

DIGITAL BUSINESS

China



Digital Business

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Quick reference guide enabling side-by-side comparison of local insights into legal and regulatory framework; contracting on the internet; security, including security of payment; domain names; advertising; financial services; defamation; intellectual property; data protection; taxation; gambling; outsourcing; online publishing; dispute resolution; and recent trends.

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LEGAL AND REGULATORY FRAMEWORK

Government approach

How can the government's attitude and approach to internet issues best be described?

The Chinese government now pays attention to Internet issues at an unprecedented new level. Cybersecurity has officially become an important component of China's national security strategy. Internet legislation is at a higher level, with a wider field of application and a deeper degree of adjustment.

The Chinese government attaches weight to both state security and market-based regulatory systems.

Law stated - 15 October 2021

Legislation

What legislation governs business on the internet?

First, China has introduced several basic laws for cyberspace governance in recent years, including the E-Commerce Law, the Cybersecurity Law, the Data Security Law and the Personal Information Protection Law.

Meanwhile, business on the internet is conducted under a licensing system in accordance with the Telecommunications Regulations. The Telecommunications Business Classification Catalogue further defines and classifies the sub-categories of telecommunications business, according to which different types of telecommunication licences shall apply. Depending on the type of business, businesses on the internet may require, among others:

- an internet content provider licence;
- an online data processing licence; or
- a transaction processing services licence.

Related business operators can only conduct business after obtaining the corresponding licences.

In addition, businesses conducted on the internet shall also comply with legislation applicable to each specific industry and transaction model, such as the Electronic Signature Law, the Advertising Law 2021 and the Encryption Law.

Law stated - 15 October 2021

Regulatory bodies

Which regulatory bodies are responsible for the regulation of e-commerce, data protection and internet access tariffs and charges?

There are various regulatory authorities involved, with three main regulatory agencies: the Cyberspace Administration of China (CAC), the Ministry of Industry and Information Technology (MIIT), and the Ministry of Public Security (MPC). The influence of market-based regulators represented by the State Administration for Market Regulation and the Ministry of Commerce (MOFCOM) has also been increasing.

The competent authorities for the e-commerce industry include CAC, MIIT and MOFCOM.

CAC is currently generally considered to be the primary data protection authority in China.

MIIT is the main regulator of internet access tariffs and charges.

Jurisdiction

What tests or rules are applied by the courts to determine the jurisdiction for internet-related transactions or disputes in cases where the defendant is resident or provides goods or services from outside the jurisdiction?

The rules determining the jurisdiction for both internet-related and offline transactions are mostly similar, and are based on the Civil Procedure Law.

Chinese law recognises the choice of forum and arbitration clause in contractual disputes, including disputes involving foreign interest. The court chosen by the parties should have a connection with the dispute and must not conflict with the provisions on jurisdiction at forum level and regarding exclusive jurisdiction.

Without the choice of the parties, the jurisdiction should be determined based on the provisions of the Civil Procedure Law. For contractual disputes, the People's Court at the place where the defendant is domiciled or where the contract has been performed shall have jurisdiction. Furthermore, Chinese law further clarifies that, with regard to a sale contract concluded via an information network and depending on whether the product is delivered through an information network or not, the place the contract has been performed should be the place where the seller is domiciled (delivered through an information network) or the place where the purchaser is domiciled (delivered by other means).

Law stated - 15 October 2021

Establishing a business

What regulatory and procedural requirements govern the establishment of digital businesses in your jurisdiction? To what extent do these requirements and procedures differ from those governing the establishment of brick-and-mortar businesses?

There is no major difference between establishing a digital business and establishing a brick-and-mortar business in China. The regulatory and procedural requirements that govern the establishment of digital businesses are as follows.

Choosing business vehicles

To establish a business in China, the first question to be considered should be which business vehicles to choose. The main business vehicles in China include a limited liability company, a partnership and a company limited by shares. As for foreign-invested enterprises, establishing a representative office instead of a separate legal entity is also available.

Pre-examination and approval procedures

The second step is to confirm whether the enterprise needs to go through the pre-examination and approval procedures. The pre-examination and approval procedures include three considerations:

- whether or not the project involves approval or filing according to the Administrative Measures on Approval and Filing for Foreign Investment Projects, and the Catalogue of Investment Projects Subject to Governmental Approval;
- whether or not the project is involved in the Administrative Measures (Negative List) for Foreign Investment

Access; and

- whether or not the preliminary licensing of access to certain industries is involved – this is not a pre-procedure aimed at foreign investment, but an administrative licensing requirement for conducting business in specific industries or activities.

Business registration

If the pre-examination and approval procedures are not required, or the approval documents are obtained according to the approval procedures, investors can officially initiate the business registration procedures, which include:

- business name registration: the naming of the company is subject to a pre-approval procedure and the pre-approved name of a company shall be reserved for six months; and
- with pre-approval of the company name, investors can submit documents to apply for registration and obtain business licences through the local Administration for Market Regulation or the online enterprise registration system.

Relevant identification certificates

After the registration is completed, the foreign-invested enterprise's information will be automatically synchronised to other departments. Investors should then complete the following procedures:

- carve and record official seals in the public security department;
- collect the invoice from the tax department;
- complete social security registration via the online platform;
- apply for foreign exchange registration with the foreign exchange administration department; and
- open a public account in a bank.

After completing these procedures, the enterprise is able to conduct business.

Law stated - 15 October 2021

CONTRACTING ON THE INTERNET

Contract formation

Is it possible to form and conclude contracts electronically? If so, how are contracts formed on the internet? Explain whether 'click wrap' contracts are enforceable, and if so, what requirements need to be met?

