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Legal Updates

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1. Brief Comments on the Personal Information Protection Law

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On August 20, 2021, the *Personal Information Protection Law of the People's Republic of China* (the "**PIPL**") was officially promulgated, which will come into effect on November 1, 2021. The PIPL will become the first systematic and comprehensive law in China that focuses on the protection of personal information.

The final draft of the PIPL (the "**Final Draft**"), on the basis of the second reading draft (the "**Second Reading Draft**"), further strengthens the requirements for personal information protection and improves the legal bases for personal information processing. The Final Draft also emphasizes the provisions on "big data discrimination" and "right to data portability" in the context of ensuring the orderly development of the platform economy, and further strengthens protections for the rights of personal information subjects and the public interest. In addition to administrative supervision, the Final Draft also further strengthens the provisions on personal litigation rights and public interest litigation. These diversified means for personal information subjects to protect their rights will further enhance the deterrence effect of the PIPL.

However, the Final Draft also takes into account the operability and feasibility of these regulations, includes human resources management as a legal basis for processing, and adds concepts such as "small personal information handler". It moderately relaxes restrictions on processing public personal information, and improves certain provisions in light of specific scenarios.

If the Cybersecurity Law opened a new stage for personal information protection in China, the PIPL brings personal information protection into a new era. Its fundamental institutional framework and wide application will have a profound impact on the digital society, including online retail, artificial intelligence, autonomous driving, healthcare, and the Internet of Things.

We will analyze and interpret the PIPL in light of the major changes in the Final Draft.

Key revisions in the Final Draft compared to the Second Reading Draft

The key revisions in the Final Draft compared to the Second Reading Draft include the following:

- Improves the legal bases for personal information processing, includes human resources management as a legal basis for processing, and further defines the applicable scope of the legal basis for processing public information;
- Points out "big data discrimination", strengthen the supervision of automatic decision making, and protects the rights of individuals to obtain fair transaction terms;
- Further limits the conditions for processing sensitive personal information to "only for a specific purpose and sufficient necessity, and subject to strict protection measures";
- Grants individuals the "right to data portability", strengthens individuals' control over their personal information, and protects the free flow of personal information between different platforms;

- Strengthens the supervision of mobile applications;
- Raises for the first time the concept of "small personal information handler", which lays a regulatory foundation for potentially exempting small enterprises from certain personal information obligations;
- Protects individuals' litigation rights by specifying actionability when personal information handlers refuse individuals' requests to exercise their personal information rights, including consumer organizations in the public interest litigation system.

Processing based on human resources management and processing public information: further adjustments to multiple legal bases for personal information processing

The PIPL adds several legal bases for processing personal information, including "necessary to perform a contract to which an individual is a party", "necessary to perform a legal obligation", etc. This is a breakthrough compared to the Cybersecurity Law, in which consent is the only legal basis for processing. The PIPL provides more diverse legal bases for the processing of personal information. It is worth noting that while the multiple legal bases alleviate the rigid application of the "informed consent" principle, the "informed consent" requirement is, in fact, enhanced. The requirement for "consent" can only be deemed to be satisfied when the personal information subject can make a true and effective decision.

On the basis of the Second Reading Draft, the Final Draft adds human resources management as a legal basis for processing personal information, and optimizes the rules for processing public personal information.

I Human resources management

The PIPL's broad application toward a variety of personal information processing activities is reflected in the protection of employees' personal information, which has been neglected in practice and difficult to address under other laws, such as the Cybersecurity Law, the Law on the Protection of Rights and Interests of Consumers. Article 13.2 of the Final Draft further specifies that "human resources management" is a legal basis for processing personal information. However, this legal basis is strictly limited to that which is "necessary for implementing human resources management in conformity with the labor rules and regulations formulated in accordance with the law and the lawfully signed collective contracts."

The emphasis on "the labor rules and regulations formulated in accordance with the law and the lawfully signed collective contracts" reflects that lawmakers have taken into account inequalities inherent in labor relations by attempting to strictly limit the scope of processing employees' personal information, and prevent employers from over-collecting employees' personal information by invoking "human resources management". On the other hand, this provision indicates a means for employers to lawfully process employees' personal information. Employers will not need to obtain each individual employee's consent if they collect personal information in conformity with internal labor rules and regulations that have been formulated through required democratic procedures in accordance with Article 4 of the Employment Contract Law.

With the enactment of the PIPL, employers will need to pay more attention to protecting employees' personal information in the same way that they treat users' personal information. We suggest that employers improve their internal labor rules and regulations as soon as possible to include provisions on the protection of employees' personal information. Employers should also pay attention to improving the mechanism for employees to exercise their rights to personal information because the PIPL grants a wide range of rights to personal information subjects, which may become a useful source of leverage for employees in potential labor disputes.

II Rules for processing public personal information

Article 27 of the Final Draft of the PIPL permits personal information handlers to "process, to a reasonable extent, personal information that the individual himself has made public or otherwise has been lawfully made public, unless the individual expressly refuses to do so. Where a personal information handler processes any public personal information, which has a significant impact on an individual's rights and interests, the individual's consent shall be obtained in accordance with this law." Compared with the Second Reading Draft, the wording in this revised article is more consistent with Article 1036.2 of the Civil Code[1]. Therefore, if personal information handlers wish to use personal information collected from public sources, it should select information that is made public by the individual or other lawfully public information (such as relevant information lawfully made public by various government websites and information made public in public news reports).

