TianTong Dispute Resolution Review

天同律师事务所
TIANTONG LAW FIRM

About Tiantong

TianTong Law Firm was founded in 2002. As one of the leading Chinese law firms, it is solely dedicated to complex civil and commercial dispute resolution. Headquartered in Beijing, Tiantong has approximately 150 people nationwide, many of whom had served as senior judges for years at different levels of Chinese courts, including the Supreme People’s Court and high courts of China. In the recent years, it has established 6 branch offices in Shenzhen, Nanjing, Chongqing, Shenyang, Xi’an and Zhengzhou, where the 6 circuit courts and 2 international commercial courts under the auspice of the Supreme People’s Court are seated.

In the past decade, Tiantong has been keeping one of the highest winning rates among all Chinese law firms before the Supreme People's Court and various high courts of China. Over 30 cases won by Tiantong have been publicized as landmark guiding cases for national trial work on some of the most authoritative law journals in China.

Tiantong advises on all types of commercial disputes, including but not limited to litigation, arbitration, contentious bankruptcy and enforcement proceedings with its most impressive achievements in banking and finance, construction and engineering, corporate and M&A disputes etc. Its clients range from foreign governments such as the US Department of Justice, multinational corporations such as RBS to large Chinese companies such as Bank of China, China Construction Bank, Agriculture Bank of China, Sinopec, Sinochem, China Datang Corporation and Ping An Insurance etc.

In addition to its traditional advantages in litigation before Chinese courts, Tiantong has extensive experience in representing clients before domestic and international commercial arbitration proceedings. Tiantong lawyers previously worked for leading arbitration institutions as case manager (e.g. the Permanent Court of Arbitration in Hague, Netherland and Hong Kong International Arbitration Centre in Hong Kong) or clerked with the Justice of the UN International Court of Justice in Hague, Netherland. Some of them once worked at leading international law firms on international arbitration matters conducted before CIETAC, HKIAC, SIAC, ICC, SCC and LCIA, where the seats of arbitration include Beijing, Shanghai, Hong Kong, Singapore, Stockholm and London.

Tiantong is also specialized in advising clients for recognition and enforcement of foreign arbitral awards and judgments before Chinese courts, and is capable of effectively working together with leading international law firms and local counsel overseas to handle multi-jurisdiction disputes.

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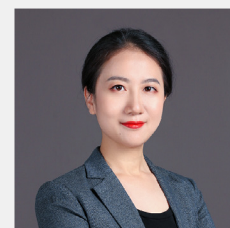

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Featured Article

Service of Foreign Judicial Documents in China

I. Introduction

When commencing legal actions against Chinese defendants in foreign national courts, plaintiffs usually encounter the problem how to accomplish service of process on Chinese defendants in China. Although China is a signatory to *the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (the "**Hague Service Convention**"), many foreign parties perceive the process through *the Hague Service Convention* in China as cumbersome and time-consuming. Such reluctance to employ ways conferred under the Hague Service Convention especially increases as a result of challenges arising from the ongoing COVID-19 pandemic. Therefore, foreign parties would attempt to find work-arounds to serving process on Chinese defendants, such as through sending emails to defendants, hiring process "agents" or retaining Chinese lawyers to hand deliver a copy of foreign court documents at the defendants' addresses in China, etc.

Unfortunately, these alternative methods of service are not unquestionable from the perspective of Chinese law. This article touches upon service of foreign judicial documents in China and address some specific methods of service that might be of interest to foreign parties who need to have foreign court documents served upon Chinese defendants in China. Specifically, this article will explore (i) the overall legal regime of serving foreign judicial documents in China, (ii) the way of effecting service of foreign judicial documents in China under *the Hague Service Convention*, and (iii)

substituted methods of service permitted under the *lex fori* circumventing *the Hague Service Convention*.

II. The Legal Regime of Serving Foreign Judicial Documents in China

The legal regime of serving foreign judicial documents in China is relatively clear-cut with the following trio points.

