

## BILATERAL TREATY ON MUTUAL ENFORCEMENT OF JUDGMENTS BETWEEN JAPAN AND CHINA: A DISCUSSION ON LEGAL STRUCTURE

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### I. Introduction

China and Japan are two of the top three global economic powers<sup>1</sup> and have conducted substantial amounts of trade with each other since China adopted the “open door” policy in 1978. Currently, Japan is the third largest trading partner of China,<sup>2</sup> while China is the second largest trading partner of Japan.<sup>3</sup> However, despite the large amount of trade between them, commercial judgments rendered in the courts of their respective countries are not enforceable in the courts of the other country. This is not only because there is no treaty on enforcement of judgments between the countries but also because there is a deadlock on enforcement of judgments due to the lack of reciprocity. Both countries have multiple negative enforcement records in their courts of judgments of the other country.<sup>4</sup>

Some Chinese scholars even describe this as a situation based on “retaliation,” arguing that the two countries are stuck in a vicious cycle of negative enforcement.<sup>5</sup>

The enforcement deadlock between the countries has been used by Chinese scholars as the primary basis to lobby for the lowering of the reciprocity standard on the Chinese side.<sup>6</sup>

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<sup>1</sup> World Bank, World Development indicators Database, available at [http://databank.worldbank.org/data/reports.aspx?Code=NY.GDP.MKTP.CD&id=af3ce82b&report\\_name=Popular\\_indicators&popularity=series&ispopular=y](http://databank.worldbank.org/data/reports.aspx?Code=NY.GDP.MKTP.CD&id=af3ce82b&report_name=Popular_indicators&popularity=series&ispopular=y).

<sup>2</sup> World Bank, China Trade at a Glance: Most Recent Values, available at <https://wits.worldbank.org/CountrySnapshot/en/CHN>.

<sup>3</sup> World Bank, Japan Trade at a Glance: Most Recent Values, available at <https://wits.worldbank.org/CountrySnapshot/en/JPN>.

<sup>4</sup> See Osaka High Court decision of 9 April 2003, Hanrei Jiho, No. 1841,111; Hanrei Taimuzu, No. 1141, 270; Tokyo District Court, 20 March 2015, Westlaw Japan (Ref No. 2015WLJPCA03208001); *Case on the Application of Gomi Akira (A Japanese Citizen) to the Chinese Court for Recognition and Enforcement of Japanese Judicial Decision* [SPC Gazette] Issue 1, 1996; *Tsuburaya Productions Co., Ltd. v Beijing Yansha Youyi Shopping City Co., Ltd.*, (2004) Er Zhong Min Chu Zi No. 12687, No. 2 Intermediate People’s Court of Beijing Municipality (20 December 2004).

<sup>5</sup> See Jiwen Wang, ‘On Reciprocity Principle of Recognition and Enforcement of Foreign Judgments in China: Analysis by Interest-balancing Method’ (2012) 6 Legal Jurist 154; Jie Huang, *Interregional Recognition and Enforcement of Civil and Commercial Judgments*, (Hart 2014), 60.

<sup>6</sup> Id.

Following a recent ground-breaking case on the enforcement of a Singaporean judgment based on reciprocity,<sup>7</sup> it seems that judicial reform on a lower standard of reciprocity may indeed be underway.<sup>8</sup> However, even if the standard were to be lowered, China would unlikely regard there to be reciprocity between Japan and China due to the existence of a history of negative enforcement of Chinese judgments in Japan. In other words, the recent reform in China may not resolve the deadlock between the countries.

Accordingly, there is both certainty and uncertainty regarding the enforcement of judgments between the two countries: certainty over the need for judgment enforceability, and uncertainty over judgment unenforceability under the current enforcement regimes of both countries. This article aims to resolve this deadlock by proposing a legal framework for a mutual judgment enforcement treaty between the countries.

As seen in the discussions below, the default enforcement regimes of the two countries actually share many similarities. This indicates that the same enforcement conditions could be acceptable to the other if they were to become the bases of enforcement in the treaty. The most important function of the treaty would be to remove the reciprocity requirement that currently exists under both regimes. Once reciprocity was removed from the equation, none of the negative enforcement history between the countries would be relevant.

Although this article does not speculate on whether such a treaty is viable diplomatically between the countries, because the legal design of the treaty is just one of the many different factors related to whether a treaty will be entered into by two sovereign nations,<sup>9</sup> it does provide the theoretical groundwork for such a treaty should both countries decide it politically opportune to do so in the future.

This article is arranged as follows: Section B outlines the background of the deadlock and recent reform in the enforcement regime of China. Section C discusses various potential solutions to the deadlock. In particular, it identifies the similarities of enforcement conditions between the existing bilateral enforcement treaties of China and the Japanese Code of Civil Procedure (“CCP”),<sup>10</sup> and suggests that a bilateral treaty might be the best solution. Section D seeks to address other potential hurdles of a bilateral treaty such as the legal independence and competence of Chinese courts, and suggests ways to overcome such hurdles by drawing on the experience of the enforcement arrangement between China and Hong Kong. Finally, Section E concludes that a treaty based on the framework suggested herein is legally viable and would serve the economic interests of both countries.

