

# Non-existence of Contract: An Often Raised Challenge at Recognition and Enforcement Stage in China

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When applicants seek recognition and enforcement (“R&E”) of foreign arbitral awards in PRC courts, a challenge often raised by respondents is the non-existence of the main contract between the parties, where the arbitration agreement is contained. Respondents contend that the contracts provided by the applicants as the basis for arbitration are not authentic or duly executed, thus non-existent. In particular, the lack of an original copy, of the signature by an officer authorized to sign the particular contract, and of an official stamp of the company being affixed may all call into question the authenticity and existence of the main contracts and, consequently, the arbitration agreement included therein. The note takes a closer look at the facts and the reasoning employed by PRC courts in relevant cotton arbitration cases, intending to show how PRC courts approached the issue of non-existence in R&E proceedings due to negligence occurring during execution of contracts.

### ***Allenberg Cotton v. Jiangsu Nijiaxiang Group (2013) Wuxi, Jiangsu***

Allenberg Cotton (“Allenberg”) applied to enforce an International Cotton Association (“ICA”) award (A01/2010/80) against Jiangsu Nijiaxiang Group (“Nijiaxiang”) before the Wuxi Intermediate People’s Court.

**Background:** The dispute arose out of a sales contract (No. 395080). The parties listed in this contract were Allenberg and Nijiaxiang, but the contract was only signed by a person named Zhang Yongzhong and not stamped by Nijiaxiang. Zhang was the general manager of Tiangong, a subsidiary of Nijiaxiang. In the past, Zhang signed one contract (No.381950) on behalf of Nijiaxiang and several contracts on behalf of Tiangong, with Allenberg. All these contracts had original paper copies and were respectively stamped by Tiangong and Nijiaxiang. However, Contract 395080 as submitted by Allenberg was a fax copy and Zhang denied that the signature was genuine.

**Court decision:** The court held that, first, Allenberg failed to provide further proof to establish authenticity of Zhang’s signature on Contract 385080. In particular, when the court asked if Allenberg wanted to apply for technical verification of the signature, Allenberg refused to do so. Second, all the previous undisputed contracts between Tiangong/Nijiaxiang with Allenberg were executed by placing Zhang’s signature as well as the company stamp on printed copies of contracts. In contrast, Contract 395080 was a fax copy with only Zhang’s signature, a notable deviation from the past practices. Thus, the court was unable to ascertain whether there was an arbitration agreement between the parties.

Further, the court proceeded to conclude that, under English law, even if Zhang's signature on Contract 395080 was authentic, Allenberg failed to prove that Zhang was authorized to sign the contract on behalf of Nijiaxiang. The main reasons relied by the court were: (i) Allenberg failed to prove that Zhang was expressly authorized by Nijiaxiang; (ii) based on past practices, Allenberg should check if Zhang was authorized or should request Nijiaxiang to stamp the contract; (iii) except for Contract 381950 (which was also stamped), Zhang had never represented Nijiaxiang in dealing with Allenberg; and (iv) Nijiaxiang declined to ratify Zhang's signature by applying for non-recognition.

On these grounds, the court concluded that there was no arbitration agreement and the condition for an arbitration agreement set forth in Article II of the New York Convention was not met. Thus, in accordance with Article V.1(a) of the Convention, the court refused to recognize and enforce the ICA award.

In another case ***Louis Dreyfus v. Jiangsu Nijiaxiang Group*** (2013) Wuxi, Jiangsu, the factual background and the court's ground for non-recognition were almost the same.

### ***ECOM Agroindustrial Asia v. Qingdao Golden Yangtze Group Penglai Textile (2014) Yantai, Shandong***

ECOM Agroindustrial Asia ("ECOM") applied to enforce an ICA award against Qingdao Golden Yangtze Group Penglai Textile ("Golden Yangtze") before the Yantai Intermediate People's Court.

**Background:** The dispute arose out of a sales contract and the corresponding confirmation letter between ECOM and Golden Yangtze, both signed and stamped. However, the contract was sent through faxing so there was no original copy. During the R&E proceeding, Golden Yangtze categorically denied the authenticity of the signature and stamp on the copy. ECOM did not provide supplementary evidence in response. Instead, ECOM argued that the authenticity of the contract was a matter of substantive law and should only be decided by the ICA tribunal and not the Chinese court.

