敬海律師事務所
WANG JING & CO.

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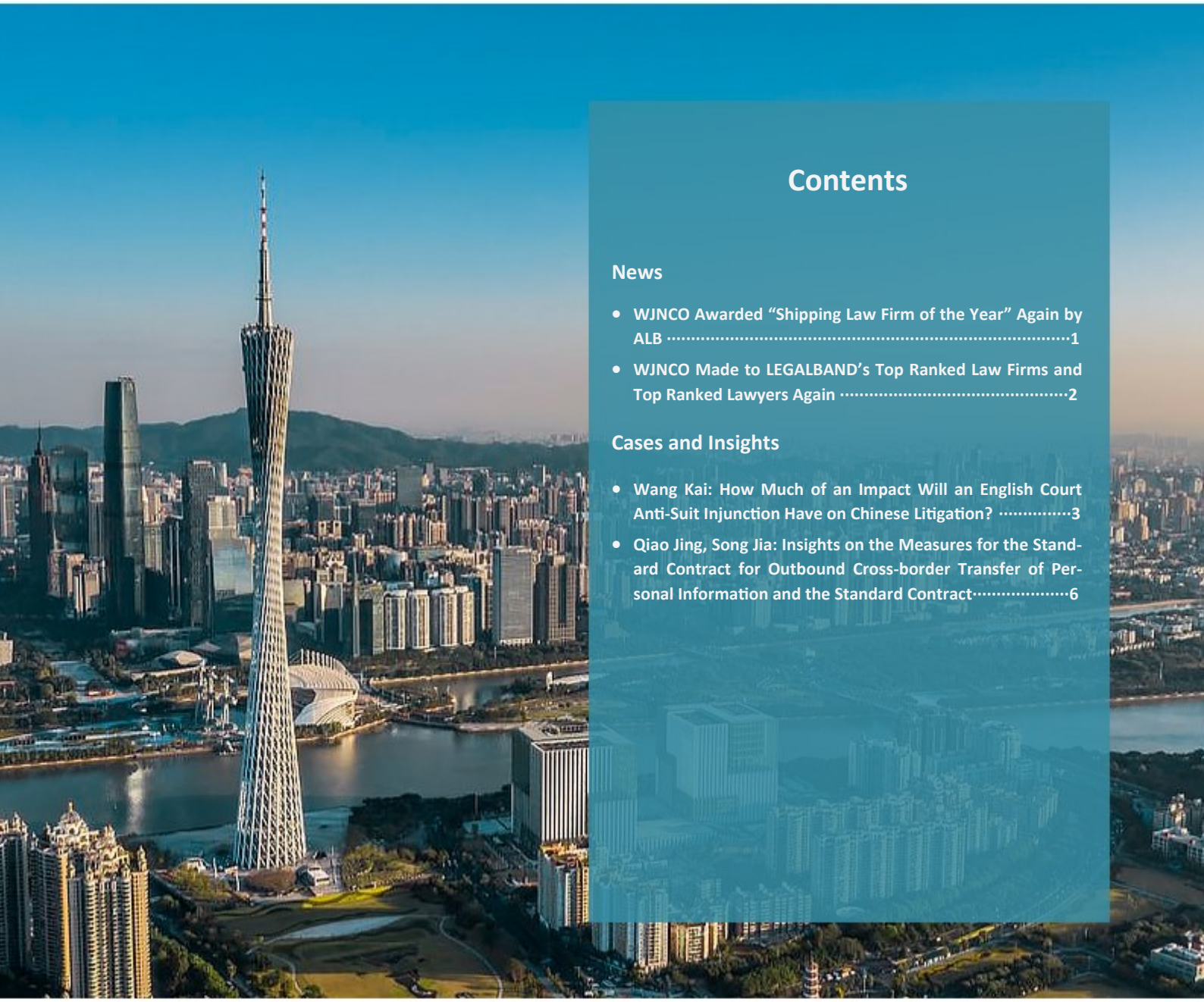
Maritime and Commercial Law Newsletter



