



# RESEARCH BRIEF

No. 1/2022

## Current Developments in the Area of Recognition and Enforcement of Court Judgements in Civil and Commercial Matters between China and Other States

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May 24, 2022

### Key Points:

- The effective enforcement of court judgements in civil and commercial matters in the Sino-foreign context remains to be assessed on a case-by-case basis; no universal formula is available.
- There is a limited number of treaties addressing the issue of mutual recognition and enforcement between China and other states.
- Given the limited availability of such treaties, the principle of reciprocity, with its own chances and risks, remains an alternative ground for enforcing court judgements.
- China has currently liberalized its approach to the principle of reciprocity by enforcing two court judgements based on *de jure* reciprocity.

### Introduction

The effective enforcement of court judgements in the Sino-foreign context, like in any cross-border context, is of extreme importance. It is needed to ensure the implementation of a judgement in cases where a losing party does not comply with it voluntarily. As aptly summarized by Peerenboom, ultimately, “parties want money, not a piece of paper”<sup>1</sup> and without effective enforcement mechanisms, a court decision is not worth much more than the paper it is written on.

In this Research Brief I analyse the current developments in the area of enforcement of court judgements in civil and commercial matters in the context of Sino-foreign disputes. I look at both the enforcement of foreign judgements in China,<sup>2</sup> as well as the enforcement of Chinese judgements in other jurisdictions. I examine the existing legal framework and recent developments in the area, focusing especially on the principle of reciprocity,

<sup>1</sup> Randall Peerenboom, *Seek Truth from Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC*, 49 AM. J. COMP. L. 249, 249 (2001).

<sup>2</sup> This Research Brief refers to the law of the People's Republic of China (PRC).

which provides an alternative ground for enforcement in case no other legal basis, such as a treaty, exists. The principle of reciprocity is both frequently relied upon, but also continues to cause challenges for parties.

### Legal bases for the enforcement of court judgements in the Sino-foreign context

In order to effectively enforce a court judgement from one jurisdiction in another state, the existence of a relevant legal basis is instrumental. Such legal bases include multilateral conventions, bilateral agreements, and the reciprocity principle.<sup>3</sup>

#### 1. *Multilateral conventions*

When it comes to multiparty conventions constituting a basis for enforcement, the options are limited. One instrument of practical significance is the Hague Convention on the Choice of Court Agreements. It obliges the parties under the Convention to recognize and enforce court judgements rendered in cases where there was a choice of court agreement between the parties. But although China signed the Convention in 2017, it has not ratified it.<sup>4</sup> Consequently, it cannot be used as a basis for the enforcement of

<sup>3</sup> For the example of China, see articles 281-282 of the Civil Procedure Law of the PRC, adopted in 1991 and revised in 2017 [中华人民共和国民事诉讼法].

<sup>4</sup> Convention of June 30, 2005, on Choice of Court Agreements; see the current list of signatory states: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>. Only a number of jurisdictions have both signed and ratified it; these are: Denmark, the UK, Mexico, the EU, Montenegro and Singapore.

<sup>5</sup> See, for example, Weixia Gu, *China's Approach to Recognition and Enforcement of Foreign Civil and Commercial Judgments and International Litigation Capacity Building*, 15 J. COMP. L. 264, 287 (2020). Another multilateral convention addressing the question of enforcement of cross-border judgements is the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019). However, it is

judgements in this context. The prospect of ratification by China in the foreseeable future, although advocated for by some, is still uncertain.<sup>5</sup>

#### 2. *Bilateral agreements on judicial assistance*

Bilateral agreements on judicial assistance which include an obligation for the concerned states to mutually recognize and enforce court judgements in civil and commercial cases can offer a viable option. As of the time of writing, China has concluded 35 such agreements including with, for example, Albania, Algeria, Argentina, Belarus, Brazil, Greece, Hungary, Ethiopia, France, Italy, Kazakhstan, Mongolia, North Korea, Poland, Russia, Turkey, Vietnam, and Uzbekistan.<sup>6</sup> When it comes to the available data on how often such agreements are relied upon as the basis for enforcement, the numbers seem limited. To illustrate, in Spain and Greece, both of which reached such bilateral agreements with China in 1994, no such cases have been reported.<sup>7</sup>

It is also worth noting that many states which have significant commercial relationships with China have not concluded any such bilateral agreements so far. Among them are the US, Germany, Japan, and South Korea. As noted by

currently of very limited practical relevance given the insignificant number of signatory states, including China's absence among them, and its lack of entry into force.

