

CHINA'S RULE OF LAW FROM A PRIVATE INTERNATIONAL LAW PERSPECTIVE

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TABLE OF CONTENTS

I. INTRODUCTION	96
A. <i>The Three Conflict Questions</i>	97
1. <i>Jurisdiction</i>	97
2. <i>Enforcement of Chinese Judgments</i>	98
3. <i>Choice of Law</i>	98
B. <i>Why Common Law Jurisdictions?</i>	99
C. <i>Scope and Limitations</i>	100
II. RULE OF LAW	101
III. METHODOLOGY	106
IV. PRIVATE INTERNATIONAL LAW CASES FROM COMMON LAW JURISDICTIONS	106
A. <i>United States</i>	106
1. <i>Jurisdiction – Forum Non Conveniens</i>	107
a. <i>General Rule</i>	107
i. <i>Alternative Forum</i>	108
ii. <i>Private and Public Factors</i>	109
b. <i>The Three Propositions</i>	110
c. <i>General Findings from FNC Cases</i>	111
d. <i>Hidden Message in the Findings?</i>	116
e. <i>Why So Secret?</i>	121
i. <i>The Low Standard</i>	121
ii. <i>International Comity</i>	123
f. <i>Statistical Analysis</i>	124

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i.	32 Cases Summary.....	124
ii.	Logistic Regression, With Single Factor	124
iii.	Logistic Regression, With Three Factors	125
iv.	Interpretation	126
g.	Indirect Effect on China's Rule of Law	126
2.	Jurisdiction - Antisuit Injunction.....	129
3.	Enforcement of Chinese Judgments in the U.S.....	131
4.	Choice of Law.....	135
B.	Hong Kong.....	137
1.	Jurisdiction - Forum Non Conveniens	138
a.	The General Rule.....	138
i.	Stage One.....	138
ii.	Stage Two.....	139
b.	Differences from U.S. Forum Non Conveniens Rule..	139
c.	General Findings	140
d.	Hidden Messages?	143
e.	Inferential Analysis.....	146
i.	FNC Factors Summary	146
ii.	Logistic Regression, With Single Factor	147
iii.	Logistic Regression, With Two Factors.....	148
iv.	Interpretation	149
2.	Jurisdiction - Antisuit Injunction.....	151
a.	General Rule.....	151
b.	General Findings	152
3.	Enforcement of Chinese Judgments.....	153
a.	General Rule.....	153
b.	Choice of Law.....	156
C.	England.....	157
1.	Jurisdiction - Forum Non Conveniens.....	158
2.	Jurisdiction - Anti-suit Injunction.....	159
3.	Enforcement of Chinese Judgments.....	160
D.	Canada, Australia, and New Zealand	161
1.	Jurisdiction - Forum Non Conveniens	161
a.	General Observations.....	161
b.	Statistical Findings	163
i.	Summary of Cases.....	163
ii.	Logistic Regression.....	163
iii.	Results.....	164
iv.	Interpretation	164
2.	Enforcement of Chinese Judgments.....	164

V. CONCLUSION 165

I. INTRODUCTION

Does China have rule of law? This has been a highly controversial topic over the last few decades, particularly after China entered the post-Mao era and adopted an open door policy.¹ One established way to measure the rule of law of a country is to survey the country's citizens and ask their views on this. These empirical researches have certainly been carried out in China. For example, the World Justice Project created a ranking of countries' rule of law based on general population polls and questionnaires distributed to in-country practitioners and academics.² In 2016, it ranked China 80th out of the 113 countries surveyed.³ Similarly, the World Bank's Worldwide Governance Indicators were created through the exclusive use of perceptions data.⁴ In 2015, it ranked China in the 44th percentile in terms of rule of law among more than 200 countries. Most recently, the World Economic Forum released its 2017-2018 global competitiveness report, which ranked China's judicial independence at 46 out of 137 countries.⁵ Surveying subjective perceptions has therefore been a widely accepted methodology in assessing rule of law in China.⁶ Considering that rule of law can be defined as "[t]he name commonly given to the state of affairs in which a legal system is legally in good shape,"⁷ asking citizens for their views on how their own countries are doing in terms of rule of law makes perfect sense. In addition, research has also been conducted on Chinese judges to collect their views on a number of rule of law-related topics.⁸

However, the perceptions of an important sector have been largely neglected in China's rule of law discussions, namely those of judges from foreign countries. This would serve as a form of "peer review" as judges are the core administrators of the rule of law in most jurisdictions. They are generally

¹ See, e.g., RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002); STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO (2000); THE LIMITS OF RULE OF LAW IN CHINA (James V. Feinerman et al. eds., 2000).

² *Id.* at 17.

³ See WORLD JUSTICE PROJECT, WORLD JUSTICE PROJECT RULE OF LAW INDEX 2016 5 (2016).

⁴ Daniel Kaufmann, et al., *The Worldwide Governance Indicators: Methodology and Analytical Issues 2* (World Bank Policy Research, Working Paper No. 5430, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1682130. Note, however, that it is not clear if the perception data is limited to in-country surveys.

⁵ *The Global Competitiveness Report 2017-2018*, WORLD ECON. FORUM 91 (2017), <http://www3.weforum.org/docs/GCR2017-2018/05FullReport/TheGlobalCompetitivenessReport2017-2018.pdf>.

⁶ Corruption Perceptions Index 2016, TRANSPARENCY INTERNATIONAL (Jan. 25, 2017), https://www.transparency.org/news/feature/corruption_perceptions_index_2016.

⁷ JOHN FINNIS, NATURAL LAW AND NATIONAL RIGHTS 270 (Oxford Univ. Press, 1980).

⁸ See e.g. Gong Xiangrui, ed. *Fazhi de Lixiang yu Xianshi* (The Ideal and Reality of the Rule of Law), Beijing, Zhongguo Zhongfa Daxue Chubanshe (1993), 33, cited by Randall PEERENBOOM, *supra* note 1, at 307.

regarded as the most impartial and independent group of legal professionals. In particular, this article will examine the views of judges from six common law jurisdictions (the U.S., England, Hong Kong, Australia, Canada, and New Zealand, hereinafter “common law jurisdictions”)⁹ on China’s rule of law as derived from their private international law cases.

Private international law cases are a particularly fertile field for collecting judges’ views on China’s rule of law because (1) these cases require judges to make decisions on conflict of laws issues in cases that involve China (see below); and (2) in making such decisions, the judges often have to consider the rule of law status of China, either expressly or implicitly, as one of the important factors. It must be stressed that the judges make these decisions primarily to address the interests of the litigants at stake, not just for the purpose of contributing to academic debate. Frequently, one of the litigants is from their own jurisdiction and the other litigant is from China.¹⁰ The judiciary, as a branch of government, also represents a view of the respective common law jurisdictions on the issue of rule of law in China.

A. *The Three Conflict Questions*

Private international law, also known as conflict of laws, deals with conflicts of legal systems in international civil litigation. In litigation involving Chinese parties or transactions involving China, judges in common law jurisdictions are asked to make decisions in three conflict scenarios:¹¹

1. *Jurisdiction*

Judges are often asked to make a choice between either adjudicating the disputes in their own courts as initiated by the plaintiff or declining the adjudication in favor of Chinese courts under the *forum non conveniens* principle.

⁹ World Economic Forum, *Global Competitiveness Index* (2017), http://reports.weforum.org/pdf/gci-2017-2018-scorecard/WEF_GCI_2017_2018_Scorecard_GCI.pdf.; WORLD ECON. FORUM, *supra* note 5, at 51, 83, 141, 221, 301, 303 (The judiciaries of all six jurisdictions enjoy high rankings from the Global Competitiveness Report 2017-2018, ranking 2nd (New Zealand), 6th (United Kingdom), 8th (Australia), 9th (Canada), 13th (Hong Kong), 25th (U.S.)).

¹⁰ See Declaration of Jacques Delisle in Support of Defendants 6Waves LLC and Six Waves Inc.’s Motion to Dismiss on *Forum Non Conveniens* Grounds, No. 4:13-cv-03977-MMC, 2013 WL 9586150 (N.D. Cal. Nov. 1, 2013)(providing expert witness testimony in relation to King.com Limited v. 6 Waves LLC and Six Waves Inc., No. C-13-3977 MMC, 2014 WL 1340574 (N.D. Cal. Mar. 31, 2014) (“These cases also almost always involved Chinese parties on one side and non-Chinese parties (and, indeed, non-Chinese parties who opposed the *forum non conveniens motion*) on the other.”).

¹¹ These three questions are the three main questions asked by private international lawyers. See RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 1(6th ed. 2010).

In an even more drastic measure, judges at times are asked to enjoin a party from continuing his or her legal proceedings in China by issuing an anti-suit injunction.

2. *Enforcement of Chinese Judgments*

In enforcement proceedings, judges are asked to recognize or enforce Chinese judgments in their own countries. Rejection of enforcement often means that the plaintiff in the Chinese proceedings will have to initiate proceedings afresh in the foreign court. Apart from a limited enforcement arrangement with Hong Kong,¹² China currently has no effective enforcement treaty/arrangement with the other common law jurisdictions.

3. *Choice of Law*

There could also be issues of choice of law when judges must decide on the applicability of Chinese law to the case. The substantive content of Chinese law might be repugnant to the notion of rule of law in the foreign country. In that case, the application of Chinese law will be declined even if it is otherwise applicable under the general choice of law rules of the common law jurisdictions. If the application of Chinese law is declined, the law of the forum or the law of a third country will apply instead.

In all three scenarios above, judges may either explicitly or implicitly express a view on China's rule of law. Will the parties receive a fair trial in China? Was the Chinese judgment rendered after going through a fair judicial process in China? To what extent shall Chinese law be given effect? All these questions will certainly be taken into account in making the final conflict decisions. On the other hand, the rule of law status of China is never the only factor considered by the courts in any of the three questions. It is therefore interesting to see the extent to which the courts will balance the rule of law considerations with other factors.

Although this article mainly focuses on China's rule of law from a private international law perspective, it is also an opportunity to reflect on the current standard imposed on justice administered by foreign courts in these six common law jurisdictions in private international law issues. Have the common law jurisdictions paid enough attention to the rule of law status of the foreign

¹² Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned, Signed by the Supreme Court (China) and Department of Justice (Hong Kong Special Administrative Region), July 14, 2006, <https://www.doj.gov.hk/eng/mainland/pdf/mainlandrej20060719e.pdf> (courtesy English translation).

legal system in handling private international law issues? It is also an opportunity to compare the similar but not identical approaches of different common law jurisdictions.

B. Why Common Law Jurisdictions?

Common law jurisdictions were thought to be the best samples for the research due to the high status given to judges. Judges are arguably at the top of the legal systems in common law jurisdictions, being in charge of both applying and developing the law. They are generally regarded as the most experienced and impartial members of the legal profession. Judgments of common law jurisdictions are also generally more elaborated and the reasoning of the judges can therefore be more readily identified from the judgments.

These six common law jurisdictions are among the most important common law jurisdictions and each conducts substantial trade with China. For example, the United States is the largest trading partner to China.¹³ Hong Kong, being part of China, offers a significant number of cases for study due to its political and geography proximity to China.¹⁴ Their views on China's rule of law will certainly have impacts on China economically and thus may be regarded as a force in shaping China's developments on the rule of law. More importantly, all six common law jurisdictions share common values in the rule of law and have similar private international law rules on all three conflict issues.¹⁵ This is of course not to say that other jurisdictions do not have similar

¹³ See *National Data*, NAT'L BUREAU OF STAT. OF CHINA, <http://data.stats.gov.cn/english/easyquery.htm?cn=C01>.

¹⁴ Hong Kong remains a common law jurisdiction despite being part of China. See *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, adopted by the National People's Congress on April 4, 1990, *reprinted in* 29 I.L.M. 1511, art. 8 (1990), 1990 FAGUI HUIBIAN at 5.

¹⁵ See JAMES FAWCETT & JANEEN M. CARRUTHERS, *CHESHIRE, NORTH, & FAWCETT PRIVATE INTERNATIONAL LAW* 35 (Peter North ed., 14th ed. 2008) ("the direct influence of these American developments of private international law theory is essentially limited to the USA.") (supporting the idea that the biggest difference lies in the focus on "interest analysis" in choice of law issues in the United States.); however, as to be discussed below, issues on China's rule of law will not be present in general choice of law cases. Singapore is excluded from the common law jurisdictions covered by this research for its different view on the role of law imposing limits on the government.

Singapore ranks much lower on measures of individual liberty... There are a number of ways in which Singapore's emphasis on maintaining law and order at the expense of liberty violates substantive norms of the rule of law. At the most basic level, Singapore has denied the right to a fair trial.

See Mark Ellis, *Toward a Common Ground Definition of the Rule of Law Incorporating Substantive Principles of Justice*, 72U. PITT. L. REV. 191, 208-214

views on the rule of law.¹⁶ However, by limiting the study to these six common law jurisdictions, such debate can be avoided and it will allow a more focused discussion on private international law cases. Methodologically, cases in common law jurisdictions are regarded as official sources of law and are generally available in legal databases. This provides key materials for the research.

C. *Scope and Limitations*

With the emphasis being placed on private international law cases, it is clear that this article will not cover areas such as Chinese domestic cases on human rights, administrative proceedings against the Chinese government, or China's criminal justice system. There is no question that these areas are all essential components to be weighed in the assessment of China's rule of law. However, this article does not set out to be a comprehensive survey of all areas of law but only to offer an additional piece to the puzzle in the contemporary conversation on China's rule of law.

Although private international law cases generally do not cover the aforementioned excluded topics, it does not mean that they are not capable of shedding light on rule of law in general. Private international law, despite the focus by most on its difficulties and technicalities,¹⁷ is as much about the rule of law as other branches of law. While the term "rule of law" is not often used in the private international law context,¹⁸ justice and fairness are at the core of private international law.¹⁹ As will be discussed below, the European Convention

¹⁶ See Ellis, *supra* note 15 (arguing for a substantive approach to the rule of law universally).

¹⁷ William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953) ("[t]he realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon.").

¹⁸ See, e.g., LAWRENCE COLLINS ET AL., *THE CONFLICT OF LAWS* (15th ed. 2012, Sweet & Maxwell) (widely regarded as the most authoritative hornbook on private international law in the common law world. It has never used the term "rule of law" to represent ideas of justice or fairness of a given legal system).

¹⁹ See J.H.C. MORRIS, *THE CONFLICT OF LAWS* 5-6 (3d ed. 1984).

What justification is there for the existence of the conflict of laws? . . . The justification for the conflict of laws can best be seen by considering what would happen if it did not exist. Theoretically, it would be possible for English courts to close their doors to all except English litigants. But if they did so, *grave injustice* would be inflicted not only on foreigners but also on Englishmen. . . . It was at one time supposed that the doctrine of comity was a sufficient basis for the conflict of laws. . . . But it is clear that English courts apply, e.g. French law in order to do *justice* between the parties, and not from any desire to show courtesy to the French Republic. . . . (emphasis added).

on Human Rights (“ECHR”) now applies to the various conflict rules of England.²⁰ For readers who are interested in the topics excluded from the scope of this article generally, they are referred to the numerous works written by established scholars.²¹ That said, as will be seen below, private international law cases could still have indirect impacts on these excluded aspects of rule of law.²²

This article is arranged in the following order: Section II briefly outlines the concept of rule of law as shared by the common law jurisdictions. Section III lays out the methodology of the empirical research on private international law cases. This is followed by discussions of the findings from private international law cases from the six common law jurisdictions in Section IV. Finally, Section V summarizes the findings and concludes with the common threads identified from the common law jurisdictions’ perception on rule of law of China.

II. RULE OF LAW

Since this article discusses the rule of law status of China from the private international law perspective, it begs the question whether there is a definition of rule of law in the first place. No one will question that rule of law is a good virtue. It is, therefore, said that “no one—the human rights community, the business community, the Chinese leadership—objects to it.”²³ The real challenge is to define what rule of law is.

Numerous attempts have been made; what is certain is that there is no consensus on a universally accepted definition. As said by Peerenboom, “[r]ule of law, like other important political concepts such as justice and equality, is an ‘essentially contested concept.’”²⁴ However, just because we cannot agree on the outer boundaries of the rule of law, does not mean there are not certain commonly agreed elements of the rule of law.

A good starting point is the definition provided by Lord Bingham, one of the most prominent common law judges in the modern era. In his seminal

Id. See J.H.C. MORRIS, *THE CONFLICT OF LAWS* 5-6 (3d ed. 1984). See also *Gutierrez v. Advanced Medical Optics, Inc.*, 640 F.3d 1025, 1030 (“At its core, the doctrine of *forum non conveniens* is concerned with fairness to the parties.”); *Interleda Co. v. Zhongshan Broad-Ocean Motor Co., Ltd.*, No. 1:13-cv-356, 2015 WL 1310724, at *7 (N.D. Ind. 2015) (“Under [*forum non conveniens*], trial courts have the option to dismiss a suit where it would normally have jurisdiction if it best serves the convenience of the parties and the ends of justice.”).

²⁰ See *infra* Section IV.C.

²¹ See PEERENBOOM, *supra* note 1.

²² See *infra* Section IV.A.1.g.

²³ See Ellis, *supra* note 15, at 191 (citing Matthew Stephenson, *A Trojan Horse in China?*, in *Promoting the Rule of Law Abroad: In Search of Knowledge*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 196 (Thomas Carothers ed., 2006)).

²⁴ PEERENBOOM, *supra* note 1, at 2.

work, *The Rule of Law*, Lord Bingham gave the following definition for the rule of law: “[t]hat all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.”²⁵ He went on to supplement this core principle with the following eight principles of the rule of law:

1. The law must be accessible and so far as possible intelligible, clear and predictable;²⁶
2. Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion;²⁷
3. The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation;²⁸
4. Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably;²⁹
5. The law must afford adequate protection of fundamental human rights;³⁰
6. Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve;³¹
7. Adjudicative procedures provided by the state should be fair;³²
8. The rule of law requires compliance by the state with its obligations in international law as in national law.³³

Although Lord Bingham’s definition is largely self-explanatory, and it is not the purpose of this article to debate its correctness, two points need to be highlighted: first, limitation of government power is essential in Lord Bingham’s definition, and second, his definition includes both the “thin” and “thick” concepts of the rule of law.

To the first point, the “no one is above the law” principle is the centerpiece to Lord Bingham’s definition and is further elaborated in the second, third, and fourth principles. However, binding the state to the rule of law probably

²⁵ TOM BINGHAM, *THE RULE OF LAW* 8 (Penguin Group 2010).

²⁶ *Id.* at 37-47.

²⁷ *Id.* at 48-54.

²⁸ *Id.* at 55-59.

²⁹ *Id.* at 60-65.

³⁰ *Id.* at 66-84.

³¹ *Id.* at 85-89.

³² *Id.* at 90-109.

³³ *Id.* at 110-129.

presents the biggest challenge to China, as the Chinese government is dominated by the Chinese Communist Party.³⁴ As will be seen in the discussions below, whether a plaintiff suing the Chinese government or state-owned enterprises will receive a fair trial in China is one of the most common issues in the context of *forum non conveniens*.³⁵

To the second point, the “thick” and “thin” theories of the rule of law are elaborated by Professor Peerenboom as follows:

A thin theory stresses the formal or instrumental aspects of rule of law – those features that any legal system allegedly must possess to function effectively as a system of laws, regardless of whether the legal system is part of a democratic or nondemocratic society, capitalist or socialist, liberal or theocratic . . . thick or substantive conceptions begin with the basic elements of a thin concept of rule of law but then incorporate elements of political morality such as particular economic arrangements (free-market capitalism, central planning, etc.), forms of government (democratic, single party socialism, etc.), or conceptions of human rights (liberal, communitarian, “Asian values,” etc.).³⁶

Thus, the “thin” theory of the rule of law focuses on the procedural aspects of the rule of law, while the “thick” theory of the rule of law takes a further step in stipulating the substantive content of the law. This is one of the biggest debates on what constitutes rule of law. If a country has a consistent, clear, and efficient legal system, will that alone be sufficient to qualify it as a country with rule of law? Or does it take more, such as the protection of fundamental human rights to earn that badge of honor? Fortunately, this is not a call that has to be made in this article due to its focus on common law jurisdictions’ notion of rule of law only.

