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COMMERCIAL LITIGATION, ARBITRATION AND ENFORCEMENT ISSUES IN ASIA PACIFIC AND BEYOND

WELCOME FROM OUR HOST

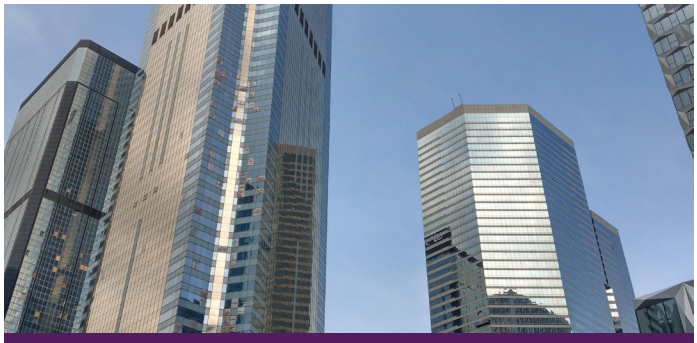
Fred Kan & Co. are proud to host the ADVOC International Business Law Conference 2019 in Hong Kong, China on Friday 1 March 2019.

The Conference's theme is Commercial Litigation, Arbitration and Enforcement Issues in Asia Pacific and Beyond. This one full-day conference includes 4 sessions. The panelists are all legal experts within ADVOC network. This is a client-facing conference: our delegates include ADVOC members and their overseas guests from various countries, as well as legal counsel and managers from Hong Kong and Mainland China.

It will be a great occasion for legal knowledge sharing. There will also be networking opportunities among overseas and local delegates during the conference.

Fred Kan
Conference Chairman

Timothy Cheung
Conference Vice-chairman



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ABOUT ADVOC

ADVOC is an international network of independent law firms with over 90 members across more than 70 countries. ADVOC are ranked as a leading legal network in Chambers and Partners Global Guide and have been shortlisted as Global Network of the Year by The Lawyer European Awards.

Each member of ADVOC has a proven record of immediate response to the needs of clients of other member firms. Each member is committed to ensuring that all clients will be more than satisfied with the service provided. Members are selected to join ADVOC for their wide experience of commercial work within their region. No fees or commission are charged for introductions and no time is wasted. As a result, referrals can be made quickly and with complete confidence.

For more information, please visit **www.advoc.com**

The ADVOC Dispute Resolution Practice Group comprises litigation lawyers of various ADVOC member firms. They are experts in their field from jurisdictions across the world. ADVOC members are firms that clients can look towards, to handle cross border disputes in different jurisdictions, and across different dispute resolution mechanisms.

John Sze
Practice Group Leader

Timothy Cheung
Practice Group Leader

DISPUTE RESOLUTION IN ASIA PACIFIC

NEW ARRANGEMENT SIGNED ON RECIPROCAL ENFORCEMENT OF CIVIL JUDGMENTS BETWEEN MAINLAND CHINA AND HONG KONG

A new Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters (the new Arrangement) was signed between Hong Kong and Mainland China on 18 January 2019 in Beijing.

The new Arrangement establishes a comprehensive mechanism for reciprocal recognition and enforcement of civil judgments in the two jurisdictions.

The new Agreement covers monetary relief and certain types of non-monetary relief. **"Judgments"** are broadly defined as any judgment, order or ruling (except interim relief). For Mainland China, judgments of the second instance or judgments of the first instance where no appeal shall lie are enforceable. For Hong Kong, judgments given by various designated courts and tribunals are enforceable.

The new Arrangement deals with judgments involving IP rights (including copyright, trademarks, geographical indications, industrial designs, patents, topographies of integrated circuits, undisclosed information and plant variety rights).

The new Arrangement covers judgments on contractual disputes involving IP rights and tort claims for infringement of IP rights (except patent infringement). Judgments ruling on licence fee rate of patents are also excluded. Rulings on the validity or subsistence of IP rights are not recognised, but judgments on liability based on IP rights are recognised.

The new Agreement will be implemented after enactment of local legislation in Hong Kong and judicial interpretation by the Supreme People's Court in Mainland China.

