Identification of the Competent Judge in China

Xi Zhiguo

For the solution of disputes arising out of the contracts of international sale of goods, in my point of view, to determine the competent court or courts is the first and probably the most important question to solve. The reasons are obvious. First of all, the choice of the competent court has great influence on the distribution of the litigation costs borne by the parties. In addition, to a great extent, it decides which country's procedural law, even material law, will be applied hereto and therefore determines the outcome of the actions, even the recognition and enforcement of the judgment. Fist of all, the civil procedural rules that dominate the actions are up to the competent court. Second, the court will use its own nation's laws of conflicts to decide the applicable material laws concerning the disputed contracts.

It can be also safely said to be one of the most complicated questions in the field of law of conflicts. However, just as the Hague Convention on choice of court agreements (30 June 2005) has pointed out that it is only through enhanced judicial co-operation that international trade and investment can be promoted, it is only through uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters that the judicial co-operation can be enhanced. Therefore, all states and nations are making great effort to coordinate the rules of jurisdiction; the PRC is now on her way too.

Up to present, there are no specific code or rules for the proceedings to resolve international sales of goods disputes, not to mention to designate the competent courts in the system of law of the People's Republic of China. Therefore, the general rules for the civil and commercial actions involving foreign elements, which are only a part of the Civil Procedural Law of China, can be applied to this kind of disputes.

X. Zhiguo (✉)
China University of Politics and Law, Civil and Commercial Law Institute, Beijing, China
e-mail: xizhiguolaw@126.com

N. Nord, G. Cerqueira (eds.), *International Sale of Goods*, China-EU Law Series 5,
DOI 10.1007/978-3-319-54036-8_2

Not as the determination of applicable law, but there is no special or independent code for the jurisdiction over actions with foreign elements. The rules about the jurisdiction and other procedural problems are only part of the Civil Procedural Law (CPL, 4th part). In this code, only two articles (Articles 265, 266) are about the jurisdiction of civil actions with foreign elements. Just as for many of the internal civil proceedings, these two framework rules are obviously not detailed enough to solve such a complicated problem. Therefore, on 4 February 2015, the Supreme Court published a much more detailed interpretation of the CPL, which also includes interpretations for the jurisdiction over actions involving foreign elements.

Next, I will introduce the Chinese solutions to the determination of jurisdiction when the disputes arise out of international sale of goods.

1 The Priority of the Choice of Court Agreement

As in most of the jurisdictions in the world, the People's Republic of China's legal system allows the parties to choose the courts to resolve their disputes arising from contracts or other property disputes with foreign elements. This is the logical result of the principle of private autonomy. In another word, private autonomy also plays a decisive role in this field as in any other private law fields.

Generally speaking, for the determination of competent court, the choice of court agreement concluded by two or more parties has priority. If there is a valid choice of court agreement, then the chosen court has jurisdiction. The choice of court can both be express and implied.

1.1 Express Choice

It is very interesting that the newly revised CPL abrogated the rules that allow the parties to choose the court to decide their disputes involving foreign elements. According to most of the well-known scholars, the newly revised CPL's rules (Article 34 and Article 127) for the choice of court for internal actions can be directly applied to the civil actions involving foreign elements. Of course, many scholars strongly criticised this revision. Therefore, the Interpretations of the SPC (2015) adopted this principle just as before (Article 531 subsection 1). It is self-evident that the disputes arising from the contracts for the international sale of goods fall under the purview of contracts with foreign elements. Therefore, the parties can choose the competent court expressly as well as impliedly.

For the choice of court, all the following requirements must be satisfied at the same time.

The agreement must be in written form, according to the interpretations of the SPC. However, according to Article 11 of the Contract Law of China (1999), the following forms are all regarded as written forms: letters, telegraph, telex, text, fax,

email, electric data exchange, etc., which are capable of expressing the will of the parties in a tangible form.

