

## China Amends Foreign-Related Civil Procedure Rules

***The amendments focus on foreign-related civil procedure and significantly expand PRC courts' authority over cases involving foreign parties.***

### Key Points:

- After January 1, 2024, the People's Republic of China (PRC) courts will allow service on foreign entities by delivering documents to their wholly foreign-owned enterprises (WFOEs) within the territory of the PRC.
- The Amended CPL generally provides the PRC courts with broader authority in hearing foreign-related civil cases, including expanding their jurisdiction over foreign-related matters, providing more options to serve on foreign parties, providing alternative methods to collect evidence outside of China, and offering more grounds for the PRC courts to review foreign judgments seeking to be recognized and enforced in the PRC.
- The conditions for PRC courts to reject certain cases based on the doctrine of *forum non-convenience* have been loosened. Specifically, merely the fact that a PRC party is involved, or that the governing law shall be the PRC laws, would no longer hinder the PRC court from dismissing the action by deeming itself a *forum non-convenience*.

On September 1, 2023, the Standing Committee of the National People's Congress (NPCSC) of the PRC adopted the amendments to the Civil Procedure Law of the People's Republic of China (the Amended CPL). The amendments particularly focus on the section of foreign-related civil procedure, with amendments to seven existing articles and additions of 11 new articles. The newly adopted changes cover the PRC courts' jurisdiction over foreign-related cases, parallel proceedings, service on foreign parties, overseas evidence collection, and recognition and enforcement of foreign judgments and arbitral awards.

According to the press conference held by the Legislative Affairs Commission of the NPCSC, the legislator commented that the NPCSC has made substantive amendments to the foreign-related civil procedural rules for the first time since the original Civil Procedure Law took effect in 1991. Firstly, the Amended CPL has incorporated important foreign-related civil procedural rules from judicial interpretations and court guidance of the Supreme People's Court of the PRC (SPC), including the "Interpretation of the SPC on the Application of the CPL" as amended in 2022 and currently effective (the 2022 CPL Judicial Interpretation), and the "Meeting Minutes of the National Symposium on Foreign-Related Commercial and Maritime Trial Work" (2021 SPC Guidance). Secondly, the Amended CPL introduces significant changes with respect to PRC courts' authority on hearing foreign-related cases, which will result in significant impacts on Chinese enterprises as well as foreign enterprises engaged in

cross-border business with China. This Client Alert is intended (and limited) to introduce key amendments to the CPL in 2023 from the perspective of foreign-related civil procedure rules.

## **Broadened Jurisdiction of PRC Courts Over Foreign-Related Cases**

The Amended CPL expands the scope of PRC nexuses that can give rise to PRC courts' jurisdiction over foreign-related cases. Per the previous CPL, a PRC court may hear a case involving foreign parties (i.e., parties that do not have domiciles in the PRC) when (i) the contract was executed in the PRC, (ii) the contract was/is to be performed in the PRC, (iii) the subject matter is located in the PRC, (iv) the seizable assets are located in the PRC, (v) the tortious act was committed in the PRC, or (vi) the foreign party has a representative office in the PRC. The Amended CPL introduces a "catch-all" provision, giving the PRC court the discretion to hear a foreign-related civil case when it considers that the case has "any other appropriate connection" with the PRC. This broad provision would be particularly relevant if a PRC enterprise's interests overseas are damaged, while the dispute itself does not have any connection with the PRC from factual perspectives.

**Express or implied agreement on jurisdiction.** If the parties agree to the exclusive jurisdiction of the PRC courts in the underlying contract giving rise to the dispute (express choice), or if the party does not challenge a PRC court's jurisdiction and meanwhile answers to the claims and/or files counterclaims (implied choice), the PRC court may hear the case based on the parties' selection of the forum. Notably, the CPL only allows parties to choose a PRC court located in places where the defendant is domiciled, the contract was/is to be performed, the contract was executed, the plaintiff is domiciled, the subject matter is located, and other places that have substantive connection to the dispute. Thus, the express or implied choice of PRC courts is only effective if a place in the PRC has "substantive connection" with the dispute.

