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Legal Updates

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Legal Updates

1. A Review of the New Mainland-HK Judgment Recognition Arrangement

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On January 18, 2019, the Supreme People's Court and the Department of Justice of the Hong Kong Special Administrative Region ("**HKSAR**") signed the *Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region* (the "**New Arrangement**").[1] As the head of the Research Office of the Supreme People's Court put it: "The arrangement is the sixth judicial assistance arrangement reached between the Mainland and HKSAR, the one with the broadest coverage and of great significance." "The purpose of the arrangement is to establish an institutional arrangement for reciprocal recognition and enforcement of judgments in civil and commercial matters between the courts of the Mainland and of the HKSAR, aiming to achieve a 'flow' of the judgments in civil and commercial matters between the Mainland and HKSAR." "The execution of the new arrangement, together with the marriage and family matters arrangement previously executed,[2] will possibly make 90% of judgments in civil and commercial matters be mutually recognized and enforced between the Mainland and HKSAR." "The arrangement marks the attainment of goal of extending the coverage of mutual legal assistance to substantially the entire civil and commercial fields between the Mainland and HKSAR." Hence, the execution of the New Arrangement serves as another milestone in cross-border litigation in China and deserves much attention and study by the legal and business communities.

This article integrates the main provisions of the New Arrangement with interpretations of the institutional arrangements for reciprocal recognition and enforcement of civil and commercial judgments as stipulated in the New Arrangement. This article is for the reference of legal practitioners, and we look forward to exchanging views on these issues.

I. Applicable Scope of the New Arrangement

According to Articles 1 and 2 of the New Arrangement, all legally effective judgments in civil and commercial matters as defined under both Mainland law and Hong Kong law, including effective judgments on civil compensation in criminal cases, are eligible for reciprocal recognition and enforcement between the Mainland and HKSAR. Moreover, reciprocal recognition and enforcement of judgments includes both monetary and non-monetary rulings (Art. 16, para. 1). Previously, reciprocal recognition and enforcement has only applied in cases where a "people's court of the Mainland or any court of the HKSAR has made an **enforceable final judgment requiring payment of money in a civil and commercial case pursuant to a choice of court agreement**" (emphasis added), according to the August 1, 2008 effective version

[1] A courtesy English translation of the New Arrangement is available at https://www.doj.gov.hk/eng/public/pdf/2019/Doc3_477379e.pdf.

[2] Refers to the *Arrangement on Mutual Recognition and Enforcement of Judgments in Marriage and Family Matters between the Courts of the Mainland and of the Hong Kong Special Administrative Region* signed on June 20, 2017.

of the *Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned* (the "**Former Arrangement**").[3]

A "judgment" referred to in the New Arrangement includes, in the case of the Mainland, judgments, rulings, conciliatory statements and orders of payment, but does not include rulings concerning preservation measures; in the case of the HKSAR, includes judgments, orders, decrees and allocators, but does not include anti-suit injunctions or orders for interim relief (Art. 4, para. 1). A "legally effective judgment" referred to in the New Arrangement means, in the case of the Mainland, a judgment of the second instance, a judgment of the first instance from which no appeal is allowed or no appeal has been filed by the expiry of the statutory time limit for appeal, as well as the above types of judgments given in accordance with the trial supervision procedure; in the case of the HKSAR, means a legally effective judgment given by the Court of Final Appeal, the Court of Appeal and the Court of First Instance of the High Court, the District Court, the Labour Tribunal, the Lands Tribunal, the Small Claims Tribunal or the Competition Tribunal (Art. 4, para. 2).

II. Judgments Explicitly Excluded Under the New Arrangement

According to Article 3, the New Arrangement does not presently apply to judgments in the following civil and commercial matters:

a. cases heard by a Mainland court on maintenance of parent(s) or grandparent(s), maintenance between siblings, dissolution of adoptive relationships, guardianship of adults, disputes after divorce on liability for damages, or division of property arising from a co-habitation relationship; or cases heard by a court of the HKSAR on whether a decree of judicial separation should be granted;

b. cases on succession, administration or distribution of an estate;

c. cases on the tortious infringement of invention patents and utility model patents heard by a Mainland court; cases on the tortious infringement of standard patents (including "original grant" patents) and short-term patents heard by a court of the HKSAR; cases on the confirmation of the license fee rate of a standard-essential patent heard by a Mainland court or a court of the HKSAR; and cases concerning intellectual property rights not covered under Article 5 of the New Arrangement;[4]

d. cases on marine pollution, limitation of liability for maritime claims, general average, emergency towage and salvage, maritime liens, and carriage of passengers by sea;

[3] A complete English copy of the Former Arrangement is available at https://www.doj.gov.hk/eng/Mainland/pdf/Mainlandrej20060719e.pdf.

[4] "Intellectual property right" referred to in the New Arrangement means an "intellectual property" as stipulated in Article 1(2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights, as well as an intellectual property right enjoyed by an owner in respect of new plant varieties as stipulated in Article 123(2)(7) of the General Provisions of the Civil Law of the People's Republic of China and the Plant Varieties Protection Ordinance of Hong Kong.

e. bankruptcy (insolvency) cases;

f. cases on the determination of a natural person's qualification as a voter, declaration of disappearance or death of a natural person, or the determination of limited or lack of legal capacity of a natural person for civil acts;

g. cases on the confirmation of the validity of an arbitration agreement or the setting aside of an arbitral award;

h. cases on the recognition and enforcement of judgments or arbitral awards of other countries or regions.

According to the head of the Research Office of the Supreme People's Court, the judgments in above-mentioned cases are excluded for various practical reasons, such as "certain types of cases lack basis for reciprocal recognition because they do not simultaneously exist in the Mainland and HKSAR; there are major differences in the legal system between the Mainland and HKSAR in certain fields, therefore a special consultation is required for implementing reciprocal recognition and enforcement of judgments in those fields … some types of judgments are only temporarily excluded from the scope of reciprocal recognition and enforcement, and a special discussion will be held on those judgments based on actual needs." Besides, "these excluded cases … only account for a small portion of civil and commercial cases."

