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3	EDITORIAL	
4	ARBITRATION	Settlement of African-Asian Disputes Under the Auspices of the Hong Kong International Arbitration Centre: What do the Numbers Show? <i>Hong Kong International Arbitration Centre</i>
12	ALTERNATIVE DISPUTE RESOLUTION	APEC's New ODR Framework <i>Nadja Alexander & Alvin Leu Jun Kang</i>
19	INTERNATIONAL LITIGATION	Insights on the Ruling of the Shanghai Maritime Court Recognising Judgments of the English Courts <i>Zhe Chen, Shan Wang & Walter Chen</i>
27	IN-HOUSE COUNSEL FOCUS	Russian Foreign Investments at Risk: Why Bring Investment Disputes Relating to Russia to the Hong Kong International Arbitration Centre? <i>Charles Ho Wang Mak & Roslyn Lai</i>
34	JURISDICTION FOCUS	Adrian Mak & Diana Bayzakova <i>Country Update: Uzbekistan</i>
43	BOOK REVIEW	So, Now You Are an Arbitrator <i>Book launch address by Susan Crennan</i>
45	NEWS	<i>Robert Morgan</i>

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EDITORIAL

This issue of *Asian Dispute Review* begins with a report by the Hong Kong International Arbitration Centre which provides an insightful analysis on dealing with African-Asian disputes. This is followed by a contribution from Nadja Alexander and Alvin Leu Jun Kang, who take a detailed look at APEC's new ODR Framework. Zhe Chen, Shan Wang and Walter Chen then review the current legal framework of and judicial practice adopted by the courts in relation to the recognition and enforcement of foreign judgments in the People's Republic of China, including recent developments.

Our In-House Counsel Focus article, written by Charles Ho Wang Mak and Roslyn Lai, discusses the practicalities of referring Russia-related investment disputes to the HKIAC. The Jurisdiction Focus article by Adrian Mak and Diana Bayzakova then provides a useful and timely update on arbitration developments in Uzbekistan.

Susan Crennan then gives an illuminating insight into Neil Kaplan and Chiann Bao's newly published book *So, Now You Are an Arbitrator*.

Finally, this issue concludes with the News section written by Robert Morgan.

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Insights on the Ruling of the Shanghai Maritime Court Recognising Judgments of the English Courts

Zhe Chen, Shan Wang & Walter Chen

This article discusses (1) the broad framework of law and judicial practice for the recognition and enforcement of foreign civil and commercial judgments in the People's Republic of China, and (2) gives insights on the implications of a ruling of the Shanghai Maritime Court recognising English court judgments for the first time in accordance with the principle of reciprocity.

Introduction

The news of an unprecedented ruling by the Shanghai Maritime Court on 17 March 2022 (the Ruling) recognising judgments rendered by the English High Court and Court of Appeal (the English Courts)¹ has sparked heated discussion in judicial circles, both domestic and foreign. This Ruling may mark the start of an era in which, in the absence of international treaties, bilateral agreements or treaties of judicial assistance in particular cases, a much less stringent principle of reciprocity will be adopted in recognising and enforcing foreign civil or commercial judgments in the People's Republic of China (PRC, or Mainland China or China).²

Applicable laws and provisions on the recognition and enforcement of foreign judgments in Mainland China

China, as a civil law system based on written statutes, operates under three pillars of written law and rules in respect of the recognition and enforcement of foreign judgments: these are (1) the Civil Procedure Law, (2) judicial interpretations, and (3) international treaties concluded or acceded to by a foreign country and the PRC. Absent the application of any of these, recognition and enforcement of such judgments may be granted in accordance with the principle of reciprocity.³

Pillar One: the Civil Procedure Law of the PRC

The relevant provisions of the Civil Procedure Law of the PRC (as amended in 2021)⁴ are arts 288 and 289 (in Chapter 27: Judicial Assistance).