In general, parties can conclude a contract electronically in China. According to article 469 of the Civil Code, the parties may conclude a contract in writing, orally or in some other form. Any electronic data that can show, in material form, the contents that it specifies through electronic data exchange or email can be accessed for reference and used at any time, and shall be regarded as a written form. Only certain types of contracts cannot be concluded electronically, such as documents involving personal relationships (marriage, adoption and succession), the transfer of rights in immovable property and public utility services.

In particular, if the contract is an online sales contract, the click-to-accept process can be adopted. Provided that the online contract does not violate the provisions on validity of contract under Chinese law and thus is deemed a legally

valid contract, the contract can be enforced in China.

Law stated - 15 October 2021

Applicable laws

Are there any particular laws that govern contracting on the internet? Do these distinguish between business-to-consumer and business-to-business contracts?

In the contract law section of the Civil Code, specific provisions are provided for the conclusion and performance of electronic contracts.

The E-Commerce Law is the main piece of legislation in China that regulates conduct of online business activities, including electronic contracts. The Electronic Signature Law is also relevant for online contracting. The Electronic Signature Law recognises that, under prescribed circumstances, electronic data messages can have the same legal effect as an original document or a written document.

In addition, the Process Specification for Online Conclusion of Electronic Contracts, a mandatory national standard approved and issued by the Ministry of Commerce in 2013, stipulates general process guidelines for e-commerce parties to follow when concluding electronic contracts via the internet in China.

Law stated - 15 October 2021

Electronic signatures

How does the law recognise or define digital or e-signatures?

In China, electronic signatures have the same legal validity as a wet-inked signature or affixation of seal, provided that the electronic signature has satisfied the conditions provided by law.

For contracts or other civil documents and instruments, the parties involved may agree to use electronic signatures and data messages, and shall not deny legal validity on the grounds of an electronic signature or a data message being used.

At present, Chinese laws only regulate the form, function and effect of electronic signatures without specifying the specific technical means. Therefore, there is no unique format for electronic signatures.

Law stated - 15 October 2021

Data retention

Are there any data retention or software legacy requirements in relation to the formation of electronic contracts?

According to article 5 of the Electronic Signature Law, there are two main data retention requirements:

- data messages should effectively express the contents contained within, and can be retrieved, checked and used at any time; and
- data messages should reliably guarantee that the content remains intact and unchanged from the time of its ultimate formation – however, endorsement of the data message, as well as changes in the format during the exchange, storage and display of data message, do not affect the integrity of the data message.

As for e-commerce platforms, according to article 31 of the E-Commerce Law, e-commerce platform operators shall record and retain information on goods, services and transactions listed on their platforms, and ensure the integrity, confidentiality and availability of such information. The information on goods, services and transactions listed on their platforms shall be retained for not less than three years with effect from the date of completion of a transaction.

Law stated - 15 October 2021

Breach

Are any special remedies available for the breach of electronic contracts?

Common remedies for breach of both electronic and offline contracts are the same, including damages compensation, permanent injunctions and specific performance.

Law stated - 15 October 2021

SECURITY

Security measures

What measures must be taken by companies or ISPs to guarantee the security of internet transactions? Is encryption mandatory?

E-commerce business operators

The E-Commerce Law sets out the following requirements which should be met by E-commerce business operators:

- collect and use the personal information of their users compliant with the provisions of laws and administrative regulations on the protection of personal information.
- adopt technical measures and other requisite measures to ensure secured and stable operation of their network, prevent cybercrime activities, deal with cyber security incidents effectively, and ensure the security of e-commerce transactions.
- formulate cyber security incident emergency plans, and forthwith trigger the emergency plans upon the occurrence of a cyber security incident, adopt the corresponding remedial measures, and report to the relevant competent authorities.

Internet service providers

The Cybersecurity Law provides more requirements for internet service providers (ISPs) to ensure the security of internet transactions. ISPs must:

- provide network products and services satisfying the mandatory requirements in the applicable national standards;
- not install malware;
- immediately take remedial action against any risk such as security defects or bugs that are found, inform users of the risk and report the case to the competent authority;
- provide consistent security maintenance for the ISP's products or services;
- expressly notify and obtain the consent of users if the products or services provided by the ISP collect user information; and
- comply with provisions of the Cybersecurity Law as well as the relevant laws and administrative regulations

governing the protection of personal information if the personal information of users is involved.

Network operators shall develop an emergency plan for cybersecurity events to promptly respond to security risks such as system bugs, computer viruses, network attacks and network intrusions. For an event that threatens cybersecurity, the operator concerned must initiate the emergency plan, take corresponding remedial actions and report the event as required to the competent authority.

Network operators shall take technical and other necessary measures to ensure the security of the personal information that it collects, and to protect such information from disclosure, damage or loss. In cases of disclosure, damage or loss (or possible disclosure, damage or loss) of such information, the network operator shall take immediate remedial action, notify users in accordance with the relevant provisions and report to the competent authority.

Network operators shall strengthen the management of the information released by their users. If the operator finds any information that is prohibited by laws and administrative regulations from release or transmission, it shall immediately cease transmission of such information and take measures such as deletion to prevent the dissemination of such information. The operator shall also keep a relevant record and report the case to the competent authority.

Encryption is not a mandatory security measure.

Law stated - 15 October 2021

Government intervention and certification authorities

As regards encrypted communications, can any authorities require private keys to be made available? Are certification authorities permitted? Are they regulated and are there any laws as to their liability?

