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# CONVERGENCE AND THE CIRCULATION OF MONEY JUDGMENTS

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*For half a century at least, the several states of the United States have taken a liberal attitude toward the recognition and enforcement of foreign country money judgments. The U.S. Supreme Court invoked the “grace” of sovereign nations to justify a restrictive approach to the recognition of judgments in the famous case of *Hilton v. Guyot*. The New York Court of Appeals laid out a more generous approach based in the vindication of private rights. Simply put, private rights won. In 1962, the Uniform Law Commission promulgated the Uniform Foreign Money-Judgments Recognition Act, which codified a liberal approach to the cross-border circulation of money judgments. The many U.S. states that adopted the uniform act were trying to lead by example. The hope was that, if they accepted incoming judgments, judgments exported to the rest of the world would be accepted, recognized, and enforced. For decades, this effort was regarded as a failure. The European Union continued to draw a sharp distinction between E.U. judgments and U.S. judgments—though acceptance of U.S. judgments by E.U. member states crept up over time. Some of the world’s largest economies—most notably, China—outright rejected recognition of U.S. money judgments.*

*Change has been recent and dramatic. In 2017, a Chinese court recognized and enforced a U.S. money judgement for the first time. Chinese law requires reciprocity between nations in order to recognize a foreign money judgment. The United States has no reciprocal judgment recognition*

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*treaty with any country. A U.S. district court recognized and enforced a Chinese judgment in 2009. This “reciprocity in fact” was sufficient for a Chinese court. A few months later, China announced that it would sign The Hague Convention on Choice of Court Agreements (“COCA”), obligating Chinese courts to recognize and enforce judgments rendered under a choice of court clause selecting the courts of any contracting state. The COCA has already entered into force between the European Union, Mexico, and Singapore. The United States has signed, but not ratified, the agreement. Meanwhile, The Hague Judgments Project gathers steam to require the free circulation of judgments arising in all but a few contexts. The drivers of this apparent convergence are obscure and likely diverse. This Article will analyze the causes of this recent, dramatic shift and will attempt to assess the likelihood of further convergence.*

### INTRODUCTION

The recognition of foreign judgments goes back at least as far as the sixteenth century, in the English courts of admiralty.<sup>1</sup> It was addressed by the 1774 Massachusetts Bay Act, the Articles of Confederation, the United States Constitution, and the First Congress.<sup>2</sup> The drafters of the U.S. Constitution and the creators of the European Union recognized the circulation of judgments as a key component of an integrated economic system.<sup>3</sup>

It is no exaggeration to say the circulation of judgments has been improving for at least five centuries. But the second half of the twentieth century was something of a pause. As judgments circulated ever more freely within economic units, like the United States or the European Union, recognition across countries stalled. Many courts of E.U. member states

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1. David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584, 1597 (2009) (footnote omitted) (“As early as 1536, there was a case for ‘execution of sentence of French Court.’”).

2. See generally *id.* (describing the historical underpinnings of the Full Faith and Credit Clause through a discussion of these legal regimes).

3. See, e.g., Ronald A. Brand, *Recognition of Foreign Judgments as a Trade Law Issue: The Economics of Private International Law*, in ECONOMIC DIMENSIONS IN INTERNATIONAL LAW 592, 640 (Jagdeep S. Bhandari & Alan O. Sykes eds., 1998) (“Economic theory demonstrates the the free movement of judgments is an essential element of a liberal trading system.”); Antonio F. Perez, *Consumer Protection in the Americas: A Second Wave of American Revolutions?*, 5 U. ST. THOMAS L.J. 698, 713 (2008) (“The greatest free trade areas in modern history, the United States and the European Union (EU), both have included recognition and enforcement of member-state judgments in the genome of their political economy.”); Jeffrey Wald, *A Clash of Two Courts: Baker, Full Faith and Credit, and Montana’s Refusal to Recognize A North Dakota Declaratory Judgment*, 89 N.D. L. REV. 143, 143 (2013) (“The Full Faith and Credit Clause of the United States Constitution is one of the most important, but least understood, constitutional clauses.”).

remained skeptical of U.S. judgments. The courts of the People's Republic of China did not recognize a single U.S. money judgment. Indeed, this reluctance contributed to the rise of international commercial arbitration.

The Chinese approach changed dramatically in the summer of 2017. For the first time, a Chinese court recognized a U.S. commercial money judgment. Chinese law requires reciprocity: a creditor seeking recognition of a foreign money judgment in China must demonstrate that the courts of the country that rendered the judgment would recognize and enforce Chinese judgments. Previous courts had required such reciprocity to be established by treaty. In the case *Liu Li v. Tao Li and Tong Wu*, the Intermediate People's Court of Wuhan City dispensed with this requirement, instead turning to the concept of "de facto reciprocity," which it held was satisfied with regard to U.S. courts.<sup>4</sup>

The Chinese government followed this development quickly with an announcement that China would sign the fledgling Hague Convention on Choice of Court Agreements ("COCA"). The COCA came out of the ashes of the attempted Convention of Jurisdiction and Recognition of Judgments. In light of the failure of that ambitious project, the drafters prepared a more limited treaty that applied only to agreements to resolve commercial disputes in a particular national forum and, crucially, obligated signatory states to recognize judgments arising from those proceedings. At the time of the announcement, only the European Union and Mexico had permitted the treaty to enter into force. The United States had signed the treaty but refused to ratify it. Since then, the list of COCA countries has continued to grow.

China has decisively opened its courts to foreign judgments at the same time the Xi government has dramatically closed other economic doors. For example, the Xi government has imposed Maoist-era currency controls—an act of profound economic self-sabotage, in the view of most observers.<sup>5</sup> China has asserted aggressive claims to monetary,<sup>6</sup> informational,<sup>7</sup> and

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4. Liú lì sù táo lì hé wú tóng (刘莉诉桃李和吴彤) [*Liu Li v. Tao Li & Tong Wu*], Yue Wuhan Zhong Min Shang Wai Chu Zi No. 00026 (Interm. People's Ct. of Wuhan City, Hubei Province June 30, 2017) (China).

5. See Tom Mitchell & Gabriel Wildau, *China's State Council Puts Seal on Capital Controls*, FIN. TIMES (Aug. 18, 2017), <https://www.ft.com/content/3a638d1c-8405-11e7-a4ce-15b2513cb3ff>.

6. See Katharina Pistor, *From Territorial to Monetary Sovereignty*, 18 THEORETICAL INQUIRIES L. 491, 493 (2017) (arguing that "if the question of sovereignty was tied not to effective control over territory and people but to effective control over money," then the "only states that may be deemed sovereign in monetary terms are the United States, the United Kingdom, Canada, Japan, Switzerland, Australia, and the People's Republic of China").

7. See RADIM POLČÁK & DAN JERKER B. SVANTESSON, INFORMATION SOVEREIGNTY: DATA PRIVACY, SOVEREIGN POWERS AND THE RULE OF LAW 2 (2017); Philip Chwee, Note, *Bringing in a New Scale: Proposing A Global Metric of Internet Censorship*, 38 FORDHAM INT'L L.J. 825, 862–63 (2015)

territorial sovereignty.<sup>8</sup> And yet it seems eager to cede ‘decisional sovereignty’ to foreign courts. Following these developments, scholars of international law queried whether China was pursuing an agenda of economic integration or economic power. The answer, naturally, is yes.

