



JONES DAY
COMMENTARY

ADDING MORE STRINGS TO THE BOW: THE 2012 AMENDMENTS TO CHINA'S CIVIL PROCEDURE LAW

In August 2012, the People's Republic of China ("PRC") enacted amendments to its Civil Procedure Law ("CPL"). These amendments (collectively referred to as the "2012 Amendments") came into force on January 1, 2013 and are the most extensive amendments made to the CPL to date.

This *Commentary* examines the following eight key changes brought about by 2012 Amendments and assesses their potential impact on future litigation and arbitration conducted in the PRC:

1. Prospective litigants are required to attempt pre-action mediation.
2. Mediation agreements can be judicially confirmed and enforced by the courts.
3. Litigation is required to be conducted in good faith.
4. Parties have greater freedom of choice of jurisdiction.
5. The scope of asset preservation measures in advance of judgment is extended.
6. Courts can order pre-action preservation of evidence.
7. The parties may themselves select a joint expert witness.
8. The grounds for the court to refuse to enforce a domestic arbitration award are curtailed.

DEVELOPMENT OF CIVIL PROCEDURE LAW IN CHINA

China's first two attempts at codifying civil procedure law were ill-fated. The first attempt was in 1910, when the Court of the Qing Dynasty promulgated the Qing Imperial Code of Civil Procedure. This was somewhat short lived, however, with imperial China coming to an abrupt end one year later. The second attempt was in 1935, when the nationalist government promulgated the Civil Procedure Law of the Republic of China. Although having a substantially longer inning than its 1910 predecessor, the 1935 Civil Procedure Law was abolished 14 years later by the government of the PRC.

Between 1949 and 1982, civil procedure rules were promulgated from time to time by the Supreme People's Court ("SPC"), there being no civil procedure code as such. Following the movement to modernize the PRC's legal system in the late 1970s–early 1980s to make it more suitable for a market-driven economy, in March 1982 the Standing Committee of the National People's Congress enacted a civil procedure law on an experimental basis ("1982 Trial CPL"). After a nine-year trial, in April 1991, an amended version of the 1982 Trial CPL was adopted as the Civil Procedure Law of the PRC ("1991 CPL").

Apart from the 2012 Amendments, there has only been one other round of amendments to the CPL since 1991. These were made in October 2007 (entering into force on April 1, 2008) and were primarily motivated by problems encountered in the enforcement of civil judgments and the retrial procedure.

PROSPECTIVE LITIGANTS ARE REQUIRED TO ATTEMPT PRE-ACTION MEDIATION (ARTICLES 122 AND 133)

The courts in the PRC have always promoted mediation as an alternative means of settling disputes. From its very first inception in 1991, the CPL expressly provided that the courts may mediate disputes after a lawsuit has commenced. The same court may then adjudicate the case in the event that the mediation fails. While the concept of the same court acting as both mediator and adjudicator raises eyebrows in many other jurisdictions, the post-action mediation provisions of the CPL remain unchanged by the 2012 Amendments (refer to Chapter 8 of the CPL).

The 2012 Amendments further promote mediation by adding the following provisions to the CPL: "Wherever appropriate, mediation shall be adopted for civil disputes before they are brought to the people's court, unless the parties thereto refuse to mediate" and "where mediation may be conducted before the trial, mediation shall be conducted to timely solve the dispute."

The legislative purpose of these provisions is to encourage parties to settle their disputes by mediation *before* actually

commencing a lawsuit, rather than waiting until after the lawsuit has commenced, and may well be in response to a decline in the number of civil cases being settled by mediation following commencement of proceedings.

JUDICIAL CONFIRMATION AND ENFORCEMENT OF MEDIATION AGREEMENTS (ARTICLES 194 AND 195)

The 2012 Amendments introduce new provisions for obtaining judicial confirmation of a mediation agreement and for the enforcement of mediation agreements. These provisions apply to all mediation agreements, no matter whether made pre-action or post-action.

These new provisions further demonstrate the increased emphasis on the use of mediation for settling disputes.

LITIGATION SHALL BE CONDUCTED IN GOOD FAITH (ARTICLE 13)

The 2012 Amendments provide that civil litigation should abide by the principle of good faith. This amendment is perhaps in response to an increase in the occurrence of frivolous or malicious lawsuits and the abuse of process by litigants, such as intentionally delaying proceedings, falsifying evidence, and the like.

While a welcome addition to the CPL, mounting a challenge to a lawsuit on the basis that the other party is acting in bad faith is likely to be difficult to implement in practice and will require further judicial interpretation to establish the line between good faith and bad faith.

CHOICE OF JURISDICTION OPTIONS ARE EXPANDED (ARTICLE 34)

Under the previous CPL, the parties to a contractual dispute were permitted, by mutual agreement, to choose the location of the court to hear the dispute. Such court may be located at the place of domicile of either of the parties, at

the place where the contract was signed, at the place where the contract was performed, or at the place where the subject matter is located.

The 2012 Amendments expand the types of dispute under which the parties may choose the location of the court to include disputes over “rights or interests in property” and also expands the options available to the parties to include “any other place actually connected to the dispute.”

EXTENSION OF THE SCOPE OF ASSET PRESERVATION MEASURES IN ADVANCE OF JUDGMENT (ARTICLES 100 AND 101)

The previous CPL permitted a party to apply to the courts for an order to preserve property where enforcement may be jeopardized by acts taken by the other party. Such an application could be made before commencing the lawsuit in urgent circumstances. These provisions for property preservation measures are retained in the amended CPL; however, following the entering into force of the 2012 Amendments, the courts now have the power to make orders requiring a party to take certain actions or refrain from certain actions (the previous property preservation measures together with the newly introduced measures are collectively referred to in the CPL as “Preservation Measures”).

