

## Article

### **Does a Fixed Civil Judgment Rendered in Mainland China and Recognized by a Taiwanese Court have any Impact on Taiwan's Legal System?**

**— Analysis of Taiwan Supreme Court Judgments (96) Tai Shang Tzu No.2531 (2007) and (97) Tai Shang Tzu No.2376 (2008)**

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#### ABSTRACT

*Does a fixed civil judgments rendered in Mainland China, although recognized by Taiwanese courts through a fixed verdict, actually have effect in Taiwan? Taiwan Supreme Court judgment (96) Tai Shang Tzu No.2531 (2007) and (97) Tai Shang Tzu No.2376 (2008) said “no” with no exceptions, due to the absence of explicit expression in the legislation regarding this issue. However, these two judgments do not reflect opinions of legal scholars and actual judicial practice in Taiwan. For example, a legal loophole exists in Article 74 of Act Governing Relations between People of the Taiwan Area and Mainland Area that complicates the issue. Additionally, it is also necessary to analogize Article 402 of Civil Procedure Code to affirm the final and conclusive effect in certain circumstances. Also, based on the essence and nature of res judicata, where there is procedural protection of due process, there is also res judicata. Furthermore, from viewpoint of judicial*

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*assistance and reciprocity, if Taiwan courts deny the final and conclusive effect of all Chinese fixed civil judgments, according to game theory, Mainland China's courts may take reprisal measures, thus significantly affecting the wellbeing of people on both sides of the Taiwan Strait.*

**Keywords:** *Act Governing Relations between People of the Taiwan Area and Mainland Area, Public Order and Good Morals, Reciprocity, Recognition and Enforcement of Foreign Judgments, Res Judicata (Claim Preclusion), Legal Method, Legal Loophole, Analogy, Judicial Assistance*

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## I. INTRODUCTION

In 1949, the Nationalist government took refuge on Taiwan, as a result of civil war in Mainland China. Since then, each side of Taiwan Strait Mainland China and Taiwan has developed separate legal systems, while at the same time claiming sovereignty over entire China.

In 1992, Taiwan enacted Act Governing Relations Between People of the Taiwan Area and Mainland Area (hereinafter referred to as the “Mainland Relations Act”) regulating cross-strait relations. In regards to private law section, Mainland Relations Act stipulates choice of law rules, as well as rules for recognition and enforcement of fixed civil judgments rendered by Mainland Chinese courts. Thus, unlike the Act of Civil Matters Involving Foreign Elements that provides rules of private international law, Mainland Relations Act governs the interregional law matters between the two sides.

Of greater interest to this paper is Article 74 of Mainland Relations Act which consists of three paragraphs. The first paragraph provides that “to the extent that an irrevocable civil ruling or judgment, or arbitral award rendered in the Mainland Area is not contrary to the public order or good morals of the Taiwan Area, an application may be filed with a court for a ruling to recognize it.” The second paragraph provides that “where any ruling or judgment, or award recognized by a court’s ruling as referred to in the preceding paragraph requires performance, it may serve as a writ of execution.” The last paragraph provides that “the preceding two paragraphs shall not apply until the time when for any irrevocable civil ruling or judgment, or arbitral award rendered in the Taiwan Area, an application may be filed with a court of the Mainland Area for a ruling to recognize it, or it may serve as a writ of execution in the Mainland Area.”

The issue discussed in this paper is whether a fixed civil judgment made by Mainland China’s court and recognized in Taiwan with a fixed verdict has any *res judicata* (effect of claim preclusion)? In other words, is a recognized judgment actually final and conclusive in Taiwan? Taiwan Supreme Court judgment (96) Tai Shang Tzu No.2531 (2007) and (97) Tai Shang Tzu No.2376 (2008) (hereinafter referred to as “the two judgments”) said “no” without any exceptions, since there is no explicit provision in the Mainland Relations Act or in any other legal provisions regarding the issue. However, this raises a legal dilemma: if the two court judgments are to be followed, then what is the purpose of recognizing Mainland China’s fixed civil judgments under Article 74 of the Mainland Relations Act, especially in judgments that do have need to be enforced (i.e. divorce cases)? What is the consequence of these two legal decisions and what impact will these judgments have on people living on both sides of the Taiwan Strait? Will

these decisions set precedent or will legal alternatives emerge? Are the opinions in the two judgments correct? Why do we need *res judicata* and what is its essence? Based on its essence, are there circumstances where we need to recognize Mainland China's fixed civil judgments as final and conclusive in Taiwan? This article attempts to address some of these questions in the following sections.

## II. SUMMARY OF TAIWAN SUPREME COURT JUDGMENT (96) TAI SHANG TZU NO.2531 (2007) AND (97) TAI SHANG TZU NO.2376 (2008)

In 2000, Zhejiang Textiles Import & Export Group Co. Ltd. (hereinafter referred to as the "Zhejiang Textiles"), a Mainland China Corporation, indirectly hired Uniglory Marine Corporation (hereinafter referred to as the "Uniglory"), a Taiwan Company, to ship school uniforms to Iraq in 21 bills of lading with a total value of over US\$2.6 million. Zhejiang Textile did not receive payment because Uniglory released of cargo without presentation of original bills of lading. Therefore, Zhejiang Textile sued Uniglory demanding damages of US\$2.6 million and RMB6.36 million. On December 25<sup>th</sup> 2002, the Shanghai Maritime Court held that the defendant should pay damages to Zhejiang Textile in the amount of US\$2.6 million and RMB3.11 million, as well as interest accrued. Uniglory was merged into the Evergreen International Storage & Transport Corporation (hereinafter referred to as the "Evergreen") on November 28, 2002. Following the merger, Evergreen appealed to the High People's Court of Shanghai City.

On September 4, 2003, High People's Court of Shanghai City rendered the final and irrevocable judgment of affirmance. Due to Evergreen's lack of assets in Mainland China, Zhejiang Textiles had to acquire a writ of execution for the compulsory enforcement of judgment against Evergreen in Taiwan. Based on Article 74 of Mainland Relations Act, Zhejiang Textiles filed with Taiwan Taoyuan District Court for a ruling to recognize the aforementioned fixed judgment made by High People's Court of Shanghai City. A granting verdict ordered by Taiwan Taoyuan District Court was upheld by Taiwan High Court and Supreme Court. The verdict was fixed.

