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Enforcing Commercial Judgments between China and South Africa in the Context of BRICS and BRI

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Abstract

The frequent business transactions between China and South Africa in the context of BRICS and the Belt and Road Initiative have resulted in many commercial disputes. The ultimate resolution of such disputes requires a feasible enforcement mechanism for commercial judgments, but some obstacles remain when enforcing commercial judgments from each side. Both countries have adopted different approaches and principles to ascertain the jurisdiction of the adjudicating court, the application of reciprocity and an understanding of public policy. This article examines these obstacles by comparing the two enforcement regimes, and explores ways to overcome these obstacles and to realize the free flow of commercial judgments between both sides.

Keywords

China, South Africa, BRICS, commercial judgments, enforcement

INTRODUCTION

The enforcement of commercial judgments[1] between different countries is of great significance for maintaining normal transnational commercial transactions. It has long been recognized that a court's judgment is worthless if it cannot be enforced.[2] If the judgments cannot be circulated freely, the judgment creditor's rights and interests will be prejudiced, which will in turn have a

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1 On the Chinese mainland, there are no separate civil and commercial codes; accordingly, there is no division between civil and commercial judgments. Generally, they are just categorized as civil *and* commercial judgments. However, commercial judgments in practice refer to those to pay a fixed or fixable sum of money. In South Africa, commercial judgments usually refer to financial judgments. This article only deals with the recognition and enforcement regimes on the Chinese mainland, not including those in the Hong Kong Special Administrative Region, Macao Special Administrative Region or Taiwan, where different enforcement regimes apply.

2 S Eiselen "International jurisdiction in claims sounding in money" (2006) 18 *South African Mercantile Law Journal* 45 at 45.

negative impact on the free movement of goods, capital, services and people. As some writers have observed, "the purpose of the recognition and enforcement of foreign judgments is founded upon enlightened social values and the facilitation of international relations",[3] and "it also supports and enhances the free flow of commerce and community interrelationships in a shrinking world".[4] Therefore, international society has made great efforts to guarantee the free circulation of commercial judgments. Considering the reality of today's world, one practical approach is to negotiate and conclude bilateral judicial assistance treaties with other countries.

Such an arrangement is particularly important for China and South Africa. As members of the Brazil, Russia, India, China and South Africa (BRICS) group and important partners for the Belt and Road Initiative (BRI), there are increasingly frequent commercial transactions between China and South Africa, requiring the establishment of an enforcement mechanism for commercial judgments between both countries. So far, China has concluded judicial assistance treaties regarding civil or commercial matters with several other countries. China has also actively participated in the negotiation of multilateral conventions on recognition and enforcement.[5] With the development of the BRI, China has made great efforts to advance the recognition and enforcement of judgments between China and other countries to protect its overseas investors better. So far however, there has been no bilateral judicial assistance treaty between China and South Africa, nor do they cooperate in the enforcement of commercial judgments.[6] This article discusses the necessity for enforcing commercial judgments between China and South Africa, and then examines the bases and conditions for enforcing commercial judgments between these jurisdictions. Based on this analysis, the article explores the obstacles to the enforcement of such judgments, before offering suggestions for enforcing commercial judgments between them.

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3 C Schulze "Practical problems regarding the enforcement of foreign money judgments" (2005) 17 *South African Mercantile Law Journal* 125 at 125.

4 AB Edwards (updated by E Kahn) "Conflict of laws" in WA Joubert (ed) *The Law of South Africa*, vol 2, part 2 (2nd ed, 2003, LAWSA), 297 at 384–85.

5 As of November 2020, China had concluded 36 bilateral judicial assistance treaties (including with Ethiopia, Brazil, Algeria, Tunisia and Egypt), which make provision for the recognition and enforcement of foreign judgments. China signed the 2005 Hague Convention on the Choice of Court Agreements in September 2017; and China has been actively engaged in negotiating the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, the final draft of which was concluded at the 22nd diplomatic session of the Hague Conference on Private International Law on 2 July 2019 and is available at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137> (last accessed 25 October 2020).

6 W Zhu "Jinzhuan guojia sifa hezuo xianzhuang wenti he qianjing" [Judicial cooperation among the BRICS countries: Present, problems and prospect] (2018) 5 *Hebei Faxue* [Hebei Law Science] 12.

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THE NECESSITY FOR ENFORCING COMMERCIAL JUDGMENTS BETWEEN CHINA AND SOUTH AFRICA

Frequent cross-border business transactions create the potential need for the enforcement of commercial judgments between different countries. Since the establishment of diplomatic relations between China and South Africa in 1998, their business relationship has strengthened steadily. According to statistics from China's Customs, the trade volume between the countries exceeded US$43.5 billion in 2018, which made South Africa China's largest trading partner in Africa for nine consecutive years and made China South Africa's largest trading partner for ten consecutive years. By the end of 2017, China's foreign direct investment stock to South Africa had exceeded US$25billion, making South Africa China's largest investment destination in Africa.[7]

The large number of civil and commercial disputes arising from these frequent business transactions made the enforcement of commercial judgments between both sides a practical necessity. Searching www.itslaw.com (a Chinese search engine for legal information) with the keyword *Nanfei Gongheguo* 南非共和国 [the Republic of South Africa], the author identified 94[8] civil and commercial judgments involving a South African element[9] in Chinese courts since 2003. Looking at the annual distribution of such judgments, the number increased year by year. For example, in 2003 Chinese courts only made one judgment involving South African elements, while since 2013 the annual number of such judgments has been at least ten.[10] The top three types of judgments (totalling 68) were those concerning contracts, *negotiorum gestio* [unauthorised business agency] and unjust enrichment; marriage, family and inheritance; as well as commercial disputes involving companies, stock, insurance and instruments. The number of disputes involving a Chinese element in South African courts was also very high. Searching the Southern African Legal Information Institute's website (www.saflii.org) with the keywords "Chinese" and "China", the author identified 332 and 496 disputes respectively. According to the author's survey several years ago, Chinese-related disputes in South African courts mainly arose from contracts, letters of credit or guarantee, maritime matters, as well as the infringement of intellectual property rights.[11]

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7 X Sheng and M Zhang "Zhongguo dui Nanfei touzi chaoquo 250 yi meiyuan" [China's FDI to South Africa exceeds US$25 billion] (24 April 2018) *Renmin Ribao (haiwai ban)* [People's Daily (overseas edition)] at 3.

8 The data collected in this part is as of 4 November 2020.

9 The cases dealt with in China with a South African element refer to those in which at least one of the parties is from South Africa, the cause of the action occurs in South Africa, or the subject matter is located in South Africa.

10 For example, 11 judgments in each of 2014 and 2015, 10 in 2016, 11 in 2017 and 18 in 2018.

11 W Zhu "A brief analysis of the disputes arising from China-African civil and commercial transactions" (2012) 7/3 *Journal of Cambridge Studies* 74 at 76–79.

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South Africa joined the BRICS group in December 2010 and was the first African country to sign the Belt and Road Cooperation Memorandum with China. Given this background, business transactions between these countries will become more frequent and, accordingly, the number of commercial disputes will increase greatly. As the final stage in commercial dispute resolution, the recognition and enforcement of judgments will determine whether or not the rights and interests of the judgment creditor can be realized. Otherwise the cross-border flow of people, capital, services and goods will be obstructed, which will subsequently affect the realization of BRI's five goals: unimpeded trade, integrated finance, coordination of policies, connectivity of infrastructure and the exchange of people. In fact, the Chinese courts have dealt with applications for the recognition of divorce judgments from the South Gauteng High Court and from a magistrate's court in Western Cape. In respect of the former, the Chinese court denied its recognition on the ground that the parties' divorce litigation was still pending in the Chinese court.[12] In respect of the latter, the Chinese court recognized it in its ruling pursuant to the judicial interpretation of the recognition and enforcement of foreign divorce judgments issued by the Supreme People's Court in China.[13] It is likely that the enforcement of commercial judgments between both sides will also arise due to the increase in commercial disputes between both sides. Thus, it is necessary to learn about each jurisdiction's recognition and enforcement systems and to make relevant arrangements in advance based on the comparative studies.

