



THE UNIVERSITY OF
SYDNEY

Sydney Law School

Legal Studies Research Paper
No. 16/102

December 2016

Overlapping Jurisdictions and the Resolution of Disputes before Chinese and Foreign Courts

Vivienne Bath

This paper can be downloaded without charge from the
Social Science Research Network Electronic Library
at: <http://ssrn.com/abstract=2880942>

Overlapping Jurisdictions and the Resolution of Disputes before Chinese and Foreign Courts

Vivienne Bath, Sydney Law School and China Studies Centre¹

I Introduction

The rapid expansion of the Chinese economy since 1979 is reflected in the growth in Chinese and foreign interactions through trade and investment in China and a major increase in the operations of Chinese companies overseas. As a result, the prospects - and implications - of China-related legal disputes have become increasingly important to both foreign and Chinese enterprises. Jurisdictional conflicts and parallel proceedings in cross-border cases are certainly not a new problem in international business. However, the approach taken by the Chinese courts, which constitute an increasingly significant participant in the area of transnational litigation, raises important issues in the areas of comparative private international law, Chinese civil procedure law and policy, and international business law.²

This article examines a range of recent foreign and Chinese commercial and maritime cases which have presented the issue of overlapping or conflicting jurisdiction. It also looks at recent developments in Chinese law and practice in relation to jurisdiction in cross-border cases, focussing on the Civil Procedure Law of the People's Republic of China, as revised in 2012 (Civil Procedure Law),³ and the 2015 Supreme People's Court Interpretation on the Civil Procedure Law (Interpretation).⁴ It considers, first, the circumstances in which parallel and overlapping proceedings in Chinese and non-Chinese court have arisen; secondly, how the issues of choice of jurisdiction and conflicts between jurisdictions are handled by the Chinese courts and, thirdly, the issues that these cases and practices present in terms of efficient and final resolution of disputes. The article concludes that, despite recent reforms, Chinese law and practice in relation to these issues is unduly restrictive, and presents a number of suggestions as to how these issues could be more efficiently handled.

¹ Vivienne Bath is Professor of Chinese and International Business Law at the University of Sydney. I would like to thank the Max-Planck-Institut für ausländisches und internationales Privatrecht (particularly Dr Benjamin Knut Pissler) for the use of their library and resources, Ms Susan Finder (author of the Supreme People's Court Monitor) for her advice and suggestions on resources, and Mr. Philip Peng (editor of the Maritime and Civil Law Blog) for identification of relevant Chinese cases.

² This discussion focuses mainly on cases in China, England, Hong Kong, United States and Australia, although there are undoubtedly other cases that may be relevant. Although many Chinese cases are now available online, it has not always been possible to locate the original judgment in the relevant Chinese court decision paralleling the overseas case and I have relied on the summary in the relevant foreign judgment. While Chinese court cases do not have precedential value (or only to a limited extent in the case of "guiding" and "model" cases), the decisions and reasoning of the Chinese courts are of considerable interest because they reflect how Chinese judges view these issues. I have generally translated the names of the parties to Chinese cases, but kept the citation in Chinese.

³ Civil Procedure Law of the People's Republic of China, issued by the National People's Congress (NPC) on 9 April 1991, amended effective 1 April 2008 and 1 January 2013.

⁴ Interpretation on the Application of the "Civil Procedure Law," issued by the Supreme People's Court (SPC) on 30 January 2015, *Fa Shi* [2015] No. 5.

The Chinese legislative and court system has traditionally made a distinction between “foreign-related” matters and cases which involve only Chinese interests.⁵ This reflects the legal and regulatory division between foreign enterprises and entities, foreign-invested partnerships and companies and Chinese entities. In the Chinese legal and judicial systems, “foreign-related” matters continue to be treated separately under the Civil Procedure Law, as well as under the Arbitration Law.⁶ These include matters to which foreign companies, foreign investment enterprises and foreign-owned Chinese entities are parties, as well as cases where the subject-matter of the dispute or the other facts in the case are in or arise outside China. They also include recognition and enforcement of foreign arbitral awards and foreign judgments.⁷ In practical terms, this is a division which is becoming increasingly difficult to sustain at an operational level as foreign investment becomes more integrated in every level of Chinese business and Chinese businesses add international investments and overseas companies to their group structures. The artificiality of this distinction is illustrated by the case of *Impala Warehousing and Logistics (Shanghai) Co. Ltd v Wanxiang Resources (Singapore) Pte. Ltd.*⁸ in which the parties to litigation in Shanghai and England were the Chinese incorporated subsidiary of the Trafigura Group (with its “consolidating entity” now incorporated in Singapore),⁹ arguing for litigation in England, and a Singapore incorporated subsidiary ultimately owned by the Wanxiang Group, a Chinese multinational,¹⁰ arguing for litigation in Shanghai.

Outside China there has also been an increase in cases involving Chinese interests and companies. Cases include litigation by and against Chinese or Chinese owned companies and enterprises, both private and state-owned; regulatory action involving Chinese entities; overseas arbitrations relating to disputes arising in China or outside China and investor-State arbitrations.¹¹ Thus there has been an increase in cases where there are potentially conflicting proceedings before Chinese and foreign courts (or arbitral tribunals), with the courts showing different degrees of readiness to surrender or refuse jurisdiction over cross-border disputes.

Although there are some limitations under Chinese law on the selection of foreign law in certain types of contracts,¹² Chinese law generally recognizes the autonomy of the parties in foreign-related civil and commercial contracts to choose the governing law. Similarly,

⁵ Some clarity in relation to the term “foreign-related” is provided by Article 1 of the Interpretation on Certain Issues concerning the application of the “Law of the People’s Republic of China on the Application of Laws to Foreign-Related Civil Relations,” issued by the SPC on 28 December 2012, *Fa Shi* [2012] No 24, and Art 522 of the Interpretation, which provide that a civil case may be treated as foreign-related if one or both parties are foreigners, stateless or foreign organisations or resident outside China; where the subject-matter of the dispute is outside China or the facts relating the civil relationship arise outside China or in other situations that may be recognised as foreign-related civil relations.

⁶ Arbitration Law of the People’s Republic of China, issued by the Standing Committee of the NPC 31 August 1994, effective 1 September 1995, as amended effective 27 August 2009, Chapter 7.

⁷ Civil Procedure Law, Part 4, “Special Provisions for Civil Proceedings of Foreign-related Civil Matters.”
⁸ [2015] EWHC 811 (Comm).

⁹ Trafigura website, *Financials, 2015 Annual Report*, <<http://www.trafigura.com/financials/2015-annual-report/>>.

¹⁰ Wanxiang Resources website, 2016, *About us, Company Overview* <<http://www.wxresources.com/en/about/index.aspx>>.

¹¹ *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium* (ICSID Case No ARB/12/29). See also *Ministry of Justice for the PRC v Top International Ltd* [2011] NZHC 630.

¹² See Contract Law of the People’s Republic of China, issued by the NPC on 15 March 1999, effective 1 October 1999, Article 126, which provides that Chinese-foreign joint venture contracts and natural resources exploration and development contracts to be performed in China must be subject to Chinese law.

although there are some areas in which Chinese courts are considered to have exclusive jurisdiction,¹³ there is some recognition in Chinese law that parties should have a degree of autonomy to choose the court in which a dispute should be heard.

The scope for international arbitration is considerably wider, and includes all foreign-related disputes arising from economic trade, transport and maritime matters disputes. This extends to joint venture contracts and Chinese natural resources agreements over which the jurisdiction of foreign courts is not recognized.¹⁴ Traditionally, foreign parties have preferred to nominate arbitration of China-related disputes (due to doubts about the Chinese legal system, difficulties in enforcing foreign awards, the wider scope for arbitration and China's early accession to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,¹⁵ facilitating the enforcement of foreign arbitral awards). Nevertheless, there is considerable scope for the litigation of disputes between foreign and Chinese parties before the Chinese courts.

II The issues - parallel and overlapping proceedings

The issue of parallel and overlapping proceedings between Chinese and foreign courts (that is, cases which deal with the same issues and parties, or involve issues arising from the same factual matrix or transaction and the same - or some of the same - parties) arise in a number of different circumstances. First, there are cases where it is claimed that the parties had agreed to the exclusive jurisdiction of the courts of a designated country, but a party brings proceedings in the courts of a different country (generally, but not always, China),¹⁶ which accepts jurisdiction over the case.¹⁷ A separate but equally problematic category of case is where there is alleged to be an arbitration agreement which provides for arbitration overseas, but a party brings a case in a Chinese court nonetheless. This includes cases where the court decides that there is no valid arbitration clause, or that the arbitration clause is invalid for some reason such as fraud, resulting in concurrent proceedings if both the court case and the arbitration go ahead.¹⁸ Secondly, there is a non-exclusive jurisdiction clause or there is no agreement on jurisdiction and both parties bring – or propose to bring - proceedings in the courts of different countries, thus giving rise to an application for a court to refuse to take jurisdiction over the case.¹⁹ Often, both the Chinese and the foreign court clearly have

¹³ Civil Procedure Law, Articles 33 and 266.

¹⁴ *Civil Procedure Law*, Article 271.

¹⁵ 330 U.N.T.S. 38. See New York Convention website (2016), *List of Contracting States*, available at <<http://www.newyorkconvention.org/list-of-contracting-states>>.

¹⁶ See, for example, the United States cases of *Intercontinental Industries Corp. v. Wuhan State Owned Industrial Holdings Co., Ltd.*, 619 Fed. App'x 592 (9th Cir. 2015) (lower level court abused discretion when it enforced the Chinese forum selection clause despite allegations of fraud); *Jiangsu Hongyuan Pharmaceutical Co., Ltd. v DI Global Logistics v DI Global Logistics* No. 15-22306-CIV-GAYLES, 2016 WL 455347 (S.D. Florida, February 5, 2016 (Chinese forum selection clause enforced).

¹⁷ *Compania Sud Americana v Hin-Pro International Logistics Ltd* [2015] EWCA 401 (Civ) and related Chinese, English and Hong Kong cases (see below); *Impala Warehousing and Logistics (Shanghai) Co. Ltd v Wanxiang Resources (Singapore) Co. Ltd* [2015] EWHC 811 (Comm); *Morgan Stanley & Co International Plc v China Haisheng Jiuce Holdings Co. Ltd.* [2009] EWHC 2409 (Comm); *Spliethoff's Bevrachtingskantoor BV v Bank of China Limited* [2015] EWHC 999 (Comm). See also the United States and Chinese litigation in *Fellowes, Inc. v Changzhou Xinrui Fellowes Office Equipment Co. Ltd.*, No. 11 C 6289, 2012 WL 3544841 (N.D. Illinois E.D., Aug. 16, 2012), rev'd 759 F. 3d 787 (7th Cir. (III), 2014) on the basis that there was no international diversity jurisdiction, and *Changzhou Xinrui Fellowes Office Equipment Co. Ltd v Fellowes Inc.*, *guiding case on contracting contract dispute jurisdiction*, (2015) *Minshenzi* No. 978 (SPC).

¹⁸ See cases discussed below.

¹⁹ *Bankhaus Wolbern & Co (Ag & Co Kg) v China Construction Bank Corporation, Zhejiang Branch* [2012] EWHC 3285 (Comm).

concurrent jurisdiction over the case under their own rules. Examples here are admiralty cases where the jurisdiction arises from the presence of a ship within the jurisdiction of the maritime or admiralty court.²⁰

Potential problems include the issue of competing orders and awards; the grant by the court, Chinese or foreign, of interim orders or remedies in an attempt to delay or restrain the competing litigation and the enforceability of those orders overseas, and, ultimately, the enforceability of arbitral awards and foreign judgments.

This article focuses on a number of recent cases that highlight the issues that arise from overlapping court proceedings.

A Exclusive jurisdiction clauses and the litigation between Companie Sud Americana De Vapores S.A. (CSAV) and Hin-Pro International Logistics Ltd (Hin-Pro)

There are now a considerable number of cases involving parallel proceedings, generally in the maritime area, where a contract or transport document contains a clause choosing a governing law and agreeing on the exclusive jurisdiction of nominated courts (often English). The private international law issues arise when a Chinese court takes jurisdiction despite the existence (or alleged existence) of the exclusive jurisdiction clause. The CSAV/Hin-Pro litigation is an excellent example of this.

CSAV is a major international carrier, based in Chile. Hin-Pro is a Hong Kong company with operations in China which entered into a number of transactions with CSAV for the shipment of goods from various ports in China to Venezuela. The cargo was shipped in each case pursuant to approximately 70 straight (that is, non-transferable) bills of lading issued by CSAV on its standard form, which contains a clause providing for English law and jurisdiction. The dispute between the parties relates to numerous actions before the Maritime Courts of Wuhan, Guangzhou, Qingdao, Tianjin, Ningbo and Shanghai, in which Hin-Pro claimed that the cargoes had been released without the production of the original bill of lading. These cases were contested by CSAV both on the basis of the jurisdiction clause and the merits.

In 2012, Hin-Pro brought 5 cases against CSAV in the Wuhan Maritime Court. In English proceedings brought by CSAV,²¹ an interim injunction was issued restraining Hin-Pro from continuing the proceedings in any court other than the High Court of England and Wales. Subsequently, a contempt order was issued against the legal representative and sole director of Hin-Pro, together with a writ of sequestration against Hin-Pro, for breach of the injunction. Hin-Pro, in the meantime, notwithstanding the English court order, commenced proceedings in the Maritime Courts of Guangzhou, Qingdao, Tianjin, Ningbo and Shanghai. In late 2013, CSAV commenced proceedings in the Commercial Court in London seeking a declaration

²⁰ *Atlasnavios Navegacao, LDA v The Ship "Xin Tai Hai" (No 2)* [2012] FCA 1497 (Federal Court of Australia; Qingdao Maritime Court); *CMA CGM SA v Ship 'Chou Shan'* [2014] FCAFC 90 (Federal Court of Australia; Ningbo Maritime Court).

