



Dispute Resolution

A Commentary on China-Singapore Memo on Enforcement of Judgment

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On 31 August 2018, the Chief Justice of the PRC Supreme Court and his Singapore counterpart signed the *Memorandum of Guidance between the Supreme People's Court of the People's Republic of China and the Supreme Court of Singapore on Recognition and Enforcement of Money Judgments in Commercial Cases* (the “**Memorandum**”) during the second China-Singapore Legal and Judicial Roundtable held in Singapore. The signing of the Memorandum is of landmark significance in the area of cross-border civil and commercial dispute resolution, which deserves the attention of the business community and legal professionals. In this article, we intend to introduce, interpret and comment on the main contents of the Memorandum on the basis of the existing legal provisions and judicial practice with respect to the recognition and enforcement of foreign civil and commercial judgments.

I. Application Scope of the Memorandum

Article 1 of the Memorandum introduces the general scope of the agreement and provides that (a) it applies only to judgments in commercial cases that involve natural or legal persons and the payment of a fixed or ascertainable amount of money, thus excluding procedural decisions such as preservation rulings, injunctions and provisional measures. From this standpoint, the Memorandum is no different than mutual legal assistance treaties that China has concluded with other countries and regions; (b) the judgment refers to any decision made by a court or to which the court's seal is affixed; and (c) “commercial cases” refer to cases in which a judgment requires recognition and enforcement by the courts of the other party, both international cases and non-international cases. It is worth noting that the definition of commercial cases in the Memorandum appears ambiguous – read plainly, it may include civil cases, such as family law cases, which are not generally within the scope of commercial cases. Considering that there is no clear legal distinction between civil and commercial cases under PRC law, courts of both

countries may interpret these matters differently in judicial practice. Thus, recognition and enforcement of certain types of judgments may face legal obstacles.

II. How PRC Courts May Recognize and Enforce Singapore Court Judgments

1. PRC courts may recognize and enforce Singapore court judgments on the basis of reciprocity

Article 6 of the Memorandum clarifies that the judgment of a Singapore court may be recognized and enforced in PRC courts on the basis of reciprocity upon an application submitted by the applicant. According to Articles 281 and 282 of the *Civil Procedure Law of the People's Republic of China*, a prerequisite for PRC courts to recognize and enforce the judgment of a foreign court is the existence of a treaty concluded or acceded to by China and the foreign country or under the principle of reciprocity. While China and Singapore have signed the *Treaty on Judicial Assistance in Civil and Commercial Matters between the People's Republic of China and the Republic of Singapore* in 1999, the treaty does not provide for the recognition and enforcement of judgments in civil and commercial cases. As a result, judgments issued by Singapore courts may only be recognized and enforced on the ground of reciprocity.

The question then arises whether China and Singapore have in fact established a reciprocal relationship, and whether there will be any substantive obstacles to future applications for recognition and enforcement of Singapore court judgments before PRC courts on the basis of reciprocity. The answer to the issue of reciprocity appears to be cautiously in the affirmative for the reasons described below.

First, the Nanjing Intermediate People's Court in 2016, citing reciprocity, recognized and enforced the Singapore High Court's civil judgment in the case of *Kolmar Group AG v. Jiangsu Textile Industry (Group) Import & Export Co., Ltd.*¹ (the "Kolmar Case"). This was the first time that a reciprocal relationship between China and Singapore had been found by a PRC court based on the standard of factual reciprocity.

Some commentators have expressed concern, however, since PRC law does not specify the criteria for reciprocity and the decision of a PRC district court, such as in the Kolmar Case, is neither a source of law nor represents legally binding precedent. It is therefore difficult to conclude with certainty that a reciprocal relationship exists between China and Singapore, or whether PRC courts will continue to consider there to be a reciprocal relationship between the two countries in future claims for recognition and enforcement of Singapore court judgments. While uncertainty may exist with respect to reciprocity, the

¹ *Case of Application for the Recognition and Enforcement of a Civil Judgment of the Singapore High Court: Kolmar Group AG v. Jiangsu Textile Industry (Group) Import & Export Co., Ltd* (Nanjing Inter. People's Ct., (2016) Su 01 Xie Wai Ren No.3; publ. 27 Dec. 2016)

following reasons cause this concern to be appear unfounded.

Second, the Kolmar Case has been selected as one of Second Batch of Typical Cases Involving Construction of the “Belt and Road.” The PRC Supreme Court believes that this case not only has landmark significance in the mutual recognition and enforcement of commercial judgments between China and Singapore, but also will powerfully advance the realization of judicial cooperation among countries along the Belt and Road in the field of recognition and enforcement of civil and commercial judgments. This typical case designation indicates that the PRC Supreme Court recognizes the existence of a reciprocal relationship between China and Singapore, which may serve as a model and guide for local PRC courts in dealing with similar cases.

