CHINA DISPUTE RESOLUTION

NEWS LETTER



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JT&N 金诚同达

FEATURES

1 Annual Report of the Supreme People's Court on Judicial Review of Commercial Arbitration (2023) Released

2 Beijing International Dispute Resolution Development Center established

3 First ad hoc arbitration case seated and held in Hainan Province

4 The Singapore High Court recognized and enforced an arbitral award issued by a tribunal constituted under the Rules of the Shenzhen Court of International Arbitration which confirmed the effectiveness of cross-border electronic service via short messaging service ("SMS").

5 The Ministry of Justice Releases Draft *Regulations of the State Council on the Resolution of Foreign-Related Intellectual Property Disputes* for Public Consultation

6 Supreme People's Court ("SPC") releases representative cases in support of Hong Kong arbitration

7 Interim Provisions on Unfair Competition on the Internet comes into effect

8 Supreme People's Court releases first batch of representative cases on the ascertainment and application of Extraterritorial Laws

9 Supreme People's Court ("SPC") releases representative cases on Monopolies and Unfair Competition

NEWS ALERT

1. Annual Report of the Supreme People's Court on Judicial Review of Commercial Arbitration (2023) Released

On September 9, 2024, the Supreme People's Court ("SPC") held a press conference to release its Annual Report on the Judicial Review of Commercial Arbitration (2023) ("Report"). At the press conference, the Deputy Chairman of the SPC Adjudication Committee introduced the main contents of the Report, which consists of three parts: an overview of the new developments in judicial review of commercial arbitration in 2023, a summary of national arbitration judicial review cases in 2023, and an analytical review of arbitration judicial review cases and adjudication rules in 2023. The release of the Report comprehensively showcases the achievements of the People's Courts in the judicial review of arbitration, and is a timely summary of judicial experience in the review of arbitration. The Report will also serve to standardize adjudication standards, thereby promoting the healthy and uniform development of the judicial review of arbitration in China.

2. Beijing International Dispute Resolution Development Center established

On August 21, 2024, the Beijing International Dispute Resolution Development Center ("Development Center") was officially established. As director of the Center, Mr. YANG Chen, Managing Partner of JTN, actively participated in the inauguration discussions, expressing his expectations and suggestions for the future of the Development Center. Mr. YANG Chen also engaged in a lively discussion regarding the Center's important role in providing comprehensive support and assurance for development, particularly given the Centre's focus on functional positioning and the emphasis placed on professionalization, standardization, and market-oriented growth. Moving forward, the Center will undertake the critical role of fully supporting and ensuring the development of the international commercial arbitration scene, both domestically and more broadly overseas.

3. First ad hoc arbitration case seated and held in Hainan Province

On July 15, 2024, an ad hoc arbitration case was seated and held in Hainan Province for the first time. The case proceeded under the "Provisions on the Development of International Commercial Arbitration in the Hainan Free Trade Port", which came into effect on July 1, 2024. The Hainan Arbitration Association facilitated the arbitration, providing necessary support such as hearing facilities and secretarial services. The case reflects the Hainan region's commitment to integrating international arbitration practices into its local dispute resolution mechanisms. These steps aim to establish Hainan as a preferred location for the resolution of international commercial disputes.

4. The Singapore High Court recognized and enforced an arbitral award issued by a tribunal constituted under the Rules of the Shenzhen Court of International Arbitration which confirmed the effectiveness of cross-border electronic service via short messaging service ("SMS").

On July 23, 2024, the Singapore High Court granted recognition and enforcement of an award rendered by a tribunal constituted under the Rules of the Shenzhen Court of International Arbitration award in the case of Wang Bin v. Zhong Sihui [2024] SGHC 189. The Respondent, a Singapore citizen, claimed that the mobile phone number to which the arbitration notification was sent was not hers, and that she did not use the mobile phone with the said mobile phone number. She accordingly argued that she did not have notice of the arbitration notification and invited the Court to refuse recognition and enforcement of the arbitral award on that basis. However, based on the electronic delivery records from the Shenzhen Court of International Arbitration, which had been the body which had effected service, as well as other evidence, the Singapore High Court determined that the Respondent had been duly served with the arbitration notification. Consequently, the Court dismissed the Respondent's application to refuse recognition and enforcement of the award.

This ruling, while fact-specific, represents an instance where the validity of cross-border electronic service methods, such as SMS, has been upheld in the context of international arbitration. This provides a degree of assurance for parties engaging in international commercial arbitration that the potential methods of service are not set in stone, and enhances the credibility of electronic communication in the service of legal proceedings.

5. The Ministry of Justice Releases Draft Regulations of the State Council on the Resolution of Foreign-Related Intellectual Property Disputes for Public Consultation

On July 29, 2024, the Chinese Ministry of Justice, in conjunction with other related authorities, issued the draft *Regulations of the State Council on the Resolution of Foreign-Related Intellectual Property Disputes* ("Regulation") for public consultation. The Regulation consists of 12 articles which cover the establishment and improvement of a database for foreign laws and regulations by the Judicial Administrative department of State Council. This database is to have a focus on foreign intellectual property laws and regulations, ensuring timely compilation of related information. Additionally, the Regulation improves the institutions and procedures associated with the dispute resolution process for international intellectual property disputes in China. Finally, the Regulation also clarifies that relevant departments of the State Council, local people's governments, and their respective departments, are to strengthen their service provision levels in dealing with international intellectual property disputes.

