Chinese Judicial Practice on Asymmetric Choice of Court Agreements in International Civil & Commercial Disputes

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A. Introduction

An asymmetric choice of court agreement is commonly used in international commercial transactions, especially in financial agreements, which usually allows one party (option holder) an optional choice about the forum in which proceedings may be brought but the other (non-option holder) an exclusive choice to sue in a designated court.[1] A typical example is as follows:

'(A) The courts of England have exclusive jurisdiction to settle any disputes ….

(B) The Parties agree that the courts of England 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 Finance Parties only. As a result, no Finance Party shall be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Finance Parties may take concurrent proceedings in any number of jurisdictions.' ***[2]***

In recent years, issues concerning asymmetric choice of court agreements have been controversial in cases within some jurisdictions.[3] Despite the significant amount of research on asymmetric choice of court agreements, little attention has been paid to Chinese stance on this topic. With Chinese private parties actively engaging in international transactions, Chinese attitude towards such clauses is important for commercial parties and academic researchers. This article gives a glimpse of how Chinese courts handle asymmetric choice of court agreements in international and commercial civil litigations.[4]

B. Characterization

Chinese courts have demonstrated mainly four different views in characterizing asymmetric choice of court agreements.

Firstly, some courts classify this kind of agreement as asymmetric jurisdiction agreements.[5] In *Hang Seng Bank Ltd. v. Shanghai Tiancheng Storage Co., Ltd. & Lin Jianhua,* Shanghai Financial Court reasoned that a jurisdiction clause which allows one party to sue in multiple jurisdictions and requires the other to only bring the dispute to a specific jurisdiction should be characterized as an asymmetric jurisdiction clause.[6]

Second, several courts characterize the agreement as non-exclusive jurisdiction clause.[7] In *Hwabao Trust Co., Ltd. v. Xiao Zhiyong*, Shanghai High People's Court observed that, according to the jurisdiction clause in issue, the option holder could either choose to initiate proceedings in the designated court or other competent courts, hence the clause is non-exclusive.[8]

Thirdly, it is notable that in *GOOD VANTAGE SHIPPING LIMITED v. Chen Fuxiang et al*, Xiamen Maritime Court classified the disputed clause as an 'asymmetric exclusive jurisdiction clause'. The court held that, under the disputed clause, only when the option holder chooses to take the proceedings in the designated court will that court have exclusive jurisdiction, but this does not exclude the right of the option holder to sue in other competent courts.[9]

Last, a number of cases overlook the particularity of asymmetric choice of courts agreements and broadly classify them as jurisdiction agreements.[10]

C. Choice of Law

Most Chinese courts tend to apply *lex fori* on the effectiveness of asymmetric choice of court agreements. Relying on Article 270 of Chinese Civil Procedure Law (hereinafter referred to as 'CPL') which provides that this Law applies to foreign-related civil actions within PRC,[11] Chinese courts normally take the view that the ascertainment of jurisdiction is a procedural matter and apply *lex fori*.[12]

D. Effectiveness

a. Validity

By far, the validity of asymmetric choice of court agreements has not been

addressed by Chinese legislation. However, in 2022, the Supreme People's Court of PRC (hereinafter referred to as 'SPC') issued Summary of National Symposium on Foreign-Related Commercial and Maritime Trials of Courts (hereinafter referred to as 'the Summary'). The Summary regulates that unless an asymmetric choice of court agreement involves the rights and interests of consumers and workers or violates CPL's provisions on exclusive jurisdiction, the people's court should reject the parties' claim that the agreement is invalid on the ground of unconscionability. Although the Summary is not an official source of law, it serves as an important reference and guideline for courts in the absence of legislation.

