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FOCUS

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

UNCONSTITUTIONALITY OF RECIPROCITY REQUIREMENT FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN JAPAN

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Abstract This article deals with reciprocity requirement for recognition of foreign judgments in Japan. Following German law, Japanese law requires reciprocity to the rendering state in addition to the jurisdiction of the state, the service of process, and the compatibility with Japanese public policy. Although Japanese courts have rarely refused the recognition of foreign judgments for lack of reciprocity for a long time, some Chinese judgments recently have not been recognized for this reason. The author clarifies first with historical review what was the purpose of the Japanese legislator, when the original law of 1890 required the reciprocity by international treaties, and when later the reform law of 1926 required the simple reciprocity that is similarly provided in the current law. The author surveys then the Japanese case law concerning the reciprocity requirement after the reform of 1926. The author focuses further on the reciprocity between Japan and China and compares the Japanese practice with the German one that led to a different result. Last, it is concluded that the reciprocity requirement is contrary to the protection of human rights under Japanese constitution.

Keywords foreign judgment, reciprocity, Japan, China, Germany, human rights

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INTRODUCTION

The recognition of foreign judgments in Japan is provided in Article 118 of the Code of Civil Procedure (hereinafter referred to as "CCP")[1]. The provision originated from German law and requires the jurisdiction of the rendering state, the due service of process, the compatibility with public policy, and reciprocity.[2] So far Japanese courts have rarely refused the recognition of foreign judgments for lack of reciprocity. However, in recent years, Chinese judgments have not been recognized in Japan for lack of reciprocity between Japan and China. From that arises various questions: Whether the refusal of recognition of Chinese judgments is consistent with the former case law of Japanese courts; whether the reciprocity requirement is appropriate for recognition of foreign judgments; whether this requirement is compatible with the protection of human rights by the Constitution of Japan.

Thus, the article will argue the following. First, it is clarified with historical review what was the purpose of the legislator, when the original CCP of 1890 required the reciprocity by international treaties, and when later the reform act of 1926 required the simple reciprocity that is similarly provided in the current CCP. Second, this article treats the case law in Japan concerning the interpretation of reciprocity requirement after the reform of 1926 of the CCP. Third, this article focuses on the reciprocity between Japan and China and compares the Japanese practice with the German one that led to a different result. Last, it is concluded that the reciprocity requirement is contrary to the protection of property rights provided in Article 29 of the Constitution of Japan.

I. HISTORICAL REVIEW

Contrary to the current law, the CCP of 1890, Law No. 29 did not provide the recognition but only the enforcement of foreign judgments. According to this, the action for enforcement of a foreign judgment should be rejected, either when the finality of the judgment is not proved, or when the enforcement the judgment ordered is impossible under Japanese law, or when the foreign court did not have jurisdiction under Japanese law, or when the defendant who is a Japanese national did not appear in the proceedings, and the documents by which the proceedings were initiated was served neither in the state of the foreign court nor in Japan with judicial assistance, or when the reciprocity is not guaranteed by international treaties (Article 515 of the 1890 CCP). This provision was modeled on the German Code of Civil Procedure (*Zivilprozessordnung*) of 1877, although

[1] Code of Civil Procedure (Minji soshô-hô), Law No. 109 of 1996 as last amended by Law No. 30 of 2012, available at http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=01&dn=1&yo=&ia=03&kn[]=%E3%81%BF&kana_x=18&kana_y=22&ky=&page=11 (last visited Mar. 20, 2018).

[2] Yasuhiro Okuda, *Recognition and Enforcement of Foreign Judgments in Japan*, 15 Yearbook of Private International Law, 411–420 (2013/2014), including an English translation of the relevant legal texts.

the latter requires no international treaty for reciprocity.[3] The cause of the difference between Japan and Germany cannot be clarified, since the minutes of the meetings on Article 515 of the 1890 CCP are missing.[4] However, according to the commentary on the 1890 CCP, foreign judgments could be enforced only on the basis of comity between both states, and the reciprocity requirement by an international treaty should be justified by their sovereignty.[5]

