

INTERREGIONAL RECOGNITION AND ENFORCEMENT OF CIVIL
AND COMMERCIAL JUDGMENTS:
LESSONS FOR CHINA FROM US AND EU LAWS

by

Jie Huang

School of Law
Duke University

Date: ___June 16, 2010_____

Approved:

_____ Ralf Michaels _____

[Supervisor Name], Supervisor

_____ Paul Carrington _____

[Committee Member Name]

_____ Paul Haagen _____

[Committee Member Name]

[Committee Member Name]

[Committee Member Name]

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Abstract

Judgment recognition and enforcement (JRE) between US sister states, between EU member states, and between Mainland China, Hong Kong, and Macao, are in the category of “interregional JRE.” This Dissertation is a comparative study and focuses on what lessons China can draw from the US and the EU to develop a Multilateral JRE Arrangement between Mainland China, Hong Kong, and Macao.

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"[T]he old has gone, the new has come!" (2 Corinthians 5:17)

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Chapter I Introduction

A. Introduction: Theme and Contribution of this Dissertation

Generally speaking, states in a country or nation-states in a supranational system not only share an overarching constitutional framework but also enjoy a higher degree of economic, geographical, cultural, and historical proximity with one another than with outsiders.¹ Therefore, a state is usually more willing to recognise and enforce a judgment² issued by a court in a sister state than a court in a state outside the constitutional framework.³ For example in the US, the Full Faith and Credit Clause of the Constitution and the related statute⁴ require full-faith-and-credit recognition and enforcement of judgments between sister states, but they do not apply to judgments from foreign countries.⁵ Similarly in the EU, the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter “Brussels Convention”)⁶ and the corresponding 2002 Regulation (hereinafter “Brussels I

¹ See *Nevada v. Hall*, 440 U.S. 410, 426 (1979) (indicating “as members of the same political family” and being bound by “the deep and vital interests,” sister states in the US should “presume a greater degree of comity, and friendship, and kindness towards one another, than...between foreign nations.”) See also Arthur T von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-wide: Can the Hague Conference Project Succeed?*, AMERICAN JOURNAL OF COMPARATIVE LAW 191, 194 (Spring 2001) (discussing the example of countries in Western Europe). See also Arthur T von Mehren, *The Case for a Convention-mixte Approach to Jurisdiction to Adjudicate and Recognition and Enforcement of Foreign Judgments*, 61 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 86, 90 (1997).

² Without special indications, “judgment” in this dissertation is used broadly to include all types of judicial awards. This dissertation focuses on judgments in civil and commercial cases; therefore, judgments in cases of divorce, maintenance, guardianship, or other family law cases are excluded. For the definition of “civil and commercial” in detail, see Chapter V.

³ A T von Mehren, *Recognition and Enforcement of Sister-State Judgments: Reflections on General Theory and Current Practice in the European Economic Community and the United States*, 81 COLUMBIA LAW REVIEW 1044, 1045-50 (1981).

⁴ 28 U.S.C. § 1738.

⁵ U.S. CONST IV, § 1 states that “Full Faith and Credit shall be given in each State to the...judicial proceedings of every other State.” The meaning of this provision is particularized by the Judiciary Act of 1790: “records and judicial proceedings of any court of any...State...” of the United States “shall have the same full faith and credit in every court...as they have by law or usage in the courts of such State... from which they are taken.” For explanations, see EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 1264-65, 1279-82 (4th ed. 2004).

⁶ [1978] OJ L 304, 36. The 1968 text of the Brussels Convention has been amended four times because of the enlargement of the EU: the accession of Denmark, Ireland, and the United Kingdom on October 9, 1978; the accession of Greece on October 25, 1982; the accession of Spain and Portugal on May 26, 1989; and the accession of Austria, Finland, and Sweden on November 29, 1996. The latest consolidated version of the Brussels Convention was reproduced at OJ C 27 (Jan. 26, 1998) and it is this version to which reference is made in this article. See Peter Kaye, *Transitional Scope of the Jurisdiction and Judgments Convention*, 7 CIV. JUST. Q. 53 (1988).

Regulation)⁷ provide that judgments rendered in an EU member state are entitled to recognition without review of the merits and subject to only limited exceptions.⁸ But, neither the Brussels Convention nor the Brussels I Regulation applies to judgments from non-EU countries.⁹

A comparable situation exists in China. Hong Kong and Macao are special administrative regions (hereinafter "SAR") in China.¹⁰ The policy of "One Country, Two Systems" provides a quasi-constitutional regime for the three regions.¹¹ They also share economic, geographical, cultural, and historical proximity with one another. However, there is no multilateral judgment recognition and enforcement (hereinafter "JRE") scheme among them, as there is in the US and the EU; and it is harder to recognize and enforce sister-region judgments in China than in the US and the EU.¹² The most severe issue is that majority of judgments rendered by Mainland courts are practically unrecognizable and unenforceable in Hong Kong, and vice versa.¹³ Therefore, tremendous efforts need to be made to develop an effective and efficient JRE system among

⁷ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] OJ L 12, 1-23. The Brussels Regulation came into effect on March 1, 2002. The Brussels Convention remains in force as regards the relations between Denmark and the other Member States.

⁸ For exceptions, see art. 35 of the Brussels I Regulation.

⁹ Art. 32 of the Brussels I Regulation.

¹⁰ Art. 31 of the PRC Constitution [Xian Fa] (Adopted at the Fifth Session of the Fifth National People's Congress on Dec. 4, 1982, and amended on Mar. 14, 2004). The preamble of the Hong Kong Basic Law (Adopted at the Third Session of the Seventh National People's Congress on Apr. 4, 1990, effective on July 1, 1997) and the Macao Basic Law (Adopted at the First Session of the Eighth National People's Congress on Mar. 31, 1993, effective as of Dec. 20, 1999). For discussion of SAR in constitutional law, see Arnaldo Gonçalves, *A Paradigm of Autonomy: The Hong Kong and Macau Sars*, 18 CONTEMPORARY SOUTHEAST ASIA 36, 36-60 (1996). For the status of SAR in international law, see Ulrich G. Schroeter, *The Status of Hong Kong and Macao Under the United Nations Convention on Contracts for the International Sale of Goods*, 16 PACE INT'L L. REV 307, 314-17 (2004). SARs are different from ethnic autonomous regions in China, such as the Tibet Autonomous Region. For comments on ethnic autonomous regions, see Lok Wai Kin, *The Relationship between Central and Local Governments Under the Unitary State System of China*, in ONE COUNTRY, TWO SYSTEMS, THREE LEGAL ORDERS -- PERSPECTIVES OF EVOLUTION ESSAYS ON MACAU'S AUTONOMY AFTER THE RESUMPTION OF SOVEREIGNTY BY CHINA 527, 533-37 (Jorge Oliveira & Paulo Cardinal ed. 2009). Chunli Xia, *Autonomous Legislative Power in Regional Ethnic Autonomy of the People's Republic of China: The Law and the Reality*, in ONE COUNTRY, TWO SYSTEMS, THREE LEGAL ORDERS -- PERSPECTIVES OF EVOLUTION ESSAYS ON MACAU'S AUTONOMY AFTER THE RESUMPTION OF SOVEREIGNTY BY CHINA 541, 541-63 (Jorge Oliveira & Paulo Gardinal ed. 2009). For comparison between SARs and ethnic autonomous regions, see Dan Wei, *Comments Local Autonomy in the Context of Chinese Political Modernization*, 583, 586-590 (Jorge Oliveira & Paulo Cardinal ed. 2009). For more discussions, see fn 214.

¹¹ For discussion of the policy of "One Country, Two Systems," see Guiguo Wang & Priscilla MF Leung, *One Country, Two Systems: Theory into Practice*, 7 PAC. RIM L. & POL'Y 279, 279-321 (1998).

¹² For details, see *infra* the Part of Current JRE System in China in Section C of Chapter I.

¹³ Although the Mainland-Hong Kong Arrangement has been implemented, because of its narrow scope, majority of judgments are left out. For details, see *infra* Chapter III.

Chinese regions.¹⁴ JRE regimes among the US sister states and among the EU member states can provide rich reference resources for Chinese regions to establish such a JRE system.¹⁵ Therefore this dissertation aims to draw useful lessons from the US and EU JRE laws to help achieve free circulation of judgments among Chinese regions.¹⁶

This dissertation intends to propose a Multilateral JRE Arrangement to help alleviate the current JRE difficulties in China.

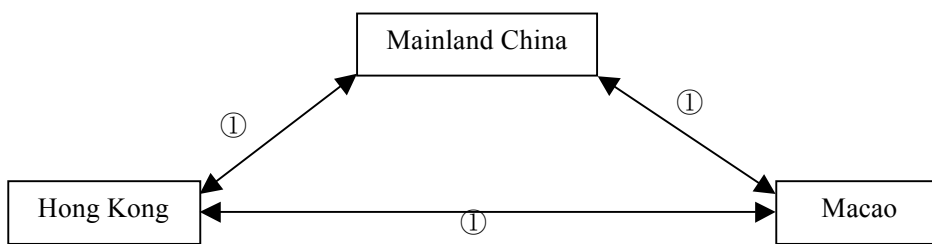


Figure 1: ① Multilateral JRE Arrangement

This dissertation is significant because the proposed Multilateral JRE Arrangement can serve as a reference for the legislatures of the three regions to reform the current system. An ultimate solution to Chinese interregional JRE problems is to develop a Multilateral Arrangement, because it will create the interregional unification that bilateral and regional laws cannot offer.¹⁷

This has been observed for Europe by Peter Kaye in his invaluable treatise:¹⁸

[T]he real obstacle to easy and effective [judgment] enforcement was complexity and diversity of national law conditions therefore, and that consequently, what was required was *facilitation, simplification and unification* of such recognition and enforcement conditions and procedure; [] *bilateral enforcement treaties ... were divergent and*

¹⁴ For need and feasibility of developing the existing JRE system between Chinese regions, see Section D of Chapter I.

¹⁵ For reasons why the US and the EU laws can provide a rich resource for China, see Part i of Section C of Chapter I.

¹⁶ For what lessons that China can draw from the US and the EU JRE laws, see Chapter IV and V.

¹⁷ For details, see Chapter III.

¹⁸ PETER KAYE, CIVIL JURISDICTION AND ENFORCEMENT OF FOREIGN JUDGMENTS, 4 (1987).

incomplete.... (Emphasis added)

By proposing a Multilateral JRE Arrangement, ultimately this dissertation aims to help realize free circulation of judgments in an effective and efficient way among Chinese regions. It can help achieve judicial economy by decreasing re-litigation¹⁹ and maintain certainty between parties regarding their rights and obligations.²⁰ As the Supreme Court of the US noted,²¹

[i]t is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision...merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.

In addition, the importance of JRE is not limited to collecting debts. It is also directly related to social justice, since justice cannot be achieved unless a legally effective judgment is enforced.²² Therefore, my dissertation also intends to enhance the administration of justice among Chinese regions.

This Chapter serves as an introduction to the whole dissertation. Besides Theme and Contribution of this Dissertation (Section One), it has four other sections. Section Two discusses

¹⁹ James D. Sumner, Jr. *The Full-Faith-And-Credit Clause—Its History and Purpose*, 34 OR. L. REV. 224, 249 (1954-1955). (indicating the *Res judicata* is the policy underlying the Full Faith and Credit Clause and it aims to avoid re-litigation, achieve economic use of judicial resources). See National Conference of Commissioners on Uniform State Laws, Prefatory Note of the Revised Uniform Enforcement of Foreign Judgment Act.

²⁰ See Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601, 1601-04 (1968) (indicating five reasons attesting to the vital importance of recognizing foreign judgments: achieving efficiency, protecting successful party, avoiding forum shopping, granting authority to the more appropriate jurisdiction, fostering stability and unity in an international order). See also Stephen Kai-yi Wong, *Comments Reciprocal Enforcement of Court Judgments in Civil and Commercial Matters Between Hong Kong SAR and the Mainland*, in ONE COUNTRY, TWO SYSTEMS, THREE LEGAL ORDERS -- PERSPECTIVES OF EVOLUTION ESSAYS ON MACAU'S AUTONOMY AFTER THE RESUMPTION OF SOVEREIGNTY BY CHINA, 378 (Jorge Oliveira, Paulo Cardinal (eds) ed. 2009) (indicating "interests of the judgment creditors and debtors" is a factor to establish an interregional JRE arrangement). Sumner, *supra* note 19 at 249. Scoles et al., *supra* note 5 at 1258. For cases, see *Riley v. New York Trust Co.*, 315 U.S. 343, 348 (1942).

²¹ *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938).

²² See Celia Wasserstein Fassberg, *Rule and Reason in the Common Law of Foreign Judgments*, 12 CAN. J. L. & JURIS 193 (July 1999).

the concept of interregional JRE. Section Three introduces the comparative perspectives of this dissertation. It first presents the comparative approach adopted by this dissertation, then it briefly compares the interregional JRE systems in the US, the EU, and China. It demonstrates that Chinese interregional JRE systems are far more ineffective and inefficient than that adopted by the US and the EU. It points out the major problem of the current Chinese JRE system is the absence of an overarching JRE scheme and insufficiency of substantive laws. Section Four analyzes the need for and feasibility of a multilateral JRE system in China. The last Section presents the structure of what follows.

B. Concept of Interregional JRE

“Interregional JRE” refers to recognizing and enforcing judgments between different regions (1) within a country, such as between states in the US and between Mainland China, Hong Kong, and Macao in China, or (2) within a supranational system, such as between member states in the EU. “Region” is used to denote a territorial unit that has its own system of private law, as opposed to “country,” which always implies sovereignty,²³ or to “state,”²⁴ which has never been used to describe the status of Hong Kong and Macao in Chinese law since Hong Kong and Macao are special administrative *regions* in China.²⁵

Some scholars suggest that interregional JRE should be restricted within one country.²⁶

²³ “Region” and “country” are not used interchangeably in this dissertation. “Country” is a territorial unit with sovereignty. But “region” may be a country, or a territorial subdivision of a country and this subdivision has no sovereignty.

²⁴ But *see* RESTATEMENT (FIRST) OF CONFLICTS § 2 (1934), which provides “...the word state denotes a territorial unit in which the general body of law is separate and distinct from the law of any other territorial unit.” This definition makes no distinction between interregional and international JRE.

²⁵ Legislation and scholarship regarding Hong Kong and Macao always use “region,” rather than “state” to describe these two regions. *Eg.*, *See* art. 31 of the PRC Constitution, art. 1 of the Hong Kong Basic Law, and art. 1 of the Macao Basic Law, Wang & Leung, *supra* note 11 at 284 and quoted in H Chiu, *Legal Problems with Hong Kong Model for Unification of China and Their Implications for Taiwan*, 2 J. CHINESE L. 83, 87 (1998).

²⁶ Jin Huang & Andrew Xuefeng Qian, “One Country, Two Systems,” *Three Law Families, and Four Legal Regions: The*

However, this suggestion has two problems. First, it improperly excludes the EU JRE system outside of the comparative parameters.²⁷ Interregional JRE should include both JRE within one country and JRE within a supranational system. This has been supported by the fact that the JRE systems among US states and among EU member states are frequently compared to each other, despite structural differences.²⁸ Moreover, the EU JRE law can offer valuable insights for improving interregional JRE in China.²⁹ Therefore, in this dissertation the definition of interregional JRE includes the JRE system among EU members, among US states, and among Chinese regions. Second, it ignores the fact that interregional JRE can be discussed irrespective of sovereignty concerns. For example, both before and after Hong Kong reunited with Mainland China, it regards Taiwan as a non-recognized government.³⁰ However, in *Chen Li Hung v. Ting Lei Miao*, the Hong Kong court ruled that the recognition and enforcement of Taiwan judgments did not violate Hong Kong public policy when³¹

- (1) the rights covered by those [judgments] are private rights;
- (2) giving effect to such [judgments] accords with the interests of justice, the dictates of common sense and the needs of law and order; and;
- (3) giving them effect would not be inimical to the sovereign's interests or otherwise contrary to public policy.

The *Chen Li Hung* court emphasized that recognizing and enforcing such judgments does not

Emerging Inter-regional Conflicts of Law in China, 5 DUKE J. COMP. & INT'L L. 289, 292 (1994) (defining "inter-regional conflicts of law" as "conflicts of law among regions with different legal systems within one country").

²⁷ For scholarships comparing the EU JRE system with Chinese interregional JRE systems, see Section C of Chapter II.

²⁸ Eg., Peter Hay, *The Development of the Public Policy Barrier to Judgment Recognition Within the European Community*, THE EUROPEAN LEGAL FORUM 289, 289-290 (2007); Brandon B. Danford, *The Enforcement of Foreign Money Judgments in the United States and Europe: How Can We Achieve a Comprehensive Treaty*, REVIEW OF LITIGATION 382, 382-432 (Spring 2004). Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference*, 57 LAW & CONTEMP. PROBS 271, 274-76 (1994); Kevin M. Clermont, *Jurisdiction Salvation and the Hague Treaty*, 85 CORNELL LAW REVIEW 89, 89-91, 115 (1999). For earlier contributions, see Peter Hay, *the Common Market Preliminary Draft Convention on the Recognition and Enforcements of Judgments*, 16 AM. J. COMP. L. 149 (1968), Bartlett, *Full Faith and Credit Comes to the Common Market*, 24 INT'L & COMP. L.Q. 44 (1975).

²⁹ For scholarship discussing the lessons from the EU JRE law for China, see Section C of Chapter II. For what insights that the EU JRE law can offer for a Multilateral JRE Arrangement among Chinese regions, see Chapter IV and V.

³⁰ *Chen Li Hung v. Ting Lei Miao* [2000] 1 HKC 461, [2000] 1 HKLR 252, per Mr. Justice Bokhary PJ (indicating Taiwan is "under the *de jure* sovereignty of the PRC but is presently under the *de facto* albeit unlawful control of a usurper government.")

³¹ *Id.*

involve recognizing this non-recognized government and its courts in public international law.³² Therefore, it is unnecessary to combine interregional JRE with the issue of sovereignty.

Interregional JRE is distinct from international JRE, because for the former the participating regions are under a constitutional or quasi-constitutional regime, such as the US Constitution for American states, the Treaty on European Union for EU members,³³ and the policy of “One Country, Two Systems” for Chinese regions. For the case of international JRE, no mutually accepted constitutional or quasi-constitutional system exists between signatories. For example, China and France concluded the Treaty of Judicial Assistance in Civil and Commercial Affairs,³⁴ but they have never shared any constitutional or quasi-constitutional regime. Thus, the JRE between China and France is international, not interregional, JRE.

C. A Comparative Perspective

This section presents the comparative perspective of this dissertation. It first introduce the comparative method. Then it compares the current interregional JRE systems in the US, the EU, and China. It demonstrates that the current Chinese interregional JRE system suffers from (1) no formal uniformity because an overarching multilateral JRE scheme is absent and (2) insufficient substantive law so it is harder to enforce sister-region judgments in China than in the US and the EU.

i. Introduction to the Method: Comparative Studies

³² *Id.*

³³ The Treaty on European Union was signed in Maastricht on Feb 7, 1992 and entered into force on Nov 1, 1993. Its Art. 2 provides that "This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe..." For the significance of this Treaty, see <http://www.historiasiglo20.org/europe/maastricht.htm> (last visited March 22, 2010).

³⁴ THE TREATY FOR JUDICIAL ASSISTANCE IN CIVIL AND COMMERCIAL AFFAIRS ON MAY 4, 1987 BETWEEN MAINLAND CHINA AND FRANCE, <http://www.people.com.cn/zixun/flfgk/item/dwjf/falv/10/10-4.htm> (last visited Feb 4, 2010).

This dissertation is a comparative study of interregional JRE systems in China, the US, and the EU. It aims to draw useful lessons from the US and the EU to help design an effective and efficient Multilateral JRE Arrangement among three Chinese regions. Admittedly, in many aspects interregional legal conflicts in China are different from those between US sister states and between EU member states.³⁵ However, these differences cannot deny the value of a comparative study for four reasons.

First, interregional JRE systems in the US and the EU are more effective and efficient than the current system in China.³⁶ Many scholars have devoted themselves to researching how to improve Chinese interregional JRE system by reference to those in the US and the EU.³⁷ However, those researches are insufficient³⁸ and this dissertation will help fill this gap. Undeniably, China, the US, and the EU have different legal, economic, and political systems, which may play a role in shaping their JRE laws.³⁹ Thus, when I transplant the US and EU JRE laws to China, I need to carefully assess how these differences may affect the feasibility of such transplant.

Second, conflicts between socialist law and capitalist law in civil and commercial cases have greatly decreased between Mainland China and its sister regions. In civil and commercial cases, socialist law refers to laws of planned economy, as opposed to capitalist law that implies laws of market economy. Since Mainland China accessed to the WTO in 2001, in terms of civil and commercial law, it is in an ongoing process of reforming its laws to comply with the WTO

³⁵ Eg., the four distinctive characteristics of Chinese interregional legal conflicts, see Depei Han, *Lun Wo Guo De Qu Ji Fa Lv Chong Tu Wen Ti---Wo Guo Guo Ji Shi Fa Yan Jiu Zhong De Yi Ge Xin Ke Ti [An Analysis of Chinese Interregional Legal Conflicts: A New Subject in Chinese Interregional Conflict of Laws]*, 6 ZHONG GUO FA XUE [CHINA LEGAL SCIENCE] 3, 5 (1998).

³⁶ See *infra* Part iv of Section C of Chapter I.

³⁷ See *infra* discussions of comparative scholarship in Chapter II.

³⁸ *Id*

³⁹ See Salvatore Mancuso, *Legal Transplants and Economic Development: Civil Law Vs. Common Law?*, in ONE COUNTRY, TWO SYSTEMS, THREE LEGAL ORDERS -- PERSPECTIVES OF EVOLUTION ESSAYS ON MACAU'S AUTONOMY AFTER THE RESUMPTION OF SOVEREIGNTY BY CHINA 75, 87 (Jorge Oliveira, Paulo Cardinal ed. 2009).

standards.⁴⁰ Therefore, the conflicts between socialist law and capitalist law have significantly decreased in civil and commercial cases.⁴¹ Second, a survey of using the public policy exception in Chinese interregional conflicts demonstrate conflicts between socialist law and capitalist law have been becoming less an issue in civil and commercial cases in China.⁴² Therefore in many aspects China can draw from the US and the EU to enhance its interregional JRE system in civil and commercial cases, although their laws are not designed to address the conflicts between socialist law and capitalist law.⁴³

Third, China can use insights from the EU JRE laws on how to solve conflicts between civil law and common law. The EU is constituted by both civil- and common-law countries.⁴⁴ The EU experience to coordinate the different JRE systems in these two types of countries will have special implications for China, because the civil-law tradition, especially that originating from Germany, has strongly influenced Mainland China and Macao, and the English common-law tradition has shaped Hong Kong's legal system.⁴⁵ Therefore, China may draw useful lessons from the US and the EU JRE laws to coordinate its multi-legal systems.

Fourth, lack of mutual trust is a problem not only among the EU members⁴⁶ but also among Chinese regions. Therefore, the EU efforts to enhancing mutual trust can shed a light on China.

As a conclusion, many thorny interregional JRE problems that China faces may have already been solved by the US and the EU; therefore, the rich jurisprudence in the US and the

⁴⁰ For Mainland China's efforts in revising laws of planned economy in order to fulfil its obligations under the WTO, see Part i of Section A of Chapter IV.

⁴¹ See Xiao Yongpin, *The Conflict of Laws Between Mainland China and the Hong Kong Special Administrative Region: the Choice of Coordination Models*, 4 in YEARBOOK OF PRIVATE INTERNATIONAL LAW 163, 198 (2003). See also Henry S. Gao, *Taming the Dragon: China's Experience in the WTO Dispute Settlement System*, SSRN ELIBRARY, 369, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1095803 (last visited Apr 6, 2010) (indicating China is halfway between a planned economy and a market economy). For detailed discussion, see Part i of Section A of Chapter IV.

⁴² For details, see Part ii of Section A of Chapter IV.

⁴³ For details, see Chapter IV.

⁴⁴ For the clash between English common law and the European continental civil law, see Jonathan Harris, *Understanding the English Response to the Europeanisation of Private International Law*, 4 JOURNAL OF PRIVATE INTERNATIONAL LAW 347, 394-95 (2008).

⁴⁵ See Mancuso, *supra* note 39_ at 87.

⁴⁶ See Harris, *supra* note 44_ at 370.

EU can provide insights for China to establish a multilateral JRE regime.

ii. Free Circulation of Judgments in the US

Free circulation of judgments among the US sister states is based on the Full Faith and Credit Clause⁴⁷ and the Full Faith and Credit Statute.⁴⁸ Free circulation of judgments is desirable for US sister states because it helps enhance interstate administration of justice and political unification of originally independent colonies. It is feasible because, as a constitutional requirement, the Full Faith and Credit Clause create an overarching JRE scheme binding for every American state.

1. Historical Backgrounds

The historical background of drafting the Full Faith and Credit Clause is related to the demand of interstate coordination in the administration of justice.⁴⁹ Before the American Revolution, the courts of each colony regarded the judgments rendered in sister colonies as *prima facie* evidence so could review its substance in the JRE proceedings.⁵⁰ Before 1776, Great Britain never enacted any law to require courts in its colonies to recognize and enforce judgments rendered in its territory or other colonies.⁵¹ Consequently, judgment debtors could

⁴⁷ U.S. CONST, art. IV, § 1.

⁴⁸ 28 U.S.C. § 1738. *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 373, 134 L. Ed. 2d 6, 116 S. Ct. 873 (1996); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 485, 72 L. Ed. 2d 262, 102 S. Ct. 1883 (1982).

⁴⁹ *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943) (indicating that the "clear purpose" of the Full Faith and Credit Clause is to "establish throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered").

⁵⁰ *See Hilton v. Guyot* 159 U.S. 180-81 (1895), *Bissell v. Briggs* 9 Mass. 462, 464, 465 (1813). *See also* Sumner, *supra* note 19 at 226.

⁵¹ Sumner, *supra* note 19 at 227.

easily escape from debts by simply moving to a neighboring colony.⁵² Since the middle of the seventeenth century, a handful of colonies began to abandon the concept of independence from each other.⁵³ Four colonies passed statutes favoring JRE.⁵⁴ In 1778, the Articles of Confederation provides that “Full Faith and Credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other States.”⁵⁵ When the Articles of Confederation was replaced by the Constitution, the Full Faith and Credit Clause was broadened by including “public acts” and strengthened by authorizing the Congress to enact relevant laws.⁵⁶ The Full Faith and Credit Clause and the federal statute established an interstate JRE system that assures the administration of justice.⁵⁷ In Justice Jackson’s words,⁵⁸

... [T]he full faith and credit clause is the foundation of any hope we may have for a truly national system of justice, based on the preservation but better integration of the local jurisdictions we have.

Moreover, before the American Revolution, a requested colony usually imposed very stringent requirements in verifying judgments from a sister colony.⁵⁹ For example, some courts required a judgment creditor to provide the original judgment, and in case of missing, to provide

⁵² *Id.* For the example of Massachusetts, see Willis L. M. Reese & Vincent A. Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153, 153-54 (1949).

⁵³ Sumner, *supra* note 19 at 227. See *Hilton v. Guyot* 159 U.S. 181 (1895). See also *Note: The History of the Adoption of Section I of Article IV of the United States Constitution and a Consideration of the Effect on Judgments of that Section and of Federal Legislation*, 4 COLUM. L. REV. 470, 470-71 (1904).

⁵⁴ Sumner, *supra* note 19 at 227. Colonies that passed JRE statutes are Connecticut, Maryland, Massachusetts, and South Carolina. CONNECTICUT, ACTS AND LAWS, TITLE VERDICTS (1650); ACTS OF ASSEMBLY PASSED IN THE PROVINCE OF MARYLAND FROM 1692 TO 1715; 1 BREVARD, DIGEST OF PUBLIC STATUTORY LAW OF SOUTH CAROLINA 316, title 74, sec. 6; and 14 GEO. 5 ACTS AND RESOLVES OF THE PROVINCE OF MASSACHUSETTS BAY 323 (1774).

⁵⁵ Articles of Confederation Art. IV, last paragraph. For historical background, see *McElmoyle v. Cohen* (1839) 13 Pet. at P.325, Sumner, *supra* note 19 at 229-30. Robert H. Jackson, *Full Faith and Credit—the Lawyer’s Clause of the Constitution*, 45 COLUM. L. REV. 1, 3-7 (1945). Note, *supra* note 53 at 471-72.

⁵⁶ For the differences between The Full Faith and Credit Clause in the Articles of Confederation and the Constitution, see Note, *supra* note 53 at 474. For the history of The Full Faith and Credit Clause in the Articles of Confederation, see Reese & Johnson, *supra* note 52 at 153-55.

⁵⁷ Sumner, *supra* note 19 at 243. Jackson, *supra* note 55 at 2.

⁵⁸ Jackson, *supra* note 55 at 34.

⁵⁹ Sumner, *supra* note 19 at 245.

witnesses to testify a copy of a judgment was authentic.⁶⁰ Therefore, the JRE proceedings were “tedious, expensive, time-consuming, and at times impossible.”⁶¹ According to the authorization of the Full Faith and Credit Clause, Congress enacted federal statutes⁶² and established an inexpensive and simplified method of proving sister-state judgments.⁶³ In this sense, the Full Faith and Credit Clause was designed to “unify the systems of justice.”⁶⁴

In addition, the Full Faith and Credit Clause also reflects the aspiration of uniting independent and sovereign American colonies into a political union.⁶⁵ When the delegates to the Constitutional Convention met, the new country was confronted with the problem that no unity existed among the states.⁶⁶ As a scholar described⁶⁷

The states considered each other as foreign countries. Experience had shown that such an association of federated states as was created by the Articles of Confederation could not result in the establishment of a nation. Without unification, the progress of each state, as well as the development of the country, was handicapped.

The framers of the Constitution clearly realized that each state needed to forego some degree of its sovereignty for the benefit of establishing a unified country.⁶⁸ The Full Faith and Credit Clause was desirable because it was one of clauses incorporated into the Constitution to achieve this goal.⁶⁹ The Clause accorded the citizens of different states equal privileges throughout of a

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Act of May 26, 1790, 1 STAT. 122 (the law declared that “records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the US, as they have by law or usage in the courts of the state from whence the said records are or shall be taken”). Act of March 27, 1804, 2 STAT. 298 (supplementing the Act of May 26, 1790 and providing the authentication of records etc., not relating to a court.)

⁶³ Sumner, *supra* note 19 at 245-46.

⁶⁴ Paul D. Carrington, *Collateral Estoppel and Foreign Judgments*, 24 OHIO ST. L.J. 381, 382-83 (1963). Sumner, *supra* note 19 at 246. Gray J. in *Atherton v. Atherton* (1900) 181 U.S. at P. 160 (indicating The Full Faith and Credit Clause “was intended to give the same conclusive effect to the judgments of all the states so as to promote certainty and uniformity in the rule among them.”)

⁶⁵ Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1228 (2009).

⁶⁶ David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L. J. 1584, 1586 and 1610 (2009).

⁶⁷ Sumner, *supra* note 19 at 241.

⁶⁸ *Id.*, at 242.

⁶⁹ *Id.*

unified country.⁷⁰ As a result, it “basically altered the status of the States as independent sovereigns.”⁷¹

2. The Full-Faith-and-Credit-JRE System

A basic feature of the American interstate JRE system is that states need to obey the Full Faith and Credit Clause and the Full Faith and Credit Statute for interstate recognition and enforcement of judgments.⁷² Art. IV, § 1 of the federal Constitution provides that “Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. The Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.”⁷³ The Supreme Court of the US interpreted this clause as having three distinct objects:⁷⁴

1. To declare that full faith and credit shall be given in each state to the records etc. in every other state. 2. The manner of authenticating such records, etc.; and, 3. Their effect when so authenticated. The first is declared and established by the constitution itself, and was to receive no aid, nor was it susceptible of any qualification by the legislature of the United States. The second and third objects of the section were expressly referred to the legislature of the union to be carried into effect in such manner as to that body might seem right.

The Judiciary Act of 1790 expanded the Full Faith and Credit Clause as: “Such Acts, records

⁷⁰ *Id.*

⁷¹ *Estin v. Estin*, 334 U.S. 541, 546, 92 L. Ed. 1561, 68 S. Ct. 1213 (1948). *Sherrer v. Sherrer*, 334 U.S. 343, 355, 92 L. Ed. 1429, 68 S. Ct. 1087 (1948) (“The Full Faith and Credit Clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation.”). *see Jackson, supra* note 37 at 18.

⁷² LUTHER L. MCDUGAL III & ET AL, *AMERICAN CONFLICTS LAW: CASES AND MATERIALS* 631 (LexisNexis 2004, 4th e.d.). ARTHUR T. VON MEHREN, *ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW A COMPARATIVE STUDY* 710 (2007). C. SYMEONIDES & ET AL, *CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL: CASES AND MATERIALS* 710 (Thomson West 2003, 2nd e.d.). The Full Faith and Credit Clause in the Constitution and the relevant statute also apply to public acts and records of the states.

⁷³ U.S. CONST. Art. IV, Sec. I.

⁷⁴ Washington J. in *Green v. Sarmiento* (1811) 3 Wash. (C.C.) 17 at P. 21.

and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court...as they have by law or usage in the courts of such State... from which they are taken.”⁷⁵ Notably, the Full Faith and Credit Clause not only covers sister-state judicial proceedings, but also includes sister-state statutes,⁷⁶ common law, and public records. Judicial proceedings are the focus of this dissertation.

The Full Faith and Credit Clause and its implementing statute generally require every requested state to give sister-state judgments at least the *res judicata* effect that the judgment would be accorded in the rendering state.⁷⁷ Full faith and credit to sister-state judgments is also demonstrated in the Second Conflicts Restatement:⁷⁸

[T]he local law of the State where the judgment was rendered determines, subject to constitutional limitations, whether, and to what extent the judgment is conclusive as to the issues involved in a later suit between the parties or their privies, upon a different claim or cause of action.

The Full Faith and Credit Clause, taken alone, does not provide a systematic inter-state JRE scheme.⁷⁹ Moreover, Congress has never exercised its power to enact a law to fill this gap. Therefore, the National Conference of Commissioners on Uniform State Law made the Uniform Enforcement of Foreign Judgments Act in 1948. Its 1964 revision establishes a speedy and economical JRE mechanism between sister-state courts, which is substantially similar to the JRE mechanism provided by Congress in 1948 for the inter-district enforcement of Federal District

⁷⁵ 28 U.S.C.A. § 1738 (1964) (originally enacted in 1790). For full faith and credit clause in family cases, see Parental Kidnapping Prevention Act of 1980, 28 U.S.C.A. § 1738A, Full Faith and Credit for Child Support Orders Act of 1994, 28 U.S.C.A. § 1738B, and the Defense of Marriage Act, 28 U.S.C.A. § 1738C. For explanation of The Full Faith and Credit Clause, see Scoles, *supra* note 5 at 1279-82.

⁷⁶ See *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145, 155 (1932).

⁷⁷ See *Hampton v. McConnel*, 3 Wheat. 234, 235, 4 L.Ed. 378. *Mills v. Duryee*, 7 Cranch 481, 484, 3 L.Ed. 411. *Riley v. New York Trust Co.*, 315 U.S. 343, 353 (1942). The Full Faith and Credit Clause also require federal courts to recognize and enforce state court judgments and vice versa, which is not a focus of this study. See 28 U.S.C.A. § 1738.

⁷⁸ RESTATEMENT (SECOND) OF CONFLICTS § 95, comment (g) (1971).

⁷⁹ *McElmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 325, 10 L.Ed. 177 (1839).

Court judgments.⁸⁰ Under the Act, if a sister-state judgment complies with the filing and notice requirements of a requested state, this state should enforce it in the same manner as its own judgment.⁸¹

If a judgment is final,⁸² valid,⁸³ and on the merits,⁸⁴ it is entitled to Full Faith and Credit JRE in all sister states. No review of merits is allowed.⁸⁵ Lack of jurisdiction,⁸⁶ undue process,⁸⁷ and fraud⁸⁸ are widely accepted defenses Full Faith and Credit interstate JRE. Notably, these defenses are limited by the principle of *res judicata*: if the judgment debtor has alleged and fully litigated these defenses in the judgment-rendering court, the requested court is precluded from reviewing the same defenses again. Moreover, the public policy exception can never constitute a defense to interstate Full-Faith-and-Credit JRE.⁸⁹ The Full Faith and Credit Clause permits a

⁸⁰ The National Conference of Commissioners on Uniform State Law, the Revised Uniform Enforcement of Foreign Judgments Act, 13 U.L.A. 155 (1964 revision of the original 1948 Act).

⁸¹ § 2 and 3 of the Revised Uniform Enforcement of Foreign Judgments Act.

⁸² A judgment subject to appeal or against which an appeal has been perfected is regarded as a final judgment. *Bank of North America v. Wheeler* (1859) 28 Conn. 433. *Faber v. Hovey* (1875) 117 Mass. 107. C.f. *Re Forslund* (1963) 123 Vt. 341, 189 A2d 537, 2 ALR3d 1379 (the Vermont court held that a California custody order was not final so not entitled to full faith and credit recognition because an appeal against it has not been finished in California). For details, see *infra* Part ii of Section B of Chapter IV.

⁸³ See *United States v. United States Fidelity & Guaranty Co. ET AL.*, 309 U.S. 506 (1940).

⁸⁴ See RESTATEMENT (SECOND) OF CONFLICTS § 93 (1971).

⁸⁵ *Fauntleroy v. Lum*, 210 U.S. 230, (1908). RESTATEMENT (SECOND) OF CONFLICTS § 106 (1971).

⁸⁶ RESTATEMENT (SECOND) OF CONFLICTS § 97 (1971). *Estin v. Estin*, 334 U.S. 541, 547-549 (1948) (in this case, a New York court awarded a permanent alimony to a wife. Later the husband moved to and resided in Nevada. He ceased paying the alimony after getting a divorce decree in a Nevada court by the constructive service upon the wife. The wife filed suit for alimony arrears. The husband argued that the Nevada decree should be recognized in New York. The Supreme Court held that Nevada could not adjudicate the rights of the wife under the New York judgment when she was not personally served and did not appeal in the divorce proceeding. Therefore, the Court divided the effects of the Nevada decree to accommodate the interests of both Nevada and New York: the full faith and credit recognition was given to the part of the Nevada decree that affecting marital status but not to the part of alimony). *Bell v. Bell*, 181 U.S. 175 (1901), *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 29 (1917), *Hansberry v. Lee*, 311 U.S. 32, 40-41. See *Nevada v. Hall*, 440 U.S. 410, 421 (1979), *Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Insurance Guaranty Assn. ET AL.*, 455 U.S. 691 (1982). For details, see *infra* Part i of Section C of Chapter V.

⁸⁷ *Russell v. Perry*, 14 N.H. 152, 155 (1843). Undue process generally refers to that the defendant does not get reasonably notice and opportunity to be heard. See *Conopco, Inc. v. Roll Int'l*, 231 F.3d 82 (2d Cir. 2000) (F1's mistake in not allowing amendment of pleadings does not violate due process, so its judgment is entitled to full faith and credit recognition in F2). For details, see *infra* Part ii of Section C of Chapter V.

⁸⁸ For leading cases regarding fraud in the US JRE law, see *United States v. Throckmorton*, 98 U.S. 61 and *Allegheny Corporation v. Kirby*, 218 F. Supp. 164 (S.D.N.Y. 1963). For details, see *infra* Part iv of Section C of Chapter V.

⁸⁹ See *Baker v. GM*, 522 U.S. 222, 233 (1998). *Estin v. Estin*, 334 U.S. 541, 546. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 438, 88 L. Ed. 149, 64 S. Ct. 208 (1943) (the Supreme Court is "aware of [no] considerations of local policy or law which could rightly be deemed to impair the force and effect which The Full Faith and Credit Clause and the Act of Congress require to be given to [a money] judgment outside the state of its rendition.") Differently, a forum can determine the applicable law by the consideration of public policy. See *Nevada v. Hall*, 440 U.S. 410, 421-424, 59 L. Ed. 2d 416, 99 S. Ct. 1182 (1979).

requested state to determine how to enforce sister-state judgments.⁹⁰ As a conclusion, the Full Faith and Credit Clause and consequent legislations create an effective and efficient JRE system among US sister states.

iii. Free Circulation of Judgments in the EU

Free circulation of judgments among the EU member states is created by the Brussels Convention and the Brussels I Regulation. The Brussels regime provides an overarching JRE scheme and substantive laws for EU members. This regime is deemed necessary because the EU framers believed that free circulation of judgments could enhance market integration and legal certainty in the EU.

1. Historical Backgrounds

Before the adoption of the Brussels Convention, the domestic JRE laws in European states were restrictive in JRE and states adopted bilateral treaties to solve JRE difficulties. For example, the Netherlands would deny JRE in the absence of a JRE treaty.⁹¹ Both France and Luxembourg permitted *révision au fond* in some circumstances.⁹² Germany required reciprocity as a condition

⁹⁰ *Baker v. GM*, 522 U.S. 222, 235 (Full faith and credit clause does not require a requested state must adopt the practices of the judgment-rendering state “regarding the time, manner, and mechanisms for enforcing judgments”). *McElmoyle ex rel. Bailey v. Cohen*, 13 Peters 312, 325 (1839). RESTATEMENT (SECOND) OF CONFLICTS § 99 (1971) (indicating “[t]he local law of the forum determines the methods by which a judgment of another state is enforced.”).

⁹¹ See DUTCH CODE CIV. PROC. (WETBOEK VAN BURGERLIJKE RECHTSVORDERING), art. 431(1) (1838, amended 1946).

⁹² *Révision au fond* implies that requested courts re-examine the merits of a foreign judgment. eg., *Holker v. Parker*, decision of Apr. 19, 1819, Cass. civ., 1819 S. Jur. I 288. But French courts abandoned *révision au fond* after *Munzer v. Jacoby-Munzer*, Cour de Cass., Ch. Civ. (1st Sect.), Jan. 7, 1964. For comments, see Kurt H Nadelmann, *French Courts Recognize Foreign Money-Judgments: One Down and More to Go*, 13 AM. J. COMP. L. 72 (1964) and Friedrich K. Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 AM. J. COMP. L. 1, 7 (1988). For Luxembourg law, see *Pellus v. Detilloux*, Cour Supérieure, April 20, 1964, 19 Pasirisie Luxembourgeoise 371.

for JRE.⁹³ Belgium courts were allowed to re-examine foreign judgments.⁹⁴ Italy denied judgments by default had conclusive effects.⁹⁵ Various bilateral treaties existed between these states except Luxembourg.⁹⁶

Against this background, the framers of the EU were concerned that business confidence would be harmed and economic integration would be discouraged if a uniform JRE interregional system was absent.⁹⁷ Therefore, the development of the EU interregional JRE mechanism is designed to parallel with European economic integration.⁹⁸ The significance of JRE to trade is best described by an invitation note sent by the European Economic Community's Commission to the Community's six member states on October 22, 1959 to invite them to negotiate the Brussels Convention. In this note, the Commission stated that⁹⁹

“The economic lift of the Community may be subject to disturbances and difficulties unless it is possible, where necessary by judicial means, to ensure the recognition and enforcement of the various rights arising from the existence of a multiplicity of legal relationships. As jurisdiction in both civil and commercial matters is derived from the sovereignty of Member States, and since the effect of judicial acts is confined to each territory, legal protection and, hence, legal certainty in the common market are essentially dependent on the adoption by the Member States of a satisfactory solution to the problem of recognition and enforcement of judgments.”

⁹³ § 328(1) GERMAN CODE CIV. PROC. (ZIVILPROZESSORDNUNG [ZPO]), (1877). Wolfgang Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 BERKELEY J. INT'L L. 175, 186-7 (2005).

⁹⁴ See Law on Jurisdiction of March 25, 1876, art. 10, [1876] Pasinomie (Belgium) 121, 129; *Projet de loi contenant le Code judiciaire* art. 570, Belgian Senate Document no. 60, 1963/64 Sess.

⁹⁵ See ITALIAN CODE CIV. PROC. (CODICE DI PROCEDURA CIVILE) art. 798 (1942).

⁹⁶ Kurt H Nadelmann, *Jurisdictionally Improper FORA in Treaties on Recognition of Judgments: The Common Market Draft*, 67 COLUM. L. REV. 995, 997 (1967).

⁹⁷ John Fitzpatrick, *The Lugano Convention and Western European Integration: a Comparative Analysis of Jurisdiction and Judgments in Europe and the US*, CONNECTICUT JOURNAL OF INTERNATIONAL LAW 695, 699 (Spring, 1993). See the Preamble to the Brussels Convention and the Jenard Report on the Brussels Convention, 1979 O.J. (C 59) 1, 38. See also P.M. NORTH & J.J. FAWCETT, CHESHIRE AND NORTH PRIVATE INTERNATIONAL LAW 282 (1987).

⁹⁸ Fitzpatrick, *supra* note 97 at 695-96. See Robert C. Reuland, *The Recognition of Judgments in the European Community: the Twenty-fifth Anniversary of the Brussels Convention*, 14 MICH. J. INT'L L. 559, 572-73 (1992-1993).

⁹⁹ von Mehren, *supra* note 72 at 70. Pippa Rogerson, *Chapter 1 Scope*, in BRUSSELS I REGULATION, 47 (ULRICH MAGNUS & PETER MANKOWSKI ed. 2007).

Because legal and economic integration often comes together, Article 63 of the Brussels Convention provided that any state becoming a member of the EC should accept the Brussels Convention.¹⁰⁰ The Preamble of the Brussels I Regulation also emphasized the significance of free circulation of judgments for economic integration. It states that in order to progressively establish an area of freedom, security, and justice, ensure the free movement of persons, and maintain the sound operation of the internal market, the measures relating to JRE is necessary.¹⁰¹

Besides facilitating economic integration, the Brussels Convention and the Brussels I Regulation also aim to ensure legal certainty regarding jurisdiction and JRE.¹⁰² They provide highly foreseeable rules and efficient procedures to achieve this goal.¹⁰³

2. The Brussels I Regulation

The Brussels Convention and the Brussels I Regulation realize free circulation of judgments among EU members.¹⁰⁴ Different from the Brussels Convention, the Brussels I Regulation is directly applicable to EU members.¹⁰⁵ The Regulation was enacted by the European Commission after it gained competence to enact regulations in the field of police and administration of justice according to the Treaty of Amsterdam.¹⁰⁶ However, regarding texts and substances, the

¹⁰⁰ Art. 63 of the Brussels Convention.

¹⁰¹ Preamble (1) of the Brussels I Regulation.

¹⁰² Ulrich Magnus, *Introduction*, in BRUSSELS I REGULATION, 8-9 (Ulrich Magnus & Peter Mankowski ed. 2007).

¹⁰³ *Id.*

¹⁰⁴ von Mehren, *supra* note 72 at 69. Burkhard Hess & Et. Al, *The Brussels I-Regulation* (EC) No. 44/2001, 17 (Verlag C. H. Beck München 2008). Another significant regulation the EU adopted is the Regulation on the Creation of a European Enforcement Order for Uncontested Claims in 2004. Council Regulation (EC) No 805/2004 of 21 April, 2004 ([2004] OJ L 143, 15-39). It came into forth on October 21, 2005. But this Regulation is distinct from the Brussels Regulations because the former gives a judgment debtor no recourse in the State of enforcement but the latter still retain a minimum of judicial control for the courts in the enforcement state.

¹⁰⁵ Art. 249 of the EC Treaty. For comments, *see* GEORGE A. BERMANN & ROGER J. GOEBEL, *CASES AND MATERIALS ON EUROPEAN UNION LAW* 78-79 (2nd ed. ed. 2002).

¹⁰⁶ The intergovernmental cooperation in matters of police and administration of justice was originally the third pillar. However, the Treaty of Amsterdam integrated it into the Treaty and made it a Community policy (first pillar). Magnus, *supra* note_102_ at 15-16. Art. 61 of the Treaty of Amsterdam.

differences between the Convention and Regulation are modest.¹⁰⁷

The Brussels Convention is considered as one of the most successful treaties ever concluded in private international law and one of the most successful pieces of EU legislation.¹⁰⁸ The most recent study shows that the Brussels I Regulation is performing well in practice.¹⁰⁹ The feasibility of the Brussels Convention and Regulation comes from four factors. First, the Convention and Regulation are double conventions.¹¹⁰ This was promoted by the insight that the "fair and reasonable jurisdiction" of the judgment-rendering court is the precondition for JRE.¹¹¹ Second, JRE can be denied only for explicitly specified grounds under the Convention and the Regulation, so the outcome of JRE is "highly predictable."¹¹² Third, the European Court of Justice (hereinafter "ECJ") was authorized to interpret the Brussels Convention and Brussels I Regulation.¹¹³ It has endeavored to promote a more intensive integration between the member states by accepting preliminary references from national courts.¹¹⁴ In many cases, it interpreted terms and phrases in the Convention and Regulation by adopting an autonomous Community definition instead of one favored by a particular member state.¹¹⁵ Therefore, the ECJ is essential for the successful operation of the Brussels Convention and the Regulation.¹¹⁶ Fourth, the accompanying Report by Jenard¹¹⁷ serves as a useful instrument to understand the Brussels

¹⁰⁷ Magnus, *supra* note_102_ at 9.

¹⁰⁸ von Mehren, *supra* note 72 at 69. Burkhard Hess & Et. Al, THE BRUSSELS I REGULATION (EC) No. 44/2001, 1, 17 (Verlag C. H. Beck München 2008). See the assessment of Goode, Kronke, McKendrick and Wool: "the most successful instrument on international civil procedure of all times" (Transnational Commercial Law, p 793).

¹⁰⁹ Hess, *supra* note 108 at 1.

¹¹⁰ A double convention refers to a convention regulating direct jurisdiction and JRE. For details, see Chapter V.

¹¹¹ Magnus, *supra* note_102_ at 14.

¹¹² *Id.*

¹¹³ Protocol on the Interpretation by the Court of Justice of the Brussels Convention, done Jun 3, 1971, 1975 O.J. (L204) 28. Its official English version was published at 1978 O.J. (L304) 50.

¹¹⁴ Bermann, *supra* note_105_ at 352-53.

¹¹⁵ Robert C. Reuland, *The Recognition of Judgments in the European Community: the Twenty-fifth Anniversary of the Brussels Convention*, 14 MICH. J. INT'L L. 559, 566 (1992-1993).

¹¹⁶ Arthur T. von Mehren, *Jurisdictional Requirements: To What Extent Should the State of Origin's Interpretation of Convention Rules Control for Recognition AND Enforcement Purposes?*, in THE HAGUE CONVENTION ON JURISDICTION AND JUDGMENTS A-29, A-34 (Andreas F. Lowenfeld & Linda J. Silberman ed. 2001).

¹¹⁷ Jenard, P. Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed at Brussels, 27 September 1968. OJ of March 5, 1979 C 59/1. (hereinafter "Jenard Report").

Convention and still a good reference for the Brussels I Regulation.¹¹⁸

The Brussels I Regulation applies in civil and commercial cases whatever the nature of the court or tribunal.¹¹⁹ It regulates both jurisdiction and JRE. Establishing uniform jurisdictional rules aims to facilitate JRE “by removing personal jurisdiction as a litigable issue” in the JRE proceedings.¹²⁰ In terms of jurisdiction rules, the Brussels I Regulation confers general jurisdiction on the courts of a member state where a defendant is domiciled regardless of the defendant’s nationality.¹²¹ It also provides specific jurisdiction rules where a court in a member state can exercise jurisdiction over a non-domiciliary defendant in cases such as contract.¹²² Article 22 of the Brussels I Regulation provides for exclusive jurisdiction for certain circumstances such as real property and Article 23 allows parties to derogate from the Regulation by a choice of court agreement.

As for JRE, the Brussels I Regulation presumes that any judgment rendered by a court of a member state must be recognized by courts of another state regardless of the defendant’s domicile.¹²³ The Regulation does not limit to judgments that “definitively terminate a dispute in whole or in part.”¹²⁴ Therefore, a judgment that is only provisionally enforceable can benefit from the Regulation.¹²⁵ In other words, lack of finality is not a ground for refusing JRE.¹²⁶ However, the requested court may stay the JRE proceedings when the judgment is challenged in the state of origin.¹²⁷ Under no circumstance can a requested court review the substance of a

¹¹⁸ See Magnus, *supra* note_102_ at 14.

¹¹⁹ Art. 1 of the Brussels I Regulation.

¹²⁰ Bermann, *supra* note 105 at 1409.

¹²¹ Art. 2.1 of the Brussels I Regulation.

¹²² Section 2, 3, 4, and 5 of the Brussels I Regulation.

¹²³ Arts. 1 and 32 of the Brussels I Regulation.

¹²⁴ Patrick Wautelet, *Chapter III Recognition and Enforcement Section 1 Recognition*, in BRUSSELS I REGULATION, 540 (ULRICH MAGNUS & PETER MANKOWSKI ed. 2007). Jenard Report, page 43.

¹²⁵ *Id.*

¹²⁶ Arts. 37 and 46 of the Brussels I Regulation.

¹²⁷ *Id.*

sister-region judgment.¹²⁸ Refusal of JRE must be based on the four explicit grounds under Articles 34 and 35.¹²⁹ The four grounds are (1) the effects of the recognition of a judgment are manifestly contrary to the public policy of the requested state,¹³⁰ (2) the judgment-rendering proceeding violates due process,¹³¹ (3) irreconcilable judgments exist,¹³² (4) the judgment-rendering court does not have jurisdiction over the case.¹³³ But the fourth ground is restricted to cases where a judgment-rendering court exercised jurisdiction against certain jurisdiction rules, such as those relating to insurance and consumer contracts¹³⁴ as well as exclusive jurisdiction rules¹³⁵ under the Brussels I regulation. Therefore, a requested court should not deny JRE—even by invoking the public policy exception—when the judgment-rendering court exercised the exorbitant jurisdiction prohibited by Article 3 of the Brussels I Regulation.¹³⁶ If none of the four grounds exists, the requested court shall recognize the sister-state judgment. Empirical studies have shown that the four grounds are generally appropriate.¹³⁷

Additionally, the Brussels I Regulation provides a uniform, autonomous, and speedy exequatur procedure¹³⁸ for the enforcement of a sister-region judgment.¹³⁹ The execution of foreign judgments is left to *lex fori*.¹⁴⁰ It also simplifies formality requirements for JRE

¹²⁸ Art. 35 of the Brussels I Regulation.

¹²⁹ They should be read in relation with art 61 and 71. Wautelet, *supra* note_124_ at 555.

¹³⁰ Article 34(1), BRUSSELS I REGULATION. For details, *see infra* Part v of Section C of Chapter V.

¹³¹ Art. 34(2) of the Brussels I Regulation. For details, *see infra* Part ii of Section C of Chapter V.

¹³² Article 34(3) and (4) of the Brussels I Regulation. For details, *see infra* Part iii of Section C of Chapter V.

¹³³ Art. 35 of the Brussels I Regulation. For details, *see infra* Part i of Section C of Chapter V.

¹³⁴ Section 3 and 4 of the Brussels I Regulation.

¹³⁵ Art. 22 of the Brussels I Regulation.

¹³⁶ Dieter Krombach v. André Bamberski, (Case C-7/98) [2000] ECR I-1935, para 34.

¹³⁷ Hess, *supra* note 108 at 138.

¹³⁸ Arts. 38-52 of the Brussels I Regulation.

¹³⁹ Here, judgments include provisional, including protective, measures under Article 31 of the Brussels I Regulation. *See* Italian Leather SpA v. WECO Polstermöbel GmbH & Co., (Case 80/00) [2002] ECR I-4995.

¹⁴⁰ Art. 40.1 of the Brussels I Regulation. Eric Coursier v. Fortis Bank and Martine Coursier, née Bellami, (Case C-267/97) [1999] ECR I-2543, I-2571 para. 28 (holding that “the Brussels Convention merely regulates the procedure for obtaining an order for the enforcement of foreign enforceable instruments and does not deal with execution itself.”) *See also* Deutsche Genossenschaftsbank v. SA Brasserie du Pêcheur, (Case 148/84) [1985] ECR 1981, 1992 para. 18; confirmed by Horst Ludwig Martin Hoffmann v. Adelheid Krieg, (Case 145/86) [1998] ECR 645, 665 para 27.

application documents.¹⁴¹ Over all, the Brussels I Regulation establishes a simple and rapid system for free circulation of judgment between EU member states.

iv. Current Interregional JRE System in China

No similar uniform instrument exists between Mainland China, Hong Kong, and Macao.¹⁴² Instead, the current Chinese interregional JRE system is constituted by both bilateral regimes in form of interregional arrangements and unilateral regimes in form of regional laws. Two such arrangements exist: the Arrangement between the Mainland and Macao on the Mutual Recognition and Enforcement of Civil and Commercial Judgments (hereinafter “Mainland-Macao Arrangement”),¹⁴³ and the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of Hong Kong Pursuant to Choice of Court Agreements between Parties Concerned (hereinafter “Mainland-Hong Kong Arrangement”).¹⁴⁴ They established the basic framework of interregional JRE laws in China. Judgments excluded by the two arrangements¹⁴⁵ are recognised and enforced according to regional laws, such as the Mainland Civil Procedure Law (hereinafter “CPL”)¹⁴⁶ and its

¹⁴¹ See art. 56 of the Brussels I Regulation.

¹⁴² For the constitutional situation among Mainland China, Hong Kong, and Macao, see *infra* Part Constitutional Framework Overarching Mainland China, Hong Kong, and Macao of Section D of Chapter I.

¹⁴³ This arrangement was signed by Mainland China and Macao on February 28, 2008 and came into force on April 1, 2008. In Mainland China, see Interpretation No. 2 [2006] of the Supreme People’s Court Adopted at the 1378th meeting of the Judicial Committee of the Supreme People’s Court on February 13, 2006. In Macao, see The No. 12/2006 Announcement of the Executive Chief of Macao on March 14, 2006.

¹⁴⁴ This arrangement was signed by Mainland China and Hong Kong on July 14, 2006. A courtesy English translation is available at <http://www.doj.gov.hk/eng/topical/mainlandlaw.htm> last visited January 1, 2009. For Mainland implementation legislation, see Interpretation No.9 [2008] of the Supreme People’s Court on July 3, 2008. For Hong Kong implementation legislation, see Mainland Judgments (Reciprocal Enforcement) Ordinance and its (Commencement) Notice, Ord. No. 9 of 2008, L.S. No. 2 to Gazette No. 27/2008, L.N. 195 of 2008. Upon the unanimity of Mainland China and Hong Kong, this Arrangement came into force as of August 1, 2008.

¹⁴⁵ Such as non-monetary judgments or judgments for disputes in which parties failed to make a choice of court agreement.

¹⁴⁶ Min Shi Su Song Fa [Civil Procedure Law] (Adopted on April 9, 1991 at the Fourth Session of the Seventh National People’s Congress, effective Apr. 9, 1991, amended Oct. 28, 2007) translated in <http://www.lawinfochina.com> last visited May 3, 2010 (P.R.C.).

judicial interpretations,¹⁴⁷ the Macao Civil Procedure Code,¹⁴⁸ and Hong Kong common law.¹⁴⁹

The following figure demonstrates the current interregional JRE system in China.

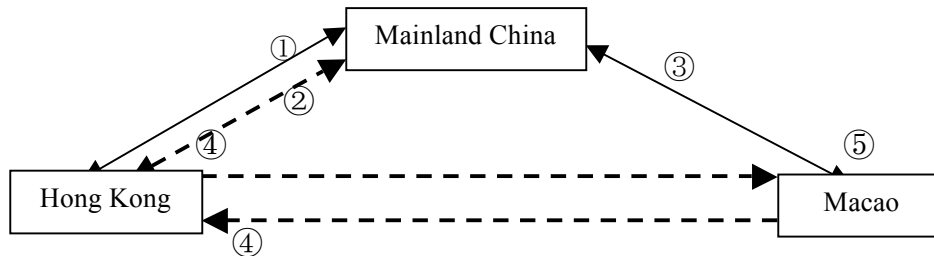


Figure 2: the current Chinese interregional JRE system
(Solid lines represent interregional laws and dotted lines represent regional laws)

Mainland-Hong Kong Arrangement (①)

Mainland regional law (②)

Mainland-Macao Arrangement (③)

Hong Kong common law(④)

Macao Civil Procedure Code (⑤)

Between Mainland China and Hong Kong, judgments included by the Mainland-Hong Kong Arrangement (①) are recognised and enforced under this Arrangement. In theory, other judgments can be recognised and enforced under Mainland regional law (②) and Hong Kong common law(④), but in practice JRE is impossible. Between Mainland China and Macao, judgments are recognised and enforced under the Mainland-Macao Arrangement (③). Hong Kong recognises and enforces Macao judgments according to common law (④). Macao recognises and enforces Hong Kong judgments according to the Macao Civil Procedure Code (⑤).

¹⁴⁷ The most important judicial interpretation is the Opinions on Application of the Mainland CPL (Promulgated by the Supreme People's Court in July 14, 1992) translated in <http://www.lawinfochina.com> last visited December 16, 2009. Its art. 318-320 are about judicial assistance.

¹⁴⁸ Especially arts. 1199-1205 of the Macao Civil Procedure Code.

¹⁴⁹ Both statute and common law govern recognition and enforcement of foreign judgments in Hong Kong. The statute mainly refers to Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) (hereinafter "FJREO"). But the FJREO was essentially an intra-Commonwealth scheme for reciprocal enforcement of judgments. So judgments rendered by courts in Mainland China and Macao are recognised and enforced in Hong Kong under common law. For details, see Part ii of Section A of Chapter III.

The major problems are no overarching multilateral JRE scheme and insufficient substantive laws.¹⁵⁰ The most urgent issue is the JRE impasse for majority of judgments between Mainland China and Hong Kong.¹⁵¹ Consequently, the current system increases the possibilities of re-litigation and risks of inconsistent judgments.¹⁵² In many circumstances, it even makes disputes between parties unresolved.¹⁵³

1. No Overarching Multilateral JRE Scheme and Insufficient Substantive Laws

In the Figure 2, every arrow represents a law that a region uses to recognize and enforce judgments from another region. The five laws are distinct and they have different scopes, requirements for JRE, and grounds for refusing JRE.¹⁵⁴ Suppose that a Mainland company sells certain products to a Hong Kong company. The sales contract includes a choice of court agreement favouring a Hong Kong court. Later disputes occur and the chosen court renders a judgment. The judgment debtor's property in Hong Kong cannot fully satisfy the judgment but it has properties in other regions. Therefore, the judgment creditor has to apply for JRE in Mainland China and Macao. However, the requirements for JRE and grounds for denying JRE under ① and ⑤ are very different. For example, under ① the recognition and enforcement of a judgment should be requested in two years since the judgment was rendered.¹⁵⁵ As a contrast, the ⑤ does not impose time limit, but it authorizes Macao courts to review the substance of judgments in certain circumstances.¹⁵⁶ This example demonstrates that, lack of an overarching

¹⁵⁰ For a detailed discussion, *see infra* Chapter III.

¹⁵¹ For the JRE impasse between Mainland China and Hong Kong, *see infra* Part i of Section A of Chapter III.

¹⁵² *Eg.*, *see infra* Chapter III.

¹⁵³ *Id.*

¹⁵⁴ *See Id.*

¹⁵⁵ Art. 215 of the Mainland CPL.

¹⁵⁶ Art. 1202.2 of the Macao Civil Procedure Code. For details of the review on merits under the Macao regional JRE law, *see*

multilateral JRE scheme inevitably requires judgment creditors to invest tremendous amount of time and money to enforce judgments according to regional laws. Furthermore, some regional laws are influenced by local protectionism, such as review on the merits;¹⁵⁷ therefore, JRE may be effectively impossible in some circumstances.

2. JRE Impasse for Majority of Judgments between Mainland China and Hong Kong

For three reasons, majority of judgments are unrecognizable and unenforceable between Mainland China and Hong Kong. First, the scope of ① is very narrow.¹⁵⁸ Suppose that a Mainland creditor won a case in Shanghai against a wholly owned subsidiary of a Hong Kong company. When this creditor enforces the judgment, it finds that the properties of the Hong Kong company in Mainland China are insufficient, but the Hong Kong company has properties in Hong Kong and Macao. The creditor can enforce the judgment according to ③ in Macao, but he or she cannot enforce the judgment in Hong Kong because ① does not apply to any judgment without a choice of court agreement.

Second, Hong Kong refuses to recognize and enforce Mainland judgments beyond the scope of ①, because its criteria for finality are fundamentally different from those in Mainland China.¹⁵⁹ *Chan Chow Yuen v Nanyang Commercial Bank Trustee Limited and et al.* demonstrates Mainland judgments cannot be recognized and enforced in Hong Kong because of the two regions have different criteria on finality.¹⁶⁰ In this case, the Court of First Instance in

Part iii of Section A of Chapter III.

¹⁵⁷ *Id.*

¹⁵⁸ For a detailed discussion of the narrow scope of the Mainland-Hong Kong Arrangement, *see infra* Part i of Section B of Chapter III.

¹⁵⁹ For a detailed discussion of the finality disputes, *see infra* Part ii of Section B of Chapter IV.

¹⁶⁰ *Chan Chow Yuen v Nanyang Commercial Bank Trustee Limited and et al.*, HACA 4/2002.

Hong Kong noticed that because Mainland judgments were not considered as final in Hong Kong so they were not recognizable and enforceable; consequently, the court suggested parties to re-litigate the case in Hong Kong in order to resolve their disputes.¹⁶¹

Third, Mainland courts would deny the recognition and enforcement of Hong Kong judgments, because they hold that no reciprocity exists between Mainland China and Hong Kong.¹⁶² *Standard Chartered Asia Ltd v. Guangxi Zhuang Autonomous Region Huajian Company*¹⁶³ demonstrates this. It involves a guarantee contract among a Hong Kong creditor, a Hong Kong debtor, and a Mainland guarantor.¹⁶⁴ The creditor won a Hong Kong judgment against the debtor and the guarantor. But he could not enforce it in Mainland China because of lack of an interregional JRE arrangement and the absence of reciprocity between Mainland China and Hong Kong.¹⁶⁵ Consequently, the creditor had to sue the guarantor in Mainland China on the same cause of action.¹⁶⁶

As a conclusion, the US and EU interregional JRE systems have already realized free circulation of judgments by a unified overarching interregional JRE scheme. On the contrary, the current interregional JRE system in China is constituted by five different laws, and in many circumstances JRE is even impossible because of insufficient substantive laws.

D. The Need for, and Feasibility of, a Multilateral JRE Arrangement

The need for a Multilateral JRE Arrangement comes from economic integration among

¹⁶¹ *Id.*, para 13.

¹⁶² For a detailed discussion of the reciprocity requirements under the Mainland JRE law, *see infra* Part i of Section A of Chapter III

¹⁶³ *Standard Chartered Asia Ltd v. Guangxi Zhuang Autonomous Region Huajian Company*, Higher People's Court of Guangxi Zhuang Autonomous Region, 1998.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

Mainland China, Macao, and Hong Kong. Its feasibility results from three factors: (i) the geographical, cultural, and historical proximities among the three Chinese regions, (ii) the constitutional framework of “One Country, Two Systems,” and (iii) contributions of the existing bilateral arrangements.

i. Need: Economic Integration

Interregional economic integration and JRE should accompany each other so that all participating regions can achieve the best comparative advantages.¹⁶⁷ For example, the preamble of the Hague Choice of Court Convention indicates that the purpose of the Convention, *inter alia*, is to promote international trade and investment through uniform rules on jurisdiction and JRE in civil and commercial matters.¹⁶⁸ Similarly, the development of the European common market also requires the establishment of a JRE system between its members.¹⁶⁹ As a return, the Brussels Convention and corresponding Regulation help to develop the common market, because once merchants know the judgments rendered in their favor at home can be recognized and enforced in the other region with certainty and at a low cost, they would be more willing to “buy and sell, work and hire, render and purchase services, and invest across [regions]...”¹⁷⁰

The development of the EU single market requires free circulation of judgments, and similarly the necessities and possibilities of developing a multilateral JRE arrangement among

¹⁶⁷ Ronald Brand, *Recognition of Foreign Judgments as a Trade Law Issue: The Economics of Private International Law*, in *ECONOMIC ANALYSIS OF INTERNATIONAL LAW: COMPARATIVE AND EMPIRICAL PERSPECTIVES*, 620-26 (J Bhandari and A Sykes ed. 1997). Antonio F. Perez, *The International Recognition of Judgments: The Debate between Private and Public Law Solutions*, 19 *BERKELEY JOURNAL OF INTERNATIONAL LAW* 44, 44-6 (2001).

¹⁶⁸ Preamble of the Hague Choice of Court Convention. For the history of the negotiations for this Convention, see Trevor C. Hartley, *The Hague Choice of Court Convention*, 31 *E. L. REV.* 414, 414-15 (2006), Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 *AM. J. COMP. L.* 543, 543-46 (2005).

¹⁶⁹ Zhihong Yu, *Lun Hong Kong He Nei Di Min Shan Shi Pan Jue Cheng Ren Yu Zhi Xin Wen Ti Jie Jue de Guang Lian Chong Gou [On Reconstructing the Concept in Recognition and Enforcement of Civil and Commercial Judgments Between Hong Kong and Mainland]*, 127 *JOURNAL OF JINAN UNIVERSITY [PHILOSOPHY AND SOCIAL SCIENCE]* 77, 80 (2007).

¹⁷⁰ Bermann, *supra* note 105 at 1383-84. See Magnus, *supra* note_102_ at 7.

Chinese regions also come from their increasingly close economic integration.¹⁷¹ Since the new Millennium, the three regions have made joint efforts to realize free circulation of goods, services, capital, and people among them.¹⁷² A free trade area¹⁷³ is emerging since Mainland China, Hong Kong and Macao, respectively, concluded two Closer Economic Partnership Arrangements (hereinafter "CEPAs") in 2003.¹⁷⁴ Since then the three regions have worked closely to introduce further economic liberalization measures by an annual supplement.¹⁷⁵ The CEPAs comprise three pillars: zero-tariff for trade in goods,¹⁷⁶ preferential treatment for trade in services,¹⁷⁷ and trade and investment facilitation.¹⁷⁸ The CEPAs quickly move the three regions in the direction of a single market.¹⁷⁹ For example, since its establishment, the CEPA has significantly enhanced economic integration between Mainland China and Hong Kong.¹⁸⁰ In 2009, Mainland China is the most significant trading partner of Hong Kong,¹⁸¹ and as a major

¹⁷¹ Yu, *supra* note 169_ at 79-80.

¹⁷² Weidong Zhu, *The Relationships between China and Its Special Administrative Regions and Their Regulation*, 4 J CAMBR. STUD. 111, 115-116 (2009), <http://journal.acs-cam.org.uk/data/archive/2009/200902-article10.pdf> (last visited March 30, 2010)

¹⁷³ Wei Wang, *The legal status of the CEPA between the Mainland and Hong Kong of China*, 4 FRONT. LAW CHINA 310, 312-13 (2009) (indicating that the two CEPAs were notified to the WTO in the name of FTAs).

¹⁷⁴ The main text of the Mainland-Hong Kong CEPA was signed on June 29, 2003 and came into effect on January 1, 2004. The text is available at http://www.tid.gov.hk/english/cepa/legaltext/cepa_legaltext.html last visited February 2, 2010. The Main text of the Mainland-Macao CEPA was signed on October 17, 2003 and came into effect on January 1, 2004. The text is available at http://www.cepa.gov.mo/cepaweb/front/eng/itemI_2.htm last visited February 5, 2010.

¹⁷⁵ http://www.tid.gov.hk/english/cepa/cepa_overview.html last visited April 22, 2009. The supplements to Mainland-Hong Kong CEPA are available at http://www.tid.gov.hk/english/cepa/legaltext/cepa_legaltext.html, and the supplements to Mainland-Macao CEPA are available at http://www.cepa.gov.mo/cepaweb/front/eng/itemI_2.htm last visited April 22, 2010.

¹⁷⁶ From January 1, 2006, Mainland China, Hong Kong, and Macao grant tariff exemption to goods from each other as long as the goods meet CEPA origin rules. For comments, *see* Wang, *supra* note 173_ at 312.

¹⁷⁷ Hong Kong, Macao, and Mainland service suppliers enjoy preferential treatment in entering into one another's market in various service areas. They also grant one another mutual recognition of professional qualifications. *See* <http://www.tid.gov.hk/english/cepa/mutual/mutual.html> and <http://bo.io.gov.mo/edicoes/en/dse/cepa/> last visited April 22, 2010.

¹⁷⁸ A summary of mutual facilitation to improve the interregional business environment can be found at http://www.tid.gov.hk/english/cepa/facilitation/summary_invest.html and <http://bo.io.gov.mo/edicoes/en/dse/cepa/> last visited April 22, 2010.

¹⁷⁹ Regarding the impact of CEPA on Hong Kong and Mainland economy, *see* CEPA Impact on the Hong Kong Economy at http://www.tid.gov.hk/english/cepa/statistics/statistics_research.html. LC Paper No. CB(1)1849/06-07(04). (This report indicates that for both trade in goods and trade in services, majority of responding companies considered CEPA beneficial to the Hong Kong economy and to the sectors that they specialized in. The Individual Visit Scheme under the CEPA boosted tourism in both Mainland China and Hong Kong. More new jobs were created for Hong Kong and Mainland residents. The CEPA also brought more investment in Mainland China. The more significant part of the CEPA to the Mainland lies with the intangible benefits, that is, the transfer of quality capital and management and professional skills to the Mainland for its long term economic development.) Regarding the impact of CEPA on Macao and Mainland economy, *see* statistics on

http://www.cepa.gov.mo/cepaweb/front/eng/itemI_4.htm and <http://yzs2.mofcom.gov.cn/aarticle/workaffair/200801/20080105328980.html> (last visited April 25, 2010).

¹⁸⁰ Zhu, *supra* note 172 at 114.

¹⁸¹ Hong Kong Government Website, <http://www.gov.hk/en/about/abouthk/facts.htm> (last visited Oct. 12, 2009).

service economy, Hong Kong has a particular strong link to Mainland China as well.¹⁸²

With the ever-increasing amount of trade, investment, and flow of people among Mainland China, Hong Kong, and Macao,¹⁸³ there is a growing likelihood that more cases involving interregional factors will appear¹⁸⁴ and consequently the demands for interregional JRE will increase.¹⁸⁵ Moreover, although arbitration can solve many disputes and the awards can be enforced under the arrangement for recognition and enforcement of arbitration awards between Mainland and Hong Kong and Macao separately.¹⁸⁶ However, not all contracts contain an arbitration clause. Even if a contract has an arbitration clause, this clause may be invalid for various reasons.¹⁸⁷ Moreover, there are many claims, such as in the fields of intellectual properties, cannot not be solved by arbitration.¹⁸⁸ Therefore, litigation will often become the only resort that parties can use to solve their disputes. As a conclusion, economic integration among

¹⁸² *Id.*

¹⁸³ Wong, *supra* note 21_ at 378. Regarding the impact of CEPA on the Hong Kong and Mainland economy, see Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA) Impact on the Hong Kong Economy. See http://www.tid.gov.hk/english/cepa/statistics/statistics_research.html. LC Paper No. CB(1)1849/06-07(04).

¹⁸⁴ Guobin Zhu, *Inter-regional Conflict of Laws under "One Country, Two Systems": Revisiting Chinese Legal Theories and Chinese and Hong Kong Law, with Special Reference to Judicial Assistance*, 32 HONG KONG L.J. 615, 618 (2002). Xianchu Zhang, *Dui "Neidi Hong Kong Xianfu Renke he Zhixing Danshiren Xieyi Guanxia de Minshanshi Anjian Panjue de Anpai" de Chubu Pinjia [Preliminary Comments on the Mainland-Hong Kong Mutual Recognition and Enforcement Judgment Arrangement]*, 8 FAZHI LUNTAN [LEGAL SYSTEM FORUM] 51, 56-57 (2006).

¹⁸⁵ Gujje Yuan, *Nei Di Yu Gang Ao Xian Fu Cheng Ren Yu Zhi Xing Ming Shan Shi Pan Jue De Fa Zhang Qu Shi [The Trend of Development between Mainland China, Hong Kong and Macao Respectively on Mutual Recognition and Enforcement of Civil and Commercial Judgments]*, 2 FA XUE JIA [JURIST], 149 (2005). Xianchu Zhang & Philip Smart, *Development of Regional Conflict of Laws: On the Arrangement of Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters between Mainland China and Hong Kong SAR*, 36 HONG KONG L. J. 553, 557-59 (2006). Shanshan Lu, *Nei Di Yu Hong Kong Min Shan Shi Pan Jue Cheng Ren Yu Zhi Xing De Xiang Zhuang Yu Jian Yi [The Status Quo of and Suggestions to Interregional JRE between Mainland China and Hong Kong in Civil and Commercial Cases]*, 39 LI LUN GUANG CHA [THEORETIC OBSERVATION] 98, 100 (2006).

¹⁸⁶ See Arrangement concerning Mutual Enforcement of Arbitration awards between the Mainland and the Hong Kong concluded on June 18, 1999 and effective on Feb 1, 2000, at <http://www.legislation.gov.hk/intracountry/eng/pdf/mainlandmutual2e.pdf> (last visited March 22, 2010). The Supreme People's Court promulgated this arrangement by issuing a judicial explanation (Judicial Explanation 3/2002) on January 24, 2000. In Hong Kong, the Arbitration Ordinance was amended accordingly. For comments, see Zhihui He, *Dui Zhong Guo Qu Ji Si Fa Xie Zhu Mo Shi De Zai Ren Ke [Reconsideration of the Model for Interregional Judicial Assistance in China]*, 109 HE BEI FA XUE [HE BEI LAW SCIENCE] 79, 82-83 (2001). Arrangement on Reciprocal Recognition and Enforcement of Arbitration awards between Mainland China and Macao concluded on October 30, 2007 and effective on Jan 1, 2008 at www.lawinforchina.com (last visited March 22, 2010).

¹⁸⁷ *I.e.* see art 58, grounds to invalidate an arbitration award, of the Arbitration Law of the PRC (Adopted at the 8th Session of the Standing Committee of the 8th National People's Congress on August 31, 1994, effective Sep. 1, 1995) available at http://www.law-lib.com/LAW/law_view.asp?id=10684.

¹⁸⁸ See art 3 of the Arbitration Law of the PRC. For comments, see Taroh Inoue, *Introduction to International Commercial Arbitration in China*, 36 HKLJ 171, 190 (2006).

the three regions demands the establishment of an effective and efficient interregional JRE system.¹⁸⁹ On the other hand, such system can facilitate interregional economy.¹⁹⁰

ii. Feasibility

1. Geographical, Cultural, and Historical Proximities among the Three Regions

Both Hong Kong and Macao share a close geographical proximity with Mainland China. Hong Kong¹⁹¹ is located at the south-eastern tip of China and is separated from the Mainland city Shenzhen by a twenty-meter wide river.¹⁹² Macao¹⁹³ is about one-fortieth of the size of Hong Kong¹⁹⁴ and is located on the southeast coast of China, facing Hong Kong to the east, the Pearl River Delta to the west, and the Guangdong Province of Mainland China to its north.¹⁹⁵ It is 60 km from Hong Kong and 145 km from the Mainland city Guangzhou.¹⁹⁶

These two regions also have strong cultural and historical ties with Mainland China.¹⁹⁷ Before they were ceded to the UK and Portugal, Hong Kong and Macao had been part of the territory of China since ancient¹⁹⁸ times. The governance of the UK and Portugal significantly

¹⁸⁹ See Wong, *supra* note_21_ at 378.

¹⁹⁰ Yu, *supra* note_169_ at 78.

¹⁹¹ Hong Kong includes Hong Kong Island, Lantau Island, the Kowloon Peninsula, and the New Territories, including 262 outlying islands. See Hong Kong Government website, <http://www.gov.hk/en/about/abouthk/facts.htm> (last visited Oct. 12, 2009).

¹⁹² Hong Kong Government website, <http://www.gov.hk/en/about/abouthk/facts.htm> (last visited Jan. 12, 2010).

¹⁹³ Macao includes the Macao Peninsula, Taipa Island, and Coloane Island. See Judith R. Krebs, *Comment: One Country, Three Systems? Judicial Review in Macao After Ng Ka Ling*, 10 PAC. RIM L. & POL'Y 111, 113 (2000 December). For the history of Macau, see STEVE SHIPP, *MACAU, CHINA: A POLITICAL HISTORY OF THE PORTUGUESE COLONY'S TRANSITION TO CHINESE RULE* (1997); GEOFFREY C. GUNN, *ENCOUNTERING MACAU: A PORTUGUESE CITY-STATE ON THE PERIPHERY OF CHINA 1557-1999* (1996).

¹⁹⁴ Krebs, *supra* note 193 at 113.

¹⁹⁵ Macao government website, <http://www.gcs.gov.mo/files/factsheet/geography.php?PageLang=E> (last visited Jan. 4, 2010).

¹⁹⁶ *Id.*

¹⁹⁷ See Hong Kong Legislative Council Paper No. CB(2) 722/01-02(04) para 13 (acknowledging cultural similarities between Hong Kong and Mainland China). Yanzhi Cao, *Macao yu Zhuguo Dalu Hunyin Falv Zhidu Zhi Bijiao [Comparison of Marriage Laws in Mainland China and Macao]*, 2 HE BEI FA XUE [HE BEI LAW SCIENCE] 52, 52 (2000).

¹⁹⁸ For the history of Hong Kong, see JOHN MARK CARROLL, *A CONCISE HISTORY OF HONG KONG 1* (2007); STEVE TSANG, *A MODERN HISTORY OF HONG KONG 1-39* (2007). For the history of Macau, see *supra* note 193.

changed the political and economic models in Hong Kong and Macao.¹⁹⁹ But they did not fundamentally change the cultural and historical ties of these two regions with Mainland China.²⁰⁰ This is demonstrated by the facts that Chinese descents are the majority population and Chinese (Mandarin and Cantonese) is the major language used in these two regions. The population of Hong Kong was approximately 6.98 million in 2008.²⁰¹ 95% is people of Chinese descents.²⁰² Today only 3.1% of the population speaks English.²⁰³ A majority of the people speak a Chinese dialect—Cantonese, and 1.1 % speaks Mandarin.²⁰⁴ Regarding Macao, 89.6% of the current population were either born in Macao or emigrated from Mainland China.²⁰⁵ More than 95% of the population speaks Chinese and only 5% speaks Portuguese, English or other languages.²⁰⁶

2. Constitutional Framework Overarching Mainland China, Hong Kong, and Macao

Hong Kong became an English colony after the Opium War in 1840.²⁰⁷ On December 19, 1984, the Chinese and British Governments signed the Joint Declaration on the Question of Hong Kong, affirming that the the People’s Republic of China (hereinafter “PRC”) Government

¹⁹⁹ For how the UK established the political and economic models in Hong Kong, *see Id.* Tsang, at 161-206. For how the Portugal established the political and economic models in Macao, *see* QICHEN HUANG, MACAO TONG SHI [THE GENERAL HISTORY OF MACAO] 321-371, 391-454 (1999).

²⁰⁰ Tsang, *supra* note_198_ at 1-39, and 47 (recognizing the great cultural differences between Chinese people and British people in Hong Kong).

²⁰¹ Hong Kong Government website, <http://www.gov.hk/en/about/abouthk/facts.htm> (last visited Jan. 12, 2010).

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*, 88.7% of population is Cantonese speakers.

²⁰⁵ Macao government website, <http://www.gcs.gov.mo/files/factsheet/geography.php?PageLang=E> (last visited Jan. 4, 2010).

²⁰⁶ “The Macanese are people of mixed Portuguese and Chinese descent.” *See* Krebs, *supra* note 193 at 113. The rest of population speaks English and other languages.

²⁰⁷ The island of Hong Kong was ceded to the British Crown in the Treaty of Nanking in 1842. Kowloon peninsula and Stonecutters Island were ceded to the British Crown in 1860 in the Treaty of Beijing. New Territories and a group of islands were rented to the British Crown for 99 years from July 1, 1898. *See* A. D. Hughes, Hong Kong, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, Vol XII 138 (Rudolf Bernhardt ed., 1990).

would resume the exercise of sovereignty over Hong Kong from July 1, 1997.²⁰⁸ Macao gradually became a Portuguese colony after the mid-16th century.²⁰⁹ On April 13, 1987, the Chinese and Portuguese Governments signed the Joint Declaration on the Question of Macao and accordingly Mainland China and Macao were reunited on December 20, 1999.²¹⁰

The former Chinese leader, Deng Xiaoping, had originally formulated the policy of "One Country, Two Systems" for the peaceful settlement of the Taiwan question.²¹¹ However, Hong Kong and Macao are the first cases where this policy has been put into practice. According to the two Declarations, after the PRC resumed sovereignty over Hong Kong and Macao, they became special administrative regions under this policy.²¹² Accordingly, these three regions belong to one country, but Mainland socialism is not applied to special administrative regions and their previous capitalist system remains unchanged.²¹³ Moreover, they enjoy legislative autonomy, independent judicial systems, and final adjudicative power.²¹⁴ Importantly, the Mainland socialist

²⁰⁸ Arts 1 and 2 of the Joint Declaration on the Question of Hong Kong. The full name of the Declaration is Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, 23 INTERNATIONAL LEGAL MATERIALS 1366 para. 33 (1984). For the text of the Declaration, see <http://www.cmab.gov.hk/en/issues/jd2.htm> (last visited March 22, 2010). For the significance of the peaceful handover of Hong Kong from the UK to the PRC, see Tsang, *supra* note_198_ at 268-69.

²⁰⁹ For the history of Macau, see fn 193.

²¹⁰ See art. 1 of the Joint Declaration on the Question of Macao. The full name of the Declaration is Joint declaration of the Government of the People's Republic of China and The Government of the Republic of Portugal on the Question of Macao. For its text, see <http://bo.io.gov.mo/bo/i/88/23/dc/en/> (last visited March 22, 2010).

²¹¹ Xiaoping Deng, *Deng Xiaoping He Yang Liyu De Tang Hua [Deng Xiaoping's Talk with Yang Liyu]*, in the DENG XIAOPING WENXUAN [COLLECTION OF DENG XIAOPING], (People Press, 1993), 230.

²¹² Art. 3 of the Joint Declaration on the Question of Hong Kong and art. 2 of the Joint Declaration on the Question of Macao.

²¹³ Art. 3 of the Joint Declaration on the Question of Hong Kong and art. 2 of the Joint Declaration on the Question of Macao. Art. 5 of the Hong Kong Basic Law and Macao Basic Law. For comments on this policy, see Yash Ghai, *The Intersection of Chinese Law and the Common Law in the Special Administrative Region of Hong Kong: Question of Technique or Politics*, in ONE COUNTRY, TWO SYSTEMS, THREE LEGAL ORDERS -- PERSPECTIVES OF EVOLUTION ESSAYS ON MACAU'S AUTONOMY AFTER THE RESUMPTION OF SOVEREIGNTY BY CHINA, 13-49 (Jorge Oliveira, Paulo Cardinal (eds) 2009) (The author's conclusion is that "the Chinese system has triumphed over the common law" but his paper concentrates on the right of abode, constitutional reform, the term of office of the chief executive and other constitutional and public law issues, instead of conflict of laws and commercial laws).

²¹⁴ *Id.*, art. 2 provides that "the National People's Congress authorizes Hong Kong to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law." Besides, arts. 12-23 provide that Hong Kong shall be vested with autonomic rights in dealing with its own affairs except foreign affairs and defense. Therefore, as special administrative regions, Hong Kong and Macao enjoy a higher degree of autonomy than ethnic autonomous regions in China. For comments regarding the policy of "One Country, Two Systems," see L H Ambrose, *The Basic Law and the Success of "One Country, Two Systems," China L.* 76, 76-77 (July, 1997); P Raghurir & G V Johar, *Hong Kong 1997 in Context*, 63 PUBLIC OPINION QUARTERLY 543 (Winter 1999). See also Albert H.Y. Chen, *The Theory, Constitution and Practice of Autonomy: The Case of Hong Kong*, in ONE COUNTRY, TWO SYSTEMS, THREE LEGAL ORDERS -- PERSPECTIVES OF EVOLUTION ESSAYS ON MACAU'S AUTONOMY AFTER THE RESUMPTION OF SOVEREIGNTY BY

system and policies will not be practiced in Hong Kong and Macao for 50 years even after they have reunited with Mainland China.²¹⁵ The meaning of "remaining unchanged for 50 years" rule under Article 5 of the Hong Kong Basic Law and Macao Basic Law should mean remaining unchanged for at least 50 years.²¹⁶ Therefore, the coexistence of the three legal regions with independent legislative and judicial powers will probably last for more than 50 years.²¹⁷

The constitutional framework created by the policy of "One Country, Two Systems" brings both necessities and possibilities to the development of an interregional JRE arrangement in China. The necessities come from the fact that Hong Kong and Macao enjoy high judicial and legislative autonomy.²¹⁸ Therefore, although they are only local authorities under the direct leadership of the central government in Mainland China,²¹⁹ the latter cannot require them to recognise and enforce its judgments. However, Article 95 of the Hong Kong Basic Law and Article 93 of the Macao Basic Law authorize these two regions to render judicial assistance to each other, which are constitutional justifications for a multilateral JRE arrangement.²²⁰ These two provisions serve as a constitutional base, making the establishment of an interregional JRE arrangement legitimate and possible.²²¹

CHINA 751, 751-766 (Jorge Oliveira & Paulo Cardinal ed. 2009). For the legislative power of the SARs, *see eg.* Fong Man Chong, *The Ranking of the International Law in the Framework of "The Basic Law of the Macao SAR of the People's Republic of China" and the Introspection on the Perplexities of Fundamental Rights*, in ONE COUNTRY, TWO SYSTEMS, THREE LEGAL ORDERS -- PERSPECTIVES OF EVOLUTION ESSAYS ON MACAU'S AUTONOMY AFTER THE RESUMPTION OF SOVEREIGNTY BY CHINA 593, 593-604 (Jorge Oliveira & Paulo Cardinal ed. 2009). For the judicial power of the SARs, *see eg.* Jorge Menezes, *Interpretation of the Basic Law by the Courts of the Macao SAR*, in ONE COUNTRY, TWO SYSTEMS, THREE LEGAL ORDERS -- PERSPECTIVES OF EVOLUTION ESSAYS ON MACAU'S AUTONOMY AFTER THE RESUMPTION OF SOVEREIGNTY BY CHINA 631, 631-53 (Jorge Oliveira & Paulo Cardinal ed. 2009).

²¹⁵ Jin Huang, *Interaction and Integration Between the Legal Systems of Hong Kong, Macao and Mainland China 50 Years After Their Return to China*, in ONE COUNTRY, TWO SYSTEMS, THREE LEGAL ORDERS -- PERSPECTIVES OF EVOLUTION ESSAYS ON MACAU'S AUTONOMY AFTER THE RESUMPTION OF SOVEREIGNTY BY CHINA 769, 769-771 (Jorge Oliveira, Paulo Cardinal ed. 1999).

²¹⁶ *Id.* at 770-71. Art. 5 of the Hong Kong Basic Law indicate that "the socialist system and policies shall not be practiced in the Hong Kong SAR, and the previous capitalist system and way of life shall remain unchanged for 50 years."

²¹⁷ *Id.* at 770.

²¹⁸ *See fn supra* 214.

²¹⁹ *Id.* art. 12 of the Hong Kong Basic Law provides that "Hong Kong shall be a local administrative region of the PRC, which shall enjoy a high degree of autonomy and come directly under the Central People's Government."

²²⁰ For detailed discussion, *see* Section A of Chapter VI.

²²¹ *Id.*

3. Contributions of the Existing Bilateral Arrangements

Although no multilateral judicial cooperation exists, bilateral judicial cooperation in China first started with the “seven-point” agreement concluded between the Guangdong Higher People's Court and the Hong Kong High Court in 1988.²²² This agreement mainly concerned mutual service of documents.²²³ It was applicable to Hong Kong and Guangdong Province, instead of the whole Mainland China.²²⁴ However, it laid down a foundation for further interregional judicial cooperation, especially service of documents.²²⁵ For example, there are many similarities between it and the Mainland-Hong Kong Service Arrangement.²²⁶

Thus far, six bilateral arrangements have been established between Mainland China, Hong Kong and Macao, respectively, in the areas of service of judicial documents,²²⁷ investigation and collection of evidence,²²⁸ and recognition and enforcement of judgments²²⁹ and arbitration award s.²³⁰ The word, “*Anpai*, 安排” or “arrangement” in English is less formal than words such as treaty, agreement or convention, in the legal context.²³¹ But it is used in the title of the three legal

²²² The Higher People's Court of Guangdong Province, Circular on the Service of Civil and Economic Judicial Documents between the Higher People's Court of Guangdong Province and the High Court of Hong Kong (July 8, 1988).

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Zhu, *supra* note_184_ at 643 and 668-69..

²²⁶ *Id.* at 669.

²²⁷ Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and Hong Kong Courts was concluded on January 14, 1999 and effective on March 20, 1999 (hereinafter "the Mainland-Hong Kong Service Arrangement"). The Supreme People's Court promulgated a judicial interpretation (Judicial Interpretation 9/1999) to implement this arrangement on March 29, 1999. The Hong Kong High Court Rules Committee promulgated the Rules of the High Court (Amendment) Rules 1999 to amend the relevant provisions (including Orders 11 and 69) in the Rules of the High Court to implement this arrangement. *See* Wong, *supra* note_21_ at 378-79. For comments, *see* He, *supra* note_186_ at 81. Arrangement on the Mutual Service of Judicial Documents and Obtaining Evidence in Civil and Commercial Matters between the Mainland and Macao was concluded in 2001 (hereinafter "the Mainland-Macao Service and Evidence Arrangement"). The Supreme People's Court promulgated a judicial interpretation (Judicial Interpretation 26/2001) to implement this arrangement on August 7, 2001 and effective on Sep.15, 2001.

²²⁸ The Mainland-Macao Service and Evidence Arrangement.

²²⁹ *See supra* fns 143 and 144.

²³⁰ *See supra* fn 186. For comments on the existing arrangements, *see* Renshan Liu, *Recent Judicial Cooperation in Civil and Commercial Matters Between Mainland China and Taiwan, The Hong Kong S.A.R. and the Macao S.A.R.*, 11 YEARBOOK OF PRIVATE INTERNATIONAL LAW 235, 235-53 (2009).

²³¹ The typical meaning of “Arrangement” is “putting in order, plan, or preparation.” It does have a meaning of “agreement or settlement,” but which is seldom ranked as its top interpretations. *See* A S Hornby, OXFORD ADVANCED LEARNER’S ENGLISH-

documents concerning service, investigation and collection of evidence, and recognition and enforcement of arbitration awards and judgments between Mainland China and Hong Kong, and those between Mainland China and Macao. This term is also found in legal documents concerning interregional economic issues.²³² Probably, future legal documents concerning interregional issues in China will continue to use this term. The selection of this term is deliberate. Compared with other more widely used terminologies, such as “agreement,” “treaty,” and “convention,” “arrangement” in Chinese has a stronger connotation of family and of reaching a consensus harmoniously, peacefully, jointly, and amicably. This is consistent with Confucianism, which emphasizes solving disputes by a peaceful way in a family or a society. Put in legal terms, “arrangement” suggests that the three Chinese regions are equal and they voluntarily agree to make joint efforts to solve legal conflicts among them for mutual benefits. From the historical perspective, the co-existence of Chinese regions results from foreign invasions.²³³ In response, the PRC has repeated that solving interregional conflicts is its internal affair and resists any foreign intervention. In a political sense, “arrangement” symbolizes that it is made between local authorities to address their common affairs.²³⁴ Thus, “arrangement” perfectly suits the legal, social, historical, and political context of interregional conflicts in China.

The existing bilateral arrangements enhance the feasibility of a Multilateral JRE Arrangement from four aspects. First, they demonstrate that Article 95 of the Hong Kong Basic Law and Article 93 of the Macao Basic Law can serve as the constitutional basis for the

CHINESE DICTIONARY 65-6 (the Commercial Press and Oxford University Press, 4th edn, 1997). *See also* http://dictionary.oed.com/cgi/entry/50012277?single=1&query_type=word&queryword=Arrangement&first=1&max_to_show=10 (last visited Dec 21, 2009); and <http://www.merriam-webster.com/dictionary/Arrangement> last visited May 1, 2009.

²³² For discussion of the meaning of “Arrangements” in the Mainland-Hong Kong CEPA and Mainland-Macao CEPA, *see* Wang, *supra* note_173_ at 311.

²³³ “China’s long history is full of glories and glooms. [However, from 1842 to 1949,] China suffered humiliation by foreign powers through a series of ‘unequal treaties’ which undermined its sovereignty.” During this period, China was demoted to a semi-colony of Western countries. *See* Wang & Leung, *supra* n 11, 280-81. For a detailed discussion on unequal treaties, *see* Priscilla Mei-fun Leung, THE HONG KONG BASIC LAW: HYBRID OF COMMON LAW AND CHINESE LAW 17 (LexisNexis, 2007).

²³⁴ Wang, *supra* note_173_ at 311 (indicating that the word “arrangement” implies that signatories are members within one country).

proposed Multilateral JRE Arrangement.²³⁵ The reason is that all the existing arrangements are established under these two articles.²³⁶ Second, the smooth functioning of these arrangements help safeguard the smooth transition of the sovereignty of Hong Kong and Macao to the PRC, and promote economic integration and judicial cooperation among three regions.²³⁷ The success of these arrangements fosters a pro-cooperation environment among regions²³⁸ and enhances mutual understanding of the operation of each other's judicial system.²³⁹ Third, service, investigation and collection of evidence are related to JRE because unfair procedure in a judgment-rendering court constitutes a defense to JRE.²⁴⁰ So arrangements on these subjects and the two bilateral JRE arrangements provide an infrastructural support²⁴¹ for developing the proposed Multilateral JRE Arrangement.²⁴² Last but not least, the existing arrangements demonstrate that regions have accepted the legal form of arrangements plus separate regional legislation for solving interregional legal conflicts.²⁴³

E. Structure of What Follows

Besides this introduction chapter, this dissertation has another seven chapters. The Second Chapter is a literature review, focusing on scholarly achievements on Chinese interregional conflict of laws. The Third Chapter analyzes the status quo of the interregional JRE in China. It

²³⁵ For discussion of the constitutional basis for the proposed Multilateral Arrangement, *see* Section A of Chapter VI.

²³⁶ *See* Wong, *supra* note 21_ at 378-81.

²³⁷ Zhu, *supra* note 172 at 117.

²³⁸ For comments of the achievements of the Mainland-Hong Kong Service Arrangement, *see* Zhu, *supra* note 184_ at 668-69.

²³⁹ Zhang and Smart, *supra* note 185_ at 568.

²⁴⁰ For details of unfair procedure defenses regarding service and investigation and collection of evidence, *see* Chapter III.

²⁴¹ Zhang and Smart, *supra* note 185_ at 561.

²⁴² *Id.*, at 568-69 (indicating "the conclusion of the agreements between the Mainland and Hong Kong on service of judicial documents and on mutual enforcement of arbitration awards apparently laid a solid foundation of mutual understanding and trust for both sides' further cooperation").

²⁴³ *See* CAMILLE CAMERON & ELSA KELLY, PRINCIPLES AND PRACTICE OF CIVIL PROCEDURE IN HONG KONG 430 (2 ed. 2008). The proposed Multilateral JRE Arrangement should adopt the legal form of arrangement plus separate regional legislation. *See* Chapter VI.

demonstrates the bilateral arrangements are first steps beyond the unsatisfactory pure regional laws. It argues that the next stage should be to establish a Multilateral JRE Arrangement. The Fourth Chapter discusses how to solve the three major challenges confronting Chinese interregional JRE: conflicts between socialist law and capitalist law; conflicts between civil law and common law; and weak mutual trust. These challenges are the most serious issues on the macro level for designing the Multilateral JRE Arrangement. They should be addressed first before proposing selected rules for the Arrangement. The Fifth Chapter discusses selected rules of the proposed Arrangement. It proposes its scope, requirements for JRE, and defences for JRE. The Sixth Chapter explores how to implement this Arrangement. It argues that the best method of implementation is the model of interregional arrangement plus separate regional legislations. The seventh chapter is a conclusion.

In this dissertation, a judgment-rendering court or forum (F1) refers to the court that rendered a judgment; a requested court or forum (F2) means the court that is requested to recognise or enforce a judgment.

Chapter II Scholarly Achievements on Chinese Interregional Conflict of Laws

Juristic writings on Chinese interregional conflict of laws demonstrate the needs and possibilities of a Multilateral JRE Arrangement. The study of Chinese interregional conflict of laws began in late 1980s and is still in its infancy.¹ The relevant literature can be divided into four categories: studies on the general theory of Chinese interregional conflict of laws, studies on interregional JRE, and comparative studies.

