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CHINA BUSINESS LAW JOURNAL 商法

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不可抗力
Force Majeure

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新技术，新规则

New technologies, new financial game

《商法》五月号刊有“科技”特别系列报道的第一篇。《金融革命》探讨在中国市场乃至整个亚洲地区快速兴起的金融科技（fintech）领域的现状，金融科技将传统金融与现代科技相结合，为人们的生活带来了革命性的改变，尤其是在银行网络覆盖率不高的地区。

有人认为，亚太地区已超越美国与欧洲，成为了金融科技创新的发展中心。不过该领域的激烈竞争才刚刚开始，随着金融科技的不断发展，未来会出现我们现在还无法想象的新事物。目前最受投资者青睐的金融科技领域以面向消费者为主，包括网上支付与借贷，不过金融科技概念所涵盖的范围却不止于此。人工智能、大数据、云计算、区块链、智能合约、智能投顾、监管科技以及保险科技也是该领域不可忽视的话题。

本篇报道亦关注金融科技领域的监管挑战。专家表示，监管机构很难预计有哪些类型的产品和服务会出现、需要怎样的规则加以监管。不过我们仍然可以找到一些散布于现有法律法规中、与金融科技产品或服务的某些方面相关的规定。欢迎读者关注本系列报道的后续文章。

同时，传统的融资途径也不容忽视。《金钱法度》关注中国市场私募股权及风险投资（PE/VC）行业的现状。普华永道的一份报告指出，虽然 2016 年全球 PE/VC 基金募资及投资金额整体有所下降，但是中国市场依然表现强劲，募资及投资金额均创历史新高。

在中国 PE/VC 基金依然活跃的同时，市场监管也在走向成熟。中国证监会与中国证券投资基金业协会发布了一系列规则和文件，进一步规管 PE/VC 投资活动。除了投资方面的知识，基金管理人还应该了解各类的合规事项。

在许多交易中，掌握交易对方的情况都是必须的。《知识就是力量》介绍声誉尽职调查（reputational due diligence）可以如何协助投资者发掘关于交易对方的信息，而这些信息通过其他类型的尽调不易获得。声誉尽调能配合其他类型的尽调，识别出对方自己介绍的情况与其在现实世界中的实际行为之间的任何矛盾之处。本文将分析声誉尽调在并购、反腐败合规、反洗钱等领域的应用。

Our May issue features the first article of a special series on technology. *Fintech revolution* explores the rapid development of fintech – the fusion of traditional finance and modern technology – in China and the wider Asian region. Fintech has brought a financial revolution to the lives of many people, including those without easy access to banks. Some suggest that the Asia-Pacific has surpassed the US and Europe to become the main hub of innovation for fintech, but the fierce competition in this sector has only just kicked off. The ongoing development of fintech may spawn the advent of new innovations that we cannot even imagine for the time being. The most popular fintech sectors are mostly consumer-oriented, such as online payment and lending, but the conception of fintech can and should cover much more than that. Artificial intelligence, big data, cloud computing, blockchain, smart contracts, robo-adviser, as well as regulatory technology (regtech) and insurance technology (insurtech), are also fintech topics that should not be overlooked.

The article also looks at the challenges to regulate the fintech sector. It is very difficult for regulators to foresee what types of products or services may appear, and what rules may be needed for them, say experts. But we can still find stipulations scattered in existing laws or regulations that are related to some aspects of fintech products or services. Watch out for further articles in this special series in future issues.

Meanwhile, traditional ways of financing are no less important. *Money rules* investigates the landscape of private equity and venture capital (PE/VC) investment in China. According to PricewaterhouseCoopers, although the proceeds raised and the amounts invested by PE/VC funds on the whole showed a decline globally in 2016, the Chinese market made a strong showing, with proceeds raised and amounts invested both setting new historical highs. While the activities of Chinese PE/VC funds remain strong, the market is also moving towards more mature regulation. Both the China Securities Regulatory Commission (CSRC) and Asset Management Association of China (AMAC) have issued a number of rules or documents to further keep PE/VC investment in check. Apart from knowledge of investment, fund managers also need to be aware of various compliance issues.

In many transactions, knowledge about the other party is also essential. *Knowledge is power* analyzes how reputational due diligence can help investors to unearth information about the other party that they may not find through other types of due diligence. Reputational due diligence can support other types of due diligence in identifying contradictions between how the other party has presented itself and how it behaves in the real world, says the author. The article focuses on the use of reputational due diligence in the contexts of mergers and acquisitions, compliance for anti-bribery and anti-corruption, and anti-money laundering.

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交易摘要 DEAL DIGEST

投资海外不动产的绊脚石

Stumbling block for overseas property investors

参与近期两宗中国海外不动产投资的法律专家表示，中国人对海外物业的投资仍然保持活跃，但现在必须要克服一些资金调度方面的困难。

最近，中国综合型房地产开发商上置集团收购了位于美国加州旧金山霍华德街 75 号的物业项目。在英国，香港上市的房地产开发公司华人置业集团以 1.749 亿英镑（约 2.278 亿美元）的价格收购了伦敦圣詹姆斯广场 11-12 号物业。

法律专家坦言，在中国投资者目前计划投

Chinese investments in overseas properties are still active but are having to overcome some new capital challenges, according to legal experts involved in two recent deals.

SRE Group, a Chinese integrated real estate developer, acquired 75 Howard, a luxury residential tower at 75 Howard St in San Francisco. In the UK, Chinese Estates Holding, a Hong Kong-listed property developer, acquired 11-12 St James's Square in London for £174.9 million (US$227.8 million).

When Chinese investors plan to invest in American and British real estate at the moment, the impacts of China's restriction on capital outflows cannot be overlooked, said the legal experts.

"We will continue to see significant outbound investment into the US in the medium to long term, but this may slow in the short term as deal fluidity is

资美国和英国的房地产时，中国政府管控资金外流所带来的影响不能忽视。

“就中长期而言，我们会继续看到中国对美国庞大的对外投资规模，但由于当前交易流动性受到中国管控资金外流的影响，这种趋势短期内可能会放缓，”普衡律师事务所香港办事处房地产业务合伙人管荣向《商法》介绍说。

普衡律师事务所旧金山代表处全球房地产业务合伙人 David Hamsher 补充说：“审批流程不太透明，给中国投资者调动完成交易所需资金的能力增添了变数，可能会导致一些卖家转而寻找更有能力落实资金的买家。”

普衡律师事务所就收购霍华德街 75 号物业，担任了上置集团的法律顾问。该所团队由 David Hamsher、管荣及香港房地产业务合伙人 David Blumenfeld 率领。

在英国，活跃的中国房地产投资者主要是高净值个人、家族办公室、香港上市公司（通常由家族控股）、中国大陆地产开发商和国有企业（例如中国的保险公司），孖士打律师事务所伦敦办公室合伙人兼英国房地产业务负责人 Chris Harvey 向《商法》介绍说。

“过去十二个月的趋势是，大部分的交易由私人机构和个人进行的，而非国有企业，”他说。“在某种程度上，这个趋势是中国管控对外投资资金所带来的一个副产品。”

Chris Harvey 表示，英国卖家最为关心的是中国买家在面临外汇管控时能否将资金从中国境内转移出来。“大多数买家都位于香港，从而不受大陆外汇管控的影响。”

CHRIS HARVEY

affected by China's restrictions on capital outflows," Paul Guan, a real estate partner in the Hong Kong office of Paul Hastings, told *China Business Law Journal*.

David Hamsher, a partner in the global real estate practice of Paul Hastings in San Francisco, added: "The somewhat opaque approval process adds potential uncertainty to the Chinese investor's ability to expatriate the capital necessary to close, and may lead some sellers to look to alternative buyers who may have a greater ability to secure such funds."

Paul Hastings represented SRE Group in its purchase of 75 Howard. The firm's team was led by David Hamsher, Paul Guan and Hong Kong real estate partner David Blumenfeld.

In the UK, the active Chinese property investors have been primarily high net worth individuals (HNWIs), family offices, Hong Kong-listed companies (which are often controlled by families), mainland Chinese developers, and state-owned enterprises (such as Chinese insurance companies), Chris Harvey, a partner in Mayer Brown's London office and head of UK real estate, told *China Business Law Journal*.

"The trend in the past 12 months has been that the majority of the deals have been carried out by private organizations and individuals rather than state-owned," he said. "That's partly a by-product of Chinese capital controls on outbound investment."

According to Harvey, what concerns the UK sellers the most is whether the Chinese buyers can get their money out

孖士打律师事务所就收购圣詹姆斯广场11-12号物业，担任了华人置业集团的法律顾问。该所团队由 Chris Harvey 带领。

Chris Harvey认为，在英国公投脱欧之后，有很多市场嗅觉灵敏的买家，尤以香港买家为主，看中并利用了英镑大幅贬值的机会，因为这意味着英国的资产和物业对于中国买家而言便宜了最高达 20%。

“近期香港和中国客户的大部分收购交易都集中在伦敦，”他说。“英国公投脱欧之后，中国买家就在寻找处于困境的资产和争取更低的价格。”但是，Chris Harvey 说，在伦敦市中心的黄金地段，很少有交易涉及陷入困境的资产。“如果中国投资者购买的是伦敦首屈一指的物业，那么他们可以从英镑贬值中获益，但物业本身的价格一直相对抗跌，”他说。“伦敦市中心顶级物业的大多数买家都是中国人，中国买家为了这里的资产不惜互相竞争。”

Chris Harvey 认为，哪种房地产最受欢迎取决于投资者的类型。他表示，高净值个人往往更青睐伦敦西区繁华街道（例如牛津街和邦德街）上的奢侈品零售门店。上市公司往往更多地关注伦敦市中心的写字楼。诸如富力和绿地集团之类的开发商倾向于购买住宅开发地块。“在伦敦之外的地方也有一些投资，也许是在曼彻斯特，但是至少 95% 的投资集中在伦敦市中心，”他说。

而在美国，“投资者会寻找能够提供长期稳健回报的交易，并可能将目光投向二线城市，”管荣表示。与此同时，Hamsher 说，“在旧金山和美国的其他门户城市，投资者对高品质、区位优越的各类型开发项目和经营性物业的需求依然强劲。”

DAVID HAMSHER

管荣 PAUL GUAN

of China. “The majority of the purchasers have been based in Hong Kong and they are not under the Chinese controls.”

Harvey led the Mayer Brown team that advised Chinese Estates Holding on the acquisition of 11-12 St James’s Square.

Harvey said that after Brexit there had been many opportunistic, primarily Hong Kong-based buyers who had taken advantage of the significant devaluation of the British pound, which made assets and properties up to 20% cheaper for Chinese buyers.

“The majority of recent deals for Hong Kong and Chinese clients have been focused on London” he said. “Chinese buyers are looking for distressed opportunities and lower prices after Brexit.” However, Harvey said that in Central London’s prime areas there were very few deals that were distressed. “If Chinese investors buy prime properties in London, they will have currency benefits – i.e., devaluation of the pound – but prices have been relatively resilient,” he said. “The majority of the buyers for prime Central London properties have been Chinese and there is an irony that Chinese buyers compete against each other for the assets here.”

Harvey said the types of properties favoured depended on the type of investor. HNWIs tended to favour luxury retail shops in prime West End streets, such as Oxford Street and Bond Street. Listed companies focused more on central London offices. Developers such as R&F Properties and Greenland Group looked for residential development sites. “There has been some investment out of London, maybe in Manchester, but 95% or maybe more has been focused on Central London,” he said.

In the US, “investors will be looking at deals that provide solid long-term returns, potentially in second-tier cities”, said Guan. Hamsher added that “demand for high-quality, well located development projects and operating properties in San Francisco and other gateway US cities remains strong across product types.”

> “如果中国投资者购买的是伦敦首屈一指的物业，那么他们可以从英镑贬值中获益，但物业本身的价格一直相对抗跌
>
> *If Chinese investors buy prime properties in London, they will have currency benefits – i.e., devaluation of the pound – but prices have been relatively resilient*

重要会议 CONFERENCE

香港律师会成功举办一带一路会议

Belt and Road conference a cross-border success for Law Society of Hong Kong

香港律师会近日召开法律会议，就中国“一带一路”倡议汇集专家意见，并连接沿线的律师团体，为“一带一路”建立坚实的法律基础。

以“一带一路：连接、融合及协作”为主题的会议于5月12日在香港会议展览中心举行。紧接此次会议，香港律师会于第二天晚上举办了成立110周年庆祝晚宴，吸引了香港法律界的精英以及来自23个司法管辖区（包括香港）的律师协会成员。

“香港律师们在一带一路会议上向中国和世界表明，香港稳健的法律制度在一国两制下受到充分尊重，香港法律界已准备好为‘一带一路’贡献力量并收获成功，”香港律师会会长苏绍聪向《商法》表示。

本次会议的一大亮点是，来自23个司法管辖区的38个律师协会签署了《香港宣言》，旨在促进“一带一路”沿线律师界的合作。根据《香港宣言》，香港律师会将与其他律师协会合作，促进各协会会员之间的合作及交流，建立社交及业务转介的联系网络，关注“一带一路”倡议的相关法律问题。

《香港宣言》的签署“表明香港律师界拥有作为超级联系人的能力，推动‘一带一路’倡议下的法律体系趋同，”苏绍聪说，香港律师会将根据宣言的指导原则，促进与其他司法管辖区律师的交流。

在上午的全体会议后，会议又进行了三个分组讨论。第一分组探讨如何应对双边和多边贸易的机遇和挑战。第二分组探讨如何发

The Law Society of Hong Kong's recent conference on the Belt and Road initiative pooled expert insights into issues related to the strategy and connected legal communities from all along the planned trade routes to lay a solid legal foundation for the project.

The conference, entitled “The Belt and Road: A Catalyst for Connectivity, Convergence and Collaboration”, was held on 12 May at the Hong Kong Convention and Exhibition Centre (HKCEC), and run in conjunction with the 110th anniversary of the society's founding at a dinner the following evening that attracted the elite

挥电子工具在国际贸易中的力量。第三分组探讨了解决不同管辖区域之间跨境贸易争端的问题。

苏绍聪说，与会者和发言人表示通过准备和出席会议，他们对“一带一路”有了进一步了解，并开始真正体会到该倡议是一个多边、多赢的机遇。

“当你投入时间来学习新事物，获取更多信息，建立联系人及探索各自的独特性、资源、优势和劣势时，机会就可能来临，无论是利用和发挥国际贸易在电子商务促进下的作用；还是利用税收条约、协议，减少贸易壁垒，推进标准化以扩大项目部署的规模；或是预防和解决‘一带一路’倡议下跨国、跨文化合同与项目中不可避免会产生的问题，”苏绍聪说。

本次会议有来自一带一路沿线 23 个司法管辖区及 44 个律师协会的 650 多名与会者，分别来自澳大利亚、亚美尼亚、文莱、中国大陆、法国、格鲁吉亚、德国、印度、印度尼西亚、日本、吉尔吉斯斯坦、立陶宛、卢森堡、澳门、马来西亚、蒙古、缅甸、巴基斯坦、俄罗斯、新加坡、台湾、英国等。

所有“一带一路”会议代表还参与了 5 月 13 日在香港会议展览中心大会堂举行的香港律师会成立 110 周年庆祝晚宴。香港终审法院首席法官马道立及律政司司长袁国强也参与了此次庆祝活动。

香港的律师分为事务律师和大律师两类。香港律师会是香港事务律师的专业协会，成立于 1907 年。截至 2017 年 3 月底，香港律师会共有会员 10443 人，其中 9076 人目前拥有作为香港事务律师的执业资格证。另外也有主要在 32 个其他司法管辖区获得资格的 1371 名外国律师。

苏绍聪在会上发言
Thomas So speaking at the conference

> “[《香港宣言》的签署] 表明香港律师界拥有作为超级联系人的能力
>
> *[The signing of the Hong Kong Manifesto] bespoke the ability of Hong Kong's legal profession as a 'super connector'*

of Hong Kong's legal community, along with members of law societies from 23 jurisdictions (including Hong Kong).

"Hong Kong lawyers have in this conference shown China and the world that Hong Kong's robust legal system under One Country, Two Systems is well respected, and members of the Hong Kong legal community are well placed to contribute to and gain with the success of the Belt and Road initiative," Thomas So, the president of The Law Society of Hong Kong, told *China Business Law Journal*.

A highlight of the conference was the signing of the Hong Kong Manifesto by 38 law associations from 23 jurisdictions, which is aimed to promote legal co-operation between lawyers from the Belt and Road regions. Under the manifesto, The Law Society of Hong Kong will work with other law associations to promote interaction between their respective members, establish a business networking community, and pay particular attention to laws touching on matters related to the Belt and Road initiative.

The signing of Hong Kong Manifesto "bespoke the ability of Hong Kong's legal profession as a 'super connector', taking the lead to push the uniformity of law under the Belt and Road initiative," said So, adding that his society would also promote more exchanges with lawyers from other jurisdictions as per the guiding principles of the manifesto.

After the plenary session, the conference included three parallel breakout sessions. The first addressed opportunities and challenges for bilateral and multilateral trade. The second looked at how the power of e-tools can be harnessed for international trade, and the final session investigated the issue of resolving disputes in cross-border trade between the diversified jurisdictions.

According to So, participants and speakers said that by preparing for and attending the conference, they had learned more and started to truly appreciate that the Belt and Road initiative was a multi-party, win-win opportunity.

"When you commit to invest time to learn new things, more information, build contacts and explore respective uniqueness, resources, strength and weakness, opportunities will come to you, be it in harnessing and unleashing the power of facilitating international trade through e-commerce; or taking advantage of tax treaties and agreements, reduction of trade barriers and standardization of standards to facilitate scalability of project deployments; [or] on pre-empting and resolving inevitable problems that will arise in many cross-country and cross-cultural contracts and projects that will result from the Belt & Road initiative," said So.

The conference was attended by more than 650 participants from 23 jurisdictions and 44 law associations along the Belt and Road routes, including Australia, Armenia, Brunei Darussalam, mainland China, France, Georgia, Germany, India, Indonesia, Japan, Kyrgyz Republic, Lithuania, Luxemburg, Macau, Malaysia, Mongolia, Myanmar, Pakistan, Russia, Singapore, Taiwan, United Kingdom, and other countries.

All the delegates to the Belt and Road conference also attended The Law Society of Hong Kong's jubilee celebration dinner to mark the society's 110th anniversary, held on 13 May. The dinner was also graced by the Chief Justice Geoffrey Ma Tao-li and Secretary for Justice Rimsky Yuen Kwok-keung.

Hong Kong's legal profession comprises solicitors and barristers. The Law Society of Hong Kong is the professional association for solicitors in Hong Kong and was established in 1907. As of the end of March 2017, the law society had 10,443 members, 9,076 of whom have a current certificate to practise as a Hong Kong solicitor. There are also 1,371 foreign lawyers qualified primarily from 32 jurisdictions.

市场动态 MARKET PULSE

金杜任命新全球负责人

KWM appoints new global leaders

金杜律师事务所近日宣布任命新的全球管理合伙人及全球首席运营官，进一步整合并加强其跨区域法律业务。

Sue Kench 将从 2017 年 6 月 1 日起担任其全球管理合伙人。“亚洲已崛起成为与美国和欧洲并驾齐驱的第三个全球经济重心，于金杜而言，我们有优势帮助我们的客户获益于此，” 她向《商法》介绍说。

“就具体的市场机遇而言，有很多与金杜的专业知识、客户的愿望相一致的机遇，如‘一带一路’倡议、分布式能源、人民币国际化，并且随着中国企业的全球化，我们仍然看到中国企业在出境并购方面的长期及短期机遇，” 她说。

“在具体行业方面，我们专注于基础设施、科技和电信、医疗卫生、农业企业、金融服务、电子商务、能源和资源等领域。”

Sue Kench 自 2013 年开始担任金杜澳大利亚管理合伙人，并且是该所国际执行委员会和国际管理委员会的成员。

作为新的全球管理合伙人，“我着眼于发挥公司优势，即我们在亚洲法律服务的广度和深度，以及我们如何利用这种优势来帮助亚洲客户走向海外，或帮助国际客户在亚洲做生意，” 她表示。

Sue Kench 表示金杜律师事务所在中国大陆和澳大利亚均处于领先地位，在香港也有强大的实力。“现在的挑战是如何将个体优势整合，使得整体力量大于部分之和，” 她说。金杜在欧洲和中东的办公室也会协助实现这一目标，她补充道。

为进一步促进区域法律业务的一体化，金杜律师事务所还设置了 “全球首席运营官” 这个新的职务。金杜律师事务所北京和香港办公室合伙人李孝如将担任金杜所首个全球首席运营官。

“全球首席运营官的角色是为了督导律师事务所的全球业务，推动金杜在不同区域的法律业务实现更高程度的一体化，在律所内部建立更密切的关系，使律所能够为全球客户提供更统一的服务，” 李孝如向《商法》说。“这个角色至关重要，因为律所整合是当前我们全球范围内的首要任务。”

李孝如目前是金杜国际管理委员会和中国管理委员会的成员。

King & Wood Mallesons (KWM) recently decided on the firm's new global managing partner and global chief operating officer (COO) to further integrate and strengthen the firm's regional practices.

Sue Kench will take over as the firm's new global managing partner from 1 June 2017. "For KWM, we are extremely well positioned to help our clients benefit from the rise of Asia as the world's third 'global economy centre of gravity', alongside the US and Europe," Kench told *China Business Law Journal*.

"In terms of particular market opportunities, there are many that align to our firm's expertise and our client's aspirations such as China's Belt & Road initiative, distributed energy, renminbi internationalization, and we continue to see short and long-term opportunities in outbound M&A as Chinese companies globalize," she said.

"In terms of specific sectors, we are focused on infrastructure, technology and telecommunications, health, agribusiness, financial services, e-commerce, and energy and resources."

李孝如 RUPERT LI

Kench has held the role of KWM's chief executive partner, Australia, since 2013, and is a member of the firm's global executive committee and international management committee.

As the new global managing partner, "my focus is on playing to the firm's strengths, which is the quality of our depth and breadth in Asia, and how we leverage this to support our Asian clients as they go offshore, or international clients as they do business in Asia," she said.

Kench said KWM has the leading presence in mainland China and Australia, and also a strong presence in Hong Kong. "The challenge now is to harness the individual strengths of these practices into something that is greater than the sum of the parts," she said, adding that the firm's offices in Europe and the Middle East would also help achieve this target.

With the vision to foster greater integration of its regional practices, KWM has also created a new role of global chief operating officer. Rupert Li, a partner of KWM in Beijing and Hong Kong, has been installed as the first global COO of the firm.

"The Global COO role was established to oversee the firm's global operations and drive greater integration of the KWM's regional practices to create closer connections across the firm and enable the firm to provide a more unified service to global clients," Li told *China Business Law Journal*. "This role is critical as integration is our number one current global priority."

Li is currently a member of the firm's international management committee and China management committee.

SUE KENCH

市场动态 MARKET PULSE

年利达新添两位资深合伙人

Linklaters hires two senior partners

孟生和 Andrew Ruff 加入年利达律师事务所，分别担任该国际所的中国公司法业务、项目团队的合伙人。

孟生是资深并购专家，拥有超过 25 年的经验，其中包括 18 年的合伙人经验。他具备跨境并购、项目开发和项目融资方面的专业知识。他有纽约和巴黎的律师执业资格，并具备为境内外公司在不同行业进行并购提供法律服务的相关经验。

Andrew Ruff 为资深项目团队律师，有超过 16 年在中国大陆、香港和台湾地区的能源基础设施投资和项目融资交易的相关经验。他加入了由四名合伙人组成的中国项目团队，该团队专注于高价值的对外能源和基础设施投资，以及中国金融机构的项目融资及其他结构性融资。

ANDREW RUFF

孟生 SIMON MENG

Simon Meng and Andrew Ruff have joined Linklaters as partners in the international law firm's China corporate practice and project team, respectively.

Meng is a senior M&A expert with more than 25 years of experience, including 18 years as a partner. He has expertise in cross-border M&A, project development and project finance work, is dual qualified in New York and Paris.

Ruff is a senior projects lawyer with more than 16 years of experience in mainland China, Hong Kong and Taiwan, having worked on energy infrastructure investments and project finance deals. He has joined a team of four partners in the China projects team that focuses on high-value outbound transactions in energy and infrastructure investments, and on project and other structured financings from Chinese financial institutions.

市场动态 MARKET PULSE

谢尔曼·思特灵新增并购法律专家

M&A PARTNER JOINS SHEARMAN & STERLING

陈力近期加入了谢尔曼·思特灵律师事务所北京代表处。此前，她曾担任艾金·岗波律师事务所合伙人，主要为中国境外交易提供法律服务。

陈力曾为重要的电力、矿业、工业企业和私募股权投资机构在涉及中国企业的公私合并、转让以及公司交易、融资提供法律服务，重点关注中国企业的境外收购和投资。

在涉及中国的并购方面，陈力服务过的客户遍布于自然资源、医疗保健、娱乐、替代能源、电讯、房地产和公用事业等多种行业。

Chen Li recently joined Shearman & Sterling as a mergers and acquisitions (M&A) partner in Beijing. Chen was previously a partner with Akin Gump Strauss Hauer & Feld, where she focused on China outbound transactions.

Chen has represented major power, mining and industrial companies and private equity firms in China-related public and private acquisitions and dispositions, as well as corporate transactions and financings, with a focus on outbound acquisitions and investments by Chinese enterprises.

She advises clients on China-related M&A across industries including natural resources, healthcare, entertainment, alternative energy, telecoms, real estate and public utilities.

陈力
CHEN LI

市场动态 MARKET PULSE

安杰再添资深专利专家

Veteran patent lawyer joins AnJie

资深专利法专家宋献涛近日以合伙人身份加盟安杰律师事务所北京办公室。宋献涛的主要执业领域为电学工业相关专利法，包括专利起草、起诉、无效、诉讼和咨询等服务。

宋献涛为包括高通、英特尔、美光科技及飞利浦在内的跨国公司担任专利起诉、侵权及专利方面的法律顾问。宋律师曾代表无效请求人或专利权人参加多起无效案件，曾经代表原告或被告参加多起诉讼案件。

宋献涛就许多专利法的理论问题和案例进行了研究，还以特邀专家身份参加了北京市高级人民法院、国家知识产权局、北京市知识产权局的课题项目和专家意见征求会。

Steve Song recently joined AnJie Law firm as a partner in Beijing. His practice focuses on patent law relating to electrical and mechanical arts, including patent drafting, prosecution, invalidation, litigation and counseling.

Song has advised multinationals such as Qualcomm, Intel, Micron and Philips on patent prosecution, infringement and validation matters. He has represented invalidation petitioners and patentees in invalidation cases, and plaintiffs or defendants in litigation cases. Song was invited as an expert to be involved in the research projects and seminars of the Beijing High Court, State Intellectual Property Office of China (SIPO), and Beijing Intellectual Property.

宋献涛 STEVE SONG

市场动态 MARKET PULSE

贝克·麦坚时和奋迅扩大联合经营

BAKER MCKENZIE, FENXUN EXPAND JOINT OPERATION

贝克•麦坚时律师事务所和奋迅律师事务所在上海进一步发展两者共同设立的联营办公室，作为该发展战略的一部分，赵希尧近日加入了奋迅律师事务所，担任资深税务顾问。

赵希尧重点关注全球税收战略、结构和转移定价。他在高科技、消费品、电子商务、工业市场、资源、工程与建筑、房地产、娱乐和制药等领域都有相关经验。

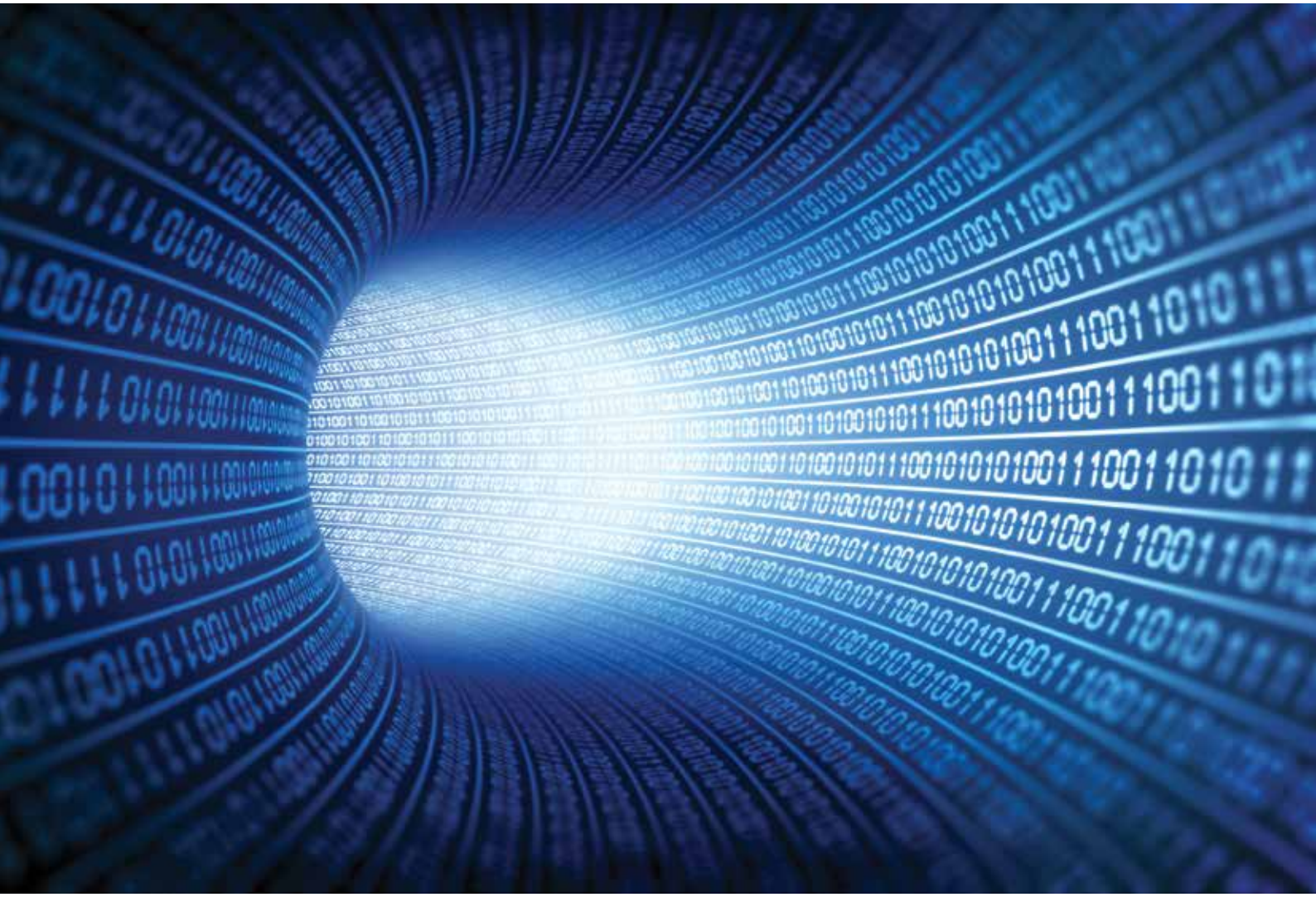
在加入奋迅律师事务所前，赵希尧曾在华为担任消费品业务部门与电子商务业务的全球税务总监。在他的职业生涯中，他曾在美国和中国跨国公司以及四大会计师事务所中担任过重要职务。他曾为中国企业在美国和全球的境外投资提供税务规划和咨询，并在外国对华投资的入境税结构、汇回税和退出规划等方面拥有相关经验。

Abe Zhao recently joined FenXun Partners as international tax director as part of Baker McKenzie and FenXun Partners' strategy to further develop their joint operation in Shanghai.

Zhao's role will focus on global tax strategy, structures and transfer pricing. He is experienced in areas including high-tech, e-commerce, industrial markets, resources, engineering and construction, real estate, entertainment and pharmaceuticals sectors.

Zhao joined FenXun from Huawei, where he was a global tax director for consumer business group and e-commerce. Throughout his career, he has held a number of key roles in-house with US and PRC multinational companies, as well as with the big four accounting firms. He specializes in tax planning and advisory for outbound investment by Chinese companies in the US and globally, and inbound tax structuring, repatriation and exit planning for foreign investment into China.

赵希尧 ABE ZHAO



网络安全 CYBERSECURITY

草案规定要求对境内数据出境进行安全评估

Draft rules impose security check on outbound transfer of local data

将于2017年6月1日生效的中国新《网络安全法》引入的数据本地化要求引发了在华跨国公司的质疑和担忧。

为了实施数据本地化的要求，国家互联网信息办公室（国家网信办）于2017年4月11日发布了《个人信息和重要数据出境安全评估办法（征求意见稿）》（《草案》）公开征求意见。

China's new Cybersecurity Law, effective from 1 June 2017, introduced a local data residency requirement that has raised questions and concerns among multinational companies operating in the country.

To implement the local data residency requirement, the Cyberspace Administration of China (CAC) released a draft Measures for Security Assessment of Outbound Transmission of Personal Information and Important Data on 11 April 2017 to solicit public comments.

The Cybersecurity Law imposed an obligation on operators of "critical information infrastructure (CII)" to store "personal information and other important data collected and generated during

《网络安全法》对“关键信息基础设施”的运营者施加了存储“在中华人民共和国境内运营中收集和产生的个人信息和重要数据”（境内数据）的义务，并要求关键信息基础设施运营者在向境外提供该等数据之前进行安全评估。不过，《草案》似乎将数据本地化要求的适用范围由关键信息基础设施的运营者扩大到了全部的“网络运营者”。

《草案》重复了《网络安全法》对“网络运营者”的定义。“网络运营者”是指网络的所有者、管理者和网络服务提供者。根据这个宽泛的定义，可以说在中国使用连接到通信网络的计算机系统的实体都会被认为是网络运营者，因此都需要遵守《网络安全法》规定的数据本地化要求。如果最终按照《草案》执行，事实上所有在中国设立并且在经营活动中使用网络的实体都会被要求在中国存储境内数据的备份。

安全评估

根据《草案》，如果网络运营者因业务需要，确需向境外提供境内数据的，网络运营者应当遵循“公正、客观、有效”的原则进行安全评估。

《草案》规定了两类安全评估：自行组织的评估和政府组织的评估。作为基本原则，网络运营者必须在数据出境前，自行组织对数据出境进行安全评估（除非触发政府组织的安全评估），并对评估结果负责。

如果出境数据存在以下情况之一的，网络运营者应报请行业主管或监管部门组织安全评估：（1）含有或累计含有 50 万人以上的个人信息；（2）数据量超过 1,000GB；（3）包含核设施、化学生物、国防军工、人口健康等领域数据，大型工程活动、海洋环境以及敏感地理信息数据等；（4）包含关键信息基础设施的系统漏洞、安全防护等网络安全信息；（5）关键信息基础设施运营者向境外提供个人信息和重要数据；（6）其他可能影响国家安全和社会公共利益，行业主管或监管部门认为应该评估。《草案》规定行业主管或监管部门组织的安全评估，应当于六十个工作日内完成，并报国家网信部门。

虽然现行法律和法规已经对某些领域的数据（包括人口健康和敏感地理信息数据）出境进行了限制，但《草案》似乎显著扩大了政府组织的安全评估要求的适用范围。首先，

operations within China” (local data) and requires that CII operators undertake security assessment before transferring such data abroad. The draft measures, however, seem to extend the applicability of the local data residency requirements from CII operators to all “network operators”.

The draft measures replicate the definition of “network operator” stipulated under the Cybersecurity Law. “Network operators” refers to owners and operators of networks, as well as network service providers. Based on this broad definition, arguably, any entity in China that uses computer systems connected to communication networks could be considered a network operator, and therefore would be subject to the local data residency requirement stipulated under the Cybersecurity Law. Should the draft measures be implemented as is, virtually all entities established in China that access and use the internet in the course of business operations could be required to keep a copy of local data in China.

SECURITY ASSESSMENT

Under the draft measures, if a network operator seeks to transfer local data overseas for business needs, it must undergo a security assessment in accordance with the general principles of “fairness, objectiveness and effectiveness”.

The draft measures provide two types of security assessments: self-assessment; and government-administered assessment. As a general principle, network operators must conduct a security self-assessment before transmitting local data overseas (unless a government-administered security assessment is triggered) and be responsible for the results of the assessment.

A government-administered security assessment is triggered if the intended outbound data transmission involves any of the following circumstances: (1) the data to be transmitted abroad involve personal information of 500,000 or more persons in each transmission or in aggregate; (2) the volume of data to be transmitted exceeds 1,000 GB; (3) the data concern areas such as nuclear facilities, chemical biology, national defence, population health, large-scale engineering activities, marine environment and sensitive geographic information; (4) network security data relate to CII, including system vulnerabilities, security protection and other cybersecurity data; (5) the export of personal information and important data by CII operators; or (6) other circumstances that may affect national security or public interests. The draft measures provide that a government-administered security assessment should be completed by the relevant industry regulator within 60 working days and be reported to the CAC upon completion.

While there are already industry-specific restrictions on cross-border transfers of certain categories of data (including population health information and sensitive geographic information data) under existing laws and regulations, the draft measures seem to significantly expand the applicability of the government-administered security assessment requirement. First, the draft measures introduce quantitative thresholds (i.e., 500,000 persons or 1,000 GB) as triggers for the government-administered security assessment, which appear to be relatively low. Second, no specific industries or business sectors are specified in respect of the proposed quantitative thresholds, which would potentially cover companies in a broad range of industries and sectors. Third, broadly defined under the Cybersecurity Law, the term CII is not further clarified under the draft measures. Finally, there's a catch-all category of data that may affect “national security and public interests”, which gives the CAC considerable additional discretion.

《草案》在触发政府组织的安全评估情形中增加了数量标准（即50万人或者1,000 GB），这似乎是比较低的标准。其次，拟定的数量标准没有明确的行业或业务领域限制，这可能会覆盖许多行业和领域的公司。第三，《草案》并没有进一步对《网络安全法》下的宽泛规定的“关键信息基础设施”进行澄清。最后，《草案》的兜底条款涵盖了可能影响“国家安全和社会公共利益”的数据，这给国家互联网信息办公室相当大的自由裁量权。

根据《草案》，自行组织的或者政府组织的数据出境安全评估应重点评估以下内容：(1) 数据出境的必要性；(2) 出境数据的数量、范围、类型及敏感程度等；(3) 数据接收方的安全保护措施、能力和水平，以及所在国家和地区的网络安全环境等；(4) 数据出境及再转移后被泄露、毁损、篡改、滥用等风险；(5) 数据出境及出境数据汇聚可能给国家安全、社会公共利益、个人合法利益带来的风险。

此外，网络运营者应根据业务发展和网络运营情况，每年对数据出境至少进行一次安全评估，及时将评估情况报行业主管或监管部门。除了每年进行安全评估外，网络运营者应当在发生以下情形时重新进行安全评估：(1) 当数据接收方出现变更，或者数据出境目的、范围、数量、类型等发生较大变化，或者 (2) 数据接收方或出境数据发生重大安全事件。进行年度安全评估的要求有些令人困惑，因为这可以被解释为只要网络运营者对个人信息和重要数据出境自行进行了安全评估，那么除非并直至触发了《草案》规定的新的安全评估情形，否则该自行安全评估对于数据出境就足够了。

《草案》规定，行业主管或监管部门负责

Under the draft measures, a security assessment, be it self-assessment or government-administered assessment, should focus on the following aspects: (1) the necessity of the outbound data transmission; (2) the volume, scope, type and sensitivity of local data to be transferred abroad; (3) the measures and ability of the recipient to ensure data security, as well as the cybersecurity environment of the country or region where the data recipient is located; (4) the risk of leakage, destruction or abuse of the data following the outbound transfer; and (5) possible risks that the outbound data transmission can pose to national security, public interests and lawful interests of individuals.

Furthermore, a network operator must, based on its business development and network operation status, conduct a security assessment on outbound data transmission at least once a year and report the assessment results to the relevant industry regulator. In addition to an annual security assessment, a network operator is required to conduct a new security assessment each time (a) there is a change in the data recipient, or significant change in the purpose, scope, volume or type of the outbound data transmission; or (b) there is a major security incident involving the data recipient or the data transmitted abroad.

The requirement on annual security assessment is quite confusing as it may be interpreted to mean that as long as a network operator has conducted the security self-assessment on outbound transmission of personal information and important data, such security self-assessment would be sufficient for its outbound data transmission unless and until the new security assessment is triggered as stipulated under the draft measures.