The Amended CPL also introduces a new provision respecting parties' agreement on exclusive jurisdiction of foreign courts, provided that the underlying case does not involve national sovereignty, as well as national security, social, or public interests of the PRC. If the parties agree on an exclusive jurisdiction of foreign courts, the PRC court may order not to accept the case, or order dismissal of the case if the case has been accepted.

**Exclusive jurisdiction of the PRC courts.** Prior to the 2023 amendments, the CPL has provided for one circumstance in which the PRC courts have exclusive jurisdiction over foreign-related cases, i.e., disputes arising from the performance of Sino-foreign joint venture contracts, Sino-foreign cooperation contracts, or Sino-foreign joint exploration contracts. The CPL introduces two circumstances in which the PRC courts have exclusive jurisdiction to hear foreign-related cases, i.e., for disputes arising from (i) incorporation, dissolution, or liquidation of PRC legal persons or other organizations; or validity of resolutions of the PRC legal entities or other organizations, and (ii) validity of PRC-issued intellectual property rights. Per the 2022 CPL Judicial Interpretation, though the above matters are subject to the PRC courts' exclusive jurisdiction and the parties may not effectively select foreign courts to govern the case, parties are otherwise allowed to agree on submitting such disputes to arbitration (including foreign arbitration, provided that there is a "foreign element" in the dispute).

**Parallel proceedings.** The 2022 CPL Judicial Interpretation addresses one scenario of parallel proceedings in which one party brings an action in a foreign court and the other party brings an action in a PRC court, and both courts have jurisdiction to hear the case. In this situation, the PRC court may hear the case, and the foreign judgment on the same matter cannot be recognized and enforced in the PRC unless otherwise required under bilateral or international treaties. The Amended CPL adjusts this rule and further includes a scenario of parallel proceedings where one party brings actions in both a foreign court and a PRC court. In both scenarios, a PRC court may hear the case as long as it has jurisdiction over the

case pursuant to the CPL. The consequence that the foreign judgment cannot be recognized and enforced in the PRC has been removed in the Amended CPL and will be dealt with by the relevant CPL rules introduced below, as well as bilateral or international treaties if applicable.

## Loosened Conditions for *Forum Non-Convenience*

There has been the concept of *forum non-convenience* under the PRC laws as early as 2015 per the then applicable judicial interpretation on the CPL. The Amended CPL incorporates the rules of *forum non-convenience* and has made significant adjustments. Firstly, it removes the requirement that the underlying case shall not involve the interests of PRC citizens, legal persons, and other organizations. Therefore, in theory, a party may argue that a PRC court is a *forum non-convenience*, notwithstanding that a PRC party is involved. Secondly, it removes the requirement that the underlying case shall not be governed by the PRC laws. Similarly, in theory, it is also possible to challenge the jurisdiction of a PRC court based on *forum non-convenience*, notwithstanding that the governing law should be the PRC laws.

Per the Amended CPL, a party may challenge a PRC court's jurisdiction based on the doctrine of *forum non-convenience* if **all** the following requirements are satisfied:

- The main disputed facts occur outside of the territory of the PRC, and it is manifestly inconvenient for the PRC courts to hear the case and for the parties to participate in the litigation;
- There is no agreement between the parties to select a PRC court to hear the case;
- The underlying case does not involve national, security, social, and public interests of the PRC;
- The underlying case is not subject to the exclusive jurisdiction of the PRC courts; **and**
- Foreign courts are more convenient to hear the case.

## Expanded Methods of Service on Foreign Parties

The legislator's comments indicate that the Amended CPL is intended to, among others, "solve the difficulty in serving foreign parties for foreign-related cases." To serve that purpose, the Amended CPL includes the below changes in respect of the methods of service on foreign parties within the territory of the PRC. If a PRC court can serve a foreign party by methods employed within the territory of the PRC, the PRC court may consider service as effected on the foreign party without having to go through the process under the Hague Service Convention, which in practice can take at least several months.

