Neutral Citation Number: [2022] EWHC 3265 (Comm)

Case No: CL-2022-000133

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19/12/2022

Before :

CHRISTOPHER HANCOCK KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

(1) HANGZHOU JIUDANG ASSET MANAGEMENT CO LIMITED **(2) HANGZHOU BIAOBA TRADING CO LIMITED**	**Claimant**
- and -	
KEI KIN HUNG **(a Protected Party by Zhu Lei his litigation friend)**	**Defendant**

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- -

Hugh Miall (instructed by **PCB Byrne LLP**) for the **Claimants**
George Hayman KC (instructed by **Zhong Lun Law Firm**) for the **Defendant**

Hearing dates: 05 December 2022

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 14:00 on Monday 19th December 2022.

Christopher Hancock KC :

Introduction and factual background.

1. This is the hearing of the Claimants' application for summary judgment, made before Mr Kei filed a defence. Mr Kei resists that application on the bases set out below. The Defendant, Mr Kei, is a Protected Party within the meaning of the Mental Capacity Act 2005, and appears by his litigation friend, Mr Zhu Lei.

2. The claim is for enforcement at common law of final judgments made in the Claimants' favour against Mr Kei by the courts of the People's Republic of China ("**PRC**"). Pursuant to those judgments (the "**Judgments**"), which I understand remain unsatisfied, it is now said that Mr Kei is indebted to:

   i) The First Claimant, Hangzhou Jiudang Asset Management Co Ltd ("**HJAM**"), in the sum of RMB 21,412,450 together with interest at 24% pa of RMB 17,889,743.81 to 22 March 2022, a service fee liability of RMB 24,150 and further default interest of RMB 2,705,463.06 to 22 March 2022. These sums amounted to £5,009,560.90 at the date of issue of the claim.

   ii) The Second Claimant, Hangzhou Biaoba Trading Co Ltd ("**HBT**"), in the sum of RMB 39,000,000 together with interest at 24% pa of RMB 35,574,301.37 to 22 March 2022, legal costs of RMB 200,000, and further default interest at RMB 3,344,250 to 22 March 2022. These sums amounted to £9,310,559.55 at the date of issue of the claim.

3. HJAM's claim arose out of a written loan agreement dated 10.09.18 by which Yaolai Culture Industry Co. Ltd ("**Yaolai**"), a company of which Mr Kei is or was ultimately the beneficial owner, borrowed RMB 21.5m from HJAM. The principal was

repayable with interest at 24% p.a. and the loan term was 180 days. Mr Kei guaranteed Yaolai's obligations to HJAM.

i) Yaolai failed to repay the principal or interest due, and Mr Kei failed to make payment as guarantor. HJAM commenced proceedings in the People's Court of Gongshu District of Hangzhou City on 09.05.19 against Yaolai, Mr Kei and a second guarantor, Beijing Sparkle Roll Investment Co Ltd ("**Beijing Sparkle**"). Mr Kei and the other defendants were represented at the hearing and defended the claim.

ii) On 26.09.19, the People's Court gave judgment in favour of HJAM for: (i) RMB 21,412,450 together with interest to 10 April 2019 of RMB 2,740,288.77, payable within 10 days of the judgment; (ii) Further interest on the principal sum from 11 April 2019 at 24% p.a. until the date of payment; (iii) A guarantee service fee (a litigation preservation insurance fee) of RMB 24,150 payable within 10 days of judgment.

iii) The Judgment also provided that if the defendants failed to perform the payment obligations within the period specified in the judgment, "*they shall pay double*[1] *interest of the debt during the delayed performance period as per the stipulation of Article 253 of the Civil Procedure Law of the People's Republic of China*" (the "**Default Interest**").

iv) Yaolai's appeal against the quantum of the principal sum, and against liability for the guarantee service fee, was dismissed on 06.03.22.

[1] There is an issue as to the translation of this word, which I address later in this judgment when I consider the evidence of Mr Yang, the expert whose report was filed on behalf of the Defendant.

4. HBT's claim arose out of two written loan agreements dated 29.05.28 and 20.06.18 by which Mr Kei borrowed RMB 25m and RMB 14m from Yu Hongguang. The principal was repayable with interest at 36% p.a. (although in the event only the statutory limit of 24% was claimed) and the term of the loan was 90 days. On 07.01.19 Yu Hongguang assigned his creditor's rights to HBT.

   i) Mr Kei failed to repay the loans or any interest thereon. On 03.04.19 HBT commenced proceedings in the People's Court of Jianggan District of Hangzhou City against Mr Kei (as well as Yaolai and Beijing Sparkle as guarantors). The claims were contested by the defendants, who were represented at the hearing.

   ii) On 11.06.20 the People's Court awarded judgment in favour of HBT for: (i) RMB 25,000,000 together with interest to 6 March 2019 of RMB 4,666,667, payable within 10 days of the judgment; (ii) RMB 14,000,000 together with interest to 6 March 2019 of 2,417,333, payable within 10 days of the judgment; (iii) Further interest on the principal sums from 7 March 2019 at 24% p.a. until the date of payment; (iv) Legal fees of RMB 200,000, payable within 10 days of the judgment.

   iii) The HBT judgment also provided for Default Interest, stating that in the event of non-payment of the sums due "*the interest on the debt during the delayed period shall be doubled*[2] *in accordance with the provisions of Article 253 of the Civil Procedure Law of the People's Republic of China*".

   iv) An appeal by Beijing Sparkle was treated as withdrawn after it failed to appear before the Intermediate People's Court, and the first instance judgment was

[2] See footnote 1 above.

declared of legal effect from service of the Intermediate People's Court's ruling on 20.10.20 (which occurred on 07.11.20).

