

China Legal Report

January 2024



* CHINA LEGAL REPORT is a regularly issued collection of Chinese law related news gathered from various media and news services, edited by WENFEI ATTORNEYS-AT-LAW LTD. distributed to its clients and CHINA LEGAL REPORT subscribers.

WENFEI ATTORNEYS-AT-LAW LTD. does not accept responsibility for the accuracy of quotes or truthfulness of its content. CHINA LEGAL REPORT is not intended to provide advice.

**A new year- a new legal framework
(summary of important changes per
January 2024)**

I. The Interpretation of the Supreme People’s Court on Several Issues Regarding the Application of the General Provisions on Contracts of the Civil Code of the People’s Republic of China Came into Effect on 5 December 2023.

The Interpretation of the Supreme People's Court on Several Issues Regarding the Application of the General Provisions on Contracts of the “Civil Code of the People's Republic of China” serves as a valuable supplement to the general rules on Contract, and clarifies important issues in that area of law. The Interpretation covers issues on, inter alia, the determination of reservation contracts (Articles 6-8), situations in which the breach of mandatory provisions does not affect the validity of the contract (Article 16), and when a change in circumstances can be said to have arisen (Article 32). Our already published CLB 293 (www.wenfei.com) focus on the parts that could be interesting for foreign investors.

II. Interpretation of the Supreme People’s Court on Several Issues Concerning the Application of the “Law of the People’s Republic of China on the Law Applicable to Foreign-Related Civil Relationships” (II) has taken effect on 1 January 2024.

The Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the “Law of the People's Republic of China on the Law Applicable to Foreign-Related Civil Relationships” (II) (“Interpretation”) became effective on 1 January 2024. It comprises of 13 articles that establish a structure for China's approach to resolving foreign law issues. Some of the most interesting provisions are as follows:

- Article 2 lists seven methods for resolving foreign law issues, including information provided by the parties, services provided by legal research institutions, or opinions provided by foreign and domestic legal experts. The article responds to the lack of a specific list of research methods. Furthermore, the provision includes an open-ended clause that allows for determinations to be made using 'other appropriate methods', providing flexibility (or risk) for different approaches to be adopted as necessary.
- Article 5 clarifies, that all relevant materials found in foreign laws shall be presented in court. The People's Court shall hear the opinions of all parties on the content of foreign laws and their understanding and application.
- Article 11 addresses the issue of the burden of costs of research by providing that, in the absence of an agreement between the parties, the court will exercise its discretion to determine the applicable costs incurred in researching the relevant foreign law.

However, this Interpretation does not contain explicit or binding instructions, but rather aims to provide a structure on how China intends to proceed when it comes to resolving foreign legal issues.

III. Reciprocal Enforcement of Civil and Commercial Judgement between Mainland China and Hong Kong

On 18 January 2019, the Supreme People’s Court of the People’s Republic of China (“SPC”) and the Hong Kong Government signed the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region (“2019 Arrangement”).

The Hong Kong Government, on 10 November 2023, announced that the Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance (“Ordinance”) and the Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Rules (“Rules”) will come into operation on 29 January 2024. The Ordinance outlines the relevant mechanisms, while the Rules cover matters such as practice and procedure relating to applications under the Ordinance.

The purpose of the Ordinance is to implement the 2019 Arrangement in Hong Kong. In Mainland China, the 2019 Arrangement will be implemented through a judicial interpretation to be promulgated by the SPC.

Some of the highlights are:

- The 2019 Arrangement removes the requirement for a written jurisdiction agreement stating that a Mainland court or a Hong Kong court has exclusive jurisdiction over the dispute(s) to which the rendered judgment relates. The jurisdiction requirement will now be comparatively less stringent under the 2019 Arrangement and will be satisfied if the dispute giving rise to the judgment has a sufficient connection with the place of the request.
- The 2019 Arrangement, however, covers a wide range of civil and commercial matters, with a list of express exclusions, including cases relating to succession, administration or distribution of estates, certain defined matrimonial and family matters, certain defined cases relating to intellectual property rights, cases involving certain maritime disputes, and bankruptcy (insolvency) cases.

The 2019 Arrangement establishes a mechanism for reciprocal recognition and enforcement of judgments in civil and commercial matters between Hong Kong and the Mainland. It covers a broad range of disputes, including those related to intellectual property rights, and provides both monetary and non-monetary relief. Enhancing the certainty and predictability of civil and commercial judgement enforceability, reducing the risk of re-litigation, and increasing time and cost efficiency are some of the benefits. Additionally, it strengthens Hong

Kong's competitiveness as an international dispute resolution hub and a regional intellectual property trading centre. There is also the risk that PRC Courts, that previously would have lacked jurisdiction, resolve matters in a binding manner that might have a closer connection to Hong Kong.

