

CHINA LAW UPDATE

JIANGZHOU Lan, SUN Yuxuan, and PENG Yali

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CHINA LAW UPDATE

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I. LAWS AND REGULATIONS

A. *Civil Procedure Law (2012 Amendment)*¹

The Civil Procedure Law of the People's Republic of China is amended for the second time in accordance with the Decision of the 28th Session of the Standing Committee of the Eleventh National People's Congress on Amending the Civil Procedure Law of the People's Republic of China on August 31, 2012 (hereinafter referred as "the 2012 Amendment").

1. Background and Significance of the 2012 Amendment

Civil Procedure Law is one of the basic laws of China. It sets out the rules and standards that courts must follow when adjudicating civil lawsuits. With China's economic development and procedural justice playing a more important role in adjudication, Civil Procedure Law has composed a significant part of China's legal system.

However, since its enactment in 1991, with one amendment in 2007, the Law can not keep pace with the sweeping changes taking place throughout China. There have been urges for modifications to the Law over the past few years. The opinion "on Deepening the Reform of Judicial System and Working Methods" from the Central Political Bureau also requires amendment to the Law².

Thus, in 2011, the Standing Committee of National People's Congress commenced the draft of the amendment to the law, aiming to adapt the law to the developing economic and social world, with the rights of the interested parties better protected, litigation procedure streamlined, and finally social stability and harmony promised³.

¹ Min shi su song fa (民事诉讼法) [Civil Procedure Law (2012 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Jan 1, 2013) (Lawinfochina) (China) [hereinafter Civil Procedure Law, 2012 Amendment].

² See Chen Liping (陈丽平), *Minshi Susongfa Xiugai Zhuyao Sheji Qige Fangmian (民事诉讼法修改主要涉及七个方面)* [Seven Main Components to the Amendment of Civil Procedure Law], FAZHI RIBAO (法制日报) [LEGAL DAILY], Dec. 24, 2011, http://www.npc.gov.cn/huiyi/cwh/1123/2011-10/25/content_1676082.htm (last visited Feb. 11, 2013) (China).

³ See *China's top legislature ends bimonthly session*, XINHUA SHE (新华社) [XINHUA NEWS AGENCY], Sep. 4, 2012, http://www.npc.gov.cn/englishnpc/news/Legislation/2012-09/04/content_1736162.htm.

2. Major modifications of the 2012 Amendment

The 2012 Amendment's sixty articles offer extensive changes covering nearly every chapter of the PRC Civil Procedure Law. The changes introduced by the 2012 Amendment primarily can be summarized to the seven aspects.

First, the 2012 Amendment better utilizes the mediation mechanism in civil law suits. Its new added Article 122 stipulates: "where mediation is appropriate for the civil dispute involved in an action instituted by a party in a people's court, mediation shall be conducted first, unless the parties refuse mediation."⁴ And the 2012 Amendment makes itself more compatible with People's Mediation Law, adding Article 194, which regulates the judicial confirmation of a mediation agreement in accordance with People's Mediation Law and other laws.⁵

Second, the 2012 Amendment strengthens its protection of citizens' right to access to courts and other rights in litigation. With growing concern over disputes regarding environmental rights and consumer rights, Article 55, for the first time expressly provides for public interest litigation, which allows agencies or organizations determined by law to bring litigation to the court.⁶ Article 123 stipulates that a people's court must accept an action instituted under Article 119 of this Law, instead of "the court shall accept the case within seven days" in the 2007 version.⁷ What's more, Article 156 provides that the public can have access to written judgments and court orders, provided that they do not pertain to state secrets, trade secrets or personal privacy.⁸

Third, the 2012 Amendment polishes its regulations on proof. Its newly added Article 65 stipulates that a party shall provide evidence for its claims in a timely manner and a people's court shall determine the evidence to be provided by a party and the time limit for provision of evidence⁹. Article 66 sets the rule that a people's court shall issue receipts for evidentiary materials submitted to the court by a party¹⁰. Article 76 for the first time empowers the interested parties the right to commence the identification for ascertaining the facts of a case by applying to the people's court¹¹.

Fourth, the 2012 Amendment improves the summary procedure process. In its added Article 162, it revises the amount of money

⁴ Civil Procedure Law, 2012 Amendment, art. 122.

⁵ *Id.* art. 194.

⁶ *Id.* art. 55.

⁷ *Id.* art. 123.

⁸ *Id.* art. 156.

⁹ *Id.* art. 65.

¹⁰ *Id.* art. 66.

¹¹ *Id.* art. 76.

people can seek in small claims to 30 percent of the average yearly wage in a province, autonomous region or municipality in which the case is heard; and it stipulates that the adjudication on small claims of the basic people's court or detached tribunal shall be final¹². According to the National Bureau of Statistics, the average yearly wage of urban Chinese in 2011 was 41,799 yuan, which means the amount will be around 12,000 yuan (1,887 U.S. dollars) in most provinces, regions and municipalities¹³. And it adds that in cases where the law does not stipulates the application of summary procedure, the parties may agree on the application of summary procedure¹⁴.

Fifth, the 2012 Amendment is likely introduced in order to enhance the protection of legal rights by strengthening the legal supervision power of People's Procuratorates. Article 208 states that the People's Procuratorate may offer procuratorial recommendations to the people's court at the same level as a way of supervision¹⁵. According to the Article 235, the People's Procuratorate is authorized to conduct legal supervision over civil enforcement¹⁶.

