

INCREASING CO-OPERATION BETWEEN AUSTRALIA AND CHINA IN THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS

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As trade and interaction between Australia and China increases, attention is being drawn to methods of dispute resolution other than international commercial arbitration, such as litigation. For litigation to be a workable option, however, there must be an effective system for recognition and enforcement of foreign judgments under both countries' laws. This commentary examines the current regimes for recognition and enforcement in Australia and China and finds, in particular, that the status of Australian judgments in China is uncertain due to the Chinese requirement of 'reciprocity'. While the results from bilateral agreements on recognition and enforcement between China and other countries have been mixed, multilateral instruments developed by the Hague Conference on Private International Law may provide a better solution.

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I INTRODUCTION

In an era of global integration with increased mobility of people, information and assets across borders and explosion in international business transactions, the practical significance of balanced and predictable rules for international dispute resolution cannot be denied. The fact that China is now Australia's largest trading partner makes this a particularly pressing issue for both countries.

Historically, international commercial arbitration has been the most popular method of dispute resolution in Australia–China transactions,¹ due to the lack of neutrality of the Chinese courts, the flexibility of the arbitral process and the uncertainty regarding enforceability of Australian court judgments in China. But

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¹ Daisy Mallett and Emily Rich, *Arbitration Clauses in Your China Trade Contracts* (17 December 2015) King & Wood Mallesons
<<https://www.kwm.com/en/au/knowledge/insights/international-arbitration-china-trade-contracts-20151217>> archived at <<https://perma.cc/DP87-RMD3>>.

arbitration has its limitations: it can often be very expensive,² can struggle to deal with disputes involving third parties and non-contractual matters³ and the lack of publicly accessible decisions can make ascertainment and application of the law difficult for advisers.⁴ The occasional inability of arbitration to deal with the entirety of a claim can lead to fragmentation and ‘splitting’ of disputes between the arbitral tribunal and national courts. Such an outcome is not only inefficient and costly for the parties but can produce inconsistent results on similar facts. Arbitration also now faces competition from newly created international commercial courts.⁵

It is therefore important to consider whether litigation can provide a viable alternative to arbitration in Australia–China transactions or at least a complement to it in cases that arbitration is inapt to resolve. For national litigation to be an effective method of dispute resolution in cross-border matters between Australian and Chinese parties there must be a workable system for recognition and enforcement of foreign court judgments in place between the two countries. The purpose of this commentary, therefore, is to assess the current position on recognition and enforcement under both countries’ laws and to consider whether the instruments developed by the Hague Conference on Private International Law in the Judgments Project, as well as possible bilateral initiatives, may enhance the position.

It is important to note that increased judicial cooperation between Australia and China was signalled during the 2016 visit by a delegation led by former Australian Chief Justice Robert French to the Supreme People’s Court of China.⁶ At the meeting with the Supreme People’s Court, the President of that Court and former Chief Justice French signed a Letter of Exchange for judicial exchange and cooperation, which included the following provision:

The Chief Justice of the High Court of Australia will request the Council of Chief Justices of Australia and New Zealand to explore opportunities for the

² According to two recent surveys of practitioners: see PricewaterhouseCoopers and School of International Arbitration, Queen Mary University of London, ‘Corporate Choices in International Arbitration: Industry Perspectives — 2013 International Arbitration Survey’ (‘Report, April 2013’) <www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf> archived at <<https://perma.cc/BFQ5-JGFZ>>; White & Case and School of International Arbitration, Queen Mary University of London, 2015 ‘International Arbitration Survey: Improvements and Innovations in International Arbitration’ (2015) 7 <<https://www.whitecase.com/publications/insight/2015-international-arbitration-survey-improvements-and-innovations>> archived at <<https://perma.cc/75XF-S9UT>>.

³ Michael Hwang, ‘Commercial Courts and International Arbitration — Competitors or Partners?’ (2015) 31 *Arbitration International* 193, 195.

⁴ Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, ‘Developing Commercial Law through the Courts: Rebalancing the Relationship between the Courts and Arbitration’ (Speech delivered at the Fourth Bailii Lecture 2016, London, 9 March 2016) [34] <<https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailii-lecture-20160309.pdf>> archived at <<https://perma.cc/GUQ7-J2JA>>; V K Rajah, ‘W(h)ither Adversarial Commercial Dispute Resolution?’ (2017) 33 *Arbitration International* 17, 24.

⁵ Rajah, above n 4, 26–7.

⁶ Chief Justice Robert French, ‘Seeing Visions and Dreaming Dreams’ (Speech delivered at Judicial Conference of Australia Colloquium, Canberra, 7 October 2016) 12 <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj7Oct2016.pdf>> archived <<https://perma.cc/GD2P-8MMH>>.

development of mutual understanding, education and cooperation, where appropriate, between the judiciaries of the two countries.