The draft measures provide that industry regulators must be responsible for organizing and administering government-administered security assessments. Where such an assessment is triggered but a competent industry regulator cannot be identified, the CAC must take charge of the assessment.

The term “important data” is not defined under the Cybersecurity Law, which has caused great concern given the local data residency requirement. The draft measures have clarified that “important data” refers to data that are closely related to national security, economic development and public interest. While it is useful to understand that coverage is not as broad as originally feared, the draft measures also refer to certain relevant national standards and identification guidelines for important data, suggesting that the specific scope of important data would be subject to further legislation.

> “网络运营者应……每年对数据出境至少进行一次安全评估，及时将评估情况报行业主管或监管部门
>
> *A network operator must ... conduct a security assessment on outbound data transmission at least once a year and report the assessment results to the relevant industry regulator*

组织和管理安全评估度工作。如果需要进行评估但行业主管或监管部门不明确的，由国家网信部门组织评估。

《网络安全法》没有对“重要数据”进行定义，由于数据本地化的要求，这引起了许多关注。《草案》澄清了“重要数据”是指与国家安全、经济发展，以及社会公共利益密切相关的数据。虽然了解到“重要数据”的范围没有此前担心的那么广是很有用的，但是《草案》也规定了参照国家有关标准和重要数据识别指南，这表明重要数据的具体范围会受限于进一步的法律规定。

提前同意

《网络安全法》笼统地要求网络运营者应当向被收集者明示收集、使用个人信息的目的、方法和范围，并且取得被收集者同意。与该一般性规定一致，《草案》规定为了进行个人信息出境，网络运营者必须向个人信息主体说明数据出境的目的、范围、内容和接收方（及接收方所在国家或地区），并经其同意。如果个人信息主体是未成年人，其个人信息出境须经其监护人同意。

鉴于云技术的广泛使用以及许多企业在地理上的扩展，该等同意要求增加了现实挑战和障碍。比如，网络运营者是否在每次个人信息出境时都必须向个人信息主体说明并取得个人信息主体的同意，这一点并不完全清楚。此外，年龄核查可能也会是一个挑战，具体要看如何实际执行该要求。在涉及到公司客户时，要网络运营者要求公司客户的联系人就为了商业目的向境外提供其个人信息（姓名、电话号码和 / 或电子邮箱地址）做出单独的同意是非常麻烦而且不现实的。更广泛地说，鉴于该提前同意要求，为了保证合规性，需要将在境内收集的个人信息传输出境的网络运营者，应当审查和修改现行隐私政策或声明。

禁止出境

根据《草案》，存在以下情况之一的，数据不得出境：（1）个人信息出境未经个人信息主体同意，或可能侵害个人利益；（2）数据出境给国家政治、经济、科技、国防等安全带来风险，可能影响国家安全、损害社会公共利益；（3）其他经国家网信部门、公安部门、安全部门等有关部门认定不能出境的。

ADVANCE CONSENT

The Cybersecurity Law generally requires that network operators shall inform data subjects of the purpose, method and scope of collection and use of personal data and obtain data subjects' consent. In line with this general requirement, the draft measures require that in order to transmit personal information overseas, a network operator must inform the data subjects of the purpose and scope of the outbound data transmission, the content and the recipient(s) (including the country(ies) or region(s) where the recipient(s) are located) of the information transmitted, and obtain consent from the data subjects. Where the data subject is a minor, the consent of the data subject's guardian is required for the outbound transmission of the data subject's personal information.

> “鉴于云技术的广泛使用以及许多企业在地理上的扩展，[提前同意要求] 增加了现实挑战和障碍
>
> *[The advance consent] requirement raises practical challenges and impediments, given the wide adoption of cloud technology and geographic spread of many businesses*

This consent requirement raises practical challenges and impediments, given the wide adoption of cloud technology and the geographic spread of many businesses. For example, it is not entirely clear if a network operator must inform and obtain consent from data subjects each time it transmits personal information abroad. Further, age verification could be a challenge depending on how the requirement is actually enforced. Also, when dealing with corporate customers, it would be quite burdensome and impractical for network operators to request contact persons of corporate customers to give a separate consent on transmitting their personal information (name, phone number and/or email address) abroad for business purposes.

In light of this advance consent requirement, network operators with a need to transmit abroad personal information collected within China should review and amend their existing privacy policies or statements in order to ensure compliance.

PROHIBITIONS ON TRANSMISSION

Under the draft measures, transmission of local data is prohibited under the following circumstances: (a) a personal information data subject has not consented to transmission of his/her personal information out of China, or the transmission could infringe on the data subject's interests; (b) the intended outbound data transmission would create a security risk in terms of national politics, the economy, science and technology, or national defence, etc., and could affect national security or harm the public interest; and (c) a relevant authority such as the CAC, public security authority or national security authority, etc., determines that the data may not be transmitted abroad.

资本市场 CAPITAL MARKETS

香港证券监管机构对违反披露要求态度强硬

HK securities regulator stays tough on disclosure breaches

香港市场失当行为审裁处于2017年4月5日裁定美亚控股有限公司和九名现任和前任高层人员因没有按照《证券及期货条例》的规定履行披露义务而被判处罚款合计1020万港币，并且被撤销其担任上市法团的董事或参与管理上市法团的资格，最长20个月。有关的问题包括未披露影响美亚控股的部分审计问题，并且在三周之后才披露核数师的辞职情况。

这项近期的决定表明了审裁处已经准备好对违反法定公司披露规定的行为进行严格的制裁。上市公司的管理人员或高管人员有采取一切合理措施，以确保设有适当保障措施防止违反上市公司披露要求的法定职责。

早在2017年2月，审裁处对精熙国际（开曼）有限公司及其行政总裁和财务总监就其违反披露要求进行了处罚。审裁处认定精熙国际延误13周才披露重大亏损的情况是由于其管理人员罔顾后果的行为而造成的。精熙国际和行政总裁被各自罚款100万港币。

与精熙国际案相比，审裁处在美亚控股案中对更大范围的高管人员进行了处罚。审裁

The Market Misconduct Tribunal (MMT) on 5 April 2017 fined Mayer Holdings and nine of the company's current and former senior executives a total of HK$10.2 million (US$1.3 million) for their breaches of the disclosure obligations under the Securities and Futures Ordinance (SFO) and disqualified them from being directors or being involved in the management of a listed corporation for up to 20 months.

处对一位前任执行董事和一位前任公司秘书及财务总监分别处以 150 万港币的罚款，并被撤销担任上市法团的董事或参与管理上市法团的资格，为期 20 个月。审裁处还对其他执行董事和非执行董事分别处以 90 万港币的罚款，并撤销资格为期 12 个月。

审裁处的决定提醒上市公司及其管理人员需要注意其个人和集体职责。

美亚控股案

美亚控股在香港交易所主板上市，其股份自 2012 年 1 月起暂停买卖。2012 年 4 月至 8 月期间，美亚控股的核数师多次就其在审核公司截至 2011 年 12 月 31 日的年度财务报表中发现的问题与公司的管理层沟通。

就未获解决的审计问题，2012 年 8 月，核数师向公司管理层表示，如果有待处理的审计问题未获解决，核数师只能发表有保留的审计意见。美亚控股或其董事没有就这些有待处理的审计问题向核数师提出有建设性的回复。

2012 年 12 月 27 日，美亚控股的董事会和审计委员会收到了核数师的辞职信。

审裁处认定，核数师的辞职、有待处理的审计问题以及可能有保留意见的审计报告都是关于美亚控股的具体信息，在关键时间属于股价敏感资料并且非普遍为公众所知。这些信息也会被投资者消极看待，并且足够影响美亚控股的股价。

> 审裁处的决定提醒上市公司及其管理人员需要注意其个人和集体职责
>
> *The MMT decision serves as a reminder that listed companies and their officers need to be mindful of their ... responsibilities*

不过，美亚控股直到 2013 年 1 月 23 日才披露核数师的辞职以及有待处理的审计问题的简要资料。审裁处认为该等延迟超过了合理可行的时间，美亚控股违反了《证券及期货条例》第 307B 条的披露要求。

审裁处认定美亚控股的管理人员没有采取合理措施，以确保设有适当保障措施防止美亚控股违反上市公司披露要求。因此，九名管理人员违反了《证券及期货条例》第 307G(2)(b) 条规定的披露要求。

The relevant breaches included failure to disclose certain audit issues affecting Mayer and a delay of more than three weeks in disclosing the auditors' resignation.

This recent decision demonstrates the MMT's readiness to impose tough sanctions for breaches of the statutory corporate disclosure laws. Officers or senior management of listed companies are under statutory duties to take all reasonable measures to ensure that proper safeguards exist to prevent the breach of disclosure requirements by listed companies.

Earlier in February 2017, the MMT sanctioned another listed company, Yorkey Optical International (Cayman), its CEO and financial controller for their breaches of the disclosure requirements. The MMT found that there was a 13-week delay in Yorkey's disclosure of its material losses as a result of the reckless conduct of its officers. The company and the CEO were each fined HK$1 million.

Compared with the Yorkey case, the MMT sanctioned a wider range of senior management in the Mayer case. The MMT fined a former executive director and the former company secretary (also the then financial controller) HK$1.5 million each and disqualified them from being a director or being involved in the management of a listed corporation for 20 months. The MMT also fined the other executive directors and non-executive directors HK$900,000 each and imposed a disqualification order for 12 months.

The MMT decision serves as a reminder that listed companies and their officers need to be mindful of their individual and collective responsibilities.

THE MAYER CASE

Mayer was listed on the main board of the Hong Kong Stock Exchange and trading in its shares has been suspended since January 2012. Between April and August 2012, Mayer's auditors repeatedly raised with the management issues identified in the course of auditing Mayer's financial statements for the year ended 31 December 2011.

In view of the outstanding audit issues, in August 2012, the auditors indicated to the management that they would have to qualify the audit opinion if the outstanding audit issues were not resolved. No constructive response was provided by Mayer or its directors to the auditors to address those outstanding audit issues.

On 27 December 2012, Mayer received a resignation letter from the auditors which was addressed to the board and the audit committee.

The MMT found that the auditors' resignation, the outstanding audit issues together with the potential qualified audit report were specific information regarding Mayer, price sensitive and not generally known to the public at the material time. The information would also have been viewed negatively by the investors and was of sufficient gravity to affect the share price of Mayer.

However, Mayer only announced the auditors' resignation together with brief details of the outstanding audit issues on 23 January 2013. The MMT considered that the delay exceeded what was reasonably practicable, and that Mayer was in breach of the disclosure requirement under section 307B of the SFO.

The MMT found that Mayer's officers had not taken any reasonable measures at any time to ensure that any proper safeguards existed to prevent the breach of the disclosure requirement by Mayer. Hence, each of the nine officers was in breach of the disclosure requirement under section 307G(2)(b) of the SFO.

社会保险 SOCIAL INSURANCE

中国社会保险体系的两大重要举措

Two major moves taken with social insurance system

中国政府近期在社会保险制度方面采取了两大重要举措。首先，中国开始实施与加拿大和芬兰签署的社会保障协定。其次，中国发布方案，计划合并生育保险和医疗保险。

虽然中国与加拿大和芬兰分别于 2015 年和 2014 年签署了《社会保障协定》，但是中国直到 2017 年 1 月 1 日起才开始实施中加社会保障协定，并于 2017 年 2 月 1 日起实施中芬社会保障协定。

根据社会保障协定，受雇于加拿大或者芬兰的雇主但是被派往中国工作的雇员可以被免除缴纳中国的相关社会保险费。加拿大派遣人员可以免除缴纳的社会保险费包括养老保险。芬兰派遣人员可以免除缴纳的社会保险费包括养老保险和失业保险。上述免除的所有社会保险费同样适用于中国在加拿大和芬兰工作的派遣人员。

不过，两个社会保障协定均明确规定了有关免除不是自动适用的。如果派遣员工无法提供已经在母国参保的证明，派遣员工则需要在工作所在国缴纳社会保险费。

根据《生育保险和职工基本医疗保险合并实施试点方案》，生育保险和职工基本医疗保险合并将会在 12 个指定的城市进行试点。北京、上海、深圳和广州等重要一线城市不在试点城市名单中。

试点方案会在七月前开始启动，试点期限为一年左右。如果政府认为试点方案成功，则会在全国范围内进行生育保险和职工基本医疗保险的合并。如果推广至全国，则现行的《社会保险法》需要进行修改。

The Chinese central government recently made two major moves related to its social insurance system. First, it started implementing the social security totalization agreements signed with Canada and Finland. Second, it issued a plan to potentially merge China's maternity and medical insurance programmes.

Although the social security totalization treaties with Canada and Finland were signed in 2015 and 2014, respectively, China did not implement the China-Canada treaty until 1 January 2017 and the China-Finland treaty until 1 February 2017.

Under the treaties, employees who are hired by entities in Canada or Finland but seconded to work in China can be exempted from certain social insurance contributions in China. For Canadian secondees, the exemption covers pension contributions. For Finnish secondees, the exemption covers both pension contributions and unemployment insurance contributions. All of these exemptions are likewise available to Chinese secondees working in Canada and Finland. However, the exemptions are not automatic. Seconded employees unable to provide proof of enrolment in their home country's social security scheme must fully contribute to the host country's social insurance scheme.

According to the Trial Plan for Merging Maternity Insurance and Medical Insurance, the merger of the maternity and the medical insurance programmes will be tested on a trial basis in 12 designated cities. Major first-tier cities such as Beijing, Shanghai, Shenzhen and Guangzhou are not included among the trial cities.

The trial will begin by July and last about one year. If the government considers the trial a success, the maternity and medical insurance programme merger will be extended nationwide. If extended nationwide, the current Social Insurance Law will need to be amended.

斯德哥尔摩商会仲裁院 ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

斯德哥尔摩商会仲裁院规则修订重点

Highlights of the revised Stockholm arbitration rules

斯德哥尔摩商会（SCC）仲裁院的仲裁规则是全球商业和投资仲裁中使用最广的规则之一。2017年1月1日，SCC 仲裁院发布了最新修订的《仲裁规则》和《快速仲裁规则》。SCC 仲裁院专门任命仲裁规则修订委员会，于 2014 年 9 月开始对规则进行修订。该委员会包括瑞典和国际仲裁从业者和学者、SCC 理事会成员及其秘书处成员。经过两年研究，委员会在 2016 年 6 月发布了拟定的修订规则草案，邀请公众提交书面意见，并在斯德哥尔摩举行了公听会。

仲裁规则修订委员会的目的并不是彻底改变 SCC 仲裁院的仲裁程序，而是根据当事者要求，简化某些程序并将现有实践经验融入规则。原 SCC 仲裁院规则自 2010 年生效以来，由于复杂的多方合同和多方争议数量大幅度增长，因而对仲裁程序提出特别的要求。另外，本次修订还包括业界讨论热烈的秘书处角色问题、新的投资者与国家间争议的透明度规则，以及应当事人要求采用更为高效低成本的仲裁程序。如何使规则适应上述发展是修订委员会关心的核心问题。

The Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) are among the most widely used in commercial and investment arbitration globally. On 1 January 2017, the SCC launched revised versions of its arbitration rules as well as rules for expedited arbitrations.

The process of revising the rules began in September 2014, when the SCC board appointed a rules revision committee.

以高效为指导原则。“效率”在整个修改过程中是重要的指导原则，由此产生了若干新规则和规则修订。值得注意的是，斯德哥尔摩商会仲裁院最新的 2017《仲裁规则》第 2 条规定，在整个仲裁程序中，仲裁院、仲裁庭和当事人均应以“高效、快捷的方式行事”。第 23 条也进一步修改，包括指明仲裁庭“应当公正、高效而快捷地进行仲裁程序”，第 28 条现要求仲裁庭和各方“应尽力寻求采用有利于提高仲裁高效和快捷的程序安排”。新修订的 SCC 仲裁规定的其他几项条款也提及效率和快捷性的标准，例如追加当事人、多份合同仲裁、合并仲裁、案件管理会议和简易程序的有关规定。参考“效率和快捷性”的规定，《仲裁规则》中增加了相应的费用规定。第 49 条和第 50 条明确规定，仲裁庭应根据各方对仲裁高效快捷进行所作出的贡献，确定当事人所应承担的仲裁费比例，并裁定一方承担对方当事方所花费的费用。同样，SCC 理事会在最终确定仲裁费时，应考虑仲裁庭高效快捷处理案件的程度。

简易程序。秉承高效的精神，在本次修改中，SCC 引入了简易程序这种规定。根据第 39 条，一方当事人可以要求仲裁庭以简易程序对一个或多个事实或法律问题进行仲裁，不必执行普通情况下仲裁案件所采取的每一项程序步骤。在仲裁过程的任何阶段，当事人都可以提出这项请求；这一点不同于其他仲裁机构的类似规定，后者只允许在仲裁程序进行的早期阶段驳回仲裁主张。

SCC 的简易程序是一个案例管理工具，旨在允许仲裁庭在短时间内驳回不重要的主张及关于管辖权、可采性及实体问题的难以成立的指控。如果有关对案件结果有重要影响的事实或法律辩解明显不能得到支持，或者即使假定另一方当事人所主张的事实是真实的，根据所适用的法律，也不能作出对其有利的裁决；在以上情况下就可能适于采用简易程序。在提出简易程序要求时，一方当事人应说明提出此要求的依据并证明采用这种程序是高效且适当的。同时，仲裁庭应给予另一方当事人就该等申请发表意见的机会。如果仲裁庭批准了这一请求，也就意味着要决定如何进行这一程序。第 39 条规定并未说明简易程序应该是什么样的，而是指示仲裁庭“应考虑案件相关因素，……给予各方当事人平等、合理的机会陈述案件，以高效和快捷的方式就所涉问题发出指令或作出裁决。”

秘书处的角色。近年来，仲裁庭行政秘书参与仲裁程序的相关问题一直是业界焦点。越来越多的机构仲裁规则规定了秘书的任命及其工作任务。SCC 将其在这方面的实践经验融入了新《仲裁规则》第 24 条中。仲裁庭可以向 SCC 仲裁院提议一名行政秘书人选，经当事各方同意后，SCC 将正式任命该行政秘书。第 24 条规定要求行政秘书签署一份

The committee included Swedish and international arbitration practitioners and academics, members of the SCC board, and members of the SCC secretariat. After two years, the committee released drafts of the proposed revised rules, in June 2016. The public was invited to submit written comments, and a public hearing was held in Stockholm.

The aim of the revision committee was not to overhaul SCC arbitration procedure, but rather to streamline certain procedures, codify existing practices, and respond to users' demands. Since the previous version of the SCC rules went into effect in 2010, there has been a significant increase in complex multi-contract and multi-party disputes, which tend to place particular demands on the arbitration procedure. Other developments have included the hotly debated issue of the role of tribunal secretaries, new transparency rules for investor-state disputes, and calls from users for yet more time- and cost-efficient arbitral proceedings. Accommodating these developments was a central concern for the revision committee.

Efficiency as a guiding principle. Efficiency served as an important guiding principle throughout the revision process, and resulted in several new and revised provisions. Notably, article 2 of SCC's 2017 arbitration rules now stipulates that the SCC, the tribunal and the parties "shall act in an efficient and expeditious manner" throughout the proceedings. Article 23 has been revised to include a specific instruction that arbitrators "must conduct the arbitration in an ... efficient and expeditious manner", and article 28 now requests the tribunal and the parties to "adopt procedures enhancing the efficiency and expeditiousness of the proceedings". The standard of efficiency and expeditiousness is also found in several other provisions in the revised SCC rules – such as those pertaining to joinder, multiple contracts, consolidation, the case management conference, and summary procedure.

To give these references to "efficiency and expeditiousness" teeth, corresponding cost provisions have been added. Articles 49 and 50 now state that the tribunal must apportion, between the parties, arbitration costs as well as party costs, having regard to each party's contribution to the efficiency and expeditiousness of the arbitration. Similarly, the SCC board must determine the costs of the arbitration, having regard to the extent to which the tribunal has acted in an efficient and expeditious manner.

Summary procedure. Also in the spirit of efficiency, the revised rules include a new summary procedure provision. Under article 39, a party can request the tribunal to decide on one or more issues of fact or law by way of summary procedure, without necessarily undertaking every procedural step that might otherwise be adopted for the arbitration. The request can be made at any point during the arbitration; this differs from similar provisions in other arbitration rules, which typically only allow for early dismissal of claims.

SCC's summary procedure is a case-management tool intended to permit the quick dismissal of frivolous claims or untenable allegations concerning jurisdiction, admissibility or merit. It may be appropriate where an allegation of fact or law material to the dispute is manifestly unsustainable, or in situations where no award could be rendered in favour of a party under the applicable law, even if the facts alleged by that party are assumed to be true.

In its request for summary procedure, a party should indicate the grounds for its request, and demonstrate that it is efficient and appropriate to proceed summarily. The opposing party is given an opportunity to submit comments on the request. If the tribunal grants the request, it also determines how to proceed; the provision does not specify what summary procedure should look like, but rather instructs the tribunal to "make its order or award on the issues under consideration in an efficient and expeditious manner, having regard to the circumstances of the case, while giving each party a reasonable opportunity to present its case".

The role of secretaries. Issues related to the involvement of tribunal secretaries in arbitral proceedings have been in the spotlight in recent years. Increasingly, institutional arbitration rules regulate how secretaries are to be appointed, and what tasks they may perform. Article 24 of the

关于公正独立的声明书，与质疑或免除仲裁员的理据一样，行政秘书也可因相同的理由遭到质疑或罢免。该条款并未对行政秘书的角色做具体说明，也未对其职责作出强制性的规定。相反，该条规定给予了弹性空间，只指示“仲裁庭应就行政秘书的职责征询当事人意见”。

多方争议和多合同争议。SCC 的新《仲裁规则》包含旨在更有效地解决复杂纠纷的规定，特别是涉及多方当事人或多份合同下主张的争议案件。第 14 条以 SCC 在多份合同争议中的实践经验为基础，允许一方当事人在一个单独的仲裁案件中提出因多份合同引起的请求。第 15 条规定允许将一个新开始的仲裁案件与一个在审的仲裁案件合并。第 13 条规定在某些情况下可追加第三方当事人。

在决定是否允许多份合同请求、合并仲裁或追加第三方当事人时，SCC 理事会将考虑仲裁协议的兼容性以及诉讼的效率和快捷性。SCC 理事会关于合并仲裁、追加当事人和多合同争议问题的决定是初步的；这意味着在新规则下，仲裁庭对当事人及其请求的管辖决定权维持不变。

revised SCC arbitration rules codify existing SCC practice in this regard. Tribunals may submit to the SCC a proposal for the appointment of an administrative secretary, and the SCC will formally appoint that secretary only if the parties approve.

The provision requires the secretary to sign a statement of impartiality and independence, and allows for the challenge and removal of secretaries on the same grounds as those applicable to arbitrators. It does not specify the role of the secretary, nor does it prescribe what tasks are appropriate or not for the secretary to undertake. Instead, rule 24 is flexible, instructing that “the tribunal must consult the parties regarding the tasks of the administrative secretary”.

Multiparty and multi-contract disputes. The new SCC rules include provisions designed for more efficient resolution of complex disputes, in particular those that involve multiple parties, or where claims arise under more than one contract. Article 14 codifies existing SCC practice in multi-contract disputes by allowing parties to make claims arising out of more than one contract in a single arbitration. Article 15 allows for the consolidation of a newly commenced arbitration with a pending one, and article 13 provides for joinder of additional parties under certain circumstances.

In deciding whether to allow multi-contract claims, consolidation of arbitrations, or joinder of additional parties, the SCC board will take into account whether the arbitration agreements are compatible, and the efficiency and expeditiousness of the proceedings. Decisions by the SCC board on joinder, consolidation and multi-contract issues would be preliminary; this means that the tribunal's power to decide on its jurisdiction over parties and claims remains unchanged under the new rules.

***Amicus curiae* in investment arbitrations.** The SCC rules are the third-most frequently used set of arbitration rules in investment disputes – after the ICSID (International Centre for Settlement of Investment Disputes) and UNCITRAL (United Nations Commission on International Trade Law) rules. Recognizing that such disputes raise different issues and involve different interests than commercial disputes, the revision committee found it appropriate to include an appendix that applies only in treaty-based disputes between an investor and a state. Most notably, the provisions in appendix III allow third persons and non-disputing treaty parties to apply to an arbitral tribunal for permission to make a written submission in the arbitration. After consulting the parties, the tribunal may also, on its own initiative, invite third persons and non-disputing treaty parties to make a submission on material issues in the arbitration.

> SCC 规则是投资争议解决领域第三常用的仲裁规则
>
> *The SCC rules are the third-most frequently used set of arbitration rules in investment disputes*

投资仲裁中的法庭之友制度。SCC 规则是投资争议解决领域第三常用的仲裁规则，排前两位的分别是国际投资争端解决中心规则及联合国国际贸易法委员会仲裁规则。相比商业争议，投资争议所引发的问题和涉及的利益都有所不同。有鉴于此，SCC 修订委员会认为需要加入一个附件规定，专门针对投资者和东道国之间基于投资协定而产生的争议。值得一提的是，附件三的规定允许既非争议案件当事人、也非涉及争议的条约缔约方（第三方）可以请求仲裁庭许可，提交书面文件。在征询当事人的意见后，仲裁庭也可以主动邀请该第三方就仲裁中的重大问题提出意见。

除上述讨论的问题以外，SCC 规则也有一些其他的重大调整：删除了默认情况下仲裁员为三人的规定，同时采纳了一种更为灵活的方法；增加了新的条款，仲裁庭可以指令申请人或反请求申请人为仲裁费提供担保；修订了收费标准，在保持仲裁的低成本优势及支付仲裁员合理报酬之间取得平衡。

修改后的SCC规则于2017年1月1日生效，恰逢 SCC 百周年纪念。SCC 网站有该规则若干语言版本可供查阅（sccinstitute.com）。

In addition to what has been discussed above, several other significant adjustments were made to the SCC rules: the presumption in favour of a three-member tribunal was abandoned in favour of a more flexible approach; a new provision empowers tribunals to order a claimant or counterclaimant to pay security for costs; and the fee schedules were revised to reflect a balance between cost-efficient proceedings and the fair compensation of arbitrators.

The revised SCC rules went into effect on 1 January 2017, in connection with the SCC's centennial anniversary. The rules are available in several different languages on the SCC website (sccinstitute.com).

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中国国际经济贸易仲裁委员会 CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

内地法院执行贸仲香港裁决第一案

First CIETAC award enforced in mainland China

中国江苏省南京市中级人民法院于2016年12月13日作出《民事裁定书》，裁定执行贸仲香港作出的仲裁裁决。这是首例由当事人向内地法院申请强制执行的贸仲香港仲裁裁决，在国际仲裁界引发了广泛关注。

本案的申请人是一家美国建筑设计公司，被申请人是一家中国内地地产开发商。申请人为被申请人提供设计等服务，并因设计费以及逾期利息与被申请人产生争议。申请人故依据涉案合同的仲裁协议将争议提交至贸仲香港，其仲裁请求获仲裁庭的支持。仲裁裁决作出后，被申请人依据裁决向申请人支付了设计费，并就逾期利息的支付问题与申请人达成了《和解协议》。

The Nanjing Intermediate People's Court of Jiangsu province, on 13 December 2016, issued its ruling to enforce an arbitral award issued by the CIETAC Hong Kong Arbitration Centre. The Nanjing court's ruling marks the first time that a Chinese mainland court has enforced a CIETAC Hong Kong arbitral award upon application from the party seeking enforcement.

In 2015, the claimant, an American architectural design firm, commenced arbitration proceedings at CIETAC Hong Kong against a Chinese property developer (the respondent), seeking design fees and unpaid interest pursuant to their arbitration agreement. An award was rendered in favour of the claimant, and the respondent later voluntarily enforced a portion of the award (design fees). The claimant and the respondent at that stage also reached a new settlement agreement on the unpaid interest.

The parties agreed that either the respondent could pay voluntarily the interest in the amount of RMB600,000 (US$87,000) before 31 May 2016, or the claimant could seek payment of the full amount before court. When the respondent did not pay voluntarily before the deadline, the claimant sought

根据《和解协议》，只要被申请人于 2016 年 5 月 31 日前完成支付，申请人同意逾期利息为人民币 60 万元。否则，该《和解协议》将过期，而申请人将寻求全额逾期利息。《和解协议》签订后，被申请人并未按照《和解协议》的约定支付逾期利息。申请人遂向南京中院申请了强制执行仲裁裁决第三项（关于逾期利息的部分），并得到了南京中院的支持。

从南京中院作出的《裁定书》和贸仲香港案件经办团队提供的相关信息，笔者现归纳下述要点，供各位读者参考：

本案的管理机构和仲裁规则的适用。本案当事人在涉案合同中约定，与合同有关的争议应提交贸仲在香港进行仲裁。2015 年 1 月 1 日起施行的《中国国际经济贸易仲裁委员会仲裁规则》第 73 条规定，当事人约定将争议提交贸仲香港仲裁中心仲裁或约定将争议提交贸仲在香港仲裁的，由贸仲香港仲裁中心接受仲裁申请并管理案件。贸仲香港管理的仲裁案件，适用该《仲裁规则》第六章“香港仲裁的特别规定”。

仲裁地和裁决执行的依据。《仲裁规则》第 74 条规定，除非当事人另有约定，贸仲香港仲裁中心管理的案件的仲裁地为香港，仲裁裁决应视为在香港作出。《仲裁规则》第六章“香港仲裁的特别规定”第 73 条规定，当事人约定将争议提交贸仲香港仲裁中心仲裁或约定将争议提交贸仲在香港仲裁的，由贸仲香港仲裁中心接受仲裁申请并管理案件。贸仲香港管理的仲裁案件，适用该《仲裁规则》第六章“香港仲裁的特别规定”。

enforcement at the Nanjing court. The court subsequently held that the unpaid interest should be enforced.

The author made a summary based on the ruling and the information provided by the case management team of CIETAC Hong Kong as follows, for easy reference.

The administrative body and the applicable rules. It was agreed by the claimant and the respondent that any dispute arising out of the contract must be submitted to CIETAC for arbitration in Hong Kong. According to article 73 of the CIETAC Arbitration Rules, effective from 1 January 2015, where the parties have agreed to submit their disputes to the CIETAC Hong Kong Arbitration Centre for arbitration or to CIETAC for arbitration in Hong Kong, the CIETAC Hong Kong Arbitration Centre must accept the arbitration application and administer the case. Parties should be aware that the entire chapter VI of the CIETAC Arbitration Rules applies to cases submitted to CIETAC Hong Kong.

The seat of arbitration and the legal basis for enforcement. According to article 74 of the CIETAC Arbitration Rules, unless otherwise agreed by the parties, for an arbitration administered by the CIETAC Hong Kong Arbitration Centre, the place of arbitration must be Hong Kong, the law applicable to the arbitral proceedings must be the arbitration law of Hong Kong, and the arbitral award must be a Hong Kong award. According to the circumstance of this case, the seat of arbitration is Hong Kong.

In its ruling, the Nanjing court expressly referred to and relied on the Supreme People's Court's (SPC) Arrangement Concerning Mutual Enforcement of Arbitral Awards between mainland China and Hong Kong. The court held that the arbitration was carried out in accordance with procedural laws in Hong Kong, and that the respondent did not invoke any of the grounds listed in article 7 of the arrangement. Finding that enforcement of

裁程序适用法为香港仲裁法，仲裁裁决为香港裁决。结合案情，本案仲裁地为香港。

南京中院认为，本案执行依据为《最高人民法院关于内地与香港特别行政区相互执行仲裁裁决的安排》，该裁决作出程序符合香港法律规定，双方当事人对裁决均无异议，且裁决内容不存在《安排》第七条中所列举的情形，亦不存在违反内地社会公共利益的情形，故支持申请人的执行请求。

仲裁员的选定或指定。《仲裁规则》第 76 条规定，贸仲现行仲裁员名册在贸仲香港仲裁中心管理的案件中推荐使用，当事人可以在贸仲仲裁员名册外选定仲裁员。贸仲香港案件经办团队表示，虽然此规定适用于贸仲香港管理的案件，但是贸仲香港案件当事人通常仍倾向于选择仲裁员名册上的仲裁员审理案件。

审理期限。从《裁定书》中可知，本案于 2015 年 8 月 25 日在香港开庭审理，约三个月后，裁决即由仲裁庭作出。贸仲香港适用《仲裁规则》管理案件，意味着其适用普通程序审理的案件应该在组庭之后六个月内作出裁决，适用简易程序审理的案件应该在组庭后三个月内作出裁决。经贸仲香港案件经办团队表示，2015 年贸仲香港的平均结案时间是组庭后 115 天。

贸仲香港案件经办团队表示，如此高效的仲裁需要高质量的仲裁员队伍和高素质的案件经办人团队。贸仲香港身处国际仲裁枢纽地带，有着极其丰富的优质仲裁员团队；贸仲香港的案件经办人全部拥有两个以上司法区的法律背景。贸仲香港的全部案件均为纯国外或跨境争议，案情本身均较为复杂，这也对贸仲香港本身提出了更高要求。

仲裁费用。《仲裁规则》为贸仲香港管理的案件制定了单独的仲裁费用表，明确规定仲裁费用由三部分组成，包括案件受理费、机构管理费及仲裁员报酬和费用。仲裁费用根据仲裁程序的进展分阶段收取。从《裁定书》来看，本案仲裁费用主要是仲裁员报酬和费用，约为案件争议金额的百分之五。

执行费用和程序。本案南京中院收取当事人执行申请费用人民币 400 元，组成合议庭对案件进行审查，并询问了当事人有关案件情况。《裁定书》内容易懂、说理非常清晰，是当事人了解内地法院执行贸仲香港裁决的重要法律文书。

> 高效的仲裁需要高质量的仲裁员队伍和高素质的案件经办人团队
>
> *Efficient arbitration requires quality arbitrators and case managers*

the award would not contradict the public interests of mainland China, the Nanjing court ruled to enforce the part of the award as per the claimant's application.

The nomination/appointment of arbitrators. According to article 76 of the CIETAC Arbitration Rules, the CIETAC panel of arbitrators in effect must be recommended in arbitration cases administered by the CIETAC Hong Kong Arbitration Centre. The parties may nominate arbitrators from outside the CIETAC's panel of arbitrators, however, according to the case management team, parties at CIETAC Hong Kong would normally still nominate arbitrators from the panel.

Meeting deadlines. According to the ruling, an oral hearing was held for this case on 25 August 2015, and the award was rendered about three months later. Because CIETAC Hong Kong applies the CIETAC Arbitration Rules to administer its cases, a six-month time limit to render an award in normal procedures, and a three-month time limit for summary procedures, applies after the formation of an arbitral tribunal. However, according to the case management team, the average time period for rendering an award at CIETAC Hong Kong was 115 days in 2015.

The case management team also commented that efficient arbitration requires quality arbitrators and case managers. Located in the hub of international arbitration, CIETAC Hong Kong is positioned to draw from an experienced pool of arbitrators, and all members of the case management team have received a legal education in at least two jurisdictions. These core competencies are crucial in that CIETAC Hong Kong manages disputes that are either cross-border in nature, or that involve non-Chinese parties.

The costs of arbitration. The CIETAC Arbitration Rules have provided a transparent fee schedule for CIETAC Hong Kong cases, collecting a registration fee, administrative fee and arbitrators' fees and expenses separately on instalments by parties. According to the court ruling, the arbitrators' fees and expenses were about 5% of the amount in dispute, also forming the most significant part of the costs of the arbitration.

The costs and procedure of enforcement. RMB400 was collected by the Nanjing court to accept the case. A three-judge tribunal was formed by the court to review the case and question the parties. The ruling is well structured and easy to follow, thus providing a valuable reference for parties interested in understanding how a Chinese mainland court would enforce a CIETAC Hong Kong award.

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FINTECH REVOLUTION

本系列报道关注技术发展所衍生出的法律问题。在本系列的第一篇报道中，**龙思聪**探讨金融科技的快速兴起，以及它对法律界的意义及影响

IN THE FIRST PART OF A SPECIAL SERIES ON TECHNOLOGY IN THE LEGAL SECTOR, **LEO LONG** EXPLORES HOW FINTECH'S RAPID RISE HAS IN MANY WAYS MIRRORED THE RELENTLESS ADVANCE OF TECHNOLOGY AND ITS IMPACT ON A LEGAL SECTOR THAT IS STRUGGLING TO KEEP PACE

“金融科技”在很短时间内就成为了律师之间津津乐道的高频用词。它是金融与科技相融合的产物，标志着新兴技术已开始为传统的金融行业带来革新。

在亚太地区，金融科技这个概念可能仍然有一些陌生，虽然它已经改变了这个地区许多国家的经济形势和人们的生活。

亚太地区最明显的金融科技发展是在支付领域。比如，超过八亿中国人已经通过使用腾讯和阿里巴巴等互联网

The word 'fintech' has rocketed its way to the front of every lawyer's lexicon in a short space of time. An integration of finance and technology, fintech indicates the intersection where technological solutions have been employed to bring innovation to traditional financial industries.

The fintech concept may still be strange in areas of the Asia-Pacific, despite the fact that it has already transformed the economic landscapes of many of the region's countries and the lives of their people.

巨头提供的在线支付渠道进入了无现金生活。截止二月底，印度支付平台 Paytm 已经吸引了两亿用户。有越来越多的亚洲公司在逐步使用金融科技概念，这种趋势在不断加强。

狐狸金服金融科技集团（香港）法务副总裁李宜坤对于亚洲特别是中国的金融科技的发展有着第一手经验。李宜坤表示，金融科技在中国的发展经历了从最初的金融 IT 化，到向区块链、云计算、金融大数据、智能投顾等更高更深的领域发展。

“一方面，中国的传统金融服务无法满足小微金融消费者的需求，而金融科技公司弥补了这个缺陷，”李宜坤说道。“另一方面，中国拥有数亿的互联网用户，整个亚太地区的人口非常多，而且互联网的普及程度非常高。庞大的用户群给金融科技带来了巨大的发展机会。”

根据埃森哲咨询公司的一份报告显示，2016 年，亚太地区的金融科技融资首次超过了北美地区，全球对金融科技企业的投资增长了 10%，达到了 232 亿美元，主要得益于中国大陆和香港地区许多重磅交易。

新加坡 OC Queen Street 律师事务所合伙人 Koh Chia-ling 表示：“金融科技在亚太地区的繁荣发展有许多原因，比如政府对协作式的金融科技系统支持、监管的便利、大量的需求、获得资本的容易程度，以及消费者对使用金融科技服务的意愿，特别是在中国。”相对地，政治的不稳定（特别是英国和美国）给亚洲国家快速发展成为金融技术的中心留下了空间，Koh 补充道。

因此，有人提出，亚太地区已经超越美国和欧洲成为了金融科技创新的首要集中地。金杜律师事务所悉尼办公室合伙人 Scott Farrell 认为，这可能很好地反映了过去一段时间的发展，但未必代表未来。“虽然东方地区确实有了重大的科技发展，但是西方可能对于如何实施这些发展并将其用于支持现有市场和基础设施有更好的理解。”

他认为，这可以反应在监管机构和政府对于如何将金融领域的重大变化容纳在他们的风险控制和监管体系内，都有思考这一问题的准备。“不过，金融科技的竞赛只是

The most outstanding fintech development in the region lies in the payment sector. For example, more than 800 million Chinese are moving towards a cashless life by using the online payment channels offered by internet giants such as Tencent and Alibaba. In India, payment company Paytm attracted 200 million users as of the end of February. And more Asian companies are progressively using fintech as the concept gathers momentum.

Li Yikun, the Beijing-based vice president and general counsel of Fox Financial Technology (Hong Kong) Group Limited (Huli.com), has first-hand experience of the growth of fintech in Asia, especially in China. Li says China's fintech has developed from basic adoption of IT in financial services to more advanced and sophisticated areas such as blockchain, cloud computing, financial big data and robo-adviser.

“On one hand, traditional financial services in China no longer satisfy the needs of consumers for small-scale financial services, while the fintech companies make up for this,” says Li. “On the other hand, China has hundreds of millions of internet users, and the Asia-Pacific also has big populations and high internet penetration. The large amounts of users offer fintech enormous opportunities.”

