IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHCR 8

High Court Suit No 671 of 2015
High Court Summons No 347 of 2016

Between

Shi Wen Yue

… *Plaintiffs*

And

(1) Shi Minjiu
(2) Fan Yi

… *Defendants*

GROUNDS OF DECISION

[Conflict of Laws] — [Judicial Settlements] — [Enforcement]
[Conflict of Laws] — [Foreign Judgments] — [Enforcement]

Shi Wen Yue
v
Shi Minjiu and another

[2016] SGHCR 8

High Court — Suit No 671 of 2015 (Summons No 347 of 2016)
Zhuang WenXiong AR
29 February; 28 March; 12 April 2016

21 June 2016

Zhuang WenXiong AR:

1 A foreign judgment can be enforced through the common law action in debt (*Godard v Gray* (1870) LR 6 QB 139). Is a settlement that is capable of being executed without further order a foreign judgment?

2 The plaintiff applied for summary judgment for certain sums due under what he characterised as a foreign judgment. The defendants raised the defences that the parties had entered into a mediation agreement, not a judgment, and that the mediation agreement provided for execution only in China. I granted summary judgment not on the basis that there was an extant foreign judgment, but on the basis that there was a mediation agreement that could be enforced outside of China. The defendants have since successfully obtained leave to file their notice of appeal one day late. I now give the detailed grounds for my decision.

3 The first defendant was a shareholder in a Chinese company, Xiao Qi Xin Rong Investment Pte Ltd ("the Company"). The second defendant is the first defendant's wife. The first defendant borrowed RMB 9,300,000 from the plaintiff. The plaintiff successfully obtained a freezing order from the Zhou Shan City District People's Court ("Zhou Shan first instance Court"), and the plaintiff thereafter sued the defendants for repayment of the loan. The plaintiff obtained a judgment from the Zhou Shan first instance Court ordering the defendants to pay the plaintiff the RMB 9,300,000 along with interest. The defendants appealed against the judgment to the Zhou Shan City Intermediate Court ("Zhou Shan Intermediate Court") but this appeal did not proceed. Instead, the parties entered into a mediation agreement on 3 March 2015 whereby the sums due were to be paid by instalments ("Mediation Agreement"). On the same day, the Zhou Shan Intermediate Court issued a "民调解书", recording the same terms (hereinafter "Mediation Paper").

4 The defendants did not pay. The plaintiff initiated enforcement proceedings in China. The plaintiff then filed this suit to claim for the unpaid sums, and the defendants unsuccessfully applied for a stay on the grounds of *forum non conveniens*. The plaintiff then filed this summons for summary judgment. Concurrently, the defendants filed a retrial petition in China in an attempt to set aside the Mediation Paper.

5 The plaintiff argued that the Mediation Paper is a final and conclusive judgment under Chinese law. Even if the Mediation Paper is not a judgment but is simply an agreement, the defendants had no defence because it is undisputed that the defendants owed the sums. The defendants argued that the Mediation Paper was not a judgment under Chinese law, and under the terms of the Mediation Paper the plaintiff could only enforce the same in China.

Is the Mediation Paper a judgment?

6 Both parties agreed, correctly, that the issue of whether the Mediation Paper was a judgment is governed by Chinese law. It is indeed the law of the foreign country where an official act occurs which determines whether that official act constitutes a final and conclusive judgment (*Berliner Industriebank AG v Jost* [1971] 2 QB 643). In this respect proof of foreign law is needed; while raw foreign sources are technically admissible (s 40 of the Evidence Act; *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") at [55]–[60]), a court is not obliged to place any weight on raw sources and it is preferable that expert opinions are provided wherever possible (*Pacific Recreation* at [60]).

7 The plaintiff engaged a Wang Liangping as his Chinese law expert. Wang opined that the Mediation Paper is a consent judgment issued by a competent Chinese court recording the terms agreed upon under the Mediation Agreement. Wang cited Articles 97 and 236 of the People's Republic of China Civil Procedure Law ("CPL") in support. The defendants engaged a Li Xiaoping as his Chinese law expert. Li opined that court judgments and mediation papers fall under different chapters in the CPL and that the Mediation Paper was not a consent judgment.