THE BASES AND CONDITIONS OF COMMERCIAL JUDGMENT ENFORCEMENT BETWEEN CHINA AND SOUTH AFRICA

Traditionally, comparative law plays a very important role in the development of private international law. The similarities and differences between foreign-related legal systems in different countries may be generalized through comparative studies. Despite the distance between China and South Africa, their legal systems have both been influenced by outside legal systems and, as a result, they are both "mixed" in nature.[14] This mixed nature is more obvious

12 The Supreme People's Court of the PRC "Zuigao renmin fayuan guanyu yuyu mou shenqing chengren yu zhixing waiguo fayuan minshi panjue yi tiao de qingshi de fuhan" [The Supreme People's Court's reply to the enquiry on XX's application to recognize and enforce a foreign civil judgment] (23 February 2012) *Minsi tazi No 3*.

13 The Intermediate People's Court of Han Dan City, Hebei Province "Wang mou yu Yang mou lihun yitiao minshi caidingshu" [The ruling on the divorce between Wang and Yang] (2017) *ji04 xiewai ren No 1*.

14 See S Wu "Zhongguo de hunhefa: Jianji Zhongguo faxi zai shijie de diwei" [Mixed laws in China: The status of the Chinese legal family in the world] (1993) 2 *Zhengzhi yu Falü* [*Politics and Law*] 36. For analysis of mixed law in South Africa, see V Palmer *Mixed Jurisdictions Worldwide: The Third Legal Family* (2001, Cambridge University Press) at 7–10; G Wille *Principles of South African Law* (5th ed, 1961, Juta & Co Ltd) at 31–49.

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in private international law. As the branch of law that regulates foreign-related civil and commercial relationships, private international laws in both China and South Africa have drawn many experiences and practices from other countries, which has led to many similarities in their recognition and enforcement regimes. While the degree of influence from the other countries is quite different, there also differences in their recognition and enforcement regimes.[15]

Bases of the enforcement of foreign commercial judgments

The recognition and enforcement of foreign judgments are based on different theories and laws. It is very important to learn about such theories and laws in the country where the recognition and enforcement are sought, for "the bases on which foreign judgments are enforced influence the scope of judgments that can be enforced", and "it can be argued that judgment enforcement regimes founded on comity or the need to facilitate international trade and commerce are more amenable to enforcing foreign judgments than regimes founded on reciprocity".[16] On the other hand, a study of recognition and enforcement regimes, namely the legal bases for such recognition and enforcement, will help ensure the specific conditions and procedures for recognition and enforcement.

So far, Chinese courts have not explored the theories relating to recognition and enforcement in their judgments and most Chinese private international law scholars have only introduced or discussed recognition and enforcement theories in textbooks or articles. With regard to the reasons for the recognition and enforcement of foreign commercial judgments, there are two main opinions in China. According to one opinion, "the fundamental reason why a country recognizes and enforces the judgments from the other country is not based on the international comity, *res judicata*, or reciprocity, nor based on the respect for the vested right or obligation conferred upon by the foreign judgments or the recognition of the foreign *lex specialis*, but based on the need to transact with other countries".[17] Meanwhile in light of the other opinion, the reason to recognize and enforce foreign judgments "is based on the principle of equality and mutual benefit".[18] Obviously, the two opinions adopted the reasoned and pragmatic method for recognition and enforcement based on the reality of international society today. It is unfortunate, nevertheless, that such kinds of opinions are not accepted in China's legislation and

15 For example, the Chinese legal system has more influences from Germany and Japan and shows more civil law features, while the South African legal system is more influenced by the UK and shows more common law features.

16 R Oppong *Private International Law in Commonwealth Africa* (1st ed, 2013, Cambridge University Press) at 316.

17 Y Xiao *Guoji Sifa Yuanli* [The principles of private international law] (1st ed, 2007, Law Press) at 422.

18 S Li *Guoji Sifa* [Private international law] (3rd ed, 2011, Peking University Press) at 405.

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practice. The principle of reciprocity remains important in China's recognition and enforcement legislation, which has caused much inconvenience and trouble in practice.

The theoretical basis for the recognition and enforcement of foreign judgments in South Africa is not entirely clear and settled.[19] As a Roman-Dutch law country and a former British colony, the doctrines of comity and obligation have always been very influential in South Africa's recognition and enforcement regimes, and "the reason for enforcing foreign judgments in South African law was first based on the notion of comity".[20] Additionally, the doctrines of vested rights and most significant relationship have also been invoked in the judgments delivered by South African courts.[21] Traces of the doctrine of reciprocity can still be found in South African cases and in the authoritative writings of Roman-Dutch law, whereas it is generally submitted that such a doctrine is not part of South African common law.[22] Recognition and enforcement are completely based on the reciprocity in the Reciprocal Enforcement of Civil Judgments Act 1966 of South Africa, but this act never came into force. The Enforcement of Foreign Civil Judgments Act of 1988 repealed the 1966 act and reciprocity was not to be found in the new act.[23] Considering the fact that each of these doctrines has its own shortcomings, private international lawyers in South Africa advocated the adoption of pragmatism in recognizing and enforcing foreign judgments. For example, when deciding whether to recognize and enforce a foreign judgment, consideration should be given to the "enlightened social values and the facilitation of international relations"[24] or "bringing a variety of policy concerns into balance to meet the contemporary needs".[25] Professor Forsyth, a prestigious South African private international law scholar, even deemed it unnecessary to consider the question separately, "for the reasons recognizing and enforcing foreign judgments are the same as those for applying foreign law generally", "[i]ndeed, the application of foreign law is the application of a general abstract norm of the foreign system, while the enforcement of a foreign judgment is simply the application of an individual concrete norm (*lex specialis*) of

19 L Middleditch "Enforcement of foreign commercial judgments in the US, England and South Africa" (1991) 10 *International Business Lawyer* 436 at 439.

20 Eiselen "International jurisdiction", above at note 2 at 46. See also *Reiss v Insamcor*, above at note 51 at 1037. Compare with *Supercat Incorporated v Two Oceans Marine CC* 2001 (4) SA 27 (C) at 30.

21 See C Roodt "Recognition and enforcement of foreign judgments: Still a Hobson's choice among competing theories?" (2005) 38 *Comparative and International Law Journal of Southern Africa* 16 at 17–19; Oppong *Private International Law*, above at note 16 at 316–18. See also *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) SA 509 at 513–16.

22 L Middleditch "Enforcement of foreign commercial judgments", above at note 19 at 439.

23 The text of the 1988 act is available at: <https://www.justice.gov.za/legislation/acts/1988-032.pdf> (last accessed 25 October 2020).

