FRONTIERS OF LAW IN CHINA
VOL. 13 JUNE 2018 NO. 2
DOI 10.3868/s050-007-018-0014-4

FOCUS

RECOGNITION AND ENFORCEMENT OF JUDGMENTS BETWEEN CHINA, JAPAN AND SOUTH KOREA IN THE NEW ERA

THE *KOLMAR V. SUTEX* CASE ON RECIPROCITY IN FOREIGN JUDGMENTS ENFORCEMENT IN CHINA: A WELCOME DEVELOPMENT OR STILL ON THE WRONG TRACK?

ZHU Lei[*]

Abstract In December 2016, the Nanjing Intermediate People's Court in China issued its ruling in the *Kolmar v. Sutex* case, where a monetary judgment from Singapore was recognized and enforced against a local textile company. The case confirms that once a foreign country has taken the initiative, Chinese courts will follow up to enforce judgments from that country reciprocally. This is the doctrine of *de facto* reciprocity adopted by some Chinese courts. The paper surveys the judicial practice of Chinese courts and finds that this area of law is full of confusion and uncertainties due to the lack of applicable rules. Recent developments suggest that China may move away from this approach and adopt a relaxed version of reciprocity, which is worthy of close attention.

Keywords recognition and enforcement of foreign judgment, reciprocity, *de facto* reciprocity, obligation doctrine

INTRODUCTION ····· 203
I. THE LEGAL FRAMEWORK ····· 204
A. Chinese Legislation on the Principle of Reciprocity ····· 204
B. The Gomi Akira Case from the SPC ····· 205
II. JUDICIAL PRACTICE AFTER THE *GOMI AKIRA* CASE ····· 207
A. Refusal of Enforcement without Adequate Reasoning ····· 207
B. Bypassing the Issue of Reciprocity ····· 208
C. Treaty as the Sole Basis — Misapplication of the Law ····· 210
D. De facto Reciprocity — Lack of Consistency ····· 211

[*] (朱磊) Lecturer in Law, Institute of International Law, Wuhan University, Wuhan 430072, China; Ph.D. in EU Competition Law, Law School, Bangor University, Wales. Contact: leizhulawyer@126.com

This article is funded by a research project (Grant No. 17SFB2044) granted by Ministry of Justice of China and supported by the Fundamental Research Funds for the Central Universities.

E. Implications of the Kolmar Case 212
III. THE *DE FACTO* RECIPROCITY AS AN ARBITRARY PRECONDITION 213
CONCLUSION 214

INTRODUCTION

In December 2016, the Nanjing Intermediate People's Court in eastern China, recognized and enforced a judgment from Singapore.[1] The facts of the case are straightforward. Kolmar Group AG, a global petrochemicals company based in Switzerland, had disputes over a sales contract with Sutex Group Ltd., a textile company incorporated in Nanjing. They reached a settlement agreement over the dispute but it proved to be futile. Kolmar filed a complaint in Singapore High Court based on a choice of court clause in the settlement agreement. Being served with the documents, Sutex's representative was absent. In October 2015, a default judgment was made by the Singapore High Court in favor of Klomar and ordered Sutex to pay 350,000 USD. Kolmar filed an application to recognize and enforce the judgment in Nanjing Intermediate People's Court where Sutex has its headquarter and assets.

In the judgment, the Court essentially followed a two-step approach. The first issue the Court had to address was the legal basis for recognition and enforcement of judgments (hereinafter referred to as "REJ"), which rests on treaty or reciprocal relationship. This is the precondition for any REJ proceeding in China, without which the court will simply strike out an application without examining the merits of the case. On this issue, China and Singapore do not have any treaty on REJ. However, the Court pointed out, as a result of a decision by Singapore High Court which recognized and enforced a Chinese judgment in January 2014,[2] a reciprocal relationship therefore did exist.

Then it examined whether the Singaporean judgment fulfills all the conditions for REJ prescribed in the Civil Procedure Law of China. On this issue, the Court concluded that "after examination, the judgment in question is not in conflict with the basic principles of Chinese law, national sovereignty, security or public interest."[3] Therefore, in December 2016, the Court held that the Singaporean judgment would be recognized and enforced in China.

This case has attracted much attention. It is regarded as a landmark case because for the first time a Chinese court confirms the existence of a reciprocal relationship between

---

[1] *Kolmar Group AG v. Sutex Group Ltd.*, (2016) Su 01 Xie Wai Ren No. 3.

[2] *Giant Light Metal Technology (Kunshan) Co., Ltd. v. Aksa Far East Pte. Ltd.*, [2014] SGHC 16.

[3] *Kolmar Group AG v. Sutex Group Ltd.*, (2016) Su 01 Xie Wai Ren No. 3, para. 5.

China and Singapore on REJ.[4] In May 2017, this case was selected and published by the Supreme People's Court (SPC) as one of the model cases which provide guidance for similar cases in the future.[5] In the press release, the SPC points out that, this case "shows that Chinese courts adopt an open and tolerant approach to promote judicial cooperation with OBOR[6] countries in the area of REJ."[7]

Chinese regime on REJ has been heavily criticized as being notoriously difficult and restrictive.[8] This case raises a very interesting question as to how open and tolerant Chinese courts have become on this issue. In other words, does this case make any breakthrough or fundamental change from the existing law? What is the future direction of Chinese law in this very important area? These are the issues that this note attempts to examine.

