融资魔法：资产证券化如何点石成金
Midas magic: Securitization turns assets to gold

交易保护盾：跨境并购保险
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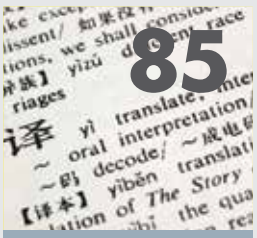
反倾销之争：中欧贸易之争
Frayed trade: China-EU trade dispute



商法词汇：法律服务和自由贸易协定
Lexicon: Legal services and FTAs

商法专栏 CORRESPONDENTS

交易摘要 DEAL DIGEST

金杜参与资本市场创新交易
KWM sinks teeth into three innovative capital market deals

金杜律师事务所最近在资产证券化、债券和首次公开发行 (IPO) 领域完成了几项具有突破性的交易。

华泰证券 (上海) 资产管理有限公司最近发行了华泰资管 - 江苏银行融元 1 号资产支持专项计划，这是全国首个票据收益权资产证券化产品，金杜律师事务所介绍说。

金杜为上述交易提供了各个方面的法律服务。据金杜介绍，该资产证券化项目开启了中国票据资产证券化新时代，有助于增强公司的直接融资能力，并拓宽投资和融资渠道。

在另一笔交易中，作为青岛银行的法律顾问，金杜为青岛银行近期发行 40 亿元绿色金融债券提供了法律服务，这是青岛银行今年第一期绿色金融债券，成为国内由城市商业银行发行的第一例绿色金融债券。

近几年来新兴的绿色金融债券为金融机构支持绿色产业和项目提供了筹资渠道。本次绿色金融债券发行募集的专项资金将全部用于节能、污染防治、资源节约与循环利用、清洁交通、清洁能源、生态保护和适应气候变化。

金杜还担任了浙商银行在香港联交所公开募股中承销商的中国法律顾问，本项目打破了全国性股份制商业银行自 2010 年以来未新增 IPO 项目的局面。

在未行使超额配售选择权的情况下，浙商银行本次发售 H 股的全球发售所得款项约为 116 亿港元，这是香港今年首个规模超百亿港元的 IPO 项目。浙商银行是中国 12 家全国性股份制商业银行之一。

法律顾问： 金杜在上述三个项目担任法律顾问。为融元 1 号和绿色金融债券提供法律服务的律师团队负责合伙人是上海办公室的胡菁菁。

为浙商银行香港上市提供法律服务的律师团队负责合伙人为北京办公室的杨小蕾、李元媛和上海办公室的刘东亚。

King & Wood Mallesons (KWM) has been involved in a couple of first-of-a-kind transactions recently in the areas of securitization, debt and initial public offering (IPO).

Huatai Securities Asset Management (HTAM) issued the HTAM-Bank of Jiangsu Rongyuan No. 1 Asset-backed Specific Plan – the first ever asset-backed securitization backed by rights to payment of negotiable instruments in China, KWM said.

KWM advised on all aspects of the transaction. This securitization project had opened an era of negotiable instrument securitization in China, the law firm said, which could help enhance companies' direct financing capacity, and broaden their channels of investing and financing.

In a separate transaction, KWM advised Bank of Qingdao in its recent issuance of RMB4 billion (US$615.4 million) worth of green bonds as its first offering of such bonds this year, which also marks the first ever issuance of green bonds by a domestic city commercial bank.

The green bond, which emerged in recent years, provides financial institutions with innovative access to capital for supporting green industries and programmes. The funds raised through this issuance will be used within the categories of energy conservation, pollution prevention, resource saving and recycling, clean transportation, clean energy, and adaptation to climate change.

KWM also acted as the PRC legal counsel to the underwriters participating in China Zheshang Bank's listing on the main board of Hong Kong Stock Exchange, an ice-breaking IPO by a Chinese national joint-stock commercial bank since the previous offering of this kind occurred in 2010.

It is estimated that Zheshang Bank will raise about HK$11.6 billion (US$1.5 billion) with this H-share offering without exercising the over-allotment option, which is the first public offering over HK$10 billion this year in Hong Kong. The bank is one of 12 national joint-stock commercial banks in China.

Legal counsel: KWM was the legal counsel in all three deals. Its teams for the Rongyuan No.1 and green bond deals were led by Shanghai partner Eddie Hu. The team for the Zheshang Bank IPO was led by Beijing partners Yang Xiaolei and Li Yuanyuan, and its Shanghai partner Liu Dongya.

中远收购位于希腊的欧洲门户港口
COSCO Group purchases Europe's gateway Greek port

作为近年来希腊最大的私有化交易之一，中国国有航运巨头中远集团与希腊国家发展基金 HRADF 签署协议，收购希腊最大港口比雷埃夫斯港 (Piraeus) 67% 的股权。

根据收购协议，中远集团将先以 2.805 亿欧元的价格收购港口经营公司比雷埃夫斯港港务局 51% 的股权，并在未来五年后再以 8800 万欧元收购余下的 16% 股权。据报道，中远集团是比雷埃夫斯港唯一的竞标者。

本次交易的成功对于将比雷埃夫斯港变为中国“一带一路”战略下中国向欧洲出口的物流门户来说是至关重要的，普衡律师事务所介绍说。希腊总理齐普拉斯 (Alexis Tsipras) 表示“这份协议向全球经济市场传达了希腊经济复苏的强烈信息”。

法律顾问： 普衡律师事务所担任了中远集团全资子公司中远 (香港) 集团的法律顾问。该所香港团队的负责合伙人是大中华区主席李曙峰以及合伙人林慧文和裴芳。

In one of the most significant Greek privatizations in recent years, China's state-run shipping giant COSCO Group agreed with HRADF, Greece's state-owned asset development fund, on the purchase of 67% of Piraeus, the largest port in Greece.

According to the agreement, Cosco will acquire 51% of Piraeus Port Authority, the port operator, for €280.5 million (US$321 million), and the remaining 16% for €88 million after five years. Cosco was reportedly the sole bidder for the port.

Success of the deal is crucial to turning Piraeus into a logistics gateway for Chinese exports to Europe under China's "One Belt, One Road" initiative, according to Paul Hastings. Greek Prime Minister Alexis Tsipras said the agreement "sends a strong message to the global economic community for the recovery of the Greek economy".

Legal counsel: Paul Hastings acted for COSCO (Hong Kong) Group, a wholly-owned subsidiary of COSCO. Its Hong Kong team was led by Raymond Li, chair of Greater China, and partners Vivian Lam and Pei Fang.

市场动态 MARKET PULSE

观韬中茂合并成立新律所
Guantao ties up with Zhongmao

总部位于北京的观韬律师事务所在四月中旬宣布与总部位于上海的中茂律师事务所合并。合并后新律所的总律师人数达到近 500 人。

原观韬律师事务所管委会主任崔利国在新律所担任管理委员会联席主任。他向《商法》介绍说，两家律所是在联盟关系的基础上顺利进行合并的；两家律所在五年前在上海开始联盟关系，并在上海合署办公。

“[我们] 通过联盟的良好互动与强大合力，驱动着我们快速的融合、持续的成长，并向更亲密的关系迈进，所以五年后，我们做出合并的决定，”崔利国说。

新律所的中文名将兼具两所的特点，为“观韬中茂律师事务所”，而英文名则沿用观韬的“Guantao Law Firm”。原中茂律师事务所主任盛雷鸣律师将共同出任新律所的管理委员会联席主任。

除了以上海为总部的中茂律师事务所参与合并，来自其他一些律所的律师也加入到其上海办公室。目前，观韬中茂在国内外 14 个主要城市设有办公室，其中包括北京、成都、广州、上海、深圳、香港以及悉尼。

“[关于] 国内发展战略，今年我们的工作重点会放在上海办公室整合及融合，并将结合杭州办公室、苏州办公室、知识产权太湖基地、苏州常年法律服务中心，形成强大的长三角平台，成为我们在全国事业发展中的重要基石，”崔利国说。

此外，观韬中茂也有其国际化的发展战略。在今年二月，观韬与香港的王泽长·周淑娴·周永健律师行正式合并。在澳大利亚，观韬将会完成悉尼办公室本地化以及加强与国际律所亚司特 (Ashurst) 的合作。观韬在 2015 年 5 月与亚司特续签了联盟协议。“[我们会] 稳步推进国际化步伐，未来三五年选择成熟时机开设其他国际办公室，”崔利国说。

中茂在房地产建筑、公司及金融方面表现活跃，曾经担任上海世博会、上海中心大厦、国家会展中心等项目的法律顾问。在去年，中茂也在中国银行上海市分行的 32.4 亿元贷款项目等项目中提供服务。


崔利国 Cui Liguo

Beijing-based Guantao Law Firm announced its merger in mid-April with Shanghai-based Zhongmao Law Firm to create a new firm with nearly 500 lawyers.

Cui Liguo, the former managing partner of Guantao and co-president of the new firm, told *China Business Law Journal* the merger was conducted smoothly and was based on the two firms' alliance that was initiated five years ago in Shanghai, where both shared offices and other resources.

"The interaction and co-operation during the alliance has driven us to a fast combination, sustained growth and a closer relationship. Therefore, we decided to merge after five years of the alliance," he said.

The Chinese name of the new law firm will be the combination of both as "观韬中茂律师事务所", while the English name will be Guantao Law Firm, the same as Cui's firm before the merger. Sheng Leiming, managing partner of Zhongmao, is also co-president of the new firm.

In addition to the Shanghai-based Zhongmao, lawyers from several other Shanghai law firms will also join the Shanghai office. Guantao now has 14 offices in major cities at home and abroad including Beijing, Chengdu, Guangzhou, Shanghai, Shenzhen, Hong Kong and Sydney.

"Domestically, our focus this year is on integration in our Shanghai office, and with co-operation with our Hangzhou office, Suzhou office, our intellectual property base in Taihu and our annual legal counsel service centre in Suzhou, we aim to form a powerful platform in the Yangtze River Delta region, which will be an important foundation for our nation-wide development," Cui said.

Internationally, in February Guantao merged with Peter C. Wong, Chow & Chow in Hong Kong. In Australia, the firm will strive to complete the localization of its Sydney office and enhance its partnership with Ashurst, with which it renewed an alliance agreement in May 2015. "We will steadily promote our internationalization and will opt to open other international offices in the next three to five years, when the time is right," Cui said.

Having advised on mega projects such as Shanghai World Expo, Shanghai Centre Tower, and the National Exhibition and Convention Centre (Shanghai), Zhongmao is active in areas including real estate construction, corporate and finance. In the past year, it also advised the Shanghai branch of Bank of China on a RMB3.24 billion (US$500 million) loan project and advised China Eastern Airlines' subsidiary on a real estate project.

反腐败专家加入柯伍陈律师事务所
Anti-corruption partner joins ONC Lawyers in Hong Kong

卫绍宗近期被香港柯伍陈律师事务所任命为诉讼及调解争议部门合伙人。此前，卫绍宗在贝克·麦坚时律师事务所工作，他亦曾在香港廉政公署任职。

卫绍宗律师的专业领域包括诉讼、金融及证券规管、内部调查和白领罪行（防止贪污）、清盘及破产诉讼、股东争议、商贸及清关诉讼、本地及国际仲裁、网络安全、个人资料保护以及隐私法和竞争法等事宜。

Dominic Wai Siu Chung was recently appointed by ONC Lawyers, a Hong Kong-based law firm, as a partner in its litigation & dispute resolution practice.

Wai joined from Baker & McKenzie. He has also worked for the Independent Commission Against Corruption (ICAC) in Hong Kong.

His areas of expertise cover litigation, regulatory and compliance, internal investigations and white-collar crime (anti-corruption), insolvency and bankruptcy litigation and shareholders' disputes, trade and customs litigation, domestic and international arbitration, cybersecurity, data protection and privacy law issues, and competition law matters.


卫绍宗 Dominic Wai

银行与融资专家加盟诺顿罗氏
Norton Rose adds banking expert to Beijing office

诺顿罗氏律师事务所近期招募黄意敦加盟其北京代表处作为银行与融资合伙人。他在加盟之前在高伟绅律师事务所北京代表处任职。

黄意敦为中国大型政策和商业银行的许多境外投资项目和出口信贷提供法律服务，尤其专注于矿业和金属业、石油和天然气、电力和基础设施行业。

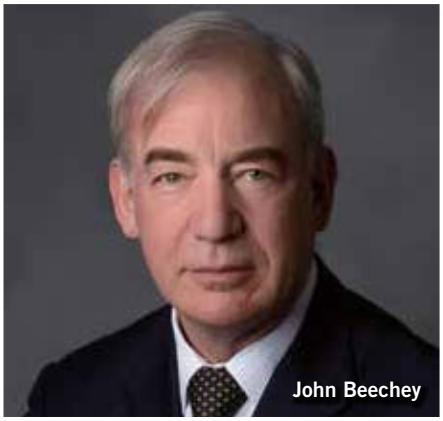
他曾为中国在澳大利亚、安哥拉、乌克兰、委内瑞拉等许多法域的海外融资大项目提供过法律服务。

Norton Rose Fulbright recently added Paul Wee Ei-don as a banking and finance partner to its Beijing office. He joins from the Beijing office of Clifford Chance.

Wee advises large Chinese policy and commercial banks mostly on outbound projects and export credit financing, with a particular focus on the mining and metals, oil and gas, power and infrastructure sectors. He has worked on some of the largest Chinese outbound financings involving various jurisdictions from Australia and Angola to Ukraine and Venezuela.


黄意敦 Paul Wee

顶级仲裁员在香港仲裁事务所开业
Ex-ICC International Court chief joins Arbitration Chambers HK


John Beechey

国际商会国际仲裁院前主席 John Beechey 最近加入了香港仲裁事务所。香港仲裁事务所将成为 Beechey 联合创办的仲裁精品所 BeecheyArbitration 的主要办公室。

在担任国际商会国际仲裁院主席期间，Beechey 主持实施了新国际商会调解与仲裁规则和新专家规则。他还曾担任国际律师协会《国际商事仲裁取证规则》起草工作组的成员，后来还担任过国际律师协会《国际商事仲裁公正、独立、信息披露准则》起草工作组的成员。

“我们对于 John Beechey 选择我们并将香港作为其主要办公地点感到非常激动，这进一步增强了香港作为日渐上升的国际仲裁中心的地位，”香港仲裁事务所主任 Gavin Denton 表示。

John Beechey, former president of the ICC International Court of Arbitration, recently joined Arbitration Chambers Hong Kong. The chambers will become the principal office of BeecheyArbitration, an international arbitration boutique of which Beechey is a co-founder.

