

CHINA LAW UPDATE

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CHINA LAW UPDATE

I. LAWS AND REGULATIONS

*A. Law on Prevention and Control of Occupational Diseases (2011 Amendment)*¹

The Amendment to the Law on Prevention and Control of Occupational Diseases has caused fifty odd modifications to the old version. This revisions ranges from clarifying the responsibilities of relevant government authorities, attaching the importance to the control from the source, solving the problem workers encounters in various aspects, rescuing and giving medical treatment to those unable to prove their relationship with employing units.² The Amendment features four remarkable improvements.

1. Expansion of the Scope of “Employment Unit”

The first improvement is that occupational disease is defined with a slight difference from its old version³. Article 2 of the Amendment refers “occupational diseases” to the diseases contracted by the employees of an enterprise, a public institution, an individual economic organization, or other employer for their exposures to toxic or harmful factors such as dust and radioactive substances in occupational activities”. Compared with the former version, this version adds the expression of “or other employer” which expands the coverage of employers, thus in fact including all types of possible employment units.

2. Simplification of Application Procedures

Another obvious change of the Amendment is that it simplifies the application procedures of identification and verification of occupational injury. There have been long-existed problems in mainland China about diagnosing and identifying occupational

¹ Zhiye Bing Fangzhi Fa (职业病防治法) [Law on Prevention and Control of Occupational Diseases (2011 Amendment)] (promulgated by the Standing Comm., Nat'l People's Cong., Dec. 31, 2011, effective Dec. 31, 2011) 2012 STANDING COMM., NAT'L PEOPLE'S CONG. GAZ. 10.

² See Ma Xuesong (马雪松), Zhonghua Renmin Gongheguo Zhiye Bing Fangzhi Fa (《中华人民共和国职业病防治法》解读) [Interpretation on Law on the Prevention and Control of Occupational Diseases (2011 Amendment)], Dalian Ribao (大连日报) [Dalian Daily], Feb. 21, 2012, at A13, available at http://szb.dlxww.com/dlrb/html/2012-02/21/content_615719.htm?div=0.

³ Zhiye Bing Fangzhi Fa (职业病防治法) [Law on Prevention and Control of Occupational Disease] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2001, effective May 1, 2002) ST. COUNCIL GAZ., Dec. 10, 2001, at 10.

diseases such as blanks in standards regarding identification of working injuries, difficulties in claiming for compensations, etc. This Amendment specifically aims to perfect the diagnostic process and mechanism with inclination towards the benefits and protection of workers. This legislative intent can be inferred from the duties of the work units highlighted in Article 45, which allows an employee to seek occupational disease diagnosis at a medical and health institution legally providing occupational disease diagnosis at the place where the employer is located, at the place of the employee's registered permanent residence, or at the place of the employee's habitual residence.⁴

Similarly, employees will also be able to find easier ways to exercise their rights to claim for the compensation for occupational injury because the newly-added Article 50 authorizes them to appeal to the local labor and personnel dispute arbitration committee for arbitration, to deal with conflicts in the process of occupational disease diagnosis or identification which concerns the employment relationship, type of work, post, or working hours when the employee's occupational history and history of exposures to occupational disease hazard factors are validated.⁵

3. Inclusion of Important Types of Occupational Disease

The Amendment also adds some typical occupational diseases of frequent occurrence. Since Chinese economy is roaring at a fast pace, some diseases caused or induced in the new technology industries come into existence and there remains much blank in laws. Previous reported cases⁶ reveal that the control and precaution over these diseases, together with the compensation are far from satisfactory. For instance, *Zhang Haichao Incident*⁷ exposed by the media cruelly but truly shows the great pains that coal miners suffered from dust lungs and the startling occupational diseases resulted from chemical poisoning. Fortunately, this Amendment

⁴ Zhiye Bing Fangzhi Fa (职业病防治法) [Law on Prevention and Control of Occupational Diseases (2011 Amendment)] (promulgated by the Standing Comm., Nat'l People's Cong., Dec. 31, 2011, effective Dec. 31, 2011) 2012 STANDING COMM., NAT'L PEOPLE'S CONG. GAZ. 10, art. 45.

⁵ *Id.* art. 50.

⁶ See Zhiye Bing Wang (职业病网) [OCCUPATIONAL-DISEASE NET], http://www.zybw.com/Category_109/Index.aspx (last visited on May 22, 2012). See also Pingguo Zhongguo Gongyingshang Gongren Zhongdu (苹果中国供应商工人中毒) [Employers of Apple Corp. vs. Apple Corp], Huanqiu Wang (环球网) [Huanqiu Net] <http://www.huanqiu.com/zhuanli/tech/apple> (last visited on May 30, 2012).

⁷ Zhang Haichao Kaixiong Yanfei Shijian (张海超开胸验肺事件) [Zhang Haichao Incident], Wikipedia, <http://zh.wikipedia.org/wiki/%E5%BC%A0%E6%B5%B7%E8%B6%85%E4%BA%8B%E4%BB%B6> (last visited on Apr. 24, 2012).

has included the above-mentioned situations in article 20.⁸ All employers are required to establish and improve a responsibility mechanism for the prevention and control of occupational diseases.⁹ The Amendment puts special emphasis on the so-called high-risk dust where special administration is required to be applied to high-risk dust operations.¹⁰

4. Rising of the Limit of Indemnity

Another obvious change in the Amendment is that the employers are required to strictly comply with the national occupational health standards and implement preventative measures against occupational diseases so as to control and eliminate occupational disease hazards at source. Such employers' duties are clarified in newly-added Article 15.¹¹ In order to guarantee the implementation of the rules, article 70 of the new law provides that the upper limit of the fines is reset to a higher level of 500,000 RMB, from its original 300,000 RMB standard.¹²

Overall, this amendment has received praises from scholars of labour law and the public for its achievements in distributing responsibilities to different administrative organs, like the health administrative department of the State Council in conjunction with the work safety administrative department and labor and social security administrative department of the State Council,¹³ different from the past that all the examination and compensation work being controlled by the public health authorities under the power of the State Council.

B. Amendment to Law on Resident Identity Cards¹⁴

This is the first time for the Standing Committee of the National Congress to revise the Law of the People's Republic of China on Resident Identity Cards [hereinafter referred to as *Resident Identity Cards Law*] since it was first promulgated in 2004. The Resident Identity Cards Law is amended to adapt to the considerable change

⁸ Zhiye Bing Fangzhi Fa (职业病防治法) [Law on Prevention and Control of Occupational Diseases (2011 Amendment)] (promulgated by the Standing Comm., Nat'l People's Cong., Dec. 31, 2011, effective Dec. 31, 2011) 2012 STANDING COMM., NAT'L PEOPLE'S CONG. GAZ. 10, art. 20.

⁹ *Id.* art. 5.

¹⁰ *Id.* arts. 2, 20.

¹¹ *Id.* art. 15.

¹² *Id.* art. 70.

¹³ *Id.* art. 2, § 3.