Sixth, it perfects the system of trial supervision including retrial procedures. The revised Article 199 adds that in a case where a party deem the effective judgment or ruling erroneous, apart from filing a petition with the people's court at the next higher level, if the number of parties on one side is large or the parties on both sides are citizens, the parties may file a petition for retrial with the original trial people's court¹⁷. Article 209 also clarifies the circumstances where a party may apply to the People's Procuratorate for procuratorial recommendations or appeal in order to better utilize the judicial resources¹⁸.

Seventh, the 2012 Amendment strengthens the enforcement procedure. The revised Article 240 empowers the enforcement personnel, after issuing a notice of enforcement to the party against whom enforcement is sought, to immediately take enforcement measures instead of waiting after the time limit within which the party fails to comply with the enforcement¹⁹. Article 115 adjusts the

¹² *Id.* art. 162.

¹³ Chen Liping (陈丽平), *Wu qian yuan yi xia an jian shi xing yi shen zhong shen* (五千元以下案件实行一审终审) [The Adjudication on Small Claims under 5000 yuan shall be Final], FAZHI RIBAO (法制日报) [LEGAL DAILY], Dec. 24, 2012, http://www.npc.gov.cn/huiyi/cwh/1123/2011-10/25/content_1676110.htm.

¹⁴ Civil Procedure Law, 2012 Amendment, art. 157, ¶ 2.

¹⁵ *Id.* art. 208.

¹⁶ *Id.* art. 235.

¹⁷ *Id.* art. 199.

¹⁸ *Id.* art. 209.

¹⁹ *Id.* art. 240.

maximum of fine on individual from 10000 to 100000, and that on an entity from 300000 to 1000000²⁰.

*B. The Prison Law (2012 Amendment)*²¹

This is the first time the Prison Law of the People's Republic of China ("Prison Law 1994")²² is amended since it was first promulgated in 1994. The impetus for the Prison Law amendment ("the PL Amendment") is to revise any area of unconformities in the Prison Law with the newly amended Criminal Procedure Law ("CPL")²³ promulgated in March 2011. As a result, seven articles are revised. The changes brought forth by the PL Amendment could be classified in five aspects as follows.

1. Reduction in scope of detention center (Paragraph 2 of Article 15)

The amended CPL provides that where a convict is sentenced to fixed-term imprisonment but the remaining term of the penalty is not more than three months before the convict is delivered for the execution of the penalty, the sentence shall be executed by the detention center instead.²⁴ However, in accordance with the Prison Law 1994, the relevant period of detention in the detention center was one year.

As a result, to be in line with the amended CPL, Paragraph 2 of Article 15 of the PL Amendment is revised to amend the detention period in the detention center from one year to three months.

2. Modifications of procedures for temporary execution outside prison (Article 17 and Article 28)

a. Article 17

The PL Amendment to Article 17 contains two modifications.

²⁰ *Id.* art. 115.

²¹ Quan guo ren min dai biao da hui chang wu wei yuan hui guan yu xiu gai Zhonghua Renmin Gongheguo jian yu fa de jue ding (全国人大常委会关于修改《中华人民共和国监狱法》的决定) [Decision of the Standing Committee of the National People's Congress on Amending "the Prison Law of the People's Republic of China"] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 26, 2012, effective Jan. 1, 2013), available at <http://www.lawinfochina.com/display.aspx?lib=law&id=11789&CGid=> (Lawinfochina) (China) [hereinafter PL Amendment].

²² Jian yu fa (监狱法) [Prison Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1994, effective Dec. 29, 1994) (Lawinfochina) (China) [hereinafter Prison Law 1994].

²³ Xing shi sus ong fa (刑事诉讼法) [Criminal Procedure Law (2012 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 14, 2012, effective Jan. 1, 1980) (Lawinfochina) (China) [hereinafter Amended CPL].

²⁴ *Id.* art. 253.

The first modification relates to the inconsistencies between the Prison Law 1994 and the amended Criminal Procedure Law regarding the circumstances requiring temporary execution of criminal punishment outside prison.

The Prison Law 1994 referred to two circumstances as follows:²⁵

i. A convict is seriously ill and needs to be released on parole for medical treatment; or

ii. A convict is a pregnant woman or a woman who is breast-feeding her own baby.

The amended Criminal Procedure Law however provides an additional circumstance, i.e. a convict cannot live by himself or herself, and it will not cause any danger to the society for the convict to temporarily serve his or her sentence outside prison.²⁶

The two circumstances as stipulated in the Prison Law 1994 were deleted under article 17 of the PL Amendment. A new reference was made to “any of the circumstances” in which the physical examination of the convict would reveal that the convict requires temporary execution of criminal punishments outside prison.

It would appear that the aforesaid “any of the circumstances” covers beyond the three circumstances stipulated in the amended CPL and can be expanded to cover any new circumstances deemed appropriate provided that there is approval as further explained in the second modification below.

The second modification relates to procedures regarding application of temporary execution of criminal punishments outside prison. In line with the addition of approval requirement stipulated in Article 254 of the Amended CPL, Article 17 of the PL Amendment now contains an additional requirement requiring the prison to put forward written opinions and submit the opinions to the relevant prison administration authority at or above the provincial level for approval.

b. Article 28

The amendment relates to the circumstances, which may render a convict who temporarily serves his/her sentence outside prison to be again put in prison.

Article 28 of the Prison Law 1994 is silent as to the circumstances, which may render a convict who temporarily serves his/her sentence outside prison to be again put in prison.

²⁵ Prison Law 1994, art. 96.

²⁶ Amended CPL, art. 254.

The amended CPL however clearly stipulates three circumstances set out below²⁷:

i. It is discovered that the convict does not meet the conditions for temporarily serving a sentence outside prison;

ii. The convict has seriously violated the provisions on supervision and management of convicts temporarily serving a sentence outside prison; or

iii. The circumstances allowing a convict's serving a sentence outside prison disappear and the convict's term of sentence has not expired.

