

LEGAL UPDATE

Edition: November 2010



Impact on Companies of the PRC Tort Liability Law

中华人民共和国侵权责任法对公司的影响

The PRC Tort Liability Law (the “Tort Law”) finally came into effect on 1st July 2010, following several years of debate. It is considered to have a significant role in developing the legal framework for the protection of civil rights in China and is designed to consolidate the existing rules and regulations.

历经数载论争，《中华人民共和国侵权责任法》（以下简称“《侵权责任法》”）终于 2010 年 7 月 1 日开始施行。业内普遍认为，《侵权责任法》加强了对于民事权益的法律保护，也对现行法律法规的相关条文进行了整合。

Areas covered by the Tort Law include liability for environmental pollution, collapsed buildings, defective products, harm caused during “performance of work duties” as well as the requirements and rules governing causation and liability. Those held to be liable under the law, may be required to, inter alia, compensate their victim for damage incurred or restore them to their pre-injury position, if possible stop the infringement of another’s rights or take steps to remove the danger, eliminate negative effects of their infringing act or make formal apologies to the victim concerned.

《侵权责任法》涉及诸多领域的民事责任，包括环境污染责任、建筑物倒塌责任、缺陷产品责任、执行工作任务造成他人伤害的责任等，并规定了因果关系构成要件、责任认定标准和责任承担方式等。根据法律规定，侵权责任人应当对被侵权人承担赔偿责任、恢复原状、停止侵害、排除妨害、消除危险、赔礼道歉、消除影响、恢复名誉等责任。

This update will highlight certain areas from the Tort Law which are likely to impact on companies doing business in China.

在下述特定领域内，《侵权责任法》将对公司在华经营产生影响。

Jade & Fountain is a leading full-service Chinese law firm with offices in Shanghai & Beijing. Our international outlook and native resources ensure we provide our clients with quality legal advice for all their business needs and objectives.

If you have any questions or comments regarding this article, please contact:

Henry Xiao

Partner

Tel: 8621 6235 1086

henry.xiao@jadefountain.com

Natalie Barnes

International Counsel

Tel: 8621 6235 1066

natalie.barnes@jadefountain.com

Protection of Privacy:-**隐私权保护**

The Tort Law details, in Article 2, a list of civil rights and interests which the law aims to protect, and introduces into PRC law for the first time, the principle of the right to privacy. In the event of a person infringing another person's right to privacy, they will be liable in tort under the Tort Law. The term "privacy" is however not defined and companies are advised to take precautions to protect any personal or private data which they receive during the course of their business, to avoid any potential claims.

《侵权责任法》第 2 条列举了该法着力保护的民事权益，其中首次明确提及“隐私权”概念。当涉及侵犯个人隐私权时，根据《侵权责任法》有关规定，公司可能承担侵权责任。然而，该法未具体定义“隐私权”，因此，建议公司可采取预防措施保护经营过程中获得的私人信息，避免引发相关侵权责任。

Article 36 refers to internet infringements and places joint and several liability on "web service providers" (interpreted in conjunction with the context, this term shall largely refer to internet content providers, i.e. ICPs only, as opposed to also including internet service providers, ISPs, who provide public internet access) who either fail, after being notified of a tort being committed via the websites operated by them, to take timely and necessary steps to block or delete the relevant content or links, or otherwise stop the tort from continuing, or who are aware that their websites are being used to commit a tort in the first place but fail to take necessary steps to stop it. It is likely that tort claims under this Article will include breach of privacy if a website is used to leak or post people's personal information and the website operator fails to remove such posts within a reasonable period of time after being asked.

《侵权责任法》第 36 条规定了对于网络隐私权的保护，网络服务提供者（结合该法上下文语境来解释，此处提及的“网络服务提供者”仅指互联网内容供应商，即“ICP”，而不包括提供公共网络接入服务的互联网服务供应商，即“ISP”）在下列情况下应当承担连带责任：

一、被侵权人通知网络服务提供者存在网络用户利用其网络服务实施侵权行为，该网络提供者接到通知后，未及时采取删除、屏蔽或断开链接等必要措施的；
二、网络服务提供者发现网络用户利用其网络服务实施侵权行为，未及时采取删除、屏蔽或断开链接等必要措施的。

根据该条规定，网络隐私权侵权行为包括：网络用户利用网络泄露或贴发他人私人信息，而该网络运营商接到被侵权人请求后，未在合理时间内删除相关内容帖。

Employer's Liability:-

用人单位责任

Where damage is caused as a consequence of, or due to the performance of an employee's tasks, Article 34 states that the employer shall be liable. If the employee is under a secondment arrangement at the time of the damage, the employer to whom the employee has been seconded shall be held to undertake primary liability.