As mentioned above, the New Arrangement also does not apply to rulings concerning preservation measures made by Mainland courts and anti-suit injunctions and orders for temporary relief made by Hong Kong courts (Art. 4).

III. Restrictions on the Content of Judgments that are Eligible for Recognition and Enforcement under the New Arrangement

According to Article 16, paragraph 2 of the New Arrangement, punitive damages contained in a judgment are, in principle, not eligible for reciprocal recognition and enforcement.

However, the New Arrangement makes exceptions for cases regarding intellectual property infringement. According to Article 17, paragraph 1 of the New Arrangement, for tortious claims for infringement of intellectual property rights, civil disputes over acts of unfair competition under Article 6[5] of the *PRC Anti-Unfair Competition Law* heard by a Mainland court or disputes over passing off heard by a Hong Kong

[5] According to Article 6 of the Anti-Unfair Competition Law of the People's Republic of China, a business operator shall not perform any of the following misleading acts that will cause people to mistake its products for the products of another business or believe certain relations exist between its products and the products of any business,

1. unauthorized use of a mark that is identical or similar to the name, packaging or decoration of another business's commodity, which has influence to a certain extent,
2. unauthorized use of another business's corporate name (including its shortened name, trade name, etc.), the name of a social group (including its shortened name, etc.), or the name of an individual (including his or her pen name, stage name, translated name, etc.), which has influence to a certain extent;
3. unauthorized use of a main domain name, website name or webpage, which has influence to a certain extent; and
4. other misleading acts that are sufficient to cause people to mistake its products for the products of another business or believe certain relations exist between its products and the products of any other business.

court, where reciprocal recognition and enforcement of the judgments is confined to rulings on monetary damages for acts of infringement committed in the requesting place, the scope of reciprocal recognition and enforcement includes punitive damages imposed in the judgments. Additionally, reciprocal recognition and enforcement of judgments concerning disputes over the infringement of trade secrets also includes punitive damages imposed in the judgments (Art. 17, para. 2).

In addition to the above restrictions, the scope of reciprocal recognition and enforcement shall not include taxes and penalties (Art. 18, para. 1). Rulings made by the original court on the validity of an intellectual property right or whether an intellectual property right is established or subsists are also not recognized or enforced (Art. 15).

IV. Application Process

A. Competent Court

According to the New Arrangement, in the case of the Mainland, an application for recognition and enforcement of a judgment should be filed with "an Intermediate People's Court of the place of residence of the applicant or the respondent, or the place where the property of the respondent is located" (Art. 7, para. 1, clause (1)); in the case of the HKSAR, the application should be filed with the High Court (Art. 7, para. 1, clause (2)).

It is worth noting that the New Arrangement stipulates that the Mainland Intermediate People's Court at the place where the applicant resides is competent to recognize and enforce judgments made by a Hong Kong court, which is different from the Former Arrangement which limits jurisdiction only to the Intermediate People's Court of the place where the respondent or its properties were located. This new rule provides convenience to applicants in the Mainland, because, under the previous provisions, an applicant may not have been able to initiate the proceeding in the Mainland court and request the court to trace the respondent's property in the Mainland if the respondent did not have a domicile in the Mainland and the applicant was temporarily unable to provide information about the respondent's property.

An application for recognition and enforcement of a judgment in a competent Mainland or Hong Kong court in accordance with the New Arrangement does not affect the applicant's rights to apply to enforce the judgment with the competent court of place where the original court is located. However, in this case, the court of one place shall, at the request of the court of the other place, provide information on the status of the enforcement of the judgment, so as to ensure the total amount recovered from enforcing the judgment in the courts of the two places must not exceed the amount determined in the judgment (Art. 21).

B. Application Materials

According to Article 8, an applicant applying for recognition and enforcement of a judgment as stipulated in the New Arrangement shall submit the following documents:

a. an application, which shall specify the basic information of the parties concerned, details of

the request and justifications for the application, status and location of the property of the respondent, and status of the judgment's enforcement in other courts (Art. 9);

b. a copy of the legally effective judgment affixed with the seal of the court which gave the judgment;

c. a certificate issued by the court which gave the judgment certifying the judgment to be legally effective and, if the judgment has content which requires enforcement, certifying the judgment to be enforceable in the requesting place;

d. where the judgment is a default judgment, a document certifying that the party concerned has been legally summoned, unless the judgment expressly states the same, or the absent party is the party applying for recognition and enforcement;

e. identity documents, which, if issued in a place outside the requested place, shall be certified in accordance with the law of the requested place. Other application materials created outside the requested place need not be certified.

C. Application Term

Different from the Former Arrangement, which generally stipulates that "the time limit … to apply for recognition and enforcement … is two years", the New Arrangement provides that "the time limits, procedures and manner for making an application for recognition and enforcement of a judgment shall be governed by the law of the requested place" (Art. 10).

In the case of the Mainland, according to Article 551 of the *Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China ("**Interpretation**")*, Mainland courts may hear civil litigation cases involving the HKSAR with reference to the special provisions on foreign-related civil procedures. According to Article 547 of the Interpretation, "the provisions of Article 239 of the *Civil Procedure La*w (i.e., the time limit for application is two years, calculated from the last day of the performance period stipulated in the legal document) shall be applicable to the time limit for a party concerned to apply for recognition and enforcement of legally effective judgments or rulings rendered by foreign courts or foreign arbitral awards." Therefore, the time limit for applicants to file applications with a Mainland court for recognition and enforcement of judgments given by a Hong Kong court should be two years, calculated from the last day of the performance period stipulated in the legal document.