“If a legally effective judgment or ruling made by a foreign court requires recognition and enforcement by a people’s court of the PRC, the party concerned may directly apply for recognition and enforcement to the intermediate people’s court of the PRC which has jurisdiction. The foreign court may also, in accordance with the provisions of the international treaties concluded or acceded to by that foreign country and the PRC or with the principle of reciprocity, request recognition and enforcement by a people’s court.” (Article 288)

“... [T]he people’s court shall, after reviewing it in accordance with the international treaties concluded or acceded to by the People’s Republic of China or with the principle of reciprocity and [sic] conclude that it does not contradict the basic principles of the law of the PRC nor violates sovereignty, security and social and public interest of the country, it shall rule to recognize the validity of the judgment or ruling, and, if required, issue an order of enforcement which shall be implemented in accordance with the relevant provisions of this Law ...” (Article 289)

Pillar Two: Judicial Interpretations of the Supreme People’s Court

For further clarification of the law, the *Interpretations of the Supreme People’s Court on Application of the ‘Civil Procedure Law’ of the PRC* (as amended in 2021)⁵ expound upon the statutory procedure and requirements for recognition and enforcement of foreign judgments. The effect of absence of a reciprocal relationship is referred to at arts 542 and 547:

“... [I]n the absence of any international treaty concluded by and between the country of domicile of the foreign court and the PRC or jointly acceded to by the said

foreign country and the PRC, and in the absence of any reciprocal relationship, the said intermediate people’s court shall render a ruling to dismiss the application...” (Article 542)

“Where a court of a country that has neither any judicial assistance treaty nor any reciprocal relationship with the PRC directly requests a people’s court to provide judicial assistance without going through diplomatic channels, the people’s court shall return the request, and explain the reasons therefor.” (Article 547)

“... [A]n unprecedented ruling by the Shanghai Maritime Court on 17 March 2022 ... may mark the start of an era in which, in the absence of international treaties, bilateral agreements or treaties of judicial assistance in particular cases, a much less stringent principle of reciprocity will be adopted in recognising and enforcing foreign civil judgments in the [PRC] ... ”

Pillar Three: International treaties concluded or acceded to by a foreign country and the PRC or in accordance with the principle of reciprocity

Up to the present, China has signed bilateral judicial assistance agreements or treaties in respect of civil and commercial matters with more than 30 countries.⁶ These include judicial assistance agreements or treaties incorporating rules or mechanisms for the recognition and enforcement of foreign judgments.

Aside from bilateral judicial assistance agreements or treaties, no multinational international treaty applies to applications for the recognition and enforcement of foreign court judgments in China. Although representatives of the Chinese delegation attended the closing ceremony of the 22nd Diplomatic Session of the Hague Conference on Private International Law (HCCH) on 2 July 2019 and signed the Final Act of the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the Hague Judgments Convention)⁷, China has not ratified this instrument at the time of writing.

Thus, unless and until such time as the Hague Judgments Convention comes into force in China, there are broadly two bases on which a Chinese court may recognise and enforce foreign judgments, *viz*, pursuant to treaties or bilateral judicial assistance agreements signed between China and other countries, or in accordance with the principle of reciprocity.

Judicial practice and developments in Mainland China with regard to the recognition and enforcement of foreign judgments

Generally

It is worth noting that courts in Mainland China have previously taken a stringent and prudent attitude when considering cases pursuant to the principle of reciprocity. Recognition and enforcement of foreign judgments has therefore been accorded only if a court in a foreign jurisdiction has previously recognised and enforced PRC court judgments. The following are some examples.

(1) In 2001, in a general financial leasing contract dispute between a German company and a Chinese leasing company, Beijing No 2 Intermediate People's Court refused to recognise judgments from a Frankfurt court because German courts had not recognised and enforced judgments issued by PRC courts at that time.

“... China has signed bilateral judicial assistance agreements or treaties in respect of civil and commercial matters with more than 30 countries. These include judicial assistance agreements or treaties incorporating rules or mechanisms for the recognition and enforcement of foreign judgments.”

