CHINA DISPUTE RESOLUTION

NEWS LETTER

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JT&N 金诚同达

FEATURES

NEWS ALERT

1. Revised Company Law of China to Come into Effect on 1 July 2024

The People's Republic of China has recently announced the issuance of a newly revised Company Law of the People's Republic of China ("**Company Law**"). The Company Law will come into effect on 1 July 2024.

One significant change in the revised Company Law is the introduction of a time limit for shareholders of limited companies to complete their capital contributions. Unlike the previous version of the Company Law, which came into effect in 2013 and had no restrictions on the time period for capital contributions, the amended Company Law now imposes a maximum period of five years for shareholders to fulfil their capital contribution obligations.

The lenient measures in the previous capital contribution system had unintended consequences, including instances where shareholders unreasonably extended payment periods, committed to excessive amounts of capital contributions, and ultimately failed to meet their obligations. Consequently, this resulted in decreased reliance by creditors on the registered capital of the company.

The revised Company Law aims to encourage shareholders to carefully consider the future business needs and investment risks associated with their capital contribution obligations, and to give effect to creditors' reasonable expectations of receiving timely payments.

2. Application of the Convention on Abolishing the Requirement of Legalization for Foreign Public Documents in the Chinese Court System

The Convention on Abolishing the Requirement of Legalization for Foreign Public Documents ("**Convention**") has officially come into effect in China.

In order to ensure the smooth implementation of the Convention, the Beijing International Commercial Tribunal issued Litigation Guidelines for the Understanding and Application of the Convention ("**Guidelines**") on 11 December 2023.

The Guidelines explain the application (and applicability) of the Convention to evidence that originates abroad and is submitted to the Beijing International Commercial Tribunal.

As an example of the Convention's recent application, the Convention was applied in a recent international divorce case heard by the Kunshan People's Court, resulting in a significant reduction in the time required for document authentication.

3. The Interpretation of the Supreme People's Court on Several Issues Concerning the Application of International Treaties and International Practices in the Hearing of Foreign-related Civil and Commercial Cases Came into Effect on 1 January 2024

Before 2021, the application of international treaties and international practices was governed by Article 142 of the General Principles of Civil Law of the People's Republic of China. Article 142 was repealed by the Civil Code of the People's Republic of China ("**Civil Code**") from 1 January

2021. This repeal notwithstanding, the Civil Code did not contain equivalent provisions on the application of international treaties and international practices.

Recently, three years later, this gap has been filled by the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of International Treaties and International Practices in the Hearing of Foreign-related Civil and Commercial Cases ("**Interpretation**"). The Interpretation covers issues on, inter alia, when international treaties are to prevail (Article 1), the conflict rules of international treaties (Article 2), the limitation of parties' autonomy when excluding the application of international treaties (Article 3), and both parties' rights to invoke non-binding international treaties as contract terms (Article 4).

4. The First Regional Investor Protection Regulation in China Came into Effect on 1 December 2023

The Qianhai Shenzhen-Hong Kong Modern Service Industry Co-operation Zone of the Shenzhen Special Economic Zone ("**Zone**") represents a further development in China's opening-up. The Regulation on the Protection of Investors in the Zone ("**Regulation**") is the first regional investor protection regulation in China. The Regulation has taken international treaties such as the RCEP, CPTPP, and BEE as references. It highlights, inter alia, that financial institutions in the Zone are to ensure that foreign investors' funds will be freely transferrable in and out without delay (Article 14), and that the Qianhai Management Bureau will assist foreign investors in responding to discriminatory restrictive measures (Article 23).

5. China's Latest Measures in Cross-Strait Legal Collaboration: Fujian Facilitates Taiwanese Arbitral Institutions in Xiamen

On 12 September 2023, the Central Committee of the Communist Party of China and the State Council jointly issued opinions titled "Supporting Fujian in Exploring a New Path for Integrated Cross-Straits Development and Establishing a Demonstration Zone for Integrated Cross-Straits Development" ("**Opinions**"). The aim of the Opinions, as set out in Article 2, Section 6, explicitly allows Taiwanese civil and commercial arbitral institutions to establish operational branches in Xiamen and engage in arbitration activities related to Hong Kong, Macao, Taiwan, and foreign affairs.

On 20 December 2023, the Department of Justice in Fujian Province issued the Administrative Measures for the Registration and Management of Business Institutions Established by Taiwanese Arbitral Institutions in Xiamen ("**Measures**"). The formulation of the Measures represents a concrete step in implementing the directives outlined in the Opinions. It is aimed at leveraging Fujian's unique advantages in its relations with Taiwan and aims to standardize the registration and professional activities of Taiwanese arbitral institutions establishing operational branches in Xiamen.

Comprising 22 articles, the Measures address various aspects, including the scope of operations, establishment conditions, documentary requirements, acceptance procedures, and registration procedures related to the establishment and operation of branches of Taiwanese arbitral institutions in Xiamen.

