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# Litigation 2024

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## **China: Trends & Developments**

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## Trends and Developments

### Contributed by:

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management, intellectual property, bankruptcy and restructuring and dispute resolution. We have nearly 800 professionals located in our seven offices in Beijing, Shanghai, Shenzhen, Hong Kong, Haikou, Wuhan, as well as Singapore, a leading financial centre in the Asia-Pacific. All our lawyers are graduates of top universities and have extensive experience in complex cross-border transactions and dispute resolution as counsel to both Chinese and foreign clients.

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### Introduction

In the post-COVID-19 era, China's business environment and legal regime continue to evolve, bringing new changes to the litigation landscape. The year 2023 has seen several key developments, including amendments to the Civil Procedural Law, changes in the higher courts' jurisdiction over complex disputes and retrials, and the abolition of the legalisation requirement in litigation. These changes aim to enhance efficiency, fairness, and predictability in Chinese litigation. This article explores these important shifts and their impact on China's litigation landscape.

On 1 September 2023, China released its newly amended Civil Procedural Law (the "Amended CPL"). The amendments, taking effect from 1 January 2024, primarily focus on the foreign-related civil procedure section, covering a broad range of topics including jurisdiction, service, collection of evidence, and recognition and enforcement of foreign arbitral awards and judgments. This is the first substantive modification to foreign-related civil procedure rules since the passage of the original Civil Procedure Law in 1991 and holds practical significance for how

foreign-related civil and commercial cases will be handled in China in the future. This article first highlights the major changes in the Amended CPL and then introduces other recent trends and developments in litigation in China.

### Amended Rules on Court Jurisdiction Over Foreign-Related Cases

Regarding the jurisdiction of PRC courts over foreign-related civil cases, the Amended CPL has added five new clauses compared with the previous version (Articles 277, 278, 280-282), and the two existing clauses have been supplemented with rules expanding the scenarios where the Chinese courts may hear cases involving a foreign element (Articles 276 and 279). These new changes include adding more jurisdictional nexuses, prescribing the legal standard of forum non conveniens, and specifying the criteria to accept or stay a domestic case when there is a parallel legal proceeding already pending before a foreign court.

### *Additional grounds to exercise jurisdiction*

Under the 2023 Amendments, the PRC court jurisdiction has been expanded in three ways. The first new nexus is the "appropriate con-

nection” with China. Traditionally, the Chinese courts may hear cases against a foreign party without domicile in China under specified circumstances – ie, the contract is executed or performed in China, the subject matter or assets available for seizure are located within China, the infringement act takes place in China, or the foreign party has a representative office in China. In addition to these connections, the Amended CPL empowers Chinese courts to exercise jurisdiction over a foreign-related case where the dispute has “other appropriate connections” to the PRC (Article 276). This addition offers Chinese entities who conduct cross-border businesses increased access to litigation in domestic courts with lower costs and enhanced efficiency.

In fact, before the 2023 Amendments, these additional grounds had already been actively argued in a series of high-profile standard essential patent-related multinational lawsuits such as *ZTE v Conversant* (2020), *OPPO v Sharp* (2021), *OPPO v Nokia* (2022) and *OPPO v Interdigital* (2023), where the Supreme People’s Court confirmed Chinese court jurisdiction over worldwide licensing fee disputes based on the appropriate connections with China.

The second aspect of the broadened jurisdiction is reflected in the new rules on express and implied consent to jurisdiction by PRC courts. The Amended CPL allows the parties to select a PRC court to adjudicate a foreign-related dispute by written agreement (Article 277). Despite the provision itself being silent on the specific criteria for the parties’ forum selection clause, it is a reasonable reading from the context of the law that there must be at least some “appropriate connection” with China. Additionally, when a party does not challenge the jurisdiction of the court, answer the complaint, or raise counter-

claims, the party will be deemed to have accepted the jurisdiction of the Chinese court.

Lastly, two types of litigation where Chinese courts have exclusive jurisdiction have been added in the Amended CPL – ie, disputes arising out of incorporation, dissolution, and liquidation of the business entities registered in China and the validity of the resolutions thereof; and disputes over the validity of intellectual property rights granted within China (Article 279). This has further broadened the scope of scenarios in which foreign-related disputes fall under the jurisdiction of PRC court.

### *Adoption of the forum non conveniens doctrine*

The doctrine of forum non conveniens is not typically applied in China’s legal system as it is a concept primarily associated with common law countries and interpreted by case laws. The Amended CPL, for the first time, adopted the doctrine of forum non conveniens into the legislation, allowing a defendant to seek dismissal when the Chinese court is not the most appropriate or convenient forum to decide the case (Article 282). This means that despite being granted the broadened authority to assert jurisdiction, Chinese courts will still take a practical, flexible, and balanced approach to determining the jurisdiction of cross-border disputes. This change also reflects an open-minded attitude of Chinese lawmakers to accept and apply concepts from the international community.

