

THE RECOGNITION AND ENFORCEMENT OF FOREIGN
JUDGMENTS BETWEEN THE UNITED STATES AND CHINA:
A STUDY OF *SANLIAN V. ROBINSON**

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This article focuses on the recognition and enforcement of judgments between the United States and Mainland China. It does not pertain to Hong Kong, Macao, or Taiwan.

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Abstract

Sanlian v. Robinson (Sanlian) is the first Chinese judgment recognized and enforced by U.S. courts. Sanlian is a breakthrough in the recognition and enforcement of judgments between the two countries. However, there are still many issues that need to be overcome in order to establish a future reciprocity arrangement with regards to recognition and enforcement of judgments between China and the United States as a whole, or even just between Chinese and Californian courts. To improve transnational justice, the courts of both countries should adopt a presumed reciprocity approach. In the long run, a bilateral treaty is the ideal solution to improve mutual enforcement of judgments between the United States and China.

I. INTRODUCTION

On March 22, 1994, a Model R44 helicopter crashed in the Yangtze River. Three people died and significant damages were incurred. *Hubei Gezhouba Sanlian Indus. Co. v. Robinson Helicopter Co.* (hereinafter *Sanlian*)¹ resulted from that accident. The helicopter was manufactured by California-based Robinson Helicopter Co. (“Robinson”), which was owned by Hubei Gezhouba Sanlian Indus. Co. (“Sanlian”) and operated by Hubei Pinghu Cruise Co., Ltd. (“Pinghu”). In March 1995, Sanlian and Pinghu sued Robinson in the Superior Court of Los Angeles County for damages based on negligence, strict liability and breach of implied warranty. The action was dismissed in November 1995 on the grounds of *forum non conveniens* (FNC). The plaintiffs then filed a lawsuit in the Chinese High People’s Court of Hubei Province (“Hubei high court”). In 2004, that Court issued a default judgment in favor of the plaintiffs. In 2006, Sanlian and Pinghu filed their complaint against Robinson in the United States District Court for the Central District of California (“California district court”) requesting enforcement of the Chinese judgment.

On March 29, 2011, the United States Court of Appeals for the Ninth Circuit (“ninth circuit court”) affirmed the decision of the California district court, which had recognized the Hubei high court’s judgment. Chinese and U.S. scholars and lawyers have paid

¹ *Hubei Gezhouba Sanlian Indus. Co. v. Robinson Helicopter Co.*, No. 2:06-cv-01798-FMC-SSx, 2009 WL 2190187, (C.D. Cal. July 22, 2009), *aff’d*, 425 F. App’x 580 (9th Cir. 2011) [hereinafter *Sanlian*].

much attention to the ninth circuit court's judgment.² Scholars have evaluated *Sanlian* as "breaking the ice,"³ "the first Chinese judgment recognized and enforced by the United States courts"⁴ and "the first landmark decision."⁵

However, the *Sanlian* litigation process was an expensive, 17-year ordeal for both parties.⁶ The FNC proceedings alone took the parties almost three years to complete.⁷ The trial proceedings in the Hubei high court took four more years, from 2001 to 2005,⁸ and the plaintiffs' request for enforcement of the Chinese judgment involved proceedings that lasted another five years.⁹

Owing to the lengthy delays and high costs, *Sanlian* is not an effective precedent to follow for the reciprocal enforcement of foreign judgments. It is unclear if *Sanlian* should really be considered a milestone or breakthrough in the recognition and enforcement of judgments between China and the United States.¹⁰ The major objective of this paper is to identify to what degree *Sanlian* actually represents a breakthrough between the two countries. I also identify and explore paths to improving transnational cooperation in enforcement of judgments.

This paper is divided into five parts. Part I introduces general background information to *Sanlian*. Part II discusses the *Sanlian* judgment and UFMJRA standards. Part III analyzes the possibility of

² See Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444 (2011); 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); E. Paul Dougherty, *First Enforcement of a Chinese Judgment by a U.S. Court under Review*, PRODUCT LIABILITY NEWSLETTER (January 2011); Christina Weston, *The Enforcement Loophole: Judgment Recognition Defenses as a Loophole to Corporate Accountability for Conduct Abroad*, 25 EMORY INT'L L. REV. 731 (2011).

³ See Liang Tao, *Breaking the Ice - Overview on the First Chinese Judgment Recognized and Enforced by the United States Courts*, 9 CHINA'S FOREIGN TRADE 60 (2010).

⁴ See Dougherty, *supra* note 2.

⁵ See Ariel Ye et al., *First Landmark Decision in Obtaining Recognition and Enforcement of a PRC Court Judgment in the US*, KING & WOOD MALLESONS, <http://www.kingandwood.com/article.aspx?id=First-Landmark-Decision-in-Obtaining-Recognition-and-Enforcement-of-APRC-Court-Judgment-in-the-US&language=en> (last visited December 8, 2012).

⁶ See Whytock & Robertson, *supra* note 2, at 1483.

⁷ See Appellant's Opening Brief at 4-12, *Sanlian*, 425 F. App'x 580 (9th Cir. 2011) (No. 09-56629).

⁸ *Id.* at 6-7 (After the case was stayed on FNC grounds by the Los Angeles Superior Court in 1998, *Sanlian* and *Pinghu* initiated arbitration proceedings against *Robinson* in the International Court of Arbitration of the International Chamber of Commerce. In 2000, the arbitral tribunal ruled that it lacked jurisdiction because no valid arbitration agreement existed between the two Chinese companies and *Robinson*. Subsequently, the plaintiffs re-filed an action in the Hubei high court in 2001.).

⁹ See *Sanlian*, *supra* note 1.

¹⁰ See Liang, *supra* note 3, at 63; see generally *Chinese Judgment Enforced in the United States*, CONFLICT OF LAWS.NET (Aug. 24, 2009), <http://conflictoflaws.net/2009/chinese-judgment-enforced-in-the-united-states/>.

Chinese courts recognizing and enforcing U.S. judgments following *Sanlian*. Part IV briefly compares FMRA and Chinese laws regarding recognition and enforcement of foreign judgments and explores the possibility of concluding a bilateral treaty in this area. Part V concludes that in the interim, adopting an approach of presumed reciprocity would be an effective first step, although a bilateral treaty would be ideal in the long-term.

II. *SANLIAN* AND THE ENFORCEMENT OF CHINESE JUDGMENTS IN U.S. COURTS

A. *Sanlian* and the UFMJRA Standards

In the United States, there is no direct source that governs recognition and enforcement of foreign judgments at the federal level. Such cases are usually governed by state law.¹¹

In *Sanlian*, the California district court applied the Uniform Foreign Money-Judgments Recognition Act (“UFMJRA”)¹² to review the Chinese judgment. The UFMJRA aims to codify “the most prevalent common law rules” for recognizing and enforcing foreign money judgments, encouraging reciprocal recognition, and enforcement of U.S. judgments in other countries.¹³ The UFMJRA has been adopted in California and codified in the former California Code of Civil Procedure, Sections 1713–1713.8. Those provisions apply to any foreign judgment that is final, conclusive and enforceable under the laws where it is rendered.¹⁴ Section 4(a) of the UFMJRA provides three mandatory grounds for non-recognition of foreign judgments:¹⁵

(1) the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

(2) the foreign court did not have personal jurisdiction over the defendant; or

¹¹ See GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 1110–13 (5th ed. 2011).

