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## Research on the principle of actual connection in foreign-related jurisdiction agreements: From the perspective of China

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### Abstract

After the 2012 amendment to the Chinese Civil Procedure Law (CCPL), the actual connection principle has relied excessively on the enumerated places in the law and has not distinguished between the exclusive and non-exclusive jurisdiction agreement. In terms of the criteria for determination, the principle of actual connection should be determined on a case-by-case basis within the scope of objective factors. In terms of the scope of application, the role of non-exclusive jurisdiction agreements is consistent with the purpose of the principle of actual connection; there is no need to extend the principle of actual connection to non-exclusive jurisdiction agreements.

**Keywords:** foreign-related jurisdiction agreements, actual connection principle, determination criteria, scope of application

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### Introduction

Jurisdiction by agreement is the application of the principle of party autonomy in the international civil jurisdiction system. However, jurisdiction involves national judicial sovereignty, so the party's autonomy in the field of jurisdiction will be subject to specific legal restrictions. The principle of actual connection is one of the restrictions, which requires the parties to agree on the choice of the court should have an actual connection with the dispute.

In recent years, given China's further opening up to the outside world and the need to align its system with international standards, scholars mostly believe that the parties' autonomy in jurisdictional agreements should be more respected. To achieve this, they call for reforming the criteria for determining the actual connection principle and the scope of application, but the research is still insufficient. This paper focuses on the criteria for determination and the scope of application of the actual connection principle in jurisdiction agreements. Here we draw out the problem with a case.

In *Welsh Company v. British Eastern Chemical Company Limited et al.* <sup>[1]</sup>, the plaintiff Welsh Company and the defendant British Eastern Chemical Company Limited were both domiciled in the British Virgin Islands. The parties jointly signed the Bond Certificate, the Second Tranche Bond Certificate. The Second Tranche Bond signed by the parties agreed that "the Second Tranche Bond shall be subject to the jurisdiction of the Hong Kong courts and shall be construed in accordance with the laws of Hong Kong and shall be subject to the non-exclusive jurisdiction of the Hong Kong courts in respect thereof." In this regard, the Dalian Intermediate People's Court first determined whether the jurisdictional agreement satisfied the requirement of actual connection under Article 531 of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law (hereinafter referred to as "2015 SPC Interpretation on CCPL"). The court held that "although the registered office of the Welsh company and the Eastern Chemical company is in the British Virgin Islands, the actual business address is in the Hong Kong Special Administrative Region. The parties may agree to choose the Hong Kong Special Administrative Region court, where their actual business address is located as the competent court."

In the above case, there are two issues worth discussing.

First, the court applied the principle of actual connection to judge the validity of the jurisdiction agreement. However, it did not strictly follow the provisions of the six objective signs in Article 531 of the SPC Interpretation on CCPL, holding that compared to the parties' domicile, the actual business address and the location of the main business contacts have an actual connection with the dispute. Therefore, the agreement on the Hong Kong Special Administrative Region court as the jurisdictional court meets the requirement of actual connection. However, if the jurisdictional court agreed in the contract is exactly the domicile of the parties, which would be deemed as a competent court stipulated by the law. Should the judge directly determine that the court has an actual connection with the dispute, or should he still insist on the flexible determination, which needs further confirmation of whether there is an actual connection between the place and the dispute in the context of the case?

Second, the jurisdictional agreement in question is a non-exclusive jurisdictional agreement. China's legislation does not distinguish between exclusive and non-exclusive jurisdictional agreements at the legislative level.

However, there is a consensus in the judicial practice: The former agreement is exclusive and excludes the jurisdiction of all courts other than the chosen court; the latter agreement does not have this function but expands the scope of jurisdictional courts. Based on this understanding, is it reasonable to still apply the principle of actual connection to review non-exclusive jurisdictional agreements?

### **Dilemma on reforming the criteria for determining the actual connection in foreign-related jurisdiction agreement**

The legislative purpose of the actual connection requirement set in foreign-related jurisdiction agreement is to limit the autonomy between the parties and thus preserve the country jurisdiction and protect the weaker parties' interests<sup>[2]</sup>. In addition, in building a new international civil and commercial order, opening up to the outside world is necessary<sup>[3]</sup>, which will be reflected in more respect for the autonomy of the parties and more convenient recognition and enforcement of foreign judgments. The reform of the criteria for determining the actual connection is based on the balance of the two concerns.