6. Mainland Courts Issue Investigation Orders in Support of Arbitration Following Application by Arbitral Institution

In November 2023, the Xiamen Intermediate People's Court and the Xiamen Arbitration Commission signed Implementation Opinions on the Organic Integration of Litigation and Arbitration to Improve the Multi-Faceted Dispute Resolution Mechanism. This collaborative effort led to the establishment of the Litigation and Arbitration Integration Center. Subsequently, the Xiamen Intermediate People's Court formulated, for the first time in the country, provisional regulations on Arbitration Institutions Applying for the Issuance of Investigation Orders.

On 7 November 2023, following a request from the Xiamen Arbitration Commission, the Xiamen International Commercial Court issued the country's first investigation order arising out of arbitral proceedings to Lujiang Police Station. This landmark order facilitated the lawful collection of evidence in an arbitration arising out of a contractual dispute handled by the Xiamen Arbitration Commission.

Noteworthy developments in this regard extend beyond Xiamen, as Shanghai implemented Regulations for Promoting the Construction of the Shanghai International Commercial Arbitration Center from 1 December 2023. These regulations, like those in Xiamen, permit the Shanghai courts to make investigation orders in support of arbitration pursuant to applications by arbitral institutions.

7. Memorandum of Understanding signed between the Beijing Arbitration Commission and the Asian-African Legal Consultative Organization's Hong Kong Regional Centre for Arbitration

The Beijing Arbitration Commission / Beijing International Arbitration Center ("**BAC / BIAC**") and Asian-African Legal Consultative Organization's Hong Kong Regional Arbitration Centre ("**AALCO-HKRAC**") signed a Memorandum of Understanding ("**MOU**") on 5 December 2023 at the AALCO's 2023 Annual Arbitration Forum.

AALCO is an intergovernmental organization. The AALCO-HKRAC, established at the 59th AALCO Conference in 2021, is the sixth regional arbitration center in the world under AALCO's auspices. It specializes in the application and promotion of the use of legal technology in the resolution of disputes, as well as the provision of a convenient online dispute resolution platform. The Center provides one-stop online dispute resolution through online software that enables secure online communication, document submission, hearings, translation, and other relevant services.

According to the MOU signed between BAC / BIAC and AALCO-HKRAC, the parties will work together to strengthen cooperation between the Mainland and the HKSAR, as well as with each other, in the field of international commercial arbitration. This will serve to further promote, inter alia, (a) the internationalization and development of arbitration and multi-disciplinary dispute resolution services; (b) the organization of relevant international projects and training; and (c) the sharing of resources between the parties.

8. First Hearings Held at the Central Asia Trial and Appeal Center of the China International

Economic and Trade Arbitration Commission

At the China-Central Asia Arbitration Forum on 1 November 2023, the China International Economic and Trade Arbitration Commission ("**CIETAC**") officially established the Central Asia Trial and Appeal Center ("**Center**") in Urumqi, Xinjiang. The aim of the Center is to facilitate parties from Central Asia and neighbouring countries in pursuit of the "Belt and Road" Initiative.

On 14 December 2023, less than 45 days after the establishment of the Center, the Center held its first hearings in two cases involving foreign parties. The cases involved disputes over international contracts for the sale of goods related to the importation of agricultural products by Chinese companies from Kazakhstan and Russia respectively. The speed with which hearings were held in the Center reflects the urgent need for context-specific dispute resolution systems in light of the current growth in trade involving Xinjiang and Central Asia.

New guideline on conflicts of jurisdiction in foreign-related litigation

GUO Shuai, XING Jingyu

The conflict of laws is a critical subject in foreign-related civil and commercial litigation. If not appropriately resolved, jurisdictional conflicts may give rise to parallel and duplicative litigation across borders, directly affecting the litigants' core interests. One of the highlights in the amendment to the Civil Procedure Law (the "2023 amendment") is to advance the rule of law in domestic and foreign-related affairs in an integrated manner. The 2023 amendment helps to clarify the rules on jurisdictional conflicts in cross-border litigation.

Rules on the conflict of laws

Before the 2023 amendment, the rules on the conflict of laws in foreign-related litigation were scattered in various judicial interpretations and documents. The 2023 amendment consolidates the previous provisions and provides clearer guidelines on jurisdictional conflicts.

Right to initiate parallel proceedings. The decision to initiate parallel proceedings is a choice made by the parties themselves based on their specific circumstances and should be respected. The 2023 amendment clarifies that if one party files a lawsuit before a foreign court while the other party files a lawsuit before a Chinese court for the same dispute, or if a party files a lawsuit before both a foreign court and a Chinese court, the Chinese court with jurisdiction (as determined under the Chinese Civil Procedure Law) may accept jurisdiction over the dispute.

Validity of exclusive jurisdiction agreements. Under an exclusive jurisdiction agreement, the parties agree that a particular court is to have jurisdiction over the case, while simultaneously excluding the jurisdiction of other courts. Such agreements serve to minimize the risk of parallel litigation, and can improve the efficiency of dispute resolution. The 2023 amendment specifically accepts exclusive jurisdiction agreements that do not involve the sovereignty, security or public interests of China as a reason for Chinese courts to decline jurisdiction over a dispute. In judicial practice, China has not only stipulated that the presumptive principle will apply to exclusive jurisdiction agreements, but has also determined the validity of asymmetric jurisdiction agreements. This is evident from the Minutes of the National Symposium on the Foreign-related Commercial and Maritime Trial Work of Courts.

