A Major Amendment to Provisions on Foreign-Related Civil Procedures Is Planned in China

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1. Background

The present Civil Procedure Law of China (hereinafter "CPL") was enacted in 1990 and has been amended four times. All amendments made no substantive adjustments to the foreign-related civil procedure proceedings. In contrast with legislative indifference, foreign-related cases in the Chinese judicial system have been growing rapidly and call for modernization of the foreign-related civil procedure law. On 30 December 2022, China's Standing Committee of the National People's Congress issued the "Civil Procedure Law of the People's Republic of China (amendment draft)". Amendments are proposed for 29 articles, 17 of which relate to special provisions on foreign-related civil procedures, including rules on the jurisdiction, service abroad, taking of evidence abroad and recognition and enforcement of judgements.

2. Jurisdiction

Special jurisdiction: Present special jurisdiction rules apply to "disputes concerning contract or other property rights or interests". The literal interpretation may suggest non-contractual or non-propertary disputes are excluded. The amendment draft extends special jurisdiction rules to cover "disputes relating to property right or interest, and right or interest other than property" (Art. 276, para. 1). The amendment draft provides proceedings may be brought before the courts "where the contract is signed or performed, the subject matter of the action is located, the defendant has any distrainable property, the tort or harmful event occurred, or the defendant has any representative office" (Art. 276, para. 1). Furthermore, "the Chinese court may have jurisdiction over the action if the dispute is of other proper connections with China" (Art. 276,

para. 2).

Choice of court agreement: A special provision on the choice of court agreement is inserted in the foreign-related procedure session (Art. 277), which states: "If the place actually connected to dispute is not within the territory of China, and the parties have agreed in written that courts of China are to have jurisdiction, Chinese courts may exercise jurisdiction. The competent court shall be specified according to provisions on hierarchical jurisdiction and exclusive jurisdiction of this law and other laws of China." In contrast to Art. 35 on choice of court agreement in purely domestic cases, Art. 277 partly partially abolished the constraint prescribed in Art. 35, which requires the chosen forum to have practical connection to the dispute. When the party chose Chinese court to exercise jurisdiction, there will be no requirement for actually connection between the dispute and chosen place. But it does not state whether Chinese court should stay jurisdiction if a foreign court is chosen, and whether the chosen foreign court must have practical connections to the dispute. This is an obvious weakness and uncertainty.

Submission to jurisdiction: Art. 278 inserted a new provision on submission to jurisdiction: "Where the defendant raises no objection to the jurisdiction of the courts of China and responds to the action by submitting a written statement of defence or brings a counterclaim, the court of China accepting the action shall be deemed to have jurisdiction."

Exclusive jurisdiction: The draft article expands the categories of disputes covered by exclusive jurisdiction (Art. 279), including disputes arising from: "(1) the performance of contracts for Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures or Chinese-foreign cooperative exploration and exploitation of natural resources in China; (2) the formation, dissolution, liquidation and effect of decisions of legal persons and other organizations established within the territory of China; (3) examining the validity of intellectual property rights which conferred within the territory of China." Not only matters relating to Chinese-foreign contractual cooperation, but the operation of legal

persons and other organizations and the territoriality of intellectual property rights are deemed key issues in China.

Jurisdiction over consumer contracts: The proposal inserts protective jurisdiction rule for consumer contracts (Art. 280). paragraph 1 of this article provides "(w)hen the domicile of consumer is within the territory of China but the domicile of operator or its establishment is not", which permits a Chinese consumer to sue foreign business in China. Paragraph 2 restricts the effect of standard terms on jurisdiction. It imposed the operator the "obligation to inform or explicate reasonably" the choice of court clause, otherwise the consumer may claim the terms are not part of the contract. Furthermore, even if consumers are properly informed of the existence of a choice of court clause, if it is "obviously inconvenient for the consumer" to bring proceedings in the chosen court, the consumer may claim the terms are invalid. In other words, the proposal pays attention to the fairness of a choice of court clause in consumer contracts both in procedure and in substance.