³⁴ See ALBERT CHEN, *AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA*, 200 (4th ed. 2011).

According to orthodox theory as officially proclaimed in mainland China, law is ultimately an instrument of the people's democratic dictatorship and thus of communist party leadership in the construction of socialism; law is party policy elevated into the will of the state through the legislative process. Judges' fidelity to the law should, if this concept of law is correct, never override their loyalty to the principle of party leadership.

Id.

³⁵ See *infra* Section IV.A.1.c, Tb.3.

³⁶ See PEERENBOOM, *supra* note 1, at 3.

Lord Bingham's view is clearly that the rule of law demands the substantive, or "thick," perspective,³⁷ and this is captured in the fifth principle, which demands that the law affords adequate protection of fundamental human rights.³⁸ To Lord Bingham, a system of law that denies protection to fundamental human rights is analogous to that of Nazi Germany.³⁹ A country "which savagely represses or persecutes sections of its people cannot ... be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp ... is the subject of detailed laws duly enacted and scrupulously observed."⁴⁰

Lord Bingham's definition is widely shared by the other common law jurisdictions.⁴¹ Two U.S. Supreme Court justices have both expressed a similar view on the rule of law. Justice O'Connor, when giving a speech on the significance of judicial independence to the rule of law to the National Judges College in China, first talked about the importance of the independence, integrity, and competence of judges to the rule of law, calling them "bedrock principles" that are indispensable in upholding the rule of law.⁴² These reflect Lord Bingham's fourth principle of rule of law as well as the thin theory in general.

Toward the end of her speech, she emphasized the importance of protecting human rights, the fifth principle in Lord Bingham's definition and the core idea behind the "thick" theory. According to her, "certain fundamental rights, to which every citizen is entitled, must be placed outside the reach of political exigency."⁴³ Specifically, she referred to the longstanding role of the courts in the United States in safeguarding the fundamental rights as enshrined in the Bill of Rights.⁴⁴ Justice O'Connor clearly thought that this was not just a U.S. version of the rule of law, but one that should be adopted by the rest of the world, including China: "[a]s the world community strives together to advance the Rule of Law, ideas and institutions transplanted from the West may take root in the rich and ancient civilizations of the East."⁴⁵ In addition, she also mentioned that "no person or group, however powerful, is above the

³⁷ See BINGHAM, *supra* note 25, at 67-68 ("I would roundly reject [the 'thin' theory of the rule of law] in favour of a 'thick' definition, embracing the protection of human rights within its scope.").

³⁸ *Id.*

³⁹ *Id.* at 76-77.

⁴⁰ *Id.* at 67.

⁴¹ *Id.* at 25-30. Although Lord Bingham mainly used examples of England in his book as illustration, he refers to a large number of non-UK examples, too. For instance, in describing the historical developments of the rule of law, he highlighted the U.S. Constitution and the U.S. Bill of Rights as important historical milestones.

⁴² Sandra Day O'Connor, *Vindicating the Rule of Law: The Role of the Judiciary*, in 2 CHINESE J. INT'L LAW 1 (2003).

⁴³ *Id.* at 8.

⁴⁴ *Id.*

⁴⁵ *Id.*

law,”⁴⁶ echoing Lord Bingham’s call on the role of the law in limiting government powers.

Justice Kennedy argued in a speech that the rule of law demands the limitation of government power and the same protection to both procedural and substantive rights. Firstly, regarding limitation of government power, he said that: “The Law rests upon known, general principles applicable on equal terms to all persons. It follows that the Law is superior to, and thus binds, the government and all its officials.”⁴⁷ Secondly, he also supported the thick theory of the rule of law, saying that: “The Law must respect and preserve the dignity, equality, and human rights of all persons.”⁴⁸

There is no need to recite similar statements of judges in other common law jurisdictions. It is safe to say that these values are largely shared by other common law jurisdictions. Even though the content of what constitutes the substantive rights is certainly debatable, it will not stop us from finding a consensus on the core rights to be protected. This is summarized by Lord Bingham succinctly:

It must be accepted that the outer edges of some fundamental human rights are not clear-cut. But within a given society there is ordinarily a large measure of agreement on where the lines are to be drawn at any particular time, even though standards change over time, and in the last resort the courts are there to draw them ...⁴⁹

In any event, for the purposes of this article, Lord Bingham’s definition will be adopted. Although it may be argued that this definition is too westernized and does not take into account “Chinese socialist characteristics,”⁵⁰ this article only examines China’s rule of law from the perspective of common law judges. It is therefore reasonable to adopt the rule of law standard that is shared by common law judges.

⁴⁶ *Id.* at 4.

⁴⁷ Robert Stein, *Rule of Law: What Does It Mean?*, 18 MINN. J. INT’L L. 293, 299 (2009) (citing Anthony M. Kennedy, *Written Constitution and the Common Law Tradition*, 20th Sultan Azlan Shah Law Lecture in Kuala Lumpur, Malaysia, 11 (Aug. 10, 2006)(transcript on file with author)).

⁴⁸ *Id.*

⁴⁹ See BINGHAM, *supra* note 25, at 68.

⁵⁰ See James V. Feinerman, *The Rule of Law. . .with Chinese Socialist Characteristics*, CURRENT HISTORY, Sept. 1997, at 96 (supporting the idea that “Chinese socialist characteristics”, while often used by the government, has no clear meaning to date).

III. METHODOLOGY

As mentioned above, this article focuses on three types of private international law cases. For each common law jurisdiction, relevant cases were identified primarily through Westlaw by using certain key phrases.⁵¹ These included “China /p forum non conveniens,” “China /p anti-suit injunction,” “China /p choice of law /p public policy,” and “China /p enforcement of foreign judgment.”⁵² As will be elaborated in later sections, additional search terms were used for certain jurisdictions due to different terminologies used there. All the searches were made up to July 31, 2017, the latest month at the time the writing of this article began.

While the Article contains empirical analysis, the depth of analysis varies depending on the available data. Some jurisdictions simply do not have sufficient cases to conduct meaningful empirical studies. Accordingly, inferential statistical analyses are conducted in some jurisdictions which have more sizeable samples (United States and Hong Kong) and thus more data for analysis. For the other jurisdictions (England, Canada, Australia, and New Zealand), the limited amount of cases only allows descriptive empirical analyses.

IV. PRIVATE INTERNATIONAL LAW CASES FROM COMMON LAW JURISDICTIONS

A. *United States*

Cases from the United States are significant for this study for a number of reasons. First, as the largest trading partner of China,⁵³ the United States has a large number of international civil disputes with China and thus provides a sizeable number of private international law cases for this research.⁵⁴ Second, due to the favorable civil procedure rules to the plaintiff, such as a jury trial for civil cases, punitive damages, class actions and contingency fees, the United States has long been a magnet to international civil disputes.⁵⁵ As Lord Denning once said: “[a]s a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win

⁵¹ This is supplemented by similar searches in Lexis for specific cases.

⁵² It is noted that the search on choice of law cases was narrower than the others. This was because of both the sheer amount of conflict cases involving the application of Chinese law in common law jurisdictions and the low likelihood that such applications would be declined. The search therefore only focused on identifying the most relevant cases where infringement of public policy was involved in the choice of law discussion.

⁵³ See NAT'L BUREAU OF STAT. OF CHINA, *supra* note 13.

⁵⁴ See *infra* Section IV A.1.

⁵⁵ See GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 3-4 (Wolters Kluwer eds., 5th ed. 2011).

a fortune.”⁵⁶ In fact, plaintiffs reportedly have even used the lack of rule of law in China to their advantage by bringing their lawsuits to the United States. It was noted by one U.S. court that: “China has a somewhat tarnished reputation in U.S. fora, and [p]laintiff may also be relying on what he may believe is the habitual generosity of New York juries.”⁵⁷ Thus, “forum shopping” is certainly a factor in some of the private international law cases involving China that were filed in the United States. Finally, the United States is probably the most vocal country in the world in terms of taking an interest in the development of rule of law in China. For example, the Congressional-Executive Commission on China was set up in 2000 “to monitor the development of the rule of law in the People’s Republic of China...”⁵⁸ The perceptions of U.S. judges on the rule of law in China therefore have impacts not only on the relationship between the two countries, but also on the perceptions of the topic in the rest of the world.

1. Jurisdiction – *Forum Non Conveniens*

Generally, jurisdictional issues have two specific questions. First, whether the U.S. court in question *can* exercise jurisdiction to adjudicate the dispute between the parties under the U.S. jurisdictional rules. Second, even if the United States can exercise jurisdiction, *should* the U.S. court exercise jurisdiction in the given dispute. It is the second question, *forum non conveniens*, that involves discussions on China’s rule of law. This is because only in weighing whether it should exercise jurisdiction will the court be presented with a choice between adjudicating the case in the United States or China.

a. General Rule

The rule of *forum non conveniens* was most recently restated in *Sinochem International Co. Ltd. v. Malaysia International Shipping Corp.*⁵⁹ by the U.S. Supreme Court, which happened to be a case involving China. According to the Supreme Court, a court can decline jurisdiction on the basis of *forum non conveniens* “when an alternative forum has jurisdiction to hear the case, and a trial in the chosen forum would establish oppressiveness and vexation to a

⁵⁶ *Smith Kline & French Lab’s Ltd. v. Bloch* [1983] 2 All ER 72, at 74 (C.A. 1982) (Lord Denning MR).

⁵⁷ *Huang v. Advanced Battery Technologies, Inc.*, No. 09 CV 8297(HB), 2010 WL 2143669, at *4 (S.D.N.Y. May 26, 2010) (citing poll results that show 53% of Americans view China unfavorably).

⁵⁸ See 22 U.S.C. § 6912(c) (2018); See also *Frequently Asked Questions*, CONGRESSIONAL-EXECUTIVE COMM. ON CHINA (Sept. 20, 2018), <http://www.cecc.gov/about/frequently-asked-questions>.

⁵⁹ *Sinochem Int’l Co. Ltd. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422 (2007).

defendant out of all proportion to plaintiff's convenience, or the chosen forum is inappropriate because of considerations affecting the court's own administrative and legal problems."⁶⁰ Thus, the first question the court needs to decide is whether there exists an alternative forum.⁶¹ If so, the next question is whether the case will be best litigated in the alternative forum after weighing a range of factors, including the private interests of the litigants and the public interest of the forum.⁶² When both questions are answered in the positive, the court will dismiss the case in favor of the foreign forum.

The defendant will have the burden of proof on both limbs. This burden is said to be a heavy one,⁶³ and *forum non conveniens* should be regarded as the exception rather than the norm.⁶⁴ This is particularly the case when the plaintiff is from the United States because courts generally defer to the plaintiff's chosen forum. However, this presumption applies with less force when the plaintiff's choice is not its home forum "for the assumption that the chosen forum is appropriate is in such cases less reasonable."⁶⁵ Each case, however, must be decided on a case-by-case basis after considering all the circumstances.

i. Alternative Forum

An alternative forum must be both available and adequate. It is generally regarded as being available if the defendant is "amenable to process in the other jurisdiction."⁶⁶ The alternative forum will be regarded as "available" if it can offer an adequate remedy which means the remedy must not be "clearly unsatisfactory."⁶⁷ It is the latter requirement on adequacy that is traditionally the battleground on the rule of law in China.⁶⁸ In a *forum non conveniens* motion, it is common for the plaintiff to argue the foreign court lacks due process

⁶⁰ *Id.* at 429 ((citing *American Dredging Co. v. Miller*, 510 U.S. 443, 447-448 (1994)) (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981))).

⁶¹ *See* *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506 (1947).

⁶² *See Id.* at 508-509.

⁶³ *Id.* at 508 ("Unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.").

⁶⁴ *RF Micro Devices, Inc. v. Xiang*, No. 1:12CV967, 2013 WL 5462295, at *1 (M.D.N.C. Sept. 30, 2013) ("Abstention from the exercise of federal jurisdiction, however, is the exception, not the rule."). *See also* *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1224 (9th Cir. 2011) (the doctrine is "an exceptional tool to be employed sparingly, and not a doctrine that compels plaintiffs to choose the optimal forum for their claim.").

⁶⁵ *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007).

⁶⁶ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981).

⁶⁷ *Id.* at 254.

⁶⁸ *Huang v. Advanced Battery Technologies, Inc.*, No. 09 CV 8297(HB), 2010 WL 2143669, at *5 (S.D.N.Y. May 26, 2010).

a forum may be deemed inadequate if it is characterized by a complete absence of due process or an inability of the forum to provide substantial

and the plaintiff will therefore be deprived of a fair trial.⁶⁹ Allegations about lack of an independent and competent judiciary, corruption and intervention by the government are often submitted as evidence to support this argument.⁷⁰

ii. Private and Public Factors

After the court is satisfied there exists an alternative forum, it will go on to examine the private and public factors in the case to see whether the litigation will be better suited to be proceeded in the foreign court. The private factors include:

- (1) The relative ease of access to sources of proof;
- (2) the availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witness;
- (3) possibility of viewing the premises, if viewing would be appropriate to the action; and
- (4) all other practical problems that make the trial of a case easy, expeditious, and inexpensive.⁷¹

These factors relate mainly to the availability of the evidence in the U.S. forum or the alternative forum. In other words, they compare the convenience in conducting the litigation in the United States and the foreign country.⁷² This is particularly clear having regard to the last factor. It is really a catch-all factor which speaks to everything that makes the litigation “easy, expeditious, and inexpensive.”⁷³ Since location and convenience are largely factual issues which vary depending on the actual circumstances of the case, these private factors are not *prima facie* relevant to the rule of law inquiry.

The public factors include:

justice, or if it does not permit the reasonably prompt adjudication of a dispute, if the forum is not presently available, or if the forum provides a remedy so clearly unsatisfactory or inadequate that it is tantamount to no remedy at all.

Id. See also *infra* Section IV.A.1.c.

⁶⁹ See e.g. *CYBERSitter, LLC v. People's Republic of China*, No. CV 10-38-JST (SHx), 2010 WL 4909958, at *4 (C.D. Cal. Nov. 18, 2010) (“Solid Oak argues that it could not receive a fair hearing in China because the Chinese courts are subject to undue influence by non-judicial government authorities.”).

⁷⁰ See *infra* Section IV.A.1.g.

⁷¹ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

⁷² *Crescendo Maritime Co. v. Bank of Comm'n Co. Ltd.*, 2016 WL 750351 (S.D.N.Y. Feb. 22, 2016) (“private interest factors relate to the convenience of the litigants”).

⁷³ *Id.*

(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized controversies decided at home; (3) the interest of having the trial of a case in a forum that is at home with the law that must govern the action; (4) the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and (5) the unfairness of burdening citizens in an unrelated forum with jury duty.⁷⁴

Unlike the private factors, the public factors look at the convenience of having the litigation conducted in the U.S. courts, not from the perspective of the litigants, but from a public resource perspective. For example, if none of the litigants are from the United States, it might not be justifiable to expend the time of U.S. courts and juries (which consist of U.S. citizens) to resolve the dispute. Thus, these public factors again do not appear to relate to the rule of law assessment.

b. The Three Propositions

Looking at the *forum non conveniens* doctrine, it is suggested that if China falls below the expectation of rule of law standard set by the U.S. courts:

- i. The success rate of *forum non conveniens* will be low. The U.S. courts will prefer to keep the litigation in the United States rather than sending it to China;
- ii. China will not be considered as an adequate forum in most cases. Again, this is because adequacy of foreign forum is most relevant to the rule of law assessment. More particularly, the rule of law challenge by the defendant under this limb will likely be successful; and
- iii. Failed *forum non conveniens* cases will not be due to failing the private and/or public factors which are factors that on the face have no relationship to rule of law in China.

These propositions are tested by a survey of U.S. *forum non conveniens* cases below.

⁷⁴ Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 n.6 (1981).

c. *General Findings from FNC Cases*

Table 1: SUCCESS RATE OF U.S. FNC CASES

No. of cases	Successful FNC cases	Success rate
32	14	43.75%

Source: Tsang 2018

Of the thirty-two U.S. *forum non conveniens* cases surveyed in this study, fourteen of these cases (43.75%) succeeded. In other words, the U.S. courts declined to exercise jurisdiction in the United States and instead sent the litigants to the Chinese courts in close to half of the cases where the *forum non conveniens* doctrine was argued. This should be considered a high success rate considering that *forum non conveniens* has always been regarded as an exception⁷⁵ and given that the burden of proof lies on the defendant.⁷⁶ Comparatively, one piece of research that reviewed all *forum non conveniens* cases in the United States between 1982 and 2007 shows a success rate of only 41%.⁷⁷ The success rate of *forum non conveniens* cases with China as the alternative forum is therefore at least on a par with those with other countries as alternative fora. In short, the general success rate suggests China has no issue with rule of law.

Table 2: FAILED REASONS FOR U.S. FNC CASES

No. of cases	Failed cases	Private and public factors not favoring China	China being an inadequate forum
32	18	18	6

Source: Tsang 2018

⁷⁵ See *Carjiano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1224 (9th Cir. 2011); *RF Micro Devices, Inc. v. Xiang*, No. 1:12CV967, 2013 WL 5462295, at *1 (M.D.N.C. Sept. 30, 2013).

⁷⁶ See *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007).

⁷⁷ See Joel H. Samuels, *When Is an Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis*, 85 *IND. L.J.* 1059, 1077 n.108 (2010).

Table 2 discusses the failed reasons between the two requirements in *forum non conveniens* cases. Since *forum non conveniens* can only succeed if the defendant can prove that both limbs are satisfied, failing either limb will lead to *forum non conveniens* being unsuccessful. In Table 2, it is shown that all of the failed cases did not manage to prove that the balancing of the private and public factors favored China. On the other hand, only six cases failed to prove China as an adequate forum. In other words, twenty-six of the thirty-two cases (81.25%) have regarded China as an adequate forum. Since rule of law discussions are conventionally considered in the adequacy limb, this again supports the argument that China has satisfied the U.S. rule of law standard. However, not all thirty-two cases involve rule of law discussions expressly in the adequacy limb. It may therefore be better to examine those cases where the rule of law argument was actually raised.

Table 3: RULE OF LAW DISCUSSION IN FNC CASES

No. of cases	China being an adequate forum	Rule of law discussed	Rule of law not satisfied
32	26	11	1

Source: Tsang 2018

Of the thirty-two cases, there were only 11 cases (34.38%) in which the plaintiff challenged the adequacy of China as a forum based on an argument relating to the rule of law status in China. More notably, the defendants succeeded in fending off the rule of law challenge in ten of eleven such cases. Among others, the following factors were raised in challenging China's lack of rule of law: 1. corruption of Chinese courts;⁷⁸ 2. incompetence of Chinese judges;⁷⁹ 3. inability to apply foreign law;⁸⁰ 4. delay in Chinese courts;⁸¹ 5.