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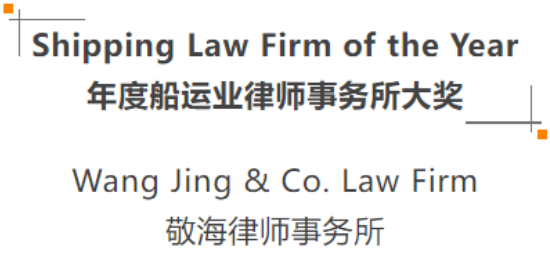
| News

WJNCO Awarded "Shipping Law Firm of the Year" Again by ALB

On the evening of 18 May 2023, the gala ceremony of ALB China Law Awards 2023 was held in Park Hyatt Beijing and ALB released the final list of the 20th ALB China Law Awards winners. Mr. Guo Xinwei, partner of Wang Jing & Co., was invited to the ceremony and accepted the award on behalf of Wang Jing & Co.

The ALB China Law Awards aims to pay tribute to the outstanding performance of leading law firms and excellent in-house teams, and the prominent transactional cases in the previous year. The ALB China Law Awards 2023 has 44 award categories, attracting over 200 law firms and legal teams with a new record of more than 1,700 nominations.



This year marks the 20th year since ALB has entered the Chinese market and the 20th anniversary of the ALB China Law Awards. Among the competitive nominees, Wang Jing & Co. was once again awarded "Shipping Law Firm of the Year", which is also the 11th time Wang Jing & Co. has won the award.

Since establishment, Wang Jing & Co. has been providing high-quality shipping-related legal services. Gathering a highly professional maritime legal service team that has been recognized the industry both at home and abroad, Wang Jing & Co. has been long providing services to P&I clubs, shipowners, insurers, charterers, logistics companies, and other clients. With a high vision towards the future, Wang Jing & Co. shall continue to perfect our practice en route towards further achievements in the shipping industry.

WJNCO Made to LEGALBAND's Top Ranked Law Firms and Top Ranked Lawyers Again

On 19 April 2023, the famous law rating agency LEGALBAND released its 2023 Client's Guide - Top Ranked Law Firms and Top Ranked Lawyers. Among the rankings, Wang Jing & Co. is once again listed in the Recommended Fields of Maritime & Admiralty in Band 1 and Insurance in Band 2. Mr. Chen Xiangyong, director and managing partner of Wang Jing & Co., and Mr. Zhong Cheng, senior consultant of Wang Jing & Co., are listed in the rankings with their professional excellence, prominent legal expertise, and prestigious reputation in the industry.

LEGALBAND is headquartered in Hong Kong with a branch in London. Its rating ranges over 31 countries and regions in the Asia Pacific Region. As a professional rating agency of commercial legal service in the Asia Pacific Region, LEGALBAND has an integrated rating system and brand operation experience with a strong local research team in China, offering companies comprehensive guides to select the law firm and lawyer to co-operate with. This year's ranking was produced after the research team spent months carrying out thorough research and studies of submissions from law firms and lawyers and its objectivity and credibility are extensively recognized.

This is the sixth time since 2017 that Wang Jing & Co. and our lawyers have been listed in the Top Ranked Law Firms and Top Ranked Lawyers by LEGALBAND. In the past year, the world economy has been battered by the labyrinthine situation domestically and internationally and multiple factors that far surpassed anticipations. While the domestic legal service market was resisting the cold global economic winter, nationwide and regional competition between domestic law firms was growing fierce.

Nevertheless, Wang Jing & Co. still stays loyal to our original aspiration and continues to perfect our work in forging every case to provide quality and professional legal service to our clients. Wang Jing & Co. making the lists represents recognition and trust from our clients and peers of our practices and service in the areas of Shipping & Admiralty and Insurance.

For More of the 2023 LEGALBAND Top Ranked Law Firms:
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For More of the 2023 LEGALBAND Top Ranked Lawyers:
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| Cases and Insights

How Much of an Impact Will an English Court Anti-Suit Injunction Have on Chinese Litigation?
— Comments on another "anti-anti-suit injunction" issued by a Chinese maritime court

Author:

Wang Kai is a partner of Wang Jing & Co. Qingdao Office. Kai is proficient at legal procedures including litigation, arbitration, and execution and adept in handling litigation and non-litigation cases involving maritime and admiralty, marine insurance, and commercial affairs while knowledgeable in company law and insolvency & restructuring. Kai also serves as the perennial legal adviser of large-scale state-owned enterprises, shipping companies, and forwarding companies, providing his clients with comprehensive legal services including corporate compliance, legal risk prevention, and dispute resolution. With his solid erudition in law and the rigorous and practical working attitude, Kai is highly recognized and trusted by his clients.