## II. *Background*

Under Article 282 of the Civil Procedure Law of China (CPL),<sup>11</sup> an effective judgment

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<sup>7</sup> *Kolmar Group AG v. Sutex Group*, Civil Case No. 3, Nanjing Intermediate People’s Court (9 December 2016).

<sup>8</sup> King Fung Tsang, *Enforcement of Foreign Commercial Judgments in China*, 14 *Journal of Private International Law* 262, 266-269 (2018).

<sup>9</sup> See e.g. Peter L. Lallas, *The Role of Process and Participation in the Development of Effective International Environmental Agreements: A Study of the Global Treaty on Persistent Organic Pollutants*, 19 *UCLA J. Envtl. L. & Pol’y* 83, 89-114 (2000/2001).

<sup>10</sup> *Minji soshoho*, Law No. 109 of 1996.

<sup>11</sup> Civil Procedure Law of the People’s Republic of China (promulgated by the President of the People’s Republic of

from a foreign country, subject to it not being contrary to public policy, can be enforced in China either by a treaty between China and the judgment-rendering country should there be one or alternatively under the principle of reciprocity. As of the end of 2017, China has entered into 33 effective bilateral enforcement treaties,<sup>12</sup> but has not had such a treaty with Japan. Accordingly, the only way to enforce a Japanese judgment in China is by the principle of reciprocity, which has not been defined in the CPL.

On the Japanese side, the conditions for the recognition and enforcement of foreign judgments in Japan are set out in Article 118 of the CCP.<sup>13</sup> Generally, a final and binding foreign judgment will be enforced in Japan if (i) the judgment-rendering court has international jurisdiction, (ii) the foreign legal proceedings are served properly to the defendant, (iii) the enforcement is not contrary to substantial and procedural public policy and, (iv) reciprocity exists between Japan and the judgment-rendering country.<sup>14</sup>

A simple comparison of these general conditions indicates that the common requirement of the two countries is reciprocity. This causes serious problems in the mutual enforcement of judgments between the countries.

The first enforcement attempt of judgments between Japan and China was in 1994. In the *Case on the Application of Gomi Akira (A Japanese Citizen) to the Chinese Court for Recognition and Enforcement of Japanese Judicial Decision*,<sup>15</sup> a Japanese person sought to enforce a Japanese judgment rendered by Oda Sub-division of Yokohama District Court of Japan as well as orders on credit distraintment and credit transfer made by the Tamana Sub-division of Kumamoto District Court of Japan against a Sino-foreign joint venture in the Intermediate People's Court of Dalian City, Liaoning Province. This case stemmed from a debt owed by a Japanese defendant. When the Japanese defendant did not satisfy the Japanese judgment, the Japanese plaintiff tried to have the Japanese defendant's equity in a Sino-foreign joint venture assigned to him by seeking to enforce the Japanese judgment in China.<sup>16</sup>

At that time, enforcement of foreign judgments was governed by Article 268 of CPL.<sup>17</sup> This was the predecessor to the current Article 282 and provided that a foreign judgment was enforceable in China either if there existed an enforcement treaty between China and the judgment-rendering country, or alternatively, on the basis of reciprocity.

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China, Apr. 9, 1991, effective 2012).

<sup>12</sup> Ministry of Foreign Affairs, Status of Sino-Foreign Treaties on Civil and Criminal Judicial Assistance, available at [http://www.fmprc.gov.cn/web/ziliao\\_674904/tytj\\_674911/wgdwdjdsfzhty\\_674917/t1215630.shtml](http://www.fmprc.gov.cn/web/ziliao_674904/tytj_674911/wgdwdjdsfzhty_674917/t1215630.shtml). Note also that China has recently entered into a new bilateral enforcement treaty with Ethiopia, see [http://www.xinhuanet.com/politics/2017-11/04/c\\_1121906570.htm](http://www.xinhuanet.com/politics/2017-11/04/c_1121906570.htm). See also King Fung Tsang, Chinese Bilateral Enforcement Treaties, 40 *Loyola of Los Angeles International & Comparative Law Review* 1, 8 (2017). This list excludes multilateral conventions China has entered into that feature recognition and enforcement of certain specific types of foreign judgments, e.g. the Protocol of 27 November 1992 to amend the 1969 International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969 (CLC PROT 1992); the Protocol of 27 November 1992 to amend the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund PROT 1992).

<sup>13</sup> Article 118, CCP.