The CCP of 1890 was widely amended by the Law of 1926, No. 61 that newly provided the recognition of foreign judgments in Article 200 and did not require any international treaty for reciprocity. However, according to the minutes of the meeting Yoshimasa Matsuoka, a member of the drafting committee, advocated the deletion of the words "by international treaties" just as amendment for drafting.[6] The reasons paper of the government similarly stated that the requirements for recognition of foreign judgments provided in Article 200 of the 1926 CCP were in fact the same as in Article 515 of the 1890 CCP for enforcement of foreign judgments.[7] Further, Kakusaburō Yamauchi, a member of the drafting committee, argued in his book published just after entry into force of the reform act that reciprocity should be in principle ensured by diplomatic negotiations, because otherwise could arise the problem of which state should first recognize the judgment of another state.[8]

Contrary to this, Yoshimasa Matsuoka gave a different opinion in his book of 1924 concerning the draft of the reform act, in which the words "by international treaties" were

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[3] Zivilprozessordnung, Law of 30 January 1877, *RGBl.* 1877, 83, § 661 Para. 2 No. 5. A Japanese translation of § 661 of German CCP is cited in: Hiroyuki Matsumoto & Kazuyuki Tokuda eds. *Minji soshô-hô, Meiji-hen 2, Tehyôsôan II, Nihon rippô shiryô zenshû 192* (CCP, Book of the Meiji Era, Issue 2, Techow's Draft II, Collection of Materials of Japanese Laws, Vol. 192), Shinzansha (Tokyo), at 516–517 (2008).

[4] Hiroyuki Matsumoto & Kazuyuki Tokuda eds. *Minji soshô-hô, Meiji 23-nen 3, Nihon rippô shiryô zenshû 196* (CCP, Meiji Era 23, Issue 3, Collection of Materials of Japanese Laws, Vol. 196), Shinzansha (Tokyo), at 71 (2014).

[5] Yasunao Honda & Nobuyuki Imamura, *Minji soshô-hôchûkai, dai 3 bunsatsu* (CCP Commentary, Vol. 3), Hakubunsha (Tokyo), at 1568–1569 (1893); Sadayoshi Kameyama, *Minji soshô-hôseigi, Ge* (Correct Interpretation of the CCP, Vol. 2), Shinpô Chûshakusha (Tokyo), at 73 (1891). See also Misao Inoue, *Minji soshô-hô jutsugi* (Interpretation of the CCP), Okajima Kôjirô (Osaka), at 1367 (1891).

[6] Hiroyuki Matsumoto, Masanori Kôno & Kazuyuki Tokuda eds. *Minji soshô-hô, Taishôkaisei-hen 3, Nihon rippô shiryô zenshû 12* (CCP, Book of the Reform of Taishô Era, Issue 3, Collection of Materials of Japanese Laws, Vol. 12), Shinzansha (Tokyo), at 379–380 (1992).

[7] Shihôshô (Ministry of Justice) ed. *Minji soshô-hô chû kaisei hôritsu-an riyû-sho, Shihô-shô-zô-han* (Reason for Draft of the Reform Act of the CCP in the Version Owned by the Ministry of Justice), Shimizu Shoten (Tokyo), at 109 (1926).

[8] Kakusaburô Yamauchi, *Minji soshô-hô no kaisei, dai 1-kan* (Reform of the CCP, Vol. 1), Hôritsu Shinpôsha (Tokyo), at 316 (1929).

already deleted.[9] He argued as follows: Assuming that it is impossible to establish completely the same rules for enforcement of judgments between different states, reciprocity should be affirmed when the foreign judgments could be enforced under substantially the same requirements. When certain kinds of judgments such as those in which a national of the enforcing state lost the case or which concerned disputes in succession law are not enforceable, the reciprocity should not be affirmed at all. That is, the partial recognition (*Teilanerkennung*) is excluded. As to the state in which foreign judgments would be recognized as final and binding but not enforced, the reciprocity should be affirmed only for recognition. Hidefumi Egawa followed in his article of 1932 by and large Matsuoka's opinion but accepted partial recognition, so that he affirmed the reciprocity to the same kind of foreign judgments as those of Japanese judgments recognized in the foreign state.[10]

II. CASE LAW IN JAPAN

Japan has concluded no international treaty with any foreign state for mutual recognition of judgments with a few exceptions.[11] Thus, before the revised CCP of 1926 the recognition of foreign judgments in Japan was completely out of question.[12] However, in 1933 four years after entry into force of the reform act, the Imperial Supreme Court recognized a judgment of California.[13] Although the Court defined reciprocity as recognition of Japanese judgments under the same or milder requirements, it affirmed the reciprocity to California, whose requirements for recognition of foreign judgments were considerably different from those of Japan. Thus, it can be concluded that the Court required not strictly the same or milder but substantially the same requirements, like

