

Recognition and Enforcement of Foreign Judgments in China: Challenges and Developments

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Abstract

The author analyses laws and regulations, current judicial practice, challenges and developments for the recognition and enforcement of foreign judgments in China against the backdrop of the increasing growth of China's investments and trade with other countries. He particularly focuses on the different legal and cultural stages of economic development and the rule of law as well as the lack of trust among jurisdictions, regions and countries. The author concludes that facilitating the reliable free movement of judgments for recognition and enforcement will benefit both China and its trading partners.

Introduction

Winning a court judgment is by no means the “happy ever after” ending; it is just the beginning of another judicial procedure to recognize and enforce such winning judgment. The prevailing party will seek the most convenient and efficient way to achieve the awarded verdict. This presents special considerations when judgment enforcement is due to occur in a foreign jurisdiction. The different legal and cultural stages of economic development and the rule of law, and particularly, the lack of trust among jurisdictions, regions and countries, may result in foreign judgments easily being refused recognition regardless of other international cooperation matters.

The increasing growth of China's investments and trade with other countries, especially European Union (“EU”) States, have brought about a corresponding increase in cross-border litigations involving EU states' judgments upon Chinese parties. Thus, for foreign parties engaged in disputes with a Chinese party and holding a foreign judgment, an increasingly major problem lies in securing the recognition and enforcement of an EU court's decision in Chinese courts. Likewise, there are similar problems for the recognition and enforcement of Chinese judgments in the courts of other jurisdictions, regions and countries.

This article is focused on the laws and regulations, current judicial practice, challenges and develop-

ments for the recognition and enforcement of foreign judgments in China.

I. General review of the recognition and enforcement laws for foreign judgments in China

The laws regarding the recognition and enforcement of foreign judgments in China are principally governed by its Civil Procedure Law (“CPL”), and the relevant Articles 281 and 282.²

According to Art 281 of CPL,³ it is obvious that a legally effective judgment or ruling by a foreign court requires the Chinese court to recognize it first, before it can be put into effect by Chinese enforcement procedures. Applications for foreign judgment recognition may be made by an applicant directly to a relevant intermediate court, or by a foreign court, for recognition and enforcement consistent with a Chinese treaty requirement, or on the basis of juridical reciprocity.

Art 282 of CPL⁴ provides that if the foreign judgments are to be recognized in Chinese courts as

² See articles 281 and 282, available from the website <<http://www.fujianlaw.com/html/790241104.html>> (last visited September 11, 2017).

³ Art. 281 of CPL provides that: “Where an effective judgment or ruling of a foreign court requires recognition and enforcement by a people's court of the People's Republic of China, a party may apply directly to the intermediate people's court of the People's Republic of China having jurisdiction for recognition and enforcement or apply to the foreign court for the foreign court to request recognition and enforcement by the people's court in accordance with the provisions of an international treaty concluded or acceded to by the People's Republic of China or under the principle of reciprocity.”

⁴ Art. 282 of the CPL provides that: “After examining an application or request for recognition and enforcement of an effective judgment or ruling of a foreign court in accordance with an international treaty concluded or acceded to by the People's Republic of China or under the principle of reciprocity, a people's court shall issue a ruling to recognize the legal force of the judgment or ruling and issue an order for enforcement as needed to enforce the judgment or ruling according to the relevant provisions of this Law if the people's court deems that the judgment or ruling does not violate the basic principles of the

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requested, first, the foreign judgments or rulings applying for recognition must be legally binding and enforceable. This is a basic condition precedent for the requested recognition. Second, if a bilateral treaty exists, the competent Chinese court might rely on the treaty as to whether recognition will be considered. Third, if such a treaty does not exist, the principle of reciprocity will be considered. Regarding reciprocity, in practice, Chinese courts normally begin with an examination as to whether the foreign court has previously recognized Chinese judgments. Fourth, if there is neither a bilateral treaty nor previous incidents of reciprocity, the foreign judgment will be refused recognition and enforcement. Of course, the underlying crucial point is always that recognition and enforcement shall not violate the basic principles of Chinese laws and public interests.

If the Chinese court arrives at the conclusion that it does not contradict the basic principles of the Chinese law nor violate State sovereignty, or the security and public interests of China, it would recognize the validity of the judgment, and, if required, issue a writ of execution to enforce it in accordance with the relevant provisions of CPL. If the application or request contradicts the basic principles of Chinese laws or violates State sovereignty, or security and public interests in China, the court would not recognize and enforce it.

A number of bilateral treaties on judicial assistance between China and other countries have been signed involving recognition and enforcement of foreign judgments in civil and commercial matters. As of October, 2017, China has signed about 39 treaties with other countries involving such civil and commercial matters, and 36 of these treaties provide for recognition and enforcement of judgments and arbitral awards.⁵ For example, treaties with countries such as France, Italy, Russia, Mongolia, Kyrgyzstan, Tajikistan and Uzbekistan, stipulate the following conditions for recognition and enforcement of judgments: (1) according to the municipal law of the adjudicating court, the judgment must be final and enforceable; (2) on the basis of the municipal law of the adjudicating court, the court has jurisdiction over the case; (3) under the municipal law of the adjudicating court, default is a lawful basis for adjudication providing there has been proper service on the defaulting party; (4) the judgment and proceeding were consistent with the law of the recognizing country; and (5) recognition and enforcement of the foreign judgment do not violate the public policy of the recognizing court.

