CHINA DISPUTE RESOLUTION

NEWS LETTER

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NEWS ALERT

1. The New Company Law of China Officially Entered into Effect on July 1, 2024

The new Company Law of China officially entered into effect on July 1, 2024. The new Company Law brings significant improvements to the existing law. Key reforms include revamping the capital system as well as the principles of capital maintenance, reinforcing shareholder responsibilities, optimizing corporate governance structures, and enhancing the fiduciary duties of directors and senior management. Notably, Article 180 of the new law officially defines the duty of diligence which applies to directors and senior management for the first time, emphasizing the obligation to act in the company's best interests with reasonable care, bringing the position in China in line with the business judgment rule in U.S., English, and Singaporean law.

2. 2024 HKIAC Administered Arbitration Rules Entered into Effect on June 1, 2024

The 2024 HKIAC Administered Arbitration Rules came into effect on June 1, 2024, after six years of development since the 2018 revision. Notable updates include addressing modern concerns such as environmental protection and data security. Articles 13.1 and 34.4(f) emphasize that arbitral tribunals need to consider environmental impact when deciding on procedures and on the allocation of arbitration costs. The concept of "green arbitration" aligns with global Environmental, Social, and Governance principles.

In relation to data security, Article 45A permits parties to agree on information protection measures. Moreover, the tribunal is empowered, after consulting with parties, to give directions to secure data. In the event that breaches occur, the tribunal can issue orders and even awards to address violations. This article is crucial for safeguarding parties' interests in the complex legal landscape of data security.

3. Guangdong High Court Adopts New Guidelines Introducing Cross-Examination Practice for Hong Kong and Macau Cases in the Greater Bay Area

On January 18, 2024, the Guangdong High Court implemented Guidelines II on the Coordination of Judicial Rules for the Trial of Hong Kong and Macau-Related Commercial Disputes by Mainland Courts in the Greater Bay Area ("**Guidelines II**"). The Guidelines II harmonize civil litigation rules between mainland China and the Hong Kong-Macau regions, addressing the qualification of witnesses, the form of testimony to be given in commercial litigation, and the manner of questioning witnesses. Notably, Guidelines II introduces common law practices such as cross-examination, providing for a shift from judge-led to party-led questioning of witnesses even in mainland Courts.

4. New Local Regulation in the Shanghai Pudong District Establishes One-Stop Dispute Resolution Center for Foreign Commercial Cases

On June 1, 2024, the Shanghai Pudong District officially launched the Regulations on Enhancing the Diversified Resolution Mechanisms for Foreign Commercial Disputes in Pudong. According to this regulation, the Shanghai Pudong District will establish a one-stop dispute resolution center for foreign commercial cases. The goal of this plan is to encourage the entry and cooperation of mediation organizations, arbitration institutions, and People's Courts etc. within the dispute resolution center to provide more convenient and efficient integrated legal services for foreign commercial entities.

For example, the center will implement an information-sharing platform, gradually clarify case allocation standards, and define obligations among arbitration institutions, mediation organizations, and courts. For example, if an agreement is reached through mediation organizations, the People's Court should efficiently confirm the mediation agreement in accordance with the law. Additionally, the center will introduce innovative measures such as online video platforms for witness evidence, which will, inter alia, simplify notarization and certification processes. There will also be close collaboration with overseas legal services for fact-finding and translation, ensuring comprehensive support for international dispute resolution in Pudong.

5. **Hong Kong Judgement Grants Compensation of Damages Caused by Refusal to Enforce a CIETAC Arbitration Award**

In a share transfer dispute, Xiamen Xinjingdi Group Co., Ltd. (“**Xinjingdi**”) initiated arbitral proceedings against Eton Properties Limited (“**Eton**”) and related entities in 2005 under the China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules, seeking specific performance of a share transfer agreement. Xinjingdi obtained a CIETAC award in its favor in 2006 and applied for enforcement of the award in Hong Kong in 2007. From 2007 to present, numerous Hong Kong legal proceedings took place among these parties.

In May 2024, the High Court of Hong Kong held that Eton was to compensate Xinjingdi for losses caused by the former’s refusal to enforce the CIETAC award ([2024] HKCFI 1291). This judgment clarifies the principle for calculating such losses, being that “*an arbitral award should as a matter of construction be read generously, in a reasonable and commercial way and in accordance with the expectations of commercial persons who are parties to the arbitration agreement*”. Given that the CIETAC award focused on the performance of share transfer agreement, (i.e. transferring the share of project company to Xinjingdi, allowing Xinjingdi to benefit from developing the land under the project company), the damages were accessed as benefits that Eton and other entities obtaining from developing the land from the date of the CIETAC award.

