China - First Steps towards Recognition and Enforcement of Foreign Awards

For foreign parties with disputes with Chinese companies, one major constraint is the difficulty to enforce foreign court judgments against Chinese-held assets. China has signed very few so-called judicial-assistance treaties, and rarely agrees to recognize foreign court judgments on an ad hoc basis. Therefore, if a foreign company wishes to claim against a Chinese company, litigation in a foreign court is impractical as long as the properties of the Chinese party are located in China. If no agreement on arbitration can be or is reached, if the Chinese party would fail to comply with the foreign judgment and it has no property in the foreign jurisdiction, the foreign companies only practical choice is to litigate directly in China.

On 14 July 2006, the Supreme Peoples Court and the government of the Hong Kong Special Administrative Region signed and published the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region. The Arrangement, which was reported on one year ago (see our Legal Newsletter (2005) 11) and will become effective after the legislation is passed in Hong Kong and the Supreme Peoples Court has issued a related judicial opinion, provides a first opening for civil and commercial awards in Hong Kong to be enforced against assets in China, and vice versa. Regarding the internal procedure for recognition and enforcement by PRC courts, the Supreme Peoples Court has not (yet) published any guidelines. For the recognition and enforcement of a foreign arbitration award, a PRC court will first hold a recognition hearing, and only then proceed with enforcement. Most likely courts will adopt the same system for Hong Kong judgments.

The Arrangement provides certain conditions for recognition and enforcement, which are discussed below.

(1) Choice of Court

For the Arrangement to be applicable to an award, the parties to the dispute must have agreed in writing to designate the court of jurisdiction with a so-called choice of court clause. Thus for a contractual dispute, such a clause must have been included in the commercial contract or concluded in writing in other documents. In practice, a clause in the commercial contract will save a lot of argument on this jurisdiction issue.

While this requirement is in line with the Hague Convention on Choice of Court Agreements, many contracts in current practice do not include a specific choice of court clause. Parties will have to take this into consideration if they intend to allow cross-border enforcement of awards.

(2) Civil and Commercial Monetary Cases

While the Arrangement does not define in detail what constitutes a civil or commercial case, it does exclude specifically excluded cases in which a natural person is involved due to employment matters, consumer matters, family matters, or other non-commercial purposes.

The award, which is broadly defined, should be related to the payment of money. This excludes any possibility of cross-border equitable relief, such as injunctions or orders for a specific performance.

(3) Final Judgments

The Arrangement will only apply to judgments that cannot be appealed under general civil procedures. For the Mainland this includes judgments by the court of second instance, and those first instance judgments for which the time limit for appeal has expired. For Hong Kong this includes legally effective judgments made by the Court of Final Appeal, the Court of Appeal, the Court of First Instance of the High Court and the District Court.

Under the Chinese legal system, a particular problem presents itself with the possibility of retrial. Under the Arrangement the retrial of a case will not affect the recognition and enforcement procedure, except that any retrial of a case judged by a Mainland court, if being enforced in Hong Kong, should be retried at a Mainland court one level higher than the original trial court.

(4) Time limits

The Arrangement provides for a strict time limit to apply for recognition and enforcement of a judgment, of six months if both parties are companies, and one year if one of the parties is a natural person. The time limit starts on the last day of the period of performance for Mainland judgment to be enforced in Hong Kong, and from the day the judgment becomes enforceable if a Hong Kong judgment to be enforced in the Mainland.

The Arrangement is not retroactive, and will apply only to final judgments made after 14 July 2006.

(5) Grounds for Denial

The Arrangement finally lists a number of grounds on which recognition and enforcement can be denied specifically:

(a) The choice of court agreement is invalid under the law applicable in the place of the original trial court;
(b) The judgment is already fully satisfied;
(c) The law of the place of enforcement has exclusive jurisdiction according to the law of that place;
(d) A party did not appear in court and had not been summoned according to the law of the place of the original trial;
(e) The judgment was obtained by fraudulent means;
(f) A judgment to the same parties based on the same cause of action has already been delivered by the court of enforcement, or a judgment or an arbitration award has been recognized and enforced by the court of enforcement;
(g) The enforcement court in the Mainland considers enforcement contrary to social and public interests, or the court of enforcement in Hong Kong considers the judgment contrary to public policy.

Conclusions
With the Arrangement, Hong Kong has become the first common law jurisdiction to have a judicial assistance treaty with the Mainland. Also taking into account the close business relationship between Hong Kong and mainland companies, these reciprocal enforcement arrangements may have a considerable impact. The limits to the scope and especially the need for the choice of court clause may now limit its application. But lawyers and businesses are likely to take the Arrangement into consideration when drafting contracts in the future, and thus the number of cases suitable for cross-border enforcement will gradually increase.

This is good news especially for those foreign companies that would prefer to litigate outside Mainland China, even if the opposing party has assets in China only. While many companies will continue looking towards arbitration as the preferred means of dispute resolution, for some especially those familiar with the common law approach to litigation may prefer the Hong Kong route.

However, the Arrangement does not resolve the issue of provisional remedy, such as property preservation or injunctions. In dispute resolution cases in China the Chinese party frequently transfers its properties in the course of litigation to frustrate a final judgment. If the properties are located in the jurisdiction of the court, the court may take provisional remedies during its proceedings. However, under this bilateral Arrangement, there is no such mutual assistance on provisional remedies to protect the party’s interest in the other jurisdiction.

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