立法會
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司法及法律事務委員會

2005年10月24日會議背景資料簡介

香港特別行政區與內地間相互執行有關商業事宜的判決

目的

本文件旨在提供背景資料，述明立法會議員過往就與香港特別行政區("香港特區")與內地間相互執行有關商業事宜的判決有關的事項所作的討論。

背景

在香港特區執行內地判決

2. 目前香港特區與內地之間並無相互執行判決安排。然而，內地判決可根據普通法獲香港特區法院承認，並予執行。在普通法中，涉及金錢的外地判決(包括內地判決)如屬以下情況，可視作債項，經由訴訟予以承認和執行 ——

(a) 判決由具管轄權的法院作出(法院是否具有管轄權由香港特區法院參照國際私法規則決定)；

(b) 涉及一筆定額款項的判決；及

(c) 對具體申索的最終且不可推翻的判決。

香港特區的判決可否在內地執行

3. 據政府當局所述，現時香港特區的判決似乎並不能在內地執行。中國作為民法司法管轄區，在承認和執行外地判決方面，並無一條規則與香港的普通法規則同等。

與內地相互執行判決的擬議安排

4. 政府當局建議就香港特區與內地間相互執行判決設立機制("該安排")，以便推廣香港特區作為解決商業糾紛中心，並發展香港特區的法律服務。

與內地訂立擬議安排的好處

5. 據政府當局於2002年3月20日向司法及法律事務委員會("事務委員會")提供的文件[例法會CB(2)1431/01-02(01)號文件附件(**附錄I**)]所述，該安排不單令香港特區商界受益，亦會惠及與內地有業務往來的國際企業。他們可指定香港特區的法院為訴訟地，解決源自與內地各方所訂合約的糾紛，而在香港特區法院發出的勝訴判決，可在內地獲得承認並予執行。

6. 政府當局又指出，隨着中國加入世界貿易組織，以及香港特區與內地間貨物和服務貿易日益增加，與內地訂立一套安排，確保香港特區的判決可在內地有效執行，亦符合香港特區的利益。此外，內地判決的判定債權人要試圖根據普通法在香港執行內地判決，亦會面對不少困難和問題，而這安排亦可消除這方面的問題，方便內地判決在香港特區執行。

該安排

7. 由於香港特區從未與內地訂立相互執行判決安排，政府當局建議先集中就特定範圍作出安排，再根據推行初步計劃的實際經驗，逐步擴大合作範圍。政府當局建議該安排 ——

(a) 只涵蓋由內地法院(中級人民法院或更高級的法院)或香港特區法院(區域法院或更高級的法院)所作出涉及金錢的判決，而該等法院是依據商業合約的有效選定訴訟地條文，行使其司法管轄權；

(b) 只容許執行最終且不可推翻的判決；及

(c) 會包括一些理據，讓內地或香港特區的法院可據此拒絕執行對方作出的判決。

請委員參閱**附錄I**，以瞭解擬議相互執行判決安排的詳情。

諮詢工作

8. 政府當局曾在2002年3月及4月，就該安排的建議大綱徵詢了法律界、多個商會及行業協會的意見。政府當局共收到17份書面回應，當中有10名回應者對該安排表示支持，兩名回應者(包括香港大律師公會)對該安排表示有所保留，而其餘回應者則對該安排的某些範疇提出意見，或表達其會員的不同意見。委員可參閱立法會CB(2)2020/01-02(01)號文件(**附錄II**)，以瞭解諮詢工作的詳情。

事務委員會的討論

9. 政府當局於2001年12月20日首次向事務委員會簡述其有意與內地就相互執行判決訂立工作安排，後再於2002年5月27日向事務委員

會簡介該安排的建議大綱及諮詢工作的結果。政府當局隨後就擬議安排與內地當局展開探討性的會議。政府當局於2004年3月22日及11月22日再次向事務委員會簡報與內地當局就擬議安排進行磋商的進展。香港大律師公會的代表曾出席部分會議，並就有關事項提供意見。

10. 政府當局在2004年11月22日的會議上告知事務委員會，當局仍繼續與內地磋商有關該安排。香港特區和內地當局都認同，該安排須建基於香港特區的法律，才可在香港實施。政府當局承諾會在有重大發展時向事務委員會匯報。

所提出的關注事項

11. 議員對該安排提出的關注事項綜述於下文第12至23段。

<u>範圍</u>

12. 部分委員關注到，鑒於香港特區與內地的法律制度有別，以及內地法院的司法及司法決定的質素，進行此事時務須極為審慎。亦有其他委員指出，商界關注到實施該安排的影響，以及可能對其利益造成的損害。該等委員建議在初期實施有限度的相互執行判決安排，所執行的判決，應只適用於以下情況 ——

(a) 有關判決須由內地某等級的法院作出，而該等法院須獲內地最高級法院批准；

(b) 以內地有外來投資直接參與龐大經濟活動的地區為"試點"，如天津、北京、上海和廣東；及

(c) 數額在50萬至100萬元之間的申索。

13. 關於上文第12(a)段的建議，政府當局回應時解釋，擬議安排只屬有限度的相互執行判決安排。此安排並非適用於所有判決，而只適用於關乎商業協議的涉外判決；而訂約各方亦已同意交由內地法院或香港法院解決糾紛。此外，由於糾紛涉及不同國家，現時在內地主要省市及經濟特區，大部分涉外民商事案件皆由中級人民法院或以上級別的法院處理。

