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Australia-China Cross-Border Commercial Disputes – Where Should They be Resolved?

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Following efforts by the Australian and Chinese governments to improve bilateral relations and restore trade in sectors significantly affected by COVID-19-era geopolitical tensions, we have seen a renewed interest in cross-border commercial collaborations, investment, and trade.

As lawyers, in the context of commercial contracts between Australian and Chinese parties, we are often asked in which country should dispute resolution take place? The question arises:

- When drafting and negotiating 'jurisdiction' and 'governing law' clauses in contracts; and
- When a dispute has already arisen between contracting parties and a party is deciding whether to start legal proceedings in China or Australia (where the contract allows for that choice).

In this article, we outline important considerations when choosing the forum (jurisdiction) and governing law that applies to a contract.

This article is prepared from a cross-border commercial perspective where:

- One contracting party is based in the People's Republic of China (excluding Hong Kong, Macao and Taiwan for the purposes of this article) (PRC) and the other is based in Australia; and
- The dispute relates to or arises from the contract between the parties.

WHERE SHOULD COURT PROCEEDINGS BE HELD?

The best option is typically the country in which the opposing party is based and holds its assets. The reason for this comes down to enforcement – the judgment will ultimately need to be enforced in the opposing party's jurisdiction.

If a judgment is obtained outside the opposing party's jurisdiction, it may be ineffective due to challenges with enforcing foreign court judgments. There is no treaty between the PRC and the

Commonwealth of Australia to enforce judgments made by a court in the other's jurisdiction.

In the PRC, this means that recognition of an Australian judgment is arbitrary and unlikely. The enforcing party will likely need to recommence proceedings de novo in a PRC court.

In Australia, a Chinese party wishing to enforce a judgment made in the PRC could only do so by relying on common law principles. This is a very onerous process that requires the enforcing party to satisfy four elements:

1. The PRC court must have had personal jurisdiction over the defendant/s at the time the jurisdiction was invoked;
2. The judgment must be final and conclusive;
3. The judgment must be for a fixed amount (i.e., a precise judgment debt); and
4. The action to enforce the PRC judgment debt in Australia must be made against the same parties and in the same interests as was litigated in the PRC judgment.

If the above-stated elements can be established, a final and conclusive unsatisfied judgment of the courts of the PRC can be enforceable by action in a Supreme Court of an Australian state or territory without re-examination of the merits of the issues determined by the PRC court, provided that no circumstances apply that give rise to a defence, such as where:

- The judgment was procured by fraud;
- The judgment was given contrary to the rules of natural justice under Australian law;
- Recognition of the judgment would be contrary to public policy under Australian law; or
- The judgment is penal or for a revenue debt.

Issues at the enforcement level generally mean that:

- Australian parties are better off commencing court proceedings against a Chinese party in China; and
- Chinese parties are better off commencing court proceedings against an Australian party in Australia.

As an Australian party, if the opposing party has assets solely or predominantly in China, there are further advantages to starting court proceedings in the PRC. For example, asset preservation orders (i.e., freezing orders) under Article 100 of the Civil Procedure Law of the PRC (?????????????) are typically much more accessible and frequently granted than the equivalent in Australia, where courts consider that such orders are extraordinary interim remedies to be granted sparingly. Being able to quickly obtain pre-judgment freezing orders is a powerful tool for applicants in the PRC.

ARE THE SAME ENFORCEMENT ISSUES ENCOUNTERED WITH ARBITRAL AWARDS?

A major advantage of engaging in international arbitration as opposed to starting court proceedings is that both Australia and the PRC are signatories to the New York Convention. The New York Convention provides that arbitral awards are binding between signatories and should be enforced.

Foreign arbitral awards are generally readily enforceable in Australia. Enforcing arbitral awards in the PRC can be challenging due to long processes and delay tactics historically used by judgment debtors, including challenging the award on public policy grounds, which is permitted under Article V

paragraph (2)(b) of the New York Convention. Notwithstanding this, the general consensus among practitioners is that the enforcement environment for foreign arbitral awards in the PRC has greatly improved in recent years. This is largely due to the PRC's highest court, the Supreme People's Court (??????), needing to endorse any lower court decision not to enforce an arbitral award that is foreign-related, acting as a deterrent to lower courts rejecting foreign arbitral awards.

If contracting parties prefer to resolve disputes through arbitration rather than court proceedings (there are several reasons why this may be preferred, in addition to enforcement issues), then they will need to agree to arbitrate disputes arising from or relating to their contract. This is usually done by agreeing to a suitably drafted arbitration clause in their contract.

GOVERNING LAW - A FURTHER DRAFTING CONSIDERATION

In general, the governing law of the contract should align with the dispute resolution forum (e.g., PRC law applies when the dispute resolution forum is the courts of Shanghai). There are several reasons for this. Courts may be reluctant to apply foreign law, and there are significant challenges associated with the parties needing to provide expert advice about foreign law to a court, including high costs of engaging foreign law experts and translators.

A WORD OF CAUTION

When drafting jurisdiction clauses in commercial contracts between Australian and Chinese parties, or deciding where to commence dispute resolution, it is important to bear in mind the cross-jurisdictional framework for enforcement of court judgments and arbitral awards. When drafting governing law clauses, it is also important to consider challenges with litigation where the governing law does not match the forum.

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