# EFFECTIVENESS OF EXCLUSIVE JURISDICTION CLAUSES IN THE CHINESE COURTS—A PRAGMATIC STUDY

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**Abstract** Chinese judicial practice demonstrates great diversity in enforcing exclusive jurisdiction clauses. In practice, the derogation effect of a valid foreign jurisdiction clause is frequently ignored by some Chinese courts. It may be argued that these Chinese courts fail to respect party autonomy and international comity. However, a close scrutiny shows that the effectiveness of an exclusive jurisdiction clause has close connections with the recognition and enforcement of judgments. If the judgment of the chosen court cannot be recognized and enforced in the request court by any means, the request court may take jurisdiction in breach of the jurisdiction clause in order to achieve justice. Chinese judicial practice demonstrates the inevitable influence of the narrow scope of the Chinese law in recognition and enforcement of foreign judgments. It is submitted that the Chinese courts do not zealously guard Chinese jurisdiction, or deliberately ignore party autonomy and international comity. Instead, the Chinese courts have considered the possibility of enforcement of judgments and the goal of justice. Applying the *prima facie* unreasonable decision test is the best the courts can do in the specific context of the Chinese law. The *status quo* cannot be improved simply by reforming Chinese jurisdiction rules in choice of court agreements. A comprehensive improvement of civil procedure law in both jurisdiction rules and recognition and enforcement of foreign judgments is needed.

## I. INTRODUCTION

Exclusive jurisdiction clauses are contractual agreements entered into by the parties consenting to submit their disputes that have arisen or might arise to the chosen court, to the exclusion of any other fora.[1] With the development of party autonomy as one of the most important doctrines of modern private international law and with the purpose to provide certainty, predictability and

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[1] See the Hague Convention on Choice of Court Agreements 2005, art 3(a); C Clarkson, *J Hill,* The Conflict of Laws (4th edn, OUP, Oxford, 2011), 77; T Kruger, 'The 20th Session of the Hague Conference: A new Choice of Court Convention and the Issue of EC Membership' (2006) 55 ICLQ 448–9.

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efficiency to commercial parties, most countries adopt the policy in keeping the parties to their bargain and recognize the effectiveness of an exclusive jurisdiction clause in civil and commercial matters.[2]

The effectiveness of exclusive jurisdiction clauses, however, is uncertain in China. The Chinese legislation provides very rigid requirements for a jurisdiction clause to be valid and does not clarify the prorogation and derogation effect of a valid exclusive jurisdiction clause. Because of the ambiguity in the law, Chinese judicial practice demonstrates great diversity. The most important diversity exists on the effectiveness given to a jurisdiction clause choosing a foreign court to hear their disputes. In practice, the derogation effect of a valid foreign jurisdiction clause is frequently ignored by the Chinese courts. It may be argued that the Chinese courts, when taking jurisdiction in breach of a foreign jurisdiction clause, have made a parochial and unfortunate decision, which is wrong in law.[3] However, a close scrutiny of Chinese judicial practice shows that the effectiveness of an exclusive jurisdiction clause has close connections with the recognition and enforcement of judgments. If the judgment of the chosen court cannot be recognized and enforced in the request court by any means, the request court may take jurisdiction in breach of the jurisdiction clause in order to achieve justice. Chinese judicial practice demonstrates the inevitable influence of the narrow scope of the Chinese law in recognition and enforcement of foreign judgments. It is submitted that the Chinese courts do not zealously guard Chinese jurisdiction, or deliberately ignore party autonomy and international comity, by asserting jurisdiction in breach of a valid foreign exclusive jurisdiction clause. Instead, the Chinese courts have considered the possibility of recognition and enforcement of judgments and the goal of justice. Making the *prima facie* unreasonable decision is the best the courts can do in the specific context of the Chinese law. The *status quo* cannot be improved simply by reforming Chinese jurisdiction rules in choice of court agreements. A comprehensive improvement of civil procedure law in both jurisdiction rules and recognition and enforcement of foreign judgments is needed.

This article conducts a pragmatic study of the effectiveness of exclusive jurisdiction clauses in the Chinese courts. Section 2 examines the prerequisites, including the exclusivity, existence and validity, of a jurisdiction clause. It demonstrates that the Chinese legislation on the preliminary issues is unduly restrictive. Section 3 considers the prorogation effect of a jurisdiction clause

[2] See eg the Regulation (EC) No 44/2001 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation), art 23(1). For the English common law, see *The Eleftheria* [1970] P 94; *Aratra Potato Co Ltd v Egyptian Navigation Co ('The El Amria')* [1981] Lloyd's Rep 119, CA. US case: *Bremen v Zapata Off-Shore* 407 US 1 (1972). Canada case: *Z.I. Pompey v ECU-Line NV* 2003 SCC 27.

[3] Liwen Liu, 'On Improvement of International Civil Jurisdiction in China' (2009) 32 Journal of Yantze University (Social Sciences) 44; Zhengjie Hu, 'International Jurisdiction of Chinese Courts in Contractual Matters; Rules, Interpretation and Practice' (1999) 46 NILR 216; Guangjian Tu, 'The Hague Choice of Court Convention—A Chinese Perspective' (2007) 55 AmJCompL 360.

choosing a Chinese court. Section 4 explores the derogation effect of a foreign exclusive jurisdiction clause and examines how recognition and enforcement of judgments affect the effectiveness of a foreign jurisdiction clause. Section 5 considers the possible approaches which the Chinese legislative body could adopt in order to improve the current situation, especially to address the dilemma between the respect of party autonomy and the necessity to enforce the claimant's right.

## II. PRELIMINARY REQUIREMENTS AND VALIDITY OF JURISDICTION CLAUSES

Ever since 1991, the Chinese legislative body has confirmed that the contractual parties are allowed to designate the competent court to hear disputes between the parties.[4] Party autonomy is adopted to address the tendency of some Chinese courts unduly to compete with each other for jurisdiction.[5] This doctrine remains in the 2007 amendment of the PRC Civil Procedure Law,[6] Article 242 of which provides that:

> Parties to a dispute over a contract or property rights and interests involving foreign elements may, through written agreement, choose the court of the place which has practical connections with the dispute to exercise jurisdiction. If a People's court of the People's Republic of China is chosen to exercise jurisdiction, the provisions of this Law on jurisdiction by forum level and on exclusive jurisdiction shall not be violated.

Article 242 literarily grants the parties the right to choose jurisdiction in cross-border disputes. There is no doubt that a court can refuse to give effect to a jurisdiction clause if the clause is invalid.[7] Compared with the law on choice of

[4] PRC Civil Procedure Law 1991, arts 25 and 244, adopted at the Fourth Session of the Seventh National People's Congress and promulgated by Order No 44 of the President of the People's Republic of China on April 9, 1991. This was the first time that party autonomy was adopted in the Chinese law. Prior to the 1991 PRC Civil Procedure Law, the PRC Civil Procedure Law (for Trial Implementation) 1982 did not include a provision allowing the parties' the right to choose the competent court. For a general introduction to the Chinese civil procedure law and source of law, see Mo Zhang, 'International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System' (2002) 25 BCIntl&CompL Rev 59.

[5] HB Wang, 'Explanation on the Civil Procedure Law of the People's Republic of China (for Trial Implementation)(Amendment Draft)', the 4th Meeting of the Seventh NPC, 2 April 1991, section 2.

[6] The PRC Civil Procedure Law 1991 was amended in 2007 by the Decision of the Standing Committee of the National People's Congress on Amending the Civil Procedure Law of the People's Republic of China, adopted at the 30th Meeting of the Standing Committee of the Tenth NPC October 28, 2007 and promulgated by the Order of the President No 75. It entered into effect from 1 April 2008. The law that is currently in force is the PRC Civil Procedure Law 2007. The translation of statutes in the article is available at the National People's Congress, the Database of Laws and Regulations <www.npc.gov.cn/englishnpc/law/Integrated_index>.

[7] *Min Ye (HK) v Liaoning Property* Supreme People's Court [1996] No 158; *Zheng v Weifu Transport* Guangzhou Maritime Court (2005) No 267 (two exclusive jurisdiction clauses choosing US courts and English courts respectively are invalid because these two places have no connections

court agreements in many other countries, Chinese law has established extra and, sometimes, unnecessary restrictions on party autonomy.

### A. Applicable Law

A jurisdiction clause can only be enforced after the court verifies that the clause exists and is valid. The substantive law in deciding the preliminary issues of a jurisdiction agreement varies widely between each country, which raises the issue of the applicable law. The PRC Civil Procedure Law does not provide choice of law rules to decide the law applicable to the existence and validity of a jurisdiction clause and inconsistent judicial practice is observable.

Some Chinese courts treat jurisdiction clauses no differently from underlying contracts and, as a result, apply the *lex causae* to decide the existence and validity of a choice of court clause.[8] This approach is subject to criticism because it fails to comply with the doctrine of severability, which is a common doctrine in the conflict of laws.[9] A jurisdiction clause is different from other substantive provisions of a contract in that it is a conflict of laws agreement. According to the doctrine of severability, a jurisdiction clause is severable and independent from the main contract. The invalidity and non-existence of the main contract does not necessarily cause the invalidity and non-existence of a jurisdiction clause.[10] Chinese legislation does not explicitly accept the doctrine of severability for a jurisdiction clause.[11] However, the Supreme People's Court has provided judicial direction to adopt this doctrine to decide the validity of an arbitration agreement, which excludes the application of the *lex*

to the dispute); *SBF (Korea) v Teng (Beijing)* Beijing Municipal High People's Court, (2005) No 98 (parties choose two alternative fora).