I. THE LEGAL FRAMEWORK

A. Chinese Legislation on the Principle of Reciprocity

The rules on REJ are found in the Civil Procedure Law of China, which only contains one short provision dealing with this very complicated issue. Article 282 provides that the court shall examine the case in accordance with international treaties or with the principle of reciprocity. China has signed 34 bilateral treaties which include a regime on REJ,[9] laying down rules for conditions for REJ and grounds for refusal. These rules are directly applicable and are sufficiently concrete and specific for the courts to apply. This does not

---

[4] SHEN Ran, 江苏法院首次承认并执行新加坡高等法院民事判决 (*A Court in Jiangsu Recognizes and Enforces a Judgment from Singapore for the First Time*), available at http://www.chinanews.com/sh/2017/01-17/8127433.shtml (last visited Apr. 20, 2018); Cynthia Y.S. Tang & Anthony K.S. Poon, *First Time PRC Court Recognizes a Foreign Judgment Based on Principle of Reciprocity*, available at http://www.lexology.com/library/detail.aspx?g=9840334a-f900-45fd-8c8c-6105ccbcfb20 (last visited Apr. 20, 2018).

[5] ZHANG Ni, 最高法发布第二批涉"一带一路"建设典型案例 (*The Supreme People's Court Releases the Second Series of Model Cases Involving One Belt and One Road Countries*), available at www.chinanews.com/gn/2017/05-15/8224293.shtml (last visited Apr. 20, 2018).

[6] OBOR is the abbreviation of "One Belt and One Road." The One Belt and One Road Initiative was launched by China in 2013. As a development initiative, it focuses on building and improving trading routes and cross-border business movement across more than 60 countries in the Eurasian region. See China–Britain Business Council, *One Belt One Road: A Role for UK Companies in Developing China's New Initiative*, available at http://www.cbbc.org/cbbc/media/cbbc_media/One-Belt-One-Road-main-body.pdf (last visited Apr. 20, 2018).

[7] See ZHANG, fn. 5.

[8] Ariel Ye, *Enforcement of Foreign Arbitral Awards and Foreign Judgments in China*, 74 Defense Counsel Journal, 248 (2007); ZHANG Wenliang, *Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention to Both the "Due Service Requirement" and the "Principle of Reciprocity"*, 12 Chinese Journal of International Law, 144 (2013).

[9] Zheng Sophia Tang, XIAO Yongping & HUO Zhengxin, *Conflict of Laws in the People's Republic of China*, Edward Elgar (Cheltenham), at 149–151 (2016).

create much difficulty in practice and there have been cases where foreign judgments are examined under treaty regime.[10]

By contrast, what is problematic is how to apply the principle of reciprocity concerning judgments from countries without a treaty relationship. This applies to China's most important trading partners, including the US, Japan, South Korea, Germany and Australia.[11] Though the principle of reciprocity has been adopted by many countries as a condition for REJ, there has been wide disagreement on what exactly it means.[12] The crucial question is how this doctrine is construed and applied. In the Chinese context, it remains unclear as the legislation is silent on its definition and leaves this issue unsettled.

Oddly, the SPC has not played its role in filling this legal loophole. This might be because cases on REJ have been far and few[13] and this issue was not high on the agenda.[14] Occasionally, questions are referred to the SPC on various aspects of REJ by courts at lower level. It is in the letters of reply to such inquiry that the SPC clarifies certain issues.

B. The Gomi Akira Case from the SPC

The first case from the SPC which defines reciprocity is the *Gomi Akira* case.[15] It is widely regarded as the authority which requires a *de facto* reciprocity, *i.e.* a court of the originating state has once recognized and enforced a Chinese judgment before.[16] But a closer scrutiny of the case casts doubts about this understanding of the case.

The main proceeding was over a purely Japanese domestic dispute without any international elements involved. The claimant Gomi Akira, a Japanese individual won the case in a Japanese court over a debt dispute, where a Japanese company and its legal

---

[10] Id. at 148–160.

[11] See *Top 10 Trading Partners of the Chinese Mainland*, *China Daily*, Feb. 19, 2014, available at http://www.chinadaily.com.cn/bizchina/2014-02/19/content_17290565.htm#Contentp (last visited Apr. 20, 2018).

[12] Arthur Lenhoff, *Reciprocity and the Law of Foreign Judgments: A Historical–Critical Analysis*, 16 Louisiana Law Review, 465 (1956).

[13] See ZHANG, fn. 8.

[14] This is in contrast with the foreign divorce judgment area, where a judicial interpretation was adopted by the SPC as early as 1991. It contains detailed rules and establishes a working regime. See Provisions of the Supreme People's Court on Procedural Issues Concerning Chinese Citizens' Application for Recognition of Divorce Judgments of Foreign Courts, Fa (Min) Fa [1991] No. 21.

[15] Letter of Reply of the Supreme People's Court on Whether the People's Court Should Recognize and Enforce a Japanese Judgment concerning the Payment of a Debt, [1995] Min Ta Zi No. 17.

