Recent Chinese Experience in London Maritime Arbitration and Litigation

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Introduction and summary

It is estimated that as many as 90% of international shipbuilding contracts are governed by English law and that of these at least 80% are subject to London arbitration, many on Terms of the London Maritime Arbitrators Association (LMAA). Since 2009 the shipbuilding industry has suffered a prolonged depression with occasional but short lived recoveries. Many arbitrations have resulted with owners trying to get out of shipbuilding contracts or renegotiate terms, in particular to delay deliveries or reduce prices, or to cancel contracts altogether. There has been a general perception in China that Chinese parties have lost a disproportionately large number of these cases. This article will show that this conclusion is based on a rather partial view. It is true that Chinese (and other) shipyards have lost cases where the yard could not meet the long stop cancelling date and the buyers chose to cancel in a depressed freight market. However, in cases where the quality of the ship as tendered has been in issue, and in cases involving post-delivery warranty claims, Chinese (and other) shipyards have been much more successful in London arbitration. Also, outside the shipbuilding field, in traditional maritime claims, Chinese parties have been successful in many cases in London arbitration. They have also had a notable success in defending claims under a corporate guarantee of charterparty liabilities. They have been successful in securing the enforcement of Chinese arbitration awards in the English courts and the recognition by the English courts of Chinese court judgements. The following article will highlight some cases involving bills of lading and the potential clash of jurisdiction between the Chinese maritime courts and English arbitration tribunals and the use of English anti-suit injunctions in these cases and in shipbuilding cases in London arbitration.

Types of cases

The typical types of cases which come to London arbitration in the maritime sphere and which involve Chinese parties mostly fall into one of the following categories:

- Shipbuilding contracts and contracts for construction of units for use in the offshore oil and gas industry
- Charterparties of various forms

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- Contracts of affreightment for carriage of specific quantities of commodities over a given period.
- Contracts for carriage of goods evidences by bills of lading.
- Guarantees for payments under shipbuilding contracts in the form of guarantees of instalments payable by a buyer and refund guarantees give for possible repayment obligations of a shipyard in the event of a legitimate cancellation of a building contract and guarantees of obligations under charterparties.
- Claims for enforcement of Chinese arbitration awards in England.
- Claims for enforcement in England of Chinese court judgements.

Shipbuilding contracts

London arbitrators are very often involved in deciding on shipbuilding contract disputes. China is now the world's largest shipbuilder. It has overtaken Korea in most types of shipbuilding and will probably continue in that position, probably to build up an even bigger lead in years to come[2]. Shipbuilding is a major priority of the Chinese Government in promoting economic development so we will see more and more ships built in China probably involving more Chinese-made equipment components as well as more sophisticated ships such as cruise ships[3]. Very many of the disputes arising from international shipbuilding contracts and this may be expected to continue in future, London being regarded as a natural neutral venue for the resolution of such disputes by arbitration and English law being the preferred substantive law for most parties operating in the international ship construction field (as well as many other international contracts).

I want to start by saying quite a little bit about shipbuilding contracts because they are a very important part of my practice as an arbitrator and because we have seen very very many of these cases in London. There is also, I think, some misunderstanding about the results of these cases.

In international practice nearly all shipbuilding contracts have traditionally been governed by English law; nearly all of them have arbitration agreements in them; and nearly all the arbitrations have been conducted on an ad hoc basis. Some, relatively few, ICC arbitrations have been held involving shipbuilding contracts. In the maritime context shipbuilding contracts are very high value disputes. A standard ship may cost anything from $10--$30milliontо build. A cruise ship or an oil rig or other sophisticated ship may cost anything between $200 and $700 million to build. So these are very high value assets and high value disputes, of a type which in other sectors are more likely to be dealt with in an ICC arbitration or an arbitration under the rules of the London Court of International Arbitration (LCIA). But usually, in the shipbuilding field, whether there is provision for ICC arbitration or LCIA

[2] C Steidl, L Daniel and C Yildiran, 'Shipbuilding Market Developments Q2 2018' (*oecd.org*, 15 May 2018) <https://www.oecd.org/sti/ind/shipbuilding-market-developments-Q2-2018.pdf> assessed 1 Jan 2020.