6. **Chinese Courts Announced Precedents after the Enactment of Interpretation II on the Application of the Law of the People’s Republic of China on the Application of Foreign-Related Civil Relations**

Following the enactment of the “*Interpretation II on the Application of the Law of the People’s Republic of China on the Application of Foreign-Related Civil Relations*” (“**Interpretation II**”) on January 1, 2024, Chinese courts (including those in Nanjing, Wuxi, and Qingdao, etc.), have issued collections of precedents on the application of foreign laws. Notably, the precedents issued by the Nanjing courts included the first case in which a Nanjing court determined questions of foreign law pursuant to Interpretation II. One of the issues in that case was whether a dissolved Irish company was a “lawful entity” for the purposes of Irish law. According to Article 2.6 of Interpretation II, the Primary People’s Court of Jiangbei New District of Nanjing City determined the question of Irish company law by seeking expert opinions from the Nanjing International Commercial Court's panel. The Court also verified the position under Irish company law by reference to the Ministry of Commerce's official website. It was ultimately ascertained that under section 737 of the Irish Company Law, the dissolved Irish company involved was not deemed to be a legal entity and thus did not need to be listed as a party to the case.

7. Shenzhen Court Issues First Interim Order in SCIAHK Arbitration Case

The Shenzhen Intermediate People's Court recently issued its first interim attachment order following an application by a claimant involved in a Hong Kong arbitration overseen by the South China International Arbitration Center (HK) ("**SCIAHK**"). This order directed the attachment of the respondent's assets in Mainland China. SCIAHK stands as the first independent arbitration institution outside the mainland initiated by a Mainland arbitration institution, showcasing the broader impact of the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures between Hong Kong and Mainland China during Arbitral Proceedings.

8. New Arbitration Jurisdiction Regulations Issued by Shanghai High People's Court

The Shanghai High People's Court has released its *Regulations on the Centralized Jurisdiction over Arbitration-related Judicial Cases Involving "Three-Specific" Ad Hoc Arbitrations and "Overseas Arbitration Business Agencies"* (the "**Regulations**"). These Regulations took effect on June 24, 2024.

The "Three Specific" ad hoc arbitrations mentioned in the Regulations refer to ad hoc arbitrations agreed to (1) be conducted in Shanghai (2) according to specific arbitration rules (3) by designated personnel. The types of cases under the centralized jurisdiction provided for in the Regulations include:

- Applications for confirmation of the validity of arbitration agreements
- Applications for annulment of arbitration awards
- Applications for enforcement of arbitral awards
- Applications for preservation measures during arbitration proceedings
- Applications for assistance in investigation and evidence collection during arbitration proceedings

For cases involving financial commercial disputes, jurisdiction lies with the Shanghai Financial Court. For maritime commercial and other such civil and commercial disputes, the Shanghai Maritime Court will have jurisdiction.

9. Shanghai International Commercial Mediation Center Unveils New Rules

On May 20, 2024, the Shanghai International Commercial Mediation Center ("**SHICMC**") was officially established. On the same day, the center released and implemented the official Mediation Rules of SHICMC. The Mediation Rules of SHICMC incorporate international standards from the United Nations Convention on International Settlement Agreements Resulting from Mediation, as well as the UNCITRAL Conciliation Rules.

During the ceremony, SHICMC signed cooperation agreements with the Shanghai International Dispute Resolution Center, Singapore International Mediation Centre, Hong Kong International Mediation Centre, Benchmark Chambers International, and the Benchmark International Mediation Center. Additionally, it established a collaborative understanding with the Dispute Resolution Centre of Australia.

Chinese Corporate Control and Shareholder Litigation Series – Improved Protection for Minority Shareholders

Vera Zuo, Guo Shuai, Li Jiarong

Preamble

Majority Rule is a fundamental principle in modern corporate governance, reflecting the democratic ethos of minority shareholders being bound by the majority in corporate law. While this ethos can enhance decision-making efficiency, it also engenders practical concerns about how best to protect the interests of minority shareholders. Due to their limited shareholding and voting power, minority shareholders often struggle to effectively participate in company management and decision-making, leading to potential violations of their rights.

The Company Law of the People's Republic of China issued on December 29, 2023 (the "New Company Law") enhances the protection of minority shareholders and provides more avenues for them to assert their rights as compared to the position under the Company Law currently in force (the "Current Company Law"). The new measures introduced include expanding shareholders' rights to information, empowering minorities to propose initiatives, extending the right to buy back shares, and introducing the concept of a "Double-Derivative action".