In the case of the HKSAR, the time limit for an applicant to apply to a Hong Kong court for recognition and enforcement of a judgment given by a Mainland court is currently subject to requirements provided in *Mainland Judgments (Reciprocal Enforcement) Ordinance* (Chapter 597) (the "**Mainland Judgments Ordinance**"), which stipulates that the "time limit for applying for registration of a judgment given by a Mainland court shall be two years" (Mainland Judgments Ordinance, Art. 7, para. 2). As a detailed rule to implement the Former Arrangement in the HKSAR, the Mainland Judgments Ordinance reiterates the time limit provided in the Former Arrangement. After the execution of the New Arrangement, however, the HKSAR will amend the Mainland Judgments Ordinance correspondingly or enact a new law to implement the New Arrangement, in which case, the time limit

for applying for recognition and enforcement of a judgment given by a Mainland court may remain to be two years, or it could also be extended to a longer period of time in reference to the Hong Kong local laws.[6]

D. Property Preservation or Enforcement Measures

According to Article 24 of the New Arrangement, a court of the requested place may, before or after accepting an application for recognition and enforcement of a judgment, impose property preservation or mandatory measures according to the law of that place. Therefore, when applying to a Mainland court for recognition and enforcement of a judgment given by a Hong Kong court, an applicant may apply to the Mainland court to impose preservation measures on the respondent's property; when applying to a Hong Kong court for recognition and enforcement of a judgment given by a Mainland court, the applicant may also apply to the Hong Kong High Court to impose preservation measures on the respondent's property.

V. Examination Procedures

A. Examination Criteria

According to the New Arrangement, in order to be recognized and enforced, a judgment should meet the following conditions:

a. **The court which gave the judgment has jurisdiction over the case**. A court of the requested place will refuse to recognize and enforce a judgment if the court considers the court which gave the judgment does not have jurisdiction over the relevant action (Art. 12, para. 1, clause (1)).

According to Article 11 of the New Arrangement, the court of the requested place should consider the original court to have jurisdiction over the relevant action if one of the following conditions is satisfied and if, according to the law of the requested place, the courts of the requested place do not have exclusive jurisdiction over the action:

- at the time the original court accepted the case, the place of residence of the defendant is within the requesting place;
- at the time the original court accepted the case, the defendant maintained in that place a branch or office without separate legal personality, and the action arose out of the activities of that branch/office;
- the action was brought on a contractual dispute and the place of performance of the contract is in the requesting place;
- the action was brought on a tortious dispute and the infringing act was committed in the

[6] According to Art. 4, para. 1 of the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319), the time limit for an applicant to apply to a Hong Kong court for recognition and enforcement of a foreign judgment is 6 years from the date of the foreign judgment.

requesting place;

- the parties to a contractual dispute or other dispute concerning interests in property had expressly agreed in writing that the courts of the requesting place shall have jurisdiction over the relevant proceeding, but where the place of residence of all the parties to the judgment was in the requested place, the requesting place should be the place where the contract was performed or signed, or where the subject matter was situated etc., being a place which has an actual connection with the dispute;

- the parties did not raise objection to the jurisdiction of the original court and appeared before and defended in the proceedings, but where the place of residence of all the parties to the judgment was in the requested place, the requesting place should be the place where the contract was performed or signed, or where the subject matter was situated etc., being a place which has an actual connection with the dispute.

For tortious claims for infringement of an intellectual property right, civil disputes over acts of unfair competition under Article 6 of the PRC Anti-Unfair Competition Law heard by a Mainland court and disputes over passing off heard by a Hong Kong court, however, aside from the above-mentioned place of infringing act (should be in the requesting place) condition, the original court will be considered to have jurisdiction only if, at the same time, the intellectual property right or interest concerned is subject to protection under the law of the requesting place. (Art. 11, para. 3).

For actions that do not meet the above conditions, the original court may also be considered to have jurisdiction if the requested court considers that the exercise of jurisdiction over the relevant action by the original court is consistent with the law of the requested place (Art. 11, para. 4).

b. **The requested court *may* refuse to recognize and enforce a judgment if the action in the original court was contrary to a valid arbitration agreement or a valid jurisdiction agreement entered into by parties on the same dispute** (Art. 13). It is worth noting that under existing Hong Kong law, the requested court *must* refuse to recognize and enforce a judgment if the action in the original court was contrary to a valid arbitration agreement or a valid jurisdiction agreement entered into by the parties. However, under the New Arrangement, to expand the applicable scope of reciprocal recognition and enforcement, the situation was provided as a *discretionary* circumstance based on which the court *may* refuse to recognize and enforce a judgment.

c. **The judgment was given without major procedural errors and was not given as the result of a malicious "parallel lawsuit" filed by the parties concerned, otherwise the judgment should not be recognized and enforced.** According to Article 12 of the New Arrangement, procedural errors mainly include:

- the respondent was not legally summoned in accordance with the law of the place of the original court, or was not given a reasonable opportunity to make representations and

defend the case.

- the judgment was obtained by fraud;
- the judgment was rendered in an action which was accepted by the original court after a court of the requested place has already accepted an action on the same dispute;
- a court of the requested place has rendered a judgment on the same dispute or has recognized a judgment on the same dispute given by another country or place;
- the requested place has made an arbitral award on the same dispute or has recognized an arbitral award on the same dispute made in another country or place.

d. **Finally, the judgment given by the original court must not be contrary to the basic principles of law or the public interest/policy of the requested place**. Where a Mainland court considers that the recognition and enforcement of a judgment given by a Hong Kong court is manifestly contrary to the basic principles of the laws of the Mainland or the social and public interests of the Mainland, or where a Hong Kong court considers that the recognition and enforcement of a judgment given by a Mainland court is manifestly contrary to the basic principles of the laws of the HKSAR or the public policy of the HKSAR, the judgment should not be recognized or enforced (Art. 12, para. 2).

B. Examination Period

The New Arrangement does not stipulate the specific time period for the Mainland and Hong Kong courts to examine applications for recognition and enforcement of judgments, but only stipulates that "the courts shall examine the application for recognition and enforcement as soon as possible and make a decision or order" (Art. 25). The time period for a Mainland court to examine an application for recognition and enforcement of a Hong Kong judgment may refer to Article 14 of the *Regulations on the Recognition and Enforcement of Taiwan Judgments*, which stipulates that "the people's court shall make a decision within six months from the acceptance of an application for recognition and enforcement of a judgment given by a Taiwan Court." No rules currently exist as to the time period for a Hong Kong court to examine an application for recognition and enforcement of a Mainland judgment, and thus the time period may be decided on a case-by-case basis.

