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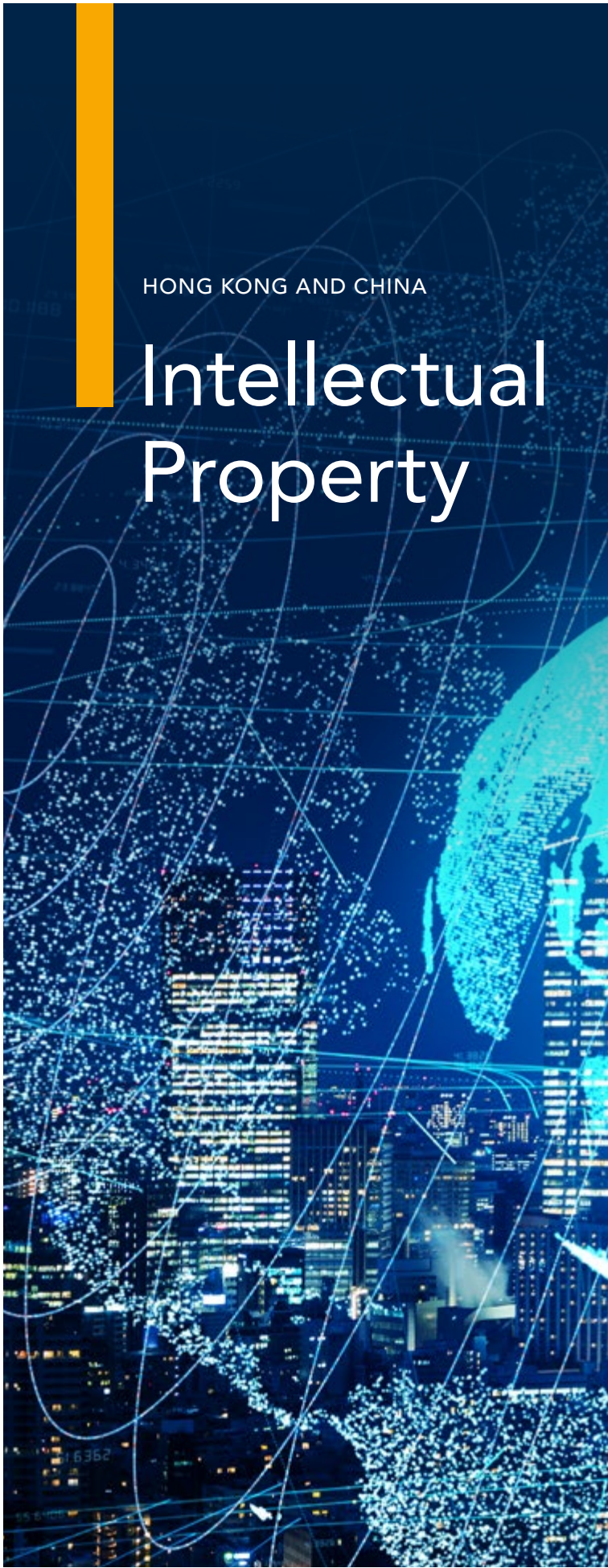
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# Intellectual Property and Mutual Recognition and Enforcement of Awards between Mainland China and Hong Kong – A New Era?

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## Introduction

Since 1997, a series of arrangements have been in place between Hong Kong and the People's Republic of China ("PRC") to ensure the smooth cross-border recognition and enforcement of judgments in the two jurisdictions. Hong Kong and the PRC have recently signed a sixth arrangement, which for the first time includes specific articles and references to Intellectual Property Rights ("IPRs").

In this article, we look at what the changes this new arrangement between Hong Kong and the PRC will bring in relation to enforcement of judgments involving IPRs.

## Background

On 18 January 2019, the Hong Kong government and the Supreme People's Court of the PRC signed the *Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and*

*of the Hong Kong Special Administrative Region ("the New Arrangement")*. Although it is not yet clear when the New Arrangement will come into effect, both jurisdictions are currently in the process of promulgating and completing relevant procedures for the new Arrangement to come into force.

The New Arrangement will, upon commencement, supersede the *Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned ("the Old Arrangement")*. The Old Arrangement came into effect in 2008, and will remain in force until the commencement date of the New Arrangement is announced.

Under the Old Arrangement, judgments were only mutually enforceable between the Hong Kong and the PRC courts if the judgment required the payment of money in a civil or commercial case and the parties had agreed to a choice of court agreement in writing prior to the dispute.<sup>1</sup>

The New Arrangement will broaden the types of judgments the Hong Kong and the PRC courts will enforce in five ways, making the relationship between the courts of the two jurisdictions stronger. The New Arrangement will:

- Apply to a broader range of cases; it will not only apply to all civil and commercial cases, but also cases related to civil damages in criminal cases;<sup>2</sup>
- Do away with the requirement for a choice of court agreement in writing between the parties;<sup>3</sup> this will enable contracting parties without a choice of court clause in their agreement to benefit from the New Arrangement;

- Cover reciprocal recognition and enforcement of monetary and non-monetary rulings;<sup>4</sup>
- Allow for partial recognition and enforcement of awards;<sup>5</sup> and
- Expand the number of courts whose decisions are recognised by PRC courts to now include Hong Kong Labour, Lands and Small Claim Tribunals decisions.<sup>6</sup>

Certain types of matters are specifically excluded from the New Arrangement, including judicial review cases, cases heard by the Hong Kong courts arising directly out of exercise of administrative powers<sup>7</sup>, Hong Kong court rulings on anti-suit injunctions and orders for interim relief and PRC court rulings concerning preservation measures.<sup>8</sup> The Arrangement will also not apply to judgments related to family, estate, marine matters, bankruptcy and insolvency and a natural person's voting power.<sup>9</sup>

## Provisions specifically related to IPRs

The New Arrangement will apply the same definition of IPRs as Article 1(2) of the 1995 *Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS")*, and will cover copyright, trade marks, geographical indications, industrial designs, patents, integrated circuit designs and trade secrets. The New Arrangement expands the TRIPS list of IPRs and adds plant variety rights as stipulated in *Hong Kong's Plant Varieties Ordinance and Article 123(2)(7) of the General Provisions of the Civil Law of the People's Republic of China*.<sup>10</sup> This is the first time plant variety rights have been recognised as an IPR in a recognition and enforcement of judgments arrangement between the PRC and Hong Kong.