²¹ *Compania Sud Americana De Vapores S.A. v Hin-Pro International Logistics Limited* [2013] EWHC 987 (Comm); followed by: *Compania Sud Americana De Vapores S.A. v Hin-Pro International Logistics Limited* [2014] EWHC 3525 (Comm); *Compania Sud Americana De Vapores S.A. v Hin-Pro International Logistics Limited* [2014] EWHC 3632 (Comm); *Hin-Pro International Logistics Limited v. Compania Sud Americana De Vapores S.A.* [2015] EWCA Civ 401. Summary taken from the Court of Appeal decision at [2015] EWCA Civ 401, decision of Clarke LJ.

that Hin-Pro was obliged by the jurisdiction clause to pursue claims under the 70 bills of lading in England, damages and a permanent injunction ordering Hin-Pro to desist from the Chinese proceedings. An anti-suit injunction was issued against Hin-Pro,²² followed by a world-wide freezing order in June 2014. In May 2014, the Ningbo Maritime Court awarded Hin-Pro damages and legal costs, which were paid by CSAV.²³ In the meantime, CSAV had receivers appointed in Hong Kong and a freezing order issued in relation to Hin-Pro's assets. A permanent injunction was issued in England in 2014, together with an order that Hin-Pro discontinue the Chinese proceedings and repay CSAV all funds paid under the Chinese judgments by way of damages. Hin-Pro's appeal was rejected by the English Court of Appeal in 2015.

In the Chinese proceedings, CSAV argued that the Chinese courts did not have jurisdiction over the disputes as the bills of lading contained an exclusive jurisdiction clause nominating the English High Court. This argument was unsuccessful, with the decision of the Qingdao Maritime Court subsequently upheld by the Shandong People's High Court²⁴ and the decision of the Ningbo Maritime Court on jurisdictional grounds upheld by the Zhejiang People's High Court.²⁵ It appears that CSAV also proceeded to defend at least some of the Chinese cases on the merits, and succeeded in late 2015 in having the Ningbo judgments overturned on the merits by the Zhejiang High Court.²⁶

Actions were also brought in Hong Kong by CSAV in support of its case against Hin-Pro.²⁷ In March 2015, however, the Hong Kong Court of Appeal handed down a decision rejecting CSAV's applications for orders in support of the English anti-suit injunctions.²⁸ (Leave to appeal this decision has been given by the Court of Final Appeal.)²⁹ In a subsequent decision, Leung J enforced an order against Hin-Pro for costs in certain of the proceedings in England.³⁰

The legal issues under Chinese law which are highlighted by these cases relate to the jurisdiction of the Chinese courts in light of what was alleged to be an exclusive jurisdiction clause; the interpretation of the jurisdiction clause, and the ability (and willingness) of the Chinese court to refuse jurisdiction. Other issues which come out of this litigation include the efficacy of court orders issued in an attempt to deal with the parallel proceedings, the ability of the courts to enforce them and the practical steps which a party can take in order to deal with the issue of overlapping jurisdiction.

B. The Chinese approach to jurisdiction and jurisdiction clauses

²² Ibid.

²³ [2014] EWHC 3632 (Comm) 13

²⁴ *Hin-Pro International Logistics v Compania Sud Americana De Vapores S.A, case on maritime transport contract dispute* (2013) *Zheguan zongzi* Nos 135, 136,137, 138,139, 143, 145, 146.

²⁵ *Hin-Pro International Logistics v Compania Sud Americana De Vapores S.A.*, (2014) *lumen guan zongzi* No. 158.

²⁶ See *Compania Sud Americana De Vapores S.A. v Hin-Pro International Logistics Limited*; unrep. DCCJ3986/2014.

²⁷ *Compania Sud Americana De Vapores S.A. v Hin-Pro International Logistics Limited*; unrep. HCMP1449/2014; HCMP1932/2014; on appeal: CACV 243/2014 (reported in [2015] 2 HKLRD 458); 31 July 2015 (reported in [2015] 4 HKLRD 388); FAMV33/2015; *In the matter of Hin-Pro International Logistics Ltd* DCCJ3986/2014.

²⁸ Note 27, [2015] 2 HKLRD 458.

²⁹ Note 27, FAMV33/2015.

³⁰ Note 27, DCCJ3986/2014; 17 November 2015; leave to appeal to the Court of Appeal refused in June 2016 (HCMP 664/2016).

CSAV's jurisdiction clause read (in relevant part):

This Bill of Lading and any claim or dispute arising hereunder shall be subject to English law and the jurisdiction of the English High Court of Justice in London. If, notwithstanding the foregoing, any proceedings are commenced in another jurisdiction, such proceeding shall be referred to ordinary courts of law...

CSAV encountered two hurdles in China. The first was the question whether the Chinese court would take jurisdiction even if the clause was exclusive. The second was the question whether the clause was in fact exclusive.

Chinese law follows the civil law model by dealing with jurisdictional questions under the Civil Procedure Law, while choice of law is handled under a separate regulatory regime. These two legal regimes have developed - and are treated by the courts - separately.

Article 34 of the Civil Procedure Law now provides as follows:

Article 34 A party to a contract or other property dispute may choose by written agreement to be under the jurisdiction of the people's court in the location of the defendant's domicile, in the location where the contract is performed or signed, in the location of the plaintiff's domicile, in the location of the subject matter or in another location which has an actual connection [shiji lianxi] with the dispute, provided that the provisions on hierarchical jurisdiction and exclusive [mandatory] jurisdiction are not violated.³¹

This provision is extended to foreign-related disputes pursuant to Article 259. Pursuant to Article 33, the mandatory jurisdiction of the Chinese courts extends to real estate, harbour operations and questions of succession. In addition, in relation to foreign-related disputes, all cases in relation to performance of Chinese-foreign joint venture contracts or Chinese-foreign contracts for the exploration or exploitation of natural resources in China are subject to the mandatory jurisdiction of Chinese courts (Art 266).

Article 34 has its origins in Articles 25 and 244 of the 1991 Civil Procedure Law,³² which provided that parties to a foreign-related contract or property rights dispute could enter into a written agreement to submit the dispute to the jurisdiction of a court in a place with an actual connection to the dispute (defined in Article 25 as the courts of the place where the defendant or plaintiff had its domicile, where the contract was signed or is to be performed, or where the subject-matter of the contract is located). Article 25 of the 2007 version of the Civil Procedure Law³³ was in the same terms as the 1991 law, while Article 242 referred generally to an "actual connection" to the court nominated and the foreign-related dispute.

In 2005, the Supreme People's Court (SPC) gave further consideration to the issue of jurisdiction. The Minutes of the Second National Working Conference on the Trial of

³¹ In Chinese, the term *zhuan shu guanxia* is used to designate subject-matter where the Chinese courts are considered to have sole jurisdiction by law, and *paitaxing* refers to the exclusion of the jurisdiction of other courts. For the purposes of this article, I have used the term "mandatory" in relation to subject-matter jurisdiction.

³² Promulgated by the NPC on 9 April 1991.

³³ Promulgated by the Standing Committee of the NPC, 28 November 2007.

Foreign-related Commercial and Maritime Cases³⁴ reiterated the concept of actual connection but extended it slightly to include places of registration and business and possible additional factors.

In the 2012 Civil Procedure Law, there is no equivalent to Article 242, resulting in foreign-related disputes becoming subject to Article 34. An initial difficulty here is that Article 34 allows parties to submit to the jurisdiction of a people's court which, on its face, would prevent parties from nominating a court outside China.³⁵ The courts have continued, however, to apply the Article to foreign-related cases on the basis set out in the Minutes.

In 2015, the SPC issued a very comprehensive Interpretation of the Civil Procedure Law.³⁶ The Interpretation clarifies a number of points in relation to Article 34, making clear, for example, that a jurisdiction agreement must be entered into in the relevant contract or prior to litigation (Art 29).

Art 531 of the Interpretation provides that parties to disputes over foreign-related contracts or other property rights may enter into a written agreement selecting the following foreign-related courts as the competent court: a foreign court at the domicile of the defendant, in the place where the contract is performed or signed, at the domicile of the plaintiff, at the location of the contract subject-matter, at the place of infringement or in any other place that has an actual connection to the dispute. This provision thus reiterates the “actual connection” test in Article 34, but adds the concept of the place of infringement as a connecting factor.

Article 34 has been the subject of considerable litigation within China in the context of domestic agreements.³⁷ There also appear to be an increasing number of cases which involve foreign-related disputes, as discussed below.

I Approach of courts – procedural v substantive law

Article 34 is essentially a mechanism for the allocation of jurisdiction between domestic courts. It acknowledges the right of the parties to choose a domestic court, but only if that court would have jurisdiction over the dispute, determined on the basis of an actual connection. The private international law analysis, therefore, is that Article 34 presents a jurisdictional question, which is procedural and should therefore be decided under the law of the forum. Thus Chinese law as the law of the forum is applied in order to determine the validity or effectiveness (*xiaoli*) of the jurisdiction clause and the governing law of the contract is applied in relation to other aspects of validity and interpretation. One

³⁴ Issued by the SPC on 26 December 2005, *Fa Fa [2005] No 26*, Art 1(4). The Minutes are not binding, but are highly authoritative for lower level courts.

³⁵ See comments in B. CHENG, *Shewai xieyi guanxia gu shiji lianxi yuanze*, *China Law wenxue guan* 2012/06 [with English translation: Foreign-related Jurisdiction by Agreement and the Principle of Genuine Link].

³⁶ Note 4. The Legislation Law of the People's Republic of China, issued and effective 15 March 2015, Article 104, recognizes the ability of the SCP to issue interpretations on specific legal provisions, although they must be consistent with “legislative purposes, principles and intent.” The Law does not set out the status of the Interpretations but the courts see this as confirming that the SPC can issue interpretations which regulate the way in which courts will apply the law to which the interpretation relates.

³⁷ See, for example, *China Merchants Bank v. Huaibei Thermal Power Co. Ltd., Guangdong Jinhai Investment Co., Ltd. and Jinhai Holdings Ltd.*, SPC, (2013) min si zhong zi No. 49, cited and summarised in Q. HE, *Chronology of Practice: Chinese Practice in Private International Law in 2013*, *Chinese Journal of International Law* 2015. A quick search of the legal database in Westlaw China (which is comprehensive but not complete) on Article 34 found a total of 111 cases in which Article 34 was argued since 2010, most of which were domestic.

commentator³⁸ divides the legal aspects of jurisdiction clauses into two categories: matters which are legal requirements under the law (that is, the Civil Procedure Law) which must be satisfied before the case can be heard (procedural), and matters of establishment and invalidity of the jurisdiction clause (to be determined under the substantive law governing the contract). The first category includes the determination of whether the case fits the criteria, i.e., whether it is a contract or property rights dispute;³⁹ the scope of the nominated court (actual connection with the dispute); the form of the jurisdiction clause (written); the content of the agreement (whether it breaches hierarchical requirements of Chinese courts or mandatory jurisdiction requirements) and content requirements (whether the chosen court is clearly indicated).⁴⁰ In addition, it is clear from the approach taken by the courts that a determination must also be made as to whether the clause is exclusive or non-exclusive. This approach makes clear that the Chinese court must apply its own rules for the purpose of deciding whether the jurisdiction of the relevant Chinese court is excluded in favour of the designated court.⁴¹

In applying the provisions of Article 34 to foreign-related disputes, the court examines the choice of court provision, determines whether it is exclusive or non-exclusive and complies with the criteria (written agreement; civil or property related dispute) and whether there is an actual connection between the dispute and the place of the nominated court. Thus in 2015, the SPC confirmed that the Chinese courts did not have jurisdiction to hear a case where the parties had entered into an exclusive jurisdiction clause which referred disputes to the Federal Court of Illinois, Northern District, or Illinois Cook County Court. Illinois was the state in which the foreign party had its business and there was therefore an actual connection between the nominated court and the dispute.⁴² Similarly, in the 2015 *Decision in the Retrial Application in the Share Transfer Dispute between Xu Zhiming v Zhang Yi Hua*,⁴³ the SPC held that a contract between the two parties (both of whom appeared to be Chinese) to litigate disputes before a Mongolian court satisfied the criteria in Article 34 in relation to an “actual connection,” as the contract was signed in Mongolia, and Mongolia was the place in which the obligations under the contract were to be carried out.

II. *Exclusive v Non-exclusive*

One issue with the drafting of the jurisdiction provision throughout the various manifestations of the Civil Procedure Law and its related documents is that Article 34 and its equivalents do not make clear what the implications are if a party establishes that the parties have indeed agreed to the jurisdiction of a foreign court which satisfies the actual connection test. In a purely Chinese internal case, the application of Article 34 resolves the question of jurisdiction and case acceptance by directing the case to the appropriate Chinese court pursuant to Article

³⁸ C. ZHOU, Xieyi guanxia wenti yanjiu: dui <minshi susong fa> di 34 tiao he di 127 tiao di 2 tiao de jieshi [Research on Questions on Agreements on Jurisdiction: In relation to the interpretation of Article 34 and Article 127(2) of the Civil Procedure Law] 26(2) *Zhong Wai Faxue* [Peking University Law Journal] 458 (2014).

³⁹ The cases discussed in this article are all clearly contract or property disputes. It should, however, be noted that the category of foreign-related disputes which, under the Civil Procedure Law, can be referred to foreign courts is relatively narrow.

⁴⁰ Note 38, 463.

⁴¹ S. TANG, Effectiveness of Exclusive Jurisdiction Clauses in the Chinese Courts – A Pragmatic study, 61(2) *International and Comparative Law Quarterly* 459 (2012), p. 473 *et seq* cites a number of cases which suggest that a Chinese court has the discretion to take jurisdiction notwithstanding an exclusive jurisdiction clause and will, or may, do so, if enforcement can only be effected if the case is heard in China.

⁴² *Changzhou Xinrui Fellowes Office Equipment Co. Ltd v Fellowes Inc.* (note 17).

⁴³ (2015) *Min shen zi* No. 471.

