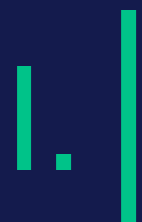


TaylorWessing

China Horizonte: Navigieren zwischen Rechtsräumen

VCI | 29. August 2024





China Today



China's footprint in the world keeps growing...

☰ Menü 🔍

Handelsblatt

👤 Thomas Pattloch



📌 Auch BASF betroffen

China verschärft Krise der europäischen Chemie

Neben der teuren Energie setzt europäischen Chemiefirmen ein neues Problem zu: Chinas globale Expansion führt zum Preisverfall. Es droht das Aus weiterer Anlagen.

Bert Fröndhoff
27.08.2024 - 11:42 Uhr

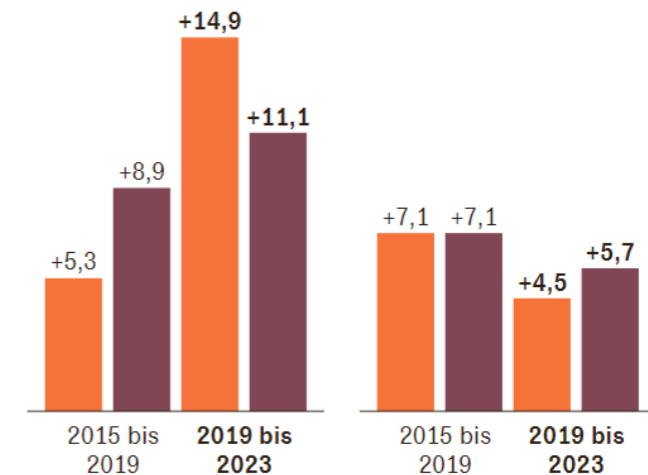
Chinas Überkapazität in der Petrochemie

Am Beispiel der Massenkunststoffe PE und PP

■ Polyethylen ■ Polypropylen

Jährliches Wachstum der Kapazitäten in Prozent

Jährliches Wachstum der Nachfrage in Prozent



HANDELSBLATT • Quelle: Global Polyolefin Outlook/S&P

Everything has changed – the “new normal” in China

Political environment:

- Strongest centralization of power at the party level in history; return of **primacy of ideology**: “East, west, south, north, and center, the Party leads everything”; China’s new self-image: “The East is rising, the West is declining”, 中国崛起 (**Rise of China**)

Market development:

- **Strong nationalism**, impacting consuming behaviour; “**China chic**” (国潮) and the need of convincing brand story matching Chinese expectations; increased need to demonstrate the proper attitude by brands, enhanced risk of online witch hunts; “Common Prosperity” mantra now receding to **favouring classic yet inobtrusive products**

Industry development:

- Strong emphasis of manufacturing industry and export in line with industry policy: “**new qualitative productive forces**” rather than entertainment, software and content creation
- Data collection and data control as well as data security seen as paramount by government and party; strong legislative **push for control of AI and online content**
- Lower economic growth rate, real estate market crisis, return of State Owned Enterprises as dominating force in the market
- International R&D **greatly impacted by onerous new laws and regulations on data protection, data export, cyber security and governmental oversight**, competition on IP creation and IP infringement levels still very significant

Impact on foreign-invested business

- **De-coupling by Chinese industry** to obtain self-sufficiency, promotion of China-designed and China-made goods in all aspects of public life and state-controlled industry
 - **Technical decouplement greatly increased:** Software system changes, smartphones, independent chip manufacturing, own data economy – significantly enhanced risk of separate technology spheres East and West
 - **Cultural decouplement exceptionally strong:** Push-back by government against Western culture, products, and services
- **“De-risking” by Western industry** (often to a still limited extent, but continuation of moving out of manufacturing industry for serving global supply chains, recent example IBM and closure of R&D centres in China) - creation of silos in different regions
- Restructuring of foreign investment rather than simple further increase of investment: **“China for China”** business strategies, **“China plus one”** strategy for manufacturing businesses
- **Localization of management in China** further increased, creating compliance issues
- Retreat from global integration by China, focus on Global South and allied countries
- **Increased perceived bias against foreign companies**, unlevel playing field, government subsidies and new conditions to be allowed into and stay in the market

The aim of “disruptive innovation”

- CNIPA intends to shorten the review period for patent applications made in 2024 to 15.5 months, down from 16 months in 2023 and 16.5 months in 2022
- Improve patent-review standards for emerging fields such as big data, artificial intelligence and genetic technologies.
- WIPO: China maintained its position for the fifth straight year as the top origin of patent applications under the UN Patent Cooperation Treaty, filing 69,610 applications in 2023, compared with 55,678 by the United States
- Fields such as computer science, communication and transport technologies global frontier levels, deficiencies perceived in pharmaceuticals, chemicals and semiconductors, CICC Global Institute
- Still low level of licensing, enforcement in Chinese courts not yet consistent

China’s world-leading patent applications being sped up, scrutinised to boost key industries

- Patents are increasingly coming under the spotlight amid Beijing’s push for tech self-reliance in the face of rising international competition
- But criticisms persist, with allegations that quantity is being emphasised over quality, while electrical engineering patents far outpace those in mechanical and chemical fields

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Sylvia Ma

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Published: 11:00pm, 12 Apr 2024

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Trade dispute impact in commercial contracts – example China

“If Foreign Partner or its brands or products violate any national laws or regulations, or **if there are any words or actions that are contrary to China’s national interests such as national unity, sovereignty and territorial integrity, national image, leadership of the Communist Party of China, or the foreign policy of the Chinese government, or other words or actions that are detrimental to China, the Chinese government or the stability of Chinese society, or words or actions that may generate negative news or negative social impact** (including but not limited to abusive remarks, sexism, racial discrimination etc.), Foreign Partner shall be solely responsible for handling and solving the problem, ensuring that the Chinese Partner shall be free from impact and loss of such adverse event and shall be liable for any legal responsibility; in particular, Foreign Partner shall actively take crisis public relations measures to eliminate the negative impact and protect Chinese Partner’s image and reputation from damage, and shall promptly inform Chinese Partner of the handling of the incident. All costs incurred by Foreign Partner in taking the aforementioned measures shall be borne by Foreign Partner itself. **If the Chinese Partner suffers from consumer complaints, claims or penalties from law enforcement departments** due to the above-mentioned incident of Foreign Partner, **all direct and indirect economic losses (including but not limited to litigation fees, attorney’s fees, etc.) shall be borne by Foreign Partner; if the Chinese Partner’s image is affected or damaged, Foreign Partner shall compensate the partner for breach of contract in the amount of RMB 1,000,000.”**

An aerial photograph of the Shanghai skyline, including the Oriental Pearl Tower and several skyscrapers, viewed from a high altitude above a thick layer of white clouds. The sky is a pale blue with some light clouds.

Management Liabilities - Implications of China's New Company Law and Criminal Law

Mike Goldammer



1 | Quick Snapshot

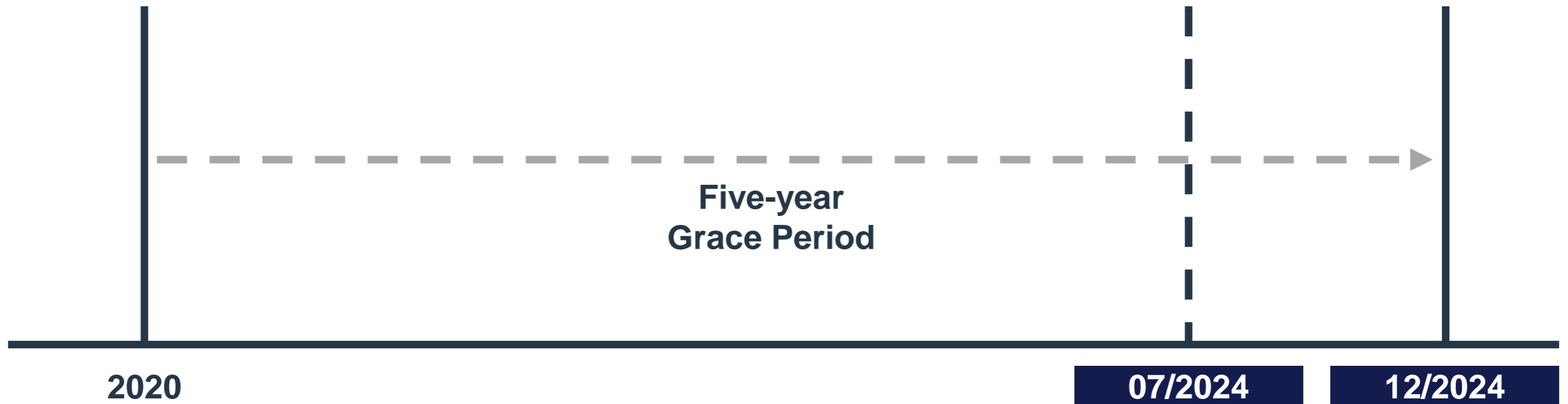
Impact of the revised Company Law



Foreign Investment Law



Revised Company Law



Major amendments under the revised Company Law

- 01 Re-introduction of Capital Contribution Timeline
- 02 Tightened Rules on Outstanding Capital Contribution
- 03 Employee Representatives
- 04 Board of Supervisors, One Supervisor, or No Supervisor
- 05 Introduction of the Audit Committee



- 06 New Personnel Eligible to Serve as Legal Representative
- 07 Compensation for Dismissed Directors
- 08 Quorum Requirements
- 09 Stricter Liability Rules for Directors and Senior Management
- 10 Shifting of Responsibilities

