

# Forum Non Conveniens in Chinese Maritime Litigation

Professor Jingying Chen

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EAST CHINA UNIVERSITY OF POLITICAL SCIENCE AND LAW

# Contents---

- The first battle in international maritime disputes— —for jurisdiction
- Case-study: A. *Atlasnavios Navegacao LDA v The Ship “Xin Tai Hai”* (No 2) [2012] FCA 1497 ; B. *CMA CGM SA v Ship “Chou Shan”* [2014] FCAFC 90
- Considerations
- Conclusion



## The first battle in international maritime disputes

- *Why battle for jurisdiction ?*
- Different standards on the limitation of liability for maritime claims
- A court may establish a jurisdiction over the case  
even if it has no actual link with the claims, i.e.  
by action in rem or maritime preservation
- Parties may choose a favorable court to conduct proceedings



# Case-study 1

- *Atlasnavios Navegacao LDA v The Ship “Xin Tai Hai” v. The Ship “Xin Tai Hai” [2012]*



**China Maritime Court Proceedings**

Atlas---> China Earth (Nov 2011)

**Australia Proceedings**

Atlas arrested XTH (May 2012)



# Case-study 1

## Brief(1):

- On July 29, 2011, the "XIN TAI HAI" collided with the "B OCEANIA" in the southern sea of the Straits of Malacca, then B OCEANIA sank
- After the collision, The shipowner of XIN TAI HAI applying to Qingdao Maritime Court for establishing a limitation fund under the Maritime Code of China
- the shipowner of B OCEANIA registered its claim in the Maritime Court, And on 26 November 2011, filed a statement of claim against China Earth in the Maritime Court. At the same time, applied for an arrest order before the Federal Court of Australia under the standard liability limitation of the 1996 Amendment
- Six months later, the negotiations between the two parties broke down. When XIN TAI HAI arrived in WA, the shipowner of B OCEANIA asked the Federal Court to arrest it and brought an action *in rem* towards the shipowner of XIN TAI HAI



# Case-study 1

## Brief(2):

- On May 10, 2012, the Federal Court accepted a letter of guarantee from P & I club of the shipowner of XTH in the amount of \$35 million and released XIN TAI HAI. On the same day, the Qingdao Maritime Court on the application of shipowner of XIN TAI HAI issued an injunction and ordered the shipowner of B OCEANIA that: "Immediately release the arrest of XIN TAI HAI and shall not arrest or adopt obstruction measures against the person or property of the applicant ."
- On 16 May 2012, China Earth attempted to have the Maritime Court accept a supplementary application for maritime injunction which sought an order that Atlas immediately return Skuld's letter of undertaking given for the release of *Xin Tai Hai*
- in order to preserve the guarantee, the shipowner of B OCEANIA applied to the Federal Court and obtained an injunction which required the shipowner of XTH to withdraw the application to Qingdao Maritime Court for compulsory withdrawal of the guarantee. The shipowner of XTH was forced to waive the withdrawal of the guarantee, but then applied to the Federal Court for suspension of proceedings
- The Federal Court decided that the Court had no "obvious inappropriate forum", and rejected the application for suspension



# Case-study 1-1

- *Main issues*
- How the courts get a jurisdiction over the case---  
Parallel proceedings set
- Whether "the first respondent court shall have priority in jurisdiction" is appropriate forum
- Whether Qingdao Maritime Court's injunction(including the order) that forced to withdraw the ship arrest guarantee is properly made



# Case-study 1-2

- ***Considerations(1)***
- The liability arising from ship collision is a tort. According to the general principles of tort law, disputes caused by tort should be under the jurisdiction of the court of the place where the tort is committed or the defendant's domicile
- neither of the courts was a natural forum, but by virtue of the particularity of maritime cases, the courts of the two countries obtained jurisdiction through *maritime preservation* and *action in rem*



# Case-study 1-3

- ***Considerations(2-1)***

- There is no system of binding precedent in the Chinese legal system. However, the Supreme People's Court has the power to publish an "*interpretation*" or "*opinion*" of Chinese law that binds all courts in China as binding statute
- Nov. 11, 2005, the Supreme People's Court held the second conference of the work of foreign-related maritime trials over the judicial practices of the parallel proceedings. It summarises:



# Case-study 1-3

## ● *Considerations(2-2)*

- when dealing with parallel proceedings, the Chinese courts should examine whether there are treaties on civil and commercial judicial assistance that China signed with other countries. These treaties usually stipulate that "the first respondent court shall have priority in jurisdiction".
- In the absence of either international treaties or the recognition or enforcement of foreign court judgments (as China and Australia in this case), the Chinese courts still adhere to the principle of absolute priority of domestic jurisdiction (even if the foreign court has accepted the lawsuit, the Chinese court can still exercise jurisdiction without paying attention to the potential injustice or inconvenience )