There is no specific rule on whether authorities can require private keys to be made available. However, according to article 31 of the Cryptography Law, cryptography administrations, related authorities and the staff thereof shall not require commercial cryptography-related agencies and commercial cryptography testing or certification agencies to disclose their source codes or other proprietary cryptography-related information.

Certification authorities are permitted and operate under a licensing system. Certification authorities can only provide service after going through the approval of the Ministry of Industry and Information Technology (MIIT) and the Ministry of Commerce. For the provision of an electronic authentication service without a licence, MIIT will order the providers to stop the illegal act and illegal income (if any) shall be confiscated.

Encrypted communications are mainly regulated under the Electronic Signatures Law, the Cryptography Law and the Administrative Measures on Electronic Certification Services.

Law stated - 15 October 2021

Electronic payments

Are there any rules, restrictions or other relevant considerations regarding the use of electronic payment systems in your jurisdiction?

Electronic banking

The Electronic Payment Guidelines (No. 1), promulgated by the People's Bank of China (PBOC), is the first document

that sets out banks' liability regarding online payment. The Measures for Management of Electronic Banking and the Guidance on Evaluation of Electronic Banking Security issued by the China Banking and Insurance Regulatory Commission generally govern the electronic banking business.

Third-party payment

Third-party payment operators are defined as non-bank institutions that handle internet payments, mobile phone payments, fixed-line payments, digital television payments and other network payment services.

The regulator of third-party payment is the PBOC and its branches. The core of the policy is the Measures for the Administration of Payment Services by Non-Financial Institutions, supplemented by industry self-regulation and supervision by commercial banks. Due to the rapid development of third-party payments, the PBOC has introduced more policies to regulate third-party payments since 2014.

The promulgation of the E-Commerce Law in 2019 brought new requirements to electronic payment service providers, including requirements to:

- notify users of the functions of electronic payment services, use methods, points to note, the relevant risks and fee rates, etc;
- not impose unreasonable transaction conditions;
- ensure the integrity, consistency, trackability and resistance against tampering of electronic payment instructions;
- provide account reconciliation service and transaction records of the past three years to users free of charge;
- promptly investigate and identify the reason for errors in payment instructions, and adopt the relevant measures to correct the error; and
- bear compensation liability where an error causes the user to suffer losses, except where it can be proven that the error in the payment instruction was not caused by the electronic payment service provider.

Law stated - 15 October 2021

Are there any rules or restrictions on the use of digital currencies?

In late 2020, the Law of the People's Bank of China (a draft revision of the law for comments) took the lead on rules and restrictions on the use of digital currencies. Article 22 of this law stipulates that no unit or individual shall make or offer token notes or digital tokens to circulate in the market in lieu of the yuan.

On 26 January 2021, the Regulations on Prevention and Disposal of Illegal Fund Raising (Administrative Regulations) were promulgated. Article 19 of these regulations clarified that the absorption of funds in the name of digital currency can constitute illegal fundraising.

On 17 June 2021, the Supreme Court, the Supreme Prosecutor and the Ministry of Public Security jointly issued the Opinions on Several Issues Concerning the Application of Law in Handling Criminal Cases of Telecommunication Network Fraud (II) (Judicial Interpretation), which involve restrictions on the use of digital currency.

On 24 September 2021, the PBOC announced that cryptocurrency-related transactions will be considered illicit financial activity, including services provided by offshore exchanges. This announcement also clarified that cryptocurrencies, including bitcoin and Tether, are not fiat currencies and cannot be circulated.

Law stated - 15 October 2021

DOMAIN NAMES

Registration procedures

What procedures are in place to regulate the licensing of domain names? Is it possible to register a country-specific domain name without being a resident in the country?

To take ownership of a domain name, applicants for registration shall register (purchase) the possible domain name from the China Internet Network Information Centre (CNNIC) or the qualified registrars accredited by the CNNIC that then shall provide an electronic certification.

There are no filing formalities for domain names in China. However, applicants who use the registered domain name for a website shall fulfil the website filing formalities with the competent department, according to the Administrative Measures on Internet-based Information Services.

It is possible for a resident to register a country-specific domain name in China without that resident being in China. In China, a country-specific domain name refers to a .cn or a .中国 domain name. The Implementing Rules for the Registration of National Top-level Domain Names 2019 provide that no restriction is imposed against non-residents to register a .cn or a .中国 domain name. Additionally, the Ministry of Industry and Information Technology also specifies the permitted registrants, either individuals or entities.

Law stated - 15 October 2021

Rights

Do domain names confer any additional rights beyond the rights that naturally vest in the domain name?

The Anti-Unfair Competition Law defines the unauthorised use of the main part of another party's domain name, website name, web page, etc, that are influential as misleading acts, which may cause the public to misidentify the goods concerned as another party's goods or to associate the goods concerned with those of another party, which therefore constitute unfair competition acts.

Law stated - 15 October 2021

Trademark ownership

Will ownership of a trademark assist in challenging a 'pirate' registration of a similar domain name?

According to article 23 of the Interim Administrative Measures on Domain Name Registration, when a third-level domain name is the same as a trademark registered in China and the registered domain name is not owned by the holder of the registered trademark, the holder of the registered trademark is entitled to object. From the date that the ownership of the trademark-exclusive right is verified, the domain name management units (at various levels) maintain the service for the domain name holder for 30 days and the domain name service automatically stops after those 30 days have elapsed.

Law stated - 15 October 2021

Dispute resolution

How are domain name disputes resolved in your jurisdiction?

There are mainly two routes: judicial action and administrative action.

Any organisation or individual asserting that legitimate rights and interests are compromised by another party's registration or use of a domain name may apply to a domain name dispute resolution agency for arbitration or file a lawsuit with a People's Court. The recognised dispute resolution institutions, including World Intellectual Property Organization Arbitration and Mediation Center, the China International Economic and Trade Arbitration Commission, and the Hong Kong International Arbitration Centre.