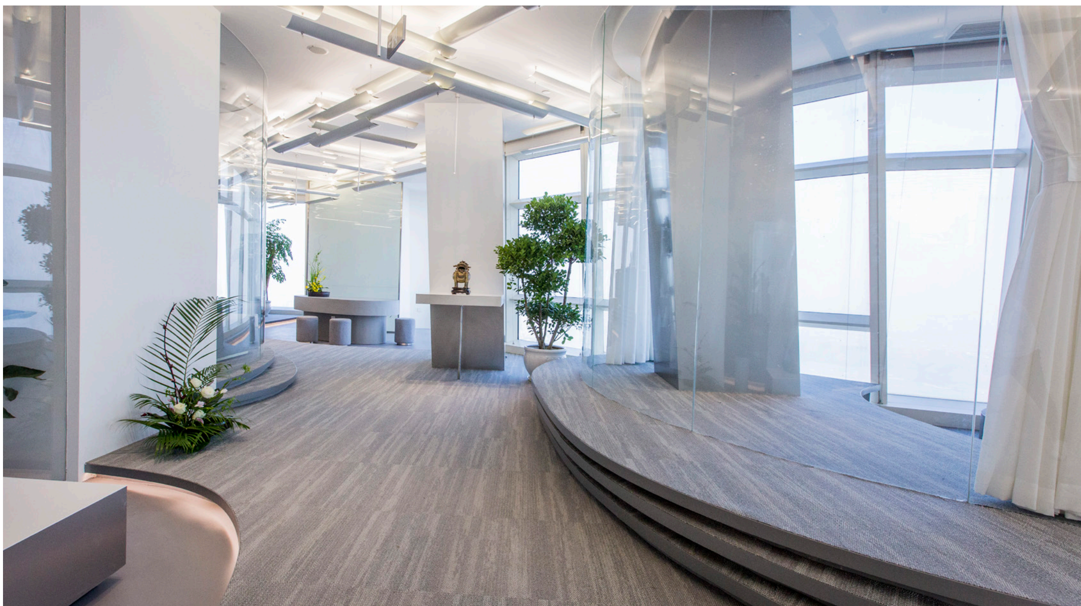
First of all, the request to serve on Chinese parties shall be processed merely through the formal methods stipulated in international treaties, or absent such treaties, through diplomatic channels.[1] Since service through diplomatic channels can hardly be employed in practice, the only viable method of serving foreign judicial documents in China is through methods conferred under international treaties. China does not permit any informal method of service.

Secondly, different from a few common law jurisdictions, the service of judicial documents in China shall be exclusively processed by Chinese courts in practice. [2] Service of judicial documents is considered exercise of China's sovereign power.[3] Foreign courts and individuals are expressly prohibited from serving process in the territory of

[1] Article 276 of the Civil Procedure Law.

[2] Jiang Bixin, The Understanding, Application and Guidelines of the New Civil Procedure Law (2015 Revision), Beijing: Law Press, pp. 348-349.

[3] For instance, *Circular of the Supreme People's Court on Terminating the Judicial Assistance Agreement between Local Courts and the Judicial Departments of Foreign Local Courts* (Fa [1995] No. 4) states that "*judicial assistance, including mutual service of judicial documents, investigation and evidence collection, recognition and enforcement of court decisions, etc., concerns to the judicial sovereignty of the country*."



China.[4] In certain judicial practice[5] , Chinese nationals who are not bailiffs or clerks of courts shall not send judicial documents of foreign courts without approval in China; otherwise they may commit torts against the persons that have been served. As such, not only does the express prohibition targets on foreign courts and individuals, attempts to bypass such prohibitions via Chinese agents are also prohibited in China's judicial practice.