In addition, with respect to the method of processing public personal information, Article 27 of the Final Draft significantly simplifies the content and requirements under the Second Reading Draft, which would have required personal information handlers to judge the "the purpose why the personal information was made public" or "reasonably and prudently process the personal information when the purpose is unclear". However, processing of public personal information should still be "reasonable". When determining the scope of what is "reasonable", factors should be considered such as the purpose of making the personal information public, the individual's expectation of privacy, the impact of using the public information on an individual's rights and interests, etc. Specific standards are yet to be specified by law enforcement and judicial decisions[2].

[1] Article 1036.2, under any of the following circumstances, an actor shall not bear civil liability… (2) the actor reasonably processes the information made public by the natural person himself or other information that has already been legally made public, unless the said person explicitly refuses or the processing of the information infringes on a significant interest of the person.

[2] For example, in a personality rights dispute case heard by Beijing Internet Court in 2019, the plaintiff's identification photo published on the alumni social network website was placed on the photo search results of an industry-leading search engine. The court considered the nature of the information publishing platform, and held that the plaintiff's purpose of publishing information on the social network was to socialize within a specified group of people, rather than publishing it as public information on the network. In another case, the plaintiff claimed that the website infringed his privacy and other rights by forwarding the judgment that was published on the official website for publishing court decisions. In this case, the court balanced the public interest, socioeconomic interest and individual's interest, and considered the form and purpose of how defendant's website uses the public information. The court held that the defendant did not improperly tamper with the content of the judgment published on the official website, nor did it carry out data matching and information processing for improper purposes such as collecting the credit information of natural persons and prying into personal privacy. The purpose of the defendant's website republishing was not contrary to the purpose of judicial publicity. The court ultimately did not support the plaintiff's claims. In an administrative enforcement case regarding personal information rights where a company in Hangzhou infringed a consumer's right to personal information, the law enforcement authority held that the party infringed the consumer's personal information rights, which were legally protected, by using personal information collected from Qi Cha Cha, Qi Xin Bao and other apps to carry out marketing activities without the

Big data discrimination and personalized marketing: norms and limitations for automated decision making

According to Article 73 of the PIPL, automated decision making refers to "an activity through a computer program to automatically analyze and evaluate a person's behavioral habits, hobbies, or financial, health, or credit status, etc., and to make decisions." Automated decision making is often used in information pushes, commercial marketing, credit reviews, job applicant personality assessments, employee performance assessments, etc. With respect to automated decision making, Article 24 of the PIPL requires that:

(1) The transparency of decisions and fair and just results of decisions shall be ensured, and no unreasonable differential treatment may be applied to individuals with respect to transaction terms, such as price.

(2) For information push, commercial marketing to individuals through automated decision making should also provide options that are not specific to their personal characteristics or provide a **convenient** way to refuse.

(3) For decisions that have a significant impact on an individual's rights and interests are made through automated decision making, an individual has the right to request an explanation from the personal information handler, and to refuse decisions made by the personal information handler solely through automated decision making.

I Big data discrimination

Paragraph (1), above, is mainly aimed at the much-criticized "big data discrimination." "Big data discrimination" generally refers to different pricing strategies that platforms adopt which target "frequent customers" with purchase records, users judged to be price-insensitive through big data analysis, and other specific types of individuals, which usually results in higher prices for "frequent customers" than "new customers".

Shortly before the promulgation of the Final Draft of the PIPL, the State Administration for Market Regulation promulgated the *Provisions on Administrative Penalties for Price-related Illegal Activities (Revision Draft for Comment)*[3], the *Provisions on the Prohibition of Unfair Internet Competition (Draft for Comments)*[4] and other regulations to regulate similar infringements of consumers' right to know and right to fair trade from the perspectives of price discrimination, unfair competition online, etc. The

consent of the person.

[3] Article 13 (1) of the *Provisions on Administrative Penalties for Illegal Pricing (Revision Draft for Comment)*, an e-commerce platform operator sets different prices for the same goods or services under the same transaction conditions by using big data analysis, algorithms, and other technical means based on the characteristics of consumers or other business operators such as preferences and transaction habits, as well as factors other than cost or legitimate marketing strategies.

[4] According to Article 21 of *the Provisions on the Prohibition of Unfair Internet Competition (Draft for Comment)*, an operator shall not unreasonably provide different transaction information to a counterparty with the same transaction conditions, infringe upon the counterparty's right to know, right to choose and right to fair trade, and thereby disrupt the fair market trading order by collecting and analyzing the counterparty's transaction information, browsing the content and the number of times such information is viewed, the brand and value of the terminal devices used in the transaction, etc. Transaction information includes transaction history, willingness to pay, consumption habits, personal preferences, payment ability, dependence, credit status, etc.

PIPL will also regulate differentiated pricing that makes use of users' personal information under law.

In our view, Article 24 does not explicitly prohibit enterprises from using user profiling for differentiated pricing (for example, offering cheaper prices or preferential subsidies to some new or inactive customers), but rather emphasizes that the use of such technologies should not lead to unfair results. That said, it is worth exploring further the precise boundary between differentiated sales strategies and "big data discrimination" that infringes upon personal rights and interests.

II Personalized marketing

Paragraph (2), above, applies primarily to "information push" (such as pushing various types of videos, articles, etc.) and "commercial marketing." Over the past year or so, regulatory enforcement has gradually come to focus on "targeted push" and "personalized display". The main points of concern have come to involve whether users are provided options that are not specific to their personal characteristics, the existence of mechanisms to deactivate or reject personalized options, and the actual effectiveness of those mechanisms[5]. When using users' personal information to carry out personalized display and targeted push, enterprises should respect the personal information subject's right to know (for example, through disclosure in privacy policies or by clearly identifying personalized and non-personalized content) and the right to choose (to ensure that users can refuse personalized content).

