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Ramon E. Reyes

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THE ENFORCEMENT OF FOREIGN COURT JUDGMENTS IN THE PEOPLE'S REPUBLIC OF CHINA: WHAT THE AMERICAN LAWYER NEEDS TO KNOW[†]

*Ramon E. Reyes, Jr.**

I. INTRODUCTION

The People's Republic of China (PRC or China) first entertained the notion of encouraging foreign investment within its borders in the late 1970s.¹ Since then, the PRC has worked diligently to develop an economic and legal infrastructure that promotes foreign investment and trade, while at the same time balances the needs of its planned economy.² These sometimes competing goals make it difficult to promote a feeling of certainty and stability within the international business community with respect to Chinese law and practice.³ However, the creation of the Special Economic Zones (SEZs),⁴ and promulgation of legislation like the Law of the People's Republic of Chi-

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* Associate, O'Melveny & Myers LLP, New York, New York; B.S., Cornell University, 1988; J.D., Brooklyn Law School, 1992; LL.M., New York University, 1993.

1. See JEROME A. COHEN, *CONTRACT LAWS OF THE PEOPLE'S REPUBLIC OF CHINA* 3-11 (1988).

2. This includes such mechanisms as currency exchange controls and state approval for certain projects. See, e.g., *Zhonghua Renmin Gongheguo Shewai Jingji Hetong Fa* [Foreign Economic Contract Law of the People's Republic of China], art. 7 (adopted Mar. 21, 1985, 10th Sess. of the Standing Comm. of the 6th Nat'l People's Cong.), translated in 1 *CHINA LAWS FOR FOREIGN BUSINESS: BUSINESS REGULATION (CONTRACTS)* ¶ 5-550(12), at 6621, 6623 (CCH Austl. 1988).

3. See Willy Wo-Lap Lam, *Li Committed to Economic Co-operation*, S. CHINA MORNING POST, Sept. 2, 1992, at 13, available in LEXIS, Asiapc Library, Schina File.

4. The PRC initiated its open economic policy in the Guangdong and Fujian provinces by establishing Special Economic Zones (SEZs) in Shenzhen, Zhuhai, Shantou, and Xiamen. Foreign investment in these zones is encouraged, but is regulated by the government so that its impact is felt slowly throughout the rest of China. The largest SEZ was later established in the Hainan province. Currently, there are 14 other SEZs in China, forming "a long coastal belt stretching from the north to the south embracing 11 provinces and cities . . . open to the rest of the world." *Round-up: China's Reform and Opening Entering New Stage*, Xinhua General Overseas News Service, Mar. 16, 1992, available in LEXIS, News Library, Xinhua File.

na on Chinese-Foreign Contractual Joint Ventures,⁵ has given rise to a greater feeling of certainty in Chinese law and practice than existed previously.⁶

The resulting increase in foreign investment and economic growth in the PRC has been in some cases astounding. For instance, the Shenzhen special economic zone experienced a forty-six percent economic growth rate in 1991, which was the highest in the world.⁷ Although China's success in encouraging foreign investment is commendable, the PRC cannot become complacent in an ever-changing world economy. The PRC must continue to instill in the world a positive sense of certainty and stability concerning its law and procedure if it is to continue to maintain its impressive economic growth.

Creating a feeling of certainty and stability in law and procedure is necessary for a nation to succeed in encouraging foreign economic investment within its borders. Businesses take into account foreign law and procedure in determining the profitability of business ventures and contracts. This is accomplished by obtaining opinion letters, or advice, from legal counsel on general or specific issues. These questions concern the substantive and procedural law of the foreign nation as well as the practices of courts and other tribunals or agencies. The lawyer must be able to give confident and correct legal advice based on his or her knowledge of the foreign jurisdiction's law, practice, and procedure. This advice will then be used in the determination of whether to undertake the business venture.⁸

5. Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures (adopted Apr. 13, 1988, 1st Sess. of the 7th Nat'l People's Cong.), translated in Jerome Alan Cohen, *The Long-Awaited Cooperative Venture Law*, CHINA BUS. REV., July-Aug. 1988, at 14, 17.

6. Concededly, this feeling of certainty in Chinese law and practice may not be tremendous, but it is surely greater in comparison to conditions in the late 1970s and mid-1980s.

7. See *Guangdong Experiences Unprecedented Inflow of Foreign Capital*, Xinhua General Overseas News Service, Sept. 18, 1992, available in LEXIS, News Library, Xinhua File. The Xinhua General Overseas News Service reported in 1992 that the Guangdong province experienced an unprecedented inflow of foreign capital in that year. There were over 6300 contracts for foreign investment signed in the first seven months of 1992 alone, at an estimated worth of more than US\$7.64 billion. Foreigners invested a record US\$2.18 billion dollars in Guangdong in 1992, a 90.2% increase from the same period in 1991. See *id.*

8. One question that a lawyer must be able to answer is whether a judgment rendered in a particular jurisdiction will be enforced in the jurisdiction in which the transaction took place, or the jurisdiction in which the other party has

An uncertain legal environment has hidden costs that make an accurate determination of profitability very difficult. If lawyers are not able to give completely dependable advice on the law and procedure of a given country, the ability to do business in that country will be adversely affected. Therefore, a nation should strive to make its law and procedure easily understood by the rest of the world.

Nevertheless, despite China's efforts at creating a certain and stable legal environment, a host of issues remains regarding Chinese law and practice that has caused the international business and legal communities to question the certainty and stability of Chinese business dealings. These questions range from the applicability of different pieces of economic legislation to various transactions to the effect of a void contract on the measure of damages for breach or nonperformance.⁹ One question that has not received a great deal of attention concerns the recognition and enforcement of foreign court judgments in the People's Courts.¹⁰

Although Chinese businesses prefer arbitration, many disputes are resolved using foreign courts.¹¹ Favorable judgments will require enforcement in China, as the Chinese party often does not have assets outside of China.¹² This is especially true today, as the number of lawsuits between Chinese and foreign parties has increased substantially since China began its massive economic reform.¹³ Therefore, the recognition and

assets. Unfortunately, answering this question when the other party is from China can be quite difficult.

9. See generally COHEN, *supra* note 1, at 15-26.

10. Recognition and enforcement are two different issues. Recognition deals with the formal transformation of a foreign judgment into a judgment of the People's Court. Enforcement concerns satisfying the recognized judgment—in other words, getting the offending party to pay.

11. See Andrew Kui-Nung Cheung, *Enforcement of Foreign Arbitral Awards in the People's Republic of China*, 34 AM. J. COMP. L. 295, 295-96 (1986); Frankie Leung Fook-Lun, *Lawyers Used to Common Law Principles Found in New York and English Law May Be Puzzled by Chinese-Law Concepts*, Reuter Textline, Jan. 25, 1986, available in LEXIS, World Library, Txtlne File.

12. See Cheung, *supra* note 11, at 296.

13. As a result of the increase in lawsuits in China and abroad, the PRC has sought to conclude "judicial assistance" treaties with many nations. Such treaties cover many issues, among them service of judicial and extra-judicial documents, evidence-taking through governmental agencies, recognition and enforcement of foreign court and arbitration judgments and rulings, and the offering of other judicial information. See *China Seeks to Expand Overseas Judicial Ties*, Xinhua

enforcement of foreign court judgments becomes an important question, and non-PRC lawyers should be aware of the requirements of Chinese procedure and the likelihood of successfully enforcing a foreign court judgment in the PRC.¹⁴

Prior to 1991, the recognition and enforcement of foreign court judgments in the PRC was governed by article 204 of the Law of Civil Procedure of March 8, 1982 (Civil Procedure Law of 1982).¹⁵ Article 204 was surrounded with uncertainty regarding its application, which was a deep concern for non-PRC lawyers.¹⁶ On April 9, 1991, the People's Congress enacted a new civil procedure law (Civil Procedure Law of 1991),¹⁷ which included a revised section on the recognition and enforcement of foreign court judgments. Articles 267 and 268 of that law greatly reduce the uncertainty regarding these issues, and provide a more efficient recognition and enforcement procedure.¹⁸

The balance of this paper focuses on the recognition and enforcement of foreign court judgments in the People's Republic of China. Part II presents a brief discussion of the recognition and enforcement of foreign judgments in the United States as a reference for the American lawyer. Part III examines judicial assistance in the PRC, specifically the recognition and enforcement of foreign court judgments.¹⁹ The first section of

General Overseas News Service, July 8, 1989, *available in* LEXIS, News Library, Xinhua File. For a discussion of the current state of Chinese judicial assistance treaties, see *infra* notes 61-63 and accompanying text.

