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应诉美利坚： 中国企业，你准备好了吗？

US lawsuits: Chinese companies, are you ready?

《商法》与美国翰宇国际律师事务所近期在北京联合举办“中国企业如何应对美国诉讼”研讨会，与各中国企业法务探讨了中国公司应如何防范和化解在美国的诉讼和仲裁风险。

China Business Law Journal and Squire Sanders & Dempsey recently conducted a round-table discussion in Beijing to investigate the strategies available to corporate counsel to prevent and mitigate the risk of US litigation and arbitration

应诉还是不应诉？

朱松：结合大家刚才介绍的情况，我谈些自己对中国公司在开拓美国市场时面临美国诉讼的认识。过去的这几十年来，我们中国公司主要是拿日用品到美国去卖，除了一些反倾销反补贴贸易摩擦，跟美国的公司没有什么大的冲突。但是最近几年，开始有大的国营或者私营企业到美国，把工业产品和高科技产

To respond or not to respond to a lawsuit?

Zhu Song, Squire Sanders & Dempsey: In view of the circumstances that everyone here has just spoken about in their introductions, I'd like to talk a bit about my experience of lawsuits in the US that PRC companies have faced in developing the US market. For the past 20 or 30 years, PRC companies have been trying to sell low-value consumer goods in the US and, with the exception of some anti-

品卖到美国去，比如汽车、电视机、洗衣机。对于美国公司来说，他们大不了丢掉中国市场，因为他们还有美国市场。可是随着中国公司进军美国市场，他们开始认真考虑如何阻止中国公司进入美国市场，其中一个非常有效的办法就是通过诉讼，例如专利侵权诉讼。

dumping and countervailing duty trade friction, there haven't been any major conflicts with American companies. However, in the last few years, some large state-owned and private enterprises have gone to the US to sell industrial and hi-tech products, such as automobiles, televisions and washing machines. For American companies, if the worst comes to the worst and they lost the Chinese market,

讨论小组	The panel
<p>吴浩 (TCL集团): TCL集团是国内一家以电子制造为主的公司，我们在几年前就提出了国际化战略，也涉及到很多法律方面的问题。</p>	 <p>Wu Hao (TCL Group): The TCL Group is a Chinese company mainly engaged in electronics manufacture. A few years back, we proposed an internationalization strategy which raised numerous legal issues.</p>
<p>朱华芳 (中化集团): 我参与过公司几次在美国的诉讼和仲裁，在这个过程当中有很多疑问和心得。</p>	 <p>Zhu Huafang (Sinochem Group): I've participated on several occasions in US lawsuits and arbitration proceedings in which the company was involved, and they have both left me with many questions and taught me many lessons.</p>
<p>胡毅 (中兴通讯): 我们公司在国内的市场不大，更多是在海外市场——公司在海外的整体收益超过60%，在海外发展过程中遭遇了许多美国专利投机人的诉讼案件，所以说我们对这方面的问题比较感兴趣。</p>	 <p>Hu Yi (ZTE): Our market here in China is not very big. Most of our markets are overseas, accounting for more than 60% of our entire revenue. In the course of our overseas development, we have run into numerous lawsuits instituted by US patent trolls, so it is not at all surprising that we have a certain interest in this issue.</p>
<p>孙晓青 (中国石化国际实业公司): 我们在海外有五个全资子公司，业务基本上是遍布全球的。国外比较复杂的法律体系要求我们的经营每一步都要很扎实。虽然我们面临的争议纠纷最终发展到诉讼或者仲裁的并不多，但是由于缺少国外诉讼的经验，碰到第一起诉讼的时候，确实不知道从哪里做起，没有一个很固定的工作模式。目前我们在海外只有一个诉讼，打了八年才拿到胜诉的判决。</p>	 <p>Sun Xiaoqing (Sinopec International): We have five wholly owned subsidiaries overseas and our business spans the entire globe. The relatively complex legal systems abroad require us to be sure-footed in every step we take. Not many of the disputes and controversies that we have faced have progressed as far as litigation or arbitration. But because we lacked experience in foreign lawsuits, the moment we encountered the first suit, we really didn't know where to begin, we didn't have a definite working model. To date, we've only had one suit abroad, in which we finally secured a winning verdict after eight long years.</p>
<p>陈佳园 (中石化公司): 我们现在整个公司在世界上47个国家有152个代表处和分支机构，公司也提出要进一步向海外发展。我们今后工作的方向就是尽量不要有国外诉讼纠纷发生，但我想这肯定是避免不了的。我个人感觉外国人和外国公司好像对诉讼的态度比较随意，动不动就提起诉讼。</p>	 <p>Chen Jiayuan (Sinopec): At present, our company has 152 representative offices and branches in 47 countries around the world, and it has proposed even more overseas expansion. In the long run, we need to endeavour to prevent to the greatest possible extent the occurrence of foreign disputes and controversies, but I know that they are ultimately unavoidable. It is my personal feeling that foreigners and foreign companies seem rather blasé about lawsuits, instituting them at the drop of a hat.</p>
<p>朱松 (合伙人, 翰宇国际律师事务所): 我代表中国公司在美国诉讼或者代表美国公司在中国诉讼，做了好多年了。</p>	 <p>Zhu Song (Partner, Squire Sanders & Dempsey): I have been representing PRC companies in legal actions in the US, and American companies in legal actions in the PRC, for many years.</p>
<p>贾维恒 (律师, 翰宇国际律师事务所): 我是翰宇国际律师事务所上海代表处的律师。</p>	 <p>Jia Weiheng (Associate, Squire Sanders & Dempsey): I am a lawyer in the Shanghai office of Squire Sanders & Dempsey.</p>
<p>王慧敏 (律师, 翰宇国际律师事务所): 我是翰宇国际律师事务所北京代表处的律师。</p>	 <p>Wang Huimin (Associate, Squire Sanders & Dempsey): I am a lawyer in the Beijing office of Squire Sanders & Dempsey.</p>

如果你不应诉的话，就会有缺席判决

If you do not respond to a suit, a default judgment will be handed down



朱松
合伙人
翰宇律师事务所
Zhu Song
Partner
Squire Sanders &
Dempsey

那中国的公司是怎么应对美国诉讼的呢？一般情况下，小的公司就是选择不应诉。现在美国有个关于中国产石膏板的诉讼（编者注：请参阅本刊2010年第3期《安心向美国出口》一文），涉案的主要是山东的一些比较小的公司，他们如果应诉的话，赔偿金额可能高达1000亿到3000亿美元。即使他们与原告达成和解，3000亿美元的赔偿额也不会一下子降到300万，而且这些厂家现在也没有对美国的后续出口，在这种情况下，他们不应诉完全是个正确的选择。