- **Delivery to PRC counsels:** Under the previous CPL, a PRC court may serve a foreign party by delivery to its PRC counsel if there is no express exclusion of the PRC counsel's authority to accept judicial documents in the Power of Attorney (POA). The legislator commented that some PRC counsels had avoided service on their foreign clients by deliberately putting in place such exclusions in their POAs. Under the Amended CPL, such exclusion in POA would no longer be effective. As long as the PRC counsel has been appointed to represent the foreign party in the PRC court proceeding, such PRC counsel is regarded as authorized to accept judicial documents on behalf of its foreign client for the same PRC court proceeding.
- **Delivery to PRC branches:** Under the previous CPL, PRC branches and business agents of foreign parties may accept judicial documents on behalf of the foreign parties if the branches and business agents are authorized to do so. Per the Amended CPL, PRC branches of foreign parties no longer need to be expressly authorized in order to accept delivery of judicial documents on behalf of its

foreign headquarters. No change will apply to PRC business agents who still need express authorization to be a PRC service agent for its foreign business partner.

- **Delivery to PRC wholly owned subsidiaries:** Remarkably, the Amended CPL allows the PRC courts to serve a foreign party by delivering judicial documents to its WFOEs in the PRC. The 2021 SPC Guidance provides that the PRC courts may serve only foreign natural persons by delivery to their WFOEs in the PRC to “forward service.” The Amended CPL on the one hand adds that service on any foreign entities can also be effected by delivery to their PRC WFOEs; and on the other hand, removes the wording of “forward service.”
- **Delivery to the legal representative or persons in charge of the foreign parties,** if such individuals are within the territory of the PRC.
- **Delivery to PRC legal persons or organizations** in which the foreign individual to be served acts as legal representative or a person in charge. The same has been provided in the 2021 SPC Guidance.
- **Other methods of service as agreed by the parties,** as long as the law of the destined country does not prohibit such method of service. Per the relevant judicial practice, uncertainty seems to remain whether/how the parties may expressly agree on service via postal mail or electronic methods to be effected on a foreign party, if the destined country has objected to postal service under Article 10 of the Hague Service Convention.

Same as the previous CPL, the Amended CPL allows public service on a foreign party when all other methods of services have failed. Further to that, the Amended CPL shortens the publication period for public service on foreign parties from three months to 60 days.

## Alternative Methods of Overseas Evidence Collection

For any evidence collection overseas, the previous CPL requires the PRC court to submit the evidence collection requests through bilateral and international treaties if applicable, or per the principle of reciprocity. For instance, per Hague Evidence Convention, an application shall be transferred to the designated authority of the destined country, and usually the review process will take at least several months. The Amended CPL allows three alternative methods of evidence collection overseas, provided that the law of the destined country does not prohibit such method, i.e.:

- Requesting the PRC Embassy or Consulate to depose a party or witness of PRC nationality
- By instant message tools if the parties agree
- By other methods as agreed by the parties

However, foreign courts are still not allowed to directly collect any evidence (including by deposing a party or witness) within the territory of the PRC, pursuant to China’s reservation made on Chapter II of the Hague Evidence Convention except for Article 15. Also, the Amended CPL continues to expressly prohibit any organization or individual from directly collecting evidence within the territory of the PRC without going through international treaties as applicable (e.g., Hague Evidence Convention), unless otherwise approved by the relevant PRC authorities.

## Recognition and Enforcement of Foreign Judgments

The Amended CPL incorporates grounds for refusal to recognize and enforce foreign judgments provided under the 2021 SPC Guidance and expands their scope of application to not only cover recognition and enforcement based on the reciprocity principle, but also those based on bilateral or international treaties. Such grounds of refusal to recognize and enforce foreign judgments are:

- The foreign court lacks jurisdiction to rule over the dispute:
  - The foreign court lacks jurisdiction according to its national law.
  - The dispute is subject to the exclusive jurisdiction of the PRC courts as provided under the CPL.
  - The foreign judgment contradicts with the parties' agreement on the exclusive jurisdiction of selected courts.
- The defendant was not duly summoned, or the defendant was so summoned but was not given reasonable opportunity to make submissions or defend the proceedings.
- The party without capability to engage in litigation was not duly represented.
- The foreign judgment was obtained by fraud.
- A PRC court has already rendered a judgment or order on the same dispute, or has recognized a judgment or order rendered by a third country on the same dispute.
- Recognition and enforcement would be contrary to the basic principles of the law of the PRC or harm the social and public interests of the PRC.

