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Choice-of-Court Agreements in Electronic Consumer Contracts in China

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I INTRODUCTION

The past a few decades have witnessed the fast-growing development of electronic commercial transactions. Digital buyers worldwide accounted for 24.3% of the world population in 2015. Now nearly 1.8 billion people are engaged in online shopping.¹ E-commerce, by its nature, is cross-border and international. It creates an international virtual market, removing access barriers and costs in traditional commerce. The international nature of e-commerce inevitably raises jurisdictional problems, i.e. since a transaction may have connections with more than one country, which court is competent to decide the dispute if anything goes wrong is in question. E-commerce, unfortunately, challenges traditional jurisdiction rules, which largely depend on geographic connecting factors. One needs to look at the place of contracting, place of performance, the habitual residence/domicile of the parties, etcetera to determine the competent court. Some connecting factors may not always be easy to determine in e-commerce, where contracts are concluded or performed online. Other connecting factors may not be easily predictable by the parties, such as the other party's habitual residence.

Considering the challenges e-commerce has brought to traditional jurisdiction rules, party autonomy is considered the most effective way out in e-commerce. It could avoid the difficulty with identify traditional connecting factors and bring certainty and predictability to the contractual parties. Unfortunately, the appropriateness of party autonomy is questioned in consumer contracts, where the parties have an inequality of bargaining power.² The consumers are usually in an unpleasant take-it-or-leave-it position and any choice of court agreement is unilaterally drafted by the business, which generates the possibility of abuse. Jurisdiction in consumer contracts, therefore, is one of the most difficult issues in e-commerce.

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¹ See Statista, *Digital buyer penetration worldwide from 2014 to 2019* (2016) <<http://www.statista.com/statistics/261676/digital-buyer-penetration-worldwide/>>.

² For more comprehensive discussion, see Zheng Sophia Tang, *Electronic Consumer Contracts in the Conflict of Laws* (Hart Publishing, 2nd ed, 2015).

II TWO MODELS

There is no fully satisfactory approach to handle party autonomy in e-consumer contracts internationally. The Hague Choice of Court Convention 2005 intentionally excludes this issue from its scope, given its controversy and the impossibility of reaching a compromise.³ There are, in general, two major models existing. One is to regulate bargaining power and asymmetric information, represented by the US law; the other is to regulate the effectiveness of a jurisdiction clause, represented by the EU Brussels I Recast.⁴ The US law does not provide specific rules to protect consumers in e-commerce. The ordinary rule favouring party autonomy applies, subject to scrutiny of genuine consent.⁵ “Genuine consent” is deemed to exist where the business has provided sufficient information, the consumer has opportunities to read, and the consumer has manifested consent in a clear and unambiguous manner.⁶ If constructive consent is found, the jurisdiction clause is generally enforceable.⁷ It is necessary to note that although e-commerce changes the way of communication, most e-communication meets the criteria if the jurisdiction clause is presented in a readable, clear and durable manner.⁸ For example, jurisdiction clauses in click-wrap contracts are held valid as far as the clause is clearly displayed, consumers are given enough time to read, and consumers are required to express their consent unambiguously by clicking on the “Agree” or “Accept” icon. More importantly, the recent development in the US judicial practice shows the gradual relaxation of the standard. For example, the courts have enforced jurisdiction agreements which are displayed in notoriously long contracts only viewable by scrolling down the text,⁹ which can only be read by clicking on the hyperlinks;¹⁰ and which are included in browse-wrap contracts and consumers continue to read or access the products.¹¹

³ *Convention of 30 June 2005 on Choice of Court Agreements*, concluded 30 June 2005, 44 ILM 1294 (entered into force 1 October 2015) art 2(1)(a).

⁴ *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2012] OJ 351/1 (“Brussels I Recast”).

⁵ *M/S Bremen v Zapata Off-Shore Co (The Bremen)*, 407 US 1 (1972) (“*The Bremen*”).