### **Criteria reform at the legislative level: from principle to objectivity**

Prior to 2012, domestic and foreign-related jurisdiction agreements were governed separately in CCPL. For the foreign-related jurisdiction agreements, the legislation only provided in principle that the chosen court must meet the requirement of actual connection, without directly listing the objective landmarks of actual connection with the dispute, and thus judges had more discretion to determine the existence of actual connection or not. After 2012, the foreign-related jurisdiction agreement was aligned with the jurisdiction of domestic agreement, and five places were explicitly listed as the objective markers of actual connection with the dispute<sup>[4]</sup>, which means that the criteria for determining the actual connection in foreign-related agreements were changed from principle to objectivity.

2015 SPC Interpretation on CCPL clarified that parties in foreign-related civil disputes can agree to choose foreign courts to exercise jurisdiction, and added the sixth objective marker - the place of tort. As to how "other locations with an actual connection to the dispute" should be determined, China currently lacks binding legal documents to explain it, but there are some meaningful guidance documents that reflect two modes of determination.

#### **a. Comprehensive determination model**

In 2005, the Supreme People's Court's Notice on Summary of the Second National Working Conference on the Trial of Foreign-Related Commercial and Maritime Cases (hereinafter referred to as "2005 SPC Summary") introduced a comprehensive determination model to determine the existence of the actual connection. Under the 2005 SPC Summary, the judgment of the existence of an actual connection should be made after taking into account many factors such as the domicile, place of registration, principal place of business, place of contract signing, place of contract performance, and location of the subject matter of the contract.

According to the comprehensive determination model, even if the parties choose a court located in the plaintiff's residence, a further consideration concerning other objective factors is still necessary for identifying the actual connection.

#### **b. Objective marked place model**

In 2006, the High People's Court of Shandong Province issued the Opinions on Several Issues Concerning the Trial of Jurisdictional Objection Cases in Civil and Commercial Litigation, in which Article 13 listed five objective landmarks of actual connection. This objective landmark model reflects the following trends: to simplify the determination by clarifying the objective landmark, i.e., as long as the selected place is one of the objective landmarks, it can be considered as having an actual connection; second, to exclude the subjective (party-selected) connection standard, and no place other than the objective landmark has an actual connection with the dispute. If judged according to the objective marker model, as long as the parties agree to choose the court for the plaintiff's residence or the defendant's residence, the actual connection can be made directly.

As seen in post-2012 judicial practice, the objective marked place model was adopted now. In *Shanghai Xunou International Freight Forwarding Co., Ltd. et al. v. Xinzhou Electronics (Hong Kong) Co., Ltd.*<sup>[5]</sup>, the Guangdong Provincial High Court held that Hong Kong, the place of the agreement court, was the plaintiff's domicile. Hence, it directly determined that Hong Kong had an actual connection with the dispute.

To sum up, after CCPL clarifies the objective landmarks of actual connection in the jurisdiction of foreign-related agreements, the standard for the determination of actual connection has completed the transformation from principled to objectification. Under the objective marked place model, as long as the agreed court place is one of the objective landmarks, the place can be exempted from the substantive examination of "whether it has an actual connection with the dispute". The reason is that CCPL has a priori determined its actual connection with the dispute.

### **Criteria discussion at the academic level: the imbalance between the purpose of the legislation and the need for openness**

The claims of scholars can be divided into two schools of thought.

The first school of thought advocates a strict determination of "actual connection" to maintain the legislative purpose of the actual connection requirement. According to this school of thought, the simplified treatment

model based on objective landmarks runs counter to the legislative purpose of the actual connection requirement and is not conducive to safeguarding China's judicial sovereignty and the interests of vulnerable parties. For example, Professor Yuan Faqiang pointed out that some objective markers may not have an actual connection with the dispute in specific cases, such as the defendant's residence. In some cases, the real place with an actual connection with the dispute would be the actual place of business. In this regard, we cannot simply think that if the agreed court is one of the legal objective signs, the place has an actual connection with the dispute. On this basis, it is necessary to consider each case's actual situation to determine whether there is an actual connection [6].

The second school of thought, from the perspective of responding to the need for opening up, advocates expanding the definition of "actual connection". This group of scholars believes that the aforementioned shift restricts the discretion of judges and the autonomy of the parties; from this point of view, the amendment is a kind of regression, which cannot meet the needs of China's opening up to the outside world and promoting international commercial exchanges [7]. In this regard, it should clarify that the objective markers in the legislation are only non-exhaustive enumeration and insist on expanding the interpretation of the actual connection in judicial practice [8].

