ARTICLE

COORDINATION OF LEGAL SYSTEMS BY THE RECOGNITION OF FOREIGN JUDGMENTS — RETHINKING RECIPROCITY IN SINO–JAPANESE RELATIONSHIPS

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Abstract In the era of globalization, commercial transactions readily gain international dimensions and are increasingly delocalized. With a view to establishing effective dispute resolution mechanisms, it is desirable that judgments rendered in one state be recognized and enforced in other states. This is especially important in East Asia, as cross-border business activities are rapidly expanding along with its economic growth. This paper aims to examine the recognition and enforcement of judgments in civil and commercial matters in East Asia with a focus on Sino–Japanese relationships, where the establishment of a reciprocal relationship has posed a considerable challenge. It is worth considering how we can gradually pave the way towards the mutual recognition and enforcement of judgments to achieve coordination among legal systems.

Keywords recognition and enforcement of foreign judgments, reciprocity, East Asia, China, Korea, Japan

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INTRODUCTION

In the era of globalization, the cross-border movement of persons, goods, services, capital and information is intensifying. Commercial transactions readily gain international dimensions and are increasingly delocalized. This necessitates harmonizing substantive and conflicts rules to regulate transactions and establishing effective dispute resolution mechanisms. With a view to guaranteeing legal certainty, efficiency and access to justice, it is desirable that judgments rendered in one state be recognized and enforced in other states. Otherwise, parties incur costs of relitigation which may lead to contradictory decisions, or they may be barred from filing another suit due to a statute of limitations. The guarantee of the circulation of judgments is particularly important in Asia, where cross-border business activities are rapidly expanding along with its economic growth.

In East Asia between China, South Korea (“Korea”) and Japan, there have not been any bilateral or multilateral treaties dealing with the recognition and enforcement of
judgments in civil and commercial matters to date,\(^1\) except for the 1969 International Convention on Civil Liability for Oil Pollution Damage.\(^2\) Thus, the recognition and enforcement of foreign judgments is governed by domestic law that includes the requirement of “reciprocity” in principle (Articles 281 and 282 of the Chinese Code of Civil Procedure (CCCP); Article 217 No. 4 of the Korean Code of Civil Procedure (KCCP); Article 118 No. 4 of the Japanese Code of Civil Procedure (JCCP)). Reciprocity means that the receiving state recognizes and enforces foreign judgments, only to the extent that the state of origin reciprocates with the recognition and enforcement of judgments of the receiving state. While a reciprocal relationship has been established between Korea and Japan,\(^3\) it has so far not been the case between China’s mainland and Japan, except with respect to divorce cases, while a remarkable progress can be observed as to judgments recognition between China’s mainland and Korea.\(^4\) It is unfortunate that judgments do not freely circulate in East Asia. In light of the recent developments in Chinese case law, as will be discussed below (infra III-B-2),

\(^1\) China has thus far signed 36 bilateral treaties on judicial assistance, 33 of which include provisions on the mutual recognition and enforcement of judgments in civil and commercial matters. Notably, 22 out of the 33 countries belong to the One Belt and One Road partners. However, they do not include China’s major trading partners, i.e. Korea, Japan, Australia, the United States, the United Kingdom or Germany. For a thorough analysis, see King Fung Tsang, *Chinese Bilateral Judgment Enforcement Treaties*, 40 Loyola of Los Angeles International and Comparative Law Review, 1, 6 ff. (2017); also Zheng Sophia TANG, XIAO Yongping & HUO Zhengxin, *Conflict of Laws in the People’s Republic of China*, Edward Elgar (Cheltenham/UK), at 148 ff. (2016); GUO Yujun, *The Republic of China*, in Adeline Chong ed. *Recognition and Enforcement of Foreign Judgments in Asia*, Asian Business Law Institute (Singapore), at 50 ff. (2017).


\(^3\) For Japanese judgments recognizing Korean judgments, see Yokohama District Court, Mar. 30, 1999, 1696 Hanrei Jihô 120; Tokyo District Court, Feb. 12, 2009, 2068 Hanrei Jihô 95; Tokyo District Court, Dec. 13, 2013, LEX/DB25516699 (Westlaw 2013WLJPCA12138015).

it is worth considering how we can gradually pave the way towards the mutual recognition and enforcement of judgments to achieve coordination among East Asian legal systems.

Against this background, the paper first examines the domestic rules on the recognition and enforcement of foreign judgments in Japan. Second, after the origin and fundamental ideas of reciprocity are explored, this study investigates the notion of reciprocity in Japanese legislation and case law. Third, this paper examines the dilemma of reciprocity in Sino–Japanese relationships from a Japanese perspective. By thoroughly analyzing the scope and methods of ascertaining reciprocity in Japan, this paper seeks to find a solution to the current stalemate. Some final remarks conclude this paper. Notably, China’s mainland, Hong Kong, Macao and Taiwan constitute independent jurisdictions and ought to be treated separately when examining the existence of reciprocity with Japan.5

I. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN JAPAN

A. Foundations

1. General Principles. — Concerning the recognition of foreign judgments, Korea and Japan have adopted the so-called “automatic” recognition system (Article 217 of the

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5 For interregional judgments recognition, China’s mainland has signed arrangements with Hong Kong and Macao respectively. See 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, signed on Jul. 14, 2006 (entering into force on Aug. 1, 2008), revised by 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, signed on Jan. 18, 2019 (not yet entered into force); Arrangement 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, signed on Jun. 20, 2017 (not yet entered into force); Arrangement between the Mainland and the Macao Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments, signed on Feb. 28, 2006 (entering into force on Apr. 1, 2006); HUANG Jie, Interregional Recognition and Enforcement of Civil and Commercial Judgments: Lessons for China from US and EU Law, Hart Publishing (Oxford and Portland, Oregon) at 20 ff. (2014); TANG, XIAO & HUO, fn. 1 at 382 ff.; ZHANG Wenliang, Recognition of Foreign Judgments in China: The Essentials and Strategies (China-1), 15 Yearbook of Private International Law, 330 ff. (2013/2014); ZHANG Xianchu & 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 Law Journal, 553 (2006). In relation to Chinese Taiwan, there are Provisions of the Supreme People’s Court on Recognition and Enforcement of the Civil Judgments of Courts of the Taiwan Region adopted in 2015, which are applicable to judgments in civil and commercial matters, as well as family and status matters (cited from ZHANG Wenliang, Recognition and Enforcement of Foreign Non-Monetary Judgments in China (China-5), 13(2) Frontiers of Law in China, 225 (2018).
KCCP; Article 118 of the JCCP), following the German model (Section 328 of the German Civil Procedure Code or ZPO, Section 108 of the German Law on Procedure in Family and Non-Contentious Matters or FamFG). It is in clear contrast to Chinese law. The Chinese judgments recognition system presupposes a prior application to or an ex officio examination by the intermediate people’s courts as the sole instance, which ought to ascertain in a so-called “delibazione” (or “exequatur”) procedure that a foreign judgment can be recognized and enforced in China (Article 281 of the CCCP).

In Korea and Japan, pursuant to the automatic recognition system, a foreign judgment that satisfies the criteria for recognition unfolds its res judicata effects automatically (Article 217 of the KCCP; Article 118 of the JCCP). The party wishing to use a foreign judgment need not apply in advance for a specific “delibazione” procedure to have it recognized. Rather, the party can directly invoke the foreign judgment as res judicata before any judicial or administrative authority by definition, which will then examine, as an incidental question, whether the requirements of recognition are fulfilled. The automatic recognition system has the advantage of legal certainty and stability, allowing

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the party to refer to the foreign judgment anytime and anywhere without being subject to a specific procedure or statute of limitations.

On the other hand, for the enforcement of foreign judgments, Korea and Japan require an exequatur judgment rendered by the district court (Articles 26 and 27 of the Korean Civil Execution Act or KCEA; Article 24 and Article 22 No. 6 of the Japanese Civil Execution Act or JCEA). The reason is that the execution of a foreign judgment involves, unlike its recognition, a direct exercise of the sovereign power in the receiving state. In order to guarantee that coercive measures of execution be expedient and justified, a prior judicial authorization is required before providing an enforcement title. In the exequatur proceedings, the judge solely ascertains ex officio that the foreign judgment fulfils the requirements of recognition pursuant to Article 118 of the JCCP. As a corollary of the automatic recognition system, a review of the merits (révision au fond) is prohibited.

2. Recognition Theories. — In Japan, automatic recognition has traditionally been understood as accepting the foreign judgment with the effects provided by the law of the rendering state. The original effects inherent in the foreign judgment are generally considered to be extended to the recognizing state (extension of effects). Following this principle, the personal and objective scope of res judicata effects as well as the constituting effects of the foreign judgment are determined by foreign law. Yet, there

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9 For family matters in Japan, the subject-matter jurisdiction for an exequatur procedure will be transferred to the Family Courts in the new Art. 24(1) of the JCEA (Minji Shikkō-hō, Law No. 4 of Mar. 30, 1979), which has been inserted by the Law No. 20 of Apr. 25, 2018 (infra note 74).

10 See Nishitani, fn. 6 Para. 191 f.

11 Constituting effects are granted to, for example, the dissolution of marriage in a divorce judgment or the revocation of a resolution at the shareholders’ meeting.

is also a minor view, according to which the extent of *res judicata* effects of a foreign judgment ought to be the same as an equivalent Japanese judgment (*equalization of effects*), as otherwise the coherence of the Japanese legal system and the party’s right to be heard would be jeopardized.\(^{13}\) Another minor doctrine puts forth determining the effects of the foreign judgment primarily by the law of the state of origin, but restricting them to the extent provided by Japanese law (*cumulation of effects*).\(^{14}\) Notably, however, the determination of the effects of the foreign judgment often yields the same result as the above-mentioned doctrine of the extension of effects, because excessively far-reaching *res judicata* effects, in the eyes of the Japanese civil procedural law (especially a collateral estoppel under US law), may be restricted on grounds of procedural public policy\(^{15}\) or by a partial recognition of the foreign judgment.\(^{16}\)

On the other hand, if it comes to the effects of enforceability, authors generally contend that the effects of enforceability are constituively attributed by an *exequatur* in Japan,\(^{17}\) instead of solely confirming the enforceability attributed by the law of the rendering state.\(^{18}\) Following the majority view, the title of enforcement is constituted *de novo* in Japan pursuant to both the foreign judgment and the *exequatur* certifying its enforceability.\(^{19}\)

Some authors in Japan used to deny the possibility of the successful party in the foreign *in personam* judgment bringing the original claim afresh to the Japanese courts, instead of petitioning for an *exequatur*, for lack of legal basis and procedural interests.\(^{20}\) However, recent authors generally support such relitigation of the same cause of action, lest the recognition of the foreign judgment be subsequently denied or *exequatur* proceedings be delayed.\(^{21}\) Since the defendant can always plead as a defense that the

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\(^{15}\) See Kobayashi & Murakami, fn. 12 at 157; Takada, fn. 13 at 362 f.


