立法會 CB(2)2020/01-02(01)號文件

二零零二年五月二十七日
參考資料

立法會司法及法律事務委員會
香港特別行政區與內地相互執行商事判決
諮詢結果

目的

當局曾就建議中的香港特別行政區與內地相互執行商事判決安排（"有關安排"）進行諮詢。本文件旨在通知各議員透過諮詢當局所收到的意見。

諮詢工作

2. 在二零零二年三月二十日至二零零二年四月三十日期間，政府當局就有關安排的大綱，徵詢法律專業界、商會、行業協會及立法會司法及法律事務委員會的意見。我們一共收到 17 份書面回應。回應者名單載於**附件 1**。

3. 在 17 名回應者中，有 10 名對有關安排表示支持。有一名回應者答應稍後提供更詳盡的意見。有三名回應者對有關建議的某些範疇提出了一些意見，以供政府當局考慮，但沒有表示是否支持有關安排。有一名回應者表達了其會員的不同意見：有很多會員作出正面回應，但亦有些會員認為須謹慎行事。只有兩名回應者，即香港大律師公會及另一個團體（截至提交本文件的日期為止，政府當局仍未獲該團體同意公開其身分）對建議表示有所保留。香港大律師公會並提出另一些可供選擇的方案。各回應者所表達意見的總覽亦載於**附件 1**。香港大律師公會的意見書副本則載於**附件 2。**

總體意見

4. 在支持訂定有關安排的意見書中，回應者提出了以下的理據:

(a) 香港特別行政區與內地在經濟和社會方面的整合日見密切，雙方正緊密合作，建立更密切的經濟夥伴關係；

(b) 建議的大綱規模集中，只適用於在當事人有選擇法院的商事協議下所作出的最終及不可推翻的涉及金錢判決；

(c) 有關安排是在推動香港成為解決國際貿易糾紛中心的過程中必不可少的一步；

(d) 香港特別行政區成為解決與內地有關的糾紛的中心，將惠及本港法律界，並會在某一程度上鼓勵外商以香港特別行政區作為業務基地；

(e) 若解決涉及內地個體的糾紛可訴諸一個完善並獨立的訴訟地，便會增強外方與內地個體做生意的信心，內地也會因貿易量增加而受惠；

(f) 有關安排有助香港公司拓展內地市場；

(g) 有關安排有助在資產所在地執行涉及金錢判決;

(h) 愈多司法管轄區在法律上承認和執行香港的判決，對香港愈為有利；

(i) 有關安排對香港有利；會為訴訟各方提供更多、更有效的法律保障；並有助改善香港特別行政區和內地的法律環境;以及加強兩地經濟合作。

5. 事實上，正如下文第 8 至 10 段所述，有些支持有關安排的回應者認為，有關安排的建議範圍不夠廣泛，應擴大如下:

(a) 包括例如強制令和破產/清盤令等判決；

(b) “商業合約”定義的範圍應更為廣泛（例如包括消費者事宜）；

(c) 包括宣判法院具有司法管轄權的判決。

6. 但另一方面，兩位對有關安排表示有所保留的回應者，則提出以下的觀點:

(a) 香港特別行政區法院曾按照普通法原則，裁定某些內地人民法院作出的民商事判決為並非最終及不可推翻的；

(b) 內地司法工作的質素和司法人員操守備受關注；

(c) 在內地，根據《中華人民共和國民事訴訟法》執行判決存在困難；以及

(d) 內地法律制度的基本原則與香港特別行政區法律制度的基本原則不同。

具體意見

7. 下文各段簡述回應者就有關安排的不同要點提出的具體意見。

涉及金錢判決（諮詢文件第 7 段）

8. 有三位回應者建議，有關安排的範圍應擴大至包括其他類型的判決，例如強制令和強制履行令。

商業合約（諮詢文件第 8 及 9 段）

9. 雖然有兩位回應者支持在有關安排下對商業合約範圍的限制，但有兩位回應者建議，“商業合約”這一概念應有範圍更廣的定義（例如包括消費者事宜）。此外，一位回應者建議，“商業合約”的範圍須進一步澄清。