8 I deal with how Article 97 should be translated. The original text of Article 97 is reproduced below:

> 第九十七条 调解达成协议，人民法院应当制作调解书。调解书应当写明诉讼请求、案件的事实和调解结果。
>
> 调解书由审判人员、书记员署名，加盖人民法院印章，送达双方当事人。
>
> 调解书经双方当事人签收后，即具有法律效力。

9 Article 97 was translated differently by the parties:

> Article 97 – When an agreement is reached by mediation, the People's Court should produce the [mediation agreement/consent judgment] which shall clearly state the litigation request, facts of the case and mediation results.
>
> The [mediation agreement/consent judgment] shall be signed by the judges and the clerk, and sealed with the stamp of the People's Court, and delivered to the two parties involved.
>
> After the mediation agreement is acknowledged as received by both parties involved, it shall become legally effective.

10 The dispute is over the term "调解书"; Wang translated the term as "consent judgment" while the defendants, who had engaged the translation services of Lingotrans Services Pte Ltd, translated the term as "mediation agreement".

11 Both parties did not accurately translate the term. Firstly, the defendants pointed out that Article 236 of the CPL — which the plaintiff relied on — deals separately with "调解书" and "民事判决、裁定", which were translated as "mediation agreement" and "civil judgment and ruling" respectively. The original text and defendants' translation of Article 236 is set out below:

> 第二百三十六条 发生法律效力的民事判决、裁定，当事人必须履行。一方拒绝履行的，对方当事人可以向人民法院申请执行，也可以由审判员移送执行员执行。
>
> 调解书和其他应当由人民法院执行的法律文书，当事人必须履行。一方拒绝履行的，对方当事人可以向人民法院申请执行。
>
> Article 236 – The parties involved must fulfill the legally effective civil judgment and ruling. If one party refuses to fulfill it, the other party involved may apply for execution at the People's Court, and the judge may transfer the execution to the executing officer.
>
> The parties involved must fulfill the *mediation agreement* and other legal documentation that should be executed by the People's Court. If one party refuses to fulfill it, the other party

> may apply for execution at the People's Court. [emphasis added]

It is plainly evident that "调解书" is not the same as "民事判决、裁定".

12 Secondly, I am conversant in Chinese. My own translation of "民事判决、裁定" is "judgment, decision". "调解书" literally translates to "mediation paper" and no person conversant in Chinese would construe "调解书" to be equivalent to "民事判决、裁定". On the other hand "书" does not carry with it the notion of agreement; agreement is normally denoted by "协议". I therefore hold that "调解书" should be translated as "mediation paper".

13 Article 97 therefore does not assist the plaintiff. Article 97 merely stipulates the formal requirements for a mediation paper to be "有法律效力" or legally effective — in other words for a mediation paper to be capable of execution under Article 236.

14 The most compelling argument for an Article 97 mediation paper being a consent judgment is that it functionally equivalent to a consent judgment entered into after mediation in common law systems. An Article 97 mediation agreement, like a common law consent judgment entered into after mediation, is capable of execution without further order.

15 However, when adjudicating upon a conflict of laws issue, a common law court must be conscious of the unexamined assumptions and biases of the common law. The common law is still regarded as embodying an adversarial system of justice; and the common law courts therefore do not take issue with settlement agreements being given the imprimatur of consent *judgments*. Civil law courts take quite a different perspective: judges play an active inquisitorial

role and are "responsible for eliciting relevant evidence" (Geoffrey C Hazard Jr, "Discovery and the Role of the Judge in Civil Law Jurisdictions" (1997) 73 Notre Dame L Rev 1017 at p 1019); party-led discovery is anathema and seen as an usurpation of judicial power (*ibid* at p 1022). From this vantage point it is easy to see why mediation papers are not labelled as judgments: it is the proper and exclusive province of judges to judge and issue judgments, and it would almost be a contradiction in terms for a party-negotiated settlement to be given the moniker of a consent judgment.