⁷⁸ *Tang v. Synutra Int'l, Inc.*, 656 F.3d 242, 247 (4th Cir. 2011); *Zheng v. Soufun Holdings, Ltd.*, No. 1:15-CV-1690, 2016 WL 1626951, at *4 (N.D. Ohio Apr. 25, 2016); *Guimei v. Gen. Elec. Co.*, 172 Cal.App.4th 689, 694-95 (2009).

⁷⁹ *CYBERSitter, LLC v. People's Republic of China*, No. CV 10-38-JST (SHx), 2010 WL 4909958, at *4 (C.D. Cal. Nov. 18, 2010).

⁸⁰ *Mintel Learning Tech., Inc., v. Beijing Kaidi Educ. & Tech. Dev. Co.*, No. C 06-7541 PJH, 2007 WL 2403395, at *11 (N.D. Cal. Aug. 20, 2007).

⁸¹ *Jiali Tang*, 656 F.3d at 247-48.

threat to personal safety of plaintiff;⁸² 6. threat to plaintiff's Chinese lawyers;⁸³ 7. bias towards defendants (Chinese government or state-owned enterprises);⁸⁴ 8. local protectionism;⁸⁵ 9. improper influence of the Chinese Communist Party;⁸⁶ 10. discrepancies between black letter law and practice;⁸⁷ and 11. insufficient remedy.⁸⁸

With the defendants having fended off the plaintiffs' rule of law argument in over 90% of these cases, it is easy to attribute that lone successful challenge to the unique facts of the case. In *BP Chems. Ltd. v. Jiangsu Sopo Corp.*,⁸⁹ BP, the giant British oil company, sued a Chinese state-owned company for trade secret infringement. BP claimed that a plant in Jiangsu, China owned by SOPO, the Chinese defendant, had unlawfully obtained access to BP's technology.⁹⁰ The Chinese defendant's argument of *forum non conveniens* was rejected by the court as it found that the Chinese courts would not provide an adequate forum for the defendants which were state-owned enterprises.⁹¹ The court explained its reasoning as follows:

I am convinced that BP cannot receive a fair hearing of its claims in a Chinese court ... After extensive litigation spanning several years here, efforts to serve process on SOPO were not fruitful; the Chinese courts have yet to serve process on SOPO or to return the service papers with a legitimate explanation for refusal of service. SOPO's registered address mysteriously changed, though SOPO itself never physically relocated. Trouble effecting service causes concern when viewed in isolation, but when viewed in light of all evidence in this case, it is apparent that China is an inadequate alternative forum to resolve this particular dispute. Because the 921 plant is a part of Chinese industry with local, regional and national importance, the likelihood of governmental interference is high. SOPO is a powerful, state-owned enterprise with significant

⁸² *Huang v. Advanced Battery Technologies, Inc.*, No. 09 CV 8297(HB), 2010 WL 2143669, at *4 (S.D.N.Y. May 26, 2010).

⁸³ *Jiali Tang*, 656 F.3d at 247; *Guimei v. Gen. Elec. Co.*, 172 Cal.App.4th 689, 695 (2009).

⁸⁴ *Guimei*, 172 Cal.App.4th, at 694-96; *CYBERSitter, LLC*, 2010 WL 4909958, at *4.

⁸⁵ *Guimei*, 172 Cal.App.4th, at 694-95.

⁸⁶ *CYBERSitter, LLC*, 2010 WL 4909958, at *4.

⁸⁷ *Id.*

⁸⁸ *Huang v. Advanced Battery Technologies, Inc.*, No. 09 CV 8297(HB), 2010 WL 2143669, at *6 (S.D.N.Y. May 26, 2010).

⁸⁹ *BP Chems. Ltd. v. Jiangsu Sopo Corp.*, No. 4:99CV323 CDP, 2004 U.S. Dist. LEXIS 27855 (E.D. Mo. Mar. 29, 2004).

⁹⁰ *Id.*

⁹¹ *Id.* at 2.

ties to the local Communist Party. The 921 plant was sponsored and financed by the provincial government. SOPO's senior officers are government and Communist Party officers. Moreover, the 921 plant is a PRC government "priority" project and a large employer; the loss of this lawsuit could jeopardize many jobs. BP's allegations, if proven, could subject officers of PRC-owned companies to significant embarrassment and to possible criminal sanctions. Both experts agree that when the interests of the State are involved, the law is not always followed. This appears to have already happened—privileged documents held by BP's Chinese counsel were seized by the Zhenjiang Intermediate Court. The evidence suggests, contrary to SOPO's counsel's arguments, that this occurrence shows some bias against BP. Although significant reforms have been undertaken in connection with China's entry into the World Trade Organization and China has been found to be an adequate alternative forum in other cases, this case is *unique* in its importance to the interests of the Chinese government.⁹² [emphasis added].

Thus, unlike other cases, *BP* managed to provide specific evidence on the lack of rule of law of China to the satisfaction of the court. It must also be noted that the *BP* case was decided before the Supreme Court's decision in *Sinochem* which held that China was an adequate forum.⁹³

Other cases which held that China was not an adequate forum were mostly related to the defendant's failure to deliver his burden of proof⁹⁴ or a lack of jurisdiction of Chinese courts.⁹⁵ They therefore had nothing to do with the rule of law status of China.

Further analysis on specific private and public factors also support the argument that China has an adequate rule of law. As shown in Table 2, the limb

⁹² *Id.* at 35-37.

⁹³ *BP* was decided in 2004, before *Sinochem* was decided in 2007. See *BP Chems. Ltd. v. Jiangsu Sopo Corp.*, No. 4:99CV323 CDP, 2004 U.S. Dist. LEXIS 27855 (E.D. Mo. Mar. 29, 2004) and *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007).

⁹⁴ *RF Micro Devices, Inc. v. Xiang*, No. 1:12CV967, 2013 WL 5462295, at *4 (M.D. N.C. Sept. 30, 2013) ("Here, this court finds that there is insufficient evidence to find that China would have provide an adequate forum for the particular contract claim at issue."). *Mintel Learning Tech., Inc., v. Beijing Kaidi Educ. & Tech. Dev. Co.*, No. C 06-7541 PJH, 2007 WL 2403395, at *8 (N.D. Cal. Aug. 20, 2007) ("[Defendant] does not offer any proof as to the existence of the contract, copyright, trademark, and patent laws in China which would provide the plaintiff a sufficient remedy for his wrong.").

⁹⁵ In *RF Micro Devices, Inc.*, 2013 WL 5462295, at *4 (a rare case where China was held to be unavailable because the defendant failed to provide sufficient proof the court's availability).

on private and public factors plays a much larger role in determining the success of *forum non conveniens* and they do not appear to relate to the rule of law assessment. Since the private and public factors discussed in the judgments depend on the circumstances of the particular cases, it is difficult to analyze individual factors. However, one factor that is constantly present in all cases is whether the plaintiff is a U.S. party.⁹⁶ According to well established principle the “local interest in having localized controversies decided at home” will be much stronger when the litigation is initiated by a U.S. plaintiff.⁹⁷ Table 4 summarizes the cases according to the plaintiffs’ country of origin.

Table 4: U.S. PLAINTIFF IN FNC CASES

	FNC cases	Successful cases (success rate)
U.S. plaintiff	15	4 (26.67%)
Non-U.S. plaintiff	17	10 (58.88%)
Total	32	14 (43.75%)

Source: Tsang 2018

The nationality of the plaintiff seems to play a big part in deciding the success of *forum non conveniens*. *Forum non conveniens* dismissals are much more likely to be secured if the plaintiff is a non-U.S. person. As seen in Table 4 above, the success rate of *forum non conveniens* increases from 26.67% in cases where one or multiple plaintiffs are a U.S. person to 58.88% when the plaintiff is a non-U.S. person. This finding suggests that the lack of rule of law in China is not an important consideration. Rule of law (or the lack thereof) is not the reason behind *forum non conveniens* success. Other factors such as nationality of the plaintiff appear to be more relevant.

With the above findings, it is easy to conclude that the U.S. courts have viewed China’s rule of law favorably, so much so that they are comfortable to let the litigations be conducted in China instead of the United States. Delisle summarized the current state of U.S. *forum non conveniens* cases regarding China as follows: “United States courts repeatedly have granted *forum non conveniens* motions dismissing to Chinese courts in recent years, or have concluded that China provides an adequate alternative forum (even though such

⁹⁶ This factor is constantly highlighted in the discussion of private and public factors, see HAY ET AL., CONFLICT OF LAWS 553-54 (West 5th ed.).

⁹⁷ Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947).

courts have concluded that private or public interest factors in a particular case weighed decisively against dismissing the case to China).⁹⁸

d. Hidden Message in the Findings?

However, it is submitted that the findings above are not conclusive if we look at all the circumstances of the cases more closely. Tables 5 and 6 break down the *forum non conveniens* cases based on (i) the states where the cases were decided and (ii) the causes of action involved respectively.

Table 5: FNC CASES BY STATE

States	No. of cases	Successful FNC cases	Success rate
CA	8	2	25.00%
NY	4	2	50.00%
MD	2	1	50.00%
OH	2	2	100.00%
PA	1	1	100.00%
SC	1	1	100.00%
NC	2	0	0.00%
OR	1	1	100.00%
DE	1	1	100.00%
FL	2	1	50.00%
NJ	1	1	100.00%
TX	2	1	50.00%
MO	2	0	0.00%
IN	1	0	0.00%
ME	1	0	0.00%
IL	1	0	0.00%
Total	32	14	43.75%

Source: Tsang 2018

⁹⁸ See Declaration of Jacques Delisle in Support of Defendants 6Waves LLC and Six Waves Inc.'s Motion to Dismiss on *Forum Non Conveniens* Grounds, No. 4:13-cv-03977-MMC, 2013 WL 9586150 (N.D. Cal. Nov. 1, 2013), at ¶ 60.

Table 6: FNC CASES BY CAUSE OF ACTION

Cause of action	No. of cases	Successful FNC cases	Success rate
IP	11	1	9.09%
Contract	8	5	62.50%
Tort	5	3	60.00%
Admiralty	3	2	66.67%
Fraud	2	1	50.00%
Statute	2	2	100.00%
Arbitration	1	0	0.00%
Total	32	14	43.75%

Source: Tsang 2018

From these tables, we can see that if a case was tried in California or involved intellectual property disputes, it is far more likely that the *forum non conveniens* claim will fail. Success rates fall to 25.00% in California cases and 9.09% in intellectual property cases while the average success rate is 43.75%.

These two factors are also significant because they account for the largest number of cases in their respective categories, i.e. California being the forum where most *forum non conveniens* cases were decided and intellectual property being the most common cause of action. How do these two factors affect the rule of law discussions above?

On their face, these factors affect *forum non conveniens* as they increase the “local interest in having localized controversies decided at home” which is one of the public factors.⁹⁹ Courts have argued that the United States has a strong interest in protecting intellectual property.¹⁰⁰ Naturally, this argument will be most convincing if the forum involved is California, which is the home of Silicon Valley and headquarters of some of the world’s largest technology corporations.

A good example is found in *CYBERSitter, LLC v. People’s Republic of China*.¹⁰¹ In this case, a California based technology company sued *inter alia* a number of Chinese companies for infringing its intellectual property rights

⁹⁹ See *Gulf Corp.*, 330 U.S. 501.

¹⁰⁰ See e.g. *Mintel Learning Tech., Inc., v. Beijing Kaidi Educ. & Tech. Dev. Co.*, No. C 06-7541 PJH, 2007 WL 2403395, at *11 (N.D. Cal. Aug. 20, 2007) (“the local interest in resolving a local controversy at home weigh heavily in favor of California as the place of trial. A forum has a significant interest in protecting the intellectual property of its citizens and businesses from infringement by foreign defendants.”).

¹⁰¹ *CYBERSitter, LLC v. People’s Republic of China*, No. CV 10-38-JST (SHx), 2010 WL 4909958 (C.D. Cal. Nov. 18, 2010).

over an Internet content-filtering program.¹⁰² Although the Court was not convinced by challenges to China's rule of law and regarded China as an adequate forum,¹⁰³ it eventually held that *forum non conveniens* was not successful. Officially, this was because the weighing of the private and public interests favored having the litigation in California instead of China.¹⁰⁴ More particularly, the court referred to California's significant interests in protecting intellectual property:

First, although [the defendant] claims that the Court has only a "nominal interest" in this case, this district and other districts throughout the country have held that the United States has an interest in the protection of its certificate of registration for copyright. This district and the United States have a strong interest in protecting their citizens' intellectual property from poaching by foreign entities. It is well-settled that the United States has an interest in protecting the intellectual property rights of its citizens. Because [plaintiff's] principal place of business is in the Central District of California and it alleges harms committed by foreign defendants, this Court has a particular interest in adjudicating the matter. The enactment of the Uniform Trade Secrets Act in California indicates a strong legislative intent to protect California residents against the misappropriation of their trade secrets. Whether China has an interest in the matter does not affect the inquiry because we ask only if there is an identifiable local interest in the controversy, not whether another forum also has an interest. (citation omitted)¹⁰⁵

On the other hand, it could be argued that the Californian courts were not satisfied with the rule of law status of China, particularly in a case in which intellectual property was involved, and they simply used this local interest factor as a disguised rule of law attack in *forum non conveniens* cases. This is clear from *S & D Trading Academy, LLC v. AAFIS, Inc.*¹⁰⁶ Like *CYBERSitter*, the court began by approving China as an adequate forum,¹⁰⁷ but allegedly

¹⁰² *Id.* at *1.

¹⁰³ *Id.* at *5.

¹⁰⁴ *Id.* at *5-9.

¹⁰⁵ *Id.* at *8.

¹⁰⁶ *S & D Trading Acad., LLC v. AAFIS, Inc.*, 494 F.Supp.2d 558, 571 (S.D. Tex. 2007).

¹⁰⁷ *Id.* at 571.

AAFIS presents a Declaration from a Chinese law expert that explains that Chinese law recognizes claims for both breach of contract, including

rejected the *forum non conveniens* motion due to, *inter alia*, public interest.¹⁰⁸ However, in the ensuing footnote, the court revealed the distrust in China in adjudicating intellectual property cases:

Furthermore, the current nationwide concern about China's lackadaisical enforcement of intellectual property rights heightens local interest in cases in which international corporations are accused of wrongfully using and profiting from U.S. intellectual property. See, e.g., Office of the U.S. Trade Representative, 2007 Special 301 Report 18–22 (citing “[i]nadequate [intellectual property rights] enforcement [as] a key factor contributing” to the continuing problem of intellectual property piracy in China) ... Robert C. Bird, *Defending Intellectual Property Rights in the BRIC Economies*, 43 *Am. Bus. L.J.* 317, 362 (2006) (concluding that “piracy in [China] remains widespread”); *Today in Business: Keeping an Eye on China*, *N.Y. Times*, June 24, 2006, at C2 (“China has been cited by the administration as a chief source of intellectual property piracy that costs American businesses billions of dollars in losses every year.”); see also Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in PostWTO China* 55 *Am. U.L.Rev.* 901, 975–81 (acknowledging that “enforcement . . . has been a major stumbling block to effective protection of intellectual property rights in China,” but highlighting the “progress China has made in the intellectual property arena”).¹⁰⁹

While other courts might not have included such detailed elaborations, the emphasis on the forum's strong interest in intellectual property is common among *forum non conveniens* cases relating to intellectual property.¹¹⁰

In addition, courts have discretely made use of other factors to prevent intellectual property-related litigation from going to China while stopping short of challenging the adequacy of the Chinese courts officially. One way is to make use of choice of law as a public interest factor. In most cases, the

oral contracts, and misappropriation of trade secrets. S & D does not dispute that Chinese law recognizes these claims. . . . Therefore, S & D has not shown that China is an inadequate forum.

Id.

¹⁰⁸ *Id.* at 573.

¹⁰⁹ *Id.* at 573 & 568 n.13.

¹¹⁰ *Jacobs Vehicle Sys., Inc. v. Yang*, 2013 U.S. Dist. LEXIS 128689, *5 (M.D.N.C. 2015) (“It serves the public interest to ensure that a United States owner of intellectual property has a forum to seek redress for alleged misuse by another United States citizen living here.”).

courts will either refrain from complicating the matters by looking at the choice of law factor,¹¹¹ or defer to the Chinese court if the choice of law analysis pointed to China.¹¹² However, in intellectual property cases, courts appeared very confident that U.S. intellectual property law should apply and that China is not capable of applying U.S. intellectual property law.¹¹³ This shows the distrust in the Chinese judiciary in intellectual property disputes.

This view can be backed up if one looks at the Chinese courts' record in applying U.S. intellectual property law. In fifty-two Chinese cases in which intellectual property disputes and U.S. parties were involved, China never applied U.S. intellectual property law despite being theoretically possible under Chinese choice of law rules.¹¹⁴

The backdoor practice by the courts to reject *forum non conveniens* motions can also be reflected in the selective citation of the leading precedent, *Sinochem*.¹¹⁵ Twenty-six of the thirty-two cases (81.25%) under the survey were decided after the Supreme Court's decision in *Sinochem* which confirmed China as an adequate forum.¹¹⁶ With that being the most recent restatement of the *forum non conveniens* doctrine by the Supreme Court and a case also involving China as the alternative forum, it was expected that all subsequent cases would have cited *Sinochem*. However, that has not been the case.

¹¹¹ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981)

¹¹² See *Warner Tech. & Inv. Corp. v. Hou*, No. 13-7415, 2014 WL 7409978, at *4 (D.N.J. Dec. 31, 2014)

Plaintiff argues that China is not an adequate alternative forum because China's judicial system is ill-equipped to apply New Jersey law... Federal courts have held that China provides an adequate forum to resolve civil disputes... Additionally, a plaintiff's concern over the application of New Jersey law in China should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry... This is because the satisfaction of this prong of the analysis does not require the Court to conduct complex exercises in comparative law.

Id. See *Warner Tech. & Inv. Corp. v. Hou*, No. 13-7415, 2014 WL 7409978, at *4 (D.N.J. Dec. 31, 2014). See also *S. Megga Telecomms. Ltd. v. Lucent Techs., Inc.*, No. 96-357-SLR, 1997 WL 86413 (D.Del. Feb. 14, 1997) (contractual issue was governed by New Jersey law, yet *forum non conveniens* was granted to send the litigation to China.); *In re Compania Naviera Joanna S.A.*, 531 F.Supp.2d 680, 689 (2007) ("The most compelling public interest factor favoring dismissal may be the challenge of applying foreign law... Chinese law will provide the substantive law of liability.").

¹¹³ *Mintel Learning Tech., Inc., v. Beijing Kaidi Educ. & Tech. Dev. Co.*, No. C 06-7541 PJH, 2007 WL 2403395, at *11 (N.D. Cal. Aug. 20, 2007) ("The crux of the issue here is [plaintiff's] allegation that the defendants violated U.S. copyright law. This matter would necessarily be out of the purview of a Chinese court.").

¹¹⁴ The search is conducted by the use of search terms "United States" and "Intellectual Property" (both in Chinese) in the Supreme People's Court official case database, China Judgement Online, available at wenshu.court.gov.cn (last visited Aug. 1, 2017).

¹¹⁵ *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007).

¹¹⁶ See *infra* Table 7.

Table 7: CITATION OF *SINOCHEM* IN FNC CASES

	Citation of <i>Sinochem</i>	Non-citation of <i>Sinochem</i>	Total
Successful FNC cases	9	1	10
Unsuccessful FNC cases	7	9	16

Source: Tsang 2018

Sinochem was cited in 9 out of 10 successful *forum non conveniens* cases (90.00%). However, in unsuccessful *forum non conveniens* cases, only half of those cases cited *Sinochem*. This again suggests that U.S. courts do not have to resort to a rule of law attack on the Chinese legal system in order to refuse the grant of a stay on *forum non conveniens*.

e. Why So Secret?

