China’s New Consumer Protection Law: Dramatic Changes Ahead

By Amy L. Sommers and Max Xin Gu

On October 25, 2013, China’s President and Chairman of the Communist Party of China Xi Jinping signed off on the long-expected revised Law on the Protection of Consumer Rights and Interests (the “New Consumer Law”), which is believed to be the first major national overhaul on the consumer protection legislations in two decades. The New Consumer Law will become effective on China’s Consumer Protection Day of 2014, i.e., March 15, 2014, on which day the 20-year old current Law on the Protection of Consumer Rights and Interests (the “Previous Consumer Law”) will cease to be effective.

The timing of the New Consumer Law is everything but coincidental. China is trying very hard to earn back trust from its people, which is indispensable both to the Communist Party’s continued success as well as the development of China’s economy. The recent heavily publicized campaign against corruption by the country’s top leadership, be it a political battle or a genuine commitment to fight against institutional corruption, is also part of a focus on public trust and has received tremendous attention domestically.

However, trust is not that easily earned. More is needed. The New Consumer Law is timed to come hand in hand with the anti-corruption campaign. While access to unjustifiable advantages is being drastically cut off, the disadvantaged also need access to benefits and protection of law.

Consumers have long been seen as disadvantaged, especially in the less developed areas of China. Protection of consumers is certainly admirable and, indeed, a just aim; but sporadic and discretionary enforcement of the law by law enforcement agencies, especially at the local level, could turn this admirable aim into an expensive exercise for business operators.

The following points highlight the primary changes in the New Consumer Law, which are likely to affect business operators’ daily operation and require them to review and adjust their current processes and policies:

- Protection of personal data. Protection of personal data has been percolating as an issue of concern for several years, but has not previously been enshrined in a comprehensive national piece of legislation. For example, in late 2012 and early 2013, several ministries (such as the General Administration of Quality Supervision, Inspection and Quarantine and the Ministry of Industry and Information Technology) issued ministerial-level guidance and regulations on the protection of personal data. Those ministerial regulations appear to focus on personal data protection in the cyber world and appear to distinguish sensitive personal data and non-sensitive personal data by requiring different forms of consent. The New Consumer Law is more broadly applicable and appears silent on that distinction. In the event of doubt, the business operators’ privacy policies should probably be designed to comply with the most restrictive requirements in the ministerial regulations and the New
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Consumer Law. By way of example, certain guidance issued by the General Administration of Quality Supervision late last year states that only implicit consent is required from the subject to collect non-sensitive personal data, but express consent is required to collect sensitive personal data. Since the New Consumer Law does not appear to make the distinction between sensitive and non-sensitive personal data, the safer approach would be to always obtain express consent from the subject regardless of whether the personal data to be collected would be sensitive or non-sensitive.

- **A more active consumer protection association.** For the first time, the consumer protection associations (at the provincial levels) are granted the right to bring lawsuits when rights of a large number of consumers are violated. This type of lawsuit could essentially be a government-led class action against private parties, such as business operators. The procedure of such lawsuits is yet to be clarified and tested. Further, for the first time the consumer protection association is officially invited to participate in the drafting of consumer protection-related laws and regulations.

- **Enhanced standard of care in shops.** Business operators are required by the New Consumer Law to ensure consumers’ safety in their shops. This would bring in a new type of tortious liability, unrelated to the products or services provided by the business operators, to operators of retail establishments. Business operators should reevaluate whether they are adequately insured for this new type of liability.

- **The statutory seven-day return policy (physical stores).** For products/services purchased at physical stores, this new statutory seven-day return policy will serve as a “gap filler” if the laws and agreements between the parties (business operators and consumers) are silent. Business operators’ return policies should be adjusted to more expressly spell out the requirements for returns.

- **The statutory seven-day return policy (non-physical stores).** While there is some vagueness as to whether “non-conforming products/services” must be present in order to apply the default seven-day return policy in the context of physical stores, non-conformity clearly is not required if products/services are purchased from non-physical stores (such as, through the internet, TV sales, telephone sales, mails, etc.). In other words, no cause is required for return in the context of shopping at non-physical stores, such as online shopping on TaoBao. Further, other than a few exceptions (e.g., perishable goods), there is very little room for business operators to limit the application of seven-day return policy. Any deviation from the seven-day policy requires consumer’s confirmation at purchase. Business operators’ return policies should be adjusted to build in mechanisms for consumer confirmation/waiver, but whether the mechanism will survive an attack on enforceability remains to be tested.

- **Boilerplate.** A business operator is required to conspicuously identify the key terms of the purchase agreement if the business operator’s boilerplate terms are used.

- **Disclosure of information by business operators of non-physical stores.** Business operators of non-physical stores are required to disclose all information related to the business transaction, such as the business operators’ physical location, contact information, quantity and quality of the commodities, price, time period and method of performance, safety/risk warning, after-sale customers service information, etc.
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- **Requirements on regulators’ seven-business-day handling process.** Regulators are required to handle any consumer complaint and notify the consumer within seven business days from receipt of the consumer complaint.

- **Damages for mental suffering.** For the first time, business operators are held liable for consumers’ emotional injuries caused by business operators’ libels, search of person, false imprisonment, etc.

- **Dramatically increased financial impact on the business operators:**
  - *Statutory damages (when fraud is involved).* If fraud is involved, a consumer is entitled to the statutory damages of three times the amount of the purchase price. This number was “one time” under the Previous Consumer Law.
  - *Punitive damages.* For the first time, a consumer is entitled to punitive damages up to two times of the amount of the losses suffered if business operator knowingly sells defective products or services which cause death or severe harm to the consumer’s health.
  - *Administrative fines.* When there is any illegal income from the transaction, business operators are facing a fine up to 10 times the amount of the illegal income. This number was “five times” under the Previous Consumer Law. When there is no illegal income involved, the business operators would still be facing a fine up to RMB500,000. This number was “RMB10,000” under the Previous Consumer Law. Yes, this is an increase reflecting a multiple of 50.

- **Establishment of a credit system.** A credit profile will be created for business operators and accessible by the general public.

In addition to the New Consumer Law, China has also been working on amending other consumer-related laws. The most notable proposed amendments are those to the Food Safety Law. The current proposed amendments to the Food Safety Law include, by way of example: (i) adding a consumer protection association to participate in the drafting of a committee for food safety standards; (ii) requiring the provider of online platforms to possess a food operation license in its own name as long as they are business operators of food products selling food products using the platform; (iii) adding consumers’ rights to sue food testing laboratories and accreditation institutions; and (iv) adding the requirement for local regulators to allocate funds to reward whistle-blowers.

The impact, at least the short-term impact, of the New Consumer Law has the potential to be dramatic. Business operators should brace themselves for March 2014, when the New Consumer Law takes effect, and expect increased volumes of consumer complaints afterwards. In a long run, it is expected that some balancing regulations will be in place. In the meantime, business operators should immediately revisit their marketing-related processes and policies to assess risk and implement necessary revisions.

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