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Insights

CASE NOTE ON INDUSTRIAL AND COMMERCIAL BANK OF CHINA (ASIA) LIMITED V WISDOM TOP INTERNATIONAL LIMITED [2020] HKCFI 322

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Introduction

This case note examines a recent Hong Kong Court of First Instance ("**CFI**") case, *Industrial and Commercial Bank of China (Asia) Limited v Wisdom Top International Limited* [2020] HKCFI 322. The case gives a cautionary note on the use of asymmetrical jurisdiction clauses in agreements (for example, international financial documents) under which contracting parties anticipate the need to seek enforcement of Hong Kong court judgments in Mainland China.

Generally speaking, an asymmetrical jurisdiction clause gives just one of the contracting parties to have additional flexibility about where to bring court proceedings. For example, the contract might have a clause that says that the courts of Country A have "exclusive" jurisdiction over disputes under the contract, but that one of the parties has to the option to sue in other countries if it so chooses.

The decision in the *Wisdom Top* case confirms that asymmetrical jurisdiction clauses, which are widely used in international financial documents, may not provide as much reassurance to a lender of a Hong-Kong-law-governed financial document in circumstances where the borrower has most of its assets situated in Mainland China.

In the *Wisdom Top* case, the ruling was that the Hong Kong judgment in favour of the lender for recovering defaulted sums could not be enforced in Mainland China pursuant to the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) (the "**Ordinance**").

If the successful claiming party cannot use that Ordinance to enforce the Hong Kong judgment in Mainland China, separate proceedings before the Mainland Chinese courts would be required in order to recover the defaulted sums from the borrower.

Therefore, it may not necessarily be beneficial for a lender under Hong-Kong-law-governed financial documents to adopt an asymmetrical jurisdiction clause if they know the borrower's assets are mostly situated in Mainland China.

The problem identified in the *Wisdom* Top case will cease to be so problematic for agreements signed after a replacement enforcement arrangement comes into effect, at a future date. But in the meantime, parties to international financial agreements are urged to consider carefully whether an asymmetrical jurisdiction clause is appropriate if the borrower's assets are located in Mainland China.

The case

In *Industrial and Commercial Bank of China (Asia) Limited v Wisdom Top International Limited*, the CFI ruled that an asymmetrical jurisdiction clause in a facility agreement does not fall within the meaning of section 3(1) of the Ordinance. The reason for the ruling was that the Ordinance requires the underlying contract to contain a "*choice of Hong Kong court agreement*" and the asymmetrical jurisdiction clause is not a "*choice of Hong Kong court agreement*". Therefore, a Hong Kong default judgment for recovery of a sum under that facility agreement did not qualify for the reciprocal enforcement arrangement between Hong Kong and Mainland China under the Ordinance.

The plaintiff, Industrial and Commercial Bank of China ("**ICBC**"), obtained a default judgment against the defendant, Wisdom Top International Limited ("**Wisdom Top**") to recover a sum under a Hong-Kong-law facility agreement between the parties (the "**Facility Agreement**"). Subsequently, pursuant to section 21 of the Ordinance and Order 71B, r.2 of the Rules of the High Court, ICBC applied to the High Court Registrar (the "**Registrar**") for a certified copy of the default judgment and a certificate to be issued by the Hong Kong High Court for the purpose of enforcement in Mainland China.

Decision by the High Court Registrar

ICBC's application under the Ordinance was dismissed by the Registrar for the following reasons:-

- Section 3(1) of the Ordinance requires the underlying contract to contain a "*choice of Hong Kong court agreement*" which is defined in the same section 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*" (emphasis added.)

- The jurisdiction clause in the Facility Agreement was a typical asymmetrical jurisdiction clause commonly found in international financial documentation. While it provided that "*the courts of Hong Kong have exclusive jurisdiction*", it also gave the lender, ICBC, (but not the borrower, Wisdom Top) an option to commence "*concurrent proceedings in any number of jurisdictions*" rather than in Hong Kong (the "**Jurisdiction Clause**").