C. Examination Results, Reconsideration or Appeal

After examination, a court of the requested place will rule or order recognition and enforcement of a judgment or refuse to do so with respect to the applicant's application. Where a court of the requested place cannot recognize and enforce a judgment in whole, it may recognize and enforce it in part (Art. 19).

Where any party is aggrieved by a decision or an order made by a court of the requested place on an application for recognition and enforcement, the party may, in the case of the Mainland, apply to the Mainland court at the next higher level for review within 10 days from the date of service of the decision or, in the case of the HKSAR, lodge an appeal according to Hong Kong law (Art. 26).

D. Suspension, Resumption and Termination of the Recognition and Enforcement

Proceedings

During a requested court's examination of an application for recognition and enforcement of an effective judgment, if a party has lodged an appeal against the effective judgment (in the case of the HKSAR) or the Mainland court has ruled for retrial for the effective judgment (in the case of the Mainland), the requested court should suspend the recognition and enforcement proceeding. Specifically, if a party has already filed an appeal against an effective judgment given by a Hong Kong court,[7] then upon examination and verification of the situation, the Mainland court should suspend the recognition and enforcement proceeding. After the appeal, if the original judgment is wholly or partly upheld, the recognition and enforcement proceeding should be resumed; if the original judgment is wholly reversed, the recognition and enforcement proceeding should be terminated. Similarly, if a Mainland court has ordered a retrial for the effective judgment, upon examination and verification of the situation, the Hong Kong court should suspend the recognition and enforcement proceeding. After the retrial, if the original judgment is wholly or partly upheld, the recognition and enforcement proceeding should be resumed; if the original judgment is wholly reversed, the recognition and enforcement proceeding should be terminated (Art. 20).

E. Conflict between Recognition and Enforcement Proceedings and Adjudicating Proceedings Regarding the Same Dispute

According to Article 22 of the New Arrangement, if, in the course of adjudicating a civil and commercial case, the court receives an application brought by a party for the recognition and enforcement of a judgment made by the court of the other place in respect of the same dispute, the application shall be accepted, and the action shall be suspended. The action shall be terminated or resumed depending on the examination results in respect of the application for recognition and enforcement of the judgment. However, if in the course of examining an application for recognition and enforcement of a judgment, a party brings another action in respect of the same dispute, the requested court should not accept this action, and should dismiss any such action which has been accepted (Art. 23, para. 1).

Additionally, after the judgment has been wholly recognized and enforced, the court of either side will no longer accept any other action brought by any party concerned in respect of the same dispute (Art. 23, para. 2). For judgments which have not been wholly recognized and enforced, the parties concerned cannot file another application for recognition and enforcement either, but they could bring an action regarding the dispute before the court of the requested place (Art. 23, para. 3).

[7] Strictly speaking, under Hong Kong law, after a legally effective judgment is appealed, it will remain in force during the appeal (until the judgment is overturned by the Court of Appeal). In other words, a judgment given by the Hong Kong court will remain valid and enforceable until it is overturned. This is somewhat similar to the effect of the trial supervision procedure under the Mainland law.

VI. Commencement of the New Arrangement and the Relationship between the New Arrangement and the Former Arrangement

The New Arrangement will commence on the same date in both the Mainland and HKSAR following the promulgation of a judicial interpretation by the Supreme People's Court and the completion of the relevant procedures in the HKSAR. Judgments made by courts of both sides on or after the date of commencement will be subject to the New Arrangement (Art. 29, para. 2). Upon commencement of the New Arrangement, the Former Arrangement will be terminated (Art. 30, para. 1). However, for a "choice of court agreement in writing" within the meaning of the Former Arrangement and signed before the commencement of the New Arrangement, the Former Arrangement remains effective (Art. 30, para. 2).

The New Arrangement is not yet in force and its exact commencement date remains uncertain. However, the legislative process of similar laws may serve as a reference point for the commencement date of the New Arrangement: the Former Arrangement was signed on July 14, 2006 and commenced on August 1, 2008; the *Arrangement on Marriage and Family Matters* was signed on June 20, 2017 and has not yet commenced.

VII. Conclusion and Outlook

In the context of promoting the "Belt and Road Initiative" initiative, the Mainland and HKSAR have accelerated the pace in promoting judicial assistance since 2015. In March 2016, the two sides signed the *Minutes of Talks between the Supreme People's Court and the Department of Justice of the Hong Kong Special Administrative Region on Negotiating Arrangement to Promote Mutual Assistance in Civil and Commercial Matters*, which set the schedule and steps for negotiating and concluding mutual legal assistance. Subsequently, the two sides signed the *Arrangements of the Supreme People's Court for Mutually Commissioned Obtaining of Evidence in Civil and Commercial Cases between the Courts of the Mainland and the Hong Kong Special Administrative Region* in December 2016, and signed the *Arrangement on Marriage and Family Matters* in June 2017. The execution of the New Arrangement is another major breakthrough achieved by the Mainland and HKSAR in the area of mutual legal assistance.

In the future, the Mainland and HKSAR are expected to continue to promote further consultations on certain matters that are not included in the New Arrangement, such as cross-border insolvency assistance and arbitration preservation assistance, and are expected to make substantial progress soon. Although the New Arrangement still awaits to be formulated into local law in the HKSAR through formal legislative procedures and awaits to be formulated into effective judicial interpretations in the Mainland, we have every reason to believe that, in the context of the deepening and accelerating cooperation between the Mainland and HKSAR in the field of mutual legal assistance, the New Arrangement will be successfully implemented in both the Mainland and HKSAR in the near future, which will open a new chapter in reciprocal recognition and enforcement of civil and commercial judgments between the two sides.