- (2) In 2006, in a case in which Sascha Rudolf Seehaus applied for the recognition and enforcement of a German judgment,⁸ the Wuhan Intermediate People's Court determined that a decision of the Berlin High Court of Justice had reciprocally recognised and enforced a judgment of the Wuxi Intermediate People's Court in Jiangsu Province, China.⁹ Thus, under the principle of reciprocity, the judgment rendered by Montabaur District Court in Germany would be recognised and enforced.
- (3) In 2016, in the case of *Kolmar Group AG v Jiangsu Textile Industry (Group) Import & Export Co Ltd*, the Nanjing Intermediate People's Court recognised and enforced a Singaporean court judgment on the basis of reciprocity.¹⁰ Yet again, this decision was premised on the fact that the Singapore High Court had recognised and enforced a civil judgment of Suzhou Intermediate People's Court in 2014.¹¹
- (4) In 2017, in the case of *Liu Li v Tao Li and Dong Wu*, the Wuhan Intermediate People's Court recognised and enforced a US court judgment.¹² Similarly, based on the fact that a PRC court civil judgment had previously been

recognised and enforced by the US court, the Wuhan Intermediate People's Court, in turn, recognised and enforced the application on the basis of reciprocity.

- (5) In 2019, the Shanghai No 1 Intermediate People's Court recognised and partially enforced a South Korean court judgment on the basis that a court in Seoul had recognised and enforced a civil judgment of the Weifang Intermediate People's Court in Shandong province in China in 2014.¹³

“ ... [C]ourts in Mainland China have previously taken a stringent and prudent attitude when considering cases pursuant to the principle of reciprocity. Recognition and enforcement of foreign judgments has therefore been accorded only if a court in a foreign jurisdiction has previously recognised and enforced PRC court judgments. ”

Under the Belt and Road Initiative

Recently, a combination of the Belt and Road Initiative (BRI) and increased cross-border judicial assistance have led to the emergence of new dynamics in relation to the interpretation and application of the reciprocity principle. The following are indicative examples of this.

- (1) In June 2015, the Supreme People's Court clearly stipulated in the *Supreme People's Court's Opinions on Providing Judicial Services and Safeguards for the Construction of 'One Belt, One Road'* that -

“in case some countries along the B&R have not yet concluded judicial assistance agreements with China, the Chinese courts may consider to firstly grant [the] other country's [sic] judicial assistance, in order to proactively facilitate the establishment of reciprocal relationship and gradually extend the scope of international judicial assistance.”¹⁴

- (2) In June 2017, the *Nanning Statement* of the 2nd China-ASEAN Justice Forum further clarified that -

“where there is no precedent of the foreign court refusing to recognize and enforce a domestic civil and commercial judgment on the ground of reciprocity, then the principle of reciprocity is presumed to exist with that foreign country to the extent permitted by the domestic law of that country.”¹⁵

- (3) In December 2019, the Supreme People's Court again advocated the adoption of “a judicial attitude of presumed reciprocity” to facilitate the mutual recognition and enforcement of judgments of commercial courts.¹⁶
- (4) In January 2022, the Supreme People's Court issued the *Minutes of the National Court's Symposium on Foreign-related Commercial and Maritime Trials* (the Minutes), which for the first time clearly laid down the conditions for PRC courts to determine whether there was any reciprocity relationship (*inter alia*) -

“...under the laws of the country where the court is located, the civil and commercial judgments made by the people's courts can be recognized and enforced by the courts of that country ... There is no evidence [to] indicate that the court has refused to recognize and enforce the judgments of [the] people's court on the ground that no reciprocal relationship exists.” (Article 44)¹⁷

The long established prudent or conservative/stringent attitude toward the principle of reciprocity has apparently

been greatly loosened and the Shanghai Maritime Court's Ruling discussed below is a recent example reflecting the current trend.

“The long established prudent or conservative attitude toward the principle of reciprocity has apparently been greatly loosened and the Shanghai Maritime Court's Ruling ... is a recent example reflecting the current trend.”

The Ruling and its ramifications

(1) The underlying case

In the present case, the foreign applicant, Spar Shipping AS, applied to the Shanghai Maritime Court against Chinese party Grand Xinhua Logistics Holdings (Group) Co Ltd for the recognition and enforcement of judgments of both the English Commercial Court¹⁸ and Court of Appeal¹⁹ and all related orders of the two courts, whereby the Chinese party was held liable for loss and damage.