[8] *The Sumitomo Bank Ltd v Xinhua Estate,* Supreme People's Court, (1999) No 194 (the parties chose the law applicable to the loan agreement which the Supreme People's Court used to interpret the meaning and to decide the validity of the choice of court agreement).

[9] See English cases *Fiona Trust v Privalov* [2007] 4 All ER 951; *Heyman v Darwins* [1942] AC 356*; MacKender v Feldia AG* [1967] 2 QB 590. Brussels I cases: C*ase C-269/95, Benincasa v Dentalkit [1997] ECR I-3767. US cases: Robert Lawrence v Devonshire Fabrics* 271 F.2d 402 (CA2 1959); *Watkins v Hudson Coal* 151 F.2d 311 (3 Cir 1945); *Petition of Prouvost Lefebvre* 102 F.Supp 757 (1952); *Haynsworth v Corporation,* 121 F.3d 956, 964 (C.A.5 (Tex) 1997). P Nygh, *Autonomy in International Contracts* (Clarendon Press, Oxford, 1999), 79; A Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP, Oxford, 2009) 62–106.

[10] Although severability does not necessarily mean different applicable law must be applied to jurisdiction clauses and underlying contracts, most Chinese courts believe jurisdiction clauses are 'procedural' and should be subject to different law from the substance. For more details, see the accompanying text to notes 13–15.

[11] Nevertheless, the doctrine of severability is widely used in Chinese judicial practice and is accepted in many academic writings. See, eg. *Shandong Jufeng v Korea MGame,* Supreme People's Court, (2009) No 4; Shandong Province High People's Court, 'Several Opinions about Disputes on Jurisdiction in Civil and Commercial Matters', (2006) No. 41, art 16; Wei Ding, 'On the Perfection in the Legal System of China's Jurisdiction over Foreign Civil and Commercial Disputes', (2006) 24 Journal of China University of Political Science and Law 152, 160; Weiguo Liu, 'Independence of Jurisdiction Clauses in International Civil and Commercial Matters' (2002) 28 Studies in Law and Business 104.

*causae*.[12] A jurisdiction agreement in a contract can be analogized to an arbitration agreement in that both are conflicts provisions, both designate the competent forum and both relate to the procedure. It is recommended that similar treatment should be provided to jurisdiction agreements.

Most Chinese courts use the *lex fori* to decide the validity of a jurisdiction clause.[13] These courts classify the validity of a jurisdiction clause as an issue relating to procedure,[14] which should be governed exclusively by the *lex fori.*[15] This is the dominant approach currently used in the Chinese courts. As a result, once a Chinese court is seised by the claimant, no matter whether a Chinese court or a foreign court is chosen, the seised Chinese court will assess the validity of the jurisdiction clause pursuant to Chinese law, unless they expressly choose the law of another country to govern the jurisdiction agreement.

However, applying the *lex fori* to decide the preliminary issues of a jurisdiction clause is not free from criticism. On the one hand, the existence and validity of a jurisdiction clause is not pure procedure. A jurisdiction clause is one of the contract terms and its effect largely depends on party autonomy. The determination of the existence and validity of a jurisdiction clause is primarily based on the contractual concept. To classify the existence and validity of a jurisdiction clause as purely procedural is not theoretically sound.[16] Recognizing the theoretical challenge, some Chinese courts have

[12] Supreme People's Court, 'Interpretation of the Supreme People's Court concerning Some Issues on Application of the Arbitration Law of the People's Republic of China' ('Interpretation 2006'), [2006] No 7, art 16: the parties could agree on the applicable law to decide the validity of an arbitration clause; in the absence of such a choice, the law of the agreed place of arbitration should apply; if the parties do not agree on either the applicable law or the place of arbitration, the *lex fori* should apply.

[13] *Shandong Jufeng v MGame* (n 11); Supreme People's Court, 'Annual Report of Intellectual Property Cases in the Supreme People's Court (2009)', [2010] No 173, case 44.

[14] *Shandong Jufeng v MGame* (n 11). In a few cases, the Chinese courts have confirmed that jurisdiction and procedure is decided by the PRC Civil Procedure Law and the substance is decided by the choice of law in the GPCL: see the Supreme People's Court, 'Answers to economic disputes relating to Hong Kong or Macau', [1987] No 28, art 3(1) and (2); Guangdong Province High People's Court, 'Notice on Issues about Deciding the Five Intermediate People's Courts of Guangzhou Municipality on the Territorial Jurisdiction and Jurisdiction by Forum Level on Civil and Commercial Matters Relating to Hong Kong and Macau', [2002] No 191, art 13; *China Point Finance Ltd v Zhuhai City Commercial Bank,* Guangdong Province High People's Court, (2004) No 263; *Zhongshan Shishen v Auli,* Guangdong Province High People's Court, (2004) No 239. Nygh (n 9), 83.

[15] Supreme People's Court, 'Rules of the Supreme People's Court on the Relevant Issues concerning the Application of Law in Hearing Foreign-Related Contractual Dispute Cases in Civil and Commercial Matters', [2007] No 14, art 1 provides that the applicable law to contracts refers to the substantive law and does not include procedural law.

[16] In the EU, since the Brussels I Regulation does not provide material validity to a jurisdiction clause, some Member States use national law, including choice of law, to decide material validity. See Hess, B , Pfeiffer, T and Schlosser, P , *Report on the Application of Regulation Brussels I in the Member States* ('Heidelberg Report'), Study JL S/C4/2005/03, Sept 2007, para 377; Austrian case, 7 Ob 320/00k, ZfRV 2001/71 = RdW2001/678; 7 Ob 38/01s, RdW 2001/676 = ÖRZ-EÜ 2001/70 =ZfRV 2001/63 = ecolex 2002, 420 = ELF 2001, 431; 5 Ob 130/02g; Parenti, 'Internationale Gerichtsstandsvereinbarungten: Lex fori oder lex causae Anknüpfung?', (2003) ZfRV 221. National Report Austria (Oberhammer/Domej), Study JLS/C4/2005/03. Also compare

taken the approach of considering a jurisdiction clause to be governed by the *lex fori*, unless the parties have agreed otherwise.[17] The applicable law to a choice of court agreement thus can be designated specifically by the parties. On the other hand, if the *lex fori* is applied to decide the preliminary issues of a jurisdiction clause, the judgment on the validity of such a clause depends on which country is seised to decide this issue. Applying the *lex fori* could cause particular difficulties in China, because Chinese law provides very restrictive requirements for jurisdiction clauses—for instance, the parties cannot choose a neutral forum and the choice is only available for contractual or proprietary disputes.[18] Applying Chinese law could invalidate many jurisdiction clauses which might be valid under the law of other countries. This approach would encourage forum shopping and enable a party to seise the Chinese court with the purpose to avoid a jurisdiction clause concluded by it. Furthermore, debates exist as to whether it is more appropriate to apply the law of the chosen country to decide the validity of the jurisdiction clause, which could keep parties to their agreements, prevent forum shopping and ensure consistent results irrespective of which court is seised to decide this issue. For example, in the Hague Convention on Choice of Court Agreements 2005, the preliminary issue of a choice of court agreement is generally decided according to the law of the chosen country, with limited exceptions.[19] It is suggested that the applicable law to decide the existence and validity of a jurisdiction clause deserves more in-depth study in China.

### *B. Subject Matter*

In the Chinese law, the parties can only choose the competent court in disputes concerning contracts or property rights.[20] In non-contractual obligations, such as personal injury or defamation, the parties are not allowed to choose the

the applicable law to an arbitration agreement in Supreme People's Court, Interpretation 2006 (n 12), art 16. See Briggs (n 9), 66–70; Nygh (n 9), 83.

[17] It is adopted in most Chinese courts and consistent with practice in many other countries. See eg English cases; *The Sumitomo Bank v Xinhua Real Estate* (n 8)*; Continental Enterprises Limited v Shandong Zhucheng Foreign Trade Group Co* [2005] EWHC 92 (Comm) (applying the *lex causae* to decide the illegality of a jurisdiction clause); *Mackender v Feldia* [1967] 2 QB 590; *Astrazeneca v Albemarle International* [2010] 1 CLC 715 (applying the *lex causae* to decide the validity of jurisdiction clause and also separability of jurisdiction clause).

[18] See *infra* subsections II.B–D for more details on the restrictive requirements of jurisdictions agreements in Chinese law.

[19] Art 5(1), art 6(a) and art 9(a) of the Hague Convention provide that the law of the chosen courts, including the choice of laws, should be applied to decide the validity of a jurisdiction clause; art 6(b) and art 9(b) provide exceptions to capacity of the parties. This approach is also supported by Nygh (n 9), 84; AG Opinion of G Slynn, Case C-150/80 *Elefanten v Pierre Jacqmain* [1981] ECR 1671, 1697–9.

