

E-COMMERCE LAWS AND PRACTICES IN CHINA

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Until a few years ago, China's leadership in E-commerce seemed incredible to most people. Now, the data speaks loud and clear, and more and more foreign companies want to take a share of the spoils. According to the statistics from the China E-Commerce Research Centre, the overall transaction amount of China's E-commerce market reached \$13.4 trillion CNY (equivalent to \$2.16 trillion USD) in 2014,¹ 31.4% higher than the transaction amount in 2013. In particular, on November 11, 2014 (China's Singles' Day), Alibaba processed

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¹ 2014 Statistical Analysis Report on China's E-Commerce Industry, CHINA E-COMMERCE RESEARCH CTR., (Apr. 8, 2015), http://www.100ec.cn/zt/upload_data/20150408.pdf.

\$57.1 billion CNY (equivalent to \$9.2 billion USD) in sales in 24 hours² and made China's Singles' Day handily surpass the United States' Black Friday as the world's most lucrative online shopping festival.³

Another number that may intrigue U.S. companies is the value of cross-border deals reached in the booming market. The data from the China E-Commerce Research Centre shows that China's E-commerce market included \$4.2 trillion CNY (equivalent to \$670 billion USD) in cross-border transactions in 2014, among which 85.4% were inbound transactions (i.e., the buyers were located in China) and 14.6% were outbound transactions (i.e., the sellers were located in China).⁴ Despite the tempting figures, Western companies have always been concerned about the legal environment of the largest developing country even before it stepped into its promising E-commerce market. This article provides a general view of China's E-commerce laws and the practices in China.

I. INTERNATIONAL LEGISLATION ADOPTED BY CHINA

On July 6, 2006, China ratified the United Nations Convention on the Use of Electronic Communications in International Contracts (Electronic Communications Convention) as the fourth signatory state to the convention.⁵ The purpose of the Electronic Communications Convention is to remove formal obstacles by establishing the rules of equivalence between electronic and written forms of contracts. Moreover, the Electronic Communications Convention further facilitates the use of electronic communications in international trade. It is intended to harmonize the rules regarding E-commerce, to foster uniformity in the domestic enactment of the United Nations Commission on International Trade Law (UNCITRAL) model laws relating to E-commerce, and to update and complement certain provisions of those model laws in light of recent practice.

In addition, China also signed and ratified the UNCITRAL Model Law on Electronic Commerce in 1996⁶ and the UNCITRAL Model Law on Electronic

² See, e.g., Adam Jourdan, *Alibaba Reports Record \$9 Billion Singles' Day Sales*, THOMSON REUTERS, (Nov. 11, 2014), <http://www.reuters.com/article/2014/11/12/us-china-singles-day-idUSKCN0IV0BD20141112>.

³ See Figure A in Appendix I: Graph.

⁴ 2014 *Statistical Analysis Report on China's E-Commerce Industry*, CHINA E-COMMERCE RESEARCH CTR., (Apr. 8, 2015), http://www.100ec.cn/zt/upload_data/20150408.pdf.

⁵ United Nations Convention on the Use of Electronic Communications in International Contracts, Nov. 23, 2005, U.N. Doc. A/60/515.

⁶ United Nations Commission on International Trade Law, *UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996, with Additional Article 5 BIS as Adopted in 1998* (New York, 1999), http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf.

Signatures in 2001.⁷ The terms of the Electronic Signatures Law of China are substantially the same as those of the UNCITRAL Model Law on Electronic Signatures.

II. GENERAL PROVISIONS UNDER THE CHINESE LEGAL REGIME

Although the detailed implementation guidance for E-commerce is provided by ministries of China, the National People's Congress (NPC)—China's top legislative body—enacted several laws laying the foundation for implementing China's E-commerce legislation.

First and foremost, the Contract Law, effective since October 1, 1999, explicitly recognizes the electronic forms of contract.⁸ The Contract Law also provides that when a contract is made in exchange of electronic data, the receiver's principal place of business will be the place of formation of the contract. If the receiver does not have a principal place of business, the receiver's habitual residence will be the place of formation.