Therefore, in conformity with the amended CPL, there is now a new reference in Article 28 of the PI Amendment stipulating that the relevant circumstances are those set out in the amended CPL.

3. Introduction of the role and responsibilities of community correction organizations (Article 27, 28 and 33)

As the amended CPL explicitly incorporated a provision conferring authority to community correction institution in dealing with temporary execution outside prison and parole cases²⁸, Articles 27, 28 and 33 of the Prison Law 1994 are thus revised to reflect the changes made.

As a consequence, public security organ is no longer responsible for supervising and executing penalty for convicts who are on parole²⁹ or are temporarily serving their sentences outside prison³⁰. Instead, the PL Amendment provides that such convicts shall be subject to "community correction carried out by community correction organization pursuant to law"³¹ and that the community correction organizations shall take up certain responsibilities in place of public security organ.³²

4. Adjustment of procedures rules in relation to appeal of people's court's decision on commutation or parole (Paragraph 2 of Article 34)

Paragraph 2 of Article 34 of Prison Law 1994 merely states that a people's procuratorate may lodge a protest within the time limit

²⁷ *Id.* art. 257.

²⁸ *Id.* art. 258.

²⁹ Prison Law 1994, art. 29.

³⁰ *Id.* art. 27.

³¹ PL Amendment, arts. 27 and 33.

³² *Id.* arts. 27, 28 & 33. Paragraph 2 of Article 33 is revised to place responsibility on the community correction organization to make suggestions to the people's court for revocation of parole.

specified by the CPL if it finds the people's court's ruling on commutation or parole improper.

In line with Article 263 of the amended CPL, the PI Amendments now clarifies the procedures rules and provides that a written correction opinion provided by the people's procuratorate must be submitted to the people's court in such situation.

5. Removal of recommendation for exemption for crime committed in prison (Article 60)

Article 60 of Prison Law 1994 states that where a convict commits a crime in prison, on conclusion of the investigation, a recommendation for prosecution or a recommendation for exemption from the prosecution shall be handed over to the people's procuratorate along with the case file and evidence. The amended version has removed "recommendation for exemption from the prosecution" to be in line with the abolishment of such practice since 1996.³³

It is understood that the primary purpose of the PI Amendment is to rectify the inconsistencies of the Prison Law 1994 provisions with the amended CPL.³⁴ The recent amendment was essentially a technical exercise and was not meant to address other issues related to the prison law such as protection of prisoner's rights, in particular in relation to women and juvenile. It is anticipated that further amendments will be made and these issues will be addressed at a later stage.

C. Lawyers Law (2012 Amendment)³⁵

The Lawyers Law of the People's Republic of China is amended for the third time in accordance with the Decision of the 29th Session of the Standing Committee of the Eleventh National People's Congress on October 26, 2012 (hereinafter referred to as *the 2012 Amendment*).

³³ See Wu Zong Xian (吴宗宪), *Lun Jianyu Fa de Xiugai Yu Wanshan* (论《监狱法的修改与完善》) [Discussion of amendments and improvements of the Prison Law], LUNWENDA.COM (Nov. 12, 2010), available at http://www.lunwenda.com/faxue20101112/127434_6.html.

³⁴ *Xinhuashe Shouquan Bofa Quanguo Renda Changweihui Guanyu Xiugai Jianyu Fa Deng 7 Bu Falu Di Jueding* (新华社授权播发全国人大常委会关于修改监狱法等7部法律的决定) [Interview with the Standing Committee of the National People's Cong. Concerning the Amendment of the 7 Provisions of the Prison Law], XINHUA, Oct. 26, 2012, http://news.xinhuanet.com/politics/2012-10/26/c_113513748.htm.

³⁵ *Quanguo Renmin Daibiao Dahui Changwu Weiyuan Hui Guanyu Xiugai Zhonghua Renmin Gonghe Guo Lushi Fa de Jueding* (全国人民代表大会常务委员会关于修改《中华人民共和国律师法》的决定) [Decision of the Standing Comm. Nat'l People's Cong. on Amending the Lawyers Law] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 26, 2012, effective Jan. 1, 2013), available at <http://www.lawinfochina.com/display.aspx?lib=law&id=11625&CGid> (Lawinfochina) (China).

1. Background of the 2012 Amendment

In the past few years, courts across the country are seeing a rising number of criminal cases, but less than half of these cases have lawyers representing suspects, reported by Du Chun, director of the department in charge of lawyers under the Ministry of Justice³⁶. In the view of Du, the difficulties faced by the lawyers, for example, in meeting detained defendants and reviewing case files and the tendency of some judicial authorities to ignore defense statements are the major factors among the others. With the Amendment to the Criminal Procedure Law³⁷ in 2012, the Standing Committee of National People Congress in 2012 promulgated the third amendment to Lawyers Law to eradicate the contradictions with the newly amended Criminal Procedure Law, as well as to better regulate the legal profession and finally to deepen the rule of law.

2. Major Modifications of the 2012 Amendment

The 2012 Amendment sees an enhanced role for defense lawyers, but also limits some of their rights in a subtle way.

First, the revised Article 28, paragraph 3 is compatible with the amended Criminal Procedure Law³⁸, which extends the time period during which a suspect can engage the services of a defense attorney to the initial police interrogation. A defender is able to provide suspects with a wider range of services according to Article 28, paragraph 3 than merely providing the legal assistance, filing a petition or charge, and applying for a bail as stipulated by the old version.

