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## INTERNATIONAL LAW

# Judgments Enforcement

**I**N THE EXTENSIVE coverage of liability issues concerning potentially injurious Chinese-origin products, few commentators have focused on how entering into a treaty on enforcement in China of U.S. products liability judgments might offer added protection to U.S. consumers. Under 19th-century precedent, *Hilton v. Guyot*, 159 U.S. 113 (1895), the United States generally enforces without requiring reciprocity civil money-damages judgments from China and other countries. U.S. courts require only that the foreign court had proper jurisdiction over the defendant, gave the defendant adequate notice and afforded the defendant an opportunity to be heard in an impartial proceeding with fair procedures. In short, an injured Chinese consumer may, in principle, enforce in a U.S. court his Chinese judgment for money damages caused by defective products exported to China by a U.S. manufacturer.

On the other hand, a U.S. consumer's products liability judgment against a Chinese manufacturer will not be enforced in a number of other countries absent reciprocity which, in the case of China, means a treaty ensuring mutual recognition. The United States has no such treaty with any country.

Responding to the challenge of potential problems with products from China requires a range of measures including enhanced regulatory action, which is reportedly under way, coordinated industry standards, agreed-upon inspection procedures and strong enforcement for non-compliance. In addition, American consumers should be able to bring a U.S. civil action for damages against those who cause

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injury through failure to meet standards and should be able to enforce any judgment in China. Providing such a remedy would serve two important purposes—ensuring a remedy to those harmed by noncompliance and deterring future failure to meet more stringent industry standards. At the same time, Chinese consumers are entitled to the more secure regime that a treaty would provide for recovering damages caused by defective U.S. products sold in their country.

### Negotiations for multilateral treaty failed in the 1990s

Despite the many difficulties that would arise in negotiating a bilateral treaty with China, there are strong reasons for the United States to pursue initial discussions with China or possibly a group of Asian countries (including China) whose products are sold in the United States. In the 1990s, the member states of the Hague Conference on Private International Law attempted to negotiate a multilateral treaty on international jurisdiction and the recognition

and enforcement of judgments. More than 60 countries are members of the conference, including the United States and China, which actively participated in the negotiations and made important contributions to the draft treaty. In the end, the negotiation failed for a variety of reasons, including disagreement over the basis on which the United States asserts personal jurisdiction over non-U.S. defendants in products liability cases.

In brief, other nations object to the activity-based analysis on which U.S. courts rely in determining whether the relationship among the defendant, the jurisdiction and pertinent facts permit an assertion of personal jurisdiction over the defendant that meets due process requirements under the Fifth and 14th amendments to the Constitution. For many countries, including notably the civil-law countries, the focus is, instead, on whether the defendant had a branch, agent or other legal presence in the jurisdiction or where the injurious conduct occurred or arose, an elusive and potentially arbitrary test. Other nations particularly criticized what they termed “doing business jurisdiction,” especially the potential for U.S. courts to find personal jurisdiction over a non-U.S. defendant based on its “continuous and systematic general business contacts” when the cause of action is entirely unrelated to those activities. See, e.g., *Wiuva v. Royal Dutch Shell*, 226 F.3d 88, 94-100 (defendant subjected to U.S. personal jurisdiction based on the presence of an investor relations office in New York in a suit based on alleged defendant involvement in governmental human rights violations entirely in Nigeria).

U.S. law also remains uncertain regarding the basis for personal jurisdiction over a non-U.S. component manufacturer that sells products to third parties to incorporate in final products destined for the U.S. market. The

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U.S. Supreme Court last addressed this subject in *Asahi Metal Industry Co. Ltd. v. Superior Court*, 480 U.S. 102 (1987). That case involved the sale of Japanese-made defective tire valve assemblies to a Taiwanese manufacturer of tire tubes. When those tubes were exported to the United States, they allegedly caused death and severe injury to the plaintiffs. At issue was whether it was constitutionally permissible under the due process clause to subject the Japanese manufacturer to specific U.S. personal jurisdiction on the facts presented.