Although the fixed judgment of High People's Court of Shanghai City was recognized by courts in Taiwan, Evergreen still tried to preclude the compulsory enforcement by instituting a suit of objection, as provided in Article 14 of the Compulsory Enforcement Act. This Article has three paragraphs regarding a debtor who may institute a suit of objection protesting against compulsory execution. The first paragraph states: "After acquiring a writ of execution by a creditor, if any ground occurs to preclude or foreclose the creditor's claim upon which the writ of execution is based, the debtor may institute a suit of objection protesting against compulsory

execution with the court that executed the compulsory enforcement before the end of compulsory enforcement procedure. If the creditor's writ of execution is based on a fixed judgment, a debtor may institute a suit of objection protesting against compulsory execution based on the grounds occurred after the conclusion of oral argument of the above-mentioned fixed judgment." The second paragraph provides that "if the writ of execution is based on a ruling that does not have the same effect as a fixed judgment<sup>1</sup> and there is any ground by a creditor to deny, preclude or foreclose the creditor's claim upon which the writ of execution is based occurs before acquiring the writ of execution, the debtor may institute a suit of objection protesting against compulsory execution with the court that executed the compulsory enforcement before the end of compulsory enforcement procedure." The first paragraph is designed for a writ of execution with the same effect as a fixed judgment while the second is for those without the same effect. The difference is significant: If a ruling has the same effect as a fixed judgment, there must have been proper procedural protection given to the parties, especially the oral arguments. If the opportunity of argument has been given, parties cannot argue again, except on grounds occurred after conclusion of oral arguments, according to the latter part of first paragraph in Article 14 of the Compulsory Enforcement Act.

At first, Taiwan Taoyuan District Court and the Taiwan High Court denied Evergreen's claim. The decisions in both courts argued that that the fixed civil judgment of High People's Court of Shanghai City is final and conclusive in Taiwan because it was recognized by Taiwanese courts by a fixed verdict. All issues raised by Evergreen occurred before conclusion of oral argument in High People's Court of Shanghai City, thus Evergreen's suit of objection was overruled in conformity with first paragraph of Article 14 of Compulsory Enforcement Act. Evergreen appealed. Taiwan High Court's original decision was reversed and remanded by Taiwan Supreme Court Judgment (96) Tai Shang Tzu No.2531 (2007). Taiwan High Court obeyed and reversed the decision in favor of Evergreen. Zhejiang Textiles's appeal was overruled by Taiwan Supreme Court Judgment (97) Tai Shang Tzu No.2376 (2008). At that point the case became irrevocable.

The two judgments in favor of Evergreen noted the following:

There is no explicit expression in Mainland Relations Act about whether or not the recognized Mainland China's fixed judgments are final and conclusive in Taiwan. Therefore, they are not final and conclusive, here, in Taiwan. By virtue of second paragraph of

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1. "The same effect as a fixed judgment" includes but not limited to *res judicata* raised by a fixed (final and conclusive) judgment. A final and conclusive arbitral award or settlement of disputes also has the same effect.

Article 14 of the Compulsory Enforcement Act, Evergreen as the debtor may institute a suit of objection protesting against compulsory execution with the court that executed the compulsory enforcement before the end of compulsory enforcement procedure. The common reasoning of the two judgments is fairly simple. However, Taiwan Supreme Court Judgment (96) Tai Shang Tzu No.2531 (2007) was more complex:

The rules regarding Mainland China's fixed civil verdicts and judgments set forth in Article 74 of Mainland Relations Act adopt the process to "grant, recognize and enforce". On the other hand, the fixed verdicts or judgments rendered by the courts of Macau or Hong Kong will be recognized automatically without any grant by a Taiwan court, pursuant to paragraph one of Article 42, Act Governing Relations with Hong Kong and Macau (hereinafter referred to as the "Hong Kong Relations Act") which is patterned after German's and Japan's legislation and concerns the application, *mutatis mutandis*, of Article 402 of Civil Procedure Code, as well as Article 4-1 of the Compulsory Enforcement Act.<sup>2</sup> There is a great difference between Mainland Relations Act and Hong Kong Relations Act. Therefore, a fixed civil judgment made by Mainland China's court which has been recognized by Taiwan court with a fixed verdict has merely enforceable effect instead of the same effect as a fixed Taiwan judgment. Consequentially, the debtor may institute a suit of objection in terms of Article 14, second paragraph of the Compulsory Enforcement Act.

### III. ANALYSIS

#### A. *Analysis of Article 74 of Act Governing Relations between People of the Taiwan Area and Mainland Area*

Do recognized Mainland China's fixed civil judgments have any effect in Taiwan? Most scholars will respond positively to this question.<sup>3</sup>

2. Art. 42, para. 1 of Hong Kong Relations Act provided: "In determining the conditions for the validity, jurisdiction, and enforceability of civil judgments made in Hong Kong or Macau, Article 402 of the Civil Procedure Code and Art. 4, para. 1 of the Compulsory Enforcement Law shall apply *mutatis mutandis*".

3. Teh-Sheng Chang, *Lun Zhong Gong Fa Zhi Ji Qi Fa Yuan Pan Jue Zhi Cheng Ren Yu Zhi Xing Wen Ti* [Study on Mainland China's Legislation as well as recognition and enforcement of its judgments], 54(10) FA LU PING LUN [CHAS YANG L. REV.] 2 (1988) (Taiwan); Teh-Sheng Chang, *Zhong Gong Fa Yuan Pan Jue Zhi Cheng Ren Yu Zhi Xing Wen Ti* [The issues on the Recognition and Enforcement of Mainland China's Judgment], 34(2) FA XUE CONG KAN [CHINA L.J.] 150, 183 (1989) (Taiwan); TIEH-CHENG LIU & RONG-CHUAN CHEN, GUO JI SI FA LUN [LIU AND CHEN ON PRIVATE INTERNATIONAL LAW] 684 (2008) (Taiwan); CHI-NAN CHEN, MIN SHI SU SONG FA LUN [CIVIL PROCEDURE LAW (II)] 97 (2000); LAI-KUN LAI, QIANG ZHI ZHI XING FA ZONG LUN [THE

However, context of Article 74 of Mainland Relations Act actually did not discuss the final and conclusive effect of a recognized fixed judgment passed in Mainland China. It only regulates the requirements for recognizing a Mainland China's fixed civil judgment in first paragraph and the enforceable effect in second paragraph. Article 74 has no provisions on the final and conclusive effect of a judgment. Why does such omission exist? The official legislative records have no data on regarding this matter.<sup>4</sup> Thus, it is not surprising that Taiwan's Supreme Court had a lot of flexibility in interpreting the Article.

