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法律法规简报 2023-12-29

Legal Update 2023-12-29

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一、最高检、国家外汇局发布惩治涉外汇违法犯罪典型案例 2023.12.27

SPP and SAFE Publish Typical Cases Involving the Crackdown on Foreign Exchange Crimes

日前，最高人民检察院、国家外汇管理局联合发出《关于印发惩治涉外汇违法犯罪典型案例的通知》（下称《通知》）。

The Supreme People's Procuratorate (SPP) and the State Administration of Foreign



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Exchange (SAFE) have jointly released the Circular on Issuing the Typical Cases Involving the Crackdown on Foreign Exchange Crimes (the "Circular").

《通知》称，两部门联合编写“赵某等人非法经营案”等 8 件惩治涉外汇违法犯罪典型案例，供办案中参考。根据《通知》，本批案例主要涉及跨境对敲型非法买卖外汇案件，对解决检察办案中指控证明犯罪难题具有重要指导意义。例如，准确把握非法买卖外汇刑事案件的证明标准，进一步提高引导取证、证据审查能力，以查清境内资金流向为重点，紧盯关联账户，全面审查银行流水、通讯记录等客观证据，结合犯罪嫌疑人、被告人供述、证人证言等言辞证据，在关联比对分析的基础上还原非法买卖外汇行为模式，准确认定案件事实。

According to the Circular, the two authorities jointly prepare eight typical cases involving the crackdown on foreign exchange crimes, including the "illegal operation case committed by Zhao X. et al.", for reference in case handling. The Circular specifies that this batch of cases mainly involves the illegal trading of foreign exchange arising from cross-border matched order, which has important guiding significance in solving the difficulties in criminal charges and proof in the prosecutorial work. For example, the cases stress the need to correctly grasp the standards of proof for criminal cases involving illegal foreign exchange trading, further raise the capabilities in evidence collection and evidence review, focus on clarifying the flow of domestic funds, keep a close eye on related accounts, comprehensively review such objective evidence as bank statements and communication records, restore the illegal foreign exchange trading behavior pattern by considering the confessions given by criminal suspects and the defendants, witness testimony, and other verbal evidence and based on correlation and comparative analysis, and accurately determine the facts of the cases.

(Source: https://www.spp.gov.cn/xwfbh/wsfbt/202312/t20231227_638215.shtml#2)

二、最高法出台民法典合同编通则司法解释

2023.12.05

SPC Releases Judicial Interpretation on the General Provisions of the Contracts Book of the Civil Code

近日，最高人民法院下发《关于适用〈中华人民共和国民法典〉合同编通则若干问题的解释》（下称《解释》），自 12 月 5 日起施行。



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The Supreme People's Court (SPC) has recently released the Interpretation on Several Issues Concerning the Application of the General Provisions of the Contracts Book of the Civil Code of the People's Republic of China (the "Interpretation"), with effect on December 5, 2023.

《解释》包括一般规定、合同的订立、合同的效力、合同的履行、合同的保全、合同的变更和转让、合同的权利义务终止、违约责任和附则等九部分。其中，关于预约合同的认定，根据《解释》，当事人以认购书、订购书、预订书等形式约定在将来一定期限内订立合同，或者为担保在将来一定期限内订立合同交付了定金，能够确定将来所要订立合同的主体、标的等内容的，法院应当认定预约合同成立。当事人通过签订意向书或者备忘录等方式，仅表达交易的意向，未约定在将来一定期限内订立合同，或者虽然有约定但是难以确定将来所要订立合同的主体、标的等内容，一方主张预约合同成立的，法院不予支持。

The Interpretation comprises nine sections, covering general rules, conclusion of contracts, effect of contracts, performance of contracts, preservation of contracts, modification and assignment of contracts, termination of rights and obligations under a contract, default liability, and supplementary provisions. Regarding the identification of a preliminary contract, according to the Interpretation, if the parties agree to conclude a contract within a certain period of time in the future by means of a letter of subscription, letter of order, letter of reservation, and the like, or if they deposit earnest money to secure the conclusion of a contract within a certain period of time in the future, thereby establishing clarity on the parties, subject matter, and other essential elements of the contract to be concluded in the future, the court should recognize the formation of a preliminary agreement. However, if the parties merely express their intention to transact by signing a letter of intent or memorandum without agreeing to conclude a contract within a certain period of time in the future, or if it is difficult to ascertain the parties, subject matter, and other essential elements of the contract to be concluded in the future, the court will reject a party's claim of the establishment of a preliminary contract, even if an agreement exists.

