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Forum Non Conveniens in China: From Judicial Practice to Law

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ABSTRACT

Chinese courts have applied the doctrine of *forum non conveniens* since the 1990s. The Chinese Supreme Court has confirmed the judicial practice in its judicial interpretations. However, the doctrine that has actually been engaged in the Chinese courts is based on the inconvenience approach to avoid inconvenience to Chinese courts. Recently, the newly amended Chinese Civil Procedure Law formally enacted this doctrine in a different way. The new doctrine of *forum non conveniens* considers the factor of inconvenience to the parties, removes the condition of involvement of Chinese parties' interests, and provides procedural remedies after dismissing actions. This new doctrine of *forum non conveniens* in Chinese law comes close to the doctrine of *forum non conveniens* in common law, which is based on an approach for the interests of all parties. This article reviews the development of the Chinese doctrine of *forum non conveniens* and assesses the conditions under the doctrine in Chinese law. It is suggested that the new Chinese doctrine of *forum non conveniens* can be improved further by removing the inconvenience to the Chinese courts and clarifying the consideration of the interests of all parties.

INTRODUCTION

The doctrine of *forum non conveniens* has long been recognized by Scottish law and has also been recognized by English law.[1] The doctrine of *forum non conveniens* has also been widely accepted and applied in other common law jurisdictions.[2] Where the plaintiff is entitled to commence his action in English courts, the competent court, applying the doctrine of *forum non conveniens*, may stay the action if the defendant satisfies the court that some other forum is more appropriate.[3] It is a tradition of English law that a court, by applying *forum non conveniens*, decides which jurisdiction is more appropriate between the court and other competent courts 'in which the case may be tried more suitably for the interests of all the

[1] In *The Abidin Daver* [1984] AC 398, 411 (HL), Lord Diplock stated that, on this point, English law and Scottish law may now be regarded as indistinguishable.
[2] See generally Ronald Brand and Scott Jablonski, Forum Non Conveniens: History, Global Practice, and Future under the Hague Convention on Choice of Court Agreements (OUP 2009).
[3] *The Spiliada* [1987] AC 460 (HL).

parties and for the ends of justice'.[4] The basis of 'all the parties and for the ends of justice' for the application of *forum non conveniens* has been reiterated by modern English law.[5] The modern doctrine of *forum non conveniens* has also been widely accepted and applied in other common law jurisdictions.[6]

The doctrine of *forum non conveniens* is a relatively new concept to civil law jurisdictions, including China.[7] The Chinese doctrine of *forum non conveniens* was originally regulated by the judicial interpretations from Chinese Supreme People's Court (SPC), which were applied as quasi-law in Chinese judicial practice. Chinese courts, by applying the concept of *forum non conveniens*, may decline jurisdiction when they find that they have difficulties in determining facts and applying foreign laws in trials of foreign-related cases. Although the Chinese courts borrowed the concept of doctrine of *forum non conveniens* from English law, that doctrine of *forum non conveniens* was substantially different from the doctrine of English law. It was designed to reject cases when adjudication of the cases becomes difficult to Chinese courts. The Chinese doctrine of *forum non conveniens* was enacted in the China's newly amended Civil Procedure Law promulgated in 2023 (CPL 2023), which is to take effect on 1 January 2024. The CPL 2023 includes the doctrine of *forum non conveniens* in the form of law for the first time. Although it still looks different from the doctrine of English common law, the new doctrine of *forum non conveniens* in the CPL 2023 has made substantial changes, making it different from the original doctrine in the SPC's judicial interpretations. The new doctrine of *forum non conveniens* still has consideration of inconvenience to Chinese courts but it also includes the consideration of inconvenience to parties in disputes. It means that Chinese courts will consider the interests of the parties by considering the inconvenience to parties in participation of litigation from 2024.

THE DOCTRINE OF *FORUM NON CONVENIENS*

Forum non conveniens in English common law

In the English common law of the doctrine of *forum non conveniens*, a '*conveniens*' forum does not simply mean the 'convenient' forum, it focuses more on an 'appropriate' forum. In *Société du Gaz de Paris v Société Anonyme de Navigation 'Les Armateurs Francais'*,[8] Lord Dunedin, with reference to the expressions of *forum non competens* and *forum non conveniens*, said that '"competent" is just as bad a translation for "competens" as "convenient" is for "conveniens."' The proper translation for these Latin words is 'appropriate'.[9] Lord Goff of Chieveley, in *Spiliada*, echoed that 'it is wiser to avoid use of the word "convenience" and to refer rather, as Lord Dunedin did, to the *appropriate* forum'.[10] The basic principle of the doctrine of *forum non conveniens* is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and the ends of justice. If the court concludes that there is some other available forum that, *prima facie*, is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted.[11]

[4] *Sim v Robinow* (1892) 19 R 665, 668 (Scottish Court of Session), per Lord Kinnear.
[5] *Spiliada* (n 3).
[6] See Brand and Jablonski (n 2).
[7] Unless otherwise stated, China in this article refers to Mainland China and Chinese courts refer to the courts of Mainland China excluding the courts of Hong Kong, Macau and Taiwan.
[8] *Société du Gaz de Paris v Société Anonyme de Navigation 'Les Armateurs Francais'* (1926) Paris SC 13 (HL).
[9] Ibid 18.
[10] *Spiliada* (n 3) 475.
[11] Ibid 476.

Lord Goff of Chieveley gave examples of the factors that the court is entitled to take into account in considering whether one forum is more appropriate for interests of all parties and ends of justice:[12]

> [T]hese will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction, and the places where the parties respectively reside or carry on business. … the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction.

The application of *forum non conveniens* under English law is for the interests of the parties, although it is at the discretion of the English courts. The discretion is exercised based on the approach for the interests of all parties and ends of justice. The application of *forum non conveniens* will be illustrated below by comparing Hong Kong common law with the Chinese doctrine of *forum non conveniens* in judicial practice, which was based on the principle of litigation inconvenience to Chinese courts.

The judicial evolution of the doctrine in China

China started trials of foreign-related disputes[13] in the 1980s and refused to recognize the doctrine of *forum non conveniens* in the trial of foreign-related cases.[14] Meanwhile, Chinese courts encountered significant difficulties in finding facts that occurred in overseas jurisdictions and applying foreign law when they tried foreign-related cases that were more appropriate to be tried by foreign courts.[15] This vexatious problem was not solved until Chinese courts transplanted the concept of *forum non conveniens* from English law. The British wind of *forum non conveniens* blew to Hong Kong.[16] At the request of Hong Kong litigants, Chinese courts began to apply the concept of *forum non conveniens* to decline jurisdiction in the 1990s.[17] Chinese courts had applied the principle of litigation inconvenience for staying their proceedings on a discretionary basis with two main factors, which were inconvenience to Chinese courts and non-involvement of Chinese parties.

It is recorded that Chinese courts started to apply the principle of litigation inconvenience in the first milestone case of *Bank of East Asia (Hong Kong) v Dong Peng Trade & Development Corporation (BEA)*.[18] In this case, both the appellant, Bank of East Asia (BEA), and the respondent, Dong Peng Trade and Development Corporation (Dong Peng), were registered companies in Hong Kong.[19] Dong Peng applied for a letter of credit to be issued by BEA for the beneficiary of an American company in Hong Kong. After the issue of the letter of credit, Dong Peng found a fraud of the beneficiary and demanded BEA not make the payment, but BEA paid the American beneficiary. Dong Peng sued BEA in the

[12] Ibid 478.

[13] Foreign-related disputes refer to disputes involving a foreign element, including foreign parties and objects in disputes outside the territory of Mainland China. See Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China 2022, art 520.

[14] See Xiaoming Xi, 'A Few Thoughts on the Doctrine of *Forum Non Conveniens*' (2002) 1 Chinese JL 84.

[15] Ibid 84–5.

[16] James Fawcett (ed), Declining Jurisdiction in Private International Law (OUP 1995) 12.

[17] Guangjian Tu, '*Forum Non Conveniens* in the People's Republic of China' (2012) 2 Chinese J Intl L 341, 364.

[18] *Bank of East Asia (Hong Kong) v Dong Peng Trade & Development Corporation* (1995) YFJEJZ no 3 (Civil Ruling of the Guangdong High People's Court) (BEA).

[19] Hong Kong was treated as foreign jurisdiction before the handover from the United Kingdom to China in 1997. Even after the handover, Hong Kong is still treated as foreign jurisdiction mainly because Hong Kong is a common law jurisdiction, whereas Mainland China is not a common law jurisdiction.

intermediate court of Shenzhen, China. The court accepted this case,[20] but BEA challenged the jurisdiction and argued that the Hong Kong court was the appropriate court for trial of the case. BEA's challenge was dismissed by the Shenzhen Intermediate People's Court and the Guangdong High People's Court as the appellate court.

