



NACUANOTES

National Association of College and University Attorneys June 19, 2019 | Vol. 17 No. 8

TOPIC:

The China Primer: Basics on Operating Higher Education Activities in China

AUTHOR:

Xinning Shirley Liu^[1]

INTRODUCTION:

It is easy to see why China remains one of the most attractive markets for U.S., European, and other non-Chinese institutions of higher education (“**IHEs**”). It has the largest education system in the world with a staggering 276 million students.^[2] In 2018, the Chinese Ministry of Education (“**MOE**”) reported a total enrollment of 38.33 million students at higher education levels.^[3] Of those numbers, close to 500,000 are international students, reflecting a 299% increase since 2004.^[4] Such numbers are expected to increase as the Chinese MOE continues to expand its funding to higher education and international studies.^[5]

At the same time, the ever-evolving Chinese legal system is also one of the most complex regulatory frameworks in the world, with thousands of (often overlapping) laws having been passed within the past three decades.

This NACUANOTE will highlight, at a high level, the key issues IHEs should consider when operating outbound educational activities in China.^[6] Many of these topics deserve NACUANOTES of their own to do them proper justice. Hence, when referring to this Note, please be mindful that local Chinese laws and practices vary greatly from region to region (or even within the same region), and the issues described here have been largely generalized for discussion purposes.

DISCUSSION:

1. How does your institution currently engage (or want to engage) in China?

Before conducting any legal analysis, the threshold question is to figure out the types of activities your institution currently has in China, or the types of activities your institution plans to have in-country.

a. Academic Programs

The most common types of collaboration are rooted in academic programs, such as articulations, affiliations, dual degrees, study abroad, and student/faculty exchanges; even international medical rotation agreements with Chinese university hospitals are increasingly more ubiquitous. Another group of pervasive activities is research collaborations between foreign and Chinese institutions, usually at the graduate or post-doctorate levels. Online and distance learning programs are also highly popular programs offered by foreign colleges and universities in China.^[7]

Unique to China are Sino-foreign cooperative education programs (“**CEPs**”) and cooperative education institutions (“**CEIs**”) (sometimes also referred to as joint institutes or centers) approved by the Chinese MOE.^[8] These MOE-approved CEPs and CEIs can be set up to operate various international academic and/or research programs.

Whether MOE approval is required to operate a particular academic program depends on, among other factors, the content and structure of the program. Article 2 of the Regulations of the People’s Republic of China on Chinese-Foreign Cooperation in Running Schools (the “**2003 Regulations**”) requires any “cooperation between foreign educational institutions and Chinese educational institutions . . . in establishing educational institutions . . . within the territory of China to provide education service mainly to Chinese citizens” to be approved by the MOE.^[9]

On the other hand, not all academic programs require approval. Article 60 of the Implementation Measures for the Regulations of the People’s Republic of China on Chinese-Foreign Cooperation in Running Schools provides that student exchange activities conducted by Chinese and foreign educational institutions only through credit transfer without materially introducing foreign educational resources generally do not require MOE approval.^[10] Consultation with local authorities is strongly advised to confirm whether a particular foreign program requires governmental approval.

b. Non-Academic Programs

There is also a wide array of non-credit based collaborations existing between Chinese and foreign partners, such as consulting, professional development, executive training, vocational education, and certificate programs. Depending on the nature of a particular training program, it may require approval by the MOE and/or the Ministry of Human Resources and Social Security (“**MOHRSS**”).^[11]

c. Education Support Activities

In addition to the above, foreign universities are frequently involved in operating various types of activities related to supporting their academic, research, and/or training operations in China. For instance, many foreign IHEs actively recruit students from China on the front end and then maintain alumni outreach after their Chinese students graduate. To implement their programs, foreign IHEs may need to send faculty to China or may hire Chinese nationals, and in turn, be subject to enterprise level and/or individual income taxes (for its employees). Foreign IHEs also commonly contract with Chinese contractors or engage in various consulting relationships and licensing arrangements (particularly technology licensing).

2. Who are your university's existing or prospective partners in China?

This may seem like an obvious question but nevertheless an important one. Chinese business relations are deeply rooted in informal social networks, or "*guanxi*." As such, it is not always transparent who your institution is working with in China, especially in a private context. Whether your prospective partner is a Chinese university, government agency, private company, or individual, conducting preliminary due diligence is highly recommended, including but not limited to running restricted party screenings as required by U.S. and other foreign country export control laws, requesting and verifying business licenses/permits, checking references, and/or evaluating Chinese and international university rankings.[\[12\]](#)

Contracts and legal documents should clearly identify the appropriate party and set forth contractual terms in a transparent manner to avoid potential conflicts of interest, as well as anti-corruption and bribery law allegations. While China does not have a direct equivalent of the U.S. Foreign Corrupt Practices Act (which has extraterritoriality under U.S. law), it has various laws governing anti-corruption and bribery that also apply to parties abroad.[\[13\]](#)

With the recent spotlight regarding foreign influence and efforts to safeguard university property and protect academic freedom, there is much focus on promoting greater transparency around the relationships U.S. colleges and universities have with foreign, particularly Chinese, entities. Certain federal laws, such as Section 117 of the Higher Education Act, require IHEs that receive Title IV federal student aid dollars to submit to the Secretary of Education reports about gifts received from any foreign source, contracts with a foreign entity, and any ownership interests in or control over the institution by a foreign entity. Many states have similar requirements. Understanding who your institution is partnering with in China, including the ownership structure and any direct or indirect affiliations of such partners, allows university administrators and attorneys to better determine what contracts with Chinese partners need to be reported to satisfy compliance obligations under federal and state laws.

