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## How an Asymmetric Jurisdiction Clause May Affect Enforcement in Mainland China A New Take by the Hong Kong Court

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An asymmetric jurisdiction clause ("**AJC**") is a jurisdiction clause that allows one party to commence proceedings over disputes arising from the underlying contract against the other contracting party in any jurisdiction of its choice while the other party is restricted to commence proceedings exclusively in one specified jurisdiction. AJCs are most commonly used in facility or loan agreements, especially if the agreement involves cross-border financial arrangements or overseas parties.

AJCs would ensure that a creditor can always litigate in a debtor's home court while preserving its right to bring proceedings where the debtor's assets are located at the time a dispute arises. This increase the prospect of a creditor successfully recovering a debt.

In the recent case of *Industrial and Commercial Bank of China (Asia) Ltd v Wisdom Top International Ltd* [2020] HKCU 405 ("**Wisdom Top**"), the Hong Kong Court of First Instance ruled that AJCs are not regarded as an exclusive jurisdiction clause for the purpose of enforcing a Hong Kong judgment in Mainland China under the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597 of the laws of Hong Kong) (the "**Ordinance**"). As a result, the Court refused to issue the certificate for the purpose of enforcing the Hong Kong judgment in mainland China under the Ordinance.

### I. FOREIGN ENFORCEMENT OF HONG KONG JUDGEMENTS

The Ordinance was implemented to give effect to the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the HKSAR, which was entered into on 14 July 2006 (the "**2006 Arrangement**"). The Ordinance provides a mechanism for a party to enforce a Hong Kong judgment in mainland China by obtaining a certified copy of the judgment and a certificate issued by the High Court and producing the same to the Chinese courts for registration.

Under s.21(1)(a) of the Ordinance, for the High Court to issue the said documents, the relevant judgment must be one from "the Court of Final Appeal or the High Court which is a chosen court", and a "chosen court" is defined as "the court or any of the courts specified in a choice of Mainland court agreement or choice of Hong Kong court agreement, as the case may be, as the court to determine a dispute to which the agreement applies". A "choice of Hong Kong court agreement" is further defined in s.3(1) of the Ordinance as "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 short, only judgments over disputes arising from a contract that expressly specifies the Hong Kong court to have exclusive jurisdiction can be enforceable in mainland China under the Ordinance.

## II. THE WISDOM TOP CASE

In the *Wisdom Top* case, the plaintiff, being a bank and creditor in a facility agreement, obtained default judgement against the defendant and sought a certified copy of the judgement and a certificate by the High Court for enforcing the judgement in mainland China pursuant to the Ordinance. The Registrar of the Hong Kong High Court refused to issue a certified copy of the judgement and a certificate. The plaintiff then lodged an appeal before a Judge in the Court of First Instance. The key issue in the appeal is whether AJC constitutes an exclusive jurisdiction clause for the purpose of the Ordinance.

In the facility agreement between the parties in this case, Clause 34.1, the jurisdiction clause, provides that:-

### "34.1. Jurisdiction of Hong Kong courts

- (a) Subject to paragraph (c) below, the courts of Hong Kong have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a dispute regarding the existence, validity or termination of this Agreement) (a "Dispute").
- (b) The Parties agree that the courts of Hong Kong are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary.
- (c) This Clause 34.1 is for the benefit of the Lender only. As a result, the Lender shall not be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Lender may take concurrent proceedings in any number of jurisdictions."

In the appeal, the plaintiff relied on the English authorities that found AJCs to constitute exclusive jurisdiction clause to argue that the above Clause 34.1 of the facility agreement should be regarded as an exclusive jurisdiction clause. The arguments were however rejected by the Court as the English

authorities were decided in the context of Brussels I Regulation recast, which has no definition of exclusive choice of court agreement, and the scheme under which is very different to the Ordinance. The Court also rejected the plaintiff's argument based on purposive interpretation of the Ordinance. Notwithstanding that AJCs were widely used in international financial documents, the focus of the 2006 Arrangement was not the international nature of the underlying contract but the deliberate choice of the contracting parties to use mainland Chinese Court or the Hong Kong Court to resolve a dispute, to the exclusion of other courts.

The Court however accepted that the obligations of each party under an AJC must be considered separately. It was ruled by the Court that the clause can be treated as an exclusive jurisdiction clause for the purpose of the Ordinance if the party instituting the action is the one who is restricted to only sue in Hong Kong. As the plaintiff in the case has the rights to sue in different jurisdictions, the aforesaid clause is not an exclusive clause under the Ordinance.

## III. IMPLICATIONS

This case provides guidance on the Hong Kong Court's position relating to the enforcement of Hong Kong judgment in mainland China under the Ordinance. Given the current position, contracting parties, especially creditors, should consider whether the counterparty has significant asset in mainland China. If so, it may be advisable to refrain from including an AJC in the contract so to utilize the mechanism under the Ordinance for easier enforcement of a Hong Kong judgement in mainland China.

It is also to note that a new Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the HKSAR was signed in January 2019 but has yet been implemented. This new arrangement removes the requirement of the "choice of Hong Kong court agreement". In other words, it would no longer be required for the underlying contract to provide the Hong Kong courts as the exclusive jurisdiction for resolving the disputes arising therefrom.

Until the new Arrangement is implemented and given effect to, parties should be careful in including AJCs in Hong Kong, especially where the counterparty has assets in mainland China.