Timothy Cheung, Fred Kan & Co, Hong Kong

A NEW AGREEMENT BETWEEN CHINA AND SINGAPORE ON A GUIDE FOR THE RECOGNITION AND ENFORCEMENT OF MONEY JUDGMENTS

On 31 August 2018, the Supreme Court of Singapore and the Supreme People's Court signed a Memorandum of Guidance (MOG) that provides guidance on the standards and procedures for money judgments issued by the Singapore courts in commercial cases to be recognized and enforced in the Chinese courts, and vice versa. The aim of this arrangement was to promote mutual understanding of the laws and judicial processes between the two courts, with a view towards facilitating the process and providing practical support for litigants to enforce foreign judgments in China or Singapore.

The Effect of the MOG on Recognition and Enforcement Procedures in China

Prior to the signing of the MOG, an applicant wishing to enforce a Singapore judgment in China would need to refer to precedents and case law on the principle of reciprocity for direction. Singapore, like most other countries, does not have an enforcement treaty with China and it is generally not easy to enforce a Singapore judgment in China. By providing conceptual and practical guidance on recognition and enforcement proceedings, the MOG offers useful clarity for future cases for both litigants and courts and marks an important step in the judicial cooperation between China and Singapore.

The Applicability of the MOG

The MOG applies to money judgments in commercial cases, including judgment on costs. These money judgments are not limited to international matters, but also include non-international cases.

There are also certain money judgments which may not be enforced. These include:

- Judgments which would amount to the direct or indirect enforcement of foreign penal, revenue or public law if recognized and enforced and;
- Judgments which are not final and conclusive i.e. is subjected to appeal or there is an application pending for appeal.

Where a Singapore judgment is being enforced in China:

- Judgments which relate to intellectual property rights cases, unfair competition cases or monopoly cases.

Comments

Overall, the MOG is a welcomed development, especially for a country like Singapore which is increasingly becoming popular as a dispute resolution venue for both court litigation and arbitration cases alike. As the MOG also applies to judgments in the Singapore International Commercial Court, judgments issued by the SICC could be enforced in China, even in commercial disputes between non-Singaporeans and Chinese parties, increasing the attractiveness of the SICC and Singapore for the resolution of disputes.

Further, we note that China has signed the Hague Convention on Choice of Courts Agreement and is in the process of consultation prior to being ratified. The said Convention has already come into effect in Singapore through the Choice of Courts Agreements Act 2016 and we believe that the ratification of the Convention in China in time to come would further strengthen the mutual recognition and enforcement of judgments between the two jurisdictions.

However, commercial parties wishing to select Singapore as a forum for dispute resolution should bear in mind the type of judgments that are excluded from enforcement under the MOG. For instance, contracting parties trying to come to an agreement on the forum to be used under a dispute resolution clause should seriously consider the kind of disputes that may arise under the contract and whether judgments resulting from these disputes are excluded from being enforced based on the guidance provided in the MOG.

John Sze, JTJB, Singapore

PRC CIVIL PROCEEDINGS INVOLVING FOREIGN PARTIES

There is a special section in the China's Civil Procedure Law that specifically regulates civil procedures involving foreign parties. For any civil litigation matter with foreign party involved, this special section will firstly apply. Other part of Civil Procedure Law is applicable only when there are no provisions in this section.

Based on our experience, the issues below are frequently encountered in the PRC legal proceedings with foreign parties involved in China.

Which court?

To initiate a civil case, the first thing one needs to know is at which court he can file the lawsuit. Normally for a contractual dispute, the courts which can hear the case are broad, including the defendant's domicile, plaintiff's domicile, the place where the contract was performed, the place where the contract was signed, the place where the subject matter is located, and any foreign venue where has actual connection with the dispute.

However, we should bear in mind the cases regarding the performance of following contracts in China can only be heard at Chinese courts: Sino-foreign equity joint venture contract, Sino-foreign cooperative joint venture contract, and contract for Sino-foreign cooperative exploration and development of natural resources.

Differently, for a Wholly Foreign Owned Enterprise ("WFOE") which is a normal practice of foreign investment in China, since it's a Chinese entity just as any other Chinese companies, if there's no foreign party or foreign factors involved in the dispute, the general provisions of jurisdiction in the Civil Procedure Law will apply. Actually, it is very often that a WFOE chooses the forum of dispute resolution in its contracts with foreign parties, as it's a better way to protect its benefits. One thing needs to be noted is that when the parties choose the forum by agreement, they should pay attention to whether the judgment made by the chosen forum can be enforced in another state where the main assets of the defendant are. If not, even if you win the case, you cannot make yourself recovered by enforcing the judgment, and the winning is meaningless.

What law to apply?