3. How will your institution operate in China?

Foreign IHEs can operate activities in China in various ways. To start, some activities by foreign IHEs do not require registration or the establishment of an in-country domestic entity. Programs such as study abroad and faculty exchange

are generally internally reported by the Chinese university to its local educational bureau or commission, and thus can generally be carried out between a foreign and Chinese university without separate governmental approval. Other more in-depth program-level collaborations, such as CEPs, may need to be first submitted and approved by the MOE before implementation. CEPs, on their own, all operate without independent legal person status.

CEIs, which commonly house multiple MOE-approved CEPs, can exist in two forms: one without legal person status (as an integrated part of its Chinese university partner, analogous to a college, center, or institute within a university); and one with legal person status (resulting in a stand-alone separate legal entity).

While the aforementioned models mostly relate to academic offerings, foreign IHEs can also operate support activities in China through mechanisms such as a representative office (“**RO**”) or a wholly foreign-owned enterprise (“**WFOE**”).^[14] A RO operates without legal identity and is rather limited in scope as to the nature of its support services; it mostly serves as a local liaison for the foreign university’s faculty, staff, and students. It cannot hire Chinese nationals, open bank accounts, or enter into contracts in its own name, all the things a WFOE can lawfully engage in since it is an independent legal entity. That being said, even a WFOE cannot be incorporated to carry out general business activities by foreign parties. Rather, a WFOE is limited by the specific business scope and investment level authorized by the relevant Chinese government authorities. In addition to a main WFOE, foreign IHEs can expand their operations in China by setting up branch WFOE locations throughout the country, which can operate either dependently or independently of the main WFOE.

The process for establishing and maintaining WFOEs has become faster and more streamlined in the past few years. That process, however, may be up for additional changes. On March 15, 2019, the Chinese National People’s Congress passed the new Foreign Investment Law, which will go into effect on January 1, 2020.^[15] This new Law will replace three existing Chinese laws on foreign direct investment, namely the Wholly Foreign-Owned Enterprises Law, the Sino-Foreign Equity Joint Ventures Law, and the Sino-Foreign Contractual Joint Ventures Law. Chinese Premier Li Keqiang stated at a press conference that the new Foreign Investment Law “is designed to better protect and attract foreign investment through legislative means.”^[16] Despite promises of fair competition for foreign investors in China, much is left uncertain due to vague and broad language contained in the Foreign Investment Law. New sets of implementing regulations and rules are expected to be released in the coming months to implement the Foreign Investment Law.

4. What governmental approvals, if any, does your institution need to operate its existing or intended activities in China?

The type of PRC government approval required depends on the specific nature of a particular program or intended activity. Some key questions to consider include where the actual teaching delivery will occur, whether a foreign degree will be issued in-country to Chinese students as a result of a local collaboration, and the extent of active collaboration between the Chinese and foreign parties.

Certain educational programs may also necessitate separate approvals by multiple agencies at various municipal, provincial, and central levels. While the MOE and its local bodies oversee all educational activities, other governmental agencies also regulate the dynamic activities of foreign IHEs in China. For instance, the establishment and operation of a WFOE falls under the purview of a myriad of authorities, including the State Administration for Market Regulation (“**SAMR**”), the Ministry of Commerce (“**MOFCOM**”), the State Administration of Taxation (“**SAT**”), and the State Administration of Foreign Exchange (“**SAFE**”), just to list a few.

With the recent adoption of the Law of the People’s Republic of China on Administration of Activities of Overseas Nongovernmental Organizations in the Mainland of China (“**Foreign NGO Law**”), the Ministry of Public Security (“**MPS**”) has also made itself a new player with broad oversight authority over the activities of foreign non-governmental organizations, including foreign IHEs.^[17] Article 53 of the Foreign NGO Law provides a limited exemption from registration for certain educational activities, provided they are otherwise regulated by other Chinese laws and regulations.^[18] In-country activities of a foreign IHE that do not fall under Article 53 will require the IHE to either register a representative office (for activities more than one year) or obtain a temporary activity permit (for activities less than one year) from the MPS.^[19]

Notably, representative offices under the Foreign NGO Law which are registered with MPS are separate and distinct from ROs discussed in Section 3 above, which are registered under the Regulation on the Administration of Registration of Resident Representative Offices of Foreign Enterprises with the SAMR.^[20]

Last, foreign IHEs should be mindful of special licenses and/or permits which may be required for certain industries. To illustrate, generating revenue from hosting internet content in China requires, among other things, an Internet Content Provider (“**ICP**”) license issued by the Chinese Ministry of Industry and Information Technology (“**MIIT**”).

5. What facilities will your institution need to operate its program(s) in China?

It is common for the Chinese partner to provide the real estate and facilities required to operate an international program. In those cases, such obligations should be clearly outlined in the collaboration agreement. If the Chinese partner is not a public Chinese university, due diligence documents such as a Real Estate Certificate (also commonly referred to as the “Immovable Property Certificate” or 《不动产权证书》) issued by the local Bureau of Land and Resource^[21] or executed lease agreements should be requested from the Chinese partner as proof of its authority to occupy that land and space. Furthermore, the Chinese Ministry of National Resources currently classifies land use types into 12 primary and 72 secondary categories; such classification of land use will be specified in the Real Estate Certificate.^[22] Since standards differ from country to country, discussions should also be had with the Chinese partner regarding applicable U.S. and/or PRC laws related to the safety, maintenance, and operational standards of each facility.

If a foreign IHE needs to secure its own property and/or facilities in China, assuming it is able to (usually through a locally registered entity), considerations should be made to ascertain whether a particular space is authorized for the intended purposes proposed by a foreign IHE.

