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Regulation of technology import: China

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This note provides an overview of Chinese laws and regulations concerning the import of technology into China (PRC). It discusses the relevant rules under the PRC Civil Code which took effect on 1 January 2021 and the Technology Import and Export Regulations (TIER), in particular regarding some of the TIER provisions revoked in 2019.

Scope of this note

This note provides an overview of Chinese laws and regulations concerning the import of technology into China (PRC), including the relevant rules under the Civil Code of the PRC 2020 (2020 Civil Code) which took effect on 1 January 2021 and the Technology Import and Export Regulations 2020 (TIER), in particular regarding some of the TIER provisions revoked in 2019.

The note focuses on the details that one should be familiar with to competently draft a technology import contract for the Chinese market. Although it is both lawful and commonplace for parties to choose foreign governing law and foreign forum in a technology import contract between a foreign transferor and a Chinese transferee, it may be impracticable for the foreign party to the contract to avoid the Chinese court when it seeks to enforce against the Chinese counterparty. The note, therefore, is intended to provide practical and up-to-date advice to foreign companies seeking to import technology into China.

Why Chinese law matters for technology import into China

A good understanding of the relevant Chinese legislation is crucial to the success of any technology import into China, even though these transactions can be, and often are, governed by foreign laws that the parties to the transactions choose.

Foreign law and foreign forum: a prevalent choice

Parties to technology import transactions are free to choose foreign governing law and foreign forum, and they often do.

In any technology import, there must be a domestic importer (that is, the transferee) and a foreign transferor. Because of the presence of a foreign party, any contract governing technology import is regarded as a "foreign-related contract" (涉外合同) under PRC law.

There is no official definition for the phrase "foreign-related contract". However, support can be found in several legal authorities for a general consensus in practice that any contract to which there is at least one foreign party is "foreign related". For example, the Interpretation of the Supreme People's Court on Several Issues in the Application of the PRC Law on the Application of Laws to Foreign-Related Civil Relationships 2020 (2020 Foreign-Related Civil Relationships Interpretation, with effect from 1 January 2021) allows Chinese courts to find any civil relationship to be foreign-related, provided, among other things, one or both parties to the relationship are foreign citizens, foreign legal persons or other organisations, or stateless persons (*Article 1*).

According to Chinese conflict-of-laws rules, foreign-related contracts may be governed by any foreign law chosen by the parties (*Articles 41 and 49*, Law on the Application of Laws to Foreign-Related Civil Relationships 2010 (2010 Foreign-related Civil Relationships Law, with effect from 1 April 2011)). (See also Practice note, Choice of governing law in China-related contracts: Foreign-related contracts: basic rule.)

Additionally, Chinese law generally honours any choice of foreign forum in a technology import agreement where it is a foreign-related contract (*Article 271,* Civil Procedure Law 2017 (2017 CPL) and *Article 531,* Interpretation Regarding the Application of the Civil Procedure Law 2020, with effect from 1 January 2021).

It is not unusual to come across technology import contracts wherein the parties choose a foreign

governing law and a foreign forum, although it is difficult to find exact figures on the prevalence of such choices. According to the Practical Law China Governing Law Survey 2014, only 31% of the Chinese cross-border IP and IT contracts surveyed are governed by Chinese law and more than half of such contracts choose one type of common law or another (21% New York, 19% Other (including California), 17% Hong Kong, 10% England and Wales, and 2% Australian). Presumably, most technology import contracts that choose foreign laws also choose foreign forums for dispute resolution.

Chinese court enforcement: potentially inevitable

Notwithstanding the choice of foreign law and foreign forum, a foreign technology transferor may still be required to seek enforcement before Chinese courts.

The reason is that in most technology import transactions, the technology importer (the Chinese transferee of the imported technology) tends to be a domestic business with little or no assets abroad. Despite any provisions for choice of foreign governing law and foreign forum that it may put into the contract, the foreign technology transferor may have to come to China to enforce the contract against the domestic importer. The most likely way for the technology import contract to end up in a Chinese court is when the foreign party seeks to execute a successful foreign judgment, or enforce a successful foreign arbitral award against the Chinese technology importer in China. Typically, such process takes place in the Chinese importer's home court. Once in a Chinese court, the Chinese importer would likely try to resist enforcement of such arbitral award, including by challenging the validity of the technology import contract.

Consequently, neither the choice of foreign governing law nor the choice of foreign forum in the technology import contract would be sufficient to keep the foreign party out of the Chinese court.

Mandatory application of Chinese law

Notwithstanding the parties' choice of foreign substantive law, a Chinese court could apply Chinese law instead of the chosen foreign law on either of the following two statutory grounds:

- Non-compliance with mandatory rules of Chinese law.
- Harm to "social and public interests".

(*Articles 4-5*, 2010 Foreign-related Civil Relationships Law.)

