**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TĀMAKI MAKAURAU ROHE**

**CIV-2020-404-733**
**[2020] NZHC 2992**

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| BETWEEN | HEBEI HUANENG INDUSTRIAL DEVELOPMENT CO LIMITED<br>Plaintiff |
| AND | DEMING SHI<br>Defendant |

Hearing: 4-5 November 2020

Appearances: K Morrison and A Manuson for the Plaintiff
B O'Callaghan and J Nolen for the Defendant

Judgment: 12 November 2020

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**JUDGMENT OF ASSOCIATE JUDGE R M BELL**

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*This judgment was delivered by me on* ***12 November 2020*** *at* ***4:00pm***
*pursuant to Rule 11.5 of the High Court Rules*

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*Registrar/Deputy Registrar*

***Solicitors***:
Meredith Connell (Kathleen Morrison/Anna Manuson), Auckland, for the Plaintiff
K3 Legal Limited (Brent O/Callaghan/James Nolen), Auckland, for the Defendant

## Introduction

[1] Shi Deming gave a guarantee to Hebei Huaneng Industrial Development Co Limited for a debt of his company, Qinhuangdao Boen Trading Co Limited. Hebei Huaneng has obtained judgment on the guarantee and wishes to enforce it against him. Hebei Huaneng and Mr Shi are based in Hebei Province, People's Republic of China. Hebei Huaneng obtained judgment against Mr Shi in the Higher People's Court of Hebei Province for RMB 103,426,379.28 – about NZD 23 million. Huaneng tried to enforce its judgment against Mr Shi in China but the small amount it obtained has been applied against costs. The judgment remains unsatisfied. Hebei Huaneng found out that Mr Shi has assets in New Zealand – an inner-city apartment in Auckland and shares in a New Zealand company, Boen Capital Co Ltd, a property developer. Accordingly, it has sued Mr Shi on the judgment of the Higher People's Court. Mr Shi has protested this court's jurisdiction to hear the claim.

[2] I set aside his appearance under protest. His objections to New Zealand hearing this case are that China does not have true courts and that Hebei Huaneng should first enforce its securities in China. These are not strong enough for this court to decline jurisdiction. The case can continue.

[3] Hebei Huaneng has applied for summary judgment but following the Court of Appeal's decision in *Advanced Cardiovascular Systems Inc v Universal Specialties Ltd*,[1] that application has been put on hold for the protest to jurisdiction to be decided first. Hebei Huaneng obtained freezing orders over Mr Shi's New Zealand assets. Mr Shi filed documents in opposition to the freezing orders and has sworn an affidavit, but it was not suggested that by taking those steps he has voluntarily submitted to the jurisdiction.

## Service of the proceeding outside New Zealand

[4] Mr Shi has been in China throughout. Accordingly, Hebei Huaneng had to deal with service of the proceeding out of the jurisdiction. It applied for an order authorising service on Mr Shi in China but it submitted that leave of the court was not

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1 *Advanced Cardiovascular Systems Inc v Universal Specialties Ltd* [1997] 1 NZLR 186 (CA).

required, because its case came within one of the gateways for which service out of the jurisdiction is available as of right without first seeking leave. It relied on r 6.27(2) of the High Court Rules 2016:

> An originating document may be served out of New Zealand without leave in the following cases: …
>
> (m) when it is sought to enforce any judgment or arbitral award.

[5] In his minute of 27 May 2020, Associate Judge Andrew accepted that the case came within r 6.27(2)(m). Hebei Huaneng had applied for leave out of caution, in the absence of any guiding authority on the scope of r 6.27(2)(m). Likewise out of caution, Associate Judge Andrew ruled that he would grant leave under r 6.28(1), if leave were required. He was satisfied that the test for leave to serve overseas under r 6.28 had been satisfied.

[6] Mr Shi's protest to jurisdiction raises two matters:

(a) As the Higher People's Court of Hebei Province is not a "court" as understood under New Zealand law, it is not possible to sue on a judgment of that court.

(b) Hebei Huaneng also had security over the assets of a Chinese company, Tangshan Harbour Detai New Material Technology Co Ltd. Under Chinese law, Hebei Huaneng had to exhaust its remedies against the Detai company before it could sue Mr Shi on his personal covenants under the guarantee or enforce any judgment against him. Hebei Huaneng is accordingly not entitled to look to Mr Shi's New Zealand assets until it has exhausted its remedies against Detai.

[7] While he contests this court's jurisdiction to hear the claim on the Higher People's Court's judgment, he says that Hebei Huaneng may sue him afresh in New Zealand under the guarantee. That may not however be possible as China has a two year limitation period. It is not clear whether that is substantive or procedural.

## The application to set aside the appearance under protest

[8] Hebei Huaneng has applied under r 5.49 of the High Court Rules to set aside the appearance. Under that rule, the court must dismiss the proceeding if it is satisfied that it has no jurisdiction to hear and determine it. If it does not dismiss the proceeding, it must set aside the appearance.

[9] Rule 6.29 of the High Court Rules 2016 says:

> **6.29 Court's discretion whether to assume jurisdiction**
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> (1) If service of process has been effected out of New Zealand without leave, and the court's jurisdiction is protested under rule 5.49, the court must dismiss the proceeding unless the party effecting service establishes—
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> (a) that there is—
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> (i) a good arguable case that the claim falls wholly within 1 or more of the paragraphs of rule 6.27; and
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> (ii) the court should assume jurisdiction by reason of the matters set out in rule 6.28(5) (b) to (d); or
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> (b) that, had the party applied for leave under rule 6.28,—
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> (i) leave would have been granted; and
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> (ii) it is in the interests of justice that the failure to apply for leave should be excused.
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> …

[10] When the court considers whether to grant leave to serve outside New Zealand under r 6.28, the applicant is required to establish these matters:[2]

> (a) the claim has a real and substantial connection with New Zealand;
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> (b) there is a serious issue to be tried on the merits;
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> (c) New Zealand is the appropriate forum for the trial; and
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> (d) any other relevant circumstances support an assumption of jurisdiction.

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2 Rule 6.28(5).

[11] As to whether r 6.27(2)(m) applies to the judgment of a foreign court, the commentary in *McGechan on Procedure* says:[3]

> This paragraph is new. It will be rare that a plaintiff will have useful recourse to this paragraph. If it is a New Zealand judgment or arbitral award that is sought to be enforced against a foreign defendant, enforcement is usually most effectively sought in the jurisdiction in which that defendant is resident or domiciled. The rule is most likely to be pressed into service where a plaintiff is seeking to enforce a foreign judgment or arbitral award against an overseas defendant where that defendant has assets in New Zealand that could be used to meet the judgment or award.