## B. *The Application of Legal Knowledge*

### 1. *A Way to Close the Legal Loophole*

The term "legal loophole" generally refers to an imperfection in legislation whereby a literal interpretation of its legal text does not accord with the definitive interpretation by a good-faith application of formal legal reasoning. It often contravenes the intent of the law without technically breaking it.<sup>5</sup> In such circumstances, the literal interpretation does not conform to the legislative intent, public purpose or legislative spirit.<sup>6</sup>

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COMPULSORY ENFORCEMENT LAW: GENERAL PART] 751 (2007); MING-HSUAN WU, MIN SHI SU SONG FA [CHINESE CIVIL PROCEDURE LAW] 1112 (1993); RONG-CHUAN CHEN, THE SITUATION AND PRACTICE ON THE CONFLICT OF LAWS BETWEEN THE STRAIT 299-300 (2003); RONG-ZONG CHEN & CHING-MIAO LIN, MIN SHI SU SONG FA [CIVIL PROCEDURE LAW] 116 (1996); Jyun-Yi Lin, *The Issues on Marriage and Succession between the Taiwan Strait*, in JUDICIAL RESEARCH ANNUAL REPORT, part I at 14, 830, 833 (1994); Shih-Ming Chiang, *Da Lu Di Qu Min Shi Que Ding Pan Jue Zhi Cheng Ren Yu Zhi Xing*, [The Recognition and Enforcement of Mainland China's Civil Judgments: Comment on Supreme Court judgment (96) Tai Shang Tzu No.2531], 123 TAIWAN L.J. 37, 44-45 (2009); Guo-Chang Huang, *Yi Ge Mei Li De Cuo Wu: Cai Ding Ren Ke Zhi Zhong Guo Da Lu Pan Jue You Wu Ji Pan Li* [A Beautiful Mistake: Comment on Supreme Court Judgment 2007 no. 2531], 167 TAIWAN L. REV. 186, 202-03 (2009); Wen-Yu Chang, *Lun Da Lu Pan Jue Zhi Cheng Ren*, [The Recognition of Mainland China's Judgment: Comment on Supreme Court Judgment (96) Tai Shang Tzu No.2531 and (97) Tai Shang Tzu No.2376], 178 TAIWAN L. REV. 246, 257 (2010). Most of the above-mentioned academic works reached the conclusion directly. However, Professor Shih-Ming Chiang specifically pointed out that it is Taiwanese investors' duty to consider the possible sufferance from some inferior judgments of Mainland's courts. Once an enterprise balances the pros and cons and then decides to invest in Mainland, it's that enterprise rather Taiwan's courts that will be responsible for the side effect of investing in Mainland. As to the interpretation of Article 74 of Act Governing Relations Between the People of the Taiwan Area and the Mainland Area (hereinafter Mainland Relations Act), certain effect should be arisen from recognition. Also, Professor Guo-Chang Huang stated that it's kind of regression in mutual judicial assistance for Taiwan's Supreme Court to allow the loser in a fixed Mainland's civil judgment on merits to argue again in a Taiwan's court. I agree with these opinions and further discuss this point in this paper. The mission and job of Taiwan's Courts is to apply laws and legal methods precisely rather than protect Taiwanese investors in Mainland.-

4. THE LEGISLATIVE YUAN SECRETARIAT, 81(51) THE LEGISLATIVE YUAN GAZETTE, RECORD OF SESSION 161-62 (1992) (Taiwan).

5. TEZ-CHIEN WANG, FA LÜ SI WEI YU MIN FA SHI LI [THINKING OF THE SOLUTION TO CIVIL CASES WITH THE BASIC-ANALYSIS DISCERNMENT CRITERION] 302-03 (1999) (Taiwan).

6. Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its*



However, the end of literal meaning of law is the outset of legal profession. An analogy may be applied to fill gaps in the texture of law that were not intended by the legislature.<sup>7</sup> That is "*Pari ratione eadem est lex*" as a way to close legal loophole - an application by analogy which employs a similar article which shares the same reasons with the matter at hand.<sup>8</sup>

It is commonly accepted that a foreign final and conclusive judgment is also final and conclusive in Taiwan based on Article 402 of Civil Procedure Code. In other words, that Article provides the requirements of recognizing foreign fixed civil judgments as well as the effect of such recognition. It expressly regulates exceptional circumstances in which final and conclusive foreign judgments shall not have *res judicata* in Taiwan. On the other hand, foreign final and conclusive judgments without any exceptional circumstance shall be final and conclusive in Taiwan as well.<sup>9</sup> Comparatively, Article 74 of Mainland Relations Act only provides the requirements for recognizing a fixed civil judgment rendered by Mainland China's courts. If an article only provides requirements with the absence of any legal effect, such an article would be incomplete and ineffective. It not reasonable to argue that that the legislators did not complete Article 74 of Mainland Relations Act by a mistake. In other words, a legislator working in good faith would not overlook such significant portion of a provision. Thus, based on legislative intent, public purpose and legislative spirit of Article 74 of Mainland Relations Act, we must close the legal loophole with legal method of application by an analogy.

As I noted previously, Mainland Relations Act regulates legal relationship across the Strait, which is different from a relationship involving foreign elements. In other words, Mainland Relations Act governs interregional law, separate from private international law which is covered in the Act of Civil Matters Involving Foreign Elements. Under the Constitutional amendment of Article 11<sup>10</sup> and the context of Mainland Relations Act,<sup>11</sup> the relationship between Mainland China and Taiwan is

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*Spending Doctrine, and How a Too-Clever Congress Could Provoke it to Do So*, 78 IND. L.J. 459, 508 (2003).