A. General Theory of Chinese Interregional Conflict of Laws

Some scholars argue that since the foundation of the PRC in 1949, it has become a country with two legal regions, because Taiwan is a *de facto* independent region with a distinct legal system compared with that of Mainland China.² But theoretical discussions of Chinese interregional conflict of laws first appeared in the early 1980s³ and prospered

¹ Interregional conflict of laws in China is still in its infancy. See Chi Chung, *Conflict of Law Rules Between China and Taiwan and Their Significance*, 22 ST. JOHN'S J. LEGAL COMMENT. 559, 559 (2008). Veronika Hradilová, *The Selected Topics of Private International Law in China*, in EUROPEANIZATION OF THE NATIONAL LAW, THE LISBON TREATY AND SOME OTHER LEGAL ISSUES, 33-41 (Brno : Masarykova univerzita, 2008). Jin Huang & Andrew Xuefeng Qian, "One Country, Two Systems," *Three Law Families, and Four Legal Regions: The Emerging Inter-regional Conflicts of Law in China*, 5 DUKE J. COMP. & INT'L L. 289, 289-328 (1994). For major academic writings in Chinese, see WEI DING, GUOJI SIFA XUE [THE SCIENCE OF INTERNATIONAL PRIVATE LAW], 628-633 (Shanghai People Press, 2004); SHANGJIN ZHANG, GUOJI SIFA [INTERNATIONAL PRIVATE LAW], 446-461 (Zhongguo Renmin Daxue Press, 2000); and JUAN SHEN, ZHONGGUO QUJI FALV CHONGTU [CHINA INTERREGINOAL CONFLICT OF LAWS], (Zhongguo Zhengfa Daxu Press, 1999). See also Qingjiang Kong and Minfei Hu, *The Chinese Practice of Private International Law*, MELBOURNE JOURNAL OF INTERNATIONAL LAW 3.2, 414 (Oct 2002).

² Xianyu Yu, *Zhongguo Quji Falv Chongtu Jiejue De Jinzhan He Qianzhan [The Progresses and Prospects of Inter-Regional Conflict of Laws in China]* (a paper presented at the Annual Conference of Chinese Society of Private International Law in the year of 2006). Before the return of Hong Kong and Macao, the JRE between Mainland China and these two regions were international JRE because they were British and Portuguese colonies.

³ Hradilová, *supra* note 1 at 41.

with the return of Hong Kong and Macao to Mainland China.⁴ Legal writings of the general theory of Chinese interregional conflict of laws discuss the general issues of Chinese interregional legal conflicts, such as the reasons and status quo of interregional conflicts, as well as possible general solutions. The survey of scholastic achievements in this Section follows a chronic order and focuses on the works of Depei Han, Jin Huang, and Yongpin Xiao. Han is the first person laying down the theoretical postulate of Chinese interregional conflict of laws. Huang and Xiao are his most representative followers. The Parts i and ii present the works published before the reunification of Chinese regions, which bring the attention of Chinese legal academia, practitioners, judiciary, legislatures, and governments to the emergence of interregional legal conflicts. Part iii discusses the representative contemporary works after the reunification. Part iv assesses scholarship on general theory of Chinese interregional conflict of laws.

i. The First Efforts

The development of Chinese interregional conflict of laws cannot be explored without paying tribute to late Mainland Professor Depei Han. He is the forefather of Chinese interregional conflict of laws and his writings published in 1980s are still highly acclaimed today. Early in 1983, he pointed out that more attention should be paid to resolving the interregional legal conflicts in China after the return of Hong Kong and Macao.⁵ His articles published in 1989 and 1990 explain the reasons, characteristics, and

⁴ *Id.*, at 35.

⁵ Depei Han & Suanyuan Li, *Yin Gai Zhong Shi Dui Chong Tu Fa de Yan Jiu [Attention should be Paid on the Study of Conflict of Laws]*, 6 *Wu Han Da Xue Xue Bao (She Hui Ke Xue Ban) [Wu Han University Journal (Social Science Edition)]* 59 (1983).

solutions for Chinese interregional legal conflicts. He observes that the policy of “One Country, Two Systems” will be reflected not only in social and economic fields but also in legal systems.⁶ Therefore, after Hong Kong and Macao reunite with Mainland China, there will be multiple different legal regions in China and consequently legal conflicts between them are unavoidable.⁷ This is the theoretic postulate Han advances for the development of Chinese interregional conflict of laws.

Han identifies four distinctive characteristics of Chinese interregional legal conflicts,⁸ which his follower, Professor Jin Huang, echoed.⁹

First are the divergences of social systems between Chinese regions, because Hong Kong and Macao establish capitalism but Mainland China is built on socialism.¹⁰ The differences between the two systems significantly increase the difficulty of solving interregional legal conflicts.¹¹

Second are the conflicts between civil law and common law, because the civil-law tradition has strongly influenced Macao and Mainland China, but the English common-law tradition has shaped Hong Kong’s legal system.¹²

Third, under the two Joint Declarations, the Hong Kong Basic Law, and the Macao Basic Law, and international treaties in effect in Hong Kong and Macao before their reunification with Mainland China will continue to be effective after the handover; and moreover, Hong Kong and Macao can conclude treaties on numerous matters with other

⁶ Depei Han, *Lun Wo Guo De Qu Ji Fa Lv Chong Tu Wen Ti---Wo Guo Guo Ji Shi Fa Yan Jiu Zhong De Yi Ge Xin Ke Ti* [An Analysis of Chinese Interregional Legal Conflicts: A New Subject in Chinese Interregional Conflict of Laws], 6 ZHONG GUO FA XUE [CHINA LEGAL SCIENCE] 3, 3-4 (1998). Depei Han & Jin Huang, *Zhong Guo Qu Ji Fa Lv Chong Tu Wen Ti Yan Jiu* [Analysis of Chinese Interregional Conflict of Laws], 1 ZHONG GUO SHE HUI KE XUE [CHINA SOCIAL SCIENCE] 117, 118 (1989).

⁷ Han *supra* note 6 at 4. Han & Huang *supra* note 6 at 118.

⁸ Han *supra* note 6, at 5.

⁹ Huang and Qian, *supra* note 1_ at 304-06.

¹⁰ Han *supra* note 6, at 5. Han and Huang *supra* note 6, at 122. Huang and Qian, *supra* note 1 at 304-05.

¹¹ Huang and Qian, *supra* note 1_ at 304-06.

¹² Han and Huang *supra* note 6, at 122.

countries or international organizations under the name of “Hong Kong, China” or “Macao, China.”¹³ Therefore, some international treaties may be applicable to one region but not to others. Consequently, Chinese interregional conflicts include not only conflicts of regional laws but also conflicts of international laws.¹⁴

The last distinctive characteristic is that Chinese interregional legal conflicts are unique conflicts within a unitary country, but they also share commonness with international conflicts.¹⁵ The first reason is that each region has legislative autonomy.¹⁶ Hong Kong and Macao laws are at the equal status as Mainland laws, but they are only effective in their own jurisdiction.¹⁷ The second reason is that each region has final adjudicative power.¹⁸ No court of final review that can hear cases from all regions exists in China¹⁹ to coordinate and to develop interregional conflict of laws.²⁰ In this context, Chinese interregional legal conflicts are like international conflicts.²¹

Han also points out three general principles for resolving interregional legal conflicts in China.²² The principle of national unity is the most important.²³ He emphasized that Hong Kong and Macao are inseparable parts of the PRC, so when solving interregional legal conflicts, each region should give priority to national unity and should not harm the interests of other regions for its own benefits.²⁴ The second principle is “One Country,

¹³ See Fong Man Chong, *The Ranking of the International Law in the Framework of "The Basic Law of the Macao SAR of the People's Republic of China" and the Introspection on the Perplexities of Fundamental Rights*, in ONE COUNTRY, TWO SYSTEMS, THREE LEGAL ORDERS -- PERSPECTIVES OF EVOLUTION ESSAYS ON MACAU'S AUTONOMY AFTER THE RESUMPTION OF SOVEREIGNTY BY CHINA 593, 593-604 (Jorge Oliveira & Paulo Cardinal ed. 2009).

¹⁴ Han *supra* note 6 at 5. Han & Huang *supra* note 6 at 122.

¹⁵ Han *supra* note 6 at 5-6. Han & Huang *supra* note 6 at 122.

¹⁶ Han *supra* note 6 at 6.

¹⁷ *Id.* For few Mainland laws that are effective in Hong Kong and Macao, see Part ii of Section A of Chapter VI.

¹⁸ *Id.*

¹⁹ Han *supra* note 6 at 6. Huang and Qian, *supra* note 1 at 304-06.

²⁰ *Id.* at 304-06.

²¹ Han *supra* note 6 at 6.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

Two Systems” and peaceful coexistence.²⁵ This is the guiding principle for solving interregional legal conflicts.²⁶ Because of the policy of "One Country, Two Systems," the different legal system in each region will maintain for at least fifty years.²⁷ So Han believes it is inappropriate to use national substantive laws to unify regional laws.²⁸ Instead, conflict of laws is the best approach to coordinate different regional legal systems.²⁹ The last principle is equality and mutual benefits.³⁰ Han emphasizes the equality between Mainland China and special administrative regions in terms of civil and commercial laws.³¹ He encourages each region to refrain from parochial territorialism and to treat its residents and parties from other regions indiscriminately.³²

Then, he proposes a three-step process for solving interregional conflicts in China.³³ First, each region may apply its own regional conflict of laws to solve interregional conflicts.³⁴ The second step is to enact a national interregional conflict of laws applicable to all regions.³⁵ Han argues that the national interregional conflict of laws represents national unity and does not fall into the autonomous affairs of Hong Kong.³⁶ So he believes the National People's Congress (hereinafter "NPC") and its standing committee can enact such law according to Articles 17.3 and 17.4 of the Draft of Hong Kong Basic Law.³⁷ As the third step, uniform national substantive laws, in areas such as trade,

²⁵ *Id.* at 7.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*, at 7-8.

³⁰ *Id.*, at 7.

³¹ *Id.*

³² *Id.*

³³ Han *supra* note 6 at 7. Han & Huang *supra* note 6, at 125. Han and Huang proposed the three steps for legal conflicts between Mainland China and Hong Kong, but they are also applicable for solving legal conflicts concerning Macao.

³⁴ Han *supra* note 6 at 7.

³⁵ *Id.*, at 8-9.

³⁶ *Id.*, at 9.

³⁷ *Id.*, at 9. Han's article was published in 1988 but the Hong Kong Basic Law was published in 1990; therefore Han

transportation, and finance, will replace relevant regional substantive laws.³⁸ As an alternative, each region may also enact identical or similar substantive laws to avoid interregional conflicts.³⁹ Han predicts that steps two and three may overlap but they cannot replace each other. He believes that ultimately solving interregional conflicts in China will take at least fifty years after 1997.⁴⁰

ii. Pioneering Works

Professor Depei Han's theoretical research on Chinese interregional conflict of laws was continued by Professor Jin Huang. The latter published a Chinese treatise in 1992.⁴¹ In this treatise, he extensively discussed the meanings of “legal regions” and “interregional conflict of laws,” as well as general characteristics and solutions for Chinese interregional conflicts. In 1995, he published an English article in the *Duke Journal of Comparative and International Law*,⁴² which summarized his Chinese treatise and brought the issue of Chinese interregional conflict of laws to the attention of the English-speaking legal academia.

Huang defines “legal region [Fa Yu]” as a specific scope in which a distinct legal system applies.⁴³ A legal region has two features. The first is that it has a distinct legal

referred to a draft of Basic Law. Article 17.3 indicates “The PRC State Council can require the Hong Kong SAR government to implement laws enacted by the NPC and its Standing Committee, regarding defense, foreign affairs, and others issues related to national unity and territorial integrity, as well as any issues outside of the high autonomy of Hong Kong according to the Basic Law, in case that these laws are applicable in Hong Kong.” Article 17.4 states that “except emergency, before issuing requirements, the State Council shall consult the Hong Kong SAR Basic Law Committee and the Hong Kong SAR government.” Notably these two provisions were deleted in the final version of the Basic Law. For criticism of Han's three step approach, see Section A of Chapter VI.

³⁸ *Id.*, at 10.

³⁹ *Id.*

⁴⁰ DEPEI HAN, HAN DEPEI XUAN JI [SELECTED ESSAYS OF HAN DEPEI] 247-48 (Wuhan University Press 1996).

⁴¹ JIN HUANG, QU JI CHONG TU FA YAN JIU [RESEARCH ON THE INTERREGIONAL CONFLICT OF LAWS] (1991).

⁴² Huang and Qian, *supra* note 1_ at 289.

⁴³ Huang, *supra* note 41 at 1. In Huang's treatise, he preferred the term “legal unit” as the English equivalent of “Fa

system.⁴⁴ Second, it covers a specific scope, which can be spatial, temporal, or with respect to its members.⁴⁵ He applies the concept of “legal region” to China and argues that after Hong Kong and Macao reunite with Mainland China, China will become a country with three legal regions because Mainland China, Hong Kong, and Macao will maintain their own distinct legal system that covers a specific geographical area.⁴⁶ He also observes that Mainland China is in the socialist-law family, Hong Kong belongs to the common-law family, and Macao is in the civil-law family.⁴⁷ Consequently, Huang concludes that in China exist "one country, two systems, three law families, and four legal regions."⁴⁸

Moreover, Huang defines “interregional conflict of laws” as “conflict of laws among regions with different legal systems *within one country* (emphasis added).”⁴⁹ He argues that interregional conflict of laws has three basic characteristics: “(1) the conflict is basically involved with domestic laws; (2) the conflict is applicable as a choice of law in civil and commercial matters; and (3) the conflict differs from private international law.”⁵⁰ Scholars in Mainland China highly acclaim Huang’s definition.⁵¹

Yu.” However, three years ago, his English articles chose the concept “legal region” and abandon the “legal unit.” Huang does not provide an explanation in his English article.

⁴⁴ *Id.*

⁴⁵ *Id.* at 2.

⁴⁶ *Id.* at 12-13.

⁴⁷ *Id.* at 13.

⁴⁸ Huang and Qian, *supra* note_1_ at 289. The four legal regions refer to Mainland China, Hong Kong, Macao, and Taiwan.

⁴⁹ *Id.* at 289-92. See Renshan Liu & Zaisheng Xiang, *Current Situation, Problems and Proposals for Interregional Civil and Commercial Judicial Assistance in China* (on file with the author) (indicating that “interregional civil and commercial judicial assistance usually refers to relationships within a country with multiple legal systems). See also Renshan Liu & Meirong Zhang, *Pi Xi Zhong Guo Qu Ji Min Shang Shi Pan Jue Xiang Fu Cheng Ren Yu Zhi Xing Wen Ti de Li Fa Yu Si Fa Xian Zhuang [Analysis of Current Legislation and Judicial Practice of Chinese Interregional Recognition and Enforcement of Judgments in Civil and Commercial Matters]*, a paper presented in 2008 Annual Chinese Association of Private International Law in Beijing. See Shawei Gao, *Mainland China and the HKSAR Have Rules to Follow in Mutual Enforcement of Arbitration awards*, 4 CHINA LAW 68 (1999). But see the definition of interregional conflict of laws in this dissertation in Section B of Chapter I.

⁵⁰ Huang and Qian, *supra* note 1 at 289.

⁵¹ See Liu and Xiang, *supra* note 49 (indicating that “interregional civil and commercial judicial assistance usually refers to relationships within a country with multiple legal systems). See also Liu and Zhang, *supra* note 49.

Huang elaborates Han's equality argument. He points out that in terms of conflict of laws all the regions in China—Mainland China, Hong Kong, and Macao—are equal:⁵²

From the conflict of laws perspective, the Mainland's socialist legal system will not be superior to any of the other legal systems. The PRC Constitution, the HK B[asic] L[aw] and M[acao] B[asic] L[aw], and statutes governing national issues such as defense and diplomacy shall constitute the "supreme law of the land" over the Hong Kong and Macao SARs. Nevertheless, in the private law context, China's socialist laws will be on par with the laws of the SARs, because the Mainland, Hong Kong, Macao, and Taiwan will all be equal, independent legal regions.

Many scholars accepted Han and Huang's equality argument. Some of them step further and argue that the legitimacy of the principle of equality between legal regions comes from Article 2 of the Hong Kong Basic Law and Article 2 of the Macao Basic Law.⁵³ The reason is that these two provisions authorize Hong Kong and Macao to exercise a high degree of autonomy and enjoy executive, legislative, and independent judicial power.⁵⁴

Huang also proposes solutions for Chinese interregional legal conflicts. He believes that unifying substantive laws in the three regions is possible only when the socio-economic situation in every region is similar to each other.⁵⁵ Therefore, at the current stage, adopting conflicts rules is likely to be more effective and feasible.⁵⁶ He argues that the best approach to unifying conflicts rules in Chinese regions is to enact nationally uniform conflict rules.⁵⁷ This method would eliminate forum shopping, avoid renvoi, and

⁵² Huang and Qian, *supra* note_1_ at 289-303. See Liu and Zhang, *supra* note 49 (acclaiming the principle of "equality between legal regions [Fa Yu Pin Deng]").

⁵³ See Liu and Zhang, *supra* note 49.

⁵⁴ *Id.*

⁵⁵ Huang and Qian, *supra* note_1_ at 309.

⁵⁶ *Id.* at 310.

⁵⁷ *Id.* at 311.

bring many other benefits.⁵⁸ He proposes a framework for unifying regional conflict of laws. He discusses rules in the fields of characterization,⁵⁹ renvoi,⁶⁰ ascertaining the law of a foreign region,⁶¹ public policy exceptions,⁶² evasion of law,⁶³ personal law,⁶⁴ laws applicable to contracts,⁶⁵ and laws applicable to property.⁶⁶

iii. The Contemporary Scene

Compiled before Hong Kong and Macao reunited with Mainland China, Han and Huang's early works emphasize the *harmonization* of legal conflicts. The contemporary legal writings on the general theory of Chinese interregional conflict of laws thrive on the theoretic postulate established by Depei Han. They acknowledge and accept the concepts and characteristics of Chinese interregional conflict of laws proposed by Han.⁶⁷ However, contemporary legal writings focus more on *coordination* among regions. The reason is that, after reunion of the three regions, "coordination" among regions is more urgent than "harmonization" in practice, because the latter require a long process in time.⁶⁸ Yongpin Xiao's works on interregional coordination is the best representative.

⁵⁸ *Id.* at 309 and 311. Xiao Yongpin, *The Conflict of Laws Between Mainland China and the Hong Kong Special Administrative Region: the Choice of Coordination Models*, 4 in YEARBOOK OF PRIVATE INTERNATIONAL LAW 163, 192 (2003).

⁵⁹ Huang and Qian, *supra* note_1_ at 316.

⁶⁰ *Id.* at 317.

⁶¹ *Id.*

⁶² Huang and Qian, *supra* note_1_ at 319.

⁶³ *Id.* at 321.

⁶⁴ *Id.* at 321.

⁶⁵ *Id.* at 322.

⁶⁶ *Id.* at 325.

⁶⁷ Yongpin, *supra* note_58_ at 164-81.

⁶⁸ For the long existence of Chinese interregional conflicts, see Jin Huang, *Interaction and Integration Between the Legal Systems of Hong Kong, Macao and Mainland China 50 Years After Their Return to China*, in ONE COUNTRY, TWO SYSTEMS, THREE LEGAL ORDERS -- PERSPECTIVES OF EVOLUTION ESSAYS ON MACAU'S AUTONOMY AFTER THE RESUMPTION OF SOVEREIGNTY BY CHINA 769, 770-72 (Jorge Oliveira, Paulo Cardinal ed. 1999).

Yongpin Xiao

Mainland Professor Yongpin Xiao explored the models of legislative coordination in the fields of substantive laws and conflict of laws between Mainland China and Hong Kong.⁶⁹ He analyzes four methods to unify substantive laws.⁷⁰ The first is direct application of national laws in Hong Kong.⁷¹ He argues that this method should be restricted to national laws cited in Annex III of the Basic Law.⁷² The second method is the application of international treaties.⁷³ Xiao believes that using international treaties to resolve legal conflicts between Mainland China and Hong Kong does not threaten national unity and territorial integrity.⁷⁴ China's accession to the WTO provides a good opportunity and a legal basis for resolving interregional conflicts.⁷⁵ Xiao predicts that the two regions will probably become more similar in the fields of commercial laws after they revise their laws according to the requirements of WTO.⁷⁶ The third method is the application of interregional agreements.⁷⁷ Interregional agreements aim to achieve unification in a particular area of law.⁷⁸ He argues that the conclusion of interregional agreements complies with the Basic Law and "nearly all Chinese scholars consider this to be a viable method."⁷⁹ Moreover, this method has been the dominant coordinating model from 1997 to the composition of Xiao's paper in 2002.⁸⁰ The last method is the enactment

⁶⁹ Yongpin, *supra* note_58_ at 182.

⁷⁰ *Id.*

⁷¹ Yongpin, *supra* note_58_ at 182-83.

⁷² *Id.* at 182. For discussion of the Annex III, *see* Section A of Chapter IV.

⁷³ *Id.* at 186.

⁷⁴ *Id.*

⁷⁵ Yongpin, *supra* note ____ at 198.

⁷⁶ *Id.*

⁷⁷ *Id.* at 189.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 197.

of common legislation.⁸¹ "When Mainland China and Hong Kong cannot reach an agreement, the respective legislative bodies may enact the same or similar rules by direct consultation or by adopting model laws drafted by certain research institution or academic society."⁸²

Xiao argues that the four methods can also be used to unify conflict of laws. He agrees with Jin Huang that the best approach is to enact uniform conflict-of-laws rules at the national level.⁸³ He suggests that the Model Law of Mainland International Conflict of Laws can serve as the basic test for the uniform interregional conflict-of-laws rules.⁸⁴ Xiao also compares unifying conflict-of-laws rules and unifying substantive and procedural rules.⁸⁵ He concludes that the former could be achieved more easily than, and provide a foundation for, the latter.⁸⁶

Xiao also provides four coordinating principles for solving interregional conflicts between Mainland China and Hong Kong.⁸⁷ First, the two regions should cooperate under a common goal of promoting national unity.⁸⁸ Each side should not treat their relationship as that between sovereign states.⁸⁹ Second, both regions should observe the principle of equality and mutual benefit when dealing with conflict-of-law issues.⁹⁰ Third, judicial circles in the two regions should adopt an attitude of mutual respect and equal treatment.⁹¹ The forth principle is to promote communication and gradual

⁸¹ *Id.* at 190.

⁸² *Id.*

⁸³ *Id.* at 192.

⁸⁴ *Id.* at 193.

⁸⁵ *Id.* at 192.

⁸⁶ *Id.*

⁸⁷ *Id.*, at 180-181.

⁸⁸ *Id.*, at 180.

⁸⁹ See Shawei Gao, *Mainland China and the HKSAR Have Rules to Follow in Mutual Enforcement of Arbitration awards*, 4 CHINA LAW 68 (1999).

⁹⁰ Yongpin, *supra* note_58_ at 180-81.

⁹¹ *Id.*, at 181.

unification.⁹² Because many fundamental differences exist between the legal systems in the two regions, it is inappropriate to resolve interregional legal conflicts by enacting unified substantive laws in a short period.⁹³ Legal unification will be realized gradually in a very long process.⁹⁴ Communication and coordination in common problems and for mutual benefits are necessary.⁹⁵

Others

Chinese interregional conflict of laws also raises the attention outside of Mainland China.⁹⁶ Notably, few studies regarding interregional conflict of laws have been undertaken in Hong Kong and Macao. Until 2002, Hong Kong scholar, Guobing Zhu, publishes the first important survey of scholarship on interregional conflict of laws. He regretfully acknowledges Chinese interregional conflict of laws does not attract much attention in Hong Kong thus far.⁹⁷ Therefore, his survey mainly concentrates on Mainland scholarship, especially those of Depei Han and Jin Huang. He agrees the reasons for,⁹⁸ the characteristics of,⁹⁹ and principles for solving,¹⁰⁰ Chinese interregional legal conflicts proposed by Huang. Especially, Zhu revisits debates on this subject in

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Eg., Hradilová, *supra* note 1 at 33-41. The author observes that interregional conflict of laws is a new conception in China. She agrees with Jin Huang regarding the concept, reasons and characteristics of Chinese interregional conflict of laws. *Id.*, at 34-35.

⁹⁷ Guobin Zhu, *Inter-regional Conflict of Laws under "One Country, Two Systems": Revisiting Chinese Legal Theories and Chinese and Hong Kong Law, with Special Reference to Judicial Assistance*, 32 HONG KONG L.J. 615, 637 (2002).

⁹⁸ *Id.* at 618.

⁹⁹ *Id.* at 625-26.

¹⁰⁰ *Id.* at 628-29.

Mainland China¹⁰¹ and concludes that it is valuable to maintain a public policy exception between Mainland China and Hong Kong:¹⁰²

Based on this general study of the existing literature in China, it can be predicted that the adoption and application of the public order / public policy doctrine in inter-regional conflict of laws will vary from one case to another. But it would be better to largely implement this doctrine in all conflicts of laws. Between the two SARs, which both maintain capitalist systems; the application of it would be less frequent and narrower in scope.

Zhu believes that both regions should make sincere efforts to solve interregional conflicts and that applying widely accepted international norms can help achieve this goal.¹⁰³ He argues that incrementalism, namely a step-by-step approach, should be the guiding principle for solving interregional legal conflicts between Mainland China and Hong Kong.¹⁰⁴ Besides the general theory of interregional conflict of laws, Zhu also conducts research regarding jurisdiction¹⁰⁵ and choice of law¹⁰⁶ in interregional cases.

iv. Assessment

Legal writings on the general theory of Chinese interregional conflict of laws contribute to building the theoretic postulate, provide terminologies, and identifying distinctive characteristics of Chinese interregional legal conflicts. They explored the consequences of "One Country, Two Systems" in regional legal systems, created the concept of "legal region," and consequently established the discipline of interregional

¹⁰¹ *Id.* at 629-37.

¹⁰² *Id.* at 637.

¹⁰³ *Id.* at 642.

¹⁰⁴ *Id.* at 643.

¹⁰⁵ *Id.* at 643-48.

¹⁰⁶ *Id.* at 649-61.

conflict of laws in China. Different from Han and Huang, much other scholarship relating to Mainland China, Hong Kong, and Macao were restricted by the central-local relationship between them.¹⁰⁷ Namely, Hong Kong and Macao are special administrative regions under the direct leadership of the Beijing government.¹⁰⁸ However, by defining them as legal regions, Han and Huang elevated Hong Kong and Macao to an equal status as Mainland China in terms of conflict of laws. This becomes the theoretic postulate to develop interregional conflict of laws. More importantly, they also established that developing interregional conflict of laws complies with the policy of “One Country, Two Systems.” Han and Huang's arguments are significant because they justify the constitutional basis for the development of interregional JRE.

Moreover, Han, Huang, Xiao and many other scholars¹⁰⁹ reach a consensus that at the current stage designing interregional conflict-of-law rules, instead of substantive-law rules, is the best method to legitimately solve interregional legal conflicts in China. They also agree that interregional legislations are a better approach than regional legislations for solving interregional conflicts. However, they fail to provide a feasible and clear way to develop interregional conflict-of-law rules, including JRE rules. For example, Xiao surveyed the four models of legislative coordination among Chinese regions; however he ended with an ambiguous conclusion: a combination of several models will be the best

¹⁰⁷ Eg., see Weidong Zhu, *The Relationships between China and Its Special Administrative Regions and Their Regulation*, 4 J CAMBR. STUD. 111, 112 (2009), <http://journal.acs-cam.org.uk/data/archive/2009/200902-article10.pdf>. See also Wang Qiansheng and Huang Shengchun, *Zhongguo Neidi yu Aomen Sifa Xiezhu de Xingzhi ji Moshi [The Characteristics and Model of the Judicial Assistance between Mainland China and Macao]*, in Shan Changzong (ed), ZHONGGUO NEIDI YU AOMEN SIFA XIEZHU ZONGHENG TAN [JUDICIAL ASSISTANCE BETWEEN MAINLAND CHINA AND MACAO SAR] 110 (Beijing: People's Court Publishing House, 1999) (indicating the unequal status of the cross-border judicial assistance can safeguard the national unity and judicial sovereignty of the PRC).

¹⁰⁸ *Id.* See also Hong Kong and Macao Basic Laws, arts 12-23.

¹⁰⁹ Zhu, *supra* note_97_ at 629 (indicating [a]ll Mainland scholars who have participated in this debate agree that a body of laws regulating inter-regional conflict of laws must be created and implemented, whatever the form of law. It could be statute law, case law or some kind of rules or practice).

method to develop interregional conflict of laws.¹¹⁰ This conclusion provides readers without a clear guidance. For example, it is unclear, when developing interregional conflict of laws, whether the four models are equally important, which one or ones are the starting points, and whether the four models will coexist from the beginning to the end.

Additionally, interregional conflict of laws includes jurisdiction, choice of laws, and JRE.¹¹¹ Depei Han and Jin Huang's works on interregional choice of laws¹¹² are so influential that many later studies follow.¹¹³ Consequently, a large volume of studies on interregional choice of law appear.¹¹⁴ However, interregional JRE, which is urgently needed in practice, has been improperly ignored.

B. Interregional Judgment Recognition and Enforcement

By the end of 1990s, the conditions for comprehensive theoretical discussion of interregional JRE became mature. Legal writing on the general theory of Chinese interregional conflict of laws, developed since the late 1980s, provides theoretical postulates for research on JRE. In practice, Hong Kong and Macao reunited with Mainland China and the interregional legal conflicts, especially the difficulties of interregional JRE, become a real thorny issue. Legislative, judicial, and executive branches in each region began to make joint efforts to solve these conflicts; negotiations on bilateral arrangements regarding service, evidence investigation, the recognition and

¹¹⁰ Zhu, *supra* note_97_ at 639.

¹¹¹ Yongpin, *supra* note_58_ at 197. Zhu, *supra* note_97_ at 622.

¹¹² Jin Huang, *Constitutional Law and Inter-regional Choice of Law: A comparative Survey*. Presented at 2005 U.S.-China Private International Roundtable, Temple University Beasley School of Law.

¹¹³ Eg., Hradilová, *supra* note 1 at 38-40.

¹¹⁴ *Id.*

enforcement of arbitration awards, as well as JRE were held between Mainland China, Hong Kong and Macao, respectively.¹¹⁵ Among these subjects, JRE is particularly contentious, so it stimulates academic interests in three regions. Scholarship in this field can be divided into three sections chronically. The first-effort section is scholarship published before 1999 when the first interregional arrangement was concluded (Part i).¹¹⁶ The pioneering-work section surveys scholarship published after the conclusion of the first arrangement but before the conclusion of the first JRE arrangement (1999-2006) (Part ii). The contemporary section presents the most recent scholarship regarding interregional JRE (after 2006) (Part iii).

i. The First Efforts

In 1999, the second major treatise on Chinese interregional conflict of laws,¹¹⁷ after the one published by Jin Huang in 1992, appeared. Its author is Mainland Professor Juan Shen. The book mainly discusses interregional choice of law; additionally it provides insightful arguments on the necessity and ways to develop interregional JRE.¹¹⁸ Shen argues that, for one region, denying interregional JRE seems to help protect its interests.¹¹⁹ However, one should not ignore that when one region denies the recognition and enforcement of judgments from other regions, other regions would probably do the

¹¹⁵ Bilateral arrangements regarding service, evidence investigation, the recognition and enforcement of arbitration awards, as well as JRE are concluded between 1999 and 2006. *See supra* Part Contributions of the Existing Bilateral Arrangements of Section D of Chapter I.

¹¹⁶ The first interregional arrangement is the Mainland-Hong Kong Service Arrangement. *See Id.*

¹¹⁷ *See* Juan Shen, ZHONG GUO QU JI CONG TU FA YAN JIU [ANALYSIS OF CHINESE INTERREGIONAL CONFLICT OF LAWS] (Beijing, China Political and Law University Press, 1999).

¹¹⁸ *Id.*

¹¹⁹ *Id.*, at 134

same to this region.¹²⁰ Therefore, the region that refuses JRE actually shoots its own foot.¹²¹ Moreover, the spread of such refusal will prevent many interregional conflicts from being effectively and efficiently solved.¹²² Notably, in practice some courts tried to avoid JRE issues by refusing to exercise jurisdiction over a case where the resulting judgment may require interregional JRE.¹²³ Shen argued that this approach was pessimistic because the court wrongly gave up the power of jurisdiction.¹²⁴ Denying either JRE or jurisdiction sacrifices the interests of parties, which contradicts the ultimate goal of private laws—protecting parties’ interests.¹²⁵ Such denial would also hinder the development of interregional relations in China.¹²⁶

Shen also proposed four valuable ways to improve interregional JRE. First is to harmonize the jurisdiction rules.¹²⁷ Only when courts in the four regions agree on the jurisdiction rules, they will reach consensus for JRE.¹²⁸ Second is to protect the lawful rights and interests of parties.¹²⁹ This factor should become the ultimate goal of interregional JRE. Third, public policy exception should be allowed but should be restrictively restrained.¹³⁰ Under the policy of “One Country, Two Systems,” public policy exception is necessary because each region’s fundamental interests are different.¹³¹ Nevertheless, public policy exception should be restricted: JRE should not be denied simply because the law of a judgment-rendering region is different from that of

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*, at 134-35.

¹²⁶ *Id.*, at 135.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*, at 135-36.

a requested region.¹³² Fourth, regions should adopt the same *res judicata* rule.¹³³ When a court with jurisdiction in a region has rendered a judgment, courts in other regions should respect this judgment and be willing to recognize and enforce it.¹³⁴ It is against judicial economy to require parties to litigate the case in merits in the requested region.¹³⁵ Re-litigation may also cause inconsistent judgments so harm parties' interests.¹³⁶ Shen also argues that a multilateral JRE arrangement is necessary for Chinese regions.¹³⁷ She proposes that, before reunification with Taiwan, Mainland China, Hong Kong and Macao, respectively, can make a bilateral JRE arrangement with Taiwan.¹³⁸ After the reunification, the four regions should consider to make a uniform JRE arrangement.¹³⁹

ii. Pioneering Works

The first interregional arrangement on judicial assistance¹⁴⁰ was concluded between Mainland China and Hong Kong on mutual service in 1999.¹⁴¹ Since then, much literature is published to discuss regional JRE laws in Mainland China and Hong Kong, as well as the possibilities of establishing interregional JRE cooperation.¹⁴² Some literature concerning Macao conflict of laws is published¹⁴³ but very little is related to

¹³² *Id.*

¹³³ *Id.*, at 136.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ In China, judicial assistance includes JRE. For detailed discussion, *see infra* fn 158 and accompanying texts.

¹⁴¹ *See supra* Contributions of the Existing Bilateral Arrangements of Section D of Chapter I.

¹⁴² Shaocong Su, *Lun Hong Kong Yu Nei Di Fa Yuan Jian Dui Pan Jue de Xian Fu Cheng Ren Ji Zhi Xing [Recognition and Enforcement of Civil Judgment Between the Mainland and Hong Kong SAR]*, 23 HEBEI LAW SCIENCE 94, 94-99 (2005).

¹⁴³ Eg., Jin Huang & Huacheng Guo, *Zailun Guoji Sifa Zhong de Gonggong Zhixu Wenti: Jian Tan Macao Guoji Sifa de Youguan Lilun yu Shijian*, 2 HEBEI LAW SCIENCE 15, 15-20 (1998).

JRE.¹⁴⁴ This is because, compared with Hong Kong, Macao is relatively less significant in interregional economy and its territory is much smaller; therefore, fewer JRE concerns Macao. Moreover, the language barrier is another factor restricting the survey of literature on Macao law.¹⁴⁵

In Mainland China, many scholars compare the regional JRE laws in Mainland China and Hong Kong.¹⁴⁶ These studies enhance the mutual understandings of each other's JRE system so pave the way for interregional JRE cooperation. Scholars also argue that international conventions that Chinese regions ratify should not be applied to solve interregional judicial assistance; instead, the best model is bilateral interregional arrangements.¹⁴⁷ Essentially, this model requires regions to reach mutual agreements through negotiation and then to implement the agreements by separate legislations in each region.¹⁴⁸ This approach complies with the Basic Law of the SAR and it can adapt to the specific situation in each region.¹⁴⁹ Some scholars also propose general principles to make a bilateral JRE arrangement.¹⁵⁰ For example, the arrangement should help

¹⁴⁴ Eg., Gujie Yuan, *Nei Di Yu Gang Ao Xian Fu Cheng Ren Yu Zhi Xing Ming Shan Shi Pan Jue De Fa Zhang Qu Shi* [The Trend of Development between Mainland China, Hong Kong and Macao Respectively on Mutual Recognition and Enforcement of Civil and Commercial Judgments], 2 FA XUE JIA [JOURIST], 147-53 (2005).

¹⁴⁵ Before the return of Macao, Portuguese is the only official language in Macao. After its return, both Chinese and Portuguese are official languages. Majority of Macao jurisprudence and scholarship published before 1999 are in Portuguese. Because of the language barrier, the survey of scholarship concerning Macao JRE law focuses on publications in English and Chinese.

¹⁴⁶ Gu Song & Liu Pin, *Zhong Guo Qu Ji Pan Jue Cheng Ren Yu Zhi Xing Zhi Du Tan Jiu---Yi Nei Di He Hong Kong Wei Li* [An Analysis of Chinese Interregional JRE System: the Examples of Mainland China and Hong Kong], 20 JOURNAL OF WEINAN TEACHERS COLLEGE 26, 26-27 (2005).

¹⁴⁷ Zhihui He, *Dui Zhong Guo Qu Ji Si Fa Xie Zhu Mo Shi De Zai Ren Ke* [Reconsideration of the Model for Interregional Judicial Assistance in China], 109 HE BEI FA XUE [HE BEI LAW SCIENCE] 79, 83 (2001). Song and Pin, *supra* note_146_ at 27-28. Some scholars, although recognizing the model of arrangements has become a precedent, suggest to explore other models because this model is not only available one. Jie Chen, *Qu Ji Fa Lv Chong Tu Zhong Pan Jue De Cheng Ren Yu Zhi Xin Wen Ti Yan Jiu* [Study on the recognition and Implementation of Judgments Concerning Interregional Conflict of Laws], 10 JOURNAL OF NATIONAL PROCURATORS COLLEGE 13, 19 (2002). Yuan, *supra* note_144_ at 150. Shanshan Lu, *Nei Di Yu Hong Kong Min Shan Shi Pan Jue Cheng Ren Yu Zhi Xing De Xiang Zhuang Yu Jian Yi* [The Status Quo of and Suggestions to Interregional JRE between Mainland China and Hong Kong in Civil and Commercial Cases], 39 LI LUN GUANG CHA [THEORETIC OBSERVATION] 98, 99 (2006).

¹⁴⁸ Chen, *supra* note_147_ at 19.

¹⁴⁹ *Id.* at 19.

¹⁵⁰ Song and Pin, *supra* note_146_ at 27-28. Weidong Cheng, *Qu Ji Fa Yuan Pan Jue Cheng Ren Yu Zhi Xing de Fa Lv Yi Ju* [The Legal Basis for Interregional JRE], 1 NANJING SOCIAL SCIENCE 56, 59-60 (2000).

maintain national sovereignty and integrity, comply with the principle of "One Country, Two Systems", observe the independence of each region, promote mutual benefits and cooperation, as well as protect parties' interests.¹⁵¹ Moreover, some scholars believe this arrangement should be convenient, transparent, fair, and efficient.¹⁵² Some also propose to make efforts in following aspects so as to facilitate interregional JRE: harmonize jurisdiction disputes, use public policy exception restrictively, and adopt an interregional *res judicata* rule.¹⁵³

Notably, interregional legal conflicts also raise the attention of scholars in Hong Kong. Professor Guobin Zhu's 2002 paper focuses on the frame of judicial assistance between Mainland China and Hong Kong before and after the 1997 handover. He observes legal principles and theories, as well as legal practices, differ significantly between Mainland China and Hong Kong.¹⁵⁴ Therefore, it is urgently necessary to establish a workable system of co-ordination and co-operation between these two regions.¹⁵⁵ He encourages his Hong Kong colleagues to give up pessimistic views towards Mainland China:¹⁵⁶

We should not underestimate the genuine intent of the Chinese legislative and judicial authorities towards a satisfactory solution of the conflict of laws between Hong Kong and the Mainland. The fact is that in dealing with all "Hong Kong-related cases", the mainland courts apply the laws and procedures applicable to foreign-related cases in line with the subsisting provisions and widely accepted international rules and practices.

¹⁵¹ Song and Pin, *supra* note_146_ at 28. Cheng, *supra* note_150_ at 59-60. Chen, *supra* note_147_ at 16-17.

¹⁵² Song and Pin, *supra* note_146_ at 28.

¹⁵³ Chen, *supra* note_147_ at 17-18.

¹⁵⁴ Guobin Zhu, *Inter-regional Conflict of Laws under "One Country, Two Systems": Revisiting Chinese Legal Theories and Chinese and HongKong Law, with Special Reference to Judicial Assistance*, 32 HONG KONG L. J. 615, 616-17 (2002).

¹⁵⁵ *Id.* For discussion of Article 95 of the Hong Kong Basic Law, *see* Section A of Chapter VI.

¹⁵⁶ *Id.* at 617.

He emphasizes that Article 95 of the Basic Law is the guidance for interregional judicial assistance.¹⁵⁷ He states that Hong Kong's traditional understanding of the phrase "judicial assistance" is narrower than Mainland China.¹⁵⁸ Namely, for the former, JRE does not fall into the field of judicial assistance but for the latter, the answer is yes. However, the Hong Kong legal authorities agree with Mainland China that JRE is part of judicial assistance.¹⁵⁹ He reviews many bilateral JRE treaties that Mainland China concluded with other countries and indicates that¹⁶⁰

It is ironic that under the doctrine of "one country, two systems", the Mainland and the HKSAR are not able to reach a comparable [JRE] agreement with each other. There may be a difference of approaches or doctrines. Indeed, both parties need to understand each other's positions to negotiate a solution.

Zhu observes that Hong Kong legislative authorities prefer the "separate legislative approach," which implies "categorically excluding a centralized legislation approach."¹⁶¹ In other words, each region should enact regional laws to solve interregional conflicts.¹⁶² This reflects Hong Kong people's concern regarding the quality of the Mainland judicial system.¹⁶³ However, he raises a valuable question that "[a]re these differences [between Mainland China and Hong Kong] more substantial than those that exist between [Mainland] China and other countries with which [Mainland] China has already reached

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*, at 663-64.

¹⁵⁹ *Id.*, at 665.

¹⁶⁰ *Id.*, at 662.

¹⁶¹ *Id.*, at 670.

¹⁶² *Id.*

¹⁶³ *Id.*

agreements?"¹⁶⁴ In other words, Zhu implies that the differences between Mainland China and Hong Kong are not insurmountable.

Importantly, regarding JRE, Zhu uses case studies to demonstrate the absence of mutual JRE system left us with an "embarrassing situation."¹⁶⁵ He points out numerous final judgments cannot be executed in the other region so some Hong Kong parties take advantage of this gap to escape legal liabilities.¹⁶⁶ He strongly advocates that the two regions should jointly make efforts to solve the JRE impasse.¹⁶⁷ However, he does not propose a clear approach for the two regions. He simply concludes his article with "a workable solution/approach is preferable...further theoretical study is needed."¹⁶⁸

iii. The Contemporary Scene

The Mainland-Macao Arrangement and Mainland-Hong Kong Arrangement were concluded in 2006. The contemporary scholarship concentrates on their achievements and insufficiencies, as well as their implementations and future developments.¹⁶⁹

Scholars in Mainland China

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 671.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 675.

¹⁶⁸ *Id.*

¹⁶⁹ For Mainland publications, i.e. Renshang Liu & Meirong Zhang, *Lun Nei Di Yu Xiang Gan Min Shang Shi Pan Jue Cheng Ren Yu Zhi Xing Zhi Du Ji Qi Wan Shan [The Judgment Recognition and Enforcement System Between Mainland China and Hong Kong: Present and future]*, ZHONG GUO GUO JI SHI FA YU BI JIAO FA NIAN KAN [THE ANNUAL JOURNAL OF CHINESE PRIVATE INTERNATIONAL LAW AND COMPARATIVE LAW] (2009). For publications outside of Mainland China, i.e. MIN YUAN, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS IN THE PRC, HONG KONG, MACAO AND TAIWAN 1-88, 111-22 (2006).

In May 2007, an important conference regarding interregional conflict of laws was held in Guangdong Province.¹⁷⁰ Eighty attendants of the conference were mainly from Mainland China, and some from Hong Kong or Macao.¹⁷¹ A report was released after this conference, where scholars compared the Mainland-Hong Kong Arrangement with the Mainland-Macao Arrangement.¹⁷²

According to this report, the negotiation of the Mainland-Macao Arrangement is faster than that of the Mainland-Hong Kong Arrangement and the scope of the former is broader than the latter; this is partly because Mainland China and Macao both had strong desires to establish judicial assistance but Hong Kong has big concerns regarding Mainland judicial system.¹⁷³ Moreover, Macao and Mainland China both belong to the civil law system so shared relatively similar views on many basic issues.¹⁷⁴ Importantly, Macao is much smaller than Hong Kong in areas, so there are less interregional JRE issues involving Macao than Hong Kong.¹⁷⁵

Mainland China and Macao only had disputes in three aspects.¹⁷⁶ First is whether the arrangement should apply to debt instruments certified by notary publics.¹⁷⁷ Such instruments are enforceable under the Macao Civil Procedure Code.¹⁷⁸ However, Mainland China hesitates to include such instruments into the Arrangement because they

¹⁷⁰ Zhihong Yu, *Di Er Ji Nei Di, Hong Kong, Macao Qu Ji Fa Lv Wen Ti Yan Tao Hui Zong Su [Report of The Second Conference Regarding Interregional Conflict of Laws among Mainland China, Hong Kong, and Macao]*, 147 FA XU PIN LUN [LAW REVIEW] 156, 156 (2008).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 157. Zhihong Yu, *Nei Di Yu Macao, Hong Kong Xian Fu Ren Ke he Zhi Xing Min Shang Shi Pan Jue An Pai de Bi Jiao ji Ping Xi [Comparison and Analysis of Mainland China, Macao, and Hong Kong Mutual Recognition and Enforcement of Civil and Commercial Judgments]*, 5 TAI PING YAN XUE BAO [PACIFIC JOURNAL] 6, 11 (2009).

¹⁷⁴ Yu, *supra* note 170, at 157.

¹⁷⁵ Yu, *supra* note 173, at 11.

¹⁷⁶ Yu, *supra* note 170 at 157. Yu, *supra* note 173 at 6.

¹⁷⁷ Yu, *supra* note 170 at 157. Yu, *supra* note 173 at 6.

¹⁷⁸ Yu, *supra* note 173 at 6.

are not enforceable like court judgments in Mainland China.¹⁷⁹ Nevertheless, Mainland China agrees to consider including such documents when expanding the scope of the Arrangement.¹⁸⁰ The second dispute is whether the Arrangement should apply to judgments of return of properties involved in criminal cases.¹⁸¹ Such judgments are essentially civil and commercial in Macao so Macao delegates hope to include them into the Arrangement.¹⁸² However, the return of properties in criminal cases is regarded as criminal judgments in Mainland China.¹⁸³ Therefore, Mainland delegates suggested including such judgments in judicial assistance arrangements on criminal issues.¹⁸⁴ The third dispute is whether judgments can be automatically recognized by the other region, namely whether the exequatur procedure for recognition should be abolished.¹⁸⁵ Macao prefers abolish such procedure.¹⁸⁶ However, Mainland China believes that this is a good suggestion but in practice, recognition without enforcement is rare.¹⁸⁷ Generally, a judgment creditor will request recognition and enforcement together.¹⁸⁸ Even if the creditor only request for recognition, the debtor may raise defenses.¹⁸⁹ So if the exequatur procedure for recognition was abolished, many disputes would occur in practice.¹⁹⁰

Both Mainland China and Hong Kong agree that international treaties cannot be applied to solve interregional legal conflicts, otherwise the policy of "One Country, Two

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Yu, *supra* note_170 at 157. Yu, *supra* note 173 at 6.

¹⁸² *Id.* at 6.

¹⁸³ *Id.* at 6-7.

¹⁸⁴ *Id.* at 7.

¹⁸⁵ Yu, *supra* note_170_ at 157. Yu, *supra* note_173_ at 6.

¹⁸⁶ Yu, *supra* note 173 at 7.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

Systems" and Hong Kong Basic Law would be endangered.¹⁹¹ However, Mainland China and Hong Kong had different opinions in five areas when formulating the arrangement.¹⁹² The first is the scope of the Arrangement.¹⁹³ Mainland China prefers the Arrangement to cover all civil and commercial judgments. However, Hong Kong insists on contractual disputes with choice of court agreements.¹⁹⁴ The second dispute is the finality of Mainland judgments.¹⁹⁵ Third, whether only judgments rendered by Mainland intermediate courts or courts at higher level can be recognized and enforced in Hong Kong.¹⁹⁶ The Hong Kong delegates insist on restricting Mainland judgments to those rendered by Mainland intermediate courts or courts at higher level.¹⁹⁷ However, Mainland China refused.¹⁹⁸ The concession is that not all judgments rendered by Mainland district courts can benefit from the Arrangement: only judgments rendered by district courts with centralized jurisdiction over interregional cases, and judgments rendered by Mainland intermediate courts or courts at higher level are included in the Arrangement.¹⁹⁹ The fourth dispute is whether natural justice should be a defense to JRE.²⁰⁰ During negotiation, Hong Kong delegates gave up this defense, and Mainland China accepted.²⁰¹ The fifth dispute is the statute of limitation for interregional JRE.²⁰² Hong Kong law provides six year for JRE. However, under Mainland law, if the

¹⁹¹ Yu, *supra* note_170_ at 157.

¹⁹² *Id.* at 157. Yu, *supra* note_173_ at 7.

¹⁹³ Yu, *supra* note_170_ at 157. Yu, *supra* note_173_ at 7.

¹⁹⁴ *Id.* at 7.

¹⁹⁵ Yu, *supra* note_170_ at 157. Yu, *supra* note_173_ at 7. For details of the finality dispute, see Chapter IV.

¹⁹⁶ Yu, *supra* note_170_ at 157. Yu, *supra* note_173_ at 7.

¹⁹⁷ *Id.* at 7.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Yu, *supra* note_170_ at 157. Yu, *supra* note_173_ at 7.

²⁰¹ Yu, *supra* note_170_ at 157. Yu, *supra* note_173_ at 7.

²⁰² Yu, *supra* note_170_ at 157. Yu, *supra* note_173_ at 7.

judgment creditor is a legal person, the statute of limitation for JRE is only 6 month.²⁰³ It will be extended to one year, if the creditor is a natural person.²⁰⁴ Ultimately, the two regions agree to accept the short period under Mainland law.²⁰⁵

This report also comments on the pros and cons of the two Arrangements.²⁰⁶ As for the Mainland-Macao Arrangement, the report praises the broad scope of the Arrangement. Among the cons, it argues that a requested court should apply the law of the judgment-rendering region to determine the latter's jurisdiction.²⁰⁷ It also suggests that the two regions should exercise the public policy exception restrictively.²⁰⁸

Regarding the Mainland-Hong Kong Arrangement, the report praises the definition of finality because it constitutes a breakthrough to the finality dispute brought by the Mainland procedure for trial supervision.²⁰⁹ However, it argues that the Mainland-Hong Kong Arrangement is only a "semi-manufactured product" rather than a "finished product" in a matured environment.²¹⁰ In particular, it criticizes the scope of the Arrangement is too narrow to fully facilitate people's lives in the two regions.²¹¹ Moreover, Hong Kong wished to include "natural justice" as a defense to JRE in the Arrangement.²¹² But ultimately, the Arrangement does not cover this defense, because this common-law principle has no equivalent and clear definition in the Mainland legal system.²¹³ Mainland scholars concern that, since this defense is a long established principle in Hong Kong, whether the current defenses to JRE under the Arrangement can

²⁰³ *Id.* at 7.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 157-59. Yu, *supra* note_173_ at 8-11.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 157.

²⁰⁹ *Id.* at 157. For detailed discussion regarding the finality dispute, see Part ii of Section B of Chapter IV.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

cover the defense of natural justice in Hong Kong law, and in case that the answer is negative, whether the Arrangement fails to satisfy the human right protections required by the Hong Kong Basic Law.²¹⁴ Overall, the majority of Mainland scholars argue that the Mainland-Hong Kong Arrangement is inadequate to solve interregional JRE difficulties and to facilitate economic exchanges.²¹⁵

After the conclusion of the Mainland-Macao Arrangement, scholarship on Macao regional JRE law and this Arrangement appears. For example, Doctor Yuan Min in his dissertation discusses Macao regional JRE law, which helps fill the gap that very little scholarship in English or Chinese exists on this subject.²¹⁶ Most scholarship concentrates on the Mainland-Macao Arrangement and discusses its achievements and shortcomings.²¹⁷

Hong Kong Scholar: Xianchu Zhan

In Hong Kong, the first representative work is co-authored by Xianchu Zhang and Philip Smart.²¹⁸ They review the history and development of the Mainland-Hong Kong Arrangement, analyze its contents, and identify concerns and problems regarding the implementation of the Arrangement.²¹⁹

Zhang and Smart observes that because of the absence of an interregional arrangement, Mainland judgments have to be recognized and enforced in Hong Kong

²¹⁴ *Id.*

²¹⁵ Yu, *supra* note_173_ at 12.

²¹⁶ Eg., Yuan, *supra* note___ at 73-89.

²¹⁷ Eg., Song and Pin, *supra* note_146_ at 1-7, Yu, *supra* note_173_ at 6-12.

²¹⁸ Xianchu Zhang & Philip Smart, *Development of Regional Conflict of Laws: On the Arrangement of Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters between Mainland China and Hong Kong SAR*, 36 HONG KONG L. J. 553, 553 (2006).

²¹⁹ *Id.*

according to the cumbersome and expensive common-law procedures.²²⁰ On the Mainland side, recognition and enforcement of Hong Kong judgments were impossible because no JRE arrangement or reciprocity exists between two regions.²²¹ The JRE impasse also brought political embarrassment to Hong Kong,²²² because Hong Kong lags behind compared with Macao and Taiwan, who has established JRE mechanisms with Mainland China.²²³ In the words of the then Secretary for Justice, Elsie Leung, "it would be ridiculous if after the handover Mainland judgments could be enforced in foreign countries, but not in Hong Kong."²²⁴ Moreover, Zhang and Smart point out the absence of an interregional JRE arrangement harms the dynamic economic integration of the two regions.²²⁵ In this background, Mainland China and Hong Kong started the first round of negotiation on mutual JRE issues in July 2002.²²⁶ Totally seven rounds of consultation were carried out and twenty-six revisions of the text were made until the conclusion of the Arrangement in July 2006.²²⁷ Zhang and Smart identify four difficulties in negotiations: the vagueness of the Article 95 of the Hong Kong Basic Law,²²⁸ the diversities between the legal systems in Mainland China and Hong Kong,²²⁹ the dispute regarding the finality of Mainland judgments,²³⁰ and the scope of the mutual enforcement regime.²³¹

²²⁰ *Id.* at 555.

²²¹ *Id.* at 555-556.

²²² *Id.* at 556-57. The same criticism can be found at Renshan Liu, *Recent Judicial Cooperation in Civil and Commercial Matters Between Mainland China and Taiwan, The Hong Kong S.A.R. and the Macao S.A.R.*, 11 *YEARBOOK OF PRIVATE INTERNATIONAL LAW* 235, 250 (2009).

²²³ *Id.* at 557.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* 558-59.

²²⁷ *Id.* at 559.

²²⁸ *Id.* at 560.

²²⁹ *Id.* at 561.

²³⁰ *Id.* at 561-62.

²³¹ *Id.* at 562.

Moreover, Zhang and Smart analyze the contents of the arrangement from the aspects of enforceable final judgments, procedures, and defenses.²³² They praise that "this Arrangement should certainly be welcome as the first step towards establishing a broader cross-border judicial cooperative regime on substantive matters."²³³ They also praise the approach adopted by the Arrangement to solve the finality dispute,²³⁴ but they also point out insufficiencies of the Arrangement. For example, compared with the Mainland-Macao Arrangement, the scope of the Mainland-Hong Kong Arrangement is much narrow.²³⁵ The authors explain that this is because the Hong Kong's common-law system is more different from the Mainland civil-law system and, more importantly, because a deep concern of the quality of Mainland judgments exist in Hong Kong.²³⁶ However, the authors worry that, even in most typical cross-border commercial settings, such limited scope will make the Arrangement rarely used.²³⁷ Another problem of the Arrangement is the lack of conflict-of-law rules on jurisdiction issues, which the authors predict, will limit the usefulness of the Arrangement.²³⁸ The authors also concern about problems such as whether Mainland courts would honor and enforce parties' choice of court agreements,²³⁹ how many judgments can be actually executed in Mainland China,²⁴⁰ no sufficient rules for recognition exists in the Arrangement.²⁴¹

As a conclusion, Zhang and Smart emphasize that the Arrangement is a "developing product with tough compromises[;]" however, it will "help to promote the development

²³² *Id.* at 564-68.

²³³ *Id.* at 568.

²³⁴ *Id.* at 572-73.

²³⁵ *Id.* at 575.

²³⁶ *Id.* at 576-79.

²³⁷ *Id.* at 580.

²³⁸ *Id.* at 579.

²³⁹ *Id.* at 580.

²⁴⁰ *Id.* at 582.

²⁴¹ *Id.* at 583.

of cross-border economic and trade relations, but may also pave the way for further development towards a more comprehensive system."²⁴²

Zhang's most recent work is the second representative scholarship in Hong Kong on interregional JRE.²⁴³ He concentrates on the Hong Kong implementing legislation of the Mainland-Hong Kong Arrangement, discusses its insufficiencies, and also analyzes issues beyond the Mainland Judgments Ordinance.²⁴⁴

The Hong Kong implementing legislation is the Mainland Judgments (Reciprocal Enforcement) Ordinance of Hong Kong (hereinafter "Mainland Judgments Ordinance").²⁴⁵ Zhang highly praised the official implementation of the Arrangement as a historical breakthrough.²⁴⁶ He discusses the contents of the Ordinance²⁴⁷ and praises that it remedies many gaps in the Mainland-Hong Kong Arrangement.²⁴⁸ For example, it provides rules to recognize Mainland judgments in Hong Kong.²⁴⁹ He emphasizes the regime of interregional JRE should be further developed and this Ordinance "lay[s] a solid foundation" for this endeavor.²⁵⁰

He also indicates his concerns regarding the Mainland Judgments Ordinance. First, it is unclear how to certify a Hong Kong judgment in the Mainland JRE proceedings.²⁵¹

²⁴² *Id.* at 584.

²⁴³ Xianchu Zhang, *A New Stage of Regional Judicial Assistance in Civil and Commercial Matters: Implementation of the Mainland Judgments Ordinance and Certain Issues Beyond*, 39 HONG KONG L. J. 3, 3 (2009).

²⁴⁴ *Id.*

²⁴⁵ Cap 597.

²⁴⁶ Zhang, *supra* note 243_ at 5 (the author praises that "[t]he official implementation of the Enforcement Arrangement has ended the history of inability to enforce civil judgments between the Mainland and Hong Kong on a reciprocal basis. This development has not only brought the cross-border judicial assistance into a new stage with new institutional supports to the development of the cross-border economic relations, but also significantly benefited Hong Kong for developing itself into an international dispute resolution centre as the sole jurisdiction of the common law in the world thus far to establish such recognition and enforcement scheme with mainland China.")

²⁴⁷ *Id.* at 6-7. For detailed discussion of the contents of the Mainland Judgments Ordinance, *see* Part ii of Section B of Chapter III.

²⁴⁸ *Id.* at 9-10.

²⁴⁹ *Id.* at 10.

²⁵⁰ *Id.* at 11.

²⁵¹ *Id.* at 11-12.

Second is how to determine the jurisdiction and validity of choice of court agreements.²⁵² Third is the finality of Mainland judgments.²⁵³ He urges Hong Kong legislatures or courts to clarify whether the "final judgment with enforceability" in the Arrangement is the same as the "final, conclusive, and enforceable judgment" in the Ordinance.²⁵⁴ The fourth concern is the service of process.²⁵⁵ Zhang noticed that the Mainland-Hong Kong Service Arrangement has been rarely used by two regions and Mainland China made unilateral laws on interregional service.²⁵⁶ He believes the best approach is to improve the Service Arrangement by joint efforts instead of unilateral laws.²⁵⁷ Zhang's last concern is judicial fraud in Mainland China.²⁵⁸ He encourages the two regions to enhance communications.²⁵⁹

Moreover, he discusses issues beyond the Mainland Judgments Ordinance. Considering the limited scope of the Ordinance, Zhang predicts that the common law in Hong Kong will still be the mainstream JRE laws for Mainland judgments in the near future.²⁶⁰ As such, two issues deserve special attention.²⁶¹ They are jurisdictional conflicts in interregional cases and the finality of the Mainland judgments to be enforced outside the Ordinance.²⁶² He argues that conflicts in direct jurisdiction "are becoming prominent concerns" in academic discussion and in practice.²⁶³ The focal point is whether Mainland courts would apply the doctrine of *forum non conveniens* in cases

²⁵² *Id.*

²⁵³ *Id.* at 13-15. For detailed discussion regarding finality, *see* Chapter IV.

²⁵⁴ *Id.* at 14-15.

²⁵⁵ *Id.* at 17.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 19.

²⁵⁸ *Id.* at 22 (indicating judicial fraud includes "parties' fraudulent conducts, protectionism of the local governments and the judicial corruption in the proceedings.")

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 24.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* at 24 and 32.

where both sides claim jurisdiction.²⁶⁴ As for finality, Zhang is not sure how the Mainland Judgments Ordinance, which explicitly recognizes the finality of Mainland judgments falling under its scope, would influence the common law scheme.²⁶⁵ He urges the Court of the Final Appeal to clarify this issue soon.²⁶⁶

Zhang concludes with his concerns about the current dual track JRE system, where some Mainland judgments are recognized and enforced according to the Ordinance, but the rest are governed by the common law.²⁶⁷ He encourages the two regions to make further cooperation and improvement.²⁶⁸

iv. Assessment

The above survey demonstrates that both Mainland and Hong Kong scholars have reached a consensus regarding the necessity of an effective and efficient interregional JRE system. Scholars are unsatisfied with the narrow scope of the Mainland-Hong Kong Arrangement and concerned about the differences between the two JRE arrangements, and between the three regional JRE laws. A majority of scholars agree that the "arrangement" model is the best way for solving interregional JRE difficulties. However, the studies are restricted to the current bilateral format. Few scholars look beyond the current format and consider the possibility of a multilateral JRE arrangement among Mainland China, Hong Kong, and Macao. Although Juan Shen discussed the possibility of a uniform multilateral JRE arrangement, she unnecessarily linked its establishment

²⁶⁴ *Id.* at 24-32.

²⁶⁵ *Id.* at 34.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 34-35.

²⁶⁸ *Id.*

with the reunification of Taiwan with Mainland China. In other words, the possibility of a multilateral JRE arrangement among Mainland China, Hong Kong, and Macao has not been sufficiently studied. Additionally, although many comparative studies have been carried out regarding the regional JRE laws in Mainland China and Hong Kong, little research has been done on regional JRE law in Macao.

Notably, scholarships regarding interregional jurisdiction conflicts, the public policy exception, *res judicata* rules, the achievements and insufficiencies of the current two Arrangements, as well as regional JRE laws in Mainland China and Hong Kong can largely help to design the contents of a multilateral JRE arrangement. The research, which justifies the constitutional basis of the current Arrangements by Article 95 of the Hong Kong Basic Law and Macao Basic Law, provides a foundation for the legitimacy of a multilateral JRE arrangement.

C. Comparative Studies

The third category of scholarship is academic works that looks to foreign interregional JRE mechanisms for lessons to solve Chinese interregional JRE difficulties.²⁶⁹ The number of comparative works is much less than scholarship in the above two categories. Although they have made outstanding achievements, most of comparative works stay in general comparisons without digging into the details of the

²⁶⁹ For comparative scholarship, see Zining Lai & Dufang Luo, *Yi Guo Lian Zhi Xia Nei Di Yu Hong Kong Fa Yuan Xian Fu Cheng Ren Yu Zhi Xing Pan Jue De Wen Ti Yan Jiu [A Study of Several Issues Concerning the Recognition and Execution of Court Decision Between the Mainland and Hong Kong under the Condition of "One Country, Two Systems"]*, 6 ZHONG SHANG DA XUE XUE BAO [ZHONG SHANG UNIVERSITY JOURNAL (SOCIAL SCIENCE EDITION)] 48, 49-49 (1997); Song and Pin, *supra* note_146_ at 27. Cheng, *supra* note_150_ at 56-57. Chen, *supra* note_147_ at 14-15. Yuan, *supra* note_144_ at 149-50.

interregional laws in China and abroad. Even less scholarship especially focuses on JRE issues.

i. The First Efforts

The value of comparative studies to the development of Chinese interregional conflict of laws was recognized by Professors Depei Han and Jin Huang early in 1989.²⁷⁰ They argue that Chinese jurists should objectively understand the situation of Chinese interregional conflicts, and refer to foreign valuable lessons so as to find a solution suitable for China.²⁷¹ Any solution drawn by comparative studies needs to adapt to China's unique situation.²⁷² When identifying the characteristics of Chinese interregional conflicts, Han compares Chinese situations with foreign ones.²⁷³ He points out four major differences between Chinese and foreign interregional conflicts. First, interregional conflicts in all foreign countries with multiple legal regions are conflicts in the same social system.²⁷⁴ For example, the interregional conflicts in the US, the UK, Canada, or Australia are in the capitalist social system.²⁷⁵ Similarly, the interregional conflicts in the Soviet Union and Poland are in the socialist social system.²⁷⁶ Only in China, the interregional conflicts are between socialist and capitalist social systems.²⁷⁷ Second, only few foreign countries, like China, have interregional conflicts between different legal

²⁷⁰ Han & Huang *supra* note 6, at 121. Huang and Qian, *supra* note_1_ at 303.

²⁷¹ Han & Huang *supra* note 6, at 121. Huang and Qian, *supra* note 1 at 303.

²⁷² Han & Huang *supra* note 6, at 121. Huang and Qian, *supra* note 1 at 303.

²⁷³ Han *supra* note 6, at 4-5.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

systems.²⁷⁸ Examples include Québec in Canada and Louisiana in the US.²⁷⁹ These two regions are in the civil-law system but their sister regions are in the common-law system.²⁸⁰ Third, generally regions in foreign countries have no right to conclude international treaties.²⁸¹ Therefore, interregional conflicts in foreign countries do not contain conflicts between treaties adopted by different regions.²⁸² However, conflicts between treaties may exist in China, because Hong Kong and Macao can ratify treaties on certain subjects under their own names.²⁸³ Fourth, the autonomy that Chinese regions enjoy is much higher than that of states in the US.²⁸⁴ One reason is that in the US, federal laws, even contradictory with state laws, shall be binding in state courts.²⁸⁵ The second reason is the Supreme Court of the US enjoys the final adjudicative power, so it can hear cases from all states.²⁸⁶ On the contrary, laws enacted by Hong Kong and Macao are in the equal status with Mainland laws as long as they are not against the two Basic Laws.²⁸⁷ No court of final appeals exists in China to hear cases from all regions.²⁸⁸ The final adjudicative power belongs to the Supreme Court in each region.²⁸⁹

When arguing how to use interregional conflict of laws to resolve interregional legal conflicts, Han also employed comparative studies.²⁹⁰ He surveys how other countries solve interregional legal conflicts and identifies two major models.²⁹¹ The first is that the

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*, at 6. But only for matters of federal law.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ Han *supra* note 6, at 8.

²⁹¹ *Id.*

highest legislature in the country enacts a national interregional conflict of laws.²⁹² This approach is adopted by Yugoslavia, Poland, and the Former Soviet Union.²⁹³ The second approach is to use international conflict of laws to solve interregional legal conflicts.²⁹⁴ The UK, the US, Canada, and Australia use this approach.²⁹⁵ Han argues that China can adopt the first approach because the NPC can enact national interregional conflict of laws which should be applicable in Hong Kong and Macao.²⁹⁶

Jin Huang further divides the two models analyzed by Han into four:²⁹⁷

1. Advocating a national uniform law of inter-regional conflict of laws. A good example is the Regulations on the Conflict of Laws and Jurisdiction over Civil Status, Family Relations and Succession enacted by the former Yugoslavian Federation in 1979.
2. Different legal districts adopting their respective inter-regional conflict laws to solve the conflicts between their own districts and the others. This once occurred in Poland and Czechoslovakia.
3. Applying by analogy private international law rules to solve inter-regional conflict of laws. This was, for example, stipulated in the 1888 Spanish Civil Code.
4. Not distinguishing inter-regional / interstate conflict of laws from international conflict of laws and directly applying these commonly accepted rules to international and inter-regional / interstate conflict of laws. This is often the case in common law countries such as the United Kingdom and the United States.

Huang's conclusion is the same as Han: a national uniform conflict of laws is the best solution for China.²⁹⁸ The most important reason is that this law can avoid conflicts of regional laws and help unify national legal systems in the long run.²⁹⁹ However, different from Han, Huang favors the model-law approach to enact this national uniform law.³⁰⁰

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ For criticism of this view, *see infra* Section A of Chapter VI.

²⁹⁷ Quoted in Zhu, *supra* note_154_ at 640.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *See infra* Proposing Model Laws of Section A of Chapter VI.

Huang also uses comparative studies to demonstrate the necessities of maintaining a public policy exception in resolving Chinese interregional conflicts. He admits that in terms of choice of law public policy exception is rarely used in solving interregional conflicts in many foreign countries, because³⁰¹

In general, natural bonds are stronger between regions than between sovereign countries, and differences between regions are not as substantial as those separating sovereign countries.

However he distinguishes Chinese interregional conflicts with those in foreign countries.³⁰² He observes the special Chinese characteristics that are not found in foreign countries.³⁰³ He indicates that "the clash between fundamentally antagonistic socialist law and capitalist law precepts is particularly problematic."³⁰⁴ Moreover, Hong Kong and Macao enjoy much broader legislative autonomy than regions in many foreign countries.³⁰⁵ Consequently, the differences between the civil and commercial laws of these regions are like those existing between many sovereign countries.³⁰⁶ Therefore, he concludes that, allowing the public policy exception in terms of choice of law is "consistent with the policy of 'one country, two systems' in promoting the co-existence of separate legal regions for a considerable period of time."³⁰⁷

ii. Contemporary Scene

³⁰¹ Zhu, *supra* note_154_ at 640.

³⁰² Huang and Qian, *supra* note 1 at 320.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 320.

The contemporary scholarship compares the interregional JRE law in Mainland China, with those in the US and the EU, and also with international JRE laws. In Mainland China, Professor Yongping Xiao's Chinese treatise, *The Legal Conflicts and Coordination between Mainland China and Hong Kong*, is the most comprehensive contemporary study regarding interregional conflict of laws in China and abroad.³⁰⁸ Although focusing on lessons for Mainland China and Hong Kong,³⁰⁹ this treatise is still insightful for solving interregional legal conflicts involving Macao. It analyzes the models to solve interregional legal conflicts in the US, the UK, Canada, Australia, Germany, Spain, Switzerland, France, and Italy.³¹⁰ It has six conclusions. First, interregional legal conflicts cannot be solved overnight, which has been demonstrated by all countries with interregional conflicts.³¹¹ Therefore, China should observe the policy of "One Country, Two Systems" and seek interregional coordination while maintaining the independent legal system of each region.³¹² Second, federal countries and unitary countries, common-law countries and civil-law countries, generally all adopt multiple models to solve interregional legal conflicts.³¹³ The first step is to refer to international conflict-of-law rules to solve interregional conflicts.³¹⁴ In the latter stage, China may consider enact national conflict of laws applicable to all regions.³¹⁵ Only when the three regions are fully integrated in politics and economy, China may apply national substantive laws to all regions.³¹⁶ Third, enacting interregional conflict of laws should

³⁰⁸ YONGPING XIAO, *NEI DI YU HONG KONG DE FA LV CHONG TU YU XIE TIAO* [THE LEGAL CONFLICTS AND COORDINATION BETWEEN MAINLAND CHINA AND HONG KONG] (2001).

³⁰⁹ *Id.*

³¹⁰ Xiao, *supra* note_308_ at 36-85.

³¹¹ *Id.* at 88.

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.* at 89.

³¹⁶ *Id.*

comply with the PRC Constitution, Hong Kong and Macao Basic Laws.³¹⁷ Fourth, differences in political systems are an important factor influencing the resolution of interregional legal conflicts.³¹⁸ In China, "One Country, Two Systems" is the basic political system, so interregional legal conflicts are unavoidable.³¹⁹ This policy also serves as the basic principle and premise for solving Chinese interregional legal conflicts.³²⁰ Fifth, courts play a crucial role in solving interregional legal conflicts.³²¹ Because the absence of a court of final appeals in China, we need to consider how to enhance the coordination systems among courts in the three regions from now on.³²² Sixth, legal culture and tradition are basic psychological factors influencing interregional legal conflicts.³²³ In order to ultimately solve interregional legal conflicts, the foremost solution is to enhance legal cultural communication among regions.³²⁴ In this aspect, non-governmental organizations, academic institutions, and scholars should play important roles.³²⁵

Many other comparative studies focus on the US and Chinese interregional JRE laws. Like Han and Huang, many contemporary scholars also observe the differences between Chinese interregional conflicts with those within a federal system.³²⁶ They indicate that Hong Kong and Macao enjoy higher degree of autonomy than the states in

³¹⁷ *Id.*

³¹⁸ *Id.* at 89-90.

³¹⁹ *Id.* at 90.

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.* at 91.

³²⁵ *Id.*

³²⁶ Hradilová, *supra* note 1 at 33-41. Yuan, *supra* note_144_ at 123-31. Zhiqiang Ma & Ling Xue, *On Several Problems of Interregional Conflict of Laws in China--Contrasting with Interstate Conflict of Laws in the U.S.A.*, 21 HENAN JIAOYU XUEYUAN XUEBAO [JOURNAL OF HENAN EDUCATION INSTITUTE (PHILOSOPHY AND SOCIAL SCIENCE)] 90, 90-92 (2002).

the US.³²⁷ They argue that greater regional autonomy will slow down the process of unifying national laws and perhaps will ultimately make this endeavour impossible.³²⁸ However, some other works, although recognizing huge differences existing between interregional conflicts in China and those in federal countries, argue that China can still draw beneficial lessons from countries like the US.³²⁹ Scholars point out that the US adopts two methods to solving interregional conflicts: federal legislation and non-governmental organizations' model laws.³³⁰ Some Mainland scholars propose that the ideal approach to solve interregional JRE in China is to make uniform laws applicable to all regions like the US.³³¹ Some scholars disagree and advocate that the model law approach is the best because the Chinese central government's authority in enacting laws applicable to Hong Kong and Macao is limited.³³² They also argue that the PRC Constitution should be amended and add provisions embracing principles such as full faith and credit, equality and mutual benefits, promoting interregional civil and commercial exchanges.³³³ These provisions can serve as a foundation for solving interregional conflicts.³³⁴ A Hong Kong scholar also argues that the US inter-state conflict of laws is of significance to China. He believes "the rules under §6 'Choice of Law Principles' and §10 'Interstate and International Conflict of Laws' in the *Restatement* are basically applicable to the Chinese situation."³³⁵ However, he warns that the US is a

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ Ma and Xue, *supra* note_330_ at 90-92. Xianglin Zhao & Yinhong Liu, *Meiguo Zhouji Falv Chongtu yu Woguo Quji Falv Chongtu zi Bijiao* [*Comparison Between the US Inster-state Conflict of Laws and Chinese Interregional Conflict of Laws*], 1 *BIJIAOFA YANJIU* [COMPARATIVE LAW STUDIES] 66, 68-70 (2000). See Zhu, *supra* note 107 at 111.

³³⁰ Zhao and Liu, *supra* note 329 at 68-70.

³³¹ G Li & H Wang, *Wo Guo Qu Ji Fa Yuan Pan Jue Cheng Ren Yu Zhi Xing Zhi Bi Jiao* [*A Comparative Study of Inter-regional Judgment Recognition and Enforcement in Our Country*], a paper presented in the 2008 Annual Conference of the Chinese Association of Private International Law (on file with the author).

³³² Zhao and Liu, *supra* note_333_ at 68-70.

³³³ *Id.*, at 69.

³³⁴ *Id.*

³³⁵ Zhu, *supra* note_107_ at 624.

federal state but China is a unitary state.³³⁶ Furthermore, rules of conflict of laws, especially rules of choice of law, cannot be developed on the basis of common law in Chinese civil-law tradition.³³⁷

Moreover, many comparative studies have also been conducted between Chinese and EU interregional JRE systems. Some Mainland scholars refer to the Brussels Convention and Brussels I Regulation³³⁸ and argue that the future JRE arrangement should be a double arrangement regulating jurisdiction and JRE.³³⁹ They make several proposals: the arrangement should provide exclusive jurisdiction rules,³⁴⁰ it should use defendant's domicile or habitual residence as the general jurisdiction rule,³⁴¹ and the courts located in the place of performance or place of tort should have jurisdiction over relevant disputes.³⁴² Other scholars also argue that China may draw useful lessons from the Brussels Convention.³⁴³ For example, they point out that the current arrangement between Mainland China and Hong Kong should be expanded to include judgments without choice-of-court agreements, and to include judgments involving consumers, the status and legal capacity of nature person, and civil compensations in criminal proceedings.³⁴⁴ Some Hong Kong scholars suggest that the laws to solve conflicts between EU law and UK law, such as the European Communities Act of 1972, may be a

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ Min Yuan, *supra* note_144_ at 141-51.

³³⁹ Yuan, *supra* note_144_ at 151. Lu, *supra* note_147_ at 99-100.

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ G Li & H Wang, WOGUO QUJI FAYUAN PANJUE CHENGREN YU ZHIXING ZHI BIJIAO [A COMPARATIVE STUDY OF INTERREGIONAL JUDGMENT RECOGNITION AND ENFORCEMENT IN OUR COUNTRY], a paper presented in the 2008 Annual Conference of the Chinese Association of Private International Law (on file with the author).

³⁴⁴ *Id.*

valuable reference for Mainland China and Hong Kong to solve their legal conflicts.³⁴⁵ In this Act, the UK Parliament adopted a principle: the EU law prevails over the UK law. Putting in Chinese context, if a multilateral JRE arrangement comes into reality, it should prevail over any conflicting regional laws.

Notably, at the starting stage of negotiating the Mainland-Hong Kong Arrangement, Hong Kong Legislative Council referred to the 2005 Hague Choice of Court Convention, the Brussels Convention, and the Lugano Convention for guidance.³⁴⁶ The Legislative Council analyzed the choice of court provision in the Draft Hague Choice of Court Convention.³⁴⁷ The Council acknowledged that under the Convention, if parties have agreed that a court should have exclusive jurisdiction over their disputes, the judgment rendered by this court should be recognized and enforced in all members of the Convention.³⁴⁸ The Council also noticed that this rule had been accepted by the Brussels Convention and the Lugano Convention.³⁴⁹ Although the Hague Choice of Court Convention will not be applied between Mainland China and Hong Kong because "the Convention, as an international agreement, will not apply as between two places in the same country", the Council emphasized that, JRE based on a choice of court agreement "may serve as a useful guide and model in any future arrangement to be made between the Hong Kong SAR and the mainland on reciprocal enforcement of judgments in civil and commercial matters."³⁵⁰

³⁴⁵ P K Y Kwong, *Hong Kong Businessmen's Development in the Mainland: Legal Conflicts Need to Be Dealt With*, XIAO BAO CAI JING YUE KAN [HONG KONG ECONOMIC JOURNAL MONTHLY] 23, 26 (June 2005).

³⁴⁶ Hong Kong Legislative Council Paper No. CB(2) 722/01-02(04) para 13, December 20, 2001.

³⁴⁷ *Id.*, at para 13-16.

³⁴⁸ *Id.*, at para 16.

³⁴⁹ *Id.*, at para 17.

³⁵⁰ *Id.*, at para 18.

In the legal academia, many scholars also analyze the similarities between the Mainland-Hong Kong Arrangement and the 2005 Hague Choice of Court Convention.³⁵¹ In terms of negotiation strategies, they praise that the former learned from the latter the approach of "start small."³⁵² Namely, JRE is a very complex issue, so Chinese regions should follow the "order from easy to difficult matters" and advance cooperation step by step.³⁵³ As for the contents, the limited scope of the Arrangement is similar to that of the Convention.³⁵⁴ Many Mainland scholars believe this scope may be appropriate for international JRE but is too narrow for the interregional context.³⁵⁵ But Hong Kong scholars point out, by referring to the Hague Choice of Court Convention; the Mainland-Hong Kong Arrangement will be confronted by fewer obstacles in the legislation process in Hong Kong.³⁵⁶ Mainland China can also gain valuable lessons from implementing this Arrangement so be prepared for the ratification of the Hague Convention.³⁵⁷

iii. Assessment

Comparative studies between the interregional JRE systems in China, the US, and the EU, as well as international JRE laws demonstrate that many scholars have realized the value of reference to foreign and international experience to solve Chinese interregional conflicts. These studies are very valuable. However, they do not systematically compare interregional JRE laws in China, the US, and the EU and dig into

³⁵¹ Zhang and Smart, *supra* note_218_ at 569-70. Yu, *supra* note_170_ at 158.

³⁵² Zhang and Smart, *supra* note_218_ at 569-70.

³⁵³ *Id.* at 568.

³⁵⁴ *Id.* at 569-70.570. Yu, *supra* note_170_ at 158.

³⁵⁵ Yu, *supra* note_173_ at 12.

³⁵⁶ Xianchu Zhang, *Dui "Neidi Hong Kong Xianfu Renke he Zhixing Danshiren Xieyi Guanxia de Minshanshi Anjian Panjue de Anpai" de Chubu Pinjia* [Preliminary Comments on the Mainland-Hong Kong Mutual Recognition and Enforcement Judgment Arrangement], 8 FAZHI LUNTAN [LEGAL SYSTEM FORUM] 51, 62 (2006).

³⁵⁷ *Id.*

their details. They also fail to provide what particular lessons that China can draw from the US and the EU and how to implement these lessons in China.

Chapter III The Existing JRE System

Between Mainland China, Hong Kong, and Macao

The current interregional JRE system between Mainland China, Hong Kong, and Macao is constituted by both the unilateral regime in form of regional laws and the bilateral regime in form of interregional Arrangements. The unilateral regime is constituted by the Mainland Civil Procedure Law (hereinafter “CPL”)¹ and its judicial interpretations,² the Macao Civil Procedure Code,³ and Hong Kong common law⁴. It regulates JRE not covered by the two Arrangements.⁵ The bilateral regime includes the two Arrangements: the Mainland-Hong Kong Arrangement and the Mainland-Macao Arrangement. These two Arrangements have been implemented by separate legislations in each region.⁶

This chapter presents and analyzes the existing JRE system. It demonstrates that the bilateral Arrangements are first steps beyond the unsatisfactory pure regional laws. It argues that, more importantly, the next stage should be to establish a Multilateral JRE Arrangement. It can be divided into three sections. First, it explores regional JRE laws in Mainland China, Hong Kong, and Macao. Here regional JRE

¹ Min Shi Su Song Fa [Civil Procedure Law] (Adopted on April 9, 1991 at the Fourth Session of the Seventh National People’s Congress, effective Apr. 9, 1991, amended Oct. 28, 2007) *translated in* <http://www.lawinfochina.com> accessed on May 3, 2009 (P.R.C.).

² The most important one is the Opinions on Application of the Mainland CPL (Promulgated by the Supreme People’s Court on July 14, 1992) *translated in* <http://www.lawinfochina.com> accessed on December 16, 2009. Its art. 318-320 are about judicial assistance.

³ Especially arts. 1199-1205 of the Macao Civil Procedure Code.

⁴ Both statute and common law govern recognition and enforcement of foreign judgments in Hong Kong. The statute mainly refers to Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) (hereinafter “FJREO”).

⁵ Such as non-monetary judgments or judgments for disputes in which parties failed to make a choice of court agreement.

⁶ Regarding the Mainland-Hong Kong Arrangement: for Mainland implementing legislation, *see* Interpretation No.9 [2008] of the Supreme People’s Court on July 3, 2008; for Hong Kong implementing legislation, *see* Mainland Judgments (Reciprocal Enforcement) Ordinance and its (Commencement) Notice, Ord. No. 9 of 2008, L.S. No. 2 to Gazette No. 27/2008, L.N. 195 of 2008. Upon the unanimity of Mainland China and Hong Kong, this Arrangement came into force as of August 1, 2008. Regarding the Mainland-Macao Arrangement: for Mainland implementing legislation, *see* Interpretation No. 2 [2006] of the Supreme People’s Court Adopted at the 1378th meeting of the Judicial Committee of the Supreme People’s Court on February 13, 2006; for Macao implementing legislation, *see* The No. 12/2006 Announcement of the Executive Chief of Macao on March 14, 2006.

laws refer to those other than the implementing legislations of the Arrangements. These laws predate the existing bilateral Arrangements, so they must be discussed before analyzing the Arrangements. Moreover, they are applied to recognize and enforce judgments outside of the Arrangements. The first section concludes that interregional JRE is difficult under regional laws. The second section discusses the two Arrangements. It compares the two Arrangements with regional laws discussed in the first section. It argues that the Arrangements are laudable successes but cannot effectively remedy interregional JRE problems. The third section focuses on why a Multilateral JRE Arrangement can best solve JRE problems in the three regions.

A. Regional JRE Laws

i. Mainland Regional JRE Law

In Mainland China, Articles 264-266 of the CPL and its judicial interpretation, namely Articles 318-320 of the Opinions on Application of the Mainland CPL, govern recognition and enforcement of foreign judgments in civil and commercial cases. A judgment creditor can request a Mainland court to recognize and enforce a foreign judgment according to the JRE treaty ratified by Mainland China or according to the principle of reciprocity.⁷ Treaties or reciprocity are the legal bases for JRE in Mainland China (Part One of this Section). The meaning of reciprocity is unclear in Mainland law, and it has rarely been used in litigation. Therefore, the requirements for JRE (Part Two) and grounds for refusing JRE (Part Three) are based on treaties ratified by Mainland China. This Section will focus on recognition and enforcement of judgments uncovered by the Arrangements, especially the JRE impasse between

⁷ Art. 265 of the Mainland CPL.

Mainland China and Hong Kong. This is because the Mainland-Hong Kong Arrangement and the Mainland-Macao Arrangement will be discussed in the Section of Interregional JRE Laws. The conclusion is that merely relying on Mainland regional legislation cannot solve the JRE impasse between Mainland China and Hong Kong.

1. Legal Bases for JRE

A foreign or sister-region judgment can be recognized and enforced according to a treaty/arrangement or the principle of reciprocity.⁸

a. Treaty/Arrangement: JRE Impasse for Judgments Outside of the Mainland-Hong Kong Arrangement

The JRE treaties between Mainland China, Hong Kong and Macao, respectively, refer to the Mainland-Hong Kong Arrangement and the Mainland-Macao Arrangement. The Arrangements will be discussed in the Section of Interregional Laws, so this Section concentrates on how to recognize and enforce judgments excluded by the Arrangements. Compared with the Mainland-Macao Arrangement, the Mainland-Hong Kong Arrangement excludes many judgments from its scope.⁹ This Part demonstrates judgments beyond the scope of the Mainland-Hong Kong Arrangement are practically unrecognizable and unenforceable. It concludes that regional JRE laws cannot solve the JRE impasse between Mainland China and Hong Kong.

⁸ Arts 264-266 of the CPL and arts. 318-320 of the Opinions on Application of the Mainland CPL.

⁹ Art. 1 of the Mainland-Hong Kong Arrangement.

As for the recognition and enforcement of Hong Kong judgments in civil and commercial cases beyond the scope of the Mainland-Hong Kong Arrangement, Mainland courts split into three opinions regarding whether such judgments are recognizable and enforceable. Although these opinions are summarized based on Mainland courts' adjudication of cases before the conclusion of the Arrangement, they are still valid and can serve as guidance for recognizing and enforcing judgments outside the scope of the Arrangement.

The first opinion advocates that Hong Kong judgments can be recognized and enforced by reference to the Provisions on Recognition of Civil Judgments of Taiwan Courts.¹⁰ For example, in 1999, Changsha Intermediate People's Court of Hunan Province recognized and enforced a judgment of Hong Kong High Court by analogy ["canzhao," 参照] to the Provisions.¹¹ When no law is enacted to address an issue, solving it by analogy to a law that was not enacted to address this issue is not an unusual practice in Mainland courts.¹² Because of the absence of JRE laws for Hong Kong and Macao judgments, courts in Mainland China need to make a choice between two analogy candidates—the JRE law applicable to foreign judgments or the JRE law for Taiwanese judgments. Applying the former will lead to refuse the JRE, but the latter may permit the JRE. A JRE-friendly court would prefer the latter so as to recognize and enforce judgments from Hong Kong and Macao.

The second opinion treats Hong Kong judgments as foreign judgments and believes that they are not recognizable and enforceable in Mainland China based on

¹⁰ The Provisions on Recognition of Civil Judgments of Taiwan Courts, issued by the Supreme People's Court on May 22 1998.

¹¹ Xianchu Zhang & Philip Smart, *Development of Regional Conflict of Laws: On the Arrangement of Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters between Mainland China and Hong Kong SAR*, 36 HONG KONG L. J. 553, 555 (2006).

¹² Jie Huang, *Direct Application of International Commercial Law in Chinese Courts: Intellectual Property, Trade, and International Transportation*, 5 MANCHESTER JOURNAL OF INTERNATIONAL ECONOMIC LAW 105, 122 (2008). For other examples that courts adopt the reference approach, Chongqing Zhengtong Pharmaceutical Co. and the Trademark Review and Adjudication Board of the State Administration for Industry and Commerce v. Sichuan Huashu Veterinary Pharmaceutical Co. LAWINFOCHINA (last visited Jan. 6, 2008) (P.R.C.) (Sup. People's Ct., Aug 31, 2007).

Article 266 of the CPL (Article 268 of the 1991 CPL). Because no reciprocity exists between Mainland China and Hong Kong, Hong Kong judgments, beyond the scope of the Arrangement, cannot be recognized and enforced in Mainland China. For example, in 2001 the Quanzhou Intermediate People's Court of Fujian Province refused to recognize and enforce a judgment of Hong Kong High Court for lack of JRE agreement and reciprocity between Mainland China and Hong Kong based on Article 266.¹³

The third opinion holds that, because Hong Kong has become part of China, it is improper to treat its judgments as foreign judgments. According to this opinion, the fact that a judgment is excluded by the Mainland-Hong Kong Arrangement demonstrates the legislative intention in the two regions that recognition and enforcement of such judgment is inappropriate. For example, in a JRE case, the requested Xiameng court held that under Article 95 of the Hong Kong Basic Law,¹⁴ interregional JRE should be carried out after the competent authorities in the two regions reached a mutual agreement.¹⁵ Since no such agreement existed, the Court

¹³ Yuanqiao tou zi you xian gong si shen qing cheng ren xiang gang fa yuan min shi shu song pan jue an [the case of Investment Co of Hong Kong to recognize a Hong Kong civil judgment], Quanzhou Intermediate People's Court on November 26, 2001. In this case, a Hong Kong company borrowed money from the other company and mortgaged a real estate located in the jurisdiction of the Quanzhou Intermediate People's Court. The debtor failed to pay the loan back to the creditor on time. Therefore, the creditor sued this debtor in Hong Kong High Court and got a favourable judgment in 1999. (No. 1801 Judgment of Hong Kong High Court on June 29, 1999.) Later, the creditor applied to the Quanzhou Intermediate People's Court to enforce the Hong Kong judgment on the collateral and the debtor's other properties located in Mainland China. However, Quanzhou Court turned down this application for lack of JRE agreement and reciprocity between Mainland China and Hong Kong based on Article 266.

¹⁴ Article 95 of the Hong Kong Basic Law provides that "The Hong Kong Special Administrative Region may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other." For analysis of this Article, see Section A of Chapter VI.

¹⁵ Li Deng Li Fa Zhan You Xian Gong Si, Fu Fua Qi Ye Gong Si Shen Qing Min Shi Zhi Xing An [the case of enforcing the judgment of Li Deng Li Development Co. and Fu Fua Enterprise] (Xiameng Inter. People's Ct., February 23, 2000) www.Lawyee.net (last visited January 15, 2009) (P.R.C.). In 1998 in a contractual dispute, Hong Kong High Court rendered a judgment for Li Deng Li and Fu Fua, requiring Yao Sheng to pay compensation to them. Yao Sheng's properties in Hong Kong were not enough to pay the amount stipulated in the judgment, but it had properties in Xiameng City in Mainland China. Therefore, in 2000 Li Deng Li and Fu Fua applied to the Xiameng Intermediate People's Court to enforce the outstanding balance of the Hong Kong judgment according to Article 267 and Article 268 of the 1991 CPL. The Xiameng Court found that all the parties in this case were Hong Kong companies, the dispute took place in Hong Kong, and Hong Kong law was the applicable law in the Hong Kong proceedings. Moreover, because the Hong Kong judicial organ is independent from its Mainland counterpart, it operates within its own judicial systems. The Court held that Article 95 of the Hong Kong Basic Law authorizes Hong Kong to establish judicial assistance with sister regions. Since no such assistance exists, the Court dismissed

dismissed the suit and suggested the judgment creditors to bring an action of contractual dispute (not an enforcement proceeding) against the debtor.

Substantially, the second and the third opinions lead to the same result: Hong Kong judgments are not recognizable and enforceable so parties have to re-litigate the merits of their disputes in Mainland China. This is time- and money-consuming and may also lead to inconsistent judgments. The first opinion can avoid these problems. However, very few courts support the first opinion. Two factors may explain why the majority of Mainland courts prefer the second and the third opinions and hesitate to recognize and enforce Hong Kong judgments. The first possible reason is that Mainland courts do not have broad discretion. Especially, the Mainland courts that hear JRE cases are intermediate courts—subordinate to the Supreme People’s Court and higher People’s Courts—so they are likely to prefer conservative approaches (the second and the third approaches) until they get new instructions from higher courts. The second reason is lack of reciprocity between Mainland China and Hong Kong. Mainland courts probably hesitate to take the initiative to recognize and enforce Hong Kong judgments by analogy to the JRE law for Taiwanese judgments. With the topic of reciprocity, here I turn to.

b. Reciprocity

Besides the existence of a treaty, Mainland courts can recognize and enforce foreign/sister-region judgments based on reciprocity.¹⁶ However, apart from divorce

the JRE action.

¹⁶ Art. 265 of the Mainland CPL. For comments, see Patricia J. Blazey & Peter S. Gillies, *Recognition and Enforcement of Foreign Judgments in China*, SSRN ELIBRARY, 6-8 (2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103364 (last visited Jun 10, 2010).

decrees without enforceable contents,¹⁷ Mainland courts have never recognized and enforced foreign or sister-region judgments under the principle of reciprocity.¹⁸ Theoretically the principle of reciprocity may be used to recognize and enforce judgments outside of the existing Arrangements. However, Mainland courts hesitate to take an initiative when other regions do not recognize and enforce Mainland judgments under this principle.¹⁹ The unclear definition of reciprocity in Mainland law also discourages Mainland courts. Especially, the Mainland courts that hear JRE cases are intermediate courts and they probably prefer higher courts to specify the principle of reciprocity *ex ant* before they can become active.

2. Requirements for JRE

According to JRE treaties that Mainland China ratified or the principle of reciprocity, requested judgments should have been effective or enforceable under the law of the judgment-rendering country.²⁰ Some treaties require that the judgments should be final and enforceable according to the law of the judgment-rendering

¹⁷ Divorce decrees that have no enforceable contents refer to those only change the status of a person and do not have enforceable contents such as partition of common properties, maintenance, and expenses of bringing up children. Art. 2 of the Supreme People's Court, Opinions on Relevant Questions Concerning People's Courts' Handling Petition for Recognition of Divorce Judgment Made by a Foreign Court, 64 THE SUPREME PEOPLE'S COURT GAZETTE 61 (2000).

¹⁸ See Gujie Yuan, *Lei Di Yu Gan Ao Xian Fu Cheng Ren Yu Zhi Xing Min Shang Shi Pan Jue de Fa Zhang Qu Shi* [The Development Trend of Mutual Recognition and Enforcement of Civil and Commercial Judgments between Mainland China and Hong Kong and Macao], FA XUE JIA [LEGAL EXPERT] 147, 149 (Issue 2, 2005). For cases that Mainland China uses lack of reciprocity to refuse JRE, see eg., Riben Gongmin Wuweifan Shengqing Zhongguo Fayuan Chengren he Zhixi Riben Fayuan Panjue An [Japanese Citizen Wuweifan Applied for Chinese Courts to Recognize and Enforce a Japanese Judgment], THE SUPREME PEOPLE'S COURT GAZETTE 1 (1999).

¹⁹ Jiwen Wang, *Woguo Pizhun Haiya "Xuanzhe Fayuan Xieyi Gongyue" de Biyaoxing Fenxi* [The Necessity that China Ratifies the Hague Choice of Court Convention], 16 ANHUI DAXUE FALV PINGLUN [ANHUI UNIVERSITY LAW REVIEW] 153, 159-61 (2009).

²⁰ Mo Zhang, *International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System*, 25 BOSTON COLL. INT'L & COMP. L. REV 59, 88 (2002). Eg., art. 22.3 of THE TREATY FOR JUDICIAL ASSISTANCE IN CIVIL AFFAIRS ON MAY 2, 1992 BETWEEN MAINLAND CHINA AND SPAIN, <http://www.people.com.cn/zixun/flfgk/item/dwjff/falv/10/10-4.htm> (last visited Feb 2, 2010); and art. 21.2 of THE TREATY FOR JUDICIAL ASSISTANCE IN CIVIL CASES ON JANUARY 1, 1995 BETWEEN THE PRC AND ITALY.; art. 17.1 of THE TREATY FOR JUDICIAL ASSISTANCE IN CIVIL AND CRIMINAL CASES ON DECEMBER 25, 1999 BETWEEN THE PRC AND VIETNAM.; art. 21.1 of THE TREATY FOR JUDICIAL ASSISTANCE IN CIVIL, BUSINESS, AND CRIMINAL CASES ON MAY 31, 1995 BETWEEN THE PRC AND EGYPT.

country.²¹

3. Grounds for Refusing JRE

A Mainland court does not review the merits of requested judgments.²² Refusal is generally based on the following four grounds, widely recognized by scholarship or bilateral JRE treaties ratified by Mainland China.²³ For example, in 1997, the Foshan People's Court recognized an Italian bankruptcy judgment after holding none of the following grounds of refusal existed according to the Mainland-Italy JRE Treaty.²⁴

a. Incompetent Indirect Jurisdiction

Mainland courts can deny JRE if the jurisdiction of the judgment-rendering court infringes the exclusive jurisdiction of Mainland courts²⁵ or the judgment-

²¹ *Eg.*, art. 25.1.1 of THE JUDICIAL ASSISTANCE TREATY IN CIVIL, BUSINESS, AND CRIMINAL CASES ON JANUARY 11, 1996 BETWEEN THE PRC AND CYPRUS.; art. 21.1 of THE JUDICIAL ASSISTANCE TREATY IN CIVIL AND COMMERCIAL CASES ON APRIL 12, 2005 BETWEEN THE PRC AND THE UNITED ARAB EMIRATES.

²² Zhang, *supra* note 20 at 88. Some scholars argue that Mainland courts review on the merits, *see* Qingjiang Kong & Hu Minfei, The Chinese Practice of Private International Law, 3 MELB. J. INT'L L. 414, 432 (2002).

²³ Zhang, *supra* note 20 at 88. For comments of bilateral JRE treaties that Mainland China ratified, *see* Wang, *supra* note 19 at 162-63. (arguing that the number of bilateral JRE treaties that Mainland China ratified is small and cannot satisfy the potential needs of JRE brought by international trade. For examples of bilateral JRE treaties that Mainland China ratified, *see eg.*, art. 19.2 of The Judicial Assistance Treaty in Civil and Criminal Cases on December 25, 1999 between the PRC and Vietnam, *supra* note 20_; ie art. 22 of THE TREATY FOR JUDICIAL ASSISTANCE IN CIVIL AND COMMERCIAL AFFAIRS ON MAY 4, 1987 BETWEEN MAINLAND CHINA AND FRANCE, <http://www.people.com.cn/zixun/flfgk/item/dwjf/falv/10/10-4.htm> (last visited Feb 4, 2010) (hereinafter "Mainland-France Treaty"). Besides the four grounds, the Mainland-France treaty also states that the JRE can be denied when, in terms of a natural person's status and civil capacities, the judgment-rendering court does not apply the choice of law of the requested court, unless the law applied by the judgment-rendering court led to the same result as the choice of law of the requested court.

