

Mainland Judgments (Reciprocal Enforcement) Bill

The Administration's Response to Issues Raised at the Bills Committee Meeting held on 30 April 2007

I. Reference to “civil or commercial” in the Long Title and the Interpretation Clause (Clause 2(1))

There have been comments that the expression “civil or commercial matters” appearing in the long title of the Bill and in the definition of “Mainland judgment” under Clause 2(1) of the Bill may not be appropriate as only judgments arising from commercial matters will be covered by the Bill.

2. As the purpose of the Bill is to give effect to the *REJ Arrangement*¹, the Administration considers it necessary to adopt similar expression in the Bill (where appropriate) for consistency sake. Article 1 of the *Arrangement* which sets out its purpose refers to judgments in a “civil and commercial case” (民商事案件) pursuant to a choice of court agreement. The long title of the Bill and the definition of “Mainland judgment” as appears in the interpretation clause (Clause 2) reflects the intent of the *Arrangement*.

3. The scope of the judgments to be covered under the *Arrangement* is more particularly prescribed in Article 2 and qualified by Article 3. Article 2 provides the types of judgments to be covered and Article 3 specifies the requirements with respect to the choice of court agreement. The relevant qualifications and requirements are duly incorporated into the Bill, notably Clauses 2, 3, 4 and 5.

“Civil and Commercial Matters” under the Mainland law

4. Although the expression “civil and commercial matters” (民商事) is rather commonly used in the Mainland law, there is no legal definition of its meaning. The *General Principles of Civil Law of the PRC* 《中華人民共和國民法通則》² (“*GPCL*”) is the basic law which protects the lawful civil rights and interests of citizens and legal persons and adjusts civil relations (Article 1).

¹ The *Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and the HKSAR pursuant to Choice of Court Agreements between Parties Concerned* signed on 14 July 2006.

² Adopted by the 6th NPC on 12 April 1986 which took effect on 1 January 1987

Although “civil activities” (民事行爲) have not been defined, Chapter V of the *GPCL* covers matters concerning “civil rights” which include –

- property ownership and related property rights;
- creditors’ rights;
- intellectual property rights;
- personal rights (such as right of personal name and right of portrait),

and Chapter VI stipulates the civil liability for breach of contracts.

5. Like the *GPCL*, the *Contract Law of the PRC* 《中華人民共和國合同法》³ (“*Contract Law*”) makes no distinction regarding contracts for “civil” or “commercial” matters. However, it seems to be common practice that in the Mainland, laws and regulations will be grouped together under the headings of “civil and commercial laws”. For example, in the (Newly) Consolidated Edition of General Laws and Regulations of the PRC 《新編中華人民共和國常用法律法規全書》 (2006 edition) which was revised and published annually by the Legislative Affairs Office of the State Council, there is a section devoted to civil and commercial laws (民法商法類). The *GPCL*, *Company Law* 《公司法》, *Contract Law* 《合同法》, *Guarantee Law* 《擔保法》 and various investment and intellectual property laws are grouped into this section. A copy of the list of the various laws and regulations grouped into this section has been extracted at Annex for reference.

6. In addition, the term “civil and commercial matters (民商事)” can be found in various judicial interpretations promulgated by the Supreme People’s Court concerning “foreign-related” matters. These include (a) the *Regulations of the Supreme People’s Court on Certain Questions Regarding the Jurisdiction of Foreign-related Civil and Commercial Cases* 《最高人民法院關於涉外民商事案件訴訟管轄若干問題的規定》⁴ (the *SPC Regulations*); and (b) the *Notice of the Supreme People’s Court on the Levy of Fees for Service of Civil and Commercial Documents to Foreign Countries* 《最高人民法院辦公廳關於就外國執行民商事文書送達收費事項的通知》⁵ (the *SPC Notice*).