127 of the Civil Procedure Law. In the case of a jurisdiction clause which refers the dispute to a place with an actual connection to the dispute, the case should presumably be directed to the foreign court on the basis that the Chinese court does not have jurisdiction over the case. Thus, in the two cases referred to above, the decision of the lower level court to refuse to accept the case was affirmed.⁴⁴ Neither the Civil Procedure Law nor the Interpretation refer to the concept of “exclusive jurisdiction” in relation to this question, but both the scholarly analysis and the cases proceed on the basis that the provision applies only if the jurisdiction clause is exclusive. Indeed, in the CSAV appeal from the Ningbo Maritime Court’s decision on jurisdictional grounds, the Zhejiang People’s High Court avoided the issue of whether there was an actual connection by construing the jurisdiction clause as non-exclusive.⁴⁵

III Choice of neutral third-party forum

Conceptually, a major issue with this approach is that it potentially excludes courts in neutral fora which have been nominated by the parties, even if there is a good reason for one party to do so (for example, to achieve consistency in the interpretation of its standard form (as in CSAV)), or both parties prefer to refer the dispute to a neutral forum, or a particular forum with expertise in a particular area of law. This is clearly not because the Chinese court needs to be satisfied that the case will be referred to a court which has jurisdiction over the dispute. The question is therefore whether a neutral location such as England or New York can have the required “actual connection” with the dispute.

In *Hin-Pro*, the Shandong High Court, on appeal from the Qingdao Maritime Court, agreed that there was no actual connection between the dispute and England.⁴⁶ Although the governing law was English law, the jurisdiction clause is independent of the contract; the question of jurisdiction is procedural and must be dealt with under the law of the forum.⁴⁷ It appears from the English judgment in *Impala Warehousing*⁴⁸ that the Shanghai No 1 People’s Intermediate Court (at first instance) reached a similar conclusion in relation to the exclusive jurisdiction clause nominating the English courts. Other cases in which the exclusive jurisdiction clause was ruled to be ineffective include a dispute between a Korean company and a Chinese company nominating the courts of Singapore;⁴⁹ a case involving a bill of lading for shipment from China to Baltimore nominating the courts of New York;⁵⁰ a bill of lading case relating to a shipment from China to Turkey nominating the courts in Genoa, Italy;⁵¹ and a case in which an Australian company successfully invalidated an exclusive

⁴⁴ Note, however, that Art 1(10) of the Minutes suggests that the court may have some discretion whether to enforce exclusive jurisdiction clauses and in a recently issued annual report of the Guangzhou Maritime Court, the court referred to the recognition of jurisdiction clauses under Article 34, “after taking into account equality, mutual benefit, parallel jurisdiction, convenience and other factors.” Guangzhou Maritime Court, Guangzhou Maritime Court Report on Trials 2013, available at < <http://www.gzhsfy.org/shownews.php?id=10597> > (English version). See also Tang (note 41).

⁴⁵ See note 24.

⁴⁶ Note 24.

⁴⁷ *Ibid.*

⁴⁸ Note 8. [2015] EWHC 811 [32] [33] per Blair J.

⁴⁹ *Shandong Jufeng Wanglao Co. Ltd. v Korea MGAME Co., third party Tianjin Fengyun Wanglao Technical Co. Ltd. Internet games agency and licensing contract jurisdictional objection appeal case* (MGAME) ((2009) SPC 50 Model Intellectual Property Cases, No. 44)

⁵⁰ *Ocean goods transport contract dispute between Shanghai Yanliu Goods Transport Agency Co. Ltd and Evergreen Marine (2011) Mintizi No. 301 (SPC)*

⁵¹ *Cangzhou Qiancheng Steel-Pipe Co, Ltd, Ye Thai International Freight Forwarders Ltd Tianjin Branch v Tabo Lai International Freight Forwarders (Shanghai) Co., Ltd., COSCO Container Lines Co., carriage of goods contract dispute case* [2014] Jin Hai Fa Shang Chu Zi No. 81-1 (Tianjin Maritime Court).

jurisdiction clause nominating the courts of England in a shipping contract with a Chinese company.⁵² This approach has been criticised by a number of Chinese commentators, on the basis that parties should have autonomy of the parties to choose the court which will hear their dispute.⁵³

The factors which are set out in Article 34 and the Interpretation refer to a tangible connection between the contract or the parties and the dispute. A long-standing issue, therefore, in cases where the parties have deliberately nominated a neutral third party court, is whether a connection with the nominated court can exist by virtue of the chosen governing law. This is a controversial question among Chinese scholars. The view of the SPC on this issue also seems to have changed over time.⁵⁴ On the “objective actual connection” view, there must be an objective external link between the chosen court and the dispute, such as the domicile of a party, place of signing or performance, place of infringement, place of shipment or destination and so on. Pursuant to the “choice of law” standard of connection, an actual connection is constituted by the practicability of selecting a court that can apply the applicable law. Thus in *Atlas Iron Ltd v China Railways Material Import & Export Co.*⁵⁵ it was argued that since the governing law to interpret the contract was English, it would be advantageous to have the English High Court monitor and apply the law, and this should constitute an actual connection for the purposes of Article 34. The Qingdao Maritime Court, however, took the view that this did not constitute an actual connection. This reflects the decision of the SPC in *Dongming Zhongyou Fuel Petrochemical Co Ltd v Delixy Energy Pte Ltd*,⁵⁶ which held that there was no connection between the dispute and England despite the choice of English law. The Commentary issued by the SPC on the Interpretation⁵⁷ also states specifically that governing law does not constitute an actual connection between the place of the court and the dispute.

In contrast, Article 3 of the Law of the PRC on the Application of Laws to Foreign-related Civil Relations states that parties may, in accordance with law, expressly choose the law applicable to foreign-related civil relations. Article 7 of the Interpretation of the SPC on the Law of the PRC on the Application of Laws to Foreign-related Civil Relations⁵⁸ states that the court shall not uphold an argument by a party that the selection of a governing law should be held to be ineffective on the basis that the law chosen by the parties has no actual connection (*shiji lianxi*) with the dispute. Under Article 532 of the Interpretation, one of the grounds for a Chinese court refusing to exercise jurisdiction on *forum non conveniens* grounds is the fact that the chosen law is foreign and therefore difficult for a Chinese court to administer, which suggests that the choice of governing law is indeed relevant to jurisdiction.

⁵² *Atlas Iron Ltd v China Railway Materials Import & Export Co. Ltd* (2015) *Qinghaifa haishang chuzi No. 25-1* (Qingdao Maritime Court). See also *Jilin Xinyuan Muye youxian Gongsi yu Ouhang (shanghai) guoji Huoyun Daili youxian gongsi Shanghai, Tonghai shuiyu Huowu yunshu hetong Jiufen Guanxia Dingyi an* [Case on a dispute relating to a water transport contract jurisdiction dispute] (2013) *mintizi No. 243* (SPC), in which the SPC applied the actual connection test to an exclusive jurisdiction clause nominating the Hong Kong courts.

⁵³ Note 35, p. 40.

⁵⁴ Cheng (note 35) cites an earlier case in which the SPC recognised a choice of Swiss law as constituting an actual connection between Switzerland and the dispute.

⁵⁵ Note 52.

⁵⁶ (2011) *zui gao renmin fayuan, mintizi No. 312*.

⁵⁷ D. SHEN, *Zui gao renmin fayuan, minshi susong fa sifa jieshi, lijie yusheyong, xia* [SPC, Civil Procedure Law Judicial Interpretation, Comprehension and Application, volume 2] People’s Court Press 2015 (Commentary).

⁵⁸ Note 5.

The SPC, in MGAME, however, made clear that there are two different tests to be applied:⁵⁹

“...an agreement selecting the applicable law and an agreement selecting the court with jurisdiction are two completely dissimilar forms of legal behaviour In relation to the validity of a clause choosing the court with jurisdiction, the decision must be made in accordance with the law of the forum; the reasoning of the decision of the original court that in relation to the agreement the jurisdiction clause must comply with the law of the country indicated by the governing law is wrong.”

IV Interpretation and incorporation

The question whether the rules of the forum or the putative proper law of a contract should be applied to determine whether a jurisdiction clause has been incorporated in a contract is a difficult issue regardless of the jurisdiction.⁶⁰ In the admiralty area, where multiple bills of lading, charter-parties and other documents tend to accumulate in the ordinary course of a ship's journey, the common law relating to the incorporation of jurisdiction and arbitration clauses in maritime documents has taken on its own distinct features.⁶¹ It is therefore not surprising that there are differences in outcome in cases in China and other jurisdictions in relation to the question of incorporation. There does not seem to be a clear legal resolution of this problem, although, in practical terms, clearer drafting and the specific incorporation of dispute resolution clauses would obviously be of assistance.

Tang comments that the Chinese cases do not on the whole address the question of which law should be applied to interpret a jurisdiction clause, although she considers that the better approach would be to apply the law governing the contract.⁶² Indeed, this would seem to follow from the comment of various courts that the choice of law and jurisdiction clause is independent of the main contract. However, since the courts consider that the determination on the effectiveness of the jurisdiction clause relates to the jurisdiction of the Chinese courts and is therefore procedural, Chinese courts appear in practice to construe the clause based on their own principles of interpretation.

This necessarily extends to the determination whether the clause is exclusive or not. Thus in the *Xu Zhiming* case, the SPC held that the clause in question was exclusive (without referring to the applicable law), because the contract did not say that the Mongolian courts had non-exclusive jurisdiction, the parties had agreed that an application could be made to seize assets of the Mongolian company, and thus it could not be inferred that the parties intended to allow other courts to hear the case.⁶³ In *Fellowes*, the SPC (again without citing principles of interpretation under the law of Illinois) cited the wording of the jurisdiction clause that the parties “shall” (spelled out in English) initiate any suit in the US Federal Court, Northern District, Eastern Division, or the Cook County Circuit Court of Illinois to hold that this set out the intention of the parties, did not contravene Chinese law, and therefore excluded the jurisdiction of the Chinese courts.⁶⁴ In *Hin-Pro*, the Zhejiang High

⁵⁹ Note 55 (case based on the 2007 Civil Procedure Law).

⁶⁰ See, for example, discussion in M.DAVIES/A.S.BELL/P.L.G. BRERETON, *Nygh's Conflict of Laws in Australia* (9th Ed), Australia 2014, p.151 *et seq.* S.C.SYMEONIDES, *What Law Governs Forum Selection Clauses*, *Oxford Commentaries on American law: Choice of Law*, Oxford 2016, p. 442.

⁶¹ M. ÖZDEL, *Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?* In M. CLARKE (Ed), *Maritime Law Evolving*, Oxford 2013, p. 181.

⁶² Tang, note 41, p. 463.

⁶³ Note 43.

⁶⁴ Note 17.

People's Court in *Hin-Pro*, stated – without referring to English law - that the parties did not say that a party could not sue in another court and the clause was therefore non-exclusive.⁶⁵ There is a marked contrast between the detailed review of the scope of the contested clause under English principles of construction in the English Court of Appeal decision, where the court looked in detail at the clause, its use and its context, and the terse one sentence addressed to the issue of exclusivity in the Zhejiang High Court.⁶⁶

A related question is the generally difficult issue of incorporation of jurisdiction clauses (and arbitration clauses) in a contract. In the dispute between *Impala* and *Wanxiang*, both the English and the Chinese courts⁶⁷ considered the question whether an exclusive jurisdiction clause had been incorporated in the contract between the parties through inclusion in *Impala's* standard terms and conditions, which were to be found online. On appeal, the Shanghai People's High Court concluded that “there was no evidence to prove that *Impala Shanghai* and *Wanxiang* had reached a consensus in respect of the jurisdiction clause.”⁶⁸ The English court, however, applied principles of interpretation under English law as “required by the applicable rules in this jurisdiction,” after considering the reasoning of the Shanghai court, to find that the jurisdiction clause was incorporated.⁶⁹ In the SPC decision in *Fellowes*, the SPC held that the exclusive jurisdiction clause providing for dispute resolution in the courts of Illinois was incorporated into the contract, but did not refer to the law of Illinois in forming this conclusion.⁷⁰

C Refusing jurisdiction – parallel proceedings and *forum non conveniens*

An important question in relation to jurisdiction is whether a party sued in a Chinese court can persuade the Chinese court not to exercise jurisdiction in a particular case. The Interpretation, in Article 533 (described in the Commentary as a rule to resolve questions on international parallel proceedings)⁷¹ provides that where both Chinese and foreign courts have jurisdiction over a case, and one party sues in the foreign court while the other party sues in a Chinese court, the Chinese court may nevertheless accept the case.⁷² After a judgment is rendered by the Chinese court, a foreign judgment will not be recognized in the Chinese court unless international treaties in which the countries of both parties participate or to which they are parties provide otherwise. However, where a judgment by a foreign court has been recognized by a Chinese court, the court cannot accept a case over the same dispute. The Commentary makes clear that this means that the question is not whether the Chinese court accepted the case before the foreign court, but whether the Chinese court rendered a judgment first.⁷³ The foreign judgment can only be given priority if it was recognized in

⁶⁵ Note 8.

⁶⁶ *Hin-Pro International Logistics Ltd. v Companie Sud Americana De Vapores S.A.* [2015] EWCA Civ 401. The fact that this was not a straight-forward question of construction can be seen from the fact that CSAV, the other parties and the court had proceeded in a previous case on the basis that a similar clause was in fact non-exclusive: *Import Export Metro Limited v CSAV* [2003] 1 Ll R 405 (stay refused on the basis that no facts were shown justifying departure from the bargain struck even under a non-exclusive jurisdiction clause).

⁶⁷ Note 8; [2015] EWHC 811 (Comm). (Comments on the Chinese cases are based on the summary in the English court decision.)

⁶⁸ *Id.*, [33].

⁶⁹ *Id.*, [106].

⁷⁰ Note 17.

⁷¹ Note 57, p. 1396.

⁷² This reiterates the terms of Article 306 of the 1992 Opinions on Certain Issues Concerning the Application of the Civil Procedure Law of the PRC, issued by the SPC on 14 July 1992; no longer in effect.

⁷³ Note 57, p. 1396.

