company Law was enacted. Later, two amendments were made to the Company Law, respectively on 25th December 1999 and on 27th October 2005. In order to better apply the Company Law, the Supreme People's Court made provisions on some issues regarding the application of the Company Law, respectively on 27th March 2006, 12th May 2008 and 6th December 2010.

- ▶ A company is a legal person that shall enjoy the right to its independent property. A company shall be liable for its debts to the extent of all its assets. In the case of a limited liability company, shareholders shall assume liability towards the company to the extent of their respective capital contributions. In the case of a joint stock limited company, shareholders shall assume liability towards the company to the extent of their respective shareholdings.¹

- ▶ The regulations for a limited liability company, provide it shall be incorporated by not more than fifty (50) shareholders.² The minimum amount of the registered capital of a limited liability company shall be RMB 30,000.³

- ▶ Except for assets forbidden to be used as capital contributions by laws and administrative regulations, a shareholder may make its capital contributions to a company in currency or by contributing such non-currency properties as material objects, intellectual property rights and land-use rights that can be evaluated in the form of currency and transferred in accordance with law. The non-currency properties to be contributed as capital shall undergo an asset valuation and verification, and shall not be overvalued or undervalued. Where there are other provisions of law and administrative regulations on the valuation and verification of non-currency properties, such provisions shall apply. The amount of the capital contributions in currency shall not be lower than thirty percent (30%) of the amount of the registered capital of

2▶

▶ Art. 3.

1▶

▶▶ Company Law, Art. 3.

2▶

▶▶ Company Law, Art. 24.

3▶

▶▶ Company Law, Art. 26.

the limited liability company.⁴

▶The Company Law provisions regarding joint stock limited companies, which provide the registered capital of a joint stock limited company established by a public share offering shall be the total amount of share capital subscribed to by all sponsors and registered with the company registration authority. The initial capital contribution of all the sponsors shall not be less than twenty percent (20%) of the registered capital, the remaining of which shall be paid in full within two (2) years of the establishment of the company. In the event of an investment company, the remaining part of the registered capital may be fully paid within five (5) years of the establishment of the company. Prior to a full contribution to the registered capital, sponsors shall not offer the shares to others. The registered capital of a joint stock limited company established by sponsorship shall be the actual total amount of share capital that is paid up and registered with the company registration authority. The minimum amount of the registered capital of a joint stock limited company shall be RMB 5,000,000. Where there is a higher level of the minimum amount stipulated by laws and administrative regulations, such stipulations shall apply.⁵

▶The ▶Company Law, Chapter 11 has provisions regarding the branch organizations of foreign enterprises. In order to establish a branch within China, a foreign company must appoint a representative or agent in charge of such branch within China, and fund its branch as appropriate in light of the nature of its intended business. Where operation of certain branches of foreign companies is subject to a minimum level of funding, such level shall be prescribed by the State Council separately.⁶ A foreign company is a foreign legal person, and its branch established within China does not have the status of a Chinese legal person. A foreign company shall bear civil liabilities in respect of the business conducted by its branch within China.⁷

▶The recent, comprehensive trial codes and regulations governing share holding organizations and corporate entities were drafted by five state central departments with the State Economic Restructuring Commission as leader. They were incorporated into 15 different documents and fall into three categories. First, an overall policy document entitled “Trial Implementation of Shareholding Enterprises” sets forth the overall purpose, principles, and requirements of the share holding system. Second, two “Prescriptive Opinions,” the Prescriptive Opinions of a Share Limited Company (hereinafter SLQ) and the Prescriptive Opinions of a Limited Liability Company (hereinafter LLQ), which are legislative code-like documents set forth in detail the organization of the SLC and LLC. Last, a set of temporary regulations governs 12 aspects of the operation of corporations, including macro-management, the accounting

⁴▶

▶Art. 27.

⁵▶

▶Art. 81.

⁶▶

▶▶Company Law, Art. 194.

⁷▶

▶▶Company Law, Art. 196.

system, labor and wage administration, taxation, auditing, financial management, materials distribution, and the like.

▶The LLC is not applicable to foreign investment enterprises, which are governed by a different set of laws and regulations.⁸ Foreign investors may invest in an SLC by holding B-shares or enter into an equity joint venture with a Chinese party and transform the joint venture into an SLC subject to government approval.⁹

10:98. Corporations-- Equity joint venture corporations

▶The law on Joint Ventures using Chinese and Foreign Investment (“Joint Venture Law”) permits foreign entities to form equity joint ventures with Chinese organizations. These new corporations have limited liability, ownership is denominated by ownership of registered capital, and the contracts last for a specified period of years. Generally, the foreign party should contribute not less than twenty-five percent of the registered capital of the corporation. The Chairman of the board of directors of the joint venture company is the legal representative of the Company. The joint venture law has attendant tax provisions, etc.

10:99. Corporations-- Contractual joint venture corporation

▶In a contractual joint venture the capital contribution of the parties is specified in the contract. The form of the venture may look very similar to the equity joint venture, but the parties do not utilize the joint venture law, shares are normally not issued, and the parties' interest in the assets of the venture, or profit, or income is contractually specified.

10:100. Corporations-- Wholly owned foreign corporations

▶These entities, increasingly common, are limited liability corporations, wholly owned by a foreign party, often having certain limited tax benefits.

XVI. Court Actions and Procedures

10:101. Civil courts-- Subject matter

▶The regular civil courts are given jurisdiction to decide all civil cases.¹ However, there are tribunals within the court for specific types of civil cases. The basic level courts of the counties, cities, self-governing districts, and districts under the jurisdiction of cities have civil sections, and the civil tribunals are empowered to decide civil cases including matrimonial disputes, disputes between citizens over property, etc. Most courts have economic tribunals, which handle all other commercial contracts such as breach of contract. In addition, in larger cities, most courts have Intellectual Property tribunals, for IP cases. In cases of major significance, the basic level courts and indeed all courts can petition courts of the next level to

⁸▶

▶LLC, Art. 78.

⁹▶

▶SLC, Arts. 10, 13.

¹▶

▶▶Civil Procedure Law, Art. 4.

assume jurisdiction over the case.²

▶ In addition to these courts of first instance, there are intermediate level courts of first instance established in cities directly under the provincial government, self-governing prefectures districts within provinces, self-governing areas, and in cities and self-governing areas directly under central governing jurisdiction. These intermediate courts also handle important civil cases as courts of primary jurisdiction as well as appeals from basic level courts.³

▶ The 29 high level courts in the provinces, in cities directly under the central, government's control, and in self-governing areas handle appeals from lower level courts as well as major cases as courts of first instance.⁴

▶ The Supreme Court has supervisory jurisdiction over all lower level courts and appellate authority over decisions and judgments of high level courts and special courts.⁵ It can handle cases of first instance designated as within its jurisdiction by law. The Supreme Court, when deciding cases having substantive legal problems, will undertake an explanation of said problems in its decision.⁶

10:102. Civil courts-- Amount in controversy

▶ Chinese law does not provide specific limitations on a court's jurisdiction based upon the amount in controversy. However, courts have the authority to petition for referral of a matter to the next higher level if the case is a serious one. Thus, a very substantial property dispute involving matters of provincial concern could be referred to a high level court for trial.

10:103. Civil courts-- Parties

▶ Natural and other persons having litigation rights and obligations can be parties to civil litigation. Commercial and non-commercial enterprises, government, and mass organizations can be parties to civil litigation by these organizations, with responsible principal individuals, acting as their legal representatives.¹ Citizens have litigation rights and obligations from birth; legal persons have litigation rights and obligations from the date of establishment of the enterprise, etc.

2▶

▶ Organic Law of Peoples' Courts, Arts. 18-21.

3▶

▶ Organic Law of People's Courts Arts. 23, 24, 25.

4▶

▶ Organic Law of People's Courts, Arts. 6, 27, 28.

5▶

▶ Organic Law of People's Courts, Art. 32.

6▶

▶ Organic Law of Courts, Art. 33.

1▶

▶▶ Civil Procedure Law, Art. 57.

▶ Foreign nationals and stateless persons have the same rights and duties as Chinese citizens in civil litigation as do foreign enterprises and organizations.² However, where foreign courts impose limitations on citizens, enterprises, or organizations from China, Chinese courts will, on the basis of reciprocity, impose the same limits upon foreign persons in courts in China.³

10:104. Civil courts-- Representation of parties

▶ Parties have the right to employ legal representatives in civil litigation.¹ Those lacking legal capacity (e.g., infants) can also employ a legal representative for purposes of litigation, or if they have none, can have one appointed by the court.² Close relatives, social organizations, persons recommended by ones unit and, with the permission of the court, other citizens and attorneys all can be legal representatives in civil proceedings.³

▶ Where foreigners, stateless persons and foreign enterprises and organizations, in the process of suing or being sued, need to entrust a lawyer to serve as an agent, they must entrust the lawyer of China.⁴ Foreign litigants in a civil action which involve foreign elements may either entrust a person from their home countries or a lawyer from their home countries as agent but not of counsel, in litigation. The officials of foreign embassies and consulates in China, if entrusted by a citizen of their home countries, may act as agents in litigation in their own name; however, they are not entitled to diplomatic privileges and immunities in litigation.⁵

▶ Foreign nationals, stateless persons, foreign enterprises, and organizations must employ attorneys admitted to practice before the courts of China when employing legal counsel in litigation but can employ foreign counsel, who will not hold himself not as an attorney, but as a legal representative; if said counsel has that oral and linguistic skills to handle the proceedings.⁶

2▶

▶▶ Civil Procedure Law, Art. 5.

3▶

▶▶ Civil Procedure Law, Art. 5.

1▶

▶▶ Civil Procedure Law, Art. 57.

2▶

▶▶ Civil Procedure Law, Art. 57.

3▶

▶▶ Civil Procedure Law, Art. 58.

4▶

▶ Art. 239.

5▶

▶ Civil Procedure Opinion, Art. 308.

6▶

▶▶ Civil Procedure Law, Art. 240.

10:105. Depositions-- Methods and forms for taking testimony

▶ Parties' statements of their views, witnesses, expert testimony, and written evidence are all acceptable in civil proceedings.¹ Under ordinary circumstances, evidence of witnesses is taken by oral testimony in open court. However, if there are proper reasons whereby the witness is unable to be present at the proceedings, a written record of oral evidence may be offered or a record of testimony can be made outside the courtroom by an officer of the court. If the witness resides in another locality, the court in said locality can undertake to examine the witness and make a record of said testimony. Similarly, expert testimony can be taken at a location outside of the courtroom, provided the court and parties or their representatives have an opportunity to examine and question the expert. The record of such testimony should be signed by the expert.

10:106. Depositions-- Authentication and form of transmission

▶ The Civil Procedure Law (Art. 260) provides that, based on treaty or on reciprocity, Chinese courts may entrust foreign courts with certain matters relevant to litigation. This responsibility can include the examination of witnesses within a foreign court's jurisdiction and the verification of evidence. Documents wherein foreign courts are requested to undertake certain legal responsibilities by Chinese courts must have an appended foreign language translation.¹

10:107. Trial procedure

▶ Suits are commenced by a complaint which can be written or, if there are difficulties in putting it in written form, can be made orally. In the latter case, the courts will record the oral complaint. Copies of the complaint must be served both on the court and on the defendant by the court.¹ Failure of a defendant to answer does not have any legal consequences.

▶ In order to commence a suit, one must have a direct substantial interest in the matter, a specific defendant or defendants, requests for relief and factual evidence, and the matter must be within the jurisdiction and venue of the court.² The court has seven days to decide whether or not to accept a case.

▶ In civil cases the court should serve a copy of the complaint on the defendant within five days of the filing date, but the defendant has fifteen days from receipt of the complaint to serve and answer.³

1▶

▶▶ Civil Procedure Law, Art. 63.

1▶

▶▶ Civil Procedure Law, Art. 262.

1▶

▶▶ Civil Procedure Law, Art. 109.

2▶

▶▶ Civil Procedure Law, Art. 108.

3▶

▶▶ Civil Procedure Law, Art. 113.