<sup>6</sup> For the list of the bilateral treaties concluded by China, see Meng Yu, *List of China's Bilateral Treaties on Judicial Assistance in Civil and Commercial Matters (Enforcement of Foreign Judgments Included)* CHINA JUSTICE OBSERVER, (May 21, 2020), <https://www.chinajusticeobserver.com/a/list-of-chinas-bilateral-treaties-on-judicial-assistance-in-civil-and-commercial-matters>. Technically, there are 39 agreements on judicial assistance, but 35 of them include the judgement enforcement clauses.

<sup>7</sup> For the collection of cases see, Guodong Du and Meng Yu, *June 2021 Update: List of China's Cases on Recognition of Foreign Judgments* CHINA JUSTICE OBSERVER (June 10, 2021), <https://www.chinajusticeobserver.com/a/june-2021-update-list-of-china-s-cases-on-recognition-of-foreign-judgments>.

Gu, many of the treaties that China has concluded so far are with developing countries. Gu observes that developing countries may believe that China's economic growth can benefit their economy. Yet, as also observed by Gu, from the perspective of developed countries, existing political, economic, and cultural differences, coupled with the fact that developed states may see China as a rival, and formalized bilateral treaties as a barrier to future negotiations, make it unlikely that bilateral agreements will be agreed in the foreseeable future.<sup>8</sup>

### 3. Principle of reciprocity

The last possible legal basis for enforcement is the principle of reciprocity. Two types of reciprocity exist: *de facto* and *de jure*. *De facto* reciprocity provides that the court in the enforcing state will recognize and enforce judgments coming from the rendering state if the rendering state court had already first recognized and enforced the judgments from the enforcing state. *De jure* reciprocity does not require such a first active step to be taken by the court in the requesting state. It would suffice that no decisions refusing the recognition and enforcement of judgements from the enforcing state exist; thus, current reciprocity between two states can be presumed.

This distinction is important in the Sino-foreign context given the fact that China traditionally recognized only *de facto* reciprocity yet, recently, there were examples when the Chinese courts found *de jure* reciprocity existing between China and Singapore, as well as between China and the UK. Both cases are more extensively discussed below.

In general, in cases of disputes between China and the US, Germany, Singapore or South Korea, there have already been instances when judgments coming from these jurisdictions have been enforced in China based on the principle of *de facto* reciprocity.<sup>9</sup> However, as discussed in greater detail below, the application of this principle is not free from problems.

### Current developments: reciprocity principle focus

#### 1. Chinese judgements and their (non-) enforcement abroad

##### a) Australia recognizes the Chinese judgement based on *de jure* reciprocity

There are jurisdictions that have decided to recognize and enforce Chinese judgements based on the *de jure* reciprocity principle, thus making the first step towards an expectation that China will respond accordingly. Such a move is aimed as facilitating the cooperation between the states concerned for the purpose of creating grounds for the reciprocal recognition and enforcement of court judgements given no other legal basis is in place. Taking into account the fact that traditionally Chinese courts have been very conservative in making the first step in recognizing and enforcing foreign courts' judgements in cases where there was no applicable treaty, foreign states may want to take this proactive approach in order to induce the operation of the reciprocity principle in the context of China.

This happened, for example, in Australia. In the case of *Bao v Qu; Tian (No 2)* [2020] NSWSC 588, the court of New South Wales of Australia decided to enforce a monetary judgment made by a

<sup>8</sup> Gu, *supra* note 5, 271.

<sup>9</sup> See *supra* note 5; see also Jianli Song, *Recognition and Enforcement of Foreign Judgments in China: Challenges and Developments* 24 GERMAN J. CHINESE L. 279 (2017).