¹⁴ Quanguo Renmin Daibiao Dahui Changwu Weiyuan Hui Guanyu Xiugai Zhonghua Renmin Gonghe Guo Jumin Shenfen Zheng Fa de Jueding (全国人民代表大会关于修改《中华人民共和国居民身份证法》的决定) [Decision of the Standing Committee of the Nat'l People's Cong. on Amending the Law on Resident Identity Cards] (promulgated by the Standing Comm., Nat'l People's Cong., Oct. 29, 2011, effective Jan. 1, 2012) (Lawinfochina).

of the society and the fast development of the information network. It contains new provisions on the expiry date of the first generation of identity cards, the registration of citizens' fingerprint when applying for identity cards, the duty of public authorities to keep citizens' personal information confidential, as well as the legitimate circumstances for the police to examine citizens' identity cards.¹⁵ The revision may improve its function of anti-counterfeiting, ensure citizens to perform social activities without personal information being leaked, and facilitate the government to maintain the public order. However, two of the amended provisions have aroused heated debates in the society.

The first controversial clause is about the fingerprint registration system that newly set up by the amendment. Article 3 of the new Resident Identity Cards Law provides that citizens applying for obtaining, replacing or reissuing a resident identity card are required to register their fingerprints.¹⁶ Advocates of this provision claim that the establishment of fingerprint registration system not only technically distinguishes genuine identity cards from the fake ones but also completely stops the illegal behavior of using others' identity cards as one's own.¹⁷ Meanwhile, the provision also receives criticisms that their fingerprints may leak out due to the misconduct of personnel of state organs.¹⁸

The other provision under debate concerns the authority of police to examine citizens' identity cards under particular circumstances. The amendment adds in (which) article "when found necessary to ascertain the identity of relevant persons at railway stations, long-distance bus stations, ports, wharfs, airports or places specified temporarily by the people's government during major events". This article is viewed as a new legitimate circumstance for the police to examine citizens' identity cards after producing related certificates. Such provision is considered to have greatly expanded the powers of the police and rendered individuals' rights at the risk of infringement. "The police needs justifications for examining individual's identity cards. Thus the legislators should set explicit standards to decide whether it is necessary to ascertain individual's identity on different occasions, or it will be very likely for the police to abuse their powers under the new provisions of Resident Identity

¹⁵ *Id.* arts. 3, 15.

¹⁶ *Id.* art. 3.

¹⁷ See Shenfen Zheng Xinxi Xielou Ke Yaoqiu Peiqian (身份证信息泄露可要求赔钱) [Individuals can claim compensation if personal information in identity cards leaked], *Fazhi Wan Bao* (法制晚报) [Legal Evening], Oct. 29, 2011, at A10, available at http://www.fawan.com.cn/html/2011-10/29/content_335074.htm (last visited on Apr. 15, 2012).

¹⁸ *Id.*

Cards Law,' commented Gan Chaoying, an associate professor of Peking University.¹⁹

*C. Law on Promotion of Cleaner Production (2012 Amendment)*²⁰

The amendment of Law on Promotion of Cleaner Production passed in the National People's Congress on February 29, 2012.

This amendment aims to reduce waste of resources and energy from the headstreams, promoting the transformation of the mode of China's economic development to a cleaner and more scientific one. Cleaner production, on one hand, refers to the decrease in the volume of pollutants or inappropriate consumption of resources in the process of production. On the other hand, it embraces the idea of raising the operating efficiency of resources, which is one of the most significant factors to measure a country's economic development model.

One of the most remarkable progresses of this amendment falls on strengthening the supervisory system of cleaner production, including specifying the scope of application of this law as well as strengthening enforcement, for which the government should take more responsibility than before.²¹

Wang Guangtao, Chairman of Environmental Protection and Resources Conservation Committee of the National People's Congress commented on the Amendment that before this amendment, the Cleaner Production Law required enterprises to pay for all the law enforcement procedures.²² However, it should be the duty of the government, rather than that of enterprises, to pay. That's why this time the Amendment imposes strict rules against government charging enterprises for the examination and verification fees, which is clarified in article 27 of the amendment.²³ He points out altogether the following four advantages of the amendment.

¹⁹ *Id.*

²⁰ Qingjie Shengchan Cujin Fa (清洁生产促进法) [Cleaner Production Promotion Law (2012 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 29, 2012, effective Feb. 29, 2012) (Chinalawinfo).

²¹ Qingjie Shengchan: Wei Zhuanbian Jingji Fazhan Fangshi Jiali (清洁生产: 为转变经济发展方式加力) [Cleaner Production Drives the Shift of Economic Development], Zhongguo Renda Wang (中国人大网) [National People's Congress Net], http://www.npc.gov.cn/npc/zgrdzz/2012-03/16/content_1715125.htm.

²² Qingjie Shengchan Cujin Fa (清洁生产促进法) [Cleaner Production Promotion Law (2012 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 29, 2012, effective Feb. 29, 2012) arts. 37, 39 - 41 (Chinalawinfo).

²³ Quanguo Renda Huanziwei Zhuren Weiyuan Wang Guantao Jiedu Qingjie Shengchan Cujin Fa (全国人大环资委主任委员汪光焘解读清洁生产促进法) [Interpretation of the Cleaning Production Law by Wang Guangtao, the Chairman of the NPC Environmental Protection and Resources Conservation Committee], Xinhua Wang (新华网) [Xinhua Net], http://news.xinhuanet.com/fortune/2012-02/29/c_111586465.htm (hereinafter *Interpretation of the Cleaning Proudction Law*).

1. Verification of the Administrative Obligations

Article 27 of the amendment regulates that the relevant authorities of local governments at or above county level shall oversee the compulsory cleaner production examination implemented by enterprises and, when necessary, may organize evaluation and acceptance check regarding the effects of enterprises' implementation of cleaner production with relevant expenses included in the government budget at the same level. It is also emphasized in the provision that the departments or entities conducting such evaluation and acceptance check may not charge fees to enterprises under evaluation and acceptance check.²⁴

2. More Economical Usage of Product Packing

Another obvious progress of the Amendment is that it gives a response to a common phenomenon that producers and manufacturers often overpackage. This not only results in a huge waste of natural resources, but also greatly contaminates the environment. This problem will be likely to get resolved in the new law. Article 20 of the Amendment requires appropriate packing through producing procedures. Enterprises shall reasonably pack their products and ensure that the material, structure, and cost of packages are appropriate for the quality, specifications, and cost of inside products to reduce generation of packing waste, and excessive packaging shall be prohibited.²⁵

3. Improvement on Law Enforceability

Additionally, the Amendment strengthens the law enforcement by mentioning the financial support from the government budget for the first time. Article 9 of the Amendment provides that the Central Government intends to expand the input of capital to promote cleaner production. Based on the Amendment, the central budget will allocate more funds for cleaner production promotion, including special-purpose funds from the central treasury for cleaner production and other funds arranged by the central budget for cleaner production, to support the cleaner production and promotion of cleaner production technologies in key areas, key sectors, and key programs as determined in the national cleaner production promotion plan and the implementation of cleaner production projects in ecologically vulnerable areas.²⁶

²⁴ Qingjie Shengchan Cujin Fa (清洁生产促进法) [Cleaner Production Promotion Law (2012 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 29, 2012, effective Feb. 29, 2012) .art. 27 (Chinalawinfo).