(Source:

http://rmfyb.chinacourt.org/paper/html/2023-12/05/content_234445.htm?div=-1)



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三、最高法出台涉外民事关系法律适用法司法解释（二）

2023.12.01

MOFCOM Unveils the Statistical Survey System for Reporting Imports and Exports of Bulk Products

日前，最高人民法院发出《关于适用〈中华人民共和国涉外民事关系法律适用法〉若干问题的解释（二）》（下称《解释》），自 2024 年 1 月 1 日起施行。

The Supreme People's Court (SPC) has recently issued the Interpretation on Several Issues Concerning the Application of the Law of the People's Republic of China on Foreign-Related Civil Relations (II) (the "Interpretation"), effective from January 1, 2024.

《解释》主要内容如下：一是明晰外国法律的查明责任；二是拓展外国法律的查明途径；三是明确查明外国法律的程序和提供形式；四是明确审查认定外国法律的程序；五是明确审查认定外国法律的标准；六是明确裁判文书必须记载查明外国法律的过程；七是明确查明费用的处理原则；八是明确港澳法律查明的参照适用规则。其中，《解释》就当事人将查明费用作为诉讼请求提出时如何处理进行了规定。当事人约定法律查明费用负担的，应充分尊重当事人的意思自治，按照其约定处理；没有约定的，法院需要根据当事人主张，结合外国法律查明情况和案件具体情况酌情支持合理的查明费用。

The Interpretation mainly involves: (1) clarifying the responsibility for ascertaining foreign laws; (2) expanding the methods to ascertain foreign laws; (3) clarifying the procedures and provision forms of foreign laws; (4) clarifying the procedures for reviewing and identifying foreign laws; (5) clarifying the standards for review and identification of foreign laws; (6) stipulating that the judicial document must contain the process of ascertaining foreign laws; (7) specifying the principles for handling ascertainment costs; and (8) clarifying the rules for reference and application in the ascertainment of Hong Kong and Macao laws. Among others, The Interpretation stipulates how to deal with the ascertainment costs which are included in the litigation request of the parties. If the parties agree on the assumption of ascertainment costs, the parties' autonomy of will shall be fully respected and the matter shall be handled in accordance with their agreement; if there is no agreement, the court shall, as appropriate, support reasonable ascertainment costs based on the claims of the parties, the ascertainment status, and the specific circumstances of the case.



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(Source: <https://www.chinacourt.org/law/detail/2023/12/id/150495.shtml>)

四、国家外汇局部署促进跨境贸易投资便利化

2023.12.11

SAFE Rolls out Measures to Facilitate Cross-Border Trade and Investment

日前，国家外汇管理局发布《关于进一步深化改革 促进跨境贸易投资便利化的通知》（下称《通知》），自发布之日起实施，第七项自 2024 年 6 月 3 日实施。The State Administration of Foreign Exchange (SAFE) has recently issued the Circular on Further Deepening Reforms to Facilitate Cross-Border Trade and Investment (the "Circular"), which has taken immediate effect, with the exception of Section (7), scheduled to become effective on June 3, 2024.

《通知》共包括九项政策措施，其中，经常项目政策措施四项，主要是完善特殊贸易外汇收支管理，将试点便利化措施推广至全国，包括优化市场采购贸易外汇管理、放宽加工贸易收支轧差净额结算、完善委托代理项下跨境贸易资金收付、便利境内机构经营性租赁业务外汇资金结算等。资本项目政策措施五项，主要是拓展资本项目便利化政策及更新优化部分资本项目外汇管理，包括全国推广跨境融资便利化试点改革政策、放宽境外直接投资（ODI）前期费用规模限制、便利外商直接投资（FDI）境内再投资项下股权转让资金和境外上市募集资金支付使用、完善资本项目收入使用负面清单管理、取消外债账户异地开立核准等。

The Circular outlines a total of nine policy measures, including four current account-related measures primarily aimed at improving the administration for foreign exchange receipts and payments in special trade and promoting pilot facilitation measures nationwide. These four policy measures include optimizing foreign exchange administration for market procurement trade, relaxing the settlement of net offsets for processing trade, improving fund receipts and payments under intermediary arrangements in cross-border trade, and facilitating the foreign exchange settlement for commercial leasing activities engaged by domestic institutions. Additionally, there are five capital account-related measures primarily aimed at expanding capital account-related facilitation policies, as well as updating and optimizing the foreign exchange administration for certain capital account items. These measures include promoting the pilot reform policy for facilitating cross-border financing nationwide; relaxing the amount limit for pre-investment expenses in outward direct investment (ODI); facilitating the



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payment of funds for equity transfers in reinvestment by FDI (foreign direct investment) investors in the domestic market, as well as the use of funds raised through overseas listings; improving the negative list management of the use of capital account income; and removing the approval requirement for the opening of accounts for foreign debt with non-local banks.

(Source: <https://www.safe.gov.cn/safe/2023/1208/23593.html>)

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