5. Neither of the Judgments has been able to be enforced in the PRC, and each remains outstanding in full.

6. In this action, the Claimants initially sought (before an amendment to their Claim Form and Particulars of Claim referred to below):

   i) Under the Huangzhou Jiudang Asset Management Judgment (the "**HJAM judgment**"), HJAM claimed:-

      a) RMB 21,412,450 (£2,552,042.85) by way of principal under the HJAM loan;

      b) RMB 17,889,743.81 (£2,132,189.12) contractual interest at 24% per annum to 22 March 2022;

      c) RMB 24,150 (£2,878.32) service fee liability; and

      d) RMB 27,616,707.39 (£3,291,497.27) default interest to 22 March 2022.

   ii) Under the Huanzhou Bioaba Trading Judgment ("the **HBT judgment**"), HBT claimed:-

      a) RMB 39,000,000 (£,4,648,215.00) by way of principal;

      b) RMB 35,574,301.37 (£4,239,977.11) contractual interest at 24% per annum to 22 March 2022;

      c) RMB 200,000 (£23,837.00) legal costs; and

d) RMB 33,510,750 (£3,993,978.74) default interest to 22 March 2022.

7. Since issuing these proceedings and since obtaining a freezing injunction (made on 8 April 2022 by Fraser J), the Claimants have (by the first witness statement of Mr Ractliff dated 31 May 2022), accepted that their claims in respect of Default Interest were overstated and now claim default interest at the rate of 0.0175% per day rather then 0.175%. Formal amendments to the Claim Form and Particulars of Claim to reflect this concession have been proposed shortly before this hearing, and these amendments were not opposed. This reduces the Default Interest sum from £7,285,476.01 to £721,035.05 overall.

The test for summary judgment.

8. There was no real dispute as to the law relating to summary judgment. The principles were summarised by Lewison J (as he then was) in *Easyair v Opal* [2009] EWHC 339 (Ch) at [15] and continue to be relied on in the most recent authorities: *Caledonian Maritime Assets Ltd v HCC International Insurance Co Plc* [2022] EWHC 164 (Ch) at [28]. I accept and adopt that summary with gratitude.

9. In addition the Defendant put forward a number of further propositions, as follows:

   i) The overall burden of proof is on the Claimants to establish that the Defendant has no real prospect of success: *ED&F Mann v. Patel* [2003] EWCA Civ 742.

   ii) The Court must consider whether the Defendant has a 'realistic' (as opposed to a fanciful) prospect of success: *Swain v. Hillman* [2001] 1 All ER 91.

   iii) A 'realistic' defence is one that carries some degree of conviction; i.e. more than merely arguable: *ED&F Man at* [8].

iv) If an application gives rise to a point of law, and that the Court has before it all the evidence necessary for the proper determination of the question the Court can and should determine the matter: *ICI Chemicals v. TTE Training* [2007] EWCA Civ 725,.

10. I accept these propositions.

11. In this case, the Defendant submitted that, not only did Mr Kei have a real prospect of successfully defending the claims, such that summary judgment should not be entered, but that the claim against him was hopeless with the result that I should exercise my inherent jurisdiction to strike out the claim, on the basis that the Claimants have no real prospect of succeeding, and there is no other reason for this matter to go to trial.

12. The defences raised were as follows:

i) First, that the Default Interest had been miscalculated. This was in fact common ground. It was accepted by the Claimants that the correct calculations were those set out by Mr Lei Yang, the expert whose report was filed on behalf of the Defendant. Accordingly, there was no issue but that any judgment given should be for the lesser amounts now claimed.

ii) Secondly, the Defendant submitted that the Judgments were rendered unenforceable in their entirety by virtue of the application of section 5 of the Protection of Trading Interests Act 1980 ("**the PTIA**").

iii) Thirdly, the Defendant submitted that the Default Interest portions of the Judgments were rendered unenforceable by virtue of the application of section 5 of the PTIA.

iv) Fourthly, the Defendant submitted that the Default Interest portions of the Judgments were rendered unenforceable as a penalty.

13. Before I turn to these specific points, however, I should outline the basic requirements for enforcement at common law of a foreign judgment, even though I did not understand the Defendant to contest that these were satisfied in the current case, as Mr Hayman KC very fairly conceded in his oral argument.

14. These requirements are well established. A foreign judgment must be the final and conclusive judgment of the court which pronounced it, and it must have been given by a court which English law regards as competent to do so. Further, to be enforceable as a debt, it must be a judgment for a fixed sum of money.[3]

15. **First**, I am satisfied that each of the Chinese Judgments is final and conclusive, in the sense that in the court in which they were pronounced, the judgment conclusively established the existence of the debt (i.e. the judgment is not provisional, or may not be abrogated or varied by the same court).[4] There is no suggestion to the contrary by the Defendant, nor is there any suggestion on the face of the Judgments that they are provisional or subject to any variation. I have further had regard to the unchallenged evidence produced before Fraser J from Shanghai Yingdong Law Firm which explains that:

i) Rulings made by one of the lower three tiers of courts in the PRC may be appealed to the next highest level of court. Rulings made by the court of second instance are final and cannot be appealed.

[3] Dicey, Morris & Collins on the Conflict of Laws, 16th Ed at 14R-024
[4] Dicey at 14-027

ii) A defendant may apply for a retrial within 6 months of the effective date of judgments and rulings, but if they fail to do so then they cannot initiate that process.

16. In both cases, one or more of the defendants to the PRC proceedings sought to appeal the first instance judgment or part of it. However, both appeals were either dismissed or treated as withdrawn, with the effect that the first instance decisions were final and effective. No party sought a retrial (to the extent different) in either of the proceedings.

17. **Second**, the PRC Courts were competent to give the Judgments by reference to English private international law rules. Such jurisdiction will be treated as existing where the relevant defendant: (i) was present in the foreign country at the time proceedings were instituted; (ii) submitted to the jurisdiction by voluntarily appearing in the proceedings; (iii) had before the commencement of the proceedings agreed to submit to the jurisdiction of the foreign court.[5]

18. The Defendant submitted to the PRC Courts in at least two of these ways, and, again, a contrary position is not advanced by the Defendant:

i) Mr Kei appeared at the hearings of each of the claims in the PRC Courts, through a lawyer, and participated in those proceedings including arguing the merits of the substantive claims. Accordingly, Mr Kei submitted to the jurisdiction of the relevant PRC Courts.

ii) Pursuant to clause 7.3 of the HJAM Loan Agreement and clause 7.4 of the HBT Loan Agreements, the PRC Courts (of the relevant district where those

[5] Dicey at 14R-058

agreements were signed) had non-exclusive jurisdiction to hear claims arising from them. Accordingly, Mr Kei can be taken to have expressly or impliedly agreed to or acknowledged the jurisdiction of the PRC Courts.