In this case, two critical issues (*inter alia*) fell to be decided:

- (1) whether there existed judicial assistance treaties or any precedents in which English courts had recognised and enforced Chinese judgments; and
- (2) if not, whether the applications in the present case could be recognised and enforced on the basis of the principle of reciprocity.

With regard to issue (1), the Shanghai Maritime Court held that China and the UK had not yet concluded or participated in international treaties on the mutual recognition and

enforcement of civil and commercial judgments of the courts, so that the principle of reciprocity should be invoked as the doctrine for reviewing the present case.

With regard to issue (2), the Shanghai Maritime Court, to a certain extent, creatively interpreted the 'the principle of reciprocity'. The Court held that the Civil Procedure Law, in stipulating this principle, did not limit its application by requiring that relevant foreign courts must firstly recognise and enforce civil and commercial judgments of PRC courts. The Court therefore determined that reciprocity in the recognition and enforcement of civil and commercial judgments exists between China and foreign countries if, according to the law of the relevant foreign court, civil and commercial judgments rendered by PRC courts can be recognised and enforced by the courts of that country. Needless to say, if there exist precedents for the recognition and enforcement of civil and commercial judgments of PRC courts by a foreign court, this can surely provide supportive evidence that judgments made by PRC courts can be recognised and enforced by that court.

“The [Shanghai Maritime] Court ... determined that reciprocity in the recognition and enforcement of civil and commercial judgments exists between China and foreign countries if, according to the law of the relevant foreign court, civil and commercial judgments rendered by PRC courts could be recognised and enforced by the courts of that country.”

The Shanghai Maritime Court further found that although the applicant had failed to prove that judgments rendered by PRC courts had been recognised and enforced by the English courts, under English law the existence of relevant treaties was not a necessary precondition for the recognition and enforcement of judgments made by foreign courts. The Court therefore held that civil and commercial judgments made by PRC courts could be recognised and enforced by the English courts.

“The Shanghai Maritime Court further found that although the applicant had failed to prove that judgments rendered by PRC courts had been recognised and enforced by the English courts, under English law the existence of relevant treaties was not a necessary precondition for the recognition and enforcement of judgments made by foreign courts. The Court therefore held that civil and commercial judgments made by PRC courts could be recognised and enforced by the English courts.”

The Shanghai Maritime Court also noted that the respondent had failed to prove that there was any impediment to recognition and enforcement of judgments rendered by PRC courts.

Ultimately, the Shanghai Maritime Court decided to recognise the subject English judgments on the basis of the principle of reciprocity after concluding that neither any contradiction of basic principles of Chinese laws nor violation

of China’s national sovereignty, security or public interests were to be found.

“Ultimately, the Shanghai Maritime Court decided to recognise the English judgments on the basis of the principle of reciprocity after concluding that neither any contradiction of the basic principles of Chinese laws nor violation of China’s national sovereignty, security or public interests were to be found.”

(2) The ramifications of the Ruling

As previously discussed, the Ruling has explicitly established a brand new bifurcated rationale for recognising and enforcing foreign judgments on the basis of reciprocity, *viz* where (1) under the laws of the country in which the court is located, civil and commercial judgments made by PRC courts can be recognised and enforced by the courts of that country, and (2) there is no evidence to indicate that a foreign court has refused recognition and enforcement of judgments of people’s courts on the ground that no reciprocal relationship exists. This in fact directly mirrors the spirit of the Minutes of the Supreme People’s Court in terms of the conditions for determining ‘reciprocity’ as reflected in the art 44 of the Minutes.²⁰

The Ruling undoubtedly represents a breakthrough. By contrast, the previously applicable, stringent and long-standing judicial practice in China of prudence or conservatism in interpreting and applying the principle of reciprocity meant that no clear provisions had applied.

Rather, three categories of reciprocity had theoretically been adopted, namely (1) legal reciprocity, (2) factual reciprocity and (3) presumed reciprocity.²¹ Each of these applied as follows.

- (1) Legal reciprocity required that the recognition and enforcement of foreign judgments in both jurisdictions should basically be on equal terms, which raised higher requirements for the identification of foreign laws.
- (2) Factual reciprocity required that the foreign jurisdiction should take the first step in recognising and enforcing Chinese judgments.
- (3) Presumed reciprocity assumed that there was a reciprocal relationship between two jurisdictions so long as the foreign country had no precedent for refusing recognition and enforcement of overseas judgments.

