KEY POINTS

- The approach of the Chinese courts does not prevent parallel proceedings.
- Only if a judgment of a foreign court has been recognised in China must the Chinese court reject a suit on the same dispute.
- It is very difficult to enforce a foreign judgment in China in the absence of a bilateral judicial assistance agreement.

Feature

Author **Professor** Vivienne Bath

Overlapping jurisdiction and the Chinese courts

In this article, Professor Vivienne Bath considers the legal issues arising where Chinese courts accept jurisdiction over cases in which it is claimed the parties have signed a jurisdiction clause nominating a foreign court.

Recent cases in China, England and a range of other jurisdictions demonstrate the potential for Chinese and foreign courts to take jurisdiction over the same or overlapping disputes. While jurisdictional issues are certainly not new in the international arena or, indeed, in relation to China, these issues are assuming increased importance as international commercial – and hence legal – contacts between Chinese and foreign companies expand. The implications are potentially significant: duplicate forms of dispute resolution in different international fora; conflicting interim orders in support of each forum's right to hear the case; competing awards and judgments and the corresponding issues of recognition and enforcement. This article focuses on the acceptance by Chinese courts of jurisdiction over cases where it is claimed that the parties have signed a jurisdiction clause nominating a foreign court and the related legal issues arising from the overlap of Chinese and foreign rules.

Some of the issues that arise can be illustrated by the recent multi-jurisdictional litigation between Compania Sud Americana De Vapores S.A. (CSAV), a major international carrier, based in Chile, and Hin-Pro International Logistics Co Ltd. (Hin-Pro), a Hong Kong company with operations in China. The dispute between the parties relates to numerous actions before the Maritime Courts of Wuhan, Guangzhou, Qingdao, Tianjin, Ningbo and Shanghai brought by Hin-Pro against CSAV on the basis of CSAV's form bill of lading, and litigation brought by CSAV in England and Hong Kong on the basis that the bill of lading provided for English law and the exclusive jurisdiction of the English courts (final appeal case: *Hin-Pro International Logistics Ltd v Compania Sud Americana De Vapores S.A.*[2015] EWCA Civ 401).

EXCLUSIVE JURISDICTION CLAUSES AND THE CHINESE COURTS

The 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 refuse jurisdiction even if the clause was exclusive. The second was the question whether the clause was in fact exclusive.

Article 34 of the Civil Procedure Law of the People's Republic of China provides that a party to a contract or property-related 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 another location *which has an actual connection with the dispute* [emphasis added], provided that the provisions on hierarchical jurisdiction and exclusive jurisdiction are not violated.' (These mandatory provisions were not relevant for the purposes of the bill of lading dispute.) It is generally agreed that Art 34 also applies to foreign-related contractual and property-related disputes. This was recently confirmed in the 2015 Interpretation of the Supreme People's Court on the Law on Civil Procedure (Interpretation).

On the face of it, therefore, parties to a foreign-related commercial contract such as a contract for the carriage of goods by sea should be able, by agreement in writing, to agree to the jurisdiction of foreign courts. The issue for a party seeking to enforce this clause is the requirement that the chosen court be located in a place with an "actual connection" (*shiji lianxi*) with the dispute. In the case of an intra-China dispute, this requires the first court to consider whether the nominated Chinese court would have jurisdiction on the bases set out in Art 34 before it refers the case to that court. When extended to a choice of foreign court, if applied literally, this requirement presents substantial difficulties when the jurisdiction clause nominates a neutral forum for the resolution of disputes.

The question of the scope of the "actual connection" between the foreign court and the dispute is contested among Chinese scholars. In particular, the issue is whether there needs to be a "substantial" or "objective" connection, such as the domicile of the plaintiff or defendant or the place of signing, performance or infringement of the contract, or whether a less tangible connection, such as the choice of governing law, would be sufficient. There is no requirement that there be an actual connection in relation to the choice of governing law. (Interpretation of the Supreme People's Court 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" (I), Art 7).

However, in relation to jurisdiction, in the Hin-Pro cases (and others), the Chinese courts have come down in favour of the objective interpretation – that is, since there

was no relationship between the dispute between CSAV and Hin-Pro and England, other than the choice of English law, there was no "actual connection" between the dispute and the nominated court and the jurisdiction clause was ineffective (see, for example, the decision of the Shandong High Court, *Lu Min Guan Zong Zi* (2014) No. 158). Therefore, the relevant maritime court, as the place of shipment, had jurisdiction over the case. The view that the governing law does not constitute an actual connection was subsequently supported by the Supreme People's Court *Commentary to the Interpretation*. It appears that the Shanghai No 1 People's Intermediate Court reached a similar conclusion in relation to the exclusive jurisdiction clause nominating the English courts which became the subject of the dispute in *Impala Warehousing and Logistics (Shanghai) Co. Ltd v Wanxiang Resources (Singapore) Pte. Ltd* ([2015] EWHC 811).