Law stated - 15 October 2021

ADVERTISING

Regulation

What rules govern advertising on the internet?

The governing rules are the following.

- Legislation: the Advertising Law 2021, as amended.
- Administrative regulations:
- Self-regulatory codes: the China Advertising Association is the industrial self-discipline association for advertising, which formulated and promulgated self-regulatory codes for the advertising industry (eg, the Self-Regulation of the China Advertising Association and the Self-Discipline Pact).

Law stated - 15 October 2021

Definition

How is online advertising defined? Could online editorial content be caught by the rules governing advertising?

Online advertising is defined as commercial advertisements that directly or indirectly promote goods or services through websites, web pages, internet applications and other internet media in the forms of texts, pictures, audios, videos, etc.

Online editorial content can be regarded as online advertising provided that there is a paid promotion of goods or services, directly or indirectly, for profit. According to the Advertising Law 2021, commercial advertising shall involve the activities carried out by sellers of goods or service providers to promote their goods or services, directly or indirectly, through a certain medium and form. Therefore, editorial content shall be caught by the rules governing advertising only if it can meet this condition.

Law stated - 15 October 2021

Misleading advertising

Are there rules against misleading online advertising?

The rules against misleading online advertising are mainly set forth in Anti-Unfair Competition Law 2019, the Advertising Law 2021 and the Interim Measures for Administration of Internet Advertising 2016.

Under the Advertising Law 2021, a wider variety of advertisements are now vulnerable to scrutiny for false advertising. Advertisers are now required to substantiate all claims and statements regarding their truthfulness to avoid non-compliance. The use of technical or digital methods to create or enhance the true effect of a product or service in advertisements, in particular, is penalised as false advertising.

There are no explicit standards governing which evidence advertisers should keep in relation to advertisement substantiation.

While the above rules are applied centrally, there are still some strict rules regarding specific areas of online advertising.

Law stated - 15 October 2021

Restrictions

Are there any products or services that may not be advertised on the internet?

General rules in the Advertising Law 2021 include that the following shall not be advertised:

- narcotic drugs;
- psychotropic substances;
- toxic drugs for medical use;
- radioactive pharmaceuticals and other special drugs;
- drug precursor chemicals; and
- pharmaceuticals, medical machinery and treatment methods for drug abuse rehabilitation.

Prescription drugs other than those stipulated in the above list may only be advertised in medical or pharmaceutical professional journals that are jointly designated by the health department of the State Council and the drug regulatory department of the State Council.

Special rules in Interim Measures for Administration of Internet Advertising 2016 state that it is not allowed to design, produce, act as agents for or publish on the internet any advertisements for goods or services the production, sales or provision of which are prohibited by laws and administrative regulations, or any advertisements for goods and services that are prohibited from being published. It is also prohibited to publish advertisements for prescription drugs and tobacco via the internet.

Law stated - 15 October 2021

Hosting liability

What is the liability of content providers and parties that merely host the content, such as ISPs? Can any other parties be liable?

Article 45 of the Advertising Law 2021 stipulates that internet information service providers shall curb the posting and

publishing of illegal advertisements through their information transmission and distribution platform of which they are aware or should be aware.

For any violation of these provisions, the State Administration for Market Regulation shall confiscate the illegal income. Where the amount of the illegal income is 50,000 yuan or above, a fine ranging from one to three times the amount of the illegal income shall be imposed simultaneously. Where the amount of the illegal income is less than 50,000 yuan, a fine ranging from 10,000 to 50,000 yuan shall be imposed simultaneously. In serious cases, the relevant authorities shall order the offender to stop the relevant businesses.

Law stated - 15 October 2021

FINANCIAL SERVICES

Regulation

Is the advertising or selling of financial services products to consumers or to businesses via the internet regulated, and, if so, by whom and how?

On 28 July 2015, 10 Chinese central regulatory agencies and industry regulators, including the People's Bank of China, the China Banking Regulatory Commission, the China Insurance Regulatory Commission and the China Internet Information Technology Office jointly released the Guiding Opinions on Promoting the Healthy Development of Internet Finance (the Guiding Opinions), which is the first comprehensive regulation issued by the Chinese government in relation to internet finance.

In the Guiding Opinions, the government set out general rules, basic rules and specific preferential measures relating to internet finance, covering internet payments, online lending, equity crowdfunding, internet fund sales, online insurance services and internet consumer finance.

In late 2021, Chinese financial regulators have demanded fintech firms to rectify prominent issues, including:

- putting all financial activities under supervision;
- requiring that all financial businesses have a certificate; and
- cutting off the improper linkage between payment tools and other financial products.

Also, internet firms are required to strictly control the expansion of non-banking payment accounts to the public domain. They are also required to strengthen the management of key procedures, including the certification of shareholders, ownership structure, and capital, risk isolation and related transactions.

Internet firms should also strengthen the protection mechanism of consumers, including regulating how personal information is collected and marketed, and the text of standard contracts.

Law stated - 15 October 2021

DEFAMATION

ISP liability

Are ISPs liable for content displayed on their sites? How can ISPs limit or exclude liability?

Article 1,195 of the Civil Code provides that, if an internet user has engaged in tortious conduct through the internet, the injured party shall have the right to notify the internet service provider (ISP) and request that it take necessary measures such as deleting content, screening content or denying services to the offending individual. Where an ISP

fails to take necessary measures in a timely manner after being notified of such offences, it shall bear – jointly and severally with the internet user – liable for increased damages caused by the failure of the ISP. The provision provides ISPs with a safe harbour from defamation claims if they implement the aforementioned notice and takedown procedures.