In an opinion by Justice Sandra Day O'Connor, the court held unanimously that the exercise of personal jurisdiction over the Japanese manufacturer would be "unreasonable and unfair." O'Connor emphasized the international context of the case, the "unique burden placed upon one who must defend oneself in a foreign legal system," the "procedural and substantive interests of other nations" and the minimal California interest in the claim. The court was badly split over the analysis of whether there were sufficient contacts with California to find that the defendant had purposely availed itself of the laws and markets of California. O'Connor, joined by three other justices, concluded that the Japanese manufacturer had not purposefully availed itself of the California market even if aware of the tire tube sales in that state. In particular, she noted that the company did no business in the state, had no office, agents, employees or property and did not advertise or solicit business. Further, its valves were not designed "in anticipation of sales in California."

Justice William J. Brennan, joined by three other justices in a concurring opinion, concluded that the defendant had purposefully engaged in forum activities even though the manufacturer had no presence in California. His opinion relied heavily on the valve manufacturer's having "placed goods in the stream of commerce" and its awareness of the operation of the tube manufacturer's distribution system and sale of the finished products, the tire tubes, in California, so that a lawsuit "cannot come as a surprise." Justice John Paul Stevens, with support of two of the justices joining in Brennan's opinion, urged that if the issue were reached, the court should make a more nuanced analysis of purposeful availment. Even though the defendant made a standard product, Stevens concluded that the defendant's regular sales to the Taiwanese company, resulting in delivery of more than 100,000 valves annually for several years, would generally be purposeful availment.

Since *Asahi*, some courts of appeals have adopted Brennan's strict "mere foreseeability" standard in applying a "stream of commerce" approach to analyzing personal jurisdiction issues. Others require that something more be found to

satisfy the minimum-contacts element of the due process requirement, generally evidence that the defendant directed the product or its marketing to the forum's markets.

In light of *Asahi*, the United States would be particularly concerned in treaty negotiations with China about crafting the basis for suing Chinese manufacturers when they supply defective components to third-party manufacturers. U.S. interests would also want to be able to reach Chinese companies that sell their end products through unaffiliated U.S. distributors or U.S. incorporated subsidiary companies. U.S. consumer groups would insist on grounds for suing a Chinese parent company that has no branch or agent in the United States, especially when the parent's officers and personnel come regularly to this country to support the sale of their products by "independent" distributors. Perhaps the two governments could agree that their manufacturers should be subject to personal jurisdiction through naming a local agent who would accept service of process.

## In light of recent events, there are strong reasons for the United States to seek a judgments-recognition treaty with China.

### Importance of impartiality and independence

Another delicate issue concerns judicial impartiality and independence. In general, nations enter into treaties for recognition or enforcement of judgments only if they have complete confidence in the independence and impartiality of the judiciary of their treaty counterparts.

The Hague Conference anticipated this issue under Art. 9(d) of the new Hague Convention on Choice of Court Agreements, which permits a court to refuse enforcement to a judgment

from another state party to the convention if the judgment is "obtained by fraud in connection with a matter of procedure." The Hartley-Dogauchi Explanatory Report makes clear that the examples intended to be covered by this provision include "where either party seeks to corrupt a judge, juror or witness." ¶ 188. Art. 9(e) also allows refusal to enforce if the rendering court failed to observe "fundamental principles of procedural fairness." That provision evolved from an unsuccessful draft convention in 2001 that included a controversial proposal to refer expressly to "the right of each party to be heard by an impartial and independent court." Some conference members argued that such a proposal would be "contrary to the need for mutual trust and confidence among the courts of Contracting States." Others noted the difficulty of proving the provision's applicability and the potential delay resulting from challenges on this basis.

In short, ensuring judicial impartiality and independence under a proposed treaty would not be easy. Given the many other difficult issues involved in negotiating a judgments-recognition treaty between China and the United States, perhaps both countries would want to defer temporarily resolution of this last point. The importance of such a treaty may be sufficient that, if other challenges are overcome, this tough issue can then also be resolved. In the end, having such a treaty would serve the interests of Chinese and American consumers.