但不应诉并不总是对的。为什么呢？我觉得国内一些公司没有认识到这一点：如果你不应诉的话，就会有缺席判决。美国很多公司拿到这个缺席判决是很高兴的，为什么呢？拿到缺席判决后它可以拿到美国各州去执行。作为被告的中国公司在美国的各种财产都可能会被冻结、没收、拍卖，然后支付赔偿。这样的话，这家中国公司与美国公司继续进行贸易将非常困难。更重要的一点是，美国的缺席判决还可以拿到其他国家和地区（例如欧盟和日本）去执行。

所以我觉得国内的公司决定应诉或者不应诉前，还要重点考虑自己的决定将来对公司业务的影响。对于像我们在座的几家大公司，我觉得不应诉不是一个办法，因为我们在美国的业务很多。如果被缺席判决的话，就像上面提到的那样，不但和诉讼有关的产品不能卖，其他产品也不能卖了。

揭开公司面纱

朱华芳（中化集团）：关于判决的执行，我有个问题，如果一家国有企业在美国败诉，而且这家企业在美国没有可供执行的财产，但是有些关联企业在美国，那么它的关联企业的财产会不会被执行？美国的法院会不会认为中国的国有企业之间的关系都很密切，他们实际上就是一个企业？

朱松：这就涉及中国企业如何预防国外诉讼的问题。防止诉讼的一个很重要的办法就是把整个公司集团的架构建立起来，母子公

司不全都丢了，因为他们历史上一直有美国市场。不过，随着中国公司进入美国，他们已经开始认真考虑如何防止中国公司“从在美国建立自己”。一个非常有效的方法就是使用诉讼，比如专利侵权诉讼。

中国公司如何应对美国诉讼？一般来说，小公司会选择不应诉。目前在美国有一个关于石膏板的诉讼，主要涉及一些来自山东的相对较小的公司（编者注：请参见《安全出口》第1卷第3期《中国商业法律杂志》）。如果他们应诉，赔偿金额可能高达1000亿美元到3000亿美元。即使他们能达成和解，赔偿金额也会从3000亿美元大幅降至3000万美元。此外，由于诉讼，这些公司没有进行任何进一步的出口。在这种情况下，不应诉是明智的选择。

不过，不应诉并不总是明智的选择。为什么？我有一种感觉，这里的一些公司没有意识到：如果你不应诉，就会有缺席判决。许多美国公司很高兴得到缺席判决。为什么？好吧，在得到这样的判决后，他们可以拿到任何州去执行。在美国的中国公司的财产可能会被冻结、没收和拍卖，所得款项将用于支付赔偿。如果事情发展到这一步，将非常困难，中国公司难以继续与美国公司交易。一个更重要的点是，这样的缺席判决可以在其他国家或地区（如欧盟和日本）执行。

所以，我认为在中国公司决定是否在美国应诉之前，必须认真考虑其决定对其未来业务的影响。对于像这里所代表的公司，我不认为不应诉是一个选项，因为你在美国做了很多业务。如果缺席判决对你不利，你不仅将无法销售涉诉产品，而且你将无法销售其他产品。

Piercing the corporate veil

Zhu Huafang (Sinochem Group): I have a question concerning the enforcement of judgments. If a state-owned enterprise loses a suit in the US but has no property in the US against which the enforcement can be effected, can enforcement take place against the property of its affiliates in the US (assuming that it has such affiliates)? Is it possible that US courts will hold that the relationship between PRC state-owned companies is so close that they are in fact just one enterprise?

Zhu Song: This touches on the issue of what Chinese companies should do to avoid foreign lawsuits. One important way of guarding against lawsuits is to establish the framework for the entire corporate group – the parent and subsidiaries must be separate, and the subsidiaries have to have their own independent boards of directors. What's more, when a US subsidiary conducts a transaction with its Chinese parent company, it must do so on an arm's length basis. If it doesn't a US court will say that the US subsidiary is not an independent company and is controlled by its Chinese parent, and therefore the principle of

司一定要分开，子公司要有自己独立的董事会。而且，子公司和国内母公司进行交易的时候，一定是要按照市场规律办事，否则，美国的法院就会说美国的子公司并不是独立的公司，而是被中国的母公司控制的，要适用“揭开公司面纱”的原则。

陈佳园（中石化公司）：我们在美国或者别的国家开展业务，往往会设立一个小型的有限责任公司。假设这个公司有了纠纷以后，我们不去管它，大不了破产，这样在诉讼和执行过程中，是否能够有效规避我们国内母公司的责任？

朱松：我觉得还是有风险的。风险在什么地方呢？第一，如果你不应诉，就会有缺席判决。因为你不应诉，也不提供证据，基本上判决的赔偿是对方说了算，而且由于对方不了解你的业务规模，所以赔偿金额往往很大。例如，你国外子公司的销售利润只有5万美元，你如果不应诉的话，原告会跟法院要求赔偿500万美元；但如果你应诉，并且说明了这些情况，原告不会愿意为了5万美元赔偿而支付大笔律师费，于是有可能与原告达成和解，只需赔偿5万美元。第二，如果国外子公司赔不起，理论上说可以破产，但是万一法院裁定该子公司是由中国国内的母公司控制的话，那500万美元就只好由母公司去支付了。所以这种情况下，不应诉并不是一个很好的做法。

陈佳园：有可能要母公司来承担吗？那会怎样牵涉到母公司呢？

朱松：对，有可能。这个主要的原因就是刚才说的“揭开公司面纱”原则。

孙晓青（中国石化国际实业公司）：我们这些大公司设子公司而不设分公司的目的就在于设立防火墙，避免承担责任。如果子公司从公司架构和法律文件角度，已经做到了与母公司的分离和独立，这种情况下，根据美国的法律，原告在针对子公司的诉讼中还有什么理由可以把母公司牵连进来而实现他们的诉讼策略？

朱华芳：对，国内的大型集团公司在各子公司的独立性方面，至少从公司治理和财务上都已经是做得比较到位了。虽然在集团公司的内部管理上，还有些内部的请示和审批的过程，但最后体现到公司法律文件上，都是以子公司的董事会决议或者股东大会决议的形式表现出来的。

朱松：除了公司治理结构，还涉及到中国母公司怎么和国外子公司进行交易的问题，比如说母公司的产品卖到美国，你不想让美国的子公司获得利润的话，那么美国子公司以什么价格卖给下家，母公司就卖给子公司什么价格，如果这样的话，即使你内部的管理手续很全，子公司也会被认为缺乏独立人格。

孙晓青：税务机关也会调查转让定价这个问题的。

王慧敏（翰宇律师事务所）：还有其他几种情形也会把母公司牵涉到诉讼中来。一种是我们国内常见的“一套人马，两个牌子”，

“piercing the corporate veil” will apply.

