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Han Kun Newsletter

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1. Labor Management Q&As During the 2019-nCoV Epidemic (I)

Authors: Will HUANG | Yina LIU | Xiu PEI | Chen WANG | Yuchun TANG | Qiuqi ZHANG

A flurry of regulatory documents has been promulgated in response to the recent large-scale spread of the novel coronavirus ("**2019-nCoV**"), many of which substantially impact the rights and interests of enterprises and their employees. We have prepared the following Q&As on labor management issues for enterprises to better navigate the handling of paid leave, payment of salaries, and other labor matters which may arise during the 2019-nCoV epidemic prevention and control period.

What is the nature of the three-day holiday extension decided by the State Council (from January 31, 2020 to February 2, 2020), and what is the standard for payment of salaries during this period?

According to the original holiday arrangements, the Spring Festival holiday ends on Thursday, January 30, with January 31 (Friday) and February 1 (Saturday) as regular work days, and February 2 (Sunday) as a non-work day. Since the Spring Festival holiday has been extended until February 2 (Sunday), February 2 remains a non-work day while January 31 and February 1 are now regarded as special holidays arranged by the State.

During this period, enterprises are required to pay the full amount of salaries to their employees. For employees that cannot take leave due to epidemic prevention and control, the enterprises should arrange compensatory time-off or pay overtime salaries at the rate of 200% of normal daily salaries.

Labor management during work postponement periods required by local governments

I. Are enterprises required to comply with work postponement notices?

Local governments have the authority to take measures during emergency response operations, based on the *Law of the People's Republic of China on the Prevention and Treatment of Infectious Diseases and the Emergency Response Law of the People's Republic of China*. Thus, enterprises are required to comply with notices on work postponement, since the current purposes the postponement of work requested by local governments (such as Shanghai Municipal Government and Zhejiang Provincial Government) are to reduce the size of public gatherings and to interrupt transmission of 2019-nCoV, which do not contravene the foregoing laws. However, certain enterprises are requested to resume work in advance and not to implement work postponement arrangements, namely enterprises in industries such as those ensuring the operation of the municipalities (including water supply, gas supply, electricity supply, communications and other industries), those ensuring epidemic prevention and control (including the industries of production and sale of medical equipment, pharmaceuticals, protective equipment, etc.), those ensuring people's daily life (including supermarkets, food production and supply industries, etc.) and other relevant enterprises that are involved in national economy and people's livelihoods.

II. Is it permissible to arrange for employees to work from home?

Yes. Local governments have required enterprises not to resume work in advance, which is considered from the perspective of limiting employee gatherings. However, this does not entirely prohibit all flexible work arrangements. We observe that the responses on matters related to postponement of work issued by Shanghai Municipal Human Resources and Social Security Bureau on January 28, 2020 mentions that "*enterprises are encouraged to arrange for employees to work from home*". Therefore, for enterprises in the internet and other industries that are more able to implement flexible working arrangements, we are of the view that arranging for employees to work from home based on operating needs is not explicitly prohibited by law. We also recommend that enterprises issue written notices on such arrangements to their employees, clarifying the rights and obligations of both parties.

III. Is it permissible to arrange for employees to take paid annual leave?

Employees will be entitled to take leave on additional non-work days specified by local governments during the work postponement period, and enterprises will not be allowed to arrange for their employees to take paid annual leave on such days. In the absence of local regulations on postponement of work, we believe that enterprises can coordinate and arrange for the taking of annual leave on the basis of specific conditions of work and their employees' individual preferences.

How should annual leave days be handled for annual leave that employees had applied for before the Spring Festival holiday that fall within: (i) the extended three-day holiday period as decided by the State Council, or (ii) the work postponement period required by a local government?

For the extended leave decided by the State Council, since February 2 falls on a non-work day, January 31 and February 1 should be regarded as special holidays, and these two days cannot be used to offset annual leave. Employees who had requested annual leave for these days are entitled to withdraw their requests.

Controversy remains as to whether employees are entitled to withdraw annual leave requests for days during a work postponement period. We are of the opinion that, if the local government has confirmed that the work postponement period constitutes "rest days", employees should be allowed to withdraw their requests, and the days during this period cannot be used to offset annual leave. In the absence of local regulations or clarity on the nature of the work postponement period, we recommend that enterprises allow employees to withdraw their applications based on the principle of fairness and reasonableness.

What is the standard for payment of salaries during the work postponement period?

Where an enterprise's shutdown or production halt occurs within one salary payment period, the enterprise should pay salaries to its employees based on the standard stipulated in the employment contracts. Where such shutdown or production halt lasts more than one salary payment period and the employees provide regular labor services, the employer should pay salaries not lower than the local minimum salary standard. If the employees do not provide regular labor services, the enterprise should pay living

allowances in accordance with the standards stipulated in the relevant provisions promulgated by provinces, autonomous regions, and centrally-administered municipalities.

The salary standard for employees who are arranged to work from home during the work postponement period should be implemented in accordance with the regulations promulgated by the local human resources and social security bureau. For example, the responses issued by Shanghai Municipal Human Resources and Social Security Bureau provide that, "*[t]he postponement of work is due to the need for epidemic prevention and control, and these days shall be regarded as holidays. For employees that are taking leave, the enterprises shall pay salaries according to the standards agreed in their employment contracts; employees that undertake tasks such as security shall be regarded as working overtime on holidays, and the enterprises shall grant compensatory time-off or pay overtime salaries.*" That is to say, employees who work from home or in any other non-group manner as arranged by enterprises in Shanghai during the work postponement period should be regarded as working overtime on a holiday. These enterprises should either arrange compensatory time-off or pay overtime salaries at the rate of 200% of normal daily salaries.

Where the local human resources and social security bureau has not issued express regulations in this regard, we recommend for enterprises that arrange for employees to work from home during the work postponement period to make reference to the responses issued by Shanghai Municipal Human Resources and Social Security Bureau, and arrange for such employees to take compensatory time-off or pay overtime at the rate of 200% of their normal daily salaries.

How are employment relationships to be handled for 2019-nCoV patients, suspected patients, and persons in close contact during the isolation treatment period or medical observation period, or for employees who cannot provide normal labor services due to isolation measures or other emergency measures implemented by the government?

Enterprises cannot terminate labor contracts with such employees based on Article 40 (no-fault dismissal) or Article 41 (mass layoff) of the *Labor Contract Law of the People's Republic of China*. If the original contract expiry date falls within such period, the employment contract is to be extended until the expiry of the medical treatment period, medical observation period, isolation period or the end of the emergency measures implemented by the government.

How are salaries of employees infected with 2019-nCoV to be paid?

The analysis should be made with respect to different stages of infection:

- Enterprises should pay salaries to their employees during the isolation treatment period or medical observation period. Beijing, Shanghai, Shenzhen, and other municipalities have further stipulated that enterprises are to regard such employees as providing regular labor services and are required to pay salaries according to the standard of the normal working period.
- After the end of isolation treatment, except for medical personnel, where other employees are infected with 2019-nCoV, the enterprise should determine their medical treatment period in accordance with statutory standards and local regulations, and pay the sick leave salaries during the medical treatment

period. Medical personnel infected with 2019-nCoV are to be treated as suffering from work-related injuries and entitled to benefits such as paid leave.

How will situations be handled where an enterprise cannot pay salaries timely due to the epidemic?

We believe that the 2019-nCoV epidemic cannot be considered to constitute force majeure in all circumstances. With respect to the view that "*[t]he epidemic constitutes force majeure and can serve as a basis for the delayed payment of salaries after the prescribed payment time*", analysis should be made on a case-by-case basis. Where an enterprise has difficulty paying salaries timely due to the extended bank holiday, we recommend that the enterprise temporarily delay the payment of salaries by giving prior written notice to all employees, and initiate the payment immediately upon the reopening of the banking system; where the enterprise cannot pay salaries timely due to its own reasons, such cash flow difficulties, the enterprise may temporarily delay the payment of salaries upon obtaining permission from the employees' labor union.

What measures may enterprises implement where they have difficulties in production and operation due to the epidemic?

According to the notice issued by the Ministry of Human Resources and Social Security, where enterprises have difficulties in production and operation due to the impact of the epidemic, job positions can be stabilized by adjusting salaries, rotating holiday, shortening working hours, etc., through consultations with their employees. Enterprises are to refrain from layoffs or downsizing, to the extent possible. Eligible enterprises can receive subsidies for stabilizing positions in accordance with relevant regulations.

Due to the particularity and urgency of the regulatory documents published in a short time period, certain issues are open to different interpretations and await further clarification. We will continue to monitor for the latest updates from central and local governments and human resources and social security bureaus, and continue to provide updates on notices and guidelines on labor and employment management during the epidemic prevention and control period.

2. Labor Management Q&As During the 2019-nCoV Epidemic (II)

Authors: Will HUANG | Yina LIU | Ying XUE

Following our previous general Q&As on labor management issues that may arise during the novel coronavirus ("**2019-nCoV**") epidemic prevention and control period, we have compiled for your reference additional issues identified in the regulatory documents promulgated by central and local governments and human resources and social security bureaus.

When are enterprises expected to resume normal operations in each region?

I. Nationally

Normal operations are to resume beginning on February 3 (this date applies by default in the absence of notices issued by local governments).

II. Municipality of Beijing

1. Before 24:00 on February 9, the normal operations of the enterprises that are necessary to ensure the operation of municipalities, epidemic prevention and control, people's daily life, and the national economy and people's livelihoods are to resume.
2. Before 24:00 on February 9, the enterprises with desirable conditions shall arrange employees to complete work from home through flexible means such as telephone and internet. The enterprises without such desirable conditions shall arrange employees to work by adopting means such as flexible working schedule for calculating working hours, and shall not cause gathering or concentration.
3. Housing construction and municipal infrastructure projects are to resume or start no earlier than 24:00 on February 9 (major national or municipal construction projects, and projects that are necessary to ensure the operation of municipalities and the national economy and people's livelihoods may resume or start work in advance, if determined by the municipal commission of housing and urban-rural development).

III. Municipalities of Shanghai and Chongqing, Provinces of Guangdong, Zhejiang, Fujian, Jiangsu, Anhui, Yunnan, Shandong, Jiangxi, Guizhou, Henan, Liaoning, Heilongjiang, Hebei, and Inner-Mongolia Autonomous Region

Normal operations are to resume no earlier than 24:00 on February 9 (except for enterprises that are necessary to ensure the operation of municipalities, epidemic prevention and control, people's daily life, and the national economy and people's livelihoods).