According to CPL requirements, treaties, and judicial interpretations in China, the following conditions shall apply to recognition and enforcement of foreign judgments in China:

- (a) The judgment is final as to its effects. Foreign judgments must be final and conclusive to be recognized and enforced in China.⁶
- (b) In principle, a foreign court must have jurisdiction over the case.⁷ This is also reflected in a number of bilateral treaties signed by China, which provide that lack of jurisdiction of the adjudicating court can be a ground for refusal.
- (c) The defendant must have been properly served in the proceedings. Lack of proper service and notice during the proceeding might be a ground for refusal.⁸
- (d) In the absence of applicable international conventions or bilateral treaties, reciprocity is a condition for the recognition and enforcement of foreign judgments.⁹
- (e) There must be no conflicting domestic or foreign judgment. Generally, for parallel litigation in China and a foreign state on the same subject matter, after a judgment is rendered by a Chinese court, a foreign judgment cannot be recognized and enforced in China.¹⁰
- (f) It must be compatible with public policy.¹¹ A foreign judgment can be impeached if its enforcement or recognition in China would be contrary to public policy; but there are very few reported cases in which such a plea has been successful in China, except the judgments concerning gambling from Macau.
- (g) The application period for enforcement is within two years unless otherwise stipulated in the applicable Supreme People's Court (the "SPC") interpretations or any treaties or conventions. According to the SPC judicial interpretation of CPL,¹² the two year time period is calculated in compliance with Art 239 of CPL.¹³

⁶ Art. 282 CPL.

⁷ Ibid.

⁸ Art. 279 CPL.

⁹ Art. 282 CPL.

¹⁰ Art. 533 Interpretation of the Supreme People's Court on the Application of the CPL(2015).

¹¹ Art. 282 CPL.

¹² Art. 547 of the Interpretation of the Supreme People's Court on the Application of the CPL (2015) provides that: "The time period for a party concerned to apply for recognition and enforcement of a legally binding judgment or ruling rendered by a foreign court or a foreign arbitration award shall be governed by Article 239 of the Civil Procedure Law. Where a party concerned only applies for recognition of a legally binding judgment or ruling rendered by a foreign court or a foreign arbitration award, and does not apply for enforcement at the same time, the period for applying for enforcement shall be recalculated from the date when the ruling rendered by the people's court on the recognition application comes into effect."

¹³ Art. 239 of CPL provides that: "The time limit for submission of an application for execution shall be two years. The termination or suspension of the time limit for submission of an application for execution shall be governed by the provisions of law on the termination or suspension of the limitation of action. The time limit prescribed in the preceding paragraph shall be calculated from the last day of

laws of the People's Republic of China and the sovereignty, security and public interest of the People's Republic of China."

⁵ It is available from the Ministry of Foreign Affairs of China website at <http://www.fmprc.gov.cn/web/ziliao_674904/tytj_674911/wgdwdjdsfzzy_674917/t1215630.shtml> (last visited October 29, 2017).

II. Recognition of judgments with Hong Kong, Macau and Taiwan

The common point among jurisdictions, regions and counties, is that whatever the adjudicatory procedure, a judgment must be completed and not subject to change if foreign recognition and enforcement is to be allowed. Simply stated, no judicial system desires to be burdened with the recognition and enforcement of incomplete foreign proceedings where foreign judgments may be unraveled at any adjudicatory level and the entire effort come to nothing. Finality is patently a key concept essential to recognition and enforcement. Thus, the law of the enforcing state must determine whether the judgment proposed for recognition and enforcement is absolute and not subject to changes in the foreign jurisdiction, region or country whether by the ruling court, by an appellate court, or as in Mainland China by the trial supervision procedure.

Judgments made within the jurisdiction of regional courts in Hong Kong, Macau or Taiwan are also subject to a review for recognition and enforcement similar to the legal framework governing the recognition and enforcement of foreign judgments. Judgments from Hong Kong, Macau and Taiwan are collectively referred to as "foreign-related judgments". Recognition and enforcement of judgments from Hong Kong, Macau and Taiwan are subject to the judicial interpretations of the SPC.¹⁴

Even though a Mainland China and Hong Kong Judgment Arrangement under the Choice of Court Agreement has already been set up, judgment recognition and enforcement between Mainland China and Hong Kong is still problematic. There are only a few judgments from Mainland China that have been recognized in Hong Kong. The policy of "one country, two systems" is well known.¹⁵ The Basic Law¹⁶ guarantees Hong Kong shall maintain its common law

the period specified in a legal document for performance of the execution. If a legal document specifies performance of the execution in stages, the time limit shall be calculated from the last day of the period specified for each stage of performance. If no period of performance is specified in a legal document, the time limit shall be calculated from the date when the legal document takes effect."

¹⁴ (1) The SPC Arrangement in respect of Mutual Recognition and Enforcement of Civil and Commercial Judgments under Choice of Court agreement in the Mainland and the Hong Kong Special Administrative Region effective on 1 August 2008 ("Mainland-Hong Kong Arrangement"); (2) the SPC Arrangement between the Mainland and the Macau Special Administrative Region in respect of the Mutual recognition and Enforcement of Civil and Commercial Judgments effective on 1 April 2006 ("Mainland-Macau Arrangement"); and (3) the SPC Directives in respect of the Recognition and Enforcement of the Civil Judgments Rendered by Courts in Taiwan Region effective on 1 July 2015 ("Mainland-Taiwan Directives"), which replaced the old SPC directives on the same subject that came into effect in 1998 and 2009 respectively.

