

**For discussion on
20 December 2001**

- (1) Enforcement of Mainland Judgments in the HKSAR and Benefits of an Arrangement for Reciprocal Enforcement of Judgments (“REJ”) between the HKSAR and the Mainland; and**
- (2) Choice of Forum Provisions and their Implications on REJ under the Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters**

Part (1) Enforcement of Mainland Judgments in the HKSAR

1. This part of the paper looks at the existing facilities for enforcement of mainland judgments in the HKSAR. The discussion is confined to enforcement of money judgments in civil and commercial matters.

2. At present there are legal arrangements in place to ensure that civil and commercial judgments obtained in many jurisdictions outside Hong Kong may be registered and enforced in Hong Kong, and conversely, that judgments obtained in the courts here can be similarly enforced in other jurisdictions. These arrangements formed the basis of the registration system in the Foreign Judgments (Reciprocal Enforcement) Ordinance, Cap 319. However, mainland judgments cannot be enforced by registration under Cap 319 because there are no arrangements between the HKSAR and the mainland on reciprocal enforcement of judgments.

3. A mainland judgment may be enforced In Hong Kong under the common law. Alternatively, the judgment creditor of a mainland judgment may initiate a fresh legal action before the Hong Kong courts based on the original cause of action in order to recover the debt or damages due.

Recognition and Enforcement of Mainland Judgments under Common Law Rules

4. At common law, a foreign money judgment, including a mainland judgment, may be recognised and enforced by action as a debt, subject to certain overriding principles. The action is brought on the judgment itself. It should be noted that –

- such a judgment does not have to originate from a common law country in order to benefit from the common law rules;
- reciprocity is not a requirement under the common law.

Hence, a judgment originating from the mainland, which does not itself give effect to Hong Kong judgments, and which is not a common law jurisdiction, may still be recognised and enforced by the Hong Kong courts.

5. The basic common law rules on enforcement of foreign judgments are quite simple. A foreign judgment, including a mainland judgment, will be recognised by the Hong Kong courts if it is given by a competent court. The notion of the “competence” of a court in another

jurisdiction is determined on the basis of the private international law rules as applied by the courts in Hong Kong. For such a judgment to be enforceable in Hong Kong, it must be (1) a judgment for a fixed sum of money and (2) a final judgment that is conclusive upon the merits of the claim.

6. Generally, the following defences are available to a defendant in a common law action brought on a judgment from another jurisdiction -

- (a) lack of jurisdiction (according to the rules of private international law as applied in Hong Kong);
- (b) the judgment was obtained by fraud;
- (c) recognition of the judgment would be contrary to public policy (of Hong Kong);
- (d) the judgment was obtained in breach of natural justice;
- (e) the judgment was obtained in breach of an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of the place where the judgment originates.

7. The procedure for enforcement of mainland judgments under the common law is no different from other civil action. The plaintiff must initiate the action by writ. He has to serve his statement of claims (which will be based on the judgment that he obtained from a court in the mainland) to the defendant. The summary judgment process (Order 14)

is equally applicable to an action to enforce a mainland judgment by common law. If the case goes to trial, the plaintiff bears the burden of proving to the court all the essential requirements (discussed in paragraph 5 above) necessary for the recognition and enforcement of the judgment.

Suing on the Original Cause of Action

8. Instead of bringing an action at common law on a mainland judgment, the judgment creditor may bring a fresh action in Hong Kong based on the same cause of action. He would have to show, among other things, that the courts in Hong Kong are an appropriate forum and competent to hear the case. An action based on the original cause of action does not involve recognition and enforcement of a mainland judgment and hence is outside the scope of this paper.

Recognition and Enforcement by Registration Under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319)

9. Compared to a judgment creditor with a judgment that is registrable under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319), the judgment creditor of a mainland judgment who wishes to seek enforcement under the common law in Hong Kong suffers the following disadvantages:

- he cannot use the simplified procedure provided for in Cap 319 and Order 71 of the Rules of the High Court (Cap 4, Sub. Leg.);

- the proceedings will take longer and he will incur higher legal costs because of the inability to invoke the simplified procedure;
- most important of all, he will bear the burden of proof whereas in proceedings for the registration of a foreign judgment under Cap 319, the burden of proof falls on the judgment debtor who will have to show why the judgment should not be registered, often after an order for registration has already been made by the court.

Benefits of An Arrangement with the Mainland on Reciprocal Enforcement of Judgments

10. The conclusion of an arrangement with the mainland on reciprocal enforcement of judgments would make it possible for mainland judgments to be enforceable by registration in Hong Kong after the necessary legislative amendments have been made. This would facilitate enforcement of mainland judgments in Hong Kong by eliminating the disadvantages and problems described in the preceding paragraph.

