SEMINAR ON RECENT DEVELOPMENTS IN ARBITRATION LAW IN CHINA

Seminar on Recent Developments in Arbitration Law in China

Co-organised by

China International Economic & Trade Arbitration Commission (CIETAC)
中國國際經濟貿易仲裁委員會
&
Faculty of Law, the University of Hong Kong
香港大學法律學院

26 April 2002 (Friday)
Pacific Place Conference Centre, Admiralty

Programme

2.30 – 2.40 pm	**Opening Addresses** **Mr. LIU Wenjie** 劉文杰 Vice-Chairman of CIETAC and Vice-Chairman of China Council for the Promotion of International Trade (CCPIT) / China Chamber of International Commerce (CCOIC) **Mr. Robert MORGAN** Professor of Law, Faculty of Law, the University of Hong Kong, Chairman of the Chartered Institute of Arbitrators (East Asia Branch)
2.40 – 3.10 pm	**Mr. WANG Shengchang** 王生長 Vice-Chairman of CIETAC *"The Development of Arbitration Law After China's Accession into the WTO"*
3.10 – 3.40 pm	**Mr. LI Yong** 李勇 President of Patent and Trademark Law Office of CCPIT/CCOIC *"Legal Protection of Intellectual Property Rights in China"*
3.40 – 4.00 pm	Break
4.00 – 4.30 pm	**Mr. CAI Hongda** 蔡鴻達 Deputy Secretary-General of the China Maritime Arbitration Commission (CMAC) *"Recent Developments in Maritime Arbitration in China "*
4.30 – 5.00 pm	**Comments** **Mr. Robert MORGAN** Professor of Law, Faculty of Law, the University of Hong Kong, Chairman of the Chartered Institute of Arbitrators (East Asia Branch)

Mr. David SANDBORG
Professor of Law, School of Law, City University of Hong Kong

5.00 – 5.20 pm **Discussion**

5.20 – 5.30 pm **Closing Remarks**
Mr. Robert MORGAN
Professor of Law, Faculty of Law, the University of Hong Kong,
Chairman of the Chartered Institute of Arbitrators (East Asia Branch)

Dr. Wang Sheng Chang

Date of Birth : 26 March 1966 Working Languages: Chinese, English

Present Position: Vice Chairman, CIETAC Expertise: Trade Law, Investment Law

Qualification and Position Relating to Arbitration and Conciliation

- Member of International Council for Commercial Arbitration (ICCA)
- Member of Advisory Committee of the Global Center for the Alternative Dispute Research of the American Arbitration Association
- Member of Editorial Committee of the Stockholm Arbitration Report
- Arbitrator of China International Economic and Trade Arbitration Commission
- Arbitrator of Singapore International Arbitration Center
- Arbitrator of Hong Kong International Arbitration Center
- Arbitrator of Korean Commercial Arbitration Board
- Life Member of Indian Council of Arbitration
- Conciliator of the Conciliation Center of China Chamber of International Commerce

Arbitration Experience

CIETAC Arbitration : have served as co-arbitrator, sole arbitrator or chief arbitrator in about 200 foreign-related arbitration cases

ICC Arbitration : have served as co-arbitrator in 3 arbitration cases

Stockholm Arbitration : have served as co-arbitrator in 6 arbitration cases

Major Publications

International Arbitration in the People's Republic of China – Commentary, Cases and Materials (Butterworths, Singapore, first edition1995, second edition 2000)

Resolving Disputes in the PRC - A Practical Guide to Arbitration and Conciliation in China (FT & Tax, Hong Kong, 1996)

International Usages and Foreign-related Arbitration (China Youth Press House, 1994)

Theory and Practice of Combining Arbitration with Conciliation (Law Press, 2001)

Career

1988	Graduated from Beijing University
2001	Juris Doctor, University of International Business and Economics
1988-date	Legal Affairs Department of China Chamber of International Commerce
1988-date	China International Economic and Trade Arbitration Commission
1991-1992	Study Swedish Law at the Stockholm University
1993	Chinese Bar examination passed

Cai Hongda

Cai Hongda graduated form the Double Bachelors Class of the China University of Political Science and Law with B.L in 1987. He lectured law courses at Beijing Chemical University as associated professor from 1987 to 1992. He studied international commercial laws and maritime law at Sheffield University of U.K from 1992 to 1993. Now he works at China Maritime Arbitration Commission (CMAC) as arbitrator and Deputy Secretary General.

Li Yong

Mr. Li Yong specializes in intellectual property acquisition and litigation and international economic, trade and technology arbitration. He has technical background of electrical engineering, computer, communication and related technology. His working experience includes acquisition, transfer and enforcement of intellectual property rights, and international economic, trade and technology arbitration. He as a lawyer has practiced patent law, copyright law, trademarks law and anti-unfair competition law in China for more than seventeen years with hundreds of clients from both domestic and abroad. He as an arbitrator has arbitrated more than hundred international or domestic disputes, most of which relate to international trade, investment or intellectual property licensing. He has also handled some dozen of domain name disputes as panelist under ICANN Uniform Domain Name Dispute Resolution Policy.

Mr. Li Yong graduated form Tshinghua University with degree in electrical engineering in 1978. He was qualified as a patent attorney in 1985 and qualified as a lawyer in China in 1988. He has become an arbitrator of CIETAC since 1993. He is also an arbitrator of WIPO Arbitration and Mediation Center and an arbitrator of International Arbitration Forum of USA. Mr. Li Yong Worked with China Council for the Promotion of International Trade (CCPIT), as the general director of the Legal Affair Department from 1996 to 2001.

Mr. Li Yong is now the president of CCPIT Patent and Trademark Law Office. He is also the Vice-Chairman of China International Economic and Trade Arbitration Commission, the Vice-Chairman of China Maritime Arbitration Commission, the Vice-Chairman of Conciliation Center of CCPIT, and the Chairman of ICC China Arbitration Committee.

He is a standing council member of Chinese Society of International Law, a standing council member of China Law Society-Intellectual property research, a standing council member of China Maritime Law Association, a council member of Chinese Society of Private International Law, a council member of License Executive Society China and a member of AIPPI China. His Publications have included articles for journals on the subject of intellectual property protection and international arbitration.

Seminar on Recent Developments in Arbitration Law in China

Opening Address

Mr. LIU Wenjie

在“ 中国仲裁法的新近发展” 研讨会上的讲话

中国国际贸易促进委员会/中国国际商会 副会长

中国国际经济贸易仲裁委员会 副主任 刘文杰

中国海事仲裁委员会 副主任

尊敬的 Robert MORGAN 教授、David SANDBORG 教授，各位嘉宾，女士们、先生们：

很荣幸能在香港出席由香港大学、中国国际经济贸易仲裁委员会共同举办的“ 仲裁法在中国的新近发展” 研讨会。今天的会议将有香港和内地学术界、仲裁界的专家发表演讲，又得到了中国贸促会驻香港代表处的悉心安排和各位在座嘉宾的热烈支持，本人谨代表诸位内地同仁向各位表示感谢！

随着经济全球化的不断发展，仲裁作为一种既古老又现代的解决商事纠纷的重要途径，越来越受到商界和法律界的推崇。在商事交往中，发生纠纷的不可避免，犹如日月更迭一样自然。内地改革开放二十几年来，香港与内地的经贸往来日益频繁，成为亚洲经贸往来最亮丽的风景线。长期以来，内地和香港仲裁界的交流与合作一直卓有成效。在香港回归祖国之前，两地的经贸纠纷可均通过仲裁的方式解决并依 1958 年《承认与执行外国仲裁

裁决公约》(以下简称《纽约公约》)得以顺利执行。自九十年代初期至今,中国国际经济贸易仲裁委员会每年都要受理100多件涉及香港当事人的仲裁案件。1995年9月1日生效的《仲裁法》是内地首次以部门立法的形式颁布的确立和发展仲裁制度的专门法。1997年7月1日,香港回归祖国,《纽约公约》已经不再适用于内地与香港特区之间仲裁裁决的执行。1999年6月,香港政府与内地最高人民法院协议达成安排,使在内地和香港特区作出的仲裁裁决可以在两地的法院相互执行,这项安排体现了《纽约公约》的精神和原则。随之,香港特区和内地分别完成了相关法律程序,使上述有关安排能够得以实施。上述安排实施以来,运作良好,广受贸易投资者的欢迎。总之,香港特区与内地在仲裁领域的合作是非常成功的,执行裁决的渠道是畅通的。最近,中国国际经济贸易仲裁委员会还与香港国际仲裁中心合作,经国际通用域名管理机构美国国际域名号码与空间分配公司(ICANN)的授权,共同成立了"亚洲域名争议解决中心",处理国际通用顶级域名争议,该中心已于2002年2月28日起正式受理案件。这是两地仲裁领域合作的又一盛事,是"一国两制"构想下的新成就。

去年12月,中国正式成为世界贸易组织成员,这意味着今后中国的对外经济贸易往来将会在世贸组织规则的前提下进行运作,国际贸易、国际投资以及国际金融等活动的前景将更加广阔,随之而来各种经贸纠纷也会必然增多。商事仲裁在迅速解决

纠纷、维持正常的贸易秩序及创造良好的投资环境方面，都将发挥着不可或缺的作用。

毫无疑问，中国入世将给国家带来历史性的机遇，也为香港特区和内地商事仲裁的发展带来新的契机。已经到来的二十一世纪充满希望，我们将拭目以待国家经济的腾飞。随着香港特区和内地法律服务市场的进一步开放和有关仲裁立法的进一步完善，两地的法律服务行业，包括仲裁服务必将在维护当事人合法权益、为经贸关系的良性发展等方面发挥越来越重要的作用。！

预祝此次研讨会圆满成功！

谢谢！

Seminar on Recent Developments in Arbitration Law in China

The Arbitration Law After China's Accession to the WTO

Mr. WANG Sheng Chang

The Arbitration Law After China's Accession to the WTO

Wang Sheng Chang*

The People's Republic of China became the 143rd member of the World Trade Organization (WTO) on 11th November 2001. China's accession to the World Trade Organization will not only benefit the country's economic development, but also have far-reaching influences on Chinese society. WTO membership will accelerate the modernization of Chinese society and have a positive effect on people's lives. However, it may also exacerbate some existing problems beneath the appearance prosper.

To strictly honor its commitments for entry to the WTO, China takes the responsibility to ensure analyzing and amending existing laws, regulations, codes and other policy measures so as to conform them to WTO requirements. Review of relevant state laws and statutes has been completed by and large, and a number of laws and regulations have been repealed, revised and formulated. The Chinese government has also announced its firm determination to have the nation mechanism geared with the demands generated from China's entry into the WTO. The Chinese government officially announced that the following measures would be taken: First, following the principles of the uniformity of law, nondiscrimination, and openness and transparency, China is to quickly improve the system of foreign-related economic laws and statutes so that they are suitable to domestic conditions and the WTO rules and able to guarantee fair and efficient law enforcement. Second, according to China's commitments in its entry into the WTO, China is to gradually expand the spheres of activity open to foreign businesses. Third, China is to study, master and fully exercise all the rights that China enjoys as a member of the WTO, and promote and participate in regional economic cooperation. Fourth, China is to study and publicize information about the WTO and its rules, and to provide training to public servants, and to bring forth, through training, a

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* Vice Chairman, China International Economic and Trade Arbitration Commission (CIETAC), Beijing, and Member, International Council for Commercial Arbitration (ICCA).

contingent of people who are well acquainted with the WTO rules and international economic cooperation and trade. [1]

Implementation of the commitments will undoubtedly boost China's links with the outside world and prosper its economy. Consequently the players in market economy will more frequently seek for assistance in resolving disputes that are believed to be inevitable by-products of prosperity of economy. It is not surprise that arbitration will play a greater role in resolving disputes.

Along with the widespread wave of legal reform in arbitration on international arena, nowadays arbitration has emerged to be a growth industry and it in turn provides with remarkable support to other industries in growth. When confronting with the situation in China, one may pay attention to the underlying problems and future movement relating to arbitration.

As required by the WTO rules, laws, regulations, rules and policies of Members concerning trade in goods, trade in services, trade-related intellectual property right protection and investment measures shall be made to the public; except those concerning national security or otherwise permitted by the WTO rules. After new laws, regulations or measures are published, opinions from all sources should be allowed and a certain period of time should be given for comments. The adequate openness and transparency of laws, regulations and policies may help improve the credibility and confidence, meanwhile creating a forum for fair play.

