First Instance where a Mainland China Civil Mediation Decision has been Recognized and Enforced in New South Wales, Australia

I Introduction

Bank of China Limited v Chen [2022] NSWSC 749 (‘*Bank of China v Chen*’), decided on the 7 June 2022, is the first instance where the New South Wales Supreme Court (‘NSWSC’) has recognised and enforced a Chinese civil mediation decision.

II Background

This case concerned the enforcement of two civil mediation decisions obtained from the People’s Court of District Jimo, Qingdao Shi, Shandong Province China (which arose out of a financial loan dispute) in Australia.[1]

A foreign judgement may be enforced in Australia either at common law or pursuant to the *Foreign Judgements Act 1991*(Cth).[2] As the People’s Republic of China is not designated as a jurisdiction of substantial reciprocity under the *Foreign Judgements Regulation 1992* (Cth) schedule 1, the judgements of Chinese courts may only be enforced at common law.[3]

For a foreign judgement to be enforced at common law, four requirements must be met:[4] (1) the foreign court must have exercised jurisdiction in the international sense; (2) the foreign judgement must be final and conclusive; (3) there must be identity of parties between the judgement debtor(s) and the defendant(s) in any enforcement action; and (4) the judgement must be for a fixed, liquidated sum. The onus rests on the party seeking to enforce the foreign judgement.[5]

Bank of China Ltd ('plaintiff') served the originating process on Ying Chen ('defendant') pursuant to r 11.4 and Schedule 6(m) of the *Uniform Civil Procedure Rules 2005* (NSW) ('UCPR') which provides that an originating process may be served outside of Australia without leave of the court to recognise or enforce any 'judgement'.[6] Central to this dispute was whether a civil mediation decision constituted a 'judgement' within the meaning of schedule 6(m).

III Parties' Submission

A *Defendant's Submission*

The defendant filed a notice of motion seeking for (1) the originating process to be set aside pursuant to rr 11.6 and 12.11 of the UCPR, (2) service of the originating process on the defendant to be set aside pursuant to r 12.11 of the UCPR and (3) a declaration that the originating process had not been duly served on the defendant pursuant to r 12.11 of the UCPR.[7]

The defendant argued that the civil mediation decisions are not 'judgements' within the meaning of UCPR Schedule 6(m).[8] Moreover, the enforcement of foreign judgment at common law pre-supposes the existence of a foreign judgement which is absent in this case.[9]

The defendant submitted that the question that must be asked in this case is whether the civil mediation decisions were judgements as a matter of Chinese law which is a question of fact.[10] This was a separate question to whether, as a matter of domestic law, the foreign judgements ought to be recognised at common law.[11]

B *Plaintiff's Submission*

In response, the plaintiff submitted that all four common law requirements were satisfied in this case.[12] Firstly, there was jurisdiction in the international sense as the defendant appeared before the Chinese Court by her authorised legal representative.[13] The authorised legal representative made no objection to the civil mediation decisions.[14] Secondly, the judgement was final and conclusive as it was binding on the parties, unappealable and can be enforced without further order.[15] Thirdly, there was an identity of parties as Ying Chen was the defendant in both the civil mediation decisions and the enforcement proceedings.[16] Fourthly, the judgement was for a fixed, liquidated sum as the civil mediation decisions provided a fixed amount for principal and interest.[17]

In relation to the defendant's notice of motion, the plaintiff argued that the question for the court was whether the civil mediation decisions fell within the meaning of 'judgement' in the UCPR, that is, according to New South Wales law, not Chinese law (as the defendant submitted).[18] On this question, there was no controversy.[19] While the UCPR does not define 'judgement', the elements of a 'judgement' are well settled according to Australian common law and Chinese law expert evidence supports the view that civil mediation decisions have those essential elements required by Australian law.[20]

Under common law, a judgement is an order of Court which gives rise to res

judicata and takes effect through the authority of the court.[21] The plaintiff relied on Chinese law expert evidence which indicated that a civil mediation decision possesses those characteristics, namely by establishing res judicata and having mandatory enforceability and coercive authority.[22] The expert evidence noted that a civil mediation decision is a type of consent judgement resulting from mediation which becomes effective once all parties have acknowledged receipt by affixing their signature to the Certificate of Service.[23] The Certificate of Service in respect of the civil mediation decisions in this case had been signed by the legal representatives of the parties on the day that the civil mediation decisions were made.[24] While a civil mediation decision is distinct to a civil judgement,[25] a civil mediation decision nonetheless has the same binding force as a legally effective civil judgement and can be enforced in the same manner.[26]