[20] Art 244 of PRC Civil Procedure Law (Amended) 2007. Different rules apply to domestic choice of court agreements, which can only be used in contract cases. See art 25. The law does not clarify what 'property rights' mean.

competent forum.[21] It is unclear why the legislation specifies the subject matter in which the parties could choose the competent forum. Although in some non-contractual obligations, such as tort, the parties usually have no plan to establish a relationship with each other and have no opportunity to enter into choice of court agreements prior to the wrongdoing, the parties could enter the agreement after the dispute has arisen. Providing the choice is genuine, there is no compelling reason to invalidate such a choice simply because the subject matter is non-contractual and non-proprietary.

In other cases, non-contractual obligations may arise out of a contractual relationship. Since the choice of court agreement does not apply to non-contractual disputes, a party sometimes wishes to avoid the effect of a jurisdiction clause by formulating its claim on a subject matter other than contract. Some non-contractual obligations have close connections with contracts, such as pre-contractual obligations, unjust enrichment based on the failure to conclude a valid contract, fraudulent misrepresentation inducing a party to enter into a contract, and the breach of fiduciary duty arising out of a contractual relationship. Although the PRC Civil Procedure Law does not define the concept of 'contract', the judicial practice has unanimously adopted a broad and flexible interpretation to cover all contract-related non-contractual issues within the classification of contract in order to enforce the parties' choice of court agreement. In *Lai v ABN AMRO Bank*,[22] for example, the claimant wanted to evade the jurisdiction clause in the investment agreement by formulating his claim on fraud. The claimant argued that the jurisdiction clause only applied to contractual obligations but not delictual ones. The court, however, decided that the scope of a jurisdiction clause was broad enough to cover not only contractual claims, but also tort claims arising out of or in relation to the contract where the jurisdiction clause was included. A claimant could not manipulate the basis of his claim in order to avoid a valid agreement which he had voluntarily entered into. In *Watanabe v Culture & Art Press*,[23] a Japanese writer and a Chinese press concluded a publication contract, choosing Japan as the exclusive forum. Watanabe later sued the Chinese publisher in China for infringement of his copyright, and claimed that the jurisdiction clause was invalid because the dispute was not contractual in nature. The court decided that if the contractual parties have expressly agreed on the competent court to decide disputes, they should not freely choose the basis of the claim to escape their agreement. Otherwise, the doctrine of party autonomy would be undermined. In legal practice, jurisdiction clauses have been extended to cover cases formulated in non-contractual obligations. This is one of the

[21] In the Hague Convention on Choice of Court Agreement 2005 and the Brussels I Regulation, the parties are allowed to choose competent courts in all types of disputes covered by the instruments. See art 2 of the Hague Convention; Art 23(1) of the Brussels I Regulation.

[22] Shanghai Municipal High People's Court (2010) No 49.

[23] Shanghai Municipal No 1 Intermediate People's Court (2008) No 210.

issues where the rigid legislation is relaxed by flexible judicial practice. It is suggested that the restriction on the subject matter should be removed to enable the proper effectiveness of party autonomy.

### C. Practical Connections

The most criticized requirement is that the parties can only choose the court of the place with 'practical connections' with the dispute under the Chinese law.[24] According to the PRC Civil Procedure Law and the judicial direction of the Supreme People's Court, the parties could choose the court located in the domicile, place of registration or place of business of the claimant or defendant, the place where the contract is concluded, the place where the contract is performed and the place where the object of the dispute is located.[25] There is no consensus as to whether other connections are eligible to validate a choice of court agreement.[26] Four of the places expressly allowed by law are the competent fora in the absence of choice.[27] The current Chinese law on party autonomy is thus very restrictive in that it does not grant the parties the power to prorogate jurisdiction to any incompetent forum other than the claimant's domicile, place of registration or place of business. If the parties have chosen a foreign court, which does not have the 'practical connection' with the dispute, or which is a neutral forum, the Chinese court shall hold the jurisdiction clause invalid.

This restriction is inconsistent with common practice globally and incompatible with commercial convenience.[28] In international commerce practice, it is common for the parties to choose a neutral forum, which may be the most experienced and highly-reputed court to hear a dispute, especially in

[24] Art 244 of the PRC Civil Procedure Law (Amended) 2007.

[25] Art 25 specifically lists these five courts available for the parties to choose from in domestic disputes. The same connection is likely to be applied to cross-border disputes to explain the meaning of the 'practical connection'. See also the Supreme People's Court, 'The Notice to Distribute the Summary of the Second National Meeting on the Trial of Foreign-Related Commercial and Maritime Cases' ('2005 Summary'), published 26 December 2005, art 4.

[26] *Shandong Jufeng* (n 11), see the next paragraph. However, some courts only permit the parties to choose from the five specified places and would not consider other connections. See eg *Meihong Xu v Conghua Yan* Fujian Province High People's Court (2010) No 78.

[27] Arts 22 and 241 of the PRC Civil Procedure Law (Amended) 2007 provide that in the absence of choice, the Chinese court has jurisdiction if it is the place where the contract is signed or performed, the object of the action is located, the defendant has detainable property, the defendant has its domicile, or the defendant has its representative agency, branch, or business agent.

[28] The general tendency in the world permits the parties to choose a neutral forum to hear their disputes. See eg Hague Convention on Choice of Court Agreements 2005, art 3; Brussels I Regulation, art 23(1). However, certain restrictions may be necessary in order to protect the weaker party in contracts with inequality of bargaining power, such as employment contracts and consumer contracts. The Chinese law does not provide protective jurisdiction for these contracts. It is suggested that if Chinese jurisdiction rules on the 'practical connections' are abolished in the future, protective jurisdiction rules should be adopted to provide safeguards for the weaker parties in special contracts.

the area of maritime insurance and bills of lading.[29] In *Shandong Jufeng*,[30] for example, a Chinese company and a Korean company concluded a contract and agreed that the Chinese law should be the applicable law and the courts of Singapore should have exclusive jurisdiction. The Supreme People's Court held that Singapore was not one of the five places explicitly listed in the civil procedure law and the judicial direction; nor had it any other connections with the dispute. The chosen court thus had no connections to the dispute and the choice should be invalid.[31] Specifically, the Supreme People's Court said that since the parties had chosen Chinese law instead of the Singaporean Law to govern their dispute, Singaporean Courts had no connection with the dispute. This reasoning seems suggest that the practical connection can be established by the parties' choice of law agreement and could be both 'objective and 'subjective'. This decision deviates from the original legislative purpose which prevents the parties from choosing a court without objective connections to a contract. It shows that Chinese judicial practice has recognized that the rigid requirement in law is incompatible with commercial needs and seeks to interpret the law in a way that relaxes the negative influence of the law and provides flexibility that suits commercial practice.

### *D. Choice of More than One Court, Alternative Choice and Asymmetric Choice*

Chinese law does not permit the parties to choose more than one court in a jurisdiction agreement.[32] Such a choice is considered an ambiguous choice and invalid. In *SBF Inc (Korea) v Teng Garments Ltd (Beijing)*,[33] the parties agreed in their contract that any disputes should be submitted to the court of Seoul or the court designated by SBF Inc. The Beijing Municipal High People's Court affirmed the decision of the Beijing Municipal No 1 Intermediate People's Court, holding the jurisdiction clause invalid because it had chosen more than one court.[34] This restriction has harsh results in practice. The parties might genuinely agree to submit their disputes to one of the designated fora, either with or without exclusion of other competent courts. If the choice is based on the authentic consent of the parties and does not infringe public policy, there is no reason why a court cannot recognize the validity of such a choice. Directly

[29] In *Zheng v Wider Logistics Ltd* Guangzhou Maritime Court (2005) No 267, the bill of lading provided that all disputes arising out of the US Carriage of Goods by Sea Act 1936 should be heard exclusively in the New York Court; for other disputes, the English courts had jurisdiction. After the dispute has arisen, the Chinese court took jurisdiction by holding neither New York nor England had connections with the dispute and the jurisdiction clause was invalid.

[30] Supreme People's Court (2009) No 4.

[31] ibid.

[32] Supreme People's Court, 'Opinion on Several Issues on the Application of the PRC Civil Procedure Law of the People's Republic of China' ('1992 Opinion') [1992] No 22, art 24. *SBF (Korea)* (n 7); *Zhongshan Shishen v Auli* (n 14).

[33] Beijing Municipal High People's Court (2005) No 98.

[34] See also *Zhongshan Shishen v Aul* (n 14).

invalidating such a choice unduly restricts party autonomy and induces rigidity. Secondly, in terms of practice, providing the parties clearly express their intention, such a choice is not too ambiguous to be enforced. A choice of more than one court is not rendered unenforceable under the Hague Choice of Court Convention, though the Convention treats it a non-exclusive clause.[35] Under the Brussels I Regulation, such a clause can even be enforced as an exclusive jurisdiction clause unless the parties expressly provide otherwise.[36] Neither has directly invalidated such a choice without considering the parties' intention.