During his term of office as the president of the ICC court, Beechey oversaw the introduction of the new ICC Arbitration and Mediation Rules and new Rules for Experts.

He was once a member of the International Bar Association's (IBA) working group responsible for drafting the IBA Rules on the Taking of Evidence in International Commercial Arbitration, and later served as a member of the IBA working Group on Guidelines on Impartiality, Independence and Disclosure in International Commercial Arbitration.

"We are particularly excited that John has chosen Chambers, and therefore Hong Kong, as his principal base, as it adds to the growing stature of Hong Kong as a leading centre for international arbitration," said Gavin Denton, director of Arbitration Chambers Hong Kong.

税务 TAXATION

增值税将全面替代营业税

VAT pilot programme expands while business tax replaced

李克强总理今年三月宣称，中国的营业税改收增值税试点范围将扩大到最后四个主要行业，包括金融服务业、房地产服务业、建筑服务业和生活服务业。这些行业将从 5 月 1 日开始试点实施征收增值税。

随着试点的扩大，增值税试点工作已经转化成为一个全国性增值税实施计划，将全面替代营业税。不同于包含在交易金额中、没有抵免的营业税，增值税不含在交易金额中且一般含免征额度。这两种税的不同会影响纳税人的缴税义务和合规负担。前述四个行业的纳税人需要准备应对改征增值税的这一变化。

Premier Li Keqiang announced in March that China will expand the value-added tax (VAT) pilot programme to cover the last four major industries still outside the programme: financial services, real estate services, construction services and consumer services. These industries were set to join the VAT pilot programme on 1 May.

With this expansion, the VAT pilot programme transforms into a comprehensive nationwide programme and completely replaces business tax (BT) in China. Unlike BT, which is included in the transactional price and not creditable, VAT is excluded from the transactional price and is generally creditable. This difference will significantly alter a taxpayer's tax liability and compliance burden. Taxpayers engaged in the four industries should prepare for this shift.

劳动问题 LABOUR ISSUES

北京法院判定在办事处解散后终止合同亦属非法

Beijing court rules termination unlawful even after office closure

北京市第三中级人民法院最近判决，尽管办事处解散，雇主以“重大变化”为由终止员工的雇佣合同仍属违法，要求雇主支付法定赔偿金、未用年假的补偿金和未支付的工资总计约 6 万 6000 元。

涉案员工是一家石油公司销售部门的销售总监，在北京销售办事处工作。该公司通过邮件通知该员工，由于公司发展战略和重组原因，公司决定立即关闭北京销售办事处。该员工完成交接手续后在和公司沟通双方终止合同事宜的过程中，公司单方终止了与该员工的雇佣合同。该员工遂向法院起诉公司，要求复职。

法院认定，北京销售办事处的关闭会影响该雇员的某些地域上的工作职能，但是并没有完全取消他的全部工作职能，所以不符合“客观情况发生重大变化”这个标准。因此，法院判定该终止行为违法。虽然该雇员最初的诉求是复职，在法院认定从该雇员的若干邮件可以显示他有双方终止合同的意图后，他随后修改诉求为金钱补偿。

该案件表明，办事处的关闭并不必然构成《劳动合同法》第 40 条第 3 款规定的可据以单方终止合同的“重大变化”，如果雇员的工作职能并没有因为办事处的关闭而全部取消的话。

该案还显示，如果公司能证明雇员有意愿接受双方终止合同，将有助于公司抗辩复职的诉求，从而来避免诉讼中最坏的结果（例如法院要求公司继续雇佣该员工）。

The Beijing No. 3 Intermediate People's Court recently ruled that an employer's termination of an employee on "major change" grounds was unlawful, even though there was an office closure, and ordered statutory damages, compensation for unused annual leave and underpaid wages totalling about RMB66,000 (US$10,000).

An employee was hired by an oil company as the sales director of the company's sales department, working from its Beijing sales office. The company notified the employee, via email, of its decision to immediately shut down the Beijing sales office due to corporate development strategies and restructuring. Later, the company unilaterally terminated the employee's employment after he completed his work handover procedure and while he was in negotiation with the company for mutual termination. The employee then sued the company and claimed reinstatement.

The court found that the closure of the Beijing sales office affected certain geographic job functions of the employee, but had not resulted in the elimination of his entire job function, and so did not satisfy the criteria for a "major change of the objective circumstances". Therefore, the court ruled the termination unlawful.

Although the employee originally sued for reinstatement, he reportedly amended his claim to ask for monetary damages instead after the court found several emails from the employee which demonstrated his intention for mutual termination.

This case indicates that an office closure may not necessarily constitute a "major change" for the purposes of justifying a unilateral termination under article 40(3) of the Employment Contract Law, if the employee's job function is not entirely eliminated as a result of the closure. It also demonstrates that if the company can prove the employee's intention to accept mutual termination, it could help to defend against a reinstatement claim and avoid the worst case scenario of a lawsuit (i.e. being ordered to take the employee back).

知识产权 INTELLECTUAL PROPERTY

高新技术企业认定新规定将实施

New HNTE recognition rules contain significant changes

科技部、财政部、国家税务总局于今年 1 月 29 日联合发布了修订的《高新技术企业认定管理办法》。

高新技术企业可以享受 15% 的企业所得税优惠政策，而常规的企业所得税税率是 25%。新的规定会追溯至 2016 年 1 月 1 日开始生效。

新规定对原先的高新技术企业认定资质条件作了修改变动。首先，需要具备知识产权的所有权。旧规定下，申请的企业需要有最近三年内通过自主研发、受让、受赠、并购等方式，或通过五年以上的全球独占许可方式，对其主要产品或服务的核心技术拥有自主知识产权。

新规定删除了三年拥有知识产权的要求，规定申请高新技术企业的企业必须拥有相关知识产权。

其次，降低了人员要求。旧规定下，具有大学专科以上学历（三年制及以上教育）的科技人员须占企业当年职工总数的 30% 以上，其中研发人员占企业当年职工总数的 10% 以上。

新规定废除了关于科技人员的教育程度要求和研发人员的最低比例要求。新规定下，企业从事研发和相关技术 / 创新活动的科技人员应占企业当年职工总数的至少 10%。

并且，研发费用要求也有降低。新规定下没有变化的规定包括，企业最近三个会计年度的研发费用总额占同期销售收入总额的比例，如为最近一年销售收入在 5000 万元至两亿元的企业，比例不低于 4%，如为最近一年销售收入在 2 亿元以上的企业，比例不低于 3%。

但是新规定下最近一年销售收入不高于 5000 万元的企业，研发费用占同期销售收入总额的比例从原先的 6% 降低为 5%。

影响

新的高新技术企业认定办法下知识产权所有权的规定，很可能会影响很多跨国公司的在华子公司。许多跨国公司为了知识产权的保护，不愿意将知识产权所有权提供给中国子公司。实践中，许多中国子公司通过外国关联公司许可的方式取得知识产权。在新规定下，这些中国子公司将不再具备高新技术企业资质。

值得注意的是，新规定下衡量是否符合 10% 的最低人员比例要求时，对象仅限于从事研发和相关技术 / 创新活动的科技人员。这项额外要求的增加很可能是为了解决一些企业为了申请高新技术企业随意将员工划分为科技人员的现象。

然而，新规定并没有明确“相关技术 / 创新活动”这个措辞的定义。所以该措辞需要其他的规定或地方税务部门解读来明确其含义，从而我们才能知晓，增加的申请要求是否会对那些虚报科技人员人数的企业的申请产生实质阻碍。

The Ministry of Science and Technology, the Ministry of Finance and the State Administration of Taxation on 29 January jointly issued the revised Administrative Measures for the Recognition of High and New Technology Enterprises (HNTE). The HNTE is subject to enterprise income tax (EIT) at the preferential rate of 15% rather than the standard 25%. The new measures retroactively take effect from 1 January.

The new HNTE recognition measures have made some notable changes to the previous HNTE recognition qualifications. First, ownership of IP is required. Previously, to qualify under HNTE, an enterprise needed to obtain core IP rights of its main products/services within the last three years by way of self-development, transfer, donation, merger and acquisition (M&A), or a global exclusive licence for a period of more than five years.

The new measures have removed the three-year requirement and provide that the enterprise must own the relevant IP for the enterprise to qualify under HNTE.

Second, personnel requirements are lowered. Previously, science and technology

(S&T) related employees with an associate degree had to account for at least 30% of the total workforce, and at least 10% of the total workforce had to be engaged in research and development (R&D) activities.

The new measures have repealed both the educational requirement for S&T-related employees and the R&D personnel minimum percentage requirement. Under the new measures, S&T-related employees engaged in R&D or technology/innovation activities should account for at least 10% of the total workforce.

Also, the R&D expense requirement is lowered. The new measures leave unchanged the rules that R&D expenses in the past three accounting years should not be lower than 4% of sales revenue for an enterprise with sales revenue ranging from RMB50 million (US$7.7 million) (excluded) to RMB200 million (included) in the past year, and 3% for an enterprise with sales revenue over RMB200 million in the past year.

However, the new measures have lowered the floor for R&D expenses from 6% to 5% for an enterprise with sales revenue of no more than RMB50 million in the past year.

Implications

The IP ownership requirement under the new HNTE recognition measures is likely to affect many Chinese subsidiaries of multinational companies (MNCs). Many MNCs are reluctant to allocate IP ownership to Chinese subsidiaries due to IP protection concerns. In practice, many Chinese subsidiaries obtain IP via a licence from a foreign affiliate. Under the new measures, these Chinese subsidiaries will no longer qualify as HNTEs.

Notably, the new measures only count S&T-related employees engaged in R&D or technology/innovation activities when determining whether the 10% minimum threshold is met. This additional qualification was probably added because some enterprises randomly classify their employees as S&T-related employees in order to qualify under HNTE.

However, the term "technology/innovation activities" is not clearly defined in the new measures. Clarification of this term is needed before we can know whether the additional qualification will constitute a significant impediment to those seeking to inflate their S&T-related employee counts.

税务 TAXATION

大陆与香港关于避免双重征税第四次议定书的影响
Impact of Fourth Protocol on Hong Kong-China DTA

继大陆和香港政府各自完成议定书的批准程序后，《内地和香港特别行政区关于对所得避免双重征税和防止偷漏税的安排》(《安排》)第四议定书(《第四次议定书》)追溯自 2015 年 12 月 29 日开始实施生效。

信息交换。《第四次议定书》扩大了《安排》中规定的信息交换范围，覆盖了如下大陆税种的信息：增值税、营业税、消费税、土地增值税和财产税。范围扩大后，大陆税务机关可以向香港相应部门要求有关于前述税种的相关信息。

反滥用条款的缩紧。《第四次议定书》在《安排》中增加了反滥用条款。如果申请人的"主要目的"是为了获取被动收入(如股息、利息、特许权使用费和资本收入)的税收优惠，其税收优惠的申请可能会被拒绝。然而，主要目的测试可能并不会实际影响到香港纳税居民根据《安排》申请税收优惠的反滥用地位。

值得注意的是，主要目的测试降低了经济合作与发展组织(OECD)提出的条约反滥用标准。具体来说，OECD 税基侵蚀和利润转移计划第六条提出的主要目的测试是，如果申请者的主要目的之一(而不是主要目的)是为了获取条约利益，那么条约利益会被拒绝。

资本所得的进一步豁免规定:《安排》第 13 条规定，就香港纳税居民处置大陆公司股份取得的资本所得免征大陆企业所得税，前提是符合下述条件：

(1) 在处置之日前三年内的任何时候，公司资产中直接或间接由在中国的不动产构成的比例低于 50%；以及

(2) 在处置之日前 12 个月内的任何时候，香港纳税居民直接或间接持有公司的股权不多于 25%。

投资基金如符合下述各项，可以认定为"香港居民投资基金"：(1) 该基金根据香港法律设立；(2) 香港证监会认可并监管该基金；(3) 该基金由经香港证监会许可的基金经理管理；以及 (4) 85% 以上的基金资本在香港资本市场筹集。

Following ratification by the respective governments of both sides, the Fourth Protocol to the double tax arrangement between Hong Kong and mainland China (HK-China DTA) is now in retroactive effect as of 29 December 2015.

Information exchange. The Fourth Protocol extends the scope of the exchange of information article under the HK-China DTA to cover information related to the following Chinese taxes: value-added tax; business tax; consumption tax; land value-added tax; and property tax. The expanded scope allows mainland Chinese tax authorities to request relevant information from their Hong Kong counterparts with respect to any of the above-mentioned taxes.

Anti-abuse provision tightened. The Fourth Protocol introduces an additional anti-abuse provision to the HK-China DTA. Claims for benefits on passive income (i.e. dividends, interest, royalties and capital gains) may be denied if the "main purpose" of the claimant is to obtain such benefits. However, this main purpose test may not actually change the anti-abuse position for Hong Kong tax residents seeking to claim benefits under the HK-China DTA.

It is interesting to note that this main purpose test imposes a lower standard than the anti-treaty abuse initiative proposed by the Organization for Economic Co-operation and Development (OECD). Specifically, article 6 of the OECD's Base Erosion and Profit Shifting Action Plan recommends a principal purposes test where treaty benefits will be denied if one of the principal purposes of the claimant is to obtain treaty benefits (rather than the main purpose).

Further exemption for capital gains. Article 13 of the HK-China DTA exempts China enterprise income tax on capital gains derived by a Hong Kong tax resident from disposal of shares in a Chinese company if: (1) less than 50% of the company's assets were comprised, directly or indirectly, of real property situated in China at any time within three years before the date of disposal; and (2) the Hong Kong tax resident held no more than 25% of the total equity interest, directly or indirectly, in such company at any time within 12 months before the date of disposal.