Basic Principles for the Resolution of Jurisdictional Conflicts. The harmonisation of domestic and foreign proceedings in cross-border parallel litigation is a common challenge faced by most countries. The 2023 amendment deals with cases relatively distinctively, according to the acceptance time. For cases that a Chinese court has accept jurisdiction over in advance, the Chinese court will exercise its jurisdiction. On the other hand, where a litigant applies to the Chinese court in writing for a stay of proceedings on the ground that a foreign court has accepted jurisdiction over the case, the Chinese court may grant a stay, depending on the specific facts.

Exceptions to the Basic Principles. As an exception to the above-mentioned principle, if the litigants have agreed to have their dispute heard by a Chinese court, or the dispute falls under the exclusive jurisdiction of a Chinese court, or it is evidently more convenient for a Chinese court to try the case, then a Chinese court may decline to grant a stay of the Chinese proceedings, notwithstanding the existence of competing foreign proceedings. Moreover, given that a stay will undoubtedly affect domestic proceedings, if a foreign court does not adopt the requisite measures to determine the case within a reasonable period, the Chinese court is empowered to lift a stay on (domestic) litigation upon a written application by a litigant.

In addition, where a litigant applies to a Chinese court for recognition and enforcement of a judgment or ruling made by a foreign court, and the subject matter of the dispute addressed in the said judgment or ruling is the same as that which is disputed in proceedings before a Chinese court, the Chinese court may stay the domestic proceedings. If the said judgment or ruling made by a foreign court is recognised by the Chinese court, the Chinese court will dismiss any domestic proceedings on the identical subject matter. If the Chinese court declines to grant recognition of a foreign judgment, any stays over related domestic proceedings will be lifted.

The Doctrine of forum non conveniens and Remedies. The 2023 amendment elevates the doctrine of forum non conveniens in previous judicial interpretations to an express legal provision. For cases that comply with statutory circumstances and are clearly inappropriate / inconvenient for a Chinese court to try, a Chinese court should exercise judicial comity towards foreign courts. If a Chinese court finds it inappropriate / inconvenient to try the case, it decline to exercise jurisdiction over the proceedings and notify the plaintiff to file a lawsuit before the courts of the forum conveniens. Meanwhile, for the comprehensive protection of the litigants' interests, the 2023 amendment also adds remedies for forum non conveniens. Where, despite being the forum conveniens, a foreign court refuses to exercise jurisdiction over a dispute, or does not adopt the requisite measures to try the case within a reasonable period, the Chinese courts may accept jurisdiction over the matter.

Views and Advice on Cross-Border Disputes

Be Fully Aware of the "Toolbox" and Rules on Jurisdiction. The 2023 amendment sets out clear jurisdictional rules for foreign-related civil and commercial litigation. It provides for, inter alia , rules governing jurisdiction agreement clauses, and two new categories of situations for exclusive jurisdiction. Therefore, to effectively safeguard their legitimate rights and interests, corporations are advised to be fully aware of the "toolbox" provided for in the 2023 amendment, as well as rules of jurisdiction in foreign-related litigation.

Agree the Governing Jurisdiction for Cross-Border Disputes. It is widely acknowledged among the international community that parties can make arrangements for agreement on jurisdiction. Corporations are encouraged to fully utilise this ability and pre-emptively arrange for exclusive and / or asymmetric jurisdiction agreements in cross-border disputes.

Seize the Initiative in Jurisdictional Issues. In dealing with specific cross-border disputes, it is often necessary to leverage the relevant conflict of laws rules and carefully strategise for the overall situation. Corporations should actively seek to expand and protect advantageous positions, while using strategies like parallel proceedings in disadvantageous situations to try and turn the tables.

Advancements in Cross-Border Legal Cooperation: Analysing the New Arrangement between Mainland China and Hong Kong for the Recognition and Enforcement of Judgments

LIN Mujuan，ZHU Jiayi

The Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region (the "**New Arrangement**") came into force on 29 January 2024.

In comparison to the existing Arrangement of the Supreme People's Court between the Mainland and the HKSAR on Reciprocal Recognition and Enforcement of Decisions in Civil and Commercial Cases under Consensual Jurisdiction, which came into effect on 1 August 2008 (the "**2008 Arrangement**"), the New Arrangement reflects a number of significant developments.

1. Expanded Scope of Enforceable Judgements

The scope of judgments recognized and enforced under the New Arrangement is broader than that under the 2008 Arrangement. Importantly, it is no longer limited solely to judgments concerning the payment of money. Instead, the New Arrangement extends to include both monetary and non-monetary judgments in general commercial and civil cases. Furthermore, the New Arrangement encompasses judgments on civil damages awarded in criminal cases, allowing for their recognition and enforcement. That said, any punitive (i.e. non-compensatory) aspect of the damages ordered in criminal cases will still not be recognized and enforced, except as stipulated under Article 17.