6. Supreme People's Court ("SPC") releases representative cases in support of Hong Kong arbitration

On 5 September 2024, the Supreme People's Court issued six representative cases in support of Hong Kong arbitration, vividly demonstrate the SPC's judicial stance of supporting Hong Kong arbitration in accordance with the law and promoting the high-quality development of international arbitration. These representative cases include cases concerning, *inter alia*: applying for confirmation of the validity of an arbitration agreement related to Hong Kong in which the parties had chosen Hong Kong as the seat of the arbitration; optimizing assistance for the conservation and preservation of property in arbitration so that to ensure the smooth progression of Hong Kong arbitration from award through to enforcement; and applications for recognition and enforcement of Hong Kong arbitral awards to further facilitate cross-border enforcement of such awards.

7. Interim Provisions on Unfair Competition on the Internet comes into effect

The *Interim Provisions on Unfair Competition on the Internet* ("Provisions") came into effect on 1 September 2024. The Provisions are aimed at establishing and clarifying rules for competitive behavior online, providing clear guidance and setting boundaries for all types of business entities. The Provisions are also envisaged as not only guiding the improved empowerment of digital technologies, but also ensuring that market competition mechanisms operate efficiently and in an orderly manner within the framework of the rule of law. Further ,the Provisions enumerate various forms of unfair competition in the online environment, strengthening platform responsibilities and optimizing the procedures for law enforcement and the handling of cases. These measures represent a clear initiative to improve the governance system for the platform economy, further promoting and regulating fair competition and innovative development in the digital economy.

8. Supreme People's Court releases first batch of representative cases on the ascertainment and application of Extraterritorial Laws

On July 11, 2024, the Supreme People's Court ("SPC") issued its first batch of five representative cases on the ascertainment and application of extraterritorial laws. These cases concern, *inter alia*, common issues which arise in such contexts, notably corporate capital contribution, sale and purchase contracts, guarantee contracts, multimodal transport contracts, engineering supervision contracts, and so forth. The foreign laws involved include, *inter alia*, the laws of the United States, the United Kingdom, Mexico, Tajikistan, and the Hong Kong Special Administrative Region of China. In these representative cases, common issues concerning the ascertainment of extraterritorial laws are of great prominence, and the representative cases are themselves of great significance in clarifying the parties responsible for the ascertainment of extraterritorial law, protecting the rights of parties, and improving the efficiency of determining and applying rules of extraterritorial law. In the context of complex commercial disputes in which such rules might arise, the JTN Cross-Border Dispute Resolution team has both extensive experience and a proven track record to ably manage high-value disputes.

9. Supreme People's Court ("SPC") releases representative cases on Monopolies and Unfair Competition

On September 11, 2024, the SPC released eight representative cases concerning monopolies and unfair competition, which include:

Four representative cases concerning monopolies, which involve important legal issues such as the treatment of horizontal monopoly agreements for fixing commodity prices and concerted refusals to deal, as well as abusive conduct by dominant market players through tying / linking products. The said cases were undergirded by a focus on public welfare and entailed actively exercising the judicial anti-monopoly function. The cases thus provided clear guidance for businesses to engage in legitimate competition in a lawful and orderly manner.

Four representative cases concerning unfair competition, which involve significant legal issues such as the application of the general provisions of the Unfair Competition Law, and the determination of acts such as imitation and passing-off, false advertising, and infringement of trade

secrets. The said cases evidenced the intensity of judicial protection for intellectual property, and entailed a vigorous crack down on “free-riding” and other unfair competitive practices. The aim of such a judicial approach is to maintain a fair and competitive market order, thereby addressing the needs of emerging business models and promoting the healthy and orderly development of the digital economy.

Guiding Case No. 201: Implications for Sports Arbitration in China

ZENG Sheng

The Supreme People's Court's Guiding Case No. 201 is a significant precedent in the intersection of international sports law and domestic judicial proceedings in China. It revolves around a contractual labor dispute between a Serbian football coach and a Shanghai football club, which later transformed into a catering business. This case provides valuable insights into how Chinese courts perceive the legal status of rulings made by sports organizations. However, its interpretation of the arbitral clause at issue arguably fails to reflect the parties' intentions to resolve disputes through arbitration, and may allow parties to circumvent arbitration by exploiting jurisdictional advantages in domestic courts.

Case Background

Following a six-month coaching tenure, a Serbian football coach (the "Coach") and the Shanghai Ju Sports Football Club (the "Ju Club") entered into a termination agreement, under which the Ju Club was obliged to pay the Coach a lump sum as compensation. When the Ju Club failed to fulfill its obligation, the Coach escalated the matter to the FIFA Players' Status Committee (the "FIFA Committee") in accordance with Article 5.1 of the termination agreement, which provides that "*any dispute related to this termination agreement or arising from it shall be subject to the jurisdiction of the FIFA Players' Status Committee or any other authorized FIFA body.*"

The FIFA Committee ruled in favor of the Coach, mandating the Ju Club to make the payment within 30 days. The decision also informed both parties of their right to appeal to the Court of Arbitration for Sport (the "CAS") and indicated that the decision would become final and binding if no appeal was filed. Neither party appealed, but the Ju Club did not comply with the decision. Instead, the Ju Club exited the football industry, deregistered from the Chinese Football Association, and rebranded itself as Shanghai Enwo Catering (the "Enwo Catering"), shifting its business to catering.

