

## CHINA LAW UPDATE

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## CHINA LAW UPDATE

## I. LAWS AND REGULATIONS

*A. Securities Investment Funds Law (2012 Amendment) 1*

The revised Law of the People's Republic of China on Securities Investment Funds, adopted at the 30th Session of the Standing Committee of the Eleventh National People's Congress of the People's Republic of China on December 28, 2012, and came into effect on June 1, 2013.

## 1. Background of the 2012 Amendment

Since Law of Securities Investment Funds was promulgated in 2003, which could not adapt to the rapid development of fund markets and satisfy the investor's needs. With respect to the publicly raised funds, the restrictions have greatly constrained the dynamism of the publicly raised funds market. Moreover, the non-publicly raised funds are out of regulate of old law, which leads to the disorder of the private equity fund market and frequent occurrence of infringement of investor's rights.

## 2. Major Innovations of the 2012 Amendment

The 2012 Amendment has made a great number of institutional innovation, which will play an significant part in promoting the modernization of the investment market. Compared to the 2003 old law, 55 articles are added as well as 3 articles are deleted in the 2012 Amendment.

First, to realize equal legal status between corporate enterprises and partnerships enterprises, the 2012 Amendment enlarges the organization form of fund managers, allowing fund managers can be from companies or partnerships.<sup>2</sup>

Second, the 2012 Amendment further perfects the supervision on publicly raised funds. The 2012 Amendment authorizes the directors, supervisors, senior managers and other practitioners of the fund manager of a publicly-raised fund as well as their spouses or interested parties to investment in securities, on conditions that they shall report to the fund manager and shall not cause conflict of interest with the holders of fund units.<sup>3</sup>

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<sup>1</sup> The revised Law of the People's Republic of China on Securities Investment Funds, adopted at the 30th Session of the Standing Committee of the Eleventh National People's Congress of the People's Republic of China on December 28, 2012, and came into effect on June 1, 2013.[hereinafter Securities Investment Funds Law, 2012 Amendment].

<sup>2</sup> *Id.* art. 12.

<sup>3</sup> *Id.* art. 18.

The 2012 Amendment prohibited the fund manager of a publicly-raised fund and any of its directors, supervisors, senior managers and other practitioners from engaging in insider trading, including divulging non-public information obtained by virtue of its position, or making use of such information to engage in or explicitly or implicitly ask others to engage in related trading activities.<sup>4</sup> Taking the regulation of Criminal Law into account, such provision in the 2012 Amendment realizes the organic convergence with the Criminal Law Amendment (7).

Third, the 2012 Amendment confirms the legal status of private equity funds, and creates a series of system in Chapter 10 to regulate, including qualified investors, fund custody, association registration for funder manger qualification, prohibition of fund raising advertisement and model of fund contract.<sup>5</sup> Article 94 provides the unlimited liability investors regime, allowing and encouraging part of the fund share holders as fund managers to be responsible for the management of private equity investment. In the event that the fund property is insufficient to pay off the debts, such holders shall assume unlimited joint and several liability.<sup>6</sup>

Forth, the 2012 Amendment attaches great importance to protection of the investors' rights and interests. Taking Article 22 for example, it provides that the shareholders, directors, supervisors and senior managers of the fund manager of a publicly-raised fund shall uphold the principle of giving priority to the interests of the holders of fund units when exercising rights or performing duties.<sup>7</sup>

The 2012 Amendment emphasizes the independence of the fund property, aiming at maintaining the security of fund assets and the fundamental interests of fund holders. Article 101 requires that fund units are independent of the proprietary assets of fund sales agencies, fund sales payment agencies and fund unit registration institutions.<sup>8</sup>

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<sup>4</sup> *Id.* art. 21.

<sup>5</sup> *Id.* arts. 88-96.

<sup>6</sup> *Id.* art. 94.

<sup>7</sup> *Id.* art. 22.

<sup>8</sup> *Id.* art. 101.

## II. JUDICIAL CASES AND REPLIES

### A. *The Third Group of Four Guiding Cases (Notice of the Supreme People's Court on Issuing the Third Group of Guiding Cases)*<sup>9</sup>

#### 1. Background Information

After publishing the Second group of four guiding cases on April 14, 2012, the Supreme People's Court continued to establish the third group of guiding cases on Sept. 18, 2012. This set of cases included two civil and two criminal cases, which are *Shanghai Cunliang Trading Company v. Jiang Zhidong and Wang Weiming, et al.* (a sale and purchase contract dispute), *Li Jianjun v. Shanghai Jiadongli Environmental Protection Technology Co., Ltd.* (a dispute over the revocation of a company resolution), *People v. Yang Yanhu, et al.* (a corruption case), and *People v. Li Fei* (a murder case). Both of the civil cases involved concrete application of the Company Law<sup>10</sup>, further clarifying both the extent of judicial authority to revoke a company resolution and the scope of judicial review of shareholder obligations. The criminal cases dealt with new forms of corruption and limitations on penalty reductions in suspended penalty cases, respectively.