Jurisdiction over cyber torts: With regard to cyber torts, Art. 281 of the draft states: action for cyber torts may be instituted in the Chinese court if: (1) "computer or other information device locates in the territory of China"; (2) "the harmful event occurs in the territory of China"; (3) "the victim domiciles in the territory of China".

3. Conflict of Jurisdiction, Lis pendens and Forum Non Conveniens

Parallel litigation and exclusive jurisdiction agreements: Art. 282 states: "If one party sues before a foreign court and the other party sues before the Chinese court, or if one party sues before a foreign court as well as the Chinese court, for the same dispute, the Chinese court having jurisdiction under this law may exercise jurisdiction. If the parties have agreed in writing on choosing a foreign court to exercise jurisdiction exclusively, and that choice does not violate the provisions on exclusive jurisdiction of this law or involve the sovereignty, security or social public interests of China, the Chinese court may dismiss the action." The

first part of this article deals with parallel litigation. It allows the Chinese court to exercise jurisdiction over the same dispute pending in a foreign court. The second part of this article provides exception to exclusive jurisdiction agreements. Although Chinese courts are not obliged to stay jurisdiction in parallel proceedings, they should stay jurisdiction in favour of a chosen foreign court in an exclusive jurisdiction clause, subject to normal public policy defence.

First-seized court approach: If the same action is already pending before a foreign court, conflict of jurisdiction will happen. First-seized court approach encourages the latter seized court to give up jurisdiction. The draft implements this approach in China. Art. 283 states: "Where a foreign court has accepted action and the judgment of the foreign court may be recognized by Chinese court, the Chinese court may suspend the action with the party's written application, unless: (1) there is choice of court agreement indicating to Chinese court between the parties, or the dispute is covered by exclusive jurisdiction; (2) it is obviously more convenient for the Chinese court to hear the case. Where foreign court fails to take necessary measures to hear the case, or is unable to conclude within due time, the Chinese court may remove the suspension with the party's written application." This provision is the first time that introduces the first-in-time or lis pendens rule in China. But the doctrine is adopted with many limitations. Firstly, the foreign judgment may be recognised in China. Secondly, Chinese court is not the chosen court. Thirdly, Chinese court is not the natural forum. The lis pendens rule is thus fundamentally different from the strict lis pendens rule adopted in the EU jurisdiction regime, especially it incorporates the consideration of forum conveniens. Furthermore, it is also necessary to reconcile the first-in-time provision with the article on parallel proceedings, which states Chinese courts, in principle, can exercise jurisdiction even if the dispute is pending in the foreign court.

Res judicata: Paragraph 3 of Art. 283 state: "Once the foreign judgment has been fully or partially recognized by Chinese court, and the parties institute an action over issues of the recognized content of the judgement, Chinese court shall not accept the action. If the action has been accepted, Chinese court shall dismiss the action."

Forum non conveniens: Even if the conflict of jurisdiction has not actually arisen, the Chinese court may decline jurisdiction in favour of the more appropriate court of another country. The defendant should plead forum non conveniens or challenge jurisdiction. Applying forum non conveniens should meet four prerequisites. (1) "Since major facts of disputes in a case do not occur within the territory of China, Chinese court has difficulties hearing the case and it is obviously inconvenient for the parties to participate in the proceedings". (2) "The parties do not have any agreement for choosing Chinese court to exercise jurisdiction". (3) "The case does not involve the sovereignty, security or social public interests of China". (4) "It is more convenient for foreign courts to hear the case" (Art. 284, para. 1). This article also provides remedy for the parties if the proceedings on foreign court do not work well. "Where foreign court declined to exercise jurisdiction over the dispute, failed to take necessary measures to hear the case, or is unable to conclude within due time after Chinese court's dismissal, the Chinese court shall accept the action which the party instituted again." (Art. 284, para. 2).

4. Judicial Assistance

Service of process on foreign defendants: One of the amendment draft's main focuses is to improve the effectiveness of foreign-related legal proceedings. In order to achieve this goal, the amendment draft introduces multiple mechanisms to serve process abroad.

