

The Latest Development on Anti-suit Injunction Wielded by Chinese Courts to Restrain Foreign Parallel Proceedings

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When confronted with international parallel proceedings due to the existence of a competent foreign court having adjudicative jurisdiction, the seized foreign court located in common law jurisdictions seems to see it as no offence to Chinese courts by granting anti-suit injunctions to restrain Chinese proceedings. This is because the common law court believes that “An order of this kind [anti-suit injunction] is made in personam against a party subject to the court’s jurisdiction by way of requiring compliance with agreed terms. It does not purport to have direct effect on the proceedings in the PRC. This court respects such proceedings as a matter of judicial comity”. [1] However, the fact that the anti-suit injunction is not directly targeted at people’s courts in the PRC does not prevent Chinese judges from believing that it is inappropriate for foreign courts to issue an anti-suit injunction restraining Chinese proceedings. Instead, they would likely view such interim order as something that purports to indirectly deprive the party of the right of having access to Chinese court and would unavoidably impact Chinese proceedings.

The attitude of Chinese courts towards the anti-suit injunction - a fine-tuning tool to curb parallel proceedings - has changed in recent years. In fact, they have progressively become open-minded to resorting to anti-suit injunctions or other similar orders that are issued to prevent parties from continuing foreign proceedings in parallel. Following that, the real question is whether and how anti-suit injunction is compatible with Chinese law. Some argued that Article 100 of the PRC CPL provides a legal basis for granting injunctions having similar effects with anti-suit injunction at common law. [2] It provides that:

“The people’s court may upon the request of one party to issue a ruling to preserve the other party’s assets or compel the other party to perform certain act or refrain from doing certain act, in cases where the execution of the judgment would face difficulties, or the party would suffer other damages due to the acts of the other party or for other reasons. If necessary, the people’s court also could make a ruling of such preservative measures without one party’s application.” [3] Accordingly, Chinese people’s court may make a ruling to limit one party from pursuing parallel foreign proceedings if such action may render the enforcement of Chinese judgment difficult or cause other possible damages to the other party. In maritime disputes, Chinese maritime courts are also empowered by special legislation to issue maritime injunctions having anti-suit or anti-anti-suit effects. Article 51 of the PRC Maritime Special Procedure Law provides that the maritime court may upon the application of a maritime claimant issue a maritime injunction to compel the respondent to do or not to do certain acts in order to protect the claimant’s lawful rights and interests from being infringed. [4] The maritime injunction is not constrained by the jurisdiction agreement or arbitration agreement as agreed upon between the parties in relation to the maritime claim. [5] In order to obtain a maritime injunction, three requirements shall be satisfied – firstly, the applicant has a specific maritime claim; secondly, there is a need to rectify the respondent’s act which violates the law or breaches the contract; thirdly, a situation of emergency exists in which the damages would be caused or increased if the maritime injunction is not issued immediately. [6] Like the provision of the PRC CPL, the maritime injunction issued by the Chinese maritime court is mainly directed to mitigate the damages caused by the party’s behaviour to the other parties’ relevant rights and interests.

In *Huatai P&C Insurance Corp Ltd Shenzhen Branch v Clipper Chartering SA*, the Maritime Court of Wuhan City granted the maritime injunction upon the claimant’s application to oblige the respondent to immediately withdraw the anti-suit injunction granted by the High Court of the Hong Kong SAR to restrain the Mainland proceedings. [7] The Hong Kong anti-suit injunction was successfully sought by the respondent on the grounds of the existence of a valid arbitration agreement. [8] However, the respondent did not challenge the jurisdiction of the Mainland maritime court over the dispute arising from the contract of carriage of goods by sea. Therefore, the Maritime Court of Wuhan City held that the respondent had submitted to its jurisdiction. As a result, the application launched by the respondent to the High Court of the Hong Kong SAR for the anti-suit injunction to restrain the Mainland Chinese proceedings had infringed the

legitimate rights and interests of the claimant. In accordance with Article 51 of the PRC Maritime Special Procedure Law, a Chinese maritime injunction was granted to order the respondent domiciled in Greece to withdraw the Hong Kong anti-suit injunction (HCCT28/2017). [9] As the maritime injunction in the Huatai Property case was a Mainland Chinese ruling issued directly against the anti-suit injunction granted by a Hong Kong court, it is fair to say that if necessary Chinese people's court does not hesitate to issue a compulsory injunction "which orders a party not to seek injunction relief in another forum in relation to proceedings in the issuing forum". [10] This kind of compulsory injunction is also called 'anti-anti-suit injunction' or 'defensive anti-suit injunction'. [11]