Following a maritime injunction granted by the Wuhan Maritime Court in 2017 ordering a party to withdraw an anti-suit injunction (ASI) issued by the Hong Kong High Court, the maritime injunction issued by the Guangzhou Maritime Court [(2020) Yue 72 Min Chu 675] in a soybean cargo claim ordering the shipowner to withdraw an English court ASI became the first factual "anti-anti-suit injunction" (AASI) against a foreign court's ASI in China's maritime jurisdiction. The case was listed as one of the top ten typical precedents of Guangzhou Maritime Court in 2022.

I. Conflict between Chinese maritime litigation and ASIs made by other jurisdictions

In most B/L disputes before Chinese maritime courts, CONGENBILL is issued for bulk carriage, the standard wording of which states: *"To be used with Charter-parties", "All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated."*

In charterparties that are incorporated into a CONGENBILL, a clause of English law and London arbitration is usually included. Before English courts, such incorporation of charterparty clause into B/L is usually recognised, i.e., the applicable law and arbitration clause in the charterparty can effectively be incorporated into the bill of lading, binding on both the ship and the cargo interests. Disputes over the B/L should be submitted to arbitration as agreed.

In Chinese maritime judicial practice, however, the courts do not recognise the above incorporation of the arbitration clause for reasons including 1) the cargo receiver/insurer was not a party to the charterparty, and the charterparty was not presented to the cargo receiver/insurer so it could not be concluded that the cargo receiver/insurer has reached an arbitration agreement with the ship interests; 2) the date of the charterparty is not stated on the face of the bill of lading; or even if the charterparty date is stated, the specified charterparty is for the purpose of freight payment and the arbitration clause in the charterparty is not explicitly applied; 3) the arbitration clause in the charterparty is not explicitly stated in the bill of lading.

Where the London arbitration clause in a charterparty is not accepted by the Chinese courts, many shipowners choose to apply for an English court ASI to block proceedings in China. English courts usually would grant an ASI to restrain cargo receivers and their insurers from commencing or continu-

ing proceedings in other countries. Breach of such injunction will be treated as contempt of the English courts and the offender will face severe penalties, including imprisonment or seizure of property in the UK.

There is no precedent of Chinese courts recognising ASI issued by the English courts and most Chinese cargo owners and insurers take a passive approach to ASIs by simply ignoring them without taking any countermeasures. However, some cargo owners and insurers have chosen to apply to Chinese courts for a maritime injunction to counteract an English court ASI in view of their interests in the UK or the inconvenience and risk that may be caused by the ASI in the future. Both the Guangzhou Maritime Court and the Wuhan Maritime Court have, upon application, grant "AASIs" in the form of maritime injunctions.

II. The Guangzhou Maritime Court's "AASI"

Contents of the AASI have not been disclosed by the Guangzhou Maritime Court, but basic information of the case is disclosed by the court as follows:

"The case is a dispute over damage to goods caused by mold occurring on imported GM soybeans. The claimant applied to this court for a maritime injunction, requesting that the defendant be ordered to withdraw an English High Court anti-suit injunction because despite the fact that both the first and second instance courts in China had determined the issue of jurisdiction, the defendant applied to the English High Court for an anti-suit injunction. In accordance with the principle of reciprocity under the Civil Procedure Law, this Court made the first anti-anti-suit injunction against a foreign court in the maritime jurisdiction, taking into account factors such as necessity and international comity", "the party who had obtained an injunction in the UK was ordered to withdraw the injunction within thirty days and eventually withdrew the injunction. The case was then settled by mediation."

From the court's briefing above, we could learn that, 1. The shipowner filed an objection to jurisdiction under Chinese law and the courts of the first and second instances have dismissed the objection, which means via effective rulings the Chinese court has confirmed its jurisdiction over the case; 2. the AASI is made in the form of a maritime injunction as applied by the cargo insurer; 3. the AASI was made based on the principle of reciprocity as stipulated in the Chinese *Civil Procedure Law* while factors such as necessity and international comity were also taken into consideration before the decision was made; 4. The shipowner complied with the Chinese court AASI and then reached a settlement with the cargo receiver.