1 Article 1 of the Old Arrangement  
2 Article 1 of the New Arrangement  
3 Article 1 of the New Arrangement  
4 Article 16 of the New Arrangement  
5 Article 19 of the New Arrangement  
6 Article 4 of the New Arrangement  
7 Article 3(1)-(2) and (4)-(7) of the New Arrangement  
8 Article 4 of the New Arrangement  
9 Article 3(1)-(2) and (4)-(7) of the New Arrangement  
10 Article 5 of the New Arrangement



## Which judgments involving IPRs will be mutually recognisable and which ones will not?

In general, judgments ruling on contractual disputes involving IPRs will be covered under the New Arrangement.

The New Arrangement has more requirements in relation to cases involving infringement of IPRs, civil disputes over acts of unfair competition under Article 6 of the *Anti-Unfair Competition law of the People's Republic of China* heard by PRC courts, and disputes over passing off heard by the Hong Kong courts. In these situations, judgments will only be enforceable if<sup>11</sup>:

- The act of infringement, unfair competition or passing off was committed in the requesting place;
- The IPR or interest concerned is subject to protection under the law of the requesting place; and
- The ruling is on monetary damages, including exemplary damages, for acts of infringement which were committed in the requesting place.

For example, if a Hong Kong court issues an award for damages for trade mark infringement and the Plaintiff wants to enforce the award in the PRC, in the Hong Kong judgment the Plaintiff must have asserted a valid Hong Kong trade mark against infringing goods in Hong Kong.

However, judgments concerning any of the following matters will be excluded from the New Arrangement<sup>12</sup>:

- Infringement of invention patents and utility model patents heard by a PRC court;
- Infringement of standard patents (including "original grant" patents);
- Short-term patent cases heard by a Hong Kong court;

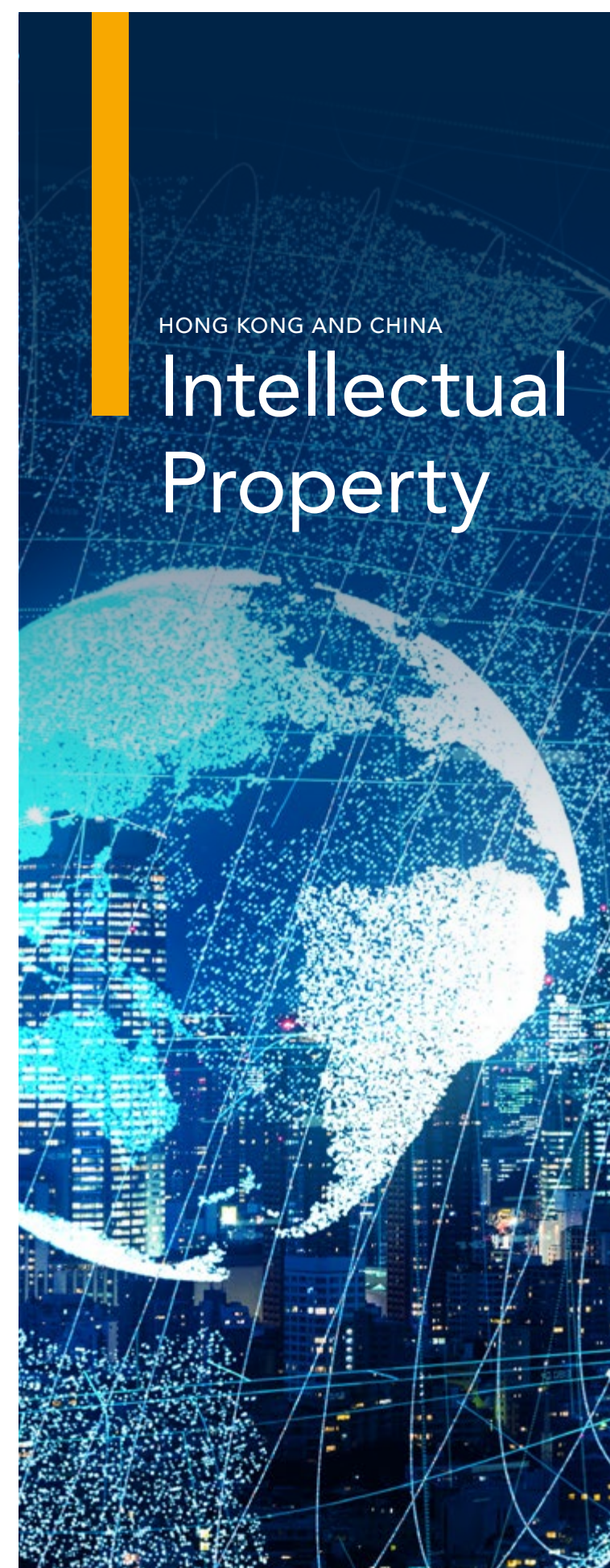
- Confirmation of the licence fee rate of a standard-essential patent heard by a PRC court or Hong Kong court;
- Any IPRs not covered under Article 5 of the New Arrangement;
- A ruling on the validity, establishment or subsistence of an IPR. (However, a ruling on liability based on such rulings and which complies with the relevant requirements of the New Arrangement will be recognised and enforced).