This article outlines the key changes in the New Company Law that aim to better safeguard the rights and interests of minority shareholders whilst striking an appropriate balance with corporate efficiency.

I. The New Company Law broadens shareholders' rights to information

Shareholders' access to company information is crucial for understanding the company's operations and financial health, overseeing management, and making informed decisions that affect their rights and interests. The right to information is particularly important for minority shareholders, who are typically not involved in the day-to-day management of the company.

While the current Company Law already grants shareholders a right to information in both limited liability and joint-stock companies, the New Company Law expands upon this provision, making it more comprehensive.

i. The New Company Law broadens shareholder information rights for shareholders of limited liability companies

The Current Company Law states that shareholders in limited liability companies have the right to access the company's accounting books. However, the New Company Law goes further by granting such shareholders access to accounting vouchers, which form the basis for the records entered into accounting books. This expansion of information rights allows shareholders in limited liability companies to access more detailed primary accounting information.

Furthermore, the New Company Law also stipulates that shareholders in limited liability companies have the right to access and make copies of the registry of shareholders, which is not a right granted under the Current Company Law.

ii. The New Company Law broadens the information right of shareholders in joint-stock limited companies

The New Company Law also expands the information rights of shareholders in joint-stock limited companies. The Current Company Law barely provides for the entitlement of shareholders of joint-stock limited companies to review company documents, whereas the New Company Law grants significantly greater information rights, including the right to copies of key documents. Such improvement provides an important safeguard for shareholders to access and store important documents, providing a means of holding management to account.

Under the Current Company Law, shareholders of joint-stock limited companies are not entitled to review accounting books and vouchers. However, the New Company Law prescribes that shareholders in joint-stock limited companies who have individually or collectively held more than 3% of the company's shares for more than 180 consecutive days are entitled to the same rights as shareholders in limited liability companies to review company accounting books and vouchers This access to information better balances the rights of minority shareholders and the interests of the company, allowing minority shareholders to, at the very least, find out about the company's performance and fiscal health.

Perhaps even more importantly, a joint-stock limited company's articles of association can only stipulate a lower proportion of shares held by minority shareholders as the threshold to review accounting books and vouchers, . In other words, the joint-stock limited company's articles may provide that persons holding 1.5% of the company's shares for the requisite period of time may requisition information, but cannot raise the threshold. This important procedural safeguard demonstrates that while companies are usually granted a high degree of autonomy, controlling shareholders will not be permitted to effectively "contract-out" of the right minority shareholders in joint-stock limited companies to review information. Even provisions in the company's articles of association will not suffice to abrogate that right.

iii. Right of shareholders in both limited liability companies and joint-stock limited companies to review and duplicate information pertaining to the company's wholly-owned subsidiaries

Another noteworthy provision in the New Company Law is the newly prescribed right for shareholders in both limited liability companies and joint-stock limited companies to review and obtain copies of information pertaining to the company's wholly-owned subsidiaries. This coheres with the newly-introduced Double-Derivative action under Article 189 of the New Company Law (as to which see below at Section V). Minority shareholders being entitled to information as to the operational and financial status of the company's wholly-owned subsidiaries prevents the incorporation of subsidiaries from being used to obscure and obfuscate acts by the majority or management. This ability to procure information about subsidiaries would also assist in minority shareholders directly initiating Double-Derivative actions to safeguard the interests of the company's wholly-owned subsidiaries.

iv. The New Company Law simplifies procedures for exercising shareholder information rights by not requiring the shareholder's presence where third-party professionals are engaged to exercise the shareholder's information rights

Article 10 of the *Provisions (IV) of the Supreme People's Court on Several Issues concerning the Application of the Company Law of the People's Republic of China* ("Judicial Interpretation of Company Law (IV)") provides that when shareholders request to inspect company documents based on enforceable court judgments, accountants, lawyers, and other third-party professionals who are bound by confidentiality obligations under the law or professional codes of conduct may assist in the inspection process, but only in the presence of the shareholders.

However, the New Company Law allows shareholders to engage third-party professionals to exercise the shareholders' information rights without the shareholders' presence. This is significant in facilitating and simplifying the exercise of a shareholder's information rights.

II. The New Company Law improves minority shareholders' right to make proposals

The right to propose is of vital importance for participation in decision-making as to the company's development and operation. This is especially so for minority shareholders, who can contribute their opinions on the company's operations through exercising such a right.

Article 115 of the New Company Law lowers the minimum shareholding requirement for submitting interim proposals. The Current Company Law stipulates that shareholders must hold at least 3% or more of the company's shares either individually or in aggregate before they may exercise the right to make proposals as to the company's management. Under the New Company Law, the shareholding requirement is lowered to 1%.

