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For information on
27 May 2002

LegCo Panel on Administration of Justice and Legal Services

Reciprocal Enforcement of Judgments ("REJ") in Commercial Matters between the HKSAR and the Mainland

Result of the Consultation Exercise

Purpose

This paper informs Members of the outcome of the Administration's consultation exercise on the proposed arrangement for REJ in commercial matters between the HKSAR and the Mainland ("the Arrangement").

The Consultation Exercise

2. The Administration conducted a consultation exercise with the legal profession, chambers of commerce, trade associations and this Panel on the broad framework of the Arrangement during the period 20 March 2002 to 30 April 2002. We have received altogether 17 written responses. A list of our respondents is at **Annex 1**.

3. Out of the 17 respondents, 10 expressed support to the Arrangement. One respondent undertook to provide more detailed comments once it was able to. Three respondents made some comments on certain aspects of the Arrangement for the Administration to consider, without indicating whether they supported the Arrangement or not. One respondent expressed mixed views among its members: many members reacted positively, but some expressed caution. Only two respondents (being the Hong Kong Bar Association and another organization which the Administration, as at the date of submitting this paper, has yet to obtain its consent to disclose its identity in this paper) expressed reservation about the Arrangement, and one of them (being the Hong Kong Bar Association) suggested alternative approaches. The overall

position of the respondents is also shown at **Annex 1**, and a copy of the submission made by the Hong Kong Bar Association is at **Annex 2**.

General Comments

4. In the responses which supported the establishment of the Arrangement, the following grounds of support were mentioned:

(a) the socio-economic integration between the HKSAR and the Mainland has been deepening immensely and both sides are now working closely to forge a closer economic partnership;

(b) the proposed framework adopts a focused approach, being confined, as it is, to final and conclusive money judgments on commercial contracts with a choice of court agreement;

(c) the Arrangement is an indispensable step to promote Hong Kong as a centre for the resolution of international trade disputes;

(d) the pre-eminence of the HKSAR as a dispute resolution centre in respect of the Mainland will benefit the legal community of the HKSAR, and to some extent encourage foreign businesses to have a base of operations in the HKSAR;

(e) the availability of a well-established and independent forum for the resolution of disputes with Mainland entities can only increase the confidence of foreign parties in doing business with Mainland entities, which should benefit the Mainland by increasing volume of trade;

(f) the Arrangement will facilitate Hong Kong companies' expansion in the Mainland market;

(g) the Arrangement will facilitate the enforcement of money judgments in places where the assets are located;

(h) it is beneficial for Hong Kong judgments to be legally recognized and enforceable in as many jurisdictions as possible;

(i) the Arrangement will provide parties with more extensive and efficient legal protection, help to improve the legal environment of the HKSAR and the Mainland, and strengthen the economic co-operation between the two places.

5. Indeed, as discussed in paragraphs 8-10 below, some of the supportive respondents are of the view that the proposed scope of the Arrangement is not broad enough, and should be expanded in the following ways -

(a) by including other court orders, such as injunctions and bankruptcy/winding-up orders;

(b) by giving a more expansive definition of "commercial contracts" (for example, to include consumer matters);

(c) by including judgments where the adjudication court has jurisdiction.

6. On the other hand, the two respondents who expressed reservations about the Arrangement made the following observations:

(a) judgments in civil and commercial matters rendered by a Mainland People's Court have been held not to be final and conclusive under the common law rules applied by HKSAR court;

(b) the quality of justice and the propriety of the judicial officers in the Mainland are matters of legitimate concern;

(c) the execution process in the Mainland under the Law on Civil Procedure is fraught with difficulties; and

(d) the fundamental principles of the Mainland legal system differ from those of the HKSAR legal system.

Specific Comments

7. In the ensuing paragraphs, the respondents' major specific comments on different elements of the Arrangement are briefly set out.

Money Judgments (para. 7 of the Consultation Paper)

8. Three respondents proposed that the scope of the Arrangement should extend to other types of judgments such as injunctions and orders of specific performance.

Commercial Contracts (paras. 8 and 9 of the Consultation Paper)

9. Whilst two respondents expressed support for the proposed commercial contract restriction under the Arrangement, two respondents suggested that the concept of "commercial contract" should be given a more expansive definition (for example, by including consumer matters). In addition, one respondent suggested that the coverage of "commercial contract" needs to be further clarified.