Effective as from 1st September 1995, the Arbitration Law of the PRC was adopted by the 9th Session of the Standing Committee of the 8th National People's Congress of the PRC and it was promptly published thereafter. One of the important goals of the new Arbitration Law is to change the nature of the domestic arbitration, i.e., to separate domestic arbitration bodies from the governmental authorities, affording the re-organized arbitration bodies with a high degree of autonomy and independence, free from interference from the government, and therefore it is expected to have normalized

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[1] *See,* Report on the Work of the Government of the PRC by Premier Zhu Rongji delivered at the Fifth Session of the Ninth National People's Congress on March 5, 2002 in Beijing.

arbitration service conforming to normal standard in domestic regime as well. In the last six years, the various municipalities have initiated the establishment of more than 160 arbitration bodies, widely scattered in almost every corner across the Mainland China. In addition, the pioneers of China's foreign-relation arbitration, i.e., the China International Economic and Trade Arbitration Commission (CIETAC) and the China Maritime Arbitration Commission (CMAC), operate their business as usual under the new Arbitration Law.[2]

While it is worth noting that the newly established arbitration bodies have contributed a great deal to the substantial development of arbitration in China, either in terms of the endeavors to promote arbitration or in terms of caseload that they received[3], one cannot ignore the existing flaws detrimental to the healthy development of arbitration. The inner spirit of arbitration is to serve to the needs of the parties on the basis of a respect for the parties' free will. Basically it is up to the parties by agreement to choose the proper arbitration bodies for resolving their disputes. However, in reality many arbitration bodies borrowed heavily the governmental influence or administrative power to promote local arbitration, notably though the inside "red-headed documents" to request the local enterprises and companies to modify their standard contracts with aim to inserting an arbitration clause solely designated the local arbitration commissions within the governing territory of the government that issued the said documents. Moreover, some local governments frequently initiate an inspection movement to review the implementation of the said documents. Despite the experienced parties might be aware of the rare possibility to re-draft the arbitration clause, an inexperienced party may fail to note the tactically drafted and local-favored arbitration clause when concluding their contracts. By and large, the inside "red-headed documents" may be categorized as unpublished administrative measures not accessible to the common business peoples, and therefore contribute to a serious lack of openness and transparency.[4]

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[2] A recent development of CIETAC arbitration is that CIETAC may take domestic arbitration cases as well, according to its revised Rules of Procedure adopted in 2000.

[3] In 2001 CIETAC received 731 arbitration cases with the disputed amount RMB10.5 billion (USD1.27 billion). According to the statistics released by the Legal Affairs Office of the State Council, the 163 newly established arbitration commissions around the Mainland China took 11,629 arbitration cases with disputed amount RMB17.15 billion (USD2.07 billion) in total.

[4] *Cf. See* Paragraph 324 "Transparency" of the Report of the Working Party on the Accession of China, which stated: "Some members of the Working Party expressed concern about the lack of transparency regarding the laws, regulations and other measures that applied to matters covered in the WTO Agreement and the Protocol. In particular, some members noted the difficulty in finding and obtaining copies of regulations and other measures undertaken by various ministries as well as those taken by provincial and other local authorities. Transparency of

China's accession to the WTO will be a stern test of the central and local governments for their policy-making, relationships with enterprises, adjustment in decision-making procedures, or redefining of the roles of government in new circumstances. It is quite reasonable for the commercial community to shift their attention to the prospects of China's compliance with the substantive commitments it has made with the implementation of these commitments. It is equally reasonable for the parties to lay off those arbitration bodies that yield under the pressure of administrative organs. Notwithstanding the fact that the development of domestic arbitration in the Mainland China is still in the time period of childhood, "break-of-mother-milk" becomes a must after China's accession to the WTO because the excessive influence from the governments will damage the long-term credibility and attractiveness of arbitration in the Mainland China.

WTO accession symbolizes China has entered a new phase of opening up to the outside world. The new opportunity allows China to be more proactive in participating in international economic co-operation and competition, and it accelerates economic reform and development with enormous benefits. One of the anticipated benefits would be the enhanced appeal of China as a place to do business. Many international companies were increasingly engaged in new ventures in China. The trade volume with the outside world would almost certainly increase as the benefits of WTO membership. The anticipated increase of disputes in trade and investment calls for professional services, including arbitration service.

According to Annex 9 "Schedule of Specific Commitments on Service" of the Protocol on the Accession of the People's Republic of China concluded for China's entry into the WTO, it is clear that, for professional services, there will be no limitations on market access and no limitation on national treatment so far as (1) cross-border supply and (2) consumption abroad are concerned. As for (3) commercial presence, there is no apparent limitation for the commercial presence of arbitration service if a foreign

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regulations and other measures, particularly of sub-national authorities, was essential since these authorities often provided the details on how the more general laws, regulations and other measures of the central government would be implemented and often differed among various jurisdictions. Those members emphasized the need to receive such information in a timely fashion so that governments and traders could be prepared to comply with such provisions and could exercise their rights in respect of implementation and enforcement of such measures. The same members emphasized the importance of such pre-publication to enhancing secure, predictable trading relations. Those members noted the development of the Internet and other means to ensure that information from all government bodies at all levels could be assembled in one place and made readily available. The creation and maintenance of a single, authoritative journal and enquiry point would greatly facilitate dissemination of information and help promote

arbitration body provides with such service. There are indeed some sorts of limitations on the commercial presence in respect of the legal services provided by foreign law firms. [5] But there is no specific limitation for the commercial presence of arbitration service provided with by the foreign arbitration bodies.

The mere fact that China is ready to open its arbitration service market to the outside world represents a significant progress. The parties are therefore able to have a reasonable expectation for the arbitration services that can be facilitated, either by the Chinese arbitration bodies or foreign arbitration bodies, or either through institutional arbitration or ad hoc arbitration. However, as demonstrated below, the current Arbitration Law is not advanced enough to cope with the new expectations. Although it is not a specific commitment for China to amend its Arbitration Law when China acceded to the WTO, it is essentially imperative for the legislative body to consider whether or not the 1995 Arbitration Law should be modified for the purpose of creating a more efficient and fair environment for the resolution of commercial disputes.

Much has been done to facilitate the operation of the 1995 Arbitration Law. To clarify the uncertainty or to fill the gap left by the Arbitration Law, which is as simple as having 80 articles only, the Supreme People's Court of the PRC has issued more than twenty pieces of judicial interpretation over the last six years. These interpretations deal with in wide range issues such as the jurisdiction of the competent courts, the validity of the arbitration agreement, the arbitration proceedings, setting aside of arbitral awards,

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compliance."

[5] As agreed by the Chinese government in Annex 9 to the Protocol on the Accession of the People's Republic of China, business scope of foreign representative offices in the PRC is only as follows:

(a) To provide clients with consultancy on the legislation of the country/region where the lawyers of the law firm are permitted to engage in lawyer's professional work, and on international conventions and practices;

(b) To handle, when entrusted by clients or Chinese law firms, legal affairs of the country/region where the lawyers of the law firm are permitted to engage in lawyer's professional work;

(c) To entrust, on behalf of foreign clients, Chinese law firms to deal with the Chinese legal affairs;

(d) To enter into contracts to maintain long-term entrustment relations with Chinese law firms for legal affairs; to enter into contracts to maintain long-term entrustment relations with Chinese law firms for legal affairs;

(e) To provide information on the impact of the Chinese legal environment.

Entrustment allows the foreign representative office to directly instruct lawyers in the entrusted Chinese law firm, as agreed between both parties.

and enforcement of arbitral awards. The "Prior Reporting" mechanism[6] can help shape a "pro-enforcement" bias that lends a great strength to crack down the local protectionism.

Yet, the people's courts cannot go beyond the scope lined up by the Arbitration Law. By applying the specific provisions of the Arbitration Law, the courts from time to time have to deny ad hoc arbitration in the Mainland China, nullify the validity of the arbitration agreements which is somehow merely ambiguous, to scrutinize heavily the merits of arbitral awards in setting aside procedure or enforcement procedure for domestic arbitration. Needless to say, the said practice is unique, unusual and unconceivable to business community. Furthermore, the Arbitration Law fails to concentrate the arbitration resources to qualified arbitration bodies and instead allows the establishment of the over-numbered local arbitration bodies heavily tainted by administrative influence.

The following issues deserve being discussed for the purpose of amending the Arbitration Law:

Issue 1 Whether or Not China Should Adopt the UNCITRAL Model Law on International

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[6] On 28 August 1995, the Supreme People's Court issued the *Notice on People's Courts' Handling of Issues in Relation to Matters of Foreign-related Arbitration and Foreign Arbitration*, within which it was decided to establish a "prior reporting" mechanism in relation to issues where the people's courts accept foreign-related cases auxiliary to arbitration agreements, refuse enforcement of foreign-related arbitral awards and refuse recognition and enforcement of foreign arbitral awards. Paragraph 2 of the Notice stipulates: "Where one party files an application to the People's Court for enforcement of the arbitral award made by the foreign-related arbitral institution of our country, or files an application for recognition and enforcement of awards made by foreign arbitral body, and if the People's Court contemplate that the award made by a foreign-related arbitral institution of our country carries with one of the circumstances enumerated by Article 260 of the Civil Procedure Law, or a foreign arbitral award sought for recognition and enforcement is not compliance with the provisions of international convention acceded to by China or is not conformed to the principle of reciprocity, the contemplating court, before deciding to refuse enforcement or refuse recognition and enforcement, must report its findings to the Higher People's Court in the same jurisdiction for review; if the Higher People's Court also agrees with the findings that enforcement or recognition and enforcement should be refused, it should report its findings to the Supreme People's Court. Only after the Supreme People's Court confirms the findings then [the Intermediate People's Court] may rule to refuse enforcement or to refuse recognition and enforcement."

Commercial Arbitration?

Compared to the previous legislative pieces, the 1995 Arbitration Law represents a closer movement towards the accepted international standards in arbitration. The basic framework, underlying principles and procedure management embraced in the Arbitration Law are more or less the same with the UNCITRAL Model Law. And the UNCITRAL Model Law has been used as a guide when drafting the Arbitration Law. But an overall assessment of the Arbitration Law will lead to the conclusion that the Law is too much tainted by local standard. As indicated above, the Arbitration Law is far from the universally accepted notions, setting out many practical obstacles to arbitration. An ideal proposal is to re-draft the Arbitration Law, adopting the UNCITRAL Model Law with some modifications, such as to insert appropriate provisions updating the "writing" requirement of arbitration agreement, incorporating combination of arbitration with conciliation, and liberalizing the management of arbitration procedures. If China becomes a territory where the UNCITRAL Model Law is adopted, it is believed that the arbitration environment will be significantly improved.

Issue 2 Whether or Not Ad Hoc Arbitration Should Be Allowed in the Mainland China?

Currently the arbitrations in the Mainland China are dominantly institutional arbitrations. The parties' free will to access to ad hoc arbitration is denied in practice. This is, in fact, contrary to the normal practice in many other countries around the world. The self-constraint on ad hoc arbitration may inspire the parties to approach to institutional arbitration, but it cannot give birth much attractiveness to those who are accustomed with ad hoc arbitration. Arbitration cases are actually floating globally, since the parties may shift their determination by agreement, not submitting their cases to the country unfriendly to arbitration, but shopping a forum where both institutional arbitration and ad hoc arbitration can find their home. It is therefore suggested that ad hoc arbitration be allow in the Mainland China, and the benefits thereof are apparent: First, the presence of ad hoc arbitration may stimulate the arbitration bodies to improve the quality of arbitration service for a better competitive status. This will in turn do better to the benefits of the parties. Second, the Chinese courts of law may acquire more opportunities to conduct judicial supervision over arbitration taken place within their territory of jurisdiction. The Chinese courts should not be unfamiliar with ad hoc

arbitration, since the Chinese courts are assumed with the responsibility to recognize and enforce ad hoc arbitral awards made in the territory of other contracting states to the 1958 New York Convention. Third, the parties may have a greater flexibility to select the types of arbitration, and a greater freedom to tail the arbitration procedure for their specific cases.

Issue 3 Whether or Not It Is Necessary to Have A China Arbitration Association?

The Arbitration Law anticipated that the China Arbitration Association (CAA) should be created with the status of a legal person, self-regulating the activities of all the arbitration bodies established in the Mainland China. Article 15 of the Arbitration Law empowers the CAA with limited missions, i.e., "in accordance with its charter, supervise arbitration commissions and their members and arbitrators as to whether or not they breach discipline". However, the time-consuming preparatory work for the establishment of the CAA indicates that the things are far from simple. Stemmed from the deeply rooted pro-administration bias, the idea to set up the CAA might have been worthy of re-consideration. With a matured legal system existing, arbitration bodies should not yield to the supervision of an organ of semi-governmental nature, but rather, should be subject to the judicial supervision by the courts of law and consecutive assessment from the parties and the society.

Issue 4 Whether or Not the "Writing" Requirement Should Be Interpreted Liberally?

The UNCITRAL Working Group on International Arbitration and Conciliation is currently working on drawing up some model provisions as regard to the written form of arbitration agreement, in light of the latest development of arbitration as a consequence of widespread national reform in the regime of arbitration. Amongst others, the 1996 English Arbitration Act constructively leads a new trend in interpreting the written form of arbitration agreement in an amazingly liberal way, reflecting the inner spirit of party autonomy. The core of this trend is to recognize that the "writing" requirement can be satisfied if the intention of arbitration of the parties can be proved, recorded or accessible by reference to the existence of some sorts of materials,

documents, communications, data message or even conducts of the parties.[7] The traditional perception that a written arbitration agreement must be reached through signing documents or exchanging letters is still prevailing, but no longer the only way. If a written form can be interpreted as such, a non-signatory to arbitration agreement may be found being bound by the arbitration agreement, provided that it is justified to say so according to the surrounding circumstances. The examples alike can be listed in a number of circumstances, as suggested by the UNCITRAL Working Group.[8] In the Mainland China, Articles 402 and 403 of the Contract Law state that the principal should be bound by the contract concluded by and between its trade agent and the third party, even if the principal does not sign on the contract and the trade agent signs the contract by his own name. The immediate question of operation of Articles 402 and 403 will be that one may doubt whether or not the principal, a non-signatory to the arbitration agreement contained in the contract, should be bound by the arbitration agreement. The 1958 New York Convention and the 1995 Arbitration Law do not provide with clear answer to this question. From perspective of commercial safety and certainty, it is highly desirable to find that the arbitration agreement is binding upon the principal as well. In a word, it would not adventure to say that an arbitration law were soon to be outdated should the "writing" requirement not be interpreted liberally.