7. KARL LARENZ, *METHODENLEHRE DER RECHTSWISSENSCHAFT* [LEGAL METHOD] 269-79 (6th ed. 1991).

8. JEN-SHOU YANG, *FA XUE FANG FA LUN* [METHOD OF LAW] 134, 180 (1995) (Taiwan).

9. Zuigao Fayuan [Sup. Ct.], Civil Division, 81 Tai-Shang Tzu No. 2517 (1992) (Taiwan); Zuigao Fayuan [Sup. Ct.], Civil Division, 92 Tai-Shang Tzu No. 985 (2003) (Taiwan).

10. Art. 11 of The Additional Articles of the Const. of the Republic of China provides: "Rights and obligations between the people of the Chinese mainland area and those of the free area, and the disposition of other related affairs may be specified by law".

11. Art. 1 of Mainland Relations Act provided, "This Act is specially enacted for the purposes of ensuring the security and public welfare in the Taiwan Area, regulating dealings between the peoples of the Taiwan Area and the Mainland Area, and handling legal matters arising therefrom before national unification. With regard to matters not provided for in this Act, the provisions of other relevant laws and regulations shall apply." Article 2 of Mainland Relations Act provided, "The

viewed to be “domestic” or “interregional” rather than an “international” relationship that exists between sovereign states. The differences between “interregional relation” and “international relation” is clear and it is certain that the lawmakers intended to have closer legal ties with Mainland China, since interregional legal relationship is more intimate by its nature, compared to an international one. This reasoning is reflected in similar requirements in Article 74 of Mainland Relations Act and Article 402 in the Code of Civil Procedure. There are only two requirements - public order, in addition to good moral and mutual recognition for a fixed Mainland’s civil judgment to be recognized, while there are two more requirements - jurisdiction and service of process for a fixed foreign civil judgment. The latter is much stricter than the former, thus the threshold for latter should be much higher. Then, if a fixed civil judgment or a verdict rendered by a foreign court can be final and conclusive automatically in Taiwan, why cannot the same be said for a fixed civil judgment or verdict rendered by the Mainland court? In other words, a fixed civil judgment or verdict (i.e. divorce judgment) rendered by a foreign court can be final and conclusive without any interference of Taiwanese courts. Yet, why a fixed civil judgment or verdict rendered by a Mainland China’s court is not treated in the similar manner? If something has granted by or gone through a court, it’s supposed to be more powerful. Thus, a fixed civil judgment or verdict rendered by a Mainland China’s court and has been recognized by Taiwan court with a fixed verdict should basically have *res judicata*.<sup>12</sup> Can we find

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following terms as used in this Act are defined below. 1. ‘Taiwan Area’ refers to Taiwan, Penghu, Kinmen, Matsu, and any other area under the effective control of the Government. 2. ‘Mainland Area’ refers to the territory of the Republic of China outside the Taiwan Area.”

12. Art. 4-1 of the Qiang Zhi Zhi Xing Fa [hereinafter Compulsory Enforcement Act] (Taiwan) provides that if the writ of execution is a fixed foreign judgment without any grounds listed in Art. 402 of Min Shi Su Song Fa [hereinafter Code of Civil Procedure] (Taiwan), it can be enforceable on the condition that courts grant it enforceability through a judgment. This article applies to a foreign performance judgments exclusively. As to a fixed declaratory or formational judgment rendered by a foreign court, it has *res judicata* automatically, in principle, subject to Art. 402 in the Code of Civil Procedure. Compared to the procedure of verdict under Art. 74 of Mainland Relations Code, the procedure of judgment seems to be more likely of a procedural protection. Thus, if a fixed civil judgment rendered by Mainland’s court has to be final, conclusive and enforceable in Taiwan, should it go through a judgment rather than merely a verdict? In my opinion, generally, the procedure of judgment is usually more considerate than that of verdict. Nevertheless, the judgment called upon a case may still have oral arguments in virtue of Art. 32 of Statute on Non-Contentious Proceedings. Such oral arguments can be provided as a full and fair opportunity or due process for parties to argue the existence of facts regarding requirements of recognition. On the other hand, the procedure set forth in Art. 74 of Mainland Relations Act solely reviews the requirements to recognize a fixed civil judgment made by Mainland’s court instead of judging on merits once again in Taiwan. Most of the time, this is easy to determine. Efficiency is also of importance in mutual judicial assistance. If the judge called upon finds out that the losers in the fixed civil judgments just intent to make use of the recognition procedure to delay or retard enforcement, he may refuse to allow too many oral arguments. Comparatively, the procedure of verdict will give the judge more flexibility to deal with varied circumstances in each case. Additionally, the concept of public order or good morals stipulated in Art. 74 of Mainland Relations Act, involving public interests or public policy which can not be

any reason to support a higher threshold for a fixed civil judgments rendered by China's courts?

The lack of legal effect in Article 74 of Mainland Relations Act establishes a legal loophole. That would be neglect instead of deliberate omitting. According to Taiwan Supreme Court Judgment (96) Tai Shang Tzu No.2531 (2007) found that there is a great difference between Mainland Relations Act and Hong Kong Relations Act which provides application, *mutatis mutandis*, of Article 402 in the Code of Civil Procedure as mentioned above. This analysis is correct. However, such a difference should be used to support the *res judicata* of fixed civil judgments or verdicts rendered by Mainland China's courts, instead of denying it. Thus, it appears that Taiwan Supreme Court Judgment (96) Tai Shang Tzu No.253 (2007) derived wrong conclusion from correct premises.

If a legal loophole in Article 74 of Mainland Relations Act actually exists, we need to investigate the legislative intent, public purpose and legislative spirit of Article 74 of Mainland Relations Act and Article 402 in the Code of Civil Procedure. Do they share the same legal reasoning? Is it proper to apply Article 402 of Civil Procedure Code by analogy to the issue of final and conclusive effect? The sections below explore these questions.