24 Edwards "Conflict of laws", above at note 4 at 385.

25 Roodt "Recognition and enforcement", above at note 21 at 25.

that system. Why should there be different rationales for the two processes?"[26] The pragmatic opinions of South African scholars have also been reflected in South African judgments, in which South African courts have emphasized the role of pragmatic bases in facilitating international trade and commerce.[27] For example, in *Westdeutsche v Horsch*, the court said that "the exigencies of international trade and commerce require that final foreign judgments be recognized as far as is reasonably possible in our courts, and that effect be given thereto".[28] This line of reasoning was reconfirmed by the Supreme Court of Appeal of South Africa in *Richman v Ben-Tovim*.[29]

The legal bases upon which the recognition and enforcement of foreign judgments are founded are manifestly different between China, with a more civil law background, and South Africa, with a more common law background. In China, recognition and enforcement regimes are included in the multilateral conventions to which China has acceded (such as the International Convention on the Civil Liability for Oil Pollution Damage of 1969),[30] the bilateral judicial assistance treaties in civil or commercial matters that China has concluded with other countries, relevant legislation in China,[31] as well as judicial interpretations issued by the Supreme People's Court of China which can in fact serve the role of legislation and are binding on courts in China at different levels.[32] The Supreme People's Court has also released some guiding cases in its gazettes involving private international law issues, including those concerning the recognition and enforcement of foreign judgments. However, these guiding cases only provide guidance for the lower courts in adjudicating similar cases and they cannot serve as binding case law. Comparative law and the writings of legal scholars cannot of course constitute sources of private international law in China either. Meanwhile in South Africa, the recognition and enforcement regimes are composed not only of statutory laws,[33] decided cases and writings of Roman-Dutch lawyers,

26 C Forsyth *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* (4th ed, 2003, Juta & Co Ltd) at 389–90.

27 *Barclays Bank of Swaziland v Koch* 1997 BLR 1294 at 1297; *Westdeutsche Landesbank Girozentrale (Landesbausparkasse) v Horsch* 1993 (2) SA 342 (Nm) at 343–44.

28 *Horsch*, ibid.

29 2007 2 SA 283 (SCA).

30 According to article X of this convention: "Any judgment given by a court with jurisdiction in accordance with Article IX which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any Contracting State, except: (a) where the judgment was obtained by fraud; or (b) where the defendant was not given reasonable notice and a fair opportunity to present his case." The full text of the convention is available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%20973/volume-973-I-14097-English.pdf> (last accessed 25 October 2020).

31 For example, the Civil Procedure Law of the PRC (as amended on 27 June 2017).

32 For example, the Judicial Interpretation of the Supreme People's Court Concerning the Application of the Civil Procedure Law of the PRC (Fashi (2015) no 5).

33 For example, the Enforcement of Foreign Civil Judgment Act 32 of 1988; the Protection of Businesses Act 99 of 1978.

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but also Roman law and customary laws.[34] Comparative law as well as the writings of some modern private international law scholars are also important persuasive sources of South African private international law.[35] It is quite common for South African courts to invoke foreign legislation and case law, especially from the UK or the US, in deciding private international law cases, and South African judges often quote the writings of some important private international scholars, such as Professor Forsyth, in their judgments.

Conditions for enforcing foreign commercial judgments

Under article 281 of the Civil Procedure Law of the People's Republic of China (Civil Procedure Law) and article 544 of the Judicial Interpretation of the Supreme People's Court Concerning the Application of the Civil Procedure Law, Chinese courts will only recognize and enforce judgments emanating from the following two groups of countries: countries that have concluded bilateral judicial assistance treaties with China or have acceded to a multilateral convention on recognition and enforcement to which China is also a party; and countries that have a reciprocal treaty with China regarding the recognition and enforcement of judgments. In the case of an application to enforce a judgment that is not from one of these two groups of countries, the Chinese court accepting the application will simply make a ruling to dismiss it.[36] So far, China has concluded 36 effective bilateral judicial assistance treaties with other countries, most of which have provisions regarding recognition and enforcement.[37] In accordance with the provisions of these treaties and article 282 of the Civil Procedure Law, a foreign judgment will not be recognized and enforced unless: it is rendered by a competent court in the foreign country; it is final and conclusive; the proceedings in the foreign court are fair and lawful; there is no inconsistency with other judgments concerning the same subject matter with the same parties; the rendering court applied the *lex causae* [law applicable to the case] determined by reference to the conflict rules in the country where the recognition and enforcement are being sought;[38] and the recognition and enforcement will not contravene public policy in China.

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34 See Forsyth *Private International Law*, above at note 26 at 15–19.

35 G Findlay "The source of law" (1948) 65 *South African Law Journal* 497.

36 Judicial Interpretation, above at note 32, art 544.

37 The treaties are available (in Chinese) at: <http://treaty.mfa.gov.cn/Treaty/> (last accessed 25 October 2019). For example, the judicial assistance treaties between China and Singapore, Thailand and South Korea have no provisions regarding the recognition and enforcement of judgments.

38 Only a few judicial assistance treaties in civil or commercial matters between China and France, Spain, etc, have such provisions. For example, the Judicial Assistance Treaty between China and France in Civil and Commercial Matters, art 22(2) provides: "as for the questions concerning the natural person's status and capacity, the requesting court does not apply the law which should have been applied in accordance with the conflict rules of the requested state, unless the similar result is reached".

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There are two kinds of recognition and enforcement regimes in South Africa: the common law regime and the statutory regime. The statutory regime is regulated by the Enforcement of Foreign Civil Judgments Act 32 of 1988. This act empowers the minister of justice to have a judgment given in a designated country registered under the act.[39] Foreign judgments have the same effect as judgments given by South African courts and, after registration, can be enforced in the same way that South African judgments are enforced. The act does not require reciprocity for the recognition and enforcement of foreign judgments.[40] However, under the act only magistrates' courts in South Africa are mandated to register foreign judgments and such courts can only accept cases up to R100,000.[41] So far, only Namibia has been designated under the act, so recognition and enforcement through registration under this act are quite limited in practice.[42]

As result, foreign judgments are currently mainly recognized and enforced under the common law regime in South Africa. In the case of *Jones v Krok* Corbett CJ set out the conditions that need to be fulfilled before a judgment will be recognized and enforced by South African courts:[43] the court that pronounced the judgment must have had jurisdiction to entertain the case according to the principles recognized by South African law with reference to the jurisdiction of foreign courts (this is sometimes referred to as "international jurisdiction or competence"); the foreign judgment is final and conclusive in its effect and has not become superannuated; recognition and enforcement of the judgment by South African courts should not be contrary to public policy; the foreign judgment was not obtained by fraudulent means; the judgment does not involve the enforcement of a penal or revenue law of the foreign state; and the enforcement of the foreign judgment is not precluded by the provisions of the Protection of Businesses Act 99 of 1978, as amended. This formulation of the requirements for enforcement was cited with approval by the Supreme Court of Appeal of South Africa in *Purser v Sales*,[44] and also by different divisions of the High Court of South Africa.[45] In a recent case in 2013,[46] the Constitutional Court of South Africa reaffirmed the principles of South African common law on enforcement developed in *Jones v Krok* and reiterated in *Purser v Sales*.

39 Enforcement of Foreign Civil Judgments Act, 1988, arts 2 and 3.

40 See Forsyth *Private International Law*, above at note 26 at 408–11; Oppong *Private International Law*, above at note 16 at 375–76; C Schulze *On Jurisdiction and the Recognition and Enforcement of Foreign Money Judgments* (1st ed, 2005, UNISA Press) at 2–27.

41 The amount was recently increased, such that, since 17 March 2014, these courts may accept disputes up to R400,000.

42 Schulze "Practical problems", above at note 3 at 127.

43 *Jones v Krok* 1995 (1) SA 677 (AD) at 685. See also Forsyth *Private International Law*, above at note 26 at 391.

44 2001 (3) SA 445 (SCA) at 450.

45 Schulze "Practical problems", above at note 3 at 126–27.

46 *Government of the Republic of Zimbabwe v Fick* [2013] ZACC 22, para 38.

