CHINA LAW UPDATE

DEVELOPMENT OF PARALLEL LITIGATION REGULATION IN CHINA'S AMENDED CIVIL PROCEDURE LAW

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Abstract

The Amended Civil Procedure Law of the People's Republic of China in September 2023 ("the Amended CPL") emerged in response to perceived deficiencies within the existing domestic legal framework and the escalating challenges encountered in cross-border scenarios. The Amended CPL has strategically addressed this predicament by expanding the jurisdictional ambit and exclusive authority of Chinese courts, precisely defining their competence in adjudicating parallel litigation cases. It has also introduced crucial principles such as the rule of prior in tempore and the doctrine of forum non conveniens to facilitate the harmonization between international proceedings. This essay is a comprehensive analysis of these legislative changes, delving into their intricacies and implications. In doing so, it aims to unravel the balance that the legislator sought to strike between two conflicting values: judicial sovereignty and international comity.

Keywords: Foreign-related Litigation, Parallel Litigation, Civil Procedure Law, Prior in Tempore, Forum Non Conveniens.

I. INTRODUCTION

Where there is trade, there are disputes, and with the internationalization of trade after World War II, disputes have become internationalized as well.[1] Compared to domestic litigation, cross-border litigation is inextricably linked to the delicate relationship between countries. When the opposing sides differ on jurisdictional and procedural matters, the proceedings' success and subsequent enforcement are invariably dependent on international cooperation.

In September 2023, the Standing Committee of the National People's Congress of the PRC passed the Amended Civil Procedure Law of the People's Republic of China on September 2023 ("the Amended CPL"), setting its focus on improving the foreign-related litigation system,[2] with one of the major goals being clarifying the procedure and limit of international judicial cooperation between Chinese and foreign courts.[3] This essay shows how Chinese legislators

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[1] Samuel P. Baumgartner, *Is Transnational Litigation Different*, 25 U. Pa. J. Int'l Econ. L., 1297, 1301 (2004).

[2] WoGuo Minshi Susong Fa Wancheng Xiugai, Jiang Genghao Baozhang Dangshiren De Susong Quanli He Hefa Quanyi (我国民事诉讼法完成修改，将更好保障当事人的诉讼权利和合法权益) [The Amendment of China's Civil Procedure Law Is Complete, Better Protecting The Litigation Rights And Legitimate Interests of the Parties Concerned], NAT'L PEOPLE'S CONG. WEBSITE (Oct. 24, 2023), http://www.npc.gov.cn/npc/c2/c30834/202310/t20231024_432465.html.

[3] Guanyu Zhonghua Renmin Gongheguo Minshi Susong Fa (Xiuzheng Caoan) De Shuoming (关于《中华人民共和国民事诉讼法（修正草案）》的说明) [Notes on the Civil Procedure Law of the People's Republic of China (Draft Amendment)], STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., June 2023.

try to balance different values by refining the relationship between courts internationally in provisions related both to the proceeding and enforcement of judgments. Specifically, Part II of the essay will discuss the domestic and international context that drove the introduction of the Amended CPL. Part III will provide a comparative overview of relevant provisions, and Part IV will conclude this essay by pointing out the balance between judicial sovereignty and international comity in the Amended CPL.

II. BACKGROUND OF THE AMENDED CPL

The context in which the amendment was enacted must be understood in terms of both the inadequacy of the existing domestic system and the growing challenges abroad.

On the domestic level, there is a significant imbalance between the influence of Chinese courts and the influence of Chinese companies on the world. In response to the Belt and Road Initiative and the "Going Global" strategy, Chinese enterprises are having greater influence on global economy. For example, in 2022, the flow of outward foreign direct investment by Chinese enterprises was among the top three in the world, with the range of investments constantly widening.[4] However, the procedural design of the old Civil Procedure Law failed to satisfy the need of Chinese enterprises to resolve the dispute efficiently, especially when parallel litigation proceedings are initiated both in Chinese and foreign courts.[5] First of all, because Chinese courts only had jurisdiction in six expressly provided situations, they were often incompetent to hear these cases.[6] In many cases involving complex legal arrangements, for example, when the defendant was a BVI or Cayman holding company controlling operating companies in China through multilayered shareholding structures, the jurisdiction may fail to be established.[7] Also, the

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[4] 2022 Nian Duiwai Zhijie Touzi Liuliang 1631.2 Yi Meiyuan, Zhongguo Duiwai Touzi Guimo Baochi Shijie Qianlie (2022年对外直接投资流量1631.2亿美元 中国对外投资规模保持世界前列) [China's Outward Foreign Direct Investment Flows to Be $163.12 Billion in 2022, China's Outward Investment Remains Among the World's Largest], ST. COUNCIL WEBSITE, (Oct. 7, 2023), https://www.gov.cn/lianbo/bumen/202310/ content_ 6907590.htm.

[5] Xiuzheng Caoan, *supra* note 3.

[6] The six situations include: (1) the contract is signed within the territory of the People's Republic of China, (2) the contract is performed within the territory of the People's Republic of China, (3) the subject matter of action is located within the territory of the People's Republic of China, (4) the defendant has any impoundable property within the territory of the People's Republic of China, (5) the defendant has any representative office within the territory of the People's Republic of China, and (6) the place where the infringement is committed is within the territory of the People's Republic of China. See Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by STANDING COMM. NAT'L PEOPLE'S CONG. Dec 24, 2021, effective Jan 1, 2022), article 272 (Chinalawinfo) ["*the Old CPL*"].