²⁵ *Id.* art. 20.

²⁶ *Id.* art. 9.

4. Stricter Rules for Energy-consuming Companies

The Amendment adopts a filtration mechanism to sort out companies that consume natural resources in excess of the standard amount allowed. All companies in this group are compelled to receive compulsory production examination. They are also ordered to monitor the consumption of resources and the generation of waste in their production and provision of services and, when necessary, implement cleaner production examination of their production and provision of services.²⁷

In general, the Amendment has achieved great accomplishments compared to the previous version promulgated in 2002. It stresses the obligations on the relevant government authorities to monitor and scrutinize manufactures that are highly-reliant on natural resources and that increase burden on the nature and includes expenditure of environmental improvement into the government budget.²⁸

This amendment is anticipated to be of great significance in realizing the targeted energy-saving goal and in transferring the developing method of economics as well, Wang Guangdao commented.²⁹

*D. Regulation on the Implementation of the Tendering and Bidding Law*³⁰

1. Background of the Regulation

Bidding is a major means to guarantee the fair trade in the procurement market. However, the market is exposed to a lot of problems, for example, some projects that legally required bidding evade tender or engage in false bids, some bidders submit bids in collusion or bidders collude with the tenderee in bidding. These undesirable conducts severely disturb the order and fairness in the bidding.

Basically, there are five remarkable changes and improvements in the new Regulation.

²⁷ *Id.* art. 27.

²⁸ *See Interpretation of the Cleaning Prouction Law, supra* note 23.

²⁹ *Id.* *See also* Wang Guangtao Zuo Guanyu Qingjie Shengchan Cujin Fa Xiuzheng Cao'an de Shuoming (汪光焘作关于清洁生产促进法修正案草案的说明) [Interpretation by Wang Guangtao on the Amendment of Cleaner Production Promotion Law], Zhongguo Renda Wang (中国人大网) [National People's Congress Net], http://www.npc.gov.cn/huiyi/cwh/1123/2011-10/24/content_1675757.htm.

³⁰ Zhaobiao Toubiao Fa Shishi Tiaoli (招标投标法实施条例) [Regulation on the Implementation of the Tendering and Bidding Law] (promulgated by the St. Council, Nov. 30, 2011, effective Feb. 1, 2012) ST. COUNCIL GAZ., Jan. 10, 2012, at 10.

2. Clearer Definition of the Term “Construction Projects”

The Regulation gives clearer definition of the term “construction projects”, providing a specific guidance to the recognition of “construction projects”. Article 2(1) of the Regulation provides that “the term ‘construction projects’ as mentioned in Article 3 of the Bidding Law means projects as well as goods and services related to project construction.”³¹ The Regulation then elaborates the coverage of “construction projects” in article 2(2) where it says “construction projects include new construction, refurbishing and expansion of buildings and fixtures and the relevant decorating, demolition and renovation of buildings and structures. The term ‘goods related to project construction’ means equipment and materials which constitute an integral part of projects and are required for realizing the basic functions of projects. The term ‘services related to project construction’ means services such as survey, design and supervision required for the completion of projects.”³²

In addition, the article makes the definition of the term “projects” in accordance with the one in the Government Procurement Law of the People’s Republic of China.³³ The consistency of the term is an improvement since it greatly reconciles the potential contradictions between the Government Procurement Law and the Bidding Law.³⁴

3. Governmental Supervision on Bidding Activities

The Regulation clarifies the governmental supervision on bidding activities from various levels. Article 4(1) provides that “the development and reform department of the State Council shall guide and supervise the bidding work across the country and supervise and inspect the bidding activities for the state’s major construction projects. The departments of industry and information technology, housing and urban-rural development, transport, railways, water resources and commerce of the State Council shall supervise the

³¹ *Id.* art. 2(1).

³² *See id.* art. 2(2).

³³ *See* Zhengfu Caigou Fa (政府采购法) [Government Procurement Law] (promulgated by the Standing Comm., Nat’l People’s Cong., June. 29, 2002, effective Jan. 1, 2003) 2002 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 228, art. 2(6) (providing that “the term ‘project’ as mentioned in the present law refers to construction projects, including the fresh construction, reconstruction, expansion, decoration, dismantling and repairing, etc. of buildings and structures”).

³⁴ Zhaobiao Toubiao Fa Shishi Tiaoli Youguan Wenti Da Jizhe Wen (招标投标法实施条例有关问题答记者问) [Answering Questions of the Press on the Regulation on the Implementation of the Tendering and Bidding Law], Zhongyang Renmin Zhengfu Wang (中央人民政府网) [Central People’s Government Net] (Dec. 29, 2011) http://www.gov.cn/zwhd/2011-12/29/content_2033367.htm (hereinafter *Answering Questions on the Regulation on the Implementation of the Tendering and Bidding Law*).

relevant bidding activities according to the prescribed division of functions.”³⁵

Articles 4(3) and (4) regulate respectively that “the public finance department shall, according to law, supervise the budgetary performance and the implementation of government procurement policies on government procurement construction projects that are subject to bidding”³⁶ and that “the supervisory organ shall, according to law, supervise the relevant supervisory objects relevant to bidding activities”.³⁷

4. Combat Improper and Unfair Acts During Bidding Activities

Another improvement of the Regulation is that it specifies and regulates the problems frequently happened in bidding activities in China, such as false bids, collusion in bidding, imbalance between duties and powers of bid evaluation committee, inaction of supervision, illegal interference in bidding from state officials, etc. For instance, articles 39 to 41 of the Regulation list seventeen circumstances as forms of collusion in bidding in great details; moreover, article 67 of the Regulation places strict legal liability to the collusion in bidding so that such acts can be greatly cracked down and safeguard the order and fairness in bidding market.

5. Supplementation to the Withdrawal Mechanism

The Regulation specifies and supplement the mechanism of withdraw in bidding activities, covering members of the bid evaluation committee, state officials and bidders. To be specific, article 46(3) of the Regulation stipulates that “Where any member of the bid evaluation committee is an interested party of the bidder, such a member shall voluntarily withdraw.”³⁸ Article 34(1) of the Regulation provides that “No legal person, other organization or individual that is an interested party to the tenderer and that may affect bid impartiality shall participate in bidding”.³⁹

6. Clarification of the Scope of Public Bidding

Article 8(1) of the Regulation provides that “projects for which state-owned funds take the controlling or leading position and bidding is required according to law shall be subject to public bidding.”⁴⁰ However, selected bidding is permitted under any of

³⁵ Zhaobiao Toubiao Fa Shishi Tiaoli (招标投标法实施条例) [Regulation on the Implementation of the Tendering and Bidding Law] (promulgated by the St. Council, Nov. 30, 2011, effective Feb. 1, 2012) ST. COUNCIL GAZ., Jan. 10, 2012, at 10, art. 4(1).

³⁶ *Id.* art. 4(3).

³⁷ *Id.* art. 4(4).

³⁸ *Id.* art. 46(3).

³⁹ *Id.* art. 34(1).