[3] Maritime equipment and hi-tech shipping features as a major focus for the PRC Government's 2025 strategy (中国制造 2025) announced in 2015.

arbitration or an ad hoc arbitration, the parties will provide for not merely for English law as the substantive law of the contract but also for arbitration in London. This is partly a matter of tradition and partly because they like what they think is the certainty which is given to them by English law and, I think, thirdly, because London has a good reputation for impartiality. Now, all of those shipbuilding cases, and there have been many thousands of these shipbuilding cases in arbitration in London, really fall into one of two categories. One is where the ship has simply not been delivered by the "long stop" cancellation date. This is usually a period of either 210 days or 270 days after the scheduled delivery date. If the shipyard has simply not been able to tender the delivery of the ship within that period, the buyer is given a right to cancel the contract. If the market has fallen, the buyer may not want to take the ship and may try to find any reason for not taking the ship. If the buyer has the opportunity to cancel the contract because the ship has not been tendered for delivery in that period, there is no further force majeure provision that the shipyard can rely on. There is a force majeure provision in the traditional shipbuilding contract but this 210-day cancellation date is what we would call a "drop dead" date or a "longstop" date so that the buyer can cancel in those circumstances irrespective of any force majeure which has happened.

In a number of cases Chinese shipyards have tried to rely on the so-called "prevention principle" or the general principle of law that a party is not entitled to rely on its own wrong if it has cause the other party to miss crucial deadlines, including a cancellation date but this line of argument has hardly ever been successful because of one of the following objections: (1) the contract contains a complete code for dealing with the consequences of delay, which is said to exclude the "prevention principle"[4] or (2) because the contract entitles the shipyard to override the objections of the buyer's site supervisors[5] or (3) the shipbuilder is unable to show a causal connection between the "prevention" complained of and the delays alleged to have resulted[6].

Now, a very large number of the cases which have been heard in London are in that category because shipyards took on, at a certain point in the market cycle, far too much work and when it came for delivery of the ship and they were not able to deliver, the market had fallen very severely. The buyers didn't want the ships in a depressed market so they exercised their rights to cancel and it was very difficult for the shipyards to defend those types of cases successfully.

The other types of cases are cases where the shipyard is able to offer the ship for delivery, but the quality of the ship, or its compliance with the specification, is the issue in the dispute. Say, I am a buyer of the ship and you are the shipyard. You tender the ship to me for delivery within the cancellation date and I say, "you haven't built in accordance with the specifications and I am not going to take delivery of the ship". In those sorts of cases, although they are fewer in number, the Chinese parties, the shipyards, have been much more successful. But the reputation of London maritime arbitration in Chinese shipbuilding cases seems to have developed very much on the basis of the first

[4] See Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2) [2007] EWHC 447.
[5] See Zhoushan Jinhaiwan Shipyard Co., Ltd v Golden Exquisite Inc [2014] EWHC 4050 (Comm).
[6] Ibid.

type of case. That is the cases which are difficult to defend because the ship has not been delivered within the cancelling date. In these cases there have quite often been parallel proceedings in the Chinese maritime courts where the shipyard usually, or its trading house partner, has alleged fraud of some kind and tried to assert jurisdiction challenging the arbitration agreement and trying to stop an arbitration award which would result in a payment out of the refund guarantee.

[Box: Shipyard successes

The following is a selection of Chinese shipyards which are recorded in publicly reported cases as having been successful in London arbitration or on appeal. These cases do not include successes by Chinese shipyards in cases which they have won in private and confidential arbitrations which have not been reported. There are however known to be a significant number of such cases:

- Shanghai Waigaoqiao Shipbuilding Co., Ltd
- Jiangsu Eastern Heavy Industry Co., Ltd
- Wuhan Ocean Economic & Technical Cooperation Co Ltd
- Wuhan Guoyu Logistics Group Co Ltd
- Zhoushan Jinhaiwan Shipyard Co., Ltd
- Foreign Economic & Technical Cooperation Co of China]

I have mentioned the two main categories of shipbuilding contract cases, cancellation for delay and rejection on grounds of quality, and it is no secret that Chinese parties have lost a large number of the first type of shipbuilding contract cases in London. Some people would tell you that Chinese shipyards have lost *all* their cases in London, but this is not at all true. The cases that have been lost are nearly all cancellation-for-delay-type cases. There are two possible approaches to this experience on the part of Chinese shipyards. One is that they can say that London arbitrators are biased against them and redirect their cases somewhere else – to Singapore or Hong Kong. The other is that they can analyse why the shipyards have not been able to deliver the ships within the allotted time and before the cancellation date or in future contracts look to try to modify them to be more advantageous, or less disadvantageous, to the shipyard in delay situations.