[12] I agree. The rule was introduced to cater for cases such as this one where a judgment creditor, relying on a judgment of a foreign court, wishes to enforce that judgment in New Zealand against New Zealand assets of a judgment debtor outside New Zealand. The rule would be largely useless if it applied only to domestic judgments. In case I am wrong on that, I will consider matters under both 6.29(1) and r 6.29(2).

[13] Mr Shi's objections go to the merits of Hebei Huaneng's claim against him. Under r 6.29, the merits are relevant. The plaintiff needs to establish a serious issue to be tried on the merits. In addition, where the plaintiff relies on one of the gateways under r 6.27 and that gateway goes to the substantive merits of the case, the plaintiff must show a good arguable case. The enquiry as to the merits is only to establish whether the court should assume jurisdiction over someone served outside New Zealand. It is not, however, a determination of the final merits. That is for decision later, if the court assumes jurisdiction.[4]

[14] The "good arguable case" test under r 6.29(1)(a)(i) comes from Lord Goff's speech in *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran*.[5] That requires a higher standard than showing a case worthy of serious consideration. In *Bomac Laboratories Ltd v F Hoffmann-La Roche Ltd* Harrison J held that in practical terms a plaintiff must provide evidence normally by affidavit to show a good arguable case, but it is not the court's function to determine any areas of factual dispute between

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3 Robert Osborne and others *McGechan on Procedure* (looseleaf ed, Thomson Brookers, updated to 9 December 2019) at [HR 6.27.22]..

4 *Advanced Cardiovascular Systems Inc v Universal Specialties Ltd* [1997] 1 NZLR 186.

5 *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438 (HL) at 452.

the parties.[6] If there are genuine and plausible differences which can only be determined on cross-examination, the court should assume jurisdiction. Uncontested evidence should still show sufficient grounds for the court to assume jurisdiction. In England on the other hand, the approach for a good arguable case is that one side has a much better argument than the other, although it does not have to prove its case on a balance of probabilities.[7] Going on the safe side, I follow the English approach.

[15] While the questions of real and substantial connection with New Zealand and appropriate forum are secondary, the plaintiff still needs to satisfy me of those matters. However, the main thrust of this decision will be on the issues raised by Mr Shi.

**Hebei Huaneng's cause of action**

[16] There are no formal reciprocal enforcement of judgments arrangements between New Zealand and the People's Republic of China, as under the Reciprocal Enforcement of Judgments Act 1934, the Trans-Tasman Proceedings Act 2010 or s 172 of the Senior Courts Act 2016. Instead Hebei Huaneng sues on the Chinese judgment under the common law. The common law regards a judgment of a foreign court as creating an obligation enforceable under New Zealand law if the judgment is given by a court, the judgment is final and conclusive, the judgment is for a definite sum, the parties are the same or privies, and the court had jurisdiction under New Zealand's jurisdiction recognition rules.[8] The remedy is a money judgment. Defences to a claim on a foreign judgment are that it was obtained in breach of New Zealand standards of natural justice, enforcing the judgment would be contrary to public policy, the judgment was obtained by fraud, the judgment was for a revenue debt, or the judgment involves the enforcement of a foreign penal law. Subject to those defences, the court does not review the merits of the foreign judgment.[9] It does not matter whether the foreign jurisdiction recognises New Zealand judgments or not. Nor is the trading relationship between the two countries relevant. The same rules apply to a judgment from Chad or China.

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6 *Bomac Laboratories Ltd v F Hoffman-La Roche Ltd* (2002) 7 NZBLC 103,627 at [28](e).
7 *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804 at [71].
8 *Von Wyl v Engeler* [1998] 3 NZLR 416 (CA) at 420-421.
9 *Godard v Gray* (1870) LR 6 QB 139.

[17] There is no issue that the Chinese court had jurisdiction under New Zealand's jurisdiction rules. Mr Shi was in China when he was sued there. He defended the proceeding. He appeared in court represented by his lawyer.

**The proceeding in China**

[18] Hebei Huaneng runs power stations. Mr Shi's company, Qinhuangdao Boen had a series of contracts between 2012 and 2015 with Hebei Huaneng to source coal for power generation. Under these contracts, Hebei Huaneng made an advance payment of RMB 103,426,379.28 to Qinhuangdao Boen which it was required to repay by 31 January 2016. On 24 March 2015, Mr Shi signed a guarantee of unlimited joint and several liability for his company's repayment of the advance payment. The Detai company gave a mortgage over its assets to Hebei Huaneng as security for the repayment. The man behind Detai is Shi Min, Mr Shi's father.

[19] Qinhuangdao Boen did not repay the advance payment by 31 January 2016 as required. On 25 December 2017, Hebei Huaneng began a proceeding in the Shijiazhuang Intermediate People's Court of Hebei Province. The defendants were Qinhuangdao Boen, Mr Shi and Detai. It sued Qinhuangdao Boen for RMB 176,636,379.28 for arrears plus interest, it sued Detai under its property security and it sued Mr Shi under his guarantee. Hebei Huaneng was represented by lawyers. Qinhuangdao Boen and Mr Shi were represented by the same lawyer, Mr Shao Lixin. Although Detai was served, it did not appear. After a hearing before a collegial panel of three judges, a decision of 3 June 2019 gave judgment against Qinhuangdao Boen and Detai, but the claim against Mr Shi was dismissed as out of time. There was a two year limitation period.

[20] Hebei Huaneng appealed to the Higher People's Court of Hebei Province against the dismissal of the claim against Mr Shi. A collegial panel of three judges heard the appeal. Hebei Huaneng and Mr Shi were both represented by lawyers at the hearing. An appeal is a complete hearing de novo on both the facts and the law, with the parties free to adduce new evidence and to put forward arguments that had not been advanced at first instance.

[21] In its judgment of 12 August 2019 the Higher People's Court broadly upheld the findings of fact of the Intermediate People's Court but held that it had erred in law. The two-year limitation period ran from 31 January 2016 to 31 January 2018. As Hebei Huaneng had begun its proceeding in 2017, the claim was not statute-barred. The court entered judgment for Hebei Huaneng against Mr Shi for RMB 103,426,379.28. That was less than what Hebei Huaneng had claimed. The court upheld the other orders of the Intermediate People's Court. It said nothing about the sequence in which its orders should be enforced as between the various judgment debtors.

[22] There is no further right of appeal. No other steps have been taken to set aside the decision of the Higher People's Court. The Intermediate People's Court has dealt with enforcement.