The Amended CPL also addresses the issue of potential parallel proceedings at the enforcement stage, providing that the PRC court **may** stay a litigation proceeding if a party has applied for recognition and enforcement of a foreign judgment on the same dispute. The PRC court may refuse to recognize the foreign judgment and resume the PRC litigation proceeding; or recognize the foreign judgment and dismiss the claims in the PRC litigation proceeding.

## Recognition and Enforcement of Foreign Arbitral Awards

The Amended CPL clarifies that the nationality of the arbitral awards should be decided by the seat of the arbitration rather than the place in which the arbitral institution is located. The previous CPL provides that “arbitral awards made by foreign arbitral institutions” shall be enforced pursuant to bilateral and international treaties, which gives rise to confusion whether an arbitral award made by a foreign arbitration institution but seated in the PRC should be regarded as a foreign arbitral award or a PRC domestic arbitral award, which are otherwise subject to the CPL in terms of enforcement as opposed to the New York Convention. The 2021 SPC Guidance as developed from judicial practice provides clarifications on this issue, providing that “an arbitral award made by a foreign arbitral institution, with the arbitration seat being within the territory of the PRC, should be deemed a foreign-related domestic award, and therefore should be recognized and enforced in accordance with the CPL.” The Amended CPL follows the position of the 2021 SPC Guidance and revises that “arbitral awards made outside the territory of the PRC” shall be regarded as foreign arbitral awards to be recognized and enforced in the PRC pursuant to the New York Convention.

Per the previous CPL and the relevant judicial interpretation, a party may apply for recognition and enforcement of a foreign arbitral award in the Intermediate People's Court where the party to be enforced is domiciled, or where the party's assets are located. If the party to be enforced does not have a domicile in the PRC and does not have assets in the PRC, but the foreign arbitral award has connection with an ongoing case being heard by a PRC court or an ongoing arbitration administered by a PRC arbitral institution, the relevant Intermediate People's Court with connection may accept the application for recognition and enforcement of the foreign arbitral award. The Amended CPL broadly provides that the Intermediate People's Courts where the applicant is domiciled, and in "places with proper connection with the dispute," may accept application for recognition and enforcement of a foreign arbitral award.

## Key Takeaways

The Amended CPL will take effect from **January 1, 2024**. Accompanying its entry into force, the SPC might need to adjust the relevant judicial interpretations and remove conflicting rules as necessary, including the 2022 CPL Judicial Interpretation. Since the Amended CPL generally gives the PRC courts expanded authority and direction on hearing foreign-related matters, it can be expected that the PRC courts will take a more proactive role in claiming jurisdiction and governing disputes in cross-border matters in the future. The foreign entities, including multi-national corporations that have business in the PRC, may want to keep a closer eye on any signs of potential legal actions involving themselves in the PRC and seek timely advice on how to respond to these legal actions at an early stage before the PRC judicial documents can be effectively served.

The most significant takeaways of the 2023 amendments to the CPL focus on foreign-related civil service. Since rejection of delivery may be considered as "deemed service" in the PRC, it can thus result in inadvertent waiver of certain procedural rights and interest in potential PRC legal proceedings.

1. Foreign entities' direct (and potentially also indirect) WFOEs in the PRC will be considered authorized to accept judicial documents on behalf of their foreign sole parent companies.
2. Foreign headquarters that have PRC branches should be aware that the PRC courts no longer need an express internal authorization to effect service on foreign headquarters by delivery to their PRC branches.
3. If a foreign company or individual has a PRC counsel that was issued a general authorization to represent in all PRC legal matters, the foreign company or individual might need to revisit the POA and narrow the scope of authorization to only specific matter(s).

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