The New Arrangement will not apply to most patent related cases, licence fee rates, cases relating to IPRs not covered under Article 5 of the New Arrangement and rulings on the validity, establishment or subsistence of an IPR<sup>13</sup>. Hong Kong and PRC courts will not mutually recognise and enforce such judgments. Parties therefore must carefully consider where to commence litigation to avoid litigating twice.

## Conclusion

This is the first step towards the recognition and enforcement of judgments concerning specific IPRs between Hong Kong and the PRC. Although in general, judgments ruling on contractual disputes involving IPRs will be covered under the New Arrangement, there are some restrictions for infringement of IPRs, passing off and unfair competition, and significant restrictions for cases related to patents. An important next step towards robust IPR protection between the two jurisdictions will be to sign a stand-alone Arrangement covering IPRs, with fewer restrictions and special provisions governing cases related to patents.

11 Article 11 and Article 17 of the New Arrangement  
12 Article 3(1) and Article 15 of the New Arrangement  
13 Article 15 of the New Arrangement



## China's Gradual Acceptance of Non-Traditional Trade Marks

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As a result of the amendments made to the PRC Trade Mark Law that came into effect on 1 May 2014, "non-traditional trade marks" (i.e. not word and/or figurative marks) do not just include colour marks and three-dimensional marks but also include sound marks.

Since 2014, we have seen China's gradual acceptance of non-traditional trade marks. Notwithstanding this encouraging development, obtaining registration for non-traditional trade marks is not simple and straightforward. Owners of non-traditional trade marks are advised to be prepared to put up a fight before achieving registration as non-traditional trade marks are still fairly new in China. Take colour marks as an example: Article 8 of the PRC Trade Mark Law provides specifically that "colour combination" is registrable as a trade mark in China. However, according to the Chinese Trade Mark Examination and Review Standard (the "**Standard**"), single colours explicitly listed as marks are not registrable as they are considered devoid of distinctive character. The examples of non-registerable marks given by the Standard are "  " and "  ". As a result, it is not surprising that previous applications to register single colour marks such as "  " and "  "



have all been refused. Recently, the Beijing High Court held that a single colour applied to a specific position can be registered under the PRC Trade Mark Law and the first sound trade mark was granted through judicial proceedings in China. These two cases and the insights as to the types of non-traditional trade marks that the Chinese Courts have accepted, are discussed below.

## Louboutin's colourful victory in China

Christian Louboutin, a well-loved and well-known French shoe designer, successfully extended the protection of its red-soled trade mark to China via a Beijing High Court ruling.

In 2010, Christian Louboutin obtained an International Registration for its signature red-soled trade mark. (shown in image A. below) in Class 25 in respect of "Ladies footwear" under no. 1031242. The Trade Mark is described as: "The mark consists of the colour red (Pantone No. 18.1663TP) applied to the sole of a shoe as shown in the representation (the outline of the shoe is not part of the mark, it is for illustration only)". For almost a decade, Christian Louboutin has fought to obtain protection of the Trade Mark by seeking to extend the International Registration to China. It is worth noting that whilst the goods originally sought to be protected in 2010 are "Ladies footwear", the goods have been limited to "High-heeled ladies footwear" with effect from 2013.



A. "Trade Mark"

## Brief background

Christian Louboutin applied to extend protection of the International Registration of its Trade Mark to China in April 2010. The Trade Mark was refused by the Chinese Trade Mark Office ("**CTMO**") in October 2010 due to it being devoid of any distinctive character in respect of the designated goods (ladies footwear). Christian Louboutin filed a review with the Trade Mark Review and Adjudication Board ("**TRAB**") against the CTMO refusal. As the TRAB maintained the CTMO refusal, Christian Louboutin appealed to the Beijing Intellectual Property Court (the "**IP Court**") against the TRAB decision.

The IP Court ruled in favour of Christian Louboutin, quashed the TRAB's decision, and ordered the TRAB to reissue the Review decision. Both the TRAB and Christian Louboutin appealed against the IP Court's judgment: the TRAB appealed requesting to quash the IP Court's ruling, whereas Christian Louboutin appealed against the reasoning of the IP Court on the basis of maintaining the IP Court's ruling. The case then went to the Beijing High Court (the "High Court").

## Grounds of Appeal

The TRAB appealed against the IP Court's finding that the TRAB wrongly identified the Trade Mark as a figurative trade mark.

Although the IP Court found in favour of Christian Louboutin, they filed an appeal on the following grounds:

1. The IP Court misunderstood the components of the Trade Mark and the protection sought and erred in including the shape of the high-heeled shoe, outlined in dotted line, as an element of the Trade Mark;
2. The IP Court erred in finding that the Trade Mark is a 3-dimensional trade mark; and
3. The Trade Mark is inherently distinctive and the Trade Mark is capable of identifying trade origin. Even if the Trade Mark is not inherently distinctive, it has acquired its distinctiveness through extensive use and promotion. The fact that the Trade Mark is successfully registered in other jurisdictions illustrates that the Trade Mark has acquired the necessary distinctiveness required for registration.

## The Judgement

The High Court dismissed the TRAB's appeal, and allowed Christian Louboutin's appeal in part. The High Court ruled that when examining a trade mark which is an extension of an International Registration, the trade mark and its specific components should be determined by the particulars as published by in the World Intellectual Property Organization ("WIPO") records.