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From this analysis, there are obviously some great differences between China and South Africa in the bases upon which recognition and enforcement are founded. For example, under Chinese law, foreign judgments can only be recognized and enforced on the basis of international treaties or reciprocity, while such bases are not given much weight in South Africa. Instead, the domestic law regime and pragmatism are given more weight in South Africa in considering whether to recognize and enforce a foreign judgment. The different bases upon which the foreign judgment is recognized and enforced in China and South Africa resulted in a more or less conservative and rigid recognition and enforcement regime in China, with a rather more flexible and pragmatic regime in South Africa. There do not seem to be as many differences in the specific conditions for recognition and enforcement in the two countries. For example, for a foreign judgment to be recognized and enforced in either country, the court of the state of origin must have jurisdiction over the dispute, the foreign proceedings must be fair, and the foreign judgment must be final and conclusive and not incompatible with public policy in the requested state. However, further examination of these conditions shows that the ascertainment of jurisdiction, the employment of the reciprocity principle and the understanding of public policy are quite different in the two countries, which will constitute significant obstacles for the enforcement of commercial judgments between the jurisdictions.

OBSTACLES FOR ENFORCING COMMERCIAL JUDGMENTS BETWEEN CHINA AND SOUTH AFRICA

In order to advance some pertinent suggestions, this section examines the influence that the differences in ascertaining the jurisdiction of the originating court, in employing the principle of reciprocity and in understanding public policy between both sides may exert on the enforcement of commercial judgments between China and South Africa.

Ascertainment of jurisdiction

There are no uniform statutory provisions for determining whether a foreign court has jurisdiction over a dispute in deciding recognition and enforcement in China. If the foreign judgment creditor bases his application for recognition and enforcement on the bilateral judicial assistance treaty concluded between China and the foreign state, then whether or not the foreign court has jurisdiction over the dispute should be determined in accordance with that treaty by reference to the principle of the prevailing application of international treaties embedded in article 260 of the Civil Procedure Law. In the event that the foreign judgment creditor based his application for recognition and enforcement on the principle of reciprocity, or if there were no stipulations regarding the ascertainment of jurisdiction in the bilateral judicial assistance treaty, whether or not the foreign court has jurisdiction should be determined in accordance with the provisions on the Chinese courts' own jurisdiction in the Civil Procedure Law by reference to the principle that the *lex*

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fori [law of the forum] governs the procedure embedded in article 259 of the same law.[47]

The bilateral judicial assistance treaties concluded between China and other countries also include no uniform provisions regarding the ascertainment of the jurisdiction of foreign courts. Generally, there are three standards to decide the jurisdiction of foreign courts under these bilateral treaties. The first is that the internal laws in the requested state should determine whether or not the court in the requesting state has jurisdiction. For example, the bilateral judicial assistance treaties between China and France, Poland, Mongolia and Romania all adopt such a standard. Secondly, the internal laws in the requested state should determine whether or not the court in the requested state has exclusive jurisdiction; if it does, then the foreign court that made the judgment has no jurisdiction over the dispute. For example, the bilateral judicial assistance treaties between China and Russia and Tajikistan adopt such a standard. Thirdly, the provisions on jurisdiction in the treaty itself should determine whether or not the foreign court has jurisdiction; the judicial assistance treaties between China and Cyprus, Egypt, Italy, Spain, Tunisia and Ethiopia all adopt such a standard.

Therefore, in determining whether or not the foreign court has jurisdiction, the Chinese court will look to only two standards, no matter whether the enforcement is sought in China on the basis of treaty or reciprocity. One is the standard established in domestic law and the other in the treaty. As for the domestic law standard, chapter 2 and article 265 in chapter 24 of the Civil Procedure Law have clear stipulations. Under these stipulations, the Chinese court has very broad jurisdictional grounds to exercise jurisdiction over commercial disputes, including the domicile and habitual residence of the defendant, the place where the contract is celebrated or performed, the place of the subject matter of the contract, the place where the property is attached, the place where the instruments are honoured, the place where the agency is located, and the defendant's submission to the court's jurisdiction. Chinese courts also have exclusive jurisdiction over disputes arising from the performance of contracts for a Sino-foreign joint venture, a Sino-foreign cooperative enterprise, and Sino-foreign cooperative exploration and development of natural resources in China.[48] The jurisdictional bases in the bilateral judicial assistance treaties between China and other countries are relatively limited compared with those in the Civil Procedure Law; they include the domicile or the habitual residence of the defendant, the seat of the agency, the place of the contract's execution or performance, the place of the subject matter of the contract, the place of the immovable property and the defendant's submission to the court's jurisdiction.[49]

47 Civil Procedure Law, chap 2 made provisions on jurisdiction by level and territorial jurisdiction.

48 Id, art 266.

49 For example, Judicial Assistance Treaty between China and Tunisia in Civil and Commercial Matters, art 23; Judicial Assistance Treaty between China and Egypt in

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In South Africa, the concept of "international jurisdiction or international competence" is adopted in deciding the foreign court's jurisdiction, namely, the court of the requesting state must have international jurisdiction over the dispute for its judgment to be enforced in South Africa. International jurisdiction has a special meaning in South African law. It does not only mean that the foreign court must have jurisdiction over the dispute in terms of its own law, nor does it mean that the foreign court must have had jurisdiction according to the South African law relating to jurisdiction; whether or not the foreign court is internationally competent must be decided according to the principles recognized by South African law with reference to the jurisdiction of the foreign court.[50] As Djikhorst J put it plainly in *Reiss Engineering Co Ltd v Insamcor (Pty) Ltd*, "the fact that a foreign court (English court) may have had jurisdiction in terms of its own law does not entitle its judgment to be recognized and enforced in South Africa. It must have had jurisdiction according to the principles recognized by our law with reference to the jurisdiction of the foreign court".[51]

South Africa's judiciary has, however, been adopting a narrow set of precepts to establish the eligibility of a foreign judgment for recognition or enforcement in its territory.[52] The South African Supreme Court of Appeal enunciated the principles in determining the jurisdiction of the foreign court in *Purser v Sales*. According to the judgment delivered by Mpati AJA, "the principles recognized by our law with reference to the jurisdiction of foreign courts for the enforcement of judgments sounding in money are: 1. at the time of the commencement of the proceedings the defendant (appellant in this case) must have been domiciled or resident within the states in which the foreign court exercised jurisdiction; or 2. the defendant must have submitted to the jurisdiction of the foreign court".[53] Additionally, before the case of *Richman v Ben Tovim*, there seems to have been no uniform opinion among South African scholars[54] and judiciaries[55] as to whether or not the

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contd
Civil, Commercial and Criminal Matters, art 22; Judicial Assistance Treaty between China and Ethiopia in Civil and Commercial Matters, art 25.

50 Oppong *Private International Law*, above at note 16 at 323.

51 1983 (1) SA 1033 (W) at 1037, paras G–H.

52 S Khanderia "The Hague Conference on Private International Law's proposed draft text on the recognition and enforcement of foreign judgments: Should South Africa endorse it?" (2019) 63/3 *Journal of African Law* 413 at 417.

53 *Purser v Sales*, above at note 44, para 12.

54 Some leading authors in South Africa supported the position that mere presence may ground international competence. See W Pollak *The South African Law of Jurisdiction* (1937, Hortors Ltd) at 219; E Spiro *Conflict of Laws* (1973, Juta & Co) at 21–213. Meanwhile, other leading authors held the opposite position. See Forsyth *Private International Law*, above at note 26 at 401–02; Edwards "Conflict of laws", above at note 4 at 387; Schulze *On Jurisdiction*, above at note 40 at 22.