IV. Jilin Province

Normal operations are to resume no earlier than 24:00 on February 2 (except for enterprises that are necessary to ensure the operation of municipalities, epidemic prevention and control, people's daily lives and the national economy and people's livelihoods).

V. Sichuan Province, Guangxi Zhuang Autonomous Region

Normal operations are to resume starting from February 3.

VI. Hubei Province

Normal operations are to resume no earlier than 24:00 on February 13.

What is the standard for payment of living allowances, if an enterprise's shutdown or production halt lasts more than one salary payment period?

According to the notice issued by the Ministry of Human Resources and Social Security Bureau, where an enterprise's shutdown or production halt occurs within one salary payment period, the enterprise should pay salaries to its employees based on the standard stipulated in the employment contracts. Where such shutdown or production halt lasts more than one salary payment period and the employees provide regular labor services, the enterprises should pay salaries not lower than the local minimum salary standard. If the employees do not provide regular labor services, the enterprises should pay living allowances in accordance with the standards stipulated in the relevant provisions promulgated by provinces, autonomous regions, and centrally-administered municipalities. Similar stipulations are provided for in the regulatory documents promulgated by local governments. Specifically, the standards for payment of living allowances include:

I. Shanghai Municipality

No lower than the local minimum salary standard.

II. Provinces of Guangdong, Zhejiang, Jiangsu, Henan, Inner-Mongolia Autonomous Region

No lower than 80% of the local minimum salary standard.

III. Shaanxi Province

No lower than 75% of the local minimum salary standard.

IV. Beijing Municipality, Provinces of Liaoning, Shandong, Hubei, Sichuan and Qinghai

No lower than 70% of the local minimum salary standard.

Due to the particularity and urgency of the regulatory documents published in a short time period, certain issues are open to different interpretations and await further clarification. We will continue to monitor for the latest updates from central and local governments and human resources and social security bureaus, and continue to provide updates on notices and guidelines on labor and employment management during the epidemic prevention and control period.

3. Labor Management Q&As During the 2019-nCOV Epidemic (III)

Authors: Will HUANG | Xiu PEI | Yina LIU | Qiuqi ZHANG

Following our previous general Q&As on labor management issues that may arise during the novel coronavirus pneumonia ("**2019-nCOV**") epidemic prevention and control period, we have compiled for your reference additional issues that are of interest to enterprises and prepared interpretations of the policies newly promulgated by the local governments.

During the period from February 3 to February 7, 2020, how are the salaries to be paid to employees who have not provided any labor services?

Enterprises are to pay normal salaries to the employees.

Should the salary standard of the employees that work from home be consistent with that before the outbreak of the epidemic?

The analysis should be made with respect to different stages:

I. During the work postponement period.

At the current stage, most local human resources and social security bureaus have not provided clear guidance on the standard for payment of salaries during the work postponement period. According to the response on matters related to work postponement issued by Shanghai Municipal Human Resources and Social Security Bureau, employees that work from home during the work postponement period as arranged by enterprises in Shanghai shall be regarded as working overtime on rest days, and such enterprises shall grant compensatory time-off or pay overtime salaries to their employees (for employees subject to the standard working hour system, 200% of normal daily salaries shall be paid). The notices issued by the human resources and social security bureaus of Guangdong Province, Suzhou Municipality and Wuxi Municipality provide that enterprises shall pay normal salaries to their employees that work during the work postponement period (no overtime salaries are to be paid, except that enterprises should arrange compensatory time-off or pay overtime salaries at the rate of 200% of normal salaries for employees working on rest days.) For regions without explicit standards for the payment of salaries, enterprises should currently pay salaries according to the normal standards, that is, the salary standard of the employees working from home should be the same as that before the outbreak of the epidemic.

II. Resumption of work until the end of the epidemic.

In principle, the salary standards of employees working from home after work resumes should remain the same as that before the outbreak, which includes base salary, merit pay, bonuses, etc. Merit pay and bonuses are to be determined in accordance with the agreements concluded between the enterprises and the employees, and the performance of the employees.

Can enterprises validly agree with their employees to forgo the payment of salaries

during the period from February 3, 2020 until the end of the epidemic?

Agreements to forgo the payment of salaries are likely to be deemed invalid. According to the notices issued by the Ministry of Human Resources and Social Security, where enterprises have difficulties in production and operation due to the impact of the epidemic, job positions can be stabilized by adjusting salaries, rotating holidays, shortening working hours, etc., through consultation with the employees. Besides these measures, PRC labor laws stipulate that where a shutdown or production halt lasts more than one salary payment period and the employees provide regular labor services, the employer should pay salaries not lower than the local minimum salary standard. For employees who do not provide regular labor services, the enterprise should pay living allowances in accordance with stipulated local standards. Therefore, even if enterprises and their employees agree on adjusting salaries during such period, the standard should not be lower than the local minimum salary standard. Enterprises should also continue paying social insurance premiums for their employees, unless local governments have issued preferential measures.

Therefore, for enterprises that cannot resume normal work due to the impact of the epidemic, we recommend that the enterprises consult with their employees to conclude salary adjustment agreements or position pending assignment agreements, appropriately adjusting working hours (for employees pending position assignments, no labor services should be provided) and salary standards, and the salary standards may not be set lower than the local living allowances standard. The specific standards for allowances can be referenced in *Labor Management Q&As During the 2019-nCOV Epidemic (II).*

Enterprises can, upon consultation, sign salary adjustment agreements with their employees who work from home due to the impact of the epidemic. Adjusting employee working hours should also be considered in order to meet daily operating needs.

In addition, the parties can also consult on the decrease or cancellation of bonus payments.

How can enterprises confirm salary arrangements during the period of salary adjustment or the period pending job assignment with the employees?

Salary adjustments and positions pending assignment constitute amendments to employment contracts. Thus, enterprises should confirm salary arrangements with their employees in writing from an administrative perspective. However, considering the special circumstance during the epidemic, enterprises can also confirm such arrangements with their employees via work email or other appropriate written forms.

Can enterprises arrange for employees to take unpaid leave before the end of the epidemic?

No. In accordance with PRC labor laws and the notice issued by the Ministry of Human Resources and Social Security Bureau, where an enterprise's shutdown or production halt occurs within one salary payment period, the enterprise should pay salaries to its employees based on the standard stipulated in the employment contracts. Where such shutdown or production halt lasts more than one salary payment period and the employees provide regular labor services, the employer should pay salaries not lower than

the local minimum salary standard. If the employees do not provide regular labor services, the enterprise should pay living allowances in accordance with local standards, or pay salaries for positions pending assignment that is not lower than the living allowances standard.

Following issuance by the Beijing Municipal Government of the *Notice on Salaries and Benefits during the Period the Employees Care for Minor Children due to School Postponement Caused by Epidemic Prevention and Control*, each family in Beijing can have one employee care for minor children at home. How should enterprises implement this policy?

I. Which employees are eligible to remain at home to care for their children?

The following conditions should be met for employees to apply for home childcare in accordance with the notice:

1. The children in need of care are under 18 years of age.
2. Children under 18 years of age in need of care should be students and children that are unable to return to colleges, middle and primary schools, kindergartens due to the impact of the policy on school postponement. The policy therefore excludes infants that do not attend kindergarten, or children under 18 that have dropped out of school, have not attended school or have left school.
3. Other family members of the employee (such as the spouse) cannot provide childcare or have not applied to their employer for home childcare, including spouses that are separated, normally work, are under quarantine, are deceased, etc. This excludes spouses or other family members who have no work or can care for children.

II. What procedures are to be completed for employees applying for home childcare?

Employees should complete leave application procedures in accordance with the enterprise's internal policies, which generally includes submitting a leave application form and other supporting documents, such as documents proving that the spouse cannot provide childcare or is under quarantine, or documents issued by the spouse's employer proving that the spouse has not taken childcare leave.

III. What is the standard for salary payment while employees are on leave for home childcare?

Home childcare should be regarded as a circumstance where an employee cannot provide normal labor services due to quarantine or other emergency measures implemented by the government. Enterprises should pay employees on leave for home childcare normally in accordance with the employee's work attendance.

IV. Can enterprises terminate employment contracts during home childcare leave?

Enterprises cannot terminate employment contracts during home childcare leave. If the original employment contract expiry date falls within such period, the employment contract is to be extended until the end of the quarantine or emergency measures implemented by the government.

V. Can enterprises arrange for employees on home childcare leave to work from home?

The notice encourages employees on home childcare leave to provide labor services flexibly, such as via telephone or the internet, and encourages employees to take work and rest shifts and to develop a spirit of mutual assistance, in order to ensure the normal operation of work and production. Therefore, enterprises can arrange for such employees to work from home in a flexible manner.

VI. Can enterprises consult with their employees on adjusting salary standards during home childcare leave?

Enterprises and their employees can adjust salary standards in writing, where both parties have reached consensus and necessity so requires. In such cases, enterprises can pay employees their salaries in accordance with the agreed standards. However, such salaries should not be lower than the local living allowances standard, such as local minimum salary standard.

During the period of epidemic prevention and control, do enterprises risk personal privacy infringement by requesting their employees to provide personal health information, including body temperatures, recent itineraries, suspected contact histories and geographical locations? How can enterprises mitigate such risks to the extent possible?

Provisions of PRC law require persons to assist in public health emergency response efforts where necessary, including by reporting suspected infectious disease cases to medical institutions. It is therefore reasonable for enterprises to request personal health information from their employees, because doing so can assist in prevention and control of the 2019-nCOV epidemic. Personal health information may include body temperatures, recent itineraries, suspected contact histories and geographical locations, etc.

At the current stage, the National Health Commission has classified 2019-nCOV as a Class B infectious disease as defined in the Infectious Disease Law, and has taken Class A infectious disease prevention and control measures. The local governments have launched a Class A major public health emergency response and have made it clear that the epidemic constitutes a public health emergency.

Enterprises should also note that, the collection and use of such information should comply with the PRC laws on protection of personal information. According to the *General Provisions of the Civil Law*, an individual's personal information (including an employee's personal information) is legally protected and may not be unlawfully disclosed to other parties. Presumably, the enterprise's employee handbook will contain consent provisions regarding the collection and disclosure of personal information. It is advisable to obtain express employee consent if such provisions do not cover personal health information in this manner. However, we view the reasonable collection and reporting of employees' personal information in furtherance of the government's epidemic prevention and control measures to be lawful, even without express consent, due to public need as specified, e.g., in the *Information Security Technology – Personal Information Security Specification*.