2. Rules for Overseas Non-financial Enterprises Issuing Panda Bonds

Author: Financial and Investment Management Department

Following the issuance of the *Interim Measures for Administration of the Issuance of Bonds by Overseas Institutions in the National Interbank Bond Market (《全国银行间债券市场境外机构债券发行管理暂行办法》)* ("**Circular No.16**") by the People's Bank of China ("**PBOC**") and the Ministry of Finance ("**MOF**") on September 8, 2018, the National Association of Financial Market Institutional Investors ("**NAFMII**") officially issued *the Guidelines on Debt Financing Instruments of Overseas Non-financial Enterprises (for Trial Implementation) (《境外非金融企业债务融资工具业务指引（试行）》)* (the "**NAFMII Guidelines**") on January 17, 2019. The NAFMII Guidelines provide specific rules and operational requirements for overseas non-financial enterprises to issue debt financing instruments in the China Interbank Bond Market ("**CIBM**").

We intend to introduce the main contents of the NAFMII Guidelines in this article.

I. Further Clarifying the Requirements for the Registration and Issuance of Panda Bonds by Overseas Non-financial Enterprises

According to the NAFMII Guidelines, the registration requirements and methods of issuing debt financing instruments by overseas non-financial enterprises are generally consistent with those for domestic non-financial enterprises. For example, debt financing instruments issued by overseas non-financial enterprises are also required to be registered with NAFMII and overseas non-financial enterprises may issue debt financing instruments in the same manner with domestic non-financial enterprises as stipulated in the *Rules for the Registration and Issuance of Debt Financing Instruments of Non-financial Enterprises (《非金融企业债务融资工具发行注册规则》)*.

Specifically, the NAFMII Guidelines further clarify the requirements for registration and issuance procedures as follows:

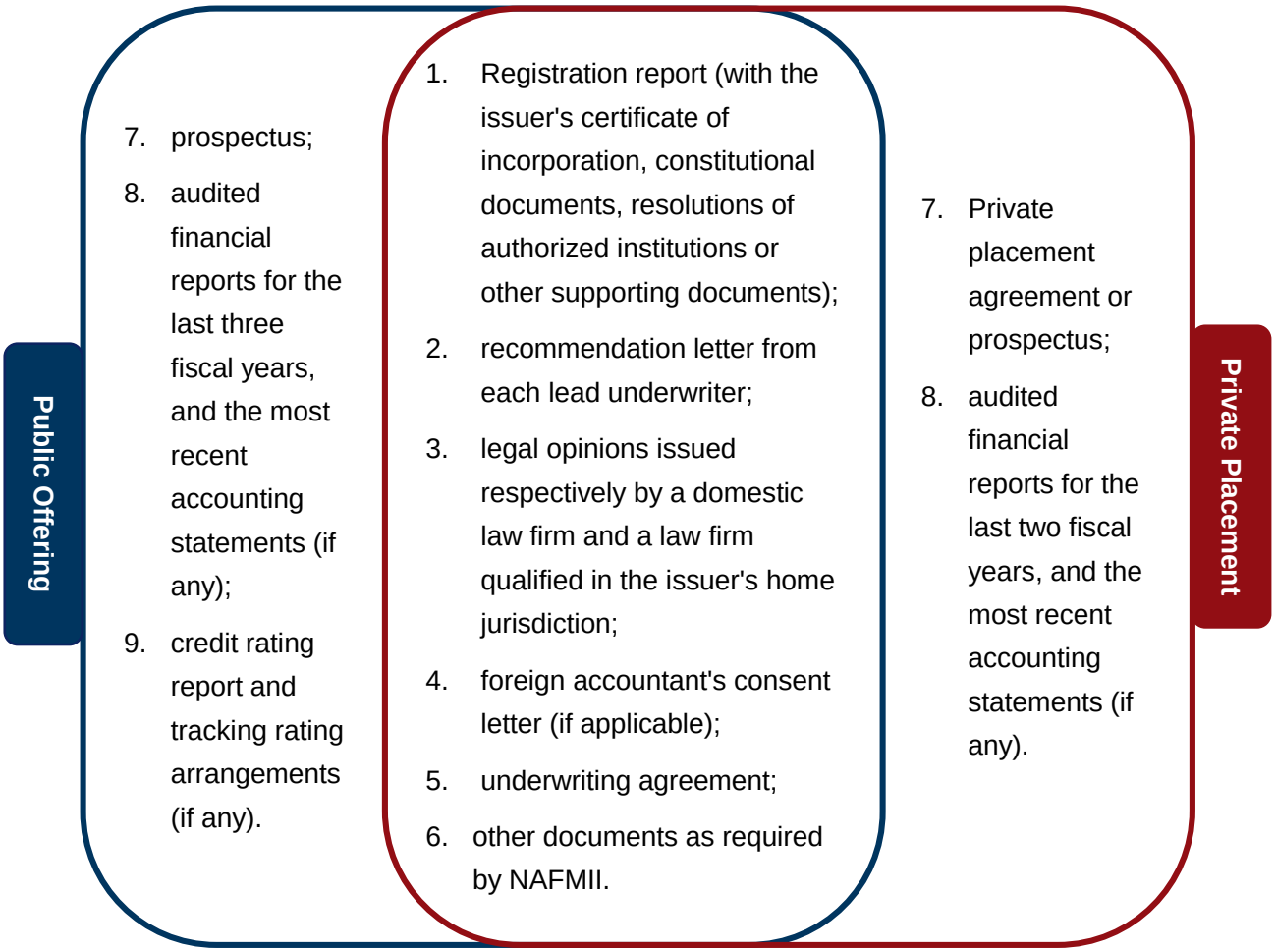
<table>
<tr><th>Time Frame</th><th colspan="3">Procedural Matters</th></tr>
<tr><td>Acceptance of Registration</td><td colspan="3">NAFMII issues a Notice of Registration Acceptance for a period of two years.</td></tr>
<tr><td>Period between Registration and Issuance</td><td colspan="3">If a major event occurs with the overseas non-financial enterprise, the enterprise is required to make a supplemental information disclosure or file with the NAFMII registration meeting for further review.</td></tr>
<tr><td>Issuances</td><td>Public Offering of Debt Financing Instruments</td><td>Private Placement of Debt Financing Instruments</td><td>Super Short-term Commercial Paper, Asset-backed Notes,</td></tr>
</table>