It is not yet clear whether we are entering a new era in the convergence of recognition of foreign judgments, in which national court judgments will resume their long march towards greater circulation among (and not merely within) economic units. It is far from clear whether China’s about-face will be lasting. The future of the COCA—and of the more ambitious Hague Judgments Project—remains uncertain. And not least of all, the consequences of the long-running inability of the United States to implement the COCA remain unclear.

This Article discusses the recent shift in China’s approach. It then proceeds to assess the forces that have lately led to greater convergence in the circulation of national court judgments.

## I. FOREIGN MONEY JUDGMENTS IN CHINESE COURTS

The *Liu* decision alone would have been noteworthy, but probably not enough to significantly change the expectations for transnational dispute resolution involving China. The *Liu* decision coupled with China’s move to join the COCA, however, indicated a dramatic shift in the recognition and enforcement of foreign judgments in China.

### A. THE OLD APPROACH: RECIPROCITY BY TREATY

The relevant Chinese law sets out “three channels”<sup>9</sup> for recognition and enforcement of foreign money judgments—applicable domestic statutes, bilateral judgment recognition and enforcement treaties, and international conventions on circulation of judgments. Until recently, the third category was a null set. China has quite a few bilateral judgment treaties, but none with its largest trading partners, including the United States.<sup>10</sup> With the

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(“[M]aintaining national security and social stability are some of the PRC’s utmost important objectives. By regulating the Internet from the ground up, the PRC is able to control the data that enters and leaves its borders . . . while maintaining compliance from its end-user citizens with their broad censorship laws.” (footnotes omitted)).

8. See David Tweed, *China’s Territorial Disputes*, BLOOMBERG (Oct. 3, 2018), <https://www.bloomberg.com/quicktake/territorial-disputes>.

9. Wenliang Zhang, *Sino-Foreign Recognition and Enforcement of Judgments: A Promising “Follow-Suit” Model?*, 16 CHINESE J. INT’L L. 515, 518 (2017).

10. King Fung Tsang, *Chinese Bilateral Judgment Enforcement Treaties*, 40 LOY. L.A. INT’L & COMP. L. REV. 1, 5–6 (2017) (“Although it is true that China has never entered into bilateral enforcement treaties with her largest trading partners, it does not necessarily mean that the countries with which she

“limited impact” of treaties, Chinese domestic law has been the “predominant” channel.<sup>11</sup>

Chinese law “follows a modified civil/political” system.<sup>12</sup> The domestic legislation applicable to recognition of foreign money judgments is mainly found in the Civil Procedure Law (“CPL”). The limited provisions applying to recognition of foreign judgments were enacted in 1991 as part of the overarching CPL and have not changed since.<sup>13</sup> The CPL and related laws<sup>14</sup> provide only a general public policy defense and a reciprocity requirement.<sup>15</sup>

This thin legislative background has left the Supreme People’s Court (“SPC”) with broad influence in shaping the interpretation of the relevant law. The Chinese legal system does not have binding precedent in the common-law sense. However, the SPC has a profound effect on interpretation, both through its decisions and by issuing official interpretations of particular statutes.<sup>16</sup> The SPC has used this authority to “to interpret the relevant laws, including the CPL, in a conservative way, thus hindering the” recognition and enforcement of foreign judgments.<sup>17</sup>

This conservative approach was most clearly demonstrated in the SPC’s “infamous” decision in *Gomi Akira v. Dalian Fari Seafood*,<sup>18</sup> which touched off a “Sino–Japanese recognition feud.”<sup>19</sup> In *Gomi Akira*, the SPC rejected arguments in favor of presumed or legal reciprocity in favor of a strict interpretation of de facto reciprocity. Thus, *Gomi Akira* became “the most

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has entered into bilateral treaties are insignificant.”).

11. Zhang, *supra* note 9, at 519.

12. Pamela Bookman, *The Adjudication Business*, 44 YALE J. INT’L L. (forthcoming 2019) (manuscript at 36) (available at <https://ssrn.com/abstract=3338152>); see also Guangjian Tu, *The Hague Choice of Court Convention—A Chinese Perspective*, 55 AM. J. COMP. L. 347, 350 (2007) (“China is a country which has inherited the civil law tradition. Thus, its law comes essentially from the legislature; judges cannot make law. International jurisdiction as well as recognition and enforcement of foreign judgments fall within the scope of basic laws which are enacted by the National People’s Congress.” (footnotes omitted)).

13. See Zhang, *supra* note 9, at 520.

14. See WENLIANG ZHANG, *RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CHINA: RULES, PRACTICE AND STRATEGIES* §§ 2.04–.06, at 206–36 (2014).

15. See Hu Zhenjie, *Recognition and Enforcement of Foreign Judgments in China: Rules, Interpretation and Practice*, 46 NETH. INT’L L. REV. 291, 294 (1999).

16. See Note, *Chinese Common Law? Guiding Cases and Judicial Reform*, 129 HARV. L. REV. 2213, 2216–17 & n.24 (2016).

17. Zhang, *supra* note 9, at 520 (emphasis omitted).

18. Zuigāo rénmin fāyuàn guānyú Wōguó Rénmín Fāyuàn Yīngfǒu Chéngrèn hé Zhíxíng Ribēn Guó Fāyuàn Jùyǒu Zhàiquán Zhàiwù Nèiróng Cáipàn de Fùbàn (最高人民法院关于我国人民法院应否承认和执行日本国法院具有债权债务内容裁判的复函) [The Reply of the Supreme People’s Court of China Concerning Recognition and Enforcement of Japanese Judgment and Rulings on Credit and Debt], Min Ta Zi No. 17 (Sup. People’s Ct. 1995) (China).

19. Zhang, *supra* note 9, at 520.

fundamental and frequently cited ground for the non-recognition of foreign judgments in China.”<sup>20</sup> This led China straight into a reciprocity trap—a stalemate in which recognition of foreign judgments was almost non-existent. This defensive attitude led commentators in both China and the United States to describe the Chinese approach to recognition and enforcement of foreign judgments as overly conservative and parochial.<sup>21</sup>

In practice, this left recognition by reciprocal treaty as the only functional “channel” by which to obtain recognition and enforcement of judgments in China. China has reciprocal judgment enforcement treaties with thirty-three countries, accounting for over 14 percent of its total trading volume.<sup>22</sup> Nevertheless, this “network of enforcement treaties” has been dismissed as “patchy.”<sup>23</sup> This may be due “to the Chinese courts’ lack of awareness of the treaties, the uncertainties in the treaties (both because of their drafting and subsequent interpretation by the courts), and the ineffectiveness in enforcing commercial judgments.” Indeed, the advantages of the COCA over the patchwork of bilateral treaties may have influenced China’s adoption of the multilateral treaty.<sup>24</sup>

#### B. THE NEW APPROACH: “DE FACTO” RECIPROCITY

On June 30, 2017, a Chinese court recognized a U.S. commercial money judgment—a first in Sino-U.S. history. It was not the first time, however, that a Chinese court had recognized a foreign commercial money judgment.