Based on the above, we provide the following general tips for collecting employee personal information in relation to the prevention and control measures:

1. Employees should be informed that the enterprise will report to the local centers for diseases control or hospital only in the circumstance of existence of risk of infection.
2. Information should be collected with the employees' consent. If an employee refuses to provide such information, the enterprise cannot force the employees to provide it.
3. If it is necessary to regularly report to the employees the epidemic prevention and control situation, it is advisable to remove any personally identifiable information from the report.
4. If suspected infection is found, a report should be made to the local centers for diseases control or hospital.

During the period of epidemic prevention and control, is it legally permissible for enterprises to measure employee temperatures at the entrance of the workplace or regularly monitor the temperatures of employees? Are enterprises entitled to request employees to leave the workplace if an abnormal temperature is discovered?

Under PRC law, enterprises are obligated to participate in epidemic prevention and control activities according to the requests from the governments.

On January 30, 2020, the working group of the State Council issued the *Notice on the Issuance of the Public Venue Health Protection Guide for 2019-nCOV*, which specifies the preventive measures that should be taken in public places and workplaces, such as offices buildings where gatherings frequently take place, including strengthening the health monitoring and registration of visitors. Besides this, local governments (such as Beijing Municipality, Jiangsu Province, and Guangdong Province) have also issued relevant notices, requesting enterprises to strengthen health monitoring and protection for employees that normally report for work in such workplaces. To comply with these requirements, enterprises can measure temperatures at workplace entrances or regularly monitor the temperatures of employees.

If an employee has an abnormal temperature, the enterprise is entitled to request the employee to leave the workplace to prevent the potential risk of infection, provided the salaries of the employee are normally paid. Meanwhile, in accordance with the provisions of the *Law on the Prevention and Treatment of Infectious Diseases*, only governments are authorized to impose quarantine measures, and only medical institutions are authorized to provide treatment to persons under quarantine. Thus, enterprises themselves cannot request or force employees to be quarantined, but can merely request them to leave the workplace.

How should enterprises pay social insurance premiums until the end of the epidemic?

We recommend enterprises to pay the social insurance premiums timely, and to avoid late payments or underpayments. If enterprises are unable to pay social insurance contributions timely due to the impact of the epidemic, postponements can be made in accordance with relevant provisions of the central or local governments, and the enterprises can make up the payments within the prescribed period after the epidemic. Enterprises and individuals that participate in the social insurance scheme are permitted to postpone the handling of business, and postponing payments will not affect social insurance benefit credits

of participants, according to the *Notice on Handling Social Security Matters During the Period of Epidemic Prevention and Control* (Ren She Ming Dian [2020] No. 7) issued by the Ministry of Human Resources and Social Security on January 30, 2020. Any contributions unpaid during this period are to be completed within three months after the end of the epidemic.

- Guangdong Province. Employers that cannot timely pay premiums for employee pension insurance, unemployment insurance, and work-related injury insurance due to the impact of the epidemic can defer the payment for up to three months after the end of the epidemic; no fines for late payments will be charged during such period. *Notice on Social Insurance Payments and Benefits Matters During the 2019-nCOV Epidemic Prevention and Control Period* (Yue Ren She Han [2020] No. 24) issued by the Human Resources and Social Security Department of Guangdong Province and Guangdong Provincial Tax Services, State Taxation Administration.

- Suzhou Municipality. Due to the impact of the epidemic, small- and medium-sized enterprises that are facing temporary production and operation difficulties and cannot pay the full amount of social insurance premiums, after obtaining permission, can postpone for up to six months the payment of premiums for pension insurance, unemployment insurance, and work-related injury insurance. After the end of the deferment period, the enterprises' full payment of the deferred amount of social insurance premiums will not affect the rights and interests of social insurance participants. *Ten Policy Opinions on Coping with the Epidemic Caused by the 2019-nCOV and Supporting the Small and Medium-Sized Enterprises to Overcome Difficulties* (Su Fu [2020] No. 15) issued by Suzhou Municipal Government on February 2, 2020.

- Shanghai Municipality. Due to the impact of the epidemic, enterprises participating in social insurance, freelancers, and urban and rural residents who fail to complete the social insurance registration or pay social insurance premiums in a timely manner are allowed to make up the process when the epidemic ends. Enterprises that cannot pay the social premiums timely will be exempted from fines for late payments, provided that the enterprises have filed a report with the social insurance handling organization. The rights and interests of the participants of social insurance will not be affected. The make-up procedures must be completed within three months after the end of the epidemic. *Notice on Proper Handling of Social Insurance during the 2019-nCOV Epidemic*, issued by Shanghai Municipal Human Resources and Social Security Bureau on February 3, 2020.

- Beijing Municipality. An extension is provided for the collection of social insurance premiums payable in January and February to the end of March, and to the end of July for enterprises that have been hit hard by the outbreak of epidemic in the industries like tourism, accommodation, catering, exhibition, trade circulation, transportation, education, training, cultural performances, film, and ice-snow sports, as confirmed by the competent authority of the relevant industry. During such period, no late payment penalties will be charged, and the rights and interests of the participants of social insurance will not be affected. *Several Measures on Further Supporting the Fight against 2019-nCOV Epidemic* (Jing Zheng Ban Fa [2020] No. 5), issued by Beijing Municipal Government.

What regions have issue policies on relieving the burden on enterprises?

- Suzhou Municipality. The municipality is providing measures for financial support, employees stability, and enterprise burden cuts, including preferential measures such as ensuring the outstanding balance of loans to small and micro enterprises shall not fall, ensuring the financing costs of small and micro enterprises shall not increase, implementing position stability policies, deferred payment of social insurance premiums, reducing or exempting housing rent and tax, supporting entrepreneurial parks, etc., in order to develop an important role played by small- and medium-sized enterprises during epidemic prevention and control, and to support such small and medium-sized enterprises to overcome difficulties. *Ten Policy Opinions on Coping with the Epidemic Caused by the 2019-nCOV and Supporting the Small and Medium-Sized Enterprises to Overcome Difficulties* (Su Fu [2020] No. 15), issued by Suzhou Municipal Government on February 2, 2020.

- Shanghai Municipality. The local human resources and social security bureau announced four measures to reduce the financial burden on enterprises on February 3, 2020, including refunding unemployment insurance premiums paid, delaying the adjustment period of social insurance contribution base, extending the social insurance payment period, and providing training subsidies.

- Beijing Municipality. Measures have been introduced with five aspects, namely, further optimizing administrative approval services, increasing the support of funds for prevention and control, ensuring services for enterprises, developing the role of technological innovation in supporting the epidemic prevention and control, and strengthening the guarantee of municipality operation services, which include policies on relieving the burden on enterprises, such as assisting enterprises to stabilize production and operation, properly resolving the financing of enterprises with difficulties, delaying payment of social insurance premiums, and encouraging the operators of commercial buildings, shopping malls, markets to offer moderate rent reductions or waivers to small, medium-sized and micro tenants. *Several Measures on Further Supporting the Fight against 2019-nCOV Epidemic* (Jing Zheng Ban Fa [2020] No. 5), issued by Beijing Municipal Government.

We anticipate that the central and other local governments will soon promulgate additional preferential policies to relieve the burden on enterprises.

During the period of epidemic prevention and control, what are the issues that enterprises should consider when downsizing their workforces?

Where enterprises have production and operation difficulties due to the impact of the epidemic, job positions can be stabilized upon consultation with employees by adjusting salaries, rotating holidays, shortening working hours, etc., in accordance with the *Notice on the Proper Handling of Employment Relationship Matters during the Period of 2019-nCOV Epidemic Prevention and Control* by the General Office of the Ministry of Human Resources and Social Security (Ren She Ting Ming Dian [2020] No. 5) and the relevant notices issued by local governments. Enterprises are to refrain from layoffs or downsizing, to the extent possible.

I. Circumstances under which layoffs are not permitted.

Besides circumstances where employees cannot terminated as specified in Article 42 of the *Employment Contract Law of the People's Republic of China* and other relevant laws and regulations,

the recently issued notices issued by the Ministry of Human Resources and Social Security and local governments also explicitly emphasize that the enterprises cannot terminate employees through mass layoffs who become infected with or are suspected of being infected with 2019-nCOV, employees that have been in close contact with 2019-nCOV in the quarantine or medical observation period, and the employees that cannot provide normal labor services due to quarantine measures or other government-implemented emergency measures.

II. Due Process.

Article 41 of the *Employment Contract Law of the People's Republic of China* provides that, if it is necessary to reduce the workforce by 20 persons or more, or fewer than 20 persons but accounting for 10% or more of the total number of employees of the employer, the employer may only do so after it has explained the situation to the labor union or to all of its employees 30 days in advance, considered the opinions of the labor union or the employees, and has submitted its workforce layoff plan to the labor administrative department. To mitigate legal risk to the extent possible, enterprises should pay attention to due process and ensure compliance, and timely report the layoff plan and process to the local human resources and social security bureau, so as to avoid the liability for wrongful termination due to procedural flaws.

III. Timely payment of salaries and severance.

Enterprises should timely pay the full amount of salaries to the employees, and pay severance for termination of employment contracts in accordance with PRC law.

IV. Avoidance of gatherings and mass events.

During the layoff process, enterprises shall fully listen to the opinions of the employees, and try to communicate with the employees through telephone, WeChat, or email, in order to preserve written records, as well as to avoid the risk of infection caused by the employee gatherings. Meanwhile, enterprises should also pay special attention to placate employees, and prepare contingency plans and prevention and control responses, avoiding mass events or other situations that affect social stability.

Due to the constant changes in policies, we will continue to monitor for the latest updates from central and local governments and human resources and social security bureaus, and continue to provide updates on notices and their interpretations. If there are any conflicts between the newly issued policies and this series of Q&A, the newly issued policies shall prevail.

4. Detailed Explanation of the Latest Opinions on Resuming Work and Production Issued on February 7 by the Ministry of Human Resources and Social Security

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Enterprises in most regions of China resumed work and production on February 10, 2020. On February 7, the Ministry of Human Resources and Social Security, together with the All-China Federation of Trade Union, the China Enterprise Confederation, and the National Federation of Industry and Commerce issued the "*Opinions on Stabilizing Employment Relationships and Supporting the Work and Production Resumption of Enterprises During the Period of COVID-19 Epidemic Prevention and Control*" (the "**Opinions**").

The Opinions were issued by bodies including governmental departments, trade unions and enterprises associations, and are notable as they may fully and accurately reflect the central government's determination and plan to stabilize employment relationships during the period of epidemic prevention and control. We have summarized the main points for your reference below.