選擇法院（諮詢文件第 10 至 13 段）

10. 有四位回應者質疑是否有需要引入有效選定法院的條文，作為適用有關安排的先決條件。他們建議，有關安排也應包括宣判法院基於其他依據而具有司法管轄權的判決。

11. 有一位回應者認為，中級人民法院司法管轄權的金錢限額並不清楚，因此有關安排應載有一項條文，規定有關安排所涵蓋的中級人民法院的金錢限額。

12. 另一名回應者建議，由於訴訟各方會適當考慮尋求執行判決的代價和利益，因此可能無須將有關安排（就香港特別行政區法院而言）限於由區域法院或更高級法院作出的判決。

13. 此外，有一位回應者認為，有關安排並無週全處理立約各方通過合約選定內地法院的安排，與《中華人民共和國民事訴訟法》第二章的關係。後者就內地法院的司法管轄權作出規定。

14. 有幾位回應者也就有關安排所規定的選擇法院協議的細節提出問題。

終局判決（諮詢文件第 14 段）

15. 考慮到內地民事訴訟程序的制度，有四位回應者提到內地判決按照普通法原則是否最終及不可推翻的問題。在這四位回應者中，有一位堅持採用普通法的方法處理終局判決的問題，有一位回應者強調在有關安排中清楚界定"最終及不可推翻"的重要性。還有一位回應者表示須仔細研究這一問題，另一位則只是提及有關問題，並沒有就未來路向提出建議。

保障措施（諮詢文件第 15 段）

16. 有一位回應者對有關安排的建議保障措施表示滿意，並注意到這些保障措施與適用於其他司法管轄區的相若制度一致。另外，有七位回應者就保障措施的範圍及適用情況提出了不同意見（見下文第 17 至 22 段）。

17. 有一位回應者指出，雖然保障措施(b)及(c)是必需的（即判決是以欺詐方法取得，及判決是在違反自然公正原則的情況下取得），但難以在香港特別行政區法院席前證明有欺詐或不符合"自然公正原則"的情況（包括偏頗），從而取消執行一項內地判決。一位回應者認為必須就"自然公正原則"設下非常具體的定義。

18. 至於保障措施(d)（即判決是違背登記法院所在地的公共政策（或公共秩序）），有回應者關注到根據內地法律，"公共秩序"一詞看來範圍廣泛且有欠明確。有回應者建議，為施行有關安排，應就該名詞設下具體或有固定範圍的定義。

19. 至於保障措施(e)（即判決與登記法院先前的判決並不一致），考慮到內地並無一套判例制度，而有關安排只限於已選擇法院的案件，有回應者對是否需要這項保障措施存疑。

20. 至於保障措施(f)（即在作出判決的法律程序中，被告人沒有接獲足夠時間的通知），一位回應者要求界定"足夠時間的通知"，以避免出現意見分歧的情況。

21. 至於保障措施(g)（即登記法院認為判定債務人有權豁免受該法院管轄，或者認為他曾有權豁免受原判法院管轄，且沒有接受該原判法院管轄），有回應者希望知道有哪些人士可根據這個理由有權獲得豁免。

22. 此外，有一位回應者提出增補取消執行判決的理據，例如被告人並非訂立合約的指定一方，亦非該方的自願承讓人;以及兩個司法管轄區在法律責任的理由或判決金額的計算方法方面有重大不同之處，以致在執行這類判決，會導致不公平或不適當的情況出現。

其他

23. 香港大律師公會提出兩個可供選擇的方案供政府當局考慮：

(a) 與內地進行磋商，讓香港的判決得以在內地執行。這項安排只適用於區域法院或以上法院的民商事判決，並以與訟雙方曾在合約條款中指定以香港特別行政區法院為解決糾紛的唯一或其中之一的訴訟地者為限。相互執行判決安排的問題（即在香港特別行政區執行內地判決）將留待現時進行的內地司法制度改革取得成果後才處理；或