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[9] Yoshimasa Matsuoka, *Kyôsei shikkô yôron, Jyôkan* (Introduction to Compulsory Execution, Vol. 1), Shimizu Shoten (Tokyo), at 488–491 (1924). Why he gave such opinion obviously different from one declared in the parliament is not clarified but could be explained as follows: On the one hand, he could not have expressed his own opinion in the parliament but that of the drafting committee; on the other hand, he could have changed his opinion after researching German law. In fact, he mentioned the German doctrine, according to which the reciprocity was affirmed by the actual case law. Id. at 491. See also Yoshimasa Matsuoka, *Shin Minji soshô-hô chûshaku* (Commentary of the New CCP, Vol. 6), Shimizu Shoten (Tokyo), at 1224–1226 (1939).

[10] Hidebumi Egawa, *Gaikoku hanketsu no shônin* (Recognition of Foreign Judgments), 50(11) Hôgaku kyôkai zasshi (Tokyo University), 61–63 (1932).

[11] See Art. 10 of the International Convention of 29 November 1969 on Civil Liability for Oil Pollution Damage as revised by the Protocol of 27 November 1992; Art. 8 of the International Convention of 18 December 1971 on the Establishment of an International Fund for Compensation for Oil Pollution Damage as revised by the Protocol of 16 May 2003. Japan acceded to both protocols in 1994. Convention No. 18 and No. 19 of 1995.

[12] See Nagasaki Imperial Court of Appeal of 11 March 1929, (2960) *Hôritsu shinbun* 4. The court justified the refusal of recognition of an American judgment rendered in Tianjin with simple reasoning that there was no international treaty for recognition of judgments between Japan and US.

[13] Imperial Supreme Court of 5 December 1933, (3670) *Hôritsu shinbun* 16.

Matsuoka and Egawa argued. Further, Nagayoshi Hosono argued in his book of 1934 that reciprocity should be affirmed when the rendering state recognized any Japanese judgment under similar and not more rigid requirements, including the case where the state required procedural conditions other than those of Article 200 of the 1926 CCP, but excluding the case where the state reviewed the merits of the judgment (*révision au fond*).[14] In conclusion, just after the amendment of CCP, Japanese courts and authors have liberally interpreted the reciprocity requirement.

The tendency toward the liberal interpretation continued after the end of World War II. The judgment of the Supreme Court of 1983 that recognized a Washington, D.C. judgment defined reciprocity as recognition of the same kind of Japanese judgments as those in question under substantially the same requirements.[15] The Supreme Court justified such an interpretation as follows. First, it can be hardly achieved in default of international treaties that the requirements for recognition of foreign judgments between Japan and other states were completely identical. Assuming that legal relations with foreign elements were well developed nowadays, inconsistent judgments in different states should be prevented as possible, as well as the efficient control of legal proceedings and the appropriate legal protection should be pursued. In these arguments will be found a change of fundamental idea regarding the reciprocity requirement. By liberal interpretation of the reciprocity requirement, the Supreme Court aimed to protect legal relations with foreign elements. Such an approach should be clearly distinguished from the doctrine before the end of World War II, according to which the enforcement of foreign judgments was based on comity between states and reciprocity was required according to the principle of state sovereignty.[16] Second, the judgment of the Supreme Court of 1983 amended the one of 1933, in which reciprocity was affirmed when the rendering state recognized Japanese judgments under same or milder requirements. From such interpretation could arise a mutual blockade of recognition of judgments, because Japanese requirements for recognition would be more rigid for the foreign state whose requirements were milder than those of Japan. The argument of the Supreme Court is not always precise. This is because the judgment of 1933, so liberally interpreted the reciprocity as to recognize the Californian judgment. Nevertheless, the reasoning of the Supreme Court that the liberal interpretation has nothing to do with whether the other state similarly interprets the reciprocity should be highly esteemed.

In this context, the judgment of the Nagoya District Court of 1987 should be noted.[17]

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[14] Nagayoshi Hosono, *Minji soshô-hôyôgi* (Introduction to the CCP), Vol. 4, Ganshôdô Shoten (Tokyo), at 227–228 (1934).

[15] Supreme Court of 7 June 1983, 37 (5) *Minshû* 611; (27) JAIL119.

