大成涉外争议解决法律资讯

Dacheng Newsletter· Cross-border Dispute Resolution

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【新法资讯】

一、中国（上海）自由贸易试验区内的准入措施调整

日前，国务院发文决定在中国（上海）自由贸易试验区暂时调整实施《中华人民共和国国际海运条例》、《中华人民共和国认证认可条例》、《盐业管理条例》以及《外商投资产业指导目录》、《汽车产业发展政策》、《外商投资民用航空业规定》规定的有关资质要求、股比限制、经营范围等准入特别管理措施。根据调整目录，国务院决定取消对外商投资进出口商品认证公司的限制，并取消对投资方的资质要求；允许外商以独资形式从事盐的批发，服务范围限于试验区内；取消对外商投资房地产中介或经纪公司的限制；允许外商以独资形式从事铁路货物运输业务及航空运输销售代理业务。来源：http://www.gov.cn/zhengce/content/2014-09/28/content_9096.htm

二、最高法明确审理利用信息网络侵害人身权益民事纠纷案件适用法律若干问题

近日，最高人民法院公布《关于审理利用信息网络侵害人身权益民事纠纷案件适用法律若干问题的规定》（以下简称《规定》），自2014 年 10 月 10 日起施行。《规定》明确了非法删帖、网络水军等互联网灰色产业的责任承担问题。根据《规定》，雇佣、组织、教唆或者帮助他人发布、转发网络信息侵害他人人身权益，被侵权人请求行为人承担连带责任的，人民法院应予支持。《规定》加大了被侵权人的司法保护力度。《规定》明确，被侵权人为制止侵权行为所支付的合理开支，可以认定为侵权责任法第二十条规定的财产损失。此外，侵权人因人身权益受侵害造成的财产损失或者侵权人因此获得的利益无法确定的，人民法院可以根据具体案情在 50 万元以下的范围内确定赔偿数额。来源：http://www.court.gov.cn/xwzx/xwfbh/twzb/201410/t20141009_198316.htm

三、最高法公布奇虎诉腾讯滥用市场支配地位案二审判决 奇虎请求被驳回

2014 年 10 月 16 日上午 9 时 30 分，最高人民法院二审宣判上诉人北京奇虎科技有限公司与被上诉人腾讯科技(深圳)有限公司、深圳市腾讯计算机系统有限公司滥用市场支配地位纠纷一案，判决结果为：驳回上诉，维持原判。涉诉双方均为中国互联网领域中的领军公司，近年来，双方之间爆发了多起诉讼，被舆论称为“3Q 大战”。2012 年 11 月，奇虎 360 向广东省高级人民法院起诉，主张腾讯滥用在即时通讯软件及服务相关市场的市场支配地位，构成垄断。

2013 年 3 月 20 日，广东省高级人民法院作出一审判决，驳回奇虎公司全部诉讼请求。这是国内首个在即时通讯领域对垄断行为作出认定的判决。

对于一审判决，奇虎公司表示不服，向最高人民法院提出上诉，请求判令腾讯公司和腾讯计算机公司立即停止被诉垄断行为；连带赔偿奇虎公司经济损失 1.5 亿元；向奇虎公司赔礼道歉；承担奇虎公司为维权而支付的合理开支 100 万元。该案中，奇虎公司请求判令：腾讯公司和腾讯计算机公司立即停止被诉垄断行为；连带赔偿奇虎公司经济损失 1.5 亿元；向奇虎公司赔礼道歉；承担奇虎公司为维权而支付的合理开支 100 万元。

最终，最高院认为，一审判决认定事实虽有不当之处，但适用法律正确，裁判结果适当，故驳回上诉，维持原判。

“3Q 大战”其实是一款软件引发的拉锯战。2010 年 2 月，腾讯推出“QQ 医生”，与 360 安全卫士形成竞争。同年 10 月 29 日，奇虎 360 推出“扣扣保镖”剑指 QQ，要对其实施包括清垃圾和去广告在内的系列“净身”动作。此后 11 月 3 日晚，腾讯宣布在装有 360 软件的电脑上停止运行 QQ 软件，用户必须卸载 360 软件才可登录 QQ，要求用户“二选一”，导致大量用户被迫删除 360 软件。