[23] In December 2019, Hebei Huaneng applied to the Shijiazhuang Intermediate People's Court to enforce the orders against Qinhuangdao Boen, Mr Shi and the Detai company. The court accepted the application. The enforcement against Qinhuangdao Boen and Mr Shi revealed only two bank accounts holding small amounts. Mr Shi is subject to a court order restricting his expenditure.

[24] Zhang Boxiang, Hebei Huaneng's in-house lawyer, describes steps his company took to enforce the judgment against the Detai company. By way of explanation, enforcement of securities was through the court process. It appears that under Chinese law, secured creditors cannot enforce their securities directly, in the same way as secured creditors can under New Zealand law (for example, by appointing receivers or taking possession and selling mortgaged assets). The Detai company had not taken any formal steps in the proceeding and judgment had gone against it by default. Detai was required to file a return as to its assets, but it did nothing. Mr Zhang explains that in seeking enforcement through the court, Hebei Huaneng sought priority for repayment over the collateral provided by Detai. That was priority over Detai's unsecured creditors. He says that this was in accordance with orders made in the Intermediate People's Court that Hebei Huaneng's claim ranked ahead of other creditors.

[25] Mr Zhang visited Detai's premises in Tangshan twice, in January 2020 and in July 2020. He says that the premises looked abandoned and there was no one present that he could talk to. Because Detai did not file any returns, the court could not take any steps to enforce the judgment against Detai's assets as it had no information to go by. Because Detai did not respond to the court order requiring a property declaration, Hebei Huaneng does not have any up-to-date information about the current value of the company assets. The only information Hebei Huaneng had about the assets of Detai was a valuation report provided in 2012. Mr Zhang considered it unlikely that raw materials and consumables referred to in the report still exist. Any remaining machinery and equipment would be eight years older and had been used in the meantime. The current value of the collateral and its location were unknown. A ruling of the Intermediate People's Court on 26 March 2020 reserved Hebei Huaneng's rights to apply for further enforcement. So far as Mr Zhang is aware, there are no further practical steps the court can take to assist Hebei Huaneng in obtaining any payment from Detai.

**Is the Higher People's Court of Hebei Province a "court" ?**

[26] Mr Shi says that a claim on a foreign judgment is available only if the body that issued the judgment is a court. His argument is not just that the Higher People's Court of Hebei Province is not a court, but that there are no courts in China, as that term is understood for proceedings to enforce judgments in New Zealand. His objection is that while there are bodies in China called courts, they and their judges are not independent in the way required of a true court. Before I go into that, I make certain comments to put it into context.

[27] The judgments of the Intermediate People's Court and the Higher People's Court both read as orthodox judgments. They identify the parties, state the claims, identify the issues, make findings of fact, apply rules of law to those facts, and state findings supported by reasons, resulting in orders. While the style in which they are written and translated may be unfamiliar to a common lawyer, they are unmistakably judicial decisions. They could have come from any commercial court anywhere in the world.

[28] In a proceeding to enforce a foreign judgment in New Zealand, a defendant may put forward affirmative defences, including that the judgment was obtained in breach of natural justice. Mr Shi does not raise any such complaint in this case. It is clear that he took an active part in the Chinese proceeding, was served, was represented and was heard in public hearings. Mr Zhang, Hebei Huaneng's lawyer, and Mr Shao, who acted for Mr Shi in the Chinese proceeding, have made affidavits. Neither of them suggests that there was anything procedurally untoward in the Chinese proceeding. And apart from the question raised in Mr Shi's second ground, the order in which judgments are enforced against judgment debtors, there is no suggestion that the judgment of the Higher People's Court was wrong on the merits.

[29] Complaints that a foreign legal system is so defective that its courts cannot be trusted to do substantial justice may arise in two contexts:

(a) Forum non conveniens cases, where it is proposed that a proceeding be heard in another jurisdiction; and

(b) Proceedings to enforce judgments from that jurisdiction.

[30] In the first case, the court cannot know for certain whether a foreign court will do substantial justice to the parties. Those opposing the case being heard in the other jurisdiction will hold out the risk that justice will not be done. Even so, in civil cases, the approach is to treat allegations that justice cannot be obtained in the foreign court with great wariness and caution. In *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd*, the Privy Council said:[10]

> [95] The better view is that depending on the circumstances as a whole, the burden can be satisfied by showing that there is a real risk that justice will not be obtained in a foreign court by reason of incompetence or lack of independence or corruption. Of course, if it can be shown that justice "will not" be obtained that will weigh more heavily on the exercise of the discretion in the light of all other circumstances.
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> …
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> [97] Comity requires that the court be extremely cautious before deciding that there is a risk that justice will not be done in a foreign country by the foreign court, and that is why cogent evidence is required. But, contrary to

[10] *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804.

> the appellant's submission, even in what they describe as endemic corruption cases (i.e. where the court system itself is criticised), there is no principle that the court may not rule.
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> …
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> [101] The true position is that there is no rule that the English court (or Manx court) will not examine the question whether the foreign court or the foreign court system is corrupt or lacking in independence. The rule is that considerations of international comity will militate against any such finding in the absence of cogent evidence…

[31] In these cases, the court's concern is prospective, because it cannot know exactly how the foreign court will deal with the case. It is clear from *Altimo Holdings* that cogent evidence is required. Comity counts against giving way to speculative suggestions or judicial chauvinism.

[32] The matter is different when the court is asked to consider whether a judgment of a foreign court should be enforced in the home jurisdiction. In those cases, the court can see how the case ran in the foreign court and whether the proceeding met New Zealand's standards of natural justice. The opportunity to scrutinise the foreign proceeding allows for the affirmative defences to come into play – breach of natural justice, fraud, revenue collecting, enforcement of penal laws, and contrary to public policy. Because those defences allow the court to see whether justice was done in the particular case, arguments that any judgment of the foreign court must be suspect because of systemic defects – such as endemic corruption or lack of independence – are left only for extreme cases.

[33] The courts have recognised and enforced judgments of courts of authoritarian regimes. In *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No.2)*, Lord Reid pointed out the difficulties that would arise if the English courts were to refuse to recognise the judgments of the courts of the German Democratic Republic.[11] Other speeches in that case share his concern. He also said:[12]

> Then it is said that the courts of East Germany are influenced by political considerations. It is true that when one examines the judgments of the East German Supreme Court – particularly the second of them - one finds them plentifully sprinkled with Communist clichés. No doubt professing Communists find it necessary to adopt this sort of embellishment. But going

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11 *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No.2)* [1967] 1 AC 853 (HL) at 907.

12 At 924.

> behind this ornamentation I find a judicial approach and a reasonable result. And, even if political considerations were apparent, it would remain true that what the courts have decided is in fact the law which is being enforced in the foreign country.