Third, Article 7 of the Nanning Statement of the 2nd China-ASEAN Justice Forum held in Nanning on 8 June 2017 provides that “if two countries have not been bound by any international treaty on mutual recognition and enforcement of foreign civil or commercial judgments, both countries may, subject to their domestic laws, presume the existence of their reciprocal relationships, when it comes to the judicial procedure of recognizing or enforcing such judgments made by courts of the other country, provided that the courts of the other country had not refused to recognize or enforce such judgments on the ground of lack of reciprocity.” The principle of “presumptive reciprocity” in Article 7 applies to cases submitted to PRC courts for recognition and enforcement of Singapore court judgments. And it also provides a more solid ground for PRC courts to recognize and enforce judgments issued by Singapore courts on basis of a reciprocal relationship.

2. Judgments of Singapore courts must be final and conclusive

Article 7 of the Memorandum expressly provides Singapore court judgments must be both “final and conclusive” to be recognized and enforced in China. Any challenge brought before a PRC court as to the finality and conclusiveness of a judgment will be determined in accordance with PRC law, rather than Singapore law. This provision is inconsistent with general professional opinions and practices in most countries and regions, which hold that it is the law under which the foreign judgment was rendered that determines the judgment’s finality and conclusiveness. Moreover, such disputes may not be resolvable under PRC law because PRC law lacks clear provisions or rules on how to determine the finality and conclusiveness of foreign judgments.

Referring to treaties on judicial assistance reached by China and other countries (e.g. Treaty on Judicial Assistance in Civil and Commercial Matters between the People’s Republic of China and the French Republic), the finality and conclusiveness of a foreign judgment is generally determined in accordance with the laws of the country in which the judgment was made. At the same time, in view of the difficulty of the country’s courts to make such a determination, the applicant is often required to submit a certificate that the

judgment is in force from the country or region in which the judgment was issued. If this is not possible, the courts of the country or region will not recognize and enforce the judgment.

However, Article 13 of the Memorandum, which describes the documents required for recognition and enforcement, does not reference a certification that the judgment is in force. Rather, Article 13 requires documents that certify “the judgment is not subjected to or under appeal, the appeal period has expired in respect of the judgment and there is no pending application for an extension of time to appeal, unless that is specified in the judgment itself.” Therefore, it appears reasonable to conclude that, if an applicant is able to provide such a document, the judgment would be deemed prima facie final and conclusive.

3. Singapore courts must have jurisdiction over the subject matter of the dispute

Article 9 of the Memorandum provides that “[t]he courts of Singapore must have had jurisdiction to determine the subject matter of the dispute, as determined by the courts of the People’s Republic of China, in accordance with [PRC] law.” It is worth emphasizing that PRC courts will apply PRC law, rather than Singapore law, to determine whether a Singapore court had jurisdiction over the dispute at issue in its judgment. While in practice there may be considerable controversy as to which governing law or criteria should be applied to determine jurisdiction, this provision of the Memorandum may be reasonable in light of practices in most countries and regions. Specifically, the policy considerations for recognizing and enforcing a foreign judgment cannot ignore the protection of the operation of the domestic legal system, and it would be difficult in practice for a domestic court to interpret and apply the laws of a foreign country or region. In addition, it is of little value for the court where recognition and enforcement is sought to examine the issue of jurisdiction since the court of the foreign country or region must have considered its jurisdiction over the dispute under domestic law before the judgment was rendered.

Singapore courts examine jurisdiction over disputes in accordance with their domestic laws when rendering judgments, while PRC courts, when requested to recognize and enforce those judgments, will examine under PRC law whether the Singapore courts had jurisdiction over the underlying disputes. Thus, there may be an unavoidable conflict in some cases between the jurisdictional rules of the two countries that may lead to Singapore court judgments not being recognized and enforced by PRC courts on the grounds that the Singapore courts lacked jurisdiction. For instance, Articles 33 and 266 of the Civil Procedure Law of the People’s Republic of China provide the principle of exclusive jurisdiction over disputes involving of real estate, port operations, inheritances and disputes arising from performance in China of Sino-foreign equity joint venture contracts, Sino-foreign cooperative joint venture contracts, Sino-foreign cooperative exploration and exploitation of natural resources contracts. PRC courts may not recognize or enforce Singapore court judgments that violate the above provisions. In another instance, under

Article 531 of the Interpretations of the Supreme People's Court on Application of the Civil Procedure Law of the People's Republic of China, in disputes arising from foreign-related contracts or other property rights, the parties may agree in writing to select as the governing jurisdiction the place which is actually associated with the dispute, such as a foreign court at the location of the defendant, the place of performance of the contract, place of execution of the contract, the location of the plaintiff, the location of the subject matter, or the place where the tortious act occurred. In such circumstances, PRC courts may refuse to recognize and enforce a judgment where the Singapore court has exercised jurisdiction based on an agreement in violation of Article 531.