[16] TU Guangjian, *Private International Law in China*, Springer (Singapore), at 171 (2016); LIAN Junya, "一带一路"战略下互惠原则在承认和执行外国法院判决中的适用现状、困境与变革 (*The Application of the Principle of Reciprocity by Chinese Courts under the Belt and Road Initiative: Judicial Practices, Problems and Solutions*), 31(6) 河南财经政法大学学报 (Journal of Henan University of Economics and Law), 158 (2016); REN Mingyan, 论互惠原则在承认与执行外国法院判决中的适用 (*On the Application of the Reciprocal Principle in the Recognition and Enforcement of Foreign Judgments*), 9(1) 公民与法(法学) (Citizen and Law), 54 (2011).

representative was ordered to pay 140 million JPY. Then during the enforcement procedure, it transpired that some Chinese elements were involved. It was found that the defendant had no asset in Japan to pay for the debt, but had invested 4.85 million JPY in a joint-venture company in China, Dalian Fari Seafood Co., Ltd. In December 1993, the local court in Japan made a garnishment order against Fari and ordered it to freeze the investment money and transfer it to Gomi Akira. The garnishment order, together with the judgment itself, was served on Fari through the Hague Service Convention channel.[17]

In May 1994, Gomi Akira filed an application to recognize and enforce the judgment and the garnishment order in Dalian Intermediate People's Court where Fari is headquartered. The court had doubts over how the case should be handled and referred it to the SPC. In the letter of reply to the local court, the SPC had the chance to rule over this case.

This case involves very complicated legal issues on REJ. There are essentially two judgments in question. The first is a monetary judgment which confirms the obligation of a debt between the parties. There is nothing unusual about it and does not raise any difficult issue.

By contrast, what is more difficult to deal with is the recognition and enforcement of the garnishment order. Usually, the garnishee (a third party) who holds the debtor's property is ordered to turn over such property to the creditor. But this case is different. The property under the order is the investment made by the judgement debtor to Fari. Such property does not belong to the judgment debtor, rather it is owned by the Fari company as an independent and separate legal person from its investors. Unless the court decided to pierce the corporate veil and deny the legal personality of Fari through a proper trial procedure, such investment money is not subject to the garnishment order.

The SPC may decide to refuse to recognize the Japanese garnishment order on the ground that it is made in the enforcement proceeding, thus constitutes a procedural judgment rather than a civil and commercial one. Even if it is treated as a civil and commercial judgment, it would not be recognized and enforced for three reasons. First, the Japanese lacked proper jurisdiction over the case. The garnishment order was made against Fari company which did not have place of registration or principal business in Japan. Nor did it appear before the court. In addition, the property subject to the garnishment order was not located in Japan. Second, the procedure was in breach of natural justice. Fari was not served with any notice of the proceeding and had no chance to raise any objections or defend itself, let alone to have a fair trial. Third, the order may be refused on public policy grounds. It is a basic principle that a company has a legal personality separate and distinct from its shareholders. The garnish order was against the company property and thus in conflict with such basic principle.

---

[17] Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

The SPC could have taken this opportunity to rule on these issues and develop substantive rules under which foreign judgments could be scrutinized. Unfortunately, its reply to the local court avoided discussing any of these issues. There is literally only one sentence of reasoning. It reads as follows,

> *China and Japan have not concluded or acceded to any treaty on mutual recognition and enforcement of judicial judgments, nor has a reciprocity relationship been established. In accordance with Article 268 of the Civil Procedure Law of China, Chinese courts will not recognize and enforce this Japanese judgment.*[18]

It seems more like a simple repetition of the text of the statute than any kind of serious legal reasoning and analysis. It is not clear from the wording itself how the SPC came to the conclusion that China and Japan have not established a reciprocal relationship. It does not deal with some basic questions such as: (1) What is reciprocity? (2) What circumstances constitute such a relationship?

II. JUDICIAL PRACTICE AFTER THE *GOMI AKIRA* CASE

The *Gomi Akira* case hardly provides any guidance as to how reciprocity should be interpretated and applied. As a result, the lower courts are faced with a controversial legal issue without clear rules to apply. Meanwhile, compared with the ever-increasing amount of private international law cases,[19] lawsuits on REJ are far and few. For most courts, it would be their first time to encounter such case. It might not be surprising that there is confusion as to how reciprocity should be applied. A survey of all the publicly available judgments shows that different approaches have been adopted by Chinese courts. This area of law is full of uncertainties.

A. Refusal of Enforcement without Adequate Reasoning

One of the biggest problems of studying Chinese cases is the fact that judgments do not provide much reasoning[20] and this often leads to unconvincing judgments. More importantly, it missed the opportunity to clarify the legal issue and develop the law by filling the gaps in legislation. This lack of reasoning is manifested in another SPC's letter of reply to Guangdong Higher People's Court concerning the enforcement of a judgment

---

[18] See fn. 15.

[19] In 2016, Chinese courts tried 46,200 private international law cases, an increase of more than ten percent from 2015. WANG Zeyan, 回放: 张勇健谈人民法院为"一带一路"提供司法保障 (*Replay: Justice ZHANG Yongjian Articulates Judicial Support for the One Belt and One Road Initiative*), available at http://www.legaldaily.com.cn/index_article/content/2017-03/10/content_7047320.htm?node=6148 (last visited Apr. 20, 2018).