[7] Shen Hongyu (沈红雨), *Woguo Fa De Yuwai Shiyong Falü Tixi Goujian Yu Shewai Minshangshi Susong Guanxiaquan Zhidu De Gaige: Jian Lun Bufangbian Fayuan Yuanze He Jinsuling Jizhi De Goujian* (我国法的域外适用法律体系构建与涉外民商事诉讼管辖权制度的改革——兼论不方便法院原则和禁诉令机制的构建) [*Construction of the Legal System for Extraterritorial Application of China's Laws and Reform of the Jurisdictional System for Foreign-related Civil and Commercial Litigation--Annotation of the Principle of Inconvenient Courts and the Construction of the Mechanism of Anti-Suit Injunctions*], ZHONGGUO YINGYONG FAXUE (中国应用法学) [CHINESE JOURNAL OF APPLIED JURISPRUDENCE] 114, 122-123 (2020).

old Civil Procedure Law did not provide detailed rules for determining the validity of the parties' agreement on selecting jurisdiction, leading to confusion among courts.[8] Lastly, when having jurisdiction, the Chinese court has constantly exercised it while the foreign courts have accepted the case, creating conflicting judgments. This practice is widely criticized as a representation of "judicial chauvinism",[9] potentially alienating Chinese courts from their foreign counterparts.

Concurrently, Chinese companies were at the same time troubled by the lack of sufficient protection from domestic courts when foreign courts exercise extraterritorial jurisdiction, with the United States being the most conspicuous example. Firstly, Chinese companies often found themselves subject to the personal jurisdiction of the U.S. courts and left vulnerable.[10] The situation has been further exacerbated by frequent recent attempts by U.S. courts to circumvent the procedural constraints imposed by international treaties in international litigations, including those governing service and evidence gathering.[11] Although the Chinese government had repeatedly complained about this practice as disregarding China's state,[12] the plaintiffs are more inclined to sue before the U.S. courts for its provision of sufficient procedural weapon, especially compared to those applicable in Chinese proceedings.[13]

China's legislature[14] and judiciary[15] have noted since long ago that this dilemma could hamper China's economic development and have issued

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[8] Zuigao Renmin Fayuan Guanyu Remin Fayuan Wei "Yidai Yilu" Jianshe Tigong Sifa Fuwu He Baozhang De Ruogan Yijian (最高人民法院关于人民法院为"一带一路"建设提供司法服务和保障的若干意见) [Opinions of the Supreme People's Court on the Provision of Judicial Services and Guarantees by the People's Courts for the Construction of the Belt and Road Initiative] (promulgated by SUP. PEOPLE'S CT. Jun 16, 2015, effective Jun 16, 2015), para 5 (Chinalawinfo).

[9] See, for example, Liu Renshan (刘仁山) et al., *Woguo Mianlin De Guoji Pingxing Susong Wenti Yu Xietiao Duice* (我国面临的国际平行诉讼问题与协调对策) [*China's International Parallel Litigation and Coordinated Countermeasures*], FAXUE YANJIU (法学研究) [CHINESE JOURNAL OF LAW] 147, 150 (2019).

[10] Xiao Yongping (肖永平), Changbi Guanxiaquan De Fali Fenxi Yu Duice Yanjiu ("长臂管辖权"的法理分析与对策研究) [Jurisprudential Analysis of "Long-arm Jurisdiction" and Research on Countermeasures], ZHONGGUO FAXUE (中国法学) [CHINA LEGAL SCIENCE] 39, 62 (2019).

[11] For circumvention of Hague Service Convention, see, for example, *In re New Oriental Educ.*, 2023 U.S. Dist. LEXIS 151330, 2023 WL 5466333; for circumvention of Hague Evidence Convention, see, for example, *Philips Med. Sys. (Cleveland), Inc. v. Buan*, 2022 U.S. Dist. LEXIS 35635, *Inventus Power v. Shenzhen Ace Battery*, 339 F.R.D. 487, 502-503.

[12] See, for example, 2023 Nian 2 Yue 10 Ri Waijiaobu Fayanren Mao Ning Zhuchi Lixing Jizhe Hui (2023年2月10日外交部发言人毛宁主持例行记者会) [February 10, 2023 Foreign Ministry Spokesperson Mao Ning presides over a regular press conference], MINISTRY OF FOREIGN AFFAIRS WEBSITE (Feb 10, 2023), https://www.fmprc.gov.cn/web/fyrbt_673021/jzhsl_673025/202302/t20230210_11023301.shtml.

[13] For the "magnetic effect" of U.S. courts, see, for example, Paul R. Dubinsky, *Is International Litigation A Field? Two Views of the Border*, 101 American Society of International Law Proceedings, 365, 366 (2007); Cassandra B. Robertson, *Transnational Litigation and Institutional Choice*, 51 Boston College Law Review 1081, 1087-1088 (2010). For a comprehensive analysis of the underlying cause and (purported) recent decline of the attraction of U.S. courts, see Christopher A. Whytock, *Transnational Litigation in U.S. Courts: A Theoretical and Empirical Reassessment*, 19 Journal of Empirical Legal Studies, 4, 12 (2022).

[14] Hainan Ziyou Maoyi Gang Zhishi Chanquan Baohu Tiaoli (海南自由贸易港知识产权保护条例) [Regulations on the Protection of Intellectual Property Rights in Hainan Free Trade Port] (promulgated by Standing Committee of the Hainan Provincial People's Congress Dec 01, 2021, effective Jan 1, 2022), article 26 (Chinalawinfo).

[15] Liu Renshan, *supra* note 9.

numerous minutes and judicial interpretations to address it,[16] with the Amended CPL representing the largest and most up-to-date modification at the legislative level in response to the dilemma of parallel litigation in the last ten years.

III. CHANGES IN PARALLEL LITIGATION REGULATION IN THE AMENDED CPL

The Amended CPL has systemized the previously dispersed regulations on parallel proceedings, renovating provisions ranging from the jurisdiction and competence of Chinese courts in adjudicating parallel litigations, the coordination of parallel proceedings, and the recognition and enforcement of judgments of foreign parallel litigation.

