

## **Enforcing Judgments in China: Comparing the Conference Minutes of the Supreme People's Court with the Hague 2019 Judgments Convention**

### **Introduction**

On January 24, 2022, the Supreme People's Court of China issued the Minutes of the National Court's Symposium on Foreign-Related Commercial and Maritime Trials (Minutes), which provide rules for judgment recognition and enforcement (JRE) in China when no treaty exists between China and the state of origin or the treaty does not address a particular JRE issue.<sup>1</sup> Later in the year, on August 29, 2022, the European Union acceded to the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Convention or the HCCH 2019 Judgments Convention).<sup>2</sup> Though some signatories, including the United States, have not yet ratified the Convention, it will enter into force in September 2023.<sup>3</sup> Given that China has not signed the Convention, it will be important for international business actors to understand and plan for the ways in which JRE in China will differ. This *Insight* provides an overview of key aspects of the Minutes and highlights notable comparisons with the Convention.

### **The Soft-Law Minutes vs. the Hard-Law Convention**

The starting point for JRE in China is the Chinese Civil Procedure Law (CPL) and the Supreme People's Court Judicial Interpretations, which provide that foreign judgments can be recognized and enforced in China according to treaties ratified by China or according to the principle of reciprocity.<sup>4</sup> Although the CPL and the Judicial Interpretations do not explain the meaning of reciprocity, cases decided by Chinese courts show that

they required *de facto* reciprocity, which was a longstanding key barrier for JRE in China.<sup>5</sup> The Minutes, as the first instance in which China's official position on *de jure* reciprocity has been articulated, somewhat reduce that barrier.<sup>6</sup> Article 44 of the Minutes provides that a people's court may determine that reciprocity exists between China and a foreign country when one of the following circumstances occurs:

- a) According to the laws of a foreign country, civil and commercial judgments made by people's courts can be recognized and enforced by the courts of that foreign country;
- b) China has reached a mutually beneficial understanding or consensus with the foreign country; or
- c) The foreign country has made a reciprocal commitment to China through diplomatic channels, or China has made a reciprocal commitment to the foreign country through diplomatic channels, and there is no evidence to prove that the foreign country has refused to recognize and enforce judgments issued by people's courts on the grounds that there is no reciprocity.

The existence of reciprocity is determined on a case-by-case basis subject to a reporting system to the Supreme People's Court.<sup>7</sup> In contrast, becoming a member of the Convention would automatically establish reciprocity for JRE.

One initial, key distinction is that, in contrast to the Convention, the Minutes are soft law in nature. Conference minutes are a type of judicial document created by the Supreme People's Court to guide lower courts.<sup>8</sup> The Supreme People's Court allows lower courts to invoke conference minutes only in their reasoning and not as the legal foundation of judgments. However, empirical studies show that lower courts often do the latter.<sup>9</sup> Nevertheless, as a formal matter, conference minutes are not binding in Chinese courts.

The soft-law status of the Minutes means U.S. businesses cannot safely assume that their monetary judgments will be recognized and enforced by Chinese courts if geopolitical conflicts between China and the U.S. further intensify. Chinese courts will have significant room to decide whether and how to apply the Minutes to U.S. monetary judgments as the U.S.-China relationship deteriorates. In a possible sign of things to come, on August 5, 2022, China suspended the U.S.-China Judicial Assistance Agreement in response to the U.S. House of Representatives Speaker Nancy Pelosi's Taiwan trip.<sup>10</sup> While the Judicial Assistance Agreement focuses on criminal cases, any countermeasure affecting civil and commercial disputes, including JRE, would have a much greater impact given the number and value of cases in that category. In this context, the HCCH 2019 Judgments Convention, as a multilateral and hard-law agreement, would provide more certainty and predictability for JRE if China became a member.

## Defenses Against JRE

Article 46 of the Minutes provides five grounds for a Chinese court to reject JRE. This section compares the defenses against JRE under the Minutes with those allowed under the Convention.