It should be noted that in practice, the distinction between these two grounds is not always clear.

Mandatory rules

For mandatory rules in the context of choice-of-law, the Supreme People's Court (SPC) identifies the following five areas of law in a non-exhaustive list where the Chinese statutory or regulatory provisions should be treated as "mandatory rules":

- The protection of the rights and interests of labourers.
- Food security or public health security.
- Environmental security.
- Foreign exchange control and financial security.
- Anti-monopoly or anti-dumping.

(*Article 8*, 2020 Foreign-Related Civil Relationships Interpretation.)

The intellectual property rights (IPR) related provisions under China's competition law regime would apply to a technology import transaction. See Practice note, Chinese competition law and IPR licensing.

In addition, Chinese regulations on technology import may also be considered mandatory rules. See What Chinese law mandates on technology import contracts.

Social and public interests

The concept of "social and public interests" is not yet clearly distinguished from the concept of "mandatory rules". In practice, the phrase "social and public interests" is often used interchangeably with "public policy". It is one of the grounds for denying recognition and execution of foreign court judgments, or denying enforcement of domestic and foreign arbitral awards (*Articles 237, 274 and 282*, 2017 CPL), or for revoking domestic arbitral awards (*Article 58*, Arbitration Law 2017, with effect from 1 January 2018).

There has been a notable difference in how the phrase "social and public interests" is invoked by Chinese courts in the enforcement of domestic versus foreign arbitral awards.

In the domestic context, there are many cases in which the Chinese court revokes, or denies enforcement of, a variety of arbitral awards on that ground. See for example:

- *Hainan Yixing Urban Construction v Zhongchengjian Sixth Engineering Bureau Group [2015] Haikou Intermediate People's Court (Hai Zhong Fa Zhong Zi No. 10)* ((2015)海中法仲字第10号) (revoking domestic arbitral award for violating social and public interests).
- *Wuhan Chaofan Logistics (Ezhou) v CCCC Second Navigation Engineering Bureau [2015] Wuhan Intermediate People's Court (E Wuhan Zhong Zhong Jian Zi No. 00159)* ((2015)鄂武汉中仲监字第00159号) (revoking domestic arbitral award for violating social and public interests).

- *Shenzhen Rongxinbao Non-Financing v Xie [2019] Shanwei Intermediate People's Court (Yue 15 Zhi No. 251)* ((2019)粤15执251号) (denying enforcement of domestic arbitral award for violating social and public interests).

With respect to the recognition and enforcement of foreign arbitral awards, however, Chinese courts have generally relied on social and public interests or public policy much less frequently. This is mainly due to a formal internal reporting mechanism whereby the lower court hearing these cases should seek advisory opinions from the SPC (Notice on the Handling of Issues Concerning Foreign-Related Arbitration and Foreign Arbitration by People's Courts 1995, revised in 2008).

Only in very limited cases did PRC courts invoke "social and public interests" as the grounds to deny the recognition and enforcement of foreign judgments or arbitral awards, and there has been no published precedent on technology import. The SPC has urged for the application of "social and public interests" only as a last resort. See for example:

- *Reply Concerning the Request by Western Bulk Pte Ltd for Recognition and Enforcement of the British Arbitral Award 2012* (关于韦斯顿瓦克公司申请承认与执行英国仲裁裁决案的请示的复函) ("Only when the recognition and enforcement of foreign commercial arbitral awards will lead to violations of the basic principles of our country's laws, violations of our national sovereignty, endangering national and social public security, violations of moral rules and other situations that endanger China's fundamental social public interests, can we deny recognition and execution for public policy reasons.").
- *Reply to the Request for Instructions on Non-Recognition of No. 07-11 (Tokyo) Arbitral Award of the Japan Commercial Arbitration Association 2010* (关于不予承认日本商事仲裁协会东京07-11号仲裁裁决一案的请示的复函) ("The issue of public policy should be limited to situations where recognition of arbitral award would violate our basic legal system and undermine the fundamental social interests of our country. If there are other grounds for denying recognition in the case, it would not be appropriate to apply the doctrine of public policy to deny recognition of the arbitral award.").

For technology import contracts (which are necessarily foreign-related) there is a real possibility that a Chinese defendant may cite "social and public interests" to resist the enforcement of foreign arbitral award or court judgment. Depending on the case-specific facts, arguments based on "social and public interests" may not be persuasive in the Chinese court against a foreign plaintiff.

By contrast, the potential application of "mandatory rules" of Chinese law to technology import contracts could be a larger risk to the foreign party whose technology import contract comes under the scrutiny of a Chinese court. (See Mandatory rules.)