Now that we know that the U.S. courts were not satisfied with Chinese courts' abilities to provide a fair trial to litigants in intellectual property cases, the next question is why they did not state this expressly through the proper channel in terms of the availability of the forum. This should be attributed to the low standard set by the Supreme Court on adequacy as well as the tradition of U.S. courts in respecting international comity in private international law cases.

i. The Low Standard

According to the U.S. Supreme Court in *Piper Aircraft Co. v. Reyno*, the leading case on *forum non conveniens*, an alternative forum is adequate unless "remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all."¹¹⁷ The "adequate forum" requirement could be satisfied relatively easily if China provided "some remedy." There is thus no question that it is a "low threshold."¹¹⁸ In fact, an inadequate forum will only be found in the most extreme cases. For example, in *Rasoulzadeh v. Associated Press*,¹¹⁹ Iran was held to be an inadequate forum because "the

¹¹⁷ *Piper Aircraft Co.*, 454 U.S. at 254 (1981).

¹¹⁸ *Tang v. Synutra Int'l, Inc.*, No. DKC 09-0088, 2010 WL 1375373, at *10 (D. Md. 2010).

¹¹⁹ *Rasoulzadeh v. Associated Press*, 574 F. Supp 854 (S.D.N.Y. 1983).

courts [are] administered by Iranian mullahs” and “if the plaintiffs returned to Iran to prosecute this claim, they would probably be shot.”¹²⁰ Similarly, in *Eastman Kodak Co. v. Kavin*,¹²¹ Bolivia was not an inadequate forum since the defendant had “already used the criminal justice system to extort a commercial settlement from Kodak, at the price of a nightmarish prison experience for [a Kodak employee plaintiff], and the conviction in absentia and sentencing of [plaintiff] and three other Kodak employees.”¹²² Further, in *Bhatnagar v. Surrendra Overseas Ltd.*, it took a delay of eighteen to twenty-six years in Indian courts to render their remedy inadequate.¹²³

In *Tang v. Synutra Intern., Inc.*, it was held that so long as China provided some form of remedy (which in this case came in the form of a fund set up by the government), it did not matter whether the plaintiffs’ access to judicial proceedings was denied.¹²⁴ “Because a judicial remedy is not required, it is immaterial that Plaintiffs must waive their right to sue if they elect compensation from the Fund.”¹²⁵ Since the threshold is just compensation at a level more than *nothing*,¹²⁶ the current rule makes it extremely easy for Chinese defendants that are part of the Chinese government or state-owned enterprises to avoid litigations in the United States by *forum non conveniens*.

Second, while the “ultimate burden of persuasion” lies with the defendant to establish adequacy, the plaintiff has to substantiate initially its allegation of the lack of rule of law,¹²⁷ and concrete evidence is required to satisfy this initial burden. “[G]eneralized, anecdotal complaints of corruption” have consistently been held to be insufficient to challenge a forum as inadequate.¹²⁸ Similarly, evidence by expert witnesses, even if they are some of the world’s leading Chinese legal scholars, have to date failed to convince the courts by themselves on the lack of rule of law in China.¹²⁹ The admissibility of reports

¹²⁰ *Id.* at 861.

¹²¹ *Eastman Kodak Co. v. Kavin*, 978 F. Supp. 1078 (S.D. Fla. 1997).

¹²² *Id.* at 1086.

¹²³ *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1228 (3d Cir.1995).

¹²⁴ *Tang v. Synutra Int’l, Inc.*, 656 F.3d 242 (4th Cir. 2011).

¹²⁵ *Id.* at 251.

¹²⁶ Compensation under the government fund is minimal. *See Tang v. Synutra Int’l, Inc.*, No. DKC 09-0088, 2010 WL 1375373, at *7 (D. Md. 2010). (\$29,000 for families of children who died, \$4,400 for families of seriously ill children and \$292 to those suffering from other kidney problems).

¹²⁷ *See Jiangsu Hongyuan Pharm. Co., Ltd. v. DI Global Logistics Inc.*, 159 F.Supp.3d 1316, 1330-1331 (2016). *See also Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 189 (2009) (“... [T]he plaintiff bears the initial burden of producing evidence of corruption, delay or lack of due process in the foreign forum...”).

¹²⁸ *Zheng v. Soufun Holdings, Ltd.*, No. 1:15-CV-1690, 2016 WL 1626951, at *4 (N.D. Ohio Apr. 25, 2016).

¹²⁹ *E.g.* Donald C. Clarke, professor at George Washington University Law School, served as expert witness for the plaintiff in *CYBERSitter, LLC v. People’s Republic of China*, No. CV 10-38-JST (SHx), 2010 WL 4909958, at *4 (C.D. Cal. Nov. 18, 2010).

produced by the U.S. government as evidence of adequacy of foreign fora is still uncertain.¹³⁰ This high evidentiary burden proves to be particularly difficult for plaintiffs who are ordinary people or small companies who need to collect such evidence against state-owned corporations or Chinese governmental bodies. It may not be a coincidence that the only successful challenge on the adequacy ground in China-related *forum non conveniens* cases had BP, a giant oil company, as the plaintiff.

ii. *International Comity*

Traditionally, U.S. courts are reluctant to criticize foreign courts for their lack of proper procedures. It is thought that U.S. courts should have proper respect for other countries as required by international comity and should not engage in comparing the legal systems of the foreign countries with the United States.¹³¹ Thus, in *Chesley v. Union Carbide Corporation*, the court was of the opinion that “[i]t is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation.”¹³² The emphasis on comity is probably the reason why concrete evidence of corruption or delay is required.¹³³ As a result, some courts even presume that adequacy of the foreign forum is satisfied.¹³⁴

The court however called Clarke’s declaration “speculative.” *Id.* at *5. *Guimei v. Gen. Elec. Co.*, 172 Cal.App.4th 689 (2009). (Plaintiff engaged Donald Clarke and Jerome Cohen).

¹³⁰ *Guimei*, 172 Cal.App.4th at 706 n.2 (The Country Report on Human Rights Practices pertaining to China was also denied judicial notice).

¹³¹ See *PT United Can Co. v. Crown, Cork & Seal Co.*, 138 F.3d 65 (1998) (“[C]onsiderations of comity preclude a court from adversely judging the quality of a foreign justice system absent a showing of inadequate procedural safeguards. . .so such a finding is rare.”).

¹³² *Chesley v. Union Carbide Corp.*, 927 F.2d 60, 66 (2d Cir. 1991).

¹³³ See *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 189 (2009) (“Absent a showing of inadequacy by a plaintiff, ‘considerations of comity preclude a court from adversely judging the quality of a foreign justice system.’”).

¹³⁴ See *Jiangsu Hongyuan Pharm. Co., Ltd. v. DI Global Logistics Inc.*, 159 F.Supp.3d 1316, 1329-1330 (2016) (“In this Circuit, an alternative forum is presumed adequate unless the plaintiff makes some showing to the contrary.”); *Tang v. Synutra Int’l, Inc.*, No. DKC 09-0088, 2010 WL 1375373, at *4 (D. Md. 2010) (“Many courts have presumed the adequacy of the alternative forum and placed at least the burden of production on the plaintiff to establish otherwise.”); *Zheng v. Soufun Holdings, Ltd.*, No. 1:15-CV-1690, 2016 WL 1626951, at *3 (N.D. Ohio Apr. 25, 2016) (“It is only in rare instances that an alternative forum will be deemed inadequate, such as where a plaintiff shows that severe obstacles to conducting litigation exist.”); *Warner Tech. & Inv. Corp. v. Hou*, No. 13-7415, 2014 WL 7409978, at *3 (D.N.J. Dec. 31, 2014) (“[I]nadequacy of the alternative forum is rarely a barrier to a *forum non conveniens* dismissal.”).

f. Statistical Analysis

To understand what causes the success or failure of *forum non conveniens* application, the five factors discussed above (“rule of law discussion,” “U.S. plaintiff,” “California being the forum,” “citation of *Sinochem*” and “intellectual property as cause of action”) are tested for statistical significance.

i. 32 Cases Summary

The following table shows the percentage of cases with or without a factor. For example, 11 out of 32 cases, or 34.38% of cases, are intellectual property cases.

Table 8: CAUSES OF U.S. FNC

Results, FNC	Success (14/32 or 44%)	Failure (18/32 or 56%)
CA as forum	Yes (8/32 or 25%)	No (24/32 or 75%)
IP	Yes (11/32 or 34%)	No (21/32 or 66%)
US plaintiff	Yes (15/32 or 47%)	No (17/32 or 53%)
<i>Sinochem</i>	Yes (16/26 or 62%)	No (10/26 or 38%)
Rule of law	Yes (11/32 or 34%)	No (21/32 or 66%)

Source: Tsang 2018

ii. Logistic Regression, With Single Factor

Five logistic regression models using logit link function, each with single factor, were conducted to explore the individual predictive power to the Dependent Variable (“DV”), *forum non conveniens*. In other words, *forum non conveniens* was regressed on each variable individually to see each of their contributing force. All the analysis, except for the factor *Sinochem*, used thirty-two cases. For *Sinochem*, only twenty-six cases were used since that is the number of cases decided on the *Sinochem* decision.

Table 9: U.S. FNC LOGISTIC REGRESSION, WITH EACH FACTOR CONSIDERED

Factor	Coefficient	p-value
CA as forum	-1.099	0.229
IP	-2.7881	0.0145
US plaintiff	-1.3683	0.0733
<i>Sinochem</i>	2.449	0.0361
Rule of law	2.0794	0.0240

Source: Tsang 2018

From the individual logistic regression models, it was shown that all of the factors considered, except for the forum being California, can significantly predict the *forum non conveniens* results.

iii. *Logistic Regression, With Three Factors*

To compare the contributing forces of all the significant factors to *forum non conveniens*, factors IP, U.S. plaintiff, as well as rule of law are taken together to predict *forum non conveniens*.¹³⁵

Table 10: U.S. FNC LOGISTIC REGRESSION, WITH THREE FACTORS

Factor	Coefficient	p-value
Intercept	0.1862	0.7621
IP	-3.0454	0.0337
US plaintiff	-0.9148	0.3608
Rule of law	2.3828	0.0453

Source: Tsang 2018

The results from Table 10 above show that when all three factors are taken together to predict success of *forum non conveniens*, intellectual property and rule of law are significant, with p-value of 0.0337 and 0.0453 respectively. On the other hand, the factor of U.S. plaintiff is no longer significant, with p-value of 0.3608. It may have to do with the multicollinearity between the

¹³⁵ Factor *Sinochem* shows significant predictive power to *forum non conveniens*. It was not considered in the full model since there are only 26 cases with *Sinochem* factor, which makes the analysis less robust.

plaintiff and other variables. For the model with these three factors, pseudo R square using McFadden method was calculated. It was 0.354.

iv. *Interpretation*

Applying the logistic equation,¹³⁶ being an intellectual property case decreases the odds of *forum non conveniens* success by a factor of 3.05. Rule of law discussed in the case increases the odds of *forum non conveniens* success by a factor of 2.38. However, the U.S. plaintiff factor only decreases the odds of FNC success by a factor of 0.91.

The statistical analysis leaves us with two factors with strong predictive value to the success of *forum non conveniens*: the discussion of rule of law in the judgment and intellectual property being the cause of action. The presence of the former factor is conducive to finding *forum non conveniens*, while the presence of the latter is not. Comparatively, the rule of law factor is a stronger factor than the intellectual property factor. This means that if both factors are present in a single case, it is more likely that the *forum non conveniens* case will fail.

In summary, two observations can be made. First, China's rule of law is in a healthy state generally in the eyes of the U.S. courts in private international law cases. Whenever the issue of China's rule of law is addressed in the U.S. courts, it is more likely that the courts will agree to send the litigants to China to resolve their disputes. Second, intellectual property cases serve as the lone clear exception to the general respect paid to China's rule of law. Accordingly, the U.S. courts tend to be reluctant to denounce China's rule of law directly due to international comity, but will do so indirectly by emphasizing the national interest of the United States in protecting intellectual property rights.

g. *Indirect Effect on China's Rule of Law*

While private international law cases do not deal with human rights directly, it does not mean that they cannot have indirect effects that impact various human right matters. In *CYBERSitter, LLC v. People's Republic of China* discussed above, it can be argued that the rejection of the *forum non conveniens* motion helped secure freedom of speech in China. The software alleged to be infringed by the Chinese defendants was said to be used in software called Green Dam Youth Escort.¹³⁷ According to the plaintiff, Green Dam had been disseminated to tens of millions of end users in China by the Chinese government's requirement that Green Dam be installed in computers made by

¹³⁶ $\text{Logit}(p(\text{FNC success})) = .1862 - 3.0454 * \text{IP} - 0.9148 * \text{Plaintiff is US} + 2.3828 * \text{Rule of Law}$.

¹³⁷ *CYBERSitter, LLC v. People's Republic of China*, No. CV 10-38-JST (SHx), 2010 WL 4909958, at *1 (C.D. Cal. Nov. 18, 2010).

certain designated manufacturers.¹³⁸ Under this program, it was reported that by June 2009, over 53 million computers had been sold with Green Dam in China.¹³⁹ While Green Dam was claimed to be a means by which the Chinese government could restrict pornographic content and prevent children from being exposed to such content, it is widely known as a device intended to execute cyber-censorship in China.¹⁴⁰

Having regard to the timing of the litigation, it may be argued that the success of the plaintiff in keeping the proceedings in the U.S. court might have factored into the Chinese government's ultimate decision to pull the Green Dam project. The Chinese government announced the program in May 2009.¹⁴¹ The plaintiff then sent cease and desist letters to the computer manufacturers on June 15, 2009.¹⁴² Soon after that, the PRC announced a delay to the program on June 30, 2009.¹⁴³ In fact, the Chinese government has not reinitiated a similar program since it lost the case. Litigating the case in California might expose many of the censorship details of the program, so the failure of *forum non conveniens* put pressure on the Chinese government to stop the program.

In contrast, the decision of the U.S. court in dismissing the case in *Tang v. Synutra Intern., Inc.* may have had the opposite effect. In that case, the Chinese consumers who suffered from contaminated infant formula that had been manufactured and distributed by the U.S. defendant's Chinese subsidiary filed proceedings in Maryland.¹⁴⁴ The case stemmed from a widely publicized crisis in China. Infant formula manufactured by twenty-two companies, including the Chinese subsidiary of the defendant, was found to be contaminated with melamine, a chemical that may affect the kidneys.¹⁴⁵ After the problem was discovered, the Chinese government set up a specific fund with contributions from the formula manufacturers to compensate the victims of the contaminated infant formula.¹⁴⁶ Accepting compensation from the fund by the victims would mean waiving the right to sue in court.¹⁴⁷ Some victims chose to sue in Chinese courts but were met with mixed results. Some of these cases were accepted by Chinese courts, while the others were stymied.¹⁴⁸ Additionally, there were reports that many Chinese lawyers who offered free legal aid

¹³⁸ *Id.* at *2.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Tang v. Synutra Int'l, Inc.*, No. DKC 09-0088, 2010 WL 1375373, at *1 (D. Md. 2010).

¹⁴⁵ *Tang v. Synutra Int'l, Inc.*, 656 F.3d 242, 246 (4th Cir. 2011).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 247.

¹⁴⁸ *Id.*

to the victims in the Chinese lawsuits were pressured to withdraw from the service.¹⁴⁹ The main issue was whether China was an available and adequate forum under the *forum non conveniens* principle in the circumstances.

The Court of Appeals rejected the plaintiffs' argument that the Chinese courts were inadequate due to the lack of judicial remedy in lieu of the fund.¹⁵⁰ This is because "*the forum non conveniens* doctrine does not limit adequate alternative remedies to judicial ones."¹⁵¹ In addition, the court was of the opinion that the Chinese courts were available to hear cases from the victims based on the evidence submitted by the defendant.¹⁵² These included reports that two provincial courts accepted contaminated cases and a statement from an officer of the Supreme People's Court that the Chinese courts were ready "to accept and hear these cases according to law at any time."¹⁵³

This was the case notwithstanding that there was specific evidence provided by the plaintiffs on the difficulties of getting cases accepted by Chinese courts. They asserted that "one of three Chinese lawyers and scholars who submitted Declarations in support of Plaintiffs' Opposition [to Defendant's motion to dismiss], was arrested from his home in Beijing ... by Chinese police authorities." In addition, the plaintiff submitted declarations from Chinese lawyers who gave detailed accounts of how the Chinese government pressured volunteering lawyers to withdraw representation of the victims and how filing of complaints was met by inaction or outright rejection by the Chinese courts.

After the case was stayed by the U.S. District Court in Maryland in March 2010, one of the leading Chinese activists, Zhao Lianhai who created a website, Kidney Stone Babies, went on trial in the same month for "inciting social disorder."¹⁵⁴ He was sentenced to jail for two and a half years in November 2010.¹⁵⁵ While this is speculative, it does make one wonder what would have been the case had the *forum non conveniens* motion failed and the case proceeded to trial in the United States.

In *Huang v. Advanced Battery Technologies Inc.*,¹⁵⁶ the court in dismissing the U.S. proceedings in favor of China on *forum non conveniens* grounds was of the opinion that the result might have been different had the claim been under the Alien Torts Claims Act:

¹⁴⁹ *Id.* at 247-48.

¹⁵⁰ *Id.* at 250.

¹⁵¹ *Id.*

¹⁵² *Id.* at 251.

¹⁵³ *Id.*

¹⁵⁴ Andrew Jacobs, *China Sentences Activist in Milk Scandal to Prison*, N.Y. TIMES (Nov. 10, 2010), <http://www.nytimes.com/2010/11/11/world/asia/11beijing.html>.

¹⁵⁵ *Id.*

¹⁵⁶ *Huang v. Advanced Battery Techs.*, No. 09 CV 8297(HB), 2010 WL 2143669 (S.D.N.Y. May 26, 2010).

Let me not conclude without a caveat: that if this were a civil liberties lawsuit rather than a contract and tort case, my view with respect to the appropriateness of the forum could be different ... (Alien Torts Claims Act, as supplemented by Torture Victim Prevention Act, 'expresses a policy favoring receptivity by our courts' to such human rights litigation). Even in this case my concern about a fair trial free from corruption gives me pause. Yet with the conditions provided here, and because the law seems clear, I have concluded that the matter must be dismissed on *forum non conveniens* grounds.¹⁵⁷

However, as shown in the two cases above, even if the cause of action does not involve an alien tort statute, it could still have significant impact on human rights in foreign countries and will at least merit more consideration as to whether the current low threshold on adequacy of the foreign forum is indeed appropriate.

2. Jurisdiction - Antisuit Injunction

Another type of jurisdiction related issue that may indicate the U.S. courts' perception of China's rule of law is antisuit injunction. However, this is considered an "extreme step."¹⁵⁸ Based on searches made in Westlaw, there were only two antisuit injunction cases involving China during the survey period.

Generally, a federal court may enjoin a party from pursuing litigation in a foreign country for the purposes of protecting the jurisdiction and judgment of the enjoining court.¹⁵⁹ The federal circuits are split as to the applicable test.¹⁶⁰ However, all circuits at least agree that protection of important public policy of the enjoining forum is a factor to consider and this is the factor on which China's rule of law will be mostly focused.¹⁶¹

The test of anti-suit injunction of the second circuit (which adopts a more restrictive approach among the federal circuits) is set out in *China Trade & Dev. Corp. v. M. V. Choong Yong*.¹⁶² To succeed, two threshold requirements must be satisfied, namely (1) the parties must be the same in both the U.S. and foreign proceedings; and (2) resolution of the case before the enjoining court

¹⁵⁷ *Id.* at *9.