Choice of Court (para. 10 to 13 of the Consultation Paper)

10. Four respondents questioned the requirement of a valid choice of court clause as a prerequisite to the application of the Arrangement. They suggested that the Arrangement should also cover judgments where the adjudication court has jurisdiction on some other basis.

11. One respondent considered that the monetary limits of the jurisdiction of the Intermediate People's Courts (IPCs) is unclear and that therefore the Arrangement should include a provision stipulating the monetary limits of the judgments of the IPCs to be covered by the Arrangement.

12. Another respondent suggested that limiting the Arrangement, in the case of the HKSAR courts, to judgments of the District Court or above may not be necessary as the parties would give due consideration to the cost and benefit of seeking enforcement.

13. Further, one respondent also commented that the Arrangement has not adequately addressed the intersection between the contractual arrangement for choice of Mainland courts and the provisions in Chapter Two of the Law of Civil Procedure of the PRC (which provides for the jurisdiction of the Mainland courts).

14. A couple of respondents have also raised questions on the details of the choice of court agreement required under the Arrangement.

Finality (para. 14 of the Consultation Paper)

15. Four respondents have referred to the issue of whether Mainland judgments are final and conclusive under the common law, in view of the system of civil procedures in the Mainland. Of these four respondents, one insisted on maintaining the common law approach in addressing this issue of finality, one stressed the importance of a clear definition of "final and conclusive" in the Arrangement, one submitted that the issue needed to be examined carefully, and one just noted the issue without recommending the way forward.

Safeguards (para. 15 of the Consultation Paper)

16. Whilst one respondent was content with the suggested safeguards in the Arrangement and noted that they were consistent with similar regimes with other jurisdictions, seven respondents have made various comments on the scope and application of the safeguards (see paragraphs 17-22 below).

17. One respondent pointed out that while safeguards (b) and (c) (i.e. that the judgment was obtained by fraud and that the judgment was obtained in breach of natural justice) were necessary, it was difficult to prove fraud or lack of natural justice (including bias) before the HKSAR courts in order to set aside a Mainland judgment. A respondent also considered it necessary to have in place a very specific definition of "natural justice".

18. As regards safeguard (d) (i.e. that the enforcement of the judgment would be contrary to public policy (or ordre public) in the place of the registering court), concerns were expressed that the meaning of "ordre public" under the Mainland law appeared to be wide and uncertain. It was suggested that a specific or limited definition for such a term should be in place for the purpose of the Arrangement.

19. As regards safeguard (e) (i.e. that the judgment is inconsistent with a prior judgment of the registering court), the need for it was questioned in view of the absence of a system of precedents in the Mainland and the limitation of the Arrangement to cases where there have been a choice of court.

20. As regards safeguard (f) (i.e. that the judgment was obtained in proceedings at which the defendant was not given sufficient notice), a respondent asked for a definition of "sufficient notice" to avoid any disagreement.

21. On safeguard (g) (i.e. that in the view of the registering court the judgment debtor either is entitled to immunity from the jurisdiction of that court or was entitled to immunity in the court of origin and did not submit to its jurisdiction), questions were raised as to the persons entitled to rely on this ground.

22. In addition, one respondent suggested further grounds for setting aside enforcement of judgments, such as that the defendant is not a party who entered into the contract as an identified party nor a voluntary assignee of such a party; and that the grounds of liability or the calculation of the amount of judgment is so materially different between the two jurisdictions that it would be unfair or inappropriate for the judgment to be enforced under the Arrangement.

Others

23. The Hong Kong Bar Association suggested two alternative approaches for the Administration to consider:

(a) to negotiate with the Mainland on the adoption of an arrangement enabling Hong Kong judgments to be enforced in the Mainland, with such judgments being confined to those rendered by the District Court level upwards in civil and commercial matters where the parties involved had previously designated in an express contractual term the HKSAR courts to be the exclusive or one of the fora for resolution of disputes. The issue of reciprocity (i.e. the enforcement of Mainland judgments in the HKSAR) should be resolved at a later date, when the current improvements to the Mainland judicial system would have borne fruit; or

(b) to conclude REJ arrangements only with those regions of the Mainland where there are substantial economic activities involving foreign direct investment and where the current improvements to the Mainland judicial system are more advanced.