In addition, the New Company Law further requires that the 1% statutory threshold may not be increased through provisions in the company's articles of association. This serves to more fully protect minority shareholder's right to make proposals.

III. The New Company Law expands the right to be bought out

If the rights and interests of minority shareholders have been significantly infringed upon in the course of the company's operation, and trust between the shareholders has irretrievably broken down, Company Law often makes provision to assist minority shareholders in withdrawing from the company so as to avoid more serious damage. This withdrawal typically takes the form of a buyout, where either the majority shareholders or the company purchase the minority's shares. Although the Current Company Law provides for the right to have one's shares repurchased / bought out in limited liability companies, the enumerated situations where this right can be exercised may not fully cover the situations in which minority shareholders should have right to withdraw from the company.

The New Company Law provides solutions to this issue.

i. The New Company Law broadens the right to have one's shares repurchased or bought out in limited liability companies

The New Company Law has augmented the right to have one's shares repurchased or bought out for shareholders of limited liability companies. Article 89 of the New Company Law provides that “[w]here a controlling shareholder abuses its rights, causing serious harm to the interests of the company or other shareholders, other shareholders shall have the right to have the company repurchase their shares at reasonable price.” This right is of vital importance for minority shareholders to safeguard their interests and prevent minority oppression. Under the Current Company Law, when facing situations where controlling shareholders abuse their rights, the primary recourse for minority shareholders is to initiate a derivative lawsuit on behalf of the company. However, not only there are preconditions which need to be satisfied before initiating a derivative lawsuit, the relief for the minority shareholders is also indirect. The newly-introduced mechanism for dissenting shareholders to have their shares repurchased allows minority shareholders to recover the value of their property rights in the face of majority oppression. This broadens the recourse available to minority shareholders, and strengthens their negotiating position in the face of the majority.

In a nutshell, when faced with oppressive behavior by controlling shareholders, minority shareholders may choose to “vote with their feet” and apply to be bought out of the company.

ii. The New Company Law broadens the right to repurchase shares for dissenting shareholders in non-listed joint-stock limited companies

The Current Company Law prescribes only one situation under Article 142 for shareholders who dissent to a resolution in a shareholders’ meeting (“dissenting shareholders”) in joint-stock limited companies to exercise the right to have their shares repurchased. This is when “a shareholder objects to a resolution of the shareholders’ meeting on the combination or division of the company.” The New Company Law broadens the right to have one’s shares repurchased for dissenting shareholders in non-listed joint-stock limited companies, including situations where “a company that has made profits for five consecutive years fails to (a) distribute any dividends to the shareholders for 5 consecutive years and (b) conform to the profit distribution conditions as prescribed in the company law”; “the company is transferring major assets to others”; and “when the business term as specified in the articles of association expires or other reasons for dissolution as prescribed in the bylaws occur, but a shareholders’ meeting votes to have the company continue as a going concern by adopting a resolution to modify the articles of association”.

Furthermore, compared to the Current Company Law, the New Company Law prescribes in each statute related to the right to have one’s shares repurchased (Articles 89, 161, and 162) that the company should transfer or cancel the repurchased shares within a specified time period after the repurchase, so as to ensure the capital of the company is properly maintained.

IV. The New Company Law introduces “Double-Derivative actions”

The Current Company Law prescribes that in certain cases where directors, supervisors, or senior executives violate laws, administrative regulations, or the company’s articles of association, causing losses to the company, shareholders may lodge a derivative suit to protect the interests of the company. However, where controlling shareholders transfer a company’s operations and personnel to the said company’s wholly-owned subsidiaries such that it is the rights of the subsidiary which are infringed upon, minority shareholders may face hurdles in initiating derivative suits. To address this issue, the New Company Law introduces Double-Derivative actions, which allow a shareholder to directly commence a derivative action to protect the interests of a wholly-owned subsidiary.

The Double-Derivative action provided for under the New Company Law can help minority shareholders in situations where controlling shareholders turn the parent company into what is in effect a “shell firm”, transferring the company’s operational activities to wholly-owned subsidiaries. If the controlling shareholders, directors, supervisors, or senior executives of a wholly-owned subsidiary infringe on the legitimate rights and interests of the said subsidiary, minority shareholders of the parent company can “leapfrog” the parent company and directly initiate a Double-Derivative action in their own name to protect the interests of the subsidiary.

