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RECOGNITION AND ENFORCEMENT OF JUDGMENTS BETWEEN CHINA, JAPAN AND SOUTH KOREA IN THE NEW ERA

RECOGNITION AND ENFORCEMENT OF FOREIGN NON-MONETARY JUDGMENTS IN CHINA

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Abstract Transboundary recognition and enforcement of judgments is of increasing practical significance and it draws a great deal of efforts at various levels. However, the efforts already made are predominantly in relation to cross-border movement of monetary judgments, leaving non-monetary judgments beyond recognizability. Investigation into China’s legislation and adjudication reveals that there is no distinction made between recognition of monetary and non-monetary judgments, and practice also ignores such a distinction. Following the trend of embracing non-monetary judgments within the scope of recognizability, China’s standpoint seemingly appears to be desirable, although the long-standing non-differentiation of monetary and non-monetary judgments is not presumed to be originally out of promoting recognition and enforcement of foreign non-monetary judgments in China. It is submitted that for promoting recognition and enforcement of foreign non-monetary judgments, China shall introduce independent rules in order to facilitate the circulation of such judgments, which merits a special treatment. For parties to seek the recognition and enforcement of such judgments, prior to any overhauling of the current legal regime, they have to follow China’s persisting general legal regime and judicial practice regarding recognition and enforcement of all categories of foreign judgments, and a special call is made for particular attention to the reciprocity requirement and due service requirement.

Keywords foreign judgment, non-monetary judgment, China, recognition and enforcement

I. A BROAD PICTURE

II. RECOGNITION OF FOREIGN DIVORCE JUDGMENTS

A. The Legal Regime

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I. A BROAD PICTURE

The term non-monetary judgment (hereinafter referred to as “NMJ”) is used vis-a-vis monetary judgment, and it is meant to refer to the judgment that contains no monetary or pecuniary award. Broadly speaking, the NMJs do not only comprise of the judgments with no monetary elements therein at all, but also include the non-monetary components in a judgment that also comprises of monetary components. It is indeed not infrequent to see the judgments combining both monetary and non-monetary components. Countries vary in the kinds of judgments, which renders impossible to enumerate what kinds of judgments fall within the category of NMJs. The orders such as injunctions, specific performance, restitution of chattel, transfer of title, discovery, and declarations are all among such NMJs. NMJs are used in the broad sense throughout the paper. For simplicity, the paper is set to consider several typical NMJs, including the divorce judgments, insolvency judgments and injunctions. These typical NMJs differ from the monetary judgments in many respects and, in some instances, Chinese law provides for a separate and differentiated legal regime for recognition and enforcement.¹

For recognition and enforcement of foreign judgments (hereinafter referred to as “REJ”), a great deal of global efforts have been mobilized. European Union (EU) and the Hague Conference on Private International Law (HCCH) have been taking the lead. Remarkable achievements have been made and individual countries have been eager to push for a global judgments convention especially for the EU under the auspices of HCCH. However, almost all the past REJ efforts or practice revolve around recognition and enforcement of monetary judgments, establishing a tradition that only foreign monetary or pecuniary judgments can be recognized or enforced. One of the long-standing orthodoxies of the REJ law is that in order to be enforceable, a foreign judgment must be looking for the payment of money. Foreign NMJs, such as injunctions,

¹ See the discussion below II. A. The Legal Regime of this paper.
specific performance, mandatory orders or contempt orders, were accordingly not enforceable. Justifications may exist for excluding the recognition or enforcement of NMJs, but there are stronger and stronger reasons for the circulation of NMJs. For international participants, of increasing significant practical importance is access to the non-monetary remedies. Courts in some countries have developed new strands of non-monetary remedies such as sweeping Mareva orders. In cases where harm is difficult to quantify, non-monetary remedies are essential for a plaintiff to obtain an effective remedy. For example, in a case of breach of intellectual property rights, damages may be subsidiary to an injunction prohibiting further infringements; and there are many other instances where non-recognition of NMJs may lead to serious inconveniences, such as in estates, internet, and media law related cases.

It is believed that more categories of NMJs will emerge. If NMJs in such cases cannot be recognized or enforced cross-borders, separate and duplicative legal proceedings may be necessary, which can be very problematic for the aggrieved parties. What is more, no such limit exists for the enforcement of foreign arbitral awards containing non-monetary components. To put it in another way, although there will be difficulties in enforcing foreign non-monetary judgments, these difficulties do not merit an outright denial of enforcement to all such judgments. The Canadian Supreme Court casts doubt on the 1993 Hunt v. T&N plc case of the long-standing rule that restricts recognition and enforcement to judgments for a fixed sum of money, and in the 2006 Pro Swing Inc. v. Elta Gof Inc., it expressly held that foreign non-monetary judgments were enforceable. In short, NMJs constitute an integral part of judgments and they call for equal transboundary movement, under the same or different requirements. And indeed, a relaxation, or abrogation, of the monetary requirement for REJ purposes would represent a sea change in cross-border litigation. Indeed, there are countries that appear not to deliberately differentiate between monetary and non-monetary judgments for REJ purposes, such as China and South Korea. Nevertheless, the mainstream still excludes NMJs from the recognizability scope.

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7 [2006] 2 SCR 612.
8 See MacDonald, fn. 4 at 45.
9 In South Korea, there is no apparent distinction made between recognition and enforcement of foreign monetary and NMJS. See, e.g. Kwang Hyun SUK, Recognition and Enforcement of Foreign Judgments in the Republic of Korea, 15 Yearbook of Private International Law, 421–437 (2013/2014).
Following the adoption of the reform and opening up policy, China has been integrating with the international community in a faster pace. Along with this process, a huge amount of civil and commercial disputes arise, which makes REJ in China inevitable. In recent years, there are a large number of applications submitted for REJ in China. According to the statistics collected from the official website of China’s Supreme People’s Courts (SPC) — China Judgments Online, in the year of 2017 alone, 691 applications were submitted for REJ in China. Among these applications, almost all (684 out of 691) are in relation to recognition of foreign divorce judgments. This backdrop highlights the importance of recognition of foreign NMJs. As of today, China has passed some special rules regarding recognition or enforcement of foreign NMJs, which relates to foreign divorce judgments and insolvency judgments although its general law concerning REJ in China, namely Code of Civil Procedure (hereinafter referred to as “CCP”), have been opting for non-distinction between foreign monetary and non-monetary judgments. Moreover, under the current Chinese legal regime for REJ, recognition always precedes enforcement in both monetary and non-monetary judgments recognition cases. Enforcement procedure follows once recognitions granted. This paper is aimed to illustrate the legal regime and the corresponding practice surrounding recognition of foreign NMJs in China. Based on the analysis, the paper is further set to explore how China’s law in this respect should be improved and what parties can do in the sense of having their foreign NMJs recognized or enforced in China. To be specific, the second part addresses recognition of foreign divorce judgments; the third part considers the possibility of recognition or enforcement of other categories of foreign NMJs; and the fourth part summarizes the obstacles and the responses regarding recognition or enforcement of foreign NMJs.