14. See Cheung, *supra* note 11, at 296. Although Cheung refers specifically to the enforceability of foreign arbitral awards, the substantive law is the same with respect to the enforcement of foreign arbitral awards and foreign court judgments. See Zhonghua Renmin Gongheguo Minshi Susong Fa (Shixing) [Civil Procedure Law of the People's Republic of China (Trial Implementation)] (adopted Mar. 8, 1982, effective Oct. 1, 1982), art. 204, 1982 Zhonghua Renmin Gongheguo Fagui Huibian [Fagui Huibian] 133 (P.R.C.), *available in* LEXIS, Intlaw Library, Chinal File [hereinafter Civil Procedure Law of 1982].

15. Civil Procedure Law of 1982, *supra* note 14, art. 204.

16. See W.D.W. Dennis, *China*, in ENFORCEMENT OF FOREIGN JUDGMENTS WORLDWIDE 36, 36-38 (Charles Platto ed., 1989). For a full discussion of the uncertain aspects of article 204, see *infra* Part III.A.

17. Zhonghua Renmin Gongheguo Minshi Susong Fa [Civil Procedure Law of the People's Republic of China] (promulgated & effective Apr. 9, 1991), 1991 Zhonghua Renmin Gongheguo Guowuyuan Gongbao [Gazette of the State Council of the People's Republic of China] 481, *translated in* CHINA L. & PRAC., June 17, 1991, at 15 [hereinafter Civil Procedure Law of 1991].

18. *Id.* arts. 267-268.

19. "Judicial assistance is defined broadly to include any judicial act which

this part briefly analyzes the requirements of article 204 under the former Civil Procedure Law of 1982, and highlights the problems associated with it. The second section of Part III presents the changes in the judicial assistance procedure brought about by the new civil procedure law. Part IV concludes with recommendations for the improvement of the PRC's procedure for recognition and enforcement of foreign court judgments.

II. RECOGNITION & ENFORCEMENT OF FOREIGN JUDGMENTS IN THE UNITED STATES

The relationship between sister states is, in some sense, similar to a state's relationship with a foreign state—another state's judgment is like a "foreign judgment" as they both "cannot be enforced directly but must be made the subject of another action."²⁰ On the other hand, the Full Faith and Credit Clause of the U.S. Constitution,²¹ and enabling legislation,²² provides that a judgment entered by a U.S. court "shall have the same full faith and credit" as judgments entered in the other states.²³ This allows sister-state judgments easily to be enforced in any state. However, this constitutional provision does not apply to foreign country judgments, and there is no federal legislation on the issue.²⁴ One Supreme Court case, *Hilton v. Guyot*,²⁵ addressed the issue, but it is not considered

[must be] effected in another jurisdiction." *Editor's Notes*, CHINA L. & PRAC., Sept. 26, 1988, at 59. The most important aspects are the service of process abroad and the recognition and enforcement of foreign judgments. *See id.*

20. Andreas F. Lowenfeld, *United States of America*, in *ENFORCEMENT OF FOREIGN JUDGMENTS WORLDWIDE*, *supra* note 16, at 259, 259.

21. U.S. CONST. art. IV, § 1.

22. *See* 28 U.S.C. § 1738 (1994).

23. *Id.*

24. *See* Lowenfeld, *supra* note 20, at 259.

25. 159 U.S. 113 (1895) (5-4 decision). In *Hilton*, the Court denied enforcement of a French court judgment on the basis of what the Court called "comity." To be recognized, the foreign judgment must have provided a "full and fair trial . . . before a court of competent jurisdiction, conducting the trial upon regular proceedings," after proper service or appearance by the defendant, and under a system of impartial justice free from fraud. *Id.* at 202. However, the Court in *Hilton* did not find the French judgment lacking in any of those respects. Instead, the Court denied enforcement of the French judgment because French courts did not recognize United States judgments. *See id.* at 212, 215, 228-29. Therefore, the real reason for the decision was not the lack of "comity," but rather the lack of reciprocity or mutuality. *See* RALPH H. FOLSOM ET AL., *INTERNATIONAL BUSINESS*

binding on the several states.²⁶ Therefore, the recognition and enforcement of foreign court judgments, even in federal court, depends on state law.²⁷

Although the recognition and enforcement of foreign court judgments depends on state law, which normally varies, such judgments are regularly given effect by state and federal courts. Twenty-five states have enacted legislation similar to the Uniform Foreign Money-Judgments Recognition Act (Recognition Act),²⁸ to bring conformity of results to such cases, and to give states a consistent set of rules on the issue of recognition.²⁹ Further, forty-four states have adopted the Uniform Enforcement of Foreign Judgments Act (Enforcement Act),³⁰ which provides the enforcement procedures for already recognized foreign money judgments.³¹ Therefore, states that

TRANSACTIONS 450 (3d ed. 1988).

26. See, e.g., *Johnston v. Compagnie Générale Transatlantique*, 242 N.Y. 381, 384, 152 N.E. 121, 123 (1926).

27. See FOLSOM ET AL., *supra* note 25, at 449-52. Under the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the enforcement of foreign court judgments in the federal courts would be based on state law. See generally JONATHAN M. LANDERS ET AL., CIVIL PROCEDURE 225-75 (2d ed. 1988). For a recent case, see *Banque Libanaise Pour Le Commerce v. Khreich*, 915 F.2d 1000, 1003 (5th Cir. 1990). It should be noted, however, that the practices followed in the 50 states do not vary widely. See Lowenfeld, *supra* note 20, at 260.

28. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 261 (1962). The Virgin Islands have also adopted provisions similar to the Recognition Act. See *id.* The Recognition Act is essentially a codification of the common law on the recognition and enforcement of foreign money judgments as it existed through 1962. See Philip R. Weems, *United States*, in 2 ENFORCEMENT OF MONEY JUDGMENTS ABROAD 4 (Phillip R. Weems ed., 1995). The state of New York has adopted the Recognition Act. See N.Y. C.P.L.R. 5309 (McKinney Supp. 1996).

29. See FOLSOM ET AL., *supra* note 25, at 451. For a comprehensive discussion of the recognition and enforcement of foreign court judgments in the United States, see Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253 (1991). For a full-length discussion of the general procedures involved in enforcing a foreign money judgment in the United States, see Weems, *supra* note 28, at 9-22.

30. UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT (amended 1964), 13 U.L.A. 149 (1948). The District of Columbia and the Virgin Islands have also adopted the provisions of the Enforcement Act. See *id.*

31. Although the Enforcement Act by its terms applies only to judgments rendered in sister-states, *id.* § 1, it is applicable to foreign judgments through section three of the Recognition Act. See UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 3 cmt., 13 U.L.A. 265 (1962). Section three provides that a foreign money judgment is entitled to full faith and credit in the same manner as judgments of the several states. Therefore, the Recognition Act incorporates the Enforcement Act by its terms. See Brand, *supra* note 29, at 278-79.

have enacted both the Recognition Act and the Enforcement Act provide the clearest procedure for the recognition and enforcement of foreign money judgments.

The Recognition Act calls for full faith and credit to be granted to foreign money judgments that are final and enforceable where they were rendered, even if an appeal is pending or possible.³²

The remainder of the states follow the traditional common law approach, which is very much similar to the Recognition Act.³³ The common law relies on *Hilton*,³⁴ and recognizes foreign money judgments using the concept of comity. In fact, the recognition of foreign money judgments is relatively simple, and usually can be accomplished by an action against a judgment debtor.³⁵

Under both approaches, courts recognize foreign money judgments when there has been an opportunity for a full and fair trial before a court of competent jurisdiction; the trial was upon regular proceedings; the defendant had notice, and appeared; and the trial was under a system of jurisprudence likely to secure an impartial administration of justice. Thereafter, if there was no fraud in procuring the judgment, prejudice, or other reason why comity should not allow full effect to the judgment, it will be recognized, and eventually may be enforced.

U.S. courts will refuse to recognize a foreign money judgment if the defendant can show: (1) the foreign court lacked jurisdiction in personam; (2) the foreign court lacked fair procedures (due process); (3) the court lacked subject matter jurisdiction; (4) the defendant did not receive adequate notice of the proceedings; (5) recognition of the cause of action would violate United States', or a particular state's, public policy; (6) the judgment was obtained by fraud; (7) the judgment conflicts with another final judgment; (8) a forum selection or arbitration clause was violated; or (9) the foreign court was a seriously inconvenient forum.³⁶ The first two reasons are mandatory,

32. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 2, 13 U.L.A. 264 (1962).

33. See Weems, *supra* note 28, at 4.

34. *Hilton v. Guyot*, 159 U.S. 113 (1895).

35. This can often be done through a motion for summary judgment in lieu of a complaint. See, e.g., N.Y. C.P.L.R. 5302 (McKinney Supp. 1996).