According to Article 21 of the Memorandum, Singapore courts mainly adopt enumerated criteria for jurisdictional nexus under the common law system to determine jurisdiction, that is, Singapore courts will find a court to have had jurisdiction so long as the case has nexus, such as, presence or residence, voluntary submission to jurisdiction or an agreement to submit to jurisdiction. These criteria are broader than the jurisdictional rules under PRC law.

Therefore, an applicant who intends to file a lawsuit in a Singapore court and have the judgment recognized and enforced in China should carefully assess Article 9 of the Memorandum to determine in advance whether the exercise of jurisdiction by Singapore courts over the subject matter of the dispute is in accordance with the jurisdictional rules under PRC law.

4. Reservations to certain types of Singapore court judgments

Article 8 of the Memorandum provides that PRC courts will not recognize and enforce judgments issued by Singapore courts that would amount to the direct or indirect enforcement of any foreign penal, revenue or public law and will not recognize and enforce certain types of judgments of Singapore courts, including but not limited to judgments arising from intellectual property rights, unfair competition, monopoly cases. The reservations to these certain types of judgments in the Memorandum are presumed to be based on special policy considerations. For example, some scholars believe that the reason why China should not recognize and enforce such judgments is that the number of works protected by intellectual property law, intellectual property law legal protections and public awareness of intellectual property in China are relatively inferior to those of more developed countries. The recognition and enforcement of foreign intellectual property-related judgments may therefore lead to an imbalance of interests between China and other more developed countries.

5. Grounds for refusing recognition and enforcement

Articles 10 and 11 of the Memorandum clarify that PRC courts will not review the merits of any Singapore court judgment, and only on certain limited grounds may a judgment be

challenged in PRC courts. Those grounds include but are not limited to: “(a) the judgment is contrary to basic principles of the law of the PRC or will prejudice to its sovereignty, security or public interests; (b) the judgment was obtained by fraud; (c) the litigant had not been given proper notice of the judicial proceedings or had not been given a reasonable opportunity to defend the case; (d) the judicial body is constituted by persons with personal interests in the outcome of the case; (e) the litigant without capacity for action has not been properly represented; and (f) the litigation between the same litigants and on the same subject is pending in PRC courts, or PRC courts have rendered or made a final and conclusive judgment, or have recognized or enforced a final and conclusive judgment rendered by a third state or an arbitration award.” Among these grounds, it should be noted in particular that where PRC courts and Singapore courts both have jurisdiction over the subject matter of the dispute, the recognition and enforcement of a judgment rendered by a Singapore court may encounter substantial obstacles if a lawsuit has been filed in China before an application is made to a PRC court for recognition and enforcement of that judgment.

6. Procedural matters

Articles 12 and 13 of the Memorandum address the process for obtaining recognition and enforcement of a Singapore court judgment in China. First, an applicant is required to submit an application to the intermediate people’s court where the party against whom enforcement is sought is domiciled or holds property. In addition, Article 13 also requires that the applicant to “submit the following documents authenticated by a notarial office in Singapore and confirmed by the [PRC] embassy or consulate stationed in Singapore: (a) a certified copy of the judgment [which may be obtained by making an application in accordance with the *Supreme Court Practice Directions*]; (b) documents to certify that the judgment is not subject to or under appeal, the appeal period has expired in respect of the judgment and there is no pending application for an extension of time to appeal, unless that is specified in the judgment itself; (c) in the case of default judgment, documents to certify that the defaulting litigant has been legally summoned, unless that is specified in the judgment itself; and (d) documents to certify that the litigant without capacity for action has been properly represented, unless that is specified in the judgment itself. The application, judgment and documents mentioned above, if not made in Chinese, shall be accompanied by a certified translation into Chinese.”