The 2008 Arrangement	**The New Arrangement**
Article 1 provides: *"For a final decision of payment with executive force made by a people's court in the mainland and a court of the HKSAR in a civil or commercial case under a written jurisdiction agreement, the party concerned may apply to the people's court in the mainland or the HK court for the recognition and enforcement of the decision."*	Article 1 provides: *"This Arrangement applies to the reciprocal recognition and enforcement of legally effective judgments in civil and commercial matters between the courts of the Mainland and of the HKSAR.* *This Arrangement also applies to the reciprocal recognition and enforcement of legally effective judgments in relation to civil damages awarded in criminal cases."*

2. Expansion in the Range of Courts Available and Removal of Filing Restrictions

A key modification in the New Arrangement involves the inclusion of the court where the applicant resides as one of the competent authorities permitted to preside over the enforcement/recognition proceedings. This broadening of jurisdictional scope is designed to improve accessibility and convenience for individuals seeking recognition and enforcement within mainland China.

The New Arrangement has also eliminated previous constraints on the number of courts to which an applicant could submit filings. This change empowers applicants to pursue their claims through multiple avenues where appropriate, streamlining the process and making it more flexible. In instances where an applicant submits applications to more than one competent court, the court that initiates the filing will be granted jurisdiction over the case.

<table>
<tr><th>The 2008 Arrangement</th><th>The New Arrangement</th></tr>
<tr><td>Article 4 provides "An application…shall be filed with, as in the mainland, the intermediate people's court at the place of domicile, the place of residence or the locality of the property of the party against whom the application is filed, and, as in HK, the High Court of HKSAR. "</td><td rowspan="2">Article 6 provides "Place of residence" referred to in this Arrangement means, in the case of a natural person, his/her place of household registration, place of permanent residence or place of habitual residence; and in the case of a legal person or other organization, its place of incorporation or registration, place of principal office, principal place of business or principal place of management."</td></tr>
<tr><td>Article 5 provides: "If the place of domicile, the place of residence and the locality of the property of the party against whom the application is filed are under the jurisdiction of different intermediate people's courts, the applicant may choose any of them to file the application and may not file with two or more people's courts at the same time.

If the place of domicile, the place of residence or the locality of the property of the party against whom the application is filed is under the jurisdiction of both the mainland and the HK SAR, the applicant may file the application with the competent courts of both places simultaneously, but the total amount of enforcement may not exceed the amount determined in the decision. Where one of the courts has partly or completely executed the decision, it shall provide detailed information about its enforcement for the other court if the other court so requires."</td></tr>
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3. Enhanced Requirements for Documentation in Enforcing / Recognizing Default Judgements

The New Arrangement introduces additional requirements for applications to recognize and enforce judgments that have been procured by default. In the event that a judgment is rendered as a default judgment, proof of legal service of process on the absent party must be submitted. However, this requirement is waived if the judgment explicitly provides otherwise, or if the absent party has acknowledged and / or applied for enforcement.

4. Abolishment of a Default 2-Year Application Limitation Period

In the 2008 Arrangement, applicants seeking to recognize and enforce a judgment had only two years from the date of the judgment to apply for recognition and enforcement. However, the recent New Arrangement has eliminated this limitation period. The updated provision now explicitly states that *"The time limits, procedures, and manner for making an application for recognition and enforcement of a judgment shall be governed by the law of the requested place."*

The 2008 Arrangement	**The New Arrangement**
Article 8 provides "*An application for the recognition and enforcement of a decision made by a people's court in the mainland or a HKSAR court shall be governed by the law of the place of enforcement in terms of application procedures, unless it is otherwise provided in this Arrangement.* *The time limit for an applicant to apply for the recognition and enforcement of a decision shall be two years.*"	Article 10 provides "*The time limits, procedures and manner for making an application for recognition and enforcement of a judgment shall be governed by the law of the requested place.*"

5. Clearer Criteria for Deciding Court Jurisdiction

Article 12 of the New Arrangement stipulates that if, following examination and verification by the court considering the application for recognition/enforcement, the court which rendered the judgment in fact lacked jurisdiction over the proceedings in question, the former court shall be precluded from recognizing and enforcing said proceedings. Additionally, Article 11 delineates specific circumstances under which the court which rendered the judgment is acknowledged as possessing jurisdiction.

6. Provision regarding prerequisite issues

According to Article 14 of the New Arrangement, the requested court (i.e. the Court considering the application for recognition and / or enforcement) cannot refuse to recognize and enforce a judgment solely because preliminary issues associated with the judgment do not fall within the scope of the New Arrangement.

7. Time limit for Reconsideration Applications in Mainland China

The New Arrangement specifies that in the event an applicant wishes to seek reconsideration of a court's decision regarding the recognition and enforcement of a judgment in mainland China before the higher courts, the application for reconsideration must be submitted within ten days from the receipt of the ruling.

As introduced above, the New Arrangement comprehensively addresses the scope and specifics of applications for mutual recognition and enforcement between mainland China and the HKSAR for judgments in civil and commercial cases. It outlines procedures for applying, jurisdiction review, circumstances under which recognition will not be granted, avenues for redress, and more. It is anticipated that the New Arrangement will broaden mutual recognition, decrease duplicative litigation, and enhance legal cooperation. The New Arrangement boosts efficiency in enforcement, safeguards parties' rights, and establishes a sturdy legal link for economic collaboration. The implementation of this agreement sets the stage for deeper judicial cooperation between mainland China and the HKSAR.