6. How will your institution manage its financial needs in China?

To evaluate the financial and banking needs of your institution, a key consideration is whether it will need to transfer funds into or out of China. In most situations, international funds transfers will need to be evidenced by a written agreement in Chinese and approved by SAFE. The initial capitalization of a registered foreign currency contribution account of a WFOE is one such example. Based on the nature of your institution's local operations, also consider whether it needs to open a Chinese bank account. If so, what types(s) of bank accounts is your institution allowed to establish and what are the associated implications? If not, how will your institution manage local funds and expenditures; will this be handled by your local Chinese partner or through a designated third party?

Since 2009, foreign IHEs are allowed to open domestic foreign exchange and RMB bank accounts in China.^[23] However, such non-resident bank accounts are limited to certain purposes and subject to numerous restrictions (by both Chinese governmental entities as well as Chinese banks)^[24] and hence, may be difficult to use in practice. Another option for foreign IHEs to manage local funds is to consider establishing dual-signatory accounts with a local Chinese partner. In negotiating agreements with local partners, foreign IHEs should carefully consider the experience of the Chinese partners to make cross-border payments, appropriate currency for payment, and the applicable exchange rate as necessary to accommodate market fluctuations.

7. What local labor law considerations are applicable to your institution's activities in China?

To support in-country operations, foreign IHEs commonly satisfy local human resources needs by: a) sending employees to work in China, b) hiring Chinese nationals or third-country nationals, or c) engaging local contractors.

When sending university employees to China, consider the types of Chinese visas such employees will need for their specific purpose and duration. Some visas will require additional processing time and closer coordination with Chinese partners. For instance, employment (Z) visas usually require a separate employment contract between the university employee and the local Chinese partner, and separate approval from the State Administration of Foreign Expert Affairs ("**SAFEA**"). Once in-country, an expatriate, depending on his or her visa status, may also need to obtain residence permits, make local tax filings, and contribute to the social welfare system. Secondment is a common vehicle for foreign IHEs to assign employees to a Chinese partner on a temporary basis. Payroll and benefits administration should be carefully managed between off- and on-shore entities for such employees. Upon the separation or termination of a foreign expatriate, keep in mind administrative requirements for the cancellation of any work and/or residence permit(s) to avoid unnecessary liabilities for the foreign IHEs and their Chinese partners.

Sometimes, it is more advantageous for foreign IHEs to hire Chinese nationals because of their knowledge of local markets, language, and culture skills, and because they may be hired at lower costs. Current Chinese law only allows IHEs with formal local establishments (e.g., WFOEs, CEIs with legal person status) to directly employ Chinese nationals. For foreign IHEs without legal entities in China, they can consider using a professional employment organization to hire and pay its Chinese employees through either a dispatch or outsourcing arrangement. That being said, such arrangements may not be a permanent option if a foreign IHE wants to employ a Chinese employee on a long-term basis.

In all cases, a written employment contract in compliance with local labor laws is required to avoid double salary^[25] and potential lifetime employment claims.^[26] During the negotiation process, be mindful of different socially accepted employment practices as such factors may affect the ultimate cost of the position. For instance, the social norm in China is to calculate salary on a 13-month basis for individual income tax saving purposes (however this benefit is expected to be revoked on December 31, 2021 as part of China's greater income tax reform). Furthermore, inquire about local employment requirements, such as a potential Chinese employee's *hukou* (the China's government-imposed household registration system), which may affect an employee's access to seek local employment and utilize other social benefits in a particular city.

Foreign IHEs also commonly enter into agreements with local independent contractors (which can be an individual or a Chinese entity) to provide needed goods and/or services. For example, Chinese student recruitment and publicity management (e.g., social media) are two service sectors highly sought after by foreign IHEs in China. In such contexts, it is important to structure an independent contractor arrangement in a truly independent manner to avoid implied or *de facto* employment relationships (similar to the analysis under U.S. labor laws).

It is important to note in this section that compliance with local labor law requirements does not guarantee tax law compliance. Sending employees abroad, hiring Chinese nationals, and engaging with Chinese contractors, even when done correctly, may trigger a permanent establishment on the part of the foreign IHE in China (see further discussion below).

8. What are the local tax implications arising from your institution's activities in China?

Under Chinese tax laws, there are generally two main categories of local tax obligations for foreign IHEs: (a) enterprise-level corporate taxes arising from local operations of a foreign IHE; and (b) individual-level income taxes arising from the presence of the employees of a foreign IHE working in China.

a. Enterprise-Level Taxes

At the enterprise level, foreign IHEs are divided into two broad categories for taxation purposes:

- i. Resident enterprises: Applies when a foreign IHE has established a formal legal entity in China, such as a WFOE or a CEI with legal person status. Resident enterprises are taxed on their worldwide income^[27].
- ii. Non-resident enterprises: Applies when a foreign IHE has not formed a legal entity in China^[28]; can exist in two forms:
 1. With an establishment (also commonly referred to as a permanent establishment or “PE”): These enterprises, arising from the scope and nature of their local activities in China, are taxed on both PRC sourced and foreign sourced income effectively connected to a PE in China^[29]; or
 2. Without an establishment in China: Such non-resident enterprises are taxed only on China-sourced income, if any^[30].