Lord Wilberforce said:[13]

> The respondents' experts' … contentions were that decisions in East Germany were those appropriate to a centralised socialist state whose courts were guided by considerations of policy. If this argument could have been carried to the point of showing that the courts of East Germany are not courts of law at all or that their decisions were corrupt or perverse, that might (I do not say would) be a ground for disregarding them in favour of decisions of other courts shown to act more judicially. But the evidence did not, in my opinion, approach this point, and a mere difference in philosophy, or even of method, so far from entitling us to prefer the West German approach, on the contrary gives support to those who argue that the East German variety of German law should be taken as being the law in East Germany.

[34] Similar problems to those that concerned the House of Lords in *Carl Zeiss Stiftung* are likely to arise if it were held that New Zealand should not recognise any decision of any Chinese court. Two examples show the point. First, suppose a married couple domiciled in China are divorced in a Chinese court. One of them migrates to New Zealand and remarries. Is the second marriage bigamous because New Zealand will not recognise the Chinese divorce decree? Second, a ship is arrested in China in a proceeding by one of its creditors. The Chinese court orders the sale of the ship with the proceeds of sale paid to its creditors, but they are not enough to clear all its liabilities. Under Chinese law, the purchaser obtains clear title to the ship. Suppose the ship comes to New Zealand. May one of the disappointed creditors have the ship arrested here, saying that New Zealand should not recognise the Chinese judicial sale? In response Mr O'Callaghan submitted that his argument was limited to proceedings to enforce Chinese money judgments. With that he was drawing a distinction between recognition of judgments and their enforcement. While the difference can be stated, it is not always easy to apply. In the examples above, if a New Zealand court recognises the foreign judgment, it gives effect to it by applying it to decide the parties' rights under New Zealand law. But if Mr Shi's case is to be limited to in personam judgments, his argument that all Chinese courts are not true courts has been undermined.

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[13] At 975-976. Similarly Lord Guest rejected criticism that there were no free judges in East Germany as unsupported by evidence, (at 939). The other two judges did not address the point.

[35] Now for whether the Higher People's Court is a court, as understood in New Zealand. Mr Shi's complaint is that Chinese courts and judges are not truly independent and therefore are not true courts. There are two aspects:

(a) whether the bodies carrying out judicial functions are distinct from those with legislative and administrative function; and

(b) whether the bodies carrying out judicial functions are subject to improper interference.

[36] As to the first aspect, in *Attorney-General v British Broadcasting Corporation*, Lord Scarman said:[14]

> I would identify a court in (or "of") law, i.e. a court of judicature, as a body established by law to exercise, either generally or subject to defined limits, the judicial power of the state. In this context judicial power is to be contrasted with legislative and executive (i.e. administrative) power. If the body under review is established for a purely legislative or administrative purpose, it is part of the legislative or administrative system of the state, even though it has to perform duties which are judicial in character. Though the ubiquitous presence of the state makes itself felt in all sorts of situations never envisaged when our law was in its formative stage, the judicial power of the state exercised through judges appointed by the state remains an independent, and recognisably separate, function of government. Unless a body exercising judicial functions can be demonstrated to be part of this judicial system, it is not, in my judgment, a court of law.

That case was about whether the BBC should be restrained from making a broadcast about the Exclusive Brethren which stood to prejudice the sect's hearing before a local valuation court. Because the power to restrain and punish contempts applies only to courts, it was necessary to establish whether the local valuation court was really a "court." (It was not). The case is accordingly purely domestic. Nevertheless it highlights that a judicial power is distinct from legislative and administrative powers.

[37] *Kuwait Finance House (Bahrain) BSC v Teece* is a New Zealand decision on the first aspect. Mander J cited Lord Scarman's dictum in *British Broadcasting* when considering whether the Bahrain Chamber for Dispute Resolution was a court in a common law proceeding brought on a judgment of the Chamber.[15] He said:

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[14] *Attorney-General v British Broadcasting Corporation* [1981] AC 303 (HL) at 358.
[15] *Kuwait Finance House (Bahrain) BSC v Teece* [2017] NZHC 1308, [2018] 2 NZLR 257.

> [63] As already observed, it will ultimately be a question of New Zealand law whether the character of the foreign tribunal and its role within the foreign jurisdiction is sufficient to constitute what is considered to be a court in this country. However, the principle of comity requires the domestic Court to be circumspect about denying recognition to a foreign tribunal created by the legislative authority of a sovereign state, to exercise that state's judicial power as a component part of its legal system. …
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> [66] I accept that a critical part of the enquiry in assessing whether a foreign tribunal such as the BCDR should be recognised by this jurisdiction as a court for the purpose of enforcement is whether the body forms part of the sovereign state's legal system and is a manifestation of the exercise of that state's sovereignty to determine how particular disputes are to be dealt within that jurisdiction.
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> [67] The difference between a body such as the BCDR and a New Zealand court in terms of process and procedure ought not, therefore, necessarily be greatly influential. However, some elements may be considered fundamental to a recognised judicial process. Importantly, the tribunal must have sufficient judicial attributes enacted in a sufficiently judicial way to be recognised as a court by this jurisdiction. At the most fundamental level, any tribunal must have employed a process which included the application of the law to the facts with opportunity to parties to participate.

[38] For his decision, Mander J considered the place, structure and character of the Chamber's jurisdiction, the place of the Chamber in Bahrain's court system, the structure of the Chamber, the formation of a tribunal and the appointment of the members, the self-executing nature of the Chamber's judgments, appeal rights, as well as other features.

[39] On the other hand, in *Bridgeway Corporation v Citibank* a Liberian judgment was refused recognition in New York.[16] While Liberia had a constitution modelled on that of the United States, Liberia was ravaged by a civil war, the constitution was suspended, the courts that existed barely functioned, rights of litigants were ignored, corruption and incompetence were prevalent, judges served at the will of the leaders of warring factions and were subject to political and social influence. Impartial and independent tribunals did not exist.

[40] In cases where the courts of the foreign jurisdiction are recognised as a distinct organ of government, a high standard of proof is required when it is alleged that they cannot be courts because of external interference. *Carl Zeiss Stiftung v Rayner and*

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[16] *Bridgeway Corporation v Citibank* 45 F Supp 2d 276 (SDNY 1999), upheld on appeal, 201 F 3d 134 (2nd Cir 2000).

*Keeler Ltd (No.2)* is an example. In *Blanco v Banco Industrial de Venezuela*, a forum non conveniens case, the Second Circuit Court of Appeals was not persuaded that justice would not be done in Venezuela, despite complaints of systemic difficulties in the Venezuelan justice system, hostility to foreign litigants and antipathy to decisions adverse to the interests of the Venezuelan government:[17]

> It is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign government.

