

# RECOGNITION & ENFORCEMENT of Foreign Judgment & Awards in CHINA

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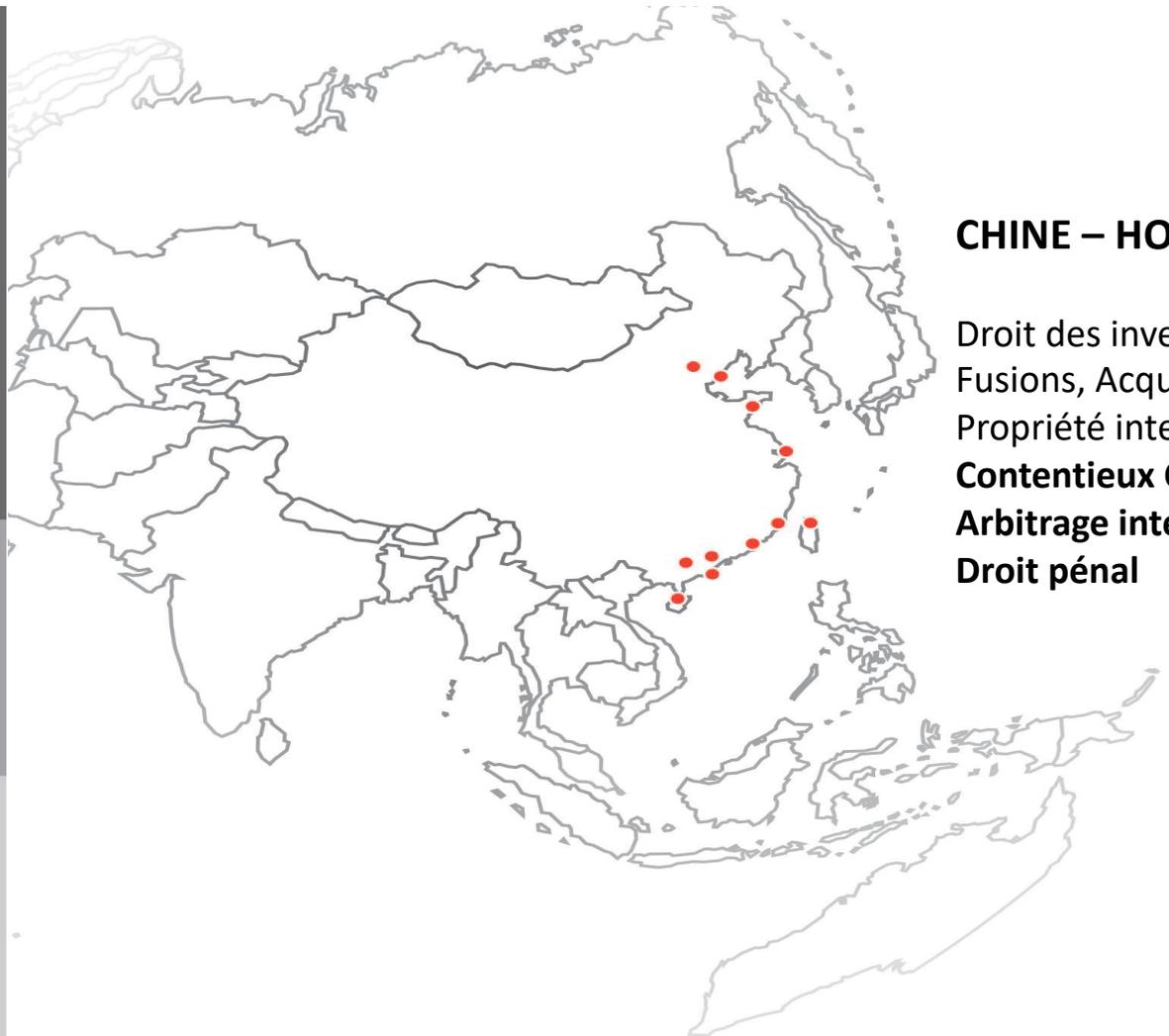
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## CHINE – HONG KONG – TAIWAN

Droit des investissements étrangers  
Fusions, Acquisitions, Restructurations  
Propriété intellectuelle  
**Contentieux Civil & Commercial**  
**Arbitrage international**  
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## ASIALLIANS INTERNATIONAL LITIGATION PRACTICE

For over 25 years the founding partners of ASIALLIANS have advised their clients in Asia and developed strong expertise in every field of local practices.

