

The Implications of China's 2010 Tort Liability Law for Foreign Companies doing Business in China

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Abstract

In this paper, the author examines the new Chinese Tort Liability Law in terms of its implications for foreign companies doing business in China. The author introduces the playing field in which companies are operating in the Chinese market as the new law emerges. Thus, the author examines the economic and legal terrain before and after the passing of the new Tort Liability Law of 2010, looking at the Foreign Corrupt Practices Act (FCPA) and its usefulness and application, as well as an environment previously characterized by a lack of legal rights for individuals, particularly Chinese employees. A basic understanding of tort law is presented through definitions and components before the author examines the meaning and importance of the new law and its most salient provisions and requirements in light of the issue under consideration in this paper. The implications and consequences of the new law for both domestic and foreign businesses in China are analyzed and the author focuses on the vulnerability of foreign businesses given the philosophical underpinnings and Confucian tendency of Chinese society. In the final analysis, the author explores the criticisms and other obstacles which the new law must face and provides several recommendations for foreign companies doing business in China to lessen or avoid liability actions and claims.

Keywords: Chinese Tort Liability Law, FCPA (Foreign Corrupt Practices Act), negligence, PRC (People's Republic of China), PC (People's Court).

Introduction

International and global companies operating in foreign territories must overcome several challenges in order to be successful. These challenges often result from the interplay of governmental-political, economic, cultural-social, technological and legal factors that affect the ways in which these businesses operate and the types of liabilities they face for failing to meet standards, especially those relevant to the protection of individual and collective rights in the territories where they do business. In 1979, there were 100 foreign-owned enterprises in China. In 1998, there were 280,000. As of 2007, foreign companies employed 25 million people in China. According to Hays (2012), as of 2010, 300,000 foreign companies had invested in China.

Many of these companies operate in strikingly different foreign environments and have for decades enjoyed much privilege because of China's lack of tort liability laws that they would otherwise face in their home territories, especially American and European companies that have relocated overseas in China. This is because many businessmen find totalitarianism to be an advantage of doing business in China and there are no labor unions to worry about (Hays, 2012). However, in 2010 China enacted the Tort Liability Law and its implications and consequences for international-global companies are tremendous.

Foreign companies doing business in China are now faced with the same legal challenges which had caused many to relocate their business to that country. As the Chinese government, through the People's Court (PC), develops, enacts, and enforces more and stronger legislations and laws, many foreign companies must now become more accountable for their potentially negligent and otherwise tortful actions that can affect both customers and employees. They must also become more accountable to the Chinese government and submit to the scrutiny and impositions of administrative agencies, including fines and other negative sanctions when they fail to comply with the newly established and emerging requirements of doing business in the Chinese economy and society. Furthermore, they must now ensure that their products and services exceed previous standards and meet comparable benchmarks or standards established by the Chinese government or international standards for organizations in their fields of business. These new requirements will significantly impact operational activities for international and global companies doing business in China, and thereby increase costs. The effects are already being felt and seen in the failure and departure of some foreign businesses from China back to their home-countries, especially to the United States and Europe.

Introduction to Tort Liability Law

It is important for individuals, and businesses in general, to have a basic understanding and appreciation of tort liability law. That is, understanding the definition, nature and purpose of tort and liability will help both Chinese workers and employers or businesses to comply with the provisions and requirements of the New Chinese Tort Liability Law. The word "tort" comes from the Latin "*tortus*" which means "crooked, dubious, twisted" (Twomey & Jennings, 2011). According to Buckley and Okrent (1997), "[a] tort is a wrongful injury to a person or his or her property. The person inflicting the harm is called the tortfeasor (*feasor* meaning "doer")" (p. 46). Prosser, Wade, Schwartz, Kelly and Partlett (2010) define a tort as "a civil wrong, other than a breach of contract, for which the law provides a remedy" (p. 1). Twomey and Jennings (2011) define tort as a civil wrong that interferes with one's person or property and which permits companies and individuals to recover from other individuals and companies for wrongs committed against them. Because we all have rights, and responsibilities that come with those rights, our actions can subject each and every one of us to becoming a tortfeasor. According to Prosser, Wade, Schwartz, Kelly & Bartlett (2010) anyone who breaches a tort duty has committed a tort and may be liable to pay damages in a lawsuit brought on by injured persons because of that tort.

Tort duty originates with rights and responsibilities. According to Buckley and Okrent (1997) tort law considers the various rights and remedies that are available to persons who are injured through other individuals' carelessness or intentional misconduct, and it holds individuals in certain situations responsible for other people's injuries regardless of blame. This gives rise to torts being categorized into three broad groups: negligence, intentional torts, and strict or

absolute liability torts. The Chinese Tort Law of 2010 covers all three categories and represents a comprehensive set of law. Understanding the three categories of torts also helps individuals and corporations to understand the basis of tort and liability. Negligence can be defined as

The failure to do something that a reasonable person would do in the same circumstances, or the doing of something a reasonable person would not do. Negligence is a wrong generally characterized by carelessness, inattentiveness, and neglectfulness rather than by a positive intent to cause injury (Buckley & Okrent, 1997, p. 47).

Thus, negligence is simply the failure to exercise reasonable care in order to avoid injuring others. Intentional torts are actions that are designed to injure others or their property, and in which the tortfeasor intended a particular harm to result from his or her behavior or conduct. Intentional torts include battery, assault, infliction of emotional distress, misrepresentation, fraud, false imprisonment, abuse of process, trespass, malicious prosecution, invasion of privacy, conversion, defamation (libel and slander), slander of title, defamation by computer and disparagement of goods (Buckley & Okrent, 1997). Thus, intentional tort can be defined as “Injury inflicted by positive, willful, and aggressive conduct, or by design, as opposed to an injury caused by negligence or resulting from an accident” (p. 48). Finally, strict (or absolute) liability refers to “liability for an injury whether or not there is fault or negligence; absolute liability” (p. 50). For example, the law imposes strict liability in product liability cases, and this holds foreign companies doing business in China liable for damages caused by their products. Products liability is the main and most important type of strict liability that foreign businesses in China might potentially face under the country’s new tort and liability laws.