I have referred to some of the criticisms that have been raised of London maritime arbitration. At the the Marintec conference which was held in Shanghai two years ago it was alleged that the Chinese shipyards "were not being fairly and impartially treated in London arbitration" and that "the Chinese shipyards' current management standards operation mode and idea about dispute resolution did not accord with the practice of London arbitration". One of these quotations comes from the China Maritime Arbitration Commission; the other one from a very prominent maritime lawyer in China who also suggested that because the shipbuilding industry in England was not flourishing (不兴旺) parties should be more inclined to look to Chinese law and arbitration to resolve disputes under international shipbuilding contracts. This, it is respectfully suggested, is not really a relevant consideration in choosing a system of law and or a dispute resolution venue in an international shipbuilding contract. What parties seek above all is neutrality and predictability, both of which are regarded by most international parties in the shipping industry as particular hallmarks of London arbitration. If anything, the absence of English or British shipowners and shipyards from the international marketplace tends to mean that London is even more than in the past a neutral venue for the determination of international shipbuilding disputes. Coupled with this is the availability of a right of appeal from the

award of an English-seated arbitration tribunal to the English Commercial Court on a point of law. This is much favoured by those in the shipping industry as a "safety valve" even if few such appeals are ultimately successful, but it is a procedure not available in almost any venue other than England, since almost all other countries have adopted the UNCITRAL Model Arbitration Law which does not allow for such a right of appeal. In current circumstances, and possibly not for some years to come, it is probably not realistic to expect that foreign parties will be prepared to choose Chinese law and/or arbitration in international shipbuilding contracts, even though the reputation of some arbitral bodies in China, notably CIETAC continues to improve internationally.

From the Chinese perspective it might be suggested that a more reflective approach might be useful in these circumstances, and to look at the things which might be done – some of them a matter of contract management – some of them a matter of litigation management or arbitration management - to avoid losing these types of cases in future. Some of these are matters for the shipyards' internal management processes to avoid disputes coming to the surface at all; others are matters of litigation or arbitration management when a dispute has arisen or is likely to arise.

[Box:

Focus points for shipyards: contract and arbitration management

- Whole process review of contract and specification with involvement and participation of legal personnel
- Strict compliance with contract
- Do not be afraid of serving notices of delay to comply with contract
- Select and appoint lawyers timely and appropriately
- Selection and appointment of arbitrator
- Determine an overall strategy at outset and then find out all essential defence points
- Witness statement preparation]

The selection and appointment of the arbitrator is obviously extremely important. Preparation of witness statements are also very important as is a serious approach to the process of document disclosure. A year ago the LMAA held a seminar to try to make London arbitrators aware of the differences between Chinese practice in arbitration and litigation and that in London. One of the big differences we found is that we rely heavily on witness evidence in London arbitration. In commercial proceedings in China, there is little cross-examination of witnesses or indeed witness evidence at all. In London, cross-examination of witnesses is likely to be the main part of a hearing and witnesses are subject to really quite testing cross-examination. They may not like it. The witnesses may be quite senior officers in some of these companies and they may not like being asked really very direct questions by counsel in London arbitration. So, it is quite important to prepare them for what is going to happen to them in the arbitration hearing because otherwise they will go to the arbitration and they will immediately be put in the headlights. In practice, we do not have oral "evidence in chief". In other

words the witness is not invited to tell his or her story. The witness will have given a written statement. The arbitrators will have read the witness statement and they will know exactly what the witness wants to say in the witness statement. So, when the witness gives evidence he or she will immediately be subjected to cross-examination and that can be a very unsettling experience. I have given evidence in an American case some time ago and it can be quite unnerving. So it is a good idea to make sure that the witness in a London arbitration is going to be well prepared. There are limits, of course, to the extent to which you should be "preparing" a witness and telling them what to say but nevertheless you should give them a flavour of what they are likely to be asked and the process in the arbitration room.

This is one example of the way in which shipyards can improve their litigation or arbitration case management. The last ten years since the financial crisis have been a very bitter experience in many cases, but it seems now that Chinese shipyards have learned important lessons, not only in terms of their internal management procedures, but also in terms of the way in which they manage and present their cases in London arbitration.

Most of the maritime cases publicly reported in England are appeals from arbitration awards. Of course, arbitration awards are private, as is the case in China. The proceedings are confidential, and is not permissible to report them unless both the parties agree to it. Sometimes the parties' agreement is obtained but very often the losing party doesn't want the result of the arbitration publicised, so it doesn't become public. But if the losing party appeals the arbitration award, then that will come into the public arena because the appeal will go to the Commercial Court and those proceedings are public and may be published in the Law Reports.

Finally on the subject of shipbuilding contracts, I would mention anti-suit injunctions (a subject which will be expanded on in the next section in connection with cases concerning bills of lading and contracts for the carriage of goods by sea). In spite of the express agreement for London arbitration in most international shipbuilding contracts, there have been several cases in recent years, where the shipyard has deliberately taken steps to instigate competing proceedings in local courts in order to serve its interests, including two important reported English cases. In these cases a fraud allegation was made before a Chinese maritime court, as a result of which it is argued that the shipbuilding contract and the associated refund guarantee issued by the shipyard's bank were tainted by illegality and thus unenforceable. The aim is to relieve the bank refund guarantor from its payment obligations under the guarantee.