¹² 13 U.L.A. 391 (1962).

¹³ *Manco Contracting Co. (W.W.L.) v. Bezdikian*, 195 P. 3d 604, 608 (Cal. 2008).

¹⁴ See CAL. CIV. PROC. CODE, § 1713.2.

¹⁵ Currently, 33 states or U.S. territories have adopted the Uniform Enforcement of Foreign Judgments Act [hereinafter UFMJRA]. See *Legislative Fact Sheet – Foreign Money Judgments Recognition Act*, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, <http://uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign%20Money%20Judgments%20Recognition%20Act> (last visited May 10, 2012). To date, a modified version of the UFMJRA, has been adopted by 15 states including California. See INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE, 151–54 (Barton Legume ed., 2005).

(3) the foreign court did not have jurisdiction over the subject matter.

Six discretionary grounds for non-recognition are listed in Section 4(b):

(1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend; (2) the judgment was obtained by fraud; (3) the [cause of action]... on which the judgment is based is repugnant to the public policy of this state; (4) the judgment conflicts with another final and conclusive judgment; (5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or (6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.¹⁶

In *Sanlian*, the California district court and ninth circuit court addressed four main issues: the statute of limitations; finality, conclusiveness and enforceability of the Chinese judgment; jurisdiction; and fairness of the Chinese judicial system and service of process.

1. The Statute of Limitations

Robinson argued that it agreed to toll the statute of limitations from the date that the plaintiffs filed their complaint in the California state court, until the California state court action was finally dismissed. The California district court granted summary judgment in favor of the defendant on the grounds that the statute of limitations had expired before the Chinese lawsuit was filed. The ninth circuit court, in its 2008 decision, ruled that Robinson's agreement to toll the statute of limitations as a condition to the FNC stay of the Californian action remained in place when the plaintiffs filed their complaint in China: "There was no basis for finding that enforcement of the PRC judgment would violate California's public policy against state claims."¹⁷ In the interest of protecting "the integrity of the judicial process", the ninth circuit court also declined to consider Robinson's argument regarding the domestic Chinese statute of limitations.¹⁸

¹⁶ See CAL. CIV. PROC. CODE, § 1716 (a).

¹⁷ *Id.*

¹⁸ *Sanlian*, 425 F. App'x 580, 581.

As for the statute of limitations concerning the enforcement of the Chinese judgment, the California district court noted that China's Civil Procedure Law contains no provisions to regulate a foreign-related case in this regard. In California, the California Civil Procedure Code Section 337.5 provides a 10-year statute of limitations for actions on judgments by other U.S. states or foreign countries. The California district court held that the plaintiffs' action requesting recognition of the Chinese judgment had been filed in a timely manner.¹⁹

2. Finality, Conclusiveness and Enforceability of the Chinese Judgment

The California district court concluded that the Chinese judgment became final, conclusive and enforceable because Robinson did not appeal the Chinese judgment within 30 days, as prescribed by Chinese law.²⁰ The California district court did not elaborate further on this issue. The ninth circuit court also did not mention this issue in its affirmative judgment.

3. Jurisdiction and Due Process

The California district court confirmed that the Hubei high court had personal jurisdiction because Robinson consented to personal jurisdiction during the FNC proceedings. The district court also held that Robinson's statement to the California court—that it would submit to the jurisdiction of an appropriate civil court in China—prevented it from raising the issue of non-recognition based on an alleged lack of personal jurisdiction.²¹ Moreover, the California district court held that the Hubei high court's jurisdiction over the subject matter was uncontested because the helicopter that crashed in the Yangtze River was still in China.²²

Robinson did not challenge the Chinese judgment on the grounds of impartial tribunals or due process under U.S. law. Robinson "had not presented any evidence, nor did it contend, that the PRC court system does not provide impartial tribunals or procedures compatible with the requirements of due process of law." The ninth circuit court found that the Chinese court system's use of Hague Convention procedures for service of process on foreign defendants did not offend notions of basic fairness²³ and was compatible with relaxed notions of due process of law.²⁴

¹⁹ Sanlian, 2009 WL 2190187, at *5.

²⁰ *Id.* at *7.

²¹ *See id.* at *1.

²² *See id.* at n. 5.

²³ *Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473, 477–78 (7th Cir. 2000).

²⁴ *See* Sanlian, 2009 WL 2190187, at *6.

4. Adequate Notice

Of the six discretionary grounds in Section 4(b) of the UFMJRA, the District Court focused on the requirement of adequate notice.²⁵ China and the United States are both signatories to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (Hague Convention).²⁶ In *Sanlian*, the Hubei high court chose the channel of central authority specified in the Hague Convention. That service channel took over three years to serve the relevant judicial documents. On February 17, 2004, a U.S. process server left a summons, statement of complaint, notification of appearance, and related papers for the Chinese action at the front desk of the defendant's facility. This was done after speaking to the receptionist of Robinson, who was the administrative assistant to Robinson's general counsel and chief financial officer.²⁷

The California district court examined the service of process issues in the Chinese action. According to Article 5(a) of the Hague Convention, the central authority of the state addressed shall serve the documents or arrange to have them served by a method prescribed by its internal laws for the service of documents in domestic actions. However, the Hague Convention does not provide any provisions regarding the validity of the service of process.

The California district court assessed whether the service of process was proper according to Rule 4(d)(iii) of the Federal Rules of Civil Procedure and the 9th circuit ruling in *Direct Mail Specialists, Inc. v. Eclat Computerized Tech.*²⁸ First, the California district court found the receptionist was sufficiently integrated into the organization of Robinson to receive service. Second, actual receipt of legal documents by Robinson's general counsel showed that service of process was proper. Third, the U.S. Central Authority returned the completed certificate to the Hubei high court, which attested that service had been rendered pursuant to the laws of the state addressed, i.e., U.S. law. Fourth, a completed certificate under the Hague Convention is *prima facie* evidence that service was made in compliance with the Hague Convention. The court would usually be justified in upholding the validity of such a certificate and decline to

²⁵ *Id.* (holding that the Chinese judgment did not have other grounds for non-recognition listed in Section 4(b)).

²⁶ *International Contracts*, THE HAGUE CONFERENCE ON PRIVATE INVESTMENT, <http://www.hcch.net> (last visited May 2nd, 2012) (stating that China ratified the Hague Service Convention on May 6, 1991 and the Convention came into force in China as of January 1, 1992, and that the United States ratified the Convention on September 15, 1965 and the Convention came into force in the U.S. as of February 10, 1969).