⁶ *Specht v Netscape* 306 F 3d 17, 28–32 (2d Cir, 2002); *Serrano v Cablevision* 863 F Supp 2d 157, 164 (EDNY 2012). See also Tang, above n 2, Ch 4, section III.

⁷ *The Bremen*, 407 US 1 (1972).

⁸ Tang, above n 6.

⁹ *Forrest v Verizon Communications*, 805 A 2d 1007, 1010–11 (DC, 2002).

¹⁰ *Person v Google Inc*, 456 F Supp 2d 488, 496–7 (SDNY, 2006).

¹¹ *Cario v Cross-media Services* (ND Cal, WL 756610, 1 April 2005) slip op 5; *Druyan v Jagger*, 508 F Supp 2d 228, 237 (SDNY 2007).

The EU approach holds jurisdiction agreements in consumer contracts *prima facie* unenforceable, except in limited circumstances.¹² The Brussels I Recast provides the uniform formal validity requirements for jurisdiction clauses, which may be valid if in writing or evidenced in writing, according to common practice between the parties, or pursuant to the commercial custom.¹³ It, however, cannot ensure fair bargain or genuine consent. Substantive validity of a jurisdiction clause is subject to the law of the chosen court,¹⁴ which may invalidate the agreement reached by fraud, misrepresentation, or common mistake. However, most domestic laws do not provide rules to protect factual consent of consumers in a standard-form contract. In order to protect consumers in that context, the EU legislators make most jurisdiction clauses unenforceable in consumer contracts, unless they are concluded after disputes have arisen, provide consumers more options, or choose the common domicile of the parties at the time of contracting.¹⁵

In principle, both models recognise the existence of inequality of bargaining power in consumer contracts, but tackle this by different means. These two models lead to fundamentally different results in protecting consumers and have different economic impacts. It is very clear that the US model may enforce jurisdiction clauses in e-consumer contracts too readily, regardless of the fact that most consumers are unaware of the existence of such a clause or must take efforts to look for and read it. Since e-commerce speeds the contracting process, the overall e-commerce context makes consumers more impatient and unwilling to read. Regulating bargains by traditional standards may no longer be appropriate and sufficient. The EU model recognises such difficulty and, without paying too much attention to regulating online contracting process, it simply denies the enforceability of jurisdiction clauses in consumer contracts.

In terms of economic impact, the US model may be more commercially appealing. It has reduced the commercial risk and cost in engaging in e-commerce. It encourages businesses to enter into the international e-market without being concerned about the potential for unpredictable or inconvenient forums. It is also argued that such a practice may benefit consumers by reduced prices and proliferation of choices.¹⁶ The EU model, therefore, is criticised for maximising commercial risk and forcing businesses to confine

¹² *Brussels I Recast*, art 19.

¹³ *Ibid* art 25(1).

¹⁴ *Ibid*.

¹⁵ *Ibid* art 19.

¹⁶ *Carnival Cruise Lines, Inc v Shute*, 499 US 585, 595 (1991). RG Bone, 'Party Rulemaking' (2012) 90 *Texas Law Review* 1329, 1364; RA Hillman and JJ Rachlinski, 'Standard-Form Contracting in the Electronic Age' (2002) 77 *New York University Law Review* 429, 439.

their market. It may not only reduce consumers' benefits but also prevent the development of e-commerce to its full potential.¹⁷

As a result, both approaches need adjustment to meet the requirements of both e-commerce and consumer protection. The US approach may be improved by lifting the standard of sufficient notice, while the EU approach may benefit from a more well defined test that only subjects businesses to the restriction if the businesses have "targeted" the consumer's domicile.¹⁸ Nonetheless, these two approaches have played pioneering roles in the world and provided models for other nations to follow.