Further, during the meeting between Chief Justice French and the Vice President of the Supreme People's Court, the Vice President stated that China would actively participate in the deliberations of the Judgments Project and work collaboratively with Australia and other countries on the development of rules relating to jurisdiction and the recognition and enforcement of foreign judgments.⁷ There is therefore a strong sentiment for increased co-operation between the two countries on this issue.

In examining the prospects for co-operation between China and Australia on recognition and enforcement of foreign judgments a brief examination will first be made of the Chinese rules and how they might apply to judgments from Australian courts.

II THE CHINESE APPROACH TO RECOGNITION AND ENFORCEMENT

The three broad principles governing recognition and enforcement of foreign judgments are contained in arts 267–8 of the *Civil Procedure Law of the People's Republic of China* ('CPL').⁸ The first requirement for recognition is that the judgment is legally effective or final in the country in which the judgment was rendered.⁹ The second requirement is that there is a bilateral treaty on recognition and enforcement of court judgments between China and the country where the judgment was rendered or there is reciprocity between China and that country on the issue of enforcement.¹⁰ The third requirement is that recognition and enforcement of a foreign court judgment does not contradict the basic principles of Chinese law nor violates the state sovereignty, social or public interest of China.¹¹

A *Recognition and Enforcement under Bilateral Treaties*

Considering the second requirement above, an Australian judgment can only be recognised and enforced in China where either a bilateral treaty on recognition is in force between the two countries or reciprocity is shown to exist by the judgment creditor.

⁷ Supreme People's Court of the People's Republic of China, 'He Rong and the Chief Justice of the Australian High Court, French and His Party Held a Working Meeting' (Press Release, 20 September 2016) <<http://www.court.gov.cn/zixun-xiangqing-26341.html>> archived at <<https://perma.cc/V8GU-X3X3>>.

⁸ See «中华人民共和国民事诉讼法» [Civil Procedure Law of the People's Republic of China] (People's Republic of China) National People's Congress, Order No 44, 9 April 1991 ('CPL'). See also Judicial Committee of the Supreme People's Court of the People's Republic of China, 最高人民法院 关于适用《中华人民共和国民事诉讼法》的解释 [Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China] (Interpretation No 5, 30 January 2015) art 544 <<http://www.court.gov.cn/fabu-xiangqing-13241.html>> archived at <<https://perma.cc/QVX8-L7A8>> ('Interpretation No 5 2015').

⁹ CPL art 267.

¹⁰ Ibid.

¹¹ Ibid art 268.

On the question of bilateral treaties, China has now implemented 33 such instruments, principally with civil law countries.¹² No bilateral treaty on recognition exists with Australia or indeed with other common law countries such as Singapore, the United Kingdom and the United States.

While the bilateral treaties are not uniform in content, there are some common features that can be identified. First, there must be no review of the merits of the foreign judgment by the requested state.¹³ Secondly, both money and non-money judgments are enforceable. Thirdly, there are typically five grounds for non-recognition of foreign judgments: (i) where there is no final and effective judgment under the law of the rendering country;¹⁴ (ii) where the rendering court lacks jurisdiction in the circumstances of the case or the law of the requested state has exclusive jurisdiction over the subject matter;¹⁵ (iii) where the defendant received inadequate notice of the proceedings through lack of proper service of process;¹⁶ (iv) where the judgment of the rendering court conflicts with a judgment of the court in the requested state involving the same action and the same parties or a similar judgment of a third country court;¹⁷ and (v) where recognition and enforcement would violate the sovereignty, national security or public policy of the requested state.¹⁸

A key question that arises is whether Australia should consider negotiating such a treaty with China. In addressing this issue, the following matters will be considered. First, how have Chinese courts interpreted the above bilateral treaty grounds? Secondly, how would adoption of a bilateral treaty on the above terms affect the current *Australian* law on recognition and enforcement of foreign judgments? Thirdly, how does the bilateral treaty regime compare with the recognition and enforcement structure under the *CPL*? Finally, would the Hague Judgments Project instruments provide a preferable model for Australia–China co-operation in this area?

On the first issue, the interpretation of the bilateral recognition treaties, Chinese court practice has been limited and inconsistent.¹⁹ First, there have been some cases where Chinese courts have entirely ignored a bilateral recognition treaty even where it applied in the circumstances of the case²⁰ and secondly, courts have occasionally refused recognition and enforcement on grounds other than those expressly stated in the treaty.²¹ Thirdly, courts have given varying interpretations of the requirements for service of process and notice to the

¹² As of July 2017. See King Fung Tsang, 'Chinese Bilateral Judgment Enforcement Treaties' (2017) 40 *Loyola of Los Angeles International and Comparative Law Review* 1, 2.