55 According to an observation made by Professor Schulze, only in two cases did the court hold that either physical presence of the defendant, or his domicile or residence, within

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"mere presence" of the defendant at the time the proceedings commenced may constitute an international jurisdictional ground. In *Richman v Ben Tovim*, the South African Supreme Court of Appeal per Zulman JA held that the defendant's mere physical presence within the area of jurisdiction of the foreign court at the time the legal proceedings commenced sufficed to satisfy the requirement of the foreign court's international jurisdiction, in applying a "common sense" and "realistic approach" and having regard to the need "to cater for itinerant international businessmen" and "the exigencies of international trade and commerce".[56] The extension of the international jurisdictional ground to include "mere presence" in this judgment has been fiercely criticized by some academic writers,[57] due to "its arbitrary nature and the potential to leave a judgment unenforceable and ineffective if the defendant escaped the jurisdiction without any assets to freeze or confiscate".[58] Fortunately, the South African Constitutional Court in the subsequent case of *Government of the Republic of Zimbabwe v Fick*[59] referred exclusively to the grounds stipulated in *Purser v Sales* when ascertaining the jurisdiction of the foreign court, giving no consideration to "mere presence".[60]

In practice, South African courts tend simply to announce whether a particular foreign court was or was not competent, without extracting the basis of that competence from the facts of the case, which tends to leave the law somewhat confused.[61] The analysis above clarified the factors that are accepted as international jurisdictional grounds in South African common law. Some other grounds are sometimes considered insufficient to establish international competence under South African common law, for example, the defendant's nationality of the state of the foreign court at the time the action commenced, the attachment of the defendant's property by the foreign court

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the area of jurisdiction of the foreign court, constituted international competency of the foreign court. In all the other cases, only the defendant's domicile or his residence within the foreign court's jurisdiction was regarded as sufficient to found the foreign court's international jurisdiction. See C Schulze "International jurisdiction in claims sounding in money: Is *Richman v Ben Tovim* the last word?" (2008) 20 *South African Mercantile Law Journal* 61 at 67.

56 *Richman v Ben Tovim*, above at note 29, para 9.

57 Schulze "International jurisdiction", above note 55 at 61; R Oppong "Mere presence and international competence in private international law" (2007) 3 *Journal of Private International Law* 321; J Neels "Preliminary remarks on the Draft Model Law on the Recognition and Enforcement of Judgments in the Commonwealth" (2017) 5 *Journal of South African Law (TSAR)* 1 at 6.

58 Khanderia "The Hague Conference", above note 52 at 419.

59 Case CCT 101/12 [2013] ZACC 22 at 53 per Mogoeng CJ.

60 Khanderia "The Hague Conference", above note 52 at 419. See also *Supercat v Two Oceans*, above at note 20 at 30B. In this case, the defendant's domicile or residence, but not his presence per se, within the jurisdiction of the foreign court at the commencement of the proceedings was required to establish the international competency of the foreign court.

61 Forsyth *Private International Law*, above at note 26 at 393.

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to found its own jurisdiction, the cause of action arising within the foreign court's jurisdiction, and the choice of a *domicillium citandi et executandi* [nominated address for service] within the area of jurisdiction of a particular court.[62] Besides the mere physical presence mentioned above, there are still controversies in South Africa among academic writers, and divergences in practice, about whether domicile may be accepted as a basis of international competence. For example, Professor Forsyth considered that South African courts should not accept that domicile per se grounds international competence, since "the rules relating to the acquisition and loss of domicile are technical and artificial", and could not establish a substantial relationship between the defendant and the court;[63] while Professor Neels noted that "domicile represents an important link between an individual or a juristic person and a particular country in the common law systems", so it could be accepted as a ground for international jurisdiction.[64] Such controversies and divergences may cause uncertainty in determining the foreign court's international jurisdiction when deciding whether its judgment may be enforced in a South African court.

This analysis reveals that there are some similar grounds in determining a foreign court's jurisdiction in China and South Africa. For example, in both countries, the defendant's residence and the defendant's submission to the foreign court's jurisdiction can be accepted as international jurisdictional grounds. On the other hand, there are also manifest differences, for example, the place where the contract is executed or performed, the place where the subject matter of the contract is located and the place where the property is attached may be the jurisdictional factor to determine the foreign court's jurisdiction in China, but none of these constitutes a ground of international jurisdiction in South Africa. While in South Africa the defendant's physical presence within the foreign court's jurisdiction at the time the action commenced may establish the foreign court's international jurisdiction, that is definitely not so in China. Such differences in determining the foreign court's jurisdiction in practice will obviously constitute obstacles for the enforcement of commercial judgments between both countries. For example, if a Chinese court assumes jurisdiction on the basis of the place of the contract's performance within its jurisdiction and the judgment creditor then seeks to enforce the judgment in South Africa, the South African court will refuse to enforce it on the ground that the Chinese court has no international jurisdiction. Similarly, if a judgment creditor seeks to enforce in China a judgment given by a South African court that assumes its jurisdiction on the basis of the defendant's physical presence within its jurisdiction, the Chinese court will most likely refuse to enforce it due to the fact that the South African court has no jurisdiction over the defendant under Chinese law.

62 Id at 404–07; Schulze *On Jurisdiction*, above note 40 at 18–26.
63 Forsyth, id at 403–04; see also Schulze, id at 22–23.
64 Neels "Preliminary remarks", above note 57 at 6.

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Employment of reciprocity

It is a statutory requirement that a foreign judgment must be recognized and enforced on the basis of reciprocity in China in the absence of the treaty regime. Despite the express stipulation of the reciprocity requirement in the Civil Procedure Law, this law does not make detailed provision for how the principle of reciprocity should be applied.[65] In judicial practice, Chinese courts take a very conservative approach to decide whether or not reciprocity exists between China and the requesting state, namely the de facto reciprocity approach. According to this approach, only when there is judicial precedent in the foreign state that has recognized and enforced the Chinese judgments, will the Chinese court recognize and enforce the judgment from the foreign state. This quite restrictive interpretation has made "the recognition of foreign judgments in China almost impossible."[66] So far, Chinese courts have denied the enforcement of commercial judgments from the UK, South Korea, Germany, the US and Chad, due to the want of reciprocity between both jurisdictions.[67] Considering the fact that, until now, there is no case precedent in South Africa enforcing Chinese commercial judgments, the reciprocity requirement will be a potential obstacle for commercial judgments from South Africa to be enforced in China.

The restrictive approach towards the principle of reciprocity will easily lead to retaliation from other states, which will prejudice the judgment creditor's rights and the free circulation of civil and commercial judgments worldwide. More and more countries have therefore repealed the requirement of reciprocity. Even in those countries that maintained such a requirement, many restrictions were imposed on it, or they adopted a favourable interpretation towards it, or they have never used such a requirement although it is expressly stipulated.[68] Chinese scholars have long realized the dilemma faced by Chinese courts in adopting the restrictive requirement of reciprocity, so they advocated the adoption of the more flexible approach of presumptive reciprocity or reverse reciprocity.[69] With the development of the BRI, it is

65 Civil Procedure Law, art 281 reads: "If a legally effective judgment or order made by a foreign court requires recognition and enforcement in a people's court of the People's Republic of China, the party concerned may directly apply for recognition and enforcement to the intermediate people's court of the People's Republic of China which has jurisdiction. The foreign court may also, in accordance with the provisions of the international treaties concluded or acceded to by that foreign country and the People's Republic of China or with the principle of reciprocity, request recognition and enforcement by a people's court."

66 B Elbalti "Reciprocity and the recognition and enforcement of foreign judgments: A lot of bark but not much bite" (2017) 13/1 *Journal of Private International Law* 184 at 204–05.

67 W Zhu "Shilun woguo chengren yu zhixing waiguo panjue de fanxiang huwei goujian" [On the construction of reverse reciprocity in the recognition and enforcement of foreign judgments in China] (2017) 4 *Hebei Faxue* 16 at 22.