The AASI granted by the Guangzhou Maritime Court differs from the previous AASI granted by the Wuhan Maritime Court in several respects: 1. In the Wuhan case, the shipowner did not object to the Wuhan Maritime Court's jurisdiction; in the Guangzhou case, the shipowner filed an objection to jurisdiction with two levels of courts; 2. The Wuhan Maritime Court held that the shipowner's silence on jurisdiction indicates acceptance of Chinese court jurisdiction; the Guangzhou Maritime Court dismissed the shipowner's objection to jurisdiction by an effective ruling; 3. The legal basis for the Wuhan Maritime Court's AASI are merely provisions on maritime injunction; in the Guangzhou case, the court also invoked the principle of reciprocity in the *Civil Procedure Law* as well as factors including necessity and international comity.

III. Comments

China's foreign-related maritime proceedings are often "interfered with" by English court ASIs. In Chinese judicial theories, it is held that English court ASIs have interfered with China's judicial sovereignty, making "AASI" against English court ASI a hot judicial topic in recent years.

There is no anti-suit injunction scheme under Chinese law. It is not well-grounded for Chinese courts to directly issue an ASI or AASI in the theory of law. However, the maritime injunction under Chinese law has become one of the grounds based on which Chinese courts grant factual AASIs.

Under Chinese law, a maritime injunction refers to a compulsory measure taken by a maritime court to compel the respondent to act or refrain from action to protect the applicant's rights and interests. Conditions for granting a maritime injunction are: 1) There is a specific maritime claim; 2) There are actions or inactions of the respondent that violate the law or breach a contract needing to be readdressed; 3) As a matter of urgency, losses will occur or increase if a maritime injunction is not granted.

However, whether an application for "AASI" qualifies as an application for maritime injunction remains highly controversial, for instance, 1) Is the application a specific maritime claim? 2) Is the application for English ASI in breach of a legal provision or contractual agreement?

In addition to the provisions on maritime injunctions, the Guangzhou Maritime Court also applies the principle of reciprocity in the Chinese *Civil Procedure Law*:

"Where a foreign court imposes restrictions on the civil litigation rights of citizens, legal persons and other organisations of the People's Republic of China, the courts of the P.R.C shall apply the principle of reciprocity to the civil litigation rights of citizens, legal persons and organisations of that country. "

The Guangzhou Maritime Court apparently held that the English court ASI had restricted the civil rights of Chinese companies and that as a Chinese court, it could therefore take reciprocal measures - making a maritime injunction ("AASI"). It is questionable here that since the principle of reciprocity that the Guangzhou Maritime Court relied on is directed at the actions of the courts of the countries where the foreign parties are located. Therefore, the Guangzhou Maritime Court could not make an AASI on the basis of the principle of reciprocity when the shipowner applying for the injunction is not an English company. We do not know the nationality of the shipowner in this case, but our experience suggests that it is likely the shipowner is not an English company. In such circumstances, the Guangzhou Maritime Court in fact erred in the application of law in granting the AASI on the basis of the principle of reciprocity in the Chinese *Civil Procedure Law*.

In addition, the concept, conditions, and legal effect of the principle of necessity and the principle of international comity invoked by the Guangzhou Maritime Court are also controversial.

Introducing the typical significance of the case, the Guangzhou Maritime Court stated that it was *"conducive to improving international judicial efficiency, safeguarding the legitimate interests of the claimant, defending China's judicial authority, and also providing a reference for the handling of similar cases."*

It can be seen that although the Chinese courts have not yet formed a unified opinion on AASI, they are inclined to look for "arguable" grounds to support cargo interests' application for an AASI, regardless of whether or not shipowners have raised jurisdictional objections. It is foreseeable that Chinese courts may grant more AASIs in the future, thus weakening the pressure on cargo receivers and cargo insurers from English court ASIs and putting shipowners under pressure from Chinese court AASIs instead, or even the shipowners will have to withdraw English court ASIs. At the same time, however, we may not deny the positive impact of an English court ASI on the shipowner's recovery from the charterers. Given the aggressive attitude of Chinese courts towards English court ASIs, the shipowners and P&I Clubs may need to be more thoughtful when faced with the option of an English court ASI.