¹³ See, eg, *Accord d'entraide judiciaire en matière civile et commerciale entre le gouvernement de la République française et le gouvernement de la République populaire de Chine* [Agreement on Mutual Legal Assistance in Civil and Commercial Matters between the Government of the French Republic and the Government of the People's Republic of China], reported in JO 1 April 1988, 4352 (signed and entered into force 4 May 1987) art 23(2).

¹⁴ *Ibid* art 22(3).

¹⁵ *Ibid* art 22(1).

¹⁶ *Ibid* art 22(4).

¹⁷ *Ibid* art 22(6).

¹⁸ *Ibid* art 22(5).

¹⁹ Tsang, above n 12, 31–3, 38–9.

²⁰ *Ibid* 31–2.

²¹ *Ibid* 32–3, 38–9.

defendant²² and fourthly, the public policy defence has been interpreted expansively on occasion leading to inappropriate denials of recognition.²³

The above practice therefore suggests that entry into a bilateral treaty with China by Australia on the above terms will not guarantee greater enforcement of Australian judgments in China; instead, the position appears uncertain.

B *A Comparison with Australian Law*

The undesirability of Australia entering into a bilateral treaty with China on the current Chinese model is reinforced when the Australian law on recognition and enforcement of foreign judgments is considered. Australia has two main regimes for recognition: pursuant to the *Foreign Judgments Act 1991* (Cth) (*'Foreign Judgments Act'*) and under common law principles. The Regulations to the *Foreign Judgments Act* list courts from countries with which Australia has entered bilateral understandings on recognition and enforcement.²⁴ The common law rules of recognition and enforcement apply to all countries not listed in the Regulations, which includes China. It is however important to note that while there are different procedures for recognition and enforcement under the *Foreign Judgments Act* and at common law, the substantive law principles of recognition and enforcement are largely similar in each case.²⁵

Broadly speaking, a foreign judgment is capable of recognition and enforcement in Australia where the following elements are satisfied.²⁶ First, the defendant judgment debtor must have either been served with process in the territory of the foreign court that rendered the judgment, resident in such country or submitted to that court's jurisdiction ('international jurisdiction'). An appearance in the foreign court solely to contest its jurisdiction of the court is not a submission.²⁷ Secondly, the judgment must have been final and conclusive. Thirdly, the judgment must have involved an order requiring the defendant to pay a sum of money. Fourthly, no review of the merits of the foreign judgment may be undertaken by the Australian court. Finally, the judgment cannot be impeachable on the grounds of fraud, denial of natural justice, public policy or conflict with an earlier recognised judgment of an Australian court or that of a third country.

It appears that the Australian law requirements for recognition and enforcement of a Chinese judgment are more onerous than under most bilateral treaties agreed by China, particularly on the issues of jurisdiction and the restriction to money judgments. While it is not clear whether entry into a bilateral treaty would in fact secure greater enforcement of Australian judgments in China arguably it would make Chinese judgments easier to enforce in Australia. For that reason, Australian lawmakers may hesitate to enter a bilateral

²² Zhang Wenliang, 'Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention to Both the "Due Service" Requirement and the Principle of Reciprocity' (2013) 12 *Chinese Journal of International Law* 143.

²³ Tsang, above n 12, 33–6.

²⁴ *Foreign Judgments Regulations 1992* (Cth).

²⁵ See generally Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis, 3rd ed, 2015) 130–58.

²⁶ See generally *ibid* ch 5.

²⁷ *Foreign Judgments Act 1991* (Cth) s 11.

agreement where the benefits to Australian judgment creditors are negligible but Australian judgment debtors may face greater exposure to enforcement actions in Australia.

C Recognition and Enforcement under the CPL

In determining whether Australia should enter a bilateral treaty with China on the above terms it is also important to consider how the bilateral treaty regime compares with the principles of recognition and enforcement under the *CPL*. At first glance, the *CPL* appears to take a more lenient approach to recognition and enforcement compared to the bilateral treaty regime. For example, there are no express jurisdictional requirements in respect of the foreign judgment to be satisfied under the *CPL*²⁸ and no requirement for proper notice to or due service upon the judgment debtor unless the foreign judgment was given in default of appearance.²⁹ There are, however, other similar provisions to those found in bilateral treaties: for example, a requirement of legal effectiveness/finality under the law of the country of rendition,³⁰ an almost identical public policy defence³¹ and a type of ‘lis pendens’ provision³² dealing with the conflict between a foreign judgment and a prior Chinese determination at the time of recognition and enforcement.