In *Stroitselstvo Bulgaria v Bulgarian-American Enterprise Fund*, another forum non conveniens case, the Seventh Circuit was unimpressed by complaints of a public perception of corruption in the Bulgarian courts:[18]

> Their generalized, anecdotal complaints of corruption are not enough for a federal court to declare that an EU nation's legal system is so corrupt that it can't serve as an adequate forum.

[41] Evidence whether the Chinese courts are "courts" comes from:

(a) Dr Zhang Wenliang, an associate professor of law in a law school in Beijing;

(b) Dr Ding Chunyan, an associate professor of law in a law school in Hong Kong; and

(c) Mr Clive Ansley, a Canadian, formerly a lawyer but now providing immigration services, who had many years' practical experience years as a foreign lawyer representing clients in China.

[42] Dr Zhang's evidence addresses the constitutional entities in China and their relationship with one another, the power of the courts and the sources of their power, the appointment of judges to the Higher People's Court, the conduct of proceedings and decision-making, and responds to criticisms by Mr Ansley and Dr Ding.

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17 *Blanco v Banco Industrial de Venezuela* 997 F 2d 974 (2nd Cir 1993) at 981.

18 *Stroitselstvo Bulgaria v Bulgarian-American Enterprise Fund* 589 F 3d 417 (7th Cir 2009) at 421.

[43] According to Dr Zhang, China has a written constitution which provides for the separation of powers – that is, the power to legislate, the power to adjudicate and the power to enforce are recognised as separate and distinct. Legislative power is in the hands of the National People's Congress, the Standing Committee of the National People's Congress, and local people's congresses at various levels. Executive power is exercised by the State Council of the People's Republic, and local people's governments at various levels. Under the Organic Law of the People's Courts of the People's Republic of China and under the Constitution, the People's Courts exercise state judicial power independently and free from interference of any organisations or individuals. There are four levels of courts in China: the basic, intermediate, high and the supreme people's courts. Some courts have general jurisdiction and others have special jurisdiction. While there are four levels of people's courts, a case can only go through two levels at most – that is, there is only one right of appeal.

[44] Provisions in the Civil Procedure Law determine which court a case can be brought in. Intermediate People's Courts have jurisdiction over cases involving major foreign-related matters, cases which have a major impact within their jurisdictions, and cases which are under the jurisdiction of the Intermediate People's Court as determined by the Supreme People's Court. An Intermediate People's Court may be a court of first instance. In this case, the Shijiazhuang Intermediate People's Court was the court of first instance and any appeal was only to the Higher People's Court of Hebei Province. Under the applicable forum selection rules Hebei Huaneng's case was appropriately brought in the Shijiazhuang Intermediate People's Court. Any appeal must be exercised within 15 days of service of the written judgment. On appeal, there is a de novo hearing of both facts and law.

[45] There are legal requirements for the appointment of judges. They must have a bachelor's degree or higher, including qualifications in law. They must also have had five years' legal experience. They must also have passed a legal professional qualification examination to qualify as a lawyer. Judges are required to exercise the judicial authority of the state, according to the law. They are required to treat the parties impartially, apply the laws equally to all individuals and organisations, they are expected to be diligent and responsible, honest and upright, and to abide by professional ethics. The president of a court is elected by the corresponding level of

the People's Congress. Vice-presidents, judicial committee members, division heads, deputy division heads and judges are appointed on the recommendation of the court's president to the Standing Committee of the corresponding level of the people's congress.

[46] In general, court proceedings are in public. Only a very small number of cases are heard in chambers. Cases of public interest may be reported in the media. The public can view court proceedings online, which goes towards establishing the openness of court proceedings. The media may also sit in at a hearing.

[47] An appellate court will decide if a hearing is required. If no new facts, evidence or legal reasons are submitted, the appellate court will not hold a hearing, but instead deal with the matter on the papers. In the present case, the Higher People's Court of Hebei did hold a hearing to allow the parties to present new facts, evidence and legal argument. In practice, an appellate court usually affirms the lower court's findings of fact and evidence, unless there is new evidence which the appellate court accepts. Even if new evidence is not submitted, the appellate court may conduct a de novo review of the law relating to the case.

[48] Parties are entitled to retain representatives. Lawyers have rights of audience. Lawyers representing parties have the right to investigate and collect evidence and may consult materials relating to the case. The court may also collect evidence on its own initiative. At first instance and on appeal evidence is presented by the parties and can be the subject of cross-examination by the other side. Evidence may include statements of a party, documentary evidence, physical evidence, audio-visual evidence or electronic data, witnesses' testimony, expert opinion and survey transcripts. The evidence must be verified before it can be used to decide facts. Evidence collected by the court is also subject to verification. The appellate court follows the same procedure as the first instance court, unless circumstances require special procedural arrangements. An appellate court forms a collegial bench consisting of an odd number of judges, normally three. Judges may not sit if there are any conflicts of interest. A collegial bench consists only of judges. There are no people's assessors (as juries). Transcripts of the judges' deliberations are prepared and signed by the members of the panel. Dissenting opinions must be included in the transcripts. In China, steps have

been taken at various levels to ensure efficiency, impartiality and access to justice. That includes allowing a case to be conducted online and allowing hearings to be observed online.

[49] His evidence describes the role of judicial committees, but it is not necessary to say much about them as there were no judicial committees in this case. A collegial panel may refer a case to a judicial committee. That is an exceptional step used in major, difficult, and complicated cases. The judicial committee deliberates and gives its decision on the case with reasons stated. A judicial committee may also intervene if the president of a court discovers any errors in any effective judgment, ruling or consent judgment, and deems a retrial necessary.[19]

[50] Dr Zhang also describes the role of the judicial committee of the Supreme People's Court. It may give guideline interpretations of the law. That is with a view to ensuring the uniform application of the law throughout the Chinese legal system. That may be important, given that not all cases may be appealed to the highest court.

[51] Dr Zhang confirms that in this case the hearings in the Intermediate People's Court and the Higher People's Court were by collegial benches only and no judicial committee was involved. His evidence also refers to the recognition of Chinese judgments in other common law jurisdictions, including the United States, Canada and Australia.

[52] Dr Ding gives a general description of the Chinese civil justice system. While she differs in detail, her description broadly aligns with Dr Zhang's. She also refers to the re-trial system, but this case did not involve any re-trial. The re-trial system involves a review of a decision which may be instigated by a party, by the Supreme People's Court, by a court at a higher level, by the president of the court and also by the Supreme People's Procuratorate or the local procuratorate. She refers to first instance judges hearing cases in collegial panels. She also notes that there may be judicial mediation which may result in a consent judgment.