II. RECOGNITION OF FOREIGN DIVORCE JUDGMENTS

Divorce judgments are a kind of judgments which normally contain monetary and non-monetary elements. As the statistics shown above, 684 out of 691 applications for REJ in China in 2017 are in relation to recognition of foreign divorce judgments, which is undoubtedly the predominant part of REJ in China. This part first explores the legal regime and practice surrounding the recognition of foreign divorce judgments and then moves to present a critique.

A. The Legal Regime

For REJ in China, international treaties, in the form of bilateral or multilateral treaties, prevail over domestic laws. However, for the recognition of foreign divorce judgments
in China, absent the limited number of Sino-foreign bilateral treaties, it is necessary to refer to Chinese domestic laws for most cases. Ideally, for recognition of foreign divorce judgments, uniform domestic rules had better be prescribed for the recognition thereof. But China’s SPC follows a different path, namely by further providing for separate specific rules for the recognition of foreign divorce judgments, besides China’s overarching law for REJ in China — CCP. China’s CCP was passed in 1991 and amended recently in 2017. Under the CCP, there are two very simple, general provisions for REJ in China, which may serve as the starting point for considering the recognition of foreign divorce judgments in China. The SPC issued an official interpretation of the CCP in 2015 (hereinafter referred to as “SPC Interpretation of the CCP”), which supplements the REJ legal structure in a procedural perspective.

Besides CCP and the SPC Interpretation of the CCP, two special SPC laws are noteworthy, i.e. the Regulation on Applications by Chinese Citizens for Recognition of Foreign Divorce Judgments 1991 (hereinafter referred to as “1991 Divorce Judgments Recognition Regulation”), and the Regulation on Applications for Recognition of Foreign Divorce judgments 2000 (hereinafter referred to as “2000 Divorce Judgments Recognition Regulation”), repealing the SPC Opinion on Several Questions regarding the People’s Courts’ Entertaining of Applications for the Recognition of Foreign Court Divorce Judgments. These two special laws complement China’s CCP. The relationship between CCP and these two Regulations calls for a special evaluation. CCP is a general law, designed to regulate all applications for REJ in China, while as the special laws, the 1991 and 2000 divorce judgments recognition regulations introduce special rules in relation to the recognition of foreign divorce judgments. It is presumed that only if the two special 1991 and 2000 divorce judgments recognition regulations do not provide for specific rules, the CCP may function as the legal basis. Indeed, it is really problematic if the CCP and the two regulations furnish contradictory requirements. Theoretically speaking, as the overarching law for REJ in China, the CCP provisions should prevail; however, in China, it would be more of a wishful thinking for the prevailing of the CCP provisions over the regulations, since the regulations were passed by China’s SPC for lower courts to follow.

China’s CCP provides for two general provisions for REJ in China. The two articles are as follows:

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13 For the discussion of such bilateral treaties, see, e.g. ZHANG Wenliang, Recognition and Enforcement of Foreign Judgments in China: Rules, Practice and Strategies, Kluwer Law International (Alphen aan den Rijn), at 206 (2014); ZHANG, id. at 544.
14 Ever since the passing of CCP, its general provisions have remained completely the same. See Arts. 267 & 268 of the CCP 1991, and Arts. 281 & 282 of the CCP 2017.
15 Fa Shi [2015] No. 5.
17 Fa Shi [2000] No. 6.
18 Fa [1998] No. 86.
Article 281: If a legally effective judgment (panjue) or ruling (caiding) delivered by a foreign court entails the recognition and enforcement before the people’s courts of the People’s Republic of China (PRC), the party concerned may directly apply to the intermediate people’s courts of the PRC having the jurisdiction over the cases for the recognition and enforcement, or [as an alternative], a foreign court may, according to the provisions of the international treaties concluded or acceded to by the PRC or based on the principle of reciprocity, request the people’s courts to recognize and enforce its judgments.

Article 282: After a people’s court of the PRC reviews an application or request for the recognition and enforcement of a legally effective judgment or ruling delivered by a foreign court according to the international treaties concluded or acceded to by the PRC or based on the principle of reciprocity, if [the people’s court] considers that such a judgment or ruling neither contradicts the basic principles of the laws [of the PRC] nor violates the national sovereignty, security, and social and public interests of the PRC, [the people’s court] shall make a ruling to recognize its effects. Where the enforcement is of necessity, [the people’s court] shall issue an order to enforce the foreign judgment according to the relevant provisions of the present law. If a legally effective judgment or ruling delivered by a foreign court contradicts the basic principles of the law [of the PRC] or the national sovereignty, security, social and public interests of the PRC, the people’s courts shall refuse to grant the recognition and enforcement.

Each of the foresaid CCP provision serves a different function. Article 281 gives the interested parties and foreign courts the right for REJ in China, which amounts to a solemn declaration that China is willing to recognize and enforce foreign judgments, but it is merely set to regulate the procedural issues regarding the recognition of foreign judgments in China. Distinct from Article 281, Article 282 is designed to set forth the basic requirements with regard to recognition of foreign judgments in China, without any further clarification. Pursuant to Article 282, the REJ requirements in China are comprised of legally effectiveness of foreign judgments, existence of reciprocity and non-violation of public policy.

In a sharp contrast to the CCP’s two provisions, the 1991 Divorce Judgments Recognition Regulation contains 22 articles altogether, providing for the scope of application, the procedure for parties to institute recognition proceedings as well as the procedure for the requested Chinese courts to address applications for recognition, and the grounds for refusal. For the Regulation, its scope of application is severely limited.

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21 Arts. 1 and 2, the 1991 Divorce Judgments Recognition Regulation.
22 Arts. 3–11, 13–14 and 17–22, the 1991 Divorce Judgments Recognition Regulation.
23 Art. 12, the 1991 Divorce Judgments Recognition Regulation.
as it is only designed for Chinese citizens who submit applications for the recognition of foreign divorce judgments in China and the Regulation does not apply to the recognition of the parts of foreign divorce judgments regarding the division of matrimonial property, alimony and child maintenance.\textsuperscript{24} As a core provision, Article 12 provides for five refusal grounds for foreign divorce judgments: (1) The [foreign divorce] judgments have not yet become “legally effective”; (2) there is an absence of [international] jurisdiction of the foreign rendering courts over the cases; (3) the [foreign divorce] judgments were delivered in default of defendants’ appearance and no legal summons were ever made; (4) the Chinese courts are currently handling or have rendered judgments over the divorce cases between the same parties, or third-country judgments between the same parties have already been recognized by the Chinese courts; and (5) the [foreign divorce] judgments contravene the basic principles of the Chinese law or harm the national sovereignty, security and social and public interests.\textsuperscript{25}

In order to facilitate the recognition of foreign divorce judgments in China, the 2000 Divorce Judgments Recognition Regulation echoes and complements the 1991 Regulation. Under the 2000 Regulation, there are three provisions in total, which is aimed to clarify several ambiguities surrounding the recognition of foreign divorce judgments in China. The 2000 Regulation brings no substantive provisions regarding recognition of foreign divorce judgments in China, except for further delimiting the subjects that are qualified to submit applications.\textsuperscript{26} By the 2000 Regulation, only the foreign divorce judgments involving at least one Chinese party may be recognized.