Corporate governance alternatives

- Directors



Board of
Directors (3 — 13)

small size

or



Executive
Director

small number of
shareholders

Corporate governance alternatives

- Supervisors



Board of ≥ 3
Supervisors

small size

or



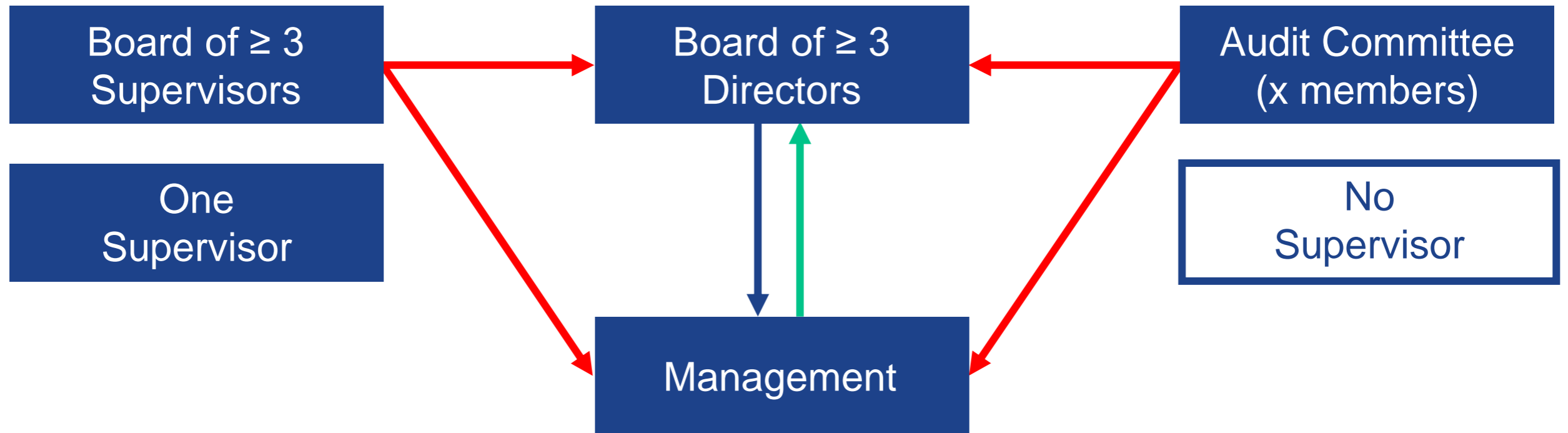
1 ~~or 2~~
Supervisor~~s~~

small number of
shareholders

No
Supervisor

Corporate governance alternatives

- **Instead of Supervisor / Supervisory Board: Audit Committee**



Corporate governance alternatives

- Legal Representative¹



Corporate governance alternatives

- Employee Representatives



Board of
Directors



Board of
Supervisors



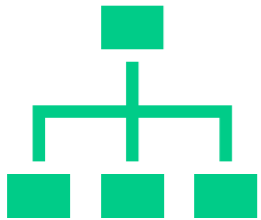
300 Employees



2 | Additional Obligations and Exposure

New obligations and diligence requirements

Specified Duties of Loyalty and Diligence



Loyalty – What you should not do:

DSMs shall take measures to avoid conflicts between their own interests and the interests of the company and shall not utilize their positions to gain undue advantage.

New obligations and diligence requirements

3 New Crimes for Private Enterprises



Operating the same type of business (DSMs)



Seeking benefits for friends, relatives (all staff)



Selling company assets at low prices (D&Os)

New obligations and diligence requirements

Specified Duties of Loyalty and Diligence

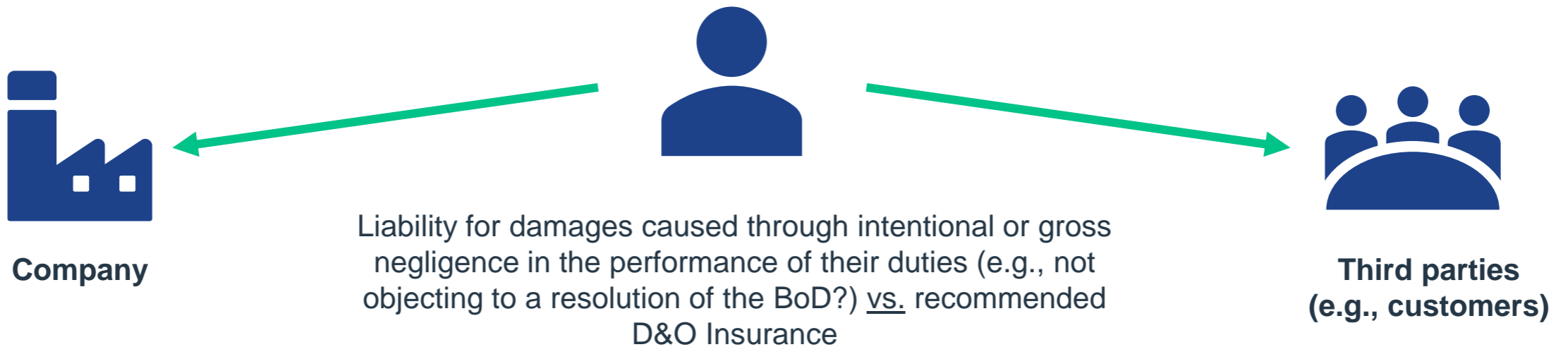


Diligence – What you should do:

When performing their duties, DSMs shall exercise the reasonable care normally required of a manager in the best interests of the Company.

New obligations and diligence requirements

Directors and Senior Management: Liability towards Third Parties



New obligations and diligence requirements

More Examples

- 1** **Directors** liable for not verifying capital contribution
- 2** **DSM** jointly liable for illegal capital withdrawal by shareholders
- 3** **Directors** (instead of shareholder) to initiate liquidation within 15 days when triggering event occurs
- 4** **Manager's** rights and obligations now subject to Articles of Association

....



