



e-Commerce

in 31 jurisdictions worldwide

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General

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

On the one hand, the government of the People's Republic of China (PRC) encourages the development of the information industry given the benefits of applying this technology to commerce, finance, science, entertainment and education. On the other hand, the government of the PRC also has reason to fear the internet as a conduit for uncensored news and unapproved views. Accordingly, a number of internet-related regulations have been specifically issued to address the threat, as perceived by the government, to 'national security and the public interest'. The love-hate attitude of the Chinese government towards the internet appears to be a major theme underlying many of China's regulations concerning such technology. The immediate consequence of the regulations governing content on the internet creates difficult and complex compliance issues for internet service providers in China and may potentially create a bottleneck for the healthy development of the new media driven by the internet and its related technologies.

Legislation

- 2** What legislation governs business on the internet?

Businesses on the internet can be broadly classified into the following categories: electronic transaction; licensing transaction; and advertising transactions.

Electronic transactions

Legislation in this area focuses on digital signatures, electronic contracts and the legal validity of electronic records. The major pieces of legislation include the Contract Law of the PRC and the Electronic Signatures Law.

Licensing transactions

Most of the content licensing and linking arrangements involve copyright protection on the internet. Major pieces of legislation include the Copyright Law of the PRC and the Regulations on the Protection of the Right of Communication through Information Network.

Advertising transactions

Internet advertising is generally governed by the Advertising Law of the PRC and related regulations. There are no specific regulations applicable to online advertising transactions.

In addition, the Telecommunication Regulations of the PRC and the Measures for the Administration of Internet Information Service govern the business activities of internet services providers such as internet service providers (ISPs), internet content providers (ICPs) and application services providers (ASPs). Certain types of internet-related services, such as e-mail services, electronic bulletin board services,

online news reporting services, online publishing, online education and online securities brokerage, are subject to special regulations.

China's government pays special attention to certain security-related issues presented by the internet. Major pieces of legislation include the Regulations for Protection and Administration of Computer Information Network and Internet Security and the Provisions on Technical Measures for Internet Security Protection.

Regulatory bodies

- 3** Which regulatory bodies are responsible for the regulation of e-commerce and internet access tariffs and charges?

The Ministry of Information Industries (MII) oversees the telecommunications sector and issues licences to various internet services providers such as ISPs, ICPs and ASPs. The MII is also responsible for the regulation of internet access tariffs and charges. Other governmental authorities may also be involved in regulating certain aspects of e-commerce activities. For example, the National Development and Reform Commission regulates the price of goods and services offered online, the State Administration for Industry and Commerce and its local counterparts supervise business activities engaged in by online operators as well as online advertising activities, and other authorities are in charge of specific industry sectors or web transaction processes, including, among other things, banking, securities, pharmaceutical, entertainment, foreign exchange, taxation and customs. In addition, the Ministry of Public Security plays a significant role in regulating internet information security.

Jurisdiction

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

There are no specific rules for determining jurisdiction for internet-based transactions. Generally, according to judicial practice in China, a Chinese court may exercise jurisdiction over a non-resident defendant if in the context of a tort claim the defendant's act (including the result thereof) giving rise to or related to the claim brought against the defendant occurred in China or, in the context of a contractual claim, a forum in China is stipulated in a contract, or in the absence of such choice the contract is deemed to be concluded or performed in China.

To apply the above principles, a Chinese court would evaluate the nature and quality of the non-resident defendant's commercial activity in China on a case-by-case basis. For example, certain factors such as using web servers in China, displaying website content in the Chinese language, conducting promotional and advertising activities in China and providing after-sales services in China should be relevant.

Contracting on the internet

- 5** 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?

It is possible to form and conclude contracts electronically. Based on the Contract Law and the Electronic Signatures Law, a contract can be formed electronically (including e-mail, website forms, click-through agreements, electronic data interchange, etc) through offer and acceptance. Generally, a contract comes into effect once an offer is communicated and accepted by the person receiving it. An issue presented by the internet is how and when an offer or an acceptance is received. For example, an electronic record is considered received when it enters a computer system that the recipient has designated. Also, a written contract (including an electronic form contract) can be established when the parties sign or seal it. In this context, a valid electronic signature has the same legal status as a handwritten signature or seal.

