JONES DAY

COMMENTARY

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Foreign Companies' Victories in Chinese Courts Support *Forum Non Conveniens* Motions in U.S. Courts

IN SHORT

The Situation: A series of recent intellectual property case victories by foreign plaintiffs against Chinese companies in Chinese courts has relevance for the *forum non conveniens* doctrine as a critical defense motion in U.S. courts. Under that doctrine, Chinese companies that are sued in U.S. state and federal courts can petition the American court to have the case suspended and refiled in a Chinese court.

The Result: These high-profile victories, although all stemming from trademark disputes, support the general notion that foreign companies can receive favorable judgments in Chinese courts.

Looking Ahead: In light of such victories, Chinese companies sued in U.S. courts should always consider the *forum non conveniens* doctrine as part of their legal defense strategy. Chinese companies should cite examples like these to educate American courts that foreign plaintiffs can receive favorable outcomes in Chinese courts even against Chinese defendants. Such arguments could make American courts more willing to transfer U.S. cases into Chinese jurisdiction.

So far this year, three foreign companies have received well-publicized, favorable judgments against Chinese competitors in Chinese courts. In June 2017, the American sports apparel company Under Armour Inc. won a trademark infringement lawsuit against a Chinese company that called itself "Uncle Martian." The court awarded Under Armour approximately US$300,000 in damages as well as required Uncle Martian to destroy all infringing products. Then, in August 2017, the American footwear company New Balance won a similar suit in Suzhou against a Chinese company known as "New Boom." New Boom copied New Balance's famous N-shaped logo. The court awarded New Balance US$1.5 million in damages. Finally, in September 2017, Singapore-based EtonHouse International Education Group won a trademark case in the Beijing Intellectual Property Rights Court against the Chinese "Etonkids International Group" and was awarded about US$125,000.

These victories, while all from trademark cases, underscore an important and general principle of American jurisprudence for foreign companies. As stated in *Cooper v. Tokyo Elec. Power Co.*, "The doctrine of *forum non conveniens* allows a court to dismiss a case properly before it when litigation would be more convenient in a foreign forum." In such motions, the defendant has a burden of establishing, among other factors, that there is an "an adequate alternative forum"—that is, a forum "where the defendant is amenable to service of process and the forum provides 'some remedy' for the wrong at issue." Cases like these support this proposition.

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When Chinese defendants file *forum non conveniens* motions to transfer cases to China, plaintiffs oppose them vigorously. Plaintiffs often carefully select their venue based on convenience and the maximum likelihood of success. Once a plaintiff has filed suit in an American court, he or she is generally unwilling to transfer the suit to another venue, especially a foreign court with which they may be much less familiar.

In the context of motions brought by Chinese defendants, plaintiffs often allege, *inter alia*, that Chinese courts are insufficiently independent and do not provide adequate safeguards to foreign litigants. Plaintiffs argue that there is protectionism that favors home parties. They also argue, as the plaintiff did in *Jiangsu Hongyuan Pharmaceutical Co., Ltd. v. DI Global Logistics, Inc.*, that Chinese courts are substantially susceptible to "excessive trial delays, obstructive legal counsel, corruption, lack of legal safeguards, and undue influence by political leadership."

U.S. courts generally have rejected these arguments. The courts observe that Chinese courts provide many of the same causes of action and scope of remedies as U.S. jurisdictions. These courts, as was the case in *CYBERsitter, LLC*, also emphasize that the Chinese legal system "possesses an independent judiciary capable of adjudicating civil disputes." These courts have dismissed as speculative the often-raised argument that Chinese courts are susceptible to bribery and influence from the government. In fact, the U.S. Supreme Court in *Sinochem Int'l. Co., Ltd. v. Malaysia Int'l Shipping Co.* (in which Jones Day represented the prevailing appellant) implicitly recognized that "China provides an adequate alternative forum for American litigants."

High-profile victories for U.S. plaintiffs against Chinese companies, such as the ones described above, support these findings. At least one court has cited such examples as a basis to uphold transfer of a case to Chinese court. In that case, the California Court of Appeal relied on examples provided by legal scholars of American litigants obtaining favorable results in Chinese courts. The court highlighted an example of "airplane crash victims" receiving "substantial monetary awards" in a court in Shanghai.

Conclusion

A defendant raising a *forum non conveniens* motion in favor of Chinese courts must prove other factors beyond the overall adequacy of the Chinese legal system, namely that the Chinese law "provides for litigation of the subject matter of the dispute and potentially offers redress for plaintiffs' injuries," and that "the balance of private and public interest factors favor dismissal" of the case from the U.S. court. These are fact-specific factors that apply differently from case to case. Examples like those of Under Armour, New Balance, and EtonHouse, however, help defendants counter the frequent and generalized argument that foreign companies cannot get justice against Chinese companies in Chinese courts.

THREE KEY TAKEAWAYS

1. Under the *forum non conveniens* doctrine, Chinese companies facing lawsuits in U.S. courts can petition to have the matter relocated to a court in China.
2. Recent rulings for Under Amour, New Balance, and EtonHouse International seem to indicate that foreign companies can receive favorable judgments in Chinese courts.
3. Chinese companies facing legal actions in the U.S. should consider the *forum non conveniens* doctrine as part of a defense strategy but should also be prepared to cite and prove factors that support the change of venue.

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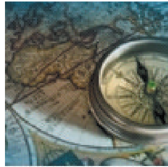
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