

## CHINA UPDATE

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## China Adopts Tort Liability Law

### Key Points:

- **First comprehensive tort law adopted by China**
- **Covers a broad range of activities including medical malpractice, personal injury and liability for environmental damages**
- **Effective July 1, 2010**

In December 2009 the PRC government adopted the Tort Law, which outlines the standards for tort liability and mitigating factors, product liability standards, liability for automobile accidents (Articles 48-53), liability for medical malpractice (Articles 54-64), liability for environmental damage (Articles 65-68), liability for hazardous products and activities (Articles 69-77), liability caused by persons who raise animals (Articles 78-84), and liability for damages caused by the collapse of structures or buildings (Articles 85-91). The Tort Law also addresses liability for injuries as a result of the acts or omissions of educational institutions (Articles 38-40), liability for operators of public accommodations and facilities such as hotels, malls and banks (Article 37), liability for defective products (Articles 41-47), liability for operators of civil aircraft (Article 71), liability for nuclear facilities (Article 70), and liability for zoo operators (Article 81).

The Tort Law, which goes into effect on July 1, 2010, sets forth standards for the determination of

tort damages including compensation for emotional distress and actual damages (Articles 16-25). In addition to the provision of damages, the Tort Law provides that a tortfeasor may be ordered to take specific steps to remedy any actions in violation of the rights of another person such as to stop acts of infringement, remove any unlawful obstacle, eliminate a danger, return property, restore property to its original condition, apologize or take other remedial actions. (Article 15).

The Tort Law generally defines concepts addressing joint and several liability of multiple tortfeasors (Articles 8-14). It also addresses the issue of comparative or contributory fault whereby the tortfeasor and the victim share their respective losses. (Article 24).

The Tort Law does not mention business-related torts such as interference with contracts, interference with business relationships, interference with prospective business relationships, fraud/misrepresentation or unfair competition. Though some of these principles are generally mentioned in other laws (such as the Contract Law, Unfair Competition Law and Anti-Monopoly Law), they are not defined as compensable torts. The same applies to privacy-related issues and claims such as invasion of privacy and defamation, although the China Supreme People's Court's interpretation of the General Principle of Civil Law provides that defamation is a compensable tort.

There are no clear references to the defenses of “consent” or “privilege.” The Tort Law makes no reference to more sensitive torts that might be committed by the police or government officials such as false imprisonment, malicious prosecution or abuse of process.

The Tort Law also has no provision concerning the statute of limitations for filing judicial complaints. However, the General Principle of Civil Law provides the statute of limitations that applies for all claim, torts or contractual, which is generally two years, but for limited specific claims, such as personal injury and certain product liability claims, the statute of limitations is just one year. Most jurisdictions will limit tort claims to one year given that tort claims are more difficult to bring after a year.

Article 71 of the Tort Law concerning aircraft-related accidents mentions only the liability of the operator and not the manufacturer of the aircraft, repair/maintenance facilities or other party that may be liable or a contributing cause of the accident. Article 70 addressing nuclear facilities also makes no mention of liability for equipment suppliers. However, manufacturers, repair/maintenance facilities and equipment suppliers would most likely be liable under the Product Liability Law or Consumer Protection Law. There are several references to what appears to be a defense based upon performing “management duties.” Article 81

(zoos) and Article 38/39 (schools) appear to provide a defense that exonerates a wrongdoer if it meets some undefined standards for performing “management duties” that might be unreasonable or unsafe.

The Tort Law lacks definitions of key terms used or alluded to throughout the Tort Law such as negligence, gross negligence, intentional acts, fraud, misrepresentation, reasonable care, trespass to land, trespass to chattel (property), assault, battery, consent, informed consent, privilege, capacity and lack thereof, and causation. However, the lack of specificity is common in most PRC laws. The only definition is in Article 2, which defines “civil rights and interests.” Liability is based upon an infringement of a person’s civil rights, but it is unclear as to the level of culpability – namely, negligence, gross negligence or intentional acts. For example, Article 22 addresses emotional distress but does not distinguish between negligent (unintentional) or intentional infliction of emotional distress. Intentional torts should require an aggravated level of culpability.

