CHINA DISPUTE RESOLUTION

NEWS LETTER

November 2024

JT&N 金诚同达

FEATURES

NEWS ALERT

1. Draft Revision of the Arbitration Law of the People's Republic of China was Submitted to the National People's Congress Standing Committee for its First Review

On November 4, 2024, the Draft Revision of the Arbitration Law of the People's Republic of China was submitted for its first review by the 14th Standing Committee of the National People's Congress. This marks the first major revision of the law since its enactment in 1995, with several updates aligning with international practices. Key highlights include but are not limited to: (a) Removing the mandatory requirement to specify a particular arbitral institution in the arbitration agreement; (b) Applying the principle of competence-competence such that a tribunal is empowered to rule on its own competence; (c) Clarifying an arbitral tribunal's power to order interim measures; (d) Reconciling the legal grounds for courts to set aside both domestic and foreign-related arbitral awards; and (e) Incorporating provisions for ad hoc arbitration.

2. The High People's Court of Zhejiang Province Releases its Report on the Curial Review of Commercial Arbitration Cases, including Ten Typical Precedent Decisions

On November 21, 2024, the High People's Court of Zhejiang Province issued its first work report on the curial review of commercial arbitration cases in Zhejiang, which covered the period from 2018 to 2023. This report was accompanied by a compilation of ten significant precedents in this area of law. The work report indicated that the Zhejiang courts handled 32 cases concerning the recognition and enforcement of foreign arbitral awards, as well as awards from Hong Kong, Macau, and Taiwan.

The report also indicated that, of the cases which had applied for recognition and enforcement of a foreign arbitral award, only one case had been rejected in the past six years, in that case due to a belated filing. As for the recognition of awards from Hong Kong and Macau, there were 11 such cases, with 10 from Hong Kong and 1 from Macau. All were recognized and enforced, save where applications were withdrawn or transferred to other competent courts.

3. Beijing IP Court Releases 2024 Guidelines on Foreign Litigation Qualification Documents

On October 17, 2024, the Beijing Intellectual Property Court ("Beijing IP Court") released the 2024 edition of its Guidelines for Handling Qualification Documents in Foreign-Related Cases ("2024 Guidelines"). This document, grounded in the Civil Procedure Law of the People's Republic of China, its judicial interpretations, and the Apostille Convention, provides a comprehensive overview of the principles and procedures for proving the qualifications and standing of foreign parties in foreign-related litigation. A key feature of the 2024 Guidelines is its country-specific structure, offering detailed lists of documents required to establish party qualifications and standing, as well as outlining the notarization and certification processes for each jurisdiction. Although issued by the Beijing IP Court, the consistency of the procedures makes the 2024 Guidelines a highly valuable reference for foreign parties engaged in international litigation in Beijing.

4. Jiangsu High People's Court Releases 2023 Typical Cases on International Commercial Disputes

On October 8, 2024, the Jiangsu High People's Court released a selection of typical cases related to international commercial disputes. This new compilation addresses several key issues that are becoming increasingly important in international trade and investment. In particular, these cases entailed consideration of:

- The application of the United Nations Convention on Contracts for the International Sale of Goods ("**CISG**") in cross-border disputes. This provided clarity on how international treaties like the CISG should be interpreted and applied by Chinese courts in cases with international dimensions.
- The validity of cross-border virtual currency transactions. The court ruled that such transactions violate public order / public policy and are therefore considered invalid. This decision sets an important precedent for handling digital asset disputes.
- The role of international commercial experts in assisting the court with expert testimony. This underscores the increasing reliance on specialized knowledge to resolve complex international commercial matters.

By addressing these cutting-edge issues, the Jiangsu High People's Court's compilation of precedents is intended to provide a clearer and more consistent legal framework, providing useful guidance to foreign businesses operating in Jiangsu.

5. An Arbitral Tribunal under the Auspices of the Beijing Arbitration Commission Issued a Decision on Interim Measures which was Confirmed and Enforced by the Beijing Court

Following the enforcement by the High Court of Hong Kong of an interim measure issued by an emergency arbitrator acting under the auspices of the Beijing Arbitration Commission in late 2017, another interim measure of an arbitral tribunal sitting under the rules of the Beijing Arbitration Commission was recently enforced by the Beijing Fourth Intermediate People's Court. This was the first time that the Beijing court functioned solely to review and confirm the interim measure determined by the arbitral tribunal, and contrasts with cases in which the Court itself ordered the interim relief. This development demonstrates the Court's recognition of an arbitral tribunal's discretionary authority.

6. Shanghai Financial Court's Ruling on Arbitration Clause: The Existence of an International Dimension is to be Judged at Contract Signing

An investor applied for the Shanghai Financial Court to confirm the invalidity of an arbitration clause providing for arbitration at the Hong Kong International Arbitration Centre. The investor contended that since the target company had failed to list in Hong Kong, this case lacked a Hong Kong element and was a purely domestic case. For a case without a foreign element, selecting arbitration under the auspices of an arbitral institution outside mainland China is invalid. However, the Shanghai Financial Court ruled that the presence of a foreign element should be determined at the time the underlying contract was signed. In this case, the investor was a renowned investment bank, and Hong Kong was provided in the contract as one of the options for the listing jurisdiction.

Thus, the foreign element existed when the parties entered into the contract, and the arbitration clause was therefore valid.

7. Hainan Court Grants Preservation Measures against a Party to a Hong Kong Arbitration for the first time

Recently, the First Foreign-related Civil and Commercial Court of the First Intermediate People's Court of Hainan Province received an application for interim measures to preserve property from a Hong Kong company which was party to a Hong Kong-seated arbitration. In line with the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region, the court approved the application. This is the first time the Hainan Court has taken such measures against a party in a Hong Kong arbitration.

8. Beijing Court's Ruling on Standard-Term Arbitration Clause

On November 6, 2024, the Fourth Intermediate People’s Court of Beijing made a civil ruling on the validity of an arbitration clause in standard form terms. The disputed clause had been drafted in advance by the respondent. The court ruled that as a dispute resolution clause, the arbitration clause impacted on the material interests of the contracting counterparty. Thus, the party seeking to rely on its standard terms has a legal duty to draw attention to the clause and explain it as necessary. In this case, the respondent failed to employ reasonable means such as emboldened or underscored font to draw the claimant's attention to the clause in question. Similarly, the respondent failed to present evidence to demonstrate that any other form of notice had been given. As a result, the claimant was held to not have had notice (or understanding) of the clause in question. The clause was accordingly held to be invalid.

An Introduction to the China International Commercial Court

Alan Li, Celine Cen

Abstract

Consisting of two international commercial courts in Shenzhen and Xi'an respectively, the China International Commercial Court (CICC) is a permanent adjudicative organ established by the Supreme People's Court. With its streamlined procedure, exceptional legal expertise (including in particular its judicial strength and the depth in its International Commercial Expert Committee), and provision of the "One-stop" Diversified International Commercial Dispute Resolution Mechanism which integrates litigation, mediation and arbitration and connects various institutions and platforms, the CICC aims to provide fair, professional and efficient dispute resolution service for international commercial disputes.

Over the past two decades, international commercial courts have developed in various jurisdictions. These have included, to name a few, the Dubai International Financial Centre Courts ("**DIFC Courts**") (2004), the Singapore International Commercial Court ("**SICC**") (2015), the International Commercial Chamber at the Paris Court of Appeal ("**ICCP-CA**") (2018), and the China International Commercial Court ("**CICC**") (2018). The rise of international commercial courts reflects the growing transnational nature of commerce and trade, and the importance of a good international dispute settlement mechanism to ensure and promote the development of business. The CICC, established by the Supreme People's Court ("**SPC**"), with two international commercial courts in Shenzhen and Xian respectively, aims to provide fair, professional, and efficient dispute resolution services for international commercial disputes through its unique advantages.

