

Insights

RECENT DECISION ON ENFORCING A SOUTH KOREAN JUDGEMENT IN HONG KONG: APPLICATION OF COMMON LAW PRINCIPLES

May 24, 2022

Hong Kong is not a party to the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. Accordingly, the two mechanisms by which a foreign judgment may be enforced in Hong Kong are:

- a. where applicable, under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319) (the “**Ordinance**”), which is a statutory registration system based on the principle of reciprocity, or;
- b. through common law principles.

Option (a) above applies only to a limited number of countries that are listed expressly in this Ordinance.

The Ordinance does not apply to South Korean court judgments, because there is no mutual enforcement agreement between South Korea and Hong Kong. To enforce a South Korean court judgment in Hong Kong, the judgment creditor must follow the common law route.

In a recent decision *Sang Cheol Woo v Yoo Shin Choi (naturalized name Charles C. Spackman)* ([2022] HKCFI 1163, HCA 1586/2016, 6 May 2022), the Hong Kong Court of First Instance (the “**Hong Kong Court**”) applied the common law principles and allowed the enforcement a South Korean judgment in Hong Kong.

BRIEF FACTS

In the South Korean court proceedings, the Plaintiff claimed against multiple defendants, including the Defendant in the Hong Kong enforcement proceedings, in respect of the Plaintiff’s loss arising from an alleged securities fraud jointly committed on the Plaintiff by those multiple defendants.

At first instance before the Seoul Central District Court, the Defendant did not enter an appearance or otherwise participate in the proceedings. In 2008, the Seoul Central District Court dismissed the Plaintiff’s claims.

The Plaintiff appealed to the Seoul High Court in relation to the Defendant and four other defendants. Despite being validly served with the judicial documents, the Defendant did not attend those appeal proceedings. Based on the Defendant's failure to appear in court or contest the Plaintiff's claims, the Seoul High Court held, under South Korean law, that the Defendant was deemed to have made admissions of the Plaintiff's reasons for the claims (the "**Defendant's Deemed Confession**"). In 2011, the Seoul High Court allowed the Plaintiff's appeal and ordered all five defendants to jointly pay damages to the Plaintiff (the "**Seoul High Court Judgment**").

The Defendant and two other defendants appealed to the Supreme Court of Korea against the Seoul High Court Judgment. In 2013, the Supreme Court of Korea handed down its judgment (the "**2013 Supreme Court Judgment**"), by which the Supreme Court of Korea (a) rejected the Defendant's contention that the Seoul High Court had erred in giving judgment against him and (b) allowed the other two defendants' appeals and ordered the Plaintiff's claims against them to be remanded to the Seoul High Court for reconsideration. In 2014, the Seoul High Court dismissed the Plaintiff's claims against the other two defendants (the "**2014 Remand Judgment**").

In 2017, the Defendant applied to the Seoul High Court for a retrial. The retrial application was dismissed. In 2018, the Defendant appealed to the Supreme Court of Korea against the dismissal of his retrial application. Again, the appeal was dismissed.

The Plaintiff brought an application to the Hong Kong Court for enforcement in Hong Kong of the Seoul High Court Judgment against the Defendant.

LEGAL PRINCIPLES ON ENFORCEMENT OF FOREIGN JUDGMENTS IN HONG KONG UNDER COMMON LAW

The Hong Kong Court summarised the following legal principles on the enforcement of foreign judgments in Hong Kong under common law:-

1. Subject to well-established exceptions such as those discussed in (4) below, a foreign judgment which is final and conclusive on the merits is conclusive as to any matter thereby adjudicated upon and cannot be impeached for any error either of fact or of law.
2. A foreign default judgment may be final and conclusive for the purpose of its enforcement in the local jurisdiction, provided that the judgment must be one given by a court of competent jurisdiction on the merits. The local courts draw no distinction between a judgment after trial and a judgment by default.
3. A foreign judgment on the merits means the judgment pronounced by a foreign court of competent jurisdiction according to its established procedure in which the whole merits of the case were open to the parties, however much they may have failed to take advantage of them, or may have waived any of their rights, and cannot thereafter be disputed.

