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# CHINA Legal Bulletin

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## Executive Summary

### ***New Mandatory Product Certification***

New regulations require that 132 products deemed hazardous to human, animal, or plant health receive inspection prior to leaving the factory, being sold, or being used for other business purposes. Goods for export or import also must comply with inspection. The regulations provide mechanisms to require new products receive certification and to punish companies that violate the law.

*By Pan Lidong, Deng Yong, and Michael Bordonaro*

### ***The New Tort Law and Product Liability***

On December 26, 2009, China adopted the Tort Law of the People's Republic of China, which will go into effect on July 1, 2010. The law contains strict products liability stipulations and provides guidance for determining damages in such strict products liability cases. Among its provisions, the law extends product recall obligations to all products sold in China and does not cap punitive damages. We describe the rules that might affect your company and provide pointers on how your company can protect itself in such cases.

*By Lu Yunguang and Margalit Faden*

### ***Criminal Evidence Rules Revised***

11 years ago a Henan man confessed to a murder he did not commit after enduring police torture. In April 2010, the purported victim of the crime re-appeared in his home village and the convict was exonerated and released. The wrongful conviction has led to new criminal procedure law prohibiting the admission of evidence obtained through torture into trials for capital crimes. Further, the law attempts to limit the admission of evidence obtained through illegal means.

*By Jiang Guoyong*

## NEWS FLASH

### **Microsoft and Yahoo Merger Runs Up Against Anti-Monopoly Law**

China's new anti-monopoly law goes into effect August 1, 2010 and could be a serious obstacle to Microsoft's attempted takeover of Yahoo. This law, coupled with existing Chinese antitrust laws, makes China a globally influential sphere of regulatory influence for transnational companies involved in mergers or acquisitions.

The anti-monopoly law gives Chinese authorities the power to examine foreign mergers and acquisitions when they involve Chinese companies or foreign businesses investing in Chinese companies. And special circumstances and restrictions could also apply if Beijing deems the deal to be a national security issue.

Yahoo, having investing \$1 billion in Alibaba.com, China's largest e-commerce business, qualifies as a party which must submit any potential merger plans to Chinese authorities. Many experts are looking to this deal and China's eventual position – whether they play a conciliatory or nationalistic role – to act as an indicator of China's stance on future deals.

*The China Legal Bulletin is produced by Wang Jing & Co. Law Firm*

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# New Mandatory Product Certification



## Introduction to Mandatory Product Certification Regulations

The PRC has issued new regulations requiring certification of products deemed hazardous to human, animal, and plant health or safety. Regulators will now maintain a catalog of products which lists what manufactured goods require certification before they may leave the factory or are sold, exported, imported, or otherwise used for business purposes. Two agencies are responsible for the rules governing certification: the State Administration of Quality Supervision, Inspection, and Quarantine (SAQSIQ) and the Certification and Accreditation Administration of the People's Republic of China (CNCA). These agencies issued the following sets of guidelines:

- 1) Regulations on the Administration of Mandatory Product Certification,
- 2) Measures on Administration for the Marks of Mandatory Product Certification, and
- 3) The Catalogue of the First Set of Product Subject to the Mandatory Product Certification (Catalog).

On December 3, 2001, CNCA established the mandatory certification system which requires that 132 products across 19 categories must receive certification. CNCA's Catalog lists the products requiring inspection and certification. Products which require certification include: electric cables and wires, circuit switches, surge protectors and extension cords, low-voltage electric appliances, and other similar items. Industry professionals frequently refer to product inspections as "3C Certification" (hereinafter referred to as "Mandatory Product Certification").

## Authorities in Charge of Mandatory Product Certification

Mandatory Product Certification regulations stipulate that SAQSIQ is in charge of the compulsory product certification throughout China. CNCA is responsible for nationwide implementation, supervision, administration, and comprehensive coordination of Mandatory Product Certification. Local quality and technology supervision departments at all levels of government and customs and quarantine enforcement departments (local quality and inspection bureaus) are responsible for supervision, administration, and enforcement of Mandatory Product Certification activities within their respective jurisdictions. SAQSIQ and CNCA share many responsibilities in the Mandatory Product Certification system. Both agencies cooperate with the relevant departments of the State Council to formulate and amend the catalogue, which SAQSIQ and CNCA jointly publish. The agencies also jointly formulate and

announce basic requirements for Mandatory Product Certification. Then CNCA generates and publishes the Mandatory Product and Certification Rules (Certification Rules) and the PRC maintains a uniform catalogue of products, uniform mandatory technical requirements, uniform standards for assessing products regulatory compliance, uniform certification markings, and uniform fees for products subject to Mandatory Product Certification.

## Application for Mandatory Product Certification

CNCA designates institutions as qualified to conduct certification inspections (Certification Institutions). Producers, distributors, and importers (Certified Producers) of products listed in the catalogue should authorize a Certification Institution to inspect and approve products before producing, selling, importing, or exporting goods subject to certification. When a company authorizes a subcontractor to manufacture products listed in the catalogue of mandatory product certification, either the company or the subcontractor may authorize a Certification Institution to inspect the manufactured goods. The Certified Producers should provide the Certification Institution with a copy of the relevant contracts between the company and the subcontractor. A distributor or importer, who is required to certify goods, should provide the Certification Institution duplicates of relevant contracts between the distributor or importer and the producer.