14. 政府當局雖然同意考慮上文第12(b)及(c)段的建議，但解釋，要決定"試點"應按何準則釐定，可能會有困難。政府當局又提出告誡，鑒於該安排所依據的對等原則，任何單方面向內地施加限制的建議，均未必輕易為內地當局所接受。

<u>保障措施</u>

15. 政府當局表示，考慮到在普通法規則及第319章下執行外地判決的情況，該安排會包括一些理據，讓內地或香港特區的法院可據此

拒絕執行對方作出的判決。如有下列情況，根據該安排作出的判決註冊可被拒絕接受或取消 ——

(a) 判決已獲完全履行；

(b) 判決是以欺詐手段取得；

(c) 判決是在違反自然公正原則的情況下取得；

(d) 執行該判決是違背登記法院所在地的公共政策；

(e) 判決與登記法院先前的判決不符；

(f) 在作出判決的法律程序中，被告人沒有接獲足夠時間的通知；及

(g) 登記法庭認為判定債務人有權豁免受該法庭管轄，或認為他曾有權豁免受原判法庭管轄，且沒有接受該法庭管轄。

16. 部分委員建議改善該安排的擬議保障措施，將判決是以脅迫或舞弊手段取得，或在對被告人不公平的情況下取得等理由，列入考慮範圍。

17. 政府當局回應時表示，保障措施乃是參照根據普通法規則、《外地判決(交互強制執行)條例》(第319章)，以及關於司法管轄權及民商事務的外國判決的海牙公約初稿等在本港執行外地判決的情況而擬訂。政府當局與內地商討該安排時會考慮委員的意見。

<u>對法院的選擇</u>

18. 一名委員詢問，在該安排下，訂約各方可否選定香港特區法院為具有司法管轄權的訴訟地。政府當局表示，根據該安排，雙方可自由選擇由香港特區或內地法院，或兩地的法院解決其商業糾紛，並視乎情況，在香港特區或內地執行有關判決。相互執行判決安排不會改變訂約雙方的議價能力。

19. 大律師公會指出，內地決定案件由中級人民法院還是更高級法院審理，與香港特區決定案件應由區域法院還是更高級法院審理所依據的準則，可能有別。基於如訴訟各方的國籍等原因，某些案件可在某地方的法院接受聆訊和裁決，但在另一地方的法院卻不可以。政府當局同意就此事進行研究，並向事務委員會作出匯報。

<u>是否最終判決的問題</u>

20. 部分委員及大律師公會關注到，鑒於內地的民事訴訟程序，有時實難以根據普通法的定義，確定內地判決是否最終且不可推翻。大律師公會建議，對於判決是否最終的問題，應維持按普通法原則處理。

21. 政府當局回應時表示，當局會與內地當局討論判決如何及何時才算最終且不可推翻這問題，以確保所達成的安排能獲雙方接納。政府當局的初步構思是以《外地判決(交互強制執行)條例》所訂安排為藍本。

實施情況

22. 一名委員詢問，如在該安排下訂立商業合約的雙方各自在兩地的法院互相提出控訴，相互執行判決安排可如何實施。政府當局承諾與內地當局商討解決此情況的方法。

23. 部分委員對有關判決能否真正相互執行表示關注。一名委員認為，能否成功實施該安排，關鍵在於訂約雙方是否有信心將案件提交香港特區及內地法院辦理。香港特區與內地數年前已締結相互執行仲裁裁決安排，有關實施此安排的經驗，可成為有用的參考資料。就此，事務委員會察悉，政府當局曾於2004年7月透露，在2002至2003年間，共有58宗有關執行內地仲裁裁決的申請獲得批准。然而，政府當局仍等待內地當局回覆曾接獲多少宗在內地執行香港仲裁裁決的申請。

立法會質詢

24. 吳靄儀議員曾在2005年1月26日立法會會議上提出口頭質詢，要求政府當局提供有關申請在內地執行香港仲裁裁決的統計數字，並詢問有關統計數字所反映的執行情況，會否影響政府當局現時就香港特區與內地相互執行商事判決的磋商所採取的立場。

25. 律政司司長回覆時表示，雖然沒有在內地執行香港仲裁裁決的紀錄，但亦無證據顯示仲裁裁決不獲執行。廣東省中級人民法院會在廣東進行實地調查，探討為何沒有要求執行香港仲裁裁決的申請紀錄。委員如欲瞭解有關詳情，可參閱2005年1月26日立法會會議的會議過程正式紀錄摘錄(**附錄III**)。

有關文件

26. **附錄IV**載有其他有關文件一覽表。該等文件可於立法會網頁取覽(網址：http://www.legco.gov.hk)。

立法會秘書處
議會事務部2
2005年10月21日

香港特別行政區與內地
相互執行商事判決

目的

對於政府當局就內地與香港特別行政區相互執行判決設立機制的建議，以及建議安排的範圍，本文件徵求有關意見。

與內地訂立建議安排的好處

2. 特區與內地之間目前並無相互執行判決的安排。附錄闡述在《外地判決(交互強制執行)條例》(第 319 章)之下的現行法律架構、普通法對在香港執行外國及內地判決的立場、以及特區判決可否在內地執行。

3. 有助特區發展成爲解決商業糾紛中心的一項重要條件，是特區作出的判決，可在判定債務人保存其資產的司法管轄區執行。與內地訂立相互執行判決安排，不但對特區的商界有裨益，也會惠及與內地有業務往來的國際企業，他們可指定特區的法院爲訴訟地，解決源自與內地各方所訂立合約的糾紛，而在特區法院發出的勝訴判決，都可在內地獲得承認並執行。這項安排，加上特區與內地在文化上的相似地方，以及特區完善的法制和卓越的法律服務業，將可協助特區發展成爲解決商業糾紛，尤其是那些涉及內地當事人的商業糾紛的中心。這項安排也會惠及本港的法律界。