For recognition and enforcement of divorcements from other jurisdictions of the PRC, namely Hong Kong, Macao and Taiwan, special rules exist and there is no room for the abovementioned divorce recognition rules or laws to apply unless the special rules or

\textsuperscript{24} Art. 1, the 1991 Divorce Judgments Recognition Regulation.
\textsuperscript{25} See ZHANG, fn. 13 at 56.
\textsuperscript{26} For the rules, see ZHANG, fn. 13 at 52–53.

Art. 1: When Chinese citizens apply before the people’s courts for the recognition of foreign divorce judgments, the people’s courts should not refuse to entertain [their applications] based on the fact that they didn’t marry in China; if Chinese citizens apply for the recognition of foreign divorce judgments rendered in default of their appearance, [they] should simultaneously submit to the people’s courts the relevant documents certifying that the foreign courts had legally summoned them.

Art. 2: When foreign citizens apply before the people’s courts for the recognition of foreign divorce judgments, if their ex-spouses with whom the applicants are divorced [pursuant to the foreign divorce judgments] are Chinese citizens, the people’s courts should entertain [the applications]; if their ex-spouses with whom the applicants are divorced [pursuant to the foreign divorce judgments] are foreign citizens, the people’s courts should not entertain [the applications], but may inform them to apply for registration of re-marriage before the marriage registration organ [of China].

Art. 3: If the parties [of foreign proceedings] apply before the people’s courts for the recognition of the effects of foreign divorce settlements reached under the intervention of foreign courts, the people’s courts should entertain [the application and review [the foreign divorce settlements] according to the 1991 Regulation on Foreign Divorce Judgments and deliver the rulings of recognition or non-recognition thereafter.
laws are silent to some issues. Regarding to Macao\textsuperscript{27} and Taiwan\textsuperscript{28}, the Mainland has concluded bilateral arrangements therewith or adopted unilateral REJ rules, which apply equally to all kinds of civil judgments including but not limited to divorce judgments.\textsuperscript{29} In contrast, for the Mainland–Hong Kong REJ relation regarding divorce judgments, there exists a clear evolution and currently specific rules are available.

Over the years, China’s SPC has changed its position on recognizing or not recognizing Hong Kong divorce judgments. In 1974, when asked for an opinion on whether to recognize Hong Kong divorce judgments, the SPC gave a negative response in the form of judicial interpretation, refusing to recognize Hong Kong judgments.\textsuperscript{30} In contrast, when the SPC was asked again in 1991 for an opinion on whether to recognize Hong Kong divorce judgments, it agreed to recognize Hong Kong divorce judgments, subject to public policy considerations.\textsuperscript{31} Rapid strides were made in 2017 when the SPC reached an arrangement with the government of the Hong Kong Special Administrative Region on reciprocal recognition and enforcement of matrimonial and family judgments.\textsuperscript{32} By reference to 22 articles, this Mainland–Hong Kong Arrangement paves the way for recognition and enforcement of Hong Kong divorce judgments in Mainland, and vice versa. It sets a good example for future rules or legislation on recognition and enforcement of foreign\textsuperscript{33} divorce judgments. In a sharp contrast to the 1991 Divorce Judgments Recognition Regulation, this Arrangement greatly broadens the scope of recognition and enforcement of foreign divorce judgments, in the sense that it covers the recognition and enforcement of not only the monetary component but also equally the non-monetary component of divorce judgments.

\textit{B. The Judicial Practice}

This section is set to examine the practice concerning recognition of foreign divorce

\textsuperscript{27} See Arrangement between the Mainland and the Macao Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments (Mainland–Macau REJ Arrangement), Fa Shi [2006] No. 2.

\textsuperscript{28} See Provisions of the Supreme People’s Court on Recognition and Enforcement of the Civil Judgments of Courts of the Taiwan Region (SPC REJ Provisions on Taiwan Judgments), Fa Shi [2015] No. 13.

\textsuperscript{29} Art. 3, Arrangement between the Mainland and the Macao Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments; Art. 2, Provisions of the Supreme People’s Court on Recognition and Enforcement of the Civil Judgments of Courts of the Taiwan Region.

\textsuperscript{30} See The SPC's Reply of Non-Recognition of Hong Kong Divorce Judgments, [74] Fa Min Zi No. 3.

\textsuperscript{31} See The SPC’s Reply on whether to Entertain the Application for Recognition of a Hong Kong Divorce Judgment Submitted by Chinese Citizen ZHOU Fangzhou, Sep. 20, 1991.

\textsuperscript{32} Arrangement of the Supreme People’s Court and the Government of the Hong Kong Special Administrative Region on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases by the Courts of the Mainland and of the Hong Kong Special Administrative Region, Jun. 20, 2017.

\textsuperscript{33} The term “foreign” used here is meant to denote other law jurisdictions instead of sovereign states, \textit{i.e.} Taiwan, Hong Kong and Macao are all the law jurisdictions within the PRC besides China’s mainland.
judgments in China, by referring to the relevant cases addressed by Chinese courts in 2017. According to the official China Judgments Online, in the whole year 2017 Chinese courts addressed 684 cases regarding recognition of foreign divorce judgments, among which 681 were handled by the intermediate people’s courts without any appeal or retrial, while two were dealt with by the basic people’s courts and one went through a retrial procedure. Almost all these applications were submitted for the recognition of the dissolution of marriage and they were easily recognized by the requested Chinese courts. There were also some applications for the recognition of not only the dissolution of marriage but also other marital matters such as alimony and division of matrimonial property. There were also cases where withdrawal of applications were allowed. For the legal bases, most cases were handled in accordance with the aforementioned domestic laws, while several cases were addressed in accordance with Sino-foreign bilateral treaties. Several typical cases will be considered here in order to expose the basic situation of recognition of foreign divorce judgments in China. To make a clear comparison between the recognition of pecuniary judgments and non-pecuniary judgments, special consideration is particularly given to the cases addressed by those courts that have recognized foreign pecuniary judgments.

In the case of XU Jie v. YUAN Mingyue, Beijing No. 3 Intermediate People’s Court was asked to recognize a Quebec divorce judgment dated March 1, 2017. The Quebec judgment dissolves the matrimonial relationship and divides the matrimonial debts. In this case, the requested court recognized the judgment to the extent of dissolution of the matrimonial relationship, leaving aside the other parts of the judgment. In this case, Beijing No. 3 Intermediate People’s Court based its decision solely on Articles 281 and 282 of the CCP, without mentioning the 1991 or 2000 divorce judgments recognition.

