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Substantial connection, exceptionality and the Greater Bay Area: Jurisdiction after *JQ v CLH*

The Court of Appeal in *JQ v CLH* (CACV 350/2021) [2022] 2 HKLRD 632 has clarified that in establishing divorce jurisdiction, there is no separate “exceptionality test” applied for parties without the presence of family in Hong Kong. Rather, maintaining a consistent economic and social presence could in some cases be sufficient to demonstrate substantial connection with Hong Kong.

Isabel Tam of Denis Chang’s Chambers and **Sindy Wong**, Senior Associate of Rita Ku & Ser, examine this significant ruling and its implications for legal practitioners advising families with cross-border elements.

Main takeaways

- The Court of Appeal in *JQ v CLH* has clarified that in establishing divorce jurisdiction, there is **no separate “exceptionality test”** applied for parties without the presence of family in Hong Kong.
 - Rather, maintaining a consistent economic and social presence could in some cases be sufficient to demonstrate substantial connection with Hong Kong, which seems to have broadened the interpretation of “substantial connection”.
 - With technological advances allowing remote participation in Hong Kong activities, and with the increasing integration within the Greater Bay area, the elastic concept of “economic and social presence in Hong Kong” is set to become an increasingly contentious fact-sensitive assessment in future cases where parties disagree on jurisdiction.
 - Thrown into the mix of strategizing jurisdictional disputes are also the options of (i) reciprocal enforcement of financial orders arising out of foreign divorces and (ii) applying for financial relief in Hong Kong after a foreign divorce.
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Jurisdiction and family presence

A series of judgments in **JQ v CLH** has addressed head-on the impact of the pandemic and the development of the Greater Bay Area: individuals increasingly having economic and social presence in multiple jurisdictions (as opposed to mere physical presence), complicating the question of *where* the divorce can, or ought to, take place.

The ruling has clarified the test for establishing substantial connection to confer jurisdiction to grant a divorce, particularly for cases where parties do not have the presence of family in Hong Kong. It has also brought into sharper focus the myriad of factors practitioners ought to take into account when advising families with cross-border elements.

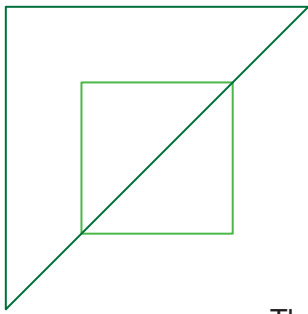
JQ v CLH concerned a couple whose marital life was “never in Hong Kong”¹. The wife and the children of the marriage “never lived in Hong Kong in any real sense during the parties’ relationship”, with the children being brought up either in the United States or in the Mainland².



The Husband at the material times did not live in Hong Kong, but whilst not maintaining a constant physical presence in Hong Kong, did pursue a certain amount of economic dealings and social activities in Hong Kong.

¹**JQ v CLH** [2021] HKFC 105 at §14

²**JQ v CLH** [2021] HKFC 105 at §14(2) and (4)



The requirements for conferring jurisdiction to obtain a divorce through Hong Kong Courts is set out in section 3 of the Matrimonial Causes Ordinance (Cap 189). Jurisdiction exists if one of the following 3 grounds are established:

“(a) either of the parties to the marriage was domiciled in Hong Kong at the date of the petition or application;

(b) either of the parties to the marriage was habitually resident in Hong Kong throughout the period of 3 years immediately preceding the date of the petition or application; or

(c) either of the parties to the marriage had a substantial connexion with Hong Kong at the date of the petition or application.”

JQ v CLH concerns the last ground in section 3 (the “**Substantial Connection Ground**”): did the Husband have a substantial connection at the time of petition³.

First Instance

The First Instance Judge summarized the legal principles on the Substantial Connection Ground⁴ and included a reference to what is often referred to as the “exceptionality test” in respect of person for whom the family is outside of Hong Kong, i.e., that “It is only in exceptional circumstances that a party who is in Hong Kong without the presence of his family will nonetheless be able to show that he has a substantial connection here”⁵.

As will be seen later, the Court of Appeal went on to take a different view on the applicability of the exceptionality issue in assessing substantial connection.