According to Zhang (2011), a tort has at least four components: (i) conduct causing harm, (ii) fault, (iii) damage, and (iv) causation. Tort law addresses harm or injury resulting from all of the above components and has five major purposes in doing so: (1) providing peaceful means for addressing the rights of the parties who might otherwise take the law into their own hands; (2) encouraging socially responsible behavior in individuals and corporations; (3) deterring wrongful conduct by individuals and organizations; (4) restoring injured parties to their original conditions insofar as the law can do by compensating them for injuries suffered at the hands of the tortfeasor; and (5) vindicating individual rights of redress (Prosser, Wade, Schwartz, Kelly & Partlett, 2010). Yu (2010) states that there are eight methods of assuming tort liabilities: (1) cessation of infringement; (2) removal of obstruction; (3) elimination of danger; (4) return of property; (5) restoration to the original status; (6) compensation for losses; (7) apology; and (8) elimination of consequences and restoration of reputation. Just as tort and liability laws existing in western society do, the new Chinese Tort Liability Law of 2010 is designed to accomplish the five major purposes described above by Prosser, Wade, Schwartz, Kelly and Partlett (2010), while making Chinese society more just and civilized in terms of individual and business relationships.

Before China’s 2010 Tort Liability Law

China has long been a haven for many international and global companies looking for cost-saving opportunities that result from cheap labor, lax regulations and rules regarding employees’ rights and liabilities resulting from injuries and negligent actions causing injuries to consumers and employees, and issues of product liability. This environment, which was significantly free from excessive government and administrative agency rules, principles, and

laws, governing company conduct and delineating liability, attracted hundreds of companies from across the globe and also resulted in corporations saving millions of dollars that would have otherwise been incurred from high labor costs, numerous civil or tort actions, and fines in their home territories. One of the major tools regulating U.S. foreign companies in their conduct in China before the introduction of China's 2010 Tort Liability Law was the Foreign Corrupt Practices Act of 1977, which mainly regulated the international-global business dealings of American corporations both at home and overseas, and was quite useful as an assistive regulatory device before the enactment of the Tort Liability Law.

The Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq. ("FCPA"), makes it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business (U.S. Department of Justice, 2012). Despite its passing and long existence, such practice is still highly common, especially in developing or Third World countries. The anti-bribery aspect of the FCPA became particularly powerful in regulating the behavior of American businesses operating in foreign territories. Specifically, the FCPA's anti-bribery provisions:

[P]rohibit the willful use of the mails or any means of instrumentality of interstate commerce corruptly in furtherance of any offer, payment, promise to pay, or authorization of the payment of money or anything of value to any person, while knowing that all or a portion of such money or thing of value will be offered, given or promised, directly or indirectly, to a foreign official to influence the foreign official in his or her official capacity, induce the foreign official to do or omit to do an act in violation of his or her lawful duty, or to secure any improper advantage in order to assist in obtaining or retaining business for or with, or directing business to, any person business (U.S. Department of Justice, 2012, p. 1).

What became even more significant was the determination of the U.S. Department of State to extend this act fully through amendments in 1998, thereby applying its provisions to foreign firms and persons who cause, directly or through agents, any act in furtherance of corrupt payments to take place within the territory of the United States (U.S. Department of State, 2012). The U.S. was joined by 33 other countries in the new amendments and enforcement of the FCPA. Moreover, the same standard was extended to American companies doing business overseas, since their operations, despite extra-territorial existence, were first bound under U.S. laws as their home-territory. The 1998 amendments expanded the FCPA to assert territorial jurisdiction over foreign companies and nationals. Furthermore, U.S. parent corporations may be held liable for the acts of foreign subsidiaries where they authorized, directed, or controlled the activity in question, for example, bribery, as can U.S. citizens or residents, themselves in "domestic concerns," who were employed by or acting on behalf of such foreign-incorporated subsidiaries (U.S. Department of Justice, 2012).

While the U.S. was fully aware that many host-countries lacked the legal and administrative regulations to ensure ethical and principled business practices, it sought to ensure that American corporations operating overseas were held as much as possible to the "American legal and ethical norms" of doing business in these foreign territories, especially in Asia where the lack of tort liability law, employee rights, and adequate government purview of the business environment created an excess of opportunities for corruption and violation of individuals' rights. The FCPA through Section 102 of its provisions sought to increase corporate accountability and make bribery of foreign officials a criminal offense (Romaneski, 1982).

Overall, the FCPA has not been very effective in preventing American corporations and their business partners and counterparts from acting against ethical norms or law in China and other foreign territories where injuries to individuals and property are concerned. However, the new Chinese tort liability provisions are proving to be extremely effective in such cases, and can be detrimental to company survival in others.

China's 2010 New Tort Liability Law

Conk (2006) believes that Chinese law reform has accelerated since the late 1970s with the country's determination to speed up modernization in the hope of reaping market-oriented systems benefits. However, according to Zhang (2011), "China did not have a single body of torts law until 2009" (p 415). The New Tort Liability Law was years in the making; approximately nine years of drafting and deliberation before the Standing Committee of the National People's Congress of the People's Republic of China passed the Tort Liability Law on December 26, 2009 (Dai & An, 2012; Sotto & Maisog, 2010). This act has been regarded as one of the most important moves of the Chinese government toward the development of a civil society ruled by law (Zhang, 2011), especially by Western nations that have long looked on China as a place where law and justice minimally exist, and where both private individuals and corporations lacked the legal foundation adequate to protect their rights, interests and assets in doing business. The new Chinese law "is acclaimed in China as a significant modern legislative achievement in civil rights protection" (Zhang, 2011, p. 418), and as such, will certainly bring about changes, even unpredictable and unforeseeable changes in how businesses operate in China.

According to Miao (2010), China's newly-implemented tort law represents the nation's first special law on liability for acts of infringement and will become vital in safeguarding individuals' personal and property rights and in better gauging social behavior, as well in regulating companies and their agents or representatives in dealing with individuals and the public. However, the new liability tort law means more than this. It means that many Chinese workers and citizens can now sue for damages resulting from medical errors or malpractice, road accidents, harm from pollution and pollutants discharged into the environment by companies, physical trauma or harm, and mental and psychological distress, and violations of privacy or reputation on the Internet, as well as various injuries from negligent actions caused by individuals, corporations as individuals, or other business entities (Law Teacher, 2012). Previously, many companies and their leaders opposed compensation for emotional distress and the courts of law simply ignored emotional distress (Ye, 1989). Sotto and Maisog (2010) describe the new law as a wide-ranging law that imposes tort liability for matters ranging from environmental damage to product liability to animal bites. Thus, the law seems to represent a comprehensive set of tort laws similar to those in the United States and other Western nations.

