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### **Tort Liability Law of the PRC**

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The Tort Liability Law of the People's Republic of China ("***Tort Law***" or "***Law***") was adopted at the 12th session of the Standing Committee of the Eleventh National People's Congress on 26 December 2009, and shall come into force on 1 July 2010.

#### **Legislative Background and Significance**

China is enacting the Civil Code. China's Civil Code is not completed once, but is developed step by step. The Tort Liability Law is another most important law in the field of civil law in China after the Contract Law and the Real Right Law. Its birth marks that the main part of the Civil Code of China has been completed.

As known, the establishment and improvement of Tort Law is to fully guarantee the lawful rights and interests including personal rights and property rights of civil subjects, and to further perfect the basic rules of market economy. Development of the market economy needs to comprehensively confirm the property right, so it is urgent to need corresponding tort law to provide more protection for property rights. We can say that tort law is a law protecting the rights and interests, which gives a full expression to the value of rule of law and the spirit of the times. The basic

connotation of the rule of law should be limitation of public rights and security of private rights. For the protection of private rights, it will largely depend on the tort law.

### **Framework of the Law**

The Tort Liability Law generally stipulates the liability composition, methods of assuming liability, the circumstances to waive or mitigate liability, and liability subjects. It then respectively lists 8 special tort liabilities based on the above general principles.

How to assume the tort liability is the core of the tort liability law. According to the Law, one who is at fault for infringement upon a civil right or interest of another person shall be subject to the tort liability<sup>1</sup>; one who is at fault as construed according to legal provisions and cannot prove otherwise shall be subject to the tort liability<sup>2</sup>; one who shall assume the tort liability for infringing upon a civil right or interest of another person, whether at fault or not, as provided for by law, shall be subject to such legal provisions<sup>3</sup>. Therefore, the tort liability consists of three necessary elements: 1) infringement; 2) damage; and 3) causality between infringement and damage. The fault is not necessary – the subject has to assume tort liabilities even if it is not at fault under the situation of special torts listed in the Law.

The methods of assuming tort liabilities include: 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. These methods of assuming the tort liability may be adopted individually or jointly.<sup>4</sup> Regarding the compensation, in the situation of the liability concurrence, namely, the infringer would bear civil tort liability, as well as the corresponding administrative liability or criminal liability, the Law confirms the priority of civil tort liability - where the infringer is answerable in terms of tort, administrative and criminal liability for the same act, but has insufficient means to discharge his obligations, his tort liability takes precedence.<sup>5</sup> Such provision indicates that the Tort Liability Law can ensure the rights owner obtain compensation farthest, so that its rights are fully realized. Regarding the amount of property losses, it shall be calculated as per the market price at the time of occurrence of the loss or calculated otherwise.<sup>6</sup> When any harm caused by a tort to a personal right or interest of another person gives rise to any loss to the property of the victim of the tort, the infringer shall make compensation as per the loss sustained by the victim as the result of the tort. If the loss sustained by the victim is hard to be determined and the

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<sup>1</sup> Please see Item 1 of Article 6 of the Tort Liability Law.

<sup>2</sup> Please see Item 2 of Article 6 of the Tort Liability Law.

<sup>3</sup> Please see Article 7 of the Tort Liability Law.

<sup>4</sup> Please see Article 15 of the Tort Liability Law.

<sup>5</sup> Please see Item 2 of Article 4 of the Tort Liability Law.

<sup>6</sup> Please see Article 15 of the Tort Liability Law.

infringer obtains any benefit from the tort, the infringer shall make compensation as per the benefit obtained by it. If the benefit obtained by the infringer from the tort is hard to be determined, the victim and the infringer disagree to the amount of compensation after consultation, and an action is brought to a people's court, the court will determine the amount of compensation based on the actual situations.<sup>7</sup> Regarding the payment of compensation, the parties may consult each. If the consultation fails, the compensation should be paid in a lump sum. If it is hard to make the payment in a lump sum, the payment may be made in installments, but a corresponding security needs to be provided.<sup>8</sup> Further, the compensation for mental loss has also been included in the Law. The compensation for mental loss can be claimed as long as the personal right infringement causes serious mental distress.<sup>9</sup>

The tort liability may be waived under any of the following situations: 1) the harm is caused intentionally by the victim<sup>10</sup>; 2) the harm is caused by a third party<sup>11</sup>; 2) the harm is caused by a force majeure<sup>12</sup>; 3) the harm is caused by self-defense<sup>13</sup>; or 4) the harm is caused by emergency hedge<sup>14</sup>. The liability of the infringer may be mitigated, if the victim of a tort is also at fault as to the occurrence of harm.

