

CHINA LAW UPDATE

Table of Contents

I. LAWS AND REGULATIONS	113
A. The New Tourism Law of the People’s Republic of China	113
1. Zero- or Negative-Fare Tours	113
2. Designated Shopping Places and Activities Requiring Additional Payment	114
3. Regulating Tourist Behavior	115
B. Key Amendments to the Consumer Protection Law	116
1. Introduction	116
2. Filling Gaps in the Consumer Protection Law	117
(a) Explicit Right to Protection of Personal Information	117
(b) Mandatory Seven Day Refund Policy for Substandard Goods	118
(c) Higher Compensation for Losses Arising from Fraudulent Activities	119
3. Heightening Obligations and Responsibilities of Business Operators	120
(a) Clarifying the Obligation to Recall Defective Products	120
(b) Clarifying the Burden of Proof on Business Operators	121
(c) Joint Liabilities for Related Businesses	122
4. Regulating E-Commerce and Other Forms of Retail ..	122
5. Clarifying the Role of Consumers’ Associations	124
6. Conclusion	125
C. Amendments to China’s Trademark Law: Protecting <i>De Facto</i> Trademark Holders and Combatting Trademark Squatting	125
1. Introduction	125
2. The Good Faith Doctrine	126
3. Preventing Trademark Squatting	126
4. Protection of Well-Known Trademarks	127
5. New Good Faith Obligations for Trademark Registration Agencies	128

6. The New Invalidation Process	128
7. Conclusion	129
II. JUDICIAL INTERPRETATIONS	130
A. Interpretation of Several Issues Concerning the Application of Law in the Handling of Criminal Cases on the Use of Information Networks to Commit Defamation and Other Similar Cases	130
1. Background	130
2. Main Articles	131
(a) Online Defamation	131
(b) Cursing and Intimidation	132
(c) Online Extortion	132
(d) Illegal Online Business Acts	133
3. Commentaries on the Interpretation	133
(a) Positive Commentaries	133
(b) Negative Commentaries	134
(c) Conclusion	135
B. Blacklisting Dishonest Judgment Debtors	135
III. CASES	138
A. The Fourth Set of Guiding Cases [Notice of the Supreme People's Court on Issuing the Fourth Group of Guiding Cases]	138
1. Wang Zhaocheng <i>et al.</i> Illegal Trading and Storage of Hazardous Substances	138
(a) Introduction	138
(b) Issues	138
(c) Guidance	139
2. Robbery Committed by a Certain Dong and a Certain Song	140
(a) Introduction	140
(b) Issues	140
(c) Guidance	140
3. Xuzhou Construction Machinery Group Co., Ltd. v. Chengdu Chuanjiao Industry and Trade Co., Ltd., <i>et al.</i>	140
(a) Introduction	140
(b) Issues	141
(c) Guidance	141
4. China Shipping Development Co., Ltd. Freighter Company's Application for the Establishment of a	

Fund for Limitation of Liability for Maritime Claims.....	142
(a) Introduction.....	142
(b) Issues.....	142
(c) Guidance.....	143
B. Seven Typical Cases in Intellectual Property Litigation Issued by the Supreme People's Court.....	143
1. Eli Lilly and Company and Eli Lilly (China) Research and Development Company, Ltd. v. Huang Mengwei.....	144
(a) Case Brief.....	144
(b) Significance.....	144
2. Foshan Haitian Flavoring and Food Company Ltd. v. Foshan Gaoming Weiji Flavoring and Food Company Ltd.....	144
(a) Case Brief.....	144
(b) Significance.....	145
3. BMW Co. v. Guangzhou Shiji Baochi Clothing Co., Ltd.....	145
(a) Case Brief.....	145
(b) Significance.....	145
4. Gree Electric Appliances, Inc. of Zhuhai v. Guangdong Midea Refrigeration Equipment Co., Ltd., etc.....	146
(a) Case Brief.....	146
(b) Significance.....	146
5. Beijing Ruibang Yonghe Technology and Trade Co., Ltd. v. Johnson & Johnson Medical (Shanghai) Ltd. and Johnson & Johnson Medical (China) Ltd.....	146
(a) Case Brief.....	146
(b) Significance.....	147
6. People v. Jiangxi Yibo Electronics Technology Co., Ltd., Yu Zhihong, etc.....	147
(a) Case Brief.....	147
(b) Significance.....	148
7. People v. Zong Lianggui, etc.....	148
(a) Case Brief.....	148
(b) Significance.....	148
C. The Case of a Certain Li <i>et al.</i> : Rape or Prostitution?.....	149
1. Introduction.....	149

2. Chinese Laws and Judicial Interpretations on Rape and Prostitution.....	150
(a) The Crime of Rape in the Criminal Law.....	150
(b) The Crime of Rape in Judicial Interpretations.....	150
(c) Regulation of Illegal Prostitution.....	151
3. The Dispute in Li's Case: Rape or Prostitution.	151
(a) Whether There Was Sexual Intercourse.....	152
(b) Whether There Was Consent for Compensation .	152
(c) Whether There Was Violence, Coercion or Other Means	153
4. Conclusion	154
5. Comments by Associate Professor Lao Dongyan of Tsinghua Law School	154
(a) On Evidence	154
(b) On the Finding of Rape.....	154
6. Comments by Professor Zhou Guangquan of Tsinghua Law School	155
(a) On Evidence	155
(b) On the Finding of Rape.....	155

CHINA LAW UPDATE

I. LAWS AND REGULATIONS

A. The New Tourism Law of the People's Republic of China¹

The Tourism Law of the People's Republic of China came into effect on October 1, 2013 and is the first law targeting the tourism industry. This new legislation contains 112 articles and is designed to regulate the tourism market, safeguard tourists' rights and interests, ensure reasonable use of resources, and foster the industry's sustainable and healthy growth.² More specifically, it addresses several prominent problems faced by the Chinese tourism industry, including "zero- or negative-fare tours", designated shopping places and activities requiring additional payment, and tourist behavior. An overview of these problems and the relevant provisions will be given below.

1. Zero- or Negative-Fare Tours

One of the problems addressed by the new Tourism Law is the notorious practice of zero- or negative-fare tours, which refer to tour services sold by travel agencies at or below cost in order to attract travelers, who are later compelled to shop at designated places for commission or tip agents during their tours.³ This practice poses much harm to the industry since it distorts the normal mode of operation of travel agencies and harms the legal interests of tourists.⁴ Article 35 sets out a prohibition on this practice by stating that "[t]ravel agencies are prohibited from organizing tourism activities and luring tourists with unreasonably low prices, or getting illegitimate gains such as rebates by arranging shopping or providing tourism services that requires additional payment."⁵ Examples of "luring" tourists include: 1) using unreasonably low prices to attract travelers to join the tour, 2) concealing the fact that the prices are below the actual costs of conducting the tour, 3) concealing facts about designated shopping places and activities requiring additional payment, and 4) not informing the traveler of the fact that the travel

¹ This update is prepared by Deng Xijun, J.D. Candidate, University of Toronto, Faculty of Law.

² Lu Hui, *China Adopts Law to Regulate Tourism*, XINHUA NET (Apr. 25, 2013), http://news.xinhuanet.com/english/china/2013-04/25/c_132339516.htm.

³ *Xinhua Insight: New Law Clears Way for China's Tourism Future*, XINHUA NET (Sept. 30, 2013), http://news.xinhuanet.com/english/indepth/2013-09/30/c_132765325.htm.

⁴ *Zhonghua Renmin Gongheguo Lüyou Fa Shiyi* (中华人民共和国旅游法释义) [*Interpretation on the Tourism Law*], CHINALAWINFO, http://vip.chinalawinfo.com/newlaw2002/SLC/SLC_SiyItem.asp?Db=SyItem&Gid=838872641 (interpretation on art. 35).

⁵ *Lüyou Fa* (旅游法) [*Tourism Law*] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 25, 2013, effective Oct. 1, 2013) art. 35 (Chinalawinfo).

agency profits from his or her spending during the tour. The term “illegitimate gains” include monetary payments such as commissions and fees per person, which are extra charges requested by some travel agencies, as well as non-monetary benefits. The Interpretation of the Tourism Law defines “unreasonably low prices” as prices that are set below the costs of operation and providing services, with some exceptions for certain types of discounts after costs have been recouped.⁶

2. Designated Shopping Places and Activities Requiring Additional Payment

The new law also prohibits travel agencies from taking tourists to designated shopping places and tourism activities that require additional payment according to the second paragraph of Article 35.⁷ This practice of compelling travelers to shop at designated places or to pay for additional activities is closely associated with the practice of zero- or negative-fare tours. It adversely affects the normal operation of the market economy by creating unfair competition among the sellers since the sellers that cooperate with travel agencies are able to increase their sales more easily.⁸ Another harm posed by this kind of practice is that tour guides who earn their income mainly based on commissions tend to neglect the quality of their services and the interests of the travelers, which have caused disputes to arise between the two sides.⁹ Moreover, the designated sellers typically set prices much higher than the local market price and make payments to travel agencies out of the additional earnings. As a result, travelers are deceived as to the real market price of the goods and their interests are harmed by such actions. With the new law in place, travel agencies are prohibited from using direct or indirect methods to compel or guide travelers to shop at designated places as well as arranging activities that require additional payment.¹⁰

⁶ *Zhonghua Renmin Gongheguo Liyou Fa Shiyi* (中华人民共和国旅游法释义) [*Interpretation on the Tourism Law*], CHINALAWINFO, http://vip.chinalawinfo.com/newlaw2002/SLC/SLC_SiyItem.asp?Db=SyItem&Gid=838872641 (interpretation on art. 35).

⁷ *Liyou Fa* (旅游法) [*Tourism Law*] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 25, 2013, effective Oct. 1, 2013) art. 35 (Chinalawinfo).

⁸ *Zhonghua Renmin Gongheguo Liyou Fa Shiyi* (中华人民共和国旅游法释义) [*Interpretation on the Tourism Law*], CHINALAWINFO, http://vip.chinalawinfo.com/newlaw2002/SLC/SLC_SiyItem.asp?Db=SyItem&Gid=838872641 (interpretation on art. 35).

⁹ Fu Xiangjun (符向军), *Liyou Fa Shishi Yibanyue, Youke Daoyou Ruhe Shuangying* (旅游法实施已半月, 游客导游如何双赢) [*The Tourism Law Has Been Implemented for Half a Month, How Tourists and Tour Guides Can Both Win*], RENMI FAYUAN BAO (人民法院报) [PEOPLE'S COURT DAILY], Oct. 18, 2013, at 2.

¹⁰ *Zhonghua Renmin Gongheguo Liyou Fa Shiyi* (中华人民共和国旅游法释义) [*Interpretation on the Tourism Law*], CHINALAWINFO, http://vip.chinalawinfo.com/newlaw2002/SLC/SLC_SiyItem.asp?Db=SyItem&Gid=838872641 (interpretation on art. 35).

An exception made by Article 35 is that it does not include “circumstances where both sides have agreed or the tourists have requested such arrangements and there is no influence on the itineraries of other tourists”.¹¹ When the travel agency intends to include shopping activities or activities requiring additional payment in its tour, it must obtain the consent of the travelers by providing them with truthful information about the shopping place or activity, including the name of the shopping place, price of the activity and length of time. In addition, the travel agency must make reasonable plans for those travelers who do not wish to participate in the shopping or optional activities so that their time is not wasted.¹²

3. Regulating Tourist Behavior

In addition to regulating industry practice, certain provisions in the new Tourism Law are aimed at regulating tourist behavior, including Articles 13, 14 and 41.¹³ These articles are designed to address the growing criticism of the behavior of Chinese tourists travelling domestically and abroad due to incidents related to damaging historical relics and lack of respect for local culture and traditions.¹⁴ They set out specific requirements for tourists to “abide by the norms of civilized tourist behaviors”, respect “local customs, cultural traditions and religious beliefs”, protect the environment,¹⁵ and not harm the local people’s rights and interests when settling a dispute.¹⁶ Tour guides also have the responsibility of explaining to tourists the norms of civilized tourist behavior and prevent behavior that violates social morality.¹⁷ The norms of civilized tourist behavior refer to the guidelines and convention for tourists traveling abroad that were published by the Chinese National Tourism Administration in 2006.¹⁸ The Regulations of the People’s Republic of China on Administrative Penalties for Public Security also set out

¹¹ Lüyóu Fǎ (旅游法) [Tourism Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 25, 2013, effective Oct. 1, 2013) art. 35 (Chinalawinfo).

¹² *Zhonghua Renmin Gongheguo Lüyou Fa Shiyi* (中华人民共和国旅游法释义) [Interpretation on the Tourism Law], CHINALAWINFO, http://vip.chinalawinfo.com/newlaw2002/SLC/SLC_SiyItem.asp?Db=SyItem&Gid=838872641 (interpretation on art. 35).

¹³ Lüyóu Fǎ (旅游法) [Tourism Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 25, 2013, effective Oct. 1, 2013) art. 13, 14, 41 (Chinalawinfo).

¹⁴ Anup Kaphle, *Chinese Tourists’ Bad Manners Harming Country’s Reputation, Says Senior Official*, WASHINGTON POST (May 17, 2013), <http://www.washingtonpost.com/blogs/worldviews/wp/2013/05/17/chinese-vice-premier-says-chinese-tourists-bad-manners-is-harming-china/>.

¹⁵ Lüyóu Fǎ (旅游法) [Tourism Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 25, 2013, effective Oct. 1, 2013) art. 13 (Chinalawinfo).

¹⁶ *Id.* art. 14.

¹⁷ *Id.* art. 41.

¹⁸ *Zhonghua Renmin Gongheguo Lüyou Fa Shiyi* (中华人民共和国旅游法释义) [Interpretation on the Tourism Law], CHINALAWINFO, http://vip.chinalawinfo.com/newlaw2002/SLC/SLC_SiyItem.asp?Db=SyItem&Gid=838872641 (interpretation on art. 35).

corresponding penalties for damaging cultural or historic relics and scenic spots,¹⁹ which work in concert with the provisions in the Tourism Law in setting a standard for tourist behavior.