<sup>14</sup> *Id.*

<sup>15</sup> *Case on the Application of Gomi Akira (A Japanese Citizen) to the Chinese Court for Recognition and Enforcement of Japanese Judicial Decision* [SPC Gazette] Issue 1, 1996.

<sup>16</sup> *Id.*

<sup>17</sup> See Civil Procedure Law of the People's Republic of China (promulgated by the President of the People's Republic of China, Apr. 9, 1991).

Enforcement of the Japanese judgment was rejected in a short judgment by Dalian Intermediate People's Court:

There are no international treaties concluded or acceded to between China and Japan on the recognition and enforcement of judgments and written orders made by each other's courts, nor has a corresponding relationship of reciprocity been established between China and Japan.<sup>18</sup>

This case received substantial attention and was endorsed by the Supreme People's Court of China (SPC upon referral by the Liaoning Higher People's Court).<sup>19</sup> The judgment of Dalian Intermediate People's Court was also subsequently included in the 1996 SPC Gazette.<sup>20</sup> While Chinese judgments generally have no binding effect on Chinese courts, a judgment decided or endorsed by the SPC will generally be expected to be followed by future courts.<sup>21</sup>

The *Gomi* judgment highlighted two key points. First, there is no bilateral treaty between China and Japan so enforcement of a Japanese judgment in China has to rely on the default rule of reciprocity. Second, the courts held that there was no reciprocity between Japan and China without explaining what reciprocity meant. Since this was the first ever reported enforcement case in China,<sup>22</sup> and one endorsed by the SPC, it appears that Chinese courts adopted an ultra-conservative view in interpreting the reciprocity requirement. In fact, according to recent research by the author, no enforcement of a foreign judgment succeeded in China expressly on the basis of reciprocity until December 2017.<sup>23</sup>

As far as Japanese judgments are concerned, a Beijing court restated the lack of reciprocity between China and Japan in 2004.<sup>24</sup> In that case, the defendant of a trademark infringement case in China tried to cite a Japanese judgment as evidence of its authorized use of the trademark.<sup>25</sup> However, again without giving a definition, the court declared that there was no reciprocity between the countries and went on to rule the Japanese judgment inadmissible as evidence. While the case did not cite the *Gomi* case, the result was very much expected given the high legal status afforded to the *Gomi* case by the SPC.<sup>26</sup>

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<sup>18</sup> *Case on the Application of Gomi Akira (A Japanese Citizen) to the Chinese Court for Recognition and Enforcement of Japanese Judicial Decision* [SPC Gazette] Issue 1, 1996.

<sup>19</sup> See Reply of the Supreme People's Court on whether the People's Court of the PRC should Recognise and Enforce Japanese Judgments Concerning Claims and Obligations, 24 June 1994 (1995) Min Tazi.

<sup>20</sup> *Case on the Application of Gomi Akira (A Japanese Citizen) to the Chinese Court for Recognition and Enforcement of Japanese Judicial Decision* [SPC Gazette] Issue 1, 1996.

<sup>21</sup> Peerenboom, Randall (2006). 'Courts as Legislators,' *The Rule of Law in China: Policy Brief 1*. Oxford: The Foundation for Law, Justice and Society, p.2 ("What is distinctive about China's legal system is that the Supreme People's Court (SPC) makes law in a much more direct and visible way. Every year the SPC issues a variety of interpretations, regulations, notices, replies, opinions and policy statements (collectively, 'interpretations'). Most are binding upon the courts; others are highly persuasive and likely to be followed by the courts. Sometimes they are rather general; at other times they are very specific and issued in response to an inquiry from [a] lower court in regard to a particular case pending before the court.").

<sup>22</sup> See supra note 8, 274 tb 2 (The first enforcement case reported by Chinese courts was decided in 1994. This happened to be the *Gomi* case).

<sup>23</sup> See supra note 8, 277.

<sup>24</sup> *Tsuburaya Productions Co., Ltd. v Beijing Yansha Youyi Shopping City Co., Ltd.*, (2004) Er Zhong Min Chu Zi No. 12687, No. 2 Intermediate People's Court of Beijing Municipality (20 December 2004).

<sup>25</sup> *Id.*

<sup>26</sup> See supra note 21.

On the Japanese side, Osaka High Court rejected the recognition of a Chinese judgment in 2003.<sup>27</sup> In particular, the court referred specifically to the *Gomi* judgment to prove that no reciprocity had been established.<sup>28</sup>

The latest skirmish between the countries came in 2015 when Tokyo High Court cited the *Gomi* case once again as one of the reasons why there was no reciprocity between the countries.<sup>29</sup> The court even stated that there was no evidence that a single foreign judgment had ever been enforced by China.<sup>30</sup>

The two negative precedents in each of the countries indicated a deadlock in the mutual enforcement of judgments between them. With international trade between the countries having picked up substantially since 1994, there has been a great deal of economic motivation to explore solutions to this deadlock.