(b) 只與內地部分地區訂立相互執行判決安排。該等地區必須已有大量涉及外商直接投資的經濟活動，而在推行內地的司法制度的改革方面是較為進步的。

24. 回應者提出的其他要點，包括了執行判決的時限，有關安排應否有追溯效力，從執行判決所得的金錢難以從內地匯出，以及一些關於判決的登記和執行程序的細節。

政務司司長辦公室
行政署

律政司

二零零二年五月

附件 1

香港特別行政區與內地相互執行商事判決

回應者所表達意見的整體情況摘要

回應者	支持	其他
1. 香港澳洲商會	✓	
2. 香港中華廠商聯合會	✓	
3. 香港銀行公會	✓	
4. 香港大律師公會		表示有所保留，並提出另一些可供選擇的方案。
5. 香港總商會	✓	
6. 香港仲裁司學會	✓	
7. 香港國際仲裁中心	✓	
8. 國際商會-中國香港商務局	✓	
9. 香港律師會	✓	
10. 一名政府當局尚未徵得其同意披露其身份的回應者		提出了一些具體意見供當局考慮，沒有表示是否支持有關建議。
11. 一名政府當局尚未徵得其同意披露其身份的回應者		表達了其會員的不同意見：有很多會員正面支持，但亦有些會員認為須保持謹慎。
12. 一名政府當局尚未徵得其同意披露其身份的回應者		提出了一些具體意見供當局考慮，沒有表示是否支持有關建議。
13. 一名政府當局尚未徵得其同意披露其身份的回應者		提出了一些具體意見供當局考慮，沒有表示是否支持有關建議。

回應者	支持	其他
14. 一名政府當局尚未徵得其同意披露其身份的回應者	✓	
15. 一名政府當局尚未徵得其同意披露其身份的回應者	✓	
16. 一名政府當局尚未徵得其同意披露其身份的回應者		將於稍後提供意見。
17. 一名政府當局尚未徵得其同意披露其身份的回應者		表示有所保留。

Annex 2

HONG KONG BAR ASSOCIATION

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19th April 2002

Government Secretariat
Room 1211 Central Government Offices (West Wing)
Lower Albert Road
Hong Kong

Attn: Mr. James Chan Yum-min
for Director of Administration

Dear Sir,

Reciprocal Enforcement of Foreign Judgments in Commercial Matters between the HKSAR and the Mainland

Thank you for your letter of 20th March 2002. I am pleased to enclose herewith the Bar's position paper on the captioned issue for your attention.

Yours faithfully,

Alan Leong, S.C.
Chairman

Encl.
/al

<u>Proposal for Reciprocal Enforcement of Judgements in Commercial Matters between the HKSAR and the Mainland</u>

SUBMISSION OF THE HONG KONG BAR ASSOCLATION

Introduction

1. The Bar was invited by the Director of Administration to comment on the proposal by the HKSAR Government to establish a mechanism for reciprocal enforcement of judgments ("REJ') between Mainland China and the HKSAR. The Bar notes that the invitation came before the HKSAR Government is to commence discussion with the Mainland authorities on the said proposal.

Benefits and Concerns

2. The Director of Administration has highlighted the fact that the proposal for REJ between Mainland China and the HKSAR is part of the HESAR Government's initiative to promote Hang Kong as a centre for the resolution of international trade disputes and to develop Hong Kong legal services.

3. The Bar notes the above objectives.

4. However, the Bar believes that the desire to achieve such objectives ought not obscure legitimate concerns in the rendering, recognition and enforcement of judgments in Mainland China. The Bar notes that judgments in civil and commercial matters rendered by a People's Court in Mainland China have been held not to be final and conclusive under the common law rules applied by the HKSAR courts (which is to be discussed in more detail below). The Bar also notes that the quality of justice and the propriety of the judicial officers in Mainland China are matters of legitimate concern not only by Hong Kong residents with civil, family or commercial interests in Mainland China but also by the Supreme People's Court, the media, NPC delegates and generally popular opinion in Mainland China. (Professor Jerome Cohen of the New York University School of Law identified the following problems: lack of sufficient professional competence and training, corruption, “guanxi”, “local protectionism”, Communist Party control and “command influence” within each court (HKU

AllFL/ICGD and IESM, Macau: China WTO: Trade Law and Policy - Inaugural Lecture, 15/11/2001). See also Jerome Cohen, Party lines cloud courts, SCMP 11/07/2001.) The Bar further notes that in practical terms, the execution process in Mainland China under the Law on Civil Procedure is fraught with difficulties and such difficulties are not confined to judgments or arbitral awards with a foreign winning party but also extend to inter. provincial/municipality and even purely local enforcement actions. Indeed Professor Cohen recently described the record of the Mainland Peoples's Courts in enforcing their own judgments as "amazingly poor" (International Financial Law Review, September 2001, p 73. See also Jane Moir, Mainland facing tough task bringing its legal system up to WTO standards, SCMP.15/11/2001 (which also included statistics showing a 17% full enforcement rate of CIETAC arbitral awards)).