However, it is necessary to note that the PRC Civil Procedure Law does not provide this restriction. This requirement was introduced by the Supreme People's Court in its 1992 Opinion in relation to the choice of court agreement in domestic cases.[37] In *SBF (Korea)*, the court relied on Article 237 of the PRC Civil Procedure Law 1991[38] to extend the effect of the judicial direction to jurisdiction agreements in cross-border disputes. Article 237 provides that '(t)he provisions of this Part (special provisions for civil procedure of cases involving foreign elements) shall be applicable to civil proceedings … in regard to cases involving foreign element. Where this Part did not provide otherwise, other relevant provisions … shall apply.' However, Article 237 refers to provisions in law and does not explicitly extend its effect to judicial direction. Secondly, Article 237 is deleted in the 2007 amendment of the PRC Civil Procedure Law. It is thus arguable that the choice of more than one court in cross-border disputes may not necessarily be invalid under the current Chinese law.

Although it is likely that the parties could not choose more than one court in a cross-border dispute, they could choose alternative courts to decide their disputes. For example, in *Zheng v Wider Logistics Ltd*,[39] the parties chose the New York court and the English court respectively, depending on the different causes of action. This choice was held valid.[40] There is no strict rule to classify an alternative choice of court agreement as exclusive or non-exclusive.

[35] Article 3(b) of the Hague Convention; R Brand, P Herrup, *The 2005 Hague Convention on Choice of Court Agreement* (CUP, 2008) 262.

[36] See the English court's decision on art 17 of the Brussels Convention in *Kurz v Stella Musical Veranstaltungs GmbH* [1992] Ch 196, 203; Case 22/85 *Anterist v Credit Lyonnais* [1986] ECR 1951, 1962–1963; *Banque Cantonale v Waterlily* [1997] 2 Lloyd's Rep 347; BJ Rodger, 'Article 17 of the Brussels Convention: Exclusivity is a must?' (1995) 14 Civil Justice Quarterly 253–4; JJ Fawcett, JM Carruthers, *Cheshire, North & Fawcett: Private International Law* (14th edn, OUP, Oxford, 2008), 288–9.

[37] 1992 Opinion (n 32). See also the Supreme People's Court, 'Re the questions about the parties' contractual choice of court' [1995] No 157.

[38] *SBF* is a 2005 case when the PRC Civil Procedure Law 1991 was in effect.

[39] Guangzhou Maritime Court (2005) No 267.

[40] The jurisdiction clause provided that if the cause of action was the carrier's liability, New York courts had exclusive jurisdiction; in all other cases, English courts had jurisdiction. This alternative choice was held valid. However, the jurisdiction clause was invalid on the ground that the chosen courts had no connections to the dispute.

Its exclusivity depends on the wording and intention of the parties. A special type of the alternative choice of court agreement is the asymmetric jurisdiction agreement. In *Lai v ABN AMRO Bank*,[41] a private investor entered into an investment agreement with a Dutch bank. Within this agreement, there was a choice of court clause to the effect that the investor could only sue the bank in Hong Kong to the exclusion of any other competent courts, while the bank could sue the investor in any competent fora. Both the Shanghai Municipal No 1 Intermediate People's Court and the Shanghai Municipal High People's Court upheld the choice of court agreement and fully respected the parties' intention in deciding the respective exclusivity of the chosen court. Pursuant to the wording of the agreement, the courts held that where the investor brought the proceedings, Hong Kong courts had exclusive jurisdiction; while the bank acted as the claimant, the jurisdiction clause was non-exclusive. An asymmetric clause is thus treated a third type of the choice of court agreement, which is neither fully exclusive nor non-exclusive. It could be exclusive for one party, but non-exclusive for another, depending on the parties' intention. The asymmetric choice of court agreement is frequently used in the standard terms of a loan agreement. It is appropriate to uphold it as a common practice in international commerce unless it is included in the contract with the inequality of bargaining power.[42]

### *E. 'In Writing'*

A jurisdiction clause must be 'in writing'.[43] The Chinese legislation does not distinguish between 'in writing' and 'evidenced in writing'. According to the Chinese Contract Law,[44] the 'written form' is defined to mean 'any form which renders the information contained in a contract capable of being reproduced in tangible form such as a written agreement, a letter, or electronic text (including telegram, telex, facsimile, electronic data interchange and e-mail)'.[45] If the *lex fori* is applied to decide the validity of a jurisdiction clause, the formal requirement of a jurisdiction clause is broad to cover the written form by any modern technology as far as it could reproduce in tangible form[46] Thus far, there is no case law to the author's knowledge that has invalidated a jurisdiction clause because it is orally agreed and evidenced in writing, or is written

[41] Shanghai Municipal No 1 Intermediate People's Court (2010) No 6, aff'd, Shanghai Municipal High People's court (2010) No 49.

[42] It is necessary to note that the current Chinese law does not provide protective jurisdiction rules to protect the weaker parties in contracts with the inequality of bargaining power.

[43] Art 242.

[44] Adopted at the Second Session of the Ninth National People's Congress on 15 March, 1999 and promulgated by Order No. 15 of the President of the People's Republic of China on 15 March, 1999.

[45] Art 11.

[46] The PRC Civil Procedure Law 1991 was established before the Contract Law entered into force. The requirement of 'in writing' prior to the Contract Law means the traditional method of 'put things on paper'.

by different means. The relaxation of the writing requirement is consistent with international practice and commercial needs.

Furthermore, the Chinese law does not specify the format of 'writing'. In principle, a jurisdiction clause can be written in different format, including being clearly written in the contract, contained in the standard terms of the general contract which is explicitly accepted by the parties, or contained in the small print on the back of the contract. If a contract is unilaterally drafted or is a standard form contract of one party, once the jurisdiction clause is properly notified to the other party, it is valid. The requirement of 'proper notice' demonstrates that some courts are ready to consider the format of writing to decide the authentic consent of the parties.[47] The proper notice requirement also applies to the valid incorporation of a jurisdiction clause contained in another contract. In a few disputes relating to bills of lading, the Chinese courts have held that a dispute resolution clause contained in the charter could not be successfully incorporated in the bill of lading if the language of incorporation only refers to 'all the terms whatsoever of the charter', instead of specifying the dispute resolution agreement,[48] or where the dispute resolution clause is only referred to on the back of the bill of lading.[49]

## III. PROROGATION EFFECT OF JURISDICTION CLAUSES CHOOSING CHINESE COURTS

Article 242 does not clarify the effectiveness of a jurisdiction clause. However, since the parties have the right to choose, it is reasonable to conclude that the provision aims to provide the chosen court with jurisdiction. Strictly speaking, the jurisdiction does not completely stem from party autonomy, because the Chinese law generally allows the parties to select from those courts that have jurisdiction under the default rules.[50]

If the parties have chosen the Chinese court in a valid jurisdiction agreement, the chosen court must take jurisdiction.[51] According to the judicial direction of the Supreme People's Court in the 'Summary of the Second National Conference on the Adjudication of Commercial and Maritime Cases with Foreign Elements' published in 2005 ('2005 Summary'),[52] a Chinese court is not allowed to decline jurisdiction if there is an agreement between the

[47] *Wenzhou Foreign Trade Co of Light Industry Arts and Crafts v Compagnie Maritime d'Affrètement (CMA) (France)* Fujian Province High People's Court, reference no CLI.C.21767 <www.chinalawinfo.com> (the choice of court agreement was printed on the face of the bill of lading in red while all other provisions were in blue).

[48] *SF Chemistry v DB Seafreight* Qingdao Maritime Court (2009) No 277.

[49] *China PingAn Insurance Dalian Branch v Cosco Shipping Co* Supreme People's Court, (2006) No 49.

[50] See comments in *supra* sections II.C on the practical connection between the chosen court and the dispute.

[51] Although the law does not expressly provide this effect, it is accepted by most courts and jurists. See eg Hu (n 3) 205.

[52] Supreme People's Court [2005] No 6. The 2005 Summary was published to interpret the 1991 PRC Civil Procedure Law.

parties choosing the Chinese court,[53] even if the foreign court may be more appropriate and convenient to hear the dispute. There may be doubt as to whether the 2005 Summary continues to apply to the amended PRC Civil Procedure Law. The probability is that it does. Although the 2005 Summary provides interpretation to the PRC Civil Procedure Law 1991, the 2007 amendment does not make any revision to the old rule in choice of court agreements. Furthermore, the 2005 Summary is not repealed by the Supreme People's Court. It suggests that the 2005 Summary continues to have legal effect.

The 2005 Summary raises three issues: firstly, in contrast with the presumption of many commentators, the Supreme People's Court of China accepts that in certain circumstances a Chinese court could decline jurisdiction even if it has jurisdiction pursuant to the Chinese law. This approach is very similar to the doctrine of *forum non conveniens* which is used widely in the common law countries. Although China has a civil law tradition and the court's discretion is very limited, the Supreme People's Court has recognized the possibility that in cross-border actions there might be cases to which a Chinese court has jurisdiction but it is difficult or inconvenient for the Chinese court to proceed due to the convenience of the parties and witnesses, the location of the properties, the application and the proof of the applicable law, and the accessibility of the evidence.[54]

Secondly, the discretion cannot be exercised where a Chinese court is designated by the parties. This is probably due to the reason that since a Chinese court is chosen, the parties have agreed that this jurisdiction should be the appropriate one and promised not to submit the dispute to other jurisdictions. Party autonomy excludes the necessity to conduct a normal check on connections between the dispute and the country to establish the more convenient forum. In practice, many Chinese courts need to be satisfied that there are no agreements choosing the Chinese court before moving to consider whether they should use discretion to decline jurisdiction.[55]

[53] Art 11.