The chosen court must have some practical connections with the disputes to be submitted to exercise jurisdiction over them. These connections are only defined objectively. They can be any of the following: the domicile of the defendants or the plaintiffs, the place where the contract is signed or performed, the place where the subject matter is located. Nevertheless, it is a very complicated problem to deal with, whether or not the choice of an unrelated country's court is valid. Of course, China's court can refuse to exercise jurisdiction over actions submitted to it according to the agreement to choose China's court in cases that have no connection with the disputes. However, it is controversial, whether the choice agreement is valid, if the parties choose a third country's court that has not any connection with the disputes. Namely, can a Chinese court, which has jurisdiction according to Chinese law, decide the action regardless of the agreement?

Only one court shall be chosen. Although there is no definite or express regulation about this, according to many courts' decisions, including the Supreme Court's, if the parties choose both a people's court of the PRC and a foreign court as the competent court, the agreement is void.

The agreement shall not run counter to the exclusive jurisdiction stipulation of Chinese law. If according to the law of China Chinese courts have exclusive jurisdiction over the disputes, then the parties may not choose foreign courts to decide their disputes. Otherwise, the people's court will not acknowledge or enforce the judgment of the foreign courts. However, in the field of international sale of goods, it does not involve exclusive jurisdiction, according to the CPL of the PRC.

The agreement shall not run counter to China's forum level rules on jurisdiction. In other words, the parties can only choose the first instance courts; they may not choose the appellate courts. For the first instance of the actions, the parties may not choose a higher or lower court too.

Finally, the choice agreement shall be a valid one. Whether the agreement is valid or not should be judged in accordance to Chinese law. The choice of court agreement is one kind of contract; therefore, Chapter 4 of the Contract Law of China, which is named the validity of contract, will be applied to decide the validity of the agreement. For example, according to Article 54, if a party induced the other party to enter into a contract against its true intention by fraud or duress or by taking advantage of the other party's hardship, the aggrieved party is entitled to petition the People's Court or an arbitration institution for amendment or cancellation of the contract.

1.2 Implied Choice of Court

In a civil action involving foreign element, if the defendant raises no objection to the jurisdiction of a people's court and responds to the action by making his defence about the merits of the disputes, he shall be deemed to have accepted that this

people's court has jurisdiction over the case and then the people's court shall have jurisdiction over the dispute.

2 The Dispositive Rules/the Rules Applicable in the Absence of Agreement

If there is no agreement to choose the court to decide their disputes related to foreign elements or the choice of court agreement is invalid, the Chinese court will directly apply the rules provided by the Civil Procedural Law of the PRC, which was recently revised on 31 August 2012. According to the CPL and the Interpretation of the SPC, the rules on jurisdiction in the absence of agreement are as follows:

– If the defendant has domicile or permanent residence within the territory of the People's Republic of China, China's court where the defendant's domicile or permanent residence is located is without doubt qualified to hear the actions.

If the defendant has no domicile or permanent residence but the contracts from which the disputes arise have material connections to the PRC, the courts of the PRC are competent to exercise jurisdiction over such disputes.

According to Article 265 of the CPL, in the case of an action concerning a contract dispute or other disputes over property right interests brought against a defendant that has no domicile or permanent residence within the territory of the People's Republic of China but the contract is signed or performed within the territory of the People's Republic of China or the subject matter of the action is located within the territory of the People's Republic of China or the defendant has its representative office within the territory of the People's Republic of China, the people's court of the place where the contract is signed or where the contract is performed or where the subject matter of the action is located or where the defendant's representative office is located shall have jurisdiction. According to Article 235 of the CPL, if the defendant has distrainable property within the territory of the People's Republic of China, the courts of the PRC may exercise jurisdiction over the actions brought against it. However, this kind of jurisdiction is highly controversial among Chinese scholars. Many famous scholars in China are totally against it. Some scholars suggest that there should be some limitation to this kind of jurisdiction. Namely, only when the distrainable property is enough to cover the damages or other obligation that may be borne by the defendant or defendants may the court where the distrainable property is located exercise jurisdiction over the disputes.

