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Greater China Risk Insight

大中华区风险洞见

Looking Ahead in the Year of the Tiger

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The last two years have reshaped the global economy and socioeconomic policies. Unforeseen changes and challenges have extended to every aspect of our lives. The world of disputes is not immune from the effects of the pandemic. As we look back to reflect on the lessons learned, we must also look ahead. In this article, we present to you the emerging trends that we see for the China disputes community in the coming year.

过去两年间，全球经济以及社会经济政策格局发生了重大改变，始料未及的变化和挑战深刻影响着人们生活的方方面面。同时，争议解决领域也受到了新冠疫情的影响。在回顾过往经验的同时，我们也要积极地展望未来。在本文中，我们将向您介绍我们对于中国争议解决领域在新一年发展趋势的理解。

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Cyber-security and data protection issues under the spotlight

Covid-19 has moved much of the world online and hastened digital transformation. With increased use in technology comes **Cyber-security** issues. These topics remain under the spotlight as a historic number of data breaches was recorded in 2021 (with costs per breach increasing by around 10% compared to the previous year). With data breaches come disputes and these may take many forms. Breach of contract, breach of privacy actions and litigation under cyber insurance policies are but a few forms in which disputes may manifest themselves.

As security breaches spiral, **Privacy** and **Data Protection** naturally come to the forefront of regulatory agenda. In November 2021, the Mainland's Personal Information Protection Law came into effect. Amongst the key takeaways from the first omnibus personal data protection legislation in the Mainland is that all data processors with any links to data from the Mainland will have to review their data infrastructure and ensure their compliance with the Mainland data laws[1]. In Hong Kong, the legislature has discussed a reform of the Personal Data (Privacy) Ordinance (PDPO) to align with international data protection standards. Meanwhile, the latest amendment to the PDPO in October 2021 also broadened the regulator's investigation and enforcement powers.

The adoption of the data laws will greatly add to the complexity of internal investigations and cross-border litigations, particularly where cross-border transfer of documents, evidence, and findings are involved. The PIPL, on its face, has strict requirements on notification and the data subject's informed consent before personal information can be processed, and the law provides statutory exceptions far narrower than those of the EU General Data Protection Regulation. The Mainland legislation also establishes criteria and restrictions on cross-border transfer of data and personal information, particularly where the transfer is in response to, or in the context of, requests from foreign government authorities.

1. See Publication co-authored by Allen & Overy and Lang Yue dated 3 November 2021, "China consults on security assessments for cross border transfer of data".

网络安全和数据保护问题仍是关注焦点

新冠疫情使得世界开启了"线上模式"，大幅加速了全球数据化转型进程。网络技术得到更广泛应用的同时，**网络安全**问题也随之而来。随着2021年的数据泄露事件数量达到历史新高（并且与上一年相比，每次数据泄露造成的损失较往年平均增加了约10%），可以预见地，网络安全问题将继续受到密切关注。数据泄露引发的争议形式多种多样，合同违约、侵犯隐私诉讼以及网络保险诉讼等是相关争议中常见的几种。

由于安全事故频率的螺旋式上升，**隐私**和**数据保护**自然被监管部门重点关注。2021年11月，内地《个人信息保护法》正式生效。作为内地第一部针对个人信息保护的统领性法规，其所传递的主要信息之一是，所有与来自内地的数据有关联的数据处理者都必须对其数据基础设施进行审查，以确保其符合内地数据法规的相关规定[1]。 在香港，为了与国际数据保护标准保持一致，香港立法机关也在就《个人资料（私隐）条例》的修订进行讨论，而2021年10月对《个人资料（私隐）条例》的最新修订已经扩大了监管机构的调查和执法权力。

数据法规的实施将大幅增加内部调查和跨境诉讼的复杂程度，在涉及文件、证据和调查结果跨境传输时尤为如此。《个人信息保护法》就其文本而言对进行个人信息处理之前的通知和数据主体的知情同意作出了严格要求，并且其所规定的法定豁免情形远比欧盟《通用数据保护条例》项下的豁免范围窄。内地的数据法规还规定了数据和个人信息跨境传输的标准和限制，特别是应外国政府当局要求而跨境提供数据时，内地规定了更为严格的限制和流程。

1. 请参见由Allen & Overy与上海朗悦律师事务所共同撰写的评论"中国政府就数据出境安全评估公开征求意见"，发布于2021年11月3日。

Anti-trust enforcement actions will increase

The move towards regulation extends to the **Digital Economy Sector**. Since the publication by the Mainland's State Administration for Market Regulation (**SAMR**) of the Guidelines for Anti-Monopoly in the Platform Economy Industries in February 2021, the SAMR has levied record fines on Alibaba and Meituan and has continued to sanction a multitude of companies, in particular but not only in the digital sector, for failing to obtain the required pre-closing approval of their transactions from the Chinese Competition Authority, SAMR. The publication of the Draft Amendment to the Anti-Monopoly Law for public comment towards the end of 2021 further foreshadows the clear priority that the Mainland intends to give to its antitrust regime[2].