In 2016, fintech financing in Asia-Pacific outsized North America for the first time, and global investment in fintech ventures increased 10% to US$23.2 billion, mainly thanks to some blockbuster deals in China and Hong Kong, according to a report by consultancy Accenture.

Koh Chia-ling, a director of OC Queen Street's Singapore law practice, says, “Fintech is booming across the Asia-Pacific region for a variety of reasons – government support for a collaborative fintech ecosystem, regulatory facilitation, scale of unmet needs, easy access to capital, and the willingness of consumers, especially in China, to adopt fintech services.”

In contrast, political uncertainty, particularly in the UK and US, is leaving space for Asian countries with rapidly growing profiles to become fintech hubs, adds Koh.

中国的传统金融服务无法满足小微金融消费者的需求，而金融科技公司弥补了这个缺陷

Traditional financial services in China no longer satisfy the needs of consumers for small-scale financial services, while the fintech companies make up for this

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金融科技在亚太地区的繁荣发展有许多原因

Fintech is booming across the Asia-Pacific region for a variety of reasons

刚刚开始，各国各地区有许多不同的方法可以让自己脱颖而出，”Farrell 表示。

Farrell 不是唯一这么认为的人。其他人认同金融科技在东方的发展不同于西方。“众所周知，亚洲不像美国或欧洲那样同质化，”品诚梅森律师事务所驻新加坡合伙人 Bryan Tan 表示。“在经济上，亚太地区是迥然不同的，金融领域也是一样。这意味着有许多非常发达、先进的大银行和银行监管者会与一些规模较小、不太先进的银行为邻。无银行账户的人口水平也截然不同。”

这意味着亚洲地区的机会与美国或欧洲的机会是不同的。“比如，西方用微支付进行快捷付款，而在亚洲，无银行账户的人使用微支付进行工资转账或购买数码产品，” Tan 表示。

很明显，亚洲许多国家的发展非常迅速。2015 年，马来西亚成为了第一个出台股权众筹集资法的东盟国家。继英国于 2015 年推出了全球第一个“监管沙盒”之后，新加坡于 2016 年推出了亚洲第一个监管“沙盒（sandbox）”机制，即对金融科技服务和产品进行测试后不会立刻产生监管后果的安全机制。有越来越多的法域也开始采取类似的沙盒机制。

在该地区，各国之间的政治和经济相互影响也变得越来越紧密和频繁。在过去两年，政府部门一直忙于签署促进金融科技合作的双边协议。比如，自 2016 年起，新加坡已经与英国、瑞士、阿联酋阿布扎比、韩国、日本、澳大利亚、印度安得拉邦和法国就金融科技合作签署了合作协议。

Therefore, it has been suggested that the Asia-Pacific region has surpassed the US and Europe to become the main hub of innovation for fintech.

Scott Farrell, a partner at King & Wood Mallesons in Sydney, believes this may be a better reflection of the past than the future. “While it is true that the there is significant technological development in the East, there is potentially a greater understanding of the way in which developments can work and support existing markets and infrastructure in the West,” says Farrell.

He believes that this is often seen through the preparedness of the regulators and governments to consider how significant changes in their financial sector can be accommodated within their risk management and regulatory frameworks. “However, the race for fintech relevance has only just begun and there are many different ways in which jurisdictions can distinguish themselves from others,” says Farrell.

Farrell is not alone. Others agree that the development of fintech in the East is different from that in the West. “Famously, Asia is not as homogenous as the US or Europe are,” says Bryan Tan, a Singapore-based partner at Pinsent Masons.

“Economically, the region is disparate and its financial industry is likewise. This means there are some very big and advanced

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金融科技的竞赛只是刚刚开始，各国各地区有许多不同的方法可以让自己脱颖而出

The race for fintech relevance has only just begun and there are many different ways in which jurisdictions can distinguish themselves from others

不过，也有些亚洲其他的发展中国家几乎没有触碰过金融科技的发展，这些国家与亚洲的发达市场存在着巨大的鸿沟。“中国是该地区大多数投资的来源，澳大利亚和新加坡主要是进行小规模但是复杂的交易，”高盖茨律师事务所墨尔本办公室合伙人 Jim Bulling 指出。

“澳大利亚和新加坡的法律框架正在发展，并且看起来是与科技和产品创新保持同步。中国大陆和香港地区的监管机构反应相对更快，而日本的金融科技监管环境还在相对初始的阶段，”他表示。

热点领域

从金融服务方面来说，金融科技包括存款、贷款、融资、保险、汇款、外汇交易、电子商务和投资管理等其他领域。此外，还存在一些专业细分的领域，比如监管科技（regtech）和保险科技（insurtech）。从技术方面来说，大数据分析、云服务、网络安全等领域以及人工智能和区块链等前沿领域也值得考虑。

西方用微支付进行快捷付款，而在亚洲，无银行账户的人使用微支付进行工资转账或购买数码产品

Micropayments are used in the West for quick payments, but they are used in Asia for the unbanked to transfer wages or pay for digital goods

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Partner
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Singapore

banks and bank regulators sitting right next to some very small and less advanced ones. The level of the unbanked population is also vastly different.”

This represents different opportunities in Asia from those found in US or Europe. “For instance, micropayments are used in the West for quick payments, but they are used in Asia for the unbanked to transfer wages or pay for digital goods,” says Tan.

It is clear that some Asian countries are advancing rapidly. In 2015, Malaysia became the first ASEAN country to enact equity crowdfunding regulations. In 2016, Singapore revealed Asia’s first regulatory “sandbox” – a safe area where testing for fintech services and products will not immediately incur regulatory consequences – after the UK launched the world’s first regulatory sandbox in 2015. More jurisdictions are also adopting similar sandbox strategies.

Political and economic interaction among countries is also becoming closer and more frequent in the region. In the past two years, governments have been busy signing bilateral agreements to enhance fintech co-operation. Since 2016, Singapore, for example, has signed co-operation agreements with the UK, Switzerland, Abu Dhabi (UAE), South Korea, Japan, Australia, Andhra Pradesh (India), and France on fintech co-operation.

But there are other developing Asian countries that have barely scratched the surface on fintech development and a chasm exists between these and Asia’s developed jurisdictions.

“China is the source of the majority of investment in the region, with Australia and Singapore being responsible for small but sophisticated transactions,” notes Jim Bulling, a partner at K&L Gates in Melbourne.

“The legal frameworks in Australia and Singapore are developing and seem to keep pace with technological and product innovations. China and Hong Kong have more reactive regulatory infrastructure while Japan’s fintech regulatory environment is more embryonic,” he says.

THE HOTSPOTS

In terms of financial services, fintech covers other areas such as deposits, lending, funding, insurance, remittances, foreign exchange business, e-commerce and investment management. There are also niche markets like regulatory technology (regtech) and insurance technology (insurtech).

In terms of technology, it is also worth considering areas like big data analytics, cloud services, cybersecurity and cutting-edge sectors such as artificial intelligence (AI) and blockchain.

Although some high-end sectors such as blockchain and insurtech are not as popular at present as consumer-facing payment and lending, many believe they will become more important in the future. To have a better understanding of fintech, there are several topics that cannot be overlooked.

(1) Payment, funding and lending. It is widely believed that more consumer-facing sectors including payments, crowdfunding and peer-to-peer (P2P) lending are the most prolific services. Mark Jephcott, a partner of Herbert Smith Freehills in Hong

虽然区块链和保险科技等一些高端领域目前不像面向消费者的支付和贷款领域那么流行，但是许多人认为这些领域在未来会变得越来越重要。想要更好地了解金融科技，那么有些话题是不可以被忽略的。

(1) 支付、融资和贷款。许多人认为越是面向消费者的领域，服务越是多产，例如支付、众筹、P2P 网络借贷。史密夫斐尔律师事务所香港办事处合伙人 Mark Jephcott 认为这些细分领域在短期内会获得最多的发展助力。

“与金融机构使用金融科技相比，面对消费者的金融科技方案的优势在于其可以从小规模起步，而且可以从审查程度较低的监管中受益，”Jephcott 表示。“消费者也比大型金融机构更容易接受新的金融科技方案。”

(2) 区块链和智能合约。许多人认为区块链将会是一种基础技术，对几乎所有的金融领域都有重要影响，并且对现有金融市场最具变革性影响，尽管该技术还没有完全流行起来。

区块链（blockchain，或者分布式账本技术）是密码货币比特币的基础，是一种分散的分布式总账技术，可以分布于许多节点、机构或者法域。简而言之，区块链是将每项交易的情况（或其他可以记录的任何信息）在同一信息链上的不同区块进行广播共享。由于信息是广播给共享网络中的所有成员，一旦交易完成执行之后，数据就不能被改动或重复执行。区块链的一个好处是可以节省中介与执行成本，也减少数据被集中管理的风险。

“未来几年，我认为这项技术会在金融技术领域留下重要印记，它的影响会在多领域体现，包括 P2P、大数据、交易、货币兑换、便利支付方式等等，”Rajah & Tann LCT Lawyers 律师事务所胡志明市办公室外国顾问 Logan Leung 表示。

许多全球最大的金融公司和一些监管者已经加入了 R3 区块链联盟去研究和开发开源分布式许可账本。此外，联合国国际贸易法委员会（UNCITRAL）在 2017 年 4 月通过的新的电子可转移记录示范法旨在规定可适用于不同类型的电子可转移记录的通用规则，包括区块链。

消费者也比大型金融机构更容易接受新的金融科技方案

Consumers are ... much more likely to embrace novel fintech solutions than large financial institutions

MARK JEPHCOTT
史密夫斐尔律师事务所合伙人，香港
Partner
Herbert Smith Freehills
Hong Kong

Kong, believes these sub-sectors will gain the most traction in the short term.

“Consumer-facing fintech solutions have the benefit of being able to start operating on a smaller scale, as compared to the use of fintech in financial institutions, and may find themselves benefiting from a lower degree of regulatory scrutiny,” says Jephcott. “Consumers are also much more likely to embrace novel fintech solutions than large financial institutions.”

(2) Blockchain and smart contracts. Many people believe blockchain will be an underpinning technology with significant influences to nearly every financial sector, and that it would be most disruptive to the existing financial market, although it is not popular yet.

Blockchain, or distributed ledger technology, which underpins the cryptocurrency Bitcoin, is a decentralised distributed public ledger that can be spread across multiple sites, institutions or jurisdictions. Under this technology, a ledger record (or similar record) is distributed and shared in different devices (as nodes) in a peer-to-peer network. The information is broadcast to all members in the network and an irrevocable record is made when a transaction is completed. In addition, the system follows order and executes transactions strictly when all conditions are met.

Because it is open to all members of a network, they do not have to worry about the risks when a centralized body monitor all data and the loss and intentional modification of information. Participants can confirm transactions without having central certifying organisations (like banks).

This kind of system can also be adopted in contracts (as with smart contract), records and cryptocurrencies.

“With some years, I expect this technology to make a significant mark in fintech, as its impact is multi-sectorial – covering anything from P2P, big data, trading, currency exchange, and payment facilitations,” says Logan Leung, a foreign counsel at Rajah & Tann LCT Lawyers in Ho Chi Minh City.

世泽律师事务所上海办公室合伙人孙铭表示，在区块链这个领域中，投资者及其顾问都需要密切关注智能合约（smart contract）在商业活动中的运用。“智能合约可能是一个会对各法域现行法律框架构成最大挑战的问题，”孙铭表示。

他解释道，智能合约包括了（通过代码化）合同当事人的约定，并且可以不需要人类的参与自动完成（通过运行代码）。一个典型的智能合约一旦被激活，就无法控制，只有等到相关程序运行完成了，才能看到最终的结果。

智能合约也可以降低成本，特别是执行方面的成本，这也会对法律专业人士产生影响，未来在减少合同执行的人力投入的同时，市场也将要求专业人士在合同起草时要具有专业合同编码技能。

金杜律师事务所 Farrell 一直密切关注区块链和智能合约的发展。“作为一项基础技术，它有潜力改变我们甚至还没有想过的事情，它的网络效应意味着这些改变可以发生得非常快，”他说。

(3) 智能投顾和人工智能。狐狸金服的李宜坤目前参与比较多的是网络借贷和网上支付领域，她认为最值得投资者关注的是智能投顾（robo-advisor），利用人工智能和机器学习，为投资者提供智能化和自动化的资产配置建议。

最近几年许多金融机构已经采用人工智能提高投资回报。“智能投顾服务在日本备受青睐，因为智能投顾通过简单地回答 10 个左右的问题就可以利用人工智能技术提供很好的投资组合，与人工提供的投资管理服务收取的投资管理费相比成本较低，”Greenberg Traurig 律师事务所日本办公室合伙人 Koichiro Ohashi 表示。“如果智能投顾可以提供适合零售客户更好的资产组合选择，那么智能投顾很有可能会有进一步发展。”

(4) 保险科技。根据埃森哲发布的一份报告，2014 年

Many of the world's largest financial companies and some regulators have joined the R3 blockchain consortium to research and develop an open-source distributed ledger. In addition, the new Model Law on Electronic Transferable Records, adopted in April 2017 by the United Nations Commission on International Trade Law (UNCITRAL), is aimed at providing generic rules that may apply to various types of electronic transferable records, including blockchain.

Roland Sun, a partner of Broad & Bright in Shanghai, says that in terms of blockchain, investors and their counsel have to keep a wary eye on the application of smart contracts in doing business. "The smart contract could be something that poses the biggest challenge to the existing legal framework of any jurisdiction," says Sun.

He explains that smart contract contains (by codifying) the agreement of parties and can take actions on its own (through running computer codes) without human involvement. A typical smart contract, once activated, is untameable until a specific outcome is delivered as a result of the relevant program execution.

Smart contracts can also reduce costs, especially in execution, which could impact legal professionals, reducing human input for executing while requiring coding skills from professionals in contract drafting in the future.

Farrell, from King & Wood Mallesons, is keeping a very close eye on blockchain and smart contracts. "As a foundation technology, it has the potential to change things that we have not even thought of, and its network effect means that the change could happen very quickly," he says.

(3) Robo-adviser and artificial intelligence (AI). Li Yikun, from Fox Financial Technology, which has mostly focused on internet lending and internet payment, believes that robo-adviser will be

智能合约可能是一个会对各法域现行法律框架构成最大挑战的问题

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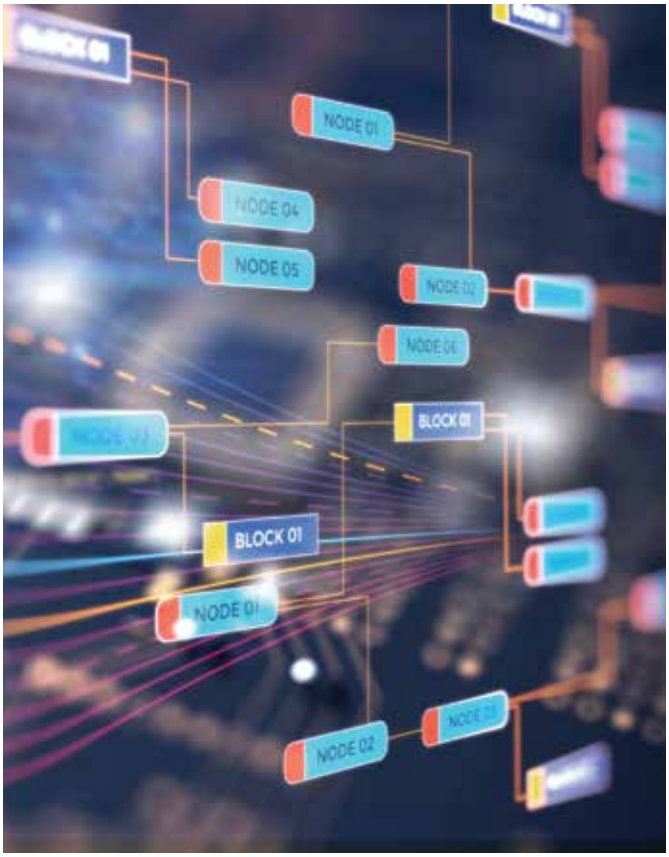
Partner
Broad & Bright
Shanghai



至 2016 年间，全球对保险科技的投资交易数量和金额几乎翻了一番，2016 年达到了 17 亿美元。

其礼律师事务所香港办公室合伙人 Joyce Chan 预计亚太地区的保险科技在未来几年中会有很大的发展，虽然与借贷和支付服务提供商对金融科技的采用程度相比还有待提升。“技术可以打开新的保险形式，新的销售渠道对于保险业和使用保险产品的人来说是非常值得高兴的，”Chan 表示。

“保险业进行变革的时机已经成熟，保险业目前的重点在于产品而非消费者。远程信息和区块链等技术可以为保险公司提供提高保险销售和索赔评估效率的机会，并提高利润率，”年利达律师事务所新加坡办公室合伙人、TMT 业务主管 Niranjan Arasaratnam 表示。

(5) 监管科技。研究公司 Let’s Talk Payments 预计全球对监管、合规和管理软件的需求在 2020 年会达到 1187 亿美元，这属于监管科技的一部分。

与金融科技的其他细分领域相比，监管科技与法律专业人士更相关，因为它运用科技将琐碎并大量的监管合规工作变得自动化，这也会影响法律专业人士处理的工作，目前投资者和企业内部法律顾问都必须时刻关注监管发展。

“我们认为运用人工智能的监管科技，特别是在反洗钱合规或欺诈检测方面，是最具有发展前景的子领域。我们将会看到更多这样的金融科技，以及可能会取代金融

the most notable area, adopting AI and machine learning to offer intelligent and automated advices on asset allocation.

Many financial institutions have already applied artificial intelligence (AI) to increase returns for investment in recent years. “Robo-adviser services are gaining popularity in Japan because they provide good allocation of portfolios using AI technology by simply answering 10 or so questions ... for a low cost compared to competitive investment management fees from manned investment management services,” says Koichiro Ohashi, a partner of Greenberg Traurig Tokyo Law Offices. “If robo-advisers provide better asset portfolio selection, which is suitable for retail customers, it is very likely to grow further.”

(4) Insurtech. According to a report by Accenture, both volume and value of deals in global investment in insurtech in 2016 have roughly doubled since 2014, totalling US$1.7 billion.

Joyce Chan, a Hong Kong-based partner of Clyde & Co, anticipates significant developments in the Asia-Pacific insurtech space in the next few years, although it is a little behind the curve compared to lending and payment providers in adopting fintech. “The ability of technology to open up new forms of insurance and new distribution channels is extremely exciting for the industry and those who use the products,” says Chan.

“The insurance industry is ripe for disruption as its current focus is on products rather than the customer. Technologies such as telematics and blockchain will offer insurers the opportunity to improve the efficiency of both insurance distribution and claims assessment, and drive up their profit margins,” says Niranjan Arasaratnam, a Singapore-based partner and TMT sector leader at Linklaters.

(5) Regtech. A research company called Let’s Talk Payments estimates that global demand for regulatory, compliance and governance software, which is part of regtech, will reach US$118.7 billion by 2020.

Compared with other fintech subsectors, regtech is more related to the legal professional because it applies technology to automate mundane and massive compliance tasks with regulation, and would affect the tasks handled by legal professionals, against the backdrop that investors and in-house counsel have to pay constant attention to regulatory developments.

“We believe regtech, which utilizes artificial intelligence, particularly in the areas of anti-money laundering compliance or fraud detection, is among the most promising sub-sectors,” says Koh, from OC Queen Street. “We expect to see more of such fintech, as well as more which would encroach on regulatory functions of financial institutions.”

THE REGULATIONS

As the categories above show, the fact that fintech is a combination of financial services and emerging technologies will create challenges for regulators and fintech companies.

“Basically, financial technology really encompasses such a wide range of products and services, many of which we can’t foresee because it’s disruptive by its nature,” says Anna Gamvros, a partner at Norton Rose Fulbright in Hong Kong. “And as a result it is very

机构一些监管职能的科技，”OC Queen Street 律所的 Koh 说道。

监管

如上文所述，金融科技是金融服务和新兴科技的结合，会对监管者和金融科技公司带来许多挑战。

“金融科技基本上包括了各种不同的产品和服务，其中有许多是我们不能预见的，它是具有颠覆性的，”诺顿罗氏律师事务所香港合伙人 Anna Gamvros 说。“因此，对监管者来说，监管和预测需要用什么类型的规定去监管那些还没有想到的服务和产品是非常困难的，尽管未必不可能。”

Gamvros 补充道，所有的这些技术都可以不受监管地运作是不可能的。“现有的法律和监管制度仍然可以适用，比如知识产权、数据保护和网络安全的相关规定。这些制度将适用于这些技术，但是如何应用这些制度是更难处理的问题，”她说。

目前，在亚洲地区很少看到单独的金融科技法律，但是我们可以在 P2P 借贷等相关行业和数据保护等技术领域找到有关的法律法规。

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随着数据收集和运用变得无所不在，公司需要调整其商业模式，以接受数据保护或隐私问题

As the collection and use of data becomes all pervasive, companies will have to adjust their business models to accept data protection or privacy concerns

hard, if not impossible, for regulators to regulate and foresee what type of regulation may be needed for services and products that are not yet thought of."

Gamvros adds that it is not the case that any of these technologies will operate without regulation. "The existing legal and regulatory frameworks will apply – for example, those for intellectual property, data protection and cybersecurity. Such frameworks will apply to those technologies, but how they may apply is what people have more difficulty grappling with," she says.

Currently, we rarely see standalone fintech law in Asian jurisdictions, but we can still find laws or regulations on relevant industries, such as P2P lending, and in technical areas such as data protection.

For most companies adopting new technologies, data protection, cybersecurity and privacy are unavoidable topics. "In this region, data protection concerns are frequently not given as much importance as they are in other jurisdictions [for example, in Europe]," says Mathew Chacko, a partner at Spice Route Legal in Bengaluru. "As the collection and use of data becomes all pervasive, companies will have to adjust their business models to accept data protection or privacy concerns."

对于采用新技术的大多数公司来说，数据保护、网络安全和隐私是不可避免的话题。“在亚洲，数据保护问题不像欧洲等其他法域经常被予以重视，”Spice Route Legal 律师事务所班加罗尔办公室合伙人 Mathew Chacko 说。“随着数据收集和运用变得无所不在，公司需要调整其商业模式，以接受数据保护或隐私问题。”

同样地，知识产权是与技术相关的另一个问题。“软件和技术的创新对于金融科技的快速发展是非常重要的。因此，对于专利和商标等知识产权的法律保护是必须的，”霍金路伟律师事务所慕尼黑办公室顾问王胜喆表示。

王胜喆建议，金融科技公司可通过注册和文件证明明确地定义并保护其知识产权，特别是在与许多的第三方进行合作时，以便掌控知识产权的使用，包括根据许可和合作安排允许的使用。

Similarly, intellectual property (IP) is another issue related to technologies. “Innovations of software and technology are critical to the rapid expansion of fintech. Therefore legal protection to the IP rights of those patents and trademarks is a must,” says Wang Shengzhe, counsel at Hogan Lovells in Munich.

Wang suggests that fintech companies clearly define and protect their IP with registrations and documentation, especially when working with multiple third parties in order to control use of IP rights, including permitted use under licensing and collaborative arrangements.

Jephcott, who is also Asia head of competition at Herbert Smith Freehills, expects to see competition or antitrust law issues to come into play as new fintech players emerge. He says it will be interesting to see how the fintech sector interacts with antitrust law.

软件和技术的创新对于金融科技的快速发展是非常重要的。因此，对于专利和商标等知识产权的法律保护是必须的

Innovations of software and technology are critical to the rapid expansion of fintech. Therefore legal protection to the IP rights of those patents and trademarks is a must

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作为史密夫斐尔律师事务所亚洲竞争业务负责人的 Jephcott 预计，随着新的金融科技公司出现，竞争法或反垄断法问题会开始出现。他表示，金融科技领域与反垄断法的相互影响应该会很值得关注。“对‘金融科技变革’及其会给已经相对稳固的金融服务市场带来怎样的创新和新的竞争，加拿大、新西兰等法域的竞争法监管机构已经明确表示关注，”Jephcott 说道。

“毫无疑问，科技和经济发展和监管发展之间总是存在差距的。这意味着大多数时候投资者和企业内部法律顾问的实践是处于灰色地带的，”Hanafiah Ponggawa & Partners 律师事务所雅加达办公室合伙人 Erwin Kurnia Winenda 表示。

他建议这个领域不应该被高度监管，因为这可能会阻碍金融科技的发展；政府需要明确表示，只要公司可以确保对消费者权益的保护，那么金融科技的任何新发展都只需要在早期上报监管机构或向监管机构进行注册即可。

“Competition law authorities in various jurisdictions, including Canada and the Netherlands, have already expressly signalled their interest in the ‘fintech revolution’ and how this can bring new innovation and competition into an otherwise relatively entrenched market of financial services,” says Jephcott.

“It goes without saying that there will always be a gap between technology and economic development and regulatory development. This state, most of the time, makes investors and in-house lawyers practice in the grey area,” says Erwin Kurnia Winenda, a partner at Hanafiah Ponggawa & Partners in Jakarta.

He suggests that the industry should not be highly regulated, because it might impede fintech development, and that government needs to make a clear stance that as long as consumer protection can be guaranteed by companies, any new development of fintech practices only needs to be notified or registered to the authority in its early stages.

ZHH

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- **Number of partners: 52**
- **Number of lawyers: 200+**
- **Languages: Chinese, English, French, Japanese, Korean, German**

- **合伙人人数: 52**
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Based in China, Zhonghao Law Firm continues to expand business inside and outside China. After years of development, Zhonghao has become a leading comprehensive law firm in China.

Zhonghao takes the lead in corporatizing its operations referring to western law firms among Chinese counterparts, integrating management and professional services that complies with the international standards. Zhonghao is dedicated to both domestic and overseas expansion. Its offices are all located in the city's CBD in Shanghai, Beijing, Chengdu, Chongqing, Guiyang, Hong Kong and New York, which enable us to provide full services in these major cities.

There are more than 50 partners and over 200 lawyers and professional staffs in Zhonghao. We regularly communicate and cooperate with major law firms in Europe and the United States and have entered into association with ONC Lawyers, one of the top law firms in Hong Kong, enabling us to further expand our service areas. Zhonghao shows excellence in many fields, having repeatedly received honorable awards including Civilized Law Firm at Ministerial Level (Ministry of Justice of P.R.C.), National Excellent Law Firm (All China Lawyers Association), Top 30 Potential Law Firms in Asia (*ALB*), Top 100 Law Firms in Asia-Pacific and China Elite Top 30 (*The Lawyer*), China Business Law Awards (*China Business Law Journal*) etc.

中豪律师集团立足中国，持续在境内外拓展业务。经过多年的发展，业已成为中国律师业中领先的综合性律师事务所。

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金钱法度
MONEY RULES

对私募股权投资者而言，中国市场从来都不缺乏机遇。但是基金管理人必须跟上快速完善的监管机制，才能顺利获得珍贵的宝藏。**焦亚惠**报道。

CHINA NEVER LACKS OPPORTUNITIES FOR PRIVATE EQUITY INVESTORS, BUT FUND MANAGERS MUST NOW KEEP UP WITH A SWIFTLY MATURING REGULATORY FRAMEWORK, WRITES **JOY JIAO**

虽然全球私募股权及风险投资（PE/VC）出现下挫，但是中国的 PE/VC 投资却逆流而上，预计在今年随后的几个月将依然保持出色表现。与此同时，许多领域的监管措施也进一步加强，以便更好地监管这一快速发展的市场。

根据普华永道发布的《中国私募股权及风险投资基金 2016 年回顾与 2017 年展望》，相比 2015 年，2016 年全球 PE/VC 基金募资及投资金额较整体虽有所下降，但是中国市场依然表现强劲，募资及投资金额均创历史新高，投资金额增至 2230 亿美元。

Private equity and venture capital (PE/VC) funds in China have defied global downward trends of late and best predictions are for continued sterling performances for the rest of the year. But with the rapid growth comes also, in many areas, a rapid rate of regulatory development to keep pace and better control fresh markets.

Although the proceeds raised and the amounts invested by PE/VC funds declined globally in 2016, the China market made a strong showing with new highs, as PE/VC-led M&A deal value increased to US$223 billion, according to *China Private*

展望 2017 年，普华永道的报告预计中国 PE/VC 基金的资金募集将继续保持上升态势。PE/VC 主导的并购活动，尤其是海外并购，将更加频繁。PE/VC 投资活跃的领域预计有高科技、金融科技、文化娱乐、医疗健康、房地产及消费品等行业。不过 2017 年，基金将继续面对退出的压力。

虽然中国 PE/VC 基金的募投势头依然强劲，但是基金管理人所面对的是监管机构更严格的要求，进一步规范和控制监管环境。热门的投资行业都各有其独特的法律问题，投资一些新兴行业所面对的合规问题尤其复杂。要想从快速增长中获利，基金管理人不仅要懂如何投资，更需要掌握各种监管和合规问题。

Equity/Venture Capital 2016 Review and 2017 Outlook, published by PricewaterhouseCoopers (PwC).

Looking ahead to 2017, PwC predicts that the proceeds raised by Chinese PE/VC funds will continue their upward trajectory. M&A led by PE/VC, particularly overseas M&A, will become even more frequent, and PE/VC investment will be active in such industries as high technology, financial technology, culture and entertainment, healthcare, real estate and consumer goods, the multinational accounting firm says. However, funds will continue to face exit challenges this year.

对于新申请的基金管理人，我们通常会建议客户先与拟设立地工商机关沟通

With respect to fund managers that are applying for the first time, we usually recommend to the client that it first talk with the administration for industry and commerce of the place where it proposes to establish

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登记备案

最近 12 个月以来，中国证券投资基金业协会（中基协）发布了多项与私募基金登记备案相关的问题解答。

根据《私募投资基金登记备案问题解答（七）》，私募基金管理人的名称和经营范围中应当包含“基金管理”“投资管理”“资产管理”“股权投资”“创业投资”等相关字样。

“但是，目前全国范围尚未完全放开对于金融类企业登记的限制，”中伦律师事务所上海办公室合伙人龚乐凡说。“对于新申请的基金管理人，我们通常会建议客户先与拟设立地工商机关沟通，确保按照协会 [中基协] 要求完成基金管理公司工商登记，”。

其他比较重要的还包括《私募基金登记备案相关问题解答（十二）》和《私募基金登记备案相关问题解答（十三）》。解答十二要求私募基金管理人的高级管理人员不得在非关联的私募机构兼职。“实践中，规范高管任职

But despite the strong growth patterns, fund managers are facing more stringent requirements from authorities as the sector moves towards a better controlled and regulated environment. And each of the favoured industries for investment presents its own legal issues, with the compliance matters faced by investors in certain emerging sectors being particularly complex. So to glean the profits from rapid growth, fund managers now not only need to understand how to invest, but they must stay ahead of the curve on regulatory and compliance issues.

REGISTRATION AND RECORDAL

In the past 12 months, the Asset Management Association of China (AMAC) issued several sets of questions and answers relating to the registration and recordal of private funds. According to AMAC's answer No. 7, the name and scope of business of a private fund manager is required to contain such words as “fund management”, “investment management”, “asset management”, “equity investment”, “venture capital”, etc.

一直是私募基金管理人登记中中基协重点监管的内容，”金杜律师事务所北京办公室合伙人龚牧龙表示。

解答十三要求，私募基金管理人在申请登记时，只能在私募证券基金管理人、私募股权 / 创投基金管理人、其他类私募基金管理人三者之间选择一种类型；私募基金管理人不可管理与本机构已登记业务类型不符的私募基金；同一私募基金管理人不可兼营多种类型的私募基金管理业务。

“这意味着之前的同一管理人对私募股权基金与私募证券基金的‘混业经营’已经一去不复返了，原来存在‘混业经营’的私募基金管理人或基金也被要求进行相关调整，”中伦律师事务所北京办公室合伙人张诗伟说。

龚牧龙表示：“解答十三对于市场上从事一、二级市场

规范高管任职一直是私募基金管理人登记中中基协重点监管的内容

Regulation of the service of senior management personnel has consistently been one of the key focal points of regulation of the registration of private fund managers by the AMAC

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同一管理人对私募股权基金与私募证券基金的‘混业经营’已经一去不复返了

The past practice of one manager concurrently engaging in private equity fund and private securities fund management business has gone, never to return

“However, the restrictions on the registration of financial enterprises have not yet been fully relaxed everywhere around the country,” says Gong Lefan, a partner at the Shanghai office of Zhong Lun Law Firm. “With respect to fund managers that are applying for the first time, we usually recommend to the client that it first talk with the administration for industry and commerce of the place where it proposes to establish, to ensure completion of business registration of the fund management company in accordance with the AMAC’s requirements.”

Other more important answers include No. 12, which requires senior management personnel of private fund managers not to serve concurrently with non-affiliated private investment firms. “In practice, regulation of the service of senior management personnel has consistently been one of the key focal points of regulation of the registration of private fund managers by the AMAC,” says Gong Mulong, a partner at the Beijing office of King & Wood Mallesons.

Answer No. 13 requires private fund managers applying for registration to choose only one from three types of business: private

联动的基金影响较大，该等基金需要对证券投资和股权投资分别登记不同的管理人和基金进行投资运作。”

根据自身经验，龚牧龙认为，以下问题是拟办理中基协登记备案的 PE/VC 基金管理人目前需要特别关注的：

（1）拟办理中基协登记备案的 PE/VC 基金管理人需在名称和经营范围中包含前述解答七中所要求的用字，否则登记申请可能会被协会拒绝。同时，管理人的经营范围中不得包括民间借贷、民间融资、配资业务、小额理财、小额借贷、P2P/P2B、众筹、保理、担保、房地产开发、交易平台等业务。

（2）管理人的股东需对管理人进行一定比例的实缴，目前实践中通常为不低于 100 万元（14.5 万美元）或不低于注册资本的 25%。

（3）管理人的关联方从事私募基金管理业务但未办理管理人登记也是中基协关注的问题，因此管理人应在申请登记备案前确保这类关联方已办理或正在办理登记，如未办理登记的原因是该关联方暂未从事相关业务，则可能需要依据中基协的要求出具承诺函甚至注销该等关联方。

（4）管理人的高管需依据中基协的规定取得基金从业资格，同时，管理人的高管应当与管理人建立正式的劳动关系而非“挂靠”，中基协的申请系统中也需要上传该等高管与管理人的劳动合同或社保公积金缴纳证明。

监管新动态

除了登记备案之外，中国证券监督管理委员会和中基协近期的监管措施或实践操作对 PE/VC 基金的募集、投资、管理、退出等环节也都产生了广泛影响。

“证监会近期出台了一系列针对二级市场再融资、并购的法规和指导意见，”尚伦律师事务所北京办公室合伙人吕海波说，“在基金层面对于针对二级市场的 PE 基金造

securities fund manager, PE/VC fund manager, or other private fund manager. A private fund manager may not manage a fund that is not consistent with the type of business for which it registered, and may not concurrently engage in multiple types of private fund management business.

“This signifies that the past practice of one manager concurrently engaging in private equity fund and private securities fund management business has gone, never to return, and private fund managers or funds that currently have such hybrid operations are being required to make the relevant adjustments,” says Zhang Shiwei, a partner at Zhong Lun Law Firm in Beijing.

Gong Mulong says, “Answer No. 13 has a relatively major impact on those funds that deal in both the primary and secondary markets, as such funds are required to register different managers and funds for securities investment and equity investment to carry on their investment operations.”

Based on his own experience, Gong Mulong argues that PE/VC fund managers need to pay particular attention to the following issues when carrying out AMAC registration/recordal:

(1) A PE/VC fund manager is required to include words such as those required by above-mentioned answer No. 7 in its name and scope of business, failing which its application for registration may be rejected. The manager's scope of business may not include such business as private lending, private financing, margin lending, small amount wealth management, extension of small loans, peer-to-peer (P2P)/person-to-business (P2B) lending, crowd funding, factoring, provision of security, real estate development, and trading platform;

(2) The shareholders of the manager must make a paid-in contribution of a certain percentage to the manager, which, in current

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证监会近期出台了一系列针对二级市场再融资、并购的法规和指导意见

The CSRC recently issued a series of regulations and guiding opinions addressing further financing on the secondary market and acquisitions

成一定冲击，个别基金的业绩受到严重影响，随之也影响到相关类别基金的募资。”

2016 年 9 月，证监会发布了《关于修改〈上市公司重大资产重组管理办法〉的决定》，修订后的新规被业界称为“史上最严的借壳新规”。龚乐凡表示，新规修订了对“重大资产重组”的界定标准。

龚乐凡介绍说，旧规定的界定标准只有两项：一是上市公司发生控制权变更；二是上市公司向收购人及其关联人购买资产总额占比超过 100%。就第二点，新规定将考察标准从原先的资产总额这一单项指标，扩大为资产总额、营业收入、净利润、资产净额、发行股份数量五个指标。

“新规出台后，中概股回归之路愈发艰难，PE 投资人需要重点关注这些标准，提前与各方顾问沟通，在交易中设计合理、合规的架构，以免触发‘借壳标准’，”他说。

中国证监会 2016 年底发布了《证券期货投资者适当性管理办法》，将于 2017 年 7 月 1 日正式生效。邦信阳中建中汇律师事务所上海办公室合伙人刘倩表示，这一管理办法适用于境内 PE/VC 基金的募集环节。

practice, is usually not less than RMB1 million (US$145,000) or 25% of the registered capital;

(3) The engagement by a connected party of a manager in private fund management business without having carried out manager registration is also an issue that the AMAC keeps a close watch on. Before applying, a manager should ensure that such a connected party has carried out, or is carrying out, registration, and if the reason that it has not carried out registration is that it is provisionally not engaging in the relevant business, it may be necessary to issue a letter of undertaking, or even deregister the connected party as required by the AMAC;

(4) The senior management personnel of a manager are required to secure fund qualifications in accordance with AMAC regulations. Senior management personnel are also required to establish a formal employment relationship with the manager and not merely be “attached” to it. The AMAC’s system also requires the uploading of the management personnel’s employment contracts with the manager, or proof of payment of social insurance and contributions to the housing reserve.

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[基金管理人] 还应进一步根据规定对投资者进行分级管理，区分专业投资者和普通投资者

A fund manager should place particular attention on managing investors by type ... distinguishing professional investors from ordinary investors

“基金管理人应特别注意，在核查投资者是否符合合格投资者标准外，还应进一步根据规定对投资者进行分级管理，区分专业投资者和普通投资者，针对普通投资者，基金管理人在信息告知、风险警示、适当性匹配等方面应履行更严格的尽职义务，”刘倩说。“基金管理人也可根据专业投资者的业务资格、投资实力、投资经历等因素，对专业投资者进行细化分类和管理。”

该管理办法出台后，刘倩表示基金管理人还应对基金产品进行风险分级管理，根据每个基金产品的特性划分不同的风险等级。基金管理人还应根据对投资者的评估向其推介适合的基金产品。最后她提醒道：“在进行前述适当性管理操作时，基金管理人应留存全部留痕。”

与证监会一样，中基协也加强了对私募投资基金的监管。“中基协对私募基金‘投’和‘退’环节监管较少，更多是涉及商业上的考量或技术上的安排。”汉坤律师事务所北京办公室合伙人张平律师表示。“相比之下，基金业协会目前对私募投资基金的‘募’和‘管’环节的管理是比较严格的，尤其是对私募基金管理人的登记、私募投资基金备案以及私募投资基金和管理人相关信息的定期披露等方面要求。”

“基金管理人不仅要根据基金协议向投资人披露，还要向协会进行信息披露。”《私募投资基金募集行为管理

RECENT REGULATORY TRENDS

In addition to registration/recordal, recent regulatory measures and practical operations from the China Securities Regulatory Commission (CSRC) and AMAC have had a wide-ranging effect on capital raising, investment, management, and exit by PE/VC funds.

“The CSRC recently issued a series of regulations and guiding opinions addressing further financing on the secondary market and acquisitions,” says Lü Haibo, a partner at Sunland Law Firm in Beijing. “At the fund level, these have had a certain impact on PE funds that deal in the secondary market, with the performance of certain of those funds seriously affected, further affecting the fund raising of related types of funds.”

In September 2016, the CSRC issued the Decision on Amending the Administrative Measures for Material Asset Restructurings of Listed Companies. Industry insiders have labelled the amended regulations the most stringent to date on backdoor listings. Gong Lefan states that the new regulations have revised the criteria for defining a “material asset restructuring”.