68 Elbalti "Reciprocity and the recognition", above at note 66 at 2–3.

69 X Xie "Tiaoyue yu huhui guanxi queshi de Zhongguo panjue de yuwai zhixing" [Overseas enforcement of Chinese judgments in the absence of a treaty and of reciprocity] (2010) 4

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increasingly important that the enforcement of commercial judgments between China and the other countries along the Belt and Road be enhanced, and the attitude of Chinese courts towards the requirement of reciprocity has somewhat changed. On 16 June 2015, the Supreme People's Court of China released Several Opinions of the Supreme People's Court (SPC) Concerning Judicial Services and Safeguards Provided by the People's Courts for the Belt and Road Construction (Several Opinions of the SPC). Article 6 of the Several Opinions of the SPC calls for judicial assistance between China and the countries along the Belt and Road to be enhanced; Chinese courts may first provide judicial assistance to parties from the countries along the Belt and Road to facilitate the establishment of reciprocity in the absence of a judicial assistance treaty, provided that there is an intention to carry out judicial cooperation between both sides and the requesting state promises to reciprocate to China in the future. This means that no judicial precedent giving effect to a Chinese judgment in the foreign state is required under the Several Opinions of the SPC. The SPC is also considering drafting a judicial interpretation on recognition and enforcement to make uniform and comprehensive provisions for such an issue in China and a liberal approach to the principle of reciprocity is expected to be adopted.

Of course, if a Chinese commercial judgment is to be recognized and enforced in South Africa, the reciprocity requirement will not be problematic, because "the doctrine of reciprocity has limited practical relevance in South African recognition and enforcement law".[70] Indeed, neither the Enforcement of Foreign Civil Judgment Act 32 of 1988 nor the common law regime in South Africa requires reciprocity from the foreign state,[71] which has the inherent potential to make worldwide judgments readily enforceable in South Africa.[72] Thus, in such a situation, a Chinese judgment will very likely be given effect and a reciprocal relationship may be established accordingly if the application for enforcement is first made by the Chinese judgment creditor to the South African court. However, a Chinese court will probably deny the

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Huanqiu Falü Pinglun [Global Law Review] 152; T Du "Huhui yuanze yu waiguo fayuan panjue de chengren yu zhixing" [The principle of reciprocity and the recognition and enforcement of foreign judgments] (2007) 1 *Huanqiu Falü Pinglun* 110; W Xu "Wo guo chengren yu zhixing waiguo fayuan panjue zhidu de goujian lujing: Jianlun wo guo rending huhui guanxi taidu de zhuanbian" [The construction of the recognition and enforcement regime of foreign judgments in China: Also on the shift of attitude towards reciprocity in China] (2018) 2 *Fashang yanjiu* [Studies in Law and Business] 171; Q He "The recognition and enforcement of foreign judgments between the United States and China: A study of *Sanlian v Robinson*" (2014) 7 *Tsinghua China Law Review* 23.

70 Roodt "Recognition and enforcement", above at note 21 at 19.

71 Forsyth *Private International law*, above at note 26 at 393–411.

72 M Martinek "The principle of reciprocity in the recognition and enforcement of foreign judgments: History, presence and no future" (2017) 36 *Journal of South African Law (TSAR)* 36 at 53.

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enforcement of a South African commercial judgment, because of the lack of a judicial assistance treaty and reciprocity between both jurisdictions.

Understanding of public policy

It is a well-established ground to deny the recognition and enforcement of a foreign judgment on the basis of a public policy exception. Almost every country has its unique answer to the question of what public policy is. The uncertainty of public policy will result in the unforeseen state of the recognition and enforcement of foreign judgments. Burrough J described the uncertain nature of public policy vividly as follows: "[p]ublic policy is a very unruly horse, and when you get astride, you never know where it will carry you".[73] Naturally, the public policy exception will constitute another potential obstacle in the course of recognition and enforcement.

Public policy has various expressions in Chinese law, such as "social moral",[74] "social public interest"[75] and "public order and good customs".[76] Article 282 of the Civil Procedure Law adopts another expression of public policy in relation to the recognition and enforcement of foreign judgments, namely, "the fundamental principles of law or state sovereignty, security, social public interests". However, Chinese laws do not give an express indication of the specific meaning of public policy. According to some Chinese scholars, Chinese courts may refuse to recognize and enforce a foreign judgment if: it is contrary to the principles or spirit of constitutional law in China; it damages ethnic harmony and national unity; it infringes China's treaty obligations or internationally recognized principles of equity and justice; or it harms China's sovereignty or security.[77] Other Chinese scholars also regard the mandatory rules relating to the protection of labour, food and public security, environmental security, foreign exchange control and anti-trust or anti-dumping, as expressions of public policy in China.[78] Furthermore, foreign revenue, penal judgments[79] or foreign judgments for excessive or exorbitant

73 *Richardson v Mellish* [1824–34] All ER Rep 258 at 266.

74 General Principle of the Civil Law of the PRC of 1986 (as amended on 27 August 2009), art 7.

75 Id, arts 7 and 150; Law of the Application of Law of the Foreign-Related Civil Relationship of the PRC (adopted 28 October 2010), art 5.

76 Civil Law of the PRC (adopted 15 March 2017), general provisions, art 10.

77 Y Ma "Waiguo fayuan panjue chengren he zhixing zhong de gonggong zhixu" [Public policy exception in the recognition and enforcement of foreign judgments] (2010) 5 *Zheng fa Luntan* [Forum on Politics and Law] 66; Xiao *Guoji Sifa*, above at note 17 at 135.

78 Q He "Guoji shangshi zhongcai sifa shencha zhong de gonggong zhengce" [Public policy in the judicial review of international commercial arbitration] (2014) 7 *Zhongguo Shehui Kexue* [Social Sciences in China] 143 at 158.

79 Memorandum of Guidance between the Supreme People's Court of the PRC and the Supreme Court of Singapore on Recognition and Enforcement of Money Judgments in Commercial Cases, art 8.

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punitive damages[80] will not be enforced in China, because of the public policy exception. In practice, Chinese courts generally adopt a restrictive interpretation towards public policy and will not rashly deny recognition and enforcement on the ground of the public policy exception.

In South Africa, "public policy is a slippery concept, difficult to pin down".[81] Therefore, "whether a foreign judgment is contrary to public policy depends largely on the facts of each case".[82] Generally, the Constitution of South Africa is an embodiment of South African public policy;[83] the "non-justifiable violation of a fundamental right in the South African Constitution", especially one contained in chapter two of the Constitution (the Bill of Rights), "would automatically infringe public policy in the private international law sphere".[84] Professor Forsyth summarized the situations in which a foreign judgment might be denied recognition and enforcement on the basis of the public policy exception under South African common law as the following: "that the foreign judgment is rendered contrary to natural justice; that the foreign judgment is obtained by fraudulent means; that the foreign judgment violates the fundamental policy of South African law; or that the foreign judgment is a penal or revenue one".[85] In addition, the then mandatory provisions in the Protection of Businesses Act No 99 of 1978 of South Africa have been seen as "statutory expressions of public policy", which include those prohibiting the recognition and enforcement of the foreign judgment for punitive or multiple damages, especially those made by certain US courts with regard to antitrust matters.[86] In particular, section 1 of this act was so widely worded that it would affect the enforcement of every foreign commercial judgment. Fortunately, South African courts have consistently adopted a restrictive approach to the interpretation of this act and "there is in fact no recorded instance in which the Act has been successfully invoked as a defense to enforcement".[87]

Public policy in each country reflects its own traditional moral ideas, customs and basic principles of law, which are prominent in the matters of marriage, family and status. With regard to commercial matters, due to the assimilation of commercial usage and commercial laws, public policy shows greater similarity and plays a less important role. For example, polygamous

80 M Hu "Shenji chengfaxing peichang de waiguo panjue de chengren yu zhixing" [The recognition and enforcement of foreign punitive judgments] (2009) 2 *Zhejiang Gongshang Daxue Xuebao* [Journal of Zhejiang Industry and Commerce University] 20 at 23.