According to China Briefing (2009), the Tort Liability Law of the People's Republic of China regulates liability and compensation for injuries caused by defective products, unruly animals and collapsing buildings, and also makes manufacturers liable for damages caused by defects in their products, and sellers liable for damages attributable to their fault. Furthermore, the new Tort Liability Law stipulates that when defects are caused by the fault of third parties such as transporters and storekeepers, manufacturers and sellers are entitled to claim for compensation from these third parties after paying the compensation amount (China Briefing, 2009). According to Zhang (2011), the new Tort Liability Law will serve as "a comprehensive

framework that regulates torts and provides a legal mechanism that governs liabilities and remedies” (p. 415).

China’s 2010 Tort Liability Law: Provisions and Requirements

The provisions of China’s 2010 Tort Liability Law are extensive and Wang and Madaio (2010) describe the new tort law as multifaceted, similar to Zhang (2011), referencing the new law as comprehensive. The new law is comprehensive because, before the new tort liabilities law became effective July 2010, “Chinese civil tort law was spread among several different pieces of legislation, various local and national regulations, and court opinions” (Wang & Madaio, 2010, p. 1). Thus, Chinese workers and businesses can expect extensive coverage under the new law, but also, companies will be required to meet numerous requirements for conformance. According to Wang and Madaio (2010), businesses operating in China must act immediately to familiarize themselves with the new requirements of the law because failure to do so could lead to serious financial consequences for businesses caught unaware of the law’s new requirements. This is especially true for businesses that did not take the time to learn about the changing legal environment of the Chinese market and economy.

According to Wang and Madaio (2010), the new Chinese Tort Liability Law contains almost 100 articles and covers many different areas of tort liability including product liability, automobile accident liability, environmental pollution, labor and employment issues and medical malpractice liability. The new law seems to be well organized as evident in how it is laid out in the following excerpt:

Chapter 1 of the law provides general provisions for tort liability, explaining that the main methods for redressing liability include: 1) stopping the infringement; 2) removing the obstacle; 3) eliminating the danger; 4) returning the property; 5) restoring items to their original condition; 6) financially compensating for damages; 7) apologizing; and 8) eradicating effects of a harm (Wang & Madaio, 2010, p. 1).

With this basic knowledge and understanding provided in Chapter 1 of the New Chinese Tort Liability Law, citizens with adequate levels of literacy; capable of reading, writing and average comprehension, can understand the fundamental purpose of the new law and their rights and entitlements when they are the victims of negligence or wrongs. Similarly, tortfeasors will be able to understand what tort and liability law entail and what is required of them in avoiding lawsuits and responding to them.

Su (2010) describes the framework of the new law as covering liability elements, methods of liability assumption, defenses to liability, liability subjects, and eight special tort liabilities based on the above general principles. According to Zhang (2011) the four major principles that are generally provided for the imputation of tort liability (fault, presumption of fault, liability without fault, and liability on the basis of fairness) are the cornerstones of China’s torts system. The new Chinese law also focuses on key intellectual property and employment issues that have been areas of neglect in Chinese Law (Yu, 2010). Yu (2010) notes:

In the past, tort law mainly aimed at protecting rights; but now, intellectual property and some personal rights are also protected by the Law. Although there are no special sections for intellectual property infringement liability under the Law, its general provisions put trademark, patent, copyright and other intellectual property rights within its protected objects, which show that intellectual property infringement liability is also regulated by the Law (p. 1).

This means that foreign companies doing business in China can now benefit from the new law as they seek to protect their intellectual property from mass piracy and other violations which previously had few or no remedies in that market.

The new Chinese Tort Liability Law is regarded as extensive in both form and function as “its twelve chapters and nearly 100 articles contain definitions for joint, fault, and non-fault tort liability, as well as liabilities for infringement in multiple matters, including product liability, medical malpractice, and environmental pollution” (Walsh & Hern, 2010, p. 1). According to Walsh and Hern (2010), the new law firmly establishes Chinese citizens’ general right to seek damages against tortfeasors, and it also outlines available remedies such as cessation of tortious acts, exclusion of hindrance, elimination of danger, restoration of property, restoration of affairs, compensation for damages, delivery of a formal apology, elimination of adverse effects, and repair of damaged reputation. Melnitzer (2010) provides a description of the contents of the new law:

It covers a wide range of subject matter, including product liability, environmental pollution, hazardous activity, motor vehicle accidents and medical malpractice. The law also promulgates general rules regarding causation, burden of proof, damage calculations, and joint and several liability. In addition to damages, the law provides for specific performance remedies including orders to halt acts of infringement, remove unlawful obstacles, eliminate dangers, return property, restore property to its original condition, apologize or take other remedial actions (p. 1).

With such extensive coverage, China is bound to see a significant increase in the number of tort cases. Even before the passing of the new law, China had experienced a significant increase in the number of tort-related cases with courts reportedly hearing over 980,000 new tort cases in 2007 and more than a million in 2008 (Grobowski & Li, 2010). Chinese workers and businesses will now have a broader platform on which to make claims against others for tortious injuries.

Implications and Consequences for Chinese and Foreign Businesses

The passing of the new Tort Liability Law in China means that companies operating in China cannot continue with “business as usual” (Wang & Madaio, 2010). Thus, with regards to China’s New Tort Liability Law, Dai and An (2012) warn that “Foreign investors doing business in China should stay alert and take steps to mitigate their exposure to the increased liabilities under this new law” (p. 1). Many companies have already fallen as victims to China’s New Tort Liability Law. As a result, many companies are leaving China because of numerous lawsuits against them from employees, customers and other entities. General Electric, L’Oreal, and New Balance are among the companies that are looking to Vietnam, Indonesia and other countries as places to locate their factories (Hays, 2012). A California LED light company called Seesmart started shifting factories to California and Illinois instead of expanding current presence in China (Rapoza, 2012). Furthermore,

A survey by the Hackett Group consultancy found that 46 percent of executives at European and North American manufacturing companies said they were considering returning some production to the United States from China, while another 27 percent said they were actively planning for or are in the midst of such a shift (Rapoza, 2012, p. 1).