\(^{18}\) This view presupposes that the effects of enforceability are determined by the foreign judgment, which Japanese courts solely need to confirm. Hajime Kaneko, *Kyôsei Shikkô-hô/Hasan-hô (Law of Civil Execution and Insolvency)*, Kobundô (Tokyo), at 35 (1964); Takeshita, fn. 12 at 622; Uemura, fn. 12.

\(^{19}\) See Kato, fn. 17 at 51; also Matsuoka, fn. 17 at 470 ff.


\(^{21}\) See Aoyama, fn. 12 at 389; Nakano, fn. 12; Takada, fn. 13 at 365 f.
foreign judgment is eligible to be recognized, it arguably entails legitimate procedural interests and does not run counter to the prohibition of double jeopardy (ne bis in idem). On the other hand, it is established case law in Japan that a petition can be made for a declaratory judgment to confirm or deny the recognition of a foreign judgment, insofar as there are legitimate interests for the positive or negative ascertainment of the judgment recognition. Negative declaratory judgments are often sought for the confirmation of the nullity of a foreign divorce judgment fraudulently obtained by a spouse abroad.22

3. Comparative Overview. — Comparatively speaking, the majority of states in the world, including both common law and civil law jurisdictions, have adopted the automatic recognition system in their domestic law to facilitate the circulation of judgments. It is in line with a number of international or regional instruments.23

As an exception, China, similar to Brazil and previously Italy, follows the “delibazione” system and provides for a specific procedure, in which a judge ascertains the eligibility of foreign judgments to be recognized, without reopening the case on the merits.24 Certain legal systems that are based on automatic recognition also provide for a particular “delibazione” procedure in some limited matters, such as divorce in Germany,25 and insolvency in Korea, Japan, and Switzerland.26 Other countries, particularly France

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24 See supra I-A-1. Brazil still follows the “delibazione” system by the Superior Tribunal de Justiça (Supreme Court of Justice), while Italy abolished it by the 1995 PIL Act.

25 An administrative procedure is conducted at the Landesjustizverwaltung (Judicial Administration of Land) or by the president of the Oberlandesgericht (Higher Regional Court) for the recognition of divorce judgments rendered in a third state (S. 107(1) of the FamFG), in order to conduct a proper examination before providing erga omnes effects. Among the EU Member States, the automatic recognition applies pursuant to the Council Regulation (EC) No. 2201/2003 of Nov. 27, 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, O.J. 23.12.2003, L 338/1 (“Brussels Ibis”).

and Belgium, used to re-examine in substance whether the foreign judgment accorded with the principles of justice and could be recognized. France and Belgium, however, abolished this principle of review of the merits and moved to the automatic recognition system in their domestic law. Finally, countries like Austria, Denmark, the Netherlands, Norway, Sweden and Finland do not formally recognize foreign judgments that are not covered by international treaties or declarations. As a matter of black-letter rules, these countries request that reciprocity be guaranteed on the grounds of international agreements with the state of origin, although some of them seem to take a rather generous approach in practice towards giving de facto effect to foreign judgments.

While countries have generally alleviated the requirements of recognition to favor the circulation of judgments, there still remain certain limitations. The differences among various recognition systems play an important role in determining whether reciprocity is warranted with the state of origin concerned, as will be discussed below (infra II-B).

B. Requirements of Judgments Recognition

1. General Remarks. — As will further be expounded below, Article 118 of the JCCP sets forth the following conditions for recognizing foreign judgments: (i) res judicata effects of the foreign judgment (Article 118, 1st sentence of the JCCP), (ii) indirect jurisdiction of the state of origin (No. 1), (iii) proper service to or voluntary appearance of the aggrieved defendant (No. 2), (iv) conformity with the substantive and procedural public policy (No. 3), and (v) the guarantee of reciprocity (No. 4). These requirements of judgments recognition largely correspond to the criteria established by Article 217 of the KCCP in Korea. Arguably, Chinese domestic law de lege lata also provides for

27 For France and Belgium, see Harold Cooke Guttridge, Reciprocity in Regard to Foreign Judgments, 13 British Yearbook of International Law, 54 ff. (1932).
28 For France, Cour de cassation, Jan. 7, 1964 (Munzel); for Belgium, 2004 PIL Act (see infra note 192).
31 For further detail, see Suk, fn. 4 (Korea-1) at 422 ff.; Id., fn. 4 (Korea-2) at 180 ff.; Id., fn. 4 (Korea-3) at 173 ff.
comparable requirements of recognition, which consist of: (i) the legal effects of the foreign judgment, (ii) reciprocity, and (iii) conformity with public policy, i.e. the basic principles of laws of China, as well as the national sovereignty, security, and social and public interests of China. In addition, indirect jurisdiction, proper service of documents and a fair trial, and the non-existence of conflicting judgments in China are generally required (infra III-A-1). The requirement of reciprocity is strictly interpreted and applied in China, which yields difficult questions of how to establish a mutual relationship of judgments recognition (infra III-A and B).

2. Requirements of Judgments Recognition in Japan. — Pursuant to Article 118 of the JCCP, first, the foreign judgment on the merits needs to be final, conclusive and binding, without being subject to ordinary review in the rendering state. The notion of “judgment” is understood in a broad sense. It includes any final decision on a private law relationship rendered by the court or judicial authority of a foreign state, as a result of proceedings that guarantee the participation and hearings of both parties, regardless of the name of the court, type of procedure and form of decision.\footnote{Supreme Court, Apr. 28, 1998, 52(3) Minshû 853.} For the sake of legal certainty, it is required that the foreign judgment has become res judicata and can no longer be altered by ordinary appeals. Consequently, foreign interlocutory judgments, provisional measures or judicial settlements do not qualify to be recognized or enforced in Japan.\footnote{Supreme Court, Feb. 26, 1985, 37(6) Katei Saiban Geppô 25; Supreme Court, Apr. 28, 1998 (Id.); Aoyama, fn. 12 at 388; Akira Takakuwa, Gaikoku hanketsu no shônin oyobi shikkô (The Recognition and Enforcement of Foreign Judgments), in Chûichi Suzuki & Akira Mikazuki eds. Shin Jitsumu Minji Soshô-hô Kôza (New Series on Civil Procedure Law in Practice), Nihon Hyôron Sha (Tokyo), at 136 f. (1982); for the recognition of foreign provisional measures, Shun-i chiro Nakano, Kakutei hanketsu (Final and Conclusive Judgment), in Akira Takakuwa & Masato Dogauchi eds. Kokusai Minji Soshô-hô: Zaisan-hô kankei (International Civil Procedure Law: Financial Disputes), Seirin Shoin (Tokyo), at 315 ff. (2002); Id., Gaikoku hozen meirei no kôryoku (Effects of Foreign Provisional Measures), Id. at 414 ff.} Second, the state of origin must have had international adjudicatory jurisdiction pursuant to the Japanese standards (Article 118 No. 1 of the JCCP). The majority of Japanese academics assert determining the indirect jurisdiction of the foreign court by the same criteria as the direct jurisdiction rules that are applicable when a case is brought to the Japanese courts (Article 3-2 ff. of the JCCP).\footnote{Masato Dogauchi, 1479 Jurist, 301 (2015); Shun-ichiro Nakano, 672 Hanrei Hyôron, 184 (2015); also Aoyama, fn. 12 at 397; Kikui & Muramatsu, fn. 12 at 514; Akira Takakuwa, Wagakuni ni okeru gaikoku hanketsu no shônin ni tsuite no sairon (Revisiting the Recognition of Foreign Judgments in Japan), 72 Seikei Hôgaku (The Journal of Law, Political Science and Humanities of Seikei University), 85 (2010).} This “mirror image” principle serves to maintain consistency with domestic cases and enhances clarity and foreseeability.\footnote{See Aoyama, fn. 12 at 397 ff.; Takada, fn. 13 at 370; Yokoyama, fn. 6 Para. 431.} According to case law, however, indirect jurisdiction ought to be determined by ratione materiae (jôri) pursuant to the general principles of fairness between the parties and
appropriate and expeditious proceedings, while taking the direct jurisdiction rules of Japanese courts as the starting point. This approach is criticized by leading authors as it entails risk of causing uncertainty, even though it enables a flexible determination of indirect jurisdiction tailored to the case at hand, possibly extending the jurisdiction grounds. Either approach generally allows a wide range of foreign judgments to be recognized in Japan, given that Article 3-2 ff. of the JCCP sets forth broad grounds of direct jurisdiction. They include, *inter alia*, the defendant’s domicile (Article 3-2 (1)(3)), place of performance of the contractual obligation (Article 3-3 No. 1), situs of assets for monetary claims (No. 3), branch office transactions or undertaking of business in Japan (No. 4 and 5), place of tort (No. 8), joinder of claims or parties (Article 3-6), as well as choice of court agreements (Article 3-7) and general appearance (Article 3-8), in addition to limited grounds of exclusive jurisdiction (Article 3-5).

Third, the defeated defendant needs to have regularly been served with documents to institute proceedings before the foreign court (Article 118 No. 2, first alternative of the JCCP). When there is an international treaty or agreement for judicial assistance between the foreign state of origin and Japan, the service needs to comply with them. Since this requirement aims to guarantee the defendant’s right to be heard, the lack of proper and timely service is remedied once the defendant enters a general or limited appearance before the foreign court (Article 118 No. 2, second alternative of the JCCP).

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37 For criticism, see Dogauchi, fn. 34; Nakano, fn. 34.

38 The direct jurisdiction rules in Art. 3-2 ff. of the JCCP were enacted in 2011. See Masato Dogauchi, *New Japanese Rules on International Jurisdiction: General Observation*, 54 Japanese Yearbook of International Law, 260 ff. (2011) (with other contributions in 54 JYIL (2011) and 55 JYIL (2012)); Yuko Nishitani, *Die internationale Zuständigkeit Japans in Zivil- und Handelssachen* (*The International Jurisdiction of Japan in Civil and Commercial Matters*), 2013 IPRax, 289 ff.; Id., *International Jurisdiction of Japanese Courts in Comparative Perspective*, 60 Netherlands International Law Review, 251 ff. (2013) (with further references); Yokoyama, fn. 6 Para. 371 ff. Comparatively speaking, the exclusive grounds of jurisdiction are limited in Japan, given that rights *in rem* disputes over an immovable property are not subject to the exclusive jurisdiction of the *situs*. One caveat however, is that Art. 3–9 of the JCCP, which entitles the judge to dismiss the case under “special circumstances” in light of the general principles of fairness between parties and appropriate and expeditious proceedings, also applies to restrict the indirect jurisdiction of foreign courts.

39 Supreme Court, Apr. 28, 1998 (fn. 32). Notably, after ratifying the 1965 Hague Service Convention on Jul. 27, 1970 and causing problems of interpretation, Japan declared its opposition to Art. 10(a) on service by postal channels, as well as Art. 8 on consular service on Dec. 21, 2018.