However, there is a key requirement under the *CPL* that does not exist under the bilateral treaty regime: the judgment creditor must also show that *reciprocity* exists between Australia and China before an Australian judgment can be enforced there.³³ The reciprocity requirement under Chinese law has been the subject of much discussion and criticism by Chinese and foreign scholars, principally because it has been rigidly and impractically interpreted, leading to many foreign judgments being refused recognition and enforcement. The key point about the Chinese courts’ approach to reciprocity is that it is strictly empirical: to satisfy the requirement a judgment creditor must provide evidence of a prior instance where a Chinese judgment has been recognised and enforced in the foreign country.³⁴ This earlier judgment does not have to have involved the same parties or the same issues as the current litigation; only that it has been enforced by the foreign court. The mere possibility or potentiality that a Chinese judgment would be *capable* of being recognised and enforced under the law of the foreign country is irrelevant. So, for example, it would not be enough to show that a Chinese judgment would be potentially enforceable in Australia if it

²⁸ Some scholars have however suggested that an ‘implicit’ requirement that ‘the foreign court must have [had] competent jurisdiction over the case’ nonetheless exists for recognition and enforcement under the *CPL*: Yujun Guo, ‘Country Report: The People’s Republic of China’ in A Chong (ed), *Recognition and Enforcement of Foreign Judgments in Asia* (Asian Business Law Institute, 2017) 49, 61.

²⁹ *Interpretation No 5 2015*, above n 8, art 543.

³⁰ *CPL* art 267.

³¹ *Ibid* art 268.

³² *Interpretation No 5 2015*, above n 8, art 533.

³³ *CPL* art 267.

³⁴ Bin Sun, ‘The Future of Cross-Border Litigation in China: Enforcement of Foreign Commercial Judgments Based on Reciprocity’ (2018) 50 *New York University Journal of International Law and Politics* 1135, 1136.

satisfied the above requirements of international jurisdiction, finality and was for a sum of money.

The harshness and absurdity of the Chinese position on reciprocity can be seen in the case of Japan where a ‘recognition deadlock’ now exists with China. Japanese courts currently refuse to recognise Chinese judgments for lack of reciprocity in response to earlier Chinese decisions in which Japanese judgments were denied recognition on the same basis.³⁵

Such an approach clearly puts a foreign judgment creditor in an invidious position: its chances of obtaining recognition and enforcement in China depend entirely on circumstances over which it has no control. Both Chinese and foreign scholars have therefore called for new test of ‘presumed’ reciprocity, which will only not be satisfied where either the foreign country does not recognise and enforce foreign judgments in any circumstances or where it allows substantial review of a foreign judgment on the merits.³⁶ The Nanning Statement, approved at the Second China–ASEAN Justice Forum in June 2017, also endorses this approach.³⁷

Until very recently, under the current Chinese view of reciprocity, no Australian court judgment was capable of being recognised and enforced, given the absence of any precedent where an Australian court has recognised a Chinese judgment. Indeed, a judgment of the Supreme Court of Western Australia was not enforced for this reason in 2006.³⁸ By contrast, judgments from Singapore³⁹ and United States⁴⁰ courts have now been recognised and enforced in China, following decisions in these countries in which Chinese judgments had been enforced.⁴¹ China may now be effectively ‘unlocked’ for recognition of future

³⁵ Wenliang Zhang, ‘Sino–Foreign Recognition and Enforcement of Judgments: A Promising “Follow Suit” Model?’ (2017) 16 *Chinese Journal of International Law* 515, 541–2 [46].

³⁶ See eg H E Qisheng, ‘The Recognition and Enforcement of Foreign Judgments between the United States and China: A Study of *Sanlian v Robinson*’ [2014] *Tsinghua China Law Review* 23, 36–8; Bélich Elbalti, ‘Reciprocity and the Recognition and Enforcement of Foreign Judgments: A Lot of Bark but Not Much Bite’ (2017) 13 *Journal of Private International Law* 184, 205. Cf Zhang, ‘Sino–Foreign Recognition and Enforcement of Judgments’, above n 35, 542 [47]: who argues that, for the moment, ‘the most advisable’ approach is for foreign courts take the initiative in recognising Chinese judgments so that Chinese courts can then ‘follow suit’.

³⁷ Regarding art 7, see Meng Yu and Guodong Lu, ‘The Nanning Statement: A Milestone in Recognizing and Enforcing Foreign Judgments in China’, *China Justice Observer* (online), 10 July 2018 <<https://www.chinajusticeobserver.com/insights/the-nanning-statement-a-milestone-in-recognizing-and-enforcing-foreign-judgments-in-china.html>>.