[20] Fang Shen, *Are You Prepared for This Legal Maze? How to Serve Legal Documents, Obtain Evidence, and Enforce Judgments in China*, 72 UMKC Law Review, 216 (2003).

from Western Australia.[21] The judgment creditor, an Australian company, obtained a favorable judgment from the Western Australian Supreme Court against a Chinese individual. It applied to enforce such judgment in the local court where the judgment debtor had its residence. The case was then referred to the SPC on the issue of reciprocity. In the letter of reply, the SPC ruled that,

> *After examination, the court concludes that China and Australia have not concluded or joined a treaty on REJ. Nor have these two countries established a reciprocal relationship. Therefore, the application should be dismissed due to lack of legal basis.*[22]

This wording is very similar to that adopted in the *Gomi Akira* case. What is different from the *Gomi Akira* case is the fact that the two judgments are from countries which adopt distinctive regimes on REJ. In Japan, REJ is subject to the reciprocity requirement. There is a risk that Chinese judgments might be refused for REJ for lack of reciprocity between the two countries. By contrast, this case concerns an Australian judgment. As a common law country, Australia adopts the doctrine of obligation, which regards foreign judgment as creating a simple debt between the parties and does not require reciprocity for REJ.[23] This would mean that Chinese judgments would have no enforcement obstacles in Australia.

Very similar wording could be found in four other cases from local courts.[24] In these cases, the result is surprisingly uniform — all concluded that reciprocity does not exist and refuse to recognize and enforce the foreign judgments. This leaves one wonder what circumstance would constitute a reciprocal relationship. Another common feature of these cases is that Chinese courts, including the SPC, did not examine how Chinese judgments would be treated in the foreign country. In other words, the rules adopted by foreign countries, *i.e.* whether the foreign courts will enforce a Chinese judgment under equal or more favorable conditions, do not have any bearing on its conclusion on reciprocity.

B. Bypassing the Issue of Reciprocity

In the Chinese regime on REJ, the first issue the court has to deal with is the issue of

---

[21] Letter of Reply of the Supreme People's Court Re Application of DNT France Power Engine Co., Ltd. for Recognition and Enforcement of Australian Court Judgment, [2006] Min Ta Zi No. 45.

[22] Id.

[23] Martin Davies, Andrew Bell & Paul Le Gay Brereton, *Nygh's Conflict of Laws in Australia* (9th edition), LexisNexis Butterworths (Sydney), at 896 (2014).

[24] (1) *ZHUO Yue v. Nanjing Diansheng Ltd.*, (2004) Ning Min Wu Chu Zi No 7. This is not a REJ case but is concerned with the estoppel effect of a US judgment;

(2) Re Application of Russia National Symphony Orchestra and Art Mont Company for Recognition of a Judgment of the High Court of Justice in England, (2004) Er Zhong Min Te Zi No. 928;

(3) Re Application of JIAN Yongming for Recognition of a Civil Judgment from Malaysia, (2014) Ning Min Ren Zi No. 13;

(4) Re Application of DONG Bin for Recognition and Enforcement of a Civil Judgment from Chad, (2014) Tan Zhong Minsan Chu Zi No. 181.

legal basis. In deciding whether or not to recognize a foreign judgment, Chinese courts will examine whether there is a treaty or reciprocal relationship between the two countries. If the answer is negative, it will simply dismiss the claim. Only if the court concludes that such relationship exists, will it proceed to examine whether the judgment in question fulfills all the conditions for REJ. In other words, for judgments from countries without a treaty relationship with China, reciprocity is the precondition.

However, in practice, the court may bypass this threshold issue of reciprocity and reject the application based on other grounds. In this way, it avoids dealing with the thorny issue of reciprocity. This approach was adopted in the *Hukela* case by the SPC regarding the enforcement of a judgment from Germany in 2010.[25] In this case, Hukela is a furniture manufacturer based in Germany. It obtained a favorable judgment from a German court regarding disputes with its Chinese distributer. It then applied to Beijing No. 2 Intermediate People's Court to recognize and enforce the judgment, which then referred this case to the SPC. It is regrettable that the Beijing Court did not raise the difficult issue of reciprocity. But rather the issue is concerned with one of other conditions as laid down in the civil procedural law, *i.e.* the foreign judgment must be effective and enforceable.

In this case, the German judgment is served to the Chinese debtor by post, which is prohibited by Chinese law. Due to this procedural flaw, the SPC concluded that the German judgment is not effective and enforceable.[26] The inspiration must have come from its previous practice. The SPC has in several occasions refused to recognize and enforce foreign judgments based on this same ground for judgments from countries which have a treaty relationship with China.[27]

The most recent example of this approach is concerned with a judgment from the US, the application was simply rejected by the Hunan Higher People's Court based on procedural issues — judgment creditor failed to submit certain documents.[28] In these two cases, the claim of the judgment creditor is not defeated. They could file the application again after the judgment is duly served or relevant documents are complete. It is regrettable that there were no follow-on suits after the cases.

In these two cases, courts in Germany[29] and the US[30] had recognized and enforced Chinese judgments before, which is strong evidence that these two countries have a reciprocal relationship with China. However, the court reached its conclusion without

---

[25] Letter of Reply of the Supreme People's Court Re Application for Recognition and Enforcement of Judgment 20460/07 of the Offenburg Court in the Federal Republic of Germany, (2010) Min Si Ta Zi No. 81.

[26] Id.

[27] See ZHANG, fn. 8 at 143–147.

