

# The Dragon Stirs: China Amends Civil Procedure Law

On the 31<sup>st</sup> August 2012, the Standing Committee of the National People's Congress of the People's Republic of China (**PRC**) approved significant amendments (the **Amended CPL**) to its Civil Procedure Law (**CPL**) which will come into effect on 1<sup>st</sup> January 2013. The Amended CPL adopts some rules established in existing Supreme People's Court judicial interpretations (**SPC interpretations**), creates new rules and aims to strengthen the effectiveness of interim relief, improve judicial transparency and increase enforceability of domestic arbitral awards. The following amendments are particularly worth noting.

## Jurisdiction

### *Jurisdiction over company law disputes (Article 26)*

The Amended CPL provides for jurisdictional rules for company law disputes. For disputes arising over company incorporation, confirmation of shareholder eligibility, dividend distribution or company dissolution, the competent people's court (**the court**) in the place where the company is domiciled shall have jurisdiction. According to earlier SPC interpretations, a company's place of domicile is where it has its main office. However, if the location of a company's office is unknown, the court in the company's place of incorporation shall have jurisdiction.

### *Jurisdiction by agreement (Article 34)*

The earlier CPL allowed contractual parties to choose courts in certain places to hear their disputes. The

Amended CPL further expands this rule. First, under the Amended CPL, this rule applies not only to a contractual dispute, but also to any other property dispute. Secondly, apart from courts in places specified in the earlier CPL (i.e. where the defendant or plaintiff is domiciled, where the contract is signed or performed and where the subject matter of the contract is located), the Amended CPL also permits parties to choose to have their dispute heard in a court in a place which has an actual connection with the dispute. However, under the Amended CPL, the specific criteria for determining whether a place has an actual connection with the dispute is unclear, therefore parties should be careful when choosing a venue outside of those specified by the previous CPL.

As before, an agreement reached by parties' as to jurisdiction may not violate existing statutory rules as to the level of jurisdiction and exclusive jurisdiction.

## Key issues

- Pre-arbitration interim relief now available
- New interim measures similar to injunctive relief possible
- Limited grounds for court to refuse enforceability of domestic arbitral awards

## Evidence

### *Timeline for filing evidence (Article 65)*

The Amended CPL follows the principle set out in an earlier SPC interpretation, namely that evidence should be filed by the court-designated deadline, but the amended provision provides a more flexible approach in dealing with evidence filed after the deadline.

According to the previous SPC interpretation, courts were not obliged to arrange for the examination of evidence filed late by one party

(unless the opposing party agreed), which effectively meant that, in such scenario, the evidence was inadmissible. In contrast, the Amended CPL now gives courts greater options when dealing with evidence filed after the cut-off date. After considering a party's reason given for its late filing of evidence, courts now have the discretion to either admit or to exclude the late-filed evidence and can also reprimand, or impose a fine upon, the transgressing party.

Despite these amendments however, which appear to promote flexibility on the court's part, parties should still use their best endeavours to file their evidence prior to the designated deadline in order to avoid evidence being ruled inadmissible or incurring penalties.

## Interim Measures

### *Pre-Arbitration interim measures (Articles 81, 101)*

Under the Amended CPL parties are now allowed, for the first time, to seek interim measures in support of a prospective arbitration. The specific rules are essentially the same as those of pre-litigation interim measures. First, pre-action interim measures will only be granted if evidence might be destroyed, assets might be dissipated, or other prejudice might be caused. Secondly, the applicant must provide security. Thirdly, unless the applicant commences litigation or arbitration within thirty days, the interim measures will be lifted.

Although the Amended CPL does not make it absolutely clear, it is likely that such pre-arbitration interim measures are still only available to

support *onshore* arbitrations as opposed to offshore arbitrations. In all likelihood, this will be an important factor influencing parties when deciding whether arbitrations will be held onshore or offshore.

### *New interim measures (Articles 100, 101 and 104)*

Prior to the Amended CPL, the only available interim measures for most cases were evidence preservation and asset preservation. Limited interim injunctions could merely be sought in certain types of intellectual property court actions (in other words, not in arbitration and not in other types of court actions).