In Hong Kong, the **Competition Commission** is also stepping up its enforcement action generally. Towards the end of 2020, the Competition Commission initiated the first abuse of substantial market power case against a foreign entity and brought its first ever enforcement against facilitators of a cartel in 2021. Setting the tone for 2022, the Competition Commission announced in December 2021 that alongside digital economy, it would also focus on (a) anti-competitive conduct that affects people's livelihood; and (b) cartels that aim to take advantage of public funding.

2. See Publication co-authored by Allen & Overy and Lang Yue dated 23 November 2021, "Proposed Amendments to the Anti-Monopoly Law: China further confirms its intention to strengthen its antitrust rules".

反垄断执法行动将进一步强化

内地市场监管部门在反垄断领域的监管和规制延伸到了**数字经济领域**。国家市场监督管理总局（下称"**市场监管总局**"）2021年2月发布了《关于平台经济领域的反垄断指南》，之后接连对阿里巴巴、美团处以创纪录的高额罚款，并对一系列尤其是数字经济领域的公司因为其未能在交易交割前取得所需的市场监管总局批准而进行处罚。2021年底发布的《反垄断法（修正草案）》公开征求意见稿也进一步预示着内地提高反垄断制度优先级的目标[2]。

香港**竞争事务委员会**亦全面加强其执法行动。2020年底，竞争事务委员会对一外国实体向竞争事务审裁处提起了首宗滥用相当程度的市场权势案件，并于2021年首次对促成合谋行为的企业采取执法行动。竞争事务委员会于2021年12月宣布，在关注数字经济领域的同时，影响民生的反竞争行为以及旨在利用公共资金的合谋行为同样是其关注要点，这为2022年反垄断相关执法奠定了基调。

2. 请参见由Allen & Overy与上海朗悦律师事务所共同撰写的评论"反垄断法修正草案：中国进一步确认其加强反垄断规制的意图"，发布于2021年11月23日。

Exit strategies remain key for investors

Exit Strategies were not far from the minds of investors frustrated by the pandemic, geo-political tensions and fast-changing regulatory environments. In the past, force majeure was perceived as one of the go-to arguments for frustrated investors in the Covid-19-era. However, care must be taken in advancing these arguments, as a recent Hong Kong judgment in Shenzhen Hina New Economy Equity Investment Fund Partnership v Unipax Properties, LLC [2021] HKCFI 2912 shows, courts and tribunals are unlikely to simply accept Covid-19 or other geo-political tensions as the basis for a plea of force majeure, particularly if the pandemic was already prevalent when the contract in question was executed.

We have seen an increasing number of exit disputes in recent years and expect the trend to continue. Often companies weigh their options among pursuing contractual exit mechanisms such as call or put options, bringing claims for breaches of contract through litigation or arbitration, seeking statutory remedies including through winding-up procedures, and negotiating a commercial outcome.

Notwithstanding Covid-19, all forms of investments continue to take place around the world. Investors who have invested across jurisdictions may continue to be affected by host State policies or actions. **Investment Treaty Arbitrations** is one option to resolve such disputes. Based on ICSID's 2021 caseload statistics released on 7 February, a record high of 66 new investment treaty arbitration cases were registered in 2021.