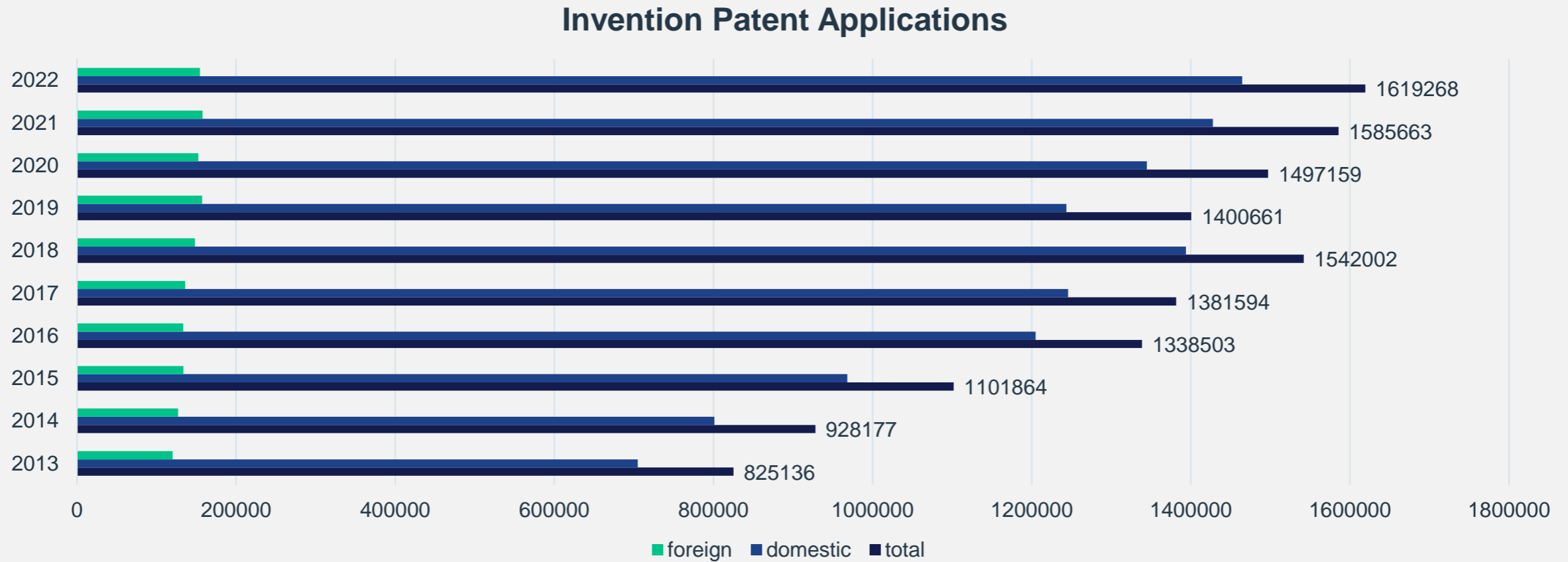
The Impact on IP Protection in China

Dr. Thomas Pattloch, LL.M.Eur

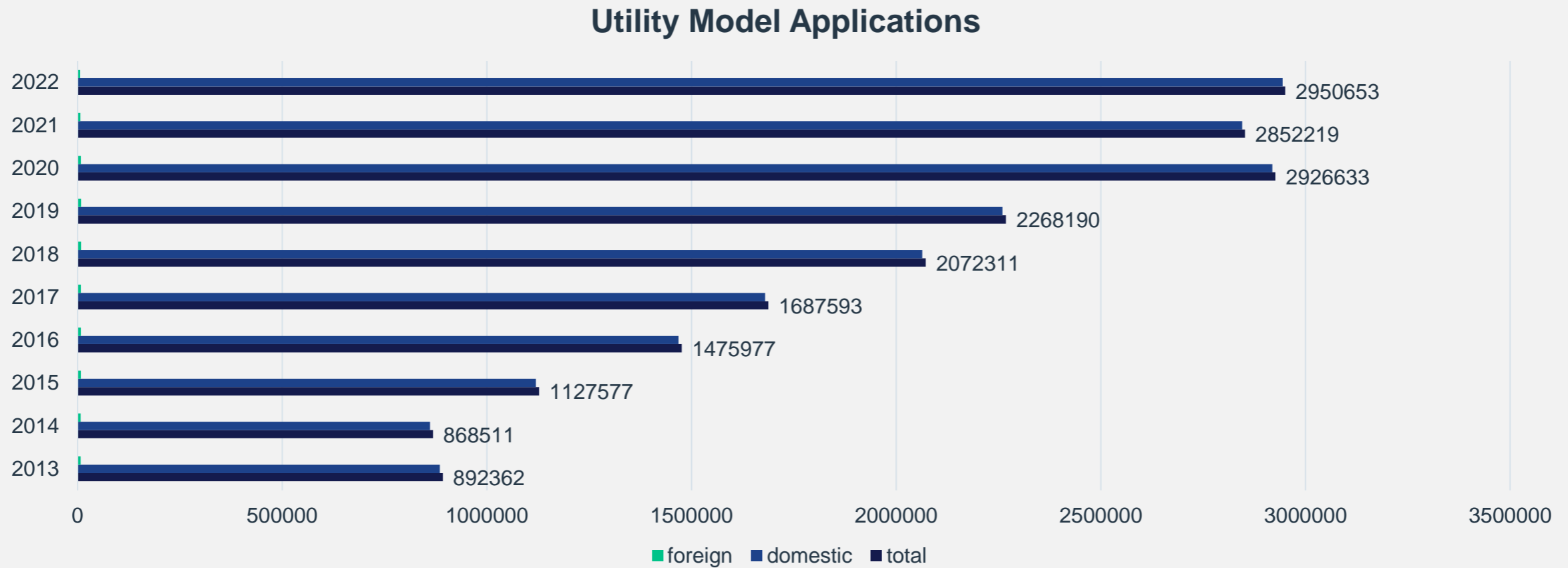


1 | IP and Statistics

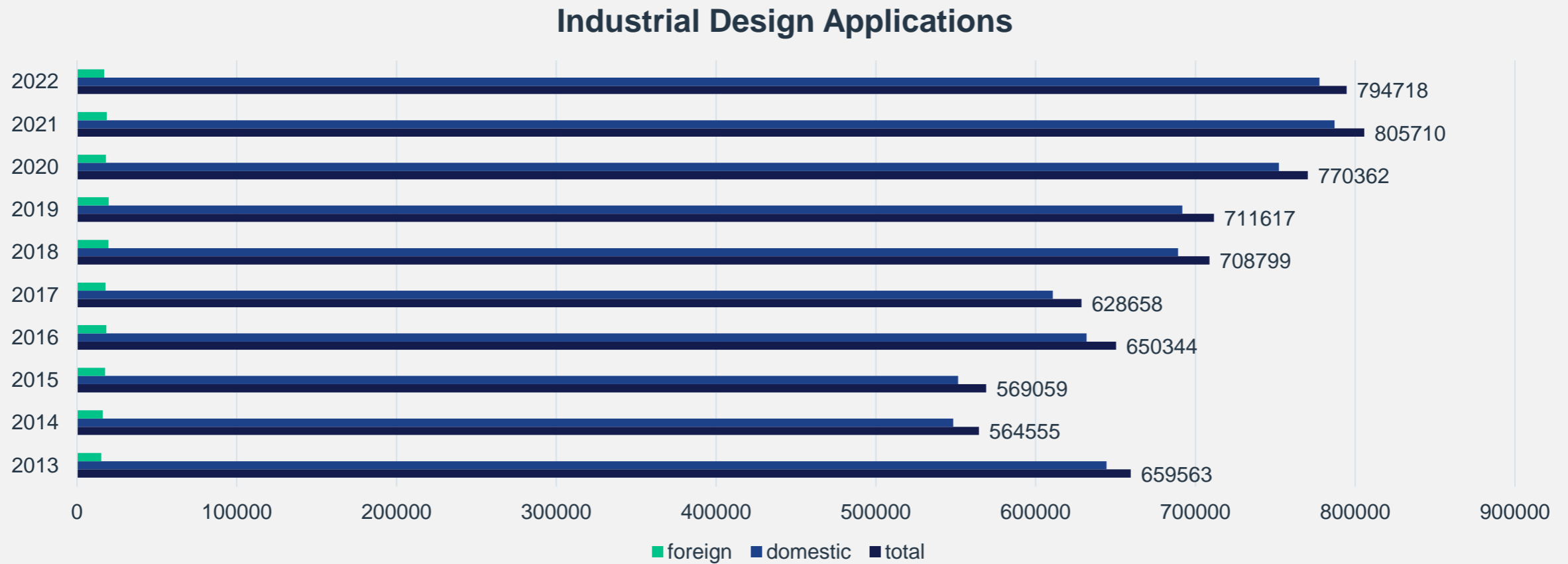
Evolution of invention patent applications (domestic and foreign)



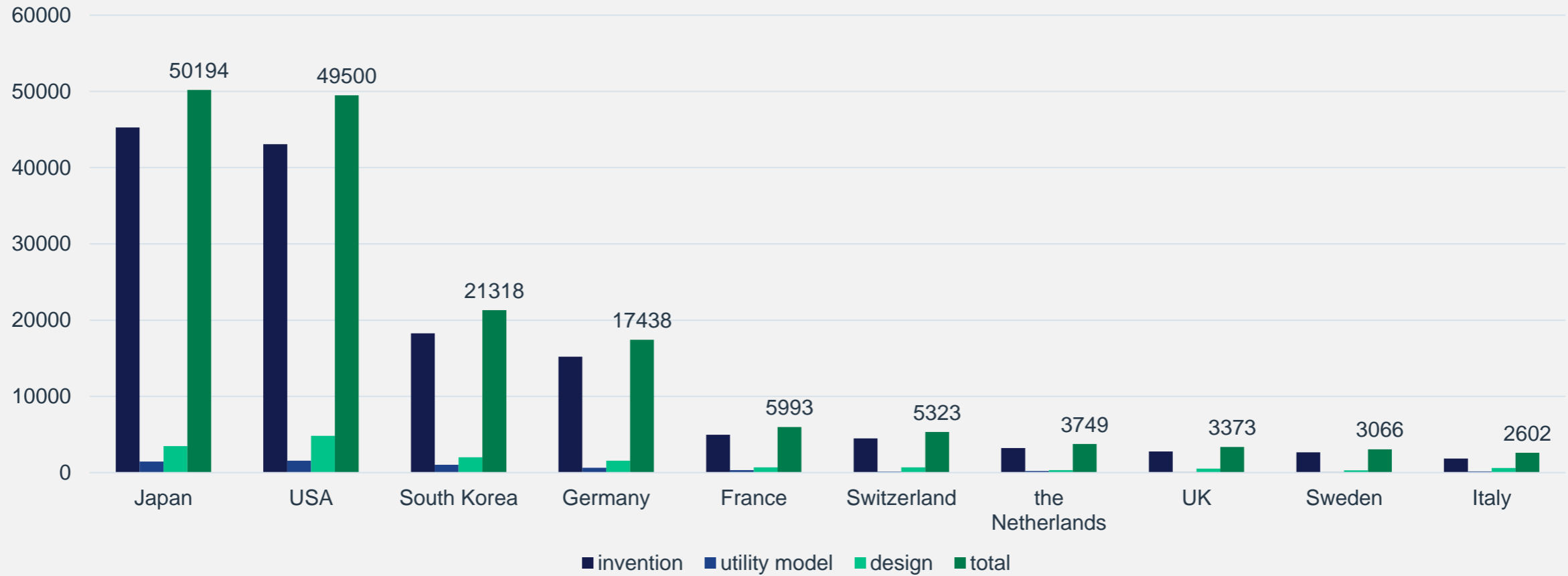
Evolution of utility model applications (domestic and foreign)



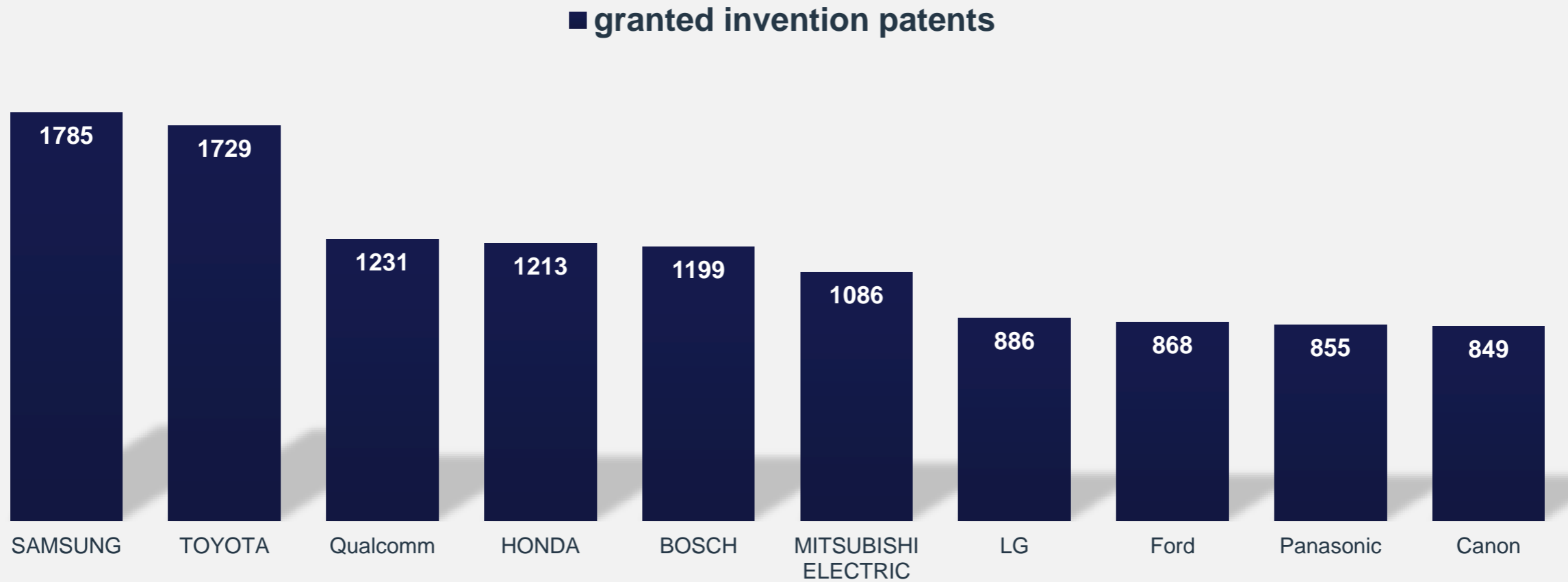
Evolution of industrial design applications (domestic and foreign)