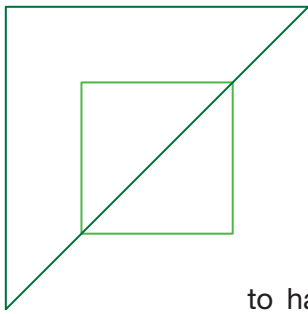
The thrust of the Court’s query was “whether the presence of the husband in Hong Kong, mainly for economic reasons, is sufficient to constitute a substantial connection for the purpose of the divorce proceeding”⁶. The Husband was found

³The issue was first raised at a hearing by his Honour Judge I Wong (the “First Instance Judge”), noting an “oddity” in the divorce petition, potentially raising query as to jurisdiction, leading to the Husband’s application to argue there was no substantial connection and thus no jurisdiction. See ***JQ v CLH*** [2021] HKFC 105 at §3; ***JQ v CLH*** [2022] HKCA 489 at §12

⁴***JQ v CLH*** [2021] HKFC 105 at §19

⁵***JQ v CLH*** [2021] HKFC 105 at §19(6)

⁶***JQ v CLH*** [2021] HKFC 105 at §39



to have marginal substantial connection, *inter alia* on there being exceptional circumstances despite the lack presence of his family in Hong Kong⁷. The Judge highlighted the following factors that came with being in an increasingly international and mobile age⁸:

- A person may have substantial connection with more than one jurisdiction. With the impact of Covid-19 and the development of the Greater Bay Area: “Things that were taken for granted should be done physically before the



Pandemic are now being done remotely with the ease of electronic communications. Further, with the ease of transportation, in future, for **many people, conducting their daily life in more than one jurisdiction, say within the Greater Bay Area, may become an order of the day.**”

- Remote control of Hong Kong companies and personal finances in Hong Kong, whilst physically residing on the Mainland, could count towards the substantiveness of the connection. The Husband’s presence was described as a “consistent “economic” and “social” presence in Hong Kong”, an “unbroken continuity”⁹.

⁷**JQ v CLH** [2021] HKFC 105 at §49

⁸**JQ v CLH** [2021] HKFC 105 at §§31-49

⁹Including *inter alia* for business meetings, medical check-ups and social events. The Court noted that the Husband oversees and manages his team remotely and comes to Hong Kong for business meetings, remotely controls his finances; his “economic” presence here “ensured” financial provision for the family and was not of a “fly-in” / “fly-out” nature.



The Appeal

The Husband appealed. The First Instance Judge granted leave to appeal. In the leave judgment, the Judge anticipated “more and more” people in similar situations” and observed “the advent of ever changing communication technology and the development of the Greater Bay Area” in making this issue “a growing area”. The following matters were said to deserve appellate attention¹⁰:

“(1) Whether conducting “remote control” of Hong Kong companies / business from another jurisdiction rather than being physically present here could give rise to substantial connection?

(2) Whether “remotely controlling” financial matters in Hong Kong from another jurisdiction, rather than being physically present in Hong Kong, would give rise to substantial connection?

(3) Whether “economic presence” within Hong Kong is sufficient to give rise to substantial connections even without accompanying physical presence in Hong Kong?

(4) Whether the above factors satisfy the requirements of “exceptionality”?”

The Court of Appeal rejected the Husband’s appeal. In doing so, the Court reiterated the applicability of the guidance set out in **ZC v CN (Divorce: jurisdiction)** [2014] 5 HKLRD 43 and **S v S** [2006] 3 HKLRD 751, but at the same time demoted the significance of the concept of “exceptionality” which appears in both **ZC v CN** §9.9 and **S v S** §19(6)¹¹.

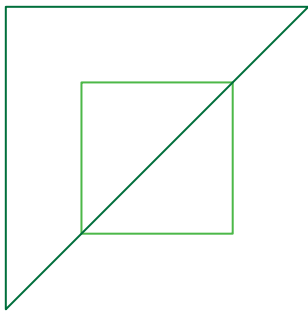
The following observations of the Court of Appeal illustrate doing away with the “exceptionality test”, and clarifying the approach for future cases¹²:

- The previous authorities mentioning exceptionality **did not create any separate category of parties without the presence of family in Hong Kong** who have to satisfy the requirement of “exceptionality” before jurisdiction under s 3(c) can be established.

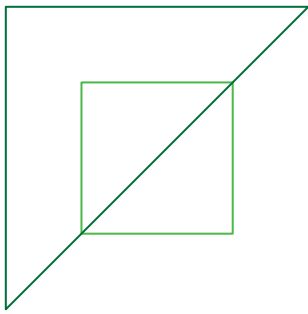
¹⁰**JQ v CLH** [2021] HKFC 133 at §15

¹¹“It is only in exceptional circumstances that a party who is in Hong Kong without the presence of his family will nonetheless be able to show that he has a substantial connection here”” (emphasis in original)

¹²**JQ v CLH** [2022] HKCA 489 at §§24-27



- In most cases, the family context is the focus of the inquiry and a material factor on the question of substantial connection, but at the same time there could be cases where, without the presence of his/her family here, a substantial connection with Hong Kong can nonetheless be established. Such cases being less frequent might thus be regarded as “exceptional”, **but does not elevate “exceptionality” as the test for determining substantial connection.**
- The only question to ask is whether the party had a substantial connection with Hong Kong within the statutory meaning, **which is a “highly fact sensitive” question of fact.**
- A party – as in the case of the Husband in ***JQ v CLH*** – who had Hong Kong as the “home base” of his finances and maintained a consistent “economic” and “social” presence here could be found to have a substantial connection with Hong Kong within the statutory meaning.
- But the findings in ***JQ v CLH*** are not intended to create precedent for future cases involving integration with the Greater Bay Area: whilst there may be many persons in a situation similar to the Husband in ***JQ v CLH***, and may be many more upon the increasing integration within the Greater Bay Area, the question still remains a fact sensitive. Hon Barma and Chow JJA specified that they “**do not see that this judgment creates any precedent.** It is, instead, a decision on the particular facts and circumstances of the present case.”