Policy orientation: safeguarding enterprises, employment, and stability

The normal production and operation of enterprises (especially small- and medium-sized enterprises) have been deeply impacted during the period of epidemic prevention and control. Employees face challenges along with enterprises, so their income and job positions will inevitably also be impacted.

For the purpose of avoiding the external pressure brought by the epidemic, which may result in increased employment relationship conflicts and even social instability, the central government is aiming to resolve problems surrounding the stability of employment relationships.

The basic policy orientation for resolving such problems is policies "without bias"—to aid enterprises and protect employees at the same time by "safeguarding enterprises, employment, and stability". Employees' interests cannot be sacrificed to save the market, nor can the pressure of protecting employees be wholly transferred to enterprises which would lead to further adverse consequences.

Policy instruments: categorized interpretation of specific measures

Based on the policy orientation of "safeguarding enterprises, employment, and stability", we have divided the policy instruments contained in the Opinions into the following three categories and summarized their respective contents:

I. Category I: protection of employees' rights and interests

1. Enterprises are encouraged to arrange for employees to work from home. In the absence of conditions for working from home, employees can be arranged to take statutory and additional annual leave.

2. Employees are encouraged to commute on a flexible schedule in order to reduce the scale of

gatherings and to control the risk of infection.

3. Enterprises cannot terminate employment relationships with employees that are under quarantine, and should regard such employees as providing regular labor services and pay salaries in accordance with normal working standards.

4. After the end of quarantine, employees who continue to receive medical treatment and cannot provide labor services are entitled to the benefits of medical treatment period.

5. For employees that worked overtime during the extended Spring Festival holiday (from January 31 to February 2), enterprises should first arrange compensatory time-off or pay overtime salaries if such compensatory time-off is not feasible.

II. Category II: enterprise employment management rights

1. Enterprises that meet the conditions to resume work can request their employees to return to work, provided that necessary epidemic prevention and labor protection measures are provided. Enterprises can handle in accordance with law those employees who are refuse to return to work after exhortation or who refuse to return to work without proper reasons.

2. During the work postponement period or pending returning to work, if employees have fully utilized all types of leave, the payment of salaries should be handled in accordance with the regulations on the enterprise's shutdown or production halt: the enterprise will pay the full amount of salaries based on the standard stipulated in the employment contracts for the first month, and pay "living allowances" starting from the second month (for example, Beijing Municipality regulations stipulate the standard for "living allowances" is 70% of the local minimum salary standard.)

3. Enterprises that have difficulty in production and operation due to the impact of the epidemic can take measures on stabilizing job positions, including adjusting salaries, rotating holidays, shortening working hours, etc., through democratic consultation processes with the employees.

4. Enterprises that are not able to pay salaries timely can be directed to consult with the labor union or employee representatives on postponing payment.

5. Enterprises can conduct layoffs if the operation difficulties still cannot be relieved by the above measures.

III. Category III: support funds provided by government departments and trade unions

1. Unemployment insurance funds (human resources and social security bureaus): expand the scope of job stability subsidies enjoyed by small and micro enterprises.

2. Training fee subsidies (human resources and social security bureaus): online and offline employee trainings arranged during the shutdown and recovery period are included in the scope of subsidized training.

3. Trade union funds (trade union organizations): trade union funds contributed by qualifying small and micro enterprises impacted by the epidemic are to be fully refunded.

4. Special trade union funds for epidemic prevention (trade union organizations): enhance solicitude for employees working on the frontline of epidemic prevention.

5. Enterprise association membership dues (trade unions and enterprises associations): a certain percentage of the membership dues contributed will be refunded to qualifying enterprises with difficulties due to the impact of the epidemic.

Please note that the Opinions are policies issued at the central government level, and mainly concern guidance and encouragement measures. During their implementation, enterprises should continue to monitor for the epidemic prevention and control measures published locally and policy updates.

5. 2019-nCoV Outbreak and Contract Disputes

Author: Commercial Dispute Resolution Department[1]

The novel coronavirus (**2019-nCoV**) outbreak has affected the performance of numerous civil and commercial contracts. In this article, we examine the general legal impact of the outbreak on the performance of contracts from two perspectives, namely: 1) force majeure and 2) change in circumstances. We identify the relevant legal issues involved from these two perspectives and put forward our preliminary analysis for your reference.

Generally speaking, the novel coronavirus outbreak may constitute a force majeure event, based on the views of PRC courts on judicial practice when handling cases during the 2003 SARS epidemic. Nevertheless, whether the parties to a contract are entitled to claim exemption from liability or rescission based on the outbreak must be analyzed on a case-by-case basis. In particular, whether the outbreak would inevitably lead to a failure to perform the contract or the frustration of the purpose of the contract must be examined in accordance with the specific circumstances of each case. If the novel coronavirus outbreak does not constitute a force majeure event, it could be deemed as a change in circumstances. When there is a change in circumstances, the court may have discretion to modify or rescind the contract based on a party's request and the principle of fairness. According to previous judicial practice, PRC courts generally take a cautious approach when applying the principle of change in circumstances.

Force Majeure, Exemption from Liability and Rescission of Contract

III. Does the novel coronavirus outbreak constitute a force majeure event?

We are of the opinion that the novel coronavirus outbreak may constitute a force majeure event.

Assuming the contract contains a "force majeure" provision, and "infectious disease" or "atypical pneumonia" is explicitly listed as one type of force majeure event, then the parties have a contractual basis to claim that the novel coronavirus outbreak constitutes a force majeure event.

If there is no "force majeure" provision in the contract, or the "force majeure" provision does not explicitly list "infectious diseases" or "atypical pneumonia" as one type of force majeure event, the parties may nonetheless claim that the outbreak of novel coronavirus constitutes a force majeure event based on the following legal provisions and judicial practices.

1. Legal provisions

Pursuant to Article 180 of the General Provisions of the Civil Law and Article 117, paragraph 2 of the Contract Law, force majeure refers to "objective circumstances that are unforeseeable, unavoidable and insurmountable".

We believe that the outbreak of novel coronavirus could not have been foreseen by the general public

[1] Lawyers involved in the drafting of this article include (in alphabetical order of the writers' surnames): Xianglin Chen, Shiwen Dong, Denning Jin, Baofu Li, Andy Liao, Paula Liu, Ying Sun, Yanyan Wang, Gloria Xu, et al.

and was unexpected. To date, no effective method has been found to completely stop the spread of the virus, and no effective cure has been discovered. Accordingly, at least for now, parties to a contract can claim that the outbreak is an unforeseeable, unavoidable, and insurmountable event of force majeure. However, whether a PRC court will support such a claim requires analysis in accordance with the specific circumstances of each case.

2. Judicial practice

To date, the Supreme People's Court has not issued any judicial documents regarding how to address contract disputes arising from the novel coronavirus outbreak.

Considering that the outbreak is similar to the 2003 SARS epidemic, significant referential value may be drawn from the views of the Supreme People's Court and local courts on judicial practice in adjudicating contract disputes arising out of the SARS epidemic.

- **Article 3, para. 3 of the *Circular of the Supreme People's Court on Carrying out the Work of the People's Courts Related to Trials and Judgment Enforcement in Accordance with Law During the SARS Epidemic*[2]** (Fa [2003] No. 72, effective 11 June of 2003):

  "... Disputes arising from the impossibility to perform a contract directly due to administrative measures taken by the government and relevant departments to prevent or control the SARS epidemic, or failure to perform a contract due to the impact of the SARS epidemic, shall be properly dealt with in accordance with Article 117 [the force majeure provision] and Article 118 of *Contract Law of the People's Republic of China*."

- ***Properly Handling Cases in which Parties Claim the SARS Epidemic as a Force Majeure Event for Exemption of Liability***[3] (Research Group of Beijing No. 2 Intermediate People's Court)

  "Despite that medical experts hold different views on the symptoms and causes of SARS, from a legal perspective, we believe SARS is an unexpected abnormal event and a worldwide epidemic. The outbreak of SARS was not only unforeseeable for the parties in dispute, but was also unforeseeable for medical experts with extensive medical knowledge. Since the [SARS] outbreak, there has been no effective method to stop its spread, and the source of infection has not been identified. Although that many SARS patients have been cured and discharged from the hospital, medical experts have not yet discovered any effective treatment method. Therefore, **at least for now, this abnormal event is an objective circumstance that was unforeseeable, unavoidable, and insurmountable by humanity. Legally speaking, it shall be deemed as a force majeure event. It is a type of natural disaster.**"

IV. If the novel coronavirus outbreak constitutes a force majeure event, what are the

[2] This notice has been abolished pursuant to the Decision of the Supreme People's Court on Abolishing Some of the Judicial Interpretations and Documents of Judicial Interpretation Nature Promulgated from July 1, 1997 to December 31, 2011(Fa Shi [2013] No.3).

[3] Published in *Journal of Law Application* (《法学适用》), Issue No. 207 in June of 2003.

corresponding legal consequences?

The legal consequences of a force majeure event should be analyzed from the following two perspectives.

First, the parties may have agreed in the contract on the relevant legal consequences. If there are terms in the contract setting out how the contract is to be performed after the occurrence of a force majeure event, the parties should perform in accordance with such terms.

Second, PRC law has provisions on the legal consequences of force majeure events. Nevertheless, whether the provisions regarding the legal consequences are applicable depends on the specific circumstances of each case.

1. Parties may claim partial or full exemption from contractual liability

Pursuant to the following legal provisions, if the obligations under a contract cannot be performed due to a force majeure event, the party that fails to perform its obligations may claim partial or full exemption from liability. It bears mentioning that the party claiming such exemption is required to prove that there is a causal relationship between the novel coronavirus outbreak (as a force majeure event) and its failure to perform the obligations.

- **Article 180, para. 1 of the *General Provisions of the Civil Law***

"If a party is unable to perform civil obligations due to a force majeure event, the party shall not bear civil liability. If other provisions of law stipulate otherwise, such provisions shall prevail."

- **Article 117, para. 1 of the *Contract Law***

"A party who is unable to perform a contract due to force majeure is exempted from liability in part or in whole in light of the impact of the force majeure event, except as otherwise provided by law. Where an event of force majeure occurs after the party's delay in performance, it is not exempted from such liability."

2. Parties may claim rescission of the contract

Pursuant to the following legal provisions, if the purpose of the contract is frustrated due to a force majeure event, either party may claim rescission of the contract. However, the party claiming rescission would be required to prove a causal relationship between the novel coronavirus outbreak (as a force majeure event) and the frustration of the purpose of the contract.