Our arbitration and enforcement experts have been working in the field of enforcement gathering experience with awards from various countries issued under various arbitration regimes and against Chinese defendants from various regions in China.

We have gathered a wealth of theoretical and practical know-how that will optimize your chances of getting your judgment and award enforced.

In China, ASIALLIANS offers unique services integrating the resources of Wang Jing & Co, a PRC law firm with a team of more than 20 partners and 100 lawyers across the country to appear before any Chinese court from the lower basic people's court towards the Supreme People's Court.

A network of 10 offices and teams, not including our offices in Hong Kong and Taipei, are ready to bring cases before the appropriate judicial institution.

## Report of the Supreme People's Court about the Enforcement Difficulty.

Justice Zhou Qiang, 24 October 2018 (Sixth Session of the Standing Committee of the 13th National People's Congress)

- (1) The court commits corruption during the enforcement.
- (2) The personnel and equipment of the court's enforcement agency are insufficient.
- (3) The process of court enforcement is not sound, and the court's management on enforcement is insufficient or even disordered.
- (4) The social credit system is not sound, which leads to the dishonest judgment debtors not being subject to effective credit discipline.
- (5) The parties have disputes over the content of the effective legal instrument, which hinders the enforcement;
- (6) The types of property subject to execution are diverse (such as financial assets, intangible assets, etc.), and the court has not yet determined how to execute these properties.
- (7) The laws related to enforcement are not sound and lack of feasibility;
- (8) Many enforcement cases involve a large number of stakeholders;
- (9) The judgment debtors of some cases completely lose their performance capacity and there is no property available to be executed, and cases like these are called “unenforceable” cases.



The recognition and enforcement of foreign decisions in China must therefore be assessed in a general context where Chinese (domestic) decisions are difficult to enforce in China.

## Legal framework

- ✓ Civil Procedure Law (CPL).
- ✓ Interpretation of the Supreme People's Court (SPC) on the Application of the CPL.
- ✓ Provisions of the SPC on Several Issues regarding Enforcement (for Trial Implementation).
- ✓ Arbitration Law & Interpretation of the SPC on the Application of Arbitration Law
  - SPC Arrangement in respect of Mutual Acknowledgement and Enforcement of Civil and Commercial Judgments under Consensual Jurisdiction by the Courts in the Mainland and the Hong Kong Special Administrative Region (New Mainland-Hong Kong Arrangement).
  - SPC Mainland-Macau Arrangement.
  - SPC Directives in respect of the Acknowledgment and Enforcement of the Civil Judgments Rendered by Courts in Taiwan Region effective on 1 July 2015 (Mainland-Taiwan Directive).
  - SPC interpretations in respect of Hong Kong, Macau or Taiwan Awards.
- HCCH Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters 1965 (Hague Service Convention), with a reservation on Articles 8, 10, 15 and 16.
- HCCH Convention on Choice of Court Agreements 2005 (Hague Choice of Court Convention).
- Bilateral treaties on the provision of judicial assistance that include provisions on the recognition and enforcement of judgments.
- UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) with commercial and reciprocity reservations.
- SPC Notice on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China.

## Legal framework

### As for France:

Treaty Between the People's Republic of China and the French Republic on Judicial Assistance in Civil and Commercial Matters:

- ✓ Inclusion of Judgment Recognition and Enforcement Clauses
- ✓ Entry into force: 8 Feb. 1988

& precedents:

- In civil and commercial cases;
- Including family matters;
- Including enforceable judgments (but not final);
- Including provisionnal measures;
- ... and without detailing existing cooperation for criminal procedures.

The Chinese courts cannot review the merits of the underlying dispute in recognition and enforcement proceedings.

... unless otherwise required...

CHINA's legislation and judicial practice adopt a formalist review mode for foreign civil and commercial judgments.

The People's Court judges according to the recognition requirements stipulated by law,

and does not substantially review whether the judgment of the court of the requesting country determines the facts and whether the law is properly implemented.

## Article 281 of China (PRC) Civil Procedure Law

If a legally effective judgment or ruling made by a foreign court needs to be recognized and executed by a court of the People's Republic of China,

the parties concerned may directly apply to the Intermediate People's Court with jurisdiction of the People's Republic of China for recognition and execution,

or the foreign court may request the People's Court to recognize and execute it in accordance with the provisions of international treaties concluded or acceded to by the country and the People's Republic of China,

or in accordance with the principle of reciprocity.”