A. Jurisdiction and Competence of Chinese Courts

1. Scope of Jurisdiction To address the issue of lacking jurisdiction, the Supreme People's Court of PRC ("the SPC") has reiterated many times through decisions that relevant provisions in the CPL cannot be interpreted literally. In a 2019 case, the SPC held that "whether a Chinese court has jurisdiction over a foreign-related civil dispute filed by a defendant who does not have a domicile or representative office in China depends on whether the dispute has an appropriate connection with China. In determining whether a dispute over a standard essential patent license has an appropriate connection with China, the characteristics of the dispute should be considered."[17] Later, in a patent dispute in 2021, the SPC further stressed that "the place of enforcement of the patent" in China could be considered as one of the criteria for determining the existence of an "appropriate connection."[18]

Recognizing the above jurisprudence, the Amended CPL has provided a statutory basis for SPC's judgments by adding an underpinning clause, allowing PRC Courts to exercise jurisdiction when "appropriate connection" other than those expressly provided is found, thereby leaving space for more

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[16] See, for example, Zuigao Renmin Fayuan Guanyu Yinfa Dierci Quanguo Shewai Shangshi Haishi Shenpan Gongzuo Huiyi Jiyao De Tongzhi (最高人民法院关于印发《第二次全国涉外商事海事审判工作会议纪要》的通知) [Notice of the Supreme People's Court on Promulgation of the Minutes of the Second National Work Conference for Foreign-related Commercial and Maritime Trials] (promulgated by Sup. People's Ct. Dec 26, 2005, effective Dec 26, 2005), para 11 (Chinalawinfo) ["*The 2005 Meeting Minutes*"]; Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gonghueguo Minshi Susong Fa De Jieshi (2015) (最高人民法院关于适用《中华人民共和国民事诉讼法》的解释（2015）) [Interpretations of the Supreme People's Court on Application of the "Civil Procedural Law of the People's Republic of China] (promulgated by Sup. People's Ct. Jan 30, 2015, effective Feb 04, 2015), article 532 (Chinalawinfo).

[17] Shangsuren Kangwensen Wuxian Xuke Youxian Gongsi Yu Beishangsuren Zhongxing Tongxun Gufen Youxian Gongsi Biaozhun Biyao Zhuanli Xuke Jiufen Guanxiaquan Yiyi Shangsu An (上诉人康文森无线许可有限公司与被上诉人中兴通讯股份有限公司标准必要专利许可纠纷管辖权异议上诉案) [Conversant Wireless Licensing S. àr. l. v. Zhongxing Telecommunication Equipment Corporation], (2019) 最高法知民辖终157号 (Sup. People's Ct. 2019).

[18] OPPO Guangdong Yidong Tongxin Youxian Gongsi Deng Yu Xiapu Zhushi Huishe Deng Biaozhun Biyao Zhuanli Xuke Jiufen Guanxiaquan Yiyi Jiufen An (OPPO广东移动通信有限公司等与夏普株式会社等标准必要专利许可纠纷管辖权异议纠纷案) [GuangDong Oppo Mobile Telecommunications Corp., Ltd., et al. v. Sharp Corporation., et al.], 2022 SUP. PEOPLE'S CT. GAZ. 306 (Sup. People's Ct. 2022) .

flexible judicial applications in handling foreign-related cases.[19] For example, Chinese courts now have jurisdiction over monopolization cases "where the alleged monopolistic conduct has the effect of excluding or restricting competition in China," even if there is no other connection.[20]

Also, requirements relating to agreed jurisdiction in foreign-related litigation have been further relaxed in the Amended CPL. Under the old CPL, even if the parties choose to resolve disputes before the Chinese Court, it could exercise jurisdiction only when the seat of the court has an "actual connection" with the dispute.[21] To "comply with international development trends and fully respect party autonomy", [22] which was reflected in various international conventions including the Hague Convention on Choice of Court Agreements signed by China in 2017 (but not yet ratified), [23] the Amended CPL has deleted this requirement. In addition, it has distinguished between agreement jurisdiction in domestic and foreign-related litigation. While only contractual and property disputes are subject to agreement jurisdiction in domestic litigation, this limit does not exist in foreign-related litigation.[24] In sum, in foreign-related litigations, where the parties have agreed in writing to choose the jurisdiction of the People's Court over a dispute, the People's Court may exercise jurisdiction.

To further assert the judicial sovereignty of Chinese courts, the Amended CPL has also expanded the list of exclusive jurisdictions. Namely, disputes related to (i) incorporation, dissolution, or liquidation of PRC legal persons or other organizations; or validity of resolutions of the PRC legal entities or other organizations, and (ii) validity of PRC-issued intellectual property rights were added as falling within the exclusive jurisdiction. By including matters with deep involvement by Chinese authorities within the scope of exclusive jurisdiction, [25] this change reflects China's recognition of the principle of territoriality in intellectual property and company registration, "resonating with

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[19] Wang Ruihe (王瑞贺), ZHONGHUA RENMIN GONGHEGUO MINSHI SUSONG FA SHIYI (中国人民共和国民事诉讼法释义) [COMMENTARY TO THE CIVIL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA] 511-512 (2023).

[20] Huang Zhihui (黄志慧), *Shewai Fazhi Shiyu Xia Shidang Lianxi Guoji Minshi Guanxiaquan Yanjiu* (涉外法治视域下"适当联系"国际民事管辖权研究) [*Study on the International Civil Jurisdiction of the "Appropriate Connection" in the Context of the Foreign-related Jurisprudence*], FAXUE (法学) [LAW SCIENCE] 177, 184 (2023).

[21] *The Old CPL*, article 35.

[22] Xiuzheng Caoan, *supra* note 3.

[23] As the principal international instrument governing agreed jurisdiction in cross-border litigations, the Convention of 30 June 2005 on Choice of Court Agreements does not require the chosen forum to have a connection with the dispute to exercise its jurisdiction, unless otherwise provided by domestic legislation. See Convention of 30 June 2005 on Choice of Court Agreements, article 5.

[24] Wang Ruihe, *supra* note 19, 513-514.