The special tort liabilities includes product liability, liability for motor vehicle traffic accident, liability for medical malpractice, liability for environmental pollution, liability for high-risk activity, liability for harm caused by domestic animal, and liability for harm caused by object under the Law.<sup>15</sup>

## **Key Issues on IP and Employment**

In the past, tort law mainly aims 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 puts trademark, patent, copyright and other intellectual property rights within its protected objects<sup>16</sup>, which shows that intellectual property infringement liability is also regulated by the Law. However, the Tort Law does not replace relevant legal provisions related to tort liability in the special intellectual property laws such as Patent Law, Trademark Law, Copyright law, etc., but it supplements the intellectual property laws.<sup>17</sup> Thus, special provisions under the intellectual property laws, as well as basic principle and general provisions of Tort

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<sup>7</sup> Please see Article 20 of the Tort Liability Law.

<sup>8</sup> Please see Article 25 of the Tort Liability Law.

<sup>9</sup> Please see Article 22 of the Tort Liability Law.

<sup>10</sup> Please see Article 27 of the Tort Liability Law.

<sup>11</sup> Please see Article 28 of the Tort Liability Law.

<sup>12</sup> Please see Article 29 of the Tort Liability Law.

<sup>13</sup> Please see Article 30 of the Tort Liability Law.

<sup>14</sup> Please see Article 31 of the Tort Liability Law.

<sup>15</sup> Please see Section 5 to Section 11 of the Tort Liability Law.

<sup>16</sup> Please see Article 2 of the Tort Liability Law.

<sup>17</sup> Please see Article 5 of the Tort Liability Law.

Law shall be observed. Once the intellectual property infringement occurs, the intellectual property laws will be applied as priority, and Tort Liability Law can be used as reference.

As far as the joint liability for infringement facilitators is concerned, whoever aids and abets others in effecting infringing acts shall be liable jointly and severally with the infringer according to the Law.<sup>18</sup> Accordingly, if the manager or landlord of a business place knows or should have known the activities infringing intellectual property rights without stopping, the court is entitled to sentence it to bear joint liability. What is more, in order to stop and punish the rampant torts through network now, the Law stipulates that network user or network service provider who infringes upon the civil right through network shall assume the tort liability. The network service provider must take such necessary measures as deletion, block or disconnection once notified by the victim, otherwise, it shall be jointly liable for any expansion part of the harm with the network user. If the network service provider knows that a network user is infringing upon other's right through its network services but fails to take necessary measures, it also shall be jointly liable with the network user.<sup>19</sup> Based on the above, the countless counterfeits sold in Xiushui market or on large sites such as taobao.com, alibaba.com, dhgate.com, ebay.com can be severely attacked, so that the intellectual property gets greater protection.

Some provisions of the Law also involve the employment management of enterprises. As previously stated, civil rights and interests protected by the Law include some personal rights, such as privacy right, portraiture right and name right.<sup>20</sup> Therefore, employers may need to improve and perfect their management systems and procedures related to staff files and employee privacy, so as to prevent these personal information to be discovered carelessly. Also, if they use portraits or names of employee in business advertising, they need to get prior consent from employee. So it is necessary for enterprises to stipulate these rights in the labor contract avoiding disputes or dissension in the future.

Whenever any employee causes damage to others in the execution of his work duty, its employer has to assume complete tort liability, in accordance with the Law.<sup>21</sup> It is noteworthy that the above-mentioned employee includes dispatched ones, rehire employees and intern students etc. If the employer dispatching the employee has fault, it shall assume the corresponding complementary liability.<sup>22</sup> Further, enterprises also need to bear the tort liability if they fail to fulfill the obligations of security as the organizer of group activity so as to cause damages to employee.<sup>23</sup> So they had better buy corresponding supplementary insurance in advance for the participants, and

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<sup>18</sup> Please see Article 9 of the Tort Liability Law.

<sup>19</sup> Please see Article 36 of the Tort Liability Law.

<sup>20</sup> Please see Article 2 of the Tort Liability Law.

<sup>21</sup> Please see Item 1 of Article 34 of the Tort Liability Law.

<sup>22</sup> Please see Item 2 of Article 34 of the Tort Liability Law.

<sup>23</sup> Please see Article 37 of the Tort Liability Law.

assure the security of participants during the activity.

## **Conclusion**

It remains to be seen how the Chinese courts will apply this new Law, being either an expansive interpretation or a limited interpretation. It is anticipated that the Supreme Court will issue Interpretations to supplement this Law and deal with some application issues that will arise, in relation to some problematic areas, in the near future. In theory, this Law has great potential to promote the rule of law in China even further.