

# China Legal Briefing\* 249

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## **1. Circuit Courts Of China's Supreme People's Court**

On 28 January 2015, the Supreme People's Court ("Supreme Court") released the *Provisions of the Supreme People's Court on Several Issues concerning the Hearing of Cases by Circuit Courts* (Fa Shi [2015] 13, the "Provisions"). According to the Provisions, the Supreme Court decided to establish two circuit courts. On the same day, the First Circuit Court was inaugurated in Shenzhen, Guangdong Province in southeast China. Three days later, the Second Circuit Court was instituted in Shenyang, Liaoning Province.

The establishment of the two Circuit Courts is no surprise, since the Supreme Court had already announced its plan to establish circuit courts in a document released at the end of the fourth plenum of the 18th Central Committee in November 2013.

### **A. Jurisdiction areas**

According to Article 1 of the Provisions, the First Circuit Court is set up in Shenzhen City, Guangdong Province. Its circuit encompasses Guangdong Province, Guangxi Province and Hainan Province. The Second Circuit Court is based in Shenyang City, Liaoning Province, and has jurisdiction over the area of Liaoning Province, Jilin Province and Heilongjiang Province.

### **B. Level**

Pursuant to Article 2 of the Provisions, the judgments, rulings and decisions made by the Circuit Courts are deemed to have the same legal effect as those made by the Supreme Court in Beijing. This means that the judgments, rulings and decisions made the Circuit Courts are final and become effective immediately.

### **C. Scope of accepted cases**

There are 11 types of cases occurring within the circuits that shall be accepted by the Circuit Courts:

1. first-instance cases in administrative matters that are complicated or of significant nationwide influence;
2. first-instance civil and commercial cases that are of significant nationwide influence;
3. appeals against the first-instance administrative or civil or commercial judgments and rulings made by the high people's courts;

4. applications for retrial of legally effective administrative, civil or commercial judgments, rulings and mediation decisions issued by high people's courts;
5. criminal appeal cases;
6. retrial applications by authorized institutions;
7. applications for reconsideration of penalty or detention decisions made by the high people's courts;
8. internal requests for review of jurisdictional issues referred by the high people's courts to the Supreme People's Court;
9. requests by the high people's courts for extension of the duration of trial;
10. civil, commercial and judicial assistance cases involving the Hong Kong Special Administrative Region, Macao Special Administrative Region and the Taiwan Region; and
11. other cases that shall be heard or handled by the circuit courts according to the Supreme People's Court's opinion.

It is worth mentioning that cases involving intellectual property rights, foreign-related commercial affairs, maritime affairs, state compensation, enforcement, the review of death sentences as well as appeals by the national procuratorate shall be heard or handled by the Supreme Court itself. The Circuit Courts currently do not handle this type of cases.

#### **D. Procedures of submission of materials by litigants**

According to Article 5 to 7 of the Provisions, where a party concerned submits an appeal against any first-instance administrative, civil or commercial judgment or ruling made by the high people's courts within the circuit, the appeal shall be submitted to the Circuit Court through the first instance court. The first instance court shall, after receiving the appeal and the reply from the opposing party, submit those documents along with all case files and evidence to the Circuit Court within five days.

On the other hand, where a party concerned applies for a retrial in respect of any legally effective judgment or ruling made by a high people's court within the circuit, the party shall submit the retrial application and related material directly to the Circuit Court.

Submissions regarding cases that shall be handled by the Supreme People's Court itself must be transferred by the corresponding circuit courts upon request of the parties concerned.

A common occurrence hampering a fair legal treatment of parties in China is the fact that the high people's courts routinely refuse to transmit appeals to the

Supreme Court and that the Supreme Court itself refuses to accept appeals and retrial applications submitted by courier. In practice, this means that it is often only possible to make a submission to the Supreme Court if a lawyer with good relations to the court is sent to deliver the submission in person. In connection with the establishment of the new Circuit Courts, there has been a certain optimism that access to the Supreme Court will improve as the Circuit Courts will accept submissions and ensure that they are transferred to the Supreme Court were required. However, at this stage we remain sceptical that a significant improvement lies ahead.

