

The Reciprocity Principle in Recognition and Enforcement of Foreign Judgements: Dilemma and Solutions

Chunlong Xu

*Institute of Social Culture, Macau University of Science and Technology, Zhujiang East Road,
Guangzhou, China
13926001118@139.com*

Keywords: Foreign Civil and Commercial Judgment, Recognition, Enforcement, The Principle of Reciprocity

Abstract: In China's judicial practice, de facto reciprocity is the underlying principle for recognition and enforcement of civil and commercial judgments and rulings by foreign countries with which China has not concluded bilateral or international treaties. The principle of reciprocity, now widely considered the key basis for recognition and enforcement of foreign judgments, should be reviewed since misuse of this principle may incur revanchism or impede the smooth enforcement of judgments. Based on the implementation of reciprocal recognition and enforcement of foreign judgments in China, the varied interpretations of judicial practice are critically analyzed, and suggestions for legislative and judicial practice are proposed from six perspectives including jurisdiction, due process, and legitimacy of judgments. The present work is intended to improve China's system of recognition and enforcement of foreign judgments and enhance China's image in international judicial practice.

1. Introduction

A series of cases, including the “Gomi Akira” case [1], the “Flush” case [2], the “Truhe” case [3], the “Liu Li” case [4], and the “Kolmar v. Sutex” case [5], have implied China's adoption of the principle of de facto reciprocity in recognition and enforcement of civil and commercial judgments and rulings by courts of countries that China has concluded no bilateral or international treaties. It has been a common practice of law in China, without substantial changes over the years. Many scholars and experts of law, aware of the grave risks this practice may incur, have been exploring solutions. Nonetheless, the research finding, no matter how insightful it is, reduces to mere empty talk if not applied to practice. What is a comfort is that in July 2015, some twenty years after the “Gomi Akira” case, the Supreme People's Court, China's highest organ of judicial policy-making, issued “Several Opinions of the Supreme People's Court on the Provision of Judicial Services and Safeguards by People's Courts for the Belt and Road Initiative”, which stipulated presumptive reciprocal recognition and enforcement of civil and commercial judgments made by foreign courts [6].

Nevertheless, it is indisputable that the “Several Opinions” mentioned above is a mere piece of document, and there is still a long way to go to incorporate it into legal practice. As China expands opening up and pushes forward its Belt and Road Initiative (BRI), problems with the recognition and enforcement of foreign civil and commercial judgments grow increasingly pronounced, such as the absence of relevant legal policies, overcaution in legal practice, and the lack of breakthroughs in theoretical research. This paper is intended to explore a possible solution to these problems and help the parties involved in the legal system to reach a consensus about the reciprocity principle.

2. Current Conditions of Recognition and Enforcement of Foreign Civil and Commercial Judgments in China

2.1. International Treaties

In China’s system, the recognition and enforcement of foreign civil and commercial judgments are pigeonholed into foreign-related civil and commercial procedures. As stipulated in the Article 260 of “Civil Procedure Law of the People's Republic of China (2012 Amendment)”, “if an international treaty that the People's Republic of China has concluded or acceded to contains provisions that are inconsistent with the Law, the provisions of the international treaty shall prevail, except for those provisions to which the People's Republic of China has declared its reservations”. To date, China has concluded bilateral treaties with 28 countries regarding the recognition and enforcement of civil and commercial judgments [7].

2.2. Domestic Law

In China, legal clauses regarding procedural law that has actual legal effects include laws released on the National People’s Congress, judicial interpretations, and corresponding directive cases issued by the Supreme People’s Court. However, for the recognition and enforcement of foreign judgments and rulings, there are only two legal clauses—Article 281 and Article 282 in the “Civil Procedure Law of the People's Republic of China (2012 Amendment)”, in which the conditions for recognition and enforcement of foreign civil and commercial judgments are specified: 1) the subject; 2) laws and regulations; 3) objective conditions; 4) the court that receives the application or request has jurisdiction; 5) the public order protected by the domestic law should not be damaged.