How Chinese law defines technology import

The definition of "technology import" is addressed in TIER:

> "The technology import and export as referred to in these Regulations refers to acts of transferring technology from outside the territory of the People's Republic of China into the territory of the People's Republic of China or vice versa by way of trade, investment, or economic and technical cooperation.
>
> The activities stipulated in the previous paragraph include assignment of the patent right or right to apply for patents, licensing for patent exploitation, assignment of technical secrets, technical services and transfer of technology by other means."

This definition is intended to be wide enough to capture all forms of technological IP transactions between a Chinese party and a foreign party.

TIER: legislative background

TIER was promulgated on 10 December 2001 and came into effect on 1 January 2002. It is a set of administrative regulations enacted by the State Council, the executive branch of the Chinese government, rather than a statute passed by the Chinese legislature, the National People's Congress (NPC) or its Standing Committee. TIER superseded earlier Chinese regulations on technology import, including the *Technology Import Contract Administration Regulations 1985* (技术引进合同管理条例) and the *Implementation Rules for the Technology Import Contract Administration Regulations 1988* (技术引进合同管理条例施行细则) (*Article 52, TIER*).

TIER provided for several mandatory requirements which, generally speaking, protect the interests of the Chinese party to cross-border technology transactions (see What Chinese law mandates on technology import contracts). Some of the TIER provisions have since been revoked (see Revoked TIER provisions).

Ever since its rollout and China's accession to the World Trade Organization (WTO), TIER has been the target of much criticism from both foreign businesses and governments. For instance, in 2003, Japan raised questions to China's Permanent Mission at the WTO concerning the discriminatory nature of Article 24 of

TIER. In 2018, both the US and the EU launched WTO cases against China citing TIER as a violation of China's treaty obligations.

However, in the 17 years after TIER's rollout, there is little published case law on TIER. This lack of precedents causes uncertainty about how a Chinese court might rule on technology import disputes and apply TIER. More importantly, despite (or perhaps because) of this lack of precedents, TIER has likely had a disproportionately large impact on the technology licensing practice of foreign businesses in China.

On 15 March 2019, the NPC enacted the Foreign Investment Law 2019 (2019 FIL), which came into force on 1 January 2020. The 2019 FIL includes a provision prohibiting any executive government body or official from forcing foreign investors to transfer technology (*Article 22*) (see Legal update, China enacts unified Foreign Investment Law: Investment protection).

In addition, the State Council announced the amendments to TIER:

- In March 2019 (*Article 38,* State Council Decision on the Amendment of Certain Administrative Regulations 2019 (2019 Amendments)).
- In November 2020 (*Article 15,* State Council Decision on Revising and Repealing Certain Pieces of Administrative Regulations 2020 (2020 Amendment)).

However, some of the revoked TIER provisions may remain relevant (see Revoked TIER provisions).

Relevant terminology in other legislation

In addition to TIER's definition, several other terms in other Chinese legislation also apply to technology import into China, including:

- **"Technology contracts" (**技术合同**).** A technology contract is a contract made by the parties to define their mutual rights and obligations for technology development, assignment, licensing, consultation or service (*Article 843*, 2020 Civil Code).
- **"Technology assignment contracts" (**技术转让合同**).** A technology transfer contract is a contract signed by the right holder who legally owns the technology and transfers existing specific patents, patent applications, and technical secrets to others (*Article 862, 2020 Civil Code*).
- **"Technology license contracts" (**技术许可合同**).** A technology license contract is a contract signed by the right holder who legally owns the technology and licenses the relevant rights of existing specific patents and technology secrets to others to implement and use (*Article 862, 2020 Civil Code*).

Therefore, in addition to TIER, technology import contracts are also subject to certain provisions of the 2020 Civil Code on technology contracts.

What Chinese law mandates on technology import contracts

This section focuses on the details one should be familiar with in order to competently draft a technology import contract for the Chinese market. The details of Chinese law discussed below are selected primarily based on how particular they are to Chinese law. These peculiarities are likely unexpected by the average common-law lawyer who is familiar with the technology licensing practice in another jurisdiction. Features of technology contract drafting that may be common to both Chinese law and foreign laws are omitted.

Prohibition against illegal monopoly of technology

Violating anti-trust rules may render a technology contract invalid. According to the 2020 Civil Code:

- Technology contracts that illegally monopolize technology or infringe the technical achievements of others are invalid (*Article 850*).
- The conclusion of a technology contract should be conducive to the protection of intellectual property rights and the progress of science and technology, and promote the research and development, transformation, application and dissemination of the fruits of scientific and technological endeavors (*Article 844*).
- Technology assignment contracts and technology license contracts should not restrict technological competition or technological development (*Article 864*).

This rule applies broadly to all technology contracts alike in China, including both purely domestic agreements between two Chinese parties and technology import agreements between a foreign assignor/licensor and a Chinese assignee/licensee.

The SPC has interpreted the phrase "illegally monopolize technology" to mean any of the following:

- Limitations on the development of improvements to the technology, and unfair exchange conditions on the improved technology, such as:
  - grant-back of improved technology without compensation;
  - non-reciprocal transfer of improved technology; or
  - sole or joint ownership of improved technology without compensation.

