INTERREGIONAL RECOGNITION AND ENFORCEMENT OF CIVIL AND COMMERCIAL JUDGMENTS

Judgment recognition and enforcement (JRE) between the US states, between EU Member States, and between mainland China, Hong Kong, and Macao, are all forms of 'interregional JRE'. This comparative study of the three most important JRE regimes focuses on what lessons China can draw from the US and the EU in developing a multilateral JRE arrangement for mainland China, Hong Kong and Macao.

Mainland China, Hong Kong and Macao share economic, geographical, cultural, and historical proximity to one another. The policy of 'One Country, Two Systems' also provides a quasi-constitutional regime for the three regions. However, there is no multilateral JRE scheme among them, as there is in the US and the EU; and it is harder to recognise and enforce sister-region judgments in China than in the US and the EU. The book analyses the status quo of JRE in China and explores its insufficiencies; it proposes a multilateral JRE arrangement for Chinese regions to alleviate current JRE difficulties; and it provides solutions for the macro and micro challenges of establishing a multilateral arrangement, drawing upon the rich literature on JRE regimes found in the US and EU.

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Interregional Recognition and Enforcement of Civil and Commercial Judgments

Lessons for China from US and EU Law

Jie Huang

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For my husband Shankuan Chen, and my parents

'[T]he old has gone, the new has come!' (2 Corinthians 5:17)

Series Editors' Preface

In this important work, the author addresses the interregional recognition and enforcement of civil and commercial judgments in China. The book gives fascinating insights into how China has accommodated the reintegration of Hong Kong and Macao from a private international law perspective. It is clear that it has done so by becoming a multi-unit State with no overarching Supreme Court to hear appeals from the courts of each of the units (like the US or the UK) or even a court that could be asked by the courts of any of the units to give a ruling on the interpretation of agreements entered into between the units (like the Court of Justice of the European Union). The degree of legislative and judicial independence of the three units (Macao, Hong Kong and Mainland China) in the area of private international law is striking. There is a very narrow agreement between Hong Kong and the Mainland modelled on the Hague Choice of Court Agreement Convention and a broader agreement on recognition and enforcement of civil and commercial judgments between Macao and the Mainland (both of which came into force in 2008). Jie Huang analyses these agreements carefully and notes that there is as yet no case law on the Hong Kong–Mainland Agreement and no agreement between Hong Kong and Macao. The author believes that there is a significant problem of parallel litigation in Hong Kong and the Mainland which is not reduced to any great extent by the existing agreement, due to its narrow scope.

Huang advocates the adoption of a new Multilateral Agreement of broad scope between Hong Kong, Macao and Mainland China on Recognition and Enforcement of Judgments in Civil and Commercial Matters. The book analyses the options for such a multilateral agreement drawing on a comparative study of the US full faith and credit system and the EU Brussels I Regulation. In the end, however, the author advocates a much less ambitious scheme for China than the US or EU models. Harmonisation of direct jurisdiction and the creation of a court with power to give uniform interpretation to an agreement made between the three units are rejected as being politically unattainable at the present time. The solution proposed by the author is seen as a first comprehensive step forward for the three regions. It is a classical 'single' agreement on recognition and enforcement of judgments based on indirect grounds of jurisdiction (like the Hague Convention of 1971) with a twist. The twist is that the author suggests that indirect jurisdiction rules can be used in a positive, a neutral and a negative way. Thus certain rules of indirect jurisdiction (including the domicile of the defendant, choice of court agreements and submission) would always be a positive basis for recognition and enforcement under the Agreement whereas certain exorbitant jurisdiction grounds (like the mere presence of the defendant in the jurisdiction)

would never on their own be enough to constitute a basis for recognition and enforcement of the resulting judgment (as is the case under the Hague Supplementary Protocol of 1971). Finally there would be room left for a significant category of indirect grounds of jurisdiction which might be, under the recognition and enforcement rules of the particular unit, a sufficient basis for recognition and enforcement even though no such recognition and enforcement is possible under the Agreement.

A single Convention on recognition and enforcement is back on the agenda at the Hague Conference on Private International Law, as noted by the author, and this helps to give the book a current global relevance. Indeed, the technical analysis in this book of the key components of a single Convention such as issues of scope, of the indirect grounds of jurisdiction, of the grounds for refusal of recognition and enforcement, and of which types of judgments in one country are enforceable in another country make this book essential reading for scholars of private international law in the three legal units that make up China (their work is carefully summarised wherever it is relevant), for those interested in systems of recognition and enforcement of judgments anywhere in the world, and for those concerned with private international law issues in multi-unit States.

Paul Beaumont, University of Aberdeen
Jonathan Harris, King's College, London

Foreword

How little we still know about law in China! How often we still encounter, when dealing with Chinese law, the legal orientalism that Teemu Ruskola describes and critiques in his splendid new book![1] That legal orientalism suggests that China has no actual law, and if it has law, then it has no rule of law. What matters, says legal orientalism, is not what the law says, but instead what the Party says. And of course, this is not entirely wrong, and of course, because it is not entirely wrong, it is even more wrong and more misleading than would be a complete untruth.

In reality, China has not one but several laws. This is so especially because of the specific and quite remarkable constitutional structure concerning the relations between Mainland China and the former colonies, and now so-called 'Special Administrative Regions' (SAR) of Macao and Hong Kong, which are small in territory but important in economic and political terms. This structure, called 'One country, two systems',[2] not only suggests that Mainland China and the SARs can maintain their different economic and legal systems. It also guarantees a high degree of autonomy to both SARs, which maintain their own constitutions. 'One country, two systems' describes an interaction of different legal systems.

Such an interaction is an obvious topic for private international law, but it presents special problems. A first set of problems arises from the fact that the relations between Mainland China and the SARs are neither those among sovereign nations nor are they relations of subordination. A second set of problems arises from the significant differences between the three legal orders, in economic perspective (the Chinese version of communism versus the market liberalism in the SARs) but also in legal traditions (socialist law in the Mainland, civil law in Macau, common law in Hong Kong.)

This situation has interested scholars before, also in publications in English.[3] However, I am not aware of a study in English that is as comprehensive as that of

[1] Teemu Ruskola, *Legal Orientalism – China, The United States, and Modern Law* (Harvard University Press, 2013).

[2] Jorge Costa Oliveira and Paulo Cardinal (eds), *One Country, Two Systems, Three Legal Orders – Perspectives of Evolution* (Springer, 2009).