4. A foreign judgment which is “final and conclusive” will be enforced in Hong Kong, unless, for instance:-
- a. The foreign proceedings offend against Hong Kong notions of substantial or natural justice. A foreign judgment which is arguably or even manifestly wrong on the merits is not impeachable on the ground that it would offend Hong Kong concepts of substantial justice. Further, a mere procedural irregularity would not offend Hong Kong concepts of substantial justice
 - b. The enforcement of the foreign judgment would be contrary to Hong Kong notions of public policy. The public policy exception is a narrow one that must be necessarily confined in line with the comity of nations principle - simply because a case could have been decided differently in Hong Kong is not a weighty enough factor to invoke it.

ISSUE BEFORE THE HONG KONG COURT IN THIS CASE

The issue before the Hong Kong Court was: whether, if found to be factually substantiated on the evidence, the Seoul High Court Judgment offended and/or its enforcement would offend Hong Kong (a) notions of substantial justice and/or (b) public policy.

Procedurally, the Defendant had exhausted all avenues of appeal and retrial applications available to him under the South Korean legal system in order to try to set aside the Seoul High Court Judgment.

The Defendant raised four grounds to support his contention before the Hong Kong Court that the enforcement of the Seoul High Court Judgment in Hong Kong would offend Hong Kong notions of substantial justice and/or public policy.

The Hong Kong Court found that all four grounds were unmeritorious. We will look at how the Hong Kong Court rejected each of the Defendant's grounds.

GROUND 1: DUE PROCESS WAS NOT OBSERVED IN THE PROCEEDINGS BEFORE THE SEOUL HIGH COURT, BY REASON OF THE NON-SERVICE ON THE DEFENDANT OF TWO OF THE PLAINTIFF'S DOCUMENTS.

Two of the Plaintiff's pleadings in support of the appeal to the Seoul High Court were filed. However, the Plaintiff did not serve these two pleadings on the Defendant.

It was undisputable that: (a) the Seoul High Court did not direct the Plaintiff to serve these two pleadings and (b) the Plaintiff did not rely on these two pleadings against the Defendant before the Seoul High Court.

The Defendant contended that the Seoul High Court relied upon these two pleadings in finding the Defendant liable to the Plaintiff.

The Hong Kong Court found the Defendant's contention was not substantiated by any evidence and only was premised on the conjecture of what the Seoul High Court had done with these two pleadings. The Defendant invited the Hong Kong Court to read the entirety of the Seoul High Court Judgment and, in the Hong Kong Court's view, this constituted a "second guess" the Seoul High Court's reasoning and thinking. The Hong Kong Court held that it was "unsafe and unsatisfactory" for the Hong Kong Court to decide, simply based on reading a translated copy of the Seoul High Court Judgment, whether the Seoul High Court had relied on these two pleadings in finding against the Defendant.

In fact, the Hong Kong Court found, as a matter of inherent probabilities, given the Plaintiff's non-reliance on these two pleadings, it was improbable that the Seoul High Court had relied on these two pleadings in finding the Defendant liable. Ground 1 was rejected.

GROUND 2: THERE WAS EFFECTIVE OR DE FACTO DISMISSAL OF THE PLAINTIFF'S CLAIMS AGAINST THE DEFENDANT IN THE KOREAN PROCEEDINGS BY REASON OF THE 2013 SUPREME COURT JUDGMENT, AND/OR THE 2014 REMAND JUDGMENT, AND/OR THE ALLEGED NON-ENGAGEMENT OF ARTICLE 760 OF THE KOREAN CIVIL ACT ("CA760").

The Defendant selected bits and pieces from the 2013 Supreme Court Judgment and the 2014 Remand Judgment, and asserted that these were either inconsistent with or had rejected all of the Plaintiff's factual allegations on the Defendant's Deemed Confession. In essence, the Defendant purported to demonstrate that the Seoul High Court Judgment effectively was overturned so far as it concerned the Defendant.

Ground 2 was rejected by the Hong Kong Court based on the following reasons.

The Hong Kong Court pointed out that the Supreme Court of Korea, as the court of final appeal in South Korea, either had or had not allowed the Defendant's appeal. On evidence, it was indisputable that the Supreme Court of Korea dismissed the Defendant's appeal. Further, if the Defendant's allegations were true, the Hong Kong Court would expect the South Korean courts to have said so in the dismissal of the Defendant's retrial application.

Further, the selected parts of the 2013 Supreme Court Judgment and the 2014 Remand Judgment only had the effect on dismissing the Plaintiff's claims against the other two defendants. The Defendant was not a party to the remand proceedings and his position wholly was unaffected by these Judgments.