| Cases and Insights

Insights on the Measures for the Standard Contract for Outbound Cross-border Transfer of Personal Information and the Standard Contract

The *Personal Information Protection Law of the PRC* ("*PIPL*") took effect on 1 November 2021. Chapter III of *PIPL* regulates the cross-border provision of personal information. On 24 February 2023, the Cyberspace Administration of China promulgated the *Measures for the Standard Contract for Outbound Cross-border Transfer of Personal Information* (the "*Measures*") and the *Standard Contract for Outbound Cross-border Transfer of Personal Information* (the "*Standard Contract*"). The *Measures* will be effective from 1 June 2023 and provides a six-month rectification period for companies that have already engaged in cross-border personal information activities. It is conceivable that the implementation of the *Measures* will have an impact on the outbound cross-border transfer of personal information, and we now share our insights on the *Measures* and *Standard Contract* below.

I. The *Measures* and the *Standard Contract* are only applicable to the outbound transfer of personal data

Both the *Measures* and the *Standard Contract* apply to "personal information", including sensitive personal information. According to the interpretation of Article 1(5) of the *Standard Contract*, "personal information" means any kind of information relating to an identified or identifiable natural person, recorded by electronic or otherwise recorded. In other words, for the outbound important information and data other than "personal information", the *Measures* and the *Standard Contract* are not applicable.

II. Only personal information processors that meet the specific conditions set out in the *Measures* may process the outbound cross-border transfer of personal information through concluding a *Standard Contract*.

According to Article 38 of *PIPL*, there are three ways to comply with the cross-border transfer of personal information, namely: (1) passing the security assessment organized by the national cyberspace authority; (2) given a certification of personal information protection by a professional institution in accordance with the regulations of the national cyberspace authority; (3) entering into a contract with the overseas recipient as per the *Standard Contract*.

It seems that the "Standard Contract" is the most flexible approach. However, in accordance with Article 4 of the *Measures*, to provide personal information to an overseas recipient under an executed *Standard Contract*, a personal information processor shall meet all the following criteria:

Author:

Qiao Jing joined Wang Jing & Co. in 2007 and is now a partner, mainly engaged in dispute resolution. Ms. Qiao has handled a large number of maritime and commercial disputes, international trade disputes, corporate and commercial disputes, property insurance, liability insurance, and reinsurance disputes for associations, shipping companies, insurance companies, and trade companies. She is familiar with relevant laws and regulations, meticulous in handling cases and flexible in thinking. Ms. Qiao is familiar with Chinese law and regulation and handles cases meticulously and carefully with flexible thinking. Ms. Qiao also provides year-round legal services to clients .

Song Jia graduated from Bristol University and got LLM degree. He then furthered his study at University of Law (London) in British Law and received GDL and LPC. Prior to joining Wang Jing & Co., Mr. Song worked at a shipping company in Singapore and a top Chinese law firm for a couple of years. His practice focuses on dry shipping cases, ship finance leasing, insurance and corporate. Mr. Song also has extensive research experience in sanctions and compliance.

(1) it is a non-critical information infrastructure operator;

(2) it processes personal information of fewer than 1,000,000 individuals;

(3) it has provided personal information of fewer than 100,000 individuals in aggregate to overseas recipients since January 1 of the previous year;

(4) it has provided sensitive personal information of fewer than 10,000 individuals in aggregate to overseas recipients since January 1 of the previous year.

III. The applicability of the *Measures* and the *Standard Contract* is subject to a case-by-case basis when Chinese legal entities provide personal information to overseas recipients.

Applicable entity: Whether it is a "processor of personal information"?

According to the interpretation of Article 1(1) of the *Standard Contract*, "Personal information processor" refers to any organization or individual that independently determines the purpose and method of processing in their personal information processing activities and provides personal information to recipients outside the territory of the PRC. In other words, if an equity collects and manages the personal information of its internal employees during its business operations and provides the information abroad, it is a personal information processor under the *Measures* and the provisions of the *Measures* shall apply.