[3] Xue Deming, *Interregional Conflict of Laws: A New Agenda for China*, Master's Thesis, Queen's University (Kingston, Ontario, 1992); Jin Huang and Andrew Xuefeng Qian, '"One Country, Two Systems", Three Law Families, and Four Legal Regions: The Emerging Inter-Regional Conflicts of Law in China' (1995) 5 *Duke Journal of Comparative and International Law* 289–328; 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' (2002) 32 *Hong Kong Law Journal* 615; Xianchu Zhang and 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' (2006) 36 *Hong Kong Law Journal* 553–584; Susanne Deißner, *Interregionales Privatrecht in China – Zugleich ein Beitrag zum chinesischen IPR* (Mohr Siebeck, 2012) and the review by Peter Leibküchler (2013) 77 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 849–53.

Jie Huang, which she submitted as an SJD dissertation at Duke University and now, in a revised version, as this book. Her topic is the recognition and enforcement of judgments, undoubtedly at the moment the most dynamic of the three fields in private international law (the other two being jurisdiction and choice of law). In looking at the relations between Mainland China and the SARs (she wisely omits relations to Taiwan, which raise their own political issues) she develops what she calls interregional judgment recognition and enforcement.

Such interregional regimes exist elsewhere in the world, and the greatest strength of the book is its continued use of comparative law. Like some other scholars before her, Jie Huang finds that the law of the European Union provides a useful object of comparison – not only because of the quasi-federal structure of the EU, but also because the EU also faces conflicts between civil and common law. Unlike prior studies, she also looks at judgments recognition between sister states in the United States under the Full Faith and Credit Clause of the US Constitution. Jie Huang is aware of the differences that make a mere transplant problematic. In her fourth chapter she views three challenges that are specific to China: conflicts between socialist and capitalist law; conflicts between civil and common law; weak mutual trust. And yet, she is able to combine comparative insights with knowledge of Chinese law to make informed and convincing suggestions for law reform.

Indeed, law reform is an important theme in this book. Based on her detailed and comparative analysis of the law of judgment recognition and enforcement, Jie Huang drafts an ambitious and comprehensive multilateral Arrangement to replace the current disarray of domestic solutions and the bilateral Arrangements between the Mainland and the respective SARs (a telling picture of the current legal confusion is on page 21). Is the Arrangement too ambitious? Perhaps. But with this book, Jie Huang certainly stakes her claim to have a say in Chinese reforms of interregional private international law.

But the book is written in English and published in Hart's excellent series on private international law, and as such it speaks not merely to Chinese lawyers but also to scholars, practitioners and lawmakers elsewhere. And indeed, although Huang speaks of lessons for China from US and EU law, there is no doubt we in the West have a lot to learn from her book as well. Her discussion of the problem of finality in the recognition of Mainland judgments in Hong Kong, for example, is a case study not just of a tricky doctrinal issue, but also provides us with a fabulous lens on the challenges of interregional relations in the area. Her book has more such insights that should be of interest to comparative lawyers and private international lawyers alike. It helps us, too, to know more about law in China – as it is today, and as it is to become.

Ralf Michaels
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Contents

1

Introduction

A. Introduction: Theme and Contribution of this Book

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 judgment[2] 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 statute[4] 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

[1] See *Nevada v Hall*, 440 US 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 AT von Mehren, 'Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-Wide: Can the Hague Conference Project Succeed?' (2001) 49 *American Journal of Comparative Law* 191, 194 (discussing the example of countries in Western Europe). See also AT von Mehren, 'The Case for a Convention-mixte Approach to Jurisdiction to Adjudicate and Recognition and Enforcement of Foreign Judgments' (1997) 61 *Rabels Zeitschrift fur Auslandisches und Internationales Privatrecht* 86, 90.

[2] Without special indications, 'judgment' in this book is used broadly to include all types of judicial awards. This book 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 ch 5.

[3] AT 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' (1981) 81 *Columbia Law Review* 1044, 1045–50.

[4] 28 USCA, s 1738.

[5] US Constitution, art IV, s 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 EF Scoles et al, *Conflict of Laws*, 4th edn (St Paul, MN, West Group, 2004) 1264–65, 1279–82.

[6] [1978] OJ L304/36. 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 9 October 1978; the accession of Greece on 25 October 1982; the accession of Spain and Portugal on 26 May 1989; and the accession of Austria, Finland and Sweden on 29 November 1996. The latest consolidated version

corresponding 2002 Regulation (hereinafter 'Brussels I 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 enforce-

of the Brussels Convention was reproduced at OJ C27 (26 January 1998) and it is this version to which reference is made in this book. See P Kaye, 'Transitional Scope of the Jurisdiction and Judgments Convention' (1988) 7 *Civil Justice Quarterly* 53.

[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 L12/1. The Brussels Regulation came into effect on 1 March 2002. The Brussels Convention remains in force regarding relations between Denmark and the other Member States. On 6 December 2012, the Council of EU Justice Ministers adopted a recast of this Regulation. European Council, Press Release, 'Recast of the Brussels I Regulation: Towards Easier and Faster Circulation of Judgments in Civil and Commercial Matters within the EU' (No 16599/12, 6 December 2012). See for the adopted text, 'Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)', [2012] OJ L351/1, available at: eur-lex.europa.eu/LexUriServ/LexUriServdo?uri=OJ:L:2012:351:0001:0032:En:PDF. The Recast abolishes *Exequatur*, revises the *lis alibi pendens* rule, emphasizes the arbitration exclusion and changes the rules relating to choice of court agreements under the Brussels I Regulation. For comments, see LJ Timmer, 'Abolition of *Exequatur* under the Brussels I Regulation: Ill Conceived and Premature?' (2013) 9 *Journal of Private International Law* 129, 129–47. The Recast will take effect in 2015. The Article number of the Brussels I Regulation referred to in this book is that before the Recast is adopted.