Other companies such as Caterpillar are reconsidering enlarging their domains in the Asian marketplace. One of the first victims of the tort liability law was Baidu, a Chinese web services company headquartered in the Baidu Campus in Haidian District, Beijing, and which is traded on the NASDAQ as BIDU. In fact, Baidu is the first Chinese company to be traded on the NASDAQ 100 Index and holds over 50% of the total market share for search engine queries in China (Abrams, 2010).

According to Abrams (2010), on Thursday, July 1, 2010, in a defamation case of a young woman who charged the company with offering her private photos and information in its search results and other products, the Shanghai Jing-an District People's Court ruled against Baidu, by ordering the company, which is a domestic search giant, to pay compensation in the sum of RMB 22,000 to the young woman. Additionally, the court ordered Baidu to display an open apology on its homepage for three consecutive days. Abrams (2010) notes that with regard to this case, while it received the first application of the newly passed tort and liabilities law, the major question which seems to have been the cause for action and decision made by the court was one of individual privacy rights violation. While Chinese society is highly regulated when it comes to information on the Internet, increasing "capitalist" ventures will certainly run into similar issues, especially when it comes to handling individual private information, even when dealing with third parties as was the case where this young woman's private photos and information, considered "indecent" and violating privacy, were posted online.

While Melnitzer (2010) argues that "the law is not aimed at foreign corporations" (p. 1), both Chinese and foreign companies doing business in China must become more aware of the extended liability under the new law which now provides for joint and several liability among joint tortfeasors (Wang & Madaio, 2010). The law brings many increased risks to U.S. and other foreign companies operating in China. Therefore, foreign businesses and their partners can be held liable for injuries; this applies to suppliers and sellers, where a product or other creation of theirs causes injury to employees or customers. This is especially the case in the products liability statutes, which are located in Chapter 5 of the law (Articles 41 through 47), and which make four broad changes that companies doing business in China should be aware of: (a) extension of possible defendants; (b) contribution between manufacturer and seller; (c) product recalls; and (d) punitive damages. This is further explained by Wang and Madaio (2010): "holding a manufacturer responsible for personal or property damage caused by a defective or unreasonably dangerous product, the law also grants an injured party the right to sue the seller of a defective product when searching for compensation" (p. 1). This means that the burden for product liability can be spread across several companies or foreign companies and their partners and suppliers. Furthermore, sellers of products in the Chinese market are held to a very strict standard under the tort and liability statutes because "in addition to being liable for defects it causes, a seller can now face strict liability if it is unable to identify the producer or supplier of a defective product" (Wang & Madaio, 2010, p. 2). Analysts of the new Chinese law see the law as a method of increasing the burden of product sellers in the market to ensure that they are knowledgeable and responsible in dealing with several manufacturing partners. As to defenses that foreign manufacturers in China could use in tort cases for product liability, Wang and Madaio (2010) suggest three possibilities implied in the law: (1) a manufacturer will likely not be liable if a product is not yet in the stream of commerce; (2) a manufacturer will also likely not be liable if the defect does not exist at the time of sale; and (3) a manufacturer will likely not be liable if the defect cannot be found at the time of sale due to scientific or other technological limitations.

The shared liability or responsibility for wrong stemming from product liability as communicated in the new Chinese law can cause bad business relationships and partnership failure to develop between foreign businesses, or foreign businesses and their Chinese partners and partnering companies as Article 43 of the law allows a seller full rights to seek contributions from a manufacturer if the seller can prove that a product contained a manufacturing or design defect. Alternatively, a manufacturer can also seek and obtain contribution from a seller if the manufacturer can demonstrate that the seller created the defect in the product, thereby causing or contributing to the injury or harm (Wang & Madaio, 2010). Thus, the new Chinese law permits both manufacturer and seller to seek contribution from a third-party such as a shipper, warehouse, or distributor if that third party created the defect in the product which has caused a tort or wrongful injury to customers. Such a far-reaching scope of tort liability can lead to the dismantling of entire industries or markets for foreign companies as they must often depend on their connections to several suppliers and partners in Asia and across the globe. Where liability incurred by a foreign or Chinese business company will damage the reputation and profits of its partners, this can lead to severance of the partnership, loss of profits and business opportunities, as well as loss of supply chain and logistical systems. Wang and Madaio (2010) support this assessment and analysis by arguing that “a company’s relationship with the other members of its distribution chain” (p. 3) can be affected by these demands, as “effective quality control mechanisms throughout the distribution chain is now much more important due to the ability of an injured party to seek damages from any seller or manufacturer, regardless of fault” (p. 3). Foreign companies must now closely monitor their manufacturing and product standards, and perhaps will have to incur the costs they have avoided in their home countries by fleeing overseas into the cheap labor and materials markets that attracted many to China and Asia.

Previously, in the Chinese market, product recall was not mandatory. However, under the 2010 Tort Liability Law of the PRC, Article 46 requires a manufacturer or a seller to provide warnings or to order a recall of a defective product. Wang and Madaio (2010) note, “Although past laws limited recalls to only certain products, the [new tort] law now requires all manufacturers or sellers to perform a voluntary recall or respond to a government ordered recall of any defective product on the market” (p. 2). This means that companies doing business in China will stand to lose far more money than previously, as they face recalls from claims of product defects under the new law. This can devastate the financial, market-branding, and productivity bases of companies, especially foreign companies which already must compete rigorously for Chinese customers’ loyalty against local brands that are culturally strong. Furthermore, Wang and Madaio (2010) also contend that “As both the manufacturer and the seller bear the responsibility of recalling defective products, both bear potential liability if remedial measures are not immediately taken and injuries result from a defective product’s use” (p. 1).

The new Chinese law now gives consumers and businesses greater power to interrupt the flow and profitability of business and to affect productivity, because Article 45 gives an individual party the right to ask a manufacturer or seller to eliminate a defect in a product that poses a danger to people or property (Wang & Madaio, 2010). This means that companies doing business in China will now face increased legal and social responsibility not only under government purview, but under the purview of their customers and partners or other parties that can use this right to demand ceasing manufacturing a product whether it contains slight or significant defects once such affect or endanger individuals or their property in any way. Thus, there is a greater need for accountability which many foreign companies had escaped in their

home territories by relocating to China. This means that one indirect result of the new Chinese Tort Liability Law will be leveling the accountability costs and playing field in terms of legal and administrative regulations and their impact on business profitability and processes. Wang and Madaio (2010) agree with this by arguing that this is troubling for manufacturers, as the cost of a recall to a manufacturer may well exceed any compensation to which a claimant demanding a product recall may be entitled.