## **2. Newly Released Foreign Exchange Control Rules To Simplify Procedures**

On 13 February 2015, the PRC State Administration of Foreign Exchange (“SAFE”) issued a *Circular on Further Simplifying and Improving the Foreign Exchange Administration for Domestic and Overseas Direct Investment* (Hui Fa [2015] No. 13) (“Circular 13”), whose purpose it is to simplify and improve the foreign exchange administration procedures for domestic and overseas direct investments, in particular by outsourcing certain tasks to banks. It is expected that more detailed regulations regarding the management of foreign exchange transactions by banks will ensue.

Circular 13 went into effect on 1 June 2015. The following main points are the worth highlighting:

### **A. Cancellation administrative approval procedures relating to foreign exchange registration**

Before Circular 13 was released, a registration and prior approval by SAFE would be required under PRC Law for most foreign exchange transactions related to foreign direct investment, such as the opening foreign exchange accounts, the receipt, transfer, payment, and settlement of foreign currency in upfront expenses accounts, the increase or reduction of the registered capital of an foreign invested entity, and the settlement of foreign currency in a capital account for special purposes. With the issuance of Circular 13, those approvals will no longer be required.

Instead, foreign investors and can select qualified banks with which to conduct foreign exchange registrations directly, and these qualified banks will administer foreign exchange transactions according to the registration information provided by the parties. The local SAFE branch will retain a supervisory authority and provide its guidance.

Further, it is worth noting that only banks that (a) have obtained the financial institution identification codes issued by the SAFE and (b) have set up an IT operating system allowing for an audit by the local SAFE branch can carry out the registration.

**B. Simplification of the administrative procedures at SAFE related to equity purchases and capital contributions**

Before Circular 13 was released, any purchase of an equity interest in a Chinese domestic company by a foreign investor involving foreign currency needed to be registered with SAFE. The completion of the registration is subject to the confirmation by SAFE that the registration information is consistent with the transaction information with respect to parties, payment method, amount of payment, etc. Failure to complete the registration meant that the purchase price cannot be exchanged into RMB and that the foreign investor cannot repatriate any funds derived from the investment.

With the issuance of Circular 13, this confirmation and registration procedure will no longer be required, both for purchase prices paid in monetary and non-monetary form. In the case of a purchase price paid in cash only, the banks, after receiving the money from foreign investors, will handle the registration procedure through their operating system. The injected capital can be used immediately after the completion of registration by the bank.

In addition, the requirement to obtain a prior confirmation by SAFE in order to register a non-monetary capital contribution when investing into a Chinese company is revoked. With regard to capital contributions in foreign currency or offshore RMB, i.e. in cash only, the confirmation and registration at SAFE is replaced by a registration at qualified banks through their operating system.

**C. Replacement of the annual inspection by SAFE by a reporting system**

Instead of an annual inspection conducted by SAFE, which was required before the entry into force of Circular 13, it is now sufficient for Chinese companies to submit an annual report (before September 30 of each year) through SAFE's information system including data regarding equity invested by them in both domestic and overseas capital markets. The annual report can also be submitted by the entity's authorized accounting firm or bank. The submission of the data is mandatory, entities that fail to make the submission will be recorded in the SAFE information system and cannot conduct any foreign exchange business at banks.

### **3. New Rules Requiring Foreign Technology Companies To Reveal Their Source Code Suspended**

On 26 December 2014, the China Banking Regulatory Commission and the Ministry of Industry and Information jointly issued the Notice of Issuing the Promotion Guideline on Application of Secured Information Technology ([2014] 317). The rules required technology companies to turn over intellectual property and reveal the source code of their software to the China Banking Regulatory Commission. After strong opposition by foreign industry representatives, the Commission released an explanation on its website, according to which the filing requirement for source codes is suspended until the release of more detailed rules regarding the filing method and procedure.

Hence it is currently only necessary for foreign technology companies to provide certification regarding the intellectual property rights or other legitimate source of the software. While there is no obligation to reveal source codes at this time, it is still possible or even likely that the Chinese authority will release further implementing rules in the future. Given the change of attitude of the PRC authorities on this issue, however, we expect these implementing rules to be less strict than their initial version.

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