Law stated - 15 October 2021

Shutdown and takedown

Can an ISP shut down a web page containing defamatory material without court authorisation?

Yes, shutting down a web page containing defamatory material could be one of the requisite measures according to article 1,195 of the Civil Code. It is an ISP's obligation to take requisite measures if the injured party sends a notice of infringement to the ISP, providing the preliminary evidence of infringement and its true identity information. With respect to which specific requisite measure or measures shall be taken, the ISP shall, based on the preliminary evidence for infringement and the type of services, make the decision accordingly.

Law stated - 15 October 2021

INTELLECTUAL PROPERTY

Third-party links, content and licences

Can a website owner link to third-party websites without permission?

Yes. Legal practice in China deems that the link itself does not contain any content and therefore is not subject to the control of the right to network dissemination of information. In 2012, the Supreme People's Court published the Provisions on Several Issues Concerning the Application of Law to Trial of Civil Dispute Cases of Infringement of the Right to Network Dissemination of Information, stipulating that the internet service provider (ISP) whose conduct constitutes joint infringement with other parties shall bear joint and several liabilities, but also providing an exemption for the ISP if it only provides a link.

However, for built-in deep linking behaviour, it is a different case. Deep linking is a technical means that allows users to directly see the content of the linked website on the linking website without a webpage transition.

Law stated - 15 October 2021

Can a website owner use third-party content on its website without permission from the third-party content provider? Could the potential consequences be civil in nature as well as criminal or regulatory?

No. Where a network user or an ISP provides works, performances, and audio and video products via an information network without the permission of the right holder for network dissemination of information, such provisions shall be deemed an infringement of the rights to network dissemination of information. Meanwhile, making available works, performances, and audio and video products in the information network by means of uploading to a network server, setting up shared files or using file-sharing software, etc, that enables the general public to download, browse or by other means obtain them at any desired time and location shall be deemed constitutions of the aforesaid provisions.

Law stated - 15 October 2021

Can a website owner exploit the software used for a website by licensing the software to third parties?

A website owner normally only enjoys a licence right rather than ownership right over the software used for the website. Whether it may exploit the software by licensing it to third parties depends on the terms and conditions of the relevant licence agreement between the software owner and the website owner.

Law stated - 15 October 2021

Are any liabilities incurred by links to third-party websites?

The link itself is not considered to contain the content of the linked website and therefore there shall be no liabilities for the violation of rights to network dissemination of information. However, the built-in deep link, which does not travel to the linked website, may constitute an infringement of rights to network dissemination of information.

Generally speaking, liability for linking to content on third-party websites does not arise where the ISP does not have effective knowledge or awareness of the nature of the content on the third-party website and promptly removes or blocks access to such illegal content upon discovery or receipt of a notice of infringement from a legitimate claimant. Failure to take such necessary action, however, may result in joint liability.

Law stated - 15 October 2021

Video content

Is video content online regulated in the same way as TV content or is there a separate regime?

The primary governing authority supervising both video content online and television (TV) content is the National Radio and Television Administration (NRTA), which is under the direct administration of the State Council.

Even with the same governing authority, the regulatory regimes applicable to TV content and video content online are separate. There are special regulations promulgated by the NRTA that are only applicable to video content online (eg, the Administrative Provisions on Internet-Based Audio-Visual Programme Services).

In addition to the NRTA, the Cyberspace Administration of China, which carries out governance activities involving network information contents within China, also supervises video content online.

In addition to governmental supervision, the China Netcasting Services Association (CNSA), which is the industrial self-discipline association, also provides censorship rules regarding video content online. In 2017, the CNSA formulated the General Censorship Rules for the Content of Online Audio-Visual Programmes, providing guidance for entities that provide services related to online audio-visual programmes. Later, in 2019, the CNSA formulated the Rules for Censorship Standards for Short Online Video Contents due to the rapid increase of short online videos.

Law stated - 15 October 2021

IP rights enforcement and remedies

Do authorities have the power to carry out dawn raids and issue freezing injunctions in connection with IP infringement?

The term 'dawn raid' is not directly incorporated into Chinese law, but the most similar existing concepts are

administrative or criminal investigations (inspections), which allow law enforcement to conduct on-site inspections as well as search corporate records and files to gather information and evidence on suspected violations of law.

In administrative procedures, which are usually initiated by a complaint filed by the intellectual property (IP) right holder, the competent administrative authorities – such as the Copyright Bureau in a case of copyright infringement – do not have the power to issue a freezing injunction. However, in terms of dawn raids, the administrative authorities may, when investigating the suspected infringement;

- question the relevant parties;
- investigate the matters relating to the alleged illegal acts;
- conduct on-site inspections of premises and articles of the parties concerned that involve alleged illegal acts;
- inspect and make copies of contracts, invoices, account books and other relevant materials relating to the alleged illegal acts; and
- seal up or seize the premises and articles involving the alleged illegal acts.

Law stated - 15 October 2021

What civil remedies are available to IP owners? Do they include search orders and freezing injunctions?

Civil remedies rendered in a civil judgment may include ordering the infringers to stop infringement, eliminate impact, apologise or compensate losses to IP owners.

Search orders and freezing injunctions are available under different circumstances. Freezing injunctions are available as a preservation measure before and during the litigation.

After the civil judgment comes into effect, the IP owner may file an application for enforcement with the enforcement division of the court.