7. Neither the *SPC Regulations* nor the *SPC Notice* provides a definition for “civil and commercial matters” but Article 3 of the *SPC Regulations* specifies the scope of its application, namely –

- (a) foreign-related contract and infringement of rights cases;

³ Adopted by the 9th NPC on 15 March 1999 which took effect on 1 October 1999

⁴ Promulgated on 25 December 2001 which took effect on 1 March 2002

⁵ Promulgated and took effect on 29 July 2003

- (b) letter of credit dispute cases;
- (c) cases involving applications for the cancellation, recognition and mandatory enforcement of international arbitration awards;
- (d) cases for the review of validity of foreign-related civil and commercial arbitration clauses;
- (e) cases involving application for the recognition and mandatory enforcement of civil and commercial judgements.

8. Noting the usage of the expression of “civil and commercial matters” under various Mainland laws, and that the Bill implements the *Arrangement* to enforce certain Mainland judgments, the Administration considers it proper to adopt such an expression. The adoption of this expression will not affect the scope of the *Arrangement* to be implemented by the Bill since the above scope hinges on the notion of “specified contract” discussed below.

II. “Specified contract”

9. “Specified contract” is defined under Clause 2(1) and reflects the 2nd paragraph of Article 3 of the *Arrangement*. In view of the absence of a generally accepted definition of “commercial matters” (which sets out the transactions that it covers), the *Arrangement* follows the drafting practice of various international conventions to define its scope by way of exclusion. Examples of such conventions include –

- (a) the Hague Convention on Choice of Court Agreements (the *Hague Convention*);
- (b) the United Nations Convention on Contracts for the International Sale of Goods; and
- (c) the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods.

10. The main reason considered by both sides to the *Arrangement* in adopting the “exclusion” approach is the difficulty of finding a precise definition of “commercial contracts”. The effect of Article 3 of the *Arrangement* is to cover all contracts between legal persons as well as all other contracts with the exception of employment contracts AND contracts in which a natural person acting for personal consumption, family or other non-commercial purposes is a party⁶. In sum, the *Arrangement* will be limited to business-to-business contracts.

⁶ In order for the *Arrangement* to apply, the contract must also contain an exclusive choice of court agreement.

Contract for service v. Contract of service

11. Another question raised at the meeting was whether a contract between a driver and the owner of a container vehicle for cross boundary transportation would be regarded as an employment contract or a commercial contract. The classification of the contract will depend on the particulars of the contract in question and the applicable law thereto. According to our research, Mainland law does not draw a clear distinction between a contract for service (in which the driver is deemed to be a contractor) and a contract of service (in which the driver is deemed to be an employee).

12. If the Mainland law is held to be the applicable law of the relevant contract, it is necessary to consult the *Labour Law of the PRC*⁷ to decide if a party is under an employment relationship. A labour contract is defined as “an agreement that establishes the labour relationship between a labourer and an employment unit and defines the rights and obligations of respective parties” (Article 16). Under Article 17 “conclusion and modification of a labour contract shall follow the principles of equality, voluntariness and agreement through consultation, and shall not run counter to the stipulations of laws, administrative rules and regulations”. Article 18 of the *Labour Law* further provides the circumstances whereby labour contracts shall be invalid if they –

- (a) violate laws, administrative rules and regulations; or
- (b) are concluded by means of fraud or intimidation.

13. The *Contract Law* also made specific provisions regarding contracts for transportation including provisions respectively dedicated to transportation of passengers and goods. Those provisions do not seek to distinguish a contract for service from a contract of service. In the event of disputes, it is inevitably a matter for the court (in exercising its jurisdiction) to determine the nature of the contract by reference to its terms, and in accordance with the applicable law. The underlining principle of a valid contract, pursuant to the *Contract Law*, is that it is entered “voluntarily” by the parties and no unit or individual may illegally interfere with it (Article 4).