This was the situation in the English Commercial Court case of **Spliethoff's Bevrachtingskantoor BV v Bank of China Ltd**.[7] There, the newbuildings, the subject matter of two shipbuilding contracts between the buyer, Spliethoff's Bevrachtingskantoor BV, one of the largest Dutch ship operating companies, and a Chinese shipyard (Rongsheng Shipyard, usually known in China as Xi Xia Kou),

[7] [2015] EWHC 999 (Comm). For a further discussion on the issue of enforcement of Chinese court judgments in England see below.

had not been delivered on time. Both contracts contained the usual provisions entitling the buyer to terminate the contracts if the ships were not delivered within the "long stop date". This had passed and the buyer duly claimed to terminate the contracts. Both contracts provided for dispute resolution by way of arbitration in London. Having terminated the contracts, the buyer asked for a refund of the advance instalments which was rejected by the shipyard. The buyer then commenced arbitration proceedings in London pursuant to the arbitration clause contained in the contracts and obtained an award in its favour. In parallel, the shipyard instituted proceedings against the buyer and the manufacturer of the ships' main engines (Wärtsilä) in the Qingdao Maritime Court in China, claiming that the buyer had committed fraudulent conspiracy by agreeing with the engine manufacturers that second hand engines would be supplied to the yard for installation in the ships. *Ex parte* interim orders were made by the Chinese court thereafter, preventing any payment out under the refund guarantees provided by the Bank of China for what was apparently a limited period. It was clear that at that stage the Chinese litigation was in almost certainly in contradiction to the arbitration clause agreed in the contracts. The buyer therefore successfully applied to the English High Court for anti-suit injunctions in support of London arbitration, restraining the yard from continuing its proceedings in China[8]. This case excited great controversy in China and the "fraud" proceedings went all the way to the Supreme People's Court before being dismissed.

Another prime example is **Crescendo Maritime Co & Anor v Bank of Communications Company Limited & Ors**,[9] a case concerning the false backdating of a shipbuilding contract (a practice which became quite common in an attempt to avoid the need to comply with new regulatory requirements relating to tank coatings). The contract in this case was terminated following the breakdown of the parties' relationship and the buyer's claim to be entitled to terminate the contract, again for delay beyond the contractual "long stop date". London arbitration was commenced in accordance with the terms of the shipbuilding contract. After an award was obtained by the buyer the refund guarantor, a Chinese bank, refused to pay out under the guarantee, on the ground that it was unaware of the backdating issue, which had amounted to fraud. The tribunal joined the bank as a party to the arbitration proceedings.[10] Later the bank stopped participating in the arbitration and commenced proceedings in China, seeking declarations of non-liability under the refund guarantees and managed to obtain a ruling to that effect. Upon learning of the duplicative Chinese litigation, the buyer of the ship sought an interim anti-suit injunction from the English Commercial Court in favour of London arbitration. On the other side, the arbitration proceeded to awards, where the bank was found to be conscious of the backdating and the allegations of fraud were therefore dismissed. Finally, a permanent anti-suit injunction was granted to stop the bank from proceeding against the buyer in China.

[8] The scope of the orders made by the Chinese maritime court as a matter of Chinese law was disputed in the English proceedings; the Chinese expert legal experts who gave evidence differed as to whether the orders were time limited and had expired and as to whether Bank of China might incur penalties in China if it did not comply with them.

[9] [2015] EWHC 3364 (Comm).

[10] There was a London arbitration agreement in the refund guarantee as well as in the shipbuilding contract

The above decisions have demonstrated the English courts' pro-arbitration approach and their willingness to grant anti-suit injunctions to uphold the sanctity of arbitration agreements, even in cases where fraud-based claims are asserted. In a case where the refund guarantor's assets are likely to be available to be attached outside China to enforce the payment obligation under a refund guarantee, the parallel Chinese proceedings are likely ultimately to prove ineffective to prevent the refund guarantor from having to pay out under the guarantee, as both Bank of China and Bank of Communications found in the above cases.

Charterparties

The second type of contract which is very often involved in maritime business is the charterparty. In simple terms charterparties are contracts for the hire of ships, and they fall into three principal categories. One is the bareboat charter where the owner gives up the whole of the management of the ship to the charterer and probably only retains a financial interest in the ship. That is of interest at the moment in China because there are many leasing companies, for example subsidiaries of banks like ICBC, who are involved in ship leasing activities. In fact, Chinese leasing companies have now become probably the most important source of finance in the shipping industry. It may well be that in a ship financing transaction a single purpose subsidiary of, say, ICBC will buy a ship, a new ship from a shipyard or a second hand ship from its previous owner, and will charter it out or lease it out on a bareboat charter. In accounting terms this is the same, effectively, as a finance lease (or less frequently a long term operating lease) where the owner recovers substantially the whole of the investment cost of the ship over the period of the charter. The charterer will insure and provide crew for the ship and often let it out to another charterer to use in its business of carrying cargo.