Other than the three major issues reviewed above, the Tourism Law also addresses many problems commonly observed such as wanton price hikes,²⁰ congestion in scenic spots,²¹ and methods of dispute settlement.²² The new law aims to address problems that have plagued the tourism industry over the years, improve the behavior of travel agencies, tourists and tour guides, and promote the healthy and sustainable growth of the tourism industry in China.

*B. Key Amendments to the Consumer Protection Law*²³

1. Introduction

On October 25, 2013, the Standing Committee of the 12th National People's Congress ("SCNPC") on its fifth meeting passed a decision to amend the country's 20-year-old consumer protection law.²⁴ The Law on the Protection of Consumer Rights and Interests ("1993 Consumer Protection Law"),²⁵ amended once previously in 2009,²⁶ is the basic law that regulates all aspects of China's consumer protection initiatives,²⁷ including the setting up of consumer advocacy groups. The amendments came as a response to the changing economic and consumer landscape, especially in the electronic commerce area.²⁸ In the Explanations on the Draft of the

¹⁹ Zhonghua Renmin Gongheguo Zhian Guanli Chufa Tiaoli (中华人民共和国治安管理处罚条例) [Regulations of People's Republic of China on Administrative Penalties for Public Security] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 5, 1986, effective Jan. 1, 1987) (Chinalawinfo).

²⁰ Zhonghua Renmin Gongheguo Lüyoufa (中华人民共和国旅游法) [Tourism Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 25, 2013, effective Oct. 1, 2013) art. 43, 44 (Chinalawinfo).

²¹ *Id.* art. 45.

²² *Id.* art. 91–110.

²³ This update is prepared by Leung Yuen-Quan, LL.M. Candidate, Tsinghua Law School.

²⁴ Quanguo Renda Changweihui guanyu Xiugai "Zhongguo Renmin Gongheguo Xiaofeizhe Quanyi Baohu Fa" de Jueding (全国人大常委会关于修改《中华人民共和国消费者权益保护法》的决定) [SCNPC's Decision to Amend the Consumers' Right Protection Law] (promulgated by Standing Comm., Nat'l. People's Cong., Oct., 25, 2013, effective Mar., 15, 2014).

²⁵ Xiaofeizhe Quanyi Baohu Fa (消费者权益保护法) [Law on Protection of Consumer Rights and Interests] (promulgated by Standing Comm., Nat'l. People's Cong., Oct., 31, 1993, effective Apr., 1, 1994) art 31 (Chinalawinfo).

²⁶ Quanguo Renda Changweihui guanyu Xiugai Bufen Falü de Jueding (全国人民代表大会常务委员会关于修改部分法律的决定) [Decision of the Standing Committee of the National People's Congress on Amending Some Laws] (promulgated by Standing Comm., Nat'l. People's Cong., Aug., 27, 2009, effective Aug., 27, 2009) (Chinalawinfo).

²⁷ A number of other specific laws also supplement the Consumer Rights Protection Law to form the consumer protection regime in China. They include the Product Safety Law and Food Safety Law.

²⁸ Quanguo Renda Changweihui guanyu "Zhongguo Renmin Gongheguo Xiaofeizhe Quanyi Baohu Fa (Cao'an)" de Shuoming (全国人大常委会关于《中华人民共和国消费者权益保护法(草案)》的说

Consumer Protection Law (“Explanatory Note”), the Working Committee of the SCNPC Legislative Affairs explains the goals the reform initiative wishes to achieve:

- i) To strengthen consumer’s rights protection with consideration as to how the laws operate in practice;
- ii) To address and resolve issues that arise from changes in the consumer landscape;
- iii) To increase consumer confidence while at the same time promote reasonable spending in the interests of resources preservation and environmental protection;
- iv) To increase the powers of relevant regulatory bodies and assist consumer rights advocacy groups.²⁹

After three readings by the SCNPC, over 31 changes were made to the original 63 articles of the Consumer Protection Law of 1993. The amendments will take effect on World Consumer Rights Day, March 15, 2014.

2. Filling Gaps in the Consumer Protection Law

(a) Explicit Right to Protection of Personal Information

The amended Consumer Protection Law will mandate protection for personal data. The concept is not entirely new. The Standing Committee of the 11th National People’s Congress in its 30th meeting passed a decision to strengthen the protection of data transmitted on the internet.³⁰ The amendments update the law to reflect China’s continual support for personal data protection.

Article 14 of the 1993 Consumer Protection Law stipulates that the dignity and customs of consumers shall be respected during all times when consumers make a purchase, use a product or receive a service. According to the Decision, Article 14 will be amended to add an additional right for consumers, namely, the right to protection of personal data. Thus, the new Article 14 will read “Consumers, at the time of purchasing, using goods, or receiving services, enjoy a

明) [Explanations of the Draft Consumer Rights Protection Law] (promulgated by Standing Comm., Nat’l. People’s Cong., Apr., 23, 2013). (Chinalawinfo).

²⁹ *Id.* para. 3.

³⁰ Quanguo Renda Changweihui guanyu Jiaqiang Wangluo Xinxin Baohu de Jueding (全国人大常委会关于加强网络信息保护的決定) [Decision of the Standing Committee of the National People’s Congress on Strengthening Network Information Protection] (promulgated by Standing Comm., Nat’l. People’s Cong., Dec., 28, 2012, effective Dec., 28, 2012) (Chinalawinfo).

right to be respected for their dignity and customs and enjoy a right to receive legitimate protection for their personal data”³¹.

The amendment makes clear that data protection is a consumer right. The legislators aim to prevent business entities from misusing consumers’ personal data collected in the course of their business. Misuse of information may include selling or revealing consumers’ information to third parties or abusing communication information collected by using it as a channel for advertising or promoting products. The right to protection of personal data encapsulates consumers’ name rights, portrait rights, and privacy rights. As a guiding principle, the collection of personal data must be legitimate, proper and necessary. Businesses are expected to give prior notice of any attempts to collect personal data explaining reasons for collection and how the data will be used. Consent must be acquired before the business collects the data. After collection businesses and their employees must take necessary steps to keep the information confidential. Businesses are expected to give prior notice of any attempts to collect personal data, explain to consumers this requirement and how the data will be used, and acquire consent before collecting the information. After collection, businesses and their employees must take necessary steps to keep the information confidential.³² These responsibilities are spelled out in Article 29 of the 2013 Consumer Protection Law.

(b) Mandatory Seven Day Refund Policy for Substandard Goods

The Consumer Protection Law governs the sale of necessities in the form of goods and services.³³ According to the Explanatory Note, because necessities directly affect the daily lives of all consumers, one of the priorities of the legislators in drafting the Consumer Protection Law was to encourage better quality products and services, especially since more than half of all consumer complaints to the Commercial Bureau and the Consumer Advocacy Group concerned the quality of products or services.³⁴

³¹ Xiaofeizhe Quanyi Baohu Fa (消费者权益保护法) [Law on Protection of Consumer Rights and Interests] (promulgated by Standing Comm., Nat’l. People’s Cong., Oct., 31, 1993, effective Apr., 1, 1994) art 31 (Chinalawinfo).

³² Quanguo Renda Changweihui guanyu “Zhongguo Renmin Gongheguo Xiaofeizhe Quanyi Baohu Fa (Cao’an)” de Shuoming (全国人大常委会关于《中华人民共和国消费者权益保护法(草案)》的说明) [Explanations of the Draft Consumer Rights Protection Law] (promulgated by Standing Comm., Nat’l. People’s Cong., Apr., 23, 2013) para.5 (Chinalawinfo).

³³ Xiaofeizhe Quanyi Baohu Fa (消费者权益保护法) [Law on Protection of Consumer Rights and Interests] (promulgated by Standing Comm., Nat’l. People’s Cong., Oct., 31, 1993, effective Apr., 1, 1994) art 31 (Chinalawinfo).

³⁴ Quanguo Renda Changweihui guanyu “Zhongguo Renmin Gongheguo Xiaofeizhe Quanyi Baohu Fa (Cao’an)” de Shuoming (全国人大常委会关于《中华人民共和国消费者权益保护法(草案)》的说明) [Explanations of the Draft Consumer’s Rights Protection Law] (promulgated by Standing Comm., Nat’l. People’s Cong., Apr., 23, 2013) para. 6 (Chinalawinfo).

Articles 23 and 45 of the old legislation placed the burden on the provider to fulfill a consumer's request to repair, exchange, or refund products in the manner provided by the parties' agreement or the governing laws.³⁵ According to the same provisions, the provider had to respond to the request in a timely manner and not unreasonably refuse it. If the goods were not in a satisfactory condition after two attempts, the provider was required to replace or refund the goods. Article 45 of the previous legislation further stipulated that the delivery costs associated with repair, exchange or refund should be borne by the goods provider.

Under the new legislation, Article 24 grants consumers a default right to return any sub-standard goods within seven days of coming into possession of them. After the seven day period, the consumer may still enforce any contractual right to return the goods. If the contract itself does not provide a right to have the item returned after seven days, the consumer will still have a right to have the item repaired or exchanged by the provider.³⁶ Any costs, for example delivery costs, associated with repair, exchange or refund, are to be borne by business operators.

(c) Higher Compensation for Losses Arising from Fraudulent Activities

Dishonest business practices in China are thought to have caused direct and indirect losses amounting to RMB 600 billion.³⁷ In fortunate cases, the harm is merely monetary loss, but in some unfortunate cases, lives are lost.³⁸ To remedy this problem as well as regain consumer confidence in local products, the solution the legislators have chosen is one of deterrence—increasing the penalty for defrauding consumers.

According to the current legislation, for any fraudulent activities discovered in the course of dealings with consumers, the business

³⁵ Xiaofeizhe Quanyi Baohu Fa (消费者权益保护法) [Law on Protection of Consumer Rights and Interests] (promulgated by Standing Comm., Nat'l. People's Cong., Oct., 31, 1993, effective Apr., 1, 1994) art 31 (Chinalawinfo).

³⁶ *Id.*

³⁷ Zhang Weiwei (张维伟), *Xiaofa Xiugai "Ershen," Jifa Shehui Chengxin Zhengnengliang* (消法修改“二审”，激发社会诚信正能量) [Second Reading of the Draft of Consumer Right Protection Law: Promoting Honest Practice], 18 ZHONGGUO RENDA (中国人大) [NAT'L. PEOPLE'S CONG.] 15 (2013). http://www.npc.gov.cn/npc/zgrdzz/2013-11/06/content_1812753.htm.

³⁸ Quanguo Renda Changweihui guanyu “Zhongguo Renmin Gongheguo Xiaofeizhe Quanyi Baohu Fa (Cao'an)” de Shuoming (全国人大常委会关于《中华人民共和国消费者权益保护法(草案)》的说明) [Explanations of the Draft Consumer's Rights Protection Law] (promulgated by Standing Comm., Nat'l. People's Cong., Apr., 23, 2013) para. 7 (Chinalawinfo).

operator must compensate the consumer by paying two times the price paid by the consumer for the goods or services.³⁹

Under the new legislation, Article 55 provides two different compensation standards. The first sub-section is similar to the original provision, requiring the business operator to compensate by paying an amount tied to the price of the goods or services provided. In the new provision, the amount will be three times the price paid or RMB 500, whichever is higher.⁴⁰ The second sub-section of the new Article 55 is a new addition. Its scope is limited to situations where goods or services have caused death or harm to the health of the users. Under the provision, the harmed party has the right to require any business operator who knowingly provides substandard goods or services to pay punitive damages of up to two times the actual losses suffered.⁴¹

Although the new provisions impose stricter penalties, objections have been raised by some SCNPC members who believe a ceiling limit on damages is inadequate in many cases where consumers suffer losses much higher than the price paid for the goods and services, especially in cases of injuries and deaths.⁴²

3. Heightening Obligations and Responsibilities of Business Operators

(a) Clarifying the Obligation to Recall Defective Products

The 2013 Consumer Protection Law has clarified and heightened the business operators' obligations when their goods or services provided are defective.⁴³

Under Article 18(2) of the old legislation, business operators were only required to notify relevant administrative departments and take preventative measures to protect consumers from harm when serious

³⁹ Xiaofeizhe Quanyi Baohu Fa (消费者权益保护法) [Law on Protection of Consumer Rights and Interests] (promulgated by Standing Comm., Nat'l. People's Cong., Oct., 31, 1993, effective Apr., 1, 1994) art. 49 (Chinalawinfo).

⁴⁰ *Id.* art. 55.

⁴¹ This new subsection supplements the new Article 49 that governs a business operator's liabilities when its goods sold or services provided have harmed the health or caused the death of a person. The new Article 49 combines of the old Article 41 and 42 which basically required the business operator to cover all costs and expenses that resulted from the harm caused by the goods or services provided.

⁴² Zhang Baoshan (张宝山), *Xiaofu Xiugai Ershen, Yancheng Jingying Qizha* (消法修改二审：“严惩经营欺诈”) [*Second Reading of the Draft Consumer's Right Protection Law: Tougher Penalties for Fraudulent Business Operations*], 18 ZHONGGUO RENDA (中国人大) [NAT'L. PEOPLE'S CONG.] 24-25 (2013), available at http://www.npc.gov.cn/npc/zgrdzz/2013-11/06/content_1812763.htm.