¹⁵⁸ See WEINTRAUB, *supra* note 11, at 311.

¹⁵⁹ *Paramedics Electronmedicina Commercial, Ltda., v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 652-655 (2d Cir. 2004).

¹⁶⁰ *Gen. Elec. Co. v. Deutz AG*, 270 F.3d 144, 160-61 (3d Cir. 2001).

¹⁶¹ The Fifth, Seventh, and Ninth Circuits generally adopt a more liberal standard which allows anti-suit injunction to be granted for vexatiousness and inconvenience to the parties. See *Id.*

¹⁶² *China Trade & Dev. Corp. v. M. V. Choong Yong*, 837 F.2d 33 (2d Cir. 1987).

must be dispositive of the action to be enjoined.¹⁶³ After these two threshold requirements are satisfied, the court will consider five discretionary factors: (1) the threat to the enjoining court's jurisdiction posed by the foreign action; (2) the potential frustration of strong public policies in the enjoining forum; (3) the vexatiousness of the foreign litigation; (4) the possibility of delay, inconvenience, expense, inconsistency, or a race to judgment; and (5) other equitable considerations.¹⁶⁴ The first two discretionary factors are regarded as particularly important.¹⁶⁵

If a party is enjoined to pursue foreign litigation, the jurisdiction of the foreign country will inevitably be affected, thus consideration of comity is arguably more important here than in the *forum non conveniens* cases which only deals with the exercise of the U.S. jurisdiction. Accordingly, courts always use anti-suit injunction "sparingly" and it will be granted "only with care and great restraint."¹⁶⁶

Of the two cases of anti-suit injunction relating to China, one case succeeded and one case failed in the application. However, no rule of law discussion was included in the two cases. In *Eastman Kodak Co. v. Asia Optical Co., Inc.*,¹⁶⁷ the court granted an anti-suit injunction to enjoin the defendant from relitigating the issue on licencing fees in China which had been disposed of in the New York proceedings. The lawsuit in China was regarded as vexatious and an attempt by the defendant to challenge the New York judgment by seeking to retrieve payment already paid to the plaintiff thereunder.¹⁶⁸

On the other hand, in *Vringo, Inc. v. ZTE Corp.*,¹⁶⁹ the plaintiff sought to enjoin the Chinese party from continuing its lawsuit in China for violating the terms of a non-disclosure agreement.¹⁷⁰ Applying the same test in *China Trade & Dev. Corp. v. M. V. Choong Yong*, the court refused to grant the antisuit injunction since the case did not satisfy the second mandatory ground, namely, that the resolution of the case before the enjoining court is not dispositive of the actions to be enjoined in the foreign fora.¹⁷¹ The court, however, granted a prohibitory injunction that required the Chinese parties to

¹⁶³ *Id.*

¹⁶⁴ *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 119-120 (2d Cir. 2007).

¹⁶⁵ *Id.* at 119.

¹⁶⁶ *Paramedics Electronmedicina Commercial, Ltda., v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 652 (2d Cir. 2004).

¹⁶⁷ *Eastman Kodak Co. v. Asia Optical Co.*, 118 F.Supp.3d 581 (2015).

¹⁶⁸ *Id.* at 589-590.

¹⁶⁹ *Vringo, Inc. v. ZTE Corp.*, No. 14-cv-4988 (LAK), 2015 WL 3498634 (S.D.N.Y. Jun. 3, 2015).

¹⁷⁰ *Id.* at 3.

¹⁷¹ *Id.* at 11.

withdraw confidential information in breach of the non-disclosure agreement in the Chinese court.¹⁷²

Despite the lack of rule of law discussion and the small sample size, it is noted that both cases related to intellectual property and the antisuit injunctions were at least partially granted in both cases. This is consistent with the suggestion that the U.S. courts are more skeptical of the Chinese legal system in intellectual property cases.

3. *Enforcement of Chinese Judgments in the U.S.*

In the United States, the rules on the enforcement of foreign judgments depend on the law of the state where the enforcement is sought.¹⁷³ This suggests that it is an incoherent enforcement system. However, since most of the states have adopted either the 1962 Uniform Foreign Money-Judgments Recognition Act (1962 Act),¹⁷⁴ or its subsequent revision, the 2005 Uniform Foreign-Country Money Judgments Recognition Act (2005 Act),¹⁷⁵ the enforcement rules of the states are substantially similar.¹⁷⁶ Under both Acts, a foreign judgment cannot be enforced if:

- 1) the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
- 2) the foreign court did not have personal jurisdiction over the defendant;
or
- 3) the foreign court did not have jurisdiction over the subject matter.

In addition, the court may on its discretion refuse to enforce a foreign judgment if:

¹⁷² *Id.* at 12.

¹⁷³ This includes enforcement cases in federal courts since the federal courts will have to apply the law of the state where it is sitting. See David P. Stewart, *Recognition and Enforcement of Foreign Judgments in the United States*, 12 Y.B. PRIV. INT'L L. 179, 180 (2010).

¹⁷⁴ UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (UNIF. LAW COMM'N 1962) (superseded 2005). As of 2017, 33 states have adopted the 1962 Act. See *Legislative Fact Sheet – Foreign Money Judgments Recognition Act*, Uniform L. Comm'n, <https://web.archive.org/web/20171102193523/http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign%20Money%20Judgments%20Recognition%20Act>.

¹⁷⁵ UNIF. FOREIGN-COUNTRY MONEY JUDGEMENTS RECOGNITION (UNIF. LAW COMM'N 2005). As of 2017, 24 states have adopted the 2005 Act and it has been introduced in Massachusetts and New Jersey. See Uniform Law Commission, *Legislative Fact Sheet – Uniform Foreign Country Money-Judgments Recognition Act*, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act>.

¹⁷⁶ See Stewart, *supra* note 173, at 183-84.

- 1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;
- 2) the judgment was obtained by fraud;
- 3) the cause of action on which the judgment is based is repugnant to the public policy of this state;
- 4) the judgment conflicts with another final and conclusive judgment;
- 5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or
- 6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.¹⁷⁷

The 2005 Act has two more discretionary rejection grounds:

- 1) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or
- 2) the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.

The most relevant factor for our discussion is the integrity of the judgment rendering court.¹⁷⁸ This section mandatorily requires the U.S. courts not to recognize a foreign judgment if the judgment rendering country does not provide impartial tribunals or procedures compatible with the requirements of due process of law.¹⁷⁹ It must be noted that this section only deals with systematic issues of the foreign legal system.¹⁸⁰ For example, in *Osoorio v. Dole Food Company*, the Nicaraguan judgment was denied recognition because *inter alia* the judgment was rendered “under a system in which political strongmen exert their control over a weak and corrupt judiciary, such that Nicaragua does not possess ‘a system of jurisprudence

¹⁷⁷ This wording is from the 1962 Act, but the wording of the 2005 Act is substantially similar. The only potential difference of substance may be the public policy ground. The 2005 Act is potentially broader as it provides that “the judgment or the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state or of the United States” with the addition of “of the United States.” See UNIF. FOREIGN-COUNTRY MONEY JUDGEMENTS RECOGNITION ACT § 4(c)(3) (UNIF. LAW COMM’N 2005).

¹⁷⁸ UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(a)(1)(UNIF. LAW COMM’N 1962) (superseded 2005); UNIF. FOREIGN-COUNTRY MONEY JUDGEMENTS RECOGNITION ACT § 4(b)(1) (UNIF. LAW COMM’N 2005).

¹⁷⁹ *Id.*

¹⁸⁰ See UNIF. FOREIGN-COUNTRY MONEY JUDGEMENTS RECOGNITION ACT § 4, cmt. 11 (UNIF. LAW COMM’N 2005). See also Stewart, *supra* note 173, at 184.

likely to secure an impartial administration of justice”.¹⁸¹ However, this section does not cover the issue of the integrity of the particular proceedings. This is covered by the two new sections of the 2005 Act set out above (§ .4(c)(7) and (8)) which have no equivalent section in the 1962 Act. It must be noted, however, that unlike the integrity of the whole system, the issue involving integrity of the specific case is not a mandatory factor.¹⁸² Apart from integrity, it is possible to reject the recognition and enforcement of Chinese judgments on public policy grounds “if recognition or enforcement of the foreign-country judgment would tend clearly to injure the public health, the public morals, or the public confidence in the administration of law, or would undermine ‘that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel’.”¹⁸³

As shown in Table 11 below, lack of integrity of Chinese courts or violation of public policy by Chinese judgments has never been a basis of rejection in the limited number of Chinese judgment enforcements in the United States.

Table 11: ENFORCEMENT OF CHINESE JUDGMENTS IN THE U.S.

No. of attempts	No. of failed enforcement attempts	No. of cases where integrity / public policy was discussed	No. of cases where integrity / public policy was a basis of rejection
7	4	3	0

Source: Tsang 2018

Only three cases out of the seven discussed the rule of law related factor and none of them had the lack of rule of law as a ground of rejection. Each of these cases is discussed below.

In *Armadillo Distribution Enterprises, Inc. v. Hai Yun Musical Instruments Manufacture Co. Ltd.*,¹⁸⁴ it was argued *inter alia* that the Chinese judgment could not be enforced for the purpose of counterclaim by the defendant

¹⁸¹ *Osorio v. Dole Food Co.*, 665 F.Supp.2d 1307, 1351-52 (S.D.Fla., 2009).

¹⁸² See UNIF. FOREIGN-COUNTY MONEY JUDGEMENTS RECOGNITION ACT § 4(c) (UNIF. LAW COMM’N 2005).

¹⁸³ UNIF. FOREIGN-COUNTY MONEY JUDGEMENTS RECOGNITION ACT § 4, cmt. 8 (UNIF. LAW COMM’N 2005), quoting *Hunt v. BP Exploration Co. (Libya) Ltd.*, 492 F. Supp. 885, 901 (N.D. Tex. 1980).

¹⁸⁴ *Armadillo Distribution Enters., Inc. v. Hai Yun Musical Instruments Manufacture Co., Ltd.*, No. 8:12-cv-1839-T-33EAJ, 2014 WL 2815943 (M.D. Fla. 2014).

due to its failure to satisfy the integrity requirement under § (1)(a) of the Florida Uniform Out-of-Country Money-Judgment Recognition Act.¹⁸⁵ This section is the same as § 4(A)(1) of the 1962 Act and the argument is thus an attack on the integrity of China's legal system as a whole.¹⁸⁶ The plaintiff argued that China lacked fair public tribunals and due process by referring to the 2013 Country Report on Human Rights Practices prepared by the U.S. Department of State which criticized China for lack of due process and judicial independence as well as rampant judicial corruption.¹⁸⁷ However, this argument was rejected by the court as it did not consider the country report by itself as sufficient evidence.¹⁸⁸ Further, it also found that the *forum non conveniens* cases discussed above "provide insightful verification of instances where the Chinese judicial system has been discussed, evaluated, and determined appropriate by U.S. federal courts."¹⁸⁹

Similarly, in *Hubei Gezhouba Sanlian Industrial Co., Ltd. v. Robinson Helicopter*,¹⁹⁰ the equivalent section of § 4(b)(1) of the 2005 Act¹⁹¹ was invoked by the defendant who sought to deny the enforcement of the Chinese judgment on the basis of lack of due process.¹⁹² The argument was that the Chinese court's service of process under the procedures of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters offended the notion of due process.¹⁹³ However, the court held that the Hague Convention was compatible with due process and hence the service of process thereunder in the Chinese court was also proper.¹⁹⁴

Finally, in *Global Material Technologies, Inc. v. Dazheng Metal Fibre Co. Ltd.*,¹⁹⁵ the defendant sought to enforce a Chinese judgment as a counterclaim against the plaintiff. One of the issues was whether the specific proceedings in the rendering court in China were not fair and impartial and thus violated the Illinois Uniform Foreign-Country Money Judgments Recognition Act.¹⁹⁶ The relevant section under the Illinois Act is identical to § 4(b)(7) of the 2005

¹⁸⁵ FLA. STAT. §§ 55.601-55.607 (2018).

¹⁸⁶ See 1994 Fla. Laws 1787 (stating that Florida enacted the 1962 Act).

¹⁸⁷ *Armadillo Distrib. Enters., Inc.*, 2014 WL 2815943, at *4.

¹⁸⁸ *Id.* at 6.

¹⁸⁹ *Id.*

¹⁹⁰ *Hubei Gezhouba Sanlian Indus. Co., Ltd. v. Robinson Helicopter Co.*, No. 2:06-cv-01798-FMC-SSx, 2009 WL 2190187 (C.D. Cal. July 22, 2009).

¹⁹¹ Cal. Civ. Proc. Code § 1713 - 1713.8 (West, 2018).

¹⁹² *Hubei Gezhouba Sanlian Indus. Co., Ltd.*, 2009 WL 2190187, at *6.

¹⁹³ *Id.* at 6.

¹⁹⁴ *Id.* at *6-7.

¹⁹⁵ *Glob. Material Techs., Inc. v. Dazheng Metal Fibre Co.*, No. 12 CV 1851, 2015 WL 1977527 (N.D. Ill. May 1, 2015).

¹⁹⁶ 735 ILL. COMP. STAT. 5/12-664(c)(7)(2012).

Act.¹⁹⁷ The court did not entertain this argument after becoming aware that the plaintiff in the U.S. proceedings was also the same party who filed the suit abroad.¹⁹⁸ Further, the court was clearly of the opinion that this section should not be used lightly as a ground of rejection: “The Recognition Act is based on the principle of international comity, which reflects a general respect for the decisions of foreign judiciaries ... It was not meant as a tool for gaining second changes at a (more) favorable judgment.”¹⁹⁹

Thus, all three relevant sections under the 2005 Act and 1962 Act have been discussed in the three Chinese enforcement cases. It is interesting to note that each of these cases succeeded in enforcement while each of the cases that did not discuss rule of law failed. This is consistent with the earlier findings in the *forum non conveniens* cases. Finally, none of the successful cases relates to intellectual property as shown in Table 11 below. Again, this is in line with the suggestion that intellectual property is an exception to the general acceptance of China's rule of law by the U.S. courts.

Table 12: U.S. ENFORCEMENT CASES BY CAUSE OF ACTION

Cause of action	No. of cases	Successful FNC cases	Success rate
Contract	4	2	50.00%
IP	1	0	0.00%
Tort	1	1	100.00%
Not specified	1	0	0.00%
Total	7	3	42.86%

Source: Tsang 2018

4. Choice of Law

Finally, it is theoretically possible for U.S. courts to refuse the application of foreign law if such application is against U.S. public policy. It was said that “[i]f the choice of law analysis leads to the application of foreign law, a court may refuse to apply that law only if its application would be violative of fundamental notions of justice or prevailing concepts of good morals.”²⁰⁰ However, this exception should be construed narrowly.²⁰¹

¹⁹⁷ Illinois adopts the 2005 Act, see <http://www.uniformlaws.org/Act.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act>.

¹⁹⁸ Glob. Material Techs., Inc., 2015 WL 1977527, at *8.

¹⁹⁹ *Id.*

²⁰⁰ Curley v. AMR Corp., 153 F.3d 5, 12 (2d Cir.1998).

²⁰¹ See PETER HAY ET AL., CONFLICT OF LAWS 169 (West 5th ed., 1992).

Based on the research, there has never been a case where application of Chinese law was rejected on the basis of violating U.S. public policy. On the contrary, there are plenty of cases where the U.S. courts have applied the Chinese law.²⁰² The two cases below discussed the public policy exception but the plaintiff ended up losing the argument in each case.

In *Wultz v. Bank of China Ltd.*,²⁰³ the family members of victims of a suicide bombing attack in Tel Aviv sued Bank of China in New York for *inter alia* the bank's alleged tortious acts in the incident. Despite the court's holding that Chinese tort law applied to these tort claims and would dismiss some of the tort claims, the plaintiff argued that dismissing the tort claims would be contrary to New York's public policy.²⁰⁴ On Chinese law in general, the court apparently had many reservations:

[T]he contemporary history of Chinese law began only in 1978...Since that time, the Chinese legal system has undergone exceptional growth and development, but it continues to lack some characteristics of the rule of law commonly assumed in the West. Black letter law in the PRC is often "general and vague," "poorly drafted," "subject to frequent change," "out-of-date," and, perhaps most significantly for the current case, "at odds with reality and current practices." Even China's current constitution contains a number of apparently legally binding statements that are in practice not enforced by the courts. The role of the Chinese Communist Party in governing the country is not reflected in the constitution. The discrepancy between language and legal reality in Chinese law calls into question the attempt to deduce Chinese law simply from the language of Chinese legal sources, without critical attention to the practices of Chinese legal institutions.²⁰⁵

Further, on the rule of law of China in particular, the court made this observation in the judgment:

In light of China's commitment to legislative supremacy, and the dominance of legislative organs by the Chinese Com-

²⁰² See *Lou v. Otis Elevator Co.*, 933 N.E.2d 140 (Mass. App. Ct. 2010) (applying Chinese tort law); *Lehman Bros. Commercial Corp. v. Minmetals Int'l. Non-Ferrous Metals Trading Co.*, 179 F. Supp. 2d 118 (S.D.N.Y. 2000) (applying Chinese corporate and securities laws).

²⁰³ *Wultz v. Bank of China Ltd.*, No. 11 Civ. 1266 (SAS), 2012 WL 5431013 (S.D.N.Y. Nov. 5, 2012).

²⁰⁴ *Id.* at *6.

²⁰⁵ *Id.* at *4.

munist Party, scholars have long debated whether China's legal system is better understood as a rule of law regime, or rather in the socialist tradition, as a regime in which the Party rules by law.²⁰⁶

Notwithstanding this rather negative view, the court held that the plaintiff did not establish any fundamental notion of justice or prevailing concept of good morals that would be violated by the dismissal.²⁰⁷ This case therefore shows how difficult it is to reject application of Chinese law on the public policy ground. General criticisms on the shortcomings of Chinese law are obviously insufficient. This result is not surprising, however, since the public policy exception is extremely narrow and it takes a most unusual case for that argument to be successful.

In *Barkanic v. General Admin. of Civil Aviation of the People's Republic of China*,²⁰⁸ it was argued by the plaintiff that the application of Chinese law, according to New York choice of law rules, would be contrary to federal policy on damages limitation. However, this was rejected by the court as the Chinese limitation on damages was set by the Warsaw Convention to which the United States was bound.²⁰⁹ While neither of the two cases were successful, it would be interesting to see whether the U.S. courts would treat the matter differently if Chinese law on intellectual property were to be applied.

In summary, after reviewing all four types of conflict cases, it is clear that rule of law arguments against China hardly have any negative impacts on the conflict decisions of U.S. courts. As such, based on the reviewed cases, U.S. courts' perception of China's rule of law can be said to be nothing but positive, boosted by a Supreme Court case and various lower court decisions. The only potential exception appears to be intellectual property cases, but even in those cases the U.S. courts prefer not to state their distrust of China's rule of law expressly for the sake of international comity. Unless there is substantial change in the high evidentiary burden in proving lack of rule of law, challenging rule of law status of China in U.S. conflict cases will remain difficult.

B. Hong Kong

Hong Kong is in a unique position among the six common law jurisdictions as far as its relationship with China is concerned. Despite being part of China, it continues to maintain a separate legal system that belongs to the common law family. In addition, while one may suspect that judicial independence might be compromised when China's interest is at stake in a case,

²⁰⁶ *Id.* at *4 n.48.

²⁰⁷ *Id.* at *6.

²⁰⁸ *Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China*, 923 F.2d 957 (2d Cir. 1991).

