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Legal Updates

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Legal Updates

1. New Regulations for Panda Bonds in China's Interbank Market (Author: Financial and Investment Management Department)

In recent years, with the development of China's economy and the internationalization of the renminbi, more and more overseas financial institutions and non-financial institutions have issued renminbi-denominated bonds in China[1] ("**Panda Bonds**"). The number and size of the Panda Bonds issued in 2018 have increased significantly. For the half year ended 30 June 2018, 23 Panda Bond issuances were offered in the China Interbank Bond Market ("**CIBM**") with a total amount of RMB 41.26 billion, accounting for 80.13% of total Panda Bond issuances by value[2]. Eight Panda Bonds were issued in the Exchange Bond Market with a total amount of RMB 10.23 billion, accounting for 19.87% of the total Panda Bond issuances by value[3].

Despite the relatively large size of Panda Bond issuances in China's markets, the relevant regulators had not issued specialized regulations for Panda Bonds, except for regulations on issuances of Panda Bonds by international development institutions. In practice, other overseas institutions that have issued Panda Bonds in the CIBM, such as foreign government agencies, overseas financial institutions and non-financial enterprises, have had to refer to relevant regulations and rules for domestic institutional bond issuances, which has led to some uncertainty. On 25 September 2018, the People's Bank of China ("**PBOC**") and the Ministry of Finance ("**MOF**") officially issued the *Interim Measures for Administration of the Issuance of Bonds by Overseas Institutions in the National Interbank Bond Market* (《全国银行间债券市场境外机构债券发行管理暂行办法》) (the "**Interim Measures**") which officially abolished the *Interim Measures for Administration of Issuing Renminbi Bonds by International Development Institutions* (《国际开发机构人民币债券发行管理暂行办法》) (the "**IDI Measures**")[4].

The Interim Measures aim to provide more systematic and specific guidelines for overseas institutions to issue Panda Bonds in the CIBM. The Shenzhen Stock Exchange also published a consultation draft of the rules for Panda Bonds in the corporate bond market this May[5] and may issue the formal rules in the near future.

We intend to introduce the main contents of the Interim Measures in this article and analyze the

[1] "China" and "Domestic" (for the purposes of this article only) refer to the territory of the People's Republic of China, excluding the Hong Kong Special Administrative Region, the Macao Special Administrative Region and Taiwan; "overseas" (for the purposes of this article only) refers to countries and regions outside of China.

[2] Please see http://finance.sina.com.cn/money/bond/market/2018-08-10/doc-ihhnunsq9352799.shtml, sourced from 联合资信.

[3] Please see http://finance.sina.com.cn/money/bond/market/2018-08-10/doc-ihhnunsq9352799.shtml, sourced from 联合资信.

[4] Please see http://english.gov.cn/archive/state_council_gazette/2015/06/08/content_281475123345680.htm.

[5] Please see http://www.szse.cn/lawrules/publicadvice/t20180525_536657.html.

changes to the regulatory rules for Panda Bonds in China.

I. The Issuers Regulated by the Interim Measures

Before the issuance of the Interim Measures, the IDI Measures were the only specialized regulation for CIBM Panda Bond issuances, which only applied to international development institutions. In practice, foreign government institutions, overseas financial institutions and non-financial enterprises largely had to refer to regulations and industry rules applicable to domestic institutions when issuing Panda Bonds. The Interim Measures expand the regulated issuers to foreign government agencies, overseas financial institutions and non-financial enterprises, and provide clearer guidelines for overseas institutions to issue Panda Bonds in the CIBM, which will thus further facilitate the development of the Panda Bond market in China.

II. Further Clarifying the Scope of Approved and Registered Issuances

Generally speaking, the Interim Measures simplify the administration of bonds issued by foreign institutions in China. According to the Interim Measures, the issuance of Panda Bonds by overseas financial institutions in the CIBM is subject to PBOC approval, and Panda Bond issuances by foreign government agencies, overseas non-financial institutions and international development institutions, etc. in the CIBM are registered with the National Association of Financial Market Institutional Investors ("**NAFMII**").

In addition, overseas financial institutions will submit to PBOC for recordkeeping a current prospectus, credit rating reports (if any), underwriting agreement and underwriting syndicate agreement, legal opinions and other final relevant documents.