11. Perhaps the most significant benefit of such an arrangement is that Hong Kong judgments will also become enforceable in the mainland under the reciprocal arrangement. This is not the case currently. China, being a civil law jurisdiction, does not have a rule that is similar to our common law rule on recognition and enforcement of foreign judgments. The present anomalous situation is unsatisfactory

because a mainland judgment may be recognised and enforced in Hong Kong but not *vice versa*.

12. If Hong Kong is to become a centre for commercial dispute resolution, it is important that judgments or arbitral awards made in Hong Kong be enforceable in the jurisdictions where the judgment debtor keeps his assets. Otherwise there is no point in having the dispute resolved in Hong Kong in situations where the debtor does not have any asset in Hong Kong. With the growing importance of trade in goods and services between Hong Kong and the mainland, it is in the interest of Hong Kong to develop a working arrangement with the mainland which will ensure that Hong Kong judgments may be effectively enforced in the mainland.

13. A good and working arrangement on reciprocal enforcement of judgments between Hong Kong and the mainland will not only benefit Hong Kong businesses. The benefits will extend to international businessmen doing business with the mainland. They will be able to stipulate Hong Kong as the choice of forum for the settlement of disputes arising from contracts entered into with mainland companies and individuals, with the confidence that any judgments in their favour made in Hong Kong can be recognised and enforced in the mainland. Such an arrangement, combined with the cultural similarities between Hong Kong and the mainland, and the well-developed legal system and legal services sector in Hong Kong, will be a key element in making Hong Kong a centre for resolution of commercial disputes, especially disputes involving the mainland.

Part (2) Choice of Forum Provisions in the Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters

14. This part of the paper looks at how the choice of forum provisions in the Draft Hague Convention (the “Convention”) will affect a Contracting Party to the Convention, if and when it enters into force. The Convention is a major project undertaken by the Hague Conference on Private International Law. The aim of the project is to negotiate and conclude a widely accepted international convention which will harmonise the rules of jurisdiction and to enable judgments in civil and commercial matters granted by the courts of one Contracting Party to be recognised and enforced in other Contracting Parties to the Convention. Negotiation on this Convention started in 1997. In view of the scope and complexity of the subject matters, it is expected that the negotiations on this Convention will not be concluded before the end of 2002.

15. The Convention contains two main chapters, the first is on rules of jurisdiction and the second is on rules for recognition and enforcement. The two chapters are inter-related because the Contracting Parties’ treatment of judgments resulting from the exercise of jurisdiction based on the different rules in the jurisdiction chapter may not be the same. A Contracting Party’s obligation to enforce judgments originating from other Contracting Parties are dealt with in detail in the recognition and enforcement chapter. There are some jurisdictional rules that are considered to be so well-established that Contracting Parties to the Convention will be obliged to recognise such rules and to enforce judgments granted by courts exercising their jurisdiction on the

basis of such rules. One of those rules is the exercise of jurisdiction based on an agreement between the parties on the choice of forum.

16. Briefly, the relevant Article in the jurisdiction chapter provides that if the parties (in a particular legal relationship) have agreed that the courts of a Contracting Party shall have jurisdiction to settle any dispute arising with a particular legal relationship, those courts shall have exclusive jurisdiction unless the parties have agreed otherwise. Another Article in the Recognition and Enforcement chapter provides that a judgment based on this particular ground of jurisdiction shall be recognised and enforced by **ALL** Contracting Parties to the Convention. This arrangement is a clear indication of the acceptance of, and respect for, the principle of parties' autonomy by the international legal community.

17. That principle is not a stranger to international conventions. The Brussels Convention and the Lugano Convention, both regional European Conventions on jurisdiction and enforcement of judgments in civil and commercial matters, have already incorporated a very similar rule. The benefit of such a rule, especially to the business community, is the certainty and predictability that it will give to each of the parties to a business transaction. The parties will be clear in their understanding as to the court which will have jurisdiction to entertain any dispute arising from their relationship. The party in whose favour the judgment is given will also have the peace of mind that the judgment can be enforced in every State that is a Contracting Party to the Convention. This will give him the advantage of recovering damages in jurisdictions where he can locate assets belonging to the judgment debtor.

18. However the relevant provisions in the Convention relating to “choice of forum” will not assist in the relationship between Hong Kong and the mainland with regard to reciprocal enforcement of judgments even if China, including the Hong Kong SAR, had ratified the Convention. This is because the Convention, as an international agreement, will not apply as between two places in the same country. However, the principle governing the choice of forum Article and the obligation to enforce a judgment resulting from the exercise of jurisdiction based on a choice of forum agreement may serve as a useful guide and model in any future arrangement to be made between the Hong Kong SAR and the mainland on reciprocal enforcement of judgments in civil and commercial matters.

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