5. It is instructive to note that Professor Cohen, who has had much experience representing foreign interests in Mainland China, considered that "there is continuing uncertainty concerning whether PRC courts will enforce arbitration awards, foreign or domestic" (China WTO: Trade Law and Policy · Inaugural Lecture, (supra)). Given that enforcement of arbitral awards also comes under the rubric of the Law on Civil Procedure of the People's Republic of China (ie Arts 217, 259 and 269) and with a procedure that Professor Cohen considered to be "maximizing the prospects for 'local protectionism'" (IFLR (supra)), there is considerable force in applying this comment also to enforcement of court judgments, which shares similar procedures under the Law on Civil Procedure of the PRC. Even the Supreme People's Court itself came under criticism from Professor Cohen, who commented that the Supreme People's Court had handled cases in a less than transparent manner and fostered non-transparent communications between lower courts and higher courts (IFLR (supra)).

6. Any arrangement for REJ between Mainland China and the HKSAR must be meaningful, practical and workable. The Bar therefore considers that the problems associated with the quality of justice in Mainland China, the enforcement of judgments by the Mainland courts and the question of the Mainland judgments being not fina1 and conclusive are real and serious problems that the HKSAR Government must address as <u>matters of prerequisite</u> to any arrangement for REJ between Mainland China and Hong Kong. Otherwise, it might be said that having an arrangement for REJ where there can be no effective enforcement in the Mainland is worse than having no arrangement at all.

Comments on the EKSAR Government's Proposal

7. A REJ arrangement, whether as relatively modest as proposed by the HKSAR Government in paragraph 6 of the paper of March 2002 or otherwise, does not address adequately the impact of Mainland judgments corruptly or otherwise improperly

obtained over innocent Hong Kong parties and their assets in Hong Kong, given the burden under existing Hong Kong conflict of laws rules for the defendant to establish fraud or lack of natural justice (including bias). Indeed paragraph 15 of the paper of March 2002 fails to indicate the burden for establishing the grounds for non-registration or setting aside of registration and it is therefore presumed that the burden falls on the party who wishes to rely on the safeguards under the registration scheme, namely "the party against whom a registered judgment may be enforced" (paraphrasing the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) s 6(1)). Fraud and bias are insidious ills and it can be difficult to obtain evidence, most probably from Mainland China, to establish, on balance of probabilities, the existence of corruption, "guanxi", "local protectionism", Communist Party control or "command influence" within the Mainland court, since the HKSAR courts are unlikely to act on assumptions, predispositions, speculations or anecdotal evidence or develop a rather counter. productive head of public policy based on these allegations.

8 Further, a REJ arrangement, whether as relatively modest as proposed by the HKSAR Government in paragraph 6 of the paper of March 2002 or otherwise, does not prevent the proliferation of the situation where a Mainland party makes it a condition for conclusion of contracts with the Hong Kong or foreign party for disputes to be resolved by the Mainland Courts and then conducts an asset-stripping exercise against the Hong Kong or foreign party's assets in Hong Kong by virtue of setting up a dispute and having it resolved in its favour in the familiar Mainland courts. Not only would such an arrangement not promoting Hong Kong as a centre for resolution of disputes, it rather would increase the risk of doing business in Mainland China.

9. The paper of March 2002 does not appear to address the categories of "Mainland Courts' that can possibly be chosen under a contractual arrangement, apart from stating such courts to be the Intermediate People's Courts or above. Chapter 2 of the Law on Civil Procedure of the PRC makes provision for jurisdiction not only by reference to the level of court, but also by reference to the geographical area of the court in relation to the type of case involved. For example, Art 27 of the Law on Civil Procedure of the PRC prescribes that, in relation to proceedings involving a dispute on a bill of exchange, the People's Court at the place where the bill was paid or at the place of residence of the defendant is to have jurisdiction. One can therefore envisage cases involving transactions or persons where the People's Court in different provinces or municipalities may have jurisdiction under Chapter 2. The paper of March 2002 therefore has not adequately address the intersection between the contractual arrangement for choice of "Mainland Courts" and the provisions of the Law on Civil Procedure of the PRC on Jurisdiction under Chapter 2 (dealing with the question of which Mainland court may and should hear a case), and whether there is a need to be more specific in the choice of court clause than simply "Mainland Courts".