III. How Singapore Courts May Recognize and Enforce PRC Court Judgments

1. Singapore courts may recognize and enforce PRC court judgments on the basis of common law

The recognition and enforcement of foreign judgments in Singapore courts are mainly based on statutory and common law rather than reciprocal relationships. Statutory

recognition and enforcement mainly relates to judgments made by the courts of specific countries or regions, such as those rendered in a Commonwealth of Nations member state. These judgments could obtain the legal effect equivalent to judgments in Singapore through a filing process, while the judgments issued in countries such as China, for which statutory law does not apply, may be recognized and enforced only by way of common law. Under the common law, the recognition and enforcement of foreign judgments must satisfy the following requirements: (a) the judgment must be final and conclusive; (b) the original court must be jurisdictionally competent in accordance with the rules of international private law; (c) there are no defenses against the recognition of the foreign judgment; and (d) the judgment must be for a fixed sum of money.

Based on the above, Articles 17 and 18 of the Memorandum respectively provide that “a judgment of the courts of the People’s Republic of China may be enforced in the courts of Singapore by a claim made at common law” and “where a foreign court of competent jurisdiction has determined that a certain sum is due from one person to another, a legal obligation arises on the debtor to pay that sum. The creditor may bring a claim to enforce that obligation as a debt. This legal obligation to pay the debt is however separate from the underlying cause of action.”

2. Basic requirements

According to Articles 19 to 23 of the Memorandum, the application for recognition and enforcement of a PRC court judgment by a Singapore court shall satisfy the following basic requirements: (a) the finality and conclusiveness of a PRC court judgment is based on PRC law, and the PRC court can evidence finality and conclusiveness by issuing a certificate; (b) as mentioned above, according to the listed criteria for jurisdictional nexus under Singapore law, a PRC court must have had jurisdiction to determine the subject matter of the dispute; (c) although Singapore courts will not review the merits of a PRC court judgment, there can be no grounds for refusing to recognize and enforce the judgment, which include the following: “(a) the judgment was obtained by fraud; (b) the judgment is contrary to Singapore public policy; (c) the proceedings were conducted in a manner which the Singapore court regards as contrary to the principles of natural justice” (Article 21). Besides these conditions, Singapore courts will also refuse to enforce PRC court judgments which would amount to the direct or indirect enforcement of any foreign penal, revenue or public law.

3. Procedural matters

Articles 24 to 29 of the Memorandum provide the procedures of applying for recognizing and enforcing a PRC court judgment in a Singapore courts. Specifically, an applicant must file a writ of summons (providing a concise statement of the nature of the claim and claiming the amount of the judgment debt) and a certified copy of the judgment in the competent court of Singapore. “Where the [respondent] is outside of Singapore ... the [applicant] will

have to seek the leave of court to serve the writ of summons out of the jurisdiction in accordance with Order 11 of the *Singapore Rules of Court* (Article 25). If, following service of the writ of summons, “the [respondent] does not respond to the claim, the [applicant] will be entitled to obtain judgment in default under Order 13 of the *Singapore Rules of Court*” (Article 26). “If, following service of the writ of summons, the [respondent] responds to the claim, the [claimant] must file and serve a statement of claim setting out the material facts which are relied upon for the claim, and the necessary particulars of the claim” (Article 27). “In most cases, a judgment creditor will be entitled to apply to obtain summary judgment without trial under Order 14 of the *Singapore Rules of Court*, unless the judgment debtor can raise a triable issue in relation to a defense” (Article 29). Further, “where the [respondent] is in ... China, the service of writ of summons, the statement of claim, particulars of the claim and other subsequent documents should be effected through competent PRC courts in accordance with *Treaty on Judicial Assistance in Civil and Commercial Matters between the People’s Republic of China and the Republic of Singapore*” (Article 28).

IV. Conclusion

While not legally binding, the Memorandum is of great significance for China in the context of the “Belt and Road Initiative,” since it symbolizes a strengthening of judicial cooperation with countries along the “Belt and Road” with respect to the mutual recognition and enforcement of civil and commercial judgments. Where it is not feasible to reach bilateral or multilateral mutual judicial assistance treaties along the “Belt and Road,” the supreme courts of these countries may execute memoranda such as the Memorandum concerning the recognition and enforcement of civil and commercial judgments. The Memorandum will aid the normalization and institutionalization of judicial assistance between China and Singapore and will meaningfully increase the predictability of the recognition and enforcement of court judgments between the two countries, although the Memorandum will still need to be tested in practice due to the differences in the respective legal systems and the limitations inherent in its form. Nevertheless, the Memorandum has rightfully brought a great deal of optimism to the business community and legal professionals alike.

English and Chinese versions of the Memorandum are available at following links:

Memorandum of Guidance between the Supreme People’s Court of the People’s Republic of China and the Supreme Court of Singapore on Recognition and Enforcement of Money Judgments in Commercial Cases (EN)

中华人民共和国最高人民法院和新加坡最高法院关于承认和执行商事案件金钱判决的指导备忘录(CN)

● **Important Announcement**

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