*(1) According to the laws of the People's Republic of China, the judgment-rendering court has no jurisdiction over the case.*<sup>11</sup>

In private international law, direct jurisdiction determines when a court of origin can seize a case according to the law of the state of origin; indirect jurisdiction (or jurisdiction in the international sense) is used by a requested court to decide whether the court of origin can seize the case according to the law of the requested state.<sup>12</sup> In the United States, Germany, and Brazil, indirect jurisdiction rules replicate direct jurisdiction rules.<sup>13</sup> However, for example, in Australia, direct and indirect jurisdiction rules are similar but not identical.<sup>14</sup>

In the Convention, Article 5 is the central provision providing indirect jurisdiction rules that a requested court should consider in JRE proceedings. In contrast, neither the Minutes nor Chinese CPL stipulates grounds for indirect jurisdiction. The Supreme People's Court should provide further guidance. Otherwise, it seems that Chinese courts would apply Chinese law for direct jurisdiction to determine whether the court of origin had jurisdiction to seize a case. The direct jurisdictional grounds recognized under Chinese law are not entirely the same as the indirect jurisdiction grounds in Article 5 of the Convention. For example, according to Article 5.1(a) of the Convention, if the person against whom recognition or enforcement is sought habitually resided in the state of origin at the time that person became a party to the proceedings in the court of origin, the judgment is eligible for JRE. This applies to both defendants and third parties to the litigation.<sup>15</sup> However, under Chinese CPL, a court can exercise jurisdiction only when the defendant, rather than a third party, habitually resides in the forum.<sup>16</sup>

*(2) The respondent has not been lawfully summoned, or even though it has been lawfully summoned, it has not been given a reasonable opportunity to present its case, or parties who are with limited litigation capacity have not been properly represented.*<sup>17</sup>

This provision of the Minutes contains three circumstances involving the violation of natural justice. The Minutes do not clarify which state's law, the state of origin or the requested state, should apply to the circumstances.

The first circumstance is undue service. It is addressed in Article 7.1(a) of the Convention. Unlike the Minutes, the Convention divides undue service into two situations subject to a different applicable law: (i) improper notice giving the defendant insufficient time to arrange for its defense, according to the law of the state of origin, and (ii) notification in a manner incompatible with the requested state's fundamental principles concerning service.

The second two circumstances are not explicitly listed in the Convention but should be considered as being covered by Article 7.1(c), regarding violations of public policy including fundamental principles of procedural fairness of the requested state. There may also be overlap with the procedural aspect of fraud in Article 7.1(b) of the Convention.

(3) *The judgment is obtained by fraud.*<sup>18</sup>

The Minutes deem fraud to be a self-standing ground for rejecting JRE, which resembles Article 7.1.(b) of the Convention. Also like the Convention, the Minutes should not be considered as limiting fraud to procedural matters such as bribery of the judge hearing the case. It should also include substantive fraud. An example would be if the judgment creditor provided fabricated evidence for damages to the court of origin.

However, neither the Convention nor the Minutes specify whether fraud should be restricted to extrinsic fraud. In many common law countries, fraud can be divided into two types: extrinsic fraud, which refers to fraud discovered after the foreign judgment was entered,<sup>19</sup> and intrinsic fraud, which is based on evidence raised, considered, or determined in the court of origin, but is argued to have been inadequately dealt with by that court.<sup>20</sup> It is unclear whether both types of fraud may be considered by Chinese courts.

(4) *The people's court has made a judgment on the same dispute or has recognized and enforced a judgment or arbitral award made in a third country on the same dispute.*<sup>21</sup>

This provision addresses the hierarchy between competing judgments. The first part of the provision applies when a Chinese court has already rendered its own judgment, and the second part applies when a Chinese court has already recognized a judgment by a third state other than the state of origin. This hierarchy is also similarly addressed by Article 7.1.(e) and (f) of the Convention.

However, the different *lis pendens* rules under Chinese CPL and the Convention may lead to different results than would be reached under the Convention. Article 533 of the

CPL Judicial Interpretations provides that where both a Chinese court and a foreign court have jurisdiction in a dispute, and one party commences a lawsuit in a foreign country while the other party commences a case on the same dispute in China, the Chinese court can accept the case regardless of whether the foreign court proceedings began first. After the Chinese court renders a judgment, the foreign judgment on the same dispute will not be recognized and enforced in China.<sup>22</sup> However, the Minutes and the CPL Judicial Interpretations do not clarify whether a Chinese court should recognize and enforce a foreign judgment if the foreign court renders a judgment earlier than the Chinese court. It is unlikely that a Chinese court would grant JRE because Article 533 of the CPL Judicial Interpretations may be extended to mean that the foreign court has no jurisdiction to hear the case in that scenario. In contrast, Article 7.2 of the Convention provides that JRE may be postponed or refused only if the proceedings in the requested state began *before* those in the state of origin.