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[7] The UNCITRAL Working Group on the International Commercial Arbitration proposed model legislative provisions as to liberally interpret the standards of "writing" requirement as follows: "Writing" included any form that provide a tangible record of the agreement or is otherwise accessible as a data message so as to be usable for subsequent reference. *See*, UNCITRAL, A/CN.9/WG.II.WP.118, 6 February 2002.

[8] The UNCITRAL Working Group on the International Commercial Arbitration used to consider that a written arbitration agreement may be interpreted in presence in the following circumstances: (a) A contract containing an arbitration clause is formed by one party sending written terms to the other, which performs its bargain under the contract without returning or making any other "exchange" in writing in relation to the terms of the contract; (b) A contract containing an arbitration clause is formed on the basis of the contract text proposed by one party, which is not explicitly accepted in writing by the other party, but the other party refers in writing to that contract in subsequent correspondence, invoice or letter of credit by mentioning, for example, its date or contract number; (c) A contract is concluded through a broker who issues the text evidencing what the parties have agreed upon, including the arbitration clause, without there being any direct written communications between the parties; (d) Reference in an oral agreement to a written set of terms, which may be in standard form, that contain an arbitration agreement; (e) Bills of lading which incorporate the terms of the underlying charterparty by reference; (f) A series of contracts entered into between the same parties in a course of dealing, where previous contracts have included valid arbitration agreements but the contract in question has not been evidenced by a signed writing or there has been no exchange of writings for the contract; (g) The original contract contains a validly concluded arbitration clause, but there is no arbitration clause in an addendum to the contract, an extension of the contract, a contract novation or a settlement agreement relating to the contract (such a "further" contract may have been concluded orally or in writing); (h) A bill of lading containing an arbitration clause that is not signed by the shipper or the subsequent holder; (i) Third party rights and obligations under arbitration agreements in contracts which bestow benefits on third party beneficiaries or stipulation in favour of a third party (*stipulation pour autrui*); (j) Third party rights and obligations under arbitration agreements following the assignment or novation of the underlying contract to the third party; (k) Third party rights and obligations under arbitration agreements where the third party exercises subrogated rights; (l) Rights and obligations under arbitration agreements where interests in contracts are asserted by successors to parties, following the merger or demerger of companies, so that the corporate entity is no longer the same. *See*, UNCITRAL, A/CN/WG.II/Wp.110, 22 September

Issue 5 Whether or Not the Arbitral Tribunal Should Be Delegated With More Powers?

There is a tendency that the arbitrators should be empowered with profound flexibility to deal with the arbitral proceedings, as the arbitrators are considered to be the masters of the arbitration procedure. The flexibility can serve to meet the need of efficient and fast disposing of disputes with less expense. Among the latest developments, it should be noted that in some jurisdictions arbitrators may issue an award ordering interim protection measure or ordering security for the costs, the truncated tribunal may continue with the arbitral proceedings and the arbitral tribunal may order measures to speed up the conducting of proceedings. In the Mainland China the Arbitration Law fails to specify to that effect. More controversially, the Arbitration Law stipulates that the arbitration bodies, not the arbitrators, are competent to decide the validity of arbitration agreement or arbitral jurisdiction. If the Arbitration Law were to be amended, a proper consideration for the foregoing problems is also necessary.

Issue 6 Whether or Not the Costs of Arbitration Should Be Determined by Market Forces?

Article 76 of the Arbitration Law stipulates, "P arties shall pay arbitration fees according to regulations. The methods for charging arbitration fees shall be submitted to the commodity price administration authorities for examination and approval." In the Mainland China, the arbitration bodies collect from parties the costs of arbitration, including the administration fees for the arbitration bodies and the expenses and remunerations for the arbitrators. As confirmed and demonstrated by Annex 4 to the Protocol on the Accession of the People's Republic of China, professional services charges, including architectural and engineering services, legal services, asset assessment services, authentication, arbitration, notarization and inspection, are subject to government guidance pricing. [9] During the negotiation for China's entry into the WTO, some members requested that China undertake specific commitments concerning its system of state pricing. In particular, those members stated that China should allow prices for trade goods and services in every sector to be determined by market forces, and multi-tier pricing practices for such goods and services should be eliminated. The

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[9] In China there are presently three types of prices; government price, government guidance price and market-regulated price.

representative of China stated that the government guidance price mechanism was a more flexible form of pricing, which could be floating at request.[10]

The concern with the pricing system is not meaningless for arbitration. In developed countries market forces determine the rates of fees charging, and this mechanism may serve to find high-quality arbitrators. Due to shortage of funds under the auspices of government guidance pricing system, arbitrators working with the Chinese arbitration bodies are sometimes complaining that they are poorly paid. This is a big problem. In some cases foreign arbitrators on the Panel simply are not willing to serve as arbitrators given the low remuneration. Whether correct or not, the effect is that, even though many foreigners are on the Panel, it is not easy to get people to agree to serve unless they are paid at an international standard. If China is to support its arbitration bodies to be truly international, the pricing policy must be adjusted to conform to the normal standard.[11]

The foregoing discussion touches on some practical issues relating to arbitration after China's accession to the WTO, from physical and technical angles. Although arbitration has become a favorable method of resolving disputes in the Mainland China, and a great deal of achievements have been made with the tremendous effort from various circles, it is nevertheless necessary to adjust the Arbitration Law, regulations, measures and practice to meet the new situation as well as China's commitments and obligations under the WTO framework. Above all, a change of mind thinking and a shift of conscious notion will pave the way to success.

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[10] *See*, Sections 50 and 54 of the Report of the Working Party on the Accession of China.
[11] T here are also critical suggestions that the panels of arbitrators be recommendatory rather than compulsory.

Seminar on Recent Developments in Arbitration Law in China

Intellectual Property Protection in China After Its Accession to WTO

Mr. LI Yong

Intellectual Property Protection in China after its Accession to WTO

----- by Yong LI

Abstract:

1. Intellectual property laws in China
2. The judicial and administrative authorities responsible for intellectual property protection in China
3. Major revisions to the Chinese intellectual property laws to accommodate China's entry to WTO
4. Several issues concerning the civil procedures in respect of intellectual property cases
5. Administrative protection of intellectual property rights

I. Intellectual Property Laws in China

Intellectual property rights protection system was not established in China until the early 80's, when China carried out its Opening-Up policy. So compared with the intellectual property protection systems in many other countries, it is still very young. Over the past decade, however, it has developed into a quite sound, mature and complete system, including the following:

1. Chinese Trademark Law, enforced in 1983, revised in 1993, 1995 and 2001
2. Chinese Patent Law, enforced in 1994, revised in 1993 and 2001
3. Chinese Copyright Law, enforced in 1991, revised in 2001
4. Chinese Anti-unfair competition Law, enforced in 1993
5. Regulations on the Protection of Computer Software, enforced in 1991, revised in 2001
6. Regulations on the Protection of Integrated Circuit Design, enforced in October 2001
7. Regulations on Customs Intellectual Property Protection, enforced in 1995
8. Regulation on the Protection of New Plant Varieties, enforced in 1997
9. Other relevant laws and regulations: The Civil Procedure Law of PRC, The Criminal Law of PRC, The Contract Law of PRC, The Law of Succession of PRC, Tax Law of PRC, Advertisement Law of PRC, Provisions on Administration of Enterprise Name Regulation, etc.

With the establishment of China's intellectual property system, China has gradually become a contracting party to most of the international conventions and treaties regarding intellectual property protection, which also constitute an important portion

of Chinese intellectual property system. The IP-related conventions and treaties that China has joined in as a member nation include:

1. Paris Convention for the Protection of Industry Property
2. Bern Convention for the Protection of Literature and Artistic Works
3. Patent Cooperation Treaty
4. Madrid Agreement Concerning the International Registration of Marks
5. Locarno Agreement Establishing an International Classification for Industrial Designs
6. Strasbourg Agreement Concerning the International Patent Classification
7. Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure
8. International Union for the Protection of New Varieties of Plants
9. Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms
10. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

II. The Judicial and Administrative Authorities Responsible for Intellectual Property Protection in China

1. The People's Court

The people's courts in China are classified as four levels. According to the provisions on territorial jurisdiction, jurisdiction by level and exclusive jurisdiction in the Civil Procedure Law, courts at different levels bear different duties in IP rights affirmation and infringement disputes hearing.

(1) The Supreme People's Court

The Third Division of the SPC (the former Intellectual Property Division) is responsible for intellectual property cases hearing.

(2) The Higher People's Court

The Higher People's Courts are at the provisional level.

(3) The Intermediate People's Court

There are currently more than 300 intermediate courts around China, which usually contain intellectual property divisions.

(4) The Basic People's Court

The Basic People's Courts are local, situated in every county and district in a city. Some of them contain intellectual property divisions.

2. The State Intellectual Property Office (SIPO)

The SIPO (Chinese Patent Office) is mainly in charge of the examination of patent applications and the grant of patent right.

3. Chinese Trademark Office

Directly led by the State Administration for Industry and Commerce, it is responsible for the examination of trademark registration applications and the approval of trademark registration.

4. Chinese Copyright Office

Directly led by the State Press and Publication Office, it is assigned to administer the copyright related matters nationwide.

5. State Customs

It is responsible for custom recordal of intellectual property rights.

6. State Agricultural Ministry and State Forestry Ministry

They accept, examine and grant the applications for new plant varieties.

7. Local patent administrative authorities

The local patent administrative authorities handle patent infringement disputes, investigate and handle patent counterfeit and mediate patent disputes, under the guidelines of the SIPO.

8. The local administrations for industry and commerce

Led by the State Administration of Industry and Commerce (AIC), the local AICs investigate and handle trademark infringement and mediate trademark infringement disputes. The local AICs are also responsible for the supervision, inspection and punishment of unfair competitions acts, handling commercial confusion and trade secret offenses, and also the registration and administration of enterprise names.

9. Local copyright administrative authorities

Led by the State Copyright Office, the local copyright administrative authorities

handle copyright infringements.

10. Local customs

Local customs are responsible for the investigation and handling of suspected infringement goods for import and export.

11. State Quality Supervision and Inspection and Quarantine Bureau and local technology supervision bureaus

The State Quality Supervision Bureau is responsible for the supervision, inspection and quarantine of products nationwide. Local technology supervision bureaus are responsible for cracking down the production of counterfeit goods, under the leadership of the State Quality Inspection Bureau.

III. Major Revisions to the Intellectual Property Laws to Accommodate to China's accession to WTO

1. Revisions to the Patent Law

(1) Protection scope widened

The new Patent Law introduces the provision of "offering to sale".

(2) Ban on the "legal" use of illegal goods.

The old Patent Law provided that the acts by a third party using or selling infringement products with good faith did not constitute infringement, while the amended Patent Law determines that the claim of being unaware of using or selling infringement goods does constitute infringement, but excusing the infringer from bearing the liability of compensation, if proof of the legal source of the products is provided.

(3) Introduction of pre-litigation measures

The amended patent law allows the patentee to request for preliminary injunction or evidence preservation before litigation, if there is evidence to prove that infringement acts are being done or to be done, and if not stopped immediately, irreparable damages will be incurred.

(4) Legislative method of calculating remedies available

The new patent law provides the principle to calculate remedies: according to the

loss incurred to the patentee by the infringment or the profit received by the infringer from the infringement. When it becomes difficult to determine the loss of the patentee or the profit of the infringer, appropriate times of the royalties for licenses for the patent concerned may be applied.

(5) Introduction of judicial review

The old patent law stipulated that the decisions made by the Patent Reexamination Board in respect of utility model or design are final. To be in line with relevant provisions of TRIPS, the new patent law introduces judicial review for such matters. So decisions of the above kinds are no longer final, but subject to trial by the court.

(6) Duties of the patent administrative authorities

According to the old patent law, patent administrative authorities have the power to order the infringer to stop the infringing acts and compensate for the damages or losses. Under the new patent law, the patent administrative authorities have only the power to order the infringer to stop the infringing acts.

(7) Preventing the abuse of patent right

Under the new patent law, the court may require the plaintiff to submit search report made the patent office, when the patentee for a utility model initiate legal proceedings against infringement.

(8) Conditions for compulsory license

The new patent law provides more strict requirements for compulsory license, requiring the latter invention shall be of important technical advance of considerable economic significance compared with the earlier invention.

2. Major amendments to the Trademark Law

(1) The trademark owner

The amended trademark law allows the individual persons to apply for trademark registration.

(2) Composing elements of a trademarks

The old trademark law allowed only words, devices and their combinations to be registered as trademark. The amended trademark law stipulates that "any signs that are capable of distinguishing the goods of a natural person, legal person or

other organization from those of others, including words, devices, alphabets, digits, three-dimensional signs and combination of such colors as well as any combination of such signs shall be eligible for registration as trademarks".

(3) Explicit definition of trademark

Under the old trademark law, a trademark referred either to a trademark of goods or one for services. The new trademark law also explicitly provides protection to collective marks, certification marks and geographical indications.