Looking forward: There is no “exceptionality test”

Whilst the Court of Appeal had said that they do not see their judgment on **JQ v CLH** will create any precedent, it will undoubtedly have a significant impact on how litigants and family law practitioners approach the issue of “substantial connection” going forward.

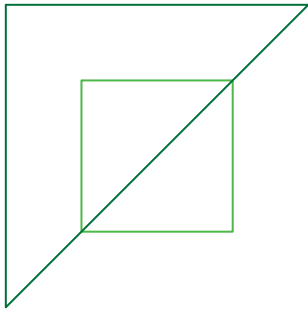
Before **JQ v CLH**, one of the authors of this article was involved in a case where neither party nor the child was in Hong Kong, but they both wanted to finalize their divorce and related issues in Hong Kong by consent. One party had various interest and involvements in Hong Kong investments and listed companies, as well as social activities here. It was ultimately rejected by the Court for lack of jurisdiction. Cases like **ZC v CN** and **ZJW v SY** also adopted similar approach.

After **JQ v CLH**, future analysis should no longer ask whether a party without the presence of his family in Hong Kong can nonetheless clear the substantial connection hurdle by showing the existence of exceptional circumstances.

Future cases will focus on whether, in fact, the litigant can show a consistent “economic” and “social” presence, and the links that presence has with providing for the family outside of Hong Kong. All activities in Hong Kong, past and present, should be viewed in totality. A door might now be available for parties who habitually reside outside of Hong Kong but have economic and social ties with Hong Kong – particularly, those with significant income derived from assets or investments in Hong Kong.

It is important to recall, however, that prior to becoming mired in the potentially lengthy and contentious allegations on economic and social presence for substantial connection, other options in the “toolkit” should also be considered:

- Divorce in the Mainland, and enforcing in Hong Kong? The Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Ordinance (Cap. 639) which has recently come into operation may provide an alternative to insisting the proceedings be heard in Hong Kong.
- Divorce in the Mainland, and obtaining further relief in Hong Kong? Under sections 29AB and 29AC of Part IIA of the Matrimonial Proceedings and Property Ordinance (Cap. 192), after a divorce in another jurisdiction, party to a foreign divorce may still come to Hong Kong Courts for leave to apply for financial relief. The jurisdictional requirements mirror those for divorce, and potentially the observations on “substantial connection” (and demoting of the exceptionality requirement) may apply analogously to a certain extent for Part IIA applications.



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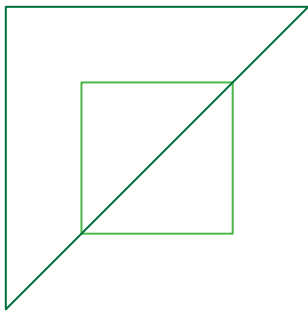
Isabel is a Bar Scholar who graduated with a first class LLB and with distinction in her LLM. She also has an MA in competition law with distinction in the examination component, and was seconded to the Competition Commission.

Called to the Bar in 2013, Isabel practises in a wide range of areas, with an emphasis on public law, building management and property law, family law, commercial law and regulatory matters.

Her experience in family law includes: children matters, ancillary relief, anti-suit injunction, and harassment-related proceedings.

Recent highlights of Isabel's work include **AA v BB** [2021] HKCFI 1401, which has been hailed as a landmark victory for the LGBTQ community, granting parental rights to a separated same-sex couple who had co-parented children during their relationship. Isabel appeared for the Respondent, the non-biological mother within the same-sex relationship, and secured parental rights for her including guardianship and joint custody.

Visit Isabel's [website profile](#) for more details.



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Sindy is a senior associate of RKS specialising in both family law and private clients' management.

She was trained and worked in an international law firm for 6 years on all family issues and had extensive exposure and experience in all aspects of family law, including divorce, nuptial agreements, children, forum issues, adoption, surrogacy, and financial matters, advising high net worth and ultra-high net worth individuals and families.

Sindy was involved in a number of the most significant cases before the courts in Hong Kong. Her language skills have also led to numerous cases involving cross border HK/PRC disputes which often involve complex issues relating to the ownership of property as well as trusts, corporate and jurisdictional issues.

Sindy is keen to use all dispute resolution avenues and regularly assists with mediation both within the court process and in private mediations. She is a qualified collaborative practitioner in Hong Kong.

Visit Sindy's [website profile](#) for more details.

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