



China Regulatory Updates

February 2013

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■ APPLICATION OF LAW / 法律适用

The PRC Supreme Court Issued Interpretations on Application of Law for Foreign-Related Civil Relations

最高法院出台有关《涉外民事关系法律适用法》的司法解释

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12 Central Government Ministries Jointly Issued Guidelines to Urge Merger and Reorganization in Certain Key Industries

12 部委发文推动重点行业兼并重组

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APPLICATION OF LAW / 法律适用

The PRC Supreme Court Issued Interpretations on Application of Law for Foreign-Related Civil Relations

最高法院出台有关《涉外民事关系法律适用法》的司法解释

On January 7, 2013, the *Interpretations (I) of the PRC Supreme People's Court on Several Issues Concerning the PRC Law on Application of Law for Foreign-Related Civil Relations* (the "Interpretations") became effective.

The Interpretations provided quite some explanations and clarifications on such ambiguous issues in judicial practice with respect to the application of law for foreign-related civil relations as the definition of qualified "foreign-related civil relations", application priorities between the PRC Law on Application of Law for Foreign-Related Civil Relations and the conflict of laws principles stipulated under other PRC laws, definition of "mandatory requirements", effectiveness of choice of foreign law as governing law for a foreign-related civil relation in question without an "actual connection", and the approaches to ascertain foreign laws by Chinese courts, among others.

As a principle, no PRC party involved in civil relations without any foreign element may choose foreign law as governing law. In this regard, the Interpretations explicitly provides that no foreign law will be applied if it was chosen by the parties based on a fake "connection point" which was made up to circumvent mandatory PRC laws and regulations.

2013年1月7日,《最高人民法院关于适用〈中华人民共和国涉外民事关系法律适用法〉若干问题的解释(一)》(“《解释》”)开始施行。

《解释》就涉外民事法律关系适用在司法实践中遇到的一些问题、误解和争议,作出了必要的说明和澄清,包括如何界定“涉外民事关系”;如何处理《涉外民事关系法律适用法》与其他法律所规定的冲突规范的关系;该法中的“强制性规定”该如何界定;选择适用的法律是否必须与涉及争议的涉外民事关系有“实际联系”;以及当事人选择适用外国法时,中国法院该如何查明等。

值得注意的是,在不存在涉外因素的民事法律关系中,当事人无权选择适用外国法律。对此,《解释》明确规定,当事人故意制造“连结点”创设涉外民事关系以规避中国法律法规的强制性规定的,不发生适用外国法律的效力。

SECURITIES / 证券

CSRC Released Guidelines to Further Regulate Unlisted Public Companies

有关非上市公司监管的配套规定出台

On January 4, 2013, the China Securities Regulatory Commission ("CSRC") released some three guidelines (the "Guidelines") to further regulate unlisted public companies. The Guidelines became effective upon issuance and are focused on the requisite provisions of the articles of association (or the "AOA") of the unlisted public companies, requirements on information disclosure by the unlisted public companies and the contents and formalities of required application materials for their proposed private placements and share transfers in public or private ways.

In terms of corporate governance, CSRC's requirements on unlisted public companies are generally less stringent than listed companies, but to some extent stricter than requirements on ordinary joint stock companies imposed by the PRC Company Law, which generally reflected the nature of unlisted public companies. It is noteworthy that the Guidelines for the first time require dispute resolution provisions to be written into the AOAs of unlisted public companies (i.e., the AOA of an unlisted public

2013年1月4日,中国证监会公布并实施了有关非上市公司监管的3个指引(“《指引》”),就非上市公司公司章程必备条款、信息披露要求以及申请股票公开转让、定向转让和定向发行时应提交的申请文件及其内容、格式等作出了规定。

从《指引》列举的章程必备条款来看,证监会对非上市公司管治的要求可以说是介于一般股份公司与上市公司之间,符合非上市公司的特质。值得注意的是,《指引》明确要求非上市公司在其章程中列明争议解决条款,即,公司章程应当载明公司、股东、董事、监事、高级管理人员之间涉

company should provide that any dispute arising from the AOA between the company, its shareholders, directors, supervisors and senior management personnel should firstly be resolved through consultations, failure of which should be submitted for arbitration or litigation). Similar requirement has never appeared before either in the PRC Company Law or CSRC's guidelines for requisite AOA provisions of listed companies. In terms of information disclosure, the Guidelines only outlined some basic requirements thereof.