36. See Brand, *supra* note 29, at 267-77; see also N.Y. C.P.L.R. 5304

and in those circumstances the U.S. court is required not to recognize the foreign judgment. The remaining seven reasons are discretionary.³⁷ The court will not, however, make an independent inquiry into the merits of the case.

Once the relatively simple procedure of recognition is completed, a litigant may have the foreign judgment enforced under the particular state's version of the Enforcement Act. Judgments are normally enforced "in the same manner as the judgment of a sister state which is entitled to full faith and credit."³⁸ In New York, for example, enforcement of a foreign court judgment may be accomplished in two ways: (1) by an action on the judgment, a motion for summary judgment in lieu of a complaint, or in a pending action by counterclaim, cross-claim or affirmative defense;³⁹ or (2) by filing an authenticated⁴⁰ copy of the foreign judgment with a county clerk within ninety days of authentication, mailing notification of filing to the judgment debtor at his or her last known address, and then utilizing the regular New York procedures for executing a judgment.⁴¹

In all, foreign court judgments are easily recognized and enforced in U.S. courts, despite the fact that the United States is not a party to any treaty concerning recognition and enforcement of judgments, and there is no federal legislation on the subject. As such, a person "can be reasonably certain that if he . . . secures a judgment abroad, that judgment will be recognized and enforced in the United States, provided only that the first court had jurisdiction over the judgment debtor under commonly accepted international standards."⁴²

(McKinney Supp. 1996) (following these guidelines).

37. See Weems, *supra* note 28, at 22; N.Y. C.P.L.R. 5304 (McKinney Supp. 1996).

38. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 3, 13 U.L.A. 265 (1962). Although the process has been considered relatively simple, Professor Brand points out that the current system may need reform. This is because of the requirement of reciprocity, and the "morass of sources for United States rules." Brand, *supra* note 29, at 323. He states, however, that this may be a purely academic argument, with "little empirical demonstration that the apparent problem is a real one." *Id.* For a full discussion of the various solutions, and their disadvantages, see *id.* at 283-322.

39. See N.Y. C.P.L.R. §§ 5303, 5406 (McKinney Supp. 1996).

40. The foreign court judgment may be "authenticated in accordance with an act of congress or the statutes of [New York] state . . ." *Id.* § 5402(a).

41. See *id.* §§ 5402-5403.

42. Lowenfeld, *supra* note 20, at 271.

III. RECOGNITION AND ENFORCEMENT OF FOREIGN COURT JUDGMENTS IN THE PEOPLE'S REPUBLIC OF CHINA

The recent economic trends in the PRC make the problem of enforcing foreign court judgments increasingly important. Commercial transactions within China have been multiplying rapidly in the recent past, and this is bound to result in an increase in future litigation, both in China and abroad. American lawyers will need to know to what extent foreign money judgments will be given effect in the PRC. To this end, it is helpful to look at the Civil Procedure Law of 1982, as well as the Civil Procedure Law of 1991. Such a review will show how Chinese law and procedure have changed, and where further revision is necessary.⁴³

A. *Article 204 of the Civil Procedure Law of 1982*

Prior to 1991, the recognition and enforcement of foreign court judgments in the PRC was governed by article 204 of the Civil Procedure Law of 1982.⁴⁴ Article 204 has been translated to read:

The People's Court of the People's Republic of China shall examine the ascertained judgment or decision which a foreign court has rendered and entrusted to the People's Court for enforcement in accordance with the international treaties which China has concluded or to which China is a party or according to the principle of reciprocity. Where it is found to be not in contravention of the basic principles of the laws of the People's Republic of China or China's national and social interests, the People's Court shall acknowledge its effect by a ruling and enforce it according to the procedure specified by this Law. Otherwise, it shall be returned to the foreign

43. At this point it is important to note that there are no *reported* cases of the enforcement of foreign court judgments in the PRC. There is a dearth of information on the practice of Chinese courts in this regard. All of the assertions in this paper are based on articles written by scholars and a few practitioners in the field. Interviews with a number of Chinese lawyers and judges provide another basis for the assertions found herein. This author knows of only one specific instance where an enforcement of a foreign court judgment was sought, and then rejected by a People's Court. See Moiz Tyebally, *Arbitration Clause: Banks Can Learn From OCBC's Experience*, BUS. TIMES, Nov. 24, 1992, Company News sec., at 4, available in LEXIS, News Library, Arcnws File.

44. Civil Procedure Law of 1982, *supra* note 14; see HENRY R. ZHENG, CHINA'S CIVIL AND COMMERCIAL LAW 223 (1988).

court.⁴⁵

Therefore, prior to 1991, the recognition and enforcement of a foreign court judgment required entrustment by the foreign court to a Chinese court, as well as the existence of an international treaty or reciprocity, and conformity with Chinese public policy.⁴⁶ Further, the foreign judgment must have been "final."⁴⁷ Only after these requirements were satisfied would a People's court issue a ruling recognizing the foreign court judgment. Thereafter, the judgment would be enforced as if it were rendered by a Chinese court.

It must be noted that article 204 did not state the type of review that a Chinese court would apply before recognizing a foreign court judgment. It was the consensus among Chinese jurists that the review was a procedural review based on Chinese law.⁴⁸ Therefore, Chinese courts would not look into the merits of the case, the finding of facts or the appropriateness of the application of the law to the facts.⁴⁹

Article 204 required first that the foreign court "entrust" the Chinese court with the enforcement of the foreign judgment.⁵⁰ This requirement prevented foreign parties from directly applying to a Chinese court for the enforcement of a foreign judgment. The significance of the enforcement procedure was greatly limited by the entrustment requirement for two reasons. First, many foreign jurisdictions do not have

45. ZHENG, *supra* note 44, at 223.

46. Henry Zheng states that the "Chinese Civil Procedure Law [of 1982] does not provide rules for the *recognition* of foreign judgments," but that such judgments must be recognized to be enforced. *Id.* at 227 (emphasis added). According to Zheng, the rules cited in article 204 for the *enforcement* of the foreign judgment should apply to recognition as well. *Id.* Zheng's points are well taken. The express language of article 204 established the rules for the enforcement of foreign court judgments. The "public policy" requirement of article 204 serves as the rule for recognition as well as that of enforcement. See Civil Procedure Law of 1982, *supra* note 14, art. 204.

47. Civil Procedure Law of 1982, *supra* note 14, art. 204; see ZHENG, *supra* note 44, at 224-25.

48. This is the general practice adopted by many major legal systems throughout the world. See Dong Likun, *Luelun Dui Waiguo Fayuan Panjue De Chengren Yu Zhixing* [Tentative Discussions on the Recognition and Enforcement of Foreign Judgments], 2 ZHONGGUO SHEHUI KEXUE [CHINA'S SOC. SCI.] 209, 209-23 (1985), cited in ZHENG, *supra* note 44, at 226-27.

49. See ZHENG, *supra* note 44, at 227.

50. Civil Procedure Law of 1982, *supra* note 14, art. 204; see ZHENG, *supra* note 44, at 223 (citing Likun, *supra* note 48).

procedures that allow litigants to apply for entrustment to a Chinese court. Second, Chinese judicial experience has demonstrated that foreign courts rarely make such entrustments.⁵¹ Strict compliance with the entrustment requirement would deny access to enforcement proceedings to many foreigners, as well as to some Chinese parties.⁵² Consequently, many Chinese lawyers, scholars, and jurists called for the reformation of the entrustment requirement.⁵³

Another area of concern was the issue of finality of the foreign judgment. The Chinese version of article 204 used the word *queding*, whose closest English translation is "ascertained."⁵⁴ *Queding* is not defined in Chinese law, but the requirement could have meant that the judgment must have been final under the procedural law of the foreign country in which it was rendered.⁵⁵ However, the word *zhongjiu* is normally used for such a purpose.⁵⁶ The use of *queding* might have indicated more than a "final judgment." In particular, *queding* might have required that the judgment was "rendered under ordinary litigation procedures and [had] already . . . taken effect in the foreign country . . ."⁵⁷ This includes lawful service of process, opportunity to be heard, and absence of

51. See ZHENG, *supra* note 44, at 224 (citing Likun, *supra* note 48).

52. For example, in the absence of an entrustment procedure, a Chinese party with a foreign judgment that remains unsatisfied could not request a Chinese court to enforce the foreign judgment against the foreign party's property in China. See *id.*

53. Henry Zheng suggested that the entrustment requirement was not an absolute prerequisite for the enforcement of a foreign court judgment. While article 204 allowed for judicial assistance between Chinese and foreign courts, nothing expressly prohibited Chinese courts from entertaining enforcement actions without judicial entrustment. See *id.* Further, Xu Qianfei pointed out that in some areas of the law, Chinese judicial practice had begun to show some flexibility in this regard by hearing enforcement requests brought directly by foreign natural or legal persons. Xu Qianfei, *Weiguo Pochan Xuangao Zaiwoguo De Xiaoli Wenti [Issues on the Effect of Foreign Bankruptcy Proclamation in China]*, 1 ZHENGZHI YU FALU [POL. & LAW] 49, 49 (1986), cited in ZHENG, *supra* note 44, at 224. At present this issue is moot, as the PRC has expressly allowed foreign parties to bring enforcement actions directly, without entrustment by a foreign court. See *infra* notes 77-84 and accompanying text.