81 Forsyth *Private International Law*, above at note 26 at 432.

82 Oppong *Private International Law*, above at note 16 at 341.

83 *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC), paras 28–29; *Zimbabwe v Fick*, above at note 59, para 39.

84 J Neels "External public policy: The incidental question properly so-called and the recognition of foreign divorce orders" (2010) 4 *Journal of South African Law* (*TSAR*) 671 at 677.

85 Forsyth *Private International Law*, above at note 26 at 430–34.

86 Id at 434.

87 Id at 436.

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marriage and same-sex marriage are recognized in South Africa,[88] but in China only monogamous marriage is recognized, which indicates the irreconcilability of public policy between both jurisdictions in respect of marriage and family. On the other hand, there are obviously many similarities in public policy in respect of the enforcement of commercial judgments. For example, neither jurisdiction will enforce a foreign judgment rendered against natural justice, foreign revenue or penal judgments, or foreign punitive judgments for excessive or exorbitant damages. It is therefore argued that, in terms of public policy, the main obstacle for enforcing commercial judgments between both jurisdictions may be the differences in their mandatory rules. Courts in both countries adopt a restrictive approach towards mandatory rules in judicial practice and the scope and contents of these mandatory rules are clearly drafted in both jurisdictions. This will prevent and limit the situations in which a commercial judgment is denied enforcement in the other jurisdiction due to a violation of the other's different mandatory rules.

THE WAYS AHEAD FOR ENFORCING COMMERCIAL JUDGMENTS BETWEEN CHINA AND SOUTH AFRICA

An effective enforcement regime for commercial judgments can bring practical benefits for individuals and is needed to facilitate cross-border commercial transactions.[89] However, due to different enforcement regimes in different countries, it is still a utopianism for a foreign commercial judgment to move freely worldwide. International society has made great efforts to facilitate the free movement of judgments. These efforts aim to eliminate the differences in various enforcement regimes among countries so as to realize the convergence of these regimes and clear ways for the smooth enforcement of foreign judgments. As one writer observed, "the process of convergence between two legal systems is undoubtedly stimulated by the fact that these systems have the same types of problems to confront everywhere".[90]

The same problem regarding the enforcement of commercial judgments between China and South Africa due to their close business relationship gives an impetus for the convergence of the enforcement regimes. "Convergence" means "integration", "harmonization" and "differences reduction", while the convergence of legal systems means cross referencing them so as to realize the unification and harmonization of different systems.[91] It

88 Neels "External public policy", above note 84 at 671. See also J Neels "The positive role of public policy in private international law and the recognition of foreign Muslim marriages" (2012) 28 *African Journal on Human Rights* 219.

89 Oppong *Private International Law*, above at note 16 at 288–89.

90 G Canivet "The interrelationship between common law and civil law" (2003) 4 *Louisiana Law Review* 935 at 938.

91 Legal convergence and legal harmonization have different meanings: the former refers to the natural and unconscious integration of different legal systems due to common interests, while the latter refers to legal unification by way of intentional negotiation:

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is generally submitted that the unification and harmonization of the laws of different countries means replacing, to different degrees, existing national laws with common rules.[92] In practice, legal unification and harmonization are usually achieved through treaty, uniform laws, model laws, international commercial customs, the harmonization of domestic laws, restatement of laws, etc.[93] The convergence of the enforcement regimes between China and South Africa may be achieved through the harmonization of domestic laws, the conclusion of bilateral treaties and accession to multilateral conventions, taking into account the current situation between both jurisdictions.

Harmonization of domestic laws

Harmonization, as distinct from unification in the strict sense, can be loosely defined as "making the regulatory requirements or governmental policies of different jurisdictions identical or at least more similar" and in its most common modern form harmonization brings about a convergence or co-ordination of different legal provisions or systems by eliminating the major differences between them.[94] According to Professor Rosett, there are two drivers for harmonization: shared commercial culture; and shared legal literature and education.[95] As another professor pointed out, the fact that Latin America's core legal systems are encoded in only two (similar) languages with a common or similar institutional legal heritage is an advantage for the convergence of laws in Latin America.[96] Even in jurisdictions with completely different legal cultures and languages, the legal systems may achieve convergence to some level. For example, as a civil law country, in its new Criminal Procedure Code, Italy has incorporated some basic features of the adversarial system on which the US and other common law criminal justice systems are based.[97] The common need for the promotion of business relationships and the common background of a mixed jurisdiction in China and South Africa

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J Hermida "Convergence of civil law and common law contracts in the space field", available at: <http://www.julianhermida.com/dossier/dossierpubhk.pdf> (last accessed 25 October 2020).

92 M Fontaine "Law harmonization and local specificities: A case study: OHADA and the law of contracts" (2003) 18 *Uniform Law Review* 50 at 50.

93 M Rossouw *The Harmonization of Rules on the Recognition and Enforcement of Foreign Judgments in the Southern African Customs Union* (1st ed, 2016, Pretoria University Law Press) at 14–16.

94 Id at 13.

95 A Rosett "Unification, harmonization, restatement, codification and reform in international commercial law" (1992) 40 *Journal of American Comparative Law* 683 at 694–95.

96 JG Picò "Legal convergence in Latin America and the prospects for world government: A short reflection" (2014), available at: <http://sociales.uprrp.edu/cipo/wp-content/uploads/sites/3/2016/02/Garriga-Pico-Legal-Convergence-and-the-prospects-for-World-Government.pdf> (last accessed 25 October 2020).

97 L Duca "An historical convergence of civil and common law systems: Italy's new 'adversarial' criminal procedure system" (1991) 1 *Dickinson's Journal of International Law* 73.

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make it favourable for the convergence of the enforcement regimes of commercial judgments between both jurisdictions, despite their different languages. For example, considering the critical significance of the recognition and enforcement of the judgments of the courts of South African trading partners and legislation in the BRICS partners, it has been proposed that the place of performance (especially the place of characteristic performance) should be accepted as a ground for international jurisdiction on the recognition and enforcement of foreign judgments.[98] Lastly, as a branch of law devoted to foreign-related civil and commercial dispute resolution, it is easier for the private international law of one country to draw some experiences or inspirations from other countries. Indeed, the development of private international laws in China and South Africa has benefited greatly from the private international law systems in the UK, the US, etc, which is advantageous for both sides reducing their differences in reforming and improving their recognition and enforcement regimes ultimately to achieve convergence.

The South African Law Commission made a proposal in 2003 in the hope of drafting consolidated legislation pertaining to international cooperation in civil matters, which mainly dealt with the recognition and enforcement of foreign judgments. The issues considered by the commission included: whether the Enforcement of Foreign Civil Judgments Act 32 of 1988 should be extended to the High Court in order to facilitate the registration of foreign money judgments in excess of R100,000; whether the consolidated act should be based on reciprocity; if not, what criteria should be used to determine to which foreign countries the consolidated act should apply or, alternatively, whether South Africa should recognize and enforce foreign civil judgments emanating from all foreign countries; and whether the Protection of Businesses Act 99 of 1978 posed an unjustifiable obstacle to international cooperation in civil matters.[99] As noted above, the Supreme People's Court of China is now also considering promulgating a judicial interpretation on the recognition and enforcement of foreign judgments to provide clear and uniform guidance for Chinese courts. The new judicial interpretation will doubtlessly deal with the principle of reciprocity, the scope of punitive judgment, the grounds to deny recognition and enforcement, and the determination of the foreign jurisdiction. In the course of the legislative reform, if the legislators, judiciaries and scholars from China and South Africa carry out extensive exchange and cooperation, this will contribute to the convergence of the recognition and enforcement regimes between both jurisdictions.

98 Neels "Preliminary remarks" above at note 57 at 7–8.

99 South African Law Reform Commission "Consolidated legislation pertaining to international co-operation in civil matters" (issue paper 21, project 121), available at: <http://icmsweb.justice.gov.za/salrc/ipapers/ip21_prj121_2003.pdf> (last accessed 25 October 2020).