In the re-trial of the case, the Guangdong High People's Court asked for opinions from the SPC before making its decision. Considering the facts that the parties had explicitly agreed on Hong Kong jurisdiction and both parties were Hong Kong companies, the SPC pointed out that the dispute had nothing to do with Mainland China. The SPC created a principle of litigation inconvenience,[21] and, by applying this principle, took the view that the case should be tried by the Hong Kong court according to the parties' jurisdiction agreement. The Guangdong High People's Court followed the SPC's reply and declined jurisdiction over the case.[22]

The SPC reaffirmed the principle of litigation inconvenience in *Sumitomo Bank v Xinhua Real Estate Ltd (Sumitomo Bank)*.[23] In this case, the parties were Hong Kong companies and the contract in dispute was signed and performed in Hong Kong. Furthermore, the parties chose Hong Kong law as the governing law of the contract. The Guangdong High People's Court exercised jurisdiction because of the defendant's distrainable property in Guangdong. The defendant challenged the jurisdiction and appealed to the SPC. Applying the principle of litigation inconvenience, the SPC held that it was more appropriate for the Hong Kong courts to hear the case and it was inappropriate for the Guangdong High People's Court to exercise jurisdiction.[24] The SPC proposed the principle of litigation inconvenience in *BEA* and formally applied the principle in *Sumitomo Bank*.

Although the SPC did not expressly apply the doctrine of *forum non conveniens* in the *Sumitomo Bank* case, it is believed that the Chinese courts had actually adopted the concept when they made decision to reject the cases.[25] However, it is doubtable whether the principle of litigation inconvenience is the equivalent to the doctrine of *forum non conveniens* in English law. The basis of the principle of litigation inconvenience is the inconvenience to Chinese courts and non-connection with China. The main concern in the application of the principle of litigation inconvenience is the inconvenience to Chinese courts, not the interests of parties or the ends of justice. Therefore, it is not convincing to conclude that Chinese courts have started to apply the doctrine of *forum non conveniens* in *BEA* and *Sumitomo Bank*, although Chinese courts dismissed cases when the defendants challenged the jurisdiction of the Chinese courts. These cases should not be characterized as *forum non conveniens* cases from the perspective of English law. It is pointed out that, 'strictly speaking, the Chinese version is not a real doctrine of *forum non conveniens* (like the British one) but only a *forum non conveniens* substitute, although Chinese lawyers have habitually used the same term'.[26] Because the concept of *forum non conveniens* has been habitually used in Chinese juridical practice, although it actually means the Chinese principle of litigation inconvenience, the phrase of Chinese doctrine of *forum non conveniens* is used for comparative study in this article.

In the application of the principle of litigation inconvenience, the SPC did not exercise jurisdiction in *BEA* and *Sumitomo Bank* where there were no parties from Mainland China. Conversely, the SPC exercised jurisdiction when the parties in dispute are/were from

[20] The Shenzhen Intermediate People's Court exercised its jurisdiction according to the Chinese Civil Procedure Law 1991. For Chinese courts' jurisdiction over foreign-related case, see generally Liang Zhao, 'Party Autonomy in Choice of Court and Jurisdiction over Foreign-related Commercial and Maritime Disputes in China' (2019) 15(3) J Private Intl L 541.

[21] The SPC created this principle without citing any Chinese statutory provisions. It is believed the SPC considered the concept of *forum non conveniens* from Hong Kong.

[22] See note 18 above.

[23] *Sumitomo Bank v Xinhua Real Estate Ltd* (1999) JZZ no 194 (SPC Civil Ruling) (Sumitomo Bank).

[24] Ibid.

[25] Shi Shi and Mei Teng, 'The Development of the Doctrine of *Forum Non Conveniens* in China' (2003) 7 JL Application 62.

[26] See Tu (n 17) 359.

Mainland China. In *Guohua Commercial Bank Hong Kong Branch v Shantou Hongye (Group) Co Ltd (Guohua)*,[27] the contract in dispute was subject to the Hong Kong jurisdiction and governed by Hong Kong law. The contract was signed and concluded in Hong Kong. The Guangdong High People's Court applied the principle of litigation inconvenience and dismissed the case.[28] However, the SPC, in the appeal trial, held that the Guangdong High People's Court should exercise jurisdiction.[29] The SPC took the view that it was convenient for Chinese courts to have the trial and enforce judgment when the defendants were Chinese companies and had assets in Mainland China.[30] It can be seen that the SPC's view in *Guohua* was still based on convenience, but decisive factors are the involvement of the Chinese parties and the parties' distrainable property in Mainland China, instead of jurisdiction agreement and choice of law in disputes.

In *Guohua*, the SPC did not explain why Chinese courts should exercise jurisdiction when Chinese parties are involved in a dispute. It is a tradition of Chinese judicial practice that Chinese courts actively exercise jurisdiction over disputes when Chinese parties are involved. Foreign jurisdiction or foreign arbitration agreements between Chinese parties without foreign elements in disputes are even held void by Chinese courts.[31] It is therefore easy to understand why Chinese courts will not decline jurisdiction by applying *forum non conveniens* if Chinese parties are involved in disputes. In fact, the factor of the involvement of a Chinese party has no direct relation with litigation inconvenience to Chinese courts. Jurisdiction over foreign-related civil cases is considered as an important part of State judicial power. This kind of understanding of national judicial sovereignty decides that Chinese courts will not give up jurisdiction when Chinese parties are involved in foreign-related disputes. It is, however, suggested that declining jurisdiction based on *forum non conveniens* is also a kind of exercise of State judicial power.[32] Unfortunately, this suggestion has not been accepted by the Chinese doctrine of *forum non conveniens*. The factor of the involvement of a Chinese party was the main factor in the Chinese doctrine of *forum non conveniens* for a long period, until the change of law in the CPL 2023.

The second factor in *Guohua* is the defendants' distrainable property in Mainland China. The concern of this factor is the enforcement of foreign judgments in China. Chinese courts adopt a restrictive approach on the recognition and enforcement of foreign judgments, which prevents judgments of countries that do not have judicial cooperation treaties or a relevant reciprocal relationship with China from being recognized and enforced.[33] Therefore, it is believed that it is necessary to permit the Chinese courts to take the factor of recognition and enforcement into consideration, and the location of the defendant's property in China would be a weighty factor in the application of *forum non conveniens* in China.[34] However, this is not a decisive factor in the application of litigation inconvenience in Chinese judicial

[27] *Guohua Commercial Bank Hong Kong Branch v Shantou Hongye (Group) Co Ltd* (2000) JZZ no 177 (SPC Civil Ruling).
[28] It is believed that the Guangdong High People's Court followed *BEA* (n 18) and *Sumitomo Bank* (n 23).
[29] The Guangdong High People's Court exercised jurisdiction as the court of the place where the defendant has his domicile in Guangdong.
[30] See note 27 above.
[31] In *Beijing Chaolai Xinsheng Sports & Leisure Co Ltd v Beijing Suowang Zhixin Investment Consulting Co Ltd* (2013) EZMTZ no 10670 (Civil Ruling of the Beijing Second Intermediate People's Court), the Beijing Second Intermediate People's Court refused to recognize the arbitration award issued from the Korean Commercial Arbitration Board because all parties were Chinese parties and the South Korean arbitration agreement between them was void; in *Tianweini (Shanghai) Commerce & Trading Co Ltd v Yinian (Shanghai) Fashion Trading Co Ltd* (2019) HMXZ 199 (Civil Ruling of the Shanghai High People's Court), the Shanghai High People's Court held that the Hong Kong arbitration agreement between two Chinese parties was void.
[32] Xi (n 14) 86.
[33] The Civil Procedure Law of the People's Republic of China 2023, art 299.
[34] Zheng Sophia Tang, 'Declining Jurisdiction by *Forum Non Conveniens* in Chinese Courts' (2015) 1 HKLJ 351, 372.

practice. In *WONG Chung Shing v WONG Chun Ho*,[35] the enforcement argument was not considered by the SPC in the application of litigation inconvenience. This factor seems to provide convenience to the plaintiffs, but it obviously ignores the interests of the defendants. In fact, this factor has never been included in the written rules of the Chinese doctrine of *forum non conveniens*.

Internal guidelines from the SPC

The Fourth Civil Division of the SPC published internal opinions for trials of foreign related cases in the Questions and Answers in Trial Practice of Foreign Related Commercial and Maritime Cases I in 2004 (Questions and Answers 2004).[36] Article 7 of the Questions and Answers 2004 provides that, although there is no provision on the doctrine of *forum non conveniens* in Chinese law, Chinese courts may not exercise jurisdiction and can give up jurisdiction by applying the doctrine of *forum non conveniens*. Under this article, Chinese courts may apply the doctrine of *forum non conveniens* when one party raises claims to Chinese courts but the other party requests Chinese courts not to exercise jurisdiction on the basis that Chinese courts are inconvenient courts, provided that the following conditions are satisfied: all parties are foreign parties; the main facts of the dispute have no any connection with China; Chinese courts have significant difficulties in ascertaining facts and applying law; and the judgments need to be enforced in foreign countries.