在“3Q 大战”不断升温之后，工信部开始介入，向奇虎和腾讯提出严厉批评。不久后，腾讯公司恢复兼容 360 软件，两公司分别向用户致歉。但两家公司的大战并未就此止步，而是转战法院。

值得注意的是，这是反垄断法出台以来，最高法院审理的首例互联网反垄断案。来源：

http://www.guancha.cn/FaZhi/2014_10_16_276758_s.shtml

【律师视点】

无约定情况下外贸合同争议的管辖问题

文/李新立

引例

某上海黄浦区企业（卖方）出口一批电器给一家位于澳大利亚悉尼的公司（买方）。买卖双方经协商，确定交易条件为，FOB上海，总价20万美元，买方先TT付30%，余款在货物装船后30天内付清。商定后，卖方制作了一份形式发票（PI），内容很简单，只有货物和价款，没有其他内容的约定。该PI扫描后通过电邮发送给买方，买方回复邮件确认接受。之后，买方支付了6万美元，卖方也如期将货物装船，但买方没有如期支付余款，且屡经催告拒不回应。经调查，买方是一家小的贸易公司，在中国没有代表处也没有财产，买方的负责人一年会来中国一两次洽谈业务。现卖方想起诉买方，问到何地法院起诉最有利？

分析

据笔者了解的情况，外贸业务中双方不签订合同书或者合同没有争议解决条款的情况很常见。一旦发生争议需要诉诸法院，当事人就得考虑到哪儿去起诉。下面笔者就对中国当事人选择法院的一些考量因素进行分析。

一、可能管辖的法院

当事人选择起诉的法院，既要基于中国法律考虑可以管辖的国内法院，也要基于合同相对方所在国法律考虑可以管辖的外国法院。

（一）可能管辖的国内法院

依照中国《民事诉讼法》第265条之规定，因合同纠纷，对在中华人民共和国领域内没有住所的被告提起的诉讼，可以由合同签订地、合同履行地、诉讼标的物所在地、可供扣押财产所在地或者代表机构住所地人民法院管辖。下面对五个管辖地逐一讨论：

1、合同签订地

合同签订地的确定首先看双方约定，没有约定看法律规定。而实践中当事人往往对此无约定，发生争议时只能求诸法定。

依照中国《合同法》，当事人签订合同书的，则最后签署的地点为合同签订地；未订立合同书的，如通过电邮、传真等方式订约的，则依照有关要约和承诺的规定，承诺生效的地点为合同签订地。

（1）合同最后签署地

实践中由于当事人分处两国，一般当事人一方先行签署，再通过邮寄方式给另一方签署，照此方式，则后签字的当事人所在地为最后签署地。但如果后签字一方并不注明日期及地点，或者日期与对方的日期相同，则会导致双方对最后签署地发生争议，起诉时需要主张最后签署的一方举证证明。

（2）承诺生效地

中国《合同法》规定，承诺通知到达要约人时生效。引例中，卖方将 PI 通过电邮发给买方，此邮件为要约，买方确认接受即为承诺，该承诺到达卖方时生效，则卖方收到承诺的地点为承诺生效地。但需要追问的是，卖方收到承诺的地点是哪里？通常来说，接收邮件的是卖方工作人员，而该人接受邮件时可能在公司办公室，也可能在家里或者出差的路上，如果不在公司办公室，则哪一地点为承诺接收地。对这一问题《合同法》第 34 条有明确规定，采用数据电文形式订立合同的，收件人的主营业地为合同成立的地点；没有主营业地的，其经常居住地为合同成立的地点。适用于本案，则承诺接受地为卖方的主营业地。