24. Other points raised by the respondents include the time limit for enforcement action; whether the Arrangement should have retrospective effect; the difficulties of transmitting money obtained from enforcement of a judgment out of the Mainland; and the details of the procedure for registration and enforcement of judgments.

Administration Wing
Chief Secretary for Administration's Office

Department of Justice

May 2002

Annex 1

Reciprocal Enforcement of Judgments in Commercial Matters between the HKSAR and the Mainland - A Summary of Overall Positions of Respondents in the Consultation

Respondents	Supportive	Others
1. Australian Chamber of Commerce in Hong Kong	√	
2. Chinese Manufacturers' Association of Hong Kong	√	
3. Hong Kong Association of Banks	√	
4. Hong Kong Bar Association		Expressed reservation and suggested alternative approaches.
5. Hong Kong General Chamber of Commerce	√	
6. Hong Kong Institute of Arbitrators	√	
7. Hong Kong International Arbitration Centre	√	
8. International Chamber of Commerce – Hong Kong, China Business Council	√	
9. Law Society of Hong Kong	√	
10. A respondent whom the Administration has yet to obtain consent to disclose his identity		Made some specific comments for consideration, without indicating whether he supported the Arrangement or not.
11. A respondent whom the Administration has yet to obtain consent to disclose his identity		Expressed mixed views among its members: many members reacted positively, but some expressed caution.
12. A respondent whom the Administration has yet to obtain consent to disclose his identity		Made some specific comments for consideration, without indicating whether he supported the Arrangement or not.
13. A respondent whom the Administration has yet to obtain consent to disclose his identity		Made some specific comments for consideration, without indicating whether he supported the Arrangement or not.

Respondents	Supportive	Others
14. A respondent whom the Administration has yet to obtain consent to disclose his identity	√	
15. A respondent whom the Administration has yet to obtain consent to disclose his identity	√	
16. A respondent whom the Administration has yet to obtain consent to disclose his identity		Will provide comments later.
17. A respondent whom the Administration has yet to obtain consent to disclose his identity		Expressed reservation.

Annex 2

HONG KONG BAR ASSOCIATION

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19th April 2002

Government Secretariat
Room 1211 Central Government Offices (West Wing)
Lower Albert Road
Hong Kong

Attn: Mr. James Chan Yum-min
for Director of Administration

Dear Sir,

Reciprocal Enforcement of Foreign Judgments in Commercial Matters between the HKSAR and the Mainland

Thank you for your letter of 20th March 2002. I am pleased to enclose herewith the Bar's position paper on the captioned issue for your attention.

Yours faithfully,

Alan Leong, S.C.
Chairman

Encl.
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Proposal for Reciprocal Enforcement of Judgements in Commercial Matters between the HKSAR and the Mainland

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SUBMISSION OF THE HONG KONG BAR ASSOCLATION

Introduction

1. The Bar was invited by the Director of Administration to comment on the proposal by the HKSAR Government to establish a mechanism for reciprocal enforcement of judgments ("REJ') between Mainland China and the HKSAR. The Bar notes that the invitation came before the HKSAR Government is to commence discussion with the Mainland authorities on the said proposal.

Benefits and Concerns

2. The Director of Administration has highlighted the fact that the proposal for REJ between Mainland China and the HKSAR is part of the HESAR Government's initiative to promote Hang Kong as a centre for the resolution of international trade disputes and to develop Hong Kong legal services.

3. The Bar notes the above objectives.

4. However, the Bar believes that the desire to achieve such objectives ought not obscure legitimate concerns in the rendering, recognition and enforcement of judgments in Mainland China. The Bar notes that judgments in civil and commercial matters rendered by a People's Court in Mainland China have been held not to be final and conclusive under the common law rules applied by the HKSAR courts (which is to be discussed in more detail below). The Bar also notes that the quality of justice and the propriety of the judicial officers in Mainland China are matters of legitimate concern not only by Hong Kong residents with civil, family or commercial interests in Mainland China but also by the Supreme People's Court, the media, NPC delegates and generally popular opinion in Mainland China. (Professor Jerome Cohen of the New York University School of Law identified the following problems: lack of sufficient professional competence and training, corruption, “guanxi”, “local protectionism”, Communist Party control and “command influence” within each court (HKU