40 With a view to fulfilling the requirement under Art. 118 No. 2 of the JCCP, it is sufficient that the defendant entered a limited appearance before the foreign court to contest the jurisdiction of the rendering state in question. See Sawaki & Dogauchi, fn. 16 at 346 ff.; Takada, fn. 13 at 381.
Fourth, the foreign judgment must not run counter to substantive or procedural public policy (Article 118 No. 3 of the JCCP). Substantive public policy intervenes when the recognition of a foreign judgment would violate good morals or fundamental principles of the Japanese legal system, as in the case of US punitive damages judgments. It therefore presupposes that the case has a sufficiently close connection with Japan, as under Article 42 of the Japanese Act on General Rules on Application of Laws (AGRAL). Procedural public policy aims to safeguard fair trials and the right of the party to be heard in the foreign court. Since public policy control is not geared toward reopening cases but solely ensuring the integrity of the legal system and achieving justice, the Japanese judge may carry out a thorough examination including new evidence, without engaging in the prohibited review of the merits.

Last but not least, the most controversial requirement is reciprocity (Article 118 No. 4 of the JCCP). Reciprocity means that Japan recognizes and enforces a foreign judgment, insofar as the state of origin reciprocates with the recognition and enforcement of Japanese judgments. While all the foregoing requirements are geared toward private law relationships and substantive justice, reciprocity primarily concerns public law relationships and the method of regulation between sovereign states. How then should reciprocity be characterized as a requirement of recognition and to what extent can it be justified?

II. FUNDAMENTAL IDEAS OF RECIPROCITY

A. Historical Developments

1. General Ideas. — Reciprocity is one of the oldest and most fundamental notions of justice for humanity. Since ancient times, the reciprocal relationship of giving favor for good and returning harm for harm was regarded as the basic principle underpinning villages, cities and other communities. Grounded on reciprocity, philosophers expounded

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41 A Californian punitive damages judgment was refused recognition. Supreme Court, Jul. 11, 1997 (fn. 12), 51(6) Minshû 2573 (Mansei Kögyô case); Yuko Nishitani, Anerkennung und Vollstreckung US-amerikanischer punitive damages-Urteile in Japan – anhand des Mansei Kögyô-Falls – (The Recognition and Enforcement of U.S. Punitive Damages Judgments in Japan — In Light of the Mansei Kögyô Case —), 2001 IPRax, 365 ff.

42 For the interpretation of Art. 42 AGRAL, Yokoyama, fn. 6 Para. 90 ff.


mutual recognition of rights and obligations between citizens, and later between sovereign states.45 This idea enabled sovereign states to build an international society as equals and regulate their relationships with common rules, instead of relying on unilateral acts.46

While the Dutch School of international law in the 17th century regarded comity as the basis for mutually giving effect to judgments among sovereign states,47 Mancini qualified it in the mid-19th century as an obligation in international society to recognize and enforce foreign judgments, rejecting the ambiguous, changeable and problematic notion of reciprocity.48 From the beginning of the 19th century, European countries gradually established a system of mutual recognition and enforcement of judgments using bilateral treaties,49 whereas they dominated overseas territories and colonies using consulate jurisdiction.50 In the absence of a treaty relationship, a common practice for states was to require reciprocity with the rendering state, rather than unilaterally giving favor to recognize foreign judgments.

2. Germany. — Germany, whose legislation largely served as a model for Japan and Korea,51 used to classify the recognition and enforcement of foreign judgments as a category of judicial assistance between sovereign states at the beginning of the 19th century. Thus, the principle of reciprocity was established and became part of jus

45 Emmanuel Décaux, La réciprocité en droit international (The Reciprocity in International Law), Librairie générale de droit et de jurisprudence (Paris), at 2 ff. (1980).
49 Carl Joseph Anton Mittermaier, Von der Vollstreckung eines von einem ausländischen Gerichte gefällten Urteils (The Enforcement of a Judgment Rendered by a Foreign Court), 14 Archiv für die civilistische Praxis (AcP) (Review of Civil Law Practice), 84 ff. (1831).
50 Hisashi Harata, 19seiki kôhan no kokusaishihô rikai no tokushitsu to sono haikei (Characteristics and Background of the Understanding of Private International Law in the Second Half of the 19th Century), 133-1 Hôgaku Kyôkai Zasshi (Journal of the Jurisprudence Association of Tokyo University), 28 ff. (2016).
Immediately after the foundation of the German Empire in 1871, the preliminary drafts of the ZPO were prepared in 1871 and 1874. As for the treatment of foreign judgments, the drafts envisaged only their “enforcement,” without providing for their “recognition.” Moreover, unlike the rules of the former German territorial states, the drafts notably dispensed with the reciprocity requirement, with a view to not leaving its decision to a strictly judicial decision and treating the question of retaliation in a special statute.

Nevertheless, after consultations in 1875, reciprocity was introduced as a legal requirement for judgment enforcement for the sake of clarity, aiming to exclude discretion of the administration. In substance, the legislators reasoned that reciprocity, as a retaliatory measure, would serve to protect German nationals abroad. Furthermore, the legislators opined that reciprocity would encourage other states to enter into treaties with Germany, while enabling Germany to uphold its honor and dignity by not unilaterally conceding to enforce judgments originating from states such as France and England, who would hardly reciprocate to enforce German judgments. In 1877, Section 661 No. 5 of the ZPO was eventually enacted, providing for reciprocity as a ground for refusal of the enforcement of foreign judgments. In 1898, when the ZPO was revised, the scope of this provision was extended to comprise also the “recognition” of the res judicata effects of foreign judgments in Section 328 of the ZPO, without though changing the reciprocity requirement.

Since then, in Germany, reciprocity has always been maintained as a ground for refusal of foreign judgments under Section 328 No. 5 of the ZPO and later also under

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54 Ss. 578 and 579 of the 1871 draft; Ss. 610 and 611 of the 1874 draft (Hahn, Id. at 77 f.; Dahlmanns, Id. at 146 f.); cf. Komuro, Id. at 46 ff.

55 See Hahn, fn. 53; Dahlmanns, fn. 53.

56 Consultations on May 29, 1875; see Hahn, fn. 53 at 804.
Section 109 (4) of the FamFG, notwithstanding various attempts to abolish it. Particularly at the 1986 revision of the ZPO and the German Introductory Act to the Civil Code (EGBGB), all the academic proposals suggested amending Section 328 of the ZPO to abrogate the reciprocity requirement. Nevertheless, it was upheld for policy reasons, aiming to give foreign states an incentive to conclude treaties with Germany and to effectuate a quality check of foreign judgments through the reciprocity requirement, as will be discussed below (infra III-B-1). It is remarkable that the German legislature at least restricted the scope of the reciprocity requirement, excluding its application in status and non-contentious family matters, such as divorce, parentage, and parental responsibilities (Section 109(4) of the FamFG), and in recognizing foreign insolvency proceedings (Section 343(1) of the German Law on Insolvency or InsO).

3. Japan. — In Japan, the first Code of Civil Procedure was adopted in 1890, largely following the model of Sections 660 and 661 of the 1877 ZPO. Thus, Articles 514 and 515 of the 1890 JCCP solely provided for the “enforcement” of foreign judgments pursuant to an exequatur, without referring to their “recognition,” and set forth the lack of reciprocity as one of the grounds for refusal of an exequatur (Article 515(2) No. 5 of the JCCP). Notably, while in Germany customary law or the practice of the foreign state to enforce German judgments was sufficient to establish reciprocity, Japanese law explicitly required reciprocity by international treaties, the same as in Austria, the Netherlands, and the Nordic countries today. The background of this policy decision by the Japanese legislature is not clearly expounded. The legislative materials at least allow us to trace back to the fact that the 1885 preliminary draft prepared by Hermann Techow, a German legal adviser sent to Japan by Bismarck, already required reciprocity to be guaranteed by


58 The reciprocity requirement solely applies to pecuniary claims grounded on maintenance obligations, matrimonial property regimes, and other family relationships (S. 112 and S. 266(1) of the FamFG).

59 Minji Soshô Hô, Law No. 29 of Apr. 21, 1890.

60 The other grounds for refusal pertained to circumstances where (i) the foreign judgment did not have res judicata effects (Art. 515 No. 1 of the JCCP), (ii) the foreign judgment ordered performance of a nature that was not allowed in Japan (No. 2), (iii) the foreign courts did not have jurisdiction (No. 3), and (iv) the aggrieved party was a Japanese national and did not enter an appearance in circumstances where he or she was not duly served with the process (No. 4).
treaties.\footnote{Hiroyuki Matsumoto & Kazuyuki Tokuda eds. *Nihon Rippô Shiryô Zenshû (Series of Legislative Materials in Japan)*, Vol. 191: *Minji Soshô-hô. Meiji-hen, Techowsôan (Code of Civil Procedure: Meiji Period, Draft of Techow)*, Shinzansha (Tokyo), at 220 (2008).} This principle was maintained throughout the consultations and drafting of the 1890 JCCP.\footnote{Id. Vol. 192, at 203 and 516; Vol. 194 at 110; Vol. 196 at 306; Vol. 197 at 157; Vol. 198 at 169.}

Interestingly enough, several commentators\footnote{Misao Inoue, *Minji Soshô-hô (Meiji 23 nen) Jutsugi (Lecture on the Code of Civil Procedure (Meiji Year 23)*), at 1367 ff. (Ch. 6, 1891; reprinted in *Nihon Rippô Shiryô Zenshû (Series of Legislative Materials in Japan)*, Shinzansha (Tokyo), special Vol. 77, 1999); also Sadayoshi Kameyama, *Minji Soshô-hô (Meiji 2 nen) Seigi (Commentary on the Code of Civil Procedure (Meiji Year 23)*), at 73 f. (Vol. 2, 1891; reprinted in Id., special Vol. 67, 1996); Yasunao Honda & Nobuyuki Imamura, *Minji Soshô-hô Chûkai (Commentary on the Code of Civil Procedure)*, at 1568 f. (1893; reprinted in Id., special Vol. 154, 2000).} pointed out that it is a general principle of public international law that sovereign states favor enforcing judgments rendered by a foreign state only if the latter reciprocates to enforce their judgments. In the opinion of these authors, because the existing treaties of commerce and navigation that Japan had entered into with the US, England, France, Prussia, and some other Western powers since 1858, by which Japan had to accept consulate jurisdiction and give up tariff autonomy,\footnote{See Nishitani, fn. 51.} did not include provisions on the mutual enforcement of judgments, these treaties needed to be amended. The authors also stressed that, by requiring an *exequatur* for the enforcement of a foreign judgment rendered as an act of sovereign state, Japan makes its own decision without being imposed upon, as Japan is not bound by the foreign judicial authority.\footnote{See Kameyama, fn. 65 at 61 ff.; Inoue, fn. 63 at 1359 ff.; Honda & Imamura, fn. 63 at 1551 ff.} Arguably, these statements suggest the policy considerations of Japan at that time to refuse opening up and conceding unilaterally to Western powers to leave room for further diplomatic negotiations, as the abrogation of the unequal treaties was of the highest priority for the Japanese government after the Meiji Restoration in 1868.\footnote{See Nishitani, fn. 51.}