#### 2. Four Guiding Cases

##### (1) *Shanghai Cunliang Trading Company v. Jiang Zhidong and Wang Weiming, et al.*, a sale and purchase contract dispute

In this case, Cunliang Company and Tuoheng Company entered into a steel sales contract on June 28, 2007. Cunliang Company performed its obligation of supplying goods worth 7,095,006.6 yuan, and Tuoheng Company paid 5,699,778 yuan for goods but still owed 1,395,228.6 yuan as payment for goods. In addition, Fang Hengfu, Jiang Zhidong and Wang Weiming, as shareholders of Tuoheng Company, held 40%, 30% and 30% of Tuoheng Company's shares, respectively. On December 25, 2008, Tuoheng Company forfeited its business license for failure to undergo the annual inspection by the administration for industry and commerce. So far, its shareholders had not organized liquidation of the company. At this point, Tuoheng Company had no office and business premises, and its account books and assets were all missing. In other cases against Tuoheng

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<sup>9</sup> Zuigao Renmin Fayuan Guanyu Fabu Disanpi Zhidaoxing Anli De Tongzhi (最高人民法院关于发布第三批指导性案例的通知) [Notice of the Supreme People's Court on Issuing the Third Group of Guiding Cases] (promulgated by the Supreme People's Court, September 18, 2012, effective September 18, 2012) (Lawinfochina).

<sup>10</sup> Gongsifa (公司法) [Company Law (2005 Revision)] (promulgated by Standing Comm., Nat'l People's Cong., Oct. 27, 2005, effective Jan. 1, 2006)

Company, enforcement had to be suspended because this company had no property for enforcement.

The court ruled that Tuoheng Company should repay 1,393,228.6 yuan as payment for goods and pay relevant liquidated damages to Cunliang Company and Fang Hengfu, Jiang Zhidong and Wang Weiming should assume joint and several liability for the repayment of the aforesaid debts of Tuoheng Company. The appeals were dismissed and the original judgment was sustained.

This case confirms that shareholders of a limited liability company, the directors and controlling shareholders of a joint stock limited company are statutory liquidation obligors who cannot be excused from their liquidation obligations simply because they do not actually control the company or participate in its operations and management.

*(2) Li Jianjun v. Shanghai Jiadongli Environmental Protection Technology Co., Ltd., a dispute over the revocation of a company resolution*

Li Jianjun was a shareholder and the general manager of Jiadongli Company. In the shareholding structure of Jiadongli Company, Ge Yongle held 40% of the Company's shares, Li Jianjun, 46%, and Wang Taisheng, 14%. These three shareholders jointly constituted the board of directors, in which Ge Yongle served as the chairman and the other two served as directors. As stated in the company bylaws, the board of directors exercised powers including appointment and removal of the company's managers; the quorum for a meeting of the board of directors was 2/3 or more of all directors; and a decision of the board of directors on matters deliberated was valid only when it was voted for by directors accounting for 2/3 or more of all shareholders. On July 18, 2009, Ge Yongle, the chairman of the board of directors of Jiadongli Company, convened and presided over a meeting of the board of directors, which all the three directors attended. At the meeting, a resolution that "in view of huge losses caused by general manager Li Jianjun for his trading of stock at the secondary market with funds of this company without the consent of the board of directors, Li Jianjun is hereby removed from his position as general manager, effective immediately" was adopted. Ge Yongle, Wang Taisheng and company supervisor affixed their signatures to the resolution. Li Jianjun did not sign it.

The district court ruled to revoke the resolution of the board of directors of Jiadongli Company. However, the appellate court decided to revoke the civil judgment of the district court and to dismiss the claims of Li Jianjun.

The case, invoking paragraph 2, Article 22 of the Company Law of the People's Republic of China<sup>11</sup>, clarifies the scope of judicial authority shall examine when dealing with the disputes over revocation of a company's resolution. A people's court shall examine: whether the procedure for convening a meeting and the manner of voting violate laws, administrative regulations or company bylaws and whether the content of the resolution violates the company bylaws. As long as none of the foregoing violations are present, whether the facts based on which a resolution removes the general manager are true and whether the grounds are well-founded shall not fall within the scope of judicial review.

*(3) People v. Yang Yanhu, et al. a corruption case*

This case provides guidelines for handling new types of corruption cases. It illustrates that "taking advantage of one's position", in the constitution of a crime of embezzlement, means taking advantage of the powers in one's position to take charge of, manage and handle public property and the related conveniences, including not only taking advantage of one's own position in taking charge of and managing public property but also taking advantage of the positions of other state personnel with a subordinate relationship in positions. In the effective judgment, the court held that Yang Yanhu took advantage of his positions as a standing member of the Yiwu Municipal Party Committee and a vice-chairman of the Standing Committee of the Yiwu Municipal People's Congress and concurrent position as the commander in chief of the headquarters to require the staff of the subordinate Confirmation and Report Section and the deputy commander in chief in charge thereof to do Wang Yuefang and others a favor, as a result of which the false settlement application by Wang Yuefang and other persons was granted.

The case also clarifies that land use rights are property interests within the meaning of "public property" as mentioned in paragraph 1, Article 382 of the Criminal Law<sup>12</sup> and may be the objects of embezzlement, giving the reason that the occupation, use, development, operation, trading and circulation of land could bring economic returns, since according to Articles 2 and 9 of the Land Administration Law of the People's Republic of China<sup>13</sup>, the People's Republic of China applied a socialist public ownership to

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<sup>11</sup> *Id.* art. 22.

<sup>12</sup> Xing Fa (刑法) [Criminal Law (1997 Revision) (revised)] (promulgated by Nat'l People's Cong., effective Oct. 1, 1997)

<sup>13</sup> Tudi Guanli Fa (土地管理法) [Land Administration Law (2004 Amendment)] (promulgated by Standing Comm., Nat'l People's Cong., Aug. 28, 2004, effective Jan. 1, 1999)

land, i.e. ownership by the whole people and ownership by collectives, and land may be allocated to entities or individuals for use.