<table>
<tr><td>Time Frame</td><td colspan="3">Procedural Matters</td></tr>
<tr><td></td><td>■ To be issued within 12 months (inclusive) upon the acceptance of registration;
■ If issued after 12 months upon the acceptance of registration, the issuance should be filed with NAFMII in advance.</td><td>■ May be issued within the validity of the registration;
■ If no issuance is made within 12 months upon the acceptance of registration, the first issuance after such 12 months should be filed with NAFMII</td><td>■ If there are other provisions in the relevant debt financing instruments, such provisions shall prevail.</td></tr>
<tr><td>Each Issuance after the Initial Issuance</td><td colspan="3">A written plan for the use of proceeds is required to be submitted to NAFMII at least three business days before the publication of offering documents for each new issuance of debt financing instruments.</td></tr>
</table>

In addition, debt financing instruments issued by overseas non-financial enterprises should be underwritten by financial institutions qualified to act as underwriters for debt financing instruments issued by non-financial enterprises. In particular, the NAFMII Guidelines require that at least one lead underwriter has a subsidiary or branch in the country or region where the overseas non-financial enterprise is incorporated or carries out its principal business, or make other necessary arrangements to ensure that it has the ability to conduct due diligence and other work related to the underwriting of such debt financing instruments.

II. Specifying the Requirements for Registration Documents for Overseas Non-financial Enterprises to Issue Panda Bonds in the CIBM.

The NAFMII Guidelines also specify relevant requirements for registration documents for different issuance methods (including public offerings and private placements):



As shown in the table above, most registration documents for these two issuance methods are the same (items 1 to 6), while the requirements for financial reports and credit rating reports are different.

III. Debt Proceeds Allowed to Be Used Outside of China

The NAFMII Guidelines separately set out the requirements for the use of debt proceeds, and clarify the principles of the use of proceeds from debt financing instruments issued by overseas non-financial enterprises, which include:

- Proceeds can be used within or outside of China according to relevant laws, regulations and regulatory requirements, which provide a clear regulatory basis for overseas non-financial enterprises to transfer proceeds out of China for use offshore;
- Account opening, cross-border settlement, information reporting and other matters related to debt financing instruments issued by overseas non-financial enterprises shall comply with the relevant provisions of the PBOC and the State Administration of Foreign Exchange;
- The use of proceeds shall comply with relevant laws and regulations and national policy requirements, and overseas non-financial enterprises shall strictly perform relevant information disclosure obligations in accordance with the use of proceeds disclosed in the prospectus; in case

of any changes to the use of proceeds, the overseas non-financial enterprise will conduct relevant change formalities and disclose at least five business days prior to such changes.

As mentioned above, the NAFMII Guidelines expressly allow overseas non-financial enterprises to use debt proceeds offshore. However, the specific legal compliance standards for the use of proceeds and the operational procedures for changing the use of proceeds still need to be further clarified.

IV. Further Requirements for Financial Statements of Overseas Non-financial Enterprises

Based on Circular No. 16, the NAFMII Guidelines put forward further requirements for the submission and disclosure of financial statements by overseas non-financial enterprises. That is, for issuers who prepare consolidated statements, in addition to submitting or disclosing their consolidated statements, the NAFMII Guidelines also require them to:

- submit and disclose the standalone financial statements of the parent company; or
- disclose the content in the standalone financial statements of the parent company that may have a material impact on investors' decision-making, and make such information prominent in the issuance documents to draw investors' attention.

It is apparent that NAFMII has become more cautious about the disclosure and examination of financial statements of overseas non-financial enterprises. For overseas non-financial enterprises that prepare consolidated financial statements, investors can have a better understanding of the financial status of the issuer by reviewing the financial statements or major financial matters of the parent company.

V. Information Disclosure

Circular No. 16 provides detailed rules on information disclosures for issuing panda bonds in the CIBM, including but not limited to the principle of authentic, complete and equivalent disclosure, disclosure targets, and requirements for relevant accounting standards and audit requirements. The NAFMII Guidelines further refine the operational rules relating to disclosure matters.

A. Applicable disclosure rules. The NAFMII Guidelines require overseas non-financial enterprises to disclose financial information on a regular basis. Disclosure of information as well as major events during the term of the debt financing instruments should be included in the registration and issuance documents in accordance with the *Rules for Information Disclosure on Debt Financing Instruments of Non-financial Enterprises in the China Interbank Bond Market (《银行间债券市场非金融企业债务融资工具信息披露规则》)* (the "**Information Disclosure Rules**").

B. The language of the disclosure documents. The NAFMII Guidelines provide the following requirements:

Public Offerings	Documents disclosed in the registration and issuance period	Should be in simplified Chinese or have a Chinese version attached
	Information disclosures during the term of the debt financing instruments	In principle, the documents should be in Chinese. Exceptions: ■ If an overseas non-financial enterprise discloses information under Article 26 of the NAFMII Guidelines (i.e. the information to be disclosed in accordance with the Information Disclosure Rules) in other securities markets in English, it shall disclose (i) the English information in the CIBM concurrently or within the shortest reasonable time, and (ii) the Chinese version of the important content within the timeframe specified in the registration and issuance documents; ■ If an overseas non-financial enterprise discloses information under Article 27 of the NAFMII Guidelines (i.e. disclosure of major events during the term of the debt financing instruments) in other securities markets in English, it shall disclose (i) the English information to the CIBM concurrently or within the shortest reasonable time; and (ii) the Chinese version or Chinese abstract within seven business days.
Private Placements	Registration and Issuance	Should be in Chinese or have a Chinese version attached.
	Other documents	Should be disclosed in accordance with the agreement with the targeted investor(s) (in English or Chinese); if there is no such agreement, information should be disclosed by reference to information disclosures for public offerings.