19. **Third**, both the HJAM Judgment and HBT Judgment are for certain debts which are either definite and actually ascertained (insofar as the interest due thereon has already been expressed) or are capable of ascertainment by a mere arithmetical calculation (which is sufficient for these purposes). Upon judgment being given on the Claimants' claims, the subject matter of the judgment will be a debt in a definite and ascertained sum.

20. I turn therefore to the four points advance by the Defendant.

Miscalculation of Default Interest.

21. I can deal with this point briefly, since it was common ground before me that the initial claim made in this action included a miscalculation of the Default Interest payable. The calculation put forward by the Defendant's expert is now agreed, and I accept that no judgment can be given for any greater amount than the amount now claimed.

The Judgments are rendered unenforceable by Section 5 of the PTIA

<u>The parties' submissions.</u>

22. Under this head, the Defendant submitted that the Judgments (including the Default Interest) are rendered unenforceable in England by the application of Section 5 of the PTIA. It was argued that this was a complete defence.

23. Section 5 (1) – (3) of the PTIA provide as follows:

"**5.— Restriction on enforcement of certain overseas judgments**.

(1) A judgment to which this section applies shall not be registered under Part II of the Administration of Justice Act 1920 or Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933 and no court in the United Kingdom shall entertain proceedings at common law for the recovery of any sum payable under such a judgment.

(2) This section applies to any judgment given by a court of an overseas country, being—

(a) a judgment for multiple damages within the meaning of subsection (3) below;

(b) a judgment based on a provision or rule of law specified or described in an order under subsection (4) below and given after the coming into force of the order; or

(c) a judgment on a claim for contribution in respect of damages awarded by a judgment falling within paragraph (a) or (b) above.

(3) In subsection (2)(a) above a judgment for multiple damages means a judgment for an amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favour the judgment is given."

24. The Defendant submitted that there were two questions that I needed to determine:-

i) Is Section 5 engaged in the present case?

ii) If so, how is Section 5 to be applied to the present case?

Is Section 5 of the PTIA engaged?

25. The Defendant contended that the Judgments included awards of interest over and above contractual interest, expressed in the following ways:-

"*If Defendants fail to perform the payment obligation within the period specified in this judgment, they shall pay double*[6] *interest of the debt during the delayed performance period as per the stipulation of Article 253 of the Civil Procedure Law of the People's Republic of China*" – (the HJAM Judgment - emphasis added)

and

"*If the obligation to pay money is not performed within the period specified in this judgment, the interest on the debt during the delayed period shall be*

[6] I consider the accuracy of this translation below, when I come to the evidence of Mr Yang.

doubled in accordance with the provisions of Article 253 of the Civil Procedure Law of the People's Republic of China" (the HBT Judgment – emphasis added)

26. The Judicial Committee of the Supreme People's Court of China promulgated on 7 July 2014 an "Interpretation" of double interest under Article 253 ("**the 2014 Interpretation**"). It stated that "*the formula of calculating <u>the doubled interest on debts</u> shall be as follows: <u>the doubled interest on debts</u> = the outstanding pecuniary debts determined by the effective legal instruments other than the general interest on debts x 0.175‰/day x the period of delay in the performance*" – emphasis added.

27. Mr Yang (whose evidence was the only expert evidence before me) explains the history of the doubled interest provisions under Chinese law, and how the daily percentage default rate of 0.0175% (per the 2014 Interpretation) came to be adopted:

    i) The starting point was the PRC Civil Procedure Laws enacted in 1991. The relevant Article at that time was Article 232, and provided that the party against whom enforcement is sought shall pay multiple interest during the period of default. Mr Yang preferred to translate the relevant Chinese character as multiple rather than double.

    ii) In 1992, the Supreme People's Court issued a formal opinion (the 1992 Opinions) that multiple interest meant to pay two times the interest calculated at the bank's highest lending rate; i.e. double the lending rate.

    iii) By 2009, the Supreme People's Court made an official reply to an inquiry from the Sichuan Province (the 2009 Reply) making it clear that the interest rate to be used was the benchmark lending rate published by the Peoples' Bank of China ("**PBOC**"), and that it was that rate of interest that was to be doubled.

iv) There was still variation of application from court to court, and so between 2012 and 2014 the Supreme Peoples' Court consulted on the issue, which led to the promulgation of the 2014 Interpretation. The 2014 Interpretation settled on a new scheme whereby the interest accruing during a default period included both (i) the contractual interest, and (ii) the default interest, with the latter being at a fixed rate multiplier of 0.0175% per day. The rate of 0.0175% per day can be annualised at 6.39%, the equivalent of the historical benchmark lending rate of the PBOC (6.4%) which had been used previously.

v) Over time, the Article numbers switched around, but the content of the rule remained. At the time of the Judgments, the relevant Article was Article 253.

28. The Defendant contended that the point set out in 27(4) above was important. The scheme under the 2014 Interpretation provides for <u>both</u> the contractual rate of interest to run and the default rate of interest to run for the period of default, whereas previously, the default rate (i.e. the benchmark lending rate) was doubled for the period of default (and the contractual rate stopped running). And so, the result is that now a judgment debtor is penalised by reason of the fixed rate multiplier of 0.0175% per day in addition to the contractual interest liability.