[25] Xiang Zaisheng (向在胜), *Zhongguo Shewai Minshi Zhuanshu Guanxiaquan De Fali Jianshi Yu Guize Chonggou* (中国涉外民事专属管辖权的法理检视与规则重构) [*Jurisprudence Review and Rule Reconstruction of China's Foreign-related Civil Exclusive Jurisdiction*], FASHANG YANJIU (法商研究) [STUDIES IN LAW AND BUSINESS], 50, 57-59 (2023).

the jurisprudence of foreign legislation",[26] including the Brussels I Regulation (recast) regulating exclusive jurisdiction within the European Union.[27]

2. Competence in Adjudicating Parallel Litigation Cases Article 280 of the Amended CPL has provided that, when having jurisdiction, Chinese courts can accept cases involving (a) the same parties, (b) the same disputes, and (c) one party filing litigation in a foreign court and the other party filing litigation in a Chinese court, or one party filing litigation in both a foreign and a Chinese court. However, if (a) the parties entered into an exclusive jurisdiction agreement choosing a foreign court, and (b) the agreement does not violate the provisions of the Amended CPL on the exclusive jurisdiction and does not implicate the sovereignty, security, or social public interests China, the Chinese Court may dismiss the case. This provision contains nuance yet important differences from its predecessors.

Firstly, the Amended CPL has further clarified the definition of parallel proceeding in Article 280 by affirming the competence of Chinese courts to accept a repetitive proceeding, in which the plaintiff is also the plaintiff of the foreign proceeding.[28] Existing norms regulating this issue deal only with reactive litigation, where a countersuit was filed by the first action's defendant files against the first action's plaintiff.[29] Some view this omission as demonstrating that repetitive proceedings were governed by Article 247 of the judicial interpretation of the CPL, which prohibits the acceptance of repeated proceedings if they were both initiated within China.[30] However, this interpretation contradicts subsequent practices by Chinese courts - the SPC and other courts repudiated this view in several judgments,[31] and the SPC-issued commentary to the judicial interpretation expressly stated that the existing norm "regulates repetitive proceedings" and "reactive proceedings."[32] Repetitive proceedings are indeed inherently suspect for possible outcomes such as double

[26] Xiuzheng Caoan, s*upra* note 3.

[27] See Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), articles. 24(2) and 24(4).

[28] Austen L. Parrish, *Duplicative Foreign Litigation*, 78 GEORGE WASHINGTON L. REV. 237, 241 (2010).

[29] The 2005 Meeting Minutes, article 10.

[30] See, for example, *Shewai Anjian De Teshu Guanxia Yiyi Chuli Guize: "Bufangbian Fayuan" Yuanze Ji Pingxing Susong Goucheng Chongfu Susong Zhuzhang* (涉外案件的特殊管辖异议的处理规则——"不方便法院"原则及平行诉讼构成重复诉讼主张) [*Rules For Dealing With Special Jurisdictional Objections In Foreign Cases: The Principle Of Forum Non Conveniens And the Claim That Parallel Proceedings Constitute Duplicative Proceedings*], TIANTONG LVSHI SHIWUSUO (天同律师事务所) [Tiantong Law Firm] (Jun 18, 2021), http://www.tiantonglaw.com/Content/2021/06-19/1453397403.html.

[31] Ruidian Ailixin Youxian Gongsi Deng Yu TCL Jituan Gufen Youxian Gongsi Deng Lanyong Shichang Zhipei Diwei Jiufen Guanxiaquan Yiyi Shangshu An (瑞典爱立信有限公司等与TCL集团股份有限公司等滥用市场支配地位纠纷管辖权异议上诉案) [Telefonaktiebolaget LM Ericsson et al. v. TCL Technology Group Corporation et al.], (2019)最高法知民辖终32号 (Sup. People's Ct. 2019).

[32] SHEN DEYONG (沈德咏), ZUIGAO RENMIN FAYUAN MINSHI SUSONG FA SIFA JIESHI LIJIE YU SHIYONG Xia (最高人民法院民事诉讼法司法解释理解与适用 下) [UNDERSTANDING AND APPLICATION OF THE JUDICIAL INTERPRETATION OF THE CIVIL PROCEDURE LAW OF THE SUPREME PEOPLE'S COURT 2], 1395-1396 (2015).

compensation and refusal of assisting enforcement,[33] but these reasons cannot sufficiently justify applying rules governing repeated litigations in a domestic context here to comprehensively bar Chinese courts from accepting these cases, which will create a "race to file" among parties, and denies Chinese courts the opportunity to assert exclusive jurisdiction at the trial stage.

Secondly, the autonomy of the litigating parties has been further acknowledged with its limit clarified. While the existing norms do not repudiate the exclusive jurisdiction agreement, they fail to expressly recognize its validity. Also, because China is a signing party of the Convention of 30 June 2005 on Choice of Court Agreements, Article 6 of that convention applies to litigations within China, which stipulates that saving for exceptional situations including those leading to "manifest injustice or would be manifestly contrary to the public policy," Chinese courts cannot exercise its jurisdiction if the exclusive jurisdiction agreement between the parties did not choose them.[34] The Amended CPL has for the first time acknowledged the validity of exclusive jurisdiction agreements in foreign-related context, and left the conundrum of identifying them to judicial interpretations.[35] It also delineated the outer boundary of the autonomy, namely the sovereignty, security, or social public interests of China and the exclusive jurisdiction of Chinese courts. Also, this provision does not deprive the competence of Chinese courts when exclusive jurisdictional agreements are present, because it merely provides that Chinese courts "may" dismiss the case. Moreover, in conjunction with the preceding paragraph, a Chinese court may accept a case when it has jurisdiction over the dispute, and the criterion for determining whether it has jurisdiction is Article 276 of the Amended CPL, which does not exclude the jurisdiction of the Chinese court if the parties have made an exclusive choice of a foreign court.[36]

Lastly, "same dispute" in parallel litigation remains undefined in the Amended CPL albeit with subtle changes in terminology. In the 2005 Meeting Minutes, this element was referred to as "same contention (同一争议)", and the judicial interpretation termed it as "same case (同一案件)". The 2021

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[33] James P George, *International Parallel Litigation - A Survey of Current Conventions and Model Laws*, 37 TEXAS INT'L L. J., 499, 533 (2002).