54. See ZHENG, *supra* note 44, at 224. But see Civil Procedure Law of 1982, *supra* note 14, art. 204 (translation by Peking University's Chinalaw Legal Research Center, interpreting *queding* to mean "final").

55. See ZHENG, *supra* note 44, at 224.

56. See *id.*

57. *Id.*

fraud, as well as the exhaustion of all opportunities for appeal. The latter view seems to be more accepted in the Chinese legal community.⁵⁸

According to article 204, Chinese courts were to determine the enforceability of foreign court judgments under international treaties that China has concluded, or to which China is a party, or according to the principle of reciprocity.⁵⁹ In other words, an international obligation to enforce the judgment must exist either under a bilateral or multilateral treaty or through reciprocity.⁶⁰ China's first bilateral treaty on judicial assistance was concluded with France in May 1987 and became effective on February 8, 1988.⁶¹ Thereafter, the State Council approved a similar treaty with Poland.⁶² However, China has yet to sign a multilateral enforcement of foreign court judgments treaty.⁶³

58. *See id.*

59. *See* Civil Procedure Law of 1982, *supra* note 14, art. 204.

60. Another interpretation for this provision has been suggested. That is, the Chinese court is to determine that enforcement would not violate Chinese treaty obligations or the principle of reciprocity. *See* ZHENG, *supra* note 44, at 225. However, the interpretation expressed in the text represents Chinese practice. *See id.* (citing Likun, *supra* note 48).

61. Accord Concerning Judicial Assistance in Civil and Commercial Matters, Feb. 8, 1988, P.R.C.-Fr., Gazette of the State Council of the People's Republic of China, vol. 8, No. 561, Apr. 15, 1988, at 228-34, *translated in* E. ASIAN EXECUTIVE REP., Dec. 15, 1988, at 20 [hereinafter Sino-French Accord]; *see* Laurence W. Bates, *The Sino-French Treaty on Judicial Assistance*, E. ASIAN EXECUTIVE REP., Nov. 15, 1988, at 11.

62. *See* Bates, *supra* note 61, at 14 n.2 (citing Accord Concerning Judicial Assistance in Civil and Criminal Matters, Mar. 20, 1988, P.R.C.-Pol., Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan Gongbao [Gazette of the Supreme People's Court of the People's Republic of China], vol. 1, No. 13, at 22-27); *see infra* note 76 and accompanying text.

Some general treaties to which the PRC is a party include provisions that obligate China to recognize and enforce foreign court judgments in specific situations. *See, e.g.,* International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, art. X, 973 U.N.T.S. 3, 8, *reprinted in* 9 I.L.M. 45, 56-57 (1970). Further, Guangdong Province has a judicial assistance agreement with Hong Kong, which took effect on July 1, 1988. *See* Bates, *supra* note 61, at 14 n.3. Moreover, the Supreme People's Court announced that the court is prepared to recognize certain judgments from Macao and Hong Kong, provided such judgments do not violate the basic principles of law of the PRC and the public order. *See* Steve Nelson, *Certain Judgments Rendered in Hong Kong May Be Recognized in the PRC*, CHINA L. & PRAC., Jan. 21, 1991, at 24. It is unclear at this point whether the recognition of judgments in Hong Kong will be affected by the approach of July 1, 1997, when China officially regains control of the island.

63. On March 2, 1991, the PRC acceded to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial

A document issued by the Supreme People's Court in February 1988, and known as the Implementation Notice,⁶⁴ proved to be a positive step in dealing with bilateral treaties like the Sino-French Accord.⁶⁵ The Implementation Notice tells Chinese courts that: (1) the Ministry of Justice is designated as the central governmental organ charged with the implementation of judicial assistance treaties;⁶⁶ (2) requests for judicial assistance must be dealt with strictly in accordance with all applicable treaties to which China has acceded;⁶⁷ and (3) in the absence of a treaty, the relevant law is the Civil Procedure Law of 1982.⁶⁸ A full recitation of the Implementa-

Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 (entered into force for the United States Feb. 10, 1969) [hereinafter Hague Convention]. This Convention covers service of judicial and extrajudicial process. Although this is related to the recognition and enforcement of foreign court judgments, it is beyond the scope of the present article. For a thorough discussion of the Hague Convention, see Stephen F. Downs, Note, *The Effect of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 2 CORNELL INT'L L.J. 125 (1969). Further, in December 1986, China acceded to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (entered into force for the United States Dec. 29, 1970) (commonly known as the New York Convention). See Mark Sidel & Mao Tong, *Recognition and Enforcement of Foreign Arbitral Awards Under the N.Y. Convention*, E. ASIAN EXECUTIVE REP., May 15, 1988, at 14.

64. *Notice of the Supreme People's Court Concerning the Implementation of Chinese-Foreign Judicial Assistance Accords* (issued Feb. 1, 1988), Doc. No. 3, Fa (ban) fa (1988) (P.R.C.), translated in *Supreme People's Court Notice on Implementation of Chinese-Foreign Judicial Assistance Accords*, E. ASIAN EXECUTIVE REP., Nov. 15, 1988, sec. A, at 26 [hereinafter *Implementation Notice*].

65. See Bates, *supra* note 61, at 11.

66. *Implementation Notice*, *supra* note 64. In 1987 a special group of lawyers, termed the Bureau of Judicial Assistance, was established within the PRC's Ministry of Justice to implement and negotiate judicial assistance treaties. See Bates, *supra* note 61, at 12.

67. *Implementation Notice*, *supra* note 64.

68. *Id.* In addition to the Civil Procedure Law of 1982, the People's courts must look to the provisions of another Circular, issued in August 1986. *Notice of the Supreme People's Court, the Ministry of Foreign Affairs and the Ministry of Justice Concerning Certain Questions on the Use by Our Country's Courts and Foreign Countries' Courts of Diplomatic Channels for the Mutual Entrustment of Service of Legal Documents* (issued Aug. 14, 1986), Doc. No. 47 Waifa (1986) (P.R.C.), translated in *Notice Concerning Use of Diplomatic Channels by P.R.C. and Foreign Courts for the Mutual Entrustment of Service of Legal Documents*, E. ASIAN EXECUTIVE REP., Dec. 15, 1988, sec. A, at 19. This Circular is part of the law in the absence of a judicial assistance treaty. See *Implementation Notice*, *supra* note 64. However, the Circular contains nothing of major importance in relation to the aspects of the recognition and enforcement of foreign court judgments discussed in this article.

tion Notice is unnecessary, as its effect on recognition and enforcement is straightforward.⁶⁹

The enforcement of French judgments in the PRC was made very simple by the Sino-French Accord. Under Chapter IV of the Accord, a French party may apply directly to the relevant Chinese court for the enforcement of a foreign judgment without the assistance of the designated governmental organs.⁷⁰ This entails presenting the relevant court with a copy of the final judgment, evidence that the judgment has been served on the adverse party, and certified translations of each document in Chinese.⁷¹ PRC Courts could refuse to recognize judgments only if the foreign judgment was issued by a court that was without proper jurisdiction;⁷² the foreign judgment was not final or otherwise enforceable under the rules of the foreign jurisdiction;⁷³ the losing party was not properly served and did not appear;⁷⁴ or if enforcement would damage the country's sovereignty, security, or public order.⁷⁵ Other judicial assistance treaties with China contain provisions similar to the Sino-French Accord.⁷⁶

In the absence of a bilateral judicial assistance treaty, judgment creditors must rely on mutual reciprocity to enforce their foreign court judgments.⁷⁷ Article 187 of the Civil Proce-

69. For the effects of the Implementation Notice on the Civil Procedure Law of 1991, see *infra* text accompanying note 112.

70. Sino-French Accord, *supra* note 61, arts. 19-25.

71. See *id.* art. 21; Bates, *supra* note 61, at 14.

72. See Sino-French Accord, *supra* note 61, art. 22(1).

73. See *id.* art. 22(3).

74. See *id.* art. 22(4).

75. See *id.* art. 22(5). Further, enforcement could be refused if, with respect to the capacity or status of a natural person, the domestic court would have applied a rule of international law different from that applied by the foreign court, unless application of the different rule could result in the same conclusion. See *id.* art. 22(2). Also, enforcement may be refused if the court in which enforcement is sought has reached a different decision in another case between the same parties on the same set of facts and having the same claim, or if that court recognized a third-country judgment that was decided differently in another case between the same parties, with the same facts and claim. See *id.* art. 22(6).