An investment fund is deemed to be a "Hong Kong resident investment fund" if: (1) the fund is constituted under Hong Kong law; (2) the fund is recognized by the Securities and Futures Commission (SFC) and subject to its oversight; (3) the fund is managed by SFC-licensed managers; and (4) more than 85% of the fund's capital was raised through the Hong Kong market.

《商法摘要》由贝克·麦坚时律师事务所协助提供，内容仅供参考之用。读者如欲开展与本栏内容相关之工作，须寻求专业法律意见。读者可通过以下电邮与贝克·麦坚时联系：张大年（上海）
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北京仲裁委员会 BEIJING ARBITRATION COMMISSION

并购交易中竞业禁止行为的合理判断

Applying logic to non-compete agreement disputes

当收购方指称出让方违反了并购交易中的竞业禁止协议，它需要提出何种证据才足以证明出让方从事了竞业行为？假设仲裁庭能够认定竞业行为的存在，面对难以确定的实际损失，仲裁庭又该如何认定遭受损失的一方当事人应该得到多少数额的补偿？

近期的一件仲裁案件中，收购方和出让方所涉企业在并购交易的框架合同下达成了一份竞业禁止协议，其中约定出让方在并购交易完成后的 20 年间不从事任何与收购方业务有关的竞业行为。

收购方指称在并购交易完成后，出让方蓄意从事了一系列与收购方业务存在竞争关系的商业活动，违反了竞业禁止协议的合同义务，并随即在北京仲裁委员会 / 北京国际仲裁中心提起了仲裁，其仲裁请求包括要求出让方赔偿数千万元人民币的违约损失。与此相反，出让方否认其直接从事收购方指称的具体商业活动，并同时反驳称这些商业活动本身也不足以构成对于收购方业务的竞业行为，亦不可能给其造成实际的利润损失。

在决定是否支持收购方的违约损失赔偿时，仲裁庭面临双重难题的抉择：其一，是否能够支持收购方仲裁请求在于是否有足够的证据证明出让方与相关竞业行为之间的联系；其二，假设能够认定出让方的竞业行为，还需要衡量其与收购方的实际损失之间的关联程度和损失范围。

证据汇总

汇总收购方提交在案证据后，仲裁庭采取了优势证据原则来判定出让方是否从事了收购方指称的商业活动。即，如果仲裁庭倾向于认为出让方从事了竞业行为，则足以推定其违反了竞业禁止协议，收购方亦有权主张相应的违约损失。

收购方提交的证据中包含在某展会上的宣传营销材料，其中显示出让方为多家企业的创始人和负责人。除此之外，收购方认为其提交的证据中还包含出让方在近期注册的多个域名，这足以证明其有意从事更多的竞业行为。出让方则坚称其与某展会上进行宣传营销的企业没有任何关系，并主张这些企业是其家人设立。同时，出让方否认了注册域名的相关事实，并称其中的关联信息是经办人员的疏忽所致。

基于对收购方提供证据链的审查，仲裁庭对于出让方是否确实与相关竞业行为存在关联的争议焦点进行了合议，最终达成了一致意见——即便本案缺乏直接证据证明这种关联性，但间接证据均指向出让方本人参与了相关的竞业行为。因此，即便出让方坚称自己从未介入，但所有的“巧合”足以认定其与竞业行为之间的关联性。

此外，收购方证据中还囊括了出让方的电子商务账户信息，表明出让方正在经营的网店经营着与收购方主打产品及服务相似的内容。还有另一组证据证明，出让方正在申请注册的商标与收购方业务发展中使用的商标存在实质性相似。

由此，尽管出让方以网店几无收入作为抗辩，并主张其所申请注册的商标尚未获准，但这些行为显然与收购方的业务发展形成了直接竞争。仲裁庭认定，出让方的行为是否确实产生收益现金流及相关商标是否获准与本案争议无涉，这些行为的本身即构成了与收购方业务发展的竞争，出让方显然违反了竞业禁止协议的合同义务。

损失认定

在确定违约损失的合理数额时，仲裁庭面临这样一个事实：尽管前述出让方的种种行为与收购方的业务发展存在竞争关系，但很难因此将收购方营业收入的减少和利润的损失归责于出让方的竞业行为。

尽管收购方主张其营业收入减少、营业额下降是由于出让方的竞业行为所致，但并无确凿证据将其糟糕的业绩与出让方的竞业行为关联起来。事实上，收购方业绩的下降可归咎于许多其他行业性的原因或是宏观经济层面上的原因。

最终，出于衡平的考虑，仲裁庭因此支持了收购方原始请求金额的 10%，既作为对收购方的损害赔偿亦作为对出让方未来不应从事竞业行为的警示。

结语

本案中，仲裁庭认真衡量每一份证据，以此确定出让方是否确实违反了竞业禁止协议的合同义务，并随即结合案件的实际情况认定了合理的违约损失数额。就利益重大的并购交易而言，专业的仲裁服务是交易各方更为明智的选择。本案以英文为仲裁语言，也为境外交易主体选择北仲的仲裁服务提供了一个好的范例。

When a party allegedly breaches a non-competition agreement, what pieces of evidence are sufficient to establish competitive business activities? And if such competitive activities are found, what is the adequate amount of damages that should be awarded to the aggrieved party when actual monetary loss is uncertain?

In a recent contract dispute, the parties involved had entered into a non-competition agreement as part of a purchase and sale transaction in which the buyer agreed to acquire the seller's company. In the non-competition agreement, the seller agreed not to engage in any competitive business activities against the buyer for a period of 20 years.

The buyer brought the case to the Beijing Arbitration Commission (BAC) claiming that subsequent to the close of the transaction, the seller failed to abide by the terms of the agreement by deliberately engaging in a series of correlated activities that competed with the buyer's business. The buyer requested that the tribunal award it damages of multiple millions of renminbi for the seller's breach. Conversely, the seller denied any direct involvement in these alleged activities and argued that, even so, these actions neither rose to the level of competition against the buyer's business nor took away from the buyer's bottom line.

The tribunal, in making its determination as to whether to grant the buyer's request for liquidated damages, had two major dilemmas to resolve: in order for the buyer to substantiate its claim, the tribunal had to determine whether the buyer had produced sufficient evidence to tie the seller to these competitive activities; and in turn, if the seller did engage in these activities, the tribunal also had to determine if, and to what extent, the seller's activities caused the buyer damages.

The evidence

Bringing together the evidence that the buyer produced, the tribunal used a preponderance of the evidence standard to determine whether the seller was personally involved in these activities. As such, if it were found that the seller more likely than not engaged in these activities, then the seller would have breached the non-competition agreement and the buyer would be entitled to damages.

The buyer submitted as evidence certain marketing materials that were distributed at a trade show. The materials revealed the seller to be the founder and chairman of the related business entities. Additionally, the buyer introduced into evidence that the seller had recently registered several domain names, which indicated intent and planning to start a business. The seller vehemently maintained that he had no personal involvement with the business entities being promoted at the trade show, that his family members established these entities, and that he did not register the domain names, which he said appeared to have been a clerical error.

Looking at the chain of evidence provided by the buyer, the tribunal deliberated on the issue of whether the seller was indeed personally involved in these activities. The arbitrators agreed on the point that though direct evidence was lacking in this case, circumstantial evidence pointed to the seller as being personally involved in these undertakings, and that the "coincidences" taken in the aggregate tied the seller to the activities for which he had claimed no personal involvement.

The buyer also introduced into evidence the seller's social media accounts, which showed the seller to be operating an online store selling various products and services similar to those marketed and sold by the buyer. The buyer also introduced into evidence that the seller had applied for certain trademarks that were substantially similar to that of the buyer's business.

Despite the seller's rebuttal that his online store had little or no revenue, and that the application of the trademarks was still pending approval, these activities nonetheless were in direct competition to the buyer's business. The tribunal held that it was irrelevant that the seller's business had no meaningful revenue stream, or that the trademarks were yet to be approved, it was the acts in themselves that constituted competitive business activities against the buyer. Therefore, the seller had breached the non-competition agreement.

Awarding adequate damages

In determining the proper damages amount, the tribunal had to take into account that, despite the fact that the seller was deemed to have carried out competitive activities against the buyer's business, there appeared to be no substantiated damage suffered by the buyer in terms of lost revenue or profits.

There was found to be no actual proof in the buyer's claim that the company's weakening revenue stream and declining bottom line was caused directly by the seller's competing business activities. In fact, the buyer's declining business could be attributed to a number of other industry-specific and macroeconomic factors.

Ultimately, in the interests of equity, the tribunal awarded the buyer 10% of its initial damages request, both to serve as a damages award to the buyer and to caution the seller from engaging in any further competing activities.

Conclusion

In this case, the tribunal had to piece together the evidence to determine whether the seller did in fact breach the non-competition agreement. Once this was achieved, an adequate amount of damages had to be determined that would be reasonable to both parties involved. Professional arbitration services would be a better choice to solve high-stake disputes in the acquisition fields. As this case was conducted in English, it also sets a good example for foreign players considering the BAC/BIAC's arbitration services.

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购房尾款资产证券化中的法律服务要点

Key points in legal services for mortgage balance securitization

房地产融资类资产支持证券（ABS）发行2015年以来呈现出了蓬勃发展的态势。中国证券投资基金业协会备案数据显示，房地产融资类ABS目前共发行24单产品，包括五单类REITs产品、八单物业费ABS产品、八单运营收益权ABS产品和三单购房尾款ABS产品。

具有代表性的国内首单购房尾款资产证券化产品“汇添富资本—世茂购房尾款资产支持专项计划”于2015年12月8日正式在上海证券交易所挂牌，以世茂集团旗下位于一、二线城市的项目公司的购房尾款应收账款（即购房人以按揭形式支付的购房尾款）作为基础资产。根据中诚信评估，该项目的主体评级及优先级债项评级均为AAA级。

世茂购房尾款ABS是一款一举两得的金融创新产品。对于世茂集团，不仅开启了一条低成本融资渠道，而且盘活了资产（购房尾款），进一步优化了财务结构。对于资本市场，投资人又多了一款低风险的投资理财产品，购房人、投资者都能间接受益。其进一步证明，只要能够产生稳定现金流的资产都可以证券化。世茂购房尾款资产证券化对于国内房地产金融的发展极具促进作用，其良好的市场反响也表明房地产资产证券化将大有可为。

今年四月，本所律师团队为可能成为第四单的购房尾款ABS产品提供法律服务，其中主要工作包括三个方面：起草相关法律文件、开展法律尽职调查并出具法律意见书。下面将结合本所律师在这项资产支持专项计划中的经验，谈谈相关的法律工作内容。

起草法律文件

资产证券化交易中，需要律师起草各种法律文件来明确界定交易各方的责、权、利。其中，特别重要的法律文件包括资产支持计划证券认购协议、资产支持计划标准条款、资产支持计划资产买卖协议、资产支持计划差额支付函、资产支持计划维好承诺函、资产支持专项计划资产服务协议、资产支持专项计划托管协议、资产支持专项计划赎回承诺函等。

尽职调查

针对购房尾款资产证券化产品的特征，本所律师主要从如下两个方面开展尽职调查：1）业务参与主体基本情况，包括原始权益人以及将与其签订债权转让合同的项目公司基本情况、担保公司基本情况、管理人基本情况、托管人基本情况、资产服务机构基本情况；2）基础资产基本情况，包括基础资产涉及的开发项目的建设情况、商品房预售情况、项目开发贷情况、购房尾款形成的相关情况。

Issuance of asset-backed securities (ABS) products for real estate financing has seen robust growth since 2015. According to data by the Asset Management Association of China (AMAC), a total of 24 such products have been issued to date, including five quasi-REIT products, eight ABS products for property management fees, eight ABS products against the rights to receive operating incomes, and three mortgage balance ABS products.

Outstanding among those is the China Universal AMC Capital – Shimao Asset-Backed Specific Plan (ABSP) on Mortgage Balance, the first ABS product for mortgage balance in China that was listed for trading on the Shanghai Stock Exchange (SSE) on 8 December 2015. Underlying the ABSP is the mortgage balance payment (i.e. balance payable by a home buyer using mortgage financing) receivable by the project units of Shimao Group in tier-1 and tier-2 Chinese cities. According to China Chengxin International Credit Ratings, the issuer rating and the senior debt rating on the ABSP are both “AAA”.

The Shimao ABSP is a financial innovation with benefits in two ways: on the one side, it not only helps Shimao Group access low-cost funding, but also enables the group to make more efficient use of its existing assets (mortgage balance), thereby optimizing its financial structure; on the other side, the ABSP represents a new type of low-cost wealth management product on the capital market, benefiting both investors and homebuyers indirectly. The ABSP is another demonstration of the notion that any asset that can generate stable cash flow can be securitized. It also gives great impetus to the development of real estate finance in China, with its remarkable market popularity pointing to the significant potential of asset securitization in real estate.

In April, our lawyer team provided legal services for what could possibly be the fourth mortgage balance ABS product, which was also an ABSP. The services we provided mainly covered the following three aspects: drafting relevant legal documents; conducting legal due diligence; and issuing legal opinions. Below, this article elaborates on relevant legal services by drawing from experiences gained from this ABSP.

Drafting legal documents

In asset securitization, lawyers are required to draft various kinds of legal documents in order to determine the responsibilities, rights and interests of the parties involved. Among the most important legal documents are the ABS subscription agreement, the standard terms and conditions for asset-backed plans, the asset sale and purchase agreement for asset-backed plans, the difference payment letter for asset-backed plans, the keep-well commitment letter for asset-backed plans, the asset services agreement for ABSPs, the custody agreement for ABSPs, and the redemption commitment letter for ABSPs.