▶ Trials are nominally public, except those concerning national secrets and private confidential matters. Evidence is exchanged, pursuant to the rules of the Supreme Court, at an early day in the course of trial proceedings. Thus, in divorce cases the parties can make application to avoid a public trial.⁴ Three days prior to trial the court should notify the parties and other participants to the litigation of its date and location.⁵ After presentation of evidence and examination of the parties and witnesses, the court renders its decision in writing and explains the facts upon which it is based, the reasoning, and the legal provisions relied upon. The results and the liability for costs, as well as the time limits respond for appeal in the appeals court, should be detailed in the decision.⁶

10:108. Appeal

▶ The Civil Procedure Law (Art. 10) provides that civil cases should be handled by two levels of courts, with the court of second instance being the court of last resort.¹ The time for an appeal is ten days from receipt of a written ruling and fifteen days from receipt of written decisions and judgments.²

▶ Any retrial petition by a party shall be made within two years after the judgment or ruling becomes legally effective; or be made within three months from the day when the party has known or should know that the legal document on which the original judgment or ruling was made was cancelled or revised or that the adjudicating personnel were involved in any conduct of embezzlement, bribery, practicing favoritism for himself or relatives, or twisting the law in rendering judgment.³

10:109. Statutes of limitations

▶ The statutes of limitations concerning contract rights under the General Principles of Civil Law must be exercised within two years of discovery of the breach of contract. Pursuant to Contract Law, the time limit for action before the court or for arbitration before an arbitration institution regarding disputes relating to contracts for international sales of goods and contracts for technology import and export shall be four years, calculating from the date on which the

4▶

▶▶ Civil Procedure Law, Art. 120.

5▶

▶▶ Civil Procedure Law, Art. 122.

6▶

▶▶ Civil Procedure Law, Art. 138.

1▶

▶▶ Civil Procedure Law, Art. 158.

2▶

▶▶ Civil Procedure Law, Art. 147.

3▶

▶▶ Civil Procedure Law, Art. 184.

party knows or ought to know the infringement on its rights. The time limits for action before the court or for arbitration before an arbitration institution regarding other contracts disputes shall be in accordance with the provisions of the relevant laws.¹ There are various rules regarding filing claims that have yet to be clarified. For example, rules for water cargo transportation claims require that, within 180 days subsequent to the claim, application shall be made for administrative relief. If denied, or if no response is received, then within 60 days from demand or from the next day after reply to the administrative agency is due, appeal shall be made to the courts. As to railroad claims for damage to goods, a six-month statute of limitations applies, and for late delivery, a 60-day period is standard. If the claim is denied or the claimant is not satisfied with the administrative decision, the claimant has 60 days from denial of the claim to file a suit in court. Within two years from the accident, a claimant must file a claim against a domestic insurance company for a claim arising from domestic travel.

▶ Contract Law (Art.129) provides a four-year statute of limitations for sales contracts. This provision is not consistent with the general principles of Civil Law (Art. 136(2)) which provides only a one year statute of limitations for commencing an action for sale of substandard goods without notice. The statute of limitations for commencing an action for goods damaged by a bailer is one year, as are personal injury actions and actions for rent. Actions for breach of civil rights have a two year statute of limitations.

10:110. Commercial tribunals

▶ The Organic Law of Courts (Art. 24) provides that intermediate level courts in cities directly under the central government and in cities in provinces and self governing regions shall have economic and civil tribunals that will handle commercial cases and have jurisdiction over matters involving foreign persons or foreign subject matter. High courts also have economic and civil tribunals.¹ If a contract dispute is involved, the court located where the contract was performed or the respondent has registered domicile has jurisdiction to hear the matter.² Venue for different types of commercial matters is provided for in the Civil Procedure Law, and while normally cases are brought at the defendants registered domicile, they can be brought where defendant actually resides. If suit is brought against a business or organization, the courts where said business or organization is located have jurisdiction. Where several defendants have different registered domiciles or actual residences, the courts in which any defendant has a registered domicile or actual residence have jurisdiction.³ Litigation arising from air transportation of cargo can be instituted in courts where the transportation was commenced or

1▶

▶▶ Contract Law, Art. 129.

1▶

▶▶ Organic Law of Courts, Art. 27.

2▶

▶▶ Civil Procedure Law, Art. 24.

3▶

▶▶ Civil Procedure Law, Art. 22.

where the cargo was to be delivered or where the respondent has its registered domicile.⁴

▶ Litigation arising from compensation for personal injuries due to an aircraft accident can be commenced where the aircraft landed or where the respondent has its registered domicile.⁵ In maritime suits concerning personal injuries due to vessel collision at sea or other accidents, the court where the accident occurred, where the injured vessel first docked, where the injuring vessel was forced or compelled to satisfy an obligation, or where the respondent has registered domicile, may exercise jurisdiction.⁶ Those seeking monies for salvage at sea may institute suit in court where the salvage was rendered or where the salvaged vessel first arrived.⁷ If these specific provisions for venue are difficult to implement, basic venue provisions may be utilized (e.g., the defendant's registered domicile or actual residence). Exclusive jurisdiction in cases of real property is given to the court where the real property is located. Similarly, cases arising from port operations are handled by courts at said port. If two or more courts have jurisdiction, the plaintiff can select the court in which to try his case.⁸ The rules of civil procedure are the same in the economic and civil tribunals of the intermediate courts as they are in the courts of general jurisdiction.

10:111. Special courts

▶ There are various special courts including railroad transportation courts, military courts,¹ etc., which have special jurisdiction over certain cases.

10:112. General rules on expenses connected with legal action

▶ The losing party is normally responsible for payment of costs, exclusive generally legal fees. If neither party is wholly successful, costs can be allocated between the parties. Initially, the plaintiff must pay costs, but if successful, costs will be reimbursed to the plaintiff by the losing party. Witnesses who lose salary as a result of the time they spend in court and have travel expenses must be compensated, as must experts. Any scientific instruments or materials used must also be paid for.

▶ Application can be made for reduction or elimination of costs in certain types of cases

4▶

▶▶ Civil Procedure Law, Art. 28.

5▶

▶▶ Civil Procedure Law, Art. 30.

6▶

▶▶ Civil Procedure Law, Art. 31.

7▶

▶▶ Civil Procedure Law, Art. 32.

8▶

▶▶ Civil Procedure Law, Art. 35.

1▶

▶ Constitution, Art. 124.

such as support cases, by organizations concerned with the public interest or by those with limited income. If said application is successful, a party can proceed with the court's permission, without payment of costs.

XVII. Recognition of Foreign Judgments

10:113. Enforcement of judgments outside China

▶ Where the courts in China are presented with a petition to enforce a judgment having legal effect and said petition involves property which is not in Chinese territory, the court can, pursuant to treaties or international conventions to which China is a party or in accordance with the principle of mutuality, entrust the relevant foreign court to assist in the execution of said decision or judgment.¹

10:114. Enforcement of foreign judgments in Chinese courts

▶ With regard to judgments and final arbitral decisions of foreign courts authorizing Chinese courts to enforce them, Chinese courts shall on the basis of the principle of mutuality or in accordance with treaties international conventions to which China is a signatory, examine said judgment or decision; and if it does not violate the basic principles of Chinese law or China's social interest, then said judgment, if legally valid, be executed according to the provisions of Chinese Law.¹ Documents such as foreign judgments which Chinese courts are asked to act upon must have appended translations in Chinese.²

XVIII. Writs of Execution

10:115. Which courts have power to issue writs of execution

▶ Legally effective decisions, judgments, orders, and conciliation agreements, important info decision concerning property are to be executed by the court of first instance.¹ Courts having jurisdiction can also enforce arbitral awards.² If the property to be executed upon is outside the jurisdiction of the court, the court where the property is located can be entrusted with execution of said judgment which should commence within 15 days of receipt of the petition.³

1▶

▶▶ Civil Procedure Law, Art. 266.

1▶

▶▶ Civil Procedure Law, Art. 267.

2▶

▶▶ Civil Procedure Law, Art. 262.

1▶

▶▶ Civil Procedure Law, Art. 201.

2▶

▶▶ Civil Procedure Law, Art. 213.

3▶

▶▶ Civil Procedure Law, Art. 206.

10:116. Execution procedure

▶ The marshal and clerk of the court shall undertake the enforcement of the judgment. If the execution involves important measures, the bailiff shall participate in such execution. Compulsory execution commences with service of process by the marshal of the document of execution upon the person upon whose property execution is to take place or upon an adult member of the family of said person. If a party or any interested party considers that the enforcement is in violation of legal provisions, it may raise a written objection to the court in charge of the enforcement. If a party or any interested party raises a written objection, the court shall review the written objection within 15 days from the day of its receipt. If the objection is tenable, the court shall rule to cancel or correct the enforcement; and if the objection is untenable, the court shall reject the objection. If a party or any interested party is not satisfied with the ruling, it may apply for reconsideration to the court at the next higher level within 10 days from the day of service of the ruling. If the court fails to effect enforcement within six months after receiving the application for enforcement, the person who has applied for the enforcement may apply for enforcement to the court at the next higher level. Upon review, the court at the next higher level may order the original court to make enforcement within a specified period of time, or may decide to make enforcement by itself or direct any other court to undertake enforcement.¹

▶ If, during the course of enforcement, a person who is not involved in the case raises a written objection to the subject matter of the enforcement, the court shall review the written objection within 15 days from its receipt. If the objection is tenable, the court shall rule to suspend the enforcement on the subject matter; and if the objection is untenable, it shall be rejected. If a person who is not involved in the case or a party involved is not satisfied with the ruling and considers the original judgment or ruling as erroneous, it shall be dealt with according to the procedure of adjudication supervision; and if the written objection is irrelevant to the original judgment or ruling, the relevant party may file a lawsuit with the court within 15 days from the day of service of the ruling.² A record should be made of the circumstances of the execution, and someone at the location should sign or place a seal on said record, as a witness thereto.³ Where notarial offices have legal authority and undertake execution on behalf of creditors they may do so, but if there is resistance to execution, application to the court can be made for enforcement of said document evidencing indebtedness.⁴ Both parties have two years to apply for execution. The time for execution is calculated from the last day of the time limit

1▶

▶ Art. 203.

2▶

▶ Art. 204.

3▶

▶▶ Civil Procedure Law, Art. 205.

4▶

▶▶ Civil Procedure Law, Art. 214.

specified in the legal document upon whose provisions execution is sought.⁵

10:117. Executions against personality, real property

▶ Where the courts determine to levy on the savings deposits or on the salary of one subject to execution, pursuant to a civil Judgment, the organizations served with said levy must conform to its provisions. The court, in making such levy, should leave sufficient income or assets to provide the individual and his family with essential living expenses.¹

▶ Where the courts compel satisfaction of an obligation, distraint, confiscate, freeze, or sell the property of a defendant pursuant to an execution, they should not levy on essential tools needed by said person and his family for his livelihood.²

▶ The party upon whose property execution is to take place by sealing or distraint should be notified or an adult of his family should be notified to appear at the location of the execution. Their failure to appear will not delay the execution. In addition, the work unit and the basic governmental organization where the property is located should also send a representative to the location. A list of the property executed upon must be made and someone at its location should sign or put their seal on the list. Thereafter said list should be given to the person upon whose property execution has taken place.³ The marshal should notify the person whose property was distrainted or sealed that he has a specific time to satisfy the legal obligations provided for in the court decision. When the time expires, the property is to be turned over for sale.⁴

▶ If there is execution on realty (land or buildings), then the person on whose property execution is to take place should be given notice, and if he fails to perform within that time the marshal should use compulsory process to compel performance.⁵

10:118. Garnishment

▶ In general, various statutes provide for garnishment, including the Marriage Law, which provides that there are various means for enforcing court ordered or agreed payment of maintenance and child support. The Civil Procedure Law (Art. 222) provides that if various forms of property do not meet the obligations of the debtor, then the salary of the debtor can be

5▶

▶▶ Civil Procedure Law, Art 215.

1▶

▶▶ Civil Procedure Law, Art. 219.

2▶

▶▶ Civil Procedure Law, Art. 220.

3▶

▶▶ Civil Procedure Law, Art. 221.

4▶

▶▶ Civil Procedure Law, Art. 223.

5▶

▶▶ Civil Procedure Law, Art. 226.

garnished, but sufficient funds for the essential livelihood of the debtor and his family, must be allowed to the debtor.

10:119. Assets exemptions from execution

► Tools needed for work and goods and income needed for essential livelihood of the individual and his family are exempt from execution. The individual himself is also exempt.

XIX. Attachments

10:120. Property attachable

► Execution for satisfaction of lawfully determined or stipulated debts can be made against all of the property of the debtor except property exempt from execution such as essential tools for work, essential goods needed for one's livelihood, etc. Attachment can also be made at the inception of litigation, with the posting of a bond by the applicant.

10:121. Types of claims which allow attachment

► Much of the procedure for attachment has been described in §10:53 above dealing with application of one of the parties prior to the court adjudicating the claim if there is reason to believe that it will be difficult or impossible to make execution after an adjudication because of the acts of one of the parties or for some other reason. Normally, the court would be concerned with the sale, transfer, or secreting of the property in question. Under extraordinary circumstances, the court shall provide a written decision within 48 hours from a party's application for preservation of certain property and should commence immediate execution on said property.¹ The application to preserve the property in question provides the scope of the relief that may be granted, unless it is property which is the subject matter of the litigation, in which case said property determines the scope of relief. If after the application for relief a party is not satisfied with the decision, an application can be made for reconsideration; but during reconsideration the original decision remains.