[28] Re Application of Tipper Tie Inc. for Recognition and Enforcement of Judgment from the Delaware Court of Chancery, (2015) Xiang Gao Fa Min San Qing Zi No. 5.

[29] Vgl. Urteil des Kammergerichts Berlin vom 18.05.2006, Aktenzeichen 20 Sch 13/04.

[30] *Hubei Gezhouba Sanlian Indus. Co., Ltd. v. Robinson Helicopter Co., Inc.*, 425 Fed. Appx. 580.

dealing with the issue of reciprocity. The trick lies in its practical and pragmatic approach: A judgment should be refused for enforcement if it does not fulfill one of the conditions, no matter which one. In this way, it ignores the fact that reciprocity is not merely one of the conditions for REJ; instead, it has a more preeminent position as a precondition, *i.e.* a threshold issue. This could amount to a misapplication of the statute.

C. Treaty as the Sole Basis — Misapplication of the Law

Some scholars suggest that the only applicable mechanism that would enable enforcement of foreign judgments is international treaty between China and the originating state.[31] This argument must have come from the practical difficulty of meeting the requirement of reciprocity in China. However, this is a misunderstanding of Chinese Civil Procedural Law, which provides that reciprocity is on an equal footing with international treaty as the legal basis for REJ.[32]

In practice, there is one case that held that international treaty is the sole legal basis for REJ.[33] This is not a REJ proceeding, but rather a tort case where the defendant raised the issue of *res judicata* of a US judgment as a defense. In this case, Symantec, a global software developer incorporated in the US, sued several Chinese companies and individuals for breaching its intellectual property rights in Shanghai. In the proceeding, the defendant argued that the Shanghai court did not have jurisdiction because a judgment had already been handed down by a US court on the same issue. On the issue of estoppel, the Shanghai Higher Court held that,

> *The precondition for Chinese courts to recognize and enforce a foreign judgment is that the two countries have signed bilateral treaties on judicial assistance based on the principle of reciprocity. There is no such treaty between China and the US. Therefore, currently the judgment made by the US court concerning the breach of intellectual property by the defendant shall not be recognized and enforced in China.*[34]

This approach contradicts Chinese Civil Procedure Law and amounts an error of law and the judgment may be overruled.

This is a very restrictive understanding of reciprocity. Treaty is the best evidence of reciprocity but not the only way of establishing reciprocity. There are 195 countries in the world. Only 34 have treaty relations with China on REJ. That is only about 17% of all the countries. For judgments from the rest of 83%, it is the principle of reciprocity that applies. These include China's most important trading partners, such as the US, Japan, South Korea, Germany and Australia. This approach essentially means that judgments from these countries are impossible to be recognized and enforced in China.

---

[31] Béligh Elbalti, *Reciprocity and the Recognition and Enforcement of Foreign Judgments: A Lot of Bark But Not Much Bite*, 13 Journal of Private International Law, 195 (2017).

[32] Art. 282 of Civil Procedural Law of China.

[33] *MA Jingyi v. Symantec Corporation*, (2011) Hu Gao Min San (Zhi) No. 88.

[34] Id.

D. De facto Reciprocity — Lack of Consistency

From the *Gomi Akira* case itself, it does not appear that the SPC adopted the doctrine of *de facto* reciprocity.[35] However, it has been widely regarded as the authority of *de facto* reciprocity by scholars.[36] This approach has been adopted by some local Chinese courts. In these cases, foreign judgments are recognized after the courts concluded a reciprocal relationship existed. The very reason for that conclusion is because the court in the originating country had recognized and enforced a Chinese judgment previously.

The first landmark case adopting this approach was handed down by Wuhan Intermediate People's Court in 2012 concerning a judgment from Germany.[37] This approach is clearly evident in its judgment which reads as follows,

> *Considering the fact that the High Court of Berlin has recognized and enforced a judgment made by the HighTech Industrial District Court of Wuxi in Jiangsu Province on May 18, 2006, this court will examine the effects of the German judgments based on the principle of reciprocity.*

The *Kolmar* case is the latest example on the application of the principle of *de facto* reciprocity. The key factor for the court to conclude that a reciprocal relationship existed is the fact that a Singapore court had enforced a Chinese judgment in December 2014.[38] Therefore, it does not break from the existing jurisprudence on this issue, nor does it mean any fundamental change. Rather it is consistent with the doctrine of *de facto* reciprocity.

What must also be pointed out is the fact that Chinese courts have not been consistent in adopting this doctrine. There has been a split on the issue of *de facto* reciprocity among local courts. This is well reflected in the case concerning the recognition and enforcement of two Korean judgments in 2011[39] and 2015[40] respectively. In the first case, Spring Comm. obtained a favorable judgment in Korea against a Korean individual. It transpires that the judgment debtor owns an apartment in Shenzhen. Spring Comm. then applied to Shenzhen Intermediate People's Court to enforce the Korean judgment in 2011.

---

[35] In 2007, a case involving an Australian judgment was referred to the SPC. In its reply, it used almost exactly the same wordings as in the *Gomi Akira* case. See fn. 21.

[36] For example, SHEN Hongyu, 外国民商事判决承认和执行若干疑难问题研究 (*A Study on Several Difficult Issues on Recognition and Enforcement of Foreign Judgments*), 5 法律适用 (Journal of Law Application), 14 (2018).