C. Disclosure requirements for credit enhancement agencies. Where an offshore credit enhancement agency provides credit enhancement to the issuer, the relevant information disclosure of the credit enhancement agency shall be in accordance with the requirements to such issuer. However, the information to be disclosed will be separately prescribed by NAFMII where an offshore parent company provides an unconditional, irrevocable joint liability guarantee for its wholly-owned subsidiary.

VI. Applicable law

Prior to the issuance of Circular No.16, the *Interim Measures for Administration of Issuing Renminbi*

Bonds by International Development Institutions (《国际开发机构人民币债券发行管理暂行办法》)[8] explicitly stipulated that any breach of contract or other disputes arising out of or in connection with the issuance of renminbi-denominated bonds within China by an international development institution was to be governed by PRC law. Circular No. 16 does not contain any mandatory provisions relating to the applicable law.

However, the NAFMII Guidelines clearly stipulate that the offering and transaction documents for issuances of debt financing instruments by overseas non-financial enterprises should be governed by PRC law. Based on these requirements, we understand that when overseas non-financial enterprises issue panda bonds, they should follow the requirements of the NAFMII Guidelines and ensure that the transaction documents (including prospectuses, private placement agreements, etc.) are governed by PRC law.

Based on Circular No.16, the NAFMII Guidelines further supplement and refine the special provisions for the issuance of panda bonds in the CIBM by overseas non-financial enterprises, and provides guidance for overseas non-financial enterprises to issue panda bonds (in particular, specific operational requirements for registration documents and subsequent disclosure documents are provided). Moreover, the requirements of the NAFMII Guidelines are consistent with the existing rules on the issuance of debt financing instruments by non-financial enterprises, which indicates that the issuance rules for domestic issuers and foreign issuers should be as consistent as possible. This will facilitate the effective supervision and management of debt financing instruments issued by domestic or overseas non-financial enterprises.

Please kindly note that the NAFMII Guidelines are currently only at the trial stage, which leaves room for further adjustments in the future. Due to different legal requirements for corporate governance in different jurisdictions, certain diversity in overseas non-financial enterprises, and the differences in establishment, registration and constitutional documents between domestic enterprises and offshore enterprises (particularly those incorporated in common law jurisdictions), further clarification is needed as for how to manage and restrict different types of overseas non-financial enterprises as issuers and propose appropriate requirements. We will continue to pay attention to the relevant rules newly issued by the regulatory authorities such as PBOC or NAFMII.

[8] *Interim Measures for Administration of Issuing Renminbi Bonds by International Development Institutions* has been officially abolished by Circular No.16.

3. Patent Lawsuits in Good Faith—Enforcement of Right or Extortion

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In July 2018, several media outlets reported that the Shanghai Municipal Public Security Bureau had made a breakthrough in a case involving the alleged extortion of a pre-IPO company. The criminal suspect in the case was alleged to have threatened to influence the company's initial public offering and unlawfully demanded huge sums of money by means of patent litigation[9].

This news immediately aroused widespread social concern and discussion after it was publicized.

Since the law grants patentees the legal right to file patent infringement lawsuits, how can a patentee be prosecuted for initiating a patent infringement lawsuit that is alleged to be "extortion"? This article discusses several relevant issues.

I. Review of the Case

From March to September in 2017, Li utilized Company X, which he controlled, to initiate a patent lawsuit against Company A on the ground that Company A had infringed the patent rights of Company X; during this time, Company A was planning and preparing for its initial public offering. Company A worried that fighting the lawsuit would affect the process of its public offering, and thus signed a "patent license agreement for implementation" with Company X to reach a settlement with Li for RMB 800,000 and obtained a license that authorized all patent rights and the rights to apply for a patent held or controlled by Company X. Afterwards, Li fabricated the fact that the exclusive license of a patent under the name of Company X had earlier been given to Company Y (Company Y's legal representative is Gao who is Li's sister-in-law; and the shareholders are Li's younger brother and sister-in-law, though the actual controller is Li), and Li's younger brother once again filed a patent infringement lawsuit against Company A in the name of Company Y. During the period, Li designated Gao to provide real-name reporting to the China Securities Regulatory Commission, and Company A reached a settlement with Company Y for RMB 800,000.

Company A reported the incident to the police after its successful initial public offering. Later, Li and others were investigated by the Shanghai police for alleged criminal extortion. In January 2018, Li and his younger brother were detained by the police. On August 24, 2018, the People's Procuratorate of Pudong New Area initiated a public prosecution in court. Li and his younger brother were charged criminal extortion for forcibly demanding public or private property for the purpose of illegal possession and the amount was extremely huge.

The case was tried twice on November 20 and December 12, 2018. The procurator believed that Li threatened patent infringement lawsuits, extorting four companies for more than RMB 2.163 million, and

[9] The Paper News, reporter Li Jiawei, Interns Wang Yucheng, Chen Shuaiqi: "上海破获敲诈拟上市公司案：囤数百"专利"再借诉讼之名勒索", https://tech.sina.com.cn/roll/2018-07-22/doc-ihfqtahi3931838.shtml , latest access time：January 5, 2019.

actually obtaining RMB 1.163 million, which constituted criminal extortion[10], and the procurator also provided as evidence recordings made by the relevant enterprises when they negotiated with Li[11].

II. Analysis and Discussion of the Case

The crime of extortion provided under Article 274 of the PRC Criminal Law has been interpreted to refer to demanding public or private property from a victim by means of threat or coercion for the purpose of illegal possession. Therefore, a determination of whether criminal extortion has been committed is based on two elements: (1) whether the conduct was for the purpose of illegally possessing public or private property (that is, whether the perpetrator had the purpose to take possession of property which does not and should not belong to him or herself); and (2) whether threatening or coercive means were used.