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[19] Compare Te Ture Whenua Māori Act 1993, s 44.

[53] She refers to the independence of judges in China. By that she means the ability of judges of a court to perform their duties free of influence or control by either government or private actors. She describes the recruitment of judges, the internal structure of the court, the judicial accountability system and the performance appraisal system. As to recruitment, while unqualified people had been appointed in the past ("veterans"), that is no longer the case. As to internal structure she refers to the role of judicial committees, which have been criticised for deciding without hearing. Reforms to the judicial accountability system reduced the supervisory powers of the division chief judge and limited the powers of judicial committees and have enhanced the independence of Chinese judges. On the other hand she considers that the performance appraisal system, under which judges are assessed on matters such as trial fairness, trial efficiency and trial result, has influenced judges and may hamper their independence.

[54] She addresses the independence of the courts separately. While the Constitution provides for people's courts to exercise judicial power independently, she says that in practice Chinese courts are likely to be influenced by the people's congress or its representatives, the Chinese Communist Party and administrative organs. Courts are required to report to people's congresses at their applicable level, the congresses can appoint and remove judges and approve the courts' financial budgets. The standing committee of the National People's Congress has an increased supervisory role over the courts. At the local level there can be interference from local government and the local Communist Party. That has led to serious problems of local protectionism. But since 2012, the Supreme People's Court has launched reforms directed at a unified management of personnel, funds and properties so as to prevent local protectionism and localised interference in the courts. She considers that the Supreme People's Court and higher provincial courts are still subject to influence from administrative agencies. She also says that it is difficult for a court to resist the supervisory power and influence of the local political and legal affairs commission of the Communist Party.

[55] Mr Ansley advocates strongly that a Chinese court is not a court as he understands that term is used in jurisdictions that follow the rule of law. Giving anecdotal examples, he says:

(a) there is no separation of powers in China;

(b) the members of the judiciary are all members of the Chinese Communist Party;

(c) judges who hear cases do not decide them;

(d) cases are decided secretly by judicial committees appointed in each court whose members are drawn from the judges of the court and from the Chinese Communist Party – decisions are delivered as though they had been determined by the judges who conducted the trial;

(e) a feature of the system is that, through several mechanisms, cases are routinely influenced by political matters. This is not ad hoc corruption or poor decision-making but is how the system is designed to work;

(f) judges are expected to decide whatever is in the interests of the Chinese Communist Party and must answer to and be accountable to the Communist Party and should not regard themselves as independent;

(g) judicial independence is considered an immoral, Western concept which has been denounced and rejected by Chinese top leadership;

(h) judges are not trained in the law;

(i) the local Political/Legal Committee of the Chinese Communist Party at every level can overrule the courts at that level;

(j) China has no rule of law; and

(k) he would call a Chinese court a local administrative unit.

[56] A weakness in his evidence is that it is some years since he was actively involved in representing clients i China. He is 79 years old. Dr Ding is more familiar

with recent developments. His evidence is vulnerable to being criticised as anecdotal and generalised. I regard the other witnesses as better informed.

[57] Their evidence shows that China does have a separate branch of government which performs the judicial function. That separation is maintained in practice, subject to what Dr Ding says about outside interference. Her description of judges' accountability and performance appraisal does show a different approach to maintaining good standards by judges, but that does not by itself mean that they are not judges. It is always helpful to bear in mind the dictum of Cardozo J in *Loucks v Standard Oil*:[20]

> We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.

[58] As to the complaint of improper outside interference in the court's decisions, it would be an over-reaction to refuse to recognise all Chinese courts, because at times decisions have been made not because of the merits of a case, but because the judges consider that they must meet the expectations of the local people's congress or branch of the Communist Party. In a proceeding to enforce the judgment of a Chinese court, the better approach is to see whether justice was done in the particular case. Instead of saying that China does not have courts, the inquiry is whether the judgment debtor has any of the standard affirmative defences, including breach of natural justice.

[59] That is borne out by the way that courts in common law jurisdictions have dealt with proceedings to enforce Chinese money judgments. They have not refused carte blanche to enforce the judgments but have considered in the particular case whether to enforce the Chinese judgment.[21] As far as I am aware, this is the first case where it has been argued that in contemporary China there are no courts, as we understand them.

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20 *Loucks v Standard Oil* (1918) 224 NY 99 at 111.

21 *Wei v Li* [2019] BCCA 114; *Chen v Lin* [2016] NZCA 113; *Suzhou Haishun Investment Management Company Ltd v Zhao* [2019] VSC 110; *Liu v Guan* Supreme Court of the State of New York, County of Queens, 7 January 2020; *Qiu v Zhang* United States District Court, Central District California, 27 October 2017; *Hubei Gezhouba Sanlian Industrial Co Ltd v Robinson Helicopter Company Inc* United States Court of Appeals 9th circuit, 12 June 2008.

[60] In this case the Hebei Higher People's Court was part of the judicial branch of the government of the People's Republic China and was separate and distinct from legislative and administrative organs. It exercised a judicial function. Its procedures and decision were recognisably judicial. There is no suggestion that the procedures or decision went awry because of any untoward outside influence. Accordingly Hebei Huaneng has established a good arguable case that it is suing on a judgment of a court.

**Must Hebei Huaneng exhaust its remedies against Detai first?**

[61] Mr Shi's alternative argument that the judgment of the Higher People's Court cannot be enforced in New Zealand is that Hebei Huaneng must first exhaust its rights under its mortgage over the assets of Detai, before it can enforce its guarantee against him. Moreover, Hebei Huaneng did not enforce its securities against Detai in good time. He has a good defence under Chinese law to Hebei Huaneng's claim against him, and that defence can be raised even after the Chinese court has given judgment against him. His defence goes to whether a creditor, whose debt is secured both by mortgages over property and by personal guarantee, is free to choose which remedies he pursues or whether it must enforce its rights in a fixed order. All parties can, of course, agree on how the creditor may enforce his rights, but Mr Shi's case is that under Chinese law a creditor must enforce mortgage securities first before enforcing personal covenants, even in the absence of agreement.

[62] As a way of putting this into context, I set out the position at common law. Generally, a creditor with security over assets of the debtor, security over assets of a third party, and a personal guarantee given by yet another third party, is free to choose what remedies to enforce and when (unless the parties have expressly agreed otherwise). In *China and South Sea Bank Ltd v Tan* the Privy Council said:[22]

> The creditor had three sources of repayment. The creditor could sue the debtor, sell the mortgage securities or sue the surety. All these remedies could be exercised at any time or times, simultaneously or contemporaneously or successively or not at all. If the creditor chose to sue the surety and not pursue any other remedy, the creditor on being paid in full was bound to assign the mortgaged securities to the surety. If the creditor chose to exercise its power of sale over the mortgage security, he must sell for the current market value and the creditor may decide in his own interest if and when he should sell …

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22 *China and South Sea Bank Ltd v Tan Soon Gin* [1990] 1 AC 536 (PC) at 545.

