

Dispute Resolution

# Judicial Assistance between Singapore and China

## – Singapore Court Highlights Importance of Observing Prescribed Treaty Procedure

### Introduction

In an age where commercial disputes frequently span multiple jurisdictions, litigants may find themselves seeking to obtain the participation of parties located abroad, or to obtain evidence from parties in foreign jurisdictions. Judicial cooperation plays a key role in facilitating such efforts, bringing the gap between domestic enforcement and international comity. Against this backdrop, countries may enter into mutual agreements to set out a framework for the processing of such judicial requests.

Singapore and the People's Republic of China ("**PRC**") have established themselves as close partners in this regard, entering into the Treaty on Judicial Assistance in Civil and Commercial Matters (中华人民共和国和新加坡共和国关于民事和商事司法协助的条约) ("**Treaty**") in 1999. The Treaty provides for the mutual provision of judicial assistance by both countries in civil and commercial matters, and sets out the applicable procedure for making and responding to requests for judicial assistance.

In the recent case of *Kiri Industries Ltd v Senda International Capital Ltd and another (Fan Jing, non-party)* [2024] SGHC(I) 7, the Singapore International Commercial Court ("**SICC**") considered an examination order that had been obtained by the plaintiff in the Singapore courts against the defendant company and two of its officers who were non-parties and foreign nationals resident in PRC. On application by the defendant company and one of the officers (the "**Applicants**"), the SICC set aside an order giving the plaintiff leave to serve the examination order on the two officers in Hong Kong and PRC respectively, as well as an order for substituted service of the examination order.

In reaching its decision, the Court highlighted the importance of observing the channels set out in the Treaty when it comes to the service of orders or the taking of evidence in PRC. The effect of the Treaty is that any activity that constitutes the collection of evidence in PRC is subject to Chinese oversight, and all such requests for judicial assistance must go through the prescribed channels. This is aptly demonstrated in the present matter, where the plaintiff's failure to utilise these channels was a major factor in the setting aside of the service orders.

The Applicants were successfully represented in this application by Toh Kian Sing SC, Mark Cheng, Priscilla Soh, Darren Lim, and Ryan Mao of Rajah & Tann Singapore LLP.



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## Brief Facts

The plaintiff ("**Kiri**") and the first defendant company ("**Senda**") had been engaged in litigation before the SICC. After various substantive orders and costs orders, Senda was liable to Kiri for a certain sum. Senda submitted that it did not have the means to make payment of this sum.

In pursuit of payment, Kiri obtained an order from the Singapore court that Senda be examined by its director, Ms Fan, and its former director, Mr Ruan, as to its means to satisfy the costs orders ("**EJD order**"). Ms Fan and Mr Ruan were both Chinese nationals who were resident in PRC. Kiri subsequently obtained an order giving leave to serve the EJD order on Senda and Ms Fan in Hong Kong, and on Mr Ruan in China ("**service out order**"). Kiri further obtained an order for substituted service of the EJD order on Ms Fan by email after she could not be served at Senda's registered address in Hong Kong ("**substituted service order**").

The Applicants (Senda and Ms Fan) applied to the SICC to set aside the EJD order, the service out order and the substituted service order. Among other grounds, they contended that:

- Ms Fan and Mr Ruan were not closely connected with the substantive claim which was the subject of the EJD order;
- There were other ways for Kiri to obtain the information sought under the EJD order which would not infringe Chinese sovereignty (that is, by a judicial assistance request under the Treaty);
- Kiri failed to fulfil its duty of full and frank disclosure in obtaining the EJD order, the service out order and the substituted service order; and
- The mode of service under the substituted service order was contrary to Chinese law.

## Holding of the SICC

The SICC granted the application to set aside the service out order and the substituted service order, but declined to set aside the EJD order.

One of the key factors in the SICC's decision was Kiri's failure to follow the procedure set out in the Treaty. The SICC's reasoning on this factor, as well as other applicable factors, is summarised below.

### Judicial assistance under the Treaty

Article 2 of the Treaty provides for the mutual provision of judicial assistance by Singapore and PRC ("**Contracting Parties**") in:

- The service of judicial documents;
- The taking of evidence;

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- The recognition and enforcement of arbitral awards; and
- The provision of information on the countries' civil and commercial law, as well as their judicial practice in civil and commercial proceedings.

With regard to the service of judicial documents, the Treaty sets out the following procedure:

- The request for service of judicial documents shall be made by way of a request issued by the Central Authority of the requesting party. The Central Authority of the requested party, if it is not the judicial authority, shall cause the documents to be served by the judicial authorities on the person concerned.
- The judicial documents shall be served either by a method prescribed by the requested party's internal law, or by a particular method requested by the requesting party (provided it is compatible with the law of the requested party).
- A requested party may refuse to comply with a request that is contrary to its sovereignty, security or national interest.

With regard to the taking of evidence, the Treaty sets out the following procedure:

- The court of one Contracting Party may request the other Contracting Party to take evidence (e.g. examination of parties, witnesses and experts and the production of documents).
- The evidence may be taken before the court of the requested party or such other person as the court of the requested party thinks fit.
- The requested party may reject the request if it is of the view that it is prejudicial to its sovereignty, security or national interest, or not within the power or scope of duty of its judicial authority.

The Applicants submitted that the procedure for making a request to PRC under the Treaty for the taking of evidence would involve the evaluation of the request and review of the resulting evidence by PRC courts. Further, the evidence would not be taken before the Registrar in Singapore but would be taken by a court in PRC and transmitted to the Singapore courts.