根据《侵权责任法》第 34 条，员工因执行工作任务造成他人损害的，其用人单位应当承担侵权责任。若该员工系劳务派遣员工，则接受劳务派遣的用工单位应当承担侵权责任（至少是首要责任）。

Defective Products:-

缺陷产品责任

The PRC General Principles for the Civil Law and the PRC Product Quality Law previously addressed product liability, and the Tort Law seeks to reaffirm and summarize some of those existing provisions. However, in addition, the Tort Law introduces two new rules:-

《中华人民共和国民法通则》和《中华人民共和国产品质量法》已规范了缺陷产品侵权责任，《侵权责任法》对现有条款进行重申和总结。除此之外，《侵权责任法》增加了两条新规定：

1. Article 46 of the Tort Law states that, in the event that a product is found to be defective, after it has been put into circulation, the manufacturers and sellers are obliged to take remedial action such as issuing warnings or instructing a recall. Failure to do so will expose the manufacturer and seller to liability for any resulting damage. Rules regulating or providing guidance for product recall have yet to be formally promulgated.
2. For the first time in Chinese law, the term “punitive damages” is used. Article 47 of the Tort Law states that if products are produced and sold with known defects resulting in death or serious injury to health, the victim has the right to claim punitive damages. Disappointingly, the Tort Law fails to provide details on how the punitive damages shall be calculated or to give indications of the likely level to be imposed and further guidance, is therefore expected. Companies are advised to monitor developments in this regard.

一、《侵权责任法》第 46 条规定，产品投入流通后发现存在缺陷的，生产者和销售者应当及时采取警示、召回等补救措施，否则应当承担侵权责任。有关产品召回的规范性文件尚未正式公布。

二、中国法律首次明确使用“惩罚性赔偿”概念。《侵权责任法》第 47 条规定，明知产品存在缺陷仍然生产、销售，造成他人死亡或者健康严重损害的，被侵权人有权请求相应地惩罚性赔偿。遗憾的是，该法并未规定如惩罚性赔偿应当如何计算，应由哪一级别机关判罚赔偿等相关细节性问题。对此，建议公司密切关注相关动态。

Environmental Pollution:-

环境污染责任

Under Article 66 of the Tort Law, the burden of proof falls on the alleged polluter to show that it is not liable under the law for any harm caused. It should be noted that companies who fully comply with the relevant environmental laws and regulations could still be exposed to liability if a claimant suffers damage due to the company's emissions.

《侵权责任法》第 66 条规定，被指称污染者应当就法律规定的不承担或者减轻承担责任的情形承担举证责任。值得注意的是，即便公司的行为完全符合相关环境法律法规规定，仍可能就其排放所造成的损害承担侵权责任。

《侵权责任法》第 68 条进一步规定，若存在第三人负有责任的情形，则被侵权人可以向污染者或者第三人主张赔偿；污染者赔偿后，有权向第三人追偿。

Damage Caused by Collapsing Buildings:- **建筑物倒塌造成损害**

Article 86 of the Tort Law provides that where a building or other structure collapses and causes damage, the owner and the construction company will be jointly and severally liable. Where third parties are also found to be liable, the owner and the construction company will have a right of recourse against them and this could therefore impact upon site managers, safety inspectors or other construction personnel involved in the build.

《侵权责任法》第 86 条规定，建筑物、构筑物或者其他设施倒塌造成损害的，所有人及施工单位应当承担连带责任。发现第三人负有责任的，所有人及施工单位在赔偿后，有权向第三人追偿。前述第三人可能包括管理人、安全检查员或其他参与建筑施工的人员。

Conclusion:- **结论**

Whilst the Tort Law can be perceived to be taking great steps towards the recognition and protection of civil rights, in terms of the introduction of both the principle of the right to privacy and punitive damages, much of the law merely consolidates the existing statutory rules. In addition, and as is common with PRC regulations, much of the law is vague and will require supporting measures to be issued to provide further guidance of how the law will be implemented and interpreted by the courts.

《侵权责任法》的实施被认为是中国民事法律领域的一大进步，通过引入“隐私权”和“惩罚性赔偿”概念和整合现有法律条文，在法律层面大大加强了对于民事权益的承认与保障。然而，该法亦不免带有中国法律法规的一大通病，即：不够精细，存在颇多模糊地带，仍有待出台相应的补充或解释性细则，对法律条文如何具体实施作进一步的规范与指引。

This publication is intended to keep our clients and friends apprised of industry, regulatory and legislative changes that may have an impact on the way business is conducted and operated in China. It is for general information only, and is not a substitute for legal consultation.