III. Substantive Requirements for Overseas Financial Institutions to Issue Panda Bonds in the CIBM

The Interim Measures specify the specific requirements for overseas financial institutions to issue Panda Bonds in the CIBM. These requirements are generally consistent with those requirements for domestic financial institutions (including PRC banking financial institutions and other non-banking financial institutions) to issue financial bonds in CIBM.

Below, we summarize the substantial requirements for different kinds of overseas issuers under the Interim Measures:

	Overseas Financial Institutions	Foreign Government Agencies and International Development Institutions	Overseas Non-financial Enterprises
Approval/ Registration	PBOC approval	NAFMII registration	NAFMII registration
Substantive Requirements	Paid-in capital of no less than RMB10 billion or its equivalent;	Foreign government agencies and international development institutions shall have bond issuance experience and are in good credit standing.	The Interim Measures are silent on substantive requirements for overseas non-financial enterprises.
	the issuer has good corporate governance mechanisms and a sound risk management system;		
	the issuer has stable financial conditions, good credit, and has been continuously profitable for the last three years;		
	the issuer has bond issuance experience and is able to pay any of its debts;		
	the issuer is under effective supervision by the financial regulatory authorities of the country or region in which it is located, and the main risk monitoring indicators are in compliance with the regulations of such financial regulatory authorities.		

IV. Issuance Methods and Applicable Conditions for Installment Issuances

The Interim Measures stipulate that Panda Bonds may be issued in the CIBM either in full or in installments up to an approved or registered amount.

Foreign government agencies, international development institutions, and overseas financial institutions may apply to issue Panda Bonds in the CIBM in installments up to the approved or registered amount if they are experienced in issuing bonds abroad or have issued bonds within China and have maintained continuous information disclosures for more than one year.

Overseas non-financial enterprises may apply to issue Panda Bonds in the CIBM in installments in accordance with the relevant NAFMII rules. Under the Rules for the Registration and Issuance of Debt Financing Instruments *of Non-financial Enterprises in the Interbank Bond Market* (《银行间债券市场非金融企业债务融资工具发行注册规则》)[6], non-financial enterprises are to complete issuances within two months of registration. In the case of installment issuances, each subsequent issuance is filed with NAFMII two business days in advance.

[6] Please see http://www.nafmii.org.cn/english/lawsandregulations/selfregulatory_e/201706/t20170623_61901.html.

V. Registration and Custody

The Interim Measures only prescribe principled provisions for the registration and custody of CIBM Panda Bonds. The Interim Measures stipulate that CIBM Panda Bonds are to be placed under the custody of certain PBOC-approved depositories. Upon completion of an issuance, issuers will timely confirm the debtor-creditor relationship with the depository, which will promptly handle the bond registration.

The China Government Securities Depository Trust & Clearing Co., Ltd. and the Shanghai Clearing House are the current depositories designated by the PBOC. In practice, most Panda Bonds are under the custody of the Shanghai Clearing House. As of 30 September 2018, there were about 70 Panda Bonds registered with the Shanghai Clearing House, including the Panda Bonds issued by foreign government agencies, overseas financial institutions and overseas non-financial enterprises[7]; there were only five Panda Bonds issued by the international development institutions registered with the China Government Securities Depository Trust & Clearing Co., Ltd[8].

VI. Foreign Exchange Administration

According to the Interim Measures, overseas institutions that have been approved or registered to issue bonds in China go through foreign exchange registration formalities. Account opening, fund remittance, cross-border transfer, information reporting and other matters regarding fundraising must comply with the relevant regulations of PBOC and the State Administration of Foreign Exchange.

We understand that matters relating to Panda Bond issuance fundraising accounts and cross-border transfers of renminbi capital proceeds will continue to be subject to the relevant provisions in the *Notice on Issues Concerning the Cross-border RMB Settlement of RMB Bonds Issued by Overseas Institutions within China* (《关于境外机构境内发行人民币债券跨境人民币结算业务有关事宜的通知》) issued by PBOC in 2016.