- **Article 94 of the *Contract Law*:**

"The parties to a contract may rescind the contract under any of the following circumstances:

a. the purpose of the contract is rendered impossible to achieve due to an event of force majeure; …"

3. Parties may claim inapplicability of the deposit penalty rule

If the contract provides for a deposit and the contract cannot be performed due to a force majeure event, the affected party may claim that the deposit penalty rule does not apply, provided the party

proves a causal relationship between the force majeure event (in this case, the novel coronavirus outbreak) and the failure in performing under the contract.

- **Article 122 of the *Interpretation of the Supreme People's Court on Several Issues concerning the Application of the Guaranty Law***

  "Where the principal agreement cannot be fulfilled due to force majeure or any accident, the deposit penalty rule shall not apply…"

  It should be particularly noted that whether the party affected by the novel coronavirus outbreak can claim exemption from liability or rescission of a contract by arguing force majeure should be analyzed on case-by-case basis.

  Key factors to consider include whether the outbreak will inevitably lead to a failure to perform the contract or the frustration of the purpose of the contract; whether the claiming party itself is also at fault, i.e. whether the failure in performing the contract during the outbreak resulted from delayed or improper performance by the claiming party, etc.

  In addition, the measures for preventing and controlling the outbreak of novel coronavirus taken by relevant government departments and local governments during different periods are also important factors.

V. What are the legal considerations/obligations of contracting parties when the performance of the contract is affected by the novel coronavirus outbreak (as a force majeure event)?

Contracting parties should consider issues from the following two perspectives.

First, from the perspective of the contractual provisions. If the contract provides for post-force majeure arrangements, such arrangements will apply.

Second, from the perspective of legal provisions. In such case, relevant legal provisions provide obligations respectively for the defaulting party and the non-defaulting party.

For the party in default, its obligations include notifying the other party in a timely manner and providing evidence of the force majeure event within a reasonable period, according to the following legal provisions. Based upon the judicial practice of the PRC courts in handling similar cases during the SARS epidemic, the occurrence of a force majeure event should be easy to prove considering the outbreak of novel coronavirus epidemic has become a "socially known fact".

- **Article 118 of the *Contract Law*:**

  "If a party is unable to perform a contract due to an event of force majeure, it shall timely notify the other party so as to mitigate the losses that may be caused to the other party, and shall provide evidence of such event of force majeure within a reasonable period."

The non-defaulting party has the obligation to "take the appropriate measures to prevent further losses", according to the following legal provisions.

- **Article 119 of the *Contract Law*:**

"Where a party has breached the contract, the other party shall take the appropriate measures to prevent the losses from increasing; where the other party's failure to take appropriate measures results in additional losses, it cannot demand compensation for the additional losses.

Any reasonable expense incurred by the other party in preventing additional losses shall be borne by the party in breach."

Change in Circumstances and Modification/Rescission of Contracts

I. What is the difference between force majeure and change in circumstances? Can they be applied at the same time?

The current PRC judicial interpretation interprets "change in circumstances" as follows:

- **Article 2 of the *Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Contract Law of the People's Republic of China (II)***[4] (Fa Shi [2009] No. 5, effective on May 13, 2009)**:**

"Where a party to a contract petitions the court to modify or rescind the contract on the grounds that the continued performance of the same is patently unfair to the party or the purpose of the contract will not be realized due to occurrence of any material change in circumstances that was unforeseeable, not caused by force majeure, and not a commercial risk after the conclusion of the contract, the court shall decide whether the contract shall be modified or rescinded according to the principle of fairness on a case-by-case basis."

A similarity exists between force majeure and change in circumstances, i.e. the occurrence of each should be "unforeseeable". However, as we discuss below, there is fundamental difference between these two obstacles to performance which does not allow for the two to be applicable at the same time.

1. Force majeure and change in circumstances both constitute obstacles to the performance of a contract, but to differing degrees. Specifically, force majeure completely prevents the performance of a contract, while a change in circumstances does not. Upon occurrence of a change in circumstances, the continued performance of the contract is still possible, but doing so becomes extremely difficult and obviously unfair to one party.

2. Force majeure is a statutory exemption from liability, which means that the affected party is exempted from liability for failure to perform as long as the party can prove that the failure resulted from the force majeure event. In such cases, whether or not to exempt the liabilities is not at the discretion of the court. However, change in circumstances is not a statutory exemption from liability. The parties are only entitled to claim for the modification or rescission of the contract by claiming a change in circumstances, and the court has discretion to decide whether the contract should be modified or rescinded.

[4] According to *Decision of the Supreme People's Court on the Abolition of Certain Judicial Interpretations and Judicial Interpretation-Quasi Documents (Tenth Batch) Published Between July 1, 1997 and December 31, 2011* (Fujian [2013] No. 7), the circular has been revoked.

3. Force majeure automatically acts to relieve the defaulting party of liability, whereas a court has discretion in determining the effect of a change in circumstances. This means the court may decide whether there exists a change in circumstances, whether the agreement will be modified or rescinded due to the change in circumstances, and whether the affected party will be exempted from liability upon the occurrence of the change in circumstances.

4. Change in circumstance is used to challenge the validity of a contract and aims to resolve the question of whether the contract should continue to be performed if the circumstances upon which the contract was concluded have changed. In contrast, force majeure is invoked when a party is in breach of contract due to a force majeure event and aims to resolve the question of whether the party in breach must bear liability. Thus, the two exemptions aim to resolve different problems.

II. Does the novel coronavirus outbreak constitute a change in circumstances?

The novel coronavirus outbreak may be deemed to constitute a change in circumstances, based upon the previous provisions of the Supreme People's Court and views of some courts when handling similar cases during the SARS epidemic (see below). In such cases, courts may order the affected contract to be modified or rescinded upon the request of either party in certain cases even if the novel coronavirus epidemic is not held to constitute force majeure.

- **Article 3, para. 3 of the *Circular of the Supreme People's Court on Carrying out the Work of the People's Courts Related to Trials and Judgment Enforcement in Accordance with Law During the SARS Epidemic*:**

  "Where the performance of a contract in accordance with its original provisions significantly affects the rights and interests of either party to a contract due to the SARS epidemic, the disputes regarding the performance of the contract shall be dealt with according to the specific circumstances by applying the principle of fairness…"

  Dispute over right of recourse between Peiyan LI (the "Lessee") and Residents Committee of Xiguan District, Yonganlu Street, Laizhou City ("Xiguan RC" or the "Lessor"), according to judgment rendered by Yantai Intermediate People's Court with the reference number (2018) Lu 06 Min Zhong No. 268

  In this dispute, the courts of first instance and second instance both held that:

  "The SARS epidemic was an unforeseen calamity. Due to the epidemic, the appellant Peiyan LI had to suspend hotel operations and therefore suffered economic losses, which was an objective fact signed and confirmed by two members of Xiguan RC. Considering that the losses suffered by lessee exceeded the scope of market risk, we uphold the original ruling which ordered an appropriate reduction or partial exemption of the lease fee by applying the change in circumstances rule."

  It should be noted, however, that the application of the change in circumstances rule is under strict control, according to the following judicial documents promulgated by the Supreme People's Court.

- ***Circular of the Supreme People's Court on the Correct Application of Interpretations of Several Issues Concerning the Application of Contract Law of the People's Republic of China (II) to***

Serve the Overall Work of the Party and the State **(Fa [2009] No. 165):**

"In order to adapt to the development and change in the economic situation and synchronize the legal effects and social effects of trial work, in accordance with the principles and spirit stipulated in the General Principles of Civil Law and the Contract Law, Article 26 of the Interpretations of Several Issues Concerning the Application of Contract Law of the People's Republic of China (II) provides that: where a party to a contract petitions the court to modify or rescind the contract on the grounds that the continued performance of the same is obviously unfair to the party or the purpose of the contract will not be realized due to occurrence of any material change in circumstances that is unforeseeable, not caused by force majeure, and not a commercial risk after the conclusion of the contract, the court shall decide whether the contract shall be modified or rescinded according to the principle of fairness on a case-by-case basis."

People's courts at all levels must correctly understand and carefully apply the above provisions. **If the application of the above provision is indeed necessary in a case according to the special circumstances of the case, the application of the rule should be examined by a high people's court. If necessary, the application of the above rule should be submitted to the Supreme People's Court for review.**

6. Court and Arbitration Adjustments During the COVID-19 Epidemic

Author: Commercial Dispute Resolution Department[5]

The novel coronavirus ("**COVID-19**") epidemic has spread across the country since December 2019. So far, 31 provinces, municipalities and autonomous regions have launched Class A major public health emergency responses. In order to better prevent and control the epidemic, to reduce the gatherings and mobility of people, and to protect the life and health of the public, to safeguard the litigation rights and interests of the parties, the courts and the arbitration commissions across the country have made adjustments for litigation and arbitration activities during the epidemic control and prevention period.

We have compiled in this issue the notices and announcements issued by courts and arbitration commissions across the country on adjustments for litigation and arbitration activities, and provide brief analysis and recommendations as to the impact on litigation rights and interests brought by these adjustments.

Summary of notices and announcements on adjustments for litigation and arbitration activities by courts and arbitration commissions

Courts and arbitration commissions across the country have issued notices and announcements on adjustments for litigation and arbitration activities to prevent the spread of the epidemic and protect the litigation rights and interests of the parties. In general, adjustments are made with respect to the following three aspects:

1. On-site case-filings, litigation services, and receipt of documents are suspended. Parties are encouraged to submit case documents via the internet or courier and to complete case filings online.

   If submission of arbitration and litigation materials is necessary, the parties can submit the electronic version of such materials through an online service platform designated by the court or arbitration commission. Where online case-filing is unavailable, the case materials can be submitted via courier.

2. On-site hearings and inquiry sessions are suspended. Parties can apply to postpone evidence submission or hearings if they cannot acquire evidence or participate in hearings due to the epidemic.

   During the period of epidemic prevention and control, courts and arbitration commissions are to take measures on postponing hearings and inquiries and notify the parties of new schedules according to the changing epidemic situation. The parties can apply to the court or arbitration commission to postpone evidence submission or hearings, if the parties and the agents are being treated for COVID-19 or are under quarantine, or are in the traffic-controlled regions due to the impact of the epidemic and thus cannot timely acquire evidence or participate in hearings and mediations.

3. On-site enforcements are to be suspended, and off-site enforcements are to be strictly controlled.

[5] Lawyers involved in the drafting of this article include (in alphabetical order of the writers' surnames): Will Huang, Yina Liu, Lifeng Lu, Ying Xue, et al.

Property preservation and enforcement monitoring are to be completed online by enhancing online monitoring.