Foreign companies doing business in China will now be required to pay punitive damages for wrongful harm to employees and customers. Wang and Madaio (2010) and Neumann (2010) note that punitive damages were generally not available in China before the 2010 Tort Liability Law. However, Article 47 of this new law allows for punitive damages against a defendant if a manufacturer or seller continues to produce a product knowing it causes a danger and the product causes death or serious bodily injury to consumers. This can be a big problem because previous to the law, manufacturers in China would often continue to manufacture products that were knowingly harmful to consumers, especially when such effect was not commonly known or proven through scientific and governmental involvement. The risk to do this has become extremely higher and many companies that choose to continue the “old ways” will find themselves in legal and financial problems from lawsuits and fines. Wang and Madaio (2010) describe the potential impact of China’s new liability laws on foreign manufacturing businesses in the Chinese market:

The existence of new liabilities in the law may create a need for increased product liability insurance, especially for those companies without coverage. In the past, a company with a manufacturing plant in China shipping all its products out of the country may have felt insulated from Chinese product liability law; however, with the extension of available defendants and the contribution aspects of the law, even a single product sold in China could be a source of potential liability for a manufacturer (p. 3).

While these represent increased responsibilities and costs on the part of manufacturers, many businesses stand to gain from the new law as attention to intellectual property rights could mean remedies for violation of their trademarks, copyrights, and other materials that were previously not covered under Chinese civil law practices. This is however an area which still needs significant development, since Du (2010) points out that there are really no special sections in the new law for intellectual infringement, but provisions for trademarks and copyrights as protected objects. Furthermore, Du (2010) notes that some provisions of the new law involve the employment management of enterprises because civil rights and interests protected by the new law include some personal rights, such as privacy right, portraiture right and name right that affect companies’ treatment of and relationship with their employees. The implications of the new Chinese Tort Liability Law for employers are tremendous. Because of the focus on individuals’ rights, especially concerning privacy and personal rights, Yu (2010) believes that employers will have to improve and perfect their management systems and procedures related to staff files and employee privacy, so as to prevent personal information from being discovered and used carelessly. Additionally, the experience of Baidu as the first victim of the new Chinese law indicates that companies can no longer freely use portraits and the names of employees, or private individuals, including customers, in business advertising without first getting prior consent.

Foreign businesses operating in China must become cognizant of the fact that under the new law, whenever their employees cause damage to others in the execution of their work duty,

they will have to assume complete tort liability. According to Yu (2010) employees for which employers assume tort liability under the new law include dispatched workers, rehired workers and interns. Under the new law, if the employer dispatching the employee has fault, then the employer must assume the corresponding complementary liability. Yu (2010) also points out that under the new Tort Liability Law, corporations or enterprises will bear the tort liability when they fail to fulfill obligations of security as the organizers of group activities that cause damages to employees. This means that these corporations will have to incur new and additional costs in the form of supplemental insurance and costs in assuring the security of participants during such activities.

If companies already operating in China follow the strict rules regulating information and the Internet so far, then they will perhaps face fewer lawsuits resulting from the passing of China's new Tort Liability Law. However, the inclination toward embracing greater technology and aspects of free-market enterprise in business will create further vulnerability and potential liability issues for companies, especially foreign and western companies that ignore country-culture practices in doing business.

The Vulnerability of Foreign Businesses

Chinese society has always been nationally and culturally entrenched in its collective predisposition, perception and perspective toward foreigners, as well as how they are treated relative to Chinese citizens and collective interests (Wu, 2004). This makes foreign corporations and individuals doing business in China rather more vulnerable to claims of negligence and even bias in the legal system when they must face Chinese prosecutors, judges and jurors, who must act in the Chinese's and China's best interests. The historical, cultural-social and political experience with foreigners has overall been a highly negative one for China, and the 1930s in particular cemented and fostered several reasons and motives for harboring resentments (Asia for Educators - Columbia University, 2009). There should be a significant level of fear that these resentments might resurface in the application of the new Tort Liability Law as a means to exact historical revenge on foreigners based not only on what could be purported as collective Chinese interests, but on nationality, since many of these foreign companies are from nations whose past in China was a major source of uproar, revolutionary conflict and resistance to foreigners and change, especially characterizing the deposing of China's dynastic government in the 1900s (Asia for Educators - Columbia University 2009).

The law can be a powerful tool when it comes to providing justice and redress to individuals and other entities seeking recovery from harm or injury, reinstatement and protection of rights and privileges, as well as fairness. However, it can also be a tool that can be used inappropriately to exact revenge, manipulate situations, as well as take advantage and victimize others when it falls in the wrong hands or is subjected to biases inherent and concocted based on social, cultural, ideological and political perspectives and values. This means that foreign businesses, particularly Western companies, might find themselves victims to unfair or biased application of the newly applied tort liability laws in Chinese society where employees, especially native Chinese, now have a powerful weapon with which to achieve their personal objectives or manipulate the system. Su (2010) agrees with this by stating that "Despite recent market reforms, the Chinese legal system continues to focus less on individual rights than on community concerns, reflecting not only China's communist roots, but also the more deeply ingrained Confucian cultural beliefs" (p. 1). Zhang (2011) agrees with Su on this point by referring to China as "a country where the clan and rites based Confucian orthodox dominate[s]"

(p. 418). In fact, such behaviors as fraudulent claims, biases, and misuse of tort and liabilities law have long been characteristic of western societies where many private individuals and employees filing fraudulent and deceptive claims and suits for harm or wrongs against companies; money being a major motivating factor – have won and obtained compensation, sometimes totaling millions of dollars.

While no justice system is perfect and this can be expected everywhere, the vulnerability and potential in Chinese society for such to occur, given the juvenility of China's tort and liabilities laws, is more than a probability. In fact, one can say that such will certainly become a great obstacle in the enforcement and due process as the judicial system interprets and applies this law. In fact, one foreign company executive expressed similar concerns: "My general impression is that Chinese suits are much more frequently aimed at premium foreign brands as opposed to domestic brands or run-of-the-mill imports" (Melnitzer, 2010, p. 1). Thus, foreign companies might become worn down by being the most prominent targets of Chinese workers who now see new opportunities for money and wealth within the frameworks of the new law. Melnitzer (2010) believes that the law can be a dangerous tool in the hands of Chinese workers and citizens because it gives claimants virtually unlimited causes of action by protecting civil rights including the right to life, health, reputation, honor, self-image, marriage, privacy, ownership, security interests and intellectual property in extensive ways.

