



I. Legal News:

1. Arbitration: Revised Arbitration Law Released for Public Comments

Recently, China has released a revision draft of the Arbitration Law of RPC (the "Draft for Comment") for public comments by August 29, 2021. Compared to the current Arbitration Law, we summarize the following major changes:

(1) Improving interim measures during the arbitration¹

Pursuant to current Arbitration Law², a party may apply for property preservation or evidence preservation during arbitration. However, the arbitration tribunal can only forward such request to the court, and it is **at the court's sole discretion** to decide whether to grant a property preservation or evidence preservation.

According to the Draft for Comment, in addition to the court, the **arbitration tribunal** will be entitled to decide directly whether to grant an interim measure or not based on the urgencies.³

Moreover, in addition to property preservation and evidence preservation, the interim measures in the Draft for Comment also include **behavior preservation**, meaning "requesting a party to perform or to cease certain activities".

If the interim measures need to be taken before the constitution of the arbitration tribunal, the party may appoint a newly introduced **emergency arbitrator** to decide the emergency relief. Once the arbitration tribunal is formed, the power of emergency arbitrator will then be transferred to the arbitration tribunal.

(2) Determination of The Validity of Arbitration Agreement⁴

A new article was added in the Draft for Comment, in which the determination of the validity of foreign-related arbitration agreements shall be subject to the law agreed upon by the parties. If the parties have not agreed on an applicable law, it shall be subject to the law of the place of arbitration. If the applicable law and the place of arbitration are not clear, the court may apply the laws of the PRC to determine the validity of the arbitration agreement.

(3) Clarifying enforcement of arbitration awards made outside China⁵

The current law only stipulates that for recognition and enforcement of an award made by a foreign arbitration commission, if the place of domicile of the party subject to enforcement or its property is not within the territory of China, the party shall apply directly to a **competent foreign court** for recognition and enforcement⁶.

The Draft for Comment clarifies that if a party applies for recognition and enforcement of an award made by a foreign arbitration commission, it shall directly apply to the PRC intermediate court of the place of domicile of the person subject to enforcement or the place where its property is located. If the forementioned domicile or property place is not within the territory of China, but the case is related to a case before a PRC court or an arbitration case within China, the party **may still apply to a PRC court** for recognition and enforcement. And the court shall handle the case in accordance with the international conventions signed by China, as well as comply with the principle of reciprocity.

http://www.moj.gov.cn/pub/sfbgw/lfyjzj/lffjy/zj/202107/120210730_432967.html

II. Case:

1. IP: "Jiang Xiao Bai" Trademark Invalidation Case Selected as SPC Guiding Case

Recently, the Supreme People's Court ("SPC") has issued the Circular on Issuing the 28th Batch of Guiding Cases (Six Guiding Cases with No.157-162) for reference in future trial of similar cases, and among which, Guiding Case No.162 is a retrial case of the renowned liquor brand "Jiang Xiao Bai".

In 2012, Jiangxiaobai⁷ and Winery⁸ concluded a distribution agreement, in which Jiangxiaobai is responsible for the design, advertisement, and sales of the wine of Winery.

The trademark at dispute "Jiang Xiao Bai" was registered by Jiangxiaobai; however, Winery in 2016 claimed that the logo "Jiang Xiao Bai" was its own property, as Jiangxiaobai, who has the contractual and business relationship with Winery, registered the logo without its authorization. Winery then filed an invalidation application at TRAB⁹ against such trademark. The result is that TRAB decided to invalidate the trademark.

Jiangxiaobai was not satisfied with the decision and filed an administrative lawsuit at Beijing IP Court. In 2017, Beijing IP Court adjudicated that TRAB's decision is incorrect.

In 2018, Winery filed an appeal at Beijing Higher People's Court, and the judgment in the second instance is in favor of Winery again.

Retrial application was further filed by Jiangxiaobai, and the final SPC judgement closed the long-running dispute with a result that Jiangxiaobai won the retrial.

The legal base of this case is article 15 of PRC Trademark Law: In the event that an agent or a representative seeks to register the client's trademark in its own name without the client's authorization, and if the client files an objection, such trademark shall not be registered and be prohibited from being used. In addition, if a trademark registered under same/similar goods is same as/similar to an unregistered trademark that has been used by others, and if there is contractual, business or any other relation between the applicant and others which make the others knows the trademark, such trademark shall not be registered when the others raise objections.

SPC adjudicated this case based on the following factors:

(1) Links between the two parties

SPC agrees that there was distribution relationship between Jiangxiaobai and Winery upon checking all contracts and agreements signed.

(2) Who created the logo and used the logo first?

SPC holds that it is Winery's burden of proof to show that it has used the logo before the trademark registration by Jiangxiaobai. Based on the evidence submitted by Winery, it is hard to prove that Winery used this logo before the registration date.

However, from Jiangxiaobai side, relevant evidence had been submitted to SPC that the logo was designed by the legal representative of Jiangxiaobai.

Based on the above, when filing a trademark invalidation against an infringer based on article 15 of Trademark Law, one needs to make sure to prove the following to win the case:

- (1) Using the logo before the infringer registered the logo.
- (2) Logo has been presented to the infringer before the infringer registered the logo.
- (3) Representative relationship, business, or other relationship with the infringer.

<http://www.court.gov.cn/zixun-xiangqing-316271.html>

As always, Asiallians remains at your service and our teams are currently mobilized in all our offices in Mainland China, Hong Kong and Taipei.

¹ Article 43 - 49 of Draft for Comment

² Article 28, 46 and 68 of Arbitration Law of RPC (Revised in 2017)

³ However, after the arbitration tribunal made the decision, it is still the court to implement the interim measures.

⁴ Article 90 of Draft for Comment

⁵ Article 87 of Draft for Comment

⁶ Article 72 of Arbitration Law of RPC (Revised in 2017)

⁷ Chongqing Jiangxiaobai Liquor Co., Ltd, and the previous name is Sichuan Xinlantu Business Co., Ltd

⁸ Jiangjin Winery (Group) Co., Ltd

⁹ Trademark Review and Adjudication Board

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