- Tie-outs, that is, limitations on the use of similar or competing technology from a third party.
- Limitations on an assignee/licensee's reasonable exploitation of the assigned/licensed technology according to market demand, including unreasonable restriction on sales quantity, type, price, channel, and export.
- Tie-ins and package licensing, that is, requirements to purchase additional technology, goods, or services that are unnecessary for the practice of the technology.
- Unreasonable restrictions on the sourcing of raw materials, parts, equipment and so on.
- Prohibitions or restrictions on an assignee/licensee's ability to challenge the validity of the assigned/licensed IP.

(*Article 10*, Interpretation of the SPC Regarding Issues Relating to the Application of Law to the Adjudication of Technology Contract Dispute Cases 2020 (2020 Technology Contract Interpretation, with effect from 1 January 2021).)

Most of the limitations and restrictions listed by the SPC in the 2020 Technology Contract Interpretation can be generally described as anti-competitive contractual arrangements. Under Chinese law, a Chinese court may find any of them sufficient for invalidating a technology assignment/license contract.

For a technology transferor, it may wish to have provisions to retain control of the technology:

- Whereby ownership of any improvement made by the licensee vests automatically in the licensor.
- Whereby any improvement made by the licensee is assigned or licensed to the licensor for no additional consideration.
- That set a strict territorial scope and prohibit the licensee from exporting to certain territories.
- For package licensing of other technology.
- Whereby the licensee acknowledges the validity of, and the licensor's right, interest and title to, the licensed IP.
- That prohibit any challenge to the validity, or the licensor's ownership, of the licensed IP rights.

However, if any of these terms is included in a technology import contract for China, there is a risk that the clause would be found to illegally monopolize technology under the 2020 Technology Contract Interpretation, and therefore invalidate the contract under Article 850 of the 2020 Civil Code. In particular, the risk would be higher if the restrictive clause is not required for the purpose of the contract.

However, precedents that cited the judicial interpretation regarding "illegally monopolize technology" are scarce. In *Wu Qi v Beijing Silugao Hi-Tech Development Limited [2007] Beijing High People's Court (Gao Min Zhong Zi No. 592)* ((2007)高民终字第592号), an explicit tie-out (limitations on the use of similar or competing technology from a third party) clause was determined to have violated the judicial interpretation and was invalidated by the court. Commentators have observed that Chinese courts are inclined to uphold a contract if the alleged IPR abuse clause is determined to be reasonable and necessary for the purpose of the contract.

A prudent approach to avoid that risk altogether is to remove the provisions that might trigger Article 850 from any technology contract for China.

Depending on the commercial negotiation between the parties, it may be worthwhile considering the following options in relation to the improvements to minimize the risk of creating any impermissible grant-backs:

- Additional non-nominal consideration in exchange for the assignment of any improvement developed by the Chinese assignee/licensee, together with a grant-back license to the Chinese assignee/licensee for use within China.
- Additional non-nominal consideration in exchange for a license to any improvement developed by the Chinese assignee/licensee, which may be exclusive outside China, with a right to grant sub-licenses to third parties.
- A free assignment of, or royalty-free license to use, any improvement developed by the Chinese assignee/licensee in exchange for a license from the foreign assignor/licensor to use improvements, upgrades, or other future technology to be developed by the assignor/licensor.
- Mutual terms for joint ownership of improvements developed by either party, with or without additional consideration.

Statutory warranties of clear title and effectiveness

Chinese law requires any technology assignor or licensor, and more specifically any foreign party to a technology import contract, to warrant that:

- It is in lawful possession of the technology offered for assignment or license (that is, clear title).
- The technology is complete, error-free, effective, and capable of reaching the agreed upon technical benchmarks.

(*Articles 862 and 870*, 2020 Civil Code and *Articles 23-24,* TIER.)

In addition, in any technology import, if a third party brings a claim of infringement arising out of the Chinese transferee's use of the imported technology pursuant to the technology import contract, and if the Chinese transferee gives notice of such third party claim to the foreign transferor, then the foreign transferor has a mandatory obligation to assist the Chinese transferee to resolve such third party claim (*Article 23, TIER*). However, sometimes it would be nearly impractical to require absolute effectiveness in normal IP transactions.

To date, technology transferors have still received little guidance from the Chinese courts as to what constitutes "complete, error-free, effective" technology. As such, when preparing a technology import contract, the foreign party should try to avoid expressly incorporating or restating the statutory warranties and consider adding in qualifiers in the warranty clause to reflect the parties' intent at the time of contracting.

Until the technology transfer regime or the relevant contract regime is further reformed, a foreign technology transferor should remain mindful of the statutory warranties and potential consequence of contract invalidation for their violation, particularly in the context of analyzing potential breaches. (See Consequences of violating mandatory rules.)