IV. Approval Granted for the Business Office Registration of a Foreign Arbitration Institution for the First Time in Shanghai, China.

On 1 December 2023, the Regulations on Promoting the Construction of International Commercial Arbitration Centres in Shanghai ("Regulations") came into effect. According to Article 16 of the Regulations, well-known foreign arbitration and dispute resolution institutions are allowed to establish business offices in Shanghai. On the same day, the Shanghai Municipal Bureau of Justice approved the registration of the Korean Commercial Arbitration Board Shanghai Centre ("KCAB"). The KCAB became the first foreign arbitration institution to have a business office approved in Shanghai. Previously, foreign arbitration institutions could only exist in China through representative offices. Awards of Institutions such as SIAC, ICC and KCAB, if issued in China, had the serious risk of not being enforceable in China. This risk might be mitigated with such registration.

This is a very significant development, as other well-known arbitration institutions may now be able to obtain a business office registration for a foreign arbitration institution in China.

V. Japanese Bankruptcy Proceedings Have Been Recognised by Chinese Court for the First Time.

On 26 September 2023, the Third Intermediate People's Court of Shanghai Municipality issued a decision recognising, for the first time, a Japanese civil rehabilitation procedure involving a Japanese company. This procedure is similar to bankruptcy reorganisation under Chinese law, where the debtor manages the company's assets itself under the supervision of an administrator. The court also recognised the identity of the supervisory commissioner and allowed the supervisory commissioner, under certain conditions, to supervise the self-management of the Japanese company's assets and business affairs within the territory of China. This case represents the first instance of a Japanese bankruptcy proceeding being recognised by a Chinese court. The primary legal basis for Chinese courts to recognise foreign bankruptcy proceedings is Article 5 of the Chinese Enterprise Bankruptcy Law. According to this provision, the conditions for recognising foreign proceedings include the

finality of the judgment and the existence of reciprocity between the two countries. Reciprocity in this context refers to legal reciprocity, i.e. whether the laws of the relevant country provide for the recognition of Chinese bankruptcy proceedings in that country.

If there is no evidence that the reciprocating country refuses to recognise Chinese bankruptcy proceedings, it can be concluded that there is a reciprocal relationship between the two parties within the meaning of Article 5. The court in this case applied the principle of comity and confirmed the existence of reciprocity between China and Japan in the recognition of cross-border bankruptcy cases.

VI. Convention Abolishing the Requirement of Legalisation for Foreign Public Documents Came into Effect in China on 7 November 2023

The Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, which took effect in China on 7 November 2023, means that China and other signatory countries will no longer require consular authentication for public documents. Instead, they will use an Apostille to verify the authenticity of seals, signatures, and other such elements. This change aims to simplify the international circulation of official documents, reducing the burden on individuals involved in foreign-related cases.

In the past, Wenfei's clients had to invest a significant amount of time and money in the traditional process of legalisation. However, with the implementation of the Apostille Convention, international document processing for both businesses and individuals is expected to become much more efficient and cost-effective (please see also our CLB 291 www.wenfei.com).

VII. The Supreme People's Court of the PRC Published the Fourth Group of Typical Cases Related to the "Belt and Road" Initiative

In 2013, President Xi Jinping laid out the concept of the Belt and Road Initiative ("BRI") as a connector between cultures on the Eurasian landmass and is a large transnational program of investments. Since 2015, the Supreme People's Court has released the first, second and third batch of typical cases related to the BRI in 2015, 2017 and 2022 in order to provide guidance and reference to local courts with regard to handling foreign-related civil and commercial lawsuits. On 27th September 2023, the fourth group of typical cases related to the BRI was released by China's Supreme People's Court. The 12 cases published this

time covers various types of international commercial disputes, including international sale of goods, independent guarantees, letters of credit, and equity transfer. These cases deal with significant matters in international commercial law. For instance, Case No.1 confirms that avoiding a contract under the CISG is equivalent to terminating a contract under Chinese law. Case No.4 affirms the principle of payment upon the beneficiary's demand in the context of independent guarantees.

The Chinese Supreme Courts have taken a significant initiative by releasing typical cases to strengthen and improve the dispute resolution mechanisms for international commercial disputes related to the BRI. The aim is to contribute to the uniformity of judgments across various levels of Chinese courts on legal issues related to foreign commercial matters.