²⁰⁹ *Id.* at 964.

judicial independence of the Hong Kong judiciary is guaranteed under Hong Kong's constitution, the Basic Law.²¹⁰ At the same time, due to its geographical and economic proximity to China, there has always been a large amount of Chinese related civil litigation and judgments that are handled by the Hong Kong courts. These create a large potential data pool for empirical analysis. Like the U.S. cases, the conflict cases of Hong Kong involving jurisdiction matters (most notably *forum non conveniens* cases) will be discussed first, followed by a discussion of cases of enforcement of foreign judgments. There is, however, no case that discusses the violation of public policy in applying Chinese law in conflict cases.

1. *Jurisdiction - Forum Non Conveniens*

The underlying concepts of *forum non conveniens* under Hong Kong law are very similar to those under U.S. law. They both seek to let the most appropriate forum resolve the dispute based on factors related to convenience and justice. The tests are however slightly different. The Hong Kong *forum non conveniens* rule is set out in *Spiliada Maritime Corp. v. Cansulex Ltd.*²¹¹ which is divided into two stages:

a. *The General Rule*

i. *Stage One*

Traditionally, stage one mainly deals with matters that affect convenience and costs, such as availability of evidence.²¹² In this regard, it is very similar to the private factors under the U.S. *forum non conveniens* doctrine. However, courts have been persistent in clarifying that this stage is not restricted to factors relating to convenience.²¹³ For example, stage one also considers such factors as choice of law which is a public factor under U.S. law.²¹⁴ Other usual factors to be considered here include the existence of parallel proceedings.²¹⁵

²¹⁰ See The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted by the National People's Congress on April 4, 1990, *reprinted in* 29 I.L.M. 1511, art. 85 (1990), 1990 FAGUI HUIBIAN at 5.

²¹¹ *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] AC 460 (HL) 483 (appeal taken from B.C.).

²¹² *Id.* at 482.

²¹³ *Yantai Wanhua Polyurethanes Co. v. Pur Prods. Ltd.*, [2012] 1 H.K.L.R.D. 590, 594 (C.F.I.).

²¹⁴ *VTB Capital plc v. Nutritek Int'l Corp.* [2013] UKSC 5, [46] (Appeal taken from Eng.) (“[I]t is generally preferable, other things being equal, that a case should be tried in the county whose law applies.”).

²¹⁵ *Owners of the Las Mercedes v. Owners of the Abidin Daver* [1984] AC 398 (HL) at 401 (appeal taken from Eng.).

The burden of proof in relation to stage one is on the defendant if writ is served on the defendant within Hong Kong.²¹⁶

ii. Stage Two

Stage two will only apply if the court is convinced that there exists a more appropriate forum under stage one.²¹⁷ In other words, success under stage one is a prerequisite for stage two. The question for stage two is whether the plaintiff will be deprived of a "legitimate personal or juridical advantage."²¹⁸ This is otherwise known as the justice prong of the test. The courts are not limited to the factors they might consider. Historically, factors such as the availability of legal aid,²¹⁹ limitation period,²²⁰ and lack of procedural fairness in the alternative forum²²¹ have been considered here. Thus, stage two is the most relevant for our analysis as the traditional allegations on the lack of rule of law will usually be discussed here. The burden of proof in relation to stage two is always on the defendant.²²²

If the plaintiff is found to be deprived of legitimate personal or juridical advantage under stage two, the court will then balance the deprived advantage under stage two to the inconvenience in keeping the litigation in Hong Kong. This is sometimes regarded as stage three which is ultimately a balancing exercise.²²³

b. Differences from U.S. Forum Non Conveniens Rule

For the purposes of this article, the Hong Kong test is different from the U.S. test in four main ways. The first is that the Hong Kong test does not look at some of the U.S. public factors, namely those that relate to public resources and the interests of the forum. For example, a local plaintiff will not have an advantage in defending the *forum non conveniens*. The second is that the rule of law is to be looked at in stage two instead of availability of an alternative forum. This substantially reduces the occasions on which Hong Kong courts will look at the rule of law factors. If stage one is decided in favor of the plaintiff, the Hong Kong court will have no need to consider stage two and

²¹⁶ The Adhiguna Meranti [1987] H.K.L.R. 904, 907 (C.A.) (H.K.).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ See Lubbe v. Cape PLC, [2000] 1 W.L.R. 1545 (H.L.).

²²⁰ Spiliada Maritime Corp. v. Cansulex Ltd., [1987] AC 460 (HL) 483 (appeal taken from B.C.).

²²¹ See Oppenheimer v. Louis Rosenthal & Co., [1937] 1 All E.R. 23 (C.A. 1936).

²²² The Adhiguna Meranti, [1987] H.K.L.R. at 904.

²²³ *Id.*

thus potentially also the rule of law factor. Of course, from the plaintiff's perspective, it makes no real difference in substance. This is because if stage one is not passed, the plaintiff will prevail. If stage one is passed, the plaintiff will still have a chance to plead his case regarding the lack of rule of law in China, the alternative forum.²²⁴ The third is that if rule of law is indeed considered in stage two, the Hong Kong test is not restricted to whether the alternative forum provides "some remedy" to the plaintiff.²²⁵ Arguably, the Hong Kong *forum non conveniens* allows more discretion to the courts in this regard.

Finally, the Hong Kong *forum non conveniens* cases cover one additional type of case, namely service-out of jurisdiction cases. Under Hong Kong law, if the plaintiff would like to sue a defendant outside Hong Kong, he will need to apply to the court for service of writ outside of Hong Kong.²²⁶ One of the criteria for the Hong Kong courts to exercise their discretion in such cases is whether Hong Kong is "clearly and distinctly the most appropriate forum."²²⁷ The relevant test is essentially the same as that of the two-stage test of *Spiliada* except that the burden of proof lies with the plaintiff in a service-out case.²²⁸

c. General Findings

Table 13: HK FNC SUCCESS RATE

	No. of cases	Successful cases	Success rate
Total FNC cases	48	13	27.08%
Cases gone through stage one	48	17	35.42%
Cases that considered stage two	26	13	50.00%
Cases that were required to consider stage two	17	12	70.59%

Source: Tsang 2018

²²⁴ Technically speaking, the two-stage rule favors plaintiff since the justice factors might favor defendants; but the defendants will not have a chance to plead those factors if plaintiff prevails on the stage one factors.

²²⁵ Rules of the High Court, (1998) Cap. 4A, O.11, r.1.

²²⁶ *Id.* r. 4(2).

²²⁷ *Transocean Maritime Grp. Holdings (HK) Co Ltd. v. Transocean Maritime Grp. Holdings Co Ltd.* [2012] H.K.C.U. 1247 (C.F.I.) (H.K.).

²²⁸ *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] AC 460 (HL) 483 (appeal taken from B.C.).

In total, there were forty-eight *forum non conveniens* cases in Hong Kong, of which thirteen were successful. This means that thirteen of the forty-eight litigations originally initiated in Hong Kong were eventually moved to China after the Hong Kong courts conducted a *forum non conveniens* analysis. Considering that *forum non conveniens* is still the exception rather than the norm, the success rate (27.08%) of Hong Kong *forum non conveniens* cases need not be considered low necessarily, though it is clearly lower than the success rate (43.75%) of their counterparts in the U.S.²²⁹

All *forum non conveniens* cases went through stage one as dictated by the test with only seventeen of them passing the test. This means that after the Hong Kong courts weighed all the factors in stage one, which mainly consisted of factors relating to costs and convenience, they only found seventeen cases in which the Chinese court was the more appropriate forum than the Hong Kong court. As mentioned above, the stage one factors are usually not relevant to rule of law and deal with such factors as the location of the evidence. As a result, it can be said that rule of law is not the reason for those thirty-five failed cases.

However, since the courts never had a chance to discuss the rule of law factor in the cases that did not pass the stage one test, the more important cases for our purposes are therefore those cases that passed stage one and moved into stage two where the courts had a chance to entertain rule of law arguments.

Theoretically, the courts only needed to consider the seventeen cases for stage two since only those cases passed stage one. However, the courts considered twenty-six cases for stage two, meaning that nine of them were technically *obiter*.²³⁰ Among the seventeen cases that actually passed stage one, twelve of them successfully passed stage two, meaning the courts considered that in twelve such cases the justice factors did not favor the plaintiffs and thus the litigations should be moved to China. It is noted that there were more overall successful cases (thirteen) than cases that passed stage two (twelve). This is because in one case the court held that *forum non conveniens* was successful without going through the necessary stage two test.²³¹

Considering twelve of these seventeen cases (70.59%) passed the stage two test, this seems to suggest there is no problem with rule of law in China. On the other hand, if the *obiter* cases are to be included, the success rate drops

²²⁹ Part of this may be attributed to the lack of consideration of public factors, and the design of the test by stages. These could have the effect of reducing the chance of the defendants pleading their cases for *forum non conveniens*. Having said that, it is not very clear as the lack of opportunities apply to plaintiffs as well.

²³⁰ This also means that these cases have no chance to succeed in *forum non conveniens*.

²³¹ *ZC v CN*, [2014] H.K.F.L.R. 469 (C.A.) (H.K.).

to 50.00%. This discrepancy merits a closer look into the rule of law discussions, if any, in the stage two cases since not all stage two cases included rule of law discussions.

Table 14: RULE OF LAW DISCUSSION IN HONG KONG FNC CASES

Total no. of FNC cases	Cases with stage two discussion	Cases with rule of law discussion	Cases in which plaintiff succeeded in rule of law
48	26	10	1

Source: Tsang 2018

Of the twenty-six cases that underwent the stage two analysis, arguments that consisted mainly of attacks on China's rule of law were discussed in ten such cases. Similar to rule of law arguments in the U.S. cases, challenges were made to rule of law regarding such aspects as lack of integrity by Chinese courts,²³² bias toward state-owned enterprise defendants,²³³ etc. The defendant prevailed in the rule of law argument in all ten cases but one. This provides a strong indication that Hong Kong courts are comfortable with China's rule of law. The lone exception is *Bayer Polymers Co. Ltd. v ICBC*.²³⁴ In that case, J. Stone held that there was a substantial risk that the plaintiff might not receive substantial justice in China.²³⁵ He relied on two grounds for that decision. First, the defendant was one of the largest state-owned banks in China.²³⁶ Second, he took into account the difficulties encountered by the Chinese judiciary as stated in the 1998 and 1999 Working Reports of the Supreme People's Court.²³⁷ It must be noted that the case was decided in 1999 and is therefore somewhat dated. There is no question that China's legal system overall has improved substantially since then.

²³² See *Zhou Yi Qin v. Pong Tak Sen*, [2012] HKEC 385, para. 31 (C.F.I.)(H.K.) (plaintiff claimed that Chinese courts would decide cases according to political reality and not in accordance with the legitimate interests of the parties).

²³³ See *Xinjiang Xingmei Oil-Pipeline Co. v China Petroleum & Chem. Corp.*, [2005] 2 H.K.C. 292, para. 41 (C.F.I.) (plaintiff argued that there was a culture in Chinese judiciary that fosters the protection of state owned property and enterprises).

²³⁴ *Bayer Polymers Co. Ltd. v. The Indus. and Commercial Bank of China*, [2000] 1 H.K.C. 805, 809 (C.F.I.).

²³⁵ *Id.* at 811.

²³⁶ *Id.*

²³⁷ *Id.* at 810.

d. Hidden Messages?

However, could there be counter evidence that one can derive from other aspects of the cases? After all, respect for comity is traditionally regarded as important in conflict of laws in common law jurisdictions and, a fortiori, Hong Kong courts have a stronger reason to respect Chinese courts on the basis of comity. The following tables seek to identify other factors that might be relevant to the assessment of China's rule of law despite Hong Kong courts not explicitly making reference to rule of law.

Table 15: PRC COURTS IN HK FNC CASES

PRC court	No. of FNC cases	No. of successful cases	Success rate
Guangdong	19	5	26.32%
Beijing	9	3	33.33%
Shanghai	3	3	100.00%
Fujian	5	0	0.00%
Jiangsu	4	1	25.00%
Trademark office	2	0	0.00%
Guangxi	1	1	100.00%
Zhejiang	1	0	0.00%
Not specified	3	0	0.00%
Multiple courts	1	0	0.00%
Total	48	13	27.08%

Source: Tsang 2018

Unlike U.S. cases, Hong Kong cases usually state the specific Chinese court which is the alternative forum in the judgments.²³⁸ Summarizing this information from the Hong Kong cases, it can be observed that Guangdong, Beijing and Shanghai combined to have the highest numbers on both *forum non conveniens* cases (31 of 48) and successful cases (11 of 13). The aggregate success rate of these three provinces/cities is 35.48% which is substantially higher than that of the other provinces (11.76%). This higher success rate can be explained in terms of rule of law. These three provinces/cities are generally regarded as having the best judges in China due to them being the

²³⁸ Only six of the thirty-two U.S. *forum non conveniens* cases specified relevant Chinese courts.

commercial hubs of China.²³⁹ Hong Kong judges therefore are more comfortable knowing that the litigations will be moved to these three provinces/cities. At the same time, it can be argued that the concentration of *forum non conveniens* cases in the three provinces/cities paints a false picture as these cases are not representative of the general quality of courts of the whole country.

Another aspect that may be worth exploring is whether the plaintiff's country of origin matters. Unlike the U.S., Hong Kong law on *forum non conveniens* does not expressly favor Hong Kong plaintiffs. In fact, local interest is not a factor in the test. Table 16 below summarizes the relationship between *forum non conveniens* success and plaintiff's origin.

Table 16: PLAINTIFFS IN HK FNC CASES

	No. of FNC cases	No. of successful cases	Success rate
Hong Kong plaintiffs	18	6	33.33%
Non-Hong Kong plaintiffs	30	7	23.33%
Total	48	14	29.17%

Source: Tsang 2018

Of the eighteen cases where the plaintiff was a Hong Kong person or company, six of these were successful (i.e. cases were eventually moved to China). On the other hand, of the thirty cases where the plaintiff was not a Hong Kong person, only seven of these were successful. Thus, the success rate falls from 33.33% to 23.33% when there is a Hong Kong plaintiff. This result is inconsistent with the proposition that Hong Kong courts might favor local plaintiffs as the U.S. courts did. Indeed, it is actually the opposite. It will be interesting to see whether there is an explanation for this anomaly.

²³⁹ See, e.g., *Guimei v. Gen. Elec. Co.*, 172 Cal.App.4th 689, 700 (2009). Defendants argued that Shanghai courts are of higher quality than those in the rest of the country because,

Shanghai boasts a legal system superior to that in other areas of China... [because] it has a high percentage of large and foreign law firms and lawyers educated at elite universities, as well as judges who are 'far better and more professionally educated than their counterparts in most of China.' Additionally, courts in Shanghai have experience handling cases involving multiple plaintiffs.

Id.

The Hong Kong rule does favor “service-in” cases where writ was served to the defendant within the territory of Hong Kong since the burden of proof in stage one will fall on the shoulders of the defendants in those cases. However, this is not based on the country of origin of the plaintiff. Foreign plaintiffs could serve writ in Hong Kong just like local plaintiffs. Table 17 shows the success rates of both service-in and service-out cases.

Table 17: SERVICE-IN VS. SERVICE-OUT IN HK FNC CASES

	No. of FNC cases	No. of successful cases	Success rate
Service-in	45	13	27.67%
Service-out	3	0	0.00%
Total	48	13	27.08%

Source: Tsang 2018

If “service-in” is indeed more favorable to the plaintiff, it will result in a lower success rate of *forum non conveniens*. However, these cases actually have a higher success rate, though it is only by a very small margin. Additionally, since there were only 3 service-out cases, there is not a sufficient sample size to draw any statistically significant inference.²⁴⁰

Since the U.S. cases treat intellectual property cases differently, it is interesting to explore whether a similar pattern can be found in Hong Kong cases. Table 18 shows the distribution of *forum non conveniens* based on causes of action.

Table 18: CAUSE OF ACTION IN HK FNC CASES

	No. of FNC cases	No. of successful cases	Success rate
Contract	28	6	21.42%
Tort	6	4	66.67%
Shipping	6	1	6.25%
Family	5	2	40.00%
Intellectual Property	2	1	50.00%
Fraud	1	0	0.00%
Total	48	13	27.08%

Source: Tsang 2018

²⁴⁰ Chi-Square = 0.17582, df = 1, p-value = 0.675.

Only one of the intellectual property cases was successful, giving it a higher success rate (50.00%) than the average success rate (27.08%). This is inconsistent with the findings on the U.S. cases, but it is certainly not statistically significant considering that there were only two such cases. A more interesting observation is the success rates between contract cases and non-contract cases. The contract cases accounted for more than half of the Hong Kong cases and had a lower success rate in *forum non conveniens* (21.42%) than non-contract cases (35.00%). This suggests that defendants will have a harder time succeeding in moving the litigation from Hong Kong to China if the cause of action in question is contractual. The reason for this discrepancy is not clear. One possible explanation may be the nature of the contractual disputes. Under Hong Kong law, if a contract contains a jurisdiction clause, particularly an exclusive jurisdiction clause, the Hong Kong courts will generally respect the choice of court by the parties.²⁴¹ It could thus be argued that the Hong Kong courts are less inclined to grant the wish of the defendants to move the litigation away from Hong Kong considering that they could have done so had they inserted a jurisdiction clause in favor of Chinese courts *ex ante*. However, this argument has never been tested in court.

e. Inferential Analysis

This section pulls together all the potential impact factors from the analyses above for inferential analysis. These factors include (1) cases that have gone through stage two; (2) cases with rule of law discussion; (3) PRC courts being Beijing, Shanghai or Guangdong; (4) presence of Hong Kong plaintiff; and (5) cause of action being contractual.

i. FNC Factors Summary

The following table shows the percentage of cases with or without a factor. For example, 13 out of 48 cases, or 23% of cases, are cases in which rule of law was discussed.

²⁴¹ *Noble Power Inv. Ltd. v. Nissei Stomach Tokyo Co. Ltd.*, [2008] 5 H.K.L.R.D. 631 (C.A).

Table 19: HK FNC FACTORS SUMMARY

Results, FNC	Success (13/48 or 27%)	Failure (35/48 or 73%)
Stage two	Yes (26/48 or 54%)	No (22/48 or 46%)
Rule of law	Yes (10/48 or 21%)	No (38/48 or 79%)
H.K. plaintiff	Yes (18/48 or 38%)	No (30/48 or 62%)
Contract	Yes (28/48 or 58%)	No (20/48 or 42%)
PRC court	Yes (32/48 or 67%)	No (16/48 or 33%)

Source: Tsang 2018

ii. Logistic Regression, With Single Factor

Five logistic regression models using logit link function, each with a single factor, were conducted to explore the individual predictive power to the DV, FNC. In other words, FNC was regressed on each variable individually to see each of their contributing force. For the individual analysis, all forty-eight cases are used.