²⁴ B&T Case. The Foshan Court recognized the No. 62673 Bankruptcy Judgment rendered by Milano Court (Italy) on October 24, 1997 and the Adjudication Order on the Transfer of Confiscated Assets rendered by Civil and Penal Court in Milano (Italy) on September 30, 1999 according to The Judicial Assistance Treaty in Civil Cases on January 1, 1995 between the PRC and Italy, *supra* note 20_. For more information of this case, *see* Recent Developments in Chinese Cross-Border Insolvencies, page 2-5 at <http://law.hku.hk/aiifl/research/April%202002/recent%20developments%20in%20chinese%20cross-border%20insolvencies.PDF> (last visited May 10, 2010).

²⁵ *Eg.*, art. 26.2 of The Judicial Assistance Treaty in Civil, Business, and Criminal Cases on January 11, 1996 between the PRC and Cyprus, *supra* note 21_; art. 22 of The Judicial Assistance Treaty in Civil Cases on January 1, 1995 between the PRC and Italy, *supra* note 20_; art. 21 of the Treaty for Judicial Assistance in Civil Affairs on May 2, 1992 between Mainland China and Spain, *supra* note 20_; art. 18 of The Judicial Assistance Treaty in Civil and Criminal Cases on December 25, 1999 between the PRC and Vietnam, *supra* note 20_; art. 22.2 of The

rendering court has no indirect jurisdiction²⁶ according to treaties. The grounds of indirect jurisdiction in the treaties concluded by Mainland China are highly similar.²⁷ They are: a judgment-rendering court should have indirect jurisdiction when (1) the defendant has his or her domicile or habitual residence in the region where the court is located, (2) the defendant has a representative office in the region where the court is located and the action is related to the activities of the office, (3) the defendant accepted the jurisdiction of the judgment-rendering court by writing, (4) the defendant defended the substance of the case in the judgment-rendering court without questioning its jurisdiction, (5) in contractual disputes, the contract was signed, or has been or will be performed in the region where the court is located, or the subject matter is located in that region, (6) in cases of tort, the conducts or results of the tort took place in the region where the court is located, (7) in cases of personal status, one party has his or her domicile or habitual residence in the region where the court is located, (8) in cases of maintenance, the judgment creditor has his or her domicile or habitual residence in the region where the court is located, (9) in cases of inheritance, when he or she died, the inherited was domiciled or his or her main inheritance was located in the region where the court is located, or (10) the subject matter is a real

Judicial Assistance Treaty in Civil, Business, and Criminal Cases on May 31, 1995 Between the PRC and Egypt, *supra* note 20_; and arts. 9 and 10 of the Regulation of the Supreme People's Court for Recognizing Civil Judgments Rendered by the Courts in Taiwan Region (hereinafter "Mainland Regulation for Recognizing Taiwan Judgments") issued on May 26, 1998.

²⁶ For the distinction between direct and indirect jurisdiction, *see* Part i of Section A of Chapter V.

²⁷ Since 1949, the PRC ratified twenty-five bilateral JRE treaties in civil cases. Six of these treaties provide indirect jurisdiction grounds. Indirect jurisdiction grounds in the five of the six treaties are almost identical, except very minor and insignificant differences. For details of these five treaties, *see* fn 27. The indirect jurisdiction grounds under the rest one treaty are in line with these five treaties, although less comprehensive than them. This treaty is The Judicial Assistance Treaty in Civil and Commercial Cases on April 12, 2005 between the PRC and the United Arab Emirates, *supra* note 21_. Its art. 19 states that a judgment-rendering court has jurisdiction in cases not involving real estate (1) when at the time of commencement of the judgment-rendering action, the defendant had domicile or habitual residence in the region where the court is located, (2) when at the time of commencement of the judgment-rendering action the defendant had a business establishment or a representative office in the region where the court is located and the action is related to the activities of this establishment or office, (3) the disputed contractual obligation should or has been performed in the region where the court is located according to the explicit or inexplicit agreement between parties, (4) in case of non-contractual obligation, the action of tort is conducted in the region where the court is located, (5) the defendant has explicitly or inexplicitly accepted the jurisdiction of the court, or (6) if the judgment-rendering court has jurisdiction over the main dispute according to this treaty, this court shall have jurisdiction over the application for provisional methods.

estate in the region where the court is located.²⁸ The requested court shall be bound by the fact-findings of the judgment-rendering court, except that the judgment is rendered by default.²⁹

b. Unfair Procedure

Mainland courts will deny JRE, if a defendant was not given adequate notice for the proceedings or was not properly represented by a guardian if lacking legal capacity.³⁰

c. Res Judicata

Mainland courts can deny JRE if an effective judgment has been rendered by a people's court for the same cause of action between the same parties, the people's court has recognized and enforced a third-country judgment on the same cause of action between the same parties, or the case was in the middle of trial in a people's court³¹ and the trial had begun before the proceedings in the foreign court started.³²

²⁸ *Eg.*, art. 26.1 of The Judicial Assistance Treaty in Civil, Business, and Criminal Cases on January 11, 1996 between the PRC and Cyprus, *supra* note_21_; art. 22 of The Judicial Assistance Treaty in Civil Cases on January 1, 1995 between the PRC and Italy, *supra* note_20_; art. 21 of the Treaty for Judicial Assistance in Civil Affairs on May 2, 1992 between Mainland China and Spain, *supra* note_20_; art. 18 of The Judicial Assistance Treaty in Civil and Criminal Cases on December 25, 1999 between the PRC and Vietnam, *supra* note_20_; art. 22.1 of The Judicial Assistance Treaty in Civil, Business, and Criminal Cases on May 31, 1995 Between the PRC and Egypt, *supra* note_20_.

²⁹ *Eg.*, art. 20 of The Judicial Assistance Treaty in Civil and Commercial Cases on April 12, 2005 between the PRC and the United Arab Emirates, *supra* note_21_.

³⁰ Zhang, *supra* note_20_ at 88. *ie.*, art. 25.1.3 of The Judicial Assistance Treaty in Civil, Business, and Criminal Cases on January 11, 1996 between the PRC and Cyprus, *supra* note_21_; art.21. 3 of The Judicial Assistance Treaty in Civil Cases on January 1, 1995 between the PRC and Italy, *supra* note_20_; arts. 22.4 and 22.5 of the Treaty for Judicial Assistance in Civil Affairs on May 2, 1992 between Mainland China and Spain, *supra* note_20_; art. 17.3 of The Judicial Assistance Treaty in Civil and Criminal Cases on December 25, 1999 between the PRC and Vietnam, *supra* note_20_; art. 21.3 of The Judicial Assistance Treaty in Civil, Business, and Criminal Cases on May 31, 1995 Between the PRC and Egypt, *supra* note_20_; arts. 21.4 and 21.5 of The Judicial Assistance Treaty in Civil and Commercial Cases on April 12, 2005 between the PRC and the United Arab Emirates, *supra* note_21_. The same ground for refusal can be found in arts. 9 and 10 of the Mainland Regulation for Recognizing Taiwan Judgments.

³¹ *Eg.*, art. 17.4 of the Vietnam Treaty The Judicial Assistance Treaty in Civil and Criminal Cases on December 25,

Article 306 of the Opinions on the Mainland CPL also involves *res judicata*. The first part of this Article is a *lis alibi pendens* rule: if both a people's court and a foreign court have jurisdiction over a case, and a party sues in the foreign court first and then the other party brings an action in the people's court, the people's court can accept the case at its discretion. The second part deals with *res judicata*: if the foreign court renders a judgment earlier than the people's court and the two judgments are inconsistent, the people's court shall refuse to recognize and enforce the foreign judgment. Article 306 exemplifies the doctrine of "Mainland judgments always prevail." Therefore, the *res judicata* rule in the treaties show more respects to foreign judgments.

d. Public Policy Exception

Mainland courts can deny JRE if recognition and enforcement of a foreign judgment would cause harm to Chinese sovereignty, security, and public order.³³

Mainland legislators have long adopted an affirmative attitude towards the application of public policy exception.³⁴ But they seldom use the term, "public policy," in their

1999 between the PRC and Vietnam, *supra* note_20_; art. 21.4 of The Judicial Assistance Treaty in Civil, Business, and Criminal Cases on May 31, 1995 Between the PRC and Egypt, *supra* note_20_; and arts. 9 and 10 of the Mainland Regulation for Recognizing Taiwan Judgments.

³² Zhang, *supra* note_20_ at 88, eg., art. 25.1.5 of The Judicial Assistance Treaty in Civil, Business, and Criminal Cases on January 11, 1996 between the PRC and Cyprus, *supra* note_21_; art. 21.5 of The Judicial Assistance Treaty in Civil Cases on January 1, 1995 between the PRC and Italy, *supra* note_20_; art. 22.6 of The Treaty for Judicial Assistance in Civil Affairs on May 2, 1992 between Mainland China and Spain, *supra* note_20_; art. 21.6 of The Judicial Assistance Treaty in Civil and Commercial Cases on April 12, 2005 between the PRC and the United Arab Emirates, *supra* note_21_.

³³ Eg, art. 25.1.6, 25.1.7, and 25.1.9 of The Judicial Assistance Treaty in Civil, Business, and Criminal Cases on January 11, 1996 between the PRC and Cyprus, *supra* note_21_; art. 21.6 of The Judicial Assistance Treaty in Civil Cases on January 1, 1995 between the PRC and Italy, *supra* note_20_; art. 21.5 of The Judicial Assistance Treaty in Civil, Business, and Criminal Cases on May 31, 1995 Between the PRC and Egypt, *supra* note_20_; art. 21.3 of The Judicial Assistance Treaty in Civil and Commercial Cases on April 12, 2005 between the PRC and the United Arab Emirates, *supra* note_21_; arts. 9 and 10 of the Mainland Regulation for Recognizing Taiwan Judgments.

³⁴ "Opinions on the Matrimonial Issues between Chinese Citizens and Foreign Residents as well as Those between Foreign Residents" issued by the Legislative Committee of the Central People's Government in 1950 is generally regarded as the first legislation invoking the doctrine of public policy exception in the history of China. This Opinions stipulated that "Lex patriae should be applied only to the extent that they are not incompatible with the

legislation. Instead, they tend to use a cluster of terms together to refer to “public policy,” such as “public interests,”³⁵ “state sovereignty,”³⁶ “security,”³⁷ “socio-economic order,”³⁸ and “social and public interests of the country,”³⁹ and etc.

Thus, in contemporary Mainland China, “public policy” includes at least the meanings of “state sovereignty, security, socio-economic order, and social and public interests of the country.” The focus of sovereignty and security in Mainland law results from a history of foreign invasions⁴⁰ and the status quo of a rebellious Taiwan. Since the establishment of the PRC, the communist party has highly emphasized sovereignty and security in all of its lawmaking. The emphasis of economic orders lies in the fact that developing economy is a predominant issue for Mainland China currently. Moreover, Chinese courts would also invoke the public policy exception to refuse recognition and enforcement of judgments tainted by fraud or involving enforcement of a foreign penal or taxation law.⁴¹

4. Conclusion

The JRE system in Mainland China has two problems. One is insufficient substantive JRE law. For example, the meaning of reciprocity is unclear, so except

ordre public, public interests, and the current basic policies of the State.” Yongping Xiao & Zhengxin Huo, *Order Public in China's Private International Law*, 53 AM. J. COMP. L. 653, 655 (2005).

³⁵ *Eg.*, art. 150 of the General Principles of the Civil Law: “The application of foreign laws or international custom and usage in accordance with the provisions of this chapter shall not violate the public interest of the People's Republic of China.” Art. 260.2 of the CPL: “The people's court shall not render the assistance requested by a foreign court, if it impairs the sovereignty, security or social and public interest of the People's Republic of China.” See also art. 266 of the CPL, and art. 276 of the Maritime Act and art. 190 of the Civil Aviation Act.

³⁶ Arts 260.2 and 266 of the CPL.

³⁷ *Id.*

³⁸ *Eg.*, art. 7 of the General Principles of the Civil Law: “Civil activities shall have respect for social ethics and shall not harm the public interest, undermine state economic plans or disrupt social economic order.”

³⁹ *Eg.*, art. 206.2 of the CPL states: “If the people's court determines that the enforcement of the award goes against the social and public interest of the country, the people's court shall make a written order not to allow the enforcement of the arbitration award.”

⁴⁰ *Eg.*, Hong Kong and Macao have been parts of the territory of China since ancient times. However, Hong Kong was occupied by Britain after the Opium War in 1840 and Macao by Portugal in the mid 16th century.

⁴¹ Blazey and Gillies, *supra* note 16_ at 7.

divorce decrees without enforceable contents, Mainland China has neither recognized nor enforced any foreign or sister-region judgments in civil and commercial matters beyond the bilateral treaties or arrangements it concluded.⁴² Second is the absence of an overarching multilateral JRE mechanism. It is necessary to develop a multilateral JRE arrangement to break through the JRE impasse between Mainland China and Hong Kong.

ii. Hong Kong Regional JRE Law

This section presents the most important contents of Hong Kong regional JRE law: legal bases for JRE (Part One), requirements for JRE (Part Two), and grounds for refusing JRE (Part Three). It reveals Hong Kong regional JRE law is insufficient for improving interregional JRE (Part Four).

1. Legal Bases for JRE

Both statute and common law govern recognition and enforcement of foreign judgments in Hong Kong. Among them, English law still plays a prominent role. This is because after Hong Kong became a part of China, the laws previously enforceable in Hong Kong, such as English common law and rules of equity, are maintained, except insofar as they contravene with the Hong Kong Basic Law or are amended by the legislature of Hong Kong.⁴³ The Hong Kong implementing statute of the Mainland-Hong Kong Arrangement will be discussed in the Section of the Mainland-Hong Kong Arrangement.

⁴² Yuan, *supra* note 18 at 149.

⁴³ Art. 8 of the Hong Kong Basic Law.

a. The Foreign Judgments (Reciprocal Enforcement) Ordinance

The Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) (hereinafter “FJREO”) constitute a legal basis for JRE.⁴⁴ Under the FJREO, a judgment creditor may apply to the Court of First Instance to register a foreign judgment in Hong Kong.⁴⁵ A registered foreign judgment has the same force and effect as a judgment issued by the registering court.⁴⁶ So after registration this foreign judgment can be enforced as a Hong Kong judgment. Originally, the FJREO closely followed the Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK). And it was essentially an intra-Commonwealth scheme for reciprocal enforcement of judgments between Australia, Bermuda, Brunei, India, Malaysia, New Zealand, Singapore and Sri Lanka.⁴⁷ The non-Commonwealth countries that the FJREO also applied to are those that the UK had JRE treaties with, including Belgium, France, Germany, Italy, Austria, the Netherlands, and Israel.⁴⁸ Even if these countries fail to give reciprocity to Hong Kong, their judgments can still benefit from the FJREO.⁴⁹

⁴⁴ The Hong Kong Foreign Judgments (Reciprocal Enforcement) Ordinance, Cap 319. http://www.legislation.gov.hk/Hong_Kong (accessed Dec 12, 2009).

⁴⁵ The other statute of registration is the Judgments (Facilities for Enforcement) Ordinance (Cap 9, LHK), but it only applies to UK judgments.

⁴⁶ GARY HEILBRONN, CHRISTINE BOOTH, AND HELEN MCCOOK, ENFORCEMENT OF JUDGMENTS IN HONG KONG 327 (Butterworths 1998).

⁴⁷ Cap 319A, Sch 1. Philip Smart, Enforcing Foreign Judgments After 1997, 4 Hong Kong Lawyer 54 (2002). Available at <http://www.hk-lawyer.com/2002-4/Apr02-litigation.htm>. (Accessed on Jan. 6, 2010). Chapter 9 of GRAEME JOHNSTON, THE CONFLICT OF LAWS IN HONG KONG (2005).

⁴⁸ Cap 319A, Sch 2.

⁴⁹ Koninlijke Philips Electronics NV v Utran Technology Development Ltd [2001] HKCFI 1068. The issue of this case is whether a monetary judgment made by a District Court of The Hague, Netherlands can be enforced in Hong Kong under the FJREO. The judge held that before July 1997 the JRE treaty between the UK and the Netherlands had extended to Hong Kong, but the treaty had no effect on Hong Kong after it became a SAR of China. The judge also indicated that no JRE agreement has been established between Hong Kong and the Netherlands thus far. The judge also found that the government of the Netherlands had clearly indicated that Netherlands court would not recognize or enforce judgments rendered by courts in the HKSAR because of the absence of a JRE treaty. However, the judge ruled that the FJREO continues to apply to judgments from the Netherlands by virtue of Article 8 of the Basic Law, which maintain all legislation before July 1997 that do not contradict with the Basic Law. Further, he held that Article 96 merely intends to empower Hong Kong to conclude new JRE treaties with other countries without striking down the FJREO. As a conclusion, the FJREO does not contravene any part of the Basic Law, therefore, judgments rendered by a court in the Netherlands should be enforced in Hong Kong under the FJREO even that the Netherlands has refused to provide reciprocity to enforce

b. Common Law

Because the FJREO only listed approximately 30 jurisdictions, judgments rendered by all other jurisdictions, including those from Mainland China and Macao, are recognized and enforced in Hong Kong under common law. Therefore, common law plays a more important role in interregional JRE practice than the FJREO.⁵⁰ Moreover, the two JRE schemes are mutually exclusive, which means that if a judgment is enforceable under the FJREO, it should not be enforced under common law, and vice versa.⁵¹

The registration procedure under the FJREO is more convenient for judgment creditors than that under common law for two reasons.⁵² First, the former is simpler than the latter.⁵³ Second, under the FJREO, a foreign judgment is assumed to be recognizable and enforceable in Hong Kong, so a debtor needs to prove it is unrecognizable and unenforceable. However, in the common law, such presumption does not exist so a judgment creditor needs to prove that the judgment is recognizable and enforceable.⁵⁴ Nevertheless, the underlying substantive rules and principles in the FJREO and common law are largely similar, except that recognition and enforcement under common law do not have reciprocity requirement⁵⁵ and some differences of

Hong Kong judgments. For criticism of this judgment, see Smart, *supra* note 47.

⁵⁰ Philip Smart, *Enforcement of Foreign Judgments*, in ENFORCING JUDGMENTS IN HONG KONG 255, 256 (Christine N Booth ed. 2004). Johnston, *supra* note 47 at 545. It also indicates that “common law governs (i) the recognition of judgments from any court anywhere in the world, (ii) the enforcement of judgments of all courts in most countries, (iii) the enforcement of judgments of certain (not 'superior') courts in the remaining handful of countries.” Common law does not distinguish sister-region judgments and foreign judgments.

⁵¹ Smart, *supra* note 50 at 257.

⁵² Hong Kong Legislative Council LC Paper No. CB(2) 1365/06-07(02), Bills Committee on Mainland Judgments (Reciprocal Enforcement) Bill Background Brief, appendix I para 3. Yuan, *supra* note 18 at 148.

⁵³ Hong Kong Legislative Council LC Paper No. CB(2) 1365/06-07(02), Bills Committee on Mainland Judgments (Reciprocal Enforcement) Bill Background Brief, appendix I para 3. Yuan, *supra* note 18 at 148.

⁵⁴ See Hong Kong Legislative Council LC Paper No. CB(2) 1365/06-07(02), Bills Committee on Mainland Judgments (Reciprocal Enforcement) Bill Background Brief, appendix I para 3. Yuan, *supra* note 18 at 148.

⁵⁵ Smart, *supra* note 50 at 256.

details.⁵⁶ Therefore, although the FJREO does not apply to judgments from Mainland China and Macao, it will be discussed when it can serve as an illustration to common law. More importantly, the FJREO is more systematic than common law. So it will be analyzed when it can help serve as a model and formulate proper rules for the proposed Multilateral JRE Arrangement. This is especially true for grounds of refusing JRE. Additionally, the common law does not distinguish foreign and sister-region judgments.

2. Requirements for JRE

Both common law and statutory regimes require finality⁵⁷ as a condition to JRE in Hong Kong.⁵⁸ The finality of a sister-region judgment is decided according to Hong Kong law.⁵⁹ The law of the judgment-rendering region is only an important reference for Hong Kong to decide the finality issue. So the fact—the judgment-rendering court holds that its judgment is final—does not necessarily lead to the conclusion that Hong Kong courts will also hold that this judgment is final.

Under Hong Kong law, a foreign judgment can be final even if it is subject to appeal or has been appealed.⁶⁰ Here “appeal” includes any proceedings by way of discharging or setting aside a judgment or an application for a new trial or a stay of

⁵⁶ The differences between enforcement regimes stipulated by common law and statute are marginal, but two factors make common law actually more favourable to judgment creditors. First is the time limit. Common law provides twelve years limitation for recognition or enforcement of a foreign judgment, but the statute indicates a six year limitation. Second is jurisdiction. Common law only requires the defendant presence in the foreign jurisdiction, whereas the statute requires the defendant’s residence. *See* Johnston, *supra* note 47_ at 547 and 555.

⁵⁷ In this dissertation, finality and conclusiveness are synonymous.

⁵⁸ FJREO cap 319, sec 3(2)(a)

⁵⁹ Johnston, *supra* note 47_ at 588.

⁶⁰ *Id.*, at 589. The Hong Kong FJREO, § 3(2)(a) and 3(3). *See* Beatty v Beatty [1924] 1 KB 807, 815-16 (holding a judgment is no less “final” just because an appeal is possible or pending unless a stay of execution has been granted in the foreign court). In other circumstance, Hong Kong courts may stay the proceedings, *see* Colt Industries Inc v. Sarlie (No. 2) [1966] 3 All ER 85, 88; [1966] 1 WLR 1287, 1293.

execution.⁶¹ Notably, Hong Kong's criterion for finality is largely different from that of Mainland China, which hampers JRE between these two regions if relevant judgments are beyond the scope of the Mainland-Hong Kong Arrangement.⁶² This issue is deeply-contentious and is a typical example of conflicts between civil law and common law; it will be discussed in Part ii of Section B of Chapter VI.

3. Grounds for Refusing JRE

The grounds for refusing JRE in Hong Kong laws include incompetent indirect jurisdiction, unfair procedures, fraud, *Res judicata*, and the public policy exception. In the JRE proceedings, Hong Kong courts will not review the facts and applicable laws of foreign judgments.⁶³ For example, in a case involving the recognition and enforcement of a Mainland judgment, the Hong Kong Court of Appeal indicated that “the court is not re-trying the case. The question is not whether the decision of the [Mainland] court was correct.”⁶⁴ Even if the judgment-rendering court applies Hong Kong laws erroneously, Hong Kong courts cannot refuse JRE solely on this ground.⁶⁵

Different opinions exist regarding whether a Hong Kong court can review the merits of a foreign judgment in the JRE proceedings if new evidence appears after the procedures to set off this judgment are not available any more in the judgment-rendering court. One opinion is that the doctrine of no review of merits still applies.⁶⁶ The judgment debtor needs to seek remedies in the judgment-rendering court. The

⁶¹ *Id.*, § 2(1).

⁶² For detailed discussion on this issue, see Chapter V.

⁶³ See *Owens Bank Ltd v. Bracco* [1992] 2 AC 443, Lord Bridge of Harwich indicated that “the defendant will not be permitted to reopen issues of either fact or law which have been decided against him by the foreign court.” See also *Godard v. Gray* (1870) LR 6 QB 139.

⁶⁴ *WFM Motors Pty Ltd v. Malcolm Maydwell*, per Ching JA, [1995] HKLY 1047 CA.

⁶⁵ *Henderson v. Henderson* (1844) 6 QB 288, *Bank of Australasia v. Harding* (1850) 9 CB 661 *Con Lorang v. Administrator of Austrian Property* [1927] AC 641, *Merker v. Merker* [1963] P 283, *Fauntleroy v. Lum*, 210 U.S. 230 (1908).

⁶⁶ See *De Cosse Brissac v. Rathbone* (1861) 6 H&N 301. See also *Johnston*, *supra* note 47 at 550.

opposing opinion believes that in this scenario Hong Kong courts can review the merits of a foreign judgment.⁶⁷

a. Lack of Jurisdiction

Common Law Regime

In a JRE proceeding, Hong Kong courts test hypothetically whether a judgment-rendering court had jurisdiction under Hong Kong law.⁶⁸ This comes from English precedent, such as *Adams v. Cape Industries Plc*, where a UK court denied JRE because the US judgment-rendering court had no jurisdiction over English defendants according to the UK law.⁶⁹ *Cape* also shows that under UK law, a foreign court has competent jurisdiction on a party only in two circumstances: the party voluntarily⁷⁰ presents himself in its jurisdiction at the time of commencement⁷¹ of proceedings or the party submits to its jurisdiction.

In terms of presence, Hong Kong courts require a nexus existing between the

⁶⁷ See DICEY, MORRIS & COLLINS, *THE CONFLICT OF LAWS*, para 14-114, 14th edn (Sweet & Maxwell, 2006) (arguing “[s]ince an English judgment can be set aside, even in the absence of fraud, if the unsuccessful party discovers new and material evidence after the trial, there seems no reason why a foreign judgment should be in a different position”).

⁶⁸ Johnston, *supra* note 47_ at 573.

⁶⁹ *Adams and Others v. Cape Industries Plc. and Another*, [1990] Ch. 433, 462-63. Cape was an English company owning asbestos mining subsidiaries in South Africa and marketing subsidiaries in the US and the UK. The US subsidiary was incorporated in Illinois. A factory in Texas used the asbestos from the South African mines. In 1974, some employees or ex-employees at this factory brought an action in the United States Federal District Court at Tyler, Texas, for damages for personal injuries allegedly suffered as a result of exposure to asbestos dust (“the Tyler 1 actions”). The defendants included Cape and its subsidiaries in South Africa, the UK, and the US. Cape and its UK subsidiary protested the jurisdiction but failed. However, the Tyler 1 actions were settled and a consent order was made in 1978. The Tyler 2 actions were brought by other plaintiffs in the same court against the same defendants. Cape and its UK subsidiary ignored the Tyler 2 actions. The US court rendered a default judgment against Cape and its UK subsidiary. The plaintiffs sought to enforce this judgment in the UK. Cape argued that the US court had no jurisdiction according to the UK law. The UK court agreed with Cape and denied the JRE. The court held that the US court had no jurisdiction in the Tyler 2 actions for three reasons. First, the facts that Cape and its subsidiaries had submitted to the jurisdiction in the Tyler 1 actions did not constitute a submission to the jurisdiction in the Tyler 2 actions. The two actions were separate and distinct. Second, it is against English principles of natural justice that the US court exercised jurisdiction over Cape and its UK subsidiaries based on the presence of Cape’s Illinois subsidiary.

⁷⁰ *Id.*, at 518-19 (indicating “voluntary” means not “induced by compulsion, fraud or duress.”)

⁷¹ Generally, the commencement of proceedings refers to the date of service. See *Emanuel v. Symon* (1908) 1 KB 302 at 309 per Buckley LJ; *Adams and Others v. Cape Industries Plc. and Another*, [1990] Ch. 433. See also Johnston, *supra* note 47_ at 574.

defendant and the judgment-rendering court.⁷² This nexus can be that the defendant resides in the judgment-rendering court's jurisdiction,⁷³ carry on business at a reasonably permanent place within the jurisdiction.⁷⁴ The nexus will also be established if the defendant defends the substance of the case, receives the service, or chooses the court in a choice of court agreement.⁷⁵ If the defendant is a shareholder or a member of a company whose charter chooses the court as the forum to resolve disputes, Hong Kong courts will also deem that the chosen court has jurisdiction.⁷⁶ However, courts in Mainland China and Macao can exercise jurisdiction without such nexus. For example, both Mainland and Macao courts can exercise general jurisdiction when the defendant has distrainable property or has its representative offices in its jurisdiction,⁷⁷ Therefore, Hong Kong courts will not recognize and enforce Mainland and Macao judgments issued on these jurisdictional grounds.

Besides presence, a foreign party's submission to the court also represents its consent to the court's jurisdiction.⁷⁸ This includes cases that a party commences an action or brings a counter-claim,⁷⁹ makes a voluntary appearance without protesting the court's jurisdiction,⁸⁰ or explicitly agrees to submit to the court's jurisdiction.⁸¹ If an act does not be regarded as a submission under the foreign law, it generally will not amount to a submission under Hong Kong laws in the JRE proceedings.⁸² Moreover, under Hong Kong law, submission to a court in a region is equal to submission to all

⁷² Heilbronn and et al, see *supra* note 46 at 311.

⁷³ *Emanuel v Symon* [1908] 1 KB 302, 309. Some authorities show that mere presence within the jurisdiction may be enough, *Carrick v Hancock* [1895] 12 TLR 59. But other scholar disagrees and argues there mere presence is not enough, see *Smart, supra* note 50_ at 272. The person's residence can have no relation to the dispute, see *Johnston, supra* note 47_ at 574 and 576.

⁷⁴ *Vogel v R and I Kohnstamm Ltd* [1973] 1 QB 133, 142; [1971] 2 ALL ER 1428, 1436.

⁷⁵ *Smart, supra* note 50_ at 272.

⁷⁶ See *Copin v Adamson* (1874) LR 9 Exch 345; *affmd* (1875) 1 Ex D 17 CA. see also *Bank of Australia v Harding* (1850) 9 CB 661.

⁷⁷ Art. 241 of the Mainland CPL and art. 17 of the Macao Civil Procedure Code.

⁷⁸ *Adams*, [1990] Ch. 433, 458.

⁷⁹ In principle, "a plaintiff who brings a claim only submits to counter-claims in respect of the same subject matter or related issues." *Johnston, supra* note 47_ at 577.

⁸⁰ *Adams*, [1990] Ch. 433, 458.

⁸¹ *Johnston, supra* note 47_ at 580. See *Blohn v. Desser* [1962] 2 QB 116, [1961] 3 All ER 1.

⁸² *Id.* at 574.

courts in this region as long as courts in this region adopt “substantially the same substantive and procedural laws and practices.”⁸³

Statutory Regime

The statutory regime divides whether a judgment is given by a court with competent jurisdiction into two categories: a judgment *in rem* and a judgment *in personam*. In the case of a judgment given in an action *in rem*, a judgment-rendering court can exercise jurisdiction when the property in question was in the judgment-rendering region at the time of the proceedings.⁸⁴

In the case of a judgment given in an action *in personam*, the judgment-rendering court has jurisdiction when a judgment debtor submits to its jurisdiction in three circumstances:⁸⁵

- (i) If the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings; or
- (ii) If the judgment debtor was plaintiff in, or counterclaimed in, the proceedings in the original court; or
- (iii) if the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of the country of that court.

But the judgment debtor shall not be treated as having submitted to the jurisdiction of the judgment-rendering court, if he or she appears in the proceedings only (1) to contest the jurisdiction of the court, (2) to ask the court to dismiss or stay the proceedings on the ground that the dispute in question should be submitted to

⁸³ *Id.*, at 579.

⁸⁴ FJREO cap 319, sec. 6(2)b.

⁸⁵ *Id.*, sec. 6(2)a.

arbitration or to the determination of the courts of another country, or (3) to protect, or obtain the release of, property seized or threatened with seizure in the proceedings.⁸⁶

If parties conclude a valid exclusive choice of court agreement,⁸⁷ Hong Kong courts do not recognize and enforce a sister-region judgment given by a court other than the chosen court when the judgment debtor does not submit to the jurisdiction of the judgment-rendering court.⁸⁸ Hong Kong courts will not be bound by a sister-region court's decisions regarding whether a choice of court agreement is valid and whether a judgment debtor submits to its jurisdiction.⁸⁹

The judgment-rendering court will also be deemed as having jurisdiction in an *in personam* action as long as the defendant is present in its jurisdiction.⁹⁰ Presence refers to two circumstances. The defendant, at the time when the judgment-rendering proceedings were instituted, resided in, or being a body corporate had its principal place of business in, the judgment-rendering region.⁹¹ Or, the defendant had an office or place of business in the judgment-rendering region and the judgment-rendering proceedings were about a transaction effected through or at that office or place.⁹²

However, regardless action *in rem* or *in personam*, a judgment-rendering court has no jurisdiction if a subject matter of the proceedings is immovable property outside the judgment-rendering region.⁹³ The FJREO also contains a "sweeping up" provision,⁹⁴ which indicates that if the jurisdiction of the judgment-rendering court is recognized by Hong Kong laws, its judgments can be recognized and enforced in

⁸⁶ Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance, Cap 46, section 4.

⁸⁷ Johnston, *supra* note 47 at 582. (stating "[t]he agreement relied upon must expressly or implicitly prohibit the resolution of the dispute in the court in question.")

⁸⁸ Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance, Cap 46, section 3(1) and (2).

⁸⁹ *Id.*, section 3(3).

⁹⁰ FJREO cap 319, sec. 6(2)a.

⁹¹ *Id.*, sec. 6(2)a(iv).

⁹² *Id.*, sec. 6(2)a(v).

⁹³ *Id.*, sec. 6(3).

⁹⁴ Heilbronn and et al, *supra* note 56 at 315.

Hong Kong.⁹⁵

b. Unfair Procedures

Common Law Regime

The question, whether a sister-region judgment is rendered through unfair procedures, is decided based on Hong Kong views of substantial justice.⁹⁶ In other words, Hong Kong laws, rather than the law of the judgment-rendering region, will be applied to decide whether the judgment-rendering proceedings are fair. For example, in the US if a defendant defaults, the court can accept the damages that the plaintiff claimed without an independent judicial assessment. However, Hong Kong courts will not recognize and enforce the subsequent judgment, because it breached substantial justice under Hong Kong law.⁹⁷ However, if a party participates in the judgment-rendering proceedings and loses, the judgment-rendering court does not breach the Hong Kong views of substantial justice because it erroneously accepts the other party's assessment of damages.⁹⁸ *Mei Yu Lau v. Shiu Ki Lau* illustrates this.⁹⁹ This case involves the enforceability of a New Jersey judgment in Hong Kong. The judgment debtor argued that the New Jersey procedure was defective because the judge blindly accepted the submissions made by the other party; therefore, the judgment violated the Hong Kong courts' view of substantial justice. The Hong Kong Court of Appeal ruled that the judgment debtor defended the case in the New Jersey, and the fact that the court accepted the creditor's claim did not constitute a violation of substantial justice. The only remedy for the judgment debtor was to appeal to the appropriate

⁹⁵ S 6(2)(c) of Cap 36.

⁹⁶ *Pemberton v. Hughes* [1899] 1 Ch. 781 (especially per Lindley MR at 790).

⁹⁷ *Adams*, [1990] Ch. 433, 493.

⁹⁸ *See Nintendo of America Inc v. Bund Enterprises Ltd*, HCA 1189/2000.

⁹⁹ *Mei Yu Lau v. Shiu Ki Lau*, CACV 197 of 1995.

appellate court in New Jersey. Therefore, the New Jersey judgment was recognized in Hong Kong.

The heart of substantial justice is reasonable notice to a defendant and opportunities to be heard.¹⁰⁰ The fact that a party cannot fully participate in the litigation because of financial constraints does not imply that it has no opportunity to be heard. For example, in *Nintendo of America Inc v. Bund Enterprises Ltd*,¹⁰¹ the judgment debtor argued that the judgment-rendering court had ordered it to pay a large sum of money before it would be allowed to continue to defend the action and the amount was tantamount to exhaust its financial ability to continue the action. So he had to default in the judgment-rendering proceeding; therefore, he had no fair opportunity to present its case on the merits. The requested Hong Kong court held that even though personal finance might constraint a party to participate in the litigation, it did not mean that this party did not have the opportunity to present its case. In the view of Hong Kong courts, the party has the opportunity but for its own reason it cannot take advantage of the opportunity.

Because the Hong Kong legal community does not trust the competence of Mainland judicial system and judges, unfair procedures will probably become a frequently raised ground for refusing Mainland judgments¹⁰² after Mainland China and Hong Kong solve the dispute of finality.¹⁰³ For example, in *New Link Consultants Ltd v Air China*, a case about *forum non conveniens*, the plaintiff argued the risk of bias in Beijing courts:¹⁰⁴

¹⁰⁰ Johnston, *supra* note 47_ at 546.

¹⁰¹ Nintendo of America Inc v. Bund Enterprises Ltd, HCA 1189/2000.

¹⁰² *Id.*, at 603.

¹⁰³ For the dispute of finality between Mainland China and Hong Kong, see Part ii of Section B of Chapter IV.

¹⁰⁴ *New Link Consultants Ltd v. Air China*, [2004] H.K.C. 169 (C.F.I.), para 98. available at <http://legalref.judiciary.gov.hk/lrs/common/ju/judgment.jsp>.

(1) State-owned enterprises are economically important to the state and hence the Chinese Communist Party/Government authorities would intervene in the judicial process. (2) Because of its dependence on the Government, the judiciary is likely to be influenced by the Chinese Communist Party. (3) Even in the absence of any intervention from the Government, because of its dependence upon the Government's financial well-being, the Chinese judiciary is prone to side with local/governmental economic interests.

However, the Hong Kong court indicated that these arguments were general because they had no support of "concrete figures and examples"¹⁰⁵ and failed to focus on the Beijing courts.¹⁰⁶ The defendant also argued that Mainland judgments might lack sufficient experience in handling sophisticated cases.¹⁰⁷ However, the Hong Kong court ruled that this argument was impermissible.¹⁰⁸ Therefore, the defendant did not make out a *prima facie* case of *forum non conveniens*.¹⁰⁹ This ruling suggests that in order to persuade Hong Kong courts to refuse recognition and enforcement of a Mainland judgment on the ground of unfair procedure, the debtor needs to prove unfair procedure occurred in the judgment-rendering proceeding rather than a general charge of incompetent Mainland judicial system.

Statutory Regime

The common-law scope of unfair procedure is much broader than that of the FJREO, because the latter limits unfair procedure to one circumstance, namely¹¹⁰

that the judgment debtor, being the defendant in the proceedings in the original court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the

¹⁰⁵ *Id.*, para 102.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*, para 103.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*, para 104.

¹¹⁰ FJREO Section 6(1)(a)(iii).

proceedings and did not appear...

Other instances of unfair procedures may fall into the public policy exception provision in the FJREO.¹¹¹ Whether the defendant has been given sufficient time to defend its case is a matter of fact and will be decided by a test of reasonableness.¹¹²

c. Fraud

Common law Regime

Fraud “includes acts, omissions or concealment by which an undue or unconscientiously advantage is taken of another.”¹¹³ It can be committed by the party seeking JRE or judges who rendered the judgment.¹¹⁴ For example, it could be that false evidence provided by a party is accepted by the judgment-rendering court, or that judges of such court take bribes even if the party relying on its judgment is not involved in the corruption. Fraud can be committed unintentionally.¹¹⁵ However, judgment-rendering courts and Hong Kong requested courts may adopt different civil proceedings or legal standards. A mere difference does not mean that judgments from the former are made through fraudulent acts.¹¹⁶ Unlike the US, Hong Kong law does not distinguish extrinsic and intrinsic fraud and does not limit the defence to JRE to extrinsic fraud.

In order to succeed in invoking fraud in Hong Kong JRE proceedings, a judgment debtor must “particularize the fraud with precision”¹¹⁷ by using plausible

¹¹¹ Johnston, *supra* note_47_ at 563.

¹¹² *Id.*

¹¹³ Dinardo v. Lark Int'l Ltd, 14565 C.F.I. 1998.

¹¹⁴ William Henry Cowie v. The Attorney General, 336 C.F.A. 1947. Johnston, *supra* note_47_ at 564.

¹¹⁵ Dinardo v. Lark Int'l Ltd, 14565 C.F.I. 1998.

¹¹⁶ Johnston, *supra* note_47_ at 565.

¹¹⁷ WFM Motors Pty Ltd v Malcolm Maydwell (unrep, C.A.C.V. 148 of 1995), Court of Appeal, per Ching JA ([1996] 2 H.K.L.R. 236 Court of Appeal).

evidence to establish a *prima facie*, arguable, or credible case.¹¹⁸ The evidence is limited to those that was not available to the losing party in the judgment-rendering court and could not be discovered by him or her with reasonable diligence before judgment has been delivered.¹¹⁹ Applying these rules to interregional JRE between Mainland China and Hong Kong, a mere argument on the general organic deficiency of the Mainland judicial system does not constitute fraud in the Hong Kong JRE proceedings.¹²⁰

Whether the sister-region court's determination of fraud has *res judicata* effect in the Hong Kong JRE proceedings is a complicated issue. The majority of authorities hold that the defence of fraud can be raised in Hong Kong even though the same defence was pleaded and rejected by the judgment-rendering court. *WFM Motors Pty Ltd* illustrates this:¹²¹

[W]here fraud is alleged it is permissible in an appropriate case to examine the evidence to consider whether or not the evidence given at the trial was fraudulent...this can be done even when the very points that are put forward have already been considered and dismissed by the foreign court.

Obviously, this rule contradicted with the *res judicata* doctrine¹²² and has been criticized for causing inconsistent judgments and wasting judicial resources.¹²³ The new trend is to limit this rule in at least two circumstances. First, if the losing party litigated the question--whether the judgment was obtained by fraud--in the judgment-rendering region in a separate and second action, she will be estopped from alleging

¹¹⁸ *Syal v Heyward* (1948) 2 KB 443; *Owens Bank Ltd v Etoile Commerciale SA* [1995] 1 WLR 44, Privy Council; *Ever Chance Development Ltd v Ching Kai Chiu* (unrep, C.A.C.V. 8 of 1997).

¹¹⁹ *Owens Bank Ltd v. Etoile Commerciale SA* [1992] 2 A.C. 443, 444 and 459.

¹²⁰ *Eg.*, *the New Link Consultants Ltd v Air China*, H.C.A. 515 of 2001, <http://legalref.judiciary.gov.hk/lrs/common/ju/judgment.jsp> (accessed on Dec 12, 2009).

¹²¹ *WFM Motors Pty Ltd v. Maydwell* [1996] 1 HKC 444 (HKCA), appeal dismissed, [1997] HKLRD 739 (PC). *See Abouloff v. Oppenheimer & Co.* (1882) 10 Q.B.D. 295; *Vadala v. Lawes* (1890) 25 Q.B.D. 310; and *Jet Holdings Inc. v. Patel* [1990] 1 Q.B. 335. *See Smart*, *supra* note 50, at 270. cf. *Hong Pian Tee v. Les Placements Germain Gauthier Inc.*, [2000] 2 SLR 81 (Singapore, CA) and *Beals v. Saldanha*, (2003) 234 DLR (4th) 1.

¹²² *See Owens Bank Ltd v. Etoile Commerciale SA* [1992] 2 A.C. 443, 462.

¹²³ *See Id.*, at 463.

the same defence in the JRE proceedings in Hong Kong.¹²⁴ Second, the doctrine of abuse of process has been used to prevent a party, who challenged judgments based on fraud in the judgment-rendering court, from re-litigating fraud in the JRE proceedings.¹²⁵ Whether re-litigating fraud in the JRE proceedings will lead to an “abuse of process” is decided by a combination of factors such as “the fairness of the foreign procedure,” “the merits of the fraud allegation,” and “reasonable opportunities to raise the allegation of fraud in the judgment-rendering court.”¹²⁶ For example, in *Wang Hsiao Yu v Wu Cho Ching*,¹²⁷ a judgment debtor had alleged the same fraud against a Taiwanese judgment by six rounds of appeal in Taiwanese courts but all failed. In the Hong Kong JRE proceeding, the debtor alleged the same fraud again without submitting any new evidence, the Hong Kong court ruled that it was an abuse of process to allow a defendant to re-litigate the issue of fraud in Hong Kong after Taiwanese court had examined extensively and thoroughly and decided this issue. The court reconciled its decision with *WFM Motors Pty Ltd* by indicating that the latter court did not consider the issue of abuse of process.

Statutory Regime

Like common law, FJREO also states that a foreign judgment obtained by fraud shall not be recognized and enforced in Hong Kong. The statute indicates that: “On an application in that behalf duly made by any party against whom a registered judgment

¹²⁴ *House of Spring Gardens Ltd. v. Waite and Others*, [1991] 1 Q.B. 241, 241-42. In this case, an Irish court issued a judgment against three defendants. Two of the defendants brought an action in Ireland to set aside the judgment by allegation of fraud. The action was dismissed. In the JRE proceedings, an English court held that all three defendants were estopped from alleging the fraud without submitting new evidence. The court held that the third defendant was estopped as the other two defendants because he was privy to them and was well aware of the proceedings brought by them to set aside the previous judgment.

¹²⁵ *House of Spring Gardens Ltd. v. Waite and Others*, [1991] 1 Q.B. 241, 242, 251 and 255. *Owens Bank Ltd v. Etoile Commerciale SA* [1995] 1 WLR 44, Privy Council.

¹²⁶ *Johnston*, *supra* note 47, at 569-70.

¹²⁷ *Wang Hsiao Yu v Wu Cho Ching*, HCA 1690/1997.

may be enforced, the registration of the judgment...shall be set aside if the registering court is satisfied...that the judgment was obtained by fraud.”¹²⁸

d. *Res judicata*

Res judicata is a ground to refuse JRE. As the FJREO states:¹²⁹

on an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment...may be set aside if the registering court is satisfied that the matter in dispute in the proceedings in the original court had previously to the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.

“A final and conclusive judgment” should “between the same parties on the same issues.”¹³⁰ Clearly the same parties include privies.¹³¹ Therefore, a foreign judgment inconsistent with a Hong Kong early-in-time decision between the same parties or their privies on the same cause of action, will not be recognized and enforced in Hong Kong. However, whether the requirements of the same parties and the same issues can be relaxed in other circumstances is still unexplored in Hong Kong conflict of laws.¹³²

e. Public Policy Exception

The public policy exception is a defence to JRE under both common law and

¹²⁸ FJREO Cap319, § 6(1)(a)(iv).

¹²⁹ *Id.*, § 6(1)(b).

¹³⁰ Johnston, *supra* note_47_ at 548.

¹³¹ *See Owens Bank*, [1995] 1 WLR 44, Privy Council.

¹³² Johnston, *supra* note_47_ at 556-58.

FJREO.¹³³ Hong Kong courts restrict the use of the public policy exception to instances where JRE would be “contrary to the fundamental conceptions of morality and justice” of Hong Kong.¹³⁴ For example, if a foreign judgment is based on an agreement made on undue influence, its enforcement is contrary to public policy.¹³⁵ The public policy exception can be used to refuse the recognition and enforcement of judgments involving revenue and penal character.¹³⁶ Accordingly, a Mainland or Macao judgment involving penal or revenue law is unrecognizable and unenforceable in Hong Kong.¹³⁷

Moreover, Hong Kong courts do not hold that the recognition and enforcement of a judgment from a region controlled by a non-recognized government violate Hong Kong public policy as long as the judgment concerns private rights only.¹³⁸ Hong Kong courts also considered whether the recognition and enforcement of a judgment rendered in a region controlled by a non-recognized government would violate Mainland public policy, because Hong Kong was part of the PRC. For example, in *Chen Li Hung v. Ting Lei Miao*, the Hong Kong court permitted JRE because the interests protected by the Taiwanese judgment were “those of the creditors in the bankruptcy, not those of the Taiwan government.”¹³⁹ Therefore, the recognition and enforcement of such judgments did not violate both Hong Kong and Mainland public policy.

Hong Kong scholars generally uphold the maintaining of public policy

¹³³ See FJREO, Section 6(1)(a)(v).

¹³⁴ *Hebei Import & Export Corp v Polytek Engineering* (1999) 2 HKCFAR 111, Sir Anthony Mason NPJ observed at p.139 E to G. *See Davies v Davies* (1887) 36 Ch D 359, *Richardson v. Mellish* (1824) 2 Bing 229, and *Enderby Town Football Club v. Football Association* [1971] Ch 591. *See Zhang and Smart, supra note_11_ at 578.*

¹³⁵ *Israel Discount Bank of New York v. Hadji Pateras* [1983] 3 All ER 129 (CA).

¹³⁶ *See Attorney-General for New Zealand v. Ortiz* [1984] AC 1(a case about a foreign Attorney General sued to recover an unpaid fine). But civil damages awarded in criminal proceedings may be enforced in Hong Kong. *See Raulin v. Fischer* [1911] 2 KB 93.

¹³⁷ *Smart, supra note_50_ at 270.*

¹³⁸ *Chen Li Hung v. Ting Lei Miao* [2000] 1 HKC 461, [2000] 1 HKLR 252, per Mr. Justice Bokhary PJ. For details of this case, *see* Section B of Chapter I.

¹³⁹ *Id.*, per Lord Cooke of Thorndon NPJ.

exception in Chinese interregional conflict of laws because Hong Kong and Mainland China represent two completely different legal systems.¹⁴⁰ In a recent case, the Hong Kong Court of First Instance invoked the public policy exception to deny JRE of a Mainland divorce decree,¹⁴¹ but the Court of Appeal reversed this decision.¹⁴² This case involves parallel proceedings in Hong Kong and in Shenzhen, Mainland China. The parties are Mainland citizens and married in Shenzhen. They acquired the right of abode in Hong Kong and maintained matrimonial homes in both Hong Kong and Shenzhen. The husband spent most of his time working in Shenzhen while his wife and kids lived in Hong Kong. Majority of their matrimonial assets were located in Mainland China and a relatively small portion in Hong Kong. In May 2006, the wife filed a divorce petition in Hong Kong. The husband never challenged the jurisdiction of the Hong Kong court. A decree nisi of divorce was issued in November 2006. However, in October 2006, the husband brought an action in Shenzhen for divorce and division of the matrimonial assets in Mainland China. The Mainland court rejected the wife's application to stay the Mainland proceedings. In November 2007, a Mainland judgment was rendered. Then the husband requested the Hong Kong court to permanently stay and strike out the wife's claim for ancillary relief and for rescission of the decree nisi. In his opinion, since the marriage had been dissolved by the Mainland judgment, the Hong Kong court no longer had jurisdiction to grant any decree absolute and relevant ancillary relief in this case.

The Hong Kong Court of First Instance noted that the Mainland court had substantial connections to the cases. It also indicated that the pursuit of concurrent parallel proceedings in the absence of any anti-suit injunction cannot be regarded as

¹⁴⁰ Guobin Zhu, *Inter-regional Conflict of Laws under "One Country, Two Systems": Revisiting Chinese Legal Theories and Chinese and Hong Kong Law, with Special Reference to Judicial Assistance*, 32 HONG KONG L.J. 615, 634 (2002).

¹⁴¹ ML v. YJ, HCMC 13/2006.

¹⁴² ML v. YJ, CACV 89/2008, per Peter Cheung J.

violating the public policy of Hong Kong.¹⁴³ However, the Court emphasized that if the parallel proceeding outside of Hong Kong was conducted by “forensic tactics”¹⁴⁴, recognizing the consequent judgment in Hong Kong was “against [Hong Kong] fundamental notion of justice.”¹⁴⁵ The court ruled that the recognition of the judgment should be denied on the grounds of the public policy exception,¹⁴⁶ because of the husband’s “latest tactical maneuver [to use the Mainland judgment] to terminate the wife’s ancillary relief application against him in Hong Kong.”¹⁴⁷ The reason is that the recognition would frustrate the parties’ common intention that there would be an ancillary relief hearing in Hong Kong to distribute properties that had not been litigated in Shenzhen.¹⁴⁸ However, the majority of the Court of Appeal held that recognizing the Mainland judgment would not infringe Hong Kong public policy because the husband had legitimate reasons to litigate in Shenzhen and the wife would not be deprived of substantial legal rights if the Shenzhen judgment is recognized.¹⁴⁹ The Court also held that there was no common intention of the parties to adjudicate different assets in different jurisdiction.¹⁵⁰

This case is significant because parallel litigations due to jurisdictional conflicts between Mainland China and Hong Kong have been rampant.¹⁵¹ It demonstrates whether to invoke the public policy exception to deny recognition and enforcement of a judgment resulting from parallel litigations is a fact-intensive decision. The court needs to consider whether a party has a legitimate reason to pursue the second action

¹⁴³ ML v. YJ, HMC 13/2006, paras 65 and 80.

¹⁴⁴ *Id.*, para 67.

¹⁴⁵ *Id.*

¹⁴⁶ Sec. 61 (2) (b) of the Matrimonial Causes Ordinance, Cap 179 states that recognition of a foreign divorce decree should be refused if that “would manifestly be contrary to public policy.”

¹⁴⁷ ML v. YJ, HMC 13/2006, para 74.

¹⁴⁸ *Id.*, at para 69.

¹⁴⁹ *Id.*, at para 139.

¹⁵⁰ *Id.*, at para 146.

¹⁵¹ For discussion of parallel litigations due to jurisdictional conflicts, see Xianchu Zhang, *A New Stage of Regional Judicial Assistance in Civil and Commercial Matters: Implementation of the Mainland Judgments Ordinance and Certain Issues Beyond*, 39 HONG KONG L. J. 3, 24-33 (2009).

after the commencement of the Hong Kong action.

4. Conclusion

Discussions in this Section demonstrate that the existing Hong Kong JRE law is insufficient to enhance interregional JRE. For example, in the JRE proceedings Hong Kong courts apply *lex fori* to determine the finality, jurisdiction, fraud, and unfair procedures of a sister-region judgment. Due to the divergences between regions, a judgment that is final in one region can be regarded as not final in the other; a court has jurisdiction according to the law of the judgment-rendering region can be regarded as lacking jurisdiction under the law of the requested region. Therefore, merely relying on unilateral regional legislation is difficult to improve interregional JRE.

iii. Macao Regional JRE Law

This Section will analyze legal bases for JRE in Macao (Part One), requirements for JRE (Part Two), and grounds for denying JRE (Part Three) in Macao regional JRE law. This Section concludes that merely relying on Macao unilateral regional legislation cannot solve interregional JRE difficulties.

1. Legal Bases for JRE

As Hong Kong law is shaped by the English law, Macao law has been

significantly influenced by Portuguese law.¹⁵² Like Portugal, Macao is in the civil law family so statutes play the most important role in regulating JRE. Chapter 14 of the Macao Civil Procedure Code regulates recognition and enforcement of judgments rendered by courts outside of Macao. Chapter 14 applies equally to the recognition and enforcement of sister-region and foreign judgments.

2. Requirements for JRE

Macao law requires that judgments should be definite according to the law of the judgment-rendering region.¹⁵³ Macao Civil Procedure Code does not use the term “final.” However, a final judgment is definite.¹⁵⁴ For example, a judgment becomes definite when it is not subject to modification or reversal by an appellate procedure.¹⁵⁵ An interlocutory judgment, such as instructions and orders issued by judges to facilitate proceedings, is definite too.¹⁵⁶

3. Grounds for Refusing JRE

Macao courts can review the merits of a sister-region judgment when new critical evidence appears, or when a Macao substantive law that leads to a more favourable judgment to a Macao resident should have been applied in the judgment-

¹⁵² All laws, decrees, administrative regulations and other normative acts made by Portuguese governors and previously in force in Macao should remain in force after Macao returned to China, if they are not against the Basic Law and not revised by the legislature and relevant organs of Macao SAR. *See* art. 8 of the Macao Basic Law.

¹⁵³ Art. 1200(b) of the Macao Civil Procedure Code.

¹⁵⁴ MIN YUAN, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS IN THE PRC, HONG KONG, MACAO AND TAIWAN 82 (2006).

¹⁵⁵ *Id.*

¹⁵⁶ Zhu Jian, MACAO MIN SHI SU SONG GUANG XIA YU QUE REN WAI DI CAI PAN DE ZHI DU [MACAO SYSTEMS FOR JURISDICTION AND JRE IN CIVIL LITIGATION], <http://www.court.gov.mo/pdf/ConfirmC.pdf> (last visited Feb 2, 2010).

rendering proceeding.¹⁵⁷

First, new critical evidence refers to one that was unknown to parties or has not been used in the judgment-rendering proceeding but can change the existing judgment into one more favourable to the losing party.¹⁵⁸ It does not require this evidence alone should be able to overturn the judgment.¹⁵⁹ It means that by adding this evidence into the evidence pool, the judgment must be overturned.¹⁶⁰ Both parties and non-parties can bring the attention of a requested Macao court to such document. This ground involves review of the merits of a sister-region judgment. But it has rarely been used according to Macao jurisprudence.¹⁶¹ This is possibly because a judgment debtor has to respond to a JRE application within fifteen days,¹⁶² so he or she may not have sufficient time to find critical new evidence. This ground of review may be proper for international JRE¹⁶³ but should be regarded as exorbitant in the interregional context. The reason is that it will harm mutual trust between regions, therefore the proper approach for Macao courts is to require the losing party to challenge the judgment in the judgment-rendering region. Only when there is no reasonable opportunities for this party to do so in the judgment-rendering region, a Macao requested court may consider reopen the merits of the case.

Second, Macao courts would deny JRE, if (1) a sister-region judgment is against a Macao resident, (2) according to Macao conflict of laws, Macao substantive law should have been applied to solve the dispute, and (3) the application of Macao substantive law leads to a judgment more favourable to the Macao resident compared

¹⁵⁷ *Id.* art. 1202.

¹⁵⁸ Arts. 1202 and Art. 653(c) of the Macao Civil Procedure Code. Yuan, *supra* note _154_ at 86.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Art. 1201(1) of the Macao Civil Procedure Code. Parties have only ten days to respond to a procurator's questions. *See* art. 1203(2) of the Macao Civil Procedure Code.

¹⁶³ *See* a similar approach in Canada, where in the context of fraud, JRE can be denied when proof of new and material facts that was previously not discoverable appear and challenge the evidence accepted by the judgment-rendering court, *Beals v. Saldanha*, [2003] 3 S.C.R. 416 para 43-51 (Can.).

to the sister-region judgment.¹⁶⁴ This ground of refusal reflects Macao's protectionism towards its residents.¹⁶⁵ The underlying policy is that, the Macao resident, who is the losing party, should receive the same treatment in the judgment-rendering court as he or she would receive in the Macao court if the action took place in Macao.¹⁶⁶ Obviously a Macao court is not able to influence what happens in the judgment-rendering court. What the Macao court can is to review whether the judgment-rendering court granted the Macao losing party the same treatment as he or she would receive in the Macao court. If the losing party received less favourable treatment, the Macao court will deny JRE. The Macao court will not review the facts finding of the judgment-rendering court. However, it will apply its own law to analyze these facts.¹⁶⁷ A Macao court cannot *sua sponte* review the merits of a sister-region judgment on this ground.¹⁶⁸ This is because whether to invoke Macao law and whether to get more favourable treatments is one of parties' disposable rights;¹⁶⁹ if parties do not initiate this ground of refusal, parties waive it.¹⁷⁰

Besides substantive grounds, Macao courts can also deny JRE for non-substantive reasons, such as lack of indirect jurisdiction, unfair procedure, *res judicata*, and public policy exception.¹⁷¹

a. Incompetent Indirect Jurisdiction

¹⁶⁴ *Id.* art. 1202. The second section of Chapter 3 of the Macao Civil Procedure Code provides detailed conflict-of-law rules. It contains seven divisions: Scope and Ascertainment of Personal Law, Law Applicable for Actions, Law Applicable for Obligations, Law Applicable for in Rem, Law Applicable for Legal Relations between Relatives, Law Applicable for Marriage De Facto, and Law Applicable for Succession.

¹⁶⁵ Jian, *supra* note 156.

¹⁶⁶ Rambas Marketing Co., LLC v. Chou Kam Fai David, Court of Second Instance of Macao, Macao judgment 29/2003 issued on June 10, 2004, page 28-9. (A curtsey English translation provided by Sérgio Silva Gaspar of the University of Macao is in file with the author).

¹⁶⁷ *Id.*, at 29.

¹⁶⁸ Jian, *supra* note 156.

¹⁶⁹ *Id.*

¹⁷⁰ Rambas Marketing, page 29.

¹⁷¹ Art. 1200(c)(d) and (e), art. 1202 of the Macao Civil Procedure Code.

Lack of indirect jurisdiction includes two circumstances.¹⁷² First, the jurisdiction of the judgment-rendering court was tainted by fraud.¹⁷³ For example, the defendant was fraudulently induced into the jurisdiction of the judgment-rendering court. The second circumstance of lack of jurisdiction is that the case falls in the exclusive jurisdiction of Macao courts.¹⁷⁴ Macao courts claim exclusive jurisdiction when lawsuits related to a property right in real estate located in Macao and the bankruptcy or insolvency of a Macao legal person.¹⁷⁵

Macao courts distinguish the *in rem* and *in personam* effects of a sister-region judgment that involves real estate located in Macao. This is illustrated by a JRE case where a Mainland divorce judgment split a couple's properties and one real estate was located in Macao.¹⁷⁶ The majority of Macao judges held that the judgment essentially concerned an obligation not a property right, although it was related to a real estate in Macao.¹⁷⁷ Therefore, the judgment-rendering court did not violate the exclusive jurisdiction of the requested court where the real estate was located. So this judgment should be recognized and enforced in Macao.

b. Unfair Procedure

The second ground for refusing JRE is unfair procedure in the judgment-

¹⁷² *Id.* art. 1200(c). Macao has only concluded two bilateral judicial assistance treaties: THE TREATY OF JUDICIAL ASSISTANCE BETWEEN MACAO SAR AND EAST TIMOR ON DECEMBER 5, 2008, and THE TREATY OF JUDICIAL ASSISTANCE BETWEEN MACAO SAR AND PORTUGAL ON FEBURARY 2, 2001. *See* <http://en.io.gov.mo/Legis/International/2/18.aspx> (accessed June 1, 2010). Neither of these treaties provide JRE rules. Both of them requires two sides should begin negotiation for detailed JRE rules soon. *See* art. 4 of the Treaty between Macao and East Timor, and art. 3 of the Treaty between Macao and Portugal.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* art. 20.

¹⁷⁶ Macao judgment 188/2003, issued on Nov. 13, 2003. Cited in Yuan, *supra* note 154, at 83.

¹⁷⁷ The dissenting judges ruled that the judgment involved both an obligation and a transfer of property right. Because the title to a real estate located in Macao needed to be transferred, the case should belong to the exclusive jurisdiction of Macao. In other words, the dissenter held that the Mainland court infringed the exclusive jurisdiction of Macao and its judgment should not be recognized and enforced in Macao.

rendering court. This includes two circumstances. First, a defendant was not properly summoned according to the law of the judgment-rendering region.¹⁷⁸ Macao courts may also apply Macao law to determine whether a defendant has been properly summoned.¹⁷⁹ Second, the judgment-rendering proceeding violates the principles of the right to argue and equality between parties.¹⁸⁰ Fair procedure does not mean both parties should actually fully present the case.¹⁸¹ Therefore, a default judgment, where the defendant has been duly served and the trial is conducted impartially, is entitled to JRE in Macao.¹⁸² According to Macao case law, Macao courts have acknowledged that the civil procedures of Mainland China, Hong Kong, Canada, Portugal, and the Philippine Republic comply with the fair procedure requirements in the Macao JRE law.¹⁸³ Additionally, JRE will be refused, if the judgment results from one or multiple judges' dereliction of duty, or acceptance of illegal interests or bribery.¹⁸⁴

c. Res judicata

Res judicata is the third ground to refuse JRE.¹⁸⁵ The Macao Civil Code provides two *res judicata* rules. First, a sister-region judgment is unrecognizable and unenforceable in Macao, if this judgment is inconsistent with an existing judgment.¹⁸⁶ The existing judgment can be a Macao judgment or a third-region judgment that has been recognized in Macao. Judgments involve different parties or different causes of action may be regarded inconsistent as long as they are irreconcilable. For example,

¹⁷⁸ Art. 1200(f) of the Macao Civil Procedure Code.

¹⁷⁹ *Rambas Marketing Co., LLC v. Chou Kam Fai David*, Court of Second Instance of Macao, Macao judgment 29/2003 issued on June 10, 2004, para 112. (A curtsey English translation provided by Sérgio Silva Gaspar of the University of Macao is in file with the author).

¹⁸⁰ Art. 1200(f) of the Macao Civil Procedure Code. Yuan, *supra* note_154_ at 84.

¹⁸¹ *Id.* at 83.5.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Arts. 1202 and 653(a) of the Macao Civil Procedure Code.

¹⁸⁵ *Id.* art. 1200(d).

¹⁸⁶ *Id.* arts. 1202(d) and 653(g).

suppose that marriage is a precondition for a man to pay maintenance to a woman. If one judgment requires a husband pays maintenance to a wife and the other is a divorce judgment, these two judgments do not involve the same cause of action but they are inconsistent.

Second, a sister-region judgment can be recognised, "[only if the debtor of the... judgment] cannot make a proper objection based on *lis pendens* and the reason that there is already a local judgment for the same case because the case is being heard in a Macau court. However, if a non-local court took the case earlier than the Macau court, it is possible that the judgment rendered by that court could be recognisable."¹⁸⁷

d. Public Policy Exception

JRE will be denied if its result will manifestly violate Macao public policies.¹⁸⁸ The Macao Civil Procedure Code does not define the meaning of public policies. Macao judges interpreted the public policies as “[a] set of absolutely imperative norms and juridical principles that form the fundamental frameworks of the system, for they are, as such, unsusceptible of derogation by the will of the individuals.”¹⁸⁹ The meaning of public policies should be determined and developed in practice, and judges should decide whether to invoke the public policy exception according to the facts of each case.¹⁹⁰ Generally, the recognition and enforcement of monetary judgments do not manifestly violate Macao public policies.¹⁹¹

The test for “public policies” may involve review of a sister-region judgment on

¹⁸⁷ *Id.*, art. 1200 (d). The English translation is cited from E-mail from Guangjian Tu, Assistant Professor of Law, University of Macao Faculty of Law, to Jie Huang (Jun 1, 2010, 11:50 PM CST) (on file with author).

¹⁸⁸ Art. 1200(e) of the Macao Civil Procedure Code. Art. 1200(e) is in line with the essence of art. 20 of the Code.
¹⁸⁹ *Rambas*, Macao judgment 29/2003.

¹⁹⁰ Jin Huang & Huacheng Guo, *Zai Lun Guo Ji Shi Fa Zhong De Gong Gong Zhi Xu Wen Ti [Re-analyze the Issue of Public Policy in Private International Law: The Theory and Practice in Macao Private International Law]*, HE BEI FA XUE 15, 20 (Issue 2, 1998).

¹⁹¹ Judgement 228/2003 issued on Aug. 29, 2005. Cited in Yuan, *supra* note_154_ at 85.

the merits.¹⁹² Some authority suggests that the public policies review is to examine whether the same judgment would be issued under Macao law and procedure.¹⁹³ The example is a JRE case where a Portuguese citizen residing in Macao requested a Macao court to recognize a Hong Kong default divorce judgment.¹⁹⁴ The Macao requested court *sua sponte* reviewed whether the judgment contradicted Macao public policies.¹⁹⁵ The court ruled that in terms of substantive law, similar to Hong Kong, Macao recognized divorce by consent and divorce by court.¹⁹⁶ Therefore, the Hong Kong substantive law was not against Macao public policies. As for procedure law, the Hong Kong court accepted the plaintiff's claim completely when the defendant defaulted in this case.¹⁹⁷ The Macao court ruled that this procedure did not contradict with Macao public policies because it did not contain strong cultural, moral, or social value elements.¹⁹⁸ Therefore, Macao courts would issue the same judgment under Macao's own substantive and procedural law. Consequently, the Macao court recognized this Hong Kong judgment.¹⁹⁹

4. Conclusion

Since the return of Macao, the JRE cases in Macao have been increasing every year, and the majority of judgments are from Mainland China and Hong Kong.²⁰⁰ Most of these judgments are divorce decrees.²⁰¹ Others are judgments concerning

¹⁹² Jian, *supra* note 156, at 11.

¹⁹³ Issued on Nov. 7, 2002. Cited in Yuan, *supra* note 154, at 85.

¹⁹⁴ Jin Huang & Huacheng Guo, *supra* note 190, at 19.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Gujie Yuan, *Lei Di Yu Gan Ao Xian Fu Cheng Ren Yu Zhi Xing Min Shang Shi Pan Jue de Fa Zhang Qu Shi [The Development Trend of Mutual Recognition and Enforcement of Civil and Commercial Judgments between Mainland China and Hong Kong and Macao]*, 2 FA XUE JIA [LEGAL EXPERT] 147, 149 (2005).

²⁰¹ *Id.*

inheritance, adoption, and business contractual disputes.²⁰² Most JRE applications in Macao are successful and only few cases are rejected because of procedural issues.²⁰³ However, substantive reviews under Macao law represent strong regional protectionism and hampers interregional JRE.

iv. Problems of Regional JRE Laws

The major problem of regional JRE laws is insufficient substantive law and the absence of an overarching JRE scheme. For example, Mainland China denies JRE when no JRE arrangement exists. It has never invoked the principle of reciprocity to recognize and enforce sister-region judgments, other than divorce decrees without enforceable contents. Moreover, Hong Kong courts apply their own law, rather than the law of the judgment-rendering region, to determine whether a sister-region judgment is final, whether the judgment-rendering court has jurisdiction, and whether the judgment-rendering proceeding is fair. Because regional laws are divergent, a final judgment in the judgment-rendering region may be considered as non-final in Hong Kong,²⁰⁴ and a court that has jurisdiction under its own law may be considered as no jurisdiction in Hong Kong.²⁰⁵ In addition, Macao courts can review the merits of sister-region judgments in the JRE proceedings. This devastates current fragile interregional mutual trust.²⁰⁶ As a conclusion, each region cannot solve interregional JRE difficulties unilaterally. Establishing an overarching JRE scheme can help address this problem.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ For detailed discussion of finality, *see* Part ii of Section B of Chapter IV.

²⁰⁵ For detailed discussion of conflicts between direct and indirect jurisdiction, *see* Part i of Section C of Chapter V.

²⁰⁶ For detailed discussion of mutual trust, *see* Section C of Chapter IV.

B. Interregional JRE Law

The current interregional JRE system between Mainland China, Hong Kong, and Macao is constituted by two bilateral Arrangements and a multilateral convention regarding oil pollution. The former includes: the Mainland-Macao Arrangement and the Mainland-Hong Kong Arrangement. The later refers to the 1992 Protocol of the International Convention on Civil Liability for Oil Pollution Damage (hereinafter “Convention on Oil Pollution”), which applies to the three regions.²⁰⁷ This section analyzes the three interregional laws. In order to achieve a better comparison, it starts from the more restrictive Arrangement between Mainland China and Hong Kong, then proceeds to the more JRE-friendly Arrangement between Mainland China and Macao, and at the end, it discusses the multilateral Convention on Oil Pollution.

i. Mainland-Hong Kong Arrangement

The Mainland-Hong Kong Arrangement was concluded in 2006 and came into effect after the Supreme People’s Court of Mainland China promulgated a judicial interpretation²⁰⁸ and Hong Kong completed the relevant legislation in 2008.²⁰⁹ This

²⁰⁷ The 1992 Protocol of the International Convention on Civil Liability for Oil Pollution Damage, http://www.imo.org/conventions/contents.asp?doc_id=660&topic_id=256 (last visited Feb 9, 2010). For status of convention by countries, see http://www.imo.org/conventions/mainframe.asp?topic_id=248.

²⁰⁸ For Mainland implementation legislation, see Interpretation No.9 [2008] of the Supreme People’s Court on July 3, 2008. For the circumstances and procedures that the Supreme People’s Court can issue judicial interpretation, see Provisions on the Judicial Interpretations of the Supreme People’s Court dated March 23, 2007. See also Art. 33 of Zhonghua Renmin Gongheguo Renmin Fayuan Zuzhi Fa [the Organic law of the People’s Courts] (promulgated by the National People’s Congress on July 1, 1979), translated in <http://www.lawinfochina.com> (accessed on Dec 12, 2009), provides that: “The Supreme People’s Court gives interpretation on questions concerning specific application of laws and decrees in judicial proceeding.” In the Mainland the interpretation of law rests with the Standing Committee of the National People’s Congress according to art. 67 of Constitution of the PRC.

²⁰⁹ For Hong Kong implementation legislation, see Mainland Judgments (Reciprocal Enforcement) Ordinance and its (Commencement) Notice, Ord. No. 9 of 2008, L.S. No. 2 to Gazette No. 27/2008, L.N. 195 of 2008, Cap 597. Upon the agreement of Mainland China and Hong Kong, this Arrangement came into force as of August 1, 2008.

Arrangement is a milestone in the interregional JRE for Mainland China and Hong Kong.²¹⁰ It will also provide valuable guidance for future judicial assistance in civil or commercial cases between the Mainland and other common law countries such as the US and the UK.²¹¹ This Arrangement will facilitate commerce between Mainland China and Hong Kong.²¹² It may also help Hong Kong to develop into a dispute resolution center for cases involving Mainland parties, because Hong Kong courts are deemed to be of a higher quality than their Mainland counterparts.²¹³ So foreign parties may prefer to litigate in Hong Kong and, if they win, they can use the Arrangement to enforce their judgment in Mainland China.²¹⁴ However, the scope of this Arrangement is very narrow, which restricts its practical significance.

1. Scope of the Arrangement

The scope of the Mainland-Hong Kong Arrangement is narrow.²¹⁵ It applies only to an enforceable final judicial award requiring payment of money in a civil or commercial case pursuant to a choice of court agreement in writing, rendered by a

For a discussion of the Mainland Judgments (Reciprocal Enforcement) Ordinance, see Zhang, *supra* note 151.
²¹⁰ See Michelle Tsang, A New Chapter in Reciprocal Enforcement of Judgments between the Mainland and Hong Kong, *Hong Kong Lawyer* 59-64 (July 2008). See also Zhang, *supra* note 151 at 5.

²¹¹ Zhang, *supra* note 151 at 5. Iain Seow, *Arrangements for Reciprocal Enforcement of Commercial Judgments Between Mainland China and Hong Kong*, MONDAQ BUSINESS BRIEFING (Sept 1, 2006): NA (indicating “when the Arrangement is implemented, Hong Kong will be the first common law jurisdiction in the world whose court judgments are recognized on the Mainland and vice versa”). It should be noted that although the Mainland signed an agreement on judicial assistance in civil and commercial matters with Singapore (a common-law country) in 1999, but the recognition and enforcement of judgments are excluded from this agreement.
<http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=7108&pdmc=rdgb> (accessed on Jan 16, 2009).

²¹² Stephen Kai-yi Wong, *Comments Reciprocal Enforcement of Court Judgments in Civil and Commercial Matters Between Hong Kong SAR and the Mainland*, in ONE COUNTRY, TWO SYSTEMS, THREE LEGAL ORDERS -- PERSPECTIVES OF EVOLUTION ESSAYS ON MACAU'S AUTONOMY AFTER THE RESUMPTION OF SOVEREIGNTY BY CHINA, 378 (Jorge Oliveira, Paulo Cardinal eds. 2009).

²¹³ See speech made by the Secretary for Justice Mr. Wong Yan Lung SC at the signing ceremony of the Arrangement on July 14, 2006, available at <http://www.doj.gov.hk/eng/topical/mainlandlaw.htm> (accessed on Jan 28, 2009). See also James Illman, *HK Courts Accord to Open China Market*, LEGAL WEEK (May 11, 2006) (indicating that the Mainland-Hong Kong Arrangement makes it possible for Hong Kong lawyers to win a bigger slice of China's potentially huge dispute resolution market and moreover because of the common-law tradition in Hong Kong, US and UK companies may like to resolve their disputes in Hong Kong and then enforce the judgments in Mainland China under the Arrangement).

²¹⁴ *Id.*

²¹⁵ Wong, *supra* note 212_ at 376.

people's court of Mainland China or a court of Hong Kong.²¹⁶ It excludes judgments in non-commercial or non-contractual disputes and judgments without choice of court agreements. This is because conflicts between Mainland and Hong Kong laws are very complex. So the Mainland-Hong Kong Arrangement was concluded after a difficult, four-year negotiation²¹⁷ and its implementation took another two years. This Arrangement is a successful example of the approach of “following in order from easy to difficult matters and advanc[ing] step by step.”²¹⁸ This is drawn from the approach of "start small" from the Hague Choice of Court Convention.²¹⁹

a. Judgments in Civil and Commercial Cases

The Arrangement is limited to judgments in civil and commercial contractual disputes, excluding any employment contracts and contracts to which a natural person acting for personal consumption, family, or other non-commercial purposes.²²⁰ The record of the Hong Kong Legislative Council shows that this exclusion is inspired by the Hague Choice of Court Convention.²²¹ However, the narrow scope and strict requirement of the Hague Convention are appropriate for the international scenario but are over-restrictive for the interregional context.²²² Considering the close cultural, economic, and historical ties between Mainland China and Hong Kong,²²³ recognition

²¹⁶ Art. 1 of the Mainland-Hong Kong Arrangement.

²¹⁷ See the Paper on Reciprocal Enforcement of Judgments in Commercial Matters between the HKSAR and the Mainland, CB (2)1431/01-02(01) march 2002. The negotiation between Mainland China and Hong Kong officially started in July 2002. See Zhang and Smart, *supra* note ___ at 558.

²¹⁸ The Speech of the then Vice President of the Supreme People's Court, Justice Songyou Huang made at the signing ceremony of the Arrangement on July 14, 2006, quoted from Xianchu Zhang & Philip Smart, *supra* note 11 at 568.

²¹⁹ See Report: Recent International Agreement—Convention on Choice of Court Agreements, Concluded June 30, 2005, 119 HARVARD LAW REVIEW 935 (2006) (indicating the approval of the Hague Choice of Court Convention demonstrates that “start small” is a good approach to complicated conflict-of-law issues). Hong Kong LC Paper No. CB(2)722/01-02(04), para 18.

²²⁰ *Id.* art. 3.

²²¹ Hong Kong LC Paper No. CB(2)722/01-02(04), para 18. Art. 2 (1) of the Hague Choice of Court Convention.

²²² See Zhang and Smart, *supra* note_11_ at 564.

²²³ See Section D of Chapter I.

and enforcement of judgments in non-commercial and non-contractual issues can facilitate people's life in these two regions. Moreover, the Mainland-Macao Arrangement has a much broader scope and less restrictive requirements.²²⁴ Extending the scope of the Mainland-Hong Kong Arrangement would promote the growth of economic and familial bonds between the two regions.

b. Monetary Judgments

The judgments covered by the Arrangement must require payment of money. This comes from the approach of "start small," since the enforcement of monetary judgments is less controversial than enforcement of orders of injunction or specific performance. Moreover, because the Arrangement improperly omits recognition rules, judgment does not require any payment or further enforcement cannot be recognized. This creates uncertainty between parties. For example, supposing that a party wins a judgment that shows he or she has no liability to pay in one region, because this judgment cannot be recognized under the Arrangement, this party will need to re-litigate the merits of her case in order to safeguard her rights in the other region.²²⁵ § 16 (1) of the Mainland Judgments (Reciprocal) Ordinance enacted by Hong Kong is designed to fill this gap.²²⁶ It states that Mainland judgments that do not require any payment or further enforcement and comply with the Ordinance can be used as a defense or counterclaim in Hong Kong litigations.²²⁷ Advisably, Mainland China should adopt a similar recognition rule in its implementing legislation of the Arrangement.

²²⁴ See art. 1 of the Mainland-Macao Arrangement.

²²⁵ Zhang and Smart, *supra* note_11_ at 558.

²²⁶ § 16 (1) of the Mainland Judgments (Reciprocal Ordinance). For comments, see Zhang, *supra* note_151_ at 10.

²²⁷ § 16 (1) of the Mainland Judgments (Reciprocal Ordinance).

c. Types of Judicial Awards

“Judicial awards” include judgments, rulings, conciliation statements, and orders for payment in Mainland China, or judgments, orders and legal cost appraisal certificates in Hong Kong.²²⁸ When discussing the Mainland-Hong Kong Arrangement, without specialization, the term, “judgment,” is used broadly as an equivalent to “judicial awards.”

In Mainland China, a judgment [pan jue] is used to decide the substance of a case and rulings [cai jue] is used to determine procedural issues.²²⁹ An order for payment [zhi fu lin] is issued when the following conditions are met: (1) a creditor requests a debtor to repay a certain amount of money or specific negotiable instruments; (2) the creditor has no obligations for reciprocal payment against delivery; and (3) the order for payment can be served on the debtor.²³⁰ Besides litigation, courts may also host mediation [tiao jie] between parties.²³¹ In the mediation, parties can make agreements in front of a judge.²³² This agreement is the so called judicial mediation agreements.²³³ Including such agreements into the Mainland-Hong Kong Arrangement should be praised, because judicial mediation agreements can be enforced as judgments in Mainland China and there is no reason to distinguish them from judgments in interregional JRE.²³⁴

In Hong Kong, a judgment is used to decide the substance of a case. An order

²²⁸ Art. 2.b of the Mainland-Hong Kong Arrangement.

²²⁹ Art. 140 of the Mainland CPL.

²³⁰ Art. 191 of the Mainland CPL and art. 215 of the Opinions of the CPL.

²³¹ Chapter 8 of the Mainland CPL.

²³² Mainly *see* arts. 9 and 16 and Art. 85-91 of the Mainland CPL, and arts. 91-97 of the Opinions of the CPL.

²³³ *Id.*

²³⁴ When a settlement is reached through mediation, the people’s court will draw up a mediation agreement. This agreement is signed by the judge and the court clerk, sealed by the people’s court, and served on both parties. Once it is received by the two parties concerned, the mediation agreement will become legally effective. *See* Chapter 8 of the Mainland CPL.

generally addresses procedural issues. It could be a cost order, an interlocutory order (e.g. to serve something within a certain period of time or injunction), or an order to execute a judgment. An allocatur is an official court document that specifies how much a party has to pay pursuant to a cost order. It includes both lawyers' fees and litigation costs.

d. Levels of Courts

Not every judgment rendered by courts in Hong Kong or Mainland China can benefit from this Arrangement.²³⁵ It covers (1) Hong Kong judgments rendered by the Court of Final Appeal, the Court of Appeal of the High Court, the Court of First Instance, or the District Court, and (2) Mainland judgments issued by intermediate or higher People's Courts, as well as district people's courts with jurisdiction over cases related to Hong Kong, Macao, Taiwan, and foreign factors.²³⁶ In Mainland China, not every district court can hear cases related to Hong Kong, Macao, Taiwan, and foreign factors.²³⁷ Therefore, the Arrangement excludes judgments issued by these district courts.

This is also because Hong Kong worries that there are more Mainland courts than Hong Kong courts, therefore the number of Mainland judgments is far higher than that of Hong Kong judgments.²³⁸ The huge flow of requested judgments from Mainland China may overwhelm Hong Kong courts.²³⁹ Moreover, Hong Kong

²³⁵ Zhang, *supra* note_151_ at 10.

²³⁶ Art. 2.a and Annex 2 of the Mainland-Hong Kong Arrangement.

²³⁷ See arts. 1 and 5 of the Provisions of the Supreme People's Court on Some Issues Concerning the Jurisdiction of Civil and Commercial Cases Involving Foreign Elements (adopted at the 1203rd meeting of the Judicial Committee of the Supreme People's Court on Dec. 25, 2001, and effective on Mar. 1, 2002.)

²³⁸ Baoguo Jiang, *Neidi yu Gang Ao Minshangshi Panjue Renke he Zhixin Anpai Bijiao Yanjiu [A Comparative Study on the Recognition and Enforcement of Civil and Commercial Judgments Arrangements between Mainland China and Hong Kong and Macao---with Special Reference to the Practices of Hong Kong]*, 113 FAXUE LUNTAN [LEGAL FORUM] 69, 72 (2007).

²³⁹ *Id.*

concerns about Mainland judicial integrity, the competence of courts, and difficulty in executing judgments.²⁴⁰ Therefore, Hong Kong strongly prefers to restrict the levels of Mainland courts so as to reduce the number of requested judgments and ensure their quality.²⁴¹ In the Mainland-Hong Kong Arrangement, Mainland China yielded to Hong Kong and agreed that the Arrangement covered judgments given by designated Basic Level People's Courts as well as courts at the Intermediate People's Court level or above.²⁴²

e. Choice of Court Agreements

A severe limitation exists insofar as the Arrangement is confined to judgments rendered on the basis of a choice of court agreement. This does not mean that the parties to the judgment must be identical to those of the choice of court agreement: the laws of subrogation, alter ego, and so forth in the judgment-rendering region apply. This choice of court agreement must be in a written form, expressly designating a Mainland court or a Hong Kong court as the one having exclusive jurisdiction.²⁴³ Additionally, unless otherwise provided in the contract, a choice of court clause in a contract exists independently and its validity will not be affected by the modification, discharge, termination or nullification of the contract.

f. Interregional

²⁴⁰ For the issue of weak mutual trust between Mainland China and Hong Kong, see Section C of Chapter IV.

²⁴¹ Jiang, *supra* note 238, at 72.

²⁴² Art. 2 of the Mainland-Hong Kong Arrangement.

²⁴³ For relevant Mainland law, see art. 3 of the Mainland CPL. For relevant Hong Kong law, see para 3 of Mainland Judgments (Reciprocal Enforcement) Ordinance, Ord. No. 9 of 2008. For a discussion of the Mainland law, see also J Huang & DH Huanfang, *Private International Law in Chinese Courts*, 1 FRONT. LAW CHINA 14, 14-33 (2006). For a discussion of Hong Kong law, see Johnston, *supra* note 47, at 579-580.

The Arrangement does not restrict its coverage to judgments involving interregional elements.²⁴⁴ For example, it does not require that one party of the judgment should come from Mainland China and the other should from Hong Kong; it also does not require that the dispute, on which the judgment is based, should involve transactions that take place across regions. Therefore, suppose that two Mainland companies sign a sales contract and carry it out completely within Mainland China. This contract contains a choice-of-court clause favoring a Hong Kong court. Later, the court renders a judgment to resolve contractual disputes between the parties. Then, the winning party applies to enforce this judgment in Mainland China according to the Arrangement. Mainland courts may refuse JRE if parties choose Hong Kong courts only to avoid the application of Mainland mandatory laws. However, in all the other circumstances, Mainland courts should recognize and enforce such judgment.

Furthermore, this Arrangement, in theory, can also be applied to a judgment that solves a dispute taking place entirely outside of Mainland China and Hong Kong and between two foreign parties, as long as they make a choice of court agreement favoring a court in Hong Kong or Mainland China.²⁴⁵ Mainland courts may not accept cases having no actual connections with Mainland China,²⁴⁶ but Hong Kong courts may accept cases that have no connections with Hong Kong.²⁴⁷ Therefore, this Arrangement may be used by strategic international litigators who have disputes with a party having properties in either Hong Kong or Mainland China.

²⁴⁴ See Zhang and Smart, *supra* note_11_ at 581.

²⁴⁵ *Id.* at 582.

²⁴⁶ Art. 242 of the Mainland CPL.

²⁴⁷ Johnston, *supra* note_47_ at 119-120.

2. Requirements for JRE

Judgments entitled to JRE under the Arrangement shall be enforceable and final.²⁴⁸ “Enforceable and final” is an autonomous terminology. It refers to any enforceable judgments rendered by qualified courts according to the above levels of courts clause. Because the Mainland procedure for trial supervision permits a court to reopen its own judgments, but under Hong Kong common law a judgment will never become final if a court retains power to do this.²⁴⁹ Therefore, the Arrangement states that when an application to enforce a Mainland judgment has been made in Hong Kong and the procedure for trial supervision calls for a retrial in Mainland China, the case shall be retried by a court at the next higher level of the judgment-rendering court.²⁵⁰

The Arrangement does not have the "on the merits" requirement because it covers rulings and orders, which address procedural, rather than substantive, issues.

3. Grounds for Refusing JRE

The Mainland-Hong Kong Arrangement provides seven mandatory grounds where JRE shall be denied. Although the Arrangement does not indicate whether the list of seven grounds is exhaustive,²⁵¹ it should be read as an exhaustive list for the purpose of legal certainty and predictability. The following interpretations serve to clarify the implications of the seven grounds.

²⁴⁸ Art. 2.a of the Mainland-Hong Kong Arrangement. Another translation is "final judgment with enforceability". Wong, *supra* note_212_ at 376-77.

²⁴⁹ For detailed discussion of the finality dispute between Mainland China and Hong Kong, *see* Part ii of Section B of Chapter IV.

²⁵⁰ Art. 2 of the Mainland-Hong Kong Arrangement. *See* Wong, *supra* note_212_ at 377. For detailed discussion of the Hong Kong common law requirements of finality, *see* Part ii of Section B of Chapter IV.

²⁵¹ The same problem exists in the Mainland-Macao Arrangement.

a. Invalid Choice of Court Agreement

The first ground is that “the choice of court agreement is invalid under the law of the place of the court chosen by the parties where the original trial was conducted, unless the chosen court has determined that the choice of court agreement is valid.”²⁵² A critical issue is which law should be applied to determine the validity of the agreement.²⁵³ The Arrangement provides two possibilities. The first is the law of the place of the chosen court.²⁵⁴ If a chosen court has decided that a choice of court agreement is valid under its law, its decision should have preclusive effect and bind any requested court. The reason is that the chosen court has the greatest expertise in its own law and its decision of the validity of the agreement under this law should be respected. However, a chosen court may issue a judgment without determining the validity of the choice of court agreement. For example, it may exert jurisdiction over the case on other jurisdictional grounds. In this scenario, the requested court must consider whether the agreement is valid under the law of the region where the chosen court is located.

The second possibility the Arrangement provides is that although the choice of court agreement is invalid under the law of the region where the chosen court is situated, the chosen court applies another law to decide the validity of the agreement. Under this law, the choice of court agreement is valid. This law can be the law of the region where the agreement is made or any other law.²⁵⁵ For example, two parties

²⁵² Art. 9 of the Mainland-Hong Kong Arrangement.

²⁵³ For a discussion of the importance of choice of law issues for a choice of court agreement in the US and the EU contexts, see Jason Webb Yackee, *Choice of Law Consideration in the Validity & Enforcement of International Forum Selection Agreements: Whose Law Applies?*, 9 UCLA J. INT'L L. & FOR. AFF. 43, 43 (2004).

²⁵⁴ Art. 9 of the Mainland-Hong Kong Arrangement.

²⁵⁵ See Yackee, *supra* note 253, at 63 (providing a list of laws that may apply to determine the validity of a choice of court clause).

concluded a choice of court agreement in Hong Kong but they choose a court in Mainland China to resolve their disputes. The choice of court agreement may be valid under Hong Kong law but invalid under Mainland law.²⁵⁶ Suppose that the Mainland court determines the agreement is valid by invoking Hong Kong law, will this judgment be subject to the first ground for refusing JRE? The answer should be negative. *Favor validitatis* should be applied here: if the Hong Kong law should be the applicable law according to Mainland conflict of laws, the chosen court should uphold the validity of the choice of court agreement. This suggestion is based on the purpose of the Mainland-Hong Kong Arrangement, which is to enhance JRE between the two regions. Given this purpose, F1's decision regarding the validity of a choice of court agreement should have preclusive effect in F2.

b. Wholly Satisfied Judgment

The second ground for refusal is that JRE will be denied if a judgment has been wholly satisfied.²⁵⁷ This is based on a common view that a creditor should not be doubly compensated.

c. Exclusive Jurisdiction

The third ground for refusal is the requested court has exclusive jurisdiction over the case according to its law.²⁵⁸ If a case involves real estate located in Hong Kong or an intellectual property right granted by Hong Kong, Hong Kong courts have

²⁵⁶ For example, unlike Hong Kong, in Mainland China parties can choose non-Mainland courts only when the dispute involves foreign or sister-region elements. *See* art. 242 of the Mainland CPL.

²⁵⁷ If a judgment has been partially satisfied in one region, only the unsatisfied part of the judgment can be enforced in the other region. *See* art. 5 and art. 9 of the Mainland-Hong Kong Arrangement. *See* also para 10 of Mainland Judgments (Reciprocal Enforcement) Ordinance.

²⁵⁸ Art. 9 of the Mainland-Hong Kong Arrangement

exclusive jurisdiction over the case.²⁵⁹ Comparatively, Mainland law grants its courts a much broader scope of exclusive jurisdiction. For example, a People's Court should have exclusive jurisdiction over cases where a lawsuit brought on a dispute over real estate, harbour operations, succession provided that a decedent's domicile or major estate is located in the Mainland, or cooperative exploration and development of natural resources in the Mainland.²⁶⁰ These grounds for exclusive jurisdiction are reasonable. However, Mainland law also requires that lawsuits brought on disputes arising from the performance of contracts for Chinese-foreign (including Mainland-Hong Kong or Mainland-Macao) equity or contractual joint ventures in Mainland China shall fall under the exclusive jurisdiction of People's Courts.²⁶¹ This provision aims to provide a forum for Chinese parties who establish joint ventures with foreigners. It should not be applicable to parties from Hong Kong or Macao after these two regions have become parts of China. Excessive use of exclusive jurisdiction will severely undermine choice of court agreements and thus interregional transactions. It is a shortcoming of the Arrangement that this ground of exclusive jurisdiction is not excluded.

Sometimes, in order to avoid the far-reaching exclusive jurisdiction of Mainland courts, parties tend to sue in Hong Kong courts. However, judgments rendered by Hong Kong courts that infringes Mainland exclusive jurisdiction cannot be recognized or enforced in Mainland China under the Arrangement. Therefore, special attention should be paid to exclusive jurisdiction of each region, when parties want a court to recognize or enforce a sister-region judgment.

²⁵⁹ For a detailed discussion of *lex situs* rule in Hong Kong, see Johnston, *supra* n , 297-318.

²⁶⁰ Art. 34 and art. 246 of the Mainland CPL. Notably, if parties agree to arbitrate their dispute, art. 34 and art. 246 do not apply according to Art. 305 of Opinions of Application of the CPL.

²⁶¹ Art. 246 of the Mainland CPL. A choice of court agreement is invalid if it is inconsistent with exclusive jurisdiction of Mainland courts, see Art. 305 of Opinions of the Mainland CPL.

d. Unfair Procedure

The fourth ground for refusal concerns procedural fairness.²⁶² It includes cases where the party who receives an unfavourable default judgment, had not been summoned according to the law of the judgment-rendering region, or the party had been summoned according to the law but had not been given the time to defend the proceedings as specified by the law.²⁶³ Compared with the relevant Hong Kong law,²⁶⁴ the Mainland-Hong Kong Arrangement shows more respect to the law of the judgment-rendering region. Other than Hong Kong FJREO and common law, the Arrangement requires the requested court to apply the law of the judgment-rendering region to determine this issue. This new rule can spur reciprocity of co-operation and improve mutual trust between Mainland China and Hong Kong. Additionally, this "Arrangement permits the People's Court of the mainland to effect service by way of public notice [announcement] in accordance with the law and relevant provisions of mainland China and exempts such service practice from the grounds to deny recognition and enforcement of the judgments rendered on that basis."²⁶⁵

Compared with relevant Hong Kong law, this provision is more comprehensive. Hong Kong FJREO only indicates one circumstance of procedural deficiency: a party has been summoned but not been given a reasonable time to defend a case. The Mainland-Hong Kong Arrangement adds a second circumstance: a party has not been summoned in the original trial. This addition is necessary because procedural deficiencies are not limited to insufficient time to defend a case.

²⁶² Art. 9 of the Mainland-Hong Kong Arrangement.

²⁶³ *Id.*

²⁶⁴ Hong Kong law decides whether the judgment-rendering proceedings are fair according to Hong Kong views of substantial justice, *see supra* ft 96 and accompanying texts.

²⁶⁵ Art. 9.4 of the Mainland-Hong Kong Arrangement. Zhang, *supra* note ___ at 18. Xianchu Zhang, *Dui "Neidi Hong Kong Xianfu Renke he Zhixing Danshiren Xieyi Guanxia de Minshanshi Anjian Panjue de Anpai" de Chubu Pinjia [Preliminary Comments on the Mainland-Hong Kong Mutual Recognition and Enforcement Judgment Arrangement]*, 8 FAZHI LUNTAN [LEGAL SYSTEM FORUM] 51, 70 (2006).

Moreover, a practical issue related to this ground of refusal is the due process in the service of judicial documents. Interregional service between Mainland China and Hong Kong can be conducted either under regional law or according to interregional law. The latter refers to the Mainland-Hong Kong Service Arrangement.²⁶⁶ Two factors explain why the Mainland-Hong Kong Arrangement requires a requested court to examine due service according to the law of the judgment-rendering region, instead of the Mainland-Hong Kong Service Arrangement. First, the Mainland-Hong Kong Service Arrangement is restricted by its narrow scope.²⁶⁷ For example, it does not include statements of counter claim, defense, or orders of payment. Its implementation is also unsatisfactory.²⁶⁸ Second, the Service Arrangement states that it is only an optional channel for service.²⁶⁹ The two regions can still conduct service according to their regional laws. However, conducting service according to the Mainland-Hong Kong Service Arrangement is a good way to avoid the losing party denying JRE on grounds of undue service. Arguably, the two regions should expand the scope of the Service Arrangement and make it a priority channel for service.²⁷⁰ Only when a judicial document failing to be served under the Service Arrangement, can it be served under regional law.

Additionally, the Mainland-Hong Kong Arrangement especially states that service by public announcement according to the law of the judgment-rendering

²⁶⁶ The Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and Hong Kong Courts (hereinafter “Mainland-Hong Kong Service Arrangement”) was concluded in 1998. For a brief comment of this Arrangement, see Weidong Zhu, *The Relationships between China and Its Special Administrative Regions and Their Regulation*, 4 J CAMBR. STUD. 111, 117 (2009).

²⁶⁷ Renshan Liu, *Recent Judicial Cooperation in Civil and Commercial Matters Between Mainland China and Taiwan, The Hong Kong S.A.R. and the Macao S.A.R.*, 11 YEARBOOK OF PRIVATE INTERNATIONAL LAW 235, 250 (2009).

²⁶⁸ Zhang and Smart, *supra* note 11.

²⁶⁹ Art. 1 of the Mainland-Hong Kong Service Arrangement provides that the courts of the two sides *may* entrust each other to provide service of civil and commercial matters (emphasis added). See art. 6 of the Several Provisions of the Supreme People’s Court on the Issues concerning the Service of Judicial Documents of Hong Kong- and Macao-related Civil and Commercial Cases, adopted at the 1463rd meeting of the Judicial Committee of the Supreme People’s Court on February 16, 2009, effective on March 16, 2009. Art. 84 of the Mainland CPL. Art. 88 of the Opinions of the Mainland CPL.

²⁷⁰ Zhang, *supra* note 151_ at 19.

region does not violate the requirement of fair procedure under the Arrangement.²⁷¹ Thus, the requested court cannot use the public policy exception to reject JRE merely because the losing party was served by public announcement.²⁷² This provision especially addressed Mainland interests, because public announcement is a way of service under its law in three strict conditions. First, the recipient does not domicile or reside in Mainland China or his or her whereabouts are unknown.²⁷³ Second, courts can use public announcement only when all other means of service fail.²⁷⁴ Third, the public announcement shall appear in publicly available press both in Mainland China and the region where the recipient is domiciled. This is to avoid cases like *Zhu Yanmin v Wenwei Publishing Co* where the public announcement was made in Mainland China but the defendant was domiciled in Hong Kong.²⁷⁵ As a conclusion, Mainland courts can use public announcement to serve a defendant only in very restrictive circumstances. Therefore, public announcement is not more far-reaching than most other cases of service as it appears. This may explain why Hong Kong accepts this way of service in the Arrangement. Moreover, Hong Kong's acceptance may be a trade-off for Mainland's agreement to restrict people's courts from reopening their own judgments.

Improperly conducted public announcement will infringe a party's right to due process. Advisably, Mainland courts should strictly observe the three conditions in practice. Moreover, Mainland law should be more precise about how to conduct

²⁷¹ Art. 9.4 of the Mainland-Hong Kong Arrangement.

²⁷² Zhang, *supra* note_151_ at 18.

²⁷³ Art. 1 of the Several Provisions of the Supreme People's Court on the Issues concerning the Service of Judicial Documents of Hong Kong- and Macao-related Civil and Commercial Cases. Art. 84 of the Mainland CPL. Art. 88 of the Opinions of the Mainland CPL.

²⁷⁴ Art. 9 of the Several Provisions of the Supreme People's Court on the Issues concerning the Service of Judicial Documents of Hong Kong- and Macao-related Civil and Commercial Cases.

²⁷⁵ *Zhu Yanmin v Wenwei Publishing Co* was reported in Tao Kaiyuan (ed), *Guangdong Zhishi Chanquan Anli Jingxuan* (Selected Cases of Intellectual Property Cases in Guangdong), Vol 2 (Beijing: Law Press China, 2004), pp 57-63. Zhang and Smart, *supra* note_11_ at 574. In this case, in mid-November 2000, the first-instance Mainland court served the complaint to the defendant who was domiciled in Hong Kong by express mail first and then a public announcement published in Mainland China. In December, the court conducted hearings and rendered a default judgment against the defendant. The defendant appealed. The appellate court noted that it was improper to publish a public notice in Mainland China as a way to serving a defendant domiciled in Hong Kong.

public announcement involving recipients domiciling in Hong Kong, such as how many times that the announcement should be made and which Hong Kong media should be chosen. The two regions should exchange information in this regard in the future negotiation.

e. Fraud

If a judgment was obtained by fraud, JRE will be denied under the Arrangement.