The long-standing previous approach of prudence and conservatism of factual reciprocity applied by China meant that if there was no precedent in a foreign jurisdiction for recognising and enforcing judgments rendered by PRC courts, the corresponding reciprocal relationship would have been deemed not to have been established. This practically represented a logical paradox of ‘who takes the first step’ in applying the principle of reciprocity: if each country rigidly followed the principle and conservatively waited for others to take the first step, this would definitely result in a judicial deadlock.

Fortunately, China, in furthering the BRI, broke the ice by taking the initiative to promulgate the Minutes and relevant rules, resulting in relaxation of the threshold for determining reciprocity. This has inevitably made an enormous contribution toward international legal jurisprudence, to the benefit of certainty and of the international community at large. The Shanghai Maritime Court’s Ruling, in observing the spirit of the Minutes in applying the principle of reciprocity, has profound practical implications.

“The Shanghai Maritime Court’s Ruling, in observing the spirit of the Minutes in applying the principle of reciprocity, has profound practical implications. ... [I]t will undeniably inspire future Chinese judicial practice on the recognition and enforcement of foreign judgments.”

Conclusion

It suffices at this point to conclude that foreign judgments can be recognised and enforced in Mainland China, provided that certain statutory conditions are met. It is, however, worth noting further that, unlike common law countries, China does not apply the case law approach. Given that the case before the Shanghai Maritime Court has not been officially listed as a Guiding Opinion of the Supreme People’s Court of the PRC,²² the Ruling is not legally binding on other courts at various levels in China. As art 44 of the Minutes provides that “[t]he people’s court shall examine and determine whether there is a reciprocal relationship case by case”, the Ruling can only be referenced when dealing with applications to recognise and enforce foreign judgments in China. This is not, however, to deny or undermine the Ruling’s exemplary role and practical implications. On the contrary, it will undoubtedly inspire future Chinese judicial practice on the recognition and enforcement of foreign judgments. ■

1 See (2018) Hu 72 Xie Wai Ren No 1 (translated) ((2018)沪72协外认1号), the Civil Ruling of Shanghai Maritime Court of the People’s Republic of China, dated 17 March 2022.

2 This article is limited to discussion of laws and developments in the jurisdiction of Mainland China. Thus, unless otherwise stated, the expressions ‘PRC’ or ‘Mainland China’ or ‘China’ as used herein do not include the Hong Kong SAR, the Macau SAR and the Taiwan region, which are separate jurisdictions of China. Likewise, the terms ‘PRC court’ or ‘law of the PRC’ used herein refer to the courts or laws of Mainland China.