10. Paragraph 14 of the paper of March 2002 notes the requirement that a judgment sought to be enforced must be final and conclusive without highlighting the problems encountered in both the HKSAR and the Mainland over the requirement. However, no proposal to address this issue is proposed in the paper of March 2002.

11. There are sufficient indications from caselaw of the HKSAR courts to the effect that when viewed with the lens of the HKSAR conflicts of law rules, a judgment after the second trial (ie appeal from first instance judgment) and a judgment at first instance of a People's Court in the Mainland is not final and conclusive because of two sets of provisions in the Law of Civil Procedure of the PRC. The first set of provisions, adumbrated in Arts 185-188 of the Law of Civil Procedure of the PRC, empower the People's Procuratorate of the appropriate level to lodge a protest against a judgment of a People's Court, which if so lodged, would result in the re-trial of the case by the same court. The role of the People's Procuratorate to supervise the civil justice is enshrined under Art 14 of the Law on Civil Procedure of the PRC. The protest procedure can be initiated by the Supreme People's Procuratorate or a higher People's Procuratorate. Cheung J (as he then was) held in Chiyu Banking Corp Ltd v Chan Tin Kwun [1996] 2 HKLR 395 that because of the initiation of the protest procedure against the Mainland judgment relied on for enforcement in Hong Kong in that case, the Mainland judgment should not be regarded as final and conclusive and ordered a stay of the Hong Kong enforcement proceedings pending the resolution of the protest procedure. The Court of Appeal (Leong CJHC, Woo and Cheung JJA) in Lam Chit Man (trading as Yat Cheung Electric Co) v Lam Chi To (unreported, 18 December 2001, CACV 354/2001) approved of the Chiyu Banking case.

12. The second set of provisions are stated in Arts 177-184 of the Law of Civil Procedure of the PRC and provide for a People's Court to re-try a case that has already resulted in a judgment having legal force, whether on the initiative of the President of the People's Court concerned, the Supreme People's Court, or the parties in the case. There appears to be no time limit if the matter is initiated by the President of the People's Court concerned or the Supreme People's Court but a time limit of 2 years from the taking effect of the judgment is imposed for attempts to seek a re trial by the parties. In Tan Tay Cuan v Ng Chi Hung (unreported, 5 February 2001, HCA 5477/2000), Waung J had regard to these provisions and also the provisions for the protest procedure and declined to grant summary judgment having recognised that it was plainly arguable that the legal system in place in Mainland China was such that the Mainland judgment relied on was not a final and conclusive judgment because it was a judgment which by Mainland procedure was capable of being corrected on review and on retrial.

13. The expression of “final and conclusive” 'refers to a quality which the foreign judgment

must possess by the law of the foreign country concerned, without which quality it cannot be recognised or enforced in the HKSAR; see Dicey & Morris on Conflicts of Law (13th Ed), para l4-115. In Nouvion v Freeman (1889) 15 App Cas 1, it was held that a foreign judgment which is liable to be abrogated or varied by the court which pronounced it is not a final judgment. It may be final and conclusive even though an appeal is actually pending in the foreign country in which it was given: Scott v Pilkington (1862) 2 B & S 11.

14. Viewed with the rules of conflict of laws set out in the preceding paragraph in mind, the Bar is of the view that while some may still argue that the protest procedure does not deprive a People's Court's judgment from being final and conclusive because under Art 186 of the Law on Civil Procedure of the PRC, the body that abrogates or sets aside the original judgment of the People's Court is not the People's Court that gave that original judgment but the higher People's Procuratorate or the Supreme People's Procuratorate issuing the protest, no similar argument can be put in respect of the provisions for ”self-supervision” under Arts 177-184 of the Law on Civil Procedure of the PRC. The latter provisions make it possible for the People's Court originally trying the case re-opening it upon its judicial committee deciding that there was an error in the judgment following reference by the President of that court or upon application by a party to itself. This is a clear case of the court of original jurisdiction "re-opening" its own original judgment under a system of "self-supervision" and definitely fails the test propounded in Nouvion v Freeman (supra).