In 2014, the High Court of Singapore recognized and enforced a commercial money judgment issued by the Intermediate People’s Court of Suzhou City in Jiangsu Province.<sup>25</sup> Two years later, the Intermediate People’s Court of Nanjing City in Jiangsu Province in *Kolmar v. Jiangsu Textile* recognized and enforced a commercial money judgment issued by

20. *Id.* at 521.

21. *See id.* at 522; Jason Hsu, *Judgment Unenforceability in China*, 19 FORDHAM J. CORP. & FIN. L. 201, 201 (2013) (“Plaintiffs may then be in for a rude awakening when they bring their U.S. money judgments abroad, for such judgments are routinely unenforceable. China has proven no exception, and foreign judgments are rarely, if ever, enforced there.”).

22. For a complete list of the treaties and an extensive analysis, see Tsang, *supra* note 10, at 2 (“[S]eek[ing] to dispel the misperception that bilateral treaties are not important due to the lack of such treaties with China’s major trading partners.”).

23. *Id.* at 5 (quoting MICHAEL MOSER, DISPUTE RESOLUTION IN CHINA 395 (Michael Moser ed., 2012)).

24. *Id.* at 21, 33 (quoting Yongping Xiao & Zhengxin Huo, *Ordre Public in China’s Private International Law*, 53 AM. J. COMP. L. 653, 654 (2005)) (focusing on the COCA’s superior approach to the “very unruly horse” of the public policy ground for rejection).

25. *See* Giant Light Metal Tech. Co. (Kunshan) v. Aksa Far E., [2014] 2 SLR 545 (Sing.).

the High Court of Singapore.<sup>26</sup> The following year, the Supreme People's Court included that recognition judgment in its Second Series of Typical Cases illustrating the "One Belt and One Road" program.<sup>27</sup>

The Belt and Road Initiative has become the organizing economic program of the Xi government. It was first mentioned in 2013, when President Xi spoke in Kazakhstan, but this "seemingly out-of-the-way event in an out-of-the-way country has since mushroomed into the keystone policy initiative of the Xi presidency."<sup>28</sup> The program draws its name from the ambition to recreate a land and maritime "Silk Road" with China as the hub, but "the undertaking became a sort of catchall for much more than new openings for international trade and investment for China" and has grown "to include developments in law in particular that can be seen as enhancing both international trade and China's image in the global community."<sup>29</sup> In 2015, the "Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road" laid out the mission statement for the initiative, including that "China will stay committed to the basic policy of opening-up, build a new pattern of all-round opening-up, and integrate itself deeper into the world economic system."<sup>30</sup> A 2015 statement issued by the Supreme People's Court specifically called on Chinese courts to "promote the mutual recognition and enforcement of judgments rendered by countries along the 'Belt and Road.'"<sup>31</sup> And in 2017 (only a few weeks before the *Liu* decision), the second China-ASEAN Justice Forum, hosted by the Supreme People's Court, produced a statement explicitly calling "for a presumption of reciprocity, even in the absence of a treaty."<sup>32</sup>

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26. See ("高尔集团股份有限公司 与江苏省纺织工业(集团)进出口有限公司申请承认和执行外国法院民事判决、裁定特别程序民事裁定书") [Kolmar Grp. AG Co. v. Jiangsu Textile Indus. Imp. & Exp. Co.], Su 01 Xie Wai Ren No. 3 (Nanjing Intern. People's Ct. of Jiangsu Province 2016) (China).

27. See Sup. People's Ct. People's Republic China, *Second Batch of Typical Cases Involving the "Belt and Road"* (May 15, 2017, 11:23 PM), <http://www.court.gov.cn/zixun-xiangqing-44722.html>, translated in China Guiding Cases Project, *B&R Typical Case 13*, STAN. L. SCH. (May 15, 2017), <https://cgc.law.stanford.edu/belt-and-road/b-and-r-cases/typical-case-13>.

28. Ronald A. Brand, *Recognition of Foreign Judgments in China: The Liu Case and the "Belt and Road" Initiative*, 37 J. L. & COM. 29, 30-40 (2018). Professor Brand's article provides an extensive analysis of the context that preceded the *Liu* judgment, as well as an in-depth discussion of the decision itself. See *id.*

29. *Id.* at 40.

30. Nat'l Dev. & Reform Comm'n et al., *Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road* (Mar. 28, 2015), [http://en.ndrc.gov.cn/news-release/201503/t20150330\\_669367.html](http://en.ndrc.gov.cn/news-release/201503/t20150330_669367.html).

31. Supreme People's Court, *Several Opinions of the Supreme People's Court on Providing Judicial Services and Safeguards for the Construction of the "Belt and Road" by People's Courts*, PEKING U. L. SCH. ¶ 6 (June 16, 2015), <http://en.pkulaw.cn/display.aspx?cgid=251003&lib=law>.

32. Brand, *supra* note 28, at 44-45.

“On [June 30th,] 2017, for the first time in history, [a] Chinese court recognized and enforced a U.S. commercial monetary judgment.”<sup>33</sup> The plaintiff, Liu Li, concluded a Share Transfer Agreement in the United States to purchase a 50 percent stake in a California corporation owned by Tao Li. Liu transferred 125,000 dollars to Tao. Liu alleged that Tao then transferred the money to his wife, Tong Wu, and then they absconded together. Liu filed an action for fraud in California state court.<sup>34</sup> When direct service was unsuccessful, the California court authorized service by publication. The defendants defaulted, and the court then entered a default judgment against them with both pre-judgment interest and costs.<sup>35</sup>

The debtors had their habitual residence in Wuhan City, where they also owned real estate that could be used to satisfy the judgment.<sup>36</sup> Liu petitioned the Intermediate People’s Court of Wuhan City to recognize and enforce the U.S. money judgment.<sup>37</sup> The Wuhan City court held that it had jurisdiction to hear the petition due to the presence of defendants’ real property.<sup>38</sup> The court rejected defendants’ arguments that service had been improper and declined defendants’ invitation to reexamine the merits of the case.<sup>39</sup>

As the United States and China have no reciprocal judgment recognition treaty, the court noted the application would have to satisfy the requirement of de facto reciprocity. Liu pointed to the decision of the U.S. District Court for the Central District of California in *Hubei Gezhouba Sanlian Industrial Co. v. Robinson Helicopter Co.*,<sup>40</sup> a products liability case in which the U.S. court had recognized and enforced a money judgment rendered by the Higher People’s Court of Hubei Province China.<sup>41</sup> The Wuhan City court held that this provided adequate evidence of de facto reciprocity and, after dispensing with the debtors’ final defense that the judgment violated Chinese public policy, recognized and enforced the U.S.

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33. Jie Huang, *Chinese Court Recognizes US Commercial Money Judgment*, LETTERS BLOGATORY (Sept. 4, 2017), <https://lettersblogatory.com/2017/09/04/chinese-court-recognizes-us-commercial-money-judgment>.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Hubei Gezhouba Sanlian Indus. Co. v. Robinson Helicopter Co.*, No. 2:06-cv-01798-FMC-SSx, 2009 U.S. Dist. LEXIS 135891 (C.D. Cal. Sept. 25, 2009), *aff’d mem.*, 425 Fed. Appx. 580 (9th Cir. 2011).