[54] The issue as to whether China could adopt the doctrine of *forum non conveniens* is complicated and this article will not provide detailed discussion. See Guoguang Li, 'The Talk in the National Trail Work of Economic Cases', published by the Supreme People's Court 23 November 1998, section 3.5; Zhang (n 4) 73. In practice, a few Chinese courts have declined jurisdiction by using the doctrine of *forum non conveniens.* See *Dongpeng Trade v HK Bank of East Asia, Selected Cases of People's Courts* (People's Court Publishing, 1996) 143; *Sumitomo Bank* (n 8); *Baron Motorcycles Inc v Awell Logistics Group, Inc* Ningbo Maritime Court (2008) No 277; *Jaten Electronic v Smartech Electronic* Shanghai Municipal No 1 Intermediate People's Court (2009) No 51; *Cai v Wang,* Fujian Province Jinjiang Municipal Intermediate People's Court (1997) No 27; *Jiangdu Shipyard v CICB* Jiangsu Province High People's Court (2001) No 003; *Castel Freres SAS v Li, Xu and Others* Zhejiang Province High People's Court (2011) No 9.

[55] *Baron Motorcycles Inc*, ibid, the court referred to the lack of a jurisdiction clause choosing China as one of the factors supporting the use of *forum non conveniens* to decline jurisdiction; *Jaten Electronic* ibid.

Thirdly, the compulsory effect is granted to any jurisdiction clauses choosing Chinese courts, regardless of their exclusivity.[56] Suppose a Chinese court is designated in a non-exclusive jurisdiction agreement. If there is another forum, which is clearly more appropriate or convenient to hear the dispute, the Chinese court could not use its discretion to decline jurisdiction pursuant to Article 11 of the 2005 Summary. A non-exclusive jurisdiction clause has no power to exclude jurisdiction of other competent fora. The judicial direction thus provides a Chinese non-exclusive jurisdiction clause stronger effects than it otherwise has. The judicial direction clearly shows that the Chinese courts recognize the importance of party autonomy and accept jurisdiction granted by consent. However, it also demonstrates the lack of proper understanding of the difference between non-exclusive and exclusive jurisdiction clauses and the failure to take parties' real intention into consideration.

## IV. DEROGATION EFFECT OF EXCLUSIVE JURISDICTION CLAUSES CHOOSING FOREIGN COURTS

Although the PRC Civil Procedure Law accepts parties' freedom in choosing a competent court to decide cross-border disputes, the Chinese law fails to clarify whether an exclusive foreign jurisdiction clause has the effect of excluding jurisdiction of an otherwise competent Chinese court. Because of the legislative uncertainty, the tradition to make jurisdiction granted by law 'compulsory',[57] the Chinese traditional tendency to expand jurisdiction in order to assert state sovereignty[58] and the absence of judicial cooperation between China and most countries to recognize and enforce each other's judgments, the Chinese courts are more reluctant to decline jurisdiction in favour of a foreign jurisdiction clause. The Supreme People's Court provides in Article 12 of the 2005 Summary[59] that even if the parties agree in their contract that a foreign court has exclusive jurisdiction, this agreement could not exclude the jurisdiction of other competent courts. A Chinese court, which is competent under the Chinese law, could hear a dispute subject to a valid exclusive jurisdiction clause choosing a foreign court.[60] However, it is necessary to note that the 2005 Summary only provides that a Chinese court 'could', instead of

[56] The 2005 Summary (n 25), art 11 does not distinguish exclusive and non-exclusive jurisdiction clauses. A possible explanation is that since the parties have, by agreement, submitted to Chinese courts, they have admitted that the trial in Chinese courts should be convenient, which excludes the consideration of *forum non conveniens*.

[57] Articles 108 and 111 of the PRC Civil Procedure Law (Amended) suggest that once jurisdiction is granted to a Chinese court, taking jurisdiction is generally compulsory with only a few exceptions. One of the exceptions is the existence of a valid arbitration agreement: P Schlosser, 'Jurisdiction and International Judicial and Administrative Co-operation' (2000) 284 *Recueil des Cours* 27.

[58] This can be demonstrated by the excessively broad ground to assert jurisdiction in cross-border civil and commercial matters and the wide scope of exclusive jurisdiction. See arts 241 and 244 of the PRC Civil Procedure Law (2007).

[59] [2005] No 6.

[60] 2005 Summary (n 25), art 12.

'should', exercise jurisdiction granted by Chinese law if the parties have concluded an exclusive foreign jurisdiction clause. The Chinese court, pursuant to its judicial direction, may decide whether or not to take jurisdiction in breach of the foreign jurisdiction agreement.[61] There is no mandatory requirement for a Chinese court to decline jurisdiction in face of a valid exclusive jurisdiction clause choosing a foreign court.

### *A. Breach of Valid Foreign Jurisdiction Clauses for the Purpose of Enforcement*

It has been argued by some commentators that if a court refuses to give effect to a valid foreign exclusive jurisdiction clause, it denies the importance of party autonomy, breaches international comity, and infringes the commercial requirement.[62] The allegation may be true in many countries. However, many Chinese courts accept jurisdiction in breach of a valid exclusive jurisdiction clause not because these courts view foreign jurisdiction clauses as an intervention in the state's sovereignty, but because foreign judgments could not be enforced in China, even if the foreign courts take jurisdiction pursuant to valid jurisdiction clauses.

The Chinese law provides very narrow grounds for a Chinese court to recognize and enforce the judgment given by a foreign court. Foreign judgments can be recognized and enforced in China based on two grounds: (1) there is an international treaty, ratified or acceded to by both the foreign country and China, which grants treaty obligations to the Contracting States to recognize and enforce each other's judicial decisions; (2) in the absence of treaty obligations, the Chinese courts can only recognize and enforce foreign judgments based on the principle of reciprocity.[63] The principle of reciprocity refers to the factual reciprocity, which means that the concerned foreign country must have precedents recognizing and enforcing the Chinese judgements.[64] If such precedents do not exist, the Chinese courts will not consider

[61] See in particular, *infra* subsection A. *Breach of Valid Foreign Jurisdiction Clauses for the Purpose of Enforcement*.

[62] Most academic writers recognize the necessity to enforce an exclusive jurisdiction clause. See eg. JT Brittain, 'Foreign Forum Selection Clauses in the Federal Courts: All in the Name of International Comity' (2000) 23 HoustJIntlLaw 305; SC Gauffreau, 'Foreign Arbitration Clauses in Maritime Bills of Lading' (1995) 21 North Carolina Journal of International Law and Commercial Regulation 417; H Schulze, 'Forum Non Conveniens in Comparative Private International Law' (2001) 118 SALJ 812; A Slaughter, 'A Global Community of Courts' (2003) 44 HarvIntlLJ 206; WW Park, 'Bridging the Gap in Forum Selection: Harmonizing Arbitration and Court Selection' (1998) 8 TransnatlL&ContempProbs 20; M Solimine, 'Forum-Selection Clauses and the Privatization of Procedure' (1992) 25 CornellIntlLJ 52.

[63] PRC Civil Procedure Law (amended) 2007, art 265. Even if both grounds are met, the Chinese courts can deny recognition and enforcement of judgments based on public policy.

[64] Supreme People's Court, 'Re whether the People's Courts should recognize and enforce the Judgment given by the Japanese Court in Payment of Debts' [1995] No 17; *NKK (Japan) v Beijing Zhuangsheng* Beijing Municipal High People's Court (2008) No 919; *RNO v Beijing International Music Festival Society* Beijing Municipal No 2 Intermediate People's Court (2004) No 928.

the fact that, according to the domestic law of the foreign country, Chinese judgments are eligible to be recognized and enforced in this country in principle.[65] Without treaty obligations and reciprocal precedents, Chinese courts will not recognize and enforce judgments made by a foreign court. No exception is given where the foreign court takes jurisdiction under an exclusive jurisdiction clause which is valid under the Chinese law. Where neither ground is met, the only remedy left for the judgment creditor is to recommence the same cause of action in the Chinese court.[66] The claimant thus has to bring the substantive claim in the Chinese court for the enforcement purpose, and go through the whole proceedings for the second time. If the Chinese court decides differently from the court chosen by the parties, the claimant loses its chance to get any remedies. The current law increases litigation costs, produces extra burden to both parties, causes duplication of proceedings, leads to potentially irreconcilable judgments, causes delay, wastes judicial recourses and hampers international comity.