### III. *Potential Solutions*

Due to the significance of the deadlock, scholars of both countries have suggested solutions. One scholar summarized potential solutions succinctly:

It is serious for judgment creditors engaged in business activities between Japan and China that the reciprocity between the two countries was denied in both Japan and China. The reciprocity for enforcement of judgments should be established as soon as possible. It is desired that both countries will change their views on reciprocity or that a bilateral agreement for mutual enforcement of judgments will be concluded between the two countries. In part, to ratify a future Hague Convention on enforcement of foreign judgments would be one solution.<sup>31</sup>

To summarize, there are three ways to solve the current deadlock:

- (i) both countries could change their interpretation of the reciprocity requirement;
- (ii) they could both ratify the Hague Convention;
- (iii) they could enter into a bilateral treaty.

All three options have been widely cited but their practicality and which one is preferable have not been extensively discussed. This section examines these suggestions with reference to the recent developments in judicial practice and treaty conclusions on the part of China, and how they could have an impact on the deadlock.

#### 1. **Change in Reciprocity**

As mentioned earlier, China did not enforce a foreign judgment on the basis of reciprocity until December 2016.<sup>32</sup> That was when the Nanking Intermediate People's Court decided to

<sup>27</sup> Osaka High Court decision of 9 April 2003, Hanrei Jiho, No. 1841,111; Hanrei Taimuzu, No. 1141, 270.

<sup>28</sup> Id.

<sup>29</sup> Tokyo High Court Judgement on November 25, 2015 for the matter 2015 (Ne) No.2461.

<sup>30</sup> Id.

<sup>31</sup> Nozomi Tada, Enforcement of Foreign Judgments in Japan Regarding Business Activities, *The Japanese Annual of International Law* [No. 46, 2003] 75.

enforce a Singaporean judgment in *Kolmar AG Group v. Sutex Group*.<sup>33</sup> While falling short of giving a definition on reciprocity, the case expressly referred to the 2014 enforcement of a Chinese judgment in Singapore<sup>34</sup> as the basis for the establishment of reciprocity. Thus, what can be derived from the case is that a single positive enforcement success of a Chinese judgment abroad could lead to the establishment of reciprocity.<sup>35</sup> Most importantly, the *Kolmar* case is not an ad hoc case. In May 2017, it was selected by the SPC as one of the Model Cases in the Establishment of the Belt and Road Initiative.<sup>36</sup>

To what extent could that impact on the Sino-Japanese mutual enforcement of judgments? Currently, there is no positive judgment enforcement record between China and Japan. Thus, for *Kolmar* to even have an impact would require a Japanese court to begin the process of building a positive judgment enforcement record for Chinese judgments. In other words, the *Kolmar* case must have the effect of changing the Japanese court's view on reciprocity and lead to a positive enforcement of a Chinese judgment.

Based on the two previous Japanese enforcement attempts, it is argued that the *Kolmar* case will not change Japanese courts' views about Chinese judgments based on Japan's notion of reciprocity. First, the Osaka High Court cited the *Gomi* case as one of the reasons for the lack of reciprocity between China and Japan. The *Kolmar* case did not in any way overrule the *Gomi* case and the *Gomi* case remains part of Chinese law.<sup>37</sup> Second, in 2015 Tokyo High Court discussed the lack of a single positive enforcement instance of a foreign judgment on the basis of reciprocity by the Chinese courts. It may therefore be argued that *Kolmar* has now served as that instance of enforcement. However, Tokyo High Court also fell short of saying that it would definitely enforce the Chinese judgment in question should there be a positive instance. As such, there remains a high level of uncertainty on the part of Japanese courts regarding the impacts that the *Kolmar* case might have.

In addition, even if Japan does change its perception on reciprocity regarding Chinese judgments and enforces a Chinese judgment, it is still not certain that Chinese courts will enforce Japanese judgments. After all, the enforcement of *Kolmar* was for a judgment from Singapore, a country considered by China as being part of the Belt and Road Initiative.<sup>38</sup> In fact, in a policy document in 2013, the SPC advocated that Chinese courts should consider first enforcing judgments of countries on the Belt and Road so as to establish reciprocity.<sup>39</sup> Even

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<sup>32</sup> See supra note 7.

<sup>33</sup> *Kolmar Group AG v. Sutex Group*, Civil Case No. 3, Nanjing Intermediate People's Court (9 December 2016).

<sup>34</sup> *Giant Light Metal Technology (Kunshan) Co., Ltd. v Aksa Far East Pte Ltd.*, [2014] 2 SLR 545.

<sup>35</sup> See supra note 8, 282-283.

<sup>36</sup> Ni Zhang, "The Supreme People's Court Promulgated the Second Series of "Model Cases regarding the Building of 'One Belt and One Road'," *China News Service*, 15 May 2017, available at <http://www.chinanews.com/gn/2017/05-15/8224293.shtml>.