VIII. The National Development and Reform Commission of PRC and the Hong Kong Monetary Authority Signed a Memorandum of Understanding on Supporting Cross-border Financing by Chinese Enterprises and Promoting the Development of the Hong Kong Bond Market.

On 18th October 2023, the National Development and Reform Commission and the Hong Kong Monetary Authority signed a Memorandum of Understanding (“MOU”) to support cross-border financing by Chinese enterprises and promote the development of the Hong Kong bond market. The MOU outlines key areas of collaboration between the two parties, including supporting Chinese enterprises in issuing bonds in Hong Kong in line with relevant regulations. This involves providing policy facilitation to eligible Chinese enterprises to expand their financing channels.

Additionally, both parties will jointly organise and participate in promotional activities to enhance market participants' understanding of the policy rules on overseas debt for Chinese enterprises. This will encourage market participants to use Hong Kong as a platform for cross-border financing.

Finally, the diversified development of Hong Kong's bond market should be promoted. These include broadening the scope of RMB-related business, encouraging issuers to issue innovative debt instruments, and broadening the variety of instruments.

IX. The Shanghai International Economic and Trade Arbitration Commission Releases New Version of Arbitration Rules

On 7th November 2023, the Shanghai International Economic and Trade Arbitration Commission (“SHIAC”) introduced its updated arbitration rules.

The SHIAC Arbitration Rules (2024) incorporate the Special Arbitration Rules for Aviation, the SHIAC Special Arbitration Rules for Data, and two instruments of SHIAC Guidance for online arbitration and ad hoc arbitration respectively. These rules have been developed based on the experience accumulated by SHIAC in managing arbitration cases over the past decade, building upon the 2015 version of the arbitration rules. The Arbitration Rules now contain 92 articles, an increase from the previous 66. One notable addition pertains to ad hoc arbitration, which are arbitrations conducted without recourse to institutional arbitration rules and without the oversight of an arbitral institution. Institutions may, however, provide administrative or logistical services to ad hoc tribunals. Article 2 of the SHIAC Arbitration Rules (2024) states that SHIAC may act as the appointing authority for arbitrators in ad hoc arbitration cases under the Arbitration Rules of the United Nations Commission on International Trade Law or other arbitration rules, and/or provide administrative services and other relevant functions in such cases, according to the agreement of the parties and the Guidance concerning ad hoc arbitration. This is one of the most recent examples of a Chinese arbitral institution issuing rules for such ad hoc arbitration. Other regulations of Chinese arbitral institutions issuing rules for ad hoc arbitration include the new arbitration rules of China International Economic and Trade Arbitration Commission (CIETAC) effective as of 1 January 2024, the publication and implementation of the Temporary Arbitration Rules of the China Maritime Law Association and the Temporary Arbitration Service Rules of the China Maritime Arbitration Commission on 18 March 2022.

X. A Practical Perspective on the Recognition and Enforcement of London Arbitral Awards in China

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, is a significant international treaty for recognising and enforcing foreign arbitral awards. It has greatly facilitated cross-border enforcement of foreign arbitral awards. However, the interpretation and standards applicable under the Convention have led to uncertainty in the cross-border enforcement of foreign awards due to divergent views among contracting parties, especially in cases where a party is in default.

The recognition and enforcement of foreign arbitral awards in domestic courts depends on whether the arbitral award meets the requirements of the New York Convention. In practice, the focus is on whether the foreign arbitral award meets the formal requirements set out in Article 4 of the Convention, as well as the additional requirements set out in Article 5. For instance, the recognition

and enforcement of the award may be refused if it can be proven that one party did not receive proper notice of the appointment of the arbitrator or the arbitration proceedings.

For instance, emails may be used to serve notices in London-seated arbitration, but it is advisable to also send a hard copy by mail and keep all relevant records in case recognition and enforcement in China is a potential concern. It is recommended to specify the agreed-upon notice delivery methods, addresses, and email addresses in the arbitration agreement. If there is a possibility that the recipient may refuse to accept the mail, which could lead to issues with recognition and enforcement in China, it may be advisable to instruct Chinese lawyers to arrange for offline delivery. Prior to the commencement of arbitration, it is crucial to communicate with lawyers in the relevant country or region where the foreign arbitration award will be recognized and enforced. Wenfei has ample experience of local courts trying to not enforce a foreign arbitration award, albeit the New York Convention would require enforcement.

© Wenfei, Beijing, January 2024

Check the China Legal Report archives on: <http://www.wenfei.com/publications.html>

Obtain your personal subscription from: china@wenfei.com