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34 The statistics were collected on China Judgments Online, available at http://wenshu.court.gov.cn/Index, posted on Feb. 4, 2018.
35 Pursuant to the current Chinese law, the REJ rulings cannot be appealed, but they can refer to the rarely-initiated extraordinary remedy — “retrial.”
36 But in several cases, Chinese courts denied the recognition of foreign divorce judgments, such as in the case LIU Huan v. YU Chuannmei, Su 01 Xie Wai Ren No. 1 (2017).
38 For example, in WANG Weihua v. WANG Fengmei (2017) Yu 16 Xie Wai Ren No. 2, the applicant applied for the recognition of the whole aspects of the Malaysian judgments besides dissolution of marriage.
40 For example, in LIU Yan v. ZHENG Jianwen (2017) Zhe 03 Xie Wai Ren No. 5, the Sino-Spanish Treaty on Civil and Commercial Judicial Assistance was resorted to.
41 For the recognition of foreign pecuniary judgments, see ZHANG Wenliang, Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention Paid to Both the “Due Service Requirement” and the “Principle of Reciprocity”, 12 Chinese Journal of International Law, 143–174 (2013); ZHANG, fn. 12 at 515–545.
42 XU Jie v. YUAN Mingyue, (2017) Jing 03 Xie Wai Ren No. 16.
regulations. In another case of **XIA Hao v. XIAO Aili**, Beijing No. 3 Intermediate People’s Court was asked to recognize a Connecticut divorce judgment dated October 28, 2014. In this case, the requested court refused to recognize the Connecticut judgment by reference to the refusal ground set forth in Article 12(4) of 1991 Divorce Judgments Recognition Regulation, namely that a Chinese court was at the time handling a divorce case between the same parties. In this case, besides the 2000 Divorce Judgments Recognition Regulation, the requested court also cited the CCP and SPC Interpretation of the CCP, which struck a sharp contrast to the above case **XU Jie v. YUAN Mingyue**.

In the case of **XIAO Rongrong v. Terry Andrew Brashaw**, Wuhan Intermediate People’s Court was asked to recognize a New Jersey divorce judgment dated December 9, 2014. An agreement on property division was attached to this divorce judgment. The requested court was only asked and also rendered for the recognition of the New Jersey divorce judgment to the extent of dissolution of matrimonial relationship. For the legal bases, Wuhan Intermediate People’s Court solely referred to Article 282 of the CCP. In the case of **DAI Jin v. XU Kenan**, Wuhan Intermediate People’s Court was asked to recognize an Australian divorce judgment dated February 14, 2017. The judgment was recognized to the extent of dissolution of matrimonial relationship. For the legal bases, Wuhan Intermediate People’s Court solely referred to Article 282 of the CCP.

In the case of **CHEN Wei v. WANG Guangjie**, Nanjing Intermediate People’s Court was asked to recognize a New York divorce judgment dated March 11, 2015. The requested court was asked to recognize the dissolution of matrimonial relationship of the New York judgment, which was upheld in accordance with Articles 281 and 282 of the CCP and Article 13 of the 1991 Divorce Judgments Recognition Regulation. In the case of **LIU Huan v. YU Chunmei**, Nanjing Intermediate People’s Court was asked to recognize an Australian divorce judgment dated September 20, 2016. In this case, the Australian divorce judgment was denied the recognition on the sole ground of undue service according to Article 12(3) of the 1991 Divorce Judgments Recognition Regulation. The court alleged that the defendant defaulted in the Australian proceeding was not legally summoned. However, except for a mere description of the service process employed in the Australian proceeding, there was no clarification of “legally summoned.” It is thus assumed that Nanjing Intermediate People’s Court referred to Chinese version of due service to examine the Australian service of proceedings. There was no consideration of other requirements concerning recognition of foreign (divorce) judgments in China.

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43 **XIA Hao v. XIAO Aili**, (2017) Jing 03 Xie Wai Ren No. 15.
C. A Critique of the Legislation and Practice

For the current legal regime on recognition of foreign divorce judgments, it is far from good or sufficient. The CCP provisions on the REJ are meant to cover the recognition of foreign divorce judgments, but they are of very scant use in the sense that the two provisions are so general. The SPC Interpretation of the CCP only complements the CCP to a limited extent. Indeed, the SPC’s 1991 and 2000 divorce judgments recognition regulations furnish a more detailed legal structure, and thus facilitate the courts’ practice. Taken as a whole, the relatively detailed legal structure introduced by the two regulations is nevertheless narrow-minded. First, it is merely aimed to regulate the recognition of foreign divorce judgments within the limit of dissolution of matrimonial relationship, thus hindering the recognition of other parts of foreign divorce judgments. Second, the regulations are limited to apply when at least one party is Chinese. It is probably presumed by the drafters that there is no need to recognize the foreign divorce judgments between two foreign citizens and this is not necessarily true. Third, the 1991 Divorce Judgments Recognition Regulation actually encourages institution of parallel proceedings before Chinese courts to block the recognition of foreign divorce judgments in China, since it prioritizes the Chinese judicial proceedings over foreign divorce judgments.\(^48\) Fairly speaking, there is a great necessity for overhauling the legal regime on recognition of foreign divorce judgments in China.

Objectively, in spite of China’s insufficient legal regime on recognition of foreign divorce judgments, Chinese courts are prone to recognize foreign divorce judgments. It is a good thing for easily circulating such foreign judgments, especially for the parties involved. However, we cannot see a smooth circulation of the divorce judgments beyond the dissolution of matrimonial relationship. This is partly due to the restrictive scope of application of the 1991 and 2000 divorce judgments recognition regulations. At the same time, the requested Chinese courts are not actually precluded from recognizing foreign divorce judgments beyond dissolution of matrimonial relationship, by reference to the CCP provisions. Unfortunately, practice shows that Chinese courts usually recognize the dissolution of marriage part of foreign divorce judgments, leaving other parts totally unrecognizable. It is beyond reasonable explanation that recognition cannot be extended to monetary or property parts of foreign divorce judgments, especially the division of community property. Some property parts within divorce judgments such as immovable, alimony or maintenance fees, may be subjected to exclusive jurisdiction of the requested states, or cannot be finalized at the recognition stage; however, non-discriminatory denial of monetary or property parts of foreign divorce judgments is inadvisable and without solid justifications. Even if the current narrow-minded legal system persists, Chinese courts should not block the recognition of the non-monetary parts of foreign divorce judgments under the general CCP provisions. To be more specific, when the dissolution

\(^{48}\) See Arts. 18 and 20, the 1991 Divorce Judgments Recognition Regulation.
of marriage part of foreign divorce judgments is recognized, the other parts thereof may be subjected to the general rules under CCP or other laws for REJ purposes.