Before the draft, the CPL has provided the following multiple service methods: (1) process is served in the manners specified in the international treaty concluded or acceded to by the home country of the person to be served and China; (2) service through diplomatic channels; (3) if the person to be served is a Chinese citizen, service of process may be entrusted to Chinese embassy or consulate stationed in the country where the person to be served resides; (4) process is served on a litigation representative authorized by the person to be served to receive service of process; (5) process is served on the representative office or a branch office or business agent authorized to receive service of process established by the person to be served within the territory of China; (6) service by post; (7) service by

electronic means, including fax, email or any other means capable of confirming receipt by the person to be served; (8) if service of process by the above means is not possible, process shall be served by public notice, and process shall be deemed served three months after the date of public notice.[1]

Article 285 of the draft outlines two new methods to serve a foreign natural person not domiciled in China. First, if the person has a cohabiting adult family member in China, the cohabiting adult family member shall be served (Art. 285, para. 1(g)). Second, if the person acts as legal representative, director, supervisor and senior management of his enterprise established in the territory of China, that enterprise shall be served (Art. 285, para. 1(f)). Similarly, a foreign legal person or any other organization may be served on the legal representative or the primary person in charge of the organization if they are located in China (Art. 285, para. 1(h)). It is clear that by penetrating the veil of legal persons, the amendment draft increases the circumstances of alternative service between relevant natural persons and legal persons.

Amongst the amendments to the CPL, there are points relating to service by electronic means that are worthy of note. Compared to traditional ways of service, service by electronic means is usually more convenient and more efficient. The position in respect of service by electronic means, both before and after the amendment to the CPL, is that such service is permitted. A major innovation introduced by the amendment draft is that the service can now be conducted via instant messaging tools and specific electronic systems, if such means are legitimate service methods recognized in the state of destination (Art. 285, para. 1(k)). It meets the urgent demand of both sides in lawsuits by improving the delivery efficiency.

Party autonomy in service abroad is also accepted. The validity of service by other means agreed to by the person served is recognized, provided that it is permitted by the state of the person served (Art. 285, para. 1(l)).

If the above methods fail, the defendant may be served by public notice. The notice should be publicized for 60 days and the defendant is deemed served at the end of the period. Upon the written application of the party, the above methods and the way of service by public notice may be made at the same time provided that the service by public notice is not less than 60 days and the litigation rights of the defendant are not affected (Art. 285, para. 2).

Investigation and collection of evidence:

Prior to the draft, the CPL stipulated that Chinese and foreign courts can each request the other to provide judicial assistance in acquiring evidence located in the territory of the other country, in accordance with treaty obligations and the principle of reciprocity. Chinese courts can take evidence abroad generally via two channels. First, evidence overseas can be acquired according to treaty provisions. In the absence of treaties, foreign evidence can only be obtained through diplomatic channels based on the principle of reciprocity.[2]

Article 286 of the draft provides more varied methods to collect foreign evidence. Firstly, foreign evidence can be acquired according to the methods specified in the international treaties concluded or acceded to by both the country where the evidence is located and China. Secondly, the evidence can also be obtained through diplomatic channels. Thirdly, for a witness with Chinese nationality, the Chinese embassy or consulate in the country of the witness will be entrusted to take the evidence on behalf of the witness. Fourthly, via instant messenger tools or other means. Access to electronic evidence stored abroad faces the dilemma of inefficient bilateral judicial assistance, controversial unilateral evidence collection and inadequate functioning of multilateral conventions.[3] The application of modern information technology, such as video conferencing and teleconferencing, can overcome the inconvenience of distance, saving time and costs. It is the mainstream of international cooperation to apply modern technology in the field of extraterritorial evidence-taking. For example, in 2020, the EU Parliament and Council revised the EU Evidence Regulation. The most important highlight of the EU Evidence Regulation is the emphasis on the digitalization of evidence-taking and the use of modern information technology in the process of evidence-taking.[4] On this basis, the amendment draft proposes that the court may, with the consent of the parties, obtain evidence through instant messenger tools or other means, unless prohibited by the law of the country where the evidence is collected (Art. 286).