¹⁵ "One country, two systems" is a constitutional principle. Under the principle, each of the two regions could continue to have its own governmental system, legal, economic and financial affairs, including trade relations with foreign countries.

¹⁶ The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China is the constitutional document of the Hong Kong Special Administrative Region. The Basic Law came into effect on 1 July 1997 when sovereignty over Hong Kong was

regime, autonomy and power of final adjudication. On the basis of these different legal systems, difficulties in enforcing judgments between Mainland China and Hong Kong have inevitably arisen. In the normal sense, a foreign judgment will be recognized at common law in Hong Kong if it is the final and conclusive judgment as long as there is no argument against its recognition. In common law legal systems, terminology is used more easily than it is defined, but "final" means that the case cannot be reopened in the court which made the ruling, even though it may be subject to appeal to a higher court; and "conclusive" in that it represents the court's settled conclusion on the merits of the point adjudicated.¹⁷ Final, as established at the ruling court level binds the parties as "*res adjudicata*" and prevents them from seeking an alternative forum to "collaterally attack" the judgment, but the judgment remains non-final pending appeal where the ruling court judgment can be reversed, amended or vacated by the appellate court. In contrast to the limited involvement of common law appellate courts, under the current CPL in mainland China, there is a special retrial system called the trial supervision procedure, which allows the parties, the court itself and the procurator to reopen the trial under specified conditions, even if the judgments are deemed final and legally binding according to the applicable civil procedure law. This kind of trial supervision procedure is intended to enable the Chinese Court to correct mistakes in trials despite the effectiveness of a judgment already handed down. Compared to the common law judgments, this is more than an appellate review of the ruling court's judgments, importantly and significantly, it provides for an entirely new fact finding proceeding for the dispute, which under common law would remove *res adjudicata* barriers to parties challenging the underlying judgment and enable the losing party to pursue a "collateral attack" through what is effectively a "*de novo*" appellate level re-adjudication. The circumstances of the two juridical approaches of common law and Mainland Chinese law produce these distinct approaches to dispute resolution among jurisdictions, regions and countries. This causes complexity for recognition and has been reflected in enforcement proceedings in Hong Kong. In *Chiyu Banking Corporation Ltd. V Chan tin Kwun*,¹⁸ a Mainland judgment was found by the Hong Kong court not to be final and conclusive because the Fujian People's Procuratorate had presented its petition to the Court for a new trial after the enforcement proceeding commenced in Hong Kong. Staying the Hong Kong proceeding, Cheung J held that "although no protest has been lodged yet, the procedure had actually been invoked. This demonstrates that the judgment is not final and conclusive."¹⁹ This approach

transferred from the United Kingdom to the People's Republic of China.

¹⁷ See *Adrian Briggs, 'The Conflict of Laws'* (Oxford University Press, 2nd edn, 2008) pp. 136, 137.

¹⁸ Hong Kong Law Reports (1996), volume 2, p. 395.

¹⁹ *Ibid.*, p. 400.

in *Chiyu Banking* has been followed in several decisions in Hong Kong.

Given the differences between Mainland China and Macau in terms of cultural traditions and legal principles, the reservation of public policy in interregional conflict of laws can ensure the independence of each region's laws. A public policy clause can accordingly be found in Art 11(6) of the Mainland China and Macau Arrangement.²⁰

According to this provision, faced with judgments from both sides, each region thus could still exercise the doctrine of public policy to reject recognition and enforcement of the judgment in question even if all the other conditions for recognition and enforcement have been satisfied.

One specific concern is whether Mainland China should refuse the recognition and enforcement of gambling debt judgments rendered by Macau courts based on the public policy of mainland China. As it is well known, the gambling industry is the largest economic pillar in Macau and some gambling debts are legal and can be collected through lawsuits according to Macau's law. However, Mainland China traditionally has a very strong negative attitude towards gambling, which is reflected in some provisions of Chinese public laws. In other words, the public policy of Mainland China would be clearly offended in such cases. Unfortunately, such an important issue has not been addressed in the Mainland China and Macau Arrangement.

On the basis of public policy in Mainland China, recognition and enforcement of a Macau gambling judgment would be frustrated in Mainland China courts. In the foreseeable future, negotiation could be restarted on the issue of recognition and enforcement of gambling debt judgments.

On June 30th, 2015, the SPC announced a new Mainland China and Taiwan Judgment Arrangement. This Arrangement consists of 23 Articles and entered into force two days later on July 1st, 2015. As early as 1998, the SPC promulgated the first judicial interpretation regulating matters of judicial recognition of Taiwan's civil judgments. Subsequently, additional interpretations were published successively between 1998 and 2009. The same idea was further echoed in 2012 when Taiwan and Mainland China signed the "An Agreement to Joint Crack-Down on Crimes and Judicial Assistance between Mainland China and Taiwan," where both parties agreed to mutually recognize and enforce civil judgments and arbitration decisions based on reciprocity under the precondition that no public policy is undermined.²¹

²⁰ See Art. 11. para. 6 of the Mainland China and Macau Arrangement provides that: "[A judgment from Macau can be denied for recognition] where recognition of the judgment would violate the basic legal principles or public interests of Mainland China; [A judgment from Mainland China can be denied for recognition] where recognition of the judgment would violate the basic principles or public policy of Macau Special Administrative Region".

²¹ Citation from website <<http://www.chinatimes.com/newspapers/20150701000509-260108>> (last visited November 9, 2017).

