

Limitation Period for Enforcement of Foreign Judgments: Australian Court Recognized and Enforced Chinese Judgment Again

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On 15 July 2022, the Supreme Court of New South Wales (“NSW”) recognized and enforced a Chinese judgment issued by the Shanghai Pudong New Area People’s Court 12 years ago in *Tianjin Yingtong Materials Co Ltd v Young* [2022] NSWSC 943.[1] It ruled that the defendant Katherine Young (“Ms. Y”) pay the plaintiff Tianjin Yingtong Materials Co Ltd (“TYM”) outstanding payment, interest and costs. This marks the second time that the court of NSW in Australia enforces Chinese judgment after *Bao v Qu; Tian (No 2)* [2020] NSWSC 588.[2]

I. The Fact

On 7 April 2009, the original plaintiff, TYM, sued Shanghai Runteyi Industrial Co., Ltd (“first original defendant”), Shanghai Runheng International Trading Co., Ltd (“second original defendant”) and Ms. Y (named as “Hong Yang” in Chinese Judgment) before Shanghai Pudong New Area People’s Court (“the Chinese Court”). According to the Chinese judgment, TYM had acted as agent for the first original defendant and the second original defendant based on seven Import Agent Agreements signed by three of them. Subsequently, TYM and each original defendant, including Ms. Y entered into a Supplementary Agreement confirming and specifying the guarantee under the seven Import Agent Agreements, pursuant to which Ms. Y was a guarantor in favour of the plaintiff. However, the two original defendants failed to fulfill their liability for repayment as agreed while the Plaintiff has performed the contract obligations.

On 29 March 2010, the Chinese Court rendered a judgment and supported the TYM’s claims that the two original defendants shall pay the debt and overdue fine, Ms. Y shall assume joint and several liability for the payment obligation of the two

original defendants. The Chinese judgment came into effect and finality when an appeal was dismissed on 1 June 2010. Due to the lack of sufficient assets of the two original defendants and the disappearance of Ms. Y, the Chinese Court only executed more than 4 million yuan in place for three years, and finally ended the enforcement procedure in 2014. The recovery of the relevant funds has subsequently reached an impasse.[3]

On 9 August 2021, after discovering the defendant's property clues, TYM filed an application for recognition and enforcement of the Chinese judgment with the Supreme Court of NSW pursuant to Australia's common law principles. The NSW court upheld the plaintiff's claim after examining four conditions accordingly of Chinese judgment with: (1) the Chinese court has international jurisdiction where Ms. Y submitted to by arguing or appearing to argue the merits of the case; (2) the Chinese judgment is conclusive and final; (3) the identity of parties in recognition proceeding consisted with Chinese proceeding; (4) the Chinese judgment was for a fixed sum. The plaintiff has established the *prima facie* enforceability of the Chinese judgment and there are no refusal grounds exist.

The most important issue at the NSW proceeding is the limitation period for enforcement.[4] The plaintiff noted that it has been over 11 years since Chinese judgment came into conclusive and effective, which means it may not be enforced at the same time by Chinese court, if there is enforceable property in China, because the application will exceed the two-year enforcement limitation period stipulated by Chinese law.[5] However, according to section 17 "Judgment" of the Limitation Act 1969 (NSW)[6], the limitation period for action upon a foreign judgment is 12 years from the date on which the judgment becomes enforceable in the place where judgment was given. Therefore, the judge of Supreme Court of NSW held that relevant limitation period has not yet expired. Hence there is no time bar to the current proceeding for enforcement of the Chinese Judgment.[7]

II. Comments

1. Applicable Law to Limitation Period for Enforcement

Limitation period is a controversial issue when classifying whether it is a procedural or substantial matter under private international law, which decides the application of law concerning it. Generally, courts apply *lex fori* in matter with procedure issues, while choose *lex causae* by conflict rules dealing with substance

issues. States distinguish limitation period as procedure or substantive issue differently, which represented by Germany and Japan who regard the limitation period as a substance issue and stipulates it in their civil codes, not specific legislation. Some common law countries, such as England, Australia and Singapore, made Limitation Acts to deal with the enforcement limitation issue in the domestic legislation.[8]