I. Overview

To safeguard international collaboration and to ensure a stable, fair, and transparent business environment under the Belt and Road Initiative ("**B&R**"), the General Office of the Communist Party Central Committee and the General Office of the State Council of the People's Republic of China ("**PRC**") issued the Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions ("**Opinion**") in January 2018. Pursuant to both the letter and spirit of the Opinion, the SPC established the CICC, the International Commercial Expert Committee and a diversified dispute resolution mechanism which integrated litigation, mediation and arbitration. This was and remains aimed at the fair, professional, and efficient dispute resolution of international commercial disputes, safeguarded by the Provisions of the SPC on Several Issues Regarding the Establishment of the International Commercial Court ("**SPC Provisions**"). The SPC Provisions were promulgated in June 2018 (revised in 2023), and are accorded the same level of authority as judicial interpretations.

As a permanent adjudicative organ established by the SPC to deal with international commercial disputes, the CICC's work is guided and coordinated by the Fourth Civil Division of the SPC. The

CICC consists of two international commercial courts, both set up in June 2018. The First International Commercial Court of the CICC is in Shenzhen City of Guangdong Province and the Second International Commercial Court is in Xi'an City of Shaanxi Province. The SPC explained the rationale for the locations where these courts are set up in the following terms:

- Shenzhen, an important economic supporting point of the B&R Maritime Silk Road, has a geographical advantage given its position near the Hong Kong and Macao SARs. It is at the forefront of opening up, particularly given the heightened number of foreign-related cases in the city itself, and in the Greater Bay Area ("**GBA**");
- Xi' an, located at the starting point of the ancient Silk Road, is a new highway for inland reform and opening up. The economic activities radiating from Xi' an to Central and Eastern Europe are thriving, which has engendered an exponential increase in related disputes and cases.[1]

II. Jurisdiction

In accordance with Article 2 of the SPC Provisions, the following cases are within the scope of the CICC's jurisdiction:

- First instance international commercial cases in which the parties have chosen the jurisdiction of the SPC according to Article 277 of the Civil Procedure Law[2], with an amount in dispute of at least RMB 300 million;
- First instance international commercial cases which are subject to the jurisdiction of the higher people's courts, which courts nonetheless consider that the cases should be tried by the SPC, and for which permission has been obtained;
- First instance international commercial cases that have a significant influence nationwide;
- Cases involving applications for preservation measures in arbitration, for setting aside or enforcement of international commercial arbitration awards where such an arbitration is under the auspices of the international commercial arbitration institutions which are participating in the "one-stop" Diversified International Commercial Dispute Resolution Mechanism; and
- Other international commercial cases that the SPC considers appropriate to be tried by the CICC.[3]

Article 3 further explains what constitutes an "international commercial case" under the SPC Proxision — either one or both of the parties' identities, one or both of the parties' habitual residences, the object in dispute, or the legal facts of the commercial relationship must be foreign in nature.[4]

In conclusion, the CICC mainly deals with disputes with foreign-related elements between commercial parties in the fields of trade and investment, and so forth. It should be noted that the CICC does not deal with investment or trade disputes between countries, or investment disputes between investors and states. These disputes fail to be resolved in accordance with existing international rules. [5]

III. Trial and Post-trial Procedures

The CICC is renowned for having a specialised team of judges. These judges are selected and

appointed by the SPC from senior judges who are experienced in trial work, familiar with international treaties, international customs, and international trade and investment practices, and are capable of using Chinese and English proficiently as working languages.[6] Cases tried by the CICC are heard by a panel consisting of three or more judges, following the rule of majority when deliberating and handing down judgments. Minority opinions can be set out in the judgment,[7] which is unique in judgements of Chinese courts. The CICC's adjudication is open and transparent; hearings are held in public, and its judicial team information and judgements are similarly made public on its website. [8]

The CICC provides an efficient system. The CICC may designate a people's court at a lower level to implement a ruling it has made on preservation.[9] For cases tried by the CICC, judgments by a court of first instance are final and non-appealable, and the judgements and rulings issued by the CICC are of binding legal effect.[10] Upon obtaining a legally effective judgment, ruling or mediation statement made by the CICC, a party may apply to the CICC for enforcement.[11] Notwithstanding the foregoing, a party may, in accordance with the provisions of the Civil Procedural Law, apply to the SPC for retrial of a legally effective judgment, ruling or mediation statement made by the CICC.[12]

The CICC also facilitates the convenience of litigants with its litigation service platforms, including the Electronic Litigation Service Platform and the Litigation Process Open Information Platform. It supports case registration, fee payment, review of files, exchange of evidence, service of process, court hearings, etc. via online means.[13]

IV. Applicable Law and Evidence

In the trial of a case, the CICC shall determine the substantial law applicable to the dispute in accordance with the Law of the PRC on Choice of Law for Foreign-related Civil Relationships.[14] Under Chinese law, parties can choose the applicable law for the civil and commercial relationship provided that such choice is in accordance with the provisions of law[15], and the CICC will respect the parties' choice of law under such circumstances.[16] For choice of law of a dispute that could be tried in a Chinese court, one should bear in mind that certain types of disputes are mandatorily subject to particular provisions of Chinese law,[17] and that the choice of law will not be permitted to violate certain mandatory provisions of law[18].

Where a Chinese court tries a case by applying a foreign law, it shall "ascertain" the foreign law, which entails identifying such law and ascertaining how it should apply to the relationship in dispute. In the case of the CICC, it may ascertain the foreign law in the following ways: a. as provided by the parties; b. as provided by the central authority or responsible authority of the foreign jurisdiction through judicial assistance; c. as provided by China's embassy or consulate stationed in the foreign country or the embassy or consulate of the foreign country in China upon request of the SPC; d. as provided by participants in the law ascertainment cooperation mechanism established by or participated in by the SPC; e. as provided by an expert of the SPC International Commercial Expert Committee; f. as provided by a law ascertainment service institution or Chinese or foreign legal experts; and g. other appropriate means. Foreign legal materials and expert opinions provided through the above-mentioned means will be presented in court, and the opinions of all parties concerned are fully considered.[19]

Comparing with cases tried in Chinese courts other than the CICC, the CICC is more efficient and convenient in its evidential requirements with simplified procedures of notarisation, certification and translation. The CICC does not demand compulsory notarisation and certification of evidence which originates outside the territory of PRC.[20] Such evidence, regardless of whether it has been notarised, certified or otherwise authenticated, is subject to cross-examination before the court. In cases where the evidence is in English, Chinese translation may be omitted upon the parties' consent.[21] The CICC may also collect evidence and organise cross-examination by using audio-visual transmission technologies or through other digital means. [22]

V. International Commercial Expert Committee and the "One-stop" Diversified International Commercial Dispute Resolution Mechanism

To facilitate the trial work of the CICC and to support diversified dispute resolution, the SPC established the International Commercial Expert Committee on 26 August 2018.[23] This is a creative move to develop a pool of international legal talent[24]. The Committee comprises Chinese and foreign legal experts invited by the SPC, who hail from different jurisdictions and legal systems. The Committee includes leaders of important international organisations, legal experts, eminent scholars, experienced judges, and outstanding lawyers, whose biographies may be found on the CICC website. The roles of Committee members include mediating cases for litigant parties as entrusted by the CICC, assisting in foreign law ascertainment as appointed by the CICC, providing advisory opinions on specific legal issues in international commercial dispute cases for the people's courts, and giving advice and suggestions on relevant judicial interpretations and judicial policies formulated by the SPC.[25]

