



HAN KUN LAW OFFICES

Legal Commentary



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Corporate Compliance

A Look at China's New Criminal Judicial Assistance Law

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The Standing Committee of the National People's Congress promulgated on October 26, 2018 the *Law of the People's Republic of China on International Judicial Assistance in Criminal Matters*¹ (the "Law"). This is a landmark legislation because China, like most other countries, treats criminal investigation and prosecution as an extension of sovereignty and any assistance therefor has been rendered pursuant to bilateral treaties of judicial assistance. The reality is that, as of today, there exist a limited number of treaties between China and foreign countries, and yet the needs for judicial assistance in criminal matters are far greater than the geography covered by the existing treaties. This Law is a timely legislation to close the gap.

The Law sets out the legal basis and procedures upon which Chinese entities or individuals may provide judicial assistance in China to foreign parties for criminal investigations or prosecutions undertaken outside of China. Central to the Law is the requirement that approval from the Chinese competent authorities must be obtained before any Chinese entity or individual may render judicial assistance in criminal matters to foreign parties.

The official press release accompanying promulgation of the Law states that the Law will help deter corruption and recover illegal gains. Paradoxically, the press release also indicates that the Law will serve as a countermeasure against long-arm jurisdiction and extraterritoriality as practiced by courts and governments of certain foreign countries relating to criminal cases being prosecuted in foreign countries. Obviously, how the Law is understood, interpreted and implemented is critical as a function of current events and as a matter of substance.

¹ 《中华人民共和国国际刑事司法协助法》 [Law of the People's Republic of China on International Judicial Assistance in Criminal Matters] (Standing Comm. Nat'l People's Cong.; promulgated and effective Oct. 26, 2018).

I **Overview**

1. **Scope of Criminal Judicial Assistance**

The Law covers mutual assistance in criminal inquiries, investigations, prosecutions, trials and enforcement activities, including service of documents, investigation and collection of evidence, arranging witnesses to testify, seizing or freezing property, confiscating and returning illegal gains and other property, and transferring convicted persons.

The Law applies to judicial assistance rendered to all foreign countries. Where there exists a treaty on judicial assistance between China and a foreign country, both the Law and the treaty will apply.

2. **Prerequisite for Assistance**

The Law at Article 4, paragraph 3 makes it clear for the first time that approval from competent Chinese government authorities is condition precedent to any activity carried out in China to facilitate criminal investigations or prosecutions in foreign countries. In the absence of it, “no foreign institution, organization or individual shall carry out criminal litigation activities specified hereunder within the territory of the People’s Republic of China, and no institution, organization or individual within the territory of the People’s Republic of China shall provide any evidentiary material or assistance set forth hereunder to a foreign country.”

According to the Report on Deliberation Results of the Constitution and Law Committee of the National People’s Congress on the Law of the People’s Republic of China on International Judicial Assistance in Criminal Matters (Draft), these provisions are designed to put an end to situations in which foreign law enforcement authorities directly request relevant assistance from Chinese institutions and individuals without approval of the Chinese competent authorities and to curtail exercise of extraterritorial jurisdiction by foreign courts and governments.

3. **Division of Responsibilities**

The Law demarcates duties of each Chinese government department responsible for providing international criminal judicial assistance, as follows:

- **Foreign affairs liaisons:** Judicial assistance treaties designate a central government department to be the foreign affairs liaison for international criminal judicial assistance (generally the Ministry of Justice and/or the Ministry of National Security). Where no treaty exists, the Ministry of Foreign Affairs is the foreign affairs liaison. The foreign affairs liaison is responsible for requesting, receiving and transmitting the request for criminal judicial assistance. Where a foreign law enforcement authority requests criminal judicial assistance from China, it is required to prepare a formal request for

criminal judicial assistance and submit relevant materials to the foreign affairs liaison for examination. If the form and substance of the request meet the requirements, the foreign affairs liaison will transfer the request to the competent authorities for processing. The foreign affairs liaison may ask the requesting party to provide supplemental materials if it so deems necessary.

- **Competent authorities:** The National Supervisory Commission, the Supreme People's Court, the Supreme People's Procuratorate, Ministry of Public Security, Ministry of National Security are the competent authorities which are tasked to provide international criminal judicial assistance. These authorities are responsible for (i) examining and processing requests for criminal judicial assistance from foreign countries forwarded by the foreign affairs liaison, arranging for the relevant case-handling authority to execute those requests deemed to be in conformity with the Law and mutual judicial assistance treaties; (ii) submitting requests to the competent authorities for criminal judicial assistance from foreign countries.
- **Case-handling authorities:** The case-handling authorities are the departments responsible for handling international criminal judicial assistance cases. These authorities are responsible for (i) timely execution of foreign requests for criminal judicial assistance received from the competent authorities; (ii) submission of requests for criminal judicial assistance to the competent authorities of foreign countries. The Law expressly requires case-handling authorities to safeguard the legitimate rights and interests of the parties and other relevant personnel and to protect personal information when executing requests.

4. Denial of Assistance

The Law authorizes China's foreign affairs liaisons and competent authorities to deny the provision of judicial assistance to foreign countries under certain circumstances.

Article 14 enumerates six grounds upon which the competent authorities may deny a request for assistance:

- The act underlying the request does not constitute a crime under Chinese law;
- At the time of receipt of the request, the criminal procedure for the crime against which the request is directed is ongoing or has been terminated in China, or the statute of limitation for the crime has expired;
- The crime for which the request is made is a political crime;
- The crime for which the request is made is a purely military crime;
- The purpose of the request is to inquire into, investigate, prosecute, try, or enforce punishment for a crime based on race, ethnicity, religion, nationality, gender, political

opinion or identity, etc., or the persons concerned are at risk of being treated unfairly for any of these reasons; and

- There is no substantive connection between the assistance requested and the subject matter of the case.

In addition, Article 15 of the Law provides that a foreign affairs liaison shall deny the provision of assistance if, in its own discretion, the provision of assistance will undoubtedly “harm the sovereignty, security and public interests of the People’s Republic of China.”

II Han Kun’s observations

In certain countries, notably the United States and United Kingdom, it is common for private individuals and institutions to be involved in criminal investigations. Based on the Law, such private individuals and non-governmental institutions must also obtain approval from the Chinese competent authorities before they can undertake criminal investigation and evidence collection activities in China. We believe the Law does not apply to self-initiated internal anti-corruption investigations by foreign companies. However, the nature of an earlier internal investigation may change if the evidence or materials obtained are submitted to a foreign criminal law enforcement authority, which may thus require prior approval by the Chinese competent authorities in relation to criminal judicial assistance.

III Summary

The Law fills a blank in Chinese law in the field of international criminal judicial assistance between China and foreign countries. It permits Chinese entities and individuals to provide judicial assistance to criminal investigations and prosecutions conducted in foreign countries and, at the same time, curtails exercise of extraterritorial jurisdiction by foreign courts and governments. As often is the case in Chinese legislative history, major pieces of legislation such as this Law will be subsequently followed by implementation rules to deal with discrepancies in application. In the meantime, a careful read of the Law itself, a good understanding of its legislative intent and practice experience are the best guide to practitioners and clients alike.

It is worth mentioning, though, that the relevant treaties to which China is a party on judicial assistance in civil and commercial matters do not prohibit Chinese persons from directly providing evidence and other assistance to foreign persons or courts. And it is unlikely that in practice this Law will be expanded to cover civil matters.

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● **Important Announcement**

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