[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 4 December 1982, amended 14 March 2004). The preamble of the Hong Kong Basic Law (adopted at the Third Session of the Seventh National People's Congress on 4 April 1990, effective 1 July 1997) and the Macao Basic Law (adopted at the First Session of the Eighth National People s Congress on 31 March 1993, effective 20 December 1999). For discussion of SAR in constitutional law, see A Gonçalves, A Paradigm of Autonomy: The Hong Kong and Macau Sars (1996) 18 *Contemporary Southeast Asia* 36, 36–60. For the status of SAR in international law, see UG Schroeter, 'The Status of Hong Kong and Macao Under the United Nations Convention on Contracts for the International Sale of Goods' (2004) 16 *Pace International Law Review* 307, 314–17. SARs are different from ethnic autonomous regions in China, such as the Tibet Autonomous Region. For comments on ethnic autonomous regions, see LW Kin, 'The Relationship between Central and Local Governments under the Unitary State System of China' in J Oliveira and P Cardinal (eds), *One Country, Two Systems, Three Legal Orders. Perspectives of Evolution. Essays On Marcau's Autonomy after the Resumption of Sovereignty by China* (Berlin, Springer-Verlag, 2009) 527, 533–37; CL Xia, 'Autonomous Legislative Power in Regional Ethnic Autonomy of the People's Republic of China: The Law and the Reality' in Oliveira and Cardinal (eds), *One Country, Two Systems*, ibid, 541, 541–63. For comparison between SARs and ethnic autonomous regions, see D Wei, Comments, 'Local Autonomy in the Context of Chinese Political Modernization' in Oliveira and Cardinal (eds), *One Country, Two Systems*, ibid; Xia, 'Autonomous Legislative Power' in Oliveira and Cardinal (eds), *One Country, Two Systems*, ibid, 583, 586–90. For more discussions, see below section iii 'Free Circulation of Judgments in the EU'.

[11] For discussion of the policy of *One Country, Two Systems*, see GG Wang and PMF Leung, 'One Country, Two Systems: Theory into Practice' (1998) 7 *Pacific Rim Law & Policy Journal* 279, 279–321.

ment (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 the 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 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 book aims to draw useful lessons from US and EU JRE laws to help achieve free circulation of judgments among Chinese regions.[16]

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

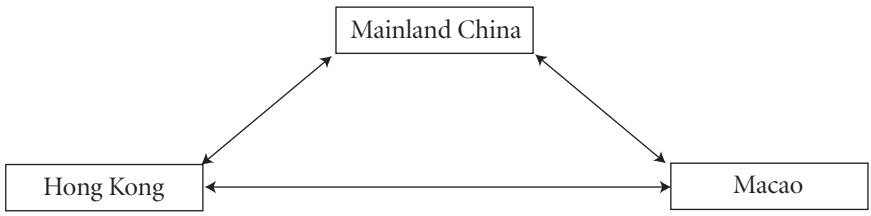

Figure 1: ① Multilateral JRE Arrangement

This book 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:

> [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 incomplet*e (emphasis added).[18]

[12] For details, see the discussion of 'Current JRE System in China', section C iv.

[13] Although the Mainland–Hong Kong Arrangement (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) has been implemented, because of its narrow scope, the majority of judgments are left out. For details, see ch 3.

[14] For need and feasibility of developing the existing JRE system between Chinese regions, see section D.

[15] For the reasons why the US and EU laws can provide a rich resource for China, see section C i.

[16] For the lessons China can draw from the US and EU JRE laws, see chs 4 and 5.

[17] For details, see ch 3.

[18] P Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments* (Abingdon, Professional Books, 1987) 4.

By proposing a Multilateral JRE Arrangement, ultimately this book 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-litigation[19] and maintain certainty between parties regarding their rights and obligations.[20] As the US Supreme Court noted,

> [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.[21]

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 book also intends to enhance the administration of justice among Chinese regions.

This chapter serves as an introduction to the whole book. Besides 'Theme and Contribution' (section A) this book has four further sections. Section B discusses the concept of interregional JRE. Section C introduces the comparative perspectives. It first presents the comparative approach adopted by this book, and then it briefly compares the interregional JRE systems in the US, the EU and China. It demonstrates that Chinese interregional JRE systems are far less effective and efficient than those adopted by the US and the EU. It points out that the major problem of the current Chinese JRE system is the absence of an overarching JRE scheme and insufficiency of substantive laws. Section D analyzes the need for, and feasibility of, a multilateral JRE system in China. Finally, section E presents the structure of what follows.

[19] JD Sumner, 'The Full-Faith-And-Credit Clause – Its History and Purpose' (1955) 34 *Oregon Law Review* 224, 249 (indicating that the *res judicata* is the policy underlying the Full Faith and Credit Clause which aims to avoid re-litigation and achieve economic use of judicial resources). See the National Conference of Commissioners on Uniform State Laws, Prefatory Note of the Revised Uniform Enforcement of Foreign Judgment Act.

[20] See AT von Mehren and DT Trautman, 'Recognition of Foreign Adjudications: A Survey and a Suggested Approach' (1968) 81 *Harvard Law Review* 1601, 1601–04 (indicating five reasons attesting to the vital importance of recognizing foreign judgments: achieving efficiency, protecting the successful party, avoiding forum shopping, granting authority to the more appropriate jurisdiction, fostering stability and unity in an international order). See also SKY Wong, Comments, 'Reciprocal Enforcement of Court Judgments in Civil and Commercial Matters between Hong Kong SAR and the Mainland' in J Oliveira and P Cardinal (eds), *One Country, Two Systems, Three Legal Orders. Perspectives of Evolution. Essays On Marcau's Autonomy after the Resumption of Sovereignty by China* (Berlin, Springer-Verlag, 2009) 378 (indicating 'interests of the judgment creditors and debtors' is a factor in establishing an interregional JRE arrangement). Sumner, above n 19 at 249; Scoles et al, above n 5 at 1258. For cases, see *Riley v New York Trust Co*, 315 US 343, 348 (1942).

[21] *Stoll v Gottlieb*, 305 US 165, 172 (1938).

[22] *See* CW Fassberg, 'Rule and Reason in the Common Law of Foreign Judgments' (1999) 12 *Canadian Journal of Law and Jurisprudence* 193.

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 '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 to within one country.[26] However, this suggestion has two problems. First, it improperly excludes the EU JRE system outside 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 with 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 book the definition of interregional JRE includes the JRE system among EU members, among US states

[23] 'Region' and 'country' are not used interchangeably in this book. '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, s 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 PRC Constitution, art 1 Hong Kong Basic Law and art 1 Macao Basic Law; Wang and Leung, above n 11 at 284 and quoted in H Chiu, 'Legal Problems with Hong Kong Model for Unification of China and their Implications for Taiwan' (1998) 2 *Journal of Chinese Law* 83, 87.