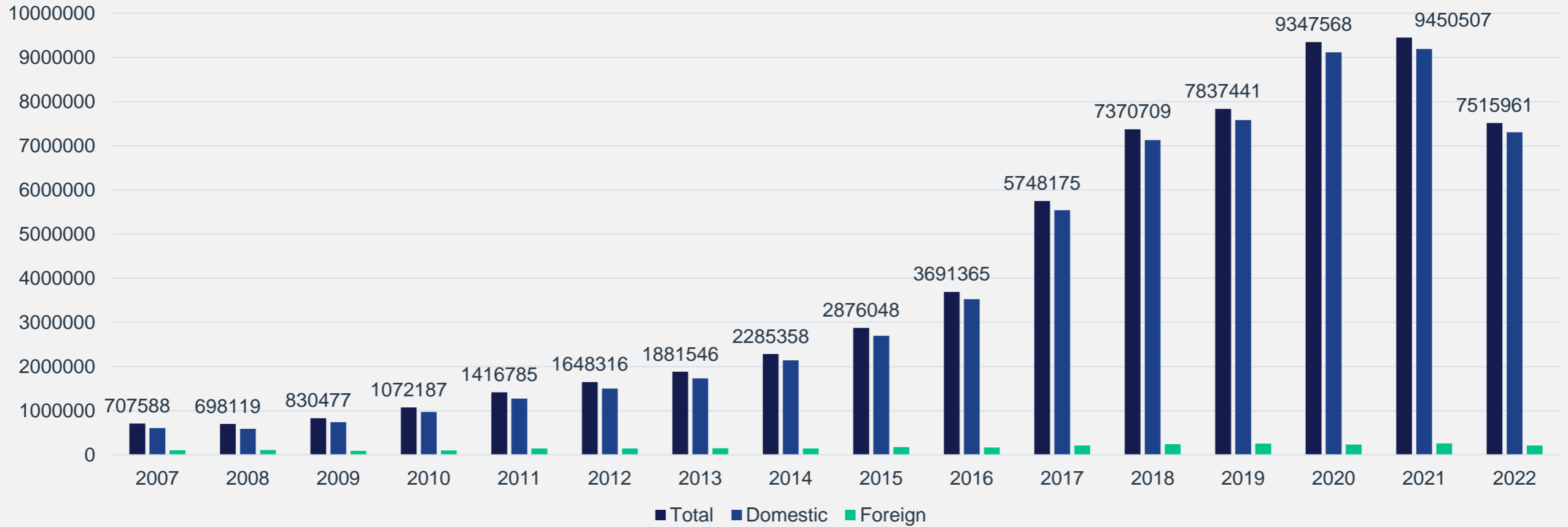
Top foreign applicants by country (2022)



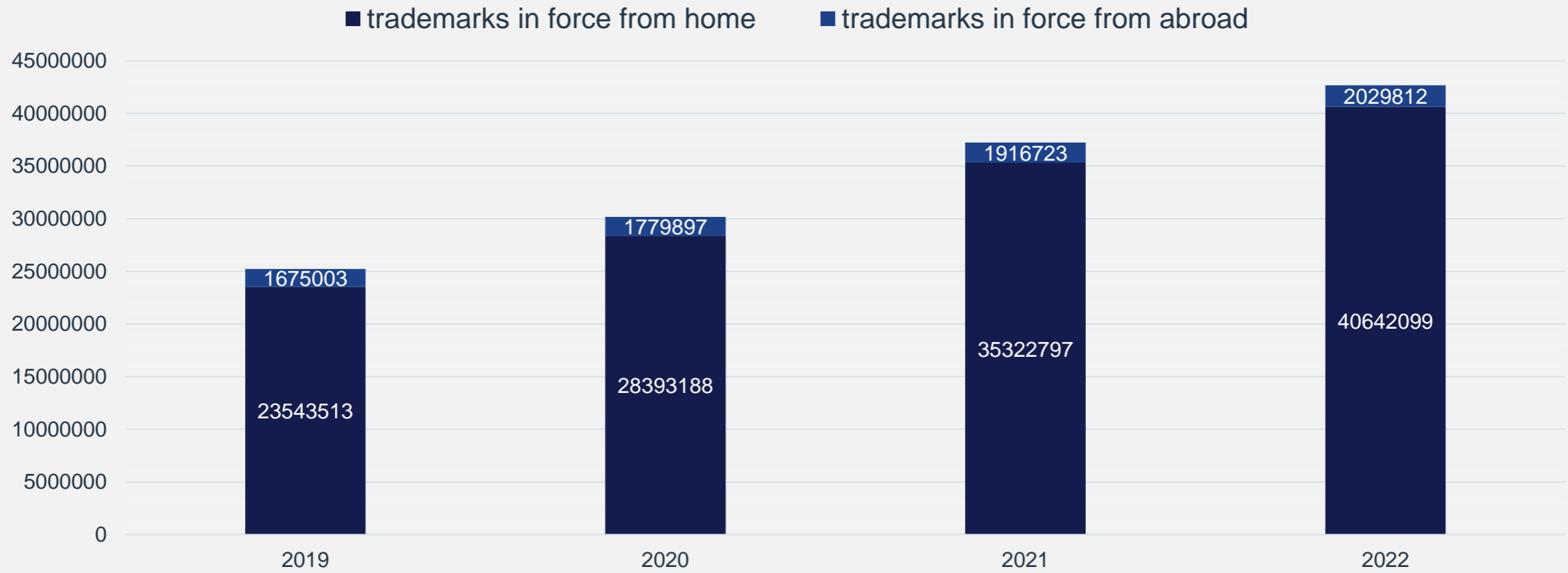
Top foreign applicants by company (2022)



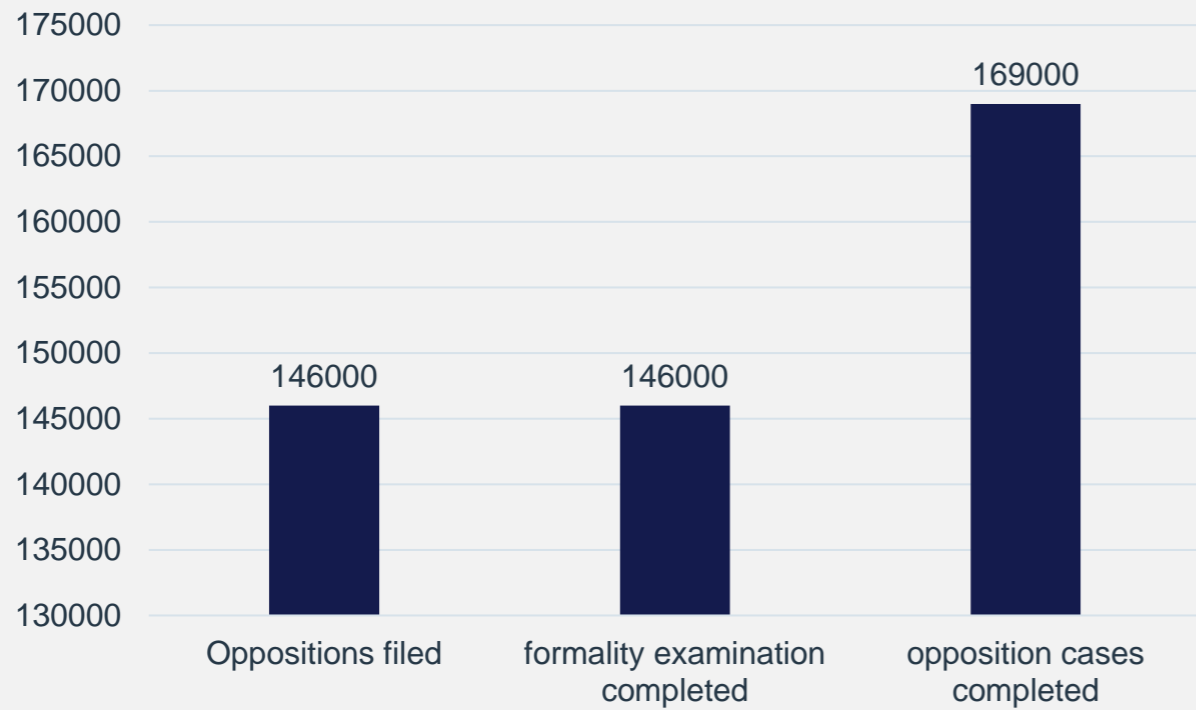
Trademark application numbers



Valid trademarks in force

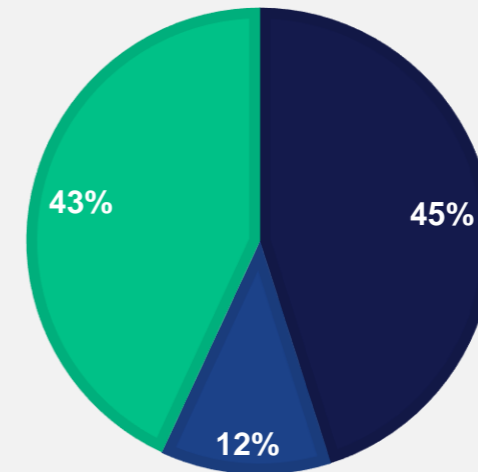


Trademark opposition examination in 2022



SUCCESSFUL RATE OF OPPOSITION CASES IN 2022

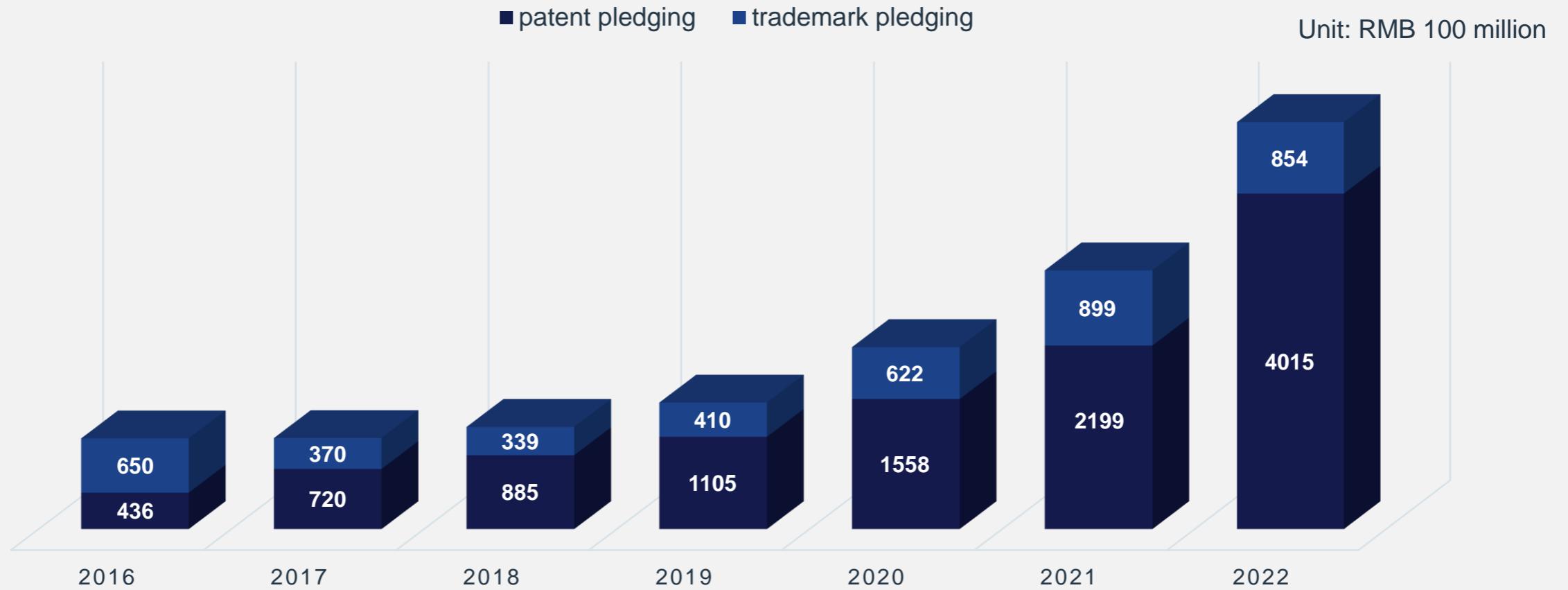
■ successful ■ partially successful ■ unsuccessful