III Decisions that have a significant impact on personal rights and interests

Paragraph (3), above, emphasizes "decisions that have a significant impact on individual rights and interests". Based on EU legislation and enforcement experience, examples of significant impact on individual rights and interests include discriminatory treatment of individuals, refusal of transaction or employment opportunities, making reward and punishment decisions, and even making decisions with legal effect[6]. For such automated decision making, individuals have an "absolute right to know", i.e., the right to ask the personal information handler to explain, and a "relative right of refusal", i.e., the right to refuse to the decision if the relevant decisions are made solely on automated decision making and without human intervention. The "absolute right to know" raises questions: (i) how should we understand the relationship between "require the personal information handler to explain" and the "right of interpretation" found in Article 48; and (ii) what is the required scope of the personal information handler's explanation. The latter may further address more complex issues such as the scope of algorithmic interpretation (e.g., whether it covers data disclosure and the interpretation of fundamental principles, accountability, fairness, safety and performance, and impact, etc.), and how to ensure the comprehensiveness of the interpretation.

[5] Recently, false deactivate buttons provided along with targeted push have also been included in the scope of special improvement campaign for the Internet industry launched by the Ministry of Industry and Information Technology "The Ministry of Industry and Information Technology launches special improvement campaign for the Internet industry". Please visit: http://mp.weixin.qq.com/s/GZkFr4DVxPPRvp0_RP8mAQ.

[6] For example, in the United States, algorithms are becoming more widely used in practice to assist judges in making parole decisions and providing reference for sentencing.

Sensitive personal information processing: is separate consent the only legal basis?

Article 28 of the Final Draft designates the personal information of minors under the age of 14 as sensitive personal information, reiterating the classification of GB/T 35273-2020 *Information Security Technology – Personal Information Security Specification*. Personal information handlers can process sensitive personal information only if it is for a specific purpose and is sufficiently necessary and the handler undertakes stringent protection measures.

Notably, Article 29 of the Final Draft deletes the wording that "when processing sensitive personal information on the basis of personal consent" and stipulates only that "processing sensitive personal information requires the individual's **separate consent**, and if laws and administrative regulations provide that **written consent** is required for processing sensitive personal information, such provisions shall prevail."

There may be two ways to interpret this revision. On one hand, it can be interpreted that "separate consent" is the only legal basis for processing sensitive personal information. On the other hand, other legal bases for processing under Article 13 still apply, depending on the circumstances (subject to the conditions of specific purpose and sufficient necessary, and takes stringent protection measures). When processing sensitive personal information on the basis of consent, it is emphasized that the form of "consent" should meet the higher requirements.

We tend to think that the latter interpretation is more reasonable. This is mainly due to the broad definition of sensitive personal information under China's data law system and the PIPL's overall legislative mindset. Specifically, Articles 14 and 15 of the PIPL provide special requirements for processing personal information based on the individual's consent, such as the standard of consent (voluntary, explicit, informed), and the exclusive right when processing personal information based on consent (right of withdrawal). The other provisions in the text that refer to "consent" do not specifically restate "when processing is based on personal consent".

What "separate consent " means is another question that is worthy of discussion. This issue has not been clarified since the first draft of the PIPL. If we look at experiences abroad, the *General Data Protection Regulation* (the "**GDPR**") also distinguishes between "ordinary" consent and "explicit consent". Under the GDPR, consent should meet four conditions: "freely given", "specific", "informed" and "unambiguous"[7], which emphasizes that consent must be specific to the processing of data, rather than binding to the ability to use a product or service. For "explicit consent" required when processing special categories of personal data, in addition to the foregoing four conditions, emphasis is made that the consent must be made in an "explicit" fashion[8]. After the PIPL takes effect, enterprises can learn from the experience of GDPR to improve the "separate consent" mechanism.

[7] GDPR Preamble 32, "Consent should be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement to the processing of personal data relating to him or her, such as by a written statement, including by electronic means, or an oral statement."

[8] EDPB Guidelines for the Interpretation of Consents under GDPR (Guidelines 05/2020 on consent under Regulation 2016/679).

Portability: extraterritorial experience to be localized

Chapter IV of the PIPL stipulates that individuals have the right to know, to decide, to restrict or refuse, to access and copy, to correct and complete, to delete, and to interpret. On the basis of the Second Reading Draft, the Final Draft of the PIPL creatively adds "if an individual requests to transfer his personal information to his designated personal information handler, and if the conditions specified by the national cyberspace administration department are met, the personal information handler shall provide the means for the transfer." This right draws on the well-known right to data portability under the GDPR. Data portability aims to solve the problem of "binding" users to large platforms, to increase users' mobility between different platforms of similar products, and to promote market competition while protecting users' right to choose.

The experience of GDPR can undoubtedly be used as a reference for how to refine the right to data portability in subsequent administrative rulemakings and for how enterprises can deal with this newly added "right to data portability". Article 20 of the GDPR grants data subjects the right to data portability. Under certain circumstances, data subjects have the right to obtain or instruct the controller to transfer to another controller the relevant personal data they have provided. Such personal data should be structured, commonly used, and machine-readable. According to the provisions of GDPR and related guidelines[9].

