



Recognition and Enforcement of Foreign Judgments in Asia

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Structure of presentation

- Overview of ABLI and Foreign Judgments project
- Reasons for harmonisation
- Analysis and comparison: common law countries; hybrid and civil law countries
- Whether harmonisation is feasible
- Enforceability of Singapore judgments abroad

Overview of the Asian Business Law Institute

- Launched in January 2016
- Aim: Facilitates research in Asian laws to promote the convergence of Asian business laws
- Mission: Remove differences between Asian legal systems that pose obstacles to free and seamless trade
- Board of Governors: chaired by Sundaresh Menon CJ of the Supreme Court of Singapore, with representatives from Australia, China, India and Singapore
- More information: <http://abli.asia/>

Foreign Judgments in Asia: Overview of the project

- 10 ASEAN Member States, Australia, China, India, Japan and South Korea
- Civil and commercial matters
- 2 phase project
 - Phase 1
 - Mapping exercise to identify the current state of the law in the fifteen countries.
 - Output: Compendium of country reports. Published in December 2017. Freely available on website.
 - Aimed to be of utility to lawyers and general counsel in the region. Springboard for Phase 2.
 - Cambodia chapter translated into Khmer. Myanmar chapter translated into Burmese. Entire compendium translated into Chinese.
 - Phase 2
 - Output: Statement of Principles
 - Objective: set out common principles and flesh out differences in the various laws.
- <http://abli.asia/PROJECTS/Foreign-Judgments-Project>

Why harmonise the law on foreign judgments?

- Closer economic integration and increasing cross-border trade
 - ASEAN Economic Community (AEC) established in 2015
 - China's Belt and Road initiative (BRI)
- Increase legal certainty and portability of judgments
 - Each country relies on its own rules
 - Lack of clarity in the laws of some countries
 - Some countries do not generally recognise and enforce foreign judgments
- Increase the attractiveness of particular courts
 - Trend of setting up international commercial courts
 - Cf arbitration (New York Convention)

Examples of harmonisation efforts

- Brussels regime in the European Union (double convention)
- Hague Convention on Choice of Court Agreements 2005
 - In force in Singapore, Montenegro, Mexico and the EU Member States
 - Signatories: China, Ukraine and USA
- Hague Conference's draft Convention on Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters

Foreign Judgments in Asia



- Common law countries: Australia, Brunei, India, Malaysia, Myanmar and Singapore
- Civil law countries: Cambodia, China, Indonesia, Japan, Lao PDR, South Korea, Thailand and Vietnam
- Hybrid system: the Philippines

Common law jurisdictions

- Doctrine of obligations
- A foreign judgment will be enforced if it is:
 - on the merits of the case;
 - for a fixed or ascertainable sum of money that is not a tax, fine or other penalty;
 - final and conclusive;
 - foreign court is a court of competent jurisdiction;
 - no defences are raised against enforcement

Common law jurisdictions

- On the merits of the case
 - Default/ *ex parte* judgments
 - India and Myanmar
- Fixed sum of money
- Final and conclusive
 - *Res judicata* between the parties under the law of the rendering court and judgment cannot be varied/reopened/ set aside by rendering court
 - Default judgments (cf India and Myanmar)
 - Interlocutory judgments
 - Judgments that are the subject of an appeal or which can still be appealed

Common law jurisdictions

- Foreign court is a court of competent jurisdiction/ foreign court has international jurisdiction
 - Usually tested by law of the forum
 - Cf Malaysia?
 - India and Myanmar (also the Philippines) - presumption that foreign court is competent- documentary evidence
 - Judgment debtor was present/resident in the rendering court's jurisdiction or had submitted to rendering court's jurisdiction
 - Australia and India- nationality
 - *Adams v Cape Industries* [1990] Ch 433:
 - Temporary presence suffices for a natural person
 - Whether corporation is carrying on business from a fixed place of business for more than a minimal period of time by an agent or by a representative who is carrying on the corporation's business in the foreign jurisdiction

Civil law and hybrid law jurisdictions

- More diverse compared to common law rules
- Countries which generally do not enforce foreign judgments
 - Indonesia, Thailand (?)
 - Have to sue afresh on the original cause of action
 - Foreign judgment may be taken as evidence

Civil law and hybrid law jurisdictions

- Countries which do enforce foreign judgments
 - Some similarities with common law framework
 - Foreign judgment must be final and conclusive
 - Judgments that can or are being appealed in court of origin: Lao, Japan, the Philippines, South Korea
 - Foreign court must have international jurisdiction
 - Refer to the law of the court of origin: the Philippines, China (?)
 - Refer to own law: Vietnam, China (?)
 - Refer to own law- apply mirror image approach: Japan and South Korea
 - Case cannot fall within exclusive jurisdiction of the enforcing court: China, Japan and Vietnam



Other elements

- No review of the merits of the judgment
- Relevance or irrelevance of mistake made by court of origin
 - The Philippines: clear mistake of fact or law which would work an obvious injustice
- Defences