Chinese court, without any other existing legal basis.<sup>10</sup> This followed an instance when the court in Victoria, Australia, had previously taken the same step.<sup>11</sup> In 2018, New Zealand acted in a similar way enforcing a Chinese judgement.<sup>12</sup> How Chinese courts will respond to these steps and whether the principle of reciprocity will be established for court judgements from Australia and Zealand remains to be seen.

***b) The Supreme Court of New York posed a challenge to the existing reciprocity between China and US; the New York's Appellate Division clarifies***

In the past, the use of the reciprocity principle in the context of the US and China seemed to be established.<sup>13</sup> However, a recent decision by the Supreme Court of New York put the reliability of this legal basis into question. In *Shanghai Yongrun Investment Management Co. v Kashi Galaxy Venture Capital Co.*,<sup>14</sup> the enforcement of a Chinese court judgement was denied on the grounds that that judgment “was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law.”<sup>15</sup> In making its conclusion, the Court referred primarily to the US State Department Country Reports as evidence that Chinese courts generally lack judicial independence and suffer from corruption, which, in this case, impacted due process.

Such findings by the New York court can be seen as presenting a challenge to the future enforcement of New York court judgements, and possibly to US court judgements in general. However, on March 10, 2022, the New York's Appellate Division reversed this decision, questioning the use of State Department Country Reports as evidence proving that Chinese courts generally lack judicial independence and ordering that there should not be a denial of enforcement based on the grounds of systemic lack of due process.<sup>16</sup>

The case, nonetheless, illustrates that the principle of reciprocity, despite its establishment between certain states, may not be considered a definitive basis for enforcement. Furthermore, it seems that political, legal, and economic tensions may potentially impact the future application of this principle in the Sino-foreign context.

***c) Germany refuses to recognize and enforce a Chinese judgement as the reciprocity between Germany and China is not guaranteed***

Another case undermining the certainty of the reciprocity principle can be observed in the Sino-German context. In 2021, the Saarbrücken Regional Court in Germany refused to recognize and enforce a Chinese court judgement, arguing that reciprocity between the two states is not guaranteed.<sup>17</sup>

<sup>10</sup> See the decisions: <https://www.caselaw.nsw.gov.au/decision/5ec3249ae4bod927f74afeda>.

<sup>11</sup> *Liu v Ma & anor* [2017] VSC 810.

<sup>12</sup> *Yang Chen v. Jinzhu Lin*, CA334/2015, [2016] NZCA 113.

<sup>13</sup> In 2009, a US court first recognized a Chinese judgment (*Hubei Gezhouba Sanlian Industrial Co. v. Robinson Helicopter Co.*), and in 2017, a Chinese court reciprocated (*Liu Li v. Tao Li & Tong Wu* [刘利诉陶莉和童武] Wuhan Intermediate People's Court). See more in William S. Dodge and Wenliang, *Zhang Reciprocity in China-U.S. Judgments Recognition* 53 VAND. J. TRANSNAT'L L. 1541 (2020).

<sup>14</sup> *Shanghai Yongrun Investment Management Co. v. Kashi Galaxy Venture Capital Co.*, 2021 NY Slip Op 31459(U).

<sup>15</sup> *Ibid.*

<sup>16</sup> *Shanghai Yongrun Inv. Mgt. Co., Ltd v Maodong Xu* 2022 NY Slip Op 01523. See also William S. Dodge, *New York's Appellate Division Holds that Chinese Judgment Should Not Be Denied Enforcement on Systemic Due Process Grounds* CONFLICT OF LAW (Mar. 15, 2022), <https://conflictoflaws.net/2022/new-yorks-appellate-division-holds-that-chinese-judgment-should-not-be-denied-enforcement-on-systemic-due-process-grounds/>.

<sup>17</sup> See the decision: <https://openjur.de/u/2343582.html>.

