Analysis of hybrid jurisdiction clauses – from perspectives of Hong Kong and English courts

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Hybrid jurisdiction clauses, which are also known as asymmetric or unilateral clauses, have grown more popular in commercial contracts worldwide. This is indeed unsurprising, the commercial world is diversified and constantly changing, the contractual parties (especially the one with more bargaining power) always want to make sure that they have the comfort of knowing that they can only be sued in their preferred jurisdiction while having the flexibility to sue others in any jurisdiction.

Therefore, it is materially important to know whether such hybrid jurisdiction clauses are recognized and supported by the judiciaries.

Hybrid/Asymmetric clauses

Hybrid/asymmetric clauses usually take two forms: (i) a unilateral right to arbitrate or litigate given to the party with better bargaining power while confining the other party to either arbitration or litigation, but not both; or (ii) a unilateral right to commence proceedings in one or more jurisdiction(s) given to the party with better bargaining power while confining the other party to bringing proceedings in an exclusive jurisdiction.

This type of clause is particularly popular in commercial loan agreements where lenders, who normally with better bargaining power, want to ensure that they have more options to enforce the loan agreements in whichever jurisdiction that the borrowers have assets in.

Hong Kong position

In China Merchants Heavy Industry Co Ltd v JGC Corp [2001] 3 HKC 58, the Hong Kong court upheld asymmetric clauses provided that they are not "*null and void, inoperative or incapable of being performed*".

In the recent Hong Kong Court of First Instance case China Railway (Hong Kong) Holdings Ltd v Chung Kin Holdings Co Ltd [2023] HKCFI 132, there were series of agreements between the parties comprising a single financing agreement. The governing law and/or jurisdiction clause under the financing agreement provided that during the implementation of the agreement, if there is an economic dispute between the two parties, it should be resolved through friendly negotiation; if the negotiation fails, it should be resolved in accordance with local laws. In a subsequent repayment agreement, there was another jurisdiction clause provided that "*any disputes or disputes arising during the execution of this agreement and relevant supplementary agreements may be resolved through negotiation. If the negotiation fails, [the lender] has the right to apply for arbitration to the arbitration committee where [a third-party guarantor] is located or bring proceedings in the people's court where [the guarantor] is located")*".

The lender commenced proceedings before the Hong Kong courts for the recovery of the outstanding debt against the borrower. The borrower applied for a stay of the proceedings in favour of the Court of Wuhan in mainland China on the basis that the dispute was subject to a dispute resolution clause which provided for the submission of disputes by the lender to either the "arbitration committee" or the Wuhan People's Court where a third-party guarantor was located.

The key issue of the dispute was whether or not the agreements sued upon by the lenders contain an exclusive jurisdiction clause in favour of Wuhan. If the clause was exclusive, the Hong Kong would normally stay the proceedings before it in favour of the specified foreign forum; otherwise, the burden would be on the borrower to show that the foreign forum was clearly and distinctly more appropriate.

The legal principal being applied was *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] 1 WLR 4117 which was held that in the attempt to interpret the contract and discover the intention of the parties, generally a choice of law clause applicable to the main contract would be interpreted as being applicable to the jurisdiction clause as well, as this promotes, inter alia, certainty, consistency, and coherence, and reduces complexities and artificiality.

The Hong Kong Court then concluded that there was no exclusive jurisdiction clause in favour of Wuhan. This was because (i) the jurisdiction clause in the repayment agreement was permissive rather than mandatory, and (ii) it was asymmetric as such right to litigate in mainland China being conferred upon the lender only, having been designed to protect the lender's interests as a creditor by granting it the right to sue where the third-party guarantor was located. In contrast, there was no reason why the parties would have wished to preclude the lender from suing in Hong Kong, where the borrower was located.

Therefore, the burden rested on the borrower to show that the mainland China courts were clearly and distinctly the more appropriate forum, which the borrower had failed to do so. Thus, the borrower's application was dismissed.

English position

In the past decades, the English position in respect of hybrid jurisdiction clauses appears to be supportive and bracing the freedom of contract. In fact, Hong Kong courts have substantially followed the consistent approach taken by the English courts.

In Lobb Partnership Limited v Aintree Racecourse Company Limited [2000] 1 Building Law Reports 65, Colman J stated that *"[t]he English courts have consistently taken the view that, providing that the contract gives a reasonably clear indication that arbitration is envisaged by both parties as means of dispute resolution, they will treat both parties as bound to refer disputes to arbitration even though the clause is not express in mandatory terms*".

In NB Three Shipping Ltd. v Harebell Shipping Ltd [2004] EWHC 2001 (Comm), it was held the mutuality was no longer a requirement and asymmetric clause has to be one that has been freely negotiated by the parties.