*(4) People v. Li Fei, a murder case*

The case sets the example of applying penalty reductions to a suspended death sentence. The judgment stated that in an intentional homicide case arising from civil disputes, if the relatives of the defendant, who should be sentenced to death penalty for his cruel criminal means and as a recidivists, voluntarily assist in the capture of the defendant and actively pay compensation, the people's court may, according to the specific circumstances of the case, legally sentence the defendant to death with a two-year suspension and concurrently decided to impose commutation restrictions so as to resolve social conflicts as much as possible.

In this case, Li (first name withheld), the aunt of the defendant, reported to the public security authority in a timely manner and assisted the public security authority in capturing Li Fei, the defendant, in the evening of the next day when he came to pick up money at the place of his aunt. The Supreme People's Court issued a criminal ruling to withhold confirmation of the death penalty on Li Fei and remanded the case to the Higher People's Court of Heilongjiang Province for retrial. Li Fei was finally found guilty of intentional homicide but sentence him to death penalty with a two-year suspension and deprivation of political rights for life and, concurrently, decided to impose commutation

*B. Notice of the Supreme People's Court on Issuing 10 Innovative Intellectual Property Cases of 2012*

On April 15, 2013, the Supreme People's Court for the first time issued 10 innovative cases in intellectual property litigation, released together with the 10 prominent IP cases and 50 typical IP cases which SPC issues routinely every year. The Supreme People's Court intends to build the innovative abilities in the judges by giving the examples of the 10 cases, so that the courts can better be adapted to the rapidly changing circumstances in intellectual property area. Each of the 10 cases has a unique highlight compared to the cases in its field in the past; and each of the highlights is an innovation in IP case trial in China.

1. Bai Wanqing v. Chengdu Hard-to-Find Goods Marketing & Service Center and Shanghai Tianxiang Industrial Co., Ltd.

**[Case Brief]** Bai Wanqing, as the plaintiff, filed a lawsuit against Chengdu Hard-to-Find Goods Marketing & Service Center (CMS in short) and Shanghai Tianxiang Industrial Co., Ltd.(STI in short),



asking the court to confirm that the products STI manufactured and CMS sold infringe his patent rights. But there is an obvious flaw in Bai's writing of patent claims, making it difficult for the technical professionals in that field to determine the specific scope and meaning of that particular technical term in the patent claims.

**[Innovative Highlight]** The Supreme People's Court made it clear in the case that a clearly defined scope of the patent claims is the premise upon which a court may determine whether there is or not a patent infringement. Therefore, when there exist apparent flaws in the writing of patent claims, making it difficult to define the scope and meaning of that claim and thus difficult to make necessary comparison between the patent claims and the allegedly infringing technical solution, then a ruling is not to be made against defendants.

2. Wuxi Longsheng Cable Materials Plant & Shanghai Xisheng Cable Materials Co., Ltd. v. Xi'an Qinqiang Telecom Materials Co., Ltd. & Xi'an Guhe Fiber Optic Co., Ltd.

**[Case Brief]** Xi'an Qinqiang Telecom Materials Co., Ltd. claimed that the products Wuxi Longsheng Cable Materials Plant manufactured infringed its patent rights. But there exists an error of one of the patent claim in the writing. The professionals in the field can distinguish the true meaning of that claim, with the help of the instruction writing, the example model, etc. Apart from that error, the allegedly infringing technical solution falls into the scope of the patent claims.

**[Innovative Highlight]** The Supreme People's Court made it clear that the explicitly stated patent claim cannot be modified or denied by the instruction writing; and if there is such an error, a ruling is not to be made against defendants. But the SPC also made a reservation that if the error is so clear that any ordinary technical staff can correct it directly and undoubtedly, then the error will be ignored and the correction to the claim will be adopted.

3. Shenzhen Tencent, Inc. v. Shanghai Honglian Network Technology Co., Ltd. & Shanghai Woyao Network Development Co., Ltd.

**[Case Brief]** Shenzhen Tencent, Inc. (Tencent in short) has been long running an instant messaging software called QQ on the internet. Shanghai Honglian Network Technology Co., Ltd. (SHNT in short) & Shanghai Woyao Network Development Co., Ltd. (SWND in short) co-developed a software called the Rainbow which can demonstrate the QQ clients' IPs which are made invisible in original QQ software. The Rainbow cannot run independently, but to rely on QQ on the internet and to alter 19 object program instructions of QQ when the both are operated to achieve its function. Tencent charged

SHNT and SWND with infringement of its right of alteration and with unfair competition. According to the Regulation on Computers Software Protection, the right of alteration means the right to supplement or abridge the software, or to change the sequence of instructions or statements; and the software means computer programs and relevant documents which must be fixed on tangible medium to be protected under the Regulation. The complication in the case is that the Rainbow software itself is not an altered QQ software; the two are quite different in aspects of computer programs and relevant documents. The traditional way to confirm alteration is to compare the two software to see if the allegedly infringing one is an altered work of the original one. So any traditional comparison between the two software in the case cannot lead to the conclusion of alteration under Article 8 in the Regulation. But in its very nature, the Rainbow does alter the computer program (object program in particular) of QQ with the help of internet; and the Rainbow plus QQ actually functions as a 19-instructions-altered QQ.

**[Innovative Highlight]** The Wuhan Intermediate People's Court confirmed that the function of a software is to be achieved by the program and document; so the alteration of the program and document in its very nature is the alteration of function. In this sense, 'alteration' under the Regulation should not be understood narrowly, as only the static changes on the original software. The 'alteration' should be judged by its aim, its function and thus its nature. So even though an allegedly infringing software has been written totally independently, the infringement of the right of alteration may still be determined once it achieves the function of alteration through the help of internet and etc.