Implications for Corporate Legal Compliance

According to Zhang (2011), regarding China's 2010 Tort Liability Law, there is a substantial gap between the law on paper and the law in action, and the enforcement of the torts law remains as a major challenge to the Chinese legal system in general and to the Chinese judiciary in particular. Furthermore, being relatively new in terms of law and legal principles, the new tort liabilities and tort law passed by the Chinese government requires deeper and more extensive legislative and judicial interpretations, as well as time to deal with any existing ambiguities (Zhang, 2011). Some individuals also argue that the new Chinese Tort Liability Law was hastily conceived (Melnitzer, 2010), and others simply feel that the average Chinese citizens who are the majority of workers and could be significantly affected by this law are not ready because of lack of education and lack of state initiative to educate citizens about the law. As this unfolds, foreign businesses in China may find themselves caught up in long and uncertain legal battles with employees, customers or other parties in the legal system. Businesses failing to meet requirements under the new Chinese law are faced with serious financial consequences including complete failure (Wang & Madaio, 2010).

Some individuals are dubious that the new Chinese law will significantly bring the great protection to individuals that tort and liability laws offer in western nations. For example, Su (2010) argues that "While the adoption and implementation of laws relevant to its burgeoning market economy will continue to expand, China's legal bureaucracy remains unassertive, infrequently interpreting or expanding existing law" (p. 1), and community rights continue to dominate in this collective society where this has been the norm for century, and where communism perpetuates through collective control. This is plausible, since Zhang (2011) in the most extensive analysis of the new law uncovered so far, reminds us that, "Torts" is an imported concept in China [and] In Chinese legal history, because of the dominance of criminal law, little attention was ever paid to civil matters" (p. 423). This means that a new appreciation of civil law

will need to develop for the new Chinese Tort Liability Law to fully realize its purpose and accomplish the levels of individual protection enjoyed in western societies.

Melnitzer (2010) believes that the new law lacks detail and there is an extensive absence of key statutory definitions needed to interpret and understand it fully. Some critics also argue that the new tort liability will have no impact (Grobowski & Li, 2010). Despite these doubts, China's relationship with opened democracies and capitalist systems such as the United States will exert some influence in making the new law important. Additionally, trends in the global economy and global interconnections will also have their impact on the forced need to make individual protection a major aim of the Chinese government in order to achieve the "civil" society it aims to build. Thus, foreign companies doing business in China must not waste time to gamble on the probability of its enforcement or application, but must be prepared to shield themselves against its negative impact in terms of legal and financial costs.

There are several actions that foreign companies doing business in China can take to avoid and lessen tort and liability actions and lawsuits. These include understanding the new law and how it can potentially impact their businesses, ensuring that there is uniformity and quality in their manufacturing, supply, and distribution chains to lessen and eliminate product defects that might subject them and their partners including shippers, warehousing, and distributing partners to products liability claims, and as Wang and Madaio (2010) note, having effective and immediate communication with all members of the distribution chain as a conduit to initiating and managing recall immediately upon discovery of a product defect as a means of minimizing potential liability or altogether avoiding it through preemptive action. Melnitzer (2010) believes that a key recommendation is that companies should revisit their consumer or professional labeling practices, product use instructions and warnings, and crisis management policies in the event of adverse developments that might engage the Tort Liability Law.

Product liability issues are only one aspect of the consequential impact of the new Chinese law. Foreign businesses will face legal problems from personal injury resulting from other conduct such as polluting the environment and causing harm or injury to health and life, death resulting from activities in the workplace or otherwise from business activities, and injuries of various sorts related to negligence and intentional torts connected to them and their business partners. Therefore, they must educate their leaders, managers, partners, and employees about the new Chinese law and make safety and social responsibility key success factors in this now legally evolved environment where workers, consumers, and business partners including sellers, can initiate and claim injury from tort conduct by businesses. Foreign companies in particular, must take necessary measures to protect themselves against the vulnerabilities which the new Chinese tort and liability laws create by applying the high standards of doing business present in their home countries. For example, U.S. companies doing business in China need to now recognize the similarities of Chinese and western tort laws and recognize that conformance to home-country rules and regulations will be more than half the job done in avoiding falling victim to the tort claims that have already driven many from what was once a fundamentally "legal-free" market with little regulation.

The importance of the new Chinese Tort Liability Law can be seen in its ability to prevent incidents such as the Sanlu tainted-milk incident in which at least six infants died and roughly 300,000 others were left suffering from lingering health problems (Neumann, 2010). If the new law can prevent problems like this, then both Chinese society; citizens, and businesses, foreign and domestic, will benefit significantly. Whatever the lasting value will be, there is no doubt that the passing of the new Tort Liability Law will protect the interests of many

disadvantaged Chinese laborers in what was previously an employer-rights dominated market. Furthermore, the new tort and liabilities laws will lead to more accountability and greater social responsibility on the part of businesses to individuals and society. While many western companies will lose millions of dollars from lawsuits and increased claims, if the new law protects individuals' rights and well-being it will have achieved some significant progress in the Chinese legal and justice system. As the new law continues to emerge and receive interpretations, what is certain is that "the growth and flourishing of China's young tort law lies in the hands of its judges and scholars, its government, and its people" (Bublick, 2011, p. 37).

According to Hays (2012), "By mid 2000s, there was a growing trend of favoritism to Chinese companies at the expense of foreign ones" (p. 1). In 2010, China announced plans to require Western companies doing business in China to turn over sensitive technologies and patents to Chinese competitors in exchange for access to the country's markets (Hays, 2012). This poses an even greater legal challenge to foreign companies coupled with those stemming from the recent tort liability laws. Multinational competition is beginning to erode in China (Economist Intelligence Unit, *The Economist*, 2011). Therefore, foreign companies are now paying greater attention to worker complaints and issues as the new laws are being effectively used to uncover challenges to workers' well-being. For example, in October 2011, European luxury group Gucci, had to replace two managers in southern China after former workers at a store released an open letter alleging employee abuse (Hays, 2012).