In China, the limitation of action is stipulated in Civil Code and is deduced as a substance issue.[9] While the statute of limitations for enforcement is a two-year period for creditors to apply to the court for execution based on a successful and legal effective document, which is provided in Civil Procedural Law of China and deemed as a procedure issue. In terms of recognition and enforcement of foreign judgments, conflicts of classification on the legal nature of enforcement limitation period between the State of requested and the State of origin will arise in the first place. When a judgment complies with the law of the requested State regarding the statute of limitations for applying an enforcement, but it has exceeded the limitations period of enforcement under the law of the State of origin, how does the court of requested State ascertain legal rules to decide? In *TYM v Ms. Y* above, the judge of Supreme Court of NSW applied Australian law to hold that there was no time bar to enforce the Chinese judgment even though the relevant limitation period has expired in China, which illustrates that enforcement limitation period of judgments is a substance issue for Australia.

2. Expiration of Limitation Period and Grounds for Refusal

Except the list of conditions to be used by the court requested or addressed to ascertain whether the judgment is eligible for recognition and enforcement, there are grounds for refusal as well. Under the common law principles for recognizing a foreign judgment in Australia, where the four conditions for recognition and enforcement, referred to Overview part, have been established, the recognition of the foreign judgment can then only be challenged on limited grounds including a) where granting enforcement of the foreign judgment would be contrary to Australian public policy; b) where the foreign judgment was obtained by fraud; c) where the foreign judgment is penal or a judgment for a revenue debt; and d) where enforcement of the decision would amount to a denial of natural justice. However, exceeding the limitation period for an application for enforcement under the law of the original State does not constitutes any of the grounds above for refusal of recognition and enforcement by the court of the requested State. In

the case of *TYM v Ms. Y*, the Australian court did not consider the expiration of enforcement limitation of Chinese judgment under Chinese law as a refusal ground to recognize and enforce it.

3. Expiration of Limitation Period and Lack of Enforceability

There are international standards to recognize and enforce a judgment, such as enforceability, provided by the 2005 Hague Convention on Choice of Court Agreements (“2005 Hague Convention”) and 2019 HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (“2019 Judgments Convention”, collectively as “Hague Conventions”). Article 8 (3) of the 2005 Hague Convention and article 4 (3) of the 2019 Judgments Convention stipulated in same way that “A judgment shall be recognized only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin”, which was believed that if the limitation period in the State of origin expires, the judgment will not be entitled to circulation under the Convention.[10] Pursuant to Civil Procedural Law of China, within the limitation period of enforcement, if the judgment creditor submits a request prescribed by law, the court will compel the debtor to perform the obligations undertaken. Otherwise, the court will still accept the applicant for enforcement, at the same time, however, the participant subject to enforcement may raise an objection to the limitation period for enforcement, and if the court finds that the objection is established upon review, it rules not to enforce it.[11] In *TYM v Ms. Y*, the plaintiff submitted a summon to recognize and enforce the Chinese judgment, which was rendered 11 years ago by Chinese court then, before the court of NSW Australia. Apparently, the limitation period of applying for enforcement of the Chinese judgment concerned in China has expired the maximum 2 years, which means the judgment may not be enforced compulsorily by courts upon application of winning party when the other party raise an objection.

At the same time, Article 14 of the 2005 Hague Convention and Article 13 of 2019 Judgments Convention stipulate that the enforcement procedures are governed by the law of the requested State unless these Conventions provide otherwise.[12] In referring to the procedure for enforcement, Article 13 of 2019 Judgments Convention is intended to include the rules of the law of the requested State that provide a limitation period for enforcement of a judgment unless itself provides otherwise, which is stipulated in Article 4 (3) that enforcement in the requested

State depends on the judgment being enforceable in the State of origin.[13] Therefore, a longer period of limitation for enforcement in the requested State will not extend the enforceability of a foreign judgment that is no longer enforceable in the State of origin. Conclusively, a foreign judgment whose limitation period expires under the law of the State of origin will not be enforced by the State of requested under the Hague Conventions. In *TYM v Ms. Y*, limitation for enforcing the Chinese judgment has expired in China though, the Australian court registered and enforced it, holding that Chinese judgment is not unenforceable because it was still within the 12-year limitation period from the date of the judgment issued according to Australian law.