Another type of charterparty is a time charter which is a contract for the leasing of a ship for a finite period and may be anything from one trip, for example, from Shanghai to Indonesia and back or it might be for a period of time, like five or ten years. But in this case the owner, or effective or "disponent owner" will have some responsibility for the appointment of the Master and crew and operation and management of the ship and will not contract this out to the charterer as in the case of a bareboat charter, although the charterer will be responsible for the supply of bunkers to the ship.

A third type of charterparty is a voyage charter where someone who owns or charters the ship will let it out just for one voyage. For example, from Shanghai to Brazil or the home port and then a return voyage to the home port.

Internationally, like shipbuilding contracts, most charterparties are governed by Englsih law which is expressly chosen by the parties and a very high proportion of them are subject to London arbitration on the Terms and Procedures of the LMAA[11]. They are very rarely the subject of court proceedings in the first instance. However, appeals from arbitration awards to the Commercial Court and beyond are

[11] The London Maritime Arbitrators Association

generally published in the official Law Reports and therefore form part of the body of the English common law.

There are many hundreds of English court decisions on particular aspects of the obligations arising under standard form of charterparties and the relative certainty which derives from being able to refer to this body of decisions is an important factor in the selection of English law and frequently English arbitration in relation to such charter contracts.

Many of the established Chinese shipowners and operators, like COSCO, SINOCHART, SINOTRANS and SINOPEC are thoroughly familiar with conducting arbitrations in London to enforce charter obligations and it is I think fair to say that they have a good success rate in winning such cases.

Contracts for the carriage of goods: Bills of lading and anti-suit injunctions

Reverting to the categories of maritime cases, I have mentioned shipbuilding contract cases and cases concerning charterparties. I should also mention bill of lading disputes. These are, unfortunately, a common source of friction between the Chinese courts and London arbitration. The following is an example of the sort of case. A cargo is delivered from Africa to a Chinese port by a ship which is on a time charter. The time charterer issues bills of lading for the carriage of the goods. The bills of lading are the title for the goods, they are a receipt that the goods have been loaded on board the ship and they also are evidence of the contract of carriage of goods by sea between the shipowner and the holder of the bill of lading. Ultimately the bill of lading will have to be presented to the Master by the consignee of the cargo to have the goods released at the delivery port. There are often major disputes as to whether arbitration agreements which are contained in the time charter party have been effectively incorporated into the bill of lading so as to bind the consignee in China. So, for example the goods, a cargo of iron ore, are delivered at Qingdao and the consignee in China, the person to whom the goods are to be delivered, says “you have not delivered enough of it”. There is a short delivery or “the goods are not in the condition in which I expected to receive them”. The first thing that will happen is that the consignee will go to the maritime court in Qingdao and have the ship arrested as security for the cargo claim. The shipowner, and the charterer, will say “but there is an arbitration agreement” in the bill of lading because there was one in the charter party and it is referred to and effectively incorporated in the bill of lading. The problem then is that the English rules about incorporation of arbitration agreements and bills of lading and the Chinese rules about incorporation of arbitration agreements of charter parties and bills of lading are different, so that the Chinese courts will assert jurisdiction and the shipowner will say “No, the English arbitration tribunal has jurisdiction” on the basis that the underlying charterparty and the bill of lading are both expressly governed by English law and subject to English arbitration . A very major conflict will develop.

A consequence of this may be an application to the English court (or in one controversial case the Chinese court) for an anti-suit injunction. This is a frequent source of friction. In the situation described above, where there is a short delivery or a complaint about the condition of the cargo being delivered in China, the consignee will go to the Chinese court and the owner will say “no, I want

arbitration in London" and he or she will try to get an anti-suit injunction from the London court to stop the proceedings in China. It is important to understand that an anti-suit injunction is not directed at the Chinese court; it is not a derogation of Chinese sovereignty. It is directed at the parties to the proceedings. It doesn't attempt to bind the Chinese court. The court can do whatever it does but there are consequences if one of the parties disobeys the anti-suit injunction. For example, if they come within the personal jurisdiction of the English court then they could be, for example, arrested for contempt of court if they come to England, even just transiting through London airport[12]. Also a party may be liable in damages for breach of the arbitration agreement by trying to litigate in the Chinese court.

