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For discussion
On 27 February 2006

LegCo Panel on Administration of Justice and Legal Services

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

PURPOSE

Following this Panel's meeting on 24 October 2005, the Administration has further discussed with the Mainland authorities and has also held discussions with the legal professional bodies on the proposed arrangement for reciprocal enforcement of judgments (REJ) in commercial matters between the HKSAR and the Mainland. This paper informs Members of the latest position.

BACKGROUND

2. The Administration first briefed the Panel on 20 December 2001 on the suggestion of establishing an arrangement for REJ with the Mainland (the Arrangement). The Arrangement will benefit the Hong Kong and the international communities that are doing business with the Mainland. They will be able to designate the courts of the HKSAR as the forum for settlement of disputes arising from commercial contracts with Mainland parties, on the basis that HKSAR courts judgments made in their favour can be recognized and enforced in the Mainland where the judgment debtor keeps his assets. This will also be conducive to the development of Hong Kong as a centre for dispute resolution in commercial cases since parties will have an option, which does not exist currently, to apply for enforcement of a money judgment in the other jurisdiction without having to go through the time-consuming and costly litigation process as is the case now. There is no doubt that a simple and effective enforcement mechanism is one of the key considerations for investors in deciding where to resolve their disputes.

3. The Administration proposed that the Arrangement should have limited application to begin with. The scope of the Arrangement might be

expanded in the light of actual experience gained in running the initial scheme. The initial proposal was that the Arrangement should cover only "*money judgments given by a court of either the Mainland (at the Intermediate People's Court level or higher) or the HKSAR (at the District Court level or higher) exercising its jurisdiction pursuant to a valid choice of forum clause contained in a commercial contract*" ("the initial proposal").

4. The main elements of the initial proposal were –

(a) judgments other than money judgments, such as orders for specific performance or injunction, would not be covered;

(b) "commercial contract" refers to a contract in which the parties are acting for the purposes of their respective trades or professions, excluding contracts relating to matrimonial matters, wills and successions, bankruptcy and winding up, lunacy, employment and consumer matters, etc;

(c) the relevant choice of forum clause should be a valid one;

(d) in the case of the HKSAR, the Arrangement should cover judgments given by the District Court or higher courts (then amounted to $50,000 or above) and, in the Mainland, judgments given by the Intermediate People's Courts or higher courts;

(e) the Arrangement should only apply to a judgment that is final and conclusive; and

(f) in line with the common law, recognition and enforcement of judgments under the Arrangement should be refused on grounds similar to those stipulated under section 6 of the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319)[1] against registration.

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[1] The proposed grounds for refusal of enforcement are :

(1) the judgment is wholly satisfied;
(2) the judgment was obtained by fraud;
(3) the judgment was obtained in breach of natural justice;
(4) enforcement of the judgment would be contrary to public policy (order public) in the place of the registering court;
(5) the judgment is inconsistent with a prior judgment of the registering court;
(6) the judgment was obtained in proceedings at which the defendant was not given sufficient notice; and
(7) 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.

5. In March 2002, the Administration conducted a consultation exercise to seek the views of this Panel, the legal professional bodies, chambers of commerce and trade associations on the proposal. The Administration reported to the Panel in May 2002 the outcome of the consultation exercise. The majority of the respondents indicated support for the initial proposal. The few consultees that had expressed reservations about the initial proposal in view of the differences between the two legal systems had observed that–

(a) judgments in civil and commercial matters rendered by the People's Court in the Mainland had 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 were matters of concern; and

(c) the execution process in the Mainland under the Civil Procedure Law of the PRC was fraught with difficulties.

6. The Administration then launched informal discussions with the Mainland authorities in July 2002, bearing in mind the above observations. The two sides held several rounds of discussions and matters that are subject to different legal principles under the two legal systems have been discussed at great length, these including the scope of the Arrangement, the level of courts which judgments are to be covered, finality of judgment and safeguards.

PROGRESS

7. Pursuant to the discussions, the Administration's revised proposal is that the proposed Arrangement should apply to "**money judgments of commercial cases given by specified courts of either the Mainland or the HKSAR made pursuant to a valid exclusive choice of court agreement in writing**" ("the revised proposal"). A comparison between the initial proposal and the revised proposal is set out in the paragraphs below.

Scope

8. As in the initial proposal, the revised proposal applies to commercial cases.

9. Regarding some Members' comments that the initial proposal was for the parties to opt in for the Arrangement, as can be seen in paragraph 4 above, there has never been suggestion that the parties should be required to expressly opt in for the Arrangement to apply in respect of the judgments concerned. This notwithstanding, the Administration's initial proposal limited the Arrangement to judgments of the HKSAR or Mainland courts where the parties to a commercial contract have entered into a choice of court agreement. The deference to a choice of court agreement was a reflection of the respect accorded to the autonomy and freedom of parties to commercial contracts. The Arrangement would not be applicable to judgments where parties have not made a prior express agreement on choice of court.

10. It should be noted that a choice of court agreement, whether exclusive or otherwise, is not a pre-condition for an application for registration of foreign judgments under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap.319). Members may wish to note that the Hague Convention on Choice of Court Agreements (which provides for uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters among member states) has recently been concluded. While the Convention is predicated on a choice of court agreement, it is not necessary for the parties to a choice of court agreement to expressly opt in the enforcement regime under the Convention.

Choice of court

11. The revised proposal is more restrictive than the initial proposal. Under the revised proposal, the Arrangement will only apply if the parties concerned expressly agreed in writing to designate a court of the Mainland <u>or</u> the HKSAR to have <u>exclusive</u> jurisdiction for resolving any dispute. The requirement for adopting an exclusive choice of court clause by the parties aims to minimize the risk of parallel proceedings being instituted in the courts of both places. As each jurisdiction has its own laws, litigation rules and procedures on enforcement of judgments which are quite different from the other, it is difficult if not impossible to agree on a common set of principles to resolve problems brought by parallel litigation. The two sides hence agreed that an exclusive choice of court agreement between the parties is a preferred option as this gives certainty to the scope of judgments covered.

Finality

12. As set out in paragraph 4 above, it has been the Administration's initial proposal that the Arrangement should only apply to judgments that are final and conclusive. Under the revised proposal, we have gone further to agree on a set of special procedures (paragraph 15) to address the concerns (paragraph 13) about the requirements of finality.

13. There were instances that the HKSAR courts ruled that relevant judgments of the Mainland courts were not final and conclusive for the purpose of enforcement in Hong Kong. In *Chiyu Banking Corp. Ltd v. Chan Tin Kwun* [1996] 2 HKLR 395, a party had initiated the protest procedure against the Mainland judgment sought to be enforced in Hong Kong which could result in the retrial of the case by the original trial court. As a result, Cheung J (as he then was) held that the relevant Mainland judgment failed to satisfy the common law requirements of finality and conclusiveness of a judgment. In the said case, a stay of the Hong Kong enforcement proceedings was ordered pending the outcome of the protest procedure. Cheung J's judgment was approved by the Court of Appeal in subsequent cases, e.g. *Lam Chit Man (trading as Yet Chong Electronic Co. v. LAM Chi-To* (unreported, 18 December 2001, CACV 354/2001).

14. However, in a recent Court of Appeal case *李祐榮 v. 李瑞群* (CACV 159/2004), Chung J (dissenting) considered that it was probable, in certain instances, that a retrial of a case could be ordered by a court in some common law jurisdictions including Hong Kong. Hence, the fact that a Mainland judgment could be subject to an order of retrial should not be automatically taken as the ground for finding the judgment not "final and conclusive". A copy of the said case is annexed as Appendix I (Chinese only).

15. The set of special procedures to address the common law requirements of finality, which will be set out clearly in the Arrangement, are as follows –

(a) only a final judgment will be recognized and enforced. Under the revised proposal, "a legally enforceable final judgment" shall carry the meaning of –

(i) in the Mainland

- ◆ any judgment of the Supreme People's Court;
- ◆ any judgment of first instance made by a Higher or Intermediate People's Court or a designated Basic Level People's Courts which has been authorized to exercise jurisdiction on civil and commercial cases of first instance involving foreign parties, or Hong Kong, Macao and Taiwan parties from which no appeal or protest is allowed according to the law or in respect of which the time limit for appeal or protest has expired and no appeal or protest has been filed;
- ◆ any judgment of second instance; and
- ◆ any judgment made in accordance with the trial supervision procedure by bringing up the case for trial by a people's court at the next higher level.

(ii) in the HKSAR

A judgment of the District Court or above.

