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China's Supreme People's Court Released Judicial Interpretations on the Application of Law in Hearing Civil Dispute Cases Caused by Monopoly (Authors: Eric LIU, Haoze LI)

On May 8, 2012, China's Supreme People's Court published *Provisions on Certain Issues Concerning the Application of Law in Hearing Civil Dispute Cases Caused by Monopoly* (the "Judicial Interpretations on Anti-Monopoly Law") and held a press conference addressing the background, basic principles and main content of the Judicial Interpretations. In this article, we will set forth, in detail, major provisions of and provide in-depth analysis on these Judicial Interpretations.

1. Anti-Monopoly Civil Lawsuit Accepted by People's Court

1.1 Monopolistic Conducts Defined by Anti-Monopoly Law

According to Article 3 and Article 32 of *the Anti-Monopoly Law of the People's Republic of China* ("Anti-Monopoly Law"), monopolistic conducts include:

(a) Monopoly agreements reached among business operators;

(b) Abuse of dominant market position by business operators;

(c) Concentration of business operators that lead, or may lead to elimination or restriction of competition; and

(d) Abuse administrative power to eliminate or restrict competition administrative by departments and other organizations authorized by laws or regulations to perform the function of administering public affairs.

1.2 Anti-Monopoly Civil Lawsuit Accepted by the Court

According to Articles 7, 8 and 9 of the Judicial Interpretations on Anti-Monopoly Law, the court may accept the anti-monopoly civil lawsuits arising out of the following monopolistic conducts:

(a) Monopoly agreements reached among business operators;

(b) Abuse of dominant market position by business operators; and

(c) Abuse administrative power to eliminate or restrict competition by administrative departments and other organizations authorized by laws or regulations to perform the function of administering public affairs.

Compared with the Anti-Monopoly Law, the provisions of the Judicial Interpretations on Anti-Monopoly Law exclude concentration of business operators that lead, or may lead to elimination or restriction of competition from the monopolistic conducts accepted by the courts. Thus, according to Anti-Monopoly Law, supervision on concentration of business operators shall first

be carried out through investigations by the Anti-monopoly Bureau of Ministry of Commerce, and in case an interested party refuses to accept the decision of the Anti-monopoly Bureau of the Ministry of Commerce, it shall first apply for administrative reconsideration; if it refuses to accept the decision made after administrative reconsideration, it may bring an administrative lawsuit before a court.

2. Requirements for A Lawsuit Brought by the Plaintiff

2.1 Standing to Sue

According to Article 1 of the Judicial Interpretations on Anti-Monopoly Law, the plaintiff may be a natural person, a legal persons or other organizations.

2.2 Pre-conditions for Bringing a Lawsuit

Article 53 of the Anti-Monopoly Law sets forth the pre-conditions for an interested party to bring an administrative lawsuit, i.e. that a decision was made by the authority for enforcement of anti-monopoly related laws. However, according to Article 2 of the Judicial Interpretations on Anti-Monopoly Law, a plaintiff may file a civil lawsuit to the court either after the decision made by authority for enforcement of the anti-monopoly related laws which announced that a monopolistic conduct has occurred took effect or directly before such administrative decision is made. In other words, it is not a pre-requirement for bringing civil lawsuit by the plaintiff that the authority for enforcement of the anti-monopoly related laws has made a decision on a monopolistic conduct.

2.3 Causes of Action

According to Article 1 of the Judicial Interpretations on Anti-Monopoly Law, a plaintiff may bring an anti-monopoly civil lawsuit under the following two circumstances:

(a) The plaintiff suffered damages due to the monopolistic conduct;

(b) Disputes arising from contracts or charters of industrial associations in violation of the Anti-Monopoly Law.

It is important to note, according to Article 50 of the Anti-Monopoly Law, an operator conducting monopolistic conducts shall only bear civil liabilities when the monopolistic conduct of the operator has caused losses to another person. However, according to the abovementioned provision of the Judicial Interpretations on Anti-Monopoly Law, no matter whether or not the plaintiff has suffered losses , it may file a lawsuit related to any disputes arising from the fact that contracts or charters of industrial associations are in violation of the Anti-Monopoly Law. Compared with Article 50 of the Anti-Monopoly Law, the abovementioned provision of the Judicial Interpretations on Anti-Monopoly Law is more helpful for the public through public lawsuits to supervise the business operators who may carry out monopolistic conducts.