'Click wrap' contracts are generally enforceable in China. There are no specific statutory requirements to be met before a click wrap contract formed and concluded electronically can become enforceable. As a matter of practice, a merchant is advised to give the other contracting party an opportunity to read the terms and conditions of the form agreement before clicking on an 'I accept' or 'I agree' button. Also, since a click wrap contract is likely to be considered an adhesion contract, the principle of fairness must be observed and the merchant needs to adopt a reasonable way to draw the other contracting party's attention to clauses that tend to exclude or restrict the liability of the merchant.

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

Contracting on the internet is subject to the Contract Law and there are no particular laws governing this area. The Electronic Signatures Law governs the legal requirements for valid digital signatures; however, it does not distinguish between consumer contracts and business-to-business (B2B) contracts.

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

According to the Electronic Signatures Law, any electronic signature that complies with all of the following conditions shall be regarded as a valid electronic signature:

- any data (ie, symbols, encoding language, etc) made by an electronic signature is used only for the electronic signature and is owned exclusively by the electronic signatory;
- the data made by an electronic signature is controlled only by the electronic signatory when signing;
- any alteration of the electronic signature after signing can be easily detected; and
- any alteration on the contents and form of any data message the e-signature accompanies can be easily detected after signing.

The parties may also choose to use the electronic signature under additional secure and reliable conditions that the parties may specify.

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

There are no specific data retention requirements applicable to the formation of electronic contracts.

According to the Electronic Signatures Law, any data message that meets the following requirements shall be regarded as satisfying the requirements for document preservation as prescribed by laws and regulations:

- the data message can effectively reveal its contents and may be accessed for reference and use at any time;
- the format of the data message is the same as the format when it was created, sent or received, or the format is not the same but is able to accurately show the contents of original creation, sending or receiving; and
- the data message is capable of identifying the addresser, addressee of the data message and the time of sending and receiving.

Security

- 9** What measures must be taken by companies or ISPs to guarantee the security of internet transactions?

The Telecommunication Regulations state that a telecommunications service operator shall establish and implement a sound internal security protection system (eg, measures for website security protection, managing information security and confidentiality and the management of the security of user information) in accordance with PRC regulations. Each telecommunications service operator shall report its internal security protection system to the local Public Security Bureau. The specific requirements vary by industry (such as online banking and online securities trading).

- 10** 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?

Private keys do not need to be provided to any authorities. In the event of criminal action or risk to national security, investigative authorities may require the private keys to be made available provided that those authorities are legally authorised to inspect the electronic communications and telecommunications equipment and facilities and provided they follow the prescribed procedures.

There are no general regulations applicable to certification authorities. The Electronic Signatures Law sets forth the liabilities of certification authorities as far as digital signatures are concerned, for example: after receiving any application for an electronic signature certificate, a certificate authority shall check the identity of the applicant and review its relevant materials; any electronic signature certificate signed by a certification authority shall be accurate; a certification authority shall ensure that the contents of an electronic signature certificate are complete and accurate within the valid period and ensure that the party depending on the electronic signature is able to prove or knows the contents specified in the electronic certificate; and a certification authority shall properly keep the information in relation to certification for at least five years after the expiration of the electronic signature certificate.

Domain names

- 11** 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?

The registration of country-level domain names ending with '.cn' and Chinese language domain names is handled by registrars accredited by the China Internet Network Information Centre (CNNIC). It is possible to register the above domain names without any residency requirements.

- 12** Do domain names confer any additional rights (for instance in relation to trademarks or passing off) beyond the rights that naturally vest in the domain name?

Mere registration of domain names does not confer the registrant any additional rights in the form of intellectual property rights beyond the rights that naturally vest in the domain name (eg, the right to exclude others from using the same domain name in the domain names system).

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

Under the dispute resolution policy governing domain names ending with '.cn' and Chinese domain names, ownership of a trademark is one of the elements to be demonstrated for filing a complaint against a registrant who has registered a domain name containing the same or a confusingly similar word in bad faith.

Advertising

- 14** What rules govern advertising on the internet?

There are no special rules governing advertising on the internet. Therefore, the laws and regulations applicable to advertising activities in the traditional media must be followed. The Advertising Law and its implementing rules are two pieces of legislation at the central level. In addition, there are some local regulations that specifically govern advertising on the internet.

- 15** Are there any products or services that may not be advertised or types of content that are not permitted on the internet?

