



# AGILE STRATEGY FOR FOREIGN EXECUTIVES IN CHINA

**Avoid Personal Liabilities &  
Navigate the Evolving Landscape**

# THE SPEAKER



## Xing HU, PRC Attorney at Law

- Partner at Da Wo Law Firm Shanghai, in charge of Criminal Practice
- Member of Shanghai Bar Association for 10 years
- Legal Counsel of French Consulate General in Shanghai since 2017
- Specialize in White-collar and Corporate Crimes, Foreign Investment, International Commercial Law

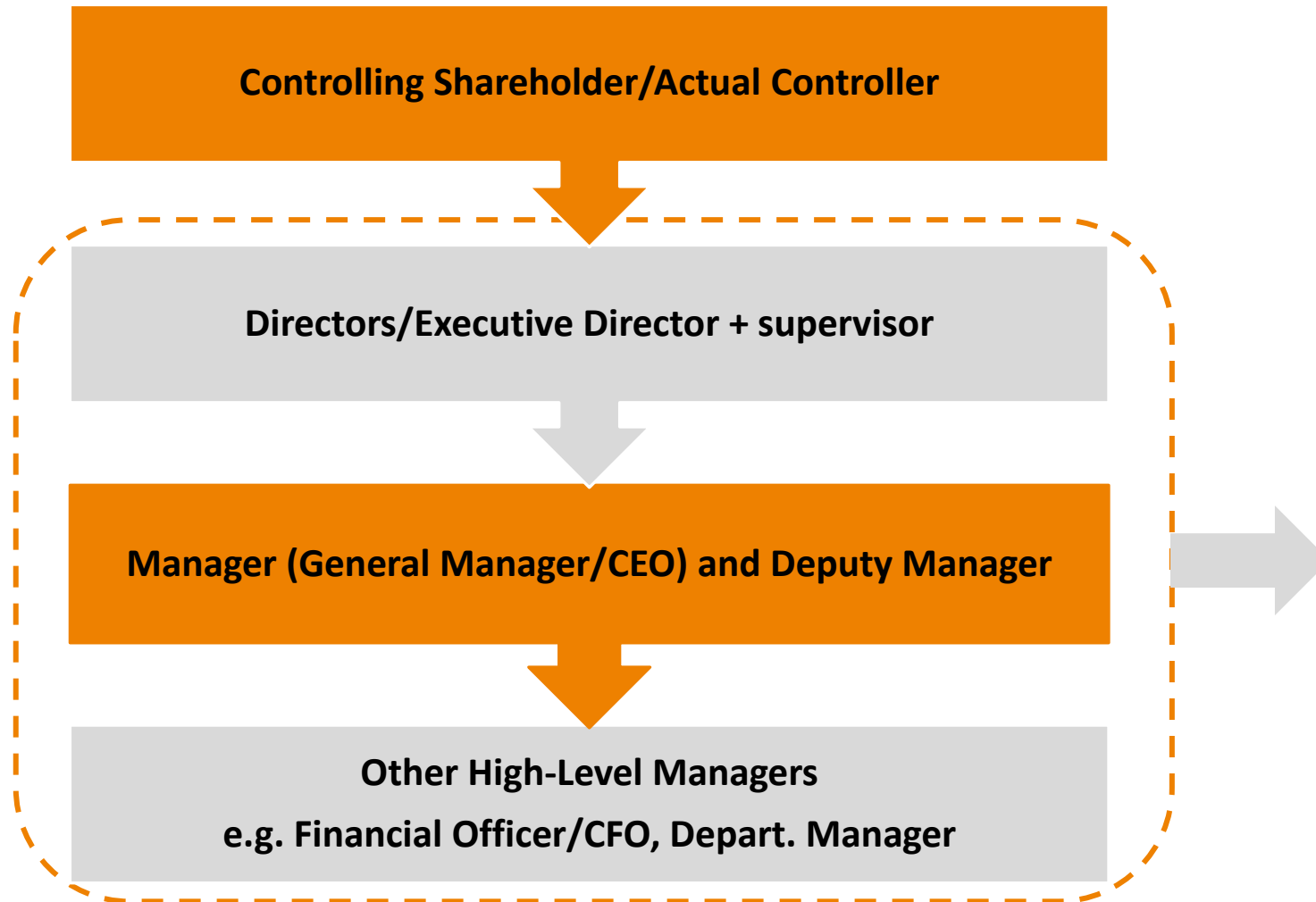
# LEGAL FRAMEWORK

- Who is personally liable ?
- What are the liabilities ?
- How to avoid/mitigate such liabilities ?