[26] J Huang and AXF Qian, '"One Country, Two Systems", Three Law Families, and Four Legal Regions: The Emerging Inter-regional Conflicts of Law in China' (1994) 5 *Duke Journal of Comparative and International Law* 289, 292 (defining 'interregional 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 ch 2, section C.

[28] eg, P Hay, 'The Development of the Public Policy Barrier to Judgment Recognition within the European Community' (2007) *The European Legal Forum* 289, 289–90; BB Danford, 'The Enforcement of Foreign Money Judgments in the United States and Europe: How can we Achieve a Comprehensive Treaty?' (2004) 23 *Review of Litigation* 382, 382–432; AT von Mehren, 'Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference' (1994) 57 *Law and Contemporary Problems* 271, 274–76; KM Clermont, 'Jurisdiction Salvation and the Hague Treaty' (1999) 85 *Cornell Law Review* 89, 89–91, 115. For earlier contributions, see P Hay, 'The Common Market Preliminary Draft Convention on the Recognition and Enforcements of Judgments' (1968) 16 *American Journal of Comparative Law* 149; LS Bartlett, 'Full Faith and Credit Comes to the Common Market' (1975) 24 *International & Comparative Law Quarterly* 44.

[29] For scholarship discussing the lessons from the EU JRE law for China, see ch 2, section C below. For the insights that the EU JRE law can offer for a Multilateral JRE Arrangement among Chinese regions, see chs 4 and 5 below.

and among Chinese regions. Second, this suggestion ignores the fact that interregional JRE can be discussed irrespective of sovereignty concerns. For example, both before and after reuniting with Mainland China, Hong Kong regarded Taiwan as a non-recognized government in public international law.[30] However, as for JRE, such as 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 when (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; (3) giving them effect would not be inimical to the sovereign's interests or otherwise contrary to public policy.[31] The *Chen Li Hung* court emphasized that recognizing and enforcing such judgments does not 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. In 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 book. It first introduces 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

[30] After the UK and Mainland China established a formal diplomatic relationship, the UK has denied recognizing Taiwan as a country. Before Hong Kong reunited with Mainland China, it was part of the UK and also denied recognizing Taiwan as a country. For cases, see *Chen Li Hung v Ting Lei Miao* [2000] 1 HKC 461, [2000] 1 HKLR 252 (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] ibid.

[32] ibid.

[33] The Treaty on European Union was signed in Maastricht on 7 February 1992 and entered into force on 1 November 1993. 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: www.historiasiglo20.org/europe/maastricht.htm.

[34] The Treaty for Judicial Assistance in Civil and Commercial Affairs on 4 May 1987 between Mainland China and France: www.people.com.cn/zixun/flfgk/item/dwjjf/falv/10/10-4.htm.

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

This book 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 three 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 the Chinese interregional JRE system by reference to those in the US and EU.[37] However, those researches are insufficient[38] and this book 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 acceded to the World Trade Organization (WTO) in 2001, in terms of civil and commercial law, it is in an ongoing process of reforming its laws to comply with WTO standards.[40] Therefore, the conflicts between socialist law and capitalist law have significantly decreased in civil and commercial cases.[41] Moreover, a

[35] eg, the four distinctive characteristics of Chinese interregional legal conflicts, see DP 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'] (1998) 6 *Zhong Guo Fa Xue* [*China Legal Science*] 3, 5.

[36] See section C.

[37] See discussions of comparative scholarship in ch 2.

[38] ibid.

[39] See S Mancuso, 'Legal Transplants and Economic Development: Civil Law vs Common Law?' in J Oliveira and P Cardinal (eds), *One Country, Two Systems, Three Legal Orders. Perspectives of Evolution. Essays On Marcau's Autonomy after the Resumption of Sovereignty By China* (Berlin, Springer-Verlag, 2009) 75, 87.

[40] For Mainland China's efforts in revising laws of planned economy in order to fulfil its obligations under the WTO, see ch 4, section A i.

[41] See YP Xiao, 'The Conflict of Laws between Mainland China and the Hong Kong Special Administrative Region: The Choice of Coordination Models' (2003) 4 *Yearbook of Private International Law* 163, 198. See also HS Gao, 'Taming the Dragon: China's Experience in the WTO Dispute Settlement System' SSRN elibrary 369: papers.ssrn.com/sol3/papers.cfm?abstract_id=1095803 (indicating China is halfway between a planned economy and a market economy). For detailed discussion, see ch 4, section A i.

survey of the use of the public policy exception in Chinese interregional conflicts demonstrates that conflicts between socialist law and capitalist law have become less of an issue in civil and commercial cases in China.[42] Therefore, in many aspects China can learn 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 draw insights from 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 of coordinating 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 US and EU JRE laws in coordinating its multi-legal systems.

As a conclusion, many thorny interregional JRE problems that China faces may have already been solved by the US and EU; therefore, the rich jurisprudence in the US and EU can provide insights for China to help establish a multilateral JRE regime.

The comparability among China, the US and EU provides a foundation for this comparative study; however, their differences and the consequential challenges to this study should also be evaluated. The differences of the three systems (China, the US and EU) and the challenges to the JRE mainly exist in the following two aspects. The solutions to limit the challenges are also discussed as follows.

First, the constitutional regime among three Chinese regions is different from that of the US and EU. The US is a federal system. China is a unitary state,[46] but the autonomy among Mainland China, Hong Kong and Macao is arguably greater than sister states in the US. The EU is not a state, but (at least traditionally) an economic region. The Constitution of the US and the Brussels Convention of the EU focus more on uniformity or at least moving to uniformity;[47] in contrast, the basic polices of Mainland China regarding Hong Kong and Macao in the first 50 years of their reunification are separation and autonomy.[48] This is because both

[42] For details, see ch 4, section A ii.

[43] For details, see ch 4.

[44] For the crash between English common law and the European continental civil law, see J Harris, 'Understanding the English Response to the Europeanisation of Private International Law' (2008) 4 *Journal of Private International Law* 347, 394–95.

[45] See Mancuso, above n 39 at 87.

[46] Preamble of the Mainland Constitution.

[47] For the US Constitution, see the discussion of 'Free Circulation of Judgments in the US' below. For the Brussels Convention, see the discussion of 'Free Circulation of Judgments in the EU' below.