In addition, according to the *Notice on Issues Concerning Full-coverage Macro-prudent Management of Cross-Border Financing* (《关于全口径跨境融资宏观审慎管理有关事宜的通知》) issued by PBOC in 2017, Panda Bonds for self-use, i.e. renminbi bonds issued within China by the offshore parent company of a domestic non-financial enterprise (other than government financial platforms and the real estate enterprises) and lent back to a domestic subsidiary, are not subject to foreign debt limits.

VII. Bond Ratings

Bond ratings are not mandatory for the issuance of Panda Bonds in the CIBM. The Interim Measures stipulate that if an overseas institution chooses to publicly disclose credit rating reports,

[7] Based on our public search on the website of Shanghai Clearing House (http://www.shclearing.com).

[8] Based on our public search on the website of China Government Securities Depository Trust & Clearing Co., Ltd. (http://www.chinabond.com.cn).

such reports shall be issued by an accredited national interbank market credit rating agency.

The *Announcement on the Operation of Credit Rating Business in the Interbank Bond Market by Credit Rating Agencies* (《关于信用评级机构在银行间债券市场开展信用评级业务有关事宜的公告》) issued by PBOC in 2017 and the *Rules on Evaluation and Registration of Credit Rating Agencies in the Interbank Bond Market* (《银行间债券市场信用评级机构注册评价规则》) issued by NAFMII in 2018, specify the CIBM qualification requirements for credit rating agencies (including both the domestic and international credit rating agencies). The large international credit rating agencies (e.g. Standard & Poor's, Moody's and Fitch Group) will be able to provide credit rating services for CIBM Panda Bonds upon passing the registration assessment according to the regulations and rules above.

VIII. Information Disclosures

The Interim Measures provide detailed regulations on the information disclosures for Panda Bonds issued in the CIBM, especially on the relevant accounting standards. The main points include:

i. **The principle of authentic, complete and equivalent disclosure:** The information disclosed by the issuer is to be authentic, accurate, complete and timely, and must not contain false records, misleading representations or major omissions. Based on the principle of equivalent disclosure, the important information disclosed by the issuer in other markets must also be disclosed to the CIBM concurrently or within the shortest reasonable time.

ii. **Disclosure requirements for private issuances:** For CIBM Panda Bonds which are only issued to specific investors, the receivers of information disclosures are limited to the investors of such Panda Bonds, and the issuance documents such as prospectuses or financial reports must not be disclosed to the public.

iii. **Accounting standards**: Before the issuance of the Interim Measures, the financial reports of Panda Bond issuers were required to be prepared in accordance with China Accounting Standards ("**CAS**") or such equivalent accounting standards, which was costly and time consuming for prospective overseas issuers. However, the Interim Measures to some extent ease the financial report requirements for private issuances of CIBM Panda Bonds and also set different disclosure requirements for different kinds of issuers in the case of public issuances.

    1) For CIBM Panda Bonds publicly issued by international development institutions, the Interim Measures require the issuer to declare the accounting standards used in its financial reports in a prominent position in the prospectus and financial reports. In addition, if the disclosed financial reports are not prepared in accordance with CAS or other accounting standards that are recognized by MOF to be equivalent to CAS according to principles of reciprocity, the issuer is required to disclose the material differences between the accounting standards adopted and CAS.

    2) For the CIBM Panda Bonds publicly issued by overseas financial institutions and non-

financial enterprises, the Interim Measures require the issuer to declare the accounting standards used in the financial reports in a prominent position in the prospectus and financial reports. If the disclosed financial reports are not prepared in accordance with CAS or equivalent accounting standards, the issuer will also be required to provide the following supplementary information:

(1) material differences between the accounting standards adopted and CAS; and

(2) a reconciliation of differences based on CAS, and an explanation of the financial impact of the accounting standard differences on all important items in the financial reports.