In this case, the TRAB in the Review decision decided that the Trade Mark is a figurative mark consisting of a common high-heel shoe and a single colour on the sole which is not distinctive to function as a trade mark. Instead of correcting the TRAB's mistake, the IP Court went further and considered that the Trade Mark includes the high-heeled shoe outlined in dotted line and the sole of the shoe in solid line and filled in red. The IP Court concluded that the Trade Mark is a 3-dimensional mark of the shape of a high-heeled shoe with the colour red filling part of the shoe. The High Court found that both the TRAB and the IP Court erred in having wrongly identified the elements constituting the trade mark to be examined. By referencing the description of the Trade Mark as recorded on the WIPO record, the High Court found that the Trade Mark comprises of the colour red at a prescribed place, which should be regarded as a single colour mark limiting its position of use. Based on this, the High Court upheld the IP Court's judgment in overruling the TRAB's decision, while correcting its factual finding.

## Takeaway

This case is important as it is the first case in the history of China's trade mark law to allow protection as a trade mark for a single colour in a specific position. The case has now been returned to the TRAB for reconsideration and reissuance of a decision. It is not clear whether the TRAB will decide in favour of Louboutin in finding that a single colour applied to a specific position can be registered under the PRC Trade Mark Law, as is the view of the High Court. We also see the Chinese High Court's willingness to consider the description of a trade mark outside China (in this case WIPO) when it comes to deciding the elements of the trade mark in question. We welcome the openness and willingness of the Chinese High Court in considering matters outside of the box and the

acceptance of registration of non-traditional trade marks. We anticipate to see more encouraging and novel judgments in the future.

## Tencent's victory in registering "Di Di Di Di Di Di" as a Trade Mark

The next case sees the first registration of a sound mark through judicial proceedings in China.

In 1999, Tencent launched its instant messaging software, QQ. Since then, QQ became one of the most popular instant messaging software in China.

Since the amendment to the Trade Mark Law of China in May 2014, sound marks have been registrable as trade marks. In May 2014, Tencent applied to the CTMO for registration as a trade mark for services (including "message sending") in Class 38 its QQ notification sound "Di Di Di Di Di Di" ("**the Sound Mark**") which signals an incoming message. The CTMO rejected the application on the basis that the Sound Mark lacks distinctiveness. Tencent appealed by filing a Review with the TRAB. The TRAB upheld the CTMO's decision, finding that the Sound Mark is indistinctive.

Tencent appealed further to the IP Court against the TRAB's decision. "Di Di Di Di Di Di" is the first sound mark application that was heard by the IP Court.

## The IP Court's Decision

The IP Court ruled in favour of Tencent, quashed the TRAB's decision, and ordered the TRAB to reconsider the Review. The IP Court ruled as follows:-

1. The Sound Mark has its special rhythm and sound effect which cannot be commonly found in daily life. The Sound Mark is not a simple sound as found by the TRAB.
2. The Sound Mark has acquired distinctiveness through its long-term and extensive use in China. The evidence provided by Tencent showed that the Sound Mark has been widely and continuously used since 1999. A stable corresponding connection between the Sound Mark, the QQ software and Tencent has been established. The Sound Mark is capable of identifying trade origin via actual use.



3. The Sound Mark is non-functional, as it is the result of an artificial setting, instead of a direct result from the operation of the QQ software.

The TRAB appealed to the High Court against the IP Court's judgment.

## The TRAB's Grounds of Appeal

The TRAB's grounds of appeal were as follows:

1. The Sound Mark is simple and indistinctive. The Sound Mark is commonly used by electronic devices as a warning or notification signal.
2. The Sound Mark is only used in QQ software to signify one particular function.
3. The evidence provided cannot prove that the Sound Mark could assist the public in identifying the origin of services.

## The Judgment

Although the High Court agreed with the TRAB and the IP Court's findings that the Sound Mark is not inherently distinctive, the High Court affirmed the IP Court's finding that the Sound Mark has acquired distinctiveness to function as a trade mark through long-term and continuous use. From the evidence provided by Tencent, the High Court found that the public is capable of identifying the origin of services as Tencent by the long term and continuous use of the Sound Mark on QQ software. The High Court upheld the major ruling of the IP Court but rejected Tencent's application for the services of "television broadcasting; news agencies; and teleconferencing services" since the Sound Mark had not been used for these services. The remaining services in Class 38 "providing online forums; computer aided transmission of messages and images; providing internet chatrooms; transmission of greeting cards online; electronic mail; message sending; transmission of digital files" have been approved.

## Takeaway

This case demonstrates the PRC courts' willingness to recognise sound marks as registrable trade marks. As Tencent's Sound Mark was allowed on acquired distinctiveness, it is not clear what the standard required for accepting sound marks on a prima facie basis will be. In order for a sound mark to be registered as a trade mark, the sound mark should be capable of distinguishing trade origin and should not be functional. Whilst the High Court judgment sets a good reference for the standard required for establishing the acquired distinctiveness required of a sound trade mark, the standard for the test of the non-functionality of a sound mark has yet to be further defined and clarified. In this case, the courts have made it said that a sound could acquire the distinctiveness for trade mark registration if the applicant could show that there is a long-term and continuous use of the sound, and the public could exclusively associate the sound with the trade origin. Further, the IP Court commented that the sound should be non-functional in order to be registrable as a trade mark. However, the courts did not provide the test for determining whether a sound is functional or not. In this case, the IP Court held that the Sound Mark is non-functional since it is the result of an artificial setting rather than an inevitable result of the operation of the software. However, arguably all digital sounds are the results of artificial setting, so this reasoning is hardly a helpful guideline, and it is not clear when a sound would be regarded as a result of artificial setting.

