SPC Guiding Case No. 189: Shanghai Panda Interactive Entertainment Culture Co., Ltd. v. Li Cen and Kunshan Boaiyou Information Technology Co., Ltd. (Contract Dispute)

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Unofficial English translation prepared for reference only. The official Chinese text prevails.

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Keywords

Civil / contract dispute / adjustment of liquidated damages / online streamer

Holding

Where an online streamer violates the agreed exclusive cooperation clause and, without the consent of the livestream platform, engages in similar business on other platforms, the streamer shall bear liability for breach of contract in accordance with the law. Where the online streamer claims that the liquidated damages agreed in the contract are manifestly excessive and requests a reduction, in circumstances where the actual loss is difficult to determine, the people's court may, based on the characteristics of the online livestream industry, take the streamer's actual income obtained from the platform as a reference basis, and reasonably determine the amount in combination with factors such as the platform's early-stage investment, platform traffic, and the individual commercial value of the streamer.

Basic Facts

The defendant Li Cen was originally a game streamer on the Panda TV livestream platform founded by the plaintiff, Shanghai Panda Interactive Entertainment Culture Co., Ltd. (hereinafter "Panda Company"), and the defendant Kunshan Boaiyou Information Technology Co., Ltd. (hereinafter "Boaiyou Company") was Li Cen's agency company. On February 28, 2018, Panda Company, Boaiyou Company, and Li Cen entered into a Streamer Exclusive Cooperation Agreement (hereinafter the "Cooperation Agreement"), stipulating that Li Cen would exclusively conduct first-person game livestreaming and game commentary of the "PlayerUnknown's Battlegrounds" game on the Panda TV platform. The breach clause of the agreement stipulated that during the term of the agreement, if Boaiyou Company or Li Cen, without Panda Company's consent, arbitrarily terminated the agreement or engaged in the same or similar cooperation on competing livestream platforms, or authorized any third party to use the livestream videos already published on Panda TV, it constituted fundamental breach, and Boaiyou Company should pay Panda TV the following compensation: (1) the cooperation fees cumulatively paid by Panda Company for Li Cen's livestream cooperation with the Panda TV platform under this agreement and before its signing; (2) RMB 50 million; and (3) the training fees and promotion resource fees invested by Panda Company in Li Cen. Streamer Li Cen bore joint and several liability to Panda Company for this. The cooperation term agreed in the contract was one year, from March 1, 2018 to February 28, 2019.

On June 1, 2018, Boaiyou Company sent Panda Company a streamer payment reminder, urging payment of the two months of cooperation fees owed to Li Cen. As of June 4, 2018, Panda Company had cumulatively paid cooperation fees of RMB 1,111,661 for Li Cen's livestreaming from February 2017 to March 2018.

On June 27, 2018, Li Cen posted on Weibo that he would lead his livestream team to the Douyu livestream platform for livestreaming, and announced the livestream time and room number. On June 29, 2018, Li Cen made his first livestream on the Douyu livestream platform. Boaiyou Company also published on its official WeChat public account the link to Li Cen's livestream room on the Douyu platform. According to a public

report on the "Tencent Games" Weibo: "BIU Lei Ge (Li Cen) is the pioneer of national console game livestream programs, a nationally renowned online game livestream star streamer, and also an original creator on the Youku game channel, with over 200,000 fans and 50 million clicks on Youku..."

On August 24, 2018, Panda Company filed a lawsuit with the people's court, requesting an order that the two defendants continue to perform the exclusive cooperation agreement, immediately cease livestream activities on other platforms, and pay corresponding liquidated damages. During the first-instance trial, Panda Company adjusted its litigation claim to an order that the two defendants pay the plaintiff liquidated damages of RMB 3 million. Boaiyou Company disagreed with Panda Company's claim and filed a counterclaim requesting: 1. an order confirming that the Cooperation Agreement entered into on February 28, 2018 among Panda Company, Boaiyou Company, and Li Cen was terminated on June 28, 2018; 2. an order that Panda Company pay Boaiyou Company cooperation fees of RMB 224,923.32 for the period from April to June 2018; and 3. an order that Panda Company pay Boaiyou Company attorney's fees of RMB 20,000.