The barrier to the recognition and enforcement of foreign judgments is a fundamental reason preventing a Chinese court from giving the derogation effect to a foreign jurisdiction clause. Even if the parties have entered into a valid jurisdiction clause choosing a foreign country, the foreign judgments cannot be recognized and enforced in China and the Chinese courts might be asked by the judgment creditor to rehear the case at the recognition and enforcement stage. In *NKK (Japan) v Beijing Zhuangsheng*,[67] for example, a Japanese company and a Chinese company concluded a contract for the sale of goods which contained an exclusive jurisdiction clause choosing the Hong Kong court. The dispute was firstly brought in the Hong Kong court which gave judgments in favour of the claimant. However, when the Hong Kong judgment was given, there was no judicial cooperation between China Mainland and Hong Kong. Hong Kong judgments, thus, could not be recognized and enforced in China. Since the judgment debtor had no property in Hong Kong, or anywhere else in the world, NKK, the judgment creditor, had to bring the same action in China. The Chinese court accepted jurisdiction pursuant to the Chinese law holding that the existence of an exclusive jurisdiction clause designating a foreign court and the existence of parallel proceedings could not, in principle, prevent the competent Chinese courts from hearing the case.[68] The Court further stated that if the Chinese court refused jurisdiction based on the ground that the parties had entered into an agreement

[65] *NKK (Japan) v Beijing Zhuangsheng* (n 64); *RNO* (n 64).

[66] Supreme People's Court, 1992 Opinion, art 318: 'If the party applied to the competent intermediate court of the People's Republic of China for recognition and enforcement of foreign judgments or rulings, if the country where the foreign court is located and the People's Republic of China have not concluded or acceded to international treaties, or formed the relation of reciprocity, the applicant could sue in the People's Court for the competent People's Court to make judgment for enforcement.'

[67] Beijing Municipal High People's Court (2008) No 919.

[68] ibid. 2005 Summary (n 25), art 12.

giving a foreign court exclusive jurisdiction, it denied the remedy that the claimant should be able to get and it eventually refused the claimant's right to have its right enforced.[69] In *RNO v Beijing International Music Festival Society*,[70] the Beijing Municipal No 2 Intermediate People's Court refused to recognize the judgment given by the English court, because there was no judicial cooperation treaty between China and the UK and there was no precedent in which the English courts recognized or enforced Chinese judgments.[71] The Court explicitly suggested that the claimant could consider bringing the same action in a competent people's court irrespective of the exclusive jurisdiction agreement choosing the English court.

In order to avoid the cost of duplicate proceedings, some contractual parties are forced to breach their jurisdiction agreements by commencing the action directly in the Chinese courts.[72] Some Chinese courts, recognizing the difficulty of the recognition and enforcement of foreign judgments made pursuant to a choice of court agreement, will take jurisdiction in breach of such an agreement in the interests of justice. In *Kwok & Yih Law Firm v. Xiamen Huayang Color Printing Company*,[73] the Xiamen Municipal Intermediate People's Court refused to decline jurisdiction in favour of the Hong Kong court, which was chosen by the parties in their jurisdiction clause, primarily based on the fact that the defendant had all their property located in China Mainland and the judgment of the Hong Kong court, if against the defendant, could not be enforced.[74] It is interesting to note that although these courts did not use the terminology of *forum conveniens*, they have followed the basic spirit of *forum conveniens* to assert jurisdiction in breach of a foreign exclusive jurisdiction clause. Recognition and enforcement of judgments and the location of assets are closely connected to the determination of an appropriate forum. If the judgment cannot be enforced, no matter how closely the country is connected with the dispute, the trial is ineffective and asserting jurisdiction is not sound management of judicial resources.[75]

However, this approach could lead to unreasonable results and procedural difficulty. Firstly, the difficulty of enforcement only exists where the claimant has succeeded or would succeed in the action. Whether a claimant could succeed should be determined at trial. When a court determines its international jurisdiction at a preliminary stage, it will not consider the merit of each

[69] *NKK (Japan) v Beijing Zhuangsheng* (n 64).

[70] Beijing Municipal No 2 Intermediate People's Court (2004) No 928.

[71] The court rejected the claim that the same type of Chinese judgments should be able to be recognized and enforced in England pursuant to English law though such precedents do not exist so far. Only existing precedents can generate the principle of reciprocity.

[72] Eg *Watanabe v Culture & Art Press* (n 23). See *infra* text accompanying footnotes 77–78.

[73] Xiamen Municipal Intermediate People's Court, 2003.08.13.

[74] The choice of court agreement in this case is a non-exclusive one. However, the court made decision largely based on the possibility of enforcing Hong Kong judgments, instead of the non-exclusive nature of the jurisdiction clause.

[75] *The Eleftheria* (n 2); *The El Amria* (n 2).

party's case or predict the possible outcome of the dispute. In other words, the possible outcome of the dispute should not be a factor for a court to take into consideration when deciding jurisdiction. Secondly, if a Chinese court blindly takes jurisdiction in all cases where the defendant has all assets in China for the purpose of enforcement, it may encourage a party to breach its contractual agreement by bringing a claim in the Chinese court. A claimant may try to bring an action, which does not have a real prospect of succeeding, in China, with the sole purpose of creating inconvenience to the defendant.

### *B. Declining Jurisdiction without Considering Enforcement*

Some Chinese courts hold that an exclusive jurisdiction clause has the effect to preclude all other competent fora, including an otherwise competent Chinese court. These courts decline jurisdiction in cases where there are valid jurisdiction clauses by providing the full derogation power to an exclusive foreign jurisdiction clause, regardless of the possibility to enforce the foreign judgment.[76]

These decisions are undoubtedly correct in theory and consistent with the international tendency to respect party autonomy and international comity. However, making the decision in the specific context and background of the Chinese judicial system leads to unexpected difficulty to the claimant and hampers the ends of justice from being achieved. *Junichirou Watanabe v Culture & Art Press*[77] is a case concerning conflict of jurisdiction between China and Japan. The parties had concluded a jurisdiction clause granting exclusive jurisdiction to the Japanese court. The claimant was a Japanese citizen, habitually resident in Japan. The defendant was a Chinese company with all its assets in China. Under normal circumstances, the claimant should have commenced the proceedings in the Japanese courts, which were also a more convenient forum to the claimant. The claimant, however, realized that the Chinese courts had refused to recognize and enforce the Japanese judgments in previous cases.[78] Although Japan was the forum chosen by the parties and had the personal connection with the claimant, the claimant eventually decided to commence the action in China in breach of the choice of court agreement.

[76] *Yacheng Automobile Parts v Huifeng* Jiangsu Province Wuxi Municipal Intermediate People's Court (2006) No 23; *Sojitz v Xiao* Shanghai Municipal High People's Court (2004) No 72; *Wenzhou Light Article Industry v CMA (France)* (n 47).

[77] Shanghai Municipal No 1 Intermediate People's Court (2008) No 210.

[78] Supreme People's Court, 'Re Whether the Chinese People's Courts should recognize and enforce the Japanese Judgments Relating to Debt and Credit', 26.6.1995, [1995] No 17; *Application of Gomi Akira (A Japanese Citizen) to Chinese Court for Recognition and Enforcement of Japanese Judicial Decision,* 1994.11.05, Liaoning Province Dalian Municipal Intermediate People's Court, (1996) 1 Gazette of the Supreme People's Court of the People's Republic of China. W Li, 'Principle of Reciprocity in the Terms of Recognition and Enforcement of Foreign Courts' Judgments', (1999) 86 Tribune of Political Science and Law 92.

Although the claimant commenced the Chinese proceedings violating his freely-entered agreement, this is an understandable action. From the perspective of law, the Supreme People's Court, in its judicial direction, accepts that a Chinese court could take jurisdiction irrespective of a foreign exclusive jurisdiction clause;[79] from the perspective of justice, suing in China was the only way by which the claimant can obtain his remedy. The claimant certainly did not bring the action with bad faith; the Japanese proceedings might prevent the claimant from receiving remedies or enforcing his rights and the Chinese proceedings were hardly vexatious or oppressive to the defendant. All these factors demonstrated that this was an exceptional case and it was better for the ends of justice for the Chinese court to take jurisdiction. The Shanghai Municipal No 1 Intermediate People's Court, however, declined jurisdiction. The only consideration in making the decision was that the jurisdiction clause was valid and exclusive and the parties should be bound by their agreements. The court did not consider the fact that there was no judicial cooperation or reciprocity between China and Japan. It is almost certain that if the Japanese court gave judgment in favour of the claimant, this judgment could not be enforced in China. The claimant, as a judgment creditor, must commence the same proceedings in China at the enforcement stage, and the Chinese court should take jurisdiction to hear the substance of the case upon this application pursuant to the 1992 Opinion.[80] The Chinese court would thus take jurisdiction in breach of the Japanese jurisdiction clause in any event. It is hard to justify why the court should not accept jurisdiction at the adjudication stage which, in the unsatisfactory circumstances, should be the only reasonable approach to prevent duplicity of proceedings and to achieve the ends of justice.

### *C. Declining Jurisdiction Where There Is No Difficulty of Enforcement*

In cases where there was judicial cooperation or reciprocity between China and the country designated by the parties in their agreement, recognition and enforcement of foreign judgments is no longer a barrier preventing the enforcement of a valid exclusive jurisdiction clause. China has entered into around 30 bilateral agreements with foreign countries or regions to recognize and enforce each other's judgments,[81] and the courts of some countries have already recognized and enforced Chinese judgments, which generates the principle of reciprocity.[82] When the Chinese courts are seised to hear a case

[79] 2005 Summary (n 25), art 12.

[80] Art 318; *RNO* (n 64)*; NKK v Beijing Zhuangsheng* (n 64).