If the infringer does not perform the obligations ordered in the civil judgment, the court shall have the right to enquire about the infringer's properties and issue freezing injunctions. If the infringer does not perform the obligations ordered in the civil judgment and conceals its properties, the court shall have the right to issue a search order signed by the president of the court. The court shall also have the right to conduct a search on the infringer and its residence or the place where the property is concealed.

Law stated - 15 October 2021

DATA PROTECTION AND PRIVACY

Definition of 'personal data'

How does the law in your jurisdiction define 'personal data'?

The Personal Information Protection Law (PIPL), effective as of 1 November 2021, defines personal information and personal data as:

Sensitive personal information refers to the personal information that is likely to result in damage to the personal dignity of any natural person, or damage to his or her personal or property safety once disclosed or illegally used,

including information such as biometric identification, religious belief, specific identity, medical health, financial account, whereabouts and previous location history, as well as the personal information of minors under the age of 14.

Additional rules apply to the processing of sensitive personal data including, subject to the individual's separate consent (written consent is required in some cases), the need to inform the individual of the necessity of processing his or her sensitive personal information and the impact on his or her personal rights and interests. The consent of a minor's parents or other guardians in the case of processing the personal information of a minor under the age of 14 must be obtained.

Information processed anonymously is currently not regulated.

Law stated - 15 October 2021

Registration requirements

Do parties involved in the processing of personal data, such as website owners, have to register with any regulator to process personal data?

The Cyberspace Administration of China (CAC) is the competent authority for leading and coordinating the supervision of personal information processors. Meanwhile, other government departments including the Ministry of Industry and Information Technology, the Ministry of Public Security and the State Administration for Market Regulation (SAMR) are responsible for protecting, supervising and administering the protection of personal data within the scope of their respective duties. Currently, there is no regulatory registration system designed for personal information processors. However, this does not mean personal information processors in China can avoid supervision.

The Personal Information Security Standards 2020 regulate the personal information protection officer system. Where a personal information processor meets any of the below thresholds, it shall designate a personal information protection officer:

- if it processes personal information as its main business and has more than 200 employees;
- if it processes the personal information of more than one million people or expects to process the personal information of more than one million people within the next 12 months; or
- if it handles the sensitive personal information of more than 100,000 people.

Law stated - 15 October 2021

Cross-border issues

Could data protection laws and regulatory powers apply to organisations or individuals resident outside of the jurisdiction?

The PIPL shall apply to all processing activities of personal information that occur in China. The PIPL also applies to the processing activities of personal information that occur outside China if:

- the purpose of such processing activity is to provide products or services to a natural person within China; or
- the activities of the natural person within China are analysed and evaluated.

Where a personal information processor needs to transfer personal data outside China, it shall:

- get the certificate issued by a specialised agency appointed by the CAC;
- pass the security evaluation organised by the CAC; and
- enter into a contract with the overseas recipient under the standard contract formulated by the CAC.

In addition, the personal information processor shall take necessary measures to ensure that the overseas recipient also satisfies Chinese standards.

Foreign national residents within China will also be protected by the PIPL.

Law stated - 15 October 2021

Customer consent

Is personal data processed on the basis of customer consent or other grounds? What is the commonly adopted mechanism for obtaining customer consent or establishing the other grounds for processing?

Instead of relying only on notification and consent as established in the Cybersecurity Law, the PIPL requires personal information to be processed under one of the legal bases set out in article 13, including:

- the necessity for contracts or human resources management, which is limited to that generated from lawfully formulated labour rules and structures as well as lawfully concluded collective contracts; and
- personal information already disclosed.

However, based on article 27 of the PIPL, a person can refuse the processing of their personal information already disclosed. Article 27 also provides that consent from such a person is still required if the processing of his or her personal information has a major influence on individual rights and interests.

Consent forms are another of the PIPL's legal bases upon which personal information processors may rely when processing personal information. Articles 14 and 15 clarify that consent is only valid if individuals voluntarily and explicitly provide such consent with full knowledge of the details of the personal information processing. Individuals also have a right to withdraw consent and personal information processors must provide individuals with a convenient means of withdrawing consent.

Moreover, where laws or administrative regulations provide that a separate consent or written consent is required to process personal information, those provisions shall prevail. There are currently no definitions or detailed procedures for obtaining separate consent, but in practice, a single pop-up consent window may be sufficient.

Law stated - 15 October 2021

Sale of data to third parties

May a party involved in the processing of personal data, such as a website provider, sell personal data to third parties, such as personal data about website users?

The sale of personal data is strictly prohibited in China. Serious cases would be subject to criminal punishment.

Law stated - 15 October 2021

Customer profiling

If a website owner is intending to profile its customer base to carry out targeted advertising on its website or other websites visited by its customers, is this regulated in your jurisdiction?

The PIPL regulates that, when the personal information processor (ie, the website owner) conducts customer profiling for advertising, it shall provide the customer with an option to enable or disable customer profiling.

Law stated - 15 October 2021

Data breach and cybersecurity

Does your jurisdiction have data breach notification or other cybersecurity laws specific to e-commerce?

Both the Cybersecurity Law and the PIPL regulate that, in the case of a data breach, the network operator (ie, the information processor) shall be obliged to take immediate remedial actions, notify the users and report to a competent authority.

Currently, there is no detailed data breach notification system specific to e-commerce that is regulated by laws and regulations.

Law stated - 15 October 2021

What precautionary measures should be taken to avoid data breaches and ensure cybersecurity?

The Cybersecurity Law stipulates that the following measures should be taken by the network operator (ie, the information processor) to prevent data breaches:

- set up internal data security management systems and operation instructions;
- appoint a person to be in charge of cybersecurity and take accountability for cybersecurity;
- take technical measures to prevent computer viruses, network attacks, network intrusions and other activities that endanger cybersecurity;
- take technical measures to monitor and record network operation and cybersecurity events;
- maintain the cybersecurity-related logs for no less than six months as required; and
- take measures such as data classification, important data backup, important data encryption, etc.