Nevertheless, this case still provides a useful guidance on how an applicant could establish the acquired distinctiveness of a sound trade mark.

## Conclusion

The two cases highlighted in this article illustrate the evolution of the PRC Trade Mark Law as far as non-traditional trade marks are concerned. However, Chinese authorities are not bound to follow precedents, and each case is factually different from the other. There is, for now, still uncertainty as to what marks warrant registration but these developments should encourage non-traditional trade mark holders to try to register their non-traditional trade mark(s) in China.



# The Fourth Amendment to the Patent Law Seeks to Significantly Strengthen Enforcement of Patents in China

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## Introduction

This article provides an overview of the recently proposed fourth amendment to the patent laws of China that will dramatically increase the effectiveness of enforcing patents in China and, correspondingly, increase the value of obtaining patent protection in China.

## Background

Since the release and enactment of the Notice of the State Council on Issuing the Outline of the National Intellectual Property Strategy, China has made rapid progress in various aspects of intellectual property, including the creation, application, and protection of intellectual property. The number of filings of applications for all kinds of intellectual property to the State Intellectual Property Office of China



("SIPO"), including patents, trade marks and design patents, are now all ranked number one in the world.

The four most important bodies of legislation in the development of China's intellectual property laws are Patent Law, Trademark Law, Copyright Law and Anti-Unfair Competition Law. As the most important legislation regarding protection of technological innovation, the Patent Law was released in 1984 and has been amended three times, with a fourth amendment to come in the near future. To promote the development of medicines, chemical substances and the food industry in China, and to integrate Chinese intellectual property law into the global community, the first amendment in 1992 lifted restrictions on awarding patents for medicines, chemical substances and food items. The second amendment in 2000 amended parts of the original Patent Law that were inconsistent with WTO rules. The third amendment in 2008 made adjustments to accommodate the needs of the present development stage in China.

## From Proposal to Amendment

The fourth amendment was first put forward by director general Changyu SHEN of the National Intellectual Property Administration during the National People's Congress and the Chinese People's Political Consultative Conference in 2018. In April 2018, the Standing Committee of the National People's Congress made the amendment of the Patent Law explicit in the 2018 legislative work plan. On 4 December 2018, 38 departments, including the National Development and Reform Commission and the People's Bank of China, issued a notice of the Memorandum of Cooperation on Joint Punishment of Dishonest Entities in the Field of Intellectual Property (Patent). On 5 December 2018, the standing committee of the State Council passed the draft of the fourth amendment and submitted it to the standing committee of the NPC for review. The official passage of the amendment is expected in 2019.

## Changes proposed to the Patent law

### 1. Damages/compensation

The proposed fourth amendment makes several important changes that will significantly enhance the protection and enforcement of patents in China. The parts relevant to damages, which are the key provisions of the amendment, have received the widest attention. Most of the existing Chinese legislation regarding patent damages is based on the principle of compensation, not punishment. In addition, the existing legislation sets a cap of one million RMB on the maximum compensation, and courts, considering factors such as the scale of infringement and patent contribution rate, tend to award only a small amount of damages. This makes the cost of infringement low and encourages repetitive infringement or wilful infringement of patent rights.

In order to promote the protection of intellectual property in China, the proposed amendment makes punitive damages available to combat intentional infringement and raises the amount of damages and fines available in cases of intentional infringement of patent rights, thereby increasing the cost of infringing intellectual property. The amendment is also a positive response to President Xi Jinping's proposal in his speech at the China International Import Expo opening ceremony that China should protect the legitimate interests of foreign-owned enterprises and punish intellectual property infringement.

In accordance with these principles, the draft of the fourth amendment makes it clear that the People's Court can set the amount of damages by no less than one time but no more than three times a certain amount, based on factors such as the content, scale and circumstances of the infringing act. The People's Court can also assess damages above 100,000 RMB and below 5 million RMB, depending on factors such as the type of patent right, the nature of the infringing act, and the circumstances of the infringement. These provisions will greatly enhance right

holders' confidence in China's intellectual property protection, reduce wilful infringement and repetitive infringement, more effectively compensate the losses of right holders, and promote the prosperity of new innovations in the market.

### 2. Burden of proof

Provisions that shift the burden of proof to the infringer under certain circumstances have also received wide attention. The principle of burden of proof in Chinese Civil Litigation Law - "the burden of proof always lies with him who alleges" - has caused difficulties for right holders and even resulted in situations where the cost of protection of intellectual property rights is greater than the cost of infringement.

According to the current burden of proof principle, the rights holder often finds it difficult to prove that it is the infringing act that has caused a decline in market share, lowered retail prices, increased costs, and reduced revenues. It is often extremely difficult for the rights holder to obtain direct proof of infringement, and the losses resulting from the infringement, based solely on public information such as the name, address, registered capital, employee number, and scope of business of the infringer.