From the discussions of scholars, it can be seen that although the change of the actual connection determination standard has unified the judicial practice, the current actual connection determination standard lacks rationality. In this regard, reformists either advocate strict adherence to the determination of individual cases or advocate lowering the criteria for identifying actual connections and expanding the scope of actual connections. We hold that the former emphasizes the role of judges in identifying actual connections, weakens the influence of objective landmarks, increases the operational difficulty of judicial practice, and may be contrary to China's opening-up situation. The latter wants to relax determination standards to promote international civil and commercial transactions. The latter also want to ensure the realization of the legislative purpose of the principle of actual connection, but what they can retain is only the surface of the principle of actual connection. For example, if it is recognized that parties can make an actual connection between a State and a dispute by choice of applicable law, then, in this case, the powerful party can arbitrarily create jurisdiction by agreeing on the applicable law of the contract. Thus, it is difficult to say such a mode still maintains the judicial sovereignty of its own country and protects the interests of the weaker parties.

### **Scope of application of the actual connection principle in foreign-related jurisdiction agreement**

As mentioned above, the criteria for determining the actual connection have been changed from principle to objectivity, which some scholars consider a manifestation of strict criteria. However, the strict standard does not mean that the scope of application is broad. Jurisdiction agreements can be divided into exclusive jurisdiction agreements and non-exclusive jurisdiction agreements. Exclusive jurisdiction agreements are undoubtedly the main target of the actual connection principle since such agreements may exclude the statutory jurisdiction of Chinese courts. As for non-exclusive jurisdiction agreements, it is necessary to discuss whether the principle of actual connection can be applied to such agreements after clarifying the differences between them and exclusive jurisdiction agreements.

### **Functional Differences between Exclusive Jurisdiction Agreements and Non-Exclusive Jurisdiction Agreements**

#### **a. Differences in impact on statutory jurisdiction**

In terms of its effect on statutory jurisdiction, an exclusive jurisdiction agreement excludes the statutory jurisdiction of other courts, while a non-exclusive jurisdiction agreement does not have this function. If a contract provides that "all disputes shall be submitted to the jurisdiction of the court of one's residence", the agreement excludes the legal jurisdiction of the place where the contract is performed. The effect of an exclusive jurisdiction agreement to exclude Chinese jurisdiction is one of the main concerns of scholars to tighten up the principle of actual connection. If the aforementioned agreement is changed to "the court shall exercise non-exclusive jurisdiction over disputes relating to the sale contract", then the court, while acquiring jurisdiction, does not exclude the statutory jurisdiction acquired by law in the performance of the contract.

#### **b. Differences in the protection of vulnerable parties**

In terms of the impact on vulnerable party protection, non-exclusive jurisdiction agreements provide more assistance to vulnerable party protection, while exclusive jurisdiction agreements risk neglecting vulnerable party protection. In a non-exclusive jurisdiction agreement, the increased choice of courts allows the weaker party to avoid entering into unfair jurisdictional provisions and thus avoid having to sue in a court that is not favorable to them [9]. This protection is greatly diminished in exclusive jurisdiction agreements because it excludes the weaker party's right to choose before a dispute arises. The only determining court of jurisdiction is the expression of the stronger party's interests. Considering these, the principle of actual connection limits the exclusive jurisdiction agreement to prevent the strong party from using autonomy to limit the weak parties' right of action. In order to protect the interests of the weak, do not allow one-sided restriction of the right to sue is vital. Non-exclusive jurisdiction agreements through the "expansion of the right to sue" practice, are more conducive to protecting the interests of the weak party.

### **Analysis of the necessity of applying the principle of actual connection to non-exclusive jurisdiction agreements**

CCPL and the SPC Interpretation on CCPL do not distinguish between exclusive and non-exclusive jurisdiction agreements, which has led some courts to believe that the principle of actual connection applies uniformly to both types of jurisdiction agreements. In the case of *Zhang Peng et al. v. Jiancheng Kaiyuan Investment Co., Ltd.*<sup>[10]</sup>, the Beijing High People's Court cited Article 531 of the SPC Interpretation on CCPL to illustrate that the non-exclusive jurisdiction agreement reached between the parties meets the requirement of actual connection. However, given the apparent difference in the efficacy of exclusive and non-exclusive agreements, it is not reasonable to apply the principle of actual connection uniformly to these two agreements. The principle of actual connection is not necessary for non-exclusive jurisdiction agreements.

The 2005 SPC Summary mentioned non-exclusive jurisdiction agreements for the first time, making it clear that the choice of non-exclusive jurisdiction of foreign courts does not affect the acceptance of cases by Chinese courts<sup>[11]</sup>. Thus, compared to exclusive jurisdiction agreements, recognizing the effect of non-exclusive jurisdiction agreements does not threaten China's judicial sovereignty and the interests of a weaker party.