Law stated - 15 October 2021

Insurance

Is cybersecurity insurance available and commonly purchased?

Cybersecurity insurance is available in China. Several insurance companies are providing such services.

In the authors' opinion, the development of the cybersecurity insurance business in China is at an early stage. Cybersecurity insurance is not yet commonly purchased by all information processors.

Law stated - 15 October 2021

Right to be forgotten

Does your jurisdiction recognise or regulate the 'right to be forgotten'?

Currently, the PIPL only regulates the right of deletion. The right to be forgotten has not been recognised and regulated by Chinese laws.

According to article 47 of the PIPL, under any of the following circumstances, a personal information processor shall take the initiative to delete personal information:

- where the purpose of handling has been achieved, it is impossible to achieve such purpose or it is no longer necessary to achieve such purpose;
- where the personal information processor ceases to provide products or services, or the storage period has expired;
- where the individual withdraws his or her consent;
- where the personal information processor processes personal information in violation of laws, administrative regulations or the user agreement; or
- other circumstances stipulated by laws and administrative regulations.

If the personal information processor fails to delete the personal information concerned, the affected individual is entitled to request the deletion of such information.

Where the storage period as stipulated by laws and administrative regulations does not expire, or the deletion of personal information is difficult to be realised technically, the personal information processor shall stop the processing other than storage and necessary security protection measures.

Law stated - 15 October 2021

Email marketing

What regulations and guidance are there for email and other distance marketing?

According to some official notices and publications, unsolicited distance marketing – such as email marketing, SMS marketing and telemarketing – shall not be allowed and would be strictly supervised by the relevant government authorities.

However, these unsolicited marketing activities can be easily found in daily practice due to there being no Chinese laws strictly enforcing their prohibition.

Law stated - 15 October 2021

Consumer rights

What rights and remedies do individuals have in relation to the processing of their personal data? Are these rights limited to citizens or do they extend to foreign individuals?

The right to personal information mainly includes the following subsidiary rights.

- The privacy disposition right: the right of a person to directly control and dominate his or her personal data. The person also has the right to decide whether, and in what manner, purpose and scope, his or her personal data will

be collected, processed and used.

- The privacy secrecy right: the right of a person to request that information be kept confidential by the information processing subject.
- The inquire right: the right of a person to enquire about his or her personal information and the processing thereof, and to request a response. The control of information must begin with knowing what personal information is collected, processed and used, and whether the information is kept complete, correct and up to date in the process.
- The correct or supplement right: the right to request the subject of information processing to correct and add to personal information that is incorrect, incomplete or, from time to time, new.
- The deletion right: the right to request the information processing subject to delete personal information for legal or agreed reasons.

The protection of personal information is applicable to the activities of processing the personal information of natural persons in China and applies to the principle of territoriality, without distinguishing by nationality.

Law stated - 15 October 2021

TAXATION

Online sales

Is the sale of online products subject to taxation?

In general, tax is imposed whenever a transaction takes place, regardless of it being online or offline. However, in Chinese tax law practice, virtual product transactions between individuals or between individuals and companies are exempt from value added tax (VAT) if they do not reach the tax threshold. For individuals who cannot provide evidence of the original value of their property, the competent tax authorities shall approve the original value of their property.

For transactions between companies in China, the seller company shall pay tax in accordance with Chinese tax law. As for cross-border virtual products between companies, China's current practice is that the foreign companies that provide virtual product services must set up a standing body in China or cooperate with a domestic entity in China. The authorities will impose VAT on the standing body or cooperative entity. There will also be a tax imposed on for-profit businesses from China.

Law stated - 15 October 2021

Server placement

What tax liabilities ensue from placing servers outside operators' home jurisdictions? Does the placing of servers within a jurisdiction by a company incorporated outside the jurisdiction expose that company to local taxes?

If the servers installed overseas by a domestic company are used solely for offshore websites, such servers will not be subject to taxes in China. Nevertheless, if such servers are installed abroad and still engaged in network business related to China or the offshore companies send professionals to provide technical services in China the domestic company receiving services shall withhold the taxes and surcharges.

If an offshore company placed servers in China and receives revenue from China through such servers, that portion of the revenue related to China is subject to taxes.

Where there are special agreements on tax collection of cross-border income in tax treaties or agreements signed

between China and an overseas country or region, the domestic company may opt to apply the preferential tax rate in the tax treaties or agreements.

Law stated - 15 October 2021

Company registration

When and where should companies register for VAT or other sales taxes? How are domestic internet sales taxed?

According to the Administrative Measures on Tax Registration (amended in 2019), taxpayers engaging in manufacturing and business activities that have obtained an industry and commerce business licence shall apply for and process tax registration formalities within 30 days of the date of collecting their industry and commerce business licence. The tax authorities shall then issue a tax registration certificate and a duplicate copy. Taxpayers shall complete tax registration formalities with the tax authorities in charge (at the county level or above) of their location.

VAT obligations arise for online sales in the same way as for any sale of goods through a brick-and-mortar business. As of April 2019, the standard rate of VAT is 13 per cent.

Law stated - 15 October 2021

Returns

If an offshore company is used to supply goods over the internet, how will returns be treated for tax purposes? What transfer-pricing problems might arise from customers returning goods to an onshore retail outlet of an offshore company set up to supply the goods?

Chinese law and practice do not address the issue of returns as described in this question.