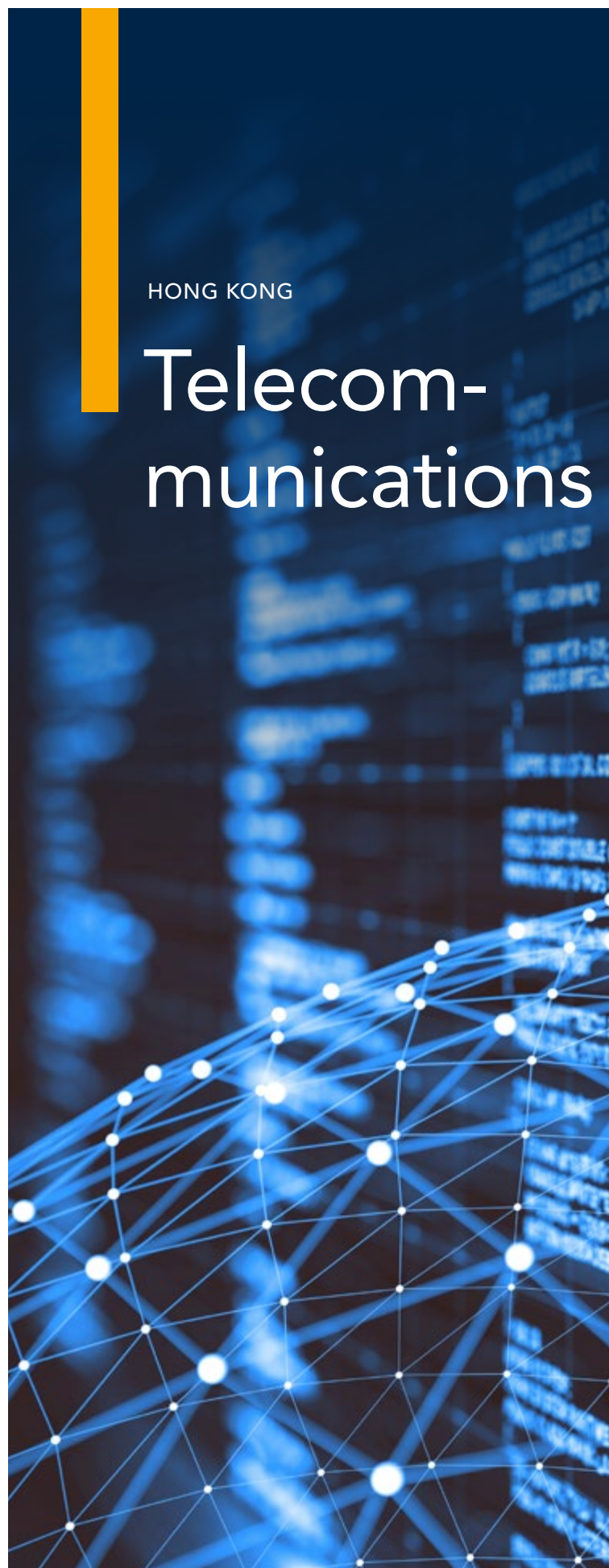
According to the new provision on the burden of proof in the Patent Law, an entity or individual manufacturing an identical product must provide proof of the differences between the process used in the manufacture of its product and the patented process. In other words, the burden of proof is reversed in disputes over patent infringement involving a patent covering a manufacturing process for a new product. The draft contains additional provisions relating to the burden of proof. For example, where the rights holder has made an effort to provide proof of damages but the information about the extent of the infringement is in the possession of the infringer, the People's Court can order the infringer to provide the relevant accounting books and materials in order to ascertain the amount of damages. If the infringer fails to provide, or provides fake, accounting books or materials, the People's Court can decide the amount of damages according to the right holder's claim and evidence provided.

### 3. Liability of network service providers in cases of infringement over the Internet

In addition, the draft of the fourth amendment clarifies the joint and several liability of network service providers in cases of infringement using the Internet. The draft provides that the patentee or interested party may, based on an effective judgment, ruling or mediation document of the People's Court, or a decision made by the relevant patent administrative department, order the cessation of the infringement, and require the network service provider to take necessary measures such as deletion, blocking and disconnecting links to infringing products. If the network service provider fails to take necessary measures in a timely manner after receiving the notice, it then becomes jointly and severally liable for the infringement. The draft clarifies that the burden of proof is on the infringer to provide relevant materials relating to the infringement, but emphasizes that the network service provider is jointly and severally liable if it fails to prevent the infringement.

## Conclusion

Thus, the fourth amendment, as proposed, makes important changes in the patent law that will significantly strengthen enforcement of patents and, in doing so, increase the value of obtaining patents in China.



HONG KONG

# Telecom-munications

## Class Licence for Telecommunications Services Set for Review

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### Background

The Class Licence for Offer of Telecommunications Services ("CLOTS") regime was introduced in 2007. Its main purpose was to regulate any person who offers telecommunications services to the public without operation or establishment or maintenance of means of telecommunications equipment, such as for example, the provision of public WiFi services, in-building telecommunications systems, etc. Over the last decade, major changes have occurred in the Hong Kong telecommunications market, including increased use of online platforms or smartphone apps and increased number of consumer complaints regarding CLOTS licensees. On 4 January 2019, the Communications Authority (the "CA") issued a consultation paper, seeking public and industry comments on proposals to amend conditions of the CLOTS licensing regime. The proposal aims to ensure that the administration of the CLOTS remains efficient, proportionate and up-to-date to facilitate business innovation, while ensuring sufficient consumer protection.

### Proposal

#### 1. Registration by CLOTS Licensees

Under the current regime, companies that offer services which fall under the CLOTS are not required to make any application to or registration with the CA before offering any such telecommunications services in Hong Kong. Instead, CLOTS licensees must simply comply with the conditions or criteria specified in relation to the relevant class licence in order to be automatically deemed to be granted such class licence.

However, the CA now considers it necessary to require CLOTS licensees to provide their essential operational information through a registration process which will allow the CA to communicate with CLOTS licensees more efficiently, monitor compliance and handle customer complaints. A similar regime is already in place for the Class Licence for Provision of Public Wireless Local Area Network Services.

Under the proposed registration new regime, CLOTS licensees will need to register with the CA before the offering of any telecommunications services in Hong Kong and provide a list of information (including name, company registration number, customer service hotline number(s), contact details, type(s) of telecommunications services to be offered under the CLOTS, name(s) of cooperating telecommunications operators, and other information as specified by the CA).