基金管理人不仅要根据基金协议要向投资人披露，还要向协会进行信息披露

A fund manager is not only required to disclose information to the investors in accordance with the requirements of the AMAC, but is also required to disclose information to the AMAC

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办法》及《私募投资基金信息披露管理办法》等相关规定对此都有做明确规定。

此外，中基协于 2017 年 3 月 1 日发布《私募投资基金服务业务管理办法》（试行）。龚牧龙表示，根据该管理办法，向私募基金提供基金募集、投资顾问、份额登记、估值核算和信息技术系统等服务业务的机构均属于私募基金服务机构。

“该等服务机构需要在中基协完成登记并成为协会会员，”他说。“从我们的经验来看，由于服务机构登记比私募基金管理人登记要求的申报材料更为复杂，需要建立的业务制度和风控内控制度更为精细，加之相关信息系统的安全性、稳定性要求，因此服务机构的登记难度也更大。”

此外，中国银行业监督管理委员会的一份规定可能对私募基金的资金来源造成影响。中豪律师集团重庆办公室合伙人郑毅表示，近两年，越来越多的银行资金通过资管计划、信托计划等通道投资私募基金或产业基金，增加了银行理财资金投资非标资产的比例，加重了银行自身风险。为此，银监会在 2017 年 4 月发布了《关于银行业风险防

He explains that there were only two criteria in the old regulations for defining such restructurings: (1) a change occurs in the control of the listed company; and (2) the proportion of the total amount of assets acquired by the listed company from the acquirer and its connected parties exceeds 100%. With respect to the second point, the new regulations expand the criteria to be examined from the single metric of total asset amount to five metrics – total asset amount, operating revenue, net profit, net asset amount and number of shares issued.

“With the issuance of the new regulations, the route for the return home of Chinese concept stocks overseas has become more difficult, so PE investors need to pay particular attention to these criteria, talk with advisers of the various parties in advance, and design a reasonable and compliant structure in the transaction to avoid triggering the ‘backdoor listing criteria’,” says Gong Lefan.

At the end of 2016, the CSRC issued the Administrative Measures for the Suitability of Securities and Futures Investors, which will formally enter into effect on 1 July 2017. Echo Liu, a partner

控工作的指导意见》，明确指出银行要切实履行自身投资管理职责，不得简单将理财业务作为各类资管产品的资金募集通道。“这表明监管机构对目前许多银行资金投入私募基金或产业基金的模式提出了警告和制止，”郑毅说。

投资热点

人工智能是当下 PE/VC 基金关注的一个投资热点。尚伦所的吕海波表示，投资人工智能（AI）需要特别关注的是知识产权问题。“由于一部分创业者是国内外高校、研究机构、大公司出身，其项目所依赖的知识产权归属乃至是

监管机构对目前许多银行资金投入私募基金或产业基金的模式提出了警告和制止

The regulator is giving a warning and proposing putting a stop to the model where significant quantities of bank funds are invested in private funds and industry funds

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in the Shanghai office of Boss & Young, says these administrative measures will apply to PE/VC funds at the offering stage.

“In addition to verifying whether an investor satisfies the criteria for a qualified investor, a fund manager should place particular attention on managing investors by type, in accordance with regulations, distinguishing professional investors from ordinary investors, and in respect of ordinary investors a fund manager is required to perform stricter due diligence obligations in terms of information provision, risk warning, suitability matching, etc.,” says Liu. “A fund manager may also further categorize and manage professional investors based on such factors as their business qualifications, investment strengths, investment experience, etc.”

After the issuance of the administrative measures, Liu says fund managers are required to manage their fund products by risk level, dividing them into risk grades based on their properties. A fund manager is also required to recommend appropriate fund products to investors based on its assessments of such investors. She says, by way of reminder, “when carrying out the above-mentioned suitability management, the fund manager should retain all traces thereof.”

Like the CSRC, the AMAC has strengthened its regulation of private investment funds. “In its oversight, the AMAC’s regulation of private funds’ investment and exit is mostly about commercial considerations and technical arrangements – not putting too much stress,” says Evan Zhang, a partner at Han Kun Law Offices in Beijing. “In contrast, the AMAC’s administration of private investment funds’ offerings and management is currently quite strict, particularly its requirements in respect of the registration of private fund managers, the recordal of private investment funds, and the regular disclosure of relevant information by private investment funds and their managers.

“A fund manager is not only required to disclose information to the investors in accordance with the requirements of the AMAC, but is also required to disclose information to the AMAC,” he adds. The Administrative Measures for Offerings by Private Investment Funds, and the Administrative Measures for the Disclosure of Information by Private Investment Funds set out express provisions in this regard.

On 1 March 2017, the AMAC issued the Administrative Measures for the Private Investment Fund Service Business (for Trial Implementation). Gong Mulong says that, under these measures, firms that provide services to private funds such as fund offering, investment advice, fund unit registration, valuation and accounting, and information technology systems are deemed private fund service firms.

“Such service firms are required to register with, and become members of, the AMAC,” he says. “In our experience, the difficulties involved in the registration of a service firm are greater due to the fact that the application materials for registration of a service

否存在竞业禁止问题都非常重要，”他说。“另外，目前 AI 项目很多都在和产品生产方联合开发，或者采用代工生产 [OEM]，其开发相关的知识产权归属也十分重要。”

不过邦信阳中建中汇的刘倩提醒道，很多基金太过于关注热点资产，而很多热点产业的长期盈利能力其实并不是很强，甚至不能产业化。以人工智能为例，去年 AlphaGo 与韩国棋手李世石的人机对弈将 AI 带入到公众的视野。“但是很多情况下，有些仿制品、科技含量并不是很高的产品也号称 AI，混淆大众的视听，”她说。“因此，

firm, as compared with the registration of a private fund manager, are more complex, and the business systems and risk control and internal control systems that they are required to establish are more detailed and add to the requirements in respect of the security and stability of the relevant information systems.”

One set of regulations of the China Banking Regulatory Commission (CBRC) could have an impact on the capital source of private funds. Ian Zheng, a partner in the Chongqing office of Zhonghao Law Firm, says that in the past two years an increasing

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[大数据行业涉及] 对个人信息保护、数据安全、网络安全的一系列规定和要求

[The big data industry] touches upon a series of provisions and requirements ... concerning the protection of personal information, data security and cybersecurity

境内 PE/VC 基金投资人工智能及相关产品领域时，应注意甄别 AI 是否具有高技术性及原创性，且在具体产业的应用能否很好地落地实施，是否符合该行业的创新型发展规律，以避免盲目跟随大流的投资陷阱。”

海问律师事务所北京办公室国际合伙人傅鹏认为，以大数据、AI 和泛物联网（包括车联网、自动驾驶、智能硬件等）为代表的领域，是当下投资的新热点。“增值电信业务经营许可领域的牌照体系是以传统互联网业务形态为基础建立的，如何更好、更精准地适用到大数据、AI 和泛物联网领域，是具有挑战的课题，”他说。“例如，以车联网为例，尤其是车联网业务中的前装 TSP[车载远程信息服务提供商] 服务领域，结合了传统的增值电信业务领域的许多业务特征，需要同时持有多张牌照才能比较好地覆盖业务内容，需要投资人审慎判断。”

傅鹏补充到，近年来中国在网络安全、数据保护领域的立法非常活跃，初步形成了一套基础监管架构，而这套监管体系与大数据、AI 和泛物联网领域行业关系非常密切，值得公司和投资人重点关注。

“例如，大数据行业本身涉及到海量数据的收集、存储、加工、处理、传输、利用，甚至是对外交易或交换，过程本身就关系到中国法律对个人信息保护、数据安全、网络安全的一系列规定和要求，”傅鹏说。“AI 行业虽然以人工智能算法作为核心，但是一个好 AI（尤其在机器深度学

amount of bank funds have been invested in private funds or industry funds, through such channels as asset management plans and trust plans, increasing the percentage of bank wealth management funds invested in non-standard assets, and heightening banks' own risks.

For this reason, in April 2017, the CBRC issued the Guiding Opinions on the Risk Prevention and Control Work of Banks, stating that banks are required to duly perform their investment management duties and not simply treat their wealth management business as a fundraising channel for various types of asset management products. “This indicates that the regulator is giving a warning and proposing putting a stop to the model where significant quantities of bank funds are invested in private funds and industry funds,” says Zheng.

INVESTMENT HOTSPOTS

Artificial intelligence (AI) is currently a big focus of attention for PE/VC funds. Lü, from Sunland, says that particular attention needs to be paid to the issue of intellectual property (IP) when investing in AI. “For entrepreneurs from universities, research institutions or large companies, it is extremely important to identify the vesting of the IP their projects rely on, and whether a non-compete issue exists,” he says. “Many AI projects are currently being jointly

医疗健康行业具有高度的专业性、较高的行业壁垒与准入门槛

The medical and health industry is highly specialized and has relatively high industry barriers and entry thresholds

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习领域）的前提是有大量数据供 AI 进行学习演练，这也是数据收集和利用的问题”。

此外，傅鹏认为泛物联网领域的许多具体业务，例如比较热门的车联网和自动驾驶，也涉及到大量数据的收集和处理，所有这些都需要特别关注网络安全和数据保护领域的监管要求。

瀚一律师事务所创始合伙人徐云认为医疗健康作为一项刚性需要，在中国城镇化、消费升级以及人口老龄化的大背景下，发展势头愈发迅猛。医疗健康行业可以包括医院、体检中心、药厂、药店、医疗器械、医疗检测用品、中药材等很多细分领域。“医疗健康行业具有高度的专业性、较高的行业壁垒与准入门槛，同时也受到政府的严格监管，投资该行业不仅需要相当的专业知识并付出大量资本，还需要保持对政策法规——尤其是反腐败反贿赂法律——的高度敏感，”他说。

但需要注意的是，即使一个基金的中资成分占了绝大多数，其含有的外资成分仍可能会妨碍其对外资受限的领域进行投资。汉坤所的张平律师表示，科技、媒体及电信（TMT）和医疗机构等行业都存在这一问题。在 TMT 领域，有些行业仍然对外资有所限制。根据张平律师的经验，

developed with product producers, or use the OEM [original equipment manufacturer] model, so the vesting of the relevant IP developed by them is also extremely important.”

However, Liu, from Boss & Young, has observed that many funds pay too much attention to popular assets, and that many favoured industries, for example AI, do not have strong long-term profitability, and may not even be commercially successful.

“In many cases, some counterfeit products with a relatively low technical content are also being called AI, confusing the public,” Liu says. “Accordingly, when a domestic PE/VC fund invests in the AI and related product sector, it needs to discriminate whether the AI is truly high-tech and original, whether it can actually be implemented in specific industrial applications, and whether it is in keeping with the innovative development pace of the industry in question, to avoid blindly following the flow into an investment trap.”

Victor Fu, an international partner in the Beijing office of Haiwen & Partners, believes that the sector represented by big data, AI and the internet of things is the new investment hotspot. “However, the licensing regime in the value-added telecommunications service business permit sector was established on the basis of the traditional internet business form, so how to better and more precisely apply it to the big data, AI and the internet of things sector is a challenging issue,” he says.

“Taking the internet of vehicles as an example, particularly the pre-installed TSP [telematics service provider] service sector in the internet of vehicles business, it combines numerous business features of the traditional value-added telecommunications service sector and requires the simultaneous holding of numerous licences to properly cover the services involved. This requires careful consideration by investors.”

Fu adds that legislation in the cybersecurity and data protection fields in recent years has been very active, tentatively giving rise to a basic regulatory framework, and the connection between this regulatory regime and big data, AI and the internet of things sector is extremely close, making it worthwhile for companies and investors to pay close attention.

“For example, the big data industry itself involves the collection, storage, processing, treatment, transmission, use and even the transacting or exchanging with third parties of vast quantities of data, and the process itself touches upon a series of provisions and requirements of Chinese laws concerning the protection of personal information, data security and cybersecurity,” he says. “Although AI algorithms lie at the core of the AI industry, the precondition for good AI, particularly in the machine deep learning field, is having a vast quantity of data available for the AI to learn and drill. This is also a data collection and use issue.”

Fu says many specific services in the internet of things sector, for example the relatively hot internet of vehicles and autonomous driving, also involve the collection and processing of vast quantities

“即使一个基金只是间接地存在外资成分，而且该外资成分也非常少，这类基金投资 TMT 领域的某些行业还是可能影响被投企业的牌照的更新及上市的申请”。

张平律师表示，医疗领域也存在这类问题。不过，就投资需要医疗许可证的医疗机构而言，对于投资人间接含外资成分、外资实质影响等问题，法规及监管机构的态度目前都不是很明确，有赖于相关法规的进一步完善和地方主管部门的认定，这也给一些基金的设立和投资带来一定的不确定性。

“但是对于有限合伙人（LP）上层股东的股权变动情况，基金管理人甚至 LP 本人都很难有效控制，”张平律师说。“LP 的间接股东发生股权变动，出现外资成分，这对基金管理人是一个不小的挑战。”

另一个 PE/VC 基金投资热点是文娱产业。“这个行业的知识产权问题也非常重要，但是政府管理的策略可能对投资人影响更大，”吕海波说。“由于二级市场对于文娱相关产业的挂牌、上市、重组监管日趋严苛，导致基金投资风险加大；同时，由于文娱产业对于明星个人的依赖性较大，导致对风险的管理和控制难度也较大。”

此外，比较活跃的投资领域还有政府与社会资本合作（PPP）项目。中伦所的张诗伟认为，该领域由于有政府投

境外有限合伙人在中国设立的人民币基金也会被视为外资，并受制于［对外商投资的规定］

RMB funds set up in China by foreign LPs are considered foreign investors and are subject to [rules on foreign investment]

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of data, and all of these require particular attention to regulatory requirements of the cybersecurity and data protection fields.

Richard Xu, the founding partner of Han Yi Law Offices, says that medicine and health, as a rigid demand, will develop exponentially as China continues to urbanize, consumer demand increases and the population ages. The medical and health industry can include numerous sub-sectors, such as hospitals, health check centres, pharmaceutical producers, pharmacies, medical devices, medical testing articles, and traditional Chinese medicinal materials.

“The medical and health industry is highly specialized and has relatively high industry barriers and entry thresholds, while also being subject to stringent regulation by the government,” he says. “Investing in this industry not only requires substantial specialized knowledge and the expenditure of significant capital, but also maintaining a high degree of sensitivity to policies and regulations, particularly anti-corruption and anti-bribery laws.”

However, one thing that needs to be noted is that even if the Chinese capital portion accounts for the overwhelming majority of a fund, the foreign investment portion that it contains could impede it from investing in sectors in which foreign investment is restricted.

Evan Zhang, from Han Kun, says this issue exists in industries such as technology, media and telecommunication (TMT) and medical institutions. Some industries in the TMT sector still have certain restrictions against foreign investment. “Even if a foreign investment portion exists only indirectly in a fund, and that foreign investment portion is very small, investment by such a fund in certain industries in the TMT sector may affect the updating of the licences and the application for listing of the investee enterprise,” he says.

Evan Zhang says this issue also exists in the medical sector. However, with respect to investments in medical institutions that require medical permits, regulations on, and the attitude of the regulators towards, such issues as investors containing an indirect foreign investment portion, and the actual impact of the foreign investment are currently unclear, and are dependent on the further improvement of regulations and determinations by local authorities. This also presents a degree of uncertainty for the establishment and investment of certain funds.

“However, with respect to changes in the top-level shareholding of limited partners [LPs], it is difficult for the fund managers, even the LPs themselves, to have effective control,” he says. “A change in the equity of an indirect shareholder of an LP, which may introduce foreign capital into the LP, poses a significant challenge for the fund manager.”

Another hotspot for investment by PE/VC funds is the culture and entertainment industry. “The issue of IP is also very important in this industry, but the strategy of government administration may have a greater impact on investors,” says Lü, from Sunland. “As the regulation of the listing and restructuring of culture and entertainment-related industries by secondary markets is becoming more stringent by the day, funds’ investment risks are

基金管理人平台
PLATFORMS FOR FUND MANAGERS

邦信阳中建中汇律师事务所上海办公室合伙人刘倩表示，基金业协会目前对基金管理人的监管日趋严格，并且涉及方方面面，尤其是在基金管理人的信息报送方面。刘倩介绍说，目前仅平台基金业协会就已推出了四个：

1. 资产管理业务综合管理平台。该平台主要是针对基金管理人和基金产品的登记备案管理及定期信息更新。
2. 信息披露备份系统。该系统是后续将针对投资者开放的基金信息披露平台，管理人应定期进行基金的信息报送。
3. 从业人员管理平台。这是针对私募基金从业人员的管理平台，从业人员应通过所任职私募机构申请个人账号。基金管理人应对机构从业人员的个人账号开立、基本信息注册登记及变更、离职备案信息、诚信信息等进行审核与维护。
4. 远程培训系统。这是对已取得基金从业资格的人员的培训系统，相关人员每年度应完成 15 学时的后续培训，以维持基金从业资格的有效性。

Echo Liu, a partner in the Shanghai office of Boss & Young, says the AMAC's regulation of fund managers is increasingly stringent and touches upon numerous aspects, particularly the submission of information by fund managers. The AMAC has already put out four platforms:

1. **Platform for the comprehensive administration of the asset management business.** The main purposes of this platform are administration of the registration, recordal of fund managers and fund products, and the regular updating of information.
2. **Information disclosure backup system.** This is a fund information disclosure platform that will subsequently be opened to investors, and through it, managers are required to regularly carry out the submission of fund information.
3. **Employee administration platform.** This is a platform for the administration of the employees of private funds, and such employees are required to apply for personal accounts through the private investment firm with which they serve. The fund manager is required to carry out the review and maintenance of the opening of personal accounts by the firm's employees, the registration and amendment of basic particulars, information filed in respect of employees who leave the firm, and integrity information.
4. **Remote training system.** This is a system for the training of personnel who have already secured fund qualifications. Relevant persons are required to complete 15 hours of follow-up training each year to maintain the validity of their fund qualifications.

increasing. Also, as this industry is quite reliant on celebrities, the difficulty of managing and controlling risks is greater."

Another relatively active investment sector is public-private partnership (PPP) projects. Zhang Shiwei, from Zhong Lun, says that since this sector involves participation by public investment platforms, when a PE/VC fund is being selected, greater stress will usually be placed on the fund's fundraising capabilities and whether it has experience in government invested projects. "The return rate on investments in such projects may not be as high as those in certain high-tech sectors, but since PPP projects are government-endorsed the risks of default or failure of the investment are relatively small," he says. "However, as the period required for the development of a PPP project is generally quite long, the major investment difficulties lie in capital chain and leverage pressures."

INVESTMENT OF FOREIGN FUNDS

The sectors that are most attractive to foreign PE/VC funds include TMT, new services (professional services and modern logistics), healthcare and pharmaceuticals, educational services, tourism and clean energy, says Jeanette Chan, managing partner of the China practice at Paul Weiss Rifkind Wharton & Garrison in Hong Kong.

Philip Li, a partner at Freshfields Bruckhaus Deringer in Hong Kong, has seen that financial investors are attracted by opportunities arising from China's urbanization and growing middle class in sectors such as healthcare, education, financial services and internet. "The key issue for investment in these sectors is that most of them are regulated sectors in China and there are qualification requirements or foreign ownership restrictions that investors need to comply with," says Li.

Chan says PE/VC investors should be aware that China restricts and prohibits foreign investment in certain sectors while permitting or encouraging foreign investment in other sectors. "RMB funds set up in China by foreign LPs are considered foreign investors and are subject to these rules," she says.

Telecommunications is such an industry where foreign investment is restricted, and the establishment of a foreign-invested telecommunications enterprise is also very time consuming. Foreign investors therefore may choose not to make a direct onshore investment, but adopt a variable interest entity (VIE) structure for the project.

"Such structuring issues require careful consideration prior to making the actual investment," says Chan. "Furthermore, given that the [central] government maintains a relatively strict foreign exchange control regime, when designing the investment plan, the foreign PE/VC funds must plan the inflow and outflow of foreign currency funds in advance carefully."

Lorna Chen, the co-managing partner of Greater China at Shearman & Sterling in Hong Kong, has also noticed that foreign

资平台参与，在选择 PE/VC 基金的时候通常比较关注该基金的募资能力及是否有从事政府投资项目的经验。“投资该等项目的投资收益率可能比不上投资部分高新科技领域，但是因 PPP 项目由政府作背书，因此违约或投资失败风险相对较小，”他说。“但因 PPP 一般建设周期较长，主要投资难点还是在于资金链及杠杆压力。”

外资基金投资

目前中国最吸引外资 PE/VC 基金的行业包括科技、媒体和电信（TMT）、新兴服务业（例如专业服务、现代物流）、医疗和制药、教育、旅游及清洁能源等，宝维斯律师事务所香港办公室中国业务管理合伙人陈剑音表示。

富而德律师事务所香港办公室合伙人李谦一表示，随着中国城市化的推进和中产阶级的壮大，医疗健康、教育、金融服务和互联网等领域不断增长的机会也吸引着财务投资者。“对这些行业投资的关键问题是，这些行业大多在中国受到监管，投资者需要符合资质要求或遵守外资所有权限制，”他说。

陈剑音表示，PE/VC 投资者需要留意到，在某些行业中国限制或禁止外国进入，但同时在另一些行业允许或鼓励外国投资。“境外有限合伙人在中国设立的人民币基金也会被视为外资，并受制于这些规定，”她说。

例如，陈剑音表示电信就是外资受限制的行业，并且要成立一家外商投资电信企业非常耗时。因此，对于这类项目外国投资者可能不选择进行直接在岸投资，而是采用可变利益实体结构（VIE）。

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投资者通过离岸退出可以直接获得美元收益

In an offshore exit, investors will receive US dollar proceeds

exchange has become a critical issue for foreign funds, and currently “funds cannot be smoothly transferred offshore, which significantly affects the foreign funds’ investment and operation”.

Since November 2016, regulators such as the People’s Bank of China (PBOC), the State Administration of Foreign Exchange (SAFE), the National Development and Reform Commission (NDRC) and the Ministry of Commerce (MOFCOM) have publicly and repeatedly expressed their concerns regarding overseas investment risks.

“The regulators have quietly started experimenting with regulatory measures to control outward remittances of foreign exchange,” says Chen, adding that some banks have adjusted their practices for outward remittances of overseas investment funds, including: (1) a regulatory interview will be conducted for any remittance requested after 28 November 2016; and (2) where a single foreign exchange purchase or payment for a capital account item equals or exceeds the equivalent of US$5 million, it must be submitted to the capital account section of a local SAFE branch through the information exchange platform and may not be effected until the PBOC and SAFE have completed their examination of its authenticity and compliance.

SAFE issued two regulations early this year – the Notice on Further Promotion of Foreign Exchange Administration Reform and Improvement of the Authenticity and Compliance Review, and the Circular on the Relevant Issues of Foreign Exchange Risk Management of Foreign Institutional Investors of China’s Interbank Bond Market. Chen says the two regulations may give hope to those funds that are affected by China’s foreign exchange issue. “However, these regulations only apply to limited situations, such as Nei Bao Wai Dai [onshore guarantees for offshore indebtedness] and free trade zones,” she says.

The tightened control on foreign exchange may make exit more complex. “Investors have always been wrestling with the choice between an onshore exit, which can deliver better internal rate of return (IRR), and an offshore exit, which gives more deal certainty,” says Li, from Freshfields. “The recent capital control measures adopted by the Chinese authorities only added further complexity to that thought process.”

Li explains that onshore exit means an A-share IPO or a sale to an RMB fund or a domestic corporate, and “in an onshore exit, RMB proceeds need to be converted into US dollars and the recent capital control measures have added uncertainties as to how and when such conversions can be made”.

Meanwhile, offshore exit means exiting at the offshore holding company level, being an IPO in Hong Kong or the US, or a trade sale of the offshore holding company, says Li, and “in an offshore exit, investors will receive US dollar proceeds”.

But there is good news as well – China has made a significant change of its foreign investment approval regime. Thanks to that change, Chan from Paul Weiss says the establishment of, or any

"在实际投资之前，需要仔细考虑采用此类 VIE 结构的问题，" 她说。"此外，鉴于中国相对严格的外汇管理制度，在制定投资计划时，境外 PE /VC 投资基金必须事先仔细规划外币资金的流入和流出。"

谢尔曼思特灵律师事务所香港办公室大中华区联席管理合伙人陈新也留意到，外汇已成为外资基金面对的关键问题，目前 "资金不能顺利转到海外，这对外资基金的投资和经营有很大影响。"

自 2016 年 11 月起，中国人民银行、国家外汇管理局、国家发展和改革委员会、商务部等监管机构一再公开表示关注海外投资中存在的风险。

陈新说："监管机构已开始试行控制外汇汇出的监管措施。" 据她介绍，一些银行已调整了对汇出海外投资所需资金的做法，其中包括：(1) 对 2016 年 11 月 28 日以后的任何汇款请求，需进行监管约谈；(2) 单笔购汇或资本项目外汇支付的金额等于或超过 500 万等值美元时，必须通过信息交换平台上报至当地外汇管理局的资本项目管理部门，待中国人民银行和国家外汇管理局完成真实合规性审查后方可生效。

国家外汇管理局今年年初发布了两项法规，《关于进一步推进外汇管理改革完善真实合规性审核的通知》及《关于银行间债券市场境外机构投资者外汇风险管理有关问题的通知》。"然而，这些规定仅适用于有限的情形，如内保外贷和自由贸易区，" 她说。

加强外汇管理可能会使基金的退出更加复杂。"投资者总是纠结于选择在岸退出还是离岸退出，在岸退出可以带来更好的内部收益率，离岸退出则可以增加交易的确定性，" 富而德律所的李谦一说。"中国政府部门最近采用的资本管控措施，使得上述抉择变得更加复杂。"

李谦一解释说，在岸退出意味着 A 股上市或向人民币基金或境内企业转让股权，"在岸退出意味着需要将人民币买价转换为美元，最近的资本管控措施增加了对于在什么时候、以何种方式可以将人民币兑换成美元这一问题的不确定性"。

离岸退出意味着在离岸控股公司层面实现退出，可以是通过在香港或美国上市，或出售离岸控股公司股权，"投资者通过离岸退出可以直接获得美元收益"，李谦一说。

但好消息是，中国的外商投资审批制度发生了重大调整。宝维斯律所的陈剑音表示，在该制度调整后，外商投资企业的设立或变更，如果不涉及外资受限制的业务，无需再经过政府审核，只需记录备案。"无论从时间还是文件要求而言，这将大大简化外资 PE / VC 基金在中国投资的程序，" 她说。

陈剑音表示，在以前的制度下，被投资企业也需要协助向政府提交各种支持文件，被投资公司成为外商投资企业之后作出的变更也需要通过核准。"所以在实践中，国内企业往往不愿接受外资 PE / VC 基金的投资，" 她说。"随着精简后的新备案制度的实施，外资 PE / VC 基金投资可能会更为国内公司所接受。这样，外资 PE / VC 基金或许能够更好地与中国快速发展的人民币基金竞争。"

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资金不能顺利转到海外，这对外资基金的投资和经营有很大影响

Funds cannot be smoothly transferred offshore, which significantly affects the foreign funds' investment and operation

change to, a foreign-invested enterprise that is not engaged in any type of business for which foreign investment is restricted will no longer need to be approved by the government, but will only require a record-filing. "This will greatly simplify the procedures through which foreign PE/VC funds make investments in China, both in terms of time and also documentation requirements," she says.

Under the previous regime, she says investee enterprises were also required to assist in submitting various supporting documents to the government and ongoing approvals were required for future changes after the investee companies become foreign-invested enterprises. "Therefore, in practice, domestic enterprises were often unwilling to accept investment from foreign PE/VC funds," she says. "With the new streamlined filing regime in place, investment made by PE/VC funds may become more acceptable to domestic companies. In this way, foreign PE/VC funds may be able to better compete with the Chinese RMB funds that are rising rapidly in China."

优秀中国私募股权投资交易
TOP CHINA PE INVESTMENT DEALS

公布日期 ANNOUNCED DATE	卖方法律顾问 SELLSIDE LEGAL ADVISERS	目标领域 TARGET SECTOR	收购方 BIDDER	收购方法律顾问 BUYSIDE LEGAL ADVISERS	卖方 SELLER	金额（百万美元） VALUE (US$M)
28/04/2017	世达律师事务所 Skadden Arps Slate Meagher & Flom	科技、媒体及电信 TMT	软银集团 SoftBank Group； 银湖投资集团 Silver Lake Partners； 交通银行 Bank of Communications； 招商银行 China Merchants Bank			5,500
12/05/2016	方达律师事务所 Fangda Partners	科技、媒体及电信 TMT	苹果公司 Apple； 中国人寿保险 China Life Insurance Company； 中国招商银行 China Merchants Bank； 阿里巴巴集团 Alibaba Group Holding； 腾讯 Tencent Holdings； 软银中国资本 SB China Venture Capital； 中信资本 CITIC Capital Partners； 中国保利集团公司 China Poly Group Corporation； 蚂蚁金服 Ant Financial Services Group	竞天公诚律师事务所 Jingtian & Gongcheng； 威嘉律师事务所 Weil Gotshal & Manges		4,500
30/05/2016	礼德律师事务所 Reed Smith	房地产 Real estate	大连万达集团财团 Dalian Wanda Group Consortium	达维律师事务所； Davis Polk & Wardwell； 德恒律师事务所 DeHeng Law Offices； 海问律师事务所 Haiwen & Partners； 凯易律师事务所 Kirkland & Ellis； 诺顿罗氏律师事务所 Norton Rose Fulbright； 盛德律师事务所 Sidley Austin； 司力达律师事务所 Slaughter and May； 天元律师事务所 Tian Yuan Law Firm;； 伟凯律师事务所 White & Case		4,391
31/05/2016	森 • 滨田松本法律事务所 Mori Hamada & Matsumoto； 美富律师事务所 Morrison & Foerster； 苏利文·克伦威尔律师事务所 Sullivan & Cromwell	科技、媒体及电信 TMT	淡马锡控股公司 Temasek Holdings； 新加坡政府投资公司 GIC Private； 阿里巴巴集团 Alibaba Group	宝维斯律师事务所 Paul Weiss； 盛信律师事务所 Simpson Thacher & Bartlett	软银集团 SoftBank Group	3,400
09/01/2017	佳利律师事务所 Cleary Gottlieb Steen & Hamilton	娱乐 Leisure	凯雷投资集团 The Carlyle Group； 中信股份 CITIC Limited； 中信资本 CITIC Capital Holdings	凯易律师事务所 Kirkland & Ellis； 中伦律师事务所 Zhong Lun Law Firm	麦当劳公司 McDonald's Corporation	2,080

数据时间为2016年5月1日到2017年5月1日，并基于金额超过500万美元的交易
Data run from 1 May 2016 to 1 May 2017, and are based on deals valued at more than US$5 million

数据来源：并购市场资讯 Source: Mergermarket

优秀中国私募股权退出交易
TOP CHINA PE EXIT DEALS

公布日期 ANNOUNCED DATE	卖方法律顾问 SELLSIDE LEGAL ADVISERS	目标领域 TARGET SECTOR	收购方 BIDDER	收购方法律顾问 BUYSIDE LEGAL ADVISERS	卖方 SELLER	金额（百万美元） VALUE (US$M)
01/08/2016	达维律师事务所 Davis Polk & Wardwell；汉坤律师事务所 Han Kun Law Offices	科技、媒体及电信 TMT	滴滴出行 Didi Chuxing	方达律师事务所 Fangda Partners；世达律师事务所 Skadden Arps Slate Meagher & Flom；威嘉律师事务所 Weil Gotshal & Manges	优步牵头的投资团 Investor group led by Uber Technologies	7,000
13/05/2016		科技、媒体及电信 TMT	万达电影院线 Wanda Cinema Line	竞天公诚律师事务所 Jingtian & Gongcheng	北京万达投资牵头的投资团 An investor group led by Beijing Wanda Investment	5,703
06/05/2016		科技、媒体及电信 TMT	乐视网信息技术(北京) Leshi Internet Information and Technology (Beijing)	金杜律师事务所 King & Wood Mallesons	乐视控股(北京)牵头的投资团 An investor group led by Leshi Holding (Beijing)	1,507
08/08/2016		商业服务 Business services	海航集团 HNA Group	海问律师事务所 Haiwen & Partners	黑石集团 Blackstone Group	1,000
14/02/2017		科技、媒体及电信 TMT	北京兆易创新科技 GigaDevice Semiconductor (Beijing)	金杜律师事务所 King & Wood Mallesons	北京清芯华创投资管理 Hua Capital Management；上海承裕投资管理 Shanghai Chengyu Investment；北京屹唐半导体产业投资中心 Beijing Yitang Semiconductor Industry Investment Centre；烟台民和志威投资中心 Yantai Minhezhiwei Investment Centre；上海闪胜创芯投资合伙企业 Shanghai Shansheng Chuangxin Investment	944

中国私募股权投资交易优秀律所（以金额为据）
TOP LAW FIRMS FOR CHINA PE INVESTMENTS (BY VALUE)

律师事务所 LAW FIRMS	金额（百万美元） VALUE (US$M)
凯易律师事务所 Kirkland & Ellis	6,918
天元律师事务所 Tian Yuan Law Firm	4,667
达维律师事务所 Davis Polk & Wardwell	4,590
德恒律师事务所 DeHeng Law Offices	4,391
司力达律师事务所 Slaughter and May	4,391
伟凯律师事务所 White & Case	4,391
盛信律师事务所 Simpson Thacher & Bartlett	2,463
威嘉律师事务所 Weil Gotshal & Manges	1,964
方达律师事务所 Fangda Partners	1,138
中伦律师事务所 Zhong Lun Law Firm	1,082

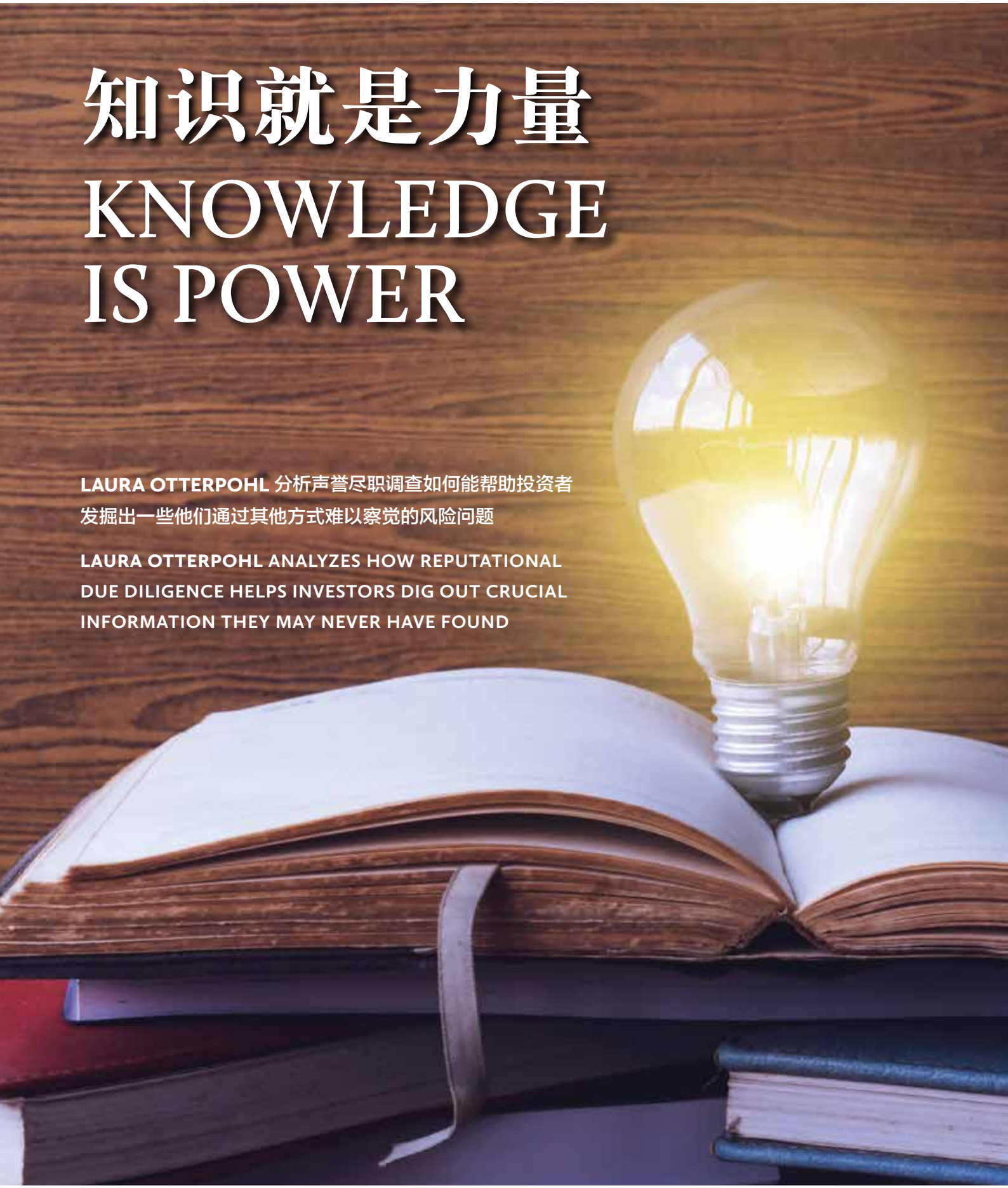
中国私募股权退出交易优秀律所（以金额为据）
TOP LAW FIRMS FOR CHINA PE EXIT DEALS (BY VALUE)

律师事务所 LAW FIRMS	金额（百万美元） VALUE (US$M)
汉坤律师事务所 Han Kun Law Offices	7,303
达维律师事务所 Davis Polk & Wardwell	7,000
年利达律师事务所 Linklaters	1,771
Mills & Reeve	1,771
瑞格律师事务所 Ropes & Gray	1,771
美富律师事务所 Morrison & Foerster	690
瑞生律师事务所 Latham & Watkins	681
博历维律师事务所 Borden Ladner Gervais	600
法铭德律师事务所 Fasken Martineau DuMoulin	600
史密夫斐尔律师事务所 Herbert Smith Freehills	600

数据时间为2016年5月1日到2017年5月1日，并基于金额超过500万美元的交易
Data run from 1 May 2016 to 1 May 2017, and are based on deals valued at more than US$5 million

数据来源：并购市场资讯 Source: Mergermarket

知识就是力量
KNOWLEDGE IS POWER



LAURA OTTERPOHL 分析声誉尽职调查如何能帮助投资者发掘出一些他们通过其他方式难以察觉的风险问题

LAURA OTTERPOHL ANALYZES HOW REPUTATIONAL DUE DILIGENCE HELPS INVESTORS DIG OUT CRUCIAL INFORMATION THEY MAY NEVER HAVE FOUND

你听人说过跨国合资中的惨痛经历吗？来自两个不同国家的公司决定在开展多年的业务合作后组建一家合资公司。其中那家“外国公司”同意将合资公司建立在其合作伙伴所在国境内。他们聘请了律师、会计师和顾问团队负责监督此项合资交易，以保证交易能够顺利完成。事实上交易也确实非常顺利地完成了。合资公司一切就绪，销售额一路上涨，每个人都很开心——直到这一切坍塌的那一刻。

一封突如其来的电子邮件在一夜之间使一切都变得面目全非。那家外国公司收到的电邮指出，在合资公司的存续期间内，价值数百万美元的库存无故消失，仿冒产品充斥合资公司的本国市场，而一直以来接收外国公司付款的很多供应商账户都是假的。这一切究竟是怎么发生的呢？

人人都知道尽职调查的重要性。尽职调查如此重要，以至于人们开展多种类型的尽调：针对财务、法律、业务、运营、人力资源等等。在这个合资公司设立过程中，开展了几种类型的尽职调查，但是风险并未被发现，灾难最终还是发生了。那么我们又该如何检测及预防这些风险呢？在许多情况下，解决的方法是：展开声誉尽职调查（reputational due diligence）。

什么是声誉尽调？

简而言之，声誉尽调能够穿透事情表象，发掘业务合作伙伴的“真相”。声誉尽调可以为其他类型的尽职调查提供支持，以将业务伙伴“字面上的”情况与其现实活动进行比较。它可以识别出业务伙伴自己介绍的情况与其在现实世界中的实际行为和存续状态之间的任何矛盾之处，也就是业务合作伙伴告诉你他们在做什么与他们真正做了什么之间的差别。

声誉尽调能够为以下问题提供答案：

- 业务伙伴的实际情况与其自己的介绍有什么出入吗？
- 有没有未披露的外部商业利益？
- 所有权结构是什么？谁是最终所有人？
- 是否有迹象表明该公司在实际运作？该公司处于合法存续状态吗？
- 业务伙伴真的拥有特定行业的经验吗？
- 投资者真的有钱做出投资吗？
- 将在本地聘用的总经理或高级职员是否有犯罪前科？

声誉尽调是对商业伙伴进行“定性”考察。它可以针对公司或个人，但通常是二者兼而有之。毕竟，公司的背后还是人在操纵。声誉尽调可以应用于各种法律环境，但本文将重点介绍其在并购和监管合规（包括反贿赂反腐败和反洗钱合规）中的应用。

并购中的声誉尽调

在并购过程中，声誉尽调用于支持其他类型的尽职调查，试图挖掘在其它类型尽职调查中的下列信息：（1）并购目标或投资者未分享的信息；以及（2）未被挖掘的信息。

参与并购的企业可能会问：桌对面的交易对手到底属于哪家公司？投资者真的有钱投资吗？目标公司可以坚持

Have you heard the story about the international joint venture (JV) disaster? It starts with two companies of different nationalities deciding to form a JV after several years of co-operating in a B2B relationship. One of the entities, “the foreign company”, has agreed to set up the JV in its partner’s home country. There are teams of lawyers, accountants and consultants overseeing the deal so that it goes off without the slightest hitch. And it does! The JV is perfect, sales go through the roof and everyone lives happily ever after – that is, until it all falls apart.