## Article 282 of China (PRC) Civil Procedure Law

For any legally effective judgment and ruling made by a foreign court under application or request for recognition and enforcement,

the People's Court shall determine its effectiveness after being reviewed in accordance with the international treaty signed or participated in by China or the principle of reciprocity to be considered without violation of the basic principle of Chinese law or national sovereignty, security and social public interest;

the enforcement order shall be issued if enforcement is needed, and such enforcement shall be in line with relevant regulations of the law.

No recognition and enforcement will be given if violating the basic principle of Chinese law or national sovereignty, security and social public interest. “

## 281 + 282 =

Civil Procedure Law only stipulates in principle the recognition and enforcement system of foreign civil and commercial judgments.

It is not clear what kind of review mode to adopt, and depends specifically on the provisions of international treaties and the definition of the principle of reciprocity.

Judging from the provisions of the bilateral treaties on judicial assistance in civil and commercial matters signed by China, the conditions for recognition and enforcement mainly include:

- (1) the judgment of the foreign court has entered into force or is enforceable;
- (2) the foreign court making the judgment has jurisdiction over the case;
- (3) the litigation rights of the losing party are protected;
- (4) there are no conflicting judgments;
- (5) the judgment of the foreign court was not obtained through fraud;
- (6) the recognition and enforcement of the foreign civil and commercial judgments does not violate the basic principles of the law or the sovereignty, security and public interests of the State;
- (7) Etc.

In judicial practice, the conditions stipulated in Article 12 of the Regulations of Supreme People's Court on Chinese Citizens' Application for Recognition of Divorce Judgment Procedures in Foreign Courts also include the above conditions.

The Chinese courts shall answer 3 questions in recognition and enforcement proceedings.

... among others...

Three substantive legal issues in the practice of recognition and enforcement system for foreign civil and commercial judgments / awards in China:

- ✓ jurisdiction review,
- ✓ due process,
- ✓ principle of reciprocity.



JUDGMENT?

An inclusive definition...

Let's include arbitration awards

A strict and traditional approach in China for Chinese judgments.

### Domestic Judgments

The term "judgment" refers to the court's determination of the substantive issues of a case and its adjudication of the claims brought to it.

Courts can also issue rulings, orders, and decisions and so on. (Domestic) Judgments must be **final and conclusive** to be enforceable.

Certain other types of rulings and orders are also enforceable, for example:

- Rulings to freeze a defendant's assets pending judgment;
- Rulings to realise debt collateral made under section 7, Chapter 15 of the CPL;
- Payment orders made under Chapter 17 of the CPL.

In an international context, judgments can include all decisions given by a court.

### Foreign Judgments

The following foreign judgments are generally enforceable:

- ✓ Money judgments;
- ✓ Judgments ordering or prohibiting the doing of acts/injunctions;
- ✓ Default judgments, enforceable subject to certain condition.

### Pending/evolving issues:

- Declaratory judgments, which do not normally contain any matters for enforcement but can be recognised as having preclusive effect;
- judgments made without notice (ex parte);
- foreign decisions granting provisional measures;
- foreign enforcement orders/(pre-judgment) attachment orders.



JURISDICTION

No China exclusive jurisdiction + No violated jurisdiction clause + No concurrent proceeding  
=  
No difficulty.

## The Chinese courts shall review jurisdiction of foreign courts

### Indirect jurisdiction

Proper jurisdiction is a prerequisite for China's courts to carry out litigation activities and make effective judgments.

When handling cases of application for recognition and enforcement of judgments of foreign courts (and arbitration awards), domestic courts examine whether foreign courts/tribunals have jurisdiction.

This is not only a procedural rule for judging whether foreign courts have jurisdiction or not, but also a prerequisite for recognition and enforcement of judgments of foreign courts.

China's Civil Procedure Law does not stipulate the indirect jurisdiction.

### Indirect jurisdiction

However, since Article 281 of the Civil Procedure Law stipulates that People's Courts can only recognize and execute foreign judgments in civil and commercial matters based on treaties or the principle of reciprocity, and international treaties have provisions on issues of indirect jurisdiction, if there are international treaties, the provisions of international treaties can be directly applied.