Last but not the least, Chinese courts reserve their power to monitor and supervise a request to serve in China via international treaties, and have the authority to refuse a request if it would "*impair the sovereignty, security, or social and public interests of the People's Republic of China*." [6] For instance in *Zhang et al v. Baidu.Com Inc. et al* [7], plaintiffs have brought a civil action against Baidu and the Chinese government alleging that Baidu suppressed political speech in China. The underlying service of process on Baidu and the Chinese government was unsurprisingly declined by the Chinese government, deemed as having impaired the sovereignty of China.

III. The Hague Service Convention

Apart from a number of bilateral treaties of mutual judicial assistance signed by China, China acceded to *the Hague Service Convention* and is therefore bound by it. If a foreign party is lodging a judicial proceeding in a jurisdiction subject *to the Hague Service Convention*, the party may request service on the Chinese defendant via submitting a request to the designated central authority of China, i.e. the Ministry of Justice of People's Republic of China (the

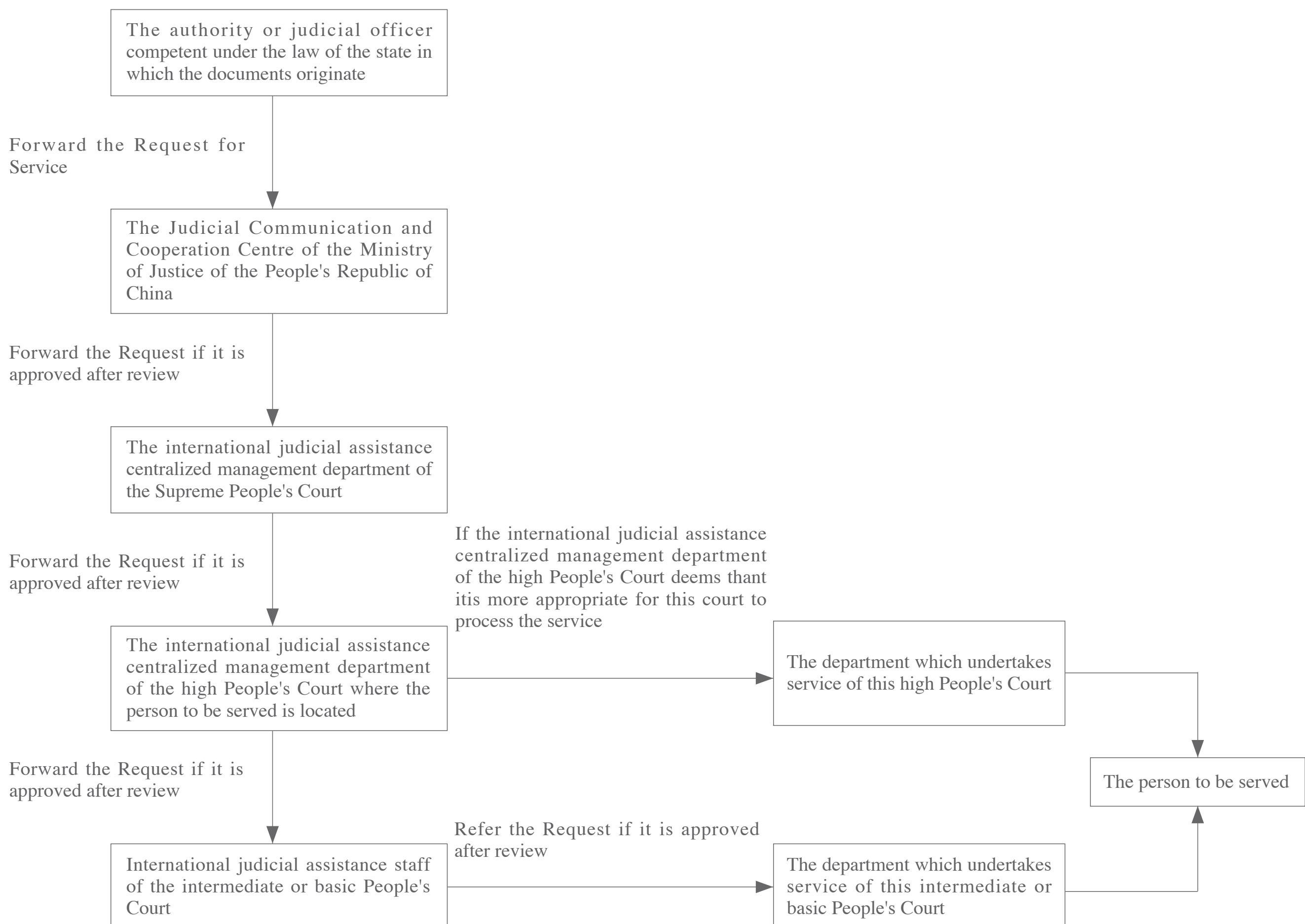
[4] Article 277 of the Civil Procedure Law.