4. Chinese sports newspaper agency v. Beijing Book Building Co., Ltd. & Guangdong Audiovisual Press Co., Ltd. & Guangdong Haosheng Culture Communication Co., Ltd.

**[Case Brief]** The General Administration of Sport composed the ninth national broadcast gymnastics and authorized the Chinese sports newspaper agency exclusively to reproduce, distribute and information-network-disseminate the gymnastics. Guangdong Audiovisual Press Co., Ltd. published the DVDs of the gymnastics, together with the same accompany music, without the consent of the Chinese sports newspaper agency; Guangdong Haosheng Culture Communication Co., Ltd. and Beijing Book Building Co., Ltd. played the part of distributing those allegedly infringing DVDs.

**[Innovative Highlight]** Beijing Xicheng District Court made the first try in China to determine whether the gymnastics constitutes the 'works' under the protection of the Copyright Law. The court gave the answer as NO, for gymnastics is naturally a method, step,

procedure etc. which falls into the realm of thought, thus not protected by the Copyright Law.

5. Institute of Oceanology of the Chinese Academy of Sciences and Zheng Shouyi v. Liu Junqian, Laizhou City Wanlida Stone Industry Co., Ltd. and Yantai Environmental Art Administration Office

**[Case Brief]** The academician of Institute of Oceanology of the Chinese Academy of Sciences, Zheng Shouyi, has created 230 biological models of an ocean insect species, 10 of which was used by the defendants to make city sculptures. Zheng accused them of infringement of copyright.

**[Innovative Highlight]** It is the first case in China related to city sculpture of biological models in copyright litigation. The main disputed issue is that whether biological sculpture the ‘works’ signified by Copyright Law. . . The Shandong Higher People’s Court explained that the works in Copyright Law ask for originality, hence, the original intellectual expressions in the realm of art, literature and science. The biological models developed by academician Zheng are the creations of his unique way of expression, including his own aesthetic choices. So the biological models are by all means the ‘works’ protected under the Law.

6. Xu Bin v. Nanjing Industrial Co., Ltd. & Nanjing Automobile Group Co., Ltd. & Beijing Haiyijie Public Transport Automobile Co., Ltd

**[Case Brief]** Xu Bin is entitled to the Trademark of MINGJUE, which is registered on commodities of electric bicycle, motor vehicle and motor cycle. The defendants, Nanjing Industrial Co., Ltd. & Nanjing Automobile Group Co., Ltd. & Beijing Haiyijie Public Transport Automobile Co., Ltd manufactured a kind of car with the same trademark of MINGJUE. The disputed issue in this case is that Xu Bin has not used the trademark for more than three years, which according to the Trademark Law should be revoked; but the defendants used the trademark before it should be officially canceled. So should the revocation be retroactive. . .

**[Innovative Highlight]** The Jiangsu Higher People’s Court confirmed that if a trademark is revoked for not been used more than three years, then it has little essential interests to be protected actually, not only after the revocation, but also in the period during which the trademark is long abandoned. Thus, the revocation should be retroactive.

7. Lenovo (Beijing) Co., Ltd. v. Trademark Appeal Board & Tingzhou Brewery

**[Case Brief]** The Tingzhou Brewery made an application for the trademark ‘Lianxiang’ (the Chinese name of Lenovo) on the drinks commodity, approved by the Trademark Office of the State Administration For Industry & Commerce and further supported by the Trademark Appeal Board after Lenovo raised its objections. According to the Trademark Law, the registered well-known trademark is protected not only in the field of similar commodity, but also in fields of different commodities. The Lenovo focused on computer while the Tingzhou Brewery on drinks. So the core issue is whether the registered Lenovo trademark (including ‘Lianxiang’) had been well-known trademark at the time the application of Tingzhou Brewery was filed.

**[Innovative Highlight]** Beijing Higher People’s Court confirmed that as long as the lawsuit is administrative litigation, the will declaration of the defendant should be the one when it made the charged administrative act. Regarding the time when the Trademark Appeal Board supported the decision of the Trademark Office to authorize Tingzhou Brewery the right of the trademark, both the Board and the Brewery did not deny that Lenovo was a well-known trademark then. So the court should take their will declaration to recognize that Lenovo was well-known at that time.

8. Leroy-Somer Co. and Leroy-Somer Electro-Technique (Fuzhou) Co., Ltd. v. Leroy-Somer Motor (Fujian) Co., Ltd.

**[Case Brief]** Leroy-Somer Co. and Leroy-Somer Electro-Technique (Fuzhou) Co., Ltd. are entitled to the trademark of LEROY-SOMER on motor commodities. Leroy-Somer Motor (Fujian) Co., Ltd. used the trademark of ‘利莱森玛’ (the Chinese translation of LEROY SOMER) and ‘LI LAI SEN MA’ (the Romanization of the Chinese translation), etc. on its own motor products. The complication of the case is how to distinguish whether a foreign-language trademark is or not similar to a Chinese-language trademark. . .

**[Innovative Highlight]** The Fujian Higher People’s Court took into consideration of the prominence of the trademark LEROY-SOMER, the usage by the plaintiffs of their trademark in the Chinese translation, and the links the related public often put between the English and the Chinese ones, confirming that if a foreign-language trademark enjoys a certain notability and the related public can easily get confused between the foreign-language trademark and its Chinese translation, then the similarity and infringement should be determined.