A rude awakening in the form of an email, and seemingly overnight things take a turn for the worse. The foreign company receives information stating that over the life of the JV, millions of dollars in inventory has gone missing, counterfeit products are found to be widespread in the JV’s home country market, and there are numerous false vendor accounts that the foreign company has been paying all this time. How could this have happened?

Everyone knows the importance of due diligence. It is so important that there are many types: financial, legal, business, operational and HR to name a few. In our JV story, several types of due diligence were done. Yet the risk of bad things happening remained under the radar. How then do we detect these risks? How do we prevent disaster? The answer, in many cases is: reputational due diligence (Rep DD).

WHAT IS REP DD?

Rep DD looks beyond the surface to unearth the “true story” of a business partner. Rep DD can support other types of due diligence in comparing the business partner’s “on-paper” profile with its real-life activity. It identifies any contradictions between how the business partner has presented itself and how it actually behaves and exists in the real world. It’s the difference between what the business partner has told you they do and what they really do.

Rep DD answers questions like:

- Does anything contradict what the business partner has said about itself?
- Are there any undisclosed outside business interests?
- What is the ownership structure / who is the ultimate owner?
- Does the company show signs of actually operating? / Does it legally exist?
- Does the business partner really have experience in a particular industry?
- Does the investor really have the money to back their offer?
- Do my future locally based general manager or high-level employees have criminal histories?

Rep DD takes a qualitative look at business partners. It focuses on either companies or individuals, but usually blends the two. After all, people are ultimately behind companies.

Rep DD is useful in a variety of legal contexts, but this article will focus on its use within mergers and acquisitions (M&A), and regulatory compliance, namely compliance for anti-bribery and anti-corruption (ABAC), and anti-money laundering (AML).

履行交易中他们一方的事项吗？另一方是否隐藏了将我方知识产权置于危险境地的商业利益？

案例分析。一名中国投资人希望投资一家尚未在中国开展业务的欧洲公司。中国投资人希望享有该公司的部分所有权，并获得该公司技术在中国的经销权。外国公司按要求提供了一切文件，且投资人开展了财务、法律和商业尽调。但中国投资人仍然怀疑："还有什么情况是我们没有发现的？这项交易是否会取得成功？"这里应该指出的是，虽然调查研究都不能用来预测未来，但声誉尽调确实能提供有关被调查的公司及其主要人员行为的有用信息。

中国投资人决定对欧洲公司进行声誉尽调。通过调查，投资人确实发现了在其他类型的尽职调查中未被发现的一些风险。欧洲公司未曾透露它有两家关联机构正在开发同类技术，并且也正在寻求与其他中国公司达成类似的投资交易。中国投资人咨询了法律顾问，并决定利用这些信息与欧洲公司进行谈判。协议签署后，本着"信任但也要验证"的精神，中国投资人决定每年进行声誉尽调，以对类似风险实施监控。

在并购中也可以利用声誉尽职调查来识别未被披露且在并购后可能将由投资者负责的诉讼或第三方关系。

反腐合规

有些人认为中国是境外反腐合规的重点关注地区。某些司法辖区要求企业合理了解其第三方商业伙伴贿赂外国官员的风险。为了满足这一要求，在接纳和监控业务合作伙伴的流程中可以将声誉尽调纳入企业的反腐合规体制，以识别合规警示信号。

REP DD IN M&A

Used in support of other types of due diligence during the M&A process, Rep DD attempts to unearth information that: (1) was not shared by the M&A target or investor; and (2) remained under the radar with other types of due diligence. Businesses involved in M&A might be asking: Who is the company on the other side of the table? Does the investor really have the money? Can the target uphold their side of the deal? Does the other party have hidden business interests that put my IP at risk?

Case study. A Chinese investor wishes to invest in a European company that has no operations in China (yet). The Chinese investor would like part ownership in the company and to obtain rights to distribute the foreign company's technology in China. The foreign company has provided all paperwork requested, and financial, legal and operational due diligence has been conducted.

But the Chinese investor still wonders, "Is there anything important that we haven't uncovered? Will this deal be a success?" It should be noted here that while all the research in the world still will not predict the future, Rep DD provides excellent indicators of the behaviour of a company and its key individuals.

The Chinese investor decides to conduct Rep DD on the European company, and it is discovered that some risks did go undetected, despite conducting the other types of due diligence. The European company had not disclosed two related entities that were developing the same types of technology and seeking similar investment deals from other Chinese companies. The Chinese investor consulted with legal counsel and decided to use this information to strengthen its negotiations with the European company. After the deal was signed, in the spirit of "trust but verify", the Chinese investor decided to conduct Rep DD every year as a monitoring tool to keep similar risks in check.

Rep DD can also be used in M&A to identify undisclosed litigation or third-party relationships for which investors would be liable, post-deal.

ABAC COMPLIANCE

China is arguably a foreign ABAC compliance hotspot. Certain jurisdictions require companies to reasonably understand risk of their third-party business partners bribing foreign officials. To address this requirement, Rep DD can be integrated into ABAC compliance programmes, within business partner on-boarding and monitoring processes, to identify compliance red flags.

Case study. A US medical device company conducts business in China, which according to its ABAC compliance programme is considered a high-risk territory. Before on-boarding Chinese business

某些司法辖区要求企业合理了解其第三方商业伙伴贿赂外国官员的风险

Certain jurisdictions require companies to reasonably understand risk of their third-party business partners bribing foreign officials

LAURA OTTERPOHL
Lohtsman公司
创始人
Founder
Lohtsman

案例分析。一家美国医疗器械公司在中国开展业务。根据该公司的反腐合规制度，中国被视为高风险地区。在中国商业伙伴被接纳之前，中国实体及其主要人员必须提供自己的信息，并披露与政府及 / 或国有企业的关系以及外部商业利益。由于中国在该美国公司的反腐合规制度中被视为高风险地区，因此在合作开始前，作为接纳合作伙伴程序的一部分，中国实体必须接受声誉尽调。

某一中国实体接受了声誉尽调并按要求向美国公司提供了所有文件。声誉尽调结果看起来很好，直到发现了几项警示信号，从而揭示出一件事实：该实体一名主要人员的近亲是医疗器械行业国有企业全资子公司的董事。这里的警示信号是：(1) 该实体的一名人员与政治敏感人士有密切关系；并且 (2) 业务伙伴与国企之间的潜在关系带来一定程度的风险。

虽然这一发现并不一定影响这家美国医疗器械公司未来与中国公司建立合作关系，但它确实有助于该美国公司评估反腐合规风险，并避免与《美国反海外腐败法》(FCPA) 有关的问题。

反洗钱合规

越来越多国家的政府都在向金融机构提出诸如“这笔钱来自哪里?”以及“你们的客户是谁?”这类问题。为了回答这些问题，金融机构遵循错综复杂的合规政策和

partners, the Chinese entities and key individuals must provide information about themselves and disclose relationships with the government and/or state-owned enterprises (SOEs) as well as outside business interests. Since China is considered a high-risk territory in the US company's ABAC compliance programme, Chinese entities must undergo a Rep DD check as a part of the on-boarding process and before co-operation can begin.

Rep DD was conducted on a particular Chinese entity that had provided all requested documentation to the US company. The Rep DD results looked fine until a couple of red flags were discovered with one finding. One of the key individuals had a close relative who was a director in a wholly owned SOE subsidiary in the medical device industry. The red flags here were: (1) one of the individuals was closely linked to a politically exposed person (PEP); and (2) the potential relationship between the business partner and the SOE presents some degree of risk.

While the finding was not intended to dictate the future (or lack thereof) of the partnership with the Chinese company, it did assist the US medical device company to assess its ABAC compliance risk and possibly avoid problems within the context of the Foreign Corrupt Practices Act (FCPA).

AML COMPLIANCE

More and more governments around the world ask of financial

指导方针，这样才能够赢得新客户并保留原有客户。客户尽职调查（customer due diligence）和强化尽职调查（enhanced due diligence）是这些复杂政策的一部分。这种背景下，声誉尽调将用于下列等目的：

- 制定股权结构并确定最终受益人
- 核实地址和业务活动
- 根据制裁名单筛选个人和实体
- 识别政治敏感人士
- 对被列为高风险的现有客户进行监控

然而，对于反洗钱合规中的声誉尽调，“是谁”的问题比“是什么”的问题要更重要。

当涉及反洗钱合规时，金融机构关注的一个主要领域是成本与效益。随着监管部门对金融机构执行反洗钱和KYC（了解你的客户）政策的审查日益严格，一些机构尽管采取了多层级的基于风险的方法，在进行客户尽调和强化尽调时仍很难保持成本和收益平衡。简单地说，在许多司法辖区，金融机构要么选择遵守政策规定并付出高昂代价，要么选择放弃客户的业务，特别是高风险客户的业务。

根据特定司法辖区的具体法律规定，将客户尽调和强化尽调外包给声誉尽职调查专家可以提高效率和减少费用，从而大大降低个案中反洗钱的合规成本。与其投入大量资源聘用并培训客户尽调和强化尽调团队，不如以更低的成本聘请专家来开展尽职调查。

知识就是力量

在并购、监管合规或其他任何法律背景下，且无论目标是节约成本、提高效率还是降低风险，声誉尽调一般都可作为一种预防措施或应对措施。

作为预防措施，声誉尽调可用来回答“交易对手方到底是谁?”的问题。预防性声誉尽调可以降低风险，识别未披露的信息，因而增强在谈判中的优势；同时它也是一个强有力的监控工具，可以在不当行为失控之前尽早察觉。此外，预防性声誉尽调还可用于提供与内部政策或监管合规有关的事实的书面凭据。

作为应对措施，声誉尽调的任务是探寻不当行为的根源。应对性声誉尽调为“合资灾难为何会发生？是怎么发生的?”等问题提供答案。在业务合作中常见的不当行为是隐瞒商业利益，这一点非常容易在其他类型的尽职调查中被忽略。在后续诉讼中，声誉尽调也可作为发现事实及了解业务合作伙伴或其主要人员有关情况的有用工具。

从性质上来说，声誉尽职调查是定性的，并且依赖于调查技能以及对特定地区的了解。虽然一些司法辖区的法律似乎限制了尽职调查的效力，但这些地区的专家知道如何在法律界限内开展工作，发现有价值的信息，以帮助处于各种境况的公司解决问题。

声誉尽调收集的是最重要的东西：信息。如果说“知识就是力量”，那么就利用声誉尽调来保护并最大限度地利用商业机会吧。

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Laura Otterpohl is the founder of Lohtsman, a consultancy providing reputational due diligence services

institutions, “Where is this money coming from?” and “Who are your customers?” Financial institutions answer these questions by following a required labyrinth of compliance policies and guidelines, just to be able to take on new customers and keep existing ones.

Part of the policy labyrinth is Customer Due Diligence (CDD) and Enhanced Due Diligence (EDD). Rep DD is used here to, for example:

- Map out shareholding structures and identify ultimate beneficial owners;
- Verify addresses and business activity;
- Screen individuals and entities against sanctions lists;
- Identify politically exposed persons; and
- Monitor existing customers classified as high risk.

However, regarding Rep DD in AML compliance, the question is not as much “What?” as it is “Who?”

A main area of concern for financial institutions is cost versus benefit when it comes to AML compliance. As financial institutions come under tougher scrutiny on enforcing AML and know your customer (KYC) policies, some struggle to find a cost/benefit balance in conducting CDD and EDD, despite a tiered risk-based approach. Simply put, in many jurisdictions financial institutions have a choice of either complying by following costly policies or declining the customer's business, especially in the case of high-risk customers.

Depending on the laws of particular jurisdictions, outsourcing CDD and EDD to Rep DD specialists can greatly reduce the costs of AML compliance by increasing efficiency and paying less, on a per-case basis. Instead of hiring and training CDD and EDD teams, delegate to experts at a lower cost.

KNOWLEDGE IS POWER

Within M&A, regulatory compliance or any other legal context, and whether the goal is to save costs, improve efficiency, or reduce risk, Rep DD is generally conducted as either a preventive or a reactive measure.

Rep DD is used preventively to answer the question, “Who, really, is the other party?” Preventive Rep DD reduces risk, attempts to identify undisclosed information, may strengthen negotiations, and is a powerful monitoring tool to catch wrongdoing early, before it gets out of hand. Preventive Rep DD is also useful for making paper trails, either for internal policies or for regulatory compliance.

When used reactively, Rep DD gets to the root of wrongdoing. Reactive Rep DD answers for example, “Why and how did the JV disaster happen?” A common theme among wrongdoing in terms of a business partnership is undisclosed business interests, which are extremely easy to miss in other types of due diligence. Rep DD might also be a useful tool within subsequent litigation in terms of fact finding or developing some sort of profile on the business partner or key individuals.

Rep DD is qualitative in nature and relies on investigative skills as well as expertise in a particular territory. Though some jurisdictions have legislation that would seem to limit the effectiveness of Rep DD, experts in those territories know how to work within the boundaries of the law to uncover valuable information to help companies in a variety of situations.

Rep DD gathers the most important of tools, information, to protect and maximize business opportunity.

“三类股东”或已常态化过会
IPO approvals with ‘three types of shareholders’

越来越多含有“三类股东”（指资管计划、契约型基金、信托计划）的企业获证监会核准上市，不禁让业界感叹。这会不会是监管层释放的对“三类股东”审核的开闸信号？

《首次公开发行股票并上市管理办法》第13条规定：“发行人的股权清晰，控股股东和受控股股东、实际控制人支配的股东持有的发行人股份不存在重大权属纠纷。”

现实中，“三类股东”由于存在实际利益人委托管理人代为持有股份等原因，发行人股东中含有以上“三类股东”一直是发行人主体资格的红线。

企业拟进行IPO时清理“三类股东”一直是业界遵循的一个规则。

近期案例

中原证券。2016年11月证监会发文核准中原证券股份有限公司首次公开发行股票。根据中原证券2016年12月公告的《招股说明书》，可看出中原证券的第二大股东渤海产业基金，其直接持有中原证券18.86%股份。经查询，渤海产业投资基金管理有限公司为经登记备案的基金管理人，渤海产业基金是其于《私募投资基金监督管理暂行办法》实施前发行的基金。

根据《招股说明书》的披露，渤海公司是经国家发改委和商务部批准成立的有限责任公司，渤海公司发行的渤海产业基金是经国家发改委批准、按契约形式设立的基金。最终未被监管层要求清理。

不过有专业人士指出，渤海公司发行的该契约型基金成立于《暂行办法》实施以前，且其成立是由国家发改委及商务部批准的，因而此案例并不具有代表意义。

海辰药业。与中原证券几乎在同一时间过会的海辰药业吸引了业界更多关注。2016年12月，证监会发文核准南京海辰药业股份有限公司首次公开发行股票。根据海辰药业2016年12月公告的《招股说明书》，其带有资管计划的股东为江苏高投创新科技创业投资合伙企业（有限合伙）。

根据《招股说明书》等文件，招商财富资产管理有限公司发行四只专项管理计划，并通过认购江苏高投创新科技的合伙份额间接持有海辰药业股份。在《补充法律意见书》等材料中，证监会仅反馈了招商财富与拟IPO企业及

The increasing number of prospective issuers with “three types of shareholders” (i.e., asset management plans, contractual funds and trust plans) that obtain initial public offering (IPO) approval from the China Securities Regulatory Commission (CSRC) has aroused investor interest. Is it a signal of less stringent regulatory review on IPO applications from prospective issuers?

Article 13 of the Measures for the Administration of IPO and Share Listing requires that “the issuer’s equity structure must be clear and there must be no major dispute over the ownership of shares held by the controlling shareholder, controlled shareholders, and shareholders controlled by the actual controller”. In practice, until very recently equity holding by “three types of shareholders” had posed a red line for IPO applicants given the fact that any shares held by these managers are being held on behalf of the beneficiary owners. That is why getting rid of “three types of shareholders” has been a rule for IPO applicants.

RECENT CASES

Central China Securities. In November 2016, the CSRC issued an IPO approval for Central China Securities (CCS). According to CCS’ prospectus, dated December 2016, a contractual fund known as Bohai Industrial Fund, the second-largest shareholder of CCS, directly held 18.86% equity in CCS. Bohai Industrial Fund was issued by Bohai Industrial Investment Fund Management (BIIFM), a fund manager that had been registered and filed, prior to implementation of the Interim Regulations on Private Investment Fund Supervision.

CCS’ prospectus disclosed that BIIFM was a limited liability company incorporated with approval from the National Development and Reform Commission (NDRC) and Ministry of Commerce (MOFCOM), and that Bohai Industrial Fund issued thereby was incepted contractually with NDRC approval. The applicant was not required to remove the contractual fund from its shareholder list.

However, some professionals argued that CCS was not a case in point, given two factors surrounding the inception of Bohai Industrial Fund: first, it was incepted prior to implementation of the interim measure; second, it was incepted with approval from the NDRC and MOFCOM.

Nanjing Hicin Pharmaceutical. The application of Nanjing Hicin Pharmaceutical that went through CSRC review almost at the same time as CCS drew more attention from investors. In December 2016, the CSRC issued an IPO approval of Nanjing Hicin Pharmaceutical. According to Hicin’s prospectus, dated December 2016, it had a shareholder named Jiangsu Gaotou Innovative Startups Investment Partnership, which ran asset management plans.

It was disclosed in the prospectus and other documents that China Merchants Wealth Asset Management, which issued four special management plans, held equity in Hicin indirectly by subscribing to partnership shares of Jiangsu Gaotou. Pursuant to the supplementary legal opinion, apart from a request for a statement on equity structure, the CSRC only asked whether China Merchants Wealth was affiliated with the prospective issuer and its controlling shareholder, actual controller, directors, supervisors, officers or any other crucial personnel, and whether there were transactions and fund transfers between China Merchants Wealth and the issuer, or its clients and suppliers. The CSRC did not

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其控股股东、实际控制人、董监高及其他核心人员之间是否存在关联关系、与发行人及其客户与供应商是否存在交易和资金往来；以及说明了一些股权结构问题。最终未要求发行人清理其中的资管计划。

专业人士指出，海辰药业资产管理计划最终穿透至自然人仅为四人，且江苏高投创新科技仅持有发行人海辰药业3.25%股份。但海辰药业作为第一只含有三类股东过会的企业，其释放出的监管层对三类股东的监管态度具有里程碑意义。而近期过会的长川科技则更能说明监管层的态度。

长川科技。2017年3月，证监会发文核准了杭州长川科技股份有限公司首次公开发行。根据《招股说明书》等材料，长川科技含有的“三类股东”为浙江天堂硅谷盈丰股权投资合伙企业（有限合伙），天堂硅谷盈丰的出资中97.28%源于契约型私募基金。根据《补充法律意见书》等材料，监管层在反馈意见中问询发行人历史上及目前是否存在委托持股、信托持股及利益输送情形；补充说明各非自然人股东的完整股权结构；说明发行人是否存在规避股东不得超过200人规定的情形。最终未要求清理“三类股东”。

监管观望

2017年3月，上海证券交易所微信公众号“上交所企业上市服务”发布一篇文章《新三板挂牌公司IPO需要注意什么问题》，其中第二点是：“对于信托计划、契约型基金和资产管理计划等持股平台为拟上市公司股东的，在IPO审核过程中，可能会因存续期到期而造成股权变动，因此拟上市公司引入该类平台股东时应在考虑股权清晰和稳定性的基础上审慎决策。”

通过比较中原证券、海辰药业以及长川投资的过会案例，不难发现拟IPO企业中含有“三类股东”已经不是不可碰触的红线，但含有“三类股东”过会的案例亦不能说明监管层已经对此开闸。根据上述指导性文章，说明监管层并没有放开审核。笔者认为，如果发行人能够做到最终权益持有人数相对较少，且不存在关联交易、利益输送等情形，且“三类股东”及其管理人均已经在相关监管层登记备案，那么“三类股东”过会或将常态化。

require the issuer to remove asset management plans from its shareholder list.

It was pointed out by experts that the asset management plans involved in Hicin's case were beneficially owned by only four natural persons, and Jiangsu Gaotou held only 3.25% equity in Hicin. However, Hicin obtaining CSRC approval as the first IPO applicant with “three types of shareholders” was believed to signify a meaningful change in the regulator's attitude towards these shareholders. The CSRC revealed its attitude more clearly in a review procedure of the more recent IPO application from Hangzhou Changchuan Technology.

Hangzhou Changchuan Technology. In March 2017, the CSRC issued an IPO approval for Hangzhou Changchuan Technology. According to Changchuan's prospectus and other documents, it had a shareholder named Zhejiang Silicon Paradise Yingfeng Equity Investment Partnership, which fell within “three types of shareholders”; 97.28% of the capital contribution from Silicon Paradise was from contractual private equity funds. Pursuant to the supplementary legal opinion, the regulator: (1) asked whether any equity of the issuer had been or was currently held by trusts or any persons being entrusted, and whether the issuer had been or was currently involved in any transfer of benefits; (2) demanded a description of the complete equity structures of all non-natural person shareholders; and (3) asked whether the issuer had done anything to circumvent the provision that prohibits companies from having more than 200 shareholders. Eventually the CSRC did not require that none of the issuer's shareholders belong to “three types of shareholders”.

REGULATORY OUTLOOK

In March 2017, the official WeChat account of Shanghai Stock Exchange, known as SSE IPO Services, published an article entitled *What OTC companies should pay attention to in their IPO.* It reminded that “in order to maintain clear and steady equity ownership during the IPO review procedure, a company with an IPO plan should be prudent in accepting shareholding vehicles such as trust plans, contractual funds and asset management plans as their shareholders, because there is always a possibility that the issuer's equity structure might change due to expiry of the tenure of such vehicles”.

The authors find from the CCS, Hicin and Changchuan cases that “three types of shareholders” no longer poses a red line for IPO applicants. However, the success of prospective issuers with “three types of shareholders” in obtaining CSRC IPO approval does not necessarily mean that regulation in connection with these shareholders is loosened. Actually, the regulator does not intend to deregulate, according to the SSE article mentioned above.

The authors believe that an IPO applicant with “three types of shareholders” is likely to obtain CSRC approval provided that: (1) there are a limited number of ultimate equity holders; (2) there are no transfers of benefits or questionable related-party transactions; and (3) any shareholders that fall within the three types, together with their managers, have been registered and filed with relevant regulators.

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营利民办教育机构境内 A 股上市
Domestic A-share listing by for-profit educational institutions

全国人民代表大会常务委员会于2015年12月27日修改了《教育法》，将“任何组织和个人不得以营利为目的举办学校及其他教育机构”修改为“以财政性经费、捐赠资产举办或者参与举办的学校及其他教育机构不得设立为营利性组织”。

2016年11月7日，全国人民代表大会常务委员会修订了《民办教育促进法》。修订后的《民办教育促进法》规定，现有民办学校可以选择登记为营利性民办学校，重新登记，继续办学。修订后的《民办教育促进法》自2017年9月1日起生效。

法律法规

《民办教育促进法》的修订对于民办学校在境内A股上市具有积极意义。从允许民办学校作为营利性法人存在来看，修订后的《民办教育促进法》扫清了民办学校在A股上市的最大障碍。

《民办教育促进法》规定营利性民办学校的举办者可以取得办学收益，学校的办学结余依照公司法等有关法律、行政法规的规定处理。营利性民办学校的收费标准，实行市场调节，由学校自主决定。

民办学校一旦可以通过自主定价获取办学收入，将办学结余作为企业盈利来源，就从根本上解决了该等主体合法取得经营性盈利和持续性经营能力的两大障碍，可以让民办学校在国内A股上市名正言顺。

修订后的《民办教育促进法》规定，民办学校应当设立理事会、董事会或者其他形式的决策机构并建立相应的监督机制。民办学校的举办者根据学校章程规定的权限和程序参与学校的办学和管理。前述规定也为营利性民办学校构建符合上市公司治理标准的董事会、监事会、股东大会等公司治理机制提供了制度依据。

《民办教育促进法实施条例》相关规定对民办学校在境内A股上市构成影响。虽然《民办教育促进法》已经修改，但《实施条例》尚未修订。现行有效的《实施条例》规定：民办学校的举办者不得向学生、学生家长筹集资金举办民办学校，不得向社会公开募集资金举办民办学校。该《实施条例》直接阻断了营利性民办教育机构通过IPO方式

The Standing Committee of the National People's Congress (NPC) amended the Education Law on 27 December 2015, revising the provision reading “no organization or individual may establish a school or other educational institution with the aim of making a profit” to “a school or other educational institution that is founded with, or the founding of which is participated in with, fiscal funds or donated assets may not be established as a for-profit organization”.

On 7 November 2016, the NPC Standing Committee revised the Law on Promoting Private Education. The revised law specifies that existing private schools may opt to register as for-profit private schools, registering anew and continuing to operate. The revised law will enter into effect on 1 September 2017.

IMPLICATIONS OF THE REVISION

The revision of the Law on Promoting Private Education has positive significance for the domestic listing of A shares by private schools. From permitting the existence of private schools as for-profit legal persons, it can be seen that the revised law has swept away the greatest obstacle to the listing of A shares by private schools.

The law specifies that founders of for-profit private schools can profit from their running of schools, with the surplus derived from running a school to be handled in accordance with such laws and administrative regulations as the Company Law. The tuition rates for for-profit private schools are to be subject to market regulation, with the schools deciding the same at their own discretion. Once a private school can earn revenue through pricing set at its own discretion, and treat the surplus from running the school as a profit source for the enterprise, the two major obstacles to such an entity lawfully securing operational profits and an ongoing operational capacity are fundamentally resolved, permitting private schools to rightly and properly list A shares in China.

The revised law specifies that a private school is required to establish a board of governors, board of directors or other manner of decision-making body and establish the corresponding supervisory mechanism. The founder of a private school participates in the running and management of the school with the authority of, and by the procedures specified in, the school's charter. The above-mentioned provisions also provide the rule basis for the establishment by for-profit private schools of such corporate governance mechanisms as boards of directors, supervisory boards, shareholders' general meetings, etc., that satisfy the standards for the governance of listed companies.

Relevant provisions of the Implementing Regulations for the Law on Promoting Private Education have an effect on the domestic listing of A shares by private schools. Although the law has been revised, the implementing regulations have yet to be amended. The current, effective implementing regulations specify that the founder of a private school may not raise funds from students, or the heads of their households, to establish a private school, or publicly raise funds from the public to establish a private school. The implementing regulations directly block the road to for-profit educational institutions raising funds by domesti-

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在境内A股市场上募资的道路。如果民办教育企业通过公开发行股票募集资金，就直接违反了上述《实施条例》的限制性规定。

在《民办教育促进法》已经修改且国家鼓励社会办学的情况下，相信《实施条例》会在不久的将来对相关规定进行修改，以满足营利性民办教育机构做大教育产业的直接境内募资之需求。

法律风险

海外上市民办教育企业VIE架构存在的法律风险。以往民办教育企业在境内上市存在障碍的情况下大多选择通过VIE架构赴境外上市，但不可否认的是，民办教育企业通过VIE架构赴境外上市也存在不小的法律风险。

在备受瞩目的号称“VIE结构第一案”的“亚兴公司诉安博教育”案件中，最高人民法院虽然没有直接否认VIE协议的效力，但在判决书中指出“对外资通过并购股权参与举办或者实际控制举办者实施义务教育民办学校的行为，可能存在危害教育安全及社会公共利益的问题，系教育行政主管部门的职责范围。对可能存在的外资变相进入义务教育领域，并通过控制学校举办者介入学校管理的行为，应当予以规范，并通过行政执法对违法行为予以惩戒。

就此，本院已向中华人民共和国教育部发出司法建议，建议该部在行政审批及行政监管过程中，对此予以依法规范，以维护社会公共利益和教育安全。”

最高人民法院对“维护社会公共利益和教育安全”的建议必将为国内民办教育企业通过VIE架构赴境外上市带来很大的不确定性和法律风险。

更好选择

综合来看，《民办教育促进法》的修订为民办教育企业境内A股上市消除了制度障碍，在以往采取VIE模式境外上市的方式受到政府日益严格审查和监管的情况下，民办教育企业回归境内A股上市应该是更好的选择。

待《实施条例》根据新《民办教育促进法》规定的原则进行修订后，民办教育企业在国内A股市场寻求融资发展的机会应该指日可待。

cally listing A shares through an IPO. If a private educational enterprise were to publicly offer shares to raise funds, it would directly violate the restrictive provisions of the above-mentioned implementing regulations.

Since the law has been revised and the state is encouraging the private sector to establish schools, the authors are confident that relevant provisions of the implementing regulations will be revised in the not too distant future, so as to satisfy the demand for for-profit private educational institutions to directly raise funds domestically to expand the educational industry.

VIE RISKS

The legal risks existing in the VIE (variable interest entity) structures of private educational institutions listed overseas. Given the obstacles to private educational enterprises listing domestically in the past, the majority opted to list abroad via a VIE structure, but it cannot be denied that listing abroad via a VIE also poses significant legal risks.

In the closely watched *Yaxing v Ambow Education* case, known as the “first VIE structure case”, although the Supreme People’s Court (SPC) did not directly deny the validity of the VIE agreement, in its judgment it pointed out that, “the act of a foreign investor participating in the establishment of, or actually controlling the founder of, a private school providing compulsory education through an acquisition of equity could potentially jeopardize educational security and the public interest, and falls within the purview of the competent educational authority. With respect to the potential existence of an act of entry by a foreign investor into the compulsory education sector in a disguised manner, and its involvement in school management through its control of the school founder, the same should be regulated and should be punished by the administrative law enforcement as a violation of the law. In this respect, this court has issued a judicial recommendation to the PRC Ministry of Education, recommending that, in the course of administrative approval and administrative oversight, it regulate the same in accordance with the law so as to safeguard the public interest and educational security.”

The SPC’s recommendation with respect to “safeguarding the public interest and educational security” is bound to bring a lot of uncertainty and legal risk for domestic private educational enterprises listing abroad via VIE structures.

BETTER OPTION

The revision of the Law on Promoting Private Education has removed systemic obstacles to the domestic listing of A shares by private educational enterprises. With the past method of listing overseas using the VIE model increasingly subject to stringent review and oversight by the government, the return of private educational enterprises to list A shares domestically should be a better option. Once the implementing regulations are revised in the light of the principles set out in the revised law, the day that private educational enterprises can domestically list A shares to seek financing for development will not be far off.

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基础合同履行情况与独立保函欺诈的认定
Performance of underlying contract and guarantee fraud

独立保函是国际商事交易中常用的一种保障债权快速实现的金融担保工具。根据《见索即付保函统一规则》（URDG758）的规定，担保人对受益人所提示的单据进行审查时，只要单据与保函的规定完全相符以及单据之间在表面上完全一致，担保人就必须承担付款义务，而无需审查基础合同的履行情况。

虽然基础合同的履行情况并非担保人放款时的审查因素，但在实践中，一旦出现保函欺诈，这一因素往往会成为法院的具体审查对象。

关于这点，最典型的案例是“东方置业房地产有限公司与安徽省外经建设（集团）有限公司、哥斯达黎加银行、中国建设银行股份有限公司安徽省分行保函欺诈纠纷”一案（东方置业案）。东方置业作为开发方，与承包方安徽外经集团、实际施工方中国安徽外经中美洲公司签订了《施工合同》。合同签订后，东方置业以外经中美洲公司违约为由，向银行申请支付保函项下的款项。

由于该案件审理时中国对于独立保函及保函欺诈问题并无明文规定，安徽省高级人民法院借鉴了国际惯例和国际公约中规定的欺诈例外原则，认定受益人东方置业的行为构成保函欺诈。

在本案中，安徽高院认为在审理保函欺诈纠纷时，法院有必要对基础合同的履行情况进行必要的审查。在安徽外经集团提交了一份认定外经中美洲公司并不存在违约行为的生效境外仲裁裁决书后，法院认为安徽外经集团已经全面、适当地履行了基础合同项下的义务，因此东方置业不具有付款请求权。

2016年11月，最高人民法院发布了名为《关于审理独立保函纠纷案件若干问题的规定》的司法解释（《规定》），这是中国出台的第一部与独立保函有关的法律规定。

《规定》不仅对独立保函做了明确的定义，同时在第12条列明了构成保函欺诈的情形：（1）受益人与保函申请人或其他人串通，虚构基础交易的；（2）受益人提交的第三方单据系伪造或内容虚假的；（3）法院判决或仲裁裁决认定基础交易债务人没有付款或赔偿责任的；（4）受益人确认基础交易债务已得到完全履行或者确认独立保函载明的付款

Independent guarantee is a financial guarantee instrument that is often used to assure rapid realization of the creditor's right. When the guarantor reviews the documents presented by the beneficiary, if the documents are totally consistent with the provisions of the guarantee and superficially consistent with one another, the guarantor must undertake the payment obligation without the need to review the performance of the underlying contract, pursuant to the Uniform Rules for Demand Guarantees.

The performance of the underlying contract is not an item the guarantor must review when making the payment, but in practice the court will usually examine this factor once a guarantee fraud occurs. A typical case in this regard is of guarantee fraud under dispute involving Eastern Property, Anhui Foreign Economic Construction Group (AFECC), a bank in Costa Rica, and Anhui Branch of China Construction Bank Corporation (CCB Anhui). As the developer, Eastern signed a construction contract with the contractor, AFECC, and the actual construction company, AFECC Central America, a local subsidiary. After signing the contract, Eastern applied for payment of the amount under the guarantee to the guarantor bank on account of AFECC Central America's default.

Considering that China had not explicitly stipulated independent guarantee or guarantee fraud when the case was heard, the People's High Court of Anhui province drew the principle of fraud exception set out under international general practice and international treaties, and judged the conduct of the beneficiary Eastern to constitute a guarantee fraud. Under this case, the Anhui court asserted that it was necessary to perform a review of the performance of the underlying contract during the trial of a dispute pertaining to guarantee fraud.

After AFECC had submitted an effective overseas arbitration award acknowledging that AFECC Central America had not incurred a default event, the court thought that AFECC had performed its obligations under the underlying contract, and therefore Eastern had no right to claim payment.

In November 2016, the Supreme People's Court (SPC) issued a judicial interpretation entitled the Provisions Regarding Several Issues during the Trial of Cases Involving Independent Guarantee, which was the first legal document pertaining to independent guarantee in China. Apart from specifying the definition of independent guarantee, the provisions also stipulate the events that must constitute a guarantee fraud under article 12: (1) The beneficiary and the guarantee applicant or other persons collude to fabricate an underlying transaction; (2) Third-party documents submitted by the beneficiary are counterfeit or untrue in content; (3) The court judgment or arbitration award asserts that the debtor under the underlying transaction bears no liability of payment or compensation; (4) The beneficiary confirms the full performance of the debt under the underlying contract or confirms the mature payment event indicated on the independent guarantee has not occurred; (5) Other situations where the beneficiary is clearly aware of no claim for payment but still abuses such right.

At the same time, the provisions specifically mention that when trying a

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到期事件并未发生的；（5）受益人明知其没有付款请求权仍滥用该权利的其他情形。

同时，《规定》特别提出，法院在审理保函欺诈纠纷时就上述情形审查认定基础交易的相关事实。不过，虽有上述规定，即使保函申请人能够证明基础交易债务已得到完全履行，并不必然意味着受益人构成保函欺诈，法院还需要判断保函付款请求与基础交易债务是否存在关联性。

南京市中级人民法院依据《规定》就中电电气（南京）光伏有限公司（中电公司）与阿尔法公司侵权责任纠纷（中电电器案）是《规定》出台后唯一一个公开渠道可以查询到的保函欺诈案件。

该案的保函载明，中电电气在该保函失效前15日未能开出新的保函的，受益人阿尔法公司可向银行提出索赔。涉案保函的到期日为2013年12月31日，而中电公司申请的新保函于2013年12月25日才开出，因此阿尔法公司申请索赔。

阿尔法公司提出索赔申请后，中电公司即向南京市中级人民法院提起诉讼，主张保函载明在其到期后两个月持续有效，因此到期日应为2014年2月28日，阿尔法公司的索赔理由不成立，构成保函欺诈。中电公司主张阿尔法公司构成保函欺诈的理由是阿尔法公司违反了《规定》第12条的兜底条款，即受益人明知没有付款请求权仍滥用该权利。

在本案中，法院虽然认定中电公司已履行了基础交易债务，但阿尔法公司提出付款请求是基于对保函有效期与中电公司不同的理解而非基于基础债务是否履行，不属于明知没有付款请求权仍滥用该权利，因此法院驳回了中电公司的诉讼请求。

结合上述两个案例以及《规定》中有关保函欺诈的相关内容可以看出，保函申请人如需法院或仲裁认定保函欺诈，应承担证明存在《规定》第12条所列出情形的举证责任，特别是证明基础交易债务已完全得到履行（基础交易债务与保函付款请求权无关的除外）。

此情况下，如果存在法院判决或仲裁裁决认定保函申请人在基础合同下不存在违约行为，这一判决或裁决将成为支持保函申请人在保函欺诈诉讼或仲裁中的有力证据。

dispute involving the guarantee fraud, the court must review the above-mentioned events to determine facts pertaining to the underlying transaction. Notwithstanding the provisions, even if the guarantee applicant can prove the full performance of the debt under the underlying transaction, it does not necessarily mean that the beneficiary's claim constitutes a guarantee fraud, and the court will still need to judge the correlation between the claim for payment under the guarantee and the debt under the independent guarantee.

Pursuant to the provisions, the Nanjing Intermediate People's Court tried a tort dispute between CSUN, a Nanjing-based photovoltaic subsidiary of China Electric Equipment Group, and Alpha Company, and it is to date the only guarantee fraud case that can be searched through public channels following the issuance of the provisions. The guarantee under the case indicated that where CSUN fails to issue a new guarantee 15 days before the expiration of the current guarantee, the beneficiary, Alpha Company, can claim compensation form the bank. The expiry date of the guarantee under the case was 31 December 2013, and the new guarantee CSUN had applied for was issued on 25 December 2013, so Alpha Company decided to claim compensation.

After Alpha Company submitted the claim application, CSUN immediately filed a lawsuit to the Nanjing court, claiming that the guarantee specified that the guarantee must remain in effect for another two months upon expiration, so the expiry date must be 28 February 2014, and that Alpha Company did not have reason for a claim, but had committed a guarantee fraud. CSUN asserted that Alpha Company had committed a guarantee fraud on the grounds that Alpha Company had violated a catch-all clause (article 12) specified in the provisions, that is, "other situations where the beneficiary is clearly aware of no claim for payment but still abuses such right".

The court confirmed that CSUN had performed the debt under the underlying contract, but Alpha Company had claimed the payment based on a different understanding of the effective period of the guarantee than that of CSUN, instead of the performance of the debt under the underlying contract, and judged Alpha Company did not abuse a right while clearly aware of no right to claim the payment. Therefore, the court rejected CSUN's claim.