退出策略对投资者至关重要

因为新冠疫情、地缘政治紧张局势和快速变化的监管环境而受挫的投资者越来越多地开始考虑**退出策略**。疫情下遭遇困境的投资者可能以为疫情必然构成不可抗力事件。然而，目前提出此类主张需要更多加以考量，正如近期一例香港判例深圳汉能新经济股权投资基金合伙企业诉 Unipax Properties, LLC [2021] HKCFI 2912显示，法院和仲裁庭不会轻易接受仅以新冠疫情或其他地缘政治紧张局势等理由提出的不可抗力主张，特别是在争议有关合同是在新冠疫情开始之后签署的情况下。

据我们观察，退出相关争议近年来不断增加，并且预计将持续增长。通常，公司会权衡多种可能的退出路径，包括诉诸合同退出机制（例如行使售股或购股权）、通过诉讼或仲裁提起违约索赔、寻求法定救济（包括清盘程序）以及谈判达成商业方案等，评估不同方案的利弊并作出选择。

尽管疫情尚未终结，但全球各地的投资仍在以各种方式广泛开展。东道国的政策或行动将持续对跨司法辖区投资的投资者造成影响。**投资条约仲裁**是解决该等争议的方法之一。根据国际投资争端解决中心（ICSID）2022年2月7日发布的2021年案件量统计数据，2021年新立案投资条约仲裁多达66宗，创历史新高。

Significant reforms in arbitration are underway

As regards **Arbitration**, Hong Kong remains a popular seat in the Asia-Pacific region, particularly for disputes in the Greater China region. The HKIAC received a total of 277 new arbitration cases in 2021. We see growing interest from companies in utilising the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings (the **Arrangement**), which provides a mechanism for parties to Hong Kong-seated arbitrations administered by qualified institutions such as the HKIAC to apply for **Interim Measures** from the Mainland courts. The HKIAC has processed 62 such applications since the introduction of the Arrangement in 1 October 2019, and the Mainland courts have issued orders to preserve USD2.6 billion worth of assets to date.

On the other hand, legislative reforms in Hong Kong allowing **Flexible Funding** arrangements for arbitration are underway. Following the sanction of third party funding arrangement in 2019, the Arbitration Ordinance of Hong Kong is ready to undergo yet another substantive amendment in favour of outcome-related fee structure in arbitration. Recommended by the Law Reform Commission weeks prior to the end of 2021, the proposals have received a warm welcome from the Department of Justice. If the timeline in relation to the implementation of third party funding is of reference, outcome-related fee structure in Hong Kong arbitration may soon see the light of day. If passed, the current prohibitions on the use of outcome-related fee structures in arbitration by lawyers would be lifted, so that users of arbitration in Hong Kong and their lawyers may choose to enter into conditional fee arrangements and other forms of outcome-related fee structures for arbitration.

In the Mainland, steps have been taken to liberate the Mainland arbitration regime through the draft amendment to the PRC Arbitration Law (the **Draft Amendment**), which would be the first significant update in nearly 30 years. Released by the Ministry of Justice on 30 July 2021 for public consultation, the Draft Amendment proposes a number of significant changes which would be relevant to parties considering arbitrations seated in the Mainland. For example, proposed changes include allowing arbitral tribunals to order interim measures (Article 43), introducing a basis for appointment of emergency arbitrators (Article 49), and allowing ad hoc arbitrations for foreign-related commercial disputes (Article 91).

仲裁领域正在经历重要变革

就**仲裁**而言，香港仍然是亚太地区最受欢迎的仲裁地之一，尤其是对大中华地区的争议而言。香港国际仲裁中心在2021年共受理了277件新仲裁案件。我们注意到，越来越多的公司希望利用《关于内地与香港特别行政区法院就仲裁程序相互协助保全的安排》以实现对内地当事人财产的保全。通过该等安排项下机制，香港仲裁当事方可就其在香港国际仲裁中心等合格机构进行的仲裁向内地法院申请**临时措施**。自该安排于2019年10月1日生效以来，香港国际仲裁中心已处理62件相关申请，内地法院迄今为止下令保全的资产价值高达26亿美元。

另一方面，香港正进行立法改革以支持**仲裁案件中更加灵活的资金安排**。继2019年批准第三方资助的安排后，香港《仲裁条例》拟再次进行重大修订，将允许与裁决结果挂钩的收费安排。法律改革委员会在2021年底提出这一议案，该议案得到了律政司的大力支持。如果参考之前第三方资助安排相关规定得到批准的时间，与裁决结果挂钩的收费安排预计也能够很快得到批准。一旦议案通过，目前禁止律师在仲裁中使用与结果挂钩的收费安排的限制将被取消，选择在香港进行仲裁的当事方及其律师将可以订立按条件收费协议以及其他形式的与裁决结果挂钩的费用安排。

内地的仲裁制度也将通过《仲裁法》修订得到放宽，《仲裁法》的修订草案标志着其或将迎来近30年来的首次重大修订。司法部于2021年7月30日发布的修订草案的征求意见稿涉及与有意在内地进行仲裁的当事人相关的多项重要变动。例如，修改草案拟允许仲裁庭下令采取临时措施（第43条），引入指定紧急仲裁员的依据（第49条），以及允许对涉外商事纠纷进行临时仲裁（第91条）。

Developments in class actions

Whilst historically, the high costs of litigation have kept small value claims out of courts and arbitration, recent trends suggest this may soon change. More small value claims may see their day as **Class Actions** slowly develop in the Mainland, which recently saw the conclusion of the country's first securities class-action lawsuit towards the end of 2021.