As part of its effort to provide convenient, efficient, low-cost, and high-quality legal services, the SPC, together with certain qualified international commercial arbitration and mediation institutions, and the International Commercial Expert Committee, developed the "One-stop" Diversified International Commercial Dispute Resolution Mechanism ("**One-stop Mechanism**"). The CICC supports parties' resolving international commercial disputes through such an integrated dispute resolution platform and in the way that parties deem appropriate.[26] At present, the One-stop Mechanism enjoys the participation of ten international commercial arbitration institutions, including the Shenzhen Court of International Arbitration (SCIA), the China International Economic and Trade Arbitration Commission (CIETAC), and the Hong Kong International Arbitration Centre (HKIAC), as well as of two international commercial mediation institutions, namely the China Council for the Promotion of International Trade Mediation Center (CCPIT Mediation Center), and the Shanghai Commercial Mediation Center (SCMC).[27]

The "One-Stop" Diversified International Commercial Dispute Resolution Platform ("One-stop Platform") is a full-process dispute resolution online service platform set up by the CICC in July 2021 to support and facilitate the One-stop Mechanism. The One-stop Platform has four primary service modules, namely mediation, arbitration, litigation, and supporting services such as neutral evaluation. These seek to resolve international commercial disputes, connect service systems of the CICC, people's courts, and the selected arbitration institutions and mediation institutions of the One-stop Mechanism, as well as to integrate information as to the relevant legal services and institutions.[28]

As for mediation under the One-stop Mechanism, the CICC may entrust members of the International Commercial Expert Committee or a selected international commercial mediation institution (which participates in the One-stop Mechanism) with mediation work within seven days after the CICC accepts a case.[29] Upon mediation hosted by members of the Committee or a selected mediation institution, the CICC may issue a mediation statement within seven days if the parties reach an agreement. Moreover, if the parties require a judgment to be issued, the court may issue a judgement to the parties on the basis of the mediation agreement.[30] A mediation statement made by the CICC shall have the same legal effect as a judgement after both parties have signed for receipt thereof.[31] The applicable enforcement and retrial application procedures, which have been discussed above, are the same whether in relation to a mediation statement or a judgement.

Where the parties choose a selected international commercial arbitration institution under the One-stop Mechanism for arbitration by agreement, they may apply to the CICC for interim measures, i.e. for preservation of evidence, property or injunctive relief. Such applications are permissible both before applying for arbitration and after the commencement of arbitration proceedings. If the parties apply to the CICC for setting aside or enforcement of the arbitral award made by a selected arbitration institution, the CICC will review the application in accordance with the provisions of the Civil Procedural Law or other applicable laws.[32]

---

1 Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions; SPC Representative's Answers to Reporters' Questions on Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions.

2 Civil Procedure Law of the People's Republic of China (2023 Amendment), Article 277: "Where the parties to a foreign-related civil dispute, by a written agreement, choose a people's court to exercise jurisdiction, the chosen people's court may have jurisdiction".

3 Provisions of the Supreme People's Court on Several Issues concerning the Establishment of International Commercial Courts (2023 Amendment), Article 2.

4 Ibid Article 3: "A commercial case with one of the following situations can be regarded as an international commercial case under these Provisions:(a) one or both parties are foreigners, stateless persons, foreign enterprises or other organizations; (b)one or both parties have their habitual residence outside the territory of the People's Republic of China; (c)the object in dispute is outside the territory of the People's Republic of China; (d) legal facts that create, change, or terminate the commercial relationship have taken place outside the territory of the People's Republic of China".

5 SPC Representative's Answers to Reporters' Questions on Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions.

6 SPC Provisions (2023 Amendment), Article 4.

7 Ibid Article 5.

8 https://cicc.court.gov.cn/html/1/219/index.html.

9 SPC Provisions (2023 Amendment), Article 6.

10 SPC Provisions (2023 Amendment), Article 15.

11 Ibid Article 17.

12 Ibid Article 16.

13 Ibid Article 18.
14 Ibid Article 7.
15 Law of the PRC on Choice of Law for Foreign-related Civil Relationships, Article 3.
16 SPC Provisions (2023 Amendment), Article 7.
17 See, for example, Law of the PRC of China on Choice of Law for Foreign-related Civil Relationships.
18 See, for example, Law of the PRC on Choice of Law for Foreign-related Civil Relationships, Articles 2, 4 and 5.
19 SPC Provisions (2023 Amendment), Article 8.
20 A Brief Introduction of the China International Commercial Court, 28 June 2018.
21 SPC Provisions (2023 Amendment), Article 9.
22 Ibid Article 10.
23 The Supreme People's Court Established the International Commercial Expert Committee, 24 August 2018, https://cicc.court.gov.cn/html/1/219/208/209/981.html.
24 A Brief Introduction of the China International Commercial Court, 28 June 2018.
25 The Decision on the Establishment of International Commercial Expert Committee of the Supreme People's Court, 24 August 2018.
26 Ibid Article 11.
27 The Supreme People's Court "One-Stop" Diversified International Commercial Dispute Resolution Platform Overview, https://cicc.court.gov.cn/pc/user/aboutus?type=platformIntroduction.
28 The Supreme People's Court "One-Stop" Diversified International Commercial Dispute Resolution Platform Launched Online Today, https://cicc.court.gov.cn/html/1/218/149/192/2084.html; The Supreme People's Court "One-Stop" Diversified International Commercial Dispute Resolution Platform Launched Upgraded Version Online Today, https://cicc.court.gov.cn/html/1/218/149/192/2461.html.
29 SPC Provisions (2023 Amendment), Article 12.
30 Ibid Article 13.
31 Ibid Article 15.
32 Ibid Article 14.

Identification, Exemption of carriers, and Risk Prevention in A Dispute Over Delivery of Goods Without the Original Bill of Lading in the International Trade in Goods

He Dongmin, Yang Rui

In the international trade in goods, the delivery of goods without the original bill of lading refers, as the phrase suggests on its face, to carriers or freight agencies delivering the goods being shipped to the consignee without the presentation of the original bill of lading. Although this practice may be convenient and meet the immediate needs of the trading parties in some cases, it also entails significant legal risks and potential economic losses.

In practice, goods often arrive at the destination port and are ready for delivery before the relevant documents have completed their circulation. At this time, if the original bill of lading has not yet reached the hands of the consignee, the delayed arrival of the bill of lading may incur additional costs such as overdue fees at the port, and, if the goods are perishable, the risk of spoilage and deterioration. Therefore, to reduce costs and facilitate transactions, carriers may choose to deliver cargo without the original bill of lading. For the seller, when the trading parties choose the Group F Incoterms, the actual control of transportation is in the hands of the buyer. In such a situation, if the buyer colludes with the carrier to release the goods without the original bill of lading, the seller may face both financial and material risks.

I. Liability of Carriers in Disputes over Delivery of Goods Without the Original Bill of Lading

i. Liability of Carriers

The bill of lading is negotiable and thus has financial attributes. During the circulation, it is possible for multiple parties to hold copies of the bill of lading at the same time. Therefore, in principle, carriers should deliver goods only to the holder of the original bill of lading. Otherwise, the security of transactions may be threatened, along with the stability of the financial system for freight.

In this regard, Article 2 of the Provisions of the Supreme People's Court on a Number of Issues Relating to the Application of Law to Cases Involving Delivery of Goods in the Absence of Original Bills of Lading ("**Provisions on Delivery of Goods in the Absence of Original B/L**") stipulates: "Where a carrier delivers goods without an original bill of lading in violation of the provisions of law, thereby causing prejudice to the right[s] of the holder of the original bill of lading, the said holder may demand that the carrier should bear civil liability for the losses resulting therefrom."