41. Huang, *supra* note 33. For other examples of U.S. courts recognizing Chinese judgments, see generally Mark Moedritzer et al., *Judgments 'Made in China' But Enforceable in the United States?: Obtaining Recognition and Enforcement in the United States of Monetary Judgments Entered in China Against U.S. Companies Doing Business Abroad*, 44 INT’L LAW. 817 (2010).

judgment.<sup>42</sup>

This case goes beyond the approach to de facto reciprocity endorsed in *Kolmar*. In *Kolmar*, the de facto reciprocity between China and Singapore was established between the same courts on the same claims—the outgoing Chinese judgment was on a contract claim and was recognized by the High Court of Singapore; the incoming judgment was rendered by the High Court of Singapore in a contract action.<sup>43</sup> After *Kolmar*, doubts remained as to whether Chinese courts “would require the same cause of action and how Chinese court[s] would apply de facto reciprocity if the requested judgment is rendered in a federal country.”<sup>44</sup> In recognizing the U.S. money judgment, the Chinese court did not require the same cause of action—the outgoing judgment had been on a tort claim; the incoming judgment sounded predominantly in contract.

Nor did the Chinese court dwell on the influence of a particular federal or state decision in a judicial system of both horizontal and vertical federalism. In the United States, judgment recognition and enforcement law is state, rather than federal, law. Therefore, state courts have the ultimate authority to interpret U.S. judgment recognition law. The *Hubei Gezhouba Sanlian Industrial v. Robinson Helicopter* decision was issued by a federal court interpreting California state law. Arguably, a state court might therefore have greater influence in setting a persuasive precedent for reciprocity. No decision based on California law would bind U.S. federal or state courts applying other states’ judgment recognition laws. (Of course, a trial court decision is not binding precedent, regardless.)

The U.S. decision that was presented as evidence of de facto reciprocity had another important facet that was not mentioned by the Chinese court. The *Hubei* decision stemmed from a so-called “boomerang” suit.<sup>45</sup> The plaintiff, a Chinese corporation, brought a tort suit in a U.S. district court. The U.S. court dismissed the action on the basis of forum non conveniens. This is not particularly unusual. U.S. courts, including the U.S. Supreme

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42. The U.S. judgment was obtained with service by publication, authorized by the U.S. court after other methods were unsuccessful. The Wuhan court touched on the issue but seemed to “provide clear deference to the U.S. court in determining proper service.” Brand, *supra* note 28, at 36.

43. Huang, *supra* note 33.

44. *Id.* (emphasis omitted).

45. See M. Ryan Casey & Barrett Ristroph, *Boomerang Litigation: How Convenient is Forum Non Conveniens in Transnational Litigation?*, 4 BYU INT’L L. & MGMT. REV. 21, 22 (2007) (coining the term “boomerang litigation” to refer to cases that return to a forum from which they were previously dismissed).

Court, have dismissed transnational actions in favor of a Chinese forum.<sup>46</sup> In the context of the forum non conveniens standard, such a dismissal includes the finding that Chinese courts present an “adequate alternative forum.”<sup>47</sup> (Indeed, this is one of the reasons that it is perhaps unsurprising that U.S. courts eventually opened their doors to Chinese court judgments.) It would have been rather odd, though not unprecedented,<sup>48</sup> for a U.S. court to initially find that Chinese courts provided an adequate forum and then, at the judgment enforcement stage, deny recognition to the very judgment for which it was responsible. But this very particular procedural posture was not considered by the Wuhan court.

None of this is to say that the Wuhan court erred. Quite the opposite. The *Hubei* decision likely is persuasive evidence that U.S. courts are open to recognition and enforcement of Chinese judgments when coupled with additional factors. Such factors include the overall liberal attitude of U.S. law towards foreign judgments and the tendency of U.S. courts to conclude in other contexts that Chinese courts are an adequate forum. But the Wuhan court did not consider these factors—and touched only lightly on other issues, such as the service by publication and the default nature of the judgment.<sup>49</sup> This suggests either a lack of familiarity with certain aspects of the U.S. legal system,<sup>50</sup> an enthusiasm for the recognition of foreign judgments, or perhaps both.

### C. THE NEW TREATY: THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS

On September 12, 2017, the People’s Republic of China signed the Hague Convention of 30 June 2005 on Choice of Court Agreements—commonly referred to as the COCA.<sup>51</sup> It joined the European Union, Mexico,

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46. See *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 435–36 (2007); *Guimei v. Gen. Elec. Co.*, 172 Cal. App. 4th 689, 701–02 (2009).

47. *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 73 (2d Cir. 2001) (articulating the standard for forum non conveniens dismissal and noting that, “[i]nitially, the court must consider whether an adequate alternative forum exists”).

48. Although the standards for forum non conveniens dismissal and for recognition of a judgment are different, it takes an extraordinary case to deny recognition to such a “boomerang” judgment. See, e.g., *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 630–31 (S.D.N.Y. 2014), *aff’d*, 833 F.3d 74 (2d Cir. 2016).

49. See Huang, *supra* note 33.

50. This lack of familiarity may be particularly plausible with regard to the federal structure of the U.S. system, which is a constant source of confusion to foreign observers. See, e.g., Chibli Mallat, *Federalist Dreams for the Middle East*, LAWFARE (Aug. 16, 2018, 1:59 PM), <https://www.lawfareblog.com/federalist-dreams-middle-east> (“Federalism in the Middle East is a loaded word. It is contradictory and misunderstood. But this is not unique to the region.”).

51. See *China Signs the 2005 Choice of Court Convention*, HAGUE CONF. PRIV. INT’L L. (Sept. 12,

Singapore, Ukraine, and the United States as signatory nations. The COCA had already entered into effect between the European Union, Mexico, and Singapore as those nations had ratified and otherwise acceded to treaty.<sup>52</sup>

In 1992, The Hague Conference on Private International Law began negotiations on a dual convention on both jurisdiction and circulation of judgments. The United States initially supported the project, but disagreements principally concerning jurisdiction eventually scuttled the proposed convention. The COCA rose from the ashes as a less ambitious treaty addressing only the least controversial aspects of the failed jurisdiction and judgments convention. The COCA is a “double convention” in the sense that it addresses both jurisdiction and judgment recognition, but only applies to disputes under forum selection clauses in cross-border commercial agreements. In essence, the COCA obligates the courts of member states to take jurisdiction over international business-to-business disputes when their courts are selected by an exclusive forum selection clause—and judgments arising from those proceedings are entitled to recognition and enforcement in the other contracting states. It has been described as a New York Convention for judgments.<sup>53</sup>

The COCA will radically change the Chinese approach to foreign commercial money judgments. However, the treaty creates little actual tension with Chinese statutory law.<sup>54</sup> In some areas, Chinese law does not permit parties to contract around grants of exclusive jurisdiction<sup>55</sup>—but the

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2017), <https://www.hcch.net/en/news-archive/details/?varevent=569>.

52. See *Status Table: Convention of 30 June 2005 on Choice of Court Agreements*, HAGUE CONF. PRIV. INT’L L., <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> (last updated Aug. 23, 2018).