*(5) Foreign judgments that violate the fundamental principles of the laws of the People's Republic of China or national sovereignty, security, and social and public interests shall not be recognized and enforced.*<sup>23</sup>

This provision relates to public policy, which is also a defense recognized by Article 7.1.(c) of the Convention. However, the Convention contains the word “manifestly,” connoting a high threshold, while the Minutes do not.

One area to watch closely is the issue of data security, which has been increasingly raised as a defense against taking evidence from China in transnational litigation. To the extent data is transferred overseas without complying with Chinese law, there may be a public policy defense when the consequent foreign judgment seeks recognition and enforcement in China. On August 26, 2022, the U.S. Public Company Accounting Oversight Board (PCAOB) signed a Statement of Protocol Agreement with the China Securities Regulatory Commission and China’s Ministry of Finance (PCAOB Agreement), which will enable U.S. regulators to inspect and investigate PCAOB-registered public accounting firms in Mainland China and Hong Kong.<sup>24</sup> The PCAOB Agreement allows PCAOB inspectors and investigators to review and retain all audit work papers without any redaction and transfer them from China to the Securities and Exchange Commission in the U.S.<sup>25</sup> The Agreement is laudable; however, it only applies to audit oversight. The question is therefore presented: if a U.S. judgment is made based on data transferred from China without complying with Chinese law, would a Chinese court refuse to enforce the judgment based on the public policy exception?

So far, there are few cases in which Chinese courts have relied on public policy exceptions to reject JRE, none involving concerns about data security or privacy. For

example, Chinese courts rejected the recognition and enforcement of two Uzbekistan judgments on public policy grounds because service of process was inconsistent with the China-Uzbekistan Judicial Assistance Treaty and infringed on China's judicial sovereignty.<sup>26</sup> Jurisprudence on arbitral award enforcement under the 1958 New York Convention shows that violating mandatory Chinese laws such as those in foreign exchange controls and import and export regulations does not necessarily lead to application of the public policy exception.<sup>27</sup> Given the high bar typically required for the public policy exception to apply, Chinese courts should assess the significance of the data involved and whether JRE would bring an intolerable result in China when deciding whether to apply the public policy exception.

## Conclusion

Compared with the CPL and its Judicial Interpretations, the Minutes, although soft law in nature, can be regarded as a breakthrough for JRE in China. Although important differences exist, many provisions in the Minutes are similar to those in the Convention, and China may be using them as a pilot to test and prepare its domestic JRE legal system for the eventual ratification of the Convention. The prominent benefit of the Convention comes from the predictability and certainty around JRE it brings, which would be valuable for enforcing U.S. commercial judgments in China considering the geopolitical tension between the two countries.

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<sup>1</sup> Minutes of the National Court's Symposium on Foreign-related Commercial and Maritime Trials, issued by Supreme People's Court (Jan. 24, 2022), <http://cicc.court.gov.cn/html/1/218/62/409/2172.html> [hereinafter Minutes]. Due to no official English translation, the relevant provisions of the Minutes in this Highlight are translated by the Author. The JRE provisions of the Minutes apply to foreign judgments rendered in commercial cases excluding bankruptcy, intellectual property, unfair competition, and anti-monopoly cases. For comments, see e.g., Meng Yu & Guodong Du, China Issues Landmark Judicial Policy on Enforcement of Foreign Judgments – Breakthrough for Collecting Judgments in China Series, <https://www.chinajusticeobserver.com/a/breakthrough-for-collecting-judgments-in-china-series-1>. The “court of origin” refers to the court that rendered a judgment and the state where the court is located is the “state of origin.” The “requested court” means the court that is requested to recognize and enforce a foreign monetary judgment and the state where the court is located is the “requested state.”