Soon after Articles 514 and 515 of the JCCP were enacted, Japanese academics started to criticize them for solely stipulating the enforcement of foreign judgments, particularly in light of Section 328 of the ZPO that had meanwhile been adopted. In fact, the enforcement presupposes that foreign judgments are recognized for their *res judicata* effects under the same conditions in Japan, which can be invoked in other contexts.\footnote{See Matsuoka, fn. 17 at 466 ff.} Moreover, authors disapproved of the narrow understanding of reciprocity as requiring treaty relationships, as it excessively limited the scope of eligible foreign judgments. Since Japan did not conclude any treaty in this respect, there was no way of enforcing foreign judgments under ex-Article 515 of the JCCP, unlike the European states that had established a network of treaties for the enforcement of judgments. It was, therefore, put
forth *de lege ferenda* that the provision ought to be changed to also accept reciprocity based on customary law or facts in the foreign state.\(^68\)

Consequently, with the 1926 reform of the JCCP,\(^69\) Articles 514 and 515 were modified and the requirements for the enforcement of foreign judgments under Article 515(2) were moved from the section on “execution” to the section on “judgments” in Article 200 of the JCCP, with a view to covering the “recognition” of the *res judicata* effects of foreign judgments.\(^70\) Furthermore, the wording of the reciprocity requirement was eventually altered to simply require reciprocity under the law or practice of the foreign state, without necessitating a treaty relationship between Japan and the foreign state (Article 200 No. 4 of the JCCP).\(^71\) Since then, the reciprocity requirement has been maintained also after the 1996 amendment of the JCCP (Article 118 No. 4 of the JCCP),\(^72\) despite various critical voices in academia as will be discussed further. What is more, although efforts had been made *de lege lata* to exclude reciprocity in status and family matters — particularly in divorce cases — by way of interpretation,\(^73\) the 2018 reform of the Japanese Procedure Act in Status Matters or SPA and Japanese Procedure Act in Family Matters or FPA, which has introduced provisions on international jurisdiction and clarified rules on the recognition and enforcement of foreign judgments, has extended the reciprocity requirement to status and family matters, entering into force on April 1, 2019.\(^74\)

\(^{68}\) Id. at 491.

\(^{69}\) Law No. 61 of Apr. 24, 1926.

\(^{70}\) Art. 514 of the JCCP was later moved to Art. 24 of the JCEA in 1979.


\(^{72}\) Law No. 109 of Jun. 26, 1996.


\(^{74}\) With the enactment of the Jinji Soshô-hô no Ichibu wo kaisei suru Hûritsu (Law on Partial Amendment of the Law of Procedure in Status Matters etc.) (Law No. 20 of Apr. 25, 2018 entering into force on Apr. 1, 2019), it has been confirmed that Art. 118 of the JCCP directly applies to status matters provided by the SPA and *mutatis mutandis* to non-contentious family matters provided by the FPA (Art. 79-2 FPA). For the legislative background, see Shôji Hômu ed. *Jinji Soshô Jiken oyobi Kaji Jiken no Kokusai Sainan Kankatsu Hôsei ni kansuru Chûkan Shian* (*Interim Report on the Legislation on International Jurisdiction in Family and Status Matters*), Shôji Hômu (Tokyo), at 1 ff. (2015).
B. Criteria of Reciprocity in Japan

1. Developments of Case Law. — The determination of the notion of reciprocity in Japan largely owes to the development of case law. The criteria of reciprocity have been materialized by two landmark decisions of the highest judicial authority in 1933 and 1983.

In the Great Court of Cassation precedent of December 5, 1933, an exequatur was petitioned for in the Japanese courts for a judgment rendered by a California state court in the US. The defendants moved to dismiss the claim for lack of reciprocity, but remained unsuccessful. The Great Court of Cassation reasoned that the reciprocity requirement is fulfilled, insofar as the state of origin recognizes Japanese judgments pursuant to an international treaty or domestic law, without reopening the case on the merits, under the “identical or more lenient” conditions than those provided by Japanese law. By applying these criteria, reciprocity was granted for the State of California in the US in the underlying case.

While the standard set by the Supreme Court in 1933 was first supported by leading authors and lower court decisions in Japan, critical voices gradually increased. It was primarily maintained that the reciprocity requirement ought to be abolished de lege ferenda, as it would unduly hamper the recognition and enforcement of foreign judgments and risk causing relitigation or conflicting judgments. Moreover, it was put forth de lege lata that the requirements for recognizing and enforcing foreign judgments largely differ throughout various jurisdictions, so the relevant foreign law and Japanese law can hardly have “identical” conditions, nor could it be readily ascertained which of them provides for “more lenient” conditions. Rather, it was held to be sufficient that the requirements of recognition of Japanese law and foreign law are essentially equivalent. This generous understanding of reciprocity was later followed by a lower court and eventually adopted by the Supreme Court on June 7, 1983.

In its 1983 decision, the Supreme Court granted reciprocity and declared enforceable a judgment rendered by the US District Court for the District of Columbia. In addition to

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75 Great Court of Cassation (Highest Judiciary of Japan until 1947), Dec. 5, 1933, 3670 Hōritsu Shinbun 16.
76 See Kaneko, fn. 12 at 339; Tsunahiro Kikui & Toshio Muramatsu, Zentei Minji Soshô-hô (Fully Revised Manual on Civil Procedure Law) (2nd edition), Nihon Hyôron Sha (Tokyo), at 1139 (1978); for lower court decisions, see Tokyo District Court, Mar. 19, 1957 (infra note 96); Tokyo District Court, Oct. 24, 1970, infra note 98.
78 See Egawa, fn. 71 at 61; also Id.
79 See Tokyo District Court, Jul. 20, 1960, 11(7) Kaminshû1522.
giving policy reasons, the Justices opined that the narrow notion of reciprocity pursuant to the 1933 precedent would unduly lead to a stalemate. When namely the state of origin provides for reciprocity and more permissive conditions of recognition than Japan, it would not recognize Japanese judgments for lack of reciprocity owing to Japan’s more stringent conditions, and Japan would in turn deny reciprocity with that state. Thus, the Supreme Court contended to follow a broad notion of reciprocity that is satisfied when “the conditions of recognition provided in the foreign state are essentially equivalent to those in Japan in relation to judgments of the same kind.” This position has been followed by lower courts and was reiterated by the Supreme Court in 1998.81

2. Implementation. — Pursuant to case law, reciprocity is determined by examining the legal requirements under statutory rules, customary law and case law or actual practice of the recognition and enforcement of foreign judgments in the state of origin. It is not required that the foreign state has entered into an international treaty, agreement or declaration with Japan. Nor is it necessary that an actual case in the foreign country has extended reciprocity to Japan, insofar as a mechanism is in place to recognize and enforce Japanese judgments under “essentially equivalent” conditions.82 As the 1983 Supreme Court decision suggests, the determination of reciprocity need not be subject to the same and uniform criteria for all categories of judgments, but they can be different, for example, for monetary and non-monetary judgments. In deciding the case at hand in Japan, suffice it for the judge to examine that reciprocity be guaranteed only in relation to the specific category of foreign judgments, such as tort or divorce judgments, and not for other categories (“partial reciprocity”).83

It is generally accepted that the foreign system that requires a judicial confirmation of recognizing a foreign judgment (“delibrazione”), as in Brazil and previously in Italy, is not a hindrance for granting reciprocity. On the other hand, if a “review of the merits” of the foreign judgment is presupposed in the recognition proceedings as under the previous French or Belgian case law, reciprocity will be denied. In this respect, the Tokyo District

81 Supreme Court of Japan, Apr. 28, 1998 (fn. 32).
83 The 1983 Supreme Court decision refers reciprocity to be guaranteed in relation to the “judgments of the same kind.” The reciprocity requirement is subject to an ex officio examination by the judge. As for the timing, it is sufficient that reciprocity be granted at the time when Japanese courts render an exequatur or a declaratory judgment on the recognition of the foreign judgment. For further detail, see Aoyama, fn. 12 at 390; Egawa, fn. 71 at 63; Kobayashi & Murakami, fn. 12 at 155 f.; Takada, fn. 13 at 391; Takakuwa, Id. at 375; Takeshita, fn. 12 at 644; for the same interpretation in Korea, see Suk, fn. 4 (Korea-1) at 433.
Court rightly refused to render an *exequatur* for lack of reciprocity with Belgium in 1960, although the result would be different today (infra III-B-3).

Furthermore, in relation to those countries that deny the recognition or enforcement of foreign judgments without international treaties or declarations, reciprocity will generally be denied. However, even if the foreign state would render afresh a judgment on the merits or a summary judgment at common law for the purpose of enforcement, reciprocity could be granted, insofar as the judge decides in accordance with the Japanese judgment without altering it in substance, subject to “essentially equivalent” substantive and procedural conditions as an *exequatur* in Japan. In this respect, although Japanese authors used to deny reciprocity with Austria, the Netherlands and Nordic countries, with the progressive opening up of the recognition system in these countries to render a judgment on the merits in accordance with the foreign judgment, reciprocity may possibly be acknowledged.

Pursuant to these criteria, reciprocity has so far been granted in relation to a number of foreign jurisdictions. These jurisdictions include, in particular, Korea, China’s Hong Kong, Singapore, Germany, France, Switzerland (Canton of Zurich), UK (England and Wales), US (California, District of

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84 Tokyo District Court, Jul. 20, 1960 (fn. 79).
86 Supreme Court, Apr. 28, 1998 (fn. 32); Tokyo District Court, Jan. 31, 1994, 1509 Hanrei Jihô 101 (England and Wales/U.K.); see Nakano, fn. 12 at 451; Takakuwa, fn. 82 at 375.
88 See Elbalti, fn. 30.
89 See fn. 3.
90 See Supreme Court, Apr. 28, 1998 (fn. 32).
91 Tokyo District Court, Jan. 19, 2006, 1229 Hanrei Times 334.
94 Tokyo District Court, Nov. 13, 1967, 18(11/12) Kaminshû 1093.
95 Tokyo District Court, Jan. 31, 1994 (fn. 86).
96 Great Court of Cassation, Dec. 5, 1933 (fn. 75); Supreme Court, Jul. 11, 1997 (fn. 41); Supreme Court, Apr. 24, 2014 (fn. 36); for lower court decisions, Tokyo District Court, Mar. 19, 1957, 8-3 Kaminshû 525; Tokyo District Court, Oct. 13, 1965, 426 Hanrei Jihô 13; Tokyo District Court, Sep. 6, 1969, 586 Hanrei Jihô 73; Tokyo District Court, Nov. 11, 1988, 1315 Hanrei Jihô 96; Tokyo District Court (Hachioji Division), Feb. 13, 1998, 987 Hanrei Times 282; Tokyo District Court, Feb. 19, 2008, Westlaw 2008WLJPCA02198003; Tokyo District Court, Mar. 28, 2011, 1351 Hanrei Times 241; Tokyo High Court, May 20, 2015, Westlaw 2015WLJPCA05206001 (appeal from Tokyo District Court, Dec. 25, 2014, 1420 Hanrei Times 312); Tokyo High Court, Sep. 24, 2015, 2306 Hanrei Jihô 68 (appeal from Tokyo District Court, Dec. 10, 2014, 2306 Hanrei Jihô 73).
Columbia, Hawaii, Illinois, Maryland, Minnesota, Nevada, New York, Texas, Virginia, and Wisconsin, and Australia (New South Wales and Queensland). In light of the generous interpretation of reciprocity under Japanese law, it is remarkable that reciprocity has so far been mutually denied in Sino–Japanese relationships. This requires a thorough examination and varied analysis in seeking a possible way-out.