Under this rule, dismissal can happen when the following conditions are met at the same time:

- the facts in dispute do not occur in China and it would be inconvenient either for the Chinese courts to hear the case or for the parties to participate in the litigation;

- there is no agreement between the parties referring the dispute to the Chinese courts;
- the dispute does not fall under the exclusive jurisdiction of a Chinese court;
- the case does not involve the sovereignty issue, national security or public interest of China; or
- it is more convenient for a foreign court to adjudicate the dispute.

The dismissal is necessarily with prejudice. If a foreign court refuses to hear the case after the dismissal by the Chinese courts, the plaintiff may re-file the case in China.

### *Co-ordination between parallel proceedings*

As Chinese entities continue to expand their global footprint, they may subject themselves to the jurisdiction of multiple courts. This raises the practical question of what Chinese courts should do if a complaint is filed in China while legal proceedings are already pending in a foreign court. The 2023 Amendments proactively address this issue and provide clear rules to help judges and litigators navigate this situation (Articles 280-281).

As a general rule, at the time of the filing, the Chinese courts have the discretion to decide whether to accept the case subject to certain restrictions (eg, the case is not subject to the exclusive jurisdiction of PRC courts or the case does not give rise to national interest or security concerns). If the case passes the filing stage, the Chinese courts can still dismiss the case or stay the PRC proceeding upon the application by the parties unless there is an express written agreement choosing a Chinese court to hear the case, the case is subject to the exclusive jurisdiction of the PRC courts, or the PRC courts are more convenient to hear the case. This co-ordination prescribed by the amendments strikes a good

balance between respecting the parties' freedom to choose an appropriate forum for their dispute and the judicial power to intervene and redress grievances of an affected party.

### **Flexible Methods of Service on Foreign Parties**

Courts in China have long been tackling the challenge of efficiently serving foreign parties, often resulting in significant delays in foreign-related cases. Since 1 January 2023, when the Supreme People's Court granted the district courts jurisdiction over first instance foreign-related civil and commercial cases, this challenge has become increasingly common at all levels of the Chinese judiciary. In response to practical issues faced in court, the Amended CPL has introduced significant changes to the provisions concerning foreign-related service. It has supplemented several alternative methods and lowered the barriers to existing service methods targeting foreign parties (Article 283). These changes include:

- removing the restrictions that previously mandated explicit prior authorisation for attorneys accepting service on behalf of the principal, preventing any avoidance of service through deliberate manipulation of the power of attorney;
- extending the scope of alternative services to include the foreign defendant's wholly owned enterprises registered in China, representative offices, and branches established in China and removing the prior authorisation restrictions;
- allowing service on domestic enterprises in lieu of serving on their foreign legal representatives or principal officials when they share co-defendant status;
- allowing service on the legal representatives or principal officials of foreign corporate

- defendants, if the legal representatives or principal officials are based in China;
- permitting service via electronic means where the receipt can be confirmed unless prohibited by the laws of the country where the recipient is located;
- enabling alternative service through other methods agreed upon by the recipient, provided that said method does not violate the laws of the country where the recipient is located; and
- shortening the statutory period for public announcement service from three months to 60 days.

These amendments collectively contribute to a more streamlined and practical system for serving foreign parties, ultimately enhancing the overall efficiency and effectiveness of the process in foreign-related cases.

## Expanded Channels to Obtain Evidence Located Overseas

As a corollary of the expanded jurisdiction of Chinese courts over foreign-related disputes, efficient and practical means to obtain evidence outside China while respecting the sovereignty of foreign countries need to be prescribed. The Amended CPL not only continues to recognise the traditional channels (international treaties and diplomatic channels) for PRC courts to engage in evidence collection outside China, but it also adds three more options to assist the parties in gathering evidence, if not prohibited by the applicable local law. These new means include:

- when parties and witnesses are Chinese nationals, the court may entrust the Chinese embassy or consulate to obtain the evidence on its behalf;
- the parties may agree to offer evidence by instant messaging tools; and
- other approaches that are agreed upon by the parties.

It is advised that these expanded avenues are only applicable to the collection of evidence by Chinese courts from overseas, not the reverse process. When a foreign court needs to collect evidence from China, it has to make a request for judicial assistance in compliance with international treaties to which China is a party or the principle of reciprocity. On 30 March 2023, the Ministry of Justice issued Common Questions and Answers on International Civil and Commercial Judicial Assistance, in which it reiterated the restriction on foreign courts and parties collecting evidence directly from parties in China for use in foreign court proceedings.

