

# China Legal Briefing\*294

29 January 2024



\* 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 advice.

- I. Interpretation II of the Supreme Court's Labor Dispute Guidelines: Draft for Comment**
- II. The Third Revision of the Catalog of Technology Export Control**
- III. Administrative Reconsideration Law of the People's Republic of China (Revised in 2023)**
- IV. The Customs Law of the People's Republic of China (draft)**

## **I. Interpretation II of the Supreme Court's Labor Dispute Guidelines: Draft for Comment**

The Supreme People's Court of China released a draft for public comment on the "Interpretation (II) on Several Issues Concerning the Application of Law in the Trial of Labor Dispute Cases" on December 12, 2023. Nearly 15 years after the enactment of the Labor Contract Law, this judicial interpretation aims to guide the accurate resolution of the increasingly complex labor disputes from trial experience. The final issuance of this interpretation will further clarify labor dispute issues and significantly guide enterprises' labor contract planning.

The draft covers topics including equity incentive disputes, defenses based on arbitration time limits, and so on. It elucidates the rights and obligations of employers and employees under various scenarios, such as the validity of labor contract, work injury compensation, and the implications of occupational health exams on contract termination.

Articles of particular interest to foreign companies in China, pending official release, include:

- Article 1 [Equity Incentive Disputes]: Courts will treat disputes over equity incentives as part of labor compensation within labor disputes, and will accept cases challenging arbitration decisions.
- Article 2 [Arbitration Limitation Defense]: Courts should not consider arbitration time limits unless they are invoked by involved parties.
- Article 3 [Late Arbitration Time Limit Defense]: Courts should dismiss defenses based on arbitration time limits if they are raised belatedly during trial unless new evidence indicates that the rights to claims are time-barred.

- Article 11 [Foreigners and Stateless Persons]: Recognition of employment relationships with foreigners or stateless persons lacking legal employment documents, working beyond their permit's validity, having residency revoked for law violations, or failing to update or reapply for permits after changing jobs or locations will not be supported by courts, except for permanent residents or those exempted from permits.
- Article 18 [Effectiveness of Non-Competition Clauses]: Courts will not support any claims for the invalidity of non-competition clauses based on the fact that such non-competition clauses cover the employment period and that no financial compensation was paid .
- Article 19 [Liability for Breach of Non-Competition Agreement by the Employee]: Employers' claims for repayment of compensation and penalties for breaches are supported by courts.
- Article 20 [Unilateral Job Position or Workplace Adjustments by Employers]: Employers must prove the legality of unilateral job or workplace changes. If unlawful changes lead to contract termination requests and compensation claims by the employee, courts should support these requests and claims.

## **Conclusion**

This draft interpretation reveals that specific groups of labor cases are increasingly being tried in the court. Employers in China should familiar themselves with these interpretations and take this opportunity to audit their employment contracts, handbooks, internal rules, and practices to ensure they align with labor laws and the interpretations provided. Wenfei will monitor the progress of this draft interpretation and provide updates upon its official release.

## **II. The Third Revision of the Catalog of Technology Export Control**

On December 21, 2023, the Chinese Ministry of Commerce, in collaboration with the Ministry of Science and Technology, has issued a revised "Catalog of Technologies Prohibited from Export and Technologies Restricted from Export in China" (the "Catalog"), promulgated as Announcement No. 57 of 2023. This revision marks the third refinement of the "Catalog" following its previous amendments in 2008 and 2020, reflecting the ongoing evolution of China's strategic approach to technology export controls.

This latest revision streamlines the "Catalog" from 164 to 134 technical items, representing a substantial recalibration of China's technology export landscape. The revision has been meticulously crafted, incorporating feedback from various sectors including government departments, industry associations, academic institutions, and public commentary, ensuring a comprehensive and balanced regulatory framework.

### **Key modifications in this revision include:**

- The elimination of six prohibited export technical items, such as the manufacturing technology for green plant growth regulators, and a reduction of twenty-eight restricted export technical items, including the manufacturing technology for medical diagnostic equipment and target feature extraction and identification technology.
- The introduction of one new prohibited technical item concerning human cell cloning and gene editing technologies. Additionally, three new restricted export technical items have been instituted, covering advancements in crop hybrid vigor utilization, bulk material handling and conveying technology, and laser radar systems. Entities

seeking to export these technologies must adhere to established licensing procedures.

- Refinements to control points and technical parameters across thirty-seven technical items. This encompasses adjustments to six prohibited export technical items related to traditional Chinese medicinal resources and production techniques, as well as thirty-one restricted export technical items spanning areas such as economic crop cultivation and breeding technology, non-ferrous metal metallurgy technology, and the design and construction of large-scale high-speed wind tunnels.

### **Conclusion**

Wenfei advises all foreign companies engaged in importing technologies from China to closely review these revisions. It is imperative to understand that Technology Export from China entails the transfer of technological assets to overseas entities via trade, investment, or economic and technological cooperation channels. Technologies listed as prohibited for export in the "Catalog" are strictly barred from such transactions. For technologies listed as restricted for export, compliance with a license management system is mandatory; exports without the required license are prohibited. Meanwhile, technologies that are not listed in the "Catalog" are managed through contract registration procedures.