[34] Wang Lei (王磊), *Shilun Woguo Shewai Minshi Susong Xieyi Guanxia Guize Tixi De Gaijin* (试论我国涉外民事诉讼协议管辖规则体系的改进) [*On the Improvement of the Rules of Jurisdiction Agreements in Foreign Civil Procedure*] WUDA GUOJIFA PINGLUN (武大国际法评论) [WUHAN UNIVERSITY INTERNATIONAL LAW REVIEW] 17, 22 (2018).

[35] For more on the identification of exclusive jurisdiction agreement by Chinese courts, see Xu Weigong (徐伟功) et al., *Woguo Shewai Guanxia Xieyi De Qufen Biaozhun Tanxi* (我国涉外管辖协议的区分标准探析) [*How to Distinguish Jurisdictional Agreements Concerning Foreign Affairs*], JIANGHAN DAXUE XUEBAO (SHEHUI KEXUE BAN) (江汉大学学报（社会科学版）) [JOURNAL OF JIANGHAN UNIVERSITY (SOCIAL SCIENCE EDITION)], 5, 12-13 (2020). This scholarship argues that Chinese courts primarily rely on literal interpretation to ascertain the nature of the jurisdictional agreement but are often confused when facing ambiguous clauses. See also Dai Shu (戴曙), *Woguo Shewai Xieyi Guanxia Zhidu De Lijie Yu Shiyong* (我国涉外协议管辖制度的理解与适用) [*Understanding and Application of China's Foreign-related Agreement Jurisdiction System*], FALÜ SHIYONG (法律适用) [JOURNAL OF LAW APPLICATION], 81, 87 (2019), analyzing the practice of Chinese courts to presume exclusive jurisdiction when they are uncertain about the nature of the jurisdictional agreement.

[36] Wang Ruihe, s*upra* note 19, 519.

Meeting Minutes and the Amended CPL have referred to this element as "same dispute (同一纠纷)", indicating its relevance to the underlying legal relationship of the case.[37] Although this shift in term does not provide much guidance, one may argue that it is a consistent and deliberate avoidance of the term "subject matter of the action (诉讼标的)", which is closely related to Article 247 of the judicial interpretation governing repetitive litigation in the domestic context.[38] Given the heated contention surrounding this issue internationally,[39] it would be understandable that if Amended CPL intentionally blurs this matter. However, the SPC-issued commentary to the Amended CPL requires the courts to ignore this terminological difference, using "subject matter of the action" to interpret "dispute."[40] Therefore, the meaning of this concept needs to be further clarified by subsequent jurisprudence and judicial interpretations.

B. Coordination of Parallel Litigations

Articles 281 and 282 have provided a hybrid system of coordinating parallel proceedings between Chinese and foreign courts, utilizing the rule of *prior in tempore* rule and the doctrine of *forum non conveniens*.

1. Prior in Tempore Rule

[37] For example, the 2021 Meeting Minutes used terms such as "transportation contract dispute（运输合同纠纷）", "Insurance contract dispute（保险合同纠纷）" to address cases arising from different legal relationships, which was inherited by the Amended CPL. See Quanguo Fayuan Shewai Shangshi Haishi Shenpan Gongzuo Zuotanhui Huiyi Jiyao (全国法院涉外商事海事审判工作座谈会会议纪要) [Minutes of the National Symposium on the Foreign-related Commercial and Maritime Trial Work of Courts] (promulgated by Sup. People's Ct. Dec 30, 2021, effective Dec 30, 2021) (Chinalawinfo) ["*The 2021 Meeting Minutes*"].

[38] Article 247 of the Judicial Interpretation provided that "Where, in the course of an action or after a judgment takes effect, a party institutes another action against matters for which an action has been instituted, and the another action meets the following conditions at the same time, it constitutes a repeated action: (1) the parties to the latter action and those to the former action are the same, (2) the subject matter of action in the latter action and that in the former action are the same, and (3) the claims in the latter action and those in the former action are the same or the claims in the latter action substantially deny the judgment in the former action. Where a party institutes a repeated action, the people's court shall rule not to accept the action; if the repeated action has been accepted, the people's court shall rule to dismiss the action, unless otherwise as prescribed in laws and judicial interpretations." See Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gonghueguo Minshi Susong Fa De Jieshi (2022) (最高人民法院关于适用《中华人民共和国民事诉讼法》的解释（2022）) [Interpretations of the Supreme People's Court on Application of the "Civil Procedural Law of the People's Republic of China (2022)] (promulgated by Sup. People's Ct. Apr 1, 2022, effective Apr 10, 2022), article 247 (Chinalawinfo).

[39] See HCCH, Chair's Summary of the First Meeting of Working Group on Jurisdiction, 11-15 October 2021, para.10; HCCH, Draft Report of the Working Group on Matters Related to Jurisdiction in Transnational Civil or Commercial Litigation, the Second Meeting of Working Group on Jurisdiction, February 2022, paras. 9-10; See also Andrew Dickinson et al. (eds.), *The Brussels I Regulation Recast*, 345 (2015).

[40] JIANG BIXIN (江必新), XIN MINSHI SUSONG FA LIJIE YU SHIYONG (2023 NIAN ZUIXIN BAN) (新民事诉讼法理解与适用 [UNDERSTANDING AND APPLICATION OF THE NEW CIVIL PROCEDURE LAW], 1379 (2023).