The recent English case Aiteo Eastern E&P Company Limited v Shell Western Supply and Trading Limited [2022] EEWHC 2912 (Comm) just affirmed the above position. In this case, the facility agreements in question were governed by English law and contained hybrid jurisdiction clauses providing disputes to be settled by way of arbitration or, at the lenders' exclusive option, in the courts of England or Nigeria respectively; one of the facility agreements also provide that the parties to "elect to refer" any dispute to arbitration.

The borrower commenced proceedings against the lenders before the Federal High Court of Nigeria and obtained a without notice interim injunction restraining the lenders from taking enforcement steps. The lenders subsequently entered a conditional appearance before the Federal High Court of Nigeria, filing a notice of appeal and an application to stay the Nigerian proceedings, and served a Request for Arbitration on the borrower and sought an anti-suit injunction from the court (which was granted).

Eventually, the arbitration tribunal handed down two awards, one rejecting the jurisdictional challenge raised by the borrower, one consolidating the arbitrations under the multiple facility agreements. The borrower challenged both awards, alleging lack of substantive jurisdiction under Section 67 Arbitration Act 1996.

In reaching the judgment, Mr. Justice Foxton relied on the Privy Council's decision in Hermes One Ltd v Everbread Holdings Ltd and others [2016] UKPC 1 to conclude that as a matter of general principle, an option to arbitrate can be exercise either by commencing arbitration itself or by requiring the other party which had commenced litigation to submit the dispute to arbitration by making an unequivocal request to that effect and/or by applying for a corresponding stay.

On the facts of the case, Mr Justice Foxton found that the Notice of Arbitration by the lenders was sufficient to exercise the option and therefore constitute the inchoate arbitration agreement. The lenders did not need to commence arbitration, seek a stay of the litigation in Nigeria, or provide an unequivocal and irrevocable commitment to arbitrate the disputes without delay. He also did not find that there was a time limit for exercise of the option to arbitrate.

As a result, both challenges by the borrower were dismissed.

Comment

The recent judgments in both English and Hong Kong courts show that hybrid jurisdiction clauses are being widely accepted in English common law jurisdiction. This should give more confidence to the lenders/creditors when entering into financing agreements. However, the judge in *Aiteo* also pointed out that the determination of the requirements to exercise an election to arbitrate in the context of a unilateral option clause should be fact specific.

Furthermore, financial institutes should also be aware that the situation may be different in EU and mainland China, etc.

In a 2015 decision by the French Supreme Court, ICH v Credit Suisse, it was held that a hybrid clause that the French borrower "*acknowledges that the exclusive forum for any judicial proceedings is Zurish or at the place where the relationship with the bank's branch is established. The bank is however entitled to bring a claim against the borrower before any other competent court*" to be void in its entirety as it was contrary to the objectives of predictability and legal certainty in Article 23 of the Lugano Convention.

The validity of asymmetric clauses is an unsettled issue in mainland China. Article 16 of the Arbitration Law of People's Republic of China ("**PRC**") stipulates that an arbitration agreement must contain (1) an expression of intention to apply for arbitration; (2) matters for arbitration; and (3) a designated arbitration commission. In practice, PRC authorities strictly require the arbitration clause to include the agreement to apply for arbitration only. Since some asymmetric arbitration clauses do not clearly express the intention to apply for arbitration, they may not be accepted by PRC authorities as valid arbitration clauses.

On the other hand, Article 14 of Provisions of the Supreme People's Court on Several Issues concerning Deciding Cases of Arbitration-Related Judicial Review provides that where, absent the parties' choice of the governing law, a PRC court is to ascertain the law governing the validity of a foreign-related arbitration agreement in accordance with Article 18 of the Law of People's Republic of China on the Application of Laws to Foreign-related Civil Relations, and where application of the law in the place of the arbitral institution and the law in the place of arbitration will bring about different results in respect of the validity of the arbitration agreement, then the PRC court shall apply the law that renders the arbitration agreement valid. Therefore, if the asymmetric arbitration clause involves foreign-related matters, PRC courts may be inclined to determine that the asymmetric arbitration clause is valid based by applying the law that renders the same valid.

In practice, we have observed inconsistent decisions of PRC courts in respect of the validity of asymmetric arbitration clauses. In (2016) Jing 02 Min Te No. 93, the Beijing No. 2 Intermediate Court held that an arbitration clause which allowed the lender to choose either arbitration or litigation was invalid pursuant to Article 7 of the SPC Interpretation on Arbitration Law. In the recent case (2022) Jing 74 Min Te No. 4, the Beijing Financial Court upheld the validity of an asymmetric arbitration clause, determining that it did not constitute an impermissible "either arbitration or litigation" clause under the law of RRC.

Therefore, financial institutions should pay closer attention to the risks and benefits of using hybrid clauses. Such clauses require careful drafting and consideration as to the ultimate place of enforcement.