Copyright registrations

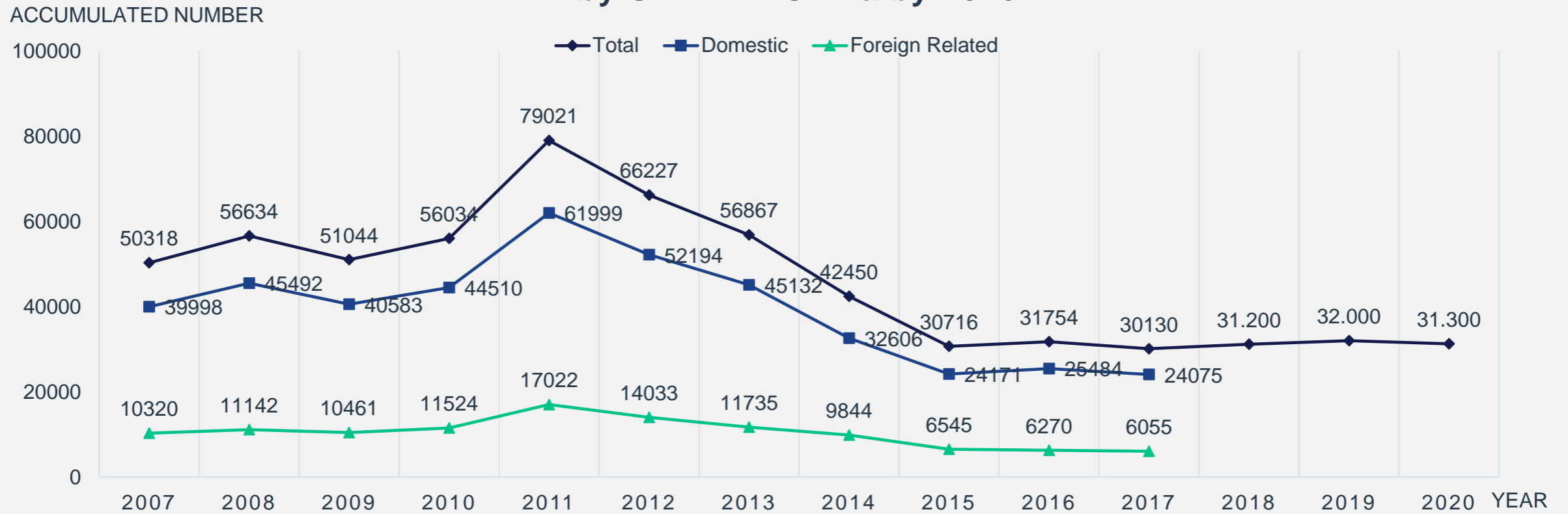


Statistics of IP pledging



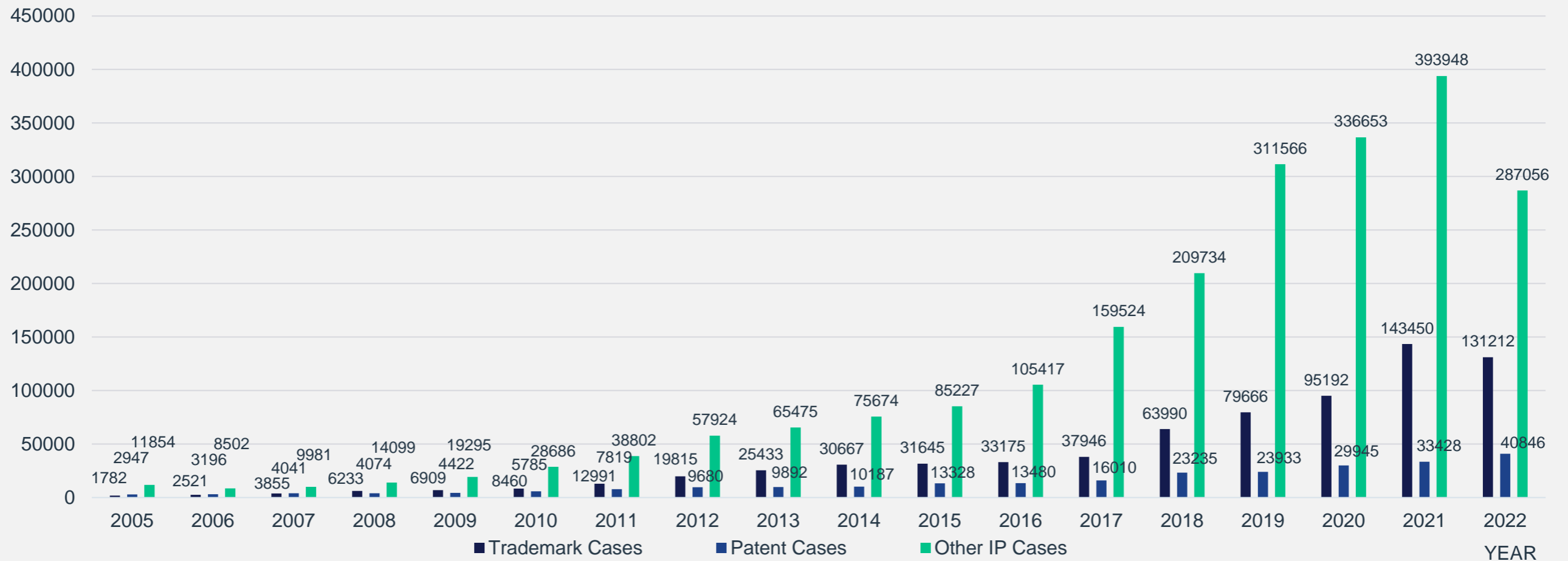
Administrative enforcement actions (SAMR)

Statistics of Investigated and Solved Trademark Cases by SAMR in China by 2020



Different types of IP cases in courts

Statistics of 1st Instance IP Cases Received by Chinese Courts by 2022 (Inclusive of Administrative and Civil Cases)



Average case load of judges of the SPC IP Tribunal in 2022

Cases received (inclusive of new cases and cases inherited from 2021)

- 142.5
- up 16 cases YoY

Cases concluded

- 79.9
- down 3.6 cases YoY

Duration of concluded cases

- 165.2 calendar days



2 | IP Trends and Developments



Trends

- Court databases feature decreasing percentage of all decisions made, difficult access from abroad
- 27 February 2024, SPC case database with app. 4000 cases announced, registration of personal information for use required
- Push against bad faith applications, illegal trademark agencies, unprofessional patent agencies
- Increased oversight over attorneys, party control emphasis
- Strong impact of economic deceleration on legal market and law firms
- Courts push strongly for mediation and settlement again
- Pressure on courts and judges (caseload etc.) increases, online proceedings create challenges in practice
- Conservative attitude to new legal issues
- Focus on national industry increases again in terms of IP protection

Increased damage awards

- **Trademark Law Art. 63 (1~5 times of damages):** Amount of compensation shall be determined based on
 - 1) the right owner's actual losses due to infringement or
 - 2) the infringer's actual interests obtained due to the same if the actual losses are hard to be determined, or
 - 3) may be determined based on times of the royalties of the registered trademark when both the losses or the infringer's actual interests obtained are hard to be determined.

For **seriously malicious** infringement, the amount of compensation may be between **one time to five times** the aforesaid amount determined in light of the foregoing regulations.

- **Interpretation of the SPC on the Application of Punitive Damages in the Trial of Intellectual Property Infringement Civil Cases (2021) Art. 3 (intentional infringement):**
 - (1) Act of **infringement continues after the defendant is notified or warned**;
 - (2) **certain relations between the defendant and the plaintiff**, which leads to possibility of **contact with the infringed IP rights**, including representation or control relationship, labor or agency relationship, business cooperation or negotiations for potential cooperation;
 - (3) in case the defendant commits any act of piracy or counterfeits any registered trademark;
 - (4) other circumstances that may be deemed to be an **intentional act**.

Increased damage awards

- **Interpretation of the SPC on the Application of Punitive Damages in the Trial of Intellectual Property Infringement Civil Cases (2021) Art. 4** regarding factors to be considered for **determining serious circumstances: Infringement approach, frequency, the lasting period of infringement act, its territorial scope, scale, consequence, the act of the infringer in the litigation.**

Typical serious circumstances:

- (1) commitment of the same or similar infringement after administrative punishment or assumption of liability based on court judgement;
 - (2) The defendant takes IP infringement as its business;
 - (3) The defendant forges, destroys or conceals any evidence of infringement;
 - (4) The defendant refuses to implement the ruling of preservation;
 - (5) The defendant obtains huge benefits from the infringement or causes huge loss to the right holder due to the infringement;
 - (6) The defendant's infringement act may endanger national security, public interest or personal health;
 - (7) Other circumstances that may be deemed to be serious circumstance.
- Art. 6 Factors to be considered in determining the **multiple of the punitive damages**: Defendant's subjective fault, the seriousness of infringement act, as well as other factors.