For countries that have not established treaty relations with China regarding the recognition and enforcement of judgments, as the general rule requires that they have indirect jurisdiction over the recognition and enforcement of foreign judgments, the People's Court is also obliged to examine whether the court of the country that made the judgment has appropriate jurisdiction over the case.

Which law or standard is applicable to judge whether the foreign court has jurisdiction over the case?

### Indirect jurisdiction

In practice, the most controversial issue is the legal application standard for judging indirect jurisdiction, i.e. which law or standard is applicable to judge whether the foreign court has jurisdiction over the case.

In the bilateral civil and commercial judicial assistance treaties signed with different countries, China has adopted different judgment standards, which are roughly divided into three modes:

- ✓ according to the laws of the requested country, that is, the standards of domestic laws;
- ✓ the provisions of the exclusive jurisdiction of the law of the requested state shall not be violated;
- ✓ specific criteria for the courts of the requesting state to have indirect jurisdiction by way of enumeration, and the exclusive jurisdiction of the requested state shall not be violated.

## China's exclusive jurisdiction:

### Indirect jurisdiction

The foreign civil and commercial judgment shall not violate China's exclusive jurisdiction:

- Article 266 of China's Civil Procedure Law stipulates, “ the People’s Court of the People’s Republic of China shall have jurisdiction over lawsuits brought over disputes arising from the performance of Sino-foreign joint ventures, Sino-foreign cooperative ventures and Sino-foreign cooperative **exploration and exploitation of natural resources** contracts in the People’s Republic of China.”
- Article 33 of the Civil Procedure Law provides exclusive jurisdiction over lawsuits brought in connection with **real estate disputes**, lawsuits brought in connection with disputes arising from **port operations**, and lawsuits brought in connection with disputes over **inheritance**.

## Agreement entered into by the relevant parties

### Indirect jurisdiction

The jurisdiction of foreign courts agreed by the parties involved must comply with the law. The Civil Procedure Law of China stipulates two forms of agreement:

- one is the express agreement jurisdiction stipulated in Article 34, which stipulates that the parties to a contract or other property rights and interests must have actual contact with the dispute in choosing a court by written agreement;
- the second is the implied jurisdiction stipulated in Article 127, that is, the parties did not raise any objection to jurisdiction and responded to the lawsuit.

In addition, Article 31 of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law (hereinafter referred to as Interpretation of the Civil Procedure Law) stipulates, "If the operator uses the standard terms to enter into a jurisdiction agreement with the consumer and fails to draw the consumer's attention in a reasonable way, the People's Court shall support the consumer's assertion that the jurisdiction agreement is invalid. "

# No concurrent proceedings (lis pendens rule)

## Indirect jurisdiction

There are no parallel proceedings settled for the same dispute in China.

Article 533, paragraph 1, of the Interpretation of the Civil Procedure Law stipulates, “ in cases where the courts of the People’s Republic of China and foreign courts both have jurisdiction, if one party brings a lawsuit to a foreign court and the other party brings a lawsuit to a court of the People’s Republic of China, the People’s Court may accept the case. After the decision, the application or the parties to a foreign court requesting the People’s Court to recognize and enforce the judgment or ruling rendered by a foreign court for the case shall not be granted; Except as otherwise provided in international treaties concluded or acceded to by both parties.”

## Arbitration clause...

### Indirect jurisdiction

The parties involved fail to reach a written arbitration agreement on the same dispute.

According to the principle that effective arbitration agreements established in China's Civil Procedure Law and Arbitration Law excludes the jurisdiction of the court, if the parties reach a written arbitration agreement on the dispute, they shall not bring a lawsuit to the court.

Therefore, in judging the indirect jurisdiction of foreign courts, attention should also be paid to examining whether the dispute is bound by the arbitration clause.

Divorce... to arise.

### Indirect jurisdiction

Finally, it should be pointed out that Article 12, paragraph 2, of the Provisions of the Supreme People's Court on the Procedural Issues Concerning Application by Chinese Citizens for Recognition of Divorce Judgments Foreign Courts stipulates that one of the reasons for refusing to recognize and execute the judgment is when " the foreign court that made the judgment has no jurisdiction over the case".

Although it has not clearly determined the indirect jurisdiction of the foreign court according to which law, the policy objective of recognizing divorce judgments is to minimize conflicts between different countries and maintain the stability of marriage relations.