### III. RELATIONSHIP BETWEEN CHINA AND JAPAN

#### A. Status Quo

1. Reciprocity in China. — The present judgments recognition system in Chinese domestic law was established in 1982. The relevant provisions were introduced in the 1991 CCCP and supplemented, in particular, by the 1992 Supreme People’s Court (SPC) Opinions. It has remained intact since then, except for some technical statutory amendments. The present Article 282 of the CCCP provides for three cardinal conditions of the recognition of foreign judgments. They are, namely, (a) legal validity and binding effect of the foreign judgment, (b) consistency with China’s basic principles of law, national sovereignty, security, and social and public interests, and (c) the “reciprocal relationship” with the state of origin. Moreover, de lege lata, other conditions also need to be satisfied, namely, (d) the indirect jurisdiction of the state of origin, (e) the proper service of documents to the defendant as well as a fair and proper trial in the state
of origin, and (f) the non-existence of conflicting judgments in China.\textsuperscript{112}

As ZHANG points out, there are three categories of reciprocity: (i) “treaty-based” reciprocity, (ii) “legally-based” reciprocity, and (iii) “recognition facts-based” reciprocity.\textsuperscript{113} As examined above, Japan moved from “treaty-based” reciprocity to “legally-based” reciprocity. Today, reciprocity is granted insofar as Japanese judgments can be recognized under “essentially equivalent” conditions by the foreign state. On the other hand, the position of China has not yet been clarified. Since China has signed 33 bilateral treaties in relation to the recognition and enforcement of foreign judgments including treaties with France, Russia, Vietnam and Brazil,\textsuperscript{114} the question was whether reciprocity can be granted for other states — such as Japan, as well as Singapore, Australia, Germany, the UK and the US — without entering into treaties.

2. Initial Stalemate in China. — Pursuant to Article 318 of the 1992 SPC Opinions,\textsuperscript{115} the parties are allowed to bring afresh an action on the merits to the Chinese courts when the relevant foreign judgments, although legally effective abroad, are not recognized in China, either due to a lack of a treaty relationship or that of an established “reciprocal relationship” between China and the state of origin. Although the wording of the SPC’s opinion suggests granting reciprocity with a foreign state outside the realm of multilateral or bilateral treaties, the interpretation has been divided among Japanese authors (infra III-A-3).

The landmark decision denying reciprocity with Japan was the Gomi Akira case decided by the Dalian Intermediate People’s Court on November 5, 1994.\textsuperscript{116} The plaintiff, Gomi Akira, a Japanese national, had brought a suit in Japan against the defendants Y1 (a Japanese company) and its representative Y2 (a Japanese national) for a monetary claim of 140 million JPY arising out of their loan contract in the Yokohama District Court (Odawara Division). After the judge acquiesced to Gomi’s claim, Gomi further applied to the Kumamoto District Court (Tamana Division) for the attachment and assignment of the

\textsuperscript{112} See GUO, fn. 1 at 55 ff.; TANG, XIAO & HUO, fn. 1 at 167 ff.; TU, fn. 7 at 173; ZHANG, fn. 7 (China-3) at 47 ff.; also Yukinori Udagawa, Beikoku California-shû hanketsu wo shônin-shikkô shita chûgoku saibansho no kettei (A Chinese Court Decision Recognizing and Enforcing a U.S. Californian Judgment), 46(4) Kokusai Shôji Hômu (Journal of the Japanese Institute of International Business Law), 481 (2018).

\textsuperscript{113} See ZHANG, fn. 7 (China-3) at 93 ff.

\textsuperscript{114} See fn. 1.

\textsuperscript{115} See fn. 110.

\textsuperscript{116} Dalian Intermediate People’s Court of Liaoning Province, Nov. 5, 1994, Gomi Akira v. Dalian Fari Seafood Co., Ltd. (for a Japanese translation: http://www.ipm-c.co.jp/faling/files/pdf_data/awazu.pdf); for further detail, see HE, fn. 7 at 36; ZHU Lei, The Kolmar v. Sutex Case on Reciprocity in Foreign Judgments Enforcement in China: A Welcome Development or Still on the Wrong Track?, 13(2) Frontiers of Law in China, 205 (2018); ZHANG, fn. 7 (China-2) at 153 (2013); Id., fn. 7 (China-3) at 91; Yasuhiro Okuda & Yukinori Udagawa, Chûgoku ni okeru gaikoku-hanketsu shônin saiban no shin-tenkai (New Developments in Chinese Case Law on the Recognition of Foreign Judgments), 45(4) Kokusai Shôji Homu (Journal of the Japanese Institute of International Business Law), 499 (2017).
claim of 4.85 million CNY that Y2 had obtained against a third debtor Z, a Sino-Japanese joint venture in Dalian in which Y2 had invested. Gomi successfully obtained garnishment and assignment orders from the Kumamoto court, obliging Z to freeze the invested money and transfer it to Gomi.117

Gomi sought the recognition and enforcement of both Japanese decisions by the Dalian Intermediate People’s Court, including the garnishment and assignment orders.118 However, as there was no multilateral or bilateral treaty between China and Japan and the existence of reciprocity was denied, the Dalian court declined the enforcement of the Japanese judgments on November 5, 1994. Upon request of the Dalian court and the High People’s Court of Liaoning Province, the SPC gave a reply on June 26, 1995,119 acquiescing to the Dalian court’s decision and stated that the Japanese judgments at hand could not be recognized and enforced in China, because “there was no international treaty concluded between or acceded to by China and Japan, nor was there any reciprocal relationship established with Japan.”120

The same position of denying reciprocity with Japan has been reiterated in the 2001 Awabiya case121 and the 2004 Tsuburaya case.122 Furthermore, pursuant to the same reasoning, judgments from other states have been refused recognition in the absence of a treaty or reciprocal relationship. In particular, judgments from Korea (2011 and 2015),123 Germany (1996 and 2002),124 Australia (2007),125 England and

117 For the detailed facts of this case, see Watanabe, fn. 87 at 218.
118 The garnishment and assignment orders are decisions of the enforcement court to execute the claims and usually do not qualify as a “judgment” on the merits to be enforced abroad. To be eligible as a “judgment,” it needs to be rendered as a result of proceedings that guarantee the participation and hearings of both parties. Watanabe, fn. 44 at 296 ff.; Id., fn. 87 at 218.
120 Cited from ZHANG, fn. 5 (China-1) at 334 f.; Id., fn. 7 (China-3) at 96.
121 No. 1 Intermediate People’s Court of Shanghai, Awabiya Co., Ltd. (2001) (cited from ZHANG, fn. 5 (China-1) at 335 (note 57).
122 No. 2 Intermediate People’s Court of Beijing, Tsuburaya Productions Co., Ltd. v. Beijing Yansha Youyi Shopping City Co., Ltd. (2004) (cited from ZHANG, fn. 7 (China-3) at 107 (note 218); Tsang, fn. 7 at 279).
123 Shenzhen Intermediate People’s Court in Guangdong Province, Spring Commons Co., Ltd. (2011) (cited from Suk, fn. 4 (Korea-3) at 196); Shenyang Intermediate People’s Court (2015) (cited from ZHU, fn. 116 at 211 (note 40)).
Wales, UK (2010), Canada (2014), Malaysia (2014), Israel (2017), and Pennsylvania, US (2017) have been involved.

3. Response from Japan. — a) 2003 Osaka High Court Judgment. — On the Japanese side, it was not until the Osaka High Court decision of April 9, 2003 that reciprocity with China was explicitly denied. In this case, the plaintiff, X (a Japanese national), i.e. A’s father, sought a declaration against the defendants as A’s heirs, i.e. A’s spouse Y1 (a Chinese national) and their children Y2 and Y3 (Japanese nationals), that X was the investor in S-Company incorporated in China based on Sino–Japanese joint ventures. The defendants invoked as a defense that a judgment rendered by an intermediate people’s court and confirmed by the High People’s Court of Shandong Province in China — which declared in their favor that T-Company was the investor of S-Company shared by A and X at 50% each and that A’s dividends were inherited by the defendants — ought to be recognized in Japan.

In the first instance, the decision of the Osaka District Court (Sakai Division) dated July 15, 2002 dismissed the claim for lack of procedural interests, holding that the decision of the High People’s Court of Shandong Province was eligible to be recognized in Japan. The judge reasoned that reciprocity was guaranteed with China in light of Article 268 of the CCCP (at that time) that provides for “essentially equivalent” conditions as in Japan. X appealed against this judgment to the Osaka High Court. X, on his part, invoked another judgment rendered by the Qingdao Intermediate People’s Court and upheld by the High People’s Court of Shandong Province in China, which indeed declared X to be the investor and granted X’s claim against A’s brother-in-law for restitution of the dividends. X asserted that none of the contradicting Chinese judgments could be recognized in Japan, as this would run counter to public policy.

The Osaka High Court acquiesced on April 9, 2003 to the appeal, revoking the lower court’s judgment and remanding the case to it for further examination. First, the Osaka High Court judges referred to Article 268 of the CCCP (at that time) and held that China does not always require a treaty or an agreement with the foreign state to recognize

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126 No. 2 Intermediate People’s Court of Beijing, Russian National Symphony Orchestra & Art Mont Company v. Beijing International Music Festival Society (2004) (cited from ZHANG, fn. 7 (China-2) at 155 (note 40)).
129 Fuzhou Intermediate People’s Court, S.L. Jonas Ltd. (2017) (cited from ZHU, fn. 116 at 212 (note 46)).
130 Nanchang Intermediate People’s Court (2016) (cited from ZHU, fn. 116 at 212 (note 44)).
131 Osaka High Court, Apr. 9, 2003, 1841 Hanrei Jihô 111.
132 Osaka District Court (Sakai Division), Jul. 15, 2002, 1841 Hanrei Jihô 113.
foreign judgments, but may accept it based on a “reciprocal relationship.” The judges, however, doubted that Japanese judgments on business transactions would be recognized in China due to the divergent economic regimes. Second, after referring to the 1994 Gomi Akira case and the 1995 SPC Reply, the judges asserted that there has not been any Japanese judgment on business transactions enforced in China, nor any renewed authoritative interpretation in China that accepted reciprocity with Japan. Considering that Japanese judgments could not be recognized under “essentially equivalent” conditions in China, the judges declined recognition of both Chinese judgments for lack of reciprocity under Article 118 No. 4 of the JCCP.

