

Mainland Judgments (Reciprocal Enforcement) Bill

Submission of the Hong Kong Bar Association

1. The Legislative Council Bills Committee on the Mainland Judgments (Reciprocal Enforcement) Bill (“the Bill”) invites the Hong Kong Bar Association (“the HKBA”) to comment on the Bill.

2. The explanatory memorandum of the Bill states that its object is to “make provisions for the enforcement in Hong Kong of judgments in civil or commercial matters that are given in the Mainland and for facilitating the enforcement in the Mainland of judgments in civil or commercial matters that are given in Hong Kong”.

3. The proposed enactment of the Bill is the ‘legislative amendment procedure’ in the HKSAR envisaged in Article 19 of the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned (“the Arrangement”) for the implementation in the HKSAR of the Arrangement.

4. The Bills Committee will find the article of Zhang Xianchu and Philip Smart, entitled *Development of Regional Conflict of Laws: On the Arrangement of Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters between Mainland China and Hong Kong SAR* (2006) 36 HKLJ 553, useful in illustrating the background and issues relating to the Arrangement and the Bill.

5. **Clauses 2(1) and 25:** (a) The definition of “recognized Basic People’s Court” appears to be wider than that prescribed in the Arrangement, which has an annex naming each and every Basic People’s Court to which the Arrangement applies, subject to the liberty of the Supreme People’s Court in Beijing to incorporate changes it makes to the list of Basic People’s Courts authorized to exercise jurisdiction of the first instance in civil and commercial cases involving foreign, Hong Kong, Macao and Taiwan parties after notifying the HKSAR Government. This definition and clause 25 together provide a more or less automatic mechanism allowing the Supreme People’s Court in an extreme case to impose upon the HKSAR for the purpose of recognition and enforcement of Mainland judgments the list of Basic People’s Court chosen by that Court in the absence of consultation and negotiation.

(b) Clause 25(2), by stipulating that the published list of recognized Basic People's Courts is not subsidiary legislation, not only takes away legislative scrutiny but also makes it at least less convenient for legal practitioners to research on the latest list as they cannot simply look to the Laws of Hong Kong (Looseleaf Edition) to locate that list.

(c) The possibility of change in the list of recognized Basic People's Courts may affect the application of choice of Mainland court agreements. For example where a certain Basic People's Court on the said list is designated under a choice of Mainland court agreement by the parties to a specified contract to determine dispute but by the time a dispute arises, this court is not on the said list, would this fact invalidate the choice of Mainland court agreement? Should there be rules governing such situations?

6. **Clause 2(1):** The definition of "specified contract" does not reproduce Article 3, second paragraph of the Arrangement in full. In particular, the words "civil and commercial" are omitted. On the other hand, the definitions of "Hong Kong judgment" and "Mainland judgment" incorporate the expression "civil or commercial matters". The Administration should explain this manner of drafting, bearing in mind the meaning of "civil and commercial contract" in Mainland law and the fact that while a "civil cause or matter" is commonly

used and has a well known meaning, the same cannot be said of a “commercial matter”.

7. **Clause 2(2):** This clause is unusual in that it specifically requires the HKSAR courts to construe a HKSAR Ordinance having regard to the meaning that certain expressions in that Ordinance may have in Mainland law. There is no provision of similar content or effect in the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) even though the provisions of that Ordinance has been extended to countries of the civil law tradition such as France, Germany and Belgium. The Administration should explain whether this clause is proposed out of an abundance of caution or for some other reason. The Administration should also provide a list of expressions in the Bill that it considers to be Mainland legal expressions and also, in respect of each and every such expression, a statement as to how it differs from its ordinary meaning as understood in Hong Kong or under the HKSAR legal system. The HKBA is of the view that no such clause needs to be enacted, given that the HKSAR courts are familiar with interpretation of statutes in respect of matters having an aspect concerning a jurisdiction outside Hong Kong by reference to works such as *Bennion on Statutory Interpretation* (4th Ed, 2002) s 221 and *Dicey & Morris on Conflict of Laws* (13th Ed, 2000) 1-018 to 1-027.

8. **Clause 3:** The Chinese version of clauses 3(1) and (2), which define “choice of Hong Kong court agreement” and “choice of Mainland court agreement” respectively, do not reproduce Article 3, first paragraph of the Arrangement in its entirety. In particular, they apparently exclude choice of court agreements made by the parties concerned for resolving disputes which has arisen in respect of a specified contract.

9. **Clause 5(2)(b):** The drafting of this paragraph may be at variance from Chinese text of the Article 1 of the Arrangement, which refers to a civil or commercial case “involving” (具有) a choice of court agreement in writing as opposed to “pursuant to” (依據) such an agreement.