As regards CA760, the relevant parts of CA760 provided: "*If two or more persons have by their joint unlawful acts caused damages to another, they shall be jointly and severally liable to make compensation for such damages*". The Defendant contended that CA760 was not engaged, based on the report by the Defendant's expert on South Korean law, which said all defendants sued must be held liable in order for any of them to be held liable.

However, in cross-examination, the Defendant's expert conceded that CA760 was applicable as long as two or more persons were held liable for a joint tortious act. By the Seoul High Court Judgment, the Defendant and the other two defendants who did not appeal were held jointly liable to the Plaintiff. This sufficed for the application of CA760.

The Hong Kong Court considered that the Defendant, by way of Ground 2, sought to argue that the Seoul High Court was wrong on the merits. This was an invitation to the Hong Kong Court to impeach the Seoul High Court Judgment, which would be contrary to the legal principle (4)(a) above.

GROUND 3: THERE WAS AN ABSOLUTE BAR ON ANY EFFECTIVE REVIEW OF THE MERITS OF THE DEFENDANT'S DEFENCE TO THE PLAINTIFF'S CLAIMS ON LIABILITY AND QUANTUM BY REASON OF THE DEFENDANT'S DEEMED CONFESSION IN THE KOREAN PROCEEDINGS, SO THAT THERE WAS NO EFFECTIVE MEANS FOR THE DEFENDANT TO SET ASIDE OR APPEAL AGAINST THE SEOUL HIGH COURT JUDGMENT.

In the present case, the "deemed confession" rule was applied in the Seoul High Court, a court of second instance. Both the parties' experts on South Korean law agreed that, as a matter of South Korean law, the Supreme Court of Korea had limited jurisdiction – it (a) could interfere with a decision of the court below only if the lower had erred on a question of law and (b) could not review the facts so found by the lower court.

The Defendant submitted these South Korean legal principles imposed an absolute bar on an effective review of the merits of the Defendant's defence to the Plaintiff's claims.

The Hong Kong Court rejected the Defendant's submissions. Although the Supreme Court of Korea was prevented from reviewing the facts as they had been found by the Seoul High Court, the Supreme Court of Korea still could review whether the lower court's application of the "deemed confession" rule was legally correct. The Hong Kong Court said it was a "complete non sequitur" to suggest that there had been an absolute bar on any effective review of the merits of the Defendant's defence. The mere fact that the Defendant had lost all the way did not mean that there had been an absence of effective review of the merits of the Defendant's defence.

The Hong Kong Court said it was not uncommon for final appellate courts to have limited powers to review and overturn the findings of fact by the lower courts. In the Hong Kong Court's view, there was nothing inherently unfair or objectionable about such a limitation on the powers of final appellate courts. In line with the comity of nations principle, it was inappropriate for the Hong Kong Court to embark upon any qualitative assessment of the justice of the South Korean legal system and its laws, in the name of Hong Kong's notions of substantial justice and/or public policy.

GROUND 4: THERE WAS NO PROPER JUDICIAL ASSESSMENT ON THE QUANTUM OF DAMAGES.

The Defendant contended (a) the Supreme Court of Korea clearly rejected the Plaintiff's claims in substance and found no causation between any of the Defendant's alleged acts and any alleged damage suffered by the Plaintiff, and (b) therefore, there had been no proper judicial assessment of damages and the award made under the Seoul High Court Judgment was "arbitrary, irrational and could not in any way be said to be related to [the Plaintiff's] true entitlement".

The Hong Kong Court regarded Ground 4 as a variation of Ground 2. For the same reasons that the Hong Kong Court rejected Ground 2, Ground 4 also was rejected.

DISPOSITION

The Hong Kong Court entered judgment in favour of the Plaintiff for: (a) a declaration that the Plaintiff was entitled to enforce the Seoul High Court Judgment against the Defendant and (b) the judgment sum of the Seoul High Court Judgment together with interest be paid by the Defendant to the Plaintiff.

BCLP COMMENTS

This judgment in *Sang Cheol Woo v Yoo Shin Choi* illustrates the application by the Hong Kong Court of the well-established common law principles on enforcement of foreign judgments. This provides comfort to foreign judgment creditors that they may look for enforcement of final and conclusive foreign judgments in Hong Kong. Of course, foreign judgment debtors are entitled to challenge the application for enforcement. However, the defences available to the foreign judgment debtors are likely to be limited.

RELATED CAPABILITIES

- Litigation & Dispute Resolution
- International Arbitration

MEET THE TEAM



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