When Should One Make a Non-Exclusive Jurisdiction Clause the Exclusive Choice?

The use of non-exclusive jurisdiction clauses is common within cross-border commercial contracts. Generally, they indicate the parties’ agreement to submit – non-exclusively – any dispute (arising from the contract) to the courts of a particular jurisdiction and at the same time leaving the parties at liberty to commence legal proceedings in the courts of any other jurisdiction. This is in contrast with exclusive jurisdiction clauses which are more restrictive in nature, prescribing that parties can only submit a dispute to the particular jurisdiction as specified in the clause.

The legal effect of each type of jurisdictional clause should be taken into consideration by any party to a commercial contract. This article seeks to examine the effect of non-exclusive jurisdiction clauses in light of a recent Singapore Court of Appeal (“CA”) decision.

Orchard Capital v Ravindra Kumar

In Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala [2012] SGCA 16, Orchard Capital I Ltd (the “Appellant”), an exempt limited liability company incorporated in the Cayman Islands, commenced an action in Singapore against Ravindra Kumar Jhunjhunwala (the “Respondent”), a Singapore Permanent Resident of Indian nationality, for the Respondent’s alleged breach of a settlement agreement. The Respondent and Appellant had previously entered into various agreements whereby the Respondent had failed to meet his obligations. In an attempt to resolve matters amicably, the parties had entered into a settlement agreement which contained the following jurisdiction clause:

“This Agreement is governed by and construed in accordance with the laws of Hong Kong SAR. The Parties submit to the non-exclusive jurisdiction of the courts of Hong Kong, SAR. The parties hereby knowingly, voluntarily and intentionally waive to the fullest extent permitted by law any rights they may have to trial by jury in respect of any litigation based hereon, or arising out of, under or in connection with this Agreement”

The Respondent applied for a stay of the Singapore proceedings, relying upon (a) this particular jurisdiction clause, and (b) the ground of forum non conveniens. The Respondent’s application was dismissed by the Assistant Registrar in Chambers but was overturned by the Singapore High Court, which held that the jurisdiction clause indicated the parties’ intention for Hong Kong to be the jurisdiction of choice. On appeal, the Singapore CA reinstated the Assistant Registrar’s decision not to grant the stay on proceedings.

CA Decision

The CA held that the jurisdiction clause was a non-exclusive jurisdiction clause. In ascertaining the effect of the non-exclusive jurisdiction clause, the CA was of the opinion that there were two central strands of analysis which may be applied: (a) a contractual analysis; and (b) a general analysis.

The contractual analysis is a matter of construction, focused on the intention of the parties and the obligations created by the non-exclusive jurisdiction clause which might lead to the clause being accorded the effect of an exclusive jurisdiction clause. The party contesting the jurisdiction of the forum would be required to display strong cause if the party is seeking to sue in a jurisdiction other than that stated in the jurisdiction clause itself. Here, the contractual arrangement between the parties takes precedence. While there is merit to such an approach, it runs the risk of a blurred distinction between the two types of jurisdiction clauses.

The general analysis depends on the court’s adjudication of the case as a whole, taking the non-exclusive jurisdiction clause into account as just one of the factors to consider in ascertaining whether the action concerned ought to be stayed, with the weight attributed to the clause depending on the precise circumstances of the case.

Given the impracticality of applying the contractual approach at an interlocutory stage (i.e., an application to stay the proceedings where only affidavit evidence is available), the CA was inclined toward the general approach. However, the CA did qualify that even if they
were to take the former approach into consideration, there were factors present which buttressed the Appellant’s case of desiring more flexibility in enforcing the terms of the settlement agreement. These included the fact that the original agreements between the parties had all contained an exclusive jurisdiction clause; accordingly it would appear that the inclusion of a non-exclusive jurisdiction clause in the settlement agreement indicated that the parties had a different intention.

In reaching its decision, the CA applied the well-established test expounded in the English House of Lords case of *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, which has become part of Singapore’s legal landscape. In applying that test, the onus fell on the Respondent to show that there was another forum available which was clearly or distinctly more appropriate than Singapore. The non-exclusive jurisdiction clause was weighed against the fact that the Respondent was resident in Singapore and that Singapore and Hong Kong laws are broadly similar; taking all these circumstances into account, the CA was of the opinion that the Respondent had failed to demonstrate that the Hong Kong Courts were clearly and distinctly more appropriate. It therefore allowed the appeal.

Our Comments

In *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala*, the CA has firmly established that the presence of a non-exclusive choice of jurisdiction clause will not, of itself, provide a strong prima facie case that the parties deem the designated forum to be the most appropriate forum to adjudicate their dispute in all circumstances. It is just one factor that the court will consider in deciding whether or not the Appellant’s action should be stayed.

However, it is important to note that such a clause will be given different weight depending on where proceedings have been instituted. The CA endorsed the following principles established in the Hong Kong case of *Noble Power Investments Ltd v Nissei Stomach Tokyo Co Ltd* [2008] 5 HLRD 632:

- Where proceedings are instituted in the named forum (to which the parties have agreed to submit), the party who seeks a stay or otherwise contests the jurisdiction of that forum has a heavy burden to discharge as the parties have by definition agreed contractually that the particular jurisdiction is an appropriate forum.

- Where proceedings are instituted in a forum other than the named forum, the party who

Ultimately, the courts are concerned with upholding the intentions of parties and the actual provisions of the applicable agreements must be carefully scrutinized to ascertain the parties’ exact intention in that particular case. Accordingly, in any form of contractual negotiations, especially those involving cross-border transactions, it is important for parties to expressly consider how and where disputes will be decided, and this should be clearly reflected in the agreement. Failure to do so can result in undesirable consequences where parties have to spend money on costly litigation to ascertain the meaning of a poorly-drafted choice of jurisdiction provision, as well as facing the risk of their contractual dispute being decided in an undesirable and unintended jurisdiction. While the use of non-exclusive jurisdiction clauses can provide parties with the flexibility of selecting a jurisdiction as and when the need arises, they should consider whether the uncertainties, costs and risks associated with multiple proceedings outweigh this benefit.

If you wish to have further information on this update or wish to discuss how it may potentially have an impact on your business, please feel free to contact the following:

**Lisa THENG**  
Managing Partner  
Head, Dispute Resolution  
Head, Corporate Advisory  
Head, Greater China  
DID: +65 6349 8706  
Fax: +65 6323 8282  
Email: mltan@cnplaw.com

**Ken CHIA**  
Associate  
Email: kchia@cnplaw.com

**YIP Suilyn**  
Practice Trainee  
Email: syip@cnplaw.com

Authors & Contributors:

This update is provided to you for general information and should not be relied upon as legal advice.