As the bill of lading is both proof of the contractual relationship of freight between the carrier and the shipper, and a certificate of ownership of the transported goods, it has the attributes of both a contract certificate and a property certificate. Due to different emphases on the nature of the bill of lading, courts have recognized the carrier's compensatory liability as either being primarily based on tortious liability or contractual liability.

The Provisions on Delivery of Goods in the Absence of Original B/L issued on February 26, 2009, in recognition of the dual nature of the bill of lading, defined the carrier's compensatory liability as a combination of contractual liability and tortious liability. Accordingly, the holder of the original bill of lading may choose to file a lawsuit for compensation based on either contract or tort.

It should be noted that the Provisions also apply to other entities that hold the original bill of lading through legal circulation. These include the issuing bank of a documentary credit, and parties with commercial interests. Therefore, such parties also enjoy the rights of the holder of the bill of lading and can claim compensation from the carrier on the basis of the legal relationship created by the bill of lading. [1]

ii. Determination of the Completion of Delivery by the Carrier

In disputes over the delivery of goods in the absence of the original bill of lading, the determination of whether the carrier has delivered the goods should not be limited to whether the physical transfer of the goods has been completed. Instead, such a determination should focus more on whether the right to control the goods has been transferred. For example, if the goods change from being under the control of the carrier to being under the control of the consignee, it is generally considered that the carrier has completed the delivery of the goods.

As an example, in the case of "(2015) Hu Hai Fa Shang Trial No. 2888", the buyer and seller agreed on a full container delivery method, but the goods were immediately de-vanned upon arrival at the port. Thereafter, the consignee dissipated the relevant goods to its customers.

The plaintiff argued that since the goods had been de-vanned and the consignee had shown them to customers, the carrier had completed delivered the goods to the consignee, albeit without the original bill of lading. The carrier, on the other hand, argued that although the goods had been de-vanned, they had always been under its control and had not been delivered to the consignee.

The Shanghai Maritime Court, after reviewing the case, considered that the goods had been delivered and that the consignee had obtained control over the goods:

First, the carrier should bear the burden of proving the status of the goods. The carrier claimed that the goods had been stored in a warehouse leased by an affiliated company after de-vanning, but the evidence did not suffice to prove the status of the goods after de-vanning.

Second, if the goods continue to be under the carrier's control, the carrier should be aware of the status of the goods. When the shipper requested the carrier to provide an update about the status of the goods, the carrier not only failed to provide one in a timely manner, but also forwarded the shipper's request to the consignee, asking the consignee to resolve the issue. This was taken to indicate that the carrier was unaware of the status of the goods.

Third, the carrier did not have the necessity to control the goods. Shortly after the goods arrived at the port, the consignee paid the customs duties and paid the freight and overdue fees to the carrier.

Fourth, the delivery of the goods to the consignee is a prerequisite for the consignee to resell the goods. In the absence of such delivery, the consignee will not have satisfied the conditions to resell the goods. The consignee showed its customers the goods involved and alleged that the "entire shipment of goods had latent defects" and that "the goods had been damaged in transit". It was thus

ultimately held that the consignee had, due to a failure to resell, instructed the carrier to return the goods.

iii. Liability of the Actual Carrier

According to Article 60 of the Chinese Maritime Law, the actual carrier is procured by the carrier (such as some freight agencies who issue bills of lading to consignors) to carry out all or part of the transportation work. In this case, whether the actual carrier needs to bear the compensatory liability for delivering goods without the original bill of lading falls to be determined in combination with the legal relationship between the carrier and the actual carrier.

a) A Contractual Relationship between the Carrier and the Actual Carrier

In such a case, the carrier plays a dual role in transportation: one is as the carrier, albeit without a vessel, for the consignors; the other is as the consignor for the actual carrier. In such a circumstance, two independent contracts of carriage are established between the consignor and the carrier on the one hand, and between the carrier and the actual carrier on the other. According to the principle of contractual relativity (privity), the execution of the relationship between the carrier and the actual carrier may be held to amount to the delivery of goods without the original bill of lading.

As an example, in the case of "(2019) Zui Gao Fa Min Shen No. 4943", the actual carrier, according to the carrier's instructions, re-issued the bill of lading to the carrier's agent for release at the destination port. The carrier's agent, without receiving the full set of original bills of lading issued by the carrier, instructed the actual carrier to release the goods. According to the legal provisions on agency relations, the legal consequences of the delivery of goods without the original bill of lading by the carrier's agent naturally should be borne by the carrier.

The main dispute in this case was whether the actual carrier should bear joint and several compensatory liability according to the provisions of Article 63 of the Maritime Law. Article 63 provides that " Where liability for compensation is borne by the carrier and the actual carrier, it shall be borne jointly and severally within the scope of that liability." The court discussed this from the aspects of contractual liability and tort liability.

Firstly, the parties' contractual arrangements on the facts of the case resulted in the release agent becoming a legitimate holder of the relevant bill of lading. The actual carrier's unlocking of the goods was done at the request of the release agent, meaning that there was in fact no delivery of goods without an original bill of lading.

Secondly, from the perspective of tortious liability, there was no evidence that the actual carrier had conspired with the release agent and the actual consignee. Accordingly, the actual carrier could not be said to have behaved in a tortious manner.

The court thus held that the actual carrier did not need to bear joint and several compensatory liability for the losses suffered by the cargo owner.

b) An Entrustment Relationship or Charter Contract Relationship Between the Carrier and the Actual Carrier

In the context of an actual carrier – carrier relationship, since the actual carrier does not issue bills

of lading and lacks a contractual relationship with the consignor, the holder of the original bill of lading has no right to claim that the actual carrier owes contractual liability for a failure of delivery. However, if the actual carrier arbitrarily implements the delivery, including by delivering without the original bill of lading being produced, it may still be held to be jointly and severally liability with the carrier on a tortious basis.

After the carrier has borne the compensatory liability, it also has the right to recover from the actual carrier. At this time, the court will allocate the compensation payable.

II. Carrier's Liability Exemption

Carriers will often seek to use Article 7 of the Provisions on Delivery of Goods in the Absence of Original B/L as a defense. Article 7 provides that: " Where a carrier is obliged to deliver the goods consigned for carriage to the local customs house or port authority under the law of the place where the port of discharge specified in the bill of lading locates".

In this regard, the Supreme People's Court, in the case of "(2021) Zui Gao Fa Min Shen No. 7603", clarified that if the carrier invokes Article 7 to claim that it has not assumed civil liability for releasing goods without the original bill of lading, it must provide evidence to prove that it has lost the right of control over the goods after delivery in accordance with the relevant local laws.

For example, in cases where the port of discharge is located in Brazil, carriers who deliver goods without the original bill of lading often claim that, according to Brazilian Decree No. 1356 of 2013, a customs policy of clearance before delivery is implemented for imported goods. Therefore, according to local law, the carrier is not liable for compensation for delivery without the original bill of lading if it delivers the goods to the local customs.

This defense is only an explanation for the physical transfer of goods. It does not address whether the right to control the goods has changed. The carrier thus has not completed the purported defense.

The reason for this conclusion is that the purpose of the Brazilian customs policy is to improve the efficiency of goods clearance and simplify the import process. After the carrier hands over goods to the customs, that does not deliver the right to control the goods to the customs authority. Put another way, the importer can only pick up the goods after the carrier or its local agent unlocks the goods in the customs system. This indicates that even after the carrier physically hands over the goods to the Brazilian customs, it still retains control over the delivery of the goods.