Defences

- Fraud
 - May be subsumed under public policy defence
 - Extrinsic fraud only: China, the Philippines
 - Distinction between extrinsic and intrinsic fraud: Singapore
- Public policy
- Breach of natural justice/ lack of due process
- *Res judicata*
 - Conflict with judgment of the court addressed
 - Little authority on conflict between 2 foreign judgments

Common principles

- Foreign court must be a court of competent jurisdiction
- Judgment must be final and conclusive
- Court addressed cannot examine the merits of the case
- Defences
 - Public policy
 - Breach of natural justice/ lack of due process
 - Conflict with local judgment

Significant differences: reciprocity

- Reciprocity in civil law and hybrid law jurisdictions; cf common law jurisdictions
- Idea of sovereignty
- Differences in how reciprocity is interpreted in the civil law jurisdictions
 - Requirement of treaty: Indonesia and Lao
 - Requirement of guarantee of reciprocity: Cambodia
 - Very broad form: Vietnam
 - Broad form: Japan, South Korea- expectation of receiving reciprocal treatment suffices
 - Narrow form: China- *de facto* reciprocity
 - *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2014] 2 SLR 545 (HC)
 - (2016) SU 01 XIE WAI REN No 3

Significant differences: reciprocity

- BUT Signs of liberalisation in some countries
 - Vietnam: compare law pre- and post-2004
 - Japan: 'same or more lenient conditions' (1933), 'not substantially different' (1983, 1998)
 - China: Supreme People's Court's 'Several Opinions on Providing Judicial Services and Guarantee for the Building of One Belt One Road' (2015); Nanning Declaration in 2nd China-ASEAN Justice Forum (2017)

Significant differences: enforcement of non-monetary judgments

- Most of the common law countries do not enforce non-monetary judgments
 - Cf Singapore (under the Choice of Court Agreements Act 2016); India
- Civil law and hybrid law countries which do enforce non-monetary judgments: Cambodia, Japan, Lao, the Philippines, South Korea
- Historical reason underlying common law refusal
- BUT Same result can be achieved indirectly: raise *res judicata* based on the foreign non-monetary judgment; local court may then grant a mirror order

Is harmonisation feasible?

- Problem of diversity should not be overstated
- Outliers
 - Indonesian law: Foreign judgments of a declaratory nature may be entitled to recognition
 - Thai law: Enactment of the International Convention on Civil Liability for Oil Pollution Damage 1992 and International Convention on the Establishment of an International Fund for Compensation for Oil Pollution 1992
- Organic movement towards harmonization
- Hague Conference's draft Judgments Convention
- Conducive environment in the region to push for harmonisation

Enforceability of Singapore judgments abroad

- Indonesia, Thailand, Lao and Cambodia
- Common law countries
 - SG court assumed jurisdiction on basis of D's presence/residence or nationality (India)
 - D has submitted to SG court's jurisdiction (choice of court agreement or by taking steps in court which indicate it is waiving its right to object to the court's jurisdiction)
 - SG court has assumed jurisdiction on the basis of Order 11
 - SG default judgment where the evidence has not been considered (India and Myanmar)
- Civil law countries
 - Whether SG court has international jurisdiction
 - The Philippines- depends on SG law
 - Japan and South Korea- consider Japanese and South Korean jurisdictional rules
 - Vietnam- whether D has submitted
 - China, Japan and Vietnam- case cannot fall within exclusive jurisdiction of the enforcing court
 - Whether SG judgment which can be appealed or is being appealed is final and conclusive
 - Lao, Japan, South Korea and the Philippines
 - Reciprocity
 - Indonesia, Lao, Cambodia

Enforceability of Singapore judgments abroad: HCCCA

- SG judgment falling within the Hague Convention on Choice of Court Agreements (HCCCA)
- If SG court is the chosen court, subject to certain defences, the judgment will circulate in the other HCCCA Contracting States
- Note Article 8(5): “where the chosen court had discretion as to whether to transfer the case to another court, recognition or enforcement of the judgment may be refused against a party who objected to the transfer in a timely manner in the State of origin.”

Enforceability of Singapore judgments abroad: HCCCA

- Choice of 'Singapore High Court'
 - Rules of Court, Order 110, r 1(1)(ca); Choice of Court Agreements Act, s 2(2)
 - Case is commenced in the SICC: the SICC is a chosen court for the purposes of the HCCCA
 - Case is commenced in the SGHC: the SGHC is a chosen court for the purposes of the HCCCA
 - Case is commenced in the SGHC and subsequently transferred to the SICC: the SICC is a chosen court for the purposes of the HCCCA
- Choice of 'Singapore High Court not including the SICC'
 - Case is commenced in the SGHC: SGHC is a chosen court for the purposes of the HCCCA
 - Case is commenced in the SGHC and subsequently transferred to the SICC: the transfer can only be made with party consent (Order 110, r 12(3B))