**Court Decision:** The court reasoned that it had the power to determine whether there was an arbitration agreement and whether it was valid on the basis of evidence. In this case, the dispute was whether the signature on faxed copy was genuine or not. This could only be ascertained by analyzing the faxed copy and other evidence materials provided by the parties. As ECOM failed to provide any other evidence materials except for the faxed copy and an ICA statement, there was not sufficient evidence to establish that there was any arbitration agreement between the parties. Hence, the application by ECOM did not meet the requirement set forth in Article II of the New York Convention and should be denied.

In contrast, in ***ECOM USA v. Foshan Nanhai Zhaoli Cotton Spinning*** (2014) Foshan, Guangdong, the court upheld the authenticity of a contract only with a fax copy because ECOM used a witness to prove the signing of the contract, whose testimony was supported by the fax number and time of transmission on the fax copy.

### ***Compass Cotton B.V. v. Shandong Yanggu Shunda Textile Co., Ltd (2014) Liaocheng, Shandong***

Compass Cotton B.V. ("Compass Cotton") applied to enforce an ICA award against Shandong Yanggu Shunda Textile Co., Ltd ("Shunda") before the Liaocheng Intermediate People's Court.

**Background:** The dispute arose out of a sales contract between Compass Cotton and Shunda, concluded with the help of an agent company in Shanghai. Compass Cotton only had a fax copy of the contract, signed by a person named Zhang Jie and stamped. Along with other challenges, Shunda also

contested the existence of the contract. In particular, Shunda provided payroll and social security records to prove Zhang was not an employee of Shunda and sample contracts to show the stamp on the contract was not the official and registered stamp of the company. In response, Compass Cotton submitted a group of supplementary evidence. First, Compass Cotton provided two contracts between Shunda and two international companies, which were executed in the same pattern, i.e. signed by Zhang and affixed with the unofficial stamp, and records from the Qingdao Customs showing that one of the two contracts was actually carried out by Shunda and Shunda used to recognize such contracts. Second, Compass Cotton provided webpages where Zhang was listed as a representative of Shunda. Third, Compass Cotton provided Shandong precedents to establish that using an unofficial stamp did not affect the contract's validity in international trade. In addition, the court, at the request of Compass Cotton, interviewed Zhu Xuesong, executive director of the agent company in Shanghai.

**Court decision:** The court affirmed the existence of contract between Compass Cotton and Shunda based on the testimony of Zhu Xuesong and the supplementary evidence submitted by Compass Cotton. As the court also found other issues in Compass Cotton's favor, it recognized the ICA award in the end.

### **Suggestions for Executing Contracts**

As analyzed above, arbitral awards may be denied recognition in China for omissions made during execution of the sales contracts. By observing some simple precautions, the possibility of non-recognition can be dramatically reduced.

#### *(a) Legal Representative*

Every company in China has a registered legal representative, either the general manager (CEO) or chairman of the board of the company. The legal representative, as the title indicates, does not need any further authorization to represent the company. On the other hand, other directors, officers or employees of a company can only represent the company within their respective authorizations. Thus, it is always a good idea to request the legal representative of a Chinese trade partner to sign the sales contract. If a person other than the legal representative is signing the contract on behalf of a Chinese company, it is prudent to request for a power of attorney.

#### *(b) Official Stamp*

Every company in China has an official stamp, which is registered at the local Administration of Industry and Commerce. Companies, however, may use other unofficial stamps, such as so-called accounting stamps, trade stamps, etc. Even if not signed or signed by a person other than the legal representative, a contract affixed with the official stamp is usually sufficient to bind the company. It's prudent to request a Chinese trade partner to affix its official stamp on the contract.

#### *(c) Keep records*

Although, execution of contracts by faxing executed copies or emailing scanned copies can be more efficient, it could be relatively hard to verify the authenticity of signatures and stamps on these copies. Records such as original fax transmission pages (showing fax number and transmission time) and email correspondences should be kept for future possible use as evidence. Similarly, it would be a good idea to keep records evidencing prior transactions with repeat trade partners.