The Coach did not pursue recognition or enforcement of the FIFA Committee's decision. Instead, he filed a labor contract lawsuit before a domestic court in Shanghai, seeking to hold Enwo Catering and its sole shareholder jointly liable for the payment. The Enwo Catering challenged the court's jurisdiction, arguing that the dispute should be submitted to CAS according to Article 5.2 of the termination agreement, which provides that "*[i]f FIFA does not have jurisdiction over a dispute, the parties shall submit it to the Court of Arbitration for Sport in accordance with the Arbitration Rules for Sports.*"

Key Points of the Judgement

The trial court dismissed the Coach's case, citing Article 5.2 of the termination agreement, which directed disputes to CAS. On appeal, the Shanghai No.1 Intermediate People's Court (the "Appellate Court") overturned the trial court's decision, holding that despite the validity of Article 5.2, domestic courts had jurisdiction over the dispute at issue.

The Appellate Court emphasized two critical points:

1.1 The Appellate Court determined that the dispute resolution mechanism under Article 5.1 did not constitute arbitration, and that the FIFA Committee's decision did not qualify as an enforceable arbitral award under the New York Convention. The FIFA Committee was characterized as an internal dispute resolution body, not an independent arbitration institution. Its jurisdiction was non-exclusive, and its decisions were neither final nor binding. In this regard, the Appellate Court took notice of Article 22 and Paragraph 4 of Article 23 of FIFA's "Regulations on the Status and Transfer of Players" (the "FIFA Regulations"), which state that the committee's competence in hearing cases is "*[w]ithout prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes*" and that decisions made by the committee "may be appealed before the Court of Arbitration for Sport (CAS)," respectively.

1.2 The Appellate Court ruled that Article 5.2, while valid, was inapplicable because the dispute at issue was beyond Article 5.2's scope. The Appellate Court held, consistent with the plain wording of Article 5.2, that it was only when "*FIFA does not have jurisdiction*" that disputes could be submitted to the CAS. In this case, the FIFA Committee had already exercised its jurisdiction and issued a decision. As a result, the dispute at issue was not a dispute over which "*FIFA does not have jurisdiction.*" Therefore, Article 5.2 could *not* exclude the jurisdiction of the trial court, as the defendant's domicile was within the court's jurisdiction.

Comments

This case is the first in mainland China to determine the legal nature of a decision made by internal dispute resolution bodies of international sports organizations. As one of the Guiding Cases (which are judicial precedents selected and published by the Supreme People's Court to ensure consistency in judicial decision-making), it establishes a precedent that the internal dispute resolution bodies of international sports organizations are not *ipso facto* arbitration institutions under the New York Convention, and that their decisions do not qualify as foreign arbitral awards under the said Convention.

However, the Appellate Court's interpretation in this case with respect to the scope of the arbitral clause (i.e. Article 5.2) seems mechanical and problematic. By limiting the scope of Article 5.2 to disputes outside FIFA's jurisdiction, the court effectively renders Article 5.2 meaningless. Given that under Article 5.1 FIFA's authority covers "*any dispute related to this termination agreement or arising from it,*" the application of Article 5.1 is so broad that the ambit of disputes to which Article 5.2 would apply would be significantly diminished.

Further, the Appellate Court's interpretation could also create a loophole for a party in similar circumstances to exploit a forum advantage. In the scenario where a party receives an unfavorable decision by the FIFA Committee, the party can either appeal to the CAS (and this right to appeal is provided for under the FIFA Regulations), or commence litigation before the Chinese domestic courts (according to the Appellate Court's interpretation).

A better view is that, taking Articles 5.1 and 5.2 and the FIFA Regulations together, the parties

intended to submit their disputes to CAS for arbitration, with the pre-arbitration requirement of submitting their disputes to an authorized internal body of FIFA if the internal body can properly exercise jurisdiction. Under this view, Article 5.1 serves as the pre-arbitration dispute resolution mechanism, with the implication that CAS has jurisdiction over those disputes, while Article 5.2 should be seen as a catch-all / sweeping-up clause, granting CAS authority over disputes not addressed by FIFA's internal bodies. This holistic view would better reflect the parties' intent.

SMS as a Valid Means of Serving Arbitration Notices upheld by Singapore High Court

Stella Lu, Wei Wenyan

Abstract

In the case of Wang Bin v Zhong Sihui, Zhong Sihui (the "defendant") sought to set aside an enforcement order related to an arbitral award issued by the Shenzhen International Arbitration Court ("SCIA") on the basis of ineffective notice having been received in the arbitration proceedings. Specifically, the defendant complained that the notice she had received had been sent via SMS to a number registered under her husband's name. Rejecting this argument, the court found that the defendant had actual notice of the arbitration, citing inconsistencies in her testimony and supporting evidence.

The court upheld the use of SMS as a valid method for serving arbitration notices under the SCIA rules, recognizing the evolving nature of electronic communications in legal processes. This development represents significant progress in adopting pragmatic and practical solutions for effective dispute resolution in international arbitration.