In addition, the Law on the Protection of Consumer Rights and Interests (Consumer Protection Law) provides consumers with some special protections in electronic transactions.⁹ For example, the law provides that consumers have a right to return most products bought online within seven days of receiving the products without having to give any justification, provided that the products are returned in good condition. Upon receipt of returned goods, the seller must refund the consumer in full (after deducting delivery charges) unless agreed otherwise.¹⁰ To facilitate the exercise of consumer rights, online business operators must provide consumers with their contact information and key terms such as product quantity and features, safety reminders, after-sale assistance, and so on.

It is reported that the first draft of the E-Commerce Law of China may be completed later this year, which would ideally foster a more mature E-commerce market.

⁷ United Nations Commission on International Trade Law, *UNCITRAL Model law on Electronic Signatures with Guide to Enactment 2001* (New York, 2002), <http://www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf>.

⁸ 中华人民共和国合同法 [Contract Law of the People's Republic of China] (promulgated by the National People's Congress and the Presidential Order No. 15, March 15, 1999, effective Oct. 1, 1999), arts. 11, 16, 26 (China), <http://www.wipo.int/wipolex/en/details.jsp?id=6597>.

⁹ Zhonghua Renmin Gong heguo Zhongguo de xiaofeizhe quanyi baohu de falu (中华人民共和国中国的消费者权益保护的法律) [Law on the Protection of Consumer Rights and Interests] (promulgated by the Standing Comm. Of the Eighth Nat'l People's Cong., Oct. 31, 1993, effective Jan. 1, 1994) (China), <http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn174en.pdf> [hereinafter Consumer Protection Law].

¹⁰ *Id.* art. 25.

III. ADMINISTRATIVE MEASURES PROMULGATED BY THE STATE ADMINISTRATION FOR INDUSTRY AND COMMERCE

As the government agency responsible for regulating the commercial transactions in China, the State Administration for Industry and Commerce (SAIC) promulgated the Administrative Measures for Online Transactions (Administrative Measures) on January 26, 2014, which set out the obligations of Business Operators (defined below) and the corresponding punishments in detail.¹¹

A. Scope of Application

The Administrative Measures are applicable to all activities related to online product transactions and relevant services.¹² Online product transactions refer to selling products or providing services via the Internet (including mobile Internet). Relevant services refer to for-profit services provided for online product transactions, including, among others, third-party transaction platforms, publicity and promotion, credit rating, payment and settlement, logistics, courier services, Internet access, server hosting, virtual space rental, and website and webpage design.¹³ Individuals, enterprises and other entities that engage in the aforesaid transactions and services (“Business Operators”) are regulated by the Administrative Measures.

B. Protection of Personal Information¹⁴

The Administrative Measures set forth the requirements that Business Operators must comply with in their business activities and when collecting and using the information of consumers. Those requirements are similar to the principal guidelines set forth in the Decision of the Standing Committee of the National People’s Congress on Strengthening Network Information Protection¹⁵ and the Law on the Protection of Consumer Rights and Interests.¹⁶

¹¹ Guojia gongshang xingzhengguan zongju Ling (国家工商行政管理总局令) [Administrative Measures for Online Transactions] (promulgated by the State Administration for Industry and Commerce, Jan. 26, 2014, effective Mar. 15, 2014) (China), <http://lawinfochina.com/display.aspx?id=16309&lib=law> [hereinafter Administrative Measures].

¹² *Id.* art. 2.

¹³ *Id.* art. 3.

¹⁴ *Id.* art. 18.

¹⁵ Quanguo Renmin Dai biao Dahui Changwu Wei yuanhui guanyu jiaqiang Wangluo xinxi baohu de jue ding (全国人民代表大会常务委员会关于加强网络信息保护的決定) [Decision of the Standing Comm. of the Nat’l People’s Cong. on Strengthening Network Information Protection] (promulgated by the Standing Comm. Of the Eleventh Nat’l

The Administrative Measures establish legality, legitimacy, and necessity as the baseline principles for consumer information collection and disclosure. Under these baseline principles, sellers must publish their own policies on the purposes for which information is collected and the methods and scope of information collection and disclosure. Consumers' consent must be obtained before any collection or disclosure.