⁴³ Quanguo Renda Changweihui guanyu “Zhongguo Renmin Gongheguo Xiaofeizhe Quanyi Baohu Fa (Cao'an)” de Shuoming (全国人大常委会关于《中华人民共和国消费者权益保护法(草案)》的说明) [Explanations of the Draft Consumer's Rights Protection Law] (promulgated by Standing Comm., Nat'l. People's Cong., Apr., 23, 2013) para. 9 (Chinalawinfo).

defects were discovered by business operators that could harm persons or property.⁴⁴

The amendments make three changes to Article 18(2).⁴⁵ First, they omit the word “serious” before defects. Second, they require the business operator to notify the consumers as well as the relevant administrative department. Third, they clarify the measures that the business operator must take. Accordingly, when the situation arises, the business operator must stop production and sales of the goods or services, issue warnings, initiate recalls, and take other necessary preventive measures.

The removal of the word “serious” signifies the legislators’ intention to ensure business operators recall defective products once defects surface. However, this may create problems in practice as “defects” can cover a wide range of problems where the degree of seriousness varies greatly. It remains to be seen whether courts will adopt a strict interpretation of this provision whereby any business operator who fails to recall its harm-inducing products will be held in breach of this provision.

(b) Clarifying the Burden of Proof on Business Operators

Concerns have been raised about the difficulties consumers face when required under the law to prove that goods or services are defective. To address this issue, the new Consumer Protection Law will reverse the burden of proof.⁴⁶

The original legislation only required business operators to assure the quality of goods and services provided. A product or service was considered standard quality if when properly used they bore their expected characteristics, capacities, functions and durability, except when defects were already known to consumers at the time of purchase. When a consumer wished to rely on this provision to claim damages, the burden of proof was placed on the consumer. This raised difficulties, especially when special technical knowledge was required to show the existence of defects.

⁴⁴ Xiaofeizhe Quanyi Baohu Fa (消费者权益保护法) [Law on Protection of Consumer Rights and Interests] (promulgated by Standing Comm., Nat’l. People’s Cong., Oct., 31, 1993, effective Apr., 1, 1994) art. 18, para. 2 (Chinalawinfo).

⁴⁵ Xiaofeizhe Quanyi Baohu Fa (消费者权益保护法) [Law on Protection of Consumer Rights and Interests] (promulgated by Standing Comm., Nat’l. People’s Cong., Oct., 31, 1993, effective Apr., 1, 1994) art. 19 (Chinalawinfo).

⁴⁶ Quanguo Renda Changweihui guanyu “Zhongguo Renmin Gongheguo Xiaofeizhe Quanyi Baohu Fa (Cao’an)” de Shuoming (全国人大常委会关于《中华人民共和国消费者权益保护法(草案)》的说明) [Explanations of the Draft Consumer’s Rights Protection Law] (promulgated by Standing Comm., Nat’l. People’s Cong., Apr., 23, 2013) para. 10 (Chinalawinfo).

⁴⁶ Quanguo Renda Changweihui guanyu Xiugai “Zhongguo Renmin Gongheguo Xiaofeizhe Quanyi Baohu Fa” de Jueding (全国人大常委会关于修改《中华人民共和国消费者权益保护法》的决定) [SCNPC’s Decision to Amend the Consumers’ Right Protection Law] (promulgated by Standing Comm., Nat’l. People’s Cong., Oct., 25, 2013, effective Mar., 15, 2014) para. 7 (Chinalawinfo).

Article 23 paragraph 3 of the new legislation now places the burden of proof on the business operator for certain goods. Within 6 months of purchasing mobile vehicles, computers, televisions, air-conditioners, washing machines and other durable goods, consumers will benefit from a reversed burden of proof. This provision will also apply to consumers of decorations or refurbishment services.⁴⁷

(c) Joint Liabilities for Related Businesses

The amendments also aim to hold parties responsible for losses caused by misinformation, especially when the information relates to health products.

Under the old Article 39 advertisers were not liable for misleading information relating to pharmaceutical products. However, when the real name and address of the manufacturer cannot be provided, the advertiser may be held liable.

Under the new Consumer Protection Law, not only will advertisers who produce false advertisements be held responsible, operators of media in which the advertisements are shown or the false information is presented will also be held responsible when the name, address and an effective contact method cannot be provided.

In addition, under the new Article 39(2)-(3) of the Consumer Protection Law, anyone who conveys false information relating to a health product that causes harm to a consumer will be held jointly responsible with the product manufacturer. This will include advertisers, operators of the media where the advertisement is shown, any organizations and any persons.

4. Regulating E-Commerce and Other Forms of Retail

Consumers are now able to acquire goods or services from a broader range of sources other than the traditional “brick and mortar” stores. Without being able to see the product, consumers rely heavily on words or pictures, and face difficulties in ascertaining the authenticity of products. Consumers are particularly prone to the influences from improper advertising. Legislators aim to protect consumers through granting consumers a right to know, a right to choose and an enhanced right to seek damages.

The new legislation places a burden on business operators who sell their products or offer their services through the internet, television, telephone, mail or other means and provide consumers with information about their operating address, contact information,

⁴⁷ Xiaofeizhe Quanyi Baohu Fa (消费者权益保护法) [Law on Protection of Consumer Rights and Interests] (promulgated by Standing Comm., Nat'l. People's Cong., Oct., 31, 1993, effective Apr., 1, 1994) art. 23(3) (Chinalawinfo).

quantity and quality of products and services, prices and other expenses, time of delivery, safety warnings, service availability after purchase, and civil responsibility.⁴⁸

Also, since prior examination of goods may be unavailable, consumers are granted a right to return non-perishable goods regardless of their quality within seven days of receipt (a cooling-off period). The new legislation further provides that business operators must refund money paid for the goods within seven days of receiving the returned goods.

The new legislation further protects consumers of e-retailers by making internet service providers who hosts retailer websites responsible if the retailers abscond or when the internet service provider knows or should have known about the retailers' unlawful activities. When the questionable business operator no longer employs an internet service provider, a consumer has no recourse, since the real identity and contact information of the business operator and its responsible persons cannot be obtained. The new legislation offers consumers better protection by making the internet service provider liable for the consumers' losses in such scenarios.⁴⁹ In addition, the internet service provider will also be held jointly liable if the internet service provider should have known or ought to have known that the distributor or service provider is infringing on consumers' right while using its services.⁵⁰

⁴⁸ Quanguo Renda Changweihui guanyu "Zhongguo Renmin Gongheguo Xiaofeizhe Quanyi Baohu Fa (Cao'an)" de Shuoming (全国人大常委会关于《中华人民共和国消费者权益保护法(草案)》的说明) [Explanations of the Draft Consumer's Rights Protection Law] (promulgated by Standing Comm., Nat'l. People's Cong., Apr., 23, 2013) para. 13 (Chinalawinfo); Quanguo Renda Changweihui guanyu Xiugai "Zhongguo Renmin Gongheguo Xiaofeizhe Quanyi Baohu Fa" de Jueding (全国人大常委会关于修改《中华人民共和国消费者权益保护法》的决定) [SCNPC's Decision to Amend the Consumers' Rights Protection Law] (promulgated by Standing Comm., Nat'l. People's Cong., Oct., 25, 2013, effective Mar., 15, 2014) para. 11 (Chinalawinfo); Xiaofeizhe Quanyi Baohu Fa (消费者权益保护法) [Law on Protection of Consumer Rights and Interests] (promulgated by Standing Comm., Nat'l. People's Cong., Oct., 31, 1993, effective Apr., 1, 1994) art. 18 (Chinalawinfo).

⁴⁹ Quanguo Renda Changweihui guanyu "Zhongguo Renmin Gongheguo Xiaofeizhe Quanyi Baohu Fa (Cao'an)" de Shuoming (全国人大常委会关于《中华人民共和国消费者权益保护法(草案)》的说明) [Explanations of the Draft Consumer's Rights Protection Law] (promulgated by Standing Comm., Nat'l. People's Cong., Apr., 23, 2013) para. 15. (Chinalawinfo); Quanguo Renda Changweihui guanyu Xiugai "Zhongguo Renmin Gongheguo Xiaofeizhe Quanyi Baohu Fa" de Jueding (全国人大常委会关于修改《中华人民共和国消费者权益保护法》的决定) [SCNPC's Decision to Amend the Consumer Rights Protection Law] (promulgated by Standing Comm., Nat'l. People's Cong., Oct., 25, 2013, effective Mar., 15, 2014) para. 17 (Chinalawinfo); Xiaofeizhe Quanyi Baohu Fa (消费者权益保护法) [Law on Protection of Consumer Rights and Interests] (promulgated by Standing Comm., Nat'l. People's Cong., Oct., 31, 1993, effective Apr., 1, 1994) art. 44(1) (Chinalawinfo).

⁵⁰ Xiaofeizhe Quanyi Baohu Fa (消费者权益保护法) [Law on Protection of Consumer Rights and Interests] (promulgated by Standing Comm., Nat'l. People's Cong., Oct., 31, 1993, effective Apr., 1, 1994) art. 44(2) (Chinalawinfo).

5. Clarifying the Role of Consumers' Associations

Since the 1993 Consumer Protection Law came into effect, the China Consumers' Association has received 120,089,766 complaints and helped consumers recoup losses amounting to RMB 11,263,680,000.⁵¹ Despite its important function in the overall protection of consumer rights, the China Consumers' Association is said to be going through an "identity crisis" in which their proper legal status has not been clearly defined.⁵² The China Consumers' Association fits the definition of a social organization as it is a non-profit association,⁵³ but it differs from a social organization in that it is also a statutory body.⁵⁴ If it is considered a social organization, the Association must be responsible for its own funding. This poses a serious problem for the Association as it is not a member-based organization that can collect membership fees.⁵⁵

Although the amendments do not provide a clear solution to the problem, changes are made to Article 31 (the new Article 36) whereby consumer associations are recognized as "social associations" (社会组织) instead of "social organizations" (社会团体). Under the new legislation, local governments will also have the duty to provide funding for the association's necessary expenses as opposed to the mere duty to provide "support" under the old legislation.⁵⁶

Another notable change is the addition of the association's power to initiate proceedings on behalf of consumers. Article 32 (the new Article 37) has been amended to specifically refer to the functions of consumer associations as the "functions in public interests". This clarification of the nature of an association's functions will allow it to initiate public interest litigation on behalf of a collective group of consumers whose interests have been harmed by particular persons or business entities under the new Article 37(7).

⁵¹ Chang Zhipeng (常志鹏) & Cui Qingxin (崔清新), *20 Nian 20 Jianshi - Xiaofeizhe Quanyi Baohufa Shishi Yilai Weiquan Dashiji* (20年20件事——消费者权益保护法实施以来维权大事记) [20 Years 20 Events—The Major Events since the Promulgation of the Consumer Protection Law], XINHUA NET (Apr., 23, 2013), http://news.xinhuanet.com/politics/2013-04/23/c_115507721.htm.

⁵² Zhang Baoshan (张宝山), *Xiaofeizhe Xiehui: Youwang Zouchu Dingwei Zhi Kun* (消费者协会: 有望走出定位之困) [Consumers Associations: Solving Their Identity Crisis] 18 ZHONGGUO RENDA (中国人大) [NAT'L. PEOPLE'S CONG.] 20, 20–21 (2013).

⁵³ Shehui Tuanti Dengji Guanli Tiaoli (社会团体登记管理条例) [Regulations on Registration and Administration of Social Organizations] (promulgated by St. Council, Sep., 25, 1998, effective Oct., 25, 1998) art. 2 (Chinalawinfo).

⁵⁴ Xiaofeizhe Quanyi Baohu Fa (消费者权益保护法) [Law on Protection of Consumer Rights and Interests] (promulgated by Standing Comm., Nat'l. People's Cong., Oct., 31, 1993, effective Apr., 1, 1994) art. 31 (Chinalawinfo).

⁵⁵ *Id.*

⁵⁶ Xiaofeizhe Quanyi Baohu Fa (消费者权益保护法) [Law on Protection of Consumer Rights and Interests] (promulgated by Standing Comm., Nat'l. People's Cong., Oct., 31, 1993, effective Apr., 1, 1994) art. 37(2) (Chinalawinfo).

6. Conclusion

The changes presented represent the major areas of change in the Consumer Protection Law. Under the new legislation, consumers are afforded greater rights and protection. In areas where consumers are vulnerable to improper business tactics, the legislation has increased the penalties to deter wrongdoers and broadened the scope of entities to be held responsible, namely by including advertising companies and internet service providers. At first sight, it may be unfair to hold third parties responsible. However, this may be justified as third parties, often for-profit companies, have greater resources and access to information that will allow them to locate the responsible retailers. All in all, the 2013 changes are a welcome sign for consumers. However since the provisions are drafted in general terms, explanatory notes and judicial interpretations are likely to arise in the near future to offer clarifications.

*C. Amendments to China's Trademark Law: Protecting De Facto Trademark Holders and Combatting Trademark Squatting*⁵⁷

1. Introduction

The new People's Republic of China Trademark Law ("Trademark Law") will come into effect on May 1, 2014. Some ground-breaking measures, which were previously introduced by judicial interpretations, were incorporated into the final draft of the Trademark Law.

The key amendments are as follows:

- i) The good faith doctrine was introduced to ensure trademark applications are made honestly and with integrity.⁵⁸
- ii) The issue of trademark squatting was addressed.⁵⁹
- iii) Protection for well-known trademark holders was clarified.⁶⁰
- iv) New obligations and responsibilities for trademark agencies were imposed, especially with respect to facilitating bad faith registrations.⁶¹ The objectively reasonable standard was adopted to determine whether a trademark agency is liable for its misconduct.
- v) Procedures for trademark applications and oppositions were updated. The updated procedures provide greater deterrence for oppositions in bad faith intended to harm the interests of *de facto* trademark holders.⁶²

⁵⁷ This update is prepared by Ng Ka-Chun, B.B.A. (Hons), J.D., PCLL, City University of Hong Kong; LL.M. Candidate, Tsinghua Law School.

⁵⁸ Shangbiao Fa (商标法) [Trademark Law] (promulgated by Nat'l People's Cong., Aug. 30, 2013, effective May. 1, 2014) art. 7 (Chinalawinfo).