²⁷ *Sanlian*, 2009 WL 2190187, at *1.

²⁸ *Direct Mail Specialists, Inc. v. Eclat Computerized Tech., Inc.*, 840 F.2d 685, 688 (9th Cir. 1988).

look behind the certificate when the defendant had not argued that it lacked actual notice.²⁹

In addition, Robinson received actual notice 30 days prior to the commencement of the Chinese action as required by Chinese law, and Robinson did not request an extension of time to file an answer to the plaintiffs' complaints.³⁰ The ninth circuit court further pointed out that any technical non-compliance with the Hague Convention could not serve as an independent basis for non-recognition of the Chinese judgment.³¹

Finally, the ninth circuit court specifically stated in its 2011 judgment that Robinson violated its promise to abide by any final judgment rendered in China. The ninth circuit court held that accepting Robinson's argument that the Chinese judgment was not enforceable would create the perception that the California court was "misled" in granting Robinson's FNV motion and would "impose an unfair detriment" on the plaintiffs.³²

B. Sanlian and Reciprocity in U.S. Courts

With regards to reciprocity, the judgment of the California district court states that "[i]n order to accomplish the goal of encouraging reciprocal recognition of United States judgments abroad, courts have interpreted the UFMJRA as informing foreign nations of particular situations in which their judgments would definitely be recognized."³³ One reason why *Sanlian* has attracted widespread attention is its potential to encourage reciprocal recognition of judgments between U.S. and Chinese courts.

The U.S. Supreme Court adopted the reciprocity requirement in *Hilton v. Guyot*.³⁴ However, this reciprocity requirement has received much criticism³⁵ and the vast majority of U.S. states have abandoned it. The UFMJRA and a number of states that have adopted the UFMJRA do not use the reciprocity requirement.³⁶ The Restatement (Third) Foreign Relationship Law also does not include it.³⁷

²⁹ See *Sanlian*, 2009 WL 2190187, at *1-2.

³⁰ *Id.* at *6-7.

³¹ See *Id.* at *4.

³² *Id.* at *4.

³³ See *id.* at *4.

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

³⁵ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1971); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481, cmt. d & reporters' note 1 (1987); see also *Direction de Disconto-Gesellschaft v. U.S. Steel Corp.*, 300 F. 741 (S.D.N.Y. 1924), *aff'd*, 267 U.S. 22 (1925); *Dow Jones & Co. v. Harrods, Ltd.*, 237 F. Supp. 2d 394, 429 n. 136 (S.D.N.Y. 2002); *Hilkmann v. Hilkmann*, 858 A. 2d 58, 66 (Pa. 2004).

³⁶ See BORN & RUTLEDGE, *supra* note 11, at 1095.

³⁷ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 (1987).

However, the abandonment of reciprocity has not been uniformly accepted by all U.S. states and the reciprocity requirement recently has enjoyed at least “a modest resurgence.”³⁸ Several states such as Florida, Maine, Ohio and Texas include a reciprocity ground for discretionary refusal to recognize or enforce a foreign judgment.³⁹ In Georgia and Massachusetts, the reciprocity treatment is a mandatory ground for non-recognition of a foreign judgment.⁴⁰ In 2005, draft federal legislation concerning the recognition of foreign judgments, called the Foreign Judgments Recognition and Enforcement Act, was proposed by the American Law Institute and also contained a modified reciprocity requirement.⁴¹

Thus, even if Chinese courts recognize that *Sanlian* constitutes reciprocity, it would be difficult for a Chinese court to decide if the principle of reciprocity has been established between China and the whole of the United States or merely between China and the particular states involved in *Sanlian*.

If Chinese courts cannot assume that reciprocity exists between China and the United States as a whole, the question of whether Chinese courts can uphold factual reciprocity between Chinese and Californian courts arises. California was one of the first states to abandon the reciprocity requirement. The Californian Code of Civil Procedure Section 1915 was enacted in 1907. Through abandoning reciprocity, Section 1915 sought to improve “the prospects of enforcing Californian judgments abroad (in foreign states following a reciprocity rule) by making it clear that foreign judgments would be recognized in California.”⁴²

The decision in *Sanlian* is a fact that proves at least one Californian court has enforced a Chinese judgment. Therefore, this case is an example that demonstrates that Californian courts have given the factual reciprocity to a Chinese judgment. In return, Chinese courts should offer reciprocity to enforce a Californian judgment if that judgment satisfies the conditions prescribed by Chinese law. However, some questions still need to be settled before reciprocity can be established between Chinese and Californian courts. First, *Sanlian* was initially recognized by the California district court, and its ruling was subsequently affirmed by the ninth

³⁸ See BORN & RUTLEDGE, *supra* note 11, at 1095.

³⁹ E.g., *Chabert v. Bacquie*, 694 So. 2d 805, 808 (Fla. 4th Dist. Ct. App. 1997); *Banque Libanaise Pour Le Commerce v. Khreich*, 915 F.2d 1000 (5th Cir. 1990); *Reading & Bates Const. Co. v. Baker Energy Resources Corp.*, 976 S.W.2d 702 (Tex. App. 1998); *Genujo Lok Beteiligungs GmbH v. Zorn*, 943 A.2d 573, 580 (Me. 2008).

⁴⁰ See BORN & RUTLEDGE, *supra* note 11, at 1095.

⁴¹ See ALI Proposed Federal Statute, *supra* note 13, at 4.

⁴² See BORN & RUTLEDGE, *supra* note 11, at 1099.

circuit court.⁴³ It will be difficult for Chinese courts to understand and decide at which level, federal, district or both, a Californian judgment should be recognized and enforced.⁴⁴ Second, *Sanlian* addresses disputes over negligence, strict liability and breach of implied warranty. How far other U.S. judgments can be generalized to be found comparable to *Sanlian* will be a complicated issue for Chinese courts to handle. Third, there will be even greater complication if in the future U.S. courts recognize and enforce Chinese judgments concerning certain issues, but refuse to recognize judgments on other issues. Such situations would complicate the ability of Chinese courts to estimate the scope of the reciprocity between the two countries.

Therefore, there are still many issues that need to be overcome in order to establish a future reciprocity arrangement with regards to recognition and enforcement of judgments between China the United States as a whole, or even just between China and California.

III. SANLIAN AND ENFORCEMENT OF U.S. JUDGMENTS IN CHINESE COURTS

Sanlian is the first Chinese judgment recognized and enforced by a U.S. court.⁴⁵ This section will analyze whether, subsequent to *Sanlian*, Chinese courts can recognize and enforce U.S. judgments, as well as what conditions are necessary for Chinese courts to enforce foreign judgments.

A. Statutory Requirements for Enforcement of Foreign Judgments

The Civil Procedure Law of the People's Republic of China ("Civil Procedure Law") states that if a party wants a legally effective judgment from a foreign court to be recognized and enforced by a Chinese court, that party may apply directly to the intermediate people's court with jurisdiction over the case. Alternatively, the foreign court may request recognition and enforcement by a Chinese court, according to provisions of international treaties concluded or acceded to by China, or based on the principle of reciprocity.⁴⁶

⁴³ See *supra* note 1.