53. See Glenn P. Hendrix et al., *Memorandum of the American Bar Association Section of International Law Working Group on the Implementation of the Hague Convention on Choice of Court Agreements*, 49 INT’L LAW. 255, 256 (2016) (noting that the COCA “is the litigation counterpart” to the New York Convention framework for arbitral awards); Thomas N. Pieper & Samuel L. Zimmerman, *The Hague Convention on Choice of Court Agreements: A Game Changer for Dispute Resolution Clauses?*, 21 INT’L B. ASS’N ARB. NEWS 101, 101 (2016) (noting that the COCA “provides a mechanism for the parties to an international commercial contract to ensure that a judgment received in the court of a member state will be enforced in the courts of other member states, much in the way arbitral awards are currently enforced under the New York Convention.”).

54. See Tu, *supra* note 12, at 365 (“A survey of Chinese law pertaining to the key issues raised by the Convention has demonstrated that there are no unresolvable conflicts between Chinese law and the Convention although China may make some declarations in order to preserve features of its domestic law. China can and should ratify this Convention.”).

55. See *id.* at 353–54 (“The courts of the People’s Republic of China shall have exclusive jurisdiction over disputes arising out of performance in China of contracts of Sino-foreign equity joint ventures, Sino-foreign contractual joint ventures and Sino-foreign cooperative exploration and development of natural resources.” (footnote omitted)); see also *id.* (“[T]he court for the place where the harbor is located shall have exclusive jurisdiction over disputes arising out of harbor operations . . .”)

COCA permits contracting states to enter into a declaration excluding certain subject areas from the treaty's scope. Chinese law and the COCA endorse the exclusivity of the parties' chosen court—the derogated courts must dismiss any parallel action.<sup>56</sup> The COCA obligates the chosen court to hear a dispute even if it has no connection to the forum—but Article 19 of the COCA permits contracting states to issue a declaration that their court need not entertain purely foreign disputes.<sup>57</sup> Such a declaration would bring the COCA into alignment with Chinese domestic law.<sup>58</sup>

A U.S. commentator noted that “China’s signing is a hopeful sign, particularly in light of a Chinese court’s recent decision” in *Liu*.<sup>59</sup> Some suggested that the United States’ liberal recognition policy had finally had an influence and hoped the reverse might hold true—that China’s move to embrace the COCA would break the U.S. stalemate on ratification.<sup>60</sup>

#### D. THE NEW QUESTIONS: THE FUTURE OF FOREIGN JUDGMENTS IN CHINESE COURTS

These new recognition decisions, coupled with the decision to join the COCA, have dramatically changed China’s place in the framework of international litigation. Many questions remain, however.<sup>61</sup>

On a doctrinal level, these decisions do not resolve serious issues such as what law Chinese courts will apply to determine whether the judgment-rendering court had power to render the judgment, in terms of jurisdiction or service. Chinese courts will have to address whether any aspects of U.S. procedure or substantive law offend Chinese approaches to due process or to substantive public policy. For example, it is far from clear how Chinese courts will approach U.S. courts’ grants of punitive damages, an issue that has bedeviled the U.S.-E.U. relationship.<sup>62</sup>

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(footnote omitted).

56. See Hu Zhenjie, *International Jurisdiction of Chinese Courts in Contractual Matters: Rules, Interpretation and Practice*, 46 NETH. INT’L L. REV. 204, 207–08 (1999).

57. Tu, *supra* note 12, at 358.

58. See *id.* at 358–59 (discussing Articles 25 and 244 of China’s 1991 Civil Procedure Law).

59. Ted Folkman, *China Signs COCA*, LETTERS BLOGATORY (Sept. 13, 2017), <https://letters.blogatory.com/2017/09/13/china-signs-coca>.

60. See *id.* (explaining that a “liberal US practice on judicial assistance might have borne some fruit in encouraging the Chinese decision,” and asking whether “China’s decision to sign the Convention [would] encourage [the United States] to overcome the Byzantine politics that have so far prevented the Senate from considering the treaty”).

61. Suni Gong, *The Chinese Court’s Enforcement of a U.S. Civil Judgement*, N.Y.U. CTR. FOR TRANSNAT’L LITIG., ARB., & COM. L. (Apr. 17, 2018), <https://blogs.law.nyu.edu/transnational/2018/04/the-chinese-courts-enforcement-of-a-u-s-civil-judgement>.

62. See Huang, *supra* note 33.

Although China has yet to ratify the COCA, its effects are being felt in Chinese courts. On April 20, 2017, a Chinese court rendered a decision referring to the COCA—even before it was signed. In *Cathay United Bank v. Gao*,<sup>63</sup> a Taiwanese bank and a Chinese national residing in Shanghai entered into a guaranty contract with a choice of forum clause selecting a Taiwanese court to resolve disputes.<sup>64</sup> The Chinese party sued in a Shanghai court.<sup>65</sup> The “clause did not specify whether it was exclusive or not,” and Chinese domestic law does not provide a rule for choice of forum clauses that are silent on exclusivity.<sup>66</sup> To fill the gap, the court referred to Article 3 of the COCA, which states that choice of forum clauses shall be construed to be exclusive, unless the parties expressly state otherwise.<sup>67</sup> The Shanghai court therefore declined jurisdiction.<sup>68</sup>

It is not even clear whether there is a basis in Chinese domestic law for reference to an unsigned and unratified international convention. As Professor Sophia Tang has observed, “Article 9 of the Chinese Supreme Court’s Judicial Interpretation of Chinese Conflict of Laws Act allows the Chinese courts to apply international conventions, which have not entered into effect in China, to decide the parties’ rights and obligations.”<sup>69</sup> However, “such an application is subject to party autonomy,” and therefore would require the parties themselves to reference the COCA as a source of applicable law.<sup>70</sup> Professor Tang notes that “a more relevant provision is Article 142(3) of the PRC General Principle of Civil Law, which provides that international customs or practice may be applied to matters for which neither the law of the PRC nor any international treaty concluded or acceded to by China has any provisions.”<sup>71</sup> This is a striking suggestion: that the COCA had attained the status of international custom or practice even before it had been signed by China (or by many other countries). Placed in context with the other developments described above, perhaps it is not too optimistic to observe a certain eagerness in the Chinese courts for greater cross-border

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63. (國泰聯合銀行訴高) [*Cathay United Bank v. Gao*], Hu Min Xia Zhong No. 99 (Shanghai High People’s Ct. 2016) (China).

