The enforceability at common law of a chinese civil mediation judgment

By Wayne Muddle SC and David Townsend

Two recent decisions of the Supreme Court of New South Wales, *Bank of China Ltd v Chen* [2022] 749 (Harrison AsJ) (*No 1*) and *Bank of China Ltd v Chen (No 2)* [2022] NSWSC 1168 (Wright J) (*No 2*), confirm, for what is understood to be the first time in Australia, that a Chinese '民事调解书' ('Minshi Tiaojie Shu', 'MTS' or 'Civil Mediation Judgment') is enforceable in Australia under common law principles for the recognition of foreign judgments. This may have considerable practical significance for the enforcement of Chinese judgments against Australian-resident judgment debtors and execution against their assets in Australia.

What is a Chinese Civil Mediation Judgment?

In Chinese civil litigation, it is common practice for the parties to be asked by the judge before whom their case would be argued whether they are prepared to undergo mediation before proceeding to a contested hearing. If the parties agree (and it is said that under the Chinese system, they generally do), the mediation takes place before the judge and any agreement between the parties is certified by the judge as conforming with the general law and is then sealed by the court. The sealed document, a Civil Mediation Judgment, may under Chinese law be relied on by the judgment creditor for execution processes in the same way as a judgment obtained after a contested hearing. Civil Mediation Judgments are reportedly a very common method of resolving civil disputes under Chinese law without the need for a contested hearing, as they not only save time and money but avoid the parties being in open dispute with one another before the court, which is said to be particularly significant where one party is a state instrumentality.

Enforcement by statute and under common law

Foreign judgments may be enforced in Australia either through a statutory process set out in the *Foreign Judgments Act 1991* (Cth) or through the common law principles for the recognition of foreign judgments. The statutory process is more straightforward than the common law process, but only applies to foreign jurisdictions which are declared by the Regulations as granting substantial reciprocity to Australian judgments in those jurisdictions. Aside from Hong Kong, the People's Republic of China has not been so declared.

The criteria for enforcement under common law are well settled, and were recently enunciated in *Bao v Qu; Re Tian (No 2)* (2020) 102 NSWLR 435; [2020] NSWSC 588 at [26]: 1) the foreign court must have exercised jurisdiction in the international sense; 2) the foreign judgment must be final and conclusive; 3) there must be identity of parties between the foreign proceeding and the forum proceeding; and 4) the foreign judgment must be for a fixed, liquidated sum. Once a plaintiff establishes the existence of these four criteria, unless the defendant can establish a defence such fraud, the foreign judgment debt already having been satisfied overseas or a public policy reason why the foreign judgment should not be recognised, it will be recognised and enforced in the forum, on the basis that it creates an effective estoppel.

Factual and procedural background

The defendant, Ying Chen, stood as guarantor for two business loans made by the plaintiff, Bank of China Ltd, to a garment trading company. The company defaulted on its loans, and the plaintiff initiated two sets of proceedings in China (one in respect of each loan) against the company and the guarantors, including the defendant. In respect of each proceeding, when the claim came to be heard by the People's Court of Jimo District, Qingdao City in October 2019, the parties agreed to undertake judicial mediation before the presiding judge. In each case, judicial mediation occurred immediately thereafter, and the parties agreed that the company was to pay back the outstanding loan with interest and that the guarantors, including the defendant, were jointly liable for this judgment debt. In each case, the Chinese Court certified that the agreement reached at judicial mediation conformed with the general law and sealed the document. These were the two Civil Mediation Judgments at issue in the NSW proceeding.

Some execution processes were undertaken in China, but the judgment debts remained, for the most part, unsatisfied. In December 2020, by summons in the NSW Supreme Court, the plaintiff sought enforcement against the defendant of the sums outstanding under these two Civil Mediation Judgments. The plaintiff served the summons on the defendant in China in January 2021 without obtaining leave to do so, in reliance on *Uniform Civil Procedure Rules 2005* (NSW) (UCPR) Sch 6(m), which allows service outside Australia without leave 'when it is sought to recognise or enforce any judgment'. The defendant sought that the summons, and service thereof without leave, be set aside as the Civil Mediation Judgments were not 'judgments' within the meaning of UCPR Sch 6(m), and also sought declaratory relief to the same end.

Once the identity of Civil Mediation Judgments as 'judgements' for the purposes of UCPR Sch 6(m) was established, there was no substantive dispute that the four factors for common law enforcement were made out...

Decision

The court confirmed that the two Civil Mediation Judgments which the plaintiff sought to enforce in NSW were indeed 'judgments' for the purpose of UCPR Sch 6(m). Whether or not a Civil Mediation Judgment is a 'judgment' is a matter of law, not a matter of translation of the Chinese term '民事调解书' (*No 1* at [91]–[92]). Further, it is a matter which falls to be determined according to what Australian law, not Chinese law, regards as a 'judgment' (*No 1* at [96]). Well-settled Australian common law defines a 'judgment' as a court document which creates *res judicata* by quelling the controversy between the parties finally and conclusively and prevents action on the same cause, and which has mandatory enforceability and coercive effect through the authority of the court itself. Expert evidence established that a Civil Mediation Judgment did indeed establish under Chinese civil law what Australian law understands as *res judicata* and that, notwithstanding that the orders pursuant to a Civil Mediation Judgment were those agreed between the parties, the Civil Mediation Judgment had authority by virtue of being sealed by the Chinese Court and (once served on the parties) had the same legal effect as a judgment in which the orders had been subject to contest (*No 1* at [103]–[104]). It was noted that, in Australia, consent judgments are nevertheless still 'judgments' (*No 1* at [104]).

Once the identity of the Civil Mediation Judgments as 'judgments' for the purposes of UCPR Sch 6(m) was established, there was no substantive dispute that the four factors for common law enforcement (mentioned above) were made out, and the court found accordingly (*No 1* at [86]–[89]). Further, aside from the fact that the defendant did not appear at the final hearing of the summons (which was ultimately due to the defendant's election), there was no reason of public policy why the Civil Mediation Judgments should not be recognised, and thus they were so recognised (*No 2* at [12]).

This decision brings Australia into conformity with New Zealand, British Columbia and Hong Kong, which have all confirmed the enforceability of Chinese Civil Mediation Judgments under common law.

Implications

The degree to which capital has flowed from China to Australia in recent decades, including in response to the Chinese government's recent crackdown on conspicuous displays of wealth in China, is well known. Much of this capital has been invested in asset classes which have seen significant appreciation of value. These recent decisions of the NSW Supreme Court clear the way for judgment creditors in Chinese proceedings to rely on Civil Mediation Judgments in enforcing outstanding judgment debts in Australia, and then to seek writs of execution against judgment debtors' assets in Australia. It may be presumed that much use may be made of this, particularly where such Australian assets include valuable, immovable property such as residential real estate. BN

Wayne G Muddle SC and David J Townsend acted for the plaintiff in these proceedings, instructed by JurisBridge Legal.