2、合同履行地

合同履行地的确定也是首先看约定，没有约定看法律规定。但实践中，双方往往没有约定，还是得求诸法律规定。

最高人民法院《关于适用＜中华人民共和国民事诉讼法＞若干问题的意见》第 19 条规定，购销合同的双方当事人在合同中对交货地点有约定的，以约定的交货地点为合同履行地；没有约定的，依交货方式确定合同履行地；采用送货方式的，以货物送达地为合同履行地；购销合同的实际履行地点与合同中约定的交货地点不一致的，以实际履行地点为合同履行地。

在外贸合同中一般有 FOB/CIF 等国际贸易术语，如引例中的 FOB 上海，按照《国际贸易术语解释通则（2000）》，货物在上海装船，卖方将货交付承运人就完成了交货义务。这样来看，上海

港即为约定的交货地点。具体而言，上海的港口有洋山港、外高桥港、吴淞港三个港口，实际装船的港口为合同履行地。依此类推，FOB 宁波，FOB 天津等等，这些交货的港口均可作为合同履行地。故当事人可以在这些地方的法院起诉。

这是法律上的分析，但笔者实际了解的情况并非如此。笔者曾经向一些沿海港口的法院立案庭逐一电话问询，问同一问题，发生纠纷的合同中贸易术语为 FOB（城市），法院可否依合同履行地规则受理，得到的答复不尽一致，情况如下。

城市	是否受理
秦皇岛	否
天津	否
威海	是
南通	是
上海	否
宁波	是
温州	是
广州	是
福州	是
深圳	是

需要说明的是，笔者是通过电话询问立案庭法官，法官的意见未必代表法院最终的意见。但至少可以说明，法院对这一问题的意见是不统一的，需要最高法院发布司法解释，对此做出规定。

3、诉讼标的物所在地

诉讼标的物一般是指买卖的货物，常见的情形是中国企业进口的货物存在质量问题，则可以在货物存放地的法院提起诉讼。对于欠款纠纷，则该规则无法适用。

4、可供扣押财产所在地

如果中国企业能发现外国企业在中国的财产，则可向财产所在地的法院起诉，并申请对财产采取保全措施。这对于中国企业无疑是非常有利的。但在实践中，当事人往往很难获得这一财产信息，即便知道了，证明财产的权属也很困难。所以据此规则取得管辖权的案件非常鲜见。

5、代表机构住所地

实践中，能在中国设立代表处的外国企业往往是大企业，这种情况并不多见。有的企业虽有代表常驻中国，但并不办理代表处登记，这样该规则也无法适用。

（二）可能管辖的外国法院

一般来说，各国的民事诉讼法都规定被告所在地法院有管辖权，故中国企业也可以到外国企业所在地法院起诉。

二、司法环境的优劣

在中国起诉还是到外国起诉，需要考虑的另一个因素是外国的司法环境是否值得信赖。如果法院地所在国法治环境很好，如英美德法日等法治国家，司法公正，则可以到外国法院起诉。如果对方国家是非洲、拉美一些法治水平低、司法不公的国家，还是不要自找麻烦，在中国法院起诉吧。

三、法院判决的可执行性

中国当事人在国内法院起诉，要考虑对方是否有财产在中国以便于法院判决的执行，否则当事人应考虑到对方所在国的法院起诉。因为除非两国缔结或者参加了承认和执行他国法院判决的双边或多边司法协助协议，否则一国法院的判决很难在另一国得到承认和执行。

以上是一般规则，但考虑到中国法院可以对外国当事人采取限制出境的措施，即便外国当事人在中国没有财产，判决得到执行的机会也大大增加。中国法院判决作出后，如果被执行人为境外公司且其负责人可能来中国，申请人可以申请法院对被执行人负责人采取限制出境的措施，以迫使被执行人执行判决。笔者曾在一些案件中使用该举措，非常有效。