Increased damage awards

- **Beijing Higher People's Court's Guidelines on the Application of Punitive Damages in Civil Cases of Infringement of Intellectual Property Rights (2022)**
- **Art. 2.5: Intentional infringement of IP rights with aggravating circumstances:**
 - (1) Infringing IP rights as the main business;
 - (2) Unauthorized transmission of infringing works before or at the early stage of public transmission of movies, TV series, variety shows, sports events or online games;
 - (3) Unauthorized provision of goods or services infringing the same right while being legally authorized to provide the goods or services of the right;
 - (4) Providing legitimate goods or services in the process of advertisement, cooperation and negotiation, signing of contracts, display of samples and experience of services, etc., but only or mainly providing goods or services that infringe the same IP right in the actual transaction;
 - (5) The same infringer commits the same infringing act again or continues to commit the same infringing act after the infringement has been recognized by administrative penalty or administrative ruling;
 - (6) The same infringer commits the same infringing act again or continues to commit the same infringing act after the infringement is recognized by the parties in the settlement agreement reached voluntarily;
 - (7) After the effective judgment, conciliation, arbitration award confirmed infringement, the same infringer again or continues to commit the same infringing acts;
 - (8) Setting up additional enterprises, changing the name of the enterprise, changing the legal representative, using affiliated enterprises and other ways for committing the same infringement again or continue to commit infringement.



3 | Data – A New Frontier and Challenge

Stronger trade protectionism affecting data

The Biden administration recently restricted the export to China of an entire category of cutting-edge semiconductors used to create artificial intelligence, as well as the equipment to manufacture those chips. The administration also extended its rules extraterritorially, regulating products that use American technology but are manufactured outside the United States.

New York Times 7 Dec. 2023, Ana Swanson, *Lawmakers Press Biden Administration for Tougher Curbs on China Tech*

The administration is working on a final version of rules for US investors in China, with hawks pushing for tougher action. And it's preparing to open a new front: data security. One measure, curbing transactions that involve sensitive personal data across a wide range of industries, could be announced as early as this week. Also in the works are restrictions on Chinese electric vehicles and other so-called "smart cars" because of the data risks they pose.

Bloomberg 12 February 2024, By Mackenzie Hawkins, Jennifer Welch, Mario Parker, and Eleonora Mavroeidi, *In Trump-Biden Rematch, the Only Sure Loser Is China*

China's emphasis on data security and its consequences

TOP STORY

China looks set to relax strict data export restrictions for companies

In a seeming setback for the hardliners in China's economic policymaking, the powerful Cyberspace Administration of China (CAC) released draft regulations which, if implemented, would significantly relax existing restrictions on companies' ability to export data. The rules, published on September 28, would walk back key aspects of the current approach to managing cross-border data flows, after the business community complained that regulators have prioritized national security and party-state control to the detriment of innovation and economic efficiency.

The proposed rules would lift the requirement for regulatory pre-approval under several data-export scenarios, including international trade, academic cooperation, transnational manufacturing, and marketing. Another major change would relieve exports of so-called "important data." Companies would now need to go through the much-dreaded CAC security review only if industry regulators explicitly deem the data to be "important."

Finally, firms would have an easier time transferring some personal data, for example information regarding human resources. The free flow of HR data is key for multinationals, many of which have had to decouple their HR operations in China from their global ones to comply with China's data localization rules for personal information.

<https://merics.org/en/data-export-rules-beijings-silence-hamas-attacks-eu-technology-risk-assessment>

Hong Kong politics

+ Add to myFT

Latham & Watkins cuts off its Hong Kong lawyers from international databases

US law firm acts as data security laws in territory look set to be strengthened on same lines as China's



Some international companies are rethinking the way they operate in the Chinese special administrative region © Tyrone Siu/Reuters

Chan Ho-him and Kaye Wiggins in Hong Kong and Suzi Ring in London 16 HOURS AGO

116



Counter-Espionage Law

- “Espionage” Art. 4 encompasses the following conduct:
 - (1) **any activity that endangers the national security** of the People’s Republic of China (the “PRC”) that is carried out, instigated, or funded by an espionage organization and its agents, or **carried out in collusion therewith by any domestic or foreign institution, organization, or individual**;
 - (2) **participating** in an espionage organization or **accepting any task** from an espionage organization and its agents, or seeking refuge with an espionage organization and its agents;
 - (3) **any activity** carried out, instigated, or funded by a foreign institution, organization, or individual other than **espionage organizations and their agents**, or **carried out in collusion** therewith by any domestic institution, organization, or individuals, to **steal, spy for, purchase, or illegally provide any state secrets or intelligence, or other documents, data, materials, or items of concern to national security**, or to incite, entice, coerce, or bribe a state employee to defect;
 - (4) any cyber attack, intrusion, interference, control, sabotage, **or other such activity carried out**, instigated, or funded by an espionage organization and its agents, or carried out in collusion therewith by any domestic or foreign institution, organization, or individual, **which targets any state agency, entity involved with classified matters, or critical information infrastructure, among others**;
 - (5) **indicating any target for an enemy**; or
 - (6) conducting any other espionage activity.

Data as property once it is registered?

- In November 2022, the China National Intellectual Property Administration (CNIPA) made an official announcement designating eight key regions, which included Beijing, Shanghai, Jiangsu, Zhejiang, Fujian, Shandong, and Shenzhen, as **pioneering locations for the management of data-related intellectual property**. Further, the State Council released “**Opinions on Constructing a Basic System of Data and Better Utilising Data Factors**” (Twenty Data Policies) in December 2022. This document proposed the establishment of a framework to differentiate between **data resource ownership**, data processing and utilization rights, and data product management rights.
- To date, several regions including Shandong, Zhejiang, Beijing, Shenzhen, Guangdong, and Tianjin, have each introduced legal documents concerning the registration of data intellectual property. Notably, the approaches adopted in Beijing and Shenzhen exhibit substantial differences in the two documents “Beijing Municipality Measures for the Registration and Administration of Data Intellectual Property (Trial)” (Beijing Measures) and the “Shenzhen Interim Measures for the Registration and Administration of Data Intellectual Property” (Shenzhen Measures).
- In the Beijing Measures, registration is only allowed for collection of data processed by rules or algorithms that have **commercial value** and **are not publicly available**. The effectiveness of registration grants prima facie evidence in the enforcement of administrative law, the judiciary, and legal supervision of ownership.
- In the Shenzhen Measures, a **collection of raw data** produced or obtained as well as **data and its derivative products**, including but not limited to datasets, data analysis reports, data visualization products, data indices, application programming interfaces (API data), encrypted data, etc., created by a natural, legal, or non-legal organizations through the input of substantial work on data resources can be registered. It can be used as the basis for data transaction, financing and collateralization, data assets in the statement of assets, and accounting, and dispute arbitration.

Data regulation and future impact on license and R&D agreements

- Know-how agreements require flow of technical data and knowledge, thus falling under technology import and export control
- Technical know-how and related tools (software) are subject to US export control law, including for Foreign-direct Products
- Data to be used in AI-applications may increasingly be deemed commercially valuable or even “important” data in the sense of the Chinese Cyber Security Law, Data Security Law and related CAC regulations for data export, thus requiring security assessment and clearance before export
- Data used in AI-applications may use and export personal information which is subject to a mandatory consent requirement under Chinese law, in addition to CAC registration prior to export by the exporting party
- License agreements may require personal information, important data or raw data subject to registrations in China to be exported and used abroad. Current regulations can be made applying to such contracts which typically do not address regulatory intervention in the fulfilment of license contracts. Contracts should be supplemented inter alia by:
 - Sanctions clauses and termination rights
 - Clauses governing export control and implementation of data screening, classification and registration or approval requirements by licensees in China
 - Liability clauses covering fines and restrictions issued by governments on one of the parties of a license agreement
 - Warranty clauses in relation to data made available from China
 - Conditions for cross-licensing in case of governmental restrictions

Rules for Cross-border Provision of Personal Information

Personal Information Protection Law (Promulgated on 2021.08.20, Effective as of 2021.11.01)

- Art. 38: Provision of personal information outside the territory of PRC is either subject to security assessment by CAC, or certification by a specialized agency, or standard contract with the overseas recipient under the standard contract specifying both parties' rights and obligations, to be filed with CAC
- Art. 39: Informed and separate consent to data subject must be obtained by exporter prior to export
- Art. 53: Personal information handler outside the territory of PRC shall establish a special agency or designate a representative within the territory of PRC to be responsible for handling matters relating to personal information protection, and submit the name and contact information of the relevant agency or the representative to the authorities
- Art. 55: Provision of personal information protection impact assessment prior to export, and keep a record of the processing

Security Assessment Measures for Outbound Data Transfers (Promulgated on 2022.07.07, Effective on 2022.09.01)

Provisions on Standard Contracts for the Export of Personal Information and Guidelines for Filing Standard Contracts on Exporting Personal Information Overseas (DEADLINE November 30, 2023)

CAC Provisions on Facilitating and Regulating Cross-border Data Flow promulgated in March 2024 (“CAC Data Exit Provisions”)

Typical hurdles to consider in cross-border data flows in China

- “Data as the new oil” leads to impact of regulatory framework on science and technology cooperation
- Different obstacles on legal side to take into account:
 - Technology Import and Export Administration Regulations may require approval of authorities
 - Export Control Law and related catalogues can impact research in sensitive areas, coupled with sanctions under foreign jurisdictions
 - Personal information export requires not only Transfer Impact Assessment and additional safeguards, but may also require registration with authorities or security assessment prior to export
 - Sensitive personal information processing and export requires additional steps to be undertaken
 - Important data requires security assessment and prior approval before export – classification problems persist
 - Core data further increases threshold for export, use restrictions
 - Genetic resources require scrutiny under Biosecurity Law, Human Genetic Resource Administration Regulations (“HGR”), Patent Law
 - Special sector rules, e.g. automotive industry Several Provisions on the Security Management of Automobile Data (Trial), Art. 3
 - “Health data” may carry further requirements for collecting, processing, exporting