► The court can use numerous means of preserving property, including attaching or sealing the property, levying (distraining) the property or freezing the assets.² The latter form of freezing the assets is normally applied to monies, property in a bank or cooperative trust, etc. Sealing involves placing a notice of sealing where the property is located or the property can be moved to another location. If the property is levied (distrained), said property can be placed in another person's hands for safekeeping or if the property is perishable it can be sold.

► In addition, the court can request a guarantee, such as a deposit of money in a bank, a bond, etc.

► In disputes involving foreign property or foreign parties, the courts have the same authority to act on the petition of a party to preserve property. Provisional attachment is available where monetary claims or claims for property are made or where claims are made that can be converted into monetary claims.

¹►

►► Civil Procedure Law, Arts. 92.

²►

►► Civil Procedure Law, Arts. 220 to 223.

10:122. Judicial orders for attachment of property

▶ The courts, in which commercial litigation takes place, normally the basic level courts or the economic tribunals or civil tribunals of intermediate level courts, have jurisdiction to act on provisional attachments, etc. If the property to be attached, levied (distrained) or sealed is not in the court's jurisdiction, the court where the property is located, at the direction of the trial court, shall act to attach the property pursuant to the order of the trial court.

XX. Arbitration

10:123. Mediation and arbitration

▶ Mediation is one of the favored means of dispute resolution in China. Numerous organizations exist to handle mediation. The Provisional General Rules for Organization of People's Mediation Committees, February 25, 1954, provides a national system of mediation tribunals. There are also attendant rules such as the Organic Rules of Urban Resident Committees and the Organic Rules of Urban Neighborhood Offices. The mediation organizations operate under the supervision of the courts and local government. Mediation pursuant to rule is non-compulsory and one need not engage in mediation. Basic level courts review mediation agreements to determine whether they conform to the law. Civil disputes can be handled by mediation. The courts themselves attempt to mediate a dispute on initial presentation of a complaint and have their own mediation organizations. In some years, many of all civil disputes were handled by mediation, but this is not true today.

10:124. Subjects excluded from arbitration

▶ Generally speaking, commercial legal disputes or disputes involving property can be subject to arbitration, however, divorce and disputes over public rights and obligations are not normally subject to arbitration.

10:125. Selection or appointment of arbitrators

▶ The China International Economic and Trade Arbitration Commission ("CIETAC") is authorized to assist in dispute settlements involving non-Chinese and Chinese firms, commercial credits and loans, disputes arising from joint ventures, etc. Normally, if said tribunal is utilized, each of the parties selects one member of the panel and the two arbitrators select a third arbitrator. Foreign counsel may be present and represent the foreign party in said arbitration proceedings. China also has a Maritime Arbitration Commission authorized to settle disputes regarding maritime collisions, salvage, carriage, chartering, maritime insurance, bills of lading, and the like. The panel from which one may choose arbitrators for CIETAC arbitrator is exceedingly narrow and contains a very limited level of quality, including some very low level participants.

▶ In addition to using Chinese arbitral tribunals, numerous contracts executed in China between foreign and Chinese firms call for arbitration outside of China in accordance with foreign rules or arbitration in the respondent's country.

10:126. Appeal from award

▶ The decision of an arbitration panel rendered by the China International Economic and Trade Arbitration Commission pursuant to its Rule of Procedure¹ or the China Maritime

¹▶

▶ Art. 36.

Arbitration Commission pursuant to its Rules of Procedure² is final and not subject to appeal.

10:127. Procedures for enforcing international commercial arbitration awards

▶ The procedures for international commercial arbitration have been discussed in §10:126 above. The parties can fix the locus, number of arbitrators, and applicable law. However, in practice in Chinese contracts when not specifying Chinese arbitration often refer to Hong Kong, Sweden, a neutral third country agreeable to both sides or on occasion, Switzerland or Holland, or the respondent's country. If the China International Economic and Trade Commission is utilized, fees ranging from 0.5%-4% of the amount in controversy shall be paid in advance. Arbitration fees shall in no way be less than RMB 2000 yuan. In addition, the claimant is required to pay other actual expenses including remuneration of arbitrators, traffic expenses and accommodations, as well as fees for experts and interpreters (translators) retained by the arbitration panel. If the China Maritime Arbitration Commission is employed, the claimant shall pay arbitration fees in advance ranging from 0.7--6% of the amount in controversy. However, arbitration fees shall not be less than RMB 2000 yuan.

▶ China became a signatory on December 2, 1986 to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, enacted in New York on June 10, 1958.

▶ On the basis of treaties or international conventions to which People's Republic of China is signatory and based on the principle of reciprocity, Chinese and foreign courts mutually entrust each other to undertake certain litigation actions. Where a matter, which a foreign court wishes to consider is incompatible with the sovereignty or security of the People's Republic of China, it should be rejected. Where a matter is not within a Chinese court's scope of authority, the reasons should be clearly explained and the matter returned to the foreign court.¹

▶ Where a court of the People's Republic of China is presented with a judgment or a definitive decision of an arbitration tribunal, and the petitioner wishes to compel enforcement thereof, and said petition involves property which is not within China, the court can, pursuant to treaties or international conventions to which China is a party, or in accordance with principles of mutuality, request a foreign court to assist in execution of said judgment, etc.² With regard to judgments and final arbitral decisions which a foreign court has authorized a Chinese court to enforce, a Chinese court should, according to treaties and international conventions to which China is a signatory, or on the basis of principle of mutuality, review the judgment. If it determines that the Judgment does not violate basic principles of law of the People's Republic of China or China's social interests and if it is determined that said decision is valid, the court should execute the judgment according to the procedures provided in the statute. If these conditions are not met, then the matter should be referred back to the foreign court.³

2▶

▶ Art. 36.

1▶

▶▶ Civil Procedure Law, Arts. 260 to 267.

2▶

▶▶ Civil Procedure Law, Arts. 260 to 267.

3▶

▶ Documents of foreign courts, requesting courts of the People's Republic of China to assist in execution or to represent said foreign court in delivery of such documents and documents requesting Chinese courts to undertake specific legal actions, must have an appended Chinese translation. Documents of courts of China requesting a foreign court to represent it in serving papers or to assist it in the execution of a Chinese decree, etc. and a document wherein a Chinese court requests a foreign court to undertake a specific legal action, must have an appended foreign language translation.⁴

▶ China, by treaty, (e.g., the Trade Agreement between China and the U.S. of July 1, 1979) accepts arbitration subject to the rules of the United Nations Commission on International Trade (“UNCITRAL”) rules or other international rules acceptable to the parties.

▶ The Chinese courts, pursuant to the principles of reciprocity, will enforce international arbitral awards not in violation of public policy, etc., and by treaty China has agreed to mutual enforcement of arbitral decisions. For example, the Agreement on Trade, Art. VIII of July 7, 1979 between the United States of America and China states:

▶ arbitration may be conducted in the United States of America, the People's Republic of China, or a third country. The arbitration rules of procedure of the relevant arbitration institution are applicable, and the arbitration rules of the United Nations Commission on International Trade Law; or other international arbitration rules may also be used where acceptable to the parties. Each contracting party shall seek to ensure that arbitration awards are recognized by their competent authorities where enforcement is sought in accordance with applicable laws and regulations.

10:128. Labor arbitration

▶ Pursuant to Arbitration Law Article 77, arbitration of labor disputes shall be separately stipulated. Such arbitration shall be governed by the relevant provisions in Labor Law and Rules for Handling of Labor Disputes in Enterprises.

▶ Where a labor dispute between the employing unit and laborers takes place, the parties concerned may apply for mediation or arbitration, take legal proceedings according to law, or may seek for a settlement through consultation. The principle of mediation shall apply to the procedures of arbitration and lawsuit.¹ Where a labor dispute takes place, the parties involved may apply to the labor dispute mediation committee of their unit for mediation; if the mediation fails and one of the parties requests arbitration, that party may apply to the labor dispute arbitration committee for arbitration. If one of the parties is not satisfied with the adjudication of arbitration, the party may bring the case to a court.² A labor dispute mediation committee may be established inside the employing unit. The committee shall be composed of representatives of the staff and workers, representatives of the employing unit and representatives of the trade union.

▶▶ Civil Procedure Law, Arts. 262 to 267.

4▶

▶▶ Civil Procedure Law, Arts. 262 to 267.

1▶

▶ Labor Law, Art.77.

2▶

▶ Labor Law, Art. 79.

The chairman of the committee shall be a representative of the trade union.³ A labor dispute arbitration committee shall be composed of representatives of the labor administrative department, representatives from the trade union at the corresponding level, and representatives of the employing unit. The chairman of the committee shall be held by a representative of the labor administrative department.⁴ The party that requests arbitration shall file a written application to a labor dispute arbitration committee within 60 days starting from the date of the occurrence of a labor dispute. The arbitration committee may generally make adjudication within 60 days from the date of receiving the application. The parties involved must implement the adjudication if no objections are raised.⁵ Where a party involved in a labor dispute is not satisfied with the adjudication, the party may bring a lawsuit to a court within 15 days from the date of receiving the ruling of arbitration. Where one of the parties involved neither brings a lawsuit nor implements the arbitration decision within the statutory time limit, the other party may apply to a court for compulsory enforcement.⁶ Where a dispute arises from the implementation of a collective contract and no settlement can be reached through consultation by the parties concerned, the dispute may be submitted to a labor dispute arbitration committee for arbitration. Any party that is not satisfied with the adjudication of arbitration may bring a lawsuit to a court within 15 days from the date of receiving the arbitration decision.⁷ If there is any dispute over the invalidating or partially invalidating of a labor contract, the dispute shall be settled by the labor dispute arbitration institution or by the court.⁸

▶ Law on Labor Dispute Mediation and Arbitration, adopted on Dec. 29, 2007, effective May 1, 2008, applies to following labor disputes arising between employing units and workers within territories of China:

- ▶ (1) disputes arising from confirmation of labor relationship;
- ▶ (2) disputes arising from conclusion, performance, modification, rescission or termination of labor contract;
- ▶ (3) disputes arising from removal or layoff of workers or resignation or retirement of workers;

3▶

▶ Labor Law, Art.80.

4▶

▶ Labor Law, Art.81.

5▶

▶ Labor Law, Art.82.

6▶

▶ Labor Law, Art.83.

7▶

▶ Labor Law, Art. 84.

8▶

▶ Labor Contract Law, Art.26.

▶(4) disputes arising from work hours, breaks, vacations, social insurance, benefits, training, or labor safety;

▶(5) disputes arising from labor remunerations, medical expenses for work-related injury, economic indemnity, compensation, etc.; or

▶(6) any other labor dispute as provided for by a law or administrative regulation.⁹

▶Labor dispute arbitration commission at the place of performance of labor contract or at the place of residence of employing unit shall have jurisdiction of labor dispute.¹⁰ In case two parties respectively apply to labor dispute arbitration commissions at the place of performance of labor contract and at the place of residence of employing unit for arbitration, labor dispute arbitration commission at the place of performance of labor contract shall have jurisdiction.¹¹

▶Parties in labor dispute arbitration case are employing unit and worker,¹² but third party that has an interest relationship with results of handling of labor dispute case may apply for participating in arbitration activities or be notified by labor dispute arbitration commission to participate in arbitration activities.¹³

▶Time limitation period for arbitration application of labor dispute is 1 year, counted as of the date when party knows or should know its right has been violated. However, said limitation period shall be discontinued upon one party's claiming a right against other party or requesting a right's remedy to relevant authority or other party's agreeing to perform obligation, and time limitation period shall be recounted from the time of interruption.¹⁴

▶If dispute arises from delayed payment of labor remunerations during period of existence of labor relationship, employee's application for arbitration shall not be subject to said limitation period. However, where labor relations are terminated, application for arbitration shall be submitted within 1 year of termination of labor relations.¹⁵

▶In respect of following labor disputes, arbitral award shall be the final award and award

9▶

▶Art. 2.

10▶

▶Art. 21.

11▶

▶Art. 21.

12▶

▶Art. 22.

13▶

▶Art. 23.

14▶

▶Art. 27.

15▶

▶Art. 27.

statement shall have legal effect from the date of making unless otherwise stated: (1) disputes in relation to claim of labor remunerations, work-related injury medical expenses, economic compensation or damages which do not exceed local monthly wage standard for an amount of 12 months; (2) disputes arising from working hours, rest days and leave days and social insurance in implementation of state labor standards.¹⁶

XXI. Bankruptcy and Creditor's Rights

10:129. In general

▶ Law on Enterprise Bankruptcy was promulgated on 27th August 2006 and effective as of 1st June 2007.

