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China

Overview

In 1995, for the purpose of clamping down and punishing improper debt collection activities, the Chinese government issued an administrative regulation of "Notice on Prohibition of Establishing Debt Collections Companies." In 2000, another notice of "Notice on Revocation of Various Kinds of Debt Collection Companies and Attack on Illegal Debt Collections Activities" was issued.

According to the above regulations, it is prohibited for any enterprises or individuals to establish debt collection companies in any form and to engage in debt collection business. In short, debt collection activity in China is prohibited. But, law firms are exempt from the prohibition.

However, in real practice, the relevant government / administrative authorities are not pro-active in enforcing these rules and generally do not take the initiative to investigate / penalize such debt collection activities, unless there are complaints against dubious tactics employed by debt collectors.

Meanwhile, "debt collection activities" still do not come within the business scope which would be permitted or approved by the Administration of Industry & Commerce. A company, which conducts debt collections activities are in the name of "consulting services" or "credit management services".

It is noted that Chinese domestic creditors have a completely different attitude to overdue debts from their Western Counterparts. In China overdue debt is handled by negotiation rather than by such forms of intense credit control pressure as phone calls, threatening correspondences, lawyers demand letters etc.

Legal and Judicial System

The modern Chinese legal system mainly consists of three levels of law are:

1. Laws, administrative regulations and departmental rules;
2. Local regulations, autonomous region regulations; and
3. Specific regulations.

The PRC's legal system is broadly divided into three levels:

1. The central government level;
2. Provincial or municipal government level, and
3. Local municipal or county government level.

In each case, the higher the level of government, the greater the degree of authority and responsibility. Foreign investors need to understand which authorities are relevant to their particular activities and it is important to appreciate that the role of government is very significant in PRC business matters.

There is a hierarchy within the court structure from the top down:

1. The Supreme People's Courts,
2. The Higher People's Courts,
3. The Intermediate People's Courts, and
4. The Basic People's Courts.

The People's Courts represent the trial organ of the state.

The Basic People's Courts are comprised of more than 3,000 courts at county level, which are further subdivided into about 20,000 smaller units referred to as people's tribunals located in towns and villages. There are 376 Intermediate People's Courts and 31 Higher People's Courts located in the provinces.

A judgment granted by a first instance court can, as of right, be appealed to an appellate court whose ruling is final. Under certain exceptional circumstances, e.g., when there arises a serious misapplication of law, a serious procedural irregularity or when new evidence comes to light, etc., the ruling of the appellate court can further be reviewed.

Litigants are generally limited to one appeal, on the theory of finality of judgment by two trials. Cases of second instances are often reviewed de novo as to both law and facts. Judgment at second instance is final, which means that a case is only heard twice by two levels of courts and the last court decision will be rendered final and binding.

International Treaties

The 1982 Constitution does not specify the treatment of international law in relation to the laws of the PRC. However, in practice the legislative approach has been to automatically incorporate international law as part of PRC law. If, however, the PRC has made a reservation to a provision of a treaty, this aspect or provision of the treaty is not implemented in the law.

Limitation of action

In general, the limitation of action regarding applications to a People's Court for protection of civil right under general trading is two years and for some exceptional international purchasing contracts is four years.

This means after the stipulated period (counting from the last demand date but not the original due date), the creditor cannot file a claim under the jurisdiction system but only can use other methods to collect their debts.

Dispute Resolution

Civil or commercial disputes in China can also be resolved through other alternative dispute resolution processes such as arbitration or mediation.

Civil and commercial disputes are traditionally resolved by litigation in the PRC Courts.

An Intermediate People's Court deals with a considerable number of disputes exceeding RMB 20 million at first instance. A Higher People's Court whose jurisdiction varies from province to province and municipality to municipality deals with large claims at first instance.

Arbitration System

Arbitration bodies are set up in China at the national and local levels. The China International Economic and Trade Arbitration Commission (CIETAC) is the arbitration agency in China that handles international economic and trade disputes.

It is headquartered in Beijing and has branch offices in Shenzhen, Shanghai and Chongqing. In addition, local arbitration bodies such as the Beijing Arbitration Commission and the Shanghai Arbitration Commission arbitrate domestic and foreign-related cases.

Arbitration rulings in China are “One Instance Being Final”, which means that the ruling takes effect immediately upon pronouncement. Even if the parties are not happy with the ruling, they cannot file a suit to the court for the same dispute or apply for arbitration or reconsideration to arbitration organizations. Instead, they should automatically implement the ruling; otherwise the other party has the right to apply to the court for enforcement.

However, parties may apply to the court for a review and verification of the case and annulment of the arbitration ruling if they believe it is indeed wrong and conditions for a legal revocation have been met.

Mediation System

There are currently four types of mediation practices in China:

1. Civil mediation:

Mediation by People's Mediation Committees outside the court.

2. Judicial mediation:

Mediation by a court of law in civil and economic disputes and minor criminal cases inside the court. Mediation is not a necessary procedure. A court's mediation document is as valid as its verdict.

3. Administrative mediation:

This can be outside-the-court mediation by grassroots governments such as a township government in ordinary civil disputes, or outside-the-court mediation by government departments in compliance with legal provisions in specific civil disputes, economic disputes or labour disputes

4. Arbitration mediation:

Mediation by arbitration bodies in arbitration cases. Arbitration is called upon only if mediation fails to resolve the differences. This is also an outside-the-court mediation.

Article 91 of the Civil Procedure Law provides that a court of law should adjudicate in a timely fashion if mediation fails to produce an agreement or if one party retracts before the mediation document arrives.

Bankruptcy Law

The Law of the PRC on Enterprise Bankruptcy (New Bankruptcy Law, “EBL”) which took effect on 1 June 2007 has a widening of applicability. It is part of the country’s attempts to align with international best practice.

The old Bankruptcy Law applied only to state-owned enterprises (SOES), but the EBL comprehensively applies to all entities that hold legal person status, even with regard to financial institutions, such as commercial banks, insurance companies and securities companies.

The new concept of administrator was established in the EBL, which provides that the People’s Court is required to appoint an administrator upon acceptance of a bankruptcy petition. Personnel from relevant departments and agencies, such as a law firm, accounting firm or bankruptcy liquidation firm, can act as administrator.

The administrator must carry out its duties and report to the People’s Court, and is subject to monitoring and supervision by the creditors. The EBL empowers the administrator to review the creditor’s claim and the creditor’s meeting to verify the creditor’s claim.

In addition to allowing the appointment of an administrator to take control of a bankrupt entity's affairs, the EBL has significantly broadened the role of creditors, by providing a mechanism for them to place debtor companies into bankruptcy or reorganization.

Moreover, the EBL provides for the establishment of a creditor's committee. The creditor's committee shall be appointed by the creditor's meeting and shall consist of no more than nine members. The members are required to be approved by the People's Court.

Under the EBL, secured creditors in relation to their secured assets shall be paid first, and employee claims and other welfare shall be paid from unsecured assets.

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