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基础资产基本情况是购房尾款资产证券化业务中律师尽职调查的重点内容。首先，律师应当确认基础资产所对应的应收账款合同是否真实及该等应收账款合同所对应的金额是否固定、是否会减损。对此，律师可以通过查阅基础资产涉及的商品房买卖合同、贷款合同，结合政府房管部门合同备案及预告登记及贷款银行出具的购房贷款台账来辅助认定基础资产真实性、合法性、有效性的问题。

其次，审查相关基础资产是否具有可转移性，就资产转让是否存在限制、是否需要获取同意或批准及必须做出哪些通知等予以核查。对此，律师可以通过原始权益人公司章程等相关文件予以核查。

最后，审查相关基础资产之上是否设定了抵押权、质权或其他担保物权。对此，律师可以通过对原始权益人访谈或核查项目相关的贷款合同、保证合同等文件及通过查阅中国人民银行应收账款质押登记系统等方式予以核查。

法律意见书

就法律意见书而言，必须保证律师事务所采取的前提假设与事实相吻合，并且该意见书仅涉及限于截止基准日的事项，且不对法律事项的未来状况做出任何保证。其内容一般包括：专项计划当事人主体资格，专项计划法律文件的合法性，基础资产的真实性、合法性、有效性、权利归属及其负担情况，基础资产转让的合法性，基础资产未被列入负面清单的相关意见，专项计划资产风险隔离的有效性，专项计划的信用增级安排的合法性、有效性，可能影响资产支持证券投资者利益的其他重大事项等。

购房尾款资产证券化进一步拓宽了中国金融产品的组合类型，丰富了国内金融市场层次。在资产证券化的加速发展中，律师事务所应当做好本职工作，在法律核查等关键问题中发挥应有的作用。

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Due diligence

In light of the characteristics of mortgage balance ABS products, our lawyers focused on the following two aspects during due diligence investigation: (1) the profiles of business participants, including the profiles of the originator and the project company with which the originator will sign an agreement to transfer its claims, as well as the profiles of the guarantor, the manager, the custodian and the asset servicer; and (2) the profiles of underlying assets, including the development of projects involving the underlying assets, the pre-sale of commodity housing, project development loans, and the formation of mortgage balance.

The profiles of underlying assets are key to the due diligence performed by lawyers during mortgage balance ABS practices. First, lawyers needs to determine whether the accounts receivable contracts corresponding to the underlying assets are authentic, and whether the amount specified in such contracts is fixed or prone to diminution.

To determine the authenticity, legality and effectiveness of underlying assets, lawyers can refer to the commodity housing sale contracts and loan contracts that involve the underlying assets, as well as the information on the contracts registered with real estate authorities and the advance notices on registration issued by them, and the mortgage ledgers issued by banks.

Second, lawyers must review whether the underlying assets involved are transferable, and verify whether there are any limits on the transfer of assets, whether such transfer is subject to consent or approval, and what notices must be issued. Such a review can be performed by referring to relevant documents such as the articles of association of the originator.

Finally, lawyers must verify whether there is any mortgage right, pledge right or any other security interest on the relevant underlying assets. The verification can be performed by referring to documents such as the interviews with the originator and the related loan contracts or guarantee contracts, as well as by making inquiries via the Accounts Receivable Pledge Registration System of the People's Bank of China.

Legal opinions

Lawyers need to make sure that the assumptions adopted by the firm are consistent with the facts, and that such opinions only involve matters as of the reference date, and contain no guarantee for the future status of legal matters. Such opinions generally cover: the eligibility of the parties involved in an ABSP; the legality of the legal documents regarding the ABSP; the authenticity, legality, effectiveness, ownership of rights and interests, and encumbrances of underlying assets; the legality of the transfer of underlying assets; opinions with regard to the exclusion of the underlying assets from negative lists; the effectiveness of risk isolation by the ABSP; the legality and effectiveness of the credit enhancement arrangements for the ABSP; and other material matters that may affect the interest of ABS investors.

Mortgage balance ABS has further expanded financial product portfolios in China, while adding more layers to China's financial market. With ABS growth accelerating, law firms must fulfil their duties by playing their role in key aspects such as legal verification.

不良资产证券化重启的优势与机遇

Advantages, opportunities in rebooting NPA securitization

美国次贷危机于2008年的爆发曾促使全球市场对金融衍生品进行反思，不良资产证券化业务也一度在中国停摆。然而，随着中国经济下行压力加大，不良资产率连续多个季度攀升，市场广泛寻找处置不良资产的方法，封存多年的不良资产证券化又重新被市场关注。

《不良贷款资产支持证券信息披露指引（征求意见稿）》于2016年的发布意味着不良贷款证券化即将重启。很多不良资产主要是短期缺乏现金流所造成的，如果能够投入相当的资金，不良资产很有可能变为优质资产。

资产证券化在融资方面优势明显：首先，融资成本低。处置不良资产需要大量的现金流，同时管理不良资产也需要高昂的成本。资产证券化中，融资资金的使用成本较低，比之银行信贷，可以避免较高的利息率；比之股权融资，可以降低融资成本，保持企业组织结构。同时还可以通过信用增级，突破不良资产自身信用评级的限制发行等级更高的证券。

第二，资产组合可降低单项不良资产的风险。根据投资组合原理，将负相关的证券进行组合，在不降低其预期收益率的情况下，可以使证券组合的风险低于单独持有任何一种证券风险。不良资产的信用等级较差、违约风险较大，但如果在证券化时将风险不同的资产组合成资产池，可相互抵消资产的单项风险，从而提高资产池整体收益水平的稳定性。

最后，风险隔离消除了融资者带来的收益支付风险。资产证券化结构设计中的最大亮点在于特殊目的载体（SPV）的设立。融资者通过“真实出售”将手中的基础资产转让给SPV，由SPV以此为担保来发行证券。

这种融资结构安排保证了资产证券化融资是以特定的资产而非融资者整体信用为支付的保证和信用基础。因此，对投资者的还本付息可以完全不受融资者自身财务状况的影响，从而降低了投资者和融资者的信用风险。既然不存在破产风险，也就不必考虑需要因此给予投资者的补偿。融资者因而降低了融资成本。

新机遇

不良资产证券化的重启也给企业与市场带来了新的机遇。首先，它可以增强企业抵御风险的能力。证券化让不同种类的不良资产进入同一资产池，实现风险对冲；并且通过资本市场加速了对不良资产的转移、隔离和集中处理，直接降低不良贷款的比率。

证券化还能使不良资产快速出表，净化表内资产，消化经济下行的风险积累，优化资产负债结构，增强业务运营能力、风险管理能力和核心竞争力。同时，市场化、批量化处理方式具有规模效应，

The crash brought on by the subprime lending crisis in the US in 2008 caused markets around the world to reconsider financial derivatives, and the business of securitizing non-performing assets (NPAs) was also suspended for a time in China. However, with the increasing pressures felt as a result of the weakening Chinese economy, the rate of NPAs has continued to rise for several consecutive quarters and the market has searched high and low for a means to dispose of such assets. The market has therefore taken a second look at NPA securitization.

The issuance of the Guidelines for Information Disclosures Relating to Non-Performing Loan Asset Backed Securities (Draft for Comment) in 2016 is a harbinger of the imminent restart of non-performing loan securitization. Many NPAs are mainly caused by a short-term cash flow shortage, and if a significant quantity of funds can be committed, the NPAs have a good chance to become quality assets.

In financing terms, the advantages of asset securitization are obvious. First, the financing costs are low. Disposing of NPAs requires a large cash flow, while management of the same requires large costs. In asset securitization, the use costs of the financing proceeds are relatively low; compared to bank loans, relatively high interest rates can be avoided; and compared to equity financing, the financing costs can be reduced while the enterprise's organizational structure is maintained. Additionally, the limit imposed by the credit rating of the NPAs themselves may be overcome through credit enhancement, to issue securities of a higher rating.

Second, an asset portfolio can reduce the risks of a single NPA. According to investment portfolio theory, combining negatively correlated securities can cause the risks of the securities portfolio to be less than the risks of any one type of security held, without reducing their anticipated return rate. The credit rating of NPAs is relatively poor and the risks of default are relatively high, but during securitization, if assets of different risk levels are combined into an asset pool, they can mutually offset the risks of single assets, thereby increasing the stability of the level of the returns of the entire asset pool.

Finally, risk remoteness eliminates the risks of the payment of the returns associated with the financed party. The major highlight in the design of an asset securitization structure is the establishment of a special purpose vehicle (SPV). The financed party removes the underlying assets from its hands by transferring the same to the SPV through a “genuine sale”, and the SPV uses these as security to issue the securities.

Such a financing structure arrangement ensures that the asset securitization financing takes the specific assets rather than the entire credit standing of the financed party as the payment guarantee and credit basis. Accordingly, the repayment of the principal and payment of interest to investors is entirely unaffected by the financial position of the financed party itself, reducing the investors' and the financed party's credit risks. Since the risk of bankruptcy is eliminated, there is no need to provide relevant compensation to investors, thus reducing the financed party's financing costs.

吕立秋 Lü Liqiu

顾放 Gu Fang

节约了不良资产处置的经济和时间成本，提高了处置效率。

第二，证券化有助于降低企业不良资产存量。随着经济下行，企业短期内迅速处置不良资产的可能性减小；不良资产项目一般在经济较好时方能取得较高收益。但是，持有资产期间较长意味着管理或处置的风险较高。通过不良资产证券化，企业可尽快出售不良资产，并利用出售所得资金投资或发展新项目，既增加了流动性，也有助于调整业务结构。

第三，不良证券化能增加资本来源。资产证券化可以为企业提供新的融资途径，有效打破当前企业过度依赖银行借款的负债格局。此外，证券化能扩大企业的收益来源。企业通过不良资产证券化，一般能在不增加负债的前提下，有效盘活存量资金，获得低成本的资金来源，从而增加资产流动性。

专业处理不良资产的资产管理公司的机遇更是大大增加。资产管理公司传统上采用的是赚取利差的营利模式。企业履约能力的下降以及中国的利率市场化改革会大大压缩其营利空间。通过不良资产证券化，资产管理公司可以取得资产管理费、手续费等中介服务费收入，满足资本监管和杠杆监管的要求。资产管理公司还可趁此机会扩大不良资产主业规模，实现营利模式的转变；还可获得结构融资、证券发行等方面的经验，为未来的经营打下基础。

最后，不良资产证券化能够增加证券化市场上基础资产的多样性，丰富信用评级和收益率的梯次，从而进一步扩大资产证券化市场规模。同时，当前资本市场上的投资产品相对于日益增加的居民财富增长需求以及庞大的社会闲散资金仍显不足。

在股市风险较大的环境下，不良贷款证券化产品能为资本市场提供新的投资品种、拓展投资渠道、增加产品选择，在帮助企业有效解决不良贷款的同时，能满足不同投资者的风险偏好和日益多元化的投资需求。

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The restart of NPA securitization also presents new opportunities for enterprises and the market. First, it can enhance an enterprise's capacity to defend against risks. Securitization allows different types of NPAs to enter one asset pool to achieve risk hedging; and, through accelerated transfer, separation and centralized disposal of the NPAs by the capital market, the percentage of non-performing loans is directly reduced.

Securitization can additionally allow rapid removal of NPAs from the balance sheet, sanitization of the on-balance-sheet assets, digestion of the accumulated risks from the sliding economy, optimization of the asset-to-liability structure and strengthening of business operation capabilities, risk management capabilities and core competitiveness. Additionally, the market-based and mass disposal method has a scaling effect, reducing the economic and time costs of disposing of NPAs and enhancing disposal efficiency.

Second, securitization also helps reduce the quantity of an enterprise's NPAs. With the weakening economy, the possibility that an enterprise can rapidly dispose of NPAs within a short timeframe decreases; and, generally, NPA projects can achieve relatively high returns only when the economy is doing quite well. However, holding assets for a relatively long period of time signifies that the management or disposal risks are relatively high. Through NPA securitization, an enterprise can sell the NPAs quickly and use the sale proceeds to invest in, or develop, a new project, increasing liquidity and helping it adjust its business structure.

Third, NPA securitization can increase capital sources. Asset securitization can provide enterprises with a new means of financing, effectively allowing enterprises to break their current over-reliance on bank borrowing. Securitization can also expand enterprises' revenue sources. Through NPA securitization, an enterprise generally can revitalize existing funds, without in general increasing liabilities, and secure a low-cost fund source, increasing asset liquidity.

Asset management companies specializing in the disposal of NPAs are presented with even greater opportunities. Traditionally, asset management companies have adopted a profit model where they make their money on the spread. The weakening in enterprises' performance capacity and China's reform of market-based interest rates have greatly squeezed their profitability space. Through NPA securitization, asset management companies can earn asset management fees, handling fees and other such intermediary service fee income, satisfying capital regulatory and leverage regulatory requirements. Asset management companies can also take advantage of this opportunity to expand the scale of their main NPA business to achieve a transformation in their profit model; additionally they can obtain experience in structured financing, securities issuance, etc., laying the foundations for their future operations.

Finally, NPA securitization can increase the diversity of underlying assets in the securitization market and increase the number of credit ranking and return rate tiers, further expanding the scale of the asset securitization market. Additionally, as compared to the increasing wealth and demand of people and the vast sums of idle private funds, the investment products currently available in capital markets remain insufficient.

In an environment where stock market risks are relatively large, non-performing loan securitization products can provide new investment products for the capital markets, open investment channels and increase product choice. While helping enterprises in effectively resolving non-performing loans, such products can satisfy different investors' risk appetites and their ever diversifying investment demands.

互联网定向委托投资产品是否合规
Are internet targeted entrusted investment products compliant?