²⁷⁶ Since the return of Hong Kong, the issue of finality has remained as the primary barrier to recognize or enforce a Mainland judgment in Hong Kong. Hong Kong courts rule that before settling the issue of finality it is unnecessary to decide whether Mainland judgments are tainted by fraud.²⁷⁷ So, thus far judgment creditors seldom invoke fraud to defend JRE of Mainland judgments in Hong Kong. However, after the conclusion of the Mainland-Hong Kong Arrangement, if a Mainland judgment is covered by the Arrangement, the issue of finality will not interfere with its recognition and enforcement in Hong Kong. In the Hong Kong business community, there are deep worries about exposing Hong Kong businessmen to judgments obtained through fraudulent means in Mainland China.²⁷⁸ Therefore, “fraud” will possibly become most frequently used ground to deny JRE under the Arrangement.

Fraud is not an independent heading in Mainland JRE laws.²⁷⁹ Making fraud an

²⁷⁶ It should be noted that there is no fraud exception in the Mainland-Macao Arrangement.

²⁷⁷ *Wuhan Zhong Shuo Hong Real Estate Company Limited*, HCA 14325/1998. Yeung J indicated that “On the present pleadings, even if the issues relating to the conclusiveness and finality or otherwise of the judgment in question were to be decided in favour of the Plaintiff, the court still have to resolve the further issues of whether the judgment was obtained by fraud and whether the granting of the judgment was against natural justice and/or contrary to public policy.”

²⁷⁸ Zhang and Smart, *supra* note_11_ at 578. But other scholarship points out that Mainland government pays more and more attention to rule of law, and encourages Hong Kong businessmen to change their negative stereotypes about Mainland legal system. See Phyllis K. Y. Kwong, *Hong Kong Businessmen’s Development in the Mainland: Legal Conflicts Need to Be Dealt With*, XIAO BAO CAI JING YUE KAN [HONG KONG ECONOMIC JOURNAL MONTHLY] 23, 23 (June 2005).

²⁷⁹ See Zhang, *supra* note_20_ at 88. Kong & Hu, *supra* note 22 at 432.

independent ground for refusing JRE in the Arrangement shows Mainland deference to Hong Kong law. The Mainland Contract Law²⁸⁰ and the General Principle of Civil Law²⁸¹ define “fraud,” but do these definitions apply to JRE? The answer is “no,” because these two laws and the JRE law are in different contexts. The former is substantive laws and the latter is conflict of laws. Moreover, their definitions of fraud do not cover fraudulent acts by the court so it is much narrower than the definition of fraud in Hong Kong law. Therefore, the understandings of fraud in Mainland China and Hong Kong²⁸² may be different.

Arguably, the two regions should design a mutually agreed autonomous definition of fraud; otherwise, the general mistrust in the Mainland judiciary and different definitions of fraud possibly will subject JRE to uncertainty.

f. *Res judicata*

The sixth ground for denying JRE is *res judicata*. JRE will be refused if a judgment on the same cause of action has been rendered and enforced in the requested region, or a court of this region has already recognized or enforced a judgment or an arbitration award on the same cause of action rendered by a court of a foreign country or an arbitration tribunal.²⁸³

The *res judicata* rule under the Arrangement creates an exception to Article 306 of the Opinions on Application of the Mainland CPL. According to this Article, in case that parallel litigations occur in Mainland China and Hong Kong, if the Hong Kong court renders a judgment earlier than the people’s court and the two judgments

²⁸⁰ Art. 68 of Opinions on Application of the General Principle of Civil Law of the PRC promulgated by the Supreme People's Court in 1988.

²⁸¹ *Id.*, “fraudulent act” is defined as “a party purposely conveys any false information to the other party, or purposely disguises any fact so as to induce the other party into making any false declaration of will.”

²⁸² For Hong Kong understanding of fraud, *see supra* fn 115 and accompanying text.

²⁸³ Art. 9 of the Mainland-Hong Kong Arrangement.

are inconsistent, the people's court shall refuse to recognize and enforce the Hong Kong judgment. The Mainland-Hong Kong Arrangement prevails in case that it conflicts with the Opinions.²⁸⁴ Thus in the above case, if the Hong Kong judgment is covered by the Arrangement, and if the Mainland judgment has not been executed before the application for recognition and enforcement of the Hong Kong judgment is submitted to a people's court, the people's court should recognize and enforce the Hong Kong judgment instead of the Mainland judgment.

Notably, the *res judicata* rule in the Hong Kong implementing ordinance reads differently from the Mainland-Hong Kong Arrangement. The difference concentrates on whether a requested court can deny JRE because a prior judgment has been rendered in the requested region. Under the Arrangement, a requested court can deny JRE because a prior judgment has been *rendered and enforced* in the requested region. However, the Hong Kong implementing ordinance states that a requested court can deny JRE because a prior judgment has been *rendered* in the requested region.²⁸⁵ Arguably, the rule adopted by the Hong Kong implementing ordinance is more consistent with judicial practices in reality: a requested court generally will not recognize and enforce a sister-region judgment when it has rendered an inconsistent judgment between the same parties, although it has not enforced its own judgment.

The *res judicata* rule in the Arrangement expands the *res judicata* rule under the Hong Kong FJREO.²⁸⁶ The requirement of “to the date of the judgment in the original court” under the Hong Kong FJREO will be waived in the case involving the recognition and enforcement of a Mainland judgment under the Arrangement. However, comparatively speaking the court that recognizes or enforces a judgment

²⁸⁴ See the third sentence of art. 306, which states that an international treaty ratified by Mainland China shall prevail if it conflicts with this Article.

²⁸⁵ Mainland Judgments (Reciprocal Enforcement) Ordinance, Ord. No. 9 of 2008, para 18 (1)(h) and (i) state that “a judgment on the same cause of action *between the parties to the judgment* has been given by a court in Hong Kong...” (emphasis added)

²⁸⁶ For the *res judicata* rule in the Hong Kong FJREO, see *supra* Part ii of Section A of Chapter III.

has less discretion under the Mainland-Hong Kong Arrangement than under the Hong Kong Ordinance.²⁸⁷

g. Public Policy Exception

The last ground for refusal is the public policy exception.²⁸⁸ JRE shall be refused if the people's court of Mainland China considers that the enforcement of a Hong Kong judgment is contrary to Mainland's social and public interests, or if the court of Hong Kong considers that the enforcement of a Mainland judgment is contrary to Hong Kong public policies.²⁸⁹

Regarding recognition and enforcement of foreign judgments, Article 266 of the Mainland CPL provides that if a foreign judgment is against *sovereignty, security or social and public interests*, it should not be recognised and enforced.²⁹⁰ Both Arrangements indicates that if a sister-region judgment is against Mainland *social and public interests*, JRE should be refused.²⁹¹ Notably, this wording departs from Article 266.²⁹² The reason is that since the three regions are within one country, they should not have any disputes over sovereignty and security.²⁹³ Therefore, "sovereignty and security" are properly out.

The "social and public interests" in the Mainland law is equivalent to the

²⁸⁷ If the requirements of the Hong Kong FJREO, § 6(1)(b) are satisfied, "the registration of the judgment...may be set aside." However, the preamble of the Art. 9 of the Mainland-Hong Kong Arrangement stipulates that "if a debtor under the original judgment adduces evidence to show any of the following situations, the court dealing with the application *shall*, upon having examined such evidence and found any of the said situations proved, refuse to recognize and enforce the judgment." That is to say if requirements of Art 9.6 of the Mainland-Hong Kong Arrangement are met, the registration of the judgment must be set aside.

²⁸⁸ Art. 9 of the Mainland-Hong Kong Arrangement.

²⁸⁹ *Id.*

²⁹⁰ Art. 266 of the Mainland CPL. For detailed discussion, *see supra* Part i of Section A of Chapter III.

²⁹¹ Art. 9 of the Mainland-Hong Kong Arrangement and art. 10 of the Mainland-Macao Arrangement.

²⁹² But the wording of the Arrangement is consistent with art. 258 of the CPL, which provides that recognition and enforcement of foreign arbitration awards should be refused if this award is against social and public interests.

²⁹³ The defense of Hong Kong and Macao is Mainland's responsibility. These two regions take charge of their own local security issues. For details, *see* Part ii of Section D of Chapter I.

“public policy” in Hong Kong law,²⁹⁴ although their contents may be different. In the JRE context, judgments involving punitive damages deserve special attention. Mainland courts award damages generally for compensatory purposes.²⁹⁵ Punitive damages are permitted in cases that business operators defraud consumers or knowingly manufacture or sell defective products to consumers.²⁹⁶ Some authorities suggest that Mainland judgments on punitive damages would possibly be refused in Hong Kong on the grounds of the public policy exception.²⁹⁷

4. Assessment and Conclusion

The most significant contribution of the Mainland-Hong Kong Arrangement is that: it solves the finality dispute between the two regions, it requires the requested court to determine the jurisdiction and procedure of a sister-region judgment according to the law of the judgment-rendering region, and it eliminates the requirement of reciprocity. However, the narrow scope is the serious shortcoming of the Arrangement. It improperly excludes non-commercial or non-contractual disputes and judgments without choice of court agreements. Judgments uncovered by the

²⁹⁴ Nansheng Sun, *Lun Yiguo Lianzhi Xia Quji Shifa Zhong de Gonggong Zhixu Baoliu [An Analysis of Public Policy Exception in Interregional Conflict of Laws under the Policy of "One Country, Two Systems"]*, 41 HUADONG ZHENGFA XUEYUAN XUEBAO [JOURNAL OF EAST CHINA POLITICAL AND LAW INSTITUTE] 73, 73 (2005).

²⁹⁵ See art. 113 of the Mainland Contract Law.

²⁹⁶ Art. 47 of the Mainland Tort Law (adopted at the 12th session of the Standing Committee of the Eleventh National People's Congress on Dec 26, 2009 and effective on July 1, 2010) (indicating that where a manufacturer or seller knowing any defect of a product continues to manufacture or sell the product and the defect causes a death or any serious damage to the health of another person, the victim shall be entitled to require the corresponding punitive compensation.) Art. 49 of Mainland Law on Protection of Consumer Rights and Interests (Adopted at the Fourth Meeting of the Standing Committee of the Eighth National People's Congress on Oct. 31, 1993 and effective on Jan. 1, 1994) (indicating that business operators engaged in fraudulent activities in supplying commodities or services shall, on the demand of the consumers, increase the compensations for victims' losses; the increased amount of the compensations shall be two times the costs that the consumers paid for the commodities purchased or services received.)

²⁹⁷ See *Nanus Asia Company Incorporated v Standard Chartered Bank* [1990] 1 HKLR 396, *Huntington v. Attrill* [1893] AC 150 (PC). See also *Lewis v. Eliades*, (2003) EWHC 368 (QB), (2003) 1 All ER (Comm) 850, on appeal (2003) EWCA Civ 1758, (2004) 1 All ER 1196. Recognition and enforcement of Mainland judgments of punitive damages may also be rejected by Hong Kong courts based on the Hong Kong Protection of Trading Interests Ordinance (Cap 417, §7(3) and 8), which forbids multiple damages.
http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/78F350B74A272F51482575EF00AFEB7?OpenDocument&bt=0 (last accessed Feb 10, 2010).

Arrangement still cannot be recognized and enforced. Moreover, many aspects of the Arrangement need to be clarified. It is unclear how to define fraud and how to address procedure deficiencies uncovered by the fair procedure defense. As a conclusion, the Arrangement is a significant achievement but it cannot completely solve all the interregional JRE difficulties.

ii. The Mainland-Macao Arrangement

The Mainland-Macao Arrangement was concluded on February 28th, 2006 and became effective on April 1st in the same year.²⁹⁸ It regulates JRE in civil and commercial cases between Mainland China and Macao. This section will discuss the scope of the Arrangement (Part One), requirements for JRE (Part Two), and grounds for refusing JRE (Part Three). In each part, it will extensively compare the Mainland-Macao Arrangement with the Mainland-Hong Kong Arrangement, as well as regional laws and international JRE treaties ratified by Mainland China.

1. Scope of the Arrangement

a. Judgments in Civil and Commercial Cases

This Arrangement has a very broad scope. It covers judgments rendered without a choice of court agreement. It includes not only the decisions of civil or commercial contractual disputes covered by the Mainland-Hong Kong Arrangement, but also decisions rendered in civil labour disputes and civil compensations in criminal

²⁹⁸ For Mainland implementing legislation, *see* Interpretation No. 2 [2006] of the Supreme People's Court Adopted at the 1378th meeting of the Judicial Committee of the Supreme People's Court on February 13, 2006. For Macao implementing legislation, *see* The No. 12/2006 Announcement of the Executive Chief of Macao on March 14, 2006.

proceedings.²⁹⁹ This broad scope is more JRE-friendly than international treaties that Mainland China concluded. For example, although those treaties generally apply to civil and commercial cases including civil compensations collateral to criminal proceedings,³⁰⁰ regarding labour disputes, some treaties explicitly include it³⁰¹ but some are silent.³⁰² Therefore, as a contrast, the scope of the Mainland-Hong Kong Arrangement is too narrow even compared with JRE treaties ratified by Mainland China.

There are three reasons for why the negotiation of the Mainland-Macao Arrangement went faster than that of the Mainland-Hong Kong Arrangement and the scope of the former is broader than the latter.³⁰³ First, Mainland China and Macao both have strong desires to establish judicial assistance, but as a contrary, Hong Kong has serious concerns regarding Mainland judicial system so hesitates to conclude a broad scope Arrangement.³⁰⁴ Moreover, Macao and Mainland China both belong to the civil law family so share relatively similar views on many basic issues.³⁰⁵ Additionally, Macao is much smaller than Hong Kong in geography and less significantly involved in interregional commerce than Hong Kong. Therefore, compared with Hong Kong, fewer cases require JRE in Macao.³⁰⁶ Consequently, Macao has fewer stakes in JRE issues so more easily to reach a broad scope JRE

²⁹⁹ Art. 1 of the Mainland-Macao Arrangement. This Arrangement does not apply to judgments obtained in administrative cases.

³⁰⁰ Eg. art. 19 the Treaty for Judicial Assistance in Civil and Commercial Affairs on May 4, 1987 between Mainland China and France, *supra* note 23_. (hereinafter “Mainland-France Treaty”).

³⁰¹ Eg. art. 1 THE TREATY FOR JUDICIAL ASSISTANCE IN CIVIL AFFAIRS ON JUNE 2, 1993 BETWEEN MAINLAND CHINA AND BULGARIA, <http://www.people.com.cn/zixun/flfgk/item/dwjf/falv/10/10-4.htm> (last visited Feb 4, 2010). (hereinafter “Mainland-Bulgaria Treaty”).

³⁰² Eg. art. 19 of the Treaty for Judicial Assistance in Civil and Commercial Affairs on May 4, 1987 between Mainland China and France, *supra* note 23_.

³⁰³ Zhihong Yu, *Di Er Ji Nei Di, Hong Kong, Macao Qu Ji Fa Lv Wen Ti Yan Tao Hui Zong Su [Report of The Second Conference Regarding Interregional Conflict of Laws among Mainland China, Hong Kong, and Macao]*, 147 FA XU PIN LUN [LAW REVIEW] 156, 156 (2008).

³⁰⁴ *Id.* at 157. Zhihong Yu, *Nei Di Yu Macao, Hong Kong Xian Fu Ren Ke he Zhi Xing Min Shang Shi Pan Jue An Pai de Bi Jiao ji Ping Xi [Comparison and Analysis of Mainland China, Macao, and Hong Kong Mutual Recognition and Enforcement of Civil and Commercial Judgments]*, 5 TAI PING YAN XUE BAO [PACIFIC JOURNAL] 6, 11 (2009).

³⁰⁵ Yu, *supra* note 303 at 157.

³⁰⁶ Yu, *supra* note 304 at 11.

arrangement with Mainland China.

b. Monetary and Non-monetary Judgments

Unlike the Mainland-Hong Kong Arrangement, the Mainland-Macao Arrangement covers both monetary and non-monetary judgments.³⁰⁷ The Mainland-Hong Kong Arrangement does not cover the recognition procedure.³⁰⁸ By contrast, the Mainland-Macao Arrangement provides recognition rules for sister-region non-monetary judgments or monetary judgments that no enforcement is requested.³⁰⁹ After recognition, a sister-region judgment has the same legal effect as a judgment issued by the requested court and can be enforced according to the law of the requested region.³¹⁰ Similarly, in Mainland law, many international JRE treaties that Mainland concluded also apply to the enforcement and recognition of monetary and non-monetary judgments.³¹¹ Therefore, again, the Mainland-Hong Kong Arrangement is too narrow.

c. Types of Judicial Awards

The term, “judicial awards” in this Arrangement include judgments, rulings, decisions, mediation agreements and orders for payment in Mainland China; decrees, judgments, mediation agreements, decisions or instructions of judges in Macao.³¹²

³⁰⁷ Art. 3 of the Mainland-Macao Arrangement.

³⁰⁸ Yu, *supra* note_6_ at 10.

³⁰⁹ *Id.*

³¹⁰ Art. 13 of the Mainland-Macao Arrangement.

³¹¹ Art. 19 of the Mainland-France Treaty. *See* art. 17 of the Treaty of Judicial Assistance in Civil and Criminal Affairs between People’s Republic of China and Mongolia, art. 10 of the Treaty of Judicial Assistance in Civil and Commercial Affairs between People’s Republic of China and the Kingdom of Morocco, and art. 21 of the Treaty of Judicial Assistance in Civil and Commercial Affairs between People’s Republic of China and Romania.

³¹² Art. 2 of the Mainland-Macao Arrangement.

When discussing the Mainland-Macao Arrangement, without special indication, the term, “judgment,” is used broadly as an equivalent to “judicial awards.” Compared with JRE treaties concluded between Mainland China and a foreign country, the definition of “judicial awards” in the Mainland-Macao Arrangement is more precise. This is because most of the JRE treaties Mainland China concluded use “judicial award [Cai jue]” without definition.³¹³

Moreover, unlike the Mainland-Hong Kong Arrangement, the Mainland-Macao Arrangement covers Mainland decisions. Decisions are made for specific issues during a proceeding in order to remove the obstacles to the proceeding and ensure its normal progress. For example, courts issue decisions to determine a party’s recusal application against a judge or a court clerk,³¹⁴ to impose fines and detentions as compulsory measures against obstruction of civil actions,³¹⁵ to grant or decline extension of a time limit upon a party’s application,³¹⁶ and to decide whether to postpone, reduce, or waive the court costs for a party.³¹⁷

The Mainland-Macao Arrangement also covers all the judicial awards that a Macao judge may render in a civil case. Macao judges can render decrees, judgments, mediation rulings, decisions, or instructions. A court will render a decree of facts after deciding the facts of a case.³¹⁸ After deciding legal issues,³¹⁹ the court will render a judgment in the first-instance trial³²⁰ and a decree if the trial is at the second instance.³²¹ Both decrees and judgments are for the substance of a case. Judges can mediate a dispute before trial if both parties agree to.³²² Instructions can be issued for

³¹³ *Eg.* art. 19 of the Mainland-France Treaty.

³¹⁴ Art. 47 of the Mainland CPL.

³¹⁵ *Id.* art. 105.

³¹⁶ *Id.* art. 76.

³¹⁷ *Id.* art. 107.

³¹⁸ Art. 556 of the Macao Civil Procedure Code.

³¹⁹ *Id.* arts. 560 and 561.

³²⁰ *Id.* art. 562.

³²¹ *Id.* art. 631.

³²² *Id.* art. 428.

either procedure or substantive issues.³²³ For example, a judge can issue an instruction to dismiss a party's motion for suspending a trial or to start to hear substantive issues.³²⁴ A judge also can use an instruction to accept an appeal³²⁵ and to impose a fine or a money guarantee.³²⁶ Decisions are made for procedural issues such as requiring appraisal of certain subject matter,³²⁷ deciding the number of witnesses,³²⁸ and appointing experts.³²⁹

d. Levels of Courts

Unlike the Mainland-Hong Kong Arrangement, the Mainland-Macao Arrangement covers judgments rendered by all levels of courts in Mainland China and Macao.

2. Requirements for JRE

Different from the Mainland-Hong Kong Arrangement, the Mainland-Macao Arrangement does not use the term "finality." Instead, it indicates any effective judgment in the judgment-rendering court is entitled to JRE under the Arrangement.³³⁰ In other words, JRE shall be refused, if the judgment has not become effective or is ruled not to come into force due to a retrial according to the law of the judgment-rendering region.³³¹ Using the term "effective" is also in line with some treaties

³²³ *Id.* art. 574.2.

³²⁴ *Id.* art. 429.

³²⁵ *Id.* art. 592.

³²⁶ *See id.* art. 607.

³²⁷ *Id.* arts. 499, 500, and 501.

³²⁸ *Id.* art. 529.

³²⁹ *Id.* art. 552.

³³⁰ *Id.* art. 11.5.

³³¹ *Id.*

concluded between Mainland China and a foreign country.³³² Some scholars point out that the use of "effective" instead of "final" or "definite" in the Arrangement is deliberate.³³³ The reason is that compared with "effective," "final" and "definite" are ambiguous.³³⁴ Any civil and commercial judgments are enforceable as long as it is legally effective.³³⁵ For example, before a retrial against a judgment is commenced under the Mainland procedure for trial supervision, this judgment is still legally effective and so should be recognized and enforced in the other region.³³⁶ Therefore, the term "effective" can facilitate Macao courts to recognize and enforce Mainland judgments.³³⁷

Moreover, the significance of the Arrangement is that it requires the requested court to apply the law of the judgment-rendering region to define "effective." This approach, like the autonomous terminology of "final" adopted by the Mainland-Hong Kong Arrangement, can help avoid controversies regarding what judgments can benefit from the Arrangements.

Like the Mainland-Hong Kong Arrangement, the Mainland-Macao Arrangement does not have the "on the merits" requirement because it covers rulings, decisions, and judge's instructions on procedural issues.

3. Grounds for Refusing JRE

Under the Arrangement, a judgment debtor may raise any of the following four

³³² Zhang, *supra* note_20_ at 88. Kong & Hu, *supra* note 22 at 432. For examples, *see* art. 22.3 of the Treaty for Judicial Assistance in Civil Affairs on May 2, 1992 between Mainland China and Spain, *supra* note_20_; art. 21 of the Treaty for Judicial Assistance in Civil Affairs on June 2, 1993 between Mainland China and Bulgaria, *supra* note_301_. (these treaties require that judgments shall be legally effective according to the law of the judgment-rendering country).

³³³ Yu, *supra* note_303_ at 158.

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.*

grounds for refusing JRE: exclusive jurisdiction of the requested court, *res judicata*, unfair procedure, and the public policy exception.³³⁸ Arguably, this list should be treated exclusive. If a requested court has denied the JRE on the first, third, and fourth grounds, a judgment creditor cannot request JRE again, and instead she can re-litigate the substance of the case in the requested court as long as it has jurisdiction.³³⁹ However, if a requested court accepts a JRE application or has recognized and enforced the judgment, it shall not accept a lawsuit on the substance of the same case.³⁴⁰ On the contrary, the Mainland-Hong Kong Arrangement improperly remains silent regarding the question whether a judgment creditor can request JRE again after his or her application has been rejected or whether he or she can litigate the substance of the case in the requested court.

a. Exclusive Jurisdiction

Like the Mainland-Hong Kong Arrangement and the Macao Civil Procedure Code,³⁴¹ the Mainland-Macao Arrangement indicates that if a judgment-rendering court infringes the exclusive jurisdiction of a requested court, JRE must be denied.³⁴² A requested court should be allowed to raise the defence of exclusive jurisdiction on its own motion.

However, refusal of JRE of judgments rendered without jurisdiction is not regulated explicitly in the Arrangement. Unlike the Mainland-Macao Arrangement, JRE treaties that Mainland China concluded generally states that JRE must be denied when the judgment-rendering court is lack of jurisdiction according to relevant

³³⁸ Art. 11 of the Mainland-Macao Arrangement.

³³⁹ *Id.* art. 17.

³⁴⁰ *Id.* art. 16.

³⁴¹ *See* art. 9 of the Mainland-Hong Kong Arrangement and art. 1200 (c) of the Macao Civil Procedure Code.

³⁴² *Id.* art. 11 (1).

provisions of international treaties or the law of the requested court.³⁴³ The benefit of this treaty provision is its clarity because it includes both no jurisdiction and violating exclusive jurisdiction. Therefore, the Arrangement should also explicitly regulate judgments rendered without jurisdiction.

b. *Res judicata*

The second ground for refusal is *res judicata*. The Mainland-Macao Arrangement provides two *res judicata* rules. First, JRE should be refused, if before brought in the judgment-rendering court; the same case had been brought in the requested court that had proper jurisdiction.³⁴⁴ Although this rule seems like a *lis alibi pendens* rule, essentially it functions as a *res judicata* rule. The reason is that, different from typical *lis alibi pendens* rules that regulate direct jurisdiction,³⁴⁵ this rule uses denying JRE to discourage parallel litigation. In other words, it does not impact on the regional direct jurisdiction rules. This approach corresponds to regional laws in Mainland China and Macao, and also reconciles the rapid Mainland civil procedure and its comparatively slow Macao counterpart.

Both Mainland and Macao have long recognized that concluding an interregional or international arrangement on direct jurisdiction is hard,³⁴⁶ if not impossible, therefore, the field of JRE is a more feasible place to address multiple judgments from parallel litigations. For example, many bilateral JRE treaties that

³⁴³ Zhang, *supra* note 20 at 88. Qingjiang Kong & Minfei Hu, *The Chinese Practice of Private International Law*, 3 MELB. J. INT'L L. 414, 432 (2002). For examples, *see* Art. 21.1 of the Treaty for Judicial Assistance in Civil Affairs on June 2, 1993 between Mainland China and Bulgaria, *supra* note_301_; art. 22.1 of the Treaty for Judicial Assistance in Civil and Commercial Affairs on May 4, 1987 between Mainland China and France, *supra* note_23_; Art. 21 of the Treaty for Judicial Assistance in Civil Affairs on May 2, 1992 between Mainland China and Spain, *supra* note_22_.

³⁴⁴ *Id.*, art. 11.2.

³⁴⁵ *Eg.*, arts. 27 and 28 of the Brussels I Regulation.

³⁴⁶ Zhang, *supra* note_151_ at 33.

Mainland China ratified state that Mainland courts can deny JRE if the same case was in the middle of trial in a people's court³⁴⁷ and the trial had begun before the proceedings in the foreign court started.³⁴⁸ Macao Civil Procedure Code also states that if a non-local court took the case earlier than the Macau court on the same cause of action, it is possible that the judgment rendered by that court could be recognisable.³⁴⁹ Similarly, the Mainland-Macao Arrangement indicates that the judgment rendered in the action brought first prevails.

This rule also helps to reconcile the rapid Mainland civil procedure and its comparatively slow Macao counterpart. It can avoid an action, which is commenced late in time but leads to a judgment earlier, to create preclusive effects in the requested court. The Mainland civil procedure is well known for its rapidity:³⁵⁰ generally a first-instance court will issue a judgment within six months after it accepts a case,³⁵¹ and an appellate court will render a judgment within three months after the appeal commences.³⁵² Under the first *res judicata* rule, suppose that after a Macao court seizes a case, one of the parties conducts a forum shopping and brings a suit on the same cause of action in Mainland China. Under this *res judicata* rule, although the Mainland court makes a judgment earlier than the Macao court, the Mainland

³⁴⁷ *Eg.*, art. 17.4 of the Vietnam Treaty The Judicial Assistance Treaty in Civil and Criminal Cases on December 25, 1999 between the PRC and Vietnam, *supra* note 20_; art. 21.4 of The Judicial Assistance Treaty in Civil, Business, and Criminal Cases on May 31, 1995 Between the PRC and Egypt, *supra* note 20_; and arts. 9 and 10 of the Mainland Regulation for Recognizing Taiwan Judgments.

³⁴⁸ Zhang, *supra* note 20_ at 88, *eg.*, art. 25.1.5 of The Judicial Assistance Treaty in Civil, Business, and Criminal Cases on January 11, 1996 between the PRC and Cyprus, *supra* note 21_; art. 21.5 of The Judicial Assistance Treaty in Civil Cases on January 1, 1995 between the PRC and Italy, *supra* note 20_; art. 22.6 of The Treaty for Judicial Assistance in Civil Affairs on May 2, 1992 between Mainland China and Spain, *supra* note 20_; art. 21.6 of The Judicial Assistance Treaty in Civil and Commercial Cases on April 12, 2005 between the PRC and the United Arab Emirates, *supra* note 21_.

³⁴⁹ *Id.*, Art. 1200 (d). The English translation is cited from E-mail from Guangjian Tu, Assistant Professor of Law, University of Macao Faculty of Law, to Jie Huang (Jun 1, 2010, 11:50 PM CST) (on file with author). For details, see *supra* Part iii of Section A of Chapter III.

³⁵⁰ Johnston *supra* n 47 at 123 (stating that “Mainland legal system, which is well known for its rapidity compared to that of Hong Kong and other common law systems.”)

³⁵¹ Art. 135 of the Mainland CPL.

³⁵² *Id.*, art. 159. Judgments of 96.06% cases accepted by peoples' courts in Mainland China are rendered within the time limits under art. 135 and art. 159 of the Mainland CPL in 2008. This number is 98.41% in 2009. See 2008 Nian Zuigao Renmin Fayuan Gongzuo Baogao [2008 Supreme People's Court Working Report] and 2009 Nian Zuigao Renmin Fayuan Gongzuo Baogao [2009 Supreme People's Court Working Report] available at http://www.gov.cn/2008lh/content_926191.htm (last accessed April 15, 2010).

judgment is unrecognisable and unenforceable in Macao. However, the downside of this *res judicata* rule is that parties have to race to the court. Notably, the *res judicata* rule in the Mainland-Hong Kong Arrangement is different, which provides that JRE should be refused if a court of the region where JRE is sought has rendered a judgment on the same cause of action.³⁵³ Therefore, in the Mainland-Macao Arrangement Mainland China compromises the rapidity of its civil procedure. It is Mainland deference to Macao and help foster mutual trust and understanding.

The first *res judicata* rule also provides an exception to Article 306 of the Opinions on the Mainland CPL.³⁵⁴ In case of parallel litigation in Mainland China and Macao, if a judgment creditor applies to enforce the consequent Macao judgment in Mainland China, Mainland courts cannot refuse JRE either under Article 306 or the first *res judicata* rule in the Arrangement. One reason is that the Arrangement trumps the Article 306, so the latter is inapplicable. Second, the Mainland court accepted the action after the Macao judgment-rendering court had accepted the action so the first *res judicata* rule is also inapplicable. Therefore, the Mainland-Macao Arrangement creates an exception to Article 306 of the Opinions on the CPL. Compared with Article 306; the Arrangement adopts a more even-handed approach, so in this light it should be applauded.

Nevertheless, this rule is problematic because it uses *when the case is brought*, rather than *when a court is seized* as the point in time relevant to determine which resulting judgment should be respected.³⁵⁵ The reason is that a court may refuse to seize a case after a party brings an action. It would be more precise to indicate that “JRE should be refused, if a court of the region where JRE is sought has jurisdiction over the same cause of action and had been seized the action before the judgment-

³⁵³ Art. 9 of the Mainland-Hong Kong Arrangement. *See supra* n 53 and accompanying text.

³⁵⁴ For discussion of art. 306 of the Opinions on the Mainland CPL, *see* fn 30 and accompanying text.

³⁵⁵ Yu, *supra* note_303_ at 157-58.

rendering court seized the action.”³⁵⁶

The second *res judicata* rule is that JRE will be refused if the requested court has already recognized or enforced a judgment or an arbitration award on the same cause of action rendered by a court of a foreign country or by an arbitration tribunal.³⁵⁷ This is the same as the *res judicata* rule adopted in the Mainland-Hong Kong Arrangement and the Macao Civil Procedure Code.³⁵⁸

c. Unfair Procedure

The third ground for refusal is unfair procedure in the judgment-rendering court. The Mainland-Macao Arrangement provides two instances: the judgment debtor has not been lawfully summoned, or the party with diminished capacity is not provided with any attorney or guardian.³⁵⁹ The laws of the judgment-rendering region shall be applied to determine the existence of unfair procedure. These two circumstances can be found in many JRE treaties concluded by Mainland China.³⁶⁰ The first circumstance also exists in the Macao Civil Procedure Code³⁶¹ and the Mainland-Hong Kong Arrangement.³⁶² The second circumstance substantiates the relatively abstract principles of adversarial hearing and equality between parties under the Code.³⁶³ Therefore, the Arrangement makes the results of JRE more predictable so it is more JRE-friendly. In addition, the biggest difference between the two Arrangements is that the Mainland-Macao Arrangement allows any losing party to

³⁵⁶ See the *res judicata* rule in the proposed Multilateral JRE Arrangement in Chapter VI.

³⁵⁷ Art. 11.3 of the Mainland-Macao Arrangement.

³⁵⁸ See *supra* Part iii of Section A and Part I of Section B of Chapter III.

³⁵⁹ *Id.*, art. 11.4.

³⁶⁰ Zhang, *supra* note_20_ at 88. For examples, see art. 22.4 and 5 of the Treaty for Judicial Assistance in Civil Affairs on May 2, 1992 between Mainland China and Spain, *supra* note_20_.Kong and Hu, *supra* note_22_ at 432.

³⁶¹ Art. 1200(e) of the Macao Civil Procedure Code.

³⁶² Art.9 of the Mainland-Hong Kong Arrangement.

³⁶³ Art. 1203(f) of the Macao Civil Procedure Code. Yuan, *supra* note_154_ at 84.

raise the defence of unfair procedure but the Mainland-Hong Kong Arrangement restricts that to default losing parties. This is probably because the second circumstance listed by the Mainland-Macao Arrangement does not address default parties.

Nevertheless, neither of the two Arrangements lists all instances of possible unfair procedure in the original trial.³⁶⁴ For example, supposing that a judge who should recuse himself according to the law of the region where the original trial was conducted did not do so, or that the hearing judge accepted bribery, do such procedural deficiencies fall under the heading of unfair procedure of the two Arrangements? Courts may interpret the aforementioned two instances of unfair procedure broadly so as to include other procedural deficiencies, or they may use the public policy exception to deny JRE.

Due service is an important part of fair procedure. Mainland China and Macao has concluded a Mainland-Macao Service and Evidence Investigation Arrangement.³⁶⁵ Like the Mainland-Hong Kong Service Arrangement, the Mainland-Macao Service and Evidence Investigation Arrangement is not compulsory. So parties in Mainland China and Macao can conduct service according to regional laws. Therefore, in order to decrease disputes about service in the JRE proceedings, advisably the two regions should make the service Arrangement a priority channel of service. Only when a document cannot be served under the Arrangement, the two regions can consider conduct service according to regional laws.

d. Public Policy Exception

³⁶⁴ For the unfair procedure provision under the Mainland-Hong Kong Arrangement, *see supra* fn 262 and accompanying texts.

³⁶⁵ For details of this Arrangement, *see* Part i of Section D of Chapter I.

The fourth ground for refusing JRE is the public policy exception. The Arrangement provides that Mainland courts can deny JRE if it would be contrary to Mainland basic principles of the laws or social public interests, and that Macao courts can deny JRE if it would violate the basic principles of the laws or public order of Macao. For example, Macao is famous for its casino industry but casino is illegal in Mainland China. Suppose a party wins a judgment in Macao based on a gambling debt and seeks JRE in Mainland China, should JRE be denied according to the public policy exception clause under the Arrangement? The answer should be “yes,” because the policy of “One Country, Two Systems” allows each region to maintain its independent political, social, and economic systems, in Mainland China it is a deep-rooted tradition that casinos are against public policy³⁶⁶ and recognizing and enforcing judgments involved gambling debts would violate the fundamental principle of justice and prevalent conception of good morals.³⁶⁷ However, generally, both regions should exercise the public policy exception with strict restraint. Otherwise, this ground will become a catch-all escape clause and hinder interregional JRE. Arguably, only when the effect of JRE will manifestly harm the public policy of the requested region, JRE can be denied.³⁶⁸

Fraud is not an independent heading for refusing JRE in the Arrangement. The Arrangement does not state which grounds of refusal that a requested court should

³⁶⁶ Sun, *supra* note 296 at 81-1. Editorials in Mainland state press, such as Beijing Youth Daily, described casino in Macao brought an “epidemic” in Mainland China because reckless gambling by Mainland government officials and entrepreneurs in Macao threat the (Mainland) national treasury and have “led to countless losses of family savings” and bankruptcy of many enterprises in Mainland China. Marina Osmond, China: Wave of Scandals Deflating Macau’s Gambling Boom, available at <http://ins.onlinedemocracy.ca/index.php?name=News&file=article&sid=12421> (accessed on August 6, 2009). For Mainland’s measures to control the extension of gambling-related problems from Macao, see BBC News, Vaudine England, Bets are off for Macao Gambling Boom, available at <http://news.bbc.co.uk/2/hi/asia-pacific/7807899.stm> accessed on August 6, 2009, see also TIME, Michael Schuman, Fortunes Fade for Macau’s Casino Kings, available at <http://www.time.com/time/world/article/0,8599,1900109,00.html> (accessed on August 6, 2009).

³⁶⁷ See *Loucks v. Standard Oil Co. of New York*, 224 N.Y. 99, 120 N.E. 198 (New York 1918). If a fact pattern similar to the one in *Fauntleroy v. Lum*, 28 S.Ct. 641, 210 U.S. 230, 28 S.Ct. 641, 52 L.Ed. 1039 (1908), takes place between Mainland China and Macao, the judgment should not be recognised and enforced in Mainland China under the Mainland-Macao Arrangement.

³⁶⁸ Yu, *supra* note 303 at 158.

invoke to refuse recognition and enforcement of judgments rendered by fraudulent jurisdiction. Both Mainland China and Macao may invoke the public policy exception to deny JRE when the judgment-rendering court's jurisdiction is tainted by fraud. The law of the judgment-rendering region should be applied to determine whether fraud exists. If fraud has been extensively litigated and decided by the judgment-rendering court, it should not be a ground to deny JRE in the requested court. The proper remedy for the losing party is to appeal against or seek review of the judgment in the judgment-rendering region.

The two circumstances where review on the merits is allowed under the Macao Civil Procedure Code do not exist in the Mainland-Macao Arrangement. This is significant because allowing substantive review of a sister-region judgment would seriously hinder JRE. Although the Arrangement does not explicitly forbid review on the merits, it limits grounds for denying JRE to the above four scenarios. The only scenario that might involve review on the merits is the public policy exception. Macao should not review the merits of a sister-region judgment by invoking the public policy exception merely to protect its residents, because this would be a violation of the Arrangement. When critical new evidence appears, only when the judgment debtor cannot challenge the judgment in the judgment-rendering region, the Macao requested court may consider deny JRE by the public policy exception.

4. Assessment and Conclusion

Scopes are the major difference between the Mainland-Macao Arrangement and the Mainland-Hong Kong Arrangement. The former is much broader than the latter in

terms of scope.³⁶⁹ This is because both Mainland China³⁷⁰ and Macao preferred to conclude a broad-scope JRE arrangement, but Hong Kong was reluctant.³⁷¹ In the view of Mainland China, the Mainland-Hong Kong Arrangement should cover all civil and commercial judgments.³⁷² However, Hong Kong insisted on restricting the Arrangement to contractual disputes with choice of court agreements.³⁷³ Ultimately, Mainland China yielded to Hong Kong.³⁷⁴ The broad scope is an achievement of the Mainland-Macao Arrangement. However, the Mainland-Macao Arrangement is not perfect. For example, it does not clarify how a requested court should deal with judgments rendered by a court without jurisdiction and how to address procedure deficiencies uncovered by the unfair procedure clause.

iii. JRE under the 1992 Protocol of the International Convention on Civil Liability for Oil Pollution Damage

Mainland China, Hong Kong, and Macao are parties to the 1992 Protocol of the International Convention on Civil Liability for Oil Pollution Damage.³⁷⁵ This Convention applies to pollution damage caused on the territory of a member region and to preventive measures against such damage.³⁷⁶ It is not a specific arrangement so will be only briefly discussed here. Under this Convention, actions for compensations for pollution damage should be brought in the region where the damage occurred or

³⁶⁹ Zhang, *supra* note_20_ at 69.

³⁷⁰ *Id.* at 56.

³⁷¹ For details, *see* Chapter II. *See* Yu, *supra* note_303_ at 156. *See also* Yu, *supra* note_304_ at 11. Zhang, *supra* note_265_ at 56.

³⁷² Yu, *supra* note_303_ at 157. Yu, *supra* note_304_ at 7.

³⁷³ Yu, *supra* note_304_ at 11.

³⁷⁴ *See* art 1 of the Mainland-Hong Kong Arrangement.

³⁷⁵ The 1992 Protocol of the International Convention on Civil Liability for Oil Pollution Damage (1969), *supra* note_208_. For status of convention by countries, *see*

http://www.imo.org/conventions/mainframe.asp?topic_id=248.

³⁷⁶ *Id.*, art. 1.

the preventive measure has been taken.³⁷⁷ Any consequent judgments shall be recognized in any contracting region except three circumstances.³⁷⁸ First, the judgment is not enforceable or subject to ordinary forms of review in the judgment-rendering region.³⁷⁹ Second, the judgment was obtained by fraud. Third, the defendant was not given reasonable notice and a fair opportunity to present his or her case.³⁸⁰ No review on the merits is permitted.³⁸¹ Therefore, interregional judgments covered by this Convention can be recognized and enforced in the three regions accordingly.

C. The Next Stage: a Multilateral JRE Arrangement

The two Arrangements are laudable because they remove many local-protectionist regional JRE laws. For example, the grounds for refusing JRE decrease, the finality dispute is solved, and requested courts are required to apply the law of the judgment-rendering region to determine issues such as fair procedure. However, the two Arrangements fail to solve Chinese interregional JRE difficulties mainly for three reasons: differences between the two Arrangements, the JRE impasse between Mainland China and Hong Kong, and no JRE Arrangement between Hong Kong and Macao. First, the differences between Arrangements increase the complexity of interregional JRE. For example, requirements for JRE and grounds for refusing JRE are different under the two Arrangements. Therefore, a Mainland judgment creditor needs to follow different Arrangements to collect debts in Hong Kong and Macao. Second, because of the narrow scope of the Mainland-Hong Kong Arrangement, majority of judgments rendered in these two regions are practically unrecognisable

³⁷⁷ *Id.*, at art. 9.1.

³⁷⁸ *Id.*, at art. 10.1

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ *Id.*, at art. 10.2

and unenforceable in the other region. Third, no JRE Arrangement exists between Hong Kong and Macao, so JRE between them is completely governed by regional laws. The above comparison has shown that Hong Kong common law and Macao Civil Procedure Code are substantially distinct. Divergences between regional laws will make interregional JRE inefficient.

Therefore, the two Arrangements are the only first steps beyond the unsatisfactory stage of pure regional laws, but more is needed: the next stage should be a Multilateral JRE Arrangement. It will harmonize the differences between the two existing Arrangements. For example, it will unify requirements for JRE and grounds for denying JRE. It will also clarify ambiguities in the two Arrangements. For instance, it will clarify how to define civil and commercial matters, fraud, and finality, as well as how to address procedure deficiencies unlisted in the heading of unfair procedure. Moreover, it will harmonize existing JRE rules. For example, the two existing Arrangements have different *res judicata* and unfair procedure rules. The above discussions have shown that both rules are problematic. The proposed Multilateral JRE Arrangement will improve these rules. Furthermore, it will expand the two existing Arrangements. For example, it will break through the JRE impasse between Mainland China and Hong Kong and will fill the gap that currently no JRE arrangement exists between Hong Kong and Macao. It will also provide indirect jurisdiction rules to increase the certainty of JRE. As a conclusion, a Multilateral JRE Arrangement will be the future of Chinese interregional JRE law.

Chapter IV

Three Serious Macro Challenges and Their Solutions

Despite their shortcomings, the two bilateral Arrangements establish a foundation on which a Multilateral JRE Arrangement can be developed. This Multilateral Arrangement will ultimately realize free circulation of judgments among Mainland China, Hong Kong, and Macao, and may be extended to Taiwan. Before proposing selected rules for this Arrangement, issues on the macro level should be addressed first.

Professors Depei Han and Jin Huang point out four distinctive challenges confronting Chinese interregional legal conflicts: the conflicts between socialist law and capitalist law, conflicts between civil law and common law, the conflicts among international treaties that regions ratified, and no court of final review that can hear cases from all the three regions.¹ They believe these challenges make Chinese interregional legal conflicts much more difficult to solve than those in foreign countries, like the US.² Structurally, these challenges are on different levels. The first two are macro-level challenges for drafting a Multilateral JRE Arrangement; however, the latter two are difficulties arising from the implementation of the Arrangement. This Chapter attempts to address the first two challenges proposed by Han and Huang, as well as the challenge of weak mutual trust. The latter has been observed by many scholars³ but has never been

¹ Depei Han & Jin Huang, *Zhong Guo Qu Ji Fa Lv Chong Tu Wen Ti Yan Jiu [Analysis of Chinese Interregional Conflict of Laws]*, 1 ZHONG GUO SHE HUI KE XUE [CHINA SOCIAL SCIENCE] 117, 6-7 (1989). For details, see Chapter II. For other literatures, see He Qiong, *Zhongguo Quji Lihun Falv Chongtu Xietiao Yinyou de Shijiao [A Necessary Perspective to Harmonize Legal Conflicts in Chinese Interregional Divorce]*, 6 YUNNAN XINZHENG XUEYUAN XUEBAO [YUNNAN ADMINISTRATIVE INSTITUTE JOURNAL] 148, 148 (2007).

² Han and Huang, *supra* note 1.

³ Xianchu Zhang, *A New Stage of Regional Judicial Assistance in Civil and Commercial Matters: Implementation of the Mainland Judgments Ordinance and Certain Issues Beyond*, 39 HONG KONG L. J. 3, 22 (2009).

satisfactorily addressed.⁴ The conflicts among international treaties that regions ratified and the issue of no court of final review will be analyzed in Chapter IV.

This Chapter is divided into four sections. The First Section addresses the conflicts between socialist law and capitalist law. It argues that, in theory and in practice, conflicts between socialist law and capitalist law in civil and commercial cases have greatly decreased between Mainland China and its sister regions after they entered the WTO in late 2001. The Second Section points out that the dispute of finality illustrates the conflicts between civil law and common law in the field of JRE. It argues that autonomous terminologies are an effective solution for such conflicts. The Third Section analyzes the issue of weak mutual trust among Chinese regions and proposes two methods to improve interregional trust. The last section is a conclusion.

A. Conflicts between Socialist Law and Capitalist Law

In Chinese interregional legal conflicts, the first distinctive challenge identified by Professors Depei Han and Jin Huang is the conflicts between socialist law and capitalist law.⁵ The reason is that Mainland China is built upon socialism while Hong Kong and Macao are capitalist.⁶ They argue that these conflicts make Chinese interregional legal conflicts much more complex than those in foreign countries.⁷ However, notably, this argument was proposed in 1989. After more than twenty years, it has been widely recognized that Mainland China has made significant achievements in reforming its legal

⁴ For details, *see infra* the section of Enhancing Interregional Legal Education and Communication of Chapter IV.

⁵ Han & Huang, *supra* note 1.

⁶ *Id.*

⁷ *Id.*

system since it adopted the policy of reform and opening.⁸ Particularly, after Mainland China entered the WTO in 2001, in trade related areas the differences between Mainland socialist law and laws in capitalist WTO members, including Hong Kong and Macao, have sharply decreased. Therefore, the conflicts between socialist law and capitalist law in civil and commercial cases, if exist, have decreased significantly and should not hamper the establishment of a Multilateral JRE Arrangement. Socialist courts in Mainland China should recognize and enforce civil and commercial judgments from capitalist courts in Hong Kong and Macao, and vice versa. Mainland China can also learn from JRE laws in the capitalist US and EU to establish a Multilateral JRE Arrangement for civil and commercial judgments.

Moreover, although in terms of contents, civil and commercial laws⁹ in Mainland China, Hong Kong, and Macao have converged significantly, their procedural laws and regulations for judges and lawyers are different. The court system also plays a role in the outcome of a commercial case. All these factors may negatively affect the quality of Mainland judgments. Therefore, public policy exception should be permitted in interregional JRE in China. This helps protect interests of Hong Kong and Macao so as to encourage them to participate in the Multilateral JRE Arrangement.

This section is divided into two parts. The First Part discusses how Mainland China

⁸ Eg., Trade Policy Review: China 2010, Restructuring and Further Trade Liberalization are Keys to Sustaining Growth, available at http://www.wto.org/english/tratop_e/tp330_e.htm, accessed on June 11, 2010 (acknowledging "that China has continued the gradual liberalization of its trade and investment regimes" since its accession); Zonglai Wang & Bin Hu, *China's Reform and Opening-up and International Law*, 9 CHINESE JOURNAL OF INTERNATIONAL LAW 193, 193 (2010).; Karen Halverson Cross, *China's WTO Accession: Economic, Legal, and Political Implications*, 27 B. C. INT'L & COMP. L. REV. 319, 347-48 (2004). DEBORAH Z. CASS, BRETT GERARD WILLIAMS & GEORGE ROBERT BARKER, CHINA AND THE WORLD TRADING SYSTEM: ENTERING THE NEW MILLENNIUM 83-174 (2003).; NICHOLAS R. LARDY, INTEGRATING CHINA INTO THE GLOBAL ECONOMY 32-62 (2002).

⁹ Civil and commercial law refers to laws that regulate relationship between private parties on equal status, such as between natural persons, between legal persons, and between natural and legal persons. Chapter Two of Min Fa Tong Ze [General Principles of the Civil Law] (hereinafter "Mainland Civil Law") (Adopted at the Fourth Session of the Sixth National People's Congress, promulgated by Order No. 37 of the President of the People's Republic of China on April 12, 1986, and effective January 1, 1987), translated in <http://www.lawinfochina.com> accessed on November 3, 2009 (P.R.C.). For detailed discussion of the meaning of "civil and commercial", see Section A of Chapter V.

modernizes its civil and commercial law in terms of legislation and adjudication. The Second Part explores issues brought by judgments against Mainland government in interregional JRE.

i. Mainland China's Modernization of its Civil and Commercial Law

1. Legislation

Mainland China distinguishes its legal system from capitalist legal systems. For example, Banguo Wu, the Chairman of the Chinese People's Congress Standing Committee, predicts that by the end of 2010, Mainland China will establish a socialist legal system with Chinese characteristics.¹⁰ This system has four socialist features.¹¹ First, it should be constructed under the guidance of Marxism-Leninism and Mao Zedong Thought, Deng Xiaoping's Theory, "Three Representatives" Principles and Scientific Concept on Development.¹² Second, it should reflect the collective interests of the country and the fundamental interests of the people.¹³ Third, it should detail, legalize, and systemize Chinese Communist Party's basic plans and policies at the primary stage of

¹⁰ This system was proposed by the Chinese Communist Party (hereinafter "CCP") at its 15th National Congress in 1999. It is constituted by seven bodies of law, namely, the Constitution and relevant laws, civil and commercial law, administrative law, economic law, social law, criminal law, litigation and non-litigation procedural law. Jiang Zemin, *Gaoju Deng Xiaoping Lilun Weida Qizhi, Ba Jianzhe You Zhongguo Tese Shehui Zhuyi Shiye Quanmian Tuixiang Ershiyi Shiji—Zai Zhongguo Gongchandang Di Shiwu Ci Quanguo Daibiao Dahui shang de Baogao [Hold High the Great Banner of Deng Xiaoping Theory for an All-Round Advancement of the Cause of Building Socialism with Chinese Characteristics into the 21st Century—Report Delivered at the 15th National Congress of the Communist Party of China]* (September 12, 1997), Part VI. Banguo Wu, *Que Bao Xin Cheng Zhong Guo Te Se She Hui Zhu Yi Fa Lv Ti Xi Mu Biao Ru Qi Shi Xian [Making Sure to Establish a Socialist Legal System with Chinese Characters]*, March 9, 2010, available at http://www.npc.gov.cn/npc/xinwen/2010-03/09/content_1558122.htm (last accessed on April 10, 2010). For comments, see Jiang Yu Wang, *The Rule of Law in China: A Realistic View of the Jurisprudence, the Impact of the WTO, and the Prospects for Future Development*, SINGAPORE JOURNAL OF LEGAL STUDIES 347, 347-48 (2004).

¹¹ Weicheng Wang, *Guang Yu You Zhong Guo Te She She Hui Zu Yi Fa Lv Ti Xi De Ji Ge Wen Ti [Several Questions regarding the Socialist Legal System with Chinese Characteristics]*, available at <http://www.people.com.cn/GB/14576/15097/2369562.html> (last visited April 10, 2010). Shaoming Zhang, *Zhong Guo Te She She Hui Zhu Yi Fa Lv Ti Xi Yu Di Fang Li Fa [the Socialist Legal System with Chinese Characteristics and Local Legislation]*, available at http://www.npc.gov.cn/npc/xinwen/rdl/fzjs/2010-04/02/content_1565997.htm (last visited April 10, 2010).

¹² *Id.*

¹³ *Id.*

socialism.¹⁴ Fourth, it should be featured with the opening policy and the modernization drive.¹⁵ However, this highly politicized language cannot hide the fact that Mainland civil and commercial law is in an on-going process of reform by embracing market-economy principles, such as party autonomy in contract, the equality between all the market players, the protection of private ownerships, and WTO standards.

Between 1949 and 1978, Mainland China's commercial law was strongly influenced by the highly centralized planned economic system.¹⁶ But since Mainland China adopted the policy of reform and opening in 1978, its economic system has gradually departed from the centralized planned economic system¹⁷ and ultimately changed to socialist market economy.¹⁸ Meanwhile, it began modernizing its civil and commercial law "through engaging in market economy and globalization."¹⁹ This process has been regarded largely as "a process of westernizing legal regimes subject to China's own 'national circumstances.'"²⁰ Since China's entry to the WTO in late 2001,²¹ this process has accelerated²² and transformed to modernizing Mainland civil and commercial

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Chen Su, *The Establishment and Development of the Chinese Economic Legal System in the Past Sixty Years*, 23 COLUM. J. ASIAN L. 109, 110-15 (2009). Razeen Sappideen & Ling Ling He, *Reflections on China's WTO Accession Commitments and Their Observance*, 43 JOURNAL OF WORLD TRADE 847, 849 (2009). Lardy, *supra* note 8, at 29.

¹⁷ For each economic reforming stage, see Su, *supra* note 16, at 110-15.

¹⁸ Jiakuai Gaige Kaifang he Xiandaihua Jianshe Bufa, *Duoqu You Zhongguo Teshe Shehuizhuyi Shiye de Gengda Shengli* [Jiang Zemin, *Speech at the Fourteenth National People's Congress: Accelerate Opening Up Reform and the Pace of Modernization, Strive for the Success of Socialism with Chinese Characteristics*] (1992), available at http://news.xinhuanet.com/ziliao/2003-01/20/content_697148.htm (last visited April 18, 2010). Art. 7 of the Amendment to the Mainland Constitution 1993. For comments, see Chen *Id.* at 116.; Mo Zhang, *From Public to Private: The Newly Enacted Chinese Property Law and the Protection of Property Rights in China*, 5 BERKELEY BUS. L.J. 317, 321. B. Naughton, *Growing Out of the Plan: Chinese Economic Reform, 1978-1993* (Cambridge: Cambridge University Press, 1995).

¹⁹ Wang, *supra* note 10 at 359. For the policy of reform and opening, see Resolution of the Third Session of the Eleventh Central Committee of Chinese Communist Party (1978).

²⁰ *Id.* at 359.

²¹ Mainland China entered the WTO on December 11, 2001. Hong Kong and Macao entered the WTO on January 1, 1995. http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited April 10, 2010).

²² Donald C. Clarke, *China's Legal System and the WTO: Prospects for Compliance*, 97 WASHINGTON UNIVERSITY GLOBAL STUDIES LAW REVIEW 97, 97-98 (2005).

law according to the WTO standards.²³ In order to fulfil its WTO obligations,²⁴ Mainland China has undertaken "sweeping measures" to reform its commercial laws and judicial interpretations relating to commercial cases.²⁵ Mainland China's fulfillment of its WTO commitments has received wide acknowledgement.²⁶ In several aspects, Mainland China even has gone beyond its WTO promises.²⁷ Up to today, Mainland commercial law, by and large, has embodied market economy-based principles such as non-discrimination, market access, fair competition, transparency, and national treatment.²⁸ Mainland China has no reason to refuse recognition and enforcement of civil and commercial judgments rendered in a capitalist region, if its civil and commercial law complies with the same market-economy principles as this capitalist region. This argument can find support from Mainland scholars' positive views towards the Hague Choice of Court Convention.²⁹ They surveyed Mainland law that involves key issues covered by the Convention and found no irresolvable conflicts between Mainland law and the Convention.³⁰ They correctly argue that, although Mainland China may make some reservations, it should

²³ Wang, *supra* note_10_ at 348. DEEPAK BHATTASALI, SHANTONG LI & WILL MARTIN, CHINA AND THE WTO: ACCESSION, POLICY REFORM, AND POVERTY REDUCTION STRATEGIES 19-99 (2004).

²⁴ For a summary of China's WTO obligations, *see* Cross, *supra* note_8_ at 327-31. Sappideen and He, *supra* note_16_ at 852.

²⁵ Wang, *supra* note 10 at 378. Su, *supra* note_19_ at 125.

²⁶ Cross, *supra* note_8_ at 357-58. Nicholas Calcina Howson, *China and WTO Liberalization of the Securities Industry: Le Choc Des Mondes or L'Empire Immobile?*, 3 ASIA POLICY 151, 151-185 (2007). Sappideen and He, *supra* note_19_ at 854-71. Clarke, *supra* note_25_ at 116.

²⁷ Nicholas Howson, *supra* note_29_ at 151-185. Clarke, *supra* note_25_ at 105.

²⁸ Wang, *supra* note_10_ at 374. Cao Jianming, *WTO and the Rule of Law in China*, 16 TEMP. INT'L & COMP. L.J. 379 (2002). Cross, *supra* note_8_ at 345-46. Sappideen and He, *supra* note_19_ at 864. For harmonization between Mainland law and the WTO law, *see* Graham Mayeda, *A Normative Perspective on Legal Harmonization: China's Accession to the WTO*, 38 U.B.C. LAW REVIEW 83, 122 (2005).

²⁹ *Eg.*, Guangjian Tu, *Hague Choice of Court Convention - A Chinese Perspective*, 55 AM. J. COMP. L. 347, 348 (2007). Guangqing Qu, Shuming Wang & Qia Sunling, *Haiya "Xieyi Xuanzhe Fayuan Gongyue" Dui Zhongguo Guoji Shifa Lifa de Qishi [The Implications of Hague Choice of Court Convention to the Legislation of Chinese Private International Law]*, 95 HENAN SHENG ZHENGFA GUANLI GANBU XUYUAN XUEBAO [HENAN POLITICS AND LAW MANAGEMENT CADRE INSTITUTE JOURNAL], 28 (2006). Jiwen Wang, *Woguo Pizhun Haiya "Xuanzhe Fayuan Xieyi Gongyue" de Biyaoxing Fenxi [The Necessity that China Ratifies the Hague Choice of Court Convention]*, 16 ANHUI DAXUE FALV PINGLUN [ANHUI UNIVERSITY LAW REVIEW] 153, 164 (2009).

³⁰ Tu, *supra* note_29_ at 348.

ratify the Convention.³¹ Therefore, Mainland self-description of its legal system as socialist should not create insurmountable difficulties to establish a Multilateral JRE Arrangement with its capitalist sister regions.

Among many examples of Mainland's capitalization of its civil and commercial law,³² this section concentrates on how Mainland reform important fields such as contract law, company law, and property law. The survey confirms that conflicts between socialism and capitalism have been minimized in the civil and commercial field.

Contract Law: Endorsing Party Autonomy

When the centralized planned economic system dominated Mainland China, contracts were "tools and mechanism for the implementation of state plans."³³ In those years, no party autonomy existed³⁴ and breaching a contract was regarded as "prejudicing the socialist planned economy."³⁵ However, in 1999, Mainland China enacted the Uniform Contract Law.³⁶ One of the guiding references for its drafters is "beneficial experience of foreign countries" and international legal documents.³⁷ Its Article 4 indicates the parties have the right to lawfully enter into a contract of their own free will, and no unit or individual may illegally interfere therewith.³⁸ This law is praised to "comprehensively and accurately reflects the essential requirements of the market

³¹ *Id.*

³² Sappideen and He, *supra* note_16_ at 853-71.

³³ Su, *supra* note_16_ at 113. For the planned pricing system for foreign trade in China before 1978, see Lardy, *supra* note_8_ at 30.

³⁴ Su, *supra* note 16 at 113.

³⁵ *Id.*

³⁶ Mainland Contract Law (adopted at the 2nd Session of the Ninth NPC on March 15, 1999, effective on October 1, 1999). This contract law combined and amended the previous three contract laws, namely the Economic Contract Law, the Foreign-Related Economic Contract Law, and the Technology Contract Law. For monograph of this contract law, see BING LING, CONTRACT LAW IN CHINA (2002).

³⁷ *Id.* at 37-38.

³⁸ *Id.*, at art. 4.

economy."³⁹ Moreover, under the WTO, Mainland China has the obligation to ensure that the market, instead of the state, determines prices for goods and service.⁴⁰

China shall...allow prices for traded goods and services in every sector to be determined by market forces, and multi-tier pricing practices for such goods and services shall be eliminated.

According to the 2010 WTO Trade Policy Review, in Mainland China only 3% of all prices in the economy are determined by governments at all level.⁴¹ Therefore, beyond law on the books, the Chinese government has been shifting its role in the economy. Endorsing party autonomy and ensuring the key function of markets in the economy, such as determining prices, make Mainland judgments in civil and commercial cases reflect private, instead of state, interests. Therefore, the conflicts between socialism and capitalism should not hamper their enforcement in other regions.

Company Law: Equalizing Private and Public Market Players

In socialism, state-owned parties prevail against private parties. The State can legitimately intervene in the production and management plans of an enterprise. The three old foreign-funded enterprise laws illustrate this. For example, the old Sino-Foreign Equity Joint Venture Law, Contractual Joint Venture Law, and Wholly Foreign Owned Enterprise Law require foreign-funded enterprises to give first priority to purchase raw

³⁹ Su, *supra* note_16_ at 130.

⁴⁰ Art. 9.1 of the China's WTO Access Protocol.

⁴¹ Trade Policy Review: China 2010, Restructuring and Further Trade Liberalization are Keys to Sustaining Growth, Trade Policies and Practices by Measure, 53, WT/TPR/S/230, http://www.wto.org/english/tratop_e/tp_r_e/tp330_e.htm.

materials in Mainland China.⁴² If they would like to purchase materials in the international market, they need to raise foreign exchange themselves.⁴³ In other words, if they do not have deposits of foreign currencies, they cannot purchase foreign currencies from banks in China. These enterprises are also required to file their production and operating plans to the government agency in charge.⁴⁴ Additionally, if a joint venture would like to buy insurance, the old laws required it to buy from Chinese insurance companies.⁴⁵ These provisions result from the planned economy and authorize state to interfere in the management of an enterprise. In 2000 and 2001 Mainland China abolished all these provisions. Since then, foreign-funded enterprises enjoy treatments no less favorable than that accorded to Mainland individuals and enterprises in respect of the procurement of materials for production, foreign exchange control, and the conditions to sell their goods in the domestic market and for export.⁴⁶ These enterprises also can freely decide their production and operating plans without reporting to the governments.

Mainland China has also reduced significantly the measures to protect state-owned enterprises from market competition.⁴⁷ For example, it bears the obligation under the WTO to "ensure that import purchasing procedures of state trading enterprises are fully

⁴² Art. 9.2 of the old Chinese-Foreign Equity Joint Venture Law, art. 19 of the old Chinese-Foreign Contractual Joint Venture Law, art. 15 of the old Wholly Foreign Owned Enterprise Law.

⁴³ *Id.*

⁴⁴ Art. 9.1 of the old Chinese-Foreign Equity Joint Venture Law, art. 56 of the old Chinese-Foreign Equity Joint Venture Regulation, art. 11.1 of the old Wholly Foreign Owned Enterprise Law, and art. 43 of the old Wholly Foreign Owned Enterprise Law Regulation.

⁴⁵ Art. 8.4 of the old Chinese-Foreign Equity Joint Venture Law.

⁴⁶ Chinese-Foreign Equity Joint Venture Law (Adopted by the 2nd Session of the 5th National People's Congress on July 1, 1979 and revised on the Third Session of the 7th NPC on April 4, 1990, revised for the second time at the 4th Session of the 9th NPC and effective on March 15, 2001)

Chinese-Foreign Contractual Joint Venture Law (Adopted at the 1st Session of the Seventh National People's Congress, and revised according to the Decision adopted at the 18th Session of the Standing Committee of the Ninth NPC on October 31, 2000, and effective on October 31, 2000). Wholly Foreign Owned Enterprise Law (Adopted at the 4th Meeting of the 6th NPC on April 12, 1986, amended at 18th Meeting of the Standing Committee of the 9th NPC and effective on October 31, 2000). For Mainland's obligation under China's WTO Accession Protocol, *see* art. 3 (non-discrimination), art. 5 (right to trade)

⁴⁷ *See* Su, *supra* note_16_ at 127 (indicating "traditional state-owned enterprise development policy of simply increasing the number and scale of enterprises was replaced by policies aimed at improving the quality of corporate governance and management"). Clarke, *supra* note_22_ at 97.

transparent, and in compliance with the WTO Agreement, and shall refrain from taking any measure to influence or direct state trading enterprises as to the quantity, value, or country of origin of goods purchased or sold, except in accordance with the WTO Agreement."⁴⁸ Governmental subsidies to the state-owned enterprises are subject to review in the WTO.⁴⁹ The Mainland Enterprise Bankruptcy Law provides that all enterprises, including state-owned enterprises, should be treated equally in a market economy, and state-owned enterprises are subject to the same bankruptcy procedure as other enterprises.⁵⁰ As a result, non-state owned enterprises are prospering. By the end of March 2009, there were 97,177,000 enterprises in Mainland China, of which 541,600 were state-owned enterprises; approximately 6,642,700 were private enterprises and 29,480,000 individual businesses.⁵¹

In a highly centralized planned economy, the state is "an almighty regulator as well as a property owner."⁵² However, nowadays, the role of the Mainland government in economy has transformed "to a public goods provider and a regulator whose authority is both established and constrained by law."⁵³ The enactment of the Administrative Licensing Law⁵⁴ illustrates this. This law significantly reduced Mainland government's

⁴⁸ Art. 6.1 of the China's WTO Accession Protocol.

⁴⁹ *Id.*, art. 10.2.

⁵⁰ See the Mainland Enterprise Bankruptcy Code (Adopted at the 23rd meeting of the Standing Committee of the 10th National People's Congress of the People's Republic of China on Aug. 27, 2006) *translated in* <http://www.lawinfochina.com> accessed on May 3, 2009 (P.R.C.). For comments, see Charles D Booth, *The 2006 PRC Enterprise Bankruptcy Law: The Wait Is Finally Over*, 20 SINGAPORE ACADEMY OF LAW JOURNAL 275, 280 (2008) (indicating the enactment of this law is "one part of the Chinese Government's arsenal of reforms and remedies to address the historical overhang of problems from the centrally-planned market economy".)

⁵¹ Xuelan Xu & Liping He, Tongji Fenxi Fabu: 2009 Nian Yijidu Quanguo Shichang Zhuti Fazhang Baogao [Statistical Analysis: Report on the Main Development of National Economic Organizations in the First Quarter of 2009] (May 11, 2009), available at http://www.saic.gov.cn/zwgk/tjzl/zhtj/bgt/200905/t20090511_47153.html (last visited April 12, 2010).

⁵² Wang, *supra* note_10_ at 339.

⁵³ *Id.* at 339.

⁵⁴ The Administrative Licensing Law (adopted at the 4th session of the Standing Committee of the 10th NPC on August 27, 2003, and effective on July 1, 2004).

excessive interference with economic matters.⁵⁵ Moreover, the Law of State-Owned Assets of Enterprises⁵⁶ published in 2008 prevent states from intervening the business activities of state-owned enterprises.⁵⁷ This law significantly helps deepen China's economic reform and develop its market economy.⁵⁸

The most significant example of restricting state powers in economy is the Mainland Anti-Monopoly Law.⁵⁹ It is illegal if administrative agents or organizations use their administrative powers to eliminate or restrict competition.⁶⁰ Although the law permits the state to protect state-owned enterprises concerning the lifeline of national economy and national security or those lawfully enjoying exclusive production and sales, those enterprises are forbidden to take advantage of their dominant position to harm the consumer interests.⁶¹ A commentator praises that⁶²

The enactment of the Anti-Monopoly Law had far-reaching importance in preventing and restraining monopolistic behavior, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and the general public, and promoting the healthy development of the socialist market economy.

The Anti-Monopoly Law further removes the state monopoly in Mainland economy and decreases the conflicts between socialism and capitalism in civil and commercial cases.

⁵⁵ Wang, *supra* note 10_ at 339.

⁵⁶ The Law of the PRC on the State-Owned Assets of Enterprises (adopted at the 5th session of the Standing Committee of the 11th NPC on October 28, 2008, and effective on May 1, 2009.)

⁵⁷ *Id.*, at arts. 6, 14.2, 16

⁵⁸ Su, *supra* note 16_ at 127. Trade Policy Review: China 2010, Restructuring and Further Trade Liberalization are Keys to Sustaining Growth, Trade Policies and Practices by Measure, *supra* note 8_ at 25. (indicating "[w]ith the entry into force of its Anti-Monopoly Law on August 1, 2008, China has taken a major step to promote competition")

⁵⁹ Mainland Anti-Monopoly Law (adopted at the 29th meeting of the Standing Committee of the Tenth NPC on August 30, 2007, effective on August 1, 2008).

⁶⁰ *Id.*, at art. 8.

⁶¹ *Id.*, at art. 7.

⁶² Su, *supra* note 16_ at 134.

Treating all market players equally⁶³ in Mainland China encourage Mainland courts to refrain from invoking the public policy exception to deny the recognition and enforcement of judgments against Mainland governments. It helps pave the way for free circulation of civil and commercial judgments between Mainland China and its sister regions.

Property Law: Protecting Private Ownership

The concept of property is central to the conflicts between capitalism and socialism.⁶⁴ In Chairman Mao's era, socialist ideology required the diminishment of private ownership,⁶⁵ because it is synonymous with capitalism.⁶⁶ But this is not the case in Mainland China any longer. On March 14, 2004, "citizen's lawful private property is inviolable" was added to the PRC Constitution.⁶⁷ This amendment implies that a socialist market economy, all market players should operate on equal footing, enjoy the same rights, observe the same rules, and bear the same responsibilities.⁶⁸ As its key implementing legislation, the Chinese Property Law was enacted and implemented in 2007.⁶⁹ It explicitly indicates that "[t]he state adopts a socialist market economy, and guarantees equal legal status and the right to develop to all market players," and that "[s]tate, collective and private property rights, as well as the property rights of other

⁶³ *Id.* at 129.

⁶⁴ Qinglan Long, *Reinterpreting Chinese Property Law*, 19 S. CAL. INTERDISC. L.J. 55, 55 (2009).

⁶⁵ Sappideen and He, *supra* note_16_ at 849.

⁶⁶ Zhang, *supra* note_18_ at 320. *See* Long, *supra* note_67_ at 55.

⁶⁷ PRC Constitution, Amendment Four, Amendment to Art. 13. National People's Congress on March 14, 2004.

⁶⁸ Su, *supra* note_16_ at 130. *See* Wang, *supra* note_10_ at 378.

⁶⁹ Property Law of the PRC (adopted at the 5th session of the Tenth NPC on Mar. 16, 2007, effective on Oct. 1, 2007). For comments of its contents, *see* Gebhard Marc Rehm & Hinrich Julius, *The New Chinese Property Rights Law: An Evaluation from a Continental European Perspective*, 22 COLUM. J. ASIAN L. 177, 234 (2009).

rights holders, are protected by law, which no unit or individual shall violate.”⁷⁰ This “br[o]k[e] up the orthodox ideology in favor of public ownership against private ownership and individual liberty.”⁷¹ And it symbolizes that Mainland China is moving from a communist economy to a fully free-market one.⁷² Moreover, its Article 67 states the rights of all (private, collective or state-owned) shareholders or investors in enterprises are equally determined based on investment contracts or the proportion of investment.⁷³ This provision is significant because it “effectively puts private property on equal footing with state property in China, a socialist state which once regarded private property as harmful to the society.”⁷⁴ Judgments in civil and commercial cases concern only private rights.⁷⁵ By protecting private ownership openly in its legislation, there is no reason for Mainland courts to reject the recognition and enforcement of judgments rendered in Hong Kong and Macao merely because they are capitalist, and vice versa.

2. Adjudication

Mainland dependent court system is alleged to be part of conflicts between socialism and capitalism. Many people worry about the quality of Mainland adjudication and allege it as a reason to reject the recognition and enforcement of Mainland

⁷⁰ Arts. 3, 4, 64, and 66 of the Property Law.

⁷¹ Zhang, *supra* note_18_ at 317.

⁷² For comments from all over the world, eg., Peter Hartcher, *Private property law puts China one step closer to free market*, *Sydney Morning Herald (Australia)*, March 21, 2007, First Edition, News and Features, pg. 2 (stating that “[t]he head of the World Bank’s operations in China, David Dollar, has challenged a popular US political depiction of China as a centrally planned economy with poor property rights.”); China’s Capitalist Leap Forward, *China Post*, March 25, 2007 (indicating “Property Law is the last nail in the coffin of communism, which has been dying a slow death since Deng Xiaoping spearheaded his reform and opening-up program in the late 1970s.”); Wang Tai Peng, *Cover Story: Private Property’s Long March*, *The Edge Singapore*, April 23, 2007; and Andrew Busch, *With its New Real Estate Law, China Shaking Off Shackles of Communism*, *The Globe and Mail (Canada)*, March 27, 2007, Report on Business Column, Economics, pg. B15.

⁷³ Art. 67 of the Mainland Property Law.

⁷⁴ Wang, *supra* note_10_ at 379. See Zhang, *supra* note_18_ at 362-63.

⁷⁵ For definition of “civil and commercial,” see Part i of Section A of Chapter V.

judgments.⁷⁶ However, these people wrongly invoke the socialism and capitalism difference because the facts show that Mainland courts generally adjudicate impartially in civil and commercial cases.

In terms of civil and commercial law, fair administration of law is China's obligation under its WTO Accession Protocol:⁷⁷

China shall apply and administer in *a uniform, impartial and reasonable manner* all its laws, regulations and other measures of the central government as well as local regulations, rules and other measures issued or applied at the sub-national level... pertaining to or affecting trade in goods, services, trade-related aspects of intellectual property rights ("TRIPS") or the control of foreign exchange. (Emphasis added)

In order to fulfil its WTO obligations, the Supreme People's Court has issued a "landmark" regulation to promote judicial independence in cases affecting international trade.⁷⁸ This regulation grants Mainland courts to review administrative decisions relating to international trade and intellectual property.⁷⁹ In reality, local governments, to a very large extent, also refrain from making policies inconsistent with China's WTO obligations.⁸⁰ Importantly, empirical studies also demonstrate that local protectionism has significantly decreased in JRE in areas with diversified economy.⁸¹

Moreover, courts in Hong Kong,⁸² Macao,⁸³ and the US⁸⁴ have upheld that

⁷⁶ See Chapter II.

⁷⁷ World Trade Organization, *Accession of the People Republic of China (hereinafter "China's WTO Accession Protocol")*, WT/L/432, Document No. 01-5996 23 November 2001, *Protocol on the Accession of the People's Republic of China*, Part I:2(A):2. For explanation of "a uniform, impartial and reasonable manner", see Wang, *supra* note_10_ at 383-84. For other comments, see Cross, *supra* note_8_ at 352.

⁷⁸ Provisions of the Supreme People's Court on Certain Questions Concerning the Hearing and Handling of International Trade Administrative Cases (Judicial Interpretation [2002] No. 27, effective Oct. 1, 2002) For comments, see Cross *Id.* at 360.

⁷⁹ Art.1 of the Provisions.

⁸⁰ Clarke, *supra* note_22_ at 106-08.

⁸¹ Xin He, *Enforcing Commercial Judgments in the Pearl River Delta of China*, 57 THE AMERICAN JOURNAL OF COMPARATIVE LAW 419, 419-55 (2009).

⁸² *New Link Consultants Ltd v. Air China*, [2004] H.K.C. 169 (C.F.I.), para 98. *available at* <http://legalref.judiciary.gov.hk/lrs/common/ju/judgment.jsp>. For detailed analysis of this case, see the section of Unfair

adjudication in Chinese courts are impartial and just. For example, in *TSMC North America v. Semiconductor Manufacturing International Corporation*⁸⁵ the appellate court held that significant evidence showing that the Beijing municipal court would provide due process to TSMC:⁸⁶

More generally, to the extent [TSMC] continue to dispute it; substantial evidence supports the trial court's finding that TSMC will receive due process in the PRC action. SMIC [Semiconductor Manufacturing International Corporation] submitted declarations from several experts in PRC law, who opined that the PRC Constitution and civil procedure laws provide for judicial independence, respect for the rule of law, equal treatment to litigants of all nationalities, the collection and presentation of evidence, direct and cross-examination of witnesses, and a right of appeal. Moreover, disproving the notion that foreign corporations like TSMC are treated unfairly in the PRC, SMIC submitted evidence demonstrating, based on PRC court records, that foreign corporations have won the majority of intellectual property cases filed in the Beijing court in recent years, particularly since the PRC gained membership into the World Trade Organization. Finding no compelling evidence to the contrary, the trial court stated it would “presume that the Beijing Municipal Court is capable of performing the traditional judicial function and that its results are not driven by political or economic interests.” In deference to the principles of judicial restraint and comity, and based upon the evidence and findings below, we too must presume the Beijing court will provide fair procedures to TSMC.

Studies also show that Chinese courts are more and more willing to apply international commercial treaties and customs as well as foreign commercial law in adjudication.⁸⁷ Courts show more respect to party autonomy in choice of law.⁸⁸ They are

Procedure of Hong Kong Regional JRE Law in Chapter III.

⁸³ MIN YUAN, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS IN THE PRC, HONG KONG, MACAO AND TAIWAN 85 (2006) (indicating that Macao court has recognized that the civil procedure of Mainland China complies with the fair procedure requirement in the Macao JRE law). For detailed discussion, see Part ii of Section A of Chapter III.

⁸⁴ *Zhang Guimei v. General Electric Co.*, 172 Cal. App. 4th 689, 696-701 (Cal. App. 2d Dist. 2009) (sending case to Mainland China under the doctrine of *forum non conveniens*). For other cases that find Mainland China as a convenient forum, ie *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 435 (2007), 127 S.Ct. 1184, 167 L.Ed 2d 15.; *China Tire Holdings v. Goodyear Tire and Rubber* (N.D.Ohio 2000) 91 F.Supp.2d 1106, 1110-1111; *In re Compania Naviera Joanna S.A.* (D.S.C. 2007) 531 F.Supp. 2d 680, 687.

⁸⁵ *Corp.*, 161 Cal. App. 4th 581 (Cal. App. 1st Dist. 2008).

⁸⁶ *Id.*, at 589, 594-95.

⁸⁷ Wang and Hu, *supra* note_8_ at 194. Jie Huang, *Direct Application of International Commercial Law in Chinese*

willing to apply international treaties not only in civil cases but also in administrative cases, and in cases without foreign factors.⁸⁹ If Chinese law has more than one interpretation, courts will choose one that complies with international treaties that Mainland China ratified.⁹⁰ Courts may also apply international law, when Chinese law does not stipulate how to deal with a certain issue but treaties ratified by Mainland China provide a provision for that.⁹¹ The reasons are that judges are more familiar with international commercial treaties and customs after Mainland China adopted the policies of reform and opening.⁹² Parties are more aware of their rights under international law so they more frequently bring their cases base on international commercial treaties and customs.⁹³ Importantly, the Supreme People's Court is a strong supporter of the application of international commercial treaties and customs.⁹⁴ In its 2008 Work Report, the Court explicitly indicated that Chinese courts should base decisions on treaties that China ratified or should refer to international customs to adjudicate commercial cases involving foreign factors in order to equally protect Chinese and foreign parties' rights and interests.⁹⁵ It is undeniable that Mainland courts still prefer to apply *lex fori*.⁹⁶ But the phenomenon that courts prefer *lex fori* is not unique to China, and instead it also widely

Courts: Intellectual Property, Trade, and International Transportation, 5 MANCHESTER JOURNAL OF INTERNATIONAL ECONOMIC LAW 105, 105-42 (2008).

⁸⁸ *Id.* at 116.

⁸⁹ *Id.* at 121. For cases, see Chongqing Zhengtong Pharmaceutical Co. and the Trademark Review and Adjudication Board of the State Administration for Industry and Commerce v. Sichuan Huashu Veterinary Pharmaceutical Co. LAWINFOCHINA (last visited Jan. 6, 2008) (P.R.C.) (Sup. People's Ct., Aug 31, 2007).

⁹⁰ *Id.*

⁹¹ Huang, *supra* note 87_ at 113. For cases, see Abdul Waheed v. China Eastern Airlines, the first-instance court is the People's Court of Pudong New Area of Shanghai Municipality, and the judgment was rendered on Dec. 21, 2005. The second-instance court is Shanghai No. 1 Intermediate Court, and the judgment was rendered on Feb. 24, 2006.

⁹² *Id.* at 141.

⁹³ *Id.*

⁹⁴ *Id.* at 141-42.

⁹⁵ See 2008 Nian Zuigao Renmin Fayuan Gongzuo Baogao [2008 Supreme People's Court Working Report], available at http://www.gov.cn/2008lh/content_926191.htm (last accessed April 15, 2010).

⁹⁶ Huang Jin & Du Huanfang, *Private International Law in the Chinese Judicial Practice in 2001*, 2 CHINESE J. INT'L L. 387, 410 (2003).

exists in the US.⁹⁷ Judges' preference may come from their unfamiliarity with foreign or international law or parties fail to plead them.⁹⁸ In other words, the conflicts between socialist and capitalist commercial law, if exist, are not the sole or manifest reason to discourage Mainland judges from applying international and foreign commercial law.

3. Conclusion

The line between civil and commercial laws adopted by socialist Mainland China and capitalist regions has become blurry.⁹⁹ Their conflicts are rapidly decreasing.¹⁰⁰ Undeniably, China's judicial institutional reform¹⁰¹ and political democracy¹⁰² still lag behind.¹⁰³ However, these factors mostly affect politically sensitive cases as opposed to civil and commercial cases. Rule of law¹⁰⁴ in Mainland China is still being criticized,¹⁰⁵ but typically in non-commercial cases, such as arbitrary arrests, torture and mistreatment while in official custody, and the denial of basic procedural protections.¹⁰⁶ Although they

⁹⁷ Jason Webb Yackee, *Choice of Law Consideration in the Validity & Enforcement of International Forum Selection Agreements: Whose Law Applies?*, 9 UCLA J. INT'L L. & FOR. AFF. 43, 47 (2004).

⁹⁸ Yackee, *supra* note 97 at 77-84. See Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 292 (1990).

⁹⁹ Xiao Yongpin, *The Conflict of Laws Between Mainland China and the Hong Kong Special Administrative Region: the Choice of Coordination Models*, 4 in YEARBOOK OF PRIVATE INTERNATIONAL LAW 163, 189 (2003). (predicting that Mainland China and Hong Kong will probably become more similar in the fields of commercial laws after they revise their laws according to the requirements of WTO)

¹⁰⁰ *Id.*

¹⁰¹ Wang, *supra* note_10_ at 385. Cross, *supra* note_8_ at 358-59.

¹⁰² See Randall Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 MICH. J. INT'L L. 471, 474-75 (2002).

¹⁰³ Frank K. Upham, *From Demsetz to Deng: Speculations on the Implications of Chinese Growth for Law and Development Theory*, 41 N.Y.U. J. INT'L L. & POL. 551, 552 (2009). Clarke, *supra* note_22_ at 111.

¹⁰⁴ For the definition of rule of law, see Wang, *supra* note_10_ at 349.; John K.M. Ohnesorge, *The Rule of Law*, 3 ANNU. REV. LAW SOC. SCI. 99, 105-07 (2007). For history of rule of law in China, see Jonathan K. Ocko & David Gilmartin, *State, Sovereignty, and the People: A Comparison of the ?Rule of Law? in China and India*, 68 THE JOURNAL OF ASIAN STUDIES 55-100 (2009).

¹⁰⁵ *Eg.*, Randall P. Peerenboom, *Competing Conceptions of Rule of Law in China*, in ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S. 113, 116 (Randall Peerenboom ed. 2004).(criticizing law-making process is lack of transparency and judges are of poor quality)

¹⁰⁶ William P. Alford, STATEMENT WILLIAM P. ALFORD HENRY L. STIMSON PROFESSOR AND DIRECTOR OF EAST ASIAN LEGAL STUDIES HARVARD LAW SCHOOL (2002), <http://www.cecc.gov/pages/hearings/020702/alford.php>. (Last visited April 10, 2010).

might, indirectly, negatively influence the full function of Mainland civil and commercial law,¹⁰⁷ they should not constitute a convincing argument that socialist Mainland China should not recognize and enforce judgments from capitalist Hong Kong and Macao (or other capitalist jurisdictions), and vice versa. These factors are also not an excuse to deny the merits that Mainland China can learn from the US and EU JRE law in civil and commercial cases. It is unconvincing that, the US and the EU cannot provide any valuable lessons for China to improve its JRE system, simply because their laws are capitalist.¹⁰⁸ JRE rules, such as finality and validity of a judgment, *res judicata*, and incompetent jurisdictions of judgment-rendering courts, have no socialist or capitalist color. Fraud and unfair procedures at the judgment-rendering proceedings may result from the incompetent Mainland court system. However, they are not necessarily the features of socialist law.

ii. Judgments Relating to Mainland Governments

In terms of the conflicts between socialism and capitalism, when a party to a judgment is a Mainland government agency, two questions are especially critical. First, should the proposed Multilateral JRE Arrangement cover such judgments; and would Mainland courts use the public policy exception to deny JRE?

1. Mainland Public Institutions

¹⁰⁷ Matthew S. Erie, *China's (Post-)Socialist Property Rights Regime: Assessing the Impact of the Property Law on Illegal Land Takings*, 37 HONG KONG L. J. 919, 920 (2007).

¹⁰⁸ For Chinese literature on learning from capitalist countries, such as the US and the EU, see Section C of Chapter II. Qiong, *supra* note_1_ at 149 (referring to US law for solving Chinese interregional divorce disputes).

The proposed Multilateral JRE Arrangement does not cover judgments in administrative cases.¹⁰⁹ In other words, it only covers civil and commercial judgments.¹¹⁰ If a judgment involves a government agency and the dispute arises from the public power exercised by this agency, this judgment is administrative.¹¹¹ However, public institutions [*Shiye Danwei*] may cause confusion in the JRE scenario. Public institutions are legal persons, owned by Mainland governments, to promote education, science and technology, culture and hygiene.¹¹² They are different from state-owned enterprises because of their non-profit nature. Typical examples include China Securities Regulatory Commission,¹¹³ schools,¹¹⁴ and hospitals.¹¹⁵ Regarding JRE, whether a judgment is civil and commercial in cases of a medical malpractice judgment involving a Mainland public hospital or a judgment related to a Mainland public school because one of its teachers' negligence causes injury to a student. These cases should be civil and commercial because, when a doctor treats a patient or a professor teaches a student, the doctor and the professor do not

¹⁰⁹ For distinctions between "administrative" and "civil and commercial," see Autonomous Terminology of "Civil and Commercial" of Section A of Chapter V.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Arts. 2 and 3 of Shi Ye Dan Wei Deng Ji Guang Li Zan Xing Tiao Li [Interim Regulation on the Registration of Public Institutions] (Order No. 252 of the State Council of the People's Republic of China issued on October 25, 1998, amended according to the Decision of the State Council about Amending the Interim Regulation on the Registration of Public Institutions on June 27, 2004) translated in <http://www.lawinfochina.com> accessed on July 5, 2008 (P.R.C.). Art. 4 of Shi Ye Dan Wei Deng Ji Guang Li Zan Xing Tiao Li Si Shi Xi Ze [Detailed Implementation Guidelines of the Interim Regulation on the Registration of Public Institutions] (published on April 15, 2005 by the National Registration and Management Bureau for the Public Institutions, and effective on January 1, 2006) available at http://sy.china.cn/cgi-bin/noticeboards/get_notice.cgi?NOTICE_ID=21248&TEMPLATE=BAB_Content&TEMPLATE_UID=368632 accessed on April 25, 2009.

¹¹³ Guo Wu Yuan Ban Gong Ting Guan Yu Yin Fa Zhong Guo Zheng Quan Jian Du Guan Li Wei Yuan Hui Zhi Neng Pei Zhi, Nei She Ji Gou He Ren Yuan Bian Zhi Gui Ding De Tong Zhi [Notice of the State Council about the Function, Organization, and Staff of China Securities Regulatory Commission] (published on September 30, 1998 by the State Council) a Chinese version is available at <http://www.fc110.gov.cn/zcfg/bwfg/200909/30414.html> accessed on April 1, 2010.

¹¹⁴ Wei Hu, *Guangyu Minban Jiaoyu Fazhan yu Guifang Shikao* [Analysis of the Development and Regulation of Non-state Owned Schools], 3 JIAOYU FAZHANG YANJIU [STUDY OF EDUCATION DEVELOPMENT] 8, 8-15 (2000); Yongjiu Kan, *Gongli Xuexiao de Gonggongxing Wenti* [The Publicity Problem of the Public School], 26 JIAOYU LILUN YU SHIJIAN [THEORY AND PRACTICE OF EDUCATION] 17, 17-20 (2006).

¹¹⁵ In Mainland China, 90% hospitals are public hospitals and only 10% are privately-owned. Licai Lin & Mao Licun, *Goujian Hexia Yihuan Guanxi Zi Wo Jian* [Establish a Harmonized Relationship between Patients and Hospitals], 23 CAIZHI [INTELLIGENCE] 296, 296 (2009).

represent the governments to exercise a public power.¹¹⁶ Although public hospitals and schools receive funding from the governments, and eventually the funding may be used to pay for the judgments against them,¹¹⁷ this factor alone cannot make the judgments administrative. Therefore, these judgments should be covered by the proposed Multilateral JRE Arrangement.

The ECJ faced a similar situation in *Sonntag v. Waidmann*. In this case, a German pupil was injured in Italy because of a teacher's negligence during a school trip.¹¹⁸ The pupil's family applied to a German court for the enforcement of an Italian judgment against the teacher.¹¹⁹ The ECJ ruled that this case was civil and commercial because although a teacher working in a public school has the status of civil servant, he does not exercise public power because the teacher's "conduct does not entail the exercise of any powers going beyond those existing under the rules applicable to relations between private individuals" and a teacher in a public school or a private school assumes the same function to students.¹²⁰ The ECJ also held that the fact that the teacher's liability was covered by a social insurance scheme governed by public law was irrelevant "since the basis of the civil claim, that is to say liability in tort or delict, is not affected by the existence of that public insurance."¹²¹

This ECJ case can provide two useful insights for China. First, the key factor to determine whether a judgment should be covered by the proposed Arrangement is

¹¹⁶ Tian Fu, *Woguo Gonglin Zhongxiaoxue Falv Diwei de Fali Fenxi [A Jurisprudential Analysis of Public Schools' Legal Status]*, 156 THE MODERN EDUCATION JOURNAL 26, 29-30 (2009).

¹¹⁷ See Xiaodong Qing, *Gaoxiao Zaiwu yu Zhengfu Zheren [Debts of Higher Education Institutes and Governmental Liabilities]*, 8 JINKA GONGCHENG JINJI YU FA [GOLDEN CARD PROJECT: ECONOMY AND LAW] 162, 162 (2009) (arguing that governments should pay for the debts of higher education institutes).

¹¹⁸ Case C-172/91 *Volker Sonntag v. Hans Waidmann* [1993] ECR I-1963, para. 3.

¹¹⁹ In Germany, the pupil's family tried to enforce the civil-law provisions of a judgment given by an Italian criminal court. *Id.*, para. 2 and 4.

¹²⁰ *Id.*, paras. 21, 22, 24, and 25.

¹²¹ *Id.*, paras. 27 and 28.

whether a party to the judgment was exercising public power when disputes occurred. The relationship between doctors and patients, or between professors and students, in public hospitals or schools is the same as that in private hospitals or schools. Therefore, there is no reason to characterize a medical malpractice judgment involving a public hospital as administrative and a judgment involving a private hospital as civil and commercial. Second, the question whether it is ultimately the government that pays for the judgment should be irrelevant to the JRE decision. Additionally, in Mainland China, doctors working in public hospitals or professors in public schools are not civil servants; this reinforces the conclusion that a medical malpractice judgment involving a Mainland public hospital or a judgment relating to a Mainland public school because one of its teachers' negligence causes injury to a student is not civil and commercial.

2. Interregional Public Policy Exception

Importantly, a requested court in Mainland China should not deny JRE merely because the judgment is against a Mainland government agency or a public institution. The reason is that the conflicts between socialism and capitalism in civil and commercial law have been substantially eliminated. In a market economy, a government agency engaging in commerce should be treated equally as a private party.¹²² Although some Mainland lower courts still abuse the public policy exception to protect government agencies in commercial transactions, the Supreme People's Court would overturn lower courts' decisions and support a restrictive interpretation of public policy exception. Two cases illustrate this.

¹²² See Autonomous Terminology of "Civil and Commercial" of Section A of Chapter V.

In 1988, two Mainland companies and a Hong Kong company contracted to jointly form a joint venture in Mainland China.¹²³ The joint venture would manufacture clothes for exportation.¹²⁴ Under the contract, one of the Mainland companies should supply the joint venture with export quotas.¹²⁵ After two years, this Mainland company suddenly refused to carry out its contractual obligation because a new government regulation forbade joint ventures to obtain export quotas.¹²⁶ Parties went for arbitration to settle disputes.¹²⁷ The China International Economic and Trade Arbitration Commission (hereinafter "CIETAC") rendered an award requiring the Mainland company to compensate other parties for breach of contract.¹²⁸ Because the Mainland company failed to execute the award, other parties applied to the Zhengzhou Intermediate People's Court for enforcement.¹²⁹ The Court invoked the public policy exception to refuse enforcement, because "if the arbitration award were enforced, the economic and social public interest of the State would be manifestly violated and the foreign trade order of the state would be undermined."¹³⁰ This reasoning reflected the socialist view that private contracts did not exist in planned economy and all business transactions should be regulated by the state economic plan. The Supreme People's Court set aside the Intermediate Court's decision and stated that "the disallowing of the arbitral tribunal by the Zhengzhou Intermediate People's Court, on the ground that the economic and social public interest of the state would be manifestly violated and the foreign trade order of the state would be

¹²³ Yongping Xiao & Zhengxin Huo, *Order Public in China's Private International Law*, 53 AM. J. COMP. L. 653, 668 (2005).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 669.

¹³⁰ *Id.* Cheng Dejun, WANG SHENGCHANG & KANG MING, GUOJI GUANLI HE SHEWAI ZHONGCAI SHIWU [INTERNATIONAL PRACTICE AND ARBITRATION INVOLVING FOREIGN ELEMENTS] 258-259 (1993).

undermined, was incorrect."¹³¹ The Supreme People's Court's holding unambiguously demonstrates the view that the state should not intervene into private business transactions.

The second case is between a Hong Kong company and a Mainland government agency.¹³² The government agency invested 105 million RMB to buy equipment from the Hong Kong company, but this equipment did not work as designed. The China International Economic and Trade Arbitration Center ruled that the malfunction of the equipment was not the fault of the Hong Kong company. So it rendered an award against the government agency. The High Court of Anhui Province refused to enforce this award on the grounds of violating social and public interests,¹³³ because the government agency had invested millions in this equipment but gained no profit. This reasoning smacks very much of the socialist idea that the interests of government should prevail against private parties even in commercial transactions.

However, the Supreme Court reversed the Anhui High Court's decision. It ruled that it was improper to refuse the enforcement of this award on the grounds of a social and public interest violation, because social and public interests refer to the fundamental national legal order. In this case, the parties concluded and performed a contract, which did not violate social and public interests. In addition, the fact that the expensive equipment was left unused did not result from the enforcement of the arbitration award. Moreover, the Court ruled that the failure of a governmental project has nothing to do

¹³¹ *Id.* See Zuigao Renmin Fayuan zhi He'an Sheng Gaoji Renmin Fayuan de Pifu [Supreme People's Court Answer to He'nan Higher People's Court] dated Nov. 6, 1992.

¹³² The Supreme People's Court Reply to Whether to Enforce an Arbitration award Made by China International Economic and Trade Arbitration Commission (CIETAC). (Effective January 23, 2006) ([2005] Min Si Ta Zi Di 45 Hao.). A Chinese version can be found at <http://www.fdi.gov.cn/pub/FDI/zcfg/zh/sfjs/P020061008639050623050.pdf> accessed on April 2, 2010.

¹³³ Social and public interests violation is included into public policy exception in Mainland China. See Part i of Section A of Chapter III.

with violations of social and public interests. Thus, this award should be enforced. The Supreme People's Court's decision demonstrates that in commercial transactions, governmental agencies are regarded as equal to private parties. In other words, the conflicts between socialism and capitalism do not play out in commercial settings. This is why a JRE is possible. Although the Supreme People's Court's decision does not announce that Mainland China will in the future be generally open to recognize judgments against its government agencies. But in this decision the Supreme People's Court does not restrict its interpretation of social and public interests only to recognition and enforcement of arbitration awards. Mainland lower courts should follow this decision in interregional JRE. This will help soothe the concern that Mainland courts may abuse the public policy exception in order to protect government agencies in civil and commercial cases.

B. Conflicts between Civil Law and Common Law

Mainland China and Macao are influenced by the civil-law tradition,¹³⁴ whereas Hong Kong is governed by the common-law tradition.¹³⁵ Many scholars argue that the differences between the civil-law and common-law traditions complicate interregional legal conflicts in China but they do not specify what problems may be created by such

¹³⁴ Zhenmin Wang, *The Roman Law Tradition and Its Future Development in China*, 1 FRONTIERS OF LAW IN CHINA 72, 72-78 (2006)

¹³⁵ Hong Kong retains the common law tradition even after it was reunited with Mainland China. Art. 8 of the Hong Kong Basic Law provides that "the laws previously in force in Hong Kong, that is, common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of Hong Kong." Its art. 84 further states that Hong Kong courts may refer to precedents of other common-law jurisdictions when adjudicating cases. But those precedents will only have reference value and no binding force over Hong Kong courts. For comments, see Albert H Y Chen, *The question of conflict of laws between mainland China and Hong Kong*, in H Y Chen & M M Chan, 48 fn 43 HUMAN RIGHTS AND RULE OF LAW [RENQUAN YU FAZHI] (Hong Kong, Wide Angle Press, 1987). See also Philip Smart, *Enforcing Foreign Judgments after 1997*, 4 HONG KONG LAWYER 144 (2002).

conflicts.¹³⁶ Conflicts between civil law and common law bring thorny problems in jurisdiction.¹³⁷ For example, under the Brussels Convention or Brussels I Regulation, most case law that has brought concern between civil law and common law is about jurisdiction.¹³⁸ Similarly, when a world-wide jurisdiction and JRE convention was negotiated at The Hague in 1990s, jurisdiction raised most serious controversies at the Hague Conference.¹³⁹ Conflicts between civil law and common law also create disputes in cases addressing forum shopping, such as anti-suit injunctions and *lis alibi pendens*.¹⁴⁰ Moreover, many literatures also discuss conflicts between civil law and common law in procedures, such as inquisitorial and adversarial systems¹⁴¹ as well as the way of executing judgments.¹⁴² Although harmonizing regional procedural laws is a laudable goal; however, considering the current stage of Chinese interregional integration, it would be far too early to discuss this issue. Therefore, in the interregional JRE proceedings in China, *lex fori* should be applied to the procedural issues. Notably, very few literature

¹³⁶ Eg., Han and Huang, *supra* note_1_ at 122.

¹³⁷ Jonathan Harris, *Understanding the English Response to the Europeanisation of Private International Law*, 4 JOURNAL OF PRIVATE INTERNATIONAL LAW 347, 352 (2008); Anna Gardella & Luca G. Radicati Di Brozolo, *Civil Law, Common Law and Market Integration: The EC Approach to Conflicts of Jurisdiction*, 51 AM. J. COMP. L. 611, 620-23 (2003).