⁴⁴ See Xie Xinsheng (谢新胜), *Tiaoyue yu Huhui Queshi shi Zhongguo Panjue de Yuwaizhixing* (条约与互惠缺失时中国判决的域外执行) [*The Extraterritorial Enforcement of Judgment by a Chinese Court in the Context of the Lack of a Treaty and Reciprocity between the US and China*], 4 HUANQIU FALÜ PINGLUN (环球法律评论) [GLOBAL LAW REV.] 152, 158–59 (2010).

⁴⁵ See Dougherty, *supra* note 2; Liang, *supra* note 3; Ye et al., *supra* note 5.

⁴⁶ Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9th, 1991) (2012), art. 281.

According to Article 282 of the Civil Procedure Law, after examining an application or request for recognition and enforcement of an effective judgment or ruling by a foreign court in accordance with an international treaty concluded or acceded to by China or under the principle of reciprocity, a Chinese court will issue a ruling to recognize the legal force of the judgment or issue an order for enforcement if the court deems that the judgment does not violate the basic principles of Chinese laws, or China's sovereignty, security and social public interest. If the judgment or ruling violates the basic principles of Chinese laws or China's sovereignty, security or social public interest, the court must not grant recognition and there will be no enforcement.⁴⁷

Article 282 sets forth the statutory requirements for recognition and enforcement of a judgment or order rendered by a foreign court. Conditions and requirements include: (a) the judgment or ruling rendered by a foreign court is already effective, (b) the country of the trial forum and China have concluded a bilateral treaty or have both acceded to a multilateral treaty on recognition and enforcement of judgments, or have a reciprocal relationship of recognition and enforcement of judgments, and (c) the foreign judgment does not contradict the fundamental principles of Chinese law or does not violate Chinese sovereignty, national security or social public interests.

In addition, China has concluded bilateral treaties for the recognition and enforcement of foreign judgments with 27 countries so far.⁴⁸ The main grounds for non-recognition in these bilateral treaties are usually as follows:

1. Non-final or unenforceable judgment. The judgment has not become effective or is not enforceable according to the law of the State of origin.⁴⁹

⁴⁷ *Id.* art. 282.

⁴⁸ Those countries are France, Italy, Spain, Bulgaria, Hungary, Morocco, Tunis, the United Arab Emirates, Poland, Mongolia, Romania, Russia, Turkey, Ukraine, Cuba, Belarus, Kazakhstan, Egypt, Greece, Cyprus, Kyrgyz, Tajikistan, Uzbekistan, Vietnam, Laos, Lithuania and North Korea.

⁴⁹ *E.g.*, *Zhonghua Renmin Gongheguo he Bai'e'luosi Gongheguo guanyu Minshi he Xingshi Sifaxiezhu de Tiaoyue* (中华人民共和国和白俄罗斯共和国关于民事和刑事司法协助的条约) [Treaty on Judicial Assistance in Civil and Criminal Matters], China-Belr, art. 21(1), Jan. 11, 1993 [hereinafter *Treaty between China and Belarus*]; *Zhonghua Renmin Gongheguo he Guba Gongheguo guanyu Minshi he Xingshi Sifa Xiezhu de Xieding* (中华人民共和国和古巴共和国关于民事和刑事司法协助的协定) [Agreement on Judicial Assistance in Civil and Criminal Matters], China-Cuba, art. 25(1), Nov. 24, 1992 [hereinafter *Agreement between China and Cuba*]; *Zhonghua Renmin Gongheguo he Falanxi Gongheguo guanyu Minshi, Shangshi Sifa Xizhu de Xieding* (中华人民共和国和法兰西共和国关于民事、商事司法协助的协定) [Agreement on Judicial Assistance in Civil and Commercial Matters], China-Fr., art. 22(3), May. 4, 1987 [hereinafter *Agreement between China and France*]; *Zhonghua Renmin Gongheguo he Alabo Aiji Gongheguo guanyu Minshi/Shangshi he Xingshi Sifaxiezhu de Xieding* (中华人民共和国和阿拉伯埃及共和国关于民事、商事和刑事司法协助的协

2. Lack of jurisdiction. According to the law of the requested State, the court addressed has exclusive jurisdiction over the case,⁵⁰ or the court of the State of origin does not have jurisdiction over the case.⁵¹

3. Improper notice to defaulting party or no representatives for parties lacking competence. According to the law of the State of origin, the party in default of appearance and against whom a judgment was made was not legally summoned or the party had no civil litigation competence and lacked agency.⁵²

4. Conflict of judgment with another final judgment entitled to recognition and enforcement. A judgment involving the same cause of action between the same parties has been rendered by a court addressed or a court in a third country and the judgment has already been recognized and enforced by the court addressed.⁵³ Sometimes, even if the court addressed has accepted the case but has not yet rendered a judgment, a foreign judgment may not be recognized and enforced.⁵⁴

5. Public policy. The recognition and enforcement of the foreign judgment violates the sovereignty, national security or public policy of the requested State.⁵⁵

In China, most cases involving recognition and enforcement of foreign judgments that have been reported or published are foreign divorce judgments involving Chinese citizens. Those foreign judgments have usually been recognized by Chinese courts in order to prevent Chinese citizens from having to initiate separate divorce proceedings when they want to remarry.⁵⁶ Several foreign judgments

定) [Agreement on Judicial Assistance in Civil, Commercial and Criminal Matters], China-Egypt, art. 21 (1), Apr. 21, 1994 [hereinafter Agreement between China and Egypt].

⁵⁰ Treaty between China and Belarus, *supra* note 49, art. 21(2).

⁵¹ E.g., Agreement between China and Cuba, *supra* note 49, art. 25(2); Agreement between China and Egypt, *supra* note 49, art. 21(2); Agreement between China and France, *supra* note 49, art. 21(1).

⁵² E.g., Agreement between China and Belarus, *supra* note 49, art. 21(3); Agreement between China and Cuba, *supra* note 49, art. 25(3); Agreement between China and Egypt, *supra* note 49, art. 21(3); Agreement between China and France, *supra* note 49, art. 21(4).

⁵³ E.g., Agreement between China and Egypt, *supra* note 49, art. 21(4); Agreement between China and France, *supra* note 49, art. 21(6).

⁵⁴ E.g., Treaty between China and Belarus, *supra* note 49, art. 21(4); Agreement between China and Cuba, *supra* note 49, art. 25(4).

⁵⁵ E.g., Treaty between China and Belarus, *supra* note 49, art. 21(5); Agreement between China and Egypt, *supra* note 49, art. 21(5); Agreement between China and France, *supra* note 49, art. 21(5).