Article 281 has incorporated the rule of prior in tempore, giving priority to the court that approached the case first in time.[41] Originated in Roman law,[42] this principle has been adopted by countries including Switzerland[43] and Germany[44] and was incorporated by various international instruments. For example, Article 29 of the Brussels I Regulation (Recast) provides that in parallel proceedings, any court other than the court first seized shall its proceedings until the jurisdiction of the court first seized is established, and where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favor of that court.[45] Similarly, Article 281 of the Amended CPL has stated that a Chinese court may stay the proceeding after accepting the case if one party applied in writing on the ground that the foreign court has accepted the case before the Chinese court. Although China has long relied on this principle in dealing with parallel domestic litigation,[46] it did not exist in foreign-related litigation.[47] Therefore, the inclusion of this gap-filling principle shows more adequate respect to foreign courts.[48]

It was argued that the *prior in tempore* principle is applied differently in international and domestic contexts because it is triggered when "the case is accepted (案件被受理)" in the former but only when "the case is docketed (立案)" in the latter, reflecting the more comprehensive protection of parties to international parallel proceedings.[49] However, this shift in wording is only technical without any real impact, because "acceptance" and "docketing" has the same meaning in Chinese civil procedure law and are often used interchangeably.[50] Nevertheless, because Chinese courts shall assess whether the case meets the conditions for instituting an action before accepting it within

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[41] Jie Huang, *Developing Chinese Private International Law for Transnational Civil and Commercial Litigation: The 2024 New Chinese Civil Procedure Law*, 70 Netherlands International Law Review 205, 216-217 (2023).

[42] Jorg Sladič, The Lessons of Airfreight Cartel: Mechanisms of Coordination of Parallel Collective Lawsuits in Several Jurisdictions?, in Class Actions in Europe: Holy Grail or a Wrong Trail? (Alan Uzelac et al., eds., 2021) 249, 257.

[43] Article 9, "Lis Pendens", Federal Action Private International Law of the Swiss Confederation of 18 December 1987 (Status as of 1 September 2023).

[44] Article 261(1), Code of Civil Procedure as promulgated on 5 December 2005.

[45] See Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

[46] *The Old CPL*, article 36.

[47] Many Chinese courts accepted cases in the knowledge that foreign litigation was in progress. See, for example, Faguo Dafei Lunchuan Youxian Gongsi Deng Yu Luokeweier Hangyun Youxian Gongsi Chuanbo Pengzhuang Sunhai Zeren Jiufen Shangsu An (法国达飞轮船有限公司等与罗克韦尔航运有限公司船舶碰撞损害责任纠纷上诉案) [CMACGMSA et al. v. Rockwell Shipping Limited] (2013) 浙辖终字第118号 (Zhejiang High People's Ct. 2013).

[48] Wang Ruihe, s*upra* note 19, 521-522.

[49] Jie Huang, *Developing Chinese Private International Law for Transnational Civil and Commercial Litigation: The 2024 New Chinese Civil Procedure Law*, 70 Netherlands International Law Review 205, 217-218 (2023).

[50] Geng Xiang (耿翔), *Minshi Lian Zhidu Yanjiu: Yi Qisu Shouli Wei Zhongxin* (民事立案制度研究——以起诉受理为中心) [*A study on the system of civil registration Taking the acceptance of prosecution as the center*], 16 and below.

seven days after the submission of materials,[51] the temporal requirement in the Amended CPL is arguably different from the criteria in Brussels Regulation I (recast), which is satisfied when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff subsequently took necessary measures to serve the defendant.[52]

The rule of *prior in tempore* in the Amended CPL is different from its counterparts in foreign jurisdictions because it has refrained from adopting the principle of recognition prognosis,[53] which favors staying the domestic litigation when the foreign court can be expected to render a recognizable decision.[54] It is discernible from the elucidation provided in the SPC-issued commentary of Amended CPL that the SPC perceived recognition prognosis as a mechanism broadening the scope of international comity, rather than constricting it.[55] However, the prevalent view is that the principle recognition prognosis, as well as any other factor, is not predominant in deciding whether to adopt the *prior in tempore* rule,[56] as seen in the discussion of the Hague Jurisdiction Project and in fact absorbed by the Amended CPL.[57] In this context, this principle can avoid the drawbacks of the rigid application of the *prior in tempore* rule leading to the recognition of extraterritorial proceedings without discrimination to better safeguard judicial sovereignty.[58] Therefore, it is more likely the complexity surrounding the criteria for *ex ante* assessment resulted in the rejection of this principle, which led to the adoption of the *ex post* determination. The Amended CPL has provided that "if a foreign court fails to take the necessary measures to hear the case or fails to conclude it within a reasonable period of time, the Chinese court shall, upon the written application of the parties, resume the proceeding", thereby exempts such

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[51] *The Old CPL*, article 126.

[52] See Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), Art. 32.

[53] Du Tao (杜涛), *Xian Shouli Fayuan Guize Yu Guoji Pingxing Susong Wenti De Jiejue* (先受理法院规则与国际平行诉讼问题的解决) [*The First-filed Rule and the International Parallel Litigation: The Feasibility of the Analogical Application of Article 35 of the Civil Procedure Law to Foreign-related Cases*], WUDA GUOJIFA PINGLUN (武大国际法评论) [WUHAN UNIVERSITY INTERNATIONAL LAW REVIEW], 49 (2015).

[54] See, for example, Article 9, "Lis Pendens", Federal Action Private International Law of the Swiss Confederation of 18 December 1987 (Status as of 1 September 2023).

[55] Jiang Bixin, *supra* note 40, 1380.

[56] Gascón Inchausti et al., The Rules On Lis Pendens And on Res Judicata in the ELI/UNIDROIT Model European Rules of Civil Procedure, 5 Ius Dictum 15, 15-29 (2021);

[57] See, for example, HCCH, Document De Discussion En Matière De Compétence: Issues Paper on Matters of Jurisdiction (Including Parallel Proceedings), para. 42 (2013); See also HCCH, Report on the Jurisdiction Project, Prel. Doc. No 3 of February 2021, para. 31 (2021). The Amended CPL accepted this view *de facto* by the exceptions to the prior in tempore rule.