9. Quzhou Wanlian Network Technology Co., Ltd. v. Zhou Huimin, etc.

**[Case Brief]** Zhou Huimin and the other 4 defendants used to be the staff in Quzhou Wanlian Network Technology Co., Ltd. which run an online BBS named box that enjoyed a user number of more than half million. The defendants left Wanlian to start their own business, a new online BBS called box2004 which took all the users' registration information from the former BBS box. The disputed issue in the case is that whether users' registration information constitutes 'business secrets' under Anti-Unfair Competition Law.

**[Innovative Highlight]** The Shanghai Higher People's Court demonstrated that as long as the information is difficult to collect, creates economic profits and is maintained secret to public, the information then should be recognized as business secret and enjoy the protection under Anti-Unfair Competition Law.

10. Liu Dahua v. Hunan Huayuan Industrial Co., Ltd. & Dongfeng Motor Company Co., Ltd.

**[Case Brief]** Liu Dahua, the owner of a Dongfeng Car, filed a lawsuit against Dongfeng Motor Company Co., Ltd. for monopolizing the authentic auto parts to charge a too high repair fee.

**[Innovative Highlight]** The Hunan Higher People's Court set a series of steps and principles to be applied to determine a charge of monopoly. First, there should be a very accurate 'related market', in this case, it should be market of car door locks, instead of a rather broad one like the market of authentic auto parts. Second, there should be a clear link between the monopoly and the interest loss for the customer. Third, if there remains replacement, then the monopoly accusation cannot be supported, that is, if there are some kinds of door locks which can replace the one of Dongfeng Company, then a ruling will not be made against Dongfeng.

*C. Reply of the Supreme People's Court on Issues concerning the Forcible Dismantlement of Illegal Buildings, Structures, and Facilities*

On March 27<sup>th</sup>, 2013, the Supreme People Court issued its reply to the Higher People's Court of Beijing Municipality, instructing that people's courts shall no longer accept the application for non-litigation administrative enforcement by an administrative organ on issues concerning forcible dismantlement of illegal buildings, structures, and facilities nationwide.<sup>14</sup>

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<sup>14</sup> Zuigao Renmin Fayuan Guanyu Weifa De Jianzhuwu, Gouzhuwu, Sheshi Deng Qiangzhi Chaichu Wenti De Pifu (最高人民法院关于违法的建筑物、构筑物、设施等强制拆除问题的批复) [Reply of the Supreme People's Court on Issues concerning the Forcible Dismantlement of Illegal

This reply marks an end of an era when the administrative organ made decisions on dismantlement of illegal buildings and the court took them into enforcement. The enforcement by the court is in its nature the non-litigation administrative enforcement, instead of judicial enforcement. The difference between the non-litigation administrative enforcement by court and the judicial enforcement by court is that the court is almost merely an executor in the former whilst apart from an executor, it is also a decision-maker in the latter.

The provisions on the non-litigation administrative enforcement can be traced back to The Administrative Procedure Law in 1989, in which Article 66 stipulates that if a citizen, a legal person or any other organization, during the period prescribed by law, neither brings a suit nor carries out the specific administrative act, the administrative organ may apply to a people's court for compulsory execution, or proceed with compulsory execution according to law<sup>15</sup>. This article is understood that if the administrative organ makes a specific act on a citizen, but the citizen responds nothing in a certain period—neither litigates against the administrative nor carries out the act, then the administrative can apply to a court for the non-litigation administrative enforcement of its own act. The application should go through the court's examination first, in a rather lenient way, as only those would be kicked out—apparently lack the basis in fact, apparently lack the basis in law, or others which are obvious violations of law, damaging the legitimate rights and interests of the party against whom enforcement is sought<sup>16</sup>. As a matter of fact, according to a statistic from the Supreme People Court, the average rates of the non-enforcement decision in the non-litigation administrative enforcement field nationwide in 2004 and 2005 are 1.7% and 1.6% respectively<sup>17</sup>.

In non-litigation administrative enforcement, the court is no longer a neutral third party regarding a dispute, but rather a helper to the administrative organ who comes into a confrontation with a citizen that seems to be omitted from a particular administrative act. But when things come to the enforcement of the dismantlement of

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Buildings, Structures, and Facilities] (promulgated by Sup. People's Ct., March. 27, 2013, effective April. 4, 2013) (Lawinfochina) (China).

<sup>15</sup> Zhonghua Renmin Gongheguo Xingzheng Susong Fa (中华人民共和国行政诉讼法) [Administrative Procedure Law of the People's Republic of China] (promulgated by Nat'l People's Cong., April. 04, 1989, effective October. 01, 1990) (Lawinfochina) (China).

<sup>16</sup> Zuigao Renmin Fayuan Guanyu Zhixing Zhonghua Renmin Gongheguo Xingzheng Susong Fa Ruogan Wenti De Jieshi (最高人民法院关于执行《中华人民共和国行政诉讼法》若干问题的解释) [Interpretation of the Supreme People's Court on Several Issues concerning the Application of Administrative Procedure Law of the People's Republic of China] (promulgated by Sup. People's Ct., March. 08, 2000, effective March. 10, 2000) (Lawinfochina) (China).