Further observations can be drawn from Chinese courts’ recognition of foreign divorce judgments. First, for most of the Chinese courts surveyed, they cannot base their decisions on a stable legal foundation. In fact, the 1991 and 2000 divorce judgments recognition regulations have already provided for relatively specific rules for the recognition of foreign divorce judgments in China, but these two regulations cannot be seen appropriately cited in a great number of the cases explored. In many cases, there was no citation of the regulations that would nevertheless be needed. Furthermore, the relationship between the CCP and the two regulations is not well handled by the requested Chinese courts. A great disparity can be seen between the Chinese courts in citing the CCP or the two regulations. It is suggested that as the general rules, the CCP provisions apply only in the instances where the 1991 and 2000 divorce judgments recognition regulations cannot furnish a direct legal basis.

Second, the reasoning of the requested Chinese courts is far from enough or satisfactory. There was hardly any detailed reasoning for the requested Chinese courts to recognize or refuse to recognize foreign divorce judgments. A citation of the relevant law(s) leads directly to a decision. For most rulings, less than 500 Chinese characters are used in the courts’ decisions. As a result, it cannot be known why foreign divorce judgments are in fact recognized. This situation cannot contribute to the unification of the application of the relevant Chinese laws, since how the laws are actually interpreted or applied is not known. Truly, most applications for recognition of foreign divorce judgments were satisfied, but this fact cannot lead to a simple conclusion that such cases were well handled by Chinese courts.

III. RECOGNITION OF FOREIGN INSOLVENCY JUDGMENTS AND OTHERS

Following the last part, this part investigates the recognition of other kinds of foreign NMJs. As Chinese law provides for independent rules for foreign insolvency judgments, this part first considers the recognition of foreign insolvency judgments and it then moves to consider other typical categories of NMJs. Insolvency judgments are a special type of judgments. Despite that there is a general global tendency towards more liberal recognition of foreign judgments, insolvency-related judgments are usually excluded from making use of the existing global or regional REJ mechanism. For example, insolvency-related judgments are not the judgments in the sense of the draft Hague Judgments Convention\(^\text{49}\) or the Brussels I Regulation Recast\(^\text{50}\). For recognition of foreign

\(^{49}\) Art. 2(1), November 2017 Draft Convention on the Recognition and Enforcement of Foreign Judgments.

insolvency-related judgments, Sino-foreign bilateral treaties can play a role as such judgments are usually not excluded from the scope of application thereof, which is also demonstrated in China’s judicial practice. Absent from such bilateral treaties, reference must be made to China’s domestic laws. On one hand, China’s CCP provides a very general legal regime for REJ in China, and foreign insolvency-related judgments should be considered to be within the scope of the CCP. On the other hand, China’s Insolvency Act also sets forth a provision addressing recognition of foreign insolvency-related judgments. UNCITRAL Model Law on Cross-Border Insolvency provides a good platform for the countries to modernize domestic insolvency laws with cross-border elements, but China has not chosen to follow up. This part is set first to explore the legal regime and judicial practice surrounding recognition of foreign insolvency judgments in China, and then to consider the possibility for the recognition of other foreign non-pecuniary judgments.

A. The Insolvency Legal Regime

As a special law, the provisions under the Insolvency Act are assumed to prevail over the CCP provisions. The single relevant article for the recognition purposes in the Insolvency Act is as follows:

Article 5: The Insolvency proceedings initiated pursuant to the present law shall have binding force over the debtor’s assets beyond the territory of the PRC. If a legally effective judgment or ruling rendered by a foreign court in an Insolvency case involves the debtor’s property in the territory of the PRC and an application or request is made to a people’s court for the recognition and enforcement thereof, the people’s court shall conduct an examination in accordance with the international treaties concluded or acceded to by the PRC or according to the principle of reciprocity; and if the people’s court holds that the foreign judgment does not contradict the basic principles of the laws of the PRC, does not impair state sovereignty, security and social and public interests, and does not jeopardize the lawful rights and interests of the creditors that are in the territory of the PRC, the people’s court shall recognize and enforce the foreign judgment.

This unique provision furnishes as an independent legal basis for recognition of foreign insolvency-related judgments in China. Its content closely follows that of the CCP. However, it only touches upon some substantive aspects of recognition of foreign insolvency judgments in China, and as a consequence, the related procedural issues must be dealt with by the general provisions in the CCP and other Chinese laws. In

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51 It is noteworthy that in Sino-Spanish Treaty on Civil and Commercial Judicial Assistance, insolvency-related judgments are excluded from the bilateral arrangement on REJ. See Art. 17(1), Sino-Spanish Treaty on Civil and Commercial Judicial Assistance, 1993.


53 For the translation, see ZHANG, fn. 19 at 327.

54 Id.
comparison with the general REJ requirements prescribed in the CCP — finality, reciprocity and public policy, this law adds a further requirement, namely that recognition does not jeopardize the lawful rights and interests of Chinese creditors. This further requirement is said to protect the creditors domiciled in China, and it is presumed to follow the prevailing international instruments in this respect, such as Article 21(2) of UNCITRAL Model Law on Cross-Border Insolvency and Article 36(1) of EU Insolvency Regulation. However, non-definition or delimitation of “lawful rights and interests” may render the requirement easily abused and above all, the elusive term “lawful rights and interests” is distinct from the expressions “…comply with the distribution and priority rights under national law that creditors would have...” in EU Insolvency Regulation and “…the interests of creditors in this State are adequately protected....” This may place Chinese creditors on a priority place in many aspects. Chinese domiciliaries may also argue for the application of this defense, in a distorted or bad way. Only the practice can tell how this defense comes out. In any case, this defense should not be understood as any reduction of benefits incurred by Chinese creditors due to participation of foreign-initiated insolvency proceedings.

B. The Insolvency Recognition Practice

In China’s judicial practice, there have been applications for the recognition of foreign insolvency-related judgments and recent years see some successful recognition practice. Compared with the vast number of recognition of foreign divorce judgments, Chinese courts have rarely been asked for the recognition of foreign insolvency-related judgments. So this section is set to consider the insolvency recognition practice by referring to several representative cases in the past decades. In the early 2000s, there were two prominent cases where foreign insolvency-related judgments were recognized or enforced by Chinese courts. In the 2000 B&T Ceramic Group S.R.L. Case, the Intermediate People’s Court of Foshan City of Guangdong Province (hereinafter referred to as “Foshan Court”) recognized Italian insolvency-related judgments, which was reported as the first case where foreign insolvency-related judgments were recognized and enforced in China. In its decision to recognize the Italian judgments, the Foshan Court mainly resorted to the Sino-Italian Treaty on Civil Judicial Assistance as the legal basis. For the recognition, the Foshan Court hardly made any arguments explaining its decision as to why the Italian judgments should be recognized, except for some basic assertions that the Italian
judgment was effective, that there existed no refusal grounds as stipulated under the Sino-Italian Bilateral Treaty and that the Italian judgment did not contradict the basic principles of Chinese law, national sovereignty, security or social and public interests. For this case, the existence of the Sino-Italian Bilateral Treaty saves the case from falling into the recognition dilemma due to the reciprocity requirement that has long been seen in China’s REJ practice. For the several defences available under the bilateral treaty, they were easily taken as met. The bilateral treaty does not set forth independent rules or exclude application thereof for insolvency-related judgments. There was no room for application of the 2006 Insolvency Act as the bilateral treaty prevails over the Act. So the special recognition defense of “lawful rights and interests” in jeopardy was not tested in this case.

