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### **Laws and Regulations Updates**

#### **I. Tortious Liability Law of the People's Republic of China (the “Tortious Liability Law”)**

The National People's Congress passed the Tortious Liability Law on 26<sup>th</sup> December 2009. The Tortious Liability Law consists of 12 chapters with 92 articles, covering various aspects including product defects, traffic accidents, medical malpractice, pollution, infringement on the internet and personal injuries inflicted by animals.

1. The Tortious Liability Law provides clear stipulations on the damages for psychiatric injury which is the first time in PRC laws. Article 22 of the Tortious Liability Law stipulates that the infringing party is eligible to claim for damages for any psychiatric injury in case of serious psychiatric injury is caused by infringement to personal rights and interests.

2. Over the years, the calculation of damages for death varies with the victim's place of registration (city / rural), his income level, the regional differences as well as other factors, leading to disputes from time to time thereon. The Tortious Liability Law now stipulates that in the event of a serious traffic accident or mining accident, equal amount of damages for death will be released notwithstanding any individual differences.

3. To enhance protection of patients' rights: Article 56 of the Tortious Liability Law provides that: "Where the opinion of a patient or his/her immediate relatives cannot be consulted in an emergency case, e.g. rescuing patients of critical condition, the appropriate medical treatment may be applied immediately upon the approval of the person in charge of the medical institution or his/her authorized person." Article 63 provides that: "Medical institutions and their medical personnel shall not engage in unnecessary medical examinations in violation of the diagnostic and treatment practices." The Tortious Liability Law stipulates clearly that where a patient suffers any injury and/or damage due to defective drugs or medical devices or transfusion of substandard blood, the patient may seek damages from the manufacturer or blood-supplying organization as well as from the medical institution. If such damage is subsequently found to be caused by the manufacturer, the damages paid by the medical institution shall be deemed as a disbursement and such medical institution shall be entitled to be reimbursed by the liable manufacturer.

4. To strengthen protection of privacy: Article 36 of the Tortious Liability Law provides that: "An internet user or internet service provider infringing the civil rights or interests of others by usage of the internet shall assume tort liability." Article 62 provides that: "Tortious liability shall be assumed in the event damage to the patient is caused by the divulgence of his/her personal information or medical record without consent."

5. The owner of rented motor vehicles is no longer liable for any traffic accident: The rights of use and the ownership of motor vehicles are now separated under the Tortious Liability Law. It is provided in Charter VI of the Tortious Liability Law that where a motor vehicle is involved in a traffic accident in which the owner is not the driver and that the driver is liable for the accident, such liability shall be assumed by the borrower or the lessee. The owner shall assume no liability unless he/she is accountable for the damage caused by such accident, where it shall then assume the relevant liability of damages.

6. The Tortious Liability Law established the first recall system for defective products: Article 46 of the Tortious Liability Law provides that where defect is found in a product after the same being introduced to the market, the manufacturer and the seller shall take remedial measures in a timely manner including issuing warnings and carrying out product recalls, and shall assume tortious liability for any damage arising from their failure to take prompt and/or adequate remedial measures.

7. The Tortious Liability Law provides more comprehensive and detailed stipulations in relation to personal injuries inflicted by domestic animals: Article 79 of the Tortious Liability Law provides that: “Where any injury is caused to others by an animal due to a violation of the management regulations and non-compliance to the safety measures stipulated therein, the keeper or manager of such animal shall assume tort liability. In addition, it is provided in Article 82 that where an abandoned or lost animal causes any injury to others after being abandoned or become lost, the original keeper or manager of such animal shall assume tort liability.

## **II. Interpretations on Several Issues Concerning the Applicable Laws for Trial of Cases arising from Patent Infringement Disputes (the “Interpretations”)**

The Supreme People's Court promulgated the Interpretations on 28<sup>th</sup> December 2009 and the same effected on 1<sup>st</sup> January 2010. The Interpretations are comprised of 20 Articles and aim at protecting the legal interests of the parties and encouraging innovation and technological advancement by deciding cases arising from patent infringement disputes properly in accordance with the legislative intents.