Chinese courts generally support the view that an asymmetric choice of court agreement will not be deemed invalid for its asymmetry. The validity of such an agreement is commonly upheld for three reasons. First, such an agreement itself is not contrary to Chinese law.[13] In *Winwin International Strategic Investment Funds Spc v. Chen Fanglin*, Fujian High People's court held that such a clause does not violate CPL and recognized its validity. [14] Second, party autonomy in civil and commercial litigations should be protected.[15] In *Sun Jichuan v. Chen Jianbao*, Beijing Fourth Intermediate People's Court pointed out that CPL allows parties to a contract the right to select the court by agreement, which reflects party autonomy in civil procedure law. The aim of protecting this right is to safeguard that both parties are treated equally by the court, but this does not mean they have to choose the exact same court. As a result, a choice of court agreement is valid so long as it does not violate mandatory rules and expresses the true intention of the parties.[16] Third, it is necessary to mention that in a domestic case where the validity of an asymmetric choice of court clause in a loan contract is in dispute, Pudong New Area People's Court of Shanghai analyzed the positions of both the borrower (non-option holder) and the bank (option holder) and concluded that the borrower's position under an asymmetric jurisdiction clause is no weaker than under an exclusive one.[17]

In a small number of cases, Chinese courts refuse to recognize the validity of standard asymmetric choice of court agreements for violating specific rules of standard clause under Chinese law.[18] In *Picc Xiamen Branch v. A.P. Moller – Maersk A/S*, Zhejiang High People's Court ruled that the disputed standard jurisdiction clause in the Bill of Lading lacks explicit, obvious forms to distinguish from other clauses, and the carrier (option holder) failed to establish that the jurisdiction clause had been negotiated with or given full notice and explanation

to the shipper (non-option holder).[19] Therefore, if the drafting party fails to prompt or explain the standard asymmetric choice of court agreement to the other party, Chinese court may consider that this clause fails to represent the true intention of the parties and determine that the clause does not constitute a part of the contract.[20]

b. Effects

An asymmetric choice of court agreement has different effects upon option holder and non-option holder. For the non-option holder, the jurisdiction clause has an exclusive effect, restricting the party to taking the proceedings to the designated court only.[21]

As for the option holder, Chinese courts have two different explanations. On the one hand, an asymmetric choice of court agreement has both exclusive and non-exclusive effects on the option holder. While the designated court has exclusive jurisdiction when the option holder brings the case to the designated court, the option holder could also choose to sue the non-option holder in other competent courts.[22] On the other hand, some courts analyze that, apart from the designated court, the option holder could also sue in other competent courts, hence the clause is non-exclusive for the option holder. [23]

E. Construction

In *Bank of Communications Trustee Ltd. v. China Energy Reserve and Chemicals Group Company Ltd.*, whether the jurisdiction clause in a guarantee agreement is an asymmetric one is in dispute. The clause provides:

*The guarantor agrees (i) for the benefit of the trustee and bondholder, the courts of Hong Kong have exclusive jurisdiction to settle any disputes arising out of or relating to this Guarantee Agreement; (ii) the courts of Hong Kong are the most appropriate and convenient courts; and (iii) as a result, the guarantor will not argue that other courts are more appropriate or more convenient to accept service of process on its behalf.**[24]***

The SPC established that, when determining whether the parties' agreement constitutes an asymmetric jurisdiction clause, the people's court should construe the parties' intention in a strict manner. The wording of the asymmetric choice of court clause should be clear and precise. The court reasoned as follows:

*In general, contractual parties share equal rights and obligations, and therefore their rights regarding jurisdiction of litigation should also be equal. For this reason, their right to select a court should be the same unless the parties specifically agree otherwise. Under the principle of disposition of procedural rights, parties are allowed to agree on an asymmetric jurisdiction clause whereby one party's right to choose the court is restricted while the other party is not. An asymmetric jurisdiction clause constitutes a significant, exceptional restriction on one party's procedural rights, which should be determined through the parties' clear and explicit intention. Otherwise, unequal or unfair rights and obligations shall not be presumed.****[25]***

Therefore, the SPC decided that the disputed jurisdiction clause is not an asymmetric one because it only highlights the exclusive jurisdiction of Hong Kong courts and doesn't specify that the guarantee has the right to bring the proceedings to other competent courts.