(4) Geographical indications

To keep in line with relevant provisions of the TRIPS, the new trademark law prohibit the use or registration of any signs that contain the geographical indications of the products, where is not the place of their origin, and cause likely confusion to the public, except for those already registered with good faith.

(5) Protection to the well-known marks

To better protect the legitimate interests of the owners of well-known marks, the new trademark law explicitly provides the protection to well-known marks. The new trademark law also provides five factors to determine a well-known trademark: (a) the knowledge of the trademark in the relevant sector of the public; (b) duration of the use of the mark; (c) duration, degree and geographic scope of the promotion of the trademark; (d) protection record as a well-known trademark; (e) other factors.

(6) Prohibition to registration of a trademark in bad faith

(7) Explicit provision for claiming priority

(8) Judicial review on administrative decisions

The decisions made by the Trademark Review and Adjudication (TRAB) are no longer final. The parties concerned may initiate legal proceedings with the court.

(9) Administrative actions against trademark infringement

The old trademark law provided that the administrative authorities may have the power to order the infringer to stop infringement and to compensate for the damages. The amended trademark law deprives the administrative authorities from ordering the infringer to compensate for the damages. Under the new law, the administrative authorities, namely the AICs may order the infringer to stop infringing acts, to seize and destroy the infringement goods in question, and to

impose a fine.

(10) Administrative measures against infringing acts

The new law provides four measures of administrative actions against infringing acts: (a) enquiring the interested parties; (b) consulting and copying relevant materials about the interested parties; (c) inspecting the scene; (d) detaining the goods in question.

(11) Trademark infringement remedies

The amended trademark law provides that the amount of the remedies for trademark infringment is determined according to the profit earned by the infringer during the period of infringement, or the losses suffered by the IP owner during the period of infringement, including reasonable expenses to stop infringing acts. When the profit received or the losses suffered become hard to determine, a remedy below 5000, 000 RMB yuan may be imposed.

(12) Provisional measures before litigation

There was no provision as provisional measures in the old trademark law. The amended trademark law stipulates that "the trademark owner or other interested parties may request the people's court to issue preliminary injunction or evidence preservation before litigation, if he/it has evidence to prove that the alleged infringer is conducting or will conduct infringing acts to his/its trademark, and if not stopped timely, irreparable damages will be incurred to the trademark owner or the interested parties". It is also provided that "to stop infringing acts, the trademark owner or the interested parties may request for evidence preservation before litigation, in case that the evidence may be lost or hard to obtain in the future."

3. Major amendments to the Copyright Law

(1) The protectable subject matters widened

The amended copyright law widens the protected subjects, including construction works, model works and acrobatic works.

(2) The scope of protection of copyright widened

The amended copyright law includes the right of rental, the right of spreading information on the Internet and right of compilation. And the right of performance and the right of broadcast are also strengthened in the amended law.

(3) The scope for "reasonable use" limited

According to the amended copyright law, the broadcast station and the TV station may use the released works of others or the published tapes of others, without the permission of the owners, but shall pay reasonable fees for the use.

(4) More power given to the copyright administrative authorities to fight against copyright infringement

Other than the power to stop infringement, to confiscate the illegal income and to impose a fine, the copyright administrative authorities have also the power to destroy the infringing products, seize the material, tools, equipment for making the infringing products.

(5) Explicit provision on infringement remedies

The amended copyright law explicitly provides the method of calculating the amount of remedies, which is provided as not exceeding 500,000 RMB yuan.

(6) Pre-litigation measures

Include preliminary injunction, property preservation and evidence preservation before litigation.

(7) Burden of proof

Under the amended copyright law, the maker, publisher, distributor of the reproduction, the renter of the motion pictures and software will be subject to legal liabilities, if they cannot prove on the legal source of the products.

IV. Several Issues of Civil Procedures in Respect of Intellectual Property Cases

1. Jurisdiction

Jurisdiction by level:

According to the interpretation by the Supreme People's Court in 2001, the first instance of patent disputes shall be subject to the jurisdiction of the Intermediate People's Court in the place where the provisional governments, government of autonomous region or municipal city is located; or the Intermediate People's Courts designated by the Supreme People's Court. At present, the above-mentioned intermediate courts have jurisdiction over patent disputes cases for the first instance. In case some other courts need to hear the patent disputes, they must gain the approval

of the Supreme People's Court first.

About the jurisdiction by level over trademark disputes, the Supreme People's Court recently issued an interpretation. Under this interpretation, the Intermediate People's Court or above shall have the jurisdiction over trademark infringement cases for the first instance, while the Higher People's Court may, according to the practical situations in the area under their jurisdiction and upon the approval of the Supreme People's Court, designate one or two basic people's courts to hear the trademark disputes as first instance courts.

With regard to the jurisdiction by level of copyright related and other intellectual property cases, the basic people's courts shall have jurisdiction as courts of first instance over civil cases, unless otherwise stipulated in the laws. For major cases involving foreign interests and cases that have major impact in the area under their jurisdiction, the intermediate courts shall be courts of first instance. The higher people's courts shall have jurisdiction as courts of first instance over cases that have major impact in the areas under their jurisdiction.

Territorial Jurisdiction:

According the Civil Procedure Law and the relevant interpretations issued by the Supreme People's Court, a lawsuit initiated for an infringing act shall be under the jurisdiction of the people's court in the place where the infringing act took place or where the defendant has his domicile. The places where the infringing acts took place shall be classified as the places where the infringing acts were undertaken and the places where the infringing results took place.

With regard to the disputes related to Internet, relevant judicial interpretations by the Supreme People's Court provide that the courts in the place where the infringing acts took place or where the defendant has his domicile shall act as courts of first instance. And the places where the infringing acts took place include the places where the alleged network servers or computer terminals are located. When it is hard to determine the place where the infringing acts took place or where the defendant has his domicile, the place where the computer terminals and other relevant equipment, on which the plaintiff found the infringing contents, are located may be deemed as the place where the infringing acts tool place.

2. Actions Before Litigation

Although the Chinese Civil Procedure Law provides provisions on pre-litigation property preservation, it does not have any provisions on preliminary injunction on infringing acts before litigation. To stop the infringing acts timely, and also to meet the requirements of WTO, amended Chinese Patent Law, Trademark Law and Copyright Law introduce the provisions on pleliminary actions before litigation,

according to which, the pre-litigation actions taken by the court in respect of intellectual property lawsuits mainly include injunction on infringing acts and property preservation.

According to the above-mentioned laws and the Civil Procedure Law, the interested parties, requesting for pre-litigation measures, shall provide security. The people's court must make a decision within 48 hours upon accepting the applications. Where the applicant fails to bring a lawsuit to the court within 15 days after the court decides to take actions, the court shall release the injunction. The decision to impose preliminary actions shall be carried out immediately. If the alleged infringer provides security, the court shall release the actions. If the application is wrong, the applicant shall indemnify the losses incurred to the alleged infringer. In case the interested parties are not satisfied with the decision of preliminary actions, they can request for a review, during which the actions will not be suspended.

3. Evidence

Evidence is an important issue in intellectual property lawsuits. With no evidence law in China, there are only some principles in the Civil Procedure Law to rely on. So it is no wonder there occasionally occur some situations of ambiguity. To fix this, the Supreme People's Court issued in 2001 the "Some Provisions Regarding Evidence in Civil Procedures", bringing great impact to the civil proceedings. These provisions provide some guidelines for the court to properly acknowledge the facts of the lawsuits, to hear the cases fairly and timely, and safeguard the legal rights of the interested parties.

With respect to the burden of proof, the Interpretation of the Supreme Court stipulates that the interested parties shall bear the burden of proof for the facts to support his/its claim or the facts to rebut the claim of the plaintiff. When it becomes difficult for the interested parties to collect the evidence, they may request the court to carry out the investigation and evidence collection. For patent disputes regarding a new patent process, the entity or the individual making the same products shall have the burden of proof, providing evidence to prove that the products were made with a different process. In case that the burden of proof is impossible to decide, the court may, in accordance with the principles of fairness, honesty and credit, decide who shall bear the burden of proof.

About the investigation and evidence collection, the Interpretation regulates that the court shall, upon request of the applicant, investigate and collect evidence. With respect to the evidence that is preserved by competent authorities and cannot be referred to without the involvement of the court, or the evidence that involves state secrets, trade secrets or the private affairs of individuals, or the evidence that the interested party are unable to obtain themselves because of objective reasons, the

interested parties may request the court to investigate and collect the evidence.

With regard to the time limit for submitting evidence, the Interpretation provides that the court shall send the notification on burden of proof in company with the notification on case acceptance and the notification on response to prosecution. The notification on burden of proof should state clearly the principle for deciding the burden of proof and the requirement thereof, the conditions under which the interested parties may request the court to investigate and collect evidence, the time limit for submitting the evidence and legal results of missing the deadline. The time limit for submitting evidence shall be at lest 30 days. The time limit can also be determined by agreement of the parties concerned with the approval of the court. In case that evidence is not submitted after the deadline, it will be deemed as giving up the right. The evidence submitted after the deadline will not be taken into the court for cross-examination, unless the other party agrees.

About the cross-examination of evidence, the Interpretation stipulates that evidence shall be presented in the court and cross-examined by the parties. The court does not rely on evidence that is not cross-examined for ascertaining the facts.

About the examination of evidence, the Interpretation stipulates that the evidence raised by one party will be consider as justifying if no sufficient evidence is provided by the other party to reject it. The expert conclusions made by an authentication department appointed by the court will be deemed as justifying if no counter-evidence or reason is provided to refute it. In case both parties raise contrary evidence, but either of which is sufficient to invalidate the evidence of the other side, the court shall affirm the evidence that is more justifying.

4. Remedies

For damages of patent infringement, the patent law provides three methods of calculation: (a) the losses suffered by the right holder due to infringement; (b) the profits gained by the infringer from infringement; (c) if it is difficult to determine the damages in the above two ways, appropriate times of the royalties for licenses for the patent concerned may be applied. For those that may refer to royalty for license, one to three times of the loyalties of the license for the patent may be used to determined the remedies, while in case with no royalty for license to be referred to, the court may determined the remedies from RMB 5,000 to RMB 300, 000, not exceeding RMB 500,000.

About the damages of trademark infringement, the trademark law also provides three methods of calculation: (a) the profits gained by the infringer through infringement during the period of infringement; (b) the losses incurred to the infringee through infringement during the period of infringement (including the reasonable expenses of the parties infringed for stopping the infringing acts); (c) where the above items are

hard to determine, the court may according to the case, determine a remedy of no more than RMB 500,000.

With regard to the damages of copyright infringment, the copyright law provides three methods including: (a) the actual losses suffered by the right holder; (b) the illegal income of the infringer, when the actual losses are hard to determine; the above two remedies shall also include the reasonable expenses of the right holder for stopping the infringing acts; (c) where it is hard to determined in the above two ways, the court may according to the case decide a remedy below RMB500,000.

5. Suspension of the lawsuit in infringement cases

During a patent infringement lawsuit, the defendant usually claims invalidation of the patent concerned to refute the plaintiff. So it often occurs to the court and the interested parties that the proceedings have to be suspended. The Supreme People's Court issued relevant interpretations regarding this matter, which provide the following basic principles: (1) where the defendant requests for suspension, he/it shall file invalidation of the patent concerned within the time limit of submitting the defense; (2) the court may not suspend the proceedings, in cases of infringement to patent of invention, infringement disputes in respect of the patents of utility models or designs that is sustained by the Patent Reexamination Board; (3) for lawsuits regarding infringement to patents of utility models or designs, if the defendant requests for suspension during the period of defense, the court shall suspend the proceedings, except for some special situations; (4) when the court decides to suspend the proceedings, the court may decide to take provisional injunction at the same time, if the patentee or other interested parties request to order the defendant to stop relevant acts or to take other measures to prevent the continuity of damage, and provide security.

6. Attorney Fees

In order to carry out the principle of full damages in intellectual property infringement, the court may upon the request of the interested parties and according to the case, include the reasonable expenses incurred to the right holder for investigating and stopping the infringing acts into the damages. But it is only upon the request of the right holder that such expenses are to be included in the damages. TRIPS stipulates that the damages "may include appropriate attorneys fees", allowing quite a large space for the member countries to determine by themselves. In case hearing, the court may, according to the case, determine whether the defendant shall compensate the plaintiff for the reasonable amount of attorney fees. But relevant cases show that only in case of intentional infringement, the court would decide that the defendant must indemnify the plaintiff for appropriate attorney fees.

V. Administrative Protection to Intellectual Property

One of the major characters of Chinese intellectual property protection system is the role relevant administrative authorities play in IP protection. It will be more efficient, faster and incur lower cost to use the administrative measures to solve intellectual property disputes. It fully demonstrates that the state governmental agencies are active in dealing with intellectual property disputes.

The Patent Law provides the legal basis for two-channel system in solving patent infringement disputes. For patent infringement, the patentee or the interested parties may bring a lawsuit to the people's court or request the patent administrative authorities to take an action. The patent administrative authority, when determining that infringement is constituted, may order the infringer to stop the infringing acts immediately. Where the interested party is not satisfied with the decision, he/it may initiate the legal proceedings in the people's court within 15 days upon receipt of the notification, according to the Administrative Procedure Law of People's Republic of China. If the infringer does not bring a lawsuit to the court, nor does he/it stop the infringing acts within the above time limit, the patent administrative authorities may request the court to enforce the order.