Chen Jiayuan (Sinopec): When we launch a business in the US or another country, we will usually do so by establishing a small limited liability company. Supposing that, if this company becomes embroiled in a dispute, we ignore it and, if the worst comes to the worst, it goes bankrupt. In this way, could the parent in China effectively avoid liability during the lawsuit and the enforcement process?

Zhu Song: I think that there is still a risk. Firstly, if you do not respond to a suit, a default judgment will be rendered. Because you did not respond to the suit and did not provide evidence, the damages awarded in the judgment will essentially be what the other party said they were. As the other party does not know the size of your business, the amount of the damages will usually be large. For example, let's say that your foreign subsidiary makes a profit of only US\$50,000, if you do not respond to a suit, the plaintiff might request that the court award damages of US\$5 million. However, if you respond to the suit and explain the situation, the plaintiff will be reluctant to incur a large amount in attorneys' fees for damages of only US\$50,000. Accordingly, it may be possible to reach a settlement with the plaintiff which will only require you to pay damages of US\$50,000. Secondly, if the damages are beyond the foreign subsidiary's means, it can in theory declare bankruptcy. However, should the court rule that that subsidiary is controlled by its Chinese parent, the parent will have no choice but to pay that US\$5 million. Therefore, under such a circumstance, not responding to the suit is not a realistic option.

Chen Jiayuan: Is it possible that the parent will be required to bear the damages? How can the parent be dragged in?

Zhu Song: Yes, it is possible. The main reason is the principle of “piercing the corporate veil” which I just described.

Sun Xiaoqing (Sinopec International): The reason that large companies like us establish subsidiaries rather than branches is to establish a firewall, to avoid liability. If a subsidiary, from the perspective of the corporate framework and legal documents, is separate and independent from the parent, on what grounds under American law can a plaintiff drag the parent into a lawsuit against the subsidiary?

Zhu Huafang: With respect to the independence of subsidiaries, large group companies in China have done quite well, at least, from the perspective of corporate governance and financial affairs. Although in terms of internal group company management there are still some internal reporting and approval procedures, what is ultimately manifested in company legal documents are resolutions of the board of directors or the shareholders' general meeting of the subsidiary.

Zhu Song: In addition to the company's governance structure, there is still the issue of how the Chinese parent conducts transactions with its subsidiaries. For example, if in selling the parent's products in the US you don't want the US subsidiary to make a profit, so you have it sell the products on at the price at which the parent sold the products to it, the subsidiary will be deemed to be lacking in independent personality, no matter how sound your internal management procedures are.

你必须诚实地把所有文件交出来

You must faithfully hand over all of the documents



贾维恒
律师
翰宇律师事务所
Jia Weiheng
Associate
Squire Sanders &
Dempsey

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这种做法在美国就有危险。如果国外子公司里几乎所有的中层和高层在国内母公司也担任着高管职务，原告就会说，这个公司是同样的团队在管理两边的公司，子公司是被母公司直接控制的。第二种是朱律师提到的转让定价，独立公司是不可能做这种事情的。第三种涉及到人事任命权。如果子公司比较低级的人事任命，都还要拿到国内母公司来决定的话，那这也是他们认定公司不独立的一个情形。第四种就是从诉讼案由上牵扯到上游的母公司。以汽车产业为例，母子公司处于产业链的不同环节（例如设计、生产和销售等），原告可能开始仅主张产品质量责任，以生产企业（子公司）为被告，结果后来又主张设计责任，就会追加设计企业（母公司）为被告。

孙晓青：大家刚才谈到的无论是公司治理结构也好，还是母子公司之间应当秉持的市场化运作也好，在这些问题上的风险可能不是很大。我们自己公司的运营基本上能做到这一点，不是为了应对诉讼，而是为了符合全世界各地监管机构的要求。但是，刚才王律师提到的母子公司产业链的问题，确实不容易规避风险。例如，我们在国内生产并销往国外的产品，虽然一般在外国都成立贸易公司，但是如果国外的贸易公司涉及产品责任的话，那国内母公司就肯定会牵连进诉讼了。

令人头疼的“证据开示”

朱华芳：这就涉及到一个实际问题，原告很难拿到证据来证明中国母子公司之间不独立或者丧失了独立性，这时候法院会要求怎么举证？会要求中国公司在美国的子公司来举证吗？

孙晓青：在我们作为被告的一个案子中，要证明我们的子公司是否受母公司控制，美国法院的法官要求我们提供完整的证据，甚至后来又要求我们把很多内部的电子邮件都作为证据提交。但是，我在举证责任这个问题上仍有疑问：是原告负有举证责任还是被告负有举证责任？原告主张我们母子公司之间有关联关系，说我们的子公司是受母公司控制的，那是不是应该由原告来提供证据？

Sun Xiaoqing: The tax authorities will also investigate the transfer pricing issue.

Wang Huimin (Squire Sanders & Dempsey): There are also other situations in which a parent could be dragged into a lawsuit. One such situation is the so-called “one team, two brands”, which is commonly seen here in China. In the US, such an arrangement has its dangers. If almost all of the senior and middle management of the foreign subsidiary also serve in senior positions in the Chinese parent, the plaintiff will claim that it is the same team that manages both companies, so the subsidiary is directly controlled by the parent. A second situation would be the transfer pricing mentioned by Mr Zhu. An independent company could not act in this way. The third situation involves the power of appointment. If the appointment of relatively low level personnel of the US subsidiary requires a decision by the Chinese parent, this is also a situation where the US courts would hold that the subsidiary is not independent. A fourth situation would be a cause of action that implicates the upstream parent. Taking the automotive industry as an example, the parent and subsidiaries are found at different links in the production chain (such as design, production and sales). At the outset, the plaintiff may just claim product quality liability and name the producer (i.e. the subsidiary) as defendant, however, if, subsequently, it also claims design liability, it will additionally name the designer (i.e. the parent) as defendant.

Sun Xiaoqing: The corporate governance structure and the market driven operations that should govern the relationship between parents and subsidiaries just discussed may not be so risky. The operations of our company basically achieve this, not intentionally to avoid lawsuits but rather to satisfy the requirements of regulators around the world. However, the parent/subsidiary production chain issue just mentioned by Ms Wang is a risk that is not so easily avoided. Although in general we have established trading companies abroad to sell our products produced here at home in foreign countries, if a trading company abroad bears liability in respect of such products, the parent here in China will almost certainly be drawn into the suit.