Therefore, in such circumstances, the carrier still needs to prove that it continues to exercise control over the goods after delivering them to customs, or that the goods were delivered without the original bill of lading by the customs without its permission.

In the case of "(2019) Zhe Min Zhong No. 422", the goods were controlled and sealed by Brazilian customs after unloading. They were later appropriated by others. The Zhejiang High Court held that although the Brazilian customs system showed that the goods had been delivered, the shipowner was still in a pending locked state, confirming that the carrier did not agree to release the goods. The full set of bills of lading was also still in the carrier's possession, and the carrier was accordingly not responsible for delivery without the original bill of lading.

III. Risk Prevention Measures

i. Suggestions for Carriers

a) Prudence in "Duplicate B/L + Guarantee"

In practice, it is common for carriers to deliver goods without the original bill of lading when the person without the original bill of lading provides a duplicate Bill of Lading and a guarantee. However, the guarantee provided by the person without the original bill of lading does not mean that the carrier can avoid the legal risks of delivery without the original bill of lading.

First, the function of the guarantee is the person's commitment to compensate the carrier for the losses it suffers. If the carrier delivers the goods without the original bill of lading, it must first bear the compensatory liability to the holder of the original bill of lading before it can claim compensation from the guarantor.

Second, the guarantee provided by the person without the original bill of lading is generally a commercial credit guarantee. If the person without the original bill of lading is insolvent or does not otherwise have the ability to compensate, then the risk-bearing function of the guarantee is extremely limited. In addition, there are also situations in practice where the signer of the guarantee does not have authorization and has no right to sign on behalf of the guarantor (subject to considerations of ostensible authority, so far as might be relevant).

Third, although the court generally recognizes the effectiveness of the guarantee for delivery without the original bill of lading, this does not exclude the possibility that the court may determine that the guarantee is invalid in individual cases where there are illegal acts, fraud against a third party (typically the consignor), or collusion to harm the interests of a third party.

Therefore, although the situation of delivery without the original bill of lading with a collateral guarantee is common in practice, it still poses a great legal risk to the carrier, and needs to be treated with caution.

b) Issue Electronic Bills of Lading

In practice, the main reason for delivery without the original bill of lading is that the circulation time of the bill of lading exceeds the circulation time of the goods. Issuing electronic bills of lading can greatly improve the circulation efficiency of the bill of lading, especially for short sea routes. In addition, since the electronic bill of lading only requires the parties to circulate through an electronic data exchange system, it can also effectively mitigate against the risk of fraud.

c) Prudence in Issuing Straight Bills to Ports in Specific Countries, and Alerting the Consignor to the Risks

For example, according to the laws of the United States, Canada and other countries, the consignee of a straight bill only needs to prove their identity, and does not need to provide the original bill of lading to take delivery of the goods. For carriers, complying with local laws can therefore mean bearing the risk of delivery without the original bill of lading. In such circumstances, strictly requiring the consignee to provide the original bill of lading may lead to disputes with the consignee locally.

Although the carrier issues the bill of lading according to the instructions of the consignor, when the

consignor requests the carrier to issue a straight bill to a port in such countries, the carrier should either try to avoid issuing a straight bill by advising the consignor otherwise, or at least alerting the consignor to such risks. This will help to avoid subsequent disputes. In addition, the carrier can also issue electronic bills of lading to speed up the circulation efficiency of the bill of lading.

d) Preserving Evidence of Control over the Goods

When the holder of the original bill of lading alleges delivery without the original bill of lading, the burden of proof (after providing preliminary evidence) shifts to the carrier. The carrier is obliged in such circumstances to prove that the right to control the goods has been continuously in its hands.

In practice, the most common evidence provided by carriers is the warehouse receipt for the goods and its notarization. It should be noted that in order to increase the probative weight of this evidence, the warehouse receipt should describe the status of the goods in detail to particularize the goods. Moreover, the carrier should look to avoid storing the goods in the warehouse of the consignee or the consignee's related party.

In addition, records of (a) the consignee's refusal to pick up the goods for legitimate reasons, (b) arranging for the return of the goods before the consignor claims delivery without the original bill of lading, and (c) the consignee's application to the local court for a mandatory order to release the goods are also strong evidence for the carrier's defence and should be properly retained.

ii. Suggestions for Consignors

a) Prudence in Choosing the Form of Documents and Incoterms

When consignors first trade with counterparties, they can use straight bills or at least order bills to ensure that the right to notify delivery is retained in the hands of the original consignor. Consignors adopting a more conservative trading model can effectively avoid situations of delivery without the original bill of lading, which is conducive to the identification of the responsible party in a timely manner in case of disputes. If a relationship of long-term trading develops, the delivery form can be gradually relaxed based on the behaviour of the other party.

In addition, sellers should try to avoid the FOB term, as it affords the overseas freight forwarder designated by the consignee more control, and is vulnerable to collusion between the consignee and forwarder without the original bill of lading. If the buyer requires the use of FOB terms, it can be agreed that the seller designates the carrier, and that the buyer bears the freight, so as to keep the effective control of the goods in their own hands.

b) Pay Attention to the Special Limitation of Action for Maritime Disputes

The holder of the original bill of lading should also pay attention to the special litigation time limit for maritime cargo transportation contract disputes. Article 257 of the Maritime Law stipulates that, "The prescribed period for compensation claims on ocean-shipping cargo transportation against a carrier shall be one year, calculated from the date on which the cargo is delivered or should have been delivered by the carrier". The suspension of the litigation time limit requires not only the claimant to make a claim, but also the obligor agreeing to accept liability.

Therefore, if the holder of the original bill of lading fails to reach a compensation plan with the carrier through negotiation, they should file a lawsuit or arbitration in a timely manner to reflect the limited limitation period.

1 (2018) Zhejiang Min Zhong No. 624 - Maritime Cargo Transport Contract Dispute between a Bank and a Tianjin Shipping Company - Case No. 2 of the 2018 National Maritime Court Typical Cases

Analysis of the Struggle for Control of Chinese Companies - Rules for the Appointment and Removal of Directors, Supervisors, and Senior Executives

Vera Zuo, Guo Shuai, Li Jiarong

Abstract

The struggle for corporate control is reflected not only in the balance of rights between minority shareholders and majority shareholders, but also in the weight given to the voice of each shareholder in corporate governance. Through the system of the powers and personnel of directors, supervisors, senior executives and legal representatives, shareholders can more conveniently participate in the daily operation and decision-making of the company, thus realizing effective control of the company. Compared to the Company Law (2018), the newly implemented Company Law, which entered into force on July 1, 2024 **("the New Company Law")**, has streamlined the rules for the appointment and removal of directors, supervisors, senior executives, and legal representatives. This includes, inter alia, optimizing the rules for the appointment and removal of directors, providing a richer range of intervention options for supervisory bodies, enhancing the powers and functions of managers, and optimizing the appointment and removal of legal representatives. This article will summarize and analyze the highlights and key changes of the rules for the appointment and removal of directors, supervisors, senior executives, and legal representatives under the New Company Law.