<sup>2</sup> For the Convention's text, see <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137>.

<sup>3</sup> Status Table, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=137>.

<sup>4</sup> Civil Procedure Law, promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, most recently amended on Dec. 24, 2021, effective Jan. 1, 2022. Judicial Interpretations of the Civil Procedure Law, promulgated by the Judicial Comm. Sup. People's Ct., Dec. 18, 2014, most recently amended and adopted Mar. 22, 2022, effective Apr. 10, 2022.

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- <sup>5</sup> Jie (Jeanne) Huang, *Enforcing Foreign Monetary Judgments in China: Breakthroughs, Challenges, and Solutions in the Context of “One Belt One Road,”* 51 GEO. WASH. INT’L L. REV. 105, 109–132 (2019).
- <sup>6</sup> Minutes, art. 44.
- <sup>7</sup> *Id.* art. 49.
- <sup>8</sup> Article 9 of Measures for the Handling of Official Documents of the People’s Court issued by the Supreme People’s Court on November 16, 2012, Fa Fa [2012] 22 Hao.
- <sup>9</sup> Hou Meng, How Do Court Minutes Affect Trials?, <http://www.fxcxw.org.cn/dyna/content.php?id=15276>.
- <sup>10</sup> Foreign Ministry announces countermeasures against Pelosi, [https://www.fmprc.gov.cn/fyrbt\\_673021/202208/t20220805\\_10735604.shtml](https://www.fmprc.gov.cn/fyrbt_673021/202208/t20220805_10735604.shtml). The US-China Judicial Assistance Agreement focuses on criminal judicial assistance.
- <sup>11</sup> Minutes, art. 46.
- <sup>12</sup> See Ralf Michaels, *Some Fundamental Jurisdictional Conceptions as Applied in Judgment Conventions*, in CONFLICT OF LAWS IN A GLOBALIZED WORLD 35–36 (Eckart Gottschalk et al. eds., 2007). “Jurisdiction in the international sense” is a term used in some common law countries as equivalent to the term “indirect jurisdiction”. See e.g. *Adams v. Cape Industries* [1990] Ch 433, 505-531, 549-557; *Lucasfilm Limited v. Ainsworth* [2010] Ch 503, [191]-[194].
- <sup>13</sup> Ronald A. Brand, *Understanding Judgments Recognition*, 40 N.C. J. INT’L & COM. REG. 877, 890-91 (2015).
- <sup>14</sup> See, e.g., Australia Foreign Judgments Act 1991 (Cth), §§ 7(3)(iv) and (v) are not entirely the same as the common-law rules for direct jurisdiction such as “presence” or “carrying business in Australia.”
- <sup>15</sup> Francisco Garcimartín & Geneviève Saumier, *Explanatory Report of Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, ¶ 139 (2020).
- <sup>16</sup> CPL, art. 22; CPL Judicial Interpretations, art. 531.
- <sup>17</sup> Minutes, art. 46.
- <sup>18</sup> *Id.*
- <sup>19</sup> For Australian authority, see, e.g. *Keele v. Findley* (1990) 21 New South Wales L. Rev. 444; for Canadian authority, see e.g., *Jacobs v. Beaver* (1908) 17 OLR 496.
- <sup>20</sup> For English authority, see, e.g., *Abouloff v. Oppenheimer & Co* (1882) 10 QBD 295. For Australian authority, see, e.g., *Yoon v. Song* (2000) 158 FLR 295.
- <sup>21</sup> Minutes, art. 46.
- <sup>22</sup> CPL Judicial Interpretations, art. 533.
- <sup>23</sup> Minutes, art. 46.
- <sup>24</sup> PCAOB Agreement with China on Audit Inspections and Investigations, <https://www.sec.gov/files/china-sop-fact-sheet.pdf>.
- <sup>25</sup> *Id.*
- <sup>26</sup> [2011] Minsi Ta Zi Di 18 Hao (Aug. 16, 2011) and [2014] Minsi Ta Zi Di 9 Hao (Mar. 6, 2014).
- <sup>27</sup> See, e.g., [2001] Min Si Ta Zi 12 Hao and [2003] Min Si Ta Zi 3 Hao.