AllFL/ICGD and IESM, Macau: China WTO: Trade Law and Policy - Inaugural Lecture, 15/11/2001). See also Jerome Cohen, Party lines cloud courts, SCMP 11/07/2001.) The Bar further notes that in practical terms, the execution process in Mainland China under the Law on Civil Procedure is fraught with difficulties and such difficulties are not confined to judgments or arbitral awards with a foreign winning party but also extend to inter. provincial/municipality and even purely local enforcement actions. Indeed Professor Cohen recently described the record of the Mainland Peoples's Courts in enforcing their own judgments as "amazingly poor" (International Financial Law Review, September 2001, p 73. See also Jane Moir, Mainland facing tough task bringing its legal system up to WTO standards, SCMP.15/11/2001 (which also included statistics showing a 17% full enforcement rate of CIETAC arbitral awards)).

5. It is instructive to note that Professor Cohen, who has had much experience representing foreign interests in Mainland China, considered that "there is continuing uncertainty concerning whether PRC courts will enforce arbitration awards, foreign or domestic" (China WTO: Trade Law and Policy · Inaugural Lecture, (supra)). Given that enforcement of arbitral awards also comes under the rubric of the Law on Civil Procedure of the People's Republic of China (ie Arts 217, 259 and 269) and with a procedure that Professor Cohen considered to be "maximizing the prospects for 'local protectionism'" (IFLR (supra)), there is considerable force in applying this comment also to enforcement of court judgments, which shares similar procedures under the Law on Civil Procedure of the PRC. Even the Supreme People's Court itself came under criticism from Professor Cohen, who commented that the Supreme People's Court had handled cases in a less than transparent manner and fostered non-transparent communications between lower courts and higher courts (IFLR (supra)).

6. Any arrangement for REJ between Mainland China and the HKSAR must be meaningful, practical and workable. The Bar therefore considers that the problems associated with the quality of justice in Mainland China, the enforcement of judgments by the Mainland courts and the question of the Mainland judgments being not fina1 and conclusive are real and serious problems that the HKSAR Government must address as matters of prerequisite to any arrangement for REJ between Mainland China and Hong Kong. Otherwise, it might be said that having an arrangement for REJ where there can be no effective enforcement in the Mainland is worse than having no arrangement at all.

Comments on the EKSAR Government's Proposal

7. A REJ arrangement, whether as relatively modest as proposed by the HKSAR Government in paragraph 6 of the paper of March 2002 or otherwise, does not address adequately the impact of Mainland judgments corruptly or otherwise improperly

obtained over innocent Hong Kong parties and their assets in Hong Kong, given the burden under existing Hong Kong conflict of laws rules for the defendant to establish fraud or lack of natural justice (including bias). Indeed paragraph 15 of the paper of March 2002 fails to indicate the burden for establishing the grounds for non-registration or setting aside of registration and it is therefore presumed that the burden falls on the party who wishes to rely on the safeguards under the registration scheme, namely "the party against whom a registered judgment may be enforced" (paraphrasing the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) s 6(1)). Fraud and bias are insidious ills and it can be difficult to obtain evidence, most probably from Mainland China, to establish, on balance of probabilities, the existence of corruption, "guanxi", "local protectionism", Communist Party control or "command influence" within the Mainland court, since the HKSAR courts are unlikely to act on assumptions, predispositions, speculations or anecdotal evidence or develop a rather counter. productive head of public policy based on these allegations.

8 Further, a REJ arrangement, whether as relatively modest as proposed by the HKSAR Government in paragraph 6 of the paper of March 2002 or otherwise, does not prevent the proliferation of the situation where a Mainland party makes it a condition for conclusion of contracts with the Hong Kong or foreign party for disputes to be resolved by the Mainland Courts and then conducts an asset-stripping exercise against the Hong Kong or foreign party's assets in Hong Kong by virtue of setting up a dispute and having it resolved in its favour in the familiar Mainland courts. Not only would such an arrangement not promoting Hong Kong as a centre for resolution of disputes, it rather would increase the risk of doing business in Mainland China.