<sup>37</sup> In China, SPC's decision could be subsequently repealed or withdrawn on the initiation of the SPC, see e.g. SPC Decision on Abolishing Some Judicial Interpretations (the Seventh Batch) issued before the End of 2007 (promulgated by SPC, Dec. 18, 2008, effective Dec. 24, 2008).

<sup>38</sup> There is no strict definition of Belt and Road countries. The phrase generally refers to countries along the old Silk Road and the Maritime Silk Road, see LC Wolff, C Xi (eds), *Legal Dimensions of China's Belt and Road Initiative* (Wolters Kluwer 2016) 7. Singapore is widely regarded as one of the Belt and Road countries, see Hong Kong Trade Development Council, Belt and Road, Country Profile for a list of Belt and Road countries, available at <https://beltandroad.hktdc.com/en/country-profiles>.

<sup>39</sup> SPC, 'Several Opinions of the Supreme People's Court on Providing Judicial Services and Safeguards for the

though *Kolmar* did not cite the SPC policy document, it is generally believed that the court was influenced by it. The best corroboration came from the selection of the *Kolmar* case as a model case for the Belt and Road Initiative.<sup>40</sup> Accordingly, the new concept of reciprocity under *Kolmar*, that a single successful enforcement precedent can establish reciprocity, might not even apply to Japan, a non-Belt and Road country.

Further, even if *Kolmar* were to be applied to Japan by Chinese courts, the case could still be distinguished. In *Kolmar*, Singapore did not have any prior negative enforcement record of Chinese judgments. However, Japan has two such cases as detailed above. It is therefore possible that a Chinese court could simply point to the two negative precedents and conclude that a single successful precedent was not sufficient to establish reciprocity once and for all.

It is of course possible for the SPC and/or the Japanese Supreme Court to interpret reciprocity differently, but this is speculative at best. More importantly, since reciprocity would require judicial practice to develop, it is unclear when reciprocity could be formally developed even if *Kolmar* does have the effect of changing the landscape. In short, it takes *both* the judiciaries to change their views on reciprocity. Reliance on such changes in reciprocity is therefore uncertain both in terms of time and substance.

## 2. The Hague Convention

The second alternative is to have both Japan and China join one of the Hague Conventions regarding judgment enforcement. China actually took the first step in joining the Hague Convention on Choice of Court Agreements (the “Convention”) in September 2017.<sup>41</sup> However, as of today, the exact terms on which China signed remain undisclosed. The most important aspect of these terms is arguably whether China made any reservations on the applicability of the Convention. These reservations are allowed under Article 21 of the Convention and would affect the extent to which the Convention could help enforce foreign judgments in China.<sup>42</sup>

In addition, no timetable has been provided by China on the ratification of the Convention. The United States, which signed the Convention in 2009, has notoriously failed to ratify the Convention.<sup>43</sup> Thus, it is uncertain when, if at all, the Convention will take effect in China, not to mention its actual applicability.

Having said that, it is undeniably a positive step towards China joining the Convention. The same, however, cannot be said about Japan. Thus far, there have been no signs that Japan has any plans to join the Convention. In fact, Japan has entered into no general enforcement convention to date.<sup>44</sup>

For its part, the Hague Conference on Private International Law has initiated a wider Convention on enforcement of foreign judgments, known as the “Judgments Project,” which aims at reviving the broader international enforcement project that was derailed by the Convention.<sup>45</sup> While both China and Japan are involved in the Judgments Project,<sup>46</sup> there is no

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Construction of the ‘Belt and Road’ by People’s Courts,’ [2015] No. 9.

<sup>40</sup> See *supra* note 36.

<sup>41</sup> Convention on Choice of Court Agreements (30 June 2005).

<sup>42</sup> See, *id.* Article 21.

<sup>43</sup> See, HCCH, Status Table, 37: Convention of 30 June 2005 on Choice of Court Agreements, available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>.

<sup>44</sup> *Id.* See also *supra* note 31, 76.

clear timetable in sight for when major progress will be made on the conclusion of a new worldwide convention, not to mention that it requires both countries to ratify that new convention.

In the end, the existing Convention is limited to cases where there is an exclusive jurisdiction agreement,<sup>47</sup> while the Judgment Project is still very much up in the air. Combined with the various uncertainties discussed above, it is unlikely to be an ideal remedy to the current deadlock.

### 3. Bilateral Treaty

The final option is for the two countries to conclude a bilateral treaty on enforcement of judgments. This is similar to the second option of the Hague Convention but on a much smaller scale. Discussions on the enforcement deadlock have focused on the issue of reciprocity,<sup>48</sup> but as shown below, this option is surprisingly attractive as far as legal design is concerned and deserves further consideration. The caveat is that the conclusion of treaties invariably involves political and diplomatic considerations, discussion of which is beyond the remit of this study. The following discussions therefore focus on only the substantive content of such a treaty.