If the issuer only discloses its financial reports to the qualified institutional investors with whom the issuer has entered into a written private subscription agreement, the issuer may negotiate with the qualified institutional investors to determine the accounting standards to be adopted in the financial reports, but the issuer is required to fully disclose relevant risks in a written private subscription agreement and have the investors confirm their undertaking of such risks.

iv. **Audit Requirements (expanding the scope of approved auditors)**: The Interim Measures stipulate that if an issuer adopts CAS to prepare its financial reports, it is required to engage a PRC accounting firm with qualifications for securities and futures business to audit the financial reports. Where other accounting standards are adopted, a PRC accounting firm with qualifications for securities and futures business or a foreign accounting firm may be engaged for the audit provided that it meets the following conditions:

1) it is legally registered and established in the country or region where it is located, and has obtained the practice qualification for auditing business and is in normal practice;

2) it has a good international reputation and market recognition;

3) it has engaged in publicly issued securities-related audits in the country or region where it is located, and has more than five years of experience in auditing publicly securities issuances; and

4) other conditions or regulatory requirements set by MOF.

The reconciliation information adjusted in accordance with CAS provided by overseas institutions is required to be certified by a PRC accounting firm with qualifications for securities and futures business.

If the issuer engages a foreign accounting firm to audit the financial reports related to the CIBM Panda Bonds, the foreign accounting firm is required to file with MOF within 20 business days before submission of the Panda Bond issuance application, and such report filings will be annually updated with MOF during the term of the bond issue.

IX. Language Requirement

Under the Interim Measures, if the issuer publicly discloses the issuance documents, such documents are required to be in simplified Chinese or otherwise provided with a simplified Chinese translation.

X. Applicable Law

Prior to the issuance of the Interim Measures, the IDI Measures explicitly stipulated that any breach of contract or other disputes arising out of or in connection with the issuance of renminbi-denominated bonds within China by an international development institution was to be governed by PRC law. In practice, CIBM Panda Bonds issued by foreign government agencies, overseas financial institutions and overseas non-financial enterprises were also subject to PRC law by reference to this regulation. The Interim Measures do not set any compulsory requirement as to the application of law, and provide some flexibility for CIBM Panda Bond issuances by overseas institutions. This trend is in consistent with the general principle of choice of laws for cross-border bond issuances in other countries.

The Interim Measures respond to the calls of investors in the CIBM as well as of foreign institutions to issue specialized regulations relating to CIBM Panda Bonds. Most provisions of the Interim Measures agree and are consistent with the currently applicable rules and practices relating to Panda Bonds. On the other hand, the Interim Measures provide more detailed and flexible operating rules (such as the rules on accounting standards and financial reports) for overseas institutions to issue Panda Bonds in the CIBM. However, some of the provisions are still too general for specific transactions. NAFMII may issue specific guidelines soon and we will continue to pay attention to relevant rules and guidelines and keep you updated.

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2. A Commentary on China-Singapore Memo on Enforcement of Judgment (Authors: LIAO Ronghua(Andy), YE Junxin, ZHANG Zixuan)

On 31 August 2018, the Chief Justice of the PRC Supreme Court and his Singapore counterpart signed the *Memorandum of Guidance between the Supreme People's Court of the People's Republic of China and the Supreme Court of Singapore on Recognition and Enforcement of Money Judgments in Commercial Cases* (the **"Memorandum"**) during the second China-Singapore Legal and Judicial Roundtable held in Singapore. The signing of the Memorandum is of landmark significance in the area of cross-border civil and commercial dispute resolution, which deserves the attention of the business community and legal professionals. In this article, we intend to introduce, interpret and comment on the main contents of the Memorandum on the basis of the existing legal provisions and judicial practice with respect to the recognition and enforcement of foreign civil and commercial

judgments.

I. Application Scope of the Memorandum

Article 1 of the Memorandum introduces the general scope of the agreement and provides that (a) it applies only to judgments in commercial cases that involve natural or legal persons and the payment of a fixed or ascertainable amount of money, thus excluding procedural decisions such as preservation rulings, injunctions and provisional measures. From this standpoint, the Memorandum is no different than mutual legal assistance treaties that China has concluded with other countries and regions; (b) the judgment refers to any decision made by a court or to which the court's seal is affixed; and (c) "commercial cases" refer to cases in which a judgment requires recognition and enforcement by the courts of the other party, both international cases and non-international cases. It is worth noting that the definition of commercial cases in the Memorandum appears ambiguous – read plainly, it may include civil cases, such as family law cases, which are not generally within the scope of commercial cases. Considering that there is no clear legal distinction between civil and commercial cases under PRC law, courts of both countries may interpret these matters differently in judicial practice. Thus, recognition and enforcement of certain types of judgments may face legal obstacles.