China's Privacy Paradigm: The Personal Information Protection Law at the Two-Year Mark

LI Lan, LIU Junzuo

In the shadow of an increasingly digitized world where data breaches have morphed into a global epidemic, China's Personal Information Protection Law (PIPL) stands as a noteworthy example of regulatory foresight and rigour. As we mark the two-year anniversary of this landmark legislation, there is unsurprisingly keen interest in its implications for both domestic and international enterprises. This legislation has not only recalibrated the power dynamic between consumers and corporations, it has also set a new benchmark for privacy protection on the global stage.

At the heart of this discourse lie the emblematic cases of Didi Global Inc. and China National Knowledge Infrastructure (CNKI), whose facts unfold as cautionary tales of (non-)compliance and consequence. These cases illuminate the intricate complexities and challenges faced by entities navigating China's privacy regulation landscape. In particular, the two cases highlighted offer invaluable insights into the operational and ethical imperatives that now define the global digital economy. Importantly, they underscore the nuanced challenges and opportunities that lie ahead for legal professionals and corporate entities alike.

I. The Didi Conundrum: A Case Study on Compliance and Consequence

1. The Prelude to Penalties: Background and Breaches

The Didi decision illustrates the interface between rapid technological expansion and the stringent demands of privacy legislation. This narrative began in July 2021 when, amid rising concerns for national data security and the safeguarding of public interests, Didi found itself under the scrutiny of a cybersecurity and data privacy review. This scrutiny was not merely procedural, but a harbinger of a more penetrating examination of the company's compliance with China's trifecta of cybersecurity, data security, and personal information protection laws.

The investigation highlighted areas where Didi's practices were found to not be fully aligned with the requirements set forth by the PIPL, the Cybersecurity Law, and the Data Security Law. The examination of Didi's digital practices revealed areas of non-compliance that led to a significant penalty of 8.026 billion yuan, underscoring the importance of aligning operational protocols with regulatory standards. This punitive measure, complemented by individual fines for Didi's top executives, underscores the severity of their lapses and the law's uncompromising stance on safeguarding personal data and national cybersecurity.

2. The Breaches: An In-Depth Analysis

a) **The Unauthorized Harvest:** At the heart of Didi's transgressions was the illegal collection of 11.96 million pieces of screenshot information from users' photo albums—a stark invasion of privacy illustrating a cavalier attitude towards user consent and data minimization principles.

b) **The Overreach of Collection:** The company's voracious appetite for data was further evidenced by the excessive accumulation of 83.23 billion pieces of clipboard and application list information, reflecting a pervasive over-collection that far exceeded the bounds of necessity and proportionality.

c) **Facial Recognition Frenzy:** Didi's over-collection extended to sensitive biometric data, with 107 million pieces of passenger facial recognition data, alongside other personal details such as age, profession, and relationships, being amassed. This not only highlighted a gross violation of privacy, but also underscored the lack of restraint in gathering sensitive personal information.

d) **Precision Tracking:** The company's excessive compilation of precise location data during various app interactions revealed a concerning practice of surveilling users' movements without clear necessity or transparent consent, further exacerbating the invasion of privacy.

e) **Educational and Identity Overstep:** The collection and plaintext storage of drivers' educational backgrounds and identity card numbers not only exposed personal data to potential misuse, but also contravened basic data security and protection standards.

f) **Opaque Intent Analysis:** Didi's covert analysis of passenger travel intentions and other personal details without clear disclosure or consent exemplified a fundamental breach of trust and transparency, undermining users' control over their personal information.

g) **Unwarranted Permission Requests:** The frequent and irrelevant demands for telephone permissions under the guise of the carpooling service highlighted a manipulative practice, exploiting app functionalities to unjustifiably intrude into users' private spheres.

h) **The Ambiguity of Information Processing:** Lastly, Didi's failure to accurately and clearly articulate the purposes for processing 19 categories of personal information epitomized the broader issue of opacity and accountability in the company's data practices.

3. The Broader Implications: Compliance, Trust, and Innovation

The Didi case serves not just as a cautionary tale but as an important learning point for businesses operating within the digital domain. It underscores the critical importance of adhering to legal frameworks designed to protect personal information, emphasizing that compliance is not optional, but a cornerstone of operational integrity and public trust.

Furthermore, this case exemplifies the delicate balance required between innovation and privacy, urging companies to navigate the digital future with a heightened sense of responsibility towards data protection. The narrative of Didi's non-compliance and the consequent penalties reinforce the notion that technological advancement should not come at the cost of privacy violations.

As the digital landscape continues to evolve, the lessons drawn from Didi's experience highlight the imperative for businesses to foster a culture of compliance, transparency, and respect for personal privacy. In doing so, companies can not only mitigate the risks of legal repercussions, but also position themselves as trustworthy stewards of personal data in the eyes of consumers and regulators alike.