Conclusion

The New Company Law proactively responds to existing issues in practice by reinforcing and improving protections for minority shareholders. On one hand, the New Company Law enables minority shareholders to have a say in the operation and management of a company, thereby providing them with more opportunities to genuinely participate in decision-making. On the other hand, the new legislation grants minority shareholders more flexible mechanisms and a wider range of avenues to vindicate their rights. This dual approach contributes to further optimizing the balance of rights within a company and improving corporate governance.

The Application of Res Judicata in PRC Arbitration

Zeng Sheng

In the realm of arbitration, the principle of res judicata serves, among its many important purposes, to safeguard the finality and enforceability of arbitral awards. Res judicata has also been firmly established in the PRC Arbitral Law, but recent judicial decisions evidence its flexibility and intricacies.

Article 9 of the PRC Arbitration Law stipulates that "[a]n arbitral award shall be final." The res judicata effect of a commercial award encompasses both positive and negative aspects. The positive effect of res judicata means that the tribunal's decisions in the operative part of an award are binding between the parties in subsequent proceedings (as reflected in Article 57 of the PRC Arbitration Law). Conversely, the negative effect precludes the parties from initiating further (and duplicative) proceedings on an identical dispute (as reflected in Article 9 of the PRC Arbitration Law).

As with the statutory provisions governing arbitration in most jurisdictions, the PRC Arbitration Law provides limited express guidance on application of res judicata. Consequently, several critical issues in this area have been left to practice and caselaw. These issues include, inter alia, the necessary requirements before the doctrine of res judicata can be invoked in relation to an award, and the exceptions to deny the effect of res judicata arising out of a prior award.

The case of *Sinopec International Petroleum Exploration and Production vs UNITOP Limited* ("*SIPC v. UNITOP*") provides significant insights into the PRC Supreme People's Court ("SPC")'s position on res judicata between different commercial arbitral tribunals.

UNITOP, a British Virgin Islands company, commenced an arbitration at the CIETAC against SIPC, a state-owned entity, over an dispute arising out of an agency agreement. UNITOP was unsuccessful in the first arbitration in 2013 but initiated a second arbitration in 2015. The second tribunal found for UNITOP. However, in 2020, the 4th Intermediate People's Court of Beijing ("Beijing 4th Court") set aside the second award in the course of judicial set-aside proceedings, holding that the second tribunal's exercise of authority violated the principle of res judicata. In its reasoning, the Beijing court cited the SPC's opinions - under PRC law, a court setting aside such an award is required to report level by level up to the SPC and obtain the SPC's approval.

The SPC's opinions referred to in *SIPC v. UNITOP* can be summarized as two key points. First, the SPC emphasized that for res judicata to apply, the disputes must be identical, necessitating the application of the triple identity test (identity of the parties, subject matter, and claims). Notably, the SPC underscored that under PRC arbitration law, new facts emerging after a prior award do not provide a basis for not applying the doctrine of res judicata. This is in contrast with the ordinary law of civil procedure as applies in litigation, where new facts can negate the application of res judicata. This distinction proved decisive in addressing the second arbitral tribunal's attempt to place reliance on Article 248 of the PRC Civil Procedure Law, which provides that if new facts emerge, a party is entitled to file a second suit over the same dispute. Put simply, Article 248 did not apply in arbitration.

Second, the SPC concluded that the legal ground to set aside an award violating res judicata was an absence of jurisdiction, *i.e.*, that "*the arbitral institution has no authority to arbitrate.*" The SPC viewing res judicata as a jurisdictional matter is important because it necessarily implies that a tribunal's decision on this issue is subject to national courts' oversight and can be overturned.

Commentators have criticized the SPC's opinions as cited in *SIPC v. UNITOP*, particularly in relation to its treatment of Article 248 of the civil procedural law. The SPC's rationale was that Article 248 applies solely to civil proceedings and not to arbitration proceedings. However, tribunals typically have the discretion to determine applicable law, provided there is no violation of fairness, the parties' agreements, and mandatory law. As the PRC Arbitration Law lacks specifics on res judicata, it is common for tribunals to refer to the civil procedural law for details as to the precise operation of res judicata. In a few seminars discussing *SIPC v. UNITOP* (one of which was held by CIETAC after the release of the setting-aside judgement), few disagreed that the disapplication of Article 248 of the civil procedure law in that case was squarely incorrect.

