

CLIENT ALERT

China Enacts New International Criminal Judicial Assistance Law, May Impact Investigation and Enforcement by Foreign Authorities

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On October 26, 2018, the People's Republic of China promulgated Presidential Decree No. 13, the International Criminal Judicial Assistance Law (the "ICJA Law"). The new law became effective immediately. The ICJA Law governs all requests for foreign "criminal judicial assistance," including assistance to law enforcement officials in other countries seeking to collect documents, compel testimony, or seize assets as part of an international criminal investigation.¹ The ICJA Law specifically applies to "service of documents," "investigation and evidence collection," "arranging witnesses to testify or to assist in investigations," "seizing, detaining, and freezing properties involved," "confiscat[ion] and return of illegal income," and "transfer of a sentenced person." Each of these types of assistance is governed by a separate chapter of the ICJA Law.

In essence, the ICJA Law serves as a "blocking statute" for criminal investigations in China.² The ICJA Law stipulates that "the institutions, organizations and individuals within the territory of the People's Republic of China shall not provide evidence materials and assistance provided in this Law to foreign countries, ***without the consent of the competent***

¹ Article 2 of the ICJA Law defines "international criminal judicial assistance" broadly to include assistance provided between China and foreign countries in criminal inquiries and investigations, evidence collection, witness arrangements, prosecutions, and trials.

² French law 68-678 of 26 July 1968, the so-called "French blocking statute," is a well-known example of a statute aimed at restricting cross-border discovery of information.

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authority of the People's Republic of China" (emphasis added).³ In other words, the ICJA Law requires Chinese government approval before any person or company may comply with a subpoena or request for documents from a foreign governmental authority in a criminal matter.

The ICJA Law states that it shall be applied in a manner to "not damage the sovereignty, security and social public interests of the People's Republic of China." Under this principle, the ICJA Law gives the Chinese government broad discretion and authority to block requests for assistance from foreign governments. Under the terms of Article 14, requests may be refused under any of the following circumstances:

1. "According to the laws of the People's Republic of China, the requested act is not a crime";
2. "At the time of receipt of the request, the inquiry, investigation, prosecution, and trial of the crime in the request are under way within the territory of the People's Republic of China, an effective judgment has been made, the criminal procedure has been terminated, or the limitation[s] [period] of the offense has expired";
3. "The crime [about] which the request is made is a political offense";
4. "The crime [about] which the request is made is purely a military offense.;"
5. "The purpose of the request is to examine, investigate, prosecute, sue, or execute a sentence based on race, ethnicity, religion, nationality, gender, political opinion or identity, or the parties may be unfairly treated for the above reasons";
6. "There is no substantive link between the requested matter and the case of assistance"; and
7. "Other circumstances under which the request can be refused."

The ICJA Law does not prescribe a certain time limit for authorities to determine whether to grant such requests and there is no enumerated process for expediting requests.

The ICJA Law states that the form and substance of a criminal judicial assistance request shall be governed by applicable treaties between China and the requesting nation. In the absence of such a treaty, the ICJA Law describes the types of information that must be included in a request for assistance, including the basic facts about the investigation, applicable

³ The "competent authority" may include the State Supervision Commission, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of National Security, and other departments. The Ministry of Justice reviews all requests for transferring individuals subject to a criminal sentence in China.

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laws, the time limit for executing the request, and a description of the information sought, the person to be questioned, or the property to be seized or confiscated.

The ICJA Law also contains provisions related to requests for witness or expert testimony and the transfer of a sentenced foreign national from China back to his or her native country under certain circumstances.

The ICJA Law is likely to present new challenges to foreign prosecuting authorities, such as the U.S. Department of Justice (the “DOJ”), that seek evidence or assistance in China, as well as to companies cooperating with DOJ investigations. For example, a company cooperating with a DOJ investigation will have to carefully navigate its approach to making China-based witnesses and documents available to the DOJ and will likely be required by the DOJ to obtain a local counsel opinion regarding the application of this law. Additionally, cooperating companies will have to carefully consider the implications of making a request for assistance to Chinese authorities, since doing so could trigger an investigation by regulators in China as well.

Civil Requests and Internal Investigations

The ICJA Law applies only to requests for assistance related to criminal investigations conducted by foreign governments. The terms of the law, therefore, presumably do not extend to requests related to civil processes, such as civil investigations conducted by the U.S. Securities and Exchange Commission or discovery conducted in private civil lawsuits. The ICJA Law also does not restrict the transfer of documents or information in the context of purely internal investigations.

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