The opinions on the application of the doctrine of *forum non conveniens* were based on the judicial experience at the exploring stage in the 1990s. They emphasized the factors of connection, difficulties, and enforcement. Article 7 expressly uses the doctrine of *forum non conveniens* for the first time in an official document of the SPC. Although the Questions and Answers 2004 is not official law, Article 7 of the Questions and Answers 2004 provides Chinese courts with guidelines for the application of the doctrine of *forum non conveniens* in Chinese judicial practice.

The SPC published the Minutes of the Second National Working Meeting on Foreign Related Commercial and Maritime Trials in 2005 (Minutes 2005).[37] Article 11 of the Minutes 2005 provides that in dealing with a foreign-related commercial case, if a Chinese court finds that it is not convenient to exercise jurisdiction, that court can dismiss the case by applying the doctrine of *forum non conveniens*. To apply the doctrine, the following conditions must be met: (i) the defendant requests the application of the doctrine, or challenges the jurisdiction of Chinese court, and the court with which the case was filed thinks the doctrine could possibly be applied; (ii) the Chinese court which the case was filed has jurisdiction over the case; (iii) there is no agreement between the parties choosing Chinese courts; (iv) the case does not fall into exclusive jurisdiction of Chinese courts; (v) the case does not involve the interests of Chinese citizens, legal persons, or other organizations; (vi) the main facts of the dispute are out of the Chinese territory and Chinese law does not apply to the case; if the Chinese courts accept the case, they will have significant difficulties in ascertaining the facts of the case and applying the governing law; and (vii) a foreign court has jurisdiction over the case and is more convenient to try the case.

Article 11 of the Minutes 2005 expressly uses the phrase of *forum non conveniens* again. It also specifies the detailed conditions for the application of the doctrine. First, for difficulties within Chinese courts, Article 11 removes the connection factor and replaces it with the factors of the main facts, which are outside of China, and the governing law, which is not

[35] *WONG Chung Shing v WONG Chun Ho* (2019) ZGFMZ 592 (SPC Civil Ruling).
[36] Questions and Answers in Trial Practice of Foreign Related Commercial and Maritime Cases I 2004 (Questions and Answers 2004).
[37] Second National Working Meeting on Foreign Related Commercial and Maritime Trials 2005 (Minutes 2005).

Chinese law. It also removes the factor of enforcement. Second, it removes the condition that all parties must be foreign parties and replaces it with the involvement of interests of Chinese citizens, legal persons, or other organizations. This factor, which will be analysed below, has seriously limited the discretion of Chinese courts in the application of the doctrine of *forum non conveniens* in Chinese judicial practice. Third, it adds the factor of jurisdiction of Chinese courts—namely, the contractual jurisdiction choice of Chinese courts and exclusive jurisdiction of Chinese courts by law. The two newly added factors have also limited the discretion of Chinese courts in the application of the doctrine. Finally, it also adds a new factor that a foreign court has jurisdiction over the same case, and it is more convenient for the foreign court to try the case. However, the below empirical study of Chinese judicial practice has proven that this factor has never been evidenced in Chinese judicial practice. Although the Minutes 2005 are not a formal law, they have provided an important basis for drafting formal written rules of *forum non conveniens* in the SPC's judicial interpretations.[38]

Chinese written rules 2015/2022

Although there is no provision on the doctrine of *forum non conveniens* in the Chinese civil procedure law, the SPC has developed the rules of Chinese doctrine of *forum non conveniens* in its judicial interpretations. The doctrine of *forum non conveniens* was regulated by the SPC in the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China in 2015 (Interpretation 2015).[39] Although the SPC's interpretations are not law promulgated by the National People's Congress or its Standing Committee, they have legally binding effect in Chinese judicial practice.[40] Therefore, the Interpretation 2015 has the force of law and is applied as written rules in Chinese judicial practice.

Article 532 of the Interpretation 2015 provides the rules of *forum non conveniens* as follows:

> Where a foreign-related civil case falls under all of the following circumstances at the same time, a people's court may render a ruling to dismiss the filing of action by the plaintiff, and inform the plaintiff to file a lawsuit to a more convenient foreign court:
>
> 1) where the defendant raises the request that the case should be tried by a more convenient foreign court, or raises objection against jurisdiction;
> 2) where there is no agreement on jurisdiction of a court of the People's Republic of China between the parties;
> 3) where the case does not fall under the exclusive jurisdiction of the court of the People's Republic of China;[41]
> 4) where the case does not involve the interests of the nation, citizens, legal persons or other organisations of the People's Republic of China;

[38] Deyong Shen (ed), *The SPC's Understanding and Application of the Interpretation on the Application of the Civil Procedure Law* (People's Court Press 2015) 1394.

[39] Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China 2015 (Interpretation 2015).

[40] Art 5 of the Provisions of the Supreme People's Court on the Work Concerning Judicial Interpretation 2007 provides that the judicial interpretation formulated and promulgated by the Supreme People's Court shall be legally effective.

[41] The exclusive jurisdiction of Chinese courts is regulated by law. According to the Civil Procedure Law of the People's Republic of China 2023, art 34, Chinese courts have exclusive jurisdiction over disputes arising from real estate by the court of the place where the estate is located, harbour operations by the court of the place where the harbour is located, and succession by the court of the place where the decedent had his domicile upon his death, or where the principal part of his estate is located. According to the Civil Procedure Law 2023, art 279, Chinese courts also have exclusive jurisdiction over disputes arising from the performance of contracts for Chinese-foreign equity joint ventures, or Chinese-foreign contractual joint ventures, or Chinese-foreign cooperative exploration and development of the natural resources in China.

5) where the main facts in dispute of the case did not take place within the territory of the People's Republic of China; the case is not governed by the law of the People's Republic of China; the people's court has significant difficulties in ascertaining facts and applying law during the hearing of the case; and
6) where a foreign court has jurisdiction over the case, and it is more convenient for the foreign court to hear the case.

The doctrine of *forum non conveniens* in Article 532 of the Interpretation 2015 mainly follows the rules of Article 11 of the Minutes 2005. It has two main differences. First, it adds the factor of the involvement of the interests of nation—that is, China. However, it does not clarify the concept or scope of the national interests. Second, it adds additional consequences if the Chinese court dismisses an action by applying the doctrine of *forum non conveniens*—that is, to 'inform the plaintiff to file a lawsuit to a more convenient foreign court'. This is a good development of the procedure law. However, it does not provide procedural remedy if the foreign court does not exercise jurisdiction over the same dispute. Further procedure rules are needed for the application of the doctrine of *forum non conveniens* in Chinese law.

The Interpretation 2015 was amended by the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China in 2022 (Interpretation 2022). The corresponding article in the Interpretation 2022 is Article 530, and its provisions are identical to those of Article 532 in the Interpretation 2015. Therefore, Article 532 in the Interpretation 2015 is referred in this article for the analysis and empirical study of the rules of *forum non conveniens* in China. Article 532 of the Interpretation 2015 does not use the phrase of *forum non conveniens*. It is, however, believed that Chinese courts consider the provisions of this article as the rules of *forum non conveniens*. This can be proven by the development of the relevant rules from the SPC.

From the provisions of Article 532, it can be seen that Chinese doctrine of *forum non conveniens* has been substantially influenced by the principle of litigation inconvenience to courts that was created and applied in Chinese judicial practice before 2015. It is obviously different from the common law doctrine, although it borrows the concept of *forum non conveniens* from the common law. This might be the reason why the SPC did not use the phrase *forum non conveniens* in Article 532 of the Interpretation 2015, although this article was sourced from the Questions and Answers 2004 and the Minutes 2005, in which the phrase *forum non conveniens* was directly used. It seems that the SPC intentionally avoided the phrase 'doctrine of *forum non conveniens*', aiming to establish a Chinese version of the doctrine of *forum non conveniens* to differ from the doctrine from common law.[42] The Chinese concept of *forum non conveniens* focuses on the convenience to Chinese courts and the jurisdiction over Chinese parties. This approach has resulted in an unsatisfactory application of the doctrine of *forum non conveniens* in Chinese courts. The following empirical study of Chinese judicial practice from 2015 to 2020 proves this unsatisfactory application.

Besides the different approaches, there is also a difference in procedure between English law and Chinese law. Unlike English courts that may stay proceedings, Chinese courts may dismiss the filing of action by plaintiffs by applying the doctrine of *forum non conveniens*. In the view of Chinese courts, a case may be in an uncertain situation for a long time if the proceedings are stayed, depending on proceedings in foreign courts. Even though Chinese courts refuse cases or reject actions by applying the doctrine of *forum non conveniens*, they may accept the cases if the factors in the doctrine of *forum non conveniens* are changed.[43]

[42] Shen (n 38) 1394–5.
[43] Xi (n 14) 92.