Therefore, it should be properly judged according to the laws of the country where the judgment was made.



DUE PROCESS

Notice ... Notice ... Notice ...

Notice ... Notice ... Notice ...

## Due process guarantee

Due process means that the judgments of foreign courts are obtained through fair and effective trial procedures and fully protect the litigation rights of both parties.

Due process guarantees include the right of the parties to receive appropriate notification of their participation in the proceedings and the right to state their case.

Notice ... Notice ... Notice ...

### Due process guarantee

Article 543 of the Interpretation of the Civil Procedure Law stipulates, “If the judgment or ruling of a foreign court is a judgment or ruling in absentia, the applicant shall also submit the supporting documents legally summoned by the foreign court, except where the judgment or ruling has clearly stated this. Any international treaty concluded or acceded to by the People’s Republic of China that provides for the submission of documents shall be handled in accordance with the provisions.”

In the Provision of the Supreme People’s Court on Issues Concerning the Acceptance of Applications for Recognition of Divorce Judgment Cases in Foreign Courts by the People’s Court, lists "the judgment was made in the absence of the defendant and without legal summons “as a case of non-recognition, and requires Chinese citizens to apply for recognition of divorce judgments made by foreign courts in their absence, and to submit to the People’s Court at the same time relevant supporting documents that the foreign court that made the judgment has legally summoned him to appear in court.

Notice ... Notice ... Notice ...

### Due process guarantee

In judicial practice, when the People's Court examines whether foreign civil and commercial judgments protect the due process rights of the parties concerned, the following issues need to be clarified:

Legal standard for judging legal service.

Since bilateral mutual judicial assistance agreements signed by China basically stipulate whether or not it constitutes a legal subpoena according to the law of the country where the judgment is made, the judgment of foreign courts that have no treaty relationship with China should also judge whether or not it is legally served according to the law of the country where the judgment is made, but should not be lower than the minimum standard of legal subpoena required by the law of China.

Notice ... Notice ... Notice ...

### Due process guarantee

Service to China shall not violate the mandatory provisions of China's Civil Procedure Law on service.

According to the provisions of Article 277 of the Civil Procedure Law of our country, requesting and providing judicial assistance should be carried out according to treaties or diplomatic channels.

When China joined the Hague Service Convention, it also explicitly opposed mail service.

However, according to the provisions of the Civil Procedure Law of our country, if there is a mutual judicial assistance treaty relationship between parties serving judicial documents in the territory of our country, it should be carried out in accordance with the ways stipulated in the treaty; in the absence of such treaties, they shall be effected through diplomatic channels; our country's laws clearly oppose foreign courts to send judicial documents directly to parties located in our country's territory by mail or other means.

Notice ... Notice ... Notice ...

### Due process guarantee

In judicial practice, when the People's Court examines whether foreign civil and commercial judgments protect the due process rights of the parties concerned, the following issues need to be clarified:

Issue of whether legal summons should include public notices.

Article 267 of our country's Civil Procedure Law stipulates eight service methods. When other service methods are exhausted and cannot be served, public notice service can be used to prepare service. Therefore, we tend to believe that if the laws of the country where the judgment is made allow the service of public notices and the applicable conditions are basically similar to those of China, the legality of the service of public notices should be recognized.

Notice ... Notice ... Notice ...

### Due process guarantee

In judicial practice, when the People's Court examines whether foreign civil and commercial judgments protect the due process rights of the parties concerned, the following issues need to be clarified:

Translation of litigation documents (i.e. whether the foreign court should attach the corresponding translation according to the nationality of the losing defendant).

Finally, even if the foreign court that issued the judgment has defects in the subpoena procedure of the parties, the parties have already appeared in court to answer the lawsuit, that is, they already have the actual opportunity to reply fully. Under such circumstances, they can no longer refuse to recognize and execute the foreign judgment on the grounds that they have not been legally summoned. That is to say, both the absence of the losing party and the absence of legal summons must be met, and the losing party is deemed to have no guarantee of its litigation rights.



RECIPROCITY

Obtaining reciprocity without demanding it too much...

## An evolving requirement

### Reciprocity

The issue of how to understand and apply the principle of reciprocity has always been the most controversial and there has been no final conclusion for a long time regarding the non-treaty relationship between the sentencing-making country and China.