76. See Bates, *supra* note 61, at 12 (citing potential treaties with Belgium, Italy, and the United Kingdom).

77. See Dennis, *supra* note 16, at 36. Some scholars equate the principle of reciprocity embodied in article 204 of the Civil Procedure Law of 1982 with that of comity. See, e.g., FOLSOM ET AL., *supra* note 25, at 451; Dennis, *supra* note 16, at 36. While there are many similarities between the two concepts, comity is slightly broader. See BLACK'S LAW DICTIONARY 267, 1270 (6th ed. 1990). To avoid any confusion, reciprocity should be used to express the principle stated in article 204,

ture Law of 1982 required Chinese courts to accord treatment which reciprocated the treatment accorded by that country to Chinese nationals.⁷⁸ Therefore, if the courts in a foreign country refused to enforce Chinese court judgments, reciprocity demanded that Chinese courts refuse to enforce judgments from the courts of that country. The issue of reciprocity is confused where the foreign country has more than one legal system—for example, state and federal⁷⁹—or where the country's courts recognize Chinese judgments only on certain legal issues. In any event, Chinese law gave discretion to the courts in determining the reciprocity requirements under article 204.⁸⁰ The lack of reported cases, however, makes any assertion about China's reciprocity with a particular nation suspect, at best.

Perhaps the most important requirement of article 204 was the foreign judgment's conformity with the "fundamental principles of the law of the People's Republic of China or [China's] national and social interests."⁸¹ A Chinese court's review of the judgment was limited to deciding whether the judgment was compatible with those interests. It has been suggested that this requirement is analogous to the public policy requirement of most of the major legal systems in the world, which is somewhat narrow.⁸² Others have stated that the scope of this requirement is likely to be wide.⁸³ The truth

and not comity.

78. Civil Procedure Law of 1982, *supra* note 14, art. 187.

79. See ZHENG, *supra* note 44, at 226. For example, it is unclear whether a Chinese court would have found the reciprocity requirement satisfied in the following situation. A party seeks to enforce a federal court judgment from the Southern District of New York. New York state and federal courts regularly enforce Chinese court judgments, but California courts do not. The reciprocity relationship within the United States is therefore unclear in such a case. See *id.*

80. Civil Procedure Law of 1982, *supra* note 14, art. 204; see ZHENG, *supra* note 44, at 226.

81. Civil Procedure Law of 1982, *supra* note 14, art. 204.

82. Zheng also points out that problems arose under article 204 when a treaty required a Chinese court to enforce a judgment which violated the policy interests of the PRC. Which would have preference, the treaty or Chinese law? Article 189 suggests that the treaty should rule. Some Chinese jurists suggested that there is an implied public policy in favor of international obligations. Others, however, refute this argument. See ZHENG, *supra* note 44, at 226 (citing Likun, *supra* note 48).

83. See Dennis, *supra* note 16, at 37-38. Dennis cites the example of Chinese adherence to the doctrine of absolute sovereign immunity, even for commercial acts. A suit against the PRC, or against its officials, would be regarded as violat-

of either assertion has yet to be proven as there are no reported cases on the issue. In any event, the "public policy" requirement of article 204 was a potential trouble-spot for foreign parties trying to enforce their judgments in China.

In all, article 204 presented a somewhat cumbersome enforcement procedure with its requirement of judicial entrustment. Further, a number of questions remained concerning the reciprocity and "public policy" requirements. As a result, Chinese jurists called for the reformation of the judicial assistance procedures, as well as other parts of the Civil Procedure Law of 1982.

B. Articles 267-268 of the Civil Procedure Law of April 9, 1991

Since the promulgation of the Civil Procedure Law of 1982, civil actions in the PRC more than doubled, and economic disputes more than quadrupled.⁸⁴ On April 9, 1991, in a further attempt to simplify and clarify PRC law, and to promote a sense of certainty and stability in China, the People's Congress promulgated the Civil Procedure Law of 1991,⁸⁵ which included a revised section on the recognition and enforcement of foreign court judgments. While the changes were not many,⁸⁶ the Civil Procedure Law of 1991 improved on the structure established by article 204.⁸⁷

The first major change in the recognition and enforcement procedure is that the procedure is now found in two sections of the Civil Procedure Law of 1991, rather than in one. Article 267 concerns what was formerly the entrustment requirement, and article 268 concerns the Chinese court's role in recognition and enforcement of foreign court judgments—the level of re-

ing the basic principles of law of the PRC. *See id.*

84. *See* Edward J. Epstein, *Editor's Notes*, CHINA L. & PRAC., June 17, 1991, at 61, 62. There were 1,851,897 such disputes in 1990. Most of the economic disputes were contract claims. *See id.*

85. Civil Procedure Law of 1991, *supra* note 17.

86. Shortly after its promulgation, an editor for *China Law and Practice* stated that "[t]he only significant departure from the tenor of the earlier law is a slight expansion of party autonomy in the conduct of proceedings." Epstein, *supra* note 84, at 61-62.

87. The Civil Procedure Law of 1991 does not alter the substance of the Civil Procedure Law of 1982, but supplements and modifies its provisions, largely in response to economic changes and legal developments between the early 1980s and the early 1990s. *See id.* at 61.

view, and how to execute the judgment.⁸⁸ By separating the recognition and enforcement procedure into two distinct sections, the People's Congress has made the procedure more comprehensible. For example, the more precise language evidences China's progress in drafting legislation.

There are two changes in the enforcement procedure established by the Civil Procedure Law of 1991. Article 267 states:

If a legally effective judgment or ruling made by a foreign court requires recognition and execution by a People's Court of the People's Republic of China, the party concerned may directly apply for recognition and execution to the competent Intermediate People's Court of the People's Republic of China. Alternatively, the foreign court may, pursuant to the provisions of an international treaty concluded between or acceded to by the foreign state and the People's Republic of China, or in accordance with the principle of reciprocity, request the People's Court to recognize and execute the judgment or ruling.⁸⁹

The most important aspect of the change found in article 267 concerns the entrustment requirement.⁹⁰ It is now clear that entrustment by a foreign court is not the only way to get a judgment recognized and enforced in the PRC. The new law enables a foreign party to "directly apply for recognition and execution" to the appropriate People's Court.⁹¹ In most cases, the appropriate court would be the Intermediate People's Court⁹² where the Chinese party is domiciled.⁹³ If the judgment debtor is not a citizen of the PRC, the appropriate People's Court would be the jurisdiction in which the property at issue is located.⁹⁴

88. Civil Procedure Law of 1991, *supra* note 17, arts. 267-268.

89. *Id.* art. 267.

90. *See supra* text accompanying notes 50-53.

91. Civil Procedure Law of 1991, *supra* note 17, art. 267.

92. The Intermediate People's Courts are the courts of first instance in major cases involving foreigners. *See id.* art. 19(1).

93. If the judgment debtor is a citizen of the PRC with no determinable domicile, then the judgment debtor's habitual place of residence will be the appropriate place for the recognition action. *See id.* art. 22. In any event, if the Intermediate People's Court to which the judgment creditor applied is the incorrect court, the People's Court can refer the action to the appropriate court. *See id.* art. 36.

94. *See id.* art. 243.

The change in procedure found in article 267 reflects the attitude of many Chinese jurists,⁹⁵ as well as the judicial practice in some courts,⁹⁶ regarding the cumbersome procedure of judicial entrustment established by article 204 of the Civil Procedure Law of 1982. There is nothing inherent in the enforcement of foreign court judgments that requires entrustment by the foreign court. Allowing a party to apply directly for recognition reduces the time and cost associated with entrustment, and promotes judicial economy. Further, this procedure avoids problems like when the foreign jurisdiction does not have an entrustment procedure.⁹⁷ This is especially important to U.S. parties, as the United States and China have no formal entrustment procedure or judicial assistance treaty.⁹⁸ In all, the inclusion of direct application by the foreign party is a welcome addition to the Civil Procedure Law.⁹⁹

As an alternative to bringing the recognition action directly, article 267 retains the entrustment procedures of article 204.¹⁰⁰ Entrustment by the foreign court is permitted pursuant to an international treaty or on the basis of reciprocity.¹⁰¹ By retaining the entrustment option, the Civil Procedure Law of 1991 facilitates the use of judicial assistance treaties or other means for the speedy recognition and enforcement of foreign court judgments, which can include judicial entrustment. This allows for a greater degree of flexibility in the enforcement procedure, as opposed to merely allowing direct action by the foreign party.