[48] Y Ghai, 'The Intersection of Chinese Law and the Common Law in the Special Administrative Region of Hong Kong: Question of Technique or Politics?' (2007) 37(2) *Hong Kong Law Journal* 363, 367, 371. O Jones, 'Customary Non-Refoulement of Refugees and Automatic Incorporation into the Common Law: A Hong Kong Perspective' (2009) 58 *International and Comparative Law Quarterly* 443, 443 (indicating 'the key ingredients of the Hong Kong "miracle" – free enterprise, small and open government and a robust legal system – were guaranteed beyond 1997 by Hong Kong's Basic Law').

the Sino–British Joint Declaration on the Question of Hong Kong and the Sino–Portuguese Joint Declaration on the Question of Macao create international obligations for Mainland China to allow Hong Kong and Macao to maintain their own independent legislative, judicial and administrative systems.[49] Moreover, the US has a Constitution applicable to all sister states in its federal system; the EU has no constitution but a convention performing the same role that binds all European Member States. China does not have an overarching constitution covering Mainland China, Hong Kong and Macao. Hong Kong Basic Law and Macao Basic Law are enacted by the National People's Congress in Beijing, and are only applicable in the two regions, respectively. In other words, the Mainland Constitution is not applicable in Hong Kong and Macao.[50] The Chinese quasi-constitutional system is founded by the policy of 'One Country, Two Systems' and the two joint declarations; it is also embodied by Article 31 of the Mainland Constitution,[51] Hong Kong Basic Law and Macao Basic Law.[52] Therefore, because this quasi-constitutional regime respects Hong Kong and Macao's autonomy, realizing free circulation of judgments in China will probably be more difficult than in the US and EU. In this context, a proposed Multilateral JRE Arrangement plus separate regional legislation is the best approach to realizing free circulation of judgment among Chinese regions.[53]

Second, the different level of mutual trust among member regions in China, the US and EU creates challenges to this comparative research. The level of mutual trust in the US and EU is much higher than that in China. Although English scholars also argue that mutual trust between the UK and European Continent is low, this is mainly due to the clash between English common law and European continental civil law.[54] However, weak mutual trust among Chinese member regions mainly comes from three factors. First is the socialism/capitalism distinction. Chapter four of the book will demonstrate this distinction, although it exists, is of diminishing importance in civil and commercial fields and for JRE. Second is the conflict between common law Hong Kong and civil law Mainland China and Macao. For this factor, the EU experience in coordinating common law and civil law systems can provide valuable lessons for China. Chapters four and five provide many examples in this regard. Third, both in the US and EU regions are of roughly similar size. By contrast, in China, one region (Mainland China) is far bigger than the rest. This also creates weak mutual trust among Chinese regions.

[49] The 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 was concluded in December 1984; 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 in March 1987.

[50] Both Hong Kong Basic Law and Macao Basic Law have an 'Annex III', which lists few fundamental laws of Mainland China that shall be applicable in Hong Kong and Macao.

[51] Art 31 of the Mainland Constitution provides that '[t]he state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of specific conditions'.

[52] For more information, see below the discussion of Current JRE System in China of ch 3.

[53] For more information, see below the discussion of ch 6 .

[54] Harris, above n 44 at 394–95.

However, the quasi-constitutional system, constituted by the policy of 'One Country, Two Systems', and the three regional constitutions can assure Hong Kong and Macao of autonomy, regardless of their geographic sizes.

In 2011, *FG Hemisphere Associates v Democratic Republic of Congo*[55] spurred huge controversies upon Hong Kong's judicial independence. In the Congo case, the Court of Final Appeal of Hong Kong sought interpretation about the doctrine of state immunity from the Standing Committee of the National People's Congress in accordance with paragraph 3, Article 158 of the Hong Kong Basic Law. Mainland China welcomes this reference and believes it is significant for comprehensively implementing 'One Country, Two Systems' and the Basic Law. Critics compare the Congo case with another landmark case decided in 1999, *Ng Ka Ling v Director of Immigration*[56] where the Court of Final Appeal held no need to seek the Standing Committee's opinion regarding the right of adobe under the Basic Law;[57] therefore, they worry that Hong Kong is beginning to lose its judicial independence.[58] They also point out that in both Hong Kong and Macao there is an increasingly visible trend of 'one country' dominating over 'two systems'.[59] However, supporters argue that, by distinguishing the power of final interpretation and the power of final adjudication, the two Basic Laws can ensure judgments of courts in special administrative regions are respected, even if their interpretations on occasion give way.[60] Nevertheless, the reference initiative, regardless of being criticized or supported, demonstrates continuous, although slow, coordination in legislative interpretation or adjudication and trust building between Mainland China and its special administrative regions. This will bring positive impacts upon interregional cooperation of JRE.

[55] *FG Hemisphere Associates LLC v Democratic Republic of Congo* (2008), [2009] 1 HKLRD 410 (Court of First Instance) [Congo (CFI)], rev'd [2010] 2 HKLRD 66, [2010] HKEC 194 [Congo (CA decision)], leave to appeal to CFA granted [2010] 2 HKLRD 1148, [2010] HKEC 670 [Congo (CA leave to appeal)], provisionally affd and interpretation of the Standing Committee of the National People's Congress requested by the Court of Final Appeal [2011] HKEC 747 [Congo (CFA provisional decision)], finally affd [2011] HKEC 1213 (CFA) [Congo (CFA final decision)] (following the interpretation of the Hong Kong *Basic Law* given by the Standing Committee, which is reproduced in Annex 2 of *Congo* (CFA final decision)).

[56] *Ng Ka Ling v Director of Immigration*, 2 HKCFAR 4 [1999] 1 HKLRD 315; *Ng Ka Ling v Director of Immigration (No 2)* [1999] 1 HKLRD 577.

[57] Under political pressure, less than a month after the judgment, the Court of Final Appeal issued a *functus officio* order to clarify that its judgment 'did not question the authority of the Standing Committee to make an interpretation under art 158 which would have to be followed by the courts of [Hong Kong]'. *Ng Ka Ling v Director of Immigration (No 2)* [1999] 1 HKLRD 577, 578.

[58] BYT Tai, 'The Constitutional Game of Article 158(3) of the Basic Law' (2011) 41 *Hong Kong Law Journal* 61, 65 indicating '[t]he reference procedure is indeed a nightmare to the C[ourt] of F[inal] A[ppeal]'. ETM Cheung, 'Undermining Our Judicial Independence and Autonomy' (2011) 41 *Hong Kong Law Journal* 95, 95.