However, it is argued that the questions of whether parties are allowed to re-claim and how to start the time limitation of action are still uncertain under the Chinese civil procedure law. It was therefore suggested to follow English law and grant a stay if another forum is more appropriate.[44] This suggestion, however, is not included in the later legislation of the CPL 2023.

New doctrine of *forum non conveniens* in Chinese CPL

The CPL 2023 makes important amendments to its predecessor on jurisdiction over foreign defendants, internationally parallel litigation, service and evidence collection, and so on. A newly added Article 282 provides formal rules for the doctrine of *forum non conveniens* in Chinese law. Article 282 reads as:

> When a People's Court accepts a foreign related civil case,[45] upon jurisdiction objection raised by the defendant, it can dismiss the action and inform the plaintiffs to bring the case to a more convenient foreign court if it meets all the following requirements:
>
> 1) The basic facts of the dispute did not take place within the territory of the People's Republic of China; it is apparently inconvenient for the People's Court to try the case and the parties to participate in the litigation;
> 2) There is no agreement between the parties that the case should be subject to the jurisdiction of the People's Court;
> 3) The case is not subject to the exclusive jurisdiction of the People's Court;
> 4) The case does not involve the sovereignty, safety or public interests of the People's Republic of China; and
> 5) It is more convenient for a foreign court to try the case.
>
> After the action is dismissed, if a foreign court refuses to exercise its jurisdiction over the case, or fails to take necessary measure to try the case, or is unable to conclude the case within a reasonable period, and the party files the case again before a People's Court, the Chinese court shall accept the case.

Article 282 develops the doctrine of *forum non conveniens* on the basic rules of the SPC's judicial interpretations, but it has unique provisions as a new doctrine of *forum non conveniens.* It has four substantial changes compared with the rules in the SPC's judicial interpretations. First, it removes the factor of Chinese law as the governing law. This might be because the SPC has provided effective and comprehensive measures for ascertaining a foreign law.[46] However, ascertaining foreign law is different from applying foreign law, although Chinese courts may not think it is difficult to apply foreign law if they can ascertain foreign law. It also removes the factor of difficulties in ascertaining facts and applying law. This factor is replaced by the factor of inconvenience to the Chinese courts in trying cases and the parties in participation. However, there is no definition or scope of the apparent inconvenience. It is unknown whether Chinese courts will cite the factor of difficulties to prove the existence of apparent inconvenience. It seems that difficulties could be evidence of apparent

[44] Hongyu Shen, 'Construction of Chinese Law Application Overseas and Reform of Jurisdiction Regime of Foreign-related Civil and Commercial Litigation: With Discussion of the Doctrine of *Forum Non Conveniens* and Creation of Concept of Anti-suit Injunction' (2020) 5 China J Applied Jurisprudence 114, 126.

[45] Chinese courts are officially called People's Courts except some special courts—for example, maritime courts and intellectual property courts. So, a People's Court generally means a Chinese court.

[46] Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations (II) 2023, art 2.

inconvenience. If this is accepted by Chinese judicial practice, there will be no substantial change of those factors between Article 532 of the Interpretation 2015 and Article 282 of the CPL 2023. More importantly, it expressly reaffirms the principle of litigation inconvenience—namely, apparent inconvenience to Chinese courts. This is still for the convenience of Chinese courts. Nevertheless, there is a substantial improvement in the change because it includes the interests of parties by considering the inconvenience to the participating parties.

Second, it removes the factor of involvement of the interests of the nation, citizens, legal persons, or other organizations of China. This removes the biggest obstacle in applying the doctrine under Chinese law. This factor is replaced by the involvement of the sovereignty, safety, or public interests of China. This new factor should have little chance to be applied to limit the application of the doctrine of *forum non conveniens* in China.[47] Even if this factor is not specified in Article 282, it could be applied by the application of Chinese public law or policies. Therefore, this factor has no harm to the application of the doctrine of *forum non conveniens* in Chinese law.

Third, it removes the requirement that a foreign court has jurisdiction over the same case. This removed requirement seems superfluous because a foreign court must have jurisdiction if it could be proven that the foreign court is more convenient to try the case. In other words, if a foreign court has no jurisdiction, there is no issue of more convenience in trial by the foreign court. Finally, it provides procedural rules after the action is dismissed by applying the doctrine of *forum non conveniens*. It allows Chinese courts to accept the case again if the case is not solved by the more convenient foreign court. However, it does not solve the issue of the time limitation of action. It is unknown whether Chinese courts will resume the case or accept it as a new case. The time limitations of action in the two circumstances are different. Since law is silent on this issue, this needs judicial clarification by Chinese courts.

Although the new rules of the doctrine of *forum non conveniens* in Article 282 of the CPL 2023 are not perfect, they have been substantially improved by considering the inconvenience to the parties for the interests of the parties. This improvement could be proven from the below empirical study of the doctrine of *forum non conveniens* in Article 532 of the Interpretation 2015. Nevertheless, the Chinese doctrine of *forum non conveniens* still has room for improvement—that is, removing the requirement of inconvenience to Chinese courts and considering more interests of the parties rather than the inconvenience to the parties only.

Chinese judicial practice in 2015–20

Empirical data analysis

Chinese judicial practice of the doctrine of *forum non conveniens* before 2012 was examined and it was argued that Chinese *forum non conveniens* needs to be specified and codified.[48] The rules of Chinese *forum non conveniens* in the Interpretation 2015 were examined and it was argued that there is no need to make substantial change but only to have technical improvement.[49] These arguments over Chinese *forum non conveniens* have not been examined or proven by Chinese judicial practice after the promulgation of the rules in the Interpretation 2015. The empirical study of Chinese judicial practice of *forum non conveniens* in 2015–20 in this research shows that Chinese *forum non conveniens* has deviated from the orthodox doctrine of *forum non conveniens* and has been facing challenges in its application.

[47] There is no reported case involving the sovereignty, safety, or public interests of China in the application of the doctrine of *forum non conveniens* in Chinese judicial practice.

[48] Tu (n 17) 341–65.

[49] See Tang (n 34) 351.

For an empirical study of the application of *forum non conveniens* in China, the judgments were searched in China Judgements Online with keywords of 'article 532' and 'jurisdiction' for judgments from 2015 to 2020.[50] It was found that China Judgement Online has published 91 judgments in which Article 532 of the Interpretation 2015 was applied. Most of these cases are commercial disputes and a few are family disputes. In these 91 judgments, there are 10 cases in which Article 532 was wrongfully applied. The errors are that the Chinese courts did not have jurisdiction over the cases but applied Article 532 to dismiss the cases[51] and that the Chinese court rejected the lawsuit from the plaintiffs based on Article 532.[52] There are 19 judgments in which the Chinese courts did not respond to the question of the application of Article 532 when the defendants raised the request of application or challenged the jurisdiction. The Chinese courts failing to examine the application of Article 532 include local courts and the SPC. This problem has existed since 2015 and was not solved in the judicial practice of 2020.[53] The errors and failure of application reflect the inappropriate practice of Chinese courts in the application of *forum non conveniens*. It is hoped that the inappropriate practice of applying the doctrine could be reduced after the enactment of the doctrine in the newly amended CPL 2023.

Omitting the wrongfully judged cases and the cases in which there is no examination of *forum non conveniens*, there are 62 valid judgments for the application of Article 532. In these judgments, Chinese courts applied the doctrine of *forum non conveniens* based on Article 532. However, not all judgments have developed a comprehensive analysis of application. Article 532 requires that the Chinese courts may not exercise jurisdiction provided that all six must-have conditions are satisfied simultaneously. Therefore, for the application of Article 532, all six conditions shall be analysed. In fact, only nine judgments contain comprehensive analysis of the six conditions of Article 532, which represents only 14 per cent of all valid judgments. There are 37 judgments in which the conditions of Article 532 were not fully analysed, which represents approximately 60 per cent of all valid judgments. The remaining 16 judgments contain no analysis of the application of Article 532, although judgments were made according to Article 532, which represents 26 per cent of all valid judgments. It indicates that the rules of *forum non conveniens* have not been strictly applied in Chinese judicial practice. It means that *forum non conveniens* is still a new concept to some Chinese courts and the application of the doctrine is at a premature stage of judicial practice in Chinese courts.

There are two important factors in Article 532 of the Interpretation 2015. The first important factor is the significant difficulty in ascertaining facts and applying law as required in Article 532(5). It is commonly understood by the Chinese courts that it is significantly difficult to ascertain facts that took place outside of the territory of Mainland China, even in Hong Kong, Macau, or Taiwan as special administrative regions of China. Chinese courts may easily decline jurisdiction based on this difficulty. However, none of the valid judgments has provided any evidence proving the significant difficulty. Such difficulty seems to be common sense, which does not need any evidence from either the defendants who challenged the jurisdiction based the difficulty or the Chinese judges who accepted the difficulty as the basis to decline jurisdiction. However, difficulty as a matter of fact needs to be proven by

[50] The website is <http://www.wenshu.court.gov.cn>; all Chinese judgments in database accessed on 13 October 2021.