While many of the causes of action (e.g., medical malpractice and product liability) are covered under other laws and regulations, having a basic tort law will support the development of the legal system. Implementing regulations may help to further define the general concepts addressed in the Tort Law.

See the Tort Liability Law of the People's Republic of China, promulgated by the 12th Session of the Standing Committee of the 11th National People's Congress on December 26, 2009, and effective on July 1, 2010. For a bilingual version of the Tort Law, [click here](#).

– Edison Chen, Laura Wang and James M. Zimmerman

## Notice Regarding Facilitating the Stable and Healthy Development of the Real Estate Market

### Key Points:

- **Notice aims to increase housing supply for low-income families, maintain strict loan policies for real estate investors and speculators, and improve risk management within the real estate market**

The General Office of the State Council issued a Notice Regarding Facilitating the Stable and Healthy Development of the Real Estate Market on January 7, 2010 (the Notice). Following are the key goals identified in the Notice.

### Increasing the Supply of Low-Income Family Houses and Ordinary Commercial Residential Houses

The Notice requires local governments to expedite

the construction of ordinary commercial residential houses. With respect to ordinary commercial residential housing projects that have been approved, the governments shall urge real estate developers to complete the construction of the projects, publicize all information about the houses available for sale at one time and sell the houses. Furthermore, the local governments shall increase the land supply for commercial houses at middle and low prices, affordable houses and low-rent houses. If requisition of land for agriculture use is involved in the residential housing project, the relevant authorities shall expedite the approval procedures.

### Strictly Implementing the Credit Policies Regarding the Purchase of More Than One House by One Family

Financial institutions shall support residents in purchasing a first house to serve as their residence, but strictly control the granting of loans for a second house (or more) to restrain investment and speculation in residential real estate. If a family has purchased one residential house by using a bank loan and then applies the loan to additional residential houses, the down payment for the second house shall not be less than 40 percent of the total purchase price and the interest rate of the loan shall be decided based on the credit risk. These provisions are consistent with those of the Notice Regarding Strengthening Loan Management for Commercial Residential Property, issued by the

People's Bank and China Bank Regulatory Commission on September 27, 2007. Many commercial banks acknowledge that they did not strictly implement the provisions over the past two years.

**Enhancing Risk Control and Market Supervision**

1. Financial institutions are prohibited from making loans to real estate developers or for real estate projects that are not in compliance with the provisions of credit policies including the capital requirements for real estate projects. In addition, it has been reported recently that the Ministry of Land and Resource has been assisting the China Security Regulatory Commission on examination of projects of real estate developers who are applying for IPOs or refinancing. These real estate projects may involve the purchase of agriculture land, implementation of the grant contract of land use rights (LURs) and so on. Some analysts believe that financing in the capital market of real estate developers will become difficult in 2010 and continue into the next couple of years.
2. The Notice specifies that the relevant authorities shall strengthen the supervision of cross-border investing and financing activities to prevent "hot" money from impacting China's real estate market.
3. The Notice marks the first time that the State Council has requested the State-owned Assets Supervision and Administration Commission to regulate real estate investments by large state-owned entities (SOEs). Such request is based on the fact that some large SOEs invested in the real estate market and bid LURs at extremely high prices, which caused the rise in real estate prices and adversely impacted the development of the real estate market.
4. According to the Notice, local governments shall explore a new mechanism for granting LURs to replace the current bidding system, in which winners are determined solely or mainly based of the price offered by bidders. In the new system, local governments shall consider the price, payment schedule, development timeframe and other factors in determining the winner. Developers that have delayed the payment of granted LURs or violated the terms of the contract of granting LURs shall be restricted from bidding for granting LURs. Regarding the payment for granted LURs, the Ministry of Finance, the Ministry of Land and Resource and other relevant authorities promulgated a notice on November 18, 2009 that requires that the down payment shall not be less than 50 percent of the total LUR price,

and the full payment for granted LURs shall be made to the land administration within one year.