In addition, CLOTS licensees will be required to update this information upon any change. Any failure or refusal to comply with these requirements will constitute a breach of the conditions of the CLOTS, which may result in sanctions being imposed by the CA.

The CA is considering whether or not this registration requirement should apply to all CLOTS licensees or only to those providing certain telecommunications services with a customer base exceeding a certain threshold.

The CA may exercise its discretion and refuse the registration of a CLOTS licensee in certain circumstances (for example if the intended licensee's licence was refused, suspended or withdrawn by the CA previously).

#### 2. Providing Regular Updates

The CA proposes that CLOTS licensees will also be obliged to provide regular updates on the number of subscribers and types of services provided, as well as the identity of licensed telecommunications operator(s) who have been granted the right to resell the licensee's telecommunications services.

Specifically, CLOTS licensees will be required (regularly and as necessary) to provide updates on the type(s) of telecommunications services provided to the public, name(s) of all licensed telecommunications operators with whom the CLOTS licensees have entered into arrangements for the provision of the services, number of subscribers to each type of telecommunications service and any other information as specified by the CA.

#### 3. Amendments to the CLOTS to Align it with the Licence Conditions of the Unified Carrier Licences (UCL) and Services-based Operator Licences (SBO)

The CA also proposes to amend the conditions of the CLOTS to ensure that the CLOTS, UCL and SBO licensees offering similar telecommunications services will be subject to the same obligations.

In particular, the CA proposes to extend the following requirements imposed on UCL and SBO licensees to CLOTS licensees:

- i. Offer of Satisfactory Service: the CLOTS licensee must provide its services on its published terms and conditions and at the published tariff, as requested by a customer (where such services can reasonably be provided by the CLOTS licensee to that customer);
- ii. Inspection: the CLOTS licensees must provide adequate support at their own cost (as may be reasonably required by the CA) to demonstrate that their services comply with the requirements imposed by the Telecommunications Ordinance or any other instrument issued by the CA;
- iii. Number Portability: the CLOTS licensee must make arrangements to facilitate, at its own cost, the fulfilment of the obligations to facilitate number portability from the numbering plan of Hong Kong.



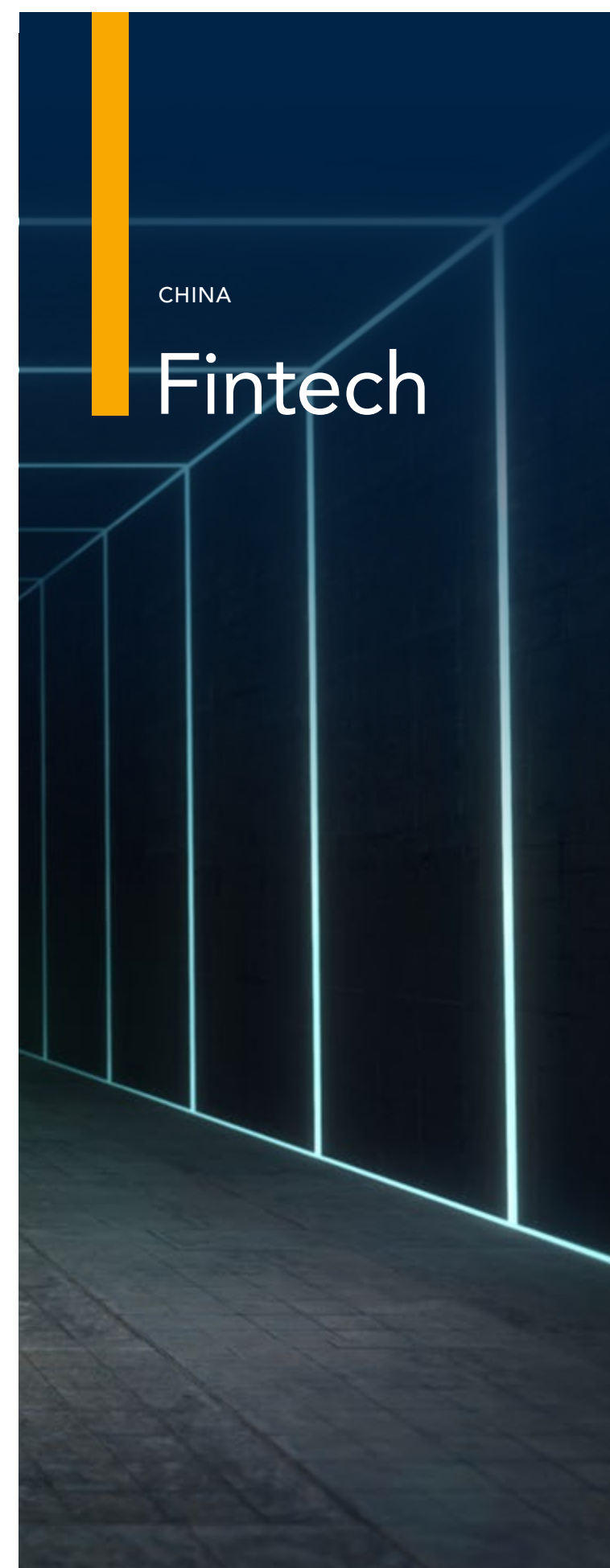
## Conclusion

A balanced approach needs to be struck between monitoring CLOTS licencees and protecting consumers, without stifling market growth.

Considering the number of companies that are providing, say, public WiFi services, it may be impractical and inefficient to require all CLOTS licencees to be registered with the CA, and to actively oversee them. Instead, a more efficient approach would be for the CA to limit the registration requirements to certain services that pose a greater risk to consumers and/or to those that have a large customer base.