The Doctrine of Non-convenience Forum

The Supreme People's Court has expressly adopted the doctrine of non-convenience forum in its Interpretation. According to Article 532 of the Interpretation of the CPL published by the Supreme People's Court, a people's

court may refuse to exercise jurisdiction over claims and notify the claimant to file actions in a more convenient court if the claims with foreign elements satisfy the following conditions at the same time:

- The defendant files an application that is more convenient for the other country's court to decide, or the defendant simply objects to the jurisdiction of the said people's court that accepted the action brought by the plaintiff.
- There is no valid agreement to choose the said people's court.
- The dispute does not belong to the exclusive jurisdiction of the PRC courts.
- The case has no influence on the PRC's interests or its citizen's, its legal person's or any other entity's.
- It is highly difficult for the people's court to determine the facts of the case and apply the law for the reason that the main facts did not happen in the territory of the PRC and that the law of the PRC is not applicable to the dispute.
- Some foreign countries'courts have jurisdiction over the dispute, and it is more convenient for them to decide the dispute.

3 The Way to Deal with Conflicts of Jurisdictions

Conflicts of jurisdiction can be divided into two categories, namely positive conflicts and negative ones. Positive conflicts mean that both a people's court and a foreign court have jurisdiction over the same disputes between or among the same parties. On the other hand, the so-called negative conflicts mean that no court is competent to decide the disputes between or among the parties.

3.1 Positive Conflicts

Now let me turn to the solution to positive conflicts. When both a people's court of the PRC and a foreign court have jurisdiction over the same dispute between the same parties, how will the people's court decide whether it accepts the claim brought by one of the parties?

If a competent foreign court has already made a valid judgment and the judgment has already been acknowledged by a people's court, then the court will refuse to accept the same claim.

If one of the parties has already filed an action in a competent foreign court and the action is pending and the other party brings an action in a competent people's court, the people's court may exercise jurisdiction over this dispute. In this case, the judgment made by the foreign court shall not be recognised and enforced by the people's court of the PRC. Many scholars criticised this rule for the reason that it runs counter to the principle of *non bis in idem*, and it also seriously interfered with

other states' judicial sovereignty. Therefore, many scholars suggest that under this circumstance, China' court shall decline jurisdiction.

As for the same party that filed an action both in China's competent court and a foreign competent court, there is no express rule. However, most of the scholars suggest that in this situation, Chinese courts should decline the action in accordance with the principle of *non bis in idem*. And most of Chinese courts also so decide.

3.2 Negative Conflicts

Finally, I must point out that in theory, there are some cases over which no courts have jurisdiction,which are the so-called negative conflicts of jurisdiction. In judicial practice, however, this kind of conflict never happened as I know. Therefore, no rules have been made to resolve negative conflicts of jurisdiction. And I think there is no need to study this in detail.

4 Conclusion

It is very complicated to decide the competent court for international sale contract disputes in China just as in any other jurisdictions. This article only provides a framework on this topic. It is very useful to point out that there are two elements that play the most important roles, namely the autonomy of parties and the public interest of China.

Further Reading

1、李旺,《当事人协议管辖与境外的判决与执行法律制度的关系初探》,载于《清华法学》, Vol.7,No.3(2013)
2、甘勇,《涉外协议管辖:问题与完善》,载于《国际法研究》,Vol. 4 (2014)
3、杜焕芳,《涉外民事诉讼协议管辖条款之检视》,载于《法学论坛》,No. 4, July (2014)
4、李旺,《国际民事裁判管辖权制度析》,载于《国际法研究》, No. 1 (2014)
5、黄进主编,《国际私法》(第二版),法律出版社2005年版,北京

http://www.springer.com/978-3-319-54035-1

International Sale of Goods
A Private International Law Comparative and Prospective Analysis of Sino-European Relations
Nord, N.; Vieira da Costa Cerqueira, G. (Eds.)
2017, XVIII, 154 p., Hardcover
ISBN: 978-3-319-54035-1