- **Exercise of the right is conditional**: that is, the data processing is realized by automation and is based on the data subject's consent or for the purpose of contract performance. In other words, a controller is not obligated to respond to data portability requests with respect to data processed under other legal bases (for example, where it is necessary to perform statutory duties or obligations).
- **Scope of exercise is limited**: the scope of portability under the GDPR is limited to the data "provided". EU regulators tend to interpret the scope of the "provided" broadly, by including personal data the controller obtains by observing user behavior, such as activity logs, website browsing records, but not data created by the controller through subsequent analysis of user data or user behavior, such as user profiling.
- **Data format requirements**: GDPR emphasizes that the data provided by the controller should be structured, commonly used, and machine readable. Where there is no common industry format, the guidelines encourage data controllers to use common open formats such as XML, JSON, CSV, and appropriate metadata.
- **Whether a fee may be charged**: in principle, fees are not allowed for data portability, but a reasonable fee can be charged when the data subject's request is unfounded or excessive, provided that the data subject should be immediately informed of the fees.
- **Whether a request can be rejected**: In principle, a controller cannot refuse to respond to a data subject's portability request on the grounds of technical or cost barriers. It is difficult to determine

[9] 29th Working Group Guidelines for the Interpretation of Data Portability under the GDPR (Guidelines on the right to data portability under Regulation 2016/679, WP242 rev.01).

that the data subject's exercise request is beyond a reasonable limit simply because the cost of responding is too high. In addition, as industries currently process data in an automated manner, technical barriers are probably difficult to justify a rejection of the data subject's request.

At present, the Final Draft of the PIPL does not specify conditions for exercising the "right to data portability", but leaves it to the cyberspace administration department to formulate relevant rules. We believe that whether and how to implement the "right to data portability" in business practice will depend on the design of the top-level legislative system as well as exploration by market players. Only when the legislative system design is combined with industry practices can there be balance between the rights of the personal information subject and enterprise operating costs.

Mobile application-related liabilities and small personal information handlers: "more and less" in personal information protection regulation and law enforcement

Articles 61 and 62 of the Final Draft respectively provide for "more and less" in terms of the personal information protection duties of the departments implementing personal information protection, i.e., strengthening the supervision and administration of mobile applications while at the same time attempting to reduce the compliance obligations of small enterprises.

I "More" regulation: Articles 61 and 66 add application testing and evaluation as one of the duties of the personal information protection department and match the violations with penalties

Article 61 of the Final Draft of the PIPL expands the work duties of the personal information protection department by incorporating "organizing testing and evaluation of personal information protection practices within their application programs and publishing the testing and evaluation results". Accordingly, Article 66 specifically provides that "[w]here personal information is processed in violation of this Law or personal information is processed without fulfilling personal information protection duties in accordance with the provisions of this Law, the departments fulfilling personal information protection duties and responsibilities shall order correction, confiscate unlawful income, and order the provisional suspension or termination provision of the application programs unlawfully handling personal information…"

The above provisions provide a clearer higher-level legal basis for the supervision of apps and law enforcement by regulatory authorities in the past two years, and also lay a foundation for the final implementation of the *Interim Provisions on the Personal Information Protection of Mobile Internet Applications,* which has been released for public comments. It cannot be ignored that app testing and evaluation has gradually become an important means for supervising apps.

It is worth discussing whether the app testing and evaluation rules can replace the application of laws and whether the testing and evaluation results can replace legal judgments. We believe that app testing and evaluation is an efficient and convenient compliance tool, which has made significant contributions to improving the personal information protection levels in recent years. However, at the same time, we also call for the avoidance of rigid use of app testing and evaluation tools; instead, the reasonableness of the collection and use of personal information by APP should be specifically judged in light of specific scenarios.

II "Less" regulation: Article 62 stipulates that small personal information handlers will be subject to special personal information protection policies

The Second Reading Draft of the PIPL stipulates that the national cyberspace administration department will formulate special rules and standards for personal information protection in respect of processing of sensitive personal information and new technologies and applications such as facial recognition and artificial intelligence. On this basis, the Final Draft adds "small personal information handlers"[10].

Legislation abroad has long focused on how to avoid imposing too onerous a compliance burden on small enterprises, unreasonably increasing their operational costs, and avoiding curbing innovation. We are glad to see that the Final Draft responds to this question. We anticipate that future regulations may be in place to exempt small enterprises from certain personal information protection obligations.

Traces of this provision are found in laws abroad. For example, the California Consumer Privacy Act (the "**CCPA**") of the United States clarifies the scope of enterprises subject to the CCPA in terms of revenue, source of income, and amount of personal information, etc. Only those companies with annual revenue of $25 million, or processing 50,000 pieces of personal information, or 50% of annual revenue from the sale of personal information will be subject to the CCPA. Article 30 of the GDPR, in principle, exempts enterprises or organizations with fewer than 250 employees from the obligation to record personal data processing activities.

Personal litigation rights and public interest litigation: coping with personal information related litigation

Article 50 of the Final Draft adds "where personal information handlers reject individuals' requests to exercise their rights, individuals may file a lawsuit with a People's Court in accordance with law." This provision specifies that individuals have a series of litigation rights where personal information handlers deny the personal information subjects exercise of the right to know, to decide, to restrict or refuse, to access and copy, to data portability, to correct and complete, to delete, and to interpretation. According to the PIPL, which will enhance the types of civil litigation related to infringement of personal information rights.

In addition, Article 70 of the Final Draft also adds consumer organizations prescribed by law to those organizations that can file public interest lawsuits in matters relating to personal information infringement in accordance with the law.

These provisions related to litigation rights will no doubt provide more channels for lawsuits related to personal information infringement, in addition to the E-commerce Law and the Law on the Protection of Consumer Rights and Interests. When responding to supervision and law enforcement in the future, enterprises can expect to face increased pressure from personal information protection litigations from

[10] Article 62 of the PIPL stipulates that the national cyberspace administration department shall coordinate with the relevant authorities to promote the following personal information protection work in accordance with this law… (2) Formulate special rules and standards for personal information protection in respect of processing of sensitive personal information and new technologies and applications such as face recognition and artificial intelligence.

individuals, state organs, and consumer protection organizations, among others. It will be challenging for relevant enterprises to respond to such actions.