Articles 100 and 101 create new types of property preservation interim measures similar to specific performance and mandatory and prohibitory injunctive relief. Courts now have the power to request a party to take action as directed or to prohibit a party from doing something before or during litigation or arbitration, irrespective of the nature of the dispute.

Furthermore, Article 104 provides that the interim measure can be lifted if the defending party provides security. However, it is uncertain whether an injunction granted in an intellectual property dispute, (which is likely to be categorized as a property dispute), can be lifted if security is provided. Existing SPC interpretations have given a negative answer and it is unclear whether Articles 100, 101 and 104, as now amended, will be held to have changed the SPC interpretations on the subject.

While the actual effect of these articles remains to be tested in practice, on their face at least, they

appear to provide parties with greater protection (such as expanding the application of interim injunction orders from intellectual property infringement cases to other types of disputes).

## Service

### *(Articles 86, 267)*

In addition to the traditional service measures, courts are now permitted, with the served party's consent, to serve documents to parties by facsimile, email or other measures by which receipt of documents can be confirmed. However, these modern delivery measures cannot be used to serve judgments, rulings and mediation statements.

For service out of the PRC, similar methods of service of legal documents are also permitted, but under the amended provisions it is unclear as to whether the served party's consent will be required and whether the amended provisions will apply to the service of court judgments, rulings and mediation statements. These questions will, we expect, be subject to clarification in future judicial practice.

## Access to Judgments

### *(Article 156)*

The Amended CPL makes commendable progress in striving for judicial transparency. Article 156 provides that the general public may refer to written judgments and rulings which have come into effect, except those relating to state secrets, trade secrets, or personal privacy. However, the Amended CPL does not specify the channels by which such information will be accessible to the general public. Again, we expect that

this issue will be clarified by future SPC interpretations.

## Summary Procedure

*(Articles 157, 162)*

The Amended CPL establishes a small claims lawsuit regime under Article 157. For simple civil cases with small claims (where the subject matter valued is below thirty percent of the annual average employee salary of the relevant provincial region), where the acts are evident and the disputes are minor, the first instance court judgments will be final and binding. An appeal is not available. In addition, in civil cases other than those regarded as simple cases, parties may also agree to adopt the same straightforward summary procedure as for small claims.

## Enforcement of Security

*(Articles 196, 197)*

Article 195 of the PRC Property Law (Property Law) provides that where there is no substantive dispute, but a mortgagor and a mortgagee simply cannot reach agreement as to how to enforce a security, the mortgagee can request a court to auction or sell the security. However, the Property Law is silent as to the procedure to be followed in applying this rule.

Articles 196 and 197 of the Amended CPL attempt to fill this gap. The mortgagee or other eligible applicant can now request the court in the place where the security is located or registered to make an order of auction or order of sale of the security, and then may request enforcement of such order. If the court refuses to grant such order, because of non-compliance with relevant laws (for

example, a dispute over the validity of the mortgage or of the principal contract), the mortgagee can bring a separate lawsuit to resolve such dispute.

These new rules under the Amended CPL will enable the mortgagee to enforce the security in a more efficient way when there is no substantive dispute.

## Enforcement of Arbitral Awards

*(Article 237)*

The Amended CPL makes some amendments to the circumstances under which a purely domestic arbitral award may be declared unenforceable by the court. With a view to restricting a court's *de novo* review of the merits, two previous grounds under which a court could deny execution of a domestic arbitral award- which were, "lack of evidence" or "wrongful application of laws" – have been replaced by two more precise grounds. The two new amended grounds, which may serve to limit a court's ability to restrict enforceability of a domestic arbitral award, are: (i) if the evidence used as a basis for ascertaining facts in the original ruling is fabricated (Article 237.4) and (ii) if the other party conceals important evidence which is substantial enough to affect the impartial ruling by the arbitration institution (Article 237.5).

Grounds of unenforceability of foreign-related onshore arbitral awards, which essentially mirror those under the New York Convention, remain unchanged.

## Conclusion

Overall, the Amended CPL provides practical and worthwhile changes to PRCs existing CPL, changes which we hope will enhance the smooth handling of civil and onshore arbitration disputes in the future.

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