29. Whilst not strictly a doubling of interest (or the doubling of the rate of interest), the outcome when applying a daily rate multiplier of 0.175‰ on top of the contractual rate is to apply two categories of interest for the default period, as appeared from the report of Mr Yang. The first is the contractual interest (in this case) of 24%[7] and the second is penal interest at the equivalent rate of 6.4% per annum (the equivalent of the benchmark lending rate that had previously been doubled), resulting in a total annual

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[7] In fact, under the HBT Judgment, the contractual interest was set at 36% per annum which was disallowed on grounds that it exceeded the statutory limit for private lending of 24%, and reduced to that level.

interest rate of 30.4% for the period of default. Before the 2014 Interpretation, it would have been just 12.8%, being 2 x the PBOC lending rate of 6.4%).

30. The Defendant contended that Section 5 of the PTIA applies not only to judgments which double or treble a sum assessed as compensation, but which "*otherwise multiply*" a sum assessed as compensation. In the instant case, the Chinese Courts ruled that the compensatory award was to be so multiplied by the rate of 0.175‰ per day, as Mr Yang confirmed. As such, the submission was that the Default Interest is not compensatory but penal, and arbitrary, accrues in addition to the contractual rate of interest, and falls squarely within the prohibition of Section 5 of the PTIA. And it is not enough to say that the Default Interest awarded by the Chinese Courts is simply an additional liability or obligation incurred for being in default of the primary payment obligations; rather it is an intrinsic part of the Judgments, enforcement of which is sought here in England. In this regard, the Defendant accepted that its submission depended on there being two rates of interest, one contractual and compensatory and the other being non-contractual and penal. The Defendant emphasised that this Act had been judicially described as "remarkable".

31. That the PTIA bites on any judgment for any sum which is multiplied (as in this case), is, it was argued, supported by *Briggs – Civil Jurisdiction and Judgments* (7th Ed.) at 34-38:-

> "*[The PTIA] would appear to mean that judgment for any sum which is multiplied, but not for one to which a sum is simply added, is caught by the prohibition on enforcement contained in the Act. It is not easy to see the policy which draws a line in this place; and it may yet be that a judgment for exemplary damages on top of the compensatory sum could be denied recognition if there is evidence (but what would it be?) of a subliminal multiplication of the compensatory sum.*"

32. No question of subliminal multiplication, it was said, arises here. The Judgments transparently apply a multiplier (0.0175%) to the compensatory elements, with the result that the non-compensatory elements are based on a multiple.

33. Also, that this is not a US anti-trust claim being enforced, it was argued, is no impediment to the application of the PTIA. Although the PTIA was enacted in response to US laws which purport to regulate trading activity outside the US, the plain wording of Section 5 renders it applicable to all overseas judgments: see *Dicey* at 14-274.

34. In response, the Claimants argued that there was no reasonably arguable case that enforcement of the Judgments is barred by operation of Section 5 of the PTIA, properly construed. Enforcement of a judgment in debt or for breach of a loan agreement, to which a right to additional interest accrues in the event of non-payment within the time required by the local court , does not fall within the scope of the statute.

35. The Claimants contended that it is well-established that statutory interpretation is concerned with identifying the true meaning of the words used by Parliament and giving effect to that meaning. In doing so the context and purpose of the relevant provision are important since the Court should aim to give effect to the legislative purpose. A meaning of the words used which does not do so, or which leads to absurdity or some other unreasonable outcome, should not be accepted as correct.[8]

36. The context and purpose of the PTIA (and in particular Section 5 thereof) has been canvassed in a number of authorities and texts. It is quite clear from these that the

[8] See e.g. *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 at [8]; *Oldham MBC v Tanna* [2017] 1 WLR 1970 at [31].

statute was enacted to *"counteract what was perceived by the United Kingdom to be an excessive exercise of jurisdiction by United States courts in anti-trust actions.*"[9] That conclusion is supported elsewhere:

i) In *British Airways v Laker Airways* [1985] 1 AC 58 at 89 Lord Diplock noted of Section 5 of the PTIA that "*This provision, as is well known, is specifically directed against antitrust actions brought in the United States of America under the Clayton Act*".

ii) Lord Hodge, sitting in the Outer House, Court of Session in *Service Temps Inc v Macleod* [2013] CSOH 162, stated in the context of a consideration of the scope of Section 5 of the PTIA that (at [27]): "*This remarkable Act was enacted to discourage the United States from seeking to enforce its competition policies by, among other means, making awards of multiple damages against persons in the United Kingdom*." He went on to note that: "*It is clear in my view that Parliament sought to discourage what it considered to be the exorbitant effects of United States antitrust laws. The Act is concerned not only with the extra-territorial effect of such laws but also with preventing the recovery of multiple damages.*" (at [33]).

iii) Potter LJ in *Lewis v Eliades (No 2)* [2004] 1 WLR 692 (CA) considered in more detail statements in Parliament prior to the statutes enactment (at [44] – [45]) commenting at [46] that "*It is notable that, so far as clause 5 was concerned, no statement appears which suggests any intention to extend the principle of unenforceability more widely than triple damages judgments or such other foreign 'competition policy' judgment as might be specified.*"

[9] *Dicey* at 14-220. *A similar statement appears in Briggs: Civil Jurisdiction and Judgments (7th Ed)* at 34.38.

37. The question then is whether "*a judgment for multiple damages*" in Section 5(2)(a), as further defined in Section 5(3), includes the situation in this case, namely a judgment for a principal sum due in debt under a loan (or as contractual damages) which is not multiplied at all as awarded, but where the local law contains a statutory provision which entitles the Claimant to further interest at a set rate in default of payment by the Defendant within a specified period.