¹³⁸ Erich Gasser GmbH v MISAT Srl, Case C-116/02, [2003] ECR I-14693, *Owusu v Jackson* and Others Case C-128/01 [2005] ECR I-1383, *Turner v. Grovit*, Case C-159/02 [2005] ECR I-3565. For comments of these cases, see Harris, *supra* note_137_ at 368-69. A Dickinson, *A Charter for Tactical Litigation in Europe*, Lloyd's Maritime and Commercial Law Quarterly 273 (2004); A Briggs, *Anti-suit Injunctions and Utopian Ideals*, 120 LAW QUARTERLY REVIEW 529 (2004).

¹³⁹ See Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference*, 57 LAW & CONTEMP. PROBS 271, 274-76 (1994); Ronald Brand, *Due Process, Jurisdiction and A Hague Judgments Convention*, 60 U. PITT. L. REV 661, 661-706 (1999); Kevin M. Clermont, *Jurisdiction Salvation and the Hague Treaty*, 85 CORNELL LAW REVIEW 89, 85-133 (1999); Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT'L L. 1003, 1003-69 (2006); and Ralf Michaels, *Some Fundamental Jurisdictional Conceptions as Applied in Judgment Conventions*, in CONFLICT OF LAWS IN A GLOBALIZING WORLD: A TRIBUTE TO ARTHUR VON MEHREN 29, 29-62 (Ralf Michaels, et al. ed. 2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=927484 (last visited Apr 15, 2010).

¹⁴⁰ Gardella and Brozolo, *supra* note_137_ at 623-28. ARTHUR T. VON MEHREN, ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW A COMPARATIVE STUDY 261-348 (2007). Allianz SpA and Generali Assicurazioni Generali SpA v. West Tankers Inc. Case C-185/07.

¹⁴¹ Eg., Jeffrey S. Parker & Michael K. Block, *Decision Making in the Absence of Successful Fact Finding: Theory and Experimental Evidence on Adversarial Versus Inquisitorial Systems of Adjudication*, 24 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 89, 89-105 (2004); Amalia D Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1181-1276 (2004); Francesco Parisi, *Rent-Seeking Through Litigation: Adversarial and Inquisitorial Systems Compared*, 22 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 193, 193-216 (2002).

¹⁴² WENDY A. KENNETT, ENFORCEMENT OF JUDGMENTS IN EUROPE 62-63 (2000).

concerns conflicts between civil law and common law in requirements for JRE and grounds for refusing JRE. This Section intends to fill this gap by using legal conflicts between Mainland China, Macao, and Hong Kong as examples.

In interregional JRE in China, conflicts between civil law and common law cause two problems: the same term may connote different meanings in regional laws and certain terms may exist in one regional law but be absent from the other. The typical example is finality. Its meaning is significantly different between Mainland law and Hong Kong law, as well as Macao law and the two existing JRE Arrangements. Different meanings or different concepts seem to concern only treaty interpretations and terminology choices. However, substantially they reflect conflicts between civil-law and common-law traditions.

Part One of this section proposes the guiding solutions to resolve conflicts between civil-law and common-law traditions in the proposed Multilateral JRE Arrangement. Part Two uses the dispute of finality to illustrate how to use these solutions to solve conflicts between civil-law and common-law traditions.

i. Guiding Solutions

Considering the conflicts between civil-law and common-law traditions in the three regions,¹⁴³ it is not easy to achieve free circulation of judgments in one step.¹⁴⁴ Chinese interregional legal conflicts are complex.¹⁴⁵ Therefore, the proposed Multilateral JRE

¹⁴³ For comparison of JRE laws among the three regions and between the two existing arrangements, see Chapter II.

¹⁴⁴ Guobin Zhu, *Inter-regional Conflict of Laws under "One Country, Two Systems": Revisiting Chinese Legal Theories and Chinese and Hong Kong Law, with Special Reference to Judicial Assistance*, 32 HONG KONG L.J. 615, 643 (2002).

¹⁴⁵ For literatures, see Chapter II.

Arrangement should adopt the approach of “start small” like the Mainland-Hong Kong Arrangement and the the Hague Choice of Court Convention.¹⁴⁶ Therefore, the proposed Multilateral JRE Arrangement will be a basic framework where further development and expansion are possible and necessary in the future.

As for the conceptual method, the proposed Multilateral JRE Arrangement should be established by focusing on and solving easy problems first and then gradually expanding to difficult issues. Additionally, the guideline for drafting is to adopt autonomous terminologies for terms that may have different meanings in regional laws. Legislatures should consider avoiding terms that have a meaning under any of the regional systems, unless that meaning is intended. In implementation, regional courts should decide the meaning of ambiguous terms by autonomous or comparative interpretations.¹⁴⁷ An interregional mechanism should be established to coordinate regional courts to achieve uniformity of interpretation.¹⁴⁸

ii. Finality Disputes

Finality is a requirement for JRE in common-law jurisdictions such as Hong Kong¹⁴⁹ and the US.¹⁵⁰ However, finality is not a requirement for JRE in the Brussels I

¹⁴⁶ For the Hague Choice of Court Convention, *see* Report: Recent International Agreement—Convention on Choice of Court Agreements, Concluded June 30, 2005 119 HARVARD LAW REVIEW 935 (2006) (indicating the approval of the Hague Choice of Court Convention demonstrates that “start small” is a good approach to complicated conflict-of-law issues). For the approach adopted for drafting the Mainland-Hong Kong Arrangement, *see* Hong Kong LC Paper No. CB(2)722/01-02(04), para 18 (indicating the approach is to “follow[] in order from easy to difficult matters and advance step by step” and this was inspired by the Hague Choice of Court Convention.) For details of the approach of “start small,” *see* Scope of the Arrangement Part i of Section B of Chapter III.

¹⁴⁷ Regarding methods of interpretations, *see* Part ii of Section B of Chapter VI.

¹⁴⁸ For details of this mechanism, *see* Section B of Chapter VI.

¹⁴⁹ For the finality criteria in Hong Kong law, *see* part ii of Section A of Chapter III.

¹⁵⁰ For the finality criteria in the US law, *see infra* fn 197.

Regulation.¹⁵¹ Nevertheless, a requested court may stay the JRE proceedings if the judgment is challenged in rendering region.¹⁵² Under Mainland law, "a legally effective judgment [*you fa lv xiao li de pan jue*]"¹⁵³ refers to "a final judgment."¹⁵⁴ Under Macao law, "a definite judgment" has been used to describe the finality of a judgment.¹⁵⁵ Besides differences in using terminologies, the meanings of finality deviate significantly between Mainland China and Hong Kong. In brief, a final judgment should not be subject to any appeal but can be subject to retrial in Mainland China. However, Hong Kong courts hold that a judgment is final even if an appeal against it is pending, but a judgment is not final if it may be retried under the Mainland procedure for trial supervision. Therefore, a final Mainland judgment is never final under Hong Kong law, and vice versa.

This section concentrates on the finality dispute between Mainland China and Hong Kong, which has hindered JRE between these two regions when a judgment is beyond the scope of the Mainland-Hong Kong Arrangement. Solving this dispute is extremely important for the success of the proposed Multilateral JRE Arrangement. This Section will discuss when a Mainland judgment becomes final under Mainland law, why Hong Kong courts hold that Mainland judgment will never become final under Hong Kong standards, and how the finality dispute can be solved.

¹⁵¹ Carlos Esplugues Mota & Guillermo Palao Moreno, *Chapter II Jurisdiction Section 5 Jurisdiction over Individual Contracts of Employment*, in BRUSSELS I REGULATION, 340 (ULRICH MAGNUS & PETER MANKOWSKI ed. 2007).

¹⁵² Arts. 37 and 46 of the Brussels I Regulation.

¹⁵³ Art. 12.3 of the Organic Law of the People's Courts.

¹⁵⁴ *Id.* Art. 12.4 reads that "Zhongshen panjue he caiding, ye jiushi fasheng falv xiaoli de panjue he caiding" [a legally effective judgment is final]. It is suggested to refer to the Chinese version of this law, which makes its meaning clearer than the English version. Others disagree with my position; see Nanping Liu, *A Vulnerable Justice: Finality of Civil Judgments in China*, 13 THE JOURNAL OF ASIAN LAW (1999), <http://www.columbia.edu/cu/asiaweb/v13n1Liu.htm>. <http://www.columbia.edu/cu/asiaweb/v13n1Liu.htm#top> (accessed Dec 27, 2009). In the context of discussing Mainland law, "final" refers to "legally effective." But the "final" in Mainland law is significantly different from that in Hong Kong law.

¹⁵⁵ For the details of Macao law, see part iii of Section A of Chapter III.

1. Comparison of the Criteria of "Finality" under Mainland Law and Hong Kong Law

Regarding the trial procedure, in Mainland China, a judgment becomes final when all appeals are exhausted¹⁵⁶ or parties do not appeal under the statute of limitation.¹⁵⁷ Judgments of the Supreme People's Court are final.¹⁵⁸ In other words, unlike Hong Kong, Mainland courts hold that a judgment is not final if it has in fact been appealed or may potentially be subject to appeal. Therefore, in the trial procedure, the finality standard under the Mainland law is stricter than that of the Hong Kong law.

However, unlike Hong Kong, Mainland China has established the procedure for trial supervision to retry final judgments rendered in the trial procedure.¹⁵⁹ The retrial can be conducted by the court rendering the original judgment or a court at the next higher level, as well as a court designated by the latter.¹⁶⁰ If the court rendering the original judgment conducts the retrial, it should form a new collegial panel for the retrial.¹⁶¹ Notably, this procedure does not influence the finality and enforceability of a judgment unless a court with competent jurisdiction orders to stay the enforcement proceedings.¹⁶² This means that enforcement can go on even while a court or a prosecutor is reviewing the judgment but has not decided to commence the procedure for trial supervision. However, Hong Kong courts hold that all Mainland judgments are not final because of this procedure.¹⁶³ In order to understand Hong Kong courts' holding, discussing three

¹⁵⁶ Art. 12 of the Organic Law of the People's Courts. *See also* Art. 10 of the Mainland CPL.

¹⁵⁷ *See* arts. 147 and 158 of the Mainland CPL.

¹⁵⁸ Art. 12.1 of the Organic Law of the People's Courts.

¹⁵⁹ Chapter XVI of the Mainland CPL and Art. 14 of the Organic Law of the People's Courts are about this procedure.

¹⁶⁰ Art. 179 of the Mainland CPL.

¹⁶¹ *Id.*, art. 184.

¹⁶² Art. 184 of the Mainland CPL.

¹⁶³ *Eg.*, *Chiyu Banking Corp. Ltd. v. Chan Tin Kwun*, [1996] 2 H.K.L.R. 395 (H.C.).

important features of this procedure is necessary.

First, this procedure can be commenced by a party to a judgment and a prosecutor in instances provided by law.¹⁶⁴ A prosecutor can lodge a protest on behalf of a party to a judgment, after it reviews and accepts this party's application.¹⁶⁵ If a prosecutor lodges a protest against the judgment, a relevant people's court shall retry the case,¹⁶⁶ but retrial does not necessarily lead to reversing the original judgment.

The second feature of the procedure for trial supervision is that, a court can *sua sponte* initiate a retrial without party's motion, when the judicial committee of a court discovers some definite error in a final judgment rendered by this court and deems it necessary to have the case retried.¹⁶⁷ If the Supreme People's Court or a people's court at a higher level discovers some definite error in a final judgment of a people's court at a lower level, it can retry the case itself or direct a competent people's court to conduct a retrial.¹⁶⁸

The third feature is, if a party to a judgment would like to initiate a retrial, he or she must submit his or her application (1) within two years after the original judgment

¹⁶⁴ Arts. 179 and 185 of the Mainland CPL. There are three circumstances that a party to a judgment and a prosecutor can request a court to commence retrial.

(1) Evidence problems: there is sufficient new evidence to set aside the prior judgment or that the main evidence used in the original judgment to find the facts was insufficient, forged, or not cross-examined; or in the original proceedings a party, who was unable to collect the evidence necessary for the trial by herself for objective reasons, applied to a people's court in writing and requested the court to investigate and collect the evidence, but the court refused her application.

(2) Procedural problems: the composition of the judicial panel was illegal or a judge who should withdraw from the case but had not; any person with no legal capacity to engage in litigation did not have a guardian(s) as a legal representative(s) to act for her in a lawsuit, or a party who should participate in a lawsuit did not participate for reasons beyond this party's or her legal representative's control; a party's right to argue for herself was illegally deprived; a default judgment was made without summons; and other undue process. This instance also includes that the judge who made the original judgment committed embezzlement, accepted bribes, performed malpractices for personal benefits or perverted the law in the adjudication of the case.

(3) Other problems: there was definite error in the application of the law in the prior judgment; the judgment-rendering court lacked jurisdiction; the judgment omitted or went beyond parties' claims; or the legal document that the judgment was based on has been cancelled or modified.

¹⁶⁵ Art. 185 of the Mainland CPL.

¹⁶⁶ *Id.*, art. 186.

¹⁶⁷ *Id.*, art. 177.

¹⁶⁸ *Id.*

becomes final, or (2) within three months after he or she has known or should know that the legal document on which the original judgment was made is cancelled or revised, or that the judge was involved in any conduct of embezzlement, bribery, practicing favoritism for herself or relatives, or twisting the law in rendering judgment.¹⁶⁹ There is no time limitation for prosecutors to lodge a protest or a court to *sua sponte* initiate a retrial against a judgment.

A key policy underlining the procedure for trial supervision is to ensure that the parties have access to justice even if all appellate procedures have been exhausted and the judgment has become final. Balancing justice and finality of a judgment, Article 179 of the 2007 CPL limits retrials to circumstances designated by law.¹⁷⁰ This Article is based on Article 179 of the 1992 version. Both versions provide that a people's court shall retry the case when a retrial application made by a party or a prosecutor finds any of the listed circumstances. For the convenient of comparison, the new Article 179 is divided into three categories.

The first category refers to the circumstances that are literally the same in both the new and old Article 179: (1) there is sufficient new evidence¹⁷¹ to set aside the prior judgment; (2) there was definite error in the application of the law in the prior judgment; and (3) the judge(s) who rendered the prior judgment committed embezzlement, accepted bribes, performed malpractices for personal benefits or perverted the law in the adjudication of the case. Thus far, there is no judicial interpretation requiring that these circumstances, although identical with those in the old law, shall be interpreted differently.

¹⁶⁹ Art. 184 of the Mainland CPL.

¹⁷⁰ Art. 179 of the Mainland CPL.

¹⁷¹ The definition of the "new evidence" can be found in article 44 of the *Zuigao Remin Fayuan Guanyu Minshi Susong Zhengju de Ruogan Guiding* [Supreme People's Court's Evidence Rule in Civil Litigation], *Fashi* [2001] No. 33 (passed at the 1201st meeting of the Judicial Committee of the Supreme People's Court on December 6, 2001, and effective on April 1, 2002.)

In other words, most likely the scope of the new law will be substantially the same as the old law in this category.

The second category is that the new law elaborates on the old law. So compared with the old law, the new law actually limit the courts' discretion in accepting retrial. This category includes defective major evidence and undue process.

The old law only indicated that the major evidence by which the facts were established in the original judgment was insufficient. The new law lists three circumstances for defective evidence. They are: (1) the major evidence by which the facts were established in the prior judgment was forged; and (2) the major evidence by which the facts were established in the prior judgment has not been cross-examined. Therefore, the new law elaborates the old law by defining insufficient major evidence as forged and non-cross-examined evidence. This clarification limits courts' discretion in making retrial decisions.

The old law only stated that a final judgment should be set aside, if the judgment-rendering proceeding was unfair, which may have affected the correctness of the judgment in the case. On the contrary, the new law lists five circumstances in detail, namely (1) the composition of the judicial panel was illegal or a judge(s) who should withdraw from the case but have not; (2) any person with no legal capacity to engage in litigation did not have a guardian(s) as a legal representative(s) to act for him in a lawsuit, or a party who should participate in a lawsuit did not participate because of reasons beyond his or his legal representative's control; (3) a party's right to argue for himself or herself was deprived; (4) a default judgment was made without summons; and (5) other unfair procedures. Therefore, compared with the old law, the new law is clearer. It

elaborates on the old law by narrowing its scope in this category. Such development demonstrates that the value of finality should outweigh a minor defect in process.

The third category focuses on the newly created circumstances to retrial under the new law. These circumstances can be further divided into two sub-categories.

The instances in the first sub-category are reasonable grounds for retrial. They include: (1) the original trial court lacked jurisdiction; (2) an original judgment omitted or went beyond parties' claims; and (3) the legal document that original judgment or written order was based on has been cancelled or modified. The first and the third circumstances are certainly reasonable. However, there are doubts about the proportionality of the second circumstance. Retrial is costly and time-consuming not only for parties but also for courts. If a prior judgment omits parties' claims, maybe trying the omitted claim in new proceedings, rather than trying the whole case again, is a remedy proper enough for the parties. Similarly invalidating the part of judgment that goes beyond parties' claims may be sufficient to relieve parties. My presumption is that a retrial court may just decide the omitted claim or simply invalidate the part of judgment that goes beyond a party's claim.

Second are unclear new categories. Only this category may potentially cause the new CPL expands the retrial grounds in the old CPL. It includes insufficient basic evidence and the failure of a court in assisting parties to collect evidence. A retrial can be commenced if the basic evidence by which the facts were established in the prior judgment was insufficient. The new law divides evidence into "basic evidence" and "major evidence." The difference between these two concepts is unclear currently. However, literally, parties or prosecutors may prefer to argue a retrial based on

insufficient basic evidence, because they may have a larger leeway to define insufficiency. By contrast, if their argument is based on defective major evidence, they have to prove either forgery or non cross-examination.

More important, the new law also provides that a final judgment should be retried if in the prior proceedings, for objective reasons, a party is unable to collect the evidence necessary for the trial of the case by itself, and if that party had applied to a people's court in writing, asking the people's court to investigate and collect the evidence and the court did not comply. These evidence should be limited to those kept by state and not accessible to parties or those related to commercial secrets or personal privacy according to Article 17 of the Supreme People's Court's Evidence Rule in Civil Litigation.¹⁷²

"Objective reasons" should be narrowly defined in order to avoid retrial.

Overall, it is unfair to charge the new CPL adds more circumstances for retrial simply because the number of grounds for retrial increases in the new law.¹⁷³ The new law actually limits the courts discretion in the second category, and some newly added grounds are reasonable. The only potentially problematic new grounds are insufficient basic evidence and the failure of a court in assisting parties to collect evidence. Advisably, Mainland courts should restrictively interpret them and avoid loosening the requirements for retrial.

¹⁷² Art. 17 of the Supreme People's Court's Evidence Rule in Civil Litigation indicates: In any of the following circumstances, the parties concerned and the agent *ad litum* thereof may plead the people's court to investigate upon and collect evidences:

1. The evidences applied for investigation and collection are the archive files kept by relevant organs of the state and must be accessed by the people's court upon authority;
2. The materials that concern state secrets, commercial secrets or personal privacy;
3. Other materials that cannot be collected by the parties concerned or the agents *ad litum* thereof due to objective reasons.

¹⁷³ For arguments that retrials will happen more frequently in Mainland China because the number of grounds for retrial increases in the new CPL, *See Zhang, supra note_3_* at 16.

2. Hong Kong JRE Case Law: *Chiyu* and its progeny

Questioning the finality of a Mainland judgment first arises in *Chiyu Banking Corporation Limited v. Chan Tin Kwun*.¹⁷⁴ In this case the plaintiff applied to a Hong Kong court for enforcing a Mainland judgment. This judgment was final under Mainland law, because all appellate procedures had been exhausted. The defendant applied to stay the Hong Kong proceedings on the grounds that he had requested a Mainland prosecutor to issue a protest against the judgment under the procedure for trial supervision. The defendant argued that if a protest would be lodged in due course, the judgment-rendering court would have to order a retrial and possibly the court would reverse the original judgment. The Hong Kong court concluded that Mainland judgment was not final and conclusive for enforcement in Hong Kong in light of the procedure for trial supervision.

The court first cited *The Conflict of Laws* by Dicey & Morris, indicating that “a foreign judgment may be final and conclusive though it is subject to an appeal and though an appeal against it is actually pending in the foreign country where it was given.”¹⁷⁵ Then it based its reasoning on *Gustave Nouvion v. Freeman*, holding that, “One must apply Hong Kong law to determine whether a judgment is final and conclusive.”¹⁷⁶ More importantly, it ruled that “no decision has been cited to the effect that an English Court is bound to give effect to a foreign decree which is liable to be abrogated or varied by the *same* court which issued it” (emphasis added).¹⁷⁷ Therefore, the court concluded that the Mainland judgment was final in the sense that it was not appealable and it was enforceable in Mainland China, but it was not final for the purpose

¹⁷⁴ *Chiyu Banking Corp. Ltd. v. Chan Tin Kwun*, [1996] 2 H.K.L.R. 395 (H.C.).

¹⁷⁵ *Id.*

¹⁷⁶ *Gustave Nouvion v. Freeman & Another* (1889) 15 App Cas 1.

¹⁷⁷ *Chiyu*, [1996] 2 H.K.L.R. 395 (H.C.).

of recognition and enforcement by Hong Kong courts because it “is not final and unalterable in the [Mainland] court which pronounced it.”¹⁷⁸ Thus, the Hong Kong court decided to stay the enforcement proceedings pending the outcome of the decision of the Mainland prosecutor.

As a conclusion, the *Chiyu* case establishes that Hong Kong courts will not recognize or enforce a judgment rendered by a Mainland court that retains power to alter the judgment. It also implies that Hong Kong courts will recognize or enforce a judgment rendered by a Mainland court, even if a court *higher than* the judgment-rendering court maintains power to alter this judgment. However, this case fails to answer an important question: would Hong Kong courts recognize and enforce the judgment if the people’s prosecutor does not lodge a protest after reviewing the defendant’s application? Or in other words, if the prosecutor does not lodge a protest, will the Mainland judgment become final? Professor Nanping Liu answers “no,” because under Mainland procedure for trial supervision, there is no time limit for a party to apply to a prosecutor to lodge a protest and the prosecutor has discretion in making its protest against a judgment at anytime.¹⁷⁹ Therefore, he argues that Mainland judgments will never become final so never become recognizable and enforceable in Hong Kong. This view has been adopted by Hong Kong courts in subsequent cases after *Chiyu*.¹⁸⁰

One example is *Wuhan Zhong Shuo Hong Real Estate Company Limited v. the Kwong Sang Hong International Limited*.¹⁸¹ In this case, the plaintiff sought to enforce the outstanding balance of a Mainland judgment in Hong Kong. The judgment was final

¹⁷⁸ *Id.*

¹⁷⁹ Liu, *supra* note 154 at 40 and 80.

¹⁸⁰ *Eg.*, *Wuhan Zhong Shuo Hong Real Estate Co. Ltd. v. the Kwong Sang Hong Int’l. Ltd.* [2000] H.K.C. 711 (C.F.I.); *Tan Tay Cuan v. Ng Chi Hung*, [2001] H.K.C. 164 (C.F.I.)

¹⁸¹ *Wuhan Zhong Shuo Hong Real Estate*, [2000] H.K.C. 711 (C.F.I.).

under Mainland law because it was rendered by the Supreme People's Court. The defendant argued that the judgment was not final and conclusive. His contention was based on a letter dated of November 25, 1999, addressed to him from the Supreme People's Prosecutor, saying that "the Supreme People's Prosecutor had decided to review the judgment of the Supreme People's Court on the basis that there was no sufficient evidence to establish the material facts and/or the wrong law had applied and/or that the lawful procedure had not been followed."¹⁸² The court agreed with the defendant that the Mainland judgment was not final and conclusive, and granted a six-month stay based on expert evidence that the decision of the Supreme People's Court or the Supreme People's Prosecutor might be known about 6 months.

Again, in 2001, the Hong Kong High Court refused to enforce a Mainland judgment because of the possibility that the Mainland Supreme People's Court could retry the case under the procedure for trial supervision. The case is *Tan Tay Cuan v Ng Chi Hung*.¹⁸³ In this case, the judgment was obtained after exhausting all appellate procedures in Mainland China. But the Hong Kong court held that this judgment was not final, because the defendant applied to the Supreme People's Court asking to retry this case under the procedure for trial supervision. The court also noted that the application to retry this case in Mainland China had not been accepted or dismissed by the Mainland Supreme People's Court. However, the court held that the situation seemed to suggest that there were possibly good grounds for a retrial. The court concluded that the Mainland judgment was "not a final and conclusive judgment because it [was] a judgment which by their procedure [was] capable of being corrected on review and on

¹⁸² *Id.*

¹⁸³ *Tan Tay Cuan v. Ng Chi Hung*, [2001] H.K.C. 164 (C.F.I.), available at <http://legalref.judiciary.gov.hk/lrs/common/ju/judgment.jsp.3>

retrial.”¹⁸⁴ Accordingly, the enforcement was denied.

Because of *Chiyu*, all the Mainland judgments become unrecognizable and unenforceable in Hong Kong. The *Chiyu* and its progeny demonstrate that three elements exist in *Chiyu* doctrine. First, Hong Kong law should be applied to determine whether a Mainland judgment is final and conclusive. Second, under Mainland law, a judgment will become final after being tried by two instances or after the period for appeal expires and no appeal is filed. However, importantly, under the Mainland procedure for trial supervision, a competent court—including the judgment-rendering court—can retry the case in limited circumstances provided by law. Therefore, however rare the circumstances may be, the judgment-rendering court may reverse its judgment in the retrial proceedings. The *Chiyu* court holds that if a court retains the power to reverse its own judgment, this judgment is not final. Third, a mere *likelihood of a retrial* is sufficient to make a Mainland judgment unrecognizable and unenforceable in Hong Kong. For example, in *Chiyu* and *Wuhan*, the retrial proceedings obviously have not been triggered: the prosecutors have not decided to lodge a protest against the judgments and the judgments are still final and enforceable in Mainland China. Another example is *Tan Tay Cuan*, where the Supreme People’s Court had not confirmed that it would retry the case, but the *Tan Tay Cuan* court held that “it does not necessarily mean that it [retrial] will take place but certainly it *may* take place. (Emphasis added)”

3. Problems of *Chiyu*

The *Chiyu* doctrine is problematic. First, it relies on the English precedent *Gustave*

¹⁸⁴ *Id.*

Nouvion, which held that a final judgment should not be revisited by the court that pronounced it and, in cases that the judgment is erroneous; it should be a higher court with jurisdiction to reopen the case.¹⁸⁵ However, the *Chiyu* doctrine interprets this precedent without looking into the specific facts of *Gustave Nouvion*.

Gustave Nouvion involves a Spanish “remate” judgment obtained in “executive” proceedings.¹⁸⁶ Under Spanish law, there are two proceedings. One is executive proceedings and the other is ordinary, plenary, or declarative proceedings.¹⁸⁷ Both proceedings can be brought against the same subject-matter and between the same parties.¹⁸⁸ But the judgment obtained in executive proceedings, which is the so-called “remate” judgment, has no *res judicata* effect.¹⁸⁹ In other words, “the rights of the parties with reference to the original cause of action are in no way affected by any judgment obtained in the executive proceedings”¹⁹⁰ and the “remate” judgment “merely [] give[s] a right to the plaintiff in the action to get execution on the assumption that he has got a good cause of action by the document on which he sues.”¹⁹¹ Furthermore, the “remate” judgment is not a decision that exhausts the merits of the controversy between the parties, because in “executive” proceedings, the defendant can only make certain pleas of a certain prescribed and definite character.¹⁹² The same court that rendered the “remate” judgment also can hear an “ordinary” or “plenary” action to decide every plea that the defendant may raise including those that had been decided in the previous executive

¹⁸⁵ See *Nouvion*, (1889) 15 App Cas 1, per Lord Herschell and Lord Watson.

¹⁸⁶ See *id.*

¹⁸⁷ *Nouvion*, (1887) 37 CH D 244, per Lopes, L. J. Affirmed by (1889) 15 App Cas 1.

¹⁸⁸ *Id.*, per Cotton, L. J.

¹⁸⁹ *Id.*, per Cotton, L. J. and Lindley, L.J.

¹⁹⁰ *Id.*, per Cotton, L. J.

¹⁹¹ *Id.*

¹⁹² *Nouvion*, (1889) 15 App Cas 1, per Lord Watson and Lord Ashbourne.

proceedings.¹⁹³

For two reasons the Spanish “remate” judgment is fundamentally distinct from a final Mainland judgment obtained in the trial procedure. First, the Mainland judgment conclusively decides the rights of the parties and has *res judicata* effect between them. Second, a defendant can raise all the pleas against a plaintiff’s claims in the Mainland trial procedure. Moreover, if a judgment is obtained through trial procedure, a party can apply to retry only in very limited grounds, such as discovering important new evidence or corrupt judges.¹⁹⁴ Therefore, the *Gustave Nouvion* holding should not be applied to Mainland judgments.

Moreover, *Gustave Nouvion* does not establish a general rule. English case laws in the nineteenth century when *Gustave Nouvion* was rendered also “established that a foreign judgment could be enforced in England despite the fact that there was a possibility that the foreign court might have to revisit its original decision.”¹⁹⁵

The second problem of *Chiyu* is that it improperly applies the law of the requested court to determine the finality of a judgment in the JRE proceedings. It ignores that a Mainland judgment is enforceable in Mainland China even if an application for retrial has been submitted to a court or a prosecutor.¹⁹⁶ A mere likelihood of retrial cannot make the judgment unenforceable in Mainland China. Therefore, the Mainland judgment should be recognizable and enforceable in other regions.

Applying the law of the region where the judgment was rendered to determine its finality is the general practice in the US. Although the Full Faith and Credit Clause does

¹⁹³ *Id.*, per Lord Watson.

¹⁹⁴ See art. 179 of the 2007 Mainland CPL.

¹⁹⁵ Philip Smart, *Enforcement of Foreign Judgments*, in ENFORCING JUDGMENTS IN HONG KONG 255, 267 (Christine N Booth ed. 2004). *Vanquelin v. Bouard*, (1863) 15 CB (NS) 341.

¹⁹⁶ Arts. 179 and 185 of the Mainland CPL.

not explicitly require finality as a precondition for JRE,¹⁹⁷ in practice, except in child support and similar cases,¹⁹⁸ only final judgments can be recognized and enforced in sister states.¹⁹⁹ The leading practice is that a requested court should determine finality according to the law of the judgment-rendering region.²⁰⁰ The Judiciary Act of 1790 explained the Full Faith and Credit Clause in the Constitution as: “Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same Full Faith and Credit in every court...as they have by law or usage in the courts of such State... *from which they are taken.*”²⁰¹ (Emphasis added) This statement clearly indicates that the issues of finality and conclusiveness should be determined by “the law and usage” of the judgment-rendering state.²⁰² The Second Conflicts Restatement also provides the same rule.²⁰³ For example, *Paine v. Schenectady Insurance Co.* involves conflicting judgments from Rhode Island and New York with appeals pending against both.²⁰⁴ An enforcement proceeding was brought in a Rhode Island court. The court consequently enforced the New York judgment, because under the New York law an appeal did not vacate a judgment but under the Rhode Island law it did. It is well received that the law of the judgment-rendering region should decide the effect of appeal, retrial and the like on the finality of a judgment.²⁰⁵ Moreover, in 2008 a US court recognized and enforced a

¹⁹⁷ See *Vardon Golf Co., Inc. v. Karsten Mfg. Corp.*, 294 F.3d 1330, 1334 (Fed. Cir. 2002); *Pure Distributors, Inc. v. Baker*, 285 F.3d 150, 157 (1st. Cir. 2002); and *Barber v. Barber*, 323 U.S. 77, 87.

¹⁹⁸ See The Full Faith and Credit for Child Support Orders Act, 28 U.S.C.A. § 1738B.

¹⁹⁹ *Pure Distributors, Inc. v. Baker*, 285 F.3d 150, 157 (1st. Cir. 2002). Notes: The Finality of Judgments in the Conflict of Laws, 41 COLUM. L. REV. 878, 878 (1941).

²⁰⁰ Clermont, *supra* note 139_ at 98.

²⁰¹ 28 U.S.C.A. § 1738 (1964) (originally enacted in 1790) (emphasis added). EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 1262 (4th ed. 2004).

²⁰² Scoles, *supra* note 201 at 1262. SYMEON C. SYMEONIDES, AMERICAN PRIVATE INTERNATIONAL LAW, 330 (Wolters Kluwer, 2008).

²⁰³ RESTATEMENT (SECOND) CONFLICT OF LAWS, §95, comnt. (g) (1971).

²⁰⁴ *Paine v. Schenectady Insurance Co.*, 11 R.I. 411 (1876).

²⁰⁵ *Bank of North America v Wheeler* 28 Conn 433, 441-43(1859).

Mainland judgment.²⁰⁶ Although this judgment is subject to the procedure of trial supervision, the US court held that it “was final, conclusive, and enforceable under the laws of the PRC...”,²⁰⁷ because “the UFMJRA, adopted in California and codified..., applied to any foreign judgment that is final, conclusive, and enforceable *under the laws where rendered*.”(Emphasis added)²⁰⁸

Under the Brussels I Regulation, finality is not a requirement for JRE.²⁰⁹ However, the requested court *may* stay recognition proceedings upon the application of the judgment debtor who lodges an appeal against the judgment in the judgment-rendering region.²¹⁰ Nevertheless, “[t]he mere lodging of a complaint with the authorities,”²¹¹ like the judgment debtor did in *Chiyu* and its progeny, “against parties who are involved in the proceedings in the country of origin, does not as such constitute an ordinary appeal.”²¹² Article 46 of the Regulation empowers requested courts to stay enforcement proceedings when the time for appeal has not yet expired, even if the judgment debtor has not lodged an appeal.²¹³ This approach looks like that adopted by the progeny of *Chiyu*, which held that Mainland judgments were never final because the prosecutors' rights to protest had no time limit. Namely, because the prosecutors' right to request courts to commence retrials will never expire, Mainland judgments are never final.²¹⁴ But, notably, Article 46 of the Brussels I Regulation particularly aims to counterbalance the unilateral nature of

²⁰⁶ Former Cal. Civ. Proc. Code § 1713.2”. Hubei Gezhouba Sanlian Indus. Co. v. Robinson Helicopter Co., No. 2:06-cv-01798-FMC-SS-x 2009 WL 2190187, (C.D. Cal. July 22, 2009).

²⁰⁷ *Id.*, at *8.

²⁰⁸ *Id.*, at *5.

²⁰⁹ Art. 37 of the Brussels I Regulation.

²¹⁰ *Id.*

²¹¹ Patrick Wautelet, *Chapter III Recognition and Enforcement Section 1 Recognition*, in BRUSSELS I REGULATION, 633 (ULRICH MAGNUS & PETER MANKOWSKI ed. 2007).

²¹² *Id.*

²¹³ Art. 46 of the Brussels I Regulation. For differences between arts. 37 and 46, see Wautelet, *supra* note_211_ at 629.

²¹⁴ Liu, *supra* note 154 at 40.

the enforcement proceedings laid down by Article 38 *et seq.*²¹⁵ Those Articles extend enforceability of a judgment from the judgment-rendering state to the requested state immediately on completion of the formalities requirement and without reviewing grounds to defend the enforcement.²¹⁶ Clearly, the needs of such counterbalance do not exist in the contexts of Chinese interregional JRE. Therefore, *Chiyu* and its progeny improperly applies the law of requested court to determine the finality of the judgment and ignore its enforceability in Mainland China.

Third, *Chiyu* causes Hong Kong courts to recognize and enforce Mainland judgments in a way distinct from how it treats judgments from other jurisdictions, such as the US. For example, Hong Kong courts refuse to recognize and enforce Mainland judgments because the judgment-rendering court has the power to retry the case. In the US, under the Federal Rule of Civil Procedure (hereinafter "FRCP") 59 and 60, the district court that renders a judgment also retains the power to revise the judgment on its own motion.²¹⁷ However, Hong Kong courts have never held that US judgments rendered by district courts are unrecognizable and unenforceable because the judgment-rendering courts maintain the power to retry the case.

For example, a default judgment rendered by a US district court may be set aside by the court that pronounced it.²¹⁸ Nonetheless, such a judgment is recognizable and enforceable in Hong Kong. In *Nintendo of America Inc v. Bung Enterprises Ltd*, the plaintiff applied to enforce a default judgment rendered by the Western Division of the

²¹⁵ Lennart Palsson, *Chapter III Recognition and Enforcement Section 2 Enforcement Article 46*, in BRUSSELS I REGULATION, 670 (ULRICH MAGNUS & PETER MANKOWSKI ed.).

²¹⁶ Arts 38 and 41 of the Brussels I Regulation. For comments, see Konstantinos Kerameus, *Chapter III Recognition and Enforcement Section 2 Enforcement Article 41*, in BRUSSELS I REGULATION, 645 and 654 (ULRICH MAGNUS & PETER MANKOWSKI ed.).

²¹⁷ FED. R. CIV. P. Rule 59 and 60.

²¹⁸ FED. R. CIV. P. Rule 55(c) and Rule 60(b).

US District Court Central District of California.²¹⁹ The defendant made a meritorious defense at the beginning of the US proceedings but defaulted later.²²⁰ In the Hong Kong JRE proceedings, the defendant argued that the US judgment was not final and conclusive because it may be set aside by the judgment-rendering court upon a reconsideration motion.²²¹ Similar to the defendant in *Chiyu*, the defendant in this case also relied on *Gustave Nouvion* and argued that the American judgment was like the Spanish judgment that “might be at any time recalled or modified” by the judgment-rendering court.²²² The Hong Kong Court of First Instance distinguished the Spanish judgment in *Gustave Nouvion* from the American judgment because the former “was known as a ‘remate’ judgment which was a judgment after consideration of limited issues and which was liable to be reconsidered in ‘plenary’ proceedings where the whole merits of the matters might be gone into.”²²³ The court held that the US judgment should be enforced regardless the judgment-rendering court may retain the power to set it aside.²²⁴ It first relied on Dicey & Morris:²²⁵

[I]t is well established that for the purpose of enforcement by an action in Hong Kong, a foreign judgment may be final and conclusive even though it is a default judgment *liable to be set aside in the very Court which rendered it.* (Emphasis added)

Then, the Hong Kong court analogized the present case to *Vanquelin v. Bouard* and

²¹⁹ *Nintendo*, HCA 1189/2000, para 1.

²²⁰ *Id.*, para 1.

²²¹ *Id.*, para 7.

²²² *Id.*, para 8.

²²³ *Id.*, para 8. The court held that the Spanish court judgment “was known as a ‘remate’ judgment which was a judgment after consideration of limited issues and which was liable to be reconsidered in ‘plenary’ proceedings where the whole merits of the matters might be gone into.”

²²⁴ *Nintendo*, HCA 1189/2000, para 10, 11, and 12.

²²⁵ Dicey & Morris, *The Conflict of Laws*, 13th edition, para 14-021.

accepted the *Vanquelin* holding.²²⁶ In *Vanquelin*, a judgment creditor attempted to enforce a French default judgment in the UK, and the judgment debtor argued that the enforcement should be refused because if it appeared in the French court the French judgment-rendering court may revise the judgment.²²⁷ Erle C J in *Vanquelin* rejected this argument because a mere possibility of retrial in the judgment-rendering court is insufficient to deny JRE in Hong Kong.²²⁸

I apprehend that every judgment of a foreign court of competent jurisdiction is valid and may be the foundation of an action in our courts, though subject to the contingency, that, by adopting a certain course, the party against whom the judgment is obtained might cause it to be vacated or set aside. *But until that course has been pursued, the judgment remains in full force and capable of being sued upon.* (Emphasis added)

The defendant also argued that he had instructed his US attorney to seek the US judgment-rendering court's reconsideration of the default judgment and planned to appeal if the reconsideration motion failed.²²⁹ This argument is essentially identical to the defendant's argument in *Chiyu* that he had requested a Mainland prosecutor to issue a protest against the judgment under the procedure for trial supervision. However, different from *Chiyu*, the *Nintendo of America Inc.* court rejected this argument and held that although the defendant had given instructions to his attorney, the US court had not begun to take any step in reversing the judgment, so the judgment should be deemed as final in Hong Kong.²³⁰

A lot of important similarities exist between *Chiyu* and *Nintendo of America Inc.* First, both judgment-rendering courts retain the power to revise the judgment under their

²²⁶ *Vanquelin v Bouard* (1863) 15 CB (N S) 341.

²²⁷ *Id.*

²²⁸ *Id.*, at 367-68.

²²⁹ Under Rule 60 of the US FRCP, parties to a final judgment can obtain relief from this judgment by filing a motion for relief within a reasonable time.

²³⁰ *Nintendo*, HCA 1189/2000, *see* para 12-13.

retrial procedure. Second, both defendants invoked *Gustave Nouvion*. Third, both defendants took some steps to initiate the retrial procedure. In *Chiyu*, the defendant applied to a people's prosecutor; and in *Nintendo of America Inc.* the defendant instructed its attorney to submit a reconsideration motion to the American court. In both cases, neither of the judgment-rendering courts has decided to retry the case. However, regardless of these significant similarities, Hong Kong courts refused the recognition and enforcement of the Mainland judgment in *Chiyu* but recognized and enforced the American judgment in *Nintendo of America Inc.* Hong Kong courts have never justified the different treatments between Mainland judgments and those from other jurisdictions.

4. Reasons for *Chiyu*

Unfamiliarity with and distrust of the Mainland procedure for trial supervision may explain why although the facts of *Chiyu* and *Nintendo of America Inc.* are similar, Hong Kong courts decided them differently. Arguably, the requested Hong Kong courts improperly ignore the following four aspects.

First, not every application submitted by parties can convince a Mainland prosecutor to lodge a protest against a judgment. A party can resubmit his or her retrial application to a prosecutor after his or her previous application has been rejected. Therefore, it makes no sense to leave a judgment, rendered after a fair trial, in the hand of a losing party who tries to delay the enforcement by applying for retrials again and again. Therefore, Hong Kong Professor Philip Smart correctly pointed out that *Chiyu* overly favors a defendant who has no claims such as fraud, undue process, and public policy

exception, and can defeat the enforcement of a judgment in Hong Kong by merely submitting a retrial application to a Mainland prosecutor.²³¹

Second, under Mainland law, even if a prosecutor lodges a protest against a judgment, this judgment is still final and enforceable in Mainland China until a court with competent jurisdiction orders to stay the enforcement.²³² Although Hong Kong courts apply Hong Kong law in its enforcement proceeding, the law of the judgment-rendering court regarding finality should be taken into account. Therefore, it is unreasonable to deny recognition and enforcement of a Mainland judgment for lack of finality, when this judgment is final and enforceable in the region where it is rendered.²³³

Third, retrial in Mainland China is functionally quite similar to appeal. Both of them aim to ensure the losing party's access to justice. Retrial follows the appellate procedure, except when the retried judgment was rendered by a first-instance court (in this case, the first-instance procedure applies).²³⁴ Both retrial and appellate proceedings reviews facts and laws decided by the original judgment.²³⁵ Moreover, the commencement of retrial or appeal does not automatically lead to reversal of the original judgment.²³⁶ Hong Kong FJREO states that "a judgment shall be deemed to be final and conclusive notwithstanding that an appeal is pending against it, or that it may still be subject to appeal, in the courts of the country of the original court."²³⁷ Therefore, if judgments are enforced although an appeal is possible or even pending, it is justifiable to do the same with a judgment subject to retrial.

²³¹ Smart, *supra* note_195_ at 268.

²³² Art. 185 of the Mainland CPL.

²³³ See *supra* Problems of *Chiyu*.

²³⁴ Art. 186 of the Mainland CPL.

²³⁵ Art. 151 of the Mainland CPL. Art. 180 of the Opinions of the Application of the CPL.

²³⁶ Art. 153 of the Mainland CPL.

²³⁷ FJREO Section 3(3).

Fourth, in reality only very few cases are retried in Mainland China. In 2002, the Supreme People's Court issued a judicial interpretation to restrict the number of retrial brought by parties or courts in every case to once.²³⁸ The 2007 Mainland CPL, compared with its 1991 version which the *Chiyu* court considered, effectively clarifies the grounds for retrial.²³⁹ Thus courts have less discretion in reopening a final judgment. Moreover, only an extremely small percentage of cases have been retried according to statistics, since the Mainland Supreme People's Court and Supreme People's Procurator adopted the policy of restricting retrials and of respecting the finality of judgments in 2001.²⁴⁰

The statistics by 2004 show that generally in one thousand final civil judgments rendered in the trial and appellate procedures: (1) about ten judgments (10/1000) were reopened in the procedure for trial supervision; (2) about four judgments (4/1000) were found erroneous in the procedure for trial supervision.

Chart I

Year	Number of Civil Cases Accepted for Trial[一审和二审收案]	Number of Civil Cases Accepted for Retrial [再审收案]	The Percentage of Retried Case among the Total Civil Cases (%)
1999	5 480 178	83 915	1.53

²³⁸ Arts. 2 and 3 of the Regulation of Remanding a Case to Retrial and Designating a Court to Retry a Case made by the Supreme People's Court [decided by the Judicial Committee of the Supreme People's Court No. 1221 Meeting on Apr. 15, 2002, and effective Aug. 15, 2002].

²³⁹ See *supra* Comparison of the Criteria of "Finality" under Mainland Law and Hong Kong Law of Chapter IV.

²⁴⁰ *Eg.*, the Opinion to Regulate Protests by the People's Procurator at the Provincial Level and the People's Procurator Rule of Making Protests in Civil and Administrative Cases, issued by the Supreme People's Procurator in August and September 2001, respectively; the Notice of Several Questions concerning the Procedure for Trial Supervision made by the Supreme People's Court in November 2001; the Regulation of Remanding a Case to Retrial and Designating a Court to Retry a Case made by the Supreme People's Court in July 2002. *Li You Rong v. Li Rui Qiong*, CACV 159/2004, para 16. available at http://www.judiciary.gov.hk/en/legal_ref/judgments.htm accessed on January 7, 2009.

2000	5 153 374	83 201	1.61
2001	5 074 080	82 652	1.63
2002	4 830 000	48 180	0.997
2003	4 827 710	46 151	0.956
2004	4 756 563	45 250	0.951

Source: JINGWEN ZHU, ZHONG GUO FA LV FA ZHAN BAO GAO: SHU JU KU HE ZHI BIAO TI XI [REPORT ON CHINESE LAW DEVELOPMENT: DATABASE AND INDICATORS] 205 and 240 (2007).

Findings of Chart I:

- a. About 1% of final judgments were reopened each year under the procedure for trial supervision.
- b. After 2002, the percentage of retried cases decreased faster than the cases accepted for trial because people's courts adopted the policy of restricting retrials and of respecting the finality of judgments.²⁴¹

Chart II

Year	Number of Civil Cases Accepted for Retrial [再审收案]	Number of Civil Cases Finished Retrial [再审结案]	Affirm the Original Judgments [维持原判]	Reverse the Original Judgments [改判]	Remand the Cases [发回重审]	The Percentage of Reversed and Remanded Cases among the Retried Civil Cases (%) *
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²⁴¹ See JINGWEN ZHU, ZHONG GUO FA LV FA ZHAN BAO GAO: SHU JU KU HE ZHI BIAO TI XI [REPORT ON CHINESE LAW DEVELOPMENT: DATABASE AND INDICATORS] 205 and 240 (2007).

1999	83 915	81 949	17 591	18 898	4 830	28.95
2000	83 201	85 155	20 294	21 276	5 081	30.95
2001	82 652	82 550	21 721	21 050	4 683	31.17
2002	48 180	48 916	16 514	15 290	2 575	36.52
2003	46 151	47 412	15 742	15 167	2 644	37.57
2004	45 250	44 211	13 709	15 161	3 014	41.11

Source: Zhu, *supra* note_241_ at 205 and 240.

*The erroneous percentage of final judgments rendered in the trial and appellate procedures [民事原裁判错误率]

Chart II demonstrates that, after 2002, the number of cases accepted for retrial decreased. Meanwhile, the percentage of cases remanded and reversed under the retrial procedure increased. This contrast implies that the decline of the former resulted from the policy of restricting retrials and of respecting the finality of judgments.²⁴² In other words, the fact that fewer cases are accepted for retrial does not represent an improvement of the quality of civil judgments in the trial and appellate procedures.

Moreover, if the retrial court holds an originally final judgment is erroneous, it will directly reverse the judgment, or remand the case to the court that rendered the original judgment or other lower courts for a new trial. Remanding to lower courts often happens when more facts findings are necessary for making a new judgment. Bear this background in mind:

²⁴² *Id.*, this Report also shows that: (1) from 1978-1987, the number of cases accepted for retrial and the number of remanded and reversed cases both increased, which means that the quality of civil judgments declined; (2) from 1992-2001, the number of cases accepted for retrial greatly increased and maintained in a high level. Meanwhile, the percentage of cases remanded or reversed in the retrial procedure also greatly increased. This means the quality of civil judgments declined again.

- a. Chart II shows that about four out of one thousand final judgments rendered in the trial and appellate procedures are reversed as erroneous. The finding (0.004) is from this formula: 1% (Chart I) X 40% (Chart II). Two factors may affect this finding. First, remanding a case does not mean the previous judgment was erroneous and would be reversed in retrial. Therefore, the actual erroneous rate should be lower than 0.004. Second, it is unknown what happened to cases in the category of "others."²⁴³ So, it is hard to assess how the "others" will affect the erroneous rate.
- b. The 41.11% is the highest since from 1978 to 2004.²⁴⁴ Even taking this highest number, it is still unconvincing to argue that Mainland judgments could be easily reversed in retrial.

In Chart II, the numbers for affirmed, reversed, and remanded don't add up to the number of cases where retrial was completed. The rest of cases fall into one of the following categories:

- a. The original final judgment is affirmed. Chart II shows that the number of final judgments that were affirmed in the retrial was close to the number of final judgments that was reversed in the retrial.
- b. The retrial is dismissed. This happens when the circumstances for retrial are not satisfied under the Chapter 16 of the Mainland CPL.
- c. The party asking for retrial withdraws the request.
- d. Parties reach a settlement.

²⁴³ See *infra* fn 245.

²⁴⁴ Zhu, *supra* note 241 at 241.

- e. Others. A fairly large number of retried cases are in this category, but the statistics does not clarify the meaning of “others.”²⁴⁵ More research needs to be done.

Notably, dismissing and withdrawing retrials won't affect the previous judgments. Settlements are parties' voluntary actions. Although the previous judgments are changed, essentially settlements are different from new judgments resulting from courts' reversal of previous judgments in terms of "finality." For example, parties often reach settlements in executing judgments, which is equal to change previous judgments. But generally nobody will blame that previous judgments lack of finality.

The statistics after 2004 are as follows:

- a. In 2005, the number of erroneous judgments (including civil, criminal, and administrative cases) found in retrial is 16 967, taking 0.34% of final judgments rendered in that year.²⁴⁶
- b. In 2006, the erroneous judgments (including civil, criminal, and administrative cases) found in retrial is 15 867, taking 0.31% of final judgments rendered in that year.²⁴⁷
- c. In 2007, the erroneous judgments (including civil, criminal, and administrative cases) found in retrial is 15 568, taking 0.27% of final judgments rendered in that year.²⁴⁸
- d. In 2008, 0.71% of final judgments (including civil, criminal, and

²⁴⁵ The number of cases in this category each year is: 20609 in the year of 1999, 20360 in 2000, 18973 in 2001, 10113 in 2002, 9508 in 2003, and 7916 in 2004. Zhu, *supra* note 241 at 240.

²⁴⁶ Gazette of the Supreme People's Court of The PRC, 8 (2005.4).

²⁴⁷ Gazette of the Supreme People's Court of The PRC, 10 (2006.4). The total number cases finished retries is 46 468, and the total number of tried cases is 5 903 832.

²⁴⁸ Gazette of the Supreme People's Court of The PRC, 11, 18 (2007.4). The total number of retried cases is 47 270, and the total number of tried cases is 5 755 591.

administrative cases) rendered in that year were retried judgments.²⁴⁹

- e. In 2009, 0.19% of final judgments (including civil, criminal, and administrative cases) rendered in that year were retried judgments.²⁵⁰

This statistics reaffirm the argument that it is unreasonable to reject the JRE of one thousand judgments simply because ten of them will be reopened and averagely only four or less will be ultimately reversed in the procedure for trial supervision.

As a conclusion, the *Chiyu* doctrine is doubtful both on the doctrinal and statistical levels. First, on the doctrinal level, the abstract reviewability of the Mainland judgment under the procedure for trial supervision in *Chiyu* is not different from the American judgment in *Nintendo*. Retrials are also not different from appellate proceedings in terms of functions, procedures, and requirements. Second, the goal of refusing JRE--to make sure enforcement is not rendered invalid because the judgment on which it was based is reversed--is only rarely important because of the statistical infrequency of reversal. Therefore, it is unjustifiable to deny the recognition and enforcement of Mainland judgments merely because they are subject to retrial.

5. Malicious Re-litigations and Forum Shopping Caused by the *Chiyu*

Doctrine

Because of the *Chiyu* doctrine, all the judgments excluded by the narrow 2006

²⁴⁹ 2008 Zuigao Renming Fayuan Gongzuo Baogao [2008 Supreme People's Working Report], available at http://www.gov.cn/2008lh/content_926191.htm (last visited April 10, 2010).

²⁵⁰ 2009 Zuigao Renming Fayuan Gongzuo Baogao [2009 Supreme People's Working Report], available at http://www.gov.cn/test/2009-03/17/content_1261386.htm (last visited April 10, 2010). According to another source, the number is 0.18%. See the 2009 Annual Report of People's Court, page 34, available at http://www.court.gov.cn/xwzx/fyxw/zgrmfyxw/201007/t20100714_7665.htm (last visited July 14, 2010).

Mainland-Hong Kong Arrangement are unrecognizable and unenforceable in Hong Kong under common law. This triggers malicious re-litigations (or parallel litigations) and forum shopping between Mainland China and Hong Kong. The two *Lam Chit Man* cases well illustrate this.²⁵¹

Yat Cheong Electric Co. (hereinafter “Yat Cheong”) is a Hong Kong company and owned by Lam Chit Man. *Lam Chit Man I* was between Lam Chit Man and Zhitao Lin. The latter is the legal representative of Dongguan Rong Feng Clocks & Watches (hereinafter “Rong Feng”), a Mainland company.²⁵² Rong Feng and Yat Cheong concluded an oral lease agreement and agreed to rent him one floor of the building located in Mainland China. However, disputes occurred during the performance of the agreement.²⁵³ Consequently, Rong Feng sued Yat Cheong in the Dongguan People’s Court,²⁵⁴ and Yat Cheong sued Rong Feng in a Hong Kong court.²⁵⁵ The two actions proceeded almost in the same period of time in Hong Kong and Dongguan, but the Dongguan court rendered a judgment earlier than Hong Kong court.²⁵⁶ So the winning

²⁵¹ *Eg.*, *Lam Chit Man t/a Yat Cheong Electric Co. v. Lam Chi To*, CACV 354/2001 (hereinafter *Lam Chit Man I*); *Lam Chit Man t/a Yat Cheong Electric Co. v. Cheung Shun Lin*, CACV 1046/2001 (hereinafter *Lam Chit Man II*).

²⁵² *Lam Chit Man I*. Dongguan is a city in Guangdong province Mainland China and it is very close to Hong Kong.

²⁵³ Rong Feng claimed that Yat Cheong failed to pay the rents on time. Yat Cheong claimed that Rong Feng breached the agreement: because Rong Feng did not provide the fire extinction certificate of the building and other government approval documents; moreover, it stopped water and electricity supply to the building without informing Yat Cheong in advance; further, it unilaterally terminated the lease, and its staff beat Lam Chit Man when he moved out of the building.

²⁵⁴ *Dongguan Rong Feng Biao Ye You Xian Gong Si v Heng Chang Dian Zi (Shengzhen) You Xian Gong Si* (Dongguan People’s Ct., Nov. 13, 2000).

²⁵⁵ *Lam Chit Man I*.

²⁵⁶ Here is a summary of the Dongguan action. On July 12, 1999, Rong Feng brought an action against Yat Cheong in Dongguan District People’s Court claiming the outstanding rents in Mainland China. Yat Cheong defended the substance of the case in Dongguan Court and brought a counter-action against Rong Feng claiming damages arising from Rongye’s breach of contract. Rong Feng defaulted in the last two hearings before the court issued the judgment. The Dongguan court ruled that based on the check issued by Yat Cheong, Yat Cheong had implicitly accepted the rents that Rong Feng asked for. The court found that the rents were reasonable and legal because it was a below average price in the local lease market. Although Yat Cheong disputed with Rong Feng about the calculation of the rents, Yat Cheong failed to provide evidence for its argument. The court also held that although Yat Cheong argued that Rong Feng should compensate it for stopping water and electricity without notice in advance, Yat Cheong failed to provide relevant evidence too. Regarding the compensation resulting from one staff of Rong Feng beating Lam Chit Man, the court found that Lam Chit Man did not provide evidence for this claim. Moreover, the cause of action of this claim was tort, but the current case was based on breach of the lease agreement. Therefore, the court suggested Lam Chit Man to bring a tort action separately for the beating. The court also ruled that Rong Feng improperly terminated the lease

party of the Dongguan judgment, Rong Feng, applied to the Hong Kong court for dismissing the Hong Kong proceeding and recognizing the Dongguan judgment.²⁵⁷

The key issue in *Lam Chit Man I* was whether the Dongguan judgment was final and should be recognized in Hong Kong. The First Instance Court of Hong Kong ruled that the Dongguan judgment was final and binding on both parties, which constituted an estoppel, therefore both parties should not litigate the same cause of action in the Hong Kong court. The Court of Appeal of Hong Kong disagreed. It first stated that under the precedent of *Chiyu*, if a Mainland prosecutor lodged a protest against a civil judgment, a relevant people's court had to retry the case and might reverse the judgment, so the Mainland judgment lacked finality and consequently could not be recognized or enforced in Hong Kong. The Court of Appeal of Hong Kong noticed two differences between *Lam Chit Man I* and *Chiyu*. First, the *Chiyu* judgment was based on expert evidence about the procedure for trial supervision in Mainland law, but in *Lam Chit Man I*, no party provided evidence regarding Mainland law. Therefore, the Court did not know whether the current Mainland law regarding the procedure for trial supervision remained the same as when *Chiyu* was decided. Second, the Court noticed that Lam Chit Man and Yat Cheong did not prove that they had taken any step to persuade a people's prosecutor to lodge a protest against the Mainland judgment. Nevertheless, the Court still ruled for Lam Chit Man and Yat Cheong because Rong Feng failed to prove that the Dongguan judgment was final.

Lam Chit Man I demonstrates that if no party provides evidence of current Mainland law regarding the procedure for trial supervision, a Hong Kong court may not

contract unilaterally, but Yat Cheong accepted this termination voluntarily by moving his equipment out of the building after receiving the termination notice from Rong Feng. Consequently, on November 13, 2000, the Dongguan court rendered a judgment favourable to RongYe. At the end of the judgment, the court indicated that if a party was not satisfied with this judgment, it should appeal to the Dongguan Intermediate People's Court within 15 days after receiving this judgment.

²⁵⁷ *Lam Chit Man II*.

be able to apply the *Chiyu* doctrine. The reason is that the court does not know whether the current Mainland law regarding this procedure remains the same as when *Chiyu* was decided. This, to some extent, restricts the application of the *Chiyu* doctrine. Half a year later, in *Lam Chit Man II* the Court of Appeal of Hong Kong removed this restriction and held that in civil proceedings a previous decision on a question of foreign law can be deemed as a precedent and applied directly to later cases.²⁵⁸

The facts of *Lam Chit Man II* are similar to those in *Lam Chit Man I*. Yat Cheong and a Mainland company signed a lease contract over factory premises located in Mainland China. Disputes took place in the performance of the contract. The Mainland company sued Yat Cheong in the People's Court of Long Gang District.²⁵⁹ Different from *Lam Chit Man I*, Yat Cheong did not defend itself in the Long Gang Court. On December 15, 2000, the Court made a judgment favourable to the Mainland company. Yat Cheong did not appeal to an intermediate people's court in due course, so the Long Gang judgment became final under Mainland law.

On November 6, 2000, Yat Cheong brought an action against the Mainland company in front of a Master in Hong Kong for the same cause of action that had been decided in Long Gang Court. On January 16, 2001, the Master decided that unless Yat Cheong would successfully set aside the Long Gang judgment within 28 days, its claims should be dismissed because they had been decided by the Long Gang judgment. In other words, the Master recognized the Long Gang judgment; therefore, he held that Hong Kong court should not re-consider the claims that had been decided by the Mainland judgment. Yat Cheong appealed to the Court of First Instance of Hong Kong against the

²⁵⁸ *Lam Chit Man II*.

²⁵⁹ Long Gang District is in Shenzhen City, Guangdong Province, Mainland China.

Master's order. The Court of First Instance held that it was improper for Hong Kong courts to exercise jurisdiction over this case for two reasons: first, all the disputes took place in Shenzhen City Mainland China and the real estate in question was also located there; second, a court in Mainland China had made a judgment over the same cause of action.

Yat Cheong appealed to the Court of Appeal in Hong Kong. The Court of Appeal reversed the judgment of the Court of First Instance and the Master's order. The Court held that according to *Chiyu* under the Mainland procedure for trial supervision the people's court that renders a "final" judgment retains the power to reverse this judgment under some circumstances in the future, so the so-called "final" judgment is not final under Hong Kong law. The Court also held that foreign law should be deemed as facts in Hong Kong courts, and the decision or finding of a foreign law by a Hong Kong court could be used as an evidence of this foreign law in later cases, unless the contrary is proved.²⁶⁰ Therefore, the finding of the Mainland procedure for trial supervision in *Chiyu* should be applied to this case. In other words, because no opposite evidence regarding Mainland law had been submitted, the Court of Appeal of Hong Kong assumed that the Mainland procedure for trial supervision has undergone no changes since *Chiyu* was decided in 1996. Therefore, the Court concluded that the Rong Gang judgment is not final and Hong Kong court can properly exercise jurisdiction over the case.

Notably, in both *Lam Chit Man I* and *II*, Yat Cheong has never tried to bring a retrial himself or request a prosecutor to lodge a protest on his behalf in Mainland China, but the Hong Kong Court of Appeal holds that this is insufficient to make the *Chiyu* doctrine inapplicable to this case, because Mainland law imposes no time limit for a

²⁶⁰ *Lam Chit Man II*, para 16-26.

prosecutor to lodge a retrial protest against a judgment. A later case further illustrates Hong Kong courts' strong opinion about the universal applicability of the *Chiyu* doctrine: the *Chiyu* doctrine should be applied so a Mainland judgment is not final, "unless and until it can be demonstrated to the satisfaction of the [Hong Kong] court that no such protest would be made by the relevant authority [in any time.]"²⁶¹ Therefore, debtors can succeed in Hong Kong enforcement proceedings by merely invoking the *Chiyu* doctrine even without making any efforts to initiate the Mainland procedure for trial supervision.

Moreover, *Lam Chit Man I* and *II* also demonstrate that the *Chiyu* doctrine encourages forum shopping. A Hong Kong party can sue its Mainland counterpart in Mainland China first. If it wins, it enforces the judgment in the Mainland; if it loses, it can bring an action against the same party in Hong Kong. For example, in *Lam Chit Man I*, Yat Cheong defended the merits of the case in a Mainland court but lost. Then it brought a case on the same cause of action against the winning party of the Mainland judgment in Hong Kong. The Hong Kong action was allowed to proceed. Therefore, obviously, Yat Cheong is allowed to bite the same apple twice. In *Lam Chit Man II*, Yat Cheong ignored the Mainland proceedings completely and concentrated on the Hong Kong proceedings, because as a Hong Kong company, suing in Hong Kong certainly gave it advantages. Overall, Yat Cheong conducted an obvious forum shopping and succeeded!

Lam Chit Man I and *II* also vividly illustrate how the *Chiyu* doctrine encourages re-litigations (or parallel litigations) in Hong Kong. Being permissive to re-litigation might facilitate parties to safeguard their rights and interests when the opposing party has assets for enforcement only in the place where the litigation is conducted. However, costs of re-

²⁶¹ Chan Chow Yuen v Nanyang Commercial Bank Trustee Limited, and et al. HCAP 4/2002, para 10.

litigation, the risks of inconsistent judgments, and the uncertainty of enforcement, will only worsen, instead of alleviate, disputes between parties. Neither Mainland China nor Hong Kong would recognize or enforce a sister-region judgment if it has rendered a judgment on the same cause of action. Therefore, in both *Lam Chit Man I* and *II*, neither Mainland judgments nor Hong Kong judgments would be recognized or enforced by the other side. Except that Yat Cheong can find enough properties of the two Mainland companies in Hong Kong, it will not be able to satisfy its Hong Kong judgments. So are the two Mainland companies. The disputes between them remain unsolved although tremendous amount of time and money has been spent on the litigations. This situation will discourage business between the two regions.

6. The Preferable Minority Approach in Hong Kong Courts

Chiyu has not been unanimously accepted by all the judges in Hong Kong courts. Minority opinions are more convincing. For example, in a *forum non conveniens* case, the plaintiff alleged that Mainland judgments were never final so Mainland courts were less convenient than Hong Kong courts.²⁶² The Hong Kong court rejected this argument because this allegation was “blinkered and partial.”²⁶³ The court further ruled that the plaintiff’s “criticisms against the Supervision Procedure in Mainland China amount to no more than a comparison between the Hong Kong system with the Mainland system and an invitation to the court to find that the local system is better than, or superior to, the Mainland system. This is precisely the sort of exercise which the court should not embark

²⁶² *New Link Consultants Ltd v. Air China*, [2004] H.K.C. 169 (C.F.I.), para 93. This allegation was made by the plaintiff’s legal aspect Professor Nanping Liu.

²⁶³ *New Link Consultants*, [2004] H.K.C. 169 (C.F.I.), para 96.

upon.²⁶⁴ This decision should be praised because imposing the Hong Kong criterion of finality to Mainland judgments results from an unjustifiable comparison of the two systems. Therefore, a judgment that is final and enforceable in Mainland China should be regarded as final in Hong Kong JRE proceedings.

Li You Rong v. Li Rui Qiong was a 2004 case.²⁶⁵ It concerned the question whether a Mainland judgment was final if it was made by an appellate People's Court and affirmed in retrial. The dissenting judge in the Hong Kong Court of Appeal held that the Mainland judgment was final and should be recognized.²⁶⁶ In his view, Hong Kong courts should not deny JRE because of a *theoretical likelihood* that a retrial may be brought in Mainland China.²⁶⁷ He held that after Mainland China adopted the policy of restricting retrials and of respecting the finality of judgments,²⁶⁸ it was *practically impossible* for the judgment debtor in this case to bring the retrial again.²⁶⁹ However, the majority remanded the case partly on the procedural ground that the legal effects of the new Mainland policy were unclear.²⁷⁰ This dissenting opinion should be applauded because it is correctly based on the practical possibility of retrial in Mainland China, instead of the theoretical possibility that adopted by the *Chiyu* doctrine.

7. Proposed Solutions to the Finality Dispute

There are three solutions to the finality dispute. The first two solutions require

²⁶⁴ *Id.*

²⁶⁵ *Li You Rong v. Li Rui Qiong*, CACV 159/2004, available at http://www.judiciary.gov.hk/en/legal_ref/judgments.htm accessed on January 7, 2010.

²⁶⁶ *Id.*, para 81.

²⁶⁷ *Id.*, para 75.

²⁶⁸ For how this policy decreased retrials in Mainland China, *see supra* fn 240.

²⁶⁹ *Li You Rong*, para 66, 68, 69, and 75.

²⁷⁰ *Id.*, paras 27 and 36.

amending relevant regional laws in Hong Kong and Mainland China. The third solution involves two interregional law approaches. They attempt to use the proposed Multilateral JRE Arrangement to fundamentally solve the finality dispute between Hong Kong and Mainland China.

a. Amend Hong Kong Law

The first solution would be for Hong Kong courts to abandon the *Chiyu* doctrine. The Mainland judgment in *Chiyu* should be treated final until a court with competent jurisdiction orders to retry the case and to suspend the enforcement of the original judgment.²⁷¹ Accordingly, the *Chiyu* court should recognize and enforce the Mainland judgment and should stay the enforcement proceedings only when a Mainland court orders to retry the case.²⁷² Suppose that the retrial is conducted by the original first-instance court, the retrial judgment will be treated as a first-instance judgment; therefore, it will become final if no appeal is filed within fifteen days after the issuance of the judgment.²⁷³ If no appeal is filed, this judgment should be treated final so recognizable and enforceable in Hong Kong. Moreover, suppose that the retrial is conducted by the original second-instance court or any other higher courts, the retrial judgment should be treated final when it is issued. Therefore, it is recognizable and enforceable in Hong Kong. This suggestion can solve the finality dispute and help to enforce Mainland

²⁷¹ See art. 10 of the 2006 Mainland-Hong Kong Arrangement. Professor Philip Smart prefers using the date that a prosecutor lodges a protest as the time point when a judgment loses its finality. See Smart, *supra* note_195_ at 267. However, there are maximum thirty days between a prosecutor lodges a protest and a court orders to retry the case according to art. 188 of the Mainland CPL. Therefore, the time point that a judgment loses its finality should be when a court orders to retry the case.

²⁷² See Smart, *supra* note_195_ at 267-68.

²⁷³ Art. 186 of the Mainland CPL.

judgments in Hong Kong.

Alternatively, Professor Philip Smart recommended a way to change the judicial practice in Hong Kong regarding the recognition and enforcement of Mainland judgments:²⁷⁴

The better approach, and one which it is submitted is fully justified by the common law authorities, would be to grant Order 14 judgment [summary judgment²⁷⁵] in favour of the plaintiff (except where, of course, the defendant raises genuine and substantial objections to enforcement, such as on the grounds of fraud or a denial of natural justice), but to stay or limit execution against the defendant's assets in Hong Kong. So that, in an appropriate case, moneys would be held in court and would not be paid out to the plaintiff until after the determination of any application for a retrial or attempt to invoke the supervisory jurisdiction of the prosecutor. The possibility of repeated but groundless applications to the prosecutor by a defendant could easily be provided for by appropriate undertakings on the part of the defendant or plaintiff.

b. Amend the Mainland CPL

The second solution would be for Mainland China to revise its procedure for trial supervision and to forbid a judgment-rendering court from reopening its own judgments. This is because essentially the *key* conflicts between the Mainland procedure for trial supervision and the finality criteria under Hong Kong law is that the former permits the court that rendered a judgment to reopen the case either *sua sponte* or based on a prosecutor's or a party's requirement. For example, the *Chiyu* court emphasizes the Mainland judgment is not final for the purpose of recognition and enforcement by Hong Kong courts *because it "is not final and unalterable in the [Mainland] court which*

²⁷⁴ Smart, *supra* note_195_ at 269.

²⁷⁵ For Order 14 judgment, *see* CAMILLE CAMERON & ELSA KELLY, PRINCIPLES AND PRACTICE OF CIVIL PROCEDURE IN HONG KONG 131-134, 331-32, 426 (2 ed. 2008).

pronounced it. (Emphasis added).”²⁷⁶ The English precedent *Gustave Nouvion* also held that a final judgment should not be revisited by the court that pronounced it, and, in cases that the judgment is erroneous, it should be a higher court with jurisdiction to reopen the case.²⁷⁷

The 2007 Mainland CPL largely narrows the circumstances that a judgment-rendering court may reopen its own judgment from three aspects. First, generally retrials should be conducted by a court higher than the judgment-rendering court.²⁷⁸ This aims to make retrial more convincing for the parties.²⁷⁹ Only when it more proper for the judgment-rendering court than a higher court to retry the case, the latter may authorize the latter to conduct retry.²⁸⁰ This refers to circumstances such as undue process that may affect correct adjudication of a case or when a higher court holds the judgment-rendering court should retry the case.²⁸¹ The newly added Article 181 of the Mainland CPL requires that when a retrial is commenced by parties’ motion, the retrial should be conducted by an intermediate people’s court or a people’s court at a higher level.²⁸² This provision forbids a district people's court from retrying its own judgments as long as the retrial is brought by a party. Second, the new Article 188 sets a default rule that if the retrial motion is submitted by a prosecutor, the court rendered the original judgment shall not conduct retrials except in limited circumstances according to the law. Those

²⁷⁶ *Chiyu*, [1996] 2 H.K.L.R. 395 (H.C.).

²⁷⁷ *Nouvion*, (1889) 15 App Cas 1, per Lord Herschell and Lord Watson.

²⁷⁸ Art. 27 of *Zuigao Renmin Fayuan Yinfa Guanyu Souli Minshi Zaishen Anjian de Ruogan Yijian de Tongzhi* [Supreme People's Court's Notice on Accepting Civil Retrial Cases], *Fafa* [2009] No. 26. April 27, 2009. *Zuigao Renmin Fayuan Shixin Minshi Zaisheng Anjian Xingui Fuzheren Da Dizhe Wen* [Supreme People's Courts' Answers to the Press Regarding the New Rules on Retrial in Civil Cases], http://www.china.com.cn/policy/txt/2009-06/01/content_17863050.htm (last visited July 15, 2010).

²⁷⁹ *Zuigao Renmin Fayuan Shixin Minshi Zaisheng Anjian Xingui Fuzheren Da Dizhe Wen* [Supreme People's Courts' Answers to the Press Regarding the New Rules on Retrial in Civil Cases].

²⁸⁰ *Id.*

²⁸¹ Art. 28 of *Zuigao Renmin Fayuan Yinfa Guanyu Souli Minshi Zaishen Anjian de Ruogan Yijian de Tongzhi* [Supreme People's Court's Notice on Accepting Civil Retrial Cases].

²⁸² Art. 181 para 2 of the Mainland CPL.

circumstances are: new evidence is found; the facts, which the original judgment is based on, have no evidence to support; or the original judgment is based on forged evidence or uncross-examined evidence.²⁸³ Third, under the 2007 Mainland CPL a judgment-rendering court cannot *sua sponte* reopen its own judgments unless it finds a definite error in the judgment itself.²⁸⁴ If a judge finds a definite error in a judgment that he or she made, this judge should refer this case to the president of the court and the president needs to ask the permission of the adjudication committee to reopen the case.²⁸⁵ As a conclusion, only in rare circumstances, a judgment-rendering court can reopen its own judgment under the procedure for trial supervision. That is no Hong Kong case law yet demonstrating the 2007 CPL has soothed Hong Kong's concern regarding the finality of Mainland judgments. Therefore, Mainland China should consider explicitly and completely banning a judgment-rendering court from reopening its own judgments in any event. Retrials should be conducted by a court at the next higher level or a court at the same level but in another district.

The Mainland-Hong Kong Arrangement has made the first effort in this direction. Article 2.2 of the Arrangement indicates that, “where a case is to be retried by a Mainland court in accordance with the law after an application for recognition and enforcement of the judgment in the same case has been filed with a Hong Kong court, the case shall be brought up for retrial by a people’s court *one level higher than the court which made the legally effective judgment*” (emphasis added).²⁸⁶ Therefore, if a people's court reopens its own judgment, the retrial judgment cannot be recognized and enforced under the

²⁸³ Arts. 179 and 188 of the Mainland CPL.

²⁸⁴ *Id.*, art. 177.

²⁸⁵ *Id.*

²⁸⁶ Art. 2.2 of the Mainland-Hong Kong Arrangement.

Arrangement. This provision also limits the retrials under Article 10 paragraph 2.²⁸⁷

Discouraging a judgment-rendering Mainland court from reopening its own judgments may also have other benefits. For example it may guarantee a retrial judgment free from defects that may taint the original trial.

As a conclusion, Mainland China should amend the CPL to restrict a judgment-rendering Mainland court from reopening its own judgments.

c. Interregional Law Approaches:

Provide an Autonomous Terminology for Finality

In order to avoid the finality dispute, the Mainland-Hong Kong Arrangement avoids words used by regional laws, namely, "legally effective" in the Mainland CPL and the "final and conclusive" in the Hong Kong JRE law. Instead, it uses a new term, "enforceable final judgments", as a requirement for JRE.²⁸⁸ Three types of judgments are "enforceable final judgments" for the case of Mainland China: (1) any judgment rendered by the Supreme People's Court²⁸⁹ and an appellate court,²⁹⁰ (2) judgments where the time limit to appeal has expired and no appeal has been filed,²⁹¹ (3) judgments rendered after the case is reviewed by the people's court at the next higher level in accordance with the procedure for trial supervision.²⁹² In the case of Hong Kong, "enforceable final

²⁸⁷ *Id.*, at para 2 art. 10. This provision indicates "Where a local people's court in Mainland China makes a decision of retrying a case for which a decision has been made, or where the Supreme People's Court makes such a decision, upon verification, a Hong Kong court may suspend the recognition and enforcement procedure, and resume the procedure if all or part of the decision is sustained after retrial, or terminate the procedure if the decision is completely overruled after retrial."

²⁸⁸ Art. 2 of the Mainland-Hong Kong Arrangement.

²⁸⁹ Art.2(1)(i) of the Mainland-Hong Kong Arrangement.

²⁹⁰ *Id.*, art.2(1)(ii)

²⁹¹ *Id.*, art.2(1)(ii)

²⁹² *Id.*, art.2(1)(ii)

judgments” refers to any legally effective judgment rendered by the Court of Final Appeal, the Court of Appeal and the Court of First Instance of the High Court and the District Court.²⁹³ The Mainland implementing legislation uses the term "enforceable final judgments".²⁹⁴ But the Hong Kong implementing legislation, the Mainland Judgments Ordinance, requires that "the judgment is final and conclusive as between the parties to the judgment; and the judgment is enforceable in the Mainland."²⁹⁵ A Hong Kong scholar asks whether the test of "enforceable and final" is the same as that of "final, conclusive, and enforceable."²⁹⁶ Although different opinions exist,²⁹⁷ this scholar believes these two tests are different.²⁹⁸ Therefore, the different wordings between the Arrangement and the Hong Kong implementing legislation have created confusions.

What brings more confusion is that no uniformity exists between the Mainland-Hong Kong Arrangement and Mainland-Macao Arrangement. Although the latter does not adopt the term "final judgment" because this term is not used by the regional laws in Mainland China and Macao,²⁹⁹ it uses "effective judgment" instead. Namely, only if a judgment is effective, it can be recognized and enforced under the Arrangement.³⁰⁰ However, this Arrangement does not define "effective." Article 3 of the Arrangement indicates

In respect to an effective judgment rendered by the court of one region and with the content of performance, the party involved can file an application for recognition and enforcement with the competent court of the other region.

²⁹³ *Id.*, art.2(2).

²⁹⁴ The Mainland implementing legislation is identical to the Mainland-Hong Kong Arrangement, except the statute of limitation.

²⁹⁵ Cap 597, s 5 (2) (c) and (d).

²⁹⁶ Zhang, *supra* note 3_ at 14-15.

²⁹⁷ *Id.* (indicating that "Madam Tsang of the Department of Justice took the view that under the Ordinance a mainland judgment is final and conclusive if falls into the enumerated list where no appeal is allowed or the time limit for appeal has expired or it is the decision of the second instance. This view *seems* to equate 'finality' with 'final judgment with enforceability'.)

²⁹⁸ *Id.* at 15.

²⁹⁹ See Section B of Chapter III.

³⁰⁰ Art. 3 of the Mainland-Macao Arrangement.

The wording of this article seems to require the requested court to apply the law of the judgment-rendering region to determine whether the judgment is effective. However, the absence of an explicit definition of "effective" will possibly cause controversies in practice.

Considering that the criteria of finality adopted by Mainland China and Hong Kong are in a sharp contrast, and that the two Arrangements use different wordings, the proposed Multilateral JRE Arrangement should provide uniformity. Arguably, the proposed Arrangement should avoid using any of following terms that have been used in either regional or interregional laws: "enforceable final judgments", "legally enforceable judgments", "effective judgments", "final and conclusive judgments" or "definite judgments." It should create a new term and all implementing regional legislations should adopt this term.³⁰¹ The following term may be considered: "qualified judgments under this Arrangement." Importantly, the term chosen should be an autonomous terminology.

Adopting autonomous terminology is a good solution to reconcile the differences between legal traditions. An autonomous terminology refers to a terminology whose meaning is disengaged from the special understandings that might be associated with it under a regional law or an international legal instrument that a region ratified.³⁰² In other words, the interpretation of a certain word or phrase in an interregional legal instrument

³⁰¹ For confusions arising from different terms used in the interregional arrangement and regional implementing legislations, see Zhang, *supra* note_3_ at 13-15 (arguing that the test of "final judgment with enforceability" in the Mainland-Hong Kong Arrangement should be different from the test of "final, conclusive and enforceable judgment" in the Mainland Judgment Ordinance).

³⁰² GEORGE A. BERMANN & ROGER J. GOEBEL, *CASES AND MATERIALS ON EUROPEAN UNION LAW* 1390 (2nd ed. ed. 2002). See also Ulrich Magnus, *Introduction*, in *BRUSSELS I REGULATION*, 31-32 (Ulrich Magnus & Peter Mankowski ed. 2007) (indicating that interpreting the Brussels Convention and Regulation by autonomous meanings have two aspects: "First, questions of doubt were principally to be answered without redress to a specific national law but from an insofar autonomous, to some extent *supra*-national viewpoint...[s]econdly, the construction of terms and the gap-filling of the Convention was to be inferred from the Convention itself generally also without any redress to other international legislative instruments...") (internal citation omitted).

should not depend on the law of one or more of the regions concerned, but, first and foremost, on the legal instrument itself.³⁰³ Using autonomous terminologies to define terms or phrases in a legal instrument has valuable benefits. It can prevent the instrument from being subject to various regional laws, can increase certainty and predictability, can simplify the interpretation process, and also can ensure that the instrument will be applied in the way that it is intended to be applied.³⁰⁴

The benefits of using autonomous terminologies to ensure legal certainty and transparency in interregional JRE can be observed in the case law of the ECJ, which has interpreted many terms and phrases in the Brussels Convention and Regulation in this way.³⁰⁵ For example, the Convention and Regulation does not define the phrase “civil and commercial matters.” In a German JRE proceeding involving a Belgian monetary judgment, a German appeal court asked the ECJ whether, for purposes of interpreting the term “civil and commercial matters,” reference should be made to the law of the state where the judgment was rendered or to the law of the state where enforcement is sought. The Court held that an autonomous definition should be given to this phrase:³⁰⁶

The concept in question must... be regarded as independent and must be interpreted by reference, first to the objectives and scheme of the convention and, secondly, to the general principles which stem from the corpus of the national legal systems.

Similarly, the proposed Multilateral JRE Arrangement should adopt an autonomous

³⁰³ See Bermann, *supra* 297 at 1386.

³⁰⁴ Case C-29/76 *Ltu Lufttransportunternehmen GMBH & CO. KG V. Eurocontrol* [1976] ECR 1541, 1556.

³⁰⁵ Magnus, *supra* note 297 at 31-33. Examples of autonomous interpretation can be found in Case C-125/92 *Mulox IBC Ltd. V. Hendrick Geels* [1993] ECR I-4075, I-4102 para. 10; Case C-440/97 *GIE Groupe Concorde et al. v. Master of the Vessel “Suhadiwarno Panjan”* [1999] ECR I-6307, I-6347 et seq. para. 11; Case C-271/00 *Gemeente Steenberg v. Luc Baten* [2002] ECR I-10489, I-10519 para. 28. Only a few exceptions to the autonomous interpretation exist. One is the place of performance, which can be interpreted according to the applicable national law, Case 12/76 *Industrie Tessili Italiana Como v. Dumlop AG* [1976] ECR 1473.

³⁰⁶ *Eurocontrol*, [1976] ECR 1541, 1550.

terminology for "finality" in the arrangement-making process. In implementation, regional courts should strictly adapt to the autonomous terminology and avoid the influences from regional laws. They should consult or seek coordination from the interregional mechanism that is established to facilitate interregional judicial assistance.³⁰⁷

Supposed that the term "qualified judgments under this arrangement" is chosen, it may be defined as follows:

a. in Mainland China:

1. a judgment rendered by the Supreme People's Court;
2. a judgment rendered by a higher people's court, an intermediate people's court or a district people's court³⁰⁸, when appeal is not allowed for the first instance judgment or no appeal is made within the prescribed time limit, or an effective second-instance judgment; or
3. a retrial judgment rendered after the case is reviewed by the people's court other than the one rendered the previous judgment in accordance with the procedure for trial supervision.

b. In Hong Kong: a judgment rendered by the Court of Final Appeal, the Court of Appeal of the High Court, the Court of First Instance, or the District Court.

c. In Macao: a judgment rendered by the Court of Final Appeal, the

³⁰⁷ For details of this mechanism, *see* Section B of Chapter VI.

³⁰⁸ Regarding whether the district people's courts should be restricted to those has been delegated jurisdiction over the first instance of a civil or commercial case involving foreign, Hong Kong, Macao or Taiwan affairs, *see* Part iii of Section A of Chapter V.

Intermediate Court, or the Court of First Instance.

If a retrial occurs in Mainland China against a judgment that is under Hong Kong or Macao JRE proceedings, the Hong Kong or Macao court may suspend the proceedings, and resume it if all or part of the Mainland judgment is sustained after retrial, or terminate it if the Mainland judgment is completely overruled after retrial. If an appeal occurs in Hong Kong against a judgment that is under Mainland or Macao JRE proceedings, the Mainland or Macao court may suspend the proceedings, and resume it if all or part of the Hong Kong judgment is sustained after appeal, or terminate it if the Hong Kong judgment is completely reversed after appeal.

Apply the Law of the Judgment-Rendering Region

As an alternative to an autonomous terminology for finality, the proposed Multilateral JRE Arrangement may require a requested court to apply the law of the judgment-rendering region to determine the finality of a judgment. This lesson is drawn from US law.³⁰⁹ Chinese regions may consider requiring a requested court to determine finality according to the law of the judgment-rendering region. If a retrial happens in Mainland China, requested courts in sister regions may suspend the recognition and enforcement proceedings upon the result of the Mainland retrial. If an appeal against a Hong Kong judgment has been filed, requested courts in sister regions may stay the recognition and enforcement proceedings upon the Hong Kong appeal. Applying the law of the judgment-rendering region also can solve the finality dispute. However, an

³⁰⁹ See *supra* Problems of *Chiyu*.

autonomous terminology of finality brings more clarity and less need to look into sister-region laws. Therefore, the latter is preferable than the former.

C. Weak Mutual Trust

Free circulation of judgments is based on the mutual trust of each other's legal system. The two existing Arrangements have shown the growth of mutual trust between Mainland China, and Hong Kong and Macao, respectively.³¹⁰ For example, The Mainland-Hong Kong Arrangement requires that a requested court should invoke the law of the judgment-rendering court to determine whether a sister-region judgment is achieved by fair procedures. Compared with Hong Kong regional JRE law that requires the application of Hong Kong law to determine the fairness of the judgment-rendering proceedings, the Arrangement shows more respect to sister regions. However, even though Chinese regions were reunited ten years ago, mutual trust between the three regions remains fragile. For example, after the conclusion of the Mainland-Hong Kong Arrangement, the Hong Kong business community expressed deep worries about exposing Hong Kong businessmen to judgments obtained through fraudulent means in Mainland courts.³¹¹

Absent mutual trust, an effective broad scope Multilateral JRE Arrangement will never be developed among Chinese regions. We should acknowledge the lack of trust among Chinese regions, particularly between Mainland China and Hong Kong, and should discuss what can be done to improve trust. Otherwise, a far-reaching interregional

³¹⁰ For details, see Chapter III.

³¹¹ Xianchu Zhang & Philip Smart, *Development of Regional Conflict of Laws: On the Arrangement of Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters between Mainland China and Hong Kong SAR*, 36 HONG KONG L. J. 553, 578 (2006). See GRAEME JOHNSTON, *THE CONFLICT OF LAWS IN HONG KONG* 122 (2005).

arrangement will only deter the incentives of smaller regions, namely Hong Kong and Macao. The English dissatisfaction towards the Brussels I Regulation and the failed Hague Judgment Convention illustrate the importance of creating mutual trust.³¹² This section proposes two solutions to increase mutual trust among Chinese regions: improving Mainland judicial system and enhancing interregional legal education and communication.

i. Improving the Mainland Judicial System

Weak mutual trust between Mainland China and its sister regions comes from a presumption that the Mainland judicial system is incompetent due to factors such as the lack of judicial independence,³¹³ local protectionism,³¹⁴ and other issues.³¹⁵ However, a recent study proves that in Guangdong Province, which has the closest economic tie with Hong Kong and Macao, this presumption is incorrect in enforcing civil and commercial

³¹² For the reasons why English scholars appear unenthusiastic about the harmonization of private international law in the EU, such as Brussels I Regulation, see Harris, *supra* note 137 at 370. For the failed Hague Judgment Convention, see Peter Trooboff, *Ten (and probably more) difficulties in Negotiating a Worldwide Convention on International Jurisdiction and Enforcement of Judgments: Some Initial Lessons*, in A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 263, 268-69 (John J. Barcelo III & Kevin M. Clermont ed. 2002).

³¹³ Q J Kong, *Enforcement of Hong Kong SAR Court Judgments in the People's Republic of China*, 49 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 867, 870 (2000) (discussing that in China administrative power dominates political and social affairs, so judgment enforcement more reflect the interests of political and senior leaders' interests instead of legislators'. Therefore, judgment enforcement is often interfered by politically influential parties.)

³¹⁴ See Wang, *supra* note 10 at 384-85. See Kong, *supra* n 308 at 870. See J A Cohen, *Reforming China's Civil Procedure: Judging the Courts*, 45 AMERICAN JOURNAL OF COMPARATIVE LAW 793, 779-800 (1997). See also D M Rosenberg, *Enforcement of Judgments and Arbitration awards in the People's Republic of China*, in SELECTED TOPICS IN CHINESE BUSINESS LAW 57-8 (Howard Chao ed., 1996) (observing "strong local protectionism makes out-of-locality enforcement quite difficult for creditors).

³¹⁵ Other problems include incompetent judges, the phenomenon of relationship [guanxi] in China and corruption of local courts. See Cohen, *supra* note 309 at 794-97, 801-02. See also Rosenberg, *supra* note 309 at 58-9 (indicating the difficulty in freezing a debtor's bank account and observing small market exists for the seized items, therefore a creditor may find it difficult to realize its rights). See A A Yuan, *Enforcing and Collecting Money Judgments in China from a U.S. Judgment Creditor's Perspective*, 36 GEORGE WASHINGTON INTERNATIONAL LAW REVIEW 757, 759 (describing collecting monetary judgments in Mainland China is like a frustrating cat-and-mouse game).

judgments.³¹⁶ Nevertheless, undeniably Mainland China still needs to make tremendous efforts in reforming its judicial system before gaining mutual trust from its sister regions. Improving Mainland judicial system is a broad topic and has been much debated in scholarship. It is beyond the scope of this dissertation to provide solutions in details. The point is this: on the one hand, Mainland China needs to make serious efforts in reforming its judicial system by enhancing judicial independence, reducing local protectionism, and training judges, etc; on the other hand, Hong Kong and Macao need to acknowledge the achievements that Mainland China has made in improving its judicial system and modernizing its laws.³¹⁷ If Hong Kong and Macao rigidly adhere to the stereotypical negative presumption towards Mainland China and disregard Mainland achievements, no mutual trust can be built.

Regarding interregional JRE, in Mainland China, not every court has jurisdiction over cases involving interregional elements. As for district courts, only those located in economic and technological development zones enjoy first-instance jurisdiction over such cases, and they generally enjoy a better reputation for fair trial than courts in rural China.³¹⁸ The Mainland-Hong Kong Arrangement restricts judgments to those rendered by these Mainland district courts and higher courts.³¹⁹ This approach should be adopted by the proposed Multilateral JRE Arrangement in order to help soothe sister-regions’

³¹⁶ He, *supra* note_84_ at 421-55 (proving “with a diversified local economy, local governments have less incentive to help specific enterprises and thus local protectionism decreases; general judicial reforms aimed at building institutions and increasing the professionalism of the judiciary have been implemented; and specific measures to strengthen enforcement have been put into place.”)

³¹⁷ For detailed discussion regarding how Mainland China modernizing its laws after entry the WTO, *see supra* Part i of Section A of Chapter IV.

³¹⁸ Arts. 1 and 5 of the Provisions of the Supreme People’s Court on Some Issues Concerning the Jurisdiction of Civil and Commercial Cases Involving Foreign Elements, adopted at the 1203rd meeting of the Judicial Committee of the Supreme People’s Court on Dec. 25, 2001, and effective on Mar. 1, 2002.

³¹⁹ *See* the second attachments to the Mainland-Hong Kong Arrangement.

concerns on the quality of Mainland judgments.³²⁰ Moreover, in order to incentivize Hong Kong to participate in a broad scope Multilateral JRE Arrangement, Mainland China need reform its procedure for trial supervision and solve the finality dispute, as well as accept common-law concepts such as fraud as a heading for denying JRE in the Multilateral JRE Arrangement.³²¹

ii. Enhancing Interregional Legal Education and Communication

Conceptual and doctrinal differences between national legal systems complicated the negotiation of a broad scope judgment convention at The Hague.³²² Delegates were sceptical about each other's legal systems.³²³ In Arthur von Mehren's word, "Nor is it easy to persuade jurists...that change is desirable. Better the devil we know--and have learned to live with--than the devil we know not."³²⁴ The divergences between the English common-law system and the European continental civil-law system make the UK doubt the European harmonization of private international law and harm the mutual trust between the UK and other EU members.³²⁵ Similarly, the divergences between the legal systems in three Chinese regions also cause weak interregional mutual trust. Put in simple terms, the three regions do not trust each other partly because they are unfamiliar with each other's legal systems. So, enhancing interregional legal communication is extremely important. The Mainland-Macao Arrangement has made a valuable effort. It authorizes a

³²⁰ See *infra* Part iii of Section A of Chapter V.

³²¹ For detailed discussion of fraud, see *infra* Part iv of Section C of Chapter V.

³²² Arthur T. Von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-wide: Can the Hague Conference Project Succeed?*, AMERICAN JOURNAL OF COMPARATIVE LAW 191, 201 (Spring 2001).

³²³ *Id.*

³²⁴ *Id.*

³²⁵ See Harris, *supra* note 137 at 352-53, 359-363, 364-367.

requested court to directly contact a judgment-rendering court in the other region to verify the genuineness of the judgment.³²⁶ Moreover, it also requires the Supreme People's Court and the Court of Final Appeal of Macao to provide each other with legal materials related to the implementation of the Arrangement and to inform each other of the results in implementation every year.³²⁷ Such communication channels will tremendously enhance interregional understandings. However, they are, regrettably, absent in the Mainland-Hong Kong Arrangement. Like the Mainland-Macao Arrangement, the Multilateral JRE Arrangement should also establish similar communication channels among regional courts.³²⁸ Nevertheless, the two existing Arrangements do not provide detailed information regarding how the communication channel operates.³²⁹

In China, interregional legal education and communication has attracted wide attentions. Early in 1999, Mainland Professor Juan Shen made a proposal to enhance interregional legal education.³³⁰ She proposed that each region should send judges or civil servants in the judicial department to work in other regions.³³¹ She proposed two possible channels. One is to establish regular visiting programs, so judges or civil servants can visit their counterparts in other regions.³³² As an alternative, Region A may establish a contact office for judicial assistance in Region B.³³³ Judges and civil servants from Region A will work in this contact office and learn the laws of region B.³³⁴ If courts in Region B need judicial assistance from Region A, they can directly contact this contact

³²⁶ See art. 7 of the Mainland-Macao Arrangement.

³²⁷ *Id.*, art. 23.

³²⁸ For details, see Section B of Chapter VI.

³²⁹ For how the proposed Multilateral JRE Arrangement fills this gap, see Section B of Chapter VI.

³³⁰ JUAN SHEN, *ZHONGGUO QUJI FALV CHONGTU* [CHINA INTERREGIONAL CONFLICT OF LAWS] (1999).

³³¹ *Id.*, at 139.

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.*

office.³³⁵ Advisably, it is a good idea to regularly arrange judges at the different levels to visit and work with their counterparts in other regions. This can help them become better acquainted with each other and understand each other's legal culture. Joint education of legal professionals has also raised the attention of the Supreme People's Court. In its 2004 annual report, the Court stated that it had made efforts to arrange Mainland judges to study, visit, or communicate with their counterparts in Hong Kong and Macao.³³⁶

Shen also observed that many challenges in the interregional conflicts come from the bad communication between the four regions. For example, it is difficult for people in one region to learn the law of another region.³³⁷ Or because of political disputes, regions have been isolated from one another; therefore, people in one region feel people in another region are strangers.³³⁸ Besides the exchange program discussed above, Shen proposed two other ways to solve these challenges. The first was to increase the exchange of scholars or students.³³⁹ This can help people in one region learn the law of the other.³⁴⁰ Second, each region should allow residents in other regions to sit for the bar exam and to practice law after passing the bar there.³⁴¹ Shen's contribution lies in her detailed and feasible advice to improve communication and education among regions. Much of her advice has become realities today. For example, nowadays residents in Hong Kong and Macao are allowed to sit for the Mainland bar exam and practice law in Mainland China after passing the Mainland bar.³⁴² The CEPA also enlarges exchange opportunities

³³⁵ *Id.*, at 139-40.

³³⁶ GAZETTE OF THE SUPREME PEOPLE'S COURT OF THE PRC 10 (April 2005).

³³⁷ Shen, *supra* note 325, at 140.

³³⁸ *Id.*

³³⁹ *Id.* at 137.

³⁴⁰ *Id.*

³⁴¹ *Id.* at 137-38.

³⁴² Residents in Hong Kong, Macao, and Taiwan can take the Mainland bar exam, *see* <http://www.chinalawedu.com/news/1300/23229/2009/1/ji39014650171511900212320-0.htm> (last visited April 15, 2010). Mainland residents also can sit for Hong Kong and Macao bar exams. For Hong Kong bar exam information,

between legal professionals in Mainland China, Hong Kong and Macao, respectively. For instance, Hong Kong law firms that have set up representative offices in the Mainland are allowed to operate in association with Mainland law firms, except in the form of partnership.³⁴³ Increasing education exchanges is another example. Up to 2010, the PRC Education Ministry has permitted eighteen universities in Hong Kong and Macao to recruit college students from Mainland China.³⁴⁴ More and more law students from Mainland China are enrolled in degree or visiting programs in universities in Hong Kong and Macao, and vice versa.³⁴⁵

Moreover, Mainland professor Yongpin Xiao also proposes two methods to enhance legal cultural communication and education. The first method is bilingualism of Hong Kong's legislation and judicature.³⁴⁶ Xiao argues that Hong Kong statutes and case law were in English during its colonial period.³⁴⁷ The Basic Law designates both Chinese and English as the official languages.³⁴⁸ Therefore, translating Hong Kong law from English to Chinese is necessary.³⁴⁹ Bilingualism of Hong Kong's legislation and

see <http://www.hkba.org/admission-pupillage/general/index.html> and for Macao bar exam information, *see* <http://www.unesco.org.mo/eng/law/18legalProfession.html> (last visited April 15, 2010).

³⁴³ Liberalization Measures under CEPA, at http://www.tid.gov.hk/english/cepa/tradeservices/leg_liberalization.html (last visited April 15, 2010). For comments, *see* Fan Wang, Hong Kong yu Neidi Kuajing Pochang de Falv Kuangjia Yanjiu [The Legal Framework for Trans-border Insolvency Cases between Mainland China and Hong Kong], 27 ZHENGFA LUNTAN [TRIBUNE OF POLITICAL SCIENCE AND LAW] 75, 78 (2009). Similar measures are applicable between Mainland China and Macao, *see* Mainland and Macao Closer Economic Partnership Arrangement (CEPA) <http://www.imprensa.macao.gov.mo/edicoes/en/dse/cepa/> (last visited April 15, 2010).

³⁴⁴ Neidi Xiangan Furen Xuwei, 18 Suo Gangao Gaoxiao Ke Neidi Zhaosheng [Mainland China and Hong Kong Mutual Recognition of Education Degree, 18 Hong Kong and Macao Universities are Permitted to Recruit Students in Mainland China], (2010), <http://edu.zjol.com.cn/05edu/system/2010/03/16/016423425.shtml> (last visited Jun 1, 2010).

³⁴⁵ In 2010, Macao universities will recruit 1594 students from Mainland China. *See* <http://learning.sohu.com/20100412/n271456789.shtml> (last visited April 15, 2010). In 2010, Hong Kong universities will recruit at least 1120 Mainland students. http://www.china.com.cn/info/zhuanti/09gaokao/2010-03/05/content_19532665.htm (accessed on June 1, 2010). Guangyu Putong Gaodeng Xuexiao Zhaoshou he Peiyang Hong Kong, Macao, Yiji Taiwan Xueshen de Zanxin Guiding [Provisional Regulation on Mainland Universities Recruit and Train Students from Hong Kong, Macao, or Taiwan] (Effective on March 1, 2006), <http://www.gatzs.com.cn/gatzs/pz/zcfg/200603/20060301/395655.html> (last visited April 15, 2010). For policies for Mainland students to study in Hong Kong, *see* <http://www.studyinhk.net/guide/ug-ncee/faqs/year2010.aspx> (last visited April 15, 2010).

