Progress and Limitation of China's Foreign-related Civil and Commercial Jurisdiction Procedure

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Abstract. With the developing of economic globalization and the expansion of China's opening to the outside world, Chinese enterprises are becoming more active in cross-border transactions, and the number of disputes is increasing at the same time. In 2022, China released Provisions of the Supreme People's Court on Several Issues concerning Jurisdiction over Foreign-related Civil and Commercial Cases and Minutes of the National Symposium on the Foreign-related Commercial and Maritime Trial Work of Courts, making new Provisions over Foreign-related civil and commercial jurisdiction. Building on a case analysis and a systematic overview of the two newly issued documents, this article focuses on issues existing in the jurisdiction concerned with civil and commercial foreign-related cases. By referring to foreign legislative experiences and practices in the jurisdiction concerned with civil and commercial foreign-related cases, the author proposes suggestions to improve China's jurisdiction procedures for civil and commercial foreign-related cases, rooted in China's national conditions and realistic needs, for the purpose of strengthening China's existing judicial practice of the application of foreign-related civil laws, protecting the legitimate rights and interests of Chinese citizens and enterprises in participating in economic globalization, and achieving the coordinated development for both domestic and foreign rule of law.

Keywords: Foreign-related Civil and Commercial Litigation; Asymmetric Jurisdiction; Exclusive Jurisdiction; Jurisdiction.

1. Introduction

Against the background of economic globalization, with the on-going promotion of high-level opening-up, great breakthroughs have been seen in China's foreign-related civil and commercial activities. The quantity of foreign-related civil and commercial cases handled by Chinese courts is rising rapidly, and more and more foreign parties concerned voluntarily choose to have the jurisdiction belongs to Chinese courts. The international credibility and influence of Chinese justice are improving continuously.

However, the issues on foreign-related civil procedures faced in judicial practice are becoming more and more complicated, and existing foreign-related civil and commercial jurisdiction procedural rules hardly meet the need of efficiently resolving foreign-related civil and commercial disputes. As shown in the chart below, according to the online judgment documents search of the Supreme People's Court (Retrieval keywords: foreign-related civil and commercial cases, jurisdiction; Retrieval time: April 6, 2023), during 2016-2021, the quantity of foreign-related civil and commercial dispute cases handled by Chinese courts for jurisdiction showed a growing trend year after year. Therefore, further improving foreign-related civil and commercial jurisdiction procedures is of great significance for the parties concerned to initiate legal proceedings.

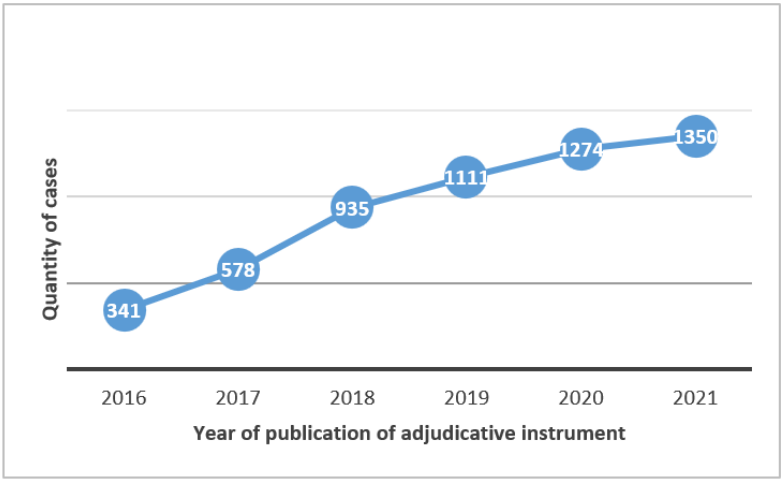

Figure 1. Quantity of Foreign-related Civil and Commercial Disputes under Jurisdiciton from 2016 to 2021

On November 15, 2022, the Supreme People's Court issued Provisions of the Supreme People's Court on Several Issues concerning Jurisdiction over Foreign-related Civil and Commercial Cases (Fa Shi [2022] No. 18, hereafter known as."Provisions over Foreign-related Jurisdiction"), making adjustments to the standards of jurisdiction of foreign-related commercial and civil cases at the first instance hearing. What's more, on January 24, 2022, the Supreme People's Court issued Minutes of the National Symposium on the Foreign-related Commercial and Maritime Trial Work of Courts (hereinafter referred to as "Minutes of Foreign-related Trial"), making a uniform provision for cutting-edge challenging issues in foreign-related commercial and maritime trials.

