

Legal Representative, Power, Limitation and Risk

[24 October, 2008 Issues 19]

The legislation relating to a Legal Representative in China came about during the times when China was going through rapid changes and the Chinese economy was moving from a planned economy to market economy. The definition is somewhat different to that in many western countries, where such equivalent persons might be termed as Chairman in that the title has special meaning, powers and responsibilities.

In 1986, 'General Principles of the Civil Law of The People's Republic of China' prescribed the definition of legal representative for the first time. It is prescribed that the responsible person who acts on behalf of the company in exercising its functions and powers shall be its legal representative.

In China, each company can have only one legal representative where it can play a legal or active role in dealing with external parties, such as government, clients, supporters, etc. However, the legal representative is not limited to his/her dealings with the outside but can be capable and functional employee of the company. And depending on the Legal Representative's position within the company can control or have influence of the company's internal affairs.

In accordance with 'Company Law of the People's Republic of China' issued in 1993, the chairman of the board of directors is normally the Legal Representative of the company, which means that he or she has great authority and power on operations both inside and outside the company.

However, in 2005, the revised Company Law changed the circumstance as to who could take up the role of being the company's Legal Representative. It stated that it could be assumed by the chairman of the board of directors, executive director or manager.

In accordance with relevant laws, the legal representative of an enterprise should exercise his/her powers pursuant to the terms of reference prescribed by laws, administrative regulations and the articles of association of the legal entity. If the legal person's activities lead to administration responsibility or criminal responsibility, even if the legal representative takes no part in the activity, he/she will still bear relevant administration and criminal responsibility. Such activities and relevant responsibility prescribed in laws were illustrated as below.

'General Principles of the Civil Law of The People's Republic of China' Article 49 prescribes that, a legal person, as well as its legal representative, should bear administrative sanctions and any fine or even criminal responsibility, if the legal person conducting the listed illegal acts.

'Law of the People's Republic of China on Enterprises Bankruptcy' Article 128 provide that if an insolvent enterprise has activities mentioned in article 31, article 32 and article 33, which damage rights and interests of the debtors, the legal representative and other persons with direct responsibility, will be responsible for compensation according to the law. It is stated in

the three mentioned articles that, within a prescribed period of time before the people's court accepts an application for bankruptcy, a bankruptcy administrator has the right to plead the court to revoke any act with the purpose of concealing or transferring assets out and avoiding debts.

'The Administrative Measures for Tax Registration' article 44 provide that where a taxpayer (company) or its legal representative who has not paid the amount of taxes payable needs to leave China, he shall pay the taxes payable and the late fee or provide a guaranty to the tax authority before leaving the country. If the taxpayer neither pays the taxes payable and the late fee nor provides a guaranty, the tax authority may notify the exit authority to stop the taxpayer from leaving the country.

As mentioned above, in China, the law gives the Legal Representatives great powers and with many responsibilities. Sometimes the responsibilities are so strict and erroneous that if these are not kept in checked then the Legal Representative can be subjected to criminal responsibility either directly or indirectly.

The Legal Representative bears administrative and criminal responsibility on behalf of the company. Therefore it is very important that the company does not do or perform anything that is illegal.

Good internal controls and business processes can help to avoid or prevent employees from undertaking illegal activities in the name of company. Such malpractices can bring about undesirable consequences to the company and to the legal representative. So setting up a reliable and effective internal controls system is crucial and important.

Lastly, a good understanding of a company's business operations and its business processes is important in helping the Legal Representative steer clear of the danger areas. This would require the Legal Representative to actively take part in the company's daily operations, instead of simply being passive

In short, if a legal representative needs to understand the laws, regulations and their responsibilities well, and to ensure proper and legal management of a company's activities.