A strict (Japanese) ruling...

## Understanding and Application of Principle of Reciprocity

Articles 281 and 282 of China's Civil Procedure Law both stipulate the principle of reciprocity as a precondition for the recognition and enforcement of foreign court judgments, but the law does not clearly explain the principle of reciprocity.

In the Case on the Application of Gomi Akira (A Japanese Citizen) to Chinese Court for Recognition and Enforcement of Japanese Judicial Decision, the Supreme People's Court issued a Reply in June 1995 on whether the People's Court of our country should recognize and enforce the judgment of Japanese court with creditor's rights and debts.

China and Japan have not concluded or participated in international treaties that mutually recognize and implement the judgment and ruling of the court and have not established corresponding reciprocal relations.

According to the provisions of the civil procedure law, the People's Court should not recognize and enforce the judgment of the Japanese court.

Caresser un cercle...

## Understanding and Application of Principle of Reciprocity

This not only makes foreign civil and commercial judgments difficult to be recognized and enforced by our courts, but also easily leads to the phenomenon that foreign courts refuse to recognize China court judgments and a large number of cross-border parallel lawsuits on the grounds of reciprocity.

For example, the Japanese court accepted the supreme court's reply in the Gomi Akira case in which the parties provided evidence in cases such as the Case of “Xia Shuqin's Application for Execution of the Judgment of the Nanjing Xuanwu District Court” and found that the mutual guarantee of judgment recognition between China and Japan was not satisfied and refused to recognize and execute the judgment of the Chinese court.

The beginning of a shift...

## Understanding and Application of Principle of Reciprocity

Afterwards (2006), the judicial practice dealt with the Request for Instructions Re Application of DNT France Power Engine Co., Ltd. for Recognition and Enforcement of Australian Court Judgment with reference to the spirit of the reply.

If there is no precedent for recognition and enforcement of court decisions of the other country in judicial practice between the two countries, it is determined that no corresponding reciprocity relationship has been established.

A good reason to take the first step?

## Understanding and Application of Principle of Reciprocity

On June 16, 2015, the Supreme People's Court issued Several Opinions of the Supreme People's Court on Providing Judicial Services and Safeguards for the Construction of the "Belt and Road" by People's Courts, explicitly proposing to strengthen judicial assistance.

Under the condition that some countries along the line have not yet concluded judicial assistance agreements with China, according to the intention of international judicial cooperation exchange and the commitment of the other country to give judicial mutual benefit to China, the court of China can give judicial assistance to the other country's parties in advance

This shows the new trend of China 's judicial practice in advocating the adoption of positive and loose standards for the determination of mutual benefit relations.

## Reciprocity is presumed

### Understanding and Application of Principle of Reciprocity

On June 8, 2017, the 2nd China-ASEAN Justice Forum held in Nanning passed the Nanning Statement, which stipulated in item 7:

“cross-border transactions and investments in the region need to be guaranteed by the mutual recognition and enforcement mechanisms of appropriate judgments of various countries.

To the extent permitted by domestic laws, participating courts will interpret domestic laws in good faith, reduce unnecessary parallel lawsuits, and consider appropriate promotion of mutual recognition and enforcement of civil and commercial judgments in various countries.

**Countries that have not yet concluded international treaties on the recognition and enforcement of foreign civil and commercial judgments can presume that there is a reciprocal relationship with the other country** if there is no precedent for the courts of the other country to refuse to recognize and execute their own civil and commercial judgments on the grounds of reciprocity in the judicial process of recognizing and executing the civil and commercial judgments of the other country, to the extent permitted by their domestic laws.”



PROCEDURE

A simplified procedure...

The procedure is the same regardless of the nature of the judgment.

- ✓ Applicants are not required to appoint an attorney and security for costs is not required;
- ✓ Judgments are enforced by the court as governed by the applicable Interpretation, treaty or convention (if any), or the court in the place where the assets of the judgment debtor are located (*Article 224, CPL*);
- ✓ The enforcing court must notify the debtor of the enforcement proceeding.
- ✓ the court can impose enforcement measures on the judgment debtor before giving notice.
- ✓ The schedule for the enforcement of judgments varies from case to case. There is no statutory time limit within which the court must make its decision (6 months in some Agreements);
- ✓ The time limit for applying for enforcement is two years from the date of the judgment;
- ✓ An application fee is calculated as a proportion of the judgment amount in accordance with the applicable progressive fee schedule. The fee does not need to be prepaid by the applicant;
- ✓ A party who considers that the enforcement violates the law can raise a written objection to the enforcing court for review.