四、诉讼成本的高低

比较来说，当事人在本国诉讼更便利，熟悉司法程序、与律师沟通方便、成本低。到外国诉讼，则存在不了解司法程序、与律师沟通困难、成本高（特别是在经济发达国家）等弊端。

因此，笔者以为，诉讼标的大的案件，可以考虑到被告所在国法院诉讼，金额小的案件，更适合在中国法院起诉。

下面，应用以上思路分析本文的引例。

第一步，分析能够受理起诉的法院

首先考虑国内法院，依照《民事诉讼法》第 265 条，可以从五个方面考虑管辖法院，基于引例案情，可以直接排除诉讼标的物所在地、可供扣押财产所在地或者代表机构住所地，剩下的是合同签订地和合同履行地。如前文的分析，由于上海法院并不认可 FOB 上海表明了合同履行地，故不能依据合同履行地起诉到法院。最后分析合同签订地，买方接受 PI 的电邮发给卖方，则卖方营业地为承诺生效地和合同签订地，故可向卖方所在区的法院起诉。

其次考虑外国法院。

买方在澳大利亚悉尼市，依照澳大利亚法律，该地法院也有管辖权。

第二步，分析司法环境的优劣

澳大利亚司法环境好，到当地起诉能够维护当事人的权益。

第三步，分析案件判决的可执行性

由于买方在中国没有财产，且中澳间没有相互承认执行法院判决的司法协助协议，故中国法院判决难以直接执行买方的财产。但买方的负责人一年会来一两次中国，故可以在中国法院起诉，待法院判决后申请对买方负责人限制出境，故执行的机会还是很大的。

当然，如果到澳大利亚的法院起诉，法院的判决是可以执行的。

第四步，分析诉讼成本

从当事人角度看，在澳大利亚打官司律师费用昂贵，且需要以英文与律师沟通，并需要提供很多的文件，非常麻烦。而本案案值不大，才 14 万美元，不值得。

综上，该争议更适合提交合同签订地的法院起诉。当然，这只是一个分析示范，并非唯一答案，有的当事人可能认识澳大利亚律师，倾向于向澳大利亚的法院起诉，这并不奇怪。

最后需要补充的一点是，以上分析是从中国当事人的角度做出的，如果从外国当事人的角度出发，其考量因素同样具有参考意义。

作者介绍：

李新立律师，华东政法大学法律硕士，上海律师协会国际贸易与反倾销研究会会员，曾被中国司法部选派到英国参加律师培训一年。现任北京大成(上海)律师事务所执业律师，有报关员资格。主要业务领域：外贸争议解决、外贸法律风险防范、海关事务咨询。

Email: li.xinli@dachenglaw.com

Chinese Anti-commercial Bribery Legal Framework and Comments

Jiacai Tan

The Changsha Intermediate People's Court on 19 September 2014 ruled that the accused GlaxoSmithKline China Investment Co., Ltd. (hereinafter "GSKCI") was convicted of bribing non-State personnel and imposed a fine of CNY3 billion; Mark Reilly was given a three-year prison sentence, subject to a four-year suspension and deportation from China. The record-breaking CNY3 billion fines have refocused attention on the GSK bribery scandal. Anti-commercial bribery has become the most eye-catching topic. In this article I examine the existing Chinese anti-commercial bribery laws and regulations and make some comments.

1. GSK bribery scandal

On 11 July 2013, a notice released by the Ministry of Public Security was like throwing a heavy bomb at the domestic and overseas pharmaceutical industry, as some of GSK's senior Chinese executives were investigated for suspected serious commercial bribery and other economic crimes. GSKCI was accused of giving bribes to government officials, pharmaceutical associations and foundations, hospitals, doctors, etc. through travel agencies in order to open drug distribution channels and inflate drug prices, and its senior Chinese executives involved were suspected of committing economic crimes such as duty encroachment and bribery of non-State personnel, and travel agency personnel were suspected of assisting the aforesaid executives in committing the duty encroachment crime. After the Chinese police arrested the four GSK Chinese executives in July 2013, the United States Department of Justice (DOJ) also launched a probe of the case to find out whether the company had