China before the Chinese judgment was handed down.⁷⁴ In practice, because of the difficulty of obtaining recognition of a foreign judgment (discussed further below), the Chinese court is generally effectively under no obligation under this provision to refuse jurisdiction or terminate proceedings before it.⁷⁵

The use of the term “may accept the case” suggests that a Chinese court could decide not to take jurisdiction in such a case. Article 1(10) of the 2005 Minutes provides that the Chinese court should decide whether or not to accept the case in light of the actual circumstances. This was not incorporated in the Interpretation, however, and the Commentary states that, in accordance with the principle of judicial sovereignty,⁷⁶ Chinese courts will exercise jurisdiction in accordance with the stipulations of the Chinese Civil Procedure Law, and are not influenced by the question whether the foreign court has already taken jurisdiction over the case.⁷⁷ The Commentary also notes that the issue whether the courts are hearing the *same* dispute is a difficult question which should be considered and weighed in the course of the case pursuant to the many factors including the parties, the application for litigation, the facts and reasons. In summary, Chinese law provides no real encouragement or guidance to a court to refuse to hear a case on the basis that a foreign court is seized of the same matter or any assistance in a case which is not identical but which overlaps in significant respects. Thus in the Symantec litigation,⁷⁸ in which, following criminal proceedings in the United States, Symantec brought actions against a number of the same defendants in both the United States (US District Court for the Central District of California) and Shanghai, the Shanghai courts noted that there were parallel proceedings but stated that the court had jurisdiction under the 1992 SPC Opinion and could accept the case, particularly since the cases were not completely identical. In any event, on the basis of judicial sovereignty, which limits the scope of judgments to the territory of each court, Symantec could not enforce the US judgment in China in the absence of a reciprocal judicial assistance agreement. The defendant’s objection to jurisdiction therefore could not succeed.

Notwithstanding the civil law origins of Chinese civil law, the Chinese courts have developed a concept similar to *forum non conveniens* pursuant to which the Chinese court may refuse jurisdiction and despatch the case to a foreign court.⁷⁹ In the 2005 Minutes, the SPC set out the basic criteria for the refusal of jurisdiction over a case on the grounds of *forum non conveniens* (*bu fangbian fayuan yuanze*)(FNC). These grounds, with some changes, appear in Article 532 of the Interpretation. The Interpretation does not, however, refer to *forum non conveniens* and sets up a structure which is more analogous to the Hong Kong *forum*

⁷⁴ Note J. HUANG, *Interregional recognition and enforcement of civil and commercial judgments: lessons for China from US and EU law*, Oxford 2014, p. 117, states that a number of the bilateral treaties, as well the Arrangement between the Mainland and the Macau Special Administration Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments, provide that recognition can be refused if there are ongoing proceedings in the home court which commenced prior to the date of the judgment for which enforcement is sought.

⁷⁵ G. TU, *Private International Law in China* Singapore, 2015 p. 133, states that “one cannot find any rule in Chinese law that can generally authorize a Chinese court to discretionarily transfer a case over which it has jurisdiction to another court, whether in a domestic or international context.”

⁷⁶ Note 57, p. 1396

⁷⁷ See also cases cited by Tu (note 75) in relation to the firm view taken by Chinese courts on *lis pendens*.

⁷⁸ *Symantec Co. Ltd. V Ma Jingyi, Li Xi and Wang Xiaodong; computer software infringement dispute appeal case* (2011) *hugaomin san (zhi) zongzi* No. 88 (Shanghai People’s High Court). For a summary of the facts, see Y. YOU, *Symantec Corporation Uses both Criminal and Civil Methods to Defeat Piracy in China*, Bridge IP Law Commentary, 9 April 2014, < <http://www.chinaiplawyer.com/symantec-corporation-uses-criminal-civil-methods-defeat-piracy-china/>>.

⁷⁹ G. TU, *Forum Non Conveniens in the People’s Republic of China*, 11 *Chinese JIL* 341.

conveniens test. Under Article 532, a Chinese court may dismiss a foreign-related case and direct the plaintiff to a more convenient foreign court if (i) the defendant requests that the case be heard by a more convenient foreign court or objects to jurisdiction; (ii) there is no choice of court agreement selecting a Chinese court; (iii) the case does not involve the mandatory jurisdiction of the Chinese courts; (iv) the case does involve Chinese national interests (added by the Interpretation), the interests of Chinese citizens, legal persons or other organisations; (v) the important facts in the dispute did not occur in China and Chinese law is not applicable, and a Chinese court accepting the case would have great difficulty in determining the facts and applying the law and (vi) a foreign court has jurisdiction over the case and it would be more convenient for that court to hear the case. The decision of the Chinese court to reject the case and inform the parties that they should sue in a more convenient foreign court is discretionary, but may be made only if all of the criteria above are satisfied.

The Commentary notes that the concept does not come from Chinese civil law, but is a principle of English and American civil procedure.⁸⁰ The Commentary's explanation and comments on issues for courts to pay attention to, strike a note of caution, emphasising that the use of FNC should be strictly limited although it can be used at an appropriate time. It stresses that the approach of some courts in seeking to avoid taking jurisdiction when the use of foreign law is difficult is in error, and reiterates that all criteria must be satisfied and the use of the discretion to refuse jurisdiction should not be used indiscriminately.

Studies on the use of the doctrine of *forum non conveniens* in Chinese cases suggest that although FNC is often raised, it is rare that a Chinese court sends a case to a foreign court on *forum non conveniens* grounds.⁸¹ The requirement that the case cannot involve the interests of China, a Chinese citizen, legal person or organisation is potentially a major bar to the use of the provision, as the domicile of a party in China does appear to be highly relevant to a decision to retain jurisdiction.

Neither the Interpretation nor the Commentary spell out what factors are relevant in terms of determining convenience, but since the doctrine cannot be utilized if Chinese law applies and the difficulty of applying foreign law is a factor for the court in refusing the case, the applicable governing law is clearly a relevant factor. The existence of a non-exclusive jurisdiction clause referring to a foreign court does not appear to be significant, although FNC would not apply if there were a jurisdiction clause (exclusive or non-exclusive) nominating a Chinese court.⁸² Another factor is the difficulty for a party of enforcing a foreign judgment in China.⁸³ The existence of ongoing foreign litigation, however, does not seem to be relevant. In a recent case (*Beijing Dishu Law Firm and Century Acquisition Corporation v Chinachem Financial Services Ltd.*), the SPC stated that the fact that a foreign court (in this case, a Hong Kong court) had accepted the case or rendered a judgment did not influence the Chinese court. However, in ruling whether or not to accept the case the court must look at concrete circumstances, including FNC factors. In *Chinachem*, the SPC considered the fact that the place of performance and the facts giving rise to the dispute were in China and distrainable assets were in China. Having a domestic Chinese court exercise jurisdiction, the court said, would be more advantageous in reaching the civil procedure objective of a timely judgment in the case and the lawful interests of the parties. Similarly,

⁸⁰ Note 57, p. 1394.

⁸¹ Tu, note 79.

⁸² Tu, note 75, p. 149.

⁸³ Tu, note 79.

the fact that Hong Kong law was the applicable law, some of the documents were in English and witnesses might be located in Hong Kong, were not sufficient factors to make a Chinese court substantially and clearly inconvenient. The arguments on parallel proceedings and forum non conveniens were therefore not a sufficient reason for the original court to refuse to take jurisdiction.⁸⁴

The cases, when combined with the narrow scope of the provisions, thus strongly suggest that Chinese courts are likely to apply FNC only in cases where the parties and the case have very little connection with China.⁸⁵ Tu describes this as a “clearly inappropriate forum” test.⁸⁶

In terms of cross-border and international litigation, the Chinese adoption of FNC represents an important step forward. However, the limited scope for Chinese courts to refuse jurisdiction, when combined with the restrictive provisions relating to parallel proceedings, suggests that in its present form it is unlikely to have a major impact on the problem of overlapping proceedings.

The essence of *forum non conveniens* in common law (and Chinese) courts is that it is a unilateral formulation applied by the court in deciding whether or not to hear a case over which it has jurisdiction.⁸⁷ Thus although there have been a number of cases before common law courts (both successful and unsuccessful) where a party in the case has attempted to persuade the foreign court to stay or dismiss the proceedings before it on the basis that the case should be heard by a Chinese court, the principles to be applied differ from jurisdiction to jurisdiction, and do not mirror the principles applied by the Chinese courts. In particular, the emphasis placed by Chinese courts on the domicile of a party in China, when combined with the Chinese approach to parallel proceedings, means that the Chinese approach is unlikely to be reflected in a foreign court decision even where the foreign court takes a balancing approach in considering whether to refuse jurisdiction. This can easily result in both courts concluding that they should continue to hear the case.⁸⁸

For example, when the Chinachem case referred to above came before the Hong Kong court, it was submitted to the Hong Kong court that in its decision in the Chinese proceedings, the SPC “had weighed up the connecting factors...and had made [a] final decision on the issue of forum non conveniens by favouring the PRC courts, so it must be implicit in such decision that the Hong Kong courts were less convenient.”⁸⁹ Ng J took the view that the SPC judgment did not constitute a final and conclusive judgment on the question whether the

⁸⁴ (2014) Minsi zongzi No. 29.

⁸⁵ Tu, note 79, p. 359.

⁸⁶ This should not be confused with the Australian “clearly inappropriate forum” test. See discussion in Nygh, note 60, p. 186 *et seq.*

⁸⁷ Contrast efforts to deal with this issue through bilateral or multilateral means, such as (in the European Union), the Brussels Regulation Recast, which generally favours the court with jurisdiction first seized in a case and, as between Australia and New Zealand, the Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement [2013] ATS 32, Article 8 of which imposes a “more appropriate court” test.

⁸⁸ See *Morgan Stanley & Co International Plc v China Haisheng Jiuce Holdings Co. Ltd.* [2009] EWHC 2409 (Comm), [37 per Teare J (“doubtful that a careful weighing of “*forum conveniens*” factors will now constitute a strong reason for not enforcing an exclusive jurisdiction clause”); *Bankhaus Wolbern & Co (Ag & Co Kg) & Anor. v China Construction Bank Corporation, Zhejiang Branch* [2012] EWHC 3285 (Comm)[16] per Field J (in light of the non-exclusive jurisdiction clause CCB cannot assert that the process of litigating in England rather than in China is unjustly inconvenient”).

⁸⁹ *Chinachem Financial Services Ltd v Century Venture Holdings Ltd* HCA 410/2013 [69] (8 January 2015; leave to appeal refused 21 April 2015).

Hong Kong action should be litigated in Hong Kong or a decision that the Hong Kong courts were an inappropriate forum. The judge applied the Hong Kong *forum conveniens* test, which requires the defendant to show that China was overall a more appropriate forum for the proceedings than Hong Kong and concluded that the defendant had failed to present arguments (including the existence of parallel proceedings) which outweighed the importance of holding the parties to the bargain agreed to in the non-exclusive jurisdiction clause pursuant to which the plaintiff commenced litigation in Hong Kong.⁹⁰

In the Australian cases of *Atlasnavios Navegacao, LDA v The Ship "Xin Tai Hai" (No 2)*⁹¹ (a case involving a collision between two ships in the Straits of Malacca) and *CMA CGM SA v Ship 'Chou Shan'*,⁹² an admiralty case arising from a collision in the Chinese EEZ, in which the courts of both Australia and China had jurisdiction over their own rules, the Federal Court of Australia applied its own rules (which involve a complex analysis to determine whether the foreign (or local) proceedings are vexatious or oppressive)⁹³ in order to determine whether the Australian forum was clearly inappropriate, deciding in one case to keep jurisdiction and in the other to refuse jurisdiction on the basis that the Federal Court was a clearly inappropriate forum for the case. In neither case did the Chinese court refuse to take jurisdiction. In the appeal case in *Chou Shan*, the Zhejiang High People's Court referred to Art 306 of the 1992 Opinion and the fact that China was not a party to the relevant international conventions and did not have a bilateral agreement with Australia, to support the trial court's decision to accept jurisdiction in relation to the case notwithstanding the Australian litigation.⁹⁴

The United States federal and state courts apply a balancing test to the question of *forum non conveniens*, and there are a number of cases in which a party has attempted to persuade a US court to dismiss a case in favour of a Chinese court on *forum non conveniens* grounds.⁹⁵ Amongst these are a number of cases in which a Chinese party pursued the United States defendant to the United States, and the US defendant then argued that China would be a more convenient forum. In *Jiangsu Hongyuan Pharmaceutical Co., Ltd v DI Global Logistics Inc.*,⁹⁶ for example, the defendant, a Florida distributor successfully argued, on the basis of an exclusive jurisdiction clause nominating China as the forum for all disputes and *forum non conveniens* principles, that the case by the Chinese manufacturer should be dismissed, notwithstanding Hongyuan's arguments both that the Chinese courts constituted an inadequate forum and that it would be practically very difficult to enforce a judgment against DI Global in China, where it had no assets. A similar decision was made in *Niburutech Ltd v Andrew Jang*,⁹⁷ where a Chinese plaintiff brought an action in California against a Californian defendant.⁹⁸

⁹⁰ Id, [101] et seq per Ng J.

⁹¹ [2012] FCA 1497

⁹² [2014] FCAFC 90 on appeal from *CMA CGM v Ship 'Chou Shan'* [2014] FCA 74.

⁹³ *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 401 per Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

⁹⁴ *Rockwell Shipping Co and CMA Ferries Ltd (owner of Provence 2008-ltd) ship collision damage compensation dispute, second instance civil ruling* [2013] zhe guan zongzi No. 118.

⁹⁵ See, for example, *Sinochem Int'l Co., Ltd v Malaysia Int'l Shipping Co.*, 549 U.S. 422 (2007) . This paper does not go into the complex rules or reasoning related to *forum non conveniens* in United States federal and state courts.

⁹⁶ Note 16.

⁹⁷ 75 F. Supp. 3d 1076 (N.D. California 2015).

⁹⁸ See, however, *BP Chemicals v Jiangsu Sopo Corporation (Group) Limited* 429 F.Supp.2d 1179 (E.D.Mo.2006).

This highlights the fact that there are a number of models on which Chinese policy-makers could draw in drafting rules on refusing jurisdiction. The present formulation of FNC is, however, likely to be of only limited assistance in resolving issues of parallel proceedings.