## 2. *The Legal Reasoning of Res Judicata Arising from Recognized Foreign Fixed Judgments*

A bi-product of sovereignty, a fixed judgment issued by a court is binding only in the territory of issuance. In principal, such judgment would be invalid beyond the territorial borders of a country. However, most countries accept certain foreign judgments or verdicts. This is due to the doctrines of comity, acquired rights, *res judicata*, obligation, reciprocity and often a sheer necessity.<sup>13</sup> Comity is most frequent motivator for accepting foreign judgments. The doctrine of comity first emerged in England for the admission of foreign monetary judgments.<sup>14</sup> It is currently exclusive to the U.S. courts and appears rarely in European private international law.<sup>15</sup> The

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compromised by the parties of that case. In the procedure of verdict, the opinion of the judgment is not supposed to be bound by the parties' claims of that case, which is generally out of reach for the procedure of judgment. Therefore, the procedure of verdict adopted in Art. 74 of Mainland Relations Act may be maintained to be better.

13. GUO JI SI FA [PRIVATE INTERNATIONAL LAW] 462-64 (Te-Pei Han ed., 2004); GUO JI SI FA [PRIVATE INTERNATIONAL LAW] 684-86 (Chin Huang ed., 2005); GUO JI SI FA [PRIVATE INTERNATIONAL LAW] 432-34 (Hsiang-Lin Yuen ed., 2005).

14. *Godard v. Gray*, L.R. 6 Q.B. 139, 148 (1870) (Eng.); Geoffrey C. CHESHIRE, *PRIVATE INTERNATIONAL LAW* 537-38 (1965); ALBERT DICEY & J. H. C. MORRIS, *THE CONFLICT OF LAWS* 967-68 (1967).

15. Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 79 (1991).

famous U.S. Supreme Court case *Hilton v. Guyot*<sup>16</sup> described comity as arising due to international obligations, convenience, and the rights of people under protection of laws of a country that admits foreign judicial rulings.<sup>17</sup> In *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, comity was interpreted as a doctrine of practice, convenience and properness.<sup>18</sup>

As to reciprocity, early law on recognition in common law imposed a reciprocity requirement.<sup>19</sup> Reciprocity has a very limited role in the U.S. today.<sup>20</sup> T. von Mehren and Donald T. Trautman, professors at Harvard Law School, noted five reasons for recognizing foreign judgments.<sup>21</sup> avoidance of double trials, protection of successful litigant, avoidance of forum shopping, stability and unity in an international order, convenience and appropriateness.<sup>22</sup>

### 3. *The Application by Analogy of Article 402 in the Code of Civil Procedure*

In my opinion, it is proper to apply Article 402 in the Code Civil Procedure by analogy with the issue of final and conclusive effect because the two documents share the same legal reasoning. My argument is as follows: (1) Each doctrine has its own unique perspective. Thus, it would be sounder to analyze them together. All the doctrines mentioned above can be

16. *Hilton v. Guyot*, 159 U.S. 113 (1895).

17. "No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations.' Although the phrase has been often criticised, no satisfactory substitute has been suggested. 'Comity' in the legal sense, is neither a matter of absolute obligation, nor of mere courtesy and good will. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard to international duties, convenience and to the rights of its own citizens, or of other persons who are under the protection of laws." See: *Hilton v. Guyot*, 159 U.S. 113, 163, 164 (1895).

18. *Somportex Ltd. v. Philadelphia Chewing Gum*, 453 F.2d 435 (3rd Cir. 1971).

19. *Roach v. Garvan*, 1 Ves. Sen. 157; 27 ER 954, 955 (1748) (Lord Hardwicke LC).

20. MAURICE ROSENBERG ET AL., *CONFLICT OF LAWS* 225 (1996); Martha C. Nussbaum, *Jurisdiction and Foreign Judgments*, 41 COLUM. L. REV. 221, 222 (1941).

21. Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601, 1603-04 (1968).

22. *Id.* at 1603 (contending that "We believe that at least five policies are important: a desire to avoid the duplication of effort and consequent waste involved in reconsidering a matter that has already been litigated; a related concern to protect the successful litigant, whether plaintiff or defendant, from harassing or evasive tactics on the part of his previously unsuccessful opponent; a policy against making the availability of local enforcement the decisive element, as a practical matter, in the plaintiff's choice of forum; an interest in fostering stability and unity in an international order in which many aspects of life are not confined to any single jurisdiction; and, in certain classes of cases, a belief that the rendering jurisdiction is a more appropriate forum than the recognizing jurisdiction, either because the former was more convenient or because as the predominantly concerned jurisdiction or for some other reason its views as to the merits should prevail.")

properly applied to support the argument for the final and conclusive effect. (2) The demand for interregional comity is no less than international because interregional comity occurs between two regions that share close geographical space and similar cultures. In the case of Taiwan and China, the necessity is obvious because the two sides share the same language and cultural background. Besides, with the passage of the Three Links Agreement which normalized postal, transportation and direct trade, it is clear that both sides will be closer than ever and are naturally expected to encounter legal disputes. Thus, the order of private interregional relationship needs to be unified and stable to promote the wellbeing of people on both sides of the strait. (3) As to reciprocity, it is an established tradition in Mainland Chinese jurisprudence to admit final and conclusive effect of Taiwan's fixed civil judgments (discussed in the sections below). If Taiwanese courts do not treat Mainland Chinese fixed civil judgments equally, there must be very strong excuses. (4) Based on the *res judicata*, if a final judgment was fixed in Mainland China and recognized by Taiwan court but lacking final and conclusive status, a party would have to file another lawsuit for the same cause of action in Taiwan. Such practice is wasteful, inconvenient and, in some cases, unfair. One of the parties even may be forced to file lawsuit in an inconvenient forum (also referred to as a *forum non conveniens*) in which the crucial evidence may not available (as was the case in the the two judgments discussed above). (5) Regarding the five policies discussed by Mehren and Trautman, I believe that all five can be applied to the issue in this paper. First, if the subject matter has been fully argued and heard under procedural protection of due process in Mainland courts, duplication of effort and waste involved in reconsidering the same subject matter should be avoided in Taiwan. Second, if a litigant has succeeded in a fixed civil judgment rendered by Mainland China's court, why must he suffer again and attempt to prove his cause against the previously unsuccessful opponent? Third, if a defendant's assets are located in Taiwan, as was the case in the two judgments, plaintiff is not supposed to file a lawsuit in Taiwan while the transactions between parties occurred in Mainland China, since almost all of the evidences will remain in China. Thus, Mainland courts are often more convenient and appropriate than Taiwanese courts for Taiwanese investors who operate in China. For example, in the two judgments, the place of transactions between the parties as well as the location of most evidence and documents was located in Mainland China, therefore both parties are supposed to have convenient access to courts. Mainland Chinese courts will be able to better analyze the evidence since it will be readily available. Fourth, if a Taiwanese court can adjudicate on same issues or subject matter on merits again, ramification or diversity of result is likely to happen. It disadvantages stability and unity that

a single interregional order strives to achieve.