3. Jurisdiction

3.1 Grade Jurisdiction

According to Article 3 of the Judicial Interpretations on Anti-Monopoly Law, the intermediate people's courts shall mainly responsible for the first trial involving monopoly and the primary people's courts serve as a supplement. The first trial involving monopoly shall be under the jurisdiction of the intermediate people's court of a city where the people's government of province or autonomous region is located or of a city specifically designated in the State plan, the intermediate people's court within the jurisdiction of a municipality directly under the Central Government, or the intermediate people's court designated by the Supreme People's Court, or the primary people's court with the approval of the Supreme People's Court.

3.2 Territorial Jurisdiction

According to Article 4 of the Judicial Interpretations on Anti-Monopoly Law, the territorial jurisdiction for civil dispute cases involving monopoly shall be determined in accordance with the Civil Procedure Law and the provisions of relevant juridical interpretations in relation to the jurisdiction over cases involving tort disputes and contract disputes based on the specific conditions of the cases.

3.3 Transfer and Designation of Jurisdiction

Two circumstances for transfer and designation of jurisdiction are provided by Article 5 of the Judicial Interpretations on Anti-Monopoly Law, i.e. where the cause of action at the time of initiation of a civil dispute case is not a monopoly dispute, however, (i) the defendant files any defense or counterclaim on the ground that the plaintiff has committed some monopolistic behavior and there is evidence supporting it, or (ii) the case needs to be ruled in accordance with the Anti-Monopoly Law, but if the court does not have the jurisdiction over civil dispute cases involving monopoly, the case shall be transferred to a people's court with jurisdiction.

4. Burden of Proof

As explained in Section 1.2 hereof, the monopolistic conducts accepted by the courts include: (i) monopoly agreements have been reached among operators; (ii) abuse of dominant market position by operators; and (iii) that administrative departments and other organizations authorized by laws or regulations to perform the function of administering public affairs abuse their administrative power to eliminate or restrict competition. Article 7, Article 8 and Article 9 of the Judicial Interpretations on Anti-Monopoly Law provide separate rules for burden of proof in respect of the abovementioned three monopolistic conducts, as follows:

4.1 Burden of Proof in Respect of Monopoly Agreements Reached Among Business Operators

Article 7 of the Judicial Interpretations on Anti-Monopoly Law provides that where the alleged monopolistic conduct arose from the fact that monopoly agreements have been reached among operators, the defendant shall bear the burden of proof to prove that the alleged monopoly agreement doesn't have the effect of eliminating or restricting competition.

According to Article 13 of the Anti-Monopoly Law, monopoly agreements refer to agreements, decisions and other concerted conducts designed to eliminate or restrict competition. In other words, "the effect of eliminating or restricting competition" is an essential condition for constituting a monopoly agreement rather than a justified reason for a monopoly agreement. Thus, the burden of proof in Article 7 of the Judicial Interpretations on Anti-Monopoly Law is the rule of inversion of burden of proof that is in favor of protecting the litigation rights of the plaintiff.

4.2 Burden of Proof in Respect of Abuse of Dominant Market Position by Business Operators

Article 17 of the Anti-Monopoly Law prohibits business operators holding dominant market positions from seven kinds of conducts by abusing their dominant market positions.[1]

Despite of the abovementioned seven conducts, the Judicial Interpretations on Anti-Monopoly Law only sets forth rules for the burden of proof under the circumstance that commodities are sold at unfairly high prices or bought at unfairly low prices, i.e. "a plaintiff shall bear the burden of proof in respect of allegation that the defendant has the dominant position in the relevant market and has abused its dominant market position. However, the defendant shall bear the burden of proof if such defendant makes a defense to allege the justification of his conduct." This regulation is the same as the basic principle of burden of proof in civil litigation, "the burden of proof lies upon him who alleges", and is not a special rule for burden of proof.

Obviously, the Judicial Interpretations on Anti-Monopoly Law makes no efforts to change the situation in practice that it is easy for a plaintiff to lose the case due to difficulties in presenting evidence. Thus, within a certain period, the situations that a plaintiff loses the case as he hardly proves the dominant position by the defendant in the relevant market will continue.

