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# China offices

Legal flash

2020 – Year in review



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## Legal regulations: 2020 update

In 2020, China adopted the Civil Code, revised the Patent Law and the Copyright Law, and released the drafts of the long-awaited Personal Information Protection Law and Data Security Law for public comment. The government finally established a unified registration of movable properties and rights guarantees, aimed at optimizing the business environment. To attract foreign investments, the negative lists for foreign investments were continually reduced, and to strengthen the security system in further opening-up to foreign investors, rules on foreign investment security review were issued.

Below we summarize the most significant developments in 2020.

### Developments in the new Civil Code and supporting regulations

- On May 28, 2020, the 3<sup>rd</sup> Session of the 13<sup>th</sup> National People's Congress ("NPC") enacted China's first Civil Code (《中华人民共和国民法典》), which came into effect on January 1, 2021, replacing a series of separate standalone civil laws, including the Marriage Law, the Law of Succession, General Principles of the Civil Law, the Adoption Law, the Guarantee Law, the Contract Law, the Property Law, the Tort Liability Law, and General Provisions of the Civil Law.

While the Civil Code largely restates the existing laws, it redefines certain fundamental rules in the area of secured transactions laws, particularly in terms of the transfer of mortgaged property, the fluidity clause under mortgage and pledge contracts, the priority rules for resolving conflicting real rights for security in the same collateral, the registration of financial leasing, and the retention of title.

- On December 31, 2020, the Supreme People's Court ("SPC") released the Interpretation of the SPC on the Application of the Guarantee Regime of the Civil Code (《最高人民法院关于适用〈中华人民共和国民法典〉有关担保制度的解释》), which applies to mortgage, pledge, lien, and guarantee, as well as such disputes as retention of title, financial leasing and factoring etc. that involve the function of guarantee.
- Six other judicial interpretations in support of the implementation of the new Civil Code were promulgated in 2020:



- ✓ Interpretation (I) of the SPC on Issues concerning the Application of Law in the Trial of Labor Dispute Cases (最高人民法院关于审理劳动争议案件适用法律问题的解释 (一))
- ✓ Interpretation (I) of the SPC on Issues concerning the Application of Law in the Trial of Construction Project Contract Dispute Cases (最高人民法院关于审理建设工程施工合同纠纷案件适用法律问题的解释 (一))
- ✓ Interpretation (I) of the SPC on the Application of the Book Real Right of the Civil Code (最高人民法院关于适用《中华人民共和国民法典》物权编的解释 (一))
- ✓ Interpretation (I) of the SPC on the Application of the Book Succession of the Civil Code (最高人民法院关于适用《中华人民共和国民法典》继承编的解释 (一))
- ✓ Interpretation (I) of the SPC on the Application of the Book Marriage and Family of the Civil Code (最高人民法院关于适用《中华人民共和国民法典》婚姻家庭编的解释 (一))
- ✓ Several Provisions of the SPC on the Retroactivity in the Application of the Civil Code (最高人民法院关于适用《中华人民共和国民法典》时间效力的若干规定)

On December 30, 2020, the SPC also abolished 116 pieces of the judicial interpretations and regulatory documents that contradict the Civil Code, and on December 31, 2020, amended 111 pieces of judicial interpretations through five separate decisions.

### **Two further major developments in civil law:**

- On August 19, 2020, the SPC promulgated its decision to revise the Provisions on Several Issues concerning the Application of Law in the Trial of Private Lending Cases (最高人民法院关于审理民间借贷案件适用法律若干问题的规定) (the “Revised Private Lending Provisions”), which took effect on August 20, 2020. One of the most significant changes introduced by the Revised Private Lending Provisions is the adjustment of the upper limit of judicial protection of the private lending interest rate.

The Revised Private Lending Provisions establish a judicial protection ceiling on the interest rate of private lending by reference to four times of the one-year loan prime rate (LPR) issued by the National Interbank Funding Center at the time when the contract is concluded, a significant drop compared to the original 24%/36% rule (i.e., annual interest



rates above 36% are considered invalid, and those between 24% and 36% fall into natural debts).