Table 20: HK FNC LOGISTIC REGRESSION, WITH EACH FACTOR CONSIDERED

Factor	Coefficient	p-value
Stage two	2.890	0.0084
Rule of law	3.2734	0.0004
H.K. plaintiff	0.9343	0.1600
Contract	-0.6802	0.301
PRC court	1.2993	0.123

Source: Tsang 2018

From the individual logistic regression models, it was shown that the stage two and rule of law factors can significantly predict the FNC results. The Hong Kong plaintiff, contract and PRC court factors cannot predict the FNC results. This result is consistent with the theoretical discussions above. Unlike the U.S. rules on *forum non conveniens*, Hong Kong plaintiffs do not enjoy any privilege since local interest is never a part of Hong Kong law. The explanation that the courts will be less sympathetic to contract cases due to the possible inclusion of a jurisdiction clause might have its appeal, but it has never been expressly stated in a judgment. It is therefore a speculation rather than a proven school of thought derived from precedent. Finally, although the

Chinese courts from major cities/provinces might be closer than H.K. plaintiffs and contract cases in predicting the outcome of *forum non conveniens* success (0.123 p-value), they are still far off statistically from stage two and rule of law to have any explanatory value. This is perhaps because the non-major cities/provinces are not economically backward areas either. While their courts are certainly not at the level of Beijing, Shanghai or Guangdong, all but the courts of one place (Guangxi) are located in relatively affluent areas along the east coast of China. For example, five cases are from Fujian, a province that has traditionally had much investment from Taiwan. If there were more cases from western China for instance, the contrast and therefore the predictive value of this factor could potentially be higher.

iii. Logistic Regression, With Two Factors

To compare the contributing forces of all the significant factors to FNC, the stage two and rule of law factors are taken together to predict FNC.

Table 21: HONG KONG FNC LOGISTIC REGRESSION, WITH THREE FACTORS

Factor	Coefficient	p-value
Intercept	-3.4388	0.00195
Stage two	2.3704	0.04452
Rule of law	2.8058	0.00475

Source: Tsang 2018

The results show that when both factors are taken together to predict FNC, both stage two and rule of law are significant, both at the level of $p=0.05$. It is also found that the intercept of the model is significant at the level of 0.05. The estimated coefficient is -3.4388, which reflects a strong baseline chance of FNC failure. This is because FNC cases are exceptions rather than the norm, and hence have a low chance of success, which leads to a high base chance of failure. For the model with these two factors, pseudo R square using the McFadden method was calculated. It was 0.392.

iv. *Interpretation*

A case that has passed the stage two test increases the odds of *forum non conveniens* success by a factor of 2.37.²⁴² Meanwhile, a case that has discussed rule of law increases the odds of *forum non conveniens* success by a factor of 2.81. Thus, not surprisingly, rule of law has the most predictive value as a factor. Since the rule of law factor is a sub-category of stage two, this finding indicates that the more specific the courts get in the discussion of China's rule of law, the more likely the *forum non conveniens* claim will succeed.

Similar to the U.S. *forum non conveniens* cases, the more the courts have a chance to discuss rule of law, the more likely the courts will conclude that China is the more appropriate forum. This is a clear indication of a vote of confidence by the Hong Kong courts in China's rule of law. In addition, the Hong Kong cases do not have an equivalence to the intellectual property exception in the United States, namely, exceptional types of cases where China's rule of law is implicitly scrutinized.

However, it should be noted that statistical analysis has its limitations. There are indeed cases where the Hong Kong courts might have manipulated the results by avoiding the discussion of rule of law in stage two. For example, in *Botanic Ltd. v. China National United Oil Corp.*, the Venezuelan witnesses were reluctant to testify before a Chinese court as "they did not trust the legal system in the PRC and believed that if they were to give evidence against the defendant, a state-owned corporation in the PRC, they would be subject to much pressure and would even face reprisal from the [d]efendant."²⁴³ This was, however, treated in the case as a stage one factor regarding availability of a witness, instead of a traditional stage two factor. The advantage afforded to the plaintiff of such treatment is substantial. First of all, if the factor is considered in stage one, it will add to the plaintiff's case along with other stage one factors. Second, since it is a service-in case, the burden of proof in stage one lies with the defendant. However, stage two's burden of proof will be on the plaintiff. Third, and probably most interesting from the discussion of the case, the witnesses' fear only needs to be genuine, not reasonable.²⁴⁴ This contrasts with proving that a legitimate personal or juridical advantage will be deprived in stage two, which requires cogent evidence.²⁴⁵ This point is clear from the judgment:

²⁴² The logistic equation is $\text{Logit}(p(\text{FNC success})) = -3.439 + 2.370 * \text{Stage 02} + 2.806 * \text{Rule of Law}$.

²⁴³ *Botanic Ltd. v. China Nat'l United Oil Corp.*, [2008] H.K.C.U. 1424, 2008 WL 2934563, para. 39 (C.F.I.).

²⁴⁴ *Id.* at [53].

²⁴⁵ *Owners of the Las Mercedes*, [1984] AC 398 (HL) at 412.

I think [defendant counsel's] comments about the Venezuelan witness' fear for their personal safety and liberty in litigating against a state-owned organization is clouded and oversweeping. The fear of reprisal is wholly unfounded . . . But, lack of confidence and fear is very subjective. For people in that part of the world not being aware of the recent development in the PRC in terms of technology, economy and legal system is not surprising. The Venezuelan witnesses' lack of confidence in the PRC legal system and fear of reprisal is unfounded but understandable. There is nothing to suggest that their lack of confidence and fear is not genuine or that it is an excuse put up by the Plaintiff to resist the Defendant's application.²⁴⁶

Apart from discussing the rule of law factor in stage one, it is also possible to package the rule of law factor into other stage two factors, which may be more likely to succeed. In *Duan QI Gui v Upper Like Investments Ltd.*,²⁴⁷ the issue at the Hong Kong Court of Appeal was whether the plaintiff would lose a legitimate personal or juridical advantage in the Chinese court as the litigation would be time-barred there. The plaintiff argued that he did not initiate the proceedings within the limitation period in China as he had lost confidence in the administration of justice in China after being sentenced to death there previously.²⁴⁸ Once again, the court allowed such a subjective belief to be admitted as evidence:

[O]n the materials available, I do not think I can conclude that it is clear that the plaintiff has failed to commence proceedings on the Mainland unreasonably and that her conduct shows that without good reason she has deliberately and advisedly allowed the time limit to expire without commencing proceedings on the Mainland . . . [I]t is her evidence, although given in relation to her criminal trial, that she had (and has) no confidence in the Mainland legal system at all. In those circumstances, it is not wholly surprising that she did not commence any legal proceedings against the defendants on the Mainland to pursue her claim.²⁴⁹

Accordingly, the Court of Appeal upheld the rejection of *forum non conveniens*. While manipulations as observed from these two cases cannot be grouped together as a category for statistical analysis, it does show that the

²⁴⁶ *Botanic Ltd. v. China Nat'l United Oil Corp.*, [2008] H.K.C.U. 1424, 2008 WL 2934563, para. 53 (C.F.I.).

²⁴⁷ *Duan QI Gui v. Upper Like Invs. Ltd.*, [2008] H.K.E.C. 1014.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at ¶ 39.

Hong Kong courts may take into account rule of law factors without resorting to a specific discussion in stage two. This is similar to the practice of the U.S. courts in emphasizing national interest in protecting intellectual property as a disguised attack on China's rule of law, or at least to find a way out of the high evidentiary requirement under the general rule.

2. Jurisdiction - Antisuit Injunction

a. General Rule

Similar to the United States, Hong Kong courts may enjoin a party from continuing a foreign legal proceeding in appropriate cases. The test was set out in *Airbus Industries GIE v Patel*.²⁵⁰ The general principle is that the injunction may be granted "when the ends of justice require it."²⁵¹ This is further elaborated to refer to the occasion "when the foreign proceedings are vexatious or oppressive."²⁵²

However, where the applicant has secured a contractual right not to be sued in the foreign country, such as the case of an exclusive jurisdiction agreement or an arbitration agreement, an anti-suit injunction will usually be granted to protect the legitimate expectation of the applicant.²⁵³ There is no need to prove bad faith in this case.²⁵⁴

Like its U.S. counterpart, anti-suit injunction under Hong Kong law must be utilized by the courts with caution. This is because the injunction, albeit imposed on the litigants personally, is "however disguised and indirect, an interference with the process of justice in that foreign court."²⁵⁵ In addition, "[c]aution is clearly very necessary where there is no remedy in the [Hong Kong] court in respect of the cause of action which, if the facts be proved, is recognized and enforceable by the foreign court."²⁵⁶ This suggests that the caution required is even higher than the case in *forum conveniens* since the plaintiff may be left without a forum.

²⁵⁰ [1999] 1 A.C. 119 (HL) 133 (appeal taken from Eng.). The test is adopted by the Hong Kong Court of Appeal in *Liaoyang Shunfeng Iron and Steel Co. Ltd. v. Yeung Tsz Wang* [2012] H.K.C. 857 (C.A.).

²⁵¹ *Airbus Indus. G.I.E.*, [1999] 1 A.C. 119 (HL) at 133.

²⁵² *Id.*

²⁵³ *Liaoyang Shunfeng Iron and Steel Co. Ltd. v. Yeung Tsz Wang* [2012] H.K.C. 857, para. 88 (C.A.).

²⁵⁴ *Id.*

²⁵⁵ *Id.* at ¶119 (quoting Lord Scarman in *British Airways Board v. Laker Airways Ltd.* [1985] AC (HL) 58, 95 (appeal taken from Eng.)).

²⁵⁶ *Id.*

b. General Findings

The results of cases involving anti-suit injunctions are set out in Table 22 below:

Table 22: HK ANTI-SUIT INJUNCTIONS AGAINST LITIGATIONS IN CHINA

No. of cases	No. of successes	Success rate	Rule of law discussion
7	1	14.29%	0

Source: Tsang 2018

There were seven cases that involved anti-suit injunctions and only one injunction was granted successfully. In none of the cases, including the lone successful case, was rule of law discussed. Due to the small number of cases, no inferential analysis can be conducted. However, the lack of a successful injunction case is consistent with the positive findings from the *forum non conveniens* cases above and thus a validation by the Hong Kong courts of China's rule of law. Table 23 breaks down the causes of action of the injunction cases.

Table 23: CAUSE OF ACTION OF HK ANTI-SUIT INJUNCTION CASES

Cause of action	No. of cases	EJC / Arbitration clause	Successful cases	Success rate
Contract	4	0	1	25%
Shipping	1	1	0	0%
Family	2	0	0	0%
Total	7	1	1	14.29%

Source: Tsang 2018

Most of the cases were contract cases (4), with the lone successful case being a contract case as well. It is noted that both contract and shipping cases may involve an exclusive jurisdiction clause or arbitration clause, the breach of which will generally make the courts grant the injunction. There was only one case involving such a breach and the court in that case also denied the application for the unconscionable delay by the plaintiff to enjoin the Chinese

proceedings.²⁵⁷ While it is expected that breach of an exclusive jurisdiction clause or arbitration clause could easily lead to a successful injunction, that is not the result from the survey, albeit its rather limited sample size.

3. *Enforcement of Chinese Judgments*

a. *General Rule*

In connection with the enforcement of Chinese judgments, Hong Kong has three separate regimes. The first was established by the Mainland Judgment (Reciprocal Enforcement) Ordinance (“MJREO”) which is based on a treaty like arrangement with China that enables judgments from the two jurisdictions to be mutually enforceable.²⁵⁸ The basic requirement of triggering the MJREO in Hong Kong is the existence of an exclusive jurisdiction agreement that designates a court in Mainland China with exclusive jurisdiction over the disputes arising from the contract.²⁵⁹ A judgment from the designated Chinese court will *prima facie* be registered in Hong Kong as if it were a domestic judgment of Hong Kong.²⁶⁰ There are a limited number of exceptions which will allow the Hong Kong courts to reject the registration of an otherwise registrable judgment.²⁶¹

For our purposes, the most relevant one is the rejection of a judgment for being contrary to public policy.²⁶² Under s.18(j), the registration of the judgment shall be set aside if the Hong Kong Court of First Instance is satisfied that the enforcement of the judgment is contrary to public policy. Arguably, if the judicial process by which the Chinese court rendered the judgment is substantially unfair to the defendant, it will be a violation of Hong Kong public policy and thus not be given effect under s.18(j). It is noted that MJREO does not include a ground of rejection for violation of natural justice, but it has been argued that this common law ground overlaps with public policy.²⁶³

Due to the limited scope of MJREO, most of the Mainland judgments (namely, those that have not resulted from an exclusive jurisdiction agreement) will fall into the second enforcement regime under the common law. Generally, a judgment will be enforceable if:

²⁵⁷ Liaoyang Shunfeng Iron, [2012] H.K.C. 857 (C.A.).

²⁵⁸ Mainland Judgments (Reciprocal Enforcement) Ordinance, (2008) Cap. 597, §5 (H.K.).

²⁵⁹ *Id.* § 3(1).

²⁶⁰ *Id.* § 5, § 14.

²⁶¹ *Id.* § 18.

²⁶² *Id.* §18(j).

²⁶³ See Xianzhu Zhang & Philip Smart, *Development of Regional Conflict of Laws: On the Arrangement of Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters between Mainland China and Hong Kong SAR*, 36 HONG KONG L.J. 553, 578 (2006).

1. The foreign court that renders the case has international jurisdiction as defined under the Hong Kong law;
2. The foreign judgment is a money judgment (not a tax payment or penalty);
3. It is final and conclusive; and
4. There exists no rejection ground including breach of natural justice and public policy.²⁶⁴

Again, for our purposes, the focus is on the rejection grounds involving natural justice and public policy. Under common law, an otherwise enforceable judgment that has satisfied all the other enforcement conditions may be impeached if the proceedings in which the judgment was obtained were opposed to natural justice.²⁶⁵ In *Pemberton v Hughes*, Lord Lindley explained the exception as follows: “[i]f a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, [Hong Kong] courts never investigate the propriety of the proceedings in the foreign court, unless they offend against [Hong Kong] views of substantial justice.”²⁶⁶ In *Adams v Cape Industries Plc*,²⁶⁷ one of the reasons the Texas judgment was denied enforcement was the substantial procedural defects in the process by which the judgment was rendered. In addition, a foreign judgment will not be enforced if its recognition or enforcement is contrary to public policy.²⁶⁸ This ground of rejection overlaps with the natural justice ground to an extent.²⁶⁹ Thus, it is also rare for courts to apply public policy as a grounds for rejection.²⁷⁰ It is submitted that the Hong Kong courts can make use of either ground to reject a Chinese judgment that does not satisfy the rule of law standard.

Finally, the third enforcement regime covers overseas divorces. Pursuant to Section 56 of the Matrimonial Causes Ordinance,²⁷¹ “the validity of an overseas divorce or legal separation shall be recognized if, at the date of the institution of the proceedings in the place in which it was obtained... (a) either spouse was habitually resident in that place; or (b) either spouse was a national of that place.” Overseas divorce is defined as a divorce that (a) has “been obtained by means of judicial or other proceedings in any place outside Hong

²⁶⁴ See COLLINS ET AL., *supra* note 18, at vol. 1, Rule 42.

²⁶⁵ *Id.* at Rule 52.

²⁶⁶ *Pemberton v. Hughes*, [1899] 1 Ch. 781, 790 (C.A.).

²⁶⁷ *Adams v. Cape Industs. Plc.*, [1990] Ch. 433, 443 (C.A.) (Eng.).

²⁶⁸ See COLLINS ET AL., *supra* note 18, at Rule 51.

²⁶⁹ See *Adams*, [1990] Ch. 433 at 496.

²⁷⁰ See COLLINS ET AL., *supra* note 18, at comment 14-153.

²⁷¹ Matrimonial Causes Ordinance, (1997) Cap 179, § 56 (H.K.).

Kong; and (b) is effective under the law of that place.”²⁷² Section 61 sets out a limited number of rejection grounds for recognition, the most important of which for our purpose is section 61(2)(b), which allows the court to reject recognizing the divorce if its recognition would manifestly be contrary to public policy.²⁷³ Accordingly, under all three regimes, it is possible for Hong Kong courts to reject recognition or enforcement of a Chinese judgment if it is contrary to public policy. This is where the rule of law status of China may be discussed. Table 24 summarizes the cases on enforcement of Chinese judgments in Hong Kong other than under MJREO.

Table 24: ENFORCEMENT OF CHINESE JUDGMENTS IN HONG KONG

No. of cases	No. of successes	Success rate	Rule of law discussion
42	32	76.19%	0

Source: Tsang 2018

Table 25: ENFORCEMENT OF CHINESE JUDGMENTS IN HONG KONG BY REGIME

Regime	No. of cases	Success cases	Success rate
Common law	15	5	33.33%
MJREO	26	26	100%
Family	1	1	100%
Total	42	32	76.19%

Source: Tsang 2018

The overall success rate of enforcement of Chinese judgments is 76.19%. This is a particularly high success rate, especially when we compare it against that of the United States (42.86%). However, for our purpose, the most important point is that the rule of law has never been a concern under the enforcement regime of Hong Kong. The success rate is clearly boosted by the MJREO regime, which registered all twenty-six cases with no reported failure.

For the other regimes, the most relevant factor causing failure of enforcement is the lack of finality of Chinese judgments. Under the adjudication supervision system of China, a judgment rendered by a Chinese court may be

²⁷² *Id.* § 55(2).

²⁷³ *Id.* § 61(2)(b).

reopened by the president of the relevant Chinese court, the Supreme People's Court, the Supreme People's Procuratorate of China, or by the litigants.²⁷⁴ This is a special feature of Chinese civil procedure which is not present in the common law. The possibility of reopening the case in China has led to debate as to whether a Chinese judgment is final and conclusive. Finality is one of the prerequisites needed to enforce a foreign judgment under the common law in Hong Kong.²⁷⁵ To date, the Hong Kong courts have not given a definitive answer on this issue,²⁷⁶ although finality is not a ground for rejection under MJREO. Non-MJREO enforcement attempts have been rejected for lack of finality as shown in Table 26 below.

Table 26: FINALITY AND FAILURE OF ENFORCEMENT (NON-MJREO)

No. of cases	Successful cases	Finality discussed
16	6	8

Source: Tsang 2018

After conducting inferential analysis, it was concluded that the discussion of finality is relevant to the chance for success of the enforcement.²⁷⁷ In cases where finality is raised, it is much more likely the enforcement will fail. Since finality itself is at most a difference in the civil procedure system instead of a corrupted feature of the legal system, this should strengthen the argument that failures in enforcement attempts are not relevant to China's rule of law.

b. Choice of Law

Under common law, an otherwise applicable law may be rejected for application due to violation of the Hong Kong public policy. This is stated in Rule 2 of Dicey, Morris & Collins:

[Hong Kong] courts will not enforce or recognise a right, power, capacity, disability or legal relationship arising under the law of a foreign country, if the enforcement or recognition of such right, power, capacity, disability or legal relationship

²⁷⁴ Civil Procedure Law of the People's Republic of China (promulgated by Order No. 44 of the President of the People's Republic of China, Apr. 9, 1991), art. 177, 178 and 185, http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383880.htm.

²⁷⁵ See *Chiyu Banking Corp. Ltd. v. Chan Tin Kwun*, [1996] 2 H.K.L.R. 395 (H.C.).

²⁷⁶ *Bank of China Ltd. v. Yang Fan* [2016] 3 H.K.L.R.D. 7 (C.F.I.).

²⁷⁷ Logistic regression coefficient = -2.6391, p = 0.0395.

would be inconsistent with the fundamental public policy of [Hong Kong] law.²⁷⁸

However, this is a rather limited exception. The prime example of such exception is illegality in the place of performance of a contract.²⁷⁹ Under this principle, a contract will not be given effect by the Hong Kong court if its performance will be forbidden by the law of the country where the performance is intended, notwithstanding that it is legal under the governing law of the contract.²⁸⁰ However, other than that, it is very rare in Hong Kong for the courts to deny an otherwise applicable law because of public policy. The survey found no case where Chinese law was inapplicable due to being contrary to Hong Kong public policy or the public policy of other commonwealth jurisdictions discussed herein. On the contrary, the courts in these common law jurisdictions have routinely applied Chinese law without hesitating whether Chinese law should be the law chosen by the choice of law rules.