- 3 Given that this article discusses the recognition and enforcement of foreign civil and commercial judgments, reference to the laws and regulations governing foreign divorces are omitted.
- 4 Civil Procedure Law of the People's Republic of China (translated) (中华人民共和国民事诉讼法), issued 9 April 1991, as amended on 24 December 2021 and effective from 1 January 2022.
- 5 The *Interpretations of the Supreme People's Court on Application of the 'Civil Procedure Law of the People's Republic of China'* (translated) (最高人民法院关于适用《中华人民共和国民事诉讼法》的解释), issued 18 December 2014, as amended on 22 March 2022 and effective from 10 April 2022.
- 6 Ministry of Justice of the People's Republic of China, *Overview of China's Work on Developing International Civil and Commercial Justice Assistance* (translated) (我国开展国际民事司法协助工作概况), available at http://www.moj.gov.cn/pub/sfbgw/jgsz/jgszsdw/zsdwfsxjzlx/sfxzjzxxwdt/202110/t20211020_439659.html (accessed 15 October 2022).
- 7 See the HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters 2019, available at <https://cicc.court.gov.cn/html/1/219/208/209/1303.html> (accessed on 17 October 2022).
- 8 See (2012) E Wuhan Zhong Min Shang Wai Chu Zi No 00016 (translated) ((2012)鄂武汉中民商外初字第0016号), issued by the Wuhan Intermediate People's Court, Hubei Province, China in 2013, in which Sascha Rudolf Seehaus applied for the recognition and enforcement of a German judgment.
- 9 See *German Zueblin International Co Ltd v Wuxi Walker General Engineering Rubber Co Ltd*, Berlin High Court of Justice (18 May 2006), Case Docket No 20 Sch 13/ 04.
- 10 See (2016) Su 01 Xie Wai Ren No 3 Civil Judgment (translated) ((2016)苏01协外认3号), *Kolmar Group AG v Jiangsu Textile Industry (Group) Import & Export Co Ltd*, Nanjing Intermediate People's Court, Jiangsu Province, China.
- 11 See *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2014] SGHC 16.
- 12 See (2015) E Wu Han Zhong Min Shang Wai Chu Zi No 00026 (translated) ((2015)鄂武汉中民商外初字第00026号), *Liu Li v Tao Li and Dong Wu*, issued by the Wuhan Intermediate People's Court, Hubei Province, China, in 2017.
- 13 See (2019) Hu 01 Xie Wai Ren No 17 Civil Judgment (translated) ((2019)沪01协外认17号), *Bigtomisulo v Shanghai Creative Art Baby Education Management Consulting Co Ltd*, issued by the Shanghai No 1 intermediate People's Court in 2020. See also (2018) Lu 02 Xie Wai Ren No 6 Civil Judgment (translated) ((2018)鲁02协外认6号), *Choi Jongwon v Joonjiyoung* issued by the Qingdao Intermediate People's Court, Shandong Province, China in 2019.
- 14 See No 9 [2015] of the Supreme People's Court, *Supreme People's Court's Opinions on Providing Judicial Services and Safeguards for the Construction of 'B&R'* (translated) (最高人民法院关于人民法院为“一带一路”建设提供司法服务和保障的若干意见), dated 16 June 2015, available at <https://www.chinacourt.org/article/subjectdetail/id/MzAwNEjNMIABAA==.shtml> (accessed 20 October 2022).
- 15 See *Nanning Statement of the 2nd China-ASEAN Justice Forum*, (translated) (第二届中国-东盟大法官论坛南宁声明), dated 8 June 2017, available at <https://www.chinajusticeobserver.com/p/nanning-statement-of-the-2nd-china-asean-justice-forum> (accessed 20 October 2022).
- 16 See No 29 [2019] of the Supreme People's Court, *Supreme People's Court's Opinion on Further Providing Judicial Services and Safeguards for the Construction of the 'B&R'* (translated) (最高人民法院关于人民
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- 17 See the *Minutes of the National Court's Symposium on Foreign-related Commercial and Maritime Trials* (translated) (全国法院涉外商事海事审判工作座谈会会议纪要), dated 24 January 2022, available at <https://cicc.court.gov.cn/html/1/218/62/409/2172.html> (accessed 17 October 2022).
- 18 *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd* [2015] EWHC 718 (Comm).
- 19 *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS* [2016] EWCA Civ 982.
- 20 See 'Judicial practice and developments in Mainland China with regard to the recognition and enforcement of foreign judgments' (above).
- 21 Zhang Yongjian & Yang Lei, *A new exploration of mutual recognition and enforcement of civil and commercial judgments by judicial organs*, *People's Justice Journal* 13 (2019):8.
- 22 *Editorial note: See Supreme People's Court, Guiding Opinions on Unifying the Application of Laws through the Strengthened Retrieval of Similar Cases (for Trial Implementation)* (27 July 2020, effective 31 July 2020), Fa Fa [2020] No 24 (translated) (关于统一法律适用加强类案检索的指导意见(试行)). See also (1) *Supreme People's Court guidance on similar case search*, *Supreme People's Court Monitor* (27 July 2020), available at <https://perma.cc/4RY4-D8R4> (accessed 22 November 2022); (2) CMS Law-Now, *PRC Supreme Court issues Guiding Opinion on using 'Precedents'* (6 August 2020), available at <https://www.cms-lawnow.com/ealerts/2020/08/prc-supreme-court-issues-guiding-opinion-on-using-precedents> (accessed 22 November 2022).

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