10:130. Entities subject to bankruptcy

▶ Where an enterprise legal person fails to clear off its debt as due, and if its assets are not enough to pay off all the debts or if it is obviously incapable of clearing off its debts, its liabilities shall be liquidated according to the provisions of the present law. Where an enterprise legal person is under the aforesaid circumstance or if it is obviously likely that it is unable to pay off its debts, it may be subject to revival according to the provisions of the present Law.¹

▶ Furthermore, according to the Provisions regarding Some Issues of the Application of the Bankruptcy Law by the Supreme People's Court on 29th August 2011, a court shall find a debtor to be qualified for bankruptcy if the debtor is unable to pay off due debts and at the same time, any one of the following occurs:

- ▶ (1) failure to satisfy debts due to grave insufficiency of funds or illiquidity of properties, etc.;
- ▶ (2) failure to satisfy debts due to the unknown whereabouts of legal representative and the unavailability of another person to take charge of the properties;
- ▶ (3) failure to satisfy debts due to the enforcement by a peoples' court;
- ▶ (4) failure to satisfy debts due to due to long-term losses and the difficulty in eliminating the losses in business; and
- ▶ (5) other circumstances that deprive the debtor of the ability to satisfy debts.

If the relevant parties concerned claim that the debtor is not qualified for bankruptcy on the ground that the person who assumes joint and several liability for the debts of the debtor is not insolvent, the court shall not support the claim.² If the following circumstances coexist, the court shall find the debtor to be unable to pay off due debts: the obligatory relationship is legally established; the time limit for the debtor to perform his obligation has expired; the debtor fails to completely pay off the debts.³ Even if the book value of the assets of the debtor is greater than its

¹⁶▶

▶ Art. 47.

¹▶

▶ Law on Enterprise Bankruptcy, Art. 2.

²▶

▶ Article 1 of the judicial interpretation.

³▶

debts, in any of the following circumstances, the court shall find the debtor to be obviously insolvent: the debtor is unable to pay off the debts because of serious insufficiency of funds or the illiquidity of property; the debts cannot be paid off because the legal representative's present whereabouts are unknown, and there is no other person in charge of the assets; the debts cannot be paid off after mandatory enforcement by the court; the debts cannot be paid off due to long-term losses and the difficulty in reversing same losses; other circumstances which lead to the debtor's insolvency.⁴

10:131. Court's jurisdiction

▶ A bankruptcy case shall be governed by the court where the relevant debtor is domiciled. The procedures for hearing a bankruptcy case shall, in the absence of relevant provisions in the present Law, be governed by the relevant provisions of the Civil Litigation Law. The procedures for bankruptcy which have been initiated according to the present Law shall have binding force over the assets of the relevant debtor beyond the territory of the People's Republic of China. Where any legally effective judgment or ruling made by a foreign court involves any debtor's assets within the territory of the People's Republic of China and if the debtor applies with or requests the court to confirm or enforce it, the court shall, according to the relevant international treaties that China has concluded or acceded to or according to the principles of reciprocity, conduct an examination thereon and, when believing that it does not violate the basic principles of the laws of the People's Republic of China, does not damage the sovereignty, safety or social public interests of the state, does not damage the legitimate rights and interests of the debtors within the territory of the People's Republic of China, grant confirmation and permission for enforcement. When hearing a bankruptcy case, the court shall guarantee the legitimate rights and interests of the employers in the insolvent enterprise and investigate its administrators' legal liabilities.¹

10:132. Petition for bankruptcy

▶ A debtor, under the circumstance as prescribed in Article 2 of the present Law, may file an application with the court for rectification, reconciliation or bankruptcy liquidation. Where the debtor fails to pay off its due debts, the creditor may file an application with the court for rectification or bankruptcy liquidation. Where an enterprise legal person has been dissolved without any liquidation or without completing the liquidation, and the relevant assets are not enough to pay off the debts, the person liable for liquidation shall apply with the court for bankruptcy liquidation. When applying for bankruptcy, an Application for Bankruptcy and the related evidences shall be submitted to the court: The following items shall be indicated in the Application for Bankruptcy:

- ▶ (1) Basic introduction of the applicant and the respondent;
- ▶ (2) Purpose of the application;

▶ Article 2 of the judicial interpretation.

4▶

▶ Art. 4.

1▶

▶ Law on Enterprise Bankruptcy, Arts. 3-5.

- ▶(3) Facts and ground for the application; and
- ▶(4) Other items that the court deems necessary to be indicated.

▶Where a debtor files an application, it shall submit the statement on financial status, checklist of debts, checklist of the creditor's rights, relevant financial statements, a plan for employees' arrangement as well as the payment documents of wages and social insurance premiums. Before the court accepts an application for bankruptcy, the applicant may request for withdrawing its application.¹ When a court receives a bankruptcy application, it shall issue to the applicant a written confirmation of receipt of the application and the attached evidence. The court, after having received the bankruptcy application, shall timely review the subject qualification of the applicant, the subject qualification of the debtor, the reason for bankruptcy and the relevant materials and evidence, and make a decision whether to accept the application according to the provisions of the Enterprise Bankruptcy Law, Art.10. If the court deems that the applicant shall supplement or correct the relevant materials, it shall, within 5 days from the day of receiving the bankruptcy application, notify the applicant. The period for the parties concerned to supplement or correct the relevant materials shall not be included into the time limit specified in Enterprise Bankruptcy Law, Art. 10.²

▶Where an applicant submits a bankruptcy application to a court, if the court has not received the application, or has not performed according to Article 7 of these Provisions, the applicant may file a bankruptcy application with a court at a higher level. The court at a higher level, after having received the bankruptcy application, shall timely order the court at the lower level to review the application according to law and to timely make a decision on whether to accept the application. If the court at the lower level still does not make a decision whether to accept the application, the court at a higher level can proceed to make a decision by itself. If the court at a higher level decides to accept the bankruptcy application, it may simultaneously order the court at the lower level to hear the case.³

10:133. Rectification

▶A debtor or creditor may, in accordance with the provisions of the present law, apply directly with the court for rectification on the debtor.¹ The period of rectification lasts from the day when the court rules that a debtor shall conduct rectification to the day when the procedures for rectification are ended.² During the period of rectification, the right to make guarantee on the

1▶

▶Law on Enterprise Bankruptcy, Arts. 7-9.

2▶

▶Article 7 of the judicial interpretation.

3▶

▶Article 9 of the judicial interpretation.

1▶

▶Law on Enterprise Bankruptcy, Art. 70.

2▶

▶Law on Enterprise Bankruptcy, Art. 72.

particular assets of a debtor shall be suspended. However, in the case of possible damage or significant decrease of value, which may injure the guarantor's right, the guarantor may apply with the court for recovering the right to make guarantee. During the period of rectification, a debtor or bankruptcy custodian who borrows capital to continue the business may set a guarantee on the loan.³ A debtor or bankruptcy custodian may, within 6 months as of the day when the court approves its rectification, submit a draft of the rectification plan to the court and the meeting of creditors. Where a debtor manages its own assets and business operation, it shall formulate a draft of rectification plan. Where a bankruptcy custodian is responsible for managing the assets and business operation of a debtor, it shall formulate a draft of rectification plan.⁴ The rectification plan shall be implemented charged by the debtor. Where the court has ruled to approve a rectification plan, the bankruptcy custodian that has taken over the assets and business operation shall transfer the assets and business operation to the debtor.⁵

10:134. Procedural steps in bankruptcy

▶ After the application for bankruptcy filed by the debtor or creditor is accepted by the court, a bankruptcy custodian shall be designated by the court.¹ A bankruptcy custodian shall fulfill the following functions and duties:

- ▶ (1) Taking over the asset, seals as well as the account books and documents of the debtor;
 - ▶ (2) Surveying the financial status of the debtor and formulating the financial statements;
 - ▶ (3) Determining the internal management of the debtor;
 - ▶ (4) Determining the daily expenditure and other necessary expenditures of the debtor;
 - ▶ (5) Determining, before the holding of the first meeting of creditors, whether to continue or terminate the debtor's business;
 - ▶ (6) Managing and disposing of the debtors' assets;
 - ▶ (7) Appearing in actions, arbitrations or any other legal procedures on behalf of the debtor;
 - ▶ (8) Suggesting the hold of creditors' meetings; and
 - ▶ (9) Fulfilling other functions and duties that the court believes it should perform.²
- ▶ The creditors' meeting shall fulfill the following functions and duties:
- ▶ (1) Examining the creditor's rights;

3▶

▶ Law on Enterprise Bankruptcy, Art. 75.

4▶

▶ Law on Enterprise Bankruptcy, Arts. 79, 80.

5▶

▶ Law on Enterprise Bankruptcy, Art. 89.

1▶

▶ Law on Enterprise Bankruptcy, Art. 22.

2▶

▶ Law on Enterprise Bankruptcy, Art. 25.

- ▶(2) Apply with the court for alteration of the bankruptcy custodians and check the expenses and remunerations of the bankruptcy custodians;
- ▶(3) To Superintending the bankruptcy custodian;
- ▶(4) Selecting and altering the members of the creditors' meeting;
- ▶(5) Determining whether to continue or terminate the debtor's business operations;
- ▶(6) Ratifying a rectification plan;
- ▶(7) Ratifying a reconciliation;
- ▶(8) Ratifying a management plan of the debtor's assets;
- ▶(9) Ratifying a conversion plan of the insolvent assets;
- ▶(10) Ratifying a distribution plan of the insolvent assets; and
- ▶(11) Executing other functions and powers that the court deems the creditors' meeting shall execute.³

▶The creditors' meeting may decide to establish a committee of creditors, which shall be composed of the creditor representatives as selected by the creditors' meeting as well as an employee representative of the relevant debtor or a representative of the work union. The members of the creditors' committee shall be not more than 9 persons.⁴ The creditors' committee shall fulfill the following functions and duties: (1) Superintend the management and disposal of the debtor's assets; (2) Superintend the distribution of the insolvent assets; (3) proposing to hold a meeting of creditors; and (4) Fulfilling other functions and duties as entrusted by the creditors' meeting.⁵ After the court accepts an application for bankruptcy, if the relevant debtor and all the creditors conclude an agreement on settlement of credits and debts by themselves, they may request the court to approve it and terminate the procedures for bankruptcy.⁶ Where the court announces bankruptcy of a debtor according to the provisions of the present law, it shall, within 5 days as of the day when the ruling is made, serve it on the relevant debtor and bankruptcy custodian, and shall, within 10 days as of the day when the ruling is made, inform the already known creditors and announce it as well. After a debtor is announced bankruptcy, the debtor shall be named as the bankruptcy and the debtor's assets shall be taken as the insolvent assets. The creditor's rights against the debtor when the court accepts an application for bankruptcy shall be the credit of bankruptcy.⁷

10:135. Other issues

3▶

▶Law on Enterprise Bankruptcy, Art. 61.

4▶

▶Law on Enterprise Bankruptcy, Art. 67.

5▶

▶Law on Enterprise Bankruptcy, Art. 68.

6▶

▶Law on Enterprise Bankruptcy, Art. 105.

7▶

▶Law on Enterprise Bankruptcy, Art. 107.

▶ Where the defaulted wages and subsidies for medical treatment and disability, comfort and compensatory expenses, the fundamental old-age insurance premiums and fundamental medical insurance premiums that shall have transferred into the individual accounts of employees as well as the compensation fees for the employees as prescribed in the relevant laws and administrative regulations after the implementation of the present law and before the promulgating day, where the assets are not enough for repayment upon liquidation, the particular assets shall be liquidated prior to the repayment for the owner of the right to make guarantee on the particular assets.¹

XXII. Torts

10:136. In general

▶ Tort Law of the People's Republic of China has been effective since July 1, 2010, and is established to protect the rights of those harmed by torts and to punish those who commit torts.¹ Tortious acts include violations to rights to life, reputation, privacy, and other personal rights.² Where the tortious act is committed by two or more parties, courts may impose joint and several liability.³

▶ A variety of remedies are available to satisfy a tort judgment including requiring the cessation of infringing acts, returning of property, or issuing an apology.⁴ Also, monetary damages are calculated according to the loss sustained by the victim of the tort.⁵ Medical expenses and mental distress damages arising from the tortuous act may also be awarded to an injured party.⁶

▶ A defense to tort liability includes comparative negligence.⁷

1▶

▶ Law on Enterprise Bankruptcy, Art. 132.

1▶

▶ Art. 1.

2▶

▶ Art. 2.

3▶

▶ Arts. 8-11.

4▶

▶ Art. 15.

5▶

▶ Art. 20.

6▶

▶ Arts. 16, 22.

7▶

▶ Art. 26.