Concerning the application scope of the new provisions on private lending, the SPC clarified in its reply to the Higher People's Court of Guangdong Province [Fa Shi [2020] No.27] that the new provisions do not apply to seven kinds of local financial institutions approved by financial regulatory authorities: micro-credit companies, financial guarantee companies, regional equity markets, pawnbrokers, financial leasing companies, commercial factoring companies, and local asset management companies.

- On December 29, 2020, the State Council released the Circular of the State Council on the Implementation of Unified Registration of Movable Properties and Rights Guarantees (国务院关于实施动产和权利担保统一登记的决定) to facilitate financing for business, providing a unified system to register movable properties and rights guarantees that will apply throughout the country from January 1, 2021. New registrations should be self-processed online with the Credit Reference Center of the People's Bank of China (PBOC) through the unified registration system.

The unified registration system applies to mortgages of production equipment, raw materials, semi-finished products and products, pledges of accounts receivable, certificates of deposit, warehouse receipts, bills of lading, financial leases, factoring, retention of title, and other movable properties and rights guarantees that qualify for registration. However, the unified registration system does not apply to mortgages/pledges of motor vehicles, ships and aircraft, bonds, equities, fund shares, or intellectual property rights, which different registration authorities continue to handle.

### **Developments in foreign investment-related laws**

- On June 23, 2020, the National Development and Reform Commission ("NDRC") and the Ministry of Commerce ("MOFCOM") jointly released (i) the Special Administrative Measures for Foreign Investment Access (Negative List) (2020 Edition) (外商投资准入特别管理措施 (负面清单) (2020 年版)); and (ii) the Special Administrative Measures for Foreign Investment Access in Pilot Free Trade Zones (Negative List) (2020 Edition) (自由贸易试验区外商投资准入特别管理措施 (负面清单) (2020 年版)). They both came into effect on July 23, 2020.

On December 10, 2020, the NDRC and the MOFCOM jointly issued the Negative List for Market Access (2020 Edition) (市场准入负面清单 (2020 年版)), which came into effect on the same date.



The Negative Lists for Foreign Investment Access set out the special administrative measures regarding foreign investors' access, while the Negative List for Market Access is a unified list that applies to all investors in mainland China. Foreign investors should consult both negative lists before investing in mainland China.

- On December 19, 2020, the NDRC and the MOFCOM jointly issued the Measures on Security Review of Foreign Investments (外商投资安全审查办法), which came into effect on January 18, 2021.

Under the Measures on Security Review of Foreign Investments, foreign investors or concerned parties in China must make a declaration for security review to the office of the working mechanism set up at NDRC and jointly led by NDRC and MOFCOM if they make any of the following investments in China:

- ✓ Any investments in areas concerning the security of national defense such as the military industry or the military support industry, or any investments in areas surrounding military facilities and military industrial facilities, regardless of whether control is obtained.
- ✓ Any investments in important areas concerning national security that result in the invested enterprises being controlled by foreign investors. Those areas include important agricultural products, important energy and resources, important manufacturing of equipment, important infrastructure, important transportation services, important cultural products and services, important information technology and Internet products and services, important financial services, and key technologies.

### Updates on dispute resolution

- On November 27, 2020, the SPC and the Hong Kong government signed the Supplemental Arrangement concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (关于内地与香港特别行政区相互执行仲裁裁决的补充安排), clarifying several key issues regarding the recognition and enforcement of the arbitral awards.
- On September 7, 2020, the State Council issued the Official Reply of the State Council on the Work Plan on Deepening the New Round of the Comprehensive Pilot Program for Expanding the Opening-up of the Service Industry of Beijing Municipality to Build a National Comprehensive Demonstration Zone for Expanding the Opening-up of the



Service Industry (国务院关于深化北京市新一轮服务业扩大开放综合试点建设国家服务业扩大开放综合示范区工作方案的批复)(the “Reply”), which came into effect on the same date. According to the Reply, renowned overseas arbitration institutions and dispute resolution institutions are allowed to establish business organizations in the designated area of Beijing (which is yet to be designated) after they have been registered with the judicial administrative department of Beijing and filed with the Ministry of Justice to provide arbitration services on civil and commercial disputes arising in the areas of international commerce and investments.