Recognition and enforcement of judgments between Mainland China and Taiwan is currently not a big problem, but is sometimes impacted by the political atmosphere due to political tension between Mainland China and Taiwan. According to the public policy in Mainland China, Taiwan's judgments would be refused recognition and enforcement in Mainland China courts based on the argument that the "One-China Policy"²² is offended in Taiwan's judgments.

III. Case Study on Recognition of foreign judgments in Recent Chinese Judicial Practice.

For a long time, it was very rare that Chinese courts recognized foreign judgments. In the vast majority of cases, courts dismissed the applications on the grounds that there was no bilateral treaty between China and the foreign country concerned regarding the recognition of the judgment, or on the basis of absent reciprocity.

For instance, in one case, the judgment creditor, a British national, filed an application with the Beijing Second Intermediate Court in 2010, against a company domiciled in China and requested recognition of the judgment given by the British High Court of Justice October 13, 2009. The Supreme People's Court of China examined the application and determined that there is neither a bilateral treaty between China and the United Kingdom nor reciprocity. Eventually the court dismissed the application for recognition of the UK judgment.²³

The Chinese Court refused to recognize the judgment of the British court on the basis of no reciprocity and no bilateral treaty, leaving the dispute between the two parties without proper resolution. Even though the judgment debtor has property in China, because the Chinese court did not recognize the British judgment due to lack of reciprocity or bilateral treaty, the result is that the judgment creditor's rights cannot be recognized and enforced in Chinese courts. In the process of examination, some argued that the principle of reciprocity should be more flexible and the Chinese courts should make the first step to break the "Cold War" in the field of recognition where there is no violation of the basic principles of laws or public interests.

In a contrasting case, a German citizen, Sascha Rudolf Seehaus, filed an application in the Intermediate People's Court of Wuhan City in Hubei province in China on July 30, 2012, to require recognition of a judgment involving an insolvency case rendered by a German

²² The One-China policy is the policy that there is only one sovereign state called "China", despite the existence of two governments. As a policy, this means that countries seeking diplomatic relations with the People's Republic of China must break official relations with Taiwan.

²³ Supreme People's Court of China (2010) 民四他字第 77 号. The decision followed a kind of internal-reporting system, meaning if the decision is made by the Intermediate People's Court not to recognize a foreign judgment, it must be reported to the higher court until otherwise ratified by the Supreme People's Court of China. This system will be helpful for recognition and enforcement of foreign judgments.

Montabaur District Court on December 1, 2009. The verdict²⁴ given by the Intermediate People's Court of Wuhan City held that the judgment of the Montabaur District Court was legally effective in Germany, and did not violate the principles of laws, State sovereignty, or security and public interests in China. Thus the Chinese court determined that the decision of the Berlin High Court of Justice made on May 18, 2006,²⁵ reciprocally recognized the judgment of the Wuxi district court in Jiangsu Province in China. Therefore, reciprocity was deemed to appropriate, with the court ruling the judgment given by the Montabaur District Court should be recognized and enforced as a foreign judgment according to the principle of reciprocity.

In another case, the Intermediate People's Court of Nanjing City in Jiangsu province in China rendered a verdict²⁶ which was to recognize the civil judgment given by the High Court of Singapore on December 9, 2016. This was a landmark for a successful judicial assistance in civil and commercial matters between the two jurisdictions because the Chinese court has recognized a judgment from a Singaporean court in recent judicial practice. In this case, the Intermediate People's Court of Nanjing City held that the High Court of Singapore had recognized and enforced a civil judgment of the Intermediate People's Court of Suzhou City in Jiangsu province of China in 2014, and concluded that there was thus reciprocity existing between China and Singapore. Thereby, the decision of the High Court of Singapore as a basis for recognition was accepted on the basis of reciprocity by the Chinese court as addressed here.

The latest case occurred in 2017,²⁷ when a judgment creditor, an American national, filed in the Intermediate People's Court of Wuhan City in Hubei Province in China to apply for the recognition of a default judgment made by the Los Angeles Superior Court in California, and issued in 2015²⁸, holding that the defendant had been properly summoned. The defendant did not appear in the Los Angeles Superior Court so a default judgment was rendered. The court ordered the defendant to refund to the plaintiff and pre-judgment interest. On 19 October 2015, the plaintiff applied to the Intermediate People's Court of Wuhan City in China to recognize and enforce the U. S. judgment against the defendant. The Intermediate People's Court of Wuhan City held that the application for recognition and enforcement of a civil judgment made in the United States courts should be in accordance with Art 281 and Art 282 of the CPL, in which the conditions for recogniti-

on of foreign judgments are provided. China and the United States have not yet signed a bilateral treaty on the recognition of judgments, but a United States court had already recognized and enforced the judgment of Hubei High People's Court of Justice in China. In the process of examination, the Intermediate People's Court of Wuhan City determined that there is no evidence the United States court was without jurisdiction over the case or that there was any default in the proceedings of original court, and that the recognition of the United States judgment would not violate the fundamental principles of Chinese laws, State sovereignty, or security and public interests in China. Therefore, the judgment of the Los Angeles Superior Court in California should be recognized and enforced on the basis of the principle of reciprocity.

