

Locke Lord QuickStudy: New Chinese Regulation Blocks Extraterritorial Application of Foreign Law

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On January 9, 2021, China's Ministry of Commerce (MOFCOM) issued its No. 1 Order of 2021 titled "The Rules on Blocking Unjustified Extraterritorial Application of Foreign Legislation and Measures" (hereinafter, the "Chinese Blocking Rules"). Because MOFCOM has yet to interpret these departmental rules, and because the Chinese Blocking Rules differ significantly from other blocking regimes, the potential impact on Chinese companies complying with foreign economic sanctions and foreign blacklisting measures remains uncertain.

The Chinese Blocking Rules include various components that establish a comprehensive and flexible regulatory regime that will be interpreted and enforced exclusively by MOFCOM. These components include:

- **Retroactive Determination by MOFCOM as to Specific Blocked Laws.** Instead of identifying the specific foreign laws that are blocked under the Chinese Blocking Rules, as prior blocking regimes from other jurisdictions have done, the legislation categorically "appl[ies] to situations where the extra-territorial application of foreign legislation and other measures . . . unjustifiably prohibits or restricts citizens, legal persons or other organizations of China from engaging in normal economic, trade and related activities" with a foreign person or entity. See Chinese Blocking Rules at Article 2. It is not until the controversy arises that MOFCOM will make a determination as to whether the relevant foreign law is blocked, based on several elements delineated in Article 2, including national security concerns and the economic rights of Chinese companies.
- **A Reporting Mechanism.** Article 5 of the Chinese Blocking Rules appears to require Chinese companies to report to MOFCOM any instances in which their commercial or trade activities with a foreign party were prohibited or restricted by the laws of a foreign jurisdiction. Failure to adhere to this reporting mandate could result in penalties, including fines. See Chinese Blocking Rules at Article 13. However, it remains to be seen whether those penalties will actually be enforced. Historically, the penalty provisions in blocking statutes from other jurisdictions have rarely been enforced.
- **Prohibition from Compliance with Blocked Foreign Law.** Article 7 of the Chinese Blocking Rules provides that MOFCOM, upon determination that unjustified extra-territorial application of foreign laws exists, may issue a prohibition order to the effect that the relevant foreign law is not accepted by China.
- **Judicial Remedies Exclusively Through Chinese Courts.** Under Article 9.1, if a party obtains a foreign judgment against a Chinese company based on a blocked foreign law to the Chinese company's detriment, the Chinese company is entitled to sue that party in China for damages occasioned by that judgment. Because the Rules also confer injunctive authority upon MOFCOM, these provisions potentially offer a vehicle to circumvent enforcement and, ultimately, collection of a foreign judgment against a Chinese company.

Chinese subsidiaries of foreign companies will undoubtedly be burdened by at least legal risks under the Chinese Blocking Rules: (1) reporting obligations under Article 5, and (2) risk of "compliance" with a foreign blocked law,

where it is not apparently clear what constitutes such a “compliance” within the scope of the rules. Additionally, foreign companies face dual indirect risks: (1) being unable to enforce or collect upon judgments against Chinese parties, and (2) being sued in China for damages arising from that judgment. These implications could manifest in the contexts of indemnity obligations, derivative suits, and contractual arrangements.

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