## I - Mapping “Executives” under Chinese Law

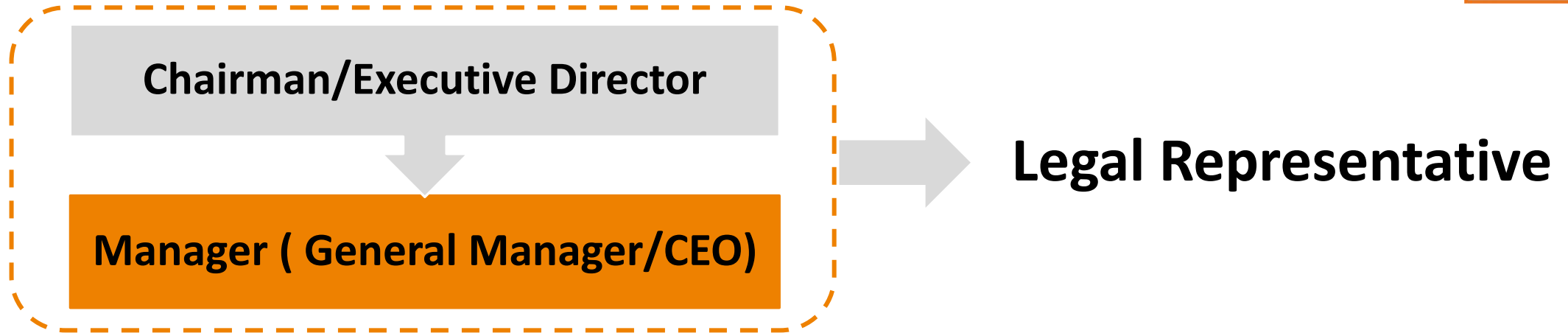
# MAPPING “EXECUTIVES” UNDER CHINESE LAW



**The determination of one's executive position is based on:**

- 1) Articles of Association of the company/power of attorney, and**
- 2) Job description in the Employment Contract**