Moreover, the SPC's categorization of res judicata as a jurisdictional issue raises concerns. The SPC has insisted that curial review of an award during set-aside proceedings should be limited to procedural issues. Indeed, in *SIPC v. UNITOP*, the issue of res judicata was treated as a squarely procedural one. Yet, res judicata appears to be more substantive in nature. In *SIPC v. UNITOP*, the second tribunal found that new facts led to the satisfaction of a condition which triggered the defendant's payment obligation. The second tribunal further held that the new facts were sufficient to negate any res judicata effects arising out of the first award. Conversely, the curial review found that new facts did not lead to the satisfaction of the payment condition and were insufficient to preclude the operation of res judicata. The Court's conclusions could therefore be seen as prying into the facts of the case and making a substantive decision different from the tribunal's.

Notably, the SPC's opinions as cited in *SIPC v. UNITOP* have not been uniformly adhered to by the PRC courts. Observations of judicial practice in the Beijing 4th Court reveal that, in at least two published cases post-dating *SIPC v. UNITOP*, the court has concluded that the new facts can indeed preclude the res judicata effect of prior awards. For instance, in *Colombian Outdoor Media Advertising (Beijing) Co., LTD vs. Beijing Bus Media Co., LTD* (2022), the Beijing 4th Court saw no error in the tribunal's reliance on Article 248 of the civil procedural law. The court affirmed the tribunal's decision that new facts denied the res judicata effect of the first award, and further said that "*if there are new facts the two cases do not fall into the same dispute and the parties may commence a new arbitration based on new facts.*"

The Beijing 4th Court in some published cases has also respected the competence of arbitral tribunals in deciding res judicata issues. This is again notwithstanding the position in *SIPC v. UNITOP*. In a case in 2024 (Case No. (2024) Jing 04 Civil Special 20), the court held that "*[t]he determination of repeated arbitration, new evidence, or new facts falls within the scope of the tribunal's power. In other words, the tribunal has the authority to determine, based on the arbitration requests and evidence submitted by the parties, whether the rights and obligations involved in the arbitration case are those already determined by a prior effective arbitration award, and (has the authority) to not accept or hear cases of repeated arbitration.*" If a tribunal has the right to not accept or hear cases of repeated arbitration, the converse side of the coin is that a tribunal has the right to accept or hear case where there is no repeated arbitration. The Beijing 4th Court implies that exercise of such right should be respected by national courts.

Although the PRC is not a common law jurisdiction, where case law is necessarily of binding effect, the Beijing 4th Court's treatment of the SPC's stance in *SIPC v. UNITOP* is notable. While the judicial divergence may not conclusively demonstrate that the decision in *SIPC v. UNITOP* was necessarily erroneous, it certainly highlights the flexibility and intricacies of res judicata issues. The unique reporting requirement in the course of curial oversight in the PRC makes such a judicial divergence possible. In *SIPC v. UNITOP*, the award was set aside, triggering the Beijing court's obligation to report its set-aside decisions to the SPC. However, this reporting requirement does not extend to instances where the court confirms a tribunal's decision, even if such confirmation conflicts with the SPC's stance. In all cases observed above, the Beijing court dismissed the set-aside application, and did so independently, without seeking or receiving approval from the SPC.

In sum, the *SIPC v. UNITOP* case serves as a critical reference point for understanding how the Chinese Courts interpret and apply res judicata in arbitration. However, attention must be paid to the judicial divergence regarding the application of Article 248 of the civil procedure law in arbitration and the competence of arbitral tribunals in deciding res judicata issues. Future developments in PRC arbitration law and judicial practice may further clarify the application of res judicata. In the interim, it will be important for practitioners and parties involved in arbitration to be aware of the nuances and potential pitfalls in this area.

Can WeChat Messages Constitute a Legally Binding Agreement?

An Analysis of the Copyright Infringement Case of "Moon Man"