64. Sophia Tang, *Chinese Courts Made Decision Taking into Account of the Hague Choice of Court Convention*, CONFLICTOFLAWS.NET (Nov. 14, 2017), <http://conflictoflaws.net/2017/chinese-courts-made-decision-taking-into-account-of-the-hague-choice-of-court-convention>.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

circulation of money judgments.<sup>72</sup>

China's decision to join the COCA may have decisive effects well beyond any impact that the *Liu* decision would have had alone. One decision, even a very promising decision, would not persuade any cross-border transactional lawyer to trust the receptivity of Chinese courts to foreign judgments over China's long-running support of international commercial arbitration.<sup>73</sup> Even if China accedes to the COCA, questions will remain about whether China will support judgment circulation with the same vigor as arbitral award circulation.<sup>74</sup>

Days after the announcement that China would sign the COCA, Wuhan University Law School hosted the "Global Forum on Private International Law," devoted to the theme of "Cooperation for Common Progress."<sup>75</sup> Subjects included both the COCA and the Hague Judgments Project. The closing address was delivered by Professor Xiao Yongping, who focused the address on three points: (1) "the Asian regional cooperation needs a set of effective dispute settlement mechanisms;" (2) "the current international dispute settlement mechanism is dominated by western developed economies" and it "is the time for Asian countries to establish a dispute resolution body with regional characteristics;" and (3) construction of "a more equitable and reasonable regional dispute resolution body should be the ideal choice for all Asian countries to promote regional cooperation."<sup>76</sup>

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72. *Id.*

73. See Dan Harris, *China Enforces United States Judgment: This Changes Pretty Much Nothing*, HARRIS BRICKEN: CHINA L. BLOG (Sept. 5, 2017), <https://www.chinalawblog.com/2017/09/china-enforces-united-states-judgment-this-changes-pretty-much-nothing.html>; Aaron Lukken, *Enforcement of U.S. Judgment in China—Don't Pop Any Corks Just Yet*, HAGUE L. BLOG (Sept. 6, 2017), <https://www.haguelawblog.com/2017/09/enforcement-u-s-judgment-china-dont-pop-corks-just-yet>.

74. See *infra* Section II.B.

75. Guo Yujun & Liang Wenwen, *Global Forum on Private International Law & 2017 Annual Meeting of China Society of Private International Law: Cooperation for Common Progress? Evolving Role of Private International Law* Held in Wuhan, China, CONFLICTOFLAWS.NET (Oct. 4, 2017), <http://conflictolaws.net/2017/global-forum-on-private-international-law-2017-annual-meeting-of-china-society-of-private-international-law-cooperation-for-common-progress-evolving-role-of-private-international-law-h>.

76. *Id.* Scholars have also been enthusiastically discussing ways out of the reciprocity "deadlock" for China's other major trading partners, such as Japan and South Korea. See Wenliang Zhang, *Mutual Recognition and Enforcement of Civil and Commercial Judgments Among China (PRC), Japan and South Korea*, CONFLICTOFLAWS.NET (Dec. 26, 2017), <http://conflictolaws.net/2017/mutual-recognition-and-enforcement-of-civil-and-commercial-judgments-among-china-prc-japan-and-south-korea>.

## II. UNDERSTANDING THE IMPROVING CIRCULATION OF JUDGMENTS

China is in the midst of a dramatic shift regarding the circulation of foreign judgments. But questions remain about both the reasons behind this shift and the likelihood that it will be both effective and long-lasting. To assess these practical questions, it is important to assess the theoretical questions behind the converging (or diverging) circulation of judgments. Despite its obvious importance, relatively little theoretical attention has been paid to the circulation of judgments, compared to other areas of private international law.<sup>77</sup>

### A. PREVAILING ECONOMIC RATIONALES

Three different rationales have dominated the economic approach to explaining the cross-border circulation of judgments. Individually, none of these theories has demonstrated compelling explanatory or predictive power. However, the congruencies of these theories may help in understanding China's sudden shift and permit some inferences about likely future behavior.

The first theoretical approach to the circulation of judgments imagines sovereigns in the classic prisoner's dilemma.<sup>78</sup> Each sovereign desires the judgments of its courts be freely recognized abroad, encouraging litigants to use the sovereign's courts, exporting that sovereign's legal norms, and offering greater relief to domestic plaintiffs that may disproportionately choose domestic courts. This account supposes that the overall optimal solution is for both sovereigns to freely recognize each other's judgments. But neither sovereign has sufficient incentive to act first in a one-shot game.

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77. Professor Michael Whincop described the theoretical literature on recognition and enforcement of judgments, with some hyperbole, as a "scholarly desert." Michael J. Whincop, *The Recognition Scene: Game Theoretic Issues in the Recognition of Foreign Judgments*, 23 MELB. U. L. REV. 416, 416 (1999). It might better be described as a scholarly dessert—it comes after everything else, is overlooked by those who should know better, and is the best part of the meal.

78. MICHAEL J. WHINCOP & MARY KEYES, POLICY AND PRAGMATISM IN THE CONFLICT OF LAWS 157–60 (2001); see also Brand, *supra* note 3, at 625–26. Professor Ronald Brand hypothesized that judgment recognition and enforcement could follow the prisoner's dilemma, in which the highest payoff for the individual player is to defect while the other players cooperate, but is likely better described by the stag hunt, in which the highest individual payoff occurs when both players cooperate. Professor Brand argued that "[r]egardless of whether the prisoners' dilemma or stag hunt model is considered the most reflective of the judgment recognition paradigm, mutual cooperation is beneficial," and therefore economic analysis "supports the negotiation of a multilateral judgments recognition treaty." *Id.*; see also Whincop, *supra* note 77, at 416–28 ("There is no theory of judgment recognition which explains the incentives of states to recognise judgments and enter recognition conventions, or the theoretical relationship between recognition and choice of law and jurisdiction.").

However, the recognition and enforcement of foreign judgments is a long-term, iterative process with repeat players. Therefore, the long-term benefits of cooperation overcome the short-term incentives to defect, leading to the greater circulation of national court judgments. Under this account, sovereigns can induce cooperation, as defection can be readily punished.

A second account proposes that the recognition and enforcement of foreign judgments is a “weakly dominant strategy”<sup>79</sup>—in essence, permitting the circulation of judgments is a unilateral good, not unlike permitting free trade.<sup>80</sup> The recognition and enforcement of foreign judgments prevents waste by preventing the re-litigation of previously adjudicated disputes and reducing burdens on national courts.<sup>81</sup> (This assumes that the costs of re-litigation are less than those of recognition and enforcement.) Therefore, even if other sovereigns refuse to recognize and enforce foreign judgments, it is still in a particular sovereign’s interest to permit free circulation of these judgments.

Neither of these accounts is entirely persuasive. The prisoner’s dilemma account is undermined by the following historical facts: (1) the United States *did* move first to welcome foreign judgments; and (2) decades passed before the circulation of judgments among economic units seemed to thaw (perhaps as a result of U.S. leadership, perhaps not). This several-decade long pause also seems to undermine the unilateral good argument. But perhaps this is asking too much, too quickly. The prisoner’s dilemma account rests on the importance of long-term incentives—perhaps those are only now bearing fruit. And the United States’ behavior is consistent with the unilateral good hypothesis—though the behavior of other nations is largely not. And the “demise of the reciprocity requirement” in U.S. law seems to undercut the prisoner dilemma’s hypotheses, while supporting the unilateral good

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79. Yaad Rotem, *The Problem of Selective or Sporadic Recognition: A New Economic Rationale for the Law of Foreign Country Judgments*, 10 CHI. J. INT’L L. 505, 510 (2010).