# EXECUTIVE VS. LEGAL REPRESENTATIVE

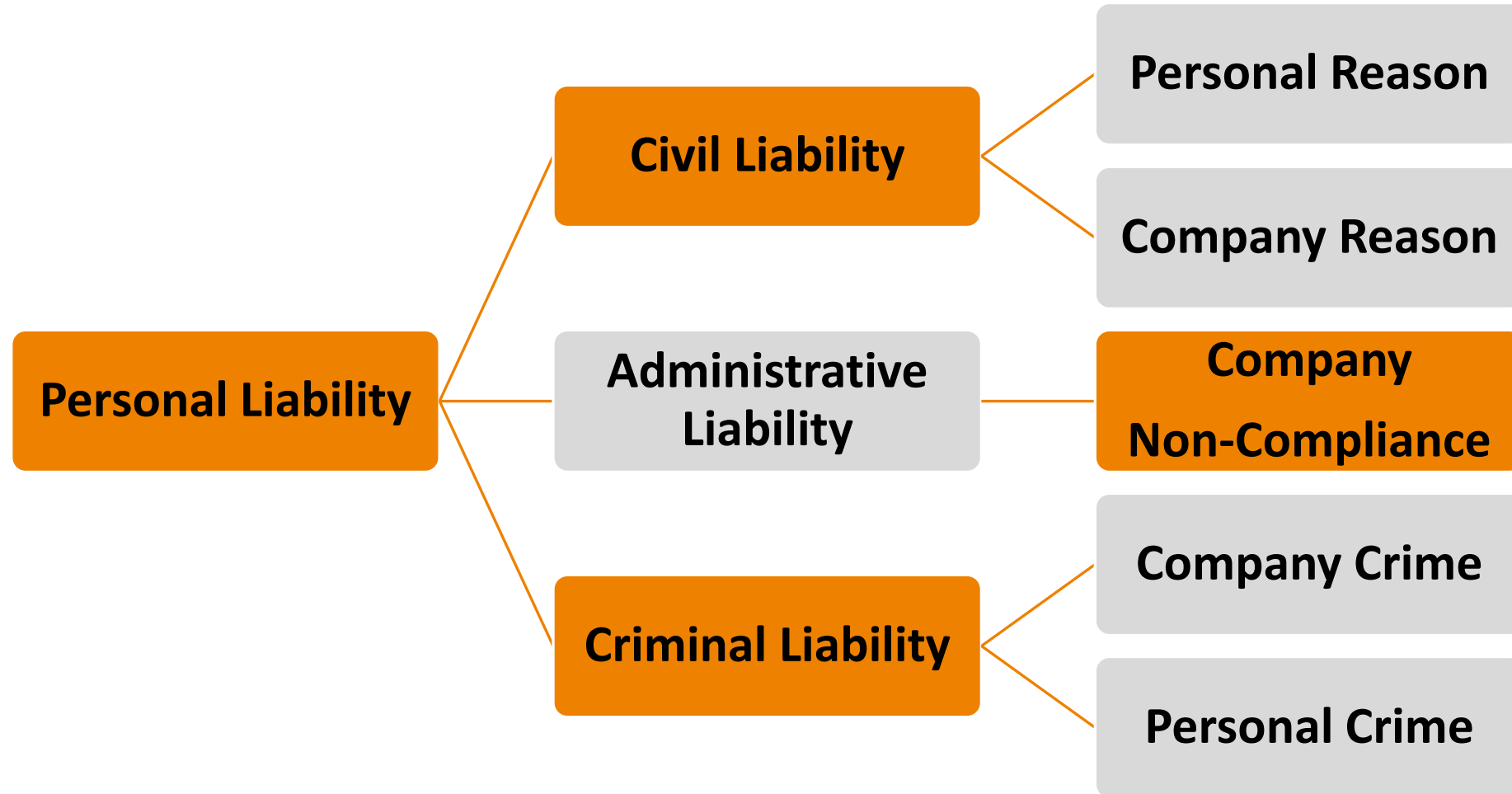


- Is Legal Rep. an executive ?
- Presumption of liability for Legal Rep. ?
- Is not being Legal Rep. a good way to avoid liability ?



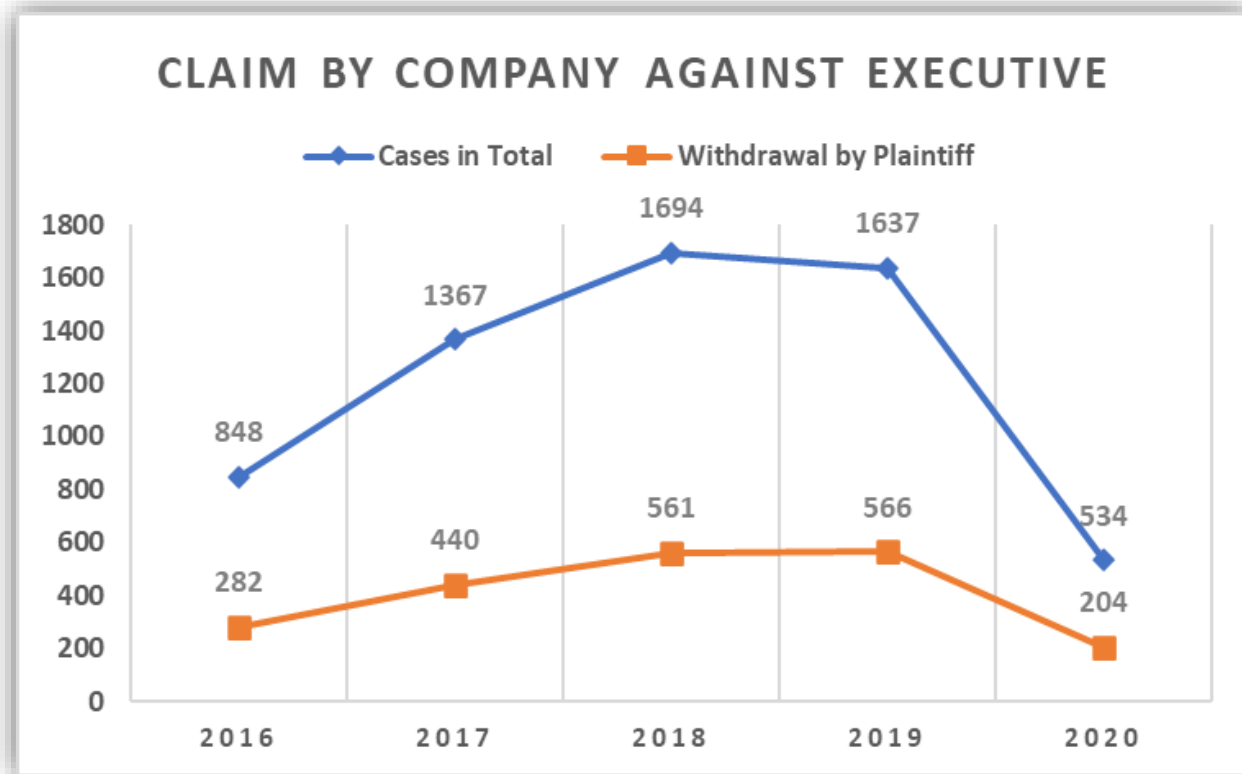
## **II - Executives' Personal Liability Overview**