Non-resident enterprises with a PE can refer to tax treaties signed between China and its home country for further guidance (and possible tax relief). For instance, the US-China Double Taxation Treaty (“**US-China DTT**”) defines a “PE” as “a fixed place of business through which the business of an enterprise is wholly or partly carried on” (commonly referred to a “**fixed place of business PE**”).^[31]

“Fixed place of business PEs” generally include management PEs (by having a fixed place of management)^[32] or operations PEs (by having a branch or office).^[33] Other categories of PEs which may be potentially triggered by a foreign IHE’s local activities include service PEs (by providing services through employees or other personnel within China for more than 183 days within any 12-month period)^[34]; or dependent agent PEs (by having a local agent, other than an agent of truly independent status operating in the ordinary course of business, who acts on behalf of and habitually exercises contractual authority in the name of the foreign IHE in China).^[35]

On February 9, 2018, the Chinese SAT issued Public Notice No. 11 (“**PN11**,” or commonly referred to as “**Bulletin 11**”) regarding some recent updates to the SAT’s implementation of the Chinese tax law.^[36] Among these changes is a new interpretation that CEPs and CEIs without legal person status, and the premises through which they operate educational activities, may be deemed a permanent establishment. Specifically, they are referring to the fixed place of business PEs that likely arise from the physical location from which educational activities are provided.

Resident enterprises and non-resident enterprises with a PE in China are usually subject to a corporate income tax (also commonly referred to as “enterprise income tax”) (“**CIT**” or “**EIT**”). The default is to calculate CIT at a standard rate of 25% based on actual profits. For non-resident enterprises that cannot accurately calculate their actual taxable income, the Chinese tax authorities may utilize various “deemed profit” calculation methods based on either actual revenue, costs, or expenditures.

Aside from the CIT, other common categories of enterprise level taxes include a value-added tax (“**VAT**”), withholding taxes on dividends, interests, royalties, as

well as other local surcharges such as urban construction and maintenance taxes, education surcharges, and other local surcharges depending on taxable activity and the particular region of physical operation in China.

On July 25, 2018, the SAT issued Public No. 42 on Several Issues Concerning the Administration of Value-Added Tax Collection for Matters Including Sino-Foreign Cooperative Education (“PN 42” or “Bulletin 42”) which clarifies that in the event that the foreign educational institutions cooperate with the domestic schools engaged in academic education to conduct Sino-foreign cooperative education, their income derived from the academic education services will be exempt from VAT.^[37]

b. Individual-Level Taxes

On August 31, 2018, the Chinese National People’s Congress adopted one of the most significant reforms to the individual income tax (“IIT”) regime that took effect on January 1, 2019. Generally, there are two ways foreign nationals can be taxed on individual income under the new Chinese IIT law:

- i. **Tax Resident:** Applies to those foreign nationals who either have a domicile in China, or reside in China for 183 days or more in a tax year^[38]. For an individual who does not have a domicile in China and has resided in China for 183 days or more cumulatively in a tax year for less than six consecutive years, his/her foreign-sourced income paid by an overseas organization or individual shall, upon filing with the tax authority in charge, be exempted from individual income tax. If he/she leaves China for more than 30 days in any year in which he/she resides in China for 183 days or more cumulatively, the computation of consecutive number of years for which he/she resides in China for 183 days or more cumulatively shall restart^[39].
- ii. **Non-Tax Residents:** Applies to those foreign nationals who are not domiciled in China but who reside in China for fewer than 183 days in a tax year^[40]. PRC non-tax residents are taxed on their China-sourced income, regardless of where they are actually paid. For an individual who does not have a domicile in China and resided in China for no more than 90 days cumulatively in a tax year, his/her income sourced in China but paid by his/her overseas employer and not borne by the employer's organization or workplace in China shall be exempted from IIT^[41].

The US-China DTT provides some additional IIT relief to U.S. nationals working in China, specifically if the following conditions are met:

- The U.S. national works in China for a period or periods aggregating no more than 183 days in a calendar year;
- Remunerations of the U.S. national are paid by a foreign entity; and
- Such remunerations are not borne by any Chinese entity^[42].

The US-China DTT also includes limited exemptions for U.S. teachers, professors, and researchers working at accredited institutions in China (independent research excluded),^[43] as well for students and trainees for the purposes of completing their education or training.^[44] Exemptions aside, if a

foreign IHE triggers a PE in China, any foreign employees could still be subject to IIT from their first day of working in-country.

Other issues to consider when you have foreign nationals working in China include payroll administration and compliance issues (e.g., setting up a shadow or split payroll system, or a combination thereof), and social security and other welfare benefits contribution factors (check to see if there is a totalization agreement between China and the foreign IHE's home country; there is none between the U.S. and China).

9. How will your institution manage the health and safety risks of your students and employees studying and working in China?

International risk management considerations applicable to all countries, such as having various travel insurance coverages, a centralized communication system, and an emergency response plan, apply similarly to foreign students and employees in China. Generally, Mainland China and its two Special Administrative Regions (“**SARs**”) (namely Hong Kong and Macau) are considered relatively safe for travel. That being said, there can be times where there are heightened levels of personal safety risks, particularly in the five autonomous regions in China (namely, Guangxi, Inner Mongolia, Ningxia, Tibet, and Xinjiang) due to political, religious, and/or ethnic tension among local groups. Hence, especially in light of the current geopolitical climate between the U.S. and China, travel advisories to all the greater China regions should be closely monitored while you have students and faculty abroad.

On January 3, 2019, the U.S. State Department renewed its enhanced travel advisory for travelers to China, cautioning U.S. citizens to “exercise increased caution to China due to arbitrary enforcement of local laws”^[45] The January 2019 travel advisory also warned that: “U.S. citizens may be detained without access to U.S. consular services or information about their alleged crime. U.S. citizens may be subjected to prolonged interrogations and extended detention for reasons related to ‘state security.’ Security personnel may detain and/or deport U.S. citizens for sending private electronic messages critical of the Chinese government.”^[46]

Despite having the world's largest population, crime rates are relatively low in China as compared to the United States, likely the result of its modern surveillance state with its strict criminal laws and their even stricter enforcement. Foreigners (with exception of those with certain diplomatic privileges and immunities) are subject to the same treatment as Chinese nationals under PRC criminal law, which can include capital punishment, a legal penalty in mainland China.