#### (i) Similarities between the existing Chinese bilateral treaties and Art. 118

The first reason why such a treaty is attractive lies in the similarities between the enforcement conditions commonly found in the 33 existing Chinese bilateral enforcement treaties and those provided under Article 118 of the CCP (other than reciprocity). These similarities indicate that both countries share similar concepts in finding foreign judgments acceptable for enforcement. Table 1 shows these similarities.

TABLE 1. ENFORCEMENT CONDITIONS UNDER 33 PRC BILATERAL TREATIES V.S. ART. 118 CCP

	Effective Judgment	International Jurisdiction	Due Process	Public Policy	Res judicata
Japan	✓	✓	✓	✓	✓
China	✓	✓	✓	✓	✓

Five enforcement conditions are commonly found in every single bilateral enforcement treaty entered into by China. These are (i) the foreign judgment is effective, (ii) not contrary to public policy, (iii) the foreign court has international jurisdiction, (iv) the defendant is properly served, and (v) there is a lack of res judicata.<sup>49</sup> Conditions (ii), (iii) and (iv) are similar to Article 118 (iii), (i) and (ii).<sup>50</sup> Condition (i) can be derived from the opening sentence of Article 118, which provides for a “final and binding judgment.”<sup>51</sup> Further, while condition (v) is not

<sup>45</sup> See HCCH, The Judgments Project, available at <https://www.hcch.net/en/projects/legislative-projects/judgments>.

<sup>46</sup> *Id.*

<sup>47</sup> Articles 3 & 5, the Convention.

<sup>48</sup> See e.g. Bélih Elbalti, Reciprocity and the recognition and enforcement of foreign judgments: a lot of bark but not much bite, *Journal of Private International Law*, 13(1), 184, 206-208.

<sup>49</sup> See Tsang, *supra* note 12, 14, *tb.* 6.

<sup>50</sup> Article 118, CCP.



expressly stated in Article 118, in 1977, the Osaka District Court ruled that it was contrary to public policy to recognize a judgment rendered by the Washington State as there existed a prior judgment rendered by Japanese court.<sup>52</sup> Accordingly, it can be derived from this case that the lack of *res judicata* is also one of the enforcement conditions under Article 118 (condition (vi)). Reciprocity is not included in Table 1.

Further analysis of the conditions may show that these enforcement conditions are similar but not identical. For example, it is not clear to what extent “effective judgment” in the bilateral treaties needs to be “final and binding” as provided under Japanese law.<sup>53</sup> However, the argument here is that the enforcement conditions are sufficiently similar to mean that both countries share some key concepts that could make a Sino-Japanese enforcement treaty viable.

Among the five conditions, the most important appears to be “international jurisdiction.”<sup>54</sup> The 33 bilateral treaties with China have three different approaches to jurisdiction, namely, (1) respective jurisdiction, (2) respective jurisdiction subject to exclusive jurisdiction, and (3) objective jurisdiction.<sup>55</sup> The most flexible requirement is respective jurisdiction. This approach requires only the judgment-rendering court to have jurisdiction under its own jurisdictional rules. In other words, the jurisdictional rules of the foreign country do not have to be the same as those of China.

The second approach (respective jurisdiction subject to exclusive jurisdiction) is the same as respective jurisdiction except that the judgment-rendering court cannot assume jurisdiction that is considered exclusive jurisdiction by the judgment-enforcing country. Compared to the first approach, this is a more stringent condition that will prevent foreign judgments that fall into exclusive jurisdiction of the enforcing court from being enforced.

The last and most stringent approach is objective jurisdiction. Unlike the other two approaches, this approach lists exhaustively the acceptable jurisdictional bases. They are objective in the sense that they are not changeable unilaterally by one country and are set out clearly in the treaty itself. The same jurisdictional bases will therefore be binding on both countries. This approach apparently requires the contracting countries to be on the same page regarding jurisdictional bases and is thus the most difficult approach to agree on. The following table shows the distribution among the 33 bilateral treaties of these three approaches:<sup>56</sup>

TABLE 2. INTERNATIONAL JURISDICTION APPROACH OF CHINESE BILATERAL TREATIES

	Type 1 – Other than Exclusive Jurisdiction	Type 2 – Respective Jurisdiction	Type 3 – Objective Jurisdiction	Total
No. of Countries	8	14	11	33

<sup>51</sup> *Id.*

<sup>52</sup> See Judgment of December 22, 1977, Osaka District Court, Case No. (Wa) 4257 of 1975 and Case No. (Wa) 5135 of 1976.

<sup>53</sup> See Tsang, *supra* note 12, 15-16 (the meaning of “effective judgment” is unclear in the bilateral treaties).