Although Art 34 does not refer to exclusive jurisdiction, the Chinese courts regard an exclusive agreement as a pre-requisite for the exclusion of the jurisdiction of the Chinese courts. The interpretation of the jurisdiction clause by the Chinese court therefore becomes a significant issue. Thus the Zhejiang High Court, on appeal from the Ningbo Maritime Court held that although the relevant clause in the bill of lading and related letter of guarantee referred to English law and English jurisdiction, it did not exclude the jurisdiction of the courts of other countries which had jurisdiction. Therefore the Chinese courts could accept the case and determine jurisdiction in accordance with Chinese law, resulting in the Ningbo Maritime Court being held to have jurisdiction (*Zhe Guan Zong Zi* (2013) No 138). This one sentence conclusion on the meaning of the clause contrasts with the lengthy and learned discussion in the English Court of Appeal.

LIS PENDENS AND FORUM NON CONVENIENS

Would it be possible to persuade a Chinese court to refuse to take jurisdiction in favour of the foreign court? Article 533 of the Interpretation reiterates the long-held Chinese approach to parallel proceedings, which is that a Chinese court may accept a case even if a foreign court also has jurisdiction and a case has been filed with that foreign court. Only if a judgment of a foreign court has been recognised in China must the court reject a suit on the same dispute. (Due to the extreme difficulty in enforcing a foreign judgment in China other than pursuant to a bilateral agreement, options for obtaining recognition or enforcement of such a judgment are few.) In a recent case, the Supreme People's Court stated that the fact that a Hong Kong court had accepted the case or rendered a judgment did not influence the Chinese court in ruling whether or not to accept the case on the basis of concrete circumstances, including considering whether the case raised the issue of inconvenient jurisdiction (*bu fangbian guanxia*). (*Chinachem Financial Services Ltd v Century Acquisition Corporation and Beijing Dishi Law Firm*, (2014) Minsi zongzi No 29)

This refers to China's recent adoption of a doctrine equivalent to *forum non conveniens*, which allows a court to refuse to accept a case. The criteria spelt out in the Interpretation (which effectively codifies previous practice) are, however, very restrictive. Pursuant to Art 232, a Chinese court *may* reject a suit and refer the parties to a more convenient foreign court with jurisdiction if *all* of the following criteria are met: the defendant requests that the case be under the jurisdiction of a more convenient foreign court or challenges jurisdiction; there is no agreement choosing the jurisdiction of the Chinese courts; the case does not fall under the exclusive jurisdiction of the Chinese courts; the case does not relate to the interests of the Chinese state or a Chinese citizen, legal person or other organisation; the important facts of the dispute in the case did not arise in China, Chinese law is not the applicable law and there would be significant difficulties for the Chinese court in determining the facts and applying the law; there is a foreign court with jurisdiction, and it would be more convenient for that court to hear the case. In summary, if the case has no connection with China or a Chinese person, the court can reject the case. Although this has been argued in many Chinese cases, there appear, not surprisingly, to be few cases in which a court has rejected a case on these grounds. Those cases appear to relate largely to disputes between foreigners. (Tu, *"Forum non conveniens" in the People's Republic of China*, (2012) 11 Chinese JIL 341)

As a result, a Chinese and a foreign court, after considering the application of their own *forum non conveniens* principles to what is arguably the same case, may quite legitimately conclude that they should each retain jurisdiction. In the *Chinachem* case, for example, the Supreme People's Court concluded that principles of *forum non conveniens* (and the fact of the litigation in Hong Kong) should not stop the Beijing High People's Court from accepting the case in question. In a related case in Hong Kong, the Hong Kong court held that the onus of showing that China was a more appropriate forum than Hong Kong had not been met and refused to stay the proceedings on *forum non conveniens* grounds (*Chinachem Financial Services Ltd v Century Venture Holdings Ltd* HCA 410/2013).

THE ROLE OF ENFORCEMENT

It is generally accepted that it is very difficult to enforce a foreign judgment in China in the absence of a bilateral judicial assistance agreement (see Interpretation Art 544) as a practice of reciprocal enforcement is very difficult to prove in China. This restrictive approach to enforcement can play a double-edged role. Tu mentions that the difficulty of enforcing foreign judgments in China plays a role in persuading Chinese courts to retain jurisdiction over disputes in *forum non conveniens* cases. In *Impala*, Wanxiang argued strongly (and ultimately unsuccessfully) that the fact that an English judgment given pursuant to an English exclusive jurisdiction clause would be unenforceable in China supported its argument that the court should not issue an anti-suit injunction stopping Wanxiang from pursuing proceedings in China.

Conversely, 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

Biog box
Vivienne Bath is Professor of Chinese and International Business Law at the University of Sydney. Email: vivienne.bath@sydney.edu.au. A more comprehensive version of this article will be published in the Yearbook of Private International Law.

of the difficulty of enforcing judgments against it in China (*Zhong Da Chemical Development Co Ltd v Lanco Industries Ltd* [2009] SGHC 112).