(b) where an application to enforce a Mainland court judgment has been made in Hong Kong and the trial supervision procedure calling for a retrial is subsequently invoked, the case will not be retried by the original trial court but will have to be brought up for a retrial by a higher court. This is to ensure that the People's Court which pronounced the original judgment will not have the opportunity to vary or abrogate the very judgment of which enforcement is sought;

(c) a certificate of "final judgment" issued by the relevant Mainland court must be submitted to the Hong Kong court by the person seeking enforcement; and

(d) the Supreme People's Court will issue a judicial interpretation to set out the above special retrial procedures applicable to Mainland judgments sought to be enforced in Hong Kong. In addition, an internal explanatory document on the new procedure will be drawn up and distributed by the Supreme People's Court before the Arrangement comes into effect.

16. The Administration considers that the above special procedures are generally in line with the requirements laid down by Hong Kong courts for determining the finality and conclusiveness of foreign judgments. In order to give effect to the proposed Arrangement, the Administration is minded to provide in the implementing legislation that only Mainland judgments which are considered final in accordance with the above special procedures will be enforced in Hong Kong. Members may wish to note that under the recently concluded Hague Convention on Choice of Court Agreements which is now open for signature by all states including China, whether a judgment given by a court of a Contracting State is enforceable in other Contracting States shall be determined by the consideration of whether the judgment is enforceable in the State of origin. The notion of "final judgment" or "finality" has not been adopted by the Convention for the reason that there being no uniform meaning of the notion in the civil and common law jurisdictions.

Level of Courts

17. The Administration's initial proposal was that the Arrangement would cover Mainland judgments given by courts at the Intermediate People's Court level or above. This proposal took into consideration that these courts have the jurisdiction to deal with foreign-related civil and commercial disputes. During the discussion with the Mainland authorities, the Administration became aware that, in pace with the economic development in the Mainland, certain Basic Level People's Courts have been designated to exercise jurisdiction over foreign-related civil and commercial cases, some of which may be allowed to adjudicate claims of up to RMB 1 million, generally on par with the District Court of the HKSAR.

18. The Administration further noted that, in many provinces, autonomous regions and municipalities directly under the Central Government, a good proportion of foreign-related cases were dealt with by the Basic Level People's Court, which could amount to 50% of the total number of foreign-related civil and commercial matters dealt with in the relevant region. Many of the designated Basic Level People's Court are situated in provinces or municipalities where Hong Kong businesses have set up operations. In view of this development, the Administration accepts the Mainland side's counter-proposal that judgments made by the designated Basic Level People's Courts should also be covered under the revised Arrangement. A list of the

Basic Level People's Courts with jurisdiction to adjudicate foreign-related civil and commercial cases provided by the Mainland authorities is attached at Appendix II.

"Trial Points"

19. Our initial proposal was that the Arrangement should cover the whole of the Mainland. This is maintained in the revised proposal. We reported to the Panel at the meeting on 24 October 2005 the Mainland authorities' explanation for not agreeing to the suggestion that initially certain better developed cities in the Mainland having proven trade or economic activities with the HKSAR should be selected as "trial points" for the implementation of the Arrangement and that the Arrangement may be extended to other cities only upon the successful implementation of such a trial scheme in due course. Members considered that the Administration should further pursue with the Mainland authorities on this suggestion.

20. The Administration has since further discussed this suggestion with the Mainland authorities. The latter reiterate their position giving the following reasons, which we consider acceptable:

(a) the Arrangement would be implemented in the Mainland through the promulgation of regulations or judicial explanation which shall be applied to the whole of the Mainland. It would not be feasible or practical to exclude certain parts of the Mainland from the uniform application of the regulations or judicial explanation;

(b) there is little established or objective basis for selecting "trial points";

(c) the "trial points" arrangement, if implemented, may impact on the distribution of investments in the Mainland. The areas selected as "trial points", as compared with the other areas, may attract more foreign investments, which may bring about or reinforce uneven regional development in the Mainland;

(d) the "trial points" arrangement may also exacerbate forum shopping. Parties who seek to benefit from the Arrangement may create some arbitrary connections between their contracts and the "trial points" so that their contractual disputes will be adjudicated by the courts in these areas; and

(e) if the application of the Arrangement were to be confined to "trial points", it would render the Arrangement ineffective as it would significantly reduce its already limited scope.

Safeguards

21. As set out in paragraph 4(f), our initial proposal was that safeguards against recognition and enforcement of judgments should be similar to the criteria adopted in Cap. 319. This is still maintained in the revised proposal. Taking into account the differences between the two legal systems, refusal to recognise and enforce a judgment of the other side should be based on the following grounds –

(a) the jurisdictional agreement (choice of court clause) is invalid in accordance with the law of the place where enforcement is sought;

(b) the judgment has been fully executed;

(c) the court of the place where enforcement is sought has exclusive jurisdiction over the case according to its law;

(d) the losing party has not been given sufficient time to defend his case;

(e) the judgment has been obtained by fraud; or

(f) the court of the place where enforcement is sought has made a prior judgment on the same cause of action.

22. In addition, the court shall refuse an application for recognition and enforcement of a judgment if –

(a) in the case of the People's Court of the Mainland, it considers that the enforcement of the HKSAR judgment is contrary to the social and public interests of the Mainland; or

(b) in the case of the HKSAR court, it considers that the enforcement of the Mainland judgment is contrary to the public policy of the HKSAR.

Application

23. Under Mainland laws, the time limit stipulated for application to enforce a Mainland or a foreign judgment is rather restrictive, i.e. one year if both or one of the parties are natural persons and six months if both parties are legal persons or other organisations. To ensure the relevant judgment could

be timely enforced, it is agreed that an application for recognition and enforcement may be made simultaneously to the courts of both jurisdictions.

DISCUSSIONS WITH THE LEGAL PROFESSION

24. The Administration met with Law Society of Hong Kong on 14 December 2005 and the Hong Kong Bar Association on 13 January 2006 for their views on the revised proposal. The Law Society indicated support to the revised proposal and the Bar Association expressed no in-principle objection.

WAY FORWARD

25. The Administration considers that the revised proposal should be accepted for establishing an arrangement for REJ between the HKSAR and the Mainland. We note the concerns raised by some stakeholders regarding finality, quality of justice and execution process in the Mainland. We consider that the revised proposal has adequately addressed these concerns given that:

(a) the Arrangement is of a restricted scope. It covers only judgments on disputes arising from commercial contracts only;

(b) the Arrangement is only applicable where the parties who, on the basis of freedom of contract, made a prior express agreement to submit to the exclusive jurisdiction of the courts of the Mainland or Hong Kong;

(c) any application for enforcement of a Mainland judgment in Hong Kong, will be carefully considered by the Hong Kong courts according to the applicable laws including all the safeguards before deciding whether the application should be granted or refused; and

(d) any problems encountered in implementing the proposed Arrangement can be taken up and resolved by the Supreme People's Court and HKSAR Government through consultation.

26. We intend to reach agreement on the Arrangement with the Mainland as soon as possible. The Arrangement will only become effective when the HKSAR has completed the relevant legislative procedures AND the

Mainland has promulgated a judicial interpretation to give effect to the Arrangement. The Administration will consult the LegCo again in the context of the detailed legislative proposals.

Department of Justice

Administration Wing
Chief Secretary for Administration's Office

February 2006

CACV 159/2004

香港特別行政區
高等法院上訴法庭
民事司法管轄權
民事上訴
案件編號：民事上訴案件 2004 年第 159 號
(原高等法院民事訴訟 2003 年第 1075 號)

原告人 李祐榮

與

被告人 李瑞群

審理法官：高等法院上訴法庭法官張澤祐
高等法院上訴法庭法官袁家寧
高等法院原訟法庭法官鍾安德

聆訊日期：2005 年 10 月 25 日
判案書日期：2005 年 12 月 9 日

判案書

B C D E F G H I J K L M N O P Q R S T U V

上訴法庭法官張澤祐：

案情

1. 本案的原告人及被告人是兄妹關係，雙方曾經在內地清遠市合作經營工廠，根據原告人所說雙方其後同意工廠由被告人經營，而被告人需要給予原告人 $199,000 作為補償。原告人指由於被告人沒有履行協議給予他有關款項，他於是在 2002 年 2 月 27 日在清遠市清城區人民法院（‘清城法院’）向被告人索償該筆款項。被告人在該宗案件的答辯理由是有關的工廠是她獨立投資及經營的。清城法院於 2002 年 5 月 18 日對案件作出裁決，判原告人勝訴。

2. 被告人不服判決，向清遠市中級人民法院（‘清遠中院’）提出上訴。該法院於 2002 年 9 月 11 日駁回被告人的上訴及維持清城法院的原判。

3. 被告人仍不服清遠中院的判決，向廣東省高級人民法院（‘廣東高院’）提出民事申訴。廣東高院命令清遠中院對案件提出覆查。經覆查後清遠中院於 2002 年 12 月 28 日駁回被告人的申請。

B C D E F G H I J K L M N O P Q R S T U V

B C D E F G H I J K L M N O P Q R S T U V

4.　原告人在清遠中院頒發 2002 年 9 月 11 日的判決後，在同年 10 月 30 日向香港區域法院提出申索，要求被告人償還 $199,000。原告人是根據清城法院 2002 年 5 月 18 日的判決向被告人提出索償。原告人並於同年 11 月 28 日提交傳票，要求區域法院以簡易程序判他勝訴。