Business Operators and their employees are further required to maintain the confidentiality of consumer information collected and must not disclose, sell, or unlawfully provide that information to any third party. If they are aware of the actual or potential loss or unauthorized disclosure of consumer information, they must take immediate remedial measures. In addition, without the consent and/or request of the consumers, Business Operators are not allowed to send any commercial advertisement to their consumers, and, upon receipt of express objection from the consumer, the seller must stop sending commercial advertisements to that consumer.

The Administrative Measures also require that credit rating service providers for online product transactions collect credit information through legitimate channels, that they comply with the principles of neutrality, impartiality and objectivity, and that they not arbitrarily adjust the credit ratings or put users' credit information to any illegal purposes.¹⁷ Specific penalty provisions are also provided.

C. Boilerplate Contracts

According to the Administrative Measures, if boilerplate (standard form) contracts are used by Business Operators, the content of such boilerplate contracts must comply with the law and must be fair in rights and obligations of the parties.¹⁸ Clauses that are material to the interests of the customers must be highlighted, and Business Operators must provide an explanation of the boilerplate contract at the request of consumer. In particular, a boilerplate contract cannot have unfair or unreasonable terms that eliminate or restrict a consumer's rights, reduce or exempt a Business Operator's liabilities, increase a consumer's liabilities, or compel consumers to comply by technical measures.

People's Cong., Dec. 28, 2012, effective Dec. 28, 2012) (China), <https://chinacopyrightandmedia.wordpress.com/2012/12/28/national-peoples-congress-standing-committee-decision-concerning-strengthening-network-information-protection/>.

¹⁶ See Consumer Protection Law, *supra* note 7.

¹⁷ See Administrative Measures, *supra* note 9, art. 36.

¹⁸ See *id.* art. 17.

D. Obligations of Third-Party Platform Service Providers

The Administrative Measures impose on third-party platform service providers (Platform Providers) the responsibilities of managing the Business Operators doing business on the platform. Platform Providers must examine the identity of each Business Operator in its on-boarding process and must enter into agreements with these Business Operators to cover such matters as entering and exiting the platform, quality control, consumer rights protection, and so on. Such agreements may be amended only after seven days' prior notice and a public announcement. Platform Providers must allow Business Operators who disagree with the amendment to exit the platform without any liability.¹⁹ Finally, before ceasing the platform service, Platform Providers must provide notice to consumers and relevant Business Operators in conspicuous places on their websites for no fewer than three months.²⁰

The Administrative Measures also require that the Platform Providers establish measures and rules for business surveillance. Platform Providers should publicly announce platform rules and policies to manage the trading processes and should implement technical support for the operation of such rules and policies. Platform Providers should supervise business-related information released by onboarding Business Operators, report to law enforcement agencies if any illegal conduct is observed, and assist law enforcement by taking necessary measures, including shutting down the platform service to any such Business Operator and stopping all other illegal conduct.²¹ Data-identifying sellers, transaction records, and other data must be retained in secure, complete, and authentic condition by the Platform Providers for no fewer than two years from either the de-registration of the on-boarding Business Operator for the identity information of that Operator or completion of the transactions for transaction records.²²

IV. ADMINISTRATIVE MEASURES STIPULATED BY OTHER AGENCIES

In addition to SAIC, E-commerce is a business that is subject to regulations by multiple governmental agencies, including the Ministry of Industry and Information Technology and Ministry of Commerce. Currently, most of the related ministries are trying to more actively facilitate E-commerce in order to respond the "Internet Plus" or "Internet+" initiative announced by Chinese Premier Li Keqiang.

For instance, nine ministries jointly released the Opinions on Policies Supporting Cross-border Retail Export, providing high-level statements to develop supportive policies for cross-border B2C exports. After that, State

¹⁹ *See id.* arts. 23-24.

²⁰ *See id.* art. 31.

²¹ *See id.* art. 26.

²² *See* Administrative Measures, *supra* note 9, art. 30.

Administration of Foreign Exchange, State Administration of Taxation, and Customs and Ministry of Commerce respectively announced additional administrative measures to clarify or solve some issues related to cross-border transactions, including the exchange settlement issue, the tax issue, and customs clearance procedures.