On December 28, 2020, the Beijing Municipal Bureau of Justice issued an implementing regulation on the above policy: the Administrative Measures on Business Organizations Established by Foreign Arbitration Institutions within China (Beijing) Free-trade Zone (the “Beijing FTZ”) (境外仲裁机构在中国（北京）自由贸易试验区设立业务机构管理办法), focusing on the registration and management issues of foreign arbitration institutions’ business organizations in the Beijing FTZ. Importantly, under article 3, business organizations of foreign arbitration institutions may only handle foreign-related civil and commercial disputes.

Up until now, both the Beijing FTZ and the Lin Gang New Area of Shanghai FTZ have been open to foreign arbitration institutions. However, there is still no guidance on how the arbitration awards should be enforced, and it remains unclear how the court will carry out a judicial review on the arbitration proceedings and how interim measures will be provided.

### Updates on intellectual property laws

On October 17, 2020, the 22<sup>nd</sup> Session of the Standing Committee of the 13<sup>th</sup> NPC passed the Decision on Amending the Patent Law (关于修改〈中华人民共和国专利法〉的决定), which will come into effect on June 1, 2021.

Highlights:

- ✓ Expands the patentable design to include partial designs of a product.
- ✓ Increases the patent protection period for design patent from 10 years to 15 years.
- ✓ Extends the right of domestic priority to design patent application.
- ✓ Introduces the patent open licensing system.



- ✓ Establishes punitive damages for serious willful infringement and raises the upper limit of the amount of statutory compensation from RMB 1,000,000 to RMB 5,000,000.
- On November 11, 2020, the 23<sup>rd</sup> Session of the Standing Committee of the 13<sup>th</sup> NPC passed the Decision on Amending the Copyright Law (关于修改〈中华人民共和国著作权法〉的决定), which will come into effect on June 1, 2021.

### Highlights:

- ✓ Expands the range of protectable works, clarifying that “works” refers to intellectual creations with originality in the realm of literature, art or science that can be represented in a certain form and incorporating a catch-all provision: “other intellectual achievements that meet the characteristics of works.”
- ✓ Replaces the concept “cinematographic works and works created in a way similar to cinematography” with “audio-visual works,” which expressly expands the range of protectable works covered; e.g., short video and live broadcasts made by methods other than filmmaking.
- ✓ Incorporates the rule of presumption of authorship.
- ✓ Adds a new clause establishing that, if co-authors fail to agree on the exploitation of the work, a co-author may exploit the work in ways other than assignment, exclusively licensing and pledging; however, the profits must be shared with the other co-authors.
- ✓ Establishes punitive damages for serious willful infringement and raises the upper limit of the amount of statutory compensation from RMB 500,000 to RMB 5,000,000.

### Developments in personal information and data protection laws

- On July 3, 2020, the Standing Committee of the 13<sup>th</sup> NPC released the Draft Data Security Law (中华人民共和国数据安全法 (草案)). According to the draft, the law will broadly apply to the data activities carried out within Chinese territory. “Data” refers to any record of information in electronic or non-electronic form, and “data activities” refer to the activities of data collection, storage, processing, use, provision, trade, and



disclosure. Once enacted, it will have a profound implication on carrying out data activities in China.

- On October 21, 2020, the Standing Committee of the 13<sup>th</sup> NPC released the Draft Personal Information Protection Law (中华人民共和国个人信息保护法 (草案)). If passed, it will become China's first comprehensive law on protecting personal information.

According to the draft, the law will not only apply to the personal information processing activities carried out in Chinese territory (regardless of the data subjects' nationality), but also to the personal information processing activities carried out outside Chinese territory against subjects in China that fall under certain circumstances, such as (i) the personal information processing is to provide products or services for individuals in China, or (ii) the personal information processing is to analyze and evaluate the behaviors of individuals in China.