II. Beyond the Breach: CNKI's Lessons for China's Evolving Privacy Protections

In September 2023, China's National Internet Information Office, wielding the comprehensive suite of China's legal instruments — notably the Cybersecurity Law, Personal Information Protection Law (PIPL), and Administrative Penalty Law — levied a significant penalty against CNKI. This action was predicated on a series of violations that not only underscored the importance of adherence to the principle of necessity in personal data collection, but also highlighted the egregious lapses in consent mechanisms, public disclosure of collection and use rules, and the need for data deletion upon account cancellation. This was not CNKI's first encounter with regulatory scrutiny. Previously, in December 2022, it faced penalties for monopolistic practices.

1. The Four Infractions: Analysis

a) **Excess Beyond Necessity:** At the core of CNKI's transgressions was the collection of personal information in violation of the necessity principle — a foundational tenet of the PIPL. This principle mandates that data collection should be directly related to and limited by the operational purposes it serves. CNKI's overreach was exemplified by collecting data beyond its operational necessity such as authors' home addresses or family information. This starkly deviated from CNKI's mandate, signalling a breach of the legal bounds of data collection.

b) **Consent Compromised:** The violation further extends to the collection of personal information without explicit consent — in blatant defiance of the "informed consent" doctrine central to the PIPL. The PIPL emphasizes a model of consent that is voluntary and informed, and is particularly stringent when it comes to sensitive information. CNKI's failure to obtain explicit consent, especially for sensitive data, constituted a clear breach of this directive.

c) **Opacity in Operation:** CNKI's infractions were compounded by its failure to publicly disclose or clarify its data collection and use policies. This lack of transparency infringed upon the PIPL's principle of openness and clarity regarding personal information processing, undermining the rights of individuals to informed participation in the data ecosystem.

d) **The Right to be Forgotten Neglected:** The final pillar of CNKI's legal violations pertains to its inadequacy in providing an account cancellation feature and its subsequent failure to delete user information promptly. This oversight neglects the "right to be forgotten," a critical aspect of the PIPL which ensures individuals' control over their personal data, including its deletion when the purpose of processing has been fulfilled or services cease to be provided.

2. Beyond the Breach: Duties and Directions for Large Data Processors

The CNKI episode transcends its immediate legal ramifications, casting a spotlight on the special obligations of large personal information processors. These entities, by virtue of their vast user base and complex service offerings, shoulder unique responsibilities under the PIPL. This includes the establishment of a comprehensive personal information protection compliance system and

independent oversight mechanisms.

The case also shines a spotlight on the roles and responsibilities of dominant players in the digital ecosystem, urging them to fortify their governance structures, clarify the personal information protection duties of their platforms and operations, and to ensure accountability and transparency in their operations.

The CNKI case thus not only marks a significant moment in the enforcement of China's personal information protection laws, but also delineates the contours of a broader debate on the future of digital governance. The terms of that debate remain fundamentally anchored in the principles of individual rights and the collective pursuit of a secure and equitable digital future.

III. Navigating the Quagmire: Compliance and Beyond

Two years after the PIPL's promulgation, the data protection landscape is a tableau of both triumph and challenge. The law has fortified the position of consumers, endowing them with newfound rights over their digital footprints. Companies, for their part, have been nudged towards greater transparency and accountability. Yet, the road to compliance has been strewn with hurdles — the costs of adherence, the complexity of operational adjustments, and not least, the ambiguity in certain regulatory edicts.

In our view, the advent of artificial intelligence and big data heralds a new frontier of possibilities. Yet, the spectre of challenges such as precision-targeted telecommunication fraud stemming from personal information breaches persists unabated. Instances of excessive data collection — be it through QR code-based ordering systems or the mandatory provision of personal identification at tourist attractions — underscore a pervasive overreach in data acquisition practices.

This era, marked by an almost boundless appetite for personal data, sees identity cards swiped not just at the gates of scenic spots, but also on a whole host of other seemingly innocuous locations, with some entities even venturing into the collection of relatives' information. Such practices, while ostensibly aimed at enhancing security and convenience, effectively amass a trove of personal data, from facial recognition patterns to location and financial information. This raises significant privacy concerns.

Against this backdrop, the rational utilization of information emerges as a pressing issue within the current legal framework of the PIPL. The task at hand is not merely to delineate the varied concepts and dimensions of personal information but to minimize the discrepancies in judicial and administrative enforcement. With technology perpetually in flux and legislation almost invariably lagging behind, the establishment of technical standards becomes paramount. The iterative process of issuing guiding cases and forging norms in administrative enforcement is thus envisioned as a an important means of refining the legal system.

Moreover, the international dimension of personal information protection, characterized by the burgeoning phenomenon of cross-border data transmission and sharing, introduces a new layer of complexity. The global interconnectedness of internet technology and the resultant data flows pose a unique challenge, with enterprises often finding themselves at the crossroads of domestic laws and foreign regulations. The disparities in the definition and categorization of personal information

between China and entities like the United States and the European Union create potential hurdles for compliance, threatening to ensnare companies in a legal quandary where adherence to one jurisdiction's regulations may contravene those of another.

The path forward necessitates a concerted effort to forge effective international co-operation mechanisms for personal information protection, thereby ensuring lawful and compliant data transmission and utilization. As China continues to refine its PIPL, aligning domestic regulations with international norms and bolstering the country's capacity to translate its personal information protection regime into a global framework becomes imperative. This endeavour not only underscores China's commitment to safeguarding personal privacy, but also contributes to the broader vision of a shared future in cyberspace.