[51] *Excalibur Special Opportunities LP v Changchun Yongxin Dirui pharmaceutical Co Ltd* (2015) JMSSZZ no 4 (Civil Ruling of the Jilin High People's Court); *Li Huanyan v Lin Yanfen* (2015) HZFMEZZ no 1847 (Civil Ruling of the Guangzhou Intermediate People's Court); *Mazars Consulting Co Ltd v Yano Co Ltd* (2019) H 01 MZ 1444 (Civil Ruling of the Shanghai First Intermediate People's Court).

[52] *Re Guangzhou Hongyu Water-Proof Engineering Co Ltd* (2017) Y 1972 MC 7901 (Civil Ruling of the Dongguan Second Intermediate People's Court).

[53] *Huang Yiming v CHOW TAI FOOK Limited* (2015) MSZZ no 9 (SPC Civil Ruling); *Re Wang Xinya* (2020) ZGFMS 5479 (SPC Civil Ruling).

evidence. Without evidence, Chinese courts have contrary point of views—for example, whether Chinese courts have significant difficulty in ascertaining facts in Hong Kong. The second significant difficulty is the application of foreign law. Similarly, Chinese courts commonly understand that it is significantly difficult to apply foreign laws, including the laws of Hong Kong, Macau, and Taiwan. There is no evidence of such difficulties in the valid judgments. It is submitted that evidence is needed for such difficulty. If the relevant foreign law cannot be proven, it might be logical to infer the significant difficulty in the application of the foreign law. If the relevant foreign law can be proven, it might be arbitrary to infer such significant difficulty without further evidence of the application of foreign law.

The second important factor is the interests of the nation, citizens, legal persons, or other organizations of China in Article 532(4). There are 48 cases involving the interests of Chinese parties, representing 77 per cent of valid judgments. Chinese courts have exercised jurisdiction over the disputes where the interests of China parties are involved in 36 cases, which represents 75 per cent of the 48 cases. It can be seen that the involvement of the interests of Chinese parties has become one of the most important factors for determining the jurisdiction under Article 532. It must be noted that not all Chinese courts exercised jurisdiction when the interests of Chinese parties were involved in disputes. There are 12 cases in which Chinese courts did not exercise jurisdiction, although Chinese parties were involved in disputes. Although this practice only represents 25 per cent of the 48 cases involving Chinese parties, it reflects a different understanding that the involvement of Chinese parties does not automatically mean the involvement of the interests of Chinese parties. This different understanding has been accepted in the new doctrine of *forum non conveniens* in Article 282 of the CPL 2023, in which the factor of interests of Chinese parties has been removed.

Like English courts, Chinese courts also consider factors affecting convenience or expense and other factors such as the governing law and the parties' places of residence or business. However, the empirical study shows that the decisive factors are the significant difficulties in ascertaining facts overseas and applying foreign law, and the involvement of the interests of Chinese parties. This is because the Chinese *forum non conveniens* is ruled not from the perspective of the interests of all parties and ends of justice but from the jurisdiction over Chinese parties and inconvenience to Chinese courts. Furthermore, unlike English law, Chinese law on *forum non conveniens* does not provide further rules for the plaintiffs to prove that, when the defendants have satisfied the burden of proof, the court should not dismiss the case on the demand of justice—for example, 'the plaintiff will not obtain justice in the foreign jurisdiction'.[54] Because of the lack of the further rules, no parties in disputes of the valid judgments had argued on the issue of ends of justice and no Chinese courts had considered this issue for the application of *forum non conveniens*. Therefore, the following analysis can be made only on the issues of inconvenience to Chinese courts and involvement of the interests of Chinese parties with comparison of the common law approach of *forum non conveniens*.

Difficulties and Inconvenience

Inconvenience to Chinese courts

Condition 5 of Article 532 provides that, where the main facts in dispute of a case did not take place within China and Chinese law does not apply to the case, and thus the Chinese court has significant difficulties in ascertaining facts and applying law, the Chinese Court may not exercise the jurisdiction over the case. There is a specified rule of the principle of litigation inconvenience in Chinese judicial practice before the Interpretation 2015 and the new doctrine of *forum non conveniens* in Article 282 of the CPL 2023 as condition 1. This

[54] *Spiliada* (n 3) 478.

condition reflects the concern of inconvenience to Chinese courts when they exercise jurisdiction. This condition avoids the difficulties to Chinese courts in finding facts out of Chinese jurisdiction and applying foreign law. It is believed that 'the Chinese style of *forum non conveniens* is primarily used to facilitate procedure efficiency'.[55] This primary purpose of the Chinese *forum non conveniens* is realized by avoiding inconvenience to Chinese courts. However, it has nothing to do with the parties' interests.

Before the Minutes 2005, it was believed that inconvenience to parties in proceedings always leads to unfair results of disputes. Therefore, inconvenience to parties in disputes should also be considered. Therefore, it was suggested that the inconvenience in *forum non conveniens* in China should include the inconvenience to parties in disputes and the inconvenience to Chinese courts, among which the parties' inconvenience is the first consideration in the application of *forum non conveniens*.[56] The concern of parties' convenience was not included in the rules of *forum non conveniens* in the Interpretation 2015.

In judicial practice of the doctrine of *forum non conveniens* in 2015–20, Chinese courts have strictly applied Condition 5 of Article 532 for determining whether or not they exercise jurisdiction. In family disputes, Chinese courts reject dispute and refuse to exercise jurisdiction when couples' marriages and lives including properties are located in foreign countries or regions.[57] Similarly, Chinese courts in commercial cases reject dispute and refuse to exercise jurisdiction when facts of disputes do not take place within the territory of Mainland China and foreign law applies to the disputes.[58] On the contrary, Chinese courts refuse to decline jurisdiction when the main facts of dispute occur in China and Chinese law applies.[59] This kind of practice shows simple criteria in the application of *forum non conveniens* under Article 532—that is, the territory of Mainland China. This geographical factor does not directly relate to the interest of parties. This should not be a reasonable factor for choice of jurisdiction under the doctrine of *forum non conveniens*. It is only a factor for considering inconvenience to Chinese courts.

Although inconvenience to Chinese courts is one of the important factors under Article 532, Chinese courts may still consider the interests of parties in disputes. In *Chen Jinlong v Hou Suying (Chen Jinlong)*,[60] the cargo in dispute was carried from Malaysia to Thailand and was found inconsistent with its description on arrival. It was held by a Chinese court that the quality problem was found in Thailand, and it was more convenient for parties to solve the problem in local courts of Thailand. This court considered the inconvenience to parties, instead of inconvenience to the court, in applying the doctrine of *forum non conveniens*. However, *Chen Jinlong* does not strictly comply with the *forum non conveniens* rule in Article 532 of the Interpretation 2015. It created a new rule—that is, parties' interests as an additional rule to the rules under Article 532. It must be noted that this is not a typical practice of Chinese courts and does not represent the current trend of practice. The judgment in *Chen Jinlong* might be overruled if it is reviewed by upper-level courts in appeal or retrial. Now, the inconvenience to parties is included in the new doctrine of *forum non conveniens* in Article 282 of the CPL 2023.

[55] See Tang (n 34) 366.

[56] See Xi (n 14) 88.

[57] *Cang v Zhou* (2017) S 0206 MC 5970 (Civil Ruling of the Wuxi Huishan People's Court) (marriage and lives in Japan); *Haile Berhanu Wondafrash v Dengede Meseret Alemayehu* (2015) HMCZ no 02542 (Civil Ruling of the Jiangsu Sihong People's Court) (marriage and lives in Ethiopia); *T v Peng* (2020) Y 0104 MC14065 (Civil Ruling of the Guangzhou Yuexiu People's Court) (marriages and lives in the United States).

[58] *Li Dianhai v Shi Changming* (2016) H 0421 MC 87 (Civil Ruling of the Heilongjiang Luobei People's Court) (facts in Russia and Russian laws apply); *Jiang Zhenzi v Jin Xuemei* (2020) JMZ 157 (Civil Ruling of the Jilin High People's Court) (facts in South Korea and South Korean laws apply); *WONG Chung Shing v WONG Chun Ho* (2019) ZFFMZ 592 (SPC Civil Ruling) (facts in Canada and Chinese law do not apply).

[59] *Helsinki Memory Technologies Co Ltd v Kingston Technology Co Ltd* (2020) ZFFZMXZ 484 (SPC Civil Ruling): the sale of infringing product in litigation occurred in Mainland China and the applicable law for tort should be Chinese law.

[60] *Chen Jinlong v Hou Suying* (2020) J 11 MC 1109 (Civil Ruling of the Hengshui Intermediate People's Court).