According to the BBC News Business Journal (2013), in an April 2013 conference in Southern China, China's President, Xi Jinping, promised to protect the rights of foreign companies, stating that, "China will sustain relatively high economic growth, but not super-high economic growth" (p. 1), and that China will "protect the lawful rights and interests of foreign-invested companies...and ensure their rights to equal participation in government procurement and independent innovation" (BBC News Business Journal, 2013, p. 1). This new declaration will perhaps alleviate some of the fears and worries of foreign companies harboring a belief that the Chinese government will be pressured by Chinese nationals as they seek to benefit from the new liability laws that give them a greater defense against company practices outside regular business norms.

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English Abstract

The Implications of China's 2010 Tort Liability Law for Foreign Companies doing Business in China

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Abstract

In this paper, the author examines the new Chinese Tort Liability Law in terms of its implications for foreign companies doing business in China. The author introduces the playing field in which companies are operating in the Chinese market as the new law emerges. Thus, the author examines the economic and legal terrain before and after the passing of the new Tort Liability Law of 2010, looking at the Foreign Corrupt Practices Act (FCPA) and its usefulness and application, as well as an environment previously characterized by a lack of legal rights for individuals, particularly Chinese employees. A basic understanding of tort law is presented through definitions and components before the author examines the meaning and importance of the new law and its most salient provisions and requirements in light of the issue under consideration in this paper. The implications and consequences of the new law for both domestic and foreign businesses in China are analyzed and the author focuses on the vulnerability of foreign businesses given the philosophical underpinnings and Confucian tendency of Chinese society. In the final analysis, the author explores the criticisms and other obstacles which the new law must face and provides several recommendations for foreign companies doing business in China to lessen or avoid liability actions and claims.

Keywords: Chinese Tort Liability Law, FCPA (Foreign Corrupt Practices Act), negligence, PRC (People's Republic of China), PC (People's Court).

French Abstract*

The Implications of China's 2010 Tort Liability Law for Foreign Companies doing Business in China

Les Implications de la nouvelle loi de 2010 sur la responsabilité délictuelle en Chine sur les entreprises étrangères faisant des affaires en Chine

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Résumé

Dans cet article, l'auteur examine la nouvelle loi sur la responsabilité délictuelle chinoise en termes d'implications pour les entreprises étrangères faisant des affaires en Chine. L'auteur introduit d'abord le champ d'action dans lequel les entreprises opèrent sur le marché chinois lorsque la nouvelle loi a émergé. L'auteur examine le terrain économique et juridique avant et après l'adoption de la nouvelle loi sur la responsabilité délictuelle chinoise, en 2010, en regardant également le Foreign Corrupt Practices Act (FCPA), y compris son utilité et son application, ainsi que l'environnement déjà caractérisé par une absence de droits juridiques pour des individus, en particulier pour les employés chinois. Une compréhension élémentaire de la loi sur la responsabilité délictuelle est présentée, par des définitions et des composants, avant que l'auteur examine la signification et l'importance, les dispositions et les exigences les plus saillants de la nouvelle loi. Les implications et les conséquences de la nouvelle loi, à la fois pour les entreprises domestiques et étrangères en Chine, sont analysées et l'auteur met l'accent sur la vulnérabilité des entreprises étrangères, étant donné les fondements philosophiques confucéens de la chinoise société. Enfin, l'auteur explore les critiques et autres obstacles, auxquels la nouvelle loi doit faire face, et propose plusieurs recommandations pour les entreprises étrangères faisant des affaires en Chine pour réduire ou éviter les actions et demandes de responsabilité.

Mots-clés: La nouvelle loi sur la responsabilité délictuelle, FCPA (Foreign Corrupt Practices Act), Négligence, République Populaire de Chine, PC (La Cour Populaire).

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German Abstract*

The Implications of China's 2010 Tort Liability Law for Foreign Companies doing Business in China

Die Auswirkungen des chinesischen Haftpflichtrechts von 2010 für ausländische Unternehmen, die in China Geschäfte tätigen

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Zusammenfassung

In diesem Papier untersucht der Autor das neue chinesische Haftpflichtrecht in Bezug auf die Auswirkungen für ausländische Unternehmen, die Geschäfte in China tätigen. Der Autor führt ein Spielfeld ein, in welchem die Unternehmen auf dem chinesischen Markt agieren, während das neue Gesetz erscheint. So untersucht der Autor das wirtschaftliche und gesetzliche Terrain bevor und nach der Verabschiedung des neuen Haftpflichtrechts in 2010 mit Blick auf den Foreign Corrupt Practices Act (FCPA) und seine Nützlichkeit und Anwendung sowie die Umgebung, die vorher durch Mangel an gesetzlichen Rechten für Personen, besonders für chinesische Angestellte charakterisiert war. Ein grundlegendes Verständnis des Deliktrechts wird durch Definitionen und Bestandteile präsentiert bevor der Autor die Bedeutung und die Wichtigkeit des neuen Gesetzes und seine hervorragendsten Bestimmungen und Voraussetzungen hinsichtlich des Problems in diesem Papier untersucht. Die Auswirkungen und Konsequenzen des neuen Gesetzes werden für inländische und ausländische Geschäfte in China analysiert und der Autor konzentriert sich auf die Verwundbarkeit der ausländischen Geschäfte angesichts der philosophischen Untermauerung und konfuzianischen Tendenz der chinesischen Gesellschaft. In der abschließenden Analyse untersucht der Autor die Kritiken und die anderen Hindernisse, welche mit dem neuen Gesetz einhergehen und liefert mehrere Empfehlungen für ausländische Unternehmen, die Geschäfte in China machen, um Haftungsklagen und Ansprüche zu vermindern oder zu vermeiden.

Schlüsselwörter: Chinesisches Haftpflichtrecht; FCPA (Foreign Corrupt Practices Act); Nachlässigkeit; PRC (People's Republic of China); PC (People's Court).