15. Having ascertained the position that judgments in civil proceedings before the People's Court in the Mainland cannot possibly under the present Mainland civil justice system be considered under HKSAR conflict of laws rules as final and conclusive judgments, the question is whether as a matter of legal policy, a statutory exception should be given to the reciprocal enforcement of a limited class of judgments in civil and commercial matters with the parties having chosen beforehand to have disputes litigated in one or both jurisdictions. The Bar notes that the HKSAR Government appears to favour such a course when it refers to a statutory registration scheme, similar to that in the Foreign Judgments (Reciprocal Enforcement) Ordinance, in para 16 of the paper of March 2002.

16. The Bar notes that under the scheme provided under the Foreign Judgments (Reciprocal Enforcement) Ordinance, registration is only accorded to judgments of a superior court of a foreign country that is final and conclusive between the parties thereto, notwithstanding that an appeal is pending against it or that it may still be subject to appeal: ss 3(2), (3) thereof. "Appeal", in the context of that Ordinance, includes any proceedings by way of discharging or setting aside a judgment or an application for a new trial or a stay of execution: s 2(l) thereof.

17. The Bar is of the view that unless the Mainland authorities be persuaded to modify the Law on Civil Procedure of the PRC and in particular Arts 177-184 and Arts 185-188 thereof, the HKSAR Government should not in any statutory registration scheme sought to implement any REJ arrangement between Mainland China and the HKSAR make provision for the abrogation of the HKSAR conflict of laws rule requiring foreign judgments sought to be enforced in the HKSAR courts to be final and conclusive judgments. The requirement for final and conclusive judgments is imposed for sound legal policy reasons and prevents enforcement of foreign judgments at a time when the respective first instance foreign litigation (where presumably the facts are found) is not completed or concluded. Further, the Bar considers that the definition of "appeal" in s 2(1) of the Foreign Judgments (Reciprocal Enforcement) Ordinance, being inclusive in nature, should be understood as supplementing the ordinary meaning of that word (ie an application to a higher tribunal or authority exercising supervisory or appellate jurisdiction) and does not detract or abrogate in any extent the principle outlined in the case of Nouvion v Freeman (supra).

18. Furthermore, the Bar does not consider that a logically sustainable or non-arbitrary line can be drawn holding that judgments rendered by certain People's Courts should be deemed final and conclusive and/or to be so deemed after a certain period of time. In this connection, the Bar observes that it is inappropriate to deem cases that had gone through the "second trial" by way of appeal should be deemed final and conclusive since this would mean that a winning party to a first instance judgment by a Mainland court can never have enforcement of that judgment in Hong Kong if no appeal from that judgment is lodged. The Bar also observes that while a time limit of two years is prescribed under Art 182 of the Law on Civil Procedure of the PRC for a party to apply for re-trial under Art 177 of the same, no time limit is prescribed for the President of the People's Court concerned, the higher People's Court or the Supreme People's Court to initiate the procedure for re-trial. Also, no time limit is prescribed for the higher People's Procuratorate or the Supreme People's Procuratorate to lodge a protest against a judgment of a People's Court. Therefore, any time limit imposed in an arrangement for REJ between Mainland China and the HKSAR for the purpose of deeming judgments by Mainland courts to be final and conclusive must involve depriving parties and Mainland supervisory institutions (ie the people's congresses, the higher people’s procuratorate, and the higher people's courts) to some extent their ability to seek re-trials under the Law on Civil Procedure of the PRC.

19. A final note on the requirement for Mainland judgments to be final and conclusive concerns the role of the provincial and municipal people’s congresses and the National People’s Congress in supervising the People's Courts. See, for example, Constitution of the people's Republic of China 1982, Art 67(6) (on the power of the Standing Committee of the NPC to supervise the Supreme People's Court): and the Law on the Organization

of the Regional People's Congresses and the Regional People's Governments, Art 44(6) (on the power of the Standing Committee of the regional people's congresses to supervise the people's courts of the relevant region). It must not be overlooked that the nature and extent of such supervision is less than clear and there are discussions in the Mainland governmental and academic circles for the strengthening of the people's congresses' role in supervision, possibly through the enactment of a specific law for the procedure to exercise supervision over major errors and injustices on the part of the people's courts. The possibility of intervention by the popular and even the highest organ of power is therefore an added dimension, to say the least.