⁵⁹ *Id.* art. 15.

⁶⁰ *Id.* art. 13, 14.

⁶¹ *Id.* art. 19.

⁶² *Id.* art. 33.

vi) Enforcement of anti-trademark infringement measures was strengthened.⁶³

2. The Good Faith Doctrine

Article 7 states that a person applying for registration or use of a trademark should comply with the doctrine of good faith. No further explanation and examples have been given on what constitutes good faith.

The introduction of the doctrine of good faith is welcomed as it enhances the standard to meet when applying for registration.⁶⁴ A potential concern is that the broadness and abstractness of the concept might trigger difficulties in its implementation.⁶⁵

3. Preventing Trademark Squatting

The new Trademark Law has implemented measures to combat trademark squatting. In conjunction with introducing the doctrine of good faith, the new Trademark Law stipulates situations where trademark applications will be considered *mala fides*.

The Trademark Law indicates that a trademark registration application will be rejected if the application is identical or similar to the same or similar goods of another trademark where the other trademark has been used earlier though not yet registered.⁶⁶ The provision tries to combat pre-emptive registration that infringes the *de facto* trademark holder's genuine right. Furthermore bad faith can be inferred from previous dealings. The law further stipulates that an application made without the consent of an existing trademark holder will be considered in bad faith if the applicant has a contractual or business relationship with that trademark holder.⁶⁷ Knowledge of the existing trademark can be actual or constructive.⁶⁸ Therefore simply relying on the defense of "without actual notice" will not help a *mala fide* applicant to defend against an allegation of bad faith.

The bad faith provision is ground-breaking because it specifically addresses the most common trademark squatting behavior. Unfortunately, it does not address whether a trademark registration application made by an Original Equipment Manufacturer ("OEM") would constitute bad faith. An OEM is a company whose products are used as components in another company's product. OEMs are

⁶³ *Id.* art. 63.

⁶⁴ KENNETH A. CUTSHAW ET. AL., CORPORATE COUNSEL'S GUIDE TO DOING BUSINESS IN CHINA 595 (2010).

⁶⁵ *Id.* at 603.

⁶⁶ Shangbiao Fa (商标法) [Trademark Law] (promulgated by Nat'l People's Cong., Aug. 30, 2013, effective May. 1, 2014) art. 15 (1) (Chinalawinfo).

⁶⁷ *Id.* art. 15(2).

⁶⁸ *Id.*

currently allowed to register a trademark despite a close relationship with the company using the OEM's components.

Under the current version of the law, in order to be protected, a trademark holder must continuously use a trademark for three consecutive years. Without fulfilling this requirement, the law will not provide protection to an unused but registered trademark.⁶⁹ Trademark holders often outsource their production to an OEM. Under the definition provided by the law, even if an OEM produces a product outsourced by a trademark holder, it will not be regarded as "usage".⁷⁰ Without proving a trademark has been used since registration, even if an OEM registers the trademark, the court will not consider its application as in bad faith. As a result, the trademark holder will not be able to rely on Article 64 of the Chinese Trademark Law to claim damages as the condition of "providing evidence of its actual use of the registered trademark in the last three years" has not been fulfilled.⁷¹

4. Protection of Well-Known Trademarks

Article 13(1) of the new Trademark Law states that a well-known trademark holder may file for well-known trademark protection if the holder believes there is infringing behavior that harms its right.⁷² The law also provides subjective elements to determine what brands should be categorized as well-known trademarks, including: the reputation of the trademark to the relevant public;⁷³ duration of the use of the trademark;⁷⁴ duration, extent, and geographical area of any publicity of the trademark;⁷⁵ and records of protection as a well-known trademark.⁷⁶ The list is not an exhaustive one and courts may exercise discretion to consider other factors.⁷⁷

Well-known trademark status provides additional protections. For instance, pursuant to Article 45, if the registration is acquired in bad faith, a well-known trademark holder shall not be subject to the five year time limit from the date of trademark registration to claim damages that ordinary trademark holders are subjected to.⁷⁸

However, the new Trademark Law does not specify whether well-known trademark protection applies to the name of an enterprise. References to the use of a well-known trademark as an

⁶⁹ *Id.* art. 49.

⁷⁰ *Id.*

⁷¹ *Id.* art. 64(3).

⁷² *Id.* art. 13.

⁷³ *Id.* art.14(1).

⁷⁴ *Id.* art. 14(2).

⁷⁵ *Id.* art. 14(3).

⁷⁶ *Id.* art. 14(4).

⁷⁷ *Id.* art. 14(5).

⁷⁸ *Id.* art. 45.

enterprise name were deliberately deleted from the December draft of the new Trademark Law.⁷⁹

5. New Good Faith Obligations for Trademark Registration Agencies

The new Trademark Law imposes legal liability on trademark agencies that assist bad faith trademark applications. The good faith requirement has been extended to trademark agencies.⁸⁰ Article 19 of the new Trademark Law provides that trademark agencies shall comply with the principles of honesty and integrity which includes the duty of confidentiality towards clients.⁸¹ Furthermore, agents must now advise their clients that trademark applications may be denied according to the law.⁸²

The Trademark Law now imposes an objective knowledge requirement on trademark agencies. When the agency knows or should know that the client's application is in bad faith, the new law states that the trademark agency should not facilitate the registration.⁸³ Trademark agencies shall not assist any bad-faith registration by illicit means of a trademark with a certain reputation enjoyed by another party.⁸⁴ Finally, trademark agencies shall not file trademark applications with forged or altered documents, seals or signatures, or forge or alter documents, seals or signatures themselves.⁸⁵

In cases of violations, the State Administrative Department for Industry and Commerce may order the trademark agency to rectify the harm, give a warning, or impose a fine of RMB 10,000 to 100,000. A person who is personally responsible for the violation can be fined RMB 5,000 to 50,000.⁸⁶ Criminal investigations can be initiated when applicable.

6. The New Invalidation Process

The opposition process has been reformed to streamline the opposition procedure and to curb "unmeritorious opposition". The new Trademark Law states that only a prior right holder or an

⁷⁹ *Shangbiao Fa Xiuzheng An Cao'an Tiaowen* (商标法修正案(草案) 条文) [*The Forth Draft Amendments to China's Trademark Law*], NAT'L PEOPLE'S CONG. (Dec. 28, 2012), http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2012-12/28/content_1749326.htm.

⁸⁰ *Shangbiao Fa* (商标法) [*Trademark Law*] (promulgated by Nat'l People's Cong., Aug. 30, 2013, effective May 1, 2014) art. 19(1) (Chinalawinfo).

⁸¹ *Id.*

⁸² *Id.* art. 19(2).

⁸³ *Id.* art. 19(3).

⁸⁴ *Id.* art. 32.

⁸⁵ *Id.* art. 68.

⁸⁶ *Id.*

interested party may file an opposition with the trademark office.⁸⁷ Where an opposition is filed against a trademark which has been preliminarily approved and published, the trademark office shall make the decision to approve or disapprove the registration within 12 months.⁸⁸

If the opposing party does not agree with the decision to approve the registration, instead of applying for an appeal, the law stipulates the party should proceed with a new invalidation process. The opposing party can petition to the Trademark Appeal Board to declare invalidation of a registered trademark.⁸⁹

When the Trademark Appeal Board finds that the trademark registration was acquired by fraud or any other illicit means,⁹⁰ the Trademark Office shall publish that the registered trademarks are declared invalid and the right of exclusive use shall be rendered void.⁹¹ However, decisions of the Trademark Appeal Board do not have retrospective effect, so the law does not prohibit use of identical or similar marks during the period of opposition. Nevertheless, the trademark registrant must compensate the trademark holder for losses caused by a bad faith registration.⁹²

A prior rights holder or interested party may petition the Trademark Appeal Board for a declaration of invalidation within five years from the date of trademark registration.⁹³ However the statutory limit does not apply to trademarks which are similar or identical to well-known trademarks acquired in bad faith.

7. Conclusion

The reform of the Trademark Law is a welcome one as it has addressed many issues and problems which were embodied in the old Trademark Law. More protection has been provided to well-known trademark holders by allowing them to file for protection under the new statutory framework. Well-known trademark holders are also not restricted by the statutory time limit to file their complaints.

⁸⁷ *Id.* art. 33.

⁸⁸ *Id.* art. 35.

⁸⁹ *Id.* art. 45.

⁹⁰ *Id.* art. 44.

⁹¹ *Id.* art. 47(1).

⁹² *Id.* art. 47(2).

⁹³ *Id.* art. 45(1).

II. JUDICIAL INTERPRETATIONS

*A. Interpretation of Several Issues Concerning the Application of Law in the Handling of Criminal Cases on the Use of Information Networks to Commit Defamation and Other Similar Cases*⁹⁴

On September 6, 2013, the Supreme People's Court and the Supreme People's Procuratorate jointly promulgated the Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Application of Law in the Handling of Criminal Cases of the Use of Information Networks to Commit Defamation and Other Similar Cases⁹⁵ (the "Interpretation").

This article will discuss: (i) the background of the Interpretation; (ii) the Interpretation's main articles; and (iii) its application in practice.

1. Background

With the rapid development and spreading of information technology, the Internet has become a new marketplace of ideas in China. Sina Weibo, the largest micro-blogging site in China, has attracted 53.6 million daily active users up till June this year.⁹⁶ With the emergence of social networking sites like Sina Weibo, the Internet in China has developed new capabilities to supervise the government and facilitate further reforms by providing a platform to air diversified opinions and cries for a more developed and just society.

However, the social network is not without its faults. The 'Market Place of Ideas' theory is based on the assumption that free individuals are discerning enough to sift through competing proposals in an open environment of deliberation and exchange, allowing truth, or the best possible results, to be realized.⁹⁷ But in reality, online rumors and defamation can always be found in the

⁹⁴ This update is prepared by Huang Minda, LL.B. Candidate, Tsinghua Law School.

⁹⁵ Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan guanyu Banli Liyong Wangluo Xinxishi Shishi Feibang Deng Xingshi Anjian Shiyong Falü Ruogan Wenti de Jieshi (最高人民法院、最高人民检察院关于办理利用信息网络实施诽谤等刑事案件适用法律若干问题的解释) [Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Application of Law in the Handling of Criminal Cases on the Use of Information Networks to Commit Defamation and Other Similar Criminal Offences] (promulgated by Sup. People's Ct. & Sup. People's Proc. Sep. 6, 2013, effective Sep. 10, 2013) (Chinalawinfo).

⁹⁶ 2012-2013 Weibo Fazhan Yanjiu Baogao Chulu (2012-2013年微博发展研究报告出炉) [Microblogging Development Research Report 2012-2013], ISC.ORG (June 17, 2013), <http://www.isc.org.cn/zxx/ywsd/listinfo-26416.html>.

⁹⁷ Brain K. Pinaire, *Marketplace of Ideas Theory*, AMERICAN CIVIL LIBERTIES (July 29, 2012), <http://uscivil liberties.org/themes/4099-marketplace-of-ideas-theory.html?newsid=4099&seourl=marketplace-of-ideas-theory&seocat=themes>.

Internet to distort truth and reality. For instance, the infamous Guo Meimei scandal, which seriously tainted the reputation of the Red Cross in China and almost resulted in the collapse of China's official charity system, was proved to be manufactured by the company of rumor-monger Qin Huohuo.⁹⁸ According to a survey by the Chinese Academy of Social Science, 80.4% of people surveyed said that online rumors and defamation is a serious problem and 93.6% found it necessary to punish rumor-mongers.⁹⁹ But previous legislation has failed to keep up with the digital age. Water army¹⁰⁰ companies that manufactured most online rumors could operate openly as long as they kept their distance from sensitive political issues¹⁰¹ and slanderers on Weibo often escaped criminal penalties as the Law did not provide for online crimes.

2. Main Articles

This section will discuss the four acts criminalized by the Interpretation: online defamation, cursing and intimidating, extortion applied in cyberspace and illegal business online. According to Article 10, the Interpretation covers not only the use of the Internet, but also television, fixed-line telephones and mobile devices, all of which were not previously governed by China's Criminal Law.

(a) Online Defamation

Article 1 of the Interpretation stipulates that the act of concocting slander and spreading it or instigating others to spread it online, or altering original information into the form of online slander and spreading it or instigating others to spread it online, shall be identified as defamation. Under Article 246 of the Criminal Law, defamation is a criminal offence and perpetrators may be punished by up to three years' imprisonment if the defamation leads to grave consequences or undermines social order or state interests.¹⁰² As defamation does not explicitly exclude online slander, Article 1 of the Interpretation is compatible with the Criminal Law.

⁹⁸ Chen Jia, *Rich 20-Year-Old's Antics Damage Red Cross Name*, CHINADAILY (June 24, 2011), http://www.chinadaily.com.cn/cndy/2011-06/24/content_12764702.htm.

⁹⁹ *Jiucheng Ren Renwei You Biyao Zhengzhi Wangluo Yaoyan* (九成人认为有必要整治网络谣言) [More than Ninety Percent of People Find It Necessary to Punish Online Rumors], PEOPLE (Nov. 19, 2013), <http://media.people.com.cn/n/2013/1119/c14677-23593162.html>.

¹⁰⁰ A "water army" is Chinese term for a group of ghostwriters paid to post online comments with particular content in order to influence public opinion. See *Undercover Researchers Expose Chinese Internet Water Army*, TECHNOLOGYREVIEW.COM (Dec. 5, 2013), <http://www.technologyreview.com/view/426174/undercover-researchers-expose-chinese-internet-water-army/>.

¹⁰¹ Neil Thomas, *China's Two Greatest Internet Rumor Mongers and "Black PR" Philanderers Arrested*, DANWEI.COM, (Aug. 22, 2013), <http://www.danwei.com/chinas-two-greatest-internet-rumor-mongers-and-black-pr-philanderers-arrested/>.