In general, products and services which are illegal under PRC law (eg, gambling) and those for which a PRC statute prohibits advertising (eg, tobacco) cannot be advertised on the internet. Advertising of certain products and services, such as medical products, pharmaceuticals and seeds, requires obtaining prior approval from the relevant government agencies.

The rationale underlying most regulations on advertising is to protect consumers from misleading, deceptive or fraudulent advertising practices. Additionally, the general regulation governing the business activities of ICPs prohibits publication of certain categories of objectionable content that, for example:

- incites ethnic hostility or racial discrimination or disrupts ethnic harmony;
- disrupts the religious policy of the state or propagates heresies and feudal superstitions;
- spreads rumours, disrupts social order or breaks down social stability;
- disseminates obscenity, pornography, gambling, violence, murder, terror or instigates others to commit offences; or
- insults or defames others or infringes upon the lawful rights and interests of others.

Financial services

- 16** 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?

Specific regulations are in place to regulate and supervise advertising or selling financial services products on the internet, as well as through traditional methods. The major government agencies involved include the People's Bank of China (PBOC), the China Banking Regulatory Commission (CBRC), the China Securities Regulatory Commission

(CSRC) and the China Insurance Regulatory Commission (CIRC). The PBOC, as the central bank, is responsible for formulating and promulgating regulations governing all banking institutions. The CBRC is responsible for the supervision and regulation of commercial banking institutions in China. The CSRC is responsible for the supervision and regulations of broker-dealers, securities exchanges and investment advisers in the activities involving offering and trading of securities. The CIRC is responsible for the supervision of and the regulations governing insurance companies.

Defamation

- 17** Are ISPs liable for content displayed on their sites?

ICPs are responsible for monitoring the content of their websites, taking down forbidden content upon discovery, retaining records relating to the publication of such content and reporting the matter to the relevant public security authority.

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

An ICP can remove defamatory material from its website without prior court authorisation.

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

There is no definite answer to this question under the statutes since whether a website provider can link to third-party websites without permission must be evaluated on a case-by-case basis. Generally, two legal theories (trademark and copyright) may be used to challenge an unauthorised link. That said, under generally accepted legal principles, 'fair use' may potentially be used as a defence if the linking does not result in confusion or economic harm to the trademark owner or the copyright owner.

- 20** Can a website owner use third-party content on its website without permission from the third-party content provider?

A website provider cannot use third-party content on its website without permission from the third-party content provider. Copyright protection covers the publication of works on the internet. Copyright owners have the exclusive rights to reproduce, publish, display, perform or otherwise disseminate their works on the internet. A website provider cannot use third-party content on its website without permission unless such unauthorised use constitutes a fair use exemption.

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

A website provider can license the software to third parties provided that it owns the software or is allowed to sub-license it under an appropriate licence or authorisation from the owner of the software.

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

As indicated in question 19, direct or indirect liabilities may be incurred if linking to third-party websites constitutes an infringement of the intellectual property rights (eg, trademark or copyright) of another. For instance, using a logo that is the same or similar to a trademark may create a likelihood of confusion that the linking party has obtained a licence to use the logo from or is affiliated with the trademark owner. Also, it is a violation of the law to create a link that contributes to unauthorised copying of a copyrighted work if the

linking party knew or had reason to know of the unauthorised copying and encouraged it. To avoid such potential liabilities, prior agreement with the third-party website owners is always recommended.

Data protection and privacy

23 What legislation defines 'personal data' within the jurisdiction?

There is no definition of 'personal data' in PRC legislation, but the concept of privacy exists under PRC law. In China, privacy is currently protected through rights of name, portrait, fame and honour. In practice, user registration information with websites, eg, real name, contact information, bank information, etc is considered to be 'personal data' protectable against unauthorised disclosure.

24 Does a website owner have to register with any controlling body to process personal data? May a website provider sell personal data about website users to third parties?

No registration is required for a website provider to process personal data. A website provider is, however, required to establish a sound management system to protect its users' registration information and file the system for record with the local public security authority as part of general compliance requirements imposed on all internet users as far as internet security is concerned. Unless otherwise stipulated by laws and regulations, users' registration information is restricted from being published or disclosed without users' consent.

25 If a website owner is intending to profile its customer base to target advertising on its website, is this regulated in your jurisdiction?

There is no specific regulation regarding the profiling of a website provider's customer base to target advertising on its website. Profiling by website providers can be carried out by way of a contractual arrangement (eg, by terms of use).