16 The Convention of 30 June 2005 on Choice of Court Agreements ("the Hague Convention") underscores the civil law perspective. Article 12 of the Hague Convention provides for judicial settlements (*transactions judiciaires*) to be enforced in the same manner as a judgment. Trevor Hartley & Masato Dogauchi, *Explanatory Report. The Hague Convention of 2005 on Choice of Court Agreements* (2013) explain that (at para 207 of p 837)

> In the sense in which the term is used here, judicial settlements are unknown in the common-law world. In France and other civil law countries, they are contracts concluded before a judge by which the parties put an end to litigation, usually by making mutual concessions. Parties submit their agreement to the judge, who records it in an official document. A judicial settlement is different from a consent order in the common-law sense (an order made by the court with the consent of both parties), since a consent order is a judgment and may be recognised and enforced as such under Article 8 of the Convention. On the other hand, a judicial settlement is different from an out-of-court settlement, since it is made before a judge, puts an end to the proceedings and is usually enforceable in the same manner as a judgment. For these reasons, a special provision is devoted to it in the Convention.

17 Singapore is a signatory to the Hague Convention and the Choice of Court Agreements Bill was read a second time on 14 April 2016. As the Bill currently stands, a judicial settlement (under s 2)

> (a) means a contract approved by, or concluded before, a court of a Contracting State (other than Singapore), in the course of proceedings, being a contract —
>
> (i) between the parties to proceedings before that court;
>
> (ii) by which those parties end those proceedings;
>
> and
>
> (iii) which is recorded by that court in an official document; but
>
> (b) does not include a consent order or consent judgment;

Section 20 of the Bill further provides for judicial settlements to be enforced in the same manner and to the same extent as a judgment.

18 A mediation agreement under Article 97 of the CPL is therefore an instance of a civil law judicial settlement that is neither a judgment nor a bare agreement, but something in between that is *sui generis*. I agreed with the defendants that an Article 97 mediation paper, and consequently the Mediation Paper, was not a judgment.

Can the Mediation Paper be enforced outside of China?

19 That a mediation paper is not a judgment is not the end of the matter. A mediation paper is enforceable *qua* agreement in a common law court.

20 The second string to the defendants' bow was the argument that the Mediation Paper could not be enforced outside of China. The parties implicitly and correctly agreed that the Mediation Paper was governed by Chinese law. The defendants relied on both Clause 3 of the Mediation Paper and certain provisions in the CPL. A portion of the preamble and Clause 3 of the Mediation Paper, alongside the plaintiff's translation follows:

> 本案在审理过程中，经本院主持调解，双方当事人自愿达成如下协议：
>
> 。。。
>
> 三、如上诉人期支付上述任何一期款项，则剩余部分款项视为自动到期，被上诉人可就剩余部分款项一次性向法院申请执行。。。
>
> During trial, upon mediation by *the* court, both parties have willingly reached the following agreement:
>
> …
>
> 3. If the [defendants] fails [*sic*] to make any of the above payments on time, the remaining of [*sic*] the amount shall be viewed as automatically due, and the [plaintiff] *shall* request from *the* court to execute the one-time payment for the remaining payment… [emphasis added]

21 There are two problems with the translated text, and these are highlighted in italics above. Firstly, the portion of the translated text that said the plaintiff *shall* request from the court execution is a mistranslation. "可就" connotes permissiveness rather than compulsion; "可就" is more accurately translated as may rather than shall. Where a person is compelled to do something, the CPL uses "必须", which translates to shall or must (see *eg,* Article 229).

22 Secondly, the two mentions of "the court" are not identical in the original Chinese text. The second instance — "向法院" — literally translates to "from court"; and the preceding article (that is, either the definite article "the" or the indefinite article "a") cannot be determined from a literal reading of the text. This is because Chinese does not have functional equivalents of English definite and indefinite articles (Daniel Robertson, "Variability in the Use of the English Article System by Chinese Learners of English" (2000) 16,2 Second Language Research 135 at p 135). In contrast, the first instance — 本院 — literally translates to "this court". As the text differentiates

between "本院" and "法院" ("this court" and "court"), this bolsters the interpretation that the second instance cannot be translated as "the court"; the more technically correct article would be the indefinite article. The more technically accurate translation follows:

> During trial, upon mediation by *this* court, both parties have willingly reached the following agreement:
>
> …
>
> 3. If the [defendants] fail to make any of the above payments on time, the remainder shall be viewed as automatically due, and the [plaintiff] *may* request from *a* court to execute the one-time payment for the remaining payment…
>
> [emphasis added]