In considering the operation of the Treaty, the SICC highlighted that "[i]t is no small thing to command a Chinese national resident in China to come to Singapore to be examined, and to produce documents in Singapore... Unless there is good reason, the available Treaty process should be followed".

### Service out order

The SICC was of the view that the examination of a judgment debtor to ascertain their means (as ordered in the EJD order) constituted a taking of evidence as provided for under the Treaty. The service and execution of the EJD order on Ms Fan and Mr Ruan thus fell within the Treaty's provisions. In reaching this conclusion, the SICC highlighted that the Treaty was intended to have a wide operation,

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whereby any activity constituting the collection of evidence in a wide sense is subject to Chinese oversight.

The SICC further held that the discretion to grant leave to serve an EJD order out of jurisdiction should be exercised sparingly. Here, in the sparing exercise of its discretion, the SICC found it appropriate to have regard to the Treaty as it provided a channel to examine Ms Fan and Mr Ruan. As there was no sufficient reason why the Treaty process should not be followed, the SICC ordered that the service out order be set aside on this ground as against Ms Fan and Mr Ruan.

The SICC also found that in any event, the service out order would have been set aside so far as it concerned Ms Fan due to Kiri's failure to provide full and frank disclosure, and because there was no sufficiently close connection with the substantive claim or any other justification to invoke the court's jurisdiction over her.

### **Substituted service order**

Since the service out order was set aside, the SICC held that the substituted service order as against Ms Fan lost its foundation and had to be set aside as well.

The SICC found that in any event, the substituted service order should also be set aside as being contrary to Chinese law. Ms Fan could only have been personally served in PRC, where she was resident, but this would have been contrary to Chinese law because under Chinese law, the only permissible means of service on her was pursuant to the Treaty. Substituted service, as a substitute for personal service on Ms Fan, could not exceed that which it replaced.

Furthermore, the SICC was of the view that the substituted service order should also be set aside for Kiri's failure to provide full and frank disclosure.

## Concluding Words

This decision demonstrates the importance of complying with established procedures for the service of documents or the making of requests for the taking of evidence from the courts of other jurisdictions. In particular, the decision highlights the operation of the Treaty in matters involving service of documents and taking of evidence between Singapore and PRC.

Parties involved in disputes spanning Singapore and PRC should be aware of the procedures set out in the Treaty. Parties should note the SICC's view that the Treaty is intended to have a wide scope of application, and that litigants should observe the procedures set out therein unless there is any good reason to depart from such procedure.

For further queries, please feel free to contact our team below.

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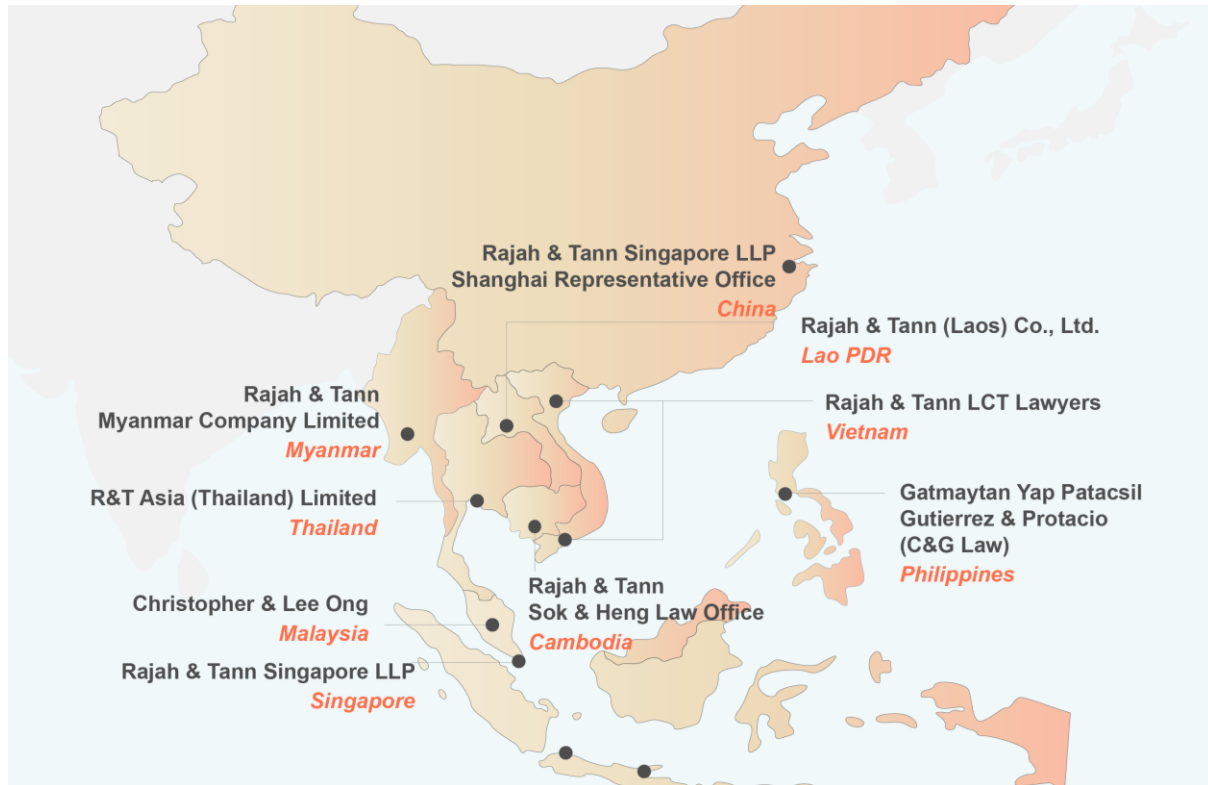
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