In the landmark case of Kangmei Pharmaceutical, the Guangzhou court ordered the Shanghai-listed company to pay 2.46 billion yuan to more than 50,000 shareholders who suffered loss as a result of the company's financial fraud. The opt-out style class action, known as a special representative litigation in securities disputes, was made possible by the implementation of the revision to the Securities Law of PRC in 2020 as well as a set of detailed rules promulgated by the Supreme People's Court. The outcome of this case may heighten the risk exposure of various entities and individuals participating in the issuance and listing of securities in the Mainland, with intermediaries in the securities sector (such as underwriters, sponsors, auditors, and legal counsel) as well as executive and non-executive directors of the issuers potentially held liable on joint and several basis together with the fraudulent issuers and facing exposure to compensation orders of hundreds of millions of Renminbi. The dramatic consequence has sparked lively debates in the Mainland on whether joint and several liability should be capped at a fair limit. The capital market will be closely monitoring any move the Mainland courts take in this regard. While the breakthrough for an opt-out style class action is currently limited only to security market misconduct, a less far-reaching opt-in style representative litigation is already available to all kinds of civil actions in the Mainland.

In Hong Kong, the decade-old Law Reform Commission Consultation Report recommending the implementation of opt-out style class action in Hong Kong may also make progress in 2022. The consultancy study commissioned to investigate the impact of a class action regime in Hong Kong is scheduled to complete in mid-2022.

集体诉讼稳步发展

虽然从历史上看，高昂的诉讼成本往往使得小额索赔对诉讼和仲裁望而却步，但最近的发展趋势表明，这种情况可能很快会有所改变。中国内地首宗证券集体诉讼于2021年底结案，随着集体诉讼在内地的缓步发展，小额索赔可能会更加普遍。

在具有里程碑意义的康美药业案中，广州法院判令这家上交所上市公司向因公司财务造假而蒙受损失的5万余名股东赔偿共计24.6亿元人民币。随着新修订的《证券法》2020年开始施行以及最高人民法院颁布一系列具体规定，证券纠纷相关的默示加入集体诉讼（即特别代表人诉讼）成为可能。该案结果可能导致参与内地证券发行和上市的各类实体和个人的风险显著增加，证券中介机构（包括承销商、保荐人、审计师和律师等）以及发行人的执行和非执行董事可能与实施欺诈行为的发行人共同承担连带责任，该等赔偿风险可能高达数亿元人民币。这一重要变化在内地引发了关于是否应为相关连带责任设定一个公平合理上限的激烈讨论。资本市场密切关注着内地法院就此类案件可能采取的任何举措。尽管这一具有突破性意义的默示加入集体诉讼目前仅限于证券市场的不当行为，但较为温和的明示加入代表人诉讼已经可在所有类型的民事诉讼程序中使用。

在香港，法律改革委员会一份约十年前的咨询报告中有关在香港实施默示加入集体诉讼的提议也可能在2022年取得进展。受委托对香港集体诉讼制度影响进行调研的顾问研究项目按计划将于2022年中完成。

Anti-sanctions regime

In the context of increasing geopolitical tensions, China has introduced three major **Tools Against Foreign Sanctions**, export controls, and other "discriminatory restrictive measures" (**DRMs**) that are considered harmful to China's sovereignty, security or development interests – the Unreliable Entity List Regulation adopted in September 2020 (the **UEL Regulation**), the Measures for Counteracting the Unjustified Extraterritorial Application of Foreign Laws and Measures adopted in January 2021 (the **Blocking Rules**), and the Anti-foreign Sanctions Law enacted in June 2021 (the **AFSL**). Taken together, these rules allow the Chinese government (as well as aggrieved Chinese parties) to take countermeasures against foreign individuals and entities responsible for developing and implementing the DRMs, as well as the parties (including foreign and domestic multinationals) choosing to comply with these DRMs at the expense of Chinese parties.