III CHINESE APPROACH

The enjoyments brought by e-commerce, most notably the lowering costs and increasing accessibility, have been exploited massively in China, a country where nearly 13% of its retail business is now conducted through online facilities.¹⁹ The 2015 Annual Report of Chinese Online-Shopping Market²⁰ stated that the market size of general online retail sales has reached an astounding \$580 billion, accounting for close to a third of the worldwide figure of \$1.67 trillion²¹. China now has over 400 million people as regular digital buyers.²² In a sense, "online shopping" has become an essential component of life, especially among China's younger generation.²³ More significantly, about a third of the country's e-commerce involves international features, represented by the figure of \$809 billion transnational e-commerce of China in 2015.²⁴ Unfortunately, despite the highly developed e-commerce industry, the Chinese law in regulation of e-commerce is still immature. In particular, the treatment of e-consumer contracts in the private international law of China still largely relies upon the general rules set out for consumer contracts, or just for contracts. Overall, a four-step analysis should be followed. Firstly, a jurisdiction agreement in an e-contract should satisfy some general formal requirements. Additionally, the designated court should also have "substantial

¹⁷ For more discussion and counter arguments, see Tang, above n 2, Ch 12, section I.

¹⁸ *Brussels I Recast*, art 17.

¹⁹ China Electronic Commerce Research Centre (CECRC), *2015 Annual Report of Chinese E-commerce Market Statistics* <<http://www.100ec.cn/zt/2015ndbg/>>.

²⁰ China Internet Network Information Centre (CNNIC), *Report of China Internet Network Information Centre (CNNIC)* (June 2016) <<http://www.cnnic.net.cn/hlwfzyj/hlwzxbg/dzswbg/201606/P020160622616579052961.pdf>>.

²¹ Statista, *Retail e-commerce sales worldwide from 2014 to 2019* (2016) <<http://www.statista.com/statistics/379046/worldwide-retail-e-commerce-sales/>>.

²² CNNIC, *The 37th Report of Internet Development in China* (2016), 1 <<http://www.cnnic.net.cn/hlwfzyj/hlwzxbg/201601/P020160122469130059846.pdf>>.

²³ *Ibid* 42.

²⁴ CECRC, above n 19.

connection” with the dispute. Thirdly, it is required that consumers should receive “reasonable notice” with regards to a jurisdiction clause incorporated into a standard form contract.²⁵ Fourthly, the substantive effectiveness of a choice-of-court agreement will also be examined, especially for a clause in favour of a foreign court.²⁶ The first three steps aim at regulating the bargaining power of online business by imposing extra responsibilities on the incorporation of such a clause. The final step, on the other hand, attempts to introduce ex-post control over a jurisdiction clause by examining its actual effects on behalf of consumers.

A REGULATING BARGAINING POWER

In terms of regulating bargains, the Chinese law requires jurisdiction clauses to be in writing, which may include any electronic means, including electronic text, telegram, telex, facsimile, electronic data interchange and e-mail.²⁷ This is a general requirement for all jurisdiction clauses and does not involve any specific concern in balancing the bargaining power in consumer contracts.

The chosen court must have “substantive connections” with the dispute,²⁸ which may be that the court is located in the domicile of either party, place of contracting, place of performance, location of the subject, place of tort committed, etcetera.²⁹ In an online sales contract, if the subject is delivered by way of internet information transmission, the domicile of consumers should be considered as the “place of performance”; if the subject is delivered by other means, the place where the delivery is received will be regarded as the “place of performance”, unless parties agree otherwise.³⁰ The substantive connection requirement might prove useful by preventing an e-company from abusing its bargaining power by unilaterally choosing a remote jurisdiction that has no connection to the dispute to create barriers to consumers. However, most businesses would only make a bona fide choice of the court of their domicile, which equally proves inconvenient for foreign consumers and may effectively hamper consumers’ access to court.

²⁵ *Judicial Interpretation of The Law on Civil Procedure of The Supreme People’s Court* (People’s Republic of China) Supreme People’s Court, 4 February 2015, art 31 (*Interpretation*).

²⁶ According to art 522 of *Interpretation*, a choice-of-court agreement in favour of a foreign court may be declined by Chinese court.