[16] See the literature cited in note 4. Yoshimasa Matsuoka equally argued that the reciprocity was necessary for the protection of state interests. See Matsuoka, *Shin Minji soshô-hô chûshaku*, fn. 9 at 1223–1224.

[17] Nagoya District Court of 6 February 1987, (1236) *Hanji* 113.

According to the judgment, reciprocity between Japan and the Federal Republic of Germany (West Germany) then was affirmed, because the predominant doctrine of the West Germany that denied the reciprocity to Japan for lack of any precedent recognizing a German judgment was not well founded.[18] There are also other judgments of district courts that affirmed the reciprocity to European, American and Asian states.[19] Before the judgments denying the reciprocity between Japan and China, only two judgments denied the reciprocity to other states.

The judgment of the Tokyo District Court of 1960 concerns the reciprocity between Japan and Belgium. Under Belgian law of that time the judgment of a state with which an international treaty for recognition of judgments was concluded was recognized, when mutually similar requirements were satisfied. However, when no such treaty was concluded, the case should be reviewed on the merits.[20] Under the current Belgian Code of Private International Law such a *révision au fond* is excluded (Article 25, Paragraph 2), and other requirements for recognition of foreign judgments is equivalent to or even milder than those of Japan's CCP (Article 25, Paragraph 1),[21] so that the reciprocity between Japan and Belgium is now affirmed. The judgment of the Fukuoka District Court of 1982 denied the reciprocity between Japan and Hong Kong, because Japanese judgments were excluded from the application of Hong Kong's act for recognition of foreign judgments at that time.[22] However, the Supreme Court declared a different holding in its judgment of 1998 concerning the case before return of Hong Kong to China. According to this, Japanese monetary judgments were recognized under common law substantially on the same requirements as provided in Article 118 of Japan's CCP.[23]

III. RECIPROCITY TO CHINA

The Chinese Civil Procedure Law (*Minshi susongfa*, hereinafter referred to as "CPL") of 1991 was widely amended in 2007 and in 2012 but as to the requirements for recognition and enforcement of foreign judgments only a little (Article 268 of the 1991

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[18] Nowadays the reciprocity between Germany and Japan is also affirmed in Germany. See Stein-Jonas, *Kommentar zur Zivilprozessordnung* (20th edition), Vol. 7, § 328, Schumann VII/1988; Dieter Martiny, *Recognition and Enforcement of Foreign Judgments in Germany and Europe*, in Jürgen Basedow, Harald Baum & Yuko Nishitani eds. *Japanese and European Private International Law in Comparative Perspective*, Mohr Siebeck (Tübingen), at 397 (2008).

[19] See Tokyo District Court of 13 November 1967, 18(11–12) *Kaminshû* 1093 (Zürich); Tokyo District Court of 24 October 1970, (625) *Hanji* 66 (Hawaii); Tokyo District Court of 16 December 1991, (794) *Hanta* 246 (Nevada); Tokyo District Court of 14 January 1994, (1509) *Hanji* 96 (New York); Tokyo District Court of 31 January 1994, (1509) *Hanji* 101 (UK); Tokyo District Court of 19 January 2006, (1229) *Hanta* 334 (Singapore); Tokyo District Court of 12 February 2009, (2068) *Hanji* 95 (South Korea).

[20] Tokyo District Court of 20 July 1960, 11(7) *Kaminshû* 1522.

[21] Code de droit international privé, Law of 16 July 2004, *Moniteur*, 27 July 2004. The requirement is milder than in Japan, because the reciprocity is not required under Belgian law.

[22] Fukuoka District Court of 25 March 1982, 31(12) *JCA Journal* 2.

[23] Supreme Court of 28 April 1998, 52(3) *Minshû* 853; (42) *JAIL* 155.

CPL, Article 266 of the 2007 CPL, Article 282 of the 2012 CPL). Under these provisions foreign judgments are examined first either according to international treaties or the principle of reciprocity (*huhui yuanze*) and then to answer the question of whether they infringe neither the basic principle of Chinese law nor the sovereignty, the security or the social public interest of China. It seems that the requirements are substantially equivalent to those of Article 118 of Japan's CCP, so that the reciprocity between Japan and China should be affirmed. Nevertheless, the case law of both states gives rise to a mutual blockade of judgment recognition for lack of reciprocity.