¹⁰² Xing Fa (刑法) [Criminal Law] (promulgated by Nat'l People's Cong., Jul. 1, 1979, effective Jan. 1, 1980) (2011) art. 246 (Chinalawinfo).

A key improvement made by the Interpretation is its clarification of which circumstances should be considered grave consequences concerning online slander, an issue which the present Criminal Law fails to address. Article 2 clarifies that a “grave case” of online slander may be identified under any of these non-exhaustive circumstances: i) the online slander is viewed by more than 5,000 users or reposted more than 500 times, ii) the rumor has had a significant negative effect on victims or their families, causing mental illness, self-mutilation, suicide or other grave consequences, iii) the libeler reoffends within two years, or iv) the rumors leads to other unlisted grave consequences.

In addition, Article 3 defines the types of circumstances where an act of slander can be identified as gravely undermining social order or state interests: i) it causes collective actions, ii) it causes public chaos, iii) it causes ethnic or religious conflict, iv) many people are slandered, resulting in grave social influence, v) it harms the national image or seriously endangers national interests, vi) it causes grave influence internationally, or vii) rumors leading to other unlisted grave consequences undermining social order or state interests will also be punishable.

(b) Cursing and Intimidation

Pursuant to Article 293 of the Criminal Law, the act of cursing or intimidating others through the Internet is criminalized as “provocative and disturbing behavior” according to Article 5, Paragraph 1 of the Interpretation. This paragraph mirrors the substance of the Criminal Law Article 293 exactly, except for the important emphasis of “online”.

Paragraph 2 of Article 5 of the Interpretation develops the concept of “public space” in Article 293 of the Criminal Law. In the Criminal Law Article 293, a person who creates a disturbance in a public place causing serious disorder should be punished. Paragraph 2 of Article 5 of the Interpretation extends the concept of public space to the Internet, ruling that the act of concocting false information and disseminating or instigating others to knowingly disseminate false information which causes serious public disorder may also be considered as provocative and disturbing behaviors.¹⁰³

(c) Online Extortion

Consistent with Article 274 in the Criminal Law, Article 6 stipulates that whoever extorts public or private property by blackmail by threatening to dispose of online information should be charged with extortion, if the amount involved is large or the crime

¹⁰³ *Id.* art. 293.

has been committed repeatedly. This article parallels the Criminal Law, albeit with particular emphasis on online information.

(d) Illegal Online Business Acts

Article 7 of the Interpretation provides circumstances in which the crime of illegal business acts can be identified. Article 225 of the Criminal Law only lists three acts as constituting illegal business operations, none of which are in the online sphere. Conversely, Article 7 states that paid services for deleting online information or spreading online rumors in violation of state stipulations should be considered to be an illegal business act if it disrupts market order and leads to grave consequences. Grave consequences are identified as follows: i) an individual who gains more than RMB 20,000 through this practice or whose volume of business exceeds RMB 50,000, ii) a group that gains more than RMB 50,000 through this practice or whose volume of business exceeds RMB 150,000.

3. Commentaries on the Interpretation

The Interpretation has generated much debate. Does the Interpretation guarantee or restrict the right of free speech? Will it help to allow truth, rather than rumors or defamation, to be realized in the end? Is the Interpretation too vague and general, leaving room for excessive administrative discretion when the administrative branch exercises its power? This section aims to introduce both positive and negative commentaries regarding these issues.

(a) Positive Commentaries

The Interpretation is considered a step towards a better-disciplined Internet.¹⁰⁴ Online rumors and defamation infringe the public good in grave situations like those elaborated in the Interpretation. Professor Zhou Guangquan of Tsinghua Law School maintains that it is not enough to rely only on private prosecution in these cases, thus expansion of the Criminal Law is necessary.¹⁰⁵

Furthermore, in the absence of relevant punishments for online crimes in China's Criminal Law, opinions expressed online increasingly distort social reality to achieve sensational effects that are constantly sought after by the mass media. As a consequence, social integration and social order is disrupted, citizens' already weakened faith in government is further reduced, and the virtual

¹⁰⁴ An Baijie & Cao Yin, *Judicial Move Aims at Online Rumors*, CHINA DAILY (Sept. 10, 2013), http://www.chinadaily.com.cn/china/2013-09/10/content_16955947.htm.

¹⁰⁵ Faxue Zhuanjia Shiyi "Lianggao" Wangluo Yaoyan Sijie Wu Redian (法学专家释疑“两高”网络谣言司解五热点) [Legal Experts Explain Five Central Issues of the Interpretation Concerning Online Defamation], LEGAL DAILY (Sep. 5, 2013), http://www.legaldaily.com.cn/locality/content/2013-09/26/content_4883464.htm?node=34710.

economy is sometimes harmed. The “marketplace of ideas” mechanism has failed to solve these problems on its own. Therefore the Interpretation can be considered a proactive move by the government to address these issues. The Interpretation makes it explicit that the Internet will never be a safe harbor for rumors or defamation.

The Interpretation also sets boundaries for the exercise of governmental power on the internet. As long as provisions mentioned in the Interpretation are not violated, citizens and mass media can safely exercise their constitutional right of free speech. In this regard, the Interpretation guarantees the legal exercise of the liberty of speech.

(b) Negative Commentaries

Conversely, the Interpretation’s wording has been criticized as too vague, leaving too much discretion for governmental interpretation. It is feared that such vague and general articles may be used as a tool to eliminate dissidents. For example, Internet users who post information that “harms the national image and seriously endanger national interests” may face imprisonment, yet the scope and content of the vague national interests remain to be defined according to administrative and judicial discretion. Given such circumstances, the Interpretation may fail to achieve its purpose of clarifying online crimes. Lack of judicial transparency further exacerbates this problem. The trial and penalty of the infamous rumor-monger Qin Huohuo was kept secret from the public.¹⁰⁶ Without effective supervision mechanisms, the government is more likely to abuse their power with the legitimacy endowed by the Interpretation.

The chilling effect¹⁰⁷ and self-censorship caused by the Interpretation in cyberspace poses another problem. Chinese citizens might self-censor their speech online for fear that the government may abuse its power and that they may land in trouble. Free discussion on the Internet might thus be stifled or restricted. The law professor and free speech advocate He Weifang posted to his one

¹⁰⁶ Qin Huohuo, an infamous rumor-monger in China, was arrested for manufacturing online rumors including the Guo Meimei Scandal on August 13, 2013. However, there is no report on his trial or any penalties since then. See Huang Qingchang (黄庆畅), “Qin Huohuo” Gongshu Guanyong Jilia: Wangluo Yaoyan, Ruci Paohi (“秦火火” 供述惯用伎俩：网络谣言，如此炮制) [“Qin Huohuo” Confesses His Accustomed Tricks: Online Rumors are Manufactured in This Way], PEOPLE (Aug. 22, 2013), <http://legal.people.com.cn/n/2013/0822/c204794-22651710.html>.

¹⁰⁷ Chilling effect is a legal term that describes a situation where speech or conduct is suppressed by fear of penalization against the interest of an individual or group. It can affect one’s free speech. See *Chilling Effect Law & Legal Definition*, US LEGAL, <http://definitions.uslegal.com/c/chilling-effect/> (last visited Nov. 26, 2013).

million followers on Weibo, “Please don’t repost my information over 500 times, and let me survive.”¹⁰⁸

(c) *Conclusion*

It remains to be seen how the Interpretation will shape the cyberspace in its application, as there has been no case with nationwide influence to which the Interpretation has been applied since its release two months ago. However, the Interpretation has already begun to affect our daily lives. Zhang Peng, a successful businessman in Nanjing, who was troubled with online rumors and extortion, received judicial relief according to the newly expanded Criminal Law, which was thought to be an innovation in Nanjing.¹⁰⁹ With the development of the Special Action against Online Rumors,¹¹⁰ other similar cases are also being dealt in this way. There lies great hope for China: that a freer and better-disciplined Internet is on the way.

*B. Blacklisting Dishonest Judgment Debtors*¹¹¹

In response to the growing concerns regarding the difficulty of enforcing judgments caused by debtors evading court-directed payments, the Supreme People’s Court issued a judicial interpretation (the “Judicial Interpretation”) on July 16, 2013 starting the use of blacklisting.¹¹² Blacklisting entails the creation of a register of debtors who have failed to settle their court-directed liabilities. Merely two weeks after the system was created, 31,259 debtors had been registered.¹¹³

¹⁰⁸ See Micro-Blogging Site of Professor He Weifang (Sep. 9, 2013), <http://weibo.com/1216766752/A8If74pGK?mod=weibotime>.

¹⁰⁹ Jia Xiaoning (贾晓宁), *Nanjing Wangluo Yaoyan Diyi An: Nizi Fatie Lesuo Laoban Beibu* (南京网络谣言第一案:女子发帖勒索老板被捕) [*The First Case Against Online Rumors in Nanjing: Woman Arrested for Extorting Boss by Posting Online*], SINA (Nov. 4, 2013), <http://tech.sina.com.cn/i/2013-11-04/11118881549.shtml>.

¹¹⁰ “Special Action against Online Rumors” is an influential campaign conducted by police all over China. It has helped shut down hundreds of illegal websites and arrested some libelers, and is thought to be highly successful in “cleaning the internet” by officials. See Guoxinban Bushu Daji Wangluo Yaoyan (国信办部署打击网络谣言) [*Information Office of State Council Disposes Action against Online Rumors*], IFENG, <http://news.ifeng.com/mainland/special/dajiwangluoyaoyan/> (last visited Dec. 5, 2013); See also Megha Rajagopalan, *China’s Rumor Crackdown Has ‘Cleaned’ Internet, Official Says*, REUTERS (Nov. 28, 2013), <http://www.reuters.com/article/2013/11/28/us-china-internet-idUSBRE9AR0BQ20131128>.

¹¹¹ This update is prepared by Leung Yuen-Quan, LL.M. Candidate, Tsinghua Law School.

¹¹² Zuigao Renmin Fayuan guanyu Gongbu Shixin Beizhixingren Mingdan Xinxi de Ruogan Guiding (最高人民法院关于公布失信被执行人名单信息的若干规定) [*Interpretation of the Supreme People’s Court on Rules on Blacklisting Dishonest Judgment Debtors*] (promulgated by the Sup. People’s Ct., July 16, 2013, effective Oct. 1, 2013) (Chinalawinfo).

¹¹³ Yan Fei (颜斐), *Zuigaoyuan Gongbu Shoupi Shixin Beizhixingren Mingdan Xinxi* (最高法院公布首批失信被执行人名单信息) [*The Supreme People’s Court Issued the First Black List of Dishonest*

According to Article 1 of the Judicial Interpretation, a judgment debtor who commits one of the following acts is entered into the “List of Dishonest Judgment Debtors” (the “Black List”):

- i) Using false evidence, violence, threats or other means to impede or prevent enforcement;
- ii) Using sham litigation, sham arbitration, by dissipating assets to prevent enforcement;
- iii) Breaching any rules under the financial reporting system;
- iv) Breaching any rules of the order to limit high spending;
- v) Unreasonably refusing to give effect to a judgment order or settlement agreement; or
- vi) Not performing any obligation as provided under a legally enforceable document.

The information published in the Black List goes beyond the judgment debtor’s name. It also includes the sex, age and identification card number in the case of a natural person, or the company name, registration number and name of the legal representative or responsible person if the debtor is an enterprise; the details of the legally enforceable document in question; the dishonest actions committed by the judgment debtor; the details of the institution issuing the legally enforceable document; and any other information the people’s courts deem appropriate so long as the information published is not related to state secrets, business secrets, personal privacy or information of a similar nature.¹⁴

Being blacklisted may be more detrimental than one would expect. The Black List is not only a list kept by the courts available for inspection upon request by an interested party. It is a list that may, together with a press conference, be published by the courts, through newspapers, radio, television, the Internet, court notice boards, or other means. In addition to publicizing the list to the mass media, courts will actively circulate the list to government bodies,

Judgment Debtors], XINHUA NET (Nov. 6, 2013), http://news.xinhuanet.com/fortune/2013-11/06/c_118021418.htm.

¹⁴ *Zuigao Renmin Faiyuan guanyu Gongbu Shixin Beizhixingren Mingdan Xinxi de Ruogan Guiding* (最高人民法院关于公布失信被执行人名单信息的若干规定) [Interpretation of the Supreme People’s Court on Rules on Blacklisting Dishonest Judgment Debtors] (promulgated by the Sup. People’s Ct., July 16, 2013, effective Oct. 1, 2013) art. 4 (Chinalawinfo).

financial regulatory bodies, financial institutions, professional regulatory bodies and other administrative bodies. Recipients will be urged to take into account the implications of an individual or organization being on the Black List when considering the judgment debtor's suitability for government acquisitions, tenders, administrative approvals, loans and other financial facilities, market entrance permits, and professional licenses. For judgment debtors that work for the government, a state organization or a state enterprise, the courts will report their inclusion on the Black List to the judgment debtor's superior.¹¹⁵ Clearly, the harm of being placed on the Black List may be significantly greater than simply "losing face".

To ensure real-time transmission of the contents of the Black List, the Supreme People's Court has signed memorandums of understanding ("MOUs") with leading state-owned banks in China, including the Industrial and Commercial Bank of China, the Agricultural Bank of China, the Bank of China and the Bank of Communications. These MOUs call for the creation of a network that will allow exchanges of information between the courts and the banks so that inquiries, freezing and deduction of bank accounts can be completed efficiently.¹¹⁶

To be removed from the Black List, the judgment debtor must either have fulfilled the obligations previously owed, obtained acceptance from the judgment creditor that obligations have been fulfilled, or been deemed by courts to have fulfilled all obligations owed.¹¹⁷

¹¹⁵ *Id.* art. 6.