violated the Foreign Corrupt Practices Act ("FCPA"). GSK is a British corporation; however, it is listed on a U.S. stock exchange, and the FCPA therefore applies to the corporation and the US authorities also have jurisdiction over GSK. The Changsha Intermediate People's Court on 19 September 2014 imposed a fine of CNY3 billion on GSKCI, which is the highest in China by far; the accused including Mark Reilly was sentenced to imprisonment ranging from two to four years.

The reason for GSKCI's violations is not because of lack of clear compliance rules inside the company but because of malfunction of the operating mechanism for the relevant systems and failure to implement the systems, which ultimately resulted in GSK's violations and a record CNY3 billion in fines. When discussing its internal compliance system, we need to study China's anti-commercial bribery legal framework.

2. The Chinese anti-commercial bribery legal framework

China's anti-commercial bribery legislation is decentralized and there is no uniform Anti-commercial Bribery Law or Anti-corruption Code. In terms of legal sources, there are domestic legislation and international conventions. The domestic laws include the following:

2.1 Administrative laws governing anti-commercial bribery

Administrative laws governing anti-commercial bribery are mainly in the provisions of the Anti-unfair Competition Law ("AUCL") and the Interim Provisions on Prohibition against Commercial Bribery Actions. In addition, there are relevant provisions in laws, regulations and normative documents, including the Administrative Penalties Law of the People's Republic of China, the Insurance Law of the People's Republic of China, the Law of the People's

Republic of China on Commercial Banks, Building Law of the People's Republic of China, the Price Law of the People's Republic of China, the Government Procurement Law of the People's Republic of China, the Taxation Administration Law of the People's Republic of China, Contract Law of the People's Republic of China, the Provisions of the State Council regarding Offering and Accepting Gifts in Performing Official Foreign-related Duties, the Implementation Programmer for Prevention of Commercial Bribery in Equity Transactions, the Reply of the China Insurance Regulatory Commission on Clarification of the Law Enforcement Bodies for Unfair Competition Acts of Insurance Agencies and the Approval of the General Office of the China Banking Regulatory Commission on Issues relating to Unfair Competition of Banking and Financial Institutions.

2.1.1 AUCL

The AUCL promulgated on 2 September 1993 is a law designed to regulate the development of the socialist market economy and advocates fair and orderly competition. Article 8 of the AUCL prescribes that business operators may not give bribes in the form of money or things or through other means for the purpose of selling or purchasing commodities. A business operator offering off-the-book kickbacks in secret to another party shall be punished for offering bribes; and any entity or individual accepting the off-the-book kickbacks in secret shall be punished for taking bribes. A business operator may, in selling or purchasing commodities expressly provide discounts to the other party and/or commission to the middleman. The business operator's provision of discounts to the other party and/or commission to the middleman must be accurately recorded in the accounts. The business operator's receipt of discounts and/or commissions must be accurately recorded in the accounts. Article 8 clearly defines the act of commercial bribery, and

also Article 22 of the AUCL prescribes the relevant administrative penalties. For example, where a business operator gives bribes in the form of money or things or through other means in selling or purchasing commodities and if he is convicted of a crime, criminal liability shall be pursued pursuant to the law; if he is not convicted, the supervision and inspection authority may impose a fine of CNY10,000 up to CNY200, 000 depending on the severity of the case and confiscate the illegal earnings, if any.