Written contract requirement for technology assignment/license

The 2020 Civil Code requires all technology assignment contracts and technical license contracts to be in writing (*Article 863*). In addition, the Computer Software Protection Regulations 2013 (2013 Software Protection Regulations) require software copyright licenses and assignments be in writing (*Articles 19-20*).

The Patent Law 2008 (with effect from 1 October 2009 to 1 June 2021), however, has removed a similar requirement of written patent licenses (*Article 12*), possibly indicating a shift toward a more lenient position on non-written technology licenses. This position is inherited by the Patent Law 2020 (2020 Patent Law, with effect from 1 June 2021). However, some commentators still maintain that Chinese law does not allow any implied license to technical IP and that consequently, in so far as there is no express, written license between the parties, there is no license whatsoever under Chinese law for all intents and purposes. Therefore, it is highly advisable to put all technology licenses into writing in China and **not** to rely on any oral agreement. (See also Practice note, Patents (China): Overview: Licences.)

Statute of limitations for technology import

Under Chinese law, technology import contracts are subject to a special statute of limitations. Whereas all other IP agreements, as well as most other contracts, has a limitation period of three years, technology import or export contracts are subject to a four-year statute of limitations. The limitation period starts when the plaintiff acquires actual or constructive knowledge of the breach and the obligor. (*Articles 188 and 594*, 2020 Civil Code.)

It is, therefore, possible for the statute to have run on other concurrent contracts, while claims arising out of the technology import agreement remain actionable.

No effective patent assignment without recordal

Unlike many other jurisdictions, no patent assignment is effective in China unless and until it is recorded with China National Intellectual Property Administration (CNIPA) (*Article 10*, 2020 Patent Law).

Therefore, recordal of Chinese patent assignment is not simply a mechanism to impute constructive notice to bona fide third parties. It determines who owns the patent.

That means that the entity registered as patentee on CNIPA's records at any point in time is the legal owner of the patent at that time, until its name changes in CNIPA's records to that of its assignee. If a patent assignment is not recorded, then the assignee will not become the patentee in any sense under Chinese law, and the assignor will remain the patentee for all purposes. Therefore, recording patent assignments in a timely manner is important in China.

Revoked TIER provisions

Articles 33 and 38 of the 2019 Amendments revoked:

- Articles 24(3), 27, and 29 of the 2001 TIER.
- Parts of Article 43 of the Implementation Regulations of the Sino-Foreign Joint Venture Law 2001 (2001 EJV Regulations).

  (The entire 2001 EJV Regulations were subsequently repealed by the Implementing Regulations of the Foreign Investment Law 2019, with effect from 1 January 2020. See Chinese foreign investment law: legislation tracker: FIL-related legislation: repealed.)

In addition, Article 15 of the 2020 Amendment revoked Article 22 of the 2001 TIER, which used to require that where the foreign party invests in technology to form a

foreign-invested enterprise (FIE), the technology import should be examined or registered alongside the FIE's establishment approval.

TIER Article 24(3) (revoked): indemnity for third party infringement claims

Unlike many real property rights, IP rights are essentially the right to exclude others from exploiting the IP.

For example, a patentee has an exclusive right to prevent others from practicing the patented invention, but the patentee's own practice of that invention might still infringe another person's dominant patent.

Consequently, a patent licensee always runs the risk of being sued for infringing a third party's IP rights, even if its licensor is the rightful owner of the licensed patent, and its use of the licensed patent adheres strictly to the terms of the license agreement.

The revoked Article 24(3) of the 2001 TIER used to require the foreign technology assignor/licensor to bear such infringement liability if the Chinese assignee/licensee's use of the imported technology as agreed in the technology assignment/license agreement infringed any third party's lawful rights and interests.

The 2019 Amendments revoked the mandatory indemnity under TIER for third party claims (*Article 38*). After the 2019 Amendments, parties to technology import contracts are free to negotiate the allocation of liability for third party claims between themselves. However, the default position under Article 874 of the 2020 Civil Code still requires the assignor/licensor to bear such liability of third party claims. If the parties agree otherwise, it must be expressly provided in the technology assignment/license contract.

TIER Article 27 (revoked): requirement for transferee ownership of transferee improvements

Another revoked provision of the 2001 TIER concerns the ownership of improvements to the imported technology. Generally with respect to IP contracts, Chinese law favours IP ownership of any improvement vesting in the party that makes such improvement. This however is just a gap-filling default rule that the parties may contract around (*Article 875,* 2020 Civil Code). See also:

- Article 11 of the 2013 Software Protection Regulations (providing for the software developer's ownership of foreground copyright, in cases where there is no clear agreement).
- Articles 859 and 861 of the 2020 Civil Code (respectively providing for the commissioned party's ownership of any new patentable invention and for joint ownership of any new trade secret, in the absence of any contractual provision).
- Article 19 of the Copyright Law 2020 (with effect from 1 June 2021, providing for the commissioned author's ownership of copyright, in cases where there is no clear agreement).