<sup>17</sup> Beijing Higher Ct., Guanyu Xingzheng Feisu Zhixing Anjian De Qingkuang Fenxi, 01 People's Judicature. 54, 54 (2007)

illegal buildings, structures, and facilities, it becomes troublesome, at least for the court. As the real estate often plays as the core economic interests for citizens, the enforcement becomes a struggle, both for the court and for the opposite party. The latter in the struggle does not take the former as a judge of right and wrong, but an enemy together with the administrative organ to be resisted. In a notice issued by the Supreme Court on Apr. 18<sup>th</sup>, 2002, there were violent confrontations between the masses and the courts in the stage of enforcement, where the courts shot into the sky to warn the crowd but very unluckily hurt some people by the shots, angering the crowd who later hit the executors in revenge<sup>18</sup>. The SPC regarded it as a humiliation and asked the courts nationwide to mind the way of enforcement for the protection of courts' reputation. And in 2007, the Higher People's Court of Zhejiang Province started its local practice. It instructed all the lower courts to narrow their acceptance of applications on forcible dismantlement of illegal buildings<sup>19</sup>.

The real turning point arrived with the issuance of The Urban and Rural Planning Law in 2007. The law for the first time vests the administrative organ with the enforcement power on the dismantlement of illegal buildings, in its Article 68<sup>20</sup>. In 2011, the Administrative Compulsion Law was issued. While stipulating again about the non-litigation administrative enforcement, its Article 44 also reaffirms administrative power to dismantle the illegal buildings<sup>21</sup>. In 2012, the Supreme People's Court gave its provision concerning the compensation for expropriation of buildings on state-owned land in non-litigation enforcement field<sup>22</sup>. Though it's not about illegal buildings, the provision set out the practice on real estate that the administrative organ shall generally organizes implementation on its own once the court approves enforcement, but the court may also enforce.

<sup>18</sup> Li Bin, *Woguo Feisu Zhixing Zhidu De Gaige Yu Wanshan*, 02 *Academia Bimestris*. 165, 166 (2009)

<sup>19</sup> Yu Dongming, *Zhe Fayuan Jushou Bufen Feisu Xingzheng Zhixing An Yin Zhendang*, *Legal Daily*, October 30, 2007, at X8

<sup>20</sup> *Zhonghua Renmin Gongheguo Chengxiang Guihua Fa* (中华人民共和国城乡规划法) [Urban and Rural Planning Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., October. 28, 2007, effective January. 01, 2008) (Lawinfochina) (China).

<sup>21</sup> *Zhonghua Renmin Gongheguo Xingzheng Qiangzhi Fa* (中华人民共和国行政强制法) [Administrative Compulsion Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., June. 30, 2011, effective January. 01, 2011) (Lawinfochina) (China).

<sup>22</sup> *Zuigao Renmin Fayuan Guanyu Banli Shenqing Renmin Fayuan Qiangzhi Zhixing Guoyou Tudi Shang Fangwu Zhengshou Buchang Jueding Anjian Ruogan Wenti De Guiding* (最高人民法院关于办理申请人民法院强制执行国有土地上房屋征收补偿决定案件若干问题的规定) [Provisions of the Supreme People's Court on Several Issues Concerning the Handling of Cases for Application to the People's Courts for Compulsory Enforcement of Decisions on Compensation for Expropriation of Buildings on State-Owned Land] (promulgated by Sup. People's Ct., March. 26, 2012, effective April. 10, 2012) (Lawinfochina) (China).

If in 2012, the court still accepted non-litigation administrative enforcement on issues of real estate, helping strengthen the legitimacy of the administrative decisions, then in 2013, the court formally bid farewell to the forcible dismantlement of illegal buildings, structures, and facilities, not only in enforcement stage, but also in acceptance of application stage. The SPC states in its reply that in accordance with the spirit of the relevant provisions of the Administrative Compulsion Law and the Urban and Rural Planning Law, for the forcible dismantlement of illegal buildings, structures, and facilities that violate the Urban and Rural Planning Law, the administrative organs have been vested with the power of enforcement by laws, and the people's courts shall no longer accept the application for non-litigation administrative enforcement filed by an administrative organ<sup>23</sup>.

### III. LEGAL NEWS

#### A. Xi Jinping: Speech on 30<sup>th</sup> Anniversary of the Current Version of the Constitution<sup>24</sup>

On Dec 14 of 2012, people came to Great Hall of Beijing and celebrate the 30th anniversary of the promulgation of the 1982 Constitution. General Secretary of the CPC central committee, chairman of the CPC Central Military Commission, Xi Jinping, gave a keynote speech at the meeting.

Comrades and Friends:

The Constitution of the People's Republic of China had been promulgated for three decades since December 4th of 1982 by the 5th plenary meeting of the 5th NPC. Today, we gathering here to celebrate such historical and meaningful event and this is to ensure the fully practice of the Constitution and CPC's 18th National Congress policy.

History always provides us meaningful inspirations. Looking back the development of our Constitution, we

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<sup>23</sup> Zuigao Renmin Fayuan Guanyu Weifa De Jianzhuwu, Gouzhuwu, Sheshi Deng Qiangzhi Chaichu Wenti De Pifu (最高人民法院关于违法的建筑物、构筑物、设施等强制拆除问题的批复) [Reply of the Supreme People's Court on Issues concerning the Forcible Dismantlement of Illegal Buildings, Structures, and Facilities] (promulgated by Sup. People's Ct., March. 27, 2013, effective April. 4, 2013) (Lawinfochina) (China).

<sup>24</sup> Xi Jinping: Speech on 30<sup>th</sup> Anniversary of the Current Version of the Constitution (习近平: 在首都各界纪念现行宪法公布施行30周年大会上的讲话), XINHUA.COM, [http://news.xinhuanet.com/politics/2012-12/04/c\\_113907206.htm](http://news.xinhuanet.com/politics/2012-12/04/c_113907206.htm) (last visited Dec. 4, 2012) (Translated by Shan Gao)



increasingly feel that our constitution is closely related to people's hardworking and remarkable achievements which have been made, also to preliminary accumulated valuable experience of our party and people.