A minor change brought about by article 267 concerns the finality of the foreign judgment. Article 267 requires the foreign judgment or ruling to be "legally effective," rather than "final" or "ascertained."¹⁰² Does this indicate merely a change

95. See ZHENG, *supra* note 44, at 224 (citing Likun, *supra* note 48).

96. See *id.* (citing Qianfei, *supra* note 53).

97. See *supra* text accompanying notes 50-51.

98. See Deborah M. Rosenberg, *Enforcement of Judgments and Arbitral Awards in the People's Republic of China*, in SELECTED TOPICS IN CHINESE BUSINESS LAW 54, 65 (Howard Chao ed., 1996).

99. This departure from the entrustment requirement is consistent with the tenor of the Civil Procedure Law of 1991, which slightly expands the degree of party autonomy in the conduct of civil proceedings. See Epstein, *supra* note 84, at 61.

100. Civil Procedure Law of 1991, *supra* note 17, art. 267.

101. See *id.*

102. Compare Civil Procedure Law of 1991, *supra* note 17, art. 267, with Civil

in wording, or is there a change in the requirement of the foreign judgment's status? One Chinese judge believes that a legally effective judgment is one that has already taken effect in the judgment forum, where the judgment debtor has already been served, and the judgment has executory force.¹⁰³ A Chinese lawyer from Shanghai suggests that a legally effective judgment is one that is final, and fulfills all "due process" requirements, including proper service of the judgment—similar to the requirements of article 204 of the Civil Procedure Law of 1982.¹⁰⁴ Since the Civil Procedure Law of 1991 does not substantively disturb the provisions of the Civil Procedure Law of 1982, but supplements and modifies its provisions,¹⁰⁵ it is likely that the requirement that the foreign judgment be "legally effective" is an amalgam of both concepts. Without formulating a specific requirement, it is safe to assume that the requirement that the foreign judgment be legally effective means that the judgment must be final, rendered in accordance with the notion of "due process," and has already taken effect in the judgment forum. However, a good deal of judicial practice must occur before one can be absolutely certain of any such formulation.

After the Intermediate People's Court determines that a party has a legally effective foreign judgment that needs to be enforced, the court must apply the appropriate level of review to determine if that judgment should be recognized and enforced.¹⁰⁶ While the level of review applied in recognizing and enforcing foreign court judgments may not have actually changed with the promulgation of the Civil Procedure Law of 1991, there is an interesting modification under the wording of article 268 that must be addressed. Article 268 states:

Having received an application or a request for recognition and execution of a legally effective judgment or ruling of a foreign court, a People's Court shall review such judgment or ruling pursuant to international treaties concluded or acced-

Procedure Law of 1982, *supra* note 14, art. 204.

103. Interview with Yungzheng Han, Assistant Judge of the Supreme People's Court, Shanghai, in New York, NY (Fall 1993).

104. Interview with Yafeng Sun, attorney, Shanghai and M.C.J. candidate, New York University School of Law, in New York, N.Y. (Fall 1993).

105. See Epstein, *supra* note 84, at 61.

106. See Civil Procedure Law of 1991, *supra* note 17, art. 268.

ed to by the People's Republic of China or in accordance with the principle of reciprocity. If, upon such review, the People's Court considers that such judgment or ruling neither violates the basic principles of law of the People's Republic of China nor violates state sovereignty, security and the public interest, it shall rule to recognize its effectiveness. If execution is necessary, it shall issue an order of execution, which shall be implemented in accordance with the relevant provisions of this Law. If such judgment or ruling contradicts the basic principles of law of the People's Republic of China or violates state sovereignty, security or the public interest, the People's Court shall refuse to recognize and execute the judgment or ruling.¹⁰⁷

The first change in article 268 is the requirement of reviewing the judgment pursuant to an international treaty, or in accordance with reciprocity. Article 204 did not provide such a clear direction in the actual procedure for reviewing foreign court judgments.¹⁰⁸ Under article 268, the appropriate procedure for review is specifically stated. International treaties, such as the Sino-French Accord,¹⁰⁹ provide specific procedures that must be followed in reviewing foreign judgments from either nation. When there is no treaty between the two nations,¹¹⁰ the principle of mutual reciprocity must be used.¹¹¹ Reciprocity requires that the Chinese court impose restrictions on foreigners that are similar to those imposed by foreign courts on Chinese litigants. The inclusion of the procedure of review can be seen as incorporating the provisions of the Implementation Notice into the Civil Procedure Law of 1991.¹¹² Finally, the enunciation of the procedure to be used in reviewing a foreign judgment is a definite improvement over the prior law.

A second change in the recognition and enforcement of

107. *Id.*

108. See Civil Procedure Law of 1982, *supra* note 14, art. 204; see also *supra* text accompanying notes 48-49.

109. Sino-French Accord, *supra* note 61.

110. Currently, there is no treaty on the recognition and enforcement of foreign court judgments between the United States and China. See Rosenberg, *supra* note 98, at 65.

111. As there is no clear picture as to the state of mutual reciprocity between the United States and China, a potential problem exists with the enforcement of any judgment from the United States.

112. *Implementation Notice*, *supra* note 64.

foreign court judgments found in article 268 is the rewording of the "public policy" requirement. Both the Civil Procedure Law of 1982 and 1991 require the People's Court to determine that recognition and enforcement of the foreign judgment would not violate the "public policy" of the PRC, and include the "basic principles of law" of the PRC as a part of that determination.¹¹³ It is reasonable to assume that the "basic principles of law" include the principles of jurisdiction, service of process, and so forth, and that any judgment rendered in violation of such principles would not be recognized or enforced.

As for the remainder of the "public policy" requirement, the two articles are dissimilar. While article 204 speaks of "China's national and social interest," article 268 mentions China's "state sovereignty, security and the public interest."¹¹⁴ Whether this represents a change of substance one can only guess. There is yet to be formed a body of judicial opinion from which to draw a hypothesis on what violates China's state sovereignty, security, and the public interest, let alone to determine a rule of law. This provision could be interpreted in a narrow or wide manner.¹¹⁵ However, given the fact that the Civil Procedure Law of 1991 does not substantively alter the provisions of its predecessor, and instead only modifies and supplements them,¹¹⁶ it is likely that courts will develop a concept of "public policy" that would work under either provision. Again, a good deal of judicial practice must occur before one can be certain of asserting what violates China's state sovereignty, security or public interest.

Moreover, in examining this public policy provision, it is unclear what role, if any, the Chinese Communist Party could play in an enforcement proceeding. Clearly, the Communist Party is the ruling party in the PRC, and all people in the PRC are expressly under its leadership and authority.¹¹⁷ Although the Civil Procedure Law of 1991 provides that the People's

113. See Civil Procedure Law of 1982, *supra* note 14, art. 204; Civil Procedure Law of 1991, *supra* note 17, art. 268.

114. Compare Civil Procedure Law of 1982, *supra* note 14, art. 204, with Civil Procedure Law of 1991, *supra* note 17, art. 268.

115. See *supra* text accompanying notes 82-83.

116. See Epstein, *supra* note 84, at 61.

117. See ZHONGHUA RENMIN GONGHEGUO XIANFA [CONSTITUTION] preamble, para. 7 (P.R.C.).

Courts are to enjoy judicial independence, free from interference by any "administrative organ, social organization or individual,"¹¹⁸ the Communist Party's influence in the PRC cannot be ignored.¹¹⁹ Interestingly, the Civil Procedure Law of 1991 is silent as to whether the Communist Party may direct a People's court in performing its judicial duty relative to the enforcement of foreign court judgments, or any issue for that matter.¹²⁰

A third change in the recognition and enforcement procedure brought about by article 268 concerns the issue of recognition without enforcement. After the Intermediate People's Court has found that the foreign judgment does not violate the "public policy" of the PRC, it may issue a ruling recognizing its effectiveness, and "execute"¹²¹ the judgment *if necessary*. As such, article 268 makes it clear that judgments and rulings of foreign courts can be recognized for purposes other than enforcement or "execution;" for example, as evidence of bankruptcy.¹²² This was not so with article 204 of the Civil Procedure Law of 1982.¹²³ Nevertheless, a judicial practice developed to accommodate this need, and was later specifically incorporated into the Civil Procedure Law of 1991. Finally, article 268 enables the court to issue and order execution, and implement it in accordance with the relevant provisions of the Civil Procedure Law.¹²⁴ The execution of judgments is covered in parts 20 through 23 of the Civil Procedure Law of 1991, and is discussed below.¹²⁵

The final aspect of article 268 that requires mention is the reiteration of the "public policy" requirement. The final sentence of article 268 directs the People's Court to refuse to recognize and enforce a foreign judgment that violates the basic principles of law of the PRC or China's state sovereignty, security or public interest. Earlier in article 268, the courts are di-

118. Civil Procedure Law of 1991, *supra* note 17, art. 6.

119. See Bin Xue Sang, *China's Civil Procedure Law: A New Guide for Dispute Resolution in China*, 26 INT'L LAW. 413, 416 (1992).