38. The Claimants said that the answer to this question is that the Judgments cannot conceivably be said to fall within the meaning of "a judgment for multiple damages" under Sections 5(2)(a) and (3) properly understood. A construction to the contrary not only fails to serve any proper purpose of the PTIA, but runs contrary to the general principles of enforcement at common law. Moreover, the conclusion reached would be one which carries with it an outcome which is certainly unreasonable, and very likely an absurdity. As to this:

    i) The PTIA was plainly intended to protect against the mischief of awards of multiple damages in competition/antitrust litigation abroad. There is, as Potter LJ noted in *Lewis*, no indication that unenforceability should extend more widely than is made clear in the PTIA.

    ii) The Judgments have nothing to do with competition or antitrust legislation. They are judgments in relation to claims in debt or contract (together with the recovery of certain litigation expenses).

    iii) Unlike those judgments which the PTIA appears to have been intended to affect (and examples can be found in *Lewis* at [8] and *Service Temps* at [2]) where the judgment sum is itself the product of a multiplication, the Judgments contain no element of multiplication at all. The PRC Courts have not, and

cannot be sensibly found to have, given "*a judgment for an amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damages sustained.*" Rather, the PRC Courts have given judgment for a principal sum due as a debt or for breach of contract, together with interest due on those sums.

iv) That the PRC Courts also determined that, in the event the Defendant did not pay the sums due within the required period, the Default Interest would apply does not change this analysis. There has been no judgment for multiple damages. At best, a liability for a further additional sum arises by reason of the Defendant's non-payment in the specified period. But this does not amount to an award of multiple damages within the meaning of PTIA, and indeed, the PRC Courts have not made an award for any particular amount or sum which could be said to have been arrived at in this respect.

v) Properly understood, the Judgments simply make provision for a further liability of the Defendant in respect of separate interest in the event of default of payment, which liability is recoverable in addition to the sums assessed as being due at the date of judgment. It is notable that Section 5 of the PTIA does not appear to apply to a judgment for a sum which is merely added (rather than multiplied): *Briggs* at 34.38. That is the position here. Any sum due under the Default Interest provision is an addition to the principal. It is not itself, nor does it make any other amount, multiplied damages within the PTIA.

vi) There is a general principle in favour of recognition and enforcement for foreign judgment at common law: see *Lewis* at [48]. It is both desirable and appropriate that enforcement of a foreign judgment should be available to the

Claimants unless plainly precluded by the terms of PTIA, and the approach to construction should be based on that premise: *Lewis* at [51]. To construe Section 5(3) of the PTIA such that the Judgments fall within it would not do so.

vii) A construction of the PTIA which resulted in the Judgments being included within Section 5 and thus unenforceable, would be wholly draconian and absurd:

a) It would mean that any judgment of a foreign court which provides for interest (irrespective of the amount) to be added in default of payment within the required period, would be unenforceable in England. Indeed, arguably it would apply to any foreign judgment which incorporates liability for further interest. That is an extraordinary and absurd result, and it cannot be what Parliament intended, particularly given the proper historical context of the PTIA.

b) That absurdity is even more pronounced when one recognises that English statute provides for default interest to be added to judgment debts in Section 17 of the Judgments Act 1838. There can be no public policy reason to suppose that the PTIA was intended to extend to the enforceability of the types of default interest for which Parliament itself has previously legislated, simply because they arise from foreign rather than domestic statute.

c) Such a construction of the PTIA would incentivise foreign judgment debtors where default interest provisions exist not to pay within the required time, because failing to do so would improve their prospects

of resisting enforcement in England. That cannot be concluded to have been the intention of Parliament, which was instead focussed on protecting English judgment debtors from exorbitant foreign statutes.

39. The Claimants also argued that I should also not be distracted by the translation issues which appear to exist in this case. Whilst the Judgments (as translated) refer to the Defendant being required to pay 'double interest of the debt' under Article 253 of the PRC Civil Procedure Law, in fact that reference to 'double' is a misnomer. As to this:

i) Mr Yang has provided expert evidence for the Defendant as to, inter alia, the various interpretations by the Supreme People's Court of Article 253,[10] the most recent of which is the 2014 Interpretation. As part of that analysis, he explains that the character used in Article 253 relevant to explaining the interest applied could mean "*double the original amount*" but could also mean "*to a greater extent*" and that the Supreme People's Court has not adopted this first meaning and the latter is the correct meaning.

ii) However, Mr Yang then says that "therefore it shall be translated into English as "*multiple*" instead of "*double*". Mr Yang then confirms the meaning of the relevant word as ""*to a greater extent*" *in the sense that extra interest as default interest is to be accrued in addition to the contractual interest during the Default Period*."

iii) The Claimants did not take issue with Mr Yang's description of the proper interpretation of the relevant Chinese word as meaning 'to a greater extent'. However, they argued that it was doubtful that as a matter of English the word

[10] Now in fact Article 260, but 253 is referred to for convenience.

‘multiple’ is appropriate. It is clear from Mr Yang’s own conclusions that the words ‘extra’, ‘further’ or ‘additional’ would all be equally if not more apt.

iv) In any event, they said that this issue is one of substance over form. Clearly the interest being applied is further interest in default of payment in time, and it appears that such interest is applied with the dual purpose of ensuring consistent compensation for creditors kept out of monies due to them and to encourage obedience by debtors of legal orders.

How is Section 5 to be applied?

40. In the alternative, the Claimants argued that even if it might be said that the Default Interest element of the Judgments did fall within Section 5 of the PTIA, this would not render the entirety of the Judgments unenforceable, because:

i) If upon examination of a judgment is it apparent that only part of it falls within the exception to enforceability, the Court should consider whether the unexceptional part can be distinguished, separated and quantified for enforcement purposes. If so, then that is what should happen: *Lewis* at [52].

ii) Whilst a judgment based on multiplication (e.g. as in *Service Temps*) may not be capable of being separated into its constituent parts and no part of it enforced, that is not the position where the total judgment sum is reached or “arrived at” by adding a multiplied sum to existing purely compensatory sums: *Lewis* at [52] – [53] and [57].

iii) Here, the only suggestion of a multiplied sum is the Default Interest. That is not part of the compensation assessed on the cause of action in debt/contract (which remains the same throughout) but a separate and additional liability

arising out of a foreign civil procedure statute which only arises on D's default of payment.