In conclusion, most of the provisions of the Notice repeat or emphasize the provisions of regulations and policies that have been promulgated in past years, although it should be viewed as a strong signal of the central government's determination to maintain a healthy real estate market. The effectiveness of the Notice will depend on the implementation by the local governments.

– Olivia Zhan

### Draft Implementation Rules of Government Procurement Law Are Published for Comment

#### Key Points:

- ***“Domestic products” are defined***
- ***“Innovative indigenous products” may be given priority for procurement***

After the PRC Government Procurement Law (the Law) was passed nearly eight years ago, its draft implementing rules (the Draft Rules) were finally issued for public comment on January 11, 2010. The Draft Rules are supposed to give detailed and practical guidance on the Law, some clauses of which – for example, the definition of “domestic products” – have been the target of hot debate in recent years. The Draft Rules include several

highlights that may be of interest to non-China-based manufacturers/service providers.

First, the Draft Rules define “domestic goods,” which are given priority in government procurement as final products that are produced within Mainland China, the domestic production costs of which exceed a certain percentage to be further determined by the Ministry of Finance. Domestic construction works and services are defined as construction works and services that are provided by China's citizens, legal persons and other entities. This means that the products produced by foreign-invested enterprises and wholly foreign-owned enterprises will be eligible as domestic goods for the purpose of government procurement, as long as their domestic component meets a certain percentage. Nevertheless, the Draft Rules also provide that support and protection will be given to innovative indigenous products through priority procurement or compulsory procurement. This corresponds to the government's earlier attempt at the end of 2009 to compose an Indigenous Products Catalogue to exclude products with foreign-owned brands and intellectual property, which has been extensively criticized among foreign manufacturers.

Second, the Draft Rules also explain that when the lowest quote from a domestic provider is at least 20 percent higher than the non-domestic quote, the relevant products/services/construction works are considered inaccessible on reasonable commercial

terms where imported products may be procured. Purchase of imported products must be approved by the township government or a higher-level government.

Other important rules include:

- Bidding invitation and other procurement documents must not specify suppliers or brands;
- Suppliers may be excluded from government procurement for one to three years for misconduct including bribery and unauthorized assignment of contracts;
- No commissions or free gifts should be given in procurement contracts; and
- The government procurement process and documents should be transparent, and an online bidding platform will be developed to facilitate a transparent and efficient process.

We will continue to monitor the development of the Draft Rules.

– Zijie Li

## State Counsel Seeks to Turn Hainan Into “Hawaii of China”

### Key Points:

- ***The Counsel has spelled out six strategies for development of the island***
- ***Measures include expanding the lottery business, extension of a favorable visa-free policy and encouraging foreign cruise companies to operate in Hainan***

On the last day of 2009, the PRC State Counsel issued Several Opinions Regarding Boosting Hainan to Develop Into an International Tourism Island (the Opinions). The Counsel hopes to develop the southern island of Hainan, China’s only tropical province, into a top international tourism destination by 2020. The Opinions explicate six strategies for the development plan, which include developing Hainan into a pilot region for China’s tourism industry reform, building the island into a world-class leisure travel and holiday tourist destination, establishing a demonstration zone for China’s ecological development, making Hainan an important platform for international economic cooperation and cultural exchanges, developing resources in the South China Sea, and developing Hainan into a service base as well as a modern national tropical agricultural base.

Among other things, the measures include:

- **Lottery Business** – According to the Opinions, Hainan will be allowed to “explore and develop” *pari-mutuel* sports betting and instant betting on international sporting events, which offer an alternative to mainland government-sanctioned gambling. At present, only two kinds of wagering are legal in mainland China: sports betting overseen by the PRC Sports Lottery Center and the welfare lottery issued by the China Welfare Lottery Center. Given the Opinions, new kinds of lotteries can be issued in Hainan with less government scrutiny and more creativity.

While it is unclear what new types of gambling will be issued and when, there has been quite a lot of speculation that horseracing could be introduced to the island, or that Hainan would even become China’s answer to Las Vegas. Such speculation, however, has no legal basis. China is a country that strictly controls gambling; allowing Hainan to build casinos or become another Las Vegas would require amendment to China’s fundamental laws, such as the Criminal Law.