Case Background

The decision arose from the defendant's application to set aside an enforcement order arising out of an arbitral award issued by the SCIA tribunal. The tribunal had found that the defendant, jointly with her husband, Mr. Lin, had entered into a loan agreement with the claimant. The loan had fallen due, and the tribunal issued an award ordering that Mr. Lin and the defendant repay the principal amount of RMB 2,820,000 plus interest of RMB 341,200 (as at 19 August 2020), and costs of RMB 137,940 (the "Award"). [1]

Prior to the commencement of the arbitration proceedings, the SCIA had sent the arbitration notice to the defendant via SMS at a mobile phone number (the "4732 Number") written on the Loan Agreement and on a copy of the defendant's passport the defendant had signed. The defendant claimed not to have seen the notice, and did not attend the arbitral hearing. The arbitral tribunal proceeded with the hearing in the defendant's absence, eventually issuing the Award.

The defendant sought to set aside the enforcement of the Award on the basis that (a) she did not have proper notice of arbitration proceedings; and (b) there was material non-disclosure of key facts in the claimant's application for enforcement.

Key Points of the Judgment

The Court's key findings are set out below.

1 Whether the defendant had proper notice of the Arbitration?

1.1 SMS is a permitted method for serving arbitration notices under the SCIA Rules.

1.1.1 Art. 6 (2) of the SCIA Rules was held to include SMS as a form of "electronic data interchange that can provide a record of delivery". Specifically, Art. 6 (2) provides that "Unless otherwise agreed by the parties, all written documents, notices and materials in relation to the arbitration proceedings may be delivered in person or sent by mail, facsimile, electronic mail, or **any other means of electronic data interchange that can provide a record of delivery**, or by any other means the SCIA considers appropriate." (emphasis added).

1.1.2 Wong Li Kok Alex JC also cited the Singapore Supreme Court Practice Directions 2021 to illustrate that other electronic means of service are increasingly permitted. Wong JC went on to comment that as commerce has increasingly moved from communications by postal mail to electronic methods, communications beyond email should also be considered appropriate methods of service. This would not only reflect a growing trend in other jurisdictions of a wider range of methods of service being accepted, it would also be more business-friendly in reflecting the reality of how commercial parties correspond with each other through various messaging apps and platforms.

1.2 What constitutes proper notice?

The judgment cited the precedent case of DEM v DEL2 to illustrate that where actual notice of a request for arbitration or arbitration notice can be established, any complaint as to the lack of proper notice will be precluded as a basis for setting aside the Award or denying enforcement.

A finding of actual notice requires evidence that the respondent to the arbitration has received notice and is actually aware of the arbitration in question. Mere evidence of the act of delivery will not suffice.

1.3 The defendant had actually received notice of the Arbitration.

1.3.1 The 4732 Number was a number that had been provided to the claimant for the purposes of contacting the defendant, as it is derived from the loan agreement and the copy of the defendant's passport attached to the said agreement. This indicated that the number was provided to the claimant for contact with the defendant.

1.3.2 The SCIA logs showed that the Arbitration documents were all sent and received by the 4732 Number.

1.3.3 The 4732 Number was in the defendant's 'custody and control', notwithstanding the fact that it was registered to Mr. Lin. The defendant's own affidavit had shown that the 4732 Number was her telephone number in her Visitor Registration Form with the Chinese Authorities.

1.4 Evidence given on behalf of the defendant was found to be inconsistent and contradictory.

1.4.1 The defendant claimed to be unaware of the arbitration notice, but alleged that she had relied on Mr. Lin to provide context and content to her assertions.

1.4.2 The defendant's claim that the relevant phone was used by her child or maid and that she had therefore not read the text messages herself was also not accepted. The judge pointed out that if the phone were used by a young child or a maid, it was reasonable that the defendant as a parent would check the phone frequently to ensure that the child was not exposed to inappropriate calls or messages. The Judge further noted that Mr. Lin had no reason to leave the 4732 number in Singapore for his children, knowing that he had left the very same number for creditors to contact.

1.4.3 Mr. Lin's claim that he did not want the defendant to be disturbed was also inconsistent with his conduct in providing the 4732 number on the copy of the passport the defendant gave to the claimant and leaving the 4732 number phone with the defendant.

1.4.4 Even though Mr. Lin was not aware that the SCIA had used the 4732 number to contact the defendant during the arbitral process, Mr. Lin did not challenge the award at that time. He also had not clarified how the tribunal had come to the conclusion that the defendant had been lawfully served. Instead, he only raised this point at the enforcement stage. Allegations as to a failure of service raised only two and a half years after the Arbitration were simply implausible.

2 Whether the claimant fulfilled his obligation of full and frank disclosure in an application for enforcement?

2.1 Application of enforcing the arbitral award requires full and frank disclosure under Singaporean law. An applicant must disclose to the court all matters within its knowledge even if they are prejudicial to its case.

2.2 Although the duty of full and frank disclosure should not be taken slightly in this case, there was no material non-disclosure by the claimant. The defendant focused on the claimant's affidavit having alleged that the defendant and others “all participated in the arbitration proceeding”. The defendant asserted that this statement was misleading. The court finds that the arbitration decision annexed to the claimant’s affidavit, and contained the tribunal’s reasoning as to the defendant’s failure to appear at the evidentiary hearing. The Court thus found that the claimant had no deliberate deceptive intent, but was merely ambiguous in expression. This did not amount to a failure of full and frank disclosure.

Comments

In recent arbitration practice, service by email and other electronic means has increasingly become permissible.