5.　區域法院於 2003 年 2 月 19 日將案件轉交高等法院原訟法庭審理。原訟法庭聆案官於 2003 年 12 月 9 日駁回原告人的申請。原告人提出上訴。原訟法庭暫委法官陳江耀於 2004 年 5 月 25 日判原告人上訴得直，陳法官根據原告人的再經修訂的申索陳述書，判原告人可獲 $192,861 連利息。

6.　被告人就陳法官的命令向上訴法庭提出上訴。

外地判決

7.　原告人雖然已在清城法院取得判決，但他仍可以根據在清城法院所提出的訴因即被告人沒有根據協議支付有關的補償作為在向香港法院提出訴訟的訴因。他亦可以根據清城法院的判決作為向本港法院提出訴訟的訴因。若果他根據清城法院的判決作為訴因，他必須證明有關的判決是一項最終及不可推翻的判決。由於《*外地判決（交互強制執行）條例*》（香港法例第 319 章）不適用於內地法院的判決，故此原告人不可以根據這條例登記有關的判決及在香港執行這個判決。

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<u>**最終及不可推翻的判決**</u>

8. 由於原告人所持的訴因是清城法院的判決，本上訴的重要爭議點是這判決是不是一項最終及不可推翻的判決。雖然原告人在經修訂的申索陳述書內指出有關的判決是最終及不可推翻的判決，但雙方從未在陳法官席前就這議題作出陳述。被告人在陳法官席前是沒有律師代表的。由於本案涉及公眾重要性而被告一方並沒有律師代表，因此上訴法庭邀請了法庭之友袁國強資深大律師協助法庭及於上次聆訊時批准雙方提交專家證人的證供。原告人提交了一份清華大學王亞新法學教授（民事訴訟法學）的法律意見書。被告人說由於她財政有困難，故此沒有聘請專家提供意見。

9. 若果一名原告人根據外地判決作為香港訴訟的訴因，他需負上舉證責任去證明有關的判決是最終及不可推翻的，而有關的責任包括提交外地法律專家意見書來支持有關的申請。本案的原告人在原訟法庭審訊時並沒有提交任何內地法律專家意見書去支持有關的申請。

<u>***Nouvion v. Freeman***</u>

10. 香港法庭在考慮香港以外法院的判決是不是一項最終及不可推翻的判決時是根據適用於香港的國際私法原則。本港適用的案例是英國上議院法庭 *Nouvion v. Freeman* [1889] 15 App. Cas. 1 一案。Lord Herschell 法官在該案有以下的裁決：

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“ 法官閣下，原告人在請求我國法院承認一個外國判決時提出，藉著該外國判決他就有充分的權利取得判決，以執行其追討債務的命令。本案唯一有爭議的問題是，在上述的情況下，在我國法院，該外國判決是否足以令原告人有權以他作為已故的衡特信先生(Mr. Henderson) 之債權人的身份取得執行償債命令的判決。

法官閣下，毫無疑問，現時我國法院會承認外國判決的效力。法院要承認這樣一個判決判的效力，並把它視作具有足以確定該債項的效力，究竟是基於什麼原則？這無需查究，依賴的是在*威廉對鍾斯*一案中佰萊男爵 (Parke B.) 及愛特信男爵 (Alderson B.) 在闡釋有關法律時提出的觀點：“ 當有司法管轄權的法院在裁定某人欠另一人若干數額的款項時，給付該款項的法律責任便隨之而生，[債權人]可以以此責任為訴因提起債務之訴從而執行該判決。 ” 然而，上訴人的代表大律師已承認，亦必須承認，會獲承認的判決之必具條件法律已有所規定，它必須是通過有司法管轄權的法院作出裁決所產生的，並且是最終及不可推翻之判決。一個外國法院作出的判決在頒布時若僅僅是了結並且最終地解決了某個法律程序中的爭議，這事實本身並不足以使該判決成為一個最終的、不可推翻的並且可藉以在我國法院請求執行的判決。

法官閣下，我認為，若要確定原審國法院作出的是這樣的一個判決，就必需顯示這判決在該法院作出時，它已不可推翻地、最終地及永久地確定了該債務的存在，並可請求我國法庭將該債務承認為不可推翻的證據，進而承認為與訟各方之間的既判事實。若這判決在該外國法院作出時並非一個不可推翻的判決 ，以致縱使有該判決，與訟各方日後仍可在該法院就債務存在與否進行爭辯，而法院通過恰當的法律程序，經審裁後又可能宣判債務並不存在，不須繳付，那麼，我不認為這種判決可以算是一個已最終及不可推翻地證明了債務存在的判決。

我認為我國法院在執行外國判決時應遵從以下原則：在有司法管轄權的法院中，無論與訟人有否充分利用甚或放棄他們的任何權利，只要與訟各方均可按固有的程序就案情的是非曲直全

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> 面進行爭辯，法院經審裁後判定了某項債務或責任的存在及作出了最終裁決，並且各方日後不得在該法院提出爭議，而只能通過在上級法院進行上訴時才能提出質疑。在這樣一種情況下才可說，我們因認同該外國法院的裁決而願意承認該判決事實已確定了債項或責任的存在。但就本案的情況而言，請求本院審裁是否執行的是一個較近於確定債項或責任不存在的判決，而該外國法院日後仍然可能宣告該債項或責任並不存在，對我來說我國法院執行外地判決的最基本原則並不足以處理這情況。... ...法官閣下，還有一種說法是，這樣的一項判決，縱使有待上訴，它實在與一個在我國法院經過訴訟而取得的判決相似，我認為兩者之間有著至關重要的區別。雖然仍有待上訴，但有司法管轄權的法院已最終及不可推翻地裁定了該債務的存在；因爲就算上訴權的賦予使該決定可能被上級法院推翻，這裁定畢竟是最終及不可推翻的。在訴訟展開時存在着一項判決，該判決在未被上級法院干預之前必須被假設為有效判決，並且必須假設其已不可推翻地確定了當事人欲在本國追討的債務的存在 ... ...”

11. 該案的原告人是引用西班牙法院頒布的判決作為他在英國法院向被告人提出申索的訴因。該案顯示西班牙訴訟法律程序有兩種:首先原告人可以根據‘簡易程序’獲得一項‘remate 判決’。除非該判決在上訴時被推翻或更改，它是一項最終的判決。但敗訴的一方亦可以在同一法院引用‘普通程序’就同一議題提出訴訟。有關的判決是‘plenary （正規的判決）判決’。這判決會令法庭之前頒布的‘remate 判決’無效。另外，在‘普通程序’勝訴的一方亦可向對方追討之前因在‘簡易程序’敗訴而履行‘remate 判決’支付給對方的款項。

12. 該案的原告人是根據一項‘remate 判決’作為在英國法院提出訴訟的訴因。英國上議院法庭指這裁決不是一項最終及

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不可推翻的裁決。該法庭亦指出就算原告人未能在英國執行這外國判決也不會構成任何不公義的情況，因為這名原告人是可以依賴原本的訴因在英國興訟。但若果這名原告人是依賴外國判決作為在英國提出訴訟的訴因，他必須符合有關的條件。

內地民事訴訟

13. 簡單來說，內地民事訴訟實行兩審終審制度，這是指一件民事案件經過兩級法院的審判，案件的審判即宣告終結的制度。根據這制度，一件民事案件經第一審人民法院審判後，當事人如果不服，有權依法向上一級人民法院提出上訴，上一級人民法院對上訴案件審理後作出的判決和裁定是終審判決、裁定當事人不得再提出上訴，見：譚兵主編《民事訴訟法學》第 115-116 頁。

‘審判監督’制度

14. 雖然根據這個制度已審的判決是終審的判決，但根據《*民事訴訟法*》第 16 章，內地同時實行‘審判監督’制度，以下三個途徑可啟動有關的制度：

1. 案件的當事人可根據《*民事訴訟法*》第 178 條，在認為已經發生法律效力的判決有錯誤時，可向原審人民法院或者上一級人民法院申請再審。《*民事訴訟法*》第 179 條

規定，若果當事人的申請符合下列情況之一，人民法院應當再審：

(1) 有新的證據，足以推翻原判決、裁定的；

(2) 原判決、裁定認定事實的主要證據不足的；

(3) 原判決、裁定適用法律確有錯誤的；

(4) 人民法院違反法定程序，可能影響案件正確判決、裁定的；

(5) 審判人員在審理該案件時有貪污受賄，徇私舞弊，枉法裁判行為的。

人民法院對不符合前款規定的申請，予以駁回。

2. 根據《*民事訴訟法*》第 177 條，各級人民法院院長對該院已經發生法律效力的判決發現確有錯誤，認為需要再審的，應當提交審判委員討論決定。另外，最高人民法院對地方各級人民法院已經發生法律效力的判決及上級人民法院對下級人民法院已經發生法律效力的判決，發現確有錯誤的，有權提審或者指令下級人民法院再審。