Based on the two provisions above, this article sorts out new changes in the rules on the jurisdiction over civil and commercial foreign-related cases in China and compares with the legislation of foreign countries, to further improve the rules referring to the jurisdiction of civil and commercial foreign-related cases with Chinese characteristics.

2. Presumption of Exclusive Jurisdiction

2.1. Exclusivity of Jurisdiction by Agreement

Jurisdiction by agreement, also known as agreed jurisdiction and consensual jurisdiction, means that the parties to civil or commercial disputes, choose a specific court by written agreement to exercise jurisdiction over the dispute, before or after occurrence of the dispute [1].

Although jurisdiction by agreement shall not violate the effect of exclusive jurisdiction, it also has a certain exclusive effect. When only one court is selected as the jurisdictional authority, the case shall only be subject to the jurisdiction of the court selected by the parties and other courts have no jurisdiction. This causes the jurisdiction by agreement to be specific to a certain extent. For the parties' choice of court, either Civil Procedure Law, Article 35, in regard to the parties' choice of court in China by agreement or Civil Procedure Law, Article 529, in regard to the parties' choice of foreign court shall have priority [2].

2.2. Practical Dilemmas of Exclusive Jurisdiction

The jurisdiction by agreement between the parties can not only exclude but also create the jurisdiction of a court. The former was called "Exclusion Jurisdiction"(Derogation), while the latter was called "(Positive) Consensual Jurisdiction"(positive Prorogation). Consensual Jurisdiction could be used in combination with Exclusion Jurisdiction. If the parties agree upon a particular court to the exclusion of all other courts with respect to the dispute, the agreed court is exclusive (Ausschließliche zuständigkeit). Conversely, where the parties merely intend by their agreement to agree upon an alternate forum for jurisdiction in addition to the statutory court of jurisdiction, such an agreement on

jurisdiction is typically referred to as an additive agreement alternative(fakultativ) agreement or discretionary(permissive) agreements [3]. In other words, the former agreement on jurisdiction shall have exclusive effect while the latter agreement on jurisdiction shall have optional effect [4]. However, in practice, due to the carelessness of the provisions in the contract, it has given rise to a litigation dispute as to whether the jurisdiction agreement has exclusive effect or optional effect.

In foreign-related civil litigation, although the parties have agreed to deliver the case to a specific foreign court for jurisdiction, some parties will assert the alternative jurisdiction clause not exclusive but alternative effect, on the grounds that the contract stipulates that the case shall be delivered to the specific foreign court or does not expressly stipulate exclusive jurisdiction. So, the domestic courts in connection with such disputes shall not be excluded from the jurisdiction of the case, to achieve the goal of submitting the foreign-related litigation to a domestic court for trial.

2.3. Legislation Practice of Domestic Laws

2.3.1 International legislation practice

Looking at the international situation, the laws of most countries recognize the exclusivity of jurisdiction agreement in principle. Both Chapter 1, Article 3 in Convention on the Choice of Court Agreements,and Article 17 in Brussels Convention have recognized the presumption of exclusivity of jurisdiction. As a member state of the two conventions, Germany also considers the jurisdiction of courts determined by the agreed jurisdiction as exclusive under its domestic law [5]. In its judgment III ZR 42/19, the German Federal Supreme Court held that even if exclusivity is not expressly provided for or agreed upon by the parties, it is normal not to express exclusivity in the wording with regard to the procedural effects of a jurisdictional agreement.

2.3.2 Before minutes of foreign-related trials

In a trial practice in China, the (2014) Ning Commercial and Foreign Jurisdiction and First Instance No. 1 Civil Order heard by the Intermediate People's Court of Nanjing City, Jiangsu Province naturally applies the exclusivity rule to the exclusive agreement expressly agreed upon by both parties. As for the provisions which only stipulate jurisdiction of a specific court but do not specify exclusivity or non-exclusivity, different courts have different attitudes. The ambiguous jurisdiction provisions lead to different application of rules in different courts, giving rise to judicial injustice that different judgments on the same case may be rendered.

2.3.3 Minutes of foreign-related trials clarifies the presumption of exclusive jurisdiction agreement

In the newly issued Minutes of Foreign-related Trials, the presumption of exclusive jurisdiction agreement is clearly stated in Article 1: "The jurisdiction agreement signed by the parties referring to a foreign-related contract or other property dispute definitely stipulates that the jurisdiction shall be exercised by a particular court but does not stipulate that the jurisdiction agreement is exclusive, which shall be presumed as an exclusive jurisdiction agreement." As a result, if a party claims that the governing clause is an exclusive clause needs to show that the contract is expressly agreed in such clause as to be exclusive, otherwise the court will "presume" that such clause is an exclusive clause.