80. See Milton Friedman, *Free Trade*, NEWSWEEK, Aug. 17, 1970, at 71 (“However, we only increase the hurt to us—and also to them—by imposing additional restrictions in our turn. The wise course for us is precisely the opposite—to move unilaterally toward free trade.”). Professor Brand draws the connection between the two bodies of law explicitly, arguing that “any system developed to facilitate free movement of economic rights . . . must contain both rules regarding free movement *and* rules regarding legal acknowledgment of the existence and value of the the underlying economic rights involved in the exchange process.” Brand, *supra* note 3, at 613. Therefore, “the rationale for the elimination of barriers to the free movement of economic rights is also the rationale for the elimination of barriers to the free movement of of judgments.” *Id.*

81. See Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601, 1603 (1968) (noting the need “to avoid the duplication of effort and consequent waste involved in reconsidering a matter that has already been litigated”).

argument.<sup>82</sup>

In a 2010 article, Professor Yaad Rotem offers a third theory, which focuses on the “problem of asymmetric information.”<sup>83</sup> Rotem posits that a “forum would prefer that its judgments always be recognized abroad while retaining the ability to pick and choose which foreign judgments it itself recognizes.”<sup>84</sup> On the other hand, the “worst-case scenario for a forum in this regard is to recognize foreign judgments but have its own judgments ignored abroad.”<sup>85</sup> The difficulty arises because of limited information among sovereigns—specifically, that sovereigns are unable to assess the causes of any particular judgment of non-recognition. Therefore, a sovereign attempting to export its judgments cannot reliably determine when refusals to recognize judgments by another sovereign’s courts are merely sporadic—which would be acceptable, yet annoying—or a genuinely selective sorting of some types of judgments from others.

Professor Rotem’s account suffers for two reasons, both related to the doctrine of judgment circulation. First, virtually all laws of judgment recognition and enforcement permit non-recognition on the ground that the incoming judgment violates the public policy of the nation where recognition is sought. Indeed, this is a genuine point of convergence among national laws on the subject. Therefore, it is broadly accepted that national law can and should have an *explicit* ground for selective non-recognition. Second, this ground is seldom used, and when it is used, it is often subject to serious criticism. Even Chinese authorities have described the public policy ground as a “very unruly horse” in the context of making the case for joining the COCA.<sup>86</sup> It is certainly possible that national courts are using other grounds for non-recognition to avoid invoking the disfavored ground of public policy. Though there is some evidence to suggest such behavior by Chinese provincial courts,<sup>87</sup> neither the practitioner nor the academic literature identify this particular sort of opportunism as a notable problem.

Simply put, broadly convergent doctrine permits an explicit ground for selective non-recognition of foreign judgments. And national courts use the public policy exception and explicitly state when they want to be selective

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82. Rotem, *supra* note 79, at 510.

83. *Id.*

84. *Id.*

85. *Id.* at 510–11.

86. See Tsang, *supra* note 10, at 33 (footnote omitted).

87. See Sapna Jhangiani, *Enforcement in China – What the Cases Show*, KLUWER ARB. BLOG (Dec. 6, 2013), <http://arbitrationblog.kluwerarbitration.com/2013/12/06/enforcement-in-china-what-the-cases-show>.

about recognizing foreign judgments. If the public policy ground were to get out of hand, this would pose other problems for the circulation of judgments—but it is not a problem of asymmetric information. Professor Rotem’s account does prompt the question of why the public policy exception exists and is not used more often. The answer must lie, however, in the underlying incentives to create a judgment circulation system.

#### B. THE SPILLOVER EFFECT OF INTERNATIONAL ARBITRATION

China has embraced international commercial arbitration as the dominant mode of cross-border dispute resolution. China acceded to the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) in 1987. The New York Convention is arguably the most successful commercial treaty in history, with over 180 contracting states. The New York Convention sets the overarching framework for international commercial arbitration, obligating contracting states to enforce arbitral agreements and to recognize and enforce arbitral awards, subject to limited and exclusive defenses.

China has been enthusiastically supportive of international commercial arbitration for over two decades. In the 1990s, the SPC became concerned that provincial Chinese courts were being insufficiently deferential in their review of international arbitral awards and therefore not complying with China’s obligations under the New York Convention.<sup>88</sup> In 1987, China acceded to the New York Convention. In 1995, the SPC announced the “Prior Reporting System,” with further expansions of the program in 1998 and 2017. Under this system, there is an “automatic appeal” from any decision denying recognition. If a people’s court decides to refuse recognition and enforcement of a New York Convention award, it must report the decision to the appropriate high people’s court. If the high people’s court approves the rejection, it must refer the decision to the Supreme People’s Court. Only after approval from the Supreme People’s Court can the court of first instance refuse to recognize the award. This system has had a demonstrable effect on recognition rates, and likely on liberalizing doctrine as well.<sup>89</sup> China has also liberalized its approach to selecting arbitral

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88. This phenomenon is not limited to arbitral award enforcement. See Yun-chien Chang & Ke Xu, *Decentralized and Anomalous Interpretation of Chinese Private Law: Understanding a Bureaucratic and Political Judicial System*, 102 MINN. L. REV. 1527, 1531–32 (2018) (“Because of the political and bureaucratic court system in China, examples and instances of decentralized and anomalous interpretations are far more numerous than casual observers would expect. That is, decentralized and anomalous interpretations in China have the same root: the sociopolitical pressure on courts, often from the political branch.”).

89. See Jhangiani, *supra* note 87.

institutions and procedures.

Many have described arbitration and litigation as competitors. Though this is sometimes true, it is just as often true to say that they are complements.<sup>90</sup> The system of international arbitration relies on national courts to enforce arbitration agreements, to recognize and enforce awards, and to offer interim assistance to arbitral tribunals. Even courts that have rejected an active role in international litigation—like China’s until recently—have become active purveyors of international arbitration.

Arbitration is appealing to nations concerned about decisional sovereignty (or the perception of infringements on sovereignty) because it appears more denationalized. Every New York Convention arbitration must be governed by a national seat, but an award rendered in a foreign seat can still seem more palatable than a judgment rendered by a foreign court. But the difference may not be so extreme. In practice, advocates of the denationalization of arbitration equate it with subservience of national courts, which in their view ought to never (or hardly ever) question arbitral award enforcement.

Even if national courts have taken a more robust view of their review of awards, they have become competitors for the business of international commercial arbitration. China is a case in point. Shanghai has actively competed to become a major center of international commercial arbitration. New arbitration centers are being opened in Beijing and Shenzhen, reflecting regional as well as national competition for the business of international arbitration. It will come as no surprise that new international commercial courts have opened in Shenzhen and Xi’an, with another coming in Beijing.<sup>91</sup> Relevant international and domestic law reflects the close relationship between the circulation of arbitral awards and the circulation of judgments. The COCA was deliberately modeled on the New York Convention. Even earlier, there was well-documented transmission of ideas between the New York Convention, the uniform U.S. state laws on the recognition of judgments, and proposed U.S. federal law on the recognition of judgments.

The Chinese experience liberalizing arbitration law has not been without speedbumps—especially among provincial courts<sup>92</sup>—but it has largely been a success. The China International Economic and Trade Arbitration Commission (CIETAC) became the leading provider of

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90. See Bookman, *supra* note 12 (manuscript at 2) (“[M]any states conceive of different kinds of dispute resolution services as complementary offerings rather than solely as substitutes or competitors.”).