IV. The Road Ahead: Multinationals and the PIPL Puzzle

As China's PIPL strides into its third year, the terrain for multinational companies operating within China has transformed dramatically. The cases of CNKI and Didi provide salient lessons for foreign enterprises navigating China's privacy regulations.

First, the legal liabilities codified within the PIPL, with penalties reaching up to the greater of 50 million yuan or 5% of annual turnover, underscore the seriousness of non-compliance. Such punitive measures, coupled with the potential for operational suspension and public denouncement of violations, emphasize the critical need for multinational corporations to enhance their data governance frameworks. In a domain where the sanctity of personal information reigns supreme, the ramifications of non-compliance extend beyond monetary fines, affecting brand reputation and consumer trust.

For international firms, the enforcement actions within China serve as a clarion call to prioritize privacy and data protection within their operational ethos. Adhering to the PIPL necessitates a proactive approach that anticipates regulatory scrutiny and ingrains privacy by design into the core of business operations. Importantly, it requires a detailed understanding of the law’s stipulations, from the intricacies of personal information collection and processing to the deployment of robust data protection measures.

Furthermore, the PIPL's global implications highlight the need for comprehensive cross-border compliance strategies. As data flows transcend national borders, multinational entities face the challenge of navigating a complex patchwork of international data protection laws. This intricate regulatory landscape demands sophisticated legal acumen, ensuring that data management policies remain compliant and adaptable to evolving legal requirements.

Given these considerations, multinationals are advised to treat compliance with the seriousness it warrants, not as a mere regulatory hurdle but as a strategic imperative. This advice may be broadly summarised in the following terms:

1. **Data Collection Sobriety:** Prudence in data collection and adhering to the principle of necessity is underscored by both Didi and CNKI's experiences. The unauthorized collection and overreach criticised in these cases highlight the importance of collecting only data that is essential for the provided service, with clear, informed consent from users.

2. **Cross-border Data Transmission Vigilance:** Companies must meticulously navigate cross-border data transmission, adhering to the requirements set out in the PIPL. This is likely to entail, inter alia, conducting impact assessments and securing regulatory approvals as necessary.
3. **Preparation for Regulatory Probes:** The scrutiny faced by Didi and CNKI emphasizes the importance of transparency and cooperation during regulatory investigations. Maintaining detailed records of data practices and proactively demonstrating compliance can mitigate potential penalties and reinforce a culture of respect for data privacy.
4. **Operational Transparency and Accountability:** Drawing lessons from CNKI's ordeal, multinationals must prioritize clear and accessible disclosure of their data collection, usage, and protection policies. This operational transparency aligns with the PIPL's demands for openness, bolstering user trust and compliance.

As multinational companies navigate this landscape, they are encouraged to view compliance as an ongoing, integral component of their business strategy. Championing transparency, accountability, and respect for individual rights not only mitigates legal risks, but also enhances consumer trust and competitive positioning in China's digital economy.

The evolution of China's PIPL is likely to significantly influence the global discourse on privacy and data protection. For multinationals, the journey through China's privacy framework presents both challenges and opportunities which they will need to be acutely alive to.

A Guarantor is Generally not Bound by an Arbitration Clause in the Underlying Con tract

"China Oceanwide Holdings Group Co., Ltd v. Guo Wei"

Beijing Financial Court (2022) Jing 74 Min Te No. 13

LI Lei

In January 2024, the Supreme Court of the People's Republic of China (**the "Supreme Court"**) issued ten leading cases in respect of judicial review of arbitration. The fifth case, China Oceanwide Holdings Group Co., Ltd v. Guo Wei, addresses whether a guarantor is bound by an arbitration clause in the underlying contract in circumstances where the letter of guarantee does not provide for an arbitration clause. In that case, the Beijing Financial Court held that the guarantor, China Oceanwide Holdings Group Co., Ltd (**"China Oceanwide"**), was not bound by the arbitration agreement in the underlying agreement with Guo Wei, and that the arbitral tribunal consequently no jurisdiction over Guo Wei's claim against the guarantor. By publishing the case as a leading case, the Supreme Court is effectively affirming the judgement of the Beijing Financial Court, and thereby confirming that a guarantor is generally not bound by an arbitration agreement in the underlying contract.

Facts

On 27 December 2019, Guo Wei signed documents titled "Fund Contract", "Fund Supplementary Confirmation Letter" and "Share Subscription of Minsheng Wealth Zunyi No. 9 Investment Fund" with (a) a fund manager, Minsheng Wealth Co., Ltd (**"Minsheng Wealth"**); and (b) the fund trustee, China Merchants Securities Co., Ltd. On the day of the signing of the "Fund Contract", Guo Wei paid CNY 4.3 million to the account designated by Minsheng Wealth. The Fund Contract provides that if any dispute arising out of or in connection with it cannot be resolved through friendly negotiation, the said dispute(s) shall be settled by arbitration before the Beijing Arbitration Commission.