¹¹⁶ Yang Weihai (杨维汉), *Zuigao Fayuan Jiang Shouji Gongbu Diyipi "Shixinzhe Heimingdan"* (最高法院将收集公布第一批“失信黑名单”) [*Supreme People's Court to Issue the First Black List of Dishonest Judgment Debtors*], XINHUA NET (Oct. 1, 2013), http://news.xinhuanet.com/legal/2013-10/01/c_117580073.htm.

¹¹⁷ *Zuigao Renmin Fayuan guanyu Gongbu Shixin Beizhixingren Mingdan Xinxi de Ruogan Guiding* (最高人民法院关于公布失信被执行人名单信息的若干规定) [*Interpretation of the Supreme People's Court on Rules on Blacklisting Dishonest Judgment Debtors*] (promulgated by the Sup. People's Ct., July 16, 2013, effective Oct. 1, 2013) art. 7 (Chinalawinfo).

III. CASES

*A. The Fourth Set of Guiding Cases*¹¹⁸ [Notice of the Supreme People's Court on Issuing the Fourth Group of Guiding Cases¹¹⁹]

The Supreme People's Court selected and published its fourth set of guiding cases on January 31, 2013. This latest batch of guiding cases included two criminal and two civil ones. Although courts at all levels in China are only required to "refer to" guiding cases released by the Supreme People's Court, these cases carry far more weight than the phrase "refer to" suggests. While not formally constituting binding precedents in the common law sense, the guiding cases may evolve to have a similar effect.¹²⁰ As the regular release of guiding cases is designed to unify Chinese judicial practices, this fourth set is expected to clarify vague provisions and provide guidance for their application.

1. Wang Zhaocheng *et al.* Illegal Trading and Storage of Hazardous Substances

(a) Introduction

Wang Zhaocheng *et al.* were charged by local procurators for the crime of illegally trading and storage of hazardous substances under the Criminal Law Article 125, Paragraph 2. Defendant Wang Zhaocheng bought sodium cyanide, a highly toxic chemical, twice without a legal license and stored it, together with defendant Jin Guomiao, for use in electroplating. Wang then sold some of it to the other three defendants to use for the same purpose. The Yuecheng District People's Court of Shaoxing Municipality, Zhejiang Province confirmed that the defendants were guilty of the crime of illegal trading and storage of hazardous substances.

(b) Issues

This case raised two issues:

a) Whether sodium cyanide is a hazardous substance according to the Criminal Law Article 125, Paragraph 2, since in a judicial

¹¹⁸ This update is prepared by Sun Yuxuan, LL.B. Candidate, Tsinghua Law School. Guiding cases are cases that are legally effective and satisfy certain requirements presented in the Provisions of the Supreme People's Court on Case Guidance.

¹¹⁹ Zuigao Renmin Fayuan guanyu Fabu Disi Pi Zhidaoxing Anli de Tongzhi (最高人民法院关于发布第四批指导性案例的通知) [Notice of the Supreme People's Court on Issuing the Fourth Set of Guiding Cases] (promulgated by Sup. People's Ct., Jan. 31, 2013, effective Jan. 31, 2013) (Chinalawinfo).

¹²⁰ Overview, STANFORD LAW SCHOOL CHINA'S GUIDING CASES PROJECT, <http://www.law.stanford.edu/organizations/programs-and-centers/china-guiding-cases-project> (last visited Nov. 26, 2013).

interpretation¹²¹ by the Supreme People's Court and Supreme People's Procuratorate, sodium cyanide is not listed as one of the five prohibited highly toxic chemicals.

b) Whether illegal trading requires concurrent acts of purchasing and selling toxic substances, or merely either purchasing or selling, on one's own initiative, without a valid license issued by the relevant departments.

(c) Guidance

This case clarifies the two issues mentioned above. First, sodium cyanide is a hazardous substance according to Criminal Law Article 125, Paragraph 2. The judicial interpretation has specified certain kinds of hazardous substances but the list is not exhaustive.¹²² According to the Regulation on the Safety Management of Hazardous Chemicals,¹²³ sodium cyanide is on the list of dangerous toxic chemicals that are highly toxic and hazardous to the human body and environment, and its usage must be strictly regulated. As the Criminal Law intends to regulate the use of any hazardous substances dangerous enough to threaten the safety of humans and the environment, sodium cyanide qualifies as a hazardous substance under the Criminal Law.

Secondly, illegally trading only requires purchasing or selling on one's own initiative without being licensed by the relevant departments, instead of concurrent acts, because either single act poses a great threat to the individual and public security that the Criminal Law is intended to protect. This interpretation is also consistent with other provisions in the Criminal Law in which trade is taken to mean purchasing or selling.¹²⁴

¹²¹ Guanyu Banli Feifa Zhizao, Maimai, Yunshu, Chucun Dushuqiang Deng Jinyong Judu Huaxuepin Xingshi Anjian Juti Yingyong Falü Ruogan Wenti de Jieshi (关于办理非法制造、买卖、运输、储存毒鼠强等禁用剧毒化学品刑事案件具体应用法律若干问题的解释) [Interpretation on Some Issues Concerning the Specific Application of Law for Handling Criminal Cases on Illegally Manufacturing, Trading in, Transporting, or Storing Tetramine and other Banned Virulent Chemicals] (promulgated by Sup. People's Ct. & Sup. People's Proc., Sep. 4, 2003, effective Oct. 1, 2003) art. 6 (Chinalawinfo).

¹²² Liang Jian & Ruan Tiejun (梁健, 阮铁军), *Weixian Wuzhi Jiqi Feifa Maimai de Rending* (危险物质及其非法买卖的认定) [*The Identification of Hazardous Substances and Their Illegal Trade*], 14 RENMIN SIFA (人民司法) [PEOPLE'S JUD.] 8, 10 (2012).

¹²³ *Weixian Hauxuepin Anquan Guanli Tiaoli* (危险化学品安全管理条例) [Regulation on the Safety Management of Hazardous Chemicals] (promulgated by St. Council, Mar. 2, 2011, effective Dec. 1, 2011) art. 3, 5, 6 (Chinalawinfo).

¹²⁴ Liang & Ruan, *supra* note 122, at 10.

2. Robbery Committed by a Certain Dong and a Certain Song

(a) Introduction

Defendants Dong and Song, two juveniles, were addicted to playing online games in Internet cafés. They committed a robbery together in which they obtained RMB 5 and a phone once they ran out of money to pay for their time at a particular Internet café. All the gains from the robbery were spent in Internet cafés. Xinhua District People's Court of Pingdingshan Municipality, Henan Province held that the two defendants were guilty of the crime of robbery. They were both sentenced to fixed-term imprisonments of two and a half years, with probation of three years, together with an injunction prohibiting them from entering designated places like Internet cafés during their probation.

(b) Issues

The issue was whether an injunction should be applied to the two juveniles according to Amendment (VIII) to the Criminal Law.¹²⁵ There were concerns that the newly introduced injunction remedy had not been fully developed in practice.¹²⁶

(c) Guidance

For a juvenile who is sentenced to probation, an injunction can prohibit a particular conduct if the crime is attributable to that conduct and the juvenile lacks the self-discipline to abstain from it. In this case, as the defendants' crime was attributed to their addiction to Internet cafés, an injunction was considered necessary during their probation to keep them away from the cause of their crime, assist their parents in guiding them, and help with their rehabilitation.

3. Xuzhou Construction Machinery Group Co., Ltd. v. Chengdu Chuanjiao Industry and Trade Co., Ltd., *et al.*

(a) Introduction

Xuzhou Construction Machinery Group Co., Ltd. sued Chengdu Chuanjiao Industry and Trade Co., Ltd. ("I&T Company") for payments due. The plaintiff argued that Chengdu Chuanjiao Engineering Machinery Co., Ltd. ("EM Company") and Sichuan

¹²⁵ Zhonghua Renmin Gongheguo Xing Fa Xiuzheng'an Ba (中华人民共和国刑法修正案(八)) [Amendment (VIII) to the Criminal Law], (promulgated by Standing Comm. Nat'l People's Cong., Mar. 2, 2011, effective Dec. 1, 2011) art. 3, 5, 6 (Chinalawinfo).

¹²⁶ Xing Shujun & Sun Zhengyu (邢书军, 孙正宇), Qiangjie An—Ruhe Zhengque Lijie he Shiyong Xing Fa Xiuzheng'an Ba Zhong de Jinzhiling? (抢劫案—如何正确理解和适用《刑法修正案(八)》中的禁止令?) [*The Case of Robbery—How to Correctly Understand the Injunction in the Amendment (VIII) to the Criminal Law?*], BHKUANG.COM, <http://www.bhkuang.com/xsal/jdalpx/1061.html> (last visited Nov. 16, 2013).

Ruilu Construction Engineering Co., Ltd. (“Ruilu Company”) should assume joint liability for their ambiguous legal relationship with I&T Company. The plaintiff also argued that the actual controller, Wang Yongli, and other shareholders of I&T Company should assume joint liability for the ambiguous assets of the I&T Company and those of theirs. The Intermediate People’s Court of Xuzhou Municipality, Jiangsu Province, as the trial court, confirmed that I&T Company was liable for more than RMB 10 million, and EM Company and Ruilu Company were jointly liable. However, the proceedings against Wang and the other shareholders were dismissed. The High People’s Court of Jiangsu Province, upheld the original judgment during the appeal.

(b) Issues

The issue in this case was determining when the corporate veil could be pierced. The third paragraph of Article 20 of the Chinese Company Law regulates the situations where creditors’ losses are due to abuse of the legal entity status of a company by its shareholders to evade legal responsibilities. However, Article 20 cannot be directly applied to ambiguous legal entities of different affiliated companies, for the liable subjects as stipulated are confined to shareholders. The first paragraph is a general prohibition on the abuse of legal entity status by the shareholders, but does not strictly define the shareholders to be liable subjects. However, this paragraph is too general and vague to test whether a particular situation is abusive or not.¹²⁷

(c) Guidance

This case involved three elements of ambiguity in the legal status of affiliated companies: a) confusion of personnel; b) confusion of financial affairs; and c) confusion of business.

Confusion over these three elements led to ambiguity in the characterization of the three companies, resulting in failure to distinguish between independently and jointly owned properties. As independent ownership of property forms the basis of an independent legal entity, the three companies were thus denied legal entity status and further denied the ability to undertake liability independently. Therefore, EM Company and Ruilu Company were ordered to assume joint responsibility with I&T Company.

¹²⁷ Shi Liufang (史留芳), *Guanlian Gongsì Renge Huntong de Rending he Falü Shiyong* (关联公司人格混同的认定和法律适用) [*The Legal Judgment and Application on Ambiguous Legal Entities of Affiliate Companies*], RENMIN FAYUAN BAO (人民法院报) [PEOPLE’S COURT], Jul. 26, 2012, at 6, available at http://rmfyb.chinacourt.org/paper/html/2012-07/26/content_48314.htm.

4. China Shipping Development Co., Ltd. Freighter Company's Application for the Establishment of a Fund for Limitation of Liability for Maritime Claims

(a) Introduction

Ning'an 11, owned by China Shipping Development Co., Ltd. Freighter Company ("CSDF Company"), collided with a ship unloader when trying to moor during its voyage from Qinhuangdao to Shanghai Waigaoqiao Port, damaging both the ship unloader and the port. CSDF Company applied to the Shanghai Maritime Court for the establishment of a fund for limitation of liability. Contentions were submitted by Shanghai Waigaoqiao Power Generation Co., Ltd. and Shanghai Waigaoqiao No. 2 Power Generation Co., Ltd. as the primary opponents and six other companies as the secondary opponents.¹²⁸

The primary opponents' contentions were twofold. First, this accident was caused by the captain's operational errors and thus Ning'an 11 should undertake full instead of limited liability. Second, Ning'an 11 is a vessel capable of engaging in international ocean shipping, not merely a vessel engaging in cargo shipping between Chinese ports, and thus Article 210 of the Maritime Law instead of Article 4 of the Provisions concerning the Limitation of Liability for Maritime Claims for Ships with a Gross Tonnage Not Exceeding 300 Tons and Those Engaging in Coastal Transport Services as Well as Those for Other Coastal Operations should be applied. The secondary opponents claimed that there were some unlimited liabilities in this accident and these liabilities should not be included in the fund. The trial court of Shanghai Maritime Court approved the CSDF's application. This ruling was appealed. The Higher People's Court of Shanghai Municipality upheld the original ruling.

(b) Issues

The main issues in dispute were:

i) Whether the court should take a procedural or substantive review in the application for the establishment of a fund for limitation of liability for maritime claims;

¹²⁸ The six other companies are PICC Property & Casualty Co., Ltd. (PICCP&C) Shanghai Branch, China Continent Property & Casualty Insurance Company Ltd. Shanghai Branch, Ping An Property & Casualty Insurance Company of China, Ltd. Shanghai Branch, Ancheng Property & Casualty Insurance Co., Ltd. Shanghai Branch, China Pacific Property & Casualty Insurance Co., Ltd. Shanghai Branch, Business Department of China Continent Property & Casualty Insurance Company, and Yongcheng Property & Casualty Insurance Co., Ltd. Shanghai Branch. With respect to more information, see *Zuigao Renmin Fayuan guanyu Fabu Disi Pi Zhidaoxing Anli de Tongzhi* (最高人民法院关于发布第四批指导性案例的通知) [Notice of the Supreme People's Court on Issuing the Fourth Set of Guiding Cases] (promulgated by Sup. People's Ct., Jan. 31, 2013, effective Jan. 31, 2013) (Chinalawinfo).

ii) Whether a “vessel engaging in cargo shipping between Chinese ports” should include those never used for international shipping but capable of it; and

iii) When limited and unlimited liabilities both exist, whether a fund of limited liability should be established.