2.1.2 Interim Provisions on Prohibition against Commercial Bribery Actions

On 5 November 1996, the State Administration for Industry and Commerce promulgated and implemented the Interim Provisions on Prohibition against Commercial Bribery Actions (the "Provisions"), which provide more practicable rules for commercial bribery. Article 2 of the Provisions defines "commercial bribery", "property" and "other means". The term "commercial bribery" refers to the act of a business operator bribing the other entity or individual by providing money or things or through other means, for the purpose of selling or purchasing commodities. The term "money or things" includes cash and property given to the other entity or individual in the context of promotion expenses, publicity expenses, sponsorships, research expenses, service fees, consultation fees, commissions or reimbursement of expenses for the purpose of selling or purchasing commodities. The term "other means" refers to the provision of other forms of benefits including various domestic and overseas travel and study other than giving of money or things. Additionally, the terms "kickbacks" "discounts" and "commissions" are clearly defined. Article 5 of the Provisions prescribes that the term "kickbacks" refers to the practice in which a business operator in selling commodities returns a

proportion of money paid for the commodities in cash, in kind or in any other manner to the other entity or individual off the book and in secret. Article 6 of the Provisions prescribes that the term "discounts" refers to the rebate sales practice in which a business operator in selling commodities offers a preferential price to the other party expressly and records it accurately in the accounts, including the immediate deduction of a proportion of the total amount of money paid for commodities at the time of payment or return of a proportion of money paid for the commodities after the total amount of money is paid. Article 7 sets out the term "commission" which refers to the money provided by a business operator to a middleman who has the legal qualifications necessary and provides services to the business operator. The Provisions also state that a business operator "may expressly offer discounts to the other party", but the parties offering and receiving discounts must accurately and truthfully record the discounts in their accounts.

2.2 Criminal laws governing anti-commercial bribery

Criminal laws containing commercial bribery provisions include the Criminal Law and the related criminal legislative interpretation and judicial interpretation, for example the Opinions on Several Issues concerning Law Application and Handling of Criminal Commercial Bribery Cases, the Interpretations of the Supreme People's Court on Issues concerning Law Application in the Hearing of Entity Criminal Cases, the Provisions of the Supreme People's Procuratorate and the Ministry of Public Security on the Standards for the Filing and Prosecution of Criminal Cases over Which the Public Security Authorities Have Jurisdiction (II), the Provisions of the Supreme People's Procuratorate on the Standards for Prosecuting the Crime of Offering Bribes and the Provisions of the Supreme People's

Procuratorate on the Standards on the Acceptance, Prosecution and Investigation of Cases by People's Procuratorates (Trial). The specific crimes are:

2.2.1 Crime of accepting a bribe by non-State personnel (Article 163 of the Criminal Law)

Where any employee of a company, enterprise or any other entity extorts or illegally accepts any money or thing from any other person by making use of his functions to seek benefits for that person, and if the amount involved is relatively large, he may be found guilty of accepting a bribe. A sentence of up to six years of imprisonment or criminal detention shall be imposed if the amount involved is relatively large; and imprisonment of more than five years or confiscation of property shall be imposed if the amount involved is huge;

2.2.2 Crime of bribing non-State personnel (Article 164 of the Criminal Law)

Any person who gives money or things to any employee of a company, enterprise or any other entity to seek improper gains may be found guilty of bribing non-State personnel if the amount involved is relatively large. A sentence of up to three years of imprisonment or criminal detention shall be imposed if the amount is relatively large; and imprisonment ranging from three to ten years, together with a criminal fine shall be imposed.

2.2.3 Crime of accepting a bribe (Article 385 of the Criminal Law)

State personnel extorting or illegally accepting money or things from any other person by making use of their functions to seek benefits for that person constitutes the crime of