⁵⁶ E.g., Wang Lijian Shenqing Chengren Meiguo Fayuan Lihun Panjue An (王力健申请承认美国法院离婚判决书案) [Lijian Wang Case of Recognition of a US Divorce Decree], 1992-1999 RENMIN FAYUAN ANLI XUAN (CIVIL VOLUME) 2027 (Guangzhou Interm. People's Ct., 1991); Jiang Xiaomin Shenqing Chengren Xinxilanguo Fayuan Jiechu Hunyue de Xieyishu Xiaoli An (蒋筱敏申请承认新西兰国法院解除婚约的决议书效力案) [Jiang Xiaomin Case for Resolution of Application to Recognize New Zealand Court's Judgment on Termination of the Engagement], *id.* at 2036, 2036-37 (Xi'an Interm. People's Ct. 1994); Ligeng Dingyingqiu Shenqing Chengren Ribenguo Fayuan Zuochu de Lihun

in commercial matters have also been recognized and enforced by Chinese courts.

For example, on December 18, 2000, an Italian company, B&T Ceramic Group s.r.l. (B&T), applied to the Foshan Intermediate People's Court for recognition and enforcement of Bankruptcy Judgment No. 62673 rendered by a Milan court on October 24, 1997 and of the Adjudication Order on the Transfer of Confiscated Assets rendered by the Civil and Penal Court in Milan on September 30, 1999. The Foshan Intermediate People's Court held that there were no grounds for non-recognition of the Italian judgment and adjudication order in accordance with Article 21 of the Treaty on Judicial Assistance in Civil Matters between China and Italy.⁵⁷ Recognition of this judgment and adjudication order did not violate China's public policy. Accordingly, the Italian bankruptcy judgment and adjudication order was recognized.⁵⁸

B. Reciprocity Requirement in Chinese Courts

As noted previously, a reciprocity relationship is currently a requirement for Chinese courts to enforce foreign judgments when no binding bilateral or multilateral legal framework exists. Two cases have been refused recognition and enforcement for lack of a treaty or reciprocity relationship, as outlined below.

In 2006, an Australian company requested enforcement of a judgment by the Supreme Court of Western Australia in the Shenzhen Intermediate People's Court. That court and its superior court, the High People's Court of Guangdong Province, refused enforcement because no treaty on mutual recognition and enforcement of judgments existed between China and Australia; nor had the two countries established reciprocity. In 2007, the case was reported to the Supreme People's Court of China which agreed with the lower courts' opinions.⁵⁹ The Australian company's request was refused. The Supreme People's Court of China suggested that the

Tiaojie Xieyi An (李庚、丁映秋申请承认日本国法院作出的离婚调解协议案) [Li Geng Case of Recognition of a Japanese Divorce Decree], *id.* at 2030 (Beijing Interm. People's Ct. 1991).

⁵⁷ The Treaty was concluded on 20 May 1991, and came into force as of 1 January 1995.

⁵⁸ See Yidali B&T Ceramic Group s.r.l. Youxian Gongsi Shenqing Chengren he Zhixing Waiguo Fayuan Panjue An (意大利 B&T Ceramic Group s.r.l. 有限公司申请承认和执行外国法院判决案) [B&T Ceramic Group s.r.l. v. Nanhai Nasseti Pioneer Ceramic Machine Co. Ltd.], RENMIN FAYUAN BAO (人民法院报) [PEOPLE'S COURT DAILY], Jun. 9, 2004 (Foshan Interm. People's Ct. 2000).

⁵⁹ See Zuigao Renmin Fayuan guanyu Shenqing Ren Fulaxi Dongli Fadong Ji Youxian Gongsi Shenqing Chenren he Zhixing Aoda Liya Fayuan Pajue Yian de Qingshi de Fuhan (最高人民法院关于申请人弗拉西动力发动机有限公司申请承认和执行澳大利亚法院判决一案的请示的复函) [The Reply of the Supreme People's Court of China concerning the Request of an Australian Company for the Recognition and Enforcement of a Judgment Rendered by the Supreme Court of Western Australia] in 14 Shewai Shangshi Haishi Shenpan Zhidao (涉外商事海事审判指导) [Guide on Foreign-Related Commercial and Maritime Trial] 107-110 (Wan Exiang (万鄂湘) et al. eds., 2007).

Australian company might file a lawsuit against the relevant Chinese parties in Chinese courts.⁶⁰

In 1994, in *Gomi Akira v Dalian Fari Seafood Co., Ltd.*,⁶¹ Gomi Akira (a Japanese citizen) asked the Dalian Intermediate People's Court to recognize and enforce a Japanese judgment and two rulings. The case involved a dispute arising out of a loan contract. The defendant owed the claimant 150 million Yen, but the defendant had no property in Japan with which to enforce the claim. However, the debtor had invested 4.85 million Chinese Yuan in a Sino-Japanese joint venture in Dalian, China. The Dalian court found that there was no multilateral or bilateral treaty governing such matters between China and Japan. The Dalian court and its superior court, the High People's Court of Liaoning Province, referred the case to the Supreme People's Court of China for final guidance. The response upheld the Dalian court's opinion and, furthermore stated that the two countries had not yet established reciprocity.⁶² Therefore, the Chinese court should not recognize and enforce the Japanese judgment and rulings.

In international judicial cooperation, reciprocity usually is a legal basis for mutual recognition and enforcement of judgments. As noted above, most U.S. States have currently abandoned the reciprocity requirement. If Chinese courts also abandoned the reciprocity requirement, it would be more effective for the damaged party to seek enforcement of a judgment in the two countries' courts. In China, the reciprocity requirement has also been criticized by some scholars.⁶³ If all countries maintain the requirement of reciprocity, the enforcement of foreign judgments will never be possible.

⁶⁰ See *Zuigao Renmin Fayuan guanyu Shiyong Zhonghua Renmin Gonghe Guo Minshi Susong Fa Ruogan Wenti de Yijian* (最高人民法院关于适用《中华人民共和国民事诉讼法》若干问题的意见) [The Opinions of the Supreme People's Court of China on Some Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China] (promulgated by the Sup People's Ct., July 14 1992) SUP. PEOPLE'S CT. GAZ., 70 (1992).

⁶¹ See *Zuigao Renmin Fayuan guanyu Woguo Renmin Fayuan Yingfou Chengren he Zhixing Riben Guo Fayuan Juti Zhaiquan Zhaiwu Neirong Caipan de Fuhuan* (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] (promulgated by the Sup People's Ct., Jun. 26, 1995, effective Jun. 26, 1995) in *Zuigao Renmin Fayuan Sifa Jieshi yu Qingshi Dafu Quanshu* (最高人民法院司法解释与请示答复全书) [Collection of Judicial Interpretations and Replies of the Supreme People's Court] 1655 (2005).

⁶² *Id.*

⁶³ See, e.g., Li Wang (李旺), *Waiguo Fayuan Panjue de Chengren he Zhixing Tiaojian zhong de Huhui Yuanze* (外国法院判决的承认和执行条件中的互惠原则) [Reciprocity Rule in the Recognition and Enforcement of Foreign Judgments], 2 ZHENGFA LUNTAN (政法论坛) [POLITICAL SCIENCE AND LAW 94 (1999)]; Xu Ruibai (徐瑞柏) et al., *Minshi Anjian Sifa Chengxu Shiwu* (民事案件司法程序实务) [Practice of Judicial Procedure of Civil Cases] 356-58 (1993).