(c) Guidance

In answering the three issues, the case makes it explicit that:

i) According to a SPC judicial interpretation,¹²⁹ a court should only take a procedural review in applications on the qualification of the applicants, the nature of the creditors’ claims and the amount of funds in the applications. The substantive claims should be separately considered in a trial on the substantive issues;

ii) A “vessel engaging in cargo shipping between Chinese ports” should be understood as a vessel put into domestic shipping use and making its voyage between Chinese ports when the accident takes place, not a vessel capable of engaging in international ocean shipping; and

iii) According to the Maritime Law, a fund of limited liability can be established independently, regardless of the unlimited liability part which can be claimed in a trial on substantial issues.

*B. Seven Typical Cases in Intellectual Property Litigation Issued by the Supreme People’s Court*¹³⁰

The Supreme People’s Court (“SPC”) announced in October 2013 that, in 2012, local people’s courts completed 12,794 criminal cases for intellectual property rights infringement and 15,518 parties were involved in the effective judgments. This was the largest number of criminal cases and parties in the past five years.¹³¹ The SPC has since issued ten new cases on intellectual property (“IP”) litigation on April 15, 2013, and another eight typical cases on IP litigation on October 22, 2013.¹³² The editor selected seven cases that are of great importance.

¹²⁹ Zuigao Renmin Fayuan guanyu Shiyong Zhonghua Renmin Gongheguo Haishi Susong Tebie Chengxu Fa Ruogan Wenti de Jieshi (最高人民法院关于适用《中华人民共和国民事诉讼法》若干问题的解释) [Interpretation of the Supreme People's Court on the Application of the Special Maritime Procedure Law of the People's Republic of China] (promulgated by the Sup. People's Ct., Jan. 6, 2013, effective Feb. 1, 2013) art. 83 (Chinalawinfo).

¹³⁰ This update is prepared by Zhang Ke, LL.M. Candidate, Tsinghua Law School.

¹³¹ *Zuigao Renmin Fayuan 2013 Nian 10 Yue 22 Ri Xinwen Fabuhui Cailiao (Yi)* (最高人民法院2013年10月22日新闻发布会材料(一)) [The Material Issued in the Press Conference of the Supreme People's Court on October 22, 2013 (No.1)], COURT.GOV.CN (Nov. 24, 2013), http://www.court.gov.cn/xwzx/xwfbh/twzb/201310/t20131022_189037.htm.

¹³² *Zuigao Renmin Fayuan Fabu Ba Qi Zhishi Chanquan Sifa Baohu Dianxing Anli* (最高人民法院发布八起知识产权司法保护典型案例) [Eight Typical Cases in Intellectual Property Litigation Issued

1. Eli Lilly and Company and Eli Lilly (China) Research and Development Company, Ltd. v. Huang Mengwei

(a) Case Brief


Huang Mengwei was an employee of Eli Lilly (China) Research and Development Limited Company (“Eli Lilly”) who had signed a secrecy agreement with his employer. Huang downloaded 48 documents from the servers of Eli Lilly in January 2013. 21 of these documents were confidential business documents. When Huang refused to be inspected and delete the documents as promised in the consent letter he signed after his downloads, the plaintiffs discharged him for stealing technical secrets and filed a lawsuit in the Shanghai Municipal First Intermediate People’s Court with an application of conduct preservation.¹³³ The plaintiffs asked the court to order the defendant not to disclose, use or allow others to use the 21 confidential business documents downloaded from the company. The court confirmed the plaintiff’s request on July 31, 2013.

(b) Significance

This case establishes the principle of conduct preservation in the Civil Procedure Law of the PRC (2012 Amendment) for the first time. Its application has been expanded to all the civil cases. This case has become the first one to apply conduct preservation measures to technical secret lawsuits under the new Civil Procedure Law and clarified that the people’s courts should apply preservation measures equitably upon application to guarantee the timeliness, convenience and effectiveness of judicial remedies for IP infringement.

2. Foshan Haitian Flavoring and Food Company Ltd. v. Foshan Gaoming Weiji Flavoring and Food Company Ltd.

(a) Case Brief

Haitian Co. had been entitled to the trademark “” on sauce and other commodities since February 28, 1994. Weiji Co. was established on February 24, 1998. It used “威极” as its name and used this name in advertising on its billboards and products. When

by the Supreme People’s Court] (promulgated by the Sup. People’s Ct., Oct. 22, 2013, effective Oct. 22, 2013) (Chinalawinfo).

¹³³ Conduct preservation is a litigation procedure in China stipulated in art. 100 of the Civil Procedure Law (2012 Amendment). Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 9, 1991, effective Apr. 9, 1991) (2012) art. 100 (Chinalawinfo) (“For a case where, for the conduct of a party or for other reasons, it may be difficult to execute a judgment or any other damage may be caused to a party, a people’s court may, upon application of the opposing party, issue a ruling on preservation of the party’s property, order certain conduct of the party or prohibit the party from certain conduct; and if no party applies, the people’s court may, when necessary, issue a ruling to take a preservative measure.”).

news that Weiji Co. had used industrial salt to produce sauce was exposed, the market reputation and sales of Haitian Co. were both affected. Haitian Co. subsequently filed a lawsuit against Weiji Co. in the Foshan Municipal Intermediate People's Court, accusing the defendant of infringing its trademark right and unfair competition. The court confirmed the infringement of the trademark right of Haitian Co. and the intention of Weiji Co. to attach itself to the trademark reputation of Haitian Co., which caused confusion and unfair competition.

(b) Significance

After confirming the unfair competition of the defendant, the people's court ordered the defendant to stop using the name “威极” and to modify it within a proper timeframe. Evidence provided by the plaintiff only demonstrated that it had suffered a great loss but could not prove the exact value of its economic loss. The court settled this problem by referring to audit reports and other evidence. The court also considered the advertising costs the plaintiff spent to restore their reputation.

3. BMW Co. v. Guangzhou Shiji Baochi Clothing Co., Ltd.

(a) Case Brief

BMW Co. had been entitled to the trademarks of “BMW”, “” and “宝马” on automobile commodities and “” on clothing commodities in China. Shiji Baochi Co. produced and sold clothing commodities with the trademarks of “”, “FENGBAOMAFENG and ”, and “丰宝马丰 FENGBAOMAFENG and ”. In addition, it advertised the signs of “FENGBAOMAFENG and ” on its website and shops and used “德国世纪宝马集团股份有限公司” as its name on clothing labels, websites and brochures.

BMW Co. filed a lawsuit against Shiji Baochi Co. in the Beijing Second Intermediate People's Court for trademark infringement and unfair competition. The appellate court confirmed the infringement of BMW Co.'s trademark, the unfair competition by the defendant for its use of the name “德国世纪宝马集团股份有限公司” and the malice of the defendant. The plaintiff's request for full compensation was also supported, as discussed in the next paragraph.

(b) Significance

The plaintiff's evidence demonstrated that the profits earned by the defendant through infringement were much more than the statutory maximum of RMB 500,000 requested by the plaintiff. The appellate court exercised its discretion when calculating the amount of compensation by taking into consideration the large-scale and

prolonged infringement, evident malice, and huge profits earned from the infringement. Thus the court ordered the defendant to cease the infringements, eliminate ill effects, and pay a fine of RMB 100,000 and provide full compensation. Finally, the appellate court discovered some other infringing acts by the defendant during the trial. But these acts had not been examined by the Industrial and Commercial Bureau, so the appellate court then provided some suggestions about them.

4. Gree Electric Appliances, Inc. of Zhuhai v. Guangdong Midea Refrigeration Equipment Co., Ltd., etc.

(a) Case Brief

Midea Co. manufactured four models of products of “Midea split-type air-conditioner” and was sued by Gree Co. in the Zhuhai Municipal Intermediate People’s Court. The plaintiff claimed those products infringed its patent for a method of production. The appellate court held that the technical proposal of the “Sleep Mode 3” products manufactured by the defendant infringed the plaintiff’s patent. All 4 models were confirmed to have incorporated “Sleep mode 3” in their design, as inferred from the installation instructions of one of the four models with the Sleep Mode 3. The defendant was ordered to compensate the plaintiff for patent infringement. The defendant recognized the profit from one of the four models was RMB 477,000, but refused to provide the amount of profits earned from the other three models. The appellate court inferred that the profits from each of the other three models were not less than RMB 477,000 after illustrating the consequences of the defendant’s refusal to cooperate.

(b) Significance

The court first confirmed the patent infringement of one of the four models. It then inferred that the other three models of products also infringed the plaintiff’s patent rights based on the instructions of the products when the defendant could not provide evidence to invalidate this inference.

5. Beijing Ruibang Yonghe Technology and Trade Co., Ltd. v. Johnson & Johnson Medical (Shanghai) Ltd. and Johnson & Johnson Medical (China) Ltd.

(a) Case Brief

A 15-year medical device distribution cooperation agreement existed between Ruibang Co. and Johnson & Johnson before they finally decided not to renew the contract in 2009. Ruibang Co. signed

a distribution contract with Johnson & Johnson in January 2008 in which Ruibang Co. agreed not to sell the same products at a lower price than Johnson & Johnson. In March 2008, Ruibang Co. won a bid for Johnson & Johnson suture sales. Johnson & Johnson then breached the contract by abrogating Ruibang Co.'s dealerships in several hospitals, refusing orders from Ruibang Co. and finally ceasing to supply products in September 2008.

Ruibang Co. sued Johnson & Johnson in the Shanghai Municipal First Intermediate People's Court, claiming that the distribution contract was a monopoly agreement. The appellate court explained that the defendant had a dominant market position in the medical suture market of mainland China and the distribution contract had the effect of eliminating or restricting competition. Therefore, the court held that the distribution contract was a monopoly agreement and that the abrogation of the dealerships and the refusal to supply products were monopoly activities.

(b) Significance

This is the first monopoly agreement dispute between an upstream supplier and a downstream distributor and the first monopoly case in which an effective judgment was entered for the plaintiff.

6. *People v. Jiangxi Yibo Electronics Technology Co., Ltd., Yu Zhihong, etc.*

(a) Case Brief

Yu Zhihong, Luo Shihe, Xiao Wenjuan and Li Yinghong were once employees of Zhuhai Saina Co., where they were able to acquire confidential information of the company. They were all obligated to keep the secrets confidential. Yu set up Zhongshan Wode Co., Aster (Hong Kong) Co., Aster (US) Co. and Aster (Europe) Co. to sell the products of Jiangxi Yibo Electronics Technology Co., Ltd. which was founded in 2011. Then Yu, Luo, Xiao and Li used the confidential information acquired from Saina Co. and sold the products of Yibo Co. to the clients of Saina Co. in the U.S. and Europe at a lower price. The Zhuhai Municipal Intermediate People's Court, in the second instance, held that the defendants committed the crime of stealing commercial secrets pursuant to Article 219 of the Criminal Law.¹³⁴

¹³⁴ Xing Fa (刑法) [Criminal Law] (promulgated by Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997) (1997) art. 219 (Chinalawinfo).

(b) Significance

The fine of RMB 37,000,000 makes this the largest case of stealing commercial secrets ever. This case is also a successful example of applying the “Three-in-One” mode¹³⁵ in the IP trials of Zhuhai Municipal Intermediate People’s Court.

7. People v. Zong Lianggui, etc.

(a) Case Brief

In November 2007, Zong Lianggui and Huang Lian founded an oil company (the “Company”) that produced edible oil sold with labels containing counterfeit versions of the registered trademarks “金龙鱼” and “鲁花”. Their business also included selling the illegally manufactured trademarks of “金龙鱼” and “鲁花” that they bought from others. Besides Zong and Huang, in this case there were also 26 other defendants, such as Chen Jinxiao, who entered into the employment of the Company knowing about the illegal business, and Liu Zhivong, who bought and sold the products manufactured, knowing that the products were bearing counterfeited registered trademarks.

The Henan Provincial Higher People’s Court, as the appellate court, held that Zong, Huang and Chen were guilty of the crimes of counterfeiting registered trademarks and selling representations of an illegally registered trademark pursuant to Articles 213 and 215 of the Criminal Law¹³⁶ and that Liu was guilty of the crime of selling goods bearing a counterfeited registered trademark pursuant to Article 214 of the Criminal Law.¹³⁷ The other 24 defendants were also fined and sentenced to imprisonment.

(b) Significance

With such a large number of criminal charges and fines, this case is uncommon in Chinese IP trials. In addition, it is an application of the “Three-in-One” mode for IP trials in the Henan Provincial Higher People’s Court.

¹³⁵ The “Three-in-One” mode in China means that civil, administrative and criminal cases involving intellectual property are all heard by the IP tribunal of a court.

¹³⁶ Xing Fa (刑法) [Criminal Law] (promulgated by Nat’l People’s Cong., Mar. 14, 1997, effective Oct. 1, 1997) (1997) art. 213, 215 (Chinalawinfo)

¹³⁷ *Id.* art. 214.

*C. The Case of a Certain Li et al.: Rape or Prostitution?*¹³⁸

1. Introduction

A certain Mr. Li, the teenage son of a Chinese general, together with four other defendants, was charged with gang rape on Feb. 19, 2013. It was reported that in the night of Feb. 17, 2013 the five defendants drank in the Global Bar with the victim Ms. Yang and a bar waiter Mr. Zhang, an acquaintance of both Li and Yang. Later at around 15:30 on February 18, 2013 the five left the bar with Yang and Zhang. They stopped at several places including a restaurant and the garage of Li's residence before they finally arrived at the Hubei Hotel in the dawn of February 18, 2013. Zhang was dropped off during the trip, leaving the five defendants and Yang alone. In the Hubei Hotel, the alleged gang rape took place.¹³⁹

Li pleaded not guilty, with the other four defendants pleading guilty to the charge of rape. The Haidian trial court found the five defendants guilty on September 26, 2013 and sentenced Li to 10 years and Wang to 12 years of imprisonment, with the other three sentenced to three to four years.¹⁴⁰ On November 27, 2013, the No.1 Intermediate Court of Beijing rejected the appeal of Li, upholding the verdict of the first trial as fair and just.¹⁴¹

This case has attracted national attention as Li has been a symbol of the children of China's political aristocrats, who are widely viewed as spoiled and above the law, since being publicly criticized for an earlier criminal offence in 2011.¹⁴² This case also raised many controversies, such as whether this incident should be considered a gang rape or prostitution.¹⁴³ As this dispute was the core issue of the case, an overview of the relevant provisions and the court's findings on this dispute will be given below.