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证监会于3月18日宣布加大对违规开展私募产品拆分转让业务的查处力度，并称“一经发现，将依法严肃处理”。证监会表示：“任何机构或个人不得向非合格投资者募集、销售、转让私募产品或者私募产品收益权，且单一私募产品不得超过法定上限。”

在此背景下，有媒体将关注的眼光投向了陆金所的“零活宝”等定向委托投资产品。作者认为，虽然“私募收益权拆分”与“定向委托投资”在客观效果上具有相似之处，即都是让小额投资者实际享有了私募基金或者其他私募类金融产品的收益，但由于交易流程的不同，两者的法律关系存在一定差异。

基本流程。定向委托投资产品的代表是陆金所的“零活宝”。根据此类产品说明书的介绍，通常是通过一个或多个特殊目的公司（SPV）发行定向委托投资产品，并将产品投向净值管理型专项资产管理计划，通过发行机构对定向委托投资标的的管理获取投资收益。定向委托投资标的的投资范围可以包括委托贷款、信托计划（含信托受益权）、基金公司及子公司发行的特定/专项资产管理计划、证券公司发行的资产管理计划、商业银行理财产品、基金公司货币基金、票据收益权、银行存款等。

法律关系。按照定向委托投资产品的介绍，其产品流程与私募收益权拆分存在差异。私募收益权拆分是先购买私募或其他金融产品，然后进行小额化拆分；而定向委托投资是先完成资金归集，或者先完成资金“委托”行为，然后再购买私募基金等金融产品。

两者法律关系的比较如图所示。可以看出，两者在资金流、权利义务的约定、产品的程序安排方面存在一定的差异。在私募收益权拆分被证监会叫停的背景下，定向委托投资产品是否也会面临同样的监管压力？该类型产品法律或者合规方面是否存在大的问题？

更近信托。根据《信托法》第二条的规定：“信托，是指委托人基于对受托人的信任，将其财产权委托给受托人，由受托人按委托人的意愿以自己的名义，为受益人的利益或者特定目的，进行管理或者处分的行为。”

在定向委托投资的交易结构中，委托人将资产交给作为受托人的SPV，由受托人以其自身的名义投资于投资标的，其法律结构与信托非常接近。

由于定向委托投资产品主要对接的是非标准化产品，受制于该类产品投资人数以及合格投资者的限制，委托人不可能直接成为定向委托投资标的直接的权利持有人，而必须以受托人的名义持有，这符合信托法律关系的特征。

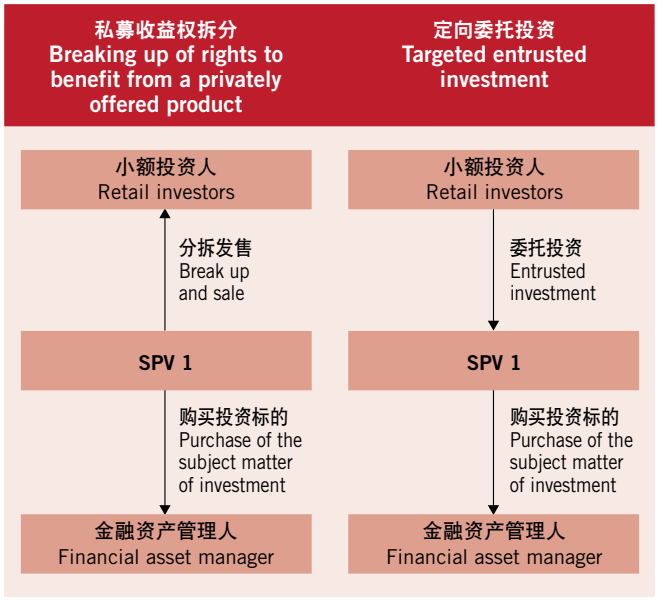
非信托公司合规分析。根据《信托法》第24条的规定：“受托人应当是具有完全民事行为能力的自然人、法人。法律、行政法规对受托人的条件另有规定的，从其规定。”按照这一规定，一般的法人可以成为适格的信托受托人。

《信托法》第四条还规定：“受托人采取信托机构形式从事信托活动，其组织和管理由国务院制定具体办法。”从上述规定看，第四条不适用于非信托公司从事信托业务。那么问题的核心在于：法律、行政法规对于受托人的条件是否另有规定？

据悉，国务院制定的《信托公司条例（征求意见稿）》第九条规定了“未经国务院银行业监督管理机构批准，任何单位和个人不得经营信托业务”。但该条例当前仍处于征求意见阶段，尚未正式颁布。

《信托法》规定了法人可以作为信托的受托人，同时规定了行政法规可以设置特殊条件。但事实上，当前国务院行政法规尚未对信托从业设置额外的准入规则。这是信托法的一个套利空间，也是“定向委托投资”暂未受到监管压力的原因之一。

当然，契约型私募基金广义上也属于信托法律范畴，如果证监会基于实质重于形式的原则，将定向委托投资产品界定为契约型私募基金，并采取监管措施，也并非没有可能。■



On 18 March, the China Securities Regulatory Commission (CSRC) announced it would intensify the investigation and handling of unlawful engagement in the business of breaking up privately offered products into smaller units and transferring the same. It stated that "if discovered, the same will be stringently dealt with in accordance with the law". The CSRC stated that "no institution or individual may offer, sell or transfer privately offered products or the right to benefit from privately offered products to unqualified investors, and a single privately offered product may not exceed the statutory upper limit".

Against this background, certain media turned their attention to such targeted entrusted investment products as "Linghuobao" of LU.com. The author is of the opinion that although "the breaking up of the right to benefit from privately offered products" and "targeted entrusted investment" have, in terms of their objective effect, certain points in common – i.e., both permit retail investors to actually enjoy benefits from private equity funds or other privately offered financial products – certain differences in the legal relationships of both exist due to the differences in their transaction procedures.

Basic procedure

"Linghuobao" of LU.com is representative of targeted entrusted investment products. As described in the prospectus for such a product, the targeted entrusted investment product is usually offered through one or more special purpose vehicles (SPVs) and the product is then targeted at earned value managed, dedicated asset management plans, and investment returns are earned via the management of the subject matter of the targeted entrusted investment by the issuing institution.

The investment scope of the subject matter of targeted entrusted investment may include entrusted loans, trust plans (including rights to benefit from a trust), specific/dedicated asset management plans offered by fund companies and their subsidiaries, asset investment plans offered by securities companies, wealth management products of commercial banks, money market funds of fund companies, rights to benefit from notes, bank deposits, etc.

Legal relationship

Based on the description of targeted entrusted investment products, there is a difference between their product procedure and the breaking up of rights to benefit from a privately offered product. In the breaking up of rights to benefit from a privately offered product, the privately offered product or other financial product is purchased first, and then broken up into smaller units; whereas in targeted entrusted investment, collection of the funds is completed first, or the fund "entrustment" act is completed first, and then the private equity fund or other financial product is purchased.

The comparison of the legal relationships of the two is shown in the figure. It can be seen that there exists a degree of difference between the two in terms of the fund flow, the provisions on rights and obligations, and the procedural arrangement for the products. Against the background of the CSRC's call to halt the breaking up of rights to benefit from privately offered products, will targeted entrusted investment products also face similar regulatory pressure? Do such products face major legal or compliance issues?

More similar to trusts

Pursuant to article 2 of the Trust Law, "the term 'trust' means the acts whereby the settlor, based on his trust in the trustee, entrusts the rights in his property to the trustee and the trustee manages or disposes of such property in his own name in accordance with the wishes of the settlor for the benefit of the beneficiary or for a specified objective".

In a targeted entrusted investment transaction structure, the client entrusts the assets to the SPV, as the trustee, which then invests in the subject matter of investment in its own name, a legal structure that is very similar to that of a trust.

As targeted entrusted investment products are mainly directed at non-standardized products and are subject to restrictions on the number of investors and the restriction to qualified investors, a client cannot directly become a direct holder of the rights in the subject matter of the targeted entrusted investment and must hold the same in the guise of a trustee. This is consistent with the features of a trust legal relationship.

Non-trust companies

Pursuant to article 24 of the Trust Law, "a trustee shall be a natural person or legal person with full civil capacity. If laws or administrative regulations contain other trusteeship conditions, such provisions shall prevail." In accordance with this provision, an ordinary legal person can become a qualified trustee of a trust.

Article 4 of the Trust Law additionally specifies that, "the State Council shall formulate specific measures for the organization and administration of trustees which engage in trust activities in the form of a trust institution". From the above-mentioned provision it can be seen that article 4 does not apply to the engagement in trust business by entities that are not trust companies. The core of the issue, then, is whether laws or administrative regulations provide otherwise in respect of the conditions for a trustee.

According to reports, article 9 of the Regulations for Trust Companies (Draft for Comment) formulated by the State Council specifies that, "no entity or individual may engage in trust business without the approval of the State Council's banking regulator". However, the regulations are still at the comment stage and have not been officially promulgated.

The Trust Law specifies that a legal person may serve as the trustee of a trust while additionally specifying that administrative regulations may set special conditions. However, in fact, administrative regulations of the State Council have not, to date, set any additional access rules for engaging in trust business. This is an arbitrage space for the Trust Law and also one of the reasons that "targeted entrusted investment" has not been subjected to regulatory pressure to date.

Of course, broadly speaking, contract-based private equity funds fall within the scope of trust law, and it is not out of the realm of possibility for the CSRC, based on the principle of substance over form, to define targeted entrusted investment products as contract-based private equity funds and take regulatory measures in that respect. ■

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“游戏”整体及构成元素的知产保护
Protection of ‘games’ and their component elements

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根据《2015 中国游戏产业报告》，中国游戏市场 2015 年收入达到 1407 亿人民币，同比增长 22.9%。随着游戏市场的繁荣，侵犯知名游戏知识产权的行为日益猖獗，相关知识产权纠纷逐渐增多。

本文中，游戏是指由软件程序和信息数据构成的，包括客户端游戏、网页游戏、社交游戏、移动游戏、单机游戏、电视游戏等。游戏本质是计算机软件，又是精美的画面、文字、音乐、动画等的综合体，涉及场景设计、人物形象设计、道具设计、装备设计、对话文本、介绍文本、音乐等。

同时，一款游戏的游戏名称、人物名称、故事、情节、人物设定甚至游戏的规则等都是游戏的有机组成部分。由此，作为游戏的权利人须综合利用各种相关法规对游戏的整体及其构成元素分门别类地进行保护。

游戏软件整体。根据《著作权法》《计算机软件保护条例》的规定，游戏作为典型的计算机软件，其作为著作权的保护客体之一，并无争议。然而，通过简单的复制方式进行的侵权开始减少，以隐蔽的方式对情节、规则和玩法进行抄袭的情形却日益严重。

场景设计、人物形象设计、道具设计、装备设计、对话文本、音乐等要素。上述游戏的构成要素如果被人抄袭，在符合《著作权法》关于“作品”的要求的前提下，可以依据该法予以保护。例如，人物造型设计可以归纳为“美术作品”，游戏说明等可归类为“文字作品”。动画则可以类似于电影作品予以保护（仍存在一定争议）。

> “一些权利人开始将游戏相关技术申请专利权”

在“广州网易计算机系统有限公司诉北京世纪鹤图软件技术有限责任公司等三被告著作权、商标权及不正当竞争”一案中，法院就认定：网易公司研发的《梦幻西游》游戏软件根据游戏设计需要包含了相应的美术作品、文字作品，游戏软件的作者亦可以针对上述作品单独行使著作权。

故事、情节及人物设定。《著作权法》保护具体表达，而不保护思想，然而有些游戏从业者将他人游戏中的故事、情节和人物进行复制，还以游戏的这些元素属于思想而不属于表达来对抗权利人。

在北京市第三中级人民法院判决的“琼瑶诉于正”著作权侵权案中，法院判定：“如果人物身份、人物之间的关系、人物与特定情节的具体对应等设置已经达到足够细致具体的层面，那么人物设置及人物关系就将形成具体的表达”。在前述网易公司诉三被告的案件中，法院判定：被告使用了网易公司游戏的情节设计、人物关系、背景等内容，属于相同表达。

游戏名称、角色名称。游戏名称是玩家识别游戏的重要手段之一。部分从业者将与他人知名游戏名称相同或近似的名称用于自己的游戏之上，刻意造成消费者的混淆。例如：在“乐动卓越公司诉昆仑乐享公司等侵犯著作权及不正当竞争”一案中，乐动卓越是移动终端游戏《我叫 MT online》《我叫 MT 2》的著作权人；被告在《超级 MT》游戏中使用了与上述游戏名称、人物名称、人物形象相近的名称和人物。法院认定，乐动卓越的上述名称已构成其在手机游戏类服务上的知名服务特有名称，受《反不正当竞争法》的保护。

另外，游戏名称及角色名称可通过行使注册商标权的方式予以保护。例如：在“腾讯科技（深圳）有限公司诉被告北京掌娱无限软件技术有限公司等侵害商标权纠纷”一案中，法院判定被告名为《地下城勇士与魔女》的游戏侵犯了权利人“地下城与勇士”系列商标的商标权。

游戏规则、玩法。通常游戏规则、玩法被认为是智力活动的规则，不在《专利法》的保护范畴；因其抽象性很难定性为具体表达，也难以享受《著作权法》保护。但特定情形下，抄袭他人的游戏规则等却可能构成不正当竞争行为。

例如，《炉石传说》是暴雪公司设计开发的游戏。而被告开发的游戏《卧龙传说》使用了与《炉石传说》基本相同的游戏规则，包括卡牌数量及构成、卡牌数值、卡牌使用方法等卡牌规则，以及回合制竞赛模式、疲劳伤害制度、场上随从数和手牌数量限制、出牌顺序等战斗规则，此外还对游戏标识、界面等进行了全面的模仿。

法院认为，现代的大型网络游戏，通常需要投入大量的人力、物力、财力进行研发，如果将游戏规则作为抽象思想一概不予保护，将不利于激励创新及营造公平合理的竞争环境。由此法院判定被告行为构成不正当竞争。

相关技术

最后，我们注意到一些权利人开始将游戏相关技术申请专利权，尽管还没有具体案例出现，但是可以预见《专利法》也将成为综合保护游戏知识产权的手段之一。■

According to the China Games Industry Report, 2015, the China games market had revenues of RMB140.7 billion (US$21.7 billion) in 2015, an increase of 22.9% over the previous year. With this flourishing games market, disputes involving intellectual property have progressively increased.

For the purposes of this column, the term "games" includes client side games, web games, social network games, mobile games, single player games, console games, etc. that are composed of a software program and information data. A game is essentially computer software, as well as an integral whole composed of images, text, music and animation that involves scenery design, character design, tool design, equipment design, dialogue, introductory text, music, etc. Additionally, the title of a game, the names of its characters, its story, plot, character design, and even its rules, are all organic components of the game. Accordingly, the holder of the rights in a game must comprehensively use various relevant regulations to protect the game as a whole and its component elements by type.

Game software as a whole. Pursuant to the Copyright Law and the Regulations for the Protection of Computer Software, there is no debate that games, as typical computer software, are one of the subjects of copyright protection. However, infringement through simple reproduction has started to diminish, whereas the covert imitation of plot, rules and game play has become increasingly serious.