Now that the reasons why foreign final and conclusive judgments are basically also final and conclusive here in Taiwan all can be applied to final and conclusive civil judgments made by Mainland China. Why not recognized the final and conclusive effect in Taiwan? What is more, foreign final and conclusive judgments are basically final and conclusive in Taiwan without going through any legal procedure, why Mainland China's final and conclusive judgments recognized by Taiwan courts are not the same?

C. *Analysis Based on Nature of Res Judicata*

In an addition to the application by analogy, we can apply the essence and nature of *res judicata*<sup>23</sup> by analyzing claim preclusion.

The preclusion doctrine includes both *res judicata* (claim preclusion) and collateral estoppel (or issue preclusion). The term "*res judicata*" is sometimes assumed to define both doctrines.<sup>24</sup> In this paper, the term refers to claim preclusion. The function of *res judicata* is to bind later courts on the same parties, subject matters and *rei adjudicatae*. It is the principle of *Res. Judic.*<sup>25</sup> The reason why foreign final and conclusive judgments basically have final and conclusive effect of *res judicata* is that the parties have already enjoyed procedural protections of a due process. In other words, they have been given the full and fair opportunity to present their claims.<sup>26</sup> The due process always includes the opportunity to be heard before a neutral judge.<sup>27</sup> In civil procedure, it is procedural protection which means that parties in a procedure have been given proper opportunities to participate in the procedure. Procedural protection includes items such as notice, service of process, record on removal, challenge of judge, right of presence, discovery, right of statement, right of interrogatory, right of objection, right of attack on judgments, right to appoint an agency, legal aid, recovery of limitations, description of *ratio decidendi*, right of clarification, expression of judges' temporary legal reasoning and opinions, oral argument, open court and so on. For this reason, if a civil judgment was fixed and rendered under procedural protection, legal relationship of the subject matter should be

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23. KARL LARENZ, *METHODENLEHRE DER RECHTSWISSENSCHAFT* [LEGAL METHOD] 366 (4th ed. 1979).

24. See Debra Lyn Bassett, *Just Go Away: Representation, Due Process, and Preclusion in Class Actions*, 2009 B.Y.U. L. REV. 1079 (2009).

25. YONG-JIA LUO, *JI PAN LI ZHI YAN JIU* [THE STUDY ON RES JUDICATA] 10 (1999).

26. See *Ingersoll Milling Machine Co. v. Granger*, 631 F. Supp. 314 (N.D. Ill. 1986); *El Ajou v. First Nat'l Bank of Chicago*, 1993 WL 393051 (ND Ill. No. 93C88, 1993); Jeremy Maltby, *Juggling Comity and Self-Government: The Enforcement of Foreign Libel Judgments in U.S. Courts*, 94 COLUM. L. REV. 1978, 1985 (1994).

27. Michael L. Morkin, *Recognition and Enforcement of Foreign Country Judgments in Illinois*, 85 ILL. B.J. 364, 366 (1997).

ascertained and settled down.<sup>28</sup> Accordingly, where there is procedure protection, there is always *res judicata*. Although procedural protection is not the only way to reach *res judicata*, it is an integral part of the process. If Mainland China's final and conclusive judgment is rendered under procedural protection and, therefore, recognized by a Taiwanese court, it should be final and conclusive in Taiwan. Yet, if a Mainland China's fixed civil judgment is contrary to public order or good morals of Taiwan, the judgment shall not be recognized by Taiwan court as per paragraph one of Article 74 of Mainland Relations Act.

Article 402 in the Code of Civil Procedure clearly states that there are two aspects of public order and good morals: merits and procedure. If a Mainland China's fixed civil judgment is contrary to Taiwan's public order or good morals on procedural matters, it cannot be recognized because it is contrary to the first paragraph of Article 74 of Mainland Relations Act. By virtue of judicial practice of Taiwanese courts, the examples of violation of procedural public order include judgment by default with excusable absence,<sup>29</sup> non-fulfillment of demands of service of process stipulated in Taiwan's Civil Procedure Code,<sup>30</sup> violation of general jurisdiction regarding recognition of judgments<sup>31</sup> and so forth. Hence, if a Mainland China's final and conclusive judgment is recognized by a Taiwanese court, there would be no issue with procedural protection since the judgment would otherwise not be recognized. In the case of the two judgments, Shanghai Maritime Court Judgment (2001) Ho Hai Fa Shang Chu Tzu No. 441 and High People's Court of Shanghai City Judgment (2003) Ho Gao Min Ssu (Hai) Chung Tzu No. 39, have detailed the reasoning. The former held eight oral arguments and the latter held one. Uniglory and Evergreen went through two levels of courts in Mainland China, have accepted the process and have been given full and fair opportunity to present their claims. Then, why the recognized fixed civil judgment was not binding upon Evergreen and why the two judgments allowed Evergreen to defend itself again in Taiwan?

In the absence of *res judicata*, it is not effective for the two judgments to merely admit the enforceable effect of recognized fixed civil judgments rendered by courts of Mainland China according to second paragraph of Article 74 of Mainland Relations Act, since such decision may be easily overruled. If Evergreen files a lawsuit in Taiwanese court against Zhejiang Textile with the same subject matter on merits, such as the suit of objection filed by Evergreen in light of Article 14 of Compulsory Enforcement Act,

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28. LIAN-GONG CHIOU, *The function of the procedural protection*, in THE FUNCTION OF THE PROCEDURAL SYSTEM 61, 95-96, 99 (1997) (Taiwan).

