

Mechanism and Legal Practice of Cross-border Dispute Resolution Involving Mainland China and Hong Kong

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Chapter 1-Jurisdiction Clauses in Contracts

With the development of China's economy and the implementation of China's "Belt & Road Initiative", more and more foreign investors come to China for investment, and more and more Chinese enterprises expand their business overseas, which has led to an increase in commercial disputes. A cross-border dispute resolution mechanism is a necessary part of the overall legal structure to support economic development. Determining jurisdiction has always been a key issue in the practice of cross-border dispute resolution. The jurisdiction clause in commercial contracts is one common way of deciding jurisdiction, which practitioners shall always pay attention to. Due to the limit of space, this chapter focuses on the asymmetric jurisdiction clause commonly seen in

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facility agreements used by financial institutions and provides a few notes on how a jurisdiction clause should be properly designed and enforced.

1. Asymmetric Jurisdiction Clause

A loan agreement provided by Hong Kong financial institutions often contains an asymmetric jurisdiction clause to preserve the flexibility of lodging legal proceedings in different jurisdictions when the assets of the borrowers are located in various jurisdictions. A typical jurisdiction clause can be:

“Jurisdiction of Hong Kong courts

- (a) The courts of Hong Kong have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including any dispute regarding the existence, validity, or termination of this Agreement) (a “Dispute”).
- (b) The Parties agree that the courts of Hong Kong are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary.
- (c) This Clause is for the benefit of the Lender only. As a result, the Lender shall not be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Lender may take concurrent proceedings in any number of jurisdictions.

Under the aforesaid clause, for any dispute arising out of or in connection with the facility agreement the borrower can only take legal proceedings in a competent Hong Kong court, while the lender is not subject to the same restraint, and is free to take legal proceedings anywhere the lender deems appropriate.

As can be seen from the clause cited above, an asymmetrical jurisdiction clause only

limits one party's choice of forum court to the one expressly stated in the clause but confers on the other party the right of free choice of forum court so that this other party may sue in the agreed court or any other court with jurisdiction.³

2. Judicial Practice Concerning Asymmetric Jurisdiction Clause

As discussed in the preceding paragraphs, an asymmetric jurisdiction clause is quite common in commercial practice as it safeguards lender's free choice of forum courts. However, its admissibility and validity vary in judicial practice in Mainland China and Hong Kong.

2.1 Judicial Practice in Mainland China

Asymmetric jurisdiction clause is controversial in Mainland's judicial practice. Mainland courts will first decide the governing law of the clause, then consider and interpret the clause based on the decided governing law.

Some Mainland courts consider that jurisdiction is a procedural issue, which shall be dealt with per *lex fori*, (i.e., parties are not allowed to choose the governing law in their contracts, and the issue shall always be decided by applying the laws of Mainland China). In *Weinstock Michel v. Antwerp Diamond Bank*, (Case No.: (2013)Yue Gao Fa Li Min Zhong Zi No.467), Guangdong High Court held that "this is a case over guarantee contract involving foreign interests; Antwerp Diamond Bank chose to sue in the court of original instance, and Weinstock Michel as defendant dissented the jurisdiction of the first instance court; based on the litigation rule that a procedural issue shall be determined by *lex fori*, the Civil Procedure Law of China shall be taken as the legal basis for determining the jurisdiction issue of

³ *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc* [2017] 1 WLR 3497

this case.”

However, some other Mainland courts held that the governing law of the underlying contract shall be applicable for construing the asymmetric jurisdiction clause. In *Sumitomo Bank v. Xinhua Real Estate Co. Ltd.* (case No.: (1999)Jing Zhong Zi No.194), an appeal case of jurisdiction dissension, the Supreme Court of China held that “because the two parties to this case agreed in Clause 23.1 of the facility agreement, which reads, *inter alia* ‘this Agreement shall be governed by Hong Kong law’, Hong Kong law as the governing law of the facility agreement as chosen by the two parties shall be applied for construing the jurisdiction clause; and under Hong Kong law, the jurisdiction clause shall be construed as ...”