The enforcing court's ruling on the recognition and enforcement application is not appealable

Recognition or acknowledgment of foreign judgments is a simplified procedure in China.

Courts are not required to hold a full oral hearing session (although they do in many cases)

and there is generally no right to appeal the court's decision.

Once recognition or acknowledgement is granted, the enforcement procedures are mostly the same as those for domestic judgments or awards.

## When facing a refusal?

The judgment creditor can apply for recognition and enforcement without opening a main proceeding.

If the court refuses to recognise and enforce the judgment, the judgment creditor can open a main proceeding and present the judgment as evidence.

What documents and information must be provided with an application for enforcement?

### Non comprehensive list ...

Subject to any applicable treaty, convention or SPC interpretations, an applicant for the recognition and enforcement of a foreign judgment in China must provide the following documents:

- ✓ A written application;
- ✓ The applicant's identification (ID) certificate or business registration certificate (& ID certificates of the authorised representative or the applicant's primary responsible person);
- ✓ A power of attorney;
- ✓ An original copy of the foreign judgment or ruling, or its certified duplicate.
- ✓ For default judgments, a certificate that the party absent from the hearing was legally summoned
- ✓ A translation into Chinese of the foreign judgment or ruling.

The procedure for enforcing a foreign arbitral award is similar to that for local awards

However...

If a court decides to refuse recognition or enforcement,

it must internally refer the case and its intended decision to a higher court.

If the higher court concurs with the lower court's decision to refuse, it must refer the case to a higher level.

This process keeps going until the case reaches the SPC, while the enforcing court must follow the SPC's final decision.

There is no statutory time limit for the SPC to make its final decision.

## & The procedure for enforcing a foreign arbitral award abide by specific rules

### Article V of the New York Convention provides that:

Recognition and enforcement of the award may be refused when:

- (a) The parties to the agreement were under some incapacity, or the said agreement is not valid,
- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;  
or
- (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, or
- (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Certification by a Chinese consulate or the Chinese Embassy.

Covid 19 has dramatically damaged this process in France

Both Ministry of Foreign Affairs (Bureau des légalisation) and China Embassy in France had to face a massive disorganization of their respective functioning.

As of January 2021, situation remains critical.



## FEW TIPS & UP DATES

## Property Preservation Available During a Judicial Review of an Application for Recognition and Enforcement of a Foreign Judgment

**Sino-French Assistance Agreement and PRC law have no specific provisions, and no judicial precedent.**

Based on Article 4 of the Sino-French Assistance Agreement, the Sino-French Assistance Agreement clearly provides that except for the matters stipulated in the Sino-French Assistance Agreement, the parties to the Sino-French Assistance Agreement shall apply their own laws to the provision of judicial assistance within their own territories, and this argument was made to procure the judge to focus on the relevant legal provisions of China.

There is a clear legal basis under the PRC law for application for property preservation.

The PRC Civil Procedure Law does not prohibit property preservation during the recognition and enforcement of foreign judgments.

The claimant has lawfully provided sufficient security for property preservation..

*Congrats to Jun He Law Firm – Beijing!*

## Five common mistakes...

### Mistake 1: Go to the court where the property of the defendant is located

This is a typical beginner's mistake.

It is indeed what is provided by the fine prints of the PRC Civil Procedural Law as well as the practice in the developed coastal areas.

But that is not the case for other parts of the large country, where the judicial system internally designated a few courts to deal with foreign related matters.

For example, in a central China province with 18 intermediary courts, only 3 can deal with foreign related matters.

## Five common mistakes...

### Mistake 2: Get translation from a "Good" translator...

As most law firm dealing with foreign companies are based in modern cities like Shanghai, Guangzhou, Shenzhen or Beijing, they usually work with nearby translators.

However, in practice, it is an undocumented practice that each court has its own designated translator in its own city that are only disclosed upon checking with the court.

## Five common mistakes...

**Mistake 3: “Duly authenticated original award or a duly certified copy thereof” produced in the “place of arbitration”**

When it comes to the nationality of the award, even the PRC Supreme People’s Court has been swinging between the “seat of the arbitration institution” and the “place of arbitration”,

since the Chinese judicial system considers arbitral awards being rendered by the institution.