Important data – recent improvements

- Originally no binding definitions of “important data” available, but draft regulations and draft standards, such as the “Regulations for the Administration of Network Data Security” (Draft released on 14 November 2021), standard “Information security technology – Guideline for identification of critical data”, (Draft released on 13 January 2022)
- Measures for Security Assessment of Outbound Data Transfers, in effect as of September 1, 2022, defines “Important Data” as “data that may jeopardize national security, economic operation, social stability, public health and safety if it is tampered with, damaged, leaked, or illegally accessed or illegally utilized”.
- Art. 21(3) Data Security Law stipulates: “Each region and department shall, in accordance with the classified and graded data protection system, determine the specific catalogue for important data for the respective region and department, and in relevant industries and areas, and undertake special protection for the data included in the catalogue.” – few/no catalogues have been issued so far.
- NEW: CAC Provisions on Facilitating and Regulating Cross-border Data Flow promulgated in **March 2024 (“CAC Data Exit Provisions”)** greatly alleviate burden to register export of personal information with CAC, and also stipulate exceptions regarding important data, Art. 2: “Data processors shall identify and declare important data in accordance with the relevant regulations. **Data processors are not required to declare the Security Assessment as important data if such data has not been announced or published as important data by relevant departments or regions.**”
- NEW: Role of standards such as the newest draft GB/T 43697-2024 “Data security techniques Data classification and hierarchy rules -Data security technology - Rules for data classification and grading”, governing the identification of important data as of October 1, 2024

GB/T 43697-2024 “Data security techniques Data classification and hierarchy rules - Data security technology - Rules for data classification and grading”

- b) Data that meets any of the following conditions is recognized as important:
- 1) Once the data is leaked, altered, destroyed or illegally obtained, used or shared, it directly causes **general harm to national security**;
 - 2) Once data are leaked, tampered with, destroyed or illegally obtained, used or shared, it directly causes **serious harm to economic operations**;
 - 3) Once the data are leaked, tampered with, destroyed or illegally obtained, used or shared, it directly causes **serious harm to the social order (e.g., affecting social stability)**;
 - 4) Once data is leaked, altered, destroyed or illegally accessed, used or shared, it directly causes **serious harm to the public interest (e.g., jeopardizing public health and safety)**;
 - 5) Data are **directly related to specific areas, specific groups or specific regions of national security, economic operation**, social stability, public health and safety;
 - 6) The data **reaches a certain precision, scale, depth or importance that directly affects national security, economic operation**, social stability, public health and safety;
 - 7) Important data as **determined by the assessment of the competent (regulatory) authorities in the industry sector**.

Important data – remaining open questions

- Important data catalogues are reviewed and updated on a regular basis
 - What about **retroactive applicability** to long-running projects for which the change falls within the period of implementation of the R&D activity?
- Appendix G of the standard of March 2024 stipulates the Guidelines for the identification of important data and adds **a further identification element**, following the overarching protected goods “national security, economic operations, social order, public interest including public health and safety” and related degree of impact and adding further details
 - How can research partners rely on CAC Provisions vis-à-vis other ministries and agencies which may publish data with such characteristics as important data in Chinese only, and which is not identified before a R&D project starts?
- While the new CAC Data Exit Provisions now appear to exempt individual rights and interests from the definition of important data, the standard of March 2024 stipulates: “Note: **If large-scale individual or organizational rights and interests are affected, the impact may not be limited to individual or organizational rights and interests, but may also have an impact on the State**”
 - Which situations would fit such scenario? Cooperation with large private companies or SOEs sufficient?

Important data GB/T 43697-2024 – determining factors

- a) **Directly affecting territorial security and national unity, or reflecting the country's natural resource base, such as unpublished data on territorial land, water and airspace;**
- b) It can be used by other countries or organizations to launch military strikes against our country, or to reflect our strategic reserves, emergency mobilization, combat and other capabilities, such as geographic data that meet certain accuracy indicators or data related to the capacity and reserves of strategic materials;
- c) Directly affecting the market economic order, such as **data supporting the core business operation of the industry or field in which the critical information infrastructure is located or the production of important economic areas;**
- d) Reflecting the qualities of our language, history, customs and national values, such as **recording data on historical and cultural heritage;**
- e) Data reflecting the physical security protection of key targets, important places or the location of undisclosed geographic targets that can be used by terrorists and criminals to carry out sabotage, such as construction drawings, internal structures, and security situations describing key security units, important production enterprises, and important national assets (e.g., railroads and oil pipelines);
- f) **Data relating to China's scientific and technological strength, affecting China's international competitiveness,** or export-controlled items, such as reflecting the major achievements of national scientific and technological innovation, or describing China's ban on the export of export-restricted items of the design principle, process, production methods, as well as involving the source code, the integrated circuit layout, the technical program, the important parameters, the experimental data, the data of the test report;
- g) Reflecting the overall operation, development and security protection of critical information infrastructures and their core software and hardware asset information and supply chain management, which can be utilized to implement cyber attacks on critical information infrastructures, such as data involving critical information infrastructure system configuration information, system topology, emergency response plans, measurements, operation and maintenance, and audit logs;
- h) Data involving undisclosed attack methods, attack tool creation methods, or attack support information that can be used to launch cyberattacks such as supply chain attacks, social engineering attacks, and other cyberattacks against key targets, such as lists of sensitive customers such as governments and military industrial units, as well as data involving undisclosed procurement of products and services, and undisclosed major vulnerabilities;

Important data GB/T 43697-2024 – determining factors

- i) Data reflecting the natural environment, the basics of the production and living environment, or data that can be utilized to cause environmental safety events, such as unpublished data related to soil, meteorological observations, and environmental monitoring;
- j) Reflecting the reserve and development and supply of resources such as water resources, energy resources, land resources, mineral resources, etc., such as unpublished data describing hydrological observations, changes in the area or quality of arable land;
- k) Data reflecting nuclear material, nuclear facilities, nuclear activities, or data that could be utilized to cause nuclear sabotage or other nuclear security events, such as those involving nuclear power plant design plans, and nuclear power plant operations;
- l) Data relating to the security of overseas energy resources, the security of strategic sea lanes, the **security of citizens and legal persons abroad**, or data that could be used to carry out sabotage of our **participation in international economic, trade and cultural exchange activities or to impose discriminatory bans, restrictions or other similar measures on our country, such as data describing production transactions of special items in international trade, and the equipping, use and maintenance of special equipment;**
- m) The actual or potential interests of China in the new strategic frontiers of space, deep sea and polar regions, such as undisclosed data related to scientific research, exploitation and utilization of space, deep sea and polar regions, as well as data affecting the safe entry and exit of personnel in the above-mentioned areas;
- n) Reflecting the research, development and application of biotechnology, reflecting the characteristics of ethnic groups, genetic information, related to major outbreaks of infectious diseases, animal and plant epidemics, related to the safety of biological laboratories, or may be utilized to manufacture biological weapons and carry out bioterrorist attacks, **related to the invasion of alien species and biodiversity, such as data on important biological resources, microbial drug resistance basic research data;**
- o) Reflecting the state of economic operation and financial activities in the overall situation or key areas, relating to the **competitiveness of industries**, causing public safety accidents or affecting the safety of citizens' lives, triggering group activities or affecting the emotions and perceptions of groups, such as undisclosed statistical data and commercial secrets of key enterprises;

CAC Data Exit Provisions 2024

Exemptions to existing cross-border data transfer compliance obligations: Several circumstances are identified where cross-border data transfers would not require either security assessments, personal information certification, or standard contracts filing:

- Data transfers related to international trade and transportation, academic cooperation, cross-border manufacturing or marketing that do not contain personal information or important data [already the case previously];
- Necessary transfers for performance of contracts involving natural persons [see Art. 13 No. 2 PIPL];
- Transfer of employee data in line with labor policies and collective contracts [see Art. 13 No. 2 PIPL];
- Transfer of personal information by other than critical Information Infrastructure Operators (“CIIOs”) involving fewer than 100,000 individuals’ personal information (excluding sensitive personal information) within a period calculated from 1 Jan of the same year till now [**NEW**: Only as of 1 January of the same year];
- Transfer of personal information not collected or generated within the PRC [**NEW**, clarification, see related Art. 3(2) PIPL];
- Transfers necessary for protecting health and safety in emergencies [see Art. 13 No. 4 PIPL]; and
- Data transfers by entities incorporated within Free Trade Zones (“FTZs”) that involve data not included on Negative Data Lists to be promulgated by such FTZs [**NEW**];
- CIIOs and companies who have transferred PI of more than one million individuals or sensitive personal information of more than 10,000 individuals within a period calculated from 1 Jan of the same year until a time point in the same year will need to undergo a security assessment [**NEW**, partially higher threshold].

CAC Data Exit Provisions 2024

Standard Contract/Protection Certificate requirements apply if:

- a data exporter has cumulatively transferred personal information of more than 100,000 individuals but less than one million individuals (excluding sensitive personal information); or
- sensitive personal information of less than 10,000 individuals out of China since Jan. 1 of the year;
- cases of export or personal information which are exempted according to the CAC Data Exit Provisions 2024 are not counted as cases for the threshold calculation, but with the exception of sensitive personal information;
- in which case data exporter must file the executed Standard Contract with the CAC's local branch at provincial level, or may obtain a personal information protection certification conducted by specialized institutions according to the requirements of the CAC.

This means that Standard Contract requirements is NOT applying to exemptions cases under the CAC Data Exit Provisions 2024.

CAC Data Exit Provisions 2024 – what does NOT change

Data processors must still

- Classify data in accordance with applicable data classification guidelines,
- have a lawful basis for data processing (usually consent),
- provide necessary information notices,
- take technical measures and other necessary measures,
- and conduct impact assessments for cross-border data transfer activities.

In case thresholds are passed or important data or core data is intended to be exported, conclusion of a standard contract, standard contract filing (for personal information) and security assessment will be required.

The validity periods of the Security Assessments have been extended from the original 2 years to 3 years (calculated from the date of issuance of the assessment results). If there is no substantial change in the data export activities and no incident has been reported, the data processor may submit an application to the CAC for an extension of the validity period through the provincial CAC, 60 working days before the expiration of the validity period. If the application is approved, the validity period can be extended by 3 years.



4 | R&D

R&D activities and related risks

R&D typically involves

- Partner
- A research object or subject
- Means with which to carry out R&D
- Objectives of the R&D
- Data either used for or during R&D, or obtained as a result
- Processes for R&D
- Utilization or plans for turning into an asset (trade secret, registered patents etc.)