II. How PRC Courts May Recognize and Enforce Singapore Court Judgments

i. PRC courts may recognize and enforce Singapore court judgments on the basis of reciprocity

Article 6 of the Memorandum clarifies that the judgment of a Singapore court may be recognized and enforced in PRC courts on the basis of reciprocity upon an application submitted by the applicant. According to Articles 281 and 282 of the *Civil Procedure Law of the People's Republic of China*, a prerequisite for PRC courts to recognize and enforce the judgment of a foreign court is the existence of a treaty concluded or acceded to by China and the foreign country or under the principle of reciprocity. While China and Singapore have signed the *Treaty on Judicial Assistance in Civil and Commercial Matters between the People's Republic of China and the Republic of Singapore* in 1999, the treaty does not provide for the recognition and enforcement of judgments in civil and commercial cases. As a result, judgments issued by Singapore courts may only be recognized and enforced on the ground of reciprocity.

The question then arises whether China and Singapore have in fact established a reciprocal relationship, and whether there will be any substantive obstacles to future applications for recognition and enforcement of Singapore court judgments before PRC courts on the basis of reciprocity. The answer to the issue of reciprocity appears to be cautiously in the affirmative for the reasons described below.

First, the Nanjing Intermediate People's Court in 2016, citing reciprocity, recognized and

enforced the Singapore High Court's civil judgment in the case of Kolmar Group AG v. Jiangsu Textile Industry (Group) Import & Export Co., Ltd.9 (the "Kolmar Case"). This was the first time that a reciprocal relationship between China and Singapore had been found by a PRC court based on the standard of factual reciprocity.

Some commentators have expressed concern, however, since PRC law does not specify the criteria for reciprocity and the decision of a PRC district court, such as in the Kolmar Case, is neither a source of law nor represents legally binding precedent. It is therefore difficult to conclude with certainty that a reciprocal relationship exists between China and Singapore, or whether PRC courts will continue to consider there to be a reciprocal relationship between the two countries in future claims for recognition and enforcement of Singapore court judgments. While uncertainty may exist with respect to reciprocity, the following reasons cause this concern to be appear unfounded.

Second, the Kolmar Case has been selected as one of Second Batch of Typical Cases Involving Construction of the "Belt and Road." The PRC Supreme Court believes that this case not only has landmark significance in the mutual recognition and enforcement of commercial judgments between China and Singapore, but also will powerfully advance the realization of judicial cooperation among countries along the Belt and Road in the field of recognition and enforcement of civil and commercial judgments. This typical case designation indicates that the PRC Supreme Court recognizes the existence of a reciprocal relationship between China and Singapore, which may serve as a model and guide for local PRC courts in dealing with similar cases.

Third, Article 7 of the Nanning Statement of the 2nd China-ASEAN Justice Forum held in Nanning on 8 June 2017 provides that "if two countries have not been bound by any international treaty on mutual recognition and enforcement of foreign civil or commercial judgments, both countries may, subject to their domestic laws, presume the existence of their reciprocal relationships, when it comes to the judicial procedure of recognizing or enforcing such judgments made by courts of the other country, provided that the courts of the other country had not refused to recognize or enforce such judgments on the ground of lack of reciprocity." The principle of "presumptive reciprocity" in Article 7 applies to cases submitted to PRC courts for recognition and enforcement of Singapore court judgments. And it also provides a more solid ground for PRC courts to recognize and enforce judgments issued by Singapore courts on basis of a reciprocal relationship.

ii. Judgments of Singapore courts must be final and conclusive

Article 7 of the Memorandum expressly provides Singapore court judgments must be both "final and conclusive" to be recognized and enforced in China. Any challenge brought before a

[9] *Case of Application for the Recognition and Enforcement of a Civil Judgment of the Singapore High Court: Kolmar Group AG v. Jiangsu Textile Industry (Group) Import & Export Co., Ltd* (Nanjing Inter. People's Ct., (2016) Su 01 Xie Wai Ren No.3; publ. 27 Dec. 2016)

PRC court as to the finality and conclusiveness of a judgment will be determined in accordance with PRC law, rather than Singapore law. This provision is inconsistent with general professional opinions and practices in most countries and regions, which hold that it is the law under which the foreign judgment was rendered that determines the judgment's finality and conclusiveness. Moreover, such disputes may not be resolvable under PRC law because PRC law lacks clear provisions or rules on how to determine the finality and conclusiveness of foreign judgments.