> The creditor is not obliged to do anything. If the creditor did nothing and the debtor declines into bankruptcy, the mortgaged security becomes valueless and the surety decamps abroad, the creditor loses his money. If disaster strikes the debtor and the mortgaged securities but the surety remains capable of repaying the debt, then the creditor loss nothing. The surety contracts to pay if the debtor does not pay, and the surety is bound by his contract.

On the other hand, a surety who pays the debt can require any security held by the creditor to be assigned to him. If the creditor discharges the security without the consent of the surety, then, unless there are express provisions in the guarantee providing otherwise, the discharge of the security also releases the surety from his obligations under the guarantee.[23]

[63] The evidence as to the corresponding Chinese law, comes from Dr Ding and Dr Zhu Xiaofeng of the Central University of Finance and Economics in Beijing, also a part-time lawyer. They refer to the Guarantee Law 1995,[24] the Judicial Interpretation of the Guarantee Law of the Supreme People's Court of 2000, the Property Law 2007, and leading decisions of the Supreme People's Court and some Higher People's Courts.

[64] Both cited Article 176 of the Property Law 2007. Two translations were provided:

> Where the creditor's right is secured by both property security and guarantee, the creditor should have his right satisfied as agreed upon, if the debtor fails to perform a due obligation or the circumstances for the realisation of property security right as agreed by the parties occur; Where no agreement, whether clear or not, is formulated in this respect, if the debtor himself provides property security, the creditor should have his right satisfied with such property first; where a third party provides property security, the creditor may either have his right satisfied with such property or request the guarantor to bear security liability. After the third party security provider fulfils the security liability, he should have the right of recourse against the debtor.

And:

> Where a secured credit involves both physical and personal security:
>
> (a) if the debtor fails to pay its due debts or any circumstance for realising the property for security as stipulated by the parties concerned occurs, the creditor shall realise the creditor's rights according to the stipulations;

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23 James O'Donovan and John Phillips *The Modern Contract of Guarantee* (3rd ed, LBC Information Services, Sydney, 1996) at 8-046 – 8-105.

24 "Guarantee Law" has also been translated as "Security Law".

(b) where there is no stipulation or the stipulations are not explicit, and the debtor provides his/its own property for the security, the creditor shall realise the creditor's rights firstly by the security by property; and

(c) where a third party provides the security by property, the creditor may realise the creditor's rights with the physical security, or may require the guarantor to assume the guarantee liability.

The third party providing the security may, after assuming the security liability, be entitled to enforce payments against the debtor.

[65] As already noted, under Chinese law a creditor with security over the asset of a debtor or a third party does not enforce its rights directly against the assets, as happens under our law where securities allow a creditor to take possession of an asset and sell it or appoint receivers. Instead in China, the secured creditor must first go to court, that is, obtain an order of the court and then have the court enforce its orders against assets over which the creditor has security. Accordingly, the issue discussed here arises when the creditor invokes the court processes to enforce its rights against the debtor, the security provider and the personal guarantor.

[66] Dr Ding's evidence addresses four questions:

(a) Can the parties agree on the realisation sequences of the security interests to satisfy the creditor's right?

(b) If there is no agreement on the realisation sequences among the parties, must the collateral be exhausted before resorting to assets of the guarantor?

(c) If the creditor chooses to request both the third party property security provider and the personal guarantor to bear security liability, must the collateral be exhausted before resorting to assets of the guarantor?

(d) When the creditor successfully claimed both the third party property security interest and a personal guarantee interest in court, but later waives the property security, should the guarantor be lessened or exempted from guarantee liability regarding rights waived by the creditor?

[67] Dr Ding explains that the "property security first principle" requires a creditor to have recourse against property security before enforcing personal covenants. That is under Article 28 of the Guarantee Law 1995 but has been in part modified by Article 176 of the Property Law 2007, which recognises the rights of the parties to agree how a creditor may enforce its securities.

[68] She accepts that under Article 176 of the Property Law 2007, in the absence of any agreement by the parties, where the debtor has given security over his assets, the creditor should have recourse to those assets first. But where a third party provides security over its assets and another has given a personal guarantee, the creditor has options: to enforce the security rights over the assets of the third party, to pursue the guarantor on his personal covenant, or to pursue both.

[69] On the question whether the property security first principle applies when the creditor pursues both the personal guarantor and the mortgaged assets of a third party, she says that the position is not governed by Article 176. Instead the property security first principle in Article 28 of the Guarantee Law prevails. For that, she cites a decision of the Supreme People's Court, *The Great Wall* case.[25]

[70] Where the creditor has pursued both the third party property security provider and the guarantor in court, the property security first principle applies. The creditor must first pursue its rights against the assets mortgaged in its favour before having resort to assets of the personal guarantor. If the creditor does not enforce its rights against debts secured in its favour by a third party it stands to lose its ability to enforce the judgment against the personal guarantor. The following conduct can count as waiver of the property security:

(a) Failure to act in a timely manner, when the mortgagor has sold the collateral and the creditor claims interest;

(b) Consenting to the mortgagor disposing of the property;

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[25] *The dispute over obligation assignment contracts and guarantee contract between Guiyang branch of China Great Wall Asset Management Corporation v Liuzhi Special District Shunjia Jiaohua Co Ltd* (2015).

(c) the creditor applying to the court for the property to be removed from a property preservation order the mortgagor has sold, when the creditor claims a mortgage interest over that asset.

[71] Dr Ding accepts that the contractual arrangements between Hebei Huaneng, Qinhuangdao Boen, Detai and Mr Shi did not provide how Hebei Huaneng should enforce its rights amongst them. There was no agreed realisation sequence, in particular as between rights under the mortgage over Detai's assets and against Mr Shi. Hebei Huaneng was entitled to exercise its right of choice by suing both Detai and Mr Shi. She considers, however, that the Higher People's Court ought to have directed that enforcement should proceed, first, against the assets of Detai before the judgment against Mr Shi could be enforced. Moreover, Hebei Huaneng did not act in a timely manner to enforce its rights against Detai's assets, and any depreciation, damage or loss in those assets jeopardising the security would relieve Mr Shi of his liability under his guarantee. That should be applied, not only before judgment, but also afterwards when the judgment is enforced against Mr Shi.