The 2012 Amendments also provide that a prospective party to an arbitration can apply for Preservation Measures prior to commencing the arbitration. It is, however, unclear as to whether or not this provision is limited to domestic arbitrations since, although the 2012 Amendments simply refer to “仲裁” (i.e., arbitration), other provisions of the CPL separate out “涉外仲裁” (i.e., foreign-related arbitration) as a separate category of arbitration. We take the view that it covers both local and foreign-related arbitration cases, but an interpretation from the SPC would be useful in this regard.

Upon receiving an application for a Preservation Measure (whether pre-action or post-action), the court is required to make a decision within 48 hours of the application, and if it grants the application, the Preservation Measure can be enforced immediately. In the case of a Preservation Measure

made pre-action, if the petitioner does not commence the litigation or arbitration within 30 days of the order, the order is cancelled.

The court may instruct the applicant to provide a surety as a condition of ordering a Preservation Measure. In this regard, it should be noted that “undertakings as to damages” cannot be provided in lieu of surety, and therefore an applicant for Protective Measures will need to be fully prepared to provide the necessary surety upon making its application to the court.

These newly introduced Preservation Measures are analogous to the common law concepts of mandatory and prohibitory interim injunctive relief and are likely to play a significant role in improving the enforceability of judgments and arbitration awards in the PRC. It remains to be seen, however, under what circumstances and to what extent the courts will be prepared to use these newly acquired powers.

PRE-ACTION PRESERVATION OF EVIDENCE (ARTICLE 81)

The previous CPL provided that a party to litigation may apply to the court for the preservation of evidence where there is a likelihood that such evidence may be destroyed, lost, or too difficult to obtain later on. Unlike the preservation of property, however, an application for the preservation of evidence could be made only after commencing a lawsuit.

Following the 2012 Amendments to the CPL, an interested party is now permitted to apply for an order to preserve evidence prior to instituting the lawsuit and, furthermore, *prior* to commencing an arbitration. Time limits for the court to grant such applications and for the interested party to actually commence the lawsuit or arbitration are the same as those for applications for Preservation Measures.

This is a significant amendment. Valuable evidence can often mysteriously disappear, or be moved, the moment a lawsuit or arbitration has commenced, and it is useful to secure the preservation of such evidence before the other party has an opportunity to react.

PARTIES MAY SELECT EXPERT WITNESSES (ARTICLES 76, 77, AND 78)

The previous CPL provided that, where the court deems it necessary to make a determination on a specialized issue, the court may refer such issue to an “authentication department authorized by law” that shall appoint an expert witness to provide an “expert conclusion.” Under the amended CPL, this provision is replaced and substituted with a provision that permits the parties to jointly select the expert witness. Further, it is not necessary for the parties to choose the expert from an “authentication department authorized by law”; therefore, the parties will presumably now have a wider pool of expert witnesses from which to choose.

The court may still choose the expert witness itself, but only where the parties have not requested to call an expert witness on an issue for which the court considers an expert opinion is required, or in the event that the parties cannot agree on the identity of the expert witness.

Under the previous CPL, the court-appointed expert witness was not required to attend the court hearing. However, the amended CPL stipulates that if a party objects to the written opinion of the expert, or if the court deems it necessary, the expert witness shall appear in court for testimony. Where the expert witness refuses to so testify, the court shall not take his opinions into account in ascertaining the facts. Further, the party paying the evaluation expenses may request the refunding of the evaluation expenses.

GROUND FOR REFUSING TO ENFORCE A DOMESTIC ARBITRATION AWARD ARE CURTAILED (ARTICLE 213)

Under the previous CPL, a court may refuse enforcement of a domestic arbitration award on the grounds that “the main evidence for determining the facts was insufficient” or that “there was an error in the application of the law.” These grounds provide considerable latitude for the courts to refuse enforcement.

The two grounds mentioned above are deleted by the 2012 Amendments and replaced by the following: “the evidence that forms the basis of the award is fabricated” and “the other party has concealed evidence from the arbitral institution that affects the impartiality of the award,” respectively. These changes significantly curtail the discretion of the court in refusing to enforce a domestic arbitration award and bring the CPL in line with the PRC Arbitration Law.

CONCLUSION

The 2012 Amendments greatly improve the CPL by strengthening the rights of litigants and widening the scope of party autonomy. At the same time, the 2012 Amendments are aimed at encouraging disputes to be settled by mediation and preventing abuse of the litigation process.

The enhanced interim measures available under the amended CPL to protect evidence and assets prior to judgment are of particular significance. The protection of evidence and assets have, for a long time, been weak spots in the PRC’s civil procedure law, with mandatory and prohibitory interim injunctive relief traditionally being available only for certain types of intellectual property actions. This has given defendants ample opportunity to destroy crucial evidence or put valuable assets out of reach upon actions being initiated against them. Following the 2012 Amendments, the courts now have the power to order a wide range of interim measures aimed at protecting evidence and assets prior to the commencement of all types of civil action, including arbitration proceedings.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Ashley M. Howlett

Beijing / Hong Kong

+86.10.5866.1113 / +852.3189.7290

ahowlett@jonesday.com

Sonny Payne

Hong Kong

+852.3189.7327

spayne@jonesday.com

Leanne Zheng

Beijing

+86.10.5866.1216

lzheng@jonesday.com

This *Commentary* should be considered guidance only and should not be relied upon as legal advice. Specific design features of employee stock plans can substantially alter the applicable legal requirements. Readers are urged to obtain specific legal advice regarding how the local requirements apply to their plan terms before filing any year-end report. The contents may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our web site at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.