²⁷ *Contract Law of the People’s Republic of China* (People’s Republic of China) National People’s Congress, 15 March 1999, art 11 (PRC Contract Law).

²⁸ *Civil Procedure Law of the People’s Republic of China* (People’s Republic of China) National People’s Congress, 9 April 1991, art 34; *Interpretation*, art 531.

²⁹ *Interpretation*, art 531.

³⁰ *Interpretation*, art 20.

The most relevant prerequisite is the latest development provided by the Supreme People's Court in 2015, which states that the choice of court agreement is invalid if the suppliers fail to bring it to the attention of consumers in a reasonable manner.³¹ The "reasonable notice" test imposes reasonable duties to the business and ensures sufficient steps have been taken to bring consumers' attention to the jurisdiction clause to prove constructive knowledge and consent. However, no clear guidance has been provided to the "reasonable notice" test. Some recent cases show the test of "reasonable notice" is applied to a large extent by judicial discretion. The existing judicial practice indicates the criteria as follows. Firstly, extra steps usually should be taken by online business providers to bring the attention of consumers to the particular existence of a choice-of-court agreement, apart from other terms in the contract. This usually involves the choice-of-court agreement being written in a noticeable form, such as in bold, or in a different colour. For example, in *Liao Yandong v Tencent*,³² the court considered a choice-of-forum clause written in bold as sufficient notice in an online service contract. Additionally, if the choice-of-court clause automatically pops out before consumers clicking the "I agree" icon or access to the online service, it is likely for a court to acknowledge the existence of reasonable notice. However, it is uncertain whether a jurisdiction clause included in an online contract without being highlighted specifically will fail the "reasonable notice" test. If an e-contract is clearly readable, is a reasonable length, and requires the consumer to read carefully before clicking to accept, it is unreasonable to argue consumers do not have "reasonable notice" of the existence of a jurisdiction clause. On the other hand, a too relaxed requirement as the sufficient notice in the US law may make the threshold too low and cannot provide sufficient protection to consumers.

Secondly, the court will take into account the duration of the parties' relationship. If the consumer contracts with the same e-business repeatedly for a long time and is presented the same contract containing the jurisdiction clause, the reasonable notice would likely exist. In *Dai zhibai v Hangzhou Leihuo Science & Technology Ltd*,³³ where the consumer played an online game operated by the defendant for several years and the service agreement appeared every time when the consumer logged onto the system, the court concluded that the consumer should have plenty chance to read the terms carefully given the length of the performance of the contract,.

³¹ *Interpretation*, art 31.

³² Foshan Intermediate People's Court of Guangdong Province, No 06646, 24 May 2016.

³³ Lianyungang Intermediate People's Court of Jiangsu Province, No 00129, 18 January 2016.

Thirdly, if the choice-of-court clause is not displayed directly in the general terms but is only accessible through a hyperlink, the positions of the courts are nevertheless inconsistent. This is clearly indicated in two cases, both concerning the choice-of-forum clause included in the hyperlink, written in bold and underlined, and choosing the jurisdiction of the business's domicile. In *Li Junbo & Zheng Juqi v Tmall Internet Ltd*,³⁴ the court recognised the validity of a choice-of-forum agreement on the ground that it was shown in a noticeable form and was clearly constructed.³⁵ In *Cui Haibin v Taobao Internet Ltd*,³⁶ the same choice-of-forum agreement was held to be invalid for two reasons. Firstly, the full agreement was lengthy, loaded with information and written in a small size. Secondly, there was also one provision allowing the e-business to make unilateral modifications to the terms at any time; and under such circumstances, the updated terms could only be accessed through several steps of operations initiated by consumers. If the choice-of-court agreement is valid, it “significantly increases the cost for consumers to access to redress” and results in imbalance in the parties’ rights and obligations to the detriment of the consumers. The jurisdiction clause was held invalid. It shows the more onerous and unusual the clause is, the more steps should be taken to bring consumers’ attention to the jurisdiction clause and the more easily accessible the clause must be.³⁷ Including an onerous jurisdiction clause in a hyperlink, therefore, will be held invalid.