I. Optimization of the Rules for the Appointment and Removal of Directors

i. Adjustment of the Number of Members of the Board of Directors

The New Company Law has adjusted the requirements for the number of members of the board of directors of limited liability companies and joint stock companies. In particular, the New Company Law adjusts the number of members of the board of directors of a limited liability company from the original "three to thirteen"[1] to "more than three"[2], removing the upper limit of the number of members of the board of directors of a limited liability company. In a similar vein, the New Company Law adjusts the requirement for the number of members of the board of directors of a joint stock company from the previous "five to nineteen"[3] to the same number of members of the board of directors of a limited liability company, i.e., "more than three"[4]. This abolishes both the upper limit and reduces the lower limit of the number of members, thereby enabling both limited liability companies and joint stock companies to form their boards of directors according to their actual needs. The elimination of the upper limit on the number of board members will also help small and medium-sized shareholders to obtain board seats and participate in corporate governance.

ii. Clarification of the Removal of Directors without Cause

Prior to the implementation of the New Company Law, Article 3 of the Provisions of the Supreme People's Court on Several Issues Concerning the Application of the Company Law of the People's

Republic of China (V) **("Fifth Judicial Interpretation of the Company Law")**[5] regulated the removal of directors without cause by the shareholders' meeting. Article 3 stipulated that the directors were entitled to file a lawsuit seeking the determination of any relevant compensation issues arising out of or in connection with their removal.

The New Company Law codifies the mechanism of the shareholders' meeting removing directors without cause into law in Article 71[6], which stipulates that the shareholders' meeting may resolve to remove a director, and that the removal shall take effect on the date of the resolution. However, if a director is removed before the expiration of his / her term of office without a justifiable reason, he or she may request compensation from the company. This new provision clarifies the legal right of the shareholders' meeting to pass a resolution to remove a director, and the legal effect such a resolution. It should be noted that although the shareholders' meeting may remove a director without cause, the relevant resolution of the shareholders' meeting must be a valid one to avoid violating various legal provisions, administrative regulations, and the company's bylaws. It will also be important to avoid defects in the validity of the resolution passed at the shareholders' meeting.

At the same time, in order to make provision the loss to a director incurred by a removal without cause, if a director is removed without justifiable reasons before the expiration of his / her term of office, the removed director has the right to directly sue the company for damages in court on the basis of Article 71 of the New Company Law as set out above.

II. Provision of Diversified Options for Supervisory Bodies

The New Company Law has made further provision for supervisory bodies in corporate governance structures, providing diverse and flexible institutional options for corporate governance.

i. Full Introduction of the Board of Auditors System

For limited liability companies, Article 69 of the New Company Law[7] provides that an audit committee composed of directors may be established to exercise the functions of the board of supervisors in accordance with the company's bylaws. This eliminates the requirement to have a separate board of supervisors or supervisors. It should be noted that Article 76 of the New Company Law[8] stipulates that no director or senior manager may concurrently act as a supervisor, and that the audit committee exercising the functions of the board of supervisors is to supervise the directors and managers executing the affairs of the company. Thus, at least theoretically, the directors attending the day-to-day operation of company affairs cannot be the members of a limited liability company's audit committee.

For joint stock limited companies, Article 121 of the New Company Law[9] provides that an audit committee consisting of directors may be established by the board of directors to exercise the functions of the board of supervisors in accordance with the company's bylaw. Similarly, this obviates the requirement of having a separate board of supervisors or supervisors. In addition, the audit committee shall have more than three members, and a majority of the members must not hold any position other than directorship in the company. It should be noted that, in view of the supervisory function of the audit committee, the directors composing the audit committee should not have any relationship with the company that may affect their independent and objective judgments in any event.

For listed companies and joint stock limited companies, Article 137 of the New Company Law[10], combined with Article 38 of the Code of Corporate Governance of Listed Companies (2018 Revision)[11], and Article 12 of the Provisions of the State Council on Implementation the Registration Management System for Registered Capital under the Company Law of the People's Republic of China[12], provides that the audit committee is one of the specialized committees that the board of directors of a listed company is required to establish.

For wholly state-owned companies, Article 176 of the New Company Law[13] provides that it is not necessary to have a board of supervisors or supervisors where the company's board of directors has an audit committee composed of directors that exercises the functions of the board of supervisors specified in its bylaws. It bears note that pursuant to Article 4 of the Measures for the Supervision and Administration of the Transactions of State-Owned Assets of Enterprises[14], "wholly state-owned companies" refers in this context only to solely state-owned companies established by government departments, institutions, or public institutions, and does not include companies in which the total shares directly and indirectly held by any of the abovementioned entities is 100%.

ii. Allowing Companies Meeting Conditions to Not Have a Supervisory Body

The New Company Law allows limited liability companies that are small or have a small number of shareholders to have no supervisors with the unanimous consent of all shareholders[15]. This further reduces the cost of corporate governance. That said, the New Company Law still requires joint stock companies that are small or have a small number of shareholders to have at least one supervisor to exercise the functions of the board of supervisors if there is no board of supervisors or audit committee[16] .

iii. Summary: Options for Various Types of Corporate Supervisory Bodies

Company Type	Supervisory body options
Limited Liability Companies	▪ **To choose one from four** ➢ The Board of Supervisors ➢ No Board of Supervisors if the company size or the number of shareholders is small, and there is one supervisor ➢ Establishment of an audit committee composed of directors of the board of directors in accordance with the company's bylaws ➢ If the size of the company or the number of shareholders is small, there may be no supervisors if all shareholders unanimously consent
Joint Stock Limited Companies	▪ **To choose one from three** ➢ The Board of Supervisors

Company Type	Supervisory body options
	➢ No Board of Supervisors if the company size or the number of shareholders is small, and there is one supervisor ➢ Establishment of an audit committee composed of directors of the board of directors in accordance with the provisions of the company's bylaws
Supervisory Body of Wholly State-Owned Companies	▪ **To choose one from three** ➢ The Board of Supervisors ➢ Supervisors ➢ Establishment of an audit committee of directors of the board of directors
Supervisory Body of Listed Companies	▪ **To choose one from two** ➢ Establishment of a board of supervisors and an audit committee that does not replace the board of supervisors (primarily exercising audit functions)[17] ➢ An audit committee which also exercises the functions of the board of supervisors

III. Full Liberalization of Manager Authority

Prior to the implementation of the New Company Law, China's Company Law, in addition to giving the board of directors and the company's bylaws the power to contour the scope of a manager's authority, also enumerated various powers of a manager.[18] These included, inter alia, presiding over the company's production management, organizing the implementation of the resolutions of the board of directors, organizing the implementation of the company's annual business and investment plan, formulating plans for the establishment of the company's internal management departments, formulating the company's basic management system, formulating specific bylaws of the company, proposing the appointment or dismissal of vice manager(s) and the persons in charge of the finances of the company, and deciding on the appointment or dismissal of reporting managers, other than those who need to be appointed or dismissed by the board of directors, etc.

The New Company Law removes the enumeration of legitimate areas of authority on the part of the manager, and instead leaves the manager's authority entirely to the company's bylaws and the board of directors.[19] This provides a guarantee that the company and its shareholders are free to divide and allocate labor within the company.

IV. Streamlining the Rules for the Appointment and Removal of Legal Representatives

i. Expansion of the Scope of Election of Legal Representatives

Prior to the implementation of *the New Company Law*, China's *Company Law* limited the choice of the company's legal representative to the chairman of the board of directors, the executive director, or the /a manager[20]. Article 10 of the *New Company Law* now stipulates that "the legal representative of a company shall be the director or manager who represents the company in attending to company affairs in accordance with the company's bylaws". In other words, save that the manager can serve as the company's legal representative, the ability to be the legal representative does not turn on one's status as a director in the company's corporate governance structure. Instead, more emphasis is placed on the *actual functions* performed by the person who is to serve as the legal representative in the company, i.e., to represent the company in attending to company affairs and actually engaging in company management. This provision expands the scope of parties eligible to serve as a company's legal representative to include any director, other than a manager, who may represent the company in attending to company affairs, which is more in line with the company's actual *need* for a legal representative.

ii. Addition of Rules on Resignation and Replacement of the Legal Representative

Article 10 of the New Company Law adds a new time requirement arising out of the resignation and replacement of the legal representative: "If a director serving as the legal representative or manager resigns, he shall be deemed to have resigned as the legal representative concurrently. If the legal representative resigns, the company shall determine a new legal representative within 30 days of the resignation of the legal representative."