4.3 Burden of Proof in respect of That Administrative Departments and Other Organizations Authorized by Laws or Regulations to Perform the Function of Administering Public Affairs Abuse Their Administrative Power to Eliminate or Restrict Competition

According to Article 9 of the Judicial Interpretations on Anti-Monopoly Law, where the alleged monopolistic conduct belongs to abuse of dominant market position by a public utility enterprise or an business operator that has an exclusive position according to the laws, the People's Court may, in accordance with the specific conditions of market structure and competition environment, determine that the defendant has the dominant market position unless otherwise reversed by

[1] These conducts include: (1) selling commodities at unfairly high prices or buying commodities at unfairly low prices; (2) without justifiable reasons, selling commodities at prices below cost; (3) without justifiable reasons, refusing to enter into transactions with their trading counterparts; (4) without justifiable reasons, demanding their trading counterparts to make transactions exclusively with themselves or with the business operators designated by them; (5) without justifiable reasons, conducting tie-in sale of commodities or adding other unreasonable trading conditions to transactions; (6) without justifiable reasons, applying differential prices and other transaction terms among their trading counterparts who are on an equal footing; or (7) other acts of abuse of dominant market positions confirmed as such by the authority for enforcement of the anti-monopoly related laws under the State Council.

sufficient contrary evidence. The above provision of the Judicial Interpretations on Anti-Monopoly Law authorizes the People's Courts with the power to assign the burden of proof based on specific cases. Where the People's Court determines that the defendant doesn't have the dominant market position, the basic principle of burden of proof, "the burden of proof lies upon him who alleges", shall apply. Where the People's Court determines that the defendant has the dominant market position, the rule of inversion of burden of proof shall apply.

5. Source of Evidence

Besides the regular source of evidence provided by *the PRC Civil Procedure Law*, the Judicial Interpretations on Anti-Monopoly Law has special regulations for source of evidence as follows:

5.1 Information Published by Defendant

According to Article 10 of the Judicial Interpretations on Anti-Monopoly Law, the information published by the defendant to the public may be used by a plaintiff to prove that the defendant has the dominant market position in relevant market. Where the information published by the defendant to the public is sufficient to prove that the defendant has the dominant market position, the People's Court may make a decision based on it, unless otherwise reversed by sufficient contrary evidence. Usually, many monopolizers publish information in public area to promote their dominant market position. This Article of the Judicial Interpretations on Anti-Monopoly Law provides an easy way for a plaintiff to prove.

5.2 Expert Witnesses

Article 12 of the Judicial Interpretations on Anti-Monopoly Law provides that a party may file an application with the people's court for requesting one or two professionals with expertise to appear in court to explain specialized issues of the case.

5.3 Market Research or Economic Analysis Report

According to Article 13 of the Judicial Interpretations on Anti-Monopoly Law, a party may file an application with the people's court for entrusting any special agency or professionals to make a market research or economic analysis report on the specialized issues of the case. The market research or economic analysis report is an expert conclusion in nature. With the approval of the people's court, both parties may determine a qualified institution or expert through consultation; in the event of an unsuccessful consultation, the people's court shall designate.

6. Legal Consequences Suffered by Defendant if He Loses the Case

Section 2.3 of this article introduces two causes of action by a plaintiff. In respective of the two causes, the defendant shall suffer different legal consequences correspondingly if he loses the case:

(a) In respective of the cause of action that "the plaintiff suffered damages due to the monopolistic conduct", according to Article 14 of the Judicial Interpretations on Anti-Monopoly Law, the defendant shall cease the infringement, to compensate for losses and etc if he loses the case.

(b) In respective of the cause of action that "disputes arising from contracts or charters of industrial associations that are in violation of the Anti-Monopoly Law", according to Article 15 of the Judicial Interpretations on Anti-Monopoly Law, the People's Court shall determine that the contracts or article of association of an industrial association that is in violation of Anti-Monopoly Law are invalid.

7. Statutory Limitation Period

According to Article 16 of the Judicial Interpretations on Anti-Monopoly Law, the statutory limitation period for right to damages arising from monopolistic behavior is two years, commencing from the date when the plaintiff is aware or should have been aware that his rights were infringed.

Where the plaintiff reports any suspected monopolistic behavior to the authority for enforcement of the anti-monopoly related laws, the statutory limitation period shall be ceased from the date when such reporting is made. And a new statutory limitation period shall be counted from the date when (i) the plaintiff is aware or should have been aware of the decision

not to initiate the case, to withdraw the case or to terminate the investigation, or (ii) the plaintiff is aware or should have been aware that the effectiveness of a decision that the authority for enforcement of the anti-monopoly related laws finds that the said behavior constitutes a monopolistic behavior.