120. See *id.* at 72 nn.154-56.

121. "Execute" is merely another term for "enforce." See Civil Procedure Law of 1991, *supra* note 17, art. 268.

122. See ZHENG, *supra* note 44, at 227 (citing Qianfei, *supra* note 53).

123. See ZHENG, *supra* note 44, at 227.

124. See Civil Procedure Law of 1991, *supra* note 17, art. 268.

125. See *infra* Part III.C.

rected to review the foreign judgment and if it does not violate the aforementioned principles, it should be recognized and enforced. It is unclear whether the final sentence of article 268 adds to the procedure for recognizing and enforcing foreign court judgments or merely serves to reinforce the importance of the "public policy" requirement. Again, a good deal of judicial practice must occur before one can be certain of the importance of the final sentence of article 268.

In all, articles 267 and 268 represent a marked improvement over article 204 of the Civil Procedure Law of 1982. The procedure for recognition and enforcement of foreign judgments is clearer, and simpler than before. For example, the specific reference to the procedure for reviewing foreign judgments,¹²⁶ and the reference to a legally effective judgment,¹²⁷ eliminate some of the confusion that existed under article 204. Further, the system is more accessible, now that parties may bring recognition actions directly. However, some questions remain that need to be addressed before the recognition and enforcement procedure of the Civil Procedure Law of 1991 can be evaluated fully.

C. Execution of Recognized Judgments Under the Civil Procedure Law of 1991

The execution of civil judgments, including enforcement of foreign court judgments, is governed by Parts 20 through 23 of the Civil Procedure Law of 1991.¹²⁸ Article 216 allows parties to apply for the execution of legally effective civil judgments,¹²⁹ and gives judges the power to refer such judgments for execution.¹³⁰ As was stated earlier, the appropriate court for the recognition and enforcement of foreign court judgments

126. See *supra* text accompanying notes 108-12.

127. See *supra* text accompanying notes 103-04.

128. Civil Procedure Law of 1991, *supra* note 17, arts. 207-236; compare *id.*, with Civil Procedure Law of 1982, *supra* note 14, arts. 161-184.

129. Civil Procedure Law of 1991, *supra* note 17, art. 216. Provided that one or both of the parties is not a citizen of the PRC, there is a one-year time limit on applying for enforcement, which begins after the last day on which performance of the judgment was to have occurred. See *id.* art. 219. If both parties are citizens of the PRC, the time limit is only six months. See *id.*

130. See *id.* art. 216. This aspect of article 216 is redundant in the case of the enforcement of foreign court judgments, as article 268 grants the judge the same power. *Id.* art. 268.

is the Intermediate People's Court where the judgment debtor is domiciled.¹³¹ If the property subject to execution is located in a locality other than that of the People's Court which recognized the judgment, execution can be entrusted to a People's Court in that locality.¹³² Execution is accomplished by "execution officers," who operate under the auspices of "execution organs" established by the courts.¹³³ The execution officers are required to issue a notice of execution ordering the judgment debtor to perform the judgment.¹³⁴ If the person subject to execution does not perform within the specified time, the People's Courts are given the power to compel performance, or in the alternative to entrust a relevant work unit to perform the obligation, at the expense of the person subject to execution.¹³⁵

If the judgment is not performed within the specified time, the People's Courts are also given the power to enforce the judgment in any of a number of ways.¹³⁶ The Civil Procedure Law of 1991 empowers the People's Courts to execute judgments that are not performed by the judgment debtor. This entails the ability to direct inquiries to banks, and to freeze and transfer accounts;¹³⁷ to withhold and garnish revenue;¹³⁸ and to seal up, distrain, freeze, auction off or sell property.¹³⁹ Further, the Civil Procedure Law of 1991 imposes penalties on those who do not pay judgments within the time limit specified. The penalty is equal to twice the interest on the judgment amount for the period during which the obligation remained unpaid.¹⁴⁰ And finally, article 233 obligates the judgment

131. See *supra* notes 92-94 and accompanying text.

132. See Civil Procedure Law of 1991, *supra* note 17, art. 210. The entrusted court has 15 days in which to commence execution, and may not refuse to comply. If the entrusted court does not execute the judgment within 15 days of receipt of the request, the entrusting court "may request the People's Court one level higher than the entrusted People's Court to instruct it to execute the judgment ruling." *Id.*

133. *Id.* art. 209. The Supreme People's Court has the power to determine the duties of the executing organs. See *id.*

134. See *id.* art. 220.

135. See *id.* art. 231.

136. See *id.* arts. 221-233.

137. See *id.* art. 221.

138. See *id.* art. 222.

139. See *id.* art. 223. However, both this article and article 222 contain provisos that a court should not deprive a person subject to execution of "necessary living expenses," *id.* art. 222, or "daily necessities," *id.* art. 223.

140. *Id.* art. 232. If the judgment debtor fails to perform any other obligation,

debtor to continue paying the judgment if the execution measures adopted by the court prove to be insufficient to satisfy the judgment.¹⁴¹

Despite the powers granted to the People's Courts to execute judgments, it is often difficult for the courts to get domestic judgments enforced, let alone foreign court judgments.¹⁴² In fact, the failure to enforce court decisions was described as "the most striking problem occurring in the adjudication work of economic cases."¹⁴³ The difficulty in getting judgments executed is due to a number of reasons. First, the courts lack a contempt power.¹⁴⁴ Article 102 of the Civil Procedure Law of 1991 provides that parties may be fined or detained if they refuse to obey a legally effective judgment or ruling.¹⁴⁵ However, one commentator has noted that article 102 only applies if the refusal to obey violates the Criminal Law, and that occurs only when threats or violence are used.¹⁴⁶ In most cases, therefore, the court would not be able to impose fines or detain

a fine may also be imposed for the deferred performance. *See id.*

141. *Id.* art. 233. The judgment creditor can seek execution on other property if the creditor learns of its existence after the original enforcement action was brought.

142. For a full discussion on this topic, see Donald C. Clarke, *Dispute Resolution in China*, 5 J. CHINESE L. 245, 263-68 (1991). Clarke points out that "[i]t is frequently difficult to get court judgments enforced against any determined defendant, to say nothing of a well-connected and politically powerful defendant." *Id.* at 263.

143. Zheng Tianxiang, *Zuigao Renmin Fayuan Gongzuo Baogao* [Supreme People's Court Work Report], 1988 *Zhonghua Renmin Gongheguo Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Gongbao* [Gazette of the Standing Committee of the National People's Congress of the People's Republic of China], No. 4, at 24, 29, translated in 3 BRITISH BROADCASTING CORPORATION, SUMMARY OF WORLD BROADCASTS: THE FAR EAST, May 3, 1988, at C1/1, available in LEXIS, News Library, Bbcswb File. Such complaints are common features of the annual Supreme People's Court work reports. *See, e.g.,* Ren Jianxin, *Supreme People's Court Work Report*, *Fazhi Ribao* [Legal Sys. Daily], Apr. 12, 1991, at 2, translated in 3 BRITISH BROADCASTING CORPORATION, SUMMARY OF WORLD BROADCASTS: THE FAR EAST, Apr. 25, 1991, at C1/1, available in LEXIS, News Library, Bbcswb File; *see also* Clarke, *supra* note 142, at 263 n.66.

144. *See* Clarke, *supra* note 142, at 264. Article 157 of the Criminal Law makes it a crime to refuse to obey a court judgment through the use of threats or violence. *Zhonghua Renmin Gongheguo Xing Fa* [Criminal Law of the People's Republic of China], art. 157 (adopted July 1, 1979, effective Jan. 1, 1980, 2d Sess. of the 5th Nat'l People's Cong.), 1979 *Fagui Huibian* 48. However, article 157 does not extend to a person who disobeys a court order simply by not following the order. *See* Clarke, *supra* note 142, at 264.

145. Civil Procedure Law of 1991, *supra* note 17, art. 102(6).

146. *See* Clarke, *supra* note 142, at 265 n.73.

the noncomplying party. Second, the cooperation of local authorities is needed to enforce judgments, and these authorities are often reluctant to help.¹⁴⁷ Third, according to Clarke, "[C]ourts often lack sufficient bureaucratic clout to enforce their judgments against administrative units."¹⁴⁸ In sum, there are significant obstacles in enforcing court judgments.