2.3. Judicial Interpretation

Judicial interpretations for foreign civil and commercial judgments include Articles 543, 544, 546, 547, and 548 in the “Interpretation of the Supreme People's Court (SPC) on the Application of the Civil Procedure Law of the People's Republic of China (Amendment 2015)”, which specify the following elements: 1) the requirements for application documents; 2) the review process; 3) prohibition of direct application for execution; 4) requirements for the application duration; 5) requirements for the review organ; 6) guarantee of procedural rights of the applicant; 7) the first-instance judgment as the final judgment. In these years, the Supreme People’s Court, conscious of the shortage of legal clauses regarding foreign civil and commercial judgments and rulings, takes establishing a set of independent judicial interpretations as the optimal solution and hence releases the “Regulations for several issues regarding the recognition and enforcement of foreign judgments in civil and commercial matters (Exposure Draft)”.

2.4. Judicial Policies

The judicial policies released by the Supreme People's Court about the recognition and enforcement of foreign civil and commercial judgments used to be in the form of typical cases in the early days, i.e., the “Gomi Akira” case. In the “Reply to the Request of the Australian company Power Engine Flush Pty Ltd. for Recognition and Enforcement of the Judgements Made by the Australian Court” issued by the Supreme People's Court in March 2007, the policy orientation identified in the “Gomi Akira” case was adopted, that is, the reciprocity principle does not apply to countries that China has not concluded any bilateral or international treaties with. As a result, the application was rejected. In July 2015, the “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” was issued, which was the first flexible variation that the Supreme People's Court made to relevant judicial policies. Specifically, in Article 6, it is stated that “under the circumstance where some countries have not concluded judicial assistance agreements with China, on the basis of the international judicial cooperation and communication intentions and the counterparty's commitment to offering mutual judicial benefits to China, the people's courts of China may consider the prior offering of judicial assistance to parties of the counterparty, positively promote the formation of reciprocal relationship”. Later in December 2019, the Supreme People's Court issued “Opinions of the Supreme People's Court on Further Providing Judicial Services and Guarantees by the People's Courts for the Belt and Road Initiative”, in which Article 19 states that “(the people's courts of China shall) take active measures to facilitate the recognition and enforcement of civil and commercial judgments of foreign courts”, and Article 24 states that “(the people's courts shall) adopt the judicial criterion of presumptive reciprocity, and gradually promote mutual recognition and enforcement of judgments between international commercial courts”.

In China's judicial practice, people's courts in China have been in a cycle of “refusal—recognition—refusal—recognition” in terms of recognition and enforcement of foreign civil and commercial judgments. Whether the judgments are recognized or not, the underlying principle for the decision is the principle of reciprocity, and in arguments, the very basis for both scenarios is that there is evidence to prove that the judgments made by the courts of China have been recognized and executed by courts of the other country in question, that is, the *de facto* reciprocity principle. To date, people's courts in China have not yet taken any substantial actions to make the principle of presumptive reciprocity the very basis for recognition and enforcement of foreign civil and commercial judgments.

3. Limitation for The Development of The “Reciprocity Principle”

As revealed in the judicial practice of countries across the globe, the *de facto* reciprocity principle is largely adopted by countries that are underdeveloped, less opened-up, and unconfident of their own legal systems and judicial practice, and opting for *de facto* reciprocity reflects the weak national strength and the lack of national confidence in legal practice. In China's legal practice, though the judicial organs have grown increasingly open-minded when it comes to foreign judgments and rulings of civil and commercial cases instead of giving refusals all the time. However, *de facto* reciprocity remains a factor to consider in examination and approval procedures. Some fuzzy issues still prevail in the judgment-making process of judicial organs in China:

3.1. The Burden of Proving The Reciprocal Relationship

In the “Gomi Akira” case, the reply to the “Flush” case made by the Supreme People's Court and the refusal to recognize foreign judgments, there are no clear rules that specify the distribution of the

burden of proof; in most cases, the people's courts make decisions directly without "establishment of a reciprocal relation". In the general practice of courts in China, the burden of proof for the reciprocal relationship is addressed through review by the court or testification by the applicant. It is theoretically feasible for the court to shoulder the burden of proving the reciprocal relationship because judicial openness has already been a common practice among civilized countries in the modern world, and the fast-developing information technologies have made it more practically feasible. The Supreme People's Court has publicly promised to "encourage collaborations research institutes, universities, associations of lawyers, industry societies, and chambers of commerce to perform legal research and training about countries along the Belt and Road, and join hands to build legal databases and case libraries for the Belt and Road based on the smart courts" [8]. If this promise is fulfilled, the court will shoulder the burden of proving the reciprocal relationship, which is an authoritative and efficient solution, and saves the trouble of the applicant for investigations. However, before this promise comes true, the rule that "the burden of proof is borne by the party that makes the claim" prevails; that is, the applicant bears the burden of proof, which is undoubtedly legitimate and appropriate.

