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# Chinese divorce cases in an international context

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Ku,Rita and Hewitt, Philippa:Chinese divorce cases in an international context The divorce of Chinese gaming entrepreneurs Zhou Yahui and Li Qiong last year was said to be China's most expensive divorce, with Mr Zhou ordered to give his wife a 25% stake worth US$1.1bn in Kunlun, one of China's biggest tech businesses and a 60% stakeholder in Grindr.

Mr Zhou retains a controlling stake of 34.5% in the company, with Li agreeing not to trim her shareholdings in the company's shares until January 2018. Nevertheless, the split demonstrates how divorce can have a significant impact on the commercial ventures of some of China's wealthiest individuals. This follows a number of high-profile and high-value divorces, including the exorbitant settlement between Wu Yajun, the billionaire chairwoman of Hong Kong listed property developer Longfor Properties, formerly China's richest woman, who paid her husband Cai Kui over HK$20bn, or US$2.75bn, in 2012 by transferring 40% of her shares to him.

Divorce rates in China are on the increase according to China's Ministry of Civil Affairs. Considering the huge population which currently stands at 1.38bn, in 2007, divorce was relatively rare, at approximately 1.6m: in 2015 this had increased to 2.8m.

As Chinese culture changes, people are becoming more open about discussing their divorce, but the legal process can be a complicated one if a separating couple is unable to reach a settlement. For couples like Mr Zhou and Ms Li, where there are large assets at stake and potentially international interests too, this is made even more difficult by the Chinese courts' reluctance to deal with assets outside China. This poses a huge challenge for parties seeking to achieve real finality without further litigation.

As family law practitioners in Hong Kong, we have seen a significant increase in the number of cross-border marriages, divorces and divorces involving Chinese nationals with assets held internationally over recent years. It is not uncommon for one spouse to seek the jurisdiction of Hong Kong for the dissolution of their marriage where there are connections both with Hong Kong and the PRC either in lifestyle, financial connections or both. The ultra-rich in China will typically have assets globally, but there are often very close ties with Hong Kong as it may be that one spouse originated from there, or the children were born there, or they divide their time equally between the two. Therefore, increasingly, family lawyers in Hong Kong must acquaint themselves with the law in the PRC to assess the risk to their client should one spouse successfully argue that the correct jurisdiction to determine the matter on the facts is the PRC.

Hong Kong has traditionally followed England and Wales in matrimonial law: many of the statutes are identical in wording and many of the major cases in England have been followed in the Court of Final Appeal in Hong Kong: in particular *White v White (LKW v DD* [2011] HKFLR 106), *Charman (Kan Lai Kwan v Poon Lok To Otto and Another* [2014] HKFLR 329) and *Radmacher (SPH v SA (Forum and marital agreements)* [2014] HKFLR 286). Hong Kong has therefore been dubbed the 'divorce capital of Asia' in the same way as London was the 'divorce capital of the world'. Naturally the financially weaker spouse will often prefer therefore to finalise his or her divorce in Hong Kong if possible. In Hong



Kong we have the concept of 'substantial connection' which will allow a party to issue a divorce in Hong Kong should it be proved on the facts that at least one of the parties had a substantial connection with Hong Kong. The parties do not have to have a substantial connection with only one jurisdiction and very often we see cases which then go on to consider the concept behind forum non conveniens to ascertain which would be the more appropriate venue. To be substantial it must be more than temporary or transitory. As Judge Hartmann said in *S v S* [2006] 3 HKLRD, it was 'not the intention of the Legislature to create a convenient off-shore divorce jurisdiction'.

Therefore cases concerning forum are common in Hong Kong. The principles are well established but an important element, which is often relevant in such cases involving Hong Kong and the PRC is that, should the court agree that there is another jurisdiction which could appropriately hear the matter, would the party seeking to challenge jurisdiction in the PRC lose a juridical advantage. In this circumstance a balance between the different systems and procedures must be considered. One of these considerations is the problem of recognition and enforceability of orders vis-à-vis Hong Kong and the PRC. The other is a difference in the ability to gain full and frank disclosure in the PRC and, in particular, the difficulty posed by the discovery process in the PRC which it can be said is not as comprehensive as that which is available in Hong Kong, or many other jurisdictions.