[81] Ten EU Member States, ie Belgium (1988), Bulgaria (1995), Cyprus (1996), France (1987), Greece (1996), Hungary (1997), Italy (1995), Poland (1988), Romania (1993) and Spain (1994) have entered into such bilateral treaties with China.

[82] Eg the US Court of Appeals for the Ninth Circuit affirmed the decision of the District Court Central District of California to recognize and enforce Chinese judgments under the California's Uniform Foreign Money-Judgments Recognition Act in *Sanlian & Pinghu v Robinson Helicopter* No 09-56629.

which is subject to an exclusive jurisdiction clause choosing one of those countries, the Chinese courts should decline jurisdiction in favour of the chosen court.

For example, China Mainland and Hong Kong have entered into a judicial cooperation arrangement in 2006.[83] This arrangement facilitates mutual recognition and enforcement of judgments between China Mainland and Hong Kong Special Administrative Region (HKSAR) pursuant to choice of court agreements. If a court of China Mainland or HKSAR has taken jurisdiction designated by an exclusive choice of forum clause[84] and has given judgments enforceable by payment of money,[85] the beneficiary can rely on the arrangement to have the decision recognized and enforced in HKSAR or China Mainland.[86] In *Lai v ABN AMRO Bank*,[87] a Chinese citizen and a Dutch bank entered into an investment agreement providing that the investor could only sue the bank in the Hong Kong court to the exclusion of any other fora. After the dispute arose, the Chinese investor sued the bank in Shanghai, which had jurisdiction in the absence of party autonomy under the Chinese law. The Shanghai court, correctly, declined jurisdiction by providing the full derogation effect to the jurisdiction clause. *Lai v ABN* can be compared with *NKK (Japan)*.[88] In both cases, the parties had chosen the Hong Kong Court in the exclusive jurisdiction agreement. In the former, the Chinese court declined jurisdiction in favour of the chosen courts; in the latter, the Chinese court had taken jurisdiction to decide the substance of the case regardless of the jurisdiction agreement and the fact that the Hong Kong court had already heard the case and made judgments. The key difference between the two cases is that at the time of decision in *Lai*, the China–HK arrangement had entered into force; while in *NKK*, there was no ground for the Chinese courts to enforce the Hong Kong judgments pursuant to the choice of court agreement.

In *Wenzhou Foreign Trade Co of Light Industry Arts and Crafts v Compagnie Maritime d'Affrètement (France)*,[89] the Fujian Province High People's Court affirmed the decision of the Xiamen Maritime Court to decline jurisdiction in favour of the chosen French court in the bill of lading. This decision, again, would not cause difficulty in recognition and enforcement of judgments. China and France had entered into a bilateral agreement for reciprocal recognition and enforcement of judgments in civil and commercial

[83] Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong SAR Pursuant to Choice of Court Agreements between Parties Concerned 2006.

[84] Art 3. [85] Art 1. [86] Art 1.

[87] Shanghai Municipal High People's Court, (2010) No 49.

[88] *See supra* text accompanying footnotes 67–69.

[89] Fujian province High People's Court, reference no. CLI.C.21767 <www.chinalawinfo.com>.

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matters in 1987.[90] According to the treaty, China and France should recognize and enforce each other's judicial decisions,[91] unless the judgments fall in one of the grounds justifying refusal,[92] one of which is that the trial court has no jurisdiction under the law of the requesting country.[93] Since the choice of court agreement is valid under the PRC Civil Procedure Law, the French judgment was eligible for recognition and enforcement in China.

### *D. Declining Jurisdiction Where Judgments Are Not Enforced in China*

In other cases, if the defendant has no assets in China, or the defendant has assets located in China and other countries, the judgment in favour of the claimant need not be enforced in China. A Chinese court, in such cases, should have no difficulty to decline jurisdiction by giving full effectiveness to the foreign exclusive jurisdiction clause. In *Yacheng Automobile Fittings v HSBC Holdings Plc*,[94] for example, the parties entered into an agreement for the claimant to transfer its share in a subsidiary company to the defendant. The defendant failed to pay the price according to the agreement and the claimant brought an action in the Chinese courts demanding the defendant to perform the contract and to pay compensation. The contract contained a clause providing exclusive jurisdiction to the Singaporean courts. Although China and Singapore entered into a bilateral judicial cooperation treaty,[95] this treaty only provides the reciprocal recognition and enforcement of arbitral awards pursuant to the New York Convention.[96] It does not contain any provision facilitating the recognition and enforcement of court judgments. There is also no precedent of reciprocity between China and Singapore. The Singapore judgment cannot be recognized and enforced in China. However, in this particular case, both parties were companies registered in Singapore and the Singaporean court could directly enforce the judgment in Singapore. There was no difficulty in terms of recognition and enforcement of judgment. The Chinese court then recognized the derogation effect of the exclusive jurisdiction clause and declined jurisdiction accordingly.

### *E. Conclusion*

Declining jurisdiction in cases where there is an exclusive choice of court agreement choosing a foreign court is far more complicated than it looks.

[90] Treaty on Judicial Assistance in Civil and Commercial Matters between the People's Republic of China and Republic of France, ratified in the 22th meeting of the sixth NPC Standing Committee on 5 Sept 1987, entered into force on 8 Feb 1988.

[91] ibid, art 19(1). [92] ibid, art 22. [93] ibid, art 22(1).

[94] Jiangsu Province Wuxi Municipal Intermediate People's Court, (2006) No 23.

[95] Treaty on Judicial Assistance in Civil and Commercial Matters between the People's Republic of China and Singapore; entered into force on 27 June 1999.

[96] Art 20.

Although it is admitted that parties should be bound by their agreements and party autonomy should be respected by the court, enforcing such an agreement in certain circumstances is impractical. Cross-border jurisdiction is closely connected with recognition and enforcement of judgments. Without the possibility to have a judgment enforced, the jurisdiction taken by the court loses its pragmatic value. The legal proceedings become largely symbolic.

The effect of a jurisdiction clause cannot be assessed in a vacuum without considering the whole context of cross-border access to justice. Without the effective mechanism to facilitate recognition and enforcement of judgments, declining jurisdiction would cause more inconvenience and costs to the parties than taking jurisdiction in breach of foreign jurisdiction clauses.[97] Although it is accepted that a court should respect the legitimate choice made by the parties, it is also true that practicability and judicial feasibility justify that sometimes courts will not give the full effect to a valid foreign jurisdiction clause. Given the narrow ground on which the Chinese courts may recognize and enforce foreign judgments, it is difficult for the courts to give judgments that both achieve the ends of justice and respect the doctrine of party autonomy. It is thus unrealistic to argue that these Chinese courts are certainly 'wrong' or 'unreasonable' to take jurisdiction irrespective of a valid foreign jurisdiction clause. On the other hand, if a Chinese court takes jurisdiction in all cases, where there might be requirements to enforce the judgment in China, this would hamper the reasonable expectation of commercial parties by entering into a jurisdiction agreement and may encourage a claimant to abuse the process.[98]

In areas where recognition and enforcement of judgments is not a problem, ie there is a judicial assistance treaty, the principle of reciprocity is applicable or the defendant has assets located somewhere else, the Chinese courts have demonstrated the clear attitude to uphold the foreign jurisdiction clause.[99] Declining jurisdiction in these cases would not cause difficulties in enforcing the claimant's rights. It is reasonable to conclude that the greatest barrier for a Chinese court to fully respect party autonomy is the unduly narrow ground for the recognition and enforcement of foreign judgements.

## V. THREE APPROACHES TO IMPROVE THE *STATUS QUO*

The *status quo* in China is clearly not ideal. On the one hand, some issues relating to the prerequisites of a jurisdiction clause are uncertain, and the law has provided unnecessary restrictions to a valid jurisdiction clause. On the other hand, the current law on recognition and enforcement of foreign

[97] Compare *NKK (Japan) v Beijing Zhuangsheng* (n 64), *RNO* (n 64) and *Watanabe* (n 23).

[98] See the approach to take jurisdiction irrespective of a valid foreign exclusive jurisdiction clause for the purpose of enforcement of judgment in *supra* subsection IV.A.

[99] *Lai v ABN AMRO Bank; Wenzhou Light Article Industry v CMA (France)* (n 47); *Yacheng Automobile Fittings v HSBC Holdings Plc* (n 76).

judgments directly hampers the effectiveness of a foreign jurisdiction clause. The current situation cannot be improved simply by producing a legislative provision or judicial interpretation to require a Chinese court to decline jurisdiction in favour of a valid chosen forum. The reform in the law on jurisdiction clauses can only clarify the preliminary issues relating to the exclusivity and validity of a jurisdiction clause but cannot fundamentally improve the dilemma caused by enforcing a foreign jurisdiction clause.