Referring to treaties on judicial assistance reached by China and other countries (e.g. Treaty on Judicial Assistance in Civil and Commercial Matters between the People's Republic of China and the French Republic), the finality and conclusiveness of a foreign judgment is generally determined in accordance with the laws of the country in which the judgment was made. At the same time, in view of the difficulty of the country's courts to make such a determination, the applicant is often required to submit a certificate that the judgment is in force from the country or region in which the judgment was issued. If this is not possible, the courts of the country or region will not recognize and enforce the judgment.

However, Article 13 of the Memorandum, which describes the documents required for recognition and enforcement, does not reference a certification that the judgment is in force. Rather, Article 13 requires documents that certify "the judgment is not subjected to or under appeal, the appeal period has expired in respect of the judgment and there is no pending application for an extension of time to appeal, unless that is specified in the judgment itself." Therefore, it appears reasonable to conclude that, if an applicant is able to provide such a document, the judgment would be deemed prima facie final and conclusive.

iii. Singapore courts must have jurisdiction over the subject matter of the dispute

Article 9 of the Memorandum provides that "[t]he courts of Singapore must have had jurisdiction to determine the subject matter of the dispute, as determined by the courts of the People's Republic of China, in accordance with [PRC] law." It is worth emphasizing that PRC courts will apply PRC law, rather than Singapore law, to determine whether a Singapore court had jurisdiction over the dispute at issue in its judgment. While in practice there may be considerable controversy as to which governing law or criteria should be applied to determine jurisdiction, this provision of the Memorandum may be reasonable in light of practices in most countries and regions. Specifically, the policy considerations for recognizing and enforcing a foreign judgment cannot ignore the protection of the operation of the domestic legal system, and it would be difficult in practice for a domestic court to interpret and apply the laws of a foreign country or region. In addition, it is of little value for the court where recognition and enforcement is sought to examine the issue of jurisdiction since the court of the foreign country or region must have considered its jurisdiction over the dispute under domestic law before the judgment was rendered.

Singapore courts examine jurisdiction over disputes in accordance with their domestic laws

when rendering judgments, while PRC courts, when requested to recognize and enforce those judgments, will examine under PRC law whether the Singapore courts had jurisdiction over the underlying disputes. Thus, there may be an unavoidable conflict in some cases between the jurisdictional rules of the two countries that may lead to Singapore court judgments not being recognized and enforced by PRC courts on the grounds that the Singapore courts lacked jurisdiction. For instance, Articles 33 and 266 of the Civil Procedure Law of the People's Republic of China provide the principle of exclusive jurisdiction over disputes involving of real estate, port operations, inheritances and disputes arising from performance in China of Sino-foreign equity joint venture contracts, Sino-foreign cooperative joint venture contracts, Sino-foreign cooperative exploration and exploitation of natural resources contracts. PRC courts may not recognize or enforce Singapore court judgments that violate the above provisions. In another instance, under Article 531 of the Interpretations of the Supreme People's Court on Application of the Civil Procedure Law of the People's Republic of China, in disputes arising from foreign-related contracts or other property rights, the parties may agree in writing to select as the governing jurisdiction the place which is actually associated with the dispute, such as a foreign court at the location of the defendant, the place of performance of the contract, place of execution of the contract, the location of the plaintiff, the location of the subject matter, or the place where the tortious act occurred. In such circumstances, PRC courts may refuse to recognize and enforce a judgment where the Singapore court has exercised jurisdiction based on an agreement in violation of Article 531.

According to Article 21 of the Memorandum, Singapore courts mainly adopt enumerated criteria for jurisdictional nexus under the common law system to determine jurisdiction, that is, Singapore courts will find a court to have had jurisdiction so long as the case has nexus, such as, presence or residence, voluntary submission to jurisdiction or an agreement to submit to jurisdiction. These criteria are broader than the jurisdictional rules under PRC law.