F. Conclusion

It seems that Chinese courts take a liberal stance on asymmetric choice of court agreements, showing their respect to party autonomy and freedom to contract in international civil and commercial jurisdiction. In 2024, reviewed and approved by the SPC, two cases[26] recognizing the validity of asymmetric choice of court agreements are incorporated into the People's Court Case Database as reference cases.[27] What's more, as has been mentioned before, the Summary recognizes the validity of asymmetric choice of court agreements based on the assumption that those agreements are compatible with CPL's provisions on exclusive jurisdiction or do not infringe certain weaker parties' interests. Asymmetric choice of court agreements are ubiquitous in international civil and commercial contracts, especially in international financial contracts. Chinese courts are adapting to the development trends of international commercial practice and are getting prepared to deal with complicated civil and commercial disputes.

Nonetheless, there is still a long journey to go for Chinese courts to establish a sophisticated mechanism to handle such agreements. As for now, Chinese judicial practice regarding asymmetric choice of court agreements remains inconsistent. Additionally, most cases only involve simple disputes concerning whether Chinese courts have jurisdiction under such agreements. Things may get really complicated when other mechanisms in international civil procedure like *lis*

pendens rule apply to such agreements. A proper solution to those issues relies on a unified and nuanced standard for courts to apply. Whether there will be a judicial interpretation or legislation regarding asymmetric choice of court agreements, and how Chinese courts will handle complex disputes related to such agreements remain to be observed in the future.

For practitioners, it is noteworthy that Chinese courts tend to apply *lex fori* on asymmetric choice of court agreements. The asymmetric nature of the jurisdiction clause should be precisely and clearly expressed. Additionally, if the asymmetric choice of court agreement is a standard one, under the Civil Code of PRC, it is suggested that the drafting party, when concluding a contract, should prompt the jurisdiction clause through conspicuous indicators such as distinctive words, symbols, or fonts that are sufficient to bring the clause to the other party's attention. Upon the other party's request, the drafting party should also fully explain the jurisdiction clause to the other party.

[1] See Mary Keyes and Brooke Adele Marshall, 'Jurisdiction agreements: Exclusive, Optional and Asymmetrical' (2015) 11 Journal of Private International Law 345, 349.

[2] See Louise Merrett, 'The Future Enforcement of Asymmetric Jurisdiction Agreements' (2018) 67 International and Comparative Law Quarterly 37, 40-41.

[3] See e.g., *Ms X v. Banque Privee Edmond de Rothschild Europe (Societe)*, French Cour de cassation (Supreme Court) (First Civil Chamber) September 2012, Case 11-26.022, *Commerzbank Aktiengesellschaft v Pauline Shipping Limited and Liquimar Tankers Management Inc* [2017] EWHC 161 (Comm).

[4] Although asymmetric choice of court agreements may take various forms, the typical example abovementioned in note 2 is the most common type in practice. Therefore, asymmetric choice of court agreements in this article only refer to agreements under which one party may bring proceedings only in the chosen court but the other party may bring proceedings in other courts as well. See Brooke Marshall, *Asymmetric Jurisdiction Clauses*, (Oxford University Press 2023) 17; Trevor Hartley & Masato Dogauchi, *Explanatory Report on the Convention of 30 June 2005 on Choice of Court Agreements* (HCCH Publications 2013) 85.

[5] See *Hang Seng Bank Ltd. v. Shanghai Tiancheng Storage Co., Ltd. & Lin Jianhua*, (2019) Hu 74 Min Chu 127 Hao [(2019)?74??127?]; *Sun Jichuan v. Chen Jianbao*, (2021) Jing Min Xia Zhong 76 Hao [(2021)????76?]; *XYZ Co. v. Chen & Su*, (2022) Lu Min Zhong 567 Hao [(2022)???567?].

[6] See *Hang Seng Bank Ltd. v. Shanghai Tiancheng Storage Co. Ltd. & Lin Jianhua*, (2019) Hu 74 Min Chu 127 Hao [(2019)?74??127?], paras. 94.

[7] See *DBS Bank (Hong Kong) Limited v. Forward (Zhaoqing) Semiconductor Co., Ltd. et al*, (2011) Yue Gao Fa Li Min Zhong Zi Di 82 Hao [(2011)????????82?]; *Suen Kawi Kam v China Dragon Select Growth Fund*, (2019) Jing Min Xia Zhong 279 Hao [(2019)????279?]; *Hwabao Trust Co., Ltd. v. Xiao Zhiyong*, (2021) Hu Min Xia Zhong 60 Hao [(2021)????60?].