Conversely, the revoked Article 27 of the 2001 TIER imposed a mandatory requirement on technology import transactions that any improvement to the imported technology be owned by the party that made the improvement. This effectively rendered it impossible for the parties to negotiate the ownership of improvements, and it meant that ownership in any improvement by the Chinese transferee must vest in the Chinese transferee. Moreover, where the foreign and domestic parties have both contributed to the development of an indivisible piece of improvement technology (which is not an unlikely scenario in a JV or a joint development project), Article 27 would require joint ownership by both parties, which is typically inefficient, impractical and a likely source of tension between the co-owners. The revoked Article 27 of the 2001 TIER created a rule on improvement ownership for foreign technology transferors that is different from the general, more permissive rules for domestic technology transferors.

Following the revocation of the TIER requirement on improvement ownership (*Article 38*, 2019 Amendments), the issue is governed under the general statutory provisions of the 2020 Civil Code for all technology assignment contracts and technology license contracts (*Article 875*). The SPC has read many extra constraints on the technology assignor or licensor into the phrase "illegal monopoly of technology", including a requirement that improvements be subject to fair and reciprocal exchange conditions (see Prohibition against illegal monopoly of technology). However, there is now at a minimum some room for the parties to negotiate some reasonable terms on the ownership of improvements that may be different from the default rule.

TIER Article 29 (revoked): prohibition against anti-competitive contractual terms

Similar to the SPC's list under Article 10 of the 2020 Technology Contract Interpretation, the revoked Article 29 of the 2001 TIER also used to include a list of impermissible anti-competitive contract terms including:

- Requiring the Chinese importer to accept any additional conditions unnecessary for the technology import, including the purchase of any unnecessary technology, raw material, product, equipment or service (that is, tie-ins and package licensing).

- Requiring the Chinese importer to pay royalties or other considerations for expired or invalidated patents.
- Restricting the Chinese importer from improving the imported technology or from using the improved technology.
- Restricting the Chinese importer from obtaining similar or competing technology from a third party.
- Unduly restricting the Chinese importer from purchasing raw material, parts and components, products or equipment from third parties (that is, tie-outs).
- Unduly restricting the quantity, variety, or sales price of the products the Chinese importer produces.
- Unduly restricting the Chinese importer's channels for exporting its products.

There is a significant overlap between this list in the revoked Article 29 of the 2001 TIER and the SPC's list that remains in force under Article 10 of the 2020 Technology Contract Interpretation. Therefore, the revoked TIER list presented much the same problems, and invited much the same solutions, as does the SPC's list (see Prohibition against illegal monopoly of technology). Accordingly, revocation of Article 29 of the 2001 TIER will have little substantive impact, if any, on Chinese law governing anti-competitive terms in technology import contracts.

Certain requirements (revoked) on technology transfer agreements for onshore joint ventures

Moving on from TIER, Article 33 of the 2019 Amendments also revoked subclauses (3)-(4) of Article 43(2) of the 2001 EJV Regulations where technology transfer agreements with any onshore EJV (that is, any equity JV) were subject to the following onerous requirements that:

- The term of the technology transfer agreement must generally last no more than ten years.
- The technology transferee be granted a right to continue its use of the transferred technology beyond the expiry of the technology transfer agreement.

These requirements are biased against the foreign JV partner, who often contributes technology to the EJV. Given the unpopularity of onshore JVs in recent years, the 2019 Amendments' partial revocation of Article 43 of the 2001 EJV Regulations will probably prove even less impactful than any of the 2019 Amendments to TIER discussed in the foregoing subsections.

Uncertainty over the 2019 Amendments' retroactive effect

Generally, new Chinese legislation, including administrative regulations, such as TIER, the 2001 EJV Regulations, and their amendments, have no retroactive effect, except where the new legislation includes specific provision on its retroactive effect for the purpose of protecting people's rights and interests (*Article 93*, Legislation Law 2015). Therefore, the 2019 Amendments have no retroactive effect.

Accordingly, the 2019 Amendments do not affect any technology import transaction concluded before its effective date. Therefore, those transactions are subject to all the TIER and 2001 EJV Regulations provisions that are revoked by the 2019 Amendments.

Technology import contracts that were entered into before the 2019 Amendments and that remain in force after the 2019 Amendments present a trickier problem. It seems to be an open question whether the revoked TIER and 2001 EJV Regulations provisions will apply to the ongoing performance of those contracts after the 2019 Amendments. The minimalist text of the 2019 Amendments offers no guidance on this issue, nor does the text of TIER or the 2001 EJV Regulations. A Chinese court may have to make a ruling of first impression, if this issue arises in court. Until then, it is probably advisable to be cautious and adopt the conservative position that the revoked regulatory provisions remain effective and applicable to future ongoing performance of technology import contracts executed before the effectiveness of the 2019 Amendments.