Courts will fully use the online enforcement monitoring system to carry out preservation and enforcement monitoring. Online enforcement monitoring will be enhanced while offline monitoring will be reduced. Enterprises and persons that are involved in the epidemic control and prevention can apply to the court to postpone taking enforcement and preservation measures such as asset monitoring. For cases that require cross-region enforcement, local courts should in principle be commissioned to undertake enforcement measures.

The relevant notices and announcements on such adjustments issued by the arbitration commissions are summarized as follows:

No.	Region	Date	Issuer	Name of Notice / Announcement
1.	National	2020.01.28	China International Economic and Trade Arbitration Commission	*Urgent Notice of the China International Economic and Trade Arbitration Commission on Work Arrangements During the COVID-19 Epidemic Prevention and Control Period*
2.	Beijing	2020.01.28	Beijing Arbitration Commission / Beijing International Arbitration Center	*Notice of the Beijing Arbitration Commission / Beijing International Arbitration Center on Work Arrangements during the Epidemic Prevention and Control Period*
		2020.02.01	BAC / BIAC	*Supplemental Notice I of the Beijing Arbitration Commission / Beijing International Arbitration Center on Work Arrangements during the Epidemic Prevention and Control Period*
3.	Shanghai	2020.01.28	Shanghai International Economic and Trade Arbitration Commission / Shanghai International Arbitration Center ("SIETAC / SIAC")	*Notice of SIETAC / SIAC on Arbitration Work Arrangement during the Epidemic Prevention and Control Period*
		2020.01.28	Shanghai Arbitration Commission	*Alert of the Shanghai Arbitration Commission on Arbitration Work Commission During the*

No.	Region	Date	Issuer	Name of Notice / Announcement
				Epidemic
		2020.01.31	Shanghai Arbitration Commission	*Supplemental Alert I of the Shanghai Arbitration Commission on Arbitration Work During the Epidemic*
4.	Shenzhen	2020.01.29	Shenzhen Court of International Arbitration	*Alert of the Shenzhen Court of International Arbitration on Arbitration Work and Relevant Matters During the Epidemic Prevention and Control Period*
5.	Guangzhou	2020.02.03	Guangzhou Arbitration Commission	*Announcement of the Guangzhou Arbitration Commission on Work Arrangements during the COVID-19 Epidemic Prevention and Control Period*

Impacts and recommendations—litigation and arbitration activity adjustments and the rights and interests of parties

1. The suspension of on-site case-filing activities due to the epidemic will delay the initiation of court or arbitration proceedings by some parties, which may lead to some parties being unable to file cases before the expiry of the statute of limitations.

   As stated above, due to the need for epidemic prevention and control, most courts and arbitration commissions have suspended on-site case filing services. Thus, parties intending to initiate arbitration or litigation proceedings cannot complete case filings by submitting case documents on site and receiving responses to case-filing inquiries. As for disputes subject to statute of limitations expiry, some parties may not be able to complete the case-filing before the expiry of statute of limitation.

   Recommendation:

   In order to initiate arbitration or court proceedings the earliest possible and to make clear the rights and interests of the parties, we recommend that, where permissible, a party intending to initiate an arbitration or court proceeding complete the case filing by both courier and online submission. When submitting the arbitration or litigation materials by mail, the waybill should be clearly indicated “case filing by courier” and should be retained. At the same time, after the online submission and courier, the parties should promptly contact the secretary of the arbitration commission or the case-filing chamber of the court by phone, in order to ensure that the documents have been accepted.

   As for disputes subject to a statute of limitations expiry, we recommend that the parties submit the arbitration or litigation materials by courier and retain the waybills in order to meet the statute of limitations. According to Article 194 of the *General Provisions of the Civil Law of the People’s Republic of China*, the statute of limitations shall be suspended during the last six months of the period

if the right of claim cannot be exercised due to obstacles such as force majeure. The statute of limitations will expire six months from the date when the obstacle causing the suspension is eliminated. Currently, whether the epidemic constitutes a force majeure event that can hinder the parties from exercising their rights in each case may be subject to debate. If it does constitute force majeure, the start and end of the force majeure event may also be subject to dispute. Therefore, to ensure the right to litigate, we recommend that plaintiffs or claimants avoid claiming that the epidemic constitutes a force majeure event during the proceedings, and instead initiate proceedings to meet the statute of limitations.

2. Off-line asset monitoring and enforcement measures undertaken by the courts will be impacted to some extent due to the epidemic for assets that require on-site preservation and enforcement.

   Recommendation:

   In order to assist the court in online monitoring for a respondent's assets, we recommend that the plaintiff or applicant collect and provide information on assets such as bank accounts or equity investments. Meanwhile, if the preservation period is about to expire during the period of epidemic prevention and control, we recommend that the parties promptly contact the judge and apply in writing for preservation measures such as continued court custody of the assets.

3. The suspension of litigation and arbitration activities such as hearings can, to a degree, delay the time of rulings confirming the parties' rights and obligations. The defendant or the respondent may well purposefully seek to delay the litigation or arbitration proceedings.

   Due to the impact of the epidemic, the courts and arbitration commissions will suspend on-site hearings or mediations, which will delay adjudication of the parties' rights and obligations. Accordingly, the scope of losses due to breach of contract or tort suffered by a plaintiff or applicant may also increase. Meanwhile, the defendant or respondent may take advantage of the epidemic and purposefully request suspension of the hearings in order to delay the progress of the litigation or arbitration proceedings, and to avoid the legal responsibilities.

   Recommendation:

   To ensure the progress of the arbitration and litigation proceedings, we recommend that the court or arbitration commission arrange for the parties complete the exchange of evidence by providing cross-examination opinions in written form, in cases where the parties do not have material disputes on the authenticity of evidence. Where permissible, the parties can recommend the court or arbitration commission to conduct online activities such as hearings and mediations. For the cases with clear facts and simple legal relationships, the parties can also apply to the court or arbitration commission to try the case in written form. In addition, the parties should be prepared to collect supplemental evidence of the increased losses or damages incurred during the postponement period.

7. Being a Good "Gatekeeper" for Corporate Bond Underwriting - the Securities Association of China Issues New Due Diligence Rules for Corporate Bond Underwriting Services

Author: Han Kun Law Offices[6]

On 28 December 2019, the 15th Meeting of the Standing Committee of the 13th National People's Congress adopted revisions to the *Securities Law of the People's Republic of China* (《中华人民共和国证券法》) (the "**Securities Law 2019**"). The Securities Law 2019 will comprehensively implement a new registration system following its effectiveness on 1 March 2020. In response, the Securities Association of China ("**SAC**"), in consideration of the development practices and characteristics of the corporate bond market, revised the *Guidelines on Due Diligence for Corporate Bond Underwriting Services* (《公司债券承销业务尽职调查指引》) initially published on 16 October 2015 (the "**Due Diligence Guidelines 2015**"), and further issued the *Guidelines on Due Diligence for Corporate Bond Underwriting Services (Revised Version)* (《公司债券承销业务尽职调查指引（修订稿）》) (the "**Due Diligence Guidelines 2020**") on 22 January 2020. On the same date, SAC issued for the first time the *Guidelines on the Content and Catalogue of Working Papers for Corporate Bond Services* (《公司债券业务工作底稿内容与目录指引》) (the "**Working Paper Guidelines**") which came into force on the date of issuance.

The Due Diligence Guidelines 2020 further refine and adjust the requirements for underwriters in providing corporate bond services, strengthen the requirements for verification and analysis of key issues such as the issuer's solvency, and put forward higher requirements for due diligence and work practices of corporate bond underwriters, to comprehensively implement the securities issuance registration system and increase the responsibilities of intermediaries, in line with the overall concepts of the Securities Law 2019.

In this legal commentary, we will analyze key revisions of the Due Diligence Guidelines 2020 based on the Due Diligence Guidelines 2015 and their impact on underwriters of corporate bonds by reference to the significant revisions to the corporate bond issuance and trading system in the Securities Law 2019, and further analyze the trend of the subsequent revisions and adjustments to rules relating to the corporate bond issuance and trading system.

The corporate bond public offering and trading system in the Securities Law 2019

We provided a detailed analysis on the specific revisions of the Securities Law 2019 in our previous Han Kun Legal Commentary the *Highlights of the New PRC Securities Law*. According to the Securities Law 2019, the registration system will be comprehensively implemented in the field of "public securities offerings", which includes public corporate bond offerings. However, it is stated that "the specific scope and implementation steps of the registration system shall be formulated by the State Council." Specifically, under the general background of the registration system, the important revisions made to the corporate

[6] Lawyers involved in the drafting of this article include (in alphabetical order of the writers' surnames): Lijuan FENG, Mengjing QIAO, Bing XUE, TieCheng YANG, Zhao ZHANG, Ying ZHOU, et al.

bond public offering and trading system in the Securities Law 2019 include:

1. Removing certain requirements for public corporate bond offerings. The requirements for the issuer's minimum net assets and the ratio of outstanding bond balances to net assets of the issuer have been replaced with "having a sound and well-functioning organizational structure". In addition, the Securities Law 2019 reflects a more market-oriented bond pricing mechanism by removing the previous requirements that: (i) the use of funds raised in the public offering shall be approved, and (ii) the coupon rate of corporate bonds shall not exceed the coupon rate stipulated by the State Council;

2. Imposing new requirements on the disclosure of significant events that may have material impact on the trading prices of corporate bonds;

3. Deleting the provisions of the currently effective version of the Securities Law (as last amended in 2014) in relation to the listing of corporate bonds on stock exchanges, including eligibility requirements for the listing of corporate bonds, application documents to be submitted to stock exchanges for corporate bond listings, circumstances under which the listing and trading of corporate bonds is to be suspended or terminated by stock exchanges, etc.; and

4. Further substantiating the legal liabilities of intermediaries as market "gatekeepers". The Securities Law 2019 specifies that underwriters and their personnel who are directly responsible bear joint and several liabilities for investors who suffer damages caused by non-performance of their duties and the corresponding rules for waiver of liabilities, and raises the range of punishments for securities service institutions (including bond underwriters, bond trustees, etc.) that fail to perform their due diligence obligations.

The above adjustments made in the Securities Law 2019 leave room to implement the registration system for corporate bond issuances and empower stock exchanges to formulate specific rules for the listing and trading of corporate bonds on stock exchanges.

The Due Diligence Guidelines 2020 were issued around the comprehensive implementation of the registration system in the Securities Law 2019 and aligned with its core concepts. Based on the overall requirements under the registration system and in combination with the characteristics of the bond market and relevant market practice, the Due Diligence Guidelines 2020 set out more detailed requirements for the practices of underwriters of corporate bonds when engaging in corporate bond services, leverage the initiative, independence, and professionalism of underwriters of corporate bonds, and further urge them to better perform their obligations as bond market "gatekeepers".