10. **Clause 6:** Clause 6(1)(d), which refers to “judgment given in a retrial by a people’s court of a level higher than the original court unless the original court is the Supreme People’s Court”, is drafted in a manner different from Article 2(1)(2) of the Arrangement in so far as it concerns “legally effective judgment made in accordance with the procedure for trial supervision by bringing up the case for retrial by a people’s court at the next higher level”. The expression for “retrial” in sub-clause (1)(d) is arguably broader than that for “retrial” in Article 2(1)(2) (which appears to be restricted to retrials

conducted by a people's court at the next higher level, as opposed to retrials conducted by the identically constituted people's court or a people's court of the same level).

11. **Clause 7:** There should be a link between this clause and clause 13, which deals with Mainland judgments to be performed in stages. Article 8, paragraph 3 of the Arrangement makes provision for a different time limit for registration where the Mainland judgment is to be performed in stages.
12. **Clause 16:** The common law position referred to in clause 16(3) may be better elucidated by reference to Smart, Philip St John, *Finality and the Enforcement of Foreign Judgments under the Common Law of Hong Kong* (2005) 5 OUCLJ 301.
13. **Clause 18:** It is noted that clause 18(1)(c) follows Article 9(1) of the Arrangement in excepting the case where the original court has determined that the choice of Mainland court agreement as valid from the defence provided under that paragraph. Also, Zhang and Smart, in their recent HKLJ article (referred to above), point out the difficulties involved in mounting a public policy ground challenge to recognition and enforcement of a Mainland judgment before a HKSAR court.

14. **Schedule 2:** In the proposed new RHC Order 71B and RDC Order 42 rule 6, no provision is proposed for the certification of Chinese translation of judgments, orders, allocaturs and documents of the HKSAR courts that are sought to be enforced in the Mainland, bearing in mind that Article 6, paragraph 2 of the Arrangement provides that where any *document* submitted to a Mainland court is not in the Chinese language, the applicant shall submit Chinese translation which has been duly certified correct. The expression “document” appears to refer to a class larger than the judgment, order etc and the certificate issued by the court and may include, for example, pleadings. The current Practice Direction 10.3 does not cater for this situation and a new Practice Direction may have to be issued. The Administration and the Judiciary should inform the Bills Committee as to whether an arrangement has been reached with the Mainland authorities concerning the certification of Chinese translations. The two sides should have an arrangement specifying the authority for certification of Chinese translations.
15. **Schedule 2:** The proposed RDC Order 42 rule 6 should specify in rule 6(2) that the affidavit and in rule 6(4) that the certificate issued by the Court shall state whether the judgment has been the subject of an application for judicial review under RHC Order 53, a rare though not necessarily excluded route of

review.

16. **Schedule 2:** The certificate issued by the Court proposed under RHC Order 71B and RDC Order 42 rule 6(4) is not required to contain a statement that the judgment to which it relates is a final judgment referred to in Article 2 of the Arrangement and enforceable in Hong Kong. The Administration and the Judiciary should consider whether such a statement is necessary or desirable bearing in mind that while a Hong Kong lawyer is in a position to deduce from the particulars on the certificate whether a judgment is final and enforceable in Hong Kong, the same might not be said of a Mainland Court reading the certificate.

17. The last sentence of Article 5, second paragraph of the Arrangement provides that “the court of one side which has enforced the judgment in part or in whole shall, at the request of the court of the other side, provide information on the status of its enforcement”. Cf Article 7 of the Arrangement between the Mainland authorities and the Macao SAR on the mutual recognition and enforcement of judgments (referred to in the Zhang and Smart article above) which allows the courts of the two sides to contact each other on a need basis to verify the genuineness of the judgment sought to be recognized and enforced at the other side. While the Bill does not propose any legislative

provision to carry out the last sentence of Article 5, second paragraph and a statement in the certificate issued under the proposed RHC Order 71B rule 2(4) or the proposed RDC Order 42 rule 6(4) will indicate whether there has been enforcement in Hong Kong and the extent of such enforcement, a subsequent request for updated information cannot be disregarded and it is understood that the HKSAR Judiciary and the Mainland judicial authorities are to maintain communications on a case by case basis. The HKBA considers that it is desirable for such communications to be handled in a manner that is as transparent as possible and pursuant to prescribed and published procedures.

18. **Schedule 2:** Paragraph 3 of this Schedule proposes amendments to the Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance (Cap 46) so that Mainland judgments or any part thereof that satisfy the requirements of clause 5(2)(a) to (e) will be excluded from the purview of that Ordinance. Given that Article 8, first paragraph of the Arrangement provides that the procedure for application for recognition and enforcement of a Mainland judgment is to be governed by the law of the HKSAR, the place where its enforcement is sought, the HKBA does not understand the rationale for this amendment and would request an explanation from the Administration.

19. Zhang and Smart, in their recent HKLJ article, highlight important concerns which neither the Arrangement nor the Bill has addressed. The first is whether the current safeguards in Article 9 of the Arrangement and clauses 18 and 19 are sufficient to deal with the future challenges in Hong Kong on natural justice. The second is, in the case that they are insufficient, whether a further constitutional issue will be raised with respect to the fundamental rights protected under Chapter III of the Basic Law of the HKSAR.

Dated 3rd May 2007.

Hong Kong Bar Association