Elements such as scenery design, character design, tool design, equipment design, dialogue and music. If the above-mentioned component elements of a game are copied, they may be accorded protection under the Copyright Law if they satisfy the requirements of the said law in respect of "works". For example, character design can be subsumed under "art works" and game explanations can be subsumed under "written works". Animations may be accorded protection similar to cinematographic works (although this point might be debatable).

In the *Guangzhou NetEase Computer System v Beijing Century Hetu Software & Technology et al* copyright, trademark and unfair competition case, the court found that, based on the game design, the game software "Fantasy Westward Journey", developed by NetEase, encompassed the relevant art works and written works, and the author of the game software could also exercise the copyrights independently in the above-mentioned works.

Story, plot and character design. The Copyright Law protects concrete expression, not ideas. However, some game producers have reproduced the story, plot and characters of another's game and mounted their defence against the rights holder on the grounds that these elements of the game are ideas rather than expression.

In its judgment in the *Qiong Yao v Yu Zheng* copyright infringement case, the Third Intermediate People's Court of Beijing Municipality determines that, "If the set-up of the identities of the characters, the relationships among them and the specific correspondence of the characters to specific scenarios attains a sufficiently detailed and concrete level, the character set-up and character relationships give rise to a concrete expression". In the above-mentioned NetEase case, the court determined that the defendant's use of the plot design, character relationships, backgrounds, etc. of NetEase's game constituted identical expression.

Game title and character names. Game titles are one of the major means by which players distinguish games. Some game producers use titles that are identical or similar to those of others' well-known game titles on their own games so as to cause confusion among consumers. For example, in the *Locojoy v Koram Games et al* copyright infringement and unfair competition case, Locojoy is the holder of the copyrights in the mobile games "I Am MT online" and "I Am MT 2"; the defendants used a title and characters in their game, "Super MT" that are similar to the title, character names and character images of the above-mentioned game. The court found that Locojoy's above-mentioned title constituted a title specific to its well-known service in the class of mobile game services and was subject to the protection of the Law Against Unfair Competition.

Furthermore, game titles and character names can be protected through the exercise of registered trademark rights. For example, in the *Tencent Technology (Shenzhen) v Beijing GameToWin et al* trademark infringement dispute case, the court determined that the defendants' game title "地下城勇士与魔女 (Dungeon Fighter and the Witch)" infringed the rights in the rights holder's series of "地下城与勇士 (Dungeon and Fighter)" trademarks.

> *"Certain rights holders have started to apply for patents for game-related technology"*

Game rules and playing strategies. Game rules and game play are generally considered the rules of an intellectual activity and fall outside the scope of Patent Law protection. Also, because their abstractness makes them difficult to fix as concrete expression, it is difficult to offer them protection under the Copyright Law. However, under certain specific circumstances, copying another's game rules can constitute an act of unfair competition.

For example, "Hearthstone" is a game designed and developed by Blizzard Entertainment. "Legend of the Crouching Dragon", the defendant's game, uses game rules that are essentially identical to those of "Hearthstone", including the card rules, such as the number and constitution of cards, card values, use of the cards, etc., as well as the fight rules, such as the turn-based match model, strain injury system, restrictions on the number of followers and number of cards in hand, play sequence, etc. It also comprehensively imitates the game logos, UI, etc.

The court held that large modern online games require the input of vast amounts of manpower, material and funds to develop. If game rules are denied protection without exception on the grounds that they are abstract ideas, this will be adverse to encouraging innovation and the creation of a fair and reasonable competition environment. Accordingly, the court determined that the defendant's act constituted unfair competition.

Relevant technology

The authors have noticed that certain rights holders have started to apply for patents for game-related technology. Notwithstanding the fact that no specific cases have arisen to date, it can be anticipated that the Patent Law will also become one of the means of comprehensively protecting the intellectual property in games. ■

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不动产善意取得的法律适用

Applying the law to acquisitions of immovable property

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中国《物权法》第 106 条为不动产适用善意取得制度提供了法律依据。根据该条规定，不动产善意取得与动产善意取得适用统一的认定标准。最高人民法院于今年 2 月 2 日公布的《最高人民法院关于适用＜中华人民共和国物权法＞若干问题的解释（一）》，充分考虑不动产物权公示方法的特殊性，进一步就认定不动产受让人“善意”的参考评价因素、举证责任分配、判断善意的时间点等问题作出了细化规定。

问：如何认定不动产受让人的主观“善意”？

答：《解释（一）》第 15 条明确了认定不动产受让人主观“善意”的标准，即不动产受让人在受让不动产时，不知道转让人无处分权，且无重大过失的，应当认定受让人是善意的。

受让人对转让人有无处分权的判断，是基于物权公示所表征的状态和内容。根据《物权法》的相关规定，不动产物权的基本公式方式是不动产登记，不动产登记簿所记载的权利状态和内容具有普遍的公信力，应被推定为真实、正确；因此，受让人对不动产登记簿的合理信赖应当受到法律保护。即使不动产登记簿所记载的内容与实际的权利状态完全不同，只要不动产受让人是基于对登记公示信息的信赖而进行交易的，就应推定其为善意，从而对其权利予以认可和保护。

> “受让人对不动产登记簿的合理信赖应当受到法律保护”

问：不动产受让人主观“善意”、“非善意”的证明责任，应该由谁承担？

答：鉴于不动产登记具有推定真实的效力，通常情况下，只要不动产受让人查阅了不动产登记簿，并合理信赖登记的状态和内容，就应推定其为善意。因此，在涉及不动产权属争议的诉讼中，只要不动产受让人信赖了物权公示，无论其诉讼地位是原告或者被告，都不需要首先举证证明自身的主观“善意”。

反之，由于不动产登记是一种推定真实，往往存在因登记错误而导致物权表征与真实状态不一致的情况。若诉讼另一方当事人或者真实权利人主张转让人无处分权、且不动产受让人为“非善意”，就应当承担证明不动产受让人明知或者应知转让人无权处分的举证责任。

至于举证的内容，可以参照《解释（一）》第 16 条列举的五种影响不动产受让人“善意推定”的情形：(1) 不动产登记簿上存在有效的异议登记；(2) 预告登记有效期内，未经预告登记的权利人同意；(3) 登记簿上已经记载司法机关或者行政机关依法裁定、决定查封或者以其他形式限制不动产权利的有关事项；(4) 受让人知道登记簿上记载的权利主体错误；(5) 受让人知道他人已经依法享有不动产物权。在真实权利人举证证明存在该五种情形时，人民法院应当认定受让人知道转让人为无权处分。

问：认定受让人的“善意”，以哪一时间点为准？

答：《物权法》第 106 条仅要求不动产受让人在受让该不动产时是善意的。然而，实践中对于如何理解“在受让该不动产时”这一用语，一直存在两种争议的观点，分别是“以订立合同时具有善意为准”和“以不动产转移登记时具有善意为准”。这种分歧也直接导致了司法裁判结果的不统一。

对此，《解释（一）》第 18 条明确规定以“依法完成不动产物权转移登记之时”，作为判断不动产受让人善意的时间点。也就是说，不动产受让人必须在依法完成不动产物权转移登记之前，始终保持善意，始终不知道且不应当知道转让人无权处分的事实，才能适用善意取得制度。

问：合同无效的情形下，能否适用善意取得？

答：尽管合同的有效性并非适用善意取得制度的前提条件，但在交易因违反法律的强制性规定、或者违反公序良俗而导致合同绝对无效时，该合同的效力被根本否定，不能产生物权变动的法律效果。

不动产善意受让人依据无效合同已经取得物权登记的，应当返还财产。因而，在合同绝对无效的情形下，不再考虑不动产受让人是否善意。同理，当合同因受让人存在欺诈、胁迫或者乘人之危等法定事由被撤销之后，该合同亦归于无效，与绝对无效合同具有同等法律效果，同样不适用善意取得制度。

因此，《解释（一）》第 21 条明确规定，在转让合同因违反《合同法》第 52 条规定被认定无效时，以及转让合同因受让人存在欺诈、胁迫或者乘人之危等法定事由被撤销而归于无效时，应当排除善意取得的适用。■

Article 106 of the Property Law provides the legal basis for the application of the system for bona fide acquisitions of immovable property. It stipulates that the criteria applicable to the recognition of a bona fide acquisition of movable assets must apply. In the Interpretations of the Supreme People's Court of Several Issues Concerning the Application of the Property Law of the People's Republic of China (1), published on 2 February 2016, the Supreme People's Court (SPC) fully considers the particulars of the method of publication of the rights *in rem* in immovable property and covers such issues as the factors to be referenced and assessed in determining the acquirer's "good faith", allocation of the burden of proof, determining the point in time of good faith, etc.

Q: How is the subjective good faith of an immovable property acquirer determined?

A: Under article 15 of the interpretations, if the acquirer at the time of acquisition was not aware that the transferor did not have the right to dispose of the same and was not himself/herself grossly negligent, he/she should be deemed to have acted in good faith.

The determination by the acquirer of whether the transferor had the disposal right is based on the state and details indicated in the property announcement. Under the Property Law, the basic method of publication of the rights *in rem* in immovable property is immovable property registration. The state and details of the rights recorded have general credibility and should be presumed to be true and correct; accordingly, the acquirer's reasonable reliance on the immovable property register is subject to the protection of law. Even if the details recorded in the register are completely at odds with the actual state of the rights, as long as the acquirer carried out the transaction based on the register, he/she should be presumed to have acted in good faith and his/her rights should be recognized and protected.

Q: Who bears the burden of proving the subjective "good faith" or "bad faith" of the immovable property acquirer?

A: Given that registration is presumably correct, under normal circumstances, as long as the acquirer made the transaction based on the register, he/she should be presumed to have acted in good faith. Accordingly, in a legal action involving a dispute over title to immovable property, as long as the acquirer relied on the property announcement, he/she is not required to first provide evidence in support of his own subjective "good faith", regardless of whether he/she is the plaintiff or defendant in the case.

There are instances of inconsistencies between the actual state and the indicated rights *in rem* due to registration errors. If the other party in the legal action or the true rights holder claims that the transferor did not have the disposal right, and the acquirer acted in "bad faith", such party bears the burden of proving that the acquirer was well aware, or ought to have been aware, that the transferor did not have such right.

For the contents of the adduced evidence, reference may be made to five circumstances that affect the "presumption of good faith" of the acquirer in article 16 of the interpretations: (1) the registration of a valid objection exists in the register; (2) the consent of the preliminary registration rights holder was not secured during the period of preliminary announcement of the registration; (3) there is a notation in the register that a judicial authority or administrative authority has ruled or decided in accordance with the law to place under seal or otherwise restrict the rights in the immovable property; (4) the acquirer was aware that the entity holding the rights as recorded in the register was erroneous; or (5) the acquirer was aware that a third party enjoyed the rights *in rem* in the immovable property in accordance with the law. Where the true rights holder adduces evidence to show the existence of any of the above-mentioned circumstances, the court should find that the acquirer was aware that the transferor did not have the right to dispose of the immovable property.

Q: What point in time prevails when adjudging the acquirer's good faith?

A: Article 106 of the Property Law requires the acquirer to be acting in good faith at the time the immovable property is acquired. However, in practice, there has consistently been two viewpoints explaining the phrase "at the time he/she acquires the immovable property", one being "acting in good faith at the time of entry into the contract" and the other being "acting in good faith at the time of registration of the transfer of the immovable property". This difference of opinion has also directly resulted in a lack of consistency in judicial rulings.

> *"The acquirer's reasonable reliance on the immovable property register is subject to the protection of law"*

Article 18 of the interpretations states that "the time at which registration of the transfer of the rights *in rem* in the immovable property is completed" is the point in time to be used to be adjudged. It means that the acquirer must remain in the state of being in good faith, that is, not being aware nor being in a position to be aware of the fact that the transferor does not have the disposal right, until registration of the transfer of the rights *in rem* in the immovable property is completed in accordance with the law, and only then does the system of bona fide acquisition apply.

Q: Can bona fide acquisition apply in a situation where the contract is invalid?

A: Notwithstanding the fact that validity of the contract is not a precondition to application of the system of bona fide acquisition, where the transaction violates a mandatory provision of a law or public order/good customs, the validity of the contract is fundamentally denied and cannot give rise to the legal effect of a change in the rights *in rem*.

Where a bona fide acquirer has secured registration based on an invalid contract, he/she has to return the property and there is no further need to consider whether the acquirer acted in good faith. Likewise, when a contract is rescinded for a statutory reason, such as deceit, coercion or taking advantage of the other party's plight by the acquirer, it too is null and void.