A. Whether for the purpose of illegal possession

Did the criminal suspect in this case fulfill the element of "for the purpose of illegal possession"? In the author's opinion, after Li's first settlement with Company A, the conduct of again filing a patent infringement lawsuit against Company A and benefiting therefrom appears to be "legal" but is in fact illegal. In the first settlement, Company A obtained the licensing with authorization of all patent rights and the rights to apply for a patent held or controlled by Company X through the "patent license agreement for implementation" with Company X; that is to say, Li has already obtained the license fees for all patents and patent applications belonging to Company X under his name from Company A, and it was illegal for Li to again obtain property from Company A through other similar conduct. For example, Li fabricated an exclusive patent license agreement exclusively licensing a related patent of Company X to Company Y held by Li's younger brother, backdated the date of the agreement, and colluded with his younger brother as the exclusive licensee to use the patent to initiate a lawsuit against Company A and demand license fees. Li repeatedly charged the same company with patent license fees, and the patent relating to the second license fee had been included in the license agreement signed in the first settlement. Thus, it can be seen that Li's ultimate goal was not to protect the patent rights, but to illegally possess the property of others, that is, "for the purpose of illegal possession".

We note that the Shanghai police have emphasized the following points: first, the time of the lawsuit was at a critical moment for the initial public offering of the other party; second, in previous patent lawsuits, the patentee had never won in a final court trial; third, Li's companies have no corporate business, their main source of revenue relies on litigation and settlement fees, and the patents are low-tech. However, it is debatable to conclude from these three facts that the patent infringement lawsuit and patent licensing conduct involved in the case were for the purpose of illegal possession.

[10] You Bin: "利用专利进行敲诈勒索案开庭审理情况"，https://mp.weixin.qq.com/s/N9fvBDEjI6vklZuoZuor7A, latest access time: January 9, 2019.

[11] You Bin: "利用专利"敲诈勒索"拟上市公司案第二次庭审情况"，https://mp.weixin.qq.com/s/y4gON9Kf452VMKy5wfxyxQ，latest access time: January 10, 2019.

Firstly, a pre-IPO company should not be the exempt from patent infringement litigation. If the company has committed patent infringement, it should bear the corresponding legal liability. From the patentee's perspective, under the premise of ensuring that the validity of patent rights, it is completely legitimate for the patentee to freely choose the timing of filing a lawsuit against possible infringement.

Secondly, the parties and facts of this patent lawsuit are different from those of the previous lawsuits. Although the previous patent lawsuits had not been won, it cannot be inferred that the alleged infringement in the patent lawsuits involved in this case would also not be established. Whether a patent infringement is established should be determined by the court after trial and should not be decided by the previous patent lawsuits.

Thirdly, although Li's company is a typical NPE (non-practicing entity) as it does not produce related products per se but specializes in the use of self-owned patents to sue others for license fees or compensation. The Patent Law and related laws, however, do not stipulate that the patentee has the right to file a patent infringement lawsuit against others only if implementing the patent by itself.

From another point of view, in recent years, China has continued to strengthen intellectual property rights protections and increased the amount of compensation, and thus it has become normal for enterprises to use patent litigation as a tool to support various commercial activities. The relevant administrative regulations concerning enterprise initial public offerings contain rules on the suspension or the termination of a company's IPO plans due to patent litigation, which clearly provide space for the relevant parties to choose the appropriate timing for litigation. Therefore, it is also worth considering whether the relevant administrative regulations need to be appropriately revised to reduce public investment risk and effectively protect the legitimate interests of listed companies under the current trend of strong protections and high compensation.

B. Whether threatening or coercive means are used

When determining whether the suspect used threatening or coercive means, the recording of the negotiations submitted by the procurator at the trial stage became critical evidence in support of the judgement. If Li and others did use language involving threats, coercion and intimidation, etc., criminal extortion could be further established following cross-examination. The procurator provided an excerpt of the recorded information in court, and asserted that the content of the recording indicated Li's purpose was to use the patents to demand money, focusing on the money rather than the appeal in terms of the patent rights, and to sue during the sensitive period when the relevant company was preparing for its initial public offering. Therefore, the procurator believed that Li's language was coercive in nature[12].

[12] You Bin: "利用专利"敲诈勒索"拟上市公司案第二次庭审情况", https://mp.weixin.qq.com/s/y4gON9Kf452VMKy5wfxyxQ，latest access time: January 10, 2019.

III. Lessons from the Patent Lawsuit Filing

This case has been hotly discussed in both corporate and legal circles immediately after it was publicized by the media. Many viewpoints hold that “patent trolls” should be combated. At the same time, many intellectual property practitioners, experts and scholars have called for the protection of the right of a patentee to legally exercise its patent rights, and believe that civil disputes should be cautiously identified as a crime of extortion.

It is worth noting that the principle of good faith is specifically added in the revision of the Patent Law promulgated by the Standing Committee of the National People's Congress at the beginning of 2019. Patentees are legally required to exercise their rights in good faith, thus establishing the obligation when a patentee exercises its rights from a legal point of view.

We will wait for further trials and court judgments to see whether criminal extortion is established in this case. On the other hand, patent holders should note the following issues if they wish to exercise their patent rights and avoid accusations of “extortion”:

First, in the process of implying the behavior of the potential infringer and negotiating the patent license, it should be noted that a lawyer's letter and license fee required in the patent license contract or the compensation required in the complaint should comply with the law. For example, the patentee should ensure that the patents involved in the case are valid, and avoid obviously illegal conduct such as repeatedly demanding license fees.

Moreover, whether reminding the other party to infringe the patent right in written or verbal form and proposing an invitation of license or requesting for the license fee, it should be noted that the wording should point to the protection of the legitimate rights and interests of the patentee without sounding threatening or coercive.

In conclusion, patentees should be very mindful of the boundary between “exercising rights in accordance with law” and “extortion” and act to reasonably safeguard their legitimate rights and interests.

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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