It's important to note, where the monopolistic behavior has already continued for over two years when the plaintiff brings a lawsuit, the plaintiff brings the lawsuit within the statutory limitation period, and the defendant files a defense on the statutory limitation period, the amount of damages shall be calculated based on a period starting from two years before the date when the plaintiff brought the lawsuit to the people's court.

Legal Updates

1. Brief of Revised Delisting Rules for China's Growth Enterprise Market (ChiNext) (Authors: Ying YANG, Jiaxin LIU, Lan LI)

On April 20, 2012, Shenzhen Stock Exchange promulgated the *Rules Governing the Listing of Stocks on the Growth Enterprise Market of Shenzhen Stock Exchange (2012 version)* (the "**Listing Rules 2012**"), which shall come into effect on May 1, 2012. In order to improve and supplement the delisting mechanism under the *Rules Governing the Listing of Stocks on the Growth Enterprise Market of Shenzhen Stock Exchange (2009 version)* (the "**Listing Rules 2009**"), after soliciting for public opinions, Shenzhen Stock Exchange published the *Scheme for Improving the Delisting System of the Growth Enterprise Market* (the "**Scheme**") on February 24, 2012, which was also incorporated in this List Rules 2012. In this article, we will introduce and analyze the salient points relating to the delisting mechanism under the Listing Rules 2012 from the following aspects:

Enriching the Standard System for Delisting

1) Adding Two New Circumstances Triggering Delisting

Pursuant to the Listing Rules 2009, there were 11 circumstances that would trigger suspension of listing and delisting at the Growth Enterprise Market ("**GEM**"), i.e., (1) consecutive loss; (2) consecutive loss caused by retroactive adjustment; (3) negative net assets; (4) the auditor provides adverse opinion or refuses to provide opinion regarding the audit report; (5) failure to correct the material errors or false records in the financial and accounting reports; (6) failure to disclose the annual report or the interim report within the statutory period; (7) dissolution of the listed company; (8) bankruptcy declaration of listed company by the court; (9) the cumulative trading volume of the shares for 120 consecutive trading days is less than 1 million shares; (10) the equity distribution or number of shareholders for 20 consecutive trading days fails to meet the listing criteria; and (11) the company no longer meets the listing criteria due to the change in its total amount of shares. The Listing Rules 2012 supplements two new delisting circumstances to the original 11 circumstances, namely (1) a GEM-listed company has been condemned publicly by the Shenzhen Stock Exchange for three times within the past 36 months; and (2) the daily closing price of the shares of a GEM-listed company is lower than the nominal value per share for 20 consecutive trading days.

2) Adjusting the required lasting periods of certain circumstances triggering suspension of listing and delisting

Besides, for purpose of accelerating delisting in applicable circumstances, the Listing Rules 2012 shortens the periods for which two existing circumstances are required to last before they trigger the suspension of listing and delisting respectively. Firstly, if the net assets of a listed company turns negative or becomes negative due to retroactive adjustment for more than one year, the listing of such company shall be suspended, and if the same situation lasts for more than two consecutive

years, such company shall be delisted. Secondly, if the total trading volume of the shares of a listed company for 120 consecutive trading days is less than 1 million, the Listing Rules 2012 provides that such listed company shall be delisted, which is different from the Listing Rules 2009 that provides delisting will be triggered only after such situation occurs twice.

Improving reviewing standards for re-listing and imposing restrictions on re-listing through back-door listing

Considering the situation that some suspended listed companies at the Main Board improperly take advantage of back-door listing to get re-listed, the Listing Rules 2012 supplements some detailed provisions with respect to the standards of review on re-listing at GEM and clarify the standpoint of not to support the re-listing through back-door listing.

1) No material changes in main business scope

The Listing Rules 2012 makes supplements to the "Resumption of Listing" section of Listing Rules 2009 by adding into the bottom-line conditions a suspended company shall satisfy for re-listing, which include no material changes in main business scope during the suspension period and ability to be sustained profitable. With regard to the company seeking listing through back-door listing, such requirement will increase the difficulty to find a proper listed shell company with matched main business, which therefore will further restrict the practice of back-door listing at GEM. By contrast, the applicable listing rules of Main Board as well as Small and Medium-sized Enterprises Board (the "**SME Board**") do not explicitly adopt the criteria of "no material changes in main business scope" as a requirement of re-listing .