Therefore, the reciprocity requirement for recognition and enforcement of foreign judgments is unjustified and unfeasible.⁶⁴

For example, the *Gomi Akira* case produced a negative influence on the recognition and enforcement of judgements between China and Japan. In 2003, a decision by the Osaka High Court of Japan refused to recognize a judgment rendered by a high people's court of China because of lack of reciprocity. The Osaka High Court referenced the *Gomi Akira* case and held that the Chinese judgment in question did not fulfil Japan's requirement of reciprocity.⁶⁵ Therefore, the Chinese judgment was refused recognition and enforcement.⁶⁶

This situation demonstrates that the reciprocity requirement easily leads to retaliatory treatment. Abandonment of the reciprocity requirement would encourage mutual enforcement of judgments. However, China is a civil law country. Once a Chinese law provides for the reciprocity requirement, Chinese courts have the obligation to implement the law. Therefore, only when the National People's Congress of China repeals the provisions of the reciprocity requirement, will Chinese courts be released from the reciprocity requirement for recognition and enforcement of foreign judgments. The abandonment of reciprocity is a legislative issue, not a judicial issue.

That being said, if U.S. states courts requiring reciprocity and Chinese courts cannot abandon the reciprocity requirement, adoption of a flexible approach may be feasible. As Chinese scholars have pointed out, if the judgments of one State can be enforced in another State in the absence of a treaty arrangement, the reciprocity requirements of the enforcing forum should be considered met.⁶⁷ Reciprocity should exist if, according to the statutory law or the case law of that country, Chinese judgments may be recognized and enforced.⁶⁸ The message here is that a potential reciprocity relationship exists, even though no precedent or prior case has been recognized and enforced. This approach waives the factual reciprocity and adopts a presumed reciprocity.⁶⁹

The requirement of factual reciprocity easily precludes mutual cooperation in recognizing and enforcing judgments among different

⁶⁴ See Li Haopei (李浩培), *Guoji Minshi Chengxu Fa Gailun* (国际民事程序法概论) [An Introduction to International Civil Procedural Law] 140 (1996).

⁶⁵ See MINJI SOSHO [MINSOHO] [C. Civ. Pro.] 1996, art. 118, para. 4 (Japan).

⁶⁶ See Osaka High Court, Judgment April 9, 2003, *Hanrei Jiho* No. 1841, at 111; *Hanrei Taimuzu* No.1141, at 270; see also Nozomi Tada, *Enforcement of Foreign Judgments in Japan Regarding Business Activities*, 46 JAPANESE ANNUAL OF INTERNATIONAL LAW 75-94 (2003).

⁶⁷ See Hu Zhenjie, *Recognition and Enforcement of Foreign Judgments in China: Rules, Interpretation and Practice*, 46(3) NETHERLANDS INTERNATIONAL LAW REVIEW 303(1999).

⁶⁸ See Li Haopei, *supra* note 64, at 139.

⁶⁹ *Id.*, at 303; Xie, *supra* note 44, at 159-60; Li Wang, *supra* note 63, at 94.

countries. This requirement ultimately damages the parties' interests as the *Gomi Akira* case has proven. Conversely, presumed reciprocity would be beneficial for the protection of the parties' rights and interests, and would enhance cooperation in the field of recognition and enforcement of foreign judgments between two States. There are also other reasons for presumed reciprocity to be adopted.

First, the request for recognition and enforcement of a foreign judgment is submitted by a party. In this process, no official entity is involved in the litigation. The government or other entities of the State of origin have no opportunities to declare whether they would like to offer reciprocity to recognize and enforce a judgment from the requested State.

Second, reciprocity is an act of the State which is beyond the parties' control. It is unfair when a party obtains a favorable judgment but the judgment cannot be enforced because of an act of the State. Thus, the strict requirements of factual reciprocity will put innocent parties at a disadvantage. However, if presumed reciprocity can be adopted, this issue will be largely resolved.

Third, with respect to factual reciprocity, it is difficult for a party to prove that the State of origin offers reciprocity if no judgment was previously recognized and enforced between the State of origin and the requested State. However, under presumed reciprocity, the party has no burden of proof. Reciprocity is presumed to exist if the other party has no evidence to prove that the enforcement of a foreign judgment is impossible.

In determining whether presumed reciprocity exists, the conditions for the two States to recognize and enforce foreign judgments should be similar. If one State's courts review substantive issues of a foreign judgment and the other State's courts review only procedural issues, the latter will obviously be unwilling to offer presumed reciprocity to the former. According to the law of the State of origin, it must be possible for the requested State's judgments to be recognized and enforced by the court of origin. Where there is no possibility, there will be no reciprocity to be presumed.

If these views and suggestions on presumed reciprocity are accepted or adopted by Chinese courts or those U.S. courts that still require reciprocity, the reciprocity issue will not be an obstacle to recognition and enforcement of judgments between the United States and China.

IV. THE WAY FORWARD IN ENFORCING JUDGMENTS BETWEEN THE TWO COUNTRIES

Nothing is more frustrating for a plaintiff than discovering that a favorable judgment is a worthless piece of paper, especially after a

long hard-fought battle. Transnational justice requires not only court access, but also due redress if the damaged party is legally entitled to such a judgment.⁷⁰ Justice may be frustrated if the damaged party obtains a favorable judgment and the defendant refuses to abide by the judgment or lacks sufficient assets in the country of the adjudicating forum. Justice is also denied when the defendant has adequate assets, but the foreign court refuses to enforce the judgment.⁷¹

In the absence of a bilateral legal framework for enforcement of a foreign judgment, courts are guided only by notions of comity and fairness—a concept that varies from country to country. Therefore, courts have broad discretion in deciding whether or not to recognize and enforce a judgment rendered by a foreign court.⁷² Furthermore, even though Chinese courts recognize that *Sanlian* constitutes factual reciprocity between China and the United States, plaintiffs also risk that one country's judgment cannot be enforced by the other country's court.⁷³

The risk of non-enforcement of a foreign judgment mainly comes from differences in legal systems between countries. By comparing the UFMJRA⁷⁴ with the aforementioned Chinese provisions on recognition and enforcement of foreign judgments,⁷⁵ both similar and dissimilar conditions can be identified.

With regards to similar conditions, the reasons to refuse to enforce a foreign judgment in the UFMJRA and Chinese laws both include lack of jurisdiction, non-final and unenforceable judgments, inadequate notice, conflict with another judgment, and repugnancy to public policy. Some provisions are not considered in the other country's laws. However this does not mean that the relevant provisions are not required by the other country's courts. For

⁷⁰ 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. 255 (1991); Whytock & Robertson, *supra* note 2, at 1472.