In these types of cases, the receiver frequently seeks to sue the shipowner in the local Chinese court where the goods are delivered, while the shipowner on the other hand, wants to have the dispute resolved by English arbitration pursuant to the relevant bill of lading which purports to incorporate the arbitration clause of an underlying charterparty. The English and Chinese law principles governing the incorporation of charterparty terms into bills of lading are significantly different. The Chinese courts have adopted a rigid approach and tend to reject the validity of the arbitration clause incorporated in the bill of lading, whereas the English courts will frequently give effect to it. In such circumstances the use of an English anti-suit injunction is an important technical device in the armoury of the shipowner to protect its contractual right to arbitrate in England.

A real case in point is **Starlight Shipping Co v Tai Ping Insurance Co Ltd**.[13] The owner had chartered its vessel, Alexandros T, subject to an arbitration agreement which was incorporated into a bill of lading. The vessel was lost together with her cargo on a voyage from Brazil to China. The insurers of the cargo, having paid out on the loss of the cargo, brought court proceedings in China against the owner, the manager and the head charterer, maintaining that the arbitration clause in the bill of lading was ineffective as a matter of Chinese law. The cargo owners and insurers also began arbitration in London under a reservation as to jurisdiction of the arbitral tribunal. The shipowner then applied for an anti-suit injunction to restrain the defendants from taking any further steps in respect of the Chinese proceedings. In granting an interim anti-suit injunction, the English High Court held that, as a matter of English law, the insurers are, as is the case with the cargo receiver, bound by the arbitration clause in the bill of lading, and that Chinese law is irrelevant to the question since 'the cargo claim is one which gives rise to a dispute "arising under the contract" and is therefore arbitrable'.[14] The English Court therefore granted the anti-suit injunction even though it was clear that Chinese jurisprudence would not regard the cargo insurers as being bound by the arbitration clause in the bill of lading.

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[12] For an recent example of the consequences of disobeying the order of the English court in relation to a freezing order see the report of Lakatamia Shipping Co Ltd v Morimoto [2019] EWCA Civ 2203: https://7kbw.co.uk/court-of-appeal-restores-e27m-worldwide-freezing-order/

[13] [2007] EWHC 1893 (Comm). For a similar application of the principle see also Niagara Maritime SA v. Tianjin Iron & Steel Group Company Limited [2011] EWHC 3035 (Comm).

[14] Starlight Shipping Co v Tai Ping Insurance Co Ltd [2007] EWHC 1893 (Comm) at para. 14.

Chinese interests may also be caught in the trap of an English anti-suit injunction even if they are not party to an arbitration agreement. A case in point is **Qingdao Huiquan Shipping Co v Shanghai Dong He Xin Industry Group Co Ltd**.[15] The case is particularly interesting in the cargo claim context. In this case it was the Chinese shipowner who sought an anti-suit injunction from the English court to restrain the court action in China. The dispute arose from a settlement agreement between the Chinese shipowner and a cargo receiver, under which the latter agreed to pay a sum of money through the receiver's agent in respect of the time charterers' default in payment of hire in return for the lifting of the lien and the release of the cargo. In the settlement agreement there was an arbitration clause providing for all disputes "arising under, out of or in connection with" the agreement to be resolved by arbitration in London. Note that the receiver's agent was not, in any event, a party to that agreement. Three years later the receiver's agent brought proceedings before a Chinese court, claiming a refund of the sum paid to the owner under the charterparty and alleging that there had been a separate oral agreement between it and the owner not containing an arbitration clause. The Chinese shipowner then applied to the Commercial Court for an anti-suit injunction against the receiver's agent to restrain the Chinese proceedings.

Giving judgment on the owner's application, Bryan J referred to the existing case law which has established that, it was possible to obtain an anti-suit injunction against a non-contracting party when that party asserted its claim on rights arising out of a contract which was subject to arbitration of disputes. In doing so the claimant was bound by the subject contract and in particular, the forum clause contained in it. The question then to be determined was whether the agent's claim was substantively based on the settlement agreement or whether it was independent. The judge found that the agent was effectively seeking to rely upon the terms of and rights arising under the settlement agreement, notwithstanding the fact that its court proceedings in China was formally based on the alleged oral agreement. As a consequence the agent was also obliged to take the burden of the arbitration clause contained in it. Accordingly, it was held that, where the foreign claimant is indeed bringing a contractual claim inconsistently with a jurisdiction clause in that contract, an injunction will be granted even in cases where privity of contract is not present. This case can be seen as a paradigm of Chinese parties' confidence and maturity in utilising foreign procedural rules to safeguard their interests.