The Chinese practice began with is reply (*pifu*) of the Supreme People's Court of 1995[24] that was given to an inquiry from the Higher People's Court of Liaoning as to the case of recognition and enforcement of a Japanese judgment. The reply declared that neither any international treaty nor the reciprocity for recognition of judgments between China and Japan existed. It is not clarified why the Supreme People's Court reached to the conclusion that not only any international treaty, but also the reciprocity was lacking. Nevertheless, the meaning of the reply of the Supreme People's Court was wrongly stretched by the judgments of the Osaka High Court of 2003 and of the Tokyo High Court of 2015.[25] According to the Osaka High Court the reply should be understood that China in the end requires a bilateral treaty for judicial assistance, although by logical interpretation the reply means that the reciprocity can be found also in default of any international treaty. According to the Tokyo High Court the practice of China that Japanese judgments should not be recognized for lack of the reciprocity has been well established, because the reply of the Supreme People's Court is mandatory for lower courts of China. However, the Tokyo High Court did not exactly distinguish various judicial interpretations of the Supreme People's Court. The judicial interpretation in the strict sense (*jieshi*) concerning the application of certain laws and legal problems as well as the provision (*guiding*) establishing a rule in accordance with the principle of legislation have legally binding effect, but the reply is given for concrete cases to a lower court's inquiry.[26] Thus the reply of the Supreme People's Court of 1995 is mandatory for the case pending before the Higher People's Court of Liaoning, but in future the Supreme People's Court can reach a different conclusion for other cases, although as of yet the

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[24] Reply of the Supreme People's Court of 26 June 1995, Min Ta Zi No. 17. See 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 143, 153–154 (2013); ZHANG Wenliang, *Recognition and Enforcement of Foreign Judgments in China: Rules, Practice and Strategies*, Kluwer Law International (Alphen aan den Rijn), at 96 (2014).

[25] Osaka High Court of 9 April 2003, (1841) *Hanji* 111; Tokyo High Court of 25 November 2015, *LEX/DB*25541803.

[26] Osamu Takamizawa, Ken Suzuki & Yukinori Udagawa, *Gendai chûgoku-hô nyûmon* (Introduction to Modern Chinese Law) (7th edition), Yûhikaku (Tokyo), at 110–111 (2016).

judgments of the First Intermediate People's Court of Shanghai of 2001 and of the Second Intermediate People's Court of Beijing of 2004 equally denied the reciprocity between China and Japan.[27]

The recognition of German judgments in China was dealt with in the same way at first.[28] The judgments of the Intermediate People's Court of Shanghai of 1996[29] and of the Second Intermediate People's Court of Beijing of 2002[30] refused the recognition of German judgments, because the reciprocity was not proved. Nevertheless, the Higher Regional Court of Berlin affirmed in a judgment of 2006 the reciprocity to China and recognized the judgment of a people's court of Wuxi of 2004.[31] The Court explained that, in default of international treaty between Germany and China for mutual recognition of judgments, the actual practice was decisive. In such a case, the one state should begin with recognition before the other state would follow, otherwise mutual recognition could be excluded. Thus, to prevent the blockade of mutual recognition in default of any international treaty, it should be considered whether the following by the other can be expected. That is, it will do if it is expected that the recognition of Chinese judgments by German courts will result in the recognition of German judgments in China.[32]

Indeed, the Higher Regional Court of Berlin was not aware of the judgments of the Intermediate People's Court of Shanghai of 1996 and of the Second Intermediate People's Court of Beijing of 2002, both of which refused the recognition of German judgments. However, the judgment of the Higher Regional Court of Berlin caused the result that Chinese courts now affirm the reciprocity to Germany. First, although the judgment of the Second Intermediate People's Court of Beijing of 2011 refused the recognition of a

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[27] See ZHANG, *Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention to Both the "Due Service Requirement" and the "Principle of Reciprocity"*, fn. 24 at 155; ZHANG, *Recognition and Enforcement of Foreign Judgments in China: Rules, Practice and Strategies*, fn. 24 at 107.

[28] However, the reciprocity is not required for certain cases in Germany and China. After the reform of 1976 of the German CCP, that applies to claims for non-property rights, for which a German court has no jurisdiction under German law (Art. 328, Para. 2 of the German CCP). Also in China that applies since 1991 to divorce decisions according to some judicial interpretations of the Supreme People's Court. See GUO Yujun, *Chûgoku shôgai kazoku-hô ni okeru tetsuzuki-hô-jô no mondai* (Procedural Problems in Chinese Family Law with Foreign Elements), (315) Ritsumeikan Hôgaku, 310–312 (2007). Nowadays, see also Art. 544, Para. 1 of Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China of January 30, 2015.