3. 根據《*民事訴訟法*》第 185 條，最高人民檢察院對各級人民法院已經發生法律效力的判決，上級人民檢察院對下級人民法院發生法律效力的判決，發現有下列情況之一應當按照審訊情序提出抗訴：

(1) 原判決、裁定認定事實的主要証據不足的；

(2) 原判決、裁定適用法律確有錯誤的；

(3) 人民法院違反法定程序，可能影響案件正確判決、裁定的；

(4) 審判人員在審理該案件時有貪污受賄，徇私舞弊，枉法裁判行為的。

另外，地方各級人民檢察院對同級人民法院已經發生法律效力的裁決、裁定，發現有前款規定情形之一，應當提請上級人民檢察院按照審判監督程序提出抗訴。

制度的影響

15. 本席了解上述的審判監督制度是因應國情需要及實踐‘有錯必糾’原則而設立：見梁寶儉主編《人民法院改革理論與實踐》,《論審判監督制度的改革》作者曾秋山及王文忠。但同時，若一名原告人在香港法院依賴內地法院的判決作為在本港提出訴訟的訴因，正因這個審判監督制度而產生內地判決是否可視為最終及不可推翻判決的爭議。這就是由於有關的制度是超越了敗訴一方可就判決提出上訴的一般上訴制度。該審判監督制度賦予（1）當事人（2）法院本身及（3）另一個權力機關（即檢察院）權力去啟動程序令案件重新審理，經審裁後法院又可能宣判原審時裁定的債務並不存在。這正如 Lord Herschell 法官所說，這類的判決不可以算是一個證明了債務存在的已最終及不可推翻的判決。香港法庭曾在多宗案件處理有關的審判監督制度是否令內地法院的裁決不能被視為是最終及

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不可推翻的判決的爭議，但上訴法庭仍未在一宗正審的案件中就這議題作出最終的判決。這些案例包括：

(1) *Chiyu Banking Corporation Ltd. v Chan Tin Kwun* [1966] 1 HKLR 395;

(2) *Tan Tay Cuan v Ng Chi Hung*, unrep. HCA 5477/2000 (5/2/2001);

(3) *林哲民經營之日昌電業公司對林志滔*，CACV 354/2001 (18/12/2001);

(4) *林哲民經營之日昌電業公司對林志滔*，HCA 9585/1999 (8/4/2003); 及

(5) *林哲民日昌電業公司對張順連*，CACV 1046/2001 (12/7/2002)。

王教授的意見

16. 王亞新教授指出近年內地最高法院及最高檢察院頒布以下的司法解釋正在逐步限制啟動審判監督程序：

1. 2001年8月14日最高人民檢察院民事行政檢察廳頒布的《關於規範省級人民檢察院辦理民事行政提請抗訴案件的意見》（‘《意見》’）第一條第5款規定，“申訴人在人民法院判決、裁定生效二年之內無正當理由，未向人民檢察院提出申訴的案件”，省級檢察院應不予受理。（最

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高法院在同年 12 月 13 日以“ 最高法院通知 ”的形式向各級法院正式轉發了檢察院的這一文件。）

2. 2001 年 9 月 30 日最高人民檢察院通過了《人民檢察院民事行政抗訴案件辦案規則》（‘ 《規則》 ’），規定自受理當事人申訴之日起 7 日內必須決定立案或不立案，立案後檢察院應調閱法院審判案卷，調閱後應在三個月內審審查終結，決定是否抗訴並通知申請人（第 9、13、23 至 27，30）條等。

3. 2001 年 11 月 1 日最高人民法院以通知的形式頒布印發了全國審判監督工作座談會《關於當前審判監督工作若干問題的紀要》（‘ 《紀要》 ’），該紀要明確指出當前及今後審判監督改革的主要任務是：規範再審立案標準，將無限申訴變為有限申訴，將無限再審改為有限再審。還在有關民事抗訴的部分明確要求，對於“ 原審案件當事人在原審裁判生效二年內無正當理由，未向人民法院或人民檢察院提出申訴的案件 ”，即使檢察院提起抗訴，法院也不予受理（第 14 條）。

4. 2002 年 7 月 31 日最高人民法院頒布並於同年 8 月 15 日起施行的 《關於人民法院對民事案件發回重審和指令再審有關問題的規定》（‘ 《規定》 ’）對發動審判監督程序進行再審的次數做了明確限制，即再審都只能以一次為限。

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17. 王教授指出：

1. 清遠中院已於 2002 年 9 月 11 日做出被告人敗訴的終審判決，而被告對此不服而向廣東高院提出的申訴請求也於 2002 年 12 月 28 日被駁回。這個時間距今已約三年。

2. 被告人此後並未向檢察院提出申訴，並請求檢察院提起抗訴。根據上述發布的有關司法解釋，時至今日被告已經不大可能再獲得通過檢察院抗訴啟動審判監督程序的機會。

3. 唯一為被告人剩下的啟動審判監督程序、推翻原審判決的渠道就在於通過法院依職權而發動再審（按照現行法規定，只有清遠中院院長向審判委員會提起再審、或廣東高院和最高法院才能指令該中級法院再審或自行提審）。但在上下各級法院觀念改變的背景及限制再審的一般司法政策下，指望本級法院主動對本案啟動審判監督程序幾乎是不可能的事情。而廣東高院和最高法院在無從知悉本案具體案情的情況下更無可能指令再審或自行提審。事實上，被告人只有採取不計成本地到各級人大或政府去上訪的行動，才有可能通過這些權力機關對法院實施的監督來推動法院依職權對本案提起再審，而這種可能性不僅在現實中微乎其微，而且也沒有任何證據表明被告人在長達兩年多的時間內從上訪這樣的渠道尋求過救濟。

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18. 王教授亦指根據司法統計，近年啟動審判監督程序的案件比率在急劇下降。在上述情況下，內地法院在執行如本案這樣的判決時，已經是不存在任何法律上的障礙，一般而言也不會有任何猶豫的。

19. 王教授認為本案的具體情況與香港法院迄今為止就是否承認執行內地判決而做出的一系列判例所涉及的案情都有不同，被告已經極少有可能或機會啟動審判監督程序去挑戰原審的裁判。因此，應該將本案原審生效判決視為最終和不可推翻的判決。

<u>袁大律師的意見</u>

20. 袁大律師對王教授意見的回應可以簡述如下：

1. 2001 年 8 月 14 日最高人民檢察院民事行政檢察廳頒發的《意見》尾段指出該條文僅供各省級人民檢察院參考，並非強制性之規範。即使撇開有關的規定是否有強制性，這意見只適用於省級人民檢察院而不適用於最高人民檢察院。根據《*民事訴訟法*》第 185 條最高檢察院對各級人民法院已經發生法律效力的判決裁定有權提出抗訴。

2. 最高人民檢察院 2001 年 9 月 30 日的《規則》雖然訂立了受理案件的條件及受理後的程序，但該規則並沒有訂

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立時限規定申訴人在特定時限之外作出的申訴不會被受理。

3. 除了檢察院可以提出的抗訴制度之外，法院本身根據《*民事訴訟法*》第 177 條是有提審及再審的權利。雖然廣東高院曾經命令清遠中院再審案件，但廣東高院亦擁有將案件提審的權力。

4. 對於 2001 年 11 月 1 日最高人民法院頒布的《紀要》即原審案件當事人在原審裁決生效兩年內無正當理由未向人民法院或人民檢察院提出的申訴案件，即使檢察院提出抗訴法庭也不予受理，袁大律師指出這是可能與監督制度抵觸，他引用張衛平《民事再審：基礎置換與制度重建》《中國法學》2003 年第一期 102-115 頁，其中以下一段支持他的說法 (109 頁)：

> 「有的人也許會指出，關於當事人糾纏再審的難題，審判監督程序也可以設定有關的條件對此加以防止。例如，必須在一定期間內提起申訴、只能提起一次、法院再審後，當事人也不能再次申請再審。對檢察機關的抗訴也可以設定抗訴限制，例如，不得超過 4 年。但問題在於，我國的再審作為一種審判監督程序，是以審判權作為基礎的，啟動它的是國家司法機關的外部權力，對這種權力的行使如果從當事人這個方面來加以限制是沒有任何意義的，如果限制司法機關行使審判監督權，又與審判監督權本身的性質相違背。審判監督權行使的條件之一就是確有錯誤，否則審判監督權就沒有存在的根據。因此，只能通過再審之訴對審判監督程序的置換，通過對當事人權利行使的合理限制來防止糾纏再審的問題。」