While the Osaka High Court judges acknowledged that China may grant reciprocity without entering into treaties with the foreign state, they ended up denying reciprocity with Japan in light of the preceding Gomi Akira case. This decision was supported by authors, on the grounds that China was not likely to recognize any Japanese judgments, except for divorce judgments (infra III-B-3). Because there had been no single foreign judgment recognized in China on the grounds of a “reciprocal relationship” without treaties at that time, it was pointed out that China might de facto adopt “treaty-based” reciprocity, to the exclusion of judgments recognition absent treaties. Yet, the prevailing view in Japan was that China would arguably follow “facts-based” reciprocity to recognize foreign judgments, once it is proven that the state of origin has already recognized Chinese judgments (“follow-suit” model) (infra III-B-2).

In connection with the outcome of the 2003 Osaka High Court decision, it should not be understood as a retaliatory measure from the Japanese side. While the Gomi Akira case concerned all Japanese nationals, the refusal to recognize Chinese judgments in the underlying case resulted in unfavorable outcomes for one Chinese national (Y1), as well as two Japanese nationals (Y2 and Y3). This result suggests that the Japanese judges determined the lack of reciprocity on a purely legal basis, without considering it as retaliation against China.

b) 2015 Tokyo High Court Judgment. — Although Japanese authors increasingly advocated abolishing or restricting the scope of reciprocity de lege ferenda and expressed concern about the deadlock with China, the same position was confirmed by

133 See fn. 119 (the judge erred in referring to the SPC Reply as dated Jun. 26, 1994).
135 See Watanabe, fn. 87; for the state of discussion in China, see ZHU, fn. 116 at 210 f.
136 Rentin Huang, Châgoku kokusai minjisoshô hô to Hague saiban kankatsu to hanketsu jôyaku junbi-sôan (International Civil Procedure Law in China and the Hague Draft Convention on Jurisdiction and Judgments), 51(2) Handai Hôgaku (Osaka Law Review), 512 (2001); Watanabe, fn. 87; cfr. for the state of discussion in China at that time, ZHANG, fn. 5 (China-1) at 336; Id., fn. 7 (China-3) at 98 ff.
137 See infra note 154.
138 See Kitamura, fn. 134 at 214; Watanabe, fn. 87 at 218.
the Tokyo High Court decision of November 25, 2015. In this case, the plaintiff, X, was an elderly Chinese lady living in China. In a book authored by the defendant, Y1 (deceased and succeeded by his heirs Y2 and Y3 during the proceedings) and published by the defendant Japanese company, Y4, X had been criticized for making false allegations of being a survivor of the Nanjing Massacre in the Second World War. Thus, X brought a damages claim on grounds of defamation against Y1 and Y4 before the Nanjing Xuanwu People’s Court of Jiangsu Province in China. Although Y1 and Y4 were duly served with the writ of summons and documents by judicial assistance in Japan, they did not enter appearances and were aggrieved in a default judgment. X then applied for an *exequatur* before the Tokyo District Court, seeking the execution of the Nanjing judgment.

According to the Tokyo District Court, reciprocity is required because, in light of the equality of sovereign states, it is not appropriate for the forum state to unilaterally do favor to acknowledge the effects of judgments rendered by the other state. The judge held that, pursuant to the “essentially equivalent” conditions test, it is necessary to examine how the state of origin would actually treat the same kind of foreign judgments in practice, not only in light of its black-letter rules, but also its case law, authoritative interpretations, regulations or standards on which the foreign judges would rely. Considering that no single foreign judgment has so far been recognized in China based on a reciprocal relationship in the absence of treaties, and that reciprocity with Japan was simply denied in the *Gomi Akira* case, the Tokyo District Court concluded that the *exequatur* of the Chinese judgment must be denied for lack of reciprocity.

The appeal to the Tokyo High Court was dismissed, though following different reasoning. The judges held that the “reciprocal relationship” under Chinese law, applicable in the absence of treaties, allows the Chinese courts to determine the effects of foreign judgments by discretion, taking the individual circumstances of the case into account. It is different from the notion of reciprocity under Article 118 No. 4 of the JCCP. On the grounds that the same kind of Japanese judgments cannot be said to be recognized under “essentially equivalent” conditions in China, the Tokyo High Court denied reciprocity.140

While both instances rightly held that the “reciprocal relationship” constitutes grounds for judgments recognition separate from treaties in China, the understanding of the Tokyo High Court, unlike that of the lower court, arguably does not correspond to the interpretations provided by the SPC and the practice at that time in China. The outcome of this case clearly shows that the deadlock between states ultimately compromised the protection of a weak private party. The victim of defamation namely had obtained a

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139 Tokyo High Court, Nov. 25, 2015, LEX/DB 25541803; for the first instance, Tokyo District Court, Mar. 20, 2015, 1422 Hanrei Times 348.

140 An appeal of this decision to the Supreme Court of Japan was denied certiorari due to lack of formalities. Supreme Court of Japan, Apr. 20, 2016, LEX/DB 25543141.
judgment awarding damages in her favor in China, but was unduly hindered from seeking its enforcement in Japan. How should we then analyze the present situation and find a solution for this stalemate in Sino–Japanese relationships?

B. Possible Way Out in Sino–Japanese Relationships

1. Theoretical Foundations of Reciprocity. — Reciprocity is a particular requirement for the recognition of foreign judgments. While the requirements in Article 118 No. 1–3 of the JCCP — i.e. indirect jurisdiction (No. 1), proper service to the defendant (No. 2) and public policy (No. 3) — are all related to the individual circumstances of the case involving private parties, reciprocity under Article 118 No. 4 of the JCCP is a general and abstract condition to be determined grounded on the relationship between the foreign state and Japan.141

As the historical development shows (supra II-A), reciprocity used to be legitimized pursuant to the fundamental principle of equality, fairness and mutual respect of sovereign states in international society. It was held to be inappropriate and disgraceful that one state unilaterally favors recognizing and enforcing judgments of other states who do not reciprocate.142 Reciprocity was also considered to enhance the protection of citizens abroad.143 This way of thinking is a reminiscence of the idea of seeing judgments recognition as a matter of sovereign acts and public interests. Today, judgments in civil and commercial matters are rather considered to be primarily geared toward private interests of private parties, whose legal relationships are at stake. From this point of view, it is hard to justify that private parties be affected in their rights and claims by a contingent stance of the states concerned, on which the parties do not have any influence. Thus, voices have been increasing against the theoretical foundation of reciprocity.144

As a matter of practical reasoning, reciprocity has been justified as giving foreign states an incentive to recognize and enforce Japanese judgments, with a view to having their own judgments mutually recognized and enforced in Japan. The same argument has also been brought about in Germany145 and the US146 to uphold or reintroduce

142 See Takakuwa, fn. 82 at 378.
143 See Nakano, fn. 12 at 450.
144 See Elbalti, fn. 30 at 215 ff.
145 See supra II-A.2.
reciprocity. However, if the states involved require both reciprocity and wait for the other to start recognizing judgments, it would lead to a deadlock rather than enhancing recognition. 147 Further, the existence of reciprocity is difficult to ascertain. The foreign state may not have explicit statutory rules or established case law on judgments recognition. Even Germany, whose Section 328 of the ZPO had been adopted almost literally in Article 200 JCCP (now Article 118 of the JCCP) in Japan, used to deny reciprocity with Japan on the sole ground that there had not been any decision of Japanese courts recognizing a German judgment.148 It was not until the Nagoya District Court granted an *exequatur* for a judgment from the No. 1 District Court of Munich on February 6, 1987149 that the existence of reciprocity was confirmed.

Reciprocity is also said to serve to ensure the minimum standard of foreign judgments, since the judgments that are rendered in a state without an independent, neutral and fair judicial system would be identified forthwith with and refused recognition.150 The reciprocity requirement indeed dispenses with the judge having to enter into sensitive issues about the quality of the foreign judicial system.151 Still, this argument is not sufficiently founded, because reciprocity would no longer serve as a safeguard, once the foreign state started recognizing and enforcing Japanese judgments.152 The judge would then have to rely on public policy to shun foreign judgments on a case-by-case basis, instead of referring to reciprocity.

Arguably, the apparent advantages of the reciprocity requirement do not outweigh its drawbacks. Reciprocity as a retaliatory measure between the states ultimately goes at the cost of private parties by unduly hampering the recognition and enforcement of foreign judgments. The lack of reciprocity risks causing relitigation or conflicting judgments. It may well also result in disfavoring Japanese judgment creditors, who have successfully obtained a foreign judgment but fail to find enforcement in Japan.153 Needless to say, relitigation is costly and time-consuming, and may not even be an option due to lack of

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147 See Takakuwa, fn. 82 at 372 ff.
149 Nagoya District Court, Feb. 6, 1987 (fn. 92).
150 See Basedow, fn. 57 at 101 ff.
151 See Elbalti, fn. 30 at 216.
jurisdiction or a statute of limitations. Thus, calls have rightly been increasing in Japan  *de lege ferenda* to abolish reciprocity \(^{154}\) or at least restrict its scope, \(^{155}\) for the purpose of enhancing the circulation of judgments and honoring the parties’ private interests. Also in China, a number of authors like HE, ZHANG, TANG, XIAO and HUO criticize reciprocity and advocate abolishing it. \(^{156}\) Comparatively, there is a trend throughout various legal systems towards abrogating reciprocity or at least employing a broader understanding of reciprocity. \(^{157}\) A Japanese author even contends that the reciprocity requirement under Article 118 No. 4 of the JCCP is unconstitutional, as it runs counter to the right to property as a fundamental right (Article 29 of the Constitution of Japan). \(^{158}\) Depending on the case, in light of the *Wagner* and the *Negrepontis* decisions of the European Court of Human Rights (ECtHR), \(^{159}\) European countries might also consider the refusal to recognize foreign judgments for lack of reciprocity as violating the parties’ right to access to justice (Article 6 of the European Convention on Human Rights or ECHR) or right to respect for family life (Article 8 of the ECHR). \(^{160}\)

Viewing the current state of discussion, the reciprocity requirement *de lege lata* ought to be interpreted and applied generously, with a view to not unnecessarily hindering foreign judgments from being recognized and enforced in the receiving state. Thus, it is desirable that “legally-based” and “presumed” reciprocity be adopted, instead of “treaty-based” or “facts-based” reciprocity, in order to ensure the protection of the parties’ private interests and enhance cooperation among states. \(^{161}\)

2. Recent Developments of Case Law in China. — After the 1994 *Gomi Akira* case, due to a lack of precedents in China recognizing a foreign judgment on the basis of the “reciprocal relationship,” there was room to understand its rules as requiring

\(^{154}\) See Aoyama, fn. 12 at 367; Hayakawa, fn. 141 at 144 (2002); Ikehara, fn. 77; Kamatani, fn. 134; Okuda, fn. 71 at 98 ff.; Sakurada, fn. 12 at 342 ff.; Uemura, fn. 12 at 879; also Elbalti, fn. 30 at 214.