The expert evidence further noted that Mainland China civil mediation decisions have been recognised and enforced as foreign judgements in the Courts of British Columbia, Hong Kong and New Zealand.[27] The factors which characterise a 'judgement' under those jurisdictions are the same factors which characterise a 'judgement' under Australian law.[28]This supports the view that the same recognition should be afforded under the laws of New South Wales.[29]Accordingly, the plaintiff submitted the a civil mediation decision possesses all the necessary characteristics of a 'judgement' under Australian law such that service could be effected without leave under schedule 6(m).[30]

IV Resolution

Harrison AsJ noted that the judgements of Chinese courts may be enforceable at common law and found that all four requirements was satisfied in this case.[31] There was jurisdiction in the international sense as the defendant's authorised legal representative appeared before the People's Court on her behalf, the parties had agreed to mediation, the representatives of the parties came to an agreement during the mediation, and this was recorded in a transcript.[32] The parties' representatives further signed the transcript and a civil mediation decision had

been issued by the people's courts.[33] Moreover, the civil mediation decision was final and binding as it had been signed by the parties.[34] The third and fourth requirements were also clearly satisfied in this case.[35]

In relation to the central question of whether the civil mediation decisions constituted 'judgements' in the relevant sense, Harrison AsJ found in favour of the plaintiff.[36] Harrison AsJ first noted that this question should not be decided on the arbitrary basis of which of the many possible translations should be preferred.[37] Moreover, the evidence of the enforcement of civil mediation decisions as judgements in the jurisdictions of British Columbia, Hong Kong and New Zealand was helpful, though also not determinative.[38]

Rather, this question must be determined by reference to whether civil mediation decisions constituted judgements under Australian law as opposed to Chinese law, accepting the plaintiff's submission.[39] The civil mediation decisions were enforceable against the defendant immediately according to their terms in China without the need for further order or judgement of the People's Court.[40] The parties could not vary or cancel the civil mediation decisions without the permission of the Jimo District Court.[41] The civil mediation decisions also had the same legal effects as a civil judgement.[42] Therefore, Harrison AsJ concluded that the civil mediation decisions were judgements for the purposes of Australian law as they established res judicata and were mandatorily enforceable and had coercive authority.[43] It then followed that the civil mediation decisions fell within the scope of UCPR schedule 6(m) and did not require leave to be served.[44]

V Orders

In light of the analysis above, Harrison AsJ held that the Chinese civil mediation decisions were enforceable and dismissed the defendant's motion.[45] Costs were

further awarded in favour of the plaintiff.[46]

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References:

[1] *Bank of China Limited v Chen* [2002] NSWSC 749, [1], [16].

[2] Ibid [8]; citing *Bao v Qu; Tian* (No 2) [2020] NSWSC 588, [23]-[29].

[3] Ibid [8].

[4] Ibid.

[5] Ibid.

[6] Ibid [9] – [11].

[7] Ibid [6].

[8] Ibid [57].

[9] Ibid [59], [84].

[10] Ibid [61].

[11] Ibid.

[12] Ibid [25].

[13] Ibid [18].

[14] Ibid.

[15] Ibid [20].

[16] Ibid [22].

[17] Ibid [24].

[18] Ibid [27].

[19] Ibid [28].

[20] Ibid.

[21] Ibid [37].

[22] Ibid [38].

[23] Ibid [39].

[24] Ibid.

[25] Ibid [41].

[26] Ibid [42].

[27] Ibid [49].

[28] Ibid [50].

[29] Ibid [51].

[30] Ibid [52].

[31] Ibid [83], [90].

[32] Ibid [86].

[33] Ibid.

[34] Ibid [87].

[35] Ibid [88]-[89].

[36] Ibid [105].

[37] Ibid [91]-[92].

[38] Ibid [93].

[39] Ibid [96].

[40] Ibid [103].

[41] Ibid.

[42] Ibid.

[43] Ibid [105].

[44] Ibid [106].

[45] Ibid [107]-[108].

[46] Ibid [109]-[112].