Second, the revised Article 31 highlights the lawyer's duty on the protection of the procedural rights of the criminal suspects or defendants. Emphasizing on the procedural rights, the modification resembles the revision to the Article 35 of the Criminal Procedure Law and reflects the legislative intention to balance public power and private rights and to safeguard the human rights of the criminal suspects and dependents, since it was included in the nation's constitution in 2004³⁹.

³⁶ See Zhang Yan, *New Law beefs up defense for suspects*, CHINA DAILY, Jan. 7, 2013, http://www.chinadaily.com.cn/china/2013-01/07/content_16089497.htm.

³⁷ Amended CPL.

³⁸ *Id.* arts. 33 & 36.

³⁹ Zhonghua Renmin Gonghe Guo Xian Fa (2004 Xiuzheng) (中华人民共和国宪法 (2004修正) [Constitution of the People's Republic of China (2004 amendment)] (promulgated by the Nat'l People's Cong., Mar. 14, 2004), available at <http://www.lawinfochina.com/display.aspx?id=3437&lib=law&SearchKeyword=&SearchCKeyword=%D6%D0%BB%AA%C8%CB%C3%F1%B9%B2%BA%CD%B9%FA%CF%DC%B7%A8>) (Lawinfochina) (China).

Nevertheless, the amended Article 34 somewhat narrows the scope of materials lawyers shall have the access to. Eliminating paragraph 2 of Article 34 of the old version⁴⁰ which stipulates that defense lawyers may, from the date on which the People's Court accepts a case, consult, extract and duplicate the materials related to the current case, the newly amended law limits the accessible materials only to those pertaining to the current case. In other words, defense lawyers may, from the date on which the People's Procuratorate begins to examine a case for prosecution, consult, extract and duplicate the judicial documents of only the current case.

Fourth, revised Paragraph 3 of Article 37 contains a subtle modification. It stipulates that when a lawyer is suspected of a crime during a legal proceeding, the criminal investigation authority shall notify the law firm employing the lawyer or the bar association to which the lawyer belongs to in a timely manner, instead of within 24 hours after the lawyer is legally detained or arrested that the old version stipulates.

Fifth, the 2012 Amendment broadens the scope within which the defense lawyers shall keep confidential the information which the clients or other people are unwilling to disclose. The revised Paragraph 2 of Article 38 crosses out the condition when the safety of property is endangered, under which lawyers are not allowed to keep it confidential under the old version. The legislative intents to ensure the criminal suspects and defendants have greater legal representation can be inferred from this modification.

D. Provisions on the Issues concerning the Implementation of the Administrative Measures for Securities Investment Made in China by Qualified Foreign Institutional Investors

Ever since its inception in 2003, the Qualified Foreign Institutional Investors ("QFII") program has evolved rapidly to attract long-term overseas investments in supporting the domestic capital market in China. The QFII program enables foreign investors upon obtaining a special license to become a QFII to invest in China's domestically listed RMB-denominated A-shares.

On July 27, 2012, The China Securities Regulatory Commission (CSRC) formally issued the *Provisions on the Issues concerning the Implementation of the Administrative Measures for Securities*

⁴⁰ Zhonghua Renmin Gongheguo Lüshi Fa (中华人民共和国律师法) [Lawyers Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2007, effective June 1, 2008), available at <http://www.lawinfochina.com/display.aspx?id=6463&lib=law&SearchKeyword=&SearchCKeyword=%C2%C9%CA%A6%B7%A8> (Lawinfochina) (China).

*Investment Made in China by Qualified Foreign Institutional Investors*⁴¹ (“New QFII Provisions”), which superseded the *Notice on Issues concerning the Implementation of the Measures for Domestic Securities Investment by Qualified Foreign Institutional Investors*⁴², issued on June 24, 2005 (“Old QFII Notice”).

1. Changes

a. Lower entry qualification threshold

The new QFII Provisions relaxed the qualification thresholds to make it easier for investors to enter the market by shortening the track record period requirement and lowering the size of securities assets held by the institutions. . The table below⁴³ reflects the differences between the New QFII Provisions and the Old QFII Provisions:

Type of Institutions	Track Record Period	Record	Amount of Securities
Asset Management companies	OT ⁴⁴ : from 5 years to 2 years	Lowered	Assets under management (“AUM”) required is reduced from USD 5 billion to USD 500 million
Insurance Companies	ET ⁴⁵ : from 5 years to 2 years	Lowered	Required securities assets held in the latest fiscal year is reduced from US\$5 billion to US\$500 million

⁴¹ Zhongguo Zhengquan Jiandu Guanli Weiyuanhui Gonggao 17 hao: Fabu “Guanyu Shishi Hege Jingwai Jigou Touzizhe Jingnei Zhengquan Touzi Guanli Banfa Youguan Wenti de Guiding de Gonggao (中国证券监督管理委员会公告17号——发布关于实施合格境外机构投资者境内证券投资管理办法有关问题的规定的公告) [Announcement No. 17 of the China Securities Regulatory Commission: Provisions on Issues Concerning the Implementation of the Administrative Measures for Securities Investment Made in China by Qualified Foreign Institutional Investors (promulgated by the China Securities Regulatory Commission) (effective July 27, 2012), available at <http://www.lawinfochina.com/display.aspx?id=10944&lib=law&SearchKeyword=China%20Securities%20Regulatory%20Commission> [hereinafter New QFII Provisions] (Lawinfochina) (China).