With regard to a commercial contract, the parties can choose the applicable law by agreement. If the parties didn't choose any, the law of the habitual residence of the party whose performance of contractual obligations can mostly reflect the characteristics of the contract, or another law which is most closely connected with the contract shall apply.

Notarization and Legalization

The PRC is not a member country to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents (the "Hague Convention"), thus the principle of apostille* is not applicable in the cases where the documents such as evidence or power of attorney being required by court in litigation proceedings, which documents were originated and produced and provided outside China must be notarized by a public notary in parties' own home country, as well as be authenticated and legalized by the Embassy or Consulate of the PRC stationed in that country, otherwise, they shall go through the certification procedures in accordance with the treaty entered into by and between the two countries.

Case study

Without the above process of notarization and legalization, the documents produced by the foreign country cannot be deemed as a proper legal document nor admissible at courts of the PRC. We have dealt with a litigation matter where we acted for a Scottish client and the UK lawyer thought we were one of member countries to the Hague Convention, just like Hong Kong, and did not get the documents authenticated and legalized by the Chinese Embassy and Consulate in UK before couriered the documents to China. As a result, those document were not admissible and they were asked to re-prepare those documents.

Comments

Among others, I am sure it is a good lesson and something important for all of us to be aware of when preparing the documents admissible at court in the PRC.

Apostille: A standard certification provided under the Hague Convention for authenticating documents used in foreign countries. Also termed Certificate of Authority, meaning a document authenticating a notarized document that is being sent to another jurisdiction. The certificate assures the out-of-state or foreign recipient that the notary public has a valid commission.

JT&N, Beijing, China

A NEW ARSENAL TO OVERCOME PROCEDURAL HURDLE TO AMEND A COMPANY'S CONSTITUTION

Section 37 of the Malaysia Companies Act 2016 conferred the court the discretion to alter or amend the constitution of a company upon an application by a director or a shareholder. The discretion is limited to only situations where it is not practicable to alter or amend the constitution using the procedures set out in the Companies Act or the Constitution itself. This is in pari materia with section 34 of the New Zealand's Companies Act 1993.

Cautious Exercise Of Discretion: The New Zealand Case Law

Upon examination of the authorities from New Zealand, it is apparent that the New Zealand court took a strict and narrow interpretation of the term 'not practicable' and refused to exercise its power under section 34, setting a high bar for future cases.

Crossing the Bar – Chew Meu Jong v Lysaght (Malaysia) Sdn Bhd [WA-24NCC-178-05/2017]

On 31 October 2018, the Malaysia High Court has exercised its discretion under section 37 of the Companies Act 1965 to allow the alteration and amendment to the Constitution of the defendant company which is the first case in Malaysia and the world where such order has been granted.

This case concerns the application to alter the provision in the Constitution regarding quorum requirement for board of directors' meeting and general meetings ('the Quorum Provisions') where one of the shareholders who is a quorum requirement have sold its shares to another shareholder within the same class. As a result of the wordings of the Constitution which require the former shareholder as a quorum requirement, some directors and shareholders refused to attend meetings by contending that the Company could not hold valid directors and shareholders' meeting. The Managing Director which was represented by Chooi & Company + Cheang & Ariff (CCA) then applied to alter and amend the Constitution pursuant to section 37.

Despite objection from some other shareholders and director of the company who applied to intervene in the proceedings, the High Court held that the application was filed in good faith and allowed the application on the ground that it is not practicable to alter and amend the Constitution the constitution using the procedures set out in the Companies Act or the Constitution itself.

Comment

This is a case where some directors and shareholders refused to attend meetings by contending that no quorum can be achieved and no meetings can be held. This has caused a situation where the company is at a standstill by not being able to hold meetings if the constitution is not amended. This case does not lower the bar to invoke the court's discretion, but has provided useful guidance as to the circumstances which may satisfy the high bar. Indeed, the circumstances of this case mirror closely to the one provided in Morison's Company and Securities Law (Lexis Nexis):

> **Examples where the impracticability ground may be used include where it is impossible to obtain a quorum for a shareholders meeting or where directors refuse to call a meeting or are unable to do so. The court may make an order altering the constitution on any terms and conditions it considers appropriate.**

This is certainly a welcomed precedent, as it showcase that section 37 is not just for show and may be invoked in genuine cases, so that the constitution cannot be used to hold hostage the economic interest of other stakeholders.

Take note, an appeal has been filed against the decision of Chew Meu Jong and a hearing date has yet to be fixed.

Cindy Goh Joo Seong, CCA, Malaysia