<sup>54</sup> See *supra* note 31, 84 (“A fundamental requirement for the requirement or enforcement of a foreign judgment is that the foreign court should have had international judicial jurisdiction pursuant to the law and treaties (Article 118(i) of the CCP.”).

<sup>55</sup> See Tsang, *supra* note 12, 17-21.

<sup>56</sup> *Id.*, 17, *tb.* 8.

It is clear from Table 2 that the distribution is rather even, indicating that China has been flexible with these three approaches. Table 3 below further compares the jurisdictional bases of the most stringent approach, the objective approach and the direct jurisdictional rules under the CCP.

The first column shows the jurisdictional bases commonly found in the 11 bilateral treaties that adopted the objective jurisdiction approach. The second column shows the number of times that a specific basis was used in the 11 treaties. The third column shows the corresponding direct jurisdictional bases under the CCP.

TABLE 3. OBJECTIVE JURISDICTION BASES V.S. CCP

Jurisdictional Basis <sup>57</sup>	No. of Countries	CCP
Location of Immovable Property	11	Art 3-3(xi)
Defendant Place of Residence	11	Art 3-2(i), (iii)
Business – Place of Agent	10	Art 3-3(v)
Contract – Place of Performance	11	Art 3-3(i)
Contract – Location of Subject Matter	9	Art 3-3(iii)
Contract – Place of Conclusion	9	N/A
Tort – Place of Act	11	Art 3-3(viii)
Tort – Place of Consequence	9	Art 3-3(viii)
Exclusive Jurisdiction of F2	11	Art 3-5(i)
Succession	7	Art 3-3(xii), (xiii)
Explicit Jurisdiction Agreement	11	Art 3-7
Defendant Defended on Merit and Did not Argue about Jurisdiction	8	Art 3-8
Status – Place of the Subject Person	5	N/A
Custody – Place of Debtor	6	N/A
Defendant's Representative in F2	1	N/A

The first general finding is that most of the common jurisdictional bases are covered by the CCP. For example, the general jurisdiction of habitual residence in the judgment-rendering country is similar to residence covered by Articles 3-2 (i) and (iii) of the CCP. Specific jurisdictional bases such as the place of tort and the place of contractual performance are also similarly covered by the CCP (Article 3-3(viii) and Article 3-3(i) of the CCP). These conditions are considered as the most important jurisdictional bases under Japanese law.<sup>58</sup> On the other hand, jurisdictional bases that have no counterpart in the CCP are usually less common bases among the treaties, such as those regarding custody and status.

These similarities do not necessarily mean that the jurisdictional bases are identical. For example, Articles 3-2(i) and (iii) of the CCP not only cover residence but also the domicile of the defendant. However, the argument is not that these jurisdictional bases are identical but that there are sufficient similarities to warrant the belief that a bilateral treaty on mutual enforcement between China and Japan is viable, not to mention that the other two jurisdictional approaches acceptable to China are even more flexible.

<sup>57</sup> These jurisdictional bases are derived from the objective jurisdiction bases as found in the 11 bilateral treaties with objective jurisdiction, see Tsang, *supra* note 12, 19, footnote 73.

<sup>58</sup> See *supra* 31, 85-86.

(ii) Existing judicial assistance treaty between China and Japan

While there is no judicial assistance treaty between the two countries on civil judgment enforcement, there is a treaty on judicial assistance on the criminal side. China and Japan entered into the Judicial Assistance Treaty in Criminal Affairs between the PRC and Japan in 2008.<sup>59</sup> While the substance of judicial assistance is totally different, that treaty did show that the two countries are capable of cooperating with each other on judicial matters. More importantly, that treaty sets up an existing communication channel between the countries that can be used again in the new enforcement treaty.<sup>60</sup> In addition, China also entered into criminal judicial assistance treaties with 30 of the 33 foreign countries that it entered into bilateral enforcement treaties with.<sup>61</sup> This supports the suggestion above regarding the advantage of having an existing communication channel.

#### IV. *Challenges of a Bilateral Treaty*

Despite the advantages discussed above, the bilateral treaty approach is not without challenges. The most significant challenge is probably the lack of confidence in the Chinese judiciary.<sup>62</sup> Notwithstanding clear improvements in the Chinese judiciary over the past three decades, the impartiality and competence of Chinese judges are still concerning.<sup>63</sup> This is particularly the case when one compares the much more developed judiciary of Japan. In 2017, the judicial independence rankings of China and Japan were 46 and 15, respectively.<sup>64</sup> In addition, there are specific fields that are more concerning such as cases on intellectual property. In a report issued by the Office of the United States Trade Representative, China was placed on the Priority Watch List.<sup>65</sup> More specifically, it was stated in the executive summary of the report that:

longstanding and new IP concerns merit attention, including with respect to coercive technology transfer requirements, structural impediments to effective IP enforcement, and widespread infringing activity – including trade secret theft, rampant online piracy and counterfeiting, and high levels of physical pirated and counterfeit exports to markets around the globe.<sup>66</sup>

<sup>59</sup> Judicial Assistance Treaty in Criminal Affairs on 1 December 2007 between the PRC and Japan.