4. 隨着中國入世，以及特區與內地間貨物和服務貿易的數量日益增加，與內地訂立一套確保特區判決可在內地有效執行的安排，也符合我們的利益。在內地的現行法律下，目前情況看來並非如此(見附錄第 7 段)。從內地的角度出發，這項安排可消除各種弊端和問題(見附錄所述)，從而方便內地判決在特區執行。

建議的安排

5. 由於特區從未與內地訂立相互執行判決的安排，因此，政府當局打算先集中就特定範圍作出安排。我們可以根據推行初步計劃的實際經驗，再考慮擴大合作範圍。

6. 在這些前提下，我們建議，有關安排應只涵蓋由內地法院(中級人民法院或更高級的法院)或特區法院(區域法院或更高級的法院)

所作出涉及金錢的判決。這些法院是依據*商業合約*內的*有效選定訴訟地條文*，行使其司法管轄權。

下文就有關安排的要點作出闡述。

涉及金錢判決

7. 建議的安排，與第 319 章所規定的制度和普通法一致，只會適用於涉及金錢的判決。舉例來說，建議安排不會涵蓋強制履行令或禁制令。

商業合約

8. 作爲起點，我們打算只集中處理商業合約，而排除其他民事案件，因爲實際上最有機會受惠於建議安排的案件，將會是那些源自商業合約的判決。此外，中國入世後，涉及內地當事人的商業糾紛多半會增加。相互執行判決的安排先集中處理商業合約，也配合政府當局把特區發展成爲解決商業糾紛中心的政策。

9. "商業合約"是指合約各方代其所屬的行業或專業行事的合約，並不包括關乎婚姻事宜、遺囑和繼承、破產和清盤、瘋狂行為、僱傭和消費者事宜等合約。在建議安排中不包括這些合約，跟第 319 章的目的及國際社會就相互執行判決的討論一致。

選擇法院

10. 建議安排只適用於特區或內地法院的某些判決。這些判決所涉及的商業合約，有關立約各方曾商定，特區或內地的法院將具有司法管轄權，或兩地法院均具有司法管轄權。只接受具有選擇法院的協議，反映出對商業合約立約各方自主權的尊重，這也是國際社會所維護的原則。就此而言，有一點是我們應予注意的，根據普通法，在某些受限制的情況下，法院可使協議中對法院的選擇無效。舉例來說，如有法定規則禁止剝奪法院的司法管轄權，或禁止將糾紛訴諸某外國法院或法律解決，而該選定法院協議是違反了這一法定規則，則選擇便會無效。

11. 鑑於兩個司法管轄區的法律均可對選定訴訟地條文效力施加限制，建議安排須訂明，有關的選定訴訟地條文必須是有效的。

12. 就特區法院而言，我們建議有關安排應涵蓋區域法院或以上所作出的判決(通常涉及港幣 50,000 元或以上)，而有關安排實際上將不包括由小額錢債審裁處作出的判決。限制有關安排所涵蓋的特區判決的範圍，是要爲有關各方帶來實際利益，並確保這些實際利益與根據建議安排執行判決所需的人力物力相稱。

13. 就內地法院而言，我們建議有關安排應涵蓋由中級人民法院或以上的法院所作出的判決。原因是，要就涉及特區方面的合約作出裁決，通常是這級別的內地法院具有司法管轄權。

終局判決

14. 有關安排只容許執行最終且不可推翻的判決。至於一項判決如何及何時才應被視爲最終及不可推翻這問題，我們將會跟內地當局討論，以確保所達成的安排能令雙方滿意。

保障措施

15. 考慮到在普通法規則及第 319 章下執行外地判決的情況，建議安排會包括一些理據，讓內地或香港的法院可據此拒絕執行對方作出的判決。經就普通法、第 319 章及國際條約慣例作出研究後，我們建議，如有下列情況，根據建議安排作出的判決登記，可被拒絕或取消：

(a) 判決已獲完全履行；

(b) 判決是以欺詐方法取得；

(c) 判決是在違反自然公正原則的情況下取得；

(d) 執行該判決是違背登記法院所在地的公共政策；

(e) 判決與登記法院先前的判決並不一致；

(f) 在作出判決的法律程序中，被告人沒有接獲足夠時間的通知；以及

(g) 登記法庭認為判定債務人有權豁免受該法庭管轄，或者認為他曾有權豁免受原判法庭管轄，且沒有接受該原判法庭管轄。

實施安排

16. 在我們跟內地當局達成雙方皆滿意的安排之後，當局便會尋求立法，以賦予有關安排所需的法律支持。我們預料將需要一套類似第 319 章的法定登記計劃。當兩個司法管轄區均具備所需的執行程序，有關安排便會正式生效。

政務司司長辦公室
行政署
二零零二年三月

附錄

根據《外地判決(交互強制執行)條例》(第 319 章)
在特區執行外地／內地判決

目前，法律已定有安排，確保在特區以外一些司法管轄區所取得的民商事判決，可在特區登記及執行，而由本地法院所作的判決，反過來亦同樣可在其他司法管轄區執行。該等安排是《外地判決(交互強制執行)條例》(第 319 章)(下稱“有關條例”)所訂登記制度的依據。有關條例規定，外地國家高級法院所作出的判決，如屬有關條例所賦予的利益並已引伸適用者，即可在不抵觸某些條件的情況下，在香港登記並執行。在有關條例中，“判決”一詞具有廣泛的涵義，包括法院在任何民事法律程序中作出的判決，以及法院在任何刑事法律程序中，就支付款項予受害一方作爲補償或損害賠償而作出的判決。有關條例讓特區可視乎需要，靈活處事，在互惠的基礎上，就個別執行判決協定，與外地司法管轄區進行談判。不過，內地所作出的判決卻不能根據第 319 章予以執行，同時特區與內地也沒有就交互執行判決訂立安排。再者，我們不能把內地當作第 319 章所指的外地國家或外地司法管轄區。