# EXECUTIVES' PERSONAL LIABILITY OVERVIEW





# CIVIL LIABILITY - PERSONAL REASON



- **Violation of Duty of Diligence & Duty of Loyalty by executives :**
  - Affiliated transactions
  - Misappropriation of funds
  - Disclosure of secrets
- **A growing trend of litigation against Executives from 2016-2018**
- **High Rate of withdrawal : 35%**

# CIVIL LIABILITY - COMPANY REASON

Examples	Personal liabilities	Executives Potentially liable
Ongoing court proceeding against a foreign invested company	<ul style="list-style-type: none"> <li>• Restriction on travel abroad</li> </ul>	Legal representative, person in charge
Failure to execute a court decision	<ul style="list-style-type: none"> <li>• Restriction on luxury consumption</li> <li>• Restriction on travel abroad</li> <li>• Fines</li> <li>• Judicial detention</li> </ul>	Legal representative, person in charge, person directly responsible for impact on performance of the obligation

# ADMINISTRATIVE LIABILITY - REGULATION AXIS



- Industry-specific laws and regulations are being updated frequently
- A growing number of industries are being regulated
- Increasing focus on personal liability by the authority

# ADMINISTRATIVE LIABILITY - CONSEQUENCES

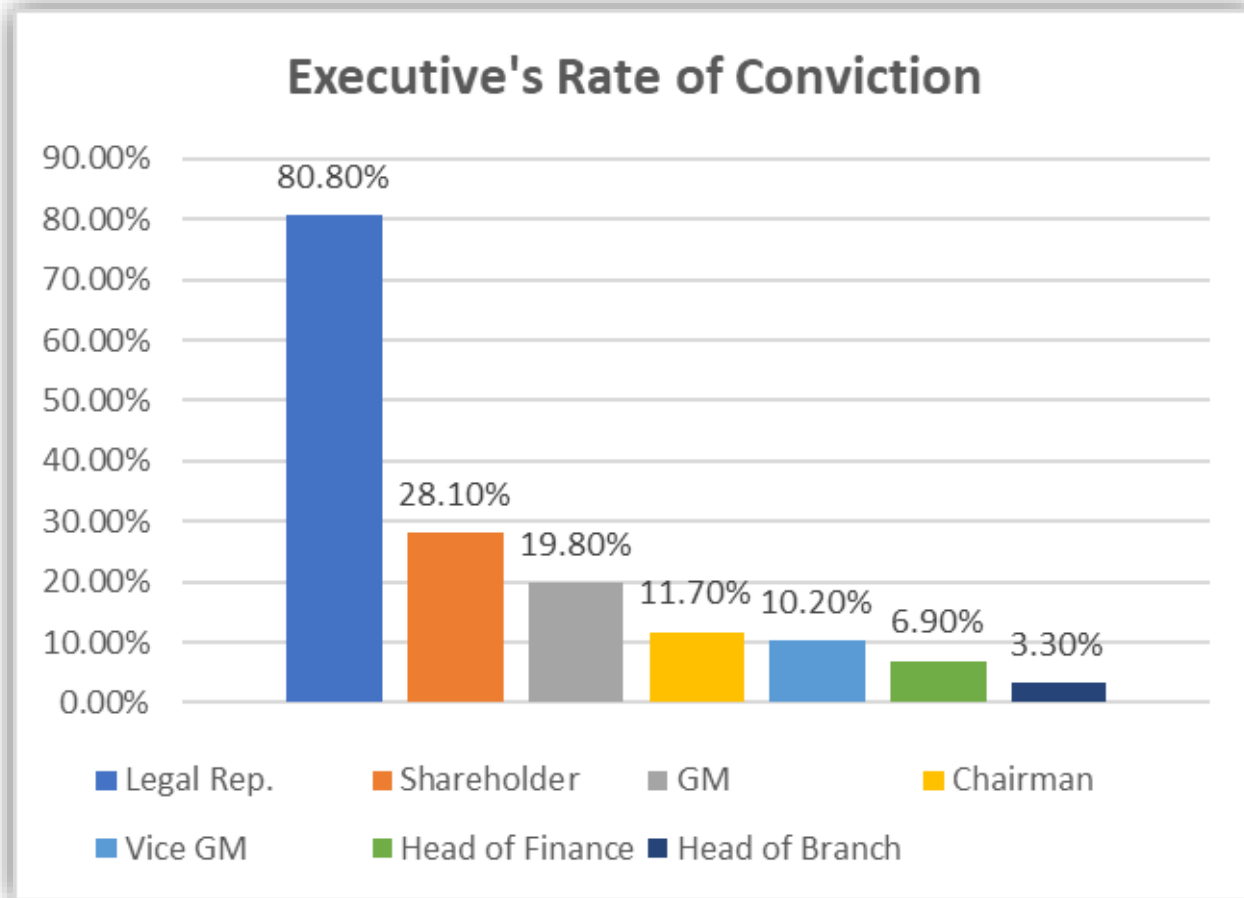
- Fines or administrative detention may be imposed on legal rep. or the person in charge
- The executive's future career prospects may be affected:
  - ◆ No director/supervisor/manager position in other companies for 3 years if he/she is personally liable in case involving revocation of business licenses
  - ◆ No future position as person in charge in certain industry, e.g. food industry
  - ◆ "Clean record" is needed for holding a management position in a listed company

# CRIMINAL LIABILITY - COMPANY CRIME

## “Dual-penalty” Principle :

- ◆ Monetary penalties on the company
- ◆ Criminal penalties on the person directly in charge/directly responsible
  - Detention, imprisonment or even death penalty
  - Fine or confiscation of property
  - Deportation may be applicable for foreign executives