9. The paper of March 2002 does not appear to address the categories of "Mainland Courts' that can possibly be chosen under a contractual arrangement, apart from stating such courts to be the Intermediate People's Courts or above. Chapter 2 of the Law on Civil Procedure of the PRC makes provision for jurisdiction not only by reference to the level of court, but also by reference to the geographical area of the court in relation to the type of case involved. For example, Art 27 of the Law on Civil Procedure of the PRC prescribes that, in relation to proceedings involving a dispute on a bill of exchange, the People's Court at the place where the bill was paid or at the place of residence of the defendant is to have jurisdiction. One can therefore envisage cases involving transactions or persons where the People's Court in different provinces or municipalities may have jurisdiction under Chapter 2. The paper of March 2002 therefore has not adequately address the intersection between the contractual arrangement for choice of "Mainland Courts" and the provisions of the Law on Civil Procedure of the PRC on Jurisdiction under Chapter 2 (dealing with the question of <u>which</u> Mainland court may and should hear a case), and whether there is a need to be more specific in the choice of court clause than simply "Mainland Courts".

10. Paragraph 14 of the paper of March 2002 notes the requirement that a judgment sought to be enforced must be final and conclusive without highlighting the problems encountered in both the HKSAR and the Mainland over the requirement. However, no proposal to address this issue is proposed in the paper of March 2002.

11. There are sufficient indications from caselaw of the HKSAR courts to the effect that when viewed with the lens of the HKSAR conflicts of law rules, a judgment after the second trial (ie appeal from first instance judgment) and a judgment at first instance of a People's Court in the Mainland is not final and conclusive because of two sets of provisions in the Law of Civil Procedure of the PRC. The first set of provisions, adumbrated in Arts 185-188 of the Law of Civil Procedure of the PRC, empower the People's Procuratorate of the appropriate level to lodge a protest against a judgment of a People's Court, which if so lodged, would result in the re-trial of the case by the same court. The role of the People's Procuratorate to supervise the civil justice is enshrined under Art 14 of the Law on Civil Procedure of the PRC. The protest procedure can be initiated by the Supreme People's Procuratorate or a higher People's Procuratorate. Cheung J (as he then was) held in Chiyu Banking Corp Ltd v Chan Tin Kwun [1996] 2 HKLR 395 that because of the initiation of the protest procedure against the Mainland judgment relied on for enforcement in Hong Kong in that case, the Mainland judgment should not be regarded as final and conclusive and ordered a stay of the Hong Kong enforcement proceedings pending the resolution of the protest procedure. The Court of Appeal (Leong CJHC, Woo and Cheung JJA) in Lam Chit Man (trading as Yat Cheung Electric Co) v Lam Chi To (unreported, 18 December 2001, CACV 354/2001) approved of the Chiyu Banking case.

12. The second set of provisions are stated in Arts 177-184 of the Law of Civil Procedure of the PRC and provide for a People's Court to re-try a case that has already resulted in a judgment having legal force, whether on the initiative of the President of the People's Court concerned, the Supreme People's Court, or the parties in the case. There appears to be no time limit if the matter is initiated by the President of the People's Court concerned or the Supreme People's Court but a time limit of 2 years from the taking effect of the judgment is imposed for attempts to seek a re trial by the parties. In Tan Tay Cuan v Ng Chi Hung (unreported, 5 February 2001, HCA 5477/2000), Waung J had regard to these provisions and also the provisions for the protest procedure and declined to grant summary judgment having recognised that it was plainly arguable that the legal system in place in Mainland China was such that the Mainland judgment relied on was not a final and conclusive judgment because it was a judgment which by Mainland procedure was capable of being corrected on review and on retrial.

13. The expression of “final and conclusive” 'refers to a quality which the foreign judgment

must possess by the law of the foreign country concerned, without which quality it cannot be recognised or enforced in the HKSAR; see Dicey & Morris on Conflicts of Law (13th Ed), para l4-115. In Nouvion v Freeman (1889) 15 App Cas 1, it was held that a foreign judgment which is liable to be abrogated or varied by the court which pronounced it is not a final judgment. It may be final and conclusive even though an appeal is actually pending in the foreign country in which it was given: Scott v Pilkington (1862) 2 B & S 11.

14. Viewed with the rules of conflict of laws set out in the preceding paragraph in mind, the Bar is of the view that while some may still argue that the protest procedure does not deprive a People's Court's judgment from being final and conclusive because under Art 186 of the Law on Civil Procedure of the PRC, the body that abrogates or sets aside the original judgment of the People's Court is not the People's Court that gave that original judgment but the higher People's Procuratorate or the Supreme People's Procuratorate issuing the protest, no similar argument can be put in respect of the provisions for ”self-supervision” under Arts 177-184 of the Law on Civil Procedure of the PRC. The latter provisions make it possible for the People's Court originally trying the case re-opening it upon its judicial committee deciding that there was an error in the judgment following reference by the President of that court or upon application by a party to itself. This is a clear case of the court of original jurisdiction "re-opening" its own original judgment under a system of "self-supervision" and definitely fails the test propounded in Nouvion v Freeman (supra).