In the 2005 Antoine MONTIER Case59, the Intermediate People’s Court of Zhongshan City of Guangdong Province (hereinafter referred to as “Zhongshan Court”) recognized a French insolvency judgment. In a way similar to that followed by the Foshan Court in the B&T Ceramic Group S.R.L. Case, the Zhongshan Court made hardly any arguments as to the reason why the French judgment was recognizable and enforceable in China; instead, it simply held that the French insolvency judgment satisfied the requirements set forth by Chinese law on REJ in China, and therefore its effects were recognized, without any explanation on how the satisfaction came about. Surprisingly, there was even no mentioning of the Sino-French Agreement on Civil and Commercial Judicial Assistance,60 which should nevertheless be the legal basis for this case. On the whole, it is indeed recommendable for the Foshan and Zhongshan courts to take the positive step to recognize the foreign insolvency-related judgments; but the lack of fair reasoning is a big problem as the recognition decisions were not fully argued and it is far from clear how the prerequisites under the bilateral treaties or other laws were examined and satisfied.61

Besides the two abovementioned successful recognition cases in the context of Sino-foreign bilateral treaties, there is a very recent typical case where recognition was awarded to foreign insolvency-related judgments without the said treaty assistance. On July 30, 2012, Sascha Rudolf Seehaus, acting as the trustee in a German insolvency proceeding, applied for recognition of a German insolvency judgment delivered by Montabaur Regional Court in 2009 (hereinafter referred to as “Sascha Rudolf Seehaus”). In the judgment, Sascha Rudolf Seehaus was nominated as the trustee of the bankrupt SP Management GmbH, with the insolvency estate ordered to be handed over to him, and the authority to administer the insolvency proceedings was granted to him as trustee. Upon

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60 Sino-French Agreement on Civil and Commercial Judicial Assistance (1987) provides for the legal basis for REJ between China and France. Insolvency judgments are not excluded from the scope of application.
61 See ZHANG, fn. 40 at 161–162.
examining the German judgment, the requested Chinese court — the Wuhan Intermediate People’s Court (hereinafter referred to as “Wuhan Court”) — ruled in a very brief way without much reasoning or arguments that the German judgment did not infringe the basic principles of Chinese law, state sovereignty, security and social and public interests. However, particular attention was paid by the Wuhan Court to the formation of a reciprocal relationship in practice between China and Germany. Considering that the Court of Appeal of Berlin had recognized a Chinese judgment regarding invalidity of an arbitration agreement on May 18, 2006 (namely German Züblin),62 the Wuhan Court held that there was a reciprocal relationship between Germany and China (in terms of REJ), and thus it could recognize the German insolvency judgment on a reciprocal basis as sanctioned by the CCP.63 Consequently, the German judgment was recognized on December 26, 2013.64 Furthermore, the Wuhan Court applied no other defences, with no hint of any bias against the foreign judgment; instead, it noted that the satisfaction of the other recognition requirements in a passing comment. Despite the positive move made by the Wuhan Court, the irregularities may be observed in its application of the relevant Chinese rules on REJ in China. In fact, although China’s Insolvency Act 2006 (Article 5) provides for a direct legal basis for recognition and enforcement of foreign insolvency judgments, this specific legal basis was completely omitted in the case. So in this case the German judgment was only recognized as a very common foreign judgment, showing no difference from other foreign judgments including pecuniary judgments. The special recognition defense of “lawful rights and interests” in jeopardy under the Insolvency Act was not tested in this case either.

However, there are some unsuccessful applications for the recognition of foreign insolvency-related judgments in China. In the Norstar Automobile Industrial Holding Limited case65, the Beijing No. 1 Intermediate People’s Court was asked to recognize a Hong Kong insolvency judgment. Despite some doubts surrounding the recognition of the Hong Kong judgment, the requested court was ready to render a recognition decision on a balance of considerations. Before giving a recognition decision, the requested courts sought the opinion from the Beijing Higher People’s Court over the case.66 The Beijing Higher People’s Court agreed to the standpoint taken by the requested court. However, when Beijing Higher People’s Court requested the SPC’s opinion on the case, the SPC took an opposite path and disallowed the recognition to be given to the Hong Kong

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63 See ZHANG, fn. 12 at 537.
66 *Norstar Automobile Industrial Holding Limited*, Beijing Higher People’s Court, Jing Gao Fa [2011] No. 156.
judgment.67 Sadly, besides affirming that Mainland–Hong Kong REJ Arrangement68 is inapplicable in the present case, the non-recognition decision by the SPC is not accompanied by any persuasive reasoning. This holding appears to strike a sharp contrast with the SPC’s position taken when it was asked for the recognition of Hong Kong divorce judgments in 1991.69

C. Recognition of Other NMJs

After the foregoing investigation into the recognition and enforcement of foreign insolvency and divorce judgments in China, this section is set to explore the possibility of recognition of other non-pecuniary judgments in China. In particular, it is worth considering whether foreign injunctions or specific performance can be recognized or not in China. To illustrate, the possibility for the recognition of such other non-pecuniary judgments will be evaluated from both China’s legal and judicial practice perspectives. Although Chinese legal regime on REJ is not restrictive to recognition or enforcement of such other NMJs, the relevant practice reveals that there are very limited applications submitted and therefore, the following comments mostly focus on what reasonable path should be taken in handling future applications in this field.

Injunctions usually denote courts’ orders commanding or preventing an action.70 In the context of Chinese law, injunctions can also be resorted to by parties as a temporary or permanent remedy. In the context of Chinese law, temporary injunctions can be applied in the form of “preservation orders” (baoquan).71 As a form of permanent remedy, injunctions can also be utilized although Chinese law does not refer to the term injunctions.72 Around the globe, there emerges a trend of recognizing and enforcing foreign injunctions. For example, as the US Restatement (Second) of Conflict of Laws mandates, injunctions may be enforced in other states,73 and in Canadian practice, such

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67 The SPC’s Reply to a Request for Opinion on the Application by Norstar Automobile Industrial Holding Limited for Recognition of Hong Kong Special Administrative Region Court Orders, [2011] Min Si Ta Zi No. 19.
68 Arrangement of the Supreme People’s Court between the Mainland and the Hong Kong Special Administrative Region on Reciprocal Recognition and Enforcement of the Decisions of Civil and Commercial Cases under Consensual Jurisdiction, Fa Shi [2008] No. 9.
69 See, e.g. fn. 31.
71 See Art. 100, CCP. The discussion of injunctions as a temporary remedy will be discussed later.
72 See Art. 179, General Provisions of the Civil Law of the People’s Republic of China. According to General Provisions of the Civil Law of the People’s Republic of China, cessation of infringement and continued performance are among the most important reliefs that can be resorted to by parties. These reliefs carry the same or at least very similar reliefs as injunctions usually do in other jurisdictions.
73 S. 102 Enforcement of Judgment Ordering or Enjoining Act provides for that “A valid judgment that orders the doing of an act other than the payment of money, or that enjoins the doing of an act, may be enforced, or be the subject of remedies, in other states.”
NMJs can be well recognized and enforced.  