Although it has been improving, there are a still lot of confusions in the minds of judges at the lower courts. If legalized in the “wrong” Chinese Embassy, the applicant has to re-legalize the documents.

## Five common mistakes...

**Mistake 4: “There is no corruption” or “there are too many corruptions” or “Guangxi is decisive”**

Corruption might not be uncommon in China, but severely fought due to recent campaign of the Chinese authorities.

Like anywhere else in the world, “Guanxi” (connections) may play an important role in everything.

However, such possible and remaining practices can not prevail over the observance of the lawfulness and the procedures provided for in relevant laws and regulations.

## Five common mistakes...

### Mistake 5: “Mission accomplished”

Getting a favourable award/judgment, a favourable SPC’s reply, a court decision recognising the award/judgment, or even a ruling to enforce the award/judgment is never mission accomplished.

As the traditionally faced serious difficulties in enforcing judicial decisions, there have been the “difficult enforcement”.

Therefore, an efficient attorney in China shall keep up the spirit until the end of the proper enforcement of the proceedings, and shall do her/his best endeavour to assist the court to find the property of the defendant so as to allow the courts to save time from the "finding property work" and to focus on the realization.

In what circumstances and against which awards has the principle of public policy generally been applied?

### Hemofarm et al v Yongning (case number (2008) Min Si Ta Zi Di 11)

This case related to a joint venture company set up by a Chinese company and three foreign companies in 1995. The joint venture contract provided for ICC arbitration in Paris. Following the set-up of the joint venture, in a leasing dispute between the Chinese company and the joint venture, a Chinese court asserted jurisdiction and issued an asset preservation order against the joint venture as defendant. Afterwards, the three foreign parties commenced ICC arbitration against the Chinese company under the joint venture contract.

The ICC tribunal ruled that, among others, the Chinese company had breached the joint venture contract by seeking the asset preservation order against the joint venture before a Chinese court, and eventually awarded damages to the foreign parties.

When the foreign parties sought recognition and enforcement of the ICC award in China, the court took the view that the leasing dispute was outside the scope of the arbitration clause and the ICC decision concerning the asset preservation order was an interference with Chinese judicial sovereignty.

Therefore, the court refused to recognise and enforce the ICC award on the ground of public policy as well as in accordance with Article V.1(c) of the New York Convention.

In what circumstances and against which awards has the principle of public policy generally been applied?

**Wicor Holding AG v Taizhou Hope Investment Co, Ltd., (2015) Tai Zhong Shang Zhong Shen Zi No. 00004 Civil Ruling**

In this case, the Taizhou court held that, before the ICC arbitral tribunal found the arbitration agreement valid and rendered an award, a Chinese court had already determined that the arbitration agreement was invalid under Chinese law.

This inconsistent finding constituted a public policy ground for refusal.

In what circumstances and against which awards has the principle of public policy generally been applied?

*Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co, Ltd. ((2013) Min Si Ta Zi No. 46)*

The SPC granted enforcement of a foreign award even though a Chinese court in another related legal proceeding in China had found that the underlying arbitration agreement was invalid.

The SPC held that since the award had been rendered before the Chinese court found that the arbitration agreement was invalid, the inconsistency did not give rise to public policy issue.

## Does China Recognize Ad Hoc Arbitration?

### *Ad hoc* arbitration with Chinese characteristics?

For a long time, China only recognized the legitimacy of institutional arbitration but denied that of *ad hoc* arbitration. In accordance with Article 16 of the Arbitration Law of the PR of China, an effective arbitration agreement must contain a selected arbitration commission, while the arbitration agreement fails to do so will be deemed invalid.

This inevitably leads to the impossibility of *ad hoc* arbitration in mainland China.

In contrast, Chinese courts are obliged to recognize and enforce foreign *ad hoc* arbitration (Article I (2) of the New York Convention).

On 30 Dec. 2016, the Supreme People's Court (SPC) promulgated the *Opinion on Providing Judicial Support for the Construction of Pilot Free Trade Zone*. According to paragraph 3 of Article 9, the arbitration agreement reached by enterprises registered in the Pilot Free Trade Zone as to the arbitration conducted in a specific place in mainland China, in accordance with specific arbitration rules and by specific personnel shall be deemed valid.



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