[29] See ZHANG, *Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention to Both the "Due Service Requirement" and the "Principle of Reciprocity"*, fn. 24 at 154–155; ZHANG, *Recognition and Enforcement of Foreign Judgments in China: Rules, Practice and Strategies*, fn. 24 at 98.

[30] Axel Neelmeier, *Verbürgung der Gegenseitigkeit zwischen Deutschland und China?* (Guaranty of Reciprocity between Germany and China?), 14(3) ZChinR 287, 289 (2007).

[31] KG, Beschluss vom 18.05.2006, *NJW-RR* 1438 (2007).

[32] See also OLG Düsseldorf, Beschluss vom 22.03.2007, *OLG Report Hamm/Düsseldorf/Köln* 569 (2007).

German judgment, this was not for lack of reciprocity but because of the service of the judgment from the German court by mail to the defendant in China. The Chinese government declared in accordance with the Hague Service Convention to refuse such service of documents by mail.[33] Although the Second Intermediate People's Court of Beijing was silent about the judgment of the Higher Regional Court of Berlin the German plaintiff brought before the Chinese court, it can be supposed that the Chinese court implicitly affirmed the reciprocity to Germany.[34] According to the legal text as mentioned above, Chinese courts firstly examine the reciprocity and only if it is affirmed, then consider the violation of public policy (Article 266 of the 2007 CPL, Article 282 of the 2012 CPL). In the case in question, the service of the German judgment by mail was incompatible with the public policy of China.[35] After all the judgment of the Intermediate People's Court of Wuhan of 2013 declared that the decision of the German court initiating insolvency proceedings was compatible with the public policy of China and should be recognized in accordance with the principle of reciprocity, because the Higher Regional Court of Berlin had recognized a Chinese judgment.[36]

Further, the Intermediate People's Court of Nanjing in its decision of 2016 recognized and enforced a Singaporean judgment.[37] The plaintiff Swiss company brought a suit against the defendant Chinese company before the High Court of Singapore according to the choice of court agreement between the parties, seeking payment of the amount of US$ 350,000 for damages. Despite of the due service of process, the defendant did not appear in the hearing, so that a judgment by default was rendered in favor of the plaintiff. Since the defendant's property was situated only in China, the plaintiff applied to the Intermediate People's Court of Nanjing for recognition and enforcement of the Singaporean judgment. The court accepted the plaintiff's application in accordance with the principle of reciprocity, above all considering that the Singaporean court had recognized and enforced a Chinese judgment before.[38]

From the above it will be concluded that Chinese courts affirm the reciprocity, when

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[33] The Second Intermediate People's Court of Beijing of February 24, 2011, (2010), Er Zhong Min Te Zi No. 13890. For this judgment, see also ZHANG, *Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention to Both the "Due Service Requirement" and the "Principle of Reciprocity"*, fn. 24 at 164–168.

[34] See also ZHANG, *Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention to Both the "Due Service Requirement" and the "Principle of Reciprocity"*, fn. 24 at 166.

[35] See Reply of the Supreme People's Court of March 6, 2014, cited by HE Qisheng, *Chronology of Practice: Chinese Practice in Private International Law in 2014*, 14 Chinese Journal of International Law 801, 828–830 (2015). The reply emphasizes that the service by mail from abroad to the defendant in China infringes the judicial sovereignty of China.

[36] Intermediate People's Court of Wuhan of November 26, 2013, (2012), Wuhan Zhong Minshang Wai Chu ZiÈNo. 00016. The author of this article thanks Prof. Dr. GUO Yujun (Wuhan University), Dr. Sascha Seehaus (Lawyer in Diez) and Prof. Dr. ZHANG Wenliang (Renmin University) for valuable information concerning the judgment.

[37] Intermediate People's Court of Nanjing of December 9, 2016, (2016) Su 01 Xie Wai Ren No. 3.