The German court noted that in the past, Germany had indeed enforced a Chinese judgement, yet this was a single case and thus not sufficient to conclude that reciprocity between China and Germany could be assumed in general. The German court specifically referred to the fact that Chinese courts, except for one case, have not responded by recognizing and enforcing German judgements. So far, following that one case where the German court enforced the Chinese decision, in China, there have been three requests to recognize and enforce German court judgements; one request was successful and other two were denied.<sup>18</sup>

## **2. Enforcement of foreign judgements in China**

### **a) Chinese court enforces the Singaporean court judgment based on *de jure* reciprocity**

In *Power Solar System Co., Ltd. v. Suntech Power Investment Pte. Ltd.*, the Shanghai First Intermediate People's Court decided to recognize and enforce a Singaporean judgment based on *de jure* reciprocity. This decision followed the signing of a Memorandum of Guidance (MoG) by China and Singapore in 2018, which refers to the issue of reciprocity between these two states.<sup>19</sup> While China and Singapore have a treaty on judicial assistance in civil and commercial matters, it does not contain a mutual enforcement obligation.<sup>20</sup> The MoG does not provide for such a legal basis either. However, it confirms the existence of the reciprocity approach between the two states.

To the best of the author's knowledge, this was the first time that a Chinese court had relied on *de*

*jure* reciprocity by making the first step in enforcing a foreign court decision. Certainly, the existence of the MoG helped. Whether Chinese courts will continue to rely on the principle of *de jure* reciprocity in other instances and vis-à-vis other countries remains to be seen. The observations made below may shed more light on this issue.

### **b) China's Conference Summary addressing the principle of reciprocity and the following case of an English judgement's enforcement in China**

China lacks a comprehensive framework when it comes to the question of enforcement of foreign court judgements, especially when the principle of reciprocity is to be relied upon. For years, China has only applied *de facto* reciprocity and Chinese courts have been merely responding to the first moves made by foreign courts in initiating the enforcement of Chinese judgements when faced with a lack of alternative legal bases.

The draft amendment to the PRC Civil Procedure Law published in October 2021 does not include any special provisions dealing with the recognition and enforcement of foreign judgments. In the past, China's Supreme People's Court (SPC) attempted to draft a judicial interpretation aimed at organizing and clarifying China's stance on related enforcement issues. This, however, has not taken place yet. Instead, China has issued the Conference Summary of the National Court's Symposium on Foreign-related Commercial and Maritime Trials (Conference Summary), which addresses certain issues

<sup>18</sup> See *supra* note 7.

<sup>19</sup> Memorandum of Guidance between the Supreme People's Court of PRC and the Supreme Court of Singapore on Recognition and Enforcement of Money Judgments in Commercial Cases signed on Aug. 31, 2018 [中华人民共和国

最高人民法院和新加坡共和国最高法院关于承认与执行商事案件金钱判决的指导备忘录].

<sup>20</sup> Treaty Between the People's Republic of China and the Republic of Singapore on Judicial Assistance in Civil and Commercial Matters from 1997 [中华人民共和国和新加坡共和国关于民事和商事司法协助的条约].

pertaining to enforcement.<sup>21</sup> Such conferences and the related sources, although unlike judicial interpretations as they lack binding power upon courts and cannot be cited in Chinese court judgments, represent the general consensus among Chinese judges and do address relevant legal issues. Thus, they are of real value for legal professionals dealing with cross-border litigation.<sup>22</sup>

The recent Conference Summary referred to the reciprocity principle. First, the Conference Summary Minutes confirmed that where there is a treaty addressing the enforcement between the states concerned such legal basis should prevail. If not, Chinese courts should examine whether there exists ground for reciprocity. In particular, reciprocity is found in the following circumstances: 1) according to the laws of a state in which a judgement to be enforced in China was made, Chinese civil and commercial judgments are recognized and enforced; 2) China has reached an understanding or a consensus with such another state concerned; 3) such another state made a reciprocity commitment (or China has made such a commitment to that state) through diplomatic channels, and there is no evidence that the other state had refused to recognize and enforce Chinese judgments in the past. In this last instance, there seems to be the reference to *de jure* reciprocity, albeit subject to an additional condition of prior diplomatic efforts in establishing the principle.<sup>23</sup>

Despite certain clarifications provided by the Conference Summary Minutes, some issues remain ambiguous. For instance, how China and other states should reach “an understanding or a consensus” on reciprocity is unclear. Further judicial interpretation in the area is still desirable. It could have a binding force for local courts and would likely provide more detailed guidelines for courts reviewing applications for the recognition and enforcement of foreign judgments.