If main facts occur in more than one territory or territorial sea and China is one of the territories, Chinese courts may exercise jurisdiction, no matter whether it is difficult to ascertain facts out of the territory of China. In *Ping An Property & Casualty Insurance Company of China Ltd Qingdao Branch v Mitsui OSK Lines, Ltd*,[61] the carrying vessel sunk with cargo in the Arabian Sea. The subrogated insurer claimed against the carrier for the loss of cargo in a Chinese court. It was held that there was no difficulty in ascertaining facts because the carriage started from China. Chinese courts have absolute discretion in determining whether main facts are in the territory of China and whether they have difficulty in ascertaining the main facts. However, there are no clear criteria for such discretion. It may cause uncertainty in applying the doctrine of *forum non conveniens* in Chinese courts. Compared with difficulties to parties, it is not predictable to parties in dispute whether Chinese courts have difficulties or inconvenience in trial of cases.

Chinese courts may have these difficulties under condition 5 of Article 532 because they have legal obligations to ascertain facts and foreign law. Under Chinese civil procedure law, it is the duty of parties to provide evidence in support of their allegations in court. However, if, for objective reasons, parties are unable to collect the evidence by themselves or if the court considers the evidence necessary for the trial of the case, the court shall investigate and collect it.[62] For proof of foreign law, although parties should provide evidence of foreign law if they choose to be governed by foreign law, Chinese courts have statutory obligation to ascertain foreign law.[63] In short, when parties in dispute cannot provide evidence to prove facts outside of Mainland China or foreign law, Chinese courts have the statutory obligations to ascertain the facts and foreign law. The obligations of Chinese courts derive from the authority of court. This authoritarianism causes difficulties to Chinese courts. If the ascertainment of facts and law can be changed to the parties' obligation only, Chinese courts may not have these difficulties and these difficulties may not become the apparent inconvenience to be considered for the application of *forum non conveniens*. If such a change can be accepted, Chinese courts can take the interests of parties as principle for applying the doctrine of *forum non conveniens*. This change will be appropriate and consistent with the relevant rules of *forum non conveniens* from common law.

Furthermore, condition 6 of Article 532 requires that a foreign court has jurisdiction over the case, and it is more convenient for the foreign court to hear the case (condition 5 of Article 282 of the CPL 2023). This requirement echoes the requirement of inconvenience to Chinese courts under condition 5 of Article 532.[64] It is understood that convenience and inconvenience are relative and judging whether it is inconvenient to Chinese courts depends on the comparison with alternative courts.[65] This seems to be a reasonable understanding. However, this requirement may not be workable for the application of the doctrine of *forum non conveniens*. Two questions arise when this condition is tested. First, how could Chinese courts ascertain whether some other forums have jurisdiction over the dispute? In fact, none of the Chinese courts in the valid judgments examined whether a foreign court has jurisdiction according to foreign law.[66] It is difficult for Chinese courts to examine this unless

[61] *Ping An Property & Casualty Insurance Company of China Ltd Qingdao Branch v Mitsui OSK Lines, Ltd* (2015) YGFLMZZ no 605 (Civil Ruling of the Guangdong High People's Court).

[62] Civil Procedure Law of the People's Republic of China 2023, art 67.

[63] Law of the People's Republic of China on Application of Laws to Foreign-Related Civil Relations 2010, art 10. In the event that foreign laws are unable to be ascertained or contain no relevant provisions, Chinese law shall apply.

[64] There might be a literal problem between the two requirements. If Chinese courts are the inconvenient courts, foreign courts might be the convenient courts, but not the 'more' convenient courts. It seems logical to infer that condition 6 requires that it is convenient for the foreign court, compared with inconvenient Chinese courts, to hear the case.

[65] See Xi (n 14) 89.

[66] *Cang v Zhou* (2017) S 0206 MC 5970 (Civil Ruling of the Wuxi Huishan People's Court): a divorce dispute that occurred in Japan; it was held that Japanese courts had jurisdiction and it was convenient for Japanese courts to hear the case; *T v Peng* (2020) Y 0104 MC 14065 (Civil Ruling of the Guangzhou Yuexiu People's Court): a divorce dispute that occurred in the United States; it was held that the US courts had jurisdiction, and it was convenient for the US courts to hear the case; *Li Dianhai v Shi Changming* (2016) H 0421 MC 87 (Civil Ruling of the Heilongjiang Luobei People's Court): a land lease dispute that occurred in Russia; it was held that Russian courts had jurisdiction, and it was convenient for Russian courts to hear

there is an agreed foreign jurisdiction and no evidence disproves the validity of the jurisdiction,[67] or a foreign court has already exercised jurisdiction over the same dispute.[68] Second, how could Chinese courts know whether it is more convenient for a foreign court to hear the case? Compared with the ascertainment of foreign jurisdiction, it is more difficult for Chinese courts to examine whether it is convenient for the foreign courts to exercise jurisdiction. It is only the foreign courts, not the Chinese courts, that know whether it is convenient to them. Therefore, inconvenience to Chinese courts, or more convenience to foreign courts, is not an appropriate factor for determining the appropriate forum by applying the doctrine of *forum non conveniens*.

Comparison between Mainland China and Hong Kong

These difficulties and inconveniences can be further analysed in the different practices between Chinese courts and Hong Kong courts. As a special administrative region of China, Hong Kong maintains a regulated border with the rest of Mainland China. Chinese courts consider Hong Kong-related cases as foreign-related cases and apply special foreign-related civil procedure rules to Hong Kong-related cases.[69] In Hong Kong-related civil and commercial cases, Chinese courts commonly take the view that they have significant difficulty in ascertaining facts in Hong Kong and applying Hong Kong law in the hearing of the Hong Kong-related cases.[70] For example, in *Wales Co Ltd v Dongsheng Chemphy Limited*,[71] the contract in dispute was governed by Hong Kong law and subject to the jurisdiction of the Hong Kong court. The Dalian Intermediate People's Court pointed out that Mainland China and Hong Kong are different legal jurisdictions and Hong Kong applies common law, which has significant differences from Chinese law. Therefore, the court held that it had significant difficulties in ascertaining facts in Hong Kong and applying Hong Kong law in the trial of the case. However, there was no evidence proving such difficulties in this case, and the court did not analyse these difficulties with any evidence. However, this is not a universal judicial practice in China.

For the difficulties in Hong Kong, the Tianjin High People's Court took a contrary view in *Dignity International Development Limited v Rich Profit Creation Limited*.[72] In this case, the main facts in the dispute occurred in Hong Kong, and Hong Kong law was the governing law of the contract in dispute. The Tianjin High People's Court held that, considering the factors of evidence collection, witnesses' testifying in court, and ascertainment of applicable law and languages, there was no significant or apparent inconvenience to the court, and the court had no significant difficulties in ascertaining facts in Hong Kong and applying Hong Kong law. However, the court did not explain how these factors were considered. More importantly, no evidence was provided or examined for difficulties or inconvenience in this case. Neither of the two kinds of practice of Chinese courts is satisfactory for the application

the case; *Jiang Zhenzi v Jin Xuemei* (2020) JMZ 157 (Civil Ruling of the Jilin High People's Court): a labour service dispute that occurred in South Korea; it was held that South Korean courts had jurisdiction and it was convenient for South Korean courts to hear the case.

[67] *Doosan Development Co Ltd v Castlex Seoul Co Ltd* (2019) LMZ 2548 (Civil Ruling of the Shandong High People's Court); *Wales Co Ltd v Dongsheng Chemphy Limited* (2016) L 02 MC 624 (no 1) (Civil Ruling of the Dalian Intermediate People's Court).

[68] *Qiu v Liao* (2016) Y 06 MZ 848 (Civil Ruling of the Fuoshan Intermediate People's Court); *WONG Chung Shing v WONG Chun Ho* (2019) ZGFMZ 592 (SPC Civil Ruling).

[69] Art 549 of the Interpretations 2022 provides that the foreign-related procedure rules can apply to civil cases relating to Hong Kong, Macau and Taiwan.

[70] *Qiu v Liao* (2016) Y 06 MZ 848 (Civil Ruling of the Fuoshan Intermediate People's Court); *Sun Yang Achievement Limited v Bunch Up Industrial Limited* (2019) Y 0391 MC 2154 (Civil Ruling of the Shenzhen Qianhai People's Court).

[71] *Wales Co Ltd v Dongsheng Chemphy Limited* (2016) L 02 MC 624 (no 1) (Civil Ruling of the Dalian Intermediate People's Court).

[72] *Dignity International Development Limited v Rich Profit Creation Limited* (2016) JMZ 45 (Civil Ruling of the Tianjin High People's Court).

of the doctrine of *forum non conveniens*. This also shows the inconsistency in Chinese judicial practice for applying the factor of difficulties or inconvenience.