One such case came before the Family Court in September last year. In *ZJW v SY FCMC* 7824/2015 the parties were born and raised in Fuzhou City in Fujian Province in the PRC. They relocated to Shenzhen and bought the matrimonial home there in 2001. There was one son, currently studying in the US. They conducted their married life in Shenzhen and it was not in issue that the wife did not have jurisdiction to pursue her divorce in Hong Kong other than on the ground of the husband's substantial connection with Hong Kong. The wife argued that the husband had this connection because his employment and a very high value court case (in which he was the plaintiff seeking redress against the wife's brother and a company holding assets allegedly belonging to him, valued at approximately HK$400m) brought him regularly to Hong Kong. The value of the assets in Hong Kong far outweighed the value of those in Shenzhen which was essentially limited to the former matrimonial home and some other assets. It was not disputed that the husband was a successful businessman and that the family had lived to a very high standard. The husband had further rented an apartment in Hong Kong. The question was whether the husband had a substantial connection: the court found that it was clear on the facts that the parties had never conducted their married life in Hong Kong and that the husband had not established any formal or permanent home in Hong Kong. It was plain that the apartment, which was modest in comparison with the former matrimonial home in Shenzhen, was for his convenience as it was close to the Hong Kong office and the court. Also relevant was the fact that the only landed property was in Shenzhen, and the assets in Hong Kong, while considerably valuable, were in the nature of cash, equities and securities which could easily be traded, transferred or purchased through brokers or the internet.

Therefore the family court did not find a sufficiently substantial connection for the wife to pursue her divorce in Hong Kong, or therefore her ancillary relief application. The husband in his application to dismiss the wife's petition also argued that, in the alternative, the Shenzhen court was the more appropriate under the rules of forum non conveniens as set out in the case of *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 and affirmed by the Hong Kong Court of Final Appeal in *SPH v SA* [2014] 3 HKLRD 497.

The husband's counsel argued that, before the principles in those cases be considered, it was impractical for the wife to pursue the husband in Hong Kong because she would have to get a divorce in China in any event. As the parties were married in the PRC, the

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divorce must also be there in order to be recognisable. The Chinese decree would be automatically recognised by Hong Kong under Part IX of the Matrimonial Causes Ordinance, s 56(1) whereas orders of the Hong Kong courts (or anywhere else), whether as to the divorce decree or orders for the division of assets, would not be recognisable or enforceable in the PRC. In order to deal with the former matrimonial home in Shenzhen, they would also require an order by a PRC court and therefore it was in the parties' best interests to avoid fresh proceedings in the PRC for recognition or enforcement of any decree or order. Counsel for the wife however argued, and the judge agreed, that the absence of mutual recognition in itself cannot be a good reason for handing over jurisdiction to a foreign court.

The judge found that, had he been able to find for the wife in her argument on jurisdiction, he would not have allowed the husband's stay application on the basis that she would be deprived of a juridical advantage should the matter proceed in the PRC. His concern was based on the arguments for the wife whose PRC legal team had identified significant weaknesses in the discovery procedure which were summarised as follows:

(a) there is no general duty on the part of the parties to disclose evidence and information;

(b) there is no specific discovery procedure or any procedure similar to interrogatories in Hong Kong;

(c) each party bears his own responsibility to produce evidence in order to prove his case, which has resulted in what PRC academia called imbalance of evidence whereby the party with control, power or custody over evidence prejudicial to himself would be in a position to withhold the same and prevent the other party from obtaining or producing the relevant evidence in legal proceedings, with such resultant unfairness which has been the subject of repeated criticism of PRC academia and the judiciary;

(d) the absence of any practical arrangement for the Shenzhen Court to collect evidence located in Hong Kong.

