



PRC Court recognises an English judgment for the first time – a Gard perspective

On March 17, 2022, the Shanghai Maritime Court (following approval from the Supreme People's Court) issued a ruling confirming that English High Court judgments can be recognised and enforced in the People's Republic of China. This is the first time that a PRC Court has, on the basis of acknowledging judicial reciprocity between PRC and English Courts, ruled that an English civil judgment is legally binding in the PRC.

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The English Proceedings

The case arose from the shipowner's termination of three long term charter parties on the grounds that the charterer had persistently failed to pay hire in advance and as required by the charterparties. The shipowner first commenced arbitration against the charterer under three charterparties. These arbitration proceedings were suspended because the charterer went into liquidation.

The shipowner therefore brought suit against the parent company of the charterer based on three performance guarantees. In the first instance, Popplewell J. held that payment of hire was not a condition but that the charterer had renounced the charter parties and that the shipowner was entitled to about USD 24 million in damages for loss of bargain in respect of the unexpired terms of the charter parties. *Spar Shipping AS v Grand China Logistics Holding (Group) Co, Ltd* [2015] EWHC 718 (Comm) (18 March 2015).

The decision was appealed, and the English Court of Appeal provided a decision answering two main questions:

1. whether a charterer's failure to pay instalments of hire punctually is a breach of condition under a time charterparty which enabled the shipowner to terminate the charterparties and claim for damages; and
2. whether the conduct of the charterer was repudiatory or renunciatory, entitling the shipowner to terminate the charterparties and recover damages.

On the first question, the English Court of Appeal held that failure to pay instalments of hire punctually and in advance under the charterparties was not a breach of condition thus upholding the judgment of Popplewell J in the first instance and confirming that *The Astra* was wrongly decided.

In consideration of the issues surrounding the second question, a three-stage test was adopted by the English Court:

1. what was the contractual benefit of the shipowner under the charterparties;
2. what was the prospective non-performance shown by conduct of charterer; and
3. did the prospective non-performance go to the root of the contract?

The Court of Appeal held, that the benefit to the owner was regular and periodic payment in advance and the charterer showed prospective non-performance by their conduct by paying in arrears. The Court concluded that the prospective non-performance did go to the root of the contract in that charterer's conduct evidenced an intent to turn the charterparties into something radically different from their terms – namely, from a contract for payment in advance to one for payment in arrears.

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As such, the conduct of charterers amounted to a renunciation of the charters, and the shipowner was entitled to terminate the charter parties and recover damages for

loss of bargain – the amount of hire that would have been earned had the charterparties been performed for their full term.” *Grand China Logistics Holding (Group) Co. Ltd v Spar Shipping AS* [2016] EWCA CIV 982.

The English Judgment was widely welcomed for clarifying the position under English law and bringing an end to a period of uncertainty that surrounded whether payment of hire is a condition following the decision in *The Astra*. The English Judgment also confirmed that there is no automatic right to damages for loss of bargain under English law. Rather, the right to terminate the contract and/or claim for damages following a repudiatory or renunciatory breach will be based on the facts of each case. Damages for loss of bargain may be recoverable if the breach deprives the innocent party of substantially the whole of the benefit of the contract.

The English Courts ordered the charterers’ parent company as guarantor to pay the shipowner the amounts due under the three charterparties including damages plus interest and costs. To collect on the English Judgment, the shipowner filed a claim in the Shanghai Maritime Court, as the court with jurisdiction over the charterer’s parent company, for the recognition and enforcement of the English Judgment.

The PRC Ruling - *Spar Shipping AS v Grand China Logistics Holding (Group) Co, Ltd.* (2018) H72XWR No.1

The PRC Ruling considered that the PRC and United Kingdom have not concluded or acceded to treaties on mutual recognition and enforcement of court judgments in civil and commercial matters, so the principle of reciprocity should be taken as the basis for the recognition of an English Judgment. Reciprocity, in theory, requires that both states recognize the judgments of the other. Thus, the Shanghai Maritime Court reviewed submissions from the parties in relation to previous matters concerning the recognition and enforcement of Chinese judgments by the English Courts.

The Shanghai Maritime Court considered that “To this point, the dispute between the parties in this case first lies in whether the judgment [2015] EWHC 999 (Comm) of the English High Court [*Spliethoff’s Bevrachtungskantoor BV and Bank of China Limited*] constitutes the recognition of the judgment and preservation ruling of court for first instance in the case (2011) QHFHSCZ No.271 and the judgment of the court for second instance in the case (2013) LMSZZ No.87” and concluded that these cases could not be regarded as precedent of recognition and enforcement by English Courts for Chinese judgments but they were also not precedent of the English Court’s refusal to recognise Chinese court judgments.

It further explained the principle of reciprocity: “The Civil Procedure Law PRC does not limit the principle of reciprocity to the prior recognition and enforcement of civil and commercial judgments of our courts by relevant foreign courts, so this court holds that if according to the law of the country where the foreign court renders the judgment, the civil and commercial judgments made by Chinese courts can be recognised and enforced by the courts of that country, it can be concluded that there is a reciprocal relationship between China and the country in recognising and enforcing civil and commercial judgments.”