For communications purposes, WeChat is a popular social media platform unique to China with over 1 billion active monthly users. In addition to existing channels of communications, there is a growing trend for foreign IHEs to establish their own official WeChat accounts to push critical safety alert messages through this mobile-based app.

10. How will your institution's intellectual property, research, and data privacy rights be protected in China?

a. Intellectual Property

Chinese intellectual property (“IP”) laws protect trademarks, patents, copyrights, software, and domain names. These PRC laws only apply to mainland China, as there are different IP registration regimes in the Hong Kong and Macau SARs. While China as a country remains a notorious offender of IP rights, IP protection in China has been improving, albeit slowly, in recent years as Chinese authorities become more sophisticated at enforcing infringement.[\[47\]](#)

Trademarks in China are governed under the PRC Trademark Law[\[48\]](#) and overseen by the Chinese Trade Mark Office (“CTMO”) under the SAMR. Since China is a member of the Madrid Protocol, foreign IHEs can register their marks directly with the CTMO (commonly referred to as a “**National Application**”), or through the World Intellectual Property Organization (“WIPO”) (commonly referred to as an “**International Application**”). While both methods take about the same time (12-18 months), a National Application is commonly preferred as it offers certain benefits, most notably the ability to trademark the Chinese name of a foreign entity. PRC Trademark Law follows a “first-to-file” principle concerning trademark registration (versus the “first-to-use” concept used under U.S. laws). Upon receiving approval of its trademark registration, the trademark holder receives the right to use the marks for a term of ten years, which may be renewed perpetually.

The Patent Office under the State Intellectual Property Office is responsible for receiving, examining, and approving Chinese patent applications. Under Chinese Patent Law, a patent is valid for a twenty-year term for an invention and a ten-year term for a utility model or design, starting from the application date.[\[49\]](#)

All copyright activities are overseen by the National Copyright Administration of China. As a member of various international conventions on copyright protection, copyright registration is not required in China but only done so on a voluntary basis. Protection is automatically triggered upon the creation of a copyrightable work for the life of the author plus 50 years.[\[50\]](#) While registration of a copyright is not required, it is still encouraged to show prima facie evidence of ownership.

The PRC Copyright Law regulates not only copyrights, but also software products and related Internet activities (such as piracy of digital content). Various Chinese laws and policies, such as the Computer Software Protection Regulations, and the Computer Software Copyright Registration Procedures, further regulate software copyright registration, as well as software licensing and transfers.

The China Internet Network Information Center (“CNNIC”) is a sub-agency under the Chinese MIIT with responsibility for Internet resources. There are a variety of detailed regulations and measures issued by CNNIC and/or the MIIT which governs the registration, operation, and administration of domain names, as well as policies and procedures related to domain name dispute and resolution.

b. Research

There are numerous Chinese laws, issued across various industry sectors, that regulate international research between Chinese and foreign entities. Most notably, the Measures for the Management of Scientific Data^[51] (promulgated by the Chinese State Council on March 17, 2018 for immediate effect) and the Working Measures on the Outbound Transfer of Intellectual Property (for Trial Implementation)^[52] (promulgated by the Chinese State Council on March 18, 2018 for immediate effect) will both likely have an impact on how foreign IHEs collaborate with their Chinese partners on the collection and use of scientific data, as well as the transfer of such data and resulting technologies abroad.^[53] Additionally, China's proposed Export Control Law, which in its current draft form does not contain a comparable "fundamental research" exclusion as available under U.S. laws, could also create significant restrictions to ongoing and future collaborative research activities between Chinese and foreign IHEs.

c. Data Privacy

Among the myriad of Chinese privacy and data security laws and regulations, the most significant is the Chinese Cyber-Security Law ("CSL").^[54] As multi-national entities, including foreign IHEs, implement compliance plans under the European Union's General Data Protection Regulation ("GDPR"), many organizations will likely turn their attention to potential compliance requirements under the CSL. Compliance will likely be even more challenging than under GDPR given the broad language of the CSL and its vague set of related regulations, some of which are still in draft form and some of which have not even been released by the Chinese authorities.

Generally, the CSL seeks to broadly regulate the protection of personal information, as well as define security requirements for "network operators" and "critical information infrastructures."^[55] Of particular significance to foreign IHEs will be the CSL's requirements regarding local data storage and data transfers. Foreign IHEs that operate networks or offer services through networks in China will likely be required to keep all "personal information" and "other important data" collected or produced in China, within China. Such data cannot be sent out of the country without a legitimate business need, consent, and a security assessment conducted by relevant Chinese units.^[56]

CONCLUSION:

Operating educational activities in China has, and will remain a dynamic balance of risks and benefits. Hopefully, this Note can provide foreign IHEs with a basic roadmap to navigate through the most pertinent issues. At the end of the day, all analysis aside, a lot may boil down to learning the local norms and practices to best deal with the many "grey zones" of Chinese law.

RESOURCES:

Rebecca Ginzburg, Xinning Shirley Liu and Bob Lammey, ["China 101: Nuts and Bolts of Operating Educational Activities in China"](#) (NACUA Annual Conference 2018).

Rebecca M. Ginzburg and Xinning Shirley Liu, [“China Higher Education Law Update: Implications of the Chinese Overseas NGO Law and More”](#) (NACUA Annual Conference 2017).

Paul Boesen, [“Engaging in Educational Activities in China,”](#) (NACUA Annual Conference 2016).

Xinning Shirley Liu, [“A Checklist of Key Issues When Establishing Educational Activities in China,”](#) 11 (NACUA Annual Conference 2015).

Richard Biever, Tracy Futhey, Christopher Holmes, and Timothy Tobin, [“Data Privacy and Security – Global Concerns a Look at The United States, European Union and China”](#) (NACUA Annual Conference 2015).