IV. Case Study on Recognition of Chinese Judgments in Foreign Jurisdictions.

In the German *Zueblin Case*,²⁹ the Berlin High Court of Justice took the initiative in recognizing a Chinese judgment given by the Wuxi Economic Development District People's Court of justice in Jiangsu Province, in which an arbitration clause had been determined to be void. In this case, the defendant argued that Chinese courts had never recognized and enforced German judgments. The defendant continued, arguing that therefore, the German court should not recognize the Chinese judgment pursuant to Art 328 (1) of German Code of Civil Procedure³⁰ which indicates the principle of reciprocity. The German court however, focusing more on the future judicial assistance between the two countries, held that although there is no international treaty between China and Germany for recognition, judicial practice could be the basis for handling this kind of case. If both jurisdictions are waiting for the other to take the first step in recognizing judgments under the argued circumstances, recognition of judgments may never happen and the principle of reciprocity would be meaningless. The critical element to be considered is whether the other side would follow suit should one judiciary go first. According to the current situation of international trade and economic development between China and Germany, China is likely to follow up.

Fortunately, in the *Zueblin case*, on the basis of the principle of reciprocity, the German court held that there is an existing reciprocity on the basis of the future judicial assistance and trading between the two countries. This is a logical and flexible approach to anticipated reciprocity, which enables the principle of reciprocity to be adopted in a timely fashion, thus preventing the disadvantageous situation of applying the principle of reciprocity based only on legislation or pri-

²⁴ The Intermediate People's Court of Wuhan, Hubei Province in China, issued in 2013, (2012) 鄂武汉中民商外初字第 0016 号.

²⁵ *German Zueblin International Co. Ltd v. Wuxi Walker General Engineering Rubber Co., Ltd*, The Berlin High Court of Justice, May, 18, 2006, Case Docket No. 20 Sch 13/ 04.

²⁶ *Kolma v. SUTEX Group*, Intermediate People's Court of Nanjing, Jiangsu Province in China, issued in 2016, (2016) 苏 01 协外认 3 号.

²⁷ The Intermediate People's Court of Wuhan, Hubei Province, issued in 2017, (2015) 鄂武汉中民商外初字第 00026 号.

²⁸ *Liu Li v. Tao Li and Tong Wu*, Court Docket No. EC062608 (Los Angeles Superior Court in California).

²⁹ *German Zueblin International Co. Ltd v. Wuxi Walker General Engineering Rubber Co., Ltd* the Berlin High Court of Justice, May 18, 2006, Case Docket No 20 Sch 13/ 04.

³⁰ German Code of Civil Procedure, see <http://www.gesetze-im-internet.de/englisch_zpo/index.html> (last visited November 8, 2017).

or decisions, effectively stimulating judicial assistance within the international community.

Notably, in the *Robinson Helicopter case*,³¹ decided on 24 August, 2009, the United States District Court Central District of California (“District Court”) recognized a Chinese court judgment in a case of product liability where the judgment had been given in China by the Hubei High People’s Court of Justice. The ruling, granted by the District Court, became the first case to enforce a Chinese judgment in the absence of treaties and prior reciprocity. Some Chinese legal scholars have voiced the opinion that the principle of reciprocity thereby is established for the United States in Chinese courts. Nonetheless, there is still a problematic issue of recognition and enforcement between the judgments of courts in China and in the United States. The United States has multiple independent legal systems for each state with varying laws. In addition, the United States has an overarching federal jurisdiction for disputes arising between citizens of different states as well as disputes with citizens or entities of foreign nations as in the *Robinson Helicopter case*. But, where the American judgment is handed down by a federal district court, or even a federal appellate court, and not the decision of the Supreme Court of the United States, should there be reciprocity? In fact, outside of federal jurisdiction, only a few states have adopted “reciprocity” as criteria for foreign judgment recognition in the United States. Given the fifty states, plus territories such as Puerto Rico, without prior legislative or judicial adoption of reciprocity, the circumstances may be ripe for anticipatory reciprocity to be applied rather than legislative or prior actual reciprocal enforcement as a condition of recognition.

In the *Giant Light Metal Technology (Kunshan) case*,³² the High Court of Singapore ruled that Singapore-based Aksa Far East (“Defendant”) was liable to pay a refund and compensation to China-based Giant Light Metal Technology (Kunshan) (“Plaintiff”). This amount had been awarded to the plaintiff in a Chinese judgment given by the Intermediate People’s Court of Suzhou City in Jiangsu Province in 2010. The plaintiff sought to enforce this judgment in Singapore. The defendant’s application to stay proceedings pursuant to section 6 of the International Arbitration Act (IAA)³³ – which states that if a party to an arbitration agreement brings a claim concerning a dispute in relation to a contract between the parties during performance, the other party may apply to the court to stay proceedings – was rejected by the High Court. It held that a claim referring to a debt arising from a Chinese judgment and not from a dispute emanating from the contract does

not fall within the terms of the arbitration agreement. Section 6 IAA was therefore deemed inapplicable. The fact that the defendant did not argue lack of jurisdiction or any procedural irregularity regarding the Chinese judgment allowed the High Court to conclude that the Chinese judgment was final and capable of both recognition and enforcement, and that the claimant was entitled to claim the debt arising from the judgment from the defendant in Singapore.