2.4. Deficiencies

Although the presumption of exclusive jurisdiction has been clarified in China, there are still defects. Where a judgment cannot be made according to the agreement text itself or a dispute arises, how should the judge rule? How should the parties remedy when the other party violates the presumption of exclusive jurisdiction? The remedies and other issues are not stipulated in Minutes of Foreign-related Trial and remain to be further improved.

3. The Validity of Asymmetric Jurisdiction Agreements is Recognized in Principle

3.1. The Validity Identification of Asymmetric Jurisdiction

Asymmetric jurisdiction clauses are also known as unilateral jurisdiction clauses or optional jurisdiction clauses. Clauses of this type usually stipulate that one of the parties must bring a lawsuit against the other party in the courts of a specified country (or region), while the other party is free to sue in any jurisdiction of its choosing [6].

Generally speaking, asymmetric jurisdiction agreements are particularly common in areas such as loans, securities, swap transactions and shipping [7]. However, in practice, with the increasing number of cross-border transactions involving multiple jurisdictions, agreements or clauses providing for asymmetric jurisdiction are appearing in more and more project contracts covering cross-border transactions. Foreign courts have different opinions on the determination of the validity of an asymmetric jurisdiction clause. However, most jurisdictions take a positive attitude towards the validity of an asymmetric jurisdiction provision [8].

In international justice, because the legality of asymmetric jurisdiction is not stipulated in writing in most countries, there are great differences in the treatment of this clause in different countries or jurisdictions. Among the negative schools, France is representative. The French Cour de cassation, in the case 11-26.022 i, 2012, found that asymmetric jurisdiction clauses were invalid, on the ground that they violated Articles 1170 and 1174 of the French Civil Code and the Brussels Regulation I. In 2015, the Cour de Cassation denied the validity of asymmetric jurisdiction clauses again in a lawsuit between a French company and a Swiss bank (13- 27.264) [9].

Meanwhile, Britain and Italy are positive. The UK has long recognized the effect of asymmetric jurisdiction clauses. For example, in the case of A4/2019/3128, Clause 33.1 of the Facility Agreement provided for asymmetric jurisdiction. The parties agreed that the courts of England shall have jurisdiction over the disputes related to the loans, but that the lender may still bring a lawsuit in other courts with competent jurisdiction. The Court of Appeal recognized the validity of Clause 33.1 of the disputed Facility Agreement, noting that asymmetric jurisdiction provisions have been widely used in the UK to achieve legitimate commercial purposes of parties and have been for at least 25 years.

But the different regulations of asymmetric jurisdiction agreement lead to the judicial divergence in the EU. As the member states of the EU, France, the UK, Italy and other countries shall apply the Brussels I Regulation. In domestic law, the civil code of Italy and France prescribes that the debt concluded under any conditions is invalid. But when it comes to the asymmetric jurisdiction clause, they give the opposite conclusion. So far, the European Court of Justice has not given a unified explanation [10].

3.2. Legislation Practice in China

In China, before the release of Trial Summary concerning Foreign Affairs, according to Article 35 of Civil Procedure Law, we cannot directly judge whether the asymmetric jurisdiction clause is valid. However, from the perspective of judicial cases, the courts in the mainland usually believe such provisions do not violate the mandatory provisions of the PRC and generally recognize the validity of asymmetric jurisdiction provisions [11].

The Minutes, for the first time, gave a legal definition to the "asymmetric jurisdiction agreement" in the form of a judicial interpretative document: "The jurisdiction agreement signed by the parties referring to the foreign-related contract or other property dispute expressly provides that any party may file a lawsuit with the court of one or more countries from which the lawsuit shall be brought. Meanwhile, where the other party can only file a lawsuit with the court of a specific country, and the people's court shall not support when the party claims that the jurisdiction agreement is invalid on the basis of obvious injustice, except that the jurisdiction agreement involves the rights and interests belong to consumers and laborers or violates the exclusive jurisdiction provisions related to the Civil Procedure Law. " Therefore, except for specific exceptions, Minutes of Foreign-related Trial has

recognized the validity of the "asymmetrical jurisdiction agreement" in the foreign-related maritime and commercial field in principle. The parties may choose the court of one country from courts of more than one country to institute an action. Meanwhile, the other party can only file a lawsuit in courts of a specific country. Moreover, where they claim the validity of the jurisdiction agreement on the basis of an obvious injustice, such claim shall not be supported.

3.3. Inadequacies

Although China recognizes the validity of asymmetric jurisdiction agreements in principle, there are still two issues to be solved urgently.