Similar to the patent system, the Trademark Law also provides for a double-channel system for handling trademark infringement disputes. When trademark infringement takes place, the trademark registrant or the interested parties may initiate a lawsuit in the people's court or go directly to the administrative offices for industry and commerce. The administrative offices for industry and commerce have the power to order the alleged infringer to stop the infringing acts, seize and destroy the infringing products and the tools for making the infringing products and counterfeiting registered trademarks, and impose a fine, when they decide that infringement is constituted. If not satisfied with the decision, the interested parties may, within 15 days upon receipt of the notification, bring a lawsuit to the people's court in accordance with the Administrative Procedure Law of People's Republic of China. Compared with the patent administrative authorities, the administrative offices for industry and commerce have greater power in handling trademark infringement.

The Copyright Law also provides that for copyright infringing acts that also are detrimental to the public interests, the copyright administrative authorities have the power to order an immediate cessation of infringing acts, to confiscate illegal income, seize and destroy infringing duplicates and to impose a fine. If the case is serious, the copyright administration may also confiscate the materials, instruments and equipment mainly for making infringing duplicates.

According to the provisions on customs protection of intellectual property, any product that infringes Chinese intellectual property right shall be banned for import or export. This duty is assigned to The State Customs and local customs. The State Customs accepts and permits the applications for recordal, while local customs decide

for the seizure of suspected infringing goods upon the request the right holders. The customs may also act on its initiative to seize goods suspected for infringement.

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Seminar on Recent Developments in Arbitration Law in China

加入 **WTO** 後中國的知識產權保護

李勇先生

加入 WTO 后中国的知识产权保护

李勇

（2002 年 3 月 25 日）

内容提要：

1、中国的知识产权法律框架

2、中国负责知识产权保护的司法和行政部门

3、为了适应加入 WTO 中国知识产权法律的主要修改（专利法、商标法、著作权法）

4、知识产权民事诉讼若干问题（管辖、证据、诉前措施、赔偿问题、诉讼中止、律师费）

5、域名争议问题

6、知识产权的行政保护

7、知识产权侵权的刑事责任

一、中国的知识产权立法

中国的知识产权保护制度始建于中国改革开发后的八十年代初期，与世界上许多国家相比，中国的知识产权保护制度非常年轻，但是经过短短的十几年，中国的知识产权法律已经非常健全、成熟和完善。以下法律法规构成了中国的知识产权法律框架：

1、《中国商标法》，1983 年实施，1993 年、1995 年、2001 年三次修改。
2、《中国专利法》，1994 年实施，1993 年和 2001 年两次修改。
3、《中国著作权法》，1991 年实施，2001 年修改。
4、《中国反不正当竞争法》，1993 年实施。
5、《计算机软件保护条例》，1991 年实施，2001 年修改。
6、《集成电路布图设计保护条例》，2001 年 10 月实施。
7、《海关知识产权保护条例》，1995 年实施。
8、《植物新品种保护条例》，1997 年实施。
9、其它有关的法律法规：《民法通则》、《刑法》、《合同法》、《继承法》、《税法》、《广告法》、《企业名称登记条例》、《技术引进合同条例》等等。

中国建立知识产权制度以来，已经陆续加入了国际上大多数重要的有关知识产权保护的国际条约，中国对这些国际条约的承诺构成了中国知识产权保护系统的重要内容。中国已经加入的有关知识产权的国际条约包括：

1、《保护知识产权巴黎公约》（Paris Convention）
2、《保护文学艺术伯尔尼公约》(Bern Convention)
3、《专利合作条约》(PCT)
4、《商标国际注册马德里条约》(Madrid Treaty)
5、《工业品外观设计国际分类协定》
6、《专利国际分类协定》
7、《微生物备案布达佩斯条约》(Budapest Treaty)
8、《保护植物新品种国际公约》
9、《录音制品日内瓦公约》

10《与贸易有关的知识产权协议》（TRIPS）

二、 中国的知识产权司法机关和行政部门

1、 人民法院。中国的人民法院共有四级。按照《民事诉讼法》的地域、级别和专属管辖的规定，各级法院负责有关知识产权权利的确定和侵权纠纷的审理工作。

（1） 最高人民法院。最高人民法院民事审判第三庭（原知识产权庭）负责知识产权审判工作。

（2） 高级人民法院。全国各省、直辖市、自治区设立高级人民法院。高级人民法院设有知识产权庭。

（3） 中级人民法院。中国目前有 300 多个中级人民法院，分布在全国。中级人民法院一般设有知识产权庭。

（4） 基层人民法院。各个县和城市的区设有基层人民法院。有些基层人民法院设有知识产权庭。

2、 国家知识产权局。按照目前的现状，国家知识产权局下属机构主要有中国专利局，它主要负责专利申请的审查和专利权的授予工作。

3、 中国商标局。中国商标局是国家工商局的下属机构，它主要负责商标注册申请的审查和商标权的授予工作。

4、 中国版权局。中国版权局是国家新闻出版署的下属机构，它主要负责全国的版权行政管理工作。

5、 国家海关总署。中国海关总署负责知识产权权利人的权利海关备案工作。

6、 国家农业部、林业部。负责植物新品种权的申请受理、审查和批准。

7、 各省、市专利管理部门。各地专利管理部门受国家知识产权局指导，负责处理专利侵权纠纷、查处假冒专利行为、调解专利纠纷。

8、 各省、市、县工商局。各地工商局受国家工商局指导，负责调查和处理商标侵权案件，调解商标侵权纠纷。各地工商局还负责监督、检查、处罚不正当竞争行为，处理商业混淆行为和侵犯商业秘密的行为。各地工商局还负责企业名称登记和管理工作。

9、 各省、市版权行政管理部门。各地版权行政管理部门受国家版权局指导，负责处理版权侵权行为。

10、 各地海关。各地海关负责调查和处理涉嫌侵权进出口货物。

11、 国家质量监督检验检疫局和各地技术监督局。国家质检局负责全国产品质量监督检验检疫工作，各地技术监督局受国家质检局的指导，负责打击“伪劣产品”的非法生产活动。

三、 为了适应加入 WTO 知识产权法律的修改情况

1、 专利法的主要修改：

（1） 扩大了权利范围。原专利法规定的专利权范围是：产品的专利权人有权禁止他人制造、使用、销售、进口专利产品；方法的专利权人有权禁止他人使用专利方法或使用、销售、进口由该方法直接制造的产品。新专利法加入了“*许诺销售权*”（offer to sell）的规定。因此产品专利权人和方法专利权人的权利分别由四项扩大为五项，从而符合了 TRIPS 的有关要求。

（2） 制止非法产品的“合法”使用。原专利法规定第三人善意使用、销售侵权

产品的行为不视为侵权。此种规定与国际上的普遍规定不符，也给侵权人造成可乘之机。按照新专利法规定，第三人在不知道的情况下使用或销售侵权产品仍属于侵权行为，只是在确定赔偿责任时，要求证明产品的来源是否合法，如果可以证明来源合法，则可以免除赔偿责任。

（3） 增加了诉前措施的规定。原专利法没有诉前措施的规定，与 TRIPS 关于*临时措施*的要求不符。新专利法规定，专利权人有证据证明他人正在实施或即将实施侵权行为，如果不及时制止将会带来难以弥补的损害，可以在起诉前请求法院采取责令停止有关行为和财产保全的措施。

（4） 增加了侵权损害赔偿计算的规定。原专利法没有规定侵权损害赔偿的计算方法，实践中法院通常采用三种计算原则中的一种：专利权人因侵权所受到的损失、侵权人因实施侵权行为所获取的利益、该专利的合理的许可使用费的数额。其中第三种方法在实践中发现不利于专利权保护。新专利法明确规定了损害赔偿的计算原则：侵犯专利权的赔偿数额，按照权利人因被侵权所受到的损失或者侵权人因侵权所获得的利益确定；被侵权人的损失或者侵权人获得的利益难以确定的，参照该专利许可使用费的倍数合理确定。

（5） *法院的终审权*。原专利法规定，对于实用新型和外观设计的复审决定和无效决定是终局决定。为了与 TRIPS 的要求相符，新专利法规定对于实用新型和外观设计的确权和无效问题均由法院终审。

（6） 专利管理部门的职权。原专利法规定专利管理部门有权责令侵权人停止侵权行为并赔偿损失。新专利法将专利管理部门的行政处理职权限定在责令停止侵权行为。

（7） 防止专利权人滥用权利。由于实用新型专利不进行实质审查，为了防止实用新型专利权人滥用权利，阻挠他人正常的生产经营活动，新专利法规定，实用新型专利权人提起侵权诉讼时，法院可以要求专利权人提供专利局做出的检索报告。

（8） 强制许可的条件。原专利法规定的强制许可包括合理条件强制许可、公共利益强制许可、依存专利强制许可三种情况。新专利法将第三种情况作了限定，要求后一发明比前一发明“*具有显著经济效益的重大技术进步*”，从而符合了 TRIPS 的要求。

（9） 其他修改：明确对职务发明人给予奖励和报酬（实施发明专利时报酬为利润的 2%，许可发明专利时为许可费的 10%）；取消撤销程序；简化向外国申请专利的程序（不必有关部门的批准）；增加国际申请（PCT）的有关规定；审批程序的有关修改（主动修改申请文件、提交外国检索资料和审查结果、专利权生效、诉讼时效、无效程序第三人、外观设计专利性条件等等）。

2、 商标法的主要修改

（1） 商标权主体。原商标法规定只有法人和个体工商户可以申请注册商标，新商标法将商标权主体扩大到自然人，规定自然人可以申请注册商标。

（2） 商标构成要素。原商标法规定文字、图形或其组合可以申请注册商标。新商标法修改为任何能够将自然人、法人或者其他组织的商品与他人的商品区别开的可视性标志，包括*文字、图形、字母、数字、三维标志和颜色组合，以及上述要素的组合*都可以申请注册商标。

（3） 商标的明确定义。原商标法所说的商标指的是商品商标和服务商标。按照

新商标法的规定，注册商标包括商品商标、服务商标、集体商标、证明商标。集体商标是指团体、协会或者其他组织名义注册，供该组织成员在商事活动中使用，以表明使用者在该组织中成员资格的标志。证明商标是指对某种商品或者服务具有监督能力的组织所控制,而由该组织以外的单位或者个人使用于其商品或者服务,用以证明该商品或者服务的原地产、原料、制造方法、质量或者其他特定品质的标志。

（4） *地理标志*。地理标志用来标示某商品来源于某地区，该商品特定质量、信誉或者其他的特征主要由该地区的自然因素或者人为因素所决定。为了符合 TRIPS 的有关规定，新商标法规定，商标中含有商品的地理标志，而该商品并非来源于该标志所标示的地区，误导共众的，不予注册并禁止使用（已经善意取得注册的继续有效）。

（5） *驰名商标的保护*。TRIPS 和《巴黎公约》都规定了对驰名商标的保护，而原商标法对此未作规定。实践当中，我国已经按照《巴黎公约》的要求对驰名商标进行保护（参见 1993 年商标评审委员会对于美国哈佛大学异议某公司申请注册“Harvard”商标案，处理结果：不予核准注册。另参见 1994 年重庆工商局处理重庆大足餐巾纸厂使用“Marlboro”作为商品包装和装潢案，处理结果：停止生产、销毁产品、罚款）。为切实保护驰名商标权利人的利益，新商标法做出了明确规定：“就相同或者类似商品申请注册的商标是复制、摹仿或者翻译他人未在中国注册的驰名商标，容易导致混淆的，不予注册禁止使用。”“就不相同或者不相类似商品申请注册的商标是复制、摹仿或者翻译他人已经在中国注册的驰名商标，误导公众，致使该驰名商标所有人的利益可能受到损害的，不予注册并禁止使用”。新商标法还规定了认定驰名商标的五项因素：（一）*相关公众对该商标的知晓程度*；（二）该商标使用的持续时间；（三）该商标的任何宣传工作的持续时间、程度和地理范围；（四）该商标作为驰名商标受保护的记录；（五）该商标驰名的其他因素。

（6） 禁止恶意抢先注册他人商标。新商标法坚持“注册原则”和“申请在先原则”。同时，对申请在先原则作了合理调整。强调申请在先必须建立在诚实信用的原则上，不允许窃取他人已经使用并且已经建立信誉的商标作为自己的商标申请注册。规定“申请商标注册*不得损害他人现有的在先权利*，也不得以不正当手段抢先注册他人已经使用并有一定影响的商标。”他人的在先权利主要指他人合法的其他民事权利。如姓名权、肖像权、著作权、外观设计专用权以及企业字号等。

（7） 增加了优先权的规定。原商标法没有关于优先权的规定。原商标法实施细则对优先权作的规定也不完善，没有涉及展览会临时保护的规定。新商标法进一步完善关于优先权的现行规定，

（8） 对*行政裁定的司法审查*问题。原商标法规定，商标评审委员会所作的有关不服驳回的复审裁定、商标异议的复审裁定、维持或撤销注册商标的裁定、对商标争议的裁定是终局裁定。新商标法增加了当事人可以就上述裁定向人民法院提起诉讼的规定。

（9） 关于商标侵权的行政处理。原商标法规定了对侵犯商标权的行政处理职权，包括责令停止侵权行为和赔偿损失。新商标法取消了行政部门责令赔偿损失的权力。按照 TRIPS 的规定，为了对侵权活动造成有效威慑，*司法当局有权在不进行任何补偿的情况下，将已经发现正处于侵权状态的商品排除*