The headache of 'discovery'

Zhu Huafang: Since it is difficult for a plaintiff to secure evidence to prove that there is no independence between a Chinese parent and its subsidiary, or that such independence has been lost, how will the court require evidence to be adduced? Will it require the US subsidiary of the Chinese company to adduce the evidence?

Sun Xiaoqing: In one case in which we were the defendant, the judge of a US court asked us to provide comprehensive evidence to show whether or not our subsidiary was controlled by the parent. The judge even subsequently asked us to submit numerous internal e-mails as evidence. However, on the issue of the burden of proof I still have questions: is it the plaintiff who bears the burden of proof, or the defendant? If the plaintiff claims that there is a connection between our parent and subsidiary, and says that our subsidiary is controlled by the parent, isn't it up to the plaintiff to provide the evidence?

Zhu Song: This involves a very important concept in American

证人可能就会不自觉地泄露出一些隐藏的信息

A witness could inadvertently disclose some information that has been withheld



孙晓青
中国石化国际
实业公司
Sun Xiaoqing
Sinopec
International

”

朱松：这涉及到美国诉讼中很重要的一个概念：证据开示程序。在美国的证据收集过程中，举证责任相对来说不是很重要。举例来说，美国公司在诉讼中同时把中国公司的母子公司作为被告，在中国母公司应诉后，马上就会收到原告的证据收集清单，要求你提供很多证据，比如孙总刚才提到的中国公司子公司和母公司之间的所有电子邮件都被要求作为证据提交，因为原告可以主张这些电子邮件会与他们以后要在法庭上提供的证据有关系。所以，美国的证据开示程序就使得原告很容易拿到这方面的证据。

朱华芳：那被告方可否对原告的证据收集清单提出一些异议，例如主张其请求的证据与案件不具备关联性？另外，如果我隐藏了一些不愿出示的证据，原告和法院有什么办法来检查呢？

孙晓青：在我们的案子中，律师曾吓唬我们，说你要不交这些电子邮件的话，美国法院会去把你电脑的服务器拿走。

贾维恒（翰宇律师事务所）：我们作为律师一般会给客户讲，你必须诚实地把所有文件交出来。虽然通常情况下，法院不会知道你把这些藏起来了，但如果通过一两个邮件让法院推理出来你把东西藏起来了，法院会认为你不诚实地执行法院的命令，甚至以后可能在判决上会对你很不利。

王慧敏：这种行为甚至会构成妨碍司法的刑事责任。我在协助中国企业处理境外诉讼时，很头疼的一个事情就是解释美国的证据开示制度，因为这跟国内较为简单的举证程序完全不同。我们跟中国客户的建议是：第一，一定要找专人负责，确保在法院规定的截止日期前提交所有证据；第二，公司和律师都要对提交的证据一一过目，否则，把有利于对方的证据提交给对方，会给自己造成很多风险；第三，对提交的证据要根据证明的内容进行证据分类。总之，中国企业在证据开示程序中的内部组织和协调非常重要。

朱松：对于孙总刚才提出的举证责任的问题，美国的证据发现程

litigation, namely discovery. The burden of proof in the evidence-gathering process in the US is, relatively speaking, not that important. For example, if in a legal action an American company names both the Chinese parent and its US subsidiary as defendants, once the Chinese parent responds to the suit, it will immediately receive a discovery list from the plaintiff, requiring it to provide numerous pieces of evidence, like all the e-mail correspondence between the Chinese parent and subsidiary as just mentioned by Ms Sun. That is because the plaintiff can claim that these e-mails are pertinent to the evidence that it will later present in court. Accordingly, the US discovery process makes it easy for the plaintiff to obtain such evidence.

Zhu Huafang: Can the defendant raise objections against the plaintiff's discovery list? For example, claiming that the requested evidence is irrelevant to the case? And if I withhold certain pieces of evidence that I am unwilling to produce, what means do the plaintiff and court have at their disposal to come and check?

Sun Xiaoqing: In our case, the lawyers tried to intimidate us by saying that if we didn't hand over those e-mails, the US court would seize our computers' server.

Jia Weiheng (Squire Sanders & Dempsey): We, as lawyers, will generally tell the client that you must faithfully hand over all of the documents. Although in normal circumstances it would be impossible for the court to know that you concealed anything, if, by virtue of one or two e-mails, the court could deduce that you had withheld something, it would deem that you failed to execute the court order in good faith. That could ultimately prove adverse to you at the time of the judgment.

Wang Huimin: Such an act could even constitute criminal liability for contempt of court. In assisting Chinese enterprises in dealing with US lawsuits, one thing that causes headaches is explaining to them the American system of discovery. It is vastly different from the relatively simple procedure for adducing evidence here in the PRC. Our advice to PRC clients is: (1) someone must be assigned to be responsible for the matter and ensure that all of the evidence is submitted by the deadline set by the court; (2) the company and its lawyers must look over each piece of evidence, failing which the submission to the other party of evidence that is favourable to the other party could give rise to many risks for one's own side; and (3) the evidence that is to be submitted should be categorized based on what it is meant to substantiate. In short, internal organization and coordination in the Chinese company during the discovery process is extremely important.

Zhu Song: To answer the question on the burden of proof of independent relationships between the defendant and its parent company just mentioned by Ms Sun, in the US discovery procedure, although it is the plaintiff that bears the burden of proof, the plaintiff may request such evidence from the defendant and the defendant will be required to provide it to the plaintiff. What happens if the defendant is unwilling to provide such evidence? Almost every time that I represent a Chinese company in a legal action in the US, I am asked the following question: if we don't provide the evidence to the plaintiff, what consequences will there be? Criminally speaking, the consequences are minor. That is because if the defendant does not provide the evidence, in general it will additionally claim that it has no

序的做法是：虽然是原告的举证责任，但是原告可以向被告来要，而且被告一定要提供给原告。如果被告不愿意提供怎么办？我每次代表国内的公司在美国诉讼，几乎都会碰到这个问题：如果不提供证据给原告的话，会有什么后果呢？刑事上的后果很小。因为被告不提供的话，一般会同时主张说自己没有义务向原告提供这些证据。但是，这会导致原告申请法官签发命令，强制要求被告提供证据。这时候，如果原告再不提供的话，那就有危险性了。法院会认为，原告要求被告出示的证据是为了证明被告的母子公司之间缺乏独立人格，而被告拒绝提供该等证据，那么就推定原告的主张成立，即子公司和母公司是一个公司。