5. Recognition and enforcement of foreign judgments and arbitral awards

Grounds for non-recognition and non-enforcement of foreign judgments: Recognition and enforcement shall not be granted if (1) the foreign court has no jurisdiction over the case in accordance with the provisions of Article 303; (2) the respondent has not been legitimately summoned or has not been given a reasonable opportunity to be heard or to argue, or the party who is incapable of litigation has not been properly represented; (3) the judgment or ruling has been obtained by fraud; (4) the court of China has issued a judgment or ruling on the same dispute, or has recognized and enforced a judgment or ruling issued by a court of a third country on the same dispute; (5) it violates the Chinese general principles of the law or sovereignty, national security or public interests of China (Art. 302).

After several amendments and official promulgation, the CPL has not significantly changed the requirements for the recognition and enforcement of foreign judgments. In China, reciprocity as a prerequisite for recognition of foreign judgments continues to play a dominating role in China. The difficulty of enforcing foreign judgments is one of the major concerns in the current Chinese conflicts system when applying the principle of reciprocity, impeding the development of international cooperation in trade and commerce. The local judicial review process may become more transparent thanks to this new draft. However, the key concern, the reciprocity principle, is still left unaltered in this draft.

In addition, if the foreign judgment for which recognition and enforcement are sought involves the same dispute as that being heard by a Chinese court, the proceedings conducted by the Chinese court may be stayed. If the dispute is more closely related to China, or if the foreign judgment does not meet the conditions for recognition, the application shall be refused (Art. 304).

Lack of jurisdiction of the foreign court: One of the grounds for non-recognition and non-enforcement of foreign judgments is that the foreign court lacks jurisdiction (See Art. 302). Article 303 provides that the foreign courts shall be found to have no jurisdiction over the case in the following circumstances: (1) The foreign court has no jurisdiction over the case pursuant to its laws; (2) Violation of the provisions of this Law on exclusive jurisdiction; (3) Violation of the agreement on exclusive choice of court for jurisdiction; or (4) The existence of a

valid arbitration agreement between the parties (Art. 303).

Recognition and enforcement of foreign arbitral awards: If the person sought to be enforced is not domiciled in China, an application for recognition and enforcement may be made to the Chinese intermediate court of the place of domicile of the applicant or of the place with which the dispute has an appropriate connection (Art. 306). The inclusion of the applicant's domicile and the court with the appropriate connection to the dispute as the court for judicial review of the arbitration significantly facilitates the enforcement of foreign awards. A major uncertainty, however, is how "appropriate connection" is defined. The amendment draft remains silent on the criterion.

6. Conclusion

The amendment draft presents efforts to actively correspond to the trends in the internationalization of the civil process along with the massive ambition to build a fair, efficient, and convenient civil and commercial litigation system. It offers more comprehensive and detailed rules that apply to all proceedings involving foreign parties. The amendment draft is significant both in terms of its impact on foreign-related civil procedures and the continuing open-door policy. It demonstrates that China is growing increasingly law-oriented to provide more efficient and convenient legal services to foreign litigants and to safeguard the country's sovereignty, security and development interests. On the other hand, the proposal also includes discrepancy and uncertainty, especially whether the practical connection for choice of foreign court is still required, what is the relationship between the first-in-time rule and the rule permitting parallel proceedings, whether reciprocity should be reserved for recognition and enforcement of foreign judgments. It is also noted that although anti-suit injunction is used in Chinese judicial practice, the proposal does not include a provision on this matter. Hopefully, these issues may be addressed in the final version.

[1] The CPL, Art. 274.

[2] The CPL, Art. 284.

[3] Liu Guiqiang, ‘China’s Judicial Practice on the Taking of Evidence Abroad in Civil and Commercial Matters: Current Situation, Problems and Solutions’ (2021) 1 Wuhan University International Law Review, 92, 97.

[4] Regulation (EU) 2020/1783 on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters (Taking of Evidence Recast). Official Journal of the European Union [online], L 405, 2 December 2020.