41. The Defendant argued that this was wrong.

42. In *SAS Institute Inc v. World Programming Ltd* [2019] FSR 30, Cockerill J considered past authorities and concluded that the exclusion in Section 5 of the PTIA covers the whole of a judgment and not merely the multiplying part of it, and that that is because of the wording of what is a "remarkable" Act[11] : at [245-247]. As to the *SAS Institute* decision:-

    i) No other English decision considers Section 5 of the PTIA as part of its ratio[12];

    ii) Cockerill J applied and followed the line of obiter authority from (i) the Court of Appeal in *Lewis v. Eliades* [2004] 1 WLR, (ii) Lord Hodge in the Scottish case of *Service Temps Inc. Macleod* [2013] CSOH 162, and (iii) *British Airways v. Laker Airways* [1984] QB 142 at p161E per Parker J;

    iii) Cockerill J also followed the weight of academic discussion on the point; See in particular *Briggs* at [34-38], which states that "*it is noteworthy and perhaps unexpected that the prohibition covers not just the sum reached by multiplication, but also the basic sum assessed by way of compensation*".

    iv) Permission to appeal the *SAS Institute* decision was sought from the Court of Appeal, and refused by Flaux LJ on the ground that the proposed appeal had no real prospect of success: see *SAS v. World Programming Limited* [2020] EWCA Civ 599 at [20]-[22].

[11] Lord Hodge in *Service Temps* had referred to the PTIA as being a "remarkable" Act.
[12] See *SAS Institute* at [215].

43. Any suggestion that the Default Interest element of the Judgments is severable, and should not be treated as infecting the whole, relying on *Lewis v. Eliades* [2004] 1 WLR 705 at [52]-[53], is misplaced. In *Lewis*:-

i) There was an agreed concession that the part of the judgment under RICO[13] was wholly unenforceable, both as to the compensatory and non-compensatory elements; hence why it was not part of the ratio decidendi in that case. Potter LJ considered that concession well made (at [41]), as did Cockerill J in *SAS Institute*; and

ii) The Court of Appeal found that the judgment in respect of an entirely separate cause of action (i.e. the non-RICO part of the case) was still enforceable, by reason of the fact that it was referable to a separate cause of action in respect of which there had been no judgment for a sum which was multiplied.

44. The Defendant submitted that the state of the law is clear. The prohibition under Section 5 of the PTIA covers not just the sum reach by multiplication, but also the basic compensatory sum. As such, the application of Section 5 is a complete defence to the enforcement of the Judgments, and to this claim.

<u>My conclusions.</u>

45. I have set out the account of the relevant Chinese provisions as given by Mr Yang in his report. No evidence was put forward in response to that account, and I accept that

[13] Racketeer Influenced Corrupt Organisations Act in the USA

the factual position, as at the dates that the Judgments were given, was as follows:

i) At the date judgment was given, the amount for which judgment was given was the amount of the contractual principal and interest, calculated at the contractually agreed rate of 24%, on the date of judgment (or the rate as contractually agreed and reduced to 24% in the case of the HBT judgment). As at that moment, there was no question of any multiplication of any amount awarded.

ii) As part of its order, the Chinese court ordered that, if payment was not made within a set timescale – here 10 days – then in addition to contractual interest, which continued to run after the judgment as it had before, "default interest" was payable. That sum was calculated as a percentage multiplier of the principal amount, and represented a superadded interest payment over and above contractual interest.

iii) The rationale for the inclusion of the provision for default interest was, on Mr Yang's evidence, to punish the debtor for late payment and to incentivise prompt payment in accordance with the Court's order. I consider that neither of these rationales can be said to be compensatory, and I accept the Defendant's submission in this regard. I consider below the proper impact of this fact.

46. I turn to consider the question of whether the PTIA applies to such a provision at all, and if so, how. In my judgment, it is necessary to consider this question as a single one. In my judgment, the following considerations are relevant.

i) I accept that the background to the PTIA was the antipathy of the UK to perceived excesses of jurisdiction on the part of the US in relation to anti-trust matters, and the award of triple damages by US Courts in such cases. Thus, it was where sums were awarded by way of principal which were arrived at by multiplying an amount awarded by way of compensation that the statute would bite.

ii) Nonetheless I also accept that it is apparent from, in particular, the SAS case, that the PTIA is not limited to antitrust cases and extends to all cases in which compensatory amounts are multiplied by the foreign court. Thus, RICO claims (i.e. claims under the *Racketeer Influenced and Corrupt Organisations Act*) are not antitrust claims but are caught by the statute.

iii) Here, however, in my judgment, the relevant provisions of the Judgments sought to be enforced are not multiples of compensation awarded within the meaning of Section 5 of the PTIA. The amount awarded by way of compensation in the Judgments is the principal and interest amount contractually agreed. There is no complaint made by the Defendant of these amounts. There could therefore have been no complaint, as at the date of the Judgments, of the amount awarded by reason of Section 5 of the PTIA. Had this amount been paid by the Defendant, the argument now put forward could never have arisen. I accept the point made by the Claimants in their skeleton argument that it does not lie in the Defendant's mouth to rely on an argument that has only arisen by virtue of his failure to comply with the foreign judgment.

iv) In the current case, there is an entirely separate amount claimed by reason of the failure on the part of the Defendant to comply with a separate part of the Court's order, which would not, as I have said, have arisen had the Defendant done what the Court ordered him to do. I do not regard this as properly described as a multiplier of the compensation awarded at all. It is a sum awarded by virtue of an entirely separate breach, due to a decision of the court and the Chinese legislature to impose a requirement designed to incentivise compliance with Court orders. The fact that the amount of the interest payment is calculated as a percentage of the principal amount awarded does not, in my judgment, make it a multiplier of the compensation within the meaning of Section 5 of the PTIA. Indeed, if it did, then it is difficult to see why any judgment carrying interest would not fall foul of the PTIA, which I regard as a wholly unreasonable result.