▶ Manufacturers can be liable for product liability of defective products.⁸ Medical staff can be liable for medical malpractice where informed consent is not obtained by a patient or where the failure to abide by medical standards causes harm.⁹ Polluters who cause harm onto others are also subject to tort liability.¹⁰

XXIII. Food Safety

10:137. In general

▶ Food Safety Law is effective on June 1, 2009, and establishes regulations to ensure food safety.¹ The Food Safety Law is broad and covers food production and processing, food additives, and packaging materials for foods.² It establishes a Food Safety Committee that assesses safety risks, establishes safety standards and inspection requirements, and handling major food safety accidents.³ For instance, it requires a sanitary environment where food producers operate and prohibits the cross-contamination of foods.⁴ Importers of foods are also required to establish records to trace foods by its source and the contact information of the exporter and purchaser for at least 2 years.⁵ Safety efforts also include prohibitions on false representations on labels and in advertisements.⁶

8▶

▶ Art. 41.

9▶

▶ Art. 54.

10▶

▶ Art. 65.

1▶

▶ Art. 1.

2▶

▶ Art. 2.

3▶

▶ Art. 4.

4▶

▶ Art. 27.

5▶

▶ Art. 67.

6▶

▶ Arts. 47-48, 54.

▶ A system for recalling foods that fail these safety standards is also established.⁷ The effects of a food safety accident are required to be mitigated and reported to the health administrative department.⁸

▶ Measures for the Administration of Food Production Licenses, effective June 1, 2010, further requires food producers within China to be inspected before licensing.⁹

XXIV. Insurance

10:138. In general

▶ Insurance Law has been effective since October 1, 2009, and governs the insurance sector in China. The term insurance broadly covers activities where an insurance applicant for an insurance policy pays a premium for the right to receive an insurance payment upon a specified event.¹ The State Council is the regulatory body responsible for insurance regulation.²

▶ Unless provided for otherwise in an insurance agreement, the insurance applicant may cancel the policy but the insurer may not.³ However, if an insurance applicant gives materially false information either grossly negligently or intentionally to the insurer, the insurer has the right to rescind the policy within 30 days of discovering the false information but only before 2 years from start of the policy.⁴

▶ Upon the occurrence of the insured event, the insurer shall complete an assessment to determine whether to pay as specified in the policy within 30 days.⁵ If the insurer does not do so, it is liable for additional payment.⁶ If it is determined that the insurance applicant committed

⁷▶

▶ Art. 53.

⁸▶

▶ Art. 71.

⁹▶

▶ Arts. 2, 11.

¹▶

▶ Art. 2.

²▶

▶ Art. 9.

³▶

▶ Art. 15.

⁴▶

▶ Art. 16.

⁵▶

▶ Art. 23.

⁶▶

fraud regarding whether the specified insured event occurred, the insurer may deny payment and keep payments made on the premium.⁷ Where an insured incident occurs as a result of any loss caused by a third party to the subject matter insured, the insurer shall, from the day when it pays insurance money to the insured, subrogate the insured's claim for indemnity against the third party within the extent of the indemnity amount. Where the insured has been indemnified by the third party after the insured incident prescribed in the preceding paragraph occurs, the insurer may, when paying insurance money, deduct the corresponding amount of indemnity which the insured has obtained from the third party. The insurer's exercise of its right to subrogation to a claim for indemnity as prescribed in Paragraph 1 of this Article shall not prejudice the insured right to claim indemnity against the third party for the part of loss which the insured has not been indemnified for.⁸ The insurer shall not exercise the right of subrogation to a claim for indemnity against a family member or a person considered a member of the insured, unless the family member or the person considered a member of the insured intentionally causes an insured incident prescribed in Article 60 Paragraph 1 of this Law.⁹

▶ The minimum amount of registered capital of an insurance company to be formed shall be RMB 200 million yuan. The registered capital of an insurance company must be paid in monetary capital. The insurance regulatory body under the State Council shall examine an application for forming an insurance company, make a decision on approval or disapproval of formation preparation within six months from the day of accepting the application, and notify the applicant in writing. If deciding to disapprove of the application, the insurance regulatory body shall give reasons in writing.¹⁰ The setting up of representative offices within the territory of the People's Republic of China by foreign insurance companies shall be subject to the approval of the insurance regulatory body under the State Council. None of such representative offices shall carry out any insurance operating activity.¹¹

▶ The scope of business of insurance companies shall be:

- ▶ (1) personal insurance, including life insurance, health insurance, accidental injury insurance, etc.;
- ▶ (2) property insurance, including property loss insurance, liability insurance, credit

▶ Art. 23.

7▶

▶ Art. 27.

8▶

▶▶ Insurance Law, Art. 60.

9▶

▶▶ Insurance Law, Art. 62.

10▶

▶ Article 71.

11▶

▶ Article 80.

insurance, guarantee insurance, etc.; and

▶(3) other insurance-related businesses approved by the insurance regulatory body under the State Council.

▶No insurer shall concurrently operate the personal insurance business and the property insurance business. However, upon the approval of the insurance regulatory body under the State Council, an insurance company which operates the property insurance business may operate the short-term health insurance business and the accidental injury insurance business. Insurance companies shall operate insurance business activities within the scope of business approved by the insurance regulatory body under the State Council according to law.¹² Insurance companies must use funds according to the principles of steadiness and safety. Insurance companies' use of funds is restricted to the following forms:

▶(1) bank deposits;

▶(2) trading bonds, stocks, shares of securities investment funds and other negotiable securities;

▶(3) investing in real estate; and

▶(4) other forms of fund use prescribed by the State Council.

▶The specific measures for the administration of the use of funds by insurance companies shall be formulated by the insurance regulatory body under the State Council according to the preceding two paragraphs.¹³

XXV. Online Resources

10:139. In general

▶▶Chinalaw Web provides information about Chinese law and the legal system in greater China.

▶▶Chinese Civil and Commercial Law Net is a professional commercial law site created by commercial law scholars from China.

▶▶<http://www.civillaw.com.cn/default.asp> [Simplified Chinese]

▶▶<http://www.civillaw.com.cn/english/default.asp> [English]

▶▶See Further information on China at: CIA World Factbook

(▶<https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html>)

▶▶Tradeport Country Library

▶▶The Library of Congress Country Studies

▶▶<http://lcweb2.loc.gov/frd/cs/cntoc.html>

▶▶CountryWatch--country-specific geopolitical intelligence

▶▶http://www.countrywatch.com/cw_country.asp?vcountry=37

▶▶<http://www.law-lib.com/law/>

▶▶<http://www.lawyee.net/Act/Act.asp>

▶▶<http://www.lawinfochina.com/Law/List.asp>

▶▶<http://www.legalinfo.gov.cn/english/>

¹²▶

▶Article 95.

¹³▶

▶Article 106.

▶ <http://www.chinacourt.org/flwk/>

Appendix 10A. Contract of Employment

▶ **Contract of Employment**

▶ _____ (hereinafter the “**Company**”) employs:

▶ Name: _____

▶ With address at: _____

▶ With Identity Card Number: _____

▶ (hereinafter the “**Employee**”) pursuant to the terms and conditions of the Contract.

▶ **1 Governing Law**

This Contract is governed by the Labor Law of the People's Republic of China and the Labor Regulations of Shenzhen City and other relevant laws and regulations.

▶ **2 Position**

▶ (a).

The Employee is employed as a salesperson in Shenzhen Office of the Company (hereinafter “**Position**”).

▶ (b).

The Employee acknowledges it has the skills to meet the requirements of this Position.

▶ (c).

The Employee shall use its best efforts to fulfill all requirements of this Position and work with diligence and skills to meet the requirements of the Company.

▶ **3 Compensation**

The Employee shall be paid the following monthly salary by the Company pursuant to this Contract and the governing law; (hereinafter “**Salary**”) _____.

▶ (a).

Salary shall be paid by the Company to the Employee on the last day of the month for each month's work.

▶ (b).

The Company, at its sole discretion, pursuant to the diligence and quality of the work of the Employee, may, but is not required to, pay a bonus to the Employee, immediately before the Chinese Spring Festival.

▶ (c).

The Employee is entitled to have a yearly Salary review. Any changes in the Employee's Salary will be determined by the Company at its sole discretion according to the Employee's position, work performance, years of service and change in cost of living and business results of the Company.

▶ **4 Term of Contract**

The term of this Contract is from ____ to ____ (hereinafter “**Term**”).

▶ **5 Social Insurance**

Pursuant to Regulations of Shenzhen City and the Central Government of China, the Company and the Employee shall provide for the Employee's social insurance by payments to

the institutions mandated by law to provide social Insurance.

▶ **6 Labor Protection**

▶(a). The Company shall do its best to provide a proper work environment for the Employee.

▶(b). The Company shall endeavor to protect the safety and health of the Employee during work hours, but the Employee will be responsible for injuries suffered as a result of the Employee's unsafe or negligent acts.

▶(c). The Employee shall strictly follow rules, regulations and procedures of performance set up by the Company for safety, labor protection and hygiene.

▶ **7 Labor Disciplines**

▶(a). The Employee shall abide by all the rules and regulations of the Company, including those in the Company Rules and Regulations and those published every now and then by the Company in accordance with its policies and Chinese law.

▶(b). The Company retains the right to levy reasonable financial sanctions on the Employee if the Employee breaks any rules and regulations of the Company.

▶ **8 Working Hours**

▶(a). The normal work schedule of the Employee is five (5) days per week from Monday through Friday, 900am to 600pm with one (1) hour for lunch.

▶(b). If necessary, the Company may require the Employee to work hours other than the normal work schedule.

▶(c). If said hours exceed forty (40) hours per week, the Employee shall be paid overtime pay pursuant to Chinese law.

▶(d). The employee shall not work for anyone else during working hours. Employee shall not work in the business the Company conducts at all, even after working hours, or in any business in competition with the Company.

▶ **9 Employee Leaves and Holidays**

The Employee is entitled to the various leaves and holiday in accordance with the Company rules and regulation and the law of the People's Republic of China; the Employee shall be entitled to seven (7) days annual leaver per year at a time or times that are convenient for the Company.

▶ **10 Replacement, Dismissal and Termination**

▶(a). Upon thirty (30) days notice, the Company may dismiss the Employee or terminate this Contract under these conditions:

▶i). if the Employee proves unable to work competently in the Position;

▶ii). if the Employee cannot return to the job after treatment for illness or injury, not caused by this employment;

▶iii). if the Employee's services are not required, given the labor requirements and profit objectives of the Company;

▶iv). if the Employee refuses to accept reassignment to positions appropriate to his/her skills and training; and

▶v). on any other conditions specified in Company rules and regulations or determined by the Company, at its sole discretion, pursuant to Chinese law.

▶(b). Upon thirty (30) days notice, the Employee may terminate this Contract under these conditions:

▶i). if the Employee works under extremely poor safety or hygiene conditions which seriously endanger or harm the Employee's health;

▶ii). if the Company does not pay Salary on time and in the amount specified herein;

▶iii). if the Company breaches substantial provisions of this Contract;

▶(c). Either the Company or the Employee may choose to renew or not to renew this Contract when its term is over.

▶(d). The Company may dismiss the Employee or terminate this Contract immediately, without notice if the Employee violates any provision of criminal law, steals, assaults, commits fraud, takes any assets of the Company for his/ her own use, contacts competitors of the Company without Company permission, uses the Company's tools, products or assets for Employee's personal uses and the like.

▶11 Violation Responsibility

▶(a). Fines may be imposed on the Employee and compensation may be required from the Employee for any damage the Employee causes to the Company.

▶(b). If there is any violation by the Employee of the labor discipline, Company rules and regulations or laws and regulations of the Shenzhen City or the laws of the People's Republic of

China, the Company may impose administrative sanctions, penalties, and fines and dismiss the Employee.

▶ **12 Taxes**

The Employee shall be responsible for all personal income taxes according to the tax laws and regulations of the People's Republic of China and the Regulations of Shenzhen City.

▶ **13 Amendment**

No alteration, amendment, future understanding, or variation of the terms of this Contract shall be valid unless made in writing and signed by both parties hereto.

▶ **14 Confirmation**

By signing this Contract, the Employee is agreeing to abide by all the rules and regulations of the Company, including those in the Company Rules and Regulations, as amended from time to time, and agrees to be bound by all terms of this Contract.

▶ **15 Confidentiality**

▶ (a).

The Employee shall not disclose, publish, use, authorize or allow anyone else to disclose, publish or use any confidential, proprietary or business information during the term of this Contract or subsequent to its termination for any reason, that he/she may acquire by reason of his/her employment by the Company, without the express written authorization of the Company, as required by the Company.

▶ (b).

The Employee will not (except in the proper course of his duties or unless ordered to do so by a court of competent jurisdiction) divulge any information concerning the operations, monitoring, business transactions, customer lists, communications (written or otherwise), prices, confidential matters and affairs of the Company thereof, either during the existence of the Contract or at any time after its termination.

▶ (c).

All notes, memoranda, accounts, records, business cards, writings and documents and all copies thereof made, prepared or acquired by the Employee during the continuance of this Contract shall be and remain the property of the Company and shall be handed over to the Company on demand at any time in any event upon leaving the Company for any reason.

▶ **16 Restrictive Covenant**

▶ (a).

