

China Legal Briefing* 268

August 2018



* CHINA LEGAL BRIEFING is a regularly issued collection of Chinese law related news gathered from various media and news services, edited by WENFEI ATTORNEYS-AT-LAW LTD. distributed to its clients and CHINA LEGAL BRIEFING subscribers.

WENFEI ATTORNEYS-AT-LAW LTD. does not accept responsibility for the accuracy of quotes or truthfulness of its content. CHINA LEGAL BRIEFING is not intended to provide

- 1. New Negative List of 2018 was Released**
- 2. Amendment of Interim Measures for the Recordation Administration of the Formation and Modification of Foreign-Funded Enterprises**
- 3. New Chinese Antitrust Authority**
- 4. China establishes International Commercial Courts**

1. New Negative List of 2018 was Released

On 28 June 2018, the *Special Management Measures for the Market Entry of Foreign Investment* (“Negative List 2018”) were released by the Ministry of Commerce of the PRC and the National Development and Reform Commission of the PRC and came into effect on 28 July 2018, while the previous Negative List of 2017 (“Negative List 2017”) was repealed.

Compared to the previous version, the Negative List 2018 further relaxes market access. The Negative List 2018 sets out special management measures, such as equity requirements and executive requirements in a unified and transparent manner. The Negative List 2017 was in general reduced from 63 to 48 provisions, and the investment areas including finance, automobiles, ships, railways, agriculture, mining and power grids were limited to 22 provisions. For instance, in the field of infrastructure, restrictions on foreign investment in the railway network and power grids have been repealed.

The investment areas that fall outside the scope of the Negative List 2018 shall be treated the same as domestic investment and shall not be restricted by any other regulation.

2. Amendment of Interim Measures for the Recordation Administration of the Formation and Modification of Foreign-Funded Enterprises

On 29 June 2018, the Ministry of Commerce amended the *Measures for the Recordation Administration of the Formation and Modification of Foreign-Funded Enterprises* (“New Measures”). Under the New Measures, the most significant positive change for foreign investors is that the registration and recordation will now take place at the same time.

According to the amendment, in the case that a non-foreign investment enterprise is, inter alia, converted to a foreign investment enterprise as a result of merger and acquisition, merger by absorption etc. and falls under the scope of filing stipulated in the New Measures, no approval is required.

In addition, if the strategic investment by a new foreign investor in a foreign invested listed company falls under the scope of filing stipulated in the New Measures, filing formalities for changes shall be completed within thirty (30) days after registration with the securities registration and clearing organization.

3. New Chinese Antitrust Authority

The anti-monopoly functions of the National Development and Reform Commission, the Ministry of Commerce and the Office of the State Council Anti-monopoly Committee are integrated into the newly established State Administration for Market Regulation (“SAMR”).

Before this institutional reform, the enforcement of the anti-monopoly law was conducted by three authorities respectively under the leadership of the State Council. The three authorities were the Ministry of Commerce (antitrust bureau), the National Development and Reform Commission (price supervision and anti-monopoly bureau) and the State Administration for Industry and Commerce (antitrust and unfair competition law enforcement bureau).

The Ministry of Commerce was mainly responsible for the examination of the concentration behavior of operators. The National Development and Reform Commission was mainly responsible for the investigation and punishment of price monopoly behavior, and the State Administration for Industry and Commerce was mainly responsible for the examination of monopoly agreements other than price monopoly behavior, abuse of

market dominance, abuse of administrative power to eliminate and restrict competition.

After the reformation, all anti-monopoly enforcement will be conducted by the SAMR, which will finally unify the enforcement of antitrust law.

4. China establishes International Commercial Courts

On 25 June 2018, the Supreme People's Court ("SPC") issued the *Provisions of the SPC on Several Issues Concerning the Establishment of International Commercial Courts* and on 29 June 2018, the China First and Second International Commercial Courts ("CICC") were established in Shenzhen City and Xi'an City respectively.

A. Why Shenzhen and Xi'an?

It should come as no surprise that the SPC chose both Shenzhen and Xi'an as the cities for the first and second international commercial courts with regards to the function of both courts. The new CICC are specifically designed to adjudicate disputes arising from the Belt and Road Initiative.

Shenzhen, as a "test field" of China's juridical revolution, has great advantages especially regarding its location, which is close to both Hong Kong and Macau. In addition, Shenzhen is an indispensable economic supporting belt for the Maritime Silk Road.

Xi'an, as the old capital of the Tang Dynasty, is the origin of the ancient Silk Road and the new One Belt One Road Initiative. Choosing Xi'an as the location of the Second International Commercial Court has an inevitable political implication. In the meantime, as a very important city in the middle of China, Xi'an is also a "test field" for the reform and opening-up of the middle of China.

B. A new type of international commercial dispute settlement agency

The CICC will, as the name implies, have jurisdiction over civil and commercial disputes between equal subjects, which means, firstly, disputes between countries and disputes between the host country and investors are excluded. Second, the cases shall be foreign-related.

CICC now tries to integrate the three dispute resolution methods, mediation, arbitration and litigation, into one platform. They can provide the parties with all three methods, which provides more options for contractual parties. If the parties decide to choose mediation as the way to solve their dispute, the CICC can mandate the case to either the international commercial experts committee or to the international commercial mediation institute. After reaching an agreement, CICC may issue a conciliation statement; with the request of the parties, the CICC may issue a judgment. Once the conciliation statement is delivered to the parties, it is a binding document of the SPC. If the parties opt for an arbitration, the parties can apply to the CICC for preservation of property, preservation of evidence or preservation of action. After an arbitration award has been rendered, the parties may request enforcement or cancellation of the arbitration award by the CICC. If a party chooses to file a lawsuit with the CICC, then the judgment/verdict shall be final and binding, i.e. it is not appealable.

Thus, the judgments and verdicts issued by the CICC are legally effective judgments/verdicts, which again indicates that the CICC belong to the SPC and the judgments/verdicts issued by the CICC are final.

It is evident that not all cases can be adjudicated by the SPC. Thus, to bring the cases before the CICC, at least one of the following requirements shall be met: 1) the parties have reached agreement on choosing the CICC in

accordance with Article 34 of the Civil Procedural Law of the People's Republic of China and the dispute amount shall be more than 300 million RMB; 2) it is an international commercial case over which the High People's Court has jurisdiction and the High People's Court has decided to have it tried by the CICC, which agrees; 3) it is an international commercial case with great impact nationwide; 4) the case is arbitrated in the frame of the international commercial dispute resolution system and a party has applied to the CICC for preservation or the enforcement/cancellation of an arbitration award; or 5) it is another form of an international commercial case that according to the SPC needs to be tried by the CICC.

Currently, commercial arbitration is by far the most common dispute resolution method in Chinese-foreign projects. The stance the CICC will take towards the enforcement of arbitration awards will be of major importance. In the past, we have experienced many irregularities of enforcing valid arbitration awards in China, both domestic and international arbitration awards.

© Wenfei, Beijing, August 2018

Check the China Legal Briefing archives on: <http://www.wenfei.com/publications.html>

Obtain your personal subscription from: china@wenfei.com