In addition to this complicated governing law issue, Mainland’s law (if decided to be the governing law of the jurisdiction clause) requires a higher standard for jurisdiction clause in a contract. China’s Civil Procedure Law, in its Article 34, provides that “parties in contract disputes or other disputes involving property right, may choose in writing the people’s court at the place of the defendants, the place of the contract performance, the place of the contract conclusion, the place of the plaintiff, the place of the subject matter, or other places with an actual connection with the dispute as the jurisdiction court of the dispute, but such choice shall not contravene with the differentiated jurisdiction and special jurisdiction in this Law”. As such, the legal requirements for an effective jurisdiction clause include: (1) it is a contract dispute or other property right dispute; (2) the choice is in a written form; (3) the court shall be a people’s court at the place with an actual connection to the dispute, such actual connection places include the place of the defendant, the place of the contract

performance, contract conclusion, the plaintiff, the subject matter; and (4) not violating any differentiated jurisdiction rules or special jurisdiction rules. Under this framework, Mainland courts generally accept the effectiveness of the asymmetric jurisdiction clause.

Even if the validity of the asymmetric jurisdiction clause is accepted, the exclusiveness of such clause is sometimes in dispute. In some cases, the Mainland courts concluded that such asymmetric jurisdiction clause did not exclude other courts from exercising jurisdiction over the disputes. The Notice of the Supreme Court on Circulating the “Summary of the Second National Working Conference on Foreign-related Commercial and Maritime Trials” provides that “[w]here the parties to an action involving foreign-related commercial disputes agree to submit the disputes between them to the non-exclusive jurisdiction of foreign courts, it may be determined that such agreement does not exclude the jurisdiction of other foreign courts which have jurisdiction over the dispute. In case that one party brings a lawsuit to the Chinese court, the Chinese court may have jurisdiction over this case according to the relevant provisions of the Civil Procedure Law of the PRC and accept the case.”

2.2 Judicial Practice in Hong Kong

In *Industrial and Commercial Bank of China (Asia) Limited v. Wisdom Top International Limited*, [2020] HKCFI 322, there was a relatively detailed analysis of the asymmetric jurisdiction clause.

The jurisdiction clause in the facility agreement involved in this case provides as follows:

“34.1. Jurisdiction of Hong Kong courts

- (a) Subject to paragraph (c) below, the courts of Hong Kong have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a dispute regarding the existence, validity, or termination of this Agreement) (a “Dispute”).
- (b) The Parties agree that the courts of Hong Kong are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary.
- (c) Clause 34.1 is for the benefit of the Lender only. As a result, the Lender shall not be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Lender may take concurrent proceedings in any number of jurisdictions.”

In this case, Hong Kong High Court analyzed the different effects of Clause 34.1 based on which of the contracting parties shall be the plaintiff. The Court held that if the party who has no option to sue elsewhere is the party instituting the action in Hong Kong, Clause 34.1 is an effective jurisdiction agreement conferring jurisdiction on Hong Kong courts as defined by the 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, 2008 (hereinafter referred to as the “Recognition and Enforcement Arrangement 2008”); but if the party who has an option to sue elsewhere (usually the lender) is the plaintiff, there is no certainty as to jurisdiction in such circumstances, and thus Clause 34.1 is not

an effective jurisdiction clause under the Recognition and Enforcement Arrangement 2008.

Nevertheless, under the 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 issued in 2019 (which has not become effective so far, hereinafter referred to as the “Recognition and Enforcement Arrangement 2019”), the requirement has been deleted that the judgment shall be based on an exclusive choice of court agreement which expressly designates a Mainland court or a Hong Kong court as the court with the sole jurisdiction over the matter. However, before the Recognition and Enforcement Arrangement 2019 enters into force the Recognition and Enforcement Arrangement 2008 and the holding of Hong Kong High Court in *Industrial and Commercial Bank of China (Asia) Limited v. Wisdom Top International Limited*, [2020] HKCFI 322 are still the governing authorities.

3. Jurisdiction Clause in Mainland-Hong Kong Cross-border Litigation

There are mainly three types of jurisdiction clauses, i.e. exclusive jurisdiction clause, non-exclusive jurisdiction clause, and asymmetric jurisdiction clause. Parties being involved in Mainland-Hong Kong cross-border transactions shall have a clear understanding of the pros and cons of the aforesaid three types of jurisdiction clauses.

3.1 Exclusive Jurisdiction Clause

Where the contracting parties have agreed on an exclusive jurisdiction clause, either side can sue only in the chosen court when a dispute arises. An exclusive

jurisdiction clause has the benefit of certainty in the jurisdiction, which is one of the pre-conditions for judgments of Mainland courts or Hong Kong courts to be enforceable in the other jurisdiction before the Recognition and Enforcement Arrangement 2019 becomes effective.