by the High Court of Singapore

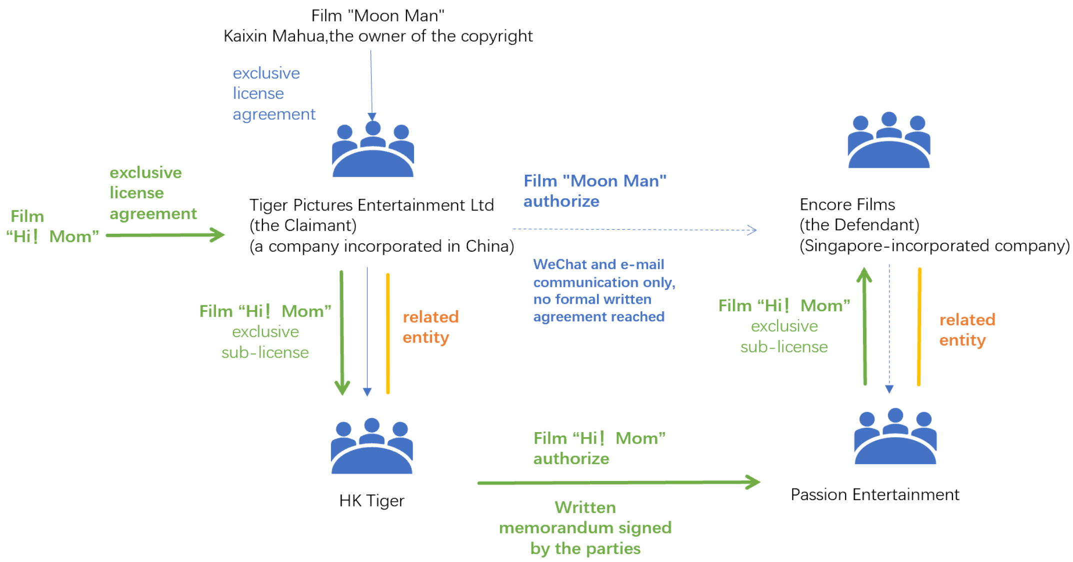
Stella Lu, Enxi Zhu

Abstract

In the recent judgment of Tiger Pictures Entertainment Ltd ("Tiger Pictures") v. Encore Films Pte Ltd ("Encore Films")[1], the General Division of the High Court of Singapore determined that Encore Films, a Singapore-incorporated company that distributes films, had infringed Tiger Pictures' copyright of the highly successful Chinese film "Moon Man". This conclusion was reached on the basis that no valid contract permitting use of the film had ever been reached through WeChat and E-mail negotiations.

Despite recognizing that chat records can, in principle, form a contract, the High Court of Singapore decided the case based primarily on the lack of two key factors leading to a failure of contract formation. These were, on the facts of the particular case, the absence of an intention to create legal relations through the relevant WeChat and E-mail negotiations, and the uncertainty as to the contract's core terms.

Case Background



On 19 August 2022, Kaixin Mahua, the Chinese copyright owner of "Moon Man" (the "Film"), exclusively licensed the Film to Tiger Pictures, which then sub-licensed it to HK Tiger. Afterwards, Tiger Pictures' President, Mr. Young, discussed distributing the film in Singapore with Encore Films' Managing Director, Ms. Lee, via WeChat and E-mail. Despite some issues with the plan as to the

promotion and advertising of the Film, Tiger Pictures and HK Tiger sent Encore Films the digital cinema package for the Film on 22 August 2022. Drafts of the distribution agreement were then exchanged between 31 August and 7 September 2022, but no consensus was reached.

On 8 September 2022, Tiger Pictures and HK Tiger warned Encore Films against exhibitions of the Film without a signed agreement, though Encore Films was still permitted to organize the Sneak Sessions. On 13 September 2022, Encore Films claimed a contract had been formed on 20 August 2022, and made arrangements to release the Film for general screening in Singapore on 15 September 2022. On that date, Encore Films screened the Film in cinemas, taking no heed of the warnings from Tiger Pictures' lawyers that no agreement for the theatrical release, except for Sneak Sessions.

Tiger Pictures then sued Encore Films for copyright infringement. Encore Films defended that an agreement had been made through WeChat and E-mail negotiations (the "Alleged Agreement").

Key Points of the Judgment

In determining whether Encore Films had infringed Tiger Films' copyright, Justice Dedar Singh Gill focused on whether an effective distribution agreement for the Film was established. The court found that no valid distribution agreement had been reached between the parties, based on the following key considerations:

1. Whether the parties intended for the WeChat and E-mail Negotiations to create legal relations?

   The parties did not intend the WeChat and E-mail negotiations to create legal relations, as both parties aimed to sign a written contract. This was in turn evidenced by the defendant's notification to the claimant that its staff would send a written contract for execution.

   The terms of the Alleged Agreement also evidence a lack of intention to create legal relations. There is an interplay between the contractual formation requirements of an intention to create legal relations and certainty. Generally, where parties have entered into a signed agreement that adequately sets out the essential terms of the transaction, the court would be extremely reluctant to infer that the parties had not intended to be bound. Conversely, uncertain and incomplete terms are often viewed as strong evidence of a lack of contractual intent, especially when key terms such as (1) the identity of the distribution company, (2) the need for a promotions and advertising plan and related receipt, (3) the scope of licensed rights and (4) the license period were not agreed upon.

   The parties' prior dealings in relation to the "Hi! Mom" film reinforced this position. In previous transactions, both parties had executed the transaction terms in the form of a written memorandum in addition to the discussions on WeChat and E-mail. This established a precedent between the parties that a written form for a contract was required.