V. BLOCKING ISSUES IN CROSS-BORDER E-COMMERCE IN CHINA

Due to the dramatic growth of E-commerce in recent years, the most severe difficulty in E-commerce transactions to China and other countries is that the regulation of E-commerce has always fallen far behind, in both regulatory theory and practice. Despite the efforts by the Chinese government, a number of blocking issues in cross-border E-commerce still remain to be solved.

A. Taxation

Most Chinese consumers have concerns about the products they purchase from foreign countries through E-commerce platform because they do not know, when calculating importation duties, whether the competent customs authority would treat the products as being for personal use or as goods being imported in bulk. Additionally, it is also not easy for the customs authorities to determine how to apply the HS codes on various piecemeal products, such as whether the amount earned by selling certain software products should be categorized as sales income or as royalty income. The answer may not be clear.

B. Foreign Exchange Control and Settlements

Further, cross-border electronic transaction would also be impeded by payment settlement due to China's control over foreign exchange and its strict requirements on payment platforms. The financial regulatory agencies clearly still have work to do.

C. Customs Clearance, Inspections and Quarantine

Customs needs to streamline and simplify the clearance process to expedite the exportation and importation process for E-commerce. So far, China has not built a comprehensive platform or database to share the information among different agencies and avail such information to the general public. EU's

RAPEX (Rapid Exchange of Information System)²³ and RASFF (Rapid Alert System for Food and Feed)²⁴ are good examples for China to follow in this regard.

Many other aspects of traditional transactions, such as logistics, warehousing, and anti-piracy, need to be reformed and upgraded to fit the characteristic and needs of E-commerce. The Chinese government must overcome many obstacles before achieving its ambitious goal.

VI. A GOOD EXAMPLE OF CROSS-BORDER E-COMMERCE PLATFORM: INTRODUCTION OF TMALL GLOBAL

Foreign companies may look to TMall Global,²⁵ a platform operated by a Hong Kong subsidiary of Alibaba, to get more information about how to step into China's promising E-commerce market. TMall Global is registered in Hong Kong, and most of the sellers on TMall Global are non-Chinese entities/individuals. In view of this, the governing law for any disputes related to TMall Global is Hong Kong Law. The Hong Kong International Arbitration Center is entrusted to arbitrate TMall-related disputes.

Next is the following question: when the buyers are located in China, do Chinese laws and regulations (such as seven-day no-reason return and refund requirements) apply to the transactions on TMall Global? According to their terms, the Administrative Measures apply to online transactions (i.e., business activity of selling products or providing services through the Internet) engaged in within China. Given the fact that the platform domain of TMall Global is registered in Hong Kong, the platform provider is a Hong Kong entity, and the sellers are foreign entities or individuals, it is unclear whether the online transactions on TMall Global are "engaged in China." Hence, it is uncertain whether Chinese laws and regulations apply to such transactions. How to enforce against the Hong Kong platform provider and the foreign sellers is also unclear in practice.

Many scholars and local attorneys claim that Chinese laws and regulations do apply to TMall Global's transactions; in particular, they argue that the pro-consumers requirements apply. TMall Global, instead, gives sellers the freedom to decide whether to adopt seven-day-no-reason return and refund policy.

²³ The Rapid Exchange of Information System (RAPEX) is the EU rapid alert system for unsafe consumer products and consumer protection. *General Product Safety Directive (GPSD)*, EUR. COMMISSION, http://ec.europa.eu/consumers/consumers_safety/product_safety_legislation/general_product_safety_directive/index_en.htm (last updated Mar. 11, 2015).

²⁴ The Rapid Alert System for Food and Feed (RASFF) is a system created in 1979 for reporting food issues within the European Union. *RASFF—Food and Feed Safety Alerts*, EUR. COMMISSION, http://ec.europa.eu/food/safety/rasff/index_en.htm (last updated Aug. 20, 2015).

²⁵ TMall Global is a platform enabling cross-border B2C transactions. TMALL GLOBAL, www.tmall.hk (last visited Dec. 16, 2015).

There is no precedent on this issue so far, and further attention should be paid to this issue and the issue of the conflict of laws in a broader sense.

APPENDIX I: GRAPH

Figure A

"Single's Day" in China (Alibaba) vs. "Black Friday" in the US (nationwide online sales) – Year 2014