Criteria 1: Whether it is a non-critical information infrastructure operator?

According to Article 10 of the *Regulations on the Security Protection of Critical Information Infrastructure*, the security protection departments shall be responsible for organizing the identification of critical information infrastructure in their respective industries and areas in accordance with the identification rules and timely notify the operators of the identification results. They shall also report such results to the public security department. Therefore, the competent security protection department will send a notice to the entity who is identified as a critical information infrastructure operator.

Therefore, if an entity has neither been identified as a critical information infrastructure operator nor been notified of being identified as a critical information infrastructure operator by the security protection departments, it can be identified as a non-critical information infrastructure operator. Under such circumstance, criteria 1 is met.

Criteria 2: Does it process personal information of fewer than one million individuals?

It is noteworthy that the *Measures* does not explicitly specify whether the subjects of personal information shall be limited to Chinese citizens. However, in conjunction with the *PIPL*, *Guide to Applications for Security Assessment of Outbound Data Transfers* and relevant regulations, we are inclined to believe that the subjects of personal information may include foreigners under certain circumstances. If a company employs foreign employees, the provisions of the *Measures* apply mutatis mutandis when personal information of such employees collected within the territory is transferred abroad. However, whether the specific operation is different from that of personal information of Chinese citizens shall be subject to the specific scenario and requires specific analysis. Company can also consult the Cyberspace Administration if necessary.

IV. WJNCO Comments

In light of the above, we suggest that companies should pay special attention to the following when processing cross-border transfer of personal information.

(i) Impact of and Preparation for the Personal Information Protection Assessment

Article 5 of the *Measures* provides that before providing any personal information to an overseas recipient, the personal information processor shall conduct a personal information protection impact assessment focusing on the following:

(1) the legality, legitimacy and necessity of the purpose, scope and method of processing personal information by the personal information processor and the overseas recipient;

(2) the quantity, scope, type and sensitivity of the personal information to be transferred abroad, the risk that the outbound cross-border transfer may pose to personal information rights and interests;

(3) the responsibilities and obligations that the overseas recipients undertake to assume, and whether the management and technical measures and capabilities of the overseas recipients to perform such responsibilities and obligations are sufficient to ensure the security of personal information to be transferred;

(4) the risk of the personal information being tampered with, sabotaged, disclosed, lost, or misused after being transferred overseas, and whether there is a clear path for individuals to protect their personal information rights and interests;

(5) the impact of personal information protection policies and regulations in the country or region where the overseas recipient is located on the performance of the Standard Contract, etc.

This Article imposes additional pre-contractual compliance obligations on personal information processors. We suggest that companies conduct the following preparations before executing the *Standard Contract*:

(1) Carry out personal information protection impact assessments and keep records of the assessment reports and the handling of information.

(2) Communicate with the overseas recipient (e.g., the overseas consignee or its agent, the overseas port/ terminal party, the cloud company where the data is stored, etc.) about the text of the standard contract, the agreement on the rights and obligations of the parties, etc.

(3) Assess whether documents such as the Personal Information Protection Policy/ Personal Information Protection Notice require improvement.

(4) Fulfil the obligation to inform and obtain individual consent from the subject of personal information.

(5) Improve internal management systems and operational processes with respect to data compliance (especially with respect to outbound transfer of data and personal information) as well as formulate and evaluate contingency plans with respect to personal information security incidents.

(ii) Impact of and Response to the "Minimum Scope" Requirement

Article 2(1) of the *Standard Contract* provides that personal information shall be processed in accordance with relevant laws and regulations, and that personal information transferred abroad shall be limited to the minimum extent necessary to achieve the purpose of the processing. Article 6 of *PIPL* stipulates that the processing of personal information shall have a clear and reasonable purpose and shall be related to the purpose of processing in a manner that has the least impact on the rights and interests of individuals. The collection of personal information shall be limited to the minimum extent necessary for the purpose of processing, and personal information shall not be collected excessively.

Therefore, the "minimum scope" under the *Standard Contract* should have two meanings: first, the personal information processor should have a clear and reasonable purpose for providing personal information to the overseas recipient, and second, the personal information provided by the personal information processor to the overseas recipient should be necessary to achieve that purpose, and non-essential information should not be trans-

ferred overseas.