Therefore, an applicant who intends to file a lawsuit in a Singapore court and have the judgment recognized and enforced in China should carefully assess Article 9 of the Memorandum to determine in advance whether the exercise of jurisdiction by Singapore courts over the subject matter of the dispute is in accordance with the jurisdictional rules under PRC law.

iv. Reservations to certain types of Singapore court judgments

Article 8 of the Memorandum provides that PRC courts will not recognize and enforce judgments issued by Singapore courts that would amount to the direct or indirect enforcement of any foreign penal, revenue or public law and will not recognize and enforce certain types of judgments of Singapore courts, including but not limited to judgments arising from intellectual property rights, unfair competition, monopoly cases. The reservations to these certain types of judgments in the Memorandum are presumed to be based on special policy considerations. For example, some scholars believe that the reason why China should not recognize and enforce such judgments is that the number of works protected by intellectual property law,

intellectual property law legal protections and public awareness of intellectual property in China are relatively inferior to those of more developed countries. The recognition and enforcement of foreign intellectual property-related judgments may therefore lead to an imbalance of interests between China and other more developed countries.

v. Grounds for refusing recognition and enforcement

Articles 10 and 11 of the Memorandum clarify that PRC courts will not review the merits of any Singapore court judgment, and only on certain limited grounds may a judgment be challenged in PRC courts. Those grounds include but are not limited to: "(a) the judgment is contrary to basic principles of the law of the PRC or will prejudice to its sovereignty, security or public interests; (b) the judgment was obtained by fraud; (c) the litigant had not been given proper notice of the judicial proceedings or had not been given a reasonable opportunity to defend the case; (d) the judicial body is constituted by persons with personal interests in the outcome of the case; (e) the litigant without capacity for action has not been properly represented; and (f) the litigation between the same litigants and on the same subject is pending in PRC courts, or PRC courts have rendered or made a final and conclusive judgment, or have recognized or enforced a final and conclusive judgment rendered by a third state or an arbitration award." Among these grounds, it should be noted in particular that where PRC courts and Singapore courts both have jurisdiction over the subject matter of the dispute, the recognition and enforcement of a judgment rendered by a Singapore court may encounter substantial obstacles if a lawsuit has been filed in China before an application is made to a PRC court for recognition and enforcement of that judgment.

vi. Procedural matters

Articles 12 and 13 of the Memorandum address the process for obtaining recognition and enforcement of a Singapore court judgment in China. First, an applicant is required to submit an application to the intermediate people's court where the party against whom enforcement is sought is domiciled or holds property. In addition, Article 13 also requires that the applicant to "submit the following documents authenticated by a notarial office in Singapore and confirmed by the [PRC] embassy or consulate stationed in Singapore: (a) a certified copy of the judgment [which may be obtained by making an application in accordance with the *Supreme Court Practice Directions*]; (b) documents to certify that the judgment is not subject to or under appeal, the appeal period has expired in respect of the judgment and there is no pending application for an extension of time to appeal, unless that is specified in the judgment itself; (c) in the case of default judgment, documents to certify that the defaulting litigant has been legally summoned, unless that is specified In the judgment itself; and (d) documents to certify that the litigant without capacity for action has been properly represented, unless that is specified in the judgment itself. The application, judgment and documents mentioned above, if not made in Chinese, shall be accompanied by a certified translation into Chinese."

III. How Singapore Courts May Recognize and Enforce PRC Court Judgments

i. Singapore courts may recognize and enforce PRC court judgments on the basis of common law

The recognition and enforcement of foreign judgments in Singapore courts are mainly based on statutory and common law rather than reciprocal relationships. Statutory recognition and enforcement mainly relates to judgments made by the courts of specific countries or regions, such as those rendered in a Commonwealth of Nations member state. These judgments could obtain the legal effect equivalent to judgments in Singapore through a filing process, while the judgments issued in countries such as China, for which statutory law does not apply, may be recognized and enforced only by way of common law. Under the common law, the recognition and enforcement of foreign judgments must satisfy the following requirements: (a) the judgment must be final and conclusive; (b) the original court must be jurisdictionally competent in accordance with the rules of international private law; (c) there are no defenses against the recognition of the foreign judgment; and (d) the judgment must be for a fixed sum of money.