For the effectiveness of the agreements specified in Articles (1) to (3) of form type, China's courts obviously adopt the standard of "reasonable reminder and attention". That is, when an asymmetric jurisdiction term is determined to be a standard term, if the developing party does not fulfill the obligation of "reasonable notice", and the right of the other party to choose jurisdiction is excluded, such term is obviously invalid. However, there are differences among the courts in China on how to define the standard of "reasonable reminder", and the standard itself is difficult to identify, which leads to differences in the identification of the validity of asymmetric jurisdiction clauses. In the lawsuit [(2016) Zhe Civil Jurisdiction and Last Instance No.294] tried by the High People's Court of Zhejiang Province, the asymmetric jurisdiction clause printed on the reverse side of the bill of lading was considered by the court not binding on the parties as the carrier did not take legitimate measures to attract the attention of the shipper to it.

In addition, according to Article 7 from Judicial Interpretation of the Arbitration Law, where the parties appoint that the dispute may be brought to arbitration or for legal proceedings, such arbitration agreement shall be invalid. As a result, in the event of a dispute arising, the creditor is unable to submit the dispute to an arbitration institution pursuant to this clause, and the debtor is not bound by the provisions of this clause in which arbitration shall be instituted.

4. Hierarchical Jurisdiction and Subordinate Jurisdiction

4.1. New Changes in Provisions Over Foreign-related Jurisdiction

The most important change in the 2022 Provisions over Foreign-related Jurisdiction is the swap between centralized jurisdiction and subordinate jurisdiction. According to the answers given by the principal of No.4 Civil Tribunal of the Supreme People's Court, the Provisions have changed the principle of centralized jurisdiction in principle with subordinate jurisdiction as an exception to the principle of subordinate jurisdiction with centralized jurisdiction as an exception [12]. This enables the basic level courts and intermediate courts to obtain universal jurisdiction. In addition, this up-to-date Provision dives the jurisdiction of the intermediate courts in all regions of the country into two categories, simplifying the classification criteria.

4.2. Subordinate Jurisdiction as the Principle

The jurisdiction of the intermediate courts in China was divided into four categories in the prior judicial interpretation of Notice on Clarifying the Level of Jurisdiction Standard and the Relevant Issues of Handling Foreign and Commercial Cases of the 27th Trial (Fa [2017] No. 359), and it was divided into two levels according to the location of the intermediate court in each category. Taking the great differences of export-oriented economic development in each place into consideration, the newly issued Provisions over Foreign-related Jurisdiction simplifies the classification standards. In order to balance the workload of courts at different levels, ensure the uniform judgment standards and improve the level of foreign-related trials among judges in the central and western regions, the Supreme People's Court has adopted the mode of gradient division of the jurisdiction standards for subject matter amount by regions after extensive research and soliciting opinions from various parties. It intensifies the involvement in regard to foreign-related civil and commercial cases of the first instance, forming unified jurisdiction rules for foreign-related civil and commercial cases.

At the beginning of formulation of No. 5 document of the law explanation [2002], it solved the constraint of the insufficient force of trial concerning foreign affairs when China entered WTO, but it also conflicted with the clauses of Civil Procedure Law. Based on Articles 18 and 19 of the Civil Procedure Law, Article 1 of Provisions over Foreign-related Jurisdiction specifies that civil and commercial foreign-related cases of first instance shall are under the jurisdiction of the grassroots people's courts in principle. Such provisions return to the original intention of the Civil Procedure Law, in line with the requirements for the reform of the functional positioning of four levels of courts.

4.3. Clear Criteria for Hierarchical Jurisdiction

Article 2 of Provisions over Foreign-related Jurisdiction clarifies the standards of hierarchical jurisdiction of intermediate people's courts over foreign-related civil and commercial cases of first instance. Item 1 of Article 19 of the Civil Procedure Law provides that intermediate people's courts shall have jurisdiction over major foreign-related cases. Article 1 of the Interpretation further specifies that major foreign-related cases refer to cases with significant impact such as a large sum of disputed subject matter, complex facts, or a large number of litigants. Item 2 and Item 3, Paragraph 1 of Article 2 of Provisions over Foreign-related Jurisdiction are consistent with Article 1 of the Judicial Interpretation of the Civil Procedure Law, while Item 1, Paragraph 1 of Article 2 defines the standard of "the amount of disputed subject matter is large" from the perspective of the amount of subject matter.

The amendment to Provisions over Foreign-related Jurisdiction enables the parties concerned to have a more concise and clear understanding of the scope of cases under the jurisdiction of the court, which can meet the reasonable needs of different areas at the same time when the jurisdiction is delegated.