出商业渠道，或者予以销毁。据此，新商标法规定，工商行政管理部门处理侵权案件时认定侵权行为成立的，可以责令立即停止侵权行为，没收、销毁侵权商品，并可处以罚款。

（10） 行政部门查处侵权行为的手段。原商标法对于工商行政管理部门查处侵权行为的手段未作规定，新商标法则明确规定了行政部门的四种侵权查处权力：（一）询问有关当事人，调查有关情况；（二）查阅、复制当事人的有关合同、发票、帐簿及其他资料；（三）对当事人涉嫌侵权活动的场所实施现场检查；（四）查封或者扣押侵犯他人商标专用权的物品。

（11） 商标侵权赔偿数额。原商标法规定商标侵权的赔偿数额为侵权人在侵权期间因侵权所获得的利润或者被侵权人在被侵权期间因被侵权所受到的损失。新商标法规定，侵犯商标专用权的赔偿数额，为侵权人在侵权期间因侵权所获得的利益，或者被侵权人在被侵权期间因被侵权所受到的损失，包括被侵权人为制止侵权行为所支付的合理开支。在侵权人所得利益或者被侵权人因被侵权所受损失难以确定时，新商标法规定了五十万元以下的法定赔偿额。

（12） 诉前临时措施。原商标法未规定诉前措施，新商标法增加规定：“商标注册人或者利害关系人有证据证明他人正在实施或者即将实施侵犯其注册商标专用权的行为，如不及时制止，将会使其合法权益受到难以弥补的损害的，可以在起诉前向人民法院申请采取责令停止有关行为和财产保全的措施。”新商标法还规定：“为制止侵权行为，在证据可能灭失或者以后难以取得的情况下，商标注册人或者利害关系人可以在起诉前向人民法院申请保全证据。”

3、 著作权法的主要修改

（1） 扩大了著作权客体的范围。新著作权法的著作权客体范围中加入了建筑作品、模型作品、杂技艺术作品。

（2） 扩大了著作权的权利范围。新著作权法加入了*出租权*、信息网络传播权、*汇编权*。新著作权法加强了表演权和广播权的保护，规定：用各种手段公开播送作品都属于表演；用无线方式、有线方式、扩音器和其他工具向公众传播作品都是广播。新著作权法明确了汇编作品的定义：汇编若干作品、作品的片断或者不构成作品的数据或者其他材料，对其内容的选择或者编排体现独创性的作品是汇编作品。据此某些数据库作品可以得到版权保护。

（3） “合理使用”的范围得到限制。原著作权法规定在非营业性播放已经出版的音乐作品时广播电台、电视台不用经著作权人许可，不必付报酬。新著作权法规定，广播电台、电视台播放他人已经发表的作品和已经出版的录音制品，可以不经许可，但是应当支付报酬。

（4） 著作权行政管理部门具有了更强的查处侵权的权力。著作权行政管理部门除了可以责令停止侵权没收非法所得和罚款外，还有权销毁侵权品、没收用于制作侵权品的材料、工具、设备等等。

（5） 明确了著作权侵权将承担的赔偿责任。新著作权法明确规定了民事赔偿数额的计算方式，规定了法定赔偿的数额（50 万元以下）。

（6） 规定了诉前措施（停止侵权行为和诉前财产保全和证据保全）。

（7） 举证责任问题。新著作权法规定，复制品的制作者或出版者不能证明有合法授权的，复制品的发行者或影视录音作品、软件作品复制品的出租者不能证明其发行、出租的复制品有合法来源的，应当承担法律责任。

四、 知识产权民事诉讼若干问题

1、 管辖问题

民事诉讼法规定，“因侵权行为提起的诉讼，由侵权行为地或者被告所在地人民法院管辖”。民诉法该规定是知识产权侵权纠纷关于管辖问题所应依据的基本原则

为了具体确定某些特定知识产权案件的级别管辖问题，最高人民法院于 1992 年作出了有关司法解释，该司法解释的规定，专利纠纷案件由最高人民法院确定的中级人民法院管辖。最高人民法院于 2001 年的司法解释《专利纠纷若干规定》进而又规定，专利纠纷的一审案件由各省、自治区、直辖市人民政府所在地的中级人民法院和最高人民法院指定的中级人民法院管辖。采用指定管辖方式，将一些具备审判实力的中级法院指定为专利案件的一审法院，符合专利审判技术性强、审理难度大的实际情况，目的在于保障统一执法和办案质量，也符合国际上的通行作法。 目前，各省、自治区、直辖市政府所在地中级人民法院和最高人民法院已经指定的中级人民法院，继续作为专利纠纷案件的一审法院，如果其他法院因本地区实际情况需要取得专利纠纷案件管辖权，则应当首先取得最高人民法院指定。 关于商标侵权纠纷案件的级别管辖问题，最高人民法院近日发出了《商标案件管辖和法律适用问题的解释》，按照该解释，商标侵权案件的第一审案件由中级以上人民法院管辖，各高级人民法院可以根据本辖区的实际情况，经最高人民法院批准，在较大城市确定 1—2 个基层人民法院受理一审案件。关于版权等其他类型的知识产权侵权案件的级别管辖，应当按照民诉法有关规定处理。也就是说，一般案件由基层法院管辖，重大涉外案件和本辖区有重大影响的案件由中级法院管辖，在全国有重大影响的案件和认为本院应管辖的案件由最高人民法院管辖。根据有关司法解释，各高级人民法院可以根据案情繁简、诉讼标的金额大小、在当地的影响等情况，提出本辖区一审案件的级别管辖意见，报最高人民法院批准后实施。

关于知识产权侵权案件的地域管辖问题，最高人民法院《专利纠纷若干规定》确定了由侵权行为地或者被告所在地法院管辖专利侵权案件，并且把专利侵权行为地分为实施地和结果发生地两种。所谓实施地包括：被控侵犯发明、实用新型专利权的产品的制造、使用、许诺销售、销售、进口等行为的实施地；专利方法使用行为的实施地；依照该专利方法直接获得的产品的使用、许诺销售、销售、进口等行为的实施地；外观设计专利产品的制造、销售、进口等行为的实施地；假冒他人专利的行为实施地。所谓结果发生地是上述侵权行为的侵权结果发生地。

在实践当中，被控侵权产品的制造地、销售地法院的管辖权问题经常引起当事人之间发生争议，各地法院的掌握也不仅一致。现在根据最高人民法院的《专利纠纷若干规定》，如果原告仅对侵权产品制造者提起诉讼，未起诉销售者，侵权产品制造地与销售地不一致的，制造地人民法院有管辖权；如果以制造者与销售者为共同被告起诉的，销售地人民法院有管辖权。 销售者是制造者的分支机构，原告在销售地起诉侵权产品制造者制造、销售行为的，销售地人民法院有管辖权。

针对与网络有关的著作权侵权纠纷的不断产生的局面，最高人民法院的有关司法解释规定，网络著作权纠纷案件由侵权行为地法院或者被告所在地法院管辖。侵权行为地包括实施被控侵权行为的网络服务器、计算机终端等设备所在地。对难以确定侵权行为地和被告所在地的，原告发现侵权内容的计算机终端等设备所在地可以视为侵权行为地。

2、诉前措施

中国的民诉法虽然有诉前财产保全的规定，但是没有关于诉前停止侵权行为的具体规定。为了及时制止侵权行为，同时为了符合 WTO 有关要求，中国专利法、商标法和版权法在修改时都加入了有关诉前措施的规定。根据以上法律规定，知识产权侵权诉讼中的诉前措施

主要包括责令停止侵权行为和诉前财产保全两种。

按照上述法律和民诉法有关规定，当事人提出诉前措施请求，应当提供担保。人民法院接受申请后，必须在 48 小时内作出裁定。在法院裁定采取诉前措施后 15 天内不起诉的，法院则会解除诉前措施的裁定。如果裁定采取诉前措施，应当立即开始执行。如果被申请人提供担保，人民法院应当解除诉前措施。如果申请有错误，申请人应当赔偿被申请人因此所遭受的损失。当事人对诉前措施的裁定不服的，可以申请复议一次，但是复议期间不停止裁定的执行。

对于专利侵权案件，最高人民法院于 2001 年 6 月 5 日发出了《诉前停止专利侵权若干规定》，其中规定：责令诉前停止侵权行为的申请应当向有专利侵权案件管辖的人民法院提出；提出申请的利害关系人可以是专利许可合同的被许可人；法院认可合理、有效的保证、抵押等形式提供的担保；停止侵权行为裁定所采取的措施不因被申请人提出反担保解除；人民法院采取停止有关行为或保全证据的措施后 15 日不起诉的人民法院应当解除裁定采取的措施；停止侵权行为的裁定的效力一般维持到终审法律文书生效时，法院也可以确定明确期限，届满时根据申请继续作出裁定；申请诉前停止侵权行为的措施时，可以同时申请证据保全。另外，最高人民法院近日还发出了《诉前停止侵犯商标权行为和保全证据适用法律的解释》，其中的规定与上述关于专利的司法解释大致相同。

3、证据问题

证据问题是知识产权侵权诉讼中的重要问题。由于中国没有证据法，只有民诉法当中的一些原则性规定，所以在诉讼案件中不时出现一些难以明确的情况。针对此，最高人民法院于 2001 年作出了《关于民事诉讼证据的若干规定》。该司法解释的出台是对于民事诉讼产生重大影响的事件，对于保证法院正确认定案件事实，公正及时审理民事案件，保障和便利当事人依法行使诉讼权利，具有重大意义。

关于当事人举证问题，该司法解释规定：当事人对自己提出的诉讼请求所依据的事实或反驳对方诉讼请求所依据的事实有责任提供证据加以证明。当事人因客观原因不能自行收集的证据，可以申请人民法院调查收集。因新产品制造方法发明专利引起的专利侵权诉讼，由制造同样产品的单位或个人对其产品制造方法不同于专利方法承担举证责任。当无法确定举证责任时，人民法院可以根据公平原则和诚实信用原则，综合当事人举证能力等因素确定举证责任的承担。当事人提供证据时，应当提供原件或原物，如果提供有困难，可以提供经法院核对无异的复制件或复制品。当事人提供的证据是在中国以外形成的时，该证据应当经所在国公证机关证明，并经中国驻该国使领馆认证。外文书证应当附具中文译文。

关于人民法院调查收集证据问题，该司法解释规定：人民法院调查收集证据，应当依当事人的申请进行。当证据属于国家有关部门保存并须法院依职权调取的材料，涉及国家机密、商业秘密、个人隐私的材料，当事人确因客观原因不能自行收集的其他材料时，当事人可以申请法院调查收集证据。当事人可以在举证期限内申请鉴定，法院同意后，由双方当事人协商确定有鉴定资格的鉴定机构、鉴定人员，协商不成的，由法院指定。当事人对于法院委托的鉴定部门的鉴定结论有异议申请重新鉴定，如果可以证明鉴定机构或人员不具备鉴定资格、鉴定程序严重违法、鉴定结论明显依据不足、经质证认定不能作为证据使用的其他情形，法院应当准许。一方当事人自行委托有关部门作出的鉴定结论，另一方当事人有证据足以反驳并申请重新鉴定的法院应当准许。

关于举证时限问题，该司法解释规定：法院在送达受理通知书和应诉通知书同时向当事人送达举证通知书，举证通知书载明举证责任分配原则与要求、可以向法院申请调查取证的情形、举证期限及逾期法律后果。举证期限不得少于 30 日。举证期限也可以由当事人协商一致，并经法院认可。逾期不提交证据材料的，视为放弃举证权利。逾期提交的证据材料，除对方当事人同意外法院审理时不组织质证。当事人增加、变更诉讼请求或提出反诉的，应

当在举证期限内提出。当事人在举证期限内提交证据材料确有困难的，应当在期限内申请延期，经批准可以适当延长举证期限。

关于证据交换问题，该司法解释规定：经当事人申请，法院可以组织开庭前交换证据。对于证据较多或复杂疑难案件，法院应当组织当事人在开庭前交换证据。交换证据的时间可以由当事人协商一致并经法院认可，也可以由法院指定。证据交换在审判人员的主持下进行。证据交换一般不超过两次，但是法院认为确有必要再次进行证据交换的除外。当事人举证期满后提供的证据不是新证据的，法院不予采纳。一审程序中的新证据包括当事人一审举证期届满后新发现的证据和确因客观原因无法在举证期限内提供，经法院准许，在延长的期限内仍然无法提供的证据。二审程序的新证据包括一审结束后新发现的证据和当事人一审举证期满前申请法院调查取证未获准许，二审法院经审查认为应当准许并依当事人申请调取的证据。

关于质证问题，该司法解释规定：证据应当在法庭上出示，由当事人质证，未经质证的证据不能作为认定案件事实的依据。在证据交换中认可的证据，经审判人员在庭审时说明后，可以作为依据。质证时应当围绕证据的真实性、关联性、合法性，针对证据证明力有无、证明力大小，进行质疑、说明与辩驳。当事人申请证人出庭作证，应当在举证期满十日前提出，并经法院许可。证人应当出庭作证，接受当事人的质询。证人确有困难不能出庭的，经法院许可，可以提交书面证言或视听材料或通过双向视听传输技术作证。当事人可以向法院申请由一至二名具有专门知识的人员出庭就案件的专门性问题进行说明。