# Case-study 1-3

- ***Considerations(3)***

- To maintain its prior jurisdiction over this case, the Maritime Court was understandable to issue an injunction.
- The maritime Court delivered an order relied on Art 214 of the *Maritime Code and The Maritime Procedure Interpretation 2003* provided, in Art 86, that, after a limitation fund has been constituted, any party that makes a claim against the fund must not assert any right against any other property of the person constituting such a fund in respect of such a claim



# Case-study 1-4

- **Conclusion---**

- In this case, Qingdao Maritime Court is the court where the lawsuit was first lodged, and it is indisputable to carry out ship arrest, accept the establishment of maritime liability limitation fund and hear the lawsuit in accordance with the connections.
- China has observed the principle of domestic jurisdiction for years. however, it has ignored cooperation and coordination in international private law and tends to exacerbate the conflicts over judicial sovereignty , and is not conducive to the development of international trade and commerce either.



# Case-study 2-1

- ***CMA CGM SA v Ship 'Chou Shan' [2014]***

## **Brief:**

- In March 2013, Chou Shan (CS, registered in Panama), a bulk carrier on voyage to AU, collided with CMA CGM Florida (CCF, registered in UK) in East China Sea. This resulted in oil/fuel spill and damage to cargo.
- After the collision, both ships went to ports in China.
- Chinese authority did the clean-up. Both ships required to pay security to Chinese authority for claims of pollution clean-up costs and damage to fisheries.
- Various proceedings commenced in China.
- ***CS travelled to WA, was arrested there.*** The claimants in these FCA (WA) proceedings were the owner and operator of CCF, and were domiciled in the Marshall Island, France and Ireland.



# Case-study 2-2

## *AUS Proceedings*

- April 2013, CCF interests (Ps) commenced this proceeding
- 16 May 2013, the Ps sought a warrant to arrest the Chou Shan
- 22 May 2013, the Chou Shan was arrested in WA  
The Chou Shan now applies to stay this proceeding **by the doctrine of *forum non conveniens*** on FNC
- ***If stay granted, CCF would lose legitimate judicial advantage*** – ie could get higher compensation in AU (about \$19 million more)



# Case-study 2-3

## *Ningbo Maritime Court's Proceedings*

- 6 May 2013, Chou Shan interests established a limitation fund under Chinese law. Claims against the fund have been made by the plaintiffs, the Shanghai MSA, the East China Fishery Administration Bureau and persons with an interest in lost, damaged and transshipped cargo aboard the CCF
- 14 May 2013, the Chou Shan interests applied to the Ningbo Maritime Court to arrest the CCF
- 20 May 2013, the Chou Shan interests filed a civil complaint against the Ps



# Case-study 2-4

## *Main issue*

- Whether Chou Shan's application to stay the proceeding should be permitted or Federal Court is clearly an inappropriate forum for the hearing and determination of the proceeding



# Case-study 2-5

## *Considerations*

- *Where the courts of another country have jurisdiction over all the parties and subject matter of the claims and can afford substantial justice, the courts should consider the implications and burdens to the parties and to third parties arising from multiple proceedings and the ‘very likely’ prospect of different outcomes: Henry (at 591).*
- The natural and obvious forum for all disputes relating to the collision is China. Unlike the *The Ship "Xin Tai Hai" (No 2)*, this collision occurred proximate to China, in China’s EEZ. It was not a collision occurring off the Malaysian coast. Following the collision, both ships steamed to Chinese ports for repair. Neither ship sank but there was considerable oil spillage in China’s EEZ which was expressly governed by Chinese jurisdiction



# Case-study 2-6

## *Considerations*

- There's the fact that the *in rem* proceeding was commenced in Australia, there was nothing and no one in this proceeding which has any connection whatsoever with Australia except a loss of a juridical advantage. but it does not appear that it is sufficient to undermine the conclusion that the Judge have reached that the Court is a clearly inappropriate forum.
- The proceeding is vexatious and oppressive as it concerns substantially the same subject matter as a pending proceeding in the Ningbo Maritime Court in China. Continuation of proceedings in China and in Australia raises real risks about inconsistent findings and verdicts. Where there is a need to enforce a judgment in a third country, the existence of conflicting findings and verdicts 'presents an intolerable situation'. That situation is only avoided, it is contended, by a stay of this proceeding.



# Conclusion

- *It is not simply a question of determining which proceeding was first in time. This is particularly so where the procedural history demonstrates a series of steps taken by each side and very closely related in time.*
- *The doctrine of forum non conveniens has not been adopted in existing Chinese statute laws, but is stipulated in the interpretations and guiding opinions of the Supreme People's Court of China, and to be applied in practice.*
- *In regard of balance the interests of the parties, “a clearly inappropriate forum” is getting more applicable.*



***Thanks for Attention***



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