[37] This case is not concerned with a monetary judgment, but appointment of bankruptcy administrator. China does not distinguish bankruptcy judgments from other commercial ones. (2012) E Wuhan Zhong Minshang Wai Chu Zi No. 16.

[38] *Giant Light Metal Technology (Kunshan) Co., Ltd. v. Aksa Far East Pte. Ltd.*, [2014] SGHC 16.

[39] *Spring Comm. Co., Ltd. v. PU Zonggen*, (2011) Shen Zhong Fa Min Yi Chu Zi No. 45.

[40] Re Application of ZHANG Xiaoxi (the applicant) for the Recognition and Enforcement of a Foreign Judgment, (2015) Shen Zhong Min Si Te No. 2.

A Korean court had recognized and enforced a Chinese judgment in 1999.[41] It is reported that the counsel for the judgment creditor has provided such evidence to the court.[42] Unfortunately, the Shenzhen Intermediate People's Court does not mention the fact that Korean courts had recognized and enforced Chinese judgments before, nor did it discuss the effect of such evidence submitted by the counsel. The judgment is surprisingly brief with little reasoning. It simply stated that reciprocity did not exist between the two countries. Four years later in 2015, the same issue arose before Shenyang Intermediate People's Court, which refused to recognize and enforce the Korean judgment on the same ground without dealing with the issue of *de facto* reciprocity.[43] The latest example on this approach is Nanchang Intermediate People's Court refusing to enforce a US judgment in April 2017.[44]

E. Implications of the Kolmar Case

The survey of judicial practice of Chinese courts shows that there has been a lot of confusion over the issue of reciprocity. Chinese courts have been inconsistent in the application of this doctrine. The results of these cases have been highly unpredictable and full of uncertainties. There is urgent need for harmonization. The publication of *Kolmar* case as a model case by the SPC in May 2017 might be seen as a step towards this direction. By doing so, the SPC recognizes the approach adopted by the case and expects local courts to follow. Though not legally binding upon local courts, it is highly persuasive. In this sense, it could provide some certainties to this muddy swamp created by local courts.

However, it is doubtful whether the publication of the *Kolmar* case as model case has settled the split over the *de facto* reciprocity. In the following June after the publication of this case, there have been two cases on this issue which repeated the same division over the issue of reciprocity. On June 30, 2017, the Wuhan Intermediate People's Court recognized a US judgment based on the fact that a Chinese judgment had been enforced by a California court before.[45]

By contrast, Fuzhou Intermediate People's Court refused to enforce an Israeli judgment on June 6, 2017.[46] The facts of the case were straightforward. S.L. Jonas Ltd., an Israeli company obtained a favorable judgment against a Chinese individual who has residence in Fujian. It then applied to the Fuzhou Intermediate People's Court to enforce

---

[41] Kwang Hyun SUK, *Recognition and Enforcement of Foreign Judgments among China, Japan and South Korea: Korean Law Perspective*, Proceedings of Recognition and Enforcement of Judgments between China, Japan and South Korea in the New Era, Law School of Renmin University (Beijing), Dec. 19, 2017.

[42] Id.

[43] See fn. 40.

[44] (2016) Gan 01 Min Chu No. 354.

[45] *LIU Li v. TAO Li & TONG Wu*, (2015) E Wuhan Zhong Minshang Wai Chu Zi No. 00026.

[46] *S.L. Jonas Ltd. v. YANG Ping*, (2017) Min 01 Xie Wai Ren No. 4.

this judgment. The court concluded that there was no treaty or reciprocal relation between the two countries. However, one crucial fact was not mentioned in the judgment: The District Court in Tel Aviv had approved a Chinese judgment in 2015.[47] This case had been reported and discussed in Chinese literature.[48] Following the *de facto* reciprocity, this would mean that a reciprocal relationship exists between China and Isreal. It is not clear whether the court was aware of the *Kolmar* case and the Israeli case enforcing the Chinese judgment. It is regrettable that the court did not provide much reasoning on how it reached its conclusion.

III. THE *DE FACTO* RECIPROCITY AS AN ARBITRARY PRECONDITION

Despite of the lack of consistency, among all the cases that have enforced foreign judgments, *de facto* reciprocity is the only instance where the court found reciprocity existed. Chinese scholars have long argued that this criterion is rigid and restrictive, which may lead to retaliation by other countries, creating barriers for international trade.[49] It has been criticized by scholars as unfair, inefficient and burdensome.[50]

A further problem with the doctrine of *de facto* reciprocity adopted by Chinese courts lies in the arbitrariness of the criterion. It does not examine what effects and privileges are granted to Chinese judgments in the originating country. Rather it is solely dependent on whether a court in the originating state has recognized and enforced a Chinese judgment before. The problem is that international litigation is of accidental nature and parties consider a broad range of factors to decide where and how their disputes are settled.[51] The fact that no court judgments have been made does not necessarily mean that Chinese judgments would be refused. It might be simply because no such case was filed and the court had no chance to make such judgment. As a passive adjudicator, the court could not reach out to make such judgment.

This problem is well illustrated by contrasting the judgments delivered by Chinese courts in the following instances: (a) Singapore[52] and the US[53]; and (b) Australia[54] and England[55]. All four of these countries follow the obligation doctrine of common law, which regard foreign judgments as simple debt that the judgment debtor has the legal

---

[47] *Yitzhak Reitman v. Jiangsu Overseas Group Co., Ltd.*, Civil Case 7884/15.