⁴⁰ *Id.* art. 8(1).

the following circumstances: one being where “only a small number of potential bidders are available for selection because of complicated technologies, special requirements or restrictions from the natural environment”; the other one being where “the cost of adopting public bidding accounts for an excessively large proportion of the project contract amount.”⁴¹

In conclusion, the promulgation and implementation of the Regulation is one of the big moves to fight and take precautions against corruption, thereby promoting the fair competition.⁴²

E. Detention House Regulation (promulgated by the State Council, February 23, 2012, effective April 1, 2012)

The Detention House Regulations (hereinafter referred to as *the Regulation*) came into effect on April 1, 2012. It is the first regulation that establishes standards for detention houses. The Regulation states that detention houses shall safeguard the personal security and legitimate rights and interests of detainees, and may not insult, mete out corporal punishment to or abuse detainees, or instigate or connive at insult, corporal punishment or abuse of detainees by others.⁴³

The promulgation of the Regulation is of great significance in implementing the principle of ruling the country by law, strengthening the construction of legal system, promoting public organs to enforce laws and regulations and maintaining the legitimate rights of detainees.

The contents of the Regulation mainly reflect in the following four different aspects. First, it clarifies the specific departments that are in charge of the establishment and administration of detention houses. According to Article 4 of the Regulation, the public security department of the State Council shall be responsible for the administration of detention houses throughout the country. Public security organs under the local people's governments at or above the county level shall be responsible for the administration of detention houses in their respective administrative regions.⁴⁴ In terms of the establishment of detention houses, Article 5 provides that local people's governments at or above the county level may set up detention houses in light of local conditions. Set up or closure of detention houses shall be proposed by public security organs under the local people's governments at or above the county level and be

⁴¹ *Id.*

⁴² See *Answering Questions on the Regulation on the Implementation of the Tendering and Bidding Law*, *supra* note 34.

⁴³ See Juliu Suo Tiaoli (拘留所条例) [Detention House Regulations] (promulgated by the St. Council., Feb. 23, 2012, effective Apr. 1, 2012) art. 1 (Chinalawinfo).

⁴⁴ *Id.* art. 4.

examined and approved according to prescribed authorities and procedures.⁴⁵

Second, it broadens the duties and obligations of the detention house and its staffs, namely the duty of establishing administrative files for the detainees, reporting problems discovered by the on-duty and patrol personnel promptly, and providing medical treatment to detainees who fall ill.⁴⁶

Third, it introduces overall regulations about every link in the administration of the detention house, including the on-duty and patrol systems, the emergency response mechanisms, the medical, health and epidemic prevention systems, the application for leave of absence from the detention house and the release of the detainees.⁴⁷

Fourth, it highlights the great importance of the protection of the legitimate rights of detainees. For instance, Article 26 entitles the detainees with the right to accept visitors during the period of detention,⁴⁸ which is viewed as a big step made towards general protection of detainees' rights.

When interviewed by People's Daily Online, Zhao Chunguang, the minister of Prison Administration Bureau, Ministry of Public Security stated that the Regulations aims to ensure the safety of the management of detention house and to maintain the legitimate rights of detainees.⁴⁹ However, scholars have expressed different opinions on this function of the Regulations.

"We were regretful to see that the Regulation deleted several important contents mentioned in the draft, including rules concerning 'the detention process should be under the supervision of people's procuratorate', 'death of detainees should be immediately notified to the people's procuratorate and processed postmortem examination', 'relatives of detainees should be informed within twelve hours after detainees being taken into custody'.⁵⁰

To be impartial, these rules should all be contained in the Detention House Regulations. To resolve the problems related to detention houses, the only solution is to accelerate the legislative process and to promote the promulgation of the Detention House

⁴⁵ *Id.* art. 5.

⁴⁶ *Id.* arts. 14, 16, 18.

⁴⁷ *Id.* arts. 14, 18, 27, 30.

⁴⁸ *Id.* art. 26.

⁴⁹ The Detention House Regulations will come into effects on Aril 1, <http://society.people.com.cn/GB/86800/17519746.html> (last visited May 14, 2012).

⁵⁰ See Juliu Suo Tiaoli (Zhengqiu Yijian Gao) (拘留所条例 (征求意见稿)) [Detention House Regulation (Draft)], art. 5, 14, 32, Zhongyang Renmin Zhengfu Wang (中央人民政府网) [Central People's Government Net], Nov. 09, 2009, http://www.gov.cn/gzdt/2009-11/09/content_1459923.htm.

Law without delay.” Li Kejie, professor of the Law School of Shandong University of Political Science and Law, commented.⁵¹

II. JUDICIAL INTERPRETATION

A. *Notice of the Supreme People’s Court on Issuing the First Set of Guiding Cases*⁵²

1. Background information

For the purpose of implementing the judicial reform measures of the CPC Central Committee on establishing a case guidance system, the Supreme People’s Court issued the Provisions on Case Guidance (hereinafter the “Provisions”) on November 26, 2010.⁵³ The issuance of the Provisions symbolizes the preliminary establishment of a case guidance system with Chinese characteristics.

According to the requirements of the Provisions, all higher people’s courts shall actively recommend and report guiding cases to the Supreme People’s Court. The Supreme People’s Court has specially set up a case guidance office to strengthen and coordinate research on guiding cases.

(1) *What is the “guiding cases”?*

According to article 2 of the Provisions, the “guiding cases” are the ones that have taken legal effects, and satisfy *any* of the following requirements:⁵⁴

- a. of wide attention from the society;
- b. when the law is not specific enough;
- c. typical
- d. complicated or of new types of cases;
- e. other cases of guidance.

In the view of Professor Cheng Jie from School of Law, Tsinghua University, the lists of requirements are not in strict logic, for instance what is of wide attention of the society might be typical as well, which means that one requirement is not clearly separated from

⁵¹ See Juliu Suo Tiaoli Nan Tuo Xingzheng Fagui Zhi Kun (拘留所条例难脱行政法规之困) [The Detention House Regulations confront the dilemma of administrative regulations], FAZHI WAN BAO (法制晚报) [LEGAL EVENING], Mar. 5, 2012, at 03, available at <http://epaper.legaldaily.com.cn/fzrb/content/20120305/Article03003GN.htm>.

⁵² Zuigao Renmin Fayuan Yinfu Guanyu Anli Zhidao Gongzuo De Guiding De Tongzhi (最高人民法院印发《关于案例指导工作的规定》的通知) [Notice of the Supreme People’s Court on Issuing the First Set of Guiding Cases] (promulgated by the Supreme People’s Court, December 20, 2011, effective December 20, 2011) (Lawinfochina).

⁵³ Zuigao Renmin Fayuan Guanyu Anli Zhidao Gongzuo De Guiding (最高人民法院关于案例指导工作的规定) [The Provisions of the Supreme People’s Court on Case Guidance] (promulgated by the Supreme People’s Court, November 26, 2010, effective November 26, 2010) (Lawinfochina).

⁵⁴ See *id.* art. 2.

each other.⁵⁵ It is common that cases with complexity or of new nature will at the same time catch public attention, cases of guidance overlap with typical cases.

