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New consumer protection law will affect China's e-commerce

The Chinese government released draft amendments to China's consumer protection laws aimed at strengthening the protection of consumer rights particularly regarding e-commerce. The proposed amendments if brought into force will impact e-commerce and platform providers. [Dr. Falk Lichtenstein, Counsel at CMS Hasche Sigle, China, analyses](#) the amendments put forward and steps to be taken by business operators.

According to the Electronic Commerce Development Report of the People's Republic of China ('PRC') of 2012, which was issued by the Ministry of Commerce on 28 May 2013¹, China's online retail turnover reached RMB 1.3 trillion in 2012. Meanwhile, the number of customer complaints regarding online shopping also reached a historical peak. The Chinese government aims to cope with these developments and, consequently, their lawmakers have taken the first steps to addressing the respective issues by means of a new Chinese consumer protection legislation. From 28 April 2013 to 31 May 2013 the Standing Committee of the PRC National People's Congress solicited public comments on the 'Draft Amendments to the PRC Law on the Protection of Consumer Rights and Interests' ('CPL Amendments'). This will be the first revision of the 'PRC Law on the Protection of Consumer Rights and Interests' ('CPL') since it was passed 20 years ago and took effect on 1 January 1994.

Return of items bought online

According to the report, most of the consumer complaints focused on dishonest representation of business operators and functional failures of the products as well as bad after-sales services. The PRC law contains provisions on repair, return and replacement of defective products protecting a customer in various provisions of the 'PRC Contract Law' of 1999, the CPL of 1994 and the 'Provisions on the Liability for the Repair, Replacement and Return of Certain Commodities' of 1995.

However, now lawmakers apparently want to take it a step further and enlarge a consumer's rights beyond those regarding defects in products. In order to strengthen the consumer's position in long-distance sales, the CPL Amendments propose the introduction of an unconditional right to return goods in such sales. This provision is apparently modelled on the unconditional return rights in various EU directives.

Article 9 of the CPL Amendments suggests the introduction of Article 28, stating that where business operators sell goods via the internet or by television sale, phone sale or mail order, consumers shall be entitled to return the goods within seven days from the receipt thereof, unless the goods are not suitable to be returned given their nature. The business operators shall refund the payments already made by the consumers within seven days upon receipt of the returned goods.

According to the provision, consumers shall be entitled to return products ordered online or through other means of long-distance selling within seven days of receipt and without giving reasons or facing economic disadvantages, i.e. against full return of the purchase price. This right is only excluded for products that are not suitable for return due to their nature, which appears to be aimed at perishable goods.

If implemented, these generous rights of return granted to Chinese consumers will require business operators to adjust their business structure, consumer contracts, and standard terms and conditions as well as cash flow management.

Liability of platform providers

The current Article 38 of the CPL imposes a backup liability on the organisers of trade fairs and lessors of sales counters for the products sold through such channels. Article 16 of the CPL Amendments extends this backup liability to providers of online sales platforms.

According to Article 16 of the CPL Amendments, Article 38 of the CPL shall be changed to Article 43, and shall be revised as follows: consumers whose legitimate rights and interests are infringed upon in purchasing goods or receiving services at trade fairs or leased counters, or via online transaction platforms, may demand compensation from the sellers or service providers. In the event that the trade fairs have been concluded, the lease of the counters has expired, or the sellers or service providers no longer use the online transaction platforms, consumers may demand compensation from the organisers of the trade fairs, the lessors of the counters or the

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providers of the online transaction platforms. The organisers of the trade fairs, the lessors of the counters or the providers of the online transaction platforms shall, after paying compensation, be entitled to recourse against the sellers or service providers.

Hence, consumers could gain compensation for infringement of their rights and interests not only from the seller but also from the organiser, lessor or internet service provider. This will considerably extend the responsibility of online service providers.

Personal information

Protection of personal data has recently been gaining the attention of scholars and lawmakers in China. The CPL Amendment follows this trend. According to Article 10 of the CPL Amendments, a new article shall be added as Article 29 of the CPL stating that business operators shall collect and use the personal information of consumers in a lawful and proper manner and only to the extent that that collection or use is genuinely necessary. They shall expressly state the purposes, methods and scope of information collection or use, and obtain the consent of the consumers whose information is to be collected. To collect or use personal information, business operators shall disclose their collection or rules of use, and shall not collect or use information in violation of laws or regulations, or in breach of agreements between parties concerned.

Business operators and their staff shall strictly keep confidential the personal information of consumers collected, and shall not divulge, tamper with, damage, sell or illegally provide others with the same. Business operators shall take technical and other necessary measures to ensure information security and prevent personal information from leakage, damage or loss. They shall immediately take remedial measures where information has been or may be divulged, damaged or lost.

Electronic advertisements

In common with many European jurisdictions, Chinese law is about to introduce a prohibition against sending advertisements to consumers without their consent. The CPL Amendments explicitly address the sending of advertisements in electronic form. According to Article 10 of the CPL Amendments, a provision shall be included in Article 29 of the CPL stating that business operators shall not send electronic commercial information to consumers without their consent or request, or after the consumers have expressly rejected such information.

Information obligation

Further, business operators must correctly display their commercial information on websites and other electronic communication, as the CPL Amendments picks up on this issue and aims to regulate it in a stricter way. According to Article 8 of the CPL Amendments, a new article shall be added as Article 27 stating that business operators that provide goods or services via the internet or by TV, phone sale, mail order, etc., and those engaging in securities, insurance or banking services, shall provide consumers with truthful and necessary information, including business addresses and contact details of the business operators, as well as the quantity and quality, price or cost, period and method for performance, risk warning, after-sales services, civil liabilities, etc., concerning the goods or services.

Foreign business operators

The CPL is unavoidable for all B2C operations or foreign enterprises ('FEs') and foreign-invested enterprises ('FIEs') in China. FIEs' B2C contracts with Chinese customers are domestic contracts and, thus, mandatorily governed by Chinese law. For FEs, it is not possible to avoid PRC law in contracts with Chinese consumers either, as according to Article 42 of the 'PRC Law on Conflict of Laws' of 2010, B2C contracts shall be governed by the law of the consumers' habitual residence.

The CPL Amendments have not yet taken effect in China; unfortunately, it is not easy to predict when a law will be enacted after the draft has been released for public comments. This often takes a few months but sometimes several years. Nevertheless, taking into account the consumer protection inclinations of the Chinese government, it appears probable that the provisions associated with the e-commerce sector will be kept in the final version and eventually become part of the new CPL. It will be essential for business operators in the PRC, including FEs and FIEs, to monitor the upcoming developments and release of the CPL. If the new withdrawal right is kept, business operators will need to adjust their contracts and standard terms for B2C contracts with Chinese customers.

If implemented, the new withdrawal right will be mandatory and must not be excluded in B2C contracts and standard terms. Existing sample contracts and standard terms will need to be revised under consideration of the withdrawal right. In the case of standard terms, Article 41 of the 'PRC Contract Law' needs to be considered. According to the provision, if a dispute arises over the understanding of a standard clause and there are two or more interpretations, the clause shall be interpreted in the manner disadvantageous to the business operator providing such a clause. By having their contracts updated according to the recent Chinese laws, business operators can mitigate the risks.

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1. An article on this report in Chinese is available at
http://www.gd.xinhuanet.com/newscenter/2013-05/31/c_115987985.htm