14. It may not be possible for the Administration to comment in abstract whether, on an application to enforce a Mainland judgment, a court of the HKSAR could reopen a case based on the argument that the subject contract was a contract of service instead of a contract for service. There are, however, established common law rules suggesting that a foreign judgment could not be re-examined on the merits provided the foreign court had jurisdiction according

⁷ Adopted by the 8th NPCSC on 5 July 1994 which took effect on 1 January 1995. [N.B. It is grouped into the section entitled “Social Law” in the Consolidated Version of General Laws and Regulations of the PRC.]

to the domestic rules of conflict of law.⁸ If the Mainland judgment in question was given by a designated court pursuant to a valid exclusive choice of court agreement, a Hong Kong court, following the said common law rules, would not normally re-examine the merits of the case where the nature of the contract is concerned.

15. The present drafting of the definition of “specified contract”, reflecting the 2nd paragraph of Article 3 of the *Arrangement*, is modelled on Article 2.1 of the *Hague Convention*. Reference was made to the *Hague Convention* largely because it represents an interface of the common law and civil law jurisdictions. The drafting of the *Hague Convention* also represents the collective effort of different countries practising different systems of law around the world in, through prolonged negotiations, drawing up a text (including a formulation of the scope of “business-to-business” contracts) which is satisfactory to all of them. A significant advantage of following the approach of the *Hague Convention* is that we may draw reference to any future case law that would be developed by the courts on the interpretation of the types of contracts covered by the *Convention*.

16. In view of the above, the Administration does not propose to amend the definition of “specified contract”.

III. “Recognized Basic People’s Court”

17. The judgments covered by the *Arrangement* are stipulated under Article 2. It is provided in paragraph 1.2 of Article 2 of the *Arrangement* that judgments of specified Basic People’s Courts (BPC) authorized to deal with foreign-related civil and commercial cases are covered. The list of the specified BPC is annexed to the *Arrangement*, and it is provided at the end of the Annex that –

“The Supreme People’s Court may, in light of the requirements of judicial work, add to or delete from 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, and incorporate such changes into the Annex after notifying the Government of the HKSAR.”

18. It is obviously a matter for the Supreme People’s Court to decide on the competency of the relevant BPCs in dealing with foreign-related civil and commercial matters, and the need to authorize such courts.

⁸ See Dicey Morris & Collins “The Conflict of Law” (14th ed.) Vol. 1, para. 14-110

19. The definition of “recognized Basic People’s Court” in Clause 2(1) of the Bill reflects the last paragraph of the Annex to the *Arrangement*. It is provided in Clause 25 of the Bill that SJ will publish the revised list, if any, in the Gazette. This follows the approach adopted in implementing the *Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region* signed on 21 June 1999, and reference was made to section 40F of the Arbitration Ordinance (Cap. 341).

20. If any amendment to the list of BPCs is made in the future, the Administration will ensure the revised list will be widely published, in addition to the Gazette, to ensure the public will have notice of the same. The Administration however agrees that, for clarity sake, reference may be made to Clause 25 of the Bill in the definition clause (Clause 2(1)).

21. The Administration notes the concern expressed on the effects of addition to and deletion from the list as discussed in the Bar Association’s submission. As the *Arrangement* has not made specific provisions on such effects, the Administration is in the course of discussing the issues with the Supreme People’s Court.

VI. Clause 2(2) of the Bill

22. The purpose of including Clause 2(2) is to enhance clarity. The drafting of this clause is similar to that of section 10C of the Interpretation and General Clauses Ordinance (Cap. 1) concerning the interpretation of an expression of common law, it reads –

“Where an expression of the common law is used in the English language text of an Ordinance and an analogous expression is used in the Chinese language text thereof, the Ordinance shall be construed in accordance with the common law meaning of that expression.”

23. Clause 2(2) follows section 10C with necessary modification and provides that “where an expression of the law of the Mainland . . . is used in the Chinese language text”. The reason for such modification is because Mainland laws are promulgated in Chinese and no authentic English version is available.

24. It will not be practical to define the expression of the law of the Mainland in the Bill where references to any court, court document or court procedure are made. Clearly, the Administration would have great difficulties in preparing a definition on behalf of the Mainland authorities.