[5] *Suqian Wahaha Hengfeng Beverage* Co., Ltd. v. KPMG Huazhen Accounting Firm and Its Guangzhou Branch, 2009 Jiangsu Civil 2 Final No. 0045.

[6] Article 276 of the Civil Procedure Law.

[7] https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2011cv03388/379407/42/

"**MOJ**"). [8] The judicial documents will be forwarded via the Supreme People's Court of the People's Republic of China (the "**SPC**") to local Chinese courts to effectuate service on the Chinese defendant. This structure can be indicated in the diagram below [9]. The entire process usually takes six to twelve months or even more time to be completed.

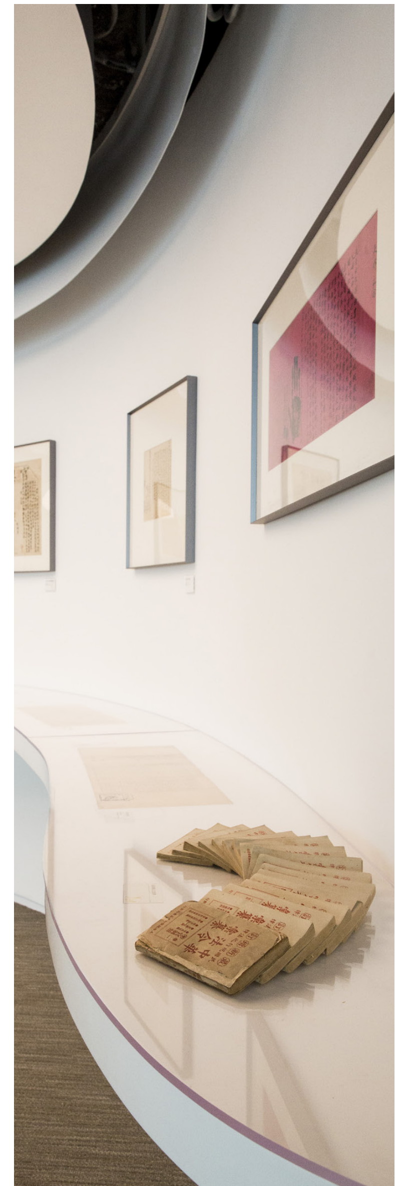


[8] Article 5 of the Hague Service Convention provides that "*[t]he Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either –*
a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or
b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed."

[9] *Rules for Implementing the Regulations on Handling Requests for Judicial Assistance on Service of Judicial Documents, Investigation and Evidence Collection in Civil and Commercial Cases under International Conventions and Bilateral Judicial Assistance Treaties (for Trial Implementation).*

