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A Historical Change In The Chinese Courts' Attitude Towards Recovery Of Lawyers' Fees

Under Chinese law, not all costs follow the event. The Civil Procedural Law only stipulates that the unsuccessful litigant shall bear the successful litigant's 'litigation fee', which is narrowly defined as fees paid or payable to the Chinese Court. However, there is no statutory provision under Chinese law specifying whether an unsuccessful litigant in a civil proceeding is to bear the successful litigant's lawyers' fees. In practice, the Chinese courts have long been notoriously reluctant in upholding a claim for the litigant's lawyers' fees. In some special types of tort cases (such as personal injury and piracy and infringement of intellectual property rights), Chinese courts have a practice of ordering the tortfeasor to bear the successful litigant's lawyers' fees, but there is no general rule to award lawyers' fees to a successful litigant in all tort cases. On the other hand, in cases involving contractual claims, Chinese courts have hitherto been unwilling to award a successful litigant its lawyers' fees, even where the contract expressly stipulates that one party shall bear the lawyers' fees of the other party.

Traditionally, the Chinese courts justified their refusal to award a successful litigant its lawyers' fees on the basis that there is no statutory provision providing for a right to the award / recovery of such fees. Contrariwise, there is also force for the opposing view that, in the absence of any statutory prohibition on the award of a successful litigant's lawyers' fees, and parties have contractually agreed that one party shall bear the lawyers' fees of the other party, the Court ought to award a successful litigant its lawyer fees.

In March 2017, the latter view was espoused by the Supreme People's Court of China – the highest level of Court in China - in *Wu Xiaoguang v Li Qiang & Others* [2016] Supreme Court Civil Final No. 613 (the "**Wu Xiaoguang case**"). In this case, the claimant lender sued, *inter alia*, defendant borrowers for default on repayment under the loan agreement. The loan agreement provided, *inter alia*, that

"If the borrowers default on the repayment, the lender shall be entitled to claim against the borrowers all costs and expenses incurred by the lender in protecting the lender's rights, including but not limited to investigation fees, litigation fees, lawyers' fees etc."

The borrowers failed to repay the loan. The claimant engaged a law firm in Jiangxi Province ("**Jiangxi Law Firm**") via a service contract to, *inter alia*, commence proceedings to recover the unpaid loan. The total service fee payable under this service contract was RMB200,000 but, at the time of the Court's judgment, the claimant had only paid half of it. The other half remained unpaid. The Jiangxi Law Firm had not issued an invoice for the service fee or any part thereof.

At first instance, the court below held that the defendant shall repay the principal amount of the loan plus interest. The defendant was further ordered by the court below to pay the claimant's lawyers' fees in full. On the appeal, the defendant did not dispute on principal amount or the interest, but only appealed against the order on costs and raised several arguments. Firstly, Chinese law and practice only allows a successful litigant to recover its lawyers' fees in special types of cases, and the case at hand does not fall into such types of cases. Secondly, Chinese law does not compulsorily require a litigation party to engage a lawyer for the purpose of litigation. While some claimants may choose to engage a lawyer, others may not. Therefore, the claimant's lawyers' fee does not arise from the

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defendant's breach of the loan agreement, but from the claimant's own choice to engage a lawyer. Thirdly, China does not have a unified standard on how much lawyers should charge. In practice, lawyers' fees vary greatly. If Chinese courts are to allow a successful litigant to claim for his lawyers' fees, it would be very difficult to determine the reasonableness of such fees. Finally, in this case, Jiangxi Law Firm had not issued an invoice so the claimant had failed to prove the amount of his lawyers' fee.

The Supreme People's Court held that since the parties have agreed in the loan agreement that the borrowers shall bear the lender's lawyers' fees, and such an agreement is not prohibited by any law or regulation, then the Court has no reason not to uphold such an agreement. Having agreed to pay such expenses, the defendant cannot in good faith now argue that such an agreement is not binding. As to the argument that Jiangxi Law Firm had not issued an invoice, the Court held that it was irrelevant; since the claimant has signed a service contract with Jiangxi Law Firm, the claimant has incurred a binding obligation to pay the agreed amount to his lawyers so the defendant must pay the same to the claimant.