D Enforcement of foreign judgments in China

Recognition and enforcement of foreign judgments in China has for many years presented major problems for parties in China-related litigation. There were no significant modifications or improvements in the 2012 Civil Procedure Law or the Interpretation. Recognition and enforcement is essentially tied to the existence of a judicial assistance agreement between China and the relevant state. According to Tu, China has entered into more than 30 treaties for, or including civil and commercial matters, including treaties with civil law countries such as France, Argentina, Spain, Tunisia, Poland and Cuba, of which 20 or so include provisions for the reciprocal enforcement of judgments.⁹⁹ Studies suggest that the Chinese courts take a very strict view of the formalities of service as a pre-condition for recognition, which casts doubt on the efficacy of these agreements in practice. Zhang comments, for example, that the insistence of the Chinese courts on the strict satisfaction of a requirement for “due service” has resulted in a refusal to recognize foreign judgments even in cases where recognition and enforcement should be possible under a bilateral judicial assistance agreement.¹⁰⁰ China has not signed the Hague Convention on Choice of Courts Agreements,¹⁰¹ which provides for the enforcement of judgments made as a result of an exclusive jurisdiction clause. Indeed, to do so, would require substantial changes to its current approach to jurisdiction clauses.

China also has regional agreements and/or legislation providing for the enforcement of judgments in and from Hong Kong, Macau and Taiwan. These are based on different criteria to each other, and have had different degrees of success.¹⁰² The China-Hong Kong Agreement¹⁰³ provides for recognition and enforcement of judgments for the payment of money in civil and commercial cases given pursuant to a written exclusive jurisdiction clause. There appear to be very few cases in which a judgment has been recognized in Hong Kong or China under the agreement.¹⁰⁴ In the case of Taiwan, the 2015 Provisions of the Supreme People’s Court on the Recognition and Enforcement of Civil Judgments Rendered by Courts in the Taiwan Region¹⁰⁵ provide for recognition and enforcement of civil judgments, with

⁹⁹ Tu, note 75, p. 175 *et seq.* See also Ministry of Justice Department of Judicial Assistance and Foreign Affairs (sifabu sifa xiezhu yu waishi si), sifa xiezhu tiaoyue (list of judicial assistance treaties), 2015, <http://www.moj.gov.cn/sfxzws/node_219.htm>. According to Linklaters, International Comparative Law Guide, Enforcement of Foreign Judgments 2016 <<http://www.iclg.co.uk/practice-areas/enforcement-of-foreign-judgments/enforcement-of-foreign-judgments-2016/china>>, there are currently 36 bilateral judicial assistance treaties relating to civil matters.

¹⁰⁰ W. ZHANG, Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention to Both the “Due Service Requirement” and the “Principle of Reciprocity,” 12(1) *Chinese Journal of International Law* (2013), p. 143.

¹⁰¹ 30 June 2005, 44 I.L.M. 1294. The Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned, signed in Hong Kong on 14 July 2006 (China-Hong Kong Agreement) draws heavily on the Choice of Courts Agreement.

¹⁰² See discussion in Huang, note 74.

¹⁰³ Note 101.

¹⁰⁴ See G. JOHNSTON, *The Conflict of Laws in Hong Kong* (2nd Ed), Hong Kong 2012, p. 660. See, however, *Wu Zuocheng et al v Allat Holding Company Limited et al*, HCMP 2080/2015 and *The Export-Import Bank of China v Liu Qingping* HMCP 1684/2015 (application for interim relief in support of an application for registration).

¹⁰⁵ Issued 29 June, 2015 and effective 1 July 2015; *Fa Shi* [2015] No. 13.

limited defences related mainly to procedural failures or conflicts with arbitral awards or foreign judgments on the same case. However, the other party to the case can forestall recognition by commencing proceedings in China at any time before the application for recognition is lodged (Art 11). As is the case with foreign proceedings generally under the Civil Procedure Law and the Interpretation, therefore, enforcement options are limited.

For countries which do not have such agreements, enforcement of a foreign judgment by a Chinese court is predicated on the existence of reciprocity in relation to enforcement between China and the foreign state where the judgment was rendered. Satisfying the Chinese court that there is reciprocity is generally agreed to be very difficult.¹⁰⁶ It is thought that Chinese courts will consider that there is reciprocity only if a court of the state has already recognized or enforced a Chinese court judgment, although instances of them doing so appear to be rare.¹⁰⁷ In a number of the cases cited in this article, the Chinese court simply notes that there is no bilateral agreement and does not consider the question of possible reciprocity at all.

Overseas courts, however, often do not require reciprocity before recognizing foreign judgments and there appears to be an increased readiness of overseas courts to enforce Chinese judgments which could potentially result in the satisfaction of the reciprocity requirement. Thus in *Splietoff's Bevrachtingskantoor v Bank of China Ltd.*¹⁰⁸ the Chinese judgment was recognised by the English court. Chinese judgments have also recognized and held to be enforceable in several states of the United States, Singapore, New Zealand and Germany,¹⁰⁹ under common law principles or the relevant legislation.

The general difficulty in obtaining recognition and enforcement of foreign judgments extends to the role which the findings of fact and evidence in foreign litigation can play in Chinese cases. In practice, the presentation of foreign judgments as evidence of facts appears to be very difficult.¹¹⁰ In a recent well-publicised decision of the SPC,¹¹¹ however, the court upheld a judgment of the Jiangsu High People's Court in which the court had accepted as new evidence a judgment of the South Korean courts. In response to an argument that this constituted an improper recognition of a foreign judgment, the SPC ruled that the Jiangsu court was right to accept it as new evidence, it had not recognized the judgment and there was no breach of procedural rules because the court had comprehensively considered all of the evidence. In a recent decision of the Beijing People's High Court,¹¹² the court held that

¹⁰⁶ Tu, note 75, p. 170, states that there appear to be no example of cases where the Chinese courts have decided that reciprocity exists between China and the foreign state where the judgment was rendered.

¹⁰⁷ Tu, note 75, pp. 171 and 172.

¹⁰⁸ [2015] EWHC 999 (Comm), per Carr J.

¹⁰⁹ *Hubei Gezhouba Sanlian Industrial Co. Ltd. v. Robinson Helicopter Co., Inc.*, No. 2:06-cv-01798-FMC.SSx, 2009 WL2190187 (C.D.Cal. 22 July 2009) and *Hubei Gezhouba Sanlian Indus., Co., Ltd. v. Robinson Helicopter Co., Inc.*, 425 Fed. App'x. 580 (9th Cir. 29 March 2011); *Global Material Technologies v Dazheng Metal Fibre* No. 12 CV 1851, 2015 WL 1977527 (N.D. Illinois E.D. May 1, 2015); *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2014] SGHC 16; *Chen v Lin* [2014] NZHC 1727; *German Zublin International Co. Ltd versus Wuxi Walker General Engineering Rubber Co., Ltd.* 18 May 2006, document number: 20 S ch 13/04 (Court of Appeal, Berlin)

¹¹⁰ See *Sompote Saengduncha, Chaiyo Productions Co., Ltd. v. Tsuburaya Productions Co.*

Ltd., Shanghai Yugu Planning Co. Ltd., et al (2011) *min shen zi* No. 259, cited in summarised in He, note 37.

¹¹¹ *WooshinmtCo v Fusheng Guangdian (Wujiang) Company Limited*, (2013) *minshenzi* No. 2360.

Summarized Chen, Ivy, "Case of the Day: WooshinmtCo v Fu Sheng Optoelectronics," 13 January 2015, Letters Blogatory, <<https://lettersblogatory.com/?s=WoshinmtCo>>.

¹¹² *Shewen Ruizhi (Beijing) Guoji Jiaoyu Keji Youxian Gongsu yu Tianjin Jushe Wenhua tushu Xiaoshou youxian Gongsu, Wuhan Chuban She, Fangyuan Dianzi Yinxiang Chubanshe Youxian Zeren Gongsu, Wanjuan*

although in the absence of formal recognition and enforcement a Korean judgment could not be directly used as evidence of the facts in the case, where the parties approved the foreign court's decision, the decision could be confirmed as the parties' self-recognized evidence on the facts. Otherwise, however, there is little suggestion that Chinese courts take into account the decisions of foreign courts.

As a matter of practice, Chinese court decisions tend to be brief, and have not in the past included detailed findings of fact, or explanations of holdings on law, although this appears to be changing, particularly in appeal courts. This would increase the difficulty for foreign courts in applying Chinese decisions, should they be prepared to do so. In principle, however, there is no reason why foreign courts should not treat Chinese judgments as *res judicata*, if they are prepared to enforce the judgments under statute or common law principles. The Hong Kong Mainland Judgments (Reciprocal Enforcement) Ordinance,¹¹³ for example, specifically provides that nothing in the Ordinance prevents a Hong Kong court from recognizing a Chinese judgment as conclusive of any matter of fact or law decided in the judgment if that judgment would be recognized as conclusive under the common law.¹¹⁴ In the recent case of *First Laser Limited v Fujian Enterprises (Holdings) Company Limited*,¹¹⁵ the Hong Kong Court of Final Appeal held that the decision of the SPC on the governing law and validity of the contested agreements was final and conclusive, on the merits and between the same parties and therefore created an issue estoppel under the common law preventing the appellant from contesting these issues again before the Hong Kong court.¹¹⁶ This contrasts with the reluctance of Chinese courts to give similar credence to the decisions of foreign courts.

III Dealing with conflicting proceedings

A party which finds itself embroiled in overlapping legal cases has some options: it may attempt to stop the party pursuing the Chinese litigation, either by seeking to persuade the Chinese court not to take the case, or by seeking an anti-suit injunction or other order from a foreign court aimed at restraining the other party from pursuing the Chinese proceedings. In the case of the English courts, although anti-suit injunctions are no longer available within the European Union,¹¹⁷ they are still available and have been quite extensively sought in relation to Chinese litigation.¹¹⁸

Chuban youxian Zeren Gongsi, Liong ning Dianzi Chubanshe youxian Zeren Gonsie deng qinhai zhaozuo jiuufenan, (2015) *gaomin (zhi) zongzi* No. 1072.

¹¹³ Cap 597, s16 (3).

¹¹⁴ There are no similar provisions in the China-Hong Kong Agreement, note 101.

¹¹⁵ (2015) 15 HKCFAR 569. See also Johnston, note 104, p. 664.

¹¹⁶ Contrast the position of the Taiwanese courts, which will enforce Chinese awards and judgments, but does not give them *res judicata* effect. H. CHEN, Enforcement of Chinese judgments and arbitral awards in Taiwan: the *res judicata* problem, 6 May 2015 < <http://www.winklerpartners.com/?p=6218>>.

¹¹⁷ Y. FARAH AND S. HOURANI, Frustrated at the interface between court, litigation and arbitration? Don't blame it on Brussels I! Finding reason in the decision of *West Tankers*, and the recast Brussels I, in P. STONE AND Y. FARAH (Eds), *Research handbook on EU private international law*, Cheltenham, 2015, p. 116.

¹¹⁸ For example, *Impala Warehousing and Logistics (Shanghai) Co Ltd v Wanxiang Resources (Singapore) Pte Ltd* [2015] EWHC 811; *Splietoff's Bevrachtungskantoor (note 121)*; *Southport Success SA v Tsingshan Holding Group Co Ltd* [2015] EWHC 1974; *Crescendo Maritime Co & anor v Bank of Communications Company Ltd* [2015] EWHC 3364; *Hin-Pro International Logistics Ltd v Compania Sud Americana De Vapores S.A.* [2015] EWCA Civ 401 and related litigation; *Beijing Jianlong Heavy Industry Group v (1) Golden Ocean Group Limited 2) Golden Zhejiang Inc (3) Ship Finance International Limited & Anor.* [2013] EWHC 1063 (Comm)

Requests for anti-suit injunctions to restrain a party from proceeding with parallel litigation in China, or from breaching an arbitration clause, have been granted by a range of courts in addition to the English courts. In Australia, the Federal Court of Australia in *Atlasnavios*¹¹⁹ granted an anti-suit injunction to restrain the defendant from proceeding with a case relating to the collision in question before the Qingdao Maritime Court. In Hong Kong, anti-suit injunctions are rarely issued, particularly in Chinese-related proceedings.¹²⁰ In *Liaoyang Shunfeng Iron and Steels Co Ltd v Sunny Growth Enterprises Group Ltd*,¹²¹ however, the Court of Appeal did grant an anti-suit injunction restraining the defendant from pursuing proceedings in the Liaoning High People's Court, which was followed by a contempt order for breach of the injunction.¹²²

Successful applications for anti-suit injunctions or other orders in respect of Chinese litigation have also been made in the United States.¹²³ In *Eastman Kodak Co. v Asia Optical Co. Inc.*,¹²⁴ an injunction was issued restraining the defendant from pursuing proceedings in China the purpose of which was to recover damages awarded against the defendant in a previous US case. In *Vringo, Inc. v ZTE Corporation*¹²⁵ a prohibitory injunction was issued enjoining ZTE (which had brought proceedings against Vringo in Shenzhen) from disclosing confidential information in current or pending litigation in breach of a Non-Disclosure Agreement between the parties.

Notwithstanding the number of anti-suit injunctions which have recently been issued in relation to Chinese proceedings, it is a remedy which the common law courts are – at least in theory – reluctant to apply. It may be refused under English law, for example, in cases of delay¹²⁶ or in the absence of a strongly arguable case.¹²⁷ Other remedies may however be available to a party aggrieved by the decision of a party to commence a case in China and the decision of the Chinese court to take a case in breach of an exclusive jurisdiction clause in the form of damages for breach of the exclusive jurisdiction clause or the arbitration clause. In *Hin-Pro*, for example, CSAV promptly paid the damages awarded against it by the Ningbo Maritime Court. It then obtained from the English court a judgment for this full amount as

(anti-suit orders issued by an arbitral tribunal in respect of Chinese litigation); *Niagara Maritime SA v Tianjin Iron & Steel Group Company Ltd* [2011] EWHC 3035.

¹¹⁹ *Atlasnavios Navegacao, LDA v The Ship "Xin Tai Hai"* [2012] FCA 715.

¹²⁰ Johnston, note 104, p. 135. Applications refused in *Chan Shu Chun v Right Margin Ltd* [2015] 3 HKLRD 409 and *Zhang Xiuhong v Liu Wenchen* HCA2118/2012.

¹²¹ CACV 234/2011 (15 March 2013).