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被告人的立場

21. 被告人承認她並沒有再去申請啟動審訊監督的程序，她說原告人曾經恐嚇她，若她回內地會作出對她不利的行動，故此她沒有再回內地跟進這件案件。她在上訴時提出了針對‘鎮領導’及清遠中院司法人員瀆職的指控。

本席的意見

22. 在本案上訴聆訊後原告人代表律師試圖以傳票形式要求本席接納王教授對袁大律師意見的回覆。本席不接納這項申請。

23. 本席認為本案不能單是依賴書面法律意見作出判決。原告人是引用簡易程序要求法院給予判決，法律規定若這類申請存有爭議點或涉及艱難的法律議題，法庭就不應頒布簡易判決，而需給予被告人答辯機會，讓案件進行正式審訊然後才作出判決。

24. 本席認為本案最具爭議性的議題是內地的判決是否純是因為審判監督制度的存在而令判決不能成為最終及不可推翻的判決，抑或是需要視乎實際情況才可以決定有關的裁決是不是屬於這類的裁決。如果法庭要視乎實際的情況來作出判決，它應如何規範或界定這個情況？舉一個例子，如果就某一宗案件，所有審判監督制度內的渠道已經被運用而內地法院最終維

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持原審的判決，但同時有證據顯示有關權力機構對某個法庭在某段期間所判決的案件重新調查及命令重審，而當事人的案件亦是該法庭在該段期間作出判決的，當事人雖然未能在兩年的期限之內要求有關權力機構重新處理這些案件，但本港法庭在這情況下是否仍因當事人未能符合王教授所指有關制度新運作的規定而裁定內地裁決是一項最終及不可推翻的裁決？若果本港法庭需要考慮案件的實際情況，本港法庭應以甚麼標準來界定內地近期司法解釋文件提出涉及就兩年期限的‘正當理由’？

25. 在 *Nouvion* 一案，法庭沒有清楚說明到底是不是只要存在着一個可以推翻‘remate 判決’的制度，法庭就已具備穩固的基礎去裁定這類判決不是最終及不可被推翻的判決。

26. 本港法庭需要考慮實際情況才作出決定的觀點無疑是有它的優點，但這樣做會出現該裁決可能和內地可使用審判監督權力的機關的實質決定有所不同，畢竟本港法庭只能就當時雙方提供的證據來作出法庭認為正確的判決。這正突顯了本港法庭採用這方式處理案件的難處，也突顯了一個原則性的議題即是本港法庭應否單方面認為在內地判決敗訴的一方再沒有可能依賴有關的審判監督制度去推翻有關的判決，就因而裁定這判決是一項最終及不可推翻的判決？鑒於內地審判監督制度的存在及內地法制沒有一項條文規定內地判決若在外地執行會在甚麼時間或情況下才被視為最終及不可推翻的判決，香港法庭應

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否作出一個價值判決來裁定一宗案件在內地已經是沒有‘正當理由’來啟動‘審判監督’制度。在現階段，本席不需要深入探討這些問題或者作出確定性的裁決，因為本上訴只是一項有關簡易判決的上訴。

27. 本案涉及的議題明顯是一項具有公眾重要性的議題。雖然王教授對本席提供了珍貴的意見，但這也只是訴訟一方所提供的專家的書面意見。袁大律師作為法庭之友對案件持中立態度，他是以專業知識協助法庭，雖然他不是內地法律專家，但本席認為他對王教授的意見所作出的回應並不是泛泛之言，王教授是應該出庭作證、接受盤問及全面解釋他的意見。

28. 代表原告人的黃大律師亦依賴王教授的法律意見，要求本席駁回被告人的上訴。黃大律師更引用「因欠缺行動而作出的判決」(default judgment) 的性質來支持內地判決是最終判決的說法。在 *Nintendo of America Inc. v. Bung Enterprises Limited* [2000] 2 HKC 629，香港原訟法庭認為雖然「因欠缺行動而作出的判決」會被同級法院撤銷，但這也不代表有關的判決不是最終及不可推翻的判決，除非被告人申請撤銷有關的判決，該判決仍是最終及不可推翻的判決。本席認為審判監督制度是內地法制獨有的制度，本港法庭是否可以引用「欠缺行動而作出的判決」的性質來處理內地判決亦是本案具有爭議性的論點，法庭需要經過正式審訊才可以作出定斷。

29. 在這情況下，本席認為適當的做法是案件需要進行正式的審訊。雖然被告人在原審時申請法律援助被拒絕，但她上訴時並沒有再次申請法律援助，本席希望被告人再次申請法律援助及法律援助署可以援助被告人，使她可以提供另一份內地法律專家意見，以便香港法庭可就這議題作出一個全面的裁決。本席亦邀請律政司司長考慮加入本訴訟及協助提供內地法律專家意見。本席認為袁大律師在審訊時應該繼續以法庭之友身份協助法庭。

專家證人的職責範圍

30. 最後，本席有必要提出一點，希望律師及專家證人能夠清楚了解專家證人在本港法律程序上的職責範圍。王教授在他的意見書最後一段說：

> 「考慮到香港特別行政區政府和內地的當局都正在謀求做出能夠促進兩地經濟交流與發展的有關安排這種努力，萬一法院的判例在事實上卻形成了十分不利於這種共同努力的司法政策，將可能帶來十分負面的影響或後果。在這個意義上，則不得不說本案的處理將會超越個案的正義，而具有一般政策的含義。
> 監於最後這一點涉及公共利益或政策的考慮，本意見書的結論依然是：對於本案原審判決，應當認為屬於最終和不可推翻的判決。」

31. 專家證人無論是法律或其他方面的專家的功用是向法庭提供專業的知識，讓法庭參考後可以作出一個正確的判決，除此之外，專家證人不應該就其他議題發表個人意見。制定政策

是政府機關的職責，法庭在審理案件時不會推行某種司法政策，只會就案情作出裁決。王教授以上所表達的竟見可能是因不熟悉專家證人在本港訴訟程序上的職責或是出於關注內地與香港判決雙互執行的問題，但這並不是專家證人職責的範圍。本席需要強調本席提出這點並不是批評王教授，而是有需要重申專家證人職責的範圍。

命令

32. 本席裁定被告人上訴得直，命令案件進行正式審訊。

訴費命令

33. 雖然原告人在經修訂的申索陳述書稱清城法院的判決是最終的判決，但在整個原訟法庭簡易程序的過程，他從沒有提交任何專家證供來支持這論點，而有關的證供是必須及基本的。關於訟費的暫准命令是本席對本上訴訟費及陳法官席前的訟費不作出任何命令。

上訴法庭法官袁家寧：

34. 本席已閱讀過上訴法庭張澤祐法官及高等法院原訟法庭鍾安德法官各自草擬的判詞。本席認為，在香港法庭應用普通法的原則的情況下，應否視內地法院的判決為‘最終及不可推

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翻’的判決，是一項複雜及影響深遠的爭議點，法庭沒有可能在一簡易程序的申請中作出判決。

35. 本席明白，本案的被告人沒有以上述的爭議點作為上訴理由之一，但原告人在申索陳述書中，要求被告人償還款項的唯一訴因，正是清城法院 2002 年 5 月 18 日的判決。有見及此，又考慮到被告人是沒有律師代表，本席認為，法庭不能當作上述爭議點沒有存在，亦不能只認定上述爭議點是局限於 *Chiyu Banking Corporation Ltd v Chan Tin Kwan* [1996] 2 HKLR 395 一案內所提及的規限。

36. 況且，原告人的中國法律專家證人的證據也顯示，內地法院到現時為止就審判監督制度對法院判決的影響，看來還在發展階段中，理論上及實行上的限制，還未塵埃落定。因此，本席認為香港法庭決不能在簡易程序的申請中，斷定在審判監督制度下的內地法院判決是否‘最終及不可推翻的’判決。

37. 無論如何，本席認為，香港法院是否應該（1）由於該審判監督制度存在，絕對地否定內地法院的判決是‘最終及不可推翻的判決’，或是(2)在甚麼情況下有關判決可被當作為‘最終及不可推翻的判決’，這重要及影響深遠的決定，應由法院經詳細考慮過雙方的法律專家意見（包括他們經受盤問過的證供後）才作出決定，法庭並不能在一簡易程序的申請中立下判斷。

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38. 本席補充一點，鑑於本港與內地商業來往日見頻繁，亦有不少香港商人在內地法院提出訴訟，本席期望可盡快有一訴訟，讓法庭可在雙方有律師代表及有中國法律專家證人的證據的情況下，作出裁決。既然本案的訴因僅是基於清城法院的判決，本席鼓勵法律援助處給予被告人法律援助，及替她聘請中國法律專家作出專家報告，好讓在正審時，雙方專家接受盤問。若能在本案作出這樣的安排，亦會惠及現時及將來的訴訟人。