根據普通法規則在特區承認及執行內地判決

2. 根據普通法，涉及金錢的外地判決(包括內地判決)可在不抵觸某些凌駕性原則的情況下，和債務一樣，藉訴訟予以承認及執行。判決即使並非源自普通法國家，亦可受惠於普通法規則；又普通法也沒有規定互惠原則。

3. 因此，源自內地的判決如屬下列性質，便可獲特區法院承認及執行：

(a) 由具管轄權的法院(由特區法院參照國際私法規則決定)所作出的判決；

(b) 支付一筆固定款項的判決；以及

(c) 就某項申索的是非曲直而作出的不可推翻的最終判決。

4. 如就另一司法管轄區的判決進行普通法訴訟，被告人可提出抗辯。抗辯的理據包括：缺乏司法管轄權；有關判決是以欺詐手段

取得的；承認有關判決有違(特區的)公共政策；以及有關判決是在有違自然公正原則的情況下取得的。

就原有訴因提出起訴

5. 判定債權人如不根據普通法就某項內地判決提出訴訟，可就同一訴因在特區提出新的訴訟。為此，判定債權人須提出多項證明，包括證明特區法院是審理有關案件的適當訴訟地，並對案件具有管轄權。

根據普通法執行內地判決相對於根據第 319 章藉登記而承認及執行判決

6. 與可根據第 319 章登記判決的判定債權人相比，試圖在特區根據普通法執行內地判決的判定債權人，須面對以下幾項幣端：

(a) 不能採用第 319 章所訂的簡化程序；

(b) 法律程序需時更長，法律費用會更高昂；以及

(c) 更重要的是，他須承擔舉證責任。然而，為根據第 319 章登記外地判決而進行法律程序，舉證責任則由判定債務人承擔，而該人須證明為何不應登記有關判決。

可否在內地執行特區的判決

7. 特區的判決目前似乎不可在內地執行。內地作為民法司法管轄區，在承認及執行外地判決方面，並沒有與我們的普通法規則相似的法則。內地於一九九一年四月九日制定的《民事訴訟法》第二百六十七條規定，外地判決可按照中華人民共和國締結或參加的國際條約的規定，或按照互惠原則予以執行。由於特區並非“外地”國家，故此未能受惠於該條文。

立法會 **CB(2)2020/01-02(01)**號文件

二零零二年五月二十七日
參考資料

立法會司法及法律事務委員會
香港特別行政區與內地相互執行商事判決
諮詢結果

目的

當局曾就建議中的香港特別行政區與內地相互執行商事判決安排（“有關安排”）進行諮詢。本文件旨在通知各議員透過諮詢當局所收到的意見。

諮詢工作

2. 在二零零二年三月二十日至二零零二年四月三十日期間，政府當局就有關安排的大綱，徵詢法律專業界、商會、行業協會及立法會司法及法律事務委員會的意見。我們一共收到 17 份書面回應。回應者名單載於**附件 1**。

3. 在 17 名回應者中，有 10 名對有關安排表示支持。有一名回應者答應稍後提供更詳盡的意見。有三名回應者對有關建議的某些範疇提出了一些意見，以供政府當局考慮，但沒有表示是否支持有關安排。有一名回應者表達了其會員的不同意見：有很多會員作出正面回應，但亦有些會員認為須謹慎行事。只有兩名回應者，即香港大律師公會及另一個團體（截至提交本文件的日期為止，政府當局仍未獲該團體同意公開其身分）對建議表示有所保留。香港大律師公會並提出另一些可供選擇的方案。各回應者所表達意見的總覽亦載於**附件 1**。香港大律師公會的意見書副本則載於**附件 2**。

總體意見

4. 在支持訂定有關安排的意見書中，回應者提出了以下的理據:

(a) 香港特別行政區與內地在經濟和社會方面的整合日見密切，雙方正緊密合作，建立更密切的經濟夥伴關係；

(b) 建議的大綱規模集中，只適用於在當事人有選擇法院的商事協議下所作出的最終及不可推翻的涉及金錢判決；

(c) 有關安排是在推動香港成為解決國際貿易糾紛中心的過程中必不可少的一步；

(d) 香港特別行政區成為解決與內地有關的糾紛的中心，將惠及本港法律界，並會在某一程度上鼓勵外商以香港特別行政區作為業務基地；

(e) 若解決涉及內地個體的糾紛可訴諸一個完善並獨立的訴訟地，便會增強外方與內地個體做生意的信心，內地也會因貿易量增加而受惠；

(f) 有關安排有助香港公司拓展內地市場；

(g) 有關安排有助在資產所在地執行涉及金錢判決;

(h) 愈多司法管轄區在法律上承認和執行香港的判決，對香港愈為有利；

(i) 有關安排對香港有利；會為訴訟各方提供更多、更有效的法律保障；並有助改善香港特別行政區和內地的法律環境;以及加強兩地經濟合作。

5. 事實上，正如下文第 8 至 10 段所述，有些支持有關安排的回應者認為，有關安排的建議範圍不夠廣泛，應擴大如下:

(a) 包括例如強制令和破產/清盤令等判決；

(b) “商業合約”定義的範圍應更為廣泛（例如包括消費者事宜）；

(c) 包括宣判法院具有司法管轄權的判決。

6. 但另一方面，兩位對有關安排表示有所保留的回應者，則提出以下的觀點:

(a) 香港特別行政區法院曾按照普通法原則，裁定某些內地人民法院作出的民商事判決為並非最終及不可推翻的；

(b) 內地司法工作的質素和司法人員操守備受關注；

(c) 在內地，根據《中華人民共和國民事訴訟法》執行判決存在困難；以及

(d) 內地法律制度的基本原則與香港特別行政區法律制度的基本原則不同。

具體意見

7. 下文各段簡述回應者就有關安排的不同要點提出的具體意見。

涉及金錢判決（諮詢文件第 7 段）

8. 有三位回應者建議，有關安排的範圍應擴大至包括其他類型的判決，例如強制令和強制履行令。

商業合約（諮詢文件第 8 及 9 段）

9. 雖然有兩位回應者支持在有關安排下對商業合約範圍的限制，但有兩位回應者建議，"商業合約"這一概念應有範圍更廣的定義（例如包括消費者事宜）。此外，一位回應者建議，"商業合約"的範圍須進一步澄清。

選擇法院（諮詢文件第 10 至 13 段）

10. 有四位回應者質疑是否有需要引入有效選定法院的條文，作為適用有關安排的先決條件。他們建議，有關安排也應包括宣判法院基於其他依據而具有司法管轄權的判決。

11. 有一位回應者認為，中級人民法院司法管轄權的金錢限額並不清楚，因此有關安排應載有一項條文，規定有關安排所涵蓋的中級人民法院的金錢限額。

12. 另一名回應者建議，由於訴訟各方會適當考慮尋求執行判決的代價和利益，因此可能無須將有關安排（就香港特別行政區法院而言）限於由區域法院或更高級法院作出的判決。

13. 此外，有一位回應者認為，有關安排並無週全處理立約各方通過合約選定內地法院的安排，與《中華人民共和國民事訴訟法》第二章的關係。後者就內地法院的司法管轄權作出規定。

14. 有幾位回應者也就有關安排所規定的選擇法院協議的細節提出問題。

終局判決（諮詢文件第 14 段）

15. 考慮到內地民事訴訟程序的制度，有四位回應者提到內地判決按照普通法原則是否最終及不可推翻的問題。在這四位回應者中，有一位堅持採用普通法的方法處理終局判決的問題，有一位回應者強調在有關安排中清楚界定“最終及不可推翻”的重要性。還有一位回應者表示須仔細研究這一問題，另一位則只是提及有關問題，並沒有就未來路向提出建議。

保障措施（諮詢文件第 15 段）

16. 有一位回應者對有關安排的建議保障措施表示滿意，並注意到這些保障措施與適用於其他司法管轄區的相若制度一致。另外，有七位回應者就保障措施的範圍及適用情況提出了不同意見（見下文第 17 至 22 段）。

17. 有一位回應者指出，雖然保障措施(b)及(c)是必需的（即判決是以欺詐方法取得，及判決是在違反自然公正原則的情況下取得），但難以在香港特別行政區法院席前證明有欺詐或不符合“自然公正原則”的情況（包括偏頗），從而取消執行一項內地判決。一位回應者認為必須就“自然公正原則”設下非常具體的定義。

18. 至於保障措施(d)（即判決是違背登記法院所在地的公共政策（或公共秩序）），有回應者關注到根據內地法律，“公共秩序”一詞看來範圍廣泛且有欠明確。有回應者建議，為施行有關安排，應就該名詞設下具體或有固定範圍的定義。

19. 至於保障措施(e)（即判決與登記法院先前的判決並不一致），考慮到內地並無一套判例制度，而有關安排只限於已選擇法院的案件，有回應者對是否需要這項保障措施存疑。

20. 至於保障措施(f)（即在作出判決的法律程序中，被告人沒有接獲足夠時間的通知），一位回應者要求界定“足夠時間的通知”，以避免出現意見分歧的情況。

21. 至於保障措施(g)（即登記法院認為判定債務人有權豁免受該法院管轄，或者認為他曾有權豁免受原判法院管轄，且沒有接受該原判法院管轄），有回應者希望知道有哪些人士可根據這個理由有權獲得豁免。

22. 此外，有一位回應者提出增補取消執行判決的理據，例如被告人並非訂立合約的指定一方，亦非該方的自願承讓人;以及兩個司法管轄區在法律責任的理由或判決金額的計算方法方面有重大不同之處，以致在執行這類判決，會導致不公平或不適當的情況出現。

其他

23. 香港大律師公會提出兩個可供選擇的方案供政府當局考慮：

(a) 與內地進行磋商，讓香港的判決得以在內地執行。這項安排只適用於區域法院或以上法院的民商事判決，並以與訟雙方曾在合約條款中指定以香港特別行政區法院為解決糾紛的唯一或其中之一的訴訟地者為限。相互執行判決安排的問題（即在香港特別行政區執行內地判決）將留待現時進行的內地司法制度改革取得成果後才處理；或