47. I turn to consider the Defendant's reliance on the SAS case. I consider that, whether or not I am bound by this decision, I should follow it, and I also consider that it is correct, with great respect. However, it does not seem to me that it really bears on the current question, and is certainly not determinative of it.

i) In SAS, the US judgment in question was clearly one for triple damages. The question was whether the fact that the judgment clearly distinguished between the compensatory element and the multiple damage element meant that the compensatory element could be enforced leaving the multiple damage element on one side. Cockerill J decided that it could not, following a consistent line of authority and academic commentary.

ii) This is not however the real issue before me, in my judgment. Here, the issue is whether the fact that the judgment includes a provision which may (or may not, depending on whether it is complied with) lead to a superadded interest liability, calculated as a percentage of the principal amount (on the basis of Mr Yang's evidence as to the meaning of the relevant Chinese legislation) means that it is to be regarded as a judgment which "otherwise multiplies a sum assessed by way of compensation" within Section 5 of the PTIA. In my judgment, the answer to this issue is clear. The judgment is for the principal and interest; it also includes a separate obligation to comply with that obligation, failing which an additional sum will be payable by way of default interest. Bearing in mind the history and background to Section 5 of the PTIA, and in any event by reference to the wording of that provision, I conclude that it is not a judgment within Section 5 of the PTIA.

iii) Instead, I consider that this case is within *Lewis v Eliades*, *ref supra*. In this regard, I adopt with gratitude the explanation of the distinction between *Lewis* and *SAS* given by the learned editors of *Dicey, Morris and Collins on the Conflict of Laws* at footnote 120 to 14-026, where they say that:

> "The effect of the Protection of Trading Interests Act 1980 is that such judgments are not enforceable in the United Kingdom at common law or otherwise, including in respect of an award of compensatory damages which has been multiplied, though where there are judgments on separate causes of action, a judgment under one for compensatory damages may still be enforced notwithstanding that judgment under another is for multiple damages and so unenforceable: Lewis v Eliades [2003] EWCA Civ 1758, [2004] 1 W.L.R. 692; SAS Institute Inc v World Programming Ltd [2018] EWHC 3452 (Comm.), [2019] F.S.R. 663."

iv) In my judgment, in this case there are, in effect, two separate causes of action. The first is for the recovery of the judgment debt and interest, assessed as at

the date of the Judgments. The second is for the recovery of an entirely separate amount, payable in the event of a contingency (i.e. non payment within the 10 days), which contingency is entirely within the control of the judgment debtor. I do not regard this as justifying a refusal to enforce the principal and interest element of the Judgments.

The Default Interest element of the Judgments is unenforceable by Section 5 of the PTIA

The parties' contentions.

48. Next, the Defendant argued that the Default Interest element of the Judgments was unenforceable by virtue of Section 5 of the PTIA. However, he said that to reach this conclusion would (for the reasons above) be inconsistent with the wording of Section 5 and its application as decided in *SAS Institute*. He put forward no real positive case on this point.

49. In this regard, the Claimants, as I understood the position, contended that, if they were right on severability (their case having been set out in paragraph 40 above), the Default Interest element of the Judgments would be unenforceable. However, their primary case was that the entire judgment was not caught by Section 5 of the PTIA.

My conclusions.

50. I can state my conclusions on this briefly.

51. Essentially, this alternative case was not really pressed by either party. The Claimants said that the entirety of the Judgments, including the Default Interest provisions, were outside the scope of Section 5 of the PTIA; whilst the Defendant, although arguing that the Default Interest was Section 5 of the PTIA, contended that this conclusion would not give proper effect to the SAS case, which was authority for the proposition

that if any part of a judgment falls foul of Section 5 of the PTIA, the whole judgment is unenforceable.

52. I conclude, for the reasons I have already given, that the Default Interest provisions are outside Section 5 of the PTIA, and thus that, just as the Judgments as a whole are not invalidated by the statute, those parts which impose Default Interest do not fall foul of the statute. In essence, I do not consider the Default Interest to be "*a judgment for an amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favour the judgment is given*." As I have said, the mere fact that Default Interest is provided for in the Judgments in the event that a contingency is not met is not in my judgment enough to bring it within this wording, particularly bearing in mind the purpose of the statute.

The Default Interest element of the Judgments is unenforceable as a penalty.

The parties' contentions.

53. Finally, the Defendant argued that where part of a judgment from an overseas Court (a) does not represent any loss suffered by the Claimants or genuine pre-estimate of that loss, and (b) is over and above the principal and contractual interest found due, it is punitive in effect and therefore unenforceable as a penalty in England under common law: see *Dicey, The Conflict of Laws, 16th Ed*. Rule 42(1) at 14R-020, which states as follows (footnotes omitted):

> "*The judgment must further be for a sum other than a sum payable in respect of taxes or the like, or in respect of a fine or other penalty. It is well settled that an English court will not entertain an action for the enforcement, either directly or indirectly, of a penal or revenue, or other public law of a foreign country. Since "the essential nature and real foundation of a cause of action are not changed by recovering judgment upon it," it follows that the court cannot entertain an action for the enforcement, either directly or indirectly, of a foreign judgment ordering the payment of taxes, fines or other contributions*

> *or penalties. A penalty in this sense normally means a sum payable to the State, and not to a private claimant, so that an award of punitive or exemplary damages is not penal. But it is possible that an award of multiple damages, e.g. in an anti-trust action, might nevertheless be regarded as penal at common law. If the purpose of the damages as awarded by the foreign court is to punish the defendant, enforcement of the judgment may be found to be against English public policy, with which the rule against enforcing foreign penal laws will overlap. If the foreign judgment imposes a fine on the defendant and also orders payment of compensation to the injured party (called the "partie civile" in French proceedings), the latter part of the judgment can be severed from the former and enforced in England.*"

54. A penalty in this sense would – the Defendant accepted – normally mean a sum payable to a State body, and not to a private claimant. But it is possible for an award of multiple damages to be regarded as penal at common law: see *Dicey, ref supra*. If the purpose of the damages is to punish a defendant (which is the case here), they argued that enforcement of that punitive part may be forbidden even if that sum is not payable to the State: see *JSC VTB Bank v. Skurikhin* [2014] EWHC 271 (Comm) at [94], and see *Schnabel and Ors v. Lui and Ors* [2002] NSWSC 15 per Bergin J.