For the period of one (1) year after the termination or expiration of this Contract, the Employee shall not, within China, Hong Kong or Macao, directly or indirectly, own, manage, operate, control, be employed by, participate in, or be connected in any manner with the ownership, management, operation, or control of any business similar to the type of business conducted by the Company, at the time this Contract terminates, nor shall the Employee provide services to any such Company. In the event of the Employee actual or threatened breach of this paragraph, the Company shall be entitled to a preliminary restraining order and injunction restraining the Employee from violating these provisions. Nothing in this Contract shall be construed to prohibit the Company from pursuing any other available remedies for such breach

or threatened breach, including the recovery of damages from the Employee.

▶(b).

For the period of one (1) year after termination of this Contract for any reason whatsoever, the Employee shall not:

▶i).

directly or indirectly canvass, solicit, endeavor to take away from the Company, the business of, procure business from or provide service to, any person, firm or Company which was at the time of such termination or had during the period of one (1) year prior thereto been a customer of or the Company, provided however that this clause shall not apply to the Employee acting in the course of the employment with government or any public body or with any Company or organization which is not itself engaged in any business or activity related or similar to or in competition with the Company's practice; or

▶ii).

endeavor to entice away from the company any person who was at the time of such termination or had at any time during the period of one (1) year immediately preceding such termination been employed or engaged by the Company as a consultant or administrator or translator or accountant or secretary or officer or director, or any other employee of the Company.

▶17 Entire Contract

This Contract contains the entire understanding of the parties and supersedes all previous verbal and written agreements. There are no other agreements, representations or warranties not set forth herein.

▶18 Notices

All notices or other documents under this Contract shall be in writing and delivered personally, or sent by facsimile, or mailed by certified mail, postage prepaid, addressed to the Company or the Employee at their address specified herein or such other address as either party may designate in writing to the other party.

▶19 Non-waiver

No delay or failure by either party to exercise any rights under this Contract and no partial or single exercise of that right shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

▶20 Headings

Headings in this Contract are for convenience only and shall not be used to interpret or construe its provisions.

▶21 Settlement of Labor Disputes

All labor disputes, differences, or questions between the parties concerning the construction, interpretation, and effect of this Contract, or the rights, obligations, and liabilities of the parties will, if possible, be settled through consultation; should consultation be unsuccessful to resolve any dispute, disputes will be settled by Labor Tribunal pursuant to Chinese law.

▶22 Signature and Effective Date

This Contract is signed in Shenzhen City, SEZ, the People's Republic of China in two

originals, each of its two originals having equal binding force.

▶▶

▶

▶

▶

▶

▶▶

▶▶ _____
▶▶ **(Company)**

▶▶

▶▶

▶▶ _____
▶▶ (signature and seal)

▶▶

▶▶ Date: _____

▶

▶ _____
▶ **(Employee)**

▶

▶ _____
▶ (signature)

▶ Date: _____

Appendix 10B. Pledge Agreement

▶ **Pledge Agreement**

▶ AGREEMENT, dated __ day of _____ between:

▶

▶

▶

▶

▶▶

▶▶ _____
▶▶ (hereinafter called the **“Lender”**);

▶▶

▶▶ _____
▶▶ (hereinafter called the **“Pledgee 1”**);

▶▶ and

▶▶

▶▶ _____
▶▶ (hereinafter called the **“Pledgee 2”**).

▶ **ARTICLE I Definitions**

▶ Section 1.01.

Companies Ordinance The *Companies Ordinance of Hong Kong*, as amended, including *Companies (Amendment) Ordinance* (hereinafter the **“Companies Ordinance”**).

▶ Section 1.02.

Joint-Venture The Joint-Venture corporation established in _____ to carry out the Project, owned by the Lender and Pledgee 1 and Pledgee 2, named _____, with address at _____.

▶ Section 1.03.

Loan The money to be lent by the Lender to the Project Corporation in amounts of RMB _____; and to the Joint-Venture in amounts of up to RMB _____, said loans to be made in US dollars in the equivalent to these RMB amounts, at the exchange rate on the day the Loans, or any portion thereof is made, pursuant to two Loan Agreements, executed on even date hereof (hereinafter together called the **“Loan”**).

▶ Section 1.04.

Loan Agreements Two agreements, one in amount of the US dollars equivalent of RMB _____ made by the Lender to the Project Corporation and called the “**Loan Agreement**”; and the other in amount of RMB _____, made by the Lender to the Joint-Venture and called “**Loan Agreement for Residential Property**”.

▶Section 1.05.

Pledge This Agreement, executed by the Lender and Pledgee 1 and Pledgee 2 whereby Pledgee 1 and Pledgee 2 pledge all their shares in the Project Corporation and in the Joint-Venture to guarantee the repayment of one half of the Loan to the Project Corporation and one half of the Loan to the Joint-Venture, until said one half of the Loan has been paid in full to the Lender (hereinafter the “**Pledge**”).

▶Section 1.06.

Project The real estate development project established in _____, on approximately of _____ of land consisting of the design, construction, sale, lease and management of residences, commercial property and a hotel.

▶Section 1.07.

Project Corporation The Hong Kong corporation, named _____, established by the Lender and Pledgee 1, in which corporation Pledgee 1 and the Lender each own ____% of the shares, established to invest in and own the WFOEs through two Hong Kong Subsidiaries.

▶Section 1.08.

Subsidiaries The Hong Kong Corporations, named _____ and _____, with offices at _____, wholly owned by the Project Corporation and directly holding all the shares of the two WFOEs.

▶Section 1.09.

Wholly Foreign Owned Enterprises (“WFOEs”) The Corporations established in _____, named _____ and _____, owned by the Subsidiaries, to carry out the Project.

▶**ARTICLE II Security**

▶Section 2.01.

In accordance with two Loan Agreements executed by the Lender and Project Corporation on the one hand; and the Lender and Joint-Venture on the other hand, the Project Corporation and Joint-Venture borrow RMB _____; and up to RMB _____ respectively, from the Lender.

▶Section 2.02.

Pledgee 1 is the owner of half of the shares of the Project Corporation and ____% of the equity of the Joint-Venture. Pledgee 2 is the owner of ____% of the equity of the Joint-Venture.

▶Section 2.03.

To ensure fulfillment of the obligations of the Project Corporation under the Loan Agreement and of the Joint-Venture under the other Loan Agreement for Residential Property (hereinafter referred to as the “**Principle Obligation**”), Pledgee 1 Pledgee 2 pledge to the Lender all their issued and outstanding shares in the Project Corporation and in the Joint-Venture, to guarantee that one half of said Loan is paid in full to the Lender.

▶Section 2.04.

The Pledge of the shares in the Project Corporation by Pledgee 1 shall guarantee the loan made by the Loan Agreement and by the Loan Agreement for Residential Property. The Pledge of shares in the Joint-Venture by Pledgee 1 and Pledgee 2 shall only guarantee the loan made by the Loan Agreement for Residential Property.

▶Section 2.05.

The scope of the above Pledge shall include one half of the unpaid Principle Obligation and its interest, including additional interest, as specified in the Loan Agreement and Loan Agreement for Residential Property, and any penalty for breach of contract, damage compensation, pledge maintenance costs, and charges for realizing the Pledge.

▶Section 2.06.

Pending repayment of the Loan to the Lender as specified herein, all documents evidencing Pledgee 1's ownership of the shares of the Project Corporation and the equity of the Joint-Venture; and Pledgee 2's ownership of the equity of Joint-Venture, shall be deposited in an escrow account to be designated by the Lender. Pledgee 1's shares of the Project Corporation and the Pledgee 1 and Pledgee 2's ownership of the registered capital of the Joint-Venture, shall be endorsed by Pledgee 1 and Pledgee 2, respectively, in form satisfactory to the Lender, including providing the Lender with an undated proxy and power of attorney, so as to permit transfer of such shares and ownership rights to the Lender; together with a Board of Directors' Resolution of the Project Corporation and the Joint-Venture Board of Directors, authorizing transfer of title of said shares, registered capital, documents and the rights they represent to the Lender. In this regard Pledgee 1 and Pledgee 2 agree to promptly, at the request of the Lender, execute any and all documents necessary, to make this Pledge Agreement fully effective pursuant to Hong Kong and Chinese Law.

▶Section 2.07.

Should the Project Corporation or Joint-Venture delay or default in timely repayment of the Principal Obligation or breach any other provision of the Loan Agreements, all the documents and shares held in escrow as specified in Section 2.05 above shall be transferred to the Lender, on five (5) days' written notice to Pledgee 1 and Pledgee 2, but such transfer to the Lender shall not reduce or eliminate the Project Corporation or Joint-Venture's obligation to pay the principal and interest and other monies to the Lender, pursuant to the terms of the Loan Agreements.

▶Section 2.08.

This Pledge shall become effective upon its execution and shall continue in force until monies payable under Loan Agreements to the Lender shall have been paid in accordance with the provisions hereof.

▶Section 2.09.

This Pledge shall be registered in the Project Corporation's Shareholders' Register Book and the Shareholder's Book of the Joint-Venture. The Project Corporation, Joint-Venture, Pledgee 1 and Pledgee 2 shall use their best efforts to facilitate registration of said pledge in the Project Corporation Shareholders' Register Book and in Joint-Venture's Register Book.

▶Section 2.10.

On any default of the Principle Obligation, the Lender shall inform the escrow agent of said default in writing and the escrow agent shall release Pledgee 1 and Pledgee 2's shares and all documents in escrow to the Lender, who is authorized to transfer said shares and rights of ownership to itself or to sell said shares.

▶Section 2.11.

The Lender, upon any default of the Principle Obligation by the Project and/or Joint-Venture, at its option, may attempt to have Pledgee 1 and Pledgee 2's shares in the Project and/or Joint-Venture, or a portion of those shares, converted into money, by sale to a third party,

and apply said funds to satisfying its claim against the Project and/or Joint-Venture, from the proceeds.

▶Section 2.12.

The sale or transfer of Pledgee 1's shares in the Project Corporation, may be applied to the monies due to the Lender pursuant to the Loan Agreement and Loan Agreement for Residential Property, for up to one half of said Loans. The Pledge of shares in the Joint-Venture by Pledgee 1 and Pledgee 2 shall only apply to one half of the monies due to the Lender pursuant to the Loan Agreement for Residential Property.

▶Section 2.13.

The Lender may only employ the sale or transfer of the pledged shares and equity as specified in Section 2.11 to obtain repayment of one half of the outstanding Principal Obligation. However, aside from exercising its rights against the pledged shares as specified herein, no provisions herein shall be construed to limit the Lender's rights to pursue its other remedies to obtain repayment of all of the outstanding Principal Obligation.

▶Section 2.14.

At such time as the claims of the Lender against the pledged assets are fully satisfied to the extent permitted herein, if there are shares of Pledgee 1 and Pledgee 2 which have been pledged to the Lender which have not been sold or otherwise disposed of, then the Lender shall release the Pledge of those shares of Pledgee 1 and Pledgee 2.

▶Section 2.15.

The Lender, however, has no obligation to attempt to sell the Pledgee 1 and Pledgee 2's shares and. may, upon default of the Principle Obligation by the Project Corporation and/or Joint-Venture, commence legal proceedings against the Project Corporation and/or Joint-Venture, to collect any unpaid monies due to it under the Loans.

▶Section 2.16.

If the Lender, upon default of the Principle Obligation by the Project Corporation and/or Joint-Venture, attempts to have the Pledgee 1 and Pledgee 2's shares in the Project Corporation and/or Joint-Venture converted into money by sale to a third party, but after such sale, the Lender still has not been made whole, to the extent permitted herein, it may commence legal proceedings against the the Project Corporation and/or Joint-Venture, to collect any unpaid monies due to it under the Loan.

▶Section 2.17.

The Lender hereby agrees that subsequent to the execution of this Pledge and its Registration in the Shareholders' Register Book of the Project Corporation and that of the Joint-Venture, so long as the Project Corporation and the Joint-Venture are not in default in the performance of any of the terms of the Loan Agreements and this Agreement or in payment of the Principle Obligation, Pledgee 1 and Pledgee 2 shall have to right to vote the pledged shares on all Project Corporation, and Joint-Venture matters. However, on breach of any of the provisions either of the Loan Agreements, the authority and power of Pledgee 1 and Pledgee 2 to vote their portion of the shares of the Project Corporation and the Joint-Venture will immediately revert to the Lender, pursuant to documents held in escrow and this Agreement

▶Section 2.18.

Pledgee 1 and the Lender hereby agree that subsequent to the execution of this Pledge and its Registration in the Shareholders' Register Book of the Project Corporation and Joint-Venture and subsequent to the WFOE's and Joint-Venture's receipt of their business licenses and establishment of their foreign currency and RMB bank accounts, and subsequent to

the establishment of the escrow account specified in Section 2.05 hereinabove and the depositing of documents and shares therein as specified hereinabove, to the reasonable satisfaction of the Lender, the Pledge Agreement executed by Pledgee 1 and the Lender pledging Pledgee 1's income from _____, shall be cancelled by Pledgee 1 and the Lender.