Following CSRC's Guidelines, China Securities Depository and Clearing Co., Ltd., the official Chinese registrar office for unlisted public companies, also started to implement its *Trial Implementing Rules on Registration and Depository Business for Shares of Unlisted Public Companies* (the "Trial Rules"). The Trial Rules require that the shares of an unlisted public company should be registered and recorded under its shareholders' own names, and the number of shares held by any of its shareholders should be subject to the registrar office's records. These requirements are widely interpreted to mirror CSRC's position to discourage nominee shareholding arrangement in unlisted public companies.

及章程规定的纠纷，应当先行通过协商解决。协商不成的，通过仲裁或诉讼等方式解决。如选择仲裁方式的，应当指定明确具体的仲裁机构进行仲裁。类似要求在《公司法》、《上市公司章程指引》等有关公司管治的规定中则从未出现过。在信息披露方面，《指引》仅原则性地规定了公众公司信息披露的最低标准。

与此同时，作为非上市公众公司股份登记存管法定机构的中国证券登记结算有限责任公司也发布实施了《非上市公众公司股份登记存管业务实施细则（试行）》，要求非上市公众公司的股份应当登记在证券持有人本人的名下，股东持有的股份以该公司记录的数据为准，被认为透露出证监会不支持非上市公众公司股份代持安排的态度。

INDUSTRIAL POLICY / 产业政策

The State Council Circulated Development Plans for Bio-Industry

国务院发布《生物产业发展规划》

The PRC State Council recently circulated the *Development Plans for Bio-Industry* (the "Plans"). According to the Plans, the bio-industry will be developed into a pillar industry of the national economy by 2020. The Plans have further identified some seven key areas for future development of the bio-industry, namely, bio-pharmaceutical, bio-medicine, bio-agriculture, biological manufacturing, bio-energy, biological environmental protection and biological service, and generally encourage establishment and development of large scale bio-pharmaceutical and bio-agricultural enterprises with an annual output of over RMB10 billion.

国务院近期颁布《生物产业发展规划》，明确到 2020 年，把生物产业发展成为国民经济支柱产业，并将其中的生物医药、生物医学、生物农业、生物制造、生物能源、生物环保及生物服务等确立为生物产业的七大重点领域，鼓励培育一批年产值超百亿元的大型生物医药和生物农业等企业。

12 Central Government Ministries Jointly Issued Guidelines to Urge Merger and Reorganization in Certain Key Industries

12 部委发文推动重点行业兼并重组

In late January 2013, some twelve PRC central government departments (including the Ministry of Industry and Information Technology or MIIT, the National Development and Reform Commission and the Ministry of Finance, among others) jointly issued the *Guiding Opinions on Accelerating Merger and Reorganization of Enterprises in Certain Key Industries* (the "Opinions"). The Opinions require that the merger and reorganization should primarily be conducted in some nine key industries (i.e., automobile, steel, cement, shipbuilding, electrolytic aluminum, rare earth, electronic information, pharmaceutical and agricultural industrialization) where the benefits of the economy of

2013 年 1 月下旬，工信部、发改委、财政部等 12 个部委联合发布了《关于加快推进重点行业企业兼并重组的指导意见》（“《指导意见》”），要求以汽车、钢铁、水泥、船舶、电解铝、稀土、电子信息、医药、农业产业化等九大能够显著体现规模经济效益的行业为重点，推进企业兼并重组。工信部同时指出，除前述九大行业外，各地区还可根据实际情况，选择本地区优先支持的企业兼并重组的重点行业，研究出台具体的支

scale are significant. Meanwhile, MIIT also pointed out that in addition to the aforesaid nine industries, local governments may also stipulate policies to support mergers and reorganizations involving local enterprises pursuant to their own priority list and other relevant circumstances.

The Opinions also encourage foreign investors to participate in the transformations, mergers and reorganizations of domestic PRC enterprises through M&A, equity participation and/or other means subject to the Chinese national industrial policies, national security and anti-monopoly requirements, and other applicable PRC laws and regulations.

持政策。

《指导意见》也鼓励外资在遵守国家产业政策、并购安全审查和反垄断审查等相关规定的前提下，以并购、参股等方式参与国内企业的改组改造和兼并重组。

For further information, please write us at inquiry@hanyilaw.com.

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