Although the Shanghai Maritime Court found no precedent in which a civil and commercial judgment issued by a Chinese court was recognised and enforced by the English court, it was satisfied that as a matter of principle Chinese civil and commercial judgments can be recognised and enforced by the English courts.

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The case before the Shanghai Maritime Court was heard in 2018 and was heard again in February 2022 after it went all the way up to the Supreme People's Court of the PRC and obtained approval.

In the intervening period, and shortly before the PRC Ruling was issued, the Supreme Court of the PRC issued an important memorandum on the handling of commercial and maritime matters entitled "Memorandum of the National Courts' Symposium on Trials for Commercial and Maritime Cases" ("**Memorandum**"). Article 33 of the Memorandum provided as the PRC and United Kingdom have not concluded or jointly acceded to international treaties, the Memorandum can be applied in respect to the review of recognition of English judgments by the PRC courts. Importantly and relevant to the PRC Ruling, Article 44 of the Memorandum provided that a condition for recognition of foreign court judgment is that: "... according to the law of the country where the court is located, the civil and commercial judgments made by the People's Court can be recognised and enforced by the courts of that country."

Unlike the English judicial system, the PRC has a civil law legal system which is not based on the doctrine of precedent, and it is largely based on statutory law rather than case law. In practice, in order to unify the interpretation of the statutes, the Supreme People's Court of the PRC regularly issues judicial practice interpretation notes and memoranda to guide the lower courts in administering the laws. This case is an example of such a memorandum and practice notes having persuasive power over a sitting court (we were also informed by the PRC lawyers handling the matter that the PRC Ruling, before it was issued, received blessing of the Supreme People's Court of the PRC). It can be expected that courts in other port cities with designated maritime courts would follow the Memorandum when faced with a similar situation. These include the Maritime Courts of Ningbo, Qingdao, Guangzhou, Dalian, Tianjin, Haikou, Wuhan, Nanjing, Beihai and Xiamen even though these courts are on the same level with the Shanghai Maritime Court, each having their own provincial High Court as their respective appellate court with the Supreme People's Court as the final court of appeal.

Impact on claims handling

China is the world's largest exporter and producer of industrial goods and is the world's second-largest importer. This gives rise to the demand for maritime transport - 85 per cent of the goods are transported by sea in the international trade. Disputes are inevitable during the performance of maritime contracts and Chinese entities would likely be involved.

The merits of a claim can be affected by the law governing the contract and the jurisdiction where the claim is to be determined. The United Kingdom is regarded as the centre for the provision of legal services to the international maritime industry. English law is widely applied to maritime disputes, perhaps more than the law of any other country. However, a maritime claimant also needs to ensure that the English court judgment can be enforced in the country where the defendant is domiciled so that there will be assets available to turn a judgment into real compensation. The inability to enforce a judgment would mean the waste of money, time and efforts in obtaining a favourable judgment.

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Before the PRC Ruling, it was thought that an arbitration clause may be more beneficial than an English court jurisdiction clause in respect of the enforcement in China. China is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. It makes arbitration awards made by the London arbitrators enforceable in China under the [convention](#). The PRC Ruling may provide parties another option in considering the law and jurisdiction clause in their maritime contracts involving Chinese entities.

The judgment adds to a growing trend of recognising foreign judgments, in 2016, the Nanjing Intermediate People's Court handed down a decision recognising and enforcing a civil judgment made by the Singapore High Court based on the principle of reciprocity while in 2017, the Wuhan Intermediate Court recognised for the first time a US civil court ruling in the PRC.

Limitations to the recognition of English Judgments

This particular case involved enforcement of a judgment for damages against a guarantor. The case is unlikely to affect pre-litigation orders, for example, anti-suit injunctions because under the Memorandum, preservation orders and other “procedural rulings” by foreign courts would not be recognized as binding. Also, if a Chinese court has made a judgement on a particular dispute, it would not recognize and enforce a judgment made by a foreign court for the same dispute.

China is a major importer of agricultural and other commodities. For claims alleging damage or loss of cargo and where the claim is filed in a Chinese Court, we expect that the Chinese courts would maintain jurisdiction despite an English law and jurisdiction clause in the charter party and incorporated in the Bill of Lading.

The use of letters of indemnity (LOIs) are common in the shipping industry and shipowners are offered LOIs by the charterers, shippers or other third parties from time to time. As an example, the recommended wording for LOIs in exchange for delivery without production of original bills of lading includes an English law and English High Court jurisdiction clause in the event of disputes. Such an LOI stands in the place of P&I cover for misdelivery, so enforcement of a judgment is an important consideration in the shipowner's decision whether to accept such an LOI. An LOI is in the nature of a guarantee and the recent recognition and enforcement of English court judgments in China may enhance the chance of shipowners in obtaining indemnity under an LOI issued by a PRC entity.

In the interconnected world of maritime trade and transportation, the recognition of foreign court judgments based on reciprocity is a welcome trend.

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