(b) 只與內地部分地區訂立相互執行判決安排。該等地區必須已有大量涉及外商直接投資的經濟活動，而在推行內地的司法制度的改革方面是較為進步的。

24. 回應者提出的其他要點，包括了執行判決的時限，有關安排應否有追溯效力，從執行判決所得的金錢難以從內地匯出，以及一些關於判決的登記和執行程序的細節。

政務司司長辦公室
行政署

律政司

二零零二年五月

附件 1

香港特別行政區與內地相互執行商事判決

回應者所表達意見的整體情況摘要

回應者	支持	其他
1. 香港澳洲商會	✓	
2. 香港中華廠商聯合會	✓	
3. 香港銀行公會	✓	
4. 香港大律師公會		表示有所保留，並提出另一些可供選擇的方案。
5. 香港總商會	✓	
6. 香港仲裁司學會	✓	
7. 香港國際仲裁中心	✓	
8. 國際商會-中國香港商務局	✓	
9. 香港律師會	✓	
10. 一名政府當局尚未徵得其同意披露其身份的回應者		提出了一些具體意見供當局考慮，沒有表示是否支持有關建議。
11. 一名政府當局尚未徵得其同意披露其身份的回應者		表達了其會員的不同意見：有很多會員正面支持，但亦有些會員認為須保持謹慎。
12. 一名政府當局尚未徵得其同意披露其身份的回應者		提出了一些具體意見供當局考慮，沒有表示是否支持有關建議。
13. 一名政府當局尚未徵得其同意披露其身份的回應者		提出了一些具體意見供當局考慮，沒有表示是否支持有關建議。

回應者	支持	其他
14. 一名政府當局尚未徵得其同意披露其身份的回應者	✓	
15. 一名政府當局尚未徵得其同意披露其身份的回應者	✓	
16. 一名政府當局尚未徵得其同意披露其身份的回應者		將於稍後提供意見。
17. 一名政府當局尚未徵得其同意披露其身份的回應者		表示有所保留。

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.
/al

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

SUBMISSION OF THE HONG KONG BAR ASSOCIATION

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 HKSAR Government's initiative to promote Hong 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

AIIFL/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 final and conclusive are real and serious problems that the HKSAR Government must address as <u>matters of pre-requisite</u> 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 HKSAR 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 14-115. 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(1) 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 the 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 judgment.
- 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 (ordre 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 Bar's 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 in 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 Beijing 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 previously 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

2005 年 1 月 26 日立法會會議的會議過程正式紀錄摘錄

~~河的挖掘情況時，也詳細審視這些條例，研究是否能直截了當地控告土地擁~~
有人。不過，這是較為複雜的問題，我們仍要與法律方面的人士研究這項《土地（雜項條文）條例》的規管範圍究竟有多直接。關於私人土地方面的問題，
~~我們還在研究當中。~~

主席：第三項質詢。

執行商事仲裁裁決及判決
Enforcement of Arbitral Awards and Judgements in Commercial Matters

3. **MS MARGARET NG**: *Madam President, regarding the enforcement of arbitral awards and judgements in commercial matters, will the Government inform this Council:*

(a) given that in response to the request made by the Panel on Administration of Justice and Legal Services (the AJLS Panel) in March last year for statistics on the number of applications for enforcement of Hong Kong arbitral awards on the Mainland, the Acting Deputy Solicitor General informed the AJLS Panel in July that a reply from the mainland authorities was still awaited, what statistics and information have been obtained so far, particularly in the up-to-date numbers of applications made, awards enforced as well as unsuccessful applications and the reasons for their being unsuccessful; and

(b) how the enforcement situation as reflected in the statistics and information in (a) above will affect the Government's position on the current negotiation on the reciprocal enforcement of judgements in commercial matters between the Hong Kong Special Administrative Region (SAR) and the Mainland?

SECRETARY FOR JUSTICE: Madam President,

(a) After the AJLS Panel meeting held on 22 March 2004, my Department approached the Supreme People's Court (SPC) for information on enforcement of SAR arbitral awards on the Mainland. The SPC advised us that, according to its records, the mainland Courts have not received any application for enforcing arbitral awards made in the SAR. This was not satisfactory. I therefore followed up with the SPC during my visit to Beijing in summer 2004, and again when the President of the SPC, Mr XIAO yang, visited Hong Kong in November 2004. I was informed on 19 January 2005 by a delegation headed by officials from the SPC visiting Hong Kong that they would be organizing a field study by visiting the Courts in Guangdong Province responsible for the enforcement of Hong Kong awards to study why there is no record of any application for the enforcement of Hong Kong arbitral awards.

In early 2002, my Department had jointly with The Law Society of Hong Kong (Law Society), the Hong Kong International Arbitration Centre, the Hong Kong Institute of Arbitrators and the Chartered Institute of Arbitrators — East Asia Branch, conducted a survey on the enforcement on the Mainland of arbitral awards made in Hong Kong. There were only a few responses, but none of them complained about any application for enforcement of a Hong Kong arbitral award having been refused by mainland Court after the implementation of the arrangement. Since the record of enforcement is not yet available from the Mainland, on 24 November 2004, the Department of Justice wrote to the local legal and arbitration professional bodies, as well as major chambers of commerce, for updated information on any non-enforcement of Hong Kong arbitral awards. To date, there has been no response indicating any case of non-enforcement. We hope that the field study of the SPC would produce useful results and would assist us in understanding the situation concerning enforcement. We would also consider exploring with Law Society and the local arbitration bodies the feasibility of a notification system whereby the members will inform us of any application for enforcement and the result of it, as well as the time taken for enforcement, and in the case of non-enforcement, the reason given for that.

Another possibility would be to require all applications to be submitted to the SPC for registration before dispatching them to local Court where the award is to be enforced. This possibility will be explored further after the results of mainland and local investigations are known, and with the agreement of relevant parties.