- As such, the Registrar decided that the Jurisdiction Clause did not satisfy section 3(1) of the Ordinance and was not a "*choice of Hong Kong court agreement*". This rendered ICBC unable

to enforce the Hong Kong default judgment in Mainland China using the summary procedures under the Ordinance.

ICBC'S appeal to CFI

ICBC was not satisfied with the Registrar's decision and appealed to the CFI. The sole issue for the CFI to consider was whether or not the Jurisdiction Clause was an exclusive jurisdiction clause within the meaning of section 3(1) of the Ordinance.

By adopting a purposive approach in construing the Ordinance and reviewing the factual context in which it was enacted, the CFI found that:-

- The Ordinance gave effect to the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and the HKSAR Pursuant to Choice of Court Agreements between Parties Concerned which was signed in July 2006 ("**2006 Arrangement**").
- According to the Report of the Bills Committee, the purpose of the 2006 Arrangement was to create a summary mechanism for reciprocal enforcement of judgments of the Mainland Chinese and Hong Kong courts, without having to commence a new action for debt recovery in the enforcing jurisdiction. The purpose of requiring an exclusive choice of court agreement was to minimise the risk of parallel proceedings being instituted in the courts of both places.
- Whether a jurisdiction clause is a choice of Hong Kong or Mainland court agreement within the meaning of the Ordinance should be decided in accordance with the governing law of the contract, which, in this case, would be Hong Kong law.

The CFI ruled that the Jurisdiction Clause was inconsistent with the purpose of section 3(1) of the Ordinance for the following reasons:-

- Where ICBC would be the plaintiff of an action, according to the Jurisdiction Clause in the Facility Agreement, the jurisdiction would be at large and would be dependent on ICBC's choice. The CFI considered that this went against the spirit of the 2006 Arrangement because, in such circumstances, there was no certainty as to jurisdiction.
- The CFI clarified that the fact that asymmetrical jurisdiction clauses are widely used in international financial documents would not be considered as the deciding factor under the statutory regime. The 2006 Arrangement did not focus on the international nature of the underlying contract but the deliberate choice of the contracting parties to use Mainland Chinese or Hong Kong courts to resolve disputes, to the exclusion of other courts.

As such, the CFI ruled that the Jurisdiction Clause in the Facility Agreement would be considered as containing an exclusive choice of court if Wisdom Top was the plaintiff of the action but not so if

ICBC was the plaintiff. The CFI confirmed that the Registrar's views were correct and therefore ICBC's appeal should be dismissed.

BCLP insight

On 18 January 2019, 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 (the "**2019 Arrangement**"). The 2019 Arrangement (unlike the 2006 Arrangement) does not require the underlying contract to provide the Hong Kong or Mainland Chinese courts as the exclusive jurisdiction of the disputes arising from that contract. Further, under the 2019 Arrangement, the reciprocal recognition and enforcement of judgments arrangement covers monetary and non-monetary judgments in relation to civil and commercial matters under both Hong Kong law and Mainland Chinese law (with some express exclusions such as bankruptcy/ insolvency cases and maritime cases).

The 2006 Arrangement will cease to have effect upon the commencement of the 2019 Arrangement. However, the 2006 Arrangement will continue to have effect on a "*choice of court agreement in writing*" signed before the commencement of the 2019 Arrangement. The 2019 Arrangement is yet to be implemented in Hong Kong (by way of local legislation) and in Mainland China (by way of judicial interpretation). If we take the 2006 Arrangement as a reference point – it was signed in July 2006 and came into effect just over two years later, on 1 August 2008, after both Hong Kong and the Mainland China completed the necessary procedures to enable its implementation – it is not unreasonable to expect that it will take a year or two for the 2019 Arrangement to come into effect. Until it does, parties to international financial agreements are urged to consider carefully whether an asymmetrical jurisdiction clause is appropriate if the borrower's assets are located in Mainland China.

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