The term "resignation" in the above provision should not only include the situation where the legal representative resigns, but should also be interpreted to include the situation where the company dismisses the legal representative. Meanwhile, in order to ensure, inter alia, the continued sound management of the company, maintain the continuity, legitimacy and compliance of the company's business and management, and avoid as far as possible the influence on the interests of the company, shareholders, investors, creditors and other relevant subjects, Article 10 of the New Company Law[21] requires that the company must determine a new legal representative within a limited 30-day period. If the company fails to determine the new legal representative within the time limit, the original legal representative may sue the company to compel compliance with the formalities for modifying its registration to remove the position of the legal representative. In practice, the court may support such applications for modification of the company's registration, while at the same time requiring that the company go through the relevant formalities to appoint a new legal representative and complete the corresponding registration of modification within a limited time.[22]

iii. Clarifying that any Registration of Modifications is to be Signed By the New Legal Representative

Prior to the implementation of the New Company Law, Article 27 of the Regulation of the People's Republic of China on the Administration of Company Registration (administrative regulations, 2016 revised edition, now expired) had explicitly required that a company applying for modification of its registration had to submit the written application for modification as signed by the company's legal representative. This meant in practice that although the modification of the legal representative was one of the reasons for the company's application for modification, such an application nonetheless required the original legal representative to sign the written application for modification.

Subsequently, the Regulation of the People's Republic of China on the Administration of Registration of Market Entities (Administrative Regulations) replaced the Regulation of the People's Republic of China on the Administration of Company Registration and deleted Article 27 as set out above. However, this change did not alter the requirement in Article 25 of the Regulation of the People's Republic of China on the Administration of Registration of Market Entities that if a company's legal representative does not serve as the legal representative during his or her term of office, an application for modification registration must be filed with the registration authority.

One recent change, however, is that Article 33 of the Detailed Rules of the Implementing of the Regulation of the People's Republic of China on the Administration of the Registration of Market Entities[23] (departmental rules), of a slightly lower level of authority than the aforementioned provisions, explicitly provides that the change of legal representative of a company shall be effected by the new legal representative signing the written application for modification registration.

Prior to the development of the law as set out above, some registration authorities required the written application for modification of legal representatives to be signed by both the original and the new legal representative of the company. However, there were a large number of cases in which the original legal representative was unwilling to sign the written application, thereby making it difficult to proceed with the formalities for modification.

In order to solve the above issues, the New Company Law provides at Article 35[24] that if a company modifies its legal representative, the application for registration of modification shall be signed by the replacement legal representative. This effectively eliminates the practical difficulty set out above, and reflects the provision of Article 33 of the Detailed Rules of the Implementing of the Regulation of the People's Republic of China on the Administration of the Registration of Market Entities.

V. Conclusion

Under the New Company Law, the rules on the appointment and removal of directors, supervisors, senior executives and the legal representative are prominently featured. The effect of such rules includes, inter alia, that the company is given greater freedom regarding the appointment and removal of directors; that the abolition of the upper limit of the number of directors encourages small and medium-sized shareholders to nominate directors to actively participate in company management (albeit subject to the realities of their limited shareholding); that corporate governance structures are streamlined in that the board of supervisors / supervisors are no longer necessary organs of the company in certain situations, thereby reducing the cost of corporate governance; that the authority of the manager has been fully left to the company's bylaws and the board of directors to decide, underscoring the importance of the board of directors; and that the rules on the appointment and removal of the legal representative have been rationalized.

In conclusion, the amendments under the New Company Law further advance the development of corporate governance in China, provide greater legal space for companies to "customize" their corporate governance structure in a way that meets their own development needs, and provide for a wider array of choices in the struggle for control of the company.

1 Article 44 of Company Law 2018: The board of directors established by a limited liability company shall be composed of 3 up to 13 members unless it is otherwise provided by Article 51 of this Law.

If a limited liability company established by 2 or more state-owned enterprises or other state-owned investors, the board of directors shall include representatives of the employees of the companies. The board of directors of any other limited liability company may also include representatives of the employees of the company concerned. The employees' representatives who are to serve as board directors shall be democratically elected by the employees of the company through the general assembly of the representatives of employees, employees' assembly of the company or in any other way.

The board of directors shall have one chairman and may have one or more deputy chairmen. The appointment of the chairman and deputy chairman shall be specified in the bylaws.

2 Article 68 of the New Company Law: The board of directors of a limited liability company shall have three or more members, who may include a representative of the company's employees. The board of directors of a limited liability company which has 300 or more employees shall include representatives of the employees of the company, unless a board of supervisors has been established in accordance with the law and has representatives of the employees of the company. The representatives of the employees who serve as board directors shall be democratically elected through the assembly of the representatives of the employees, the assembly of employees, or other methods.

The board of directors shall have one chairman and may have deputy chairmen. The appointment of the chairman and deputy chairman shall be specified in the bylaws.

3 Article 108 of Company Law 2018: A joint stock limited company shall set up a board of directors, which shall be composed of 5-19 persons.

The board of directors may include representatives of the company's employees. The representatives of the employees who serve as board directors shall be democratically elected through the assembly of the representatives of the employees, the assembly of employees, or other methods.

The provisions in Article 45 of this Law on the term of office of the directors of a limited liability company shall apply to the director of a joint stock limited company.

The provisions in Article 46 of this Law on the functions of the board of directors of a limited liability company shall apply to the board of directors of a joint stock limited company.

4 Article 120 of the New Company Law: A joint stock limited company shall have a board of directors, unless otherwise specified in Article 128 of this Law.

The provisions of Article 67, paragraph 1 of Article 68, Article 70, and Article 71 of this Law shall apply to joint stock limited companies.

5 Article 3 of Fifth Judicial Interpretation of the Company Law: The people's court shall not support the claim of a director who has been removed by a valid resolution of the shareholders' meeting or the general meeting of shareholders before the expiration of the director's term of office that the removal is not legally effective. If, after a director has been removed from his or her post, he or she files a lawsuit in a dispute with the company over compensation, the people's court shall, in accordance with the provisions of laws, administrative regulations, the articles of association of the company, or the agreement of the contract, and taking into account the reasons for the removing from his or her post, the remaining term of office, the director's remuneration, etc., determine whether to compensate or not to compensate as well as the reasonable amount of compensation.

6 Article 71 of the New Company Law: The shareholders' meeting may resolve to remove a director, with effect on the date of resolution.

If a director is removed before expiration of his term of office without good reason, the director may request

compensation from the company.

7 Article 69 of the New Company Law: A limited liability company may establish an audit committee composed of directors of the board of directors in accordance with the company's bylaw which exercises the functions of the board of supervisors specified in this Law, and is not required to have a board of supervisors or supervisors. Employee representatives who are members of the company's board of directors may serve as members of the audit committee.

8 Article 76 of the New Company Law: A limited liability company shall have a board of supervisors, except as otherwise provided for in Articles 69 and 83 of this Law.

The board of supervisors shall consist of three or more members. The members of the board of supervisors shall include representatives of shareholders and an appropriate percentage of representatives of the company's employees. The percentage of the representatives of employees shall account for no less than 1/3 of all the supervisors, but the concrete percentage shall be specified in the bylaw. The representatives of employees who serve as members of the board of supervisors shall be democratically elected through the assembly of representatives of the company's employees, the shareholders' assembly or by other means.