³⁴⁶ Yongpin, *supra* note_102_ at 193.

³⁴⁷ *Id.*

³⁴⁸ Art 9 of the Hong Kong Basic Law.

³⁴⁹ Yongpin, *supra* note_102_ at 193-96.

judicature can also facilitate legal professionals from other regions to understand Hong Kong law.³⁵⁰ Second, Xiao argues that divergent legal cultures make translating Hong Kong law from English to Chinese difficult because³⁵¹

Hong Kong laws contain numerous legal terms denoting concepts that do not exist in the laws of Mainland China, it follows that there are no Chinese equivalents for such terms. On the other hand, some terms may be the same but have different meanings in the two jurisdictions, such as individual rights, the rule of law, judicial independence...

Therefore, Xiao believes that improving comparative studies of the legal terminologies in Mainland China and Hong Kong is "the essential presupposition" of interregional legal cultural communication.³⁵² Xiao's proposals are insightful and should be applicable to Macao as well. Considering the cost and time of translating all regional laws into three languages, regional laws in English or Portuguese should be first translated into Chinese. This is because Chinese is the official language in the three regions and spoken by majority of people there. Mainland China should support Hong Kong and Macao in financial or other ways for this endeavor. Additionally, legal academia in three regions should conduct more comparative studies to enhance mutual understanding.

Hong Kong scholars also agree that interregional communication should be improved. Hong Kong Professor Xianchu Zhang expressed deep concern regarding the judicial fraud in Mainland China.³⁵³ He advocates that two regions should establish "a cross-border consultation and information exchange scheme" to "enable the Hong Kong court to access to needed information and verification, reflect issues and concerns for the

³⁵⁰ *Id.* at 193-96.

³⁵¹ *Id.* at 196.

³⁵² Yongpin, *supra* note_102_ at 196.

³⁵³ Zhang, *supra* note_3_ at 22 (indicating judicial fraud includes "parties' fraudulent conducts, protectionism of the local governments and the judicial corruption in the proceedings.")

attention of the relevant authorities of the mainland, and obtain necessary assistance so that justice and public trust on the judiciary in Hong Kong can be ensured."³⁵⁴ Zhang's observation is correct. Court-to-court information exchange is crucially necessary to promote mutual trust in JRE.³⁵⁵ However, Zhang does not provide any solution to improve interregional legal communication and education.

EU law provides good examples of enhancing interregional legal communication and education. They can serve as valuable guidance for China. As for communication, European Judicial Network in Civil and Commercial Matters can serve as a valuable reference for China.³⁵⁶ The Network is a non-bureaucratic structure and attempts to provide unofficial support to the courts and people involving in interregional litigations.³⁵⁷ It is composed by bodies in the member states, such as designated contact points, central authorities in charge of judicial cooperation in civil and commercial matters, liaison magistrates, and other judicial or administrative authority for judicial cooperation.³⁵⁸ The member states shall notify the European Commission full contacts information³⁵⁹ and the working languages³⁶⁰ of those bodies.³⁶¹ The Network has two highlights. The first is contact points designated by member states for judicial assistance. They shall supply each other with information of and process requests for judicial

³⁵⁴ *Id.* at 22-23.

³⁵⁵ For how to establish a court-to-court information exchange system in interregional JRE, *see* Part i of Section B of Chapter VI.

³⁵⁶ COUNCIL DECISION OF MAY 28, 2001 ESTABLISHING A EUROPEAN JUDICIAL NETWORK IN CIVIL AND COMMERCIAL MATTERS, OJ L 174, 27.6.2001, p. 25, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001D0470:EN:NOT> (last visited Apr 10, 2010). For comments, *see* The European Evaluation Consortium, Evaluation of the Functioning of the European Judicial Network in Civil and Commercial Matters, Framework Contract No: BUDG-02-01-L2. June 20, 2005.

³⁵⁷ http://ec.europa.eu/civiljustice/network/network_en.htm, last visited April 8, 2010.

³⁵⁸ Art. 1 of Council Decision of May 28, 2001 Establishing a European Judicial Network in Civil and Commercial Matters, *supra* note_351_ at Art. 2.

³⁵⁹ *Id.* at art. 8.

³⁶⁰ *Id.* at art. 7.

³⁶¹ *Id.* at art. 2.

cooperation.³⁶² In case that a contact point is unable to respond to a request for information from another member of the Network, it shall forward it to the contact point that is best able to reply.³⁶³ They shall also meet regularly each half year to exchange information, identify best practices in judicial cooperation, and ensure the accessibility of information on judicial cooperation within the Network.³⁶⁴ The second highlight is that the European Commission shall construct and maintain³⁶⁵ an online public information system, including the European Judicial Network website,³⁶⁶ to facilitate people involving in interregional litigations.³⁶⁷ This system shall provide international, EU, and national legal instruments and case laws relating to judicial cooperation.³⁶⁸ This system also comprises practical and concise information sheets provided by member states, which provide most recent information on the national judicial systems, procedures for bringing cases to court, conditions for obtaining legal aid, national rules on service and JRE, alternative dispute-settlement possibilities, and organisations and operation of the legal professions in member states.³⁶⁹ All these information shall be translated into official languages of other member states.³⁷⁰ By September 30, 2009, the Network was composed of approximately 83 contact points and 335 central authorities, liaison magistrates, and other judicial or administrative authorities.³⁷¹ The Network website provides 20 themes for 27 member states in 22 languages.³⁷² From 2008 to 2009, the

³⁶² *Id.*, at art. 5.2.

³⁶³ *Id.*, at art. 5.3.

³⁶⁴ *Id.*, at arts. 4.3, 9, and 10.

³⁶⁵ *Id.*, at art. 17.

³⁶⁶ http://ec.europa.eu/civiljustice/index_en.htm accessed on April 15, 2010.

³⁶⁷ Art. 14 of the Decision on European Judicial Network.

³⁶⁸ *Id.*, at art. 14.2.

³⁶⁹ *Id.*, at art. 15.

³⁷⁰ *Id.*, at art. 17.4.b.

³⁷¹ João Paulo Simões de Almeida, THE EUROPEAN JUDICIAL NETWORK: A TOOL TO SIMPLIFY AND EXPEDITE JUDICIAL COOPERATION IN CIVIL AND COMMERCIAL MATTERS ACROSS EUROPE 2, www.ccbe.org/fileadmin/user.../EJN_presentation_CCB1_1256900818.pdf.

³⁷² *Id.* at 3.

average number of visitors (unique visitors) per month is 108,000 for a total of 274,000 monthly page views.³⁷³ The Network facilitates international litigation and judicial cooperation between EU member states.³⁷⁴ From January 1, 2011, qualified professional associations in the member states will be able to become members of the Network and the contact points shall have appropriate contacts with them.³⁷⁵ Having lawyers working together with the Network will make judicial cooperation in the EU more effective.³⁷⁶

The European Judicial Network offers valuable lessons for China. Based on its own situations, China may adopt the following three methods to enhance interregional legal communication.

First, each region should formally designate a central authority in charge of interregional judicial cooperation in civil and commercial matters. Establishing central authorities for interregional judicial assistance does not mean that parties should send requests for judicial assistance to an authority and then the authority would forward the request to its counterpart in a sister region.³⁷⁷ A judgment creditor should be allowed to directly request a sister-region court where a judgment debtor's assets are located for enforcement.³⁷⁸ The major responsibility of a central authority is to solve problems arising from implementing arrangements and to coordinate with its sister-region counterparts for uniform interpretation of arrangements. Under the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters,³⁷⁹ the

³⁷³ *Id.*

³⁷⁴ *Id.* at 1.

³⁷⁵ Art. 1 of Decision No 568/2009/EC of the European Parliament and of the Council of June 18, 2009, OJ L 168, 30.6.2009.

³⁷⁶ Almeida, *supra* note 367, at 4.

³⁷⁷ See Xiangqian Zhu, *Shipin "Guanyu Neidi yu Hong Kong SAR Xianfu Renke he Zhixin Danshiren Xieyi Guanxia de Minshangshi Anjian Panjue de Anpai"* [Comments on the Mainland-Hong Kong Arrangement], FAZHI YU SHEHUI [LAW AND SOCIETY] 479, 380 (2007).

³⁷⁸ Art. 4 of the Mainland-Hong Kong Arrangement. *Id.* at 380.

³⁷⁹ For the text of the Convention, see http://www.hcch.net/index_en.php?act=conventions.text&cid=82 (last visited

central authority for international judicial assistance in each of the three regions is: the Bureau of International Judicial Assistance of the PRC Ministry of Justice,³⁸⁰ the Chief Secretary for Administration of Hong Kong,³⁸¹ and the Procurator of the Procuratorate of Macau.³⁸² On the contrary, currently, it is unclear what the central authority is for interregional judicial assistance in each region. The existing six arrangements on judicial assistance were negotiated between Mainland Supreme Court, Hong Kong or Macao judicial department, respectively. However, for solving problems arising from the implementation of the arrangements, the arrangements indicate different communication organs. Namely, Mainland Supreme People's Court and Hong Kong High Court,³⁸³ Mainland Supreme People's Court and Macao Court of Final Appeal,³⁸⁴ Mainland Supreme People's Court and the representatives of Macau Special Administrative Region,³⁸⁵ or Mainland Supreme People's Court and the Hong Kong government.³⁸⁶ In practice, the Supreme People's Court takes charge of interregional judicial assistance in Mainland China.³⁸⁷ But it is unclear whether the central authorities in Hong Kong and Macao should be their Court of Final Appeal or the judicial or administrative department. Moreover, it appears that Hong Kong or Macao does not intend to appoint the same central authority of international judicial assistance for interregional affairs, because these

April 15, 2010).

³⁸⁰ Bureau of International Judicial Assistance, Ministry of Justice of the People's Republic of China 10 Chaoyangmen Nandajie, Chaoyang District, Beijing 100020, China.

³⁸¹ Chief Secretary for Administration of Hong Kong SAR, Central Government Offices, Lower Albert Road, Hong Kong, tel: (011) (852) 8102954.

³⁸² Procurator of the Procuratorate of Macau SAR, Alameda Dr. Carlos D'Assumpcao, NAPE, Edificio Comercial Tai Fung, 13, Regiao Administrativa Especial de Macau; tel: 853-797-8271, fax: 853-727-621.

³⁸³ *Eg.*, art. 10 of the Mainland-Hong Kong Service Arrangement.

³⁸⁴ *Eg.*, art. 23 of the Mainland-Macao Arrangement.

³⁸⁵ *Eg.*, art. 24 of the Mainland-Macao Service and Evidence Arrangement and art. 15 of the Mainland-Macao Arbitration award Arrangement.

³⁸⁶ *Eg.*, art. 11 of the Mainland-Hong Kong Arbitration award Arrangement.

³⁸⁷ See Baoguo Jiang, *Neidi yu Gang Ao Minshangshi Panjue Renke he Zhixin Anpai Bijiao Yanjiu [A Comparative Study on the Recognition and Enforcement of Civil and Commercial Judgments Arrangements between Mainland China and Hong Kong and Macao---with Special Reference to the Practices of Hong Kong]*, 113 FAXUE LUNTAN [LEGAL FORUM] 69, 70 (2007).

authorities have not been much involved in negotiating and implementing the existing arrangements. Therefore, it is necessary for Hong Kong and Macao to explicitly designate their highest court or the judicial or administrative department as their regional central authority for interregional judicial assistance.

The second lesson that China can draw from the European Judicial Network is to establish contact points to facilitate interregional JRE. Each region may establish an interregional JRE office under the central authority or designate judges or civil servants in the central authority as contact points responsible for interregional JRE. These contact points can serve as the communication channels in the proposed Multilateral JRE Arrangement. They should respond to questions from other regions in a rapid and practical way and also should meet periodically for information exchange. Importantly, the contact points should coordinate to design a uniform information form for verification of sister-region judgments. In case that a requested court doubts the genuineness of a sister-region judgment, it can fill this form and submit it directly to the judgment-rendering court for verification of the judgment.³⁸⁸

The third lesson is to make interregional and regional laws easily accessible for the public. Central authorities should submit a report to each other annually, which comprises updated information regarding regional judicial systems, civil procedure, legal aid, rules on service and JRE, alternative dispute resolution procedures, organisations of legal professions, case law, and etc. This report should be available to the public from a website designated for interregional judicial assistance. The online information should be available at least in Chinese. Ideally, the website should provide information also in English and Portuguese; however, if it would be expensive to translate all information

³⁸⁸ See Section B of Chapter VI.

into three languages, the choice should be one language (Chinese) but more information.³⁸⁹ Currently, an urgent issue is that someone wanting to research JRE laws or conduct interregional litigation in China is overwhelmed by the divergences of legal systems involved and the difficulty of finding official versions of the texts. So this website aims to make the laws in one region more understandable and usable for the public, judges, and lawyers in the other region. Ultimately, persons in interregional litigation will have better access to justice. This website may be constructed and maintained jointly by central authorities, or by the proposed Interregional Coordination Organization.³⁹⁰

Regarding interregional legal education, the EU experience also provides good examples for China. For instance, the European Judicial Training Network, founded in 2000, constitutes the "principal platform and promoter for the development, training, and exchange of knowledge and competence of the EU judiciary."³⁹¹ This Network aims to develop mutual trust between judges in member regions primarily by two types of judicial exchange programs.³⁹² The first type is the exchange program for judges.³⁹³ It can be conducted by a two-week basis, where one or more visiting judges work with their counterparts in the courts' offices of other member states.³⁹⁴ Or in a three-month to one-year program, visiting judges from member states work together at the ECJ, the European

³⁸⁹ See Joachim Bornkamm, *The German Supreme Court: An Actor in the Global Conversation of High Courts*, 39 TEX. INT'L L.J. 415, 427 (2004) (advocating methods for globalization of the judiciary).

³⁹⁰ For detailed discussion of this Organization, see Part iii of Section B of Chapter VI.

³⁹¹ <http://www.ejtn.net/> (last visited on April 8, 2010). The Lisbon Network of magistrates is another training cooperation program in EU, see EUROPEAN NETWORK FOR THE EXCHANGE OF INFORMATION BETWEEN PERSONS AND ENTITIES RESPONSIBLE FOR THE TRAINING OF JUDGES (LISBON NETWORK), A NETWORK TO SUPPORT JUDICIAL TRAINING IN THE COUNCIL OF EUROPE MEMBER STATES (2006).

³⁹² Since 2005, "about 1500 judges, public prosecutors and judicial trainers have participated to the Exchange Programme. The number of beneficiaries has been in constant development. About 400 judges, prosecutors and judicial trainers participate in the Programme every year." <http://www.ejtn.net/Exchange-Programme/Overview/> (last visited on April 8, 2010).

³⁹³ *Id.*

³⁹⁴ *Id.*

Court of Human Rights and Eurojust.³⁹⁵ The second type of program is the exchanges of trainers, where judicial trainers are hosted for one or two weeks by a judicial training institution of another member state to exchange experiences and best practices.³⁹⁶

Arguably, Chinese regions may consider establishing a Judicial Training Network as well, because "legal uniformity is not merely a matter of existing norms. It is also a matter of whether the legal profession thinks and operates on a system-wide level."³⁹⁷ By working and studying together, judges will be able to get to know each other and comprehend each other's legal culture more effectively. In the long run, it will contribute legal harmonization among Chinese regions.

D. Conclusion

The ultimate goal of interregional JRE studies in China is to develop a Multilateral JRE Arrangement on the basis of the two current bilateral Arrangements. This Chapter aims to help solve the three most crucial macro challenges for interregional JRE in China. They are conflicts between socialist law and capitalist law, conflicts between civil law and common law, and weak mutual trust. This Chapter proposes detailed solutions for these challenges. Its major arguments can be summarized as follows:

First, the argument that a crash between socialist law and capitalist law exists between Mainland China and its sister regions in the civil and commercial laws was made in 1989.³⁹⁸ Mainland China accessed to the WTO in 2001. Since then, in terms of civil

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ Daniel Halberstam & Mathias Reimann, *Federalism and Legal Unification: A Comparative Empirical Investigation of 20 Systems* 21 (2010), <http://ssrn.com/abstract=1557690>.

³⁹⁸ *See supra* Section A.

and commercial law, Mainland China is in an ongoing process of reforming its laws to comply with the WTO standards. The survey of Mainland legislation and adjudication demonstrate that the conflicts between socialist law and capitalist law have significantly decreased in civil and commercial cases.³⁹⁹ Therefore, Mainland China should not deny JRE merely because judgments are rendered in capitalist Hong Kong and Macao, and vice versa.

Second, the success of the proposed Multilateral JRE Arrangement will come from its ability in coordinating between the civil-law and common-law traditions. A good approach is to formulate autonomous terminologies for controversial terms such as finality. It should adopt the "start small" approach and avoid regulating direct jurisdiction.

Last but not least, legal communication and education is important for enhancing mutual trusts.

³⁹⁹ See Yongpin, *supra* note_102_ at 198. See also Henry S. Gao, *Taming the Dragon: China's Experience in the WTO Dispute Settlement System*, SSRN ELIBRARY, 369, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1095803 (last visited Apr 6, 2010). For detailed discussion, see Chapter III.

Chapter V Selected Rules of the Proposed Multilateral JRE Arrangement

Chapter IV has demonstrated valuable lessons that China can draw from US and EU JRE laws for solving the three serious macro challenges for interregional JRE. These lessons can help design a Multilateral JRE Arrangement in terms of methodology.

First, the approach of "start small" requires that the arrangement should be established by focusing on easier problems first and then gradually expanding to difficult issues. Therefore, this Chapter will propose a single enforcement arrangement and focus on the scope, the requirements for JRE, and the defenses for JRE in this proposed Arrangement. Direct jurisdiction, as an important subject for future study, will not be covered by this Arrangement at the current stage. Second, the following approaches can help make the proposed Arrangement acceptable to all regions: allowing the public policy exception, adopting autonomous terminologies for contentious concepts, and acknowledging some regional legal peculiarities, namely fraud and Mainland procedure for trial supervision.¹ Third, the possibility of being accepted by each region and the feasibility of implementation in practice should be the touchstones for designing rules in this proposed Arrangement. Only by striking a balance between the big region (Mainland China) and smaller regions (Hong Kong and Macao), the proposed Arrangement can gain supports in practice. This Chapter attempts to serve as guidance for the three regions when they decide to combine the two existing arrangements and develop a new one.

¹ The Mainland procedure for trial supervision is related to the finality dispute. For details, *See* Part ii of Section B of Chapter IV.

This Chapter is divided into four sections. The First Section discusses the scope of the Proposed Multilateral Arrangement. The Second Chapter analyzes the requirements for JRE in this Arrangement. The Third Section explores the grounds for refusing JRE. The last Section is a summary.

A. Scope

The proposed Multilateral JRE Arrangement should be broader than the current Mainland-Hong Kong Arrangement in order to facilitate interregional commerce. Hong Kong can accept a broad-scope JRE arrangement, because the factors that cause Hong Kong to restrict the scope of the Mainland-Hong Kong Arrangement² cannot be sustained any longer. These factors are: (1) The Mainland-Hong Kong Arrangement is only the preliminary stage of interregional judicial assistance on JRE issues.³ Hong Kong would like to learn how this Arrangement would work in practice then to consider expanding its scope.⁴ (2) Hong Kong questions the judicial integrity of Mainland judges and practitioners.⁵ (3) Mainland China and Hong Kong have different criteria for finality.⁶ (4) It is difficult to execute judgments in Mainland China.⁷ Therefore, Hong Kong cannot benefit from a broad scope arrangement since Hong Kong judgments cannot be executed in Mainland China. However, these four reasons should not make a broad scope JRE arrangement unacceptable for Hong Kong.

² Hong Kong Legislative Council, LIFAHUI SIFA JI FALV SHIWU WEIYUANHUI HONG KONG SPECIAL ADMINISTRATIVE REGION YU NEIDI XIANFU ZHIXIN SHANGSHI PANJUE [LEGISLATIVE COUNCIL, JUDICIAL AS WELL AS LEGAL AFFAIR COMMITTEE MUTUAL ENFORCEMENT OF COMMERCIAL JUDGMENTS BETWEEN HONG KONG SAR AND MAINLAND CHINA] (2006), CB (2) 1202/05-06 (02).

³ *Id.* at para 3.

⁴ *Id.*

⁵ *Id.*, at paras 5 and 25.

⁶ *Id.*

⁷ *Id.*

The first reason, actually, emphasizes that the Mainland-Hong Kong Arrangement should be expanded. The Arrangement came into force in August 2008. Thus far, no judgment has been recognized and enforced under this Arrangement. This is due to the short period of time since its implementation and also because of its narrow scope.⁸ Lack of cases shows that the Arrangement is insufficient. It is also for Hong Kong's interests to establish a broad scope JRE arrangement because more Hong Kong judgments will be recognized and enforced in Mainland China, and also because Hong Kong will be able to become an interregional dispute resolution center.⁹

Second, the proposed Multilateral JRE Arrangement will provide grounds for refusing JRE such as fraud, unfair procedure, and the public policy exception. These grounds can protect Hong Kong debtors from Mainland judgments tainted by corruption.¹⁰ Mainland China should also make efforts to improve its judicial system.¹¹ Moreover, the two regions should enhance legal education and communication channels to increase mutual trust.¹² All these measures can help sooth Hong Kong's concern regarding the qualities of Mainland judgments.

⁸ Xianchu Zhang, *Dui "Neidi Hong Kong Xianfu Renke he Zhixing Danshiren Xieyi Guanxia de Minshangshi Anjian Panjue de Anpai" de Chubu Pinjia* [Preliminary Comments on the Mainland-Hong Kong Mutual Recognition and Enforcement Judgment Arrangement], 8 FAZHI LUNTAN [LEGAL SYSTEM FORUM] 51, 67-69 (2006). Xiangqian Zhu, *Shipin "Guanyu Neidi yu Hong Kong SAR Xianfu Renke he Zhixin Danshiren Xieyi Guanxia de Minshangshi Anjian Panjue de Anpai"* [Comments on the Mainland-Hong Kong Arrangement], FAZHI YU SHEHUI [LAW AND SOCIETY] 479, 478 (2007). Yiling Lin, *Neidi Hong Kong Minshangshi Anjian Xianfu Chengren yu Zhixing Wenti Chutan* [Preliminary Analysis of Mutual Recognition and Enforcement of Civil and Commercial Judgments between Mainland China and Hong Kong], CONSUME GUIDE 137, 138 (2007) (indicating the narrow scope of the Mainland-Hong Kong Arrangement will restrict its use in practice).

⁹ The Hong Kong Legislative Council acknowledged that:

It is difficult to estimate the number of Mainland judgments that parties would seek to enforce in Hong Kong under the Arrangement, and to what extent the [Mainland-Hong Kong] Arrangement may encourage parties to choose HKSAR courts as the designated courts to determine their business disputes. Nevertheless, we do not envisage that the enforcement number will be large, at least at the initial stage of implementation, given the restricted scope and application of the Arrangement, the availability of other modes of disputes resolution, and the fact that not all judgment debtors have assets in Hong Kong worthy of execution.

Hong Kong Legislative Council LC Paper No. CB(2) 1365/06-07(02), Bills Committee on Mainland Judgments (Reciprocal Enforcement) Bill Background Brief, appendix I para 10.

¹⁰ See Hong Kong Legislative Council, *supra* note 2_ at para 25.

¹¹ For details, see Part i of Section C of Chapter IV.

¹² *Id.*

Third, different criteria for finality cannot block the establishment of a broad scope JRE arrangement. On the contrary, the proposed Arrangement can provide an autonomous terminology of finality, which is acceptable to Mainland China and Hong Kong.¹³ So it will ultimately solve the finality dispute between them.¹⁴

Fourth, an authoritative empirical study has demonstrated that judgments are not difficult to execute in economically advanced areas in Mainland China.¹⁵ In 2007, Mainland China amended its CPL and issued a new judicial interpretation, aiming to improving judgment execution.¹⁶ Advisably, Supreme People's Court may require lower courts to prioritize executing sister-region judgments so as to soothe Hong Kong's concern. But in any event, the difficulty in executing judgments, alone, should not dissuade Hong Kong from concluding a broad scope JRE arrangement with Mainland China and Macao.

Furthermore, lack of judicial integrity and difficulty of judgment execution in Mainland China cannot justify the rejection of a broad scope JRE arrangement, because these two factors are not even sustained in Hong Kong courts. For example, in a 2005 *forum non conveniens* case, the plaintiff alleged that it could not get a fair trial in Mainland China because the defendant was a state-owned enterprise and Mainland courts would protect it.¹⁷ The Hong Kong court rejected this argument because of "absence of compelling evidence underpinning the general and pejorative conclusions presently

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Xin He, *Enforcing Commercial Judgments in the Pearl River Delta of China*, 57 THE AMERICAN JOURNAL OF COMPARATIVE LAW 419 (2009).

¹⁶ Preamble of Interpretation of the Supreme People's Court of Several Issues concerning the Enforcement Procedures in the Application of the CPL (No. 13 [2008] of the Supreme People's Court, adopted at the 1452nd meeting of the Judicial Committee of the Supreme People's Court on September 8, 2008).

¹⁷ Xingjiang Xingmei Oil-Pipeline Co. Ltd v. China Petroleum & Chemical Corp, [2005] 2 HKC 292, para 41.

asserted on behalf of the plaintiff."¹⁸ The plaintiff also argued that enforcing judgments against state-owned enterprises were difficult in Mainland China.¹⁹ The court rejected this argument too because this was only a speculative assertion and no evidence showed that the defendant was able to influence enforcement officials.²⁰ This case demonstrates that Hong Kong courts would not uphold a general allegation that Mainland judicial system was incompetent. So the concern of Mainland judicial system should not withhold Hong Kong from joining a Multilateral JRE Arrangement. A correct approach for Hong Kong is to embrace this Arrangement, and in implementation, to adopt a case-by-case analysis approach and deny JRE on the grounds provided by the Arrangement and on solid and particularized evidence.²¹

As a conclusion, a broad-scope arrangement should be acceptable for Hong Kong. Therefore, the proposed Multilateral JRE Arrangement should be broader than just covering judgments based on choice of court agreements. However, the "start small" approach makes it possible to leave out some judgments in order to encourage the participation of regions. Thus, on the one hand, the proposed Multilateral JRE Arrangement will cover both contractual and non-contractual civil and commercial judgments. On the other hand, this Arrangement should not cover judgments in family-law cases and allow regions to reserve JRE in certain cases such as employment disputes and insolvency. This section aims to formulate an autonomous terminology of "civil and commercial" under the proposed Arrangement.

¹⁸ *Id.*, para 45.

¹⁹ *Id.*, para 47.

²⁰ *Id.*, para 49.

²¹ *See* Zhang, *supra* note 8_ at 65.

The first Part of this Section will define "civil and commercial." Second, Mainland China and Hong Kong have disputes regarding whether judgments rendered by *all* levels of Mainland courts should be recognized and enforced in Hong Kong.²² As for Mainland judgments, the Mainland-Hong Kong Arrangement only covers judgments rendered by district courts with jurisdiction over interregional cases, and judgments rendered by intermediate courts or courts at higher level.²³ Therefore, the Second Part will answer whether this restriction should be maintained in the proposed Multilateral JRE Arrangement. The Third Part will explore what types of judgments should be covered by the proposed Arrangement.

i. Autonomous Terminology of "Civil and Commercial"

Laws in the three Chinese regions have different definitions for "civil and commercial." For example, in Mainland China and Macao where the civil-law tradition has been adopted, the distinction between private and public laws generally helps to differentiate administrative cases from civil and commercial cases.²⁴ However, Hong Kong, which follows the English common-law tradition, does not clearly distinguish private and public laws.²⁵ Moreover, all of the existing arrangements on judicial

²² Zhihong Yu, *Di Er Ji Nei Di, Hong Kong, Macao Qu Ji Fa Lv Wen Ti Yan Tao Hui Zong Su [Report of The Second Conference Regarding Interregional Conflict of Laws among Mainland China, Hong Kong, and Macao]*, 147 FA XU PIN LUN [LAW REVIEW] 156, 157 (2008). Zhihong Yu, *Nei Di Yu Macao, Hong Kong Xian Fu Ren Ke he Zhi Xing Min Shang Shi Pan Jue An Pai de Bi Jiao ji Ping Xi [Comparison and Analysis of Mainland China, Macao, and Hong Kong Mutual Recognition and Enforcement of Civil and Commercial Judgments]*, 5 TAI PING YAN XUE BAO [PACIFIC JOURNAL] 6, 6 (2009).

²³ *Id.*

²⁴ See Report Schlosser para. 23; Anna Gardella & Luca G. Radicati Di Brozolo, *Civil Law, Common Law and Market Integration: The EC Approach to Conflicts of Jurisdiction*, 51 AM. J. COMP. L. 611, 616-17 (2003).

²⁵ GRAEME JOHNSTON, *THE CONFLICT OF LAWS IN HONG KONG* 129-44 (2005). (proposing a category of "public laws" including penal and revenue laws, but the existence and delineation of the notion of "public laws" remain debatable.) For discussion of "civil and commercial" in English law, see Report Schlosser para 24; Gardella and Brozolo, *supra* note_24_ at 617. For English case law, see *O'Reilly v. Mackman* [1982] 3 WLR 1096 (H.L.).

assistance do not define the meaning of “civil and commercial.” The Mainland-Macao Arrangement attempts to clarify the meaning of “civil and commercial” by distinguishing it from administrative matters.²⁶ However, the Arrangement does not provide any criteria for distinction. When a party to a judgment is a government agency or an institution established by a government, the distinction between “civil and commercial” and “administrative” becomes blurred. A judgment-rendering region might regard a case as being civil and commercial while a requested region might consider it administrative. This issue has been ignored by the Chinese literature. Moreover, the Mainland-Hong Kong Arrangement excludes contracts for employment and personal consumption from the scope of “civil and commercial.” Many scholars opposed this exclusion.²⁷ Therefore, whether these contracts should be covered by the proposed Arrangement deserves discussion. This Part tries to define the scope of the proposed Arrangement by formulating “civil and commercial” as an autonomous terminology.

1. “Civil and Commercial” v. Administrative

The proposed Multilateral JRE Arrangement should cover civil and commercial rather than administrative judgments. “Civil and commercial” cases traditionally concern disputes²⁸

rest[ing] on the law of obligations (both contractual and non-contractual), the law of property (including succession law), and the law of persons (including family law). It includes those areas of commercial law that extend the law of contracts (e.g., the law of unfair competition), the law of property (e.g., intellectual

²⁶ Art. 1 of the Mainland-Macao Arrangement.

²⁷ See Scope of the Arrangement of Part i of Section B of Chapter III.

²⁸ Ralf Michaels & Nils Jansen, *Private Law beyond the State - Europeanization, Globalization, Privatization*, 54 AM. J. COMP. L. 843, 847 (2006).

property) and the law of persons (e.g., corporate law). It excludes those areas that are not based on such extensions and are therefore seen as (merely) regulatory public law (e.g., antitrust law).

The watershed between a “civil and commercial” judgment and an administrative one should be whether a party to the judgment is exercising a public power. This party should be a public authority, which generally includes a government agency, an institution established by a government agency, or an agent entrusted by a government agency. It may be a natural person or an entity. Whether it exercises its public power lawfully is irrelevant to the nature of the judgment.²⁹ This distinction can find support in the laws of all three regions. In Mainland China, “civil and commercial” matters mean matters between private parties such as between natural persons,³⁰ between legal persons, and between natural and legal persons.³¹ In contrast, “administrative matters” refer to matters between a private party and a government agency exercising its public authoritative powers.³² The key to their differences is that: the former is between parties of an equal status; but the latter is between parties of an unequal status because one party is exercising a public power.³³ Similarly, the Macao Administrative Procedure Law states that administrative cases are related to public powers³⁴ and public orders.³⁵ Moreover,

²⁹ see art. 2(1) of Regulation (EC) N. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for Uncontested Claims, OJ 2004 L 143, p. 15. See also art. 2(1) of Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 Creating a European Order for Payment Procedure, OJ 2006 L 399, P.1).

³⁰ Natural persons include citizens and organizations, such as partnership, which are not legal persons. See Chapter Two of Min Fa Tong Ze [General Principles of the Civil Law] (hereinafter “Mainland Civil Law”) (Adopted at the Fourth Session of the Sixth National People's Congress, promulgated by Order No. 37 of the President of the People's Republic of China on April 12, 1986, and effective January 1, 1987), translated in <http://www.lawinfochina.com> accessed on November 3, 2009 (P.R.C.)

³¹ See art. 2 of the Mainland Civil Law.

³² See art. 12, Xing Zheng Su Song Cheng Xu Fa [Administrative Procedure Law] (Adopted at the Second Session of the Seventh National People's Cong., April 4, 1989, effective October. 1,1990) translated in <http://www.lawinfochina.com> accessed on July 5, 2009 (P.R.C.).

³³ Michaels and Jansen, *supra* note 28, at 849.

³⁴ Art. 2 of the Macao Administrative Procedure Law. Available at <http://bo.io.gov.mo/bo/i/99/50/codpacn/codpac001.asp#clal>, (accessed on April 24, 2010).

³⁵ *Id.*, at art. 3.

commercial activities defined by the Macao Commercial Code have nothing to do with public powers.³⁶ Additionally, Hong Kong courts deny the recognition and enforcement of foreign penal and revenue judgments, because Hong Kong civil courts are not "an enforcement arm of foreign governments."³⁷ In other words, such judgments represent the public power of the judgment-rendering region.

Undeniably, a public authority exercises public power when it renders sanctions, such as warning, confiscating, seizing, or freezing illegal gains or property, imposing fines, suspending or rescinding licenses or permits, or restricting personal freedom.³⁸ The public power also includes issuing non-sanction decisions such as issuing, altering, suspending, or discharging certificates and permits, levying taxes, and providing social insurance or minimum maintenance fee for living according to law.³⁹

However, it becomes controversial when a public authority charges fees for the service it provides. For example, toll roads are very common in Mainland China.⁴⁰ 70% toll roads are state-owned.⁴¹ Governments can unilaterally decide the amount of fee for using state-owned toll roads.⁴² Vehicles using toll roads shall pay the fee in a way

³⁶ Arts. 2 and 3 of the Macao Commercial Code state that: commercial activities refer to the activities designed to gain profits and conducted by a commercial entity, including (1) industrial activities such as manufacturing products or providing service, (2) product circulations and intermediary service, (3) transportation, (4) banking and securities, and (5) all subsidiary activities to the above.

³⁷ Johnston, *supra* note 25, at 129.

³⁸ See art. 6 of The Mainland Administrative Reconsideration Law (adopted at the Ninth Session of the Standing Committee of the Ninth National People's Congress on April 29, 1999, and effective on October 1, 1999). See also arts. 8, 9 and 10 of The Law of the People's Republic of China on Administrative Penalty (adopted at the Fourth Session of the Eighth National People's Congress of the People's Republic of China on March 17, 1996, and effective on October 1, 1996).

³⁹ See art. 6 of The Mainland Administrative Reconsideration Law. See also arts. 8, 9 and 10 of The Law of the PRC on Administrative Penalty.

⁴⁰ See Gao Bo, *Shoufei Gaosu Gonglu de Dingjia yu Zhengfu Guangzhi Sikao [Toll Highway and Government Management]*, 354 *JIAGE YUKAN [PRICE MONTHLY]* 3, 3 (2006) (indicating 90% highways in Mainland China are toll highway, 80% first-level roads are toll roads, and more than 40% second-level roads are toll roads. Overall 7% of roads in Mainland China are toll roads).

⁴¹ Ye Fan, *Woguo Shoufei Gonglu Fazhang Zhong De Wenti Ji Zhengche Jianyi [Problems Arising from Toll Roads in China and Policy Suggestions]*, 5 *ZONGHE YUNSHU [COMPREHENSIVE TRANSPORTATION]* 40, 42 (2004).

⁴² Art. 15.1 of the Regulation of Toll Road, enacted by the State Council on Aug 18, 2004 and effective on Nov. 1, 2004. A Chinese version is available at <http://www.china.com.cn/chinese/law/668550.htm>, last visited Apr. 24, 2010.

unilaterally determined by the governments.⁴³ If a judgment for collecting or returning tolls involves a Hong Kong or Macao driver, is it civil and commercial? Another example is the airport construction fee in Mainland China. In 2004, a consumer brought a civil action against an airline company that had charged him the airport construction fee.⁴⁴ In 2007, a consumer brought an administrative action against the Mainland Civil Aviation Bureau for the airport construction fee charged by an airline company.⁴⁵ Both consumers requested return of the fees and challenged their legitimacy.⁴⁶ The airport construction fee is for the construction and maintenance of airport fire control, safety inspection, guardrail, and other safety equipments.⁴⁷ It was approved by the State Council in 1992 and has been imposed to airline passengers since then.⁴⁸ After 2004, the Mainland Civil Aviation Bureau authorized airline companies to directly collect this fee from passengers.⁴⁹ All passengers who fly or transfer from a Mainland airport to a domestic or international destination shall pay this fee.⁵⁰ The amount of the fee and the procedure of payment are determined unilaterally by the Mainland Financial Ministry and the Civil

⁴³ *Id.*, at art. 7. Governments usually entrust an agent to manage state-owned toll roads.

⁴⁴ Hao Xu, *Lvshi Zhuanggao: Jichang Jianshefei Bu Hefa, Zhuangjia Fuyu: Jinkuai Chutai Xinzheng Shoufei Fa* [Lawyer Argues: Airport Construction Fees are Illegal, Expert Urge: Enact Administrative Charge Law Quickly], XIAOFEI [CONSUMPTION] 36, 37 (2008). Juan Chen, *Dui Jichang Jianshefei de Hefaxing Sikao* [Analysis of the Legitimacy of Airport Construction Fees], 2 JINKA GONGCHENG JINJI YU FA [GOLDEN CARD PROJECT: ECONOMY AND LAW] 73, 73 (2009).

⁴⁵ Xu, *supra* note 44, at 36. Chen, *supra* note 44 at 73. Yanjun Dai, *Xuzheng Jichang Jianshefei Hefa Ma?* [Is It Legal to Continue Charging Airport Construction Fee?], CHINA TRIAL 92, 92-93 (2008).

⁴⁶ These two cases were dismissed by courts. Xu, *supra* note 44, at 36. Chen, *supra* note 44 at 73.

⁴⁷ Xu, *supra* note 44, at 37. For comments, *see* Chen, *supra* note 44, at 73-74.

⁴⁸ Xu, *supra* note 44, at 36. Guowuyuan Bangongting Zhuanfa Minhan Zongju, Guojia Jiwei, Caizhengbu Guangyu Zhengdun Minhan Jichang Daishou Gezhong Jianshe Jijing Yijian de Tongzhi [State Council, Civil Aviation Bureau, State Planning Commission, Financial Ministry Notice Regarding Regulation of Construction Funds Charged by Civil Airports], Issue in November 11, 1995 (Guofaban [1995] No. 57). For the history of airport construction fee, *see* Caoyan, *Jichang Jianshe Fei Buru Zhongjie Guidao* [The Ending of Airport Construction Fee], <http://news.carnoc.com/list/41/41790.html> (last visited April 24, 2010).

⁴⁹ Art. 1 of Chaizhen Bu, Minhan Zongju Guangyu Gaige Minhan Jichang Guanli Jianshefei Zhengshou Guanli Fanshi Deng Youguan Wenti de Tongzhi [Financial Ministry and Civil Aviation Bureau Notice to Reform the Method of Charging and Management of Civil Airport Construction Fee], Caizongzhi [2004] No. 51.

http://www.ljzfsf.gov.cn/zxl/zcfg_show.asp?lbbm=0604&wjbm=0004 (accessed on Apr. 24, 2010).

⁵⁰ *Id.*, art. 2(1).

Aviation Bureau.⁵¹ Should a Mainland monetary judgment be considered civil and commercial in nature, when it requires a Hong Kong passenger who flew from a Mainland airport to pay this fee or it asks the Air Macao who operates in a Mainland airport to return an overcharged fee to a passenger?

The EU JRE law sheds light on answering these questions. The ECJ, in *Eurocontrol*,⁵² decided that route charges imposed by a European Organization⁵³ on aircraft owners were not a civil and commercial matter, because this organization was a legal person established jointly by states; it unilaterally decided the rate of charges, the methods of calculation, and the procedures for collection; and the use of its service was obligatory and exclusive.⁵⁴ So the European Organization, when charging the fee, exercised public powers. In another case,⁵⁵ the ECJ held that a fee to remove wrecks in a public waterway was not civil and commercial.⁵⁶ The reason was that the agent that removed the wrecks was authorized by the Netherlands who assumed a treaty obligation of removing wrecks, so the agent actually exercised the public power.

There are many similarities between the two ECJ cases and Chinese cases of toll roads and airport construction fees. All of them are related to a fee charged by one party authorized by a government (or an inter-governmental organization in *Eurocontrol*) to

⁵¹ *Id.*, art. 2(2). For comments, see Qintong Lin & Lingwei Li, *Zhengshou Jichang Jianshefei Shi Xingzhen Qingquan Xingwei [Charging Airport Construction Fee Is Administrative Tort]*, 10 JOURNAL OF LIAONING ADMINISTRATION COLLEGE 34, 34-35 (2008).

⁵² *LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol* (Case 29/76), [1976] ECR 1541.

⁵³ This organization is the European Organization for the Safety of Air Navigation. It is an international organization established by several now-EU states in 1960. It imposed route charges on owners of aircraft for the use of its air safety services. These charges were authorized by the international agreement to establish Eurocontrol and by other agreements between states. Based on these agreements, it charged a German airline company LTU, who is the defendant in this case.

⁵⁴ *Eurocontrol* at 1550.

⁵⁵ *Netherlands State v Reinhold Ruffer*, [1980] ECR 3807, Case 814/79.

⁵⁶ The background of this case is that the Netherlands and Germany both claim sovereign rights of a waterway. A 1960 treaty between them states that, without prejudice to sovereignty, the Netherlands takes charge of the administration of the waterways, including the removal of wrecks. In 1971, a German resident's vessel sank in this waterway. The Netherlands authorized an agent to remove the wreck and later the agent claimed the cost of removing against the German resident.

provide service. Meanwhile, the other party is required by law to use this service at a price, a place, or a procedure unilaterally decided by the former. Therefore, the fee for state-owned toll roads and airport construction fees are administrative in nature. Accordingly, judgments involving these fees cannot benefit from the proposed Multilateral JRE Arrangement. In addition, although in the toll road case drivers who do not want to pay the fee may choose a freeway if available, this factor alone cannot change the administrative nature of this case.

In a broader sense, under the proposed Multilateral JRE Arrangement, a judgment is not civil and commercial if it relates to an obligation between two parties where one is required by the law to use the other's service or equipment at a price, a place, or a procedure unilaterally decided by the latter, when the latter is a government agency or is entrusted by this agency to exercise public power.

Moreover, the scope of the proposed Arrangement should be determined autonomously. Whether a judgment is civil and commercial is irrelevant to the nature of the judgment-rendering proceeding. For example, an action on airport construction fee can be brought according to Mainland civil law,⁵⁷ so the judgment is civil in Mainland China. But the nature of judgment under Mainland law should not affect how courts in Hong Kong and Macao determine the nature of this judgment according to the proposed Arrangement. Requested courts should base on the Arrangement to decide whether a judgment is civil and commercial. The ECJ adopts the same approach. For example, the fact that the agent sought to recover the costs of removing the wreck by a civil action instead of an administrative proceeding was insufficient to bring the matter in dispute

⁵⁷ Xu, *supra* note_44_ at 37. Chen, *supra* note_44_ at 73.

within the ambit of the Brussels Convention.⁵⁸ The other example is *Irini Lechouritou v. Dimosio tis Omospondiakis Dimokratias tis Germanias*.⁵⁹ In this case, Greek nationals residing in Greece brought a compensation claim against Germany for financial losses and mental damages during the Second World War. Under Greek law, this case is civil in nature. However, the ECJ ruled that this case was not civil or commercial because acts conducted by armed forces were linked to state sovereignty, in particular a state's foreign and defense policy.⁶⁰ Namely these acts came from the exercise of public powers and fell outside of the scope of the ordinary legal rules applicable to relationships between private individuals.⁶¹ Therefore, the compensation disputes resulting from these acts were not civil and commercial. The court explicitly indicated that for determining whether the case was civil and commercial under the Brussels Convention "[t]he fact that the proceedings brought before the referring court are presented as being of a civil nature... [wa]s... entirely irrelevant."⁶²

2. Judgments for Personal Consumption Disputes

Different from the Mainland-Macao Arrangement, the Mainland-Hong Kong Arrangement is limited to business-to-business commercial disputes and excludes contracts for personal consumption.⁶³ This is inspired by the Hague Choice of Court

⁵⁸ *Ruffer*, [1980] ECR 3807, Case 814/79.

⁵⁹ *Irini Lechouritou v. Dimosio tis Omospondiakis Dimokratias tis Germanias*, Case C-292/05.

⁶⁰ *Id.*, para 37.

⁶¹ *Id.*, para 34.

⁶² *Id.*, para 41.

⁶³ Art. 3 of the Mainland-Hong Kong Arrangement. For details, see the Mainland-Hong Kong Arrangement of Section B of Chapter III.

Convention.⁶⁴ However, the proposed Multilateral JRE Arrangement should include consumer contracts. This is because consumer contracts concern an important area of cases. Thousands of Mainland consumers visit Hong Kong and Macao every year.⁶⁵ More than 50% tourists in these two regions are from Mainland China.⁶⁶ Mainland consumers have played an important role in boosting tourism, hotel, retail, and transportation industries in these two regions.⁶⁷ Many Hong Kong and Macao residents also visit or live in Mainland China.⁶⁸ Therefore, a lot of cases involving sister-region consumers probably occur in Hong Kong and Macao. In order to facilitate interregional economic integration and people's lives in the three regions, the proposed Arrangement should cover judgments involving personal consumptions.

3. Civil Compensation Collateral to Criminal Proceedings

The proposed Arrangement should also cover civil compensation collateral to criminal proceedings.⁶⁹ This is because both the Mainland-Macao Arrangement⁷⁰ and the

⁶⁴ See art. 2.1.a of the Hague Choice of Court Convention. For details, see the Mainland-Hong Kong Arrangement of Section B of Chapter III.

⁶⁵ Wen Zhang & Fei Tan, *Dui Zhongguo Dalu Lvyouzhe Zai Xianggan Xiaofei Jiegou de Fenxi [Analysis of the Consumption Structure of Mainland Tourists In Hong Kong]*, 113 BEIJING DIER WAIGUOYU XUEYUAN XUEBAO [BEIJING NO.2 FOREIGN LANGUAGE INSTITUTE JOURNAL] 24, 24-8 (2003). Duo Chen, *Huigui Shinian Aomen Yu Neidi Jinmao Guanxi Fazhang Huigu [A Review of the Economic and Trade Relationship between Macao and Mainland China after 10-year Reunion]*, 6 GUANGDONG SHEHUI KEXUE [GUANGDONG SOCIAL SCIENCE] 16, 18 (2009) (indicating 658 million Mainland tourists visited Macao in 2008.)

⁶⁶ Yong Hu & Lei Huang, *Zhongguo Dalu Pu Xianggan Lvyou Yuche Moxing [Forecasting Model for Hong Kong's Tourism from Mainland China]*, 24 GUOJI JINGMAO TANSUO [INTERNATIONAL ECONOMIC AND TRADE RESEARCH] 41, 44 (2008).

⁶⁷ Neidi Gouwuyou Chen Xiangan Xiaofei Xin Zhuli [Mainland Tourists Constitute the New Major Consumer Group in Hong Kong], Beijing Shangbao [Beijing Business Newspaper] March 1, 2010, available at <http://finance.ifeng.com/news/20100301/1868550.shtml> (accessed on June 1, 2010).

⁶⁸ Yu Hou & Hong Yinli, *Qiantan Shengang Yitihua [A Brief Analysis of Economic Integration of Shenzhen and Hong Kong]*, 139 ZHONGGUO GAOXIN JISHU QIYE [CHINA HI-TECH ENTERPRISES] 51, 52 (2010) (indicating many Hong Kong residents prefer to live in Shenzhen and work in Hong Kong, because living costs in Shenzhen is much lower than that in Hong Kong).

⁶⁹ Guanghui Li & Han Wang, *Woguo Quji Fayuan Panjue Chengren Yu Zhixing Zhidu Zhi Bijiao [Comparison of Chinese Interregional Judgment Recognition and Enforcement Systems]*, 2 FALV KEXUE (LEGAL SCIENCE-JOURNAL OF

Hong Kong Regional JRE law consider it civil and commercial.⁷¹ Similarly, according to the EU JRE law, even though joined to criminal proceedings, a civil action for compensation for injury to an individual resulting from a criminal offence is civil in nature.⁷² Advisably the proposed Arrangement should include civil compensation collateral to criminal proceedings. Because currently no interregional arrangement exists to recognize and enforce criminal judgments in Chinese regions,⁷³ using the proposed Multilateral JRE Arrangement to recognize and enforce civil compensation collateral to criminal proceedings can help victims in criminal cases to safeguard their rights.

4. Judgments for Employment Disputes

Unlike the Mainland-Macao Arrangement, the Mainland-Hong Kong Arrangement excludes judgments for employment contracts.⁷⁴ This also follows the Hague Choice of Court Convention.⁷⁵ At the beginning stage, because of two reasons the proposed Multilateral JRE Arrangement may not need to cover judgments for employment disputes.

First, the types of courts under the Arrangement do not cover courts that address labor disputes in Hong Kong.⁷⁶ In Hong Kong, the jurisdiction of monetary employment

WEST AND EAST POLITICS AND LAW UNIVERSITY) 118, 123 (2009). Yixian Song, *Zhongguo Neidi yu Hong Kong Quji Minshangshi Sifa Xiezhru Ruogan Wenti Tanta*o [Discussion of Several Questions Relating to Interregional Judicial Assistance in Civil and Commercial Affairs between Mainland China and Hong Kong], 57 HUADONG ZHENGFA XUEYUAN XUEBAO [JOURNAL OF EAST CHINA POLITICAL AND LAW INSTITUTE] 59, 63-64 (2008).

⁷⁰ Art. 1 of the Mainland-Macao Arrangement.

⁷¹ See Hong Kong FJREO, *supra* Hong Kong regional JRE Law of Section A of Chapter III.

⁷² Sonntag v. Waidmann, Case C-172/91, para 19.

⁷³ The only existing bilateral arrangement for criminal issues is Arrangement on Transfer of Sentenced Persons between the Government of Macao and the Government of Hong Kong concluded on May 20, 2005, available at <http://en.io.gov.mo/Legis/International/record/7.aspx> (accessed on June 1, 2010).

⁷⁴ Art. 3 of the Mainland-Hong Kong Arrangement. For details, see the Mainland-Hong Kong Arrangement of Section B of Chapter III.

⁷⁵ See art. 2.1.b of the Hague Choice of Court Convention. For details, see the Mainland-Hong Kong Arrangement of Section B of Chapter III.

⁷⁶ For types of courts covered by the proposed Multilateral JRE Arrangement, see *infra* Level of Courts of Section A of

disputes belongs to the Minor Employment Claims Adjudication Board and the Labor Tribunal.⁷⁷ A party can appeal to the Court of First Instance only on the grounds of the award of the Board or the Tribunal is erroneous in point of law or outside their jurisdiction.⁷⁸ If the Court upholds the appeal, it should remand the case to the Board or the Tribunal for a new hearing.⁷⁹ The Court of First Instance can hear claims for non-monetary remedies, such as tort claims or injunctions to prevent breach of a post-employment restraint.⁸⁰ However, obviously, it does not have the first-instance jurisdiction to hear majority of employment disputes. Like the Mainland-Hong Kong Arrangement, at the beginning stage the proposed Multilateral JRE Arrangement should not cover judgments rendered by the Board and the Tribunal. This is because the judgment-rendering process in the Board or the Tribunal is very informal and flexible.⁸¹ For example, no practicing attorney is allowed.⁸² It is still undetermined whether other regions may accept the judgment-rendering proceedings in the Board or the Tribunal meet the requirement of fair procedure for JRE.

Chapter V.

⁷⁷ PATTIE WALSH, HONG KONG EMPLOYMENT LAW: A PRACTICAL GUIDE 359 and 360 (2008). The Board can exercise jurisdiction over employment claims involving less than 10 claimants for a sum of money not exceeding HK\$8,000 per claimant. All other employment claims are heard by the Tribunal. Only in exceptional circumstances, the Tribunal can refer cases to the Court of First Instance. For details, see Walsh, at 366.

⁷⁸ Art. 31 of the Minor Employment Claims Adjudication Board Ordinance, Cap 453, at <http://www.hklii.org/hk/legis/ord/453/>; and art. 32 of the Labour Tribunal Ordinance, Cap 25 at <http://www.hklii.org/hk/legis/en/ord/25/> (accessed on June 1, 2010).

⁷⁹ Wang Guoshe, *Neidi Yu Xiangnan Laodong Zhengyi Zhongcai Zhidu Bijiao Yanjiu [Comparative Studies of Labor Arbitration Dispute in Mainland China and Hong Kong]*, 26 XIANDAI FAXUE [MODERN LAW SCIENCE] 68, 71 (2004). In practice, few parties appeal to the Court of First Instance and the awards are generally enforced in Hong Kong. See Zheng Gui, *Xiangnan Laodong Zhengyi Chuli Gaikuan [Overview of Labor Dispute Resolution in Hong Kong]*, ZHONGGUO LAODONG [CHINA LABOR] 40, 41 (2003).

⁸⁰ Walsh, *supra* note 78, at 360. *Glock (Hong Kong) Limited v Brauner Wilhelm (HCA2865/2004)* confirms that the Labour Tribunal has exclusive jurisdiction in hearing a broad range of employment-related claims, but does not have jurisdiction over claims in tort.

⁸¹ *Id.* at 360.

⁸² For reasons, see Guoshe, *supra* note 80, at 70 (indicating the reasons are to speed up the procedure and lower the costs). For criticism, see Walsh, *supra* note 78 at 360.

Second, in Mainland China, employment disputes are subject to compulsory arbitration.⁸³ The arbitration award can be recognized and enforced according to the Mainland-Hong Kong Arbitration Award Arrangement.⁸⁴ Employers and employees cannot use a choice of court agreement to opt out the jurisdiction of the labor dispute arbitration commission.⁸⁵ If an employee disagrees with the arbitration award, he or she can litigate the case in a court.⁸⁶ But an employer can only request a court to set aside the arbitration award on procedural grounds instead of litigating the merits of the case.⁸⁷

Macao law neither imposes compulsory arbitration for employment disputes nor establishes a special labor tribunal. Employers and employees can solve their disputes by litigation according to Macao Labor Litigation Code or Civil Procedure Code.⁸⁸ Nevertheless, due to the peculiarities of solving employment disputes in Hong Kong and Mainland China, although employment disputes concerns an important area of cases, at the beginning stage the proposed Multilateral JRE Arrangement should exclude them from its scope.

⁸³ Art 2 of The Law of Labor Dispute Mediation and Arbitration (adopted at the 31st meeting of the Standing Committee of the Tenth National People's Congress of the People's Republic of China on December 29, 2007, effective on May 1, 2008) states that

This following labor disputes arising between an employer and an employee in Mainland China shall be submitted to labor arbitration: (1) A dispute arising from the confirmation of a labor relationship; (2) A dispute arising from the conclusion, performance, modification, rescission or termination of a labor contract; (3) A dispute arising from the removal or layoff of an employee or the resignation or retirement of an employee; (4) A dispute arising from the work hours, breaks, vacations, social insurance, benefits, training, or labor safety; (5) A dispute arising from the labor remunerations, medical expenses for a work-related injury, economic indemnity, compensation, etc.; or (6) Any other labor dispute as provided for by a law or administrative regulation.

⁸⁴ For details of this Arrangement, *see* Part ii of Section D of Chapter I.

⁸⁵ Jurisdiction lies in the arbitration commission at the place of performance of a labor contract or at the place of residence of an employer. Art. 21 of the Law of Labor Dispute Mediation and Arbitration.

⁸⁶ *Id.*, at art. 48. But *see* art. 47, an arbitration award is final in case of (1) a dispute over the recovery of labor remunerations, medical expenses for a work-related injury, economic indemnity, or compensation, in an amount not exceeding the 12-month local monthly minimum wage level; or a dispute over the working hours, breaks and vacations, social insurance, etc., arising from the execution of state labor standards.

⁸⁷ *Id.*, at art. 49.

⁸⁸ Arts.1 and 2 of the Macao Labor Litigation Code, at <http://bo.io.gov.mo/bo/i/2003/26/codprotracn/codprotra001.asp#t1a1>, (accessed on June 3, 2010).

5. Judgments on Insolvency and Related Issues

The recognition and enforcement of sister-region insolvency proceedings and judgments is an urgent issue in China.⁸⁹ Many debtors take advantage of the absence of an interregional JRE mechanism to escape debts.⁹⁰ Between Chinese regions, whether insolvency proceedings in sister-region courts should be recognized is decided on a case-by-case basis. Therefore, inconsistent practice exists. For example, early in 1983, in the *LMK Nam Sang Dyeing Case*, a Hong Kong accounting firm, as a representative appointed by a Hong Kong court, obtained permission from a Mainland municipal government to take over the debtor's assets in Mainland China back to Hong Kong where the primary insolvency proceedings was being held.⁹¹ The effects of Hong Kong insolvency proceedings were implicitly recognized in Mainland China.⁹² However, in *Liwan District Construction Company v. Euro-American China Property Limited*, the plaintiff sued the Hong Kong defendant for breach of contract in Mainland China.⁹³ Meanwhile the defendant was in an insolvency proceeding in Hong Kong.⁹⁴ However, the Mainland court refused to recognize the extraterritorial effects of the Hong Kong proceeding and the liquidator appointed by the Hong Kong court.⁹⁵ Nevertheless, in recent years, Hong Kong liquidators have reported that especially courts in Guangdong

⁸⁹ Teng Ma & Jian Hu, *Lun Neidi yu Hong Kong Kuajing Pochang Zhong de Falv Chongtu ji Xietiao Jizhi [Legal Conflicts and Coordinating System between Mainland China and Hong Kong in Transborder Insolvency Cases]*, 16 ANHUI DAXUE FALV PINGLUN [ANHUI UNIVERSITY LAW REVIEW] 31, 31-32 (2009).

⁹⁰ *Id.*

⁹¹ Fan Wang, *Hong Kong yu Neidi Kuajing Pochang de Falv Kuangjia Yanjiu [The Legal Framework for Trans-border Insolvency Cases between Mainland China and Hong Kong]*, 27 ZHENGFA LUNTAN [TRIBUNE OF POLITICAL SCIENCE AND LAW] 75, 79 (2009).

⁹² For comments of this case, see Jingxia Shi, *Chinese cross-border insolvencies: current issues and future developments*, 10 INTERNATIONAL INSOLVENCY REVIEW 33, 38 (2001).

⁹³ Wang, *supra* note_91_ at 79.

⁹⁴ *Id.* at 79.

⁹⁵ *Id.* at 79. Ma and Hu, *supra* note_89_ at 41. Donald J Lewis & Charles D Booth, Case Comment, *Liwan District Construction Company v. Euro - America China Property Limited*, 6 China L. Prac. 27 (1990).

province Mainland China are increasingly willing to offer co-operation to them.⁹⁶ As for Hong Kong, Hong Kong court recognized the extraterritorial effects of Mainland insolvency proceeding in the famous *GITIC* case.⁹⁷ The Hong Kong court stayed its proceeding and deferred to the Mainland court as the principal winding up jurisdiction.⁹⁸ The Court indicated that comity requires it to refrain from interrupting the Mainland proceeding when the court could equally treat local and overseas creditors.⁹⁹ But in *Re Zhu Kuan*, three parallel insolvency proceedings against the same debtor took place in Hong Kong and Macao.¹⁰⁰ The debtor was a Hong Kong subsidiary owned by a Macao company. However, because both the Macao court and the Hong Kong court refused to recognize the liquidator appointed by each other, the two courts had to restrict the proceedings to the debtor's assets within their jurisdictions. Creditors have to litigate the case in three regions, which is time- and money-consuming.

Both Mainland and Hong Kong regional laws have adopted the "universality approach."¹⁰¹ In other words, they would recognize the extraterritorial application of sister-region jurisdiction's laws and allow the representative appointed by sister-region courts to claim the debtor's assets located in their jurisdiction.¹⁰² The 2006 new Mainland Enterprise Bankruptcy Law states that Mainland insolvency proceedings have effects on

⁹⁶ Charles D Booth, *The 2006 PRC Enterprise Bankruptcy Law: The Wait Is Finally Over*, 20 SINGAPORE ACADEMY OF LAW JOURNAL 275, 311 (2008).

⁹⁷ *CCIC Finance Ltd v. Guangdong Int'l Trust & Inv Crop ("GITIC")*, unrep HCA 15651/1999, July 31, 2001. For comments, see Jingxia Shi, *Woguo Pochang Chengxu Yuwai Xiaoli de Shili Fenxi [A Study of An Real Case of The Extraterritorial Effects of Mainland Insolvency Proceedings]*, 20 ZHENGFA LUNTAN [TRIBUNE OF POLITICAL SCIENCE AND LAW] 41, 41-45 (2002).

⁹⁸ *Id.*

⁹⁹ *Id.*, at 40.

¹⁰⁰ *Re Zhu Kuan Group Co Ltd*, unrep HCCW 875/2003. Wang, *supra* note 91_ at 80.

¹⁰¹ For the "universality approach," see Booth, *supra* note 97_ at 311. For Mainland law, see Wang, *supra* note 91_ at 76. For Hong Kong law, see generally Charles D Booth & Philip Smart, *The New Avoidance Powers Under Hong Kong Insolvency Law: A Move From Territoriality to Extraterritoriality*, 34 INT'L LAW. 225 (2000).

¹⁰² See Booth, *supra* note 97_ at 311; see Wang, *supra* note 91_ at 76.

the debtor's properties located outside of Mainland China.¹⁰³ Mainland Courts shall recognize and enforce foreign judgments on insolvency issues according to international treaties that Mainland China ratified or the principle of reciprocity.¹⁰⁴ Under Hong Kong law, courts may recognize a sister-region court as the principal jurisdiction and offer administration help in an insolvency proceeding (1) when the debtor's domicile is located in the region where the insolvency proceeding commenced¹⁰⁵ and whose law adopts the "universality approach", and (2) when the debtor requests Hong Kong courts to exercise jurisdiction.¹⁰⁶

The Mainland-Macao arrangements implicitly include insolvency and related issues in the scope of "civil and commercial."¹⁰⁷ Therefore, in theory, insolvency judgments and proceedings can be recognized under the arrangements. However, the Mainland-Hong Kong Arrangement requires a choice of court agreement. Because insolvency cases generally involve many parties and are difficult to reach consensus on choice of court, the Mainland-Hong Kong Arrangement is probably *de facto* inapplicable to insolvency cases.¹⁰⁸ If the three regions prefer, proceedings and judgments on insolvency and related issues may be covered by the proposed Multilateral JRE Arrangement.

Nevertheless, insolvency laws in Mainland China and Hong Kong are very different. For example, in Mainland China, no personal bankruptcy exists.¹⁰⁹ Under Hong Kong law, insolvency applies to the bankruptcy both of nature person and partnership¹¹⁰

¹⁰³ Art. 5, para 1 of the Law of the PRC on Enterprise Bankruptcy (adopted at the 23rd meeting of the Standing Committee of the 10th National People's Congress of the PRC on August 27, 2006, effective on June 1, 2007.)

¹⁰⁴ *Id.*, art. 5 para 2.

¹⁰⁵ *American Express Int'l Banking Corp v. Johnson* [1984] HKLR 372. *Felixstowe Dock and Rly Co v. US Lines Inc* [1989] QB 360, [1988] 2 ALL ER 77, English High Court, Hirst J.

¹⁰⁶ Wang, *supra* note 91_ at 77-78.

¹⁰⁷ Art. 1 of the Mainland-Macao Arrangement.

¹⁰⁸ Wang, *supra* note 91_ at 79.

¹⁰⁹ Booth, *supra* note 97_ at 291-92.

¹¹⁰ Hong Kong Bankruptcy Ordinance, Cap 6, 1999

as well as legal persons.¹¹¹ The insolvency rules for these two types of entities are rather different in Hong Kong.¹¹² Therefore, it is unclear whether Hong Kong judgments on the insolvency of a natural person and partnership can be recognized and enforced in Mainland China. The other example is that Mainland laws on insolvency issues prioritize the protection of employees¹¹³ and tax. However, Hong Kong laws tend to protect creditors' rights.¹¹⁴

Besides the differences in regional insolvency laws, the concerns of recognition and enforcement of insolvency orders are different from those of other judgments. For example, finality is not an issue for the former but is crucial for the latter.¹¹⁵ Moreover, interregional insolvency involves not only recognition and enforcement of judgments and court orders but also cooperation in court proceedings. For example, in what circumstances that an ancillary jurisdiction should defer to the principal jurisdiction and how to exchange information between courts regarding issues such as the debtor's assets, fraudulent trading, disqualification of directors and etc.¹¹⁶ Considering the peculiarities and complexity of insolvency cases, regions should be allowed to make reservations on judgments of insolvency.

¹¹¹ Hong Kong Companies Ordinance, Cap 32, 1999.

¹¹² *Id.*

¹¹³ Mainland laws require that if a company may be bankrupted by the enforcement of a People's Court's judgment, the enforcement proceedings should leave sufficient funds to support the basic life of workers. *See* arts. 6, 48, 82, 113, and 132 of the Mainland Enterprise Bankruptcy Law (providing that in the hearing of a bankruptcy case the People's Court shall guarantee the legitimate rights and interests of the employees in the insolvent enterprise. For example, before outstanding tax and the unsecured creditors' claims, the insolvent assets should be used to pay off employees' wages, compensation for their medical treatment, their basic retirement insurance premiums, their basic medical insurance premiums, and other compensation for employees as prescribed by the relevant laws and administrative regulations.) *See also* The Notice of the Supreme People's Court on Strict Prohibition of Freezing and Transferring Basic Living Fund of Laid-off Workers of State Owned Enterprises, dated Nov. 24, 1999 (Providing that the basic living support fund for laid-off workers of state-owned enterprises is immune from any detention or execution.).

¹¹⁴ Wang, *supra* note_91_ at 35.

¹¹⁵ Johnston, *supra* note_25_ at 509.

¹¹⁶ *Id.* at 459-60.

Alternatively, the three regions may conclude a separate arrangement on insolvency issues.¹¹⁷ Excluding insolvency issues from other civil and commercial cases is not unusual in both Chinese regional laws and international/foreign laws. For example, the Mainland CPL is inapplicable to insolvency issues, which shall be decided according to the Enterprise Bankruptcy law. The Hong Kong FJREO does not apply to insolvency judgments.¹¹⁸ The Hague Choice of Court Convention excludes judgments on insolvency and related issues from its scope.¹¹⁹ The reason is that choice of court agreements may conflict with the strong trend of centralizing insolvency and analogous proceedings in one forum.¹²⁰ In the EU, the Brussels Convention and Brussels I Regulation do not apply to insolvency and related issues.¹²¹ Instead, EC Regulation No 1346/2000 on Insolvency Proceedings addressed such issues.¹²² In the US, the Congress established bankruptcy courts for solving insolvency issues.¹²³ Therefore, arguably, in China, a specialized arrangement on interregional insolvency issues should be established.

¹¹⁷ Wang, *supra* note_91_ at 82. Ma and Hu, *supra* note_89_ at 45. Booth, *supra* note_97_ at 313-14. Johnston, *supra* note_25_ at 478.

¹¹⁸ Section 2(2) of the Hong Kong FRJEO.

¹¹⁹ Art. 2(e) of the Hague Choice of Court Convention. RONALD BRAND & PAUL HERRUP, THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS COMMENTARY AND DOCUMENTS 60-61 (2008).

¹²⁰ *Id.* at 60-61.

¹²¹ Art. 1(2)(b) of the Brussels I Regulation. Pippa Rogerson, *Chapter 1 Scope*, in BRUSSELS I REGULATION, 59-62 (ULRICH MAGNUS & PETER MANKOWSKI ed. 2007).

¹²² EC Regulation No 1346/2000 on Insolvency Proceedings, adopted on May 29 2000 and entered into force on May 31 2000. Its contents is practically identical to that of the defunct EC Convention on Insolvency Proceedings of 1995, 5 Int. Insolv. Rev. 171-185 (1996). For a brief introduction to its contents, see MICHAEL BOGDAN, CONCISE INTRODUCTION TO EU PRIVATE INTERNATIONAL LAW 167 (2006). For comments, see Comments: by Miguel Virgos and Etienne Schmit, Document 6500/96 of the Council; see also B. WESSELS, CURRENT TOPICS OF INTERNATIONAL INSOLVENCY LAW (2004). Insolvency proceedings concerning insurance undertakings and credit institutions are governed by Directive No. 2001/17 of 19 March 2001 on the Reorganisation and Winding-up of Insurance Undertakings, and Directive No. 2001/24 of 4 April 2001 on the Reorganisation and Winding-up of Credit Institutions.

¹²³ *Eg.*, *Kalb et ux. v. Feuerstein et ux.*, 308 U.S. 433 (1940) (In this case a state court in Wisconsin rendered a judgment of foreclosure of a farm while an identical suit was pending in a federal bankruptcy court. One of the issues is whether the state court's judgment is subject to collateral attack. The Supreme Court of the US held that as a general rule a judgment rendered by a court of competent jurisdiction was not subject to collateral attack. However, because Congress has power over the subject of bankruptcy, it created an exception to this general rule: it legislated that the bankruptcy courts had exclusive jurisdiction over a petitioning farmer-debtor or his property. The Wisconsin case involved a farmer-debtor. So the federal bankruptcy court should have exclusive jurisdiction over this case. In other words, the Wisconsin court lacked jurisdiction, so its judgment was subject to collateral attack).

6. Judgments on Family-law Issues

The proposed Arrangement should not be applied to judgments on rights or obligations arising out of a family relationship.¹²⁴ The three regions may consider establishing a separate JRE regime on judgments in family-law cases. This is for three reasons.

First, for Hong Kong's interests, the proposed Multilateral JRE Arrangement will probably be limited to judgments issued by Mainland district courts with "centralized first-instance jurisdiction"¹²⁵ and higher courts. The "centralized first-instance jurisdiction" rule does not apply to cases involving family-law issues. The majority of judgments on family-law issues are rendered by courts without "centralized first-instance jurisdiction."¹²⁶ Therefore, the proposed Multilateral JRE Arrangement is not useful for the recognition and enforcement of family-law judgments.

Second, the recognition of sister-region divorce decrees without enforceable contents is possible under the current regional laws. The three regions do not require reciprocity in this regard.¹²⁷

¹²⁴ Zhu, *supra* note_8_ at 478. (supporting the Mainland-Hong Kong Arrangement to exclude family-law issues, because the two regional laws on allocating assets in divorce are very different). For proposing using regional laws to solving interregional divorce dispute, see He Qiong, *Zhongguo Quji Lihun Falv Chongtu Xietiao Yinyou de Shijiao [A Necessary Perspective to Harmonize Legal Conflicts in Chinese Interregional Divorce]*, 6 YUNNAN XINZHENG XUEYUAN XUEBAO [YUNNAN ADMINISTRATIVE INSTITUTE JOURNAL] 148, 151 (2007).

¹²⁵ See *infra* Levels of Courts of Section A of Chapter V.

¹²⁶ Family-law cases are typically in the jurisdiction of district courts located in the place where the defendant has domicile. In exceptional circumstances, the district courts located in the place where the plaintiff is domiciled has jurisdiction. The district court located in the place where the parties were married may also have jurisdiction. See arts. 22 and 23 of the Mainland CPL and art. 13 of the Supreme People's Court's Opinions on the CPL.

¹²⁷ For Mainland law, see Supreme People's Court, Opinions on Relevant Questions Concerning People's Courts' Handling Petition for Recognition of Divorce Judgment Made by a Foreign Court, 64 THE SUPREME PEOPLE'S COURT GAZETTE 61 (2000). For details of this Mainland law, see Part i of Section A of Chapter III. For Hong Kong law, see Matrimonial Causes Ordinance, Cap 179, Section 55. For Hong Kong cases, see *Maples v Maples* [1988] Fam 14, per Lately J. For Comments on Hong Kong law, see Johnston, *supra* note_25_ at 408. For Macao law, see Part iii of Section A of Chapter III.

Third, the best approach for three regions is to establish a Multilateral JRE Arrangement specializing on family-law judgments. This is because unilateral regimes cannot offer the efficiency and stability of a multilateral JRE regime.¹²⁸ Scholars have already suggested that family-law judgments should be included into an interregional JRE mechanism.¹²⁹ Establishing a specialized JRE law for family-law judgments is a widely-accepted approach in Hong Kong, the US, and the EU JRE laws. The Hong Kong FJREO does not apply to any proceedings in connection with either matrimonial matters, administration of estates of deceased persons, lunacy, or guardianship of infants.¹³⁰ In the US, the Full Faith and Credit for Child Support Orders Act applies to child support and similar cases.¹³¹ Moreover, in the EU, although the Brussels I Regulation address maintenance issues, it does not apply to status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession. The Brussels II Regulation is established to address these issues.¹³² Council Regulation (EC) No. 4/2009 abolishes the exequatur procedure and deals with matters relating to maintenance obligations in a more efficient way.¹³³ Similarly, the Hague Choice of Court Convention also excludes maintenance obligations, other family-law matters, and wills and succession.¹³⁴ This is mainly because the Hague Conference has provided special conventions on these issues.¹³⁵

¹²⁸ See Chapter III.

¹²⁹ Li and Wang, *supra* note 70_ at 123. Song, *supra* note 70_ at 64.

¹³⁰ Section 2(2) of the Hong Kong FJREO.

¹³¹ The Full Faith and Credit for Child Support Orders Act, 28 U.S.C.A. § 1738B.

¹³² Council Regulation (EC) No 2201/2003 of November 27 2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility,

¹³³ Council Regulation (EC) No. 4/2009 of December 18 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, Official Journal L007, P.1, 2009/01/10.

¹³⁴ Art. 2 (b)(c)(d) of the Hague Choice of Court Convention.

¹³⁵ *Eg.*, Convention of October 24, 1956 on the Law Applicable to Maintenance Obligations Towards Children, Convention of November 15, 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions, Convention of June 1, 1970 on the Recognition of Divorces and Legal Separations, and Convention of March 14, 1978

7. Summary

The proposed Multilateral JRE Arrangement should include civil and commercial judgments, which covers both contractual and non-contractual disputes, including personal consumption disputes as well as civil compensation collateral to criminal proceedings. At the beginning stage, the proposed Arrangement may not need to cover judgments for labor disputes. This is because Hong Kong courts that resolve labor disputes are not covered by the Arrangement, and also because Mainland labor arbitration awards can be recognized and enforced according to the arbitration award arrangements. Arguably, separate arrangements should be concluded for recognizing and enforcing judgments in family-law cases as well as in insolvency and related cases.

The proposed Arrangement defines "civil and commercial" as an autonomous terminology: a case is not civil and commercial if one party is a government agency or is entrusted by a government to exercise public power, which includes a debt between two parties where one is required by the law to use the other's service or equipment at a price, a place, or a procedure unilaterally decided by the latter.

ii. Levels of Courts

on Celebration and Recognition of the Validity of Marriages. For comments, *see* Brand and Herrup, *supra* note_119_ at 58-59.

The two existing Arrangements are different regarding the levels of courts whose judgments are entitled to JRE.¹³⁶ The Mainland-Macao Arrangement covers judgments rendered by all the courts in Mainland China and Macao. By contrast, the Mainland-Hong Kong Arrangement does not cover judgments issued by some district people's courts.¹³⁷ Namely, judgments rendered by district people's courts that are not designated to exercise jurisdiction over foreign-related civil and commercial cases cannot benefit from the Arrangement.

As discussed above, the concerns of Mainland judicial integrity and difficulty in executing judgments should not be an obstacle for Hong Kong to conclude a broad-scope JRE arrangement with Mainland China. Hong Kong courts have not been overloaded by requested Mainland judgments since the Mainland-Hong Kong Arrangement was implemented in August 2008.¹³⁸ On the contrary, this Arrangement has not been invoked even in one case partly because of its limited scope.¹³⁹ Therefore, ideally the proposed Multilateral JRE Arrangement should not impose any limitation regarding the types of Mainland courts in order to expand its scope and to benefit more judgments. However, if Hong Kong insists, Mainland China should compromise and accept the limitation. Restricting the types of Mainland courts make senses for three reasons.

First, this limitation is not directed against Mainland law. In Mainland China, as for district courts, the first-instance jurisdiction over cases involving foreign (including interregional factors) is limited to those located in an economic and technological

¹³⁶ See *supra* in Section III.

¹³⁷ The Mainland-Hong Kong Arrangement covers Hong Kong judgments rendered by the Court of Final Appeal, the Court of Appeal of the High Court, the Court of First Instance, or the District Court, and Mainland judgments issued by intermediate or higher people's court, as well as district people's courts with jurisdiction over cases related to Hong Kong, Macao, and Taiwan factors. Art. 2.a and Annex 2 of the Mainland-Hong Kong Arrangement.

¹³⁸ See Hong Kong Legislative Council LC Paper No. CB(2) 1365/06-07(02), Bills Committee on Mainland Judgments (Reciprocal Enforcement) Bill Background Brief, appendix I para 10 (envisaging that the Mainland-Hong Kong Arrangement will not be frequently invoked.)

¹³⁹ See *Id.*

development zone. Such a zone shall be established under the approval of the State Council).¹⁴⁰ This is the so-called “centralized first-instance jurisdiction.” Compared to other areas, more foreign and interregional businesses exist in economic and technological development zones. District courts in these zones are more experienced than other district courts in deciding cases involving foreign and interregional factors. Centralizing first-instance jurisdiction to these courts optimizes the use of judicial resources, eliminates local protectionism, and improves the quality of judgments. Therefore, restricting the type of district courts under the Multilateral JRE Arrangement to those with centralized first-instance jurisdiction is acceptable for Mainland China.

Second, such limitation would only minimally impede interregional economy because all interregional economic disputes adjudicated by district courts fall into those courts with centralized first-instance jurisdiction. As for district courts taking charge of cases entirely relating to Mainland China, their judgments generally do not require interregional JRE. The exceptions are cases where a judgment debtor has insufficient property for enforcement in Mainland China but meanwhile has property in a sister region. The creditor may require to have this judgment recognized in the sister region. However, overall, such circumstances do not frequently occur. Therefore, if Hong Kong strongly insists on limiting Mainland district courts to those with jurisdiction over foreign-related cases in the proposed Multilateral JRE Arrangement, Mainland China should consider accepting this limitation.

¹⁴⁰ Arts. 1 and 5 of the Provisions of the Supreme People’s Court on Some Issues Concerning the Jurisdiction of Civil and Commercial Cases Involving Foreign Elements, adopted at the 1203rd meeting of the Judicial Committee of the Supreme People’s Court on Dec. 25, 2001, and effective on Mar. 1, 2002.

Third, restricting the scope of the proposed Arrangement to district courts with jurisdiction over foreign-related cases as well as higher courts can sooth Hong Kong's concerns. Hong Kong Legislative Council confirms the value of this restriction:¹⁴¹

[A]bout 1% out of the 3 100 odd Basic Level People's Courts in the Mainland had been designated to exercise jurisdiction over foreign-related civil and commercial cases, some of which might be allowed to adjudicate claims of up to RMB 1 million, generally on par with the District Court of the HKSAR. In many provinces, autonomous regions and municipalities directly under the Central Government, a good proportion of foreign-related cases were dealt with by the Basic Level People's Court, which could amount to 50% of the total number of foreign-related civil and commercial matters dealt with in the relevant region. Many of the designated Basic Level Peoples' Courts were situated in provinces or municipalities where Hong Kong businesses had set up operations. In view of this development, the Administration accepted the Mainland side's counter-proposal that judgments made by designated Basic Level People's Courts should also be covered under the revised Arrangement.

As a conclusion, the types of courts covered by the MJA should be: all courts in Macao; the Hong Kong Court of Final Appeal, the Hong Kong Court of Appeal of the High Court, the Hong Kong Court of First Instance, and the Hong Kong District Court; Mainland District, Intermediate, Higher, and the Supreme People's courts. Whether the type of Mainland district courts should be limited to those with centralized first-instance jurisdiction will depend on negotiations between Mainland China and Hong Kong.

iii. Types of Judicial Awards

The types of judicial awards in the proposed Multilateral JRE Arrangement should include (1) judgments, rulings, mediation agreements and orders for payment from

¹⁴¹ Hong Kong Legislative Council LC Paper No. CB(2) 1365/06-07(02), *supra* note 137, at para 16.

Mainland China, (2) judgments, orders, and allocaturs from Hong Kong, and (3) decrees, judgments, mediation rulings, and judges' instructions on substantive issues from Macao. This is based on the types of judicial awards covered by the two existing JRE Arrangements.¹⁴² Therefore, regarding the proposed Multilateral JRE Arrangement, Mainland China is likely to accept decrees, judgments, mediation rulings, decisions, and instructions of judges from Macao, as well as judgments, orders, and allocaturs from Hong Kong. Considering the broad coverage of the Mainland-Macao Arrangement, it is unlikely that Macao would refuse to accept judgments, orders, and allocaturs from Hong Kong under the Multilateral JRE Arrangement.

Because unlike the Mainland-Macao Arrangement, the Mainland-Hong Kong Arrangement excludes Mainland decisions,¹⁴³ the issue for the proposed Arrangement is whether Hong Kong would accept Mainland decisions and Macao decisions and instructions of judges.

Both Mainland decisions and Macao decisions only address procedural issues.¹⁴⁴ Macao judges' instructions are for either procedure or substantive issues.¹⁴⁵ Macao judges' instructions on the substantive issues should be covered by the proposed Arrangement because they have the same effects as Macao judgments. However, Mainland and Macao decisions as well as Macao judges' instructions on procedural issues need not to be included in the proposed Arrangement for two reasons.

¹⁴² Art. 2 of the Mainland-Macao Arrangement. The Arrangement covers judgments, decisions, and mediation agreements from Mainland China and Macao; rulings and orders for payment from Mainland China; decrees and instructions of judges from Macao. For detailed discussion of each of these judicial awards, *see* Chapter III. Art. 2 of the Mainland-Hong Kong Arrangement. The Mainland-Hong Kong Arrangement includes judgments, rulings, mediation agreements and orders for payment from Mainland China, and judgments, orders and allocaturs from Hong Kong. For detailed discussion of each of these judicial awards, *see* Chapter III.

¹⁴³ *Id.*

¹⁴⁴ For details, *see* Part ii of Section B of Chapter III.

¹⁴⁵ *Id.*

First, the majority of Mainland and Macao decisions as well as Macao judges' instructions on procedural issues aim to facilitate judgment-rendering proceedings and have no enforceable content in a sister region. For example, a decision of a party's recusal application against a judge or a court clerk cannot be enforced in a sister region. Neither can a decision of granting or declining extension of a time limit upon a party's application, nor a Macao court instruction dismissing a party's motion for suspending a trial. These judicial awards are interlocutory in nature and aim to facilitate the proceedings in the judgment-rendering court. It is pointless to include them in the proposed Multilateral JRE Arrangement. The same approach is adopted by the US and EU laws. In the US, these judgments are not on the merits, so they cannot benefit from the full-faith-and-credit JRE.¹⁴⁶ In the EU, the Schlosser Report provides that "interlocutory decisions which are not intended to govern the legal relationships of the parties, but to arrange the further conduct of the proceedings," should be excluded from the Brussels I Regulation.¹⁴⁷ The reason is that these decisions concern procedural issues in the region of origin and is minimally related to the legal order of the requested region.¹⁴⁸ For similar reasons, Mainland and Macao decisions as well as Macao judges' instructions on procedural issues need not to be covered by the proposed Multilateral JRE Arrangement.

Second, Mainland and Macao courts also can use decisions to impose fines or money guarantees as compulsory measures against obstruction of civil actions.¹⁴⁹ Notably, the Mainland-Hong Kong Arrangement excludes penalties, such as fines, from

¹⁴⁶ See Part ii of Section C of Chapter I.

¹⁴⁷ Report Schlosser para. 187.

¹⁴⁸ See Patrick Wautelet, *Chapter III Recognition and Enforcement Section 1 Recognition*, in BRUSSELS I REGULATION, 543 (ULRICH MAGNUS & PETER MANKOWSKI ed. 2007).

¹⁴⁹ For details, see Part ii of Section B of Chapter III.

its scope.¹⁵⁰ If Hong Kong is not willing to recognize and enforce judicial awards on fines from other regions, the proposed Multilateral JRE Arrangement should exclude judicial decisions on fines and money guarantees.

In conclusion, the types of judicial awards in the proposed Arrangement should include (1) judgments, rulings, mediation agreements and orders for payment from Mainland China, (2) judgments, orders, and allocatur from Hong Kong, and (3) decrees, judgments, mediation rulings, and judges' instructions on substantive issues from Macao. Mainland and Macao decisions as well as Macao judges' instructions on procedural issues are not necessarily to be covered by the proposed Arrangement.

B. Requirement for JRE

In the proposed Multilateral JRE Arrangement, the requirement for JRE is that a judgment should be final.¹⁵¹ The criterion of finality is determined either by an autonomous terminology provided by the Arrangement or according to the law of the judgment-rendering region.¹⁵² The former should be preferable to the latter because it can bring more clarity and less need to look into sister-region laws.¹⁵³ On the merits is not required, because the types of judicial awards covered by the proposed Arrangement includes judicial awards on procedural issues, such as Mainland rulings and Hong Kong court orders.¹⁵⁴

¹⁵⁰ Art. 16 of the Mainland-Hong Kong Arrangement.

¹⁵¹ For detailed discussion of solving the finality dispute and the autonomous terminology of "finality," see Part ii of Section B of Chapter IV.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Neither Mainland-Hong Kong Arrangement nor the Mainland-Macao Arrangement has the requirement of "on the merits." For details, see Section B of Chapter III.

C. Grounds for Refusing JRE

There are five grounds for refusing JRE under the Arrangement: lack of jurisdiction, unfair procedure, fraud, *res judicata*, and public policy exception. This list is exhaustive. Neither the Mainland-Hong Kong Arrangement nor the Mainland-Macao Arrangement states that the grounds for refusing JRE in the Arrangements are exhaustive.¹⁵⁵ In other words, it is unclear whether a judgment debtor can invoke a ground for refusing JRE that is available in the regional laws but not in the existing Arrangements. This issue is important because the existing Arrangements do not cover grounds such as natural justice in Hong Kong law or substantive review under Macao law.¹⁵⁶ Some scholars argue that regional JRE laws should be applied to interregional JRE issues that the existing Arrangements have not covered.¹⁵⁷ For example, in Mainland China, a senior judge of the Supreme People's Court opined that regional JRE laws can be applied to the issues that the Mainland-Macao Arrangement does not stipulate:¹⁵⁸

For instance, the grounds under the Macao Arrangement to deny recognition and enforcement do not include violation of the parties' equality and judicial corruption, which are separately provided in the Code of Civil Procedures of Macao.... [] (at least) on theory these rules shall not be excluded for application (in reciprocal recognition and enforcement proceedings). []

Similarly, a Hong Kong scholar also argues that the grounds for refusing JRE in Hong Kong common law should be applied to interregional JRE even under the

¹⁵⁵ See Section B of Chapter III.

¹⁵⁶ For grounds for refusing JRE under the two existing Arrangements, see Chapter III.

¹⁵⁷ Xianchu Zhang, *A New Stage of Regional Judicial Assistance in Civil and Commercial Matters: Implementation of the Mainland Judgments Ordinance and Certain Issues Beyond*, 39 HONG KONG L. J. 3, 19 (2009).

¹⁵⁸ *Id.*

Mainland-Hong Kong Arrangement.¹⁵⁹ Therefore, the defense of "natural justice", although not provided in either the Arrangement or the Mainland Judgments Ordinance, may be applied to interregional JRE.¹⁶⁰

It is true that sometimes regional JRE laws should be applied to interregional JRE issues that the arrangements have not covered. For example, generally the *lex fori* still governs the procedural issues of the interregional JRE proceedings and decides how to execute a sister-region judgment in the requested region. However, very importantly, the list of grounds for refusing JRE shall be considered exhaustive. In other words, grounds available in the regional laws but not in the existing interregional Arrangements shall not be allowed in cases where Arrangements are applicable.

This approach is adopted by the Brussels I Regulation. The grounds for refusing JRE under Article 34 and 35 of the Regulation are the sole grounds for refusing JRE.¹⁶¹ Unremunerated grounds, such as those under national laws, are inapplicable.¹⁶² Similarly, in the Hague Choice of Court Convention, grounds not explicitly specified in the Convention cannot be invoked to deny JRE.¹⁶³ The proposed Multilateral JRE Arrangement should adopt this approach. Because if grounds unspecified in the Arrangement are permitted, predictable and effective interregional JRE will be hard to achieve. This will also potentially subject the proposed Arrangement to the manipulation of regional courts and devastate mutual trust.

¹⁵⁹ *Id.* at 20.

¹⁶⁰ *Id.* at 21.

¹⁶¹ Art. 45 of the Brussels I Regulation. Stephanie Francq, *Chapter III Recognition and Enforcement Section 1 Recognition*, 557-59 (ULRICH MAGNUS & PETER MANKOWSKI ed.).

¹⁶² *Id.* at 559. Grounds for refusing JRE under public international law, although unremunerated in Articles 34 and 35, can serve as defense against JRE.

¹⁶³ Arts. 8.1 and 9 of the Hague Choice of Court Convention. For comments, *see* Brand and Herrup, *supra* note_119_ at 101.

i. Incompetent Indirect Jurisdiction

1. Direct and Indirect Jurisdiction

a. JRE Difficulties Brought by Different Regional Direct and Indirect

Jurisdiction Laws

If a requested court deems that a judgment-rendering court lacked in jurisdiction, it will not recognize and enforce the latter's judgment.¹⁶⁴ However, a court, which has jurisdiction over a case according to its own law, may not have jurisdiction according to the law of the requested region. A typical case in practice would be: a Hong Kong company that has no domicile in the Mainland signs a contract in the Mainland with a Mainland company. Later, the Mainland company brought an action against the Hong Kong company for breach of the contract. Because the contract was signed in the Mainland, the Mainland court has jurisdiction over this case under the Mainland CPL.¹⁶⁵ Suppose that the Mainland court effected service by way of public announcement¹⁶⁶ and made a default judgment ordering the Hong Kong defendant to pay a sum of money to the Mainland plaintiff, then the judgment creditor applied to a Hong Kong court for enforcement of this judgment. According to Hong Kong law, because this hypothetical case is an action *in personam*, and the defendant did not appear in the Mainland court, the Mainland court did not have jurisdiction over the case.¹⁶⁷ Therefore, the Hong Kong

¹⁶⁴ Arthur T. von Mehren, *Recognition of Foreign Adjudications: A Survey and A Suggested Approach*, 81 HARV. L. REV. 1601, 1610 (1965).

¹⁶⁵ According to art. 243 of the Mainland CPL, an action concerning a contract dispute brought against a defendant who has no domicile in the Mainland, where the contract is signed or performed in the Mainland, then the people's court of the place where the contract is signed has jurisdiction over this case.

¹⁶⁶ Art. 307 of the Opinions on Application of the Mainland CPL.

¹⁶⁷ The Hong Kong FJREO, Cap 319, § 6(2)(a)(i) provides that: "For the purposes of this section, the courts of the country of the original court shall, subject to the provisions of subsection (3), be deemed to have had jurisdiction...in the case of a judgment given in an action *in personam*...if the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings..."

court refused to enforce this Mainland judgment. This case reflects the conflicts of direct and indirect jurisdictions between Mainland China and Hong Kong.¹⁶⁸

Direct jurisdiction is determined by the laws where the judgment-rendering court is located, and indirect jurisdiction is decided according to the law where the judgment seeks to be recognized or enforced.¹⁶⁹ These two types of jurisdiction could be different.¹⁷⁰

[D]irect jurisdiction is a privilege –the courts of state A are free to exert direct jurisdiction, and state B has no right (the opposite of a privilege) that state A refrain from that jurisdiction. Indirect jurisdiction, by contrast, is a power – if the courts of state A have indirect jurisdiction, they bind the courts of state B with the ensuing judgment [] Powers and privileges can be connected in a legal system, but – this is important – there is no logical connection between them. The courts of state A may have direct but not indirect jurisdiction, and vice versa.

In our hypothetical case, the Hong Kong court refused to recognize and enforce the Mainland judgment, because the Mainland court did not have indirect jurisdiction over this case under the Hong Kong JRE law, notwithstanding the Mainland court had competent direct jurisdiction under the Mainland CPL. A close look at Mainland direct-jurisdiction law and Hong Kong indirect-jurisdiction law is necessary.

A Mainland court regards a defendant's domicile as the basis of exercising direct jurisdiction over a civil or commercial case involving foreign elements.¹⁷¹ If an action

¹⁶⁸ See Ralf Michaels, *Some Fundamental Jurisdictional Conceptions as Applied in Judgment Conventions*, in *CONFLICT OF LAWS IN A GLOBALIZING WORLD: A TRIBUTE TO ARTHUR VON MEHREN* 29, 35-36 (Ralf Michaels, et al. ed. 2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=927484 (last visited Apr 15, 2010).

¹⁶⁹ *Id.* at 35-36.

¹⁷⁰ *Id.* at 36-37. See also von Mehren, *supra* note 164, at 1610-36. Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments--General Theory and the Role of Jurisdictional Requirements*, 167 *RECUEIL DES COURS* 9 (1980); Arthur Nussbaum, *Jurisdiction and Foreign Judgments*, 41 *COLUM. L. REV.* 221 (1941).

¹⁷¹ This is called the general jurisdiction. Art. 22 of the Mainland CPL indicates: "A civil lawsuit brought against a citizen shall be under the jurisdiction of the people's court of the place where the defendant has his domicile; if the place of the defendant's domicile is different from that of his habitual residence, the lawsuit shall be under the jurisdiction of the people's court of the place of his habitual residence." See also Jin Huang and Huanfang DH, *Private*

concerns a dispute over property rights and interests against a defendant who has no domicile in the Mainland, a Mainland court may exercise jurisdiction over the following cases: those where the contract is signed or performed within the Mainland, those where the object of the action is located within the Mainland, those where the defendant has distrainable property within the Mainland, or those where the defendant has its representative office within the Mainland.¹⁷² A Mainland court can also hear a case according to a choice of court agreement concluded by the parties¹⁷³ or a case in which a defendant raises no objection to the jurisdiction.¹⁷⁴ Therefore, in our hypothetical case, Mainland court's direct jurisdiction is based on the fact that Mainland China is the place where the contract was concluded.

Hong Kong common law requires a nexus existing between the defendant and the judgment-rendering court for indirect jurisdiction.¹⁷⁵ However, such nexus does not exist in our hypothetical case. Therefore, Hong Kong courts hold that the Mainland judgment is unrecognizable. Even if we supposed that the Hong Kong FJREO¹⁷⁶ would apply to Mainland judgments, the conclusion were the same. The reasons is none of the indirect jurisdiction grounds provided by the FJREO exists in our hypothetical case. Hong Kong courts would consider the Mainland court without jurisdiction even if the "sweeping up"

International Law in Chinese Courts, FRONT LAW CHINA 1, 14-33 (2006). A case involving foreign factors refers to a case that one of the parties is a foreigner, stateless person, foreign enterprise or organization; that the legal facts creating, changing, or terminating the civil legal relations between parties occur in a foreign country; or that the subject matter of the dispute is located in a foreign country. *See* art. 304 of the Opinions on Application of the Mainland CPL.

¹⁷² Correspondingly, the people's court of the place where the contract is signed or performed, or where the object of the action is, or where the defendant's distrainable property is located, or where the torts are done, or where the defendant's representative office is located, shall have jurisdiction. *See* art. 241 of the Mainland CPL.

¹⁷³ *Id.*, art 242.

¹⁷⁴ This is called the presumptive jurisdiction. *See id.*, art. 245 indicates: "If in a civil action in respect of a case involving foreign element, the defendant raises no objection to the jurisdiction of a people's court and responds to the action by making his defense, he shall be deemed to have accepted that this people's court has jurisdiction over the case."

¹⁷⁵ GARY HEILBRONN, CHRISTINE BOOTH, AND HELEN MCCOOK, ENFORCEMENT OF JUDGMENTS IN HONG KONG 311 (Butterworths 1998). For details, *see* Part ii of Section A of Chapter III.

¹⁷⁶ S 6(2)(a) of FJREO, Cap 36. For details of the indirect jurisdiction grounds under the FJREO, *see* Part ii of Section A of Chapter III.

provision of the FJREO is applied.¹⁷⁷ This provision requires that, if according to Hong Kong direct jurisdiction law (not FJREO), Hong Kong courts can exercise jurisdiction over the same case; the judgment-rendering court should be considered to have jurisdiction.¹⁷⁸ But Hong Kong courts probably will decline jurisdiction over a contractual dispute merely because parties conclude a contract in Hong Kong and no other contact to Hong Kong exists. As a conclusion, under the FJREO, the Mainland court still lacks indirect jurisdiction therefore its judgment is unrecognizable in Hong Kong.

This case describes a typical situation that likely happens to people who are involved in interregional litigations. Due to the differences of direct and indirect jurisdictions between the judgment-rendering region and the requested region, judgments rendered by one region may not be recognized and enforced in the other. Consequently, disputes between parties continue and their rights and obligations remain uncertain.

The existing Arrangements fail to harmonize the differences between direct- and indirect- jurisdiction laws in Chinese regions. The Mainland-Hong Kong Arrangement uses a choice of court agreement to align regional direct and indirect jurisdiction laws.¹⁷⁹ However, this Arrangement has very narrow scope,¹⁸⁰ therefore, it cannot sufficiently solve the conflicts of direct and indirect jurisdiction rules between regions. The Mainland-Macao Arrangement only states that a requested court can refuse JRE if its exclusive jurisdiction is infringed by the judgment-rendering court. But it is silent regarding whether a requested court can deny JRE when it holds that the judgment-

¹⁷⁷ For details of this provision, *see* Part ii of Section A of Chapter III.

¹⁷⁸ Heilbronn, *supra* note 175 at 315.

¹⁷⁹ *See Supra* Part i of Section B of Chapter III.

¹⁸⁰ *Id.*

rendering court has no indirect jurisdiction according to the law of the requested region. Therefore, the proposed Multilateral JRE Arrangement should coordinate regional jurisdiction laws to facilitate JRE.

b. Single Enforcement Arrangement

The proposed Multilateral JRE Arrangement does not regulate direct jurisdiction, because harmonizing regional direct jurisdiction law is a difficult,¹⁸¹ if not an impossible, task.¹⁸² The absence of a court of final review requires that the requested court should be allowed to review issues of indirect jurisdiction.¹⁸³ Moreover, the "start small" approach also emphasizes that, at the beginning stage, the proposed Arrangement should focus on indirect jurisdiction rules. In other words, it leaves direct jurisdiction to regional laws, but it requires requested courts to review jurisdiction of judgment-rendering courts according to the unified indirect jurisdiction rules under the proposed Arrangement.

Therefore, the proposed Multilateral JRE Arrangement is a single enforcement arrangement¹⁸⁴ that deals only with JRE (including indirect jurisdiction) but not direct

¹⁸¹ Yoav Oestreicher, *The Rise and Fall of the "Mixed" and "Double" Convention Models Regarding Recognition and Enforcement of Foreign Judgments*, 6 WASHINGTON UNIVERSITY GLOBAL STUDIES LAW REVIEW 339, 341 and 349 (2007). Linda J. Silberman & Andreas F. Lowenfeld, *The Hague Judgments Convention--And Perhaps Beyond, in Law and Justice in a Multistate World* 121-22 (James A.R. Nafziger & Symeon C. Symeonides eds., 2002). See Arthur T. Von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-wide: Can the Hague Conference Project Succeed?*, AMERICAN JOURNAL OF COMPARATIVE LAW 191, 195 (Spring 2001) (arguing "many American jurists consider the absence of a general activity-based jurisdiction a serious--even fatal--defect in the Special Commission's draft").

¹⁸² For the difficulties of harmonizing direct jurisdictions, see eg Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT'L L. 1003 (2006).

¹⁸³ Arthur T. von Mehren, *Jurisdictional Requirements: To What Extent Should the State of Origin's Interpretation of Convention Rules Control for Recognition and Enforcement Purposes?*, in THE HAGUE CONVENTION ON JURISDICTION AND JUDGMENTS A-29, A-43 (Andreas F. Lowenfeld & Linda J. Silberman ed. 2001). For discussion of no court of final review, see Section B of Chapter VI.