The Israeli High Court of Justice, on 15 August 2017, rendered a ruling to recognize and enforce a judgment given in China by the Intermediate People’s Court of Nantong City,³⁴ Jiangsu province on 14 December 2009. In this case, a Chinese citizen surnamed Chu (“Plaintiff”) instituted a legal action against an Israeli citizen, Itshak Reitmann (“Defendant”), claiming that the defendant failed to perform his obligations as agreed, and demanding that he refund the corresponding commission and the workers’ wages that had been paid in advance. The defendant was ordered to refund the entirety of the commission paid to the plaintiff. The essential issue here is, in the absence of an agreement for the mutual recognition and enforcement of judgments between China and Israel, the Israeli court, based on the principle of anticipated reciprocity, actively moved to recognize and enforce a judgment rendered by a Chinese court against an Israeli citizen in a contractual dispute³⁵.

In a most recent case, *Qinrong Qiu V. Hongying Zhang et al.*, the plaintiff Qinrong Qiu (“plaintiff”) filed a complaint against defendants Hongying Zhang et al. (“Defendant”) for breach of contract and fraud at Suzhou Industrial Park People’s Court (“Industrial People’s Court”). The Industrial People’s Court determined that Defendants were liable to the Plaintiff for failure to repay the loans and returned a judgment in favor of the Plaintiff. This judgment was affirmed on appeal in December, 2016, by the Intermediate People’s Court of Suzhou City, Jiangsu Province in China. In September, 2017, the Plaintiff filed an application at the United States District Court Central District of California (“District Court”) for a default judgment due to Defendant not filing an opposition. The District Court concluded that the Plaintiff is entitled to a default judgment on the claim alleged in the complaint, also concluded that the Plaintiff had met his burden of showing that the judgment in the China action was entitled to recognition under the Uniform Foreign-Country Money Judgments Recognition Act³⁶. The District Court

³⁴ The Intermediate People’s Court of Nantong, Jiangsu Province, issued in 2009, (2009) 通中民三初字第 0010 号.

³⁵ Gu Jianbing/Tao Xinqin (顾建兵/陶新琴), “以色列高等法院作出终审裁判首次承认并执行中国法院生效判决 (A Chinese Judgment was firstly recognized and enforced in Israel)”, *People’s Court Daily* (August 16, 2017, S. 3). See website: <http://rmfyb.chinacourt.org/paper/html/2017-08/16/content_129031.htm?div=-1> (last visited November 8, 2017).

³⁶ Uniform Foreign-Country Money Judgments Recognition Act, see website: <<http://www.uniformlaws.org/ActSummary.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act>> (last visited November 10, 2017).

³¹ *Hubei Gezhouba Sanlian Indus. Co. v. Robinson Helicopter Co.*, No. 2:06-CV-01799-FMC-SS, 2009 Westlaw 2190187 (US District Court for the Central District of California, July 22, 2009); aff’d, 425 F. App’x 580 (US Court of Appeals, 9th Cir. 2011) (Westlaw).

³² *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd*, [2014] Supreme Court of Singapore 16.

³³ Singapore International Arbitration Act (IAA), see website <<http://www.siac.org.sg/our-rules/international-arbitration-act>> (last visited November 10, 2017).

further held that the Chinese court granted monetary recovery and that the judgment was final, conclusive and enforceable on the evidence the Plaintiff submitted. Finally, on 27 October, 2017, the District Court recognized the Chinese judgment.³⁷

V. Challenges in Chinese Courts.

Article 281 and 282 of the CPL have regarded reciprocity as a basis for the recognition of judgments, but do not provide further explanation for applying the principle of reciprocity, resulting in some problems for judicial determinations. Thus, there is a major problem for Chinese judges at different levels regarding identification of the principle of reciprocity and how to apply it properly. Additionally, the reality is that issues concerning sovereignty, economic security and other factors have continuously resulted in a complicated set of rules for consideration regarding recognition and enforcement. Therefore, judicial assistance in the establishment of reciprocity is likely to be a heavy door that will be difficult to open.

Presently, there have been only a few foreign judgments recognized and enforced by Chinese courts. The reasons are three. First, the number of countries that have entered into bilateral treaties of judicial assistance with China is limited, and does not include important trading partners such as the United States, Germany, the United Kingdom, Japan and India. Therefore, a number of foreign judgments cannot be recognized by Chinese courts applying restrictive criteria for reciprocity. Secondly, China has signed and ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (“New York Convention”),³⁸ and therefore the parties would be more likely to choose adjudication under the arbitration clause to settle disputes of civil and commercial matters rather than test judicial solutions pursuant to agreements between China and other jurisdictions. Thus, in practice, for the vast majority of disputes related to Chinese parties, in light of the difficulties of recognition and enforcement of foreign judgments in Chinese courts, the parties likely would avoid the litigation route and elect to proceed by arbitration. Thirdly, in judicial practice, Chinese courts have adopted the principle of “substantial reciprocity”, which requires that other countries recognize Chinese judgments as a precedent, but it is difficult to confirm the existence of reciprocal relations between countries, and the laws do not stipulate criteria for the principle of reciprocity. For these reasons, Chinese courts generally are unwilling to apply the principle of reciprocity to recognize foreign judgments in the first instance – the first step dilemma discussed above.

By contrast, in the case mentioned above, a German court considering whether a country rendering a foreign judgment recognizes German judgments, will mainly assess the likelihood of a German judgment being recognized and enforced in that foreign jurisdiction. Accordingly, even if there is no agreement for the recognition and enforcement of judgments between the country that rendered the foreign judgment and Germany, and there is no instance of that country having recognized and enforced a German judgment, the German court will not simply find that the principle of reciprocity is inapplicable and refuse to recognize and enforce the foreign judgment in question. Furthermore, after assessment, recognizing and enforcing a foreign court judgment demonstrate their outlook of international cooperation. Similarly, the Israeli court in the case mentioned above, made the same decision as the German court for recognition and enforcement of a Chinese court judgment.

