



Client Alert

昊理文法律动态

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[*Environmental Liability*/环境责任]

Restatement of Environmental Liabilities: Compliance is not an Excuse for Environmental Pollution

The Tort Liability Law of People's Republic of China (PRC) (the "Tort Law") was passed on December 26, 2009. Chapter 8 of this new law is dedicated to establish guidelines on liabilities for environmental tort in response to increasing pollution in China. Principles and rules contained in the special laws have been incorporated into this Tort Law.

I. Polluters' Tough Liability

Pursuant to Article 65 of the Tort Law, a polluter is liable for the damage caused by its pollution of the environment even though it fully complies with all environmental law requirements. For instance, a company that discharges chemical into a river may now be

liable for damaging the environment or injuring residents downstream, even though the company is operating in strict compliance with regulatory limits. This rule seems to wipe out the affirmative defense "not-at-fault" set forth by General Rules of Civil Law. However, it in fact reinstates the general principle of the 1989 Environmental Protection Law PRC and implements the opinion of State Environmental Protection Bureau that the violation of environmental laws and regulations was not a prerequisite for tort liability of a polluter.¹

¹ Reply of the State Environmental Protection Bureau on Confirming the Issue of Environmental Pollution Damage Liabilities ([91] Huan Fa Han Zi No.104)

Further, as Article 68 of the Tort Law states, an injured party can seek relief from any of multiple tortfeasors, for instance, either from the polluter or a third party if the environmental damage was caused by a third party. Be fair to the polluter who is not at fault, the polluter may pursue the third party at fault in contribution after it has compensated the injured party.² Notably, the injured party who is found negligent for the injuries will recover damages after reducing the amount caused by his comparative responsibility.³ However, if the injured party intentionally causes the injury, he will be completely barred from recovery.⁴

Additionally, according to Article 67 of the Tort Law, if there are two or more polluters, instead of dividing the liability equally by the number of joint polluters, Chinese courts will apportion liability amongst the polluters by considering the type of and quantity of pollutants being discharged.

II. Shifting the Burden of Proof

In a normal tort litigation, the plaintiff bears the burden of proving that the defendant's action caused the damage or loss suffered by the plaintiff. However, the Tort Law shifts burden of proof to the defendant, that is the defendant is presumably be found liable in tort and it shall prove that there are situations that would leave them with no liability or mitigate its liability.⁵ And it is consistent with an interpretation of the Rule

of Evidence in Civil Procedures by the Supreme People's Court in the year of 2001.⁶

III. A Force Majeure Event

The Tort Law also stipulates in its general provisions that polluters can be exempt from liabilities for damage caused by Force Majeure, unless the laws stipulates otherwise.⁷ An Event of Force Majeure, as provided in Article 153 of the General Rules of PRC Civil Law, refers to any event unforeseeable, unavoidable and beyond the control of the affected Party. In other words, in order to defend itself against an environmental tort claim, the discharging party will have to prove that the environmental damage is caused by force majeure rather than its act or omission. But be noticed that, although the Tort Law doesn't provide otherwise/detail in this Charter for pollution liabilities, a force majeure event that may be applied to safeguard a polluter/ an operator of pollution source from liabilities are limited to those events clearly situated in other environmental laws and regulations. For example,

1. Under air pollution, a force majeure event can only be such unpreventable natural disasters. That means riot, war, strike, and other actions of governments or people cannot be a good defense for causing air pollution.

² Article 68 of the Tort Law

³ Article 26 of the Tort Law

⁴ Article 27 of the Tort Law

⁵ Article 66 of the Tort Law

⁶ Article 4 of the Several Provisions of the Supreme People's Court on Rule of Evidence in Civil Procedures (Fa Shi [2001] No. 33)

⁷ Article 29 of the Tort Law

2. Under maritime environment pollution, a force majeure event can only be such unpreventable natural disasters, war or negligence of relevant authorities in charging the lighthouse and/or navaid.
3. Under nuclear pollution, a force majeure event can only be a war, armed clash, hostility and riot, excluding such natural disasters.

IV. Conclusions

Companies doing business in China need to understand the potential for environmental tort liabilities notwithstanding full compliance with China's environmental laws and regulations, and the potential need to expand insurance coverage and adopt adequate risk management measures in light of these clear rules.

Should you have any questions about this Client Alert, please contact the partner of HaoLiWen Environmental Liability Group:

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