Judgment

On September 16, 2019, the Jing'an District People's Court of Shanghai rendered Civil Judgment (2018) Hu 0106 Min Chu No. 31513: first, Boaiyou Company shall pay Panda Company liquidated damages of RMB 2,600,000 within ten days from the date this judgment takes effect; second, Li Cen shall bear joint and several liability for Boaiyou Company's aforesaid payment obligation; third, Panda Company shall pay Boaiyou Company cooperation fees of RMB 186,640.10 for the period from April to June 2018 within ten days from the date this judgment takes effect; and fourth, Boaiyou Company's other counterclaims were dismissed. Li Cen, dissatisfied with the first-instance judgment, filed an appeal. On November 12, 2020, the Shanghai Second Intermediate People's Court rendered Civil Judgment (2020) Hu 02 Min Zhong No. 562: dismissing the appeal and affirming the original judgment.

Reasoning

The court in its effective judgment held:

First, based on the facts ascertained in this case, Panda Company, Boaiyou Company, and Li Cen entered into the Cooperation Agreement and voluntarily established a contractual legal relationship, rather than the labor contract relationship claimed by Li Cen. The Cooperation Agreement was the true expression of intent of the three parties, did not violate the mandatory provisions of laws and regulations, and should be determined valid; all parties should strictly abide by it. From the breach liability clause of the Cooperation Agreement, the agreement made detailed stipulations on the rights and obligations of all three cooperating parties, and a streamer's livestreaming on a competing platform without Panda Company's consent constituted breach and should bear liability for compensation.

Second, although Panda Company had defects in performance, they were not sufficient to constitute fundamental breach, and Boaiyou Company and Li Cen could not claim termination of the Cooperation Agreement on this ground. Moreover, even from the perspective of the manner of termination, the expression of intent to terminate a contract should be clearly and unambiguously issued to the counterparty in accordance with statutory or agreed means; Li Cen's so-called "official announcement" posted on the Weibo platform to unspecified objects, or his direct livestreaming on other platforms, could not be determined as the issuance of a clear expression of intent to terminate the contract to Panda Company. Therefore, Li Cen's and Boaiyou Company's claim in the second instance that they had already exercised the right to terminate the contract due to Panda Company's breach could not be established.

Third, where a party claims that the agreed liquidated damages are excessive and requests an appropriate reduction, the determination should be based on the actual loss, taking into account the performance of the contract, the degree of the parties' fault, and expected benefits and other comprehensive factors, and measured according to the principles of fairness and good faith. For the standard of application of the

principles of fairness and good faith and the accurate definition of losses suffered from breach, full consideration should be given to the characteristics of the emerging industry of online livestreaming. An online livestream platform is an enterprise that uses the internet as a necessary medium and streamers as a core resource. In platform operation, it usually needs to invest more early-stage costs in bandwidth and streamers, while the specific amount of loss caused to a livestream platform by a streamer's breach of contract and livestreaming on a third-party platform is actually difficult to quantify. If an excessive burden of proof is imposed on the online livestream platform, it would violate the principle of fairness. Therefore, the adjustment of liquidated damages in this case should take into account the characteristics of online livestream platforms and the foreseeability of Panda Company's costs and benefits at the time of contract signing. In this case, considering the actual circumstances that streamer Li Cen enjoyed high popularity and reputation in the game livestream industry, combined with his income situation, the remaining performance period of the contract, the breach by both parties and the degree of their respective faults, Panda Company's quantifiable losses, the reduction Panda Company had already made to the agreed liquidated damages, and the current situation of Panda Company's platform, and according to the principles of fairness and good faith and the balance of interests between the livestream platform and the individual streamer, the liquidated damages were appropriately adjusted to RMB 2.6 million.

Relevant Legal Provisions

Article 585 of the Civil Code of the People's Republic of China (this case applied Article 114 of the Contract Law of the People's Republic of China, which came into effect on October 1, 1999).

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