39. 本席同意張法官的判決，被告人上訴得直，案件應進行正式審訊。

原訟法庭法官鍾安德：

40. 本訴訟的背景，已在上訴法庭張法官的判詞的第 1 至 6 段述及，不再在此重覆。

41. 導致本上訴的是 2004 年 5 月 25 日宣布的判決。該判決是依《高等法院規則》第 14 號命令第 3(1)條規則作出。該規則的相關部分規定:-

> "除非 ... 被告人使法庭信納，就該申請所關乎的申索或部分申索而言，有應予以審訊的爭論點或有爭議的問題，或為其他理由該申索或該部分申索應予以審訊，否則法庭在顧及所申索的補救或濟助的性質後，可就該申索或該部分申索，作出公正的原告人勝訴被告人敗訴的判決"。

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42. 在依第 14 號命令提出的申請中，被告人有令法庭信納，“有應予以審訊的爭論點 ... 或為其他理由該申索 ... 應予以審訊”的責任：參看 *Bank of India v Murjani and Others* [1990] 1 HKLR 586, *Re Safe Rich Industries Ltd.* [1994] HKLY 183, *Ng Shou Chun v Hung Chun San* [1994] 1 HKC 155。

43. 被告人在上訴通知書中列載的上訴理由, 可簡述為以下幾點:-

(a) 原訟法庭暫委法官在作出 2004 年 5 月 25 判決時，誤以為她在誓章中聲稱在國內的訴訟程序中，因懷孕從未出席任何聆訊。其實她在誓章中僅稱，在國內的“二審終審庭”聆訊時，因懷孕而未能出席應訊；

(b) 原訟法庭暫委法官過於偏重原告人存檔的誓章，致在“判案書”中，就 2002 年 4 月 12 日的事情，作出錯誤的敍述；

(c) 前(a)及(b)分段證明, 暫委法官未清楚理解被告人存檔的誓章的內容；

(d) 暫委法官以原告人代表律師提供的案例作出判決，對未能延聘律師代表的被告人不公平；

(e) 原告人國內既已查封被告人的資產，企圖將之出售以支付判決債項，又同時在香港取得判決，對被告人不公。

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44. 上訴理由的第 1 點（前第 43(a)段），是指暫委法官的判案書中的第 18，20，21 及/或 24 段。而相關誓章則為被告人分別在 2003 年 1 月 14 日，2004 年 1 月 2 日，2004 年 2 月 26 日及 2004 年 3 月 15 日存檔的誓章。本席在審閱過該等誓章後，認定暫委法官並無誤解其內容。

45. 上訴理由的第 2 點（前第 43(b)段），不具合理理據。從暫委法官的"判案書"的整體內容可知，暫委法官已公允及平衡地考慮過，與訟雙方就涉案案情及事實提出的證據及論據。

46. 基於以上各點，本席亦裁定上訴理由書的第 3 點（前第 43(c)段），並無理據。

47. 暫委法官在"判案書"中引用的法律典籍，例如 *Dicey and Morris: The Conflict of Laws* 第 13 版，及 *Ever Chance Development Ltd. v. Ching Kai Chiu trading as Wing Hung Hardwares & Machinery Co. and Others* HCA 8/1997 等均是涉及，以欺詐手段取得外地判決有關的法律原則。而暫委法官在考慮過有關的法律典籍及案例後說:-

> "因此，明顯的是如果被告人能夠證實有表面證據、有爭論餘地或可信的案情，指出清城法院及清遠中院的判決是用欺詐得到的，她便應該獲得准許在這個訴訟提出抗辯 ..."
>
> （"判案書"第 9 段）

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從上文得知，暫委法官並沒有因此而在“判案書”中表示，單從法律論點而言，被告人已無抗辯理據。相反，暫委法官在其中已考慮過一個被告人未明確提出的抗辯理由。

48. 故此，本席亦認定，上訴理由書第 4 點（前第 43(d)段）並不成立。

49. 最後，並無證據證明或顯示，原告人在已獲付內地的判決債務的全數後，企圖在本訴訟取得雙重利益。因此，上訴理由書的第 5 點亦不成立（前第 43(e)段）。

50. 在本訴訟（包括本上訴）中，被告人自己並未以內地的民事訴訟制度中，設有“審判監督”的基制，容許對原審判提出抗訴這一點，作為本上訴的上訴理由。

51. 內地的“審判監督”制度，相對於本上訴的重要性，源起於 *Chiyu Banking Corporation Ltd. v. Chan Tin Kwun* [1996] 2 HKLR 395 一案。香港法庭在 *Chiyu Banking Corporation* 一案判定，香港法院在以外地判決為訴因的訴訟中，只會執行性質屬最終及不可推翻的外地判決。香港法院在 *Chiyu Banking Corporation* 一案的“判案書”，對內地的“審判監督”制度，有以下的描述:-

> "Under the legal system in PRC, another state organ, the Procuratorate exercise a supervisory function over civil adjudication by the courts: Article 14 of the Civil Procedure Law of 1991 ("the Civil Procedure Law"). Under Article 185, the Procuratorate may lodge a protest

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to the court in respect of a judicial decision. The circumstance in which the protest may be lodged are set out in art. 185, namely,

(i) the main evidence to substantiate the original judgment or ruling was insufficient;

(ii) the law which was applied in the original judgment or ruling was incorrect;

(iii) the People's Court was in violation of the statutory procedure which have affected the correctness of the judgment or ruling;

(iv) the judicial members in trying the case committed embezzlement, accepted bribes, practised favouritism or [made] a judgment that perverted the law.

It is for the Supreme People's Procuratorate to lodge the protest but under Article 185, the Fujian People's Procuratorate is entitled to refer the matter to the Supreme People's Procuratorate for it to lodge a protest.

Under art. 187, the court, upon receipt of the protest, is required to conduct a retrial of the action."

(第 397 頁 A 至 D)。

高等法院基於上述事項，及英國上議院法庭在 *Nouvion v. Freeman* 一案的判決(詳見前第 10 至 12 段)，在 *Chiyu Banking Corporation* 一案裁定，福建中級人民法院的判決，並非香港普通法所指的“最終及不可推翻”的判決。

52. 依香港法例第 8 章《證據條例》第 59 條（尤其第 59(2) 條），在香港高等法庭以可引述形式報導或記錄的裁斷或決定，可接納為有關香港以外國家或地區的法律的證據：參看*林 民 日昌電業公司對張順連* CACV 1046/2001(其中第 17 至 27 段)。

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53. 就香港法院在 *Chiyu Banking Corporation* 一案有關內地“審判監督”制度的描述，原告人提交的專家意見書並沒有提出異議。被告人並未提交有關此點的專家意見書或其他證據。香港以外的國家或地區的法律，依香港法律而言，屬香港法院對涉案事實的裁斷：詳見 *Phipson on Evidence* （2005 年）第16 版，第 1-42，33-57 及 33-58 段，及香港法例第 4 章《高等法院條例》第 33A(5)條。

54. 基於以上各點，本席認定內地“審判監督”制度，只可在規定的四種情況才可援引（見前第 51 段）。

55. 但是，除名稱有別之外，內地“審判監督”制度所涉的四種情況，與香港法律已確立的上訴理由，實質上並無不同：詳見 *Hong Kong Civil Procedure 2004*，第 59/1/48 (第 828 頁) (“ ... [where the] Court of Appeal is satisfied that the conclusion reached ... is plainly wrong, it should intervene ...”)，59/3/1 (“ ... whether the misdirection, misconception of evidence or other alleged defect in the trial has taken place, so that a new trial should be ordered ... ”)，59/11/3 (“Misdirection, where substantial wrong or miscarriage has been thereby occasioned”) 至 59/11/8 (“Improperly admitting or rejecting evidence, where some substantial wrong or miscarriage has been thereby occasioned”)，59/11/15 (“Discovery of fresh evidence”) 至 59/11/18 (“A slip or mistake in the proceedings”) 及 59/11/23 (“Some substantial wrong or miscarriage”) 段。

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56. 此外，香港法律亦賦予法院在裁定上訴得值時，頒令訴訟應重新審訊的權力：詳見《高等法院規則》第 59 號命令第 11 條規則，及 *Hong Kong Civil Procedure 2004*, 第 59/1/47 及 59/11/2 至 59/11/21 段。

57. 原訟法庭在其自身頒布的命令未完備及登錄前，亦具自行重新審訊訴訟的權力：詳見 *Hong Kong Civil Procedure 2004*，第 20/11/1，20/11/6，20/11/7，20/11/8 及 59/1/53 段。

58. 即使有前第 55 至 57 段所述的情況，以香港的法律而言，香港法院的判決，仍屬“最終及不可推翻”的判決。並無資料顯示，香港法院的判決，依普遍適用的國際私法原則，在外地被視為不屬“最終及不可推翻”的判決。

59. 本席因此認定，單就“審判監督”制度所涉的四種情況而言，並不足以令內地的判決，被裁定為不屬“最終及不可推翻”的判決。

60. 前第 14.2 至 14.3 段述及，內地《中華人民共和國民事訴訟法》（“《民事訴訟法》”）第 177 及 185 條。因該等條款並未在 *Chiyu Baking Corporation* 一案，或原告人提交的專家意見書中述及，不屬第 8 章第 59 條所指的可接納的證據。