The SPC and other local courts will review the formality and content of supporting materials submitted along with the request for service on Chinese defendants. The criteria for Chinese courts to transmit such request include [10]:

a) There is a request of service of process or a transmittal letter issued by the central authority;
b) The jurisdiction of the requesting party is a signatory to *the Hague Service Convention*;
c) The documents to be served are judicial or extrajudicial documents prescribed under *the Hague Service Convention*;
d) The documents to be served are those that shoud be served by Chinese courts within their authority. For instance, arbitration documents are not to be served by Chinese courts in China.
e) The request is not inconsistent with *the Hague Service Convention*;
f) If the requesting party proposes to serve via particular methods, such method of service shall not be incompatible with Chinese law or impossible or difficult to be implemented in practice; and
g) Unless the requesting party proposes to serve via alternative channels as provided under Article 5(2) of *the Hague Service Convention* (i.e. service via particular methods), the request shall be accompanied by a translation in Simplified Chinese.



China has objected to service in its territory by foreign diplomats upon Chinese nationals provided under Article 8(2) of *the Hague Service Convention*. Nevertheless, China cannot object to service by foreign diplomats upon nationals of the diplomat's own state according to the same article. China has also expressly opposed to service of foreign judicial documents in the territory of China through alternative methods as provided under Article 10 of *the Hague Service Convention*, i.e. service via postal channels and judicial officers. [11] That is to say, the only prevalent way to serve foreign judicial documents in China is the way set forth under Article 5 of *the Hague Service Convention*, i.e. service via the central authority.

The MOJ reiterates that it is "*the only legal authority to receive requests for service of judicial document from abroad*" on the website of the Hague Conference on Private International Law (HCCH). Any manner of service

[10] *Id*.

[11] Article 2, 3 of the PRC's declarations, available at: https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=393&disp=resdn; See also Article 2, 3 of *Decision of the Standing Committee of the National People's Congress on Ratifying the Accession to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*.

on a Chinese individual or entity in China from abroad circumventing the MOJ is therefore impermissible in the view of Chinese central authority.

IV. Substituted Methods of Service

Nevertheless, plaintiffs do not always have to strictly follow the position held by Chinese authorities to serve foreign judicial documents on Chinese defendants. Plaintiffs who initiate judicial proceedings outside China against Chinese defendants usually do not expect to enforce default judgements later in China, since Chinese courts are cautious about enforcing such foreign judgments. [12] Even if plaintiffs accomplish service of process on Chinese defendants through *the Hague Service Convention* and manage to obtain winning judgments, there is a slim chance for plaintiffs to obtain enforcement of such judgements in China.

Therefore, what plaintiffs pay more attention to is whether courts where they initiate legal actions would recognise the proposed methods of service to proceed with default cases against Chinese defendants, rather than the position held by Chinese authorities which is simply against any methods of service circumventing *the Hague Service Convention*.

Some jurisdictions allow plaintiffs to employ substituted methods of service to apprise foreign defendants of the proceeding working around *the Hague Service Convention*. Below are two examples of jurisdictions where substituted methods of service may be employed under certain conditions. [13]

[12] China acceded to the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters but has yet entered it into force.

[13] Please note that this article is drafted by a Chinese lawyer. All the references and perception of laws in other jurisdiction are taken from public searches.

The United States (U.S.): the U.S. federal courts appear to embrace alternative methods of service "*reasonably calculated to give notice*" as long as there is "*no international agreement directly to the contrary*." [14] The U.S. federal courts do not necessarily regard alternative methods of service as the last resort when all attempts to serve via the international agreements have been exhausted. Rather, the U.S. federal courts look to whether the proposed method of service is expressly prohibited under international agreements for the plaintiff to employ alternative methods of service on foreign defendants. For instance, it is seemingly arguable before the U.S. federal courts whether service via emails on Chinese defendants is directly contrary to *the Hague Service Convention*. There were some cases permitting plaintiffs "frustrated" by service through the MOJ to serve on Chinese defendants through emails [15] whilst other cases indicate that service via emails on Chinese defendant is either contrary to China's objection to Article 10(a) of *the Hague Service Convention* or inconsistent with the methods of service provided for by *the Hague Service Convention*.[16]

The United Kingdom (U.K.): English courts would prioritise service via international treaties, but still allow substituted methods of service if service via international treaties turns out to be impractical. English courts will defer to express prohibitions under local laws of the place where the service is to be effected when determining whether substituted methods of service can be employed. [17] However, since Chinese law expressly prohibits foreign courts and individuals from undertaking service of process within the territory of China, the proposed methods of service working around Chinese authorities could hardly suffice the prerequisite for English courts to allow substituted methods of service.

