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New Evidence Rules Allow Document Production in China

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Document production in China – getting to maybe

Document production (also known as "discovery") is still a very foreign concept in China's civil law court system. The traditional notion of "*who claims, proves*" ("*???????*") in China's Civil Procedural Law has ingrained in people's mind that one has to prove its case by its own evidence. While the courts were given certain discretion to investigate the facts in dispute and collect evidence (including ordering provision of evidence by a party) under the Civil Procedure Law, before 2015, there was no legal basis for a Chinese court to grant an application by one party for the production of evidence by another.

An important step was taken in January 2015 when the Supreme People's Court (**SPC**) adopted the "Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China" (**CPL Interpretation**). Under article 112 of the CPL Interpretation, a party has the right to apply to the court for an order requiring the opposing party to produce documentary evidence "*under the opposing party's control*." The CPL Interpretation, however, did not provide any guidelines on the criteria for the application and execution of such order. Consequently, document production applications remain rare in Chinese litigation.

On 5 February 2015, the China International Economic and Trade Arbitration Commission (**CIETAC**) published Guidelines on Evidence. The Guidelines introduced a set of rules akin to those in the IBA Rules on the Taking of Evidence in International Arbitration. These guidelines, however, are binding only if the parties expressly agree to adopt these rules, which rarely happened in practice.

The Judicial Committee of the Supreme Court of the People's Republic of China enacted the Amendments to Several Provisions of the Supreme People's Court on Evidence for Civil Litigation at its 1777th session on 14 October 2019 (the **New Rules of Evidence**). These were formally promulgated on 25 December 2019 (Fa Shi [2019] No. 19). The New Rules of Evidence signal another step towards the PRC legal system's adoption of international practices and is a welcome step towards creating an environment conducive to the most-commonly accepted international arbitration practices. In this article, we examine the key guidelines for document production and the likely impact on arbitration practice in mainland China.

Adoption of detailed guidelines for document production

For the first time, the New Rules of Evidence provide user-friendly, detailed guidelines for the courts and parties, thus paving the way for document production to become more prevalent in PRC litigation.

Under 45 of the New Rules of Evidence, an application for document production shall include the following:

- the name of the documentary evidence requested or a description of its content;
- the fact to be proven by such documentary evidence and the materiality of such fact;
- the reason why such documentary evidence is believed to be under the requested party's control; and
- the reason why such documentary evidence should be produced.

Under Article 46, the court may deny an application if:

- the request lacks specificity;
- the requested documentary evidence is not necessary to prove the relevant fact;
- the facts proposed to be proven by the documentary evidence requested are "not material to the court's judgment";
- the requested documentary evidence is not within the requested party's control; or
- the requested documentary evidence does not fall within the scope of Article 47 (as discussed below).

Article 47 sets out the types of documents that can be subject to a request for production. Such documents include:

- evidence to which a party has referred in court proceedings as being in its control;
- evidence created for the benefit the other party (i.e. the applicant);
- evidence that the applicant is legally entitled to access or obtain;
- account books and original vouchers for book-keeping; and
- other documentary evidence which the court considers should be produced in appropriate circumstances.

Article 47 also provides that where state secrets, trade secrets, personal privacy of the parties, or documents that should be kept confidential under provisions of the law are produced, "examination of the document shall not be conducted openly." This shows that privacy, confidentiality, and state or commercial secrecy are not always sufficient grounds in themselves for objecting to a document production request under the New Rules of Evidence.

Article 48 of the New Evidence Rules reaffirms the CPL Interpretation rule that the court has discretion to draw adverse inferences if a party fails to produce documentary evidence ordered by the court without good reason.

Article 99 of the New Evidence Rules clarifies that the provisions applicable to "documentary evidence" also apply to "audio and video materials" and "electronic data." This allows a party to request the other party's production of evidence in such forms, using the mechanism set out in the New Evidence Rules for requesting and producing documentary evidence.

Impact on conduct of arbitration proceedings in China

Under the previous PRC rules of evidence, the concept of having an opposing party produce evidence in support of another's claim was entirely alien and counterintuitive. With the New Rules of Evidence, parties in China court proceedings will soon realise the power of such a tool and the impact it could have on the outcome of their cases. With rules of document production now officially recognised as part of the PRC courts' procedural rules, we would expect a resulting impact on arbitration practice in China.

As document production gradually becomes more common in Chinese court proceedings, Chinese parties may become more cooperative regarding document production in domestic and international arbitration. It is not uncommon for a country's arbitration practice to be influenced by its litigation practice. With parties becoming more and more familiar with the concept and procedure of document production, counsel in domestic and international arbitrations involving Chinese parties should find it easier to work with their clients when it comes to document production.

The New Rules of Evidence indicate that documentary evidence involving state and commercial secrets can be produced in court proceedings, subject to a requirement that the examination of such documents be conducted in private. Given that the confidentiality of international arbitration can certainly afford similar protection, we anticipate that arbitral tribunals will also be more willing to order production even where the requested party objects on grounds of commercial or state secrecy.

Finally, court-ordered evidence production in support of commercial arbitrations in China may become available. We have seen some US courts allowing discovery and depositions in aid of private commercial arbitration in China under 28 USC. § 1782.[1)] While it remains to be seen, with the green light given by China's State Council to allow the Lin-gang Free Trade Zones the right to apply and enforce measures in support of arbitrations involving Chinese and foreign parties, Chinese courts (particularly those located in Free Trade Zones) might allow similar measures given the tools available under the New Rules of Evidence. This may be another step forward in China's drive to open its doors to international arbitration institutions in China.

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References

?1 See, for example, HRC-Hainan Holding Co., LLC v. Yihan Hu No. 19-mc-80277-TSH, 2020 US Dist. LEXIS 32125, at *2 (N.D. Cal. Feb. 25, 2020).

This entry was posted on Friday, June 12th, 2020 at 4:13 am and is filed under China, Commercial Arbitration, Discovery, Document Production
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