Chinese courts learned the concept of *forum non conveniens* from Hong Kong, but Hong Kong has a different doctrine of *forum non conveniens*. Hong Kong is a common law jurisdiction in China and has a similar common law system, like that of English law.[73] Hong Kong courts apply the doctrine of *forum non conveniens* and follow the rules in *Spiliada*. In *Peng Yan*,[74] cargo interests commenced *in rem* proceedings in Hong Kong against the owners and charterers of the carrying vessel Hui Rong and also against the owners of the vessel Peng Yan for cargo damage due to the collision of the two vessels. The defendants applied to stay the proceedings in Hong Kong on the ground of *forum non conveniens*, arguing that the Chinese court was a more appropriate court for the case.

Justice Reyes, in *Peng Yan*, considered a number of factors. First, he did not regard the fact that the vessel Peng Yan was registered in Mainland China nor that her owners being Mainland China-based carried much weight. On the contrary, the registration of the vessel had little impact on the trial of a cargo claim.[75] Second, he pointed out that crew members as witnesses of collision were often away from home and that, therefore, having to attend trial at a Hong Kong court would not be unduly inconvenient.[76] Third, the main evidence going to the issue of the respective fault of both vessels would come from the reports of the incident compiled by the Hong Kong Marine Department and the Shenzhen Maritime Safety Administration of China. Reyes J did not find evidence as to why the authors of these reports would find any difficulty in attending a trial in Hong Kong.[77] Reyes J held that these factors did not establish the Chinese court as the more appropriate forum and refused to stay the Hong Kong proceedings.[78]

It can be seen from *Peng Yan* that the Hong Kong courts, in applying the doctrine of *forum non conveniens*, took into account the inconvenience to the parties, not the courts. Furthermore, evidence collection and witnesses from Mainland China are not weighted factors in determining the more appropriate forum by the Hong Kong court. If the practice of *Peng Yan* is applied in Mainland China, Chinese courts should not take Hong Kong factors—for example, Hong Kong-registered companies and Hong Kong witnesses—as evidence of significant difficulty to decline jurisdiction over Hong Kong-related cases.

As for the application of foreign law, the Hong Kong courts are of the view that the English law can be ascertained by foreign courts with appropriate methods. In *Jin Yi*,[79] the defendants submitted that Hong Kong should be the appropriate forum because the Hong Kong courts would apply English law and would be more experienced in its application. However, the Hong Kong court pointed out that the body of English law (on carriage of goods by sea) is well-established and has been exhaustively commented upon in world-famous textbooks. It is hard to see how a court (whether in Hong Kong or Dubai) would have real difficulty in identifying and applying English law as the applicable law.[80] Similarly, Hong Kong law can also be ascertained without real difficulty by Chinese courts. Hong Kong law has been systematically introduced, in Chinese, in Mainland China. In particular, Hong Kong e-Legislation is the official database providing a bilingual version of Hong Kong

[73] Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, art 8.
[74] *Peng Yan* [2009] 1 HKLRD 144 (HK CA).
[75] *Peng Yan* [2008] 5 HKLRD 418, paras 18 and 19 (HK CFI).
[76] Ibid paras 20–3.
[77] Ibid paras 25–9.
[78] In the appeal, the Court of Appeal upheld the decision of the first instance and focused on the issue of the parallel proceedings in the competing jurisdictions of Hong Kong and the Chinese court: *Peng Yan* (n 72).
[79] *Jin Yi* [2011] HKEC 404 (HK CFI).
[80] Ibid paras 29–33.

legislation in both English and Chinese.[81] Even for common law, Hong Kong lawyers can provide legal opinions on common law that can be translated into Chinese. In fact, it is not uncommon for Chinese courts to ascertain and apply foreign law in judicial practice.[82]

In addition, the factor of language carries little or no weight in the application of the doctrine of *forum non conveniens*. In *Jin Yi*, many relevant documents were in English. As between forums of Hong Kong and Dubai, it was held that this factor points marginally in favour of Hong Kong, where English is one of the court's official languages.[83] The other Hong Kong official language is traditional Chinese, which can also be understood in Mainland China. Even documents in dispute are written in English; they could be formally translated into Chinese for official use in Chinese courts. Therefore, the common understanding that Chinese courts have significant difficulty in ascertaining facts in Hong Kong and applying Hong Kong law might not be tenable. Of course, different evidence may prove the difficulties to the contrary. In short, no matter how difficult it is in ascertaining facts in Hong Kong and applying Hong Kong law, evidence is needed. Compared with the Hong Kong courts' practice, the Chinese courts' practice of *forum non conveniens* is uncertain in terms of the difficulties in ascertainment of facts in foreign jurisdictions and the application of foreign law. If these difficulties are cited for evidence of inconvenience to Chinese courts, the change of factor in condition 1 of Article 282 of the CPL 2023 will not make the doctrine different from that one in previous judicial practice in China.

Interests of Chinese parties

Chinese courts considered the interests of the nation, citizens, legal persons, or other organizations of China in the application of *forum non conveniens* under condition 4 of Article 532. However, these interests are only Chinese interests, not interests of all parties in dispute. It is understood that the requirement of Chinese interests aims to protect interests of Chinese parties.[84] This understanding is not tenable because there is no reason to believe that Chinese courts can only protect interests of Chinese parties. In practice, it is rare that a dispute without Chinese interests is submitted to Chinese courts. It means, therefore, that Chinese courts rarely decline jurisdictions in foreign-related cases. It might be reasonably inferred that Chinese courts actively exercise jurisdiction when Chinese interests are involved in foreign-related disputes. However, this is an issue of jurisdiction over Chinese parties but not consideration of parties' interests. The condition of Chinese interests was criticized when it was included in the Minutes 2005 for the first time.[85] However, this criticism was not accepted by the Interpretation 2015.

In the valid Chinese judgments on *forum non conveniens*, the major Chinese interests are the interests of Chinese legal persons and the minor the interests of Chinese citizens. There is no reported case having interests of the Chinese nation or other organizations. Chinese citizens mean only the citizens of Mainland China.[86] Citizens from Taiwan[87] and Hong Kong[88] are not considered to be the subjects of Chinese interests because disputes with Taiwan, Hong Kong, and Macau matters are considered as foreign-related disputes.[89]

[81] 'e-Legislation'<https://www.elegislation.gov.hk>.

[82] *S EoiL Shipping Co Ltd v Tangshan Ganglu Iron and Steel Co Ltd* (2012) JGMSZZ no 4 (Civil Ruling of the Tianjin High People's Court): the Tianjin High People's Court ascertained and applied English law.

[83] *Jin Yi* (n 79) para 28.

[84] Zhihui Huang, 'Reflection on the Status Quo of the Application of *Forum Non Conveniens* by People's Courts: From "Six Conditions" to "Two Stages"' (2017) 6 Studies in L & Business 162.

[85] Jianli Song, 'Application of *Forum Non Conveniens* in Chinese Courts' (2012) 21 People's Judicature-Application 43.

[86] *Xiang Qingcong v Wu Zhiyuan* (2019) Y 18 MZ 567 (Civil Ruling of the Qingyuan Intermediate People's Court).

[87] *Hong v Lin* (2020) H 0115 MC 34125 (no 1) (Civil Ruling of the Shanghai Pudong People's Court).

[88] *Sun Yang Achievement Limited v Bunch Up Industrial Limited* (2019) Y 0391 MC 2154 (Civil Ruling of the Shenzhen Qianhai People's Court).

[89] *Beijing Shentong Culture Club Co Ltd v Zhou Songkai* (2018) ZGFMXZ 261 (SPC Civil Ruling).

Chinese people with other foreign nationalities are also not considered as Chinese interests.[90] Even Chinese people having no foreign nationality but permanent residency abroad are not considered as Chinese interests.[91] Although Chinese citizens are strictly limited to the mainland citizens having no foreign nationality or permanent residency, that one of the parties in dispute is a Chinese citizen is sufficient for the condition of Chinese interests, even if parties have agreed upon foreign law[92] or foreign jurisdiction in contract.[93] Once Chinese citizens are involved in disputes, Chinese courts will not decline jurisdiction in the application of *forum non conveniens* under Article 532. This reflects active jurisdiction over cases concerning Chinese parties in Chinese judicial practice. This is the Chinese judicial practice when the Chinese individuals are the plaintiffs.

The practice is different when the Chinese individuals are the defendants. Chinese courts may not exercise jurisdiction when Chinese citizens challenge jurisdiction based on *forum non conveniens* under Article 532. In *Qiu v Liao*,[94] the plaintiff was a Hong Kong resident and the defendants were Mainland citizens. The mainland citizens requested that the case be tried by the convenient Hong Kong court based on *forum non conveniens*. The Chinese court did not discuss interests of the Mainland citizens but pointed out that the court should respect the request as the right of the parties. It can be seen that Chinese courts applied *forum non conveniens* under Article 532 in different ways depending on the position of Chinese parties in legal proceedings in Chinese courts.