³⁸ «最高人民法院关于申请人弗拉西动力发动机有限公司申请承认和执行澳大利亚法院判决一案的请示的复函» [Reply of the Supreme People’s Court of China Concerning the Request for Instructions Re Application of DNT France Power Engine Co Ltd for the Recognition and Enforcement of a Judgment Rendered by the Supreme Court of Western Australia] (Shenzhen Intermediate People’s Court, 2006), cited in Sun, above n 34, 1137 n 6.

³⁹ «高尔集团股份有限公司申请承认和执行新加坡高等法院民事判决案» [Kolmar Group AG v Jiangsu Textile Industry (Group) Import and Export Co Ltd], Nanjing Intermediate People’s Court, 9 December 2016, cited in Sun, above n 34, 1140 n 37.

⁴⁰ «刘利与陶莉等申请承认和执行外国法院民事判决纠纷案» [Liu Li v Tao Li and Tong Wu], Wuhan Intermediate People’s Court, 30 June 2017, cited in Zhang, ‘Sino–Foreign Recognition and Enforcement of Judgments’, above n 35, 545 [51].

⁴¹ See *Hubei Gezhouba Sanlian Industrial Co Ltd v Robinson Helicopter Co* (CD Cal, No 2:06-cv-01798-FMC-SSx, 22 July 2009); *Giant Light Metal Technology (Kunshan) Co Ltd v Akxa Far East Pte Ltd* [2014] 2 SLR 545.

judgments from these states, subject to any defences available in the circumstances of the case.

A word of caution however needs to be sounded. In 2016 a Jiangxi provincial court refused to recognise and enforce a judgment of a Pennsylvanian court for damages for personal injury.⁴² Apparently, the judgment creditor relied upon the same American decision (*Hubei Gezhouba Sanlian Industrial Co Ltd v Robinson Helicopter Co*) as proof that Chinese judgments were now enforceable in the United States,⁴³ but the Chinese court nevertheless dismissed the application because reciprocity had not been established. A similar situation arose in the case of an application to recognise and enforce a South Korean judgment.⁴⁴ One commentator has suggested that these decisions show that Chinese courts may not take a uniform, nationwide approach to reciprocity,⁴⁵ which leaves the matter highly uncertain.

The position in Australia may also have changed after the recent decision of the Supreme Court of Victoria in *Liu v Ma*,⁴⁶ where a Chinese judgment was successfully enforced for the first time by an Australian court. *Liu* concerned a default judgment given by the People's Court of Jiangsu Nantong Chongchuan District in 2017. The judgment was for moneys due under a loan contract between two Chinese nationals with the Victorian court finding that the Australian common law requirements for recognition and enforcement were met. Specifically, the judgment was for a fixed sum of money, the parties were identical and international jurisdiction existed, based on the 'active [Chinese] citizenship' of the defendants.⁴⁷

In theory, Australian judgment creditors should now be able to rely on this case to obtain enforcement of their judgments in China on the basis that de facto reciprocity has been established, in line with the Singapore and United States precedents above. However, the Jiangxi case above is a salutary reminder that even where proof is provided of a foreign court recognising and enforcing a Chinese judgment, this does not mean that all Chinese courts will automatically accept that reciprocity exists. Since the position therefore remains unsettled, other avenues for protecting Australian judgment creditors need to be considered. While, as noted earlier, the Chinese bilateral treaty regime has also not been an entirely reliable pathway for foreign litigants, multilateral initiatives of the Hague Conference on Private International Law may be more beneficial.

⁴² «赫伯特楚西, 玛丽艾伦楚西申请承认和执行外国法院民事判决, 裁定一审民事裁定书» [Civil Ruling of Herbert Truhe et al's Application of Recognition and Enforcement of a Foreign Court Judgment], Jiangxi Nanchang Intermediate People's Court, 2016, cited in Sun, above n 32, 1142 n 34.

⁴³ *Hubei Gezhouba Sanlian Industrial Co Ltd v Robinson Helicopter Co* (CD Cal, No 2:06-cv-01798-FMC-SSx, July 22 2009).

⁴⁴ See Elbalti, above n 36, 204 n 106, citing a decision of the Shenzhen Intermediate People's Court, dated 30 September 2011.

⁴⁵ Sun, above n 34, 1148.

⁴⁶ *Liu v Ma* [2017] VSC 810. Israeli and New Zealand courts have also recently recognised and enforced Chinese judgments. See Zhang, 'Sino-Foreign Recognition and Enforcement of Judgments', above n 35, [15]–[27].