Also, the draft adopted an independent chapter for the rules on the crossborder transfer of personal information that may have wide-ranging implications for the daily operation of foreign invested companies in China. If personal information needs to be transferred outside the territory of China to meet certain business needs, at least one of the following conditions must be met:

- ✓ Having passed the security assessment organized by the state cyberspace authorities
- ✓ Having obtained personal information protection certification issued by professional agencies under the regulations of the state cyberspace authorities
- ✓ Having signed a contract with the overseas receiving parties to stipulate the rights and obligations of both parties and to supervise the processing activities to ensure they comply with the standards stipulated in this law
- ✓ Meeting any other conditions stipulated by laws, administrative regulations, or the state cyberspace authorities.

Also, in cases of the crossborder transfer of personal information, the processor must inform the data subjects of (i) the identity and contact information of the overseas receiving party, (ii) the handling purpose and method, (iii) the type of personal information to be handled, and (iv) the way in which the individuals can exercise the





rights and interests under the law against the overseas receiving party, and obtain separate consent from the data subjects.

### **New challenges for certain industries**

- On January 22, 2020, the State Administration for Market Regulation issued the Administrative Measures for Drug Registration (药品注册管理办法) and the Administrative Measures for Monitoring Drug Production (药品生产监督管理办法), both of which came into effect on July 1, 2020, focusing on (i) facilitating the full implementation of the Market Authorization Holder (MAH) System established by the revised Drug Administration Law in 2019; (ii) optimizing the processes of review and approval; and (iii) improving life-cycle management.
- On June 16, 2020, the State Council promulgated the Regulations on the Supervision and Administration of Cosmetics (化妆品监督管理条例), which came into effect on January 1, 2021.

#### Highlights:

- ✓ Confirms that cosmetic raw materials and cosmetics are subject to classified administration systems based on their risks. Different administration and supervision methods will be applied accordingly.
- ✓ Specifies the definition and scope of special and ordinary cosmetics.
- ✓ Outlines the general responsibilities of registrants and record-filing applicants of cosmetics, making them accountable for cosmetics' quality, safety, and alleged functions.
- ✓ Establishes the obligations applicable to operators that sell or supply cosmetics to consumers via certain special channels, such as centralized trading markets and trade fairs, e-commerce platforms, salons, and hotels.
- ✓ Establishes a monitoring system for adverse reactions, the cosmetics recall system, and the safety re-assessment system of cosmetics and raw materials.
- ✓ Applies administrative penalties such as warnings, fines, confiscation, the suspension of production or operation, and revoking licenses, but with much higher fines and more detailed application conditions.



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## Tax regulations: 2020 update

2020 was an exceptional year. The unexpected outbreak of the COVID-19 pandemic at the beginning of the year disrupted the progress of tax legislation, forcing the government to take extraordinary measures, which were also the focus of the tax authorities in the first half of the year. Consequently, many tax regulations were centered around preventing and controlling the pandemic and providing support for the hardest-hit companies. As these policies were released under the exceptional circumstance and have a limited application without a far-reaching impact for the future, we will not repeat them in this issue of the legal flash. Instead, we will review a handful of the tax regulations in 2020 that relate more to companies' daily operations under normal circumstances.

In 2020, one significant event in China was **the building of the Hainan Free Trade Port**. On June 1, 2020, China released its Master Plan for the Construction of the Hainan Free Trade Port (the "Master Plan"), aimed at making the Hainan Free Trade Port ("FTP") a crucial port that will lead China's opening-up to the world in a new era. The scope of the FTP's implementation will cover the entire island of Hainan.

The Master Plan establishes several tax policies, which are expected to be rolled out in two stages: (i) before 2025, and (ii) before 2035:

- For customs tariffs, the FTP will implement the bonded area for the whole island in due time. Before that, the FTP will administrate the imported goods with positive/negative "zero tariff" catalogues, applying an exemption on customs tariffs, import VAT and consumption tax to goods listed in the catalogues.
- For enterprise income tax ("EIT"), before 2025, a reduced tax rate of 15% applies to companies registered and effectively operating in the FTP and engaging in the encouraged industries. Afterwards, before 2035, 15% will apply to all companies registered and effectively operating in the FTP, except for those engaging in the negative list industries.
- For individual income tax ("IIT"), before 2025, IIT burden over 15% for comprehensive income, operational income and subsidies recognized by the Hainan Province is exempt for the top-level and urgently needed talents working in the FTP. Afterwards, before 2035, for individuals staying in the FTP for 183 cumulative days or more in a tax year, the comprehensive income and operational income arising from the FTP will be applied with three-tire progressive tax rates of 3%, 10% and 15%.