To date, China has been relatively conservative in implementing these anti-sanctions tools. Based on published information, there are no reports of any foreign sanctions or export control measures officially blocked, or any party added to the unreliable entity list, or subject to administrative penalty or suit for complying with foreign sanctions against China. China has, however, relied on the AFSL to issue four rounds of "countermeasures" (i.e., retaliatory sanctions) against non-Chinese entities and individuals, with the most recent announced on 21 February 2022, against Raytheon and Lockheed Martin, for selling weapons to Taiwan. This suggests that while China may be judicious in how it deploys its new anti-sanctions regime, the new laws still pose an active risk that parties engaged in China-related business must consider.

反制裁制度

在地缘政治紧张局势加剧的背景下，中国针对外国制裁、出口管制和其他被认为危害中国主权、安全或发展利益的"歧视性限制措施"推行了三大应对措施——2020年9月生效的《不可靠实体清单规定》、2021年1月生效的《阻断外国法律与措施不当域外适用办法》和2021年6月生效的《反外国制裁法》。概括来说，这些规则允许中国政府（以及受到损害的中国当事方）对负责制定和实施歧视性限制措施的外国个人和实体以及选择以损害中国当事方为代价遵守歧视性限制措施规则的各方（包括境内外跨国公司）采取反制措施。

迄今为止，中国在实施这些反制裁手段时采取了相对保守的态度。根据公开信息，目前还没有关于外国制裁或出口管制措施被阻断办法正式阻断的报道，也没有实体被列入不可靠实体清单或因遵守外国对华制裁而受到行政处罚或被起诉的报道。但是，中国已经根据《反外国制裁法》对非中国实体和个人实施四轮"反制措施"（即报复性制裁），最近一次宣布实施反制措施是在2022年2月21日，反制对象为参与对台军售的雷神公司和洛克希德马丁公司。这表明，尽管中国在部署新反制裁制度方面较为审慎克制，但对于开展中国相关业务的各方而言，新的反制裁法律仍是其必须考虑的切实风险。

Hybrid hearings are here to stay

We conclude our roundup, once again, with **Covid-19**. The pandemic will continue to drive the manner in which disputes are conducted around the world this year. Courts and arbitral institutions have adapted swiftly to conduct hearings remotely over the past two years. In the Mainland, where the Courts have been at the forefront of embracing online litigation, detailed rules on the conduct of online litigation were published by the Supreme People's Court for application in domestic Courts across the Mainland. In Hong Kong, the judiciary has similarly issued Guidance Notes on the practice for remote hearings in civil cases. Arbitral institutions such as HKIAC and CIETAC also provide guidelines for remote hearings, which showcases the readiness of arbitral institutions in facilitating virtual hearings in order to maintain their attractiveness and competitiveness to potential users. Whilst arbitration institutions in the Mainland and Hong Kong are well equipped to cope with hearings in the Covid-19-world, in-person hearings have its advantages and we expect future arbitrations to combine remote and physical hearings. We invite you to visit our Virtual Hearing hub for more pooled resources and insights from across our global network.

Please speak to your usual contact at Allen & Overy or Lang Yue if you would like to schedule a briefing on these trends.

混合庭审将继续存在

我们再次以**新冠疫情**相关内容对本文收尾。我们预计疫情将在今年持续影响全球争议解决事务的开展方式。在过去两年中，法院和仲裁机构已经迅速适应了远程庭审方式。内地法院一直走在通过网络开展诉讼的前沿，最高人民法院已经发布了有关内地法院如何通过网络进行诉讼的详细规定。在香港，司法机构也就在民事案件中进行远程聆讯发布了类似指引。包括香港国际仲裁中心和中国国际经济贸易仲裁委员会在内的仲裁机构同样支持远程开庭，这表明仲裁机构希望以推广远程开庭的方式保持仲裁对于潜在使用者的吸引力和竞争力。尽管内地和香港仲裁机构均已为新冠疫情背景下的庭审做好了应对准备，但现场出席仍有其优势，我们预计未来的仲裁将以远程和现场出庭相结合的方式开展。我们邀请您访问我们的虚拟庭审中心，获取来自我们全球网络的更多资源和见解。

如果您希望就上文所述的各项动态获得更多信息，烦请与您在Allen & Overy或朗悦的联系人联络。

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