⁴⁷ *Liu v Ma* [2017] VSC 810, [7]. While nationality has long been regarded as a controversial ground of international jurisdiction, it has some support in recent Australian decisions. See, eg, *Independent Trustee Services Ltd v Morris* (2010) 79 NSWLR 425.

III THE HAGUE INSTRUMENTS

A The Hague Convention on Choice of Court Agreements

A first option to consider is that Australia and China could both implement the 2005 *Hague Convention on Choice of Court Agreements* ('2005 Convention'),⁴⁸ an issue that has been discussed enthusiastically in both countries.⁴⁹ Yet the 2005 Convention, even if it were to be adopted, may have only limited impact on recognition and enforcement law and practice in Australia and China. The reason for this view is that the 2005 Convention requires a court of a 'Contracting State' to recognise and enforce a judgment given by a court of another Contracting State only where that court was stipulated in an exclusive choice of court agreement.⁵⁰

The Convention therefore has very limited operation in terms of recognition and enforcement of foreign judgments, although it does cover both final money and non-money judgments.⁵¹ There are also many important areas excluded from the scope of the 2005 Convention, in art 2: consumer and employment transactions, carriage of goods, competition and insolvency matters and actions for breach of primary intellectual property rights.⁵² Judgments arising from commercial contracts where no choice of court agreement exists and concerning purely non-contractual claims such as tort and unjust enrichment are also not covered.⁵³ Non-exclusive choice of court agreements are also excluded, although there is a presumption of exclusivity in art 3(b) and a Contracting State may declare under art 22 that it will recognise and enforce judgments given by courts of other Contracting States designated in a non-exclusive choice of court agreement.⁵⁴

A question may arise concerning the operation of the Convention in relation to Chinese state-owned enterprises. Article 266 of the CPL confers exclusive jurisdiction on Chinese courts for any disputes involving Chinese-foreign joint venture contracts.⁵⁵ Presumably China will want to retain this provision even after accession to the 2005 Convention, which means that it may feel bound to enter a declaration excluding such contracts from the Convention's scope under art 21.⁵⁶ Such a declaration would remove a wide body of potential disputes from the Convention but could be justified by China on important state security and

⁴⁸ *Hague Convention on Choice of Court Agreements*, opened for signature 30 June 2005, 44 ILM 1294 (entered into force 1 October 2015) ('2005 Convention').

⁴⁹ See eg Guangjian Tu, 'The Hague Choice of Court Convention — A Chinese Perspective' (2007) 55 *American Journal of Comparative Law* 347; Tsang, above n 12, 48–9; Richard Garnett, 'The Hague Choice of Court Convention: Magnum Opus or Much Ado About Nothing?' (2009) 5 *Journal of Private International Law* 161; Alex Mills, 'The Hague Choice of Court Convention and Cross-Border Commercial Dispute Resolution in Australia and the Asia-Pacific' (2017) 18 *Melbourne Journal of International Law* 1. China signed the Convention on 12 September 2017 but has not yet ratified it: see Guo, above n 28, 67.

⁵⁰ 2005 Convention art 8(1).

⁵¹ Ibid art 4(1).

⁵² Ibid art 2.

⁵³ Ibid.

⁵⁴ Ibid arts 3(b), 22.

⁵⁵ CPL art 266.

⁵⁶ Tu, above n 49, 355; Patricia Blazey and Peter Gillies, 'Recognition and Enforcement of Foreign Judgments in China' (2008) 1(3–4) *International Journal of Private Law* 333.

public policy grounds. Any wider declaration, however, which excluded state owned enterprises *entirely* from the *Convention* could seriously weaken the effectiveness of the instrument given the prominence of such enterprises in international commercial transactions.⁵⁷

Further on this point, even without an express declaration excluding them from scope, art 1(1) of the *2005 Convention* could possibly be relied upon by Chinese courts to protect state enterprises. This provision requires that the *Convention* only applies to ‘civil or commercial’ matters. This expression is notoriously difficult to define but it has been suggested that it may exclude cases in which a foreign state was exercising powers unique to government.⁵⁸ While most commercial transactions would not obviously involve such conduct, a Chinese court may take a different view where local regulations and policy were involved.

Also, the operation of the *2005 Convention*’s recognition and enforcement rules will depend upon a court of a Contracting State declining to exercise jurisdiction when presented with an exclusive choice of court agreement stipulating the courts of another Contracting State. Suppose, for example, that a contract was entered into between an Australian company and a Chinese enterprise and contained an exclusive choice of court agreement in favour of the courts of Victoria in Australia. After a dispute arose, the Chinese party sued the Australian company in a Chinese court. The recognition and enforcement provisions of the *Convention* would be rendered useless if the Chinese court, under art 6 of the *2005 Convention*, refused to decline jurisdiction in favour of the chosen Australian court for in such a case there would be no judgment to which the *Convention* could apply.