20. The Bar now turns to &e safeguards proposed in para 15 of the March 2002 paper and makes the following observations—

- As to grounds (b) and (c), the Bar considers these grounds to be necessary but would like to indicate that it is difficult to prove fraud or bias before the HKSAR courts in resistance to the registration of a Mainland judgement.
- As to ground (d), the Bar considers this ground to be necessary but would like to indicate that while the broad ground of public policy is relatively well illustrated under the common law rules applied in the HKSAR, the same cannot possibly be said of the ground of public order (order public) or harm to social and public interest under Mainland law. One should not naively consider that the nature and extent of the ground of public order (ordre public) or harm to social and public interest under Mainland law is identical to those applicable to the ground of ordre public in a civil law jurisdiction such as France. For example, would it be contrary to social and public interest under Mainland Law for the local People's Court to enforce a HKSAR judgment having the effect of seizing the assets of a local enterprise providing the livelihood of hundreds of residents of the locality and directly contributing to their unemployment? Further, a reference to the 1998 regulations concerning Taiwanese civil judgments and Art 268 of the Law on Civil Procedure of the PRC indicates that Mainland law provides for another ground of non-recognition and non-enforcement, namely contravention of basic principles of PRC law. The Bar considers that this broad ground of contravention of basic principles of PRC law is very uncertain. Both concepts are liable to be applied arbitrarily to deny enforcement. The Bar therefore asks the HKSAR Government to clarify the extent of this ground and its applicability to HKSAR judgments with the Mainland authorities.
- As to ground (e), the Bar finds it difficult to understand the need for such a ground if the proposed REJ arrangement thus far is limited to cases where there have been a choice of court(s). The only scenario seems to be a case of a choice of both HKSAR and Mainland courts as having jurisdiction for dispute resolution. In such circumstances, the existence of ground (e) would, in the Bars view, encourage the parties to secure as quickly as possible a judgment in a jurisdiction most

advantageous to their respective cause. In such circumstances, the HKSAR courts may possibly lose out in such a "race" given the time and administrative constraints and the possibility of litigation first on forum conveniens issues. It is not known if the Mainland courts have adopted principles similar to forum conveniens and Arts 243-246 of the Law on Civil Procedure of the PRC do not appear provide room for such principles to apply. Further, the Bar does not understand what is proposed to be a "prior judgment" and asks this expression to be sufficiently clarified. It may be that the expression is meant to refer to a prior judgment binding on the parties and thus a concept similar to the common law concept of res judicata. Be that as it may, the Bar finds it difficult to understand how the Mainland courts decide whether a HKSAR judgment is inconsistent with a prior judgment of the Mainland courts in the absence of not only a system of precedents but also an effective and efficient system of record-keeping, particularly of judgments rendered by people's courts of different localities, provinces and municipalities.

- As to ground (g), the Bar doubts whether this ground is in truth a safeguard or rather a ground for impunity. The Bar considers that while it is relatively clear under HKSAR law to categorise the persons entitled to immunity from jurisdiction, it is by no means easy in terms of Mainland law. For example, is a state owned enterprise or a member of the armed forces entitled to immunity from jurisdiction under Mainland law? These are matters which need to be clarified not only in the discussion with the Mainland authorities but also in consultation with the interested parties in the HKSAR, including the Bar. Indeed the HKSAR Government should publicize this aspect of Mainland law to ensure that foreign or Hong Kong contracting parties should be aware of the status of the Mainland counterpart before signing a contract providing for resolution of disputes by the Mainland courts so that the contract would afterwards be still of some worth at the time of dispute.
- Lastly, the Bar considers the paper of March 2002 insufficient in dealing with the expression of "registering court" in respect of the Mainland. It is not inconceivable that enforcement of a HKSAR court judgment may be sought in two different locations in the Mainland against assets located therein of a party. In such a circumstance. there is a need to clarify whether registration is needed with the people's courts at both locations and if so, how differing decisions by the people's courts at each location affect the validity of the registration and the consequential enforcement and whether there is a mechanism for resolving such disputes.