[48] For example, LIAN, fn. 16 at 161.

[49] WANG Jiwen, 互惠原则在判决承认与执行上的缺陷 (*Defects of the Reciprocal Principle in Recognition and Enforcement of Judgment*), 21(3) 云南大学学报(法学版) (Journal of Yunnan University (Law Edition)), 167 (2008).

[50] John F. Coyle, *Rethinking Judgments Reciprocity*, 92 North Carolina Law Review, 1112 (2014).

[51] See *Forum Shopping Reconsidered*, 103 Harvard Law Review, 1677 (1990).

[52] See fn. 3, *Kolmar Group AG v. Sutex Group Ltd.*

[53] See fn. 28.

[54] See fn. 21.

[55] Re Application of Russia National Symphony Orchestra and Art Mont Company for Recognition of a Judgment of the High Court of Justice in England, (2004) Er Zhong Min Te Zi No. 928.

obligation to pay.[56] Pursuant to this principle, REJ is not subjected to any reciprocity requirement. This essentially means that courts in these countries will not look at whether a reciprocal relationship with China exists and will enforce Chinese judgments provided that certain conditions are met.

However, the obligation doctrine adopted by these common law countries does not play any role in the analysis of Chinese courts. On the contrary, Chinese courts adopt a formal standard of *de facto* reciprocity. The sole criterion is whether or not foreign court has made a decision to recognize a Chinese judgment previously. As a result, judgments from Singapore and the US were recognized by the Chinese courts. By contrast, judgments from Australia and England were refused simply because it happens to be the case there were no such court decisions in these countries.

A better solution would be to look at how Chinese judgments would be treated in the originating state to decide whether to grant reciprocal status. For example, Singapore does not require the reciprocity as a precondition and it had recognized judgments from the US,[57] Canada,[58] Japan,[59] Indonesia,[60] which are in similar circumstances as China and do not have reciprocal relationship with Singapore. Therefore, Chinese courts could safely conclude that Chinese judgments would be recognized in a similar way in Singapore. Requiring a *de facto* reciprocity would not be necessary.

CONCLUSION

REJ in China has been criticized as being notoriously difficult.[61] This is largely due to the lack of clear rules on reciprocity and the requirement of *de facto* reciprocity as a precondition. It has become the greatest hurdle for REJ in China. Once this obstacle has been overcome, the scrutiny becomes relatively simple and straightforward. On this aspect, China does not impose overly stringent conditions. The reported cases so far show that the focus has been on procedural issues.[62]

The SPC itself has realized the problems with the principle of *de facto* reciprocity.[63] It has begun to move away from this requirement and towards a relaxed version of the

---

[56] Adrian Briggs, *Recognition of Foreign Judgments: A Matter of Obligation*, 129 Law Quarterly Review, 88 (2013).

[57] *Alberto Justo Rodriguez Licea and others v. Curacao Drydock Co., Inc.*, [2015] SGHC 136, [2015] 4 SLR 172.

[58] *Hong Pian Tee v. Les Placements Germain Gauthier Inc.*, [2002] 2 SLR 81, [2002] SGCA 17.

[59] *Bellezza Club Japan Co., Ltd. v. Matsumura Akihiko and others*, [2010] SGHC 94.

[60] *Murakami Takako (executrix of the estate of Takashi Murakami Suroso, deceased) v. Wiryadi Louise Maria and Others*, [2007] 4 SLR 565; [2007] SGCA 43.

[61] See ZHANG, fn. 8 at 144.

[62] Id.

[63] ZHANG Yongjian, "一带一路"背景下互惠原则实践发展的新动向 (*New Developments of the Reciprocity Principle against the Background of the One Belt and One Road Initiative*), 人民法院报 (People's Court Daily), Jun. 20, 2017.

reciprocity principle. This follows the global trend of development in this area of law.[64] The first sign of such change is reflected in an official opinion published by the SPC on how Chinese courts could contribute to the One Belt and One Road Initiative. In this document, the SPC points out that, Chinese courts may take the initiative to provide judicial assistance to individuals from these countries in cases where no treaty existed between the two countries[65] which is a big step forward.[66]

The SPC also mentions the factors needed to be taken into account, including the intention of international judicial cooperation from the counterpart country, its guarantee and promise to grant judicial reciprocity to China.[67] It seems that it would be very difficult for a court to ascertain if such intention or guarantee exists based on a case-by-case basis. It might be possible for the parties to obtain official declaration from public authorities of a foreign country. But this process might be difficult and time-consuming. Also it is doubtful if such documents could be used in other cases.

A more practical approach would be the adoption by public authorities of official documents of such effect. On this aspect, a welcome development is that the Supreme Court of Singapore and the SPC are negotiating an MOU on judgment recognition and enforcement.[68] This might not be legally binding, but it is a strong and sufficient evidence for international judicial cooperation between the two countries. It is the first time that the SPC signed this kind of document.[69]

A further development in this direction is reflected in the Nanning Declaration adopted in the China–ASEAN Justice Forum in June 2017. It declares that reciprocity is assumed to exist if there is no precedent of refusal of enforcement in the originating state because of the lack of reciprocity.[70] This is a more liberal and relaxed version of the principle of reciprocity. While the declaration is not legally binding, it is the consensus reached by the participating countries. In particular, it reflects China's position on this issue.