(2) *Who is responsible for the collection, selection and publishing the “guiding cases”?*

Pursuant to article 4 of the Provision, all trial divisions of the Supreme People’s Court and all the courts at all levels can recommend cases that met the requirements set forth in Article 2 to the case guidance office.⁵⁶ Pursuant to article 5 of the Provision, NPC deputies, CPPCC members, experts and scholars, lawyers, and those who are concerned with the work of the courts can recommend cases that satisfy the requirements in article 2 to the court of the original judgement.⁵⁷

According to article 3 of the Provision, the case guidance office specifically set up by the Supreme People’s Court is responsible for the selection, review and report of the guiding cases.⁵⁸ Article 6, paragraph 1 of the Provision provides that the case guidance office should give reviewing opinions in time when they receive cases recommended by courts; if the recommended cases met the requirements of article 2, the office should submit these cases to the President or the vice-president of the SPC for further discussion and decision by the judicial committee of the SPC.⁵⁹

Pursuant to article 1 and article 6, paragraph 2 of the Provision, it is the SPC that finalizes and publishes uniformly the guiding cases decided by the judicial committee by virtue of announcement published on the Gazette of the Supreme People’s Court, website of the SPC and People’s Court Daily. The case guidance office compiles the guiding case annually according to article 8 of the Provision.

2. The First Set of Four Guiding Cases

Recently, upon deliberation, the Judicial Committee of the Supreme People’s Court decided to publish the first set of four guiding cases, which includes *Shanghai Zhongyuan Property Consultancy Co., Ltd. v. Tao Dehua* (Intermediary Contract Dispute), *Wu Mei v. Xicheng Paper Co., Ltd. of Meishan City in Sichuan*

⁵⁵ Interview with Cheng Jie, Associate Professor, School of Law, Tsinghua University, Beijing, P.R.C. (Apr. 12, 2012)

⁵⁶ Zuigao Renmin Fayuan Yinfa Guanyu Anli Zhidao Gongzuo De Guiding De Tongzhi (最高人民法院印发《关于案例指导工作的规定》的通知) [Notice of the Supreme People’s Court on Issuing the First Set of Guiding Cases] (promulgated by the Supreme People’s Court, December 20, 2011, effective December 20, 2011) art. 4 (Chinalawinfo).

⁵⁷ See *id.* art. 5.

⁵⁸ See *id.* art. 3.

⁵⁹ See *id.* art. 6(1).

Province (sales contract dispute), *People v. Pan Yumei and Chen Ning* (on charges of taking bribes) and *People v. Wang Zhicai* (on charge of intentional homicide).⁶⁰

(1) Shanghai Zhongyuan Property Consultancy Co., Ltd. v. Tao Dehua

The guiding case regarding disputes over an intermediary contract between Shanghai Zhongyuan Property Consultancy Co., Ltd. and Tao Dehua is aimed at settling disputes arising between a purchaser and a real estate agency in the purchase and sale of used homes where the purchaser concludes a deal without the involvement of the agency.

As affirmed in this case, where an intermediary contract has a clause prohibiting the purchaser from concluding a real estate purchase contract with the seller by using the housing information provided by the agency but without the involvement of the agency, such a clause is binding on the purchaser; namely, the purchaser should not breach the contract by concluding a deal without the involvement of the agency.

However, where information regarding the same home is issued by multiple agencies and the purchaser obtains the information properly from such agencies, the purchaser has the right to select the agency with a low quoted price and good service to facilitate the conclusion of a deal, which is not a breach of contract for concluding a deal without the involvement of a real estate agency. This not only protects the lawful rights and interests of real estate agencies, promotes the sound development of the intermediary service market and maintains good faith during transactions, but also promotes fair competition between real estate agencies, improves the quality of service and protects the lawful rights and interests of consumers.

(2) Wu Mei v. Xicheng Paper Co., Ltd. of Meishan City in Sichuan Province

The guiding case regarding disputes over a sales contract between Wu Mei and Xicheng Paper Co., Ltd. of Meishan City, Sichuan Province is aimed at properly handling the relationship between the validity of an out-of-court settlement and a judgment.

As affirmed in this case, where both parties reach an out-of-court settlement and one party withdraws its appeal in a trial on appeal, the parties should perform the settlement. If one party does not perform or entirely perform the settlement, the other party may apply to the people's court for enforcement of the effective judgment from

⁶⁰ The four guiding cases are attached in the Notice of the Supreme People's Court on Issuing the First Set of Guiding Cases (promulgated by the Supreme People's Court, effective Dec. 20, 2011).

the original trial. Therefore, the right of the parties to freely dispose of the subject matter at issue is respected, the rule that an agreement must be fulfilled in good faith is underscored, and the authority of an effective judgment of the people's court is maintained.

(3) People v. Pan Yumei and Chen Ning

The guiding case regarding bribes taken by Pan Yumei and Chen Ning is aimed at addressing issues on determination of crimes of taking bribes in new forms or by new means.

As affirmed in this case, where a state official takes bribes in the name of "jointly running" a company or in the form of transactions, takes bribes by promising to "seek any benefit for others" but without seeking such benefit, or returns bribes taken to cover up his or her crime, it should not affect the determination of the crime of taking bribes. This case provides specific guidance on the handling of bribes taken by new means in recent years.

This case is highly significant for the punishment of bribe-taking crimes, the effective investigation and punishment of new forms of bribery cases, and the furtherance of the fight against corruption.

(4) People v. Wang Zhicai

The guiding case regarding intentional homicide by Wang Zhicai is aimed at defining the conditions for a suspended death penalty sentence and restrictions on commutation.

As affirmed in this case, the commutation restriction rules as provided for in the Amendment (VIII) to the Criminal Law of the People's Republic of China may apply to crimes occurring before April 30, 2011; where the defendant should be sentenced to death with immediate execution for his or her extraordinarily serious crime, and the victim's side reacts strongly, but the defendant is eligible for statutory or discretionary lighter punishment, the defendant should be sentenced to a suspended death penalty. If matching punishment to crime can be achieved by imposing commutation restrictions, the defendant may be sentenced to a suspended death penalty with commutation restrictions.

This is conducive to the effective implementation of the criminal policy of tempering strict justice with mercy: sternly punishing grave criminal offenses according to law while more stringently restricting the use of death penalty to increase positive factors and decrease negative factors at the maximum and promote social harmony.

3. To effectively use guiding cases

According to the Notice, the people's courts at all levels shall organize judges to diligently study and thoroughly and accurately understand the spirit and significance of guiding cases; strengthen

the consciousness of using guiding cases and properly hear similar cases. By strictly referring to these guiding cases, so as to further improve the quality and efficiency of case handling, ensure the unity of the legal effects and social effects of adjudications, and guarantee social stability and harmony.

Courts at all levels should attach great importance to case guidance, carefully select, actively recommend, and timely submit guiding cases, further improve the quality of selected and submitted cases, and promote the solid development of case guidance work.

All higher people's courts may provide guidance on the trial work of the people's courts and special courts within their respective jurisdictions by issuing reference cases. However, they should not use such titles as "guiding cases" or "guidance cases" to avoid confusion with guiding cases.

(1) No binding forces

According to article 7 of the Provision, the people's courts at all levels should refer to these guiding cases when they hear similar cases.⁶¹

In the view of Professor Cheng, the key word in this Article is the phrase "refer to". Because China is not a case-law country, judges do not have to make their judgments in accordance with the principle of *stare decisis*. Therefore, Article 7 uses the phrase "refer to", which reflects the lack of binding effects.

