

Enforcing a Chinese Judgment in England



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Introduction

It is important for winning parties to be able to enforce judgments made in their favour.

Before issuing proceedings claimants will often need to consider where the assets of a potential defendant are located and whether any judgment obtained can be enforced in the country where the judgment debtor has assets.

If a proposed defendant to Chinese proceedings holds assets in England, it will be particularly important for a claimant to examine whether an English court will enforce a Chinese judgment in their favour.

The purpose of this briefing note is to summarise the principles and procedures governing the enforcement of Chinese judgments in England and Wales.

Convention and treaties

There is at present no treaty or convention in place which provides for the direct recognition and enforcement of Chinese judgments in England and Wales.

In the absence of a relevant treaty, a Chinese judgment must be enforced in England and Wales by a claim made under common law.

Under the English common law, where a foreign court of competent jurisdiction has determined that a certain sum is due from one person to another, a legal obligation arises on the defendant to pay that sum. The claimant may bring a claim in England to enforce that obligation as a debt.

The claim must be brought by way of fresh proceedings in England for a debt, with the unsatisfied Chinese judgment serving as the cause of action.

The applicable principles

A Chinese court judgment may be enforced in England if the judgment:

- a) is for a debt or a definite sum of money;
- b) is unrelated to taxes, fines or penalties;
- c) is final and conclusive;
- d) was given by a court having jurisdiction to determine the dispute according to the English rules of the conflict of laws.

These requirements are explained below.

Definite sum of money

For a claim to be brought to enforce a foreign judgment, the judgment must be for a definite sum of money. If the Chinese judgment requires the defendant to do anything other than pay a sum of money, e.g. specifically perform a contract, it will not support a cause of action.

Unrelated to taxes, fines or penalties

The judgment must not be for a sum payable in respect of taxes, or in respect of a fine or other penalty. A "penalty" normally means a sum payable to the State but if the sum awarded is intended to punish the defendant, enforcement of the judgment may be unenforceable on the basis that it is against English public policy (see below).

Final and conclusive

In order to establish that a final and conclusive judgment has been pronounced, it must be shown that the Chinese judgment finally established the existence of the debt.

A judgment may, however, be final and conclusive even though it is subject to an appeal. The key point is that the judgment must be final and unalterable by the court which pronounced it.

If the Chinese judgment is subject to appeal the English court may enforce it but attach conditions which save the interest of those who have a right of appeal. For example, a stay of execution may be ordered by an English court pending a possible appeal of the underlying Chinese judgment.

Competent jurisdiction

The relevant Chinese court must have had jurisdiction, according to the English rules of the conflict of laws, to determine the subject matter of the dispute. The English court will generally consider the Chinese court to have had the required jurisdiction only where the person against whom the judgment was given:

- a) was, at the time the proceedings were commenced, present in the jurisdiction; or
- b) was the claimant, or counterclaimant, in the proceedings; or
- c) submitted to the jurisdiction of the Chinese courts by voluntarily appearing in the proceedings; or
- d) agreed, before commencement, in respect of the subject matter of the proceedings, to submit to the jurisdiction of the Chinese courts.

The key point is that when deciding whether the Chinese court had jurisdiction, the English court will apply, not the law of the Chinese court, but the above rules of the conflict of laws.

The available defences

Even where the above requirements have been met, the enforcement of a Chinese court judgment may nevertheless be challenged in the English court. The grounds of challenge include:

- a) where the judgment was obtained by fraud;



- b) where the judgment is contrary to English public policy; and
- c) where the proceedings were conducted in a manner which the English court regards as contrary to the principles of natural justice.

Importantly, the English court will not re-examine the merits of a Chinese judgment. The Chinese judgment may not be challenged on the grounds that it contains an error of fact or law. In other words, the English court will not seek to go behind the Chinese judgment or re-try the facts of the underlying proceedings.

These potential defences to enforcement are explained below.

Fraud

If the Chinese judgment was obtained by fraud then it will be open to attack in England and may not be enforceable. Such fraud may be either:

1. fraud on the part of the party who “won” in the Chinese proceedings; or
2. fraud on the part of the Chinese court.

The fraud defence forms part of the general policy of the common law that “fraud unravels all”. For example, if a claimant successfully obtains a Chinese court judgment but does so by fraudulently concealing relevant facts then the judgment may not be enforceable in England.