朱华芳：那如果要求提交的证据中涉及到公司的商业秘密怎么办？

朱松：我们曾代表中国一家公司在美国诉讼，美国公司怀疑中国公司侵犯了他们的商业秘密，并且要求到中国公司去看一下中国公司的产品设计中有没有使用美国公司的商业秘密。对此，中国公司也担心自己的商业秘密被泄露，就申请了法院的保护令。这样，美国的原告不能看，原告外聘的律师可以看，但是也只能在法官的办公室里面看。而且律师是不允许向外透露的，否则他的律师执照都会被吊销。

孙晓青：我觉得这方面风险还是太大了。据说丰田公司在一些诉讼中的不利证据都是被对方使用“无间道”的方式弄到的，就是对方派人到丰田公司内部取得这些证据。

朱华芳：这种通过非法渠道取得的证据能使用吗？

朱松：非法渠道取得的证据不能用。如果派人到对方公司取得证据，而且涉及违法的话，就不能使用这些证据。

孙晓青：比较可怕的一点，因为你提交的文件之间，在语言、内容，甚至时间上，会有些逻辑性关联，比较有经验的律师在阅读

obligation to provide such evidence to the plaintiff. However, this will result in the plaintiff applying to the judge for the issuance of an order compelling the defendant to provide the evidence. If the defendant still fails to provide the evidence at this juncture, it can be dangerous. The court will think that the evidence that the plaintiff requested the defendant to present was for the purpose of showing that the subsidiary lacked a personality independent from that of the parent and the defendant refused to provide such evidence, so it will infer that the plaintiff's claim is tenable, i.e. that the subsidiary and the parent are one company.

Zhu Huafang: What should be done if the requested evidence contains trade secrets?

Zhu Song: We once represented a Chinese company in a lawsuit in the US where the American company suspected that the Chinese company had infringed its trade secrets, and asked to be allowed into the Chinese company to see whether the Chinese company had used those trade secrets in its product design. Worried that its own trade secrets could be leaked, the Chinese company applied to the court for a protective order. In this way, the American plaintiff could not view the evidence, but its lawyers could, but only in the judge's chambers. Additionally, the lawyers were not permitted to disclose the information on pain of revocation of their licences.

Sun Xiaoqing: I still feel that such a risk is too great. I've heard that adverse evidence in a legal action in which Toyota was involved was obtained surreptitiously by the opposite party, namely the opposite party had sent "spies" to Toyota to obtain that evidence.

Zhu Huafang: Can such evidence that has been obtained through illegal means be used in court?

Zhu Song: Evidence that has been obtained through illegal means is inadmissible. If someone is sent to the other company to obtain evidence and it is obtained illegally, such evidence cannot be used in court.

Sun Xiaoqing: One thing that is worrying is that among the documents that you provide there will be some logical connections in terms of language, content and even time. A relatively experienced lawyer reading such documents will discover these connections and deduce that you are withholding certain evidence. Furthermore, an experienced lawyer, when cross-examining a witness, will talk unendingly with the witness, at times for even up to three days. During the conversation, a witness could inadvertently disclose some information that has been withheld. This is quite worrisome.

Hu Yi (ZTE): I have a question about attorney-client privilege. Can't a company ask its lawyers whether certain documents can be withheld, or if they are submitted, what adverse effect this could have?

Zhu Song: Generally, our US clients will give all of their documents to their lawyers to look at. We've had some cases in which there were 20 or 30 lawyers involved. We look at each page of evidence to see if there is any content that is subject to attorney-client privilege. If it is subject to such protection it is not submitted

非法渠道取得的证据不能用

Evidence that has been obtained through illegal means is inadmissible



朱松
合伙人
翰宇律师事务所
Zhu Song
Partner
Squire Sanders &
Dempsey

助您拓展全球业务的法律顾问

Your Legal Partner to Expanding Business Globally



美国翰宇国际律师事务所长期致力于协助各类公司拓展全球业务。我们分布于15个国家的32间办公室组成了强大的服务网络与平台；不论您寻求在美国、欧洲、拉美还是亚洲其他地区拓展业务，我们都将向您提供既务实又具有战略性的法律服务。我们曾协助数家大型企业走出国门，并为其海外业务的发展提供持续性支持。我们专业团队中的中国本土律师以及长期活跃于跨境业务的外国律师相得益彰，长于弥合文化差异并提出睿智的法律解决方案。通过我们在北京、上海或香港的代表处，您可以便捷地享受到翰宇的全球网络以及通达其他国家和地区的法律资讯。

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时会发现这些关联，推断出你隐藏了部分证据。另外，有经验的律师在盘问证人时，会跟证人不停地谈，可以长达三天，谈的过程中证人可能就会不自觉地泄露出一些隐藏的信息，这个比较可怕。

胡毅（中兴通讯）：我有个关于律师保密特权的问题。公司可不可以就某些文件，向自己的律师咨询：这些证据能不能不作为证据提交，或者如果提交后会有什么不利影响？

朱松：我们的美国客户的做法一般是把所有的文件都给律师看，我们有些案子里面有几十个律师，每页证据都看有没有受律师保密特权保护的内容，如果受保护的话就不作为证据提交，如果不受保护就把它交上去。但是，公司如果要就某份文件主张律师保密特权，一定要有足够的依据，比如要写一份备忘录，而且这个备忘录往往是另外聘请律师来出具，这样法院比较容易采纳。

争议解决条款

吴浩（TCL集团）：合同中的争议解决条款一般怎么去写合适，到底选仲裁还是选诉讼？如果选择诉讼，诉讼地点选择哪里？

朱松：关于选择诉讼地点，我想先说最新的一个案例。一家中国公司到美国去起诉美国的一家公司，美国的公司就以双方在合同中约定在中国法院诉讼为由提出抗辩，这一理由得到美国法院的支持，结果中国公司败诉，只好回到中国重新诉讼，而美国公司既不应诉，在中国也无可供执行的财产，结果中国公司在取得中国法院的缺席判决后不得不再回到先前的美国法院申请执行。而一般情况下，中国公司拿缺席判决到美国执行的可能性为零。不过，从上面的案例可以看出，美国的法院是尊重合同条款的约定的，关键是中国公司要学会选择和约定合适的诉讼地点。