▶ **ARTICLE III Governing Law**

This Agreement shall be deemed to be an agreement made under the laws of Hong Kong including the *Companies Ordinance* and other relevant laws. Where mandatory provisions of Chinese Law apply to matters related to WFOEs, Joint-Ventures and other matters, such laws shall be applicable.

▶ **ARTICLE IV Jurisdiction for Dispute Settlement**

This Agreement and any disputes arising hereunder shall be settled by the parties hereto, by arbitration, at the Hong Kong International Arbitration Centre, pursuant to its rules, but nothing herein shall be construed to limit the parties' rights to seek ancillary relief from a court having jurisdiction, during the pendency of the arbitration.

▶ **ARTICLE V Successors and Assigns**

This Agreement shall bind and inure to the benefit of the respective successors and assigns of the parties hereto, except that the Pledgee 1 and Pledgee 2 may not assign or otherwise transfer all or any part of its rights or obligations under this Agreement without the prior written consent of Lender.

▶ **ARTICLE VI Counterparts**

This Agreement may be executed in counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same agreement.

▶ **ARTICLE VII Governing Language**

This Agreement shall be in the English language.

▶ **ARTICLE VIII Amendment**

Any amendment of this Agreement shall be in writing and signed by the parties hereto.

▶ IN WITNESS WHEREOF, the parties hereto, acting through their duly authorized representatives, have caused this Agreement to be signed in their respective names as of the date first above written.

▶▶ **Lender:** _____

▶

▶ Seal & Signature by Authorized Representative:

▶

▶ Date:

▶

▶▶ **Pledgee 1:** _____

▶

▶ Seal & Signature by Authorized Representative:

▶

▶ Date:

▶

▶▶ **Pledgee 2:** _____

▶

▶ Seal & Signature by Authorized Representative:

▶ Date:

Appendix 10C. Agency Agreement

▶ **AGENCY AGREEMENT**

▶ The parties to this Agreement are:

▶ _____ [company name], a U.S. corporation, with office at _____ (the “**Principal**”); and

▶ _____ [company name], a Hong Kong corporation, with offices at _____ (the “**Agent**”)

▶ **General Principles**

▶ **WHEREAS**, the Principal imports _____ [products] from China; and

▶ **WHEREAS**, the Principal requires an Agent to source said goods in China and inspect them for quality; and

▶ **WHEREAS**, the Principal needs said goods to meet international quality standards for such goods; and

▶ **WHEREAS**, the Agent has offices in Hong Kong and China and has experience in sourcing, purchasing and quality inspection of the manufacture of various products, including _____; and

▶ **WHEREAS**, the Principal is willing to employ the Agent, as an agent in the territory, to perform the services specified hereinabove, and the Agent is willing to perform said services for the Principal,

▶ **NOW, THEREFORE**, the parties hereto agree as follows,

▶ **1 Definitions**

The terms used herein shall have the following meanings:

▶ (a) “**Agency**”

The Principal's employment of the Agent to assist the Principal by introducing factories or other institutions in China to manufacture Goods the Principal wishes to purchase, to be shipped to the U.S.A, and to inspect said goods for quality, prior to shipment.

▶ (b) “**Commission**”

The fee to be paid to the Agent by the Principal of ____ percent (____%) of the Price of Goods, said Commission amount to be added to all letters of credit opened by the Principal to the Agent or others, for the Factories, or added to any other means of payment to be made for the Goods.

▶ (c) “**Confirmation**”

Order Confirmations (pro-forma invoice) must be faxed or emailed by the Agent to the Principal within one week of receipt of the Purchase Order.

▶ (d) “**Factories**”

The Factories in China, that manufacture the Goods for the Principal, pursuant to Purchase Orders executed by the Agent on behalf on the Principal.

▶ (e) “**Goods**”

Goods refer to the _____ [products] and any similar Goods ordered by the Principal, through the Agent, from Factories in China.

▶ (f) “**Price of Goods**”

The Price of the Goods sold to the Principal as specified in the Purchase Orders, ex-factory price.

▶(g) **“Purchase Orders”**

The Purchase Orders provided by the Principal, entered into by the Agent on behalf of the Principal, specifying all the terms and conditions for purchase and delivery of the Goods. A copy of the Purchase Order shall be provided to the Principal after execution by the Factories and Agent on behalf of the Principal.

▶(h) **“Services”**

Those services to be performed by the Agent on behalf of the Principal, including sourcing of the Goods in the Territory, executing Purchase Orders on behalf of the Principal, inspecting the Goods for quality and performing the other work specified in this Agreement.

▶(i) **“Shipping”**

All shipping of the Goods shall be arranged by the Principal, but the Agent shall inform the Principal's shipping agent when the Goods have been completed and are ready for shipping.

▶(j) **“Territory”**

China, Hong Kong, Macao and Taiwan.

▶**2 Terms of Payments for the Goods**

▶(i).

The payment for the Goods will be made by irrevocable, transferable, divisible letters of credit (“L/C”); or by periodic cash payments, which payments all shall include the Agent's Commission.

▶(ii).

Letter of Credit will be opened by the Principal during the first week of the month that the shipment of the Goods is to be made. Exceptions will be granted by the Principal to new Factories only for the purpose of establishing a business relationship.

▶(iii).

Purchase Order terms will be listed on the L/C application (**Attachment “A”**), which the Agent shall carefully review before filling out and present any questions to the Principal before the L/C is opened. L/Cs will not be amended because of a disagreement of terms after the L/C is opened. All delivery points must be specified on the L/C.

▶(iv).

The Principal will open said L/Cs for purchasing the Goods in the amount of the Purchase Price, plus commission, as specified in the Purchase Order and this Agreement. The Principal will be responsible for all damages, including consequential damages, to the Factories, for failure of the Principal to open the L/C pursuant to the terms specified in the Purchase Order.

▶**3 Term of this Agreement**

The term of this Agreement is for five (5) years from execution, but it may be extended from time to time by the written agreement of the parties hereto.

▶**4 Standard of Manufacturing of Goods and Timely Delivery**

▶(a).

The Principal will specify the standard of the Goods as per sample, to be inspected by both the Agent on behalf of the Principal and the Factories, and to be signed and preserved by both the Agent on behalf of the Principal and the Factories.

▶(b).

The Factories will be fully responsible for any claims with regard to defects in the Goods,

breach of warranty of fitness for use or any other warranty, failure to manufacture the Goods pursuant to sample and injury to third parties caused by the Goods.

▶(c).

The Factories shall be responsible for all damages, including consequential damages to the Principal, for failure of the Factories to make timely delivery of the Goods, pursuant to the terms of the Purchase Order.

▶(d).

The Agent will assist the Principal should the Principal make any claim against the Factories for breach of the terms of the Purchase Order.

▶5 Inspection

▶(a).

The Agent shall have the obligation on behalf of the Principal to periodically inspect the Goods, to verify they are being manufactured pursuant to sample, in the quality specified in the Purchase Order and will be delivered on time. The Agent shall arrange to visit the Factories at any time during normal business hours either at the Factories facilities or the storage facilities of the Factories. The failure to inspect shall not be deemed a waiver of any of the Principal's rights, but shall be a breach of the Agent's responsibilities under this Agreement.

▶(b).

After each inspection, the Agent will report to the Principal as to the quality of the Goods being manufactured and the likelihood of timely delivery pursuant to the terms of the Purchase Order.

▶6 Warranties

The Factories shall warrant in the Purchase Order that the Goods will conform to the description contained in the sample agreed to by both Principal and Factories and will perform in accordance with the specifications set forth therein. Factories will further warrant in the Purchase Order that the Goods will be free from defects in material and workmanship. All defective Goods that fail to operate for the full warranty period, will be fully refunded or replaced at no charge, including no charge by the factories, for service costs and transportation costs.

▶7 Patent, Right and Infringement

If the Goods are covered by a patent[s], the Factories shall warrant that it holds the exclusive patent right to the Goods in China and elsewhere and shall indemnify the Principal and Agent against all judgments, decrees, costs, and expenses resulting from any alleged infringement and to defend, upon Principal's request, any action which may be brought against the Principal or Agent and/or its customers, under any claim of patent infringement of such Goods.

▶8 Relationship between Principal and Agent

Nothing herein shall be construed to characterize the relationship between the Principal and Agent as a relationship between employer and employee. The Agent is not an employee of the Principal, but an independent contractor, working, pursuant to the terms of this Agreement.

▶9 Agent Activity using Best Efforts

The Agent shall use its best efforts to source the Goods, inspect them for quality and timely manufacturing schedule so as to meet the requirements of the sample and Purchase

Orders.

▶ **10 Force Majeure**

Neither party shall be responsible for any losses resulting if the fulfillment of any of the terms of this Agreement is delayed or prevented by revolutions or other civil disorders, wars, acts of enemies, strikes, fires, floods, acts of God, or by any other cause not within the control of the party whose performance is interfered with, and which, by the exercise of reasonable diligence, such party is unable to prevent, whether of the class of causes enumerated or not.

▶ **11 Confidentiality and Non-Circumvention**

▶(a).

The Agent shall not disclose, publish, use, authorize or allow anyone else to disclose, publish or use any confidential, proprietary or business information of the Principal during the term of this Agreement or subsequent to its termination for any reason, that the Agent may acquire by reason of the Agent's employment by the Principal, without the express written authorization of the Principal, as required by the Principal.

▶(b).

The Principal shall not disclose, publish, use, authorize or allow anyone else to disclose, publish or use any confidential, proprietary or business information of the Agent during the term of this Agreement or subsequent to its termination for any reason, that the Principal may acquire by reason of the Agent's work on behalf of Principal, without the express written authorization of the Agent, as required by the Agent.

▶(c).

The Agent will not (except in the proper course of its duties or unless ordered to do so by a court of competent jurisdiction) divulge any information concerning the operations, monitoring, business transactions, customer lists, communications (written or otherwise), prices, confidential matters and affairs of the Principal thereof, either during the existence of the Agreement or at any time after its termination.

▶(d).

The Agent will introduce the Principal to factories, other corporations and businesses in China. The Principal hereby acknowledges, warrants and agrees that all communications and dealings with said factories, other corporations and businesses in China will be exclusively the province of the Agent. All communications with the aforesaid organizations in China will at all times during the existence of this Agreement be exclusively done for the Agent.

▶(e).

The Principal will not (except in the proper course of its duties or unless ordered to do so by a court of competent jurisdiction) divulge any information concerning the operations, monitoring, business transactions, customer lists, communications (written or otherwise), prices, confidential matters and affairs of the Agent thereof, either during the existence of the Agreement or at any time after its termination.

▶(f).

All notes, memoranda, accounts, records, business cards, writing and documents and all copies thereof made, prepared or acquired by the Agent during the continuance of this Agreement shall be and remain in the possession of the Agent, but shall be handed over to the Principal on demand at any time, and in any event upon leaving the Principal for any reason.

▶ **12 Entire Agreement**

This Agreement contains the entire understanding of the parties and supersedes all previous verbal and written agreements. There are no other agreements, representations or warranties not set forth herein.

▶ **13 Notices**

All notices or other documents under this Agreement shall be in writing and delivered personally, or sent by facsimile, or mailed by certified mail, postage prepaid, addressed to the Principal or the Agent at their address specified herein or such other address as either party may designate in writing to the other party.

▶ **14 Non-waiver**

No delay or failure by either party to exercise any rights under this Agreement and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

▶ **15 Headings**

Headings in this Agreement are for convenience only and shall not be used to interpret or construe its provisions.

▶ **16 Governing Law and Settlement of Disputes**

The terms of this Agreement shall be governed by Hong Kong law.

All disputes between the parties concerning the construction, interpretation, and effect of this Agreement, or the rights, obligations, and liabilities of the parties hereto will, if possible, be settled through mutual consultation; should consultation be unsuccessful to resolve any disputes, said disputes will be settled by arbitration in Hong Kong, at the Hong Kong International Arbitration Centre, pursuant to its rules, before a single arbitrator.