1 The acceptance of service by electronic means other than email is provided for in the arbitration rules of many arbitral institutions in addition to the SCIA.

1.1 The UNCITRAL Arbitration Rules set out that "A notice, including a notification, communication or proposal, may be transmitted ***by any means of communication that provides or allows for a record of its transmission***." It further specifically makes reference to service via electronic means such as emails and facsimiles. [3]

1.2 The CIETAC arbitration rules stipulate that "All documents, notices and materials in

relation to the arbitration ("arbitration documents") may be delivered by electronic means. ··· Electronic means of delivery include service of arbitration documents by electronic means to the email addresses or other electronic addresses agreed/designated by the parties, or via the digitalized information exchange system of CIETAC or other information system easily accessible to all parties, etc.". [4]

1.3 The SIAC arbitration rules provide that, "Any such notice, communication or proposal may be transmitted by any form of electronic communication (including electronic mail and facsimile)." [5]

2 This case is significant for its support of electronic service methods, including SMS, in international arbitration. The judgment emphasizes the importance of clear communication in contracts and the need for parties to ensure the accuracy and availability of contact information for effective dispute resolution.

2.1 In determining what phone number documents should be served at, the elements to be taken into account include, but are not limited to, a) the contact number stated in the relevant agreement; b) the contact number written on the photocopies of IDs or passports of relevant person; c) other evidence proving that the number was used by the designated person, such as numbers entered into registration forms for official documents.

2.2 The phone number being registered to someone else is not determinative. So long as it can be proved that the phone was, at the relevant times, under the custody and control of the designated person, proper service (by means of actual notice) can still be effected.

2.3 It is of pivotal importance for the arbitral institution to keep detailed records of electronic service records as those records can be used as proof of the relevant party's knowledge of the electronic service in subsequent applications for recognition and enforcement of any award.

With the rapid development of technology, the delivery of arbitration documents has also developed in a clearer and more efficient direction. This case is significant for its support of electronic service methods, including SMS, in international arbitration.

To ensure the efficacy of dispute resolution mechanisms, it is prudent for parties engaged in business transactions to meticulously delineate all pertinent contact information within the contractual framework. Furthermore, it is imperative to undertake diligent verification of the accuracy and availability of such information as provided by the counterparty. This due diligence will serve to fortify the legitimacy of communication methods, including but not limited to SMS and other electronic means, which may become pivotal in the context of dispute resolution. By adhering to these practices, or agreeing contractually-stipulated means of service, parties can better ensure that the courts and arbitral tribunals are equipped with reliable channels for the service of notices, thereby upholding procedural integrity and ensuring the effectiveness of the dispute resolution process.

1 [2024] SGHC 189.
2 [2024] SGHC 80.
3 Article 2, Paragraph 1. of the UNCITRAL Arbitration Rules (2021) .
4 Article 8, Paragraph 1. of the CIETAC Arbitration Rules (2024).
5 Paragraph 2.2 of the SIAC Arbitration Rules 2016.

Recognition and Enforcement of Foreign Judgments in China

Alan Li, Celine Cen, Zhang Yu

Abstract

In recent years, with China's increasing emphasis on opening-up, the recognition and enforcement of foreign judgments has become more readily provided for under China's laws and judicial practice. In this regard, China has seen more and more interaction – and indeed tension – between its own laws and regulations on one hand, and foreign judgments on the other. In this article, we will examine the attitudes of Chinese mainland courts to recognising and enforcing a judgment rendered by a foreign court, particularly as regards, as provided in Article 299 of the Chinese Civil Procedure Law (a) the principle of "reciprocity"; and (b) "not violating the basic principles of laws of China" — this article will specifically consider punitive damages as an example.

I. Introduction

Recognition and enforcement of foreign judgments is the final step of cross-border litigation proceedings. Civil and commercial disputes typically are only actually resolved when a judgement is enforced. If a judgment cannot be enforced, a party's rights and interests cannot be fully protected, even with a favourable judgment on paper. The Chinese Civil Procedure Law ("CPL")[1] sets out a framework of recognition and enforcement of foreign judgments, see in particular Article 298, which specifies the competent courts to decide questions of recognition and enforcement, as well as the conditions for filing an application for recognition and enforcement[2]; Article 299, which stipulates the circumstances under which foreign judgments should be recognised and enforced, i.e. the principles that Chinese courts should follow when deciding an application for recognition and enforcement[3]; and Article 300, which stipulates the circumstances under which foreign judgments should not be recognised and enforced[4]. With case analysis, we will examine the attitudes of Chinese mainland courts to recognizing and enforcing the judgments of foreign courts, particularly as regards the principle of "reciprocity" and "not violating the basic principles of laws of China" (taking punitive damages as an example) as provided in Article 299 of the CPL.

II. The Principle of Reciprocity

According to Article 298 of the CPL, applications for recognition and enforcement of foreign judgments can be made upon the existence of effective international conventions, treaties, or reciprocal relationships. In terms of international conventions and treaties, China has not yet ratified any international conventions on the recognition and enforcement of foreign judgments. As of August 2024, China has entered into 35 bilateral treaties with other countries on recognition and enforcement of foreign judgments. However, these treaties do not cover judgments from the United States ("US"), Singapore, and most EU countries.[5]

For judgements from countries with which China does not have a valid international convention or treaty, the principle of reciprocity will be examined as a basis for recognition and enforcement. When it comes to the principle of reciprocity, Article 299 of the CPL makes reference to "*the principle of reciprocity*", but does not specify the standard to be applied in determining the existence of a

reciprocal relationship. For over two decades, the Chinese courts had applied a requirement of *de facto* reciprocity in a stringent manner. This required the foreign country whose court issued the relevant judgement to have a precedent of recognising and enforcing judgements issued by a Chinese court.[6] Under this *de facto* standard, absent such a precedent, the judgment of that country can neither be recognised nor enforced in China.