From these two cases and the contents of the provisions, it can be seen that when requesting the court or arbitration commission to confirm a guarantee fraud, the guarantee applicant must bear the burden to prove the events listed by article 12, and in particular prove the debt under the underlying contract has been fully performed (unless the debt under the underlying contract does not relate to the right to claim the payment under the guarantee). For this reason, if the court judgment or arbitration award asserts that the guarantee applicant has not committed a default under the underlying contract, the judgment or award will be strong evidence supporting the guarantee applicant under the litigation or arbitration involving the guarantee fraud.

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驰名商标对保护范围的影响
Case shows traps involved in protecting unregistered marks

由于驰名商标对知名度的要求较已经使用并有一定影响的商标更高，在混淆认定过程中对商品的类似程度要求相应会放宽。在“酷狗”商标案中，北京高院改判了一审法院关于不必认定驰名商标的意见，并且在认定互联网驰名商标的标准上做出了有益的尝试。

2009年7月，利丰公司在“培训、安排和组织音乐会、节目制作、娱乐”等服务上申请注册了带有“Ku Gou”及“酷狗”字样的争议商标，商标专用期限自2011年12月7日至2021年12月6日。2014年11月，酷狗公司向商评委提出无效宣告申请。

商评委认为争议商标构成对酷狗公司在先未注册驰名商标“酷狗”的复制与摹仿，是对其在先商号及在先使用并具有一定影响力的“酷狗”商标的侵犯。因此，裁定撤销争议商标全部核定服务，并认定“酷狗”商标在“提供在线音乐（非下载）”服务上为未注册驰名商标。

不同保护范围

利丰公司向北京知识产权法院提起诉讼，法院认定争议商标注册在“安排和组织音乐会”等服务上损害了酷狗公司在先商号权，并认定利丰公司构成以不正当手段抢注他人已经使用并有一定影响的商标，但却认为本案已经通过《商标法》（2001版）第31条对“酷狗”商标予以保护，已无认定“酷狗”商标是否驰名的必要性，最终部分撤销被诉裁定，维持争议商标在“培训”等服务上的注册。酷狗公司不服提出上诉。

二审中，酷狗公司主张，未注册驰名商标与第31条所适用的保护范围有所不同，未注册驰名商标认定的知名度要求更高，其保护的范围在商标近似程度和商品类似程度上须有更大的延展，才能避免混淆。特别是本案请求保护的部分服务并未被第31条全部覆盖，此时考量引证商标是否达到驰名程度是必要的。

最终，二审法院2017年3月13日判决认定“酷狗”未注册商标已经达到为公众知晓的驰名程度，对争议商标的全部服务项目均予以撤销。

2001年《商标法》第31条禁止以不正当手段抢先注册他人已经使用并有一定影响的商标；第13条禁止使用复制、摹仿或翻译他人的驰名商标。两条规定均是对他人在先使用未注册商标的保护，区别在于在先使用的未注

If you wish to cite a prior but unregistered trademark to oppose or invalidate a junior trademark in China, you must resort to articles 13.1 and 31 of the 2001 Trademark Law (renumbered as articles 13.2 and 32 by the latest version of the law, but since the 2001 Trademark Law applies to substantial matters of the case this article will explore, all the citations are from the 2001 Trademark Law). Under article 31, it is not necessary to recognize the well-known status of the unregistered trademark, but under article 13.1, such recognition is necessary.

In practice, the China Trademark Office (CTMO), the Trademark Review and Adjudication Board (TRAB) and the courts tend to rely on article 31 to solve the problem, for convenience and for the lower threshold to invoke protection. In a recent trademark administrative case, Beijing High Court applied both articles to grant full protection over an unregistered trademark.

Guangzhou KuGou Networks is a leading supplier of digital music interactive services in China. KuGou Networks has been offering free music-streaming services to the public since 2004. In July 2009, Shantou Lifeng Electric Appliances applied for the trademarks “酷狗” and “KuGou” (KuGou in Chinese characters & pinyin) for “arrangement and organization of concerts, training; providing karaoke services; entertainment, etc.” in Class 41, which was approved by the CTMO in December 2011. In November 2014, KuGou Networks filed an invalidation application with the TRAB.

On 18 February 2016, the TRAB ruled in favour of KuGou Networks, revoking the disputed mark on all designated services. The board based its ruling on the finding that: (1) the “酷狗” (Chinese characters of KuGou) mark of KuGou Networks constituted an unregistered well-known trademark in “providing online music service (not for downloading)”; (2) the registration of the disputed mark in “entertainment, providing karaoke services, etc.” is in violation of article 13.1 of the law; and (3) the registration and use of disputed mark in “arrangement and organization of concerts, etc.” violates article 31 of the Law.

PROTECTION DIFFERENCE

Lifeng filed an administrative lawsuit with the Beijing Intellectual Property Court. The trial court found that the “酷狗” mark had already been used and had acquired certain influence in respect of the above-mentioned services before the application date of the disputed mark. The court cited article 31 to revoke the registration of the disputed mark in “arrangement and organization of concerts, programme production, providing karaoke services; night clubs and entertainment” based on the prior rights (the trademark and trade name) of KuGou Networks, but maintained the registration in dissimilar services: “fitness club, mobile library, training; book publishing; modelling for artists.” The court held that invoking article 31 to protect the “酷狗” mark exempts the necessity to determine its well-known status. Both KuGou Networks and Lifeng appealed.

KuGou Networks argued in the appeal that article 31 does not cover all the services for which the company seeks protection, so the recognition of its trademark’s well-known status was

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册商标知名度不同，且所要保护的在先权益内容不同。第31条更侧重于保护在先商标使用人基于商标使用而获得的利益，而第13条更侧重于防止市场混淆。因此，在适用第31条无法覆盖诉争商标指定或核定的全部商品或服务时，仍需适用第13条。

本案中，根据酷狗公司提交的行业协会出具证明、纳税金额、广告宣传、“酷狗”商标使用合同发票、期刊网络等媒体的报道数量和范围等证据，可以认定在争议商标申请前“酷狗”商标在“提供在线音乐（非下载）”服务上已经达到广为公众知晓的驰名程度。

司法解释

本案3月13日宣判时，最高人民法院2017年1月11日发布的《最高人民法院关于审理商标授权确权行政案件若干问题的规定》已于3月1日生效，虽然判决没有直接引用该司法解释，但其裁判思路显然是与之吻合的。

该司法解释第12条全面重构了商标侵权判断过程中对“容易导致混淆”及混淆可能性的认定标准。该标准中不再简单要求商品类似，而是使用了“商品类似程度”的表述，即商标知名度越高，对要对抗的商品服务的类似程度要求就越低。

互联网特殊性

因此，二审法院特别指出，在先使用有一定影响商标更侧重于保护在先商标使用人基于商标使用而获得的利益，而未注册驰名条款因其高知名度，广地域范围及相关公众的知晓程度，则更侧重于防止市场混淆的发生。

其次，《商标法》第14条所列举的驰名要素原则上需要综合考量。但在本案所涉的互联网这一特殊领域，相关指标基于行业特性并不能一一对应全部要素，但相关公众对其认知程度又远远高于其他商品或服务品牌，此时如果再对驰名指标全面适用就显得不合时宜。

因此，当商标满足其中一项因素且较为突出时，也可通过此方面去认定为驰名商标。互联网的特点是，信息在短时间内可达到相当的规模，但服务主推“免费下载、收听”，其营利点与传统行业有明显区别，因此并不能用同一把尺子进行衡量，即驰名商标认定的核心要件在于相关公众的认知程度，而不一定要逐一举证营业额、广告费或商标使用时间等“硬指标”。

necessary. To avoid confusion, the scope of protection for unregistered well-known trademarks is more extensive when it comes to the similarity between the marks and the goods/services, because as required such trademarks always have higher levels of reputation. Article 13.1 intends to provide stronger and wider protection over unregistered well-known trademarks.

The Beijing High Court made a ruling on 13 March 2017, upholding the TRAB's decision. The Court of Appeal opined that the difference between article 13.1 and article 31 lies in the extent of the reputation of the unregistered mark and the substance of the prior rights seeking protection. Article 31 intends to protect the prior trademark owner's interests generated by its trademark use. Article 13.1, by contrast, focuses on preventing confusion in the market. The court echoed KuGou's argument that article 13.1 should apply in assessing the registrability of a disputed mark in respect of services not covered by article 31.

The court found that evidence submitted by KuGou Networks – including certificates issued by industrial associations, the amount of tax paid, advertising and promotion materials, contracts and invoices, and media coverage – was sufficient to prove that the “酷狗” mark had reached well-known status before the application date of the disputed mark.

JUDICIAL INTERPRETATION

The Provisions of the Supreme People's Court on Several Issues Concerning the Hearing of Administrative Cases Involving the Granting and Affirmation of Trademark Rights entered into force on 1 March 2017. The judgment, which does not directly cite the provisions, clearly adopts the same reasoning.

Article 12 of the provisions enumerates the factors to be considered by the courts for determining the likelihood of confusion. The provisions use the voluntary expression “the extent of similarity of the trademarks” instead of “trademark similarity”, which is in line with the principle that the higher the level of reputation of the prior mark, the lower extent of similarity between the goods/services is required to determine the likelihood of confusion.

SPECIAL FEATURES OF INTERNET

Article 14 of the law enumerates the factors to be considered, in principle, for determining well-known status. However, given the peculiarity of the internet, not all these criteria fit this case. Considering the preponderant public awareness of the “酷狗” mark, it would be inappropriate to indiscriminately apply all the factors. The internet grows public awareness quickly via its unique operation of promoting “free downloading and streaming services”. It differentiates from traditional industry in respect of its earning mode. Therefore, it would be advisable to assess the awareness of the relevant public for the determination of well-known status instead of following the same standards and requesting the proof of revenue, advertising costs and duration of trademark use.

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职务作品与职务发明的分类管理
Separate management of service works and service inventions

职务作品和职务发明尽管均属知识产权客体范畴，但在定义、判断标准、权利归属、作者和发明人的权利等方面均具有自身特点，企业在知识产权交易、许可、商业利用以及与之有关的劳动合同等各项安排中有必要在进行梳理和厘清其基本内容的基础上分类管理。

关于职务作品的法律规定主要见于《著作权法》中，而关于职务发明的主要规定主要见于现行《专利法》中。本文将现行法律中的相关内容归纳如下：

定义及判断标准。职务作品，指“公民为完成法人或其他组织工作任务所创作的作品”。例如：员工接受单位指派创作的电影剧本、影视剧、小说、美术、摄影作品、软件等均属此类。职务作品又分为“一般职务作品”和“特殊职务作品”。“特殊职务作品”主要是指利用法人（或其他组织）的物质技术条件、由法人（或其他组织）承担责任的工程设计图、产品设计图、地图、计算机软件等职务作品，或者法律、行政法规规定或合同约定著作权由法人（或其他组织）享有的作品。职务发明创造，指“执行本单位的任务或者主要是利用本单位的物质技术条件所完成的发明创造”。

对比可知，一般职务作品的定义和判断标准为“完成法人或者其他组织工作任务”。对“工程图”等特殊职务作品，则以“完成法人或者其他组织工作任务”、“主要利用法人或者其他组织物质技术条件”、“法人或者其他组织承担责任”三个要件来共同判断，缺一不可。职务发明则是以“执行本单位的任务”或“主要是利用本单位物质技术条件”为要件，满足任一条件某发明即可被认定为职务发明。

权利归属。无论职务作品还是职务发明，均遵循“约定优先”原则，即权利的权属如有约定则跟从约定（无效、可撤销的约定除外）。但权属相关的争议往往发生在没有明确约定的情形下。在作者与法人（或其他组织）没有约定的情形下，一般职务作品归属于作者，而特殊职务作品的著作权则归属于法人（或其他组织）。实践中，对于一般职务作品的权属问题是职务作品争议多发的领域之一。

而职务发明申请专利的权利属于法人（或其他组织）；申请被批准后，法人（或其他组织）为专利权人。换言之，在无约定情形下，

Notwithstanding the fact that service works and service inventions fall within the scope of intellectual property (IP), they each have their own specific features in terms of definition, judgment criteria, vesting of rights, author and inventor rights, etc. Enterprises need to manage them separately on the basis of an understanding and clarification of their basic content in the various arrangements for IP transactions, licensing and commercial use, as well as employment contracts that have a connection.

The legal provisions on service works are mainly found in the Copyright Law, whereas those on service inventions are in the Patent Law. This column examines the relevant provisions of the current laws.

Definitions and judgment criteria. A service work means “a work created by a citizen in order to accomplish a task assigned to him or her by a legal person or other organization”. For example, a film script, film or television series, novel, artwork, video work, software, etc., created by an employee as assigned by his or her employer all fall within this category. Service works are further divided into “general service works” and “special service works”. The latter mainly refer to project design drawings, product design drawings, maps, computer software, etc., created using the legal person’s (or other organization’s) material and technical resources, and in respect of which the legal person (or other organization) bears liability, or another work in which a legal person (or other organization) enjoys the copyrights as specified in laws or administrative regulations, or as specified in a contract. A service invention or creation means “an invention or creation completed in executing a task of one’s employer or mainly by using the material and technical resources of one’s employer”.

From a comparison it can be seen that the definition and criteria for determining a general service work are “to accomplish a task assigned by a legal person or other organization”. The determination of a special service work, such as project drawings, etc., requires three conditions: “to accomplish a task assigned by a legal person or other organization”; “mainly using the material and technical resources of the legal person or other organization”; and “the legal person or other organization bears liability in respect thereof”, none of which may be absent. As for a service invention, “completed in executing a task of one’s employer” or “mainly using the material and technical resources of one’s employer” are key conditions, and if either are satisfied an invention may be deemed a service invention.

Vesting of rights. Both service works and service inventions observe the principle of “priority of agreement”, meaning that if provisions pertaining to title to the rights exist, such provisions are to be complied with (except if such provisions are invalid or revocable). However, disputes relating to title to the rights usually occur when there is no express agreement. Where there is no agreement between the author and the legal person (or other organization), a general service work vests in the author, whereas the copyrights in a special service work vest in the legal person (or other organization). In practice, the issue of title to a general service work is one of the areas in which service work disputes often arise.

In contrast, the right to file for a patent for a service invention vests in the legal person (or other organization); and once

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分类管理

基于以上对比可知，职务作品和职务发明虽然均与法人（或其他组织）的工作任务有关，但又各有其特点，建议企业对两者分门别类地进行管理工作。例如针对职务作品，履行完备的注册、登记、权属约定等法律手续。又例如针对职务发明，进行例行的、周期性的专利发掘和专利申请工作，避免有价值的发明因未申请而进入公有领域，也避免发明人自行申请专利损害企业的合法利益，酿成将来的纠纷。

结合笔者实践经验看，现行法律制度仍存在一定模糊地带。值得欣喜的是，在2014年国务院法制办公室公布的《著作权法(修订草案送审稿)》中以及2015年公布的《专利法修订草案（送审稿）》中分别包含了与职务作品以及职务发明有关的修改内容，这表明有关问题已引起立法机构的重视，对此我们将持续关注。

> “现行法律制度仍存在一定模糊地带
> *Current legal systems still harbour some ambiguities*

the application is approved, the legal person (or other organization) becomes the patent holder. In other words, where there is no agreement, the right to file for a patent for, and the patent rights in, a service invention both vest in the legal person (or other organization).

Right to remuneration. The inventor of a service invention has a statutory right to receive remuneration, namely “the entity that has been granted patent rights must reward the inventor or designer of the service invention. After the invention patent has been exploited, the entity must give the inventor or designer reasonable remuneration based on the scope of propagation and application of the patent, and the economic benefits derived”.

In contrast, the author of a service work has no such statutory right to receive remuneration. Even with respect to special service works, the law only provides that the legal person (or other organization) may give the author a reward.

Exploitation of rights and restrictions. With respect to general service works, where the copyrights vest in the author, the legal person (or other organization) has a preemptive right to their use within its scope of business. Furthermore, without the consent of his or her employer, the author of a work may not, within the first two years after completion of the work, license a third party to use the same in a manner identical to that of his or her employer.

However, as for service inventions and special service works, since the rights vest in the legal person (or other organization), their exploitation does not require the consent of the author or inventor.

MANAGEMENT BY TYPE

Based on the above-mentioned comparisons it can be seen that, although both service works and service inventions are connected with the tasks of the legal person (or other organization), they each have their own particular features, so the authors recommend that enterprises manage them separately. For example, with respect to service works, duly carry out such legal procedures as registration, stipulation of title, etc. With respect to service inventions, carry out routine and periodic patent mining and patent filing work, so as to avoid valuable inventions entering the public domain due to a failure to file, and avoid the inventor himself or herself filing for a patent, harming the lawful interests of the enterprise, and spawning future disputes.

In light of the authors’ practice experience, current legal systems still harbour some ambiguities. One thing worth celebrating is that the Copyright Law (Revised Draft Sent for Review) published in 2014, and the Patent Law Revised Draft (Sent for Review) published in 2015, contain revised provisions on service works and service inventions, respectively, which indicates that relevant issues have drawn the attention of the legislative authorities.

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未雨绸缪胜过临渴掘井
Prepare for bad weather before it rains

近期遇到商标权利人咨询几起商标冲突案件。虽然每个案件具体情况不同，在案件种类上既有商标侵权案件，也有商标行政诉讼案件，但共同点是权利人均对其商标缺乏总体规划安排，仅在个案冲突发生后才引起重视。但这几起案件的冲突对方却是在冲突发生前就已经做好了商标布局；因此，即便权利人个案胜诉，若不从商标整体布局进行考虑和安排，也很难最终赢得品牌策略的胜利。

中国有句古话："勿临渴掘井，宜未雨绸缪"，说的就是策略的重要性。这个道理在商标战略上也同样适用。2016年广东高院就商标侵权纠纷，二审宣判New Balance赔偿原告中国公司500万元，引发点其实在于New Balance在最初确定并使用中文商标前，未对中国境内已存在的冲突权利进行充分检索并安排应对策略。通过法院直播的该案庭审情况，我们也看到被告虽然对该次诉讼进行了充分准备，但却仍然无法弥补最初策略上的疏忽，导致最终败诉赔偿的结果。

那么商标策略到底应该考虑哪些方面呢？商标策略从商标权利确立、冲突权利应对方案、商标与其他知识产权的关系、诉讼风险预防、冲突中的非诉讼解决方案、法律策略与商业策略的配合等方面都有值得考虑的地方。下面分析两方面的内容。

权利布局

权利人最关心的商标问题就是其品牌保护问题。但品牌保护的前提是以权利人在一定的法域内确定有效的商标权利为基础的。如果缺乏这样的基础，也无从谈到品牌保护。就商标权而言，因为其地域性保护的特点，必须考虑商标在不同法域的注册。在美国注册的商标，即便具有一定知名度，如果不在中国注册，那其商标权也很难在中国得到保护。即便就中国一个国家而言，也存在港、澳、台、大陆四个不同法域；在中国大陆注册的商标不会在其他三个法域自动受到保护。因此，权利人需要根据自己的商业发展规划考虑安排商标注册的地域。

此外，商品和服务类别也是需要考虑的因素。就中国大陆而言，除了45个商品和服务（以下统称"商品"）分类外，每个商品类别下

Recently, the author has encountered a number of cases of trademark rights holders enquiring about trademark conflict issues, including trademark infringement cases, administrative trademark litigation cases, and others. Their common point was the rights holders' lack of a comprehensive plan or arrangement regarding their trademarks, a point that drew their attention only after the occurrence of a conflict.

However, the conflict counterparties in these cases had already duly prepared their trademark strategies before the occurrence of the conflict. Accordingly, even if a rights holder manages to prevail in the individual case, if consideration and arrangement do not begin from an overarching trademark strategy, it is difficult to ultimately secure a brand strategy victory.

There is an old saying in China, "Don't dig a well when facing thirst, it is better instead to prepare for foul weather before it rains," which speaks to the importance of having a strategy in advance. This principle is likewise applicable to trademark strategy. In a trademark infringement dispute in 2016, the Guangdong High Court, at appeal, ordered New Balance to pay the plaintiff, a Chinese company, compensation in the amount of RMB5 million (US$723,000).

The trigger can be found in New Balance's failure, before determining and using a Chinese-language trademark, to carry out a thorough search as to whether there existed any conflicting rights in China, and prepare a corresponding strategy. Through a live broadcast of the case from the court the author could see that, although the defendant fully prepared for the trial, it was nonetheless unable to overcome its initial negligence in strategy, ultimately resulting in its losing the case and being required to pay damages.

The question then becomes, what things need to be considered in a trademark strategy? All things, such as the establishment of trademark rights, a response plan for conflicting rights, the relationship between a trademark and other intellectual property, prevention of litigation risks, non-litigation resolution plans in the course of the conflict, co-ordination of the legal strategy and business strategy, etc., have points worthy of consideration in a trademark strategy. This article will analyze two of these aspects below.

Deployment of rights. The trademark issue of most concern to a rights holder is to determine valid trademark rights in a certain legal jurisdiction to protect its brand. As the protection is territorial, consideration must be given to registering the trademark in different jurisdictions. If the rights in a trademark registered in the US are not also registered in China, they are unlikely to be accorded protection there, even if the trademark has a certain degree of notoriety in the US. Even in China, there are four different legal jurisdictions: Hong Kong, Macau, Taiwan and the mainland. A trademark registered in mainland China does not automatically gain protection in the other three jurisdictions. A rights holder needs to consider the regions where it resides to arrange for registration in light of its business development plans.

Classes of goods and services are another factor to be considered. In mainland China, in addition to the 45 classes of goods and services, each class of goods contains a number of different subclasses under it; some subclasses of goods constitute similar goods, whereas different subclasses of goods without any special explanation do not constitute similar goods.

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面还有不同的群组；有些群组的商品构成类似，但未特别说明的不同群组商品之间不构成类似。因此，除了考虑和权利人业务相关的核心类别及需要进行商标防御的类别之外，还需要根据具体的商品考虑商标群组问题。

最后，在商标权利确立过程中，对于他人的在先权利也需要有清晰的了解并制定相应的策略。对于可能阻碍权利人商标注册的其他在先商标，也需要分析考虑是否有可能通过无效、撤三（撤销连续三年不使用的商标）或谈判去除该注册障碍。除了在先商标之外，对于在先的企业名称及其他在先权利，也需要评估可能的法律风险，之后再综合考虑商业发展规划及法律风险，最终确定商标的权利布局。

综合策略

司法实践中，很多情况下是在商标权利冲突发生后才会引起商标权人对自己的权利的重视。而且，权利人在处理此类纠纷的时候，更多的情况是头疼医头脚疼医脚；即仅仅着眼于目前的个案解决，而不是从冲突对方的意图、权利人自身整体权利确立和保护的角度去考虑该问题。在这种情况下，如果权利冲突的确是偶发的个案，可能会临时应对成功，不会产生太严重的后果。但在司法实践中，更多情况是冲突对方本身已经开始商标策略布局，而个案冲突仅仅是对方商标策略布局中的某一部分与权利人权利发生的冲突。

在这种情况下，如果仅仅个案应对，很有可能出现打完一场诉讼又有一场诉讼的情况。在经历多次诉讼之后，权利人才会逐渐意识到对方可能有商标策略布局，其真正目的是通过商标注册、转让、诉讼等一些列方式获取特定品牌及商业利益，而非偶发的个别商标权利冲突。如果应对不利，就会出现官司越打越被动，最终会导致无法挽回的品牌及商业利益的损失。即便赢得了个案，但最终也可能会在对方的全盘攻势下输了品牌及商业利益的大局。商标之争如同两军对垒，如果不在整体策略进行布局，失败是很难避免的；即便在个案中全力以赴，也会出现赢得了一场战斗，却输掉了整个战役的情况。

因此，我们建议权利人在考虑商业规划之初，就着手从商标整体布局进行考虑和安排；未雨绸缪，最终取得品牌和商业的双赢。

Accordingly, in addition to considering the core class relating to the rights holder's business, as well as those classes in respect of which defensive registrations have to be carried out, the issue of trademark sub-classes also needs to be considered on the basis of the specific goods.

Finally, when establishing trademark rights, the prior IP rights of others needs to be clearly understood, and the appropriate strategy must be formulated in advance. Wherever prior trademarks that could hamper the rights holder's trademark registration, analysis and consideration of whether such obstacles to registration can be removed through invalidation, "non-use cancellation" (cancellation of a trademark that has not been used for three years in succession) or negotiations need to be carried out. The potential legal risks of prior enterprise names and other prior rights need to be assessed. Subsequently, it is necessary to comprehensively consider the business development plan and legal risks before determining the final trademark rights strategy.

Comprehensive strategy. In judicial practice, a trademark rights holder may only realize the importance of its rights after a trademark rights conflict arises. Furthermore, when handling such disputes, the rights holder will be reactive rather than proactive, i.e., rather than considering the intent of the conflict counterparty, and establishment and protection of its own rights in an overarching fashion, it will train its sights only on resolving the particular case at hand. If the rights conflict truly is a one-off occurrence, it may successfully respond for the time being, without giving rise to any serious consequences. However, in judicial practice, in most circumstances, the conflict counterparty will itself have commenced the deployment of its trademark strategy, with the conflict in any one case merely being a certain part of its conflict with the rights holder in the deployment of its trademark strategy.

Under such a circumstance, if the response is only made on a case-by-case basis, it is very likely that another case will crop up soon after the litigation in the previous one has come to an end. After a string of legal actions, the rights holder will finally realize that the counterparty could have deployed a trademark strategy to gain specific brand and commercial benefits through trademark registration, transfer, legal actions, etc., and not just the occasional triggering of individual trademark rights conflicts. If the response proves unsuccessful, the rights holder will progressively be backed into a corner as the legal actions pile up, ultimately resulting in irreversible brand and commercial benefit losses.

Even if it manages to prevail in the odd case, it may ultimately lose the overall brand and commercial benefit match under the relentless offensive of the counterparty. A trademark dispute is like two armies standing face to face; if deployment is not carried out under an overarching strategy, defeat is hard to avoid. And even if all efforts are expended in an individual case, it is possible to win the battle, but lose the war.

Accordingly, we would recommend that rights holders, when first considering their business plans, focus their consideration and arrangement on an overarching trademark strategy, and make hay while the sun shines, so as to ultimately secure a brand and business double win.

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网络安全法与雇员隐私
The Cybersecurity Law and protecting employee privacy

作为网络信息安全以及个人隐私保护方面里程碑式的《网络安全法》将在2017年6月1日正式施行。4月11日，国家互联网信息办公室发布了《个人信息和重要数据出境安全评估办法（征求意见稿）》，开始了为期一个月的向全社会公开征求意见的过程。此《征求意见稿》对个人信息储存、跨境传输、安全评估以及接收提供了极其详尽的要求和指引。

在此之前公布，并且将于2017年10月1日施行的划时代的《民法总则》，再次明确并且清楚界定“自然人的个人信息受法律保护。任何组织和个人需要获取他人个人信息的，应当依法取得并确保信息安全，不得非法收集、使用、加工、传输他人个人信息。不得非法买卖、提供或者公开他人个人信息”。在此严格立法的大环境下，雇主在经营过程中必须要非常重视雇员个人信息的收集、利用、传输等问题，并且建立合规机制和预防措施加大雇员隐私权保护，以避免潜在的法律风险。

实用建议

结合目前的法律法规要求，笔者提出以下几点建议：

获取个人信息前得到个人同意。按照《网络安全法》的界定，“个人信息，是指以电子或者其他方式记录的能够单独或者与其他信息结合识别自然人个人身份的各种信息，包括但不限于自然人的姓名、出生日期、身份证号码、个人生物识别信息、住址、电话号码等”。

对于个人应聘者在应聘过程中提供的相关个人信息，以及雇员在被雇佣过程中提供的个人信息，建议雇主在获取相关信息前获取个人同意，明确告知由于雇佣的需要，雇主会收集和获取相关信息。

获取个人信息的范围要合理。《网络安全法》的重要原则之一就是“收集、使用个人信息，应当遵循合法、正当、必要原则”。因此，雇主在获取个人信息时，应当严格界定个人信息收集的范围，除非雇佣和特殊岗位相关的，不得收集与雇员所在行业、岗位无关的个人信息。

安全储存个人信息，防止数据泄露、被窃取、篡改和被滥用。雇主需要制定内部数据安全管理制度和操作规程，确定信息安全负

A milestone in network information security and personal privacy protection, the Cybersecurity Law will officially be implemented from 1 June 2017. On 11 April, the State Internet Information Office issued the Measures for Security Assessments of Personal Information and Important Data Sent Abroad (Draft for Comment), launching a one-month process of seeking comment from the public. The draft provides finely detailed requirements in respect of, and guidelines on, the storage, cross-border transmission, security assessment and acceptance of personal information.

The previously published General Provisions of the Civil Code, to be implemented from 1 October 2017, further specify and clearly define that, “the personal information of natural persons is protected by law. Any organization or individual that wishes to obtain the personal information of other persons shall do so in accordance with the law, ensure the security thereof, may not unlawfully collect, use, process or transmit the same, and may not unlawfully buy or sell, provide or disclose the same.”

In such a stringent legislative environment, an employer must attach great importance to the issue of the collection, use and transmission of the personal information of its employees, and establish a compliance mechanism and precautionary measures to increase the protection of the privacy of its employees to avoid potential legal risks.

The author makes the following recommendations in light of the requirements of current laws and regulations:

Securing individuals’ consent before obtaining personal information. Pursuant to the Cybersecurity Law, personal information is defined as, “various types of information recorded electronically or otherwise that singly or in combination with other information can identify a natural person, and includes but is not limited to a natural person’s name, date of birth, ID document number, personal biometric information, address, telephone number, etc.”

With respect to relevant personal information provided by an individual job applicant during an employee search process, and personal information provided by an employee during the employment process, it is recommended that the employer secure the individual’s consent before obtaining the relevant information and expressly inform him or her that it collects and obtains relevant information for employment purposes.

Scope of personal information obtained to be reasonable. One of the key principles of the Cybersecurity Law is that the collection and use of “personal information shall comply with the principles of lawfulness, legitimacy and necessity”. Accordingly, when an employer obtains personal information, it should strictly define the scope of the personal information it collects, and not collect personal information unrelated to the employee’s industry or job, except where necessary for employment or a special job.

Secure storage of personal information to prevent the leakage, theft, alteration and misuse of data. An employer needs to formulate internal data security management systems and operating rules, designate someone in charge of information security, improve its internal mechanisms for the protection of personal information, prevent the leaking of personal information and prevent its personal information management personnel from abusing their position to steal and unlawfully use personal information.

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责人，完善个人信息保护的内部机制，防止个人信息泄露，并且防止个人信息管理人员滥用职权，窃取和非法利用个人信息。

数据跨境存储或者传输前获得个人同意。《征求意见稿》明确在中华人民共和国境内运营中收集和产生的个人信息和重要数据，应当在境内存储。数据出境前必须要评估数据出境的必要性，并且重点是评估个人信息的数量、范围、类型、敏感程度，以及个人信息主体是否同意其个人信息出境。

以下情形必须报请行业主管或监管部门组织安全评估：（一）含有或累计含有50万人以上的个人信息；（二）数据量超过1000GB；（三）包含核设施、化学生物、国防军工、人口健康等领域数据，大型工程活动、海洋环境以及敏感地理信息数据等；（四）包含关键信息基础设施的系统漏洞、安全防护等网络安全信息；（五）关键信息基础设施运营者向境外提供个人信息和重要数据；（六）其他可能影响国家安全和社会公共利益，行业主管或监管部门认为应该评估。

《征求意见稿》首次明确个人信息出境未经个人信息主体同意，或可能侵害个人利益的，数据不得出境。因此，雇主对于雇员个人信息必须跨境存储或者跨境传输的，必须征得个人同意。

第三方合规制度。数据共享或者委托第三方存储时，必须督促第三方建立合规制度。目前企业在运营中，使用第三方专业人力资源管理软件，或者委托第三方远程云存储雇员个人信息的不在少数。尽管在《网络安全法》和《征求意见稿》中对此情形并未做出进一步的界定，但作为广义的“网络运营者”，此第三方公司也受相关法律的约束。

雇主在使用此类第三方公司提供的专业服务时，也需要严格督促其遵守个人信息保护以及雇员隐私安全方面的法规，厘清责任承担义务。

总体而言，相关法律法规和实施办法的陆续出台，对于雇主在雇员个人信息的保护和隐私权保护方面提出了更高更严格的要求。雇主在收集、存储、使用、传输雇员个人信息过程中，必须高度加以重视，避免泄露滥用个人信息的法律风险，甚至国家安全方面的合规风险。

Securing the consent of the individual before cross-border storage or transmission of data. The draft expressly provides that personal information and important data collected and generated in the course of operations in China are to be stored in China. Before data is sent abroad, the necessity of doing so must be assessed, the focus thereof to be an assessment of the quantity, scope, type and sensitivity of the personal information, and whether the subjects of the personal information consent to their personal information being sent abroad.

In any of the following circumstances, the competent industry authority or regulator must be asked to arrange for a security assessment: (1) the data contain or cumulatively contain the personal information of at least 500,000 persons; (2) the quantity of data exceeds 1,000GB; (3) the data contain information on such sectors as nuclear facilities, chemical biology, the national defence industry, population, health, etc., or on large project activities, the marine environment or sensitive geological information; (4) the data contain network security information, such as system vulnerabilities in, or security prevention of, key information infrastructure; (5) an operator of key information infrastructure is to provide personal information and important data to foreign parties; or (6) other data that could affect national security, or the public interest is involved and the competent industry authority or regulator deems the conduct of an assessment necessary.

The draft specifies for the first time that data cannot be sent abroad if the consent of the subject of the personal information has not been secured or the interests of the individual could be infringed. Accordingly, if an employer needs to store or transmit personal information of its employees abroad, it must secure the individuals' consent.

Third-party compliance system. If data are to be shared or if their storage is to be entrusted to a third party, the establishment of a compliance system by the third party must be procured. At present, a significant number of enterprises use, in their operations, third-party professional human resource management software, or engage a third party to remotely store personal information of their employees in the cloud. Notwithstanding that neither the Cybersecurity Law nor the draft provide further definition in respect of such circumstances, as a "network operator" in the broad sense, such a third-party company is likewise bound by relevant laws. When using the professional services of such a third-party company, an employer is required to strictly procure its compliance with regulations on the protection of personal information and the security of the privacy of employees, and clarify responsibilities and the bearing of obligations.

The successive issuance of relevant laws, regulations and implementing measures imposes more stringent requirements on employers in respect of the protection of the personal information and privacy of their employees. In the course of collecting, storing, using and transmitting this personal information, employers must pay close attention to avoiding the legal risks that could arise from the leaking or misuse of personal information, and even compliance risks relating to national security.

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国内矿业并购法律尽职调查
Due diligence in domestic mining M&A

国家“十三五”规划指出，要支持矿山企业技术和工艺改造，引导小型矿山兼并重组，关闭技术落后、破坏环境的矿山。工信部在2016-2020年有色金属工业发展规划中也指出，要推进国内区域矿山整合，实现规模开发、集约利用。与其他并购项目不同的是，矿业并购项目具有核心资产特殊（不可再生的矿产资源）、价值判断专业性较高、涉及风险众多等特点。因此，在对矿业并购项目开展法律尽职调查的过程中，需要重点关注以下几点。

矿产资源储量的真实性。对于矿业并购项目而言，除了市场价格、可采选条件之外，矿产资源储量无疑是最大的客观风险之一。但矿山资源储量的估算结果与诸多因素有关，例如：矿体地质构造的复杂程度；矿床控制与研究程度；选择勘查网度和工程手段；估算方法的选择等。因此，在对矿业并购项目开展法律尽调的过程中，律师除需将被并购企业历年年检资源开采报告、详查或勘探报告、评审备案报告等与公司实际生产销售量进行核对外，还应当建议并购方聘请矿业专家对现有矿山资源储量进行补充勘查、化验，及/或委托矿产所在地的评审中心对勘察报告进行重估等，以最大程度地确保被并购企业提供矿产资源储量的可靠性、真实性。

矿业权取得及处置的合法性。矿业并购项目中，矿业权流转的合法与否是衡量矿业并购项目是否可行的关键内容。

在对矿业并购项目开展法律尽调的过程中，律师需对被并购企业矿业权的以下情况进行关注和核查：取得方式、有效期限，及权利限制情况；矿业权人是否依法缴纳了探矿权使用费、采矿权使用费、资源税、矿产资源补偿费、矿山环境治理恢复保证金；探矿权人是否完成了规定的最低勘查投入；探矿权人领取的勘查许可证是否已满两年，或者在勘查作业区内是否有发现可供进一步勘查或开采的矿产资源；矿业权是否被政府纳入整合计划、范围；矿业权证是否存在在交易完成后无法得到延续的可能；被并购企业是否存在未经审批擅自非法承包、出租、转让、与他人合作开采等违法行为。

项目用地的合法性。由于矿产资源大多埋藏于地下，矿业并购项目不可避免地会涉及到被并购企业国有土地使用问题。

China's 13th Five-Year Plan pointed out that the central government should support mining enterprises to upgrade technologies, guide the merger and acquisition (M&A) of small mines, and close outdated and environmentally unfriendly mines. In the Development Plan for the Nonferrous Metals Industry (2016-2020), the Ministry of Industry and Information Technology said the regional consolidation of mines should be promoted across the country to expedite large-scale development and intensive use of resources.

M&A projects in the mining industry are unlike other ones for special core assets (non-renewable mineral resources), requiring high levels of expertise in value evaluation and in evaluating various risks. During the legal due diligence on such M&A projects, attention should be paid to following aspects:

The authenticity of mineral reserves. For mining sector M&A, the mineral reserve is one of the biggest risk factors, apart from market price and conditions for mining and mineral processing. The estimation of mineral reserves involves multiple factors, such as the complexity of an ore body's geological structure, the control and study of ore deposits, the choice of exploration grid density and engineering techniques, and the choice of estimation methods. When performing legal due diligence on such M&A, lawyers should advise the acquirer to hire experts to examine existing mineral reserves and/or commission evaluation centres where the target mines are located to review exploration reports, on top of reviewing annual inspection reports on resource exploitation, exploration reports, and examination registration reports of target companies, as well as their real production and sales. The purpose is to ensure the authenticity of mineral reserve information provided by target companies.

Legitimacy of the obtainment and disposal of mining rights. For a mining M&A project, whether the transfer of mining rights is legal is key to assessing its feasibility. During legal due diligence, lawyers should examine the following issues: the way the target company obtains the mining rights, as well as the term of validity of the rights and attaching restrictions; whether the mining rights owner has paid fees for exploration rights, fees for exploitation rights, resource taxes, compensation fees for mineral resources, and deposits for environmental restoration in mineral exploitation; whether the exploration rights owner has completed the required minimum exploration and survey input; whether the exploration rights owner has obtained the mineral exploration and survey permit for two years, or whether new mineral resources are found for further exploration and survey, or exploitation within the exploration and survey operations area(s); whether the mining rights are included in consolidation plans by the government; whether it is possible that the mining rights certificates cannot be renewed upon the deal's completion; and whether the target company, without approval, illegally contracts for or leases mining work, transfers the mining rights, or co-operates with others in mineral exploitation.