We should also be mindful that the guiding case system is different from "precedents" and "case law" in the context of Common Law system. "The most distinctive differences are as follows: first, as opposed to the process of making law by judges, guiding cases are the process of legal application, thus the nature of each other is not the same. Second, the guiding cases do not have binding forces nor can they be cited directly in the judgements", Professor Cheng commented.⁶²

⁶¹ Zuigao Renmin Fayuan Yinfa Guanyu Anli Zhidao Gongzuo De Guiding De Tongzhi (最高人民法院印发《关于案例指导工作的规定》的通知) [Notice of the Supreme People's Court on Issuing the First Set of Guiding Cases] (promulgated by the Supreme People's Court, December 20, 2011, effective December 20, 2011) art. 8 (Chinalawinfo).

⁶² Interview with Cheng Jie, Associate Professor, School of Law, Tsinghua University, Beijing, P.R.C. (Apr. 12, 2012)

III. CASES

A. Apple Inc. and IP Application Development Limited v. Provview Technology (Shenzhen) Co., Ltd. iPad Trademark Ownership Dispute Case. (The Intermediate People's Court of Shenzhen Municipality, Guangdong Province)

1. Case Summary

The defendant, Provview Technology (Shenzhen) Co., Ltd (hereinafter Shenzhen Provview) is a subsidiary of Provview International Holdings Ltd. In 2001, Shenzhen Provview registered the iPad trademark in Mainland China. In the meantime, a Taiwan subsidiary of Provview International Holdings (hereinafter *Taiwan Provview*) held the rights to use the iPad trademark in several other countries including Mexico, Singapore and Indonesia. In 2009, the second plaintiff, IP Application Development Limited (hereinafter IP Application) approached the Taiwan Provview and the latter agreed to sell all the iPad trademarks it held around the world to the former, including the trademark in Mainland China. Later the IP Application resold all these iPad trademarks to Apple Inc., which then launched its new product named iPad in 2010. However, Shenzhen Provview claimed that it was the legitimate owner of the iPad trademark on the Chinese mainland and it had never agreed to transfer its rights to use for the iPad trademark to Apple Inc. Shenzhen Provview also asked Apple Inc. to stop the infringement and to compensate its losses. In July 2010, Apple Inc. and IP Application filed a lawsuit against Shenzhen Provview, asking the court to confirm its rights over the iPad trademark in Mainland China.

The main issue in this case is whether Shenzhen Provview should be bound by the contract between Taiwan Provview and IP Application. The contract is signed by Ray Mai, the Legal Executive of Taiwan Provview and Handn Wood, President of IP Application. The plaintiffs claimed that evidence showed Ray Mai also worked as the legal executive of Shenzhen Provview and he had been authorized by Yang Rongshan, the legal representative of both Shenzhen Provview and Taiwan Provview.

According to Shenzhen Intermediate People's Court's decision, it is clear that one of the contracting parties to the Transfer Agreement is Taiwan Provview instead of Shenzhen Provview. Although Yang Rongshan is the legal representative of Shenzhen Provview, his signature and seal of the letter of authorization show that he signed the letter in his capacity of the legal representative of Taiwan Provview. The Court also found the evidence provided by the plaintiffs too weak to prove Ray Mai's capacity as the legal

executive of Shenzhen Provview. Since Taiwan Provview is not the legitimate owner of the iPad trademark in Mainland China, it lacks the right to transfer the iPad trademark. Therefore, the Court held that the defendant, Shenzhen Provview was unrelated to the transfer contract between Taiwan Provview and IP Application and the iPad trademark in Mainland China still belongs to Shenzhen Provview.

Apple Inc. then appealed to Guangdong Higher People's Court and now the case was still under trial. A judge from Guangdong Higher People's Court indicated that the Court was trying to mediate between the two parties under the principle of equality and voluntariness.⁶³

2. Viewpoints on the iPad Trademark Ownership Dispute Case

According to the facts of the case, the transfer of iPad trademark can be divided into three phases.

In the first phase, IP Application purchased the global iPad trademarks from Taiwan Provview at the price of 35000 pounds. The fact that Taiwan Provview agreed to sell the iPad trademarks at such a low price indicates that it did not value the iPad trademarks highly at that time. The contract that shows Taiwan Provview's genuine intention of selling the global rights for the iPad trademark to IP Application is authentic and valid. During the second phase of the case, Apple Inc. unveiled its identity as the real buyer of the iPad trademarks, immediately after which Shenzhen Provview refused to go through the transfer formality and claimed that the contract signed by Taiwan Provview did not include the iPad trademark it registered in Mainland China, of which Shenzhen Provview was the legitimate owner. In the third phase, Apple Inc. ignored the fact that it had not completed the transfer formality required by the Chinese law yet and insisted on launching the iPad product in Mainland China.

After giving an overview of the three phases of the case, it is evident that when signing the transfer contract, Taiwan Provview's genuine intention was to sell the global rights for all the iPad trademarks, including the one registered by Shenzhen Provview on Chinese mainland, to IP Application, and Yang Rongshan authorized Ray Mai to sign the transfer contract with IP Application in his capacity of the legal representative of all the Provview subsidiaries. Otherwise it would be meaningless for the Provview to retain only the iPad trademark in Mainland China when those in all the other

⁶³ Guangdong Gaoyuan Tan iPad Shangbiao An: Zhengqu Pingguo Weiguan Tiaojie (广东高院谈iPad商标案: 争取苹果唯冠调解) [Voices from Guangdong Higher People's Court: Efforts are Made to Reach Reconciliation], Souhu IT (搜狐IT) [Sohu IT] (April 17, 2012), <http://it.sohu.com/20120417/n340861049.shtml>.

countries have already been sold, such method does not correspond to the general trademark transfer rules under the present background of economic globalization.

The dispute in this case actually shows the conflict between the principle of contractual freedom in common law and the theory of formal act concerning trademark transfer in Mainland China.

According to the principle of contractual freedom, the contracting parties who are bound by the contract should strictly comply with the principle of honesty and good faith, and the validity of the contract is determined by the genuine intentions of both sides when concluding the contract. Thus it is the validity of the contract instead of the transfer formality that matters under the rules of common law. However, the theory of formal act adopted in Mainland China requires that one may become the legitimate owner of a trademark only after going through certain transfer formalities. Therefore the real issue we should focus on in this case is how to weigh and balance between these two principles.

As far as I am concerned, the genuine intention of the parties involved when concluding the contract is the key to settle this dispute. The transfer formality should be attended to on the basis of the genuine intentions of both sides. The transfer formality is not the requirement for the establishment of the contract but the result of performing the transfer contract.

On the other hand, Apple Inc. also had some flaws in respect of its business management. It picked the iPad trademark in great haste and ignored the requirement of going through certain transfer formalities in China. Under the circumstance that Shenzhen Provview had broken the promise and refused to attend to the transfer formalities, Apple Inc. insisted on using the iPad trademark in Mainland China, which intensified the dispute and rendered the matter of compensation the central issue of this case.