⁴² Zhōngguó zhèngquǎn jiāndū guǎnlǐ wěiyuánhùi guānyú shíshī “hége jìngwài jīgòu tóuzī zhě jìngnèi zhèngquǎn tóuzī guǎnlǐ bànfǎ” yǒuguān wèntí de tōngzhī (中国证券监督管理委员会关于实施《合格境外机构投资者境内证券投资管理办法》有关问题的通知) [Notice of China Securities Regulatory Commission on the Relevant Issues Concerning the Measures for the Administration of Securities Investment within the Territory of China by Qualified Foreign Institutional Investors] (promulgated by the China Sec. Regulatory Comm’n, Aug. 24, 2006, effective Sep. 1, 2006), available at <http://www.lawinfochina.com/display.aspx?id=5442&lib=law&SearchKeyword=Relevant%20Issues%20Concerning%20the%20Measures%20for%20the%20Administration%20of%20Securities%20Investment%20within%20the%20Territory%20of%20China%20by%20Qualified%20Foreign%20Institutional%20Investors&SearchKeyword=> (Lawinfochina) (China) [hereinafter Old QFII Notice].

⁴³ Based on Article 1 of New QFII Provisions, as well as on Old QFII Notice.

⁴⁴ “OT” means “Time of Operation.”

⁴⁵ “ET” means “Time of Establishment.”

		million
Securities companies	OT: Lowered from 30 years to 5 years	Net assets of no less than USD 500 million (replaced the paid-in capital requirement of no less than USD 1 billion) Minimum AUM requirement in the latest fiscal year is lowered from USD 10 billion to USD 5 billion
Commercial Banks	OT: 10 or more years (ranking requirement is removed)	Tier 1 capital of no less than USD 300 million Minimum AUM requirement in the latest fiscal year is lowered from USD 10 billion to USD 5 billion
Other institutional investors	ET: Lowered from 5 years to 2 years	AUM or assets held in the latest fiscal year is reduced from US\$5 billion to US\$500 million

b. Streamlined and simplified application procedures

Huge efforts are made in the new QFII Provisions to provide a more streamlined and simplified application procedures for QFII license.

In an attempt to enhance long-term operational and administrative efficiency, the new QFII provisions make online application available. QFII applicant is now required to submit application materials in electronic form through CSRC's website before submitting the hard copy version to CSRC.¹ Further, where any material event¹ occurs to a QFII, the QFII is required to promptly file such events electronically via CSRC's websites.¹

The required application documents have also been simplified to speed up the approval of QFII qualifications. It is no longer a requirement to provide an article of association¹ or a draft custodian agreement.¹ Additionally, QFII applicant only has to submit the audited financial statements of the latest year¹ (rather than the latest 3 years).

c. Improved account management

The New QFII Rules clarified account management rules and improved transparency for QFIIs.

The New QFII Rules now provide a clear segregation between QFII's own funds and the client funds so as to distinguish ownership rights and to isolate associated risks. QFII is now required to open separate accounts for different clients in the name of "QFII+ the

name of the client” and a separate account for its own long-term funds in the name of “QFII + Fund (or insurance capital, etc)”.¹ The rules also explicitly provide that the assets under the latter account shall be independent of the QFII and the custodian.

d. Lifted operational constraints on multiple broker model

Each QFII has always been permitted to entrust up to three securities companies to trade securities in each of the Shanghai and Shenzhen stock exchanges. However, in practice, a QFII is limited to engaging in one security company in each stock exchange because (i) there was previously a requirement stipulating that every security account must correspond with a special RMB account approved by the State Administration of Foreign Exchange (SAFE) on a one-to-one basis; and (ii) QFII is only allowed to have one special RMB account.

The New QFII provisions now abolish the one-to-one basis requirement and thus enable QFIIs to have multiple securities accounts 1 opened with up to three securities companies in each Stock Exchange.

e. Broadened the Scope of Investment

Previously, QFIIs could only invest in (i) stocks, bonds, warrants traded in or transferred in stock exchanges; (ii) securities investment funds; and (iii) other financial instruments permitted by the CSRC.

The New QFII rules now permit QFIIs to invest in stock-index futures and fixed-income products traded on the inter-bank bond market.⁴⁶ Two points however should be noted. First of all, the requirement that at least 50% of its assets in listed equities still remains intact. Secondly, stock-index futures transactions are unlikely to take place until PBOC makes rules allowing QFII to open special RMB account for the purpose of the stock index futures.⁴⁷ It is thus encouraging to see that the Vice Chairman of CSRC, Jiang Yang, recently stated that QFII participation in stock index futures trading will soon be implemented enabling foreign investors to legally transfer or subscribes for equity of Chinese-funded future companies.⁴⁸

⁴⁶ New QFII Provisions, arts. 8(2) & 8(4).

⁴⁷ Mark Shipman et al, CLIFFORD CHANCE, *CSRC New Rules to Buck up the QFII Program*, 2 (July 2012), http://www.cliffordchance.com/publicationviews/publications/2012/07/csdc_new_rules_tobuckuptheqfii_program.html [hereinafter Shipman et al].

⁴⁸ An Xiecheng, *The first QFII permitted to participate in the stock index futures*, POPULAR PAPERS, Jan. 25, 2013, <http://www.popular-papers.com/news-3768319-The-first-QFII-permitted-to-participate-in-the-stock-index-futures.html>.

The New QFII rules also loosened the restriction on the cap of the aggregated amount of A-shares that all foreign investors may hold in a listed company from not exceeding 20% to 30%.⁴⁹ The cap of the amount of A-shares that a single investor may hold remains unchanged at 10%.⁵⁰

Moreover, the New QFII rules also added a provision allowing a QFII to entrust a domestic fund management company to provide it with specific customer asset management services, and open corresponding accounts.⁵¹

2. Uncertainties

The changes brought forward by the New QFII Rules have undoubtedly brought forth helpful additions and clarifications to the QFII program. However, there remains a list of outstanding issues to be resolved in relation to QFII quota, QFII's investment plans and possible tax implications of QFIIs.

