Jurisdiction agreement under China Laws

Description

International business contracts often include an jurisdiction clause in which the parties agree to submit the disputes arising from such contracts to certain courts.

Since there are so many international business contracts with China, it is of particular importance for foreign legal counsels to know the rules under Chinese laws and judicial practice in regard of jurisdiction agreement.

I. Statutory Provision

China Civil Procedures Law, newly coming into force in 2013, after taking out the only one provision concerning jurisdiction agreement, now actually contains no provision regarding choice of courts by agreement in the case of foreign-related business contracts. But the latest Supreme Court's guidelines on applying China Civil Procedures Law issued early this year makes up for the "loss". Article 531 of the Guidelines reads:

> The parties to a foreign-related contracts or property disputes may choose in writing and submit to foreign courts having actual connection to the disputes such as the court in the place of defendant's domicile, contract performance, contract execution, plaintiff's domicile, the location of the subject matter and the tortious conducts.
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> As for cases which are prescribed to be exclusively within the jurisdiction of Chinese courts pursuant to Article 33 and Article 266 of China Civil Procedures Laws, the Parties cannot choose foreign courts provided however that arbitration can be agreed for such cases.

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Article 33 and Article 266 single out a certain few types of legal matters that must be submitted to China courts, such as disputes over real estate, disputes in port operation, disputes over inheritance of estates, and disputes over Sino-foreign joint ventures.

II. Understanding the Rule

Though the cited provision, as a judicial interpretation, is not a statutory provision in a strict sense, it is however observed and followed by all Chinese courts throughout the country, serving *de facto* as a piece of statutory law. So it is worthy to grasp the clear meaning and understanding of this provision.

The following elements or points shall be born in mind for understanding the rule:

(1) jurisdiction agreements apply to contractual and property disputes (including tort damages) only, excluding personal disputes;

(2) the agreement on jurisdiction shall be manifested in writing;

(3) only courts that have actual connection to the disputes shall be chosen;

(4) the agreement shall be in compliance with China compulsory rules regarding jurisdictions.

However, this is not the full picture about the jurisdiction agreement issues.

III. Controversies over the Law

Ever since the passing of the updated China Civil Procedures Law (2013), the treatment on jurisdiction agreement in foreign-related disputes therein has sparked many controversies in both academic and practical arena, giving rise to much confusion and uncertainty in practice.

The major change of the new law against the old one is that the two provisions related to jurisdiction issues under foreign-related chapter of the old law were deleted one of which was directly related to jurisdiction agreement in international disputes. Such deletion is interpreted by many as an attempt to unify the rules on jurisdiction agreements in both domestic and foreign-related disputes. This signified a departure from previous “dual tracks” approach referring to two different requirements on jurisdiction agreement in domestic and international (foreign-related) disputes. However, this attempt was received with strong objections from scholars, calling this a retrogress in this area of law.

Indeed, this may lead to unnecessary confusion in practice. In the part of general rules regarding jurisdiction agreement for domestic disputes in the aforementioned newly issued judicial guidelines, the court chosen by the jurisdiction agreement shall be determinable at the time of initiating the lawsuit. In other words, the wording of the jurisdiction agreement shall refer to specific court(s) which can be more than one court. Otherwise, the court will simply disregard the jurisdiction agreement and resort to other general rules to determine the competent court.

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Given requirement on the determinability of the court, the jurisdiction agreement with the wording like “the disputes shall be submitted to the state or federal courts in Arkansas” may be found to be invalid because Chinese courts will find it impossible to determine which exact court shall have the jurisdiction over the dispute in question. So far, it is not clear how Chinese courts will deal with this issue.

Another flash point attracting criticism is the requirement of chosen courts being actually connected with the said dispute, which makes it impossible or very hard for the parties to choose impartial court in a third country that generally has no connection with the disputes. Furthermore, what constitutes actual connection remains unclear, though the judicial practice seems to indicate that only factual connection counts.

Apparently, with the strong challenge and criticism on the change, it is likely that China Supreme Court will further issue judicial notice to clarify and unify the judicial practice in relation to jurisdiction agreement in foreign-related disputes.

IV. Validity of Jurisdiction Law

When a dispute arises, a party may challenge the jurisdiction agreement that chooses a foreign court as its forum by instituting the legal action to nullify the jurisdiction agreement with a China court. What will the China court do? Will China court apply the applicable law chosen by the parties in the relevant contract or apply Chinese laws in determining the validity of the jurisdiction agreement?

A precedent case whose judgement was delivered by China Supreme Court in 2009 has made this clear that the China court will apply Chinese laws in determining the validity of the jurisdiction agreement. The reason is that according to this judgment, under Chinese laws, the applicable laws chosen in a contract shall not include the conflict rules and procedural rules of that country, and therefore, the choice of foreign applicable laws does not mean China courts will be bound thereby to apply such foreign laws in deciding on the validity of jurisdiction agreement. Therefore, China courts shall apply Chinese rules in deciding on the validity of the jurisdiction agreement.

V. Hague Convention

Last but not the least, China is not a party to the Convention on Choice of Court Agreement.

Accordingly, foreign court judgments are not recognizable and enforceable in China. A common mistake made by international clients in drafting their China-related contracts or agreements is to choose a foreign court for their dispute settlement without being aware that such judgments cannot be enforced in China where the defendant's assets are located.

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Date Created
August 2015
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