For permanent injunctions, there appears to be no special barriers for the recognition or enforcement thereof. As the CCP goes, foreign judgments may only be refused the recognition on the basis of non-finality, lack of reciprocity and public policy. Permanent injunctions may well satisfy these recognition requirements. Therefore, if the foreign injunctions meet the REJ requirements set forth in CCP, there should be no reason for denying the recognition thereof. Following this vein of logic, the recognition of permanent injunctions is placed on the same footing as common monetary judgments. Thanks to China’s non-differentiation between monetary and non-monetary judgments for REJ purposes, there is no practice that Chinese courts have refused recognition of foreign judgments due to the injunction nature. The only problem may arise in the enforcement stage. If relevant enforcement measures cannot be provided by Chinese law, it will be difficult for the recognized foreign injunctions to be enforced and the effects thereof cannot be realized in the end.

For temporary injunctions, it will be very difficult to meet the finality requirement under CCP. Unless there are any special treaty arrangements as regards interim remedies, there would be little hope for Chinese courts to recognize such foreign interim remedies including temporary injunctions. However, in the scenario, it would be advisable for parties to directly apply for preservation orders [Chinese version of interim remedies] and it is relatively easy to get preservation orders in Chinese practice if a guarantee is sufficiently provided. In fact, Chinese law sets forth very low threshold for interim remedies. So the headache due to non-recognition of foreign temporary injunctions is alleviated by a relative easy access to interim remedy in China’s judicial practice.

For other foreign NMJs, such as specific performance, they will not encounter special barriers; just as for foreign permanent injunctions, there are no particular rules to block the recognition thereof. The past Chinese practice also shows that there are no special difficulties for the recognition of such judgments. For example, in the case LIU Li v. TAO Li & TONG Wu, the Wuhan Intermediate People’s Court recognized a Californian judgment, which contains non-monetary rulings. To be specific, the judgment debtor was ordered to transfer the shares he held. The Wuhan Intermediate People’s Court recognized the Californian judgment in its entirety, including the ruling of shares transfer. This practice is actually consistent with the various reliefs that are available under the Chinese civil law, e.g. cessation of infringement, removal of obstacles, elimination of danger, restitution of property, restoration to the original condition, repair, reworking, or replacement, continued performance, compensation for loss liquidated damages,

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74 See, e.g. fn. 7.


elimination of adverse effects and rehabilitation of reputation, apology and so on.\textsuperscript{77} The existence of such a wide range of civil reliefs makes foreign NMJs easily recognized, and enforced thereafter. If there are no corresponding or similar reliefs under Chinese law, there would be some difficulties for foreign NMJs to be circulated in China.

\textbf{D. Summary}

In conclusion, Chinese law only provides for very scant rules for special treatment of non-pecuniary judgments. As an exception, the foreign insolvency-related judgments can nevertheless refer to the one specific rule for recognition, Article 5 of the Insolvency Act. There are seemingly no substantial differences between this special law and CCP in relation to recognition except for a single point, namely the defense of Chinese creditors’ lawful rights and interests in jeopardy. The Insolvency Act gives no clarification of its very general rules on recognition. In practice, the Chinese courts have recognized several foreign insolvency-related judgments. A relatively easy recognition is seen of such judgments if there is any treaty assistance. If there is no such treaty assistance, reference must be made to Chinese domestic laws, including Insolvency Act, CCP and other rules. The Sascha Rudolf Seehaus case shows that foreign insolvency-related judgments can be recognized. Despite the specific recognition rules in the Insolvency Act and the general recognition rules in the CCP, the Chinese courts still dwell on reciprocity in recognizing foreign insolvency-related judgments. Just as the Sascha Rudolf Seehaus case shows, the satisfaction of China’s long-standing reciprocity requirement due to a prior German recognition of a Chinese judgment invalidating an arbitration agreement led to a smooth recognition of the German judgment. Seen from this perspective, Chinese courts tend to treat the foreign insolvency-related judgments in the same way as other foreign judgments, including the foreign pecuniary judgments. On one hand, this practice is not recommendable in the sense that foreign insolvency-related judgments are usually treated differently from other foreign judgments, especially the monetary judgments. On the other hand, it cannot be said that the Chinese courts follow Chinese law. For example, in the Sascha Rudolf Seehaus case, it is inappropriate to ignore the specific rules in the Insolvency Act for recognition of the German insolvency judgment.

For the other foreign non-pecuniary judgments, the above consideration concludes that there are no special rules or barriers for the recognition thereof. That is to say, these categories of foreign judgments can be recognized in accordance with the general recognition rules set forth in CCP. The Chinese judicial practice also demonstrates no special troubles. As a result, the satisfaction of the recognition requirements under the CCP can presumably lead to the recognition of such foreign judgments. Then it matters how the general REJ requirements under the CCP are met. In this respect, much consideration has been given. It is suggested that special attention must be paid to the

\textsuperscript{77} Art. 179, General Provisions of the Civil Law of the People’s Republic of China.
reciprocity requirement and the due service defense, as is seen in common foreign judgments recognition and enforcement practice. And in the context of a follow-suit recognition model developed practice, it is strongly advocated that foreign courts must have confidence towards the Chinese adjudication and take the initiative to recognize the Chinese judgments, following which the Chinese courts are very likely to reciprocate and accordingly recognize foreign judgments that equally include the non-pecuniary judgments. For the recognition and enforcement of the insolvency judgments and the other categories of judgments from Macau and Taiwan, the aforementioned 2005 Mainland–Macau REJ Arrangement and 2015 SPC REJ Provisions on Taiwan Judgments apply in the same way as they apply in the field of recognition and enforcement of divorce judgments. For Mainland–Hong Kong, no special REJ rules exists for the insolvency judgments and the other categories of judgments; moreover, the Mainland–Hong Kong REJ Arrangement seemingly has no role to play as this Arrangement is limited to apply for recognition and enforcement of the monetary judgments. As the Norstar Automobile Industrial Holding Limited cases shows that the SPC does not intend to expand this Arrangement to insolvency judgments, and following this vein, it is very likely that there will be no room for the Arrangement to apply in other instances. Thus, China’s general REJ rules may apply by analogy in relation to the recognition and enforcement of other categories of Hong Kong non-monetary judgments except for divorce judgments.