IMPACT OF CHINESE LITIGATION ON FOREIGN CASES

The combination of these factors can clearly put the contesting parties in a difficult position. In *Spliethoff's Bevrachtingskantoor BV v Bank of China Limited* ([2015] EWHC 999), for example, a case where the Chinese courts took jurisdiction notwithstanding an arbitration clause, the plaintiff argued its case on the merits in China after losing the jurisdictional claim there. This constituted a submission to jurisdiction under English rules and the Chinese court judgment thus became enforceable in England.

In the case of Hin-Pro and CSAV, CSAV promptly paid the award of damages against it in the first of the Chinese cases. It obtained 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 comply. CSAV's attempts to enforce its interim orders from the English court in Hong Kong against Hin-Pro have so far had limited success, although Hin-Pro did pay the amount of the Chinese judgments into court in Hong Kong. The Hong Kong Court of Appeal (*Compania Sud Americana De Vapores S.A. v Hin-Pro International Logistics Ltd* [2015] 2 HKLRD 458) declined to provide assistance to CSAV in its application for interim relief in aid of the English proceedings. It refused to become involved in what it described as a conflict as to jurisdiction between the Chinese and English courts over the application of their own laws to the CSAV jurisdiction clause. CSAV did, however, subsequently succeed in obtaining an order in Hong Kong for recovery of English legal costs incurred due to Hin-Pro's adjournment application (DCCJ 3986/2014). (From this case, it also appears that CSAV succeeded on the merits in China in having some of the initial judgments in China overturned.)

However, parties engaged in Chinese litigation may also have difficulties in relation to enforcement. An attempt to enforce a Chinese judgment in Hong Kong, for example, in a case where the Chinese court takes jurisdiction notwithstanding an exclusive jurisdiction clause, would meet with a number of difficulties (as long as the contesting party has not engaged on the merits): first, the Chinese judgments are not made pursuant to an exclusive choice of court agreement as required under the 2006 Chinese-Hong Kong *Arrangement on Recognition and Enforcement of Judgments in Civil and Commercial Matters pursuant to Choice of Court Agreements*, and, secondly, under the *Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance* (Cap 46), Hong Kong does not enforce judgments which are made in breach of an exclusive jurisdiction clause unless the party claiming submitted to the foreign jurisdiction or participated on the merits in the proceedings.

Similarly, the issue of enforcing protective orders relating to the proceedings is not solely a problem for litigants in courts outside China. In a number of recent cases, the orders of Chinese courts directed at protecting Chinese litigation by preventing Chinese banks with international operations from honouring refund guarantees to foreign parties have not been effective in stopping the English courts from ordering payment nonetheless (*Spliethoff's Bevrachtingskantoor BV*).

DISCUSSION AND SUMMARY

These legal issues are not new. However, the number of cases involving China can be expected to increase. In the twenty-first century, it is questionable whether China's restrictive approach and limited co-operation with foreign courts are necessary or indeed useful, particularly when contrasted to the receptiveness of Chinese legislators to international arbitration, in terms of both jurisdiction and enforcement.

First, the approach of Chinese courts does not prevent parallel proceedings. Foreign parties and foreign courts (including the Hong Kong courts) are not in any way deterred from litigation as a result of the Chinese courts taking jurisdiction. International companies such as CSAV which prefer a uniform dispute resolution clause and a neutral forum with specialist expertise are not likely to change their form documents because of decisions of the Chinese courts.

Secondly, the Chinese rules do not necessarily operate to the advantage of Chinese claimants or defendants. Hin-Pro, for example, is a Hong Kong company, arguably engaging in a form of judicial arbitrage in its many suits in China. Impala is a case between the Chinese subsidiary of a multi-national conglomerate and the Singapore subsidiary of a Chinese conglomerate. Orders by Chinese courts ordering Chinese banks not to make payments under international guarantees merely put the banks in a very difficult position. The major Chinese banks, like other expanding Chinese enterprises, have international reputations to maintain and substantial assets outside China. For these companies, limitations on enforcing foreign judgments in China does not prevent enforcement of those judgments elsewhere in the world.

The tendency of the Chinese courts to take and retain jurisdiction is by no means a practice limited to China. Australia's very restrictive *forum non conveniens* rules are an example of this. Unlike Australia and other common law jurisdictions, however, China has the advantage of having a legislative and judicial system which potentially allows legislators and particularly the Supreme People's Court to change practice on policy grounds relatively smoothly. It is to be hoped that the flow of funds and investment from China will have a similarly internationalising effect on its handling of foreign-related cases. ■

Further Reading:

- Overseas beneficiaries' remedies for breach of trust in China [2015] 6 JIBFL 364.
- Beijing Report: New Arbitration Law and Rules [1995] 7 JIBFL 342.
- LexisNexis Dispute Resolution blog: China International Economic and Trade Arbitration Commission.