Legitimacy of the land for mining M&A projects. As most mineral resources are under the earth, mining

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在对矿业并购项目开展法律尽调的过程中，律师应注意核查被并购企业是否依法取得了相关国有土地使用权；被并购企业的生产建设项目是否经过了依法批准；经批准的建设项目需要使用国有建设用地的，是否依法办理了建设用地审批手续；被并购企业用地涉及农村集体用地的，是否有办理承租或受让农村集体建设用地用于项目建设或通过农用地转用及征地手续；被并购企业生产占用草地、林地的，是否有依法办理相关征用审核批准手续，是否有编制并严格履行土地复垦方案、水土保持方案等。

生产经营的安全性。根据国务院《安全生产许可证条例》，国家对矿山企业、建筑施工企业和危险化学品、烟花爆竹、民用爆炸物品生产企业实行安全生产许可制度，未取得安全生产许可证的，不得从事生产活动。

因此，律师需关注被并购企业安全生产许可证、民用爆破物品购买许可证、爆破作业单位许可证，以及爆破作业人员许可证等安全生产类证照的取得情况；被并购企业是否有缴纳安全生产风险抵押金；尾矿库的建设、运行、闭库和闭库后再利用的安全技术要求是否符合《尾矿库安全技术规程》；新建矿山企业的矿权项目是否具备安全报告；安全设施是否经安全生产监督管理部门验收合格等情况。

并购方案的可行性。完成对被并购企业的尽职调查及综合评估后，针对被并购企业自身的特点及项目的综合情况，设计和制定切实可行的并购方案对于完成矿业并购项目显得尤为重要。依据《探矿权采矿权转让管理办法》，探矿权人在完成规定的最低勘查投入后，经依法批准，可以将探矿权转让他人；已经取得采矿权的矿山企业，因企业合并、分立，与他人合资、合作经营，或因企业资产出售以及有其他变更企业资产产权的情形，需要变更采矿权主体的，经依法批准，可以将采矿权转让他人采矿。此外，并购方亦可采取股权并购的方式完成对于被并购企业核心资产的实际控制。

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M&A projects will inevitably involve target companies' use of state-owned land. When conducting legal due diligence, lawyers should examine the following issues: whether target companies have obtained the right to use state-owned land; whether the construction projects of target companies have been approved; whether the approved construction projects that need to use state-owned land have legally obtained the approval of land for construction purposes; whether target companies that involve rural collective land have been approved to rent or take over that land for construction purposes, or use farmland for other purposes; whether target companies have been approved to use grassland and forest land for production; and whether target companies have worked out and strictly implemented programmes of land rehabilitation, and water and soil conservation.

Work safety. According to the Regulation on Work Safety Licences released by the State Council, the state applies a work safety licensing system to enterprises engaged in mining, construction, the production of dangerous chemicals, fireworks and crackers, and blasting equipment for civil use. No enterprises may engage in production activities without work safety licences. Therefore, lawyers should pay attention to the following issues: whether target companies have obtained work safety licences, purchase permits for blasting equipment for civil use, licences for blasting operation organizations, and licences for blasting operators; whether target companies have paid deposits for production risks; whether the construction, operation and closure of tailing ponds, as well as the reuse of closed tailing ponds, comply with the Safety Technical Regulations on Tailing Ponds; whether new mining companies' projects have safety reports; and whether safety equipment passes the inspection of work safety supervisory authorities.

Feasibility of M&A plans. After completing the due diligence and assessment of target companies, it is important to work out feasible M&A proposals tailored to the characteristics of target companies and comprehensive information of M&A projects. According to the Measures for the Administration of Transfer of Mineral Exploration Rights and Exploitation Rights, mineral exploration rights owners may, upon fulfillment of the required minimum exploration and survey input and approval in accordance with law, transfer the mineral exploration rights to another person. A mining enterprise having obtained the exploitation rights may, subject to approval, transfer the exploitation rights to another person for exploitation as a result of enterprise amalgamation, separation, engaging in a joint venture or co-operative venture with another person, or as a result of the sale of the enterprise assets as well as other circumstances that change the property rights of the enterprise assets necessitating a change in the main body of the exploitation rights. The acquirer can also gain control over the core assets of target companies through equity financing.

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海外并购的东道国法律政策环境
Recognizing M&A risks in the target country

跨境交易涉及不同法域，这是海外并购与国内并购的最大区别。受跨境交易这一因素影响，企业进行海外并购时需要防范的风险更多，防范风险的难度更大。对并购交易的东道国及国际法律政策环境进行深入了解，及时识别可能出现的重大风险并作出相关的风险管控，是海外并购成功的必要前提。主要包括且不限于以下方面。

外国投资审查制度。经过过去一轮全球化和经济国际化的推进，目前世界许多国家/地区都在外资审查方面建立了一定的政策法律制度，对外资准入作出明确规定并设立专门机构进行审核。对外资准入的限制，是国际公认的对国民待遇的合理例外。通常而言，国外都会对本国军工企业及银行、电信、铁路、机场等关系国计民生的重要行业和基础设施领域对外商投资设置很多限制，而鼓励外资向有利于国民经济发展，特别是向新兴产业部门以及改善国际收支、扩大出口的部门投资。

“国家安全审查制度”是广为人知的一项外资审查制度。以美国为例，美国对外资的审查主要是出于国家安全考虑。其中最重要的一项立法是《国防生产法》，即所谓爱克森-佛罗里奥条款，该法案授权总统可根据“国家安全”方面的理由，禁止任何外国人对从事州际商务的美国企业实行吞并、收购或接管。

2007年，美国国会通过《外国投资与国家安全法》，法案关注更为广泛的美国国家安全，扩大了审查范围。只要交易涉及与美国国家安全有关的核心基础设施、核心技术及能源等核心资产，就会面临严格审查。外资所在国是否在反恐问题上与美国积极合作、外资公司是否在地区范围内对美国形成军事威胁等也被纳入审查内容。国外均存在类似制度，但往往缺乏“国家安全”的明确标准或定义，从而赋予相关审查机构很大的自由裁量权。很多海外并购项目因为贴上了国家安全的标签而归于失败。

反垄断审查制度。随着引资规模扩大，跨国公司的市场优势地位也带来经济安全、垄断和限制竞争等负面影响。为此，不少国家也采取了相应的措施予以控制和防范。对于大型的并购交易，还需注意其可能面临的反垄断审查。反垄断合规目前已成为全球关注的热点问题之一，并购完成后的企业反垄断合规问题也越来越受到重视。可预见，反垄断合规将成为中国

The biggest difference between cross-border and domestic M&As lies in that the former involves two or more jurisdictions. An acquirer of cross-border M&A, therefore, needs to be prepared for an increasing number of, and much more challenging, risks. Having a good understanding of the legal and policy environment in the target country, and in the world, identifying significant potential risks in a timely manner, and implementing proper risk controls accordingly is the precondition to a successful overseas M&A. Key considerations in this regard include, but are not limited, to the following:

Foreign investment review system. After decades of globalization and economic internationalization, many countries/regions have established a policy and legal system for foreign investment review. Explicit provisions are formulated and specialized agencies are designated to undergo foreign investment review procedure. Restrictions on foreign investment are internationally recognized as reasonable exceptions to national treatment. Generally, foreign firms are restricted from entering infrastructure and other industries of vital importance to the nation's economy and the people's livelihood, such as military projects, banking, telecoms, railways and airports. Instead, they are encouraged to enter sectors conducive to economic development, especially emerging industries and sectors that help improve the international balance of payments and boost exports.

"National security review" is a typical foreign investment review system. In the US, for example, foreign investment review is implemented mainly for ensuring national security. The Exon-Florio provision of the Defense Production Act, which is the most important legislation related to foreign investment review, authorizes the US president to prohibit, from a "national security perspective", mergers, acquisitions and takeovers by foreigners of any US companies engaging in interstate business.

The scope of review was broadened by the Foreign Investment and National Security Act enacted in 2007 by the US Congress, which focuses on the broader national security of the US. A deal is surely subject to stringent review if it involves core assets, such as core infrastructure, technology or energy, which relates to US national security. In the review procedure, questions such as whether the country of the foreign acquirer actively co-operates with the US in fighting against terrorism, and whether the foreign acquirer poses any regional military threat to the US, are also asked. Similar systems are implemented in almost all foreign countries. However, reviewers usually have a lot of discretion due to the lack of definition or standard description of "national security". Many overseas M&A proposals fail because of national security concerns.

Antitrust review system. The advantageous market position of multinationals, a result of expanding cross-border investment, has also brought about concerns over economic security and monopolistic behaviour, as well as possible restraints on competition. In response, many countries have taken action to control and prevent such negative impacts. Large takeover deals could face antitrust scrutiny. Antitrust compliance has become a worldwide concern, as regulators are paying increasing attention to whether two companies, if allowed to combine, would breach antitrust rules. It's predicted that antitrust compliance will be one of the great challenges Chinese companies have to overcome when they seek to acquire foreign assets.

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企业进行跨境并购将面临的重要挑战之一。

劳动用工制度。世界各国通常都会通过劳动用工法律，规定雇佣当地人员的比例，以及裁减雇员的限制性条款和补偿标准，特别是一些发达国家/地区针对并购后裁员和降薪作出十分严厉的规定。如果仅仅对当地的劳工法律一知半解，并购后的相关劳动用工调整就有可能触犯法律。

环境保护制度。随着经济高速发展，全球环境问题日益严重，除了国际性的保护环境协定，大多数国家/地区出台专门的环境立法来规制相关产业，并日趋严格。环境污染的高额罚款及为恢复环境所支付的巨额费用是参与海外并购的相关公司必须考虑的因素之一。同时，注重环保也是企业应履行的社会责任之一，有利于中国企业在海外树立良好的社会形象。

征收和国有化。对外国资本的征收曾经广泛地在发展中国家发生。为了使外国投资者在新的历史条件下重新建立入境投资的信心，许多发展中国家在保护本国经济主权的前提下，在其外资法典中作出了有关保证，规定在一般情况下对外商投资企业不实行国有化和征收。

但是，近年来，为了加强对矿产资源的控制，分享大宗商品涨价带来的利益，部分拉美和非洲国家，如哥伦比亚、洪都拉斯、秘鲁、玻利维亚、委内瑞拉、赞比亚和津巴布韦等，提高了采掘业的提成费和税收。有些国家如厄瓜多尔则在2010年要求重新谈判投资合同，而在谈判失败时，直接征收了相关项目。

因此，东道国法律政策直接影响到海外并购的成败，寻找专业化程度高，可以信赖的当地律师团队，对于识别和防范海外并购中的东道国法律政策风险，十分必要。同时，还需要熟悉国际法的专业律师，通过利用双边或多边条约下的国际投资保护机制，为中国企业的海外并购保驾护航。

> “ 注重环保也是企业应履行的社会责任之一
>
> *Commitment to environmental protection is one of the social responsibilities companies should assume*

Labour employment system. Most countries have labour protection laws requiring that a certain proportion of the workforce at companies to be acquired by foreign firms must be locals, and setting restrictive provisions for job reductions and compensation. Some developed countries/regions have rolled out stringent regulations about job cuts and wage reductions against foreign acquisitions of local businesses. If Chinese companies do not have a full picture of their labour protection rules, they might break the law when reorganizing human resources at the foreign subsidiaries they have acquired.

Environmental protection system. The world is facing more serious environmental issues caused by rapid economic development. In addition to international accords on environmental protection, most countries/regions have introduced increasingly strict laws to regulate sectors that damage the environment. Hefty fines on environmental pollution and huge costs for repairing the environment should be taken into consideration when a company prepares an offer to buy a foreign business. In the meantime, commitment to environmental protection is one of the social responsibilities companies should assume, and it is also helpful for Chinese enterprises to build good reputations in foreign markets.

Expropriation and nationalization. There were times when expropriation of foreign capital took place generally in developing countries. To ensure that foreign investors regain the confidence of investing in their countries again in the new historical context, many developing countries, on the precondition of protecting local economic sovereignty, warrant in their foreign investment codes that nationalization and expropriation will not happen to foreign-invested enterprises except in very limited circumstances.

However, the past couple of years have seen some Latin American and African countries, such as Colombia, Honduras, Peru, Bolivia, Venezuela, Zambia and Zimbabwe, raising royalties and taxes in the mining industry to strengthen control over mineral resources and take a share in the rise of commodity prices. Ecuador, who demanded renegotiation of investment contracts in 2010, even went further to expropriate relevant projects when negotiations failed.

Laws and policies in the target country have a direct impact on the outcome of an overseas M&A. Therefore, it is important to hire a highly specialized, reliable local counsel to identify and prevent potential legal and policy risks that may arise in the target country. Besides, it is also necessary to have a counsel familiar with international laws who serves to safeguard the acquirer's overseas M&A by taking advantage of international investment protection mechanisms under bilateral and multi-lateral treaties.

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REITs：不动产融资的蓝海
REITs: A blue ocean of real estate financing

房地产行业是典型的资金密集型行业，将不动产作为融资载体向来是开发商融资的重要渠道，在传统融资模式不能满足需求的情况下，成熟存量物业尤其是商业地产的二次融资成了境内开发商和投资者不断探索新融资方式的蓝海。本文简要梳理不动产融资的发展历史和实质特征，以房地产投资信托基金（REITs）为例展望境内不动产证券化的未来前景。

传统不动产融资模式

在目前不动产融资的实际操作中，开发商为避免两次不动产转让，产生过高的税收成本，极少选择以物权方式让渡不动产。如果开发商选择以股权方式融资，则往往会通过让渡子公司即项目公司的股权，间接让渡不动产所有权或者用益物权，此时，开发商和投资者往往会默契地约定股权回购，真实进行股权转让的少之又少。纵观当下流行的融资方式，无论是传统的“债权+抵押权”融资模式还是通过不动产的收益权进行融资，其本质都是在非公开交易市场中，双方或多方主体之间产生债权关系。

当传统银贷融资模式受到阻碍时，信托成了首要融资渠道。从常规的信托贷款加上股权投资信托，到后来收益权投资资金信托，直至最新的收益权财产信托，信托交易结构经历了从简单到复杂的渐变过程。目前，以信托收益权为代表的受益权转让在类证券化上已经达到了资管产品的顶峰。可是，实现真正的不动产证券化才是中国未来融资的发展方向。笔者接下来以境内的类REITs为例，展望境内不动产证券化的未来前景。

境内类REITS

REITs是一种专门投资于房地产行业的投资基金。它通过公开发行股票或单位收益凭证来募集资金交由专业投资管理机构运作，并将基金投资于房地产或项目来获取投资收益和资本增值，然后将投资收入以分红形式分配给投资者。

中国内地没有制定REITs专项法律，而现行的《公司法》《信托法》《证券法》《证券投资基金法》以及相关的税收法律规定等都未对REITs进行明确的规定，加之中国对房地产融资等调控政策的不断变化，因此境内出现了借道不同法律架构设立的类REITs。主要模式如下。

（1）信托计划。该模式应用于法国欧尚天津第一店资金信托计划中，该计划是国内首个用于经营型物业的准REITs。2003年北京国际

In the capital-intensive real estate industry, developers that need liquidity have relied heavily on funding backed by their properties. When their liquidity demand cannot be met with this conventional financing approach, domestic developers and investors set eyes on secondary financing backed by existing properties, especially commercial properties, believing this new approach would prove a blue ocean for funding. Starting with the history and substantial features of real estate financing, we look into the prospect of real estate securitization in China, with real estate investment trusts (REITs) as an example.

CONVENTIONAL APPROACH

In view of the heavy tax burden in connection with transfers of real estate to and from developers, few developers that seek real estate financing would choose to transfer title to their real estate. Instead, many of them prefer equity financing, which involves indirect transfer of ownership, or usufruct, of real estate through assignment of the equity in subsidiaries (companies set up for running projects), while authentic assignment of equity is seldom seen because developers and investors usually reach consensus on repurchase. In practice, both the financing approach that combines “claim plus mortgage” and the approach that focuses on usufruct in real estate are implemented in non-open markets, and transactions resulting from both approaches give rise to a debtor-creditor relationship.

As access to bank facilities is restricted, trusts have taken their place as the major source of funding for the real estate industry. This trend entails an increasingly complex structure of trusts that enter into financing transactions, which evolve from the conventional “trust loan plus equity investment trust” model at the beginning, to usufruct investment fund trust at a later stage, and to usufruct property trusts launched most recently.

The current practice of transferring usufruct, represented by usufruct in trusts, marks the highest level of quasi-securitization permitted for asset managers. However, the authors believe that achieving true real estate securitization is the right direction in which China’s property financing should develop. In the section below, we look into the prospect of real estate securitization in China with domestic quasi-REITs as examples.

QUASI-REITS IN CHINA

REITs are investment funds that focus on investing in the real estate industry. Their funds, raised by issuing beneficiary certificates of shares or units in open markets, are put into the hands of professional investment managers who invest them in real estate or related projects to achieve capital appreciation and earn investment income that is distributed to investors as dividends.

No PRC law on REITs has to date been enacted, nor can any explicit provisions on REITs be found in the Company Law, Trust Law, Securities Law, Securities Investment Fund Law or any taxation laws or regulations in effect. Owing to this lack of pertinent legislation, and changing controls over real estate financing, quasi-REITs in China are created under various legal frameworks. Below is an overview of major REIT models.

(1) Trust plans. The trust plan was initially introduced for capitalizing the first department store opened by Groupe Auchan in Tianjin. It was the first quasi-REIT used for operating property in China. In

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（2）证券公司专项资产管理计划。作为中国内地第一单REITs的中信启航专项资产管理计划就采用了这一模式。2014年5月，中信证券推出“中信启航专项资产管理计划”，中信启航项目设立了一个非公募基金来持有天津京证、深证两个物业所对应的项目公司的股权，再以专项资产管理计划认购其非公募基金份额。中信金石基金作为管理人对该非公募基金进行管理。中信启航专项资产管理计划虽然在交易结构上比较接近国外的REITs，但由于其私募的性质，致使其离真正的REITs还有一步之遥。

（3）公募证券投资基金。作为中国内地第一只公募REITs的鹏华前海万科REITs封闭式混合型发起式证券投资基金就采用了这一模式。2015年6月，鹏华基金管理公司推出了鹏华前海万科REITs封闭式混合型发起式证券投资基金。该基金通过增资入股的方式获得目标公司50%的股权，获取自2015年1月1日至2023年7月24日期间前海企业公馆项目100%取得的营业收入、物业管理费。虽然鹏华前海REITs并非传统意义上的股权REITs产品，也未能将绝大部分物业投资于房地产领域，但其突破了基金投资比例的限制，为未来的股权类REITs产品上市提供了范例。

自鹏华前海REITs发行至今，中国内地出现的类REITs产品没有在现有法律制度下再进行创设性的突破，同时囿于中国现行的税收管理体制，中国至今还未出现真正意义上的REITs产品。但鉴于国内不断的金融创新实践，相信国内真正意义上的REITs很快就会到来。

> “鉴于国内不断的金融创新实践，相信国内真正意义上的 REITs 很快就会到来
> *The Chinese market will see true REITs very soon due to ongoing financial innovations*

2003, Beijing International Trust & Investment (known as Beijing International Trust) and Groupe Auchan jointly launched the Capital Trust Plan for Tianjin No.1 Store of Groupe Auchan.

Capital pooled under the trust plan was used to acquire title to the Tianjin No.1 Store. In addition to long-term steady high returns from leasing the property, investors could expect potential income from property appreciation. However, this trust plan is not considered a true REIT, because instead of allowing trading on exchanges, as foreign REITs do, it limited transfer to chosen investors, although holders may seek mortgage loans from banks as an alternative way of getting liquidity.

(2) Specific asset management plans of securities companies. This model was adopted by the CITIC Qihang Specific Asset Management Plan, the first Chinese REIT. The plan was launched by CITIC Securities in May 2014, under which a non-public equity fund was created to hold equity in a project company that controlled two properties, known as Tianjin Jingzheng and Tianjin Shenzheng, and the specific asset management plan was used in turn to subscribe to shares in the non-public equity fund, which was under management of CITIC Goldstone Fund Management. However, since it was offered through private placement, the CITIC Qihang Specific Asset Management Plan was still different from foreign REITs, despite their similarities in deal structure.

(3) Public securities investment funds. The model was used by Penghua Qianhai Vanke REIT's Closed-End Hybrid Securities Investment Fund, the first public REIT in mainland China. The fund, created by Penghua Fund Management in June 2015, acquired a 50% stake of its target by taking the opportunity presented by capital increase of the target and thus is entitled to 100% operating income and property management fees generated and received by the Qianhai Business Mansion project from 1 January 2015 to 24 July 2023. Penghua Qianhai Vanke REIT is not an equity-based REIT in the traditional sense, nor does it invest the absolute majority of its resources in the real estate sector. Despite this, it sets an example for future equity-based REITs by breaking the upper investment limits.

Since Penghua Qianhai Vanke's REIT was issued, no innovative breakthrough has been made by quasi-REITs in the PRC under the existing legal framework, and no REITs in the true sense have been introduced to the Chinese market, given its existing tax system. But the authors believe the Chinese market will see true REITs very soon due to ongoing financial innovations.

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谁应该为 PPP 采购文件的失误买单?
PPP procurement mistakes: Who's responsible?

笔者近期经手的PPP项目中，经常遇到采购文件、合同文件等出现内容缺漏、错误、前后矛盾的情况，不仅导致了社会资本中标结果被推翻的严重后果，同时还产生了投标保证金退还、相关损失由谁负责等争议，给交易各方、项目推进均带来诸多困扰。

其中一个项目经过竞争性采购程序确定了中标社会资本，项目实施机构也向社会资本发出了中标通知书。但是，在中标之后、合同签署前的洽谈过程中，双方对于合同中需明确且会对投资收益产生重大影响的某一财务指标产生分歧。究其缘由，在采购时，采购文件从未对该指标提出报价要求，任何文件也未给予该指标具体的计算公式，故双方只能基于自身的理解确定该财务指标。但因双方基于不同的理解，采用的计算基准依据不同，导致该指标产生重大差异。令人遗憾的是，双方多次协商未果，最终政府方通知社会资本取消其中标资格。

该财务指标问题属于采购文件的重大缺失。那么，对于采购文件的重大失误，依法应由社会资本承担被取消中标资格等不利后果和法律风险吗？答案是否定的。

笔者认为，对于采购文件的过失问题，双方应当友好协商予以解决，但有些政府方在双方未能就争议达成一致的情况下径行取消中标人资格的做法有失妥当，有悖于现行法律法规的要求，且会给地方及项目造成负面影响。

采购程序确定的合同法律关系应当依法受到保护。《政府采购法》第46条规定："中标、成交通知书对采购人和中标、成交供应商均具有法律效力。中标、成交通知书发出后，采购人改变中标、成交结果的，或者中标、成交供应商放弃中标、成交项目的，应当依法承担法律责任。"

在上述项目中，通过政府方的采购程序，政府方已确认投标文件符合采购文件要求的全部实质性条件，并向社会资本发放中标通知书。目前，虽然实践中对于中标通知书的效力及后果存有不同看法，但是司法判例中一般均倾向于认为双方已达成合同法律关系。笔者认为，前述项目中双方业已成立的法律关系应受保护，政府方不宜仅仅因为项目所涉的部分争议问题就主动改变项目中标结果，这涉嫌违反《政府采购法》等相关法律规定。

交易合意应受到充分尊重。依《合同法》基本原则，采购文件属于"要约邀请"，响应文件属于"要约"，中标通知书属于"承诺"。政府方已在"承诺"中同意"要约"，并以《中标通知书》的书面形式确定。至此，项目完成

It's frequent to see deficient, erroneous and contradictory content in procurement documents and contracts of public-private partnership (PPP) projects, leading to serious consequences such as the revocation of an award, as well as disputes over the return of bid security and the responsibility for resulting losses. This causes trouble for relevant parties and hinders the progress of projects.

In one case, a private party won the bid for a project through competitive procurement procedures, and received a bid-winning notice from the government agency responsible for the project. However, during negotiations prior to the contract signing, the two parties disputed a financial indicator that should have been clarified in the contract, which would have a material impact on investment return. As the procurement documents did not set pricing requirements on the indicator, nor did any other document offer a detailed calculation formula for it, the two parties had different views on the financial indicator, leading to a great difference due to their differing calculation bases. The government agency revoked the bidding result.

The financial indicator issue was a big flaw, in this case, within the procurement documents. But should this result in the private party bearing the negative consequences, like revocation of the award and legal risks? The answer is no.

When there are mistakes in procurement documents, the two parties should seek a solution through amicable negotiation. It is improper, and even illegal, for governments to unilaterally revoke an award-winning bid without reaching a consensus over the disputes; this undermines the reputation of local governments, and also stalls projects.

The contractual relationship established by procurement procedures should be protected according to the law. Article 46 of the Government Procurement Law stipulates that, "the notice of winning the bid (or concluding the transaction) must have binding force upon the purchaser, and the winning bidder (or the supplier). If, after the issuing of the notices, the purchaser alters the results of bid winning (or the conclusion of transaction), or the winning bidder (or the supplier) forgoes the bid (or the transaction), the breaching party must be held legally accountable."

In the above-mentioned project, the government agency had confirmed that the bidding document met all the substantive requirements on procurement documents, and issued the notice of winning the bid to the private party. Though there are divided views on the effectiveness and consequences of the bid-winning notice, judicial precedents tend to agree that the two parties have established contractual relations. The legal relationship between the two parties in the project should be protected, and the government agency should not change the bidding outcome just because of partial disputes over the project, which may violate relevant laws such as the Government Procurement Law.

Transaction agreement should be fully respected. According to the basic principles of the Contract Law, procurement documents are defined as "offer invitations", bidding documents as "offers", and

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了采购公告、响应及报价、综合评审、采购结果确认谈判、最终采购结果确认、发出中标通知书的整个采购流程，双方已就合同的实质性内容达成了合意，从而合同法律关系形成，采购文件、响应文件、中标通知对双方均有法律约束力。

而且，依据《政府采购法》《政府和社会资本合作模式操作指南（试行）》等文件要求，采购文件、响应文件、中标通知书等均是合同文本拟定的基础。因此，若在部分争议未能解决的情况下，政府方直接取消社会资本的中标资格，不仅有违双方已达成的合意，也未能符合对依法签署PPP项目合同的要求，更有失诚实信用。

分歧问题的解决应当本着公平交易的原则。采购文件存有失误是既定事实，应由过错方负责。各方是否有责、责任多寡应经过合理判断，不宜简单粗暴地界定为完全归于某一方，或要求某一方独自承担而不管其是否存有过错，更不应由无过错一方承担由此引起的不利后果。

笔者认为，既然项目采购程序已完成、中标结果已确定，各方应当本着公平、合理的原则定纷止争，结合法律规定、交易惯例等进行友好协商，最终确不能达成一致的情况下，应协商确定切实可行的退出路径和对该中标人相关损失及预期利益的合理赔偿。

上述项目中，个别地方政府方无视中标社会资本的合法权益，对既有失误视而不见，以己方意见强加于对方，让无过错方承担全部的不利后果，最后甚至直接取消中标社会资本的成交资格。这种做法有悖PPP本身的“合作”精神及公平交易原则，也可能因违背相关法律法规的要求而承担相应的法律责任。同时，社会资本亦有权通过提出质疑、投诉，乃至以诉讼、仲裁等渠道维护自身权益。

“分歧问题的解决应当本着公平交易的原则

The solution to disputes should be based on the principle of fair dealing

bid-winning notices as “acceptances”. The government agency had agreed with the “offer” in its “acceptance”, and confirmed with the bid-winning notice. The project had so far completed the procurement workflow of procurement announcement, response and quotation, comprehensive evaluation, negotiation about confirming procurement results, final confirmation of procurement results, and issuing of bid-winning notice. The two parties reached an agreement on the contract’s substantive content and thus established a contractual legal relationship. For the two parties, the procurement documents, bidding documents and the bid-winning notice were legally binding.

Besides, according to the Government Procurement Law and the Guidelines for Mode of Co-operation for Government and Social Capital (for Trial Implementation), procurement documents, bidding documents and the bid-winning notice are the basis for writing a contract. Therefore, if the partial disputes remained unresolved, the government’s revocation of the private party’s qualification as the winning bidder breached the agreement and failed to meet the requirement of signing a PPP project contract in accordance with the law, as well as impairing its credibility.

The solution to disputes should be based on the principle of fair dealing. The party that makes mistakes in procurement documents should be held accountable. However, it should be judged in a reasonable manner as to which party should be responsible, and to what degree it should bear the responsibility, rather than jump to a conclusion that one party should be fully responsible, or requiring one party to take sole responsibility regardless of whether or not it made mistakes.

If procurement procedures were completed and the bidding outcome confirmed, the parties should resolve the disputes fairly and reasonably, and conduct negotiations according to laws and regulations, and customary practice. Even if the parties failed to reach a consensus eventually, they should work out a feasible exit mechanism and the government agency should make proper compensation for relevant losses and expected incomes of the winning bidder.

In the above-mentioned project, the local government ignored the legal rights and benefits of the private investor and overlooked existing mistakes, and forced the innocent party to bear all the negative consequences. It even revoked the winning result. This behaviour violated the PPP’s spirit of co-operation and principle of fair dealing, and the local government may be held legally accountable for breaching relevant laws. Meanwhile, the private party has the right to challenge the government’s decisions and even take legal or arbitration action to defend its legitimate interests.

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医疗行业反垄断执法特点及企业合规建设
Anti-monopoly health enforcement and compliance trends

医疗行业逐渐成为中国反垄断执法机构的关注重点。国家发展改革委员会（发改委）和国家工商行政管理总局及省级工商行政管理局（以下统称“工商局”）都将医疗行业反垄断纳入了近两年的工作重点。截至2017年4月底，发改委和工商局累计对11家医药企业开出罚单，罚款总额约人民币1.33亿元。我们预计今年两家执法机构可能会在医疗行业刮起更猛烈的“反垄断风暴”，也可能会陆续调查或处罚一些知名的药企和医疗器械企业。工商局和发改委通过查处一系列案件，在医疗行业领域也积累了较多经验。医疗企业将面对更为严峻的反垄断合规考验。

问：已经处罚的医疗行业垄断案件有什么特点？答：医疗行业查处的垄断案件主要呈现出如下特点：（1）受处罚的企业主体多元化，涉及到民营企业、中外合资企业、外商独资企业、国有企业等各种性质的企业；（2）垄断行为类型多样化，执法机构将滥用市场支配地位及达成、实施横向或纵向垄断协议的违法行为一网打尽；（3）行业涉及面广、涵盖上下游产业链，处罚对象包括原料药生产商、药品生产和经销商、医疗器械生产商等。

问：查处的垄断行为具体有哪些类型？答：目前查处的案件不仅涵盖了几大常见的垄断行为，还包括一些相对隐蔽或复杂的垄断行为。截至2017年4月底，工商局在医疗行业共查处三起案件，均为滥用市场支配地位案件，且均是围绕中国某一类原料药市场展开；发改委及省级价格监管部门则共查处五起案件，其中包括一起滥用市场支配地位案、两起横向垄断协议案和两起纵向垄断协议案。值得关注的是，工商局查处的重庆青阳药业有限公司及重庆西南制药二厂的滥用市场支配地位拒绝交易案分别为中国第一例和第二例拒绝交易案件，发改委查处的艾司唑仑药品垄断协议案为《反垄断法》实施以来首例协同行为案件。

问：在横向垄断协议中，执法机构是如何认定协同行为的？答：在艾司唑仑药品垄断协议案中，三家企业秘密举行会议，就艾司唑仑片剂的集体涨价形成默契。其中，常州四药制药有限公司虽然没有积极参与协商，但对参会期间讨论内容没有提出异议，并在事后跟随采取了一致行动，发改委因此认定常州四药与其他

The healthcare industry has gradually become a key focal point of the antitrust law enforcement authorities in China. In recent years, the National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce (SAIC) have incorporated antitrust efforts in the healthcare industry as a focus of their work. As of the end of April 2017, the NDRC and SAIC had fined 11 healthcare enterprises for a total of about RMB133 million (US$19.3 million).

The authors foresee the two law enforcers potentially raising a more forceful ‘antitrust windstorm’ in the healthcare sector this year, and possibly investigating and penalizing in succession certain well-known pharmaceutical and medical device enterprises. Through the investigation and handling of a series of cases, the NDRC and SAIC have accumulated a significant amount of experience in the healthcare sector, and healthcare enterprises are about to face a more serious antitrust compliance challenge.

Q: What are the distinctive features of the already punished healthcare industry antitrust cases? A: The antitrust cases that have been investigated and handled in the healthcare industry manifest the following defining features: (1) the enterprise entities that have been subjected to penalties are diverse, involving enterprises of various natures, such as private enterprises, Sino-foreign equity joint ventures, wholly foreign-owned enterprises, state-owned enterprises, etc.; (2) the types of antitrust acts are variegated, with the law enforcement authorities penalizing not only the abuse of dominant market position but also the violations of reaching and implementing of horizontal or vertical monopoly agreements; and (3) the cases extend over a broad area, covering both the upstream and downstream of the industry chain, with the recipients of penalties including active ingredient producers, pharmaceutical producers and distributors, medical device producers, etc.

Q: What are the specific types of antitrust behaviours that have been investigated? A: The cases that have been investigated and handled to date not only cover commonly seen antitrust behaviour, but also include certain relatively obscure or complex ones. As at the end of April 2017, the SAIC had investigated three cases in the healthcare industry, all of which included abuse of dominant market position in certain active ingredient markets in China; and the NDRC and provincial-level pricing authorities had handled a total of five cases, including one case of abuse of dominant market position, two horizontal monopoly agreement cases and two vertical monopoly agreement cases. It is worth noting that the cases of abuse of dominant market position to refuse a deal involving Chongqing Qingyang Pharmaceutical and Chongqing Southwest No. 2 Pharmaceutical Factory, investigated and handled by the SAIC, were the first and second refusal to deal cases in China. Furthermore, the Estazolam drug cartel case investigated and handled by the NDRC was the first concerted practice case since the implementation of the Antitrust Law.

Q: How do the authorities determine a concerted practice in a horizontal monopoly agreement? A: In the Estazolam case, three enterprises held secret meetings, reaching a tacit understanding on a collective increase in the price of Estazolam tablets. Although Changzhou Siyao Pharmaceutical did not actively participate in the conspiracy, it did not object to the collusion and later followed the other two companies’ lead. The NDRC determined that it engaged in a concerted practice. Article 6 of the Provisions on Anti-Price Monopoly, formulated

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两家企业构成了协同行为。发改委制定的《反价格垄断规定》第六条和工商总局制定的《工商行政管理机关禁止垄断协议行为的规定》第三条分别对如何认定协同行为进行了具体规定。尽管两家执法机构在对协同行为规定的文字表述上略有不同，但基本的考察因素是类似的，即行为的一致性、经营者之间的意思联络、一致行为是否有合理解释、市场结构和市场变化等情况。

问：执法机构对纵向垄断协议的态度如何？答：纵向价格垄断行为一向是发改委反垄断执法的重点之一，在医疗行业尤其如此。我们预计这一趋势仍会延续。值得关注的是，在美敦力转售价格维持案中，发改委在处罚决定书中不仅明确了当事人美敦力（上海）管理有限公司固定转售价格和限定最低转售价格行为的违法性，而且涉及了其采取的限定经销商的销售区域、禁止经销商销售具有竞争关系品牌的产品等行为。发改委认为“这些限制措施与纵向价格措施并用，进一步强化了固定转售价格和限定最低转售价格的实施效果”。该案也释放出反垄断执法机构在延续此前严格查处纵向价格垄断的执法风格的同时，也已经开始关注其他非价格纵向限制措施的信号。因此，相关企业对纵向的限制措施，无论是涉及价格还是不涉及价格都需要谨慎而为。

问：企业如何应对日益严峻的反垄断合规考验？答：笔者建议相关医疗企业密切关注反垄断调查的发展趋势和特点。企业可通过如下方式加强反垄断合规建设：（1）及时展开风险排查，必要时聘请专业律师协助进行反垄断内部审计；（2）对高管和员工（尤其是销售部门）进行反垄断合规培训，并可安排高管和员工进行应对反垄断调查“黎明突袭”的模拟演练；（3）对公司产品的定价政策、折扣或返利制度、销售政策、经销商合同等从反垄断法的角度进行审查；（4）警惕横向信息交流，包括协同行为，审慎对待敏感信息交换；（5）评估自身的市场份额，如可能构成市场支配地位或较强的优势地位，则需要对与上下游企业之间签署的协议进行核查，对非常规终止交易、拒绝交易、排他性安排或其他限制措施或涉嫌不合理的商业条款进行反垄断风险评估；（6）如发现存在涉嫌违法行为，则更应尽早咨询专业律师意见，及时制定整改或应对方案。

by the NDRC, and article 3 of the Provisions for Administrative Authorities for Industry and Commerce on Prohibiting the Conclusion of Monopoly Agreements, formulated by the SAIC, set out specific provisions on the determination of concerted practice. Despite the fact that there are nuanced differences between the two articles, both consider the following major factors when analyzing whether concerted practice has occurred: uniformity; the exchange of information; reasonable explanations; and the market structure and market changes.

Q: What is the law enforcement authorities' attitude towards vertical monopoly agreements? A: Vertical price monopoly has always been one of the priorities of the NDRC's antitrust law enforcement, particularly in the healthcare industry. The authors envision that this trend will continue. It is worth noting that, in the Medtronic resale price maintenance case, the NDRC, in its penalty decision, not only clarified the illegality of the fixed resale price of Medtronic (Shanghai) Management and its setting of a minimum resale price, but also touched upon such acts taken by it as limiting the sales territory of distributors, prohibiting distributors from selling products of competing brands, etc. The NDRC held that "these restrictive measures were implemented together with the vertical pricing measures, further strengthening the anticompetitive effect of maintaining the resale prices and setting minimum resale prices". This case, while indicating that antitrust law enforcers should continue their strict enforcement in vertical pricing monopolies, also sees them beginning to pay attention to other non-pricing vertical restrictive measures. Accordingly, it is necessary for relevant enterprises to act prudently with respect to vertical restrictive measures, regardless of whether they involve pricing or not.

Q: How should enterprises respond to the increasingly serious antitrust compliance challenge? A: The authors recommend that healthcare enterprises closely watch development trends in, and features of, antitrust investigations. Enterprises can strengthen their antitrust compliance in the following ways: (1) promptly conducting a risk screening and, if necessary, engaging a professional lawyer to assist in conducting an internal antitrust audit; (2) providing antitrust compliance training to senior officers and employees (particularly sales departments) and arranging for senior officers and employees to participate in drills for responding to 'dawn raids' in antitrust investigations; (3) examining the company's product-pricing policy, discount or rebate system, sales policies, distributor contracts, etc., from the perspective of the Anti-trust Law; (4) being vigilant for horizontal information exchanges, including concerted practice, and prudently handling sensitive information exchanges; (5) assessing one's own market share, and if the same could constitute a dominant market position or relatively strong advantageous position, conducting a check of the agreements executed with upstream and downstream enterprises, and conducting an antitrust risk assessment regarding irregular terminations of dealing, refusals to deal, exclusive arrangements, other restrictive measures or commercial terms suspected of being unreasonable; and (6) if a suspected violation of the law is discovered, seeking legal opinion as soon as possible and promptly formulating a rectification or response plan.

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上市公司并购重组中的业绩承诺问题
Performance commitments in listed firms' M&A

近年来，众多上市公司通过并购重组推高二级市场股价。在高额利润承诺对二级市场股价的疯狂刺激下，市场频现高倍的业绩承诺，但由于相关监管规定不健全、惩戒力度不足且市场参与者缺乏诚信等原因，不少业绩承诺最终沦为一纸空文。

监管部门与上市公司的博弈。中国证监会于2008年5月出台《上市公司重大资产重组管理办法》（《重组办法》），规定上市公司收购资产，应提供拟购买资产的盈利预测报告，并与交易对方签订业绩补偿协议。

现实中，由于高倍业绩承诺一旦公告往往引起二级市场股价疯涨，重组方在二级市场的获利足以覆盖其违约成本，因而导致上市公司并购重组中夸大的业绩承诺频频出现，为防止上市公司及重组方随意变更承诺，证监会于2013年12月发布《上市公司监管指引第4号——上市公司实际控制人、股东、关联方、收购人以及上市公司承诺及履行》（《监管指引第4号》），明确规定了上市公司及收购人变更承诺需履行的程序。

证监会于2014年10月发布修订后的《重组办法》，规定上市公司向控股股东、实际控制人或其控制的关联人之外的特定对象购买资产且未导致控制权发生变更的，上市公司与交易对方可根据市场化原则，自主协商是否采取业绩补偿和每股收益填补措施及相关具体安排。但因套现动机，重新修订的《重组办法》未能对上市公司及重组方随意变更承诺给予充分抑制。上市公司业绩承诺难以达标时，利用《监管指引第4号》变更业绩补偿承诺似乎成为了通行之法。如合力泰、东材科技等以时间换空间，将利润补偿原则由逐年计算补偿变更为三年累积计算补偿；又如掌趣科技将股份补偿变更为现金补偿，重组方通过二级市场股价套利以覆盖现金补偿的损失。更有深圳市华新股份有限公司曾公告提出对原承诺的业绩进行调整，该方案先后通过董事会、监事会、股东大会审议，独立董事亦发表了独立意见，且法律顾问就该事项出具法律意见书，认为：

（一）重组并未导致公司实际控制人发生变更，且重组方并非上市公司控股股东、实际控制人或者其控制的关联人。因此业绩补偿的期限可依据《合同法》关于当事人协商一致，可变更合同的规定予以调整；

In recent years, numerous listed companies have boosted their share values on the secondary market through company mergers, acquisitions and restructurings. With share values sharply spurred by promises of large profits, the market has been frequent witness to high multiple performance commitments. However, due to regulation flaws, insufficient punishment and a lack of honesty and transparency in the market, a significant number of performance commitments ultimately turn out not to be worth the paper they are written on.

