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## Recent Developments in the PRC: A Change in Tide for Arbitration?

Holly Blackwell (King & Wood Mallesons) · Tuesday, December 5th, 2017 · YSIAC

There have been a number of recent developments in Chinese judicial practice. These include the first known enforcement of foreign court judgments in China on the basis of reciprocity,<sup>1)</sup> as well as China's signing of the Hague Convention on Choice of Court Agreements ("Hague Convention"). While these developments are welcome, they are unlikely to ignite a shift from arbitration to litigation as the preferred forum for China-related dispute resolution. More likely, they demonstrate a continued commitment to promoting the rule of law and the integration of China into the global economy, from which users of litigation and arbitration both benefit. They may also provide comfort to a party compelled to litigate in a foreign court, perhaps due to a pathological arbitration clause or no arbitration clause at all, that a favorable judgment may be enforceable in China.

### Recent developments concerning the enforcement of foreign court judgments in China

In China, foreign court judgments are enforceable pursuant to international treaties or on the basis of reciprocity. To date, China has concluded an estimated 33 bilateral treaties concerning the mutual enforcement of foreign court judgments, as well as arrangements with Hong Kong, Taiwan and Macau. China has not entered into bilateral enforcement treaties with some of its largest trading partners such as Australia, Germany, Japan, Singapore, the US, or the UK. At present, there is no binding international convention like the New York Convention that would require China to recognize and enforce foreign commercial court judgments with few exceptions. In the absence of a binding treaty, litigants must rely on the principle of reciprocity to enforce foreign court judgments in China. Until recently, there was no report of a foreign court judgment being enforced in China on the basis of reciprocity. This has changed with the recent enforcement of US and Singapore court judgments on the basis of reciprocity.

In *Liu Li v Tao Li and Tong Wu* (2015) E Wuhan Zhong Minshang Waichuzi No 26, the Wuhan Intermediate Court in Hubei Province enforced a monetary judgment from the Los Angeles Superior Court in California. Given the absence of a binding enforcement treaty between the US and China, the Wuhan court cited the case of *Hubei Gezhouba Sanlian Industrial Co Ltd v Robinson Helicopter Co Inc* 2009 WL 2190187 (CD Cal 2009), in which a federal court in California had enforced a Hubei High Court judgment, and enforced the Los Angeles judgment on the basis of reciprocity.

The *Liu Li* case was preceded by *Kolmar Group AG v Jiangsu Textile Industry (Group) Import &*

*Export Co Ltd* (2016) Su 01 Xie Wai Ren No 3, in which the Nanjing Intermediate People's Court in Jiangsu Province enforced a monetary judgment from the Singapore High Court. Like the US, there is no binding enforcement treaty between Singapore and China. The Nanjing court cited the case of *Giant Light Metal Technology (Kunshan) Co v Aksa Far East Pte Ltd* (2014) SGHC 16, in which the Singapore High Court had enforced a judgment from the Suzhou Intermediate Court in Jiangsu Province, and likewise enforced the Singapore judgment on the basis of reciprocity. The *Kolmar* case was the first known Singapore court judgment to be enforced in China and is believed to be the first foreign court judgment enforced in China solely on the basis of reciprocity.

China has taken a further step toward the enforcement of foreign court judgments by joining the EU, Mexico, Singapore, and the US, among others, as a signatory to the Hague Convention. China has not yet ratified the Hague Convention. Once ratified, China commits to enforce civil and commercial judgements from the courts of other contracting states pursuant to exclusive jurisdiction clauses in favor of those courts.

### **Potential impact of these developments on judicial and arbitral practice in China**

While these developments provide insight into how a Chinese court may treat an application to enforce a foreign court judgment and certain types of foreign arbitral awards, they also demonstrate the uncertainty surrounding the enforcement of foreign court judgments in China.

First, the *Liu Li* and *Kolmar* cases demonstrate that a party seeking enforcement on the basis of reciprocity will need to establish *de facto* reciprocity between China and the foreign state. That is, the party will need to demonstrate that the foreign state has already enforced a Chinese court judgment, the failing of which could result in refused enforcement. This was indeed the result in two prior cases in which Chinese courts refused to enforce Japanese and Australian court judgments given the absence of proof of *de facto* reciprocity.<sup>2)</sup>

In June 2015, however, the Supreme People's Court issued the Several Opinions of the Supreme People's Court on Providing Judicial Services and Safeguards for the Construction of the "Belt and Road" by People's Courts ("Belt & Road Opinions") which permit a Chinese court to take the first step in establishing reciprocity. The Belt & Road Opinions do not extend this discretion to a court faced with enforcing a judgment from a country beyond the Belt & Road or a country with which China has no binding treaty or *de facto* reciprocal relationship.