\(^{155}\) For authors who accept reciprocity only in relation to financial disputes, to the exclusion of status and family matters, see Honma, Nakano & Sakai, fn. 12 at 196; Naoshi Takasugi, 63(7) Journal of the Japan Commercial Arbitration Association, 6 (2016); for authors who accept reciprocity only for judgments ordering performance (*Leistungsurteil*) to be enforced, see Takakuwa, fn. 34 at 98.

\(^{156}\) See HE, fn. 7 at 37; ZHANG, fn. 7 (China-2) at 166; idem, fn. 7 (China-3) at 94 ff.

\(^{157}\) See Elbalti, fn. 30 at 187 ff.

\(^{158}\) See Okuda, fn. 71 at 98 ff.

\(^{159}\) ECtHR, Jun. 28, 2007, *Wagner* v. Luxembourg (No. 76240/01); ECtHR, May 3, 2011, *Negrepontis-Giannisis* v. Greece (No. 56759/08). In these decisions, the European Court of Human Rights held that the refusal of recognizing a foreign adoption decree on ground of not applying the proper law or violating public policy violated the parties’ right to family life under Art. 8 of the ECHR. For further analysis, see Yuko Nishitani, *Identité culturelle en droit international privé de la famille* (Cultural Identity in Private International Family Law), Recueil des cours de l’Académie de droit international de La Haye (Collected Courses of the Hague Academy of International Law), (forthcoming 2019).

\(^{160}\) See Basedow, fn. 152 at 347 ff.

\(^{161}\) See HE, fn. 7 at 37; ZHANG, fn. 7 (China-3) at 95.
“treaty-based” reciprocity. Chinese case law, however, has recently taken a remarkable turn.

a) Germany. — It was the 2013 Wuhan Intermediate People’s Court decision that notably recognized, on the grounds of the reciprocal relationship, a decree of the Montabaur District Court of Germany that had opened insolvency proceedings and appointed a liquidator (“Sascha Rudolf Seehaus” case). The absence of treaties with Germany did not prevent the Wuhan court from recognizing the German decision. The judge seems to have confirmed the step forward made by the No. 2 Intermediate People’s Court of Beijing in 2011, which declined the enforcement of a German judgment solely for lack of proper service while still leaving room for implied reciprocity (“Hukla” case).

In fact, the Wuhan court welcomed the German decree and positively responded that the Higher Regional Court of Berlin (“Züblin” case) had recognized a judgment from the Wuxi Intermediate People’s Court invalidating an arbitration clause in 2006. The Berlin court had declared itself to be satisfied with reciprocity with China under Section 328(1) No. 5 of the ZPO, considering that German judgments would presumably be recognized in China, and that declining reciprocity would unduly lead to a stalemate between both countries. The same position was followed by the Higher Regional Court of Düsseldorf in 2007, despite the fact that several previous Chinese judgments had refused to recognize German judgments. This is a good example of overcoming reciprocity by favorably taking initiative to recognize judgments of the other state.

b) Singapore. — While the 2013 Wuhan decision remained unpublished and is said to have had limited impact, the first published decision granting reciprocity without
treaties was rendered by the Nanjing Intermediate People’s Court in 2016. It declared enforceable a default judgment from the High Court of Singapore (“Kolmar” case), awarding the Swiss plaintiff the payment of 350,000 USD against the Chinese defendant based on their contract.\(^{168}\) The Nanjing court decision was a positive response to the 2014 Singaporean High Court decision that had recognized and enforced a commercial money judgment from the Suzhou Intermediate People’s Court in relation to a contractual dispute (“Giant Light Metal” case).\(^{169}\) The fact that Singapore at common law does not require reciprocity for judgments recognition\(^{170}\) certainly helped to establish reciprocity.

On May 15, 2017, the SPC gave significant effect to the Kolmar decision by publicly referring to it as one of the selected 10 Typical Cases to be followed in China.\(^{171}\)

c) US. — Furthermore, in 2017 the Wuhan Intermediate People’s Court granted recognition and enforcement of a judgment from the Los Angeles Superior Court in California, US, ordering the return of disputed funds based on the parties’ financial agreements (“LIU Li” case).\(^{172}\) The fact that the Los Angeles court had rendered a default judgment did not matter, as the Wuhan court confirmed that the defendants had been properly summoned and had failed to appear on purpose.\(^{173}\) This generous attitude toward recognition was a courtesy paid to the US Court of Appeals for the 9th Circuit, which, in 2011, had ordered the enforcement of a judgment from the High People’s Court of Hubei Province awarding damages against a US defendant company due to a helicopter crash in China (“Sanlian” case).\(^{174}\) In fact, in 2017 the Wuhan court reciprocated in favor of the Californian state court judgment, although the 2011 US judgment that served as a basis for reciprocity was from a federal court in California.\(^{175}\) The difference of the counterpart between the state court and the federal court did not play a role in accepting reciprocity in the case at hand.

In the US, the State of California\(^{176}\) does not provide for the reciprocity requirement;

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\(^{168}\) Nanjing Intermediate People’s Court, Dec. 9, 2016, Kolmar Group AG v. Sutex Group, available at http://cgc.law.stanford.edu/belt-and-road/b-and-r-cases/typical-case-13 (last visited Mar. 10, 2019); see also ZHANG, fn. 7 (China-4) at 583; Tsang, fn. 7 at 266 ff.


\(^{170}\) See Yeo, fn. 85 at 454 ff; ZHANG, fn. 7 (China-4) at 529.

\(^{171}\) See Brand, fn. 128 at 17 ff.; Morikawa, fn. 125 at 1087; Tsang, fn. 7 at 262.

\(^{172}\) Wuhan Intermediary People’s Court, Jun. 30, 2017, LIU Li v. TAO Li & TONG Wu (Japanese translation: Udagawa, fn. 112, at 482 ff.; English translation: Brand, fn. 128 at 49 ff.).


\(^{174}\) U.S. Court of Appeals, Hubei Gezhouba Sanlian Ind., et al. v. Robinson Helicopter Company, No. 09-56629 (9th Cir. 2011); for further detail, see HE, fn. 7 at 24 ff.

\(^{175}\) See Brand, fn. 128 at 35.

\(^{176}\) California had adopted the Uniform Foreign Money-Judgments Recognition Act (UFMJRA), abandoning the reciprocity requirement provided by Hilton v. Guyot (fn. 146); see HE, fn. 7 at 29 ff.
thus, the first step to recognize Chinese judgments could be taken there readily. Yet, a careful assessment will be necessary as to whether reciprocity exists with other States of the US, particularly with those that make reciprocity a mandatory ground for recognition (Georgia and Massachusetts) or a discretionary ground for recognition (Florida, Idaho, Maine, North Carolina, Ohio, and Texas).177

d) Korea. — Finally, on March 25, 2019, the Qingdao Intermediate People’s Court granted recognition and enforcement of a Korean default judgment rendered by the Suwon District Court in 2017, ordering the defendant to pay 80 million KRW arising out of a loan contract.178 The Qingdao court affirmed a reciprocal relationship with Korea, on the ground that the Seoul District Court had rendered an *exequatur* for a Chinese money judgment from the Weifang Intermediate People’s Court in Shandong Province in 1999.179 Once reciprocity was established, the Qingdao court neither questioned the appropriateness of the service by publication to institute proceedings before the Suwon court, nor examined the fact finding and law application underlying the Korean judgment. This generous attitude is remarkable, considering that the Japanese courts would have conducted the necessary examination of facts to ascertain the requirements of recognition, and would have ultimately refused enforcement of the Korean judgment for lack of proper service pursuant to Article 118 No. 2 of the JCCP.

e) Background of “Facts-Based” Reciprocity. — According to these recent decisions in China, reciprocity ought to be granted when it is proven that the foreign state has already recognized or enforced a Chinese judgment. Following “facts-based” reciprocity, the Chinese courts should now be ready to reciprocate, once the foreign state has taken the initiative to give effect to Chinese judgments.

These developments of opening up towards foreign states correspond to the Belt and Road Initiative (“One Belt, One Road”). With a view to enhancing trade and economic cooperation, the Belt and Road Initiative has yielded a strategic plan for China to be a leading player in international judicial cooperation in the region. It later led to the establishment of the China International Commercial Court.180 The 2015 SPC Opinions

178 Qingdao Intermediate People’s Court, Mar. 25, 2019 ((2018) Lu 02 Xie Wai Ren No. 6). It granted an *exequatur* for a money judgment from the Suwon District Court rendered on Jul. 20, 2017 ((2017) GADAN No. 15740).
179 See fn. 4.
180 The China International Commercial Court was established as a chamber of the SPC in 2018. For further information, see http://cicc.court.gov.cn/html/1/219/index.html (last visited Mar. 30, 2019).
included a program to enhance judicial assistance and mutual judgments recognition.\textsuperscript{181} For this purpose, the 2017 “Nanning Statement of the 2nd China–ASEAN Justice Forum” declared that mutual judgments recognition be guaranteed among the member states pursuant to “presumed” reciprocity in the absence of treaties, provided that the courts of the other state have not refused to recognize or enforce such judgments for lack of reciprocity.\textsuperscript{182} In light of the developments of case law and the general policies of China, the privileged states are arguably not limited to the states belonging to the Belt and Road Initiative, but also include other states,\textsuperscript{183} even though the Kolmar decision may have attracted more attention due to the fact that Singapore belongs to this region.\textsuperscript{184}

3. Practical Solutions. — a) Presuppositions. — Against this background, it is worth reflecting afresh on how to overcome the current stalemate in the Sino–Japanese relationships. The ideal solution would be the abrogation of reciprocity in domestic law or the signing of a bilateral or tripartite treaty for judgments recognition between China, Korea and Japan.\textsuperscript{185} These methods of lawmaking are, however, not likely to be achieved in the near future. \textit{De lege lata}, for the purpose of judgments recognition, a generous interpretation of reciprocity ought to be envisaged both under Articles 281 and 282 of the CCCP and Article 118 No. 4 of the JCCP.

b) Criteria of Reciprocity. — In the 1983 Japanese Supreme Court decision on reciprocity, the Justices could readily grant reciprocity with the US District of Columbia, because there had been neither a positive precedent granting the recognition of Japanese judgments, nor a negative precedent declining it. The question is how to proceed when there is indeed a negative precedent like the 1994 \textit{Gomi Akira} case in the Sino–Japanese relationship.\textsuperscript{186}


\textsuperscript{183} See Morikawa, fn. 125 at 1088 f.

\textsuperscript{184} See Tsang, fn. 7 at 285.

\textsuperscript{185} See Suk, fn. 4 (Korea-3) at 198; Tsang, fn. 7 at 293; Id., \textit{Bilateral Treaty on Mutual Enforcement of Judgments between Japan and China: A Discussion on Legal Structure}, (forthcoming 2019). Tsang advocates taking the 2006 China’s Mainland and the Hong Kong Special Administrative Region Arrangement as a model, limited to judgments resulting from an exclusive choice of court agreement and rendered by one of the courts listed in the instrument.