¹²² *Liaoyang Shunfeng Iron and Steel Co. Ltd & anor v Sunny Growth Enterprises Group Ltd & anor* HCMP667/2013 (15 May 2013)

¹²³ The criteria for the issuance of an anti-suit injunction vary across the different common law jurisdictions. No attempt has been made to summarize or discuss the bases on which such an injunction or otherwise interim measure will be granted by the courts of the different jurisdictions.

¹²⁴ 118 F.Supp.3d 581 (2015).

¹²⁵ 2015 WL3498634, US District Court, S.D. New York (prohibitory injunction in relation to disclosure of information covered by a Non-disclosure Agreement in pending or future litigation); but also see *TSMC North America v Semiconductor Mfg. Intern. Corp.* 161 Cal.App.4th 581 (2008) (state court) (anti-suit injunction refused on the basis that "protection of the California trial court's jurisdiction and effectiveness of rulings did not constitute exceptional circumstances").

¹²⁶ See *Essar Shipping Ltd v Bank of China Ltd* [2015] EWHC 3266; followed in Hong Kong in *Sea Powerful II Special Maritime Enterprises (ENE) v Bank of China Ltd*. HCMP 2399/2015 (12 January 2016), per Chan J. (application for anti-suit injunction in respect of proceedings before Qingdao Maritime Court allegedly in breach of an arbitration clause); appeal dismissed by Court of Appeal, CACV36/2016.

¹²⁷ *Transfield Shipping Inc v Chipping Xinfa Huayu Alumina Co Ltd* [2009] EHC 3629.

damages.¹²⁸ The remedy of damages for breach of an exclusive jurisdiction clause is not, however, a remedy which is universally available and such an award would not be enforceable in China, as discussed above.¹²⁹

A major issue with injunctions and orders issued by a foreign court in respect of Chinese proceedings is effectiveness. An anti-suit injunction is of course limited in jurisdictional effect to the jurisdiction of the issuing court. The theory behind the issue of an anti-suit injunction, therefore, is that the party will comply with an order of the court. In the case of *Hin-Pro* and *CSAV*, *CSAV* obtained an anti-suit injunction, a judgment from the English court including these amounts as damages recoverable from *Hin-Pro*, and a range of protective orders - with which *Hin-Pro* did not – at least initially - comply. *Hin-Pro* is a Hong Kong company which apparently does not have assets in England; the officer against whom contempt orders were made has not ventured into England and *Hin-Pro* did not withdraw its Chinese proceedings. The process of dealing with *Hin-Pro*'s Chinese litigation through the English and Hong Kong courts has been a long and expensive one.

In *Crescendo Maritime Co v Bank of Communications Company Limited/ Alpha Bank A. E. v Bank of Communications Company Limited*,¹³⁰ an argument was made to Tier J that an anti-suit injunction (ordering the Bank not to proceed with litigation before the Qingdao Maritime Court instituted in breach of an arbitration agreement) would not be useful because foreign judgments are very difficult to enforce in China. He responded that it was indeed useful because the Bank could be expected to comply with the order and had in fact complied with earlier orders of the court.¹³¹ It appears, however, that the bank did not comply with the order, as, when an action for enforcement was brought before the United States District Court, Southern District New York,¹³² the Bank of Communications argued (unsuccessfully) that China would be a more appropriate forum for the proceedings because the Bank was pursuing related fraud claims against *Crescendo* in the Qingdao Maritime Court – presumably the same proceedings in respect of which the anti-suit injunction had been granted. The US court noted, in fact, that the status of that action was in doubt, due to the issue of the permanent anti-suit injunction.¹³³

In *Impala Warehousing*, the argument was strongly pressed that an English judgment would not be enforceable in China and this was a strong ground for not issuing an anti-suit injunction. The judge, however, concluded that since both parties were members of major international commercial groups, both of which are aware of the importance of dispute resolution clauses and could be expected to be aware of difficulties with enforcement when the clause was entered into, an anti-suit injunction should nevertheless be granted.¹³⁴

¹²⁸ *Compania Sud Americana De Vapores S.A. v Hin-Pro International Logistics Ltd* [2014] EWHC 3632, per Cooke J; confirmed by the decision of the Court of Appeal in *Hin-Pro International Logistics Ltd v. Compania Sud Americana De Vapores S.A.* [2015] EWCA Civ 401. See also *Essar Shipping*, note 126 [76] per Walker J (applicant for anti-suit injunction for breach of arbitration agreement refused on basis of delay; plaintiff “left to its claim in damages”).

¹²⁹ A. DINELLI, *The Limits on the Remedy of Damages for Breach of Jurisdiction Agreements: The Law of Contract Meets Private International Law*, 38 *Melbourne University LR* 1023 (2015).

¹³⁰ [2015] EWHC 3364 (Comm) [53].

¹³¹ *Ibid.*

¹³² *Crescendo Maritime Co. v Bank of Communications Co. Ltd* Case 2016 A.M.C. 679 (S.D.N.Y.).

¹³³ *Ibid.*

¹³⁴ Note 8, [142] per Blair J.

It may be possible to obtain the assistance of courts in other jurisdictions, although this is not necessarily an easy matter. In Australia, for example, the courts are not obliged to give effect to foreign anti-suit injunctions.¹³⁵ However, the High Court has recently confirmed the jurisdiction of the state courts (in this case, the Western Australian Supreme Court) to give sweeping relief in order, among other things, to protect a prospective foreign enforcement process.¹³⁶ In the Hin-Pro litigation, CSAV's attempts to obtain assistance from the Hong Kong courts to enforce its interim orders from the English court in Hong Kong against Hin-Pro have so far had limited success, although they did result in Hin-Pro paying the amount of the Chinese judgments into court in Hong Kong and an order for recovery of some of the English court costs.¹³⁷ In particular, the Hong Kong Court of Appeal¹³⁸ declined to provide assistance to CSAV in its application for interim relief in aid of the English proceedings. It refused on grounds of judicial comity to become involved in what it described as a conflict between the Chinese and English courts over the application of their own principles of conflict of laws to the CSAV jurisdiction clause.

Finally, the foreign party may be able to resist enforcement of the Chinese judgment if the court proceeded against a foreign defendant over whom it did not (arguably) have jurisdiction under the rules applied by the foreign court, particularly where the court proceeded notwithstanding an exclusive jurisdiction clause or arbitration clause, or in breach of an anti-suit injunction.¹³⁹ However, under English (and other) rules, if a party contests jurisdiction in the Chinese courts and loses, and then contests the merits, it may also lose the right to seek remedies in the foreign court, as it will be deemed to have submitted to the jurisdiction of the Chinese courts. Thus in *Spliethoff's Bevrachtingskantoor BV v Bank of China Limited*,¹⁴⁰ the court held that even though the Chinese party had breached the relevant arbitration clause by contesting the underlying case in a Chinese court, Spliethoff's Bevrachtingskantoor had ultimately submitted to jurisdiction in China by contesting the case on the merits. The Chinese court judgment was therefore enforceable in England notwithstanding the arbitration clause.

The enforcement of interim orders is not, however, solely a problem for litigants in courts outside China. The Chinese courts are also faced with the issue of attempting to protect the integrity of their own proceedings when there is a concurrent overseas court case or arbitration. Thus in a number of cases, Chinese courts have attempted to reinforce their own jurisdiction in multinational disputes by issuing stop orders to Chinese parties directing them not to make payment on negotiable instruments or guarantees issued in support of a principal contract which is the subject of litigation. In the case of a Chinese bank with international interests and assets and an international reputation, this puts the bank in a very difficult

¹³⁵ *Commonwealth Bank of Australia v White (No 4)* [2001] VSC 11.

¹³⁶ *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2015] HCA 36 [46] per French CJ, Kiefel, Bell, Gageler and Gordon JJ.

¹³⁷ DCCJ 3986/2014.

¹³⁸ *Compania Sud Americana De Vapores S.A. v Hin-Pro International Logistics Ltd* [2015] 2 HKLRD 458.

¹³⁹ *Philip Alexander Securities and Futures Ltd v Bamberger* [1997] ILPr73 (cited by Johnson, note 104, p. 128 - Hong Kong courts will not enforce a foreign judgment given as the result of breach of an anti-suit injunction; doubted in *Spliethoff's Bevrachtingskantoor*, note 146). In Australia, see *Foreign Judgments Act 1991 (Cth)* (court of the country of the original court deemed not to have had jurisdiction if judgment given contrary to an agreement to settle dispute other than by proceedings before that court, except in case of submission); s7(4)(b). The Foreign Judgments (Restrictions on Recognition and Enforcement) Ordinance (Cap.46) s.3 (foreign judgment will not be recognized or enforced in Hong Kong if brought in breach of an agreement that the dispute be resolved elsewhere than the foreign court (unless the party submitted to the jurisdiction of the foreign court)).
¹⁴⁰ [2015] EWHC 999 (Comm).

situation. Such a measure also suffers from the problem that a foreign court, applying its own private international law rules, will not necessarily give effect to such an order outside China.

Orders by a Chinese court to stop payment of letters of credit were enforced by the foreign court in the Singapore case of *Sinotani Pacific Pte Ltd v Agricultural Bank of China*¹⁴¹ and the Hong Kong case of *Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. v Bank of China*¹⁴² on the basis that the governing law of the letter of credit was Chinese and therefore arguments for illegality under the proper law of the credit had been made out.

In contrast, where Chinese law is not the governing law and the contract in question is not to be performed in China, the English courts have not been inclined to give effect to the Chinese courts' preservation or freezing orders.¹⁴³ Thus, in *Splietoff's Bevrachtungskantoor*, where an application was made by the Bank of Communications for a stay of execution under a guarantee until a Chinese freezing order expired, it was common ground that there was no defence on the basis of illegality, as the guarantee was legal under its proper law (English) and the place of performance (London). Illegality in the performing party's place of business or domicile was irrelevant. An argument that a stay should be granted on the basis of principles of international comity was rejected.¹⁴⁴

In cases of this kind, China's restrictive regime in relation to enforcement of judgments is of no assistance to the Chinese bank, as an international bank undoubtedly has substantial assets outside China against which a judgment or award can be enforced.¹⁴⁵ Indeed, this is presumably the basis upon which the banks were asked to give guarantees in the first place. The choice of foreign law and foreign dispute resolution is therefore specifically designed – and in this case effective – to avoid the issues presented by litigation in China and China's restrictive rules on enforcement.

IV Discussion

The discussion above highlights some of the issues in cross-border cases that arise in relation to China's rules on jurisdiction and enforcement. While China is certainly not the only country in which the courts are protective of their jurisdiction, it is certainly arguable that Chinese legislation and jurisprudence is not keeping up with the rapid expansion in international trade and investment and related legal disputes involving China and Chinese companies. The slow pace of reform, it is argued, has an adverse impact on both foreign and Chinese litigants, as well as on the international standing of the Chinese judicial system.

A. The role of the Maritime Courts

A large number of the cases referred to above relate to decisions of one of the Chinese maritime courts. This is not surprising, as it can be expected that these courts will hear a considerable number of foreign-related cases.¹⁴⁶ In addition, in cases relating to carriage of

¹⁴¹ [1999] SGCA 53.

¹⁴² [2004] 3 HKLRD 477.

¹⁴³ See Bankhaus Wolbern, note 19; *Crescendo Maritime*, note 118.

¹⁴⁴ Note 140 [215] per Carr J.

¹⁴⁵ See note 132.

¹⁴⁶ According to the 2015 SPC Report, the maritime courts heard 16,000 cases in 2015, which the report claims was the largest number of maritime cases in the world. Zhou Qiang, President of the SPC, *Zuigao renmin fayuan gongzuo baogao*, 20 March 2016, <http://www.chinacourt.org/article/detail/2016/03/id/1825026.shtml>;

goods by sea and collisions on the high seas, there are often multiple courts internationally which can legitimately claim to have jurisdiction over the matter pursuant both to contract and to domestic concepts of admiralty jurisdiction. The fact that China has not acceded to any of the international conventions on carriage of goods by sea, or to the Convention on Limitation of Liability for Maritime Claims 1976 or the 1996 LLMC Protocol,¹⁴⁷ also potentially offers parties opportunities for a form of judicial arbitration.¹⁴⁸

Another reason for the number of cases involving the maritime courts is the expansive jurisdiction of the courts, which includes contracts relating to shipbuilding cases and the related bank guarantees (which have also given rise to significant amounts of international litigation and arbitration in the aftermath of the global financial crisis).¹⁴⁹ The recent decision of Chinese authorities further to expand the jurisdiction of the maritime courts, with a view to building up China as an international maritime centre, will, it can be anticipated, result in these courts hearing a higher proportion of foreign-related cases.¹⁵⁰

This raises the question whether a factor in the failure of the SPC to accept the principle of the autonomy of the parties to select a neutral forum to resolve disputes is the objective of building up the Chinese maritime courts - at the expense particularly of the English courts.¹⁵¹ After all, the maritime courts, unlike the general courts hearing civil matters, are able to accept and hear foreign-related cases if the parties so agree even though there is no place with an actual connection to the dispute within China.¹⁵² This is in marked contrast to Article 34 of the Civil Procedure Law, which refuses recognition to such an agreement in the absence of a connection between the dispute and the foreign location.

It is true that a number of states take a restrictive view in relation to jurisdiction in maritime matters. S11 of Australia's *Carriage of Goods by Sea Act 1991* (Cth), for example, not only prescribes that the law of the port of departure applies to all contracts of carriage for goods leaving Australia, but also provides that the parties cannot validly exclude the jurisdiction of an Australian court in relation to contracts of carriage where the goods leave or arrive in

see also summary at S. FINDER, Takeaways from the SPC 2015 work report, 15 March 2016, SPC Monitor, <https://supremepeoplescourtmonitor.com/2016/03/15/takeaways-from-the-supreme-peoples-court-2015-work-report/>.

¹⁴⁷ 1511 U.N.T.S. 3 and 77. China's accession applies only to the Hong Kong Special Administrative Zone.

See International Maritime Organization, IMO Documentation, 2015 <https://imo.amsa.gov.au/public/parties/llmc96protocol.html>

¹⁴⁸ In *Atlasnavios*, note 20, the juridical advantage sought in the Australian court was the higher limitation fund and wreckage removal costs available in Australia due to Australia's accession to the LLMC Protocol. See also *Chinese People's Property Insurance Co., Ltd. Shenzhen Branch v. Shenzhen-Rui International Freight Forwarding Co. Ltd., Mitsui OSK Lines carriage of goods contract dispute* (2014) guanghai fa chu zi No. 487-3 (establishment of limitation fund by Japanese court not recognized; forum non conveniens principles not applicable).