[59] For Hong Kong, see D Chang, 'The Imperatives of One Country, Two Systems: One Country before Two Systems?' (2007) 37 *Hong Kong Law Journal* 351, 351. For Macao, see I Castellucci, 'Legal Hybridity in Hong Kong and Macau' (2012) 57(4) *McGill Law Journal* 665, 697.

[60] Anthony Mason AC KBE, 'The Rule of Law in the Shadow of the Giant: The Hong Kong Experience' (2011) 33 *Sydney Law Review* 623, 623; O Jones, 'Let the Mainland Speak: A Positivist Take on the Congo Case' (2011) 41 *Hong Kong Law Journal* 177, 177.

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 Clause[61] and the Full Faith and Credit Statute.[62] 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 creates 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.[63] 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.[64] 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.[65] Consequently, judgment debtors could easily escape from debts by simply moving to a neighbouring colony.[66] From the middle of the seventeenth century, a handful of colonies began to abandon the concept of independence from each other.[67] Four colonies passed statutes favouring JRE.[68] In 1778, the Articles of Confederation provided 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 State'.[69] When the Articles of Confederation was replaced by the

[61] US Constitution, art IV, s 1.

[62] 28 USCA, s 1738. *Matsushita Elec Industrial Co v Epstein*, 516 US 367, 373, 134 L Ed 2d 6, 116 S Ct 873 (1996); *Kremer v Chemical Constr Corp*, 456 US 461, 485, 72 L Ed 2d 262, 102 S Ct 1883 (1982).

[63] *Magnolia Petroleum Co v Hunt*, 320 US 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').

[64] See *Hilton v Guyot* 159 US 180–81 (1895); *Bissell v Briggs* 9 Mass 462, 464, 465 (1813). See also Sumner, above n 19 at 226.

[65] Sumner, above n 19 at 227.

[66] ibid. For the example of Massachusetts, see WLM Reese and VA Johnson, 'The Scope of Full Faith and Credit to Judgments' (1949) 49 *Columbia Law Review* 153, 153–54.

[67] Sumner, above n 19 at 227. See *Hilton v Guyot* 159 US 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' (1904) 4 *Columbia Law Review* 470, 470–71.

[68] Sumner, above n 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).

[69] Articles of Confederation Art IV, last paragraph. For historical background, see *McElmoyle v Cohen* (13 Pet.) 325 (1839); Sumner, above n 19 at 229–30. RH Jackson, 'Full Faith and Credit – the Lawyer's Clause of the Constitution' (1945) 45 *Columbia Law Review* 1, 3–7. Note, above n 67 at 471–72.

Constitution, the Full Faith and Credit Clause was broadened by including 'public acts' and strengthened by authorizing the Congress to enact relevant laws.[70] The Full Faith and Credit Clause and the federal statute established an interstate JRE system that assures the administration of justice.[71] In Justice Jackson's words,[72] '[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.[73] For example, some courts required a judgment creditor to provide the original judgment, and in cases where the original judgment was missing, to provide witnesses to testify that a copy of a judgment was authentic.[74] Therefore, the JRE proceedings were 'tedious, expensive, time-consuming, and at times impossible.'[75] According to the authorization of the Full Faith and Credit Clause, Congress enacted federal statutes[76] and established an inexpensive and simplified method of proving sister-state judgments.[77] In this sense, the Full Faith and Credit Clause was designed to 'unify the systems of justice.'[78]

In addition, the Full Faith and Credit Clause also reflects the aspiration of uniting independent and sovereign American colonies into a political union.[79] When the delegates to the Constitutional Convention met, the new country was confronted with the problem that no unity existed among the states.[80] As one scholar described:

> 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.[81]

[70] For the differences between the Full Faith and Credit Clause in the Articles of Confederation and the Constitution, see Note, above n 66 at 474. For the history of the Full Faith and Credit Clause in the Articles of Confederation, see Reese and Johnson, above n 66 at 153–55.

[71] Sumner, above n 19 at 243; Jackson, above n 69 at 2.

[72] Jackson, above n 69 at 34.

[73] Sumner, above n 19 at 245.

[74] ibid.

[75] ibid.

[76] Act of 26 May 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 27 March, 1804, 2 Stat 298 (supplementing the Act of 26 May 1790 and providing the authentication of records etc, not relating to a court).

[77] Sumner, above n 19 at 245–46.

[78] PD Carrington, 'Collateral Estoppel and Foreign Judgment' (1963) 24 *Ohio State Law Journal* 381, 382–83; Sumner, above n 19 at 246. Gray J in *Atherton v Atherton*, 181 US 160 (1901) (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').

[79] SE Sachs, 'Full Faith and Credit in the Early Congress' (2009) 95 *Virginia Law Review* 1201, 1228.

[80] DE Engdahl, 'The Classic Rule of Faith and Credit' (2009) 118 *Yale Law Journal* 1584, 1586, 1610.

[81] Sumner, above n 19 at 241.

The framers of the Constitution clearly realized that each state needed to forego some degree of sovereignty for the benefit of establishing a unified country.[82] The Full Faith and Credit Clause was desirable because it was one of the clauses incorporated into the Constitution to achieve this goal.[83] The Clause accorded the citizens of different states equal privileges throughout a unified country.[84] As a result, it 'basically altered the status of the States as independent sovereigns'.[85]

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.[86]Article IV, section 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.'[87] The Supreme Court of the US interpreted this clause as having three distinct objects:

> 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.[88]

The Judiciary Act of 1790 expanded the Full Faith and Credit Clause to:

> 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.[89]

[82] ibid, at 242.
[83] ibid.
[84] ibid.
[85] *Estin v Estin*, 334 US 541, 546, 92 L Ed 1561, 68 S Ct 1213 (1948); *Sherrer v Sherrer*, 334 US 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, above n 69 at 18.
[86] LL McDougal et al, *Conflict of Laws: American, Comparative, International: Case and Constitution and Materials* 4th edn (LexisNexis, 2004) 631; AT von Mehren, *Adjudicatory Authority in Private International Law: A Comparative Study* (Leiden, Martinus Nijhoff Publishers, 2007) 79; SC Symeonides et al, *Conflict of Laws: American, Comparative, International: Cases Materials* 2nd edn (St Paul, MN, Thomason West, 2003) 710. The Full Faith and Credit Clause in the Constitution and the relevant statute also apply to public acts and records of the states.
[87] US Constitution, art IV, s 1.
[88] Washington J in *Green v Sarmiento* 3 Wash. (CC) 17, 21 (1811).
[89] 28 USCA, s 1738 (1964) (originally enacted in 1790). For the Full Faith and Credit Clause in family cases, see Parental Kidnapping Prevention Act 1980, 28 USCA, s 1738A; Full Faith and Credit for Child Support Orders Act 1994, 28 USCA, s 1738B; and the Defense of Marriage Act, 28 USCA, s 1738C. For explanation of the Full Faith and Credit Clause, see Scoles, above n 5 at 1279–82.