Xinning Shirley Liu, [Demystifying the Ministry: A Practical Guide to Submitting an Application to the Chinese Ministry of Education for the Establishment of a Chinese-Foreign Cooperatively Run Educational Project](#), NACUANOTES, Vol. 13, Iss. 2 (Nov. 20, 2014).

Steve Robinson and Sherry (Yingzi) Gong, [“Recent Developments in China's Education Laws and Implications on Foreign Institutions”](#) (NACUA Annual Conference 2014).

NACUA RESOURCE PAGE ON [IMMIGRATION AND INTERNATIONAL ACTIVITIES](#) (last visited June 17, 2019).

[XL LAW AND CONSULTING P.A. RESOURCES PAGE](#) on operative Chinese laws governing international education and collaborating with Chinese universities (last visited June 17, 2019).

END NOTES:

[1] Xinning Shirley Liu is the President of XL Law and Consulting P.A., where she concentrates her practice on higher education and international law. She regularly advises higher education institutions on operating educational activities in China. Shirley has experience implementing a wide array of international programs and has advised on a variety of regulatory and transactional matters. She also assists clients in the strategic design and implementation of their global portfolios and helps address local compliance concerns. She is also a frequent speaker on issues related to international higher education at events organized by NACUA, the Association of International Educators (“NAFSA”), and the Florida Bar. [Click here for more information.](#)

[2] Organization for Economic Co-operation and Development, [Education in China: A Snapshot](#) (2016); CHINESE MINISTRY OF EDUCATION, [2018 NATIONAL STATISTICAL REPORT ON EDUCATION DEVELOPMENT](#) (hereinafter “2018 MOE National Statistics”) (Feb. 26, 2019).

[3] 2018 MOE National Statistics, *supra* note 2.

[4] Li Xia, “[Nearly 500 International Students Study in China](#),” Xinhua News Agency (Apr. 12, 2019); Chris Parr, “[A two-way street: why China is not just a student departure lounge anymore](#),” The PIE News (Apr. 20, 2018) (citing the Ministry of Education / Center for Strategic and International Studies).

[5] CHINESE MINISTRY OF EDUCATION, [MINISTRY OF EDUCATION DEPARTMENTAL BUDGET 2019](#) (Apr. 2, 2019).

[6] Due to the space limitations, this Note will not address issues related to inbound educational activities involving Chinese students or institutions. For further discussion on issues related to foreign influence, academic espionage, foreign source and contracts reporting, and research integrity, see Xinning Shirley Liu, “[International Visitors in the Lab: What Counsel Needs to Know](#),” [11 \(NACUA November CLE Workshop 2018\)](#) (discussing recently proposed/enacted U.S. Laws and policies affecting foreign students and researchers at U.S. colleges and universities at pages 12-36 of the .Pdf document); Ass’n of Pub. and Land-Grant Universities and Ass’n of Am. Universities, [Actions Taken by Universities to Address Growing Concerns About Security Threats and Undue Foreign Influence on Campus](#) (Apr. 22, 2019); American Council on Education, [Memorandum on “Threats of Foreign Influence and Espionage in Academic Setting”](#) (May 10, 2019); The Nat’l Inst. of Health Advisory Comm. to the Dir. (ACD), [ACD Working Group for Foreign Influences on Research Integrity](#) (Dec. 2018 Report).

[7] See Xinning Shirley Liu, “[China 101: Nuts and Bolts of Operating Educational Activities in China](#)” (NACUA Annual Conference 2018) (discussing online programs at pages 18-19 of the .Pdf document).

[8] See Xinning Shirley Liu, [Demystifying the Ministry: A Practical Guide to Submitting an Application to the Chinese Ministry of Education for the Establishment of a Chinese-Foreign Cooperatively Run Educational Project](#), NACUANOTES, Vol. 13, Iss. 2 (Nov. 20, 2014) (hereinafter “Chinese MOE NACUANOTE”) (discussing specific MOE approval procedures).

[9] CHINESE MINISTRY OF EDUCATION, [REGULATIONS ON CHINESE-FOREIGN COOPERATION IN RUNNING SCHOOLS](#), Ch. I, Art. 2 (Sept. 1, 2003) (hereinafter the “2003 Regulations”) (English version).

[10] CHINESE MINISTRY OF EDUCATION, [IMPLEMENTATION MEASURES FOR THE REGULATIONS OF THE PEOPLE’S REPUBLIC OF CHINA ON CHINESE-FOREIGN COOPERATION IN RUNNING SCHOOLS](#), Art. 60 (June 4, 2004) (hereinafter the “2004 Measures”); See also *supra* note 8, Section III.B of the Chinese MOE NACUANOTE for more discussion on whether approval is required.

[11] *2004 Measures, supra* note 10, at Art. 61 (“Specific measures for examination and approval and administration of cooperatively-run educational projects for offering vocational skill training, which provide education mainly to Chinese citizens and are operated jointly by foreign educational institutions and Chinese educational institutions within the territory of China, shall be formulated by the labour administrative department of the State Council”).

[12] See Xinning Shirley Liu, “[We Have a Program Where?! Compliance Considerations for Global Partnerships](#),” (NACUA November CLE Workshop 2017) (discussing due diligence on pages 1-10).

[13] *E.g.*, Provisions of the PRC Criminal Law that prohibit bribery to state officials, state agencies, state-owned enterprises, and civil organizations; Interpretation of the Supreme People’s Court and the Supreme People’s Procuratorate on Several Issues Concerning the Specific Application of the Law in the Handling of Criminal-Bribe Giving Cases; Anti-Unfair Competition Law; SAIC Interim Provision on Prohibition on Commercial Bribery Activities; and Law of Protection of State Secrets.