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61. 即使《民事訴訟法》第 177 及 185 條屬可接納的證據，其性質亦與前第 54 至 59 段所述的相同。本席在本判案書的論據亦適用於該等條款。

62. 法庭之友在本上訴作出的陳詞亦稱，就原審法院再審的權力而言，內地“審判監督”制度，有兩點可被視為與香港的法制有實質不同之處:-

(a) 除內地民事訴訟所涉的與訟人外，(1)各級人民法院院長，(2)上級人民法院及(3)人民檢察院，均可依上述的四種情況，向原審人民法院或上一級人民法院申請再審；

(b) 由各級人民法院院長或最高人民法院提交，提審或指令的再審，單就《民事訴訟法》而言，並無指明的時限（詳見其中第 177 條）。人民檢察院依《民事訴訟法》提出抗訴，亦無指明的時限（詳見其中第 185 條）。

63. 但無論抗訴是否由與訟其中一方提出（前第 62(a)段），或是否在某時限內提出（前第 62(b)段），以在本上訴所呈交的證據而言（即 *Chiyu Banking Corporation* 一案的判決的有關指述，及原告人呈交的專家意見書），任何抗訴申請，只可在前述的四種情況其中一種已被確立時，才會被接納及導致頒令再審。

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64. 故此，內地“ 審判監督 ”制度可經由第三者（例如最高人民法院或人民檢察院）提交、提審或指令，亦不足以影響此結論。因為無論抗訴申請由何方提出，仍需符合前第 51 及 59 段所述的四種情況。本席因此仍維持在前第 58 及 59 段所作的結論。

65. 除與訟其中一方提出再審申請外，《民事訴訟法》並未列明提出再審申請的時限：詳見其中第 182 條。表面看來，這一點與香港的法律原則不同。但實際上，香港法院亦具延展法律程序（包括上訴程序）的時限的權力：詳見《高等法院規則》第 3 號命令第 5 條規則及第 59 號命令第 15 條規則及 *Hong Kong Civil Procedure 2004*, 第 3/5/1 至 3/5/3 及 59/15/1 段。因此，即使香港法院的判決，亦可能在規定時限屆滿後，被頒令撤銷及重審。

66. 在本上訴，原告人呈交的專家意見書述明，內地在不同場合提出的司法解釋，已對申請再審的時限作出規定。其中包括:-

(1) 2001 年 8 月 14 日最高人民檢察院民事行政檢察廳頒布的《關於規範省級人民檢察院辦理民事行政提請抗訴案件的意見》規定，內地判決，裁定生效兩年之內無正當理由，未向人民檢察院提出申訴的案件，省級人民檢察院應不予受理；

(2) 2001 年 9 月 30 日通過的《人民檢察院民事行政抗訴案件辦案規則》規定，自受理與訟其中一方申訴之日

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起 7 天內，檢察院必須決定立案或不立案。立案後檢察院應調閱法院審判資料，並應在 3 個月內審查終結，決定是否抗訴；

(3) 2001 年 11 月 1 日最高人民法院頒布的《關於當前審判監督工作若干問題的紀要》指出，有關民事抗訴的部份明確要求，對於“原審案件當事人在原審裁判生效二年內無正當理由，未向人民法院或人民檢察院提出申訴的案件”，即使檢察院提起抗訴，法院也不予受理；

(4) 2002 年 7 月 31 日最高人民法院頒布《關於人民法院對民事案件發回重審和指令再審有關問題的規定》，再審只能以一次為限。

67. 有關《民事訴訟法》未列明申請時限這一點，本席已在前第 65 段討論。本席認為，前第 66 段所述的專家意見書，已進一步確定，被告人未能在本上訴中顯示，就重審內地判決這一點，“有應予以審訊的爭論點 ... 或為其他理由 ... 應予以審訊 ...”。

68. 本席在作出此裁斷時，亦考慮到被告人在內地曾提出的上訴，已在 2002 年 9 月 11 日被中級人民法院駁回，而她曾向中級人民法院請求申訴，亦在 2002 年 12 月 28 日被駁回。她在本上訴聆訊時承認，自該日起計近三年的期間，並未向任何內地機關作出抗訴申請。她亦沒有表示將會這樣做。

69. 法庭之友在其“補充陳詞撮要”中，作出了對上述各司法解釋的評論（詳見其中第 3 至 9 段），例如最高人民檢察院頒布的意見（前第 66（2）段），僅供各省級人民檢察院參考用，或該意見只列明適用於各省級人民檢察院，而不適用於頒布該意見的最高人民檢察院，或最高人民法院頒布的記要（前第 66（2）段），只適用於人民檢察院提出的申請，不適用於各級人民法院等。本席認為這些論據:-

(a) 不足以影響本席在前第 64 及 67 段作出的結論；

(b) 無論如何，過份著重純理論性而未顧及本上訴所涉案情的合理可能性。

70. 有關英國上議院在 *Nouvion* 一案所作的判決，香港原訟法庭曾在 *Biard Laboratoires SA v. Rosumi Ltd.* HCMP 252/1997 一案中論及。該案的判案書認定，*Nouvion* 一案的判決，是基於其涉案事實而作出。*Biard Laboratoires* 一案，涉及在香港依法國里昂上訴法院（依法國的《新民事程序法》(New Code of Civil Procedure) 第 484 及 488 條）頒令的中期判令(interim decision)而提出的訴訟。該案的原告人已依香港法例第 319 章《外地判決（交互強制執行）條例》將法國法院的判令登記，但該案的被告人，以依第 319 章第 3(2)(a)及 6(1)(a)(i) 條而言，該中期判令並非“最終及不可推翻的判決”為由，要求香港法院撤銷該登記。祈彥輝法官（當時官階）在判案書論及 *Nouvion* 一案時說:-

> "5. Final and conclusive. The Defendant contends that the order of the Commercial Court was not final and conclusive because of the nature of the order which was made and the nature of the proceedings in which it was made. ...
>
> 6. I cannot accept this argument...
>
> 9. [The Defendant] relied on the decision of the House of Lords in Nouvion v. Freeman (1889) 15 App. Cas. 1....
>
> 10. However, the ***House of Lords' conclusion on the facts*** of that case ***do not assist me*** in determining whether the *ordonnance de refere* in the present case was final and conclusive. In both the *remate* and "plenary" proceedings, the issue was whether one of the parties was indebted to the other. ***The remate proceedings did not conclusively resolve that issue.*** It resolved only some of the questions which bore on that issue. In the present case, the issue in the proceedings in the Commercial Court was wholly unrelated to the underlying dispute between the parties. The issue was whether, irrespective of the merits of the underlying dispute, French law permitted the Defendant to countermand the cheques. The conclusion of the Commercial Court that the Defendant was not permitted under French law to countermand the cheques was final and conclusive because it did not depend on the merits of the underlying dispute between the parties..." （上文獲強調處，由本席後加）。

基於上述（及其他）原因，法庭拒絕被告人撤銷判令登記的申請。

71. 原訟法庭在 *Nintendo of America Inc. v. Bung Enterprise Ltd.* HCA 1189/2000 一案, 亦論及外地判決是否 " 最終及不可推翻的判決 " 這一點。該訴訟所涉的是美國加洲法院頒布的缺席判決(default judgment)。有關 *Nouvion* 一案的判決，原訟法庭在 *Nintendo of America* 一案的判決書說:-

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"8. The defendant relied on the observation of Lord Watson in Nouvion v Freeman (1889) 15 App. Cas. 1 at page 13 that the Court would refuse to recognise a judgment because it is not final and conclusive on the ground that 'it might be at any time recalled or modified by the Court of Session on just cause shown'. However I am of the view that ***the observation must be looked at in the context of the judgment*** which Lord Watson had to consider. In Nouvion's case, the Court would have to consider ***a judgment of the Spanish Court which was known as a 'remate' judgment*** which was ***a judgment after consideration of limited issues*** and which was ***liable to be reconsidered in 'plenary' proceedings*** where the whole merits of the matters might be gone into. Likewise the order of the Court of Session spoken of by Lord Watson as one which the Court would not recognise was one which the Court had retained the power to alter.

9. The defendant also relied on the observation of Lord Diplock in The Sennar (No. 2) where he said (at 494A):

> 'It is often said that the final judgment of the foreign court must be "on the merits". The moral overtones which this expression tends to conjure up may make it misleading. What it means in the context of judgments delivered by courts of justice is that the court has held that it has jurisdiction to adjudicate upon an issue raised in the cause of action to which the particular set of facts give rise, and that its judgment on that cause of action is one that cannot be varied, re-opened or set aside by the court that delivered it or any other court of co-ordinate jurisdiction although it may be subject to appeal to a court of higher jurisdiction.'