5. Suggestions

5.1. Give the Judge Discretion

As mentioned before, although the exclusive jurisdiction presumption is defined in China, there is no solution to the dispute about whether to agree on the non-exclusive jurisdiction in the agreement text. Therefore, the author is of the view that it is necessary to grant a certain degree of discretion to the judges. When it is impossible to judge based on the text of the agreement or any dispute arises, the specialized judges shall decide whether the jurisdiction agreement has exclusive effect.

5.2. Imposition of Substantive Law Obligations on Parties in Breach of Exclusivity of Jurisdiction

Currently, there is no regulation in China concerning whether the right of claim for damages belonging to the non-breaching party shall be supported in foreign-related civil and commercial cases arising from breach of the agreement. Taking Germany as an example. The German Federal Supreme Court upheld the right of the non-breaching party to claim damages in its judgment on October 17, 2019 (III ZR 42/19). Accordingly, the author believes that we should characterize exclusive agreement jurisdiction as a kind of substantive contract agreed by international commercial subjects on jurisdiction procedures, imposing substantive law obligation on the parties that they cannot litigate in any court other than the court they have chosen. A breach of this duty by a party governed by an exclusivity agreement gives the non-breaching party a substantive cause of action and further a right to damages.

5.3. Limited Recognition of Form Asymmetric Jurisdictional Clauses

In China's judicial practice, the court has held that the form clause cannot bind the parties because the carrier did not take legitimate measures to attarct the attention of the shipper [(2016) Zhe Min Zhi Zhong No. 294]. But the blurring of the boundary of the reasonable way should not hinder the inherent

value of the standard form clause to improve the commercial efficiency and promote the commercial order. Looking at the world, the UK has recognized the validity of the asymmetric jurisdiction clause for many times, stemming from the pursuit of freedom of contract. Therefore, in a foreign-related trial, the effectiveness of the jurisdiction clause with asymmetric format shall not be directly denied. The author suggests that restrictive conditions may be added, including: (1) the jurisdiction clause with asymmetric format seriously restricts the relief rights of one party; (2) the jurisdiction clause has led to serious inequality of rights and obligations of the two parties [13]. On this basis, asymmetric jurisdiction clauses are recognized in a limited manner as the types described above.

5.4. Recognizing Agreement on "Selecting Arbitration or Litigation" in Asymmetric Jurisdiction Clause

According to Article 7 from Judicial Interpretation of the Arbitration Law, any dispute appointed by parties to arbitration or for legal proceedings shall be invalid. Therefore, in China's judicial practice, most arbitration or trial agreements involving asymmetric jurisdiction clauses are deemed as invalid. As a result, when a dispute arises, the creditor cannot submit the dispute to the arbitration institution in accordance with such clause, and the debtor is not bound by the stipulation of compulsory arbitration under such clause.

Therefore, the author suggests that the asymmetric jurisdiction clause should be recognized as the agreement of "selecting arbitration or litigation". Looking broadly at the international level, the Singaporean High Court has held that clauses providing for unilateral arbitration rights fall under section 2A of Singapore International Arbitration Act (AMENDMENT IAA2012), meaning that dispute resolution agreements similar to asymmetric jurisdiction clauses that expressly confer arbitration power only to a party constitute valid arbitration agreements [14]. This not only respects the choice of the parties, but also balances the positions of arbitration and litigation, but also conforms to the current attitude and policy tendency of encouraging arbitration in China.

6. Conclusion

The Regulations on Jurisdiction Involving Foreign Elements and Summary of Trials Involving Foreign Elements recently promulgated by the Supreme Court adapt to the development of today's judicial practice unify the standards of adjudication of jurisdiction involving foreign elements and provide parties concerned with a more concise and clear understanding of the scope of cases under the jurisdiction of the court, which provide important guidance for practice.

In this study, by sorting through the new changes in Provisions over Foreign-related Jurisdiction and Minutes of Foreign-related Trials, the author briefly analyzes the progress and deficiency of China's provisions on the jurisdiction over civil and commercial foreign-related matters under the new situation, and proposes suggestions with the help of foreign legislative experience, in order to provide reference for further improving China's jurisdiction procedures over civil and commercial foreign-related matters. However, due to the short time of the document, it is impossible to study whether the new provisions reduce the disputes of jurisdiction in practice.

In a word, the jurisdiction procedure referring to foreign-related civil and commercial matters is an operation that needs to be systematized, which should not limit to the individual provisions or easily change a certain principle. In the future, more attention should be paid to the connection and coordination between the civil procedure law and the civil procedure law, and the balance should be sought among the conflicts in the procedure, so as to facilitate the in-depth study of the system.

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