Apart from the above two examples, the most viable approach to avoid the mandatory ambit of *the Hague Service Convention* and Chinese law seems to be serving Chinese defendants via their foreign agents incorporated in the jurisdiction where the action has been brought. For example, if a civil lawsuit is commenced against a Chinese company before an English court, and such company happens to have appointed an individual agent in London, the U.K. or has established a subsidiary in London, the U.K. that is perceived as an agent of this Chinese defendant, English court documents may be served upon the Chinese defendant's agent in London. Such method of service obviates the need of sending judicial documents outside the jurisdiction where the action has been brought, with the result that neither *the Hague Service Convention nor* Chinese law would apply. [18]

[14] United States Code: Federal Rules of Civil Procedure, Rule 4 (f)(3); see also Rio Props., Inc. v. Rio Intern. Interlink, 284 F.3d 1007, 1016 (9th Cir. 2002).

[15] *Victaulic Company v. Allied Rubber & Gasket Co., Inc.*: https://dockets.justia.com/docket/california/casdce/3:2017cv01006/533396

[16] *Anova Applied Elec., Inc. V. Hong King Grp., Ltd., 334 F.R.D.* 465 (D. Mass. 2020).

[17] Order 11 Rule 5(2) of the Rules of the Supreme Court of the United Kingdom; Order 11 Rule 4 (2) of the Rules of Court of Singapore.

[18] For instance, see *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988)

China Law Updates

China Signs the RCEP with Other 14 Asia-Pacific Nations

On 15 November 2020, China together with other 14 Asia-Pacific Nations including the 10 member states of Association of Southeast Asian Nations ("**ASEAN**"), Japan, South Korea, Australia and New Zealand, officially signed the Regional Comprehensive Economic Partnership (the "**RCEP**"), a free trade agreement creating the worlds' largest free trade bloc. It is the first time China signs a multilateral trade pact, and is also the first free trade agreement between China, Japan and South Korea, making it possible to further promote economic cooperation in Northeast Asia.

The RCEP consists of 20 chapters, covering a wide range of matters, e.g., tariffs, intellectual property, investment, electronic commerce and government procurement. In particular, rules related to investments are set out in Chapter 10. Aiming at creating a sound investment environment in the region, Chapter 10 provides for, *inter alia*: (i) a pre-establishment national treatment clause (Article 10.3); (ii) a most-favoured-nation treatment clause (Article 10.4); (iii) commitments on prohibition of performance requirements (Article 10.6); and (iv) a Schedule of Reservations and Non-Conforming Measures providing for the Party's commitments on taking on a negative-list approach, which is the first time China adopts the negative-list approach with respect to market access commitments in non-service sectors.

It is worth noticing that in RCEP an investor-state dispute settlement (ISDS) mechanism has been purposefully left out. According to Article 10.18 of the RCEP, the Parties shall discuss this issue no later than two years after the date of entry

into force of the RCEP.

The RCEP will become effective once it is ratified by at least six ASEAN members and three non-ASEAN signatories.

China Releases the Amendment to the Copyright Law

On 11 November 2020, the Standing Committee of the National People's Congress passed the amendment to the Copyright Law of PRC, which will come into effect on 1 June 2021. Amongst other things, the long-awaited amendment to the Copyright Law for the first time introduces punitive damages in cases of copyright infringement, and raises the bar of statuary damages.