2) Adopting the reviewing standard of net profit after deducting the extraordinary profit and loss

If a company whose listing is suspended due to three years' consecutive loss or three years' consecutive loss after retroactive adjustment intends to apply for re-listing, the Listing Rules 2009 applies the standard of profitability in terms of financial requirement and only requires the audited annual financial accounting report demonstrates such company has achieved profit in that year. Whereas, the Listing Rules 2012 instead adopts the standard of net profit and requires that the audited annual financial accounting report shall demonstrate the net profit of the company is positive in that year. In addition, the Listing Rules 2012 introduces the concept of extraordinary profit and loss used in the context of initial public offering and refinancing at Main Board and SME Board and requires that the lower one between the net profit before and after deducting extraordinary profit and loss shall be applied as the calculation basis to determine whether a suspended company is qualified to get re-listed. The adoption of such standard indicates that GME listed companies can no longer take advantage of assets disposal, government subsidy and other short-term financial adjustment tools to adjust their profits to procure relisting and the purpose is to eliminate the cases of circumventing delisting by profit adjustment through extraordinary profit and loss. In consideration of there is no precedent of re-listing in GME till now, we may refer to the cases of

re-listing on Main Board to assess the potential impacts of such additional requirement. According to the statistics of Shenzhen Stock Exchange, there are 30 companies in total in the history of Main Board of Shenzhen Stock Exchange which managed to achieve re-listing after it had been suspended due to 3 years' continuous loss, among which 24 companies would have negative net profit after deducting the extraordinary profit and loss. In another word, such 24 companies could not get relisted, if they are subject to above standard of the Listing Rules 2012.

3) Clarifying the requirement of standard unqualified audit report

Pursuant to the new requirement of the Listing Rules 2012, if a company whose listing was suspended due to three years' continuous loss or three years' continuous loss after retroactive adjustment intends to apply for re-listing, a standard unqualified audit report shall be issued by a certified accountant for the annual report disclosed after suspension of listing.

4) Clarifying the period for documents supplement

The Listing Rules 2012 explicitly clarifies that the period for companies to supplement application documents on re-listing is 30 trading days, upon expiration of which, Shenzhen Stock Exchange will no longer accept any supplemental application documents, instead of the ambiguous wording of "period required by Shenzhen Stock Exchange" in List Rules 2009. The purpose of this clarification is to regulate the common practice at Main Board that some suspended companies purposely delay the submission of application documents in an attempt to get re-listed through back-door listing.

Optimizing the method of risk warning of delisting from GEM

Before the Listing Rules 2012 was promulgated, GEM employed the same method of risk warning of delisting as that adopted by the Main Board and SME Board. In order to avoid confusing investors as for companies with delisting risk in GEM with companies in the other two boards and strengthen disclosure of delisting risks, the Listing Rules 2012 abandons the method of delisting risk warning previously adopted and instead clearly specifies the initial timing of risk disclosure and frequency of subsequent risk disclosures as to each applicable circumstances triggering suspension of listing and de-listing, requires the company to publish announcements on risk warning of delisting every five trading days and establishes the "unitary mechanism of information disclosure and member remind of delisting risk".

Implementing the system of "Delisting Arrangement Period" and establishing the "Delisting Arrangement Board"

After further studying the experience of its overseas counterparts, Shenzhen Stock Exchange introduces the "Delisting Arrangement Period" in the Listing Rules 2012, which provides a 30-trading days period for trading of shares of the to-be-delisted companies commencing from the date when Shenzhen Stock Exchange decides on delisting of such company until the shares of the company are actually delisted. During such Delisting Arrangement Period, the shares of the to-be-delisted

companies will be moved to the "Delisting Arrangement Board" for trading, in order to facilitate investors' identifying shares of delisted companies and enhance the effect of risk disclosure. The Delisting Arrangement Period provides the investors with necessary window and time to handle the shares held by them before delisting of such company, and render more time to realize return of shares prices of the delisted companies, whereby reducing the risk of delisting at high price to some extent.