accepting a bribe. State personnel, when conducting economic activities, who violate the State's rules and regulations and accept various kickbacks or service charges and take them into their own possession shall be convicted of the crime of accepting a bribe. If the amount of the bribe is more than CNY100,000, the State personnel shall be imposed imprisonment of more than ten years or life imprisonment, and may be subject to the confiscation of property; the death penalty together with confiscation of property shall be imposed on State personnel convicted of extremely serious bribe-taking crimes. If the amount of the bribe is between CNY5,000 and CNY50,000, imprisonment ranging from one year to seven years shall be imposed; and imprisonment ranging from seven to ten years shall be imposed if the circumstances are serious. If the amount of the bribe is between CNY5,000 and CNY10,000, the State personnel who repent for the act of bribe-taking and give up the bribe can be given a lesser sentence or be exempted from criminal sanctions, but the entity for which the personnel work or a superior authority shall be imposed an administrative sanction. If the amount of the bribe is less than CNY5,000 and the circumstance is serious, two years of imprisonment or criminal detention can be imposed; if the circumstance is not serious, the entity for which the State personnel work or a superior authority may impose administrative sanctions at its own discretion. If the State personnel accept bribes more than once, sanctions shall be given based on the accumulated amount.

2.2.4 Crime of accepting a bribe by an entity (Article 387 of the Criminal Law)

Where a State organ, State-owned company, enterprise, public institution or civil association extorts or illegally accepts money or things from another person to seek benefits for that person, if the circumstances are

serious, the crime of accepting a bribe by an entity shall be established. An entity set out in the preceding paragraph which accepts various off-the-account discounts or service charges in secret in economic activities shall be convicted of the crime of accepting a bribe and be punished pursuant to the provisions in the preceding paragraph. If the circumstances are serious, the entity itself shall be imposed a fine, and the persons who are directly in charge and the other directly responsible persons shall be sentenced to fixed-term imprisonment of up to five years or criminal detention.

2.2.5 Crime of offering a bribe (Article 389 of the Criminal Law)

Any person who gives money or things to State personnel for the purpose of seeking improper gains shall be convicted of offering bribes. In economic activities, any person who violates the State's rules and regulations and offers various kinds of kickbacks or service charges to State personnel shall be convicted of offering bribes and punished. The person shall be imposed imprisonment of up to five years or criminal detention; if the act of bribing and seeking improper gains is serious or causes significant damage to the State interest, he shall be imposed imprisonment ranging from five to ten years; if the circumstance is extremely serious, he shall be imposed imprisonment of more than ten years or life imprisonment, and may be subject to the confiscation of property. If the person voluntarily confesses his act of offering bribes before prosecution, he may be given a lesser sanction or exempted from sanctions.

2.2.6 Crime of offering a bribe to an entity (Article 391 of the Criminal Law)

Any person who offers money or things to a State organ,

State-owned company, enterprise, institution or civil association in order to seek improper gains, or in economic activities violates the State's rules and regulations and gives all kinds of kickbacks or service charges shall be convicted of the crime of offering a bribe to an entity. A sentence of up to three years of imprisonment or criminal detention shall be imposed on him. If an entity commits the crime, the entity itself shall be imposed a fine, and the persons who are directly in charge and the other directly responsible persons shall be sentenced to fixed-term imprisonment of up to three years or criminal detention.

2.2.7 Crime of acting as a middleman in the bribery (Article 392 of the Criminal Law)

Any person who acts as a middleman to bribe State personnel may be convicted of the crime of acting as a middleman in bribery and if the circumstances are serious, he shall be imposed imprisonment of up to three years or criminal detention. If that person voluntarily confesses his act, he may be imposed lesser or be exempted from sanctions.

2.2.8 Crime of offering a bribe by an entity (Article 393 of the Criminal Law)

If an entity offers a bribe in order to seek improper gains, or violates the State's rules and regulations to offer kickbacks or service charges to State personnel, if the circumstances are serious, it shall be convicted of the crime of offering a bribe by an entity. If the circumstances are serious, the entity itself shall be imposed a fine and the persons who are directly in charge and the other directly responsible persons shall be sentenced to fixed-term imprisonment of up to five years or criminal detention. Any person who possesses the improper gains derived from bribery shall be convicted and punished under the provisions

governing the crime of offering a bribe.