The legislative purpose of the actual connection principle overlaps with the efficacy of non-exclusive jurisdiction agreements, so there is no need to apply the actual connection principle to non-exclusive jurisdiction agreements. The legislative purpose of the actual connection principle is to safeguard China's judicial sovereignty and protect the interests of vulnerable parties in China. Non-exclusive jurisdiction agreements have only an enabling function, do not exclude the jurisdiction of Chinese courts, and protect the interests of the weaker party by expanding the right to sue. When the parties agree on the jurisdictional court in a non-exclusive jurisdiction agreement, it adds a new connection point to the original connection points, the new connection point is available for the parties to choose when a dispute is filed<sup>[12]</sup>. In other words, the non-exclusive jurisdiction agreement allows the parties to choose a neutral court while retaining the statutory jurisdiction of the original court.

In summary, exclusive jurisdiction agreements exclude the statutory jurisdiction of other courts, while non-exclusive jurisdiction agreements provide more protection for weaker parties by expanding the right to sue. The legislative purpose of the actual connection principle is to ensure that the jurisdiction of Chinese courts is not improperly excluded and to protect the interests of the weaker bargaining parties in China. While non-exclusive jurisdiction agreements are consistent with the actual connection principle's legislative purpose, there is no need to place non-exclusive jurisdiction agreements within the scope of application of the actual connection principle.

### **Suggestions for the application of the actual connection principle in foreign-related jurisdiction agreement Determination criteria: a comprehensive determination model limited by objective factors**

The principle of actual connection still has value in judicial practice, and it is not desirable to exclude it altogether. The reformist scholars who advocate flexible determination of actual connection have already defeated the legislative purpose of the actual connection principle, as mentioned in the second part. Therefore, from the standpoint of improving the principle of practical connection, it is not desirable to leave the skin of practical connection and remove the soul of the actual connection principle since this constitutes an abandonment of the principle of practical connection.

In the author's opinion, the existence of an actual connection should be determined comprehensively by objective factors in each case by the judge to avoid the use of fixed connection points that may lead to results that are not relevant to the actual situation of the case. However, considering that the civil law system influences China more, the explicit enumeration model should be retained. It is important to note that a place cannot be directly identified as having an actual connection to the dispute simply because it belongs to one of the listed objective landmarks; other objective factors must also be considered for a comprehensive determination.

In summary, to maintain the legislative purpose of the actual connection principle while responding to the need for institutional openness, two points need to be clarified. First, Article 35 of CCPL and Article 531 of the SPC Interpretation on CCPL should be recognized as a non-exhaustive list of objective landmarks. Second, the objective landmarks explicitly provided cannot be exempted from the "actual connection review" in individual cases. The second point means that even if the agreed forum is the residence of the plaintiff or the defendant, the judge cannot directly determine that the place has an actual connection with the dispute but should be combined with other factors for a comprehensive determination. The aforementioned 2005 SPC Summary can provide some reference for judicial practice in the comprehensive determination model.

### **Scope of application: The actual connection principle does not apply to non-exclusive jurisdiction agreements**

Since the effect of non-exclusive jurisdiction agreements is to authorize, not exclude, the actual connection principle is not necessary to apply to such agreements. Judges can skip the "actual connection review" when reviewing the jurisdictional validity of such agreements, thus enhancing judicial efficiency.

The recognition of non-exclusive jurisdiction agreements by Chinese courts means that Chinese courts recognize the jurisdiction of foreign courts. If it is not clear that non-exclusive jurisdiction agreements are exempt from the "actual connection review", it will create institutional obstacles at the recognition and enforcement stage. Chinese courts need to review the jurisdiction of foreign courts before recognizing foreign judgments, and the review may be based on Chinese law according to bilateral arrangements<sup>[13]</sup>. Suppose the Chinese courts insist

that jurisdiction agreements that do not meet the actual connection requirement are invalid. In that case, it will make Chinese courts conclude that foreign courts do not have jurisdiction, even if the jurisdiction of foreign courts is not exclusive. At the recognition stage of foreign judgments, the actual connection principle is no longer necessary to protect the weaker party because the weaker party is never deprived of the right to choose the court even after the dispute has arisen. Clarifying that non-exclusive jurisdiction agreements are exempt from the “actual connection review” can alleviate the legal obstacles faced by foreign judgments in the process of recognition and enforcement in China, thus providing more openness and inclusiveness to the agreed jurisdiction system as a whole.

Hence, to realize the exemption of “actual connection review” of the non-exclusive jurisdiction agreement, it is proposed to add a sentence after paragraph 1 of Article 531 of the SPC Interpretation on CCPL. “If the parties choose the jurisdiction of a foreign court that has no actual connection with the place of the dispute, the agreement does not exclude the Chinese court from exercising jurisdiction according to law.”

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