



# Parallel cases and overlapping jurisdictional claims – the Chinese courts

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# China and parallel proceedings

- How do parallel proceedings in Chinese and non-Chinese courts arise?
- How are these issues handled (in the foreign jurisdictions and in China)?
- What specifically Chinese problems does this present in terms of resolution of disputes?
  - Recognition of exclusive jurisdiction clauses
  - Lis alibi pendens
  - Refusal of jurisdiction – forum non conveniens lis alibi pendens
  - Issues with enforcement of judgments
- Can these issues be resolved and how?

# How do the cases arise?

- Two courts with jurisdiction (admiralty) and no agreement between parties
- Exclusive agreement on jurisdiction but different interpretations by courts: exclusive v non-exclusive; incorporation of terms (and which law to apply); scope of clause; courts taking jurisdiction notwithstanding clause – competing decisions
- Arbitration clause for foreign arbitration not recognized by Chinese court, resulting in competing decisions
- Agreement on jurisdiction but non-exclusive
- Orders given by Chinese court to stop payment of guarantees, in support of Chinese litigation

Anti-suit injunctions and related orders by foreign courts<sup>3</sup>

# Example – CSAV v HIN-PRO dispute

- Parties: *Compania Sud America de Vapores SA*; *Hin-pro International Logistics Limited* (軒輝國際物流有限公司)
- Facts relating to dispute
- Cases and courts
  - **Chinese maritime courts** – multiple cases: *Hin-Pro v CSAV*: damages for delivery of cargo without production of original B/L; jurisdictional challenges by CSAV; subsequent appeals on the merits alleging fraud and forged documents
  - **UK cases**: *CSAV v Hin-Pro*: declaration that B/Ls subject to exclusive jurisdiction of English courts; anti-suit and mareva injunctions to stop Hin-Pro from proceeding with Chinese cases; contempt orders; award of damages
  - **HK courts** – attempts by CSAV to obtain orders in support of UK anti-suit injunction - receivership and Mareva orders

# Issue 1 – exclusive jurisdiction clauses and neutral fora

- Role of exclusive jurisdiction clauses generally:
  - Agreed forum (court or arbitral tribunal)
  - Neutral/specialist forum (maritime/financial; New York/London/Hong Kong etc)
- Are they generally accepted? Generally yes, but may be subject to
  - Nominated court agreeing to take the case
  - Mandatory law of the forum
- Do the Chinese courts recognize jurisdiction clauses nominating foreign courts (and foreign law)?
- Yes – under some circumstances: *Fellowes v Changzhou Xinrui Fellowes Office Equipment* (SPC and US courts)
- What are the limits? The actual connection rule (实际联系)

# Exclusive jurisdiction clauses in China

- Conceptual approach: jurisdiction is procedural and a matter for the law of forum ie Chinese law applies; includes whether criteria are satisfied (written; civil or property dispute, etc; exclusive or non-exclusive; whether there is a connection)
- Will the Chinese courts recognize exclusive jurisdiction clauses nominating a foreign court?
- Significance of “actual connection”
- SPC Commentary – choice of law is not a connecting factor – see also *Atlas Iron QMC 2015*
- Note also implications for exclusive jurisdiction clauses nominating Chinese courts (except maritime courts) – for example, new International Commercial Courts

What happened in Hin Pro?

# Civil Procedure Law and SPC Interpretation

- **Article 34** A party to the 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, where the contract is performed or signed, in the location of the plaintiff's domicile, in the location of the subject matter or in other locations **which have an actual connection with the dispute**, provided that the provisions on hierarchical jurisdiction and exclusive jurisdiction are not violated.
- SPC Civil Procedure interpretation 2015 Art 531: parties may choose (in writing) foreign courts for disputes involving foreign-related contracts or asset disputes – domicile of D; where contract to be performed or signed; domicile of P; locus of subject-matter; place of infringement or other place that has **actual connection to dispute in question** (与争议有实际联系地点) .

# Parallel jurisdiction – *lis alibi pendens*

- What if both courts have jurisdiction and take the case (or overlapping cases?)
  - First in time? (common law: not necessarily significant v EU approach)
  - Res judicata/estoppel?
- China? Interp 533
  - If both courts have jurisdiction, if one party sues abroad and one in China, Chinese court may accept case (ie no *lis pendens*)
  - Once the judgment of the foreign court is recognised, the Chinese court should not accept a case by a party on the same dispute
  - BUT, court will not recognise foreign judgment unless there is a treaty or (very limited) reciprocity



# Responses to overlapping jurisdictions and Chinese decisions

- Response of UK courts to Chinese courts taking jurisdiction:
  - Interpretation of jurisdiction clause must be under law of clause (English)
  - Unenforceability of English judgment in China not a factor in granting a stay of English case
  - FNC not an argument for staying case in England arising from an exclusive jurisdiction clause (Morgan Stanley)
- Interim orders – foreign courts
  - Anti-suit injunctions; freezing orders; Mareva orders, etc; contempt proceedings
  - Damages for breach of exclusive jurisdiction courts
  - Enforceability?

Interim orders – Chinese courts

# Issues for parties

- What if claimant loses on jurisdiction and defends on merits in Chinese court?
  - *Splithoff's Bevrachtingskantoor BV (Claimant) v Bank of China Limited (Defendant)* [2015] EWHC 999 – judgment enforceable despite arbitration clause
- What if claimant defends on jurisdiction and loses? Hin-Pro: Orders sought and obtained in support of CSAV's claim: declaration, permanent injunction, anti-suit injunction, world-wide freezing order, contempt (gaol) for Hin-Pro rep who disregarded order, receivership in HK, order of damages to compensate CSAV for payments made under orders of Chinese courts
- Issues for Chinese parties: stop orders? Crescendo Maritime: China, England, US

# Implications and consequences

- Will the nominated court give up jurisdiction? Generally not
- What can the nominated court do in the circumstances?
  - Anti-suit injunctions, etc.
  - Are these useful?
  - Where are the assets?
- What can the affected party do?
  - Persuade the Chinese court not to hear the case? Lis alibi pendens
  - Withdraw from the Chinese proceedings and risk losing the case? Enforcement in China?
  - Engage on the merits? Enforcement outside China?
- What happens if both sets of proceedings are ongoing?

# Related issues

- Issue 3 - Persuading the Chinese (or foreign) court not to take a case
  - Director Chen – forum non conveniens rules
- Issue 4 – enforcement of foreign awards/judgments in China and Chinese judgments in Australian and elsewhere
  - Ass/Prof Huang

# Prospects for change?

- Choice of Courts Convention
  - Will require change of Civil Procedure Law and interpretation
  - Change of policy relating to “substantial connection test” (and, possibly, jurisdictional scope of Chinese courts unless take Art 21 exception)
  - Similar MOU with HK on exclusive jurisdiction clauses (Mainland Judgments (Reciprocal Enforcement) Ordinance CAP597 – no cases?)

# Summary

- Cannot avoid issues with Chinese courts and enforcement of judgments indefinitely, particularly if Chinese judgments enforced o/s
- Chinese companies exposed to foreign courts – need way to resolve parallel proceeding
- Chinese companies and subsidiaries subject to foreign jurisdiction and seizure of assets located abroad – Chinese courts taking jurisdiction in all cases note the answer
- China should not be a safe harbour for forum shopping (eg limitation funds)