In recent years, in line with its drive for opening up, China's law and judicial practice has been more open and tolerant for the application of the reciprocity principle. In particular, the standard of *de jure* reciprocity has also been adopted. On 31 December 2021, the Supreme People's Court issued the *Minutes of the National Symposium on the Foreign-related Commercial and Maritime Trial Work of Courts, Article 44 of which stipulates that: "[Determination of reciprocal relationships] When hearing a case involving an application for the recognition and enforcement of a judgement of a foreign court, a people's court may determine that there is a reciprocal relationship under any of the following circumstances: (1) According to the laws of the country of the foreign court, the civil and commercial judgement made by people's courts can be recognised or enforced by the courts of the country ... The people's court shall examine and determine whether there is a reciprocal relationship on a case-by-case basis*". The Minutes thus embody the essence of *de jure* reciprocity, that a reciprocal relationship can be found if there is a possibility that a Chinese court judgment "can" be recognised and enforced under the law of that foreign country, rather than requiring a precedent in the foreign country of the recognition and enforcement of a Chinese judgement as a prerequisite.

After the publication of the Minutes, in March 2022, Shanghai Maritime Court, in *Spar Shipping v Grand China (A Case of Applying for Recognition of Foreign Court Judgement)*, applied, *inter alia*, the *de jure* reciprocity standard. The Shanghai Maritime Court ultimately ruled to recognise and enforce the English court judgment on such an approach.[7] This case marks the first time that a Chinese court recognised and enforced a commercial judgment rendered by an English court pursuant to the principle of *de jure* reciprocity, and also marks a change in the restrictive interpretation of reciprocity where *de facto* reciprocity was applied as the sole standard. This change marked a departure point from what had been a long-standing practice of the Chinese courts.[8]

There are three noteworthy points to the Court's interpretation of the principle of reciprocity in this case. First, pursuant to Article 289 of the CPL (2021 Amendment), the Court determined that it should decide the case based on the principle of reciprocity as there were no international conventions or treaties on the recognition and enforcement of foreign judgments binding between China and the United Kingdom ("UK").[9] The CPL (2021 Amendment) did not limit the interpretation of reciprocity to de facto reciprocity, so the Court held itself competent to adopt the standard of de jure reciprocity and did do so in this case——"*Where Chinese court judgments can also be recognised and enforced according to the law of the country of the court which rendered the judgement, a reciprocal relationship between China and that foreign country on recognition and enforcement of civil and commercial judgements is found*". Second, the Court recognised that *de facto* reciprocity was still applicable——"*Undoubtedly, if there is such precedent that the foreign court has recognised and enforced a Chinese court judgment, it is naturally a strong proof that Chinese court judgments can be recognised and enforced in that country*". However, in this regard,

the Applicant had failed to prove that such a precedent (of an English court recognising and enforcing a Chinese court judgement) exists. Indeed, there was an expression in [2015] EWHC 999 (Comm),

a case cited by the Applicant, that Chinese court judgments and orders obtained by Rongcheng Xixiakou Shipyard Co Ltd in Chinese litigation "*f[e]ll to be 'recognised'*" by the English court[10], but the Applicant failed to demonstrate that under English law, any recognition or citation of a foreign court judgment expressed which arose only in relation to certain defences would amount to "recognition" within the meaning of the "recognition and enforcement of foreign court judgments". Third, the Court considered whether English courts had ever refused to recognise and enforce Chinese court judgments on the ground that no reciprocal relationship existed. The Respondent argued that English court's refusal to grant a stay of execution per the Bank of China Limited's application in [2015] EWHC 999 (Comm) was essentially a denial of recognition and enforcement of Chinese court judgments. However, the Court held that [2015] EWHC 999 (Comm) was not a matter of recognition and enforcement of foreign judgments, and that the English court did not dismiss the Bank's application for stay of execution on the ground that no judicial reciprocity existed between China and the UK. Accordingly, the Court decided that [2015] EWHC 999 (Comm) could not serve as a precedent of the English courts' refusal to recognise and enforce Chinese court judgments, nor could it serve as an illustration to demonstrate that no reciprocal relationship existed between China and the UK.

This case was followed by the First Intermediate People's Court of Beijing, which also adopted the standard of *de jure* reciprocity to recognise a German court ruling concerning insolvency proceedings.[11]

III. Non-recognition as to Punitive Damages

According to Article 299 of the CPL, a foreign judgment is not entitled to recognition and enforcement merely on the basis of the principle of reciprocity; the Chinese court will also examine whether the judgment "violates the basic principles of Chinese law" and whether it "damages the sovereignty, security, and public interest of China". Here, we will explore the attitude of Chinese courts on the recognition and enforcement of punitive damages in foreign judgments.