…

10. However it is ***well established*** that for the purpose of enforcement by an action in Hong Kong, a ***foreign judgment may be final and conclusive*** even though it is [a] ***default judgment liable to be set aside*** in the very Court which rendered it (see *Dicey & Morris The Conflict of Laws* 13th edition paragraph 14-021). In Vanquelin v Bouard (1863) 15 C B (N S) 341, Erle C J held that it was no defence to an action based on a judgment given by a Court in France that the judgment was a judgment by default for wanting of an appearance

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by the defendant in the Court and by the law of France, the judgment would become void as of course on an appearance being entered. In so holding, the Chief Justice said (at page 367-368):

> 'I apprehend that every judgment of a foreign court of competent jurisdiction is valid and may be the foundation of an action in our courts, though subject to the contingency, that, by adopting a certain course, the party against whom the judgment is obtained might cause it to be vacated or set aside. But ***until that course has been pursued***, the ***judgment remains in full force*** and capable of being sued upon.'

Thus the fact that the judgment is a judgment by default whereby the Court may have the power to set it aside is no ground for saying that the judgment is not final and conclusive for this purpose. The defendant cannot improve its position by refusing to comply with the procedural requirement of the foreign Court or refusing to defend an action properly brought against him in a foreign Court.

11. In my view the ***apparent conflict*** between the observation of Lord Diplock quoted above and the observation of Erle C J ***could be reconciled***. In my view when Lord Diplock said 'its judgment on that cause of action is one that cannot be varied, re-opened or set aside by the Court that delivered it or any other Court of co-ordinate jurisdiction' ***he was referring to cases where the Court delivering the judgment had intended that the effect of its judgment was merely provisional*** such as in cases when the Court had reserved the jurisdiction to vary or set aside the judgment."（上文獲強調處，由本席後加）。

72. 法庭之友在其書面陳詞撮要亦說:-

> " ... 因被告欠缺抗辯而取得的判決(default judgment)可被頒佈該判決的法院撤銷，但在普通法上仍被視為最終及不可推翻之判決。（參看 *Dicey & Morrison [The Conflict of Law]*, 13th edn., Vol. I, para. 14.021 (p.477; *Barclays Bank Ltd .v. Piacun* [1984] 2 Qd. R. 476, pp.477 (line 29) – 478 (line 6).)"

（其中第 15 段）。

73. *Nouvion* 一案所涉的 "remate 判決"，屬即使是正確的判決，仍可在 "plenary 判決" 中重新判定的判決。這種 "remate" 判決與在本上訴所涉，可依 " 審判監督 " 而被命令重審的內地判決完全不同，更沒有證據顯示，本上訴所涉的內地判決在內地被視為暫准判決。

74. 在此情況下，本席認為 *Nouvion* 一案的判決，不適用於本上訴。

75. 基於以上各點，本席認定，內地判決不應純因有可能被頒令重審而被視為不屬 " 最終及不可推翻 " 的判決。這是因為同一可能性，亦適用於至少部分採用普通法法律原則的國家或地區（包括香港）（參看前第 56 至 58 段）。法庭之友在本上訴聆訊時亦同意，在裁定內地判決是否屬 " 最終不可推翻 " 的判決這一點時，香港法院不應只從純理論的角度考慮重審的可能性，而應兼顧涉案事實是否顯示有合理的可能性。

76. 法庭之友亦在本上訴聆訊時指，被告人有權在本訴訟審訊時，向原告人方的專家證人提出盤問。但單以這點，並不足以顯示，被告人已確立第 14 號命令第 3（1）條規則規定的舉證責任：參看原訟法院在 *Eugene Jae-hoon Oh v. Kate Gaskell Richdale* HCA 380/2002（尤其判案書的第 23，27 及第 63 段）及上訴法庭在同案的上訴 CACV 162/2003（2005 年 10 月 7 日的

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判案書)(尤其判案書的第 13(c) and (d), 18, 20, 29, 30 及 31 段)的判決。

77. 基於以上各點，本席更改本席在*林 民日昌電業公司對張順連*一案中，對內地“審判監督”制度是否導致內地判決不屬“最終及不可推推翻”的判決的看法。

78. 本席必須指出，如前所述，香港以外國家或地區的法律，屬法院對涉案事實的裁斷：詳見前第 53 段。因此，香港法院對此點的裁斷，往往取決於在該訴訟中呈交的相關證據。亦基於此因，該等裁斷通常不具概括的適用性。

79. 原告人在本上訴提交的專家意見書，是依本庭在 2005 年 5 月 20 日發出的指示而預備的。如前所述（前第 8 及 53 段），被告人雖已有充分機會在本上訴提交專家意見書，但她基於個人理由，並未依指示提交有關資料。

80. 法庭之友亦在其書面陳詞撮要中指出，被告人聲稱內地法院的判決，是原告人以欺詐手段取得。但此點不是被告人的上訴理由之一。此外，本席審閱過原訟法庭的“判案書”及被告人呈交的資料。本席認定，原訟法庭正確地裁定，被告人的指稱全不可信。

81. 故此，本席駁回本上訴。

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由此

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上訴法庭法官張澤祐：

82. 本庭以大比數裁定被告人上訴得直及命令案件進行正式審訊。本庭作出以下的暫准訟費命令：本庭對本上訴訟費及陳法官席前的訟費不作出任何命令。

(張澤祐) 高等法院上訴法庭 法官	(袁家寧) 高等法院上訴法庭 法官	(鍾安德) 高等法院原訟法庭 法官

原告人：由梁鄧蔡律師事務所轉聘黃士翔大律師代表。

被告人：無律師代表，親自出席。

袁國強資深大律師，法庭之友。

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Appendix II

List of Basic Level People's Courts of the Mainland with Jurisdiction to Deal with Civil and Commercial Cases of First Instance Involving Foreign, Hong Kong, Macao and Taiwan Parties

1. Guangdong Province (16)

The People's Court of Dongguan

The People's Court of Luogang District, Guangzhou

The People's Court of Nansha District, Guangzhou

The People's Court of Tianhe District, Guangzhou

The People's Court of Yuexiu District, Guangzhou

The People's Court of Haizhu District, Guangzhou

The People's Court of Panyu District, Guangzhou

The People's Court of Futian District, Shenzhen

The People's Court of Luohu District, Shenzhen

The People's Court of Baoan District, Shenzhen

The People's Court of Longgang District, Shenzhen

The People's Court of Nanshan District, Shenzhen

The People’s Court of Yantian District, Shenzhen

The People’s Court of Zhanjiang Economic and Technological Development Zone

The People’s Court of Dayawan Economic and Technological Development Zone, Huizhou

The People’s Court of Chancheng District, Foshan

2. Shandong Province (3)

The People’s Court of Zibo New and Hi-Tech Industrial Development Zone

The People’s Court of Yantai Economic and Technological Development Zone

The People’s Court of Rizhao Economic and Technological Development Zone.

3. Hebei Province (3)

The People’s Court of Shijiazhuang New and Hi-Tech Industrial Development Zone

The People’s Court of Langfang Economic and Technological Development Zone

The People’s Court of Qinhuangdao Economic and Technological Development Zone

4. Hubei Province (3)

The People's Court of Wuhan Economic and Technological Development Zone

The People's Court of Xiangfan New and Hi-Tech Industrial Development Zone

The People's Court of Wuhan East Lake Hi-Tech Industrial Development Zone
(a state-level development zone newly approved by the State Council)

5. Liaoning Province (3)

The People's Court of Shenyang Economic and Technological Development Zone

The People's Court of Dalian Economic and Technological Development Zone

The People's Court of Shenyang New and Hi-Tech Industrial Development Zone

6. Jiangsu Province (2)

The People's Court of Suzhou Industrial Park

The People's Court of Wuxi New and Hi-Tech Industrial Development Zone

7. Shanghai Municipality (2)

The People's Court of Pudong New Area

The People's Court of Huangpu District

8. Jilin Province (2)

The People's Court of Changchun Economic and Technological Development Zone

The People's Court of Jilin New and Hi-Tech Industrial Development Zone

9. Tianjin Province (1)

The People's Court of Tianjin Economic and Technological Development Zone

10. Zhejiang Province (1)

The People's Court of Yiwu

11. Henan Province (1)

The People's Court of Luoyang New and Hi-Tech Industrial Development Zone

12. Guangxi Zhuang Autonomous Region(1)

The People's Court of Chengdong Development Zone, Baise

13. Sichuan Province (1)

The People's Court of Chengdu New and Hi-Tech Industrial Development Zone

14. Hainan Province (1)

The People's Court of Yangpu Economic Development Zone

15. Fujian Province (1)

The People's Court of Mawei District, Fuzhou

16. Anhui Province (1)

The People's Court of Hefei New and Hi-Tech Industrial
Development Zone

A total of 42 Basic Level People's Courts.