25. In Clause 6 of the Bill, various references such as “no appeal is allowed from the judgment ...”, “a judgment of the second instance” and “a judgment given in a retrial ...” are expressions used in the *Civil Procedure Law*. Whether a definition can be drawn up for such expressions will of course depend on if the *Law* has provided for such. If these expressions were included into Clause 2(1), it would follow that where any changes are brought to the *Civil Procedure Law* affecting the interpretation or understanding of these expressions, consequential amendments would have to be made to our domestic legislation and this would not be desirable.

26. The inclusion of Clause 2(2) is aimed at addressing the issues discussed in the paragraphs above which, in any event, will be the approach adopted by the Hong Kong courts in hearing Mainland-related cases. In the light of Section 10C of Cap. 1, the Administration considers the said Clause 2(2) is neither novel nor inappropriate.

V. Clause 3 of the Bill

27. The questions relating to Clause 3 of the Bill will be more particularly discussed in the Administration’s response to the issues raised at the Bills Committee meeting held on 14 May 2007.

Department of Justice
June 2007

#334248v1

Civil and Commercial Laws

General Principles of Civil Law of the People's Republic of China

Guaranty Law of the People's Republic of China

Copyright Law of the People's Republic of China

Regulations for the Implementation of the Copyright Law of the People's Republic of China

Trademark Law of the People's Republic of China

Rules for the Implementation of the Trademark Law of the People's Republic of China

Patent Law of the People's Republic of China

Regulations for the Implementation of the Patent Law of the People's Republic of China

Regulations on Computer Software Protection

Regulations of the People's Republic of China on Customs Protection of Intellectual Property Rights

Regulations of the People's Republic of China on the Origin of Import and Export of Goods

Regulations on National Defence Patents

Contract Law of the Peoples' Republic of China

Law of People's Republic of China on Bidding Invitation and Bidding

Electronic Signature Law of the People's Republic of China

Company Law of the People's Republic of China

Regulations of the People's Republic of China Governing the Registration of Companies

Law of the People's Republic of China on Partnership Enterprises

Measures of the People's Republic of China for Administration of Partnership Enterprise Registration

Law of the People's Republic of China on Individual Proprietorship Enterprises

Law of the People's Republic of China on Small and Medium-sized Enterprises

Provisional Regulations of the People's Republic of China on Private Enterprises

Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures

Rules for the Implementation of the Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures

Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures

Regulations for the Implementation of the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures
Law of the People's Republic of China on Foreign Capital Enterprises
Rules for the Implementation of the Law of the People's Republic of China on Foreign Capital Enterprises
Measures for Investigating, Dealing with and Banning Unlicensed Business Operations
Interim Regulations on Supervision and Management of State-owned Assets of Enterprises
Measures on Administration of Registration of Ownership of State-owned Assets of Enterprises
Law of the People's Republic of China on Enterprise Bankruptcy (Trial Implementation)
Auction Law of the People's Republic of China
Insurance Law of the People's Republic of China
Law of the People's Republic of China on Negotiable Instruments

Law of the People's Republic of China on Regulation of and Supervision over the Banking Industry
Law of the People's Republic of China on the People's Bank of China
Law of the People's Republic of China on Commercial Banks
Regulations of the Peoples' Republic of China on Administration of Foreign-funded Financial Institutions
Regulations on Closure of Financial Institutions
Measures on Banning Illegal Financial Institutions and Illegal Financial Business Activities
Measures for Punishment of Illegal Financial Acts
Regulations of the People's Republic of China on Administration of Renminbi
Regulation on the Foreign Exchange System of the People's Republic of China

Securities Law of the People's Republic of China
Law of the People's Republic of China on Funds for Investment in Securities
Interim Regulations on Administration of Futures Trading
Trust Law of the People's Republic of China
Maritime Law of the People's Republic of China

Marriage Code of the People's Republic of China
Regulations on Marriage Registration
Law on Succession of the People's Republic of China
Adoption Law of the People's Republic of China
Measures for Registration of Adoption of Children by Chinese Citizens