¹⁴⁹ P. MURRAY AND J. LIN, PRC Shipbuilding Disputes in London Arbitration: The Threat of Parallel Proceedings in China and the Consequences and Possible Alternatives, 39 *Tulane Maritime LJ* 183 (2014-2015).

¹⁵⁰ SPC, Regulations on the Scope of Cases to be accepted by the Maritime Courts, issued 24 February 2016, effective 1 March 2016, *Fa shi* [2016] No. 4.

¹⁵¹ S. FINDER, China's Maritime Courts: Defenders of "Judicial Sovereignty," *The Diplomat*, 5 April 2016, <http://thediplomat.com/2016/04/chinas-maritime-courts-defenders-of-judicial-sovereignty/>.

¹⁵² Special Maritime Procedure Law of the People's Republic of China, Issued by the Standing Committee of the NPC on 25 December 1999, effective 1 July 2000, Article 8. Generally, a Chinese court's jurisdiction over foreigners extends to contract and property disputes brought against a defendant with no domicile in China only if the contract was signed or performed in China, the subject-matter of the action is in China, the defendant has distrainable property in China, or the defendant has a representative office in China (Article 264, Civil Procedure Law) or, potentially, if a foreign party fails to object to jurisdiction under Article 127 of the Civil Procedure Law.

Australia, even in cases where the parties have agreed to international arbitration outside Australia. The Rotterdam Rules, if adopted, could significantly limit the scope of exclusive jurisdiction clauses in bills of lading and other transport documents.¹⁵³

The application of Article 34 of the Civil Procedure Law and other provisions protecting the jurisdiction of the Chinese courts are not, however, limited to maritime matters. The United States cases involving Chinese parties and courts appear to be focussed on trade secrets and intellectual property, as well as trade disputes. The Hong Kong cases often involve Hong Kong corporate law. Similarly, the English law cases are not limited to bill of lading disputes but include issues of general commercial law and sale of goods. The protective policies pursued by the Chinese legislature and SPC cannot therefore be attributed solely to the wish to strengthen Chinese maritime jurisdiction.

B. The concept of judicial sovereignty and the question of comity

An important conceptual problem is presented by the attitude which Chinese courts take to foreign courts and decisions. Chinese cases and judicial documents dealing with international legal matters tend to refer both to the important concept of judicial sovereignty (*sifa zhuquan*) and to the more general idea of reciprocity. The phrase “judicial sovereignty” is used in connection with the protection from foreign encroachment of the jurisdiction and autonomy of Chinese courts. Thus the Commentary uses it as a justification for the refusal to take into account the fact that a foreign court has accepted a case or deal with parallel proceedings;¹⁵⁴ it encompasses protection of the mandatory jurisdiction of the Chinese courts¹⁵⁵ and the refusal to enforce foreign judgments or foreign awards which are considered to be overreaching or in breach of a treaty.¹⁵⁶ Generally it relates to the preservation of the territorial jurisdiction of the courts and the protection of the Chinese courts from foreign infringements on their autonomy. Reciprocity, in the context of enforcement, is in practice limited to responding to steps first made by foreign courts. Thus both concepts are essentially inward-looking and focussed on the defence of the integrity of the Chinese court system from perceived threats and encroachments. The concept of judicial sovereignty does not appear to involve respect by Chinese courts for the judicial sovereignty of foreign courts or deference to their decisions.¹⁵⁷

This contrasts with the concept of international or judicial comity (the idea of respect for foreign courts and their jurisdiction), which is often raised as an argument in foreign courts (which can also be jealous of their jurisdictional power), including in China-related cases, generally with a view to persuading the foreign court not to exercise jurisdiction. It does not arise generally in relation to the issue of an anti-suit injunction in English courts, because the rationale is that comity is not offended as the order is addressed to the party and not to the

¹⁵³ United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, New York, 2008, Chapter 14; See also discussion in Yvonne Baatz, “Thirty Years of Europeanisation of Conflict of Laws and Still all at Sea?” in Malcolm Clarke (ed), *Maritime Law Evolving* (Hart, 2013), 237.

¹⁵⁴ Commentary, note 57, p. 1396.

¹⁵⁵ Tu, note 75, pp. 148 and 151.

¹⁵⁶ See Response of SPC in relation to the civil decision on the enforcement and recognition of a judgement issued by the Fargona Regional Court of the Republic of Uzbekistan in relation to Chorvanaslxzmat Co Ltd. [2011] minsi tazi No. 18. See also text to notes 76 and 78.

¹⁵⁷ See, however, text and notes 111 and 112, which suggest the possibility that Chinese courts may be moving towards taking account of the content of foreign judgments.

foreign court.¹⁵⁸ In addition, where there is an agreement relating to dispute resolution, the consensus of the English courts appears to be that comity is not particularly relevant. In *Starlight Shipping*, for example, the judge stated that: “Whilst this court proceeds with the utmost respect for any foreign court and the exercise of its jurisdiction in accordance with its law, questions of comity play a small role where a party has agreed to the jurisdiction of a particular court or to arbitration.”¹⁵⁹

In the Hong Kong Court of Appeal decision in *Hin-Pro*,¹⁶⁰ however, the Court considered that the principle of judicial comity was engaged in the court’s consideration of an application for interlocutory relief in aid of CSAV’s English proceedings. The court refused relief because it considered that there was in essence a conflict between the application by the Chinese courts of Chinese law on the effect of the jurisdiction clause and the effect of the application of English law by the English courts on the clause.

Comity plays a much more significant role in United States jurisprudence and, in the private international law context, is particularly significant in terms of the formulation of doctrines relating to judicial restraint, that is, deferring to foreign courts by restraining the exercise of the jurisdiction of the United States courts.¹⁶¹ It is thus an important consideration in cases involving parallel proceedings. In the US case of *Jiangsu Hongyuan*, for example, where the Chinese plaintiff made a spirited attack on the Chinese legal system, the court noted that considerations of comity preclude a court from “adversely judging the quality of a foreign judicial system.”¹⁶²

In the hotly contested parallel Chinese and United States cases on the trade secrets dispute between Sino-Legend and SI Group, where directly conflicting judgments on the same factual matrix have been issued by the US and Chinese courts,¹⁶³ the *amicus curiae* brief filed by the Trade Remedy and Investigation Bureau of the Ministry of Commerce (TRB) in the ultimately unsuccessful petition for rehearing in *Sino Legend (Zhangjiagang) Chemical Co. Ltd v International Trade Commission*¹⁶⁴ draws on the concepts of both judicial sovereignty and comity. The brief states that the TRB appears as *amicus* as “the Chinese government has a substantial interest at stake in this case, as it relates to the judicial sovereignty of China.” It argues “that the astonishing ruling in this case – that the decisions of Chinese courts on the identical issue between the same parties are total irrelevant and, therefore, can simply be ignored by the ITC – frustrates the respect properly due to the judicial sovereignty of any

¹⁵⁸ *Crescendo Maritime Co v Bank of Communications Company Limited/ Alpha Bank A. E. v Bank of Communications Company Limited*[2015] EWHC 3364 (Comm), [53].

¹⁵⁹ *Starlight Shipping Co & anor v Tai Ping Insurance Co. Ltd., Hubei Branch* [2007] EWHC 1893 [44] per Cooke J (application for interim anti-suit injunction in relation to proceedings before Wuhan Maritime Court in breach of arbitration clause).

¹⁶⁰ *Companie Sud Americana de Vapores S.A. v Hin-Pro International Logistics Limited* [2015] 2 HKLRD 458. This question is one of the issues to be addressed in the appeal before the Court of Final Appeal. See *Compania Sud Americana de Vapores S.A. v Hin-Pro International Logistics Limited* FAMV No 33 of 2015.

¹⁶¹ See discussion in W.S. DODGE, *International Comity in American Law*, 115 *Columbia LR* 2071 (2015), p. 21-5 *et seq.*

¹⁶² *Jiangsu Hongyuan Pharmaceutical Co., Ltd. V DI Global Logistics Inc.*, note 16.

¹⁶³ See SINO LEGEND (CHINA) CHEMICAL COMPANY LTD, The Supreme People’s Court of China overrules SI Group’s Retrial Request, 1 March 2016, < <http://www.prnewswire.com/news-releases/the-supreme-peoples-court-of-china-overrules-si-groups-retrial-request-570642731.html>>; C. POWELL, ITC Asks Fed. Circ. To Keep Import Ban On China Co’s Resin, 15 April 2016 < <http://www.law360.com/articles/785342/itc-asks-fed-circ-to-keep-import-ban-on-china-co-s-resin>>.

¹⁶⁴ *Sino Legend (Zhangjiagang) Co., Ltd v International Trade Commission and SI Group*, Petition for Rehearing, Amicus Curiae Brief of the Trade Remedy and Investigation Bureau of the Ministry of Commerce of the PRC in Support of Rehearing *en banc*; decision aff. 623 Fed. App’x 1016 (Mem)(Fed. Cir. 2015).

nation and treaty partner” and urges the court “to respect comity.” The brief goes on to say that “[C]entral to the orderly conduct of international trade and the stable conduct of international relations is the premise that courts of each nation respect the rulings of foreign courts, especially the judicial decisions of treaty partners on issues of their own domestic commercial law.”¹⁶⁵

Significantly, the brief does not state that this is the approach required of Chinese courts in dealing with foreign court decisions under Chinese law,¹⁶⁶ and there is little suggestion in the Interpretation or the recent Chinese cases that the TRB’s argument on the role of comity reflects the approach of the Chinese courts. The concept of judicial sovereignty is much more likely to stand in the way of Chinese courts surrendering or refusing jurisdiction in favour of foreign courts than to encourage respect for their judgments and rulings.

C. The role of China’s rules on enforcement

The stringency of Chinese rules relating to enforcement has had the undesirable side-effect of making the difficulty of enforcing judgments in China a strategic factor in both Chinese and foreign litigation. First, it has led to attempts by counsel to use the difficulty of enforcing judgments in China as grounds to persuade the foreign court to stay the foreign proceedings in favour of China on *forum non conveniens* grounds. In the English cases, these have generally been unsuccessful. In *Impala*, for example, it was strongly argued that the English court should not give effect to the exclusive jurisdiction clause because it was common ground that the judgment of the English court would not be enforceable in China. Blair J, however, noted that there were few cases in support of this proposition, presumably because it was foreseeable at the time the clause was entered into that this would be the case. In this case, both parties were part of major international commercial groups and both were aware of the significance of international dispute resolution provisions.¹⁶⁷ Nevertheless, *Impala* made significant efforts to deal with this concern and there were suggestions in the case that the court might ultimately impose a condition that the parties arbitrate the dispute in order to resolve it.¹⁶⁸

In the US, the difficulty of enforcing judgments in China has also been raised as a relevant factor in *forum non conveniens* applications. In *Coach, Inc. v Di Da Import and Export, Inc.*, Coach argued that if Di Da diverted assets and monies to China, Coach would be without an adequate legal remedy.¹⁶⁹ In *Warner Technology & Inv. Corp. v Hou*,¹⁷⁰ the court regarded it as relevant to the *forum non conveniens* argument that if the New Jersey court heard the case, the plaintiff would then need to pursue the judgment in China. The difficulty of enforcing foreign judgments in China also plays a tactical role in Chinese decisions to retain jurisdiction. Tang argues, for example, that the ability to enforce judgments in China can be a significant factor in the decision of Chinese courts to take jurisdiction over cases where there is an exclusive jurisdiction clause.¹⁷¹ According to Tu, the difficulty of enforcing a foreign

¹⁶⁵ Ibid, p. 7.

¹⁶⁶ This is possibly implied by the comment that “The question would be whether a Chinese court could properly re-litigate the issues of misappropriation when the products were later imported into China... surely it would be difficult for the United States to accept such an outcome.” Ibid.

¹⁶⁷ Id [142]

¹⁶⁸ Id [146].

¹⁶⁹ *Coach, Inc. v. Di Da Import and Export, Inc.*, No. 13 C 7165 15 December 2015 (U.S. Dist Ct, N.D. Illinois, E.D.).

¹⁷⁰ CA No. 13-7415 (MAS (DEA)31 December 2014 (U.S. Dist Ct, Dist NJ).

¹⁷¹ Note 41.

judgment in China is also a relevant factor in refusing *forum non conveniens* applications, even though it is not included in the list of factors in either the 2005 Minutes or the 2015 Interpretation.¹⁷² The issue of enforcement thus plays into and reinforces the already protective view of the Chinese courts in relation to jurisdiction over foreign-related matters.

China's restrictive approach to enforcement may, however, have unexpected consequences outside China. In a recent Singapore case, the Chinese appellant against a Singapore arbitral award was required (unusually) to put up security for its appeal in large part because of the difficulty of enforcing judgments against it in China.¹⁷³ In *Jiangsu Hongyuan v DI Global*, the Chinese plaintiff attempted unsuccessfully to use the fact that the U.S. defendant had no assets in China and a judgment could therefore not be enforced as an argument against moving the case to China in accordance with the jurisdiction clause.¹⁷⁴ In *Herman Miller, Inc. v Alphaville Design*,¹⁷⁵ the plaintiff put forward the ingenious, but unsuccessful, argument that it should be awarded maximum statutory damages against the defendant on the basis that enforcing a judgment in China "was notoriously difficult."

Another consequence is the adoption by foreign parties of structures and arrangement designed to avoid the problem of enforcement. The cases involving guarantees given by Chinese banks show that where Chinese parties with assets outside China are involved, enforcement in China be avoided by the inclusion of a clause which provides for foreign law and jurisdiction. Where a Chinese company holds assets outside China, a foreign judgment may well be enforceable in another foreign jurisdiction where the company holds assets. Arbitration can be nominated as an alternative to litigation.

As a practical issue, where Chinese multinational companies are building up their businesses and reputations internationally, restrictions on the enforcement of judgments in China are often not relevant or useful. Conceptually, the inward-looking nature of China's restrictive regime in relation to enforcement lends itself to a perception that its main purpose is to protect the interests of Chinese companies.