[72] Dr Zhu agrees that the parties can agree as to the order of liability between the debtor, each guarantor and each property security provider. On the other hand, where the debtor provides security, the creditor must first exercise its rights against the debtor's assets under the security before pursuing personal guarantees given by third parties. But when a third party gives the creditor security over its assets and another party gives only a personal guarantee, in the absence of any agreement as to order of liability, the creditor has the right to choose which rights it will enforce – choosing to pursue both or either does not affect the rights and obligations of the third parties either as property security providers or personal guarantors. Once a creditor has exercised his right of choice and the court has upheld this, without determining any order of enforcement, the guarantor is not entitled later to resist enforcement by insisting on the principle of absolute priority of property security. In his view, Article 176 of the Property Law 2007 has largely superseded Article 28 of the Guarantee Law 1995. The *Great Wall* case relied on by Dr Ding has been overtaken by a later decision of the

Supreme People's Court, the *Wusheng* case.[26] In his opinion, once judgment was given against Mr Shi, he can have no reason for resisting enforcement by alleging that Hebei Huaneng ought first to pursue Detai under its mortgage.

[73] For this case the important difference between the experts is at the post-judgment stage. Dr Zhu says that when the parties have not agreed in what order a creditor may enforce its remedies under securities given by one third party and a personal guarantee given by another, after judgment the creditor can enforce its remedies in whichever order it chooses. Dr Ding says that notwithstanding the absence of agreement on the order of enforcement, after judgment the creditor must enforce its securities first. Dr Ding's complaint that the Higher People's Court ought to have directed in which order Hebei Huaneng should enforce its judgments, first against Detai's mortgaged assets and then against Mr Shi, is irrelevant for this case. A New Zealand court does not second-guess the foreign judgment. The foreign court knows its own law better than a New Zealand court does. Under the principle of finality the judgment is conclusive and the merits of the judgment are not up for review.[27]

[74] Instead, the issue here is whether, even after judgment in China, Mr Shi, as guarantor, can resist enforcement in New Zealand because Hebei Huaneng has not first exhausted its rights against Detai's assets.

[75] For a New Zealand court to give a money judgment to a foreign judgment creditor, the obligation under the foreign order must be unconditional. The New Zealand court only enforces accrued liabilities. The remedy in the common law claim on a foreign judgment is a money judgment. A money judgment is only for a previously existing liability that has been ascertained or established in the proceeding.[28] That is to be contrasted with orders to pay, which may impose fresh liabilities (as with costs orders) and may be conditional.[29] The money judgment

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26 *Shanxi Wusheng New Material Co Ltd and Great Wall Guoxing Financial Lesson Co Ltd* Supreme People's Court (2019) No. 484 and also *Jiangsu East China Wujin City Co Ltd, Bank of Gansu Co Ltd*, *Lanzhou Chengguan sub-branch,* Supreme People's Court 2019 SFNZ 1361.

27 *Godard v Gray* (1870) LR 6 QB 139.

28 *Ex parte Chinery* (1884) 12 QBD 342 (CA) at 345.

29 For example, under an order for specific performance of an agreement for sale and purchase of land, payment is usually required only upon the other side transferring the property.

derives from the common law origins of actions to enforce foreign judgments. The common law counts were debt or indebitatus assumpsit (although the promise was entirely fictitious).[30] It would not be right to give judgment in New Zealand to a foreign judgment creditor when that creditor's right to payment under the decision of the foreign court can be enforced only if other remedies have been exhausted first. The foreign creditor cannot expect more extensive rights from a New Zealand court than it has under the original decision on which it sues.

[76] As to the issue that divides the experts, at this stage of the case the facts point to Dr Zhu's position being stronger. The Intermediate People's Court has enforced the judgment against Mr Shi without first requiring Hebei Huaneng to enforce its mortgage over Detai's assets. The court has not treated the judgment against Mr Shi as conditional. At this stage Hebei Huaneng has a good arguable case that its judgment against Mr Shi is an accrued liability. Moreover, the evidence of Zhang Boxiang about Hebei's inquiries about Detai's assets suggests that little could be achieved by taking enforcement steps in the Intermediate People's Court against Detai.

**Other matters under r 6.29**

[77] On the two matters on which Mr Shi objected to Hebei Huaneng's claim, it has established a good arguable case against him. It follows that it has also shown a serious issue to be tried on the merits. Besides, it was not submitted that there was not a serious issue.

[78] In case I have erred in finding a good arguable case, I am satisfied that the case has a real and substantial connection with New Zealand. Even though the parties are Chinese and Hebei Huaneng's claim arises out of contracts made in China, to be performed in China and governed by Chinese law, the case concerns the enforcement of Hebei Huaneng's judgment against Mr Shi's assets. They are in New Zealand and that is a sufficient connection for an enforcement proceeding.

[79] New Zealand is the appropriate forum to decide whether Hebei Huaneng's judgment should be enforced against Mr Shi's New Zealand assets. Execution

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30 *Yoonwoo C & C Development Corp v Huh* [2019] NZHC 2986 at [11]-[15] and [50].

measures taken in China will be ineffective against Mr Shi's New Zealand assets. China does not have a personal bankruptcy law[31] and accordingly Hebei Huaneng could not have Mr Shi bankrupted in China. As China is not a party to the UNCITRAL Model Law on Cross-Border Insolvency, the Insolvency (Cross-Border) Act 2006 could not be used. For all practical purposes there is no other alternative forum. There is nothing else that counts against New Zealand assuming jurisdiction.

**Outcome**

[80] Hebei Huaneng has accordingly established that New Zealand should assume jurisdiction under both r 6.29(1)(a) and (2) of the High Court Rules. That means that Mr Shi's appearance protesting the jurisdiction is set aside. Hebei Huaneng will be able to continue with its application for summary judgment. It will however need to amend its statement of claim, which seeks "Enforcement of the Higher People's Court's judgment." It should plead a sum for which it seeks judgment.

[81] I make these orders:

(a) Mr Shi's appearance under protest to jurisdiction is set aside;

(b) By **20 November 2020** Hebei Huaneng is to file and serve an amended statement of claim pleading a sum for which it seeks judgment;

(c) By **18 December 2020** Mr Shi is to file and serve a notice of opposition to the application for summary judgment and any further affidavits;

(d) By **26 February 2021** Hebei Huaneng is to file and serve any affidavits in reply;

(e) The Registrar is to allocate a fixture for the summary judgment for one day no earlier than **12 April 2021**;

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[31] *Mainzeal Property and Construction Ltd (in liq) v Yan* [2019] NZHC 3145 at [15].

(f) Hebei Huaneng has costs on the application to set aside the application to set aside the appearance. If the parties cannot agree costs, memoranda may be filed;

(g) Leave is reserved to apply for further directions.

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**Associate Judge R M Bell**