Law stated - 15 October 2021

GAMBLING

Legality

Is it permissible to operate an online betting or gaming business from the jurisdiction?

The Chinese mainland is staunchly opposed to gambling. Both online and offline gambling are illegal, with both punishable by criminal penalties and detention.

Law stated - 15 October 2021

Are residents permitted to use online casinos and betting websites? Is any regulatory consent or age, credit or other verification required?

No, residents in the Chinese mainland are not allowed to use online casinos and gaming sites.

Law stated - 15 October 2021

OUTSOURCING

Key legal and tax issues

What are the key legal and tax issues relevant in considering the provision of services on an outsourced basis?

Agreement

When choosing the provision of services on an outsourced basis, an enterprise shall try to avoid direct personnel management, including signing any written agreement with outsourced employees or paying salaries and social insurance premiums. Instead, the enterprise should sign standardised outsourcing agreements with its outsourced services provider.

Qualification

The outsourced services provider shall possess corresponding qualifications if the outsourcing business involves qualification requirements.

Business secrets

Enterprises shall not assign outsourced employees to core positions that may have access to the business secrets of the enterprise.

Tax

If an outsourced service provider is qualified for the recognition of advanced technology-based service enterprises in terms of employee qualifications, sources and percentages of revenue, it will be entitled to tax incentives.

Law stated - 15 October 2021

Employee rights

What are the rights of employees who previously carried out services that have been outsourced? Is there any right to consultation or compensation, and do the rules apply to all employees within the jurisdiction?

Generally speaking, in the company, the benefits related to salary, annual leave and promotion of outsourced employees might be inferior to regular employees. In terms of the rights of employees (such as severance or consultation) under Chinese employment law, there is no legal distinction between outsourced and regular employees.

Law stated - 15 October 2021

ONLINE PUBLISHING

Content liability

When would a website provider be liable for mistakes in information that it provides online? Can it avoid liability? Is it required or advised to post any notices in this regard?

The internet service provider (ISP) shall not bear liability for infringement when the relevant copyright owner fails to issue a warning or provide any other information that is sufficient to make the ISP aware of such an infringement. The necessary measures taken by the ISP include the technical approaches that may directly prevent the occurrence of infringement consequences, such as deleting infringing content, breaking links and filtering keywords.

After receiving the notice, if the ISP still does not remove the infringing link within a reasonable period resulting in the further expansion of the damage, it will bear the legal responsibility for such additional damages.

Law stated - 15 October 2021

Databases

If a website provider includes databases on its site, can it stop other people from using or reproducing data from those databases?

If the website provider owns the copyright on the database, then the website provider has the right to ask others to stop using or copying the data in the database.

Law stated - 15 October 2021

DISPUTE RESOLUTION

Venues

Are there any specialist courts or other venues in your jurisdiction that deal with online/digital issues and disputes?

China has established three internet courts in Beijing, Hangzhou and Guangzhou. These courts specialise in internet-related cases online, all of which are located in the most booming and prosperous areas of China's internet industry. These internet courts are skilled in hearing disputes arising from contractual disputes over online shopping or services and underwrite financial loans, as well as online copyright disputes and internet-related public interest litigation, among others. Most of the evidence in the cases heard by internet courts is in the form of electronic data and is stored on the Internet.

Law stated - 15 October 2021

ADR

What alternative dispute resolution (ADR) methods are available for online/digital disputes? How common is ADR for online/digital disputes in your jurisdiction?

For online or digital disputes, alternative dispute resolution (ADR) is a very common practice in China. E-commerce platforms such as Alibaba and JD.com have set up their own ADR platforms and most consumers are accustomed to solving online shopping contractual disputes through such platforms.

For example, on Alibaba, when a consumer is dissatisfied with goods or services online, the consumer usually submits evidence and negotiates with the supplier first. After the consumer submits the dispute, the two parties have three to

30 days to negotiate without the involvement of the e-commerce platform itself. If the supplier provides a different proposal, the consumer could request Alibaba's assistance by clicking the 'escalate dispute' button or may continue to negotiate with the seller.

In general, the ADR platforms of businesses are more inclined to protect the interests of consumers.

However, some consumers will directly seek the help of the official ADR platform, which is the 12315 platform. The 12315 platform is a hotline that is directly affiliated with the State Administration for Market Regulation (SAMR). In addition, at a local level, many SAMR offices have also established their own separate complaint channels in the form of the hotline or social media accounts.

Law stated - 15 October 2021

UPDATE AND TRENDS

Key developments of the past year

Are there any emerging trends or hot topics in e-Commerce regulation in the jurisdiction? Is there any pending legislation that is likely to have consequences for e-Commerce and internet-related business?

On 20 August 2021, China released the full final draft of the Personal Information Protection Law (PIPL). Effective from 1 November 2021, the PIPL, along with the Cybersecurity Law and the Data Security Law, establishes an extensive legal framework of cybersecurity and personal information protection in China.

We assume that the PIPL will have a profound effect on business operations in China with regard to data security and privacy management. It will also bring more challenges to foreign-invested companies conducting business in China.

Law stated - 15 October 2021

Jurisdictions

	Brazil	Pinheiro Neto Advogados
	Chile	Magliona Abogados
	China	Buren NV
	Germany	SKW Schwarz Rechtsanwälte
	India	AZB & Partners
	Italy	ICT Legal Consulting
	Japan	Anderson Mōri & Tomotsune
	Malaysia	Raja, Darryl & Loh
	Russia	Morgan, Lewis & Bockius LLP
	Taiwan	Lee and Li Attorneys at Law
	Turkey	Boden Law
	USA	Baker McKenzie