Lastly, I would mention that, while the English court has the power to issue an anti-suit injunction, an unnecessary delay in seeking the injunction where the foreign proceedings were already far advanced may result in an otherwise strong application being rejected by the English court. In such cases Chinese parties have been successful in withstanding the potential threat from the English courts. For example In **The Kishore**,[16] the applicant for an anti-suit injunction had waited for more than nine

[15] [2018] EWHC 3009 (Comm).
[16] Essar Shipping Ltd v Bank of China Ltd (The "Kishore") [2015] EWHC 3266 (Comm). See also Pan Ocean Co Ltd v China-Base Group Co Ltd (1) & Beihai Xinan Petrochemical Co. Ltd [2019] EWHC 982 (Comm), where the judge found that the relevant contract did not contain an exclusive jurisdiction clause in favour of the English courts, and went on to conclude that even if there had been a binding

months after the commencement of proceedings in China before it sought an anti-suit injunction in England. The English High court therefore refused the application on the basis that the relief was not sought promptly.

From a carrier shipowner's perspective these problems often arise because of the basic differences between the English and Chinese law approaches to incorporation of charterparty arbitration clauses. The English law on this subject has developed through a significant number of reported cases over the last century and is widely followed by other common law countries [17]. A certain body of caselaw has recently developed in China[18] but it is respectfully suggested that the Chinese decisions at the level of individual maritime courts are not wholly consistent or predictable and in some cases unreasonably favour Chinese consignees or their insurers. For example the Chinese courts have generally refused to recognise that a cargo insurer claiming in right of a bill of lading holder should be bound by the same obligations as the holder of the bill, including the arbitration agreement. No doubt this battle of jurisdictions in cargo cases will continue for some years to come.

I know there is a view in China that these anti-suit injunctions are a matter of interference with Chinese sovereignty, that they are easily obtained by owners and that they are a frequent bar to proceedings in the Chnese maritime court. In fact, it is quite difficult, and, as I see it, becoming in fact increasingly difficult for a shipowner to obtain an anti-suit injunction in order to stop the proceedings in China. As in the **Qingdao Huiquan** case cited above however, Chinese shipowners delivering cargo to Chinese ports may find the English approach more appealing even if consignees in China and their insurers will inevitably favour litigation in the Chinese courts.

Corporate guarantees: a flexible attitude of the English court to different corporate procedure and behaviour?

Jiangsu Shagang Group Co Ltd v Loki Owning Company Ltd: [2018] EWHC 330 (Comm) was a case concerning a guarantee of charterhire payable by a subsidiary and provides an illustration of the extent to which an Englsih court has been prepared to take into account practices in China in sanctioning important transactions entered into by a major company which were quite different from those which might have been expected in England or many other jurisdictions.

A subsidiary of Jiangsu Shangang Group Limited had entered into a charterparty for a ship to carry iron ore for its steel mill in China. The charterer defaulted in payment of charrterhire and the charter was terminated. About US$70 million was involved in this case. The parent company in the Shagang Group had given guarantees for the obligations of the chartering subsidiary under the long term charter entered into by it. The shipowner who let the ship to the Chinese subsidiary sued the Shagang

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exclusive jurisdiction clause, he would have declined to grant an anti-suit injunction on the basis of delay.

[17] Since Thomas v Portsea Steamship Company Limited [1912] AC 1

[18] See Liang Zhao and Lianjun Li: The Incorporation of Arbitration Clauses into Bills of Lading under the PRC Law and its practical implications Arbitration International, 2016 and Zhao and Li: Maritime Law and Practice in China, 2017, paragraphs 6.23 through 6.28

parent company under its guarantee. There was an arbitration agreement in the guarantee and the arbitration tribunal found in favour of the foreign shipowner and against the Chinese party. The Chinese party which had given the guarantee appealed to the English Commercial Court and won. This is I think important because it shows that the English court is prepared to accept that there are different ways of doing business in China to the way which a public company, for example in England or America or Europe, might do business. This was a company which was very much controlled by one shareholder and that shareholder was accustomed to approve or not to approve things which were done by the company with very little corporate documentation.

The judge said this:

"The absence of any record or formal documentary reaction (either within JSG or Shagang) to the discovery of the Guarantee in late 2010 is surprising, at least to an English lawyer's eyes. However, allowances must be made for differences in working practices. It is clear that much of JSG's dealings (such as the giving of authority by SWM for guarantees) went undocumented. Additionally, it is apparent that JSG's record keeping systems were very far from perfect…"

Nevertheless the judge accepted that the guarantee which was the subject of the case had not been properly authorised and the claimant shipowner went away empty handed.

From cases such as this it would be hard to say that the English court was in some way prejudiced against the position of the Chinese party. The non-Chinese party in this case certainly had a different view.