Clarifying the future arrangements for delisted companies

The Listing Rules 2012 specifies that companies delisted from the GEM will be transferred to the Agency Share Transfer System for listing, which offers the investors a channel and platform to transfer shares held by them, thus is in favor of protection of the investors' interest after the companies are delisted.

Our Observations

Before the Listing Rules 2012 was published, the Listing Rules 2009 only provides a comparatively simple delisting system, which was formulated on the basis of its counterparts of Main Board and SME Board. However, the delisting system of Main Board and SME Board, though having been implemented for years, has achieved limited effects and delisting could be circumvented by means of back-door listing or financial statement restructuring, etc. in practice. Through solicitation of public opinions and combination of its practice of supervision with experience learned from the overseas counterparts, Shenzhen Stock Exchange supplements and improves the delisting system of GME from many aspects by such Listing Rules 2012, such as clarifying the standpoint of not supporting re-listing via back-door listing and replacing the previous standard of profitability by the standard of net profit. In addition, we notice that Shanghai Stock Exchange and Shenzhen Stock Exchange have respectively released the *Plan for Improving the Delisting System (Draft for Comments)* and the *Plan for Improving the Delisting System of Main Board and SME Board (Draft for Comments)* on April 29, 2012. Based on our observation, part of the delisting system design of the Listing Rules 2012 has been absorbed and reflected in the aforesaid Drafts, such as adopting the standard of net profit after deducting extraordinary profit and loss as well as setting up "Delisting Arrangement Period". We will pay close attention on official promulgation of the plans on improvement of delisting system of Main Board and SME Board and related amendments on listing rules, and share our insights with you in time.

2. Notice of Ministry of Commerce on Record Filing of Foreign-Invested Venture Capital Enterprises (Authors: Evan ZHANG, Lu RAN)

On May 17, 2012, the Ministry of Commerce (the "**MOFCOM**") published, on its official website, the

Notice of Ministry of Commerce on Improving Administration for Record Filing of Foreign-Invested Venture Capital Enterprises (the "**Notice**"), which sets forth further provisions on record filing procedures and documentation requirements of Foreign-Invested Venture Capital Enterprises (the "**FIVCEs**") and provides more definite, detailed and unified record filing regulations for the FIVCEs.

The Notice is the first separate rules issued by the MOFCOM providing for detailed requirements on the record filing of the FIVCEs since the issuance of *the Administrative Provisions for Foreign-Invested Venture Capital Enterprises* (Order No. 2 (2003), the "**Order**") by the Ministry of Foreign Trade and Economic Cooperation, Ministry of Science and Technology, State Administration for Industry and Commerce, State Administration of Taxation, and State Administration of Foreign Exchange in 2003. Its contents are summarized as follows:

Record Filing of the FIVCEs

The Notice indicates that newly established FIVCEs approved by provincial-level commerce departments shall be filed for record directly with the MOFCOM through MOFCOM's administration system for the examination and approval of foreign-invested enterprises. Those FIVCEs already established shall filed for record in accordance with the Order and the *Circular of the Ministry of Commerce on the Matters Relating to the Examination and Approval of Foreign-Invested Venture Capital Enterprises and Venture Capital Management Enterprises* (Shang Zi Han [2009] No. 9) (the "**Circular 9**"). That is, these FIVCEs shall fill out and submit the *Form of Record Filing for a Foreign-Invested Venture Capital Enterprise* in March annually to the relevant provincial-level commerce departments, which then issues a record filing certificate and collect and submit the relevant information to the MOFCOM before May 31 every year.

The Notice further emphasizes that MOFCOM will announce the names of FIVCIEs that have completed record filing procedures on its website, and the local commerce departments shall not conduct the relevant procedures for the changes or approve its investment of a FIVCE if such FIVCIE is not listed on the MOFCOM's website. That is, the FIVCEs shall be filed for record with WOFCOM compulsorily, and the FIVCEs failing to conduct record filing with the MOFCOM will not be able to complete any change application or investment in China.