<sup>60</sup> See *id.*, Article 2(1).

<sup>61</sup> See Ministry of Foreign Affairs, Status of Sino-Foreign Treaties on Civil and Criminal Judicial Assistance (2016), available at [http://www.fmprc.gov.cn/web/ziliao\\_674904/tytj\\_674911/wgdwdjdsfhzty\\_674917/t1215630.shtml](http://www.fmprc.gov.cn/web/ziliao_674904/tytj_674911/wgdwdjdsfhzty_674917/t1215630.shtml).

<sup>62</sup> See Morio Takeshita, The Recognition of Foreign Judgments by the Japanese Courts, 39 *Japanese Ann. Int'l L.* 56 (1996) (“the fact remains that no one can be expected to take such an attitude towards foreign judgments without a trust in foreign judicial systems.”).

<sup>63</sup> See Albert Chen, *An Introduction to the Legal System of the People's Republic of China*, (4th edn, LexisNexis 2011), 200-211.

<sup>64</sup> World Economic Forum, The Global Competitiveness Report 2017-2018, 91, 161, available at <http://www3.weforum.org/docs/GCR2017-2018/05FullReport/TheGlobalCompetitivenessReport2017-2018.pdf>.

<sup>65</sup> See Office of the United States Trade Representative, 2017 Special 301 Report, available at <https://ustr.gov/sites/default/files/301/2017%20Special%20301%20Report%20FINAL.PDF>.

<sup>66</sup> *Id.* 1.

These concerns are legitimate but there are also ways that they could at least be mitigated, if not completely addressed. One notable case is the enforcement arrangement between China and Hong Kong. Since Hong Kong is not a country, there can be no treaty between China and Hong Kong despite having different legal systems. In 2008, China and Hong Kong entered into the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned (the “Hong Kong Arrangement”).<sup>67</sup> This raised significant concern in Hong Kong about the quality of Chinese courts and judges, similar to the concerns that could be raised by Japan.<sup>68</sup> However, the Hong Kong Arrangement included features that could mitigate these concerns.

To start with, the scope of the Hong Kong Arrangement is limited to judgments resulting from an exclusive jurisdiction agreement.<sup>69</sup> Therefore, if Japan has concerns over certain specific areas such as intellectual property, one way to deal with that is to expressly exclude those areas from the scope of the treaty. Of course, the more limited the scope, the lesser the effect of the treaty. There is therefore a balance to be struck in this regard. In addition, the Hong Kong Arrangement is only applicable to judgments from certain Chinese courts. These are usually higher courts from certain big cities and provinces.<sup>70</sup> They happen to be courts that are regarded as more international and sophisticated. This could at least reduce concerns regarding the impartiality and competence of the Chinese courts that render the judgments.

## V. Conclusion

To date, Japan has not entered into an enforcement treaty with any country. Therefore, the probability that Japan will enter into such a treaty with China is low. Nonetheless, this article sets out to explore the substance of a potential treaty, not the likelihood of one being agreed. A comparison of the similarities of the key concepts in the enforcement conditions of the two countries suggests that they are largely compatible and there is currently a foundation on which to create a mutual judgment enforcement treaty. This is a much better approach than the more elusive alternatives of relying on both countries’ judiciaries to make changes to their reciprocity principle or on the Hague Convention. It is easy to dismiss an idea without actually considering its merits, but with the merits elaborated, the two countries could use this proposal as a starting point. From the perspective of legal design, there is much common ground on which to work

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<sup>67</sup> This is given effect in China by a SPC interpretation - SPC, ‘Arrangement of the Supreme People’s Court between the Mainland and the HKSAR on Reciprocal Recognition and Enforcement of the Decisions of Civil and Commercial Cases under Consensual Jurisdiction’ [2008] No. 9; SPC, and in Hong Kong by the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597).

<sup>68</sup> See Xianzhu Zhang; Philip Smart, Development of Regional Conflict of Laws: On the Arrangement of Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters between Mainland China and Hong Kong SAR, 36 Hong Kong L.J. 553, 578 (2006)(“Indeed, in Hong Kong there have been deep worries about the exposure of Hong Kong businessmen to rulings obtained through questionable means on the Mainland.”).

<sup>69</sup> Articles 1 & 3, Hong Kong Arrangement.

<sup>70</sup> See Sch. 1, Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597). The list of recognized Basic People’s Courts was published by the Hong Kong Secretary for Justice in the Gazette on 25 July 2014 (G.N. 4289), available at <https://www.doj.gov.hk/eng/topical/pdf/egn201418304289.pdf>.

on a Sino-Japanese foreign judgment enforcement treaty that would serve the economic interests of both countries.