¹⁸⁴ The single enforcement convention only deals with JRE not direct jurisdiction. For definition of a single enforcement convention, see Michaels, *supra* note_168_ at 54-55. For single enforcement bilateral treaties that Mainland China ratified, eg. THE TREATY FOR JUDICIAL ASSISTANCE IN CIVIL AFFAIRS ON MAY 2, 1992 BETWEEN MAINLAND CHINA AND SPAIN, <http://www.people.com.cn/zixun/flfgk/item/dwjf/falv/10/10-4.htm> (last visited Feb 2,

jurisdiction.¹⁸⁵ It has three categories of indirect jurisdiction: required, excluded, and permitted.¹⁸⁶ Compared with arrangements addressing direct jurisdiction,¹⁸⁷ a single enforcement arrangement will be much easier to negotiate¹⁸⁸ between Chinese regions, especially considering their legal systems are distinct,¹⁸⁹ their regional laws are divergent,¹⁹⁰ and they have not established strong mutual trust yet¹⁹¹ and do not have an overarching court of final review.¹⁹² The asymmetric design of direct and indirect jurisdictions leaves regions' direct jurisdiction laws untouched so each region still maintains its freedom in rendering judgments, therefore it will probably meet less resistance in regions.¹⁹³ And meanwhile this design unifies regional indirect jurisdiction law, so will significantly increase the certainty of JRE.¹⁹⁴

Notably, when negotiating a broad scope judgment convention at the Hague Conference, one of the main criticisms against a single enforcement convention was that

2010). Its Article 21 indicates the circumstances where a judgment-rendering court shall be regarded as having jurisdiction. Article 22 states that if a court does not exercise jurisdiction according to Article 21, its judgments cannot be recognized and enforced under the Treaty. Other examples are THE TREATY FOR JUDICIAL ASSISTANCE IN CIVIL, COMMERCIAL, AND CRIMINAL AFFAIRS BETWEEN MAINLAND CHINA AND CYPRUS, THE TREATY FOR JUDICIAL ASSISTANCE IN CIVIL AFFAIRS BETWEEN MAINLAND CHINA AND ITALY, THE TREATY FOR JUDICIAL ASSISTANCE IN CIVIL AND CRIMINAL AFFAIRS BETWEEN MAINLAND CHINA AND VIETNAM, AND THE TREATY FOR JUDICIAL ASSISTANCE IN CIVIL, COMMERCIAL, AND CRIMINAL AFFAIRS BETWEEN MAINLAND CHINA AND EGYPT. Examples of single enforcement international conventions, *see* the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters and the draft UK-US Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters.

¹⁸⁵ For designs of single conventions, *see* ARTHUR T. VON MEHREN, ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW A COMPARATIVE STUDY 355 (2007). *See* Oestreicher, *supra* note_181_ at 341. (arguing combining the issues of recognition and enforcement with the issue of jurisdiction is the key reason for the failure of a broad-scope international judgment convention.)

¹⁸⁶ Michaels, *supra* note_168_ at 54-55.

¹⁸⁷ Arrangements addressing direct jurisdiction include single jurisdiction conventions that regulate direct jurisdiction but not JRE, and double conventions that addresses both JRE (indirect jurisdiction) and direct jurisdiction. For explanation of these conventions, *see Id.* at 54-55.

¹⁸⁸ Oestreicher, *supra* note_181_ at 350-54 (arguing "[a] simple convention will make it easier for the parties to join the proposed international instrument, as it would eliminate the need to agree in advance on the bases for the assertion of jurisdiction").

¹⁸⁹ *See* Chapter I.

¹⁹⁰ *See* Chapter III.

¹⁹¹ *See* Section C of Chapter IV. *See* von Mehren, *supra* note 185 at 356.

¹⁹² von Mehren, *supra* note_183_ at A-43 (indicating the single convention format is appropriate when there is no "neutral institutions that can control the interpretation and application of each state's international obligations".)

¹⁹³ Michaels, *supra* note_168_ at 38-39.

¹⁹⁴ *Id.* at 38-39.

it leaves jurisdiction to uncertainty¹⁹⁵ so it would not improve the current situation where each country recognizes and enforces foreign judgments according to its own law.¹⁹⁶ This criticism is unconvincing, because:¹⁹⁷

[a single enforcement convention] will change and improve dramatically the current international regime as it will add a major international obligation and a moral commitment on the part of all of the participating countries to recognize and enforce foreign judgments, something that does not exist under the current regime and should not be underestimated. This is a major improvement on what we have today.

In the context of Chinese interregional JRE, a multilateral single enforcement arrangement will significantly expand the scope of the Mainland-Hong Kong Arrangement, because the latter is restricted to judgments on a choice of court agreement. So it will help solve the JRE impasse between Mainland China and Hong Kong. It will also enhance the certainty of JRE between Mainland China and Macao because the Mainland-Macao Arrangement does not clarify the indirect jurisdiction rules that requested courts should apply in the JRE proceedings. In addition, it will fill the gap between Hong Kong and Macao because currently no JRE arrangement exists between them.

Another benefit of a single enforcement arrangement is its ability to adapt to the changing economic, legal, and political situations among Chinese region. If Chinese regions become more and more economically interrelated, legally converged, and

¹⁹⁵ Fausto Pocar & Peter Nygh, *Report of the Special Commission drawn up by Peter Nygh and Fausto Pocar*, in THE HAGUE PRELIMINARY DRAFT CONVENTION ON JURISDICTION AND JUDGMENTS 209, 214 (2005). (indicating that "a 'single Convention' would not be useful."). This is accepted by the Hong Kong delegation to the Hague Conference. See para 11 of CONSULTATION PAPER ON THE DRAFT HAGUE CONVENTION ON INTERNATIONAL JURISDICTION AND RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL OR COMMERCIAL MATTERS (hereinafter "Hong Kong Paper") (International Law Division, Department of Justice Hong Kong) (1999), available at <http://www.doj.gov.hk/eng/archive/doc/4499.doc> (last visited April 16, 2010).

¹⁹⁶ Oestreicher, *supra* note_181_ at 355.

¹⁹⁷ *Id.* at 350-54.

politically allied in the future, the single enforcement arrangement has the potentiality to develop into a mixed or double arrangement and ultimately harmonize regional direct and indirect jurisdiction laws. A mixed arrangement regulates both JRE and jurisdiction,¹⁹⁸ and it also divides jurisdiction into three types: required, prohibited, and permitted.¹⁹⁹ The 1999 Hague Draft Convention is an example.²⁰⁰ This type of arrangement best suits participating regions that “have become to a significant extent economically and politically inter-dependent but do not aspire to political or economic union.”²⁰¹ Therefore, after concluding a single enforcement arrangement, when regions are more integrated with each other, they may consider to develop it into a mixed arrangement.

As a further step, regions may consider to reduce the permitted jurisdiction grounds in the mixed arrangement and change it into a double arrangement.²⁰² A double arrangement addresses both indirect and direct jurisdiction.²⁰³ Under such an arrangement, certain types of jurisdictional bases are allowed and the rest are prohibited.²⁰⁴ The Due Process Clause and the Full Faith and Credit Clause in the US Constitution, and the Brussels I Regulation are examples of double arrangements.²⁰⁵ This type of arrangement generally requires member regions share similar legal traditions, strong political alliances, and an overarching court that can control the interpretation and application of the

¹⁹⁸ If a judgment is based on a required jurisdictional ground under such arrangement, it should be recognized and enforced in another participating region. Exorbitant jurisdictions are prohibited. If a court assumes jurisdiction on such grounds, the recognition and enforcement of its judgments should be denied. Permitted jurisdictional grounds are a grey area where participating regions cannot make an agreement; therefore it is left to their regional laws. von Mehren, *supra* note 185 at 356.

¹⁹⁹ *Id.*

²⁰⁰ See Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, adopted by the Special Commission on 30 October 1999, available at <http://www.hcch.net/upload/wop/jdgmpl1.pdf>, Article 17; see also Report of the Special Commission drawn up by Peter Nygh and Fausto Pocar, *supra* note 195 at 19, 28-29.

²⁰¹ von Mehren, *supra* note 185 at 356.

²⁰² von Mehren, *supra* note 185 at 355-56. von Mehren, *supra* note 181 at 198.

²⁰³ von Mehren, *supra* note 185 at 355-36.

²⁰⁴ *Id.*

²⁰⁵ Michaels, *supra* note_168_ at 37-38.

arrangement.²⁰⁶ Although the Hague 2005 Choice of Court Convention is a double arrangement, it is concluded because its limited scope makes the alliances between its members less important. Therefore, only when Chinese regions are closely integrated in terms of politics and economy, they are ready to develop a double JRE arrangement.

c. Three Categories of Indirect Jurisdiction

The proposed Arrangement provides three categories of indirect jurisdictions: required jurisdiction, excluded jurisdiction, and permitted jurisdiction.²⁰⁷ Requested courts shall review the judgment-rendering court's jurisdiction according to these rules. First, requested courts shall recognize and enforce judgments that comply with the required indirect jurisdictional grounds.²⁰⁸ Second, requested courts are barred from recognizing and enforcing judgments rendered on an excluded indirect jurisdictional ground.²⁰⁹ Third, if the judgment-rendering court exercises jurisdiction according to the rules for permitted indirect jurisdiction, requested courts are free to determine whether or not judgments on such basis should be recognized and enforced.²¹⁰ The category of permitted jurisdiction is designed to encourage the participation of regions and facilitate their negotiations.²¹¹

A quick look at policy impacts shows how helpful the gray [permitted

²⁰⁶ For explanation of double convention, *see* von Mehren, *supra* note 185 at 356; von Mehren, *supra* note 181 at 198; Michaels, *supra* note 168 at 39-41.

²⁰⁷ The design of required, excluded, and permitted jurisdiction bases first appeared in Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference*, 57 LAW & CONTEMP. PROBS 271, 283 (1994). Michaels, *supra* note 168_ at 32-35. *See* Andreas Lowenfeld, *Thoughts About a Multinational Judgments Convention: A Reaction to the von Mehren Report*, 57 LAW & CONTEMP. PROBS. 289 (1994).

²⁰⁸ For details, *see infra* Required Direct Jurisdiction of Section C of Chapter V.

²⁰⁹ For details, *see infra* Excluded Direct Jurisdiction of Section C of Chapter V.

²¹⁰ For details, *see infra* Permitted Direct Jurisdiction of Section C of Chapter V.

²¹¹ Michaels, *supra* note 168_ at 35.

jurisdiction] category would have been for negotiations. Generally, required bases favor plaintiffs, while excluded bases favor defendants. Without the gray category of permitted bases, this means that delegates must not only agree for every basis of jurisdiction whether it is good and should be required, or whether it is bad and should be excluded; they must also always have the overall balance between plaintiffs and defendants in view. This is almost impossibly complex. By contrast, once bases can be left in the gray area, it becomes possible to negotiate over individual bases of jurisdiction without having to agree on every single one of them. This makes negotiations much easier and the consequences of conventions on the balance between plaintiff and defendant interests easier to predict.

As a conclusion, the category of permitted jurisdiction grounds can flexibly adapt to the current extent of convergence of Chinese regions.²¹²

2. Required Indirect Jurisdiction

If a judgment-rendering court exercised jurisdiction based on a defendant's domicile, a choice of court agreement, or a defendant's voluntary submission, a requested court shall recognize and enforce the resulting judgment, if no other defense exists.

a. The Defendant Has His or Her Domicile or Habitual Residence in the Region Where the Judgment-rendering Court is Located

All the bilateral treaties containing indirect jurisdiction rules and ratified by Mainland China state that: the judgment-rendering court should have jurisdiction, when a defendant has his or her domicile or habitual residence in the region where the court is

²¹² See von Mehren *supra* note 185 at 356.

located.²¹³ If the defendant is a non-natural person, it has its principal place of business or is registered in the region where the court is located.²¹⁴ This rule is not against the indirect jurisdiction rule under the Macao Civil Procedure Code.²¹⁵ Hong Kong has accepted a similar rule. For example, under Hong Kong common law, a judgment-rendering court has competent indirect jurisdiction if a defendant resides in its jurisdiction or carry on business at a reasonably permanent place within its jurisdiction.²¹⁶ The FJREO also adopt a similar rule.²¹⁷ Therefore, using defendant's domicile or habitual residence as a ground for indirect jurisdiction will be likely accepted by all regions.

Additionally, the Brussels I Regulation permits a court that is seized of a case to invoke its regional law to determine a natural person's domicile,²¹⁸ but it provides an autonomous terminology for the domicile of a non-natural person.²¹⁹ At the starting point of the proposed Multilateral JRE Arrangement, arguably a requested court should decide the domicile of a party (regardless that the party is a natural person or not) according to the law of the judgment-rendering court. Moreover, "domicile" may be replaced by "habitual residence." For example, in Mainland China if the defendant's domicile is different from his or her habitual residence, the people's court located in the place of his or her habitual residence has jurisdiction.²²⁰ In the future, if regions agree upon autonomous definitions of "domicile" or "habitual residence," the proposed Arrangement should adopt these definitions for the benefit of certainty and predictability.

²¹³ See Incompetent Indirect Jurisdiction of Part i, Section A of Chapter III.

²¹⁴ *Id.*

²¹⁵ See Incompetent Indirect Jurisdiction of Part iii, Section A of Chapter III.

²¹⁶ See Incompetent Indirect Jurisdiction of Part ii, Section A of Chapter III.

²¹⁷ *Id.*

²¹⁸ Art. 59.1 of the Brussels I Regulation.

²¹⁹ Art. 60 of the Brussels I Regulation.

²²⁰ Art. 22 of the Mainland CPL. The "habitual residence" of a defendant refers to the place where he or she has continuously resided for more than one year from the time when he or she left her domicile to the time of the action, except the place where she is hospitalized. Art. 5 of the Opinions of the Application of the CPL.

b. The Defendant has a Representative Office in the Region Where the Court is Located and the Action is Related to the Activities of the Office

This rule should be adopted by the proposed Multilateral JRE Arrangement because it complies with the indirect jurisdiction rules in the bilateral JRE treaties concluded by Mainland China,²²¹ Hong Kong JRE law,²²² and the Macao Civil Procedure Code.²²³ The requirement of a relation between the action and the activities of the representative office is consistent with the rule adopted by the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters²²⁴ and the Supplementary Protocol to the Hague Judgment Convention.²²⁵

c. Jurisdiction Based on a Choice of Court Agreement

A judgment must be recognized if a judgment-rendering court exercises jurisdiction based on a choice of court agreement. This rule has been accepted by the Mainland-Hong Kong Arrangement and regional laws in Mainland China, Macao, and Hong Kong.²²⁶ The Hague Choice of Court Convention will not be implemented among Chinese regions.²²⁷

²²¹ See Incompetent Indirect Jurisdiction of Part i, Section A of Chapter III.

²²² See Incompetent Indirect Jurisdiction of Part ii, Section A of Chapter III.

²²³ See Incompetent Indirect Jurisdiction of Part iii, Section A of Chapter III.

²²⁴ Art. 10 (2) of the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

²²⁵ Art. 2(d) of the Supplementary Protocol to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, concluded on Feb 1, 1971.

²²⁶ See Chapter III.

²²⁷ See Hong Kong Legislative Council Paper No. CB(2) 722/01-02(04) para 18, December 20, 2001. For details, see Relations with Other Interregional and International JRE Instruments of Chapter VI.

The two existing Arrangements are designed to fill this gap.²²⁸ The three regional laws on choice of court agreements, although similar, contain some differences. Based on the rules for choice of court agreements under the Mainland-Hong Kong Arrangement, the proposed Arrangement attempts to harmonize relevant regional laws by formulating an autonomous terminology for choice of court agreements.

Exclusive Choice of Court Agreement

The Mainland-Hong Kong Arrangement is restricted to judgments with an explicit exclusive choice of court agreement. This is because Mainland China and Hong Kong have different direct jurisdiction laws.²²⁹ An exclusive choice of court agreement aims to minimize the risk of parallel proceedings.²³⁰ Hong Kong also hopes more parties may choose Hong Kong to litigate their cases so as to make Hong Kong an interregional dispute resolution centre.²³¹ For the same reasons, the choice of court agreement should also be exclusive under the proposed Arrangement.

This requirement also complies with regional and interregional laws. For example, only exclusive choice of court agreements are valid under Mainland laws.²³² A case between a Hong Kong shipping company and a Mainland company demonstrates this. In this case, they concluded a charter party with an arbitration clause.²³³ Later they signed

²²⁸ *See id.*

²²⁹ Baoguo Jiang, *Neidi yu Gang Ao Minshangshi Panjue Renke he Zhixin Anpai Bijiao Yanjiu [A Comparative Study on the Recognition and Enforcement of Civil and Commercial Judgments Arrangements between Mainland China and Hong Kong and Macao---with Special Reference to the Practices of Hong Kong]*, 113 FAXUE LUNTAN [LEGAL FORUM] 69, 71-72 (2007).

²³⁰ *Id.* at 72. Hong Kong Legislative Council LC Paper No. CB(2) 1365/06-07(02), *supra* note 137 at para 14.

²³¹ *Id.*

²³² Art. 24 of the Opinions of the Mainland CPL. Guangjian Tu, *Hague Choice of Court Convention - A Chinese Perspective*, 55 AM. J. COMP. L. 347, 356 (2007).

²³³ Hong Kong Yin Sen Shipping Company v. The Overseas Chinese Bank, Xiamen Branch and Xiamen Shengli

an Agreement on Payment of Freight with an exclusive choice of court clause favoring the Hong Kong High Court. Accordingly, a Mainland bank provided a guarantee for the Mainland party favoring the Hong Kong company. Because the Mainland party did not pay the freight, the Hong Kong company brought an action against the Mainland bank in the Xiamen Maritime Court in Mainland China. The court exercised jurisdiction because the choice of court clause conflicted with the arbitration clause, therefore both of them were invalid. But the appellate court (the Higher People's Court of Fujian Province) reversed this decision. It ruled that the charter party was separate from the Agreement on Payment of Freight. The choice of court agreement was valid because it was exclusive; therefore, the Hong Kong High Court should have jurisdiction. In Hong Kong, both exclusive and non-exclusive submission to Hong Kong courts is effective "but only the former practically precludes a defendant from arguing that the Hong Kong court should not exercise its jurisdiction."²³⁴ Macao law is similar to Hong Kong law on choice of court agreements.²³⁵ Therefore, in order to gain supports from all regions, the proposed Arrangement should consider restricting to exclusive choice of court agreements and leaving non-exclusive choice of court agreements to regional laws.

In addition, Mainland law also requires that the choice should not violate the laws regarding the jurisdiction by level in Mainland China.²³⁶ However, under Hong Kong and Macao law, submission to a court in a region is equal to submission to all courts in that

Economic and Trade Development Company, Higher People's Court of Fujian Province, 1994, in SUPREME PEOPLE'S COURT, SELECTED CASES OF PEOPLE'S COURTS 2015-19 (1996).

²³⁴ Johnston, *supra* note 25 at 60.

²³⁵ Zhu Jian, MACAO MIN SHI SU SONG GUANG XIA YU QUE REN WAI DI CAI PAN DE ZHI DU [MACAO SYSTEMS FOR JURISDICTION AND JRE IN CIVIL LITIGATION], <http://www.court.gov.mo/pdf/ConfirmC.pdf> (last visited Feb 2, 2010). (Indicating Macao courts recognize both exclusive and non-exclusive choice of court agreements.). See Chapter III.

²³⁶ Art. 242 of the Mainland CPL.

region.²³⁷ Hong Kong applies this rule to choice of court agreements favoring Mainland courts.²³⁸ This approach is better than that adopted in Mainland China. In the interregional context, advisably, a choice of court agreement should be valid even if it is against a regional law regarding the jurisdiction by level. The chosen court can transfer the case to the proper venue in the same region based on regional law.

In Writing

The choice of court agreement under the proposed Arrangement should be in writing. A written form means a form, in which the contents may be displayed visibly and are accessible for subsequent reference and use.²³⁹ Besides a written contract or a letter, an electronic data message, such as an e-mail, a telegram, a telex, or a facsimile, is also a written form in this Arrangement.²⁴⁰

This requirement is modeled upon the Mainland-Hong Kong Arrangement.²⁴¹ It is also consistent with the corresponding concept in Article 11 of the Mainland Contract Law.²⁴² In Hong Kong, a choice of court agreement or clause can be either in oral or writing.²⁴³ Therefore, the form requirement under the proposed Arrangement will be a compromise between regional laws. Since Hong Kong accepts the written requirement in

²³⁷ For Hong Kong law, *see Supra* Part ii of Section A of Chapter III. For Macao law, *see Supra* Part iii of Section A of Chapter III *Supra* Part ii of Section A of Chapter III, *see also* Jian, *supra* note_235_.

²³⁸ A348, art. 3(2) of the Mainland Judgment (Reciprocal) Ordinance. *See Supra* Part ii of Section A of Chapter III.

²³⁹ *Id.* at A348, art. 3(3).

²⁴⁰ *Id.*

²⁴¹ Art. 3 of the Mainland-Hong Kong Arrangement.

²⁴² Art. 11 of the Mainland Contract Law. He Tong Fa [Contract Law] (Adopted at the Second Session of the Ninth National People's Congress on March 15, 1999, effective October 1, 1999) *translated in* <http://www.lawinfochina.com> accessed on November 3, 2009 (P.R.C.). Tu, *supra* note_232_ at 356.

²⁴³ Johnston, *supra* note 25 at 579-580.

the Mainland-Hong Kong Arrangement, it is likely to accept the same requirement in the proposed Arrangement.

This requirement is also in line with recent international private law conventions, including the 2005 UNCITRAL Convention on the Use of Electronic Communications in International Contracts.²⁴⁴ Comparatively, the Hague Choice of Court Convention has a more flexible requirement regarding the format of choice of court agreements. It includes agreements in writing or “by any other means of communication which renders information accessible so as to be useable for subsequent reference.”²⁴⁵ Therefore the Hague Convention can include as many judgments in its scope as possible.²⁴⁶ Arguably, when expanding the proposed Arrangement in the future, regions may consider accepting choice of court agreements in means of communication other than writing.

Connection between the Chosen Court and the Dispute

Mainland law requires that the court chosen should be located in a place with actual connections to the dispute.²⁴⁷ Generally, a place would have "actual connections" with a court if it is located where one of the parties is domiciled, where the contract would be performed or signed, or where the subject of the contract is located.²⁴⁸ However, it is unclear what other factors can count as "actual connections." Neither Hong Kong law nor the Mainland-Hong Kong Arrangement imposes the requirement of "actual

²⁴⁴ U.N. Comm. on Int'l Trade Law [UNCITRAL], U.N.Doc. A/60/515, annex I, chapter III, art. 9(2)(2005).

²⁴⁵ Art. 3(c) of the Hague Choice of Court Convention. For comments, *see* Brand and Herrup, *supra* note_119_ at 45-46.

²⁴⁶ *Id.* at 46.

²⁴⁷ Art. 242 of the Mainland CPL.

²⁴⁸ *See id.*, art. 25.

connections."²⁴⁹ In the US, a chosen court does not necessarily need to have any actual connection with the dispute.²⁵⁰ For example, in *Bremen v. Zapata Off-Shore Co.*, a US company contracted with a German company to tow a drilling rig from the US to Italy.²⁵¹ The contract contained a choice of court clause favoring the London Court of Justice.²⁵² Because of a severe storm in the Gulf of Mexico, the rig was damaged and the tug Bremen had to berth at the Tampa, Florida, the nearest port of refuge. Parties disputed whether the court of Tampa or the London court should have jurisdiction regarding the damages to the rig. The Supreme Court of the US stated that²⁵³

the courts of England meet the standards of neutrality and long experience in admiralty litigation. The choice of that forum was made in an arm's length negotiation by experienced and sophisticated businessmen, and, absent some compelling and countervailing reason, it should be honored by the parties and enforced by the courts.

Therefore, the Court held that unless a defendant can meet the heavy burden of showing that the enforcement of a choice of court agreement would be unreasonable, unfair, or unjust, the agreement should be binding on the parties.²⁵⁴

Similarly, according to the Brussels I Regulation, no connection is required between the chosen court and the dispute.²⁵⁵ The 2005 Hague Choice of Court Convention does not require a connection exists between the chosen court and the

²⁴⁹ Johnston, *supra* note 25 at 119-120.

²⁵⁰ *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). Ved P. Nanda, *The Landmark 2005 Hague Convention on Choice of Court Agreements*, 42 TEX. INT'L L.J. 773, 774-75 (2007) (indicating in *Bremen*, "the Court approved of what it called a recent trend in adopting 'a more hospitable attitude' toward choice of forum clauses.)

²⁵¹ *Bremen*, at 407 U.S. 1 at 1.

²⁵² The clause is "[a]ny dispute arising must be treated before the London Court of Justice." *Id.*, at 2.

²⁵³ *Id.*, at 12.

²⁵⁴ *Id.*, at 8-20. For comments, see Ronald Brand, *Due Process, Jurisdiction and A Hague Judgments Convention*, 60 U. PITT. L. REV 661, 699-700 (1999).

²⁵⁵ Art. 23 of the Brussels I Regulation. For comments, see Ulrich Magnus, *Chapter II Jurisdiction Section 7 Prorogation of Jurisdiction*, in BRUSSELS I REGULATION, 389 (ULRICH MAGNUS & PETER MANKOWSKI ed. 2007). For cases, see *Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy SpA*, (Case C-159/97) [1999], ECR I-1597, I-1656 para 50; *Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravières Rhénanes SARL*, (Case C-106/95) [1997] ECR I-911, I-944 para. 34.

dispute,²⁵⁶ however, it permits member states to declare that "its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that state and the parties or the dispute."²⁵⁷ The proposed Multilateral JRE Arrangement might adopt this approach. However, arguably, Mainland China should not require an actual connection between the chosen court and the dispute in civil and commercial case,²⁵⁸ except that parties purposefully choose a court to maliciously evade Mainland mandatory laws. Considering that Mainland China accepts the Mainland-Hong Kong Arrangement that does not require the chosen court should have an actual connection to the dispute, Mainland China is likely to waive the same requirement in the proposed Arrangement.

Miscellaneous

The terms of a choice of court agreement exist independently, unless it is otherwise provided in the contract. No matter whether the contract is modified, rescinded, terminated or nullified, terms on jurisdiction remain effective. Further, a choice of court agreement shall not violate the exclusive jurisdiction under regional laws.

Moreover, some scholars based in Hong Kong are concerned that Mainland courts may set aside choice of court clauses concluded by parties for reasons such as local protectionism.²⁵⁹ Especially, according to a judicial interpretation when invalidating foreign or sister-region related arbitration clauses, lower courts shall seek the approval of

²⁵⁶ Art. 5 of the 2005 Hague Choice of Court Convention. *Forum non conveniens* is forbidden.

²⁵⁷ Art. 19 of the Hague Choice of Court Convention. Brand and Herrup, *supra* note 119, at 146-49.

²⁵⁸ Jiwen Wang, *Woguo Pizhun Haiya "Xuanzhe Fayuan Xieyi Gongyue" de Biyaoxing Fenxi* [The Necessity that China Ratifies the Hague Choice of Court Convention], 16 ANHUI DAXUE FALV PINGLUN [ANHUI UNIVERSITY LAW REVIEW] 153, 157 (2009).

²⁵⁹ Zhang, *supra* note 157 at 12-13.

the Supreme People's Court.²⁶⁰ But such a requirement does not exist in the choice of court context. It is advisable to treat choice of court agreements and arbitration agreements equally so to soothe people outside of Mainland China. Therefore, the Supreme People's Court should consider expanding its judicial interpretation regarding arbitration agreements to choice of court agreements.

d. Jurisdiction Based on Submission

A requested court shall recognize and enforce a judgment that is rendered on the ground that the defendant submitted to the jurisdiction of the judgment-rendering court. In other words, a defendant argues the substance of the case in a court without raising objection to its jurisdiction, should be deemed to have accepted its jurisdiction. What amounts to submission should be determined by the law of the judgment-rendering region. Jurisdiction based on submission has been widely acknowledged by regional JRE laws.²⁶¹ Therefore, this rule is likely to be accepted by all regions.

3. Excluded Indirect Jurisdiction

Besides required indirect jurisdiction grounds, the proposed Multilateral JRE Arrangement should also stipulate excluded indirect jurisdiction grounds. JRE shall be denied if the judgment is rendered on these grounds. Providing excluded indirect

²⁶⁰ Point 1 of the Notice of the Supreme People's Court Concerning Handling of Certain Issues of Foreign Related Arbitration and Foreign Arbitration dated 28 August 1995. Printed in 2 *Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan Sifa Jieshi Quanji* [Collection of Judicial Interpretations of the Supreme People's Court] 548 (1993-1996) (Beijing: People's Court Publishing House, 1997).

²⁶¹ See Section A of Chapter III.

jurisdiction grounds seemingly makes little sense in a single enforcement arrangement, whose aim is to "make enforceability easier rather than harder."²⁶² However, conflicts between direct jurisdiction rules among Chinese regions are an urgent issue and no interregional legal solution exists.²⁶³ At the current stage, concluding an arrangement on direct jurisdiction is probably an insurmountable task.²⁶⁴ Comparatively speaking, a single enforcement arrangement with excluded indirect jurisdiction grounds is easier for regions to agree upon. This is because it leaves direct jurisdiction to regional laws, and meanwhile more importantly, it can use denying JRE to discourage parties to sue on exorbitant direct jurisdiction grounds. This will pave the way for the regions to develop a mixed or double arrangement regulating both direct and indirect jurisdiction in the long run. Admittedly, there may be concerns that the excluded indirect jurisdiction grounds may make the proposed Arrangement less appealing for regions because it may regulate too much. However, the benefits of decreasing conflicting jurisdictions and parallel litigations should outweigh this concern. Excluded indirect jurisdiction grounds do not regulate too much. Instead, it fills the gap in the current Chinese interregional conflict of laws where JRE is difficult and jurisdiction conflicts are rampant. It makes the proposed Arrangement more effectively solving interregional legal conflicts so it is more appealing. Additionally, the excluded bases of indirect jurisdiction mainly concern Mainland exorbitant jurisdiction law.²⁶⁵ Therefore, it is for the interests of each region to accept excluded indirect jurisdiction grounds.

²⁶² This argument is noted in Michaels, *supra* note_168_ at 41.

²⁶³ Zhang, *supra* note 157 at 24-34.

²⁶⁴ *Id.*, at 33 (indicating "[a]pparently, the considerable disparities [regarding direct jurisdictions] between the two regions [Mainland China and Hong Kong] would not allow any substantive compromise and comprehensive cooperation at this moment.)

²⁶⁵ *See* Chapter II.

a. Exclusive Jurisdiction over Certain Disputes of Joint Ventures

The JRE treaties containing indirect jurisdiction rules and the two existing JRE Arrangements concluded by Mainland China all states that Mainland China can refuse JRE if the judgment-rendering court infringes the exclusive jurisdiction of Mainland courts.²⁶⁶ Mainland courts have exclusive jurisdiction over disputes arising from the performance of contracts for joint ventures established between a Mainland party and a party from a sister region.²⁶⁷ Mainland China should give up its claim to this ground of exclusive jurisdiction,²⁶⁸ at least vis-à-vis the other sister regions. The establishment of exclusive jurisdiction aims to protect Mainland sovereignty and national interests.²⁶⁹ However, it is doubtful that imposing exclusive jurisdiction over joint ventures would promote this goal,²⁷⁰ especially when the ventures are established by capital from a sister region. It is even doubtful to distinguish joint ventures from other companies in jurisdictional rules when national treatment has been granted to joint ventures in other fields in Mainland law.²⁷¹ Therefore, a requested court in Hong Kong and Macao should refuse recognizing and enforcing Mainland judgments rendered on this rule.

b. Jurisdiction of the Place Where the Contract is Signed

²⁶⁶ For discussion of required exclusive jurisdiction rule under the Proposed Multilateral JRE Arrangement, *see supra* Required Indirect Jurisdiction of Chapter V.

²⁶⁷ Art. 244 of the Mainland CPL.

²⁶⁸ For criticism of this jurisdiction ground and the problems it brings to JRE, *see* Patricia J. Blazey & Peter S. Gillies, *Recognition and Enforcement of Foreign Judgments in China*, SSRN ELIBRARY, 10 (2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103364 (last visited Jun 10, 2010).

²⁶⁹ JIN HUANG, GUO JI SI FA [PRIVATE INTERNATIONAL LAW] 893-94 (Law Press, 1999). Depei Han, GUO JI SI FA XIN LUN [NEW ANALYSIS OF PRIVATE INTERNATIONAL LAW] 629 (Wu Han University, 1997).

²⁷⁰ Ding Wei, On the Perfection of the Legal System of China's Jurisdiction over Foreign Civil and Commercial Disputes, the Collection of Papers presented on 2007 Chinese Private International Association Annual Conference 200-1 (on file with the author).

²⁷¹ *Id.*, at 201. For detailed reasons why this jurisdictional ground is exorbitant, *see* Chapter III.

The JRE treaties ratified by Mainland China often state that a judgment-rendering court should have indirect jurisdiction when, in contractual disputes, the contract was signed in the region where the court is located.²⁷² The Mainland CPL contains a same rule for direct jurisdiction, namely, when the defendant has no domicile in Mainland China, the court located in the place where the contract is signed, can exercise jurisdiction over the contractual dispute.²⁷³ Jurisdiction of the place where the contract is signed is unreasonable because this place may be fortuitous and hard to determine.²⁷⁴ Notably, jurisdiction based on the place where the contract is signed is exorbitant in the Brussels I Regulation.²⁷⁵ In the US, although jurisdiction based on the place where the contract is signed appears in some state long-arm statutes,²⁷⁶ such ground possibly violates the Due Process Clause in the US Constitution.²⁷⁷ Therefore, if a Mainland judgment is rendered on this ground, Hong Kong and Macao requested courts should be barred from recognizing and enforcing these judgments under the proposed Arrangement.

c. Jurisdiction by Service on a Defendant Who Temporarily Appears

The Hong Kong FJREO has a "sweeping up" indirect jurisdiction rule, which provides that if the jurisdiction of the judgment-rendering court is recognized by Hong Kong laws, its judgments can be recognized and enforced in Hong Kong. Under Hong

²⁷² See Incompetent Indirect Jurisdiction of Part i of Section A of Chapter III.

²⁷³ Art. 241 of the Mainland CPL.

²⁷⁴ See Brand, *supra* note 254, at 691-92.

²⁷⁵ Art. 3(2) of the Brussels I Regulation and Annex I.

²⁷⁶ Brand, *supra* note 254, at 691. For cases, see *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706, 712 (4th Cir. 1966); *Byham v. National Cibo House Corp.*, 143 S.E.2d 225, 233 (1965).

²⁷⁷ Brand, *supra* note 254 at 691-92.

Kong direct jurisdiction law, courts can exercise jurisdiction when the document initiating an action have been served on the defendant during his or her temporary presence in Hong Kong.²⁷⁸ In Hong Kong, service can be affected by personal service upon a defendant. It is sufficient to finish a service by informing the defendant the nature of the document and “leave it as nearly as could be done in his possession or control.”²⁷⁹ The defendant’s refusal to accept the document is irrelevant. Service can also be affected by inserting the judicial document through the letterbox at or sending it by registered mail to “the defendant’s usual or last known address in Hong Kong.”²⁸⁰ Establishing jurisdiction by merely serving a document initiating an action to a defendant who temporarily appears is exorbitant and has been banned by the Supplementary Protocol to The Hague Judgment Convention²⁸¹ and the Brussels I Regulation,²⁸² as well as suggested by many American commentators during the negotiation of a broad scope Hague Judgment Convention.²⁸³ Therefore, a requested court in Mainland China or Macao should refuse to recognize and enforce Hong Kong judgments rendered on this jurisdiction ground.

4. Permitted Indirect Jurisdiction

²⁷⁸ Johnston, *supra* note 25, at 67.

²⁷⁹ Re David C Buxbaum ex p Samuel-Rozenbaum (HK) Ltd, HCB 7637/2004, para 14, per Kwan J. See also Hong Kong Civil Procedure 2004, Vol 1, para 65/2/3; Thomson v Phoney (1832) 1 Dowl. 441 at 443.

²⁸⁰ Johnston, *supra* note 25 at 67. See Rules of the High Court, Order 10, r 1(2)(a)&(b).

²⁸¹ Art. 2(e) of the Supplementary Protocol to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, concluded on Feb 1, 1971.

²⁸² Annex I of the Brussels I Regulation.

²⁸³ LINDA J. SILBERMAN & ANDREAS F. LOWENFELD, *The Hague Judgments Convention--And Perhaps Beyond*, in LAW AND JUSTICE IN A MULTISTATE WORLD 128 (James A.R. Nafziger & Symeon C. Symeonides eds., 2002) (arguing that tag jurisdiction can be eliminated except for war criminals, human rights violators, and Holocaust profiteers). von Mehren, *supra* note 181 at 195-96.

All the remaining regional indirect jurisdiction laws fall into this category.

Requested courts can exercise discretion to recognize and enforce judgments rendered on these jurisdiction grounds. Because Mainland regional JRE law contains no indirect jurisdiction rules, the Mainland indirect jurisdiction laws analyzed in this dissertation are based on the bilateral JRE treaties ratified by Mainland China. Macao indirect jurisdiction law is very brief²⁸⁴ and Macao has not concluded any JRE treaty with an indirect jurisdiction rule.²⁸⁵ Based on these regional laws, at the beginning stage, the proposed Arrangement should contain four permitted indirect jurisdiction rules. Regions should be allowed to add indirect jurisdiction rules into this category, and they should inform each other if they do so. However, arguably, regions should work together to reduce the number of permitted grounds to enhance the certainty of interregional JRE. The three permitted indirect jurisdiction rules are as follows:

First, in an action *in rem* of which the subject matter was movable property, if the property in question was at the time of the proceedings in the region where the judgment-rendering court is situated.²⁸⁶ This is an indirect jurisdiction rule in the Hong Kong regional JRE law. It is a proper rule. Because current Mainland and Macao JRE law do not contain a similar law, it should be a permitted, instead of required, ground.

Second, in contractual disputes, the contract has been or will be performed in the region where the court is located, or the subject matter is located in that region.²⁸⁷ Third, in cases of tort, the conducts or results of the tort took place in the region where the court is located.²⁸⁸ These two rules are found in bilateral JRE treaties concluded by Mainland

²⁸⁴ Art. 1200 (c) of the Macao Civil Procedure Code.

²⁸⁵ *See supra* Incompetent Indirect Jurisdiction of Part iii of Section A of Chapter III.

²⁸⁶ Hong Kong FRJEO Section 6, art. 3(b).

²⁸⁷ *See supra* Incompetent Indirect Jurisdiction of Part i of Section A of Chapter III.

²⁸⁸ *Id.*

China. These two rules are proper. They are permitted, rather than required, grounds because there is no equivalence of these rules in Hong Kong and Macao JRE law.

Four, requested courts are free to decide the recognition and enforcement of judgments, if the judgment-rendering court infringes the exclusive jurisdiction of the requested court. This rule is endorsed by regional JRE laws in Mainland China, Hong Kong, and Macao, as well as the two existing JRE Arrangements.²⁸⁹ Advisably, the proposed Multilateral JRE Arrangement should adopt it. It should also list the exclusive jurisdiction of each region. Regions should inform each other if they would like to revise their exclusive jurisdiction laws.

Mainland China, Hong Kong, and Macao have a common exclusive jurisdiction law: a lawsuit brought on real estate shall be under the jurisdiction of the court located in the region where the real estate is situated.²⁹⁰ Therefore, in the proposed Arrangement, a requested court can deny recognition and enforcement of judgments that violates this exclusive jurisdiction rule.

Besides this common jurisdiction law, each region has one more exclusive jurisdiction law that may be relevant to the proposed Arrangement. Under Hong Kong law, a lawsuit regarding the registration of an intellectual property right in Hong Kong shall be under its exclusive jurisdiction.²⁹¹ Macao courts enjoy exclusive jurisdiction when lawsuits related to the bankruptcy or insolvency of a Macao legal person.²⁹² This jurisdiction law is relevant to the proposed Arrangement only when the regions decide to include insolvency and related issues into the Arrangement. According to Mainland law,

²⁸⁹ See Section A and Section B of Chapter III.

²⁹⁰ See Section B of Chapter III.

²⁹¹ For a detailed discussion of *lex situs* rule in Hong Kong, see Johnston, *supra* note 25 at 297-318.

²⁹² Art. 20 of the Macao Civil Procedure Code.

a lawsuit concerning port operations and Sino-foreign cooperative exploration and development of natural resources shall be under the jurisdiction of the court located in the region where the port and the resources are located.²⁹³ The court where a port is located is best suited to address disputes arising from the operation of the port. Regarding natural resources, Mainland China has a larger territory than Hong Kong and Macao. Exclusive jurisdiction over cooperative exploration and development of natural resources, although protectionist, are important for Mainland China. Recognizing Mainland courts have exclusive jurisdiction over cooperative exploration and development of natural resources can motivate Mainland China to accept the proposed Arrangement. Meanwhile, Hong Kong and Macao have fewer ports and natural resources than Mainland China, so this rule matters less for them and is likely to be acceptable for them.

ii. Unfair Procedure

1. Three Instances

The Mainland-Hong Kong Arrangement states that JRE shall be denied when the judgment-rendering proceeding is unfair, which includes the case in which the default judgment debtor has not been summoned in the original trial or has been summoned but not been given a reasonable time to defend a case.²⁹⁴ Besides the requirement of lawful summons, the Mainland-Macao Arrangement lists another procedural deficiency: a party who doesn't have litigation capacity was not assigned a guardian as specified by the law

²⁹³ Besides exclusive jurisdiction over ports and natural resources, as well as joint ventures that will be discussed above, Mainland China has one more exclusive jurisdiction laws (*see* art. 34.3 of the Mainland CPL): a lawsuit concerning inheritance shall be under the exclusive jurisdiction of the people's court located in the place where the decedent had his or her domicile upon his or her death, or where the principal portion of his or her estate is located. But this rule concerns family-law issues and should be excluded by the proposed Multilateral JRE Arrangement.

²⁹⁴ Art. 9.4 of the Mainland-Hong Kong Arrangement. For comments, *see* Part i of Section B of Chapter III.

of the place where the original trial was conducted.²⁹⁵ Both Arrangements do not cover all possible procedure deficiencies in the original trial. But in general it is impossible to list all procedure deficiencies in a JRE arrangement. The proposed solution is to list some instances of procedure deficiencies under the heading of unfair procedure and to regard the rest as fraud or violating public policy.²⁹⁶

In the proposed JRE Arrangement the heading of unfair procedure includes three instances: the losing party was not duly summoned or was summoned but not given a reasonable time to defend a case, or was not properly represented by a guardian if lacking litigation capacity. If a party lacking litigation capacity is not represented by a guardian in hearings, he or she essentially loses the reasonable opportunity to be heard. Therefore, all three instances emphasize due notice to a losing party and his or her reasonable opportunity to be heard. The grounds of unfair procedure in the US and EU JRE laws, as well as the Hague Choice of Court Convention all underscore the same policy.

In the US, judgments rendered in a procedure violating the Due Process Clause cannot be recognized and enforced in sister regions.²⁹⁷ The opportunity to be heard is the fundamental requisite of due process of law.²⁹⁸ It means a defendant should be informed of the pendency of a suit so can choose to appear or default.²⁹⁹ The form of notice used must be reasonable in light of the practicalities and peculiarities of the specific case. *Mullane v. Central Hanover Bank & Trust Co.*³⁰⁰ is the leading case concerning the

²⁹⁵ Art. 11.4 of the Mainland-Macao Arrangement. For comments, see Part ii of Section B of Chapter III.

²⁹⁶ For how to delimit procedure deficiencies under the heading of unfair procedure, fraud, and public policy, see *infra* fn 453 and accompanying texts.

²⁹⁷ RESTATEMENT (SECOND) OF CONFLICTS § 105 (1971).

²⁹⁸ *Id.*, at § 92 (b). *Grannis v. Ordean*, 234 U. S. 385, 234 U. S. 394. See *Conopco, Inc. v. Roll Int'l*, 231 F.3d 82 (2d Cir. 2000) (F1's mistake in not allowing amendment of pleadings does not violate due process, so its judgment is entitled to full faith and credit recognition in F2).

²⁹⁹ *Milliken v. Meyer*, 311 U. S. 457; *Grannis v. Ordean*, 234 U. S. 385; *Priest v. Las Vegas*, 232 U. S. 604; *Roller v. Holly*, 176 U. S. 398.

³⁰⁰ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), 314-15.

constitutional sufficiency of notice to a defendant in the US law. In this case, according to New York law, a defendant planned to establish a common trust fund by pooling small trust estates into one fund for investment administration. Among those small trusts, some beneficiaries did not reside in New York. The defendant notified all beneficiaries by publication in a local newspaper, which complied with the minimum requirements of a New York banking law.³⁰¹ The Supreme Court of the US ruled that for beneficiaries with unknown contact information, this notice is sufficient because they could not be notified in a way more practicable and more effective.³⁰² But for known beneficiaries, this notice was insufficient under the Due Process Clause because “it is not reasonably calculated to reach those who could easily be informed by other means at hand.”³⁰³ The Court held that the defendant shall notify known beneficiaries at least by ordinary mail.³⁰⁴ Therefore, *Mullane* demonstrates that, in the US JRE law, due notice must be afforded to a defendant and his or her reasonable opportunity to be heard must be guaranteed.

Similarly, Article 34(2) of the Brussels I Regulation aims to protect a defaulting defendant’s right for a due notice and a reasonable opportunity to be heard.³⁰⁵ It states that JRE can be denied if the document(s) that instituted the proceedings or its equivalent(s) was not served upon the defendant properly so he cannot arrange his defense.³⁰⁶ According to the ECJ case law, this condition refers to the situation that the defendant was not served with the document(s) duly both in method and timing so he or

³⁰¹ *Id.* at 310. The announcement listed the name and address of the trust company, the name and the date of establishment of the common trust fund, and a list of all participating estates.

³⁰² *Id.* at 313-18.

³⁰³ *Id.* at 319.

³⁰⁴ *Id.* at 318-20.

³⁰⁵ Art. 34(2) of the Brussels I Regulation. *Maersk Olie & Gas A/S v. Firma M. de Haan en W. de Boer*, (Case C-39/02) [2004] ECR I-9657. Arthur T. von Mehren & Kerameus Konstantinos, *The Scope of Recognition of Judgments*, in *THE HAGUE CONVENTION ON JURISDICTION AND JUDGMENTS* 59, 65-66 (Andreas F. Lowenfeld & Linda J. Silberman ed. 2001).

³⁰⁶ For explanation, see Francq, *supra* note_161_ at 585-91.

she could not assert his or her rights before an enforceable judgment was rendered.³⁰⁷

This condition is not met if the defendant “was notified of the elements of the claim and had the opportunity to arrange for this defense.”³⁰⁸ *Weiss und Partner* illustrates this.³⁰⁹

In this case, the defendant complained that the service of document to him was defective because the annexes of the document instituting the proceeding had not been translated into English.³¹⁰ The ECJ ruled that service could not be refused on the sole ground that the annexes had not been translated. The reason was that the annexes “ha[d] a purely evidential function and [wa]s not necessary for understanding the subject-matter of the claim and the cause of action.” In other words, if the document instituting the proceeding was translated and was sufficient to enable the defendant to assert his or her rights, the service was proper. Therefore, similar to *Mullane*, *Weiss und Partner* demonstrates that due service requires a defendant should be afforded a reasonable opportunity to prepare his or her case and to be heard.

Moreover, the Hague Choice of Court Convention³¹¹ and the 1999 Hague Draft³¹² also emphasizes a defendant’s right for a due notice and an opportunity to prepare his or her defense. Its Article 9 (c) states two instances to refuse JRE: the defendant was not notified or the notification did not allow him or her proper time or manner to arrange for an effective defense.³¹³

³⁰⁷ Hengst Import BV v Anna Maria Campese, (Case C-474/93) [1995] ECR I-2113 para. 19.

³⁰⁸ Volker Sonntag v. Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann, (Case C-172/91) [1993] ECR I-1963 para. 39.

³⁰⁹ *Weiss und Partner*, ECJ C-14/07, Judgment (OJ) OJ C 158 of 21.06.2008, p.5.

³¹⁰ See Art. 8.1 of Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing (annul) Council Regulation (EC) No 1348/2000 (OF L 324, 10.12.2007).

³¹¹ Art. 9(c) of the Hague Choice of Court Convention.

³¹² Art. 28.1(d) of the Hague 1999 Draft. Pocar and Nygh, *supra* note_195_ at 306-08.

³¹³ Brand and Herrup, *supra* note_119_ at 114.

Therefore, the proposed Multilateral Arrangement underscores the same policy adopted by the US and the EU JRE laws as well as the Hague Choice of Court Arrangement.

Additionally, in the proposed Arrangement, a requested court should invoke the law of the judgment-rendering region to determine whether unfair procedure tainted the original trial. This has been adopted by the two existing arrangements.³¹⁴ Notably, some commentators imply that, under the Hague Choice of Court Convention, a requested court may invoke its own law to determine whether the judgment-rendering procedure is unfair.³¹⁵ This may be correct for international JRE where mutual trust among countries is weak. However this is improper in the Chinese interregional scenario, especially considering the two existing Arrangements have abandoned this approach.³¹⁶

2. Losing Party or Defendant

Following the existing two Arrangements,³¹⁷ the unfair procedure defense in the proposed Arrangement should extend protections from "defendant" to "losing party." This is because in Mainland China, courts are responsible to ensure every party in the action (both plaintiffs and defendants) who lacks litigation capacity is represented by a guardian.³¹⁸ The unfair procedure defense in many bilateral JRE treaties that Mainland

³¹⁴ Art. 9.4 of the Mainland-Hong Kong Arrangement and art.11.4 of the Mainland-Macao Arrangement.

³¹⁵ Brand and Herrup, *supra* note_119_ at 114.

³¹⁶ The existing two arrangements require the requested court to review the legitimacy of judgment-rendering process according to the law of the judgment-rendering region. Art. 9.4 of the Mainland-Hong Kong Arrangement and art. 11.4 of the Mainland-Macao Arrangement.

³¹⁷ Art. 9.4 of the Mainland-Hong Kong Arrangement and art.11.4 of the Mainland-Macao Arrangement.

³¹⁸ Art. 57 of the Mainland CPL and art. 67 of the Opinions to the Mainland CPL.

China concluded is identical to the existing two JRE arrangements.³¹⁹ They all use "losing party" rather than "defendant."³²⁰ This should be acceptable to Macao and Hong Kong, because they are not against their regional laws. Both plaintiff and defendant of the original trial can invoke the unfair procedure defense under the Macao JRE law, because the defense covers procedure issues, such as defendants were not duly summoned or parties were not duly represented.³²¹ The unfair procedure defense under the Hong Kong JRE law only addresses undue notice, so only a defendant in the original trial can invoke it.³²² However, a losing party without litigation capacity who was not represented by a guardian in the judgment-rendering proceedings can invoke the public policy exception to defend JRE.³²³

As a conclusion, the proposed Arrangement may indicate that JRE should be denied if the losing party was not duly summoned or was summoned but not given a reasonable time to defend a case, or was not properly represented by a guardian if lacking litigation capacity.

3. Obligation of Challenging a Judgment on the Ground of Unfair Procedure in the Judgment-Rendering Court

³¹⁹ *Eg.*, art. 17.3 of THE JUDICIAL ASSISTANCE TREATY IN CIVIL AND CRIMINAL CASES ON DECEMBER 25, 1999 BETWEEN THE PRC AND VIETNAM; the Treaty between the PRC and Spain, *supra* note 191, at art. 22.4 and 22.5. Both these treaties provide that JRE should be denied if the losing party was not duly summoned or was summoned but not given a reasonable time to defend a case, or was not properly represented by a guardian if lacking litigation capacity.

³²⁰ *Id.*

³²¹ Art. 1200 (e) of the Macao Civil Procedure Code states that JRE shall be refused if the defendant had not been duly summoned, or the principles of adversarial procedure and the equality between parties were not been observed. For details, *see* Part iii of Section A of Chapter III.

³²² The Hong Kong FJREO Section 6(1)(a)(iii) provides that JRE shall be refused when "the judgment debtor, being the defendant in the proceedings in the original court, did not...receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear."

³²³ *See* the Public Policy Exception of the Part ii of Section A of Chapter III.

In the Brussels I Regulation, one precondition for refusing JRE on unfair procedure is that the defendant commenced the proceedings to challenge the judgment on this ground when it was possible for him to do so. If the defendant fails to do so in the judgment-rendering region, he or she cannot invoke Article 34(2) in the JRE proceedings.³²⁴ This precondition aims to balance finality and justice, because a defendant should litigate the issue of unfair procedure in the judgment-rendering court. As the ECJ indicates, “the possibility of having recourse, at a later stage, to a legal remedy against a judgment given in default of appearance, which has already become enforceable, cannot constitute an equally effective alternative to defending the proceedings before judgment is delivered.”³²⁵ Moreover, the obligation that a defendant should challenge the issue of unfair procedure in the judgment-rendering court is only imposed on him “when it was possible for him to do so.”³²⁶ Therefore, if a defendant raises the issue of unfair procedure, the requested court should examine whether the defendant should have been in a position to appeal or seek review in the judgment-rendering court.³²⁷ If the defendant was in this position but did not litigate the issue of unfair procedure, he or she waives the right to deny JRE on grounds of unfair procedure in the JRE proceedings. In other words, a defendant should challenge unfair procedure in the judgment-rendering region, and only when the defendant has no opportunity to do so, a requested court should be permitted to review the judgment-rendering procedure and deny JRE accordingly.

US law adopts a different approach. It distinguishes erroneous but valid

³²⁴ Francq, *supra* note_161_ at 591-92.

³²⁵ Minalmet GmbH v. Brandeis Ltd, (Case C-123/91) [1992] ECR I-5661 para. 19.

³²⁶ Francq, *supra* note_161_ at 592.

³²⁷ *Id.*

judgments³²⁸ from void judgments.³²⁹ The former refer to judgments that contains an error of fact or of law but are valid in the judgment-rendering region.³³⁰ A judgment debtor, who alleges a judgment is erroneous, should utilize the review procedures available in the judgment-rendering state, not collateral attack in the requested court.³³¹ However, if a judgment is void in the region where it is rendered, collateral attack is permitted in a requested court.³³² "A judgment is void unless a reasonable method of notification is employed and a reasonable opportunity to be heard afforded to persons affected"³³³ according to the law of judgment-rendering region and subject to constitutional restraints.³³⁴ Therefore, a defendant who did not have a fair opportunity to be heard does not have the obligation to challenge the judgment in the judgment-rendering court. Instead, the defendant can challenge this judgment in a requested court.

Comparatively, the US approach suits China's situation better for two reasons. Hong Kong concerns about the judicial competence of Mainland courts.³³⁵ No precondition should be required before a losing party brings a collateral attack against a judgment rendered from an unfair procedure. The fact that no court of final review exists to guarantee a defendant's right for a fair hearing in China reinforces this argument. However, a requested court should apply the law of the judgment-rendering region to

³²⁸ RESTATEMENT (SECOND) OF CONFLICTS §§ 92 and 106 (1971). *U.S. v. Bigford*, 365 F.3d 859, 867. *NationsBank of North Carolina v. Parsons*, 324 S.C. 506, 477 S.E.2d 735, 736, 739.

³²⁹ RESTATEMENT (SECOND) OF CONFLICTS § 105 (1971). RESTATEMENT (SECOND) OF JUDGMENTS § 11, comment c (1982).

³³⁰ RESTATEMENT (SECOND) OF CONFLICTS § 106 (1971). *Craven v. Southern Farm Bureau Cas. Ins. Co.*, 117 P.3d 11, 13–14.

³³¹ *Fauntleroy v. Lum*, 210 U.S. 230 (1908). RESTATEMENT (SECOND) OF CONFLICTS § 106 (1971), comment (a) (1971). EUGENE F. SCOLES ET AL., *CONFLICT OF LAWS* 1287-89 (4th ed. 2004).

³³² RESTATEMENT (SECOND) OF CONFLICTS §§ 25 and 105 (1971). *Griffin v. Griffin*, 327 U.S. 220 (1946). *Miserandino v. Resort Properties*, 345 Md. 43, 691 A.2d 208, 213, cert. denied 522 U.S. 953, 118 S.Ct. 376, 139 L.Ed.2d 292 (1997).

³³³ RESTATEMENT (SECOND) OF JUDGMENTS § 6 (1982).

³³⁴ *Id.*, §§ 7 and 8 (1942)

³³⁵ Xianchu Zhang & Philip Smart, *Development of Regional Conflict of Laws: On the Arrangement of Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters between Mainland China and Hong Kong SAR*, 36 HONG KONG L. J. 553, 574 (2006).

determine whether unfair procedure exists. Like the existing two Arrangement, the proposed Arrangement should also impose this choice of law requirement. It can help enhance interregional mutual trust.

4. Conclusion

In the proposed JRE Arrangement, the concept of unfair procedure is an autonomous terminology. It includes three instances: according to the law of the judgment-rendering region, the losing party was not duly summoned or was summoned but not given a reasonable time to defend a case, or was not properly represented by a guardian if lacking litigation capacity. The losing party should be allowed to challenge the judgment tainted by unfair procedure in the requested court.

iii. *Res judicata*

The existing Arrangements divide the *res judicata* rules into two instances: a judgment for which JRE is requested conflicts with a judgment rendered in a third region or with a local judgment.

1. Conflicts between a Requested Judgment and a Recognized Judgment

The two existing Arrangements provide the same rule: JRE shall be refused if the requested court has already recognized or enforced a judgment on the same cause of

action rendered by a court in a third region.³³⁶ This rule is unanimously agreed among the three regions.³³⁷ Therefore, the proposed Multilateral JRE Arrangement should adopt this rule. The Brussels I Regulation also adopts a similar rule. Its Article 34(4) indicates that: JRE shall be refused, if the judgment is irreconcilable with an earlier judgment given in another member region or in a third region, if the two judgments involve the same cause of action and between the same parties, and if the earlier judgment fulfils the conditions necessary for its recognition in the member region requested.³³⁸ Therefore, the proposed Arrangement can draw useful insights from case law under the Brussels I Regulation, such as how to define “the same cause of action” and whether the requirement of “the same parties” is necessary.³³⁹

2. Conflicts between a Requested Judgment and a Local Judgment

Compared with Hong Kong and Macao, the Mainland civil procedure is well-known for its rapidity.³⁴⁰ Therefore, when free circulation of judgments is possible among the three regions, parties may maliciously take advantage of the rapid Mainland civil procedure, try to get a favorable judgment in Mainland China first, and then claim preclusive effects in other regions. In other words, parties may rush to "get one action decided ahead of the other in order to create a situation of *res judicata* or issue estoppel

³³⁶ Art. 11.3 of the Mainland-Macao Arrangement.

³³⁷ For details discussion, *see* Section B of Chapter III.

³³⁸ Art. 34(4) of the Brussels I Regulation.

³³⁹ Under the American *Res judicata* rule, the judgment obtained last in time will prevail against all previous judgments. For reasons that the American rule will possibly not be well received in China, *see* Hong Kong Anti-suit Injunction of Section B of Chapter IV.

³⁴⁰ Johnston *supra* note 25 at 123 (stating that “Mainland legal system, which is well known for its rapidity compared to that of Hong Kong and other common law systems.”) For problems brought by Mainland rapid civil procedure in interregional JRE, *see* Part i and ii of Section B of Chapter III.

in the latter."³⁴¹ *ML v. YJ*, illustrates this.³⁴² In this case, the wife commenced a divorce action in Hong Kong first, but later the husband brought the second divorce action in Mainland China and obtained a favorable judgment earlier than his wife. Then, the husband applied to a Hong Kong court to recognize and enforce the Mainland judgment.

In Chapter III, the comparison of *res judicata* rules in the three regional laws and the two Arrangements demonstrates that the benefit of the rule in the Mainland-Macao Arrangement is to prevent parties from taking advantage of the rapid Mainland civil procedure.³⁴³

Unlike *res judicata* rules in China, the Brussels I Regulation states that the judgment rendered in the requested region always prevails against a sister-region judgment although the former may be late in time.³⁴⁴ This rule has a bias towards F2 judgments.³⁴⁵ Comparatively, the *res judicata* rule in the Mainland-Macao Arrangement adopts a more balanced and objective approach to forum and F2 judgments.

In the US, in case that two or more valid but inconsistent judgments are rendered in different forums between the same parties on the same cause of action, the one rendered last in time will prevail.³⁴⁶ The rationale is that court should not *sua sponte* raise the doctrine of *res judicata*.³⁴⁷ Therefore, if parties in the second action do not relied upon the judgment in the first action, the second judgment should become valid even though it

³⁴¹ The Abidin Daver [1984] AC 398, [1984] 1 All ER 470, House of Lords, per Lord Brandon.

³⁴² HCMC 13/2006. For detailed discussion of this case, see Chapter III.

³⁴³ For detailed comparison of the five *res judicata* rules, see Chapter III.

³⁴⁴ The precondition is that the judgment that is requested to recognize is irreconcilable with a judgment given in a dispute between the same parties in the requested region. Art. 34(3) of the Brussels I Regulation.

³⁴⁵ See BURKHARD HESS, THOMAS PFEIFFER & PETER SCHLOSSER, THE BRUSSELS I REGULATION 44/2001 APPLICATION AND ENFORCEMENT IN THE EU.

³⁴⁶ *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 75-8 (1939). *Andrysek v. Andrysek*, 280 Or. 61, 569 P.2d 615 (1977). Ruth B. Ginsburg, *Judgments In Search of Full Faith and Credit: The Last-In-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798 (1969).

³⁴⁷ RESTATEMENT (SECOND) OF JUDGMENTS, § 15 (1982).

is inconsistent with the first judgment.³⁴⁸ Therefore, the second judgment is generally held conclusive in a third action.³⁴⁹ However, in China, there is no strict rule preventing Mainland courts from *sua sponte* raising the doctrine of *res judicata*. Moreover, Mainland China and Macao adopt the inquisitorial civil-law system, where judges generally play a more active role in actions compared with their counterparts in the American adversarial system. Moreover, Hong Kong courts follow the English precedent *Vervaeke v. Smith and Others*.³⁵⁰ So if a foreign judgment is inconsistent with a Hong Kong early-in-time decision between the same parties or their privies on the same cause of action, the judgment will not be recognized and enforced in Hong Kong.³⁵¹ Obviously, Hong Kong law contradicts with the American *res judicata* rule. Therefore, the American *res judicata* rule will possibly not be well received by judges in Mainland China, Hong Kong, and Macao.

As a conclusion, the proposed Multilateral JRE Arrangement should state that if the requested court had been seized the action before the judgment-rendering court was seized the action, the former's judgment should prevail against the latter, even if the former is late in time.

3. Same Cause of Action

Like the existing Arrangements, the proposed Multilateral JRE Arrangement should also require that the two conflicting judgments should be on the same cause of

³⁴⁸ *Id.*

³⁴⁹ *Id.* However the second judgment may not have *res judicata* effect if “the error consisted of a denial of Full Faith and Credit to the [first] judgment of a sister state and the losing party was denied review in the Supreme Court of the United States.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 114, Comment b (1971).

³⁵⁰ *Vervaeke v. Smith and Others*, [1983] 1 AC 145.

³⁵¹ For details, see Part ii of Section A of Chapter III.

action. If two judgments share the same cause of action, they should have a common legal and factual basis, and a common legal objective.³⁵² Such rule is administrable in practice as long as regional courts make determinations according to whether the ultimate goals of the actions are mutually exclusive.³⁵³ EU law provides rich resources in this regard.³⁵⁴ For example, an action aiming to enforce a contract and an action to annul a contract are of the same cause of action.³⁵⁵ The reason is that the ultimate goals of the two actions are mutually exclusive. Moreover, supposed that a matrimonial link is the precondition of maintenance, one judgment about divorce between parties and the other about maintenance between them are of the same cause of action.³⁵⁶ Because if the first judgment resolves the marriage, the second judgment cannot exist; therefore, they are mutually exclusive.

4. Same Parties

The *res judicata* rules in the proposed Multilateral JRE Arrangement should not have the “same parties” requirement, because this complies with existing laws in Chinese regions. The *res judicata* rules in the two existing Arrangements do not have the “same parties” requirement.³⁵⁷ Macao law states that judgments involving different parties or

³⁵² See *Gantner Electronic GmbH v. Basch Expolitatie Maatschappij BV*, (Case C-111/01) [2003] ECR I-4027, I-4235 paras. 24-32. The Owners of the cargo lately laden on board the ship "Tatry" v. The owners of the ship "Maciej Rataj", (Case C-406/92) [1994] ECR I-5439. *Gubisch Maschinenfabrik KG v. Giulio Palumbo*, (Case 144/86) [1987] ECR 4861. Richard Fentiman, *Chapter II Jurisdiction Section 9 Lis Pendens-Related Actions*, in BRUSSELS I REGULATION, 502-04 (Ulrich Magnus & Peter Mankowski ed. 2007).

³⁵³ See Pocar and Nygh, *supra* note_195_ at 304 (explaining the meaning of "inconsistent judgments" of Art. 28 (b) of the Hague 1999 Draft as "mutually exclusive").

³⁵⁴ See *The Owners of the Cargo Lately Laden on Board the Ship "Tatry" v. The Owners of the Ship "Maciej Rataj"*, (Case C-409/92) [1994] ECR I-5439, I-5475 para. 41. See also *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, (Case 145/86) [1998] ECR 645 para. 22.

³⁵⁵ Fentiman, *supra* note_352_ at 502.

³⁵⁶ The facts are based on *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, (Case 145/86) [1998] ECR 645.

³⁵⁷ For details, see Section B of Chapter III.

different cause of action may be regarded inconsistent as long as they are irreconcilable.³⁵⁸ The *res judicata* rule in Article 306 of the Opinions on Application of the Mainland CPL does not explicitly require that conflicting judgments should be between the same parties.³⁵⁹ Although the Hong Kong FJREO and common law have the "same parties" requirement, courts generally do not interpret the "same parties" as "identical parties."³⁶⁰ Moreover, the *res judicata* rule in the Mainland Judgments (Reciprocal Enforcement) Ordinance does not explicitly impose a "same parties" requirement.³⁶¹ Therefore, mutually exclusive judgments between different parties should be subject to the *res judicata* rules in the proposed Arrangement.

Loosening the "same parties" requirement is also the solution adopted by the US law. Mutuality of parties is not required when collateral estoppel is used defensively in the US. The leading case is *Bernhard v. Bank of America*, where the court held that it was proper for a new party (the defendant in the second suit) to invoke the findings of a previous suit to bar action by a party of that suit, as long as that party had a full and fair opportunity to litigate the issue in the first suit.³⁶² Whether non-mutuality of parties can be permitted in offensive collateral estoppel is determined on a case-by-case basis.³⁶³ This permission should not be given when a new party (the plaintiff in the second suit) could easily have joined in the first suit or when granting this permission would be unfair to a defendant.³⁶⁴ Relaxing the "same parties" requirement also can be found in the EU JRE law. Although the *res judicata* rules in Article 34.3 and 34.4 of the Brussels I

³⁵⁸ *Id.*

³⁵⁹ For discussion of this Article, see Part i of Section A, Part i and Part ii of Section B of Chapter III.

³⁶⁰ Johnston, *supra* note_25_ at 556. For details, see Chapter III.

³⁶¹ Mainland Judgments (Reciprocal Enforcement) Ordinance, para 18 (1)(h) and (i) provide that "a judgment on the same cause of action *between the parties to the judgment* has been given by a court in Hong Kong..." (emphasis added)

³⁶² *Bernhard v. Bank of America*, 19 Cal.2d 807, 122 P.2d 892 (1942).

³⁶³ *Parklane Hosiery Co v. Shore*, 439 U.S. 322 (1979).

³⁶⁴ *Parklane Hosiery*, 439 U.S. 322 (1979), *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971).

Regulation require the two conflicting judgments shall between the same parties,³⁶⁵ the "same parties" requirement includes all parties, although maybe different, and sharing common legal interests.³⁶⁶ Moreover, the 1999 Hague Draft does not have the requirement of same parties.³⁶⁷ A commentary explains that³⁶⁸

[i]nconsistent judgments...can result from causes of action in respect of subject matters which are different and may even arise when the parties are different as when one judgment condemns a guarantor to pay for a debt that as between the creditor and principal debtor has been annulled in another judgment.

In addition, Article 9.f of the Hague Choice of Court Convention requires that the two conflicting judgments shall between the same parties.³⁶⁹ But the Convention does not give a strict interpretation of the "same parties"; instead, it leaves the interpretation to the law of the requested region.³⁷⁰

5. Conclusion

The *res judicata* rules in the proposed Multilateral JRE Arrangement should include two instances. First, JRE shall be refused if the requested court has already

³⁶⁵ Fentiman, *supra* note_352_ at 501.

³⁶⁶ *Id.* at 501. Drouot Assurances SA v. Consolidated Metallurgical Industries, (Case C-351-96) [1998] ECR I-3075, I-3097 para. 19 (the ECJ ruled that if an insurer subrogates the insured and sued in the latter's name, the "insurer and insured must be considered to be one and the same party).

³⁶⁷ Art. 28.1(b) of the 1999 Hague Draft.

³⁶⁸ Pocar and Nygh, *supra* note_195_ at 304.

³⁶⁹ For the EU law, *see* Fentiman, *supra* note_352_ at 501. For US law, *see* RESTATEMENT SECOND OF CONFLICTS § 114 (1971), comment a. For the Hague Choice of Court Convention, *see* Brand and Herrup, *supra* note_119_ at 120.

³⁷⁰ For the US law, *see* Kevin M. Clermont, *Jurisdiction Salvation and the Hague Treaty*, 85 CORNELL LAW REVIEW 89, 98 (1999).; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 94 (1971) (stating that " What persons are bound by a valid judgment is determined, subject to Constitutional limitations, by the local law of the State where the judgment was rendered."); *Hansberry v. Lee*, 311 U.S. 32 (1940); and *Riley v. New York Trust Co.*, 315 U.S. 343 (1941). For the EU law, *see* Fentiman, *supra* note_352_ at 501. For the Hague Choice of Court Convention, *see* Brand and Herrup, *supra* note_119_ at 120.

recognized or enforced a judgment on the same cause of action rendered by a court in a third region. Second, JRE shall be refused, if a requested court, which has jurisdiction over the same cause of action, had been seized before the judgment-rendering court was seized.

iv. Fraud

1. Autonomous Terminology

Fraud is a ground for refusing JRE in Hong Kong law³⁷¹ and the Mainland-Hong Kong Arrangement.³⁷² Macao courts also use fraud to refuse JRE if it is associated with jurisdiction or critical new evidence, and courts may regard recognition and enforcement of a judgment tainted by fraud violates Macao public policy.³⁷³ However, fraud is not a defence to JRE in the Mainland-Macao Arrangement, although it may be implicitly covered by the public policy exception.³⁷⁴ Moreover, before the Mainland-Hong Kong Arrangement was concluded, fraud had never existed as a ground in Mainland JRE law. But the Arrangement does not define fraud.³⁷⁵ Regretfully, the Mainland 2008 implementing legislation of the Arrangement does not define the meaning of “fraud”, either.³⁷⁶ Therefore, potentially, the different meanings of fraud may create controversies in interregional JRE. Harmonization of these differences will be achieved if the proposed Multilateral JRE Arrangement provides an autonomous terminology of fraud.

³⁷¹ For details, see Grounds for Refusing JRE of Part ii of Section A of Chapter III.

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ *Id.*

Similar to Hong Kong law, fraud is a defence against JRE in US law³⁷⁷ and the Hague Choice of Court Convention.³⁷⁸ However, like Mainland China and Macao, in EU JRE law, fraud is part of public policy exception.³⁷⁹ In the proposed Multilateral JRE Arrangement, fraud should have an independent heading. The first reason is to encourage Hong Kong to participate in the Arrangement because Hong Kong JRE law traditionally gives fraud an independent heading.³⁸⁰ The second reason is that it is improper to include fraud into the public policy exception. The reason is that in the JRE settings, fraud and the public policy exception are of different natures. Fraud focuses on the fraudulent acts of the parties or the judgment-rendering courts; in contrast, the public policy exception concentrates on the results of JRE in the requested region.³⁸¹ A good example for their different natures is that, in some legal systems, a party who conducts fraudulently may be punished, but there is no punishment for violating public policies.³⁸²

In the proposed Arrangement, fraud should be restricted to procedural issues, which includes jurisdiction. This aims to keep the requested court from reopening the merits of a sister-region judgment. Fraud involving procedural issues is so-called extrinsic fraud. The concept of extrinsic fraud, as opposed to intrinsic fraud, is drawn from the US JRE law. In the US, a judgment tainted by fraud is not entitled to Full Faith and Credit recognition and enforcement in a requested state,³⁸³ when the same defence is available

³⁷⁷ *Eg.* Big Tex Trailer Mfg., Inc. v. Duff Motor Co., Inc., 275 S.W.3d 384 (Mo. Ct. App. W.D. 2009).

³⁷⁸ Art. 9 (d) of the Hague Choice of Court Convention. Fraud is also a ground to deny JRE in the UK law, *see* Gerhard Walter & Samuel P. Baumgartner, *Recognition and Enforcement of Foreign Judgments Outside the Scope of the Brussels and Lugano Conventions*, in CIVIL PROCEDURE IN EUROPE: RECOGNITION & ENFORCEMENT, 31 (Gerhard Walter & Samuel P. Baumgartner ed. 2000).

³⁷⁹ Schlosser Report para. 192. Wautelet, *supra* note_149_ at 628. For the use of fraud to deny JRE outside of the Brussels regime in Europe, *see* Walter and Baumgartner, *supra* note_378_ at 31.

³⁸⁰ For details of fraud in Hong Kong regional JRE law, *see* Grounds for Refusing JRE of Part ii of Section A of Chapter III.

³⁸¹ Jin Huang & Huacheng Guo, *Macao Guo Ji Si Fa Zhong De Qi Zha [Fraud in Macao Private International Law]*, 109 FA XUE YAN JIU 125, 127.

³⁸² *Id.*

³⁸³ *Wheeler v. Winters*, 134 S.W.3d 774 (Mo. Ct. App. W.D. 2004). *L & L Wholesale, Inc. v. Gibbens*, 108 S.W.3d 74

against a domestic judgment in the judgment-rendering state.³⁸⁴ But the defence is limited to extrinsic fraud.³⁸⁵

Extrinsic fraud is in connection with judgment-rendering court's jurisdiction³⁸⁶ or a matter of procedure that deprived the losing party of adequate opportunity to present his or her case to the court.³⁸⁷ Examples of extrinsic fraud include cases in which the plaintiff lured the defendant into the jurisdiction of the judgment-rendering court by false representations,³⁸⁸ the plaintiff obtained a default judgment by "a false affidavit that the defendant had been duly served with the initiating process,"³⁸⁹ or the judgment creditor won the action by bribing judges or kidnapping of witnesses.³⁹⁰ In contrast, intrinsic fraud refers to circumstances where "a witness in the foreign proceedings gave false testimony or [] a forged document was introduced in the foreign proceeding."³⁹¹

Generally, in the US, the intrinsic fraud is not a defence against JRE in a requested

(Mo. Ct. App. S.D. 2003). There are cases law that held sister-state judgments were not impeachable for fraud. *Mills v Duryee* (1913, US) 7 Cranch 481, 3 L ed 411; *Hampton v M'Connel* (1818, US) 3 Wheat 234, 4 L ed 378; *Christmas v Russell* (1866, US) 5 Wall 290, 18 L ed 475. Notably, these cases decide only that fraud in the procurement of a judgment is no defense at law in the sister-state enforcement proceedings; the holdings do not forbid a judgment debtor to defend the enforcement of a sister-state judgment by bringing an action in equity on the ground of fraud in its procurement.

³⁸⁴ *Baker v. Erbert*, 199 Kan. 59, 427 P.2d 461 (1967) (citing annotation). *Blume Law Firm PC v. Pierce*, 741 N.W.2d 921 (Minn. Ct. App. 2007).

³⁸⁵ For leading cases regarding fraud in the US JRE law, see *United States v. Throckmorton*, 98 U.S. 61 and *Allegheny Corporation v. Kirby*, 218 F. Supp. 164 (S.D.N.Y. 1963).

³⁸⁶ See *Comment, Direct and Collateral Attack on Judgments*, 66 YALE L.J. 526 (1957).

³⁸⁷ See Section 4(B)(2) of the US Uniform Foreign Money-Judgments Recognition Act. See also § 5(v) of the Foreign Judgments Recognition and Enforcement Act, proposed by the American Law Institute in 2005. "Fraud is regarded as extrinsic or collateral where it prevents a party from having a trial or from presenting his cause of action or his defense, or induces him to withdraw a defense, or operates upon matters pertaining not to the judgment itself, but to the manner in which it was procured." *Chisholm v. House*, 160 F.2d 632, at P.643 (10th Cir. 1947).

³⁸⁸ See *Tootle v. McClellan*, 7 Ind. T. 64, 103 S.W.766 (1907). False representation made by the winning party to the losing party includes false promises of compromise made by the former to the latter or promise that the latter is a nominal party against whom no relief is sought.

³⁸⁹ THE AMERICAN LAW INSTITUTE, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE 62 (2006).

³⁹⁰ See *Vestal, A Study in Perfidy*, 35 IND. L.J. 18 (1959).

³⁹¹ The American Law Institute, *supra* note 389, at 62. The fraud is regarded as intrinsic where "the judgment was founded on a fraudulent instrument or perjured evidence, or the fraudulent acts pertained to an issue involved in the original action and litigated therein." *Chisholm v. House*, 160 F.2d 632, at P.643 (10th Cir. 1947). *Auerbach v. Samuels*, 10 Utah 2d 152, 155, 349 P.2d 1112, 1114 (1960).

court,³⁹² because the judgment debtor is supposed to raise this defence in the judgment-rendering court³⁹³ and because allowing the requested court to consider intrinsic fraud may potentially lead to reopen the merits of the case.³⁹⁴

The distinction between intrinsic and extrinsic fraud³⁹⁵ has been criticized as being fuzzy,³⁹⁶ particularly when the intrinsic fraud tainted a fair trial of the case.³⁹⁷ However, this distinction has been endorsed by international law, such as the 1999 Hague Draft³⁹⁸ and the 2005 Hague Choice of Court Convention.³⁹⁹ These two conventions state that the requested court may deny recognition and enforcement if the judgment was obtained by fraud in connection with a matter of procedure.⁴⁰⁰ This can be interpreted as extrinsic fraud.⁴⁰¹ The benefit of this distinction is to prevent the requested court from reviewing the merits of the judgment, which is explicitly forbidden by Article 8(2) of the Hague

³⁹² *Dixie Cash Register Co., Inc. v. S.D. Leasing, Inc.*, 172 Ga. App. 424, 323 S.E.2d 284 (1984) (holding that the trial court properly refused to allow the defendant to maintain collateral attack on a sister-state judgment on ground that it was procured by fraud, because the alleged fraud was of intrinsic nature involving contract rights underlying the judgment.)

³⁹³ The American Law Institute, *supra* note_389_ at 62 and 73. *See Fidelity Standard Life Ins. Co. v. First Nat. Bank & Trust Co. of Vidalia*, 382 F. Supp. 956 (S.D. Ga. 1974), judgment aff'd, 510 F.2d 272 (5th Cir. 1975) (holding that the claim of fraud regarding the underlying loan obligations on which a sister-state judgment was based was intrinsic fraud, so should be brought in the judgment-rendering court).

³⁹⁴ *See Allegheny Corporation v. Kirby*, 218 F. Supp. 164, 183 (S.D.N.Y. 1963) (indicating that the distinction between extrinsic and intrinsic fraud aims to reconcile justice to the parties and a finality of litigation).

³⁹⁵ *See In re Estate of O'Keefe*, 833 So. 2d 157 (Fla. Dist. Ct. App. 2d Dist. 2002). *Fahrenbruch v. People ex rel. Taber*, 169 Colo. 70, 453 P.2d 601 (1969) (citing annotation).

³⁹⁶ *See Howard v. Scott*, 225 Mo.685, 125 S.W.1258 (1910). In this case, a party obtained a partition judgment by a combination of extrinsic and intrinsic fraud. His fraudulent acts included hiding transaction details from the other party, false swearing in a bankruptcy proceeding, and suing the other party without actual notice. The appeal court indicated that "[t]hat case illustrates the honorable sensitiveness of courts to frauds on their jurisdiction, and shows how shadowy, uncertain and somewhat arbitrary is the line between fraud in the procuring of the judgment as distinguished from fraud in the cause of action itself." 225 Mo. 685, 714. The court held that because the party who committed fraudulent acts basically made courts an "instrument of injustice," it was unnecessary to distinguish extrinsic and intrinsic fraud and the partition judgment should be reversed. 225 Mo. 685, 714-75. For Canadian cases, *see Beals v. Saldanha*, [2003] 3 S.C.R. 416 paras 43-51 (Can.).

³⁹⁷ *See Reese, The Status in this Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783 (1950).

³⁹⁸ Art. 28.1(e) of the 1999 Hague Draft. *Pocar and Nygh, supra* note_195_ at 308-09.

³⁹⁹ Article 9 (d) of the 2005 Hague Choice of Court Convention. Masato Dogauchi & Trevor C. Hartley, PRELIMINARY DRAFT CONVENTION ON EXCLUSIVE CHOICE OF COURT AGREEMENTS: EXPLANATORY REPORT, para 42 (2004), Prel. Doc. No. 26 of December 2004, http://www.hcch.net/index_en.php?act=publications.details&pid=3512&dtid=35.

⁴⁰⁰ *Pocar and Nygh, supra* note_195_ at 308. The Nygh/Pocar Report divided fraud into "extraneous fraud" and "intrinsic fraud." The former refers to "a fraud which the complaining party only discovered after the original trial." The latter implies "any credible allegation of a fraud committed by the other party even if the complaining party was aware of it and raised it at the original trial." *Id.*, at 309.

⁴⁰¹ *Brand and Herrup, supra* note_119_ at 116. However, it seems that the examples of fraud provided by the Draft Report may include intrinsic fraud: the plaintiff forged the defendant's signature on a false choice of court agreement and either party conceals evidence. *Dogauchi & Hartley, supra* note 399 at paras 141 and 142.

Choice of Court Convention.⁴⁰² Therefore, arguably, the proposed Multilateral JRE Arrangement should follow this trend and limit the defence of JRE to procedure issues.

Moreover, the procedural issues should not include a general argument regarding the organic deficiency of the Mainland judicial system. The reason is that the general structure of Mainland courts has nothing to do with fraud, and that fraud needs to be proven to exist in the particular case.⁴⁰³ For example, Hong Kong law generally requires that a judgment debtor must “particularize the fraud with precision”⁴⁰⁴ by using plausible evidence to establish a *prima facie*, arguable, or credible case.⁴⁰⁵ This rule should be applied to Mainland judgments.

As a conclusion, arguably, fraud in the proposed Arrangement should be an autonomous terminology: it should be restricted to procedural issues. Namely, JRE cannot be refused because the judgment is based on fraudulent evidence. The underlying policy is to avoid a requested court from opening the merits of a sister-region judgment and to protect its finality.

2. Review of Fraud in F2

Some authorities in Hong Kong suggest that the defence of fraud may be raised in Hong Kong even though this defence was pleaded and rejected by the judgment-

⁴⁰² *Id.* at 116-17.

⁴⁰³ *Id.*

⁴⁰⁴ WFM Motors Pty Ltd v Malcolm Maydwell (unrep, C.A.C.V. 148 of 1995), Court of Appeal, per Ching JA ([1996] 2 H.K.L.R. 236 Court of Appeal) (This case suggests that Hong Kong courts may not support a general argument that Mainland courts are corrupt so fraud cannot be properly established or litigated there). The same approach is adopted by the US court, eg., Eastman Kodak Co. v. Kavlin (S.D.Fla.1997) 978 F.Supp. 1078, the court dealt with the question whether corruption in Bolivian courts precluded application of *forum non conveniens* to allow trial of the matter in Bolivia. The court noted that generalized allegations of corruption “do[] not enjoy a particularly impressive track record.” (*Id.* at 1084.)

⁴⁰⁵ Syal v Heyward [1948] 2 KB 443; Owens Bank Ltd v Etoile Commerciale SA [1995] 1 WLR 44, Privy Council; Ever Chance Development Ltd v Ching Kai Chiu (unrep, C.A.C.V. 8 of 1997).

rendering court.⁴⁰⁶ However, *Wang Hsiao Yu v Wu Cho Ching* demonstrates that litigation of fraud should be restricted by the doctrine of abuse of process.⁴⁰⁷ In this case, the court held that Hong Kong courts should not impeach a sister-region judgment on the ground of fraud when the allegation of fraud had been examined extensively and thoroughly in the judgment-rendering court in Taiwan. This holding should be applied to Mainland judgments when the allegation of fraud has been tried by the Mainland procedure for trial supervision.⁴⁰⁸ As a return, Mainland China should not deny JRE because of fraud if the allegation has been fully litigated in the judgment-rendering court in Hong Kong.

The doctrine that, judgment-rendering court's determination of fraud should have preclusive effects in the requested court is also adopted by US and EU JRE laws. In the US, if fraud has been expressly litigated in the F1, F1's determination of fraud becomes *res judicata* and is entitled to Full Faith and Credit recognition and enforcement.⁴⁰⁹ A requested court will be precluded from considering the same defence of fraud, either intrinsic or extrinsic, when this issue has been fully litigated in the judgment-rendering court,⁴¹⁰ even if the judgment-rendering court made an erroneous decision.⁴¹¹ Similar to

⁴⁰⁶ Philip Smart, *Enforcement of Foreign Judgments*, in ENFORCING JUDGMENTS IN HONG KONG 255, 270 (Christine N Booth ed. 2004). See *WFM Motors Pty Ltd v. Maydwell* [1996] 1 HKC 444 (HKCA), appeal dismissed, [1997] HKLRD 739 (PC), cf. *Hong Pian Tee v. Les Placement Germain Gauthier Inc.*, [2000] 2 SLR 81 (Singapore, CA) and *Beals v. Saldanha*, (2003) 234 DLR (4th) 1.

⁴⁰⁷ *Wang Hsiao Yu v Wu Cho Ching*, HCA 1690/1997 (holding that it was an abuse of process to allow a defendant to re-litigate the issue of fraud in Hong Kong after his allegations had been examined extensively and thoroughly and determined against him by a judgment-rendering court in Taiwan after 6 rounds of appeal. The *Wang Hsiao Yu* court reconciled its decision with *WFM Motors Pty Ltd* by indicating that the latter court did not consider the issue of abuse of process.)

⁴⁰⁸ For information of Mainland procedure for trial supervision, see Part ii of Section B of Chapter IV.

⁴⁰⁹ *Ex parte Aufill*, 268 Ala. 43, 104 So. 2d 897 (1958) (holding that in the enforcement proceedings in F2, fraud pleaded must present some issue that was not litigated and that parties did not have an opportunity to litigate in the judgment-rendering court).

⁴¹⁰ *Superior Distributing Corp. v. White*, 146 Colo. 595, 362 P.2d 196 (1961) (in this case, the jurisdictional facts alleged as fraud have been heard and decided by the judgment-rendering court, so the same defense was not available in the requested court.)

⁴¹¹ See *Sherrer v. Sherrer*, 334 U.S. 343, 68 S.Ct. 1087, 92 L.Ed. 1429 (1948). *Treinius v. Sunshine Mining Co.*, 308 U.S. 66, 60 S.Ct. 44, 84 L.Ed. 85 (193).

the US JRE law, in the EU law, if the allegation of fraud has been fully decided in the judgment-rendering court, generally the same allegation could not be accepted as a ground for refusing JRE in a requested court.⁴¹² The Chinese regions should adopt the same approach because the finality of a judgment should not be easily questioned. Therefore, the proposed Multilateral JRE Arrangement should state that, if fraud has been fully tried in F1, F2 should refrain from considering this issue in the JRE proceeding and should suggest the losing party to appeal in F1. However, when no reasonable opportunity (such as a wholesale of judicial corruption in the judgment-rendering region) exists for a judgment debtor to challenge the ground of fraud in the judgment-rendering region, he or she should be allowed to allege this defence in the JRE proceedings.

The related issue is whether a requested court can review a sister-region judgment in substance when the judgment debtor has not alleged fraud in the judgment-rendering court. The answer should be negative. In the US, the party, who alleges a judgment is tainted by fraud, should utilize the review procedures available in the judgment-rendering state, not collateral attack in the requested court.⁴¹³ Moreover, the Queen's Bench in the UK faced a similar issue in a JRE proceeding where the judgment debtor alleged that the creditor achieved this judgment by fraudulent acts in the judgment-rendering court in France.⁴¹⁴ The Court carefully distinguished judgments rendered in an EU member state from those outside of the EU.⁴¹⁵ It held that if a judgment debtor alleges that a judgment rendered in an EU member state is tainted by fraud, the English Court should first consider whether a remedy lies in the judgment-rendering state, and if so the Court

⁴¹² Francq, *supra* note_161_ at 573. For UK cases, *see* Interdesco S.A. v. Nullfire Ltd [1992] 1 Lloyd's Rep. 180.

⁴¹³ Sherrer v. Sherrer, 334 U.S. 343 (1948). RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 106, comment (a). Scoles et al., *supra* note_332_ at 1287-89.

⁴¹⁴ Interdesco S.A. v Nullifire Ltd, [1992] 1 Lloyd's Rep. 180.

⁴¹⁵ *Id*, 186-87.

should leave the debtor to pursue his or her remedy in that state.⁴¹⁶ In any case, the Court should not review the judgment in substance.⁴¹⁷ Both US and EU laws provide a valuable lesson for China: the requested courts should avoid reviewing the substance of a sister-region judgment. If the debtor has not litigated the allegation of fraud in the judgment-rendering region, the requested court should suggest the debtor to challenge the judgment under the appellate procedure or the retrial procedure in that region.

As a conclusion, if a judgment debtor litigated fraud and lost in F1, the proper response for F2 is to suggest the debtor to appeal in F1. If the debtor failed to litigate fraud in F1, although he or she may be barred from making the argument on the appeal or review proceedings in F1, he or she should not be able to litigate fraud in the JRE proceedings in F2 either.

v. Public Policy Exception

1. Necessity of Preserving a Public Policy Exception

Whether a public policy exception should be allowed in interregional JRE is a controversial issue in China. Some scholars, including Professor Jisheng Ren who is the former President of the Lawyer's Association of China, argue that a public policy exception should not be allowed because this doctrine is related to the sovereignty of a state.⁴¹⁸ According to Ren, since Hong Kong, Macao, and Mainland China are under one sovereign, a public policy exception should not be applied between them.⁴¹⁹ However,

⁴¹⁶ *Id.*, at 188.

⁴¹⁷ *Id.*, a 187.

⁴¹⁸ Jisheng Ren, *Guo Nei Bu Tong Fa Yu Zi Jian De Si Fa Xie Zhu [Judicial Assistance of Different Legal Regions]*, 4 FA XUE JIA [JURISTS' REVIEW] 63 (1995).

⁴¹⁹ *Id.*

other scholars disagree.⁴²⁰ Mainland Professor Depei Han⁴²¹ and Jin Huang,⁴²² as well as Hong Kong Professor Xianchu Zhang,⁴²³ all believe that a public policy exception should be allowed in interregional conflict of laws in China because great disparities exist between regional political and economic systems. Some other scholars argue that the public policy exception should be allowed in interregional JRE because the regions are equal in terms of conflict of laws; therefore, each region should be allowed to make necessary reservations to protect its own legal orders.⁴²⁴

The same controversy exists between the US and the EU JRE laws: the former forbids public policy exception in interregional JRE, but the latter permits it.

In the US, the public policy exception can never constitute a defense to interregional full-faith-and-credit JRE.⁴²⁵ For example, *Fauntleroy v. Lum* demonstrates that, the public policy exception cannot be used to deny the recognition and enforcement of a judgment rendered by a sister-region court of competent jurisdiction,

⁴²⁰ Those scholars include law professors from Mainland China or Hong Kong, officials from the Judicial Assistance Department of the Ministry of Justice and judges from the Higher People's Courts of Guangdong and Hainan. Chuxian Zhang, *The Extraterritorial Service of Judicial Documents from Hong Kong*, 28 HONG KONG L. J. 356, 371 (1998). See Xianchu Zhang, *The Agreement between Mainland China and the Hong Kong SAR on Mutual Enforcement of Arbitral Awards: Problems and Prospects*, 29 HONG KONG L.J. 463, 478 (1999) (pointing out the maintenance of public policy exception in recognizing and enforcing arbitral award between Mainland China and Hong Kong results from the difference between capitalist system in Hong Kong and the socialist ideology and institutions in Mainland China). See Huang Feng, *Shi Lun Zhong Guo Wei Lai De Qu Ji Si Fa Xie Zhu [One Future Regional Judicial Assistance within China]*, 4 FA XUE JIA [JURISTS' REVIEW] 76 (1995). See also Ling Qiman & Wang Xiaoming, *Zhong Guo Da Lu Yu Xiang Gang Min Shang Shi Fa Lv Chong Tu Yan Jiu [A Study of Conflict of Laws between the Mainland and Hong Kong on Civil and Commercial Matters]*, 7-8 KAI FANG SHI DAI [OPEN TIMES] 92 (1997).

⁴²¹ HAN DEPEI (ED), *ZHONG GUO CHONG TU FA YAN JIU [STUDIES OF CHINESE CONFLICT OF LAWS]* 422 (Wuhan: Wuhan University Press, 1993).

⁴²² Jin Huang & Andrew Xuefeng Qian, "One Country, Two Systems," *Three Law Families, and Four Legal Regions: The Emerging Inter-regional Conflicts of Law in China*, 5 DUKE J. COMP. & INT'L L. 289, 319 (1994).

⁴²³ Zhang, *supra* note 420 at 372-73.

⁴²⁴ Renshan Liu & Meirong Zhang, *Pi Xi Zhong Guo Qu Ji Min Shang Shi Pan Jue Xiang Fu Cheng Ren Yu Zhi Xing Wen Ti de Li Fa Yu Si Fa Xian Zhuang [Analysis of Current Legislation and Judicial Practice of Chinese Inter-regional Recognition and Enforcement of Judgments in Civil and Commercial Matters]*, a paper presented in 2008 Annual Chinese Association of Private International Law in Beijing.

⁴²⁵ See *Baker v. GM*, 522 U.S. 222, 233 (1998). *Estin v. Estin*, 334 U.S. 541, 546. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 438, 88 L. Ed. 149, 64 S. Ct. 208 (1943) (the Supreme Court is "aware of [no] considerations of local policy or law which could rightly be deemed to impair the force and effect which the Full Faith and Credit Clause and the Act of Congress require to be given to [a money] judgment outside the state of its rendition.") Differently, a forum can determine the applicable law by the consideration of public policy. See *Nevada v. Hall*, 440 U.S. 410, 421-424, 59 L. Ed. 2d 416, 99 S. Ct. 1182 (1979).

notwithstanding any errors of law in the judgment or the fact that the underlying cause of action is prohibited in the second region.⁴²⁶ The prohibition of a public policy exception in the US interregional JRE does not contradict with Section 103 of the Second Restatement, which provides that a judgment “is not required by the national policy of Full Faith and Credit because it would involve an improper interference with important interests of the sister state.”⁴²⁷ Section 103 implies that, although the Full Faith and Credit Clause may be limited when “the most unusual and extraordinary [] circumstances” occur, these circumstances are not considered as public policy exception.⁴²⁸ As a conclusion, the public policy exception is not allowed in the US interregional JRE laws.

Unlike the US, the EU JRE law allows a member region to use public policy exception to refuse recognition and enforcement of judgments. Article 34(1) of the Brussels I Regulation states that, JRE shall be refused, if the effects of JRE are manifestly contrary to the basic, essential norms and values of the requested region.⁴²⁹ The law of the requested region shall define the contents of its public policy.⁴³⁰ The ECJ, however,

⁴²⁶ *Fauntleroy v. Lum*, 210 U.S. 230, 233 (1908).

⁴²⁷ See A.A. EHRENZWEIG & D.W. LOUISELL, JURISDICTION IN A NUTSHELL 138 (3d ed. 1973). Reynolds, *The Iron Law of Full Faith and Credit*, 53 MARYLAND L. REV. 412, 436-49 (1994).

⁴²⁸ Scales, *supra* note 332 at 1292-93. See *Yarborough v. Yarborough*, 290 U.S. 202, 220 and 227 (1933) (the dissenting Justice Stone held that South Carolina had a peculiar interest and concern in the maintenance and support of children domiciled there. According to him, the majority’s decision improperly extended the operation of the Full Faith and Credit Clause and “ma[d]e it an instrument for encroachment by Georgia upon the domestic concerns of South Carolina.”). Later cases echoed Justice Stone’s dissent and sought to limit the scope of the Full Faith and Credit Clause when F2 has a compelling interest that appears after F1 renders a judgment. For example, in *Elkind v. Byck*, the court held that the *Yarborough* decision would not control where the father had moved out of F1 and changed his domicile after F1 rendered its decree. See *Elkind v. Byck*, 68 Cal.2d 453, 67 Cal. Rptr. 404, 439 P.2d 316 (1968).

⁴²⁹ Peter Hay, *The Development of the Public Policy Barrier to Judgment Recognition Within the European Community*, THE EUROPEAN LEGAL FORUM 289, 291 (2007). Regarding public policy exception under the Brussels Convention, see Xandra E. Kramer, *Enforcement under the Brussels Convention: Procedural Public Policy and the Influence of Article 6 ECHR*, http://publishing.eur.nl/ir/repub/asset/10824/2003_Int-1_Lis_Annotation_Maronier-Kramer.pdf (last visited Apr 30, 2010) (indicating “The Brussels Convention did not contain the phrase ‘manifestly’, but it has always been clear from the explanatory Jenard-report, the case law of the Court of Justice and literature, that the public policy exception has to be applied restrictively.”)

⁴³⁰ *Franco*, *supra* note 161 at 565. Notably “European public policy” exists and is defined by the ECJ, which is a concept going beyond the traditional national meaning of public policy. *Renault SA V. Maxicar SpA and Orazio Formento*, (Case 38/98) [2000] ECR I-2973 para. 32.

can set limits to this definition⁴³¹ and the EU public policy constitutes part of the public policy of its members.⁴³² Similar to the interregional JRE in the US, the requested court in the EU cannot invoke the public policy exception to refuse recognition of a sister-region judgment on the mere ground that the judgment-rendering court wrongly applied national or Community law.⁴³³

The public policy exception should be maintained in interregional JRE in China. China's situation is different from the US. The function of the Full Faith and Credit Clause in the US Constitution is to unite independent states;⁴³⁴ however, the policy of "One country, Two Systems" in China aims to preserve the interests and autonomy of each region.⁴³⁵ Notably, in the EU, although the convergence of European values urges that the public policy exception should be abandoned in interregional JRE, a strong argument against this suggestion states⁴³⁶

non-use or non-applicability [of the public policy exception] (as also in the United States) does not necessarily require abandonment... Infringements of sovereign functions of the recognizing state remain thinkable and a few borderline areas remain, in which there are still strongly held differences among member states... Moreover, the convergence of national values and the emergence of commonly held European values... must also be seen in the context of a larger and growing Community. To have the public policy defense on the books, assuming its continued narrow interpretation by national courts, thus continues to seem useful.

Considering the divergence among the regional legal and political systems in China,

⁴³¹ Dieter Krombach v. André Bamberski, (Case C-7/98) [2000] ECR I-1935.

⁴³² *Renault*, (Case 38/98). *Eco Swiss China Time Ltd. v. Benetton International NV*, (Case 126/97) ECR [1999] I-3055.

⁴³³ *Régie*, 11 May 2000, Case C-38/98.

⁴³⁴ *Baker v. GM*, 522 U.S. 222, 234 (1998).

⁴³⁵ See Huang and Qian, *supra* note_430_ at 319-20.

⁴³⁶ Hay, *supra* note_430_ at 294.

arguably, the public policy exception should be maintained in interregional JRE.⁴³⁷ This can help assure Hong Kong and Macao that their fundamental interests are protected, so they would be willing to participate in a broad-scope JRE arrangement. Nevertheless, the use of public policy exception should be strictly restrained.⁴³⁸ Only when the effects of JRE, rather than the law on which the judgment is based, will manifestly infringe the fundamental interests of a region, a requested court can deny JRE.⁴³⁹ Manipulation of this defense will create uncertainties and instabilities regarding whether a right created in one region can be recognized in the others.⁴⁴⁰ In the long run, it will jeopardize the mutual trust between the regions and consequently harm the policy of “One country, Two Systems”.⁴⁴¹

2. Substantive and Procedural Public Policy Exception

The proposed JRE Arrangement recognizes both substantive and procedural public policy exception. Both should be invoked only in exceptional situations. As for the former, a requested court should be allowed to refuse JRE when the result of JRE is manifestly against the public policies of the requested region. Only when JRE will

⁴³⁷ Nansheng Sun, *Lun Yiguo Lianzhi Xia Quji Shifa Zhong de Gonggong Zhixu Baoliu* [An Analysis of Public Policy Exception in Interregional Conflict of Laws under the Policy of "One Country, Two Systems"], 41 HUADONG ZHENGFA XUEYUAN XUEBAO [JOURNAL OF EAST CHINA POLITICAL AND LAW INSTITUTE] 73, 83 (2005).