In 2018, China also passed the Supervision Law which is focused on international cooperation against corruption. It authorizes the National Supervisory Commission to cooperate with foreign parties to search and arrest individuals who are suspected of crimes such as corruption, bribery, neglect of duty, and malfeasance in office. Additionally, the Chinese National People’s Congress (NPC) also revised the Criminal Procedure Law in October 2018, adding several provisions to allow individuals who have fled the country for corruption and bribery allegations to be tried in absentia.

[14] See generally Rebecca M. Ginzburg, [Establishing a Legal Presence in China for Educational Activities](#), NACUANOTES, Vol. 8, Iss. 12 (Aug. 19, 2010) (providing a discussion of the differences between RO and WFOE).

[15] NATIONAL PEOPLE'S CONGRESS, [FOREIGN INVESTMENT LAW OF THE PEOPLE'S REPUBLIC OF CHINA](#) (effective Jan. 1, 2020).

[16] STATE COUNCIL INFORMATION OFFICE OF THE PEOPLE'S REPUBLIC OF CHINA, [FULL TRANSCRIPT OF PREMIER LI KEQIANG'S PRESS CONFERENCE](#) (Mar. 18, 2019) (English version).

[17] NATIONAL PEOPLE'S CONGRESS STANDING COMMITTEE, PEOPLE'S REPUBLIC OF CHINA LAW ON THE MANAGEMENT OF FOREIGN NON-GOVERNMENTAL ORGANIZATIONS' ACTIVITIES WITHIN MAINLAND CHINA (hereinafter "*Foreign NGO Law*") (effective Jan. 1, 2017).

[18] *Id.* at Art. 53; see also Xinning Shirley Liu and Rebecca M. Ginzburg, "[China Higher Education Law Update: Implications of the Chinese Overseas NGO Law and More](#)" (NACUA Annual Conference 2017); Xinning Shirley Liu and Rebecca M. Ginzburg, "[China 101: Nuts and Bolts of Operating Educational Activities in China](#)" (NACUA Annual Conference 2018).

[19] *Id.* at Art. 9 and 17.

[20] STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, [REGULATION ON THE ADMINISTRATION OF REGISTRATION OF RESIDENT REPRESENTATIVE OFFICES OF FOREIGN ENTERPRISES](#) (effective Mar. 1, 2011).

[21] In March 2018, as part of a broader reform to streamline government functions, the Chinese State Council consolidated various responsibilities from Ministry of Land and Resources, State Oceanic Administration, National Administration of Surveying, National Development and Reform Commission, Ministry of Housing and Urban-Rural Development, Ministry of Water Resources, Ministry of Agriculture and State Forestry Administration of China into a newly created Ministry of Natural Resources. Since some of these departments and ministries will no longer exist after the consolidation, such as the Ministry of Land and Resource, it is likely that the names of the local bureaus of land and resource will also be soon updated to reflect this new change. As of the date of this Note, these bureaus are still referred to as bureaus of land and resource. See CHINESE NATIONAL FORESTRY AND GRASSLAND ADMINISTRATION, [CHINA'S MINISTRY OF NATURAL RESOURCES OFFICIALLY ESTABLISHED](#) (Apr. 14, 2018).

[22] GENERAL ADMINISTRATION OF QUALITY SUPERVISION, INSPECTION AND QUARANTINE OF THE PEOPLE'S REPUBLIC OF CHINA, CHINA NATIONAL STANDARDIZATION ADMINISTRATION, [CURRENT LAND USE CLASSIFICATIONS](#) (Nov. 1, 2017).

[23] CHINESE STATE ADMINISTRATION OF FOREIGN EXCHANGE, [NOTICE OF THE STATE ADMINISTRATION OF FOREIGN EXCHANGE ON THE RELEVANT ISSUES CONCERNING THE MANAGEMENT OF DOMESTIC FOREIGN EXCHANGE ACCOUNTS OF OVERSEAS INSTITUTIONS](#) (effective Aug. 1, 2009).

[24] CHINESE STATE ADMINISTRATION OF TAXATION, [ANNOUNCEMENT OF THE STATE ADMINISTRATION OF TAXATION](#), THE MINISTRY OF FINANCE, THE PEOPLE'S BANK OF CHINA, ET AL. ON ISSUING THE ADMINISTRATIVE MEASURES FOR THE DUE DILIGENCE OF TAX-RELATED INFORMATION OF FINANCIAL ACCOUNTS OWNED BY NON-RESIDENTS, STATE ADMINISTRATION OF TAXATION, THE MINISTRY OF FINANCE, THE PEOPLE'S BANK OF CHINA, THE CHINA BANKING REGULATORY COMMISSION, THE CHINA SECURITIES REGULATORY COMMISSION, AND THE CHINA INSURANCE REGULATORY COMMISSION (effective July 1, 2017).

[25] NATIONAL PEOPLE'S CONGRESS, [THE LABOR CONTRACT LAW OF THE PEOPLE'S REPUBLIC OF CHINA](#), at Art. 82 (effective Jan. 1, 2008) (hereinafter "*PRC Labor Contract Law*") ("Where an employing unit fails to conclude a written labor contract with a worker for more than a month but less than a year from the date it starts employing him, it shall pay the worker two times his salary for each month.") (English version).

[26] *Id.* at Art. 14 (“If the employer fails to sign a written labor contract with an employee after the lapse of one full year from the date when the employee begins to work, it shall be deemed that the employer and the employee have concluded a labor contract without a fixed term.”).

[27] *EIT Law*, *supra* note 27; *EIT Regulation*, *supra* note 27, at Art.3 and 5.