Record Filing for the FIVCEs' Investment in Encouraged Industries or Permitted Industries

The Notice specifies the record filing requirements for the FIVCEs when making investments in encouraged industries or permitted industries as set forth in the *Foreign Investment Industrial Guidance Catalogue.* The Notice emphasizes that such record filing shall be based on the name lists announced by MOFCOM on its website, and the local commerce departments shall issue the *Reply Letter on Review of the Record-filing* and the *Approval Certificate of Foreign-Funded Enterprise* to the investee enterprises accordingly. That is, if any FIVCE fails to complete the filing for record with the MOFCOM, its invested enterprises will not be able to obtain its own reply

opinions from relevant commerce departments. Meanwhile, where a FIVCIE's invested enterprise applies for any change, the relevant commerce departments shall refer to the requirement as mentioned above, which will practically restrict the investment business of such FIVCE.

Investment by FIVCEs in RMB

According to the Notice, where a foreign investor newly establishes a FIVCE or increases its capital commitment in an existing FIVCE by using overseas RMB, the procedures and formalities shall be completed in accordance with *Notice of the Ministry of Commerce on Issues Relating to RMB Foreign Direct Investment* (Shang Zi Han [2011] No. 889). Where a FIVCE make its investment in RMB, the same regulations and rules shall apply as the investment is made in a freely convertible foreign currency.

Examination of Record Filing

In addition to the requirements as mentioned above, an *Application Form for Establishment of a New Enterprise and Changes of a Investee Enterprise* is also attached to the Notice. This form is mainly used to review a single project invested by a FIVCE, including the particular industry of the invested enterprises, the shareholdings of the FIVCE as the investor, etc.; however, the *Form of Record Filing for a Foreign-Invested Venture Capital Enterprise* as required by Circular 9 focuses on the annual review of the overall investment situation of the FIVCE. These two forms together facilitate the record-filing supervision on the FIVCEs and their investee enterprises.

3. China's State Council Promulgated Special Provisions on Labor Protection of Female Workers (Authors: Eric LIU, Ning LI)

On April 18, 2012, China's State Council adopted *the Special Provisions on Labor Protection of Female Workers* (the "New Provisions") at its 200th executive meeting. The New Provisions were officially promulgated and came into force as of April 28, 2012, when *the Provisions on Labor Protection of Female Workers* (the "Original Provisions") issued by State Council on July 21, 1988 were simultaneously repealed. Compared to the Original Provisions, the New Provisions have introduced new provisions with respect to the scope of labor activities that are tabooed for female workers, maternity leave, supervision and administration mechanism, employers' responsibilities and liabilities, etc. This article will address major changes of the New Provisions in these respects.

Scope of Application

Besides the State organs, enterprises, public institutions and social groups which are within the scope of application of the Original Provisions, the New Provisions shall also apply to other

employers such as individual economic organizations and other social organizations. The scope of application of the New Provisions covers all employers and their female workers, including female migrant workers.

Maternity Leave and Allowance

1) Maternity Leave

According to the Original Provisions, maternity leave for a female employee is 90 days. The New Provisions has extended the period to 98 days. The Original Provisions provide 15 days of prenatal leave while the New Provisions provide that 15 days of maternity leave may be taken before giving birth. It is unclear whether the change entitles the female workers to decide the length of prenatal leave (no more than 15 days) at their own discretion. Further interpretations by the State Council or the administrative departments of human resources and social security are expected.

There are no specific provisions regarding the length of maternity leave in the case of a miscarriage in the Original Provisions. The New Provisions provide that a female worker shall receive 15 days of maternity leave in the case of a miscarriage in the first four months of pregnancy and shall receive 42 days of maternity leave in the case of a miscarriage after four months of pregnancy. It is worth noting that a female worker shall receive the same number of days of maternity leave no matter she suffers spontaneous abortion or aborts the pregnancy intentionally.

2) Maternity Allowance

The New Provisions set forth new provisions on maternity allowance, standard for payment of medical expenses for child birth or miscarriage and the payer of the aforesaid amount. According to the New Provisions, if a female worker has already participated in maternity insurance, the maternity allowance given to her during the maternity leave and medical expenses for child birth or miscarriage shall be paid by the maternity insurance fund; if a female worker has not participated in maternity insurance, the abovementioned maternity allowance and medical expenses shall be paid by the employer.

According to the New Provisions, whether a female worker has participated in maternity insurance may influence the standard of maternity allowance payable to her:

a) If a female worker has already participated in maternity insurance, the maternity allowance shall be paid by the maternity insurance fund according to the standard of the average monthly wage of the workers paid by the employer during the preceding year;

b) If a female worker has not participated in maternity insurance, the maternity allowance shall be paid by the employer according to the standard of the wage of the female worker before the maternity leave.