3.2. The Criterion for Proving The Reciprocal Relationship

The criterion for proving is a matter of degree: does it suffice if the applicant puts forward only one case in which the foreign court has recognized the judgments by a Chinese court or more than one case is required? If the defendant defends by putting forth a case or cases in which the judgments by Chinese courts are denied by the foreign court, does the applicant need to provide further proof? As revealed in the publicly released judicial adjudications in China, the applicant needs to provide only one case in which the foreign country recognizes the judgments of a Chinese court before the Chinese court justifies the reciprocal relationship with the foreign country in question. However, the defendant party may put forward cases in which the country in question has denied judgments made by a Chinese court. In this scenario, the situation is rather complicated. It is a matter of admissibility of evidence, which is supposed to be determined by the judge as per the Law of Evidence. If the case of denial precedes the case of recognition, it can be considered as a trend that the reciprocal relation is shaping between China and the foreign country in question. However, if the case of denial happens after the case of recognition, is it reasonable to consider that the reciprocal relationship with the country in question no longer exists? The author believes it is unwise to rush to this conclusion: the judge needs to compare the respective evidence for the cases of denial and recognition to identify correlations before making a decision: if the foreign country has not denied all judgments made by Chinese courts, it cannot be concluded that there is no reciprocal relation between China and the country in question.

3.3. Impacts of Foreign Legal Systems and Court Systems

There are two court systems in federal countries: the federal court system and the state court system. Though these two systems differ only in jurisdiction, they are not in a relationship of administrative subordination or guidance. The federal court may not conform to the rules issued by local courts, and vice versa. Take the United States for example. When it comes to recognition and enforcement of foreign judgments, the state courts in the US do not consider it a crucial factor whether the foreign country in question gives equivalent recognition for their judgments [9]. Besides, countries in the common law system, especially the commonwealth countries, do not consider whether China provides reciprocity when denying or recognizing judgments made by their courts. For example, even though China recognizes the judgments of Australian courts for the sake of the reciprocal relation between China and Australia, the courts in Australia will keep sticking to the common law in its

denial or recognition of Chinese court judgments instead of providing equivalent reciprocity [10]. Therefore, for these countries, China's practice of taking the reciprocal relation as a basis for denial or recognition of foreign judgments is misoriented and impractical.

3.4. Defense of Service

There is no denying that substantive review is time-consuming and costly, which is true for any court in any country around the world. It has long been a common practice among all countries to forbid substantive review of foreign judgments [11]. Therefore, the procedural review is performed for the review of recognition and enforcement of foreign civil and commercial judgments. The key factor in procedural review is to check whether the defendant, especially a native defendant, can equally participate in the proceeding, that is, whether the defendant can be informed of the truth of the case, have the chance to properly prepare for the defense to protect his or her legitimate interests. Legitimate service, in this scenario, turns out a key issue. In 2015, the "Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China" was issued, where Article 543 states that "in the case, the judgment/ruling rendered by the foreign court is a default judgment/ruling, the applicant shall also submit documents to prove that the foreign court has summoned the relevant parties pursuant to law, except that the judgment/ruling has provided clear explanations on this issue". This article, in essence, assigns the burden of proof for legitimate service of an instrument to the applicant. However, in Clause 2 of Article 548, it is stated that "the people's court shall serve the written application on the respondent who may state its opinions". The regulation that the defendant may state his or her opinions gives the defendant the right of defense, and the substantive effect of the defense is the defense of service.

4. Thoughts on Reconstructing The System of Recognition and Enforcement of Foreign Judgments

Despite the public law relations between nations, the recognition and enforcement of foreign civil and commercial judgments can be separated. The recognition is a matter of negation or acknowledgment of a judgment after a review of the legitimacy of existing legal facts or evidence, and hence enforcement is a matter of execution of judgments made by the local court instead of by the foreign court. In this light, the reciprocal relations between nations are no longer a crucial factor to consider in the recognition or enforcement of foreign judgments or rulings. What if the court forgoes the reciprocity principle? The author believes that the "Uniform Foreign Money Judgments Recognition Act (UFMJRA)" issued by the Uniform Law Commission in 1962 can provide a reference. Section 4 of UFMJRA specifies the grounds for the non-recognition of foreign money judgments by illustrating three mandatory scenarios and six arbitrary scenarios [12]. This is the general practice among countries in the common law system. In summary, the content for review includes the following:

- 1) Jurisdiction: the court of the country that makes the judgment must have legitimate jurisdiction, including personal jurisdiction over the defendant, jurisdiction over the subject matter jurisdiction, and conformity with the principle of contractual jurisdiction or the *forum non conveniens* principle. Surely, the determination of the right of jurisdiction is based on the law of the country where the judgment is made, but meanwhile, it should not violate the local laws.