15. Having ascertained the position that judgments in civil proceedings before the People's Court in the Mainland cannot possibly under the present Mainland civil justice system be considered under HKSAR conflict of laws rules as final and conclusive judgments, the question is whether as a matter of legal policy, a statutory exception should be given to the reciprocal enforcement of a limited class of judgments in civil and commercial matters with the parties having chosen beforehand to have disputes litigated in one or both jurisdictions. The Bar notes that the HKSAR Government appears to favour such a course when it refers to a statutory registration scheme, similar to that in the Foreign Judgments (Reciprocal Enforcement) Ordinance, in para 16 of the paper of March 2002.

16. The Bar notes that under the scheme provided under the Foreign Judgments (Reciprocal Enforcement) Ordinance, registration is only accorded to judgments of a superior court of a foreign country that is final and conclusive between the parties thereto, notwithstanding that an appeal is pending against it or that it may still be subject to appeal: ss 3(2), (3) thereof. "Appeal", in the context of that Ordinance, includes any proceedings by way of discharging or setting aside a judgment or an application for a new trial or a stay of execution: s 2(l) thereof.

17. The Bar is of the view that unless the Mainland authorities be persuaded to modify the Law on Civil Procedure of the PRC and in particular Arts 177-184 and Arts 185-188 thereof, the HKSAR Government should not in any statutory registration scheme sought to implement any REJ arrangement between Mainland China and the HKSAR make provision for the abrogation of the HKSAR conflict of laws rule requiring foreign judgments sought to be enforced in the HKSAR courts to be final and conclusive judgments. The requirement for final and conclusive judgments is imposed for sound legal policy reasons and prevents enforcement of foreign judgments at a time when the respective first instance foreign litigation (where presumably the facts are found) is not completed or concluded. Further, the Bar considers that the definition of "appeal" in s 2(1) of the Foreign Judgments (Reciprocal Enforcement) Ordinance, being inclusive in nature, should be understood as supplementing the ordinary meaning of that word (ie an application to a higher tribunal or authority exercising supervisory or appellate jurisdiction) and does not detract or abrogate in any extent the principle outlined in the case of Nouvion v Freeman (supra).

18. Furthermore, the Bar does not consider that a logically sustainable or non-arbitrary line can be drawn holding that judgments rendered by certain People's Courts should be deemed final and conclusive and/or to be so deemed after a certain period of time. In this connection, the Bar observes that it is inappropriate to deem cases that had gone through the "second trial" by way of appeal should be deemed final and conclusive since this would mean that a winning party to a first instance judgment by a Mainland court can never have enforcement of that judgment in Hong Kong if no appeal from that judgment is lodged. The Bar also observes that while a time limit of two years is prescribed under Art 182 of the Law on Civil Procedure of the PRC for a party to apply for re-trial under Art 177 of the same, no time limit is prescribed for the President of the People's Court concerned, the higher People's Court or the Supreme People's Court to initiate the procedure for re-trial. Also, no time limit is prescribed for the higher People's Procuratorate or the Supreme People's Procuratorate to lodge a protest against a judgment of a People's Court. Therefore, any time limit imposed in an arrangement for REJ between Mainland China and the HKSAR for the purpose of deeming judgments by Mainland courts to be final and conclusive must involve depriving parties and Mainland supervisory institutions (ie the people's congresses, the higher people’s procuratorate, and the higher people's courts) to some extent their ability to seek re-trials under the Law on Civil Procedure of the PRC.

19. A final note on the requirement for Mainland judgments to be final and conclusive concerns the role of the provincial and municipal people’s congresses and the National People’s Congress in supervising the People's Courts. See, for example, Constitution of the people's Republic of China 1982, Art 67(6) (on the power of the Standing Committee of the NPC to supervise the Supreme People's Court): and the Law on the Organization

of the Regional People's Congresses and the Regional People's Governments, Art 44(6) (on the power of the Standing Committee of the regional people's congresses to supervise the people's courts of the relevant region). It must not be overlooked that the nature and extent of such supervision is less than clear and there are discussions in the Mainland governmental and academic circles for the strengthening of the people's congresses' role in supervision, possibly through the enactment of a specific law for the procedure to exercise supervision over major errors and injustices on the part of the people's courts. The possibility of intervention by the popular and even the highest organ of power is therefore an added dimension, to say the least.