Not only therefore is the scope of the *2005 Convention* quite limited in terms of recognition and enforcement but the effectiveness of the existing provisions will depend upon each country’s courts interpreting the jurisdictional rules in a non-parochial way. For example, it has been argued that the current approach under Australian law, whereby a foreign exclusive choice of court agreement may not be enforced where an Australian party would be denied the protection of an Australian statute, is hard to reconcile with the *2005 Convention*.⁵⁹

Further, even where a judgment has been given by the chosen court and so is capable of recognition and enforcement under the *2005 Convention*, the utility of the instrument will be undermined if the defences to recognition are too widely construed. In theory, this situation should not arise since the drafters of the *2005 Convention* made it clear that the defences were to be limited in number and only discretionary grounds of refusal.⁶⁰ For example, art 9 provides that enforcement ‘may be refused’ where the judgment would be manifestly incompatible with the public policy of the enforcing country, was obtained by fraud, the defendant did not receive adequate notice of the proceedings, the choice of court agreement

⁵⁷ Ilan Alon, et al, ‘Chinese State-Owned Enterprises Go Global’ (2014) 35 *Journal of Business Strategy* 3.

⁵⁸ Ronald A Brand and Paul Herrup, *The 2005 Hague Convention on Choice of Court Agreements* (Cambridge University Press 2008) 47–8.

⁵⁹ Garnett, ‘Magnum Opus or Much Ado About Nothing’, above n 49, 166–167.

⁶⁰ Brand and Herrup, above n 58, 110.

was invalid under the law of the state of the chosen court or the judgment was inconsistent with a judgment given in the requested country or a third state.⁶¹

The difference between the *2005 Convention* view of public policy and the apparently wider version under the Chinese *CPL* is particularly striking here. Adoption of the *2005 Convention* provision would therefore hopefully limit the degree to which Chinese courts could refuse recognition and enforcement on public policy grounds.⁶²

On balance, while the *2005 Convention* does not go very far in terms of the range of foreign judgments that may be enforced, its adoption in both countries could provide an important first step in bilateral co-operation. The *2005 Convention* may also encourage Australian and Chinese parties to insert choice of court agreements in their transactions and so provide greater certainty in dispute resolution. The success of the *Convention* in Australia and China will however depend on both countries' courts giving a uniform and consistent interpretation to its provisions. The uncertainty apparent in the Chinese courts' consideration of the bilateral recognition treaties must be avoided.

B *2018 Draft Hague Convention*

A further and perhaps more promising development at the Hague Conference is the Draft Convention on Recognition and Enforcement of Foreign Judgments of 2018 ('Draft Convention').⁶³

Significantly, the Draft Convention applies to many matters not covered by the *2005 Convention* including consumer and employment claims, (possibly) primary intellectual property rights,⁶⁴ contracts with no choice of court agreement, non-contractual obligations involving property damage or personal injury, tenancies of immovable property and trusts. Both monetary and non-monetary judgments are also included, if they are final orders on the merits. The comments made above about Chinese state-owned enterprises in the context of the *2005 Convention* also apply here.

The Draft Convention then provides a series of jurisdictional filters in art 5 the presence of any one of which in a judgment will provide a basis for recognition and enforcement of that judgment in another Contracting State.⁶⁵ Examples are where the defendant judgment creditor was habitually resident in the Contracting State whose court rendered the judgment, where the defendant maintains a branch or agency in that country, where the defendant consented to jurisdiction in the course of the proceedings, where the judgment involved a contractual obligation the performance of which occurred in that country and where the judgment ruled on a non-contractual obligation where the act causing harm occurred in the country of rendition.

⁶¹ *2005 Convention* art 9.

⁶² Tsang, above n 12, 49.

⁶³ Special Commission on the Recognition and Enforcement of Foreign Judgments, Hague Conference on Private International Law, '2018 Draft Convention' (Draft Convention, 24–29 May 2018) <<https://assets.hcch.net/docs/23b6dac3-7900-49f3-9a94-aa0ffbe0d0dd.pdf>> archived at <<https://perma.cc/S9FZ-2DTY>> ('*2018 Draft Convention*').

⁶⁴ The provisions on IP rights remain in square brackets in the draft Convention: see *ibid* art 2.

⁶⁵ *Ibid* art 5.