Meanwhile, shortly after the Conference Summary and its Minutes, the Shanghai Maritime Court, acting with the approval of the SPC, decided to recognize the judgment made by the English High Court, and made it based on the principle of *de jure* reciprocity. That means, again, that in the past, there was no previous decision of an English court recognizing and enforcing a Chinese court judgment. The Shanghai Maritime Court observed that in a previous judgement rendered by the English court, namely in *Spliethoff's Bevrachtingskantoor BV v Bank of China Ltd* from 2015, the English judge pointed out that a Chinese court judgment could be recognized and enforced under English law and elaborated on conditions for that. The Shanghai Maritime Court noted the likelihood of the enforcement of Chinese judgements in the UK and concluded that this was sufficient to find that the principle of reciprocity between China and the UK exists.<sup>24</sup> The spirit of the Shanghai Maritime Court's ruling was

<sup>21</sup> See Conference Summary of the National Court's Symposium on Foreign-related Commercial and Maritime Trials [全国法院涉外商事海事审判工作座谈会会议纪要], <http://cicc.court.gov.cn/html/1/218/62/409/2172.html>

<sup>22</sup> See more in Susan Finder, *Supreme People's Court Issues New Guidance on Cross-Border Commercial & Procedural Legal Issues*, SUPREME PEOPLE'S COURT MONITOR (Jan. 22, 2022), <https://supremepeoplescourtmonitor.com/2022/>

[01/28/supreme-peoples-court-issues-new-guidance-on-cross-border-commercial-procedural-issues/](https://supremepeoplescourtmonitor.com/2022/01/28/supreme-peoples-court-issues-new-guidance-on-cross-border-commercial-procedural-issues/).

<sup>23</sup> See point 44 of the Conference Summary Minutes.

<sup>24</sup> See more in Zhilin Hao, *The Chinese Court Recognizes an English Commercial Judgment for the First Time*, CONFLICT OF LAW (May 16, 2022), <https://conflictoflaws.net/2022/the-chinese-court-recognizes-an-english-commercial-judgment-for-the-first-time/>.

consistent with the requirements of the Conference Summary Minutes introduced above.

### Conclusions

The principle of reciprocity as a legal basis for the enforcement of court judgements in the Sino-foreign context, even though sometimes already established in the past, can still pose practical problems. While the current shift to *de jure* reciprocity by China (with regard to Singapore, the UK, and mentioned in the Conference Summary Minutes) is generally a positive development, it would be desirable for China to further systematize its approach. In addition, other states could seek to facilitate the use of reciprocity when considering enforcing Chinese court judgements. Bilateral treaties can offer more predictability, but only a number of jurisdictions have such agreements with China, and this does not include some states with strong commercial ties with China, such as the US, Germany and Japan. The conclusion of new bilateral treaties is uncertain. Many such treaties date back to the 1990s and the most recent one, signed by China with Iran in 2016, has not yet become effective. As pointed out above, developing countries may be more inclined to enter into such judicial assistance agreements containing a mutual enforcement obligation with China given their perception of China's economic

growth as beneficial for their own economy. In that sense, the principle of reciprocity may also be explored as a tool to facilitate the flow of the court judgements. On the level of multilateral conventions, the situation could be improved to some extent if China and other jurisdictions decide to accede to, and ratify, the Hague Convention on the Choice of Court Agreements.

Given the existing challenges in enforcing court judgements in the case of Sino-foreign litigation, international arbitration seems to offer more predictable enforcement prospects. This is due to the wide reach of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards which obliges signatory states to mutually enforce international arbitral awards (subject to limited refusal grounds). Both China and 168 other jurisdictions are among the signatory states, with Turkmenistan acceding the Convention most recently.<sup>25</sup> However, as arbitration requires a previous consensus in order to take place at all, and litigation can offer its own benefits, it is worth paying attention to developments concerning the enforcement of court judgements in the Sino-foreign context.

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<sup>25</sup> See New York Arbitration Convention, *Contracting States - List of Contracting States*, <https://www.newyorkconvention.org/list+of+contracting+states>.