▶▶
▶▶
▶▶
▶▶
▶▶
▶▶

▶▶ _____
▶▶ (Principal)

▶▶ _____
▶▶ (Agent)

▶▶ _____
▶▶ (Signature)

▶▶ _____
▶▶ (Signature)

▶▶ Date: ____ day of ____, 20 ____

▶▶ Date: ____ day of ____, 20 ____

▶ **Attachment “A”**

▶ Letter of Credit Application Form

Appendix 10D. Board Resolution

▶ **Board Resolution**

▶ (To be completed by a Limited Company)

▶ Name of Company: _____

▶ Trade Name (if any): _____

▶ In the Board Meeting of the Company held at

- ▶ Place: _____
- ▶ Time: _____
- ▶ Date: _____
- ▶ Present:
- ▶ _____
- ▶ _____
- ▶ _____

- ▶ A quorum was present.
- ▶ The following resolution was unanimously passed:
- ▶ The person below is hereby appointed as an authorized person of the Company with immediate effect. The appointee is granted _____ authority in the Company and is responsible for _____ affairs of the Company.
 - ▶ Name in Chinese: _____
 - ▶ Name in English: _____
 - ▶ ID Card No.: _____
 - ▶ Residential Address: _____
 - ▶ Mobile: _____
 - ▶ Title in the Company: _____
 - ▶ Appointee (signature): _____
 - ▶ Company (Seal): _____
 - ▶ Chairman (Signature): _____

Appendix 10E. Share Transfer Agreement

▶ Share Transfer Agreement

- ▶ This share transfer agreement (hereinafter the “**Agreement**”) is entered into on _____ by and between:
 - ▶ _____ (hereinafter the “**Transferor A**”), _____ (hereinafter the “**Transferor B**”);
 - ▶ and
 - ▶ _____ (hereinafter the “**Transferee**”).

▶ General Principles

- ▶ **Whereas**, Transferor A has rights to ____% of the shares of _____ (hereinafter the “**Company**”), a limited company duly organized and existing under the laws of the People's Republic of China with its registered address in _____, and serves as the legal representative of the Company; and
- ▶ **Whereas**, Transferor B has rights to ____% of all the outstanding shares of the Company; and
- ▶ **Whereas**, Transferor A is desirous of selling to Transferee, and Transferee is desirous of buying from Transferor A, all of Transferor A's shares of the Company; and
- ▶ **Whereas**, Transferor B agrees to sell to Transferee, and Transferee is desirous of buying from Transferor B, all of Transferor B's shares of the Company; and
- ▶ **Whereas**, Transferor A and Transferor B are willing to sell and have available to sell one hundred percent (100%) of the Company's shares to Transferee and Transferee is willing to buy one hundred percent (100%) of the Company's shares;
- ▶ **Now, therefore**, in consideration of the mutual covenants herein contained, the parties hereto agree as follows:

▶ 1 The Purchase Price and Percentage of the Equity Interests Transferred

▶1.1.

Transferor A and Transferor B will transfer one hundred percent (100%) shares of the Company to Transferee with a purchase price of RMB _____.

▶2 **Effective Date and Mode of the Equity Transfer**

▶2.1.

This Agreement shall become effective upon execution of the parties hereto. The payment of the purchase price by Transferee to Transferors A & B specified in Clause 1 is to be made in three installments: the first installment of RMB _____ is to be made upon transfer of the company registration; the second installment of RMB _____ is to be made upon change of the legal representative; the remaining RMB _____ is to be made upon transfer of the company CIQ rights and customs documents. Transferor A shall complete all legal procedures for the share transfer within two (2) months after the effective date of this Agreement and keep Transferee fully informed.

▶3 **Warranties and Representations**

▶3.1.

Transferors hereby jointly and severally warrant and represent to Transferee that they have all requisite power, authority and legal capacities to execute and deliver this Agreement, and that at the time of transfer, the transferred shares will be free and clear of any liens, encumbrances and liabilities.

▶3.2.

Transferors hereby jointly and severally warrant and represent to Transferee that at the time of transfer all debts of the Company have been transferred to a third party.

▶3.3.

Transferee hereby warrants and represents to Transferors that it has full right and authority to enter into this Agreement.

▶4 **The Warehouse**

▶4.1.

The Company uses the warehouse and office and fumigation warehouse, all of which are leased personally in Transferor A's name. Said lease shall be transferred to the Company name prior to or concurrently with the first payment for the transfer as specified above. The lease agreement is attached hereto as Exhibit A.

▶4.2.

Transferee will keep renting the warehouse until the expiration of this year's rent contract at the same rent rate that Transferors pay to the warehouse owner. The rent of the warehouse includes two parts:

▶(1).

Rent of the warehouse and office RMB _____ per year

▶(2).

Rent of fumigation warehouse RMB _____ per year

After the rent contract expires, Transferee will renew the contract with the warehouse owner. Transferors shall repair the warehouse roof before handing it over to Transferee.

▶5 Creditor and Debtor Responsibilities

▶5.1.

Upon execution of this Agreement by the parties hereto and completion of all procedures required by the laws of the People's Republic of China, Transferors shall be free from any liabilities for the transferred shares and benefit no more from the earnings of the transferred shares.

▶5.2.

Upon execution of this Agreement by the parties hereto and completion of all procedures required by the laws of the People's Republic of China, Transferee shall receive the profits and assume the risks and loss of the transferred shares of the Company.

▶6 Expenses

▶6.1.

All the expenses incurred in relation to the execution of this Agreement shall be undertaken by Transferee.

▶7 Breach of Agreement

▶7.1.

In the event that Transferor A fails to complete all legal procedures for the transfer within the stipulated time specified in Clause 2.1, Transferor A shall pay to Transferee a penalty sum of ____% of the transfer amount for every month of delay beyond the initial ____ days. If the breach exceeds ____ months, Transferee reserves the right to terminate this Agreement and promptly require the return of any payments made by the Transferee to the Transferors, and to demand compensation for any loss of it, in addition to the penalty sum specified in this paragraph of 7.1 from Transferor A.

▶8 Governing Laws and Dispute Resolution

▶8.1.

This Agreement shall be governed by and construed in accordance with the laws of the People's Republic of China.

▶8.2.

In the event that any dispute arises from this Agreement or its performance or enforcement, the parties hereto will use their reasonable efforts to attempt to settle such dispute amicably. If the parties hereto cannot resolve the dispute, then it shall be resolved by arbitration in Hong Kong at the Hong Kong International Arbitration Center pursuant to the prevailing arbitration rules before a single arbitrator. The award of the arbitrator will be final and binding as to the parties hereto and the losing party or parties shall bear all the arbitration costs.

▶9 Language and Entire Agreement

▶9.1.

This Agreement is written and executed in both the English and Chinese languages, both versions of which shall be equally binding.

▶10 Originals

▶10.1.

This Agreement will be executed in eight (8) original copies in both the English and Chinese languages. Transferor A and Transferor B shall each hold one copy, Transferee shall hold one copy and the other copies shall be sent to relevant governmental departments to proceed with this transfer. All copies are equally binding and of same legal effect.

▶ **In witness whereof**, the parties hereto have caused this Agreement to be executed by their respective duly authorized representatives, as of the date first written above.

▶▶ Transferor A: _____

▶ _____ (signature)

▶ Date:

▶

▶ Transferor B: _____

▶ _____ (signature)

▶ Date:

▶

▶ Transferee: _____

▶ _____ (signature and seal of the company)

▶ Date:

▶ Exhibit A

Appendix 10F. Premises Lease Agreement

▶ **Premises Lease Agreement**

▶ **Party A:** _____

▶ Address: _____

▶ Zip code: _____

▶ Legal Representative: _____ Title: _____ Tel: _____

▶ **Party B:** _____

▶ Address: _____

▶ Zip code: _____

▶ Legal Representative: _____ Title: _____ Tel: _____

▶ Pursuant to the relevant regulations including the Contract Law of the People's Republic of China, based on equality, voluntariness, honesty and credibility, Party A and Party B have, in respect of Party B's use of a premises from Party A, reached an agreement through friendly consultation and entered into this Agreement.

▶ **1 Location of the Premises**

Party A will provide Party B with the _____ which is located at _____ and is in good condition.

▶ **2 Size of the Premises**

The registered size (gross size) of the premises, premises type and structure are those specified in the registration of the premises management department of the government.

▶ **3 Usage Term**

The time of use will be from _____ to _____.

▶ **4 Purpose**

Party B will use the premises for _____.

▶5 Premises Usage Fees (including management services fees) and Cost of Equipment Purchase and Installation, etc.

▶(a).

Both parties agree that Party B will for using the premises pay to Party A usage fees pursuant to the standard of ____ per month, which in total will be _____.

▶(b).

Party A shall purchase relevant equipment (the ownership of the purchased equipment belongs to Party B) pursuant to Party B's specific requirements and standards. Both parties agree that Party B shall pay to Party A cost of equipment purchase and installation, etc., which amounts to _____. The equipment that Party A shall purchase and install for Party B mainly includes: air conditioners, bathroom bathtubs, cabinets, cupboards and table tops, etc.

▶(c).

Party B shall pay to Party A the premises usage fees and cost of equipment purchase and installation, etc. in the form of cash.

▶6 Obligations of Party A

▶1.

Party A shall hand over the premises that complies with the specific requirements and standards of the Interior Repairs List (See Exhibit 1) provided by Party B for Party B to use, and purchase and install relevant equipment for Party B.

▶2.

Party A shall before _____ hand over the premises that meets Party B's standards for Party B to use. If the premises when being used by Party B does not meet the agreed standards, Party A shall before _____, in other words, before Party B pays the second installment, proceed with refurbishment of the premises to fully meet Party B's usage needs.

▶3.

During the usage term of the premises, Party A shall proceed with regular maintenance of the premises, and keep the premises remaining in a condition (including a continuous supply of water and electricity and the general maintenance of the premises, etc.) that allows Party B to use it normally. In case the premises and facilities are damaged due to quality problems, natural damages, force majeure or accidents, Party A shall be responsible for the repairs and bearing relevant expenses.

▶4.

Party A permits Party B to send representatives to participate in the whole process of the maintenance, and listen to the opinions from Party B's representatives.

▶5.

Party A shall be responsible for increasing the electricity supply to the premises to meet Party B's usage needs, and shall guarantee a bottom level of _____.

▶6.

During the term of premises usage, Party A shall guarantee that Party B has free access to the premises during the time of use stipulated in Clause 3 of this Agreement.

▶7 Obligations of Party B

▶1.

The premises usage fees and cost of equipment purchase and installation, etc. amounting to _____, and will be paid by Party B in three installments. Party B shall pay to Party A the premises usage fees and cost of equipment purchase and installation, etc. which amount to _____ before _____. The second installment which amounts to _____ shall be paid before _____. Party B shall settle the outstanding _____ before _____.

▶2.

Costs of water and electricity that arise from Party B's usage are not included in the premises usage fees that Party B pays to Party A. Party B shall pay the costs of water and electricity to Party A separately in accordance with independent water, electricity meters installed.

▶3.

Party B shall carry out activities within the laws of the People's Republic of China.

▶4.

Party B's activities shall not affect the normal work and life of the units and residents nearby.

▶5.

In the process of premises usage, Party B shall maintain the good condition of the premises and be responsible for compensating for any man-made damages.

▶8 Breach of the Agreement

▶1.

Party A shall hand over the premises for Party B to use by the stipulated deadline. Should the hand-over be overdue, Party A shall pursuant to the number of days that the hand-over is overdue pay to Party B a penalty in accordance with the standard of _____ per day.

▶2.

Should Party B fail to pay the premises usage fees and cost of equipment purchase and installation, etc. on time, Party B shall pursuant to the number of days that the payment is overdue pay to Party A a penalty in accordance with the standard of _____ per day.

▶3.

During the usage term, should Party A not timely perform the responsibility of maintenance and care stipulated in this Agreement, causing damages of the premises, property loss or personal injury of Party B, Party A shall be responsible for the compensation.

▶9 Dispute Resolution

▶1.

This Agreement is subject to the jurisdiction of laws and regulations of the People's Republic of China.

▶2.

Disputes that arise from the performance of this Agreement by both parties shall be resolved through consultation; in case no agreement is reached through consultation, both parties agree to resolve disputes by instituting legal proceedings in a court that has jurisdiction over the premises.

▶10 Miscellaneous

▶1.

This Agreement will be effective after being executed by both parties. In respect of anything not covered in this Agreement, supplementary terms may be entered into after both parties have reached an agreement through consultation. Supplementary terms of this Agreement are an inseparable part of this Agreement.

▶2.

The exhibit attached to this Agreement is incorporated into this Agreement and has equal legal effect with this Agreement.

▶3.

This Agreement is entered into in Chinese and English. Should disagreements arise from the understanding of the Chinese version and the English version, the Chinese version shall be taken as the standard.

▶4.

This Agreement together with its exhibit is made into two original copies, each of which is to be held respectively by Party A and Party B. These two original copies of the Agreement have equal effect.

▶▶
▶
▶
▶
▶
▶

▶▶ Party A (Seal):

▶▶ Party B (Seal):

▶▶

▶▶

▶▶ Legal Representative (Signature):_____

▶▶ Legal Representative (Signature): _____

▶▶ Date:

▶▶ Date:

▶▶ In:

▶▶ In:

▶ Exhibit:

▶ 1. Interior Repairs List