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

the plaintiff proves the case law of the rendering state recognizing a Chinese judgment. However, that leads to the result that the recognition of a Chinese judgment must always go ahead. Japanese courts considered such Chinese practice as insufficient for reciprocity from the Japanese perspective.[39] That gives rise to a mutual blockade of recognition of judgments between Japan and China. From the German–Chinese practice it can be expected that Chinese courts will affirm the reciprocity between China and Japan when a precedent of the recognition of a Chinese judgment by a Japanese court is proved.[40] Further, considering the judgment of the Supreme Court of 1983 and other Japanese judgments, it will be reasonable to affirm the reciprocity between Japan and China, because the requirements for recognition of foreign judgments in China is substantially equivalent to Article 118 of Japan's CCP. Indeed, the reciprocity requirement is not exactly the same, since a proof of precedent recognizing a Chinese judgment is required on the Chinese side, but such a difference is not so serious as the reciprocity by international treaties or the *révision au fond*. Therefore, the judgments of the Osaka High Court of 2003 and of the Tokyo High Court of 2015 should be found contrary to the case law of other Japanese courts.

IV. UNCONSTITUTIONALITY

The judgment of the Tokyo High Court of 2015 concerns a case in which the defendant author wrote in his book published in 1998 by the defendant publisher that the plaintiff Chinese woman known as a victim of the Nanjing Massacre of 1937 was not a victim in truth. In 2006 the Chinese court ordered the defendants to pay damages for pain and suffering because of defamation to the plaintiff. The defendant's property was located only in Japan, but the recognition and enforcement of the judgment was refused there. The plaintiff has no chance to bring a new action in Japan any longer because the statute of limitations had run out. From that occurs a constitutional problem of whether the reciprocity requirement is compatible with the protection of property rights (Article 29 of

[39] See also from German perspective, Neelmeier, fn. 30 at 289; Susanne Deißner, *Anerkennung gerichtlicher Entscheidungen im deutsch-chinesischen Rechtsverkehr und Wirksamkeit von Schiedsabreden nach chinesischem Recht* (Recognition of Court Judgments in the German and Chinese Legal Relations as well as Effectiveness of Arbitration Awards under Chinese Law), IPRax 565, 568–569 (2011).

[40] Chinese judgments are recognized not only in Germany and Singapore, but also in South Korea and California. See Sung Hoon Lee, *Foreign Judgment Recognition and Enforcement System of Korea*, 6(1) Journal of Korean Law, 135 (2006); *Hubei Gezhouba Sanlian Indus. Co. v. Robinson Helicopter Co.*, No. 2:06-cv-01798-FMC-SSx, 2009 *WL* 2190187, (C.D. Cal. 22 July 2009), aff'd, 425 *F. App'x* 580 (9th Cir. 2011); HE Qisheng, *The Recognition and Enforcement of Foreign Judgments between the United States and China: A Study of Sanlian v. Robinson*, 6 Tsinghua China Law Review, 24–44 (2013). Thus, the judgments rendered in South Korea and California can be recognized in China. A California judgment was recognized by the decision of the Intermediate People's Court of Wuhan of June 30, 2017, (2015), Wuhan Zhong Minshang Wai Chu Zi No. 00026.

Constitution of Japan).[41] According to this provision property rights should be protected in principle, and the regulation of property rights by law must conform to the public welfare (*kôkyô no fukushi*). According to the case law of the Supreme Court the question of whether the regulation is conformable to the public welfare should be decided considering various circumstances such as the purpose, necessity and contents of the regulation, the kind and nature of the property rights as well as the degree of restricting the property rights by the regulation.[42]

The judgment of a Japanese court is enforceable only when it is final and binding, but a foreign judgment enforceable in Japan, when a Japanese judgment for the enforcement of the foreign judgment is final and binding (Article 22, No. 1 and No. 6 of the Civil Execution Act)[43]. An action for the judgment to enforce a foreign judgment should be rejected, either if the finality of the foreign judgment is not proved, or any of the requirements for recognition under Article 118 of the CCP are not satisfied (Article 24, Paragraph 3 of the Civil Execution Act). This rule is applicable to both Japanese and foreigners. The claim confirmed by a judgment should be protected as property rights under Article 29 of the Constitution. Accordingly, the exclusion of the recognition of foreign judgments is unconstitutional, if any of the requirements of Article 118 of the CCP is incompatible with the public welfare.