20. The Bar now turns to &e safeguards proposed in para 15 of the March 2002 paper and makes the following observations—

- As to grounds (b) and (c), the Bar considers these grounds to be necessary but would like to indicate that it is difficult to prove fraud or bias before the HKSAR courts in resistance to the registration of a Mainland judgement.
- As to ground (d), the Bar considers this ground to be necessary but would like to indicate that while the broad ground of public policy is relatively well illustrated under the common law rules applied in the HKSAR, the same cannot possibly be said of the ground of public order (order public) or harm to social and public interest under Mainland law. One should not naively consider that the nature and extent of the ground of public order (ordre public) or harm to social and public interest under Mainland law is identical to those applicable to the ground of ordre public in a civil law jurisdiction such as France. For example, would it be contrary to social and public interest under Mainland Law for the local People's Court to enforce a HKSAR judgment having the effect of seizing the assets of a local enterprise providing the livelihood of hundreds of residents of the locality and directly contributing to their unemployment? Further, a reference to the 1998 regulations concerning Taiwanese civil judgments and Art 268 of the Law on Civil Procedure of the PRC indicates that Mainland law provides for another ground of non-recognition and non-enforcement, namely contravention of basic principles of PRC law. The Bar considers that this broad ground of contravention of basic principles of PRC law is very uncertain. Both concepts are liable to be applied arbitrarily to deny enforcement. The Bar therefore asks the HKSAR Government to clarify the extent of this ground and its applicability to HKSAR judgments with the Mainland authorities.
- As to ground (e), the Bar finds it difficult to understand the need for such a ground if the proposed REJ arrangement thus far is limited to cases where there have been a choice of court(s). The only scenario seems to be a case of a choice of both HKSAR and Mainland courts as having jurisdiction for dispute resolution. In such circumstances, the existence of ground (e) would, in the Bars view, encourage the parties to secure as quickly as possible a judgment in a jurisdiction most

advantageous to their respective cause. In such circumstances, the HKSAR courts may possibly lose out in such a "race" given the time and administrative constraints and the possibility of litigation first on forum conveniens issues. It is not known if the Mainland courts have adopted principles similar to forum conveniens and Arts 243-246 of the Law on Civil Procedure of the PRC do not appear provide room for such principles to apply. Further, the Bar does not understand what is proposed to be a "prior judgment" and asks this expression to be sufficiently clarified. It may be that the expression is meant to refer to a prior judgment binding on the parties and thus a concept similar to the common law concept of res judicata. Be that as it may, the Bar finds it difficult to understand how the Mainland courts decide whether a HKSAR judgment is inconsistent with a prior judgment of the Mainland courts in the absence of not only a system of precedents but also an effective and efficient system of record-keeping, particularly of judgments rendered by people's courts of different localities, provinces and municipalities.

- As to ground (g), the Bar doubts whether this ground is in truth a safeguard or rather a ground for impunity. The Bar considers that while it is relatively clear under HKSAR law to categorise the persons entitled to immunity from jurisdiction, it is by no means easy in terms of Mainland law. For example, is a state owned enterprise or a member of the armed forces entitled to immunity from jurisdiction under Mainland law? These are matters which need to be clarified not only in the discussion with the Mainland authorities but also in consultation with the interested parties in the HKSAR, including the Bar. Indeed the HKSAR Government should publicize this aspect of Mainland law to ensure that foreign or Hong Kong contracting parties should be aware of the status of the Mainland counterpart before signing a contract providing for resolution of disputes by the Mainland courts so that the contract would afterwards be still of some worth at the time of dispute.
- Lastly, the Bar considers the paper of March 2002 insufficient in dealing with the expression of "registering court" in respect of the Mainland. It is not inconceivable that enforcement of a HKSAR court judgment may be sought in two different locations in the Mainland against assets located therein of a party. In such a circumstance. there is a need to clarify whether registration is needed with the people's courts at both locations and if so, how differing decisions by the people's courts at each location affect the validity of the registration and the consequential enforcement and whether there is a mechanism for resolving such disputes.