Alternative Approaches

21. In the light of the above matters. the Bar asks the HKSAR Government to adopt an approach that is more limited than what it has proposed in this consultation exercise. In the spirit of constructive engagement, the Bar tenders the following alternative

approaches.

22. The Bar asks the HKSAR Government to first negotiate with the Mainland authorities on the adoption by the Supreme People's Court of regulations similar to those issued by the Supreme People's Court on the Recognition of Civil Judgments of Courts of the Taiwan Region (1998) and confined to judgments rendered by HKSAR courts from the District Court level upwards in civil and commercial matters where the parties involved had previously designated in an express contractual term the HKSAR courts to be the exclusive or one of the fora for the resolution of disputes. The Bar notes the existence of instances of implementation of the 1998 regulations. The adoption of such regulations will, in the Bar's view, have the beneficial effect of promoting Hong Kong as a centre for resolution of commercial disputes involving a Mainland party to the litigation while at the same time, leave the issue of reciprocity (ie enforcement of Mainland judgments in Hong Kong) to be resolved at a later date, when the current improvements to the Mainland judicial system would have borne fruit.

23. The Bar recognises that this alternative approach does not resolve the practical problems of enforcement in Mainland China, the resolution of which would have required reforms exclusively undertaken in Mainland China both in relation to its laws, procedures and practice but also relation to the administration of its courts and the quality and discipline of its judicial officers. Yet, this alternative approach has the merit of minimizing the impact of Mainland judgments corruptly or otherwise improperly obtained over innocent Hong Kong parties and their assets in Hong Kong, since in the absence of a statutory registration scheme which is aimed to make enforcement in Hong Kong easier, the so-called “winning party” would still have to re-litigate or sue on the Mainland judgment in the HKSAR courts.

24. The other alternative approach that the Bar asks the HKSAR Government to adopt provides for the HKSAR Government to conclude REJ arrangements only with those regions of Mainland China where there are substantial economic activities involving foreign direct investment and where the current improvements to the Mainland judicial system are more advanced. Such regions will probably include the Beijng municipality, the Tianjin municipality, the Shanghai municipality and the Guangdong Province and the arrangements to be limited to judgments rendered by HKSAR courts from the District Court level upwards in civil and commercial matters where the parties involved had previously designated in an express contractual term the HKSAR courts to be the exclusive or one of the fora for the resolution of disputes and to judgments rendered by the Intermediate People’s Court upwards (including the Supreme People’s Court) in civil and commercial matters where the parties involved had previous designated in an express contractual term those Mainland courts to be the exclusive or one of the fora for the resolution of disputes. The Bar considers that this less than across-the-board

approach in the establishment of juridical relations is permitted under Article 95 of the Basic Law of the HKSAR and there is no legal reason inhibiting the HKSAR Government to take such an approach. Again, the Bar considers that this approach has the merits outlined in the preceding paragraph.

25. The Bar understands that the practice of the People's Courts in the Mainland in dealing with matters involving Taiwan, HKSAR and Macau SAR residents or interests is to adopt with necessary modifications legal provisions applicable to foreign-related matters. Therefore, it is practicable for the Mainland authorities to apply those provisions of the Law on Civil Procedure of the PRC (ie Part 4 of that Law and in particular Arts 267 and 268 thereof) for recognition and enforcement of judgments rendered by the courts of the HKSAR even though that Law does not make provision in that regard for judgments rendered by a court of a Special Administrative Region of the People's Republic of China. The HKSAR Government should therefore clarify with the Mainland authorities whether recognition and enforcement of HKSAR judgments is at present possible directly through Part 4 of the Law on Civil Procedure of the PRC or indirectly through a judicial interpretation of Part 4 of that Law.

26. The Bar welcomes the opportunity extended by the HKSAR Government on this occasion for it to comment on the HKSAR Government's current proposal for REJ and would ask the HKSAR Government to consult the Bar (whether on a confidential basis or not) during the course of the discussion between the HKSAR Government and the Mainland authorities on REJ. The Bar considers that such continued consultation will be particularly useful in clarifying matters that the Bar queries or comments in this Submission and in commenting on additional matters encountered during the discussion.

Dated 19th April 2002.

Council of the Hong Kong Bar Association