[28] *Id.*

[29] *Id.*

[30] NATIONAL PEOPLE’S CONGRESS, [ENTERPRISE INCOME TAX LAW OF THE PEOPLE’S REPUBLIC OF CHINA](#), at Art. 2 - 3 (last amended Jan. 1, 2019) (hereinafter “*EIT Law*”); CHINESE STATE COUNCIL, [REGULATION ON THE IMPLEMENTATION OF THE ENTERPRISE INCOME TAX LAW OF THE PEOPLE’S REPUBLIC OF CHINA](#), at Art.3 (last amended April 23, 2019) (hereinafter “*EIT Regulation*”).

[31] United States-The People's Republic Of China Income Tax Convention, [The Agreement Between the Government of the United States of America and the Government of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Tax Evasion with Respect to Taxes on Income](#), at Art. 5.1 (Apr. 30, 1984) (hereinafter “*US- China DTT*”).

[32] *Id.* at Art. 5.2.

[33] *Id.*

[34] *Id.* at Art. 5.3.

[35] *Id.* at Art. 5.5

[36] STATE ADMINISTRATION OF TAXATION, [PUBLIC NOTICE \(PN\) 11 REGARDING CERTAIN ISSUES RELATED TO THE IMPLEMENTATION OF TAX TREATIES \(SAT PN \[2018\] NO. 11\)](#) (Feb. 8, 2018).

[37] STATE ADMINISTRATION OF TAXATION, [PUBLIC NOTICE ON SEVERAL ISSUES CONCERNING THE ADMINISTRATION OF VALUE-ADDED TAX COLLECTION FOR MATTERS INCLUDING SINO-FOREIGN COOPERATIVE EDUCATION](#) (July 25, 2018).

[38] NATIONAL PEOPLE’S CONGRESS, [INDIVIDUAL INCOME TAX LAW OF THE PEOPLE’S REPUBLIC OF CHINA](#), at Art. 1 (last amended Aug. 31, 2018) (hereinafter “*IIT Law*”).

[39] NATIONAL PEOPLE’S CONGRESS, [REGULATION ON THE IMPLEMENTATION OF THE INDIVIDUAL INCOME TAX LAW OF THE PEOPLE’S REPUBLIC OF CHINA](#), AT ART. 4 (last amended Dec. 18, 2018) (effective Jan. 1, 2019) (hereinafter “*ITT Regulations*”).

[40] *IIT Law*, *supra* note 38.

[41] *IIT Regulations*, *supra* note 39, at Art. 5.

[42] *US-China DTT*, *supra* note 31, at Art. 14.

[43] *Id.* at Art. 19.

[44] *Id.* at Art. 20.

[45] U.S. DEP’T OF STATE, [CHINA TRAVEL ADVISORY](#) (Jan. 3, 2019).

[46] *Id.*

[47] See U.S. CHAMBER OF COMMERCE'S GLOBAL INNOVATION POLICY CENTER, [U.S. CHAMBER INTERNATIONAL IP INDEX 7TH EDITION](#), 10 (Feb. 2019) (indicating that China has shown positive IP reform in the past 7 years).

[48] STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS, [TRADEMARK LAW OF THE PEOPLE'S REPUBLIC OF CHINA](#) (Aug. 23, 1982) (amended Oct. 27, 2001).

[49] STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS, [PATENT LAW OF THE PEOPLE'S REPUBLIC OF CHINA](#), at Art. 42 (effective Oct. 1, 2009) (English version).

[50] STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS, [COPYRIGHT RIGHT LAW OF THE PEOPLE'S REPUBLIC OF CHINA](#), at Art. 21 (June 1, 1991) (last amended Apr. 1, 2010).

[51] CHINESE STATE COUNCIL, [MEASURES FOR THE MANAGEMENT OF SCIENTIFIC DATA](#) (Mar. 17, 2018).

[52] CHINESE STATE COUNCIL, [WORKING MEASURES ON THE OUTBOUND TRANSFER OF INTELLECTUAL PROPERTY](#) (FOR TRIAL IMPLEMENTATION) (Mar. 18, 2018).

[53] For more detailed discussion on these laws and other related laws, see Xinning Shirley Liu, "[China 101: Nuts and Bolts of Operating Educational Activities in China](#)" (NACUA Annual Conference 2018).

[54] STANDING COMMITTEE OF THE NATIONAL PEOPLE'S COUNCIL, [CYBER-SECURITY LAW OF THE PEOPLE'S REPUBLIC OF CHINA](#) (hereinafter "CSL") (effective June 1, 2017).

[55] *Id.* For network operators, see Articles 21-30, and 40-50; for critical information infrastructures, see 31-39.

[56] Recently, Cyberspace Administration of China released the *Measures for Security Review of Cyber Security (Consultation Draft)* on May 21, 2019, and the *Measures for the Management of Data Security (Consultation Draft)* on May 28, 2019. Article 28 of the *Measures for the Management of Data Security (Consultation Draft)* states that, prior to releasing, sharing, trading or providing important data/personal data abroad, network operators shall evaluate the possible security risks and report to the competent regulatory authorities of the industry or the provincial network and information department for approval.

[NACUANOTES Issues](#) | [Contact Us](#) | [NACUA Home Page](#)

NACUANOTES Copyright Notice and Disclaimer

Copyright 2019 by Xinning Shirley Liu. NACUA members may reproduce and distribute copies of NACUANOTES to other members in their offices, in their law firms, or at the institutions of higher education they represent if they provide appropriate attribution, including any credits, acknowledgments, copyright notice, or other such information contained in the NACUANOTE.

Disclaimer: This NACUANOTE expresses the viewpoints of the authors and is not approved or endorsed by NACUA. This NACUANOTE should not be considered to be or used as legal advice. Legal questions should be directed to institutional legal counsel.