[58] Guo Zhenyuan (郭镇源), *Lun Guoji Pingxing Susong De Haiya Gongyue Fangfa Yu Zhongguo Yingyin: Yi Xin Minshi Susong Fa Di 281 Tiao Wei Zhongxin* (论国际平行诉讼的海牙公约方法与中国因应——以新《民事诉讼法》第281条为中心) [*Research on the Approach of International Civil Parallel Proceedings of Hague Convention and the Response of China —Concentrate on Article 281 of the New Civil Procedure Law*], GUOJI JINGJIFA XUEKAN (国际经济法学刊) [JOURNAL OF INTERNATIONAL ECONOMIC LAW] 28, 32-33.

litigation from the regulation of repeated litigations, better safeguarding the efficiency of the litigation and the rights of the parties.[59]

Article 281 contains several restrictions and exceptions. The *prior in tempore* rule is inapplicable when the parties agree on the jurisdiction of the Chinese court, including both exclusive and non-exclusive agreements.[60] When the subject matter of the dispute falls inside the exclusive jurisdiction of Chinese courts, the rule also does not apply. The most noteworthy exception, however, is the incorporation of the theory of better forum, giving judges discretion to assess whether this court is more suitable to adjudicate the case.[61] Similar to the discussion in the Hague Jurisdiction Project,[62] the court should take into consideration various factors, including the connection of the litigation to China, the accessibility of evidence, the probability of recognition and enforcement, etc.[63] Finally, it is important to note that the above exceptions are only a non-exhaustive list, and the SPC explicitly states that the Chinese courts should consider various factors, such as whether the foreign litigation was initiated with malice, when deciding whether the exercise jurisdiction.[64]

2. Forum Non Conveniens Principle

The doctrine of *Forum non conveniens* facilitates cross-border proceedings by allowing courts to decline to exercise jurisdiction on the ground that it is not appropriate for it to hear the case or that a foreign court is better suited to hear the case on grounds of expediency. [65] Article 282 has introduced the doctrine of forum non conveniens for the first time at a statutory level and relaxes the conditions for its application.

The modification that has attracted the most attention is the deletion of the requirement that the case "does not involve the interests of Chinese citizens or legal persons", which has been replaced by the requirement that the case does not involve China's sovereignty, security, or social public interests. Since the introduction of the *forum non conveniens* principle to the civil procedure law of China, this element has been seen as the major cause leading to the scarce application of the principle. Adhering to the notion of "strictly limiting the scope of application of the doctrine of *forum non conveniens*,"[66] the SPC has consistently treated "one of the parties to the litigation is domiciled in China"

[59] Wang Ruihe, s*upra* note 19, 522.

[60] Jiang Bixin, s*upra* note 40, 1378-80.

[61] See HCCH, Annex to the Draft Agenda: Possible Options of Rules for Parallel Proceedings, Prepared by the Chair of the EG, 2021, paras. 10-14.

[62] Cf., HCCH, Annex 1 to Report of the Working Group on Jurisdiction (Prel. Doc. No 7), 2022, pp. 11-12.

[63] Wang Ruihe, s*upra* note 19, 522.

[64] Jiang Bixin, s*upra* note 40, 1380.

[65] See Zheng Sophia Tang, *Declining Jurisdiction in Chinese Courts by Forum Non Conveniens*, 45 Hong Kong Law Journal 351-352 (2015).

[66] Zuigao Renmin Fayuan Minfadian Guanche Shishi Gongzuo Lingdao Xiaozhu Bangongshi (最高人民法院民法典贯彻实施工作领导小组办公室) [Office of the Leading Group for the Implementation of the Civil Code of the Supreme People's Court], Zuigao Renmin Fayuan Xin Minshi Susong Fa Sifa Jieshi Lijie Yu Shiyong Xia (最高人民法院新民事诉讼法司法解释理解与适用 下) [Understanding and Application of the Judicial Interpretation of the New Civil Procedure Law of the Supreme People's Court 2], 1169 (2022).

as a sufficient condition for fulfilling this requirement,[67] rendering applying this principle extremely difficult.[68] Behind this veil is the fear of the abuse of this principle, which may result in jeopardizing the interests of a party, as in the case of the United States courts.[69] However, the prevalent invocation of this principle in the United States courts is conditional upon their excessive personal jurisdiction conferred by legislation, which is nonexistent in China.[70] Therefore, at the current stage, the principle of *forum non conveniens* remains an important tool to reduce the workload of Chinese courts, with the risk of abuse still remote, which justifies the deletion of this redundant requirement in the Amended CPL.

Additionally, the requirements that the foreign court has jurisdiction over the dispute, the applicable law is not the PRC law, and the Chinese court has significant difficulty in ascertaining facts and applying the law, have been deleted, leaving only the criteria that the foreign court is "more convenient to adjudicate the dispute." This change solves the problem of overlapping between constituent elements in the previous provision and prevents foreign courts from doubting the judicial competence of Chinese courts.[71]

Moreover, the Amended CPL has left the criteria of assessing whether "the foreign court is more convenient" to judicial interpretation and subsequent practices, and the commentary issued by the legislator provided a non-exhaustive list, including whether it is convenient for parties to reach the court, availability of evidence, enforceability of the judgment, place of dispute, language, application of the law, etc.[72] This change incorporates the American jurisprudence that gives judges the discretion to measure the "public interest" and the "private interest" involved in dismissing cases,[73] reflecting the legislator's willingness to soften the rigidity of the previous provision by expanding judicial discretion.

Lastly, the Amended CPL has provided the parties may file the litigation again when the foreign court refuses to exercise its jurisdiction or does not

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[67] See, for example, Shangsuren Kangwensen Wuxian Xuke Youxian Gongsi Yu Beishangsuren Zhongxing Tongxun Gufen Youxian Gongsi Biaozhun Biyao Zhuanli Xuke Jiufen Guanxiaquan Yiyi Shangsu An (上诉人康文森无线许可有限公司与被上诉人中兴通讯股份有限公司标准必要专利许可纠纷管辖权异议上诉案) [Conversant Wireless Licensing S. àr. l. v. Zhongxing Telecommunication Equipment Corporation], (2019)最高法知民辖终157号 (Sup. People's Ct. 2019).