Summary and outlook

Prior to the PIPL, personal information protection was severely restricted due to an inadequate legal foundation, despite regulatory authorities having significantly strengthened the supervision and law enforcement of personal information protection in the past two years and the increased frequency of personal information-related litigation. This is reflected in the following situations.

- Limited scope of personal information protection. The previous personal information protection legislation has primarily consisted of the Cybersecurity Law and the Law on the Protection of Consumer Rights and Interests, which mainly target network services and consumer protection scenarios and cannot address the offline collection of personal information, especially employees' personal information protection scenarios.
- Relatively weak law enforcement. Although the law enforcement activities are frequent, most have focused on announcements, warnings, or small fines.
- Limited personal rights. The rights of personal information subjects have mainly focused on the right to know, to access, to correct, to delete, etc. Other personal information subject rights have lacked a basis at the legislative level and there has been insufficient protection of personal litigation rights.

The PIPL addresses these issues by providing systematic provisions on the compliance requirements for the following matters: all personal information processing throughout the data life cycle, the rights of personal information subjects, division of work and cooperation between regulatory authorities, personal litigation rights and public interest litigations, the effectiveness of extraterritorial application, and the cross-border transfer of personal information. Moreover, the PIPL will significantly increase the intensity of law enforcement and punishment. Going forward, we will undoubtedly see significant increases in the complexity of personal information protection, law enforcement efforts, and the frequency of lawsuits.

Notably, the PIPL will enter into force only two months following its promulgation, which reflects lawmakers' eagerness to have the PIPL come into effect as soon as possible. However, this short interval for preparation undoubtedly presents a significant challenge, both for enterprises and legal practitioners. In this regard, we suggest that enterprises in all industries attach great importance to personal information protection, comprehensively determine their personal information processing activities, and establish and improve personal rights protection mechanisms to avoid major compliance risk exposures. At the same time, we also hope that regulatory authorities will gradually promote enforcement of personal information protection provisions and provide time for enterprises and legal practitioners to study and adapt to the new law, so as to achieve an organic balance among personal information protection, healthy industry development, and stable market operations.

2. A Review of the Arbitration Law (Revision Draft for Comment)

Author: Dispute Resolution Department[11]

Arbitration, a universally adopted dispute resolution mechanism, plays an important role in China's alternative dispute resolution system. The *Arbitration Law of the People's Republic of China* (the "**Arbitration Law**"), which was adopted in 1994, appears incompatible with the latest arbitration practice that has evolved along with China's economic development. Amendments to the Arbitration Law adopted in 2009 and 2017 made only minor changes to several of its provisions, far from satisfying needs in practice. On July 30, 2021, the Ministry of Justice issued for public comments a revision draft to the Arbitration Law[12] (the "**Revision Draft**"), with a view toward making significant changes to the law. This article provides a brief review of some of the proposed revisions and analyzes their potential impacts.

Establishment of the seat of arbitration standard

International arbitration commonly adopts the seat of arbitration standard. That is, the seat of arbitration determines matters such as the nationality of the arbitral award and the competent court to set aside the arbitral award. China has adopted the "institutional standard" in its laws for historical reasons. Judicial practice, however, has supported a shift toward the seat of arbitration standard. For example, a Chinese court has held that an ICC award rendered in Singapore was a Singaporean award rather than a French award[13]. In another case, a court in Guangzhou held that an ICC award made in Guangzhou was a Chinese foreign-related award[14]. Under the regime proposed in the Revision Draft, awards rendered in China by foreign arbitral institutions would be considered Chinese awards subject to domestic judicial review. The Revision Draft would establish the "seat of arbitration standard" to directly bridge the gap between the law and judicial practice for international commercial arbitration.

The seat of arbitration, as a legal concept, is distinguished from the venue of an arbitration hearing. According to the Revision Draft, if a party disputes the tribunal's decision on the validity of an arbitration agreement or the tribunal's jurisdiction, it must submit the case to the court of the seat of arbitration for review (Article 28). In addition, the court of the seat has jurisdiction to order interim measures (Article 46), to set aside an award (Article 77), and to assist in forming an *ad hoc* arbitral tribunal as well as to decide on challenges to arbitrators (Article 92). Parties should pay attention to the choice of the seat of arbitration when drafting arbitration clauses—choose a jurisdiction with a mature arbitration practice and

[11] Contributed by Xianglin CHEN, Denning JIN, Ronghua LIAO, Yuxian ZHAO, Haoyang MA, Jingru WANG.

[12] Circular of the Ministry of Justice on the Opening for Public Comments the Arbitration Law of the People's Republic of China (Revision Draft for Comment) (Min. Justice; issued July 30, 2021 for public comment until August 29, 2021), *available at* http://www.moj.gov.cn/pub/sfbgw/lfyjzj/lflfyjzj/202107/t20210730_432967.html.

[13] Reply of the Supreme People's Court to the Request for Instructions on Application for Recognition and Enforcement of a Foreign Arbitral Award in the Case of DMT Ltd. (France) (Applicant) v. Chaozhou City Huaye Packing Materials Co., Ltd. and Chao'An County Huaye Packing Materials Co., Ltd. (Respondents), http://www.pkulaw.cn/fulltext_form.aspx/pay/fulltext_form.aspx?Db=chl&Gid=bd44ff4e02d033d0bdfb.