Analysis and interpretation of key revisions in the Due Diligence Guidelines 2020

Compared to the Due Diligence Guidelines 2015, the key revisions of the Due Diligence Guidelines 2020 include the following aspects:

I. Putting forward more explicit requirements for underwriters' due diligence practices

First, the Due Diligence Guidelines 2020 explicitly require that underwriters to develop an adequate and thorough internal management system for due diligence, maintain a project work log based on the

specific phases of due diligence, and provide issuers with necessary training on bond offerings.

Second, the Due Diligence Guidelines 2020 impose new requirements on due diligence for an issuer's re-financings. Where the same underwriter conducts due diligence on the issuer's re-issuance of corporate bonds, the underwriter may cite the results of the previous due diligence and supplement the investigation with those parts that have changed.

Third, the Due Diligence Guidelines 2020 further strengthen and specify the duties of intermediaries. The details are as follows:

1. Emphasizing that the principle of due diligence shall be "diligent undertaking and good faith"; the method of due diligence shall be "through various effective methods and steps"; the purpose of due diligence is to "grasp the business conditions, financial conditions and solvency of the issuer" (rather than "know" as prescribed in the Due Diligence Guidelines 2015), and to "analyze the impact on the issuer's solvency and sustainable operating ability" in combination with the basic conditions of the issuer;

2. Requiring to distinguish whether other intermediaries are providing professional opinions to support the relevant content of the offering documents, requiring underwriters to perform a general duty of care and special duty of care, and to verify the business qualifications, eligibility, compliance, and other conditions of each of the intermediaries during the reporting period;

3. Expanding the scope of due diligence of underwriters from "significant matters that may affect the solvency of the issuer" as prescribed in the Due Diligence Guidelines 2015 to "other matters that may have a significant impact on the solvency of the issuer or investment decisions of the investors", which materially puts forward broader requirements for the scope of the underwriters' due diligence; and

4. Underwriters are to perform duties strictly in accordance with the requirements of the Due Diligence Guidelines 2020 and be able to prove no fault in the course of practice. According to the Due Diligence Guidelines 2020, if SAC determines that an underwriter is in violation, it may take self-disciplinary measures against the underwriter, unless the underwriter can prove that it is not at fault.

Fourth, the Due Diligence Guidelines 2020 supplement the verification requirements for the specific issuer's eligibility requirements for special bond types (such as green bonds and convertible bonds) and special industries (such as real estate).

Fifth, the Due Diligence Guidelines 2020 apply more broadly to corporate bond offerings. The Due Diligence Guidelines 2020 delete provisions in the Due Diligence Guidelines 2015 that non-public corporate bond offerings are to be carried out by reference. We understand that this revision is intended to unify the due diligence requirements between different types of corporate bond offerings so that due diligence for corporate bond underwriting services will be conducted in a unified manner in accordance with the provisions of the Due Diligence Guidelines 2020.

Sixth, to further clarify the rules that underwriters shall abide by during due diligence, as an industry self-disciplinary organization, SAC provides in the Due Diligence Guidelines 2020 that where there are relevant provisions stipulated in "laws, regulations and normative documents" and other regulatory

rules whose level is higher than that of the self-disciplinary rules, such provisions shall prevail; where there are relevant provisions in other self-disciplinary rules for which the Due Diligence Guidelines 2020 do not provide, such provisions shall prevail.

II. Highlighting the concept of bonds, focusing on prevention of credit risk in bond services

In order to improve the verification efficiency in bond services, the Due Diligence Guidelines 2020 strengthen verification and focus on the issues which may affect an issuer's credit status and solvency, which are mainly reflected in the following aspects:

1. With respect to an issuer's business operations, underwriters will no longer be required to examine the issuer's production and sale of its primary products/services and supplies of raw materials/energy; the Due Diligence Guidelines 2020 retain and further refine the requirements that underwriters must verify transactions between the issuer and its major clients and suppliers, in order to judge the impact on the issuer's solvency caused by reliance on its suppliers and clients;

2. With respect to credit verifications, newly added provisions require that underwriters shall obtain the issuer's credit reports, and verify their credit status, material litigations and arbitrations involving entities in which the issuer has made significant equity investments. The method of verifying credit status is necessity-oriented. Detailed methods for verification are no longer specified;

3. Specific requirements are newly added for the verification of issuers' key financial statement items and solvency, and the verification methods and requirements for such items are refined;

4. With respect to verification of the validity of bond guarantors and guarantee measures, requirements are newly added for underwriters to (a) investigate the status of performance guarantees for credit bonds on public markets, and credit standing and solvency of guarantors; (b) verify the legality and validity of guarantee contracts; and (c) investigate certificates of ownership, collateral evaluation reports or other documents that can prove the value of the collateral, and collateral/pledge contracts;

5. With respect to investigating bond ratings, under the Due Diligence Guidelines 2020, if the bond rating is higher than the issuer's rating, the underwriter is required to pay attention to the reasonableness of the rating; and

6. With respect to risk prevention, a requirement for risk prevention measures is newly added that requires underwriters to verify the major interests between the issuer and the key personnel of intermediaries.

III. Fully leveraging the initiative, independence, and professionalism of bond underwriters

In the current self-disciplinary rules, the verification requirements for underwriters regarding financial accounting mainly focus on reviewing the materials and professional opinions of other intermediaries. The Due Diligence Guidelines 2020 require underwriters to fully leverage their initiatives, with an emphasis on independent judgment for material irregularities, overall conditions of the issuer, etc. The revisions to the relevant financial accounting provisions in the Due Diligence Guidelines 2020 are mainly in the following aspects:

1. Regarding the major changes in the scope of the consolidated financial statements during the reporting period: first, if there is any significant equity investment in which the issuer holds more than 50% of the total equity but is not included in the consolidated statement, or the issuer holds less than 50% of the total equity but is included in the consolidated statement, the underwriter is required to verify its reasonableness; second, the underwriter is required to verify and analyze the major accounting policies, the changes in accounting estimates, and the material corrections of accounting errors of the issuer during the reporting period;

2. Verification requirements have been newly added for the issuer's key financial statement items. The Due Diligence Guidelines 2020 require underwriters to verify the status of assets that may have a significant impact on the issuer's solvency at the end of the reporting period and to verify high-value non-operating fund occupation or lending during the reporting period;

3. Regarding the issuer's solvency, underwriters are required to verify changes in the issuer's asset-liability ratio during the reporting period and debt at maturity within the next three years. Specifically, if the debt at maturity within one year accounts for a large proportion of overall debts, the underwriter is required to confirm whether there is any repayment protection for the debt at maturity; and

4. Regarding the verification of contingent information: first, the underwriter's verification methods for subsequent events is not limited to reviewing notes to the issuer's accounting statements; second, verification requirements are newly added for the credit and financial status of key guaranteed parties to assess the issuer's compensation risk.

The Working Paper Guidelines to promote digitization and standardization of working papers in corporate bond services

SAC formulated and issued the Working Paper Guidelines to clarify the main content, basic requirements, and documentation standards for working papers in bond services. Meanwhile, the Due Diligence Guidelines 2020 require underwriters of corporate bonds to prepare working papers in accordance with the *Working Paper Catalogue of Corporate Bond Underwriting Services* (《公司债券业务工作底稿目录》) (the "**Working Paper Catalogue**"). The formulation of the relevant rules will help promote the digitization and standardization of working papers in corporate bond services.

Regarding the preparation of working papers, the Working Paper Guidelines set out the main contents of working papers for corporate bond underwriters and trustees. However, the Working Paper Guidelines only set general requirements for the preparation of working papers, while materials and information that may have a significant impact on a corporate bond offering shall also be retained as working papers.

Regarding documentation standards for working papers, the Working Paper Guidelines stipulate that working papers can be retained in hardcopies, as electronic files, or in other forms of media.

Regarding the preparation of working paper catalogues, the Working Paper Guidelines explicitly require that underwriters and trustees of corporate bonds establish a unified catalogue of working papers which is easy to review. The Working Paper Catalogue sets out detailed requirements for (i) due diligence documents for corporate bond underwriting services, (ii) documents at the offering stage for corporate

bond underwriting, (iii) documents relating to corporate bond trust management services, and (iv) other documents for reference.

Outlook

As mentioned in Part I, the revisions in the Securities Law 2019 leave certain room for the registration system and detailed system design for corporate bond listings and trading on stock exchanges. We understand, after the implementation of the Securities Law 2019, relevant regulatory authorities will revise the original rules such as the *Measures for Administration of Issuing and Trading of Corporate Bonds* (《公司债券发行与交易管理办法》) (the "**Administrative Measures**") in relation to the registration system for public corporate bond offerings as well as the listing and trading of corporate bonds on stock exchanges. Meanwhile, relevant supporting regulations and detailed implementation rules will be further revised and/or formulated.

In fact, since the implementation of the Administrative Measures in January 2015, the pre-approval system for the listing of corporate bonds has been gradually implemented in the field of public corporate bond offerings to simplify the approval procedures. The arrangements for the pre-approval system are, to a large extent, close to the requirements of the registration system. The implementation of the Securities Law 2019 will also provide a clear legal basis for the formal implementation of the corporate bond offering registration system. Meanwhile, in the context of the comprehensive implementation of the registration system, with the continuous development of the corporate bond market, we expect that the regulatory authorities will set higher and stricter requirements for bond underwriters, bond trustees, and other intermediaries in areas such as due diligence and standardization of practice, while the role of securities intermediaries as market "gatekeepers" will continue to be strengthened. In light of this, the corresponding rules and supporting systems need to be revised and improved in accordance with the Securities Law 2019 to accompany the implementation of the comprehensive and deepened reform of the securities markets and to safeguard the legitimate rights and interests of investors. We will also further monitor the revisions of the relevant supporting rules and share our views with our readers in a timely manner.

8. 2019 Highlights: China's Fight Against Bad Faith Trademarks

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Strengthening the crackdown on bad faith trademarks was a focus of China's trademark law and practice in 2019. In this article, we review the main highlights of the past year in China's combatting bad faith trademark registrations from the perspective of laws and regulations, trademark data, and typical cases.