The *status quo* can be improved by three different means: the first one is to amend the current Chinese law on recognition and enforcement of foreign judgments. The current grounds for recognizing and enforcing foreign judgments are unduly narrow.[100] It is suggested that China should abandon the doctrine of reciprocity and follow the practice in most countries by establishing standard conditions and principles and recognize foreign judgments satisfying these standards. The procedure for enforcement application should be simpler, speedier and more straightforward than deciding an action in substance. If the legislative body finds it is hard to make the fundamental amendment to the law on recognition and enforcement of foreign judgments in all types of cases, it is possible to make experimental reform in selected issues where consensus is easy to reach.[101]

The second approach is to strengthen judicial cooperation with foreign countries or regions, by concluding bilateral judicial cooperation treaties on recognition and enforcement of judgments in civil and commercial matters pursuant to choice of court agreements. However, this approach requires the Chinese government to enter into treaties with each individual country. This is an extremely slow method for improving the whole situation and since each treaty will vary in content, it also hampers certainty in cross-border commercial relationships.

The third approach is to improve the situation based on the existing global judicial cooperation instrument. The Hague Conference on Private International Law adopted the Hague Convention on Choice of Court Agreements in 2005, which is currently open for signature. The Convention aims to facilitate judicial cooperation between the Contracting States in enforcing exclusive jurisdiction clauses and to recognize and enforce judgments given by the other Contracting States pursuant to a valid jurisdiction clause. After becoming a Contracting Party of the Convention, the Convention rules on exclusive jurisdiction clauses and recognition and enforcement of

[100] See En-yuan Liu, 'Basic Conditions for China to Recognize and Enforce Foreign Judgments' (2008) 23 Journal of Shanghai University of Political Science and Law 63.

[101] For example, the Supreme People's Court has already removed the rigid recognition rule in the enforcement of foreign decisions on divorce. See Supreme People's Court, 'Notice on Distribution of the Regulation about Chinese Citizens Applying for Recognition and Enforcement of Foreign Divorce Judgments', [1999] No 21; Supreme People's Court, 'Regulation on Some Issues about Accepting the Application in Recognition and Enforcement of Divorce Judgments Given by a Foreign Court' [2000] No 6.

foreign judgments replace domestic law for disputes falling within the scope of the Hague Convention. Although this Convention is not yet in force,[102] once it is ratified by most countries in the world, it has the potential to become a judicial counterpart of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ('New York Convention').[103]

Although the third approach is a promising one, it is necessary to recognize that diversity exists between the Chinese law and the Hague Convention. The Chinese law on the prerequisites of a jurisdiction clause is uncertain and over rigid. There are strong arguments suggesting that the Chinese law on this issue should be revised, and the judicial practice has shown that some Chinese courts voluntarily provide flexible interpretation to relax the law.[104] One of the possible approaches recommended by commentators is to revise the Chinese law in line with the Hague Convention.[105] The divergence between the Chinese law and the Hague Convention on the preliminary issues cannot form a fundamental barrier preventing China from ratifying the Hague Convention.

The major difference between the Chinese law and the Hague Convention is the recognition and enforcement of foreign judgments. It is likely that the Chinese lawmakers would be more reluctant to open the door to the recognition of a foreign judgment in civil and commercial matters than to relax the prerequisites. However, the potential concern of the Chinese legislator may be reduced by considering two facts. On the one hand, China has ratified the New York Convention and participated in the international cooperation recognizing the effect of an arbitration agreement and enforcing arbitral awards. The Hague Convention 2005 does not produce more risk to the Chinese court than the New York Convention. Both Conventions exclude a large number of issues from their scope,[106] provide similar grounds for refusal,[107] and the Hague Convention provides the possibility to make relatively broad reservations.[108] The practice in the past 25 years in enforcing the New York Convention in China demonstrates great benefits to the international trade and commerce involving Chinese interests and the

[102] The Convention has been signed by Mexico, US and the EU.

[103] C Schulze, 'The 2005 Hague Convention on Choice of Court Agreements' (2007) 19 SAMercLJ 140; R Garnett, 'The Hague Choice of Court Convention: Magnum Opus or Much Ado About Nothing?' (2009) 5 Journal of Private International Law 161, section 3.2.

[104] See *Lai v ABN AMRO Bank* (n 22)*; Shandong Jufeng* (n 11). See *supra* text accompanying footnotes 22–23 and the comments on *Shandong Jufeng* in *supra* section II.C.

[105] See Guangqin Qu, Shumin Wang, Shunning Jia, 'Hague Convention on Choice of Court Agreements and Its Relation to Legislation of Chinese Private International Law' (2006) 95 Journal of Henan Administrative Institute of Politics and Law 28–30; Jiwen Wang, 'Analysis of the Necessity for China to Ratify the Hague Convention on Choice of Court Agreements' (2009) 16 Anhui University Law Review 156ff; Tu (n 3); Xiao-Li Gao, 'The Impact of the Hague Convention on Choice of Court Agreements on Chinese Adjudication in Civil and Commercial Matters' (2006) People's Judicature 86–7.

[106] Art 2 of the Hague Convention. See Garnett (n 103), section 3.2. Some issues that are covered by the New York Convention are excluded from the Hague Convention.

[107] ibid art 9 of the Hague Convention. ibid Garnett.

[108] ibid art 21.

development of arbitration as one of the most popular dispute resolution methods in China. The successful experience in arbitration could encourage China to take a positive view over the choice of court convention. On the other hand, an experimental arrangement has been made between China and HKSAR. The terms of the bilateral arrangement largely imitate the Hague Convention. The arrangement can be regarded as an experiment of enforcing the Hague Convention in China. The effect of the arrangement in the Hong Kong related business relationship could provide useful evidence demonstrating the future influence of the Hague Convention in China in the global context. If the experiment is successful, it could encourage China to ratify the Hague Choice of Court Convention.[109]

However, the attitude of the Chinese legislative body is still ambiguous and hard to predict. In many cases in the past it has amended Chinese domestic law in harmony with an international treaty before China ratifies or accedes to the treaty.[110] The Hague Convention was established in 2005, the China–HK Arrangement was adopted in 2006, and China reformed the PRC Civil Procedure Law in 2007. Unfortunately, the 2007 amendment does not address any diversity between the Chinese law and the Hague Convention, demonstrating an absence of present intention to ratify the Hague Convention. The PRC Civil Procedure Law is currently under review again and it is necessary to wait and see whether the Chinese lawmaker will bridge the difference between the Chinese law and the Hague Convention in the forthcoming amendment. If the Chinese law is reformed by emulating the Hague Convention, it would give a clearer signal that China might be preparing to ratify the Hague Convention in the future.

## VI. CONCLUSION

The pragmatic study of Chinese judicial practice in enforcing choice of court agreements gives rise to some interesting discoveries. Firstly, in contrast with the traditional presumption that the Chinese courts have no discretion in deciding whether to take or to decline jurisdiction, discretion arguably plays an active role in the current context where the legislation is ambiguous, inappropriate and outdated. Since it usually takes time for the legislative body to amend the current law to suit the urgent needs of commercial practice, some Chinese courts have used discretion to apply the law in a flexible manner in order to provide reasonable judgments in this unsatisfactory legislative

[109] Most Chinese jurists argue that ratifying the Hague Convention 2005 could bring more advantage to China and Chinese business than disadvantage. See *supra* n 102.

[110] For example, China revised the Chinese law on adoption before it ratified the Hague Convention on the Protection of Children and Cooperation 1993 in 2005. See more discussion in Hanqin Xue, Qian Jin, 'International Treaties in the Chinese Domestic Legal System' (2009) 8 Chinese Journal of International Law 299, para 25–32.

context.[111] However, the actual exercise of discretion in the Chinese courts leads to inconsistent and unpredictable results. This is largely due to the fact that no consistent guidance has been provided and precedent has only instructive value in the Chinese legal system. Although the attempt of these Courts is laudable, the effect of the discretionary decisions is limited and produces uncertainty for the parties. Discretion is not enough to save ill-formed law, and the Chinese courts frequently encounter a dilemma in choosing between the ends of justice and respect for party autonomy, and between what the law is and what the law should be.

Secondly, recognition and enforcement of judgments is a very important factor in deciding the effectiveness of a jurisdiction clause. The doctrine of party autonomy only requires the court to consider whether there is an authentic agreement between the parties and whether the agreement has infringed public policy or mandatory rules. However, the ultimate goal of every claimant by commencing an action is to have its legal right enforced. Since the valid choice of court agreement does not necessarily lead to the enforcement of the judgment in another country, the compulsory requirement for a court to decline jurisdiction in every case where there is a valid foreign exclusive jurisdiction clause is not pragmatic. The difficulty in China also demonstrates that fully respecting party autonomy and protecting certainty and predictability requires judicial cooperation in facilitating mutual recognition and enforcement of judgments at the international level.

The Chinese law needs to be reformed and the reform requires a review of a broad range of issues, especially the recognition and enforcement of foreign judgments in China. Although China has played an important role in international trade and economy and has demonstrated a clear intention to give more commitment to international judicial cooperation, it is uncertain whether the Chinese legislator is ready systematically to reform law on the recognition and enforcement of foreign judgments. However, it is necessary to understand that the international tendency is to move from isolation to cooperation. With the improvement of its economy as the core of Chinese policy, China will inevitably step out and become more engaged with international judicial cooperation. Although it is hard to predict when the change will be made, it is almost certain that such a change is only a matter of time.

[111] The possibility for the Chinese courts to use discretion is even accepted by the Supreme People's Court. See the 2005 Summary (n 25), arts 11 and 12.