王慧敏：国外公司的做法通常是，在进军海外市场之前会咨询当地律师，了解当地的诉讼和仲裁法律程序、费用、可供选择的仲裁机构等问题，然后根据不同的地区，草拟不同的争议解决条款。其实，诉讼和仲裁是各有利弊的。大家原来喜欢用仲裁，但是，第一，仲裁不见得就会好，因为有些仲裁花的时间比诉讼还长，而且仲裁一般是一裁终局，没有上诉程序；第二，要考虑仲裁或诉讼程序使用的语言，使用自己不熟悉的语言进行法律程序会给自己造成很大障碍。第三，一定要考虑到将来能否顺利执行的问题；最后，公司要分析在每个交易所处的位置，是自己诉对方的可能性大还是对方诉自己的可能性大，以及纠纷的性质是侵权还是合同关系，一般侵权是没有办法选择管辖的。考虑了以上几个因素后，再决定选择诉讼还是仲裁，以及具体的地点。

孙晓青：我们以前碰到过一个案子，既涉及到合同纠纷，也涉及到侵权纠纷。这种情况下，即使对侵权纠纷约定了仲裁解决，最后也不得不去法院诉讼。

as evidence, and if it isn't subject to such protection, we submit it. However, if the company claims attorney-client privilege in respect of a certain document, there must be sufficient reasons, for example, it must prepare a memorandum to explain such reasons, which, in general, is issued by another lawyer who is engaged separately and specially for this purpose. Proceeding in this manner makes the company's claim of attorney-client privilege easier for the court to accept.

Dispute resolution clauses

Wu Hao (TCL Group): In general, how should the dispute resolution clause in a contract be written, and which is the better choice, arbitration or litigation? If litigation is opted for, which place should be selected as the place of litigation?

Zhu Song: With respect to the choice of the place of litigation, I'd first like to talk about a recent case. A Chinese company instituted a lawsuit against an American company in the US. The American company filed an objection on the grounds that the parties had agreed in their contract that any lawsuit was to be heard in a PRC court. The American court upheld this position, resulting in the PRC company losing the suit. Its only option was then to return to the PRC and institute a lawsuit there. The American company not only did not respond to the suit, but it also did not have any property in China against which judgment could be enforced. In the end, the Chinese company had no other option after securing a default decision in the PRC court but to return to the same US court and apply for enforcement. Under normal circumstances, the chances of a Chinese company being able to enforce a PRC default judgment in the US are nil. However, from the above case it can be seen that American courts respect contractual terms, so the key lies in PRC companies' learning how to select the appropriate place of litigation and then stipulate it in the contract.

Wang Huimin: It is the usual practice of foreign companies, before entering into a foreign market, to seek the advice of local lawyers so as to gain an understanding of the legal procedures, the costs of local litigation and arbitration and the available arbitration institutions. The local lawyers will then draft dispute resolution clauses that are appropriate for the locality. In actuality, litigation and arbitration have both their advantages and disadvantages. It seems that everyone has a preference for arbitration, however, arbitration is not necessarily better because some arbitration cases may take even longer than litigation and, in general, arbitration is final, which precludes the possibility of an appeal. Secondly, consideration has to be given to the language used in arbitration or litigation – using a language with which one is not thoroughly familiar in conducting a legal procedure can create a major obstacle for oneself. Thirdly, consideration must be given as to whether enforcement can be smoothly achieved in future; and lastly, a company needs to analyse its position in each transaction: is it more likely that it will be suing the other party or is it more likely that the other party will be suing it, and whether the dispute is in the nature of a tort or a contractual relationship. In general, there is no choice of jurisdiction in the case of a tort. A decision as to whether to opt for litigation or arbitration as well as to the specific location should be made only after considering the foregoing factors.

Sun Xiaoqing: Some time back we encountered a case that

美国法院是尊重合同条款约定的

American courts respect contractual terms



朱松
合伙人
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Zhu Song
Partner
Squire Sanders &
Dempsey

魔鬼“专利投机人”

胡毅：我们关注的是在美国的专利投机人提起的专利侵权诉讼。对于这种情况应该怎么应对？

朱松：我谈谈我个人的看法。先给大家解释一下专利投机人的概念，他是指有些人，甚至比如说律师，购买一些他人的专利，买来以后就去对其他公司提起诉讼，而且往往是起诉大公司。大公司因为诉讼费用很高，往往不愿意诉讼，就通过支付较少的费用与专利投机人达成和解，这种事情现在在美国越来越多，对在美国从事业务的科技公司是一个很大的威胁。我觉得有好多处理办法：第一，你不应诉，但这不是一种好的办法，因为你不应诉的话，他会拿到缺席判决，会影响你在美国现在或者将来的好多业务。第二种办法就是集体应诉。一般来说，专利投机人起诉的被告会涉及很多家公司。比如说30家公司被诉，30家公司一并应诉主张原告的专利无效，这样分摊到每家公司的费用就很小。实践中，专利投机人的做法是对这些集体应诉的公司各个击破，通过各种手段胁迫被告逐一跟他达成和解。例如，他会说你现在和解的话支付3万美元，一年以后和解5万，三年以后10万。中国公司可以这样应对专利投机人的和解提议：如果你认为对方的专利是有效的，而且你可能真的涉及侵权的话，你可以一开始就跟他和解；反之，如果你确信自己不侵权，而且你认为对方的专利也可能是无效的，这种情况下，你就可以不和解，一直把案子打下去。

胡毅：根据我们实际的经验，“道高一尺，魔高一丈”，专利投机人是越来越聪明。第一，他们不是只拿一个专利来敲诈，而是一系列的专利。先不说你要不要去对这些专利申请撤销，你自己先分析一下你的产品有没有跟他的专利冲突，就已经是非常难的事情了。第二，他有很多不同的策略，比如有个策略叫“赛跑”，就像刚才朱律师说的，比如第一次他找你的时候，说你现在是属于第二等级，支付5万美元就可以了；下次再来，就说这一年又有哪些公司已经签了和解协议，如果你再不签，那你就是第五等级了，最少支付20万美

involved both contractual disputes and torts. In such a circumstance, even if resolution by arbitration was specified in the contract for such tortious disputes, ultimately the only option for the parties to resolve these disputes was to institute a court action rather than an arbitration .

The demon “patent trolls”

Hu Yi: One thing of particular concern to us is patent infringement suits instituted by patent trolls in the US. How should we deal with such situations?