Accordingly, the personal information provided by a company to an overseas recipient should be only limited to the information necessary to achieve a specific and reasonable purpose. The "minimum necessary" standard should also be determined on a case-by-case basis. For example, names and telephone numbers/email addresses of domestic employees who will be attending overseas meetings or assisting in certain tasks, etc.

(iii) Impact of and Response to the Requirement to Inform Third Party Beneficiaries

Article 2(4) of the *Standard Contract* provides that the personal information processor shall inform the personal information subject that the processor has entered into this contract with the overseas recipient, that the personal information subject is a third-party beneficiary, and that if the personal information subject does not expressly refuse within 30 days, he or she may have the rights of a third-party beneficiary under this contract.

We suggest that the appropriate method of notification should be chosen for different subjects of personal information. If a standard contract is signed in the future:

(1) Where the subject of personal information is an external person: a third-party beneficiary notification clause can be added to the personal information protection policy, and this part of the clause can be displayed in a pop-up window together with the clause on outbound transfer of personal information, and the subject of personal information will be given a relevant button or mechanism to refuse.

(2) Where the subject of the personal information is an internal employee: a third-party beneficiary notification clause may be included into the *Employee Personal Information Protection Notification Consent Form* or other employee data compliance documents, and design a checkbox to ask employees to confirm whether they accept or decline to become a third-party beneficiary of a standard contract, to ensure that both types of personal information subjects can make a request to the personal information processor to decline to become a third-party beneficiary of a standard contract The checkbox will be added to the standard contract.

(iv) Impact of and Response to the Requirement to Re-sign a Standard Contract

Article 8 of the *Measures* provides that if any of the following circumstances occurs during the term of the standard contract, the personal information processor shall conduct a new personal information protection impact assessment, supplement or re-sign the standard contract, and conduct the relevant filing procedures:

(1) changes in the purpose, scope, type, sensitivity, manner and storage location of the personal information provided abroad or the use or manner of handling of the personal information by the overseas recipient, or extension of the storage period of personal information;

(2) changes in the personal information protection policies and regulations of the country or region where the overseas recipient is located that may affect the rights and interests of the personal information; and

(3) other circumstances that may affect the rights and interests related to the personal information.

Therefore, we suggest that where the outbound data transfer is required on an ongoing basis during the term of the contract, the size, scope, type, sensitivity, handling, location or period of storage of the personal information should also be focused on and thoroughly evaluated, and external counsel and professional advice may be sought to make this determination.

(v) Consequences of not signing or filing a standard contract and how to respond

If legal entities choose the "Standard Contract" approach to transfer personal information abroad, they should fill in the relevant content and sign the contract strictly in accordance with the format of the standard contract tem-

plate. If entities modify or delete the content items set out in the body of the standard contract and in Appendix I, they may run the potential risk of not being accepted or filed when the Cyberspace Administration subsequently conducts an outbound filing review. Although whether a contract is filed or not does not affect the validity of the signed contract, if the contract is not filed with the Provincial Cyberspace Administration within 10 working days from the effective date of the contract in accordance with the *Measures*, it may face the potential risk of being reported by others or intervened initially by Cyberspace Administration for rectification.

(vi) Suggestions for supplementing the content of Appendix II of the *Standard Contract*

Appendix II of the *Standard Contract* is designed to facilitate additional agreement by the provider of personal information on other commercial terms and conditions that it has agreed with the overseas recipient that are inconsistent with, and not in conflict with the main text of the *Standard Contract*, subject to his own business. Therefore, taking into account the characteristics of their own business, they may choose to make further agreements in Annex II of the *Standard Contract*.

V. Conclusion

In general, both the *Measures* and the *Standard Contract* regulate the outbound transfer of personal information, and the outbound transfer of information other than personal information must be handled in accordance with other relevant regulations. If the four application conditions set forth in the *Measures* are met, personal information may be transferred overseas by signing a *Standard Contract* with the overseas recipient without the need for a security assessment by the Cyberspace Administration or a personal information protection certification by a professional institution. In such case, enterprises should strictly comply with the duties and responsibilities set forth in the *Measures* and the *Standard Contract* for personal information processors, so as to fully protect the rights and interests of personal information subjects.