Enforcement of Chinese arbitral awards

Turning to the enforcement of a Chinese arbitration award, **Sinocore v RBRG (UK) Ltd** [2018] EWCA Civ 838 is a relatively recent case where an award of a CIETAC arbitral tribunal with a Chinese "seat" was approved for enforcement in England under the New York convention. This was despite the fact that there was an allegation of fraud and illegality affecting the bills of lading which were involved in the case. Under the New York Convention, public policy can be a defence to an application to enforce a foreign arbitration award. The court drew a distinction between domestic public policy (that is English domestic public policy in this case) and international public policy and decided that as a matter of international public policy the award should be upheld despite the alleged illegality which might have been a bar to enforcement in the case of a domestic English arbitration award. So, a Chinese party can be confident, I believe, that awards which are properly rendered by Chinese arbitration tribunals will be enforced under the New York Convention in England.

Conversely, we know from our experience in the LMAA that awards made by "ad hoc" LMAA tribunals are regularly approved for enforcement, where necessary by the Chinese Supreme People's Court, and that very few have actually been refused enforcement.

Recognition and enforcement of Chinese court judgements

Finally, on the recognition of Chinese court judgments, there is no multi-lateral treaty governing the enforcement of court judgements as there is governing the enforcement of arbitration awards. There is no equivalent of the New York Convention regarding the mutual recognition of court judgments. However, the question whether the English court would enforce the judgement of a Chinese court came for decision in the case of **Spliethoffs Bevrachtingskantoor BV v Bank of China Ltd** (mentioned above in the context of parallel proceedings in China in a shipbuilding contract dispute).

This case aroused considerable controversy in China. The shipowner claimed in arbitration for the refund of instalment payments under its contract with the shipyard[19] on the basis that it had properly cancelled the contracts for delay. The shipyard brought parallel proceedings in the Qingdao maritime court in China claiming against the shipowner and the supplier of the main engines, Wärtsilä and alleging that they had conspired to supply engines which were not the new engines as required by the shipbuilding contracts. These Chinese proceedings eventually went to the Supreme People's Court which dismissed the claim by the shipyard. The reported English case concerned a refund guarantee given by Bank of China. Bank of China tried to challenge the arbitration award and avoid payment under the refund guarantee because the bank claimed that it was restrained from paying out by an order of the Qingdao Maritime Court. There was some controversy about whether the Chinese court judgement was in fact binding on the Bank of China and did in fact prevent it from making the payment. But the English court did quite clearly recognise that the Chinese court's judgement was enforceable as such as a matter of principle under the English Senior Courts Act and that that is could be enforced. The judge (the same judge as in the Shagang case mentioned above) said this:

"*In my judgment, it is clear as a matter of English law that, in choosing to fully defend the claims against it in the [Chinese] proceedings after the final dismissal of its jurisdictional challenges in the Supreme Court, [Spliethoffs] is to be treated as having "otherwise submitt[ed]" to the jurisdiction of the Chinese courts, subject to s.33(1)(c) of the CJJA...".*……."*Here, having unsuccessfully challenged jurisdiction, [Spliethoffs] appeared at trial and made substantive submissions on the facts and the law. When it lost in the [Qingdao Maritime court], it appealed to the Shandong High Court and then applied to the Supreme Court for a retrial. Under English law principles of private international law, that was submission." …….[Spliethoffs] seeks to rely on s.33(1)(c) of the [English Civil Jurisdiction and Judgments Act] on the basis that it should not be regarded as having submitted because it appeared in China to protect or obtain the release of property seized or threatened with seizure in the proceedings. The difficulty for [Spliethoffs] is that, whilst it did submit for the purpose of seeking to lift the [Chinese court] orders, it was unsuccessful in doing so and then went on to defend the claims fully on the merits. …….I therefore conclude that [Spliethoffs] is to be treated as having submitted to the jurisdiction of the Chinese courts."*

[19] The shipyard in question is known in China under its name Xi Xia Kou ("XXK") (in English the shipyard is usually known as "Rongsheng").

This decision is also I think likely to be important in considering the question of reciprocity. In proceedings in future to enforce an English court judgement in China. The Chinese courts, if asked to enforce an English court judgement, will inevitably ask the question "Will the English courts enforce a Chinese court judgement?" and the answer is in principle yes, at least if the foreign party has defended the Chinese proceedings and effectively submitted to the jurisdiction of the Chinese court.[20]

Conclusion

This summary may I hope give some insight into maritime arbitration proceedings in London and related litigation involving Chinese parties. I hope that it may help to disprove the suggestion that the English courts and English maritime arbitration tribunals are in some way biased against Chinese parties. It is I think clear from these recent decisions that they will decide the cases which come before them strictly in accordance with the contractual agreements entered into by the parties and the evidence presented to them.

[20] See: Recognition and enforcement of foreign court judgment in China – from the perspective of recognizing an English court judgment: Yang, Luo and Xiao; The Ninth International Conference of Maritime Law, Shanghai October 2018.