IV. OBSTACLES AND THE RESPONSES

A. The Hurdles v. Increasing Demands

The foregoing exploration reveals the status quo of recognition of foreign non-pecuniary judgments in the current Chinese legal and judicial context. Nowadays, it appears that the Chinese courts tend to recognize those non-pecuniary judgments in the same way as the pecuniary judgments are usually recognized which forms a picture that is different from the world mainstream practice. No special barriers are witnessed in China for the recognition of the non-pecuniary judgments although there is a clear differentiation between recognition of the pecuniary and non-pecuniary judgments in other jurisdictions or globally and non-pecuniary judgments are usually biased. China’s lack of a truly independent legal regime for non-pecuniary judgments contributes to this scenario, which is indeed admirable since there is a growing demand for recognition of foreign non-pecuniary judgments.

But it must be pointed out that it is still advisable for China to design a separate lenient legal regime for recognition of those foreign non-pecuniary judgments, rather than

78 See Part II. A. The Legal Regime.
79 Art. 1, Mainland–Hong Kong REJ Arrangement.
80 See Part III. B. The Insolvency Recognition Practice.
just sticking to the same set of REJ rules for all foreign judgments in China. At present, the hurdles for recognition of foreign non-pecuniary judgments are therefore the same as those encountered by recognition of foreign monetary judgments. It has been shown that the reciprocity requirement and the due service requirement are the biggest hurdles for REJ in China,\(^{81}\) which equally applies to recognition of foreign monetary and NMJs.

**B. China’s Future Rules or Global Participation?**

It is meaningful to inquire into how future Chinese rules will be on recognition of foreign non-pecuniary judgments. In the near future, it appears to be very unlikely that China’s CCP will be overhauled for differentiating between recognition of foreign monetary and NMJs, especially in view of the fact that the CCP has remained stagnant regarding REJ in China ever since its promulgation in 1991. As it is shown recently, China’s SPC has been very active in promoting REJ in China. It is making endeavors to pass detailed rules on REJ in China. Pursuant to SPC’s draft REJ Rules, recognition may be awarded to foreign judgments as a general principle, except for some special judgments concerning foreign intellectual property, divorce and insolvency.\(^{82}\) But there were different opinions in the course of drafting the SPC’s draft REJ Rules. Some hold that there should be no differentiation between recognition of foreign monetary and NMJs, while some submit that recognition should be reserved only to foreign monetary judgments and it is not ripe for considering recognition of foreign NMJs. The current version of the draft regulation follows a middle course, namely by introducing a general REJ regime for all foreign judgments, excluding limited categories of judgments — foreign intellectual property, divorce and insolvency judgments. It is unclear which course will be taken in the final regulation. In any case, it would be pertinent for China to have in mind the global forefront development in the field of recognition of NMJs, especially that seen in Canada in the case of *Pro Swing Inc. v. Elta Golf Inc.*\(^{83}\)

> Modern-day commercial transactions require prompt reactions and effective remedies. The advent of the Internet has heightened the need for appropriate tools. On the one hand, frontiers remain relevant to national identity and jurisdiction, but on the other hand, the globalization of commerce and mobility of both people and assets make them less so. The law and the justice system are servants of society, not the reverse. The Court has been asked to change the common law. The case for adapting the common law rule that prevents the enforcement of foreign non-money judgments is compelling. But such changes must be made cautiously. Although I recognize the need for a new rule, it is my view that this case is not the right one for implementing it.

\(^{81}\) See, e.g. ZHANG, fn. 40.

\(^{82}\) Art. 1, Regulation of the SPC on Several Issues Relating to REJ (Draft, 6th version), Jun. 2017. It is learnt that the Draft Regulation is still under review and there appears no definite timetable for the SPC to pass it.

Pro Swing Inc. v. Elta Golf Inc. also brings relevant factors in determining whether a foreign equitable order should be enforced. And in the following United States v. Yemec, the Ontario Court of Appeal elected to enforce the equitable relief portion of an Illinois order, by considering a number of relevant factors, all of which the Court found supported the enforcement of the order. In particular, the Court cited Pro Swing Inc. v. Elta Golf Inc. in favor of enforcing the injunction, and it held that the terms of the injunction were simple, clear and specific; there were no unforeseen obligations to which the defendants would be exposed; third parties were not affected; and the injunction was consistent with the types of orders that would be allowed for domestic litigants. Therefore, the injunctive relief component of the US court order should be fully recognized and enforced.

For China, it has shown great enthusiasm for the global judgments project under the auspices of the HCCH. Recently, China signed the 2005 Convention on Choice of Court Agreement, which opens a new chapter for REJ in China. As the Convention does not cover most foreign NMJs, therefore it will not bring a direct or substantial impact for recognition of such judgments in China. It is nevertheless expected that the environment for recognition for recognition judgments as a whole will be generally improved once the Convention is applicable in China. For future global judgments cooperation, it is submitted that China will be mobilized and it will play an active and positive role. This predicts a bright future at the global level for recognition of foreign NMJs in China.

C. Parties’ Possible Choices

For parties, NMJs are of increasing significance, and the recognition and enforcement thereof becomes more and more important to the parties involved. Although globally there is a general distinction made between monetary and NMJs for recognition purposes, China does not adopt such a bipartite approach. Fairly speaking, this approach is good for parties to seek the recognition of such judgments in China. Chinese law and practice in this regard shows no discrimination against foreign NMJs. Despite that there are some specific rules regarding recognition of foreign divorce and insolvency judgments in China, such rules, especially those for recognition of foreign insolvency judgments, are substantially similar to those adopted for foreign monetary judgments, which also explains why some Chinese courts wrongly refer to the CCP for recognition of some insolvency judgments. This scenario has several implications for the parties to seek the recognition of foreign NMJs in China.

First, China generally treats foreign NMJs in the same way as the foreign monetary judgments. Both Chinese law and practice demonstrate no special barriers for the

84 2010 ONCA 414.
86 Art. 2, 2005 Convention on Choice of Court Agreement.
recognition of foreign NMJs as compared with foreign monetary judgments. For the parties, to satisfy the requirements set forth in China’s CCP can pave the way for the recognition of foreign NMJs.

Second, if there are special rules for recognition of some categories of foreign NMJs, it is advisable to follow such rules. For recognition of foreign divorce judgments, the special rules are detailed but not harsh in nature. The only issue appears to be that these special rules are only aimed at covering the foreign divorce judgments regarding resolution of matrimonial relationship and there must be at least one Chinese party involved. As regards foreign insolvency judgments, the rules are almost the same as those seen in the CCP except for one defense, which nevertheless has no significant bearing in practice.

Third, like the applications submitted for recognition and enforcement of foreign monetary judgments, parties must prove the satisfaction of the general REJ requirements under the CCP. The long-standing REJ stalemate is largely due to two requirements: reciprocity and due service. Satisfaction of these two requirements will usually lead to a smooth recognition of foreign judgments, including NMJs. If there are Sino-foreign bilateral treaties that can be available for REJ purposes, recognition of foreign NMJs can be based on a solid ground, especially considering that the reciprocal relationship is guaranteed. If there are specific rules or arrangements for recognition and enforcement of foreign NMJs, reference thereto is necessary and in some instances, there will be better chance for recognition.