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Conclusion of a bilateral treaty

At present, in terms of recognition and enforcement, most countries are still in the Hobson's "natural state" for the lack of an effective, worldwide recognition and enforcement regime. In such a scenario, it is difficult for countries to cooperate in this area, often resulting in the "prisoner's dilemma".[100] The harmonization of domestic laws may mitigate such a dilemma to some degree, but in the long run, it is preferable to conclude bilateral or multilateral treaties to provide an institutional basis for the free circulation of foreign judgments.[101]

Negotiating a bilateral treaty may be significantly less complicated than negotiating a single multilateral one, as the participants need only adhere to the wills and interests of two parties.[102] Most countries are therefore more willing to conclude bilateral treaties instead of negotiating multilateral ones. So far, the only African countries with which China has concluded bilateral judicial assistance treaties are Morocco, Algeria, Tunisia, Egypt and Ethiopia. All these treaties have provisions on recognition and enforcement, but obviously all these countries are situated in northern or eastern Africa. Thus the status quo of the treaties between China and African countries may be generally described as "asymmetry in structure" and "imbalance in weight". "Asymmetry in structure" means that China has only concluded bilateral treaties with countries from northern and eastern Africa, and not with countries from western, southern and central Africa. "Imbalance in weight" means that other African countries with strong business relationships with China (such as South Africa, Nigeria, Kenya and the Democratic Republic of Congo) have not concluded such treaties with China. As a result, it is essential for China to conclude such a treaty with South Africa, which would to some extent achieve "symmetry in structure" and "balance in weight". Moreover, if China concludes such a treaty with South Africa, it will be much easier for China to conclude such treaties with other southern African countries, such as Botswana, Namibia and Zimbabwe, whose legal systems are based on the South African legal system.

In a future China-South Africa bilateral treaty, provisions on recognition and enforcement may be made by reference to those stipulated in the bilateral treaties between China and Egypt, Tunisia and Ethiopia, the recognition and enforcement sections of which have specific provisions on ascertaining a foreign court's jurisdiction. Hence it is the jurisdictional rules stipulated in the treaty that will determine whether or not a foreign court has jurisdiction over a dispute. This arrangement is manifestly useful for recognition and enforcement where the jurisdictional rules in two countries are quite different. Furthermore, public policy in each country may be clearly set out in a

100 M Whinchop "The recognition scene: Game theoretic issues in the recognition of foreign judgments" (1999) 13/2 *Melbourne University Law Review* 416 at 418–20.

101 Roodt "Recognition and enforcement", above at note 21 at 31.

102 Rossouw *The Harmonization of Rules*, above at note 93 at 44.

future bilateral treaty between China and South Africa in order to reduce the uncertainties that the public policy exception may bring to recognition and enforcement.

Accession to the multilateral convention

Negotiating a single international instrument on recognition and enforcement has proven to be extremely complicated, but a multilateral instrument has the advantage of realizing a wider circulation of judgments.[103] Some regional or international organizations have made great efforts to realize wider circulation of judgments. For example, some members of the Arab League adopted the Convention on the Enforcement of Judgments and Arbitral Awards of 1952 and the Riyadh Convention on Judicial Cooperation Between the States of the Arab League of 1983. In 1995, the courts of the member states of the Arab Gulf Cooperation Council issued the Protocol on the Enforcement of Judgments, Letters of Rogatory and Judicial Notices, which also set out the recognition and enforcement of judgments and arbitral awards between member states. Since its establishment, the European Community (later the European Union) has successively adopted the Brussels Convention in 1968, the Lugano Convention in 1988 and Brussels Regulation I in 2001, which laid a solid legal framework for the recognition and enforcement of judgments between member states. The Organization of American States produced the Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments in 1984.[104] If the rendering court's jurisdiction satisfies the requirements under this convention, its judgments will have extraterritorial validity and may be recognized and enforced in other member states. As an international inter-governmental organization devoted to the codification of conflict of laws issues, the Hague Conference on Private International Law (HCCH) has long been concentrating on recognition and enforcement issues. Since 1954, the HCCH has adopted Convention of 1 March 1954 on Civil Procedure, the Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (Recognition and Enforcement Convention)[105] and the Convention of 30 June 2005 on Choice of Court Agreements (Choice of Court Convention).[106] Following approval by the European Union on 11 June 2015, the Choice of Court Convention came into force as of 1 October 2015. After several years' hard negotiation, on 2 July 2019 the 22nd diplomatic session of the HCCH

103 Id at 44–46.

104 The text of the convention is available at: <http://www.oas.org/juridico/english/treaties/b-50.html> (last accessed 25 October 2020).

105 The text of the convention is available at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137> (last accessed 25 October 2020).

106 The text of the convention is available at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98> (last accessed 25 October 2020).

concluded the Recognition and Enforcement Convention, which is the latest effort in this area. The newly adopted convention aims to provide a set of uniform rules for the worldwide circulation of foreign civil or commercial judgments.

It is still not realistic for China and South Africa to negotiate a regional convention on recognition and enforcement. China and South Africa, together with other African countries, may therefore accede to the Choice of Court Convention or the newly adopted Recognition and Enforcement Convention, to promote the wider circulation of judgments. China signed the Choice of Court Convention on 12 September 2017, and many scholars in China have advocated that China join these two important Hague conventions so that judgments between China and its trading partners along the Belt and Road may circulate freely. So far, African countries' participation in the HCCH is not as high. Considering the increasing economic transactions between the African continent and other countries outside the continent, an African private international lawyer has appealed for wider cooperation between African countries and the HCCH in order to provide a favourable multilateral legal framework for cross-border civil and commercial transactions.[107] As for South Africa in particular, it has been submitted that it should become a contracting party to the Choice of Court Convention[108] or the Recognition and Enforcement Convention,[109] which will "bring the country's legal system into line with internationally accepted standards on the subject",[110] "facilitate the free flow of judgments and create a measure of predictability of litigation outcomes which, in turn, lowers the risk of cross-border commerce",[111] and eventually "boost investors' confidence, which may, in due course, lead to the creation of jobs and the alleviation of poverty in the country".[112]

CONCLUDING REMARKS

As the final stage in foreign-related civil and commercial dispute resolution, the recognition and enforcement of foreign judgments is of great significance for the parties involved and for the smooth cross-border movement of people, goods, services and capital. The large number of cross-border civil and commercial disputes between China and South Africa in the context of BRICS and BRI requires a feasible enforcement regime between both countries. From a comparison of the bases and conditions of the enforcement of

107 R Oppong "The Hague Conference and the development of private international law in Africa: A plea for cooperation" (2006) 8 *Yearbook of Private International Law* 189.

108 Neels "Preliminary remarks" above at note 57 at 1; C Schulze "The 2005 Hague Convention on Choice of Court Agreements" (2007) 19 *South African Mercantile Law Journal* 140.

109 Khanderia "The Hague Conference", above at note 52.

110 Id at 432.

111 Schulze "The 2005 Hague Convention", above at note 108 at 149.

112 Neels "Preliminary remarks" above at note 57 at 7.

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commercial judgments between these jurisdictions, there remain some obstacles for the free flow of commercial judgments. Both sides should work together to clear such obstacles. The harmonization of domestic laws may to some extent mitigate such a situation, but in practice it is a very difficult and lengthy, if not impossible, process. Comparatively speaking, it will be optimal for China and South Africa to negotiate a bilateral judicial assistance treaty in civil or commercial matters or just to accede to existing multilateral conventions on recognition and enforcement, such as the Choice of Court Convention or the Recognition and Enforcement Convention.

CONFLICTS OF INTEREST

None

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