B EFFECTIVENESS OF JURISDICTION CLAUSES

Chinese law does not hold jurisdiction clauses in consumer contracts *prima facie* unenforceable, as the EU Brussels Recast Regulation has done. The control of substantive effectiveness of jurisdictional clauses is stated as a general principle of all standard consumer contracts, requiring that a clause should not impose unfair or unreasonable burdens on behalf of consumers.³⁸ In terms of jurisdiction clauses, it requires that consumers should not be deprived of fair and reasonable access to courts.

The issues are sometimes addressed in court by applying the “reasonable notice” test that involves the consideration of both formal requirements and substantive effects of a jurisdiction clause in determining the standard of

³⁴ Hanjiang Intermedium People’s Court of Hubei Province, No 96/24, 28 June 2016.

³⁵ The court did not provide further explanation of what it meant by “clear construction”.

³⁶ Taizhou Intermedium People’s Court of Jiangsu Province, No 12/12421 June 2016.

³⁷ cf PRC Contract Law, art 40.

³⁸ *Law of the People's Republic of China on Protection of Consumer Rights and Interests* (People’s Republic of China) National People's Congress, 31 October 1993, art 24; *Administrative Measures of Online Trading* (People’s Republic of China) State Administration for Industry and Commerce, Order No 60, 26 January 2014, art 17.

“reasonableness” in a specific case. In some cases, the Chinese courts may not provide full effectiveness to a jurisdiction clause, which, however, is not due to the consideration of administration of justice or consumer protection, but due to a zealous attempt to protect the jurisdiction of Chinese courts, especially concerning the effectiveness of a jurisdiction clause choosing a foreign court. The law does not expressly require the Chinese courts to decline jurisdiction if the foreign court is chosen in an exclusive jurisdiction clause. Therefore, some Chinese courts may decide to exercise jurisdiction anyway, irrespective of a valid jurisdiction clause choosing a foreign court.³⁹ This may nevertheless benefit Chinese consumers, who would avoid the consequence of having to sue a foreign company abroad. However, other courts may wish to enforce a foreign jurisdiction clause anyway. The uncertainty of the effectiveness of a foreign choice-of-court clause cannot be relied on in protecting Chinese consumers. A Chinese court, on the other hand, cannot decline exercising jurisdiction if it is chosen in a jurisdiction clause, even if it requires a foreign consumer to sue in China and the dispute may have no substantive connections with China.⁴⁰ It may largely benefit Chinese businesses, which could confidently insert a clause in e-contracts choosing Chinese courts and such clauses would be enforced by Chinese courts given the “reasonable notice” test is satisfied.

C COMPARATIVE STUDY

In general, the Chinese law follows the US model. Although the EU model may provide stronger protection to consumers, the potential cost and burden for businesses are not favoured by Chinese legislators. E-consumers are protected in China through regulating the bargaining power. The newly developed “reasonable notice” test plays a crucial role in determining the success of the Chinese approach. However, there is no consistent guidance provided to apply the test in e-commerce. Since e-commerce changes the communication method, the judges would exercise discretion to determine whether reasonable notice is given on a case-to-case basis. Difficulties usually arise concerning jurisdiction clauses which are included at the end of a lengthy contract which can only be read by scrolling down the bar, which are displayed in small font, in grey colour or against a low contrast background, which are contained in a hyperlink, which are made binding when consumers continue to browse the website, or which are concluded when an icon not expressly stating “Acceptance” is clicked. Furthermore, the approach following the US path

³⁹ *NKK (Japan) v Beijing Zhuangsheng*, Beijing Municipal High People's Court, No 919, 2008; *RNO v Beijing International Music Festival Society*, Beijing Municipal No 2 Intermediate People's Court, No 928, 2004. ZS Tang, 'Effectiveness of Exclusive Jurisdiction Clauses in the Chinese Courts' (2012) 61 *International and Comparative Law Quarterly* 459, 473-476.