Punitive damages are widely seen in American jurisdictions in cases concerning tort, contract and maritime law, etc. It is not uncommon that the amount of punitive damages is several times the amount of compensatory damages. For example, in *Pacific Mutual Life Insurance Co. v. Haslip*, the Supreme Court of Alabama upheld a judgment of USD 1 million in punitive damages (four times the amount of compensatory damages sought and awarded).[12] In *TXO Production Corp. v. Alliance Resources Corp*. (a bad-faith slander of title action), the Supreme Court of Appeals of West Virginia upheld a judgement of USD 19,000 in compensatory damages and USD 10 million in punitive damages against TXO.[13] However, under Chinese law, civil and commercial damages are awarded for the purpose of compensating, prohibiting the injured party from profiting from the act of infringement[14], and any compensation is limited to the scope of "actual losses", see, for example, the limitation of damages for breach of contract under Chinese law.[15]

Article 45 of *Minutes of the National Symposium on the Foreign-related Commercial and Maritime Trial Work of Courts* also provides clarification on the negative approach of Chinese Courts to the recognition of punitive damages in foreign judgments: "*[Court decisions awarding punitive*

damages] Where a decision of a foreign court awards damages in conspicuous excess of actual loss, the people's court may refuse to recognise and enforce the excess". This provision also explains that

Chinese courts may partially recognise and enforce civil and commercial judgments rendered by foreign courts, and may refuse to recognise and enforce only the punitive damages award (or any other offending provision).

In the infamous *CIIF EB-5 Scam*, which arose out of an immigration scam involving a total amount of up to USD 50 million, several courts in the US ruled that Zeng Fang and other defendants were to return to the plaintiffs the investment amount they had obtained through fraud. Punitive damages in the sum of several times the investment amount were also ordered, and the defendants were made jointly and severally liable.[16] After learning that one of the defendants, Zeng Fang, had enforceable properties in Guangzhou, a number of successful plaintiffs (including one Wang Anqin) applied to the Intermediate People's Court of Guangzhou for recognition and enforcement of three US judgments relating to the scam.[17] In relation to punitive damages, the Respondent Zeng Fang raised a consistent defence in (2019) Yue 01 Xie Wai Ren No. 3 and (2019) Yue 01 Xie Wai Ren No. 58 that any damages ordered should be limited to only direct and indirect losses, and that punitive damages several times the amount of compensatory damages "*obviously violate the basic principles of Chinese law*" such that recognition and enforcement should not be granted. In her defence, Zeng Fang summarised that "*the US civil judgment ruled that Zeng Fang should compensate Wang Anqin for his investment of USD 560,000 and punitive damages in the amount of USD 1.24 million, close to three times of the amount of compensatory damages", "the US court, in the civil judgement, ordered Zeng Fang to pay to Jiang Hui and the other five people, respectively, 1.6 million in punitive damages close to three times of the total investment ranging from US $50,000 to US $540,000, in addition to paying such investment amount as compensation* [Authors' Note: the US Court in this judgment awarded USD 540,000 in compensatory damages to each of the six plaintiffs including Jiang Hui, and USD 1.6 million in punitive damages to each of the six plaintiffs, respectively.]".[18] In these three judgments, the Guangzhou Intermediate Court unanimously determined that "*the civil judgment[s] rendered by the US court may be recognised and enforced according to the principle of reciprocity, but the portion of punitive damages that is in manifest excess of actual losses shall not be recognised and enforced"*. Under Article 289 of CPL (2021 Amendment),[19] and upon findings by Higher People's Court of Guangdong Province and the Supreme People's Court, the Guangzhou Intermediate Court ruled to "*partially recognise and enforce the civil judgment*" rendered by the US court, and "*recognise and enforce part of the main text of the judgment*". In other words, the defendants were held to be jointly and severally liable for paying *compensatory* damages (returning the investment amount), but not punitive damages, which is the part of judgement that the Court refused to recognise and enforce.

IV. Conclusion

When a party seeks to recognise and enforce a foreign judgment before a Chinese court, it should check whether there is an international convention or treaty on the recognition and enforcement of judgments between China and the country of the court that rendered the relevant judgment. Absent an international convention or treaty, the party should then look into whether there is reciprocity between China and that foreign country — whether there is a precedent that a Chinese court judgment was recognised and enforced by that foreign country, or whether the laws of that country allow Chinese court judgments to be recognised and enforced there. As for foreign judgments which may be said to offend against basic principles of Chinese Law, as is the case with punitive damages,

a party should be aware that the Chinese courts may refuse to recognise and enforce the offending part(s) of the foreign judgement on the ground that they "violat[e] the basic principles of Chinese law", while recognise and enforce only the remaining content of the foreign judgments.

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1 Unless otherwise specified, all references to the Civil Procedure Law (the "CPL") (without indicating a specific version) in this article are to the *Civil Procedure Law of the People's Republic of China (2023 Amendment)*.

2 Article 298 of the CPL: "Where an effective judgment or ruling rendered by a foreign court requires recognition and enforcement by a people's court, a party may directly apply to the intermediate people's court having jurisdiction for recognition and enforcement or the foreign court may request recognition and enforcement by a people's court in accordance with the provisions of an international treaty concluded or acceded to by the foreign country and the People's Republic of China or under the principle of reciprocity".

