

Mainland Judgments (Reciprocal Enforcement) Bill

Information Paper on the Effect of the Bill on the Application of Common Law Rules Governing Forum Shopping

At the meeting of the Bills Committee of 24 April 2007, the Administration was requested to provide a paper to explain whether or not the Bill, if enacted, would affect the application of common law rules in Hong Kong that govern forum shopping.

2. Upon the research conducted, it is noted that there exists no common law rule which supports the proposition that the court would refuse to give effect to an exclusive jurisdiction clause entered into by the parties designating a forum to hear the dispute on the ground that there exists no real and substantial connection between the forum and the subject matter of dispute.¹

3. The question then considered was whether Hong Kong courts could refuse to recognise or enforce a judgment given by a foreign court, being the chosen forum, on the ground that the relevant foreign court did not have real and substantial connection with the subject matter of dispute.

A. Common Law position

- (a) At common law, a foreign judgment *in personam* given by a court having jurisdiction according to the conflict of laws rules of the place where enforcement is sought, may be enforced by action provided that (a) it is for a debt or a definite sum of money; and (b) it is final and conclusive².
- (b) If the judgment debtor, being a defendant in the foreign court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings or *before the commencement of the proceedings, had agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or the courts of that country, that foreign*

¹ The same finding appears to be applicable to choice of law clauses. In *Vita Food Products Inc. v Unus Shipping Co. Ltd. (In Liquidation)* ([1939] AC 277, [1939] 1 All E. R. 513), the Privy Council, in considering the issue concerning the proper law of a bill of lading, rejected the argument that the choice of English law contained in the bill of lading was invalid as the transaction had no connection with England and held that "connection with English law is not, as a matter of principle, essential" and there was no ground for refusing to give effect to the express selection of English law as the proper law in the bill of lading.

² *Dicey, Morris and Collins*, 14th edition, Rule 35, at pages 574 – 575.

*court would be regarded as having jurisdiction to give a judgment in personam capable of enforcement under common law*³.

- (c) It follows that if a contract provides that all disputes between the parties shall be referred to the exclusive jurisdiction of a foreign tribunal, the foreign court would be regarded as having jurisdiction over the parties pursuant to common law rules. In such a case, enforcement of a judgment *in personam* given by that foreign court would not be refused on the ground that the foreign court lacked jurisdiction.

B. The Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319)

The above common law rules are also reflected in Cap. 319 in respect of the enforcement of foreign judgments by registration:

- (d) Section 6(1) of Cap. 319 provides the grounds for setting aside the registration of a foreign judgment in Hong Kong. Under s 6(1)(a)(ii), if the court is satisfied that the courts of the country of the original court had no jurisdiction in the circumstances of the case, the registration of the judgment shall be set aside.
- (e) In respect of a judgment given in an action *in personam*, if the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings or *before the commencement of the proceedings, had agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of the country of that court, the courts of the country of the original court shall be deemed to have had jurisdiction* (sections 6(2)(a)(i) and (iii) of Cap. 319).
- (f) It follows that if the judgment debtor had voluntarily submitted to the jurisdiction of the foreign court or had entered into an agreement to submit to the jurisdiction of the foreign court, under Cap. 319, the registration of the relevant foreign judgment, if given in an action *in personam*, would not be liable to be set aside on the ground that the foreign court had no jurisdiction to hear the case.

³ *Dicey, Morris and Collins*, op cit, Rule 36, at pages 588 – 589.

Conclusion

4. Having considered the relevant principles guiding the courts in Hong Kong on the issue of whether applications for enforcement of foreign judgments may be refused on the ground that the foreign court, being the chosen forum, did not have any real and substantial connection with the dispute, it is concluded that the Bill will not affect the applicable common law rules above discussed.

Department of Justice
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