

LC Paper No. CB(2)1838/06-07(01)

**The Bar's Note of Response
Mainland Judgment (Reciprocal Enforcement) Bill**

1. We refer to the meeting on 5th May 2007 and the Bills Committee's letter dated 7th May 2007. This Note is a summary of the Bar's response to the concerns expressed by the Hon. Ronny Tong, S.C.
2. Two matters are raised by Mr. Tong. The first concerns "forum shopping". However if the term "forum shopping" is used in the traditional sense, the Bar does not see how it can be relevant in the present context.
3. The Mainland Judgments (Reciprocal Enforcement) Ordinance (when passed) can only be invoked if the conditions set out in section 5(2) are satisfied. Amongst others, it requires the judgment is given pursuant to a choice of Mainland court agreement. By reason of section 3(2), a "choice of Mainland court agreement" must designate a court in the Mainland to determine the dispute which has arisen or may arise "to the exclusion of courts of other jurisdictions". In other words, when the parties entered into the contract, they had already designated a court which will have exclusive jurisdiction. Thus, when dispute subsequently arises, the parties are obliged to submit their disputes to the designated court (unless the exclusive jurisdiction clause is struck down by the court). There is thus no question of either party choosing a forum which best suits him and no question of forum shopping.
4. If the concern is that a party with stronger bargaining power may dictate the choice of court at the time when the contract is negotiated, it is a matter of commercial reality and not a matter of law. Such a situation happens not only in respect of parties doing business with the Mainland, but generally in all kinds of commercial contract. Unless it is considered that the contract law of Hong Kong should be fundamentally changed, the Bar does not see how this issue can be tackled. Nor does the Bar think it is appropriate to deal with such issue in the present context of reciprocal enforcement of judgments.

5. It is also pertinent to draw analogy with the mechanism for enforcing Mainland arbitral awards in Hong Kong. The protection laid down in section 18 is similar to the protection provided for under the Arbitration Ordinance in respect of arbitral awards made in the Mainland. If the argument of "forum shopping" is correct, the same argument (with the necessary modifications) can be made in the context of arbitration. As the legislature did not see fit to make any provisions in the part of the Arbitration Ordinance allowing enforcement of Mainland arbitral awards in Hong Kong, it is difficult to justify why a difference stance should be adopted in the context of enforcement of Mainland judgments.
6. The second point raised by Mr. Tong concerns "other abuses such as the commercial contract is signed under circumstances which are unfair to the defendant". In this regard, we believe the considerations set out in paragraphs 4 and 5 above apply with equal force. Under Hong Kong's present law of contract, a party is not protected against every type of unfairness. Apart from recognized cases such as duress, undue influence and the like, Hong Kong's contract law does not afford protection to unequal bargaining power. Whether this is desirable or whether the contract law of Hong Kong requires reform is a different question which merits separate study, but certainly not a question that can be appropriately considered in the present context.
7. The Bar hopes the above have dealt with the concerns expressed. Should there be any further queries, the Bar will be obliged to assist.


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Chairman
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11th May 2007