The board of supervisors shall have one chairman, who shall be elected by a majority of all the supervisors. The chairman of the board of supervisors shall convene and preside over the meetings of the board of supervisors. If the chairman of supervisors is unable or fails to perform his duties, the supervisor elected by a majority of the supervisors shall convene and preside over the meetings of the board of supervisors.

No director or senior manager may concurrently act as a supervisor.

9 Article 121 of the New Company Law: A joint stock limited company may establish an audit committee composed of directors of the board of directors in accordance with the company's bylaw which exercises the functions of the board of supervisors specified in this Law, and is not required to have a board of supervisors or supervisors.

The audit committee shall have three or more members, and a majority of the members shall neither hold a position other than directorship in the company nor have any relationship with the company that may affect his independent and objective judgments. Employee representatives who are members of the company's board of directors may serve as members of the audit committee.

The audit committee shall adopt resolutions by a majority vote of its members.

Each audit committee member is entitled to one vote when voting on a resolution.

The methods of discussion and voting procedures of the audit committee shall be specified in the bylaws, unless otherwise provided by this Law.

The company may establish other committees of the board of directors in accordance with the company's bylaw.

10 Article 137 of the New Company Law: Where a listed company establishes an audit committee of the board of directors, the board of directors shall obtain the approval of more than half of all members of the audit committee before adopting resolutions on the following matters:

(1) Engaging and removing the accounting firm that undertakes the company's audit business;

(2) Appointing and removing the person in charge of finance;

(3) Disclosing financial and accounting reports;

(4) Other matters prescribed by the securities regulatory agency of the State Council.

11 Article 38 of the Code on Governance of Listed Companies (2018): The board of directors of a listed company shall set up an audit committee and may set up relevant specialized committees, such as strategy, nomination, remuneration and appraisal, as required. Specialized committees shall be responsible to the board of directors and perform their duties in accordance with the articles of association and the authorization of the board of

directors, and the proposals of the specialized committees shall be submitted to the board of directors for consideration and decision. The members of the specialized committees shall all be composed of directors, of which the independent directors of the audit, nomination and remuneration and evaluation committee shall account for the majority and act as the convenor, and the convenor of the audit committee shall be an accounting professional.

12 Article 12 of the Provisions of the State Council on the Implementation of the Company Law of the People's Republic of China on the Registration and Management System of Registered Capital: Listed companies, in accordance with the Company Law and the State Council's regulations, shall stipulate in their articles of association that an audit committee shall be established in the board of directors and shall set forth the composition, powers and authority of the audit committee, among other matters.

13 Article 176 of the New Company Law: Article 176 Where the board of directors of a wholly state-owned company has an audit committee composed of directors that exercises the functions of the board of supervisors specified in this Law, the wholly state-owned company is not required to have a board of supervisors or a supervisor.

14 Article 4 of the Measures for the Supervision and Administration of Transactions in State-owned Assets of Enterprises: State-owned and state-controlled enterprises and enterprises under actual control of the State as referred to in these Measures include:

(1) Wholly state-owned enterprises (companies) funded by government departments, agencies and institutions, and wholly state-owned enterprises in which the combined direct or indirect shareholding of the above units and enterprises is 100%;

(2) Enterprises in which the units and enterprises listed in paragraph (1) of this Article, individually or jointly, together own more than 50 percent of the property (stock) rights and one of them is the largest shareholder;

(3) Sub-enterprises at all levels in which the enterprises listed in paragraphs (1) and (2) of this Article make external contributions and own more than 50 percent of the equity;

(4) Government departments, agencies, institutions, single state-owned and state-controlled enterprises that do not directly or indirectly hold more than 50 percent of the shares, but are the largest shareholders and are able to exercise actual dominance over them through shareholders' agreements, articles of association, board of director's resolutions, or other agreed arrangements.

15 Article 83 of the New Company Law: A limited liability company that is small or has a small number of shareholders is not required to establish a board of supervisors, and may either have one supervisor who exercises the functions of the board of supervisors specified in this Law or have no supervisor with the unanimous consent of all shareholders.

16 Article 133 of the New Company Law: A joint stock limited company that is small or has a small number of shareholders is not required to establish a board of supervisors, but shall have one supervisor who exercises the functions of the board of supervisors as provided for in this Law.

17 For listed companies, the provisions of the New Company Law themselves allow for a choice between two. Whether the audit committee will be fully implemented to replace the supervisory committee in subsequent practice still requires further observation of the opinions of the Securities and Futures Commission, the Stock Exchanges and other relevant departments.

18 Article 49 of Company Law 2018: A limited liability company may have a manager, who shall be hired or removed upon decision of the board of directors. The manager shall be responsible for the board of directors and shall exercise the following powers: (1)Taking charge of the management of the production and business operations of the company, organizing the implementation of the resolutions of the board of directors;

(2)Organizing the execution of the company's annual business plans and investment plans; (3)Drafting plans on the establishment of the company's internal management departments; (4)Drafting the company's basic management system; (5)Formulating the company's specific rules and policies; (6)Proposing to hire or remove the company's vice manager(s) and the person in charge of finance; (7)Deciding on the hiring or removal of the persons-in-charge other than those who shall be decided by the board of directors; and (8)Other powers conferred by the board of directors. If the bylaw provides otherwise for the powers of managers, the bylaw shall be followed. The manager attends the meetings of the board of directors as a non-voting representative.

Article 113 of Company Law 2018: A joint stock limited company may have a manager whom may be hired or removed by the board of directors. The provisions of Article 49 of this Law on the powers of the manager of a limited liability company shall apply to the manager of a joint stock limited company.

19 Article 74 of the New Company Law: A limited liability company may have a manager, who shall be hired or removed upon decision of the board of directors.

The manager shall be responsible to the board of directors, and perform functions in accordance with the company's bylaw or under the authority of the board of directors. The manager attends the meetings of the board of directors as a non-voting representative.

20 Article 13 of Company Law 2018: The legal representative of a company shall, be assumed by the chairman of the board of directors, executive director or manager according to the company's bylaw and shall be registered according to law. If the legal representative of the company is changed, the company shall go through the formalities for modifying the registration.

21 Article 10 of the New Company Law: The legal representative of a company shall be the director or manager who represents the company in attending to company affairs in accordance with the company's bylaw.

If a director serving as the legal representative or manager resigns, he shall be deemed to have resigned as the legal representative concurrently.

If the legal representative resigns, the company shall determine a new legal representative within 30 days of resignation of the legal representative.

22 Reference to No. 23 Civil Judgment of Retrial by Shanghai Second Intermediate People's Court (2023).

23 Article 33 of Rules for the Implementation of the Regulations of the People's Republic of China on the Registration of Market Entities: An application for change registration of a market entity to change its legal representative, managing partner (including appointed representative), or person in charge shall be signed by the New legal representative, managing partner (including appointed representative), or person in charge.

24 Article 35 of the New Company Law: When a company applies for registration of modification, it shall submit to the company registration authority an application for registration of modification signed by the company's legal representative, a modification resolution or decision made in accordance with the law, and other documents.

If the modification of the company registration matter involves the amendment of the company's bylaws, the company's bylaws as amended shall be submitted.

If the company modifies its legal representative, the application for registration of modification shall be signed by the replacement legal representative.

AUTHORS

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

He Dongmin（Beijing）
+86 10 5706 8369
hedongmin@jtn.com

Vera Zuo（Beijing）
+86 10 5706 8458
zuotianyu@jtn.com

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

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

Celine Cen（Shenzhen）
+86 755 2223 5518
cenlin@jtn.com

Yang Rui（Beijing）
+86 10 5706 8278
yangrui@jtn.com

Li Jiarong（Beijing）
+86 10 5706 8371
lijiarong@jtn.com

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

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


JT&N 金诚同达