D. Practical issues and prospects for change

Neither the Interpretation nor the Commentary provides any real explanation for the slow rate of change in Chinese approaches to dealing with exclusive jurisdiction clauses, parallel litigation and enforcement. The economic and hence legal relationships between China and the world have changed markedly since 1991, when these measures first appeared in the Civil Procedure Law. Chinese companies, as a necessary consequence of their increased international engagement, are increasingly involved in litigation outside China, both as defendants and as plaintiffs. They sign agreements agreeing to the jurisdiction of foreign courts and, as the cases make clear, where they consider it tactically appropriate or advantageous, make a conscious choice to litigate or arbitrate outside China. Their multiple subsidiaries and business partners are fully subject to jurisdiction of courts outside China. The issues highlighted in this article in relation to the Chinese approach to jurisdiction and enforcement thus do not merely affect foreign parties.

¹⁷² Note 79, p. 351.

¹⁷³ *Zhong Da Chemical Development Co Ltd v Lanco Industries Ltd* [2009] SGHC 112.

¹⁷⁴ Note 160.

¹⁷⁵ *Herman Miller Inc. v. Alphaville Design Inc.*, No. C 08-03437 WHA, 16 July 2008 (U.S. Dist. Ct, Californian N. D. C)..

As a practical matter, there are various ways in which Chinese and foreign parties can and do deal with these legal difficulties, just as they deal with court and jurisdictional rules. Many of the issues addressed in this article can be resolved by the anticipation of difficulties, better tactics and clearer drafting. Even if the issue of the autonomy of the parties to choose the court for resolution of disputes cannot be resolved under current rules, the availability of international arbitration provides another option for specialist dispute resolution. The availability of assets overseas increases options for contracts which provide for foreign law and jurisdiction. After all, the issue of parallel proceedings is one which frequently arises in cross-border transactions and international litigants need to be prepared to deal with it.

At an international level, however, there are considerable advantages for business in reducing the options for forum-shopping and facilitating the international enforcement of both judgments and awards.¹⁷⁶ In this context, given China's major role in international trade and investment, there is no clear rationale for China's delay in improving the participation of the Chinese courts in the international legal system.

In the case of Article 34 of the Civil Procedure Law, in particular, there is no real justification for the requirement that an exclusive jurisdiction clause have an actual connection with the chosen forum, other than its longevity. If China took the view that China had a strong public policy interest in having cases involving shipment of goods from China heard in a Chinese court, it could follow the Australian approach in relation to mandatory jurisdiction over disputes of that kind, just as it does with other issues which are considered to come within the mandatory jurisdiction of the Chinese courts. If the justification is that, as a general policy matter, cases should only be heard by courts with a connection to the dispute regardless of the decision of the parties, it is not clear why the Chinese maritime courts are free to accept cases with which China has no connection if the parties so agree. Although China has not signed the Hague Convention on Choice of Courts Agreements (and would need to amend Article 34 in order to do so), the China-Hong Kong Agreement provides for mutual recognition and enforcement of judgments only when the parties have specifically agreed to the exclusive jurisdiction of the Chinese or Hong Kong courts.¹⁷⁷ There is no mention in the Agreement of a requirement for any connection between the case, the parties and the dispute and the validity of the exclusive jurisdiction clause is determined under the law of the court nominated under the clause.¹⁷⁸

In addition, it is not clear why, if parties are free to choose the governing law for their contracts, with no requirement for an "actual connection," the same should not apply in relation to the choice of courts. It is true that Chinese law, like the German civil law system on which it is based, deals separately with choice of law and choice of forum, and a number of SPC cases have reiterated that the choice of law does not constitute an actual connection with a court in the country of the proper law. Art 532 of the Interpretation, however, which sets out the principles relating to refusal of jurisdiction on *forum non conveniens* grounds, clearly recognizes the significance of the ability of the court hearing the case to be able to

¹⁷⁶ For a contrary view, see P. K. BOOKMAN, *The Unsung Virtues of Global Forum Shopping* (May 6, 2016). 92 *Notre Dame Law Review*, (Forthcoming); Temple University Legal Studies Research Paper No. 2016-21.

Available at SSRN: <http://ssrn.com/abstract=2768408>.

¹⁷⁷ Note 101.

¹⁷⁸ See Agreement, Article 9(1). See, however, the decision of the SPC in *Jilin Xinyuan Muye youxian Gongsi yu Ouhang (shanghai) guoji Huoyun Daili youxian gongsi Shanghai, Tonghai shuiyu Huowu yunshu hetong Jiufen Guanxia Dingyi an* [Case on a dispute relating to a water transport contract jurisdiction dispute](2013) mintizi No. 243 (SPC) (between two Chinese parties), which seems to suggest that an actual connection would be required even if the chosen court was Hong Kong.

apply the proper law to the case. In reality, there is no reason why a Chinese court should care whether the chosen foreign court has jurisdiction or not, as it is surely a matter for the foreign court to determine whether or not it has jurisdiction over the case. In any case, this should be outweighed by the disadvantage for foreign parties of having to litigate in China, in Chinese, and hire Chinese lawyers, when both parties had agreed to litigation elsewhere.

There are a number of ways in which this issue could be dealt with. The SPC could state that choice of law does constitute an actual connection, in view of the fact that it is easier for a case to be heard in the court of the proper law than in a Chinese court. It would be preferable, however, for jurisdiction in foreign choice of court cases to be de-linked from Article 34, subject to limitations relating to mandatory jurisdiction. The court would acknowledge the ability of the parties to choose both governing law and court, and, as with arbitration clauses, apply the proper law of the dispute resolution clause to its interpretation and application. China could also accede to the Hague Convention on Choice of Court Agreements.¹⁷⁹

A truly difficult issue is presented by parallel – or overlapping - proceedings. The introduction of the concept of *forum non conveniens* represents a welcome addition to the powers of the Chinese courts to accommodate overlapping or parallel proceedings. In practice, however, the extremely limited scope of the formulation, particularly when combined with the China's restrictive approach both to refusing jurisdiction on the basis of parallel proceedings and to enforcement of foreign judgments, significantly restricts its usefulness.

First, the list of the factors in Article 532 which must be satisfied is very restrictive. In particular, the requirement that there be no interests of the Chinese state, citizen, enterprise or organisation involved in order for a Chinese court to refuse jurisdiction suggests that the courts must – or will - hear any case which involves a Chinese party. The studies on the application of the doctrine support this interpretation.¹⁸⁰ This is not the case in the common law jurisdictions on whose law the doctrine is based. In addition, it is not clear why the fact that the dispute is subject to Chinese law should automatically disqualify another jurisdiction as distinct from being a relevant factor for the court to consider. Chinese courts can apply foreign law and, correspondingly, foreign courts are able to (and do) apply Chinese law.

Secondly, Article 532 gives no assistance on what factors should be relevant in the court determining whether another court would be a more convenient forum. However, the concept of *forum non conveniens* does provide a potentially useful method for the court to deal with parallel proceedings, rather than ignoring the very real issues for parties which arise from being involved in conflicting litigation in different parts of the world. While the concept of allowing courts to exercise their own discretion presents difficulties for China's civil law jurisdiction, the SPC could set out a list of factors that the court could take into account, drawn from the extensive jurisprudence of common law jurisdictions. Such a list could include the existence, status or continuation of parallel proceedings before a foreign court with jurisdiction over the case and the impact upon the parties; factors relating to convenience such as the location of witnesses and evidence; connections with China and the alternative forum such as the residence of a party or parties; the applicable law; the desirability of having the whole of a multi-faceted international dispute heard before one

¹⁷⁹ See G. TU, The Hague Choice of Court Convention: A Chinese Perspective 55(2) *American Journal of Comparative Law*, p. 347.

¹⁸⁰ In the Mitsui case (note 148), for example, the Guangzhou Maritime Court cited the Interpretation but said that *forum non conveniens* did not apply because the plaintiff (the insurer) was a Chinese legal entity with a branch office in the jurisdiction and the place of departure of the goods was Shenzhen.

competent tribunal and other factors drawn from a consideration of international practice, such as available remedies, convenience, expense, juridical advantage, language of witnesses and proceedings, availability of the alternative forum and so on.¹⁸¹

Underlying this is the need for Chinese courts to move away from a purely protective approach to their own jurisdiction under the principle of judicial sovereignty towards a more outward-looking and reciprocal approach of respecting the capability and jurisdiction of courts of other legal systems. The willingness of the Chinese courts to accept cases regardless of the existence of foreign proceedings, and the lack of an adequate mechanism for the courts to refuse jurisdiction where a foreign court is hearing the same or a related dispute, increases opportunities for tactical litigation manoeuvres in cross-border disputes.¹⁸²

Finally, China's approach to enforcement generally presents a major obstacle in terms of transnational litigation. As a practical matter, this is not in the long term necessarily to the advantage of Chinese parties. It encourages the choice of arbitration over litigation where enforcement is likely to be sought in China, as well as a preference for foreign law and foreign jurisdiction where Chinese companies have assets outside China and enforcement in China can be avoided. It is difficult to understand China's continued reliance on judicial assistance treaties, since Chinese authorities have negotiated only a small number of civil judicial assistance agreements, of which very few are recent. The difficulty of persuading Chinese courts that foreign courts do recognize their judgments as a condition for reciprocal recognition ensures that enforcement continues to be very difficult, despite the increase in foreign cases where foreign courts have indeed recognized and enforced Chinese judgments. This contrasts unfavourably with China's long-term acceptance of the enforceability of foreign arbitral awards.

V Conclusion

Chinese courts are not alone in struggling with the appropriate way to deal parallel and overlapping litigation. The English courts take a very inflexible view to the enforcement of exclusive jurisdiction clauses nominating England, which reflects the role of the English courts as neutral jurisdiction of choice in many cases; the Australian courts ascribe to an approach to *forum non conveniens* which results in few cases being sent away by the courts; the Hong Kong courts rarely appear to stay proceedings in favour of the Chinese courts on *forum conveniens* grounds and the US courts have been criticized by the Chinese for their willingness to rehear cases which have already been heard in China.

Nevertheless, all of these courts do attempt to recognize the issues presented by parallel and overlapping proceedings. The US courts have referred cases to the Chinese courts on *forum non conveniens* grounds; common law courts generally have begun to enforce Chinese judgments and all of them recognize the right of parties to choose the jurisdiction in which disputes will be resolved. The United Kingdom and the other countries of the European

¹⁸¹ See F. M. Manolis/N. J. Vermette/R.F. Hungerford, The Doctrine of *Forum Non Conveniens*: Canada and the United States Compared, *FDDC Quarterly* Fall 2009, p.2; Nygh, note 60, pp. 192-195; Johnston, note 115, pp. 114-125.

¹⁸² See M. COHEN, When IP Systems collide – True Adventures in Foreign-Chinese Judicial Interaction, October 2015, US-China IP Conference – Best Practices for Innovation and Creativity <<https://www.law.berkeley.edu/wp-content/uploads/2015/07/Mark-Cohen-When-IP-Systems-Collide.pdf>>.

Union have ratified the Choice of Courts Agreement; the United States has signed it,¹⁸³ and Australia has started formalities for accession.¹⁸⁴

The revisions to the Civil Procedure Law in 2012 and the approach of the SPC in the 2015 Interpretation to the issues of choice of court, parallel litigation (with the exception of the formal introduction of a *forum non conveniens* concept) and enforcement have been excessively cautious. Given the length and substance of the Interpretation, which contains 552 articles and is longer than the Civil Procedure Law itself, it may be that foreign-related issues simply did not receive adequate attention. Indeed, 3 months after the issue of the Interpretation, the SPC issued the Several Opinions on the Provision by the People's Courts of Judicial Services and Safeguards for the Construction of "One Belt One Road,"¹⁸⁵ which recognized that there are ongoing problems in relation to jurisdiction and enforcement. The Several Opinions state that the right of Chinese and foreign market participants in the countries along the One Belt One Road to choose judicial jurisdictions should be respected and that, through friendly consultations and deepened legal cooperation, international jurisdictional conflicts in foreign-related matters should be minimised and problems of international parallel proceedings should be resolved. They also state that while China's jurisdiction should be protected, the jurisdiction of foreign courts should also be respected (Art 5). In relation to the recognition and enforcement of judgments, Article 5 raises the possibility that even where no judicial assistance agreement has been entered into, if a country has committed to extend reciprocity, the Chinese courts could consider providing judicial assistance first in order to contribute to the development of reciprocity and the growth of international legal assistance.

Although an advance on the Interpretation, these are very general suggestions and statements of principle on which no subsequent substantive progress appears to have been made.

In summary, the cautious approach on jurisdiction and enforcement in the 2012 Civil Procedure Law and the Interpretation fails to reflect the realities of the growth of foreign-related cases in China and the increased involvement of Chinese parties overseas. Expanding the jurisdiction of courts, improving procedures and improving the quality of judges and providing support for international arbitration are important steps to improve the Chinese legal system, but do not deal with the realities of cross-border litigation. If China's aim is to become an international maritime law centre, or a major international law centre generally, this will be achieved by providing high quality courts rather than by restrictive and protective jurisdictional rules.

China is certainly not required to adopt foreign rules or practices (which are in any event not cohesive internationally and far from perfect). However, in an era of "going out," China needs to create a legal framework for foreign-related litigation, which facilitates working with foreign courts and supporting overseas litigation and other methods of dispute settlement. This requires the recognition that the concept of judicial sovereignty can extend to respect for the judicial sovereignty of foreign courts without undermining the power and autonomy of the Chinese courts, and, secondly, that the full participation of Chinese parties in a globalised

¹⁸³ Note 101. See HCCH, Convention of 30 June 2005 on Choice of Court Agreements, Status table <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>>.

¹⁸⁴ Parliament of Australia, Australia's Accession to the Convention on Choice of Court Agreements (The Hague, 30 June 2005) <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/15_March_2016/Treaty_being_considered>.

¹⁸⁵ Issued 16 June 2015, *Fa fa* [2015] No. 9, Articles 5 and 6.

world may require Chinese courts to recognize the autonomy of parties and foreign courts to make decisions with which the home court disagrees.