The uncertainties concerning QFII quota are as follows: First of all, it is unclear whether the QFII quota can be recycled and a client account re-designated if a client of a QFII exits and is replaced by another client.⁵² Secondly, the New QFII provisions failed to address whether there is a time-limit in which QFII has to make investments after obtaining the approved quota even though it is believed that, in practice, QFII's failure to invest may reduce its chances to later increase the investment quota.⁵³ Thus, it would appear that there is no any existing legal provision stipulating a validity period for approved quota. There are only provisions describing situations in which the quota may be revoked due to QFII's non-compliance (e.g. if QFII fails to remit its funds into China within 6 months after being granted the investment quota).⁵⁴

There is also an uncertainty related to conformity with investment plan. The New QFII provisions did not address the question whether there would be a penalty if the QFII's actual investment is different from its investment plan submitted to the regulatory authorities or whether the regulatory authorities would exercise any of their supervisory powers to ensure that the plan is followed.

⁴⁹ New QFII Provisions, art. 9(2).

⁵⁰ *Id.* art. 9(1).

⁵¹ *Id.* art. 7.

⁵² CSRC issues new rules to relax restrictions under the QFII regime, LINKLATERS, Aug. 2, 2012, <http://www.linklaters.com/Publications/AsiaNews/LinkstoChina/Pages/CSRC-issues-new-rules-relax-restrictions-under-QFII-regime.aspx>.

⁵³ David Livdahl et al, PAUL HASTINGS, CSRC Issues New Rules to Promote QFII Program, 3 Sep. 10, 2012, <http://www.paulhastings.com/assets/publications/2248.pdf>.

⁵⁴ *Id.*

Suggestions⁵⁵ are made that there may however be a tacit understanding of supervision of regulatory authorities as QFII's custodian bank is required to submit monthly reports to the regulators, and thus regulators would regularly review whether QFII's investment activities are in fact conducted in accordance with its investment plan.

The tax treatment in relation to QFIIs remains to some extent ambiguous. Current PRC tax regime is silent on the Enterprise Income Tax treatment of capital gains derived from the disposition of securities investments by QFIIs from China. However, according to an official of the CSRC, China's tax regulator may start imposing a 10% enterprise income tax ("EIT") on the annual net capital gains of QFIIs after offsetting against losses.⁵⁶ It is to hope that a new tax policy, which is expected to be promulgated in the near future, would clarify tax-assessment period, carry-forward of capital losses, application of tax treaties, tax payment method and the effective date of the new policy.⁵⁷

3. Future Outlook

The growing trend towards favoring long-term investors is apparent. Most of the new quotas granted this year have been to long-term investors, such as sovereign wealth funds and pension and endowment funds. Very recently, SAFE published a set of new regulations on its website on 14 December 2012 stating that it has made a decision to remove the \$1 billion limit set for foreign sovereign wealth funds, central banks and monetary authorities buying Chinese assets through QFII. A new top limit for investment was not specified. It is to anticipate that such change will undoubtedly add liquidity to the market and further facilitate foreign investments.

Another interesting dimension to the new development of QFII program is the increasing search of local advisors by foreign investors. A number of QFIIs such as Canada Pension Plan Investment Board and Second Swedish National Pension Fund Ted Lee have recently publicly expressed strong interests in looking for local advisors in China.⁵⁸ It may well be that many foreign funds lack the knowledge and network to invest directly in China and thus

⁵⁵ *Id.*

⁵⁶ James Wang et al., *Capital Gains Tax for QFIIs on the Horizon*, HAN KUN LAW OFFICES LEGAL COMMENTARY, <http://www.hankunlaw.com/backuser/picinfo/2012102312025.pdf> (last visited Feb. 15, 2013).

⁵⁷ *Id.*

⁵⁸ Samuel Shen & Kazunori Takada, *Global Fund Managers Battle for Investor Cash Bound for China*, REUTERS, Dec. 12, 2012, available at <http://uk.reuters.com/article/2012/12/12/uk-china-investment-foreign-idUKBRE8BB0AQ20121212>.

would often be inclined to turn to local third-party advisors. However, it is worthy of one's attention that currently domestic fund managers often still lack the necessary English linguistic skills and IT knowledge suitable for QFII business. Thus, industry executives and analysts view that the real beneficiaries to act as advisors to QFII are often foreign fund companies having joint ventures with domestic partners as required by law.⁵⁹

The inclusion of fixed-income products in the inter-bank bond market and the stock index futures in the investment scope of QFII is likely to significantly attract more long term investment from abroad especially given the high accessibility and liquidity of the interbank bond market. It is exciting to see how CSRC would bring its recent commitment to implement the stock index futures in practice to fruition.

The New QFII provisions have undoubtedly brought positive developments to the QFII program. However, it is hopeful that QFIIs would soon be granted even more flexibility and liquidity particularly in the following aspects.⁶⁰ It would be at best if QFII could eventually (a) invest more than 50% of the assets in fixed income products now that QFIIs are allowed to enter the interbank bond market; (b) enjoy a more simplified procedures of inward and outward remittance of RMB; and (c) be able to process subscriptions and redemptions of the fund freely like that of the parallel RMB QFII.