[14] Brentwood Industries (US) v. Guangdong Faanlong Machinery Engineering Co., Ltd., Guangzhou Zhengqi Trading Co Ltd. and Guangdong Environmental Engineering Equipment Corporation, (2015) Sui Zhong Fa Min SI Chu Zi No. 62 (Guangzhou Interm. People's Ct. August 6, 2020), *available at* https://law.wkinfo.com.cn/judgment-documents/detail/MjAzMTk1NjMzOTE%3D?searchId=b8d0f0a56a624d968cc3b76aeba307ac&index=1&q=%E5%B8%83%E5%85%B0%E7%89%B9%E4%BC%8D%E5%BE%B7&module=.

an experienced arbitration-related judiciary to make full use of the court's support and supervision.

Arbitration jurisdiction concerning principal and accessory contracts

Article 24 of the Revision Draft provides that a principal contract will prevail if it contains an arbitration clause inconsistent with its accessory contract, and the arbitration clause of the principal contract covers disputes under the accessory contract. If the accessory contract does not contain an arbitration clause, parties to that contract will also be bound by the arbitration clause of the principal contract.

It is worth noting that Article 21 of the *Interpretation of the Supreme People's Court on Application of the Security System under the Civil Code of the People's Republic of China* (the "**Interpretation**") provides that "where an arbitration clause is stipulated in a principal contract or a security contract, the people's court shall have no jurisdiction over disputes between the parties to the contract that stipulates an arbitration clause"; "where a creditor brings a lawsuit against the security provider separately under the law and the creditor only sues the security provider, the competent court shall be determined by the security contract." This provision treats as distinct the dispute resolution clauses of a principal contract and its accessory contract.

The Revision Draft would change this approach. Under the Revision Draft, the effect of an arbitration clause in the principal contract would extend to the accessory contract, and courts would have no jurisdiction over either the principal contract or the security contract, regardless of whether the security contract contains an arbitration clause. Thus, contrary to Article 21 of the Interpretation, the creditor would be required to initiate arbitration against the security provider if the principal contract contained an arbitration clause, even in cases where the creditor only filed claims against the security provider. While the Revision Draft aims to provide a pro-arbitration regime to deal with inconsistent dispute resolution clauses in principal and accessory contracts, the complete denial of the independence of the accessory contract's dispute resolution clause could inconvenience the parties if, as in this instance, the creditor only sought remedies against the security provider.

Derivative arbitration on behalf of a corporation/limited liability partnership

Chinese law provides for derivative suits on behalf of companies and limited liability partnerships, respectively, at Article 151 of the *Company Law of the PRC* and at Article 68 of the *Partnership Law of the PRC*. Shareholders or limited partners may file lawsuits against third parties on behalf of the company or the limited liability partnership in certain circumstances. However, where an arbitration agreement is concluded between the company or limited partnership and the third party, it is unclear whether shareholders or limited partners are bound by the arbitration agreement and may initiate derivative arbitration. Article 25 of the Revision Draft provides that shareholders of a company and limited partners of a partnership would be bound by the arbitration agreement between the company/partnership and the third party when seeking remedies against the third party on behalf of the company/partnership under the relevant law.

Arbitration agreements valid in the absence of a clear choice of arbitration institution

Article 35 of the Revision Draft provides that a party's application for arbitration must contain an arbitration agreement, specific claims with facts and reasons, and matters in dispute arbitrable under the Arbitration Law. Compared with the Arbitration Law, the Revision Draft would no longer require an arbitration agreement to contain a "chosen arbitration committee." This provision is in concert with the provision concerning the foreign-related *ad hoc* arbitration (Article 91). Meanwhile, it lifts the restriction on the validity of arbitration agreements in the absence of a clear choice of arbitration institution. According to the Revision Draft, even if the parties cannot reach a supplementary agreement as to the choice of arbitration institution, they may apply for arbitration to the institution located at the parties' common domicile. If the parties do not have a common domicile, the institution outside the parties' domiciles that first dockets the case would have the right to arbitrate the case (Article 35). However, this first-to-docket concept lacks sufficient clarity. Different institutions may have different standards in practice for case docketing and practitioners may argue for different interpretations. Thus, this provision could trigger procedural disputes in the absence of a clear definition of the first case docketed and a method to deal with disputes over the timing of case registrations.

Tribunal's competence to decide its jurisdiction

Article 28 of the Revision Draft provides that the arbitral tribunal is empowered to determine its own jurisdiction to hear the case or the validity of the underlying arbitration agreement, if either party raises an objection in this regard. Before the tribunal is constituted, the arbitral institution may decide whether to proceed with the arbitration proceedings based on *prima facie* evidence. Courts may not take challenges made directly by a party without the tribunal or institution's prior determination of these issues. First, the Revision Draft would give discretion to the tribunal to determine jurisdiction, rather than the institution. Next, the Revision Draft fully endorses the "competence-competence" doctrine, a remarkable development in arbitration law. Under the Arbitration Law, if one party requests the institution to determine the tribunal's jurisdiction while the other party requests a court to do so, the power to make the decision rests with the court. In addition, under the Arbitration Law, upon the court's notice of a party's challenge to the tribunal's jurisdiction, the institution must suspend the arbitration proceedings. However, the Revision Draft sets forth a mechanism whereby the court's review of the jurisdictional challenge would not interrupt the arbitral proceedings.