Notably, the Full Faith and Credit Clause not only covers sister-state judicial proceedings, but also includes sister-state statutes,[90] common law and public records. Judicial proceedings are the focus of this book.

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.[91] Full faith and credit to sister-state judgments is also demonstrated in the Second Conflicts Restatement:

> [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.[92]

The Full Faith and Credit Clause, taken alone, does not provide a systematic interstate JRE scheme.[93] 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 introduced 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 court judgments.[94] 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.[95]

If a judgment is final,[96] valid[97] and on the merits,[98] it is entitled to Full Faith and Credit JRE in all sister states. No review of merits is allowed.[99] Lack of jurisdiction,[100]

[90] See *Bradford Electric Light Co v Clapper*, 286 US 145, 155 (1932).

[91] See *Hampton v McConnel*, 3 Wheat 234, 235, 4 L Ed 378 (1818); *Mills v Duryee*, 7 Cranch 481, 484, 3 L Ed 411 (1913); *Riley v New York Trust Co*, 315 US 343, 353 (1942). The Full Faith and Credit Clause also requires federal courts to recognize and enforce state court judgments and vice versa, which is not a focus of this study. See 28 USCA, s 1738.

[92] Restatement (Second) of Conflicts, s 95, comment g (1971).

[93] *McElmoyle v Cohen*, 38 US (13 Pet) 312, 325, 10 L Ed 177 (1839).

[94] The National Conference of Commissioners on Uniform State Law, the Revised Uniform Enforcement of Foreign Judgments Act, 13 ULA. 155 (1964 revision of the original 1948 Act).

[95] ss 2 and 3 of the Revised Uniform Enforcement of Foreign Judgments Act.

[96] 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* 28 Conn 433 (Conn Sup Ct 1859); *Faber v Hovey* 117 Mass 107 (1875). *cf Re Forslund* 123 Vt 341, 189 A2d 537, 2 ALR3d 1379 (1963) (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 ch 4, section B ii.

[97] See *United States v United States Fidelity & Guaranty Co et al*, 309 US 506 (1940).

[98] See Restatement (Second) of Conflicts, s 93 (1971).

[99] *Fauntleroy v Lum*, 210 US 230 (1908). Restatement (Second) of Conflicts, s 106 (1971).

[100] Restatement (Second) of Conflicts, s 97 (1971). *Estin v Estin*, 334 US 541, 547–49 (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

undue process,[101] and fraud[102] are widely accepted defences in Full Faith and Credit interstate JRE. Notably, these defences are limited by the principle of *res judicata*: if the judgment debtor has alleged and fully litigated these defences in the judgment-rendering court, the requested court is precluded from reviewing the same defences again. Moreover, the public policy exception can never constitute a defence to interstate Full Faith and Credit JRE.[103] The Full Faith and Credit Clause permits a requested state to determine how to enforce sister-state judgments.[104] As a conclusion, the Full Faith and Credit Clause and consequent legislation 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 Background

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.[105] Both France and Luxembourg permitted 'révision au fond' in

given to the part of the Nevada decree that affecting marital status but not to the part of alimony). *Bell v Bell*, 181 US 175 (1901); *Chicago Life Ins Co v Cherry*, 244 US 25, 29 (1917); *Hansberry v Lee*, 311 US 32, 40–41 (1940). See *Nevada v Hall*, 440 US 410, 421 (1979); *Underwriters National Assurance Co v North Carolina Life & Accident & Health Insurance Guaranty Assn et al*, 455 US 691 (1982). For details, see ch 5, section C i.

[101] *Russell v Perry*, 14 NH 152, 155 (1843). Undue process generally refers to when the defendant does not get reasonable 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 ch 5, section C ii.

[102] For leading cases regarding fraud in the US JRE law, see *United States v Throckmorton*, 98 US 61 (1878) and *Allegheny Corporation v Kirby*, 218 F Supp 164 (SDNY 1963). For details, see ch 5, section C iv.

[103] See *Baker v GM*, 522 US 222, 233 (1998); *Estin v Estin*, 334 US 541, 546 (1948); *Magnolia Petroleum Co v Hunt*, 320 US 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'). However, a forum can determine the applicable law by the consideration of public policy. See *Nevada v Hall*, 440 US 410, 421–24, 59 L Ed 2d 416, 99 S Ct 1182 (1979).

[104] *Baker v GM*, 522 US 222, 235 (1998) (the Full Faith and Credit Clause does not require that 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 Pet) 312, 325 (1839). Restatement (Second) of Conflicts, s 99 (1971) (indicating '[t]he local law of the forum determines the methods by which a judgment of another state is enforced').

[105] See Dutch Code of Civil Procedure, art 431(1) (1838, amended 1946).

some circumstances.[106] Germany required reciprocity as a condition for JRE.[107] Belgian courts were allowed to re-examine foreign judgments.[108] Italy denied judgments by default had conclusive effects.[109] Various bilateral treaties existed between all these states except Luxembourg.[110]

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.[111] Therefore, the development of the EU interregional JRE mechanism is designed to run parallel with European economic integration.[112] 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 22 October 1959 to invite them to negotiate the Brussels Convention. In this note, the Commission stated that:

> 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.[113]

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

[106] 'Révision au foud' implies that requested courts re-examine the merits of a foreign judgment, eg, *Holker v Parker*, decision of 19 April 1819, Cass civ, 1819 S Jur I 288. But French courts abandoned 'révision au foud' after *Munzer v Jacoby-Munzer*, Cour de Cass, Ch Civ (1st Sect) 7 January 1964. For comments, see KH Nadelmann, 'French Courts Recognize Foreign Money-Judgments: One Down and More to Go' (1964) 13 *American Journal of Comparative Law* 72 and FK Juenger, 'The Recognition of Money Judgments in Civil and Commercial Matters' (1988) 36 *American Journal of Comparative Law* 1, 7. For Luxembourg law, see *Pellus v Detilloux*, Cour Supérieure, 20 April 1964, 19 Pasicrisie Luxembourgeoise 371.