## Clearer Standards for Refusing to Recognise and Enforce Foreign Judgments

The current CPL only contains a general provision on the enforcement of foreign judgments: an application to enforce a judgment must be reviewed in accordance with international treaties that China has ratified or participated in or based on the principle of reciprocity; and the courts should not recognise or enforce a foreign judgment conflicting with the basic principles of the PRC law, national sovereignty, national security, or public interest. The 2023 Amendments set forth four additional grounds for denying recognition and enforcement, including:

- the foreign court lacks jurisdiction to hear the case;
- the defendant was not duly summoned, given a reasonable opportunity to present its case, or properly represented by legal counsel when the defendant lacked the capacity to litigate on its own;

- the judgment was obtained by fraud; and
- a Chinese court has already ruled on the same dispute or already recognised a ruling by a foreign court on the same dispute.

These additions necessitate a more thorough examination of procedural aspects of a foreign judgment by the courts, aligning with established international standards in this regard. The Amended CPL also enhances the co-ordination of concurrent proceedings in the context of enforcement. If an application for enforcing a foreign judgment is submitted to the Chinese court handling the same dispute, the Chinese court may suspend the ongoing litigation until a decision on enforcement is rendered.

In essence, the Amended CPL reflects China's commitment to establishing an equitable and appealing legal landscape for both domestic and foreign parties involved in litigation. Although the true effect of these amendments will only be discernible after their implementation in 2024, the Amended CPL is likely to provide further flexibility, clarity, efficiency, and predictability in litigating and trying cross-border disputes in China.

## Other Trends and Developments in Litigation in 2023

### *Continued implementation of pretrial mediation in China*

The use of pretrial mediation in China was first introduced by the Supreme People's Court in 2010 as a supplementary approach to civil lawsuits, and it was subsequently incorporated into the Civil Procedure Law in the 2012 Amendment. Currently, there are primarily two methods for pretrial mediation in practice. One involves the docketing chamber judge directly facilitating mediation between the parties within a 30-day timeframe to resolve the dispute before formal docketing. The other method, known as

the alternative dispute resolution (ADR) mechanism, entails the court outsourcing mediation to a social organisation with the parties' consent.

With over a decade of implementation, pretrial mediation has gained widespread acceptance in Chinese courts, significantly enhancing the efficiency of litigation. For instance, in Shenzhen, and Guangdong, courts actively engage in pre-litigation mediation to help parties save time and resources by resolving disputes before entering formal litigation procedures. Therefore, it is advisable for parties to familiarise themselves with local court rules and be well-prepared to leverage the pretrial mediation process effectively. The parties are also reminded to assess the impact of the pretrial mediation on the statute of limitations.

### *Updated regime on heightened jurisdiction and retrial by the Supreme Court*

The Chinese court system consists of four levels of courts: the Supreme People's Court, which is the apex court, followed by the higher, intermediate, and basic people's courts, each with its own jurisdiction and responsibilities. On 28 July 2023, the Supreme People's Court issued the Guiding Opinions on Strengthening and Standardising the Work of Elevated Jurisdiction and Retrial of Cases (the "Guidelines"), which further streamlined the process of when and how a case may be sent to a higher court for adjudication in the first instance and also set forth the rules for retrial by the Supreme People's Court.

The rules concerning heightened jurisdiction are applicable to criminal, civil, and administrative cases. In these cases, higher courts have the authority to directly adjudicate eligible cases upon request from lower courts or exercising their inherent jurisdiction. These eligible cases include those of a new or complex nature, or

those that have significant legal implications for future application. Additionally, regarding retrials, the Supreme Court has reinstated its authority to determine whether a case necessitates a review or retrial, a responsibility that was previously delegated to the Higher People's Courts.

Although China's legal system is predominantly based on legal codes, judicial decisions continue to hold substantial importance by providing courts and legal practitioners with persuasive reference materials. The Guidelines represent one of several measures adopted by the Supreme Court to enhance consistency and address legal discrepancies in the application of the law.

### *Abolishment of requirement for legalisation of foreign public documents*

Starting from 7 November 2023, litigants in China will no longer be required to undergo the legalisation process for public documents obtained from foreign sources. This change is a result

of China's accession to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents (the "Apostille Convention"). Previously, documents originating or collected abroad had to undergo certification by the foreign country's diplomatic department and subsequent legalisation by the Chinese embassy or consulate before they could be accepted by Chinese courts. This procedure often led to several weeks or even months of delay. Now, with the adoption of the Apostille Convention, litigants can directly request an apostille from the relevant foreign authority, eliminating the need for the dual certification process. The Apostille Convention encompasses a wide range of documents pertinent to legal proceedings, including, among others, those issued by administrative agencies and judicial bodies, extracts and records from commercial registers, patents, notarial acts, and notarial attestations of signatures.



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