### **III. Administrative Reconsideration Law of the People's Republic of China (Revised in 2023)**

The amendment of the Administrative Reconsideration Law of the People's Republic of China (the "ARL") was officially released on September 1, 2023, and has taken effect on Jan 1, 2024. Administrative reconsideration is an important legal mechanism for resolving administrative disputes, preventing and correcting illegal administrative

acts and protecting the lawful rights of businesses and citizens from such acts. The ARL consists of 7 chapters, and we will introduce you to some key amendments in this publication.

- **The clarification of Jurisdictional system of administrative reconsideration**

Firstly, the ARL specifies that the local people's governments at and above the county level uniformly exercise administrative reconsideration duties. In the past, the departments of local people's governments were responsible for administrative reconsideration. Secondly, Departments of the State Council have jurisdiction over administrative reconsideration cases where their own departments, dispatched agencies and authorized organizations are the respondents. Thirdly, the administrative organs with vertical management system, such as Customs, finance, foreign exchange management, tax and national security organs, retain within such system the administrative reconsideration responsibilities.

- **Expansion of the scope of administrative reconsideration**

Art 11 of the ARL specifically lists the scope of administrative reconsideration, the newly added situations include administrative penalty decisions, compulsory measures, compulsory enforcement decisions, license and administrative decisions recognizing ownership or use of natural resources etc.

- **Establishment of a mediation and conciliation system and Administrative Review Board**

The ARL states that the administrative reconsideration organ shall handle administrative reconsideration cases and could engage in mediation. The ARL also clarifies that governments at and above the county level should establish an Administrative Review Board (the "ARB")

with the participation of relevant government departments, experts and scholars, etc., in order to provide advice on administrative reconsideration cases.

In particular, the following cases should be referred to the Administrative Review Board for an advisory opinion.

- (1) The case is significant, difficult and complex;
- (2) Highly specialized and technical;
- (3) Administrative review cases under the jurisdiction of the people's government of a province, autonomous region or municipality directly under the Central Government and when they refuse to accept an administrative act made by the organ concerned.
- (4) The cases which the ARB considers necessary to treat.

- **Conclusion**

The ARL was amended to clarify the general underlying principles and to improve the scope of administrative reconsideration, which not only increases the convenience of legal applications but also improves the efficiency of administrative reconsideration.

#### **IV. The Customs Law of the People's Republic of China (draft)**

On December 29, 2023, the Customs Law of the People's Republic of China (draft) (the “**Draft**”) was published and currently open for public comments until January 27, 2024. The Draft consists of 7 chapters and 70 clauses, targeting on promotion of foreign trade, maintenance of the order of imports and exports, and regulation of the collection and payment of Customs duties. In this publication, we will introduce the key contents of the Draft.

- **Scope of Application of Customs Duties**

It is made clear in the Draft that Customs duties should be levied by the Customs on goods permitted to be imported into or exported from the

PRC and on articles that are allowed to be imported into the PRC. The consignee of imported goods, the consignor of exported goods and the carrier or consignee of entry articles are the Customs duty payers. In addition, enterprises and individuals who are obliged by laws, administrative regulations or the State Council to withhold or collect Customs duties on behalf of the taxpayers are the withholding and payment obligors of Customs duties.

- **The principle of taxation, the setting, adjustment and implementation of the tariff items and rates.**

The tariff items, rates and applicable rules for imported and exported goods shall be implemented in accordance with the Import and Export Tariff Rules of the PRC, which is annexed to this Draft. Imported articles are exempted from Customs duties up to the prescribed amount, and those exceeding the prescribed amount but still within a reasonable quantity for personal use are subject to the simplified collection method of Customs duties, while other articles are subject to Customs duties applicable to imported goods. The amount of imported articles exempted from Customs duty, the scope of imported articles subject to the simplified collection method and the specific collection method will be prescribed by the State Council and reported to the Standing Committee of the National People's Congress for the record.

- **Customs collection management system**

Based on the successful experience in the past, the Draft specifies that tariff collection management can be implemented in a model that separates the release of goods from the determination of the duty amount. Besides, taxpayers and withholding agents could choose the Customs to handle the tax declaration. Customs has the right to confirm the amount of tax within a certain period, and if the result of the confirmed amount is inconsistent with the declared and paid amount,



the tax shall be additionally paid or refunded.

- **Liability**

For failure to fulfil the tax obligations or failure to report to the Customs required business status or goods information, as stated in chapter 6 of the Draft, the Customs Service will firstly issue a warning; in serious cases, a fine of up to 30,000 yuan will be imposed.

Furthermore, if a taxpayer or withholding agent adopts such means as transferring or concealing property to prevent the Customs from recovering the tax, it will be subject to a fine between 50 % and five times of the unpaid tax, in addition to the recovery of the tax and the late payment fee imposed by the Customs.

- **Conclusion**

The amendment of the Customs Law is an important legislative arrangement to implement the tax law, which is conducive to China's better integration into the international market and the world trade system. Wenfei will monitor the progress of this Draft and provide updates upon its official release.

\*\*\*\*\*

© Wenfei, Beijing, Jan. 2024

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

Obtain your personal subscription from: china@wenfei.com