In October 2014, China Oceanwide issued a guarantee letter to Minsheng Wealth, promising to provide credit enhancement guarantee support for the asset management products initiated and established by Minsheng Wealth, and assuming active management responsibilities.

In September 2021, Guo Wei (as claimant) commenced arbitration before the Beijing Arbitration Commission against Minsheng Wealth, China Merchants Securities Co., Ltd, and China Oceanwide as respondents. On 23 November 2021, China Oceanwide formally challenged the jurisdiction of the Beijing Arbitration Commission. On 14 December 2021, the Beijing Arbitration Commission replied to China Oceanwide's challenge, observing that the jurisdictional challenge could only be determined after reviewing the case on its merits, and the jurisdictional challenge will be decided by the Tribunal after constitution of the Tribunal.

On 19 January 2022, China Oceanwide commenced proceedings before the Beijing Financial Court,

inviting the court to decide whether there existed a valid and binding arbitration agreement between China Oceanwide and Guo Wei. On 21 January 2022, the Beijing Financial Court accepted the case.

Issue

Whether there was a valid arbitration agreement or arbitration clause between China Oceanwide and Guo Wei.

Decision

The Beijing Financial Court observed that China Oceanwide did not directly sign the Fund Contract with Guo Wei, nor was the guarantee letter addressed to Guo Wei. There was no clear expression of intent to resolve the dispute through arbitration between China Oceanwide and Guo Wei. Thus, there was no arbitration agreement between China Oceanwide and Guo Wei. China Oceanwide had challenged the jurisdiction of the Tribunal before the first hearing in the arbitral proceeding, which is consistent with the relevant procedural provisions. The Beijing Arbitration Commission had also not made any decision as to the jurisdictional challenge which was before it. In the circumstances, the Beijing Financial Court ruled that there was no valid arbitration agreement between China Oceanwide and Guo Wei.

Commentary

The Supreme Court confirmed this case as a typical case for determining the applicability of arbitration clauses in underlying contracts to accessory contracts. The Supreme Court further commented that Chinese courts fully respect the parties' willingness to arbitrate, and determined that the arbitration clause of the main contract is not, without more, binding on the accessory contract (and the parties thereto) in the absence of an arbitration clause in the accessory contract. Based on these comments, it seems that whether the guarantee letter in the instant case was directly addressed to Guo Wei was irrelevant, and the Supreme Court may be considered to have established a general rule that a guarantor is not, without more, bound by an arbitration clause in the underlying contract (which the guarantor is guaranteeing).

It is noted that the English courts may be seen to have adopted different approaches depending on the specific facts. For instance, in Stellar Shipping Co LLC v Hudson Shipping Lines [2012] 1 CLC 476, Hamblen J (as he then was) held that Stellar Shipping Co LLC, as the guarantor, was bound by the arbitration clause contained in a Contract of Affreightment entered between its wholly-owned subsidiary Phiniqia International Shipping (as Charterer) and Hudson Shipping Lines (as Owner). Critical to the Court’s reasoning was the fact that Stellar had “endorsed” the underlying Contract of Affreightment – Hamblen J held that Stellar’s endorsement of the underlying contract could only have meaningful effect if it involved Stellar’s own agreement to arbitration in respect of any disputes concerning its own obligations. This dovetailed with the approach in Fiona Trust v Privalov [2007] 2 CLC 553, where the House of Lords had held that it was reasonable to expect the parties to have agreed to a common method of dispute resolution in a single commercial relationship. It is not the purpose of this note to opine on whether the approach of the English or the Chinese Courts is preferable, particularly given the somewhat different factual backgrounds against which the relevant cases were decided, but the differences in approach nonetheless bear note.

It is further noted that, in the draft Amendment to the Chinese Arbitration Law, the legal draftsman suggested a different approach to the Supreme Court's position in the China Oceanwide case. Article 24 of the draft Arbitration Law of the People's Republic of China (Revision) (Draft for Comments) dated 30 July 2021 provides, "If the dispute involves a main-accessory contract, and the arbitration agreement between the main contract and the accessory contract is inconsistent, the agreement of the main contract shall prevail. If there is no arbitration agreement in the accessory contract, the arbitration agreement of the main contract shall be valid against the parties to the accessory contract". Thus, it remains to be seen whether the position set out by the draftsman will be affected by the Supreme Court's view in the China Oceanwide case.

AUTHORS

Yang Chen (Beijing)
+86 10 5706 8027
yangchen@jtn.com

Liz Lin (Shanghai)
+86 21 3886 2367
linmujuan@jtn.com

Bian Tong (Shanghai)
+86-21-3886 2123
biantong@jtn.com

Li Zhuangyi (Beijing)
+86-10-5706 8585
lizhuangyi@jtn.com

Guo Shuai (Beijing)
+86 10 5706 8293
guoshuai@jtn.com

Alan Li (Shenzhen)
+86 755 2348 2627
lilan@jtn.com

Li Lei (Beijing)
+86 10 5706 8435
lilei@jtn.com

Xing Jingyu (Beijing)
+86 10 5706 8390
xingjingyu@jtn.com

Liu Junzuo (Shenzhen)
+86 755 2223 5518
liujunzuo@jtn.com


JT&N 金诚同达