The problems mentioned above are compounded when foreign judgments are enforced. Local courts are de facto arms of the local government, and are dependent on the government for financial support.¹⁴⁹ Further, local authorities often oppose enforcement of foreign judgments because the government is more dependent upon its own resources than it was before the economic reforms of the recent past.¹⁵⁰ The local authorities are unwilling to let resources flow out from the jurisdiction. Under such circumstances, it is very difficult to get the cooperation of a local court if the local authorities oppose.¹⁵¹ It remains to be seen, however, how well the Civil Procedure Law of 1991 will assist courts in enforcing foreign court judgments. As of the present, there are not enough published opinions, or even second hand information, on the enforcement of foreign court judgments from which to draw an accurate picture.

D. Opinion of the Supreme People's Court on the Application of the Civil Procedure Law of 1991

On July 14, 1992, the Supreme People's Court issued an opinion regarding the application of the Civil Procedure Law of 1991 (the Opinion).¹⁵² The Opinion expands on a number of

147. *See id.* at 265.

148. *Id.* In theory, courts and governmental agencies are supposed to be equal. *See id.* However, judges in the PRC are generally of a lower bureaucratic rank than officials of the same level in administrative organizations. *See id.* "A low-status judge does not have the prerogative to disobey, much less to command, a higher-status official." *Id.*

149. *See id.* at 266.

150. *See id.* Clarke notes that "[t]he financial contract system, under which localities are [obligated] to turn over a fixed amount of revenues to the [government] center each year and may keep the remaining revenues, has made it even less likely that local authorities will permit resources to flow out of the jurisdiction." *Id.* at 267 (footnote omitted).

151. *See id.* at 266-67.

152. *Application of the Civil Procedure Law, Several Questions: Opinion* (issued July 14, 1992, Supreme People's Court), translated in CHINA L. & PRAC., Jan. 14,

issues that were not addressed in the Civil Procedure Law of 1991, and contains several points relevant to the discussion of the enforcement of foreign court judgments in the PRC. Although these points do not resolve all of the questions raised above, they are nevertheless important to this discussion.

First, the Opinion provides a definition of precisely what constitutes a case involving foreign parties:

Civil cases in which one party or both parties are foreigners, stateless persons, foreign enterprises or foreign organizations; or in which the legal fact of establishment, modification or termination of the civil legal relationship between the parties legally occurred in a foreign country; or in which the object of the action is located in a foreign country, shall be civil cases involving foreign parties.¹⁵³

This definition encompasses not only what is thought of as traditional cases involving foreign parties, but also cases in which both parties could be from the PRC but the subject matter of the dispute ("the object of the action") was located in a foreign nation, or the prior relationship ("the legal fact of establishment, modification or termination of the legal relationship") was governed by foreign law. This appears to be a rather broad definition of such cases.

Second, the Opinion provides for jurisdiction in the People's courts over cases which may be litigated concurrently in foreign courts.¹⁵⁴ However, the Opinion also mandates a People's court to refuse to recognize and enforce "the judgment or ruling of the foreign court in such a case after the People's Court has made a judgment . . . [unless] otherwise provided in an international treaty acceded to or concluded by both countries concerned."¹⁵⁵

Third, the Opinion provides:

Where a party applies to a competent Intermediate People's Court of the PRC for recognition and enforcement of a legally effective judgment or ruling made by a foreign court, if the country in which such foreign court is located and the PRC ha[s] not concluded or acceded to an international treaty and

1993, at 40.

153. *Id.* para. 304.

154. *Id.* para. 306.

155. *Id.*

ha[s] no reciprocal relations, the party may institute an action in the People's Court and in such case the competent People's Court shall make a judgment and enforce the judgment or ruling of the foreign court.¹⁵⁶

It is clear that U.S. parties can go directly to an Intermediate People's Court to seek the recognition and enforcement of a judgment obtained in the United States or other foreign nation.

Finally, and most importantly, the Opinion also provides:

Where a court of a country with which the PRC has *no judicial assistance agreement or reciprocal relations*, requests judicial assistance directly from a court of the PRC without going through diplomatic channels, the Chinese court *shall refuse the request* and explain the grounds for such refusal.¹⁵⁷

The Supreme People's Court did not, however, elaborate on precisely what "judicial assistance" means. China has concluded "judicial assistance" treaties with other nations that include provisions for the recognition and enforcement of foreign court judgments. Therefore, it is possible that the Supreme People's Court intended the term to include such recognition and enforcement.¹⁵⁸ Nevertheless, it is unclear whether the enforcement of foreign court judgments is included within the term "judicial assistance" as used in the Opinion.

IV. CONCLUSION

Although the foregoing discussion serves only as a brief introduction into the topic of recognition and enforcement of foreign court judgments in the PRC, it illustrates both the positive and negative aspects of the current system. The Civil Procedure Law of 1991 and the Opinion of the Supreme People's Court have made definite positive strides in improving on the procedure established by the prior law. However, a few areas of uncertainty remain that need to be addressed before the current system can be a complete benefit to all parties concerned.

156. *Id.* para. 318.

157. *Id.* para. 319 (emphasis added).

158. *See supra* notes 61-76 and accompanying text.

First, it is now clear that entrustment by a foreign court is no longer a prerequisite to the recognition and enforcement of a foreign court judgment in the PRC.¹⁵⁹ Article 267 allows foreign parties to apply directly for recognition and enforcement to the People's Courts. Allowing a party to apply directly for recognition and enforcement reduces the time and cost associated with entrustment, promotes judicial economy, and is the most important change in the recognition and enforcement procedure.

Second, the language used in articles 267 and 268 is more precise than that used in article 204. Terms such as "legally effective" judgment promote more certainty in the law than an "ascertained" judgment. Similarly, because of the more precise draftsmanship, it is now clear that foreign judgments can be recognized for purposes other than enforcement.

Finally, article 268 specifically provides the procedural rules for reviewing foreign court judgments—based on an international treaty or reciprocity. This provides for much more certainty and also marks a major improvement over article 204.

Notwithstanding the improvements mentioned above, the enforcement procedure is still relatively cumbersome¹⁶⁰ and a few areas of uncertainty remain that need to be resolved before the current system can be a complete benefit to the PRC and the international business and legal communities.

The most important issue concerns the change in wording of the "public policy" requirement. It is unclear what exactly would violate China's state sovereignty, security, and public interest. As with article 204, there is not enough information on actual court practice, let alone reported cases from which to draw a firm conclusion on this issue. Only after such a conclusion is drawn can American lawyers be confident that they can enforce U.S. court judgments in the PRC with ease. Given the current tenor of diplomatic relations between the two nations, it is unlikely that this issue will be resolved satisfactorily in the near future.

A second remaining question concerns the importance of

159. Indeed, the Opinion appears to indicate that where the foreign court's nation and the PRC have no judicial assistance treaty or reciprocal relations, a People's court must refuse such entrustment.

160. See Rosenberg, *supra* note 98, at 64.

the reiteration of the "public policy" requirement. It is unclear whether the final sentence of article 268 adds to the procedure for recognizing and enforcing foreign court judgments or merely serves to reinforce the importance of the "public policy" requirement. Again, a good deal of judicial practice must occur before one can be certain of the effect of the final sentence of article 268. Further, it remains unclear whether, in cases where there is no judicial assistance treaty or reciprocal relations, a foreign court requesting enforcement of its judgment in the PRC must first go through "diplomatic channels" to have the judgment enforced.¹⁶¹

One very encouraging note for foreign lawyers is China's intention to conclude more judicial assistance treaties. It is strongly recommended that China continue with these efforts. Such treaties make the recognition and enforcement of foreign judgments much easier. Special procedures can be established to avoid any anticipated problems. Without such treaties, foreign lawyers, including American lawyers, must rely on reciprocity in enforcing foreign judgments. This is not the ideal way to enforce foreign judgments because the existence of reciprocity is often unclear. The United States would be doing the international business community within its borders a service by concluding such a treaty with the PRC as soon as possible.

A final recommendation would be for the Supreme People's Courts or other reporting agencies to publish more decisions on recognition and enforcement cases. While the past decade has seen an increase in the number of certain types of foreign court judgments enforced successfully in the PRC,¹⁶² there are relatively few examples of cases involving the successful enforcement of foreign court judgments or commercial contract disputes. Moreover, only anecdotal information exists regarding such cases. The international business and legal community would benefit from seeing what courts do in these situations. Only after a body of judicial practice is made available will the legal community be certain on the law of recognition and enforcement of foreign court judgments in the People's Republic of China.

161. See *supra* text accompanying note 157.

162. See Rosenberg, *supra* note 98, at 65 (successful enforcement of divorce decrees rendered in the United States, Australia, and Canada).