## Certification Period of Validity

In accordance with the Regulations on the Administration of Mandatory Product Certification, certification is valid for five years. Certification Institutions should include the Internet address and telephone number of the Certified Producers in the certification, including contact information of their facilities for follow-up inspections of the company's products. Ninety days prior to a certifications' expiration, the Certified Producers should file an application for renewal if the Certified Producers wishes to continue producing the product. If the Certified Producers needs to alter any aspect of the certification to comply with the Regulations on the Administration of Mandatory Product Certification, the Certified Producers should file an application for alteration of certification with the Certification Institution. The certification institution shall then take appropriate action. The Regulations on the Administration of Mandatory Product Certification also stipulate that under certain circumstances, companies which are importing products to China must have their goods certified.

## PRC LEGAL UPDATE:

### RMB Unpegged from US Dollar

The Chinese Government has pledged to promote currency flexibility and to let the renminbi strengthen against the dollar. Within a week of said pledge, the renminbi has made a total gain of 0.5 percent against the dollar and most experts agree it will continue to rise. Experts expect the renminbi to have risen 3 to 5 percent against the dollar by the end of 2010 and nearly 10 percent by the end of 2011.

### BP, Chevron Bid on Oil Project Near Hong Kong

Pending approval by the Ministry of Commerce, BP and Chevron will jointly develop a deep-water, 7,000-square kilometer exploration block south of Hong Kong in the South China Sea. Chevron likely will operate the block and hold a 60% stake, while BP will hold the remainder.

### Exxon Mobil Negotiates Oil and Gas Development with Chinese Oil Companies

Exxon Mobil is negotiating with Chinese oil companies about joint development of oil and gas projects within China and abroad. Talks are at an advanced stage with the China National Petroleum Corp. and China Petroleum and Chemical Corp. and in the beginning stages with China National Offshore Oil Corp. The discussions focus on projects ranging from exploration to mature ventures.

# New Mandatory Product Certification cont.



## Legal Liability for Not Complying with the Mandatory Product Certification

If a company ships, sells, imports, exports, or uses products without the necessary certification, the local quality and inspection bureau has the authority penalize them for such actions. The bureau may take the following actions:

- impose a fine between RMB 50,000 and RMB 200,000;

- confiscate the earnings the company made from goods which lacked necessary certification;  
- order the company to rectify its actions.

## Conclusion

Companies which intend to manufacture or sell products in China or intend to import goods to China should confirm whether these products are

subject to the Catalogue of Mandatory Product Certification. Products which likely pose hazards to human, animal, or plant health and safety may be subject to certification requirements. Legal counsel can be of assistance in determining if products are subject to certification and in securing the necessary certification.

*By Pan Lidong / Deng Yong / Michael Bordonaro*

# The New Tort Law and Product Liability

## How Product Liability and Defective Product Recalls Fit with the New Tort Law

On January 28, 2010, Tianjin FAW TOYOTA Motor Co., Ltd. submitted a Recall Report to the State Administration for Quality Supervision, Inspection, and Quarantine and recalled 75,552 RAV4 automobiles that were manufactured from March 19, 2009 to January 25, 2010. On February 1, 2010, Guangzhou Municipal Administration of Industry and Commerce recalled all dairy products labeled with "Lekang Dairy Company Ltd. of Weinan City" and "Tiantian Dairy Company Ltd. of Wuzhong City, Ningxia Hui Autonomous Region" after melamine, a poisonous substance, was found in powdered milk. On December 26, 2009, China adopted the Tort Law of the People's Republic of China (Tort Law), which will go into effect on July 1, 2010.

The scope of products covered by the new Tort Law is undefined. According to PRC law, a "product" is movable property, but does not include intangible properties or services. Under the Tort Law, the principle of strict liability applies to product liability. Hence, despite the fault of either party, the victim can hold both the manufacturer and seller of the end product jointly and severally liable. "Manufacturers" are the companies whose name, trademark or other visible external marks or expressions are present on the product. "Sellers" are the import agents of the product. If a product's component causes a defect, the manufacturer and seller of the end product has the right to claim compensation against a third party, such as the

supplier of the raw material, the carrier, the warehouseman, or the supplier to the seller. Both consumers and actual users of the product can sue for damages.

The Tort Law does not define the scope of what constitutes a "defect." Under Chinese law, a "defect" is an unreasonable danger existing in a product, which imperils property or human life. A "defect" may also be a failure to conform to state or industrial standards. In practice, Chinese courts will determine whether design, manufacturing, or defects of warning specification defects exist. When a product defect is found after the product is put into circulation, the manufacturer or seller must react in a timely manner. A manufacturer or seller will be held liable

**“When personal injury occurs, the liable parties must compensate victims for treatment and rehabilitation costs, such as medical expenses, nursing fees, and travel expenses, as well as lost wages.”**

if it has caused harm but fails to take sufficient, effective, or timely measures, such as warning the public or recalling the product. Previously, defective product recall obligations only applied to certain types of products, such as food, toys, medicine and automotive products. The Tort Law, however, now mandates obligations for recalls of any kind of product sold in China.