Accordingly, article 21 of the interpretations states that where a transfer contract is found to be invalid due to its violating article 52 of the Contract Law, or where it is rescinded and becomes null and void due to deceit, coercion or taking advantage of the other party's plight by the acquirer, the application of bona fide acquisition is obviated. ■

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以票据支付工程款引起的票据纠纷
Disputes arising from payment with negotiable instruments

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公司A与B签订了某工程分包合同。该分包合同落款处盖有B公司工程项目部印章以及代表人王某签名。工程施工过程中，B公司多次出具加盖B公司印章及代表人王某签名的施工现场签证单，以及多次通过加盖B公司财务专用印章及代表人王某签名的招商银行支票支付工程款。

工程完工后，B公司为向A公司支付拖欠的工程款，先后签发金额为人民币15万元及人民币14万元的某银行支票，但支票记载的出票日期晚于实际开具日期，因此A公司作为票据持有人在收到支票的当日并不能向银行申请兑付，在支票上记载的日期到期后，A公司持票至银行兑现时，银行均以B公司账户内资金不足为由退票拒付。为此，A公司多次与B公司交涉未果，故诉至法院，请求判令B公司支付票据款计人民币29万元。

争议焦点

本案的特殊性在于出票人否认支票上的印鉴系其真实印鉴，否认出票人与票据持有人之间存在票据基础关系，从而引发双方关于票据是否真实有效，出票人是否具有支付票据款义务的争议。

本案争议焦点有两点：一是系争支票是否是有效票据；二是A公司与B公司是否存在票据基础关系。在票据的有效性问题上，A公司主张系争票据真实有效。B公司辩称系争票据上的印章不是其真实印章，票据上签名的负责人也非其工作人员，该票据签章及署名皆为伪造，其从未在系争票据的付款行开立一般账户。

> “因此，系争票据具有形式上的合法性”

在票据的基础关系问题上，A公司主张其与出票人存在真实合同关系。B公司辩称与A公司并不存在商业往来，工程合同的签订及履行皆是伪造票据签章者的个人行为，与B公司无关。

票据的效力

证明系争票据是否合法的关键在于票据上的签章是否为他人伪造。《最高人民法院关于审理票据纠纷案件若干问题的规定》第九条第二款规定，向人民法院提起诉讼的持票人有责任提供诉争票据。该票据的出票、承兑、交付、背书转让涉嫌欺诈、偷盗、胁迫、恐吓、暴力等非法行为的，持票人对持票的合法性应当负责举证。

为证明票据权利，A公司向法院提交了系争票据及银行退票通知单。B公司为证明票签章为伪造，提供了证明其印模及法定代表人签名样式的公证书、该公司在其他银行开立基本账户的资料。

为反驳B公司辩解、证明票据合法性，A公司向法院申请向涉案银行调查取证，虽然涉案银行不同意法院调取开户原始文件，但提供了系争票据的一般账户资料及交易情况，证明开户时已审核B公司营业执照、法定代表人身份证明等证照原件并将该一般账户开立情况通知B公司，该系争票据上的签章与预留银行的签章完全相符且直至本案受理前该账户仍有结算业务发生。因此，系争票据具有形式上的合法性，B公司的证据不足以证明其签章为伪造。

票据基础关系

证明票据基础关系的关键在于双方是否存在合同关系。根据《票据法》第十条及《最高人民法院关于审理票据纠纷案件若干问题的规定》第十条规定，票据的取得，必须给付对价，持票人应当提供相应的证据证明已经履行了约定义务。

为证明存在工程分包合同且已履行合同义务，A公司提供了工程合同、现场签证单、竣工验收单、银行进账单等证据。B公司则否认该工程合同，称其签章也属伪造，双方根本不存在合同关系。

为证明分包工程合同为合法签订，A公司提供了上海市建筑业管理办公室公示的B公司与业主C公司签订的承包合同。该合同通过了正规招投标程序，经上海市某区招投标管理办公室审核并备案，故A公司有理由相信B公司的签章真实有效，并与其签订了工程分包合同且该工程早已竣工验收，B公司多次通过系争票据账户支付工程款。因此，A公司提供的上述证据已经可以组成证据链来证实分包工程的事实。

票据追索权纠纷的举证关键在于票据的效力及基础关系。A公司通过银行开立一般账户的基本流程证实票据形式上真实有效，并通过工程合同及现场签证单等证据证明票据基础关系存在，形成了完整的证据链。法院审理后认为，A公司作为持票人，提供的证据足以证明票据的有效性及基础关系成立，判决B公司承担票据责任。■

Company A and company B entered into a subcontract for a project. The signature section of the subcontract was stamped with the seal of company B's project department and signed by its representative, Mr Wang. In the course of the work, company B issued construction site visas bearing its seal and the signature of Mr Wang on a number of occasions and paid the project money on a number of occasions with cheques bearing its finance seal and the signature of Mr Wang, drawn on China Merchants Bank.

After completion of the works, company B issued post-dated cheques in the amounts of RMB150,000 (US$23,000) and RMB140,000 drawn on a certain bank. Company A, as the negotiated instrument holder, could not apply to the bank to cash the cheques on the dates it received them, and when it went to the bank after the maturity date indicated on the cheques to cash them, the bank refused to honour and pay them because there were insufficient funds in company B's account. After several unsuccessful attempts to contact company B, company A took it to court, requesting a judgment ordering company B to pay RMB290,000 – the amount of the negotiable instruments.

Focus of the dispute

The distinguishing point of this case lies in the negotiable instrument issuer denying that the seal and signature on the cheques were genuine, and denying that there existed an underlying instrument relationship between it and the negotiable instrument holder. There were two points of dispute in this case: (1) whether the disputed cheques were valid negotiable instruments; and (2) whether there existed an underlying instrument relationship between company A and company B. For (1), company A asserted that the disputed negotiable instruments were genuine and valid, whereas company B argued that the seals and signatures on the disputed negotiable instruments were forged and the person who signed them was not a member of its staff, and that it had never opened a general account with the payment bank for the disputed negotiable instruments.

For (2), company A asserted that there existed a genuine contractual relationship between it and the negotiable instrument issuer. Company B argued that it did not have any business dealings with company A, and that the execution and performance of the works contract were the personal acts of the forger of the negotiable instruments, and had no connection to company B.

Validity of negotiable instruments

The key to substantiating whether the disputed negotiable instruments were lawful lay in whether the signature and seal on the negotiable instruments were forged by a third party. The second paragraph of article 9 of the Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Disputes Involving Negotiable Instruments specifies that a negotiable instrument holder that institutes a legal action in a people's court is under obligation to provide the disputed payment instrument. If there is suspicion that the issuance, acceptance, payment or endorsement and transfer of the negotiable instrument involves an illegal act – such as deceit, theft, coercion, intimidation, violence, etc. – the negotiable instrument holder bears the burden of proving the lawfulness of the negotiable instrument.

As evidence for the rights in the negotiable instruments, company A submitted to the court the disputed negotiable instruments and the cheque dishonour notices from the bank. On the other hand, company B provided a notarial certificate evidencing its seal impression and the sample of its legal representative's signature, and its bank accounts information. With the objective of refuting company B's arguments and establishing the lawfulness of the negotiable instruments, company A applied to the court for the investigation of, and collection of evidence from, the bank in question.

The bank provided general account information and transaction details pertaining to the disputed negotiable instruments. It produced evidence that, at the time of opening of the account, it had reviewed the originals of such documents as company B's business licence, and the ID document of its legal representative, and notified company B of the opening of the general account in question, that the signature and seal on the disputed negotiable instruments were fully consistent with the samples left with the bank, and that settlements had occurred through that account until the acceptance of the case. Accordingly, the disputed negotiable instruments were formally lawful and the evidence provided by company B was insufficient to show that its signature and seal were forged.

Underlying relationship

The key to evidencing an underlying instrument relationship lies in whether a contractual relationship exists between the parties. Pursuant to article 10 of the Law on Negotiable Instruments, and article 10 of the Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Disputes Involving Negotiable Instruments, in connection with the securing of a negotiable instrument, consideration must be paid and the negotiated instrument holder is required to provide relevant evidence showing that the specified obligations were performed.

> *"Accordingly, the disputed negotiable instruments were formally lawful"*

As evidence for this, company A provided the works contract, the site visas, the final acceptance note, and the bank deposit receipts. Company B denied the works contract, claiming that the signature and seal on it were also forged, and claimed that no contractual relationship existed. As evidence that the subcontract was lawfully executed, company A provided a contract entered into by company B and a company C, the owner, published by the Shanghai Municipal Construction Industry Management Office.

The contract had undergone a conventional bid invitation and submission procedure, and been reviewed and placed on the record by the bid invitation and submission office of a certain district of Shanghai municipality. Company A had reason to believe that company B's signature and seal were genuine and valid. Furthermore, it had executed the subcontract with it, the works had been completed and accepted, and company B had paid project money through the disputed negotiable instrument account on several occasions. Accordingly, the above-mentioned evidence provided by company A comprised an evidentiary chain substantiating the fact of the subcontracted works.

The key to the adducement of evidence in negotiable instrument recourse right disputes lies in the validity of the negotiable instrument and the underlying relationship. Following the trial, the court held that company A, as the negotiable instrument holder, was able to prove the validity of the negotiable instruments and the establishment of the underlying relationship, and rendered a judgment ordering company B to bear the liabilities associated with the negotiable instruments. ■

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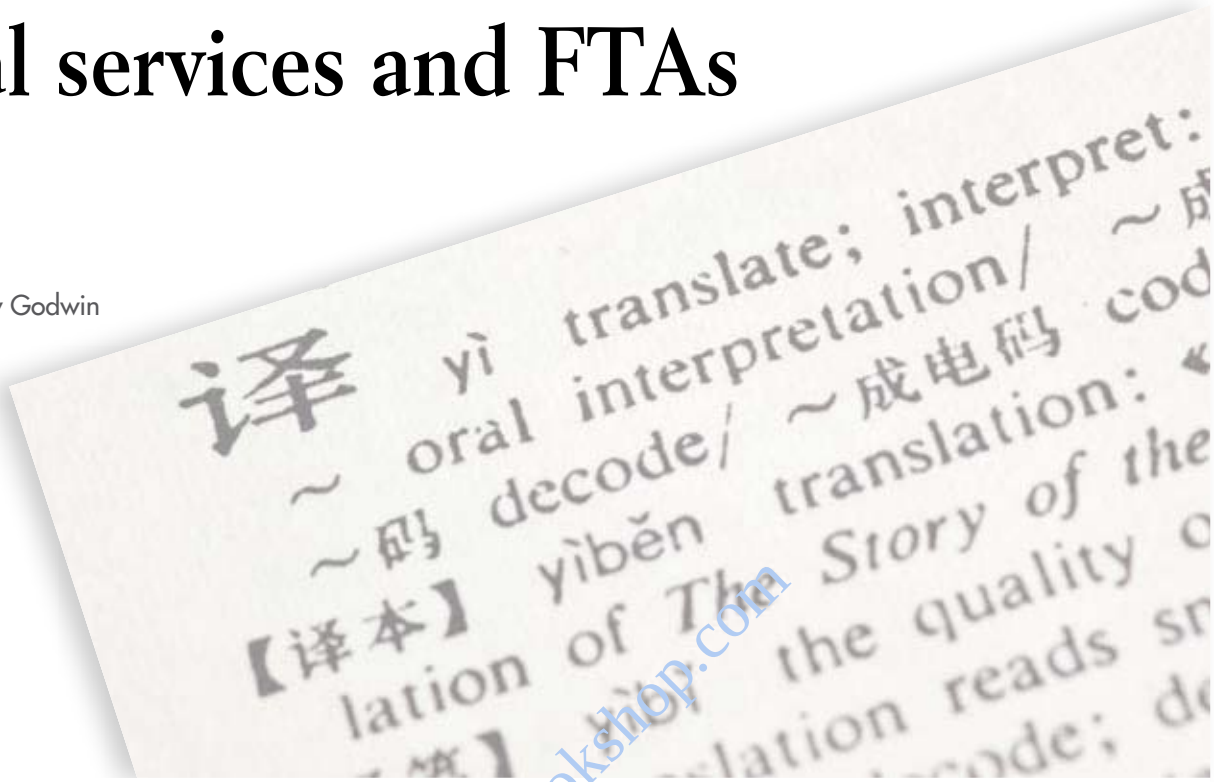
法律服务和自由贸易协定
Legal services and FTAs

葛安德 Andrew Godwin



简单来说，自由贸易协定（FTA）是减少或消除两国或多国之间贸易和服务壁垒的安排，从而促进各国之间的商品和服务贸易。除了商品关税及配额之外，贸易壁垒通常包括监管限制，比如许可和其他要求。FTA 是为了促进签署国之间建立更加紧密的贸易和商业关系，被越来越多地用于消除服务贸易壁垒，包括法律服务。

FTA 可以是两国（地区）之间的双边协议或者多国（地区）之间的多边协议形式。《跨太平洋伙伴关系协定》（TPP 协定）就是多边协议之一。本文将分析 FTA 对各国间法律服务贸易的影响，TPP 协定下将实行的安排以及中国内地与香港之间的发展。

双边自由贸易协定

正如此前的文章所述（请见《商法》第 4 辑第 7 期《法律服务的开放与整合》），法律服务领域的国际市场受《服务贸易总协定》（GATS）管辖。《服务贸易总协定》是世界贸易组织于 1994 年 4 月创立之时签署的协议之一，是关于服务贸易的首个多边贸易协定。《关税及贸易总协定》（GATT）则是规管商品贸易的协议。

不过，韩国等成员国没有就 GATS 项下的法律服务做出任何承诺。因此，该等成员国根据与其他国家签署的双边自由贸易协定向外国法律服务者开放其法律市场。韩国目前已与欧盟、美国和澳大利亚、加拿大等其他国家签署了自由贸易协定。这些自由贸易协定允许其他国家的律师事

In simple terms, a free trade agreement (FTA) is an arrangement under which barriers to trade and services between two or more states are reduced or eliminated, facilitating the trade in goods and services between those states. In addition to tariffs and quotas on goods, barriers to trade commonly include regulatory restrictions such as licensing and other requirements. FTAs are designed to encourage stronger trade and commercial ties between the signatory countries and are increasingly being used to remove barriers to services, including legal services.

An FTA may take the form of a bilateral agreement between two jurisdictions or a multilateral agreement between numerous jurisdictions. An example of a multilateral agreement is the Trans-Pacific Partnership Agreement (TPP). This article examines the impact of FTAs on the trade in legal services between states, the arrangements that will come into effect under the TPP, and developments between mainland China and Hong Kong.

Bilateral FTAs

As noted in a previous article (see *China Business Law Journal*, volume 4 issue 7: Liberalization and integration of legal services) the international market in legal services is governed by the General Agreement on Trade in Services (GATS). GATS was one of the agreements signed in April 1994, when the World Trade Organization (WTO) was created. It was the first multilateral trade agreement to govern the trade in services. GATT, the General Agreement on Tariffs and Trade, governs the trade in goods.