Catch me if you can. In May 2008, the China Securities Regulatory Commission (CSRC) issued the Administrative Measures for Material Asset Restructurings of Listed Companies, specifying that when a listed company acquires assets, it is required to provide a profit forecast report for the proposed assets and execute a performance compensation agreement with the transaction counterparty. However, in reality, once a high multiple performance commitment is announced, the share value on the secondary market will skyrocket, allowing the committed party to obtain profits high enough to cover the costs it incurs due to a breach of contract. This results in exaggerated performance commitments. In December 2013, the CSRC issued Guidelines on the Regulation of Listed Companies No. 4 to regulate commitments and performance thereof by listed companies and their actual controllers, shareholders, connected parties and acquirers. The guidelines set out the procedure that a listed company and its acquirer are required to carry out in the event of a change in their commitments.

The amended restructuring measures in October 2014 specify that where a listed company purchases assets from a specific counterparty other than its controlling shareholder, actual controller or a connected party controlled thereby, and such purchase does not result in a change of control, the listed company and the transaction counterparty may negotiate at their own discretion as to whether to adopt performance compensation and earnings per share remedial measures and related specific arrangements.

However, due to the motivation to cash out, the revised restructuring measures have been unable to fully put a stop to listed companies and acquirers modifying their commitments at will. It is common for listed companies to use the guidelines to modify their performance compensation commitments. For example: Holitech and EM Technology changed their profit compensation principle from year-to-year calculation of compensation to three-year aggregate calculation of compensation. When Shenzhen Huaxin proposed to revise its committed performance, the plan was then deliberated on by the board of directors, supervisory board and shareholders' general meeting, and an independent opinion issued by the independent directors and a legal opinion issued by a law firm, stating that:

(1) The restructuring had not resulted in a change in the actual controller, and the restructuring party was not the new controlling shareholder or actual controller of Huaxin or a connected party controlled thereby; accordingly, the deadline for the performance compensation may be adjusted only relying on the provision of the Contract Law specifying that parties may amend a contract if they reach a consensus through consultations;

(2) Pursuant to the restructuring measures, if in the course of a material asset restructuring by a listed company a material matter occurs that laws or regulations require be disclosed, an announcement is to be promptly made. If such a matter causes

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（二）根据《重组办法》，上市公司实施重大资产重组过程中，发生法律、法规要求披露的重大事项的，应及时作出公告；该事项导致本次交易发生实质性变动的,须重新提交股东大会审议，属于该办法第13条规定的交易情形的，还须重新报经证监会核准。鉴于本次重大资产重组金不属于《重组办法》第13条规定的交易情形，因此无须重新报经证监会核准；

（三）公司与重组方协商变更盈利补偿期限并签署的补充协议待上市公司股东大会审议通过后生效。

就上述种种现象，监管部门当然进一步加强规范，证监会于2016年1月发布《关于并购重组业绩补偿相关问题与解答》，强调上市公司的控股股东、实际控制人或者其控制的关联人在未完成业绩承诺的情况下,均应以其获得的股份和现金进行业绩补偿。随后，证监会又于2016年6月发布《关于上市公司业绩补偿承诺的相关问题与解答》，指出上市公司重大资产重组中，重组方的业绩补偿承诺是重组方案的重要组成部分，重组方不得适用《监管指引第4号》变更其作出的业绩补偿承诺。

证监会出台的上述文件在一定程度上限制了业绩补偿承诺的随意变更，但依然未对上市公司收购重组中的白条类业绩承诺给予充分抑制，如美康生物于2016年10月发布公告称拟调整重组方业绩承诺期及承诺数，因前期收购行为不构成重大资产重组，故不受《关于上市公司业绩补偿承诺的相关问题与解答》约束，该承诺调整事项先后经公司董事会、监事会、股东大会审议通过，且独立董事亦发表独立意见。

综合目前相关法律法规以及上述案例，笔者提出以下建议：

（一）加强业绩承诺履行制度。可根据业绩承诺的完成情况给予相关方一定比例的股票解禁权利，对于未完成业绩承诺的，可要求其持有的股票不得解锁并不得质押。

（二）强化信息披露和监管。证监会等监管部门可要求上市公司及相关承诺方对业绩承诺及补偿方案履行的可行性出具专项说明。

（三）中小股东积极参与，保证定价和交易过程的程序公平。同时,中小股东应正确看待高倍的业绩承诺，理性判断投资价值，不应过分相信其对自身利益的“保护作用”。

a substantive change in the contemplated transaction to occur, the same must be submitted anew to the shareholders' general meeting for deliberation, and if a circumstance under article 13 of the measures applies to the transaction, it must be submitted to the CSRC anew for approval. Given that the circumstances under article 13 did not apply to the moneys for the contemplated material asset restructuring, there is no need for resubmission to the CSRC for approval;

(3) After consideration and adoption by the shareholders' general meeting, the Supplementary Agreement to the Profit Forecast Compensation Agreement entered into effect.

In order to solve this kind of phenomenon, the regulator further tightened regulation. In January 2016, the CSRC issued the Questions and Answers on Performance Compensation in Acquisitions and Restructurings, emphasizing that until the controlling shareholder, or actual controller of a listed company, or a connected party controlled thereby, had completed implementation of its performance commitments it was required to use the shares and cash obtained by it to effect compensation.

In June 2016, the CSRC issued the Questions and Answers on Performance Compensation Commitments of Listed Companies, pointing out that the restructuring party's performance compensation commitments in a material asset restructuring of a listed company are a key integral part of the restructuring plan, and the restructuring party may not apply the Guidelines No.4 to modify such commitments.

These CSRC documents have limited to some degree, but not truncated, the creeping spread of empty performance commitments. In October 2016, Medical System Biotechnology announced that it was proposing to revise the performance commitment term and commitment amount of the restructuring party, and as the preceding acquisition did not constitute a material asset restructuring, it was not bound by the CSRC June document above, and the revision of the commitments was considered and adopted by the company's board of directors, supervisory board and shareholders' general meeting, and the independent directors issued an independent opinion.

Given the relevant regulations and cases, the authors would make these recommendations: (1) Shoring up the performance commitment performance system. Depending on the degree of completeness of implementation of the performance commitments, the relevant party could be granted the right to unlock a certain percentage of the shares, and with respect to those performance commitments that have not been fully performed, it would not be permitted to unlock or pledge the shares it holds.

(2) Strengthening information disclosure and oversight. The CSRC and other regulators could require listed companies and relevant parties that have given commitments to issue a dedicated account of the feasibility of implementing the performance commitments and compensation plan.

(3) Active participation of small and medium shareholders to ensure procedural fairness in the pricing and transaction process. Small and medium shareholders should correctly assess high multiple performance commitments, rationally judge the investment value and not overly believe in its effectiveness in protecting their interests.

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上市对赌法律风险分析
Legal risks of VAM agreements on IPO

对赌（Valuation Adjustment Mechanism）又称估值调整机制，通常是在融资投资活动中，由投资方及融资方对于未来不确定的情况进行约定；一旦协议约定的条件成就，投资方可以根据约定行使权利，弥补因高估所投资公司价值而蒙受的损失。“上市对赌”即投资人将所投资的目标公司完成上市的时间作为对赌标的。实务中，对赌的主体、补偿机制、协议条款以及监管政策均可能影响上市对赌的法律效力以及实际履行效果。以下将分析“上市对赌”的相关法律风险并提供实务建议。

无效。最高院曾在2012年的一项判决中，确定了投资者与目标公司之间的对赌属无效的原则（见[2012]民提字第11号民事判决书）。自该判决作出后，中国各地各级法院均循此裁判标准，认定与目标公司的对赌条款无效。然而，在目前已知的仲裁案例中，仲裁庭均裁决目标公司承诺现金补偿或回购股份的对赌条款有效，并且申请撤销该等仲裁裁决的申请也被法院驳回，驳回理由是根据《仲裁法》第58条的规定：法院无权对仲裁的实体问题进行审查。因此，法院与仲裁在目标公司作为“上市对赌”的主体方面的裁判差异短期内无法消弥。

此外，即使未与目标公司对赌，以上市时间作为对赌标的本身就存在约定无效的法律风险，该对赌的方式往往不与企业经营业绩挂钩，投资方不承担经营的风险责任，不论盈亏均按期收回本息，可能被归类为“以合法形式掩盖非法目的”的行为而无效。但在上述最高院的判决作出后，与目标公司的原股东或实际控制人进行的上市对赌作为投资人的风险控制机制，已获得上海等地的司法实践认可。

明股实债。实务中，“上市对赌”对应的补偿方式往往与目标公司的业绩情况无必然联系，对赌补偿金额的计算公式与委托贷款合同或借款协议中约定的到期还本付息的还款金额计算公式无异，如无股权投资的进一步证据，实务中确有可能导致被认定为借贷。

根据最高院2015年发布的《关于审理民间借贷案件适用法律若干问题的规定》，企业与企业之间为生产、经营的需要发生的资金融通行为并非当然无效，因此，上市对赌的相关对赌条款不会因为存在保证最低收益的机制

Valuation adjustment mechanism (VAM) agreements, usually adopted in financing or investing activities, are concluded between an investor and an invested company (the target) regarding future uncertain conditions which, if satisfied, will entitle the investor to exercise its right to recover losses resulting from overvaluation of the target. A “VAM agreement on IPO” is used by the investor to bet on the time that the target goes public.

In practice, the legal validity and actual performance of a VAM agreement on IPO is affected by factors that include, but are not limited to, parties to the agreement, compensation mechanism, terms and conditions of the agreement, and regulatory policies.

Invalidity ruling. A ruling issued in 2012 by the Supreme People’s Court (SPC) established a principle that VAM clauses between investors and targets are invalid (refer to the Civil Judgment [2012] Min Ti Zi No.11). From then on, courts of various levels across the PRC followed in the footsteps of this ruling to find VAM clauses concluded with targets invalid.

However, in the arbitration cases known to date, all VAM clauses where the target undertook to provide cash compensation or repurchase shares were upheld by arbitration tribunals, and all petitions to revoke such arbitration awards were rejected by courts on the ground that courts were not in a position to review substantive issues of arbitration cases pursuant to article 58 of the Arbitration Law. Therefore, in the near term, it seems unlikely that courts will take the same stand as arbitration tribunals on cases involving VAM agreements on IPO, in which the target is a party.

Even if the target is not a party to such bet-on agreements, a bet-on IPO timing is highly likely to be held invalid on the ground of “covering up illegal purposes in a legitimate form”, because the bet, generally not linked to financial performance of the target, allows the investor to take back principal together with interest at expiry, whether the target makes a profit or not – in other words, the investor does not take any risk in the target’s performance. However, it is notable that after the release of the above-mentioned SPC ruling, VAM agreements on IPO concluded by investors with existing shareholders or actual controllers of the targets (instead of the targets themselves), as a means of risk control, started to win support from judicial bodies in Shanghai and other places.

Fake equity, real debt. In VAM agreements on IPO, the compensation is often not linked with financial performance of the target, not to mention the formula for calculating an amount of compensation, which appears scarcely different from the formula for principal and interest payments at maturity of entrusted loans or lending agreements. If there is no further evidence of equity investment, the capital injected under, or in connection with, a VAM agreement on IPO is highly likely to be considered a loan.

According to the SPC Provisions on Several Issues Concerning the Application of Law in the Trial of Private Lending Cases, issued in 2015, the validity of lending agreements between enterprises for the purpose of meeting production or operation needs should be affirmed except under prescribed circumstances. Therefore, VAM provisions in a VAM agreement on IPO should not be held null and void simply because there is an assurance of minimum return.

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而必然无效。但是，为避免上市对赌的补偿按照民间借贷的利率被调整，笔者建议在相关投资协议及其补充协议中，明确体现投资方向目标公司进行股权性投资的意思表示，并设计有相关资本进入、资本维持及资本退出的投资保障条款，而非民间借贷类的单纯定期还本付息条款，以增强投资协议及补充协议的投资特征，避免被认定为借贷。

阻却对赌条件成就。实务中，承担现金补偿或回购股权义务的一方拒绝履行对赌协议义务时，常提出以下抗辩：（1）中国证监会暂停IPO审核；（2）企业所在地发生暴恐事件导致利润下滑，不满足上市条件；（3）因欧美国家的反倾销、反补贴调查导致目标公司利润下滑，不满足上市条件；（4）因投资方限制、干预甚至剥夺公司经营管理权，直接影响公司业绩。在审查以上抗辩能否成立时，法院结合证据审查了该等抗辩所述理由是否为可预见的商业风险、是否与目标公司未按时上市具有因果关系等要素。

笔者建议就上市时间进行对赌时，相关协议应约定“不可抗力”或除外情形，以免在目标公司无法按时上市时产生争议。

强制终止。根据《首次公开发行股票并上市管理办法》规定，证监会主要关注发行人的股权真实、股权结构稳定。如果目标公司存在对赌协议，可能导致其股权结构发生调整，构成重大不确定性。因此，对赌协议在申请上市前必须清理。

与证监会的态度有所区别的是，全国股转系统在一定程度上接受对赌协议的存在。如果上市对赌中，不存在以挂牌公司作为特殊条款的义务承担主体等损害挂牌公司或挂牌公司股东合法权益的特殊条款，可以被有条件地接受。

鉴于以上被强制清理的风险，笔者建议投融资双方应在对赌协议中约定对赌协议被强制清理情况下的处理方式，并约定相应的补偿机制。

谨慎行事

投资有风险，对赌需谨慎。面对上述上市对赌的法律风险，投融资各方均应结合监管导向、法律规定和商务预判，确保上市对赌的条款设立有效、合理、可行。

Nevertheless, to avoid compensation under a VAM agreement on IPO being ordered to be adjusted as per private lending rate, the author suggests that the relevant investment agreement and its supplementary agreements be drafted in a manner that, in addition to provisions showing the investor's explicit intent to make equity investment in the target, there are provisions on investment protection (i.e., provisions on injection, maintenance and withdrawal of capital) instead of those on principal and interest payment at maturity, as typically seen in private lending agreements. The purpose of these provisions is to highlight the investment agreement and its supplementary agreements as investment documents so that they are not considered to be intended for lending transactions.

Preventing VAM conditions from being satisfied. In practice, the party with cash compensation or share repurchase obligation usually cites the following reasons to defend its failure to honour the VAM agreement: (1) IPO review procedure being suspended by the CSRC; (2) failure to meet IPO conditions due to declining profit attributable to any terrorist incident in the place of the target; (3) failure to meet IPO conditions due to declining profit attributable to anti-dumping and countervailing investigations initiated in European or American countries; and (4) financial performance of the target being directly affected by the investor's restriction, intervention or even deprivation of the target's operation and management powers. In deciding whether the defence is justified, the court examines, among other things, whether these reasons are foreseeable business risks and whether they are causes of the target's failure to go public as scheduled.

The author suggests that the VAM agreement on IPO should contain a force majeure clause or prescribed exceptions in order to prevent dispute arising out of the target's failure to go public as scheduled.

Mandatory termination. According to the Measures for the Administration of IPO and Share Listing, the CSRC review mainly focuses on authenticity and stability of equity holding in issuers. A VAM agreement, which is likely to cause change in equity structure, exposes the target to significant uncertainty. That is why VAM agreements must be cleaned away before IPO filing is submitted.

In contrast to the CSRC's attitude, VAM agreements are acceptable, though not to the full extent, to the National Equites Exchange and Quotations (NEEQ). A VAM agreement on IPO is conditionally acceptable provided that it contains no special provisions imposing obligations on the listed company that are detrimental to legitimate rights and interests of either the listed company or its shareholders.

In view of the risk of mandatory termination, we suggest that the VAM agreement be designed to contain a solution and appropriate compensation in case of mandatory termination of the agreement.

VAM deals should be cautiously addressed since all investments involve risks. To avoid exposing their VAM agreement on IPO to legal risks, investors and investees should work together to ensure that its provisions are valid, reasonable and practicable by following regulatory guidelines, legal stipulations and their prediction of commercial performance.

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以内保外贷实现跨境投资资金间接出境
Sending funds abroad: an indirect approach

在跨境投资外汇政策收紧的背景下，深圳A投资公司拟投资美国B公司，投资金额为600万美元，并于2016年12月签署了投资协议。A公司成立于2015年12月，注册资本为人民币500万元。A公司在向深圳市经济贸易和信息化委员会申请境外投资项目备案时，深圳经信委以公司名称及经营范围中含有“投资”而不予受理。后经我们咨询确认，即使更换合适的投资主体（成立时间较长、注册资本大于600万美元且名称和经营范围中不含“投资”），深圳经信委的审批时间亦无法确认。

在跨境投资外汇政策收紧的背景下，境内企业在跨境投资过程中遇到一些障碍，在资金直接出境无法达成的情况下，越来越多的境外投资业务开始转向“内保外贷”这种间接出境的方式。通俗来讲，内保外贷就是由境内主体为境外的借款人做担保，一旦境外的借款人无法偿还该笔境外债务，那么境内的担保人就要履行担保义务，将资金汇出境外用于向境外的贷款人偿还这笔境外债务。

经与某国有银行沟通，笔者得知深圳A公司通过内保外贷实现资金出境投资美国B公司有两种方式（见图）。第一种方式是，深圳A投资公司对美国B公司仅体现为持有一笔债权，如何体现及取得投资收益需要一系列配套协议进行约定，A公司对此有所顾虑。第二种方式则较为直接，设立一家香港公司直接持有美国B公司的股权，深圳A投资公司及香港公司之间的股权可以在对外直接投资外汇政策放开后再进行内部调整。

银行审核重点。银行在办理内保外贷业务时会重点关注境外借款的还款能力及保函履约倾向性。银行展业尽职调查的时候，会从主体资格合法性、商业合理性、主债务资金用途、履约倾向性和是否存在潜在冲突等多个维度进行审核。

在前述案例中，第一种方式银行重点关注美国B公司是否有实业经营、在两三年内营业收入能否覆盖借款，需要测算美国B公司近三年的现金流。第二种方式因香港壳公司本身还款能力有限，银行审核香港公司是否具有还款能力会从香港公司自身的还款能力、收购标的公司是否有稳定的分红能够补充还款来源以及香港公司是否有其他关联方能够提供还款来源等几个方面进行综合考量。

最新政策。但需说明的是，《跨境担保外汇管理规定》规定：“内保外贷合同项下融资资金用于直接或间接获得对境外其他机构的股

Against a background where exchange policy relating to cross-border investment has tightened, a Shenzhen investment company (company A) proposed to invest US$6 million in a US company (company B), and executed an investment agreement in December 2016. Company A was established in December 2015 with registered capital of RMB5 million (US$727,000).

When Company A applied to the Economy, Trade and Information Commission (ETIC) of Shenzhen municipality for recordal of an offshore investment project, the ETIC refused to accept on the grounds that the company's name and scope of business contained the word “investment”. Following inquiries, the authors were able to confirm that even if the application was changed to a suitable investment entity (one that was established for a relatively long period of time, had registered capital greater than US$6 million, and did not have the word “investment” in its name and scope of business), the amount of time required for approval by the ETIC was uncertain.

Against this background, domestic enterprises are encountering some obstacles in the course of cross-border investment, and where funds cannot be sent abroad directly, an increasing number of offshore investments have turned to “foreign loans secured by domestic security” as an indirect means of doing so. In simple language, a foreign loan secured by domestic security involves a domestic entity providing security for a foreign borrower, and when the foreign borrower is unable to repay the foreign debt, the domestic guarantor is required to perform its security obligations, remitting funds abroad to be used to repay the foreign debt to the foreign lender.

Through conversations with a certain state-owned bank, the authors learned that there were two options available to Shenzhen company A to send funds abroad to invest in US company B through a foreign loan secured by domestic security (see the figures). The first option is for company A to only reflect that it holds a claim against US company B. How the same is reflected and how the investment returns are to be obtained require stipulation in a series of complementary agreements, something that gave company A certain misgivings. The second option is more direct – establishing a Hong Kong company to directly hold equity of company B, to be followed by internal adjustment of the equity between company A and the Hong Kong company once the exchange policy relating to direct foreign investment is relaxed.

Points of focus in bank review. When handling matters relating to a foreign loan secured by domestic security, the bank will focus on the capacity to repay the foreign loan and the chance that the letter of guarantee will need to be performed. When conducting due diligence, the bank will carry out its review from multiple angles, such as the lawfulness of the qualifications of the entities, commercial reasonableness, purpose of the proceeds of the master debt, chance of performance, whether potential conflicts exist, etc.

In the cases above, under the first scenario, the bank would focus on whether US company B has genuine operations and whether its operating revenues in two to three years can cover the loan, and would need to calculate the cash flow of company B in the coming three years. Under the second scenario,

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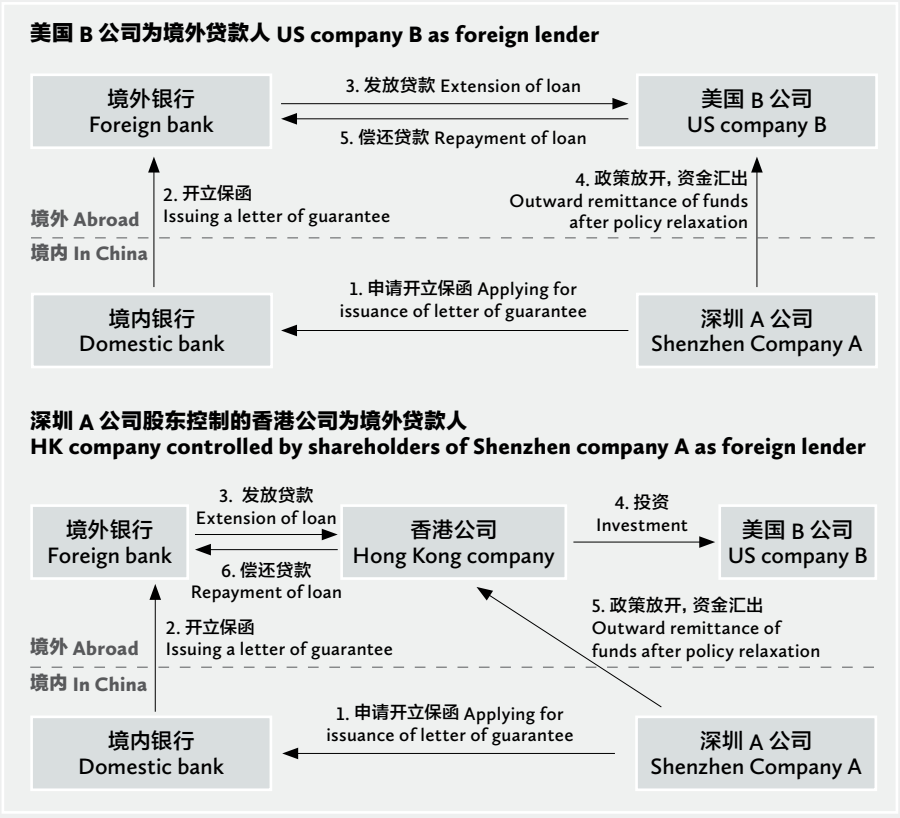
2017年4月27日发布的《国家外汇管理局关于进一步推进外汇管理改革完善真实合规性审核的通知》政策问答（第二期）进一步明确：“以内保外贷境外融资替代境内机构货币出资的境外投资项目，如按照现行对外投资相关监管原则，境内机构境外股权投资受到限制的，暂停办理相关跨境担保业务，担保人为非银行机构的，外汇局不予办理内保外贷登记；担保人为银行的，银行不得为此提供担保。”

由于各地及银行对跨境投资监管政策执行及对内保外贷进行审核时掌握的尺度可能不完全一样，建议投资者在制定方案时以个案为基础充分征求主管机关和银行建议。



the repayment capacity of the Hong Kong shell company itself is limited, so when the bank conducts its review of whether the Hong Kong company has the capacity to repay, it would consider such factors as the Hong Kong company's own repayment capacity, whether the target company has stable dividends that can top up the repayment source, and whether the Hong Kong company has other affiliates that could provide a repayment source.

Most recent policy. However, the Provisions for Exchange Control Relating to the Provision of Cross-border Security specify that, "when the financing proceeds under a contract for a foreign loan secured by domestic security are used to directly or indirectly acquire equity in another offshore organization (including a newly established offshore enterprise, acquisition of equity in an offshore enterprise, or participation in the capital increase of an offshore enterprise) or claims therein, such investment act shall comply with the regulations on offshore investment of relevant domestic authorities".

The Policy Questions and Answers on the Notice of the State Administration of Foreign Exchange (SAFE) on Further Promoting Exchange Control Reform and Improving Reviews of Genuineness and Compliance (2) further clarify that, "in an offshore investment project where offshore financing obtained through a foreign loan secured by domestic security substitutes for the sending abroad of funds by the domestic organization, if the domestic organization's offshore investment in equity is, in accordance with current regulatory principles governing investment abroad, subject to restrictions, handling of relevant offshore security matters is provisionally put on hold, and if the guarantor is not a banking institution, the SAFE will not carry out registration of a foreign loan secured by domestic security for it; if the guarantor is a bank, it may not provide the security."

Given that the enforcement of the policy on regulation of cross-border investment in different regions, and by different banks, and the yardsticks held when conducting reviews for foreign loans secured by domestic security may not be completely consistent, investors, when formulating their plans, should seek the advice of the competent authorities and banks based on their individual cases.

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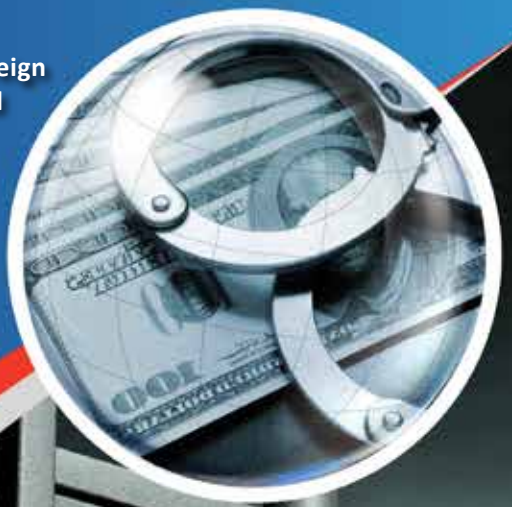

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不可抗力 Force Majeure

商业律师对不可抗力这个概念非常熟悉。虽然不可抗力条款在商业合同中通常被视为一个标准条款或者“样本”条款，并且不需要任何关注或者进行谈判，但是了解该概念的运作以及在不同法域下的运用是非常重要的。本期文章将分析不可抗力这个概念，以及在普通法和中国法中的运用。

何为不可抗力

英语中使用的“不可抗力”这个术语实际上是一个法语词语，意思为“更强的力量”或者“更强的实力”。不确定该术语是如何开始在英语中开始使用的，不过由于法国《拿破仑法典》使用了该术语，有可能是熟悉不可抗力这一术语的当事人在英文商业合同中加入了该术语。因此，这是一个很有趣的例子，说明了最初在大陆法系法律中采用的概念是如何被使用在英国法管辖的合同中的。

通常来说，“不可抗力”是指不在合同当事人控制范围之内，并导致一方或者多方当事人不能或者延迟履行义务的不能预见的事件。国际统一私法协会《国际商事合同通则》第 7.17 条中定义的“不可抗力”非常有用，该定义结合了普通法法域和大陆法法域中该概念的要素。

第 7.1.7 条
（不可抗力）

1. *若不履行的一方当事人证明，其不履行是由于非他所能控制的障碍所致，而且在合同订立之时该方当事人无法合理地预见，或不能合理地避免或克服该障碍及其影响，则不履行的一方当事人应予免责。*
2. *若障碍只是暂时的，则在考虑到这种障碍对合同履行影响的情况下，免责只在一个合理的期间内具有效力。*

THE CONCEPT of *force majeure* is familiar to commercial lawyers. Although it is often treated as a standard or “boilerplate” clause that appears in commercial contracts and does not require any attention or negotiation, it is important to be aware of how the concept operates and the different ways in which it is treated under the laws of different jurisdictions. This article examines the concept of *force majeure* and how it operates under the laws of common law jurisdictions and Chinese law.

THE CONCEPT OF *FORCE MAJEURE*

The term *force majeure* as used in English is actually a French term that means “superior force” or “superior strength”. It is not certain how the term came to be used in English, but it is likely that it was inserted in English commercial contracts by parties who were familiar with the term as it was used in the French Napoleonic Code. Accordingly, it is an interesting example of how a concept that was originally embodied in the laws of a civil law jurisdiction was adopted for use in contracts governed by English law.

As it is generally understood, the concept refers to an unforeseen event that is outside the control of the parties to a contract and prevents or delays the performance of obligations by one or more of the parties. A useful definition of *force majeure* – one that combines elements of the concept in both common law jurisdictions and civil law jurisdictions – appears in article 7.1.7 of the UNIDROIT Principles of International Commercial Contracts:

ARTICLE 7.1.7
(Force majeure)

1. *Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its*

3. *未能履行义务的一方当事人必须将障碍及对其履约能力的影响通知另一方当事人。若另一方当事人在未履行义务方当事人知道或理应知道该障碍后的一段合理时间内没有收到通知，则未履行义务方当事人应对另一方当事人因未收到通知而导致的损害负赔偿责任。*
4. *本条并不妨碍一方当事人行使终止合同、拒绝履行或对到期应付款项要求支付利息的权利。*

理解“不可抗力”的运作，需要了解两个根本性的问题：(1)“不可抗力”的定义是什么；(2) 不可抗力的法律后果是什么？以下我们将从普通法和中国法的角度来探讨这两个问题。

普通法

有趣的是，英国和其他普通法法域的法律通常没有“不可抗力”的法定定义。相反，“不可抗力”是当事人根据其自由意思而决定是否写入合同，因此需要遵守合同解释的原则。这些原则包括疑义利益解释原则（contra proferentem rule），也就是说应当狭义地解释排除一方当事人责任的条款。此外，如果一个条款约定模糊，则应当作出不利于希望援引该条款（有关免责条款的分析，请见《商法》第 6 辑第 10 期文章《免责条款》）的当事人的解释。此外，证明发生不可抗力事件的责任是在希望援引该条款的当事人的。

虽然不可抗力条款是一种免责（或免除）条款，但是它通常不受限于适用于标准免责条款的其他规则。比如，不要求规定免除责任的性质或者损失程度。此外，在消费合同中，不可抗力条款通常被认为是合理的，不会以该条款不合理或者不公平的理由而被质疑。

由于不可抗力不受成文法而是由合同当事人约定的合同条款管辖，因此有关条款通常会列出属于不可抗力事件的情况。这些情况可能会包括：(1) 自然灾害等天灾；(2) 法律规定和法律修改导致无法履行义务；(3) 战争和内战；(4) 流行病；(5) 罢工。

一些合同简单地约定了“不可抗力”。在这种情况下，普通法法院会根据当事人的意图、合同的性质和一般条款对该条款进行解释。在判例法中，“不可抗力”的范围比天灾或者自然灾害更广，还包括其他不在当事人控制范围内并阻止其履行义务的不能预见的事件。不过，法院通常会排除由于希望援引不可抗力条款的当事人过失或故意违约引起的不可抗力事件。此外，法院进行解释的时候会排除仅仅影响合同收益性或者履行合同难易程度的经济变化或其他情况变化。

不可抗力条款的法律后果取决于该条款是如何起草的。比如，不可抗力条款可以约定允许受影响的一方当事人在不可抗力事件持续的期间迟延履行义务。或者 / 并且，不可抗力条款可以约定在一定期限后，一方或者双方当事人有权终止合同。通常来说，不可抗力条款会约定受影响的一方当事人有义务通知另一方当事人并且减小不可抗力的影响。

control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
2. *When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.*
3. *The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.*
4. *Nothing in this Article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.*

Two questions are of fundamental importance in understanding how the concept works: (1) what is the definition of *force majeure*; and (2) what are the legal consequences of *force majeure*? The discussion below examines these two questions from the perspective of the laws of common law jurisdictions and Chinese law.

COMMON LAW

It is interesting to note that in general the laws in England and other common law jurisdictions do not provide a statutory definition of the concept of *force majeure*. Instead, the concept is incorporated into contracts by the parties based on their own free will and is therefore subject to the principles of contractual interpretation. These principles include the rule known as the *contra proferentem* rule; namely, the rule that a clause excluding the liability of a party to the contract should be interpreted narrowly. Further, if the clause is ambiguous, it should be interpreted against the interests of the party who is seeking to rely on it (for a discussion about exclusion clauses, see *China Business Law Journal* volume 6 issue 10: Exclusion clause). In addition, the burden of proving that an event of *force majeure* has occurred is on the party that is seeking to rely on it.

Although a *force majeure* clause is a type of exclusion (or exemption) clause, it is generally not subject to the other rules that apply to standard exclusion clauses. For example, there is no requirement to specify the nature or extent of the losses for which liability is excluded. In addition, if it is used in the context of consumer contracts, it is usually assumed to be reasonable and is not subject to challenge on the basis that it is unreasonable or unfair.

Because the concept is not governed by written law but instead by the contractual terms between the parties, the relevant clause often lists the events that qualify as events of *force majeure*. These may include the following events: (1) an act of God such as a natural disaster; (2) laws and changes in law that prevent the performance of obligations; (3) war and civil disturbance; (4) epidemics; and (5) strikes.

不可抗力条款既可非常详细，也可非常简单
The *force majeure* clause may be either very detailed or very simple

根据合同约定，不可抗力条款可以非常详细或者非常简单。有严格履行时间表的合同（如供应合同）以及服务提供合同（如娱乐合同）通常会有详细的不可抗力条款列出具体的事件。此外，通常会在合同中加入与合同履行地（如可能受到国际制裁的国家）或合同履行时间（如在英国退出欧盟后）相关的新的事件以反映特定的情况。

简单的不可抗力条款通常不会列出任何具体的事件，以下为一个例子：

> *如果一方当事人因不在合理控制内的事件、情况或者原因导致其迟延履行或者未履行本协议下义务的，该当事人不被认为违反本协议，并且不需要就迟延履行或者未履行本协议下的义务承担违约责任。在这种情况下，履行时间应当延长相当于迟延履行或者未履行合同义务的期间。如果延迟履行或者未履行期间持续超过两个月，则未受影响的一方当事人可以提前 30 天向受影响的一方当事人发出书面通知终止本协议。*

了解不可抗力和履约受挫原则的区别是非常重要的。履约受挫原则的适用情形更加狭窄，是指发生导致物质上或者商业上无法履行合同的事件或者导致当事人的义务变得与有关当事人签署合同时完全不同的情况。履约受挫原则的后果是免除受影响一方的义务。由于履约受挫原则的适用情形存在不确定性，因此合同当事人通常愿意在合同中加入不可抗力条款而不愿意依赖普通法的履约受挫原则。

中国法

不同于普通法法域，中国采用了大陆法法域的做法，在成文法中规定了不可抗力的概念。不可抗力主要是在《合同法》（第 117 条和第 118 条）和《民法通则》（第 107 条、第 139 条和第 153 条）中进行了规定。《合同法》的约定如下（见引文一）：

In some contracts, the clause simply refers to *force majeure*. In such circumstances, the courts in common law jurisdictions construe the term by reference to the intention of the parties and also the nature and general terms of the contract. Under case law, the concept is understood to go further than just acts of God or natural disasters and to include other unforeseen events that are outside the control of the parties and prevent the performance of obligations. However, the courts have generally excluded events of *force majeure* that are caused by the negligence or wilful default of the party who seeks to rely on the clause. In addition, the courts have interpreted the concept to exclude a change in economic or other circumstances that simply affect the profitability of the contract or the ease with which it can be performed.

In terms of the legal consequences of the clause, these depend on how the clause is drafted. For example, the clause may suspend the performance of obligations by the affected party for the period that the event of *force majeure* continues. Alternatively, or in addition, the clause may provide that one or both of the parties have the right to terminate the contract after a certain period of time. In general, the clause will provide that the affected party has an obligation to notify the other party and to mitigate the effects of the *force majeure*.

Depending on the terms of the contract, the clause may be either very detailed or very simple. Detailed clauses that list the specific events are often found in contracts that have strict performance timeframes (e.g., supply contracts) and also contracts for the performance of services (e.g., entertainment contracts). In addition, new events are often inserted in contracts to reflect specific challenges that relate to the place in which the contract is to be performed (e.g., countries that may be subject to international sanctions) or the time when the contract is to be performed (e.g., after the UK withdraws from the European Union as a result of Brexit).

An example of a simple clause that does not list any specific events appears below:

> *Neither party shall be in breach of this agreement nor liable for delay in performing, or failure to perform, any of its obligations under this agreement if such delay or failure result from events, circumstances or causes beyond its reasonable control. In such circumstances the time for performance shall be extended by a period equivalent to the period during which performance of the obligation has been delayed or failed to be performed. If the period of delay or non-performance continues for two months, the party not affected may terminate this agreement by giving 30 days' written notice to the affected party.*

It is important to be aware of the difference between *force majeure* and the doctrine of frustration. Frustration is much narrower and refers to the situation where an event occurs that renders it physically or commercially impossible to perform the contract or

引文一　Citation 1

《合同法》第 117 条
因不可抗力不能履行合同的，根据不可抗力的影响，部分或者全部免除责任，但法律另有规定的除外。当事人迟延履行后发生不可抗力的，不能免除责任。本法所称不可抗力，是指不能预见、不能避免并不能克服的客观情况。

《合同法》第 118 条
当事人一方因不可抗力不能履行合同的，应当及时通知对方，以减轻可能给对方造成的损失，并应当在合理期限内提供证明。

Article 117, 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 accordance with the impact of the event of force majeure, except as otherwise provided by law. Where the event of force majeure occurred after the party's delay in performance, it is not exempted from liability. Force majeure in this law refers to an objective circumstance that is unforeseeable, unavoidable and insurmountable.

Article 118, Contract Law
If a party is unable to perform a contract due to force majeure, it must notify the other party in a timely manner so as to mitigate the loss that may be caused to the other party, and must provide proof within a reasonable period.

《合同法》第 94 条第 1 款规定，如果因不可抗力致使不能实现合同目的，当事人可以解除合同。《民法通则》的规定与《合同法》的规定类似。此外，《民法通则》规定不可抗力可以暂停诉讼时效（有关诉讼时效的讨论，请见《商法》第 7 辑第 7 期文章《诉讼时效》）。

值得注意的是，不同于普通法法域中当事人可以自由决定在合同中是否约定不可抗力条款，不可抗力条款在中国法中被认为是强制适用的；也就是说，不论当事人是否在合同中约定了有关条款，不可抗力均适用。此外，当事人不能通过合同选择限制或者排除不可抗力条款的适用，不过当事人可以在合同中扩大不可抗力的范围。

changes the obligation into a radically different obligation from that undertaken by the relevant party at the time the contract was entered into. The consequence of frustration is that the affected obligations are discharged. Because of the uncertainty concerning the circumstances in which frustration applies, the parties to a contract usually prefer to include a *force majeure* clause in the contract rather than rely on the common law doctrine of frustration.

CHINESE LAW

Unlike common law jurisdictions, China has adopted the approach of civil law jurisdictions in terms of including the concept of *force majeure* in its written law. The main laws in which the concept appears are the Contract Law (articles 117 and 118) and the General Principles of Civil Law (articles 107, 139 and 153). The Contract Law provides as follows (see Citation 1).

Article 94(1) of the Contract Law provides that the parties to a contract may terminate the contract if the result of *force majeure* is that the purpose of the contract cannot be realised.

The provisions in the General Principles of Civil Law are similar to the provisions in the Contract Law. In addition, article 139 of the General Principles of Civil Law provides that a limitation period may be suspended by *force majeure* (for a discussion about limitation periods, see *China Business Law Journal* volume 7 issue 7: Limitation periods).

It is important to note that unlike the position in common law jurisdictions, where the parties are free to include or exclude *force majeure* clauses in the contract, the *force majeure* provisions in Chinese law are considered to have mandatory application; namely, the provisions apply irrespective of whether the parties have included relevant clauses in the contract. In addition, the parties cannot choose to limit or exclude the provisions by contract, although it is possible to broaden their scope in the contract.

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