- **Visa-Free** – The Opinions extend the favorable visa-free policy beyond the previous 21 nations (including the United States, Japan and Canada) to five other nations including Finland, Denmark,

Norway, Ukraine and Kazakhstan. In addition, the visa-free policy previously applied only to five or more people applying as a group; the Opinion lowers that number to two for tourists from Russia, Korea and Germany and extends the permitted period of visitation from 14 to 21 days. It is expected that the relaxed policy will be applied to more countries.

- **Foreign Cruise and Travel Agency** – The Opinions explicitly encourage foreign cruise companies to establish an operational presence in Hainan and provide international cruise services. Currently, a few foreign cruise companies have established foreign-invested travel agencies in China. Foreign-invested travel agencies, however, are not allowed to provide outbound travel service, – i.e., they can bring in customers but cannot solicit customers from China to go abroad. Therefore, under the current law, it does not make much sense for foreign cruise companies to establish a presence in China. It is unclear whether the Opinions would allow the “operational” presence of foreign cruise companies to solicit customers from China. Detailed implementation rules may provide further explanation.

– Lindsay Zhu

## Articles, Publications and Other Media

**Rainer Burkardt** contributed an article, "An Overview of Mergers and Acquisitions in China," to the January 23-29, 2010 edition of *The China Executive Report*, in which he discusses the legal framework for mergers and acquisitions that has emerged in China since the country's accession to the World Trade Organization in 2001.

*Reuters* quoted **David M. Spooner** January 19 regarding China's probable reaction to safeguard tariffs.

*Silicon Valley/San Jose Business Journal* quoted **Song Zhu** January 22 regarding Google's suggestion it might leave China. The article was subsequently published by *South Florida Business Journal* and the *Orlando Business Journal*.

*Legal Week* quoted **Daniel F. Roules** and **Amy L. Sommers** January 21 on the increased number of Chinese lawyers serving as in-house counsel for major multinational businesses with interests in China.

*IndustryWeek* quoted **George N. Grammas** January 14 regarding China-based companies that trade in the United States despite trade restrictions.

InsideCounsel.com quoted **Song Zhu** January 16 regarding ways that China's courts are proceeding under China's antimonopoly law, which went into effect August 2008. The article also appears in the February issue of *InsideCounsel* magazine.

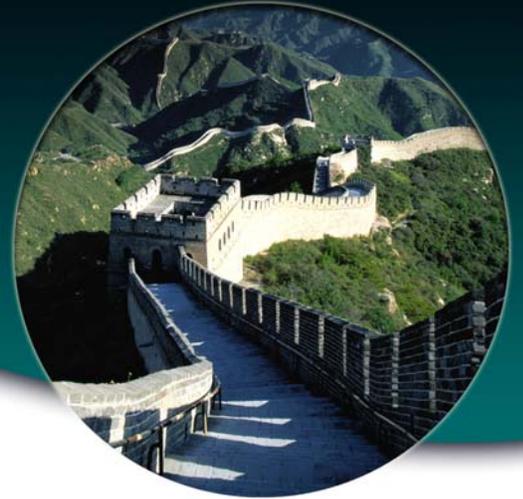
**David M. Spooner** was quoted January 13 on FT.com regarding the trade issue between Google and China. The FT.com article was picked up by several China-based media including *Beijing Spring* and *The Epoch Times*.

*Inside US-China Trade* quoted **James M. Zimmerman** December 23 on potential candidates for the post of assistant US Trade Representative for China.

**James M. Zimmerman** was quoted on WSJ.com December 22 regarding a recent ruling by the World Trade Organization that makes China's restrictions on imported films and other media illegal.

*The Telegraph* in England quoted **Charles R. McElwee II** December 14 regarding China's efforts to establish "coal-free zones" as part of its pollution-control efforts.

Squire Sanders published the following China Alerts in December: [Indigenous Innovation Products Accreditation Program Raises Concern of Protectionism](#) and [PRC Medical Device Good Manufacturing Practice Rules Issued](#).



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