Re: Reciprocal Enforcement of Judgments Arrangement Between the HKSAR and the Mainland

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THE HONG KONG BAR ASSOCIATION'S POSITION PAPER

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1. Since the last Panel on Administration of Justice and Legal Service Meeting held on 24th October 2005, the Department of Justice ("DOJ") has supplied the Hong Kong Bar Association ("HKBA") with further materials on the proposed reciprocal enforcement of judgments arrangement between the Hong Kong Special Administrative Region ("HKSAR") and the Mainland ("Proposed REJ Arrangement").

2. Given the huge amount of commercial activities going on between the HKSAR and the Mainland, the desirability of having an arrangement for reciprocal enforcement of judgment does not require elaboration. Besides, there is certainly the consideration of maintaining and promoting the HKSAR as a centre for commercial disputes resolution. Bearing these factors in mind and having considered the contents of the proposal, the HKBA in principle supports the Proposed REJ Arrangement. The following are the key points that the HKBA would like to highlight.

Choice of Forum Clause

3. One of the key matters considered by the HKBA is the requirement for invoking the mechanism of reciprocal enforcement. We understand that there are two different views in this regard. Under the first view, reciprocal enforcement should be allowed if the parties have expressly agreed in writing to designate a court of the Mainland or the HKSAR to have exclusive jurisdiction for resolving the disputes between them. On the other hand, there has been suggestion that the relevant clause should specifically provide for reciprocal enforcement and not merely a choice of court. Whilst we can see

the rationale behind the second view, the HKBA is in favour of the first view, namely, an exclusive choice of court clause will be sufficient to invoke the mechanism of reciprocal enforcement of judgments.

4. Our reasons are mainly two-fold. First, this is in line with the international trend including the recently concluded Hague Convention on Choice of Court Agreements. Second, international trend aside, practical considerations also support the first view. Generally speaking, a choice of forum clause (as opposed to choice of law clause) is unlikely to be found in home-made contracts. In the majority of commercial cases involving parties from the Mainland and the HKSAR, choice of forum clauses are found in contracts drafted by the legal profession or by people with some understanding of contract law. Thus, when parties agree in their contracts to designate a court of the Mainland or the HKSAR to have exclusive jurisdiction for resolving their disputes, it can be safely assumed that the parties are willing to have the entire litigation process (i.e. from commencement of proceedings up to enforcement and execution of judgment) dealt with by the court designated in their contracts. Besides, should the parties be reluctant to resort to litigation, they have the option of alternative dispute resolutions including arbitration. In reaching this conclusion, we appreciate that there may be cases where some laymen may, for the purpose of saving costs or otherwise, simply copy a choice of forum clause from another professionally drafted contract without really considering or understanding its implications. Although we cannot exclude this possibility, we do not think the possible adverse consequences in such scenario should or can as a matter of principle outweigh the benefit of subscribing to the first view.

Finality

5. In common law, a foreign judgment can only be enforced in Hong Kong if it is final and conclusive. Similar requirement is also laid down in section 3(2)(a) of the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319). The question of whether a judgment pronounced by a court of the Mainland is final and conclusive has generated a considerable body of case law in Hong Kong[1].

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[1] See, e.g.: (1) *Chiyu Banking Corporation Ltd. v Chan Tin Kwun* [1996] 1 HKLR 395; (2) *Tan Tay Cuan v Ng Chi Hung*, unrep., HCA No. 5477 of 2000 (2/5/2001); (3) *Korea Data Systems Co. Ltd. v Chiang Jay Tien* [2001] 3 HKC 239; (4) 林哲民經營之日昌電業公司對林志滔, HCA 9589/1999

This Position Paper is certainly not the appropriate venue for discussing the relevant cases or their effects. Suffice it to point out that, in practice, the requirement of a final and conclusive judgment has remained one of the key practical difficulties in enforcing judgment pronounced by the Mainland courts in Hong Kong.

6. For the present purpose, the pertinent question is how this common law requirement can be overcome or modified without in any way compromising administration of justice so as to facilitate reciprocal enforcement of judgments between the HKSAR and the Mainland. In our view, a fair balance should be struck between maintaining the common law requirement on the one hand and providing a practically workable solution for reciprocal enforcement. With these considerations in mind, we are satisfied that the approach adopted in the Proposed REJ Arrangement is acceptable. We believe the issue of a certificate of final judgment by the relevant Mainland court is a practical way out. In fact, a similar approach had been adopted in some of the cases where the litigant sought to adduce a certificate issued by the People's Procuratorate (《不抗訴決定書》), though this approach does not always work due to certain features in the current civil litigation system in the Mainland.

Level of Court

7. We have considered the list of the Basic Level People's Courts with jurisdiction to adjudicate foreign and Taiwan/HKSAR/MSAR-related civil and commercial cases provided by the Mainland. For the time being, we are not in a position to suggest whether any of the courts listed there should be excluded.

Safeguards

8. We note that the proposed safeguards are generally in line with the safeguards provided for in the context of enforcement of Convention or Mainland arbitral awards. Subject to the three matters summarised below, we

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(8/4/2003); (6) 林哲民日昌電業公司對張順連, CACV 1046/2001 (12/7/2002); (7) *Chan Chow Yuen v Nanyang Commercial Bank Trustee Ltd.*, unrep., HCAP No. 4 of 2002 (7/6/2004); and (8) 李祐榮對李瑞群, CACV 159/2004 (9/12/2005).

believe those safeguards should be sufficient.

9. First, we suggest the issue of incapacity should be expressly provided for as in section 44(2)(a) of the Arbitration Ordinance (Cap. 341).

10. Second, we note that one of the safeguards is expressed as "the losing party had not been given sufficient time to defend his case". We believe this may be a drafting issue. We, however, suggest this be rephrased along the line of section 44(2)(c) of the Arbitration Ordinance.

11. Lastly, another safeguard is where the judgment has been fully executed. We appreciate the relevant draft legislation is yet to be prepared. However, we wonder whether the scenario of partially executed judgment has been considered. For instance, there may be the following scenario. Company A is a Hong Kong company whilst Company B is a Mainland company. Company A obtains judgment in a Mainland court. For whatever reason, the judgment is only partially satisfied. In such circumstances, provided the other relevant requirements are satisfied, there is in principle no objection why Company A should not be allowed to enforce the balance of the judgment against Company B's assets in Hong Kong. We hope the Proposed REJ Arrangement should take this kind of scenario into account and make appropriate provisions.

Hong Kong Bar Association
21st February 2006