29. Gaodeng Fayuan [High Ct.], Civil Division, 92 Chia-Kang Tzu No. 355 (2003) (Taiwan).

30. Gaodeng Fayuan [High Ct.], Civil Division, 91 Chia-Kang Tzu No. 366 (2002) (Taiwan).

31. Gaodeng Fayuan [High Ct.], Civil Division, 91 Chia-Kang Tzu No. 436 (2002) (Taiwan).

the company may also request a motion to cease enforcement procedure, pursuant to second paragraph of Article 18 of Compulsory Enforcement Act. If final result of the new trial is contrary to that of Mainland China's fixed civil judgment, the enforcement procedure shall be cancelled and the new judgment will prevail.<sup>32</sup>

D. *Analysis of Mutual Judicial Assistance*

The third paragraph of Article 74 of Mainland Relations Act reflects judicial assistance and reciprocity. The "Provisions on the People's Court's Recognition of the Verdicts on Civil Cases Made by Courts of Taiwan Province" (hereinafter referred to as the "Provisions") has been approved at the No. 957 Session of the Judicial Committee of the Supreme People's Court on January 15, 1998 to be effective on May 26, 1998. Since then, Mainland China has constantly recognized and enforced fixed civil judgments rendered by Taiwan's courts in Mainland China. For example, on June 9, 1998, the Taizhou Intermediate People's Court in Zhejiang Province, Mainland China, recognized the first judgment of a Taiwanese court. It was a fixed ruling made by Taiwan Nantou District Court regarding the adoptive status between a Taiwanese Chun-Tsai Chu and his nephew Chun-Chou Chu, a resident of Tiantai of Zhejiang Province. On June 10, 1998, the Shanghai First Intermediate People's Court recognized and enforced a judgment made by the Taiwan Kaohsiung District Court which involving discharging of a debt between a Taiwanese Wen-Lin Hsu and a Taiwan Construction Development Company Tai-Chuang Chang.<sup>33</sup>

Article 12 of Provisions notes the following: "upon accepting the application for the recognition of the verdict made by a court in Taiwan, the People's Court shall not accept any suit brought against the same case". The Supplementary Provisions of the Supreme People's Court on the People's Courts' Recognition of Civil Judgments of the Relevant Courts of the Taiwan Region (hereinafter referred as the "Supplementary Provisions"), which were adopted at the 1465th meeting of the Judicial Committee of the Supreme People's Court on March 30, 2009, were promulgated and went into force on May 14, 2009. The second paragraph of Article 1 in Supplementary Provisions notes the following: "A civil judgment of a relevant court of the Taiwan Region, recognized upon a ruling of the people's court shall be of

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32. RONG-ZONG CHEN, QIANG ZHI ZHI XING FA [COMPULSORY ENFORCEMENT LAW] 174 (1999).

33. His-Hsiang Sung & Fei Wang, *The Ways and Methods of Interregional Judicial Assistance*, 2001(2) POL. SCI. & L. 58, 62 (2001); Chen-Tung Lin, *Liang An Xiang Hu Ren Ke Huo Zhi Xing Min Shi Pan Jue De Shi Jian Yu Si Kao* [The Practice and Reflection on Mutual Recognition and Enforcement of Civil Judgments] (2009), available at <http://xjtcn.fyfz.cn/art/554409.htm> (last visited Feb. 19, 2011).



equal effect as an effective judgment of the people's court". Subject to this paragraph, if a Taiwanese court has fixed civil judgment that is final and conclusive in Taiwan, it will be final and conclusive in Mainland China as well. According to legal assistance and reciprocity, which embodied in last paragraph of Article 74 of Mainland Relations Act, the recognized final and conclusive judgment rendered by Mainland courts can be final and conclusive in Taiwan.

However, it must be noted that not all recognized Mainland China's fixed civil judgments are recognized to be final and conclusive in Taiwan.<sup>34</sup> For example, Article 97 of Civil Procedural Law of Mainland China provides: "The people's court may, at the request of the parties concerned, order preliminary execution in respect to the following cases: (1) those involving claims for alimony, support for children or elders, pension for the disabled or the family of a decedent, or expenses for medical care; (2) those involving claims for remuneration for labor; and (3) those involving urgent circumstances that require preliminary execution". The first paragraph of Article 92 notes that "if it becomes impossible or difficult to execute a judgment because of the acts of one of the parties or for other reasons, the people's court may, at the request of the other party, order to adopt property preservation. In the absence of such request, the people's court may, when necessary, still order to adopt property preservation measures". The "preliminary execution" and "property preservation measures" are not final and conclusive in Mainland China, so they will receive the same status in Taiwan, even though these cases are recognized by Taiwanese courts.

#### E. *Game Theory Analysis*

Why the recognized Mainland China's or foreign final judgments are basically binding in Taiwan? A broader question is: what are motivations and incentives of countries to accept foreign judgments?

Modern economic theory assumes that human behavior is fundamentally rational. In other words, we balance means and ends and react to what we expect others will do.<sup>35</sup> Game theory compares all possible strategies available to a decision maker and analyses profit and loss resulting from particular strategies – a cost benefit analysis. The best available strategy is known as *Nash equilibrium*. There is also a *dominant strategy* meaning that a player with a strategy is better off no matter what strategy the other party takes.<sup>36</sup> These various scenarios are played out in prisoner's dilemma model where A and B are arrested on the charge of larceny. The unlucky fellows are

34. Huang, *supra* note 3, at 193.

35. See DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 1 (1994).

36. DAVID M. KREPS, *A COURSE IN MICROECONOMIC THEORY* 397-98 (1990).

detained separately and told that there is sufficient evidence to convict both of them, with a lesser accusation of housebreaking, for two years imprisonment, if neither of them confesses. However, if one of them chooses to betray the other, the silent detainee will get a sentence of six years, while the confessor get only six months in reward for his assistance in sentencing the silent suspect. The most tragic outcome is for both of these suspects to testify against each other, resulting in a four year sentence of each of them. Research indicates that confession becomes dominant strategy and the game's sole equilibrium.<sup>37</sup> This is because A and B are separated from each other without any communication or ability to cooperate. Even if they are given an opportunity to talk and promise to remain silent, it is unlikely that they will trust each other. There is, however, an alternative interpretation: the fact that both individuals are aware of their ability to destroy one another may actually force both of them to be silent.<sup>38</sup> The table is as follows:

Years	B confesses		B does not confess	
A confesses	4	4	½	6
A does not confess	6	½	2	2
	A	B	A	B

The prisoner's dilemma has been applied to choice of law or private international law.<sup>39</sup> On the occasion of private international or interregional law relationship, due to publication or disclosure of judgments and other relative information, it is almost impossible to enter into "A1/2 B6" or "A6, B1/2" model. This means that if any party initially refused the *res judicata* of the other's fixed civil judgment, the other will know and respond in the similar manner. Thus, "double disadvantages" occasion in which one admits the other's effect but loses effect over the other side will not happen. If each refuses, both parties suffer. In other words, if each refuses to admit the other's judgments, people from both sides will suffer from "double jeopardy" as well as instability of civil relationship. For example: a final and conclusive divorce judgment has been rendered and fixed by Mainland China's court and recognized by the courts in Taiwan. If it has no *res judicata* in Taiwan, the effect of divorce becomes unilateral and therefore the marriage is limp. The divorced couple still cannot find a new spouse in

37. AVINASH K. DIXIT & BARRY J. NALEBUFF, THINKING STRATEGICALLY: THE COMPETITIVE EDGE IN BUSINESS, POLITICS, AND EVERYDAY LIFE 11-14, 89-115 (1991).

38. Robert Axelrod's "THE EVOLUTION OF COOPERATION (1984)" is a classic in our understanding of why cooperation occurs in humans.

39. See LEA BRILMAYER, CONFLICT OF LAWS: CASES AND MATERIALS 445-564 (1995); see also Larry Kramer, *Rethinking Choice of Law*, 90 COLUM L. REV. 277, 341-44 (1990).

Taiwan due to possible bigamy charges. Furthermore, if any one of the "old couple" trusted the Mainland China's fixed judgment and the recognition of Taiwan's court or the vested judicial practice in Taiwan, actually remarried and gave birth to children together with the new spouse, his or her "old marriage" may one day return because he or she lost lawsuit of action for a declaratory judgment filed by the "old spouse". Such soap opera scenario is not improbable and will cause great heartache for all parties involved. Can these individuals hold two legitimate marriages at the same time? If the answer is positive, what can be said of the public order or good morals in Taiwan? If the answer is negative, what should be done about the children from old or new marriage? What legal status would these children carry? How to cure the mental pain caused by the refusal of *res judicata*? Thus, it is essential to avoid the "A4, B4" scenario in the prisoner's dilemma in order to protect the wellbeing of people living at both sides of the Taiwan Strait.

The two judgments rendered by the courts fit into the "A2, B2" model. The so called "old judicial practice" in Taiwan tends to let recognized final and conclusive judgments of Mainland China to be also final and conclusive in Taiwan.<sup>40</sup> It is naturally the best arrangement that would result in the *Nash equilibrium*, pleasing the two sides without any formal treaties.<sup>41</sup> However, the two judgments have broken the balance by contributing to the unfair "A 2/1, B6" model. Imagine that you are a decision maker in China or B in the prisoner's dilemma. The two judgments push B to confess and cause Chinese decision maker to refuse *res judicata* of Taiwan court's fixed civil judgments as a retaliatory measure. In the end, both sides will inevitably enter into "A4, B4". By doing so, the caseload of duplicated files will increase on both sides<sup>42</sup> and wellbeing of people will be damaged.

#### IV. CONCLUSION

Does a fixed civil judgment rendered by the Chinese court and recognized by Taiwan's court become final and conclusive in Taiwan? The two judgments said "no" due to the absence of explicit expression in legislation regarding the issue. As I demonstrated in this paper, this decision

40. Chang, *Lun Da Lu Pan Jue Zhi Cheng Ren*, *supra* note 3, at 247-48.

41. See Kenneth Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335, 375 (1989); Robert Axelrod & Robert O. Keohane, *Achieving Cooperation under Anarchy: Strategies and Institutions*, 38 WORLD POL. 226, 226-54 (1985); ROBERT KEOHANE, *INTERNATIONAL INSTITUTIONS AND STATE POWER: ESSAYS IN INTERNATIONAL RELATIONS THEORY I* (1989); Stephen Krasner, *Structural Causes and Regime Consequences: Regimes As Intervening Variables*, 36 INT'L ORG 185, 185-88 (1982); John Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L.J. 139, 227-29 (1996).

42. Michael Whincop, *The Recognition Scene: Game Theoretic Issues in the Recognition of Foreign Judgments*, 23 MELB. U. L. REV. 416, 421 (1999).

does not reflect the prevailing legal opinions and judicial practice.

A legal loophole exists in Article 74 of Mainland Relations Act. In the circumstances of a recognized fixed judgment being final and conclusive in Mainland China, it is necessary to analogize Article 402 of Civil Procedure Code to affirm the final and conclusive effect of it in Taiwan. Besides, due to the essence and nature of *res judicata*, there is always *res judicata* where there is procedural protection of due process. If a final and conclusive judgment is rendered by Mainland China's courts with proper procedural protection and recognized by courts in Taiwan, we cannot deny its *res judicata* at random. Based on the concepts of judicial assistance of reciprocity, Mainland China has constitutently recognized Taiwan's final judgments in China. According to last paragraph of Article 74 of Mainland Relations Act, the recognized final and conclusive judgment made by Mainland China courts should be also final and conclusive in Taiwan. Game theory effectively demonstrates that the current Taiwanese policies of refusing *res judicata* of Mainland China's final and conclusive judgments may result in retaliatory measures that will cause great hardships to all parties involved.

In the case of the two judgments, Evergreen filed the suit of objection in Taiwan to preclude Zhejiang Textiles's claim on the grounds occurred before the conclusion of oral argument in High People's Court of Shanghai City. According to Article 14, first paragraph of the Compulsory Enforcement Act, Evergreen's suit of objection should be overruled, because the fixed judgment rendered by High People's Court of Shanghai City has *res judicata* in Taiwan.

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