The value of trademarks generates from enterprises' uses of them on their products and services. In this sense, it is Apple Inc. instead of Shenzhen Provview that creates the commercial value of the iPad trademark. Shenzhen Provview should not exploit the iPad trademark whose commercial value is created by Apple Inc. to reap exorbitant profits. Thus even if the transfer contract is eventually affirmed to be exclusive of the iPad trademark on Chinese mainland, Apple Inc. should not compensate Shenzhen Provview with the commercial profits it has earned from the use of the iPad trademark, since the losses Shenzhen Provview suffered are caused due to differences in the understanding of the contract. As Taiwan Provview accepted the 35000 pounds paid by IP Application, it is reasonable for Apple Inc. to believe that Taiwan Provview has

accepted the offer. Therefore the fault leading to the consequent losses lies in the Provview subsidiary.

After all, it is prospective for the parties involved in this case to come to reconciliation. From my point of view, the 35000 pounds Apple Inc. paid for the iPad trademarks is comparatively low. Apple Inc. should add a proper sum of money to the previous price it offered and purchase the full rights for the iPad trademark in Mainland China, only in this way can the business reputation it creates from the iPad products be maintained.

We could gain some enlightenment from this case. First, special attention must be paid to the qualifications of the subjects during the transfer of trademarks. Second, in order to guarantee the trademark transfer process from legal flaws, parties involved should not only comply with the principle of honesty and good faith, but also take great notice of the requirements for the transfer formalities. Third, it is of particular importance for those high and new tech enterprises to focus more on the management of intellectual properties and adopt proper strategies on trademarks and patents.

(Chen Jianmin⁶⁴)

IV. ACADEMIC DEVELOPMENTS

A. The Seminar on the Improvement of Law Concerning Drunk Driving and Speeding in China Held in Beijing, China

On March 3, 2012, the Seminar on the Improvement of the Law about Drunk Driving and Speeding in China (hereinafter the Seminar) was held in School of Law, Tsinghua University, Beijing. The Seminar is jointly organized by the World Health Organization and the Public Law Research Center of Tsinghua Law School.

Leaders from National People's Congress, Legislative Affairs Office of State Council, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of Health, etc., scholars from the Law Department of Chinese Academy of Social Sciences, Utrecht University, Tsinghua University and other universities, as well as experts and officials from the World Health Organization, the Global Road Traffic Safety Team, the Red Cross Society of China attended the Seminar.

Professor Wang Zhenmin, Dean of Tsinghua Law School, Mr. Chen Sixi, Director of the Internal and Judicial Affairs Committee of the National People's Congress, Mr. Hu Yunteng, Director of Policy Research Office of the Supreme People's Court and Mr. Brent

⁶⁴ Chen Jianmin (陈建民), Associate Professor of Tsinghua Law School. As a qualified attorney, she is one of the most well-know lawyers specialized in IP rights in Beijing, experienced in legal clinics and has offered legal aid voluntarily for many years.

Powis, Director of the WHO Collaborating Centre for Environmental Health at UWS addressed speeches successively.

The Seminar centered on the report on the subject of “The Improvement of the Law Concerning Drunk Driving and Speeding in China” which was mainly taken charge of by the Public Law Research Center of Tsinghua Law School and sponsored by the Bloomberg Philanthropies. Four other specific subjects including “the Practical Effects of the Modifications of Criminal Law”⁶⁵ and “Road Traffic Safety Law”⁶⁶, “How to Improve and Hold the Legal Responsibilities for Drunk Driving and Speeding”, “How to Strengthen the Enforcement of Relevant Laws in Local Areas” and “The Focus of Future Work in National and Local Terms” were also thoroughly discussed by the participants.

Achievements of the Seminar

“The Seminar furthers and promotes the process of the making a set of unified standards of law enforcement among the three department: namely the Public Security Bureau, the procuratorate and the court. Moreover, the Seminar provides new ideas to solve the drunk driving problem. That is the solution can not be restricted to law enforcement, other means can also be used in a comprehensive way”, commented by Professor Yu Lingyun, the host of the Seminar, of Tsinghua University.

“A simple speeding limit is not enough, what else should be taken into consideration is the maintenance of road conditions; what’s more, volunteers should play a more important role in this process. Sufficient propaganda to the primary and middle school students as well as their families is necessary, in this way, we can raise safety awareness of the whole society”, suggested by Professor Yu.

According to the field survey conducted in cities in China like Suzhou and Dalian, incrimination of all drunk driving behaviors led to new problem. For instance, drivers sometimes resorted to force in order to escape from alcohol test required by the police.⁶⁷

⁶⁵ See Xingfa Xiuzheng An (Ba) (刑法修正案(八)) [The Eighth Amendment to the Criminal Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Feb. 25, 2011, effective May 1, 2011) 2011 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 129 (China) (“Whoever races a motor vehicle on a road with execrable circumstances or drives a motor vehicle on a road while intoxicated shall be sentenced to criminal detention and a fine.”)

⁶⁶ See Daolu Jiaotong Anquan Fa (道路交通安全法) [Road Traffic Safety Law (2011 Amendment)] (promulgated by the Standing Comm., Nat’l People’s Cong., Apr. 22, 2011, effective May 1, 2011) 2011 STANDING COMM., NAT’L PEOPLE’S CONG. GAZ. 418, art. 91 (China) (clarifying the legal responsibilities for drunk drivers).

⁶⁷ Zhangwei, Ying Tichang Shu Du Jiehe Kuan Yan Xiangji Jiujia Zhili Fangshi (应提倡疏堵结合宽严相济酒驾治理方式) [The Promotion of Shift to the Governance of Drunk-driving in the Post-Criminalised Era], Renmin Wang (人民网) [People] (April 6, 2012, 8:55 AM), <http://legal.people.com.cn/GB/17586356.html>.

Another problem is that the record of having received criminal punishment may exert lifelong negative influence on drivers, so the decision of the police on making punishments takes a stake in the interest of drivers.⁶⁸ All these phenomena demonstrate that the legal punishment against drunk driving did receive satisfactory results overall, yet there is no denying that some problems still exist in the practice, which requires further study and improvement of legislation. The experts on the Seminar proposed that confronted with the present situation, we should call for an approach of tempering justice with mercy, an attitude bearing both tolerance and strictness should be advocated. Besides, foreign experiences in terms of regulation of drunk driving should be absorbed.

B. The Seminar of Social Responsibility of Banking and Central Enterprises was held in School of Law of Tsinghua University, Beijing.

1. Introduction

In January 2012, the seminar of “the Social Responsibility of Banking and Central Enterprises” was held in School of LawTsinghua University. Leaders from National People’s Congress Law Committee, Department of Climate Changeof National Development and Reform Commission, Bureau of Policies and Legal Regulations of State-owned Assets Supervision and Administration Commission (hereinafter SASAC), Department of Treaties and Law of the People’s Bank of China, Department of Law of China Banking Regulatory Commission (hereinafter CBRC), and Dean Wang Zhenmin of School of Law, Tsinghua University addressed on the seminar successively. More than 200 people attended this seminar.