It seems that the Chinese courts prefer to exercise jurisdiction when the Chinese citizens are plaintiffs but may not insist on jurisdiction when Chinese citizens are defendants and are willing to accept foreign jurisdictions. In the former circumstance, Chinese courts support the claims from Chinese parties as plaintiffs by rejecting the jurisdictional challenge from the foreign parties as defendants. In the latter circumstance, Chinese courts also support Chinese parties as defendants by declining the jurisdiction over dispute from foreign parties as plaintiffs. Therefore, condition 4 of Article 532 is for the interests of Chinese citizens in the application of *forum non conveniens*. This might be unfair to foreign parties whose interests are not considered for the jurisdiction matter in Chinese courts. This might also cause a negative impact in access to justice in regard to foreign parties' interests. It is submitted that nationalities of individual parties in civil disputes should be a neutral factor for *forum non conveniens* and the involvement of Chinese citizens should not be a factor for exercising or declining jurisdiction.

For commercial disputes, Chinese courts decline to exercise jurisdiction based on *forum non conveniens* when all parties are foreign legal persons.[95] However, when Chinese legal persons are involved in commercial disputes with foreign parties, Chinese courts may exercise jurisdiction because the Chinese legal persons represent the interests of China as either the plaintiffs or the defendants,[96] or even one of the defendants.[97] It means that Chinese courts

[90] *Zheng v Wang* (2017) L 01 MZ 11236 (Civil Ruling of the Shenyang Intermediate People's Court): all parties in this case were Chinese with German nationality.

[91] *Wang Xiaoqing v Fan Shuangrui* (2020) X 2801 MC 4856 (Xinjiang Kuerle People's Court): all parties in this case had permanent residency of Denmark.

[92] *Qu Wei v Prudential Hong Kong Limited* (2019) EMZ 404 (Civil Ruling of the Hubei High People's Court): Hong Kong law is the applicable law.

[93] *Asia Rich Shipping Limited v Shi Ruichao* (2020) M 72 MC 239 (Civil Ruling of the Xiamen Maritime Court): Hong Kong courts have exclusive jurisdiction.

[94] *Qiu v Liao* (2016) Y 06 MZ 848 (Civil Ruling of the Fuoshan Intermediate People's Court).

[95] *Wales Co Ltd v Dongsheng Chemphy Limited* (2016) L 02 MC 624 (no 1) (Civil Ruling of the Dalian Intermediate People's Court); *Grace Young International Limited v Seoil Agency Co Ltd* (2017) LMZ 577 (Civil Ruling of the Shandong High People's Court).

[96] *Beijing Shentong Culture Club Co Ltd v Zhou Songkai* (2018) ZGFMXZ 261 (SPC Civil Ruling): Chinese legal person was the plaintiff in the case; *MSC Cruises SA v Beijing Wuzhou Roaming Travel Agency Co Ltd* (2018) J 72 MC 654 (Civil Ruling of the Tianjin Maritime Court): Chinese legal person was the defendant in the case.

[97] *Helsinki Memory Technologies Co Ltd v Kingston Technology Co Ltd* (2020) ZFFZMXZ 484 (SPC Civil Ruling).

strictly apply *forum non conveniens* for the jurisdiction over commercial disputes. As a general practice, Chinese courts insist on jurisdiction once Chinese legal persons are involved in commercial disputes. Although the factor of places where the parties carry on business is always considered for choice of court under *forum non conveniens*,[98] consideration of only Chinese legal persons will inevitably result in Chinese jurisdiction. This is obviously against the interests of foreign parties in disputes and is thus not a reasonable factor for *forum non conveniens*. A negative consequence is that Chinese courts may even be in a dilemma over whether they exercise jurisdiction when they have significant difficulties in ascertaining facts and applying foreign law, but Chinese parties are involved in disputes. Chinese judges may be reluctant to hear the cases in which they have these difficulties but have to exercise jurisdiction because the condition of non-involvement of interests of Chinese parties is not satisfied.[99] This also proves that the involvement of interests of Chinese parties is not an appropriate factor for the doctrine of *forum non conveniens* in Chinese courts.

In Chinese judicial practice, it is noted that the involvement of Chinese legal persons does not certainly mean the involvement of interests of Chinese parties. When a Chinese legal person involved in a commercial dispute is one of the defendants, Chinese courts may consider whether the interests of Chinese legal persons are really affected in the disputes between foreign parties as the plaintiff and the other defendant. In *Saito Yukio v Nakagawa Yuichi*,[100] the plaintiff claimed against the defendants, including one Chinese legal person, for repayment of a loan for investment. Evidence proved that the Chinese legal person was not involved in the loan transaction and was not invested by the plaintiff. It was held that the Chinese legal person had no repayment obligation. Therefore, no interest of Chinese legal persons was involved in this dispute. The Chinese court thus applied *forum non conveniens* and rejected the case. Similarly, in *WONG Chung Shing v WONG Chun Ho*,[101] the plaintiff and the first defendant had disputes of equity transfer agreement and the agreement was for investment to a Chinese legal person as the second defendant in dispute. It was found that the equity transfer dispute had no direct relation to the Chinese legal person and, therefore, the dispute did not involve the interests of the Chinese legal person. The SPC rejected the case even though the Chinese legal person was one of the defendants.[102]

The traditional practice of Chinese courts shows the extensive jurisdiction over disputes with involvement of Chinese legal persons. To some extent, the distinction in the involvement between Chinese legal persons and Chinese legal persons' interests eases the expansion of the jurisdiction of Chinese courts. However, it must be admitted that this new judicial practice is based on special facts that Chinese legal persons are one of the defendants and are not substantially involved in transactions in dispute. Those are not common facts in most foreign-related commercial disputes. This judicial practice did not essentially change the traditional practice of *forum non conveniens* where Chinese legal persons are involved in disputes and Chinese courts thus refuse to decline jurisdiction over such disputes. In the new doctrine of *forum non conveniens* in Article 282 of the CPL 2023, the factor of involvement of Chinese parties' interests has been removed. This is a substantial improvement in the Chinese doctrine of *forum non conveniens*. The involvement of the national interests has been replaced by the involvement of the sovereignty, safety, or public interests of China. This new factor will not cause prejudice to parties in dispute.

[98] *Spiliada* (n 3) 460.
[99] This circumstance is proven by an interview with a Chinese judge on 16 December 2021 for a case in which facts were to be ascertained in Taiwan and Taiwanese law should apply, but Chinese legal persons were involved in the dispute.
[100] *Saito Yukio v Nakagawa Yuich* (2017) L 02 MZ 112 (Civil Ruling of the Dalian Intermediate People's Court).
[101] *WONG Chung Shing v WONG Chun Ho* (2019) ZGFMZ 592 (SPC Civil Ruling).
[102] See also *Doosan Development Co Ltd v Castlex Seoul Co Ltd* (2019) LMZ 2548 (Civil Ruling of the Shandong High People's Court).

CONCLUSION

Although Chinese courts, including the SPC, have applied the doctrine of *forum non conveniens* since the 1990s, the Chinese doctrine is different from that of English common law. This difference is caused by the misunderstanding of *conveniens* and results in the principle of litigation inconvenience in Chinese law. It was suggested that 'the Chinese version of *forum non conveniens* need not follow one or more of the existing models in other countries'[103] and only 'more systematic legislation' is needed.[104] However, the empirical study of Chinese judicial practice in 2015–20 proves that the 'more systematic legislation'—that is, the Interpretation 2015 or the CPL 2023—does not substantially change the inconvenience approach of Chinese doctrine of *forum non conveniens*. Although the doctrine of *forum non conveniens* in Article 282 of the Chinese CPL 2023 has substantial changes compared with previous rule and judicial practice, it still has a clear requirement of inconvenience to Chinese courts.

Based on the comparative study of *forum non conveniens* between English law and Chinese law, it is submitted that Chinese law needs to change from the inconvenience approach to the approach for the interests of all parties. For this change, it is pointed out that the main problems of the *forum non conveniens* in China are the unclear purpose and value of the current doctrine and it is suggested that the current rules should be improved urgently.[105] For improvement of the Chinese rules, it should be clear that the purpose of the doctrine is not to avoid the inconvenience to Chinese courts, but to find an appropriate forum for trial of cases. It should be also clear that the value of the doctrine is not for expanding jurisdiction over Chinese parties, but for interests of all parties. Chinese courts borrowed the concept of *forum non conveniens* from English law. Chinese law may consider the suggested purpose and value of *forum non conveniens* from English law. This may help the Chinese doctrine of *forum non conveniens* to develop from the inconvenient approach to the approach for the interests of all parties. Only when Chinese law adopts the same approach as the English law for the interests of all parties in the choice of jurisdiction will Chinese law and English law tread different paths that lead to the same destination.

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[103] See Tang (n 34) 372.
[104] Ibid 352.
[105] See Shen (n 44) 121.