   Furthermore, the parties' subsequent conduct does not contradict the lack of intention to create legal relations. Although Encore Films claimed to have started contract preparations after believing that the contract was formed and argued that Tiger Pictures' lack of objection should be seen as an acknowledgment of the contract, there was no evidence that Tiger Pictures was aware or should have been aware of Encore Films' preparations. Therefore, subsequent actions could not overturn the lack of intention to create legal relations through WeChat and E-mail.

2. Whether the Alleged Agreement fails for lack of certainty?

Certainty and completeness are requirements for a valid contract. Even if there is a valid offer and acceptance, a contract may still fail due to uncertainty and incompleteness. For a binding contract to arise, the parties must agree on all essential terms. In this case, the parties did not agree on the core terms of the Film distribution agreement, leading the court to conclude that the alleged contract did not meet the certainty requirement and that no valid agreement was reached.

In summary, the parties had not reached a valid agreement for the distribution of the Film given the lack of intention to establish legal relations through the WeChat and E-mail negotiations, and the lack of certainty in the Alleged Agreement. Therefore, the court ruled that Encore Films had infringed on Tiger Pictures' copyright over the Film.

Comment

In cross-border transactions, understanding the contractual formation requirements and validity regulations of China and its key trading partners (such as Singapore, the U.S., and the U.K.) can effectively reduce obstacles to commercial cooperation, thereby minimizing the likelihood of disputes. With the widespread use of social media, platforms like WeChat and WhatsApp are commonly used for business communications. Can courts in various countries recognize social media chat records as legally binding contracts? If so, what requirements must be met for WeChat messages to form a contract?

The rules for contract formation and validity are similar across the major legal systems. WeChat and similar social media chat records can form contracts in such jurisdictions, subject of course to the particular facts of the case. Under Chinese law, Article 469 of the *2020 Civil Code of the People's Republic of China* and Article 3 of the *2005 Electronic Signature Law of China* establish the principle of freedom of contract, with few exceptions requiring specific forms or conditions for contract formation. The Supreme People's Court also recognized WeChat as merely a communication tool during contract formation, indicating that there was no fundamental difference between contracts formed through WeChat and traditional written contracts.[2]

Similarly, in this case, the Singapore court also acknowledged the potential of WeChat messages to form a valid contract. This formed the basis for Dedar Singh Gill J going further to hear the substantive contents.

As for the U.S., a text message can also be legally binding under the *2000 Electronic Signatures Global and National Commerce Act, or E-Sign Act* for short. According to the *E-sign Act*, "(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation."[3] In cases such as *Stanley Works Israel Ltd. v. 500 Grp. Inc.*,[4] and *Spilman v. Matyas*,[5] U.S. courts have also recognized that electronic exchanges can constitute legally binding agreements.

Regarding the essential elements a valid contract must include, the requirements are the same for both traditional written contracts and electronic ones:

(a) Offer and acceptance – one party must make an offer that another party accepts;

(b) Consideration – both parties must engage in a valuable exchange, such as one party providing services and the other party paying for those services. (This element is not required under Chinese law but is considered a key point under UK and US law.);

(c) Intent to be bound – both parties must intend the messages to create a legally binding agreement; and

(d) Mutual assent – both parties have a mutual understanding and agreement on the essential terms of the contract.

Finally, some guidance on utilizing chat tools (WeChat, WhatsApp, etc.) during business negotiations is as follows. If there is no intention to form a contract during informal communications:

(a) it is crucial to explicitly state that the discussions are non-binding, clarifying that communications are for negotiating / information purposes only and do not constitute a contract or legal commitment.

(b) confirming specific contract terms in a formal written agreement is essential to ensure clarity and avoid misunderstandings.

(c) using non-binding language, such as "discussion" or "proposal" instead of "contract" or "commitment," can help prevent accidental commitments.

(d) implementing company policies and providing training for employees on these practices further safeguards against unintentional contract formation.

Conversely, if the intention is to form a contract through social media or messaging applications, ensure that communications meet the above-mentioned elements for contract formation. In significant business negotiations, involve lawyers early on to meet company intentions and achieve desired business outcomes through WeChat communications.

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1 [2024] SGHC 39

2 (2023) Supreme People's Court Civil Jurisdiction 134

3 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §7001 (2000). S.101(a).

4 Stanley Works Isr. Ltd. v. 500 Grp., Inc., 332 F. Supp. 3d 488 (D. Conn. 2018)

5 Spilman v. Matyas, 212 A.D.3d 859, 183 N.Y.S.3d 473, 2023 N.Y. Slip Op. 344 (N.Y. App. Div. 2023)

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