⁴⁰ *Interpretation*, art 522.

may reduce business risks but does not provide enough protection to consumers. This weakness can be addressed by increase the criteria for the “reasonable notice” test. In other words, the very liberal US approach is inappropriate and the Chinese courts should adopt the higher threshold for “reasonable notice” to be established. This tendency is already shown in the existing court decisions, but given the lack of experience of discretion exercising, a clear guidance, taking the development of technology into account, is necessary to provide certainty and a reasonable standard of protection for consumers.

IV CONCLUSION

Electronic commerce is a significant “sunrise industry” in China. The high profitability of business and wide accessibility for the general public can guarantee its prospective fast growth in the years to come. Doing business in an online environment intensifies the strain between law and technology, and it becomes more obvious when it comes to consumer protection. The protection of consumers as weaker parties, the protection of local business, and the need to continue boosting technology, are the values to balance. Generally speaking, the protection of local business and the need of safeguarding jurisdiction of Chinese courts are central concerns underlining the current legislative framework. On the one hand, the lack of consumer-favourable jurisdictional rules, together with a lenient approach to determining the effectiveness of a choice-of-court agreement, indicate that Chinese law prioritises the protection of local exporting e-business, which constitutes a significantly larger component in the transnational e-commerce of China.⁴¹ A large number of Chinese e-businesses therefore acquire great certainty and predictability in imposing jurisdiction agreements favouring Chinese courts on prospective consumers. On the other hand, the jurisdiction of Chinese courts is secured not only by enforcing clauses choosing local forums, but also through negative attitudes towards foreign-forum selection clauses. It at the same time extends protection towards local e-consumers purchasing imported goods, although they may face risks of accepting jurisdiction in a foreign forum. As a result, Chinese e-commerce has enjoyed a rapid growth in recent years under such a favourable policy and is able to make a noticeable contribution towards domestic economy.

However, an attitude of local-protectionism may not work in the long run. Local exporting e-businesses may experience difficulties when expanding their business overseas. Consumers need confidence to purchase online, without

⁴¹ CECRC, above n 19. Exporting business accounts for 83.2% of total cross-border e-commerce, compared to the 16.8% of importing business.

worrying about the consequence of being deprived of the right of access to justice. Without protection of the appropriate level, consumers may be held back from engaging in e-commerce, thus leaving foreign consumers hesitating to purchase from Chinese exporting businesses due to the lack of proper consumer protection rules.

Under the current legal framework, the protection to consumers can only be provided through a proper interpretation of the “reasonable notice” test in the e-commerce context, before any substantial changes are brought in revising legislation. The introduction of the “reasonable notice” test is to safeguard the genuine consent of parties in agreeing upon a standard contractual clause. To such end, the application of the test should operate on two aspects. Formally speaking, a valid clause should be incorporated in a “reasonable” manner, which involves the examination of noticeable form, clear construction of the clause, and the appropriate steps taken to bring it to the attention of consumers. Substantively speaking, the standard of satisfying “reasonable” notice should be decided by considering the relevant circumstances of the case and the content of the clause. The more onerous and unusual a clause appears, the higher the standard should be. In this regard, the “reasonable notice” test should be put in context with the examination of the “substantive effectiveness” of a jurisdiction clause. Finally, “the substantial connection” requirement should be used to complement the “reasonable notice” test, in order to maintain the minimum link between the chosen forum and the present case.

Overall, at this stage, the guided cases released by Supreme People's Court may be the most effective way to bring uniformity and certainty into current Chinese law to improve the level of consumer protection in internet jurisdiction rules. Future legislation should aim at building a systematic structure which puts together the regulation for online operators, clarified standards of consumer protection and protective jurisdictional rules in a consistent manner.