关于证据的审核认定问题，该司法解释规定：一方当事人提出的证据，对方当事人提出异议但是没有足以反驳的相反证据的，法院应当确认其证明力，这些证据包括书证原件或与书证原件核对无误的复印件、照片、副本、节录本；物证原物或与其核对无误的复制件、照片、录象资料等；有其他证据佐证并以合法手段取得的、无疑点的视听资料或与其核对无误的复制件；一方当事人申请法院制作的对物证或现场的勘验笔录。法院委托鉴定部门作出的鉴定结论，当事人没有足以反驳的相反证据和理由的，可以认定其证明力。双方当事人对同一事实分别提出相反证据，但是都没有足够的依据否定对方证据的，法院根据情况对于证明力较大的证据予以确认。诉讼过程中当事人承认的对己方不利的事实和认可的证据，法院应当确认，但是当事人反悔并有相反证据足以推翻的除外。有证据证明一方当事人持有证据无正当理由拒不提供，如果对方当事人主张该证据的内容不利于证据持有人，可以推定成立。数个证据对于同一事实的证明力的认定原则为：国家机关、社会团体依职权制作的公文书证的证明力一般大于其他书证；物证、档案、鉴定结论、勘验笔录或经过公证、登记的书证，证明力一般大于其他书证、视听资料和证人证言；原始证据的证明力一般大于传来证据；直接证据的证明力一般大于间接证据；证人提供的对与其亲属或其他密切关系的当事人有利的证言，证明力一般小于其他证人证言。

4、赔偿问题

虽然《民法通则》规定了十种承担民事责任的主要方式，但是人们最为关心的知识产权侵权的民事责任还是停止侵权行为和赔偿损失这两种。对于专利侵权的赔偿问题，专利法规定了三种赔偿数额的计算方式：一是权利人因侵权所受到的损失；二是侵权人因侵权所获得的利益；第三，当采用以上方式难以确定数额时，则可参照该专利许可使用费的倍数合理确定。为了更加明确赔偿数额的计算，最高人民法院有关司法解释规定权利人因被侵权所受到的损失可以根据专利权人的专利产品因侵权所造成销售量减少的总数乘以每件专利产品的合理利润所得之积计算。权利人销售量减少的总数难以确定的，侵权产品在市场上销售的总数乘以每件专利产品的合理利润所得之积可以视为权利人因被侵权所受到的损失。 侵权人因侵权所获得的利益可以根据该侵权产品在市场上销售的总数乘以每件侵权产品的合理利润所得之积计算。侵权人因侵权所获得的利益一般按照侵权人的营业利润计算，对于完全以

侵权为业的侵权人，可以按照销售利润计算。 被侵权人的损失或者侵权人获得的利益难以确定，有专利许可使用费可以参照的，人民法院可以根据专利权的类别、侵权人侵权的性质和情节、专利许可使用费的数额、该专利许可的性质、范围、时间等因素，参照该专利许可使用费的 1 至 3 倍合理确定赔偿数额；没有专利许可使用费可以参照或者专利许可使用费明显不合理的，人民法院可以根据专利权的类别、侵权人侵权的性质和情节等因素，一般在人民币 5000 元以上 30 万元以下确定赔偿数额，最多不得超过人民币 50 万元。 人民法院根据权利人的请求以及具体案情，可以将权利人因调查、制止侵权所支付的合理费用计算在赔偿数额范围之内。

关于商标侵权的赔偿责任，商标法规定了三种计算方式：一是侵权人在侵权期间因侵权所获得的利益；二是被侵权人在被侵权期间因被侵权所受到的损失（包括被侵权人为了制止侵权行为所支出的合理开支）；第三，如果以上数额难以确定，法院可以根据侵权行为的情节判决给予 50 万元以下的法定赔偿。

关于版权的侵权的赔偿责任问题，著作权法规定了三种方式：第一是侵权人应当按照权利人的实际损失给予赔偿；第二，当实际损失难以计算时，可以按照侵权人的违法所得给予赔偿。以上两种赔偿数额还应当包括权利人为制止侵权行为所支付的合理开支。第三，当权利人的实际损失或者侵权人的违法所得不能确定时，由人民法院根据侵权行为的情节，判决给予 50 万元以下的法定赔偿。

关于可以免除赔偿责任问题，专利法、商标法和著作权法都有特殊规定。专利法规定，为生产经营目的使用或者销售不知道是未经专利权人许可而制造并售出的专利产品或者依照专利方法直接获得的产品，能证明其产品合法来源的，不承担赔偿责任。商标法规定，销售不知道是侵权商品，能证明该商品是合法取得的并说明提供者的，不承担赔偿责任。著作权法规定，复制品的出版者、制作者不能证明其出版、制作有合法授权的，复制品的发行者或者电影作品或者以类似摄制电影的方法创作的作品、计算机软件、录音录像制品的复制品的出租者不能证明其发行、出租的复制品有合法来源的，应当承担法律责任。虽然著作权法的表述与其他两个法律不同，但是其含义应当是，首先该条规定确立了过错推定原则，认为举证责任在于涉嫌侵权的行为人。如果他们不能证明法律规定的证明事项，就应当承担法律责任。其次，即使行为人能够证明合法授权和合法来源，但是如果授权人本身就不具备合法资格，或来源本身就是侵权品，则行为人仍应当承担停止侵权行为的责任，但是免除赔偿责任。

5、专利侵权案件的中止问题

在专利侵权诉讼案件中，被告经常使用的抗辩理由是被告的专利权无效。因此法院和当事人常常会遇到诉讼中止问题。最高人民法院对此问题做出了有关的司法解释。该司法解释明确了以下一些原则：（1）、被告请求中止诉讼的，应当在答辩期内对原告的专利权提出宣告无效的请求。被告在答辩期间届满后请求宣告该项专利权无效的，人民法院不应当中止诉讼，但经审查认为有必要中止诉讼的除外。（2）、人民法院受理的侵犯发明专利权纠纷案件或者经专利复审委员会审查维持专利权的侵犯实用新型、外观设计专利权纠纷案件，被告在答辩期间内请求宣告该项专利权无效的，人民法院可以不中止诉讼。（3）、人民法院受理的侵犯实用新型、外观设计专利权纠纷案件，被告在答辩期间内请求宣告该项专利权无效的，人民法院应当中止诉讼，但具备特殊情形的，可以不中止诉讼。这些情形包括， A、原告出具的检索报告未发现导致实用新型专利丧失新颖性、创造性的技术文献的； B、被告提供的证据足以证明其使用的技术已经公知的； C、被告请求宣告该项专利权无效所提供的证据或者依据的理由明显不充分的； D、人民法院认为不应当中止诉讼的其他情形。（4）、人民法院决定中止诉讼，专利权人或者利害关系人请求责令被告停止有关行为或者采取其他制止侵权损害继续扩大的措施，并提供了担保，人民法院经审查符合有关法律规定的，可以在裁定

中止诉讼的同时一并作出有关裁定。

6、律师费

为了贯彻对知识产权侵权损害的全面赔偿原则，人民法院根据权利人的请求以及具体案情，可以将权利人因调查、制止侵权所支付的合理费用计算在赔偿数额范围之内，但是将上述费用计算在赔偿数额范围之内的前提是权利人提出请求。根据最高院法官的解释，调查、制止侵权的合理费用不包括诉讼程序中的律师费。TRIPS 协议关于损害赔偿的规定是“*可以包括适当的律师费*”，给予了成员国根据本国情况自行决定的较大余地。有关司法解释没有将诉讼律师费一律归入上述合理费用范围之内，但在案件审理中，人民法院可以根据案件具体情况决定是否责令被告赔偿原告所支付的适当合理的诉讼律师费。有关案例表明，只有故意侵权时法院才判定被告向原告补偿合理的律师费用（参见北京中级人民法院 1993 年“大磨坊”商标侵权案）。

7、涉台案例

1993 年台湾宜兰食品工业公司诉中山中益食品公司和中山东协食品公司商标侵权案。台湾宜兰公司享有“仙贝”注册商标权，注册类别为第 30 类米果食品等。两被告使用“阿里仙贝”、“新东洋仙贝”、“百利仙贝”作为食品名称，销售米果等食品。宜兰公司起诉后，一审长沙中级人民法院经审理认为被告在同一种商品上使用类似商标，属于商标侵权，责令停止侵权，销毁包装袋和制版，分别赔偿 47 万元和 100 万元。被告不服一审判决，上诉至省高级法院，上诉期内，原被告达成调解协议，调解协议被高级法院确认后，发生法律效力。

此案涉及：　管辖问题（被告住所地、侵权行为地）；
商标相似问题；
赔偿问题（原告索赔额高，是两被告注册资本全额，但是举证不足）；
销毁侵权品问题；
调解书效力问题。

五、域名争议问题

域名争议指的是域名注册人的不当行为侵犯了他人的知识产权或者产生了不正当竞争行为，从而引发的域名持有人和知识产权人之间的争议。在中国域名争议的解决方式主要有诉讼和专家裁判两种，涉及的域名有“.cn”一般域名、“.cn”中文域名、“.中国”中文域名、“.公司”中文域名以及“通用网址”域名。

1、 诉讼方式解决域名争议

目前中国没有直接可以适用的关于域名争议的法律。根据最高人民法院 2001 年 7 月做出的《关于审理涉及计算机网络域名民事纠纷案件适用法律若干问题的解释》，人民法院在审理域名纠纷案件时，可以适应《民法通则》和《反不正当竞争法》总则中的有关“公平”和“诚信”原则，对符合以下各项条件的，应当认定被告注册、使用域名等行为构成侵权或者不正当竞争：

（1） 原告请求保护的民事权益合法有效；

（2） 被告域名或其主要部分构成对原告驰名商标的复制、模仿、翻译或音译；或者与原告的注册商标、域名等相同或近似，足以造成相关公众的误认；

（3） 被告对该域名或其主要部分不享有权益，也无注册、使用该域名的正当理由；

（4） 被告对该域名的注册、使用具有恶意。

目前中国法院审理的域名争议已经有几十起，影响较大的有美国百事公司诉广州粤经信息公司抢注 pepsi.com.cn 案、美国耐可公司诉广州粤经信息公司 nike.com.cn 案、美国 P&G

公司诉北京新天地电子公司 tide.com.cn 案、P&G 公司诉上海智能科技公司 safegard.com.cn 案、美国杜邦公司诉北京国网公司 dupont.com.cn 案。以上案件都已经终审结束，除了 tide.com.cn 案件外，终审法院都支持了一审原告胜诉的判决。上述案件的特点是原告的商标大多被法院认定为驰名商标，从而获得较强的保护。而对于一般性商标与域名的冲突，法院的态度尚待明朗。

2、 专家裁判方式解决域名争议

根据 CNNIC 于 2001 年发布的《中文域名争议解决办法》的规定，针对注册域名的投诉获得支持的前提条件是：

（1） 投诉人享有受法律保护的商标权；

（2） 被投诉的域名与该商标相同，或者具有足以导致混淆的相似性；

（3） 域名持有人对该域名及包括该域名的其他字符组合不享有商标权，也没有受法律保护的其他权利和利益；

（4） 域名持有人对该域名的注册与使用具有恶意；

（5） 投诉人的业务已经或者极有可能因该域名的注册与使用受到损害。

根据 CNNIC 于 2001 年发布的《通用网址争议解决办法》，针对通用网址的投诉得到支持的条件是：

(1) 投诉人享有受中国法律保护的权利或合法利益；

(2) 被投诉的通用网址与投诉人享有权利或利益的名称相同或者近似；

(3) 被投诉的通用网址注册人对通用网址或其主要部分不享有权利或者合法利益；

(4) 被投诉的通用网址注册人对通用网址的注册或使用具有恶意。

从上述两个争议解决办法可以得知，中国的专家裁判域名争议解决原则与 ICANN 颁布的 Uniform Domain Name Dispute Resolution Policy 所规定的原则大致相同，不同之处在于通用网址争议解决办法扩大了原告的权利基础（受中国法律保护的权利和合法权益都可以作为投诉的权利基础），是一个不小的突破。

（同其他国家一样，对域名争议解决原则在中国有不少争论，有人认为跨国大公司得到了太强的保护，不利于小公司和个人在网络上发展。有人指称 P&G 公司自己注册了 149 个域名却咄咄逼人的告他人抢注域名并且胜诉，认为是“只许美国州官放火，不许中国百姓点灯”。另外，关于域名争议解决的管辖问题、适应法律问题、执行问题、恶意认定问题等等都是有待研究的问题。）

六、 知识产权的行政保护

中国的知识产权保护制度的一大特色是国家有关行政部门在知识产权保护中起着重要的作用。以行政手段解决知识产权侵权的问题，可以做到效率高、速度快、当事人费用低，能够很大程度上保障权利人的利益，维护正常的市场秩序，保证公平和诚信的原则得以实行。另外，以行政手段解决知识产权侵权问题，充分体现了国家权力机关对于知识产权侵权处理的主动介入姿态，也可以采取措施，防止侵权的发生，惩戒严重的侵权行为。