Public policy

It is also possible to resist a Chinese judgment on the basis that its enforcement or recognition would be contrary to public policy. The scope of the public policy defence has not been precisely defined but it is generally accepted that the rule may extend to a refusal to recognise or enforce judgments which offend universal principles of morality. Furthermore, if the enforcement of the Chinese judgment would be contrary to the European Convention on Human Rights, enforcement will in principle be refused.

Natural justice

As mentioned above, the English court will not investigate the merits of the Chinese judgment at the enforcement stage. However, the English court may refuse to enforce a Chinese judgment if there has been an irregularity in the underlying proceedings.

When considering the defence of natural justice, the focus of the English court is often on whether the defendant to the Chinese proceedings was given notice of claim against him and whether the defendant was afforded an opportunity to substantially present his case to the court. The defence of “natural justice”, however, goes further and an English court will consider all of the circumstances of the case to determine whether there was a procedural defect in the Chinese proceedings which constituted a breach (in the English court’s view) of substantial justice.

The procedure for enforcement

In order to enforce a judgment of the Chinese court in the English court, a party must issue a Claim Form providing a concise statement of the nature of the claim and claiming the amount of the judgment debt.

Where the judgment debtor is outside the United Kingdom, the claimant must apply for permission to serve the claim out of the jurisdiction.

If, following service, the defendant does not respond to the claim, the claimant will be entitled to obtain judgment in default.

If the defendant acknowledges service, the claimant must file and serve Particulars of Claim, setting out a concise statement of the facts relied on in support of the claim. The Particulars of Claim should contain a statement that the Chinese court had jurisdiction over the underlying proceedings.

In most cases a party will be entitled to apply to obtain summary judgment without trial, unless the debtor can satisfy the English court that it has a real prospect of establishing at trial one of the defences set out above. Applications for summary judgment are dealt with swiftly, without the need for oral evidence.

If the claim on the Chinese judgment is successful, the judgment creditor will then have the benefit of an English court judgment. The judgment creditor will then be entitled to use the procedures of the English courts to enforce the judgment as set out below.

Methods of enforcement

Obtaining recognition of the judgment in England may not be the end of the matter. There is always the risk that the judgment debtor will fail to comply with and satisfy the judgment that has been obtained from the English court. What can the judgment creditor do after it has turned the Chinese court judgment into an English judgment?

In England there are a number of relatively straightforward ways in which a successful party can enforce a judgment which requires payment of money by another party. The decision as to which method to use will be based on an assessment of the judgment debtor’s specific financial circumstances. If the judgment creditor is not already aware of the types of assets owned by the judgment debtor, there are means available for requiring the judgment debtor or its directors to attend court to answer questions and provide information about its finances.

The options open to an unsatisfied judgment creditor are as follows:

Third party debt order

On the basis of the unsatisfied judgment, the judgment creditor can obtain a (further) order from the court but this time against a third party who owes money to the judgment debtor. The order will require the third party to pay the money which it owes to the judgment debtor directly to the judgment creditor rather than to the judgment debtor. This can be used in relation to the judgment debtor’s bank account (assuming that it is in credit). As a result, it is always useful if you can obtain details of the judgment debtor’s bank account.

Charging order

The judgment creditor can obtain a charge over the judgment debtor’s property. A charging order gives the judgment creditor some security in relation to the unsatisfied judgment, which can be enforced if necessary. A charge, however, does not materialise into payment of the judgment sum until and unless the property over which the charge is obtained is sold. You will also need to consider whether there are other charges over the

property which will take priority over yours.

Writ of Control

This authorises a court enforcement officer, on behalf of the judgment creditor, to seize the judgment debtor's goods up to the value of the judgment debt with a view to selling them at auction. As a result, it is always useful to have some information as to what saleable goods the judgment debtor owns and what is the value of those goods.

Insolvency

Applying to put the judgment debtor into insolvency results in someone closely supervising the judgment debtor's finances with a view to paying the debtor's creditors. The threat of insolvency alone can be an effective means to persuade the judgment debtor to satisfy the judgment debt, without any further action being required. However, the court is not keen for insolvency proceedings to be used as a "back door" method for debt collection.

Freezing injunction

If the judgment creditor has reason to believe that the judgment debtor is attempting to dissipate its assets beyond the reach of the judgment creditor, or may do so in the near future, an injunction may be obtained to prevent the judgment debtor from actually dissipating its assets.

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