  - Enforcement measures during investigation process

# CRIMINAL LIABILITY - LESSONS FROM 2019



Source: [www.itslaw.com](http://www.itslaw.com)

- Legal Rep. is highly likely to be convicted in case of company crimes.
- The chance of GM and Chairman being charged is quite high.
- Financial manager is more likely to be charged than other depart. managers.

# CRIMINAL LIABILITY - WHITE-COLLAR CRIME

- ◆ Embezzlement
- ◆ Misappropriation of funds
- ◆ Commercial bribery (offering or taking)
- ◆ Illegal fundraising
- ◆ Making illegal profits for relatives and friends
- ◆ Contraband
- ◆ .....



### **III - Strategy for Avoiding and Mitigating Personal Liabilities**



# PREVENTIVE MEASURES

## For executives of top management/holding level

- Keep updated on laws and regulations specific to the company's industry, design and implement proper compliance policies
- Review and update regularly the organization structure and the chain of responsibilities of the company
- Define and keep documentation of detailed powers and responsibilities of other executives and key employees, such as power of attorneys, board resolutions, internal regulations and employment contracts
- Prepare contingency plan to ensure continuity of operations in the event that local management is under investigation

# PREVENTIVE MEASURES

## For other executives

- Understand your position as an executive from a legal perspective; look deep into your responsibility both as an employee and as part of the corporate management structure
- Be aware of laws and regulations specific to your industry, follow company compliance policies
- Keep written records of any objections throughout the decision making process in case non-compliant behavior is identified
- Remain diligent and loyal to the company, be careful with any situation that may present a conflict of interest



# Questions & Answers



## Da Wo Law Firm Shanghai

E-mail: [xing.hu@DaWo-lf.com](mailto:xing.hu@DaWo-lf.com)

Tel : 0086 21 6288 8682

18601701926

[www.DaWo-lf.com](http://www.DaWo-lf.com)