Potential risks under the current Chinese legal system

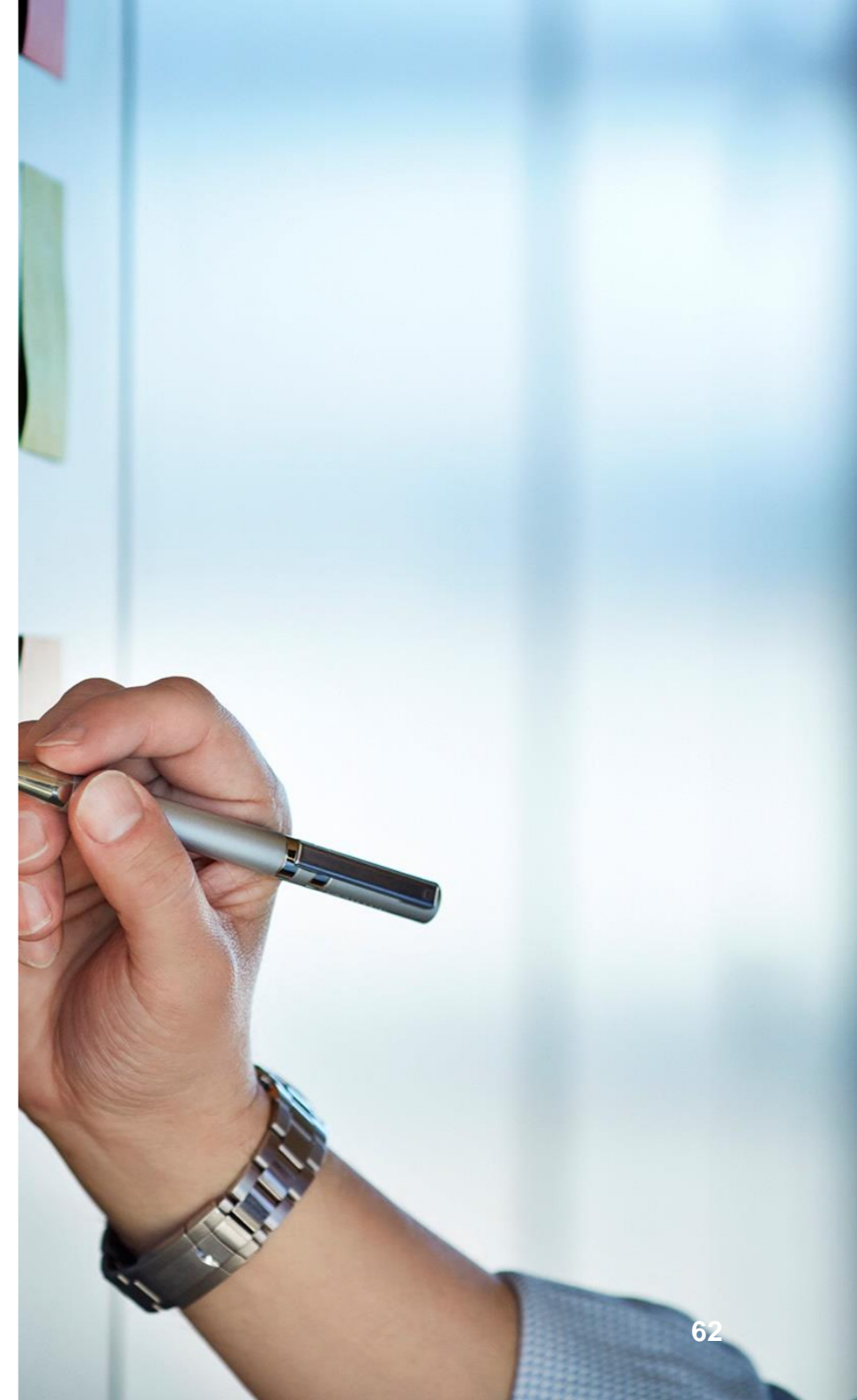
- Partners may be sanctioned as unreliable entity
- The object or subject may be restricted in terms of access (genetics), import/export (TIER catalogues; export control) or use by foreigners (state secrets, important data/core data)
- Some means may be forbidden or restricted to be applied only by Chinese nationals/designated Chinese partners (e.g. publishing, gene data banks, basic telecom services, cryptography)
- Objectives may be deemed to be related to espionage activities or activities harmful to interests of Chinese state, its citizens and organizations or their legitimate rights and interests
- Restriction of mass-use of PI, export of important data, national core data, use of data related to CIIO, potential liability of misuse (actual or perceived)
- Results may be made subject to local use only, compulsory licensing, export restrictions, reporting obligations to authorities
- Surveillance and risks for proprietary information

A list of special regulatory requirements under Chinese laws

- Registration of contracts, processes
- Approval of contracts, export
- Classification of data in accordance with Chinese classification system
- Monitoring of internet use (CSL), data use, security systems
- Reporting requirements to Chinese authorities (CAC, data incidents, technology import or export)
- Assessment requirements (data protection impact assessment, data classification and protection measures before export)
- Resources to provide (DPO for foreign PI users, responsible person for important data)
- Securing contractual obligations of partners for use and processing of data, protection of important data, trade secrets
- Cease-and-desist from harmful actions (espionage et al)

Summary of key challenges in cross-border collaboration

1. Eligible Partner(s)? – Mofcom Unreliable Entity List
2. Permissible object of research without export control (control lists ECL)
3. No action restrictions according to TIER, no National Security Review required, planned research actions can also be undertaken by the respective partner (licenses, business scope etc.)
4. Data classification and possible consequences, export restrictions
 - i. Personal data: “DSGVO” plus chin. Regulations, which could cause data export or liability under chin. Data protection law; use of Chinese Standard contracts or security review according to MLPS system in China
 - ii. Important data: Review of risks and feasibility if important data is to be assumed; Termination facts and liability in contract; Security Review according to MLPS system in China; Organization of research
 - iii. Scientific data subject to Scientific Administrative Measures: Agreement of procedures with chin. Partner, proof and reporting obligations, influence on feasibility of the project and utilization of research results
5. Publication requirements and barriers, licenses, IP
6. Risks under Counter-Espionage Law, including for R&D



Dr. Thomas Pattloch, LL.M.Eur

Thomas co-heads the International China Group at Taylor Wessing. As head of the IP department he acts for European, Asian and American companies in all aspects of intellectual property rights in China.

His advice is characterised by established experience and a strong network in China. Enforcement, licensing law, technology, data transfer and R&D are as much a part of his practice as the dialogue with political decision makers. Furthermore, Thomas advises Chinese companies on market entry and litigation in Germany and the EU. These services and the strategically experienced representation in arbitration proceedings in and outside China illustrate the breadth of his expertise in IP and IT law.

Languages

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Key Lawyer for Intellectual Property, [Legal 500 2022 – 2024](#)

Ranked as Notable Practitioner for Intellectual Property, [Chambers and Partners 2022 – 2024](#)

Thomas Pattloch speaks fluent Mandarin and advises Chinese clients on patent disputes in Germany, including patent infringement cases. One client attests: “He advises us on how to go about engaging Chinese clients. It is a different way of working and it is very useful advice.”, [Chambers and Partners 2021](#)

Leading Individual – Silver – 2021-2024 “Technology transfer and IP transactions whizz Pattloch is a vital resource for businesses keen to secure or exploit their rights in China”, [World Trademark Review WTR1000 2023](#)

Leading the charge here is Thomas Pattloch, a technology transfer specialist who is now the go-to-guy in Munich for all things China. As well as offering strategic advice, he drafts impeccable software and technology licensing agreements and astutely brokers IP-rich transactions.”, [World Trademark Review WTR1000 2021](#)

“Heading the IP division of Taylor Wessing’s China group, Thomas Pattloch regularly shuttles between his Munich base and the Beijing and Shanghai offices. He is a conduit for Chinese clients that become enmeshed in litigation in Europe, and for European companies making forays onto the Chinese market.” [IAM Patent 1000, 2020](#)

“Thanks to his singular understanding of Chinese customs and commercial law, Thomas Pattloch attracts a slew of inbound instructions from the country involving market maximisation and conflicts in Europe.”, [Individuals: transactions IAM Patent 1000 2016](#)

“Thomas Pattloch is fluent in Mandarin and practised in Beijing for six years. He specialises in industrial property rights and technology transfers in China.”, [Chambers 2016](#)

“Thomas Pattloch’s smooth handling of pharmaceutical portfolios and lucrative tech transfer deals in China sees him break into the guide this year. The Mandarin speaker is a ‘deep well of strategic advice’.”, [IAM Patent 1000 2015](#)



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He focuses his practice on advising subsidiaries or joint ventures on all phases of the development and localisation of compliance-management systems both in a preventive and investigative manner in the context of internal investigations, mainly concerning business activities between Germany/Europe and China.

Mike combines legal expertise with extensive knowledge of the country with a broad intercultural understanding, which is essential in dealing with sensitive issues relating to compliance such as anti-corruption, conflicts of interest, fraud, or breach of trust.

Languages

- German, English



Ranked as Key Lawyer for Compliance, [Legal 500 2022 – 2024](#)

Winner Corporate Compliance: Taylor Wessing Compliance Team, [China Business Law Award 2024](#)

Ranked as Key Lawyer for China Corporate / M&A, [Legal 500 Asia Pacific 2023](#)

“Mike Goldammer and his team in Shanghai are great to work with, providing us contacts and expert advice in all “time zones”.”, [Legal 500 2023](#)

“Mr. Goldammer has been acting for us for many years and therefore knows our company in many areas like an “employee”. He keeps in touch and also gives advice, without request, when it is needed. He is forward thinking and very service-oriented.”, [Legal 500 2023](#)

“Key contact and lawyer for compliance matters in relation to China.”, [Legal 500 2021](#)

“Taylor Wessing is a highly service-oriented law firm, especially in relation to their compliance consultancy. Mike Goldammer is proficient in China-related issues.”, [Legal 500 2019](#)

“Taylor Wessing: home to a strong international investigations practice. Notable partners in Munich include ... Mike Goldammer, a member of the firm's corporate practice group who specialises in Asian matters.”, [Global Investigation Review 100](#)



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