Alternative Approaches

21. In the light of the above matters. the Bar asks the HKSAR Government to adopt an approach that is more limited than what it has proposed in this consultation exercise. In the spirit of constructive engagement, the Bar tenders the following alternative

approaches.

22. The Bar asks the HKSAR Government to first negotiate with the Mainland authorities on the adoption by the Supreme People's Court of regulations similar to those issued by the Supreme People's Court on the Recognition of Civil Judgments of Courts of the Taiwan Region (1998) and confined to judgments rendered by HKSAR courts from the District Court level upwards in civil and commercial matters where the parties involved had previously designated in an express contractual term the HKSAR courts to be the exclusive or one of the fora for the resolution of disputes. The Bar notes the existence of instances of implementation of the 1998 regulations. The adoption of such regulations will, in the Bar's view, have the beneficial effect of promoting Hong Kong as a centre for resolution of commercial disputes involving a Mainland party to the litigation while at the same time, leave the issue of reciprocity (ie enforcement of Mainland judgments in Hong Kong) to be resolved at a later date, when the current improvements to the Mainland judicial system would have borne fruit.

23. The Bar recognises that this alternative approach does not resolve the practical problems of enforcement in Mainland China, the resolution of which would have required reforms exclusively undertaken in Mainland China both in relation to its laws, procedures and practice but also relation to the administration of its courts and the quality and discipline of its judicial officers. Yet, this alternative approach has the merit of minimizing the impact of Mainland judgments corruptly or otherwise improperly obtained over innocent Hong Kong parties and their assets in Hong Kong, since in the absence of a statutory registration scheme which is aimed to make enforcement in Hong Kong easier, the so-called “winning party” would still have to re-litigate or sue on the Mainland judgment in the HKSAR courts.

24. The other alternative approach that the Bar asks the HKSAR Government to adopt provides for the HKSAR Government to conclude REJ arrangements only with those regions of Mainland China where there are substantial economic activities involving foreign direct investment and where the current improvements to the Mainland judicial system are more advanced. Such regions will probably include the Beijng municipality, the Tianjin municipality, the Shanghai municipality and the Guangdong Province and the arrangements to be limited to judgments rendered by HKSAR courts from the District Court level upwards in civil and commercial matters where the parties involved had previously designated in an express contractual term the HKSAR courts to be the exclusive or one of the fora for the resolution of disputes and to judgments rendered by the Intermediate People’s Court upwards (including the Supreme People’s Court) in civil and commercial matters where the parties involved had previous designated in an express contractual term those Mainland courts to be the exclusive or one of the fora for the resolution of disputes. The Bar considers that this less than across-the-board

approach in the establishment of juridical relations is permitted under Article 95 of the Basic Law of the HKSAR and there is no legal reason inhibiting the HKSAR Government to take such an approach. Again, the Bar considers that this approach has the merits outlined in the preceding paragraph.

25. The Bar understands that the practice of the People's Courts in the Mainland in dealing with matters involving Taiwan, HKSAR and Macau SAR residents or interests is to adopt with necessary modifications legal provisions applicable to foreign-related matters. Therefore, it is practicable for the Mainland authorities to apply those provisions of the Law on Civil Procedure of the PRC (ie Part 4 of that Law and in particular Arts 267 and 268 thereof) for recognition and enforcement of judgments rendered by the courts of the HKSAR even though that Law does not make provision in that regard for judgments rendered by a court of a Special Administrative Region of the People's Republic of China. The HKSAR Government should therefore clarify with the Mainland authorities whether recognition and enforcement of HKSAR judgments is at present possible directly through Part 4 of the Law on Civil Procedure of the PRC or indirectly through a judicial interpretation of Part 4 of that Law.

26. The Bar welcomes the opportunity extended by the HKSAR Government on this occasion for it to comment on the HKSAR Government's current proposal for REJ and would ask the HKSAR Government to consult the Bar (whether on a confidential basis or not) during the course of the discussion between the HKSAR Government and the Mainland authorities on REJ. The Bar considers that such continued consultation will be particularly useful in clarifying matters that the Bar queries or comments in this Submission and in commenting on additional matters encountered during the discussion.

Dated 19th April 2002.

Council of the Hong Kong Bar Association