Interim and partial awards

Article 74 of the Revision Draft provides that, "in arbitrating a dispute, if part of the facts involved has already become clear, the arbitral tribunal may first make a partial award in respect of such part of the facts. In arbitrating a dispute, if a disputed matter affects the progress of the arbitration proceeding or needs to be clarified before the final award, the arbitral tribunal may make an interim award in respect of that matter." Article 55 of the Arbitration Law allows partial awards on some of the facts that have been discovered; however, in practice, tribunals are reluctant to make partial awards. The availability of partial awards enhances the efficiency of arbitration, as it allows the parties to promptly realize the benefits that have been determined by an award. The Revision Draft reaffirms the norm of partial awards and would

add interim awards as new tool. The Revision Draft would require parties to perform partial and interim awards and entitle winning parties to apply to courts for enforcement of partial awards. This would empower tribunals to render partial and interim awards in practice, giving full play to the characteristics of arbitration and facilitating the efficient resolution of disputes.

Establishment of foreign-related ad hoc arbitration

Article 91 of the Revision Draft would enable the parties to refer foreign-related commercial disputes to a "specified arbitral tribunal", also known as an "*ad hoc* arbitral tribunal". *Ad hoc* arbitration is the "original" form of arbitration, whereby the parties, according to an arbitration agreement (clause), select arbitrators to form an arbitral tribunal on an *ad hoc* basis after a dispute has arisen. The *ad hoc* tribunal is only responsible for adjudicating the case and will dissolve itself once the adjudication is completed by rendering an award. *Ad hoc* arbitration is commonly used in the international community and is recognized by national laws and international conventions. As a contracting state to the New York Convention, China recognizes and enforces foreign *ad hoc* arbitral awards. The establishment of *ad hoc* arbitration framework in the Arbitration Law would reflect the equal treatment of domestic and foreign arbitrations. Notably, according to the Revision Draft, *ad hoc* arbitration would be available only for "foreign-related commercial disputes", not domestic commercial disputes.

Conducting an *ad hoc* arbitration smoothly relies on the cooperation of the parties. Otherwise, the parties could easily reach an impasse in the proceedings in the absence of institutional management. If the parties choose to arbitrate on an *ad hoc* basis, they should cautiously devise and agree upon the procedural rules or procedural matters in advance. In the event of an impasse regarding the constitution or challenge of the tribunal, the parties may appoint an arbitration institution to decide or request assistance from a court (Article 92).

Improvements to the interim measures regime

The Revision Draft would make the following improvements to the existing provisions on interim measures:

I Empower arbitral tribunals to order interim measures (Article 43)

Under the Arbitration Law, courts enjoy exclusive jurisdiction over applications for interim measures, increasing the cost of communication among the court, the arbitration institution, and the parties. This approach does not meet the parties' expectation for efficient dispute resolution. Allowing the arbitral tribunal to issue interim measures is consistent with the logic of arbitration. The tribunal is more familiar with the case and is in the best position to decide whether an appropriate interim measure is required. By contrast, a court lacks knowledge of the case and will face a dilemma—conduct a speedy review that may result in improper decisions or conduct a comprehensive review that could undermine efficiency. In addition, considering the urgency of interim measures, it is more efficient for arbitral tribunals to make these decisions, thereby obviating the need to refer the case to a court.

II Broaden the types of interim measures

The Arbitration Law only stipulates the preservation of property and evidence, but not behaviors. The

Revision Draft further enables the court/tribunal to require a party to do or cease certain activities. The tribunal or the court can also order other short-term measures it deems necessary (Article 43), such as maintaining the status quo. The availability of such measures enables the tribunal and the court to better protect the parties' interests.

III Establish the emergency arbitrator mechanism (Article 49)

Current arbitration rules allow the parties to appoint an emergency arbitrator to decide on urgent issues[15]. In practice, an emergency award rendered by an emergency arbitrator in a BAC-administered arbitration has been enforced by the High Court of Hong Kong[16]. The SAC has also made similar decisions. The provisions of the Revision Draft would not only provide a legal basis for the arbitration rules but also facilitate the use of the emergency arbitrator mechanism in practice, furthering the efficiency of arbitration. Under the Revision Draft, if the parties intend to apply for interim measures before the constitution of the arbitral tribunal, they may appoint an emergency arbitrator under the relevant arbitration rules. This improvement of the interim measures system is expected to allow the emergency arbitrator mechanism to play a greater role in domestic arbitrations.

More flexible rules of evidence

The following two aspects reflect more flexible rules of evidence:

I Examination of evidence

Article 45 of the Arbitration Law provides that "the evidence shall be presented during the hearings and may be examined by the parties." Before the implementation of the Arbitration Law, there was no fixed procedure for examining evidence in Chinese arbitration proceedings; after the implementation of the law, examining the evidence became mandatory. The Revision Draft would allow the parties or the tribunal to devise appropriate procedures for examining evidence (Article 63), which may simplify the examination procedure and enhance the efficiency of the arbitration.

II Allocation of the evidential burden

Article 43 of the Arbitration Law provides the principle that the parties must provide evidence to support their arguments. In practice, however, the cost and difficulty of obtaining evidence could be unequal. Rigid adherence to this principle could cause injustice in substantive aspects. The Revision Draft would empower the tribunal to judge the validity and reliability of the evidence and reasonably allocate the burden of proof between the parties (Article 63). This provision would encourage the tribunal to exercise its procedural discretion to level the parties' playing field in obtaining and presenting evidence. Under the framework of the Revision Draft, the tribunal is well placed to review a party's application

[15] See e.g., Annex 3 of the China International Economic and Trade Arbitration Commission Arbitration Rules (2015); Article 63 of the Beijing Arbitration Commission Arbitration ("**BAC**") Rules (2019); Article 69 of the Shanghai Arbitration Commission ("**SAC**") Arbitration Rules (2018); Article 21of the Shanghai International Arbitration Center's China (Shanghai) Pilot Free Trade Zone Arbitration Rules (2015).

