

Asymmetrical jurisdiction clause held not to be an exclusive jurisdiction clause for enabling enforcement in Mainland

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In the recent decision of *Industrial and Commercial Bank of China (Asia) Limited v Wisdom Top International Limited*¹, the Hong Kong Court of First Instance has decided that an asymmetrical jurisdiction clause commonly seen in international financial documents does not satisfy the requirement of an exclusive jurisdiction clause under the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) (**Ordinance**). As a result, the judgment creditor cannot benefit from the more efficient way of enforcing a monetary judgment against the debtor in the Mainland.

Background

After having obtained a default judgment for the sum of HK\$379 million and interest in the High Court of the HKSAR, the plaintiff bank applied *ex parte* to the Registrar of the High Court for the necessary documentation² in order to seek recognition and enforcement of the judgment against the defendant borrower in the Mainland pursuant to the 2006 Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and the HKSAR (the **Reciprocal Arrangement**), to which the Ordinance gives effect. Under the Reciprocal Arrangement, a judgement recognised in accordance with the arrangement shall have the same force and effect

as one being made by a court of the place where the enforcement of the judgment is sought.

Reciprocal Arrangement

Under the Reciprocal Arrangement, where any people's court of the Mainland or any court of the HKSAR had made a final judgment requiring payment of money in a civil and commercial case, any party concerned may apply to a people's court of the Mainland or a court of the HKSAR for recognition and enforcement of the judgment. In order to rely on the Reciprocal Arrangement, the judgment must have been made by the court pursuant to a written agreement between the parties to submit their dispute to sole jurisdiction of a people's court of the Mainland or a court of the HKSAR. For parties to cross-border contracts, it means they can confidently choose to have disputes resolved in either the Mainland or the HKSAR, knowing that there is an avenue to enforce a judgment in the other jurisdiction without incurring significant cost and time in initiating new proceedings.

¹ [2020] HKCFI 322

² These include a certified copy of the judgment and a certificate that the judgment can be enforced by execution

in Hong Kong pursuant to s.21 of the Ordinance and Order 71B, r.2 of the Rules of the High Court.

The underlying facility agreement between the plaintiff bank and the defendant contains an asymmetrical jurisdiction clause (**AJC**), which provides that:

- Should a dispute arise, the borrower must sue in the courts of Hong Kong which the parties recognised as the most appropriate and convenient forum and shall not challenge the exclusive jurisdiction of the Hong Kong courts.
- On the other hand, the bank can sue the borrower not just in Hong Kong courts, but in the courts of any other competent jurisdiction. Nonetheless, if the bank chooses to commence legal proceedings in other jurisdictions, it would need to justify that choice given the parties' agreement that Hong Kong courts are the most appropriate and convenient forum.

Indeed, such AJC is widely used in financial documents with cross-border elements as it gives the lender the optionality as to where to enforce its rights depending on where the borrower's assets can be located in the event of a default.

After hearing the plaintiff bank's case, the Registrar dismissed its application for the reason that the AJC is not a "choice of Hong Kong court agreement" within its meaning under s.3(1) of the Ordinance. The term is defined to mean an agreement concluded by the parties to a specified contract and specifying the courts in Hong Kong or any of them as the court to determine a dispute which has arisen or may arise in connection with the specified contract to the exclusion of courts of other jurisdictions. In other words, exclusivity of the court chosen by the parties is key (the **Exclusivity Requirement**). It was decided by the Registrar that s. 3(1) require an exclusive jurisdiction clause in favour of Hong Kong with respect to both parties to the agreement, and that since the plaintiff bank had the option to commence proceedings overseas, the AJC did not satisfy the Exclusivity Requirement.

The Judgment

The bank brought an appeal to the Court of First Instance. The Registrar's decision was upheld.

The Court considered the nature of the AJC, the legislative scheme under the Ordinance, the corresponding provisions in the Hague Convention on Choice of Court Agreement and a number of English authorities in reaching the determination that the AJC in question did not constitute the "choice of Hong Kong court agreement" under s. 3(1) of the Ordinance.

Having noted that the purpose of the Exclusivity Requirement is to minimise the risk of parallel proceedings and to facilitate enforcement by a summary procedure, the Judge came to the view that the AJC in question did not serve this purpose as there was no certainty as to which jurisdiction the plaintiff bank would submit the dispute and the choice of forum is at large depending on the choice of the plaintiff bank. Whilst recognising Hong Kong courts to be the most appropriate and convenient forum, the plaintiff bank could as well sue in Singapore where the relevant witnesses and the defendant were located. As such, the possibility of parallel proceedings in multiple jurisdictions could not be eliminated.

The plaintiff bank sought to rely on English authorities which recognise certain AJCs as agreements conferring exclusive jurisdiction but were decided in the context of the Brussels I Regulation recast (**BIR recast**). Indeed the BIR recast is different to the Ordinance in that the phrase "to the exclusion of other courts" was missing from the requirement of an exclusive choice of court agreement under the BIR recast. In addition, in these English cases the courts were considering which court had priority to hear a matter under the BIR recast, but was not dealing with the enforcement of a judgment already obtained as contemplated under the Ordinance and the Reciprocal Arrangement. The English authorities were therefore distinguished from the present case.

The Court also regarded the fact that AJCs are used widely in international finance documents to be an irrelevant consideration under the statutory regime.

Takeaway

With this recent decision of the High Court in mind, lenders may need to consider whether to include an AJC in their facility agreements with borrowers whose assets are in the Mainland. If a favourable Hong Kong judgment is rendered ineligible for the Reciprocal Arrangement because of an AJC, it could be time-consuming and costly for the judgment creditor to recover the debt as it will have to commence new proceedings in the Mainland. In this case, the plaintiff bank

commenced separate proceedings in the Mainland to enforce the debt pending appeal against the Registrar's decision.

It is worth noting that in early 2019, a new **arrangement** replacing the current Reciprocal Arrangement has been entered into between the PRC Supreme People's Court and the HKSAR Government, under which the Exclusivity Requirement is abolished. However, the new arrangement has not come into effect. Until then, this decision will remain as the guiding authority on the Exclusivity Requirement and its implications on AJCs.



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