---

[64] Ralf Michaels, *Recognition and Enforcement of Foreign Judgments*, in Rüdiger Wolfrum ed. *Max Planck Encyclopedia of Public International Law*, Oxford University Press (Oxford), (2012).

[65] The Supreme People's Court on How the People's Courts May Provide Judicial Services and Safeguard for the Construction of the "Belt and Road," Fa Fa [2015] No. 9.

[66] See LIAN, fn. 16 at 157.

[67] See fn. 65.

[68] LUO Shuzhen, 刘贵祥会见新加坡最高法院代表团 (*Justice LIU Guixiang Holds a Meeting with Delegates from the Supreme Court of Singapore*), available at http://www.court.gov.cn/zixun-xiangqing-44162.html (last visited Apr. 20, 2018).

[69] Singapore has singed similar MOU with the Dubai International Financial Centre (DIFC) Courts, which clarifies how judgments will be recognized and enforced between the two countries. Memorandum of Guidance as to Enforcement between DIFC Courts and the Supreme Court of Singapore, available at http://difccourts.ae/wp-content/uploads/2015/01/MoG-with-Singapore.pdf (last visited Apr. 20, 2018).

[70] 第二届中国—东盟大法官论坛南宁宣言 (*Nanning Declaration of the Second China–ASEAN Justice Forum*), available at http://www.chinacourt.org/article/detail/2017/06/id/2891257.shtml (last visited Apr. 20, 2018).

It is also noteworthy that the SPC is drafting a judicial interpretation on REJ.[71] Being a major piece of legislation in this area, it will lay down detailed rules on REJ. It is very likely that these new developments on reciprocity will be incorporated in this new law. In the current draft version of the judicial interpretation, the standards for reciprocity are largely relaxed. The requirement of reciprocity is fulfilled under the following instances: (1) prior recognition and enforcement of a Chinese judgment by a court in the originating country; (2) recognition and enforcement of Chinese judgments under equal or more favorable conditions; and (3) a unilateral commitment by the foreign country or the existence of consensus on judicial cooperation between China and the foreign country.[72] Therefore, it moves towards a more liberal approach, which would greatly facilitate and ease the enforcement of foreign judgments in China.

In the Chinese legal system, judicial interpretation is a source of law and has binding effect.[73] Once adopted, this judicial interpretation will provide much needed guidance on this issue. Equally important, the judicial interpretation establishes an internal report mechanism. It provides that before local courts decide to refuse to enforce a foreign judgment, it must report to the SPC and awaits the SPC to make such decision.[74] It essentially means that the power to decide under what circumstances foreign judgments may be refused will be transferred from local courts to the SPC. This will provide harmonization and consistence in the future.

It also settles down the split over *de facto* reciprocity. It specifies that *de facto* reciprocity is one form of reciprocity. From Chinese perspective, it might constitute the strongest evidence of reciprocity. What the *de facto* reciprocity requirement essentially needs is the fact that foreign court has recognized and enforced a Chinese judgment previously. In order to facilitate the free movement of judgment across borders, it would be desirable for foreign courts to take the initiative once such case arises. Once a foreign court recognizes and enforces a Chinese judgment, China should follow suit. This will establish a reciprocal relationship between the two countries and overcome the biggest hurdle.

German treatment of a Chinese judgment is illuminating. In 1996, there had been a case in Shanghai which refused to recognize a Frankfurt judgment.[75] This does not

---

[71] LUO Shuzhen, 最高人民法院发布第二批涉"一带一路"建设典型案例 (*The Supreme People's Court Releases the Second Series of Model Cases involving One Belt and One Road Countries*), available at http://www.chinacourt.org/article/detail/2017/05/id/2863082.shtml (last visited Apr. 20, 2018).

[72] Art. 17 of Judicial Interpretation of the SPC on Several Issues Relating to Recognition and Enforcement of Foreign Judgments (the 6th draft version), Jun. 2017. The document is on file with the author.

[73] LI Wei, *Judicial Interpretation in China*, 5 Willamette Journal of International Law & Dispute Resolution, 88 (1997).

[74] Art. 21 of Judicial Interpretation of the SPC on Several Issues Relating to Recognition and Enforcement of Foreign Judgments (the 6th draft version), Jun. 2017.

[75] SHEN Yiming, *Resolution of Disputes between Foreign Banks and Chinese Sovereign Borrowers: Public and Private International Law Aspects*, Kluwer Law International (The Hague), 159–162 (2000).

prevent a German court from recognizing a Chinese judgment because of lack of reciprocity. In 2006, in a case concerning the recognition of a Chinese judgment, Berlin High Court ruled that,

> *If both parties await the other party to take the initiative to recognize a judgment first and then to follow suit, a reciprocal relationship will never take place in practice. This would in fact preclude mutual recognition, which is not the intention of the legislator. In order not to hinder the development of mutual recognition of judgments without a treaty relationship, it needs to take into account whether the counterpart will follow suit after one party take the initiative first.*[76]

It is laudable that the German court has adopted this constructive and forward-looking approach. Thus, it avoids a retaliation circle and paves the way for mutual recognition of judgments between the two countries.

[76] This is an English translation by the author.