[107] German Code of Civil Procedure (*Zivilprozessordnung* [ZPO]) (1877), s 328(1); W Wurmnest, 'Recognition and Enforcement of US Money Judgments in Germany' (2005) 23 *Berkeley Journal of International Law* 175, 186–87.

[108] See Law on Jurisdiction of 25 March 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.

[109] See Italian Code of Civil Procedure (*Codice Di Procedura Civile*) (1942), art 798.

[110] KH Nadelmann, 'Jurisdictionally Improper FORA in Treaties on Recognition of Judgments: The Common Market Draft' (1967) 67 *Columbia Law Review* 995, 997.

[111] J Fitzpatrick, 'The Lugano Convention and Western European Integration: A Comparative Analysis of Jurisdiction and Judgments in Europe and the US' (1993) 8 *Connecticut Journal of International Law* 695, 699. See the Preamble to the Brussels Convention and the Jenard Report on the Brussels Convention: P Jenard, *Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters*, signed at Brussels, 27 September 1968 ('Jenard Report') [1979] OJ C59/1. See also PM North and JJ Fawcett, *Cheshire and North Private International Law* (London, Butterworths, 1987) 282.

[112] Fitzpatrick, above n 111 at 695–96. See RC Reuland, 'The Recognition of Judgments in the European Community: The Twenty-fifth Anniversary of the Brussels Convention' (1993) 14 *Michigan Journal of International Law* 559, 572–73.

[113] von Mehren, above n 86 at 70; P Rogerson, 'Scope' in U Magnus and P Mankowski (eds), *Brussels I Regulation* (Munich, Sellier, 2007) 47.

accept the Brussels Convention.[114] 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 are necessary.[115]

Besides facilitating economic integration, the Brussels Convention and the Brussels I Regulation also aim to ensure legal certainty regarding jurisdiction and JRE.[116] They provide highly foreseeable rules and efficient procedures to achieve this goal.[117]

2. The Brussels I Regulation

The Brussels Convention and the Brussels I Regulation realize free circulation of judgments among EU members.[118] Different from the Brussels Convention, the Brussels I Regulation is directly applicable to EU members.[119] 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.[120] However, regarding texts and substances, the differences between the Convention and Regulation are modest.[121]

The Brussels Convention is considered to be one of the most successful treaties ever concluded in private international law and one of the most successful pieces of EU legislation.[122] The most recent study shows that the Brussels I Regulation is performing well in practice.[123] The feasibility of the Brussels Convention and Regulation comes from four factors. First, the Convention and Regulation are double conventions.[124] This was promoted by the insight that the 'fair and reasonable jurisdiction'

[114] Art 63 of the Brussels Convention.

[115] Preamble (1) of the Brussels I Regulation.

[116] U Magnus, 'Introduction' in U Magnus and P Mankowski (eds), *Brussels I Regulation* (Munich, Sellier, 2007) 8–9.

[117] ibid.

[118] von Mehren, above n 86 at 69; B Hess, T Pfeiffer and P Schlosser, *The Brussels I-Regulation (EC) No 44/200: Application and Enforcement in the EU* (München, Verlag CH Beck, 2008) 17. 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 L143/15). It came into existence on 21 October 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.

[119] Art 249, EC Treaty. For comments, see GA Bermann and RJ Goebel, *Cases and Materials on European Union Law* 2nd edn (St Paul, MN, West Group, 2002) 78–79.

[120] 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, above n 116 at 15–16; Art 61, Treaty of Amsterdam.

[121] Magnus, above n 116 at 9.

[122] von Mehren, above n 86 at 69; Hess et al, above n 118 at 1, 17. See the assessment of Goode, Kronke, McKendrick and Wool: 'the most successful instrument on international civil procedure of all times': R Goode, H Kronke, E McKendrick and J Wool, *Transnational Commercial Law* (Oxford, Oxford University Press, 2007) 793.

[123] Hess et al, above n 118 at 1.

[124] A double convention refers to a convention regulating direct jurisdiction and JRE. For details, see ch 5 below.

of the judgment-rendering court is the precondition for JRE.[125] Second, JRE can be denied only for explicitly specified grounds under the Convention and the Regulation, so the outcome of JRE is 'highly predictable.'[126] Third, the European Court of Justice (hereinafter 'ECJ') was authorized to interpret the Brussels Convention and Brussels I Regulation.[127] It has endeavoured to promote a more intensive integration between the Member States by accepting preliminary references from national courts.[128] In many cases, it interpreted terms and phrases in the Convention and Regulation by adopting an autonomous Community definition instead of one favoured by a particular Member State.[129] Therefore, the ECJ is essential for the successful operation of the Brussels Convention and the Regulation.[130] Fourth, the accompanying report by Jenard[131] serves as a useful instrument to understand the Brussels Convention and is still a good reference for the Brussels I Regulation.[132]

The Brussels I Regulation applies in civil and commercial cases whatever the nature of the court or tribunal.[133] 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.[134] 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.[135] 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.[136] 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.[137] The Regulation is not limited to judgments that 'definitively terminate a dispute in whole or in part'.[138] Therefore, a judgment

[125] Magnus, above n 116 at 14.
[126] ibid.
[127] Protocol on the Interpretation by the Court of Justice of the Brussels Convention, 3 June 1971, [1975] OJ L204/ 28. Its official English version was published at [1978] OJ L304/ 50.
[128] Bermann, above n119 at 352–53.
[129] Reuland, above n 112 at 566.
[130] AT von Mehren, 'Jurisdictional Requirements: To What Extent Should the State of Origin's Interpretation of Convention Rules Control for Recognition and Enforcement Purposes?' in AF Lowenfeld and LJ Silberman (eds), *The Hague Convention on Jurisdiction and Judgments* (New York, Juris Publishing Inc, 2001) A-29, A-34.
[131] Jenard Report, above n 111.
[132] See Magnus, above n116 at 14.
[133] Art 1 of the Brussels I Regulation.
[134] Bermann, above n 119 at 1409.
[135] Art 2(1) of the Brussels I Regulation.
[136] ss 2, 3, 4 and 5 of the Brussels I Regulation.
[137] Arts 1 and 32 of the Brussels I Regulation.
[138] P Wautelet, 'Recognition and Enforcement. Section 1. Recognition' in U Magnus and P Mankowski (eds), *Brussels I Regulation* (Munich, Sellier, 2007) 540; Jenard Report, above n 111 at 43.