Zhu Song: Patent trolls are people, in some cases even lawyers, who purchase certain patents from their holders, then institute legal action for patent infringement against other companies, usually large companies. Because litigation costs are so high, large companies are usually reluctant to get involved in a lawsuit, and they prefer to reach a settlement with the patent troll by paying a relatively small amount. There is more and more of this type of thing happening in the US now, posing a major headache for technology companies doing business in the US. I believe that there are several approaches that can be taken to deal with such a situation. The first approach is not responding to the suit, although this is not a good approach. That is because if you do not respond to the suit, the patent troll will secure a default judgment that could affect a lot of your current and future business in the US. The second approach is a joint response. Generally speaking, a patent troll will institute legal actions against several companies. For example, if 30 companies are sued and the 30 companies respond together to the suits by claiming that the plaintiff's patent is invalid, the costs falling on each company will be quite small. In practice, a patent troll will try to divide and conquer such an alliance by using various means to compel each company to reach a separate agreement with him. For example, he will say that if you settle with him now it will cost you only US\$30,000, but will cost US\$50,000 to settle in one year and US\$100,000 to settle in three years. A Chinese company can respond to such settlement proposals as follows: if you think that the patent troll's patent is valid and that it is possible that you actually did infringe it, you can settle with him from the very outset. Conversely, if you are convinced that you didn't infringe his patent and you think that it is possible that his patent is invalid, you can refuse to settle and fight the case to the end.

Hu Yi: Based on our own actual experience, “for every foot the law progresses, the criminal element leaps ahead by 10”. Patent trolls are getting smarter and smarter. Firstly, a patent troll is not just using one patent in his extortion schemes, but a whole series of patents. Simply analysing whether your product conflicts with their patents is already by itself extremely difficult, not to mention applying for the cancellation of these patents. Secondly, he has numerous different strategies, for example, one of which called “racing”. As just mentioned by Mr Zhu, the first time that he comes to you he says a payment of US\$50,000 will suffice; the next time he comes he says that other companies have signed settlement agreements with him that year, and if you still hold out, you will have to pay at least US\$200,000. Because the patent troll is worried that instituting lawsuits simultaneously against several companies could result in collective revenge, he will use such means to attempt to convince each company, on a

一般侵权是没有办法选择管辖的

There is no choice of jurisdiction in the case of a tort



王慧敏
律师
翰宇律师事务所
Wang Huimin
Associate
Squire Sanders &
Dempsey

元。因为专利投机人也担心把很多公司同时起诉，会导致集体的报复，所以他就采取这种做法轮流地、有批次地说服各家公司进行和解。基本策略就是首先捡软柿子捏，看谁比较弱就先找谁。

这种专利投机人诉讼和专利鼓励创新的本质是背道而驰的。在美国有没有这样一个趋势：通过立法，限制那些不实际使用和实施专利的专利投机人对实施专利的企业提起诉讼？

朱松：美国的议会、法律界都已经认识到有这个问题，现在好多事情已经开始在做了。其实，专利投机人诉讼给企业界的压力比较大，倒不在于赔钱多少的问题，而是企业都担心专利投机人申请禁止令。比如黑莓（BlackBerry）的案子，如果专利投机人申请禁止令，黑莓的客户都将不能继续使用黑莓手机，即使黑莓公司最终赢了诉讼，也会丢了客户。所以在 eBay 的案件中，法院认为原告属于非专利实施人，未同意其申请长期禁令的请求。而且美国《专利法》准备进行大的改革，但是由于像中兴所处的电子行业，与医药行业的想法正好相反，而两个行业的实力都很强大，都在游说国会按照他们的做法修改专利法，我无法告诉你这个修订法案什么时候会出来。但是美国已经认识到现在的专利制度不是在鼓励发明创造，而是成为了专利投机人的工具。

如何选择律所和审查账单

吴浩：我们的美国业务不多，但是一旦有诉讼争议，如何选择律师去解决争议？

朱松：非常重要的一点就是公司内部事先要有一套相应的律师聘请和诉讼管理程序，否则因为诉讼往往突如其来，临时抱佛脚会来不及。关于聘请律师，你要事先了解美国律师事务所的费用标准和支付方式，是按小时还是按阶段，哪一种对公司更合适。关于诉讼管理，以专利诉讼为例，一种办法是公司通过亲身经历多起诉讼来学会如何保护自己，怎么管理这个诉讼；另外一种办法就是经常参加一些会议和律师事务所的培训，系统地学习相关的知识和经验。显然后者是更好的做法。

rotating basis, to settle. His basic strategy is to first “squeeze the soft persimmons”, namely to see which one is the weakest and then go for that one first.

Such patent troll lawsuits run completely counter to the original intent of patents, which was to encourage innovation. Is there any sign of a move in the US to use legislation to curtail those patent trolls, who do not actually use their patents, from instituting legal actions against enterprises that do use such patents?

Zhu Song: The US Congress and legal circles are already aware of this problem, and numerous things have been put in motion to address it. In fact, the pressure that legal actions by patent trolls are putting on the corporate world is quite serious, but, contrary to what one would expect, it is not due to the amount of the damages, rather it is patent trolls’ applying for injunctions that worries enterprises. A case in point is the BlackBerry case. If the patent troll applies for an injunction, BlackBerry’s customers will be unable to continue using their BlackBerrys, and even if BlackBerry ultimately emerges victorious, it will lose customers. Accordingly, in the eBay case, as the court held that the plaintiff was a “non-practising entity”, it refused its request for a permanent injunction. Furthermore, there are preparations now being made to overhaul the US Patent Act. However, as the electronic industry, in which ZTE operates, and the pharmaceutical industry have wildly opposing points of view, and both of these industries are extremely powerful and are lobbying Congress to amend the Patent Act to their advantage, I can’t tell you when this amendment bill will come out. However, the US has recognized that the current patent system does not encourage inventions, but has become a tool of patent trolls.

Choosing a law firm, reviewing the bill

Wu Hao: We don’t do much business in the US, but, in the event of a dispute, how should we go about choosing a law firm to resolve it?

Zhu Song: It is very important for a company to prepare, in advance, an internal set of lawyer retention and litigation management procedures. That is because most lawsuits arise unexpectedly, so it is better to be safe than sorry. In retaining lawyers, you first have to familiarize yourself with the fee rates and payment methods of American law firms, i.e. by the hour or by stage, and determine which is more appropriate for the company. With respect to litigation management, taking patent litigation as an example, one method is for the company to learn how to protect itself, and learn how to manage such lawsuits by having itself been through numerous such suits. Another method is by attending seminars and participating in training by law firms so as to systematically acquire the relevant knowledge and expertise. Clearly the latter method is the better one.

I’d like to ask everyone at this table, when a PRC company chooses a foreign law firm, do you care whether the firm has lawyers who can speak Chinese, and whether there is an advantage to bilingualism or multilingualism?