- 2) Due process of law. This means the defendant in the foreign court should receive the notice of the proceedings to be enabled to take part in the litigation and make a proper defense. Other procedural issues like whether to open a court session are not the content for review.

- 3) The legitimacy of the judgment: the judgment should not be made through fraud, such as one party intentionally providing a false address to the court, refusing to provide evidence, or bribing the

judge to reach a default judgment in his or her favor.

4) Public policy: in the case that the foreign judgment is repugnant to the local public policy or its basic principle of law, the judgment will not be recognized or enforced. This is the major reason why the reciprocity principle is unnecessarily the basis for the judge. That is, the national interest can be primarily protected if the principle of public order reservation is followed, and hence there is no need to stick to the reciprocity principle.

5) Conflicts with existing judgments: if a proceeding based on the same set of laws has been judged in the home country and the judgment conflicts with the foreign judgment of the application in question, then, the foreign judgment will not be recognized.

6) Time limit: the application should be within the time limit. The time limit can be set according to the enforcement period prescribed in the law of the country that makes the judgment or according to the procedural law of the home country. For the sake of protection of rights, the time limit should be the longer of the two.

5. Conclusions

As revealed in the series of judicial policies released by the Supreme Peoples's Court of China and the “Regulations for several issues regarding the recognition and enforcement of foreign judgments in civil and commercial matters (Exposure Draft)” released in 2017, China still sticks with the principle of reciprocity in its recognition and enforcement of foreign civil and commercial judgments. The legal system and judicial systems should be updated to keep pace with socioeconomic development; otherwise, it will become a hurdle to a nation’s sustainable development. As China sketches its strategic blueprint for globalization, the principle of reciprocity should be reviewed to reconstruct the system with the big picture in mind. This is a way to demonstrate the magnanimity of the Chinese people, increase China’s soft power, protect the legitimate rights of Chinese citizens in legal practice across the world, and hence safeguard the national interest.

References

- [1] *The Gazette of the Supreme People's Court* (1997).
- [2] *No. 45 of the Fourth Civil Court Judgement of The Supreme People's Court* (2006).
- [3] *Civil Ruling in Writing of the No. 354 Judgement of Civil Court by Intermediate People's Court of Nanchang* (2016).
- [4] *Civil Ruling in Writing of No. 00026 First Judgement of Civil and Commercial Court of Intermediate People's Court of Wuhan* (2015).
- [5] *Civil Ruling in Writing of No. 3 Judgement of Foreign Recognition of Intermediate People's Court of Nanjing* (2016).
- [6] Huang Z, H. (2018) *Dilemma and Solution in China's Application of Principle of Reciprocity in Recognition and Enforcement of Judgment*. *Tribune of Political Science and Law*, 6, 63-76.
- [7] Liu Y. J. and Chen W. S. (2020) *Application of the Principle of Reciprocity in Recognition and Enforcement of Foreign Judgements in the Context of Belt and Road Initiative*. *Journal of Xinjiang University (Philosophy and Social Sciences)*, 4, 32-41.
- [8] *Article 16 of Opinions of the Supreme People's Court on Further Providing Judicial Services and Guarantees by the People's Courts for the Belt and Road Initiative* (2019).
- [9] Liu Y. F. and Yan F. (2019) *The Principle of Reciprocity in Recognition and Enforcement of Civil Judgements between China and the US*. *Journal of Beihua University (Social Sciences)*, 4, 53-59.
- [10] Wang Y. H. (2019) *Practice and Improvement of Recognition and Enforcement of Civil and Commercial Judgements between China and Australia*. *Chinese Review of International Law*, 6, 88-102.
- [11] Zhang W.L. (2019) *Defense of Service in the Context of Recognition and Enforcement of Foreign Judgements*. *Contemporary Law Review*, 2, 150-160.
- [12] Huo Z.X. (2019). *The Dilemma of the American Law System in Recognition and Enforcement — China's Response and Lessons*. *Science of Law (Journal of Northwest University of Political Science and Law)*, 5, 171-181.