⁷¹ See Whytock & Robertson, *supra* note 2, at 1472.

⁷² *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895) (The US Supreme Court noted “Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.”)

⁷³ As the situation showed in *Sanlian*, the two plaintiffs risked US non-enforcement of the Chinese judgment due to the lack of a relevant treaty and different provisions concerning enforcement of a foreign judgment between the United States and China. If the Chinese judgment had failed to obtain recognition and enforcement by a US court, the judgment of the Hubei High People's Court would have been just a piece of useless paper as Robinson had no assets within China.

⁷⁴ In the United States, as previously stated, thirty-three U.S. states and territories have chosen to adopt the UFMJRA. In China, the previous system of recognition and enforcement of foreign judgments is uniformly implemented and enforced by Chinese courts. A comparison between the UFMJRA and relevant Chinese provisions can demonstrate many similarities and differences in this realm between the two countries.

⁷⁵ See *supra* Part II and III.

example under the UFMJRA, fraud in obtaining the judgment is a discretionary ground for non-recognition.⁷⁶ In general, that ground refers to extrinsic fraud,⁷⁷ not intrinsic fraud.⁷⁸ In China, a judgment obtained by fraud may not be considered a legally effective judgment.⁷⁹ Also under the UFMJRA, a U.S. court may refuse to enforce a foreign judgment if inconsistent proceedings exist in the foreign court by relying on a forum selection clause.⁸⁰ In China, violation of a choice of forum agreement is incorporated into lack of jurisdiction grounds.

At least three different conditions exist with regards to differences between the UFMJRA and Chinese provisions in recognition and enforcement of foreign judgments. First, the UFMJRA evaluates whether foreign courts provide a system of impartial tribunals or procedures compatible with due process under U.S. law.⁸¹ Chinese courts do not make similar evaluations. Second, Chinese law requires an international treaty or the principle of reciprocity to exist. The UFMJRA has no such requirements. Third, FNC is a discretionary ground for U.S. courts to refuse enforcement of a foreign judgment—although FNC has seldom succeeded as a defense.⁸² Under Chinese law, FNC does not constitute a ground for non-recognition.

In addition, although some provisions are similar, they may be interpreted differently in each country. For example, a “final and conclusive and enforceable” judgment is referenced in Section 2 of the UFMJRA. Similar provisions exist in China’s Civil Procedure Law⁸³ and bilateral treaties.⁸⁴ In the United States, a final judgment

⁷⁶ See *Laufer v. Westminster Brokers, Ltd.*, 532 A.2d 130, 133 (D.C. 1987); *Continental Transfer Technique Ltd. v. Federal Gov’t of Nigeria*, 697 F. Supp. 2d 46 (D.D.C. 2010); *Transportes Aereos Pegaso, S.A. de C.V. v. Bell Helicopter Textron Inc.*, No. 08-959, 2009 WL 1585996 (E.D. Pa. May 29, 2009).

⁷⁷ *E.g.*, fraudulent conduct by the prevailing party that deprived the losing party of the opportunity to present its claim or defense.

⁷⁸ *E.g.*, fraud in the underlying transaction or the trial of the case, such as perjured testimony or falsified documents.

⁷⁹ See *Minshi Susong Fa* (民事诉讼法) [Civil Procedure Law] (promulgated by the Standing Comm., Nat’l People’s Cong., Apr. 9, 1991, effective Apr. 9, 1991) art. 282 (Chinalawinfo) (Art. 282 of China’s Civil Procedure Law does not mention “fraud” directly, but fraud is not in keeping with the requirements listed here).

⁸⁰ See *Biggelaar v. Wagner*, 978 F. Supp. 848 (N.D. Ind. 1997); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §482 cmt. (1986).

⁸¹ See UFMJRA, Section 4(a).

⁸² INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE, *supra* note 15, at 135.

⁸³ See *Minshi Susong Fa* (民事诉讼法) [Civil Procedure Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 9, 1991, effective Apr. 9th, 1991) (2012), arts. 281–282 (Chinalawinfo).

⁸⁴ See *supra* note 49.

is one that resolves the underlying disputes in their entirety.⁸⁵ If finality is disputed, the dispute will be resolved in accordance with the laws of the foreign country where the judgment was entered.⁸⁶ However, in China, in accordance with Chapter 16 of the Civil Procedure Law, *Procedure of Adjudication Supervision*, a final judgment is not subject to any appeal but may be subject to retrial.⁸⁷ On the whole, similar and dissimilar conditions co-exist in the recognition and enforcement of foreign judgments in both countries. Once litigation cannot be avoided, plaintiffs should first evaluate the prospects of enforcement of a favorable judgment in the defendants' home jurisdictions.⁸⁸

In cases with issues similar to *Sanlian*, a Chinese plaintiff may choose to sue in a competent U.S. forum where the defendant has assets available for enforcement. This will prevent having to sue in a Chinese court and then applying for enforcement in a U.S. court.⁸⁹ However, as *Sanlian* demonstrated, Chinese plaintiffs' actions in the United States can be dismissed due to FNC. In reported opinions, U.S. district courts grant defendants' motions on FNC grounds at an estimated rate of almost 50% overall. The rate is more than 60%

⁸⁵ See *Rail Servs. of Am. v. State Comp. Ins. Fund*, 110 Cal. App. 4th 323, 1 Cal. Rptr. 3d 700, 705–06 (2003).

⁸⁶ See *Hernandez v. Seventh Day Adventist Corp.*, 54 S.W.3d 335, 337 (Tex. App. 2001). Moreover, some cases have indicated that foreign law may be relevant but not necessarily decisive as to whether a foreign judgment is final, conclusive, and enforceable where rendered. See *Manco Contracting Co. (W.W.L.) v. Bezdikian*, 195 P. 3d 604, 604 (Cal. 2008); *Mayekawa Mfg. v. Sasaki*, 888 P.2d 183 (Wash. Ct. App. 1995).

⁸⁷ Among the twenty-seven bilateral treaties concluded by China, for example, in art. 21(1) of the Treaty between China and Belarus; art. 25(1) of the Treaty between China and Cuba; art. 22(3) of the Treaty between China and France; art. 21(1) of the Treaty between China and Egypt, the law of the forum State that rendered the judgment is the governing law that decides the finality of the judgment. Therefore, despite different interpretations of 'finality' of a judgment in the United States and in China, no disputes will arise as long as the finality of the judgment is decided according to the law of the forum state where it is rendered.

⁸⁸ At present, transnational civil procedure is primarily controlled by *lex fori*. "The added nuances of foreign laws, languages, and cultures exponentially complicate what is already a byzantine judicial system" that confounds most litigants. See *INTERNATIONAL LITIGATION: DEFENDING AND SUING FOREIGN PARTIES IN U.S. FEDERAL COURTS*, (David J. Levy ed., 2003), at xii. Generally speaking, a damaged party should consider three crucial factors when deciding to initiate a lawsuit: the physical location of the lawsuit, the substantive law to be applied and the potential for subsequent enforcement of a judgment. See generally DAVID EPSTEIN & CHARLES S. BALDWIN IV, *INTERNATIONAL LITIGATION: A GUIDE TO JURISDICTION, PRACTICE, AND STRATEGY* 80 (Martinus Nijhoff Publishers, 2010); LOUISE ELLEN TEITZ, *TRANSNATIONAL LITIGATION* 233-50 (1996); *INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE*, *supra* note 15, at 49.