Second, it is unclear how broadly Chinese courts will construe the reciprocal relationship between the US, Singapore, or other foreign states with whom a reciprocal relationship may be established. The *Liu Li* and *Kolmar* cases involved the mutual enforcement of judgments from the same regions: the *Liu Li* case involved judgments from California and Hubei Province; the *Kolmar* case involved judgments from Singapore and Jiangsu Province. It is unclear whether a Chinese court would interpret the reciprocal relationship more broadly to enforce judgments from courts beyond these regions.

Third, the Hague Convention is still limited in its application. While China has signed the Hague Convention, there is still no timeline for its ratification. By comparison, the US signed the Hague Convention in 2009 but has yet to ratify it. Even when ratified, the Hague Convention has limited territorial reach, as least for now. Unlike the New York Convention, which extends to more than 150 countries, the Hague Convention extends to only 30 countries (excluding many key Belt & Road countries).

Further, the Hague Convention applies only to civil and commercial disputes where parties from contracting states have agreed to the exclusive jurisdiction of the foreign court whose judgment is sought to be enforced. Whether a Chinese party would agree to submit to the exclusive jurisdiction of a foreign court at the contracting (or any) stage is unclear, particularly when investing in developing countries. The same may be true of a foreign party faced with acquiescing to the exclusive jurisdiction of a Chinese court.

Moreover, currently there is no legislative or judicial guidance on the procedure for enforcing foreign court judgments in China. Unlike the framework for foreign arbitral awards, there is no system for higher court reporting if a lower court is inclined to refuse enforcement of a foreign court judgment. By contrast, if a lower court is inclined to refuse enforcement of a foreign arbitral award, it must report to the higher court and ultimately to the Supreme People's Court for approval. This system has reduced the risk of local protectionism and increased the likelihood of enforcing foreign arbitral awards in China.

Finally, the *Liu Li* and *Kolmar* cases did not involve substantial monetary judgments (approximately USD 250,000 and USD 350,000 respectively). Whether a judgment of a substantial sum awarded against a prominent private or state-owned company would encounter the same ease of enforcement is unclear. The limitations discussed above may provide a basis for a lower court to decline enforcement.

These developments are nevertheless notable. They signal an increased openness of the Chinese judiciary and an increasingly liberal approach to the enforcement of foreign court judgments. Further, the *Liu Li* and *Kolmar* cases both involved the enforcement of default judgments against Chinese parties, which may signal that an increased willingness of a Chinese court to enforce a default arbitral award, provided adequate notice and an opportunity to participate was given.

The *Liu Li* case also demonstrates that a Chinese court would be expected to abstain from review of case merits when tasked with enforcing a foreign court judgment. During the enforcement proceeding, Mr Liu sought post-judgment interest in addition to monetary damages and pre-judgment interest awarded by the Los Angeles court. The Wuhan court considered this to be an issue concerning case merits and refused the request for post-judgment interest. Similar treatment would be expected when enforcing a foreign arbitral award in China.

### **Concluding remarks**

Foreign arbitral awards have benefited from [increased enforcement in China](#) in recent years. It is unlikely that the ease of enforcement and other recognized benefits of arbitration will give way to a notable increase in the use of foreign courts to resolve China-related disputes. However, parties that find themselves before foreign courts, particularly in countries that have enforced Chinese court judgments and countries on the Belt & Road, now have the benefit of knowing that enforcement of a foreign court judgment against assets and parties in China, while still challenging, may not be futile.

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### References

- ?1 References to the enforcement of foreign court judgments are generally intended to include recognition and enforcement of those judgments.

*Gomi Akira v Dalian Fari Seafood Ltd (Application of Gomi Akira (Japanese Citizen) to Chinese Court for Recognition and Enforcement of Japanese Judicial Decision)*, (1996) 1 Supreme People's

- ?2 Court Gazette 29; *Letter of Reply of the Supreme People's Court on Request for Instructions Re Application of DNT France Power Engine Co Ltd for Recognition and Enforcement of Australian Court Judgment*, (2006) Min Si Ta Zi No 45

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