It is noticeable however that for the time being there is still no arrangement or other mechanism where preservation measures could be taken in the Mainland in aid of litigation in Hong Kong. Therefore, in case Hong Kong courts are chosen as the exclusive courts of jurisdiction in the contract, and if the debtors' assets are mainly in the Mainland, the creditors may face difficulties in having the debtors' assets preserved in the Mainland as security for the enforcement of a future judgment. While in a Hong Kong seated arbitration, there are arrangements between Mainland China and Hong Kong regarding the preservation of assets before or during the arbitration proceedings⁴. If there are Hong Kong or Mainland arbitration clauses in the contracts, parties can apply for court-ordered interim reliefs before or during the arbitration proceedings.

3.2 Non-exclusive Jurisdiction Clause

Where a non-exclusive jurisdiction clause has been agreed upon, the creditors have the option to commence legal action in Hong Kong or Mainland China.

However, under the Recognition and Enforcement Arrangement 2008, one of the prior conditions for enforcing a Hong Kong court judgment in Mainland China or enforcing a Mainland court judgment in Hong Kong is that a jurisdiction clause exists in the contract giving either the Hong Kong court or the Mainland court the sole jurisdiction of the case. Therefore, if the creditor

⁴ The Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region.

sues in a Hong Kong court, the creditor cannot enforce the Hong Kong court judgment in Mainland China relying on the Recognition and Enforcement Arrangement 2008 because the jurisdiction clause is non-exclusive. If the debtor does not have many assets in Hong Kong but has substantial assets in Mainland China, the creditor might face an unpleasant situation that there are no sufficient assets in Hong Kong to satisfy the Hong Kong judgment while in the meantime the Hong Kong judgment cannot be enforced in Mainland China, where the debtor's major assets are located.

3.3 Asymmetric Jurisdiction Clause

Where the parties have agreed on an asymmetric jurisdiction clause, the party, who has the option to choose the forum, can sue at places that the party considers proper or convenient, but the other party can only sue in the agreed court. In practice, such party with option is usually banks or other large financial institutions. An asymmetric jurisdiction clause facilitates the legal protection of banks and other financial institutions. But as analyzed hereinabove, if the party with option commences legal action in Hong Kong, the asymmetric jurisdiction clause is likely to be considered as non-exclusive, and accordingly, the subsequent Hong Kong judgment cannot be enforced under the Recognition and Enforcement Arrangement 2008. If the party with the option commences legal action in Mainland China, the effect of the asymmetric jurisdiction clause is subject to the Mainland court's review as discussed in above Section 2.1.

4. Jurisdiction-related Court Injunction in Mainland China

Previously, Mainland courts seldom issue jurisdiction-related injunctions barring one party from conducting parallel proceedings or foreign proceedings. Recently,

Wuhan Intermediate People's Court ("WIPC") issued a jurisdiction-related injunction. The Applicants are Xiaomi Communication (a Chinese company) and its related companies, and the Respondents are Inter Digital (a US company) and its related company. The dispute is about the patent license fee. Since 2013, the Applicants have negotiated with the Respondents about the quantum and payment of patent license fee, but without result. In June 2020, the Applicants started litigation before WIPC for ascertaining the correct patent license fee and its payment. In July 2020, the Respondents started litigation before an Indian court regarding the same dispute (i.e., a parallel proceeding). In September, WIPC issued an injunction that affirmed its jurisdiction over the dispute and in the meantime requested the Respondents to stop the parallel proceeding in India and not to commence any parallel proceeding globally. The punishment, as per WIPC's Civil Ruling, of not obeying the injunction, is a daily fine of CNY 1,000,000 (about USD 155,000 @6.5). The Respondents appealed against the injunction, which was dismissed. Now the injunction is final and binding.

In the future, Mainland courts might be more and more willing to consider and issue such jurisdiction-related injunctions. For parties having jurisdiction clauses in their contracts, the court's review standard of such clauses and the possibility of jurisdiction-related court injunction shall be carefully considered.

5. Conclusion

In summary, parties to cross-border transactions shall enhance their understanding of the importance of designing a proper jurisdiction clause for dispute resolution. They are suggested to consider the following factors: (1) the validity and effectiveness of the jurisdiction clause; (2) the courts' interpretation (in both Hong

Kong and Mainland China) of the clause; (3) the enforcement of such jurisdiction clause (e.g., applying for or defending against a court's jurisdiction-related injunction); (4) the available interim reliefs; and (5) the recognition and enforcement of future judgments.

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