II. THE SECOND SET OF GUIDING CASES

After publishing the first set of four guiding cases⁶¹ on December 20, 2011, the Supreme People's Court continued to establish the second group of guiding cases on April 14, 2012. This set includes two administrative cases and two civil cases, which include *Suzhou Branch of Luwei Salt Import and Export Co., Ltd. v. Salt Administration of Suzhou City in Jiangsu Province* (salt industry administrative penalty case), *Huang Zefu, He Boqiong, and He Yi v. Jintang County Administration for Industry and Commerce of Chengdu City in Sichuan Province* (administrative punishment dispute), *Hongge Construction and Installation Co., Ltd. of Mudanjiang City v. Hualong Real Estate Development Co., Ltd. of*

⁵⁹ *Id.*

⁶⁰ Shipman et al., *supra* note 47, at 3.

⁶¹ Guiding cases are the cases that are legally effective and satisfy certain requirements presented in the Provisions of the Supreme People's Court on Case Guidance. With respect to guiding cases and the case guidance system of China, see *Judicial Interpretation*, 4 TSINGHUA CHINA L. REV. 304, 305 (2012), available at http://tsinghuachinalawreview.org/articles/PDF/TCLR_0402_ChinaLawUpdate.pdf.

Mudanjiang City and Zhang Jizeng (construction engineering contract dispute), and *Lin Fangqing v. Kailai Industrial Co., Ltd. of Changshu City and Dai Xiaoming* (company dissolution dispute).⁶²

A. *Suzhou Branch of Luwei Salt Import and Export Co., Ltd. v. Salt Administration of Suzhou City in Jiangsu Province*

Luwei Company purchased 360 tons of industrial salt from Jiangxi Province and other places. The Suzhou Salt Administration maintained that when Luwei Company purchased and transported industrial salt, it should have acquired a permit for the transportation of industrial salt in accordance with the Jiangsu Salt Industry Implementation Measures⁶³ and that Luwei Company's purchase of industrial salt outside of Jiangsu Province without a permit for transportation was a suspected violation of law. Therefore, Salt Administration of Suzhou City issued a written Administration Penalty Decision of Salt Administration against Luwei Company.

The court decided to overrule the Administrative Penalty Decision made by the Suzhou Salt Administration. The main reason is that in accordance with the Law on Administrative Penalty⁶⁴, under the circumstance that administrative regulations have already been formulated, local government rules can only make specific provisions within the scope of the acts subject to administrative penalty and the types and range of such penalty established by administrative regulations. The Regulation on Salt Industry Administration promulgated by the State Council does not provide for any administrative penalty against the salt wholesale business of other enterprises that are not salt industry companies, hence, local government rules cannot establish an administrative penalty against such business act.

This case makes it more explicit that where an administrative penalty is not provided for in laws and administrative regulations on the administration of the salt industry, it may not be provided for in local government rules for such business.

B. *Huang Zefu, He Boqiong, and He Yi v. Jintang County*

⁶² These four cases are attached in *Zuigao Renmin Fayuan Guanyu Fabu Dierpi Zhidaoxing Anli de Tongzhi* (最高人民法院关于发布第二批指导性案例的通知) [Notice of the Supreme People's Court on Issuing the Second Group of Guiding Cases] (promulgated by Sup. People's Ct., Apr. 9, 2012, effective Apr. 9, 2012) (Lawinfochina) (China).

⁶³ The Jiangsu Salt Industry Implementation Measures is a local administrative rule issued by the government of Jiangsu Province, which has a lower legal level than law or administrative regulation promulgated by the Standing Committee of the National People's Congress or the State Council.

⁶⁴ *Xingzheng Chufa Fa* (行政处罚法) [Law on Administrative Penalty] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 17, 1996, effective Oct. 1, 1996), art. 13 (Lawinfochina) (China).

*Administration for Industry and Commerce of Chengdu City in
Sichuan Province*

The plaintiffs and Jintang County Library in Sichuan Province jointly established a multimedia e-reading room in Jintang County. But afterwards their partnership terminated and the plaintiffs could not do business in the name of “multimedia e-reading room”. However, during an inspection conducted by Jintang Administration for Industry and Commerce of Jintang County, it was discovered that three first-year middle school students were playing online games inside plaintiffs’ room. The plaintiffs were unable to produce an Internet Culture Business Permit and a business license. Therefore, the Jintang Administration for Industry and Commerce decided to impound the plaintiffs’ 32 host computers by issuing a Notice on Impounding Property. The plaintiffs alleged that the administrative punishment imposed by the defendant was illegal. They requested the court to revoke the Administrative Punishment Decision.

The court issued an administrative judgment that the Administrative Punishment Decision made by defendant should be revoked because Article 42 of the Administrative Punishment Law of the People’s Republic of China provided that: “A government agency shall, before making a decision to impose an administrative punishment, such as ordered suspension of production or business operations, forfeiture of a business permit or license, or a relatively large fine, inform the party that the party is entitled to a hearing.”⁶⁵ In this case, before making the administrative punishment decision, the defendant only informed the plaintiffs of their rights to make statements or arguments under general administrative punishment procedures and failed to inform them of their right to a hearing. Therefore, its administrative punishment decision violated statutory procedures and should be revoked in accordance with law.

As affirmed in the case, where a government agency makes an administrative punishment decision to confiscate a relatively large amount of property involved but fails to inform the party that the party is entitled to a hearing or fails to legally hold a hearing, the people’s court shall determine that the administrative punishment violates statutory procedures.