23 Li, the defendants' expert, argued that Article 224 of the CPL precludes a person from applying for multiple enforcements in different jurisdictions. Wang, the plaintiff's expert, argued that Article 224 of the CPL does not preclude multiple enforcements, and Article 280 of the CPL enables an applicant to apply directly to a foreign court for recognition and enforcement. I hasten to add that Article 280 falls under "第二十七章 司法协" , which translates to "Chapter 27 – judicial cooperation", and this was not translated by either of the parties. Wang explained that Articles 224 and 280 were also applicable to mediation papers due to an enabling provision, namely Article 234 (but see [29] below). Other than this, the original text and the plaintiff's translation of the mentioned provisions follow:

> 第二百二十四条 发生法律效力的民事判决、裁定，以及刑事判决、裁定中的财产部分，由第一审人民法院或者与第一审人民法院同级的被执行的财产所在地人民法院执行。。。。
>
> 第二百三十四条 人民法院制作的调解书的执行，适用本编的规定。
>
> 第二十七章 司法协
>
> 。。。

> 第二百八十条　人民法院作出的发生法律效力的判决、裁定，如果被执行人或者其财产不在中华人民共和国领域内，当事人请求执行的，可以由当事人直接向有管辖权的外国法院申请承认和执行，也可以由人民法院依照中华人民共和国缔结或者参加的国际条约的规定，或者按照互惠原则，请求外国法院承认和执行。。。。
>
> Article 224 – For legally effective civil judgment or ruling and criminal judgment or ruling on property, the People's Court of the first instance or the People's court at the locality of the property to be executed and of the same level as the People's Court of the first instance shall carry out the execution. …
>
> Article 234 – The provisions stated herein shall be applicable to the execution of the [mediation paper] produced by the People's Court.
>
> Chapter 27 – Judicial Cooperation
>
> …
>
> Article 280 – In regard to legally effective judgment and ruling made by the People's Court, if the enforcee or his/her property is not within the People's Republic of China and where the party involved requests execution, the party involved may directly apply for acknowledgment and execution at the foreign court with the jurisdiction, or the People's Court may request for acknowledgment and execution by the foreign court based on the People's Republic of China's treaties or provisions under the international treaties participating in or in accordance with the principle of reciprocity. …

24 Although neither party cited Article 229, this article is also relevant. The original text and my translation follow:

> 第二百二十九条　被执行人或者被执行的财产在外地的，可以委托当地人民法院代为执行。受委托人民法院收到委托函件后，必须在十五日内开始执行，不得拒绝。执行完毕后，应当将执行结果及时函复委托人民法院；在三十日内如果还未执行完毕，也应当将执行情况函告委托人民法院。
>
> 受委托人民法院自收到委托函件之日起十五日内不执行的，委托人民法院可以请求受委托人民法院的上级人民法院指令受委托人民法院执行。
>
> Article 229 – Where the party against whom enforcement is sought or the property under enforcement is in a different place, enforcement may be entrusted to the people's court in that different place. The entrusted people's court must begin enforcement within 15 days after receiving a letter of

> entrustment and shall not refuse enforcement. After completion of enforcement, the entrusted people's court shall notify in a letter the entrusting people's court of the results of enforcement; or if enforcement cannot be completed within 30 days, the entrusted people's court shall also notify in a letter the entrusting people's court of the status of enforcement. If the entrusted people's court fails to begin enforcement within 15 days after receiving a letter of entrustment, the entrusting people's court may request a court superior to the entrusted people's court to order the entrusted people's court to conduct enforcement.

25 Neither Clause 3 of the Mediation Paper nor the mentioned provisions of the CPL assisted the defendants.

26 The interpretation of Clause 3 is governed by Chinese law, but the defendants' expert, Li, did not submit on how Clause 3 ought to be interpreted. Singapore law is therefore presumed to be identical to Chinese law on this point (*EFT Holdings, Inc v Marinteknick Shipbuilders (S) Pte Ltd [2014] 1 SLR 860* at [60] and [63]). Clause 3 clearly functioned as an acceleration clause: if the defendants failed to timeously pay an instalment when it fell due, the entire remaining unpaid sum would immediately become due. There was also nothing in the language of clause 3 that precluded multiple enforcements. This was at two levels: firstly clause 3 used "可就" or "may"; the plaintiff had the option of applying to court for execution and was not compelled to do so. Secondly "向法院" or "from a court" does not indicate that execution must take place in any one stipulated court; nor does the phrase indicate that, once execution is commenced in one particular court, execution can no longer be commenced in another.