[16] First Emergency Arbitrator Proceeding in the jurisdiction of PRC: Reflections on How to conduct an EA Proceeding from Procedural and Substantive Perspectives, Wei Sun, Sept. 1, 2018, *available at* https://www.bjac.org.cn/news/view?id=3273.

for document production by the other party and to make an adverse inference against the requested party on substance if it refuses to comply with the tribunal's order for document production. Most institutional arbitration rules grant tribunals broad discretion concerning evidence, and relevant judicial interpretations of the Supreme People's Court suggest the courts' positive attitude toward tribunals' ordering parties to provide evidence[17]. That said, in practice, tribunals generally hesitate to render document production orders due to concerns that the parties could challenge such orders in court. The Revision Draft would eliminate such concerns and pave the way for tribunals to allocate the evidential burden.

Notwithstanding the aforesaid improvements, Article 61 of the Revision Draft would reserve the tribunal's right to "collect" evidence on its own. The scope of such right is not entirely clear. The tribunal could be prejudiced by first impression if it exercises such right improperly, which could to some extent undermine the parties' right to be heard.

Reconsideration of decisions to set aside awards

According to the Revision Draft, if a party is dissatisfied with a court decision on the validity of the arbitration agreement or a jurisdictional challenge, it may apply for reconsideration by a court at a higher level (Article 28). In addition, the Revision Draft would also enable a party to apply for reconsideration by a court at a higher level against a ruling to set aside an arbitral award (Article 81). The inclusion of this provision may come from the lower courts' practice of seeking approval from higher courts to set aside awards[18]. Legislation of such practice can enhance the transparency of judicial supervision of arbitration and secure the parties' right to participate in review proceedings. It is worth noting that if a court decides to set aside an arbitral award, it must report the decision to the higher court on its initiative, pursuant to the currently effective *Relevant Provisions of the Supreme People's Court on Issues concerning Applications for Verification of Arbitration Cases under Judicial Review*. It is unclear under the Revision Draft whether the courts would still need to report to a higher court if none of the parties apply for reconsideration. From a pro-arbitration perspective, we believe that the courts must still do so. This new right to reconsideration would merely allow the parties to participate in the review process in order to guarantee their right to be heard and to further increase the transparency of the review process.

Improvements to the jurisdiction of enforcing arbitral awards

Article 86 of the Revision Draft provides that "where a party requests the enforcement of an arbitral award

[17] Provisions of the Supreme People's Court on Several Issues Concerning the Handling of Cases of Enforcement of Arbitration Awards by People's Courts, Article 16:Where the following conditions are met, the people's court shall identify the establishment of the circumstance that "the other party has concealed any evidence to the arbitration agency that is sufficient to affect fair judgment" prescribed in Item 5 of Paragraph 2 of Article 237 of the Civil Procedure Law:(1) The evidence is the main evidence of identifying the basic facts of the case; (2) The evidence is only available to the other party but not submitted to the arbitration tribunal; or (3) It is learned of the existence of the evidence during the arbitration, and the other party is required to produce it or the arbitration tribunal is requested to order the other party to produce it, but the other party fails to produce it without justifications. If one of the parties conceals the evidence it holds during the arbitration, after the arbitration award is made, the people's court shall not support the application for non-enforcement of the arbitration award on the grounds of the evidence concealed by the said party affecting the fairness of the arbitration.

[18] Explanation of the Arbitration Law of the People's Republic of China (Revision Draft for Comment), *available at* http://www.moj.gov.cn/pub/sfbgw/zlk/202107/t20210730_432965.html.

in force, the party shall apply directly to a foreign court with jurisdiction for recognition and enforcement if the party against whom enforcement is sought or the property thereof is not within the territory of the People's Republic of China." Article 87 provides that "for foreign awards requiring recognition and enforcement by PRC courts, the parties shall apply directly to the intermediate court of the place of domicile of the party against whom enforcement is sought or the place where its property is located. If the party against whom enforcement is sought or its property is not in the territory of the PRC, but its case is related to a case before a PRC court, the party may apply to such court. If the party against whom enforcement is sought or his property is not within the territory of PRC, but its case is related to an arbitration case within the territory of PRC, the party may apply to the intermediate court at the place where the related arbitration institution is located or at the seat of arbitration. The PRC court shall proceed under the international treaties concluded or participated by the PRC, or the principle of reciprocity."

The foregoing articles incorporate the provisions of Article 280 of the *Civil Procedure Law of the People's Republic of China* and Article 3 of the *Provisions of the Supreme People's Court on Several Issues Concerning the Judicial Review of Arbitration Cases*. There is no need to refer to the Civil Procedure Law. Moreover, the provision adopted by the judicial interpretation is confirmed by the law, which further improves the enforcement legal mechanism.

In addition to the above, other notable changes in the Revised Draft include the unification of the standards for judicial review of domestic and foreign-related arbitral awards as well as the shortening of the time for challenging an arbitral award from six months to three months. In summary, the Revision Draft, while retaining the distinction between domestic and foreign arbitration, responds to difficult issues in practice by, for example, empowering third parties to file objections regarding the subject matters of enforcement, clarifying the ranking of arbitration clauses in principal and accessory contracts. It also incorporates useful experiences from international arbitration by, for example, empowering arbitral tribunals to issue interim measures. Although the Revision Draft is still at the consultation stage and is not yet effective, it already reflects the legislative intent of supporting arbitration, enhancing the flexibility and efficiency of arbitration, and aligning with international standards. These are encouraging signals for the development of the arbitration community and the optimization of the business environment.

Important Announcement

This Newsletter has been prepared for clients and professional associates of Han Kun Law Offices. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

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