China and Australia are neither contracting parties to Hague Conventions, it's reasonable for Australian court to recognize and enforce Chinese judgment even if the limitation period of it has expired, because the court regarded which as a procedural issue and applied *lex fori* to ascertain it. However, the outcome of *TYM v Ms. Y* will be negative if the Hague Conventions come into force between China and Australia. Furthermore, there is another problem about reciprocity. The limitation period for enforcement of judgments in China is much shorter than it in Australia, which means the situation is common where an Australian judgment sought to bring enforcement proceedings in China during the period of enforceability of the judgment under the law of Australia but after the limitation period for enforcement under the law of China has expired. Under the principle of reciprocity, Chinese court may enforce Australian judgments according to Article 288 of Civil Procedural Law of China.[14] However, pursuant to Article 545 of Supreme People's Court Interpretation of Civil Procedural Law of China, the provisions of Article 246 of the Civil Procedure Law shall apply to the period during which a party applies for recognition and enforcement of a legally effective judgment or ruling rendered by a foreign court, which means the period for applying for enforcement of foreign judgments is two years. Therefore, a Chinese court will probably not enforce an Australian judgment when the application expires two-year limitation period and there is an objection from the judgment debtor.

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<https://www.caselaw.nsw.gov.au/decision/181ff033dcea3902d40b24ea>, accessed 10 October 2022.

[2] Jeanne Huang, 'The first Mainland China monetary judgment enforced in NSW Australia: Bao v Qu; Tian (No 2) [2020] NSWSC 588' (*conflict of laws.net*, 20 May 2020); Meng Yu, 'Court of NSW Australia Recognizes Chinese Judgment for the First Time' (*China Justice Observer*, 26 September 2021).

[3] Li Zhang, Shuting Chen, 'Lao Lai Hides Abroad for More Than a Decade Still Can't Escape the Law, The Australian court has once again recognized and enforced the Chinese court judgment' (*Legal Insights*, 17 September 2022).

[4] The limitation period in this article referred to only relates to the enforcement of a foreign judgment and should not be conceptually confused with the limitation period governing the original substantive right or claim at stake, i.e., the limitation period to bring a legal action on the merits before a court.

[5] Article 246 of Civil Procedural Law of China provides "the period of application for enforcement is two years".

[6] Available at <https://jade.io/article/276236/section/54>, accessed 10 October 2022.

[7] Para 42, (n 1).

[8] Guiqiang Liu, 'Study on the Limitation Period in the Enforcement of Foreign Judgments' (2020)4 *China Journal of Applied Jurisprudence* 109.

[9] Yongping Xiao, *Principles of Private International Law* (2003) Law Press China, p.4.

[10] Permanent Bureau, Limitation period on the Enforcement of Foreign Judgments in the Context of the 2018 Draft Convention, No 11 of May 2019.

[11] Lina Guo, 'How much is known about implementation period' (jszx.court.gov.cn, 14 July 2019), available at <https://jszx.court.gov.cn/main/ExecuteCase/227653.jhtml>, access 10 October 2022.

[12] "The procedure for recognition, declaration of enforceability or registration

for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court addressed shall act expeditiously.”

[13] Francisco Garcimartín, Geneviève Saumier, ‘Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters’ HCCH Permanent Bureau, para 310.

[14] Article 288 of Civil Procedural Law of China provides “If a legally effective judgment or ruling made by a foreign court requires recognition and enforcement by a people’s court of the People’s Republic of China, the party concerned may directly apply for recognition and enforcement to the intermediate people’s court with jurisdiction of the People’s Republic of China. Alternatively, the foreign court may, pursuant to the provisions of an international treaty concluded between or acceded to by the foreign state and the People’s Republic of China, or in accordance with the principle of reciprocity, request the people’s court to recognize and execute the judgment or ruling.”