27 Article 224 expressly provides for "the People's Court of the first instance or the People's court at the locality of the property to be executed and of the same level as the People's Court of the first instance". There is nothing

in Article 224 that suggests that execution can only take place in one court to the exclusion of all others. Article 229 supports this interpretation of Article 224; under Article 229, an enforcement court ("the entrusting court") *may* entrust another Chinese court with enforcement ("the entrusted court"). This suggests that the Article 229 entrustment mechanism is facilitative in nature; a creditor may invoke the entrustment mechanism, or he may himself directly apply to another Chinese court for enforcement under Article 224. Daniel C K Chow, *The Legal System of the People's Republic of China in a Nutshell* (West Academic Publishing, 3rd ed, 2015) explains that (at para 302)

> Article 229 establishes a procedure for the enforcement of judgments in areas outside the locality of the court issuing the judgment. This provision is designed to deal with the problem of local protectionism where courts in different locations may protect a local defendant by refusing to recognize or enforce a court judgment.

28 Where a court is located outside of China, Article 229 cannot apply; rather, Article 280, despite falling under Chapter 27 – Judicial Cooperation, expressly states that the creditor may *directly* apply to the court outside of China for enforcement, or he may also choose to apply to a Chinese court for the Chinese court to initiate foreign enforcement on a court-to-court level pursuant to an international treaty or to the principle of reciprocity. Article 280 does not mention anything about a creditor first having to satisfy the condition that there not been any enforcement proceedings in China before he is allowed to apply to enforce outside of China.

29 During oral submissions the defendants also contended that Article 280 did not apply to mediation papers, but Article 224 did. This was a completely untenable argument. Either both apply or neither applies: both articles refer to "legally effective civil judgment or ruling"; while Article 234 simply says that provisions relating to execution shall also be applicable to mediation papers.

30 I therefore held that the Mediation Paper *qua* agreement could be enforced outside of China.

The pending re-trial petition

31 The defendants filed a retrial petition in China, dated 10 March 2016, on the grounds that the Mediation Paper had interest-on-interest provisions that were prohibited under Chinese law.

32 In a proper case an enforcing court will grant a stay of execution pending an appeal in the foreign court (*Dicey, Morris and Collins on the Conflict of Laws* vol 1 (Lord Collins of Mapesbury gen ed) (Sweet & Maxwell, 15th ed, 2012) at para 14-026). However I did not grant a stay of execution in the instant proceedings, and instead ordered that the defendants could separately apply in another summons for a stay of execution. This was for three reasons. Firstly the retrial petition was filed late in the day — on 12 March 2016, when the Mediation Paper was issued more than a year earlier on 3 March 2015 and after execution had already been carried out in China. I therefore had doubts over the *bona fides* of the retrial petition. Secondly the plaintiff, during the course of oral submissions, pointed out that Wang had opined that there was a time limit of six months for the filing of a retrial petition; the defendants disputed this and argued that there was no time limit but did not point to any expert evidence in support — probably because they did not anticipate that this would be material to a possible stay. Thirdly hearing the summons for a stay of execution on a later date would allow this court to be potentially apprised of further developments in China — for instance if the retrial petition were to be summarily rejected or dismissed on the ground that it was out of time.

33 In conclusion I granted summary judgment in favour of the plaintiff, less sums already received from enforcement proceedings in China, along with costs fixed at $8,500 and disbursements fixed at $3,881.10. I also ordered that the defendants were at liberty to apply separately for a stay of execution pending the disposal of the retrial petition in China.

Zhuang WenXiong
Assistant Registrar

Pua Lee Siang (Kelvin Chia Partnership) for the plaintiff;
Tan Chee Kiong (Seah Ong & Partners LLP) for the defendants.