(b) Regarding the second part of the Honourable Margaret NG's question, under the principle of "one country, two systems", we have no right to interfere with the administration of justice on the Mainland. Since an agreement on arbitral awards is in place, if a Hong Kong arbitral award is not enforced on the Mainland, we are entitled to take the matter up with our counterpart and find out why. The lack of a record of enforcement or non-enforcement is discouraging, but we are in the course of finding out the reason for this. If there is evidence of non-enforcement, we shall take up the matter with the SPC.

The reasons we pursue an agreement under which certain Hong Kong judgements in commercial cases could be enforced on the Mainland are: (i) this would save the time and expense of bringing the action again on the Mainland; (ii) the Hong Kong party might not be able to comply with the rules of procedure concerning jurisdiction or proof of claim under the mainland law; and (iii) the other party to the proceedings may not have assets in Hong Kong but have assets on the Mainland. An agreement for reciprocal enforcement is certainly beneficial to a Hong Kong company or individual, and is a proposal supported by many in the business sector when we carried out the consultation in the spring of 2002. The proposal was also supported by the AJLS Panel before we started negotiations with the Mainland.

The Administration informed the AJLS Panel of the latest developments concerning the ongoing discussions at its meeting on 22 November 2004. The Administration reported at that meeting that since mid-2002, we had conducted three rounds of informal meetings with the mainland authorities to exchange views on the scope of the proposed arrangement, on the issue of finality, and on the technicalities involved in the recognition and enforcement of judgements in both jurisdictions. These meetings have served to enhance our understanding of the other side's legal and judicial systems, and the rationale underlying the proposed arrangement.

Discussions are still continuing, and indeed, other meetings were held on the 19 and 20 January 2005 and some progress has been made. It would be premature at this stage to predict when we may reach a mutually satisfactory and acceptable arrangement. Both the SAR and the mainland authorities recognize that the arrangement would need to be underpinned by local legislation in the SAR before it may take effect in Hong Kong. We will report to the AJLS Panel when there is any major development.

MS MARGARET NG: *Madam President, the short answer is that there is no record of any enforcement on the Mainland of arbitral awards made in Hong Kong. In spite of exhaustive research, there is still no record. My question is: This being the case, what is the basis for any confidence that the enforcement of judgements will be truly reciprocal? What would be the effect if it is uncertain whether Hong Kong judgements are enforced on the Mainland while mainland judgements are regularly enforced in Hong Kong?*

Madam President, I just would also like to slightly clarify the point made in the Secretary's answer about the support of the AJLS Panel — there were also a lot of reservations expressed.

SECRETARY FOR JUSTICE: Madam President, it is true that there has been no record or no available record for enforcement of arbitral awards on the Mainland, but likewise, there has been no evidence of non-enforcement of arbitral awards. Actually, that is what puzzled us and we are trying to find out what exactly the position is. If, according to our local investigation, there is indeed any incident at all of non-enforcement, the Department of Justice would be glad to take it up with the SPC, and if the Honourable Margaret NG has any evidence of that, or any incident of a case in which the Hong Kong award is not enforced on the Mainland, I would be glad to take it up.

主席：吳靄儀議員，你的補充質詢是否未獲答覆？

吳靄儀議員：*主席女士，司長完全沒有回答我補充質詢的第二部分，即是既然沒有這樣的情況，內地的裁決便一定會在香港執行，但我們卻不知道究竟香港的裁決是否可在內地執行。有鑒於此，我們還有何理由繼續要求要做到這項協議呢？*

律政司司長：主席女士，正如我剛才說，我們沒有記錄香港的仲裁裁決在內地執行的情況，但同樣地，我們亦沒有證明指香港的裁決不能在內地執行。至於現時所建議有關兩地裁決相互執行這項協議有何好處，我在主體答覆第(二)部分已有闡述，我不再重複。現時談判中的建議是希望給予香港商人多一個選擇，但卻是局限於在商事案件糾紛發生之前或之後，雙方就哪一個司法管轄區的法院有作出裁決達成協議，然後才可在另一個司法管轄區執行。因此，如果香港商人對內地司法制度缺乏信心、對裁決的執行缺乏信心，那麼他便無須利用這安排。這個安排只是給予他多一個渠道執行裁決而已。

湯家驊議員：*主席，相互執行裁決及判決，是基於相互關係的原則，英文是 mutuality。我想問一問政府，在未作出這些安排前 — 是之前，不是之後 — 政府有否作出過任何研究，看看有多少香港的訴訟人在內地執行或試圖執行裁決，又或在申請裁決及判決時因遇到困難而須有這些安排？*

律政司司長：主席女士，在未有安排之前，香港的裁決在內地的法院是無法執行的，所以我們沒有辦法進行這項調查。

余若薇議員：*主席，如果內地有仲裁要在香港執行，是一定要透過香港的法庭。所以，如果我們詢問香港的法庭，司法機構是一定可以告訴我們一個數字，指出究竟有多少宗內地仲裁在香港執行。現時，我們是問有關內地的情況。主體質詢本來是問：我們於去年 3 月，在司法及法律事務委員會已曾問及，在 7 月時又再追問，但當時也表示是沒有回覆。現在已是 1 月，而司長在主體答覆內有兩處地方也說這種情況不令人滿意及失望等。主席，我想問司長，可否向我們解釋為何需時這麼久，但卻依然得不到一個令人滿意的答覆呢？*