91. See Brand, *supra* note 28, at 46.

92. See Chang & Xu, *supra* note 88, at 1533–34.

international arbitration in Asia and was regarded as both reputable by foreign parties (though perhaps giving Chinese parties a certain home-court advantage) and politically acceptable to the central government. To the extent that CIETAC, headquartered in Beijing, became a dominant provider of international arbitration services, it also provided an opportunity to centralize international dispute resolution—centralization being an ongoing priority of the Xi government. However, CIETAC splintered into three arbitral bodies in 2012, effectively empowering regional authorities in Shanghai and Shenzhen.<sup>93</sup> It may well be the case that, just as international arbitration once presented an opportunity to expand economic opportunity while centralizing power,<sup>94</sup> transnational litigation in Chinese courts now presents a similar opportunity. Particularly if the same tools, such as the automatic appeal of non-recognition judgments, are used.

### C. FREE RIDERS IN TRANSNATIONAL DISPUTE RESOLUTION

Not all sovereigns are necessarily interested in exercising decisional sovereignty. Rather, a liberal judgment recognition policy allows sovereigns to freeride on other highly sophisticated judicial systems, particularly in commercial disputes. This free-riding approach allows resource-constrained nations to enjoy the benefits of a sophisticated transnational dispute system without internalizing any of the costs of developing such a system.

The only “cost” is the reduced ability to apply local laws and norms to transnational disputes. That concern, however, is muted in commercial disputes. Sophisticated contracting parties will exercise their autonomy to select a transnational dispute mechanism, forum, and law that suits them. Therefore, any application of foreign norms and laws to domestic litigants must flow through the expressed choice of those very domestic litigants. If domestic litigants in certain industries are subject to consistent bargaining power discrepancies, national legislatures can provide prophylactic protections specific to those industries.

China is clearly not attempting to freeride—it is attempting to leverage this effect. It is telling that each statement about “opening-up” also

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93. See Jie Zheng, *Competition Between Arbitral Institutions in China – Fighting for a Better System?*, KLUWER ARB. BLOG (Oct. 16, 2015), <http://arbitrationblog.kluwerarbitration.com/2015/10/16/competition-between-arbitral-institutions-in-china-fighting-for-a-better-system>.

94. The theme of the 2014 annual plenary meetings of the Chinese Communist Party’s top leadership was 法治, which can be translated as “rule of law” or “rule by law.” See Josh Chin, *‘Rule of Law’ or ‘Rule by Law’? In China, a Preposition Makes All the Difference*, WALL ST. J. (Oct. 20, 2014, 2:03 PM), <https://blogs.wsj.com/chinarealtime/2014/10/20/rule-of-law-or-rule-by-law-in-china-a-preposition-makes-all-the-difference>.

emphasized the need to move away from Western-dominated modes of dispute resolution. The emphasis is on developing modes of transnational dispute resolution that reflect the norms of East and South Asia—the heart of the Belt and Road—as opposed to norms and laws imposed by the West. China is attempting to carve out a decisional “sphere of influence.” It hopes that other nations on the Belt and Road will be willing to leverage the extensive benefits of commercial extraterritorial litigation,<sup>95</sup> while tolerating the imposition of Chinese, rather than Western, norms and laws. Under this account, China may care little about occasionally importing a U.S. or German judgment. To the extent that doing so burnishes the reputation of Chinese courts as exporters of commercial judgments, it may be beneficial. But China may not be competing with the Western centers of dispute resolution. Its ambition is to become the preeminent center of transnational dispute resolution within the aspirational Belt and Road economic unit.<sup>96</sup>

#### D. HETEROGENEOUS INCENTIVES

The free-riding effect is one example of a larger concern absent from the prevailing economic theories of judgment circulation: heterogeneous incentives among the players in the “recognition game.”<sup>97</sup> Each of the prevailing economic approaches to understanding the circulation of judgments counterfactually assumes homogenous incentives: that all sovereigns want to export all of their judgments to all countries and to refuse to import judgments from all countries; that all countries want to import all judgments; or that all judgments want their judgments recognized abroad and will tolerate sporadic, but not selective, non-recognition.

There are more things in heaven and earth than are dreamt of in this philosophy.<sup>98</sup> There are nations that are predominantly judgment exporters or predominantly judgment importers. There are nations that are predominantly capital exporters or capital importers. These positions change over time, which explains some of the significant recent shifts in transnational dispute resolution; for example, the West is increasingly skeptical of international investment arbitration, as countries like the United States and Germany import more capital, with the strings attached that they themselves strung. Some nations, such as the United States, Great Britain,

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95. See Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 1 (2008).

96. This also raises the possibility that greater circulation of judgments among economic units—celebrated at the outset of this Article—may be simply the happy side-effect of attempts to promote circulation within the aspirational Belt and Road economic unit, at least as far as China is concerned.

97. Whincop, *supra* note 77, at 418.

98. With apologies to William Shakespeare. WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 5.

and Singapore, aim to export judgments to the entire world. Some nations, such as China, may aim to export judgments only to a region. These distinctions matter in determining what strategies sovereigns will adopt in their approach to recognition of foreign judgments.

Transnational law is dictated by domestic interests. Even among countries that one might expect to have similar overall strategies, particular domestic constituencies will demand different approaches to transnational law. New York is a transnational litigation hub and the lending capital of the world. The dominance of large financial institutions drives a transnational litigation system that elevates the enforcement of financial obligations. Accordingly, exporting judgments is crucial, while importing judgments is either irrelevant or advantageous. London has been shaped as a transnational litigation hub by Britain's history as a commercial and maritime center. London's ambition is therefore to market its expertise in commercial and maritime matters to the world—accordingly, U.K. courts want badly to export judgments, but are nonetheless less welcoming to incoming judgments than their U.S. counterparts. Chinese courts exist in the context of a political-legal system responsive to the desires of the central and regional governments. It is plainly the ambition of the Xi government to establish regional economic dominance along the so-called Belt and Road. Accordingly, China's new international commercial courts may see themselves in competition with other Asian courts (and with each other) and not with New York or London at all.

Finally, the “recognition game” may be one where a player can occupy a strategy and effectively exclude others. There is only one preeminent global financial center—and therefore, only one player can adopt the appropriate strategy for circulation of judgments. China aims to be the dominant economic power in the so-called Belt and Road—only one player can adopt the transnational litigation strategy that comes with that position, if it is achieved.

### CONCLUSION

Only a couple years ago, “the Chinese example” was discussed as the most prominent resistance to the growing circulation of foreign money judgments.<sup>99</sup> China now stands, for the moment, as the most prominent example of how quickly a nation can adopt a pro-recognition and

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99. Bélig Elbalti, *Reciprocity and the Recognition and Enforcement of Foreign Judgments: A Lot of Bark but Not Much Bite*, 13 J. PRIV. INT'L L. 184, 201 (2017) (“One of the most restrictive reciprocity systems is the one adopted in China. . . . In other words, recognition is still refused on this basis regardless of how liberally foreign judgments are recognized and enforced in the rendering State.”).

enforcement policy after decades of refusal. The “Chinese example,” however, prompts several questions, including what forces drove the change and whether the change will stick. Prevailing theories of competition or cooperation among nations fail to adequately explain or predict the development of the circulation of judgments. This Article has sought to offer some brief suggestions as to approaches that better reflect the behavior of nations with heterogeneous incentives and strategies, embedded in a web of transnational dispute resolution in which litigation may be just one mode among many.