Consequences of violating mandatory rules

As most of the Chinese legal provisions on technology transfer contracts and all the Chinese regulatory provisions on technology import contracts are considered mandatory rules (see Mandatory application of Chinese law), Chinese courts are bound to apply them when adjudicating a dispute concerning technology import contracts, regardless of the parties' choice of foreign law (*Article 4*, 2010 Foreign-related Civil Relationships Law).

The violation of these mandatory rules could have severe repercussions. According to the 2020 Civil Code, a contract is invalid where the contract violates a mandatory provision of any laws or administrative regulations (*Article 153*).

An unanswered question regarding contract invalidation is whether the application of Article 153 or Article 850 of the 2020 Civil Code would invalidate the contract in its

entirety or only in its part that violates any mandatory Chinese law. A textual or contextual analysis of the statutory language seems to favour an interpretation as requiring invalidation in whole (though there is another school of thought in favour of invalidation in part). Therefore, both invalidation in whole and invalidation in part are possible outcomes under Article 153 or Article 850 of the 2020 Civil Code.

Once a contract (or any part of it) is invalidated, it is deemed void *ab initio* (*Article 155, 2020 Civil Code*). Specifically, upon invalidation, the parties are discharged from performing the contract (or the invalidated part). If any performance is already under way, it should cease. If a contract has been fully performed, the Chinese court would try to restore the parties to their pre-contract state (that is, as if the contract had never been entered into). The party at fault for rendering the contract invalid is liable for damages caused to the other faultless party. However, even upon invalidation, there are special rules for technology contracts that favours transferees (*Articles 11-12*, 2020 Technology Contract Interpretation):

> "Upon invalidation or cancellation of a technical contract, where both parties are unable to renegotiate and agree on ownership of, and sharing of benefits from, a new technical achievement completed in the performance of the contract or subsequent improvement of others' technical achievement, the people's court may rule that the party which completed the technical achievement should take ownership.
>
> Following the invalidation of a technology contract in accordance with Article 850 of the Civil Code for infringement of a third party's technical trade secret, unless the laws and administrative regulations provide otherwise, the party that acquired the technical trade secret in good faith may continue to use such technical trade secret within its scope of use at the time of its acquisition, provided that it pays reasonable royalties and maintains its confidentiality obligation to the right-holder."

In the light of the serious consequences that can follow from violating mandatory Chinese rules on technology import contracts, it is highly advisable for the foreign party to such contracts to avoid such violations.

Chinese technology import control regimes

Chinese law regulates technology import based on the type of the technology. This section summarises the technology import control regimes of China, including the registration and approval procedures for different categories of technology import into China.

Classification of imported technology

Chinese law divides imported technology into the following three categories:

- Prohibited.
- Restricted.
- Unrestricted.

(*Articles 14 and 16-17*, *Foreign Trade Law 2016* (对外贸易法) and *Articles 5, 8–10 and 42*, TIER.)

The Ministry of Commerce (MOFCOM) maintains a catalogue of prohibited and restricted technology categories, that is, the *Catalogue of Technology Prohibited or Restricted from Import 2007* (2007 MOFCOM Catalogue) (禁止进口限制进口技术目录). Any technology not listed on that catalogue is deemed unrestricted under TIER (*Article 5*). The import of any prohibited technology is, as the name suggests, prohibited (*Article 9*). For the importation of restricted technology and unrestricted technology, different procedures apply.

MOFCOM registration of unrestricted technology

The importation of most technology is unrestricted, also known as free-to-import (自由类). For this category of technology, there is only a registration procedure for its import contract, and that registration is not a pre-requisite for the contract to take effect (*Article 3*, Measures for the Registration and Administration of Technology Import and Export Contracts 2009 (2009 Contract Measures)). Specifically:

- **Registration authority: MOFCOM or its local branches.** For technology import contracts in any project covered by the Catalogue of Investment Projects Verified and Approved by the Government 2016 or any project receiving government funding for which the State Council or its competent department has granted preliminary approval, their registration falls within the purview of the national MOFCOM. The local MOFCOM branches are responsible for all other unrestricted technology import contracts. (*Articles 4-5*, *2009 Contract Measures*.)
- **Time for registration.** For contracts providing for royalties as a percentage of certain monetary benchmark, within 60 days after such benchmark becomes ascertainable for the initial payment; for all other contracts, within 60 days after the effective date (*Articles 6-7*, *2009 Contract Measures*).