Sun Xiaoqing: We of course care. A bilingual lawyer will most certainly be our first choice. As mentioned by Ms Wang, language could be more important than other factors involved in the dispute resolution process, so we attach great importance to this. But what

我想问在座的各位，中国公司在选择国外律所的时候，会不会很在意律师事务所是否有讲中文的律师，是否在语言上面有双语或多语言优势之类的？

孙晓青：会在乎，双语的律师肯定是我们首选的。像王律师提到的，语言在解决争端过程中可能比其他因素更重要，所以我们是重视的。我们公司法务在跟律师事务所打交道有点困惑的，不是前面谈费率的问题，而是后面计小时的问题，也就是我们怎么去审查账单。我们没有办法做很细的审查，没法减很多，而且审查得太厉害的话大家不好合作。大家对这个问题有没有好的办法？

贾维恒：我现在跟国内客户打交道最头疼的也是这个问题，每次账单寄出去，客户都要和我逐项核对，浪费我很多时间精力，因为核对账单是不能收费的。我有时候也觉得麻烦，只能统一打折，这是最快最有效的解决办法。

孙晓青：我们现在按小时计算的律师费是一个季度结算一次，我曾经给律师事务所提出月结，这样刚刚过的事情大家比较容易回忆和确认。

朱华芳：我们的是一个半月结一次。

贾维恒：从律师事务所的角度来讲，我们内部每个月也会审单子，如果觉得超出合理范围的小时数，会把它砍掉。

朱松：我觉得公司法务解决这个问题的很重要的一个办法就是，不要等拿到了账单后再来查看，而是事先要让律师事先估计一下这项工作要花多长时间。律师不希望你觉得他能力有限，往往会给一个比较合理的估计。还有一个就是，律师事务所里面一定要有个你能够信任的律师，你可以直接问他费用为什么这么多。他为了保持和你长期的客户关系，能在内部帮你控制一下费用。有没有一个可以完全解决审查律师账单这个问题的方法呢？没有。但这些事情都做下来以后，你就发现对你控制律师费用会有些帮助。而且现在很多国外律师事务所也都愿意接受固定费率了。

孙晓青：你们的固定费率跟国内的律师事务所一样吗？比如说按照标的的百分之几？

朱松：我的算法是分阶段，第一步多少钱，第二步多少钱，第三步多少钱，基本上也是按小时费率估算出来的。这样对公司法务的好处是，律师费金额固定，容易跟公司高管解释。

王慧敏：如果案子不需要律师跟公司做太多解释工作，律师比较愿意接受固定费率。否则，如果公司需要律师不时地提供各种咨询意见，律师一般就不大愿意用固定费率了。

孙晓青：如果在公司法务比较有经验的情况下，这种解释工作和一般性咨询可以由公司法务去跟公司高管去解释。

troubles us in-house counsel so much is not the selection of a law firm or even the issue of fee rates, but rather the issue of calculation of hours. In other words, how do we review the bills? It is impossible for us to do a detailed review and to reduce the bill by much, and too strict a review could hamper cooperation. Does anyone have an effective approach to this issue?

Jia Weiheng: When I deal with clients here in China, the biggest headache is precisely this issue. Whenever a bill is mailed out, the client wants to check each and every item with me, wasting a lot of my time and energy because I cannot bill clients the hours for reviewing the bill. Sometimes I get fed up and the only option is to give an across the board discount, this being the quickest and most effective method of resolution.

Sun Xiaqing: We settle our lawyers' fees that are calculated on an hourly basis once per quarter. I once proposed monthly settlement to the law firm, as this would make it easier for everyone to remember and confirm things that had just recently occurred.

Zhu Huafang: We settle on a monthly basis.

Jia Weiheng: From the perspective of the law firm, we also internally review our bills on a monthly basis. If the number of hours exceeds what we feel is reasonable, we will cut some.

Zhu Song: I think that one of the important ways that in-house counsel can use to resolve this problem is to ask the lawyers up front to estimate how much time a task will require, rather than to wait for the bill to arrive and then check it. Lawyers don't want you to think that their capabilities are limited, so they will usually give you a relatively reasonable estimate. Another is to ensure that there is a lawyer in the law firm that you can trust, someone to whom you can directly ask why the fee is so high. To maintain a long-term client relationship with you, he can help you internally to keep the fees in check. Is there one perfect solution to completely resolve the problem of reviewing lawyers' bills? I don't think so. However, if you do what I just mentioned you will find that they are helpful in keeping a lid on lawyers' fees. Furthermore, many foreign law firms are now willing to accept fixed fee rates.

Sun Xiaqing: Are your fixed fee rates like those domestic law firms here in the PRC? For example, a certain percentage of the subject matter?

Zhu Song: We calculate by stages: a certain amount at the first

专利投机人是越来越聪明

Patent trolls are getting smarter and smarter



胡毅
中兴通讯
Hu Yi
ZTE



双语的律师肯定是我们首选的

A bilingual lawyer will most certainly be our first choice



孙晓青
中国石化国际
实业公司
Sun Xiaoqing
Sinopec
International

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朱松：现在美国的大公司还有一种做法，就是会说我每年给你律师事务所固定的费用，有多少案子你都得去做。我在华盛顿参加的一个座谈会，一家大公司长期合作的五家律所，原来都是按小时计费，现在不按小时付，1000万美元的费用，每家200万美元，有多少案子你都去打，如果案子不多的话你赚，如果案子多的话你亏。当然目前这种做法比较少。■

stage, a certain amount at the second stage, a certain amount at the third stage, and so on. Essentially, this too is estimated based on the hourly billing rate. The advantage for a corporate counsel in this approach is that the amount of lawyers' fees is fixed, so it is easily explained to the company's senior management.

Wang Huimin: Lawyers are more willing to accept a fixed fee rate if they do not need to be constantly explaining things about a case to the company. On the other hand, if the company requires the lawyers to frequently provide all types of advice, lawyers will not generally be willing to accept a fixed fee rate.

Sun Xiaoqing: If a corporate counsel is relatively experienced, he or she will be able to provide this type of general explanations and advice to the senior management.

Zhu Song: Some large American companies now pay a firm a fixed fee each year, and the firm handles all the cases, no matter how many. At a seminar that I attended in Washington, five law firms that had a long-term cooperative relationship with a large company had originally charged by the hour, but they don't do so any more. Instead, the company pays them a fee of US\$10 million, US\$2 million per firm, and they handle all the cases regardless of the number. If there aren't many cases in one year, they make money and if there are many cases, they lose. Of course, this way of doing things is still relatively rare. ■



中国企业法律顾问与美国翰宇国际律师事务所的律师们交换意见。

In-house counsel from Chinese companies exchange views with lawyers from Squire Sanders & Dempsey.