*C. Hongge Construction and Installation Co., Ltd. of Mudanjiang
City v. Hualong Real Estate Development Co., Ltd. of Mudanjiang
City and Zhang Jizeng*

Hualong Real Estate Development Company filed an petition for retrial with the Supreme People’s Court against the civil judgment

⁶⁵ *Id.* art. 42.

rendered by the Higher People's Court of Heilongjiang Province regarding the dispute over a construction engineering contract between Hualong Company and Hongge Construction and Installation Company and Zhang Jizeng. At the same time, the appellant filed a petition for protest with the procuratorate concurrently with its filing of a petition for retrial with the court. After accepting the petition for protest, the Supreme People's Procuratorate decided to file a protest regarding this case according to the trial supervision procedure. Afterwards, the dispute was resolved, so Hualong Company submitted to the Supreme People's Court an application to withdraw the lawsuit and the court confirmed the appellant's application.

A year later, the court received the civil protest from Supreme People's Procuratorate for review and trial. The Supreme Court communicated with the Supreme People's Procuratorate and recommended that the Supreme People's Procuratorate withdraw the protest. The Supreme People's Procuratorate, however, did not consent to the withdrawal of the protest. Finally, Hualong Company once again submitted to the Supreme People's Court an application to withdraw the lawsuit and the Supreme Court ruled to close the review of the case.

Therefore, after the people's court receives a written civil protest, where the people's court discovers upon examination that the disputes in the case have been resolved, one party applies to withdraw the lawsuit, and the state's interest, the public interest, or the interests of third parties are not damaged, the people's court shall rule to close review of the protest case in accordance with law; and where a ruling on retrial has been made, the people's court shall rule to close the retrial.

D. Lin Fangqing v. Kailai Industrial Co., Ltd. of Changshu City and Dai Xiaoming

This case is aimed at interpreting "serious difficulty" of Article 183 of the Company Law. Plaintiff Lin Fangqing alleged that: Kailai Industrial Co., Ltd. of Changshu City had serious difficulty in business operations and management and thus he requested the court to dissolve Kailai Company. Defendants Kailai Company and Dai Xiaoming contended that: Kailai Company and its branches were in a good operating state and did not meet the conditions for company dissolution; the conflicts between Dai Xiaoming and Lin Fangqing could be settled otherwise, and judicial procedures should not be used for compulsory company dissolution. The appeal court finally revoked the original judgment and dissolved Kailai Company.

Pursuant to the Company Law, “serious difficulty in business operations and management of a company” is one of the conditions for a shareholder to institute an action for company dissolution.⁶⁶ To determine whether the business operations and management of a company are in serious difficulty, the operating status of the company’s organizational structure should be analyzed comprehensively. Where a company is making profits but there is a long-term mechanism failure of its shareholders’ meeting, there are serious obstacles in its internal management, and the company has entered a state of deadlock, the company may be determined to have serious difficulty in business operations and management. If other conditions as prescribed in the and relevant judicial interpretations are satisfied, the people’s court may make a judgment to legally dissolve the company.

III. ACADEMIC DEVELOPMENTS

A. The Forum on China Law Innovation was held in School of Law of Tsinghua University, Beijing.

1. Introduction

The Forum of China Law Innovation was successfully held in School of Law of Tsinghua University on the afternoon of December 5, thanks to the China Law Society, Tsinghua University and Legal Daily. This forum mainly discussed the methods of constitutional studies. Han Dayuan, professor of the Law School of Renmin University of China, Gao Quanxi, professor of the Law School of Beihang University, Lin Laifan, professor of the Law School of Tsinghua University and Chen Duanhong, professor of Peking University Law School, are the guest speakers conveying academic thoughts to more than 200 students and teachers from the law schools in Beijing. The forum was chaired by Dean Wang Zhenmin of the School of Law of Tsinghua University. Lin Zhongliang, General Secretary of China Law Society, also attended the forum and delivered a speech. The forum lasted more than three hours.

2. Achievements of the Seminar

Professor Han Dayuan believes that the text of the Constitution carries the basic consensus of a society, the study of the Constitution and the discussion of the constitutional issues should be based on the

⁶⁶ See Gongsì Fa (公司法(2005年修订)) [Company Law (2005 Revision)] (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 27, 2005, effective Jan. 1, 2006), art. 183 (Lawinfochina) (China).

constitutional text. The constitutional study is unable to obtain an independent life if the constitutional study does not respect the text or clarify the meaning of the text using certain interpretation techniques. He also stated that it didn't mean that the study of the Constitution excluded other disciplines and the real investigation, but that all constitutional studies should analyze from the text and ultimately went back to the text. He holds that the Constitution is the fundamental law of the country and to maintain the dignity and authority of the Constitution. He believes that instead of amending the constitution too often, adopting proper method to interpret the Constitution is a relatively wiser choice.

Professor Gao Quanxi based his constitutional studies on the heavy intellectual history. He believes that the study of the constitution of China shall have an ideological background of more than 100 years' history of Chinese constitutionalism, noting the inherent temporal continuity. He holds that the judgment of the "contemporary" is very important, and the western countries' format copied. The early modern Western studies and common ideological resources shall be regarded as an important reference to justify the system design of Chinese constitutional order.

Professor Lin Laifan proposed that there is a more profound normative constitution system behind the Constitution and it is, in essence, reconcile with the text of the Constitution and the constitutional value. The study of the Constitution must construct the norm from the terms through the use of interpretative methods and value judgments, and this value judgment is ultimately a value of "personalism" caring hosted by a country's constitution. On the other hand, the norms of the Constitution must keep abreast of the norm, and stressed the importance of rational methods.

Professor Chen Duanhong believes that Constitution is not just a set of narration of the protection of the rights, but also a direct expression of norms of sovereignty implementation. Professor Chen does not wander away from the text of the Constitution, but go beyond the text of the Constitution to some extent to seek and prove the political logic described in the text of the Constitution. The political constitutional studies he proposed emphasized the concentration on the political practice and practices, and on the power, order and national space structure of the country as a whole.