A female worker whose wage before the maternity leave is higher than the average monthly wage of

the workers paid by the employer during the preceding year and who has already participated in maternity insurance may suffer disadvantages due to the above provisions. Besides, the vague expression of the New Provision may cause difficulties for the calculation of maternity allowance on a per-day basis. Some local regulations have provided for reasonable calculation method in this regard. For example, *the Notice of Beijing Municipal Bureau of Human Resources and Social Security on Issues Related to the Adjustment of Policies regarding the Maternity Insurance for Workers in Beijing Municipality* (Jing Ren She Yi Fa [2011] No.334) provides that the amount of maternity allowance shall be the average monthly wage of the workers paid by the employer divided by 30 and then multiplied by the number of days of maternity leave. If the maternity allowance is higher than the female worker's wage, the employer may not withhold the difference. If the maternity allowance is lower than the female worker's wage, the shortfall shall be made up by the employer.

Employers' Liabilities

1) Civil Liabilities of Employers

The Original Provisions state that where an employer harms a female employee's rights and interests, the in-charge administrative department of the employer shall order the employer to grant reasonable economic compensation to the female employee. The New Provisions remove this administrative disciplinary measure by providing in Article 15 that an employer harming a female employee's rights and interests shall bear civil liability for compensation. That is to say, if a female employee's rights and interests are harmed, she need not to ask for economic compensation through administrative procedures, rather, she may directly claim against the employer for compensation through labor dispute arbitrations and lawsuits.

2) Administrative Liabilities of Employers

Where an employer violates the provisions in relation to maternity leave or maternity leave in case of a miscarriage, arranges female workers pregnant for seven months or more or lactating female workers to extend their working hours or to work night shifts, or violates the scope of labor activities tabooed for female workers or the scope of labor activities that female workers are barred from during the menstrual period, the administrative department of human resources and social security may order it to make rectification within the specified time limit and impose a fine calculated according to the standard of more than RMB 1,000 and less than RMB 5,000 for each female worker being harmed. Where an employer violates the scope of labor activities that are tabooed for female workers during pregnancy and lactation, the employer may be imposed a fine of more than RMB 50,000 and less than RMB 300,000 or even be ordered closure. These provisions are much stricter than the administrative sanction provided by the Original Provisions.

New Requirements for Employers

Besides the above, the New Provisions have set forth some new requirements for employers, including:

a) Employers shall strengthen labor protection of female workers, adopt measures to improve the labor safety and health conditions of female workers and organize training on labor safety and health knowledge for female workers; (Article 3 of the New Provisions)

b) Employers shall inform female workers in writing of the posts falling within the scope of labor activities that are tabooed for female workers; (Article 4 of the New Provisions)

c) If a female worker is pregnant for seven months or more or breast-feeds babies less than one year old, her employer shall not extend her working hours or arrange her to work night shifts; (Article 6 and Article 9 of the New Provisions)

d) Employers shall prevent and prohibit any sexual harassment against female workers in the workplace. (Article 11 of the New Provisions)

We suggest that employers further improve their rules and regulations, modify the provisions of their labor contracts, correct irregularities during their business operation course, and provide more protection to the rights and interests of female workers in accordance with these new requirements.

Important Announcement

This Newsletter has been prepared for clients and professional associates of Han Kun Law Offices. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

If you have any questions regarding this publication, please contact:

Contact Us

Beijing Office

Tel.: +86-10-8525 5500
Suite 906, Office Tower C1, Oriental Plaza
No. 1 East Chang An Ave.
Beijing 100738, P. R. China

Rong CHEN Attorney at-law
Tel.: +86-10-8525 5541
Email: estella.chen@hankunlaw.com

Shanghai Office

Tel.: +86-21-6080 0909
Suite 5709, Tower 1, Plaza 66, 1266 Nanjing West Road,
Shanghai 200040, P. R. China

Yinshi CAO Attorney-at-law
Tel.: +86-21-6080 0980
Email: yinshi.cao@hankunlaw.com

Shenzhen Office

Tel.: +86-755-3680 6500
Suite 4709, Excellence Times Plaza, 4068 Yitian Road, Futian District,
Shenzhen 518048, P. R. China

Jason WANG Attorney at-law
Tel.: +86-755-3680 6518
Email: jason.wang@hankunlaw.com