55. As a result, those parts of the Judgments that constitute a penalty (i.e. the Default Interest sums totalling £721,035.05 following the amendments to the Claim Form and Particulars of Claim) were, it was argued, unenforceable in any event.

56. For their part, the Claimants contended as follows:

    i) For a judgment to be unenforceable as a penalty (in the normal sense used in enforcement matters) it ought to be a sum payable in respect of a sum due to the State, and not to a private claimant: *Dicey, ref supra*. This narrow concept clearly does not apply here.

    ii) It was argued that the Defendant's use of the term 'penalty' is intended to mean that the sum awarded is punitive, i.e. contrary to public policy (because the sums payable are in addition to the contractual interest awarded, and/or do

not represent an actual loss or genuine pre-estimate of loss). However, there is no proper basis to conclude that the Default Interest awarded by the PRC Courts is contrary to English public policy. As to this:

a) Dicey[14] suggests that "*the ultimate question of whether enforcement of a judgment may be refused on grounds of public policy when the judgment is for exemplary, punitive, or manifestly excessive damages remains undecided, although as the English courts themselves award exemplary damages in some cases, the application of public policy should normally at least be excluded if the foreign court awarded exemplary damages in equivalent circumstances.*"

b) In *JSC VTB Bank v Skurikhin* [2014] EWHC 271 (Comm), which concerned an application for summary judgment in enforcement proceedings like this case, Simon J was asked to consider a similar point. He held that:

   "*In my view the question of whether that part of a judgment represented by an unusually high rate of interest awarded by a foreign court is enforceable at Common law does not fall to be decided by the English Court's conception of the appropriate rate of interest, but rather on whether the approach of the foreign court to the award of interest runs contrary to domestic public policy. It is at least arguable that the award of a 'manifestly excessive' rate of interest would run contrary to this aspect [of] English law public policy. The question is whether the award of interest in the Russian judgments in the present case arguably falls into that category.*"

c) The Claimants contended that this could not apply in this case. The Judgments provide (in essence) that if the Defendant does not pay the sums due within the specified period, further default interest will be due on those sums. The amount of that interest equates to c.6.4% p.a.

[14] At 14-153

Plainly there is no 'manifestly excessive' rate of interest being applied to the judgment debts which it could be said to run contrary to English public policy. Indeed, the annualised rate is less than English statute applies to judgment debts.

d) Moreover, there is nothing objectionable, and certainly nothing contrary to public policy, about the imposition of a default rate of interest after a period for payment has expired without payment being made (for example as a method of ensuring consistent compensation of claimants, or as an incentive for prompt payment). That is precisely for what Section 17 of the Judgment Act 1838 provides, and it does so whether or not the default interest applicable is a genuine pre-estimate of loss.

57. Moreover, it was submitted, the approach to penalties apparently adopted by the Defendant, at least as a matter of the law of contract, has been somewhat superseded by the more recent approach to what constitutes a penalty in English law (and therefore ought properly to inform what is contrary to public policy). In particular, an obligation to make a payment, even if not a genuine pre-estimate of loss, will be enforced even if the obligation acts as a deterrent, provided there is a legitimate interest in deterring the breach or default, and the provision is not extravagant or unconscionable in proportion to that interest.[15]

58. Given that the court's approach to the enforcement of penal clauses was (and is) informed by public policy considerations, in principle the same (modern) approach to an allegedly punitive element of a foreign judgement ought to be adopted. Even if a

[15] See the commentary in the contractual context in *Chitty (34th Ed)* at 29-224 ff.

foreign law applies interest which does not represent a genuine pre-estimate of loss suffered by a claimant, there is plainly a legitimate interest in both encouraging judgment debtors to discharge their liabilities and compensating a claimant for being kept out of his money. Where the interest applied is not manifestly excessive as to its rate (as is true in this case), it is difficult to see how any sensible objection on public policy grounds can be maintained.

59. For these reasons, the Claimants submitted that this aspect of the Defendant's defence should be rejected because it disclosed no real prospect of success. Alternatively, summary judgment should be entered in respect of the remainder of the sums due under the Judgments.

My Conclusions

60. I have concluded that, despite the fact that this argument raises different considerations from the arguments previously considered, I should deal with the point at this stage and not leave the matter for trial.

61. My conclusions, and the reasons for them, are as follows:

    i) It is clear that the general rule is that the rules which lead to non-enforcement of judgments relate to fines, taxation laws, and penal laws of the state. This is accepted by the Defendant.

    ii) Nonetheless, I accept that the rules are not limited to such cases, and that where laws are penal as regards individual Defendants but do not involve the types of law identified above, this may mean that judgments giving effect to such laws are not enforceable as a matter of English public policy.

iii) I also accept that, particularly in the light of the *JSC VTB Bank* case, where a rate of interest is applied that is penal, this may offend against English public policy.

iv) I am conscious that, in the *JSC VTB Bank* case, Simon J regarded the fact that elements of the interest awarded in that case were described as penalties and were not genuine pre-estimates of loss, meant that summary judgment should not be given in relation to those amounts.

v) However, Simon J was clearly considering the matter in the light of the then accepted approach to penalty clauses. I consider that the law has moved on since then. In the light of the recent decisions relating to penalty clauses, I accept that where provisions of this sort pursue a legitimate policy of deterrence, then they may be justifiable.

vi) Overall, on the basis of the evidence before me, I would conclude that the provisions of Chinese law in question do indeed pursue such a legitimate policy aim, and that an English Court should not seek to be overly astute to pass a negative judgment on such aims.

vii) Accordingly, I conclude that the imposition of default interest was not objectionable on the grounds that it constituted a penalty which offends against English policy, and I further conclude that this is not a reason to refuse to enforce the Default Interest element of the Judgments.

62. I should close by expressing my thanks to Counsel for both parties and their respective teams for their considerable assistance. I understand that there may be other matters which the parties wish me to deal with as well as consequential matters.

In the first instance, I would be grateful if the parties would draw up an Order designed to give effect to this judgment.   I will deal with any other matters in writing.