However, some member countries such as South Korea did not make any commitments in respect of legal services under GATS. As a result, the opening of their markets to foreign legal services has occurred pursuant to bilateral FTAs with other countries. South Korea has now

务所在韩国开设办公室。尽管许多国家在签署 GATS 时就法律服务贸易做出了承诺，不过一些国家在与其他国家签署的双边自由贸易协定中就法律服务贸易作出了进一步的约定。

根据最惠国待遇原则，一个成员给予另一个成员方的任何特许必须给予其他成员，这意味着 GATS 成员国很难在自由贸易协定下给予其他 GATS 成员国不享有的特许。不过，一些国家在自由贸易协定中就法律服务达成明确的约定，保证现有承诺下的利益，并鼓励两国在法律服务领域中建立更加紧密的联系。

近年来，澳大利亚政府在这方面的表现特别积极活跃。比如，于 2015 年 12 与 20 日生效的中澳自由贸易协定包括了中国就法律服务做出的明确承诺。

中澳自由贸易协定确保澳大利亚律师事务所将有权根据中国现有的 WTO 承诺进入中国法律服务市场。该协定也保证了澳大利亚律师事务所可以利用上海自贸区允许外国律师事务所和本地律师事务所互相派驻律师并与中国律师事务所建立联营合作关系的规定。中国与澳大利亚在该领域的合作关系通过签署附函得到进一步的加强，两国同意通过相关专业机构进行对话，以加强提供跨国法律服务的合作。

除了与中国、韩国签署的自由贸易协定之外，澳大利亚政府与日本也签署了自由贸易协定，《日本 - 澳大利亚经济合作协议》于 2015 年 1 月 15 日生效。

与中澳自由贸易协定一样，《日本 - 澳大利亚经济合作协议》保证了对澳大利亚律师现有的市场准入。澳大利亚律师事务所可以继续根据日本法律成立法律专业公司，并且双方同意澳大利亚和日本专业机构之间会进一步加强就法律服务合作的讨论。

澳大利亚与印度之间的双边贸易协议《澳大利亚 - 印度全面经济合作协议》目前正在谈判中。看看该协议是否会包含有关法律服务的约定会十分有趣。

跨太平洋伙伴关系协定

继七年的谈判和争论之后，12 个成员国于 2015 年 10 月 5 日签署了《跨太平洋伙伴关系协定》（TPP 协定）。该协定将在一定数量的签署国批准后生效。

TPP 协定是 12 国之间的全面自由贸易协定，这 12 个国家共占全球经济比重的 40%。已签署 TPP 协定并且批准后将受其约束的国家有澳大利亚、文莱、加拿大、智利、日本、马拉西亚、墨西哥、新西兰、秘鲁、新加坡、美国和越南。

TPP 协定规定了成员国监管各自市场的规则或原则。事实上，TPP 协定的主要目标之一是为成员国之间的贸易和投资提供透明的规则。它的主要特点包括取消或削减跨境货物和服务贸易的关税和非关税壁垒，以及减少或消除投资限制。TPP 协定规定了其他贸易协议中的核心义务，比如一成员国给予另一成员国国民待遇、最惠国待遇和投资市场准入的义务。

entered into FTAs with the EU, the US and other countries such as Australia and Canada. These FTAs allow law firms from the counterpart countries to establish a presence in South Korea.

Although many countries made commitments in respect of the trade in legal services when they entered GATS, some countries have made further provision for the trade in legal services in their bilateral FTAs with other countries.

The most-favoured nation principle, under which any concessions agreed with one member country must be extended to other member countries, means that it is difficult for a GATS member country to offer concessions under FTAs that are not available to other GATS member countries. However, some countries have agreed on express provisions concerning legal services in their FTAs to guarantee the benefits under the existing commitments, and to encourage closer relationships between the two countries in the area of legal services.

In recent years, the Australian government has been particularly active in this respect. For example, the China Australia Free Trade Agreement (ChAFTA), which came into force on 20 December 2015, contains express commitments from China in relation to legal services.

ChAFTA guarantees that Australian law firms will have access to the China legal services market under China's existing WTO commitment. It also guarantees that Australian law firms may take advantage of the rules in the Shanghai Free Trade Zone that allow foreign firms and local firms to undertake reciprocal secondment of lawyers, and also to establish commercial associations with Chinese law firms. The relationship between China and Australia in this area is further strengthened by a side letter under which the two countries agree to pursue dialogue through the relevant professional bodies for the purpose of strengthening co-operation in the provision of transnational legal services.

In addition to the FTAs with China and South Korea, the Australian government has also concluded an FTA with Japan, the Japan-Australia Economic Partnership Agreement (JAEPA), which entered into force on 15 January 2015. Like ChAFTA, JAEPA guarantees existing market access for Australian lawyers. Australian firms will continue to be able to form legal professional corporations under Japanese law, and it has been agreed that further discussions will take place between the professional bodies in Australia and Japan regarding co-operation in legal services.

A bilateral trade agreement between Australia and India, known as the Australia-India Comprehensive Economic Co-operation Agreement, is currently under negotiation. It will be interesting to see whether this contains any provisions on legal services.

Trans-Pacific Partnership

Following seven years of negotiation and debate, the Trans-Pacific Partnership (TPP) was signed by its 12 member countries on 5 October 2015. It will come into effect when it is ratified by the requisite number of signatory countries.

The TPP is a comprehensive free trade agreement between 12 countries, which together represent approximately 40% of global GDP. The countries that have signed the TPP and will become bound by its terms upon ratification are Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the US and Vietnam.

The TPP sets out rules or principles by which the member countries must regulate their markets. In fact, one of its primary objectives is to provide transparent rules for trade and investment between the member countries. Its key features include the elimination or reduction of tariffs and non-tariff barriers for cross-border trade in goods and services, as well as the reduction or removal of restrictions on investment. It

与其他贸易协议一样，TPP 协定允许每个成员国保留各国从本国国家利益和自身经济发展认为有必要保留的不符合规定的措施。

事实上，这些措施作为特定国家核心义务的例外并在附件中列明。比如，日本、马来西亚和越南在维持现状承诺中加入了其对法律实践现有的限制，就此，上述国家承诺维持现有不符合规定的措施，并且在未来不会对这些措施作出更多的限制。

就法律服务而言，附件 10-A 第 9 段认可了跨国法律服务“在推动贸易和投资以及促进经济发展和商业信息”方面的重要性。此外，第 10 段规定在外国律师和跨国法律服务监管方面，鼓励成员国考虑许多问题，包括是否应当允许外国律师通过建立商业实体提供跨国法律服务，以及是否应当允许外国律师和国内律师共同提供全面综合的跨国法律服务。

总的来说，TPP 协定中有关法律服务的承诺受到成员国根据 GTAS 和 FTA 等文件作出的现有承诺和保留的限制。与这些文件相比，值得注意的是，TPP 协定特别鼓励成员国允许外国律师以暂时“飞来飞去”的方式提供法律服务。某些法域一直很关注这个问题。比如，外国律师通过搭乘飞机往返的方式提供跨境法律服务对于马来西亚来说一直是个问题，直到马来西亚通过法律确认如果外国律师在马来西亚每年停留不超过 60 天，那么该外国律师就可以提供服务。

将上述规定与鼓励制定有关最低居住要求的替代方案和通过更好的签证安排鼓励专业人士流动的措施放在一起看时，TPP 成员国之间似乎有更大的动力促进跨境法律服务的提供。

成员国的小型律师事务所将对此特别感兴趣，许多这类律师事务所在某国没有办公室，可以通过飞来飞去的方式提供法律服务。增加人员流动性的措施也有利于希望迁址其他地区或在其他成员国外国律师事务所进行短期借调的个人律师。

TPP 协定还特别鼓励成员国允许外国律师与本国律师共同提供“全面综合”的跨国法律服务。尽管“全面综合”这个概念没有定义，但是它可能包括本国律师事务所可以成为国际业务实践一部分的安排，本国律师事务所不仅可以分享共同的品牌，还可以分享共同的管理和资源，这是真正全球化业务的重要部分。

中国内地和香港

《内地与香港关于建立更紧密经贸关系的安排》(CEPA) 于 2004 年生效，是中国内地和香港签署的自由贸易协定。该安排主要涵盖了货物贸易、服务贸易和贸易便利化三个方面。

imposes core obligations found in other trade agreements, such as the obligation to accord national treatment, most-favoured-nation (MFN) treatment, and market access to investments of one member country into another member country.

Like other trade agreements, it makes provision for each member country to maintain non-conforming measures that the relevant country considers necessary in terms of its own national interests and its own economic development. In effect, these operate as country-specific exceptions to the core obligations and are contained in the annexes. For example, Japan, Malaysia and Vietnam have included their existing restrictions on legal practice in the standstill commitments, under which they commit to a standstill in their non-conforming measures and not to make such measures more restrictive in the future.

In terms of legal services, paragraph 9 of annex 10-A recognizes the importance of transnational legal services in “facilitating trade and investment and in promoting economic growth and business confidence”. Further, paragraph 10 provides that in regulating foreign lawyers and transnational legal services, member countries are encouraged to consider a range of questions, including whether foreign lawyers should be permitted to provide transnational legal services by establishing a commercial presence, and whether foreign lawyers and domestic lawyers should be permitted to work together in the delivery of fully integrated transnational legal services.

In the main, the commitments in the TPP concerning legal services are subject to the existing commitments and reservations that member countries have made pursuant to instruments such as GATS and FTAs. When compared with these instruments, the TPP is noteworthy insofar as it specifically encourages member countries to allow foreign lawyers to provide legal services on a temporary fly-in, fly-out basis.

This has been a concern in relation to certain jurisdictions in the region. For example, a concern about the ability of foreign lawyers to provide cross-border legal services on a fly-in, fly-out basis had previously arisen in relation to Malaysia until the position was clarified by legislation permitting foreign lawyers to provide advice on condition that they do not stay in Malaysia for more than 60 days each year.

When this is viewed alongside the measures to encourage alternatives for minimum residency requirements and also greater mobility of professionals through enhanced visa arrangements, it appears that there is a strong push to facilitate the cross-border provision of legal services between TPP member countries. This will be of particular interest to smaller law firms in the member countries, many of which do not have a regional presence and provide services on a fly-in, fly-out basis. The measures to increase mobility will also benefit individual lawyers who may wish to relocate to other jurisdictions or spend short periods of time on secondment with foreign law firms in other member countries.

The TPP also specifically encourages member countries to allow foreign lawyers to deliver transnational legal services on a “fully integrated” basis, together with domestic lawyers. Although the concept of “full integration” is not defined, it is likely that this would embrace arrangements under which local law firms may become part of an international practice that shares not only common branding but also common management and resources – an essential component of a truly global practice.

Mainland China and Hong Kong

The Closer Economic Partnership Arrangement (CEPA) came into effect in 2004 and is an FTA between Hong Kong and mainland China. It covers three broad areas; trade in goods, trade in services, and trade and investment facilitation.

中国内地在 CEPA 下就法律服务贸易做出了许多承诺。其中两个重要的承诺是允许已在内地设立代表机构的香港律师事务所与内地律师事务所实行联营，不包括合伙形式，并且允许大陆律师事务所聘用香港律师。根据内地与澳门的类似自由贸易协定，上述规定也适用于澳门律师事务所。

在联营关系下，律师事务所可以根据联营协议共用其资源，以联营名义销售其服务，收费和分配费用，负担成本和承担责任。联营的每家律师事务所只限于提供相关规定允许的获批准法律服务。此外，在联营期间，每家律师事务所的法律地位、名称和财务必须各自保持独立、各自独立承担民事责任。这似乎排除了允许一家律师事务所分享一定比例的另一家律师事务所在合作业务中取得利润的利益分配安排。

如今 CEPA 进一步向香港和澳门律师事务所开放了市场。根据 CEPA 补充协议八，香港律师事务所和大陆律师事务所可以以合伙形式在广东省设立联营律师事务所。自 2014 年 9 月 1 日起施行的《广东省司法厅关于香港特别行政区和澳门特别行政区律师事务所与内地律师事务所在广东省实行合伙联营的试行办法》在广东省深圳前海、广州南沙和珠海横琴引入了合伙联营模式。

上述办法允许一家或多家香港或澳门律师事务所与一家内地律师事务所在广东省内组建合伙型联营律师事务所。合伙联营是设立一家有限合伙或“特殊普通合伙”形式（有关律师合伙的讨论，请见《商法》第 4 辑第 6 期第 89 页《合伙企业》）的独立律师事务所。香港和澳门律师事务所第一次可以与内地律师事务所建立收益分配合伙关系。联营律师事务所将与中国其他律师事务所受到一样的监管，除了其执业范围不得包括涉及内地法律适用的刑事诉讼、行政诉讼法律事务。

与 CEPA 下的联营为上海自贸区提供了发展模式一样，这种发展也可能为向外国律师事务所进一步开放法律服务市场提供一种发展模式。

Under CEPA, mainland China has made a number of commitments with respect to legal services. Two significant commitments are the commitment to allow Hong Kong law firms that have set up representative offices in the mainland to enter associations with mainland Chinese law firms, except in the form of a partnership, and to allow mainland law firms to employ Hong Kong lawyers. The above is also applicable to Macau law firms under a similar FTA between mainland China and Macau.

Under these associations, law firms may pool their resources, market their services under the name of the association, collect and distribute fees, bear costs and assume liabilities – all in accordance with the terms of the association contract. Each law firm in an association is limited to undertaking the approved legal services that are permitted by the relevant rules. In addition, during the term of the association, the legal status, name and finances of each law firm must be kept independent and each law firm must independently assume civil liability. This appears to rule out any profit-sharing arrangement under which one law firm is able to share a percentage of the profits generated by the other firm in joint matters.

CEPA has now further liberalized the market for Hong Kong and Macau law firms. Pursuant to supplement VIII of CEPA, Hong Kong law firms and mainland law firms are now permitted to establish and operate an association in the form of a partnership in Guangdong province. The Pilot Implementation Measures for Partnership Associations between Hong Kong Law Firms, Macau Law Firms and Mainland Law Firms in Guangdong province, which came into effect on 1 September 2014, introduce a partnership model in three locations in Guangdong province: Qianhai in Shenzhen, Nansha in Guangzhou, and Hengqin in Zhuhai.

The measures permit one or more Hong Kong law firms and Macau law firms and one domestic law firm to enter into a “partnership-style association” in Guangdong province. The partnership association involves the establishment of a separate law firm, which takes the form of a limited liability partnership or a “special general partnership” as it is called in China (for a discussion of partnerships between lawyers, see *China Business Law Journal* volume 4 issue 6: Partnership). For the first time, Hong Kong and Macau law firms are able to enter into profit-sharing partnerships with mainland law firms. The partnership firm is regulated in the same way as other law firms in China, except that its permitted business scope excludes criminal and administrative matters that involve domestic law.

This development may be a model for further liberalization of the legal services market for foreign law firms in the same way as associations under CEPA have served as a model for developments in the Shanghai Free Trade Zone.

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