VI. New Developments in China

China is currently opening up with rapid economic development meaning it is moving from a capital-importing to capital-exporting country. The progressive development of international trade and the consequent number of cross-border disputes in relation to Chinese enterprises or businessmen will increase. Chinese courts have gradually realized that the acknowledgement of reciprocity in current judicial practice should be more liberal, in order to enhance international trade.

In order to strengthen international trade and facilitate the recognition of foreign judgments, there is a necessity for review and reflection on reciprocity associated rules and judicial practice. It appears there are some obstacles in the recognition system in China. The experience gained from international conventions and some legislatures in different jurisdictions would suggest that more attention should be given to the protection of private rights and international cooperation rather than national sovereignty and dignity.

On September 12, 2017, China signed the Hague Choice of Court Convention³⁹, and ratification by the National People’s Congress is expected. If ratified, this would be a big step for China’s judicial cooperation with other countries. No doubt, restrictions on recognition of foreign judgments will be eased, and foreign judgments will more easily secure recognition and enforcement in China.

The SPC is currently working on the Draft Judicial Interpretation of the Recognition and Enforcement of Foreign Judgments (“Fifth Draft”). Article 18 of Fifth Draft⁴⁰ is intended to clarify the reciprocity concept

³⁷ *Qinrong Qiu v. Hongying Zhang et al.*, Case Docket No: CV 17-05446-JFW (JEM) (US District Court for the Central District of California, October 27, 2017).

³⁸ For the text of the Convention, see website: <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html> (last visited January 25, 2018).

³⁹ Since The Hague Choice of Court Convention was concluded in 2005, and came into force on October 1, 2015, Singapore, Mexico and the European Union (except for Denmark) have signed and ratified the Convention.

⁴⁰ Article 18 of the Fifth Draft provides that: “The rules for examination of the principle of reciprocity where a party is applying for the recognition and enforcement of a foreign judgment in civil and

in detail. In facilitating judicial assistance and international trading, this provision is deemed to loosen the restriction on “substantial reciprocity” applied in previous judicial practice by Chinese courts, aided by an assessment of the laws and judicial practice in the court of origin before giving recognition and enforcement of foreign judgments.

Article 19 of the Fifth Draft⁴¹ is intended to clarify some grounds for the non-recognition of foreign judgments. The domestic legislation and the relevant international treaties of all involved jurisdictions set the conditions to be followed, and are to be provided to the Chinese court at the same time as the provisions of the domestic court or forum to determine whether to recognize and enforce foreign court decisions.

The issue of judicial jurisdiction is expressed in Art 21 of the Fifth Draft,⁴² and this provision is intended to

commercial matters, and there is no a bilateral treaty or international conventions between the foreign jurisdiction and China. However, if any of the following circumstances are present, the Chinese court may, in accordance with the principle of reciprocity, recognize the foreign judgment:

- (A) Foreign court has a precedent for the recognition of a Chinese judgment;
- (B) According to the laws of the State of the forum, a Chinese judgment may, in the same circumstances, be recognized and enforced by the foreign court;
- (C) On basis of the agreement of judicial assistance between China and the State of foreign court, the principle of reciprocity may be applied.

If the Chinese court shall, on the basis of the principle of reciprocity, recognize and enforce the foreign judgments, the decision issued by Chinese court shall be reported to the Supreme Court and filed for the record.”

⁴¹ Article 19 of the Fifth Draft provides that: “The foreign judgment, under the consideration of the principle of reciprocity, shall be refused in any of the following circumstances:

- (A) In accordance with the Article 21 of the draft, the foreign courts have no jurisdiction over the case;
- (B) The defendant has not been legally served, or not been properly represented in accordance with the law of the State of the forum;
- (C) The foreign judgment was obtained by fraud and bribery;
- (D) The Chinese court has made a judgment on the same dispute; or the judgment given by the Hong Kong Special Administrative Region, the Macao Special Administrative Region, the Taiwan Region or the third country has been recognized by Chinese court;
- (E) The recognition and enforcement of the foreign judgment will violate the basic principles of the laws, national sovereignty, security and public interests in China.”

⁴² Article 21 provides that: “In any of the following circumstances, a Chinese court shall determine that the foreign court given the judgment has no jurisdiction:

- (A) The case shall be subject to the exclusive jurisdiction of Chinese law;
- (B) The case has no foreign-related factors; or the foreign-related factors exist but there is no real and substantial connections with the foreign court in dispute;
- (C) The parties to the case have entered into a valid arbitration agreement and have not given up the arbitration clause;
- (D) The foreign court does not have jurisdiction over the case in accordance with the law of the State of the forum;

provide for the examination of the jurisdictional basis of a foreign court’s decision. Jurisdiction over the case is a prerequisite for litigation. The experience obtained from judicial determinations and treaties between China and other countries are reflected in this provision.

Generally, the Fifth Draft has the following characteristics:

Firstly, the definition of foreign judgments in civil and commercial matters is clarified, which means, only the merits of the judgments and rulings could be recognized and enforced. It mainly refers to the judicial practice of different jurisdictions, the bilateral treaties, and the Convention of 30 June 2005 on Choice of Court Agreements (“Hague Choice of Court Convention”).⁴³ Despite the differences in different legal systems, judgments and rulings applying for recognition shall be assessed on merit rather than procedural issues so that the law and procedures of the forum do not become those of the Chinese court on recognition and enforcement of the foreign judgment.