专利法规定了解决专利侵权纠纷的双轨制度。在专利权侵权方面引起纠纷的，专利权人或者利害关系人可以向人民法院起诉，也可以请求管理专利工作的部门处理。管理专利工作的部门处理时，认定侵权行为成立的，可以责令侵权人立即停止侵权行为，当事人不服的，可以自收到处理通知之日起十五日内依照《中华人民共和国行政诉讼法》向人民法院起诉。侵权人期满不起诉又不停止侵权行为的，管理专利工作的部门可以申请人民法院强制执行。管理专利工作的部门有权责令停止侵权行为，无权判定侵权赔偿数额，但是应当事人的请求，

可以就侵犯专利权的赔偿数额进行调解，调解不成的，当事人可以依照《中华人民共和国民事诉讼法》向人民法院起诉。对于假冒他人专利的，管理专利工作的部门有权责令改正并予公告，没收违法所得，可以并处违法所得三倍以下的罚款，没有违法所得的，可以处五万元以下的罚款。对于以非专利产品冒充专利产品、以非专利方法冒充专利方法的，管理专利工作的部门有权责令改正并予公告，并且可以处五万元以下的罚款。

与专利制度相似，商标法也建立了处理商标侵权的双轨制度。当产生商标侵权纠纷时，商标注册人或利害关系人可以向法院起诉，也可以请求工商行政管理部门处理。工商管理部门处理时认定侵权成立的，有权责令立即停止侵权行为，没收、销毁侵权商品和专门用于制造侵权商品、伪造注册商标标识的工具，并可以处以罚款。当事人对处理决定不服的，可以自收到处理通知之日起十五日内依照《中华人民共和国行政诉讼法》向人民法院起诉，侵权人期满不起诉又不履行的，工商行政管理部门可以申请法院强制执行。工商行政管理部门无权判定侵权赔偿数额，但是可以就其进行调解，调解不成的，当事人可以依照《中华人民共和国民事诉讼法》向人民法院起诉。

与专利管理部门相比，工商部门有更大的行政处理权。除了上述认定侵权后责令停止侵权行为，没收、销毁侵权商品和侵权工具外，依照商标法，县级以上的工商部门根据已经取得的违法嫌疑证据或举报，对涉嫌侵犯他人注册商标权的行为进行查处时还可以行使下列职权：1、询问有关当事人，调查与侵犯他人商标权有关的情况；2、查阅、复制当事人与侵权活动有关的合同、发票、帐簿以及其他有关资料；3、得以当事人涉嫌从事侵犯他人商标权活动的场所实施现场检查；4、检查与侵权活动有关的物品；对有证据证明是侵犯他人商标权的物品，可以查封或扣押。（案例：2000 年 11 月，CCPIT 接受 TOYOTA 委托，调查北京三个汽车配件市场，取得了 100 多个商家的大量假冒商品证据，绘制了侵权商家在市场中的分布图，然后与工商局联系，提交了有关材料。10 天后，10 余名律师会同 100 余名工商局工作人员和北京公安局警察一同行动，一举查获数百万元价值的侵权商品，装满 10 余辆大卡车，侵权人员和侵权商品依法得到处置。）

著作权法也规定，对于著作权侵权行为同时损害公共利益的，著作权行政管理部门有权责令停止侵权行为，没收违法所得，没收、销毁侵权复制品，并可处以罚款，情节严重的，著作权行政管理部门还可以没收主要用于制作侵权复制品的材料、工具、设备等。（案例：1995 年，美国电影协会投诉北京某两家音像出版社、天津某电子有限公司未经其授权，复制、出版并发行其会员公司的多部电影的 VCD，侵犯了其会员公司的著作权，要求进行查处。经查，被投诉人未经授权，复制、出版并发行上述 VCD 行为属实。国家版权局责令停止发行侵权 VCD，没收库存侵权 VCD 并各罚款 1-2 万元。）

根据海关知识产权保护条例的规定，凡是受中国法律保护的享有中国知识产权的货物禁止进出口，这一任务由海关总署和各地海关负责。海关总署接受权利人的备案申请并予以批准，各地海关则根据权利人的申请，决定扣留涉嫌侵权货物。海关自己发现进出口货物有侵权嫌疑时，有权予以扣留。海关扣留涉嫌侵权货物后应在 15 日内开始调查（有关当事人已经将争议提交法院或知识产权行政管理部门处理的除外），经海关、法院、知识产权行政部门认定侵权的货物海关予以没收和处理。据国务院发展研究中心调查，仅 1999 年 1—8 月，海关查获的进出口侵权货物价值为 9400 万元人民币。

以上相关行政部门采取的措施是非常必要的，尤其是工商部门和著作权行政管理部门依法有权销毁侵权品的行政措施是非常实际的打击侵权的手段。在以前的侵权行政处理和侵权诉讼案件的司法实践当中，行政部门和法院采用过销毁侵权品的手段，但是这些手段缺乏明确的法律依据。《民法通则》和有关法律没有将销毁侵权产品作为一种民事制裁手段，因此与 TRIPS 协定关于“将已经发生的正处于侵权状态的商品排除出商业渠道”的要求不尽相符。2001 年商标法和著作权法的有关行政制裁措施的新规定，对于上述欠缺是有益的弥补。

七、 知识产权侵权的刑事责任

刑事处罚是打击严重知识产权侵权的主要手段，许多民事责任不能奏效的案件，刑事责任可以根本解决问题。（据有关材料，浙江义乌批发市场曾经有大量假冒“舒肤佳”、“夏士莲”、“飘柔”、“舒蕾”、“沙宣”商标商品，吴某某是主要供应商。过去吴某某曾经四次被查处，但是遏制不了他的侵权活动。2000 年 10 月，工商局接宝洁公司报告后查处了吴某某的仓库，并将案件移送公安部门，经公安部门侦查，查明其销售额达 40 多万元，经检察院起诉，人民法院审理，吴某某以假冒商标罪被判 6 年徒刑，彻底打击了当地严重的商标侵权活动。）

《中华人民共和国刑法》有以下关于侵犯知识产权罪的规定。

1、 商标侵权的刑事责任

(1) 未经注册商标所有人许可，在同一种商品上使用与其注册商标相同的商标，最高可以处七年有期徒刑，并处罚金。

(2) 销售明知是假冒注册商标的商品，最高可以处七年有期徒刑，并处罚金。

(3) 伪造、擅自制造他人注册商标标识或者销售伪造、擅自制造的注册商标标识，最高可以处七年有期徒刑，并处罚金。

2、 专利侵权的刑事责任

(1) 假冒他人专利，情节严重的，处三年以下有期徒刑或者拘役，并处或者单处罚金。

3、 著作权侵权的刑事责任

(1) 以营利为目的，有下列情形之一，最高可以处七年有期徒刑，并处罚金：

（一） 未经著作权人许可，复制发行其文字作品、音乐、电影、电视、录像作品、计算机软件及其他作品的；

（二） 出版他人享有专有出版权的图书的；

（三） 未经录音录像制作者许可，复制发行其制作的录音录像的；

（四） 制作、出售假冒他人署名的美术作品的。

(2) 以营利为目的，销售明知是上述规定的侵权复制品，违法所得数额巨大的，处三年以下有期徒刑或者拘役，并处或者单处罚金。

4、 商业秘密侵权的刑事责任

(1) 有下列行为之一，给商业秘密的权利人造成重大损失的，最高可以处七年有期徒刑，并处罚金：

（一） 以盗窃、利诱、胁迫或者其他不正当手段获取权利人的商业秘密的；

（二） 披露、使用或者允许他人使用以前项手段获取的权利人的商业秘密的；

（三） 违反约定或者违反权利人有关保守商业秘密的要求，披露、使用或者允许他人使用其所掌握的商业秘密的。

（2） 明知或者应知上述行为，获取、使用或者披露他人的商业秘密的，以侵犯商业秘密论。

5、 知识产权侵权罪案件追诉标准

(1) 未经注册商标所有人许可，在同一种商品上使用与其注册商标相同的商标，涉嫌下列情形之一的，应予追诉：

（一） 个人假冒他人注册商标，非法经营数额在十万元以上的；

（二） 单位假冒他人注册商标，非法经营数额在五十万元以上的，

（三） 假冒他人驰名商标或者人用药品商标的；

（四） 虽未达到上述数额标准，但因假冒他人注册商标，受过行政处罚二次以上，又假冒他人注册商标的；

（五） 造成恶劣影响的。

(2) 销售明知是假冒注册商标的商品，个人销售数额在十万元以上的，单位销售数额在五十万元以上的，应予追诉。

(3) 伪造、擅自制造他人注册商标标识或者销售伪造、擅自制造的注册商标标识， 涉嫌下述情形之一的，应予追诉：

（一） 非法制造、销售非法制造的注册商标标识，数量在二万件（套）以上，或者违法所得数额在二万元以上，或者非法经营数额在二十万元以上的；

（二） 非法制造、销售非法制造的驰名商标标识的；

（三） 虽未达到上述数额标准，但因非法制造、销售非法制造的注册商标标识，受过行政处罚二次以上，又非法制造、销售非法制造的注册商标标识的;

（四） 利用贿赂等非法手段推销非法制造的注册商标标识的。

(4) 假冒他人专利，涉嫌下列情形之一的，应予追诉：

(一) 违法所得数额在十万元以上的；

(二) 给专利权人造成直接经济损失数额在五十万元以上的；

(三) 虽未达到上述数额标准，但因假冒他人专利，受过行政处罚二次以上，又假冒他人专利的；

(四) 造成恶劣影响的。

（5） 侵犯商业秘密，涉嫌下列情形之一的，应予追诉：

（一） 给商业秘密权利人造成直接经济损失数额在五十万元以上的；

（二） 致使权利人破产或者造成其他严重后果的。

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Seminar on Recent Developments in Arbitration Law in China

Recent Development in Maritime Arbitration in China

Mr. CAI Hong Da

Recent Development in Maritime Arbitration in China

Cai Hongda

The history of China Maritime arbitration means the development of China Maritime Arbitration Commission.

CMAC is a permanent arbitration organization. CMAC makes its arbitration rules closer to international modern arbitration rules.

CMAC has good cooperation relations with some maritime arbitration commissions. CMAC ranked the fourth in maritime arbitration cases in 2000 in the world.

1.Development of the organization and the new Arbitration Rules

CMAC is composed of one chairman, several vice-chairmen and a number of Commission members.

Functions of CMAC's 3 special commissions: 1).the Experts Consultative Group; 2). the Arbitrators Qualification Review Board; 3).the Awards Adaptation Commission.

The self-regulation mechanism within CMAC.

CMAC is preparing an English version of CMAC awards selection and the new book will be published in Hong Kong this year.

CMAC awards selection has been published in www.isinolaw.com in dual languages.

The present working of CMAC Secretariat. Necessary establishment of the Award Drafting Reviewing Group.

CMAC's liaison in Shanghai.

Arbitration Rules of 2001 amended many parts comparing with 1995 Rules, in order to embody CMAC's characters of efficiency, economy and flexibility.

2. the new Panel of Arbitrators

The new panel of 2001 has 159 arbitrators.

CMAC has a Ethical Rules for Arbitrators.

CMAC has an arbitrators training program.

3. Further extension of Jurisdiction

China's adoption of reforming and opening policy has widely extended CMAC's

Jurisdiction step by step.

The new Rules of 2001 not only specially detail the 6 items of Rules in 1995, but also add new contents: disputes arising from mortgage loan on ships or other offshore mobile units; maritime security; contract of multi-model transport; reinsurance..... It is expected that the disputes arising from logistics may be included within CMAC jurisdiction soon.

Although the Arbitration Law of P.R.C. regulates validity of arbitration agreement strictly including the name of arbitration commission, the later judicial interpretation entrusts the arbitration agreement and the jurisdiction over an arbitration case. Therefore, such "arbitration in Beijing" clause is no problem in CMAC have been recognized valid and enforceable by the China Maritime Courts.

CMAC recommends the following model arbitration agreement:

"Any dispute arising out of or in connection with this contract shall be submitted to China Maritime Arbitration Commission for arbitration in accordance with the existing arbitration rules of the Commission. The arbitration award shall be final and binding upon the parties."

4. New measures to put forward proceedings

Fair, fast, flexible and economical proceeding of arbitration is one of the purposes of CMAC to carry out the task of judicial idea.

The new arbitration rules add some new articles to prevent parties form deliberately delaying proceedings.

Article 44 The parties shall submit written documents and evidence in accordance with requirements of the arbitration tribunal within the prescribed time; and the arbitration tribunal is entitled to decide whether to accept the documents and evidence submitted by a party after the prescribed time.

Article 76 Neither modification of the claim nor the lodgment of a counterclaim shall affect the process of the proceedings, expect that the amount of the modified claim or of the counterclaim countravenes the provisions of Article 68. These measures effectively ensure the proceeding time.

CMAC embodies stipulations regarding summary procedure. An award shall be Rendered within 90 days form the day when the arbitration tribunal is formed.

In general arbitration proceeding, the arbitration tribunal shall render an award within 9 months as from the date on which the arbitration tribunal is formed.

All the CMAC awards have been performed by the parties themselves, or enforced by courts within the Chinese territory or in the other countries concerned until now.

5. Combination of Arbitration with Conciliation

Combination of arbitration with conciliation is a salient feature of China's maritime arbitration.

According to the new rules of 2001, CMAC adopts more flexible way to encourage the parties to make effective conciliation.

China's entry into the World Trade Organization creates a lot of opportunities for CMAC development in the shipping fields as well as many challenges to deal with at home and abroad.

Our confidence.