Even though China does not have the principle of 'binding precedents', the *Wu Xiaoguang* case is likely to be followed or at least considered by the lower courts as persuasive guidance in future cases, as this case was decided by the Supreme People's Court.

However, it cannot be said that the Supreme People's Court in the *Wu Xiaoguang* case intended to lay down a general rule for all successful litigants to recover their lawyers' fees in all civil cases. The Supreme People's Court in the *Wu Xiaoguang* case only held, *inter alia*, that the court would order an unsuccessful litigant to bear a successful litigant's lawyers' fees if the contract between them contains an express provision to that effect. As such, if a contract is silent as to the recoverability of lawyers' fees, the Chinese courts are still unlikely to order an unsuccessful litigant to bear the lawyers' fees of a successful litigant. It is therefore strongly recommended that contracts governed by Chinese law should expressly stipulate that the unsuccessful litigant shall bear the lawyers' fees of the successful litigant. Commercial parties are further recommended to consult their lawyers on the appropriate wording of the clauses in such contracts to provide for recovery of lawyers' fees.

For further queries, please feel free to contact our team below.

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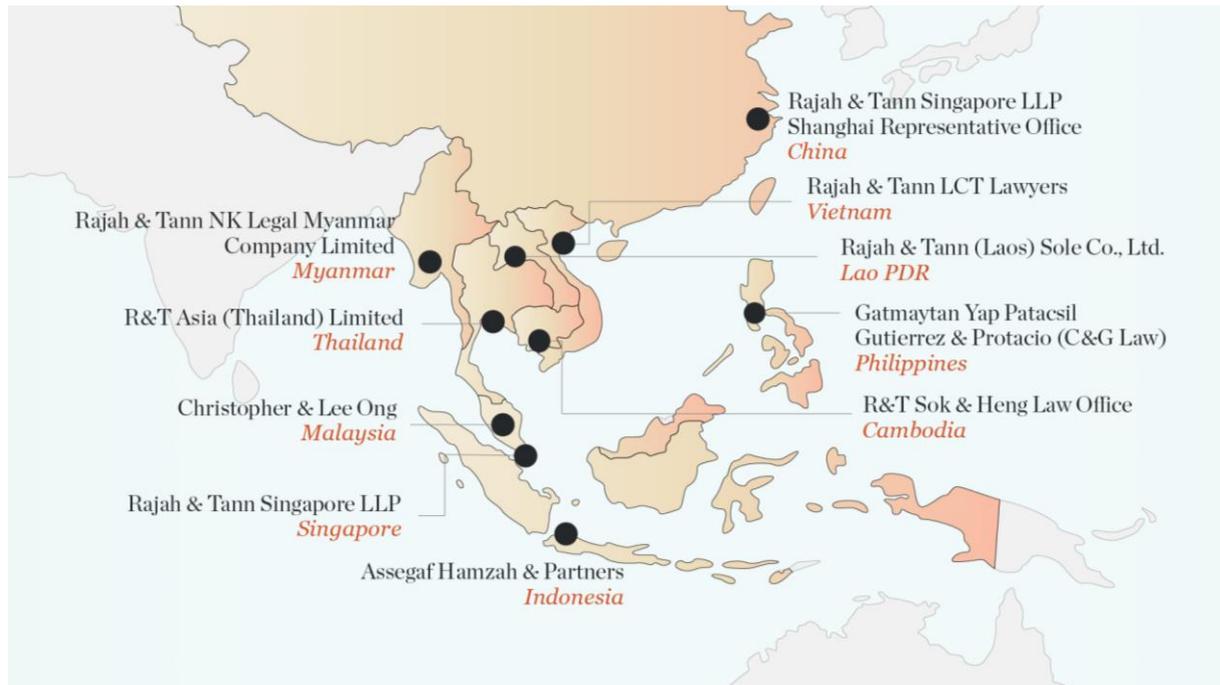
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