26 If an internet company's server is located outside the jurisdiction, are any legal problems created when transferring and processing personal data?

Assuming the internet company is a foreign company that does not have web servers in China, the internet company will not be subject to the PRC jurisdiction. As such, the PRC laws and regulations become irrelevant.

Taxation

27 Is the sale of online products (for example, software downloaded directly from a website) subject to taxation?

VAT should be payable for the sale of online products by domestic companies. That said, in reality if a foreign company carries out the sale of online products through servers located outside China, VAT is not collected.

28 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 a foreign company places servers (eg, a mirror site) inside China to provide faster access and the functions of the mirror site are limited to advertising, promotion or preparatory or auxiliary activities, there would be no exposure to local taxes in China. If, however, the servers in China support a highly interactive website that permits, among other things, the conclusion of contracts, the sale

and payment of online products and the downloading of online products, the activities in China could give rise to the creation of a permanent establishment of the foreign company in China and therefore tax liabilities may ensue in China.

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

Companies registered in the PRC are required to effect tax registrations with the local tax authorities upon their establishment. Domestic internet sales are taxed as a normal sales transaction conducted offline.

30 If an offshore company is used to supply goods over the internet, how will returns (goods returned in exchange for a refund) 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?

Sales of goods by an offshore company into China may attract customs duties and import-level VAT. Customs duties and import-level VAT can be refunded to customers inside China upon re-export of the goods returned in exchange of a refund. At the moment, the branch offices (usually in the form of a representative office) of foreign companies are not allowed to carry out business activities and therefore transfer-pricing problems are not present.

Gambling

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

Gambling is illegal under PRC law and online betting and gaming business inside China are forbidden. That said, it seems that PRC authorities are considering allowing certain authorised domestic operators of specified lottery tickets for sports-related activities to conduct online business activities on a pilot basis in certain major cities in China.

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

The operation of online casinos and betting websites is currently not allowed inside China. Also, it is reported that China has blocked access by residents to most online casinos and betting websites operated from servers located offshore.

Outsourcing

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

As a matter of policy, China does not encourage the provision of services by domestic companies on an outsourced basis. There are restrictions against foreign services providers conducting internet-related businesses from servers located in an offshore location unless the service is provided through a foreign-invested enterprise in the form of an equity joint venture established inside China with foreign ownership capped at 50 per cent. The tax considerations for providing services should be the same as for any domestic service providers established in the PRC.

Update and trends

An emerging trend in China is the increasingly stringent government's control over the internet. For example, according to an investment catalogue issued by the government at the end of 2007 concerning foreign investment in industries, foreign investment in the following sectors is prohibited: 'websites engaging in news reporting, online delivery of audio/video programmes, internet cafes, and website-based cultural-related operations (eg, online games)'. In the meantime, the relevant governmental authorities promulgated Regulations on Online Audio and Video Services (which took effect from 31 January 2008) to set forth very restrictive provisions on who

can engage in these services and how the contents of online audio or video programmes are regulated.

A hot topic in e-commerce context appears to be discussions among legal scholars and practitioners in China concerning the scope of 'personal information' of online users collected, stored and used by online service providers. That said, there is no pending legislation addressing this topic and practices in this regard will continue to be governed by the contracts and policies of individual online service providers.

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

There is no specific legislation dealing with the rights of employees who performed services that have since been outsourced. The general principles contained in the Labour Law on the termination of employment would apply and severance pay may be triggered in specified circumstances. For instance, if employees are laid off due to such outsourcing, the employer shall inform the labour union or 'employee representative body', as well as the employees, of such termination of employment with at least one month's notice and shall pay compensation in accordance with the length of time the employee has worked for the employer.

Online publishing

- 35** When would a website provider be liable for mistakes in information that it provides online? Can it avoid that liability?

In general, a website provider could be held liable for publishing or republishing untruthful information online due to the legal principle of misrepresentation. Liability may be avoided in circumstances such as if the information was initially published by users in the context of a bulletin board system, for example, online chat rooms and forums, and the website provider has taken steps to block or restrict access to such information upon discovery or notice.

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

Databases are protected compilation works under the Copyright Law only in terms of original selection and arrangement. A website provider is not entitled to stop others from using or reproducing data from the database if the structure and organisation of the database are not copied.



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