The Interpretations cover major issues concerning the applicable laws for the trial of cases arising from patent infringement disputes, including the confirmation of the scope of patent protection and the principles for determining infringement in relation to inventions and utility models, principles for determining design patent infringement, the application of defences of existing techniques and rights of advanced usage, and

the confirmation of acceptance of non-infringement actions.

1. The Several Stipulations of the Supreme People's Court Concerning the Applicable Laws for Trial of Cases arising from Patent Infringement Disputes, which was implemented on 1<sup>st</sup> July 2001, has established the Doctrine of Equivalence in deciding patent infringement cases, and has clarified that the scope of protection of patent shall include not only those confirmed by the technological specifications as defined in the application, but shall extend to those confirmed by the equivalence features. The Interpretations further clarified and improved the rules of application of the Doctrine of Equivalence. The stipulations in Article 5 of the Interpretations are known as the Doctrine of Dedication to the Public. Any technical solution described only in the specification and not in the application shall be deemed dedicated to the public by the patent owner. The patent owner shall not claim such content to be within the scope confirmed by the equivalence features in a patent infringement action. Furthermore, the stipulation in Article 6 of the Interpretations is known as the Estoppel Principle in the theory of patent law, which acts also as a restriction to the application of the Doctrine of Equivalence. Where any content of the patent has been abandoned by the patent owner in the patent granting or invalidation procedure, the Doctrine of Equivalence shall not be applicable to re-include such content in the scope of protection of the patent.

2. Article 7 of the Interpretations provides the basic principle for determining whether patent infringement has occurred, which is known as the Whole Coverage Principle in the theory of patent law: where the allegedly infringing technical solution contains the patented technical features, it shall be deemed to fall within the scope of patent infringement, irrespective of any other additional technical features contained therein.

3. Concerning Infringement in relation to Parts and Components: according to Article 70 of the Patent Law, the user of the patent-infringing product may be

exempted from the liabilities to pay damages under certain conditions while the same does not apply to the manufacturer. Accordingly, there is a legal implication in differentiating between manufacturing and usage. There are two approaches in the judicial practice in relation to cases where the patent-infringing product is used as a part or component of another product: act of manufacturing and act of use. Where the infringing party involves only in the manufacturing of another product and not the patented product, such infringement shall be classified as an act of use under Article 12 of the Interpretations.

### **III. Circular on Issues Concerning Collection of Individual Income Tax on Individuals' Transfer of Restricted Shares of Listed Companies (the "Circular")**

In order to further improve the relevant systems introduced by the equity division reform and to utilize the regulatory function of taxation on the high-income group, the Ministry of Finance, State Administration of Taxation and the Securities and Futures Commission have jointly issued the Circular on 31<sup>st</sup> December 2009:

1. Income generated from the transfer of restricted shares in listed companies by individuals shall be subject to individual income tax as an "income from transfer of property" with tax rate of 20% since 1<sup>st</sup> January 2010.
2. The restricted shares referred to in the Circular include:
  - (1) The formerly restricted shares held by shareholders subsequent to the equity division reform of listed companies and prior to the resumption date, and the bonus shares and converted shares derived from the aforementioned shares during the period beginning from the resumption date till the release date;
  - (2) The restricted shares issued by a listed company in connection with the initial public offering and the listing thereof subsequent to the resumption of

share sales under the equity division reform in 2006, and the bonus share and converted shares derived from the aforementioned shares during the period beginning from the first day of listing till the release date; and

- (3) Other restricted shares jointly confirmed by the Ministry of Finance, State Administration of Taxation, Legislative Affairs Office and the Securities and Futures Commission.

The summary is only intended to provide an outline of certain recent developments in the PRC and is not intended to be relied upon or taken as legal advice provided by Sit, Fung, Kwong & Shum or Hong Kong Sit, Fung, Kwong & Shum Xi'an Representative Office. If you have any enquiry, please contact Alex Chan, our partner in Xi'an Representative Office at Tel: (852) 29097320 and fax: (852) 28459292 (Hong Kong) or Tel: (8629) 87203203 and fax: (8629) 87203033 (Xi'an) e-mail: [alexchan@sfks.com.hk](mailto:alexchan@sfks.com.hk)