The constitutionality of the reciprocity requirement is questionable comparing with the other requirements of Article 118 of the CCP. The examination of jurisdiction of the rendering state and of the service of process aims to protect defendants from foreign judgments that result from proceedings at inappropriate forum or those in default of opportunity of defense. The compatibility with the public policy is useful to protect defendants from foreign judgments that are prejudicial to the fundamental principles of Japanese law. Contrary to this, the reciprocity requirement aims to retaliate for the refusal of recognition of Japanese judgments, with which the parties of the foreign judgment have no concern. When the enforcement of the foreign judgment that satisfied the other requirements of Article 118 of the CCP[44] is refused, the plaintiff suffers a disadvantage

[41] Also in Germany the constitutionality of the reciprocity requirement is discussed, but from view of the equal treatment. See Hans-Jürgen Puttfarken, *Zur Anerkennung und Vollstreckung ausländischer Urteile deutscher Kläger — verfassungswidrige Gegenseitigkeit* (On the Recognition and Enforcement of Foreign Judgments for German Plaintiffs — Unconstitutional Reciprocity Requirement), RIW 149–151 (1976).

[42] Supreme Court en banc of April 22, 1987, 41(3) *Minshû* 408; Supreme Court en banc of February 13, 2002, 56(2) *Minshû* 331.

[43] Civil Execution Act (Minji shikkô-hô), Law No. 4 of 1979 as last amended by Law No. 96 of 2013, available at http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=01&dn=1&yo=&ia=03&kn[]=%E3%81%BF&kana_x=18&kana_y=22&ky=&page=6 (last visited Mar. 20, 2018).

[44] In the case of the judgment of the Tokyo High Court of 2015, the jurisdiction of the rendering state should be affirmed, because the result of defamation occurred in China, and the document by which the proceedings were initiated was duly served to the defendant in Japan through judicial assistance. However, the damages for pain and suffering the Chinese court ordered amounted to RMB 800,000 (about € 100,000). Although this amount should be reduced to the normal standard of Japan, the Chinese judgment satisfied the requirements for recognition including the reciprocity in other respects.

and the defendant profits from the other proceeding not related to both parties. The plaintiff is not responsible for the refusal of recognition of Japanese judgments in the foreign state.[45] He is not entitled to change the requirements of another state for recognition of foreign judgments. Also in general the reciprocity requirement should not be used as a means of threat.[46] The reciprocity requirement will result in a mutual blockade of recognition of judgments as shown in the Japanese and Chinese case law. Thus, the reciprocity as a requirement for recognition of foreign judgments is manifestly incompatible with the public welfare.

CONCLUSION

The requirements for recognition of foreign judgments is differently provided for in each state. Thus, the Supreme Court defined the reciprocity so in a judgment of 1983 that Japanese judgments should be recognized under the substantially same requirements. However, with such liberal interpretation the reciprocity is also denied, when either the reciprocity by international treaties or the *révision au fond* is required in the rendering state. From that occurs a dilemma for the Supreme Court that tried to protect the legal relations with foreign elements under *lex lata*. Further, it is sometimes difficult to decide whether the foreign requirements are substantially same as those of Japan. That is the Chinese case law which requires a precedent of the rendering state that has already recognized a Chinese judgment. For legal certainty the Japanese parliament should delete the reciprocity requirement, or the Supreme Court should declare the requirement as unconstitutional.[47]

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[45] As to the same argument for the Swiss Code of Private International Law of 1987 that abolished the reciprocity requirement, see Max Keller & Kurt Siehr, *Allgemeine Lehren des internationalen Privatrechts* (General Rules of Private International Law), Schulthess (Zürich), at 624 (1986); Andreas Bucher ed. *Loi sur le droit international privé, Convention de Lugano (Commentaire romand)* (Law on the Private International Law, Lugano Convention [French–Swiss Commentary]), Helbing Lichtenhahn (Basel), at 339 (2011).

[46] It is said that the reason why the French courts renounced the *révision au fond* was the refusal of recognition of French judgments in Germany for lack of reciprocity. See Yasushi Nakanishi, *Gaikoku hanketsu no shônin shikkô ni okeru révision au fond no kinshi ni tsuite* (Prohibition of *Révision au fond* for Recognition and Enforcement of Foreign Judgments), 135(2) Hôgaku Ronsô (Kyoto University) 1, 8 (1994). However, that was earlier than 50 years ago, and since then no similar examples cannot be found.

[47] The author of this article wrote an expert opinion for the case of the Tokyo High Court of 2015 in the plaintiff's favor and argued that first the interpretation of the reciprocity requirement by the High Court was incompatible with the judgment of the Supreme Court of 1983, and second the requirement for recognition of foreign judgments was unconstitutional anyway. However, the Supreme Court rejected the appeal by a summary judgment of April 20, 2016.