The current Constitution could trace back to Semi-Constitution document The Chinese people's political consultative conference common program and 1954 Constitution. Under the form of fundamental law, these documents affirmed Chinese historical struggles against domestic and international enemies to pursuit national independence and people's freedom and happiness. It also affirmed the CPC led Chinese won the victory of New-Democratic Revolution, and historical transformation that Chinese gain state power.

In 1978, Third plenary session of the 11th central committee of CPC historically unfolded the new era of "Open-Up." Since then, developing Socialist Democracy and making Socialist legal system fuller in scope and sounder in practice had become State and Party's unshakable and fundamental line.

At that meeting, Deng insightfully pointed out that "To ensure people's democracy, we must strengthen the practice our legal system. Democracy must be institutionalized and legalized, so as to make sure that institutions and laws do not change whenever the leadership changes, or whenever the leaders change their views or shift the focus of their attention." Based on the Party line of the Third plenary session of the 11th central committee of CPC, experience, both positive and negative gained from the socialism construction, hard lessons learnt from ten years of Culture Revolution, and successes and failures of other countries' socialism construction, we draft current Constitution that represented China's "Open-Up" policy, which encouraging China's socialist modernization and legal system construction. Furthermore, the prosperity of the Constitution lies on its capacity of adjusting to new social trend, incorporating new social experience and affirming new social achievements. The Constitution Amendment in 1988, 1993, 1999 and 2004 were the best example to illustrate how these critical adjustments make our Constitution following the latest social trend without compromise of its stability and authority.

Under the form of fundamental state law, Constitution defined China's socialist theory and socialist path with Chinese characteristic, reflected the common will and fundamental interest of all Chinese and all ethnic groups, became the representation of state and party's core mission, primary principals, critical political lines' under state legal system.

Under its supremacy position and enormous enforcement power, Constitution safeguarded the notion "People are the master of the State", efficiently promoted construction of socialist modernization and market economy, pushed the process of socialist Rule of Law forward, encouraged developments of human rights, efficiently maintained the unity of all its nationalities and stabilization of the society, and projected great influence to the politics, economy, culture and social life.

The development of the past three decades provided sufficient evidence to show that the Constitution of P.R.C. complies with China's reality and practice. It shows that Constitution represents people's will, ensures people's democratic rights and defends people's core rights. It pushes the development of the state. Moreover, it fully ensures people's happiness and great revival of Chinese nation. Last, Constitution is the fundamental guarantee for state and people surviving from all kinds of difficulties and challenges and continuing socialist path with Chinese characteristic.

Tracing back to the history of China's Constitution for the past six decades, we could clearly see that, China's future and people's wellbeing is highly tied to the Constitution. Maintaining the authority of the Constitution is maintaining the authority of the Party and People's common will. Fighting for the dignity of the Constitution is fighting for the dignity of the Party and people's common will. Ensuring the implementation of the Constitution is ensuring the realization of People's interest. As long as we fully respects and efficiently implements Constitution, people could be the master of the state; and party and state's affairs could be better solved. If we ignore Constitution or disrespect to Constitution, people's rights and freedom as well as party and state's affairs will be at the risk. We should warned by the past mistakes and appreciate current achievements of the Constitution.

Although we celebrate the achievements, we shall not forget our weaknesses. For example: institutional deficiencies and poor oversight for the practice of Constitution. Other issues concern people's core interest are quite severe. Abuse of law, lax enforcement of laws and malpractice, are commonly existed among local law enforcement departments, which severely harm the reputation of China's legal authority. Moreover, some civilians, including certain cadres need to improve their respect to Constitution. For these problems, we need to highly concentrate and find practical solutions.

Comrades and Friends:

The 18th Party congress emphasized that Rule the state according to Law is the governing principals and "Rule of Law" is the fundamental way to manage politics and state affairs. In order to fully encouraging Rule of Law and speeding up the construction of socialist rule of law, we need to completely practice the Constitution.

To fully implement the Constitution needs to be the sole task and the basic work in building a socialist nation ruled by law.

The propriety and basic task of constructing "Socialist Rule of Law" is to fully practice the Constitution. Constitution is the supreme law and main charter of a state with features of stableness and supremacy. "The people of all nationalities, all State organs, the armed forces, all political parties and public organizations and all enterprises and institutions in the country must take the Constitution as the basic standard of conduct, and they have the duty to uphold the dignity of the Constitution and ensure its implementation." No organization or individual has the privilege to overstep the Constitution and the law, and any violation of the Constitution and the law must be investigated.

The value and authority of Constitution depends on the practice of Constitution. Thus, we must improve the level of practicing Constitution.

First, following correct political trend and standing firm on the path of socialist political development with Chinese characteristics. Since the roll out of the economic "Open-Up" policy, CPC have successfully led people to obtain enormous political and democratic achievements; to break though the

past for socialist political development road with Chinese characteristic; to provide correct direction for realizing most representative people's democracy system. The Constitution had been recognized and reaffirmed the core ideal, primary content and fundamental requirements of such political development path. The Constitution had established many important systems and rules. For example, Constitution defined: "basic system and basic tasks of the State," "the core leadership and guiding ideology of the state," the basis of democracy system "led by the working class and based on the alliance of workers and peasants." NPC system, the system of the multi-party cooperation and political consultation led by CPC, system of regional ethnic autonomy, system of self-governance on community level, the Patriotic United Front, Socialist Rule of Law and the principle of democratic centralism...We must appreciate and develop these systems and principals completely and firmly.