- For sales tax, once the FTP fully implements the bonded area for the whole island, it will simplify the tax system and consolidate VAT, consumption tax, vehicle purchase tax, city maintenance and construction tax (“CMCT”), and education surcharges into a unified sales tax, applying at the retail stage for goods and services.

Also, to rejuvenate **China’s automotive industries**, Chinese government authorities released several stimulus measures to create a more favorable market environment for automobile consumptions, including the following tax policies:

- From January 1, 2021, to December 31, 2022, the vehicle purchase tax exemption will continue to apply to the purchase of new energy vehicles. In the meantime, due to the negative effects of the COVID-19 pandemic, the financial subsidy that was scheduled to end at the end of 2020 has been extended for a further two years, which is good news for new energy vehicle manufacturers.
- From May 1, 2020, to December 31, 2023, to increase the sales of second-hand vehicles and market vitality, taxpayers distributing second-hand vehicles are subject to VAT at 0.5% (previously 2%) under a simplified method (i.e., no input VAT deduction).

In the context of **tax legislation progress in China**, in 2020, two new tax laws (i.e., the new Deed Tax Law and the new CMCT Law) have been approved by the 21<sup>st</sup> session of the Standing Committee of the 13<sup>th</sup> NPC, both of which will enter into effect on September 1, 2021. Although both the new laws inherit most of the stipulations under the current regulations, it is another step towards putting China’s tax rules into law.

Main changes for the new Deed Tax Law

- The scope of taxable activities is extended to include assigning rural collective land use rights due to the amendment of the Land Administrative Law, allowing the use right of collective operational construction land to be assigned.
- The new law maintains the current deed tax rate range of 3% to 5%, while increasing the level of authorization to determine the specific rate from the current local provincial-level government to the standing committee of the provincial-level people’s congress. The decision must also be filed with the NPC and the State Council instead of the Ministry of Finance (“MOF”) and the State Taxation Administration (“STA”) under the current regulations.



- Apart from the tax preferential treatments provided by law, the new law also mentions that, in line with the nation's economic and social development, the State Council can provide deed tax exemption and reduction policies to meet residential housing demand, corporate restructuring and post-disaster reconstruction, which needs to be filed with the Standing Committee of the NPC.
- The new law removes the requirement to make the tax declaration within 10 days from the date the ownership transfer contract is signed. Therefore, provided the taxpayer makes the tax declaration before the ownership registration process, there is no late payment surcharge or penalty for not declaring the deed tax.

### Main changes for the CMCT Law

- The new law accommodates the result of the VAT reform in China and the new refund policy for the uncredited input VAT released in 2019, by establishing that (i) taxpayers of CMCT are those who pay VAT and consumption tax in China; (ii) the tax basis of CMCT is the actual VAT and consumption tax payable amount; and (iii) the tax basis of CMCT should deduct the VAT refund amount at the end of each period.
- The new law excludes CMCT from applying to the VAT and consumption tax amount arising from imported services provided and intangible assets sold by an overseas supplier to a Chinese recipient, which is a welcomed new rule. We expect a similar rule to be introduced soon for education surcharges, which are always levied together with CMCT.

In the context of **VAT**, to encourage the use of electronic VAT invoices, after implementing electronic VAT special invoices by newly established companies in three pilot areas, namely Ningbo, Shijiazhuang and Hangzhou, from December 21, 2020, the pilot program was expanded to 11 regions: Tianjin, Hebei, Shanghai, Jiangsu, Zhejiang, Anhui, Guangdong, Chongqing, Sichuan, Ningbo, and Shenzhen, and the location of the recipient of electronic VAT special invoices has been expanded to the whole nation.

Also, from January 21, 2021, the pilot program has been further expanded to the newly established companies in 25 regions. Soon after, we can expect the pilot program to be implemented nationwide and to the existing taxpayers in due time.

