

foreign court judgment enforcement in China

Description

China has never been integrated with the world so extensively and so deeply as it is today. For the last three decades, China has been welcoming and hosting foreign investors and business people at home, and now more and more Chinese investors and business people are making their roads into foreign countries over the globe.

Either way, there is an important legal cause in their deal contracts to be negotiated and decided: which court will have jurisdiction over the disputes arising out of the contracts in question.

Ill-advised foreign parties may insist that disputes shall only be submitted to courts in their home countries, exhibiting clear distrust in Chinese judicial system. While this insistence is understandable, very often, those foreign parties will in the end find themselves having lifted a stone that will only fall onto their own feet.

I. General Examination of the Issue in China

China has not concluded or acceded to any international convention on recognition and enforcement of foreign courts judgments. In most cases, foreign court judgments cannot be enforced in China.

On the other hand, China has entered into some bilateral treaties with foreign countries in which the parties agree to enforce the judgment delivered by the courts of the other party. However, please note that unfortunately, China has no such bilateral treaties with the world major economies such as USA, Japan, UK and Germany. So far, China has signed such bilateral treaties with France, Italy, Australia (in regard of investment disputes, as specially defined in the treaty), Russia, Cyprus and a few other countries.

When applying particular bilateral treaties in specific cases, the party shall need to look carefully at the terms of the treaty concerned. There are some specific provisions restricting the enforcement of foreign states in China. For example, in the treaty with Italy, Section 21 lists circumstances where the foreign judgments may not be enforced in the other party state, and further, Section 22 defines proper jurisdiction as used under the treaty.

One of the practical points for foreign party seeking enforcement in China is that they need to clearly and sufficiently prove that the Chinese party has been served with due summons of the proceedings in their home country.

In particular, we have noticed that German court has enforced a court judgment delivered by a Jiangsu court in China. By way of reciprocity, it is possible that Chinese court will be willing to enforce judgments made by German courts. Our firm has helped a client in enforcing a German court judgment in China though the request is refused on the ground that the Chinese company has not been served on notice about the German proceedings.

Important Update on April 27, 2013: I have just noticed that a judgment made by a Chinese court in Hubei were successfully recognized and enforced by the United States Court of Appeals for the Ninth Circuit back in 2011, the first ever decision made by American courts. This milestone decision will set precedent in United States for recognizing and enforcing Chinese court judgments which is in the interests of the Chinese companies. On the other hand, this landmark decision will also make it possible for American court judgments to be recognized and enforced in China based on the principle of reciprocity and comity. It will not be too much to however hail and applaud the decision in the context of US-China strong economic interaction.

II. Non-exclusive Jurisdiction

The above analysis means that in many cases, it is not wise to stipulate a dispute resolution by submitting disputes to the foreign court. In practice, international deals documents often see arbitration as a way of dispute resolution since China is a party to the New York Convention on recognition and enforcement of arbitration awards rendered by foreign or international arbitration bodies.

However there are cases where the foreign parties have overwhelming reasons to choose their home country as forum of court for resolving disputes. Besides, arbitration has its obvious drawbacks, for instance, it is slow or impossible for international arbitration bodies to adopt expedite and effective conservatory measures in favor of one party. With more and more Chinese parties invest in foreign countries, Chinese companies are moving their assets outside Chinese borders, which gives foreign parties and courts opportunities to enforce their judgments at home against the assets of Chinese companies in their own countries. So it makes good sense for foreign parties to reserve the right to litigate in their home countries.

Given the contradictory situation, the possible way out of the dilemma is to stipulate non-exclusive jurisdiction clause in the transaction documents whereby each party is given the option to choose either the foreign state or Chinese court as forum for dispute resolution. Pursuant to a guideline issued by China Supreme Court, where a contract stipulates that the foreign court has a non-exclusive jurisdiction over the subject matter, the Chinese court shall have the right to entertain the same case despite that the foreign court proceedings have started already.

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