3 Article 299 of the CPL: "After examining an application or request for the recognition and enforcement of an effective judgment or ruling rendered by a foreign court in accordance with an international treaty concluded or acceded to by the People's Republic of China or under the principle of reciprocity, a people's court shall render a ruling to recognize the legal force of the judgment or ruling and issue an order for enforcement as needed to enforce the judgment or ruling according to the relevant provisions of this Law, if the people's court deems that the judgment or ruling neither violates the basic principles of laws of the People's Republic of China nor damages the sovereignty, security, and public interest of the state".

4 Article 300 of the CPL: "A people's court shall, after examining an application or request for the recognition and enforcement of an effective judgment or ruling rendered by a foreign court, render a ruling not to recognize and enforce the judgment or ruling under any of the following circumstances:
(1) The foreign court has no jurisdiction over the case according to Article 301 of this Law.
(2) The respondent has not been lawfully summoned or has been lawfully summoned but has not been given a reasonable opportunity to make statements or arguments, or the party without the capacity to action is not properly represented.
(3) The judgment or ruling is obtained by fraud.
(4) A people's court has rendered a judgment or ruling on the same dispute or has recognized a judgment or ruling rendered by a court of a third country on the same dispute.
(5) The basic principles of the laws of the People's Republic of China are violated or the sovereignty, security, or public interest of the state is damaged."

5 The Treaty Database of the People's Republic of China, see http://treaty.mfa.gov.cn/Treaty/web/list.jsp?nPageIndex_=1&keywords=%E5%85%B3%E4%BA%8E%E6%B0%91%E4%BA%8B&chnltype_c=all, last accessed on 14 August 2024.

6 For example, Reply of the Supreme People's Court of the People's Republic of China on Whether Chinese Courts Should Recognize and Enforce the Decisions on claims and debts by Japanese Court, (1995) Min Ta Zi No.17 ((1995)民他字第 17 号); Beijing No. 2 Intermediate People's Court, (2004) Er Zhong Min Chu Zi No. 12687 ((2004)二中民初字第 12687 号).

7 Spar Shipping AS v Grand China Logistics Holding (Group) Co. Ltd (A Case of Applying for Recognition of Foreign Court Judgement), (2018) Hu 72 Xie Wai Ren No. 1 ((2018)沪 72 协外认 1 号).

8 *Haitong Cases: The First Time a Chinese Court Recognizes U.K. Judgment*, https://mp.weixin.qq.com/s/mlNwEIJqnqT309JxsdRWJA.

9 Article 289 of the CPL (2021 Amendment): "After examining an application or request for recognition and

enforcement of an effective judgment or ruling of a foreign court in accordance with an international treaty concluded or acceded to by the People's Republic of China or under the principle of reciprocity, a people's court shall issue a ruling to recognize the legal force of the judgment or ruling and issue an order for enforcement as needed to enforce the judgment or ruling according to the relevant provisions of this Law if the people's court deems that the judgment or ruling does not violate the basic principles of the laws of the People's Republic of China and the sovereignty, security and public interest of the People's Republic of China. If the judgment or ruling violates the basic principles of the laws of the People's Republic of China or the sovereignty, security or public interest of the People's Republic of China, the people's court shall not grant recognition and enforcement".

10 See *Spliethoff's Bevrachtingskantoor BV v Bank of China Ltd*, [2015] EWHC 999 (Comm), 17 April 2015, paragraph 139.

11 See (2022) Jing 01 Po Shen No.786 ((2022)京 01 破申 786 号).

12 Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).

13 TXO Production Corp. v. Alliance Resources Corp. 509 U.S. 443 (1993).

14 Song Lianbin, Chen Xi, Divergence and Coordination of Recognition and Enforcement of Foreign Punitive Damages in Practice, Jianghuai Tribune 2021(3), p.111.

15 Article 584 of Civil Code of the People's Republic of China: "Where a party fails to perform its obligations under the contract or its performance fails to conform to the agreement, causing losses to the other party, the amount of compensation for losses shall be equal to the losses caused by the breach of contract, including the interests receivable after the performance of the contract, but not exceeding the probable losses caused by the breach of contract which are foreseen or should have been foreseen when the party in breach concludes the contract".

16 CV-17-08936-MWF (RAOx) of the United States District Court for the Central District of California, CV17-7149-MWF (RAOx) of the United States District Court for the Central District of California, and BC661793 of the Superior Court of California, County of Los Angeles.

17 See (2019) Yue 01 Xie Wai Ren No.3 ((2019)粤 01 协外认 3 号), (2019) Yue 01 Xie Wai Ren No.22 ((2019)粤 01 协外认 22 号) and (2019) Yue 01 Xie Wai Ren No.58 ((2019)粤 01 协外认 58 号).

18 See (2019) Yue 01 Xie Wai Ren No.3 ((2019)粤 01 协外认 3 号) and (2019) Yue 01 Xie Wai Ren No.58 ((2019)粤 01 协外认 58 号).

19 *Supra* note 9.

AUTHORS



Vera Zuo（Beijing）
+86 10 5706 8458
zuotianyu@jtn.com



Zeng Sheng（Beijing）
+86 10 5706 8208
zengsheng@jtn.com



Stella Lu（Shanghai）
+86 21 3886 2246
lvsiqiong@jtn.com



Alan Li（Shenzhen）
+86 755 2348 2627
lilan@jtn.com



Celine Cen（Shenzhen）
+86 755 2223 5518
cenlin@jtn.com



Li Jiarong（Beijing）
+86 10 5706 8371
lijiarong@jtn.com


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