Based on the above, Articles 17 and 18 of the Memorandum respectively provide that "a judgment of the courts of the People's Republic of China may be enforced in the courts of Singapore by a claim made at common law" and "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 debtor to pay that sum. The creditor may bring a claim to enforce that obligation as a debt. This legal obligation to pay the debt is however separate from the underlying cause of action."

ii. Basic requirements

According to Articles 19 to 23 of the Memorandum, the application for recognition and enforcement of a PRC court judgment by a Singapore court shall satisfy the following basic requirements: (a) the finality and conclusiveness of a PRC court judgment is based on PRC law, and the PRC court can evidence finality and conclusiveness by issuing a certificate; (b) as mentioned above, according to the listed criteria for jurisdictional nexus under Singapore law, a PRC court must have had jurisdiction to determine the subject matter of the dispute; (c) although Singapore courts will not review the merits of a PRC court judgment, there can be no grounds for refusing to recognize and enforce the judgment, which include the following: "(a) the judgment was obtained by fraud; (b) the judgment is contrary to Singapore public policy; (c) the proceedings were conducted in a manner which the Singapore court regards as contrary to the principles of natural justice" (Article 21). Besides these conditions, Singapore courts will also refuse to enforce PRC court judgments which would amount to the direct or indirect enforcement of any foreign penal, revenue or public law.

iii. Procedural matters

Articles 24 to 29 of the Memorandum provide the procedures of applying for recognizing and enforcing a PRC court judgment in a Singapore courts. Specifically, an applicant must file a writ of summons (providing a concise statement of the nature of the claim and claiming the

amount of the judgment debt) and a certified copy of the judgment in the competent court of Singapore. "Where the [respondent] is outside of Singapore … the [applicant] will have to seek the leave of court to serve the writ of summons out of the jurisdiction in accordance with Order 11 of the *Singapore Rules of Court*" (Article 25). If, following service of the writ of summons, "the [respondent] does not respond to the claim, the [applicant] will be entitled to obtain judgment in default under Order 13 of the *Singapore Rules of Court"* (Article 26). "If, following service of the writ of summons, the [respondent] responds to the claim, the [claimant] must file and serve a statement of claim setting out the material facts which are relied upon for the claim, and the necessary particulars of the claim" (Article 27). "In most cases, a judgment creditor will be entitled to apply to obtain summary judgment without trial under Order 14 of the *Singapore Rules of Court*, unless the judgment debtor can raise a triable issue in relation to a defense" (Article 29). Further, "where the [respondent] is in … China, the service of writ of summons, the statement of claim, particulars of the claim and other subsequent documents should be effected through competent PRC courts in accordance with *Treaty on Judicial Assistance in Civil and Commercial Matters between the People's Republic of China and the Republic of Singapore*" (Article 28).

IV. Conclusion

While not legally binding, the Memorandum is of great significance for China in the context of the "Belt and Road Initiative," since it symbolizes a strengthening of judicial cooperation with countries along the "Belt and Road" with respect to the mutual recognition and enforcement of civil and commercial judgments. Where it is not feasible to reach bilateral or multilateral mutual judicial assistance treaties along the "Belt and Road," the supreme courts of these countries may execute memoranda such as the Memorandum concerning the recognition and enforcement of civil and commercial judgments. The Memorandum will aid the normalization and institutionalization of judicial assistance between China and Singapore and will meaningfully increase the predictability of the recognition and enforcement of court judgments between the two countries, although the Memorandum will still need to be tested in practice due to the differences in the respective legal systems and the limitations inherent in its form. Nevertheless, the Memorandum has rightfully brought a great deal of optimism to the business community and legal professionals alike.

English versions of the Memorandum is available at following links:

Memorandum of Guidance between the Supreme People's Court of the People's Republic of China and the Supreme Court of Singapore on Recognition and Enforcement of Money Judgments in Commercial Cases (EN)

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Important Announcement

This Newsletter has been prepared for clients and professional associates of Han Kun Law Offices. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors This Newsletter has been prepared for clients and professional associates of Han Kun Law Offices. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

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