¹³⁸ This update is prepared by Sun Yuxuan (LL.B. Candidate, Tsinghua Law School) & Zhang Ke (LL.M. Candidate, Tsinghua Law School).

¹³⁹ Chai Huiqun (柴会群), *Li Moumou Shexian Qiangjian An 8 Xiaoshi Anqing Huanyuan* (李某某涉嫌强奸案8小时案情还原) [*Restoration of the Case of a Certain Li Charged of Rape*], NANFANG ZHOUMO (南方周末) [SOUTHERN WKLY.] (September 26, 2013), <http://www.infzm.com/content/94633/1>.

¹⁴⁰ Zhou Yuanqing (周元卿), *Li Moumou Deng Qiangjian An Yishen Xuanpan, Wu Beigao Fenbie Huoxing* (李某某等强奸案一审宣判 五被告人分别获刑) [*Sentence of the First Instance of a Certain Li et al. Charged with Rape, Five Defendants Were Sentenced to Imprisonment*], CHINA COURT (Sep. 26, 2013), <http://bjgy.chinacourt.org/article/detail/2013/09/id/1101755.shtml>.

¹⁴¹ Yi Zhongxuan (义中宣), *Li Moumou Deng Qiangjian An Zhongshen Xuanpan* (李某某等强奸案终审宣判) [*Sentence of the Final Instance of a Certain Li et al. Charged with Rape*], CHINA COURT (Nov. 27, 2013), <http://bjgy.chinacourt.org/article/detail/2013/11/id/1151551.shtml>.

¹⁴² Reuters, *Minor Son of Chinese General Denies Gang Rape, Inflames Public Anger*, INDIA TODAY (Aug. 28, 2013), <http://m.indiatoday.in/story/minor-son-chinese-general-gangrape-public-anger-india-today/1/304227.html>.

¹⁴³ Chai, *supra* note 139.

2. Chinese Laws and Judicial Interpretations on Rape and Prostitution

(a) The Crime of Rape in the Criminal Law

Article 236, Paragraph 1 of the Criminal Law states that “Whoever by violence, coercion or other means rapes a woman is to be sentenced to not less than three years and not more than 10 years of fixed-term imprisonment.”¹⁴⁴

Article 236, Paragraph 2 states that:

Whoever rapes a woman or has sexual relations with a girl involving one of the following circumstances is to be sentenced to not less than 10 years of fixed-term imprisonment, life imprisonment, or death:

- i) Rape a woman or have sexual relations with a girl and when the circumstances are odious;
- ii) Rape several women or have sexual relations with several girls;
- iii) Rape a woman in a public place and in the public;
- iv) Rape a woman in turn with another or more persons;
- v) Cause the victim serious injury, death, or other serious consequences.¹⁴⁵

Thus, if a defendant is found guilty of raping a woman in turn with “another or more persons”, a sentence of not less than 10 years of fixed-term imprisonment, life imprisonment, or death should be imposed against them according to Article 236 of the Criminal Law.

But what is left unclear is the interpretation of “rape”. In which circumstances can the court consider sexual intercourse rape? What are the elements of rape in the Criminal Law? This definition is found in the judicial interpretations discussed below.

(b) The Crime of Rape in Judicial Interpretations

According to one Answer, rape is interpreted as forcible sexual intercourse conducted by violence, coercion or other means without the consent of the victim.¹⁴⁶

¹⁴⁴ Xing Fa (刑法) [Criminal Law] (promulgated by Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997), art. 236(2) (Chinalawinfo).

¹⁴⁵ *Id.* para.2.

The Answer also clarifies several issues below:

i) On confirming the consent of the victim, the victim's past sexual promiscuity should not be considered; forcible sexual intercourse with a promiscuous woman should also be taken as rape;

ii) An apparent declaration of resistance is not essential to finding the existence of rape; rape may also be found to exist when there is no apparent declaration of resistance;

iii) Violence includes conduct, such as beating, kicking and binding, that may threaten individual safety and freedom; and

iv) Coercion includes conduct, such as threatening and intimidating, that deprives the victim of free will.

It can be concluded from the Answer that rape should be defined as:

i) Sexual intercourse;

ii) By forcible means, including violence, coercion, etc.; and

iii) Without consent from the victim.

(c) Regulation of Illegal Prostitution

There is presently no authoritative definition of prostitution in laws, central government regulations or judicial interpretations. But many local regulations clarify the concept of prostitution and these clarifications reflect widespread judicial practices.

The definition of prostitution at its very core usually involves:

i) Sexual intercourse;

ii) For compensation; and

iii) The consent of the prostitute.¹⁴⁷

3. The Dispute in Li's Case: Rape or Prostitution?

Rape is a Criminal Law offence and defendants found guilty are sentenced to no less than three years of imprisonment. Prostitution is only punished according to the Public Security Administration Punishments Law and is only punishable by detention of no more than 15 days, sometimes with a fine up to RMB 5,000.¹⁴⁸

This article will divide the dispute into three issues:

¹⁴⁶ Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan, Gongan Bu guanyu Dangqian Banli Qiangjian Anjian Zhong Juti Yingyong Falü de Ruogan Wenti de Jieda (最高人民法院、最高人民检察院、公安部关于当前办理强奸案件中具体应用法律的若干问题的解答) [Answers by the Supreme People's Court, the Supreme People's Procuratorate and the Ministry of Public Security on Some Issues Concerning the Implementation of Law on the Cases of Rape] (promulgated by Sup. People's Ct. & Sup. People's Proc., Apr. 26, 1984, ineffective Jan. 18, 2013), available at http://www.law-lib.com/law/law_view.asp?id=2858.

¹⁴⁷ Shenme Shi Maiyin Piaochang (什么是卖淫嫖娼) [What is Prostitution], FALÜ KUAICHE (法律快车) [LAWTIME] (Aug. 26, 2010), <http://www.lawtime.cn/info/xingfa/changshi/2010082660303.html>.

¹⁴⁸ Zhi'an Guanli Chufa Fa (治安管理处罚法) [Public Security Administration Punishments Law] (promulgated by Nat'l. People's Cong. Aug. 28, 2005, effective Mar. 01, 2006) (Chinalawinfo).

- i) Whether there was sexual intercourse between the victim and the five defendants;
- ii) Whether the victim gave her consent and whether the consent for sex was for compensation; and
- iii) Whether there was violence, coercion or other forcible means as covered by Article 236, Paragraph 1 of the Criminal Law.

(a) Whether There Was Sexual Intercourse

A judicial authentication showed that only the semen stains of defendants Wang and Wei remained on the victim's clothes and underwear and that there were no traces of semen stains and DNA of the other three defendants.¹⁴⁹ This authentication apparently contradicted the victim statement against Li, as the victim in her first testimony stated that all five defendants ejaculated and in her second testimony stated that at least Li and another man ejaculated.¹⁵⁰

But in the first testimonies of the five defendants, all the five confessed that they had sexual intercourse with the victim,¹⁵¹ and they clearly recalled the sequence.¹⁵² Li's friend also testified that Li told him they had sexual intercourse with the victim.¹⁵³ Though in later testimonies, Li denied having sexual intercourse and claimed that he was asleep while it took place, the trial court held that there was enough evidence to confirm sexual intercourse took place between the five defendants and the victim.¹⁵⁴ The appellate court held that the testimonies were acquired in accordance with due process and the semen stain was not required to confirm that there had been sexual intercourse.¹⁵⁵

(b) Whether There Was Consent for Compensation

This issue is the most controversial part of the dispute. If the sexual intercourse was with consent for compensation, a finding of rape could not be made.

Li's pleading on prostitution was composed of four elements:

- i) The victim was a bar hostess and a prostitute;

¹⁴⁹ Chai, *supra* note 139.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Li Moumou Deng Qiangjian An* (李某某等强奸案) [*Beijing Haidian People's Procuratorate vs. A Certain Li et al.*], XINWEN PINDAO (新闻频道) [NEWS CHANNEL] (Sep. 26, 2013), http://www.s1979.com/news/china/201309/26102072026_2.shtml.

¹⁵⁴ *Id.*

¹⁵⁵ *Li Moumou Deng An Ershen Weichi Yuanpan, Shenpanzhang Huida Wuda Jiaodian Wenti* (李某案二审维持原判 审判长解答五大焦点问题) [*The Verdict of the Case of a Certain Li et al. Was Upheld, the Judge in Chief Answered Five Key Issues*], NANDU (南都) [SOUTHERN METROPOLIS] (Nov. 28, 2013), <http://ndnews.oeeee.com/html/201311/28/540404.html>.

ii) According to the objective evidence, including videos and witness testimonies, the victim voluntarily followed the five defendants all the way and voluntarily entered the room of the hotel, with little evidence of violence or coercion;

iii) The five victims left RMB 2,000 for the victim after sexual intercourse and

iv) The victim and the staff in the bar contacted Li's family to ask for compensation after the incident. A text on the mobile phone of the driver of Li's family proved that the victim threatened to report the case to the police and media if compensation was not provided.¹⁵⁶

The trial court found that:

i) The victim was a bar hostess,¹⁵⁷ but a bar hostess need not be a prostitute. As long as the consent of the woman is absent, the forcible sexual intercourse should be taken as rape, regardless of her occupation;¹⁵⁸

ii) According to videos and testimony by Li's friend, violence used against the victim, together with the wounds on the victim's face, proved lack of consent;

iii) The court confirmed the five defendants left RMB 2,000 for the victim, but did not explain the nature of the money; and

iv) The court seemed to admit that the victim contacted Li's family, but held that this cannot be taken as consent as it took place after the alleged rape.¹⁵⁹

(c) Whether There Was Violence, Coercion or Other Means

Li claimed that little objective evidence showed there was violence, coercion or other forcible means used against the victim. Specifically:

i) The victim left the bar in the company of Zhang, as admitted by both the victim and Zhang;

ii) She left the restaurant together with Zhang and entered one of the defendants' cars without any sign of violence or coercion, as stated by a witness in the restaurant at the time;

iii) There seemed to be no resistance when they crossed the hotel hall, according to the testimony of the security guard;

iv) The victim seemed to enter the room on her own according to video evidence; and

v) The wounds on her face could have been made afterwards according to two forensic pathologists employed by Li's family.¹⁶⁰

¹⁵⁶ Chai, *supra* note 139.

¹⁵⁷ *Li Moumou Deng Qiangjian An* (李某某等强奸案) [*Beijing Haidian People's Procuratorate v. A Certain Li et al.*], XINWEN PINDAO (新闻频道) [NEWS CHANNEL], (Sep. 26, 2013), http://www.s1979.com/news/china/201309/26102072026_2.shtml.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

The trial court rejected the defense and held that there was enough evidence to confirm violence and coercion:

a) Several testimonies by the victim, other defendants, and Li's friend established the use of violence against the victim;

b) Several signs in the video should be interpreted as dragging, beating and pushing;

c) The wounds on the victim's face were left out of the violence, given the small possibility of having being made afterwards, after taking into consideration the testimonies of the doctors, official forensic pathologists and the staff of the bar.

4. Conclusion

This case, with the national attention it received, limited objective evidence and contradictory testimonies by the victim and the defendants, seems to be a *Rashōmon*. The figure of Li has inflamed too much social sentiment against the privileged. Those sentiments, or in other words, public opinion, may have put pressure on both the parties and the court, leading to a situation where the truth and the opinions of the masses cannot be clearly distinguished from each other. Many issues still remain unclear or may never be clarified with the end of the appeal.

5. Comments by Associate Professor Lao Dongyan of Tsinghua Law School

(a) On Evidence

To a great extent, the trial court based its verdict on the testimonies of both parties. Were the testimonies convincing enough to find the defendants guilty? As the alleged rape took place in a closed space, without any audio or video recordings, testimony became crucial evidence in the case. Based on the premise that the testimonies were acquired in accordance with due process, if the testimonies of the defendants were found consistent on important details, then the court would be inclined to accept the testimonies. If the testimony of a defendant was found to be self-contradictory, the court would usually be inclined to accept the testimony that was consistent with other evidence (including other defendants' testimonies).

(b) On the Finding of Rape

Semen stains were not required for the court to confirm that there had been sexual intercourse. The sexual intercourse constituting rape in the Criminal Law does not require ejaculation. As no semen stain

¹⁶⁰ Chai, *supra* note 139.

could be found, testimonies were crucial to support the finding of rape.

The key point in the crime of rape is the absence of consent when the alleged crime takes place. The fact that the victim contacted the defendant's family for compensation could not lead to the conclusion that the victim consented to have sexual intercourse. For the finding of the absence of consent, evidence such as video recordings and the testimonies of other defendants were much more important.

6. Comments by Professor Zhou Guangquan of Tsinghua Law School

(a) On Evidence

In the joint crime with several suspects, although it is not rare that some suspects try to shift their responsibility onto others, the competency of their statements should not be denied if these statements can be corroborated mutually, coincide with the testimony of the other witnesses and are logically compelling.

With regard to the doubts about whether Li's behavior displayed in the surveillance video constitutes violence and coercion, it is necessary for the court to make a value judgment to decide the nature of Li's behavior. Furthermore, it is only the court who can make such a valid value judgment. Any medium or person who was not involved in the case, but watched the surveillance video of this case, which was not heard in open court, has infringed the right of privacy of the minor suspects and the victim.

(b) On the Finding of Rape

The facts that take place before or after sexual intercourse are not decisive when judging whether rape exists. In other words, it is the victim's will at the moment the sexual intercourse happened that should be clarified to ascertain the existence of rape.