[68] For an empricial study on the (non-)application of the *forum non conveniens* principle by Chinese courts, see Chen Nanrui (陈南睿), *Bu Fangbian Fayuan Yuanze Zai Zhongguo De Shiyong Yu Wanshan: Yi 125 Li Caipan Wenshu Wei Shijiao* (不方便法院原则在中国法院的适用及完善——以125例裁判文书为视角) [*The Application and Improvement of ForumNonConveniens in Chinese Courts：From the Perspective of 125Judicial Documents*], WUDA GUOJIFA PINGLUN (武大国际法评论) [WUHAN UNIVERSITY INTERNATIONAL LAW REVIEW], 114 (2021).

[69] Cassandra B. Robertson, Transnational Litigation and Institutional Choice, 51 B.C. L. REV. 1081, 1094 and below (2010).

[70] Alexander Reus, *Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany*, Loy. 16 L.A. INT'L & COMP. L. J. 455, 469 and below.

[71] Jiang Bixin, S*upra* note 40, 1383.

[72] Wang Ruihe, s*upra* note 19, 523.

[73] Alexander Reus, *Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany*, *Loy*, 16 L.A. INT'L & COMP. L.J. 455, 469 and below.

conclude the case in a reasonable period of time, eradicating the possibility of "double refusal." This change highlights the consideration to expedite the litigation process and alleviate the burden on the parties.[74]

C. Recognition and Enforcement of Judgment

Recognition and enforcement of foreign judgments in essential in regulating parallel litigation. Drawing on the principles in various meeting minutes and international conventions, the Amended CPL has provided further guidance on this regime in Articles 300 to 302.

Article 300 of the Amended CPL has put forward that, among other circumstances, after the Chinese court issues a judgment or ruling on a dispute or recognizes the judgment or ruling of a third country, the people's court will rule on the non-recognition and non-enforcement of judgments and rulings issued by a foreign court on the same dispute. Compared to the previous provision in the judicial interpretation, Article 301 has introduced a situation where a ruling or decision by a foreign court succeeds a recognizable ruling or decision issued by a court of a third country, increasing the scope of non-recognizable judgments and reflecting China's legislative policy of preventing conflicting judgments, which is in line with the 2021 Meeting Minutes and the Hague Judgment Convention.[75] As further specified in the SPC Commentary, by way of analogy, if the Chinese court recognizes an arbitration award on the same dispute, the judgment is also unrecognizable.[76]

Article 301 has further provided situations under which the foreign courts are considered to lack jurisdiction over a dispute, which, according to Article 300, leads to the non-recognition and non-enforcement of their judgments in China. These situations include (a) the foreign court lacking jurisdiction or lacking proper connection to the dispute albeit having jurisdiction, (b) violating the provisions on the exclusive jurisdiction of Chinese courts, and (c) violating the parties' exclusive jurisdiction agreement. Notable among these is the criterion of applicable law adopted by Amended CPL in determining whether a foreign court has jurisdiction over a dispute in paragraph (a). It relies on a two-step model primarily based on foreign law and supplemented by Chinese law, i.e., as a first step, foreign law should be used to assess whether the court of that country has jurisdiction, but even if jurisdiction is judged to exist, it does not necessarily mean that the Chinese courts are required to accept that judgment. The Chinese court should apply the test of "proper connection" in Article 276 of the Amended CPL, and if no jurisdiction is found to exist, the Chinese court would not recognize the jurisdiction of the foreign court.[77]

The Amended CPL also for the first time provides a remedy for the (non-)recognition of foreign judgments. Under Article 302, the parties may

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[74] *Supra* note 8, 122-123.

[75] *The 2021 Meeting Minutes*; article 7, Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

[76] Jiang Bixin, s*upra* note 40, 1383.

[77] Wang Ruihe, s*upra* note 19, 560.

apply for reconsideration to the Chinese court of a higher level within ten days from the date of service of the ruling.

IV. CONCLUSION: NAVIGATING BETWEEN VALUES

In the context of regulating parallel legal proceedings, it is imperative to give due regard to intricate factors, with judicial sovereignty and international comity emerging as the foremost considerations. While judicial sovereignty means giving priority to decisions issued by domestic courts, international comity implies granting due weight to those issued by foreign courts through establishing priority rules. However, the orientation of different countries between these two values is not consistent.

As shown in legislative comments, the CPL tries to strike a balance between these two values by both expanding the scope of application of international comity and better securing the interests of Chinese companies abroad.[78] Therefore, the Amended CPL protects the interests of Chinese companies by expanding the jurisdiction and exclusive jurisdiction of Chinese courts but remains cautious about providing for the more destructive exclusive jurisdiction as opposed to jurisdiction. In addition, the provisions on coordination of parallel proceedings and recognition and enforcement also draw heavily on international treaties while ensuring that China's national interests and exclusive jurisdiction are not infringed upon, which will facilitate cross-border judicial collaboration with foreign courts in the future.

Another way in which the Amended CPL attempts to balance these two values is by trying to give more discretion to the court. For example, the definition of parallel litigation and criteria for the application of the principle of *forum non conveniens* and the *prior in tempore* rule are left to judicial interpretation and other normative documents, allowing the judicial system to respond promptly to future judicial circumstances. This is accompanied by the affirmation of the freedom of the parties, which is reflected in several provisions that expressly allow the parties to enter into exclusive jurisdictional agreements, among other things. These changes successfully responded to previously widely recognized criticisms of China's foreign-related litigation rules, namely that they lacked responsiveness to the international judicial situation and respect for the wishes of the parties. In fact, because of these changes, it is still too early to estimate how well the Amended CPL will work in practice, and it will be necessary to wait until the accompanying judicial interpretations and guiding cases come out.

[78] Quanguo Renmin Daibiao Dahui Xianfa He Falü Weiyuanhui Guanyu Zonghua Renmin Gongheguo Minshi Susong Fa (Xiuzheng Caoan) Shenyi Jieguo De Baogao (全国人民代表大会宪法和法律委员会关于《中华人民共和国民事诉讼法(修正草案)》审议结果的报告) [Report of the Constitutional and Legal Committee of the National People's Congress on the Results of its Deliberations on the Civil Procedure Law of the People's Republic of China (Draft Amendment)], STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., June 2023.