- **Two-step registration.** Each applicant must pre-register through the online MOFCOM Business System Uniformed Platform (商务部业务系统统一平台) and then submit hardcopy application materials (*Article 8, 2009 Contract Measures*).
- **Timeframe and certificate obtained.** MOFCOM offices must issue the Certificate of Technology Importation Contract Registration (技术进口合同登记证书) within three business days after the agency's receipt of all application materials (*Article 8, 2009 Contract Measures*). In practice, the timeframe might not be strictly adhered to by the authorities and might differ among different local authorities.

  This certificate (Registration Certificate) has no impact on the effectiveness of the technology contract (*Article 17*, TIER and *Article 3*, *2009 Contract Measures*). However, it may be necessary for foreign exchange control, banking, tax and customs purposes (*Article 20, TIER*).

  (For example, until 2013, the State Administration of Foreign Exchange (SAFE) required banks to review the Registration Certificate while processing any payment (for example, royalties and license fees) in foreign currencies under the technology import contract. This requirement was revoked in 2013. At present, for the import of unrestricted technology, it has been reported that banks no longer require the importer to produce the Registration Certificate for foreign exchange control purposes.)

MOFCOM approval for restricted technology

The importation of any technology listed as restricted in the 2007 MOFCOM Catalogue is subject to MOFCOM's prior approval, without which no contract for the importation of restricted technology is effective (*Article 16,* TIER and *Articles 3, 10 and 13*, Measures for the Administration of Technology Prohibited or Restricted from Import 2019 (2019 Administration Measures)).

Though there is little similarity to the procedure for unrestricted technology, the application process for the importation of restricted technology also has two steps. The first step is supposed to take place before the parties sign any technology contract. If successful, the Chinese importer is allowed three years to negotiate and sign a technology import contract. In the second step, the signed contract is reviewed by MOFCOM, and comes into effect only if MOFCOM grants final approval. Alternatively, the parties can execute the contract first, and initiate both steps of the application at the same time. (*Articles 9-13, 2019 Administration Measures*.)

Restricted technology import process: table

Details of the application process for the importation of restricted technology are set out in the 2019 Administration Measures and summarised in the table below. It should be noted that the timeframe below may not be strictly followed.

	Pre-execution	Post-execution
Regulatory authority	Provincial branches of MOFCOM, in consultation with technology experts and trade experts (*Articles 4 and 6*).	Provincial branches of MOFCOM (*Articles 10-11*).
Criteria	The government will consider the pre-contract execution application by the following criteria: • Whether the proposed importation will jeopardize national security, social and public interest, or public morality. • Whether it will present risks to human well-being, or the health of animal or plant life. • Whether it will harm the environment. • Whether it will comport to any international obligation of China. (*Article 7*.)	The authenticity of the executed technology import contract (*Article 11*).
Timeframe	30 business days (*Article 6*).	Ten business days (*Article 11*).

	Pre-execution	Post-execution
Certificate	Letter of Intent to Approve Technology Importation (技术进口许可意向书) (LOI) (*Article 9*). The LOI is a preliminary document that allows the applicant importer to enter into an import agreement for the technology in question within the three years following its issues. The LOI by itself does not give effect to any technology import contract.	Certificate of Approval for Technology Import (技术进口许可证) (*Article 13*). This certificate is required for customs clearance when importing the restricted technology into China (*Article 17*). For any foreign currency payment of more than US$50,000 in exchange for the import of restricted technology, SAFE requires the Chinese importer to produce the Certificate of Approval for Technology Import to the bank for remittance of funds (*Article 6(7)*, Implementing Rules for the Guidelines for Foreign Exchange Control for Trade in Service 2013, revised in 2015 and 2016 respectively).

Consequences of violating technology import control

The importer of any prohibited technology or of any restricted technology without MOFCOM approval may face indictment for the criminal offenses of smuggling, illegal business operation, and potentially other crimes (*Article 43*, TIER).

Smuggling is the most serious of these offenses. Depending on the value of the technology smuggled, the punishment may be a prison sentence of a fixed term or (for serious offenders) for life (*Article 153*, *Criminal Law 2020* (刑法), with effect from 1 March 2021).

Under the 2020 Criminal Law, a fixed-term prison sentence may be up to 15 years for any single offense, or up to 20 years for multiple offenses (*Articles 45 and 69*).

Corporations may also be found collectively guilty for smuggling and fined, and its responsible management personnel and employee may be imprisoned (*Article 153*). For the lesser crime of illegal operation of business, a fine may be imposed of up to five times the illegal gains, in addition to generally up to five years of imprisonment (*Article 225*).

Apart from criminal prosecution, TIER also imposes administrative penalties for less severe offences. For example, fines, confiscation of illegal gains and revocation of administrative approvals by MOFCOM, and customs seizure are all possible consequences for importing prohibited technology, importing restricted technology without or beyond the scope of MOFCOM's approval (*Articles 46-47*). These administrative penalties are appealable to Chinese courts (*Article 53*).