2.2.9 Crime of accepting a bribe for the exertion of influence (Article 388 of the Criminal Law)

Any State official who, by taking advantage of his own functions or position, seeks improper gains for a person who asks him to do so through another State official's performance of his duties and extorts or accepts money or things from that person shall be convicted and punished for accepting a bribe. If the amount involved is relatively large or there are any other relatively serious circumstances, the offender shall be imposed imprisonment of up to three years or criminal detention and a criminal fine; if the amount involved is huge or there are any other serious circumstances, the offender shall be imposed imprisonment ranging from three to seven years and a criminal fine; if the amount is extremely huge or there are any other extremely serious circumstances, the offender shall be imposed imprisonment of more than seven years, and a criminal fine or confiscation of property.

2.2.10 Crime of bribing foreign public officials or officials in international organizations (Article 164 of the Criminal Law)

Any person who offers money or things to foreign public officials or officials in international organizations in order to seek illegitimate commercial interests shall be convicted of the crime of bribing foreign public officials or officials in international organizations. If the amount involved is relatively large, the person shall be imposed imprisonment of up to three years or criminal detention; if the amount involved is huge, the person shall be imposed imprisonment ranging from three to ten years and a criminal fine.

3. Comments

China's anti-commercial bribery legislation is decentralized and there is no uniform code. The basic content is covered. The GSK bribery scandal in China fully proves that there is not a lack of legal ground for pursuit of liability but insufficient law enforcement efforts. China's anti-bribery judicial practice extends the focus from combating crimes committed on duty to the combating of commercial bribery and crimes on duty, and is becoming increasingly internationalized. In terms of legislation, we need to further improve the Chinese anti-commercial bribery legal framework to make it consistent and more practical. In the meantime, we should pay more attention to judicial practice, strengthen law enforcement efforts and safeguard the rule of law. In terms of corporate practice, a compliance system in line with Chinese laws and regulations should be established and improved.

We appreciate the translating efforts made by Legal Studio in this article

Jiacai Tan acquired a master's degree in law from the Institute of Law of the Chinese Academy of Social Sciences and earned a master of law from Temple University Beasley School of Law. He is a partner at Dacheng Law Offices, LLP, Shanghai office, and holds the post of chairman and researcher at Shanghai University of Political Science and Law, ASEAN Comparative Law Centre. He regularly advises clients on corporate legal affairs, IP and foreign-related disputes.

【大成（上海）涉外争议解决律师团队介绍】

我们的优势

● 团队中的大部分律师具有海外留学背景，部分律师获得了国外律师执业资格

● 核心律师皆具有 7 年以上诉讼执业经验，处理了大量涉外仲裁/诉讼案件

● 能够熟练运用英语、日语等作为工作语言。

● 部分律师具有在中国的法院、检察院、公安机关以及其他政府机关的工作经验

● 部分律师已被选聘为 CIETAC，SHIAC、SAC 等仲裁机构的的仲裁员

● 有广泛的全球网络，大成律师事务所在国内 40 家分所，海外　分所，是 World Services Group 的会员单位，且与世界很多中心城市的律师事务所建立了协作关系，可以为客户在全球范围内提供全方位、多层次的法律服务

大成（上海）涉外争议解决团队由 13 名核心律师组成，其中合伙人 4 名，律师 6 名，律师助理 3 名。伴随客户对法律服务的要求和需求不断提升，大成（上海）涉外争议解决团队不再仅仅提供传统意义上代理当事人/客户参加诉讼、仲裁等争议解决法律服务，而是在企业风险管理、交易框架规划，或在争议发生前尽早尽快地介入其中，以事前规划、协商、谈判等方式解决未来可能发生或者当前已经发生的争议。

主要服务范围

- 参与交易架构设计及相关文本起草
- 内资/外资企业风险控制
- 监管合规
- 诉前/仲裁前谈判
- 境内仲裁/诉讼
- 海外账款催收
- 国际贸易争议解决
- 跨境诉讼/仲裁

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