⁴³⁸ Pocar and Nygh, *supra* note_195_ at 309.

⁴³⁹ *Id.* at 309.

⁴⁴⁰ See Liu & Zhang, *supra* note 425. See also Weidong Chen, *Qu Ji Fa Yuan Pan Jue Chen Ren Yu Zhi Xing Tiao Jian Zhi Bi Jiao* [A Comparative study of the Conditions of Inter-regional Judgment Recognition and Enforcement], ZHONGGUO GUOJI SIFA YU BIJIAOFA NIANKAN [ANNUAL JOURNAL OF CHINA PRIVATE INTERNATIONAL LAW AND COMPARATIVE LAW] 353 (1999).

⁴⁴¹ See Huang & Qian, *supra* note 422 at 321. See also Xianyu Yu, *Zheng Qu Jie Jue Taiwan Yu Nei Di Ji Gang Ao De Fa Lv Chong Tu Wen Ti* [Correct Solve the Legal Conflicts Between Taiwan and Mainland China as well as Hong Kong and Macao], ZHONGGUO GUOJI SIFA YU BIJIAOFA NIANKAN [ANNUAL JOURNAL OF CHINA PRIVATE INTERNATIONAL LAW AND COMPARATIVE LAW] 263 (1999).

infringe the fundamental interests and values of the requested region, the requested court can invoke the public policy exception for refusal.⁴⁴²

Regarding procedural deficiencies of judgment-rendering courts, the ground of unfair procedure in the proposed Multilateral JRE Arrangement only lists three circumstances: according to the law the judgment-rendering region, the losing party was not duly summoned or was summoned but not given a reasonable time to defend a case, or was not properly represented by a guardian if lacking litigation capacity.⁴⁴³ The remaining procedural deficiencies, such as jurisdiction fraud and judicial corruption, fall under fraud. However, it is possible that even if the judgment-rendering proceedings comply with the law of the judgment-rendering region and no fraud is involved, the proceedings still do not meet the basic elements of a fair trial of the requested region. Therefore, the procedure contents of the public policy exception should be acknowledged in the proposed Arrangement.

Application of the public policy exception to procedural deficiencies beyond the ambit of the unfair procedure ground is endorsed by the EU JRE law. In the Brussels I Regulation, Article 34(1) permits a requested court to deny JRE because of public policy exception. Article 34(2) is the guarantor of fair procedure but limited to default judgments where the defendant was not properly served. Nevertheless, the protection of fair procedure must be more far-reaching than proper service, because there should be fair trial "after its commencement, not just notice at its beginning."⁴⁴⁴ The EU JRE law

⁴⁴² This is generally agreed by regional laws, *see* Chapter III. For discussion that discourages Mainland China from denying JRE merely because the judgment is against a Mainland government agency, *see* Section A of Chapter IV.

⁴⁴³ *See supra Res Judicata of* Section C of Chapter V.

⁴⁴⁴ Hay, *supra* note_429_ at 292-93.

demonstrates the exceptional situation where Article 34(1) should be applied to procedure issues. Two examples illustrate this.

The first is *Krombach v. Bamberski*.⁴⁴⁵ *Krombach* concerns the question whether the requested court can deny JRE by invoking the public policy exception, when the defendant did not have a fair hearing in the judgment-rendering court. In this case, Mr. Bamberski and Mr. Krombach were domiciled in France and Germany, respectively. Mr. Krombach was suspected of having murdered Mr. Bamberski's daughter in Germany. The French court exercised jurisdiction based on the victim's French nationality, although the Brussels Convention banned this jurisdiction ground. Mr. Krombach was served properly but he refused to attend the hearing. The French court held that he was in contempt of the court. Under French law, no defense counsel may appear on behalf of the person in contempt. Finally, the French court ruled for Mr. Bamberski without hearing the defense counsel instructed by Mr. Krombach. Mr. Bamberski sought JRE in Germany. Mr. Krombach invoked the public policy exception under the Brussels I Regulation on the ground that he had been unable to defend himself effectively in the French court. The ECJ ruled that the public policy exception in Article 34(1) includes all conditions considered by the European Convention on Human Rights (hereinafter "ECHR") as necessary for a fair trial.⁴⁴⁶ The ECJ held that, the French court refused to hear Mr. Krombach's defense because he was not present at the hearing; although this complied

⁴⁴⁵ Dieter Krombach v. André Bamberski, (Case C-7/98) [2000] ECR I-1935. A parallel ECHR case is *Krombach v. France*, Application no. 29731/96 Judgment Strasbourg February 13, 2001, Final May 13, 2001 (the ECHR court held that the French judgment-rendering proceeding violated Article 6 § 1 of the ECHR taken in conjunction with Article 6 § 3 (c)).

⁴⁴⁶ *Krombach*, (Case C-7/98) [2000] ECR I-1935, at paras 24-26, 38-39, and 42.

with the French law, it still manifestly breached Mr. Krombach's fundamental rights for a fair trial.⁴⁴⁷ Therefore, JRE was denied.

The second example is *Maronier v. Larmer*.⁴⁴⁸ In this case, the plaintiff brought an action against a dentist in the Netherlands and properly served him. However, this action was suspended due to the plaintiff's health problem and bankruptcy. Meanwhile, the defendant moved to the UK and lost all contacts with the Holland law firm representing him. After 12 years of suspension, the plaintiff reactivated the action without affecting a fresh service on the defendant. Consequently, the defendant was not aware of the reactivated action until the plaintiff requested a British court to recognize and enforce the Dutch judgment. The requested court in the UK invoked the procedural aspect of the public policy exception of Article 34(1) and refused the JRE because the defendant did not have a fair trial in the Netherlands under the ECHR.⁴⁴⁹

Therefore, in the proposed Multilateral JRE Arrangement, the requested court should be allowed to invoke the public policy exception to deny JRE for procedural deficiencies unlisted in the ground of unfair procedures.⁴⁵⁰ It helps soothe Hong Kong and Macao's concern about the Mainland judicial system, especially in *extremely exceptional* situations, that requested courts in Hong Kong and Macao may hold that a Mainland judgment is tainted by corruption but because of the wholesale judicial corruption, a judgment debtor cannot obtain evidence to prove the existence of corruption.

⁴⁴⁷ *Id.*

⁴⁴⁸ *W. Maronier v. Bryan Larmer* [2002] I.L.Pr. 685 (C.A., per Lord Phillips of Worth Matravers M.R.). For comments, see Kramer, *supra* note_429_.

⁴⁴⁹ *Maronier*, [2002] I.L.Pr. 685 (C.A., per Lord Phillips of Worth Matravers M.R.).

⁴⁵⁰ This approach is adopted by the Hong Kong FJREO. See Johnston, *supra* note_25_ at 563.

Therefore, this can satisfy the human right protections, including rights to a fair trial, required by the Hong Kong and Macao Basic Laws.⁴⁵¹

The grounds of unfair procedures, fraud, and public policy exception all involve procedure deficiencies. They also co-exist in the Hague Choice of Court Convention⁴⁵² and the 1999 Hague Draft.⁴⁵³ Commentaries and reports on the two Conventions provide valuable guidance in delimiting these three grounds.⁴⁵⁴ Accordingly, in the proposed Multilateral JRE Arrangement the ground of unfair procedures⁴⁵⁵ are *lex specialis* compared with fraud and public policy exception. Therefore, if a case involves any of the three instances under the heading of unfair procedures, this heading should prevail against fraud and public policy exceptions.⁴⁵⁶ Fraud should be applied to cases such as if the plaintiff seduced the defendant into the jurisdiction of the judgment-rendering court or the judgment creditor won the action by bribing judges or kidnapping of witnesses. The procedural contents of the public policy exception should be applied to cases beyond the perimeters of the grounds of unfair procedures and fraud. Notably, a mere difference between the procedures of the judgment-rendering region and the requested region does not trigger the procedural public policy exception.⁴⁵⁷ Only when the judgment-rendering proceedings contradict with fundamental elements of fair procedure of the requested region, the court may invoke public policy exception to reject JRE.

⁴⁵¹ Some Mainland scholars concern that the exclusion of natural justice as a ground for refusing JRE in the Mainland-Hong Kong Arrangement may fail to meet the requirement of human rights protections under the Hong Kong Basic Law, *see* Yu, *supra* note_22_ at 157. For details, *see* Chapter II.

⁴⁵² Art. 9(c)(d)(e) of the Hague Choice of Court Convention.

⁴⁵³ Art. 28.1(c)(d)(e) of the 1999 Hague Draft.

⁴⁵⁴ Brand and Herrup, *supra* note_119_ at 119. Pocar and Nygh, *supra* note_195_ at 309. *See* Dogauchi and Hartley, *supra* note_399_ at 32-34.

⁴⁵⁵ The three grounds refer to the losing party was not duly summoned or was summoned but not given a reasonable time to defend a case, or was not properly represented by a guardian if lacking litigation capacity. *See supra* Unfair Procedure of Section C of Chapter V.

⁴⁵⁶ Brand and Herrup, *supra* note_119_ at 119.

⁴⁵⁷ Pocar and Nygh, *supra* note_195_ at 309.

Notably, the *lex specialist* argument also can find support from treatises on the Brussels I Regulation.⁴⁵⁸ A prominent commentator argues that Article 34(2) is only one express application of procedural due process of rights but Article 34(1) must be the broader source of such rights.⁴⁵⁹

Therefore, like the two existing arrangements, the proposed Multilateral JRE Arrangement should adopt the public policy exception as a ground to refuse JRE. However, different from the two existing Arrangements, the proposed Arrangement should state that only a manifest violation of the public policy can constitute a defense to JRE.⁴⁶⁰ The contents of the public policy exception should be determined according to the law of the requested region. A requested court can deny JRE only when the effects of JRE will manifestly infringe the fundamental interests of the requested region.⁴⁶¹ The procedural contents of the public policy exception should cover procedure deficiencies beyond the scope of the unfair procedure defense and fraud.

D. Summary

This Chapter proposes selected rules of the proposed Multilateral JRE Arrangement by comparative studies between China, the US, and EU JRE laws, as well as Hague Conventions. It covers the scope, requirements for JRE, and defenses against JRE in the proposed Arrangement. In brief, it has three important contributions. First, at the starting point, the proposed Arrangement should be a single enforcement arrangement. It

⁴⁵⁸ Eg. Hay, *supra* note_429_ at 293.

⁴⁵⁹ *Id.* at 293. For fraud and public policy exception in JRE outside of the Brussels I Regulation, *see* also Walter and Baumgartner, *supra* note_378_ at 31.

⁴⁶⁰ For details, *see* Chapter III.

⁴⁶¹ *Id.*

regulates JRE (including indirect jurisdiction) but not direct jurisdiction. It divides indirect jurisdiction into categories of required, excluded, and permitted. Second, in order to harmonize divergences between regional laws and between the two existing Arrangements, the proposed Arrangement provides autonomous terminologies for "civil and commercial," "finality," "choice of court agreements," "unfair procedures," "fraud," and "*res judicata*." More autonomous terminologies should be developed for terms used in the Arrangement in the future. Third, it also explains grounds for refusing JRE in details, namely lack of jurisdiction, unfair procedure, *res judicata*, fraud, and public policy exception.

Chapter VI Implementation of the Proposed Multilateral JRE Arrangement

This chapter focuses on the most important issues regarding the implementation of the proposed Multilateral JRE Arrangement. It argues that the best legal form for the proposed Arrangement is an interregional instrument signed by the three regions and implemented by separate regional legislations. Then it proposes a coordination mechanism to solve the problems brought by the absence of a court of final review. Finally, it argues that *lex specialis* should determine the hierarchy between the proposed Arrangement and international JRE conventions ratified by Chinese regions.

A. Legal Form

Different proposals exist regarding which legal form is most suitable to solve interregional JRE.¹ They fall into three categories: adding a guiding principle of interregional JRE in the PRC Constitution, enacting a national law applicable to all regions, and adopting a model law.² However, all these proposals are less appropriate compared with the form of interregional arrangement plus separate regional implementing legislation.

¹ For academic debates, see Chapter II.

² Guobin Zhu, *Inter-regional Conflict of Laws under "One Country, Two Systems": Revisiting Chinese Legal Theories and Chinese and Hong Kong Law, with Special Reference to Judicial Assistance*, 32 HONG KONG L.J. 615, 674-75 (2002). Charles Chau Chi-chung, *Implementation of Article 95 of the Basic Law: Mutual Recognition and Enforcement of Civil and Commercial Judgments between the Hong Kong Special Administrative Region, the Mainland China and Taiwan*, 3 HKSLR 170 (1997).

i. Amending the PRC Constitution

The first approach advocates that the Mainland National People's Congress (hereinafter "NPC") should amend the PRC Constitution by adding a guiding principle relating to interregional JRE and should make this clause directly binding on Hong Kong and Macao.³ This approach is feasible if Mainland China, Hong Kong, and Macao are in agreement. However, it requires amending the PRC Constitution, which is very complex.⁴ Moreover, even without this amendment, interregional JRE is still legitimate because Article 95 of the Hong Kong Basic Law and Article 93 of the Macao Basic Law have already provided a constitutional basis for interregional judicial assistance including JRE.⁵ Because these two Articles are essentially identical, here I use Article 95 of the Hong Kong Basic Law as an example. It reads: "The Hong Kong SAR, may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of the country, and they may render assistance to each other."⁶ Clearly, it authorizes Hong Kong to make efforts to enhance interregional judicial assistance.⁷ However, one commentator criticizes this Article.⁸ He raised four questions:⁹

[Article 95] fails to answer whether the H[ong]K[ong] SAR courts may

³ Zhu, *supra* note 2 at 647. Hu Jinnan, *A Study on the Approaches of Inter-regional Judicial Assistance*, in STUDIES ON INTER-REGIONAL JUDICIAL ASSISTANCE [QUJI SIFA XIEZHU YANJIU] (Huang Jin & Huang Fend, eds.) 33 (Beijing: Press of University of Politics and Law of China, 1993).

⁴ Art 64 of the PRC 2004 Constitution states that: amendments to the Constitution are to be proposed by the Standing Committee of the NPC or by more than one-fifth of the deputies to the NPC and adopted by a vote of more than two-thirds of all the deputies to the Congress.

⁵ Zhu, *supra* note 2_ at 674. The two Basic Laws directly implement art 31 of the PRC Constitution and enjoy the highest status in the hierarchy of laws of Hong Kong and Macao.

⁶ Art. 95 of the Hong Kong Basic Law.

⁷ Zhu, *supra* note 2_ at 672. (Indicating that art. 95 of the Hong Kong Basic Law encourages further institutional arrangements regarding judicial assistance between the HKSAR and other parts of Mainland China.)

⁸ Qingjiang Kong, *Enforcement of Hong Kong SAR Court Judgments in the People's Republic of China*, 49 INT'L & COMP. L.Q. 867, 873 (2000).

⁹ *Id.*

enforce their final judgments on the mainland; the provision fails to clarify whether the H[ong]K[ong] SAR courts shall request assistance from individual courts in mainland China on a case-by-case basis; the provision fails to elaborate whether the law of the H[ong]K[ong] SAR or the law of the PRC shall be paramount; the provision fails to address whether the people's court on the mainland shall review the judgments of H[ong]K[ong] SAR before recognizing and enforcing them within its jurisdiction.

This criticism is inappropriate for three reasons. First, these four questions concern specific JRE issues. As a constitutional clause, Article 95 does not need to provide answers for such detailed issues. It is more appropriate for JRE arrangements concluded under Article 95 to respond to these questions. For example, the Mainland-Hong Kong Arrangement and its 2008 implementing legislations in the two regions have answered all these four questions.¹⁰ Second, Hong Kong law and Mainland law are two separate and equal systems¹¹ so one system cannot be "paramount" to the other. Third, the Basic Law of Hong Kong does not apply in Mainland China, so it, of course, cannot say anything about what a Mainland court should or should not do in a JRE proceeding. As a conclusion, Article 95 of the Hong Kong Basic Law and Article 93 of the Macao Basic Law can justify the legitimacy of the proposed Multilateral JRE Arrangement.¹²

ii. Enacting a National JRE Law

The second approach refers to enacting a national JRE law applicable to all

¹⁰ See Chapter III.

¹¹ For the constitutional framework between Mainland China and Hong Kong and the equality principle between regions, see Chapter I and II.

¹² CAMILLE CAMERON & ELSA KELLY, *PRINCIPLES AND PRACTICE OF CIVIL PROCEDURE IN HONG KONG* 430 (2 ed. 2008) (indicating that the Mainland-Hong Kong Arrangement forms "part of a range of initiatives to develop mutual legal assistance between the Mainland and the HKSAR, in accordance with Article 95 of the Basic Law") See Zhu, *supra* note 2, at 674 (indicating adding a general principle for interregional judicial assistance in the PRC Constitution is not feasible because it ignores Article 95 of the Hong Kong Basic Law).

regions.¹³ This approach was proposed early in 1980s by Professor Depei Han.¹⁴ According to Han's three-step solution to Chinese interregional conflicts, the first step is regional conflict of laws, the second step is interregional conflict of laws, and the third step is national substantive law.¹⁵ Han argues that on the second step, a national interregional JRE law enacted by the NPC should replace regional laws under Articles 17(3) and (4) of the Hong Kong Basic Law draft.¹⁶ Notably, these two provisions were removed in the final version of the Basic Law. Under Article 17 of the final version, Hong Kong SAR shall be vested with legislative power.¹⁷ Article 18 further clarifies that laws enacted by the NPC and its Standing Committee are inapplicable in Hong Kong except the six laws listed in the Basic Law.¹⁸ The Standing Committee of the NPC may add or delete from the list of laws after consulting the Hong Kong SAR Basic Law Committee and the Hong Kong government.¹⁹ This list shall be confined to laws relating to defense and foreign affairs as well as other matters outside the autonomy of Hong Kong as specified by the Basic Law.²⁰ However, the Basic Law clearly states that judicial

¹³ Qian Hua, *Approaches and Methods for Conducting Inter-regional Judicial Assistance between the Mainland and Hong Kong*, in STUDIES ON INTER-REGIONAL JUDICIAL ASSISTANCE [QUJI SIFA XIEZHU YANJIU] (Huang Jin & Huang Fend, eds) 80 (Beijing: Press of University of Politics and Law of China, 1993); Liu Zhengjiang, *Exploration on the Issues regarding Inter-regional Judicial Assistance in China*, in STUDIES ON INTER-REGIONAL JUDICIAL ASSISTANCE [QUJI SIFA XIEZHU YANJIU] (Huang Jin & Huang Fend, eds.) 51-52 (Beijing: Press of University of Politics and Law of China, 1993).

¹⁴ Depei Han, *Lun Wo Guo De Qu Ji Fa Lv Chong Tu Wen Ti--Wo Guo Guo Ji Shi Fa Yan Jiu Zhong De Yi Ge Xin Ke Ti* [An Analysis of Chinese Interregional Legal Conflicts: A New Subject in Chinese Interregional Conflict of Laws], 6 ZHONG GUO FA XUE [CHINA LEGAL SCIENCE] 3, 8-10 (1988). For details of this article and comments, see Chapter II.

¹⁵ *Id.*

¹⁶ *Id.*, at 9-10.

¹⁷ Art 17 of the Basic Law indicates:

The Hong Kong Special Administrative Region shall be vested with legislative power.

Laws enacted by the legislature of the Hong Kong SAR must be reported to the Standing Committee of the NPC for the record. The reporting for record shall not affect the entry into force of such laws.

If the Standing Committee of the NPC, after consulting its Hong Kong SAR Basic Law Committee, considers that any law enacted by the legislature of the Region is not in conformity with the provisions of this Law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region, the Standing Committee may return the law in question but shall not amend it. Any law returned by the Standing Committee of the NPC shall immediately be invalidated.

This invalidation shall not have retroactive effect, unless otherwise provided for in the laws of the Region.

¹⁸ See art. 18 and the Annex III of the Hong Kong Basic Law.

¹⁹ Art. 18(2) of the Hong Kong Basic Law.

²⁰ *Id.*, art. 18(3).

assistance falls into the autonomy of Hong Kong.²¹ Therefore, it is against the Basic Law if the NPC and its Standing Committee enact a national interregional JRE law and require Hong Kong and Macao to implement it.²²

iii. Proposing Model Laws

The third approach is to enact a model law.²³ Its supporters believe each region should amend its regional JRE law according to a model law.²⁴ The benefit of the model law approach is to maintain the autonomy of each region while achieving harmonization.

Advocating model laws for solving Chinese interregional conflicts can be traced back to 1990, when Professors Depei Han and Jin Huang drafted the Model Law for Choice of Laws between Mainland China, Taiwan, Hong Kong, and Macao in Civil Cases.²⁵ In 1995, they proposed the Model Law for the Shenzhen Special Economic Zone on the Application of Laws in Hong Kong and Macau-related Cases.²⁶ As their name indicates, these two model laws only deal with the issue of choice of law and they have

²¹ *Id.*, at art. 95.

²² Zhu, *supra* note 2, at 674-75.

²³ *Id.* at 675.

²⁴ See Renshan Liu & Meirong Zhang, *Pi Xi Zhong Guo Qu Ji Min Shang Shi Pan Jue Xiang Fu Cheng Ren Yu Zhi Xing Wen Ti de Li Fa Yu Si Fa Xian Zhuang [Analysis of Current Legislation and Judicial Practice of Chinese Inter-regional Recognition and Enforcement of Judgments in Civil and Commercial Matters]*, a paper presented in 2008 Annual Chinese Association of Private International Law in Beijing (arguing good unilateral legislation can better facilitate interregional JRE than bilateral arrangements). There are three Model Laws aiming to solve interregional conflicts proposed by Mainland scholars. Depei Han & Jin Huang, *Model Regulations on the Application of Laws in Civil Matters between the Mainland and Taiwan, Hong Kong and Macau*, published at the 1991 Annual Conference of the China Association of Private International Law held in Jinan, Shandong Province. Yuan Quan, Review and Prospects on the Research of Inter-regional Conflict of Laws in China before the End of the Century II *Perspectives Do Directo* (bilingual, *Fayu zongheng*) 148 (1997). Depei Han & Jin Huang, *Regulations of Shenzhen Special Economic Zone on the Application of Laws in Hong Kong and Macau-related Cases*, 6 *LAW REVIEW [FAXUE PINGLUN]* 47 (1995). These two Model Laws have no JRE chapter. For comments see Zhu, *supra* note 2, at 639. The third model law is proposed by Xianyu Yu & et al., see Xianyu Yu & et al, *The Model Law of Chinese Interregional Conflict of Laws (2009)*, presented in the 2009 Annual Conference of Chinese Private International Law Association in Hanzhou, October 2009. (on file with the author).

²⁵ Model Regulations on the Application of Laws in Civil Matters between the Mainland and Taiwan, Hong Kong and Macau, see *supra* note 24.

²⁶ Model Law for Shenzhen Special Economic Zone on the Application of Laws in Hong Kong and Macau-related Cases, see *supra* note 24.

not been supported strongly by legislatures in any region.²⁷ However, they are the first model laws for Chinese interregional conflict of laws.

An important effort to unify conflict-of-law rules in the four regions was made in 2009, when Mainland professor Xianyu Yu and his research team presented The Model Law of Chinese Interregional Conflict of Laws in the annual Conference of Mainland Private International Law Association.²⁸ This Model Law contains 125 conflict-of-law rules concerning jurisdiction, choice of law, and the recognition and enforcement of judgments and arbitration awards.²⁹ It serves as a sample for legislators to adopt in Mainland China, Hong Kong, Macao, and Taiwan.³⁰ Its Article 119 stipulates general principles for JRE.³¹

Judicial decisions (including judgments, decisions, orders, and court settlements) and arbitration awards, rendered in any of the four regions should be recognized and enforced in another region according to the bilateral arrangements or the principle of reciprocity. Refusing JRE shall comply with the explicit grounds provided by this law.

Its Article 120 provides that judicial decisions rendered in one region should not be recognized and enforced in another region in which recognition or enforcement is sought in any of the following circumstance.³²

²⁷ Zhu, *supra* note 2, at 639.

²⁸ *The Model Law of Chinese Interregional Conflict of Laws (2009)*, *supra* note 28.

²⁹ *Id.*

³⁰ *Id.*

³¹ Art. 119 of the Model Law. The English translation is the author's.

³² Art. 120 of the Model Law. The English translation is the author's. Yu's Model Law also indicates what documents that a party seeking recognition or enforcement should submit to the requested court. Art. 122 of the Model Law provides that *lex fori* or bilateral JRE arrangements shall determine the JRE procedures and the way of execution. Art. 123 of the Model Law indicates that "an application with the name and address of the judgment debtor, a copy of judgment that can sufficiently establish its authenticity and enforceability in the judgment-rendering court, and a certificate proving that the losing defendant was lawfully summoned or that the losing defendant with no capacity to take part in litigation was represented with an agent. If the above documents are made in a language other than Chinese, a Chinese translation should be provided." The English translation is the author's.

1. According to the law of the region where the requested court is located, the requested court has exclusive jurisdiction over the case;
2. According to the law of the region where the judgment-rendering court is located, the judgment is not legally effective, or its enforcement has been suspended;
3. An action based on the same claim is pending in the requested court, which was brought before the commencement of the JRE proceedings, and the requested court has jurisdiction over the action;
4. The court of the place of enforcement, a foreign country or an overseas region has rendered a decision for the same claim, or an arbitral agency has rendered an arbitration award for the same claim, and such decision or arbitration award has been recognized or enforced by the court at the place of enforcement;
5. In the proceedings at the judgment-rendering court, the losing defendant has not been lawfully summoned or the losing defendant with no capacity to take part in litigation is not represented with any agent;
6. Judicial decisions are contrary to the basic legal principles or public policy of the region where the requested court is located.

Huang's Model Laws attract Mainland legal academia to the emergence of Chinese interregional conflicts. Yu's Model Law is a concrete step towards harmonizing JRE rules in Chinese regions. However, no model law has ever been adopted by any regional legislature thus far.³³ This fact reveals the shortcomings of the model-law approach: it attempts to unify regional laws by suggesting legislatures in each region to adopt it on a *voluntary* basis. Model laws have no binding force and do not impose an implementation obligation on regions. Nobody can guarantee its acceptance by the legislatures in the three regions.³⁴ It may also take regions a long time to unanimously adopt the law.³⁵ Considering the urgent need for interregional JRE,³⁶ this approach is not preferable. Moreover, even if regions would like to adopt a model law, there is no guarantee that they will adopt it in a similar time frame. In contrast, a multilateral interregional arrangement will impose an *obligation* on its member regions to reform their regional laws in a certain

³³ Zhu, *supra* note 2_ at 639.

³⁴ *Id.*, at 675.

³⁵ *Id.* Xu Hong, *On the Judicial Assistance in Civil Matters between Hong Kong and the Mainland under One Country, Two Systems*, 6 JURIST'S REVIEW [FAXUE JIA] 19 (1996).

³⁶ Zhu, *supra* note 2_ at 675.

time frame. Therefore, the arrangement can provide more effective coordination among regions. Additionally, the absence of an authoritative institution to draft model laws for the three regions is another serious obstacle to the model-law approach.

Moreover, Yu's Model Law is imperfect. For example, the grounds for refusing JRE under the Model Law are very similar with those of the Mainland-Macao JRE Arrangement but largely deviate from the Mainland-Hong Kong Arrangement. It does not address any common-law concerns, such as finality and fraud.³⁷ Therefore, it may not be welcomed by Hong Kong.³⁸ Moreover, compared with proposed grounds for refusing JRE in Chapter V, Yu's Model Law does not regulate indirect jurisdiction except excessive jurisdictional bases. It is also unclear how to address unfair procedures uncovered by Article 120.5.³⁹ It has been shown from Chapter V that Article 120.3 (*res judicata*) in Yu's model law cannot address forum shopping brought by the rapidity of Mainland civil procedure. Moreover, Article 120.6 (public policy exception) is not restricted to cases of manifest violations, so it is not best formulated to suit Chinese interregional situations.

iv. Interregional Arrangement plus Separate Regional Legislations

The above discussion demonstrates that amending the PRC Constitution, enacting a national JRE law, and adopting model laws, do not fit Chinese situation. This dissertation argues that the best model is "interregional arrangement plus separate regional legislations." Namely, regions negotiate an interregional arrangement and then implement

³⁷ For details of finality and fraud in Hong Kong common law, *see* Part ii of Section A of Chapter III.

³⁸ For how the proposed Multilateral JRE Arrangement addresses finality and fraud, *see* Chapter IV and V.

³⁹ *Id.*

it by separate regional legislations.⁴⁰ As discussed in Chapter I, “arrangement” is an interregional instrument signed by member regions in China to address interregional issues.⁴¹ After signing an arrangement, regions will make separate implementing legislations in their own jurisdiction. This “[interregional] arrangement plus separate legislative approach” has been proved to be feasible and effective to solve questions relating to judicial assistance.⁴² Therefore, the proposed Multilateral JRE Arrangement should adopt the same legal form: it should be an interregional instrument signed by the three regions and replace the existing two JRE arrangements; and it should be implemented by separate legislations in each region. This process attempts to ultimately harmonize the JRE laws in the member regions, just like adopting the Brussels Convention was aimed to use a multilateral JRE convention to replace existing bilateral JRE treaties and to achieve unification among its members.⁴³ Moreover, like other arrangements, the constitutional foundation of the proposed JRE Arrangement is Article 95 of the Hong Kong Basic Law and Article 93 of the Macao Basic Law.

As a conclusion, the proposed Multilateral JRE Arrangement should be an

⁴⁰ *Id.*

⁴¹ See Chapter I.

⁴² Stephen Kai-yi Wong, *Mutual Enforcement of Arbitral Awards between the Mainland and the HKSAR*, HONG KONG LAWYER 67 (Nov. 1999). Zhu, *supra* note 2_ at 615. JRE is a part of judicial assistance in a broad sense. For scholarship in Hong Kong, see Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* 351 (Hong Kong: Hong Kong University Press, 2nd edn, 1999). For scholarship in Mainland China, see Li Shuanyuan, *Several Issues Concerning the Theoretical Research and Practice on Private International Law in China*, in STUDIES ON CHINESE CONFLICT OF LAWS [ZHONGGUO CHONGTUFA YANJIU] (Han Depei ed.) 365 (Wuhan: Wuhan University Press, 1993); Xiao Yongpin, *The Conflict of Laws Between Mainland China and the Hong Kong Special Administrative Region: the Choice of Coordination Models*, 4 in YEARBOOK OF PRIVATE INTERNATIONAL LAW 163, 189 and 197 (2003). For examples, see art. 3 of the Treaty of Judicial Assistance in Civil and Criminal Affairs between People's Republic of China and Republic Belarus (indicating judicial assistance includes the service of documents, investigation of evidence, recognition and enforcement of civil judgments, and etc.). Art. 6 of the Treaty of Judicial Assistance in Civil Affairs between People's Republic of China and Bulgaria (indicating judicial assistance includes the service of documents, investigation of evidence, recognition and enforcement of judgments and arbitration awards). See also Art. 2 of the Treaty of Judicial Assistance in Civil and Commercial Affairs between People's Republic of China and France (indicating judicial assistance includes the service of documents, investigation of evidence, recognition and enforcement of judgments and arbitration awards and etc.)

⁴³ Kurt H Nadelmann, *Jurisdictionally Improper FORA in Treaties on Recognition of Judgments: The Common Market Draft*, 67 COLUM. L. REV. 995, 997 (1967).

interregional instrument ratified by regions and implemented by separate legislations in each region.

B. Coordination Mechanism for Implementing the Proposed Multilateral JRE Arrangement

The Supreme People's Court in Mainland China, and the Court of Final Appeal in Hong Kong and Macao, respectively, are the highest court in each region and are equal in authority. No court of final review exists to hear cases from all three regions. As special administrative regions, Hong Kong and Macao enjoy final adjudicative powers according to their Basic Laws.⁴⁴ Therefore, establishing a supra-regional court of final review, without the agreement of Hong Kong and Macao, intrudes upon the Basic Laws. If the three regions agree to establish a supra-regional court, interregional judicial coordination will be significantly enhanced. However, currently, the three regions have not show consent to establish such a court. Nevertheless, the proposed Multilateral JRE Arrangement can be implemented consistently even without a court of final review in China. This is for three reasons.

First, the proposed Arrangement adopts autonomous terminologies to avoid regional idiosyncratic interpretations. When interpreting terminologies in the proposed Arrangement, regional courts should adopt the solution of autonomous interpretation and comparative interpretation. The former requires regional courts to strictly comply with autonomous terminologies in the proposed Arrangement. The latter encourages regional courts, when interpreting a term that has not been defined in the proposed Arrangement,

⁴⁴ Art. 2 of the Hong Kong Basic Law. Art. 2 of the Macao Basic Law.

to take into account how other regions have interpreted it and use that as a presumption to follow. The approach of comparative interpretation is demonstrated by the US Supreme Court's decision in *Abbott v. Abbott*.⁴⁵ In this case, the Court held that “[t]he ‘opinions of our sister signatories’ ... are ‘entitled to considerable weight’ in interpreting ‘right of custody’” under the Hague International Child Abduction Convention.⁴⁶ Similarly, the Supreme People's Court also refers to the general practices of contracting countries when interpreting the meaning of “agent” according to the Paris Convention for the Protection of Industrial Property.⁴⁷ Comparative interpretation can help regional courts to interpret the proposed Arrangement consistently. In addition, since the proposed Arrangement aims to realize rapid recognition and enforcement of judgments rendered in member regions, when conflicting definitions exist, words and phrases in the Arrangement should be interpreted in a way favorable to interregional JRE.

Second, notably, interregional JRE in the US involves fifty states and the EU twenty-seven Member States.⁴⁸ It is difficult for so many members to cooperate and maintain consistent interregional JRE without the supervision of the Supreme Court of the United States or the ECJ. However, Chinese interregional JRE involves only three regions. The small number of regions makes the cooperation between them considerably easier. Moreover, the number of courts in Hong Kong and Macao is far more less than that in Mainland China. In other words, the majority of courts involving interregional JRE are in Mainland China and the Supreme People's Court can ensure them to interpret

⁴⁵ *Abbott v. Abbott*, 2010 WL 1946730 (U.S.).

⁴⁶ *Id.*, at page 10.

⁴⁷ *Chongqing Zhengtong Pharmaceutical Co. and the Trademark Review and Adjudication Board of the State Administration for Industry and Commerce v. Sichuan Huashu Veterinary Pharmaceutical Co.* LAWINFOCHINA (last visited Jan. 6, 2010) (P.R.C.) (Sup. People's Ct., Aug 31, 2007). For detailed discussion of this case, see Jie Huang, *Direct Application of International Commercial Law in Chinese Courts: Intellectual Property, Trade, and International Transportation*, 5 MANCHESTER JOURNAL OF INTERNATIONAL ECONOMIC LAW 105, 122-25 (2008).

⁴⁸ The number of EU Members has been 27 since 2007.

the Proposed Arrangement uniformly. Therefore, if the three regional central authorities cooperate well, consistent application of the proposed Arrangement is theoretically possible even if a court of final review is absent.

Third, establishing a coordination mechanism is more feasible than establishing a supra-regional court of final review. The former only requires the consensus of regions and can be established in the current regional institutions. But the latter involves amending Basic Laws⁴⁹ and the PRC Constitution,⁵⁰ as well as establishing a new court. It also requires differentiating the authorities between the new court and the existing three supreme courts. Therefore, the former is considerably easier and feasible than the latter at the current stage.

Notably, the Mainland-Macao Arrangement requires the two regions to establish a coordination mechanism.⁵¹ It authorizes a requested court to directly contact a judgment-rendering court in the other region to verify the genuineness of the judgment.⁵² It also requires the Supreme People's Court and the Court of Final Appeal of Macao to provide each other with legal materials related to the implementation of the Arrangement and to inform each other of the results in implementation every year.⁵³ These channels are valuable for smooth implementation of the Arrangement in Mainland China and Macao. However, the Mainland-Macao Arrangement does not provide information regarding how these communication channels operate in practice. Moreover, these channels are, regrettably, absent in the Mainland-Hong Kong Arrangement. The Mainland-Hong Kong Arrangement requires a JRE applicant to provide a certificate issued by the judgment-

⁴⁹ For the high requirements of amending the Basic Laws, *see* art. 159 of the Hong Kong Basic Law and art. 143 of the Macao Basic Law.

⁵⁰ For the high requirements of amending the PRC Constitution, *see* art. 62.

⁵¹ Arts. 7 and 23 of the Mainland-Macao Arrangement.

⁵² *See id.*, art. 7.

⁵³ *Id.*, art. 23.

rendering court, proving that the said judgment is a final judgment described in Article 2 of this Arrangement.⁵⁴ However, the contents of and the procedure for obtaining such certificates are unclear. Additionally, although the existing two JRE Arrangements contain a similar provision stating that any problem arising from their implementation and any amendment to be made to them should be resolved through consultation between the Supreme People's Court and the Government of Hong Kong and of Macao,⁵⁵ it is unclear yet how this scheme will work out. These insufficiencies show an emerging problem that has not been widely addressed in the two regions, which is how to make swifter amendments when an arrangement reveals shortcomings. Therefore, the proposed coordination mechanism should fill these gaps.

The proposed mechanism addresses two problems concerning the implementation of the proposed Arrangement: (1) information about the specific judgments that are to be enforced; (2) maintenance of interpretational uniformity. Additionally, this mechanism can also help regions to amend the proposed Arrangement by consensus. This mechanism has two levels. First is a court-to-court information exchange mechanism. It is designed to address the first problem. The second level is a central authority-to-central authority information exchange mechanism. It aims to solve the second problem. In the long run, regions may consider developing the central authority-to-central authority information exchange mechanism into a coordination organization specializing in enhancing interregional JRE and other judicial assistance issues.

i. Exchanging Information about the Specific Judgments that Are to be

⁵⁴ Art. 6.3 of the Mainland-Hong Kong Arrangement.

⁵⁵ Art. 22 of the Mainland-Macao Arrangement and art.18 of the Mainland-Hong Kong Arrangement. *See eg.*, art. 10 of Mainland-Hong Kong Service Arrangement and art. 11 of the Mainland-Hong Kong Arbitration Arrangement.

Enforced

Judgments in the three regions are in different formats and maybe in different languages; therefore, facilitating the requested court to determine the authenticity and to find the essential information of a judgment is important. In this regard, China can draw useful insights from the US and the EU JRE laws. The Brussels I Regulation leaves the authenticity requirement to the law of judgment-rendering region.⁵⁶ However, it requires a JRE applicant to produce a standardized certificate containing necessary information for recognition and enforcement.⁵⁷ In practice, this certificate "does in fact make it easier for a creditor to have a judgment recognized or enforced."⁵⁸ In the US, the authenticity criteria for a judgment are determined by 28 U.S.C. Section 1738 or the statutes of requested state. The former requires the judgment should be with the attestation of the clerk and seal of the judgment-rendering court, together with a certificate of a judge of the court that the said attestation is in proper form.⁵⁹ The latter generally requires a JRE applicant to produce an affidavit that contains information of the judgment, such as the name of the parties and their attorney, contacts information of the judgment-rendering court and state, case number, amount of judgment and date of judgment.⁶⁰ This affidavit should be submitted with a copy of the judgment. Considering the divergences of regional law in China, a standardized certificate can provide higher uniformity than an

⁵⁶ Report Jenard p. 55.

⁵⁷ Arts. 53-55 of the Brussels I Regulation.

⁵⁸ Lajos Vekas, *Chapter III Recognition and Enforcement Section 3 Common Provisions*, in BRUSSELS I REGULATION, 687-89 (ULRICH MAGNUS & PETER MANKOWSKI ed. 2007).

⁵⁹ 28 U.S.C. Section 1738.

⁶⁰ *Eg.*, MC 62 (3/08) Affidavit And Notice Of Entry Of Foreign Judgment of State of Michigan at <http://forms.justia.com/michigan/statewide/civil/general/affidavit-and-notice-of-entry-of-foreign-judgment-12534.html> (last visited June 1, 2010). *Eg.*, The Uniform Enforcement of Foreign Judgment Act adopted in Alabama requires the affidavit must include the names and last known addresses of the judgment debtor and creditor, and a statement that the foreign judgment is valid, enforceable and unsatisfied. available at <http://www.madisoncountycircuitclerk.org/CircuitCivilDivision.htm> (last visited June 1, 2010).

affidavit under regional law. Therefore, arguably, the proposed Arrangement should require a JRE applicant to produce a standardized certificate. The certificate should contain information, such as (1) the contact information of the judgment-rendering court and judge, (2) the date, reference number, parties and their attorneys to the judgments, (3) whether there are appellate or retrial pending against the judgment, (4) date of service of the document instituting the proceedings if the judgment was given in default; and (5) the number of claims and corresponding decisions. This certificate should be attached to a copy of the judgment. It should be in the official language of the requested region and issued by the judgment-rendering court or the central authorities of the judgment-rendering region.

If a requested court has doubts regarding the authenticity of judgments, it can directly contact a judgment-rendering court for information under the proposed Arrangement. Notably, this court-to-court information exchange may overlap with the information exchange channel between regional contact points discussed in Chapter IV. The former is specially designed to enhance the efficiency of judicial co-operation between courts involved in a JRE case. Courts may also use the information exchange channel between regional contact points. But the latter is more indirect than the former, because a requested court needs to send its request to the regional contact point where the judgment-rendering court is located, and then the contact point forwards the request to the judgment-rendering court.

Moreover, this court-to-court information exchange channel is especially valuable when a judgment is enforced in two or more regions. For instance, if the place of domicile or habitual residence of the judgment debtor or the place where his or her

property is situated falls within more than one region, the judgment creditor may file separate applications with the courts of both regions at the same time. However, the total amount recovered from enforcing the judgment in the courts of the two regions shall not exceed the sum specified in the judgment. In this case, courts should coordinate in order to assure that a judgment creditor can be fully compensated, but not overcompensated.⁶¹ The proposed Multilateral JRE Arrangement should provide a time frame in which a court should respond to the question proposed by another court.

ii. Maintaining Interpretational Uniformity

The central authorities in the three regions should meet at least annually to discuss how to solve problems arising from the implementation of the proposed Arrangement and how to amend it if necessary.⁶² Information exchange between central authorities is crucially important to ensure the uniform interpretation of the proposed Arrangement and its amendment. The value of information exchanges and meetings has been endorsed by Professor Arthur von Mehren when negotiating the Hague Convention on Jurisdiction and Judgments.⁶³ He argues that⁶⁴

[i]t may be feasible to provide for exchanges of information and occasional

⁶¹ The other way to avoid over or under compensation is to require the creditor to designate a court to enforce his or her judgment first and the other court to seize, detain, or freeze the judgment debtor's property while the other court is enforcing the judgment. When the property located in one court's jurisdiction cannot satisfy the whole judgment, the other court can use the property located in its jurisdiction to enforce the outstanding judgment. *See* art. 4 of the Mainland-Macao Arrangement.

⁶² For discussion of central authorities, *see* Part ii of Section C of Chapter IV.

⁶³ Arthur T. von Mehren, *Jurisdictional Requirements: To What Extent Should the State of Origin's Interpretation of Convention Rules Control for Recognition and Enforcement Purposes?*, in *THE HAGUE CONVENTION ON JURISDICTION AND JUDGMENTS* A-29 (Andreas F. Lowenfeld & Linda J. Silberman ed. 2001).

⁶⁴ *Id.* at A-34. Arthur T. von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable Worldwide: Can the Hague Conference Project Succeed?*, in *A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE*, 289 (John J. Barcelo III & Kevin M. Clermont ed. 2002).

meetings to discuss the State parties' decisional law. Such arrangements can at best encourage a greater measure of uniformity in the interpretation and application of the convention than would otherwise be the case.

Therefore, Chinese regions should inform each other their implementing legislations and relevant cases. They also need to inform each other implementing results annually.

Regular meetings should be scheduled among central authorities for JRE issues they are commonly interested in.

iii. Proposed Coordination Organization

Regular meetings and information exchange between central authorities may not assure litigants that regional courts will uniformly interpret and apply the arrangements.⁶⁵ Therefore, in the long term, establishing an organization for interregional coordination should be considered. This organization should aim to help enhance uniform implementation of the proposed Arrangement and may extend its authority to other issues regarding interregional judicial assistance.

Establishing such an organization has been well received by Mainland scholars. They support the establishment of an interregional institution to provide consultation, coordination, and cooperation for solving interregional legal conflicts.⁶⁶ However, scholars dispute whether this organization should be intergovernmental or non-governmental. Professor Yongpin Xiao proposes to establish a coordination institution

⁶⁵ von Mehren, *supra* note_63_ at A-34. von Mehren, *supra* note_64_ at 289. (Indicating that information exchange and meetings “can, at best, encourage a greater measure of uniformity in the interpretation and application of the [Hague] convention than would otherwise be the case. They would not, however, assure litigants that the convention's provisions will be fairly and uniformly interpreted and applied by national courts.)

⁶⁶ Jie Chen, *Qu Ji Fa Lv Chong Tu Zhong Pan Jue De Cheng Ren Yu Zhi Xin Wen Ti Yan Jiu [Study on the recognition and Implementation of Judgments Concerning Interregional Conflict of Laws]*, 10 JOURNAL OF NATIONAL PROCURATORS COLLEGE 13, 17-18 (2002).

under the NPC.⁶⁷

[It] would be composed of an equal number of members from Mainland China and HKSAR. Its main functions would be to draft model laws, improve legal communication, mediate potential disputes, formulate and publish advisory opinions on the Basic Law approved by a majority of its members.

Although Xiao made his proposal to solve interregional conflicts between Mainland China and Hong Kong, this proposal can also be applied to conflicts involving Macao. Xiao's proposal should be regarded as an intergovernmental model.

By contrast, Professor Jin Huang prefers a non-governmental organization. He indicates that regional unilateral legislations are insufficient for solving interregional legal conflicts.⁶⁸ He argues that "it is absolutely necessary" to establish a comprehensive multilateral interregional mechanism of legal consultation, coordination and cooperation.⁶⁹ He names this mechanism "National Commission of Legal Consultation and Coordination."⁷⁰ He believes that it should be founded on the framework of the PRC Constitution and the two Basic Laws and should be constituted by legislature members, judges, lawyers, legal academics, and other legal experts appointed by the three regions.⁷¹ Its responsibilities include "the initiation of research, consultation, and coordination in interregional legal affairs and issues, and the making of proposals that are agreeable to all parties in order to promote mutual assistance and cooperation in legal matters."⁷²

⁶⁷ Yongpin, *supra* note 42, at 200.

⁶⁸ Jin Huang, *Interaction and Integration Between the Legal Systems of Hong Kong, Macao and Mainland China 50 Years After Their Return to China*, in ONE COUNTRY, TWO SYSTEMS, THREE LEGAL ORDERS -- PERSPECTIVES OF EVOLUTION ESSAYS ON MACAU'S AUTONOMY AFTER THE RESUMPTION OF SOVEREIGNTY BY CHINA 769, 772 (Jorge Oliveira, Paulo Cardinal ed. 1999).

⁶⁹ *Id.* at 770.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

Although this Commission should receive official supports from the three regions,⁷³ Huang believes it should be a non-governmental organization.⁷⁴ So its legislative proposals are not mandatory.⁷⁵

Its legislative proposals would thus serve as recommendations, model laws, or instructions without having mandatory force. The final decision-making power would rest with the respective legislatures in accordance with the respective Basic Laws of the SARs.

Huang concludes that the establishment of such commission should be the primary objective during and after the first 50-year that Hong Kong and Macao reunited with Mainland China.⁷⁶ Additionally, some scholars suggest the Hague Conference as a good model.⁷⁷ The legislative suggestion proposed by this organization is not binding and legislatures in each region are the final decision-makers.⁷⁸

The functions of the organizations proposed by Xiao and Huang are similar: draft model laws, enhance regional legal communications, and publish advisory opinions. They differ in the fact that Xiao's proposal is an intergovernmental organization while Huang advocates a non-governmental organization. In my view, both intergovernmental and non-governmental forms deserve to be attempted. The central authority in every region may jointly establish an organization for interregional JRE issues. Although not deciding particular cases, this organization should provide guidance for regions in implementing the proposed Arrangement and maintain its uniform interpretation.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Chen, *supra* note_66_ at 18.

⁷⁸ *Id.*, at 19.

Alternatively, the Chinese Society of Private International Law in Mainland China⁷⁹ may cooperate with academic organizations in other regions⁸⁰ to promote interregional legal exchange in a non-governmental fashion. Because currently no association contains members from all Chinese regions, another channel of non-governmental cooperation is to establish a Chinese Interregional Law Association. It should comprise of the elites of the academia, the judiciary, and the private bar from the four regions. It aims to help clarify and simplify interregional JRE laws as well as other interregional laws. It may draw useful insights from the development and function of the American Law Institute (hereinafter “ALI”)⁸¹ and the proposed European Law Institute.⁸² The ALI is also a private, non-profit corporation,⁸³ and has played a very important role in the harmonization of American state laws since its establishment in 1923.⁸⁴ It is dedicated to address controversial issues involving difficult intersections of policy and social interests and its projects include restatements⁸⁵ and model laws.⁸⁶ Notably, the European Parliament also

⁷⁹ Chinese Society of Private International Law is a non-governmental academic organization founded in October 1987. Its members include academics, judges, and lawyers in Mainland China. It arranges an annual meeting to discuss important theoretical and practical issues on private international law. It also invites people from Hong Kong, Macao, and Taiwan to participate in the annual meetings. Its major achievements include the Model Law of Private International Law of the People’s Republic of China (2000). Chinese Society of Private International Law, *Model Law of Private International Law of the People’s Republic of China*, Law Press China 2-3 (August 2000).

⁸⁰ Eg., the Law Society of Hong Kong, more information is available at http://www.hklawsoc.org.hk/pub_e/default.asp, Hong Kong Academy of Law, more information is available at <http://www.hklawacademy.org/about.php>, and the Law Society of Macao, more information is available at <http://en.io.gov.mo/Priv/record/1728.aspx> (last visited on May 1, 2010).

⁸¹ The ALI was founded because the then best legal minds of the US were unsatisfied with the inconsistency, uncertainty, and complexity of the common law. For more information about the ALI, see also <http://www.ali.org/index.cfm?fuseaction=about.creationinstitute> (last visited on March 23, 2010).

⁸² For details of European Law Institute, see <http://www.europeanlawinstitute.eu/> (last visited on March 23, 2010)

⁸³ G C Hazard, Jr., The American Law Institute Is Alive and Well, 26 *Hofstra L. Rev.* 661, 664 (1997-1998). The ALI is formed under the laws of the District of Columbia, the US. C W Wolfram, “Bismarck’s Sausages and the ALI’s Restatements” 26 *Hofstra Law Review* 817, 819 (1997-1998).

⁸⁴ See Hazard, Jr., *supra* 83 at 665. H P. Wilkins, Symposium on the American Law Institute: Process, Partisanship, and the Restatements of Law, 26 *Hofstra Law Review* 567 (1997-1998). But the ALI is not perfect. For criticism of its restatement making process, see C W Wolfram, *supra* n 83. For the difficulties that the ALI faces when its project intends to change the status quo, particularly to upset important economic relationships, see generally C Silver, The Lost World: of Politics and Getting the Law Right, 26 *Hofstra Law Review* 773 (1997-1998).

⁸⁵ For the restatement making process, see W T Barker, Lobbying and The American Law Institute: the Example of Insurance Defense 26 *Hofstra Law Review* 573, 576-78 (1997-1998). For a plea for a new restatement in relation to private international law, see Simeon C. Symeonides, A New Conflicts Restatement: Why Not? 5 *Journal of Private International Law* 383 (2009).

advocates to establish an European Law Institute, where "legal policy-makers, the administrative authorities, the judiciary and those responsible for applying the law cooperate on a scientific basis" to prepare a European restatement of civil and commercial law.⁸⁷ This Institute, following the ALI, is expected to lead the discussion of the harmonization of European private law, draft and update the text of the principles and an official commentary, and provide a website for information.⁸⁸ It will certainly take years for the proposed comparative Chinese Interregional Law Association to become a major force, like the ALI or the proposed European Law Institute, in shaping interregional JRE laws in a plural legal system. The success of the proposed Association will come from its contribution to the advancement and unification of laws in China's interregional conflicts.

As a conclusion, because Chinese interregional JRE only involves three members, court-to-court and central authority-to-central authority information exchange can address the problems of exchanging information about the specific judgments that are to be enforced and maintaining interpretational uniformity. In the long term, a governmental or non-governmental organization may be established to enhance interregional judicial assistance.

C. Relationship with Other Interregional or International JRE Instruments

⁸⁶ Hazard, Jr., *supra* n 83 at 662.

⁸⁷ Para 15 of the European Parliament Resolution on the Approximation of the Civil and Commercial Law of the Member States (COM (2001) 398- C5-0471/2001-2001/2187(COS)), dated November 15, 2001, which responded to the European Commission's Communication on European Contract Law, COM (01) 398.

⁸⁸ Dominik Kallweit, *Towards a European Contract Law: For a Prosperous Future of International Trade*, 35 VICT. U. WELLINGTON L. REV. 269 (2004). Martijn W. Hesselink, *The Common Frame of Reference as a Source of European Private Law*, 83 TUL. L. REV. 919, 928 (2009). Christian v. Bar, *From Principles to Codification: Prospects for European Private Law*, 8 COLUM. J. EUR. L. 379, 387 (2002). Joachim Bornkamm, *The German Supreme Court: An Actor in the Global Conversation of High Courts*, 39 TEX. INT'L L.J. 415, 427 (2004).

The proposed Multilateral JRE Arrangement should supersede the Mainland-Hong Kong Arrangement and the Mainland-Macao Arrangement. If in the judgment-rendering proceedings, service is conducted or evidence is collected according to relevant interregional arrangements,⁸⁹ the requested court should not deny JRE on the ground of unfair procedure regarding service and evidence collection, if no other defense exists.

The Majority of conventions concluded at the Hague Conference,⁹⁰ including the Hague Choice of Court Convention, will not be applied among Chinese regions.⁹¹ Regarding the relationship between the proposed Arrangement and international JRE instruments ratified by Chinese regions and applicable among them, China may draw useful insights from the EU. The EU JRE law adopts the *lex specialis* rule to solve potential conflicts between the Brussels I Regulation and international conventions.⁹² The goal is to ensure regions comply with the particularities in ratified conventions regarding specific matters.⁹³ Therefore, the proposed Arrangement should not prejudice to international conventions involving JRE on specific matters. In other words, specialized

⁸⁹ *Eg.*, the Mainland-Hong Kong Service Arrangement and the Mainland-Macao Service and Evidence Arrangement. For details of these arrangements, *see* Chapter I.

⁹⁰ The Hague Conventions that continue to be applicable to Hong Kong after it reunited with Mainland China are Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, Convention of 5 October 1961 Abolishing the Requirement of Legislation for Foreign Public Documents, Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations, Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition. The Hague Conventions that continue to be applicable to Macao after it reunited with Mainland China are Convention of 1 March 1954 on civil procedure, Convention of 24 October 1956 on the law applicable to maintenance obligations towards children, Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants, Convention of 5 October 1961 Abolishing the Requirement of Legislation for Foreign Public Documents, and Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. *See* <http://cn.io.gov.mo/Legis/International/1/14.aspx> (accessed on June 1, 2010).

⁹¹ *See* Hong Kong Legislative Council Paper No. CB(2) 722/01-02(04) para 18, December 20, 2001. The conclusion of the Mainland-Hong Kong Arrangement partly aims to fill the gap when Mainland China and Hong Kong ratify the Hague Choice of Court Convention but it does not apply between these two regions. Similarly, the Hague Evidence Convention and the 1958 New York Convention are inapplicable among Chinese regions. Therefore, interregional arrangements on evidence and arbitration awards were concluded among Chinese regions.

⁹² Art. 71(1) of the Brussels I Regulation. Peter Mankowski, *Chapter VII Relations with Other Instruments*, in BRUSSELS I REGULATION, 754-55 (ULRICH MAGNUS & PETER MANKOWSKI ed. 2007).

⁹³ Mankowski, *supra* note 92 at 755. The Owners of the cargo lately laden on board the ship “Tatry” v. The owners of the ship “Maciej Rataj” (Case 406/92), [1992] ECR I-5439, I-5471 para. 24; Nürnberger Allgemeine Versicherungs-AG v. Protbridge Transport International BV, (Case C-148/03) [1004] ECR I-10327, I-10335 para. 14. The “Po” [1991] 2 Lloyd’s Rep 206 (C.A.).

conventions should prevail against the proposed Arrangement in case of conflicts. For example, the 1992 Protocol of the International Convention on Civil Liability for Oil Pollution Damage should prevail against the proposed Arrangement when requested judgments are relating to pollution damage or preventive measures against such damage.⁹⁴ However, the proposed Arrangement should apply when conventions on specific matters do not govern.

⁹⁴ International Convention on Civil Liability for Oil Pollution Damage (1969), , http://www.imo.org/conventions/contents.asp?doc_id=660&topic_id=256 (last visited Feb 9, 2010).

Chapter VII Conclusion

This dissertation is a comparative study and focuses on what lessons China can draw from the US and the EU to develop its interregional JRE law. It argues that the Mainland-Hong Kong Arrangement and the Mainland-Macao Arrangement are only first steps beyond the unsatisfactory stage of pure regional JRE laws, but more is needed: the next stage should be a Multilateral JRE Arrangement. It explores solutions for the three most crucial macro challenges for this Arrangement: conflicts between socialist law and capitalist law, conflicts between civil law and common law, and weak mutual trust among Chinese regions. It also proposes selected rules of the proposed Multilateral JRE Arrangement. This Arrangement should be a single enforcement arrangement, regulating JRE (including indirect jurisdiction) but not direct jurisdiction. It divides indirect jurisdiction into categories of required, excluded, and permitted. This dissertation also discusses the scope, requirements for JRE, and defenses against JRE in the proposed Arrangement. It argues that the proposed Arrangement should be adopted as an interregional instrument signed by the three regions and implemented by separate regional legislations. Moreover, it proposes a coordination mechanism to solve the problems brought by the absence of a court of final review.

As a Chinese proverb says, “a journey of ten thousand miles must begin with a single step.” This dissertation is only a single step. There is still a substantial amount of work to develop Chinese interregional JRE rules, so as to deal with the new challenges brought by the more and more frequent interactions among the distinctive regions within one China. The future work at least includes how to develop this Arrangement into a

mixed or double arrangement in order to enhance the certainty of JRE and to reduce the conflicts of jurisdiction, and how to extend this Arrangement to Taiwan.

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A. The Mainland-Hong Kong Arrangement	
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Announcement of the Supreme People's Court

最高人民法院公告

Pursuant to Article 95 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, upon negotiations, the Supreme People's Court and the Hong Kong Special Administrative Region reached the Arrangement between the Mainland and the Hong Kong Special Administrative Region on Reciprocal Recognition and Enforcement of the Decisions of Civil and Commercial Cases under Consensual Jurisdiction (hereinafter referred to as Arrangement), which was signed on July 14, 2006. This Arrangement was adopted at the 1390th meeting of the Judicial Committee of the Supreme People's Court on June 12, 2006 and is hereby promulgated. Upon the unanimity of both parties, this Arrangement shall come into force as of August 1, 2008.

根据《中华人民共和国香港特别行政区基本法》第九十五条的规定，最高人民法院与香港特别行政区经协商，达成《关于内地与香港特别行政区法院相互认可和执行当事人协议管辖的民商事案件判决的安排》（以下简称《安排》），并于2006年7月14日签署。《安排》已于2006年6月12日由最高人民法院审判委员会第1390次会议通过，现予公布。根据双方一致意见，本《安排》自2008年8月1日起生效。

二〇〇八年七月三日

July 3, 2008

最高人民法院关于内地与香港特别行政区法院相互认可和执行当事人协议管辖的民商事案件判决的安排（法释[2008]9号）

Arrangement of the Supreme People's Court between the Mainland and the HKSAR on Reciprocal Recognition and Enforcement of the Decisions of Civil and Commercial Cases under Consensual Jurisdiction (No.9 [2008] of the Supreme People's Court)

根据《中华人民共和国香港特别行政区基本法》第九十五条的规定，最高人民法院与香港特别行政区政府经协商，现就当事人协议管辖的民商事案件判决的认可和执行问题作出如下安排：

Pursuant to Article 95 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, upon negotiations, the Supreme People's Court and the HKSAR made the following arrangements on the recognition and enforcement of the decisions of civil and commercial cases under consensual jurisdiction:

第一条 内地人民法院和香港特别行政区法院在具有书面管辖协议的民商事案件中作出的须支付款项的具有执行力的终审判决，当事人可以根据本安排向内地人民法院或者香港特别行政区法院申请认可和执行。

Article 1 For a final decision of payment with executive force made by a people's court in the mainland and a court of the HKSAR in a civil or commercial case under a written jurisdiction agreement, the party concerned may apply to the people's court in the mainland or the HK court for the recognition and enforcement of the decision.

第二条 本安排所称“具有执行力的终审判决”：

Article 2 The term “final decision with executive force” refers to:

a. in the mainland:

（一）在内地是指：

1. a judgment made by the Supreme People's Court; or
2. a decision made by a higher people's court, an intermediate people's court or a grassroots people's court (see annex) which has been delegated jurisdiction over the first instance of a civil or commercial case involving foreign, Hong Kong, Macao or Taiwan affairs, when appeal is not allowed for the first instance decision or no appeal is made within the prescribed time limit, or an effective second instance decision or a decision made after the case is reviewed by the people's court at the next

1、最高人民法院的判决；

2、高级人民法院、中级人民法院以及经授权管辖第一审涉外、涉港澳台民商事案件的基层人民法院（名单附后）依法不准上诉或者

higher level in accordance with the procedure for adjudication supervision.

b. In HKSAR: an effective decision made by the Court of Final Appeal or the Court of Appeal of the High Court, the Court of First Instance or the District Court.

The “decisions” as mentioned in this Arrangement includes decisions, verdicts, mediation awards and payment orders in the Mainland, or decisions, orders and legal cost appraisal certificates in HKSAR.

Where the people’s court in the mainland retries a case after the party concerned applies to the HK court for the recognition and enforcement of the decision, the retrial shall be made by the people’s court at the next higher level which made the effective decision.

Article 3 The “written jurisdiction agreement” as mentioned in this Arrangement refers to an agreement concluded after this Arrangement becomes effective by the parties concerned which expressly stipulates in writing that a people’s court in the mainland or a HK court has exclusive jurisdiction over any dispute related to a certain legal relationship that occurred or may occur. The “certain legal relationship” refers to a civil or commercial contract between the parties concerned, excluding a contract of employment or a contract to which a natural person is involved as a party for purposes of personal consumption, family affairs or other non-commercial purposes.

The “in writing” means that the contract is concluded in the form of a written contract, a letter, a data message (including telegraph, telefax, fax, electronic data exchange and e-mail) or other form which carries the contents of the contract in a physical form so as to make it possible to consult in the future.

A written jurisdiction agreement may consist of more than one written document.

Unless it is otherwise provided in the contract, the terms of the jurisdiction agreement in the contract exist independently. No matter whether the contract is modified, rescinded, terminated or nullified, terms on jurisdiction remain effective.

已经超过法定期限没有上诉的第一审判决，第二审判决和依照审判监督程序由上一级人民法院提审后作出的生效判决。

(二) 在香港特别行政区是指终审法院、高等法院上诉法庭及原讼法庭和区域法院作出的生效判决。

本安排所称判决，在内地包括判决书、裁定书、调解书、支付令；在香港特别行政区包括判决书、命令和诉讼费评定证明书。

当事人向香港特别行政区法院申请认可和执行判决后，内地人民法院对该案件依法再审的，由作出生效判决的上一级人民法院提审。

第三条 本安排所称“书面管辖协议”，是指当事人为解决与特定法律关系有关的已经发生或者可能发生的争议，自本安排生效之日起，以书面形式明确约定内地人民法院或者香港特别行政区法院具有唯一管辖权的协议。

本条所称“特定法律关系”，是指当事人之间的民商事合同，不包括雇佣合同以及自然人因个人消费、家庭事宜或者其他非商业目的而作为协议一方的合同。

本条所称“书面形式”是指合同书、信件和数据电文（包括电报、电传、传真、电子数据交换和电子邮件）等可以有形地表现所载内容、可以调取以备日后查用的形式。

书面管辖协议可以由一份或者多份书面形式组成。

除非合同另有规定，合同中的管辖协议条款独立存

在，合同的变更、解除、终止或者无效，不影响管辖协议条款的效力。

Article 4 An application for the recognition and enforcement of a civil or commercial decision as mentioned in this Arrangement shall be filed with, as in the mainland, the intermediate people's court at the place of domicile, the place of residence or the locality of the property of the party against whom the application is filed, and, as in HK, the High Court of HKSAR.

Article 5 If the place of domicile, the place of residence and the locality of the property of the party against whom the application is filed are under the jurisdiction of different intermediate people's courts, the applicant may choose any of them to file the application, and may not file with two or more people's courts at the same time.

If the place of domicile, the place of residence or the locality of the property of the party against whom the application is filed is under the jurisdiction of both the mainland and the HK SAR, the applicant may file the application with the competent courts of both places simultaneously, but the total amount of enforcement may not exceed the amount determined in the decision. Where one of the courts has partly or completely executed the decision, it shall provide detailed information about its enforcement for the other court if the other court so requires.

Article 6 To apply to a competent court for the recognition and enforcement of a decision, an applicant shall submit the following documents:

1. an application form;
2. a duplicate of the decision affixed with the seal of the court which made the final decision;
3. a certificate issued by the court which made the final decision, proving that the said decision is a final decision described in Article 2 of this Arrangement and that it can be executed at the place where it is made;
4. identity certificate:
 - (1) in the case of a natural person, it refers to his identity card or a notarized photocopy thereof;
 - (2) in the case of a legal person or other organization, it refers to a notarized photocopy of the registration certificate; and
 - (3) in the case of an alien legal person or other organization, it refers to the corresponding notarization and attestation materials.

If any document submitted to a people's court in the

第四条 申请认可和执行符合本安排规定的民商事判决，在内地向被申请人住所地、经常居住地或者财产所在地的中级人民法院提出，在香港特别行政区向香港特别行政区高等法院提出。

第五条 被申请人住所地、经常居住地或者财产所在地在内地不同的中级人民法院辖区的，申请人应当选择向其中一个人民法院提出认可和执行的申请，不得分别向两个或者两个以上人民法院提出申请。

被申请人的住所地、经常居住地或者财产所在地，既在内地又在香港特别行政区的，申请人可以同时分别向两地法院提出申请，两地法院分别执行判决的总额，不得超过判决确定的数额。已经部分或者全部执行判决的法院应当根据对方法院的要求提供已执行判决的情况。

第六条 申请人向有关法院申请认可和执行判决的，应当提交以下文件：

(一) 请求认可和执行的申请书；

(二) 经作出终审判决的法院出具的证明书，证明该判决属于本安排第二条所指的终审判决，在判决作出地可以执行；

(三) 作出终审判决的法院出具的证明书，证明该判决属于本安排第二条所指的终审判决，在判决作出地可以执行；

(四) 身份证明材料：

1、申请人为自然人的，应当提交身份证或者经公

mainland is prepared in a language other than Chinese, the applicant shall also submit a Chinese version thereof which shall have been certified as precise.

It is not necessary for the court of the place of enforcement to request for notarizing a certificate issued by the court mentioned in this Article.

Article 7 The application form shall state:

1. if the party concerned is a natural person, his name and domicile; and if it is a legal person or other organization, its name and domicile and the name, office and domicile of the legal representative or the person in charge of it;
2. the reasons for and content of the application for enforcement, the locality and status of the property of the party against whom the application is filed; and
3. Whether the decision concerned has been executed at the place of the court of the original instance, and, if so, the specific situations.

Article 8 An application for the recognition and enforcement of a decision made by a people's court in the mainland or a HKSAR court shall be governed by the law of the place of enforcement in terms of application procedures, unless it is otherwise provided in this Arrangement.

The time limit for an applicant to apply for the recognition and enforcement of a decision shall be two years.

For a decision made in the mainland that is to be executed in HKSAR, the time limit prescribed in the preceding paragraph shall be calculated from the last day of the time limit for voluntary execution as stated in the decision, if the decision is to be executed by stages, from the last day of

证的身份证复印件;

2、申请人为法人或者其他组织的,应当提交经公证的法人或者其他组织注册登记证书的复印件;

3、申请人是外国籍法人或者其他组织的,应当提交相应的公证和认证材料。

向内地人民法院提交的文件没有中文文本的,申请人应当提交证明无误的中文译本。

执行地法院对于本条所规定的法院出具的证明书,无需另行要求公证。

第七条 请求认可和执行申请书应当载明下列事项:

(一)当事人为自然人的,其姓名、住所;当事人为法人或者其他组织的,法人或者其他组织的名称、住所以及法定代表人或者主要负责人的姓名、职务和住所;

(二)申请执行的理由与请求的内容,被申请人的财产所在地以及财产状况;

(三)判决是否在原审法院地申请执行以及已执行的情况。

第八条 申请人申请认可和执行内地人民法院或者香港特别行政区法院判决的程序,依据执行地法律的规定。本安排另有规定的除外。

申请人申请认可和执行的期间为二年。

前款规定的期间,内地判决到香港特别行政区申请执行的,从判决规定履行期间的最后一日起计算,判决

the time limit set for each stage, or, if there is no time limit in the decision, from the day when the decision becomes effective. For a decision made in HKSAR that is to be executed in the mainland, the time limit prescribed in the preceding paragraph shall be calculated from the day when the decision becomes enforceable, i.e., the date when the decision is made as indicated in the decision, or, if there is any other provision on the enforcement period, from the date when the prescribed enforcement period expires.

Article 9 For an application for the recognition and enforcement of a decision, if the debtor in the decision of the original instance provides evidence to prove any of the following circumstances, the court accepting the application shall, upon verification, make a ruling to disallow the recognition and enforcement thereof:

1. according to the law of the place of the court of the original instance selected by the parties concerned by agreement, the jurisdiction agreement is invalid, unless the selected court has determined the agreement as valid;
2. the decision has been fully executed;
3. according to the law of the place of enforcement, the court of the place of enforcement has exclusive jurisdiction over the case;
4. according to the law of the place of the court of the original instance, the party losing the lawsuit by failing to appear in court has not been summoned according to law or has been summoned but not been informed of the time limit for defense, but if the court of the original instance has served by public notice in accordance with the relevant laws and provisions, the party losing the lawsuit shall be deemed as having been summoned according to law;
5. the decision was obtained by means of fraudulence; or
6. the court of the place of enforcement, a foreign country or an overseas region has made a decision for the same claim, or an arbitral agency has made an arbitral award for the same claim, and such decision or arbitral award has been recognized or enforced by the court at the place of enforcement.

Where a people's court in the mainland believes that enforcing in the mainland a decision made by a HKSAR court is against the public interests of the mainland, or where a HKSAR court believes that enforcing in HK a decision made by a people's court in the mainland is against the public policies of HK, the said court shall not recognize and enforce the decision.

规定分期履行的，从规定的每次履行期间的最后一日起计算，判决未规定履行期间的，从判决生效之日起计算；香港特别行政区判决到内地申请执行的，从判决可强制执行之日起计算，该日为判决上注明的判决日期，判决对履行期间另有规定的，从规定的履行期间届满后开始计算。

第九条 对申请认
珊 楠 葱 械 呐 芯 解
笈 芯 鲋 械 恼
裨 颂 峇 十 ぞ 葵 っ 饗 邢 铝 星 樾 沃
坏 模 蒂 磷 昵 氩 姆 壕 罍 楹 耸 担 辈 枚 挥 枞 峡 珊 楠 葱 校

(一) 根据当事人协议选择的原审法院地的法律，管辖协议属于无效。但选择法院已经判定该管辖协议为有效的除外；

(二) 判决已获完全履行；

(三) 根据执行地的法律，执行地法院对该案享有专属管辖权；

(四) 根据原审法院地的法律，未曾出庭的败诉一方当事人未经合法传唤或者虽经合法传唤但未获依法律规定的答辩时间。但原审法院根据其法律或者有关规定公告送达的，不属于上述情形；

(五) 判决是以欺诈方法取得的；

(六) 执行地法院就相同诉讼请求作出判决，或者外国、境外地区法院就相同诉讼请求作出判决，或者有关仲裁机构作出仲裁裁决，已经为执行地法院所认可或者执行的。（以判决执行为标准）

但是香港法的理解是：

执行地法院就相同诉讼请求作出判决；或者外国、境外地区法院就相同诉讼请求作出判决，或者有关仲裁机构作出仲裁裁决，已经为执行地法院所认可或者执行的

内地人民法院认为在内地执行香港特别行政区法院判决违反内地社会公共利益，或者香港特别行政区法院认为在香港特别行政区执行内地人民法院判决违反香港特别行政区公共政策的，不予认可和执行。

Article 10 For a decision made by a HKSAR court, if the debtor determined in the decision has made an appeal or if the procedure of appeal has not been finished yet, a people' s court in the mainland may, upon verification, suspend the recognition and enforcement procedure, and resume the procedure if all or part of the decision is sustained after appeal, or terminate the procedure if the decision is completely overruled after appeal.

Where a local people' s court in the mainland makes a decision of retrying a case for which a decision has been made, or where the Supreme People' s Court makes such a decision, upon verification, a HK court may suspend the recognition and enforcement procedure, and resume the procedure if all or part of the decision is sustained after retrial, or terminate the procedure if the decision is completely overruled after retrial.

Article 11 A decision recognized by this Arrangement has the same effect as a decision made by a court of the place of enforcement of the decision recognized by this Arrangement.

Article 12 Where a party concerned refuses to accept a ruling of disallowing the recognition and enforcement of a decision, if in the mainland, it/he may apply for reconsideration to the people' s court at the next higher level, or, if in HK, it/he may lodge an appeal in accordance with the law of HK.

Article 13 Where, during the period when a party concerned applies to a court for the recognition and enforcement of a decision, the party concerned brings a lawsuit on the same facts, no court may accept the lawsuit.

第十条 对于香港特别行政区法院作出的判决，判决确定的债务人已经提出上诉，或者上诉程序尚未完结的，内地人民法院审查核实后，可以中止认可和执行程序。经上诉，维持全部或者部分原判决的，恢复认可和执行程序；完全改变原判决的，终止认可和执行程序。

内地地方人民法院就已经作出的判决按照审判监督程序作出提审裁定，或者最高人民法院作出提起再审裁定的，香港特别行政区法院审查核实后，可以中止认可和执行程序。再审判决维持全部或者部分原判决的，恢复认可和执行程序；再审判决完全改变原判决的，终止认可和执行程序。

第十一条 根据本安排而获认可的判决与执行地法院的判决效力相同。

第十二条 当事人对认可和执行与否的裁定不服的，在内地可以向上一级人民法院申请复议，在香港◆七鸚姓™区可以根据其法律规定提出上诉。

第十三条 在法院受理当事人申请认可和执行判决期间，当事人依相同事实再行提起诉讼的，法院不予受

Where, after a decision is recognized and enforced, the party concerned brings a lawsuit on the same facts, no court may accept the lawsuit.

Where an application for the recognition and enforcement of a decision is dismissed pursuant to Article 9 of this Arrangement, the applicant may not file another application for recognition and enforcement, but may bring a lawsuit with a court of the place of enforcement on the same case facts in accordance with the law of the place of enforcement.

Article 14 Before or after accepting an application for the recognition and enforcement of a decision, a court may, if the applicant so requests, order an attachment of property or take other compulsory measures against the party against whom the application is filed in accordance with the legal provisions of the place of enforcement on attachment of property or prohibiting the transfer of property.

Article 15 Where a party concerned applies to a competent court for the recognition and enforcement of a decision, it/he shall pay enforcement fees or court fees in accordance with the laws and provisions of the place of enforcement on legal costs.

Article 16 The objects subject to the reciprocal recognition and enforcement by courts in the mainland and HKSAR include the amount determined in a decision, the payable interest, and the attorney fees and legal costs ratified by court, with the exception of taxes and penalties.

In HKSAR, the term “legal costs” refers to the legal costs which are ratified or whose payment is ordered by the judge or the registrar in the legal cost appraisal certificate.

Article 17 This Arrangement shall apply to all decisions made by courts in the mainland and HKSAR from the date when this Arrangement becomes effective.

Article 18 Any problem encountered or any amendment needed in the implementation of this Arrangement shall be settled by the Supreme People’s Court and the HKSAR Government upon negotiations.

Annex: List of the Grassroots People’s Courts in the Mainland with Delegated Jurisdiction over the First Instance of Civil and Commercial Cases involving

理。

已获认可和执行的判决，当事人依相同事实再行提起诉讼的，法院不予受理。

对于根据本安排第九条不予认可和执行的判决，申请人不得再行提起认可和执行的申请，但是可以按照执行地的法律依相同案件事实向执行地法院提起诉讼。

第十四条 法院受理认可和执行判决的申请之前或者之后，可以按照执行地法律关于财产保全或者禁制资产转移的规定，根据申请人的申请，对被申请人的财产采取保全或强制措施

第十五条 当事人向有关法院申请执行判决，应当根据执行地有关诉讼收费的法律和规定交纳执行费或者法院费用。

第十六条 内地与香港特别行政区法院相互认可和执行的标的范围，除判决确定的数额外，还包括根据该判决须支付的利息、经法院核定的律师费以及诉讼费，但不包括税收和罚款

在香港特别行政区诉讼费是指经法官或者司法常务官在诉讼费评定证明书中核定或者命令支付的诉讼费用。

第十七条 内地与香港特别行政区法院自本安排生效之日（含本日）起作出的判决，适用本安排。

第十八条 本安排在执行过程中遇有问题或者需要修改，由最高人民法院和香港特别行政区政府协商解决。

附：截止2006年5月31日，内地经授权管辖第一审涉外、涉港澳台民商事案件的基层人

Foreign, HK, Macao or Taiwan Affairs by May 31, 2006

民法院名单

List of the Grassroots People' s Courts in the Mainland with Authorized Jurisdiction over the First Instance of Civil and Commercial Cases involving Foreign, HK, Macao or Taiwan Affairs (by May 31, 2006)

Guangdong Province:

Yuexiu District People' s Court of Guangzhou
Haizhu District People' s Court of Guangzhou
Tianhe District People' s Court of Guangzhou
Panyu District People' s Court of Guangzhou
Luogang District People' s Court of Guangzhou
Nansha District People' s Court of Guangzhou
Futian District People' s Court of Shenzhen
Luohu District People' s Court of Shenzhen
Bao' an District People' s Court of Shenzhen
Longgang District People' s Court of Shenzhen
Nanshan District People' s Court of Shenzhen
Yantian District People' s Court of Shenzhen
Chancheng District People' s Court of Foshan
People' s Court of Dongguan
People' s Court of Zhanjiang Economic and Technological Development Zone
People' s Court of Daya Bay Economic and Technological Development Zone of Huizhou

Shandong Province:

People' s Court of Jinan High and New-tech Industrial Development Zone
People' s Court of Zibo High and New-tech Industrial Development Zone
People' s Court of Tai' an High and New-tech Industrial Development Zone
People' s Court of Yantai Economic and Technological Development Zone
People' s Court of Rizhao Economic Development Zone

Hebei Province:

People' s Court of Shijiazhuang High and New-tech Industrial Development Zone
People' s Court of Langfang Economic and Technological Development Zone
People' s Court of Qinhuangdao Economic and Technological Development Zone

Hubei Province:

People' s Court of Wuhan Economic and Technological

附:

内地经授权管辖第一审涉外涉港澳台民商事案件的基层人民法院名单
(截止2006年5月31日)

广东省

广州市越秀区人民法院

广州市海珠区人民法院

广州市天河区人民法院

广州市番禺区人民法院

广州市萝岗区人民法院

广州市南沙区人民法院

深圳市福田区人民法院

深圳市罗湖区人民法院

深圳市宝安区人民法院

深圳市龙岗区人民法院

深圳市南山区人民法院

◆ 〇 钰 讵 醒 翁 错 ◆ 嗣 穹 彳 ◆

佛山市禅城区人民法院

东莞市人民法院

湛江经济技术开发区人民法院

惠州市大亚湾经济技术开发区人民法院

山东省

济南高新技术产业开发区人民法院

淄博高新技术产业开发区人民法院

泰安高新技术◆◆悼

Development Zone
People' s Court of Donghu New-tech Development
Zone of Wuhan
People' s Court of Xiangfan High and New-tech
Development Zone

Liaoning Province
People' s Court of Shenyang Economic and
Technological Development Zone
People' s Court of Shenyang High and New-tech
Industrial Development Zone
People' s Court of Dalian Economic and Technological
Development Zone

Jiangsu Province
People' s Court of Suzhou Industrial Park
People' s Court of Wuxi High and New-tech Industrial
Development Zone
People' s Court of Changzhou High and New-tech
Industrial Development Zone
People' s Court of Nantong Economic and
Technological Development Zone

Shanghai
People' s Court of Pudong New Area
Huangpu District People' s Court

Jilin Province
People' s Court of Changchun Economic and
Technological Development Zone
People' s Court of Jilin High and New-tech Industrial
Development Zone

Tianjin
People' s Court of Tianjin Economic and Technological
Development Zone

Zhejiang Province
People' s Court of Yiwu

Henan Province
People' s Court of Zhengzhou High and New-tech
Industrial Development Zone
People' s Court of Luoyang High and New-tech
Development Zone

Sichuan Province
People' s Court of Chengdu High and New-tech
Industrial Development Zone
People' s Court of Mianyang High and New-tech
Industrial Development Zone

Hainan Province

◆(3)◆嗣穹行◆

烟台经济技术开发区人民
法院

日照经济开发区人民法院

河北省

石家庄高新技术产业开发
区人民法院

廊坊经济技术开发区人民
法院

秦皇岛市经济技术开发区
人民法院

湖北省

武汉市经济技术开发区人
民法院

武汉东湖新技术开发区人
民法院

襄樊高新技术开发区人民
法院

辽宁省

沈阳经济技术开发区人民
法院

沈阳高新技术产业开发
区人民法院

大连经济技术开发区人民
法院

江苏省

苏州市工业园区人民法院

无锡市高新技术产业开发
区人民法院

常州高新技术产业开发
区人民法院

南通经济技术开发区人民
法院

People' s Court of Yangpu Development Zone

上海市

Inner Mongolia Autonomous Region
People' s Court of Rare Earth High and New-tech
Industrial Development Zone of Baotou

浦东新区人民法院

黄浦区人民法院

Anhui Province
People' s Court of Hefei High and New-tech Industrial
Development Zone

吉林省

长春市经济技术开发区人民
法院

If, for the needs of the adjudicative work, the Supreme
People' s Court needs to increase or dec

吉林高新技术产业开发区
人民法院

Any increase or decrease of the grassroots people' s
courts which have authorized jurisdiction over the first
instance of civil and commercial cases involving foreign,
HK, Macao or Taiwan affairs by the Supreme People' s
Court for meeting the demands of the adjudicative work
shall be listed into the Annex after notifying the HKSAR
Government.

天津市

天津市经济技术开发区人
民法院

浙江省

义乌市人民法院

河南省

郑州高新技术产业开发区
人民法院

洛阳市高新技术开发区人
民法院

四川省

成都高新技术产业开发区
人民法院

绵阳高新技术产业开发区
人民法院

海南省

洋浦开发区人民法院

内蒙古自治区

包头稀土高新技术产业开
发区人民法院

安徽省

合肥高新技术产业开发区
人民法院

最高人民法院根据审判工作的需要，对授权管辖第一审涉外、涉港澳台民事案件的基层人民法院进行增减的，在通报香港特别行政区政府后，列入附件。

chl_106347

Announcement of the Supreme People's Court of the People's Republic of China

中华人民共和国最高人民法院
公告

According to Article 93 of the Basic Law of the Macao Special Administrative Region of the People's Republic of China, the Supreme People's Court reached the Arrangement between the Mainland and the Macao Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments (hereinafter referred to as the Arrangement) with the Macao Special Administrative Region upon consultation and signed the Arrangement on February 28, 2006. This Arrangement has been adopted at the 1378th meeting of the Judicial Committee of the Supreme People's Court on February 13, 2006 and is hereby promulgated. In light of the unanimity of both parties, this Arrangement shall come into force as of April 1, 2006.

根据《中华人民共和国澳门特别行政区基本法》第九十三条的规定，最高人民法院与澳门特别行政区经协商，达成《内地与澳门特别行政区关于相互认可和执行民商事判决的安排》（以下简称《安排》），并于2006年2月28日签署。本《安排》已于2006年2月13日由最高人民法院审判委员会第1378次会议通过，现予公布。根据双方一致意见，本《安排》自2006年4月1日起生效。

March 21, 2006

二〇〇六年三月二十一日

Arrangement between the Mainland and the Macao Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments

最高人民法院关于内地与澳门特别行政区相互认可和执行民商事判决的安排
(法释〔2006〕2号)

(Interpretation No. 2 [2006] of the Supreme People's Court Adopted at the 1378th meeting of the Judicial Committee of the Supreme People's Court on February 13, 2006)

According to Article 93 of the Basic Law of the Macao Special Administrative Region of the People's Republic of China, the Supreme People's Court reached the following arrangements between the Mainland and the Macao Special Administrative Region on the mutual recognition and enforcement of civil and commercial judgments with the Macao Special Administrative Region upon consultation:

根据《中华人民共和国澳门特别行政区基本法》第九十三条的规定，最高人民法院与澳门特别行政区经协商，就内地与澳门特别行政区法院相互认可和执行民商事判决事宜，达成如下安排：

Article 1 The mutual recognition and enforcement of judgments of civil and commercial cases (including the labor dispute cases in the Mainland and the civil labor cases in the Macao Special Administrative Region) between the Mainland and the Macao Special Administrative Region (hereinafter referred to as Macao) shall be governed by this Arrangement.

第一条 内地与澳门特别行政区民商事案件（在内地包括劳动争议案件，在澳门特别行政区包括劳动民事案件）判决的相互认可和执行，适用本安排。

This Arrangement shall also be applicable to the judgments and verdicts of civil damages involved in criminal cases.

本安排亦适用于刑事案件中有关民事损害赔偿的判决、裁定。

This Arrangement shall not be applicable to administrative cases.

本安排不适用于行政案件。

Article 2 The "judgments" as mentioned in this Arrangement include the judgments, verdicts, decisions, mediation agreements and orders to pay in the Mainland; and include the judgments, verdicts, mediation rulings, decisions or instructions of judges in Macao.

第二条 本安排所称“判决”，在内地包括：判决、裁定、决定、调解书、支付令；在澳门特别行政区包括：裁判、判决、确认和解的裁定、法官的决定或者批示。

The "requested party" as mentioned in this Arrangement refers to

either party of the Mainland or Macao that accepts the application for recognition and enforcement of the judgment.

本安排所称“被请求方”，指内地或者澳门特别行政区双方中，受理认可和执行判决申请的一方。

Article 3 In respect to an effective judgment rendered by the court of one party and with the content of performance, the party involved can file an application for recognition and enforcement with the competent court of the other party.

第三条 一方法院作出的具有给付内容的生效判决，当事人可以向对方有管辖权的法院申请认可和执行。

In respect to a judgment without the content of performance or which needs not to be implemented but must be recognized through judicial procedures, the party involved may solely file an application for recognition with the court of the other party or may directly use this judgment as the evidence in the litigation procedures of the court of the other party.

没有给付内容，或者不需要执行，但需要通过司法程序予以认可的判决，当事人可以向对方法院单独申请认可，也可以直接以该判决作为证据在对方法院的诉讼程序中使用。

Article 4 The court that has the power to accept the applications for the recognition and enforcement of judgments shall be the intermediate people's court at the locality of the domicile, habitual residence or property of the party against whom the application is filed. Where there are two or more intermediate people's courts that have the jurisdiction, the applicant shall choose one intermediate people's court.

第四条 内地有权受理认可和执行判决申请的法院为被申请人住所地、经常居住地或者财产所在地的中级人民法院。两个或者两个以上中级人民法院均有管辖权的，申请人应当选择向其中一个中级人民法院提出申请。

The court that has the power to accept the applications for the recognition of judgments in Macao shall be the intermediate court, and the court that has the power to enforce shall be the primary court.

澳门特别行政区有权受理认可和执行判决申请的法院为中级法院，有权执行的法院为初级法院。

Article 5 Where the party against whom the application is filed has the property that can be executed both in the Mainland and Macao, the applicant may file an application for enforcement with the court of either place.

第五条 被申请人在内地和澳门特别行政区均有可供执行财产的，申请人可以向一地法院提出执行申请。

When the applicant files an application for enforcement with the court of one place, he/it can file an application for seal-up, seizure or freeze of the property of the executed with the court of another place. After the court of one place enforces the judgment, the applicant may, upon the strength of the enforcement certification issued by the court of one place, apply for adopting enforcement measures of property execution with the court of another place for the insufficient part.

申请人向一地法院提出执行申请的同时，可以向另一地法院申请查封、扣押或者冻结被执行人的财产。待一地法院执行完毕后，可以根据该地法院出具的执行情况证明，就不足部分向另一地法院申请采取处分财产的执行措施。

The total amount of property executed by the courts of two places shall not exceed the amount determined according to the judgment or the law.

两地法院执行财产的总额，不得超过依据判决和法律规定所确定的数额。

Article 6 An application form for the recognition and enforcement of judgments shall indicate the following matters:

第六条 请求认可和执行判决的申请书，应当载明下列事项：

(1) If the applicant or the party against whom the application is filed is a natural person, the application form shall indicate his name and

(一) 申请人或者被申请

domicile; if the applicant or the party against whom the application is filed is a legal person or any other organization, the application form shall indicate its name and domicile, the name, position and domicile of its legal representative or main principal;

(2)The case number and date of adjudication of the judgment for which an application for recognition and enforcement is filed; and

(3)The reasons and targets for the application for the recognition and enforcement as well as the implementation of this judgment by the court that renders it.

Article 7 An application form shall be affixed with the duplicate of the effective judgment or the certification with the seal of the court that renders this effective judgment as well as the relevant documents issued by the court that renders this effective judgment or the competent institution that can prove the following matters:

(1)The summons is delivered according to law, unless it is proved by the judgment;

(2)A person with no capacity to take part in litigation has an agent, unless it is proved by the judgment;

(3)The judgment has been served on the parties involved according to the law of the place where the judgment is rendered and has come into effect;

(4)The duplicate of the legal person business license or corporate registration certificate has been provided if the applicant is a legal person; and

(5)The certification on the implementation of the judgment issued by the court that renders the judgment has been provided.

In case the court of the requested party maintains that it has thoroughly known the relevant matters, the relevant documents need not to be submitted.

In case the court of the requested party is still doubtful about the authenticity of the judgment provided by the party involved, it may request the court that renders this effective judgment for confirmation.

Article 8 An application form shall be made in Chinese. In case the attached judicial documents or relevant documents are not made in Chinese, the Chinese translation thereof shall be provided. If the judgment rendered by the court is not made in Chinese, the Chinese translation thereof issued by the court shall be provided.

人为自然人的，应当载明其姓名及住所；为法人或者其他组织的，应当载明其名称及住所，及其法定代表人或者主要负责人的姓名、职务和住所；

(二) 请求认可和执行的判决的案号和判决日期；

(三) 请求认可和执行判决的理由、标的，以及该判决在判决作出地法院的执行情况。

第七条 申请书应当附生效判决书副本，或者经作出生效判决的法院盖章的证明书，同时应当附作⦿⦿⦿芯葩姆彳奔蚌晒腥厂薰⦿钩鼯叩闹つ脍铝惺李畹南喙匚募™：

(一) 传唤属依法作出，但判决书已经证明的除外；

(二) 无诉讼行为能力人依法得到代理，但判决书已经证明的除外；

(三) 根据判决作出地的法律，判决已经送达当事人，并已生效；

(四) 申请人为法人的，应当提供法人营业执照副本或者法人登记证明书；

(五) 判决作出地法院发出的执行情况证⦿⦿⦿

如被请求方法院认为已充分了解有关事项时，可以免除提交相关文件。

被请求方法院对当事人提供的判决书的真实性有疑问时，可以请求作出生效判决的法院予以确认。

第八条 申请书应当用中文制作。所附司法文书及其相关文件未用中文制作的，应当提供中文译本。其中法院判决书未用中文制作的，应当提供

Article 9 After the court receives an application form for recognition and enforcement of the judgment filed by an applicant, it shall serve the application form on the party against whom the application is filed.

The party against whom the application is filed has the right to put forward the plea of defense.

Article 10 The court of the requested party shall examine the application for recognition and enforcement as soon as possible and render the verdict.

Article 11 In case the court of the requested party examines and verifies that there is any of the following circumstances, it shall rule not to recognize the judgment:

(1)The matter verified in the judgment shall be subject to the exclusive jurisdiction of the court of the requested party according to the laws of the requested party;

(2)The court of the requested party has disposed any similar action, and the aforesaid action is put forward prior to the judgment to be recognized, and the court of the requested party has the jurisdiction;

(3)The court of the requested party has recognized or enforced the judgment or arbitration award rendered by the court or arbitral organ other than itself for the same lawsuit;

(4)The party that loses the case has not been lawfully summoned or the person with no capacity to take part in litigation is not provided with any agent according to the laws of the place where the judgment is rendered;

(5)The judgment for which an application for the recognition and enforcement thereof has not come into force or is ruled not to be enforced due to retrial according to the laws of the place where the judgment is rendered; or

(6)The recognition and enforcement of the judgment in the Mainland would be contrary to the basic principles of the laws or social public interests of the Mainland; or the recognition and enforcement of the judgment in Macao would be contrary to the basic principles of the laws or public order of Macao.

Article 12 After the court renders a verdict in respect to the request for recognition and enforcement of the judgment, it shall timely serve the verdict.

In case the party involved is not satisfied with the verdict in which the recognition of the judgment is approved or not, he/it may request the

由法院出具的中文译本。

第九条 法院收到申请人请求认可和执行判决的申请后,应当将申请书送达被申请人。

被申请人有权提出答辩。

第十条 被请求方法院应当尽快审查认可和执行的请求,并作出裁定。

第十一条 被请求方法院经审查核实存在下列情形之一的,裁定不予认可:

(一)根据被请求方的法律,判决所确认的事项属被请求方法院专属管辖;

(二)在被请求方法院已存在相同诉讼,该诉讼先于待认可判决的诉讼提起,且被请求方法院具有管辖权;(以诉讼提起为标准)

(三)被请求方法院已认可或者执行被请求方法院以外的法院或仲裁机构就相同诉讼作出的判决或仲裁裁决;

(四)根据判决作出地的法律规定,败诉的当事人未得到合法传唤,或者无诉讼行为能力人未依法得到代理;

(五)根据判决作出地的法律规定,申请认可和执行的判决尚未发生法律效力,或者因再审被裁定中止执行;

(六)在内地认可和执行判决将违反内地法律的基本原则或者社会公共利益;在澳门特别行政区认可和执行判决将违反澳门特别行政区法律的基本原则或者公共秩序。

第十二条 法院就认可和执行判决的请求作出裁定后,应当及时送达。

当事人对认可与否的裁定不服的,在内地可以向上

review to the people's court at the next higher level in the Mainland, or may file an appeal according to the laws in Macao. In case he/it is not satisfied with the verdict made during the course of implementation, he/it may seek for relief from the court at the next higher level according to the laws of the requested party.

Article 13 Where a judgment is recognized by verdict, it shall have equal force with the judgment rendered by the court of the requested party. If any performance shall be conducted according to the judgment, the party involved may apply to the competent court of the requested party for the enforcement.

Article 14 When the court of the requested party can not recognize or enforce all the requests confirmed in a judgment, it may recognize or enforce some requests.

Article 15 Before or after the court accepts an application for recognition and enforcement of the judgment, it may take preservation measures for the property of the party against whom the application is filed according to the provisions in the laws of the requested party on the property preservation and upon the strength of the application of the applicant.

Article 16 While the court of the requested party accepts an application for recognition and enforcement of the judgment, or where the judgment has been recognized and enforced, if the party involved files a similar lawsuit, the court of the requested party shall not accept it.

Article 17 As to the judgment that can not be recognized according to Item (1), (4) or (6) of Article 11 of this Arrangement, the applicant shall not file any application for recognition and enforcement any more. However, if the court of the requested party has the jurisdiction according to its laws, the party involved may file another lawsuit to the local court with the facts of the same case.

In respect to the judgment as mentioned in Item (5) of Article 11 of this Arrangement, the applicant may file another application for recognition and enforcement after the circumstance for not recognizing the judgment eliminates.

Article 18 In order to apply this Arrangement, all the authentication formalities shall be exempted for the original, duplicate and translation made or notarized by the competent public institution (including notaries public) of one party, and they can be used by the other party.

Article 19 When an applicant applies for the recognition and enforcement of the judgment according to this Arrangement, he/it shall pay the litigation costs and enforcement costs according to the laws of the requested party.

一级人民法院提请复议，在澳门特别行政区可以根据其法律规定提起上诉；对执行中作出的裁定不服的，可以根据被请求方法律的规定，向上级法院寻求救济。

第十三条 经裁定予以认可的判决，与被请求方法院的判决具有同等效力。判决有给付内容的，当事人可以向该方有管辖权的法院申请执行。

第十四条 被请求方法院不能对判决所确认的所有请求予以认可和执行时，可以认可和执行其中的部分请求。

第十五条 法院受理认可和执行判决的申请之前或者之后，可以按照被请求方法律关于财产保全的规定，根据申请人的申请，对被申请人的财产采取保全措施。

第十六条 在被请求方法院受理认可和执行判决的申请期间，或者判决已获认可和执行，当事人再行提起相同诉讼的，被请求方法院不予受理。

第十七条 对于根据本安排第十一条（一）、（四）、（六）项不予认可的判决，申请人不得再行提起认可和执行的申请。但根据被请求方的法律，被请求方法院有管辖权的，当事人可以就相同案件事实向当地法院另行提起诉讼。

本安排第十一条（五）项所指的判决，在不予认可的情形消除后，申请人可以再行提起认可和执行的申请。

第十八条 为适用本安排，由一方有权限公共机构（包括公证员）作成或者公证的文书正本、副本及译本，免除任何认证手续而可以在对方使用。

第十九条 申请人依据本安排申请认可和执行判决，应当根据被请求方法律规定，交纳诉讼费用、执行费用。

In case the applicant is approved to be able to suspend, reduce or exempt the payment of litigation costs at the place where the effective judgment is rendered, he/it shall enjoy the equal treatment when it files an application for recognition and enforcement of the judgment with the court of the requested party.

Article 20 Unless it is prescribed by this Arrangement, the recognition and enforcement of civil and commercial judgments shall be governed by the laws of the requested party.

Article 21 The request for recognition and enforcement put forward before this Arrangement comes into force shall not apply this Arrangement.

As to the judgments rendered by the courts in the Mainland and Macao from December 20, 1999 to the entry-into-effect of this Arrangement, if the party involved fails to apply for the recognition and enforcement with the court of the other party or the court of the other party refuses to accept, the application still can be filed after the entry-into-effect of this Arrangement.

The time limit for the party involved to file an application for the recognition and enforcement of judgments rendered by the court in Macao during the aforesaid term with the people's court in the Mainland shall be calculated anew as of the entry-into-effect of this Arrangement.

Article 22 Where this Arrangement meets any problem during the course of implementation thereof or needs to be altered, the Supreme People's Court and the Macao Special Administrative Region shall solve it through mediation.

Article 23 In order to implement this Arrangement, the Supreme People's Court and the Court of Final Appeal of Macao shall mutually provide the relevant legal materials.

The Supreme People's Court and the Court of Final Appeal of Macao shall mutually circulate the notice on the enforcement of this Arrangement every year.

Article 24 This Arrangement shall come into force as of April 1, 2006.

申请人在生效判决作出地获准缓交、减交、免交诉讼费用的，在被请求方法院申请认可和执行判决时，应当享有同等待遇。

第二十条 对民商事判决的认可和执行，除本安排有规定的以外，适用被请求方的法律规定。

第二十一条 本安排生效前提出的认可和执行请求，不适用本安排。

两地法院自1999年12月20日以后至景才派白靳鲍呐芯觶笔氯宋聪蚌苑椒荷呢肴峡珊椭葱校蚌叨苑椒壕莞森模钥梢杂诒景才派III第崙鏊呢笱

澳门特别行政区法院在上述期间内作出的判决，当事人向内地人民法院申请认可和执行的期限，自本安排生效之日起重新计算。

第二十二条 本安排在执行过程中遇有问题或者需要修改，应当由最高人民法院与澳门特别行政区协商解决。

第二十三条 为执行本安排，最高人民法院和澳门特别行政区终审法院应当相互提供相关法律资料。

最高人民法院和澳门特别行政区终审法院每年相互通报执行本安排的情况。

第二十四条 本安排自2006年4月1日起生效。