When personal injury occurs, the liable parties must compensate victims for treatment and rehabilitation costs, such as medical expenses, nursing fees, and travel expenses, as well as lost wages. If death occurs, the liable party is responsible for funeral service fees and compensation. When a product defect causes property loss, the

liable party must compensate for or restore the damaged property. The liable party may also be responsible for other possible losses caused by the defective product, such as obtainable benefits. The damage to or loss of the defective product itself is not expressly excluded from the calculation of damages under the Tort Law. Additionally, companies can be liable for inflicting serious mental distress or harming a personal right. In such cases, they are liable for damages for pain and suffering.

When manufacturers or sellers knowingly continue to manufacture or sell defective products, victims can claim punitive damages. If the victim has not incurred any loss, punitive compensation for fraudulent activity regarding products and services might still be available. There is no statutory maximum punitive compensation under the Tort Law. Some experts, however, believe that compensation should be no more than twice the actual loss. It remains unclear whether infringed parties can litigate a complaint against the manufacturer and seller of the defective product while also claiming compensation for tort and breach of contract in the same lawsuit.

In order to reduce business risk, we suggest that companies consider purchasing product liability and recall insurance from companies with strong positions and well-deserved reputations. Additionally, we recommend that product manufacturers, sellers, and suppliers of spare parts and raw materials stipulate contractual clauses relating to product liability as specifically as possible so as to reduce legal risk under the Tort Law.

*By Lu Yunguang and Margalit Faden*

# Criminal Evidence Rules Revised



## China Adopts New Rules to Exclude Illegally-Obtained Evidence from Criminal Trials

On October 30, 1997, Zhao Zuohai a resident of a village in Henan province had a physical altercation with another villager, Zhao Zhenxiang. Following the fight, Zhao Zhenxiang disappeared. On May 8, 1999, police discovered an unidentifiable corpse in the village and, without conducting DNA tests on the body, declared the body to be that of the missing Zhao Zhenxiang. The next day, the police arrested Zhao Zuohai and charged him with the murder of Zhao Zhenxiang. During police interrogation, Zhao Zuohai confessed to the murder of Zhao Zhenxiang. The defendant's verbal confession was the only evidence presented at trial. On December 5, 2002, the Shangqiu Intermediate Court convicted Zhao Zuohai and sentenced him to death with a two-year suspended sentence. The sentence was never carried out and Zhao Zuohai remained in prison.

On April 30, 2010, Zhao Zhenxiang, the presumed murder victim, returned to his village after a thirteen-year absence. On May 8, 2010, the High Court of Henan Province ruled to disaffirm Zhao Zuohai's conviction and sentence and held him to be not guilty. Zhao Zuohai was then freed from custody. Three former police officers have been arrested for allegedly torturing Zhao Zuohai, and four judges involved in Zhao's wrongful conviction have been suspended from the Henan courts. Zhao received RMB 650,000 (USD 96,000) in compensation and an official apology.

Legal analysts and observers believe that Zhao Zuohai's coerced confession and wrongful imprisonment motivated the Supreme Court, the Supreme Procuratorate, the Ministry of

Public Security (the top Chinese police authority) the Ministry of the State Security, and the Ministry of Justice to jointly enact the Evidence Review Rules in Death Sentence Cases and Illegal Evidence Exclusion Rules in Criminal Cases (the New Rules). Because of the New Rules criminal procedure offers new protections for suspects. Specifically, evidence which police officers obtain through coercion, torture, violence, or intimidation or if the evidence is of unclear origins is now inadmissible in court, particularly in capital cases.

Reform of criminal procedural law is likely to have wide ranging effects on the Chinese legal system. Zhao Bingzhi, dean of Beijing Normal University's law school, believes the reform of criminal procedure will better protect human rights, reduce the number of executions in China, and influence the mindset of police officers by discouraging the use of torture. However, the true impact of the New Rules will only be understood after courts and law enforcement have the opportunity to apply the law to actual cases.

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## PRC LEGAL UPDATE:

### Beijing Raises Minimum Wage

Beijing's municipal government has increased the minimum wage to RMB 960 up from the previous RMB 800, effective July 1, 2010. The city raised the hourly minimum wage from RMB 4.6 to RMB 5.5. Payment guidelines prohibit employers from including social security payments, housing stipends, overtime wages, meal or transportation reimbursements, and other such non-salary pay when calculating employees' minimum wage. Part-time hourly workers must now earn at least RMB 11 per hour.

### China Opens State Run Industries to Private Sector

China announced that it will open various state-owned industries to the private sector, including power generation, water projects, logistics and mining. Private firms will be able to start new companies or invest in existing enterprises. China also stated that it plans to support private firms interested in entering currently government-run industries by simplifying administrative procedures and improving financing services. China also encouraged private firms to increase overseas investment and international operations abroad in order to develop internationally competitive Chinese brands and multinational corporations.