Upholding socialist political development path with Chinese characteristic is primarily depends on the organic unification between the practice of CPC lead people as the master of the state and the practice of "Rule of Law." The primary purpose of this development is to ensure people are the master of the state, to promote the prosperity of the party, state and people, to expand socialist democracy and political civilization. We need to uphold the Constitution notion of "State power belongs to the People." Moreover, we need to widely mobilize and organize people to manage social, economy and culture issues and become the master of state, society and themselves though People's Congress at different levels, through different forms and channels, under the requirements of Constitution and Law. We need to insistent the system of NPC practicing state power under Constitutional and political principal of "democratic centralism" Under the system and principals that established by the Constitution, we need to correctly manage the relationship between "Central and Local" and relationship between different ethnic groups; we need to mobilize all positive conditions to consolidate and develop democracy and solidarity; and current political situation of liveliness, stability and harmony. Furthermore, in order to develop people's democracy more extensive, fuller in scope and sounder in practice; fully take the advantages of China's socialist political system; we need to properly expand people's democracy, encourage the conditions for developing social

economy, and positively and reasonably carry out political reform.

Second, in order to speed up the construction of socialist state under the “Rule of Law,” we need to practice law-based governance of the country in an all-around way. Constitution provides that “The People’s Republic of China governs the country according to law and makes it a socialist country under rule of law. The State upholds the uniformity and dignity of the socialist legal system.” To realize the basic line of “Rule of Law,” and speed up the process of constructing “Socialist Rule of Law,” we need to make laws in a scientific way, enforce them strictly, administer justice impartially, and ensure that everyone abides by the law.

We must see that the Constitution is the supreme rule, and keep perfecting socialist legal system with Chinese characteristic. We should make all state business follow the path of “Rule of Law.” We need to make laws are observed and strictly enforced and lawbreakers are prosecuted. NPC and its standing committee shall strengthen legislation in key areas to expand channels for people’s orderly participation in the legislative process. Safeguarding the systems and principals of the Constitution by enforce the Constitution. State Council and NPC and its standing committee at local level with legislation power should speed up drafting relevant administrative or local regulations to ensure the implement of the Constitution and law. All administrative, judicial and procuratorial organs of the State must insist on law-based administration, judicial justice. We need to speed up the construction of governance on law and improve the credibility of the judicial system. State council and local governments as the enforcing party of state power have the responsibility of implementing Constitution and law. We need to deepen the judicial reform as to ensure the independent judicial rights. NPC and its standing committee and relevant state supervising agency shall take the responsibility of overseeing the implementation of the Constitution and law. Moreover, we must establish mechanisms to restrain power. Power must come with responsibility and supervision. Local NPC and its standing committee shall take the responsibility of supervising the implementation of Constitution and law in their jurisdiction.

Third, we need to uphold people’s core position in the country and safeguard people’s rights and duties. People’s

rights and duties are the core of Constitution. Constitution is the guarantee of people's rights and duties. We must ensure that the power bestowed by the people is constantly used for the interests of the people.

We need to protect people's personal rights, private property rights and other political rights in accordance with the law. We need to protect and realize people's various rights in the area of economy, culture and society, and ensure people's pursuing of better life. We need treat people's request fairly with the effort of delivering Justice to everyone. We need to avoid any jeopardy to people's trust and interest by unjust court rulings. We need to promote the Constitution education, especially rise the social awareness of "Socialist Rule of Law" among party and state officials. We need to make effort to set up the authority of the Constitution and law, which allow people to believe in law and utilizing law to protect their interest. Most of all, we need to educate party officials. Party officials at all levels should learn the basic concept of the Constitution. Law is the written moral and moral is one person's internal subconscious. We need to combine the wisdom of "Rule the Country by Virtue" with the "Rule of Law" as a expression to guide people use law, obey law and enjoy the Constitutional rights as well as fulfill their Constitutional duties.

Fourth, insist Party's leadership and improve Party's governing and ruling style. Rule of Law is primary about rule the state according to Constriction. Under current trend and in order to properly carry out the responsibility of governing state, CPC must manage the party affairs according to the party Constitution and manage state affairs according to Constitution. Party led people draft Constitution and law, Party led people enforce Constitution and law. Party must act under the requirements of the Constitution and law.

We need to uphold that Party's core leadership, basic state policy of "Rule of Law" and "Administration according the law." We need to be good at transforming party's policy to state policy through legal process, be good at recommending party elite to become state leader, be good at ruling the state and society through state political agency. We need to support state legislature, administration, judicial departments working in accordance with the Constitution and law, working independently under cooperation mind. Leaders in party organ

should set model of obeying law. Leaders at all levels should have the minds of “Rule of Law,” which requiring further reform and developing the society in accordance with the law. Moreover, we need to make effort to solve social issues in accordance with the law as well. We must ensure that the power bestowed by the people is constantly used for the interests of the people. We need to establish mechanism to supervise the power operation and to prosecute any violations of law and malpractices.

Comrades and Friends!

All Party members and the people of all ethnic groups should closely unite around the Party’s central committee, hold high the great banner of socialism with Chinese characteristics, guide themselves with Deng Xiaoping Theory, the important thought of Three Represents and the Scientific Outlook on Development, uphold Rule of Law, Rule the state in accordance with the law, uphold socialist Rule of Law construction unremittingly promote the building of a moderately well-off society, working hard, forging ahead with determination, and fighting in unity for the fulfillment of the tasks of the 18th National Congress of the Party.