

Should parties adopt an asymmetric jurisdiction clause in contracts involving Mainland China and Hong Kong entities?



It has been held in *Industrial and Commercial Bank of China (Asia) Limited v Wisdom Top International Limited* [2020] HKCFI 322, that under the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) (the “**Ordinance**”), an asymmetric jurisdiction clause (“**AJC**”) will not be regarded as an exclusive jurisdiction clause. The Ordinance gives 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 signed on 14 July 2006 (the “**2006 Arrangement**”).

What is an Asymmetric jurisdiction clause?

An AJC generally allows one party (usually a bank) to sue another party (usually a borrower) in any jurisdiction but restricts the borrower to sue in only one exclusive jurisdiction. AJCs are commonly seen in financing documents such as loan agreements and guarantees.

Background and the appeal outcome

In April 2019, the plaintiff (the “**Bank**”) obtained a default judgement against the defendant (“**Wisdom Top**”) under a facility agreement for the sum of HKD 379 million. The Bank then made an *ex parte*¹ application to the Registrar of the Hong Kong High Court for a certified copy of the judgement and a certificate which are required to apply for recognition and enforcement of the judgement in Mainland China under the 2006 Arrangement. The application was dismissed by the Registrar on the basis that the AJC in the facility agreement did not satisfy the requirement of choosing the Hong Kong Courts exclusively under the Ordinance, which is essential to give effect to the 2006 Arrangement. The Bank appealed.

The appeal was dismissed. In dismissing the appeal, the judge tested the AJC by two hypothetical examples to show that the AJC would allow the Bank to sue in different forums and would not meet the requirement of “*to the exclusion of courts of other jurisdictions*” under s.3(1) of the Ordinance. The judge then analysed the nature of the AJC and the statutory scheme. The judge emphasised that the purpose of the Ordinance was to minimise the risk of parallel proceedings being instituted both in Mainland China and Hong Kong. The Judge finally adopted the purposive approach to conclude that the AJC was not in line with the legislative purpose of the Ordinance and was against the spirit of the 2006 Arrangement.

The English authorities

The Bank tried to persuade the judge to follow the English authorities which have consistently held that an AJC is an exclusive jurisdiction clause. The judge refused to accept the Bank’s contention as the English cases were decided in a completely different context – the BIR recast². The purpose of the BIR recast is to enhance the effectiveness of exclusive choice of court agreements and to ensure that the designated court has priority to determine the validity of the agreements, while the purpose of the 2006 Arrangement is not to deal with priority issues between courts, but the enforcement of a judgement already obtained. The judge considered the leading English authority *Commerzbank*³, where the English Courts held that there had to be an exception to the general *lis pendens* rule to provide a quick resolution as to which court should be seised of the matter and to avoid abusive tactics, so there was every reason to recognize an AJC as an exclusive jurisdiction clause in the context of BIR recast.

¹ To apply on an *ex parte* basis means that the Bank did not give Wisdom Top notice of this application.

² Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

³ *Commerzbank Aktiengesellschaft v Lquimar Tankers Management Inc* [2017] EWHC 161 (Comm).

Implications

This decision is significant as it is the first judicial decision determining the interpretation of “choice of Hong Kong court agreement” under the Ordinance. This decision clarifies that an AJC will not be considered an exclusive jurisdiction clause for the purposes of the Ordinance. Therefore, a judgment obtained under such an AJC either from the Hong Kong or Mainland Chinese Courts may not be enforceable under the 2006 Arrangement. This is significant given that AJCs are a common type of jurisdiction agreement in financing documents that involve Mainland Chinese and Hong Kong parties.

A new arrangement between Hong Kong and Mainland China was signed in 2019⁴ to replace the 2006 Arrangement. Significantly, under the new judicial arrangement, there will no longer be a requirement of the “choice of court agreement” and establishing jurisdiction will be easier. However, the new judicial arrangement has not come into force yet. Therefore, parties to financial documents should carefully consider if it is appropriate to adopt an AJC for future financing documents, particularly if the borrower has assets in Mainland China.

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⁴ The Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters between the Courts of the Mainland and of the Hong Kong SAR.