The main issues of this seminar includes: the legislative review and policy development of corporate social responsibility, the latest development and practices of the social responsibility of central enterprises and banking, the international standards of social responsibility of enterprises and its localization. Delegates from United Nations Environment Programme, Citibank, UBS Securities, Bank of East Asia, American Chamber of Commerce in Shanghai, and the Global Reporting Initiative system also shared their experiences in such fields and presented valuable suggestions.

In addition, participants in the conference also have heated discussion about the following questions. Is corporate social responsibility a moral obligation or legal issue? What kind of role government should playwhen enterprises carry out their social

⁶⁸ *Id.*

responsibility? What is the difference between the social responsibility undertaken by banking and state-owned enterprises and by private enterprises and foreign-funded ones? How to apply the international standards and principles of corporate social responsibility to Chinese practice?

2. Background information of Corporate Social Responsibilities

In recent years, both the public and enterprises themselves has drawn increasing attention to and recognized the concept of corporate social responsibility. Despite emphasis on the pursuit of economic interests, corporate social responsibility underlines the responsibilities of enterprises for their shareholders, employees, consumers, suppliers, communities and other parties at interests. It also encourages enterprises to assume responsibilities for environment and society, aiming to achieve the sustainable development of enterprises, environment and society.

Nowadays, government, regulatory bodies, self-regulatory organizations and NGOs have all attached remarkable importance on this issue. The SASAC has compiled the *"Twelfth Five-Year Plan" of the Implementation of the Strategy of Harmonious Development of the Central enterprises*.⁶⁹ The China Banking Regulatory Commission is now drafting the *Guidelines on Green-credit Policy*⁷⁰ and the *Administrative Regulation of the Social Responsibility of Banking Financial Institutions*, planning to incorporate the social responsibility into the regulatory system.

3. The Legal Basis for Corporate Social Responsibilities

Article 5 of Company Law of the People's Republic of China (2005 Revision) provides that "when companies engage in management, companies must obey laws, administrative regulations, social ethics, and commercial ethics, be honest and trustworthy, accept the supervision of the government and the public, and undertake social responsibility." This provision can be seen as the starting point of the legislation of Chinese enterprises' social responsibility.

The CBRC published *Opinions of the General Office of China Banking Regulatory Commission on Strengthening the Social*

⁶⁹ Zhongyang Qiye "Shier Wu" Hexie Fazhan Zhanlue Shishi Gangyao (中央企业"十二五"和谐发展战略实施纲要) [The "Twelfth Five-Year Plan" of the Implementation of the Strategy of Harmonious Development of the Central enterprises] (promulgated by State-owned Assets Supervision & Admin. Comm. St. Council Gaz., Sept. 31, 2011, effective Sept. 31, 2011) (The plan acts as a guideline drafted by the government to help central enterprises to implement the national development plan).

⁷⁰ This guideline aims to encourage banks to start their business of green credit. The green credit is designed to forward the national policy of environment protection, such as saving energy and resource recycling.

Responsibility of Banking Financial Institution, in December 2007, which was a promotion and encouragement to banking industries to carry out their social responsibility.⁷¹

The SASAC issued *Guiding Opinions of SASAC on the Performance of Social Responsibility of Central Enterprises* in January 2008, requiring Central Enterprises fully disclose the reports of social responsibilities.⁷² The Ministry of Environment Protection of the People's Republic of China published *Guiding Opinions of Ministry of Environment Protection on Strengthening the Supervision and Administration on Environment Protection of Listed Companies*,⁷³ and *Measures for the Disclosure of Environmental Information*⁷⁴. Shanghai Stock Exchange issued *Guidance for Listed Companies' Disclosure of Environmental Information*⁷⁵ in May 2008, which aimed to encourage listed companies to disclose their performance of social responsibility as well as their achievement, and to request them to disclose their social responsibility reports as they disclose their company annual reports.

In December 2011, Hong Kong Stock Exchange published *Hong Kong Exchanges and Clearing Limited ("Company") Corporate Social Responsibility ("CSR") Policy*, a paper which set higher

⁷¹ ZhongguoYinjian Hui Bangong Ting Guanyu Jiaqiang Yinhang Ye Jinrong Jigou Shehui Zeren De Yijian (中国银监会办公厅关于加强银行业金融机构社会责任的意见) [Opinions of the General Office of China Banking Regulatory Commission on Strengthening the Social Responsibility of Banking Financial Institutions] (promulgated by the General Office of China Banking Regulatory Comm., Dec. 5, 2007, effective Dec. 5, 2007), <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=144615> (China).

⁷² See Guanyu ZhongyangQiyeLixingShehuiZeren De ZhidaoYijian (关于中央企业履行社会责任的指导意见) [Guiding Opinions of Ministry of Environment Protection on Strengthening the Supervision and Administration on Environment Protection of Listed Companies] (promulgated by the State-owned Assets Supervision & Admin. Comm. of St. Council, Dec. 29, 2007, effective Dec. 29, 2007) art. 18(4), <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=100817> (China).

⁷³ Guojia Haiyang Jü Guanyu Jiaqiang Shangshi Gongsì Hujing Baohu Jiandu Guanli Gongzuo De Zhidao Yijian (国家海洋局关于加强上市公司环境保护监督管理工作的指导意见) [Guiding Opinions of Ministry of Environment Protection on Strengthening the Supervision and Administration on Environment Protection of Listed Companies] (promulgated by Mini. of Environment Protection of the P.R. China, Feb. 22, 2008, effective Feb. 22, 2008), <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=102260> (China).

⁷⁴ Huanjing Xinxi Gongkai Banfa (Shixing) (环境信息公开办法(试行)) [Measures for the Disclosure of Environmental Information (for Trial Implementation)] (promulgated by Mini. of Environment Protection of the P.R. China, Apr. 11 2007, effective May, 1, 2008), <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=90179> (China).

⁷⁵ See Shanghai Zhengguan Jiaoyi Suo Shangshi Gongsì Huanjing Xinxi Pilu Zhiyin (上海证券交易所上市公司环境信息披露指引) [Guiding Opinions of Ministry of Environment Protection on Strengthening the Supervision and Administration on Environment Protection of Listed Companies] (promulgated by Shanghai Stock Exchange, May 14, 2008, effective May 14, 2008), art. 3, <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=105453> (China).

standards for Listed Company in Hong Kong concerning the prevention of environmental and social risk.⁷⁶

4. The Practices of Corporate Social Responsibility in China

In terms of the practices of corporate social responsibility in China, Pudong Development Bank published its first banking social responsibility report in June 2006; China COSCO Group and China Development Bank joined United Nations Global Compact in December 2006; in 2008, Industrial Bank Co., Ltd. became the first Chinese financial institution that recognized the *Equator Principles*. Moreover, Standardization Administration of People's Republic of China has led 26 Ministries and Committees to participate in the setting of ISO26000, the international standard of social responsibility since 2009. Chinese enterprises actively participated in World Climate Conference held in Durban in November 2011 and will actively join in United Nations Conference on Sustainable Development held in Rio de Janeiro in June 2012.

⁷⁶ http://www.hkex.com.hk/eng/exchange/csr/Documents/CSRpolicy_e.pdf (Hong Kong Exchanges And Clearing Limited (HKEx)).