The defences in art 7 of the Draft Convention closely model those in the *2005 Convention*. For example, recognition and enforcement ‘may be refused’ where there is fraud, inadequate notification to the defendant, manifest incompatibility with public policy of the requested state or inconsistency with a prior judgment of the requested state or a third country.⁶⁶ Such defences will again need to be narrowly construed by courts in requested states to ensure the effectiveness of the instrument as a tool in maximising global circulation of judgments.

Given the wide range of judgments available for recognition and enforcement and the limited opportunities for obstruction by defendants, the Draft Convention arguably presents a promising opportunity for co-operation between Australia and China. From a Chinese perspective, the Draft Convention would not change existing law greatly apart from removing the reciprocity requirement for countries such as Australia who have no bilateral treaty relationship with China. It is hoped that China will accept that this requirement is inappropriate in an interconnected world and so can be safely discarded. Furthermore, the Draft Convention provides conditions for recognition and enforcement of a foreign judgment in China that are at least as strict as those under the current bilateral treaties and possibly stricter than the *CPL*, although the public policy defence is narrower in the Draft Convention. It is likely therefore that China would retain considerable flexibility and control on recognition and enforcement matters. The Draft Convention also provides a set of rules that reflect international best practice on recognition, designed to be applied in diverse legal cultures. Overall, therefore, and considering that China retains the power to exclude sensitive matters by declaration, the Draft Convention may be acceptable to China.

From an Australian perspective, by contrast, the effect of adopting the Draft Convention would be that more Chinese judgments would be enforceable in Australia since the range of jurisdictional filters under the Draft Convention is greater than under current Australian law and non-money judgments are included. While some practitioners acting for Australian companies may be concerned about this greater exposure for Australian judgment debtors, the safeguards in the Draft Convention in terms of fraud, denial of natural justice and public policy will still be available to avoid enforcement of judgments obtained in unconscionable circumstances with undesirable effects. Also, any detriment to Australian judgment debtors must be weighed against the opportunity for Australian judgment creditors to secure enforcement of their judgments in China which, as discussed above, is highly uncertain.

The adoption of both the *2005 Convention* and the Draft Convention by Australia and China would help level the playing field between arbitration and litigation⁶⁷ by creating a clearly defined global regime for the recognition and enforcement of judgments, that covers a wide range of subject matter. At the moment, arbitration operates largely by default in Australia–China transactions in large part due to its enforcement ‘advantage’,⁶⁸ but if a greater range of court

⁶⁶ Ibid art 7.

⁶⁷ For a fuller discussion, see Richard Garnett, ‘The Resurgence of Litigation in International Commercial Disputes’ (Speech delivered at the Supreme Court of Victoria Commercial Law Conference, Supreme Court of Victoria, 13 October 2016) <https://law.unimelb.edu.au/__data/assets/pdf_file/0010/2154484/SCV-Conference-2016_Richard-Garnett.pdf> archived at <<https://perma.cc/4RYU-5MVD>>.

⁶⁸ Ibid 2.

judgments were now more widely enforceable, including matters that often cannot be arbitrated such as third party claims and non-contractual obligations, then litigation may emerge as a more serious option to consider.

Wide acceptance of both Hague instruments could also possibly lead to a re-examination of adjudicatory jurisdiction as a topic for a convention. While this aspect of the Hague Project collapsed almost 20 years ago due to United States–European Union differences⁶⁹ the momentum created by broad acceptance of the conventions may encourage nation states to reconsider the idea. If a system of harmonised jurisdictional rules were ever agreed this would be an even greater boost to co-operation between Australia and China in cross-border dispute resolution.

The Draft Convention on recognition and enforcement, however, is not in final form and is still the subject of intense negotiations among delegations at The Hague. Australia and China may therefore have to wait some time before such an instrument is available for adoption but once agreed, it would likely provide a valuable opportunity to create a more reliable and effective system for recognition and enforcement of judgments.

IV CONCLUSION

As Australian and Chinese entities increasingly engage in commercial transactions attention has been drawn to appropriate methods of dispute resolution. While arbitration has traditionally been the dominant model this has been largely due to the difficulty of enforcing Australian court judgments in China. Options that exist to improve the current situation include negotiation of a bilateral treaty on recognition or Australian judgment creditors relying on recent Australian authority to overcome the ‘reciprocity’ bar in Chinese law. The likely success of both pathways is however not clear.

A possibly more promising and solid foundation for reciprocal recognition and enforcement of judgments may be through implementation of the *2005 Convention* and the Draft Convention. Such instruments reflect international best practice on recognition and enforcement, cover a wide range of subject matter and provide clear guidelines to parties. Perhaps the supremacy of arbitration in Australia–China commercial dispute resolution is about to be challenged.

⁶⁹ Ibid 5–6.