The new **IIT Law** came into effect in China for the second year in 2020, and the following regulations were released to further clarify several key tax issues:



- The tax circular Announcement of MOF and STA [2020] No. 3<sup>1</sup> provides the definition on foreign-sourced income, calculation mechanism and requirements for foreign credits of resident taxpayers, and tax declaration procedures for foreign-sourced income.
- The detailed guidelines on the 2019 annual IIT declaration for comprehensive incomes provide extensive information on the annual declaration process, considering it was the first annual declaration for comprehensive incomes since the new IIT Law came into effect. The guidelines can also be used as a reference for future years.

In the context of **international taxation** in 2020, following the step of the OECD Secretariat's release of the Analysis of Tax Treaties and the Impact of the COVID-19 crisis, on August 14, 2020, the International Tax Department of the STA released a Q&A on the implementation of tax treaties under the COVID-19 pandemic on its official website, providing the Chinese interpretation of permanent establishment ("PE") and residency status under the tax treaty provisions and Guoshuifa [2010] No. 75.<sup>2</sup> Although the Q&A is not a regulation, in practice, the local tax authorities are expected to apply its interpretation uniformly.

The interpretations in the Q&A from the STA are mostly consistent with the OECD's stance:

- Home office: A temporary home office in China due to the COVID-19 pandemic will not create a PE as a fixed place of business.
- Agency PE: Employees temporarily working from home due to the COVID-19 pandemic in China and concluding contracts for and on behalf of their overseas employers will not create an agency PE, with two exceptions.
- Construction PE: The duration of a full suspension of activities due to the COVID-19 pandemic will not be included when determining whether a construction site constitutes a PE. This interpretation is more relaxed than the OECD's stance, which includes the interruption of activities caused by the COVID-19 pandemic when calculating the duration of a construction site.
- Tax residency status of a company: The temporary change of the place where a

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<sup>1</sup> The tax circular concerning the IIT policies for foreign-sourced income (Announcement of MOF and STA [2020] No. 3) was released on January 17, 2020, retroactive to January 1, 2019.

<sup>2</sup> The tax circular concerning the interpretation of the China-Singapore Double Taxation Treaty and its Protocols (Guoshuifa [2010] No. 75) was released on July 26, 2010, and it entered into effect on the same date. It is applicable to all tax treaties signed by China.



company's senior management makes their decisions due to the COVID-19 pandemic will not affect the company's residence status under the tax treaties.

- Tax residency status of an individual: The temporary change of an individual's place of residence due to the COVID-19 pandemic will not change the individual's residence status under the tax treaties.

In the context of **tax administration**, on December 31, 2020, the STA released the implementation plan to fully execute the notification and commitment system to tax matters (税务证明事项告知承诺制); i.e., when companies and individuals apply for tax matters with the tax authorities, the tax authorities will inform the applicants in writing of all the verification obligations and content, and the legal consequences of untruthful commitment, and the applicants agree in writing that they have the evidence required and acknowledge the legal consequences of untruthful commitment. Consequently, the tax authorities will then take the word of the applicants without requesting the evidence. Instead, the evidence will be kept available for future review by the tax authorities in its post-application checks.

The above system intends to benefit taxpayers by improving the tax authorities' efficiency; in the meantime, taxpayers must improve their own internal control methods to ensure they are truthful to their commitment and always keep the documentary evidence completely and properly.

Another development worth mentioning in the area of **customs administration** is the release of the new Administrative Measures on Tax reduction and Exemption for Imported and Exported Goods,<sup>3</sup> providing (i) simplified procedures to apply for tax reduction and exemption policies for imported and exported goods, (ii) a reduced timeline for customs to review applicants' documents and make their decisions, and (iii) an opportunity for companies to use the goods under customs' supervision for mortgage with banks or non-banking financial institutions.

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<sup>3</sup>The Administrative Measures on Tax Reduction and Exemption for Imported and Exported Goods (GAC Decree [2020] No. 245) was released on December 21, 2020, and it will enter into effect on March 1, 2021.



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