Counsel for the husband submitted that courts in Hong Kong had noticed such difficulties in the PRC system and had held the same to be capable of constituting a legitimate juridical disadvantage in the context of applications on the grounds of forum non conveniens, as in the case of *Shenzhen Futaihong Precision Industry Co Ltd and Another v BYD Co Ltd and Others*, HCA 2114/2007, unreported 27 June 2008. The judge in that case concluded that the deprivation of the compulsory and comprehensive discovery and the procedure for the administration of interrogatories would constitute a prejudice to the plaintiffs in obtaining relevant evidence to advance their claim, and that the lack of these procedures under the PRC legal system would result in the real risk that the plaintiffs may not be able to obtain substantial justice if the matter were to be tried in the Shenzhen court instead of in Hong Kong.

Further, the juridical disadvantage was particularly pronounced where one of the parties had significantly less knowledge, information and evidence than the other: *Botanical Limited v China National United Oil Corporation* HCA 1852/2005 unreported 25 August 2008. The wife further argued that the consequences arising from the difference in the discovery procedure was particularly acute in the present case as the husband was determined to withhold information concerning his assets and income in the proceedings. The judge agreed that there had been a 'thundering silence' from the husband thus far.

The proper approach would be to allow the wife to proceed in Hong Kong so that the discovery process could take its normal course and, should it be necessary to take out PRC proceedings as well, then the evidence which had been discovered could be adduced in those proceedings. Clearly the PRC court would not be able to make an order concerning property in Hong Kong of which it was unaware. However, in this case the judge's hands were tied as he did not find he had jurisdiction on the facts, although it would appear that there were almost HK$400m worth of assets outside the PRC in Hong Kong, and the discovery of their full extent, location and value formed the most crucial part of the ancillary relief proceedings.





In Hong Kong we also have the ability to seek financial relief following a foreign divorce under Part IIA Matrimonial Proceedings and Property Ordinance Cap 192 s 29, but in order to be successful in obtaining leave to make that application, a party must prove the same jurisdictional grounds as for divorce, and therefore it would be very unlikely for the wife in this case to be able to seek financial relief in Hong Kong.

In another recent case before the same judge in January 2016, *TJ v XGM* FCMP 220/2015, the wife was able to prove that she had either habitual residence or a substantial connection with Hong Kong. Here the judge found that it was important for the wife to be able to proceed with her financial claims in Hong Kong because the former matrimonial home and funds which had previously been held in her securities accounts were then being held by her husband's father in the PRC. The problem for the wife in that case was that, in addition to the problems of discovery, there was no concept of 'trust' under PRC law and, unlike the Hong Kong courts, there was no power in the PRC courts to join any third party allegedly holding assets on trust for one of the spouses in divorce proceedings. This was significant as it was the husband's case before the PRC court that there were no matrimonial assets to be distributed between the parties.

These cases, particularly if they rely on an interpretation of substantial connection, are inevitably complex and the judgments are not always consistent if the evidence as to PRC law is not comprehensibly put before the court. For example, in *CL v ZRC (Jurisdiction; Forum non conveniens)* [2015] HKFLR; FCMC 11118 of 2014, the District Court in Hong Kong did not find in favour of a wife who raised similar concerns to those in *ZJW v SY*, finding that the arguments in favour of one set of proceedings, 'for the dissolution of one marriage', trump the concerns of the wife in respect of the disclosure of assets held in Hong Kong. There the expert evidence could only show that it was 'fairly difficult' for a PRC court to 'dispose the assets not located in China'. These problems will only increase as the number of cross border cases increase, not just with Hong Kong but globally. China had the largest number of billionaires in the world in 2015 according to *The Hurun Report* at a tally of 596. These individuals will increasingly own assets outside the PRC and the divorce rate never seems to go down. Therefore we can assume that the problems faced by the family courts in Hong Kong can only increase and be replicated globally unless there is some much needed reform for the law in China in respect of not only discovery (as urged by their own academia) but also in the recognition of decrees and enforceability of foreign court orders.