Looking at all three types of conflict cases in Hong Kong, it is clear that the Hong Kong judiciary has been positive about China's rule of law. Apart from *Bayer Polymers Co. Ltd. v ICBC, Hong Kong Branch* discussed above,²⁸¹ Hong Kong has never made a conflict decision against a Chinese court, judgment or law based on the poor rule of law status of China.

C. England

England is important for this research for three reasons. First, it is the second largest trading partner to China in Europe.²⁸² Second, due to the history of the development of common law, English decisions are highly influential over other common law jurisdictions. As far as conflict rules applicable to China, English rules are substantially similar to those of Hong Kong since the Hong Kong rules were inherited from England back in its colonial days. Finally, on the top of all the relevant rules, England is subject to the ECHR. Article 6 of the ECHR provides for the right to a fair trial which affects the rules on *forum non conveniens* and the enforcement of foreign judgments to be discussed below. While there is a limited number of conflict cases in England that are related to China, the categories they fall into are quite revealing and so deserve further examination.

²⁷⁸ COLLINS ET AL., *supra* note 18, at Rule 2.

²⁷⁹ *Ralli Bros. v. Compañía Naviera Sota Y Aznar* (1920) 2 KB 287 (appeal taken from Eng.).

²⁸⁰ *Id.*

²⁸¹ *Bayer Polymers Co. Ltd. v. The Indus. and Commercial Bank of China*, [2000] 1 H.K.C. 805, 809 (C.F.I.).

²⁸² NAT'L BUREAU OF STAT. OF CHINA, *supra* note 13.

I. Jurisdiction – Forum Non Conveniens

The common law test developed in *Spiliada* discussed above originates from England and will apply to *forum non conveniens* case regarding China. However, it is argued that the English court now has a statutory obligation to “undertake a quality audit of a foreign system” as required by Article 6 of the ECHR.²⁸³ There is only one failed *forum non conveniens* case. *Bankhaus Wobbern & Co (AG & CO KG) v China Construction Bank Corp, Zhejiang Branch*²⁸⁴ emerged from a ship building contract that was guaranteed by a Chinese bank. The contract provided for disputes to be resolved by arbitration in England, while the guarantee included a non-exclusive jurisdiction clause in favor of England and was governed by English law.²⁸⁵

When the dispute arose over the performance of the contract, arbitration was initiated in London.²⁸⁶ However, the ship builder refused to honor the arbitration award against it.²⁸⁷ Meanwhile, the ship builder initiated legal proceedings in the Qingdao Maritime Court in China against its client and was awarded damages of \$10 million in U.S. currency.²⁸⁸ In addition, the Qingdao court made a preservation order against the Chinese bank regarding the guaranteed sum.²⁸⁹ The plaintiffs subsequently filed proceedings in England on the guarantee against the Chinese bank in England and the issue was whether England was a *forum conveniens*.²⁹⁰ On the strength of the jurisdiction and governing law clauses in the guarantee, the High Court had no difficulty rejecting the Chinese bank’s *forum non conveniens* case. On the face of it, the case did not involve any discussion of rule of law in China, but some interesting observations will be made after the antisuit injunction cases are reviewed. There are surprisingly six anti-suit injunction cases relating to China which are set out in the table below.

²⁸³ ADRIAN BRIGGS, PRIVATE INTERNATIONAL LAW IN ENGLISH COURTS, 341 (Oxford 2014).

²⁸⁴ [2012] EWHC (Comm) 3285.

²⁸⁵ *Id.* at [1].

²⁸⁶ *Id.* at [5].

²⁸⁷ *Id.*

²⁸⁸ *Id.* at [6].

²⁸⁹ *Id.*

²⁹⁰ *Id.* at [12].

2. Jurisdiction –Anti-suit Injunction

Table 27: ANTI-SUIT INJUNCTION

No. of cases	No. of successes	Success rate	Rule of law discussion
6	5	83.33%	1

Source: Tsang 2018

The success rate of anti-suit injunctions is also surprisingly high.²⁹¹ From this, an argument can be made that the English courts do not trust the Chinese courts in handling a dispute. This is particularly the case since an antisuit injunction is often looked at as an excessively intrusive measure that interferes with other countries' jurisdiction, and thus is a violation of comity.²⁹²

Table 28: CAUSES OF ACTION IN ENGLISH ANTISUIT INJUNCTION CASES

Cause of action	No. of cases	Successful cases	Success rate	EJC / Arbitration clause
Contract	2	2	100%	2
Shipping	4	3	75%	4
Total	6	5	83.33%	6

Source: Tsang 2018

On the other hand, all six cases involved either an exclusive jurisdiction clause or arbitration clause and they all designated England as the place of dispute resolution. As discussed previously in the Hong Kong antisuit regime, courts are generally willing to issue an antisuit injunction to enjoin the breach of a contractual dispute agreement. Thus, despite the unusually high success rate in anti-suit injunctions, it can be argued that it has nothing to do with the

²⁹¹ In fact, the claimant failed the injunction application simply because of its delay in filing the injunction. *See* *Essar Shipping Ltd. v. Bank of China Ltd.*, [2015] EWHC (Comm) 3266.

²⁹² *See* *Liaoyang Shunfeng Iron and Steel Co. Ltd. v. Yeung Tsz Wang* [2012] H.K.C. 857, ¶ 88 (C.A.).

rule of law status of China. In addition, it is also important to note none of these cases discussed any China rule of law issue.²⁹³

However, there are two additional reasons which may explain the unusually high success rate of the injunction, namely shipping disputes and the defendants' breach of arbitration/ jurisdiction clause by initiation of proceedings in China. It is noted that both features were present in *Bankhaus* above.²⁹⁴

Four of the six anti-suit injunction cases are shipping cases. It may be speculated that, like the U.S. *forum non conveniens* cases, England has a special national interest in a particular area of law, here dispute resolution involving shipping disputes. England has long been the world center of shipping transactions and dispute resolutions, and it may thus be in England's interest to protect such interest. In addition, it is not just that the defendants breached the jurisdiction/arbitration agreements by initiating lawsuits in China, but also the fact that the Chinese courts entertained those lawsuits. Attempts at collateral attack by such Chinese lawsuits were criticized by the English court, though it was directed to the Chinese party instead of the Chinese court.²⁹⁵ Combining these two factors together, it may thus be argued that English courts disapprove of China's rule of law in handling shipping related disputes.

3. *Enforcement of Chinese Judgments*

Common law rules continue to apply to the enforcement of Chinese judgments.²⁹⁶ However, one will now also have to consider the impact of the ECHR. It has been argued by a commentator that Article 6 of ECHR may "now have taken over the role of the common law defence of breach of natural justice."²⁹⁷ It has also been held by the European Court that if the judgment rendering court has fallen below the standards under the ECHR, by refusing a party's right to be heard, it will be considered a violation of public policy to recognize the judgment.²⁹⁸ There are only two enforcement cases regarding

²⁹³ In fact, one can even argue that the English court treated Chinese courts with respect. See *Impala Warehousing and Logistics (Shanghai) Co. Ltd. v. Wanxiang Res. (Singapore) PTE Ltd.*, [2015] EWHC (Comm) 811, ¶ 106 ("this court respectfully notes that the Shanghai courts have reached a different conclusion as to the incorporation of the exclusive jurisdiction clause, and has carefully considered the reasoning in that regard.").

²⁹⁴ See *Bankhaus Wolbern & Co (AG & CO KG) v. China Constr. Bank Corp., Zhejiang Branch*, [2012] EWHC (Comm) 3285.

²⁹⁵ *Crescendo Maritime Co. v. Bank of Communications Co. Ltd.*, [2015] EWHC (Comm) 3364, ¶ 53.

²⁹⁶ *Vizcaya Partners Ltd. v. Picard*, [2016] UKPC 5, para 5 (appeal taken from Gib.).

²⁹⁷ BRIGGS, *supra* note 283, at 481.

²⁹⁸ *Krombach v. Bamberski*, Case C-7/98, [2000] E.C.R. I-1935. See also *id.* at 431.

Chinese judgments, with one success²⁹⁹ and one failure.³⁰⁰ Neither of them discusses China's rule of law. However, it is noteworthy that both are shipping cases. In *Peoples' Insurance Company of China*,³⁰¹ enforcement of a Chinese judgment was rejected by the English court because of the existence of a prior arbitration award. Thus, in aggregate, seven of the nine conflict cases in England related to Chinese parties' violations of arbitration/ jurisdiction agreements, designating England as the dispute resolution forum in shipping related matters. An argument therefore could be made that English courts secretly resent the handling of such disputes by the Chinese courts in a similar way to how U.S. courts view intellectual property disputes. Finally, although it has long been the tradition for English courts to refuse the application of a foreign law that is inconsistent with rights recognized under international law, particularly human rights,³⁰² no relevant choice of law case involving a discussion on Chinese rule of law was identified.

D. Canada, Australia, and New Zealand

Research on these three jurisdictions revealed only a limited amount of cases. In addition, since the conflict rules of these countries are similar to those of Hong Kong and England, this section will only highlight any differences in the basic conflict rules and discuss the findings of the cases in summary.

1. Jurisdiction - Forum Non Conveniens

a. General Observations

The three jurisdictions have adopted similar rules to England. Australia does not separate *forum non conveniens* into two stages.³⁰³ However, it is generally thought that the Australian rules make no substantive difference in practice. Table 29 below compares the success rate and frequency that rule of law is raised in *forum non conveniens* cases between Canada, Australia, and New Zealand.

²⁹⁹ *Spliefthoff's Bevrachtungskantoor BV v. Bank of China Ltd.*, [2015] EWHC (Comm) 999.

³⁰⁰ *People's Ins. Co. of China, Hebei Branch v. Vysanthi Shipping Co. Ltd.*, [2003] EWHC (Comm) 1655.

³⁰¹ *Id.*

³⁰² See ALEX MILLS, *THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW* 278 (2009).

³⁰³ See *Oceanic Sun Line Special Shipping Co. Inc. v. Fay* (1988) 165 CLR 197, 260-61 (Austl.).

Table 29: FNC IN CANADA, AUSTRALIA, AND NEW ZEALAND

Country	No. of FNC cases	FNC success (i.e. favor China)	Rule of law discussion	Rule of law argument success (favor China)
Canada	10	1	0	0
Australia	5	2	2	2
New Zealand	3	1	2	2
Total	18	4	4	4

Source: Tsang 2018

Of the three jurisdictions in this section, Canada has the most *forum non conveniens* cases with ten cases but only one success. The success rate is substantially lower than those of Hong Kong and the United States. However, none of them discusses China's rule of law and thus one should not read too much into the relatively low success rate. Due to the limited sample size, no particular reason is identifiable for the low success rate. For Australia and New Zealand, each of them has two cases discussing rule of law of China. In all four cases, the defendants successfully convinced the courts that China's rule of law was not a problem. For example, in *CMA CGM SA v Ship 'Chou Shan'*,³⁰⁴ the Australian court decided to stay the Australian proceedings under the *forum non conveniens* doctrine in favor of the Chinese Maritime Court. In fact, the Australian court appeared to think highly of the Chinese court as indicated by the judgment: "[A]s to the submission that there are proceedings before a Chinese court that has jurisdiction over all persons and claims such that substantial justice will be done in China, in essence I accept this submission. There is no doubt that the Chinese Maritime Court is a sophisticated and experienced legal system which has already substantially embraced all of the disputes arising out of the collision."³⁰⁵

Similarly, the New Zealand court granted a stay in favor of a Chinese court in *Fang v Jiang*,³⁰⁶ despite claims of persecution of Falun Gong practitioners by the Chinese government. It was held that risk of victimization in China and difficulties in obtaining justice there were not issues which a New Zealand

³⁰⁴ [2014] FCA 74 (Austl.).

³⁰⁵ *Id.* at ¶ 158d.

³⁰⁶ [2007] N2AR 420 (HC).

court could or should properly concern itself with.³⁰⁷ There was no anti-suit case in any of the three jurisdictions.

b. Statistical Findings

This section further compares the *forum non conveniens* cases across the six common law jurisdictions. This is the only type of conflict case that merits such comparison as it has the most sizeable sample of all three types of conflict cases.

i. Summary of Cases

The following table shows the percentage of FNC cases that succeeded and those in which rule of law was discussed in each country.

Table 30: COMPARISON OF FNC SUCCESS RATE AND RULE OF LAW

Countries	FNC success results	Rule of law discussed
U.S.	14/32 or 44%	11/32 or 34
H.K.	13/48 or 27%	10/48 or 21%
England	0/1 or 0%	0/1 or 0%
Canada	1/10 or 10%	0/10 or 0%
Australia	2/5 or 40%	1/5 or 20%
New Zealand	1/3 or 33%	1/3 or 33%
All Cases	31/99 or 31%	23/99 or 23%

Source: Tsang 2018

ii. Logistic Regression

Ninety-nine cases across six jurisdictions form the base number of the regression. A regression model was produced, with logit link function using rule of law discussed as a factor, to predict the FNC result.

³⁰⁷ *Id.* at ¶ 4, ¶ 13.

Table 31: SIX JURISDICTION FNC LOGISTIC REGRESSION

Factor	Coefficient	p-value
Intercept	-1.5782	0.0000
Rule of law	2.8591	0.0000

Source: Tsang 2018

iii. Results

The results show that rule of law is a very strong factor to predict FNC, which is significant at a level of $p=0.001$. It was also found that the intercept of the model is significant at a level of 0.001. The estimated coefficient is -1.5782, which reflects a strong baseline chance of FNC failure. This finding is similar to the finding in the Hong Kong regression analysis. For the model with the rule of law factor, pseudo R square using McFadden method was calculated. It was 0.239.

iv. Interpretation

Adopting the logistic equation,³⁰⁸ it was shown that with rule of law discussed, the odds of *forum non conveniens* success increased by a factor of 2.86. This indicates that the discussion of rule of law of China in *forum non conveniens* cases in the six jurisdictions actually increases the likelihood of *forum non conveniens* success. It is difficult to think of better proof of the rule of law in China than in private international law cases since it appears that the more opportunities the common law courts have to discuss China's rule of law, the more likely it is the common law courts will send the litigation to the Chinese courts.

2. Enforcement of Chinese Judgments

There were only two enforcement cases in the three jurisdictions. They were from New Zealand and Canada. In *Chen v Lin*,³⁰⁹ the lower court judge refused to enforce the extra 30% interest (for late payment of judgment debt) placed on a Chinese judgment awarded to the appellant in New Zealand. The issue on appeal was whether the enforcement of a Chinese judgment's interest sum was contrary to the "public policy" exception.³¹⁰ The test applied by the

³⁰⁸ $(\text{Logit}(p(\text{FNC success}))) = -1.5782 + 2.8591 * \text{Rule of Law}$.

³⁰⁹ [2016] NZCA 113 (CA).

³¹⁰ *Id.* at [16]-[17].

appellate court was whether the policy in Chinese courts as to interest payments shocked the conscience of the reasonable New Zealander.³¹¹ The court allowed the appeal as it held that the extra 30% penalty charged by the Chinese courts was a matter of substantive Chinese law, and was not a policy that shocked the conscience of the reasonable New Zealander.³¹² Accordingly, the entire judgment was enforceable in New Zealand.³¹³ The Canadian enforcement case did not involve any rule of law discussion.

In summary, apart from a low success rate in Canadian *forum non conveniens* cases, there is no indication from all three jurisdictions of any resentment against Chinese rule of law status. Due to the limited sample size, the low Canadian success rate is speculative at best.

There is no relevant choice of law case relating to Chinese rule of law in all three jurisdictions.

V. CONCLUSION

Looking at all the conflict cases from all the common law jurisdictions, one can argue that China passed the rule of law test with flying colors. The argument was raised most often in *forum non conveniens* cases, but rule of law issues in China have never been a serious problem in any of the six jurisdictions. In all but one U.S. and one Hong Kong *forum non conveniens* case did the defendants fail to fend off the rule of law argument. This might be attributed to the special circumstances of the cases.³¹⁴ In addition, rule of law issues have never been successful in other types of conflict cases. This is so no matter the jurisdiction or the type of conflict case. In fact, what the statistical analysis most strongly reveals is the positive correlation between the discussion of rule of law in conflict cases and a successful pro-China result, be it dismissal of the U.S. proceeding for trial in China, or the enforcement of the Chinese judgment. As it is said in an old Chinese saying, "real gold fears no fire." It is certainly encouraging from China's perspective that China's rule of law passes rule of law challenges time and time again.

Of course, there are special areas of concern for particular countries. These include intellectual property cases in the United States and cases dealing with shipping matters in England. However, even taking into account these exceptional cases, the overall picture is still extremely positive. To say the least, as far as private international law cases are concerned, China certainly reaches

³¹¹ *Id.* at [21].

³¹² *Id.* at [22].

³¹³ *Id.* at [26].

³¹⁴ See *BP Chems. Ltd. v. Jiangsu Sopo Corp. (Group)*, No. 4:99CV323, 2004 U.S. Dist. LEXIS 27855 (E.D. Mo. Mar. 29, 2004); *Bayer Polymers Co. Ltd. v. The Indus. and Commercial Bank of China*, [2000] 1 H.K.C. 805 (C.F.I.).

the goal of the Singapore model, namely a high level of rule of law at least in commercial matters.³¹⁵

On the other hand, much of this success can be attributed to the extremely high evidentiary threshold for the rule of law argument to be successful. As highlighted by the U.S. *forum non conveniens* cases, it is difficult in a lot of cases for plaintiffs with limited resources to gather the evidence needed against the Chinese government or giant state-owned enterprises. Perhaps this is the time for all common law jurisdictions to reconsider the rule of law status of a particular country. It is not so much a bias but rather facts that can be substantiated on a national level. A lower threshold, such as to prove that just compensation will not be available instead of “some remedy” will be available in U.S. *forum non conveniens* cases, would go a long way in affording a proper forum for the plaintiffs. The intellectual property cases in the U.S. *forum non conveniens* cases clearly show that there is such a need, at least in limited types of cases. Addressing this issue properly in the availability limb would be better than the stealth practice of hiding the rule of law criticism under the guise of national interest. On a more positive note, private international law could serve as a tool for rule of law governance. As the *Tang* case and *CY-BERsitter* case show, high profile private international law cases could put a foreign government reluctantly under the spotlight in an international setting and expose many of its problems. This is sometimes far more powerful than the economic interests at stake for the litigants with national ties to the foreign country. This has the potential to prompt real changes and developments in the rule of law of a foreign country. In fact, private international law could take a more active role in promoting the protection of human rights, not just in China but across the world. This idea is not entirely novel and could even be argued to be part of the common law tradition. Justice Gray declared back in 1895 such a role of private international law in *Hilton v. Guyot*³¹⁶:

International law...including . . . ‘private international law’, or the ‘conflict of laws’, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation, - is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination.

As awareness of international human rights becomes more prominent around the world, this seems as good a time as any to consider giving rule of law a more prominent role when courts exercise their discretion in conflict

³¹⁵ See Ellis, *supra* note 15, at 209.

³¹⁶ 159 U.S. 113 (1895).

decisions. While the actual changes that need to be made are not reflected by the empirical data and analyses conducted in this particular research, it seems at least to be one of the many questions private international scholars should ask themselves. The high evidentiary threshold to prove lack of due process in a foreign trial, or the low threshold set on the adequacy of recovery under a foreign legal system in the United States are examples that one might want to reconsider. The admissibility of various status reports on a country's rule of law produced by government agencies and NGOs as evidence to be considered by the courts should also be a good starting point. It is granted that this will add some uncertainty in the application of the rules. However, these rules have never been designed as hard and fast rules, and providing justice should always be the paramount criterion.