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Spanish Abstract*

The Implications of China's 2010 Tort Liability Law for Foreign Companies doing Business in China

Las Implicaciones de la Ley de Responsabilidad de Daños de China de 2010 para Empresas Extranjeras que operan en China

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Abstract

En este trabajo, el autor examina la nueva Ley de Responsabilidad de Daños de China en términos de sus implicaciones para las empresas extranjeras que hacen negocios en China. El autor introduce al campo de juego en el que las empresas están operando en el mercado chino como emerge la nueva ley. Por lo tanto, el autor examina el terreno económico y jurídico antes y después de la aprobación de la nueva Ley de responsabilidad por daños de 2010, mirando a la Ley de Prácticas Corruptas en el Extranjero (FCPA) y su utilidad y aplicación, así como un entorno caracterizado previamente por la falta de derechos legales de los individuos, en particular los empleados chinos. Un conocimiento básico de la ley de responsabilidad civil se presenta a través de las definiciones y los componentes antes de que el autor examine el significado y la importancia de la nueva ley y sus disposiciones más relevantes y los requisitos a la luz de la cuestión que se revisa en este trabajo. Las implicaciones y las consecuencias de la nueva ley, tanto para las empresas nacionales y para las extranjeras centrándose en la vulnerabilidad de las empresas extranjeras, dados los fundamentos filosóficos basados en Confucio de la sociedad china. En el análisis final, el autor explora las críticas y otros obstáculos que la nueva ley debe enfrentar y ofrece una serie de recomendaciones para las empresas extranjeras que hacen negocios en China para disminuir o evitar la acción de responsabilidad y de reclamaciones.

Keywords: Ley china de Responsabilidad Civil Extracontractual, FCPA (Ley de Prácticas Corruptas en el Exterior), negligencia, República Popular China (República Popular China), PC (Tribunal Popular).

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Arabic Abstract*

The Implications of China's 2010 Tort Liability Law for Foreign Companies doing Business in China

الآثار المترتبة على قانون المسؤولية التقصيرية في الصين 2010 و مسؤوليتها عن الشركات الأجنبية العاملة في الصين

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ملخص

يتناول المؤلف في هذه الورقة القانون الجديد للمسؤولية التقصيرية في الصين و الآثار المترتبة على الشركات الأجنبية العاملة في الصين . حيث يقوم المؤلف بإعطاء الحق لجانب الشركات التي تعمل ضمن نطاق السوق الصيني في ظل القانون الجديد . وبالتالي , يدرس المؤلف الأوضاع الاقتصادية و القانونية قبل و بعد صدور القانون الجديد (المسؤولية التقصيرية) من عام 2010 و النظر في ممارسات الفساد الأجنبي و فائدة تطبيقه , و المقارنة بالبيئة السابقة التي كانت تتسم بنقص الحقوق القانونية للأفراد و الموظفين الصينيين بشكل خاص . حيث يتم تقديم أساسيات تفهيمية و توضيحية لشرح مكونات و تعاريف و دراسة معنى و أهمية القانون الجديد و أحكامه و أبرز متطلباته في ضوء هذه القضية قيد البحث , ثم يتم تحليل آثار و نتائج القانون الجديد لكل من الشركات المحلية و الأجنبية في الصين حيث يركز على درجة الضعف من ناحية الشركات الأجنبية و ذلك نظرا للأسس الفلسفية و الميول الكونفوشوسية في المجتمع الصيني . و في التحليل النهائي , يوضح المؤلف الانتقادات و غيرها من العقبات التي ستواجه القانون الجديد , و يقدم عدة توصيات للشركات الأجنبية لتقليل و تجنب الإجراءات و المطالبات بالمسؤولية عند ممارسة الأعمال التجارية في الصين .

الكلمات الدالة: قانون المسؤولية التقصيرية الصيني, قانون الممارسات الأجنبية الفاسدة, الإهمال, جمهورية الصين الشعبية, محكمة الشعب.

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Italian Abstract*

The Implications of China's 2010 Tort Liability Law for Foreign Companies doing Business in China

Le implicazioni della Tort Law di Responsabilità del 2010 in Cina per le aziende straniere che fanno business in Cina

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Abstract

In questo studio l'autore esamina la legge cinese di responsabilità Tort in termine delle implicazioni che ha sulle aziende che svolgono affari in Cina. L'autore introduce il contesto in cui si trovano le aziende straniere nel momento in cui la legge sta emergendo. Per questo motivo l'autore esamina il terreno economico e legale prima e dopo l'introduzione della legge nel 2010 con particolare riferimento alla legge sulle pratiche di corruzione estera FCPA, la sua utilità e applicazione, oltre che l'ambiente che era precedentemente caratterizzato da una mancanza di diritti legali per le persone, in particolare i lavoratori cinesi. Una comprensione di base della Tort Law viene introdotta attraverso definizioni e componenti, poi l'autore esamina il significato e l'importanza della nuova legge riguardo ai fattori evidenziati nello studio stesso. Vengono analizzate le implicazioni e conseguenze dell'implementazione della legge sia per aziende cinesi che straniere e l'autore si concentra sulla vulnerabilità delle aziende straniere a causa degli aspetti filosofici e basi di Confucianesimo che fanno parte della società cinese. Infine l'autore esplora aspetti critici che altri ostacoli con cui la nuova legge deve confrontarsi e fornisce varie raccomandazioni per aziende straniere che operano in Cina al fine di ridurre o evitare richiami cause di responsabilità.

Parole Chiave: La Legge Cinese di Responsabilità Tort, FCPA (Foreign Corrupt Practices Act, negligenza, PRC (Repubblica Popolare Cinese), PC (Corte Popolare)

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Chinese Abstract*

The Implications of China's 2010 Tort Liability Law for Foreign Companies doing Business in China

中国 2010 侵权责任法对在中国开展业务的跨国公司的启示

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[摘要]

[在本文中，作者考察了新出台的中国侵权责任法对在中国开展业务的跨国公司的启示。作者介绍了伴随着此新法的颁布出现的公平竞争环境，即在中国市场经营的跨国公司。作者考察了中国侵权责任法之前和之后的经济和法律领域，介绍了反海外腐败法（FCPA）以及它的实用性和应用，并介绍了以前缺乏对个人，特别是中国员工的合法权益的市场环境。本文先通过定义和组成部分介绍了对侵权法的基本了解。然后本文探讨了此法的意义和重要性以及其最显著的规定和要求。本文分析了此法对中国的公司以及在中国的跨国公司的影响和结果。作者着重考虑了中国社会中儒家倾向和哲学基础之下的跨国企业的脆弱性。在最后的分析中，作者探讨了此新法必须面对的批判和其他障碍；并为对跨国公司提出了如何减轻或逃避诉讼和索赔的若干建议。]

[关键词: 中国侵权责任法, FCPA (反海外腐败法), 疏忽, PRC (中华人民共和国), PC (人民法院)。]

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