Secondly, with regard to legal effect of foreign judgments, the Fifth Draft provides a basis for the law of the State of the forum to examine whether the judgment is effective and final. In judicial practice this means the Chinese court must examine the legal effect of a foreign judgment. The applicable law shall be the law of the forum where the judgment is made as to whether there is ultimate finality sufficient for recognition and enforcement by the Chinese court.

Thirdly, the Fifth Draft has a new development for the acknowledgement of reciprocity. Under the Fifth Draft, even without a treaty or a precedent of recognition of Chinese judgments, foreign judgments could be recognized by Chinese courts based on future judicial assistance. That is “anticipated reciprocity” discussed above.

Fourthly, the Fifth Draft provides for the examination of the jurisdiction of foreign courts in principle, in accordance with the law of the State of the forum where the judgment is made. This excludes cases which are within the exclusive jurisdiction of Chinese courts and domestic cases without foreign elements, usually filed in forum shopping for adjudication by foreign courts and subject to dismissal by the foreign court exercising judicial economy as *forum non conveniens*.

Fifthly, multiple damages awarded in addition to actual damages are not recognized in the Fifth Draft, but if the actual loss can be determined from the foreign judgment, it could be recognized in addition to actual damages. Otherwise the whole judgment would be rejected due to the award of multiple damages. The principle of judicial review on foreign judgments is the same as used by other jurisdictions, judicial review is

(E) Other circumstances determined by Chinese courts.”

⁴³ This Convention, including related materials, is accessible on the website of Hague Conference on Private International Law <<http://www.hcch.net>>, under “Conventions” or under the “Choice of Court Section”.

limited to a procedural examination, rather than a substantive examination on the merits – unless dealing with the defense of public policy infraction.

Conclusion

A massive increase in cross-border trade inevitably leads to an increase in international litigation. International trade depends in some measure on mutual trust and confidence derived from the availability of effective legal remedies on cases where dispute arise.

Recently, China's announcement of "One Belt and One Road" policy initiatives⁴⁴ and the establishment of the Asian Infrastructure Investment Bank is a clear indication of China's desire to join in the main flow of the world economy. It is without question, that the Chinese Government will increasingly seek to improve the functions of its judicial system. The implementation of judicial reforms will be positively received, with the integration of China into the world economy due to attract more and more foreign investors. New ideas on efficiency for the recognition of foreign judgments in China will result in increasing competence in Chinese courts when handling international civil and commercial litigation.

It is a reasonable understanding of the principle of reciprocity according to the new Fifth Draft that reciprocity is presumed to exist for judicial interpretation unless there are contrary precedents to prove it does not.

In any event, the Hague Conference on Private International Law is currently working on a judgments project to regulate the jurisdiction and recognition of foreign judgments.⁴⁵ If the new Convention on the recognition and enforcement of judgments is implemented, it will replace the 1971 Convention and is intended to complement the Hague Convention.⁴⁶

The future Convention on the recognition and enforcement of judgments seeks to establish uniform legal rules on the recognition and enforcement of judgments which will provide international litigants with certainty in cross-border transactions.

There is no doubt that China has become a significant and major economic body in the global context. Particularly the exchange of capital, whose flow traditionally was inbound only – attracting foreign investment into China – has currently become multi-directional as Chinese investment is attracted outbound into other countries. Thus, with regards to the progressive development of international trade, in the near future the number of cross-border disputes in relation to Chinese enterprises or businessmen will increase. Consequently, Chinese judgments applying for recognition in foreign jurisdictions will occur more frequently. Therefore, facilitating the reliable free movement of judgments for recognition and enforcement will benefit not only China but also other countries, China's trading partners.

⁴⁴ The Silk Road Economic Belt and the 21st Century Maritime Silk Road, better known as the One Belt and One Road Initiative (OBOR), The Belt and Road (B&R) and The Belt and Road Initiative (BRI) is a development strategy proposed by China's leader Xi Jinping that focuses on connectivity and cooperation between Eurasian countries.

⁴⁵ See the Judgments Project in the Hague. See <<https://www.hcch.net/en/projects/legislative-projects/judgments>> (last visited, November 8, 2017).

⁴⁶ The 1971 Convention was ratified only by Albania, Cyprus, Kuwait, Netherlands, Portugal. See <<https://www.hcch.net/en/instruments/conventions/full-text/?cid=78>> (last visited November 8, 2017).

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Anerkennung und Vollstreckung ausländischer Urteile in China: Herausforderungen und Entwicklungen

Der Autor analysiert die Herausforderungen und Entwicklungen bei der Anerkennung und Vollstreckung ausländischer Urteile in China mit Blick auf die relevanten gesetzlichen und untergesetzlichen Vorschriften und die richterliche Praxis vor dem Hintergrund steigender chinesischer Investitionstätigkeit und zunehmendem Handel mit anderen Ländern. Er betrachtet dabei insbesondere die unterschiedlichen rechtlichen und kulturellen Niveaus der wirtschaftlichen Entwicklung sowie der Rechtsstaatlichkeit sowie das fehlende Vertrauen zwischen Staaten, Regionen und Jurisdiktionen. Der Autor folgert, dass eine vereinfachte Anerkennung und Vollstreckung von Urteilen im Interesse sowohl Chinas als auch seiner Handelspartner liege.