According to Article 54 (previously Article 49) of the amendment to the Copyright Law, in the case of copyright infringement, the copyright holder may elect to recover either (i) actual damages or (ii) any illegal gains of the infringer; or (iii) statutory damages.

Precisely, the copyright holder is at first place entitled to recover actual damages suffered by her as a result of the infringement, or, any illegal gains of the infringer which can be attributable to the infringement. In determining actual damages suffered by the copyright holder and/or the infringer's gains, the normal royalties of the copyright in dispute can be used as reference. Alternatively, the court may on its own initiative request the infringer to disclose documents under her control that are related to the alleged infringement. More importantly, the amendment to the Copyright Law confers on courts the discretionary power to award punitive damages up to five times of damages granted to the copyright holder in cases of wilful infringement.

In addition, the amendment to the Copyright Law raises the ceiling of statutory damages for copyright infringement from RMB 500,000 to RMB 5 million, and sets a floor of RMB 500 for the same.

Such amendments align with the punitive damage rules enshrined in the newly-promulgated the Civil Code of PRC as well as the amendments to the Trademark Law and Patent Law.

China Promulgates the First Biosecurity Law

On 17 October 2020, after several rounds of deliberations, the first Biosecurity Law of PRC was passed by the Standing Committee of the National People's Congress, which will become effective from 15 April 2021.

Based on the existing biosecurity rules scattered in different laws and administrative regulations, the Biosecurity Law establishes a comprehensive legislative framework covering a wide range of issues, including, inter alia: (i) biosecurity risk management; (ii) prevention and control of outbreaks of infectious diseases for humans, animals and plants; (iii) research, development and application of biotechnology; (iv) biosecurity of pathogenic microbials laboratories; and (v) human generic resources and biological resources.

The Biosecurity Law aims at establishing an integrated nationwide regulation system. Of particularity is the establishment of an approval and recordal system with respect to activities in biotechnology. Under Chapter 4 of the Biosecurity Law, activities of research, development and application of biotechnology should be categorised into high-risk, medium-risk and low-risk, which will be determined based on the risk of harm to public health, industry, agriculture, ecology, etc. Activities fall in the scope of high-risk and medium-risk categories are required to obtain approval or recordal from relevant authorities and must be conducted by a legal entity incorporated in the territory of China.

Shanghai Financial Court Recognises and Enforces a Hong Kong Judgment Involving "Keepwell Deed"

In terms of the announcement made by Shanghai Financial Court, the Court had recognised and enforced a Hong Kong court judgment which ordered a Mainland Chinese company to pay principal and interest of the bonds issued by its offshore subsidiary to the bond holder on the basis of a "keepwell deed". This is the first time a Mainland court recognises and enforces a Hong Kong judgment where a "keepwell deed" is involved.

"Keepwell deed" is a type of credit enhancement tool that is mostly used where a Chinese parent company intends to support its offshore subsidiary in issuing bonds or borrowing. A typical keepwell deed usually stipulates that the Chinese parent company undertakes to keep its offshore subsidiary remain solvent and have sufficient liquidity to pay back the bond or loan. Unlike guarantees, a keepwell deed does not impose a direct payment obligation on the parent company to the bond holder and the effectiveness of such deed under Chinese law is therefore still debatable in practice.

In the instant case, Shanghai Financial Court held that under *the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters* (the "**Arrangement**"), the scope of judicial review with respect to recognition and enforcement of Hong Kong judgments should be limited to procedural matters, and whether the keepwell deed in dispute is effective under Chinese law is a substantive law issue which should not be considered by the Chinese court at the enforcement stage. The Court also declined the respondent's argument that the enforcement of the Hong Kong judgment would harm public interests of Mainland China, on the ground that since the governing law of the deed is the law of Hong Kong, the effectiveness of the keepwell deed under Chinese law was irrelevant and that the Court would need to consider only whether to enforce this judgment would harm public interests of Mainland China at the time.

The full decision of this case is yet to be published by Shanghai Financial Court.