⁸⁹ In a decentralized transnational litigation system, if the damaged party chooses a forum that does not have jurisdiction over any assets of the defendant, the damaged party must apply for enforcement in another country's court that has jurisdiction over the assets of the defendant after the court renders the judgment. See *Brand*, *supra* note 70, at 255. If the judgment cannot be enforced, a prevailing plaintiff that obtained court access may be denied satisfactory access to justice due to the lack of a final remedy. Litigation in an adjudicating forum may prove to be an enormous waste of time and money. See *Whytock & Robertson*, *supra* note 2, at 1464.

when the plaintiff is a foreign entity. Evidence also shows that the dismissal rate is increasing.⁹⁰ In such a case, Chinese plaintiffs will have no choice but to file their actions in China and then seek enforcement of the Chinese judgment in a U.S. Court. As demonstrated above, the plaintiff always faces a risk that Chinese judgments cannot be enforced by U.S. courts.

Moreover, if a U.S. plaintiff brings a lawsuit in a U.S. court and seeks enforcement of the U.S. judgment in a Chinese court, the Chinese court has no obligation to enforce the U.S. judgment in the absence of a bilateral treaty. So far, no similar foreign judgments have been enforced by Chinese courts.

Therefore, the more secure and efficient approach towards improving mutual enforcement of judgments is a country-to-country approach,⁹¹ especially when concluding a bilateral judgment treaty. The bilateral treaty will not only operate as a legal instrument for courts in the two countries to mutually enforce judgments, but can also unify the conditions for recognition and enforcement of judgments between the two countries.

However, the United States is not presently a signatory to any international treaty on recognition and enforcement of foreign judgments. In the 1970's, the United States and United Kingdom sought to conclude a bilateral treaty on mutual recognition and enforcement of judgments, but eventually failed.⁹² One of the obstacles blocking the United States from concluding a bilateral treaty is the liberal approach to and size of U.S. damage awards in tort actions. In negligence suits, particularly in product liability cases, damage awards rendered by U.S. courts are among the highest in the world.⁹³

As pointed out earlier, China has concluded bilateral treaties regarding recognition and enforcement of foreign judgments with 27 countries, but has not concluded any such bilateral treaties since 2009. Therefore, it seems unrealistic for the United States and China

⁹⁰ See Whytock & Robertson, *supra* note 2, at 1462.

⁹¹ The situation in the European Union (EU) demonstrates this point. In the EU, several important conventions have been concluded to improve cooperation with regards to mutual recognition and enforcement of judgments. Examples include Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001); and Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (OJ L 338, 23.12.2003). Judicial cooperation in civil matters appears to have been an important means of establishing progress in an environment of freedom, security and justice throughout the EU.

⁹² See Hans Smit, *The Proposed United States-United Kingdom Convention on Recognition and Enforcement of Judgments: A Prototype for the Future?*, 17 VA. J. INT'L L. 443 (1977).

⁹³ See EPSTEIN & BALDWIN, *supra* note 88, at 6 and 376; Weston, *supra* note 2, at 732.

to conclude a bilateral treaty on mutual recognition and enforcement of judgments in the foreseeable future.

The discussion of *Sanlian* in this paper demonstrates that the laws or regulations dealing with transnational litigation in one country can substantially affect the behavior of entities in another country. This situation requires governments to be aware of those interconnections and to act accordingly in our current, globalized society. Uniform legal systems will bolster transnational interaction and improve transnational cooperation and respect. However, due to different legal systems and legal traditions, it will be impossible to reduce or eliminate differences in the two countries' judicial systems without a uniform legal document, such as a bilateral treaty.

Therefore, the two countries should strengthen communication and information exchange in preparation for concluding a bilateral treaty, as one of the most effective paths in pursuing recognition and enforcement of judgments at the State-to-State level.⁹⁴ Efforts in this realm ought to be encouraged, supported and rewarded.

V. CONCLUSION

Sanlian, the first Chinese judgment recognized and enforced by a U.S. court, may produce positive effects for the mutual recognition and enforcement of judgments between the United States and China. However, significant obstacles and uncertainties remain.

In *Sanlian*, the huge litigation costs and lengthy delays derived from different procedural requirements. As there are different requirements for U.S. and Chinese courts, without a bilateral treaty or presumption of reciprocity, there is always a risk that one country's judgment cannot be enforced by the other country's courts. Even if the damaged party obtains a favorable judgment

⁹⁴ Even on a global scale, a multilateral jurisdiction and judgments convention under the auspices of the Hague Conference on Private International Law is also being negotiated. The "Judgments Project" refers to the work undertaken by the Hague Conference since 1992 on two key aspects of private international law in cross-border litigation of civil and commercial matters: the international jurisdiction of courts and the recognition and enforcement of their judgments abroad. Due to disagreements over the scope of judicial jurisdiction and other reasons, the negotiations were suspended in 2001. See BORN & RUTLEDGE, *supra* note 11, at 1085; Miller, *Playground Politics: Assessing the Wisdom of Writing Reciprocity Requirement into U.S. International Recognition and Enforcement Law*, 35 GEO. J. INT'L L. 239, 261 (2004). Discussions continued and resulted in the completion of the Hague Convention on Choice of Court Agreements in 2005. *Hague Convention on Choice of Court Agreements*, 44 I.L.M. 1294 (June 30, 2005). In 2011, the Hague Conference on Private International Law was mandated to assess the possible merits of resuming the Judgments Project. In 2012, the Members of the Hague Conference agreed to re-launch work on the Judgments Project. See *The Judgments Project*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net/index_en.php?act=text.display&tid=149 (last visited December 19, 2012).

domestically, the claimant still faces the risk of the judgment not being enforced in the foreign forum.

In order to improve judicial cooperation in enforcement of judgments, the abandonment of the reciprocity requirement would provide a good foundation for Chinese and U.S. courts to establish mutual recognition and enforcement of judgments. Courts in the two countries could also adopt an approach of presumed reciprocity. As stated above, reciprocity can be reasonably seen as established if one country's judgments may be recognized and enforced according to the statutory law or the case law of the other country.

As a more effective tool in promoting mutual enforcement of a judgment, a bilateral legal instrument should be negotiated and adopted by China and the United States. In the long run, a bilateral treaty would be the most effective way to improve transnational justice.

If *Sanlian* can induce Chinese courts and U.S. states requiring reciprocity to adopt a presumed reciprocity approach, or drive the two countries to conclude a bilateral treaty, *Sanlian* will be a real breakthrough in the field of recognition and enforcement of foreign judgments between the two countries.