律政司司長：主席女士，我的困難是我不知道為何，甚至連最高人民法院也不知道為何，所以才要進行實地調查。最高人民法院表示在本月底會進行調

查，所以我們希望等一等，看看結果是怎樣。不過，議員可以看到，我們根本不接受它這個回覆。我們在收到答覆後，曾與最高人民法院提出這件事，而當最高人民法院院長在 11 月來港時，我們又再提出這件事，但是否說來說去也沒有結論呢？我覺得他們在 11 月 19 日告知我們他們願意作實地調查，已是一個較積極的回應。我希望這項實地調查能取得成果。

MR JASPER TSANG: *Madam President, in her answer, the Secretary mentioned a field study to be conducted by the SPC in Guangdong about the enforcement of Hong Kong arbitral awards. Can I ask if the Secretary is aware of the details of this field study, including when it is going to take place, and what specific questions will be asked?*

律政司司長：主席女士，我們是在上一個星期才知道有這件事，即會作實地調查。到目前為止，我未有收到任何資料。我只知道廣東省中級人民法院負責執行仲裁裁決，他們會到廣東省進行這項調查。至於我們曾詢問最高人民法院的問題，包括：第一，自安排執行以來，有多少宗案件涉及當事人向內地法院提出申請執行香港仲裁裁決；第二，執行申請的成功率為何；第三，如申請被拒，所涉及的原因為何；第四，在獲法院予以執行的申請當中，能成功執行裁決的比例大致為何；第五，如當事人未能成功執行裁決，所涉及的原因為何。主席女士，這是我們在 2004 年 4 月 8 日致最高人民法院的信件中所提出的問題。

梁家傑議員：*主席，司長在主體答覆第(二)部分第二段開列了 3 個理由，說明為何要繼續商討有關相互執行商事裁決。當然，對香港商人來說，這一點是有利的，但由於這是相互執行，所以一定要考慮到內地的判決在香港執行的情況。我想司長也知道，香港有很多商人對於這方面也有保留。司長在主體答覆最後一段說，"有關的安排須建基於香港特區的法律才可在香港實施。如有任何重大發展，我們會向司法及法律事務委員會匯報。"請問司長，會否真的在與內地洽談出結果後，才知會該事務委員會呢？如果這樣，便會出現很尷尬的情況，那便是事務委員會如果提出一些意見，便無法在討論過程中向內地轉達。請問會否出現這種情況，即所達致的結論，可能是立法會不支持的呢？*

律政司司長：主席女士，正如我在主體答覆說，有關兩地相互執行商業判決這種安排，對商人來說是有一個好處，亦給了他們多一個選擇。如果沒有這種安排，他們可能直情不可把香港的裁決在內地執行，此外，他們在內地是否能夠提出起訴，也是涉及司法管轄權的問題。所以，我們認為這種安排對香港商人是有利的。至於梁家傑議員擔心會否在我們達成一項協議後，立法會覺得不滿意而不批准，或是在立法上得不到支持，其實律政司一直以來也有就這問題向司法及法律事務委員會報告，在聽取了他們的意見後，把他們的建議向對方提出。所以，我們亦會考慮梁家傑議員剛才的意見。如果我們所達成的任何協議得不到立法會支持，甚或不能通過成為法律，我們也是沒有辦法執行的。在商討較成熟時，我們一定會向司法及法律事務委員會匯報。

主席：本會就這項質詢已用了超過 18 分鐘，最後一項補充質詢。

何俊仁議員：*主席，司長在主體答覆中提到於 2002 年年初，律政司曾聯同香港律師會、香港國際仲裁中心等就香港仲裁裁決在內地執行的情況進行調查，收到的回應甚少。我想問一問司長，從這些甚少的回應中，司長得到甚麼資料及結論呢？*

律政司司長：主席女士，在 2002 年，經過香港律師會統籌的工作小組曾去信 18 間國際有名的律師事務所，查問他們有關執行的情況，但所有回覆均沒有提供特別例子，說明裁決為何不能執行。他們向我們提供的資料，主要是說當事人沒有資料，不知道債務人在當地的資產屬於何種形式或債務人居於何處。因此，這種執行上的困難跟香港執行裁決的困難是沒有分別的。如果申請人不知道債務人的資產在哪裏，便是不能執行。在大多數收回來的信件中，均表達了一個普遍的顧慮，擔心基於某種問題令裁決不能執行。他們的擔心包括：有保護主義、有利用關係、有地方法院不清楚執行的程序，但這些也只是律師事務所的擔心，而並非有實例指因為保護主義或貪污等，令裁決無法執行。他們並沒有向我們提供有關的實例。

附錄IV

香港特別行政區與內地間相互執行有關商業事宜的判決

有關文件

立法會文件編號		**文件**
政府當局提供的文件		
CB(2)722/01-02(04)	——	政府當局就"在香港特區執行內地判決，以及香港特區與內地交互執行判決安排的好處；以及關於司法管轄權及民商事外國判決的海牙公約初稿的選擇訴訟地條文，以及這些條文對交互執行判決安排的影響"提供的文件
CB(2)1431/01-02(01)	——	行政署長於2002年3月20日發出的函件，隨函夾附了有關"香港特別行政區與內地相互執行商事判決"的文件
CB(2)2020/01-02(01)	——	行政署長就"諮詢結果"提供的文件
CB(2)248/04-05(05)	——	政府當局所提供有關"香港特別行政區與內地相互執行商事判決"的文件
意見書		
CB(2)248/04-05(04) *(只備中文本)*	——	香港大律師公會會員羅沛然先生提交的意見書
司法及法律事務委員會會議的紀要		
CB(2)955/01-02	——	2001年12月20日會議紀要
CB(2)2780/01-02	——	2002年5月27日會議紀要
CB(2)386/04-05	——	2004年11月22日會議紀要