\textsuperscript{186} Some Japanese authors sought to restrict the scope of the 1983 Supreme Court decision to foreign states that have no precedent marking reciprocity with Japan, advocating to adopt more generous criteria for reciprocity in relation to China (See Awazu, fn. 134 at 135). Yet, this academic view failed to state sufficient
As Okuda points out, it ought to be considered that the 1994 Gomi Akira decision and the 1995 SPC Reply are not legally binding on other Chinese courts, even though they may give certain guidance to judges. The fact that China has denied reciprocity with Japan in one case should not be understood as systematically rejecting Japanese judgments forever. Pursuant to the “essentially equivalent” conditions test of Japanese case law, not the past practice but the likelihood of future recognition of Japanese judgments in the foreign state should be decisive.

In general, the existence of reciprocity, which is examined ex officio by the judge, has been affirmed in a generous way in Japan (supra II-B). Although German authors used to deny reciprocity with Japan for lack of precedent, reciprocity was confirmed on the Japanese side in 1987 when the Nagoya District Court rendered an exequatur for a German judgment. In relation to Belgium, reciprocity had first been denied by the Tokyo District Court in 1960, on the ground that Belgium had followed the review of the merits system at that time. Nonetheless, after the enactment of the 2004 Belgian Private International Law Code, which explicitly prohibits the review of the merits (Article 25 (2)), Japanese authors generally consider that reciprocity is guaranteed with Belgium.

Notably, Japan used to contend that China’s Hong Kong did not guarantee reciprocity, on the grounds that common law jurisdictions require the plaintiff to bring a claim on the merits afresh in the recognizing state, and that Japan was not listed as an eligible counterpart on the Schedule of the Hong Kong Foreign Judgments (Reciprocal Enforcement) Ordinance. In 1998, however, the Japanese Supreme Court rightly acknowledged reciprocity with Chinese Hong Kong, contending that Japanese judgments would be recognized and enforced under “substantially equivalent” conditions at common law. In light of this extended notion of reciprocity, Japanese judges should also be able to assume reciprocity with China in the future, given that the Chinese courts may well reciprocate pursuant to the evolving Chinese case law toward “facts-based” reciprocity, once the Japanese courts take the initiative to recognize Chinese judgments. Furthermore,

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188 See ZHANG, fn. 5 (China-1) at 336; Id., fn. 7 (China-3) at 96.
189 See fn. 83.
190 Nagoya District Court, Feb. 6, 1987 (fn. 92).
191 Tokyo District Court, Jul. 20, 1960 (fn. 79).
193 See Okuda, fn. 71 at 77.
194 Fukuoka District Court, Mar. 25, 1982, 31(2) JCA Journal 2; also Takakuwa, fn. 33 at 145 (previous view).
195 Supreme Court, Apr. 28, 1998 (fn. 32); cf. Kawabe, fn. 36 at 482 f.
the actual conditions of recognition pursuant to Articles 281 and 282 of the CCCP (supra III-A-1) can be qualified as “essentially equivalent” to those of Article 118 of the JCCP, although some uncertainty remains as to the interpretation of the Chinese rules. Viewing the position taken by the SPC so far, it would not be conceivable for China to take the initiative to start recognizing Japanese judgments. For the purpose of avoiding a vicious circle, it would be desirable for Japanese courts to give the green light to start recognizing and enforcing Chinese judgments, notwithstanding the remaining uncertainty as to whether China would reciprocate immediately.

What is more, Japanese case law limits the scope of reciprocity to “judgments of the same kind,” allowing partial reciprocity. Thus, a proper classification of foreign judgments may well facilitate the granting of reciprocity. This has been the case with divorce, as the 2004 SPC Judicial Interpretation on the Recognition of Divorce dispenses with the reciprocity requirement for the recognition of foreign divorce decrees, insofar as one of the spouses is a Chinese national. In response, the Tokyo Family Court in 2005 and the Tokyo High Court in 2006 have rightly recognized Chinese divorce judgments. Notably, both judgments included, as an ancillary measure, an order against the father to pay child support, which was recognized in Japan and taken into consideration while dismissing the claim due to the prohibition of double jeopardy, or while calculating the remaining maintenance obligations to be performed. These decisions could possibly be understood as granting reciprocity for maintenance orders from China as the first step in granting reciprocity. In response, it would be desirable for China to reciprocate by recognizing at least the corresponding categories of court orders from Japan, with a view to gradually overcoming the current stalemate.
4. Remaining Issues. — In order for Japanese courts to proceed to recognize Chinese judgments, there are several remaining issues. First, the first sentence of Article 118 of the JCCP requires that the foreign judgment has become “final, conclusive and binding.” The question is whether the trial supervision procedure in China ought to be characterized as an ordinary review, preventing the judgment from becoming res judicata. In China, either the party, the people’s court, or the people’s procuratorate can, under particular circumstances, petition the original or higher people’s court for a retrial of the case. While the timeframe for the party is limited to six months from the date of the original judgment becoming effective, the people’s court and the people’s procuratorate are not subject to a timeframe, but can petition for a retrial only once.204 Although the grounds for a retrial have been restricted to exceptional procedural errors after the 2012 reform of the CCCP, a careful assessment may still be necessary in characterizing the Chinese judgment at hand as final, conclusive, and binding.205

Second, although in China the abovementioned remarkable decisions have adopted “facts-based” reciprocity in accordance with the “follow-suit” model, other courts have tended to decide cases differently. Despite the fact that Korean courts had recognized Chinese judgments several times, Chinese courts refused to reciprocate206 until the Qingdao court finally granted recognition and enforcement for the Suwon court decision in 2019.207 Furthermore, shortly before the Wuhan court granted an exequatur for a Californian state court judgment in June 2017,208 the Nanchang Intermediate People’s Court refused to enforce a personal damages compensation judgment rendered by the Superior Court of Pennsylvania, US for lack of reciprocity in April 2017.209 These seemingly inconsistent decisions cause uncertainty and risk compromising confidence in the judiciary. Hopefully, a uniform position can soon be taken by Chinese courts to ensure predictable outcomes. Now that various foreign states have begun to recognize Chinese judgments, including Korea, Germany, the US and Singapore, as well as the UK (2015),210 Israel (2015),211 New Zealand (2016),212 and Australia (2017 & 2019),213 it is

205 See Suk, fn. 4 (Korea-3) at 174 f.; ZHANG, fn. 5 (China-1) at 322 f.
206 See Suk, Id. at 195 ff.; see fn. 4.
207 See fn. 178.
208 See fn. 172.
209 See fn. 130.
211 Tel Aviv District Court, Oct. 6, 2015, Jiangsu Overseas Group Co., Ltd. v. Isaac Reitman (File No. 48946-11-12).
desirable that the reciprocal relationship will further be established on the part of China as well.

Third, the consequences of “facts-based” reciprocity are not yet clearly predictable. For example, the 2016 Kolmar decision by the Nanjing court to enforce a judgment from the High Court of Singapore was a positive response to the latter’s decision in 2014 to enforce a Chinese judgment. It is not obvious what will happen if the High Court of Singapore should decline the enforcement of a Chinese judgment in the future, due to a lack of indirect jurisdiction or proper service to the defendant. In theory, this ought not negatively affect the reciprocal relationship, but there remains some uncertainty. Furthermore, there is no straightforward answer yet as to what extent the reciprocal relationships need to be guaranteed. It ought to be determined whether the types and subject-matters of disputes, the level of courts, and the default or non-default judgments need to be the same or equivalent in China and the foreign state, as well as whether the relevant province in China and the jurisdiction concerned in a multi-unit state like the US need to correspond. Depending on the position, decisions from a federal court and a state court in the same state in the US may yield different results as to the existence of reciprocity with China.

Fourth, as for the recognition requirements provided in the foreign state, China could possibly give a carte blanche to the foreign state and be satisfied with granting reciprocity, insofar as Chinese judgments have been recognized and enforced there. Yet, some authors recommend that the Chinese courts specifically examine the conditions of the foreign state to recognize Chinese judgments and, if they are more stringent, raise the threshold for recognizing its judgments in China to adjust the standard. While such treatment might be justified for the purpose of retaliation, this would mean that the Chinese courts need to conduct a case-by-case analysis on the conditions of recognition to be applied to the foreign judgment at hand. It would arguably jeopardize legal certainty and predictability.

It remains to be seen how case law develops and moves towards establishing a reasonable standard of judgments recognition in China. With a view to facilitating the cross-border circulation of judgments and enhancing the harmony of decisions, it is preferable for both China and Japan to adopt “legally-based” and “presumed” reciprocity.

CONCLUSION

Nowadays, the recognition and enforcement of foreign judgments does not primarily

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214 See Tsang, fn. 7 at 284.
215 Id. at 164 ff.; Tsang, fn. 7 at 283 ff.
216 See TANG, XIAO & HUO, fn. 1 at 164.
217 See HE, fn. 7 at 37 f.; TANG, XIAO & HUO, fn. 1 at 166.
concern public or state interests, but rather the rights and obligations of private parties. To guarantee predictability and secure business transactions, it is crucial that the recognition and enforcement of foreign judgments be guaranteed also between China and Japan as well as Korea in the region. Now that Chinese arbitral awards are readily enforced in Japan218 and China has become responsive to enforcing foreign arbitral awards, including Japanese ones,219 it would be desirable that comparable openness also apply to litigation. De lege lata, an appropriate interpretation of Articles 281 and 282 of the CCCP, as well as Article 118 No. 4 of the JCCP, would enable Japanese judges to take initiative to recognize Chinese judgments and overcome the long-drawn Sino–Japanese stalemate.

In today’s globalized world, states are becoming more and more interconnected and interdependent.220 Coordination of legal systems ought to be achieved through mutual recognition and enforcement of judgments in civil and commercial matters. While the reform of domestic law or the signing of a bilateral or tripartite treaty for the purpose of mutual judgments recognition does not seem to be an immediately viable solution, China, Korea and Japan could contemplate joining a global convention. One could think of, in particular, the 2005 Hague Choice of Court Convention.221 Now that Singapore has ratified and China has signed it,222 its attractiveness will increase in East Asia. Furthermore, the Draft Hague Judgments Convention to be adopted at the 22nd Diplomatic Session in 2019223 may be a viable way to establish a mutual judgments recognition system. It remains to be seen how dynamically the East Asian region will develop in the near future.


219 In 1995, a reporting system was introduced, according to which the competent intermediate people’s court has to refer to the high people’s court, and when it also agrees, then to the SPC, when the enforcement of a foreign arbitral award ought to be refused. This system has obviously enhanced the enforcement of foreign arbitral awards in China. See Tetsuo Kurita ed. Asia Kokusai Shôji-chûsai no Jitsumu (Practice of International Commercial Arbitration in Asia), Lexis Nexis Japan (Tokyo), at 344 ff. (2014).