[8] See *Hwabao Trust Co., Ltd. v. Xiao Zhiyong*, (2021) Hu Min Xia Zhong 60 Hao [(2021)????60?], para. 10.

[9] See *GOOD VANTAGE SHIPPING LIMITED v. Chen Fuxiang et al*, (2020) Min 72 Min Chu 239 Hao [(2020)?72??239?], paras. 13, 15.

[10] See *Beijing Huahai Machinery Co., Ltd. v. KAMAT GmbH & Co. KG*, (2017) Jing 02 Min Zhong 4019 Hao [(2017)?02??4019?]; *Winwin International Strategic Investment Funds Spc v. Chen Fanglin*, (2019) Min Min Xia Zhong 151 Hao [(2019)????151?]; *Antwerp Diamond Bank v. Weinstock Michel*, (2013) Yue Gao Fa Li Min Zhong Zi Di 467 Hao [(2013)????????467?]; *Guosen Securities (Hong Kong) Financial Holdings Co., Ltd v. Yunnan Zhongyuan Industrial Group Co., Ltd. et al*, (2017) Zui Gao Fa Min Xia Zhong 423 Hao [(2017)??????423?]; *Picc Xiamen Branch v. A.P. Moller – Maersk A/S*, (2017) Zhe Min Xia Zhong 119 Hao [(2017)????119?]; *Zhu Yuquan v. AxiCorp Financial Services Pty Ltd*, (2021) Jing Min Zhong 893 Hao [(2021)???893?].

[11] Article 270 of CPL provides: 'This Part (Part 4 of CPL, Special Provisions on Foreign-Related Civil Procedures) shall apply to foreign-related civil actions within the People's Republic of China. For issues not addressed in this Part, other provisions of this Law shall apply.'

[12] See *Antwerp Diamond Bank v. Weinstock Michel*, (2013) Yue Gao Fa Li Min Zhong Zi Di 467 Hao [(2013)????????467?]; *Suen Kawi Kam v. China Dragon Select Growth Fund*, (2019) Jing Min Xia Zhong 279 Hao [(2019)????279?]; *GOOD*

VANTAGE SHIPPING LIMITED v. Chen Fuxiang et al, (2020) Min 72 Min Chu 239 Hao [(2020)?72??239?]; *Hwabao Trust Co., Ltd. v. Xiao Zhiyong*, (2021) Hu Min Xia Zhong 60 Hao [(2021)????60?]; *Guosen Securities (Hong Kong) Financial Holdings Co., Ltd v. Yunnan Zhongyuan Industrial Group Co., Ltd. et al*, (2017) Zui Gao Fa Min Xia Zhong 423 Hao [(2017)??????423?]; *Picc Xiamen Branch v. A.P. Moller – Maersk A/S*, (2017) Zhe Min Xia Zhong 119 Hao [(2017)????119?]; *Zhu Yuquan v. AxiCorp Financial Services Pty Ltd*, (2021) Jing Min Zhong 893 Hao [(2021)???893?].

[13] See e.g. *Sun Jichuan v. Chen Jianbao*, (2021) Jing Min Xia Zhong 76 Hao [(2021)????76?]; *XYZ Co. v. Chen & Su*, (2022) Lu Min Zhong 567 Hao [(2022)???567?]; *GOOD VANTAGE SHIPPING LIMITED v. Chen Fuxiang et al*, (2020) Min 72 Min Chu 239 Hao [(2020)?72??239?]; *Zhu Yuquan v. AxiCorp Financial Services Pty Ltd*, (2021) Jing Min Zhong 893 Hao [(2021)???893?].

[14] See *Winwin International Strategic Investment Funds Spc v. Chen Fanglin*, (2019) Min Min Xia Zhong 151 Hao [(2019)????151?], para. 2.

[15] See *Antwerp Diamond Bank v. Weinstock Michel*, (2013) Yue Gao Fa Li Min Zhong Zi Di 467 Hao [(2013)????????467?]; *Sun Jichuan v. Chen Jianbao*, (2021) Jing Min Xia Zhong 76 Hao [(2021)????76?].