New laws and regulations promulgated to combat bad faith trademark registrations

I. Fourth amendment of the Trademark Law (implementation date: November 1, 2019)

Regulation of bad faith applications, hoarding of registrations, and other acts are the key content of this amendment of the *Trademark Law of the People's Republic of China* (the "**Trademark Law**"). Specifically, the following provisions are added to the Trademark Law to strengthen the crackdown on bad faith applications for trademark registration:

1. **Increase regulation of applicants' bad faith applications**. Bad faith applications for trademark registration for a purpose other than use shall be rejected. (Trademark Law, Art. 4)

2. **Regulate bad faith conduct of trademark agencies**. Article 19 of the Trademark Law increases the duty of care of trademark agencies. For example, trademark agencies must examine whether client trademark registration applications violate Article 4 of the Trademark Law. Article 18 further adds provisions specifying punishment for bad faith applications for trademark registration and bad faith lawsuits by trademark agencies.

3. **Increase compensation for bad faith infringement of the exclusive right to a trademark**. For example, Article 64 of the Trademark Law increases statutory compensation for bad faith infringement of the exclusive right to a trademark from RMB 3 million to RMB 5 million, and increases punitive damages from not more than three times to not more than five times.

II. Several Provisions on Regulating Trademark Application and Registration Activities (State Administration for Market Regulation, effective December 1, 2019)

Several Provisions on Regulating Trademark Application and Registration Activities (the "**rules**") were promulgated to implement provisions of the Trademark Law and further detail and regulate bad faith applications for trademark registration. The rules focus on the following:

1. **List considerations when examining a bad faith application for trademark registration**. For example, the rules detail factors that can be comprehensively considered when determining whether a trademark application for registration is "a bad faith application for trade registration for a purpose other than use", including the quantity of trademarks to be registered in the application, categories of designated goods on which the trademarks are to be used, information on trademark transactions, the industry and operating conditions of the applicant, whether the trademark registration being applied for is identical with or similar to the trademark of another which has a certain reputation, the name of a famous person, the trade name in an enterprise name, or the abbreviation of an enterprise name,

among others.

2. **Refine punishment measures for bad faith applications for trademark registration and unlawful agency conduct.** For example, in accordance with the Trademark Law, the rules set a fine of three times the illegal income but not more than RMB 30,000 for applicants who apply for trademark registrations in bad faith, and a fine of up to RMB 100,000 against trademark agencies that assist in bad faith applications. If the circumstances are serious, the intellectual property administrative department may decide to stop accepting the trademark agency business of the trademark agency. Other measures for bad faith registration applications are also stipulated, including publishing the punishment information through the National Enterprise Credit Information Publicity System, rectification interviews with the agency's person in charge, and trademark agency industry organizations adopting self-regulatory measures. Many other measures have been adopted to form a long-term mechanism to severely crack down on bad faith applications for trademark registration.

Primary statistics on combating bad faith trademark registrations

The following data is taken from the State Intellectual Property Office and the Beijing Intellectual Property Court, which can help us understand the state of combating bad faith trademark registrations in 2019 from both administrative and judicial perspectives.

I. Trademark statistics of the State Intellectual Property Office[7]

According to data disclosed by the State Intellectual Property Office in 2019, the number of trademark registration applications in China was 7.837 million. The number of registered trademarks was 6.406 million. In terms of trademarks, the crackdown on bad faith trademark registrations was the focus and highlight of the work of the State Intellectual Property Office in 2019. According to publicized data[8], since the first half of 2019, the Trademark Office has continued to increase its efforts to monitor and crack down on cybersquatting in bad faith and hoarding of trademarks during the examination, opposition, and review stages. In the second quarter of 2019, 24,145 abnormal applications for trademarks were rejected. Since April 1, 2019[9], the Trademark Office has rejected 24,145 abnormal applications for trademarks for three consecutive months, accounting for approximately 1.2% of the same period of examinations and approximately 4.2% of the same period of rejections. Among bad faith registrations (including both bad faith and hoarding characteristics), there were 8,656 cases of bad faith registrations, accounting for approximately 36%; and 15,489 cases of hoarding, accounting for approximately 64%.

From the trend, it is apparent the number of rejections of bad faith applications for trademark registration has declined slightly each month, and the number of rejections of hoarding trademark registration applications showed a rapid decline. These declines **indicate that the previous**

[7] Data source: Press conference of the main work statistics and related information of the State Intellectual Property Office in 2019, http://www.sipo.gov.cn/twzb/2019nzygztjsjjygqkxwfbh/index.htm

[8] Data source: Analysis of Trademark Registration in the First Half of 2019, http://sbj.cnipa.gov.cn/sbtj/201910/t20191021_307503.html

[9] Same as 8

resolute actions against abnormal trademark applications, represented by a large number of rejections, have had a positive impact on subsequent trademark registration applications.

II. Statistics of Beijing Intellectual Property Court

Nationwide administrative cases involving patents, trademarks, and other intellectual property authorizations and confirmations are concentrated in the Beijing Intellectual Property Court. The Beijing Intellectual Property Court has operated for five years since its establishment on August 31, 2014. In the field of combating bad faith trademarks, the Beijing Intellectual Property Court has frequently imposed severe measures. The main features of the cases of the Beijing Intellectual Property Court are as follows (Data source: China Intellectual Property News and IPHOUSE Data Report)[10]:

1. **Trademark cases account for the largest proportion of cases**. In the past five years, the breakdown of the court's caseload was as follows: trademark cases accounted for 58%, copyright cases accounted for 25%, patent cases accounted for 13%, and other cases including unfair competition, franchising, technology contracts, etc. accounted for 4%.

2. **In trademark cases involving bad faith, the court determined bad faith in more than half of the cases**. There were 242 trademark civil cases in 2018, of which ten involved bad faith registrations. Bad faith was found in six of the ten cases. There were 8,697 trademark administrative cases, with a withdrawal rate of 26.03%, and approximately 311 involved bad faith, among which bad faith was found in 166 cases and not in 145 cases.

Typical cases of combating bad faith trademark registrations

I. Trademark infringement and unfair competition dispute[11]

Significance of the case: The court did not support the infringement claims based on the bad faith trademark registration applications. The infringer was ordered to pay compensation of more than RMB 8 million, reflecting that Chinese courts impose severe punishment for bad faith trademark registrations.

- Trial court and judgment date: People's Court of Haizhu District of Guangzhou City, Guangdong Province, May 23, 2019

- **Judgment Summary**: The three trademarks at-issue are used on wooden flooring and other designated goods. The Plaintiff's trademark is used on furniture and other designated goods, the trademarks overlap with each other in terms of sales channels and consumer groups. The Defendant registered or was transferred the three trademarks at-issue and licensed another company to use the trademark with subjective intent. The Defendant **did not terminate use of the three trademarks at-issue and licensed another company to use the trademark after the Trademark Review and**

[10] The data was last updated on November 6, 2019 (the fifth anniversary of the establishment of the Beijing Intellectual Property Court)

[11] (2018) Yue 0105 Min Chu No. 8055

Adjudication Board ruled that the trademarks at-issue were invalid. **These acts were clearly both intentional infringement and in bad faith**. In addition, The Defendant promoted the infringing products through its WeChat public account and exhibitions. Based on this, the court found that the Defendant had clear intent in the above infringement.

……From this, it can be judged that the Defendant **is aware of the Plaintiff's corporate name and still chose the trademark at-issue as its name** and registered the company name in the same service industry, which objectively makes the relevant public mistakenly believe that it is related to the Plaintiff, **subjectively expressing its intention to "attach" to a well-known enterprise**. Therefore, this court supports the Plaintiff's claim that the Defendant's use of the corporate name constitutes unfair competition.

The Defendant **refused to provide its financial books and materials to the court without justifiable circumstances under the explicit order of this court**. **As a result, the profits from infringement could not be determined, so the Defendant should bear the burden of obstruction of evidence**. At the same time, the Defendant **continued the various infringements under the ruling of the Trademark Review and Adjudication Board declaring the three trademarks at-issue invalid. The nature of the infringement is serious and the infringement is obvious. It should be severely punished by law**. This court focuses on these two factors and considered the other factors mentioned above and determines that the amount of compensation for economic losses in this case is **RMB 8 million**……

II. Trademark infringement dispute[12]

Significance of the case: The Plaintiff's application for trademark registration was for improper purposes, and the Plaintiff filed a lawsuit after the registration was approved, among other acts. These acts were found to violate the principle of good faith and the court did not support the Plaintiff's claims.

- Trial court and judgment date: People's Court of Pudong New Area of Shanghai, June 27, 2019
- **Judgment Summary**: In this case, the infringing product marketed by Company A is a technology-intensive product. The customers who directly use the product are other high-tech companies in the integrated circuit and semiconductor industries, not end consumers. Therefore, the scope of influence of Company A and its products are mainly in this industry. The Plaintiff is a one-person company established by a natural person, and does not have technical capabilities in the industry. Its legal representative also acknowledged that he did not know the industry before registering the trademark.

  However, the Plaintiff applied to register the trademark at-issue in the month of its establishment and three months after the trademark was approved for registration, it began to send cease and desist letters to multiple distributors of Company A and complaints to the regulatory authorities, and even sent cease and desist letters to investors of Company A. **The**

[12] (2018) Hu 0115 Min Chu No. 46794

products at-issue were high-tech products that the Plaintiff did not understand. **It can be seen that the Plaintiff's application for registration of the trademark at-issue deliberately targeted Company A**. After the Plaintiff was established in Hong Kong, it did not conduct any business in Hong Kong. Only when the trademark at-issue was registered for nearly one year and Company A filed an application for invalidation of the trademark for nine months, it reached a deal with a third party about small storage devices such as USB flash drives. Such use does not conform to the usual practice of using trademarks in commercial activities; meanwhile, the content of the website promoting the products claimed by the Plaintiff is also obviously unreasonable. Based on this, it can be determined that the Plaintiff did not have the intent to use the trademark when applying for registration of the trademark, nor did it actually use the trademark.

Taking the above facts into consideration, **the Court determined that the Plaintiff's application for registration of the trademark was for improper purposes**. **The Plaintiff's application for registration of the trademark, the issuance of cease and desist letters in bulk, administrative complaints, and the filing of the lawsuit after the registration were approved clearly violated the principle of good faith and its related claims should not be protected and supported by law**.

In retrospect, the 2019 highlight for trademarks in China was undoubtedly the fight against bad faith registrations. China's crackdown on bad faith trademarks has achieved fruitful results, from both legal and policy perspectives. Bad faith trademark registrations deviate from the true intent of trademark registration, preempt opportunities for real trademark owners to register their marks, and also cause adverse social impacts. The crackdown on bad faith trademarks is not only the true intent of the Trademark Law, but also the natural demand of society for a fair and just value system. As the rule of law in China continues to advance, there will be no more refuges for bad faith trademark registrations.

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.

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