Another area that may require some further thought is whether a grace period of a number of months should be granted to allow existing CLOTS licencees to transition to the new system and complete the registration process.

The consultation period closed on 1 February 2019.



## “Chaining” It Up: New PRC Blockchain Regulations

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Whilst there is ongoing debate over cryptocurrency (the risks and rewards), blockchain has generally been heralded as the golden nugget when it comes to new ways of doing business. Blockchain in its simplest form is a decentralised digital ledger that cannot be altered. Many governments in the Asia Pacific region have publicly encouraged the development of blockchain. Blockchain development was identified as one of the core aims in the PRC government’s 13th Five Year Plan in 2016, the Singapore Infocomm Media Development Authority recently announced that it will be offering seed funding to blockchain companies in the media and ICT sector, and the Hong Kong Monetary Authority commissioned the Hong Kong Applied Science and Technology Research Institute (“ASTRI”) to investigate the potential deployment of blockchain.

The application of blockchain is on the rise in all sectors, with the potential adoption and use of such technology by all sectors of activity being limitless. But with increased growth comes great responsibility. Government authorities across the region have started considering the need to regulate blockchain, without stifling innovation. So far, most new regulations or legislation in the area have been focused on cryptocurrency and initial coin offerings.



Now the attention is shifting towards whether or not blockchain (outside the context of digital currencies) requires a regulatory framework.

One of the countries leading the charge is China. On 10 January 2019, the Cyberspace Administration of China (“CAC”) announced the release of the new Regulations on the Management of Blockchain Information Services (“Blockchain Regulations”), which came into effect on 15 February 2019. The CAC is the top-level governing body for the internet in China. In addition to being the main government authority responsible for ensuring compliance with and enforcement of the Cybersecurity Law, it has also issued a series of measures and regulations that are intent on monitoring internet users and controlling user content. It is not surprising, given all this, that the Blockchain Regulations should fall under the remit of the same regulatory authority.

## Blockchain Regulations

The Blockchain Regulations apply to blockchain information service providers in China (i.e. information services provided to the public via the internet or application programs, through the use of blockchain technology or systems) (“Providers”). This includes foreign companies that have a presence in China, or third party service providers that operate the blockchain business in China on behalf of a foreign entity. The main requirements include the following:

- Providers must record their blockchain services with the CAC, within 10 working days from the launch of their blockchain services. For Providers that are already in operation from the date that the Blockchain Regulations came into effect, they will have 20 working days to file with the CAC. Such records must include information regarding the Provider’s name, service categories, forms of service, fields of application, server addresses, and so on. The CAC will inform the Provider within 20 working days if its application for recordal has been approved, and will provide a filing number that must be displayed by the Provider on its website or app. Further filings must be made to update the recordal if the blockchain services are amended or terminated.

- Any new products, applications or functions that Providers wish to develop or launch must be notified to the CAC and must undergo a security assessment.
- Providers must verify the real identity of their users through their national identity numbers or mobile numbers.
- Providers must keep content and login records of all users for at least 6 months, which should be made available to the relevant authorities upon request.
- Certain operational and technical measures must be implemented by the Providers to ensure compliance with the local laws, including prohibiting and taking down any content that is prohibited under PRC law.
- Providers are required to notify the relevant authorities if a user infringes any local laws, e.g. disseminates illegal content, and must issue warnings or restrictions to the user or shut down their account.
- Providers must establish mechanisms for users or the public to submit any complaints, which must be dealt with in a timely manner.
- Providers must implement technical measures relevant for their services.
- Providers must cooperate with the relevant authorities in relation to any supervision or inspection conducted in accordance with the law (e.g. the Cybersecurity Law), including providing any necessary information and technical support.

Many of the requirements under the Blockchain Regulations are not necessarily new, as similar ones are imposed under existing laws that may already apply to the Providers. For example, the Regulation on the Administration of Internet Information Service already imposes an obligation to retain user logs and content.

The Blockchain Regulations provide a general framework for Providers. Further implementation measures, interpretations and guidance are needed in order to provide clarification on how the Blockchain Regulations will be implemented and/or enforced. In particular, the circumstances in which the CAC will reject an application for recordal and

the security assessment criteria will benefit from further clarification.

As with the Cybersecurity Law, further clarity is also required regarding the level of access that Providers must grant to government authorities. The Blockchain Regulations may potentially allow government authorities to obtain back door access to confidential and sensitive information of Providers, including any data stored in China concerning their foreign operations. Such risk already arises in the context of the Cybersecurity Law and the Regulation on Internet Security Supervision and Inspection by Public Security Bureaus.<sup>14</sup> To date, the question regarding the level of access that needs to be provided remains unanswered.

## Takeaways

As with any new laws that are introduced in relation to technological developments, the inevitable question arises as to whether or not they will stifle innovation. Will these new regulations help or hinder the adoption of blockchain solutions in China? Will they strike a balance between protecting users and encouraging development?

While cryptocurrency and initial coin offerings have pretty much been banned in China, it is unlikely that the Chinese government will use the Blockchain Regulations to prohibit or stifle blockchain businesses – the Chinese government has been pushing for the development and adoption of blockchain solutions across all sectors. Instead, the Blockchain Regulations will likely be used to maintain oversight over Providers to ensure compliance with existing requirements (e.g. prohibition on dissemination of illegal content) and prevent any businesses that are seen as contrary to public policy.

<sup>14</sup> See our article entitled Close Encounters of the Government-kind: China’s New Regulation on Internet Supervision and Inspection: <https://www.mayerbrown.com/Asia-IP--TMT-Quarterly-Review-12-12-2018/>

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