[16] See *Sun Jichuan v. Chen Jianbao*, (2021) Jing Min Xia Zhong 76 Hao [(2021)????76?], para. 15.

[17] 'On the one hand, the borrower's exclusive choice could facilitate the enforcement of judgements. On the other hand, the bank's right to choose the competent court could reduce commercial costs, which will eventually benefit ordinary clients (including the borrower). In this sense, the borrower's position is no weaker than under an exclusive jurisdiction clause.' See *Bank of Tianjin CO., LTD. Shanghai Branch v. Gong Chongfang et al*, (2022) Hu 0115 Min Chu 87551 Hao [(2022)?0115??87551?], para. 7.

[18] See *Shaoxing Haoyi Trading Co., Ltd. v. GMA-CDMS et al*, (2016) Zhe Min Xia Zhong [(2016)????294?]; *Picc Xiamen Branch v. A.P. Moller – Maersk A/S*, (2017) Zhe Min Xia Zhong 119 Hao [(2017)????119?].

[19] See *Picc Xiamen Branch v. A.P. Moller – Maersk A/S*, (2017) Zhe Min Xia Zhong 119 Hao [(2017)????119?], para. 10.

[20] Article 496, paragraph 2 of the Civil Code of PRC provides: 'Upon concluding a contract, where a standard clause is used, the party providing the standard clause shall determine the parties' rights and obligations in compliance with the principle of fairness, and shall, in a reasonable manner, call the other party's attention to the clause concerning the other party's major interests and concerns, such as a clause that exempts or alleviates the liability of the party providing the standard clause, and give explanations of such clause upon request of the other party. Where the party providing the standard clause fails to perform the aforementioned obligation of calling attention or giving explanations, thus resulting in the other party's failure to pay attention to or understand the clause concerning its major interests and concerns, the other party may claim that such clause does not become part of the contract.' See Civil Code of the People's Republic of China, The State Council of the People's Republic of China, https://english.www.gov.cn/archive/lawsregulations/202012/31/content_WS5fedad98c6d0f72576943005.html, visited on 10th March, 2025.

[21] See *Sun Jichuan v. Chen Jianbao*, (2021) Jing Min Xia Zhong 76 Hao [(2021)????76?].

[22] See *Winwin International Strategic Investment Funds Spc v. Chen Fanglin*, (2019) Min Min Xia Zhong 151 Hao [(2019)????151?]; *GOOD VANTAGE SHIPPING LIMITED v. Chen Fuxiang et al*, (2020) Min 72 Min Chu 239 Hao [(2020)?72??239?].

[23] See *Suen Kawi Kam v. China Dragon Select Growth Fund*, (2019) Jing Min Xia Zhong 279 Hao [(2019)????279?]; *Hwabao Trust Co., Ltd. v. Xiao Zhiyong*, (2021) Hu Min Xia Zhong 60 Hao [(2021)????60?].

[24] See *Bank of Communications Trustee Ltd. v. China Energy Reserve and Chemicals Group Company Ltd.,* (2021) Zui Gao Fa Min Zai 277 Hao [(2021)?????277?], para. 25.

[25] See *Bank of Communications Trustee Ltd. v. China Energy Reserve and Chemicals Group Company Ltd.,* (2021) Zui Gao Fa Min Zai 277 Hao [(2021)?????277?], para. 26.

[26] See *Bank of Communications Trustee Ltd. v. China Energy Reserve and Chemicals Group Company Ltd.,* (2021) Zui Gao Fa Min Zai 277 Hao

[(2021)?????277?]; *XYZ Co. v. Chen & Su*, (2022) Lu Min Zhong 567 Hao [(2022)???567?].

[27] According to Article 19 of Procedures for the Construction and Operation of the People's Court Case Database, the people's courts should refer to similar cases of the Database when hearing cases. However, this reference may not be used as a basis of the adjudication. See Susan Finder, Update on the People's Court Case Database, Supreme People's Court Monitor, https://supremepeoplescourtmonitor.com/2024/12/, visited on 26th February 2025.