When it comes to civil and commercial matters, including preserving intellectual property rights, the people's court in Mainland China is also prepared to issue procedural orders or rulings to prevent the parties from pursuing foreign proceedings, similar to anti-suit injunctions or anti-anti-suit injunction in common law world. In Guangdong OPPO Mobile Telecommunications Corp Ltd and its Shenzhen Branch v Sharp Corporation and ScienBiziP Japan Corporation, the plaintiff OPPO made an application to the seized Chinese court for a ruling to preserve actions or inactions.[12] Before and after the application, the defendant Sharp had brought tort claims arising from SEP (standard essential patent) licensing against OPPO by commencing several parallel proceedings before German courts, a Japanese court and a Taiwanese court. [13] In the face of foreign parallel proceedings, the Intermediate People's Court of Shenzhen City of Guangdong Province rendered a ruling to restrain the defendant Sharp from pursuing any new action or applying for any judicial injunction before a Chinese final judgment was made for the patent dispute. [14] The breach of the ruling would entail a fine of RMB 1 million per day. [15] Almost 7 hours after the Chinese 'anti-suit injunction' was issued, a German 'anti-anti-suit injunction' was issued against the OPPO. [16] Then, the Shenzhen court conducted a court investigation to the Sharp's breach of its ruling and clarified the severe legal consequences of the breach. [17] Eventually, Sharp choose to defer to the Chinese 'anti-suit injunction' through voluntarily and unconditionally withdrawing the anti-anti-suit injunction granted by the German court. [18] Interestingly enough, Germany, a typical civil law country, and other EU countries have also seemingly taken a U-turn by starting to issue anti-anti-suit injunctions in international litigation in response to anti-suit injunctions made by other foreign courts, especially the US court. [19]

In some other IP cases involving Chinese tech giants, Chinese courts appear to

feel more and more comfortable with granting compulsory rulings having the same legal effects of anti-suit injunction and anti-anti-suit injunction. For example, in another seminal case publicized by the SPC in 2020, Huawei Technologies Corp Ltd (“Huawei”) applied to the Court for a ruling to prevent the respondent Conversant Wireless Licensing S.A.R.L. (“Conversant”) from further seeking enforcement of the judgment rendered by the Dusseldorf Regional Court in Germany. [20] Before the application, a pair of parallel proceedings existed, concurrently pending before the SPC as the second-instance court and the Dusseldorf Regional Court. On the same date of application, the German regional court delivered a judgement in favour of Conversant. Within 48 hours after receiving the Huawei’s application for an anti-suit injunction, the SPC granted the injunction to prohibit Conversant from applying for enforcement of the German judgment; if Conversant failed to comply with the injunction, a fine (RMB 1 million per day) would be imposed, accumulating day by day since the date of breach. [21] Conversant applied for a reconsideration of the anti-suit injunction, and it was however rejected by the SPC eventually. [22] The SPC’s anti-suit injunction against the German regional court’s decision compelled both parties to go back to the negotiating table, and the dispute between the two parties striving for global parallel proceedings was finally resolved by reaching a settlement agreement. [23]

The SPC’s injunction in Huawei v. Conversant is commended as the very first action preservation ruling having the “anti-suit injunction” nature in the field of intellectual property rights litigation in China, which has prematurely established the Chinese approach to anti-suit injunction in judicial practice. [24] It is believed by the Court to be an effective tool to curb parallel proceedings concurrent in various jurisdictions across the globe. [25] We still wait to see Chinese court’s future approach in other civil and commercial matters to anti-suit injunction or anti-anti-suit injunction issued by itself as well as those granted by foreign courts.

1. See *Impala Warehousing and Logistics (Shanghai) Co Ltd v Wanxiang Resources (Singapore) Pte Ltd* [2015] EWHC 811, para.144.
2. See Liang Zhao, ‘Party Autonomy in Choice of Court and Jurisdiction Over Foreign-Related Commercial and Maritime Disputes in China’ (2019) 15 *Journal of Private International Law* 541, at 565.
3. See Article 100, para.1 of the PRC CPL (2017).

4. See Article 51 of the PRC Special Maritime Procedure Law (1999).
5. See Article 53 of the PRC Special Maritime Procedure Law (1999).
6. See Article 56 of the PRC Special Maritime Procedure Law (1999).
7. See *Huatai Property & Casualty Insurance Co Ltd Shenzhen Branch v Clipper Chartering SA* (2017) E 72 Xing Bao No.3 of the Maritime Court of Wuhan City.
8. See HCCT 28/2017 of the High Court of the Hong Kong SAR.
9. See (2017) E 72 Xing Bao No.3.
10. See Andrew S. Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press 2003), at 196.
11. See *ibid.*
12. See (2020) Yue 03 Min Chu No.689-1.
13. See *ibid.*
14. See *ibid.*
15. See *ibid.*
16. See *ibid.*
17. See *ibid.*
18. See *ibid.*
19. See Greta Niehaus, 'First Anti-Anti-Suit Injunction in Germany: The Costs for International Arbitration' *Kluwer Arbitration Blog*, 28 February 2021.
20. See *Huawei Technologies Corp Ltd and Others v Conversant Wireless Licensing S.A.R.L.* (2019) Zui Gao Fa Zhi Min Zhong No.732, No.733, No.734-I.
21. See *ibid.*
22. See *Conversant Wireless Licensing S.A.R.L. v Huawei Technologies Corp Ltd and Others*, (2019) Zui Gao Fa Zhi Min Zhong No.732, No.733, No.734-II.
23. See Case No.2 of the "10 Seminal Intellectual Property Right Cases before Chinese Courts", *Fa Ban* [2021] No.146, the General Office of the Supreme People's Court.
24. See *ibid.*
25. See *ibid.*