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“Excuse Me Sir a Stop Order is in place preventing you from leaving China”

That will be the last thing you want to hear when you are about to leave China at airports or other border crossings in China. However, this risk exists if the foreign employee or the company he or she works for is involved in litigation in China and he or she is the legal representative, person in charge or holds a position of key responsibility in the company.

Recently, a client WFOE consulted our office regarding an “immigration stop order” which had been imposed on its legal representative (an Australian). The WFOE was involved in an employment litigation in which judgment had been entered against the WFOE and a stop order had been applied for and issued against the legal representative of the WFOE, pending enforcement of the judgment. This order was then notified to the PRC Immigration authorities by the Court.

The legal representative was therefore prevented from leaving China. What is of particular concern is that such orders appear possible to obtain from the Chinese court before a final judgment is obtained and therefore potential abuse of these orders exists especially in civil cases which may involve (1) a WFOE and Chinese domestic company or where (2) there is a claim between the WFOE and a Chinese national.

The further question arises that if the PRC Company Law 2005 and General Principle of Civil Law 1987 are supposed to enshrine the concept of “limited liability”, then the rationale for a stop order is to ensure the presence of a key executive only for the purpose of giving evidence in civil proceedings and is not supposed to extend to the provision of security by that individual or restriction on

an individual's rights of travel until enforcement of a judgment is obtained against the company for whom he or she is employed.

Below, we summarize the current regulations concerning restrictions on foreigners from exiting China.

A. In what situations will an Immigration Stop Order be made preventing a foreigner from leaving China?

In accordance with Law on Foreigners Entry and Exit of Chinese Territory, foreigners may be banned from leaving China in the following situations:

- (1) They are suspects in criminal cases;
- (2) They are involved in civil cases that are yet to be settled;
- (3) They have as an individual committed other violations of Chinese laws.

In this article, we discuss the restrictions that may be imposed in economic and commercial disputes. The revised China Civil Procedures Law state that persons (natural or corporate) subject to enforcement proceedings may be banned from leaving the country.

Based on these rules, it can be inferred that after a case is heard by the court until the completion of enforcement of the judgment, an order can be issued by the court to the PRC immigration authorities preventing the foreigner from exiting China at any time.

B. Who is at risk of being subject to a Stop Order?

For individual foreigners involved in Chinese litigation, they themselves are at risk.

This question often arises where a foreign invested company with a foreign management team is involved in litigation. Foreign managers/representatives are very concerned whether they will be banned from leaving China because their company is litigated against.

In this regard, the judicial interpretation on the China Civil Procedures Law has made it clear that if the person subject to enforcement/execution is a corporate entity, the legal representative, person-in-charge and other directly responsible person may be banned from exiting China.

C. How long will a Stop Order preventing a person from leaving China remain in place?

The regulations provide a maximum of 30 days however an applicant who seeks the stop order and/or the Court itself is free to extend the stop order on its own volition. However, there is no clear limitation on the length of an immigration stop order. Certain judicial comments have been made suggesting a maximum period of 90 days should be applied but in practice the stop order can be in place indefinitely. Upon meeting certain conditions, the stop order will be lifted.

D. Corporate Bankruptcy

According to China Bankruptcy Law, during the period from the date of the Chinese court accepting a bankruptcy case to the date of completion of the bankruptcy action, the court may order that relevant persons of the company which is the subject of the proceeding not to leave China. Such persons shall include in the first place the “legal representative” of the company, or by application to the court, could extend to “financial officers and other executives”.

Summary

So where your company in China is going to be involved in litigation or possibly be subject to bankruptcy proceedings, it may be